Women in the Courts: An Old Thorn in Men's Sides

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WOMEN IN THE COURTS: AN OLD THORN IN MEN'S SIDES

Nikolaus Benke*†

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INTRODUCTION

Our world changes constantly. This is the very essence of history. The task of the historian is to reason about the features, conditions, and impact of these changes. It is also within the historian's province to observe what seems to remain unaltered by the course of time and to investigate the reasons behind such endurance.

This article was inspired by the work of a series of state task forces on women in the courts. It examines the subject from a historical perspective, comparing ancient Rome, mainly during the period from the first century B.C. to the third A.D., with the United States, from its prerevolutionary beginnings to the present. The article's focus is gender bias against women acting in official court functions.


3. See, e.g., MAX KASER, ROMAN PRIVATE LAW (Rolf Dannenbring trans., 3d ed. 1980); WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY (J.M. Kelly trans., 1966); FRITZ SCHULZ, CLASSICAL ROMAN LAW (1951); FRITZ SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE (1953) [hereinafter SCHULZ, ROMAN LEGAL SCIENCE]; OLGA TELLEGEN-COUPERUS, A SHORT HISTORY OF ROMAN LAW (1993); ALAN WATSON, ROMAN LAW & COMPARATIVE LAW (1991).

4. For women's legal history in the United States, see JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991). For a historical survey of the American woman in official court functions, see KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT (1986). For the leading cases concerning women in the late nineteenth and twentieth centuries, see LESLIE FRIEDMAN GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN (2d ed. 1988). Unless otherwise indicated, the quotations of American material such as letters, speeches, articles, etc. are taken from HOFF, supra, and MORELLO, supra, and the citations are based on the form these authors use.


6. For a discussion of current issues concerning women lawyers, see, e.g., MONA HARRINGTON, WOMEN LAWYERS: REWRITING THE RULES (1993); Marilyn J. Berger
Although remote from each other in time and cultural development, Roman and American gender-biased arguments and rules bear strong resemblances. The similarities appear in semantics and attitudes as well as in social strategies and legal techniques. Thus, what might at first seem to be an exercise in historical sophistry reveals surprising parallels once the ancient and modern sources are compared.

I begin this article by addressing some fundamental rules of constructing gender and sustaining male dominance. Subsequently, I highlight several strikingly similar issues, approaches, and tactics in Roman and American legal discourse that both reflect and produce gender bias. After examining the devices that have oppressed women in their roles as attorneys, jurors, and judges, I observe how the law functions generally as a crucial tool of patriarchy.

& Kari A. Robinson, Woman's Ghetto Within the Legal Profession, 8 Wis. Women's L.J. 71 (1992–93); Resnik, supra note 1, at 1682–1772.


8. "We need to know precisely how the benefits and burdens of this system are allocated. . . . We need to know how this system gives each woman a survival stake in the system that is killing her." Catharine A. MacKinnon, The Art of the Impossible, in Feminism Unmodified, supra note 5, at 2 [hereinafter MacKinnon, Art].

9. "The complex and fundamental connections, however, between law and patriarchy in a more general historical context have not been adequately developed, and these connections are essential to an understanding of political and social power." Janet Rifkin, Toward a Theory of Law and Patriarchy, 3 Harv. Women's L.J. 83, 89 (1980).

10. See infra part I.

11. See infra parts II. through V.

12. For a general survey of American women in the legal profession, see Cynthia Fuchs Epstein, Women in Law (2d ed. 1993).

13. See infra part VI. "The only real question is what is and is not a gender question. Once no amount of difference justifies treating women as subhuman, eliminating that is what equality law is for." Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, in Feminism Unmodified, supra note 5, at 43 [hereinafter MacKinnon, Difference].
I. GENDER DISCOURSE, PATRIARCHY, AND RULE MAKING

Patriarchy is a regime. A regime works through rules. Patriarchy works specifically by way of gender rules. The regime of patriarchal dominance is based primarily on a distinction between the male and female sexes.

Like all societal rules, patriarchy's rules can have an impact on facts and on other rules; additionally, some rules and factual scenarios are expressions of yet other rules. This interrelation is not a static system but a dynamic network in which norms are proposed and subsequently more or less accepted. Its dynamics conform to the pattern of a dialogue; similar to a dialogue, in which the partners are both speakers and listeners and are interrelated by mutually expressing and receiving messages, there is a normative interrelation both between different rules and between rules and facts. The communication of messages that represent or refer to rules constitutes the normative discourse.

In this dynamic process, rules and facts interrelate in two ways. On the one hand, a rule can be applied to facts; this results in a rule-governed state of facts. On the other hand, a certain state of facts can be used as the basis for developing a rule. That is, a state of facts can be perceived and presented as a case to guide future similar cases.

These general tenets supply the main perspectives for the historical analysis that follows. These tenets are further developed in Part A of this section on the notions of sex and gender and the nature of gender rules, in Part B on the fundamental components of patriarchy's success strategy, and in Part C on the connection between rules and cases and the normative use of certain cases by treating them as exemplary.

A. Making and Remaking Gender

Although there is no clear-cut distinction between the concepts of sex and gender, it is useful to acknowledge a difference in their connotations. Notwithstanding the ways in which their meanings are culturally defined, the male and female sexes are biological categories,
whereas gender notions are primarily societal constructs. Gender denotes a set of rules that society establishes primarily by reference to the male or female sex. In other words, gender roles are norms created

15. This description is intended to clarify the analytical approach of the following discussions. Nevertheless, in making this distinction, I do not intend to ignore the definitional problems of "sex" and "gender" or to disregard the fact that the two concepts are closely interrelated. See, e.g., Rhode, supra note 2, at 5.

The notions of feminine and masculine gender reflect the societal roles and expectations associated with the female and male sexes. In short, female or male sex indicates and allocates certain rules, whereas feminine and masculine gender are these rules. Therefore, a distinctly normative discourse (such as legal reasoning) requires using terms of gender instead of terms of sex. Reducing such a discussion to terms of sex is problematic because it obscures those who enjoy the benefits and those who bear the burdens under the regime at issue and obfuscates the way in which that regime works.

For example, the Supreme Court in J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) held that "the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man." Id. at 1430. See also infra text accompanying notes 211–225. The assumption with which the Court was concerned is based on roles and expectations related to men and women and therefore is a matter of gender, not of sex.

Justice Scalia, in a dissenting opinion, refused to view the issue as one of gender discrimination and instead viewed it as an issue of sex discrimination. J.E.B., 114 S. Ct. at 1436 n.1. This approach, however, distorts the problem, since the crucial issue in the case was whether peremptory strikes of potential jurors would be legitimate if based on certain masculine or feminine attitudes. A lawyer’s concern with whether a juror is a man or a woman is not about the juror's physical qualities but about stereotypical ways that men and women perceive, feel, think, and act. The lawyer is actually concerned with the juror’s gender, not with his or her sex.

Justice Scalia observes that the case ignored the possibility of effeminate men and exclusively connected masculine attitudes to any person of male sex and feminine attitudes to any person of female sex. J.E.B., 114 S. Ct. at 1436 n.1 (Scalia, J., dissenting). Justice Scalia's reference to effeminate men suggests that he himself conducts a gender discourse, however resolutely he denies doing so. Scalia's own assumption seems to be that effeminate men have feminine attitudes and that these attitudes might be relevant to juror impartiality.

A closer look at Scalia's reference to effeminate men raises further questions about gender: what is meant by these effeminate men? Are they transsexual men (persons who feel that they have a "female" personality despite having a male body) or gay men (men who have a masculine identity but a sexual orientation directed toward the male sex) or pro-feminist men (men who are committed to feminist attitudes)?

16. As a rule, the gender typology (feminine and masculine) constructs a parallel correspondence with the sex typology (female and male). Generally, masculine is associated with male and feminine with female. However, the gender regime inverts this association with respect to homosexuals by stereotyping lesbians as "masculine" and gay men as "feminine." See infra part V.B.
by society and, like any human role, belong to society's normative texture.\textsuperscript{17} This normative texture functions as an internal, self-relational structure; society not only makes its rules but is at the same time made by its rules.\textsuperscript{18}

Since gender subsists in sets of norms, any remark on gender inevitably entails a normative discourse. Speaking of, or otherwise referring to, gender necessitates evaluating the "rules" of gender. There is no indifference about gender rules.\textsuperscript{19} To agree explicitly with gender rules strengthens them; to criticize gender rules weakens them; and when gender rules are not attacked, but tacitly accepted, they are confirmed. Even that which seems merely descriptive or politically neutral implicitly consents to and thus supports the existing norms.

In order to understand how the regime of gender bias works, one must inquire into the grammar, the syntax, and the vocabulary that govern the ways of perceiving, thinking, and expressing attitudes toward either sex.\textsuperscript{20} Thus, the subject of women in the courts must be regarded as part of the general gender discourse. Statements about gender must be examined for the approach they take, for the reasoning they purport, and for the specific aspects of gender roles they imply. The analysis must focus on the normative quality of the statements and relate them to the structures and dynamics of societal rules, such as morals, customs, and laws.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{17} "Gender is a social system that divides power. It is therefore a political system." \textsc{Mackinnon, State, supra note 5, at 160.} \textit{See also} \textsc{Nancy Fraser, Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory} (1989).
\item \textsuperscript{18} I regard notions concerning transcendental sources of society's rules as philosophical or theological subjects that lie beyond the framework of this study. This limitation of approach is well founded for two reasons. First, it complies with the common concept of legal and social science. Second, although reference to transcendental normative sources still plays an important role in society's discourse, as a matter of principle, those sources are not to be considered as prior or superior to others.
\item \textsuperscript{19} "Simply by treating the status quo as 'the standard,' it invisibly and uncritically accepts the arrangements under male supremacy." \textsc{Mackinnon, Difference, supra note 13, at 43.}
\item \textsuperscript{20} "But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake." \textsc{Mackinnon, Difference, supra note 13, at 42 (emphasis added).}
\item \textsuperscript{21} "[M]en's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life." \textsc{Mackinnon, State, supra note 5, at 161.}
\end{itemize}
B. Basics of the Patriarchal Program

Before further discussing related questions and sources, it is helpful to describe the fundamental rules of the normative discourse that serve as a framework for the subsequent analysis. Consider the following tenets of the "Patriarchal Program" that establish and maintain successful supremacy:

1. Power creates truth. Let your power create your truth. Express your truth and power as if they were crucial for the existence and welfare of society as a whole.

2. Construct and exert your dominance by establishing public forms of societal discourse.

3. Economize the forms of discourse by setting up institutional structures. Camouflage your power in the anonymity of the institutional structures.


5. Be irrational. Establish some issues beyond rational discourse. Create your myths.

6. Be irrational. Create your logic, but break your own rules occasionally to assert your overwhelming power.

7. Immunize your fundamental concepts against critical attack by calling these concepts "natural" or "essential," thus disguising norms as phenomena of some physical reality and pretending they are valid regardless of historic conditions.

8. Whenever you express your concept of nature, exercise a monopoly in interpreting it.

9. Be ignorant and arrogant. Check any critical approach to your dominance by selectively paralyzing the discourse. Check the development of a critical discourse already in progress through discretionary misunderstandings and misrepresentations.

10. Set standards with which your addressees can comply. Demand compliance and reward it by conferring some benefit upon the rule-abiding addressees.

11. Set a number of standards with which the addressees cannot comply. Ensure your addressees' failure, and punish it.

12. Equality, fairness, and justice have always been intrinsic components of the law and indispensable factors of its coherence. Therefore, where possible, dominate your addressees through non-legal rules.

13. Monopolize means of coercion, including violence, to express and execute your supremacy.
Patriarchal supremacy, characterized by the above tenets, has been established and upheld by various methods of rule making. A frequent and effective way to shape and strengthen a rule is to transform a set of facts into a case and to posit that case as an example. Elevating a case to the level of a normative example is a common practice in the normative discourse.

A set of facts becomes a “case” as soon as these facts are evaluated. Evaluating facts entails finding the norms that seem most appropriate to govern the case and to express its significance. When a case is presented as an example, some features of its underlying norms are distinguished and endorsed. Proffering the case as an example endows the case with the authority to serve as a guide for future situations involving similar issues. This process brings forth a norm with a specific articulation, a distinct history, and an enhanced imperative quality.\textsuperscript{22}

Not every example, however, has a normative character. There are examples that merely serve to illustrate; they solely comment on and explain an already existing pattern and have no guiding, normative impact. These kinds of examples are to a certain extent fungible and incidental. The examples with which we are concerned, on the other hand, have a different nature and function. These examples do wield normative power because they have been vested with a normative impact.

Creating such examples both confirms certain norms and develops the texture of societal rules. Positing a case as an example is perhaps the smoothest, most unspectacular method of instituting a norm. Therefore, it can be a particularly useful tool for exerting dominance. In contrast to rules that are articulated in a purely general and abstract way, examples are concretely linked to the facts of the case; since examples seem to be part of practical life, they have a direct and compelling appeal.\textsuperscript{23}

\textsuperscript{22} For the normative nature of examples in general and specifically in the making of Roman law, see Nikolaus Benke, \textit{Exemplum contra legem}, LVII Tijdschrift voor Rechtsgechiedenis 275 (1989). For the common use of \textit{exempla} in legal reasoning, see Niklas Luhmann, \textit{Das Recht der Gesellschaft} 349 (1993).

\textsuperscript{23} Making rules by way of example also works when the case at issue is a stereotyped or even a hypothetical case. Again, regarding such a case as an example means forming and developing a rule. In a certain respect, such examples do not lack “realism.” Even if an example is not developed by use of a historic incident, its style is specific and concrete rather than general and abstract. This makes an example
Furthermore, since examples are cases, their normative potential is mediated by the specific facts of the case. An example is a cluster of specific facts and the various normative elements that are employed to evaluate those facts. Thus, an example reveals a normative nature that is less definite and more adaptable than, for instance, a single, abstractly determined rule. As a consequence, the example is perceived as less oppressive than abstract and generalized rules and is therefore more readily accepted. At the same time, its normative impact is more difficult to grasp, analyze, and control than that of a clear-cut rule. Thus, examples permit more flexibility and discretion in their application than clear-cut rules.\textsuperscript{24}

II. Carfania's Case: An Archetypal Story

The Roman sources tell us about one intriguing example (exemplum) of discrimination against women in court; I call this example Carfania's case. It provides rich material, both in form and substance, for discussing women's roles in official court functions. On the one hand, Carfania's case exhibits the method of developing rules by making a case into an example. On the other hand, its substantive reasoning reflects gender stereotypes that have endured throughout history.

