

“A RANK USURPATION OF POWER”¹—THE ROLE OF PATRIARCHAL RELIGION AND CULTURE IN THE SUBORDINATION OF WOMEN

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I. INTRODUCTION

A fundamental assumption of contemporary feminist theory and practice is that gender is a form of power, and a universal one at that.² The system facilitating and entrenching this power—patriarchy—can be defined as the manifestation and institutionalization of male dominance over women in society.³ Anthropologist Sherry Ortner argues that in every known culture women are considered in some degree inferior to men.⁴ She identifies three types of data that constitute evidence that a particular culture considers women inferior: “(1) elements of cultural ideology and informants’ statements that explicitly devalue women, according them, their roles, their tasks, their products, and their social milieux less prestige than are accorded men and the male correlates; (2) symbolic devices, such as the attribution of defilement, which may be interpreted as implicitly making a statement of inferior valuation; and (3) social-structural arrangements that exclude women from participation in or contact with some realm in which the highest powers of the society are felt to reside.”⁵ Although any of these data types will suffice to indicate women’s inferiority in a given culture, they might all occur simultaneously and appear interrelated.⁶ This is true in some dominant versions of major religions, such as conservative Christianity and orthodox Judaism, in which women are devalued, considered impure, and barred from positions of power.

1. Angelina Grimke, *Angelina E. Grimke, Letters to Catherine [sic] E. Beecher, in reply to An Essay on Slavery and Abolitionism, addressed to A. E. Grimke*, in *THE PUBLIC YEARS OF SARA AND ANGELINA GRIMKE SELECTED WRITINGS 1835–39* 146, 197 (Larry Ceplair ed., 1989) [hereinafter *THE PUBLIC YEARS*].

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2. Nicholas Dirks et. al., *Introduction to CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 3, 33 (Nicholas Dirks et. al. eds., 1994); ELIZABETH FRAZER & NICOLA LACEY, *THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL- COMMUNITARIAN DEBATE* 33 (1993).

3. This definition is adapted from Gerda Lerner, who defines patriarchy as “the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general.” GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986) [hereinafter *THE CREATION OF PATRIARCHY*].

4. SHERRY B. ORTNER, *MAKING GENDER: THE POLITICS AND EROTICS OF CULTURE* 23 (1996).

5. *Id.*

6. *Id.*

This article discusses the way in which the power of religion and culture perpetuates the hegemony of patriarchy. Although religion and culture are as fundamental to women as they are to men and are shared by both women and men, the current legal protection afforded to patriarchal aspects of religion and culture perpetuates patriarchy's hegemony and seriously undermines women's ability to achieve equality. Although freedoms of religion and association and the right to culture are equally important to women and men, how these rights are understood and applied perpetuates gender hierarchy and deprives women of equality and freedom rather than ensuring their freedom of religion and culture or guaranteeing them equal respect. Furthermore, liberalism's skewed understanding of the desired scope and content of toleration, religious liberty, and cultural and associational rights stems from its lack of an adequate theory of power.⁷ Liberalism disregards the institutions, practices, discourses, and norms of a religion or culture as a socially and politically significant site of power, which severely curtails its ability to ensure that the exercise of power and authority over the individual is justified and that the rights of the individual are safeguarded.⁸

Part II will present the concepts of power, culture (and religion), and hegemony and will expose the ways in which the power of religion and culture creates and perpetuates the hegemony of patriarchy. Part III will utilize a historical perspective to describe the advent and perpetuation of patriarchy and the historical relationship between patriarchy and patriarchal religion. Part III.A will provide an overview of the creation of patriarchy primarily through patriarchal religion. Part III.B will describe its perpetuation through the control of knowledge and paternalistic dominance. Part III.C will analyze the insightful critiques of church and state offered by early American feminists, such as the Grimke sisters and Elizabeth Cady Stanton. Historically, feminists, especially religious feminists, have recognized the central role of religion in women's oppression and have demanded equality for women inside as well as outside religion. Modern feminism has largely neglected the call for equality within religion, assuming, following the enlightenment and its underlying assumptions, that it is both possible and desirable to guarantee equality for women in society at large without directly confronting religious prejudice and that religion and its accompanying prejudice are a passing phenomenon. This change within feminism can be explained both by the apparent loss of power that patriarchal religion has suffered after the severance of its long-standing, official ties with the state and by the inability of liberal feminism to properly analyze and critique the power patriarchal religion has retained despite severing its ties with the state. Nevertheless, recent struggles between feminism and conservative religion over the ERA and abortion demonstrate the power of patriarchal religion is very much alive, and its ability to safeguard the hegemony of patriarchy and circumvent women's struggle for equality is considerable.

7. FRAZER & LACEY, *supra* note 2, at 193. See also NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY 26 (1989).

8. FRAZER & LACEY, *supra* note 2, at 76.

Part IV will claim that despite the constitutional separation between church and state, patriarchal religion continues to influence—directly and indirectly—the law and to constitute a significant force perpetuating the hegemony of patriarchy. Part IV.A will describe how religious doctrines prescribing the subordination of women have entered American law and remain there under different guises to this very day. Part IV.B will argue that religious freedom, freedom of association, and the right to culture are being used as “status enforcing mechanisms” to maintain women’s subordination.⁹ Part IV.C will utilize the abortion controversy to demonstrate how patriarchal religion affects current law, and part IV.D will challenge the notion that toleration requires acceptance and protection for patriarchal religious practices. Finally, part IV.E will argue that a proper analysis of the power of religion and culture and the way in which it is used to maintain the hegemony of patriarchy would result in a very different understanding of the desired scope and content of toleration, religious liberty, and cultural and associational rights than current liberal understanding. Specifically, toleration should be required and religious liberty and cultural and associational rights should be vigorously protected. But such protection should not entrench unequal power relations and the hegemony of patriarchy. When the freedom of a patriarchal religion to continue practices that subordinate women conflicts with the right of women to receive equal treatment both inside and outside religion, the right of women should prevail.

II. POWER/CULTURE/HEGEMONY: HOW THE POWER OF RELIGION AND CULTURE CREATES AND PERPETUATES THE HEGEMONY OF PATRIARCHY

A. Power

The most influential theorist of power, Michel Foucault, is said to have revolutionized the western perception of power. Foucault posited that a major problem with western perceptions of power is both the representation of power in a juridical form and its attribution to the sovereign.¹⁰ “The language of power is law, not magic, religion or anything else.”¹¹ It is focused on the rights of the individual vis-à-vis the sovereign and neglects all other forms of power that threaten individual rights.¹² According to Foucault, a proper analysis of power must extend beyond the limits of the state both “because the state, for all the omnipotence of its apparatuses, is far from being able to occupy the whole field of actual power relations, and further because the state can only operate on the basis of other, already existing power relations.”¹³ Thus, Foucault posited that

9. The term “status enforcing mechanism” is borrowed from Reva B. Seigel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 99 (Robert C. Post et. al. eds., 2001).

10. MICHEL FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977 109, 119–21 (Colin Gordon ed., Colin Gordon et. al. trans., 1980).

11. *Id.* at 201.

12. *Id.* at 121–22.

13. *Id.* at 122.

power is everywhere; it is exercised from “*within* the social body rather than from *above* it,” and it is deeply, albeit covertly, invasive.¹⁴ Power is a productive social network defined by “a more-or-less organised, hierarchical, co-ordinated cluster of relations.”¹⁵ Furthermore, power cannot be recognized simply by its appearance as a negative force. Power is accepted because it is a hierarchical, productive force that “induces pleasure, forms knowledge, and produces discourse.”¹⁶ As Phelan explains, “[p]ower operates through discourses that define and legitimate its operation.”¹⁷ This understanding of power is highly compatible with the view that culture and its religious subsets are a major site of power. Importantly, Foucault posited that power relies on the appearance of freedom.¹⁸ It covertly guides conduct and suggests possible outcomes because the person upon whom it is exercised is envisioned as a person whose actions are freely chosen.¹⁹ In this respect, religion and culture are quintessential sites of power because they are highly determinative of individual actions and are regarded as positively informing rather than obstructing free choice.

Arguably, the inadequacy of the liberal theory of power stems from its individualistic structure and inability to consider the group as a crucial mediator between the individual and the state.²⁰ An analysis that recognizes groups both as a crucial site of power and a crucial reservoir of power that can be utilized by members both within and outside the group entails a different understanding of existing power relations and their effects on individuals. The focus on the state as the major, or even sole, threat to individual rights is particularly evident in theories of political liberalism, wherein the commitment to maintaining freedom from the state in the private sphere of community far exceeds the commitment to protect the individual from private oppression.²¹ But if power is everywhere, then the liberal framework envisioning the private sphere as a power-free zone of rights is mistaken.²² Moreover, as Fraser points out, employing Foucault’s analysis, “the proliferation of discourse governed by this liberal framework may itself function . . . to mask the actual character of power and thus to conceal domination.”²³ Consequently, Fraser argues that Foucault can be understood to advocate a “politics of everyday life” because “if power is instantiated in

14. MICHEL FOUCAULT, *Prison Talk*, in POWER/KNOWLEDGE, *supra* note 10, at 37, 39.

15. MICHEL FOUCAULT, *The Confession of the Flesh*, in POWER/KNOWLEDGE, *supra* note 10, at 194, 198.

16. MICHEL FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE, *supra* note 10, at 109, 119.

17. Shane Phelan, *Foucault and Feminism*, 34 AMERICAN J. OF POL. SCI. 421, 424 (1990).

18. *Id.* at 425.

19. *Id.*

20. See, e.g., FRAZER & LACEY, *supra* note 2, at 197.

21. The prime example is Rawls’ theory of political liberalism which “rather than confronting religious and nonliberal doctrines with a comprehensive liberal philosophical doctrine . . . (aims) to formulate a liberal political conception that those nonliberal doctrines might be able to endorse.” JOHN RAWLS, POLITICAL LIBERALISM, xlvii (1996).