A. The Momentous Example of Carfania

Carfania's case is important for discourses on gender in general; but more than that, it is a legal example and must be viewed as part of the legal discourse. Legal discourse must be understood as a specialized discipline. The Romans were the first to establish the law as a discipline specialized by an autonomous legal profession; they developed numerous legal constructs and types of legal reasoning that are still in use.\textsuperscript{25}

\textsuperscript{24} See Benke, supra note 22, at 278.

\textsuperscript{25} There was law before the Roman civilization, but the Romans defined and cultivated law as a distinct, highly sophisticated technique—the Romans invented legal science. One innovative step toward making the law a specialized discipline was to disconnect it from religion. See Schulz, Roman Legal Science, supra note 3, at 80–81. Requiring special expertise, the law was the domain of a very distinguished
Carfania's case involves the capacity of Roman women to act for others in court. In terms of Roman legal procedures, acting in court focused on postulare, which technically meant making applications to the judicial authority in order to initiate claims and move for defenses.26

Before Carfania's case led to an edict27 prohibiting women from representing others in court, Roman women seem to have enjoyed the same litigation rights as men.28 This is remarkable because Rome during that period maintained a profoundly patriarchal societal order,29 including highly developed legal institutions.30 As a whole, Rome after the

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26. The Roman sources treat this issue under the notion De Postulando, which is mainly covered by Title 3.1 in the Digest of Justinian. "Postulare autem est desiderium suum vel amici sui in iure apud eum, qui iurisdictioni praeest, exponere: vel alterius desiderio contradicere." Dig. 3.1.1.2 (Ulpianus 6 ad edictum). (Translation: But to make applications is to bring forth one's own claim or that of one's friend in due proceedings before the official administering the law, or to oppose the claim of another.) (All translations have been provided by the author.)

Considering the meaning of "in court," it must be kept in mind that the Roman iudex, who only took evidence and decided the cases, had a role different from and less extensive than that of a modern judge. All the preliminary issues, such as access to litigation, the right to file claims or move for defenses, and specific substantive requirements of particular claims and defenses, were the province of another official, the praetor. When speaking of postulare, the sources are discussing applications to the praetor. For a brief survey of the roles of praetor and iudex in a Roman lawsuit, see TELLEGEN-COUPERUS, supra note 3, at 53–59.

27. An edictum is one of the types of Roman legal sources. The style of an edictum is typically general and abstract. Since an edictal provision can be formulated without a legal sanction, the edictum may contain maxims of legal policy as well as legal directives. See Walter Selb, Das prätertorische Edikt: vom rechtspolitischen Programm zur Norm, Festchrift Kasner 259–72 (1986). For Roman magistrates' edicts in the second and first centuries B.C., see, e.g., ALAN WATSON, LAW MAKING IN THE LATER ROMAN REPUBLIC 31–87 (1974).

28. Until the Civil War, the American common law tradition was in many respects much more oppressive to women than the Roman law of the late republic and the pre-Constantine empire. See, e.g., GARDNER, supra note 7, at 257–65. See also Blackstone's famous dictum, "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband..." 1 WILLIAM BLACKSTONE, Commentaries *442 (1765) (footnote omitted). See also infra text accompanying notes 90–91.

29. See, e.g., CANTARELLA, supra note 7, at 113.

30. See generally SCHULZ, ROMAN LEGAL SCIENCE, supra note 3, at 38–98.
WOMEN IN THE COURTS

Punic Wars\(^{31}\) appears as an urban society with citizens capable of meeting Hellenistic intellectual challenges, a manifoldly structured commercial life,\(^{32}\) and networks of extensively differentiated societal and legal structures.\(^{33}\)

Women's litigation rights were abridged in the second quarter of the first century B.C., when one woman, Carfania, allegedly irritated a magistrate so deeply by her vexatious applications that all women were subsequently excluded from making applications on behalf of others.\(^{34}\)

The general prohibition that ensued from Carfania's case is certainly not the first legal provision to discriminate against women,\(^{35}\) but it is the first evidence in Western tradition of a misogynous policy articulated through elaborate legal reasoning. The Roman jurist Ulpianus,\(^{36}\) writing approximately in 190–223 A.D., reports the magistrate's rule; the text is transmitted in the Digest of Justinian:

\[
\textit{Secundo loco edictum proponitur in eos, qui pro aliis ne postulent: in quo edicto exceptit praetor sexum et casum, item notavit personas in turpitudine notabiles.}
\]

31. The third Punic War ended in 146 B.C.
32. For a discussion of Roman social and legal life, Roman intellect, and Roman economy, see generally JOHN A. CROOK, LAW AND LIFE OF ROME (1967); ELIZABETH RAWSON, INTELLECTUAL LIFE IN THE LATE ROMAN REPUBLIC 3–114 (1985); MOSES I. FINLEY, THE ANCIENT ECONOMY (2d ed. 1985).
33. For a historical discussion of these structures, see generally KUNKEL, supra note 3, at 35–116.
35. Some examples are the Lex Oppia (215 B.C., Liv. 34.1-8), condemning luxury among women (the Lex Oppia was abolished by the Lex Valeria Fundania, 195 B.C., Liv. 34.1-8); and the Lex Voconia (169 B.C., G. Inst. 2.226, 2.274), excluding women from being "instituted" as "heirs" by testators who were members of the first—the wealthiest—class at the census. Significant legal provisions against women in the early principate are the marriage legislation of Augustus (Lex Iulia de maritandis ordinibus, 18 B.C., UE 13.1, Lex Poppaea, 9 A.D., UE 16.1-2), abridging women's capacity to take under wills unless they had given birth to legitimate children, and the Senatusconsultum Velleianum (Dig. 16.1 ad senatus consultum Velleianum) prohibiting women from making themselves collaterally liable for the debts of others.
36. Domitius Ulpianus, born before 172 A.D. and killed in either 223 or 228 A.D., was a high official under Roman emperors of the Severan dynasty and the most prolific legal writer of classical Roman law. TONI HONORE, ULPIAN 3, 7–8, 45, 46 (1982).
Next comes an edict against those who are not to make applications on behalf of others. In this edict the praetor debarred on grounds of sex and disability. He also blacklisted persons tainted with disrepute.

On the ground of sex, now he forbids women to make applications on behalf of others. The reason for this is to prevent that they involve themselves in the cases of other people contrary to the modesty in keeping with their sex—that women fulfill male offices.

Originally, this was in fact brought about by a most disapproved woman—Carfania—who by brazenly making applications and disturbing the magistrate gave rise to the edict. . . .

This text, drafted in approximately 210 A.D., is a legal source that reflects the Roman law since the time of Carfania’s example, which occurred perhaps around 60 B.C. For the composition of his text, it seems very likely that Ulpianus used prior legal material, probably the writings of older jurists; here, however, he does not quote any sources.

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37. Dig. 3.1.1.5 (Ulpianus 6 ad edictum). The text, which is contained in the Digest of Justinian, has an inscription: “Ulpianus libro sexto ad edictum.” Dig. 3.1.1.5 (Ulpianus 6 ad edictum). (Translation: Ulpianus in the sixth book of commentaries on the edict [of the praetor].) For a discussion of edictum, see supra note 27; for a discussion of praetor, see supra note 26.

38. The paragraph divisions have been added by the author. The whole of Dig. 3.1.1.5 (Ulpianus 6 ad edictum) is a lengthy text; its second part, which reports an exemplum on the disability of blindness, is omitted here.

39. For the dating of Ulpianus’ text that contains Carfania’s case, see Honoré, supra note 36, at 148.

40. The Roman jurists’ legal opinions are regarded as legal sources like statutes and edicts. See Dig. 1.1.7.pr (Papinianus 2 definitionum); G. Inst. 1.2, 1.7.

41. This assumption is based on the fact that Carfania died in 48 B.C. See Val. Max. 8.3.2; infra note 45.

42. Honoré, supra note 36, at 205–07. Reference to the authority of earlier Roman jurists is an often-applied technique in Roman jurists’ legal writing. Honoré, supra note 36, at 207. For an analysis of Ulpianus’ references to other Roman jurists, see Honoré, supra note 36, at 204–48.
Although he might have shaped the material, Ulpianus presumably did not alter the essential form and substance of the text but relied on tradition and used what he found on Carfania's case in his juristic predecessors' writings.\footnote{43}

In addition to this legal source, the historian Valerius Maximus, who wrote in the early first century A.D.,\footnote{44} reports that Carfania had become the primary example of a woman whose "shameless" conduct in court vexed the magistrate. Valerius Maximus also reports that Carfania was married to the senator Licinius Bucco and that she died in 48 B.C.\footnote{45} Approximately one hundred years later, the satirist Juvenal\footnote{46} mentions

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the uniformity in style and the fundamental stability of classical Roman jurists' legal thinking, see, e.g., \textit{Schulz, Roman Legal Science}, \textit{supra} note 3, at 124–40.
\item The dates of Valerius Maximus' birth and death are unknown; he lived around 20 A.D. \textit{See The Oxford Classical Dictionary} 1106 (2d ed. 1970).
\item Val. Max. 8.3.2. Valerius Maximus states:

\begin{verbatim}
C. Afrania vero, Licinii Bucconis senatoris uxor prompta ad lites contrahendas pro se semper apud praetorem verba fecit, non quod advocatis deficebatur, sed quod invidiae abundasset. Itaque inustissimis foris latatibus addidit tribunalia exserendo muliebris caluminiae notissimum exemplum evasit, adeo ut pro crimine inprobi feminarum moribus C. Afraniae nomen obiciatur. Prorogavit autem spiritum suum ad C. Caesarem iterum P. Servilium consules: tale enim monstrum magis quo tempore extinctum quam quo sit orium memoriae tradendum est.
\end{verbatim}

\textit{Val. Max. 8.3.2.}

\textit{Translation:}

In fact, the wife of the senator Licinius Bucco, C. Afrania, [a woman] ready to take up lawsuits, always spoke before the praetor for herself, not because she lacked advocates, but because she abounded in shamelessness. And so by constantly harassing the tribunals with yappings unusual for the forum, she became the best known example of female vexatious proceeding—so much so that the name C. Afrania is used as a label for the offense [made up] by women's disapproved habits. She (yet) prolonged her life up to the consulships of C. Caesar—his second—and P. Servilius [48 B.C.]: for certainly it must be recorded when such a monster died rather than when it was born.

Valerius Maximus reports that this woman, whom we identify as Carfania, spoke "\textit{pro se}" (for herself). \textit{Val. Max. 8.3.2.} (In the editions of Valerius Maximus, Carfania is referred to as C. Afrania probably because of a transmittal mistake that occurred during the copying of the manuscripts by hand. For a brief discussion of the difference between the names "Carfania" and "C. Afrania," see \textit{Richard A. Bauman, Women and Politics in Ancient Rome} 231 n.29 (1992)). The use of "\textit{pro se}" probably does not mean that she litigated only on her own behalf, but rather seems to emphasize that she acted by herself before the \textit{praetor}, thus conducting business that would normally have been the male advocates' domain.

\item Decimus Iunius Iuvenalis was born probably between 50 and 65 A.D. and died in 127 A.D. or later. \textit{See The Oxford Classical Dictionary} 571–72 (2d ed. 1970).
\end{enumerate}
\end{footnotesize}
Carfania in a very short remark, pointing out that other people dress even more indecently than she did.47

The Roman material reveals the following three “neutral” facts about Carfania: she was of senatorial rank, conducted legal business by herself before the magistrate, and died in 48 B.C.48 Apart from this, there are only emphatically negative remarks about her. Throughout the sources, she is a target of disdain and ridicule.49 Over a period of almost two centuries, the repeated stereotype seems so narrow and defamatory that it lacks credibility. The palpably hostile tone used by each of the Roman writers gives rise to the suspicion that Carfania may in fact have been of quite a different character.

Whatever the reality, it is obvious that Carfania became an instrumental part of a patriarchal strategy. The story of her notoriety50 suggests that she served as a convenient scapegoat for the patriarchs when they felt that women’s activities in court were an increasing annoyance. They successfully made her into a negative icon, and the patriarchal tradition upheld this image for centuries. The way in which this exemplum51 was fabricated and designed to work deserves a closer look.

B. Carfania’s Case Reveals the Patriarchal Arsenal

The first sentence in Ulpianus’ report of the edict associates the female sex with disability and dishonesty,52 thus establishing the two

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47. Iuv. 2.65–70. “Sed quid non facient ali, cum tu multicia sumas, Cretice, et hanc vestem populo mirante perores in Proculas et Pollitias? Est moecha Fabulla, damnetur, si vis etiam Carfinia: Talem non sumet damnata togam.” (Translation: But what won’t other men do, Creticus, when you put on thin garments and, as the people wonder at this clothing, you speak against Procula and Politta [i.e., loose women]? Fabulla is an adulteress; let Carfinia be condemned as well, if you’d like. The condemned [woman] won’t put on such a toga [as you wear].)

48. Val. Max. 8.3.2; see supra note 45.


50. Valerius Maximus identifies Carfania as the best-known example of a magistrate’s vexation by a woman—“mulibris calluniae notissimum exemplum.” Val. Max. 8.3.2; see supra note 45.

51. Ulpianus refers not only to Carfania but to a number of cases that he considers relevant for discussing postulare. Dig. 3.1.1.5 (Ulpianus 6 ad edictum). Ulpianus’ repeated use of the term exemplum in the part following Carfania’s story makes clear that each of those cases, including Carfania’s case, is regarded as an exemplum: “exstat quidem exemplum . . . idque multis comprobatur exemplis.” Dig. 3.1.1.5 (Ulpianus 6 ad edictum).

52. At the beginning of his report, Ulpianus introduces the categories sex (“sexus”), meaning women; disability (“casus”); and persons noticeable for disrepute (“personas
pillars on which the whole structure of discrimination rests. The under-
lying assumption of the structure is that women are either feeble or
vicious or both;\textsuperscript{53} therefore, women must be subject to different treat-
ment than men. Consistent with their view that women lack physical
strength,\textsuperscript{54} the patriarchs represent women as weak in intellect and
character as well.\textsuperscript{55} The first weakness exposes women to men’s protec-
tion, the second to men’s correction.

Since correction is an effective means of exercising dominance, the
Roman patriarchs establish a correctional scheme by imposing a certain
ethos on women. This ethos pointedly identifies the female sex with
isolation and modesty\textsuperscript{56} and generally outlaws any behavior by women
that contradicts this code ("contra pudicitiam sexui congruentem").\textsuperscript{57} The
maxim of isolation condemns women to privacy; they may not app-
roach other people (at least not without patriarchal control) or become
involved in others’ affairs.\textsuperscript{58} The maxim of modesty renders women
inferior to men by defining women’s fundamental disposition as not
claiming equality with men.