22. FRASER, *supra* note 7, at 26.

23. *Id.* at 26–27.

mundane social practices and relations, then efforts to dismantle or transform the regime must address those practices and relations.”²⁴

B. Culture

Foucault’s theory of power is particularly conducive to a proper analysis of the power that culture, and religion as an important part of culture, has in people’s lives.²⁵ Although in the past “one of the core dimensions of the concept of culture has been the notion that culture is ‘shared’ by all members of a given society,” it has now become clear to contemporary anthropologists that when “we speak of culture as shared, we must always ask ‘by whom?’ and ‘in what ways?’ and ‘under what conditions?’”²⁶ Furthermore, contemporary anthropology emphasizes “the degree to which culture is grounded in unequal relations and is differentially related to people and groups in different social positions.”²⁷ Surveying developments in the theory of anthropology since the sixties, Ortner argues that while in the past anthropological research has emphasised what culture enables people to see, feel, and do, it has since moved to emphasize the ways in which culture restricts people’s actions and feelings. Precisely because anthropologists agree that culture effectively shapes the reality that people live in, they consider this reality with critical eyes and question why that particular reality has been created and what sorts of alternative realities people are prevented from experiencing.²⁸ Ortner further argues that although material and political constraints such as force are fully acknowledged, there is considerable agreement among anthropologists that culture and religion systematically constrain action by controlling people’s “definitions of the world,” limiting “their conceptual tools,” and restricting “their emotional repertoires.”²⁹ Thus, religion and culture restrict most deeply by becoming part of the self.³⁰

C. Hegemony

24. *Id.* at 26.

25. Kymlicka defines societal culture as “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.” WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 76 (David Miller & Alan Ryan eds., 1995). Religion is an essential part of culture and the more religious the community the greater religion’s part in defining the culture of that community. On religion as a cultural system, see Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 *NOTRE DAME L. REV.* 579, 631–32 (1999). For this reason, religion and religious culture had a crucial role in creating the hegemony of patriarchy that was far greater than the role of secular culture. Consequently, my use of the term “culture” should be understood as referring not only to secular culture but also, and even mainly, to religion and religious culture. Similarly, I often use the terms religion and culture together in order to emphasize the role of religion and not to suggest that religion is not a part of culture.

26. Dirks et. al., *supra* note 2, at 3.

27. *Id.*

28. Sherry Ortner, *Theory in Anthropology Since the Sixties*, in *CULTURE/POWER/HISTORY*, *supra* note 2, at 372, 396.

29. *Id.* at 397.

30. *Id.*

The strength and depth of the power of culture and the central roles of domination and subordination in forming culture are perhaps best captured in Antonio Gramsci's notion of "hegemony."³¹ Hegemony is "the power to establish the 'common sense' or 'doxa' of a society, the fund of self-evident descriptions of social reality that normally go without saying."³² If culture is traditionally understood as the social process by which people define and shape their lives, then hegemony goes beyond this traditional understanding by relating culture to specific distributions of power and influence.³³ Thus, hegemony's most important contribution is recognizing that culture is both political and ideological because it is produced to serve certain dominant interests.³⁴ But, the concept of hegemony also expands beyond "ideology" in insisting that our perception of the world is not only shaped merely by a conscious system of ideas and beliefs but also by our whole lived experience that is itself shaped by specific and dominant meanings and values.³⁵ Hegemony is not solely an ideology and it does not operate just through manipulation or indoctrination:

It is a whole body of practices and expectations, over the whole of living: our senses and assignments of energy, our shaping perceptions of our selves and our world. It is a lived system of meanings and values – constitutive and constituting – which as they are experienced as practices appear as reciprocally confirming. It thus constitutes a sense of reality for most people in society, a sense of absolute because experienced reality beyond which it is very difficult for most members of society to move, in most areas of their lives.³⁶

Consequently, it is not only the hegemonic culture that becomes part of the self, but also the relationship of dominance and subordination upon which the culture is founded that becomes an inseparable part of the self.³⁷ Thus, hegemony's most important contribution is stressing that hegemonic culture "constitutes the terrains of meaning and feeling that are central to the securing of consent and/or the incitement to rebellion," which renders the use of force and coercion to secure cooperation largely unnecessary.³⁸

This article will argue against legal protections for religion and culture to the extent that they serve to perpetuate the hegemony of patriarchy. Legal concepts such as toleration, religious liberty, and associational and cultural rights are used, inter alia, to perpetuate the subordination of women, and the only way to end the hegemony of patriarchy and replace it with a hegemony of equality is to intervene in religion and culture. According to Williams,

31. Raymond Williams, *Selections from Marxism and Literature*, in CULTURE/POWER/HISTORY, *supra* note 2, at 585, 595.

32. Nancy Fraser, *The Uses and Abuses of French Discourse Theories for Feminist Politics*, 17 BOUNDARY II 82, 85 (1990).

33. Williams, *supra* note 31, at 595.

34. Dirks et. al., *supra* note 2, at 23.

35. Williams, *supra* note 31, at 595.

36. *Id.* at 596–97.

37. *Id.*

38. Dirks et. al., *supra* note 2, at 23.

“hegemony is always a process.”³⁹ “It does not just passively exist as a form of dominance,” but “has continually to be renewed, recreated, defended and modified.”⁴⁰ Simultaneously, it is also “continually resisted, limited, altered, [and] challenged by pressures not at all its own.”⁴¹ Thus, hegemony presupposes a process in which cultural authority is continuously negotiated and contested, but wherein some perspectives have more authority than others.⁴²

Understanding hegemony as a structure of pervasive domination, which is continuously challenged and defended, is important for feminism because it highlights both the depth and strength of patriarchal religion and culture’s influence over all of our lives and the role of individual agency in defending and challenging this structure. An important feminist critique of structuralist theories such as Foucault’s is that they fail to envision power as both a structural and an individual concept.⁴³ Therefore, power lies both in the social structures and in the individuals who exercise it. All exercise of power is completed within social and cultural structures comprised of discourses and practices that make the exercise possible and significant. Nevertheless, within this socio-cultural context the exercise of power is by individuals, who are not merely affected by power, but are also actively participating in practices and discourses that create power by exercising it, resisting it or failing to resist it.⁴⁴ Although it largely determines the positions, practices and discourses of individuals, the hegemonic structure is also simultaneously being created and recreated, challenged, and defended through the actions, practices, and discourses of individual actors.

A similar understanding of the socio-cultural process is embraced by practice theory anthropologists. In practice theory, human action is seen as both “constrained by the given social and cultural order” and as making “structure” by reproducing it, transforming it, or both.⁴⁵ Consequently, the refusal of some religions to ordain women should be seen both in the context of an established, sexist power structure and as an individual exercise of power by religious leaders who may have the power to transform the unequal social structure, but choose not to act. Similarly, state refusal to utilize the law to intervene on behalf of women who are refused ordination or discriminated against in religious positions should also be seen as both a manifestation of the established sexist power structure within the state and an individual exercise of power by state officials—such as judges or legislatures—who choose to utilize their power to protect the system rather than transform it. Finally, the religious women who challenge the discrimination within their own faith, who support it, or who merely refuse to challenge it should be understood as individual actors acting

39. Williams, *supra* note 31, at 598.

40. *Id.*

41. *Id.*

42. Fraser, *supra* note 32, at 85.

43. FRAZER & LACEY, *supra* note 2, at 35.

44. *Id.*

45. ORTNER, *supra* note 4, at 2.

within their (highly constrained) positions in the patriarchal structure with the goal of either transforming or reproducing the structure itself.

By using the force of law to bar both internal and external challenges to patriarchal religion and culture, liberal states are renegeing on their expressed commitment to transforming the system to achieve women's equality and are subsequently entrenching patriarchal hegemony. In the legal systems of liberal states, the hegemony of patriarchy is partially challenged by equality legislation that is aimed at ensuring equality before the law, equality in the public sphere, and equality in specific areas such as employment. However, such challenges are inadequate because the nucleus of the hegemonic power of patriarchy lies within religion and culture. If hegemony is secured not through public social institutions, but primarily through control over religious and cultural language and imagery, through the shaping of everyday practices, and through constituting meaning and feeling, then the hegemony of patriarchy can never truly be challenged without an outright challenge to the patriarchal practices entrenched in most religions and cultures.

III. PATRIARCHY AND PATRIARCHAL RELIGION—A HISTORICAL PERSPECTIVE

A. The Creation of Patriarchy

Early American feminist Angelina Grimke has identified the “*mere circumstance of sex*”⁴⁶ as the founding force of patriarchy. A historical study by Gerda Lerner reveals that prior to the formation of the archaic states, societies existed in which men and women were substantially equal, even though a division of labor existed that was based on the woman's exclusive ability to give birth and ensure the survival of the infant given the conditions in prehistoric times.⁴⁷ Far from serving as a justification for male domination, woman's procreative power was venerated, and the first form of religious worship was the worship of the Mother-Goddess.⁴⁸

Archeological and historical evidence indicates that for thousands of years and across cultures the Mother-Goddess was worshiped as the Supreme Being.⁴⁹ The power of the goddesses remained active and strong even as women's economic, educational, and legal subordination deepened.⁵⁰ Lerner posits that the development of strong kingships and archaic states brought changes in religious beliefs and symbols. The Mother-Goddess figure was demoted and gradually replaced with a male Creator-God as the head of the pantheon of gods and goddesses⁵¹ to whom the power of creation and fertility was transferred. These changes in religious symbols and meanings closely reflect the

46. Angelina Grimke, *supra* note 1, at 194.

47. THE CREATION OF PATRIARCHY, *supra* note 3, at 40–41.

48. *Id.* at 39.

49. *Id.* at 141–60. See also ROSEMARY RADFORD RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY 47 (1993) [hereinafter SEXISM AND GOD-TALK].

50. THE CREATION OF PATRIARCHY, *supra* note 3, at 141–42.

51. *Id.* at 145.

gradual absorption of female rights by the patriarchal structure and the transition from matrilineal kinship and royal succession to patrilineal kinship and succession.⁵² Initially, the goddesses had power in their own right, and their power was not limited only to sex and procreation but extended to all domains, including power on the battlefield and over other gods and kings.⁵³ The goddesses and gods were equivalent images of the divine, which had both sexual potency and social power.⁵⁴ As a gradual reflection of the societal change in the concepts of gender, the power of the goddesses was transformed into the power to intercede with the dominant male god and was restricted to domains such as healing and procreation.⁵⁵ Nevertheless, the worship of the goddesses continued to flourish in popular religion while the priests and the ruling elites were transforming official religious practices and texts that created the new dominance of the male god.⁵⁶ In fact, archeological evidence shows that the goddess Asherah was worshipped alongside the Hebrew god in the Hebrew temple for two thirds of its existence.⁵⁷ For many people, the Hebrew god replaced the Canaanite god Baal as the husband of the goddess.⁵⁸

Lerner maintains that all religions have to answer three basic questions: (1) Who can speak to God? (2) Who creates life? (3) Who brings evil into the world? In a brilliant analysis, Lerner demonstrates how through a gradual process that culminated with the Hebrew monotheist religion and the Bible, the answers to these questions were transformed so as to entrench patriarchal rule and women's subordination and make them appear natural and inevitable.