These two maxims are combined in the command that women
shall not assume male business. The constructed identification of the
female sex\textsuperscript{59} with privacy and modesty—\textit{pudicitia}—has its counterpart

\textit{in turpisudine notabiles}). Dig. 3.1.1.5 (Ulpianus 6 ad edictum). See \textit{supra} text
accompanying notes 37–38.

\textsuperscript{53} See \textit{supra} part I.B., rule 5.

\textsuperscript{54} For a modern discussion of physicality and its different meaning for men and
women, see Catharine A. MacKinnon, \textit{Women, Self-Possession, and Sport, in
Feminism Unmodified}, \textit{supra} note 5, at 117–24.

\textsuperscript{55} For this line of argument in Roman legal sources, see Suzanne Dixon, \textit{Infirmitas
sexus: Womanly Weakness in Roman Law}, LII TiJDSCHaFr VOOR RECHTS-

\textsuperscript{56} “Not being heard is not just a function of lack of recognition, not just that no one
knows how to listen to you, although it is that; it is also silence of the deep kind,
the silence of being prevented from having anything to say.” MacKinnon, \textit{Di-
ference, supra} note 13, at 39.

\textsuperscript{57} Dig. 3.1.1.5 (Ulpianus 6 ad edictum); see \textit{supra} text accompanying notes 36–40.

\textsuperscript{58} “Ne... alienis causis se immisceant.” Dig. 3.1.1.5 (Ulpianus 6 ad edictum). See
\textit{supra} text accompanying notes 36–40.

\textsuperscript{59} See \textit{supra} part I.B., rule 7. The phrase “contra pudicitiam sexui congruentem,” see
\textit{supra} text accompanying note 57, reveals remarkable semantics: Ulpianus speaks of
in the remarkably artificial notion of “male offices” (virilia officia).\textsuperscript{60} This approach monopolizes for men the domain of public and official functions.

Roman patriarchy views public acts as such intrinsic parts of the masculine gender that it calls them male offices, virilia officia.\textsuperscript{61} The approach is general and abstract, because to describe these functions in more specific terms than “male” would hamper the patriarchs’ goal of usurping public power positions as they wish. (In addition, their supremacy benefits from the privilege to define a function as “male” whenever desirable.) Thus, patriarchy establishes its exclusive access to public power—and not incidentally. After all, the central institutions and procedures of patriarchal dominance are at stake.\textsuperscript{62}

The example of Carfania, which Ulpianus presents to conclude his argument for women’s restricted capacity in the courts, substantially embodies the maxims of modesty and isolation. Primarily, Carfania is marked as a woman who is utterly disapproved of (“Carfania improbissima femina”).\textsuperscript{63} This expresses that she is completely ostracized under the regime of pudicitia.\textsuperscript{64} Her alleged conduct before the magistrate suggests a person devoid of decency. She is said to have behaved brazenly (“inverecunde”) when addressing the magistrate.

An important method of controlling the societal discourse is to keep it free from certain persons, issues, or forms of articulation. Patriarchy regards such methods as necessary to accomplish order and maintain peace. Yet, the patriarchal striving for order and peace is problematically associated with silencing certain people.

\textsuperscript{60} Women shall not fulfill male offices: “ne virilibus officiis fungantur mulieres.” Dig. 3.1.1.5 (Ulpianus 6 ad edictum). See supra text accompanying notes 36–40.

\textsuperscript{61} See supra part I.B., rule 4.

\textsuperscript{62} See supra part I.B., rule 3.

\textsuperscript{63} Dig. 3.1.1.5 (Ulpianus 6 ad edictum). See supra text accompanying notes 36–40. See supra part I.B., rule 8.

\textsuperscript{64} For a discussion of pudicitia, see supra notes 56–60 and accompanying text. For antique inscriptions about men’s praise of women’s virtues, see, e.g., \textsc{Lefkowitz \& Fant}, supra note 7, at 16–21. An outstanding exemplum of Roman female virtues is reported in the so-called “laudatio Turiae,” a funerary speech of the late first century B.C. \textsc{3 Fontes Iuris Romani Antejustiniani} 209–18 (Vincentius Arangio-Ruiz ed., 2d ed. 1972). See also infra note 248.
Since Carfania has caused inquietude to the magistrate ("magistratum inquietans"), who symbolizes the male regime, she must be silenced. The patriarchs exercise an act of silencing when they introduce the new prohibition. They use Carfania as an example because her lack of pudicitia is likely to arouse some latent misogynous feelings, provoking a patriarchal call for a general restrictive measure. Thus, they silence all women by introducing the new edict prohibiting women from acting in court for others.

The jurist Ulpianus gives no hint that Carfania broke the law; he probably would have done so if she had. Her conduct was indeed significant, but not because she neglected the formalities of civil procedure. Apparently she complied with the procedural rules, but asserted her rights with vigorous tenacity. Her assertive posture seems to have constituted the fatal provocation of the magistrate. Carfania disregarded the societal norms that required her either to surrender herself to the magistrate's mercy and paternalistic guidance or to have a male advocate act in her stead.

65. DIG. 3.1.1.5 (Ulpianus 6 ad edictum). See supra text accompanying notes 36-40.
66. "Women have been silenced as women: we have been told . . . that women can't speak the language of significance . . . ." CATHERINE A. MACKINNON, Desire and Power, in Feminism Unmodified, supra note 5, at 56-57 [hereinafter MACKINNON, Desire].
67. Apart from his report on Carfania, Valerius Maximus tells us in his chapter 8.3, entitled "Quae mulieres apud magistratus pro se aut pro aliis causas egerunt," VAL. MAX. 8.3 (Translation: Women who pleaded cases before magistrates for themselves or for others), about two other women acting before the magistrates: Maesia Sentinas, VAL. MAX. 8.3.1, and Hortensia, VAL. MAX. 8.3.3. In an introductory phrase, Valerius Maximus explains his leitmotif for presenting the reports on Maesia Sentinas, Carfania, and Hortensia: not to be silent about women who have unduly broken their silence. "Ne de ipsis quidem feminis tacendum est, quas condicio naturae et verecundia stolae ut in forum et iudicini sacerunt cibiber non valuit." VAL. MAX. 8.3. (Translation: One also should not be silent about those women whose natural condition and the modesty of the woman's cloak could not confine them to being silent in the forum and court.)
68. Valerius Maximus speaks of her crime (crimen) but quite probably not in a technical legal sense. VAL. MAX. 8.3.2; see supra note 45. Juvenal refers to her as "Carfnia . . . damnata," IUV. 2.65-70, see supra note 47; but since Juvenal writes as a satirist, and a satire is made by ironical distortions and exaggerations, his phrase "Carfnia . . . damnata" neither proves that she was condemned for her reported vexing of the magistrate nor that she was convicted on another occasion.
69. When Carfania exercised her legal liberties regardless of contrary societal expectations (pudicitia), this was felt as a critical approach to patriarchy and evoked patriarchal opposition. See supra part I.B., rule 9.
70. VAL. MAX. 8.3.2; see supra note 45.
The exemplum\textsuperscript{71} of Carfania is an illuminating drama. It first arouses Roman men's fears that women might achieve some autonomous position in the gender discourse by stylizing Carfania as a monster.\textsuperscript{72} The exemplum then relieves their fears by defeating Carfania herself and, at the same time, by eliminating the danger of such monsters arising in the future.

This example is intentionally biased. The patriarchs apparently devised such a massive strategy because their abridgement of women's litigation rights was difficult to justify in terms of legal doctrine and legal structure. The magistrate had the right to sanction any contempt of court. Thus, the women's alleged disrespectful behavior in court would not be the true reason for the particular measure.\textsuperscript{73}

The example of Carfania works by way of distortion.\textsuperscript{74} It invents an urgent need to exclude women from certain litigation rights and ignores the structural inconsistency of this specific provision in the general legal framework.\textsuperscript{75} The example also camouflages the patriarchs' underlying purpose, which is to gain or regain control of the litigation process.\textsuperscript{76} They achieve this by depriving women of some litigation rights and annexing those rights to the male hemisphere.\textsuperscript{77}

III. CARFANIAN EXAMPLES IN UNITED STATES HISTORY: SUFFRAGE

Although women's suffrage might at first seem to be a deviation from our focus on women in the courts, there are good reasons for entering this excursus. Suffrage is a central civil right. It indicates the fundamental acceptance of a person as a citizen. Furthermore, it is assumed that the right to vote will lead to the acquisition of other civil

\textsuperscript{71} For the nature of example in the normative discourse, see supra part I.C.

\textsuperscript{72} Valerius Maximus calls her a monstrum. \textit{Val. Max.} 8.3.2; see supra note 45.

\textsuperscript{73} The magistrates had the legal power to take coercive and repressive measures in order to execute their commands and to punish minor disorderly offenses. This aspect of the magistrates' administration was called coercitio. \textit{See} Cic. \textit{Leg.} 3.6 ("coercitio"); Künk, \textit{supra} note 3, at 15.

\textsuperscript{74} See supra part I.B., rule 9.

\textsuperscript{75} See supra part I.B., rule 6.

\textsuperscript{76} For the strategic advantages of examples as instruments in the normative discourse, see supra text accompanying notes 23–24.

\textsuperscript{77} For the discussion of the virilia officia, see supra text accompanying notes 59–62.
rights and liberties not yet achieved, including full access to courts.

Women's suffrage helped expand and unify the civil rights of women that previously existed only in a patchwork pattern across the different states. For example, Delaware and Rhode Island admitted women to the bar only after the Nineteenth Amendment made women's suffrage a part of the U.S. Constitution in 1920. Moreover, as an issue of outstanding real and symbolic significance in terms of power, women's suffrage caused some of the most impassioned discussions of gender in American politics.

A. Suffrage and Women as Citizens

At the time of the American Revolution, women's suffrage became a repeatedly discussed issue. Abigail Adams' famous request to her husband, "Remember the Ladies," alludes to it. John Adams,

78. "Unfortunately, full rights of citizenship for women as women were not a major theoretical concern of progressive female activists at the turn of the century. They simply assumed it would somehow result from suffrage." Hoff, supra note 4, at 18.

79. For the history of women's suffrage in the United States, see, e.g., Beverly Breton, Women Vote in the West: The Woman Suffrage Movement, 1869-1896 (1986); Steven M. Buechler, Women's Movements in the United States (1990); Ruth Barnes Moynihan, Rebel for Rights: Abigail Scott Duniway (1983).

80. Hoff, supra note 4, at 164.

81. Roman women were not permitted to vote. Any influence they had on elections was political, not legal. The remnants of ancient Pompeii provide evidence of such political activities; there are graffiti revealing the names of women who expressed their appraisal and support for certain candidates in the community's elections. See, e.g., Lefkowitz & Fant, supra note 7, at 152-53; Wolfgang Schuller, Frauen in der römischen Geschichte 24 (1987); Liisa Savunen, Women and Elections in Pompeii, in Women in Antiquity: New Assessments 194 (Richard Hawley & Barbara Levick eds., 1995). For a discussion of Roman women's political influence, see generally Bauman, supra note 45.

82. Hoff, supra note 4, at 60. Abigail Adams wrote to her husband:

I long to hear that you have declared an independancy—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

Letter from Abigail Adams to John Adams (Mar. 31, 1776) in Hoff, supra note 4, at 60 (quoting 1 Adams Family Correspondence 370 (L. H. Butterfield & Marc Friedlander eds., 1963)).
writing to his colleague James Sullivan, however, emphatically rejects the idea:

But why exclude Women? You will Say, because their Delicacy renders them unfit for Practice and Experience, in the great Businesses of Life, and the hardy Enterprises of War, as well as the arduous Cares of State. Besides, their attention is so much engaged with the necessary Nurture of their Children, that Nature has made them fittest for domestic Cares... Depend upon it, Sir, it is dangerous to open so fruitfull a Source of Controversy and altercation; as would be opened by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell. 83

Adams operates with the separate spheres conception of men as breadwinners, soldiers, and statesmen and women as homemakers and mothers. 84 The true vocation of women, established by nature, is bearing and nurturing children. 85 Apart from that, women are handicapped by their “delicacy” (a romantic expression for weakness) 86 and banished from public interactions in the economy, politics, and the law. Thus, men establish their own competence, representing themselves as devoted priests of public affairs, committed to “great Businesses,” “hardy Enterprises,” and “arduous Cares.” 87 The possibility of a change in this metaphysically rooted order evokes in Adams’ mind a scenario of apocalyptic horror—the loss of peace and hierarchy, leading to a state of devastating equality (“to one common Levell”). 89

After the Civil War, women’s claim to suffrage drew strength from two new developments: state legislation concerning women’s capacity to hold property and the adoption of the Fourteenth and Fifteenth Amendments to the Constitution. At common law, married women

84. See supra part I.B., rule 5.
85. See supra part I.B., rule 7.
86. See supra text accompanying notes 52–55.
87. See supra part I.B., rule 2.
88. See supra part I.B., rule 5.
89. See supra part I.B., rule 1.
were denied the legal capacity to hold or convey property; they were even regarded as legally incapable of entering into contracts.\textsuperscript{90} Blackstone's explanation for this is that "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing. . . ."\textsuperscript{91}

Although there were court decisions and state legislation concerning married women's property rights throughout the nineteenth century,\textsuperscript{92} it was only in the second half of the nineteenth century, particularly after the Civil War, that these rights were systematically established. At that time, the change was one of principle, with a large-scale effect.\textsuperscript{93} Prior to this, only those women who had escaped guardianship or marriage could directly and actively participate in legally acknowledged economic transactions and positions.\textsuperscript{94}

Enjoying property rights subjected women to taxation. In the American conscience, taxation implies representation and, therefore, being taxed gave women a substantial argument for representation not mediated by their husbands.\textsuperscript{95} Moreover, in terms of demographics, the

\textsuperscript{90} For a discussion of this tradition at common law and its exceptions in equity, see John D. Johnston, Jr., Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. Rev. 1033, 1044–57 (1972).

\textsuperscript{91} 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (emphasis in original) (footnote omitted).

\textsuperscript{92} See, e.g., Johnston, supra note 90, at 1057–70.

\textsuperscript{93} See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 495–96 (2d ed. 1985); HOFF, supra note 4, at 127–34, 377–82.

\textsuperscript{94} As an exception to these rigidities at common law, equity procedures enabled women to enjoy certain property interests. From a general perspective, however, those equitable or beneficial property rights were of minor importance for two reasons: they were designed for the upper class, and they conferred only limited options to enjoy and to dispose of property. For a historical discussion of women's property rights in equity, see HOFF, supra note 4, at 124–27.

\textsuperscript{95} Elizabeth Cady Stanton (a leading member of the American women's suffrage movement in the second half of the nineteenth century) explains that the constitutional ideals of the American Revolution turned into tyranny when certain groups were taxed but denied the right to vote. She insists, "[o]ur Fathers . . . denied the elective franchise to men without property and education, to clergymen, women and negroes. They declared taxation without representation tyranny, then taxed all these dis-enfranchised classes." HOFF, supra note 4, at 145 (quoting ANDREW SINCLAIR, THE BETTER HALF: THE EMANCIPATION OF THE AMERICAN WOMAN 185 (1965)). For a discussion of property as a qualification for voting in the American states (except Vermont), see WILLI P. ADAMS, THE FIRST AMERICAN CONSTITU-
argument rested on a broad base because many women had become taxpayers or potential taxpayers.\textsuperscript{96}

Similarly, the Fourteenth and Fifteenth Amendments of the Constitution (ratified in 1868 and 1870 respectively), both designed to empower the African-American male population, could also have been read as enfranchising women. Section One of the Fourteenth Amendment is broad and bold in its proclamation: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . ."\textsuperscript{97} Section Two, however, prescribes the reduction of a state's representation only when the right to vote is "denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States. . ."\textsuperscript{98} The Fifteenth Amendment specifically determines that "citizens" of the United States shall not be denied the right to vote because of "race, color, or previous condition of servitude."\textsuperscript{99}

The argument that the amendments gave women the right to vote was, however, rejected in \textit{United States v. Anthony}.

\textsuperscript{100} Susan B. Anthony registered to vote in Rochester, New York; took part in an election by casting a ballot on November 5, 1872; and was then subjected to criminal prosecution. She was charged with violating the federal Civil Rights Act of 1870, in particular a provision that sanctioned electoral fraud where a voter cast more than one ballot. This provision was

\textsuperscript{96.} For statistics demonstrating the extent to which women’s legal capacity concerning property rights was enhanced in the nineteenth century, see Hoff, \textit{supra} note 4, at 129, 377-82.

In one of her arguments for women’s suffrage, Susan B. Anthony characterizes women as taxpayers not different from men when she speaks of "women of the entire nation, vast numbers of whom are the peers of those honorable gentlemen themselves, in morals, intellect, culture, wealth, family—paying taxes on large estates, and contributing equally with them and their sex, in every direction, to the growth, prosperity, and well-being of the Republic." Hoff, \textit{supra} note 4, at 154 (quoting 2 \textit{History of Woman Suffrage} 639-40 (Elizabeth Cady Stanton, Susan B. Anthony, and Mathilda J. Gage eds., 1881, repr. 1970)).

\textsuperscript{97.} U.S. CoNsT. amend. XIV, § 1.

\textsuperscript{98.} U.S. CoNsT. amend. XIV, § 2.

\textsuperscript{99.} U.S. CoNsT. amend. XV, § 1.

\textsuperscript{100.} 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459).
applied to her on the assumption that she had no right to vote at all. Anthony expressed her uncompromising criticism of male dominance in a large, well-publicized campaign for women’s rights of which her voting was a part.

During her trial, Anthony challenged her prosecution as procedurally unfair because she was not being tried by her peers. The judge rejected this argument and ordered her to be silent.

Judge Hunt: The Court must insist—the prisoner has been tried according to the established forms of law.

Miss Anthony: Yes, your honor, but by forms of law all made by men, interpreted by men, administered by men, in favor of men, and against women; and hence, your honor’s ordered verdict of guilty, against a United States citizen for the exercise of, “that citizen’s right to vote”, simply because that citizen was a woman and not a man. . . . As then the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so now must women, to get their right to a voice in this Government, take it; and I have taken mine, and mean to take it at every possible opportunity.

Judge Hunt: The Court orders the prisoner to sit down. It will not allow another word.

Anthony’s perspective differs remarkably from that of her attorney, Henry R. Seldon. In contrast to Anthony, Seldon obviously makes a great effort to reconcile his client’s claim with the traditional view of gender:

On the one hand it is supposed by some that the character of women would be radically changed—that they would be unsexed, as it were, by clothing them with political rights, and that instead of modest, amiable and graceful beings, we should have bold, noisy, and disgusting political demagogues, or something worse, if anything worse can be imagined. I think those who entertain such opinions are in error. . . .

101. See Hoff, supra note 4, at 153, 156–57, 160.
102. See Hoff, supra note 4, at 152–57.
103. See supra part I.B., rule 13. “When a woman speaks for herself, her violation becomes an atrocity and is therefore a lie.” MacKinnon, Art, supra note 8, at 11.
104. Hoff, supra note 4, at 159 (quoting 2 History of Women Suffrage 687–88 (Elizabeth Cady Stanton, Susan B. Anthony, and Mathilda J. Gage eds., 1881, repr. 1970)).
So far as women, without change of character as women, are qualified to discharge the duties of citizenship, they will discharge them if called upon to do so, and beyond that they will not go. Nature has put barriers in the way of any excessive devotion of women to public affairs, and it is not necessary that nature's work in that respect should be supplemented by additional barriers invented by men. Such offices as women are qualified to fill will be sought by those who do not find other employment, and others they will not seek, or if they do, will seek in vain.105

Seldon, a pragmatist, tries to alleviate men's fears. His argument clearly subscribes to the conventional rejection of women's serious participation in official power structures when he speaks of "disgusting political demagogues."106 Seldon, like the Roman patriarchs and John Adams before him, identifies the feminine gender with the private sphere. He assumes that modesty is women's fundamental attitude107 and that providing for men's enchantment is one of women's most important functions.108

Seldon develops a rhetorical strategy to minimize the possible consequences of allowing women's suffrage.109 He characterizes women's nature as being little devoted to public affairs.110 Asserting that their

105. Hoff, supra note 4, at 158 (quoting 2 History of Women Suffrage 660–61 (Elizabeth Cady Stanton, Susan B. Anthony, and Mathilda J. Gage eds., 1881, repr. 1970)).

106. Hoff, supra note 4, at 158.

107. See supra text accompanying notes 56–58.

108. The ability to enchant men is, of course, turned against women. For example, in 1869, Belva A. Lockwood applied to the Law Department of Columbian College in Washington. The rejection letter from the President, George W. Samson, reads as follows:

Madam, the Faculty of Columbian College have considered your request to be admitted to the Law Department of this institution and after due consultation, have considered that such admission would not be expedient as it would be likely to distract the attention of the young men.

Letter from George W. Samson to Belva A. Lockwood (Oct. 7, 1869) in Morello, supra note 4, at 71.

109. This becomes particularly obvious in Seldon's argument preceding his explanation of women's nature: "So far as women, without change of character as women, are qualified to discharge the duties of citizenship, they will discharge them if called upon to do so, and beyond that they will not go." Hoff, supra note 4, at 158 (quoting 2 History of Woman Suffrage 660–61 (Elizabeth Cady Stanton, Susan B. Anthony, and Mathilda J. Gage eds., 1881, repr. 1970)).

110. See supra part I.B., rule 7.
nature bars further ambitions, he advocates women's suffrage. Finally, he implies that if women sought to go further there would be means to detain them. However, Seldon's efforts to calm patriarchal fears did not succeed. The court held that women had no right to vote, and Anthony was convicted under the Civil Rights Act of 1870 for having acted "against the peace of the United States of America and their dignity."\footnote{112}

The application of the Fourteenth and Fifteenth Amendments became a gender issue before the United States Supreme Court in the case of \textit{Minor v. Happersett}.\footnote{113} Again, women's suffrage was denied. The Court took an approach similar to that of Judge Hunt in \textit{United States v. Anthony}\footnote{114} by interpreting the Fourteenth and Fifteenth Amendments as having no impact upon the states' abilities to restrict suffrage to males.

The opinion in \textit{Minor v. Happersett} is technical and devoid of references to traditional gender stereotypes.\footnote{115} It is based mainly on four assumptions. First, the Constitution uses the word "citizen" as an expedient expression for people belonging to the nation of the United States, but not as a legal concept implying rights or liberties.\footnote{116} Second,
the Fourteenth and Fifteenth Amendments did not change this meaning of "citizen."\textsuperscript{7} Third, the Constitution is an agreement of the states that can only comprehend and reflect the constitutional law of the states at the time that the federal Constitution was made.\textsuperscript{118} At that time, each state constitution restricted suffrage to certain groups of citizens, and only in New Jersey were women made voters.\textsuperscript{119} Fourth, the Supreme Court's competence is confined to ascertaining existing law; it does not create new law.\textsuperscript{120}

\begin{itemize}
\item 117. "The [Fourteenth] amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." \textit{Minor}, 88 U.S. (21 Wall.) at 171.
\item And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? [sic] Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part? \textit{Minor}, 88 U.S. (21 Wall.) at 175.
\item 118. "The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. . . . The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters." \textit{Minor}, 88 U.S. (21 Wall.) at 170. "This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of [the Constitution's] adoption." \textit{Minor}, 88 U.S. (21 Wall.) at 171.
\item 119. "When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. . . . Upon an examination of those constitutions we find that in no State were all citizens permitted to vote." \textit{Minor}, 88 U.S. (21 Wall.) at 172. "As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them." \textit{Minor}, 88 U.S. (21 Wall.) at 176.
\item 120. The Court explains:
\begin{quote}
If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us.
\end{quote}
\end{itemize}
The final argument, which regards women's suffrage as an issue beyond the reach of the Court, sounds almost apologetic; however, by this approach, the Court avoids a material discussion of women's suffrage. The exclusion of women from the voting booth is thus achieved by a shining example of liberal legalism. Leaving out any reference to gender concepts gives the appearance of fairness and legalistic consistency. Yet, the Court's highly selective and strangely static style of legal thinking actually succeeds in manipulating the gender issue.

B. A Carfanian Experience in New Jersey, 1807

In an isolated phenomenon in American legal history, the New Jersey Constitution of 1776 established women's suffrage. In 1807, however, this right was abolished, and suffrage was restricted to white men. Although the information given by the sources is not sufficient to exclude ambiguity, we know enough about the historic context to comment on three aspects of this phenomenon: the situation that gave rise to suffrage for women in 1776, the probable reasons for its abolishment in 1807, and the tactics used to achieve its abolishment.

The late eighteenth century was an age of epochal changes. The philosophy of enlightenment substituted a new concept of the person

121. The Court states:

No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Minor, 88 U.S. (21 Wall.) at 178.

122. See supra part I.B., rule 3.

123. MacKinnon describes the patriarchal background of liberal legalism:

We notice in language as well as in life that the male occupies both the neutral and the male position. This is another way of saying that the neutrality of objectivity and of maleness are coextensive linguistically, whereas women occupy the marked, the gendered, the different, the forever-female position.

MacKINNON, Desire, supra note 66, at 55. See also MacKINNON, State, supra note 5, at 162–67. See also supra note 115.


125. HOFF, supra note 4, at 98–103.

126. GOLDSTEIN, supra note 4, at 75; HOFF, supra note 4, at 98.
for the outworn feudalistic structures. This new idea of the person focused on equal autonomy and dignity as every individual's fundamental innate rights. These rights were to be perceived as prior and superior to the regimes of law and state. In theory, this concept rested on the primary assumption that the person is endowed with property.

This philosophical approach nurtured two societal systems that remain of great importance today. First, it created the modern state as an egalitarian democracy committed to the civil rights of the individual. Second, it formed the basis of the bourgeois civil society, which arrived at its climax in the nineteenth century but is still alive in many traditions today.

In the initial phase of an enlightened movement, the intellectual and political climate is connected with more generous rules of discourse. There is apparently less intimidation, control, and censorship of ideas. In such times of change, women seem to participate more freely in the societal discourse than in more settled or more conservative periods, although the success of their ideas may still be frustrated by their male contemporaries.


130. This is also true for the later Roman republic, when the Roman mind was influenced by ideas of Greek philosophy. For a general survey of the intellectual life in Rome of that period, see Rawson, supra note 32, at 3-114. In her conclusion, Rawson states that "[t]he Ciceronian age was one in which considerable intellectual liberty prevailed . . . ." Rawson, supra note 32, at 322. "Rome was not to recover under the Empire the sense of intellectual excitement and achievement that she knew in the period of the collapse of the Republic." Rawson, supra note 32, at 325.

The Greek influence produced a discussion of the traditional Roman virtues and values in a way that reflected the anthropocentric focus that had dominated Greek philosophy since Socrates. This becomes most obvious in the later Roman republic's discussion of society, state, and politics. See generally Neal Wood, Cicero's Social and Political Thought (1988). In legal discourse, Greek philosophy probably inspired enlightened ideas such as personal freedom and individualism. See Schulz, Roman Legal Science, supra note 3, at 84.


132. For example, Abigail Adams' husband had a negative reaction to her views. See
The late eighteenth-century enlightenment had an ethos and even a pathos of radical equality based on its concept of the person. Sometimes this concept did not remain programmatic but gained entry into the law and even into constitutions. This seems to have happened in New Jersey in 1776.

The rules of power typical for a rapidly growing society in the process of industrialization soon overcame the spirit of this enlightened egalitarianism. Society's focus shifted from eliminating feudalistic or imperialistic dominance to organizing the new economic potential in terms of power. In politics, the struggle for personal freedom and national independence made way for the concern with distribution of economic means and profits.

The political dynamic thus succumbed to the logic of the capitalist market. This economic system paralyzed the idea of political and legal equality, because capitalism tends to foster elite competition that produces accumulations of wealth and power. Hence a societal climate

\textsuperscript{133} This ethos is primarily expressed in claims for liberty, equality, independence, civil rights, democracy, and division of powers. See, for example, the American constitutional enactments of that period, such as The Declaration of Independence (U.S.) 1776; Mass. Const. of 1780; N.J. Const. of 1776; Va. Bill of Rights of 1776. See generally Robert A. Rutland, The Birth of the Bill of Rights (1955).

\textsuperscript{134} In New Jersey, the Quakers' liberal attitude toward women seems to have contributed to the enfranchisement of women in New Jersey's 1776 constitution. See Hoff, supra note 4, at 98–99.

\textsuperscript{135} For a discussion of "equality" in the first American constitutions, see, e.g., Adams, supra note 95, at 164–76.

\textsuperscript{136} The gender-neutral language of the other constitutional enactments of that period gave only lip service to the idea of equality. Those legal terms were subsequently interpreted in a patriarchal manner, thus excluding women's suffrage. Cf. Hoff, supra note 4, at 117–18 (maintaining that the constitutional enactments deliberately omitted references to women).