1. *Who Can Speak to God?*

As long as the worship of goddesses continued, women could find their likeness in the image of the female goddesses just as men could find their likeness in the image of the male gods.⁵⁹ Women were empowered both symbolically and practically through the goddesses and their priestesses (the goddesses usually had female priestesses while male gods had male priests).⁶⁰ Thus, women could both speak directly to God and find themselves in God without the need for male mediation. With the advent of monotheist religion and the worship of a single, supreme, male God, women's access to God was severely curtailed, and they were rendered powerless in their religious life. Although in the early texts the Hebrew god was not gendered and could theoretically embody both male and female aspects, he has always been perceived as a male Father-God.⁶¹ The result has been the emergence of an all

52. *Id.* at 154–58.

53. *Id.* at 143.

54. SEXISM AND GOD-TALK, *supra* note 49, at 52.

55. THE CREATION OF PATRIARCHY, *supra* note 3, at 159.

56. *Id.* at 158.

57. SEXISM AND GOD-TALK, *supra* note 49, at 56.

58. *Id.*

59. THE CREATION OF PATRIARCHY, *supra* note 3, at 160.

60. *Id.* at 142, 178.

61. *Id.* at 178.

male priesthood. Women had no place in the religious ritual, neither functional nor administrative or even as a member of the cult fellowship.⁶² Though at first women and men congregated together for worship, by the time of the second temple women were no longer allowed to enter the area of the temple reserved for those who took part in the religious ritual. Segregation between men and women was created, and women could no longer speak to God.⁶³

The basis for excluding women from speaking to God is the biblical story of the covenant between God and the Hebrews, in which God promises the chosen people collective immortality in the form of many generations of children, land, power, and victory over their enemies if they fulfill certain obligations under the covenant.⁶⁴ In the biblical story, the covenant God makes with Abraham, which is later confirmed in his covenant with Moses, is a covenant between God and man alone wherein woman has no place.⁶⁵ God makes the covenant with Abraham alone and not with Sarah. It is only Abraham who God addresses, and it is only he who God advises of his and his progeny's rights and duties under the covenant. Thus, the leadership of the patriarch over his family and tribe is given divine sanction.⁶⁶ Sarah's relation to the covenant as the bearer of Abraham's children embodies the relation of women to both religion and the state for generations to come.⁶⁷ Consequently, Sarah is the means through whom God's covenant with Abraham and His promise to multiply Abraham's seed is to be carried out. But, her relation to the covenant itself and therefore to God exists only through her relationship to Abraham and her role as the child-bearer. Following God's covenant with men, women can no longer connect directly to God but must connect to Him indirectly through men.⁶⁸

2. *Who Creates Life?*

The symbol chosen as the token of the covenant, circumcision, is a powerful representation of the exclusion of women.⁶⁹ Women are irreversibly excluded from the covenant both because they do not have penises and because similar to the focus on Abraham's seed, the focus on the male penis signifies the shift from the female to the male procreative role. This shift fosters the belief that man creates life and therefore has a right over both his wife and his progeny.⁷⁰ The transformation from the worship of woman's sexual and reproductive role, represented by the worship of goddesses, to man's metaphysical appropriation of these roles, is powerfully illustrated in the story of creation in the Book of Genesis. The biblical story of Adam and Eve is one of the most powerful myths of western civilization and has defined the

62. *Id.* at 177–78.

63. THE CREATION OF PATRIARCHY, *supra* note 3, at 178–79.

64. *Id.* at 193; *Genesis* 17 (King James).

65. THE CREATION OF PATRIARCHY, *supra* note 3, at 189–90.

66. *Id.* at 190.

67. *Id.*

68. SEXISM AND GOD-TALK, *supra* note 49, at 53.

69. THE CREATION OF PATRIARCHY, *supra* note 3, at 190–92.

70. *Id.*

relationships between men and women on both theoretical and practical levels for generations.⁷¹ After creating Adam, the man, from the dust of the earth, God put Adam to sleep and from his rib he created his mate, who Adam then named Woman.⁷² In this story not only does a male God create humanity, but also reverses the biological and natural order of things in making woman evolve from man's body and not man from woman's body.⁷³ Thus, man's right to ownership over woman stems both from Adam's power in naming Eve just as he names the animals⁷⁴ and from the physical fact that Eve is created out of Adam's rib so Adam is seen as "giving birth" to Eve.⁷⁵ Consequently, as Lerner observes, the prevailing assumption throughout Genesis is that humans are born to men and that the physical act of procreation is a male act in which no mothers are involved.⁷⁶ Adam's "giving birth" to Eve is an act devoid of any sexual nature, pain, or blood and involves only Adam and God. The only other birth in the history of the Judeo-Christian tradition in which no sexual intercourse is involved is Mary's immaculate conception of Jesus. The event also represents the lost alternative before the Fall, when "pure nature, as it came forth from the hand of God, was totally under the power of the Spirit, and so was without evil and was not subject to death."⁷⁷ Mary's ability to give birth without sexual intercourse, an unprecedented phenomenon after the Fall, raises her to a level above all other women. As part of their punishment for the Fall, women are obliged to engage in sexual intercourse in order to procreate and are destined to give birth in pain and suffering.

3. *Who Brings Evil into the World?*

After the woman ate from the tree of knowledge and seduced Adam into eating as well, they were both banished from paradise and Adam renamed the woman Eve, for "she was to be the mother of all living."⁷⁸ The creation of Eve from Adam's rib has been seen as proof of the God-given inferiority of woman.⁷⁹ An additional justification for women's inferiority in the Christian tradition is found in Eve's responsibility for the fall of Adam, which was interpreted to hold all women responsible for the advent of evil into the world.⁸⁰ At the time of the writing of Genesis, "the snake was clearly associated with the fertility goddess and symbolically represented her."⁸¹ Thus, it is the woman's inducement by the

71. MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 44–45 (1985); ORIT KAMIR, *EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW* 30 (2001); *THE CREATION OF PATRIARCHY*, *supra* note 3, at 182.

72. *Genesis* 2:21–23 (King James).

73. *THE CREATION OF PATRIARCHY*, *supra* note 3, at 181.

74. *Id.*

75. ROSEMARY RADFORD RUETHER, *NEW WOMAN NEW EARTH, SEXIST IDEOLOGIES AND HUMAN LIBERATION* 15 (Beacon Press 1995) (1975).

76. *THE CREATION OF PATRIARCHY*, *supra* note 3, at 187.

77. *SEXISM AND GOD-TALK*, *supra* note 49, at 151.

78. *Genesis* 3:20 (King James).

79. *THE CREATION OF PATRIARCHY*, *supra* note 3, at 183.

80. *SEXISM AND GOD-TALK*, *supra* note 49, at 167–68.

81. *THE CREATION OF PATRIARCHY*, *supra* note 3, at 196.

snake, which represents the fertility goddess and in turn a woman's own free sexuality, that is responsible for the Fall.⁸² Woman's punishment for her act is comprised of her eternal subjugation to her husband, the restriction of her sexuality solely for purposes of procreation within the conjugal relationship, and the pain of child bearing.⁸³ In Christian thought, woman's role as a submissive wife and mother is not only her punishment but also her only means of salvation.⁸⁴

In the service of patriarchy, the story of Creation establishes the following facts: (1) God granted procreative power to man and not to woman; (2) sexual intercourse, pregnancy, and childbirth are not an expression of women's unique power to procreate (which God placed with man), but the physical manifestations of women's punishment for the Fall; (3) man's closer relationship with God along with his procreative power entitle him to ownership of both women and their offspring, which are exclusively man's offspring. Furthermore, if woman's punishment for the Fall is both to be the vessel of man's procreative power and to suffer pain and sorrow while performing this role, then one could argue that treating women as a means for procreation becomes not only permissible but necessary and commendable. More importantly, a woman who tries to obstruct in any way—such as through contraceptives or abortion—the fulfillment of her procreative obligations, should be condemned for trying to avoid the deserved punishment God has ordained for her and for attempting to prevent man from fulfilling his own procreative obligation to God. If it is woman (Eve) who through her disobedience is to blame for her destiny to give birth and suffer for it, what right does she have to object to this destiny or try to manipulate it? After all, had it not been for woman's disobedience, procreation might have been achieved painlessly and magically through man's body (e.g., the creation of Eve) without any soiling female involvement.⁸⁵

Viewed this way, the story of creation provides an airtight justification for man's superiority over woman, for his right to control her sexuality and procreative ability (and therefore her body), and for his right to possess both her and her offspring. The only thing left to ascertain is that woman has no power to challenge this story because man exerts a monopoly over knowledge. Ironically, Eve was the first to eat from the Tree of Knowledge and the first to acquire the ability to distinguish good from evil. Consequently, she was banished from the Garden of Eden along with Adam. Nevertheless, it is the denial of women's moral capacity and their ability to distinguish right from

82. *Id.* at 198.

83. *Id.* at 196; *Genesis* 3:16 (King James).

84. "But I suffer not a woman to teach, nor to usurp authority over the man, but to be in silence. For Adam was first formed, then Eve. And Adam was not deceived but the woman being deceived was in the transgression. Notwithstanding she shall be saved in childbearing, if they continue in faith and charity and holiness with sobriety." 1 *Timothy* 2:12–15 (King James).

85. See Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 *TEX. J. WOMEN & L.* 43 (2005) [hereinafter *Gender Construction*] (Discussing the use of the myth of Adam and Eve and the suppression and demonization of Eve's counter image—Lilith—as a framework for the construction of gender in the western world and on the implications of this use for liberal equality).

wrong that maintains the hegemony of patriarchy and justifies women's subordination. This denial of women's moral capacity is at the heart of the critique of patriarchy and of patriarchal religion by abolitionist feminists such as the Grimke sisters.⁸⁶

The symbolic devaluing of women in relation to the divine is achieved in the Hebrew monotheist religion through the establishment of a supreme, male God who makes a covenant exclusively with men that excludes women from the religious ritual and from the religious symbol systems. Through the portrayal of woman, especially her sexuality, as the source of all weakness and evil, this symbolic devaluation becomes one of the two founding metaphors of western civilization.⁸⁷ Aristotelian philosophy supplies the other founding metaphor and holds "that women are incomplete and damaged human beings of an entirely different order than men."⁸⁸ Whereas male is active female is passive; whereas male is soul female is matter.⁸⁹ Whereas the male is a complete human being comprised of both matter and soul, the female is a mutilated male who lacks soul and is only matter.⁹⁰ This incompleteness of the woman makes her inferior in her capacities, in her ability to reason, and in her ability to make decisions, making man's rule over woman just as natural and expedient as man's rule over the animals.⁹¹ Thus, we see that the hegemony of patriarchy, which is crucially dependent on the divine sanction granted to it by patriarchal religion, is further expanded and entrenched through patriarchal philosophy. These concepts coalesce and are deeply rooted in Christian thought wherein male superiority is the embodiment of the transcendent mind, and the female embodies an inferior physical nature, body, and passions and represents the source of sin.⁹² On the basis of these two founding metaphors of western civilization, the subordination of women is seen as natural, and the stereotypes regarding women appear to represent reality, resulting in the firm establishment of patriarchy as an actuality and as an ideology.⁹³ Therefore, the hegemony of patriarchy is established.