\textsuperscript{137} This new economic development is reflected, for example, in the rise of the business corporation. See Friedman, supra note 93, at 188–201.

\textsuperscript{138} See, e.g., Hall, supra note 129, at 67–128.
ensued that likely contributed to the abolishment of women’s suffrage in New Jersey.139

In this setting, men simply needed an expedient example, such as that of Carfania, to render women’s suffrage scandalous.140 The occasion was found in an election in 1807, which was regarded as tainted because more women appeared to vote than were registered. There are two explanations for this surplus of women voters. One is that some women reappeared in changed outfits and cast a second ballot. The other version maintains that some men disguised themselves as women and cast extra ballots.141

Whatever happened, the officials in charge of the election apparently escaped blame. Although the fraud may have resulted from poor organization or from misrepresentation by male voters, women were once again used as scapegoats.142 If men did in fact disguise themselves as women, then the exclusion of all New Jersey women from voting is particularly perfidious.143 Furthermore, this raises the question of whether men took part in the election disguised as women solely to produce a scandal that could be used as an example to defame women and abolish their suffrage.144

IV. CARFANIAN EXAMPLES IN UNITED STATES HISTORY: RESISTANCE TO WOMEN AT THE BAR AND IN THE JURY BOX

History has disproved the aspiration that constitutions proclaiming democratic principles and equal privileges and immunities to all citizens would result in women’s equal participation in official functions. Women’s suffrage had to be fought for specifically, and, once achieved,
did not automatically guarantee women access to the public domain. Thus, women’s fight for participation in official court functions remained fragmented and reproduced experiences similar to Carfania’s defeat.

**A. A Carfanian Claim: Women’s Access to the Bar**

Carfania’s example led to the legal exclusion of Roman women from the role of advocate in court.\(^{145}\) It is difficult to assess the effects of this exclusion on legal practice because there is no ancient Roman source that tells us about women as professional advocates. However, since Roman upper-class women of the first century B.C. regularly evaded strict subordination to male family power\(^{146}\) or male guardianship,\(^{147}\) they could freely enjoy property rights and did in fact own large estates. Administering their affairs seems likely to have necessitated their

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145. See supra parts II.A and II.B.

146. *Patria potestas* was the paternal power of the head of the Roman family, who was called *pater familias*, over his legitimate offspring. As a rule, the children (and their children, etc.) under *patria potestas* had an extremely restricted capacity in private law until their *pater familias* died (or when the father, during his lifetime, released the child from his *potestas* by granting the *emancipatio*). Persons not under paternal power were called *sui iuris*. In marriage, a woman could be subjected to her husband’s family power. She was then in his *manus*, a legal status very similar to the children’s in *patria potestas*. In the later Roman republic it seems to have been an upper-class rule that on the occasion of the daughter’s marriage the *pater familias* made her *sui iuris* by performing the legal act of *emancipatio*, and no *manus* by her husband was established. See [GARDNER](#), supra note 7, at 5–14.

147. On account of her sex, a Roman woman *sui iuris*, see supra note 146, was under a specific guardianship, called *tutela mulierum* (translation: women’s guardianship). As a rule, the law attributed the function of a woman’s guardian to her closest male relative, for example, to her father (in the case of *emancipatio*), uncle, brother, or even her son. Apart from that, there were ways to appoint a man who did not belong to her family—for instance, her husband—as her *tutor mulieris* (translation: guardian of the woman).

The *tutela mulierum* was originally designed to control women’s major transactions. However, there is considerable evidence that during the later Roman republic and after, this guardianship was not very cumbersome for Roman upper-class women. For example, in the eyes of the law, the *tutor mulieris* was considered to be of so little importance that the woman could not make him accountable for his conduct as guardian. Furthermore, in certain cases the woman could choose who she wanted appointed as her guardian, or she was given a legal remedy to attain her guardian’s authorization of a transaction she wanted to make. In fact, quite often the women seem to have evaded *tutela mulierum* completely by treating it as a negligible legal formality. See [GARDNER](#), supra note 7, at 14–22.
appearance in court.\textsuperscript{148} Considering that such women were at the top of social hierarchies, it seems plausible that they found themselves in a position to litigate on behalf of others.\textsuperscript{149}

Just as Carfania emerged from Rome prior to the Roman Revolution that turned the republic into the principate,\textsuperscript{150} Margaret Brent, a famous lawyer and litigator, emerged from prerevolutionary America. Brent, an English aristocrat, settled in St. Mary’s Parish, Maryland, in 1638 and acquired extensive real estate holdings. She was appointed counsel to the governor, Leonard Calvert, and became executor of his estate in 1647.\textsuperscript{151}

Brent’s example reveals that owning and administering a large complex of property, particularly real estate, leads to participation in the public domain.\textsuperscript{152} Such administration requires some active involvement in institutional public power. Thus, it is apt to increase the prospects of holding office.\textsuperscript{153} Court records mention Margaret Brent in 124 court appearances in court.\textsuperscript{148} Considering that such women were at the top of social hierarchies, it seems plausible that they found themselves in a position to litigate on behalf of others.\textsuperscript{149}

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\textsuperscript{148} The report of Valerius Maximus on Maesia Sentinas, Val. Max. 8.3.1, and Hortensia, Val. Max. 8.3.3, supports this assumption. Neither, however, provides much information about women's advocacy functions. Maesia Sentinas, defending herself, acts only on her own behalf. Hortensia does speak for other women ("causam feminarum . . . est") when she fights the heavy tax imposed upon the class of Roman matrons; however, she seems to be the matrons' voice in a political sense rather than their litigator in a technical sense. For a discussion of the scarce material on women in law in the Roman republic, see Bauman, supra note 45, at 45–52.

\textsuperscript{149} Not every Roman court appearance would have required a professionally trained advocate. Laymen, and probably also laywomen, conducted proceedings that were without complicated legal technicalities. For example, the Roman legal sources cite a variety of instances when a person goes to court and acts on behalf of an absent friend (negotorum gestio) who would otherwise face a judgment on default (absent indefensus). See, e.g., Dig. 3.5.1 (Ulpianus 10 ad edictum provinciale).

\textsuperscript{150} See, e.g., Ronald Syme, The Roman Revolution (1939).

\textsuperscript{151} See Anton-Hermann Chroust, The Rise of the Legal Profession in America 49 (1965); see also Morello, supra note 4, at 3–5.

\textsuperscript{152} The evidence of women pleading in court prior to 1869 shows mostly issues of property and estate settlements. Morello, supra note 4, at 8.

\textsuperscript{153} Nevertheless, one must keep in mind that Margaret Brent's unique career may be explained in part by English aristocratic legal structures that did not survive in the United States. The traditional feudal hierarchy provided for feudal overlords to administer some local jurisdictions. This function was understood to be one of the various rights vested in the person who held property in an upper rank of the feudal hierarchy. Being an English aristocrat, Brent presumably enjoyed some distinguished education, perhaps including some training for the practical administration of property. Such a background might explain why she was familiar with these legal functions when she moved to Maryland. For a discussion of local jurisdictions connected with feudal land law, see generally John P. Dawson, A History of Lay Judges 208–64 (1960); A. K. R. Kiralfy, Potter's Historical Introduction to English Law and Its Institutions 97–103 (4th ed. 1958).
cases from 1642 to 1650. A highly successful and respected negotiator and litigator, Brent attempted to step further into the public domain. As attorney for the governor, she demanded a vote and a voice in the Maryland Assembly. Her application, however, was unsuccessful.

While Margaret Brent, unlike Carfania, was not used as a “bad” example to establish a provision restricting women, neither did Brent become an example to encourage more general women’s activity in courts. Two factors likely explain this disapproval of women litigating on behalf of others. One factor is an increasing professionalization of the litigation business; the other is a strengthened bias against women that often surfaces when a revolutionary movement consolidates into stable powerholding.

The professionalization of the legal discipline distinguishes and invigorates the law as a specific part of the normative discourse. This professionalization monopolizes competition and regulates recruitment; thereby enhancing control over legal constructs and legal functions. Such a change disables the versatile layperson. In Rome, shortly before

154. Chroust, supra note 151, at 49; Morello, supra note 4, at 6.
155. Morello, supra note 4, at 6–7.
156. As Friedman notes,

The lower levels of the bar were hard to control. Lawyers, like actors and painters, were often part-timers and amateurs. In 17th-century Maryland, most lawyers were planters, who spent part of their time on the practice. It was only in the 18th century that it was possible to speak of lawyers in Maryland as “professional” at all. Of the 207 attorneys in Maryland between 1660 and 1715, 79 were planters; others were clerks or merchants; only 48 could be described as professional lawyers.

Friedman, supra note 93, at 99 (footnote omitted).
158. Internal professionalization has also led to an increase of patriarchal control. The rise of large law firms has meant further specialization that has prevented women from litigating in court and has relegated them to research and drafting work. See, e.g., Morello, supra note 4, at 194–217; Deborah K. Holmes, Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective, 12 Women’s Rts. L. Rep. 9, 27 (1990).
159. In the nineteenth century, attending law schools became increasingly necessary to establishing a legal career. Therefore, women interested in the legal profession focused on gaining access to such institutions. The Ivy League law schools in the East, reflecting the highest degree of professionalization, were the last to admit women. Yale, Columbia, and Harvard did not do so until well into the twentieth century, whereas the developing states of the Midwest and the West accepted women in their law schools relatively soon after the Civil War. See Morello, supra note 4, at 39–107.
Carfania's case, the jurists ceased acting as attorneys in court and left this responsibility to the rhetoricians.\textsuperscript{160} This was a new distribution of functions in the field of litigation and a step toward further professionalization,\textsuperscript{161} a new order that was hardly advantageous for women lay-advocates.

This specialization was presumably caused by shifts in Roman society; the old nobility lost some of its dominance, while an expanding upper class searched for new fields in which to acquire official merits.\textsuperscript{162} In America, the professionalization of litigation that occurred in the eighteenth\textsuperscript{163} and nineteenth centuries\textsuperscript{164} was mainly caused by the urbanization and industrialization of society.\textsuperscript{165} American women's struggles for admission to the bar were certainly inhibited by this professionalization.

The second factor contributing to the disapproval of women acting in court on behalf of others stems from the fact that political consolidation often leads to reactionary politics; such restorative measures tend to be directed against women, since women are vulnerable targets for the demonstration of reinforced patriarchal dominance. Only those revolutionaries who focus on the reconstruction or establishment of order

\begin{footnotes}
\item[160] See, e.g., SCHULZ, ROMAN LEGAL SCIENCE, supra note 3, at 55, 108-109, 119.
\item[162] See, e.g., FRANZ WEACKEr, RÖMISCHE RECHTSGESCHICHTE 595-617 (1988). The historic setting of this development is Rome's rise (after the Punic Wars) to a capital of unprecedented size, wealth, and cosmopolitan orientation. See also FRIER, supra note 161, at 282. This resembles the rise of big cities in the nineteenth century, but the historical approach must not overlook essential differences. Rome's commercial and urban achievements cannot be properly perceived in terms of the modern industrial revolution and its type of urbanization.
\item[164] This professionalization did not occur in a progressively linear fashion. Roscoe Pound describes the later eighteenth and early nineteenth centuries as the formative era for the legal profession in America. He also speaks about the middle of the nineteenth century as a period of decadence for the American legal profession, which suffered from problems of organization, education, and professional training. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 175-249 (1953).
\item[165] The Midwest and West, less consolidated than the Northeast, offered a more permissive situation to women lawyers. In 1869, the Chicago Legal News reported that Mary E. Magoon successfully practiced as an attorney in North English, Iowa County. MORELLO, supra note 4, at 11. Magoon took advantage of the fact that she could practice law on the county level without being admitted to the state bar. MORELLO, supra note 4, at 11.
\end{footnotes}
eventually succeed in power. Staying in power requires attaining a firm grip on the state's institutions.\textsuperscript{166} Under a firm patriarchal grip, some of women's freedom—in particular, recently gained liberty—is likely to disappear.\textsuperscript{167} The edict resulting from Carfania's example fits into a line of misogynous legal provisions that figured among the Roman Revolution's restorative measures.\textsuperscript{168} In America as well, the consolidation following the Revolution resulted in banning women from the litigation business and subsequently forcing them into a fight for their admission to the bar.

\textbf{B. Men's Interference on Women's Way to the Bar}

In 1869, Belle Babb Mansfield, then twenty-three years old, was admitted to the Iowa state bar, thus becoming the first professionally appointed woman lawyer in the United States.\textsuperscript{169} The legal reasoning that opened this avenue to Mansfield is as exceptional as it is noteworthy. The Iowa Code of 1851 required an applicant to the bar to be a white male.\textsuperscript{170} Justice Francis Springer, who delivered the opinion of the Iowa Supreme Court concerning Mansfield's admission, found by some clever reasoning that the relevant provision did not exclude women. He interpreted the term "male" by referring to another Iowa provision, which said that women were to be included wherever masculine legal terms were used.\textsuperscript{171}

\begin{itemize}
\item \textsuperscript{166} See supra part I.B., rule 3.
\item \textsuperscript{167} The recent radical political change in the former Eastern-bloc countries reveals examples of women losing liberties as a result of new state concepts and societal orders. See, e.g., \textit{Wider das Schlichte Vergessen} (Christine Kulke et al. eds., 1992).
\item \textsuperscript{168} Two of those provisions appear to be the most significant. One is the marriage legislation of Augustus, which diminished women's capacity to take under wills unless they had given birth to legitimate children. Lex Julia de maritandis ordinibus, 18 B.C., UE 13.1; Lex Papia Poppaea, 9 A.D., UE 16.1-2. The other is the Senatusconsultum Velleianum (circa 50 A.D. Dig. 16.1 ad senatus consultum Velleianum), which prohibited women from incurring contractual liabilities for the benefit of third parties. In particular, it prevented women from becoming guarantors for the debts of others. As a consequence, the Senatusconsultum Velleianum kept women at the fringe of the financial market. See J. A. Crook, \textit{Feminine Inadequacy and the Senatusconsultum Velleianum, in The Family in Ancient Rome} 83 (Beryl Rawson ed., 1986).
\item \textsuperscript{169} Hoff, supra note 4, at 162; Morello, supra note 4, at 11-13.
\item \textsuperscript{170} Morello, supra note 4, at 12.
\item \textsuperscript{171} Morello, supra note 4, at 12. The event must not be misunderstood as part of a general move toward feminist politics but rather as a rare example of sophisticated legal technique applied not against women, but for their benefit. See, e.g., Hoff, supra note 4, at 162-63.
\end{itemize}
While Belle Babb Mansfield was admitted to the Iowa bar, Myra Bradwell\textsuperscript{172} was denied admission in Illinois.\textsuperscript{173} Bradwell brought the matter to the United States Supreme Court and lost. The decision in \textit{Bradwell v. Illinois},\textsuperscript{174} which upheld the Illinois statute excluding women from the bar in the face of constitutional challenge,\textsuperscript{175} is replete with evocations of gender mythology. Justice Bradley gives us an excellent example of the nineteenth-century upper-class patriarchal gender view:

It certainly cannot be affirmed, as a historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity

\textsuperscript{172} For a detailed history of the life of Myra Bradwell, see JANE M. FRIEDMAN, \textit{AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL} (1993).

\textsuperscript{173} The Illinois Supreme Court states:

\begin{quote}
If we were to admit them, we should be exercising the authority conferred upon us in a manner which, we are fully satisfied, was never contemplated by the legislature. Upon this question, it seems to us neither this applicant herself, nor any unprejudiced and intelligent person, can entertain the slightest doubt.

It is to be remembered that at the time this statute was enacted, we had, by express provision, adopted the common law of England, and, with three exceptions, the statutes of that country passed prior to the fourth year of James the First, so far as they were applicable to our condition.

It is to be also remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of Bishops, or be elected to a seat in the House of Commons.

It is to be further remembered that when our act was passed, that school of reform, which claims for women participation in the making and administering of the laws had not then arisen, or, if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action. That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth.
\end{quote}


\textsuperscript{174} 83 U.S. (16 Wall.) 130 (1872).

\textsuperscript{175} \textit{Bradwell}, 83 U.S. (16 Wall.) at 138–39. The decision rejects the argument that a woman would be entitled to admission to the bar as a privilege or immunity under the Fourteenth Amendment.
and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

The harmony, not to say, identity of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. ... 

... [I]n my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.  

Justice Bradley's use of gender clichés is extensive and varied. It lacks only the apocalyptic vision of liberated women torturing honest men by indulging in fraudulent trickery and hysteria. Apart from that, his opinion recounts the story of the polarization of men and women into two spheres. Women are timid, delicate, unfit for many occupations of civil life, and destined for duty-bound roles as wives and

176. *Bradwell*, 83 U.S. (16 Wall.) at 141, 142 (Bradley, J., concurring). The paragraph divisions have been added by the author.

177. See *supra* part I.B., rules 4 and 5.

178. Similarly, this attitude is paradigmatically asserted by Judge Horatio Davis in his commencement address to the graduating class of the East Florida Seminary for Women:

> Within the last month, for the first time in the history of Florida, young ladies have been examined and licensed to practice law. Whether they will make a success of it is yet to be determined. ...

> History is full of the noble deeds of your sex. ...

> But publicity is not your true sphere. It is a sun that while it warms, scorches and blisters.
Men, the "sterner sex," are expected to protect women and are privileged to hold the offices and functions of public life and reap the benefits of such positions.

Justice Bradley makes a considerable effort to emphasize that women's legitimate place is subordinate to men and remote from the public domain. He cites a diverse array of sources for support: state law, constitutional law, jurisprudence, and "the law of the Creator." Furthermore, he resorts to the most existential foundations and the most superior authority imaginable.

Finding nature and reason insufficient justifications, he asserts

“Seek to be good, but aim not to be great,
A woman's noblest station is retreat...”

Commencement address by Horatio Davis to the graduating class of the East Florida Seminary for Women (May 24, 1898), in Morello, supra note 4, at 42.

179. The arguments in Carfania's case refer to the ethos of female modesty (pudicitia) and reject the idea that women should become involved in male offices (virilia officia). There is, however, no explicit reference to the female role of being a wife and mother. See supra notes 56–64 and accompanying text. The protectionist argument is also missing in Carfania's case. However, in the provisions based on the Senatusconsultum Velleianum (Dig. 16.1 ad senatus consultum Velleianum; see also supra note 168), which prohibits women from making themselves collaterally liable for the debts of others, Roman jurists espouse a strong protectionist ideology. See, e.g., Crook, supra note 168, at 85.

180. For a discussion of virilia officia, see supra text accompanying notes 60–62.

181. See supra part I.B., rule 1.


186. In contrast, a sexist ideology with a more practical focus was expressed by Yale graduate George G. Sill in an 1872 letter to Yale Law School, making the first request for the admission of a woman. Apparently, it failed to produce a formal answer:

A young lady has applied to me for permission to become a student of law in my office. I advised her to seek admission into Yale Law School for one year and then enter my office. Are you far advanced enough to admit young women to your school? In theory I am in favour of their studying & practising law, provided they are ugly, but I should fear a handsome woman before a jury.

Letter from George G. Sill to Yale Law School (Mar. 9, 1872), in Morello, supra note 4, at 90–91.

187. See supra part I.B., rules 7 and 8.

188. See supra part I.B., rule 4.
finally that women's roles are directly decreed by God. 189

Justice Bradley's effort produces an overblown argument. His rejection of Myra Bradwell's application becomes obsessive, thereby diminishing his credibility. It appears as if he needed not only to convince his audience but also to convince himself of the decision's correctness. 190 Justice Bradley's sermon proved in some respects more wishful than compelling. In 1879, the sexist sentiment expressed in his opinion was substantially frustrated by a statute 191 that provided for women's admission to the bar of the United States Supreme Court. 192

C. The Tedious Fight for Women as Jurors

The patriarchal desire to exclude women from active participation in the courts has also dominated the discussion of women's jury service. 193 The categorical exclusion of women jurors, developed as a rule of English common law, 194 died a slow death. The final steps toward


190. His opinion shows that Justice Bradley is aware that benefits are at stake and thus explicitly addresses the problem of distribution. He argues that men, who bear the responsibility of conducting public affairs, are entitled to the benefits of such activities. See Bradwell, 83 U.S. (16 Wall.) at 142 (Bradley, J., concurring).


192. The enactment was initiated by and particularly fought for by Belva A. Lockwood. Hoff, supra note 4, at 183–84; Morello, supra note 4, at 34–35.

193. See Hoff, supra note 4, at 224–27.

194. Blackstone explains that women were barred from jury service "because of the defect of sex": "propter defectum sexus." 3 William Blackstone, Commentaries *362. The same idea (defectus sexus) seems to have kept the Roman woman from being a iudex, who was the Roman official with functions similar to the juror. The iudex, appointed for a specific case, acted according to the litigation program that was decreed for him by the praetor. For an explanation of praetor and iudex see supra note 26. Through this program, the iudex received detailed guidance about how to hear evidence and decide the case.

Even though the iudex was not a magistrate, his function was of such importance in public life that men seem to have strictly reserved it for themselves. The sources reveal little reasoning for this gender rule. The Roman jurist Ulpianus simply connects the iudex function with the male sex: "Feminae ab omnibus officiis cивиibus vel publicis remotae sunt et iedo nec iudices esse possum nec magistratum gerere nec postulare nec pro alio intervenire nec procuratores existere." Dig. 50.17.2 (Ulpianus 1 ad Sabinum). (Translation: Women are excluded from all civil or public functions; therefore, they can neither be iudices nor hold the office of a magistrate nor make applications or interventions for another person, nor be procurators.) Paulus attributes the exclusion of women from functioning as iudices to custom: "Quidam enim legem impedimentum ne iudices sint, quidam natura, quidam moribus... Moribus feminae et
substantial gender equality in jury service were taken only in recent decades.\textsuperscript{195} There were even dissenting opinions expressing a pointed resistance to gender equality in the 1994 Supreme Court decision that held gender-based peremptory strikes unconstitutional.\textsuperscript{196}

The heart of Justice Bradley's philosophy in \textit{Bradwell v. Illinois},\textsuperscript{197} which relegates women to the domestic sphere and men to the public sphere, is also apparent in the result and the reasoning of \textit{Hoyt v. Florida}.\textsuperscript{198} This 1961 Supreme Court decision assumed and confirmed a traditional gender view; the Court maintained this view until its 1975 decision in \textit{Taylor v. Louisiana}.\textsuperscript{199} \textit{Hoyt} held that Florida's practice of automatically excluding women from jury service unless they explicitly asked to serve was constitutional.\textsuperscript{200} Justice Harlan delivered the opinion of the Court:

\begin{quote}
Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many
\end{quote}

\textit{servi, non quia non habent iudicium, sed quia receptum est, ut civilibus officiiis non fungantur.}\textsuperscript{\textsuperscript{195}} Dice 5.1.12.2 (Paulus 17 ad edictum). (Translation: In fact, some are prevented by statute from being \textit{iudices}, some by nature, some by custom. . . . Women and slaves by custom, not because they lack judgment, but because it is accepted that they do not perform civil functions.)


A system excluding all women, however, is a wholly different matter. It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare \textit{any} women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials.

\textit{Taylor}, 419 U.S. at 534–35 (footnote omitted).


\textsuperscript{197.} 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

\textsuperscript{198.} 368 U.S. 57 (1961).

\textsuperscript{199.} 419 U.S. 522 (1975) (holding that the practice of systematically excluding women from state jury duty is unconstitutional). See, e.g., \textit{Hall v. Mississippi}, 385 U.S. 98 (1966) (affirming the reasoning of \textit{Hoyt v. Florida}).

\textsuperscript{200.} \textit{Hoyt}, 368 U.S. at 61–62.
parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.201

The tone of Justice Harlan’s statement may be different from Justice Bradley’s in *Bradwell v. Illinois*,202 but its substance is remarkably similar. Women are essentially homemakers, wives, and mothers,203 while men are obviously envisioned differently. This difference sets a standard for men as less committed to the practical challenges and the emotional dynamics of family life than women.

According to Justice Harlan, the two-sphere gender concept promotes general welfare.204 This argument is as traditional as it is specious.205 Harlan evokes the idea of general welfare but fails to explain it. Rather, he seems to identify the existing order with the general welfare. This approach contains a one-dimensional concept of legitimacy—any deviation from the given order automatically means an illegitimate attack against the general welfare. Thus, Harlan resorts to a circular argument. His approach fails to utilize a notion of general welfare that can serve as an independent criterion for the legitimacy of the respective order.206 This simplification might, however, be expedient. In a conservative view, the fear of exposing those who benefit from the given societal order provides good reason to avoid a serious discussion of this welfare concept.207

Justice Bradley explains in *Bradwell v. Illinois* that “[m]an is, or should be, woman’s protector and defender.”208 Like Justice Bradley,

202. 83 U.S. (16 Wall.) 130 (1872); see *supra* text accompanying notes 175–181.
203. See *supra* text accompanying notes 82–89 and notes 177–192.
205. For an earlier example of the use of this argument, see Letter from John Adams to James Sullivan, *supra* note 83.
206. Another way of superficially discussing the general welfare is to draft a biased, pessimistic scenario depicting the end of civilized society should the existing order change. See *supra* text accompanying notes 88–89.
207. See *supra* part I.B., rules 1 and 3.
208. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

“[E]ven the disabilities which the wife lies under, are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.” 1 WILLIAM BLACKSTONE, COMMENTARIES *445.
Justice Harlan regards generally relieving women from their civic duty as legitimate. Not incidentally, his argument focuses on the burdens of jury service and ignores its benefits. The patriarchal strategy is to hide the fact that jurors are exercising a civic right and that their role, since it is vested with legal authority, allows them to participate significantly in the societal discourse.\textsuperscript{209}

Although many of the nineteenth-century gender stereotypes seem to have disappeared from current judicial opinions, judges still use the conservative approach of preserving gender rules by minimizing gender issues.\textsuperscript{210} In the recent Supreme Court decision of \textit{J.E.B. v. Alabama ex rel. T.B.},\textsuperscript{211} which held that gender-based peremptory strikes of potential jurors are unconstitutional,\textsuperscript{212} the dissenting opinions of Chief Justice Rehnquist and Justice Scalia provide evidence of this method. Chief Justice Rehnquist rejects the majority's reliance on \textit{Batson v. Kentucky},\textsuperscript{213} which prohibits race-based peremptory strikes:

Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality.\textsuperscript{214}

Chief Justice Rehnquist's dissent expresses two peculiar ideas. The first is that only numerical minorities warrant specific protection. Chief Justice Rehnquist apparently assumes that because women are not a numerical minority, they are sufficiently served by having access to the institutions and proceedings of democracy.\textsuperscript{215} The second idea is that gender equality may be neglected because "racial equality has proved to be a more challenging goal to achieve. . ."\textsuperscript{216} This is a manipulative polarization of two distinct, but nevertheless substantially related,\textsuperscript{217}

\begin{itemize}
  \item \textsuperscript{209} See \textit{supra} part I.B., rules 8 and 9.
  \item \textsuperscript{210} See \textit{supra} part I.B., rules 4 and 9.
  \item \textsuperscript{211} 114 S. Ct. 1419 (1994).
  \item \textsuperscript{212} \textit{Id.} at 1421.
  \item \textsuperscript{213} 476 U.S. 79 (1986).
  \item \textsuperscript{214} \textit{J.E.B.}, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{215} See \textit{supra} part I.B., rule 3.
  \item \textsuperscript{216} \textit{J.E.B.}, 114 S. Ct. at 1435 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{217} See, \textit{e.g.}, \textit{Judith Butler}, \textit{Bodies That Matter} 18, 167 (1993); \textit{Catharine A.}
Moreover, the attribution of the phrase "more challenging" to race-matters oddly depreciates gender-matters as issues of relatively little importance.\footnote{219}

Justice Scalia similarly adopts a minimizing approach in his dissent.\footnote{220} This first becomes obvious in his semantics: he insists on speaking of sex instead of gender, thus reducing the impact of the decision on the legal gender discourse.\footnote{221} Furthermore, he depicts the historical considerations in the majority opinion as irrelevant and adds derisive comments:

[T]he Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot).\footnote{222}

By making this casual joke, Scalia attempts to conceal that attorneys and juries share a material common denominator, in that both play a significant role in the power game.\footnote{223} When women practice law and render jury service, they are doing much more than "going to the
courthouse a lot".\footnote{222}

\begin{footnotes}
\footnote{218}{See, e.g., \textsc{Morello}, supra note 4, at 143–72.}
\footnote{219}{See \textit{infra} text accompanying notes 234, 238–242. A similar manipulative approach resulting from a distortedly narrow view of the issues at stake is taken by the Court in \textit{Bowers} v. \textit{Hardwick}, 478 U.S. 186, 206, 208 (1986). For Justice Blackmun’s criticism of that approach, see \textit{Bowers}, 478 U.S. at 206, 208 (Blackmun, J., dissenting). See \textit{infra} note 302.}
\footnote{220}{See supra note 15.}
\footnote{221}{For Justice Scalia’s semantics, see supra note 15.}
\footnote{222}{\textit{J.E.B.}, 114 S. Ct. at 1436 (1994) (Scalia, J., dissenting). Justice Scalia further comments that "the Court’s legal reasoning in this case is largely obscured by anti-male-chauvinist oratory . . . ." \textit{J.E.B.}, 114 S. Ct. at 1438 (Scalia, J., dissenting).}
\footnote{223}{"The lawyer role has as its implicit norms the same qualities that are the explicit norms of masculinity as it is socially defined. It is a power role." \textsc{MacKinnon}, \textit{On Exceptionality: Women as Women in Law, in Feminism Unmodified}, supra note 5, at 74 [hereinafter \textsc{MacKinnon}, \textit{Exceptionality}].}
\end{footnotes}
courthouse a lot.”\textsuperscript{224} They are playing an active part in the institutional proceeding, thereby exercising a function of essentially public significance.\textsuperscript{225}


Carfania’s story is ancient but is not antiquarian history. Men still condemn women to self-restraining “decency,”\textsuperscript{226} and this attitude sometimes invades the legal discourse. In a recent well-known case, a female New York attorney was rudely silenced by a judge.\textsuperscript{227} Martha Copleman, the attorney, reports:

The judge went into a long diatribe about how legal services lawyers bring a lot of frivolous cases, clog the court’s calendar and should be confined to a special court for legal services-initiated proceedings. At one point during his questioning he addressed me as “little girl”. I objected, and requested that he address me as “counselor”. He apologized. Finally, he denied my request for interim relief, and rescheduled the case to be heard several weeks later. I then requested a shorter adjournment, and he exploded. In the middle of my reargument, he ordered me to be quiet and, by way of denying my final request for a briefer adjournment of the case, yelled: “I tell you what, little girl, you lose!”\textsuperscript{228}

It appears that, like Carfania,\textsuperscript{229} Copleman had exercised her litigation rights without diffidence or womanish coquetry, thereby

\textsuperscript{224} \textit{J.E.B.}, 114 S. Ct. at 1436 (Scalia, J., dissenting).