B. The Control of Knowledge and Paternalistic Dominance as Key Elements of the Hegemony of Patriarchy and Patriarchal Religion

1. *Control of Knowledge*

One of Foucault's most important insights is that power operates by forming knowledge and producing discourses that define and legitimate its operation.⁹⁴ Men's monopoly over defining, determining, and interpreting truth

86. See the discussion of the Grimke sisters and other abolitionist feminists *infra*.

87. THE CREATION OF PATRIARCHY, *supra* note 3, at 199–201.

88. *Id.* at 10.

89. *Id.* at 206–07.

90. *Id.*

91. *Id.* at 207–08.

92. SEXISM AND GOD-TALK, *supra* note 49, at 93.

93. THE CREATION OF PATRIARCHY, *supra* note 3, at 211.

94. Phelan, *supra* note 17, at 424.

and knowledge perpetuates the hegemony of patriarchy and maintains men's control over women. Nowhere is the structure of patriarchy more evident than in patriarchal religions, which are built on two pillars of control—men's control over truth and knowledge, which ensures their control over women, and men's control over women's sexuality and reproductive capacity. The considerable influence of patriarchal religions in liberal democratic societies also manifests itself along these same two pillars of control. In the United States this is demonstrated very well in the abortion controversy. The "knowledge" that life begins at conception not only serves to prevent women within some patriarchal religions from having abortions, but when allegedly severed from its religious origins and presented as socio-cultural "knowledge," this "knowledge" also serves to justify legal restrictions on abortions imposed by the secular state.⁹⁵ The control of women's reproductive ability and the division of labor attached to it has been crucial in maintaining men's control of knowledge. Throughout history men have left themselves free to control culture by relegating most tasks of domestic production and reproduction to women.⁹⁶ Based on their procreative abilities, women have been assigned to perform all of the domestic work, leaving men free to engage in cultural and religious definitions that justify and normalize this division of labor. Accordingly, women's procreativity and sexuality have served as the basis for creating the hegemony of patriarchy by excluding women from the creation of religion and culture and by turning them from persons into property. These exclusions enable the proprietor (father/husband) to exploit their labor, fail to remunerate it, and declare it non-existent and insignificant while still relying on it as the indispensable basis for his own achievements.⁹⁷

Patriarchal religions are not alone in using male domination of knowledge and truth to control women's sexuality and reproductive rights. As Betty Friedan shows in her classic book *The Feminine Mystique*, scientific, psychological, and cultural male-generated "truths" have served, as late as the second half of the twentieth century, to reduce women to the role of complacent, procreative machines.⁹⁸ The hegemony of patriarchy is subsequently maintained through mutually reaffirming religious, cultural, and scientific knowledge and discourses. Although the control over knowledge and truth formation in most disciplines and institutions in many liberal states is still largely in the hands of men, most liberal states are at least formally committed to rectifying the situation and achieving equality within these institutions. But, the opposite is true with regard to religion, whereby liberal states are committed to protecting the right of religious patriarchs to preserve their own hegemony by invoking concepts such as freedom of religion and freedom of association, autonomy, and toleration.

95. See, e.g., *Harris v. Mcrae*, 448 U.S. 297 (1980), discussed *infra*.

96. SEXISM AND GOD-TALK, *supra* note 49, at 74.

97. *Id.* at 261–63.

98. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

2. *The Priesthood and the Control of Knowledge*

Carol Gilligan defines patriarchy as a “hierarchy—a rule of priests—in which the priest, the hieros, is a father. It describes an order of living that elevates fathers, separates fathers from sons (the men from the boys), and places both children and women under a father’s authority.”⁹⁹ However, the sons will grow up to become fathers, but the women will never do so. The order of religious patriarchy is also established in the Garden of Eden story; God over Adam, Adam over Eve, and the serpent at the bottom. Eve and then Adam eat from the Tree of Knowledge and are punished by God through the establishment of patriarchy.¹⁰⁰ Patriarchy, according to Gilligan, is “secured by the prohibition against knowing what you know through experience, a prohibition that creates the need for the priesthood.”¹⁰¹ In patriarchy “the fathers stand at the top of the hierarchy, serving as priests—the interpreters of truth, the dispensers of goodness, those with direct access to power, mediating relationships with power for those below.”¹⁰²

Likewise, Radford Ruether suggests that the patriarchal domination of men over women and fathers over children is duplicated in the ecclesiastical hierarchy in the form of clericalism.¹⁰³ The basic assumption of clericalism is that the people have no direct access to the divine and the priests are the only ones capable of preaching, teaching, and mediating between God and the laity.¹⁰⁴ While the “male laity may be allowed subordinate roles within this system of clerical power,” women are excluded from such roles altogether and “become the archetypal representatives of the passive recipients of clerical sacral power.”¹⁰⁵ Consequently, Radford Ruether argues that “it is impossible to liberate the Church from patriarchy and retain a clerical definition of the ministry.”¹⁰⁶ A similar claim was made more than a century and a half ago by the Grimke sisters, two of the first American abolitionist feminists, who posited that the church government would have to come down in order for women and slaves to gain their rights.¹⁰⁷

Both aspects of patriarchy that are identified by Gilligan, sex and age, pose an almost insurmountable obstacle for women in their attempt to challenge patriarchal religions from within and to regain their right to interpret truth and determine knowledge. While the sex factor keeps women subordinate to men, the age factor keeps the system in place by immunizing ancient rules from modern challenges. The reverence for the old and its superiority over the new is

99. CAROL GILLIGAN, *THE BIRTH OF PLEASURE* 16 (2003).

100. *Id.* at 205.

101. *Id.*

102. *Id.* at 156.

103. SEXISM AND GOD-TALK, *supra* note 49, at 207.

104. *Id.* at 206–07.

105. *Id.* at 207.

106. *Id.*

107. Angelina Grimke, *Angelina E. Grimke to Theodore Dwight Weld and John Greenleaf Whittier, in THE PUBLIC YEARS OF SARA AND ANGELINA GRIMKE SELECTED WRITINGS 1835–1839* 281, 284 (Larry Ceplair ed., 1989).

the hallmark of patriarchal religion.¹⁰⁸ For example, in Orthodox Judaism the authority of a biblical interpretation is determined first and foremost by its antiquity, with older interpretations invariably superior to newer ones. This is a fatal blow for those who attempt to change discriminatory interpretations of biblical rules in favor of more egalitarian understandings. Truth and knowledge become a more or less fixed essence, determined and controlled by men, the priests–fathers, who are its sole judges and interpreters. Women who attempt to change these discriminatory interpretations are silenced and excluded from the community of believers with the assistance of the State, which prefers the right of community leaders to determine who belongs to the community to the right of the women to challenge their discrimination.¹⁰⁹ Reducing women to silence is an important tool in women’s subordination. Men define the world for both men and women from the men’s point of view and dismiss interpretations that come from the women’s point of view.¹¹⁰ When done in the name of religion and culture, the liberal state not only condones this action but also considers it a fundamental right. The control over knowledge is preserved, the hegemony of patriarchy is protected and, the liberal framework is used “to mask the actual character of power and to conceal domination.”¹¹¹

3. *Paternalistic Dominance*

Foucault’s insight that power operates through discourses that define and legitimate its operation is also well demonstrated by the central role of paternalistic dominance in perpetuating patriarchal hegemony. Paternalistic dominance is a subset of patriarchal relations in which the relationship of dominance “is mitigated by mutual obligations and reciprocal rights.” Women “exchange submission for protection and unpaid labor for maintenance.”¹¹² Dominance is disguised as benevolence, and sexism—the ideology of male supremacy and superiority over women—serves as the “factual” basis that explains to women why they need this form of paternalism while simultaneously allowing men to convince themselves that they are only acting in everyone’s, especially women’s, best interests.¹¹³ As Radford Ruether poignantly observes, women trade “a diminished humanity for dependent forms of security.”¹¹⁴ Because women’s subordination is maintained primarily through paternalistic dominance within the structure of the family, which is traditionally understood as a haven of loving relations, it lends particular credibility to the claim that benevolent domination obscures the political implications of women’s subordination.

108. See e.g., Leslie C. Allen, *The Old Testament in Romans I-VIII*, 3 VOX EVANGELICA 6, 6 (1964).

109. See e.g., MARY FAINSDO KATZENSTEIN, FAITHFUL AND FEARLESS: MOVING FEMINIST PROTEST INSIDE THE CHURCH AND MILITARY 132–58 (1998).

110. SEXISM AND GOD-TALK, *supra* note 49, at 74–75.

111. FRASER, *supra* note 7, at 26–27.

112. THE CREATION OF PATRIARCHY, *supra* note 3, at 239–40.

113. *Id.* at 240–41.

114. SEXISM AND GOD-TALK, *supra* note 49, at 173.

The central role of paternalistic benevolence in perpetuating patriarchy is essential to understanding the role of patriarchal religion in maintaining the hegemony of patriarchy. Religious hierarchy—God over man, man over woman—is crucially based on benevolence and love. Just as God’s relation to both man and woman is one of benevolent hierarchy, so man’s relation to woman, and in particular to his wife, is also one of benevolent hierarchy. While the notion that women are weak and inferior is aimed at persuading them that it is futile and dangerous to resist the hierarchy, the notion that the hierarchy is based on love and ordained by God is aimed at persuading women that it is sinful, immoral, and ungrateful to resist it. Thus, religion is relied on as both the foundational justification for women’s subordination to men and as a “daily aid” in securing this subordination.¹¹⁵ In sum, the hegemony of patriarchy in religion is maintained by the existence of a clear gender hierarchy, immune from change and presented as benevolent and ordained by God. The hegemony of patriarchy maintains a monopoly on power and knowledge by prohibiting women, on account of their sex, from knowing what they know through their own experience and teaching them to live their lives according to the knowledge produced by the male elite. What makes this structure seem natural and inevitable to so many women is not only its eternity, but also its pervasiveness, *mutatis mutandis*, across disciplines and cultures.

C. Religion as a Major Tool in the Oppression of Women—The Views of Early American Feminists

In her book *The Creation of Feminist Consciousness*, Gerda Lerner maintains that for more than a thousand years women’s major intellectual enterprise was to re-conceptualize religion in such a way that would give them an equal and central role and counteract the pervasive patriarchal assumptions of their inferiority and incompleteness as human beings.¹¹⁶ According to Lerner, “[w]omen’s striving for emancipation was acted out in the arena of religion long before women could conceive of political solutions for their situation.”¹¹⁷ Lerner identifies both “the misogynist explanatory system that dominated church doctrine and shaped ideas of gender in society,” and the belief “in the God-given inferiority of women and their subordinate position” as the major causes for women’s subservience and their difficulties in fighting their oppression to create a feminist consciousness.¹¹⁸ All women, whether religious or not, were adversely affected by the core Biblical texts which were used time and again by patriarchal authorities to justify women’s subordination.¹¹⁹ The prohibitions on women’s thinking, teaching, and speaking in public were all based on biblical authority and “[t]hese biblical core texts sat like huge boulders across the paths women had to travel in order to define themselves as equals of men.”¹²⁰

115. *Id.* at 170.

116. GERDA LERNER, *THE CREATION OF FEMINIST CONSCIOUSNESS* 10–11 (1993).

117. *Id.* at 11.

118. *Id.* at 46–47.

119. *Id.* at 138.

120. *Id.*

1. *The Grimke Sisters*

Sara and Angelina Grimke, two of the most important abolitionist feminists, recognized the inseparability and interrelation between equality at the state level and equality within religion as early as the middle of the nineteenth century. Given their special life circumstances and the period in which they lived, perhaps it is not surprising that the Grimke sisters saw so clearly almost two centuries ago what is hidden from the eyes of so many today. The sisters were born into a southern slave holding family but left the South due to their deep objections to slavery and their own family's commitment to the practice in particular and settled in the north.¹²¹ Their antislavery activism and the negative reactions they received as women trying to speak publicly in front of northern audiences led them to develop the analogy between the immoral prejudices of racism and sexism.¹²² Catharine Beecher, an avid believer in the heavenly ordained superiority of man, and in separate spheres for men and women, who was a strong objector to the Grimke's public speaking, received a letter from Angelina explaining that "[t]he investigation of the rights of the slave has led me to a better understanding of my own."¹²³ In another letter, Angelina suggests "the rights of the slave [and] woman blend like the colors of the rainbow."¹²⁴ According to Angelina, all human beings have rights because they are moral beings, and although these rights can be wrested from the slave, his entitlement to them will not change. Similarly, the "*mere circumstance of sex*" does not give man higher rights than those of woman because this physical circumstance is secondary to the moral nature of both men and women.¹²⁵

The Grimke's public speaking on abolition brought to the forefront the parallel issue of women's rights and elicited strong condemnation of the sisters from ministers of the church. Strong pressure was subsequently applied to the sisters by various leaders of the abolitionist movement to stop addressing the issue of women's rights altogether.¹²⁶ In response to this pressure, the sisters expressed their conviction that they could not effectively fight for abolition without defending their own right to speak their minds in public. They asserted that the attack on them was part of a deep-laid scheme of the clergy to silence women and prevent them from exercising their right to conscience.¹²⁷ "What then can woman do for the slave, when she is herself under the feet of man [and] shamed into silence,"¹²⁸ or alternatively, what power can woman have if she is not even allowed to speak? According to the sisters, the struggles for the abolition of slavery and for women's rights were two inseparable parts of the same whole, and the church government, which stood in the way of reform on

121. DAVID A. J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 83 (1998).

122. *Id.* at 83-84.

123. *THE PUBLIC YEARS*, *supra* note 1, at 194.

124. *Id.* at 286.

125. *Id.* at 194.

126. *Id.* at 281-93.

127. *Id.* at 283.

128. *Id.* at 284.

both issues, would have to come down in order for the reform to take place.¹²⁹ Matilda Joslyn Gage, a contemporary of the Grimkes and an avowed feminist in her own right, pointed to the clergy attacks on the Grimke sisters and the timid response of the anti-slavery leadership as the cause of the sisters' withdrawal from public advocacy for the abolitionist movement.¹³⁰ Importantly, the power utilized by the church to silence the Grimke sisters and to perpetuate the hegemony of white patriarchy was neither the power of law nor that of the sovereign. It was strictly the private power of religious and cultural prejudice in a society in which women were, in the words of Elizabeth Cady Stanton "slaves of custom, creed and sex"¹³¹ that silenced the Grimke sisters and put an end to their struggle for equality and freedom.

The race-sex analogy, coupled with their deep religious convictions and the openly and pervasively sexist society in which they lived allowed the Grimke sisters to see clearly that equality for women can simply not be achieved until it is achieved not only at the state level but also in custom and creed. Angelina writes:

Now, I believe it is woman's right to have a voice in all the laws and regulations by which she is to be *governed*, whether in Church or State; and that the present arrangements of society, on these points, are a *violation of human rights, a rank usurpation of power*, a violent seizure and confiscation of what is sacredly and inalienably hers—thus inflicting upon woman outrageous wrongs, working mischief incalculable in the social circle, and in its influence on the world producing only evil, and that continually.¹³²

According to Grimke, women have a right to complete equality in both church and state because each one exercises power over women and women's lack of voice evidences their lack of power. Equality in society demands equality of power in both church and state and cannot be ensured by having one without having the other. Thus, when the state defends patriarchal religion and culture and denies women the right to equality within them, such denial is not merely a neutral exercise aimed at ensuring religious and cultural freedom but a usurpation of power and a violation of human rights.

2. Elizabeth Cady Stanton

Elizabeth Cady Stanton, a contemporary of the Grimke sisters who is best known for her leadership role in organizing the Seneca Falls women's rights convention in 1848 and in the struggle for women's suffrage, was one of the fiercest critics of the role of religion in the oppression of women.¹³³ Her publication of a feminist interpretation of the bible called *The Woman's Bible* led to her condemnation by the National American Woman Suffrage Association, and due to the uncompromising nature of her views, she was unable to obtain

129. *Id.*

130. MATILDA JOSLYN GAGE, *WOMAN, CHURCH AND STATE* 447 (1893).

131. ELIZABETH CADY STANTON, SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES 81 (Ellen Carol Dubois ed., 1981) [hereinafter READER].

132. THE PUBLIC YEARS, *supra* note 1, at 197 (emphasis added).

133. READER, *supra* note 131, at 182–93.

the financial backing necessary for the publication of her speeches and writings.¹³⁴ Stanton believed that religion was the most effective tool for the subordination of women, for “she never could have been held the pliant tool she is to day but for the subjugation of her religious nature to the idea that in whatever condition she found herself as man’s subject, that condition was ordained by Heaven”¹³⁵ The major problem was women’s internalization of their own subordinate position. “[A]ll the religions on the face of the earth degrade her, and so long as woman accepts the position that they assign her, her emancipation is impossible.”¹³⁶ After describing her own emancipation from “false theology,” which was facilitated by her discussions with William Garrison, Stanton asks, “[i]s the bondage of the priest-ridden less galling than that of the slave, because we do not see the chains, the indelible scars, the festering wounds, the deep degradation of all the powers of the God-like mind?”¹³⁷ Thus, as early as the mid-nineteenth century feminists such as Stanton have had an acute understanding of the way hegemony ensures domination by constituting “the terrains of meaning and feeling that are central to the securing of consent and/or the incitement to rebellion” thereby rendering the use of force and coercion to secure cooperation largely unnecessary.¹³⁸

With the growing influence of organized religion in the women’s movement and in American politics in general in the 1880’s and the 1890’s, Stanton’s lifelong interest in the relationship between religion (especially Christianity) and the idea of women’s inferiority grew stronger.¹³⁹ Consequently, she published *The Woman’s Bible* in which she and other feminist writers gave their own feminist interpretations of biblical passages that were traditionally used to justify the subordination of women.¹⁴⁰ In the introduction to *The Woman’s Bible*, Stanton explained the centrality of religion to the oppression of women and responded to the criticisms aimed at her project. First, she pointed to the Bible as the source of women’s divinely ordained inferiority and described how this idea was used by both the church and the state to justify woman’s subservience to man:

The Canon and the civil law; church and state; priests and legislators; all political parties and religious denominations have alike taught that woman was made after man, of man, and for man, an inferior being, subject to man. Creeds, codes, Scriptures and statutes, are all based on this idea. The fashions, forms, ceremonies and customs of society, church ordinances and discipline all grow out of this idea¹⁴¹

134. *Id.*

135. *Id.* at 136.

136. *Id.* at 232.

137. *Id.* at 80. William Lloyd Garrison was a prominent abolitionist and social reformer and one of the founders of the American Anti-Slavery Society.

138. Dirks et. al., *supra* note 2, at 23.

139. *Id.* at 228.

140. *Id.*

141. ELIZABETH CADY STANTON, *THE WOMAN’S BIBLE, PART ONE* (1895), in *READER*, *supra* note 131, at 229.

Next, Stanton turned to answer the criticisms leveled against her. Interestingly, the two major arguments raised against her project are the same arguments still raised today against those who suggest challenging patriarchal religion. These enduring, albeit contradictory, arguments offer on the one hand, that it is audacious and impolitic to challenge religion (presumably because it is a challenge to people's deeply held beliefs), and on the other hand that it is a useless waste of energy to criticize something as obsolete and inconsequential as religion.¹⁴² To the charge of audacity and lack of political prudence Stanton queried:

Why is it more ridiculous for women to protest against her [sic] present status in the Old and New Testament, in the ordinances and discipline of the church, than in the statutes and constitution of the state? . . . Women have compelled their legislators in every state in this Union to so modify their statutes for women that the old common law is now almost a dead letter. Why not compel Bishops and Revising Committees to modify their creeds and dogmas?¹⁴³

She insists that women's situation cannot be changed without arousing religious opposition and that "an entire revolution in all existing institutions is inevitable" if such a "far-reaching and momentous" reform as changing woman's position from a subordinate to an equal is to be achieved.¹⁴⁴ Importantly, Stanton reminds us that "all reforms are interdependent" and that those who compromise cannot achieve reform.¹⁴⁵ With regard to the claim that the Bible is inconsequential and that most intelligent women have no reverence for it, Stanton's reply is as accurate and as forceful today as it was over a hundred years ago:

So long as tens of thousands of Bibles are printed every year, and circulated over the whole habitable world, and the masses in all English-speaking nations revere it as the word of God, it is vain to belittle its influence. The sentimental feelings we all have for those things we were educated to believe sacred, do not readily yield to pure reason¹⁴⁶

Thus, in the past patriarchal religion was the primary force shaping culture and the state yet today religion and the state have been largely separated and culture has expanded beyond the realm of religion. But, the assumption that by simply ignoring patriarchal religion and its misogynistic teachings it is possible to negate their current influence remains as futile as the assumption that by simply ignoring power we negate its existence:

[M]any of us are under the impression that all we have to do is not enter a church, refuse to practice the sacraments, and never read the sacred texts in order to be free from the influence of religion in our lives This does not solve the problem of how significant is the influence of religion upon culture. Thus, we are all imbued with the many Greek, Latin, Asian, Jewish and

142. *Id.* at 231–32.