\textsuperscript{225} Justice Scalia’s disdain for historical arguments is inconsistent with his use of such arguments when it serves his ends. For example, he writes:

\begin{quote}
In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people’s traditions.
\end{quote}

\textit{J.E.B.}, 114 S. Ct. at 1439 (Scalia, J., dissenting).

\textsuperscript{226} In Carfania’s case, it is the notion of \textit{pudicitia}. See \textit{supra} notes 56–60 and accompanying text.

\textsuperscript{227} See \textit{supra} part I.B., rule 13.


\textsuperscript{229} See \textit{supra} text accompanying notes 68–70.
provoking the judge, Anthony T. Jordan, Jr., to react in a blatantly discriminatory manner. The judge finds Copleman’s presence in the courtroom offensive. He degrades her professional commitment by blaming her for bringing frivolous cases, humiliates her by repeatedly addressing her as “little girl,” and silences her with his order to be quiet.

Copleman subsequently filed a complaint against the judge, and the case was tried before the New York State Commission of Judicial Conduct. The majority of the Commission held that the judge’s behavior constituted misconduct and that he should be admonished. However, one member of the Commission, John J. Bower, delivered a dissenting opinion in which he stated that there was no misconduct and therefore no grounds for sanction:

To prosecute a judge for anything trivial was aptly described by Horace some 2,000 years ago: "The mountains will be in labor, and a ridiculous mouse will be brought forth." . . .

I am not persuaded that we must make a public example of respondent so that no judge in the state will insult sensitive female lawyers by calling even one, in an inadvertent manner, “little girl”.

Bower’s quotation of Horace returns us to Carfania. Horace, born in 65 B.C., probably knew of her as a contemporary. In his dissenting opinion, Bower utilizes the proven patriarchal method of attempting to dispose of an issue by labelling it trivial.

230. Copleman, suspecting that the judge also harbored a class prejudice against legal services’ clients, concludes: “The judge’s mounting irritation at my assertive insistence on my client’s right to access to the court was, I think, what finally elicited the ‘little girl’ remark.” Copleman, supra note 228, at 108.

231. Similarly, the restriction of Roman women’s litigation rights resulting from Carfania’s case is based on the argument that she lacked pudicitia and disturbed the magistrate’s peace (“magistratum inquietans”). See supra text accompanying notes 65–67.


236. See supra part I.B., rule 9.
Furthermore, his citation of Horace's metaphor has an insidious double message. Bower ridicules Copleman by contrasting the mountains, the machinery of male justice, to a mouse, the female attorney. His insult goes beyond that of the trial judge; he insinuates that the complaining lawyer is not only a "little girl," but also a little animal. By referring to her in this way, he both incapacitates and dehumanizes her.3

Bower's distortion continues when he contemptuously speaks of Copleman as "sensitive,"8 thus attributing to female lawyers an attitudinal weakness that renders them unfit for professional business in the courtroom.239 Bower seems determined to prevent Judge Jordan from becoming an example that reflects the rules of appropriate judicial behavior.240 Therefore, Bower refuses to join a decision that should have some impact on the fight to eliminate bias against women in the courts,241 stating, "I am not persuaded that we must make a public example. . . ."242

V. Patriarchal Outlawing of Non-Masculinity

Patriarchy frequently operates by exercising the power of definition. To define is to set limits and to determine what is inside and what is beyond those limits. Two achievements of patriarchy's power to define are of primary significance for the present analysis. The first is the myth of women's inability to hold official power (preferably by creating deterrent examples of powerful women). The second is the degradation of men who reveal behavior that patriarchy regards as feminine.

237. See supra part I.B., rule 12.
239. See supra part I.B., rules 10 and 11.
240. For the pattern of exemplum, see supra part I.C.
241. As Copleman describes it, the case seems to have developed into an example: "Apparently, according to reports I have received, this decision had a tremendous impact on older male judges, which proves to me that it was the very subtlety of the insult 'little girl' and its condemnation which made the Commission's determination so educational." Copleman, supra note 228, at 108.
A. Male Blindness to Images of Women in Official Power

Patriarchy has deeply internalized the separation of feminine gender and official power. The few images of women who exert considerable power beyond the domestic sphere bear largely fictitious features. The fictitious negative exaggeration of these images works in two ways: it both prevents women's positive identification and provokes a common reaction of contempt and repellence.

Antique Greek myth provides two archetypes of such images in Western tradition. Among those women who involve themselves in the power game, two figures emerge—Medea and the Amazon. They are constructs of genuinely powerful women; that is, they enjoy positions distinct from the male origin and control of power.

Medea performs a highly political and public act when she radically rejects her role of wife and mother. She opposes the divorce pursued by her husband Jason, and she also kills the two sons she has had with Jason as well as his wife-to-be, Glauke. Medea’s power is not derived

243. “A woman can also take the male point of view or exercise male power, although she remains always a woman. Our access to male power is not automatic as men’s is; we’re not born and raised to it.” MacKinnon, Desire, supra note 66, at 52; see also Berger & Robinson, supra note 6, at 73–80.

244. Margaret Brent, see supra text accompanying notes 151–155, was not an image, but a real woman who was exceptionally successful in legal business. Evidence of the male reaction to the presence of this woman in the official domain can be gleaned from the terms of their discourse—they frequently addressed her as: “Gentleman Margaret Brent.” See Morello, supra note 4, at 3.

245. See supra part I.B., rules 1 and 5.

246. Greek mythology provides other examples of powerful women (such as Klytemnestra, Elektra, Kassandra, Lysistrata, and Antigone), but their power seems largely limited and controlled. When they deviate from the patterns of patriarchy they are ignored, misunderstood, discouraged, or (more severely) punished by the patriarchal regime. See, e.g., Mary R. Lefkowitz, Women in Greek Myth 80–94 (1986).

247. See, e.g., Cantarella, supra note 7, at 67–69 (with references to the play Medea by Euripides). A comparable conflict between matriarchal claims and patriarchal principles can be discovered in Aeschylus’ Eumenides (The Furies). See Kate Millett, Sexual Politics 157–60 (1969).

248. Medea can be sharply contrasted with a woman who is depicted in a Roman funerary inscription. Fontes Iuris Romani Ante Justiniani, supra note 64, at 209–18. For a translation of the funerary inscription, called the “laudatio Turiae,” see Lefkowitz & Fauth, supra note 7, at 135–39. This woman is probably the person Valerius Maximus refers to as Turia. Val. Max. 6.7.2. Turia died in or shortly before 9 B.C. See Dietz Flach, Die sogennante Laudatio Turiae 5–6 (1991). Praising Turia, the inscription enumerates what the Roman patriarchs regarded as women’s virtues, called domestica bona (domestic goods). The first of the virtues ascribed to Turia is pudicitia. Fontes Iuris Romani Ante Justiniani, supra note 64, at 212. For an explanation of pudicitia, see supra notes 56–60 and accompanying text. Turia is
from an official function, but rather lies in her crimes. Her power has a
twofold negative connotation. In the eyes of the Greek patriarchy,
Medea's power is not only destructive and criminal, but also relies on
witchcraft. After she has committed her crimes, she even succeeds in
leaving the country, and thus she evades punishment by the Greeks.

The Greeks, who invented Medea, deliberately made her a
barbarian (she is not Greek but from Kolchis, located at the Black Sea)
and invested her with magical forces. Because the Greeks perceived the
elements of feminine gender and genuine, not male-derived, power as
incompatible, they attribute Medea's power to a dark and mysterious
source.

The Amazons are another example of a mythical image of women
who exert genuine power. They are portrayed as even more inhuman
than Medea. The Greeks viewed the Amazons as combat machines.
For example, the Amazons cut off one breast in order to be unham-
pered in archery. The myth also claims that they use men only as slave
labor and occasionally resort to foreigners for the purpose of conception.

Male resistance to images of women in positions of official power
still exists in the courtroom. The common reaction to the appearance

particularly admired for having offered a divorce to her husband out of altruism.
Because their marriage was childless, Turia wanted to give her husband the
opportunity to remarry and have legitimate natural offspring. 3 Fontes Iuris Romani
Antejustiniandi, supra note 64, at 216. See generally Cantarella, supra note 7, at
132–33; Flach, supra.

249. For their appearance in antique literature, see, e.g., Homer, Ilias 2.814, 3.189, 6.186;
Herodot, Historiae 4.110–4.117; and Diodor, Bibliotheka 2.45.3, 3.53.3. See also
Plut. Thes. 26; Justin. 2.4.9. For modern discussions see, e.g., Cantarella, supra

250. For women's roles and functions vis-à-vis the military of Roman antiquity, see, e.g.,
Margaretha Debrunner Hall, Eine reine Männerwelt?, in Reine Männerwelt? Frauen in Männerdomänen der antiken Welt 207, 207–28 (Maria H.
Dettenhofer ed., 1994). For antique sources on women gladiators, see Lefkowitz & Fant, supra
note 7, at 213–15. For a discussion of the enduring resistance to
women participating in combat, see, e.g., Elizabeth Villiers Gemmette, Armed
Combat: The Women's Movement Mobilizes Troops in Readiness for the Inevitable
Constitutional Attack on the Combat Exclusion for Women in the Military, 12 Wom-
en's Rts. L. Rep. 89 (1990). For a discussion on women's roles in the armed
forces, see, e.g., Women in the Military (E. A. Blacksmith ed., 1992).

251. See Diod. 2.45.3, 3.53.3; Plut. Thes. 26; Justin. 2.4.9.

252. For example, Justice Lawrence, delivering the court's opinion in In re Bradwell, 55
Ill. 535 (1869), aff'd sub nom. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872)
(see supra text accompanying notes 172–176), comments on male lawyers' patriar-
chal conservatism and expresses a paternalistic commitment to women's liberation:
of a woman attorney illustrates a perfidious dilemma. The initial reproach, put forward by the client and nurtured by male colleagues in her firm, is that she is not aggressive enough. However, as soon as a woman displays the assertiveness that men usually show in court, the accusation becomes, “she is too pushy.” This criticism implies that the lawyer is foremost seen as a woman who should not confront

While those theories which are popularly known as “woman’s rights” can not be expected to meet with a very cordial acceptance among the members of a profession, which, more than any other, inclines its followers, if not to stand immovable upon the ancient ways, at least to make no hot haste in measures of reform, still, all right minded men must gladly see new spheres of action opened to woman, and greater inducements offered her to seek the highest and widest culture.

In re Bradwell, 55 Ill. at 542. See also, e.g., Berger & Robinson, supra note 6, at 88–102. Furthermore, Karen Berger Morello remembers:

Throughout much of the 1970s I found myself conspicuously the only woman lawyer in the courtroom. On several occasions I was told to sit down and wait for my lawyer to show up. Once, when I approached the bench for a pretrial conference, the presiding judge refused to believe I was a lawyer. A crowded and noisy courtroom fell silent as he demanded to know the date and place of my admission to the bar. When I gave the information the judge winked at me and said, “Okay, I’m sorry, honey,” then he and the spectators exploded with laughter.

Morello, supra note 4, at xi. See also supra part IV.D.

253. This dilemma is produced by patriarchy’s stereotyping categorizations: “[T]o be a woman means either to be like a man or to be like a lady. We have to meet either the male standard for males or the male standard for females.” MacKinnon, Exceptionality, supra note 223, at 71.

254. For the oppression that women encounter as lawyers in big law firms, see also supra note 158.


256. Maesia Sentinas, the woman Valerius Maximus speaks of before he tells Carfania’s story, see supra note 67, is depicted as having exhibited such a masculine mind (“sub specie feminae virilem animum gerebat”) that she was called “Androgyne,” the “man-woman.” Val. Max. 8.3.1.

257. Morello, supra note 4, at 188–89.

258. See, e.g., Justice Lawrence in In re Bradwell:

There are some departments of the legal profession in which she can appropriately labor. Whether, on the other hand, to engage in the hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, would not tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her, is a matter certainly worthy of her consideration.

In re Bradwell, 55 Ill. at 542. See also supra text accompanying notes 172–176.
and embarrass men in court by transgressing the norms of female delicacy.

Finally, there may be an even stronger bias against women judges. The patriarchs instinctively guard the judicial domain, where the power is greater and more expressive than in other legal areas and where a woman, because of her official position, would be protected by the dignity of the court against the sexism of attorneys or parties. Thus, patriarchy seems to focus its control on the judicial recruitment process, which on the whole disfavors women. This strategy is evidenced by the low percentage of women judges. Even when a woman does succeed to the bench, she is likely to be appointed to a court of inferior jurisdiction or of family matters.