143. *Id.*

144. *Id.* at 232.

145. *Id.*

146. *Id.* at 232–33.

Christian traditions, at least, particularly through the art, philosophy and myths we live by, exchange, and perpetuate, often without our realizing. Simply negating what already exists cannot make the passage from one era to the next.¹⁴⁷

The consequences of women's inequality within religion and culture are far reaching. As Lerner argues, "the structuring of society in such a way that women were for millennia excluded from the creation of the cultural product has more decisively disadvantaged women in their economic and political rights than any other factor."¹⁴⁸ Because hegemonic culture along with the relations of dominance and subordination become an inseparable part of the self,¹⁴⁹ the hegemonic culture "constitutes a sense of reality for most people in the society, a sense of absolute because experienced reality beyond which it is very difficult for most members of the society to move, in most areas of their lives."¹⁵⁰ Today liberal states, such as the United States, do not outright exclude women from shaping culture. Nevertheless, they actively and no less successfully, assist in perpetuating the hegemony of patriarchy by protecting the right of powerful patriarchal religions and other patriarchal communities to exclude women from positions of power. The result is that women have no voice in the shaping of the internal cultures of many communities within the state and consequently have much less than an equal say in the shaping of the overall culture of the state. By tolerating discrimination and protecting the religious, cultural, and associational rights of the leaders of patriarchal religious and cultural groups, and by refusing to assist dissenters within those groups to shape the group's cultural product, the state legitimates the continued existence of overt patriarchy and protects patriarchy's power base from any external and even internal challenge.

IV. PATRIARCHY, RELIGION AND THE LAW

A. Religious Law as the Law Governing the Rights of Early American Women

The United States Constitution is silent on issues of women and family, leaving the power to regulate women's status and the family relationship to the states through the Tenth Amendment.¹⁵¹ All states have chosen to perpetuate the English common law doctrine of coverture,¹⁵² thereby incorporating essentially a highly discriminatory religious view of women into their laws. This transformation from religious edict to common law tradition and then to civil law is particularly interesting for two reasons: first, because it demonstrates

147. TOVA HARTMAN HALBERTAL, APPROPRIATELY SUBVERSIVE, MODERN MOTHERS IN TRADITIONAL RELIGIONS 2 (2002) (quoting LUCE IRIGARAY, JE, TU, NOUS: TOWARDS A CULTURE OF DIFFERENCE 23 (1993)).

148. LERNER, *supra* note 116, at 272.

149. Williams, *supra* note 31, at 596-97.

150. *Id.*

151. BARBARA ELLEN BABCOCK ET. AL., SEX DISCRIMINATION AND THE LAW, HISTORY, PRACTICE AND THEORY 16 (2nd ed. 1996).

152. *Id.* at 16-17.

the way patriarchal religion has operated as the fundamental force behind the creation of the hegemony of patriarchy in society; second, because it reveals the way in which the decrease in the power and centrality of religion and the increase in the power of non-religious culture have transformed patriarchal religious edicts into patriarchal non-religious traditions, which later could be legitimately incorporated into civil law without offending the mandate of separation between religion and the state.

In her epic book, *Women, Church and State*, Matilda Joslin Gage, a nineteenth century American feminist, described in detail how the ecclesiastical or canon law with regard to marriage and the status of women became incorporated into English common law and was later adopted into the civil law of the States of the Union.¹⁵³ She argued that following the incorporation of canon law into the common law, “the complete inferiority and subordination of woman ha[d] been as fully maintained by the State as by the Church.”¹⁵⁴ For example, Gage argued that the canon law that forbids women to “presume to teach a man in a public assembly” became the basis for the common law rule which denied women admittance to the bar, the pulpit or medicine.¹⁵⁵ This contention is fully substantiated by *Bradwell v. Illinois* in which the Supreme Court explained that Myra Bradwell’s attempt to obtain a license to practice law contradicted both the common law of coverture and the law of the creator.¹⁵⁶ Furthermore, canon law that barred a wife from leaving her husband without his consent also prohibited anyone from harboring or sheltering her under penalty of law. Gage recounted a court case in New York that awarded a husband who sued those who sheltered his wife after she left him ten thousand dollars on the basis of this canon turned common law.¹⁵⁷ Thus, while American men were guaranteed the First Amendment protections of free exercise and non establishment of religion, American women’s lives were subjected entirely to patriarchal religious law transformed into patriarchal common law and later incorporated into civil law which was buttressed by the coercive powers of the state. A law which, in Stanton’s words turned American women into a legal nonentity.¹⁵⁸

According to the rules of coverture, women lost their legal capacities, which were transferred to their husband and master upon marriage. The woman’s rights to her property and her earnings were transferred to her

153. JOSLIN GAGE, *supra* note 130, at 145–53. See also HENRY MAINE, ANCIENT LAW, Chapter 5 (1861), available at <http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/maine/anclaw/chap05>.

(“The Scandinavian laws, harsh till lately to all females, are still remarkable for their severity to wives. And scarcely less stringent in the proprietary incapacities it imposes is the English Common Law, which borrows far the greatest number of its fundamental principles from the jurisprudence of the Canonists.”).

154. JOSLIN GAGE, *supra* note 130, at 145.

155. *Id.* at 146.

156. *Bradwell v. Illinois*, 83 U.S. 130 (1873).

157. JOSLIN GAGE, *supra* note 130, at 149.

158. Elizabeth Cady Stanton, *Address to the Legislature of New York on Women’s Rights, February 14, 1854*, in READER, *supra* note 131, at 44, 48.

husband, and she was no longer able to contract or file suit in her own name.¹⁵⁹ The wife became subordinate to her husband and was subject to his power to chastise her¹⁶⁰ or even to rape her with impunity.¹⁶¹ The justification for the woman's complete loss of status and individual rights following her marriage was based on her consent to the marriage and on the concept of the union formed between husband and wife upon marriage. As Nancy Cott explains, "[b]oth the emphasis on consent and the principle of union seamlessly adapted Christian doctrine to Anglo-American law."¹⁶² The rules of coverture were directly applicable only to married women; however, because in the prevailing ideology of the time all women were either on their way to marriage, married, or widowed, these rules defined not only women's relationship to the man they married, but also their place in the polity in general.¹⁶³ For example in *Bradwell*, the Supreme Court explained that although it is true that many women are unmarried and are therefore not affected by the duties and incapacities which the state imposes on married women, unmarried women are "exceptions to the general rule" and the rules of civil society cannot be based on such exceptions.¹⁶⁴ Consequently, the same rules excluding married women from the bar applied to unmarried women as well.

The same Founders who guaranteed to all men free exercise and non establishment of religion as constitutional rights simultaneously incorporated religious notions of women's subordination into the American civil law and thereby ensured the continued subordination of women in the new Union.¹⁶⁵ It is likely that neither the Founders nor most other Americans of that period ever felt the contradiction or questioned the propriety of incorporating these religiously-based discriminatory notions into the American civil law. It might even be argued along the lines of contemporary Establishment Clause doctrine, that the states had a good secular reason to incorporate the religiously-based English common law with regard to women's marriage rights namely because it was part of the common law of England that was incorporated en masse as the civil law of the various states.¹⁶⁶ Nevertheless, it is exactly this sort of allegedly innocuous incorporation of patriarchal religion and culture into the civil law that is still prevalent today,¹⁶⁷ and best explains why exempting the patriarchal religious and cultural communities from the need to abide by norms of equality

159. Reva Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy," 105 YALE L.J. 2117, 2122-23 (1996).

160. *Id.*

161. See e.g. *State v. Smith*, 426 A.2d 38, 44 (1981).

162. NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11(2000).

163. *Id.*

164. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

165. According to Babcock, "Sixteen of the subscribers to the first American edition of Blackstone's commentaries were signatories of the Declaration of Independence, six were delegates to the Constitutional Convention." BABCOCK ET. AL., *supra* note 151, at 17.

166. See, e.g., *Harris v. Mcrae*, 448 U.S. 297 (1980), discussed *infra* note 183.

167. See, e.g., Sherryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 306-12 (1984).

serves to perpetuate the hegemony of patriarchy and flies in the face of ensuring women's right to equality and freedom in the liberal state.

B. Religious Freedom, Freedom of Association and the Right to Culture as Status-Enforcing Mechanisms

Similar to any other hegemony, the hegemony of patriarchy has throughout history been challenged, contested, and transformed accordingly. Lerner stresses that throughout history, patriarchy appears in various forms and modes and its structure and function shift and change as it adapts to female pressure and demands.¹⁶⁸ A common example is the law of coverture, which transformed religious law into common law and then into civil law with each transformation intended to perpetuate the hegemony of patriarchy in the most appropriate means for the particular day and age.

In several historical studies, Reva Siegel demonstrates how “status regimes” evolve over time in order to preserve social stratification.¹⁶⁹ Group inequalities that are socially pervasive and persistent (articulated across social domains and over time) are typically referred to as a condition of social stratification.¹⁷⁰ Social stratification is formed through the social structure—such as institutions (slavery or marriage) and practices, and through social meaning—such as stories and reasons.¹⁷¹ According to Siegel, what is perhaps most visible in a historical perspective is the heterogeneity of institutions, practices, stories, and reasons that sustain the unequal social position of different groups over time. The elements of social structure and social meaning that sustain stratification vary by group and within groups, and they evolve over time as their legitimacy is contested.¹⁷² Struggles over group inequality that transform the rules and reasons by which social stratification is enforced and justified are termed by Siegel “preservation through transformation.”¹⁷³ Thus, her account of social stratification and how it is created, maintained, contested, and transformed is very similar to the traditional concept of hegemony used in this article to describe the process of social and cultural domination and subordination.

But, her account lacks the crucial explanation of the manner in which the hegemonic order (or what Siegel would term the “status regime”) becomes part of the self, even for the subordinated group.¹⁷⁴ Her account is illuminating

168. THE CREATION OF PATRIARCHY, *supra* note 3, at 239.

169. See e.g. Reva Siegel “*The Rule of Love*”: *Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2175–79 for a detailed explanation of status regimes and their evolution over time.

170. Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 99, 105 (Robert C. Post et. al.) (2001) [hereinafter *Discrimination in the Eyes of the Law*].

171. *Id.*

172. *Id.*

173. *Id.* at 143.

174. For discussion of the patriarchal construction of gender in western societies, see *Gender Construction*, *supra* note 85.

however in how she shows historically that law can be used covertly as a status-enforcing mechanism (that is, to perpetuate hegemony) without appearing to do so. It is plausible to argue that precisely because hegemony constitutes the self, it is so hard for us to identify and resist the law when it is used to perpetuate hegemony. At the same time, it is important for us to question the assertion that the law is neutral and to continuously examine the ways in which allegedly neutral laws can serve to perpetuate domination and subordination.

Seigel shows how in various instances—such as racial segregation of public accommodation, violence against women, and married women's property—prior regimes of social stratification and overt discrimination that were previously sanctioned by the state were abolished after it became politically incorrect to maintain them and how in their place, a new discourse of privacy was used to maintain, at least to some degree, the previous discrimination on allegedly benign grounds.¹⁷⁵ Seigel argues that privacy has replaced open racism and sexism as a status-enforcing mechanism.¹⁷⁶ A similar development can be traced with respect to the use of patriarchal culture and religion as status-enforcing mechanisms used to maintain women's subordinated position in society and perpetuate the hegemony of patriarchy.

After centuries in which the state and church openly combined their forces to subjugate women and maintain male dominance through a combination of civil and canon laws, the unholy pact between church and state was allegedly severed, but the civil law concerning women remained unchanged, its fundamental principles still based on discriminatory canon law.¹⁷⁷ At the same time that America prided itself on its "wall of separation" between religion and the state, common law principles derived solely from canon law were used to deny women all their rights through the institution of coverture.¹⁷⁸ After long struggles, women succeeded in eliminating the legal institution of coverture, but as Seigel points out in her studies, many of the notions underlying this institution have remained and women's subordination is maintained through the use of new juridical forms such as the invocation of privacy.¹⁷⁹ Similarly, when it became improper to justify women's inequality at the state level on grounds of Godly authority, formal equality at the state level was enacted contemporaneously while women's subordination within patriarchal religion was maintained by invoking privacy, religious freedom, and freedom of association. In addition, the regulation of sex and sexuality, including issues such as abortion which have a crucial impact on women, continued to be largely determined by patriarchal religious morality, albeit disguised as non-religious

175. Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111, 1116–29 (1997) [hereinafter *Why Equal Protection No Longer Protects*].

176. *Id.*

177. See generally JOSLIN GAGE, *supra* note 130.

178. JOSLIN GAGE, *supra* note 130, at 145–53.

179. *Why Equal Protection No Longer Protects*, *supra* note 175, at 1118. "By the turn of the century, courts seeking to justify wives' continuing legal disabilities described marriage as an emotional relationship subsisting in a private realm 'beyond' the reach of law—reasoning about the relationship in these terms would have startled Blackstone."

tradition.¹⁸⁰ Today, the state continuously refuses to intervene in patriarchal religion and culture on behalf of women, leaving them the impossible task of achieving equality from a position of deep inferiority. Worse still, as will be discussed below, even though equality is the professed norm in the United States and separation between religion and the state is allegedly maintained, the state still continues its support for patriarchal religion and culture by enforcing their patriarchal morality and financing patriarchal religion through voucher programs, charitable choice, and tax cuts.¹⁸¹

C. How Do Patriarchal Religion and Culture Affect the Law Today?

Even today, through a use of their political power, patriarchal religions and cultures that discriminate against women and in which women have little voice, shape the law and through it the rights of all women. While the constitutional separation between church and state may prevent an overt state-wide institutionalization of religion, it is powerless to prevent the insertion of patriarchal religion into politics, which adversely impacts the rights of all women. Contemporary struggles that may have important ramifications affecting the life of every American woman are being waged by feminists against an increasingly politically powerful Christian Right over matters such as abortion, contraception and sex education.¹⁸²

One pertinent example concerning abortion is *Harris v. Mcrae*, in which a challenge was made to the Hyde amendment which prohibits federal funding of abortions for Medicaid recipients except when the continuation of the pregnancy would endanger the woman's life.¹⁸³ The plaintiffs in *Mcrae* argued that the Hyde amendment was a violation of the Establishment clause because it codified the teachings of the Roman Catholic church with regard to abortions. The Supreme Court rejected this argument on the ground that the fact that the law happens to coincide with the teachings of a certain religion does not lead to a violation of the Establishment clause as long as there is a legitimate secular purpose for the law.¹⁸⁴

Beyond the court's intentional failure to take notice of the connection between the law and Roman Catholic teachings, the secular purpose that the Court found is particularly instructive. According to the Court, denying federal funding for abortions is not an establishment of religion because "[t]he Hyde

180. See, e.g., JANET JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN* 19–44 (2003) (discussing *Bowers v. Hardwick*, 478 U.S.186 (1986) and *Romer v. Evans*, 517 U.S. 620 (1996)); see also discussion of *Harris v. Mcrae*, 448 U.S. 297 (1980) in section C below.

181. See Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality*, 10 WILL. & MARY J. OF WOMEN & L. 459 (2004) [hereinafter *The Free Exercise of Discrimination*].

182. See, e.g., CRISTINA PAGE, *HOW THE PRO-CHOICE MOVEMENT SAVED AMERICA: FREEDOM, POLITICS AND THE WAR ON SEX* (2006); Patricia Donovan, *The Adolescent Family Life Act and the Promotion of Religious Doctrine*, Vol. 16, No. 5 FAMILY PLANNING PERSPECTIVES 222 (Sep.–Oct., 1984); Amy Nunn et. al., "Contraceptive Emergency: Catholic Hospitals Overwhelmingly Refuse to Provide EC," 24 *Conscience* 38 (2003).

183. *Harris v. Mcrae*, 448 U.S. 297 (1980).

184. *Id.* at 319.

amendment . . . is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."¹⁸⁵ The Court might very well be right. Patriarchal values are prevalent in both culture and religion, and consequently in law.

Although it is often reiterated that the impetus for state legislation enacted in the mid-nineteenth century banning abortion originated in the medical profession, it is also true that the physician's campaign was largely based on the then-controlling societal perception about women's godly-ordained roles and duties and was couched in religious terms that directly appealed to religious prejudices regarding women. In her detailed historical analysis of anti-abortion legislation in the United States, Siegel demonstrates how doctors have used religious understandings of women's roles to advance their claim that the community has the right and the duty to control procreation through the medical profession,¹⁸⁶ and how they used the women's movement's support for abortion to generate support for their own anti-abortion campaign by associating the right to abortion with the attack on established gender roles.¹⁸⁷ As Siegel argues, nineteenth century laws banning abortions were explicitly based on the discriminatory view that women are destined solely for the home and for the rearing of children, and should be understood in that context.¹⁸⁸ In the present, critics of the recent *Gonzales v. Carhart* decision could not fail to notice that the five Supreme Court justices who voted to uphold the ban on partial birth abortion and thus reverse the seven-year-old *Stenberg v. Carhart* decision were all Catholics.¹⁸⁹ These critics could not help but wonder how this fact could be reconciled with the constitutional separation between church and state. The critics' critics answered in return that the allegation that the five justices decided the case on the basis of their religious beliefs could not be substantiated because religion was not mentioned once throughout the decision.¹⁹⁰ It is probably impossible to find clear evidence supporting either side of this unfinished debate. Nevertheless, it is becoming clearer than ever in recent years that the notion that women's rights are protected by the constitutional separation of church and state from the reach of patriarchal religious ideas is patently wrong.¹⁹¹

Thus, the hegemony of patriarchy is maintained by translating patriarchal religious edicts and patriarchal cultural assumptions into patriarchal law. In a

185. *Id.*

186. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 296-97 (1992) [hereinafter *Reasoning from the Body*].

187. *Id.* at 314.

188. *Id.* at 356.

189. See *Gonzales v. Carhart*, 127 S. Ct. 1610 (Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia, Thomas, and Alito, JJ., joined); *Stenberg v. Carhart*, 530 U.S. 914 (2000); Robert Barnes, *Did Justices' Catholicism Play Part in Abortion Ruling?*, WASHINGTON POST, Apr. 30 2007, at A13.

190. Barnes, *supra* note 189, at A13.

191. On the various facets of the relationship between religion and the state and its effects on women's rights, see Gila Stopler, *The Liberal Bind: The Conflict Between Women's Rights and Patriarchal Religion in the Liberal State*, 31 SOCIAL THEORY AND PRACTICE 191 (2005).

society such as the United States, in which separation between religion and the state is allegedly maintained, religiously-based patriarchal edicts are buttressed by non-religious patriarchal traditions in order to legalize patriarchal laws. In countries that do not mandate separation between church and state, patriarchal law can rest directly on religious grounds.¹⁹² But, one could argue that this is merely a semantic difference. The fusion so clearly apparent in *Mcrae* between patriarchal religious values, patriarchal traditional values, and patriarchal laws demonstrates the central argument of this article, namely, that the hegemony of patriarchy is maintained through the creation of patriarchal values within patriarchal religions and cultures which are then incorporated into patriarchal law. Because power operates through discourses that legitimate its operation and conceal domination, it is exactly the hegemonic nature of patriarchy which keeps us oblivious to its pervasive presence.¹⁹³ As a result, the fundamental problem with *Mcrae*, namely that it maintains the domination of women by usurping their power to control their bodies, cannot even be discussed in terms of domination and subordination because in a patriarchal world abortion is not a matter of women's equality.¹⁹⁴ At the same time, the underlying cause of the problem is that the patriarchal religious and cultural assumptions that are the basis for the law cannot be challenged because they are protected by religious liberty, by the right to culture and by freedom of association. This is how the hegemony of patriarchy is maintained.