B. Patriarchy’s Artistry in Creating and Modifying Gender

Another conspicuous patriarchal strategy that works by gender definition is to oppress men by “feminizing” them. This process of “feminizing,” by which men are subjected to gender rules originally developed for and connected with women, is likely to result in excluding some men from official functions, such as conducting legal business.

This takes us back to functions in court and to the Roman legal provisions surrounding Carfania’s case. The Romans excluded not only women from making applications on behalf of others, but also other groups: blind persons, persons condemned for a capital crime, gladiators, and men known to have engaged in passive


260. See supra part I.B., rule 12.

261. For statistics, see, e.g., Berger & Robinson, supra note 6, at 89–93; Resnik, supra note 1, at 1770–71. For a discussion of the small percentages of women judges in the federal courts, see, e.g., Resnik, supra note 1, at 1700–12.

262. See, e.g., Morello, supra note 4, at 225–27 (noting that few female judges serve on traditionally male benches); Berger & Robinson, supra note 6, at 89–91 (finding that women encounter glass ceilings in the legal profession).

263. See supra part II.A.

264. See Digest 3.1.1.5 (Ulpianus 6 ad edictum).

265. See Digest 3.1.1.6 (Ulpianus 6 ad edictum). Similarly, a man condemned for calumnia, i.e., vexatious litigation, is excluded from making applications on behalf of others. See Digest 3.1.1.5 (Ulpianus 6 ad edictum).

266. See Digest 3.1.1.6 (Ulpianus 6 ad edictum) (applying the restriction to the man who has hired out his services to fight against beasts in the arena).
WOMEN IN THE COURTS

homosexual acts. The last category is noteworthy in terms of gender, as Ulpianus' report makes clear:

Removet autem a postulando pro aliis et eum, qui corpore suo muliebra passus est. . . ."267

Translation:

He [the praetor]268 excludes also that one from making applications for others who has submitted his body in the female manner. . . .

In ancient Rome, the practice of sodomy269 resulted in some discrimination, but it was a marginal issue at law.270 The Roman legal sources regard homosexual activity as a crime only in cases of rape or when a juvenile is involved.271 This contradicts Chief Justice Burger's claim in Bowers v. Hardwick272 that "[h]omosexual sodomy was a capital crime under Roman law."273 His argument is designed to suggest that virtually the whole of Western civilization, even ancient Rome with its

267. Dig. 3.1.1.6 (Ulpianus 6 ad edictum). For an explanation of this inscription, see supra note 37.
268. For a discussion of praetor, see supra note 26.
269. Against the background of mostly historical sources, it seems appropriate to use the word "sodomy" as a descriptive term denoting homosexual acts. For the introduction of "sodomy" as a legal term, see infra note 276.
270. A person who voluntarily submits to stuprum (illegitimate sexual conduct) will be fined one-half of his property and prohibited to dispose of the other half by way of will. The passive male sodomite seems to be included in this provision. Paul Sent. 2.26.13; see also Coll. 5.2.2.
271. A republican statute, the Lex Scatinia (149 B.C., Cic. fam. 8.14), seems to have levied a fine for stuprum (illegitimate sexual conduct) cum masculo (with a man). The statute is never referred to in the transmitted writings of Roman jurists. The Augustan Lex Iulia de adulteriis (18 B.C., Suet. Oct. 34), which proscribed stuprum, led to a comment by the jurist Modestinus explaining that stuprum included acts committed with a widow, a virgin, or a boy. Dig. 48.5.35.1 (Modestinus 1 regularum). Thus it seems that before the fourth century A.D., criminal prosecution of homosexual activity between men focused on cases of rape (Paul Sent. 2.26.12; see also Coll. 5.2.1) or cases involving juveniles. See also Derrick S. Bailey, Homosexuality and the Western Christian Tradition 64–70 (1955); Danilo Dalla, "ubi Venus Mutatur": Omosessualità e diritto nel mondo romano 7–131 (1987).
pagan ethics pre-dating Christian morals, regarded homosexual activity between consenting adults as a horrid offense.\textsuperscript{274}

Before the Christianization of the Roman state in the fourth century A.D., Roman law\textsuperscript{275} deals very little with sodomy.\textsuperscript{276} Nevertheless, Roman ethics do taint sodomy as dishonorable behavior. In ancient Rome, for example, if a man became known as a sodomite, his career

\begin{quote}

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality and the Western Christian Tradition 70–81 (1975). . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.


Burger's citation of Bailey refers to Bailey’s chapter on the Christian Roman emperors; the preceding chapter explains how little pre-Constantinian legislation and practice were concerned with homosexual conduct. Bailey, supra note 271, at 64–70.

275. The body of rules referred to as Roman law is primarily understood as the law of Roman antiquity prior to the Constantine Christianization in the fourth century A.D. There is also a second, much broader understanding of Roman law. In terms of legal tradition, the thread of Roman law (first evident in the Twelve Tables, circa 450 B.C.) has never been cut off. Reinhard Zimmermann, \textit{The Law of Obligations: Roman Foundation of the Civilian Tradition} x–xi (1990). In South Africa, Roman law still constitutes a considerable part of the legal system. Zimmermann, supra, at xiii. In the countries of the civil law tradition, Roman legal thought lives on in the concepts of statutes that have replaced Justinian’s Corpus Iuris Civilis. Zimmermann, supra, at x–xi.

276. Of the two sources cited in Chief Justice Burger's concurring opinion in \textit{Bowers v. Hardwick}, 478 U.S. 186, 196 (1986), the first, Code Th. 9.7.6, is an enactment by the emperors Valentinianus, Theodosius, and Arcadius, dated August 6, 390 A.D. See also Coll. 5.3. The second, Code J. 9.9.31, see also Code Th. 9.7.3, is an enactment by the emperors Constantius and Constans, dated December 4, 342 A.D. Both enactments provide severe punishment for homosexual activity.

Surprisingly, Chief Justice Burger does not mention the statute Nov. 141 (dated March 15, 559 A.D.), by which the emperor Justinian recriminalized men’s homosexual conduct and, by reference to the Old Testament’s story of Sodom, \textit{Genesis} 19:5, created sodomy as a criminal legal term. Nov. 141 became the leading legal source used in the criminalization of sodomy for centuries. “[T]he juristic fame of their [Nov. 141 and Nov. 77] promulgator has invested them with a special authority, with the result that they have exerted a strong influence upon the formation of mediaeval and modern opinion, and have tended to standardize punishments of extreme severity.” Bailey, supra note 271, at 73.

in the public domain would be jeopardized.\textsuperscript{277}

The Romans' feeling of repugnance for acts of sodomy reflects patriarchal gender definitions.\textsuperscript{278} Patriarchy shapes our conceptions of gender\textsuperscript{279} mainly by establishing interrelational rules of supremacy and subordination.\textsuperscript{280} In defining gender, patriarchy attributes the stereotyped characteristics of masculine gender to male sex and of feminine gender to female sex. In addition, however, patriarchy creates a peculiar cross-correlation between its categories of sex and gender: a person of male sex who engages in a sexual practice that is labelled “feminine” will be gendered “feminine” and thus subjected to subordination like the female sex.\textsuperscript{281} The Roman law concerning litigation rights offers evidence of this pattern. A man who practices sex in the female manner (by being penetrated) has his litigation rights abridged just as if he were a woman.\textsuperscript{282}

This patriarchal pattern, while ancient, is still quite prevalent.\textsuperscript{283} It persists in every jurisdiction, in the United States\textsuperscript{284} and elsewhere, that

\begin{itemize}
\item \textsuperscript{277} This is illustrated, for example, by Roman historians' repeated reference to military leaders and statesmen who suffered prosecution and discrimination upon being accused of homosexual activity. For a brief list of antique Roman sources reporting such incidents, see Amy Richlin, \textit{The Garden of Priapus: Sexuality and Aggression in Roman Humor} 87–88 (2d ed. 1992). For a survey and discussion of Roman sources concerning male homosexuality, see John Boswell, \textit{Christianity, Social Tolerance, and Homosexuality} 61–87 (1980); see also Richlin, \textit{supra}, at 220–26, 257–59, 287–91.
\item \textsuperscript{278} For gender as a social category that might even feminize men, see MacKinnon, \textit{Desire}, \textit{supra} note 66, at 56.
\item \textsuperscript{279} Patriarchy tends to camouflage that the conceptions of gender are shaped and can be reshaped in society's discourse. See \textit{supra} part I.B., rule 7. For example, Justice White, who delivered the opinion of the court in Bowers v. Hardwick, 478 U.S. 186 (1986), states: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ." \textit{Bowers}, 478 U.S. at 191. Procreation is a phenomenon that is not as obviously connected with homosexuality as with heterosexuality. However, family and marriage are societal constructs, and whether their connection to sexual conduct (which Justice White asserts to be relevant) can be found depends completely on what society defines as family and marriage.
\item \textsuperscript{280} "Gender is an inequality of power, a social status based on who is permitted to do what to whom." MacKinnon, \textit{Art}, \textit{supra} note 8, at 8.
\item \textsuperscript{281} See \textit{supra} part I.B., rules 10 and 11.
\item \textsuperscript{282} See Digest 3.1.1.6 (Ulpianus 6 ad edictum) (explaining that a man raped by robbers or enemies is not subject to the woman-like restriction of litigation rights).
\item \textsuperscript{284} As of 1993, the criminal statutes of twenty-four American states and the District of Columbia made adult consensual sodomy a crime. \textit{Lesbians, Gay Men, and the Law} 80 (William B. Rubenstein ed., 1993).
\end{itemize}
criminalizes homosexual activity. Like today, the traditional criminal concept of sodomy has developed a broader meaning, labelled "deviant sexual intercourse." Thus, as a rule, the criminalization has extended to the active sodomite and sometimes even to certain forms of sexual acts between partners of the different sexes.

Nevertheless, societal condemnation still focuses on sexual conduct between men and acts of non-vaginal penetration. The obsession with these particular sexual acts explains in part why there have been fewer oppressive measures against homosexual activity between women. For example, lesbian sex was scarcely criminalized until the late nineteenth century. Furthermore, the legal regulation of lesbian sex seems as a whole to have been less rigid than the prosecution of sodomy between men.

285. See supra part I.B., rules 7, 8, and 11.
287. As Ruthann Robson comments:

The oral/anal strategy usually prohibits any sexual contact between the sex organs (described also as genitals) of one person, and the mouth or anus of another. These statutes are anatomically specific to a certain extent, but they also target what is generally considered sodomy—sexual contact between a man's penis and an anus, or sexual contact between a man's penis and a mouth, also called fellatio. A few states broaden this strategy by also including objects, fingers, and body parts as prohibited penetrators of sexual organs.

Ruthann Robson, Crimes of Lesbian Sex, in Lesbians, Gay Men, and the Law, supra note 284, at 80, 81.
288. "Lesbians were censured by silence; sexual acts between two women were unimaginable." Silvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 202. See also Model Penal Code § 213.2 cmt.1.
289. A common patriarchal attitude toward lesbianism is to ignore or to deny its existence. See, e.g., Arriola, supra note 283, at 283. Justice Blackmun comments on Georgia's tradition of sodomy laws:


Little has changed in the patriarchal strategy of gender-stereotyping sexual behavior; the masculine role is still perceived as active and performing, the feminine role as passive and receiving. This discriminating regime lives on despite proclamations of equality. For example, the recent policy for dealing with homosexuals in the American armed forces, "don't ask, don't tell, don't pursue," does not affect the underlying rules outlawing all manifestations of homosexual orientation. Therefore, this policy is, in effect, the enforcement of the traditional homophobic regime. It rejects any form of affirmative expression or lifestyle

290. As its basic strategy, the patriarchal regime dictates a discourse of heterosexuality: "Heterosexuality is [the organized expropriation's] social structure, desire its internal dynamic, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue." Mackinnon, State, supra note 5, at 3-4.


292. The American Armed Forces Policy on Gay Troops is as follows:

Sexual orientation is a personal and private matter. Officials of the Armed Forces will not ask and service members will not be required to reveal their sexual orientation.

Homosexual orientation alone is not a bar to service entry or continued service unless manifested by homosexual conduct.

Homosexual conduct includes a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. When a member engages in homosexual conduct, he or she is subject to administrative separation.

A statement by a member that demonstrates a propensity or intent to engage in homosexual acts—such as a statement by the member that he or she is a homosexual—is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.


293. For a discussion of sexual orientation and sexual identity, see, e.g., Arriola, supra note 283, at 280–82.

connected with homosexual identity.\(^{295}\)

Patriarchy denigrates, genders, sometimes explicitly labels as "feminine," and often criminalizes behavior that deviates from the patriarchal conception of masculinity. Such "feminine" men are treated as outcasts and subjected to forms of oppression, including traditional methods of ostracizing women. Criminally convicting men for behavior that is gendered "non-masculine" officially stigmatizes them and constitutes formal legal discrimination.\(^{296}\) For instance, these men are excluded from official functions such as jury service or professional work at the bar or on the bench.

The persecution of the passive male sodomite under Roman law is evidence of patriarchy's paramount power of definition. By gendering certain men "feminine," patriarchy succeeds in transcending its initial stereotype that connects feminine gender and female sex. Patriarchy extends "feminine" beyond the correlating "female" and connects it with "male," which was originally its definitional opposite (in terms of sex).\(^{297}\) Legal and non-legal discrimination against male homosexuals pointedly reveals that gender, although based on sex and manifoldly related to sex,\(^{298}\) is not restricted to a specific sex.\(^{299}\) Patriarchy designs gender through highly artificial and arbitrary constructions when such constructions are expedient for its dominance.\(^{300}\)

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295. A person’s sexuality is truly his or her most intimate sphere, but at the same time it undeniably has public implications. (One example is Anita Hill’s testimony regarding Clarence Thomas and its enduring impact.) Insisting that gay men and lesbians stop confronting other people with their issues of sexuality is an oppressive act of silencing that prevents gender equality. See, e.g., Arriola, supra note 283, at 270–71. Rhode comments on the interdependence of the public and the private spheres: "Public policy shapes ‘private’ conduct, and private conduct also has public consequences in a wide range of areas, such as divorce, employment, sexual abuse, reproductive choice, sexual preference, single-sex institutions, and nonmarital cohabitation." Rhode, supra note 2, at 319.


298. For the sexual elements of the feminine gender stereotype, see, e.g., MacKinnon, State, supra note 5, at 109–11.

299. For a discussion of the social construction of sexual identity, see, e.g., Arriola, supra note 283, at 287–88.

300. "Contemporary condemnation of homosexual behavior is directed