D. Toleration and Equality

One of the concepts that has been most distorted due to liberalism's lack of a proper understanding of power is toleration, which is regarded by many as the fundamental tenet of liberalism.¹⁹⁵ Because calls for tolerance are made without taking into account the power relations between those who demand toleration and those who suffer the consequences thereof, the result is that most often toleration is itself used as a status enforcing-mechanism. This is particularly true with regard to women, who are a-priori excluded from most accounts of toleration. Thus, while both discourse and practice are replete with demands and grants of toleration for those that discriminate against women for reasons of culture and religion, women's demands for equality and the right to conscience within their religion and culture are rejected as incompatible with the principles of toleration. This is not surprising. Due to its origin as a remedy for religious persecution of one group by another, toleration has mostly been understood as applying between groups and not within them. Arguably, the remedy for intra-group dissenters—the right to exit—is the exact opposite of toleration because it protects the right of the dominant group members to be

192. See, e.g., *The Free Exercise of Discrimination*, *supra* note 181, 483–95 (2004) (discussing the case of Israel and drawing comparisons to the situation in the United States).

193. See discussion of power and hegemony in section II.

194. *Reasoning from the Body*, *supra* note 186, at 347–80.

195. E.g., JOHN RAWLS, *POLITICAL LIBERALISM*, xxvi (2nd ed. 1996).

intolerant while forcing the dissenters to exit the group and search elsewhere for equality and for their right to conscience.¹⁹⁶

This conflict between toleration and women's rights is not a light matter. If power operates through discourse and if toleration is one of the most, if not the most, powerful concepts of liberalism, then the discursive opposition between women's equality and toleration places anyone who tries to argue for women's equality within culture and religion at a serious disadvantage. Nonetheless, a proper understanding of toleration would entail the exact opposite result. Toleration as properly understood can only be invoked to restrain the use of arbitrary and prejudiced power against powerless "others." When it is used to enforce and perpetuate arbitrary and prejudiced power, toleration is being misused. Thus, toleration properly understood would entail respect for women's right to equality and to conscience within their religion and culture both from members of their communities and from society at large.¹⁹⁷ All invocations of toleration as justification for the continued subordination of women are in conflict with the true meaning and purpose of toleration and serve as a status-enforcing mechanism that perpetuates the hegemony of patriarchy.

Two critiques of toleration are pertinent for understanding the way in which the current concept of toleration can obstruct women's rights. First, toleration is used to sustain social structures of inequality, and second, the focus on toleration leads to the condemnation of the struggle against injustice rather than the condemnation of injustice itself.¹⁹⁸ Toleration as it is currently understood reinforces the status quo by calling for an almost indiscriminate acceptance of existing hierarchies, practices, and customs, regardless of any adverse consequences. The anti-judgmental character of tolerance makes people reluctant to take sides and to distinguish those who are being wronged from those inflicting the wrong.¹⁹⁹ Consequently, injustice is obscured and even denied. This is inimical to women's rights because in most groups that demand and receive toleration, women are subordinated and the practices and customs tolerated are aimed at keeping them in that position. Even worse, in a culture in which the struggle against injustice rather than injustice itself is perceived as the major threat to public order and to peaceful co-existence, women who try to challenge the existing hierarchy are silenced and branded as intolerant extremists.²⁰⁰ If reserving judgment is a virtue then critiquing is a vice and struggling to change that which is not perceived as wrong, while stirring up

196. For a related argument on the reliance on the right to exit as reinforcing conservative tendencies, see Susan Moller Okin, "*Mistresses of Their Own Destiny*": *Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 214 (2002).

197. See, e.g., Habermas' position that there should be no tolerance for prejudice and discrimination. Jurgen Habermas, *Intolerance and Discrimination*, 1 I. CON 2, 3 (2003).

198. JAKOBSEN & PELLEGEINI, *supra* note 180, at 58.

199. *Id.* at 59.

200. E.g., on the reaction of the Catholic Church to attempts by women activists to challenge existing discriminatory norms, see MARY FAINSOD KATZENSTEIN, FAITHFUL AND FEARLESS MOVING FEMINIST PROTEST INSIDE THE CHURCH AND MILITARY 134-48 (1998).

conflict and strife, is especially problematic. Thus, toleration becomes a status-enforcing mechanism that perpetuates the hegemony of patriarchy.

Nevertheless, if, as Ronald Dworkin famously argues, equality is the ultimate value of any plausible political theory, then it must come before toleration, and not vice versa.²⁰¹ As Habermas posits, the elimination of prejudice must precede any talk of toleration, and though we must tolerate people who think differently or have different beliefs from our own, prejudices on the basis of religion, ethnicity, race, or sex must not be tolerated.²⁰² The appropriate solution to prejudice is combating discrimination rather than calling for “more tolerance,” and the classification of particular beliefs as prejudices should be done “in light of the principle of equal treatment of all citizens, especially given the notion of ‘full membership’ by everybody.”²⁰³ This strict intolerance of prejudice, if applied to private actors such as religious and cultural communities, has the potential to revolutionize the status of women in society. However, intolerance to prejudice should be accompanied by an analysis of power that will allow us to decide what private actors should be targeted. While eliminating prejudice on all levels is certainly desirable, enforcing non-discrimination obligations on individuals in their intimate relations for example would seem decidedly undesirable.²⁰⁴ An analysis of power would enable us to identify and dismantle the structures of power that create and maintain male dominance and female subordination.

E. A Power Based Analysis of Toleration, Religious Liberty, and Cultural and Associational Rights

There is no reason why a proper analysis of private power should not be incorporated into our understanding of toleration, religious liberty, and cultural and associational rights. The inclusion of considerations of inter-group and intra-group power disparities in our understanding of the desired scope of toleration and of religious, cultural, and associational rights would ensure greater justice and equality not only for women, but for disempowered groups in general. Although a proper analysis of power will rule out tolerating religious and cultural practices that discriminate against women within disfavored groups, it will simultaneously require tolerating other practices of such groups, which do not involve discrimination or harm to others, and which are of high religious or cultural value to people.²⁰⁵ When toleration, religious

201. Ronald Dworkin, *What is Equality Part III: The Place of Liberty*, 73 IOWA L. REV. 1, 7 (1987).

202. Jürgen Habermas, *Intolerance and Discrimination*, 1 I. CON 2, 3 (2003).

203. *Id.* Hence, a religious or cultural belief justifying the inferiority of classes of people (such as women) and advocating the denial of their full and equal rights should be considered prejudice and must not be tolerated. On the precedence of equality over culture, see generally BRIAN BARRY, *CULTURE AND EQUALITY* (2001).

204. The right to intimate association and its scope was defined in *Roberts v. United States Jaycees*, 468 U.S. 609, 620–21 (1984). On the application of this right to religious associations, see *The Free Exercise of Discrimination*, *supra* note 181, at 509–10.

205. See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990) (in which employing the suggested approach would lead to an opposite result than that of the court, allowing the use of peyote for religious rituals).

liberty, and cultural and associational rights are understood as means for empowering individuals by enabling them to live their lives fully within the cultural and religious contexts that constitute part of their selves, then a line can be drawn between those practices that empower some at the expense of others, and are therefore forbidden, and those practices that empower people without disempowering others, and should therefore be protected.

Under a proper analysis of power, the traditional liberal solution to the subordination of women within religious and cultural groups—tolerating the discrimination but safeguarding the right of exit would be found lacking.²⁰⁶ The liberal suggestion that the appropriate remedy for discrimination within the group is for the oppressed to exit and establish their own group does not provide any real solution for the oppressed, both because it is impracticable and because exit only entrenches and legitimates the differences of power instead of mitigating them. As for impracticability, it is questionable that the oppressed have the practical and psychological ability or the desire, to leave the community.²⁰⁷ The assumption that the disempowered can and should do what the most powerful would find very hard to do is facetious.²⁰⁸ As for the entrenchment of power differentials, although it is true that exit, if practicable, may enable oppressed religious women to establish their own egalitarian religion, this will in no way change the social reality in which their egalitarian religion will be largely powerless while the power to influence society and to dictate social conditions, norms, and perceptions will remain in the hands of the male leaders of the patriarchal religions. Furthermore, the reliance on the option of exit protects patriarchal power from the need to answer calls for change within the community and delegitimizes those who seek such change from within.²⁰⁹

Finally, when incorporating an analysis of power into our understanding of toleration, religious liberty, and cultural and associational rights we should take into account all forms of power and power disparities, including the power of the state, the power of dominant religious and cultural groups, the power, or lack thereof, of minority or non-dominant religious and cultural groups, and the power, or lack thereof, of individuals within each group. This would necessitate that the use of state power to ensure equality for women must be done across the board, targeting dominant religious and cultural groups that discriminate

206. The right of exit is often suggested by liberals as a remedy for in-group discrimination. See JOHN RAWLS, *JUSTICE AS FAIRNESS, A RESTATEMENT* 93 (Erin Kelly ed., 2001); JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* 53 (2000).

207. *The Free Exercise of Discrimination*, *supra* note 181, at 515–23.

208. It is quite surprising to observe that the same liberals who argue for the rights to freedom of religion, freedom of thought, and freedom of association on the basis of the central importance of religious and moral convictions and of enduring attachments and loyalties to individuals, and on their inability to imagine themselves apart from these convictions, attachments and loyalties (e.g., Rawls), reverse this theoretical assumption when dealing with the disadvantaged members of the community and assume that these members are quite capable of breaking with their convictions, attachments and loyalties and exiting the community.

209. Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 *ETHICS* 205, 214 (2002).

against women as rigorously, and arguably even more rigorously, than non-dominant ones. Restraining arbitrary and prejudiced power should start in those places in which it is most influential. While it is true that many non-dominant cultures and religions are as patriarchal, if not more so, than dominant ones, the hegemony of patriarchy depends first and foremost on the persistence of patriarchy in dominant religions and cultures, and not in their non-dominant counterparts. Nevertheless, because the state should be equally concerned with the fate of each subordinated individual, it must act to end subordination in non-dominant groups as well.

V. CONCLUSION

As Angelina Grimke observed over a century and a half ago, not allowing women an equal voice in religion and culture is “*a rank usurpation of power.*”²¹⁰ In a legal and political order which sees all political power as held by the sovereign and denies the political and legal significance of the tremendous power inherent in culture and religion, this usurpation of power is hardly noticed. Even worse, in a legal and political order dominated by patriarchy, this usurpation of power is sanctioned and protected by masking its insidious nature behind distorted accounts of toleration, religious liberty, and cultural and associational rights. However, the foregoing inquiry into the way in which patriarchal religion and culture have been tailored to create and maintain the hegemony of patriarchy should make clear that until this “*rank usurpation of power*” is recognized and remedied, and our understanding of toleration, religious liberty, and cultural and associational rights is modified accordingly, equality for women will not be achieved.

210. THE PUBLIC YEARS *supra* note 1, at 197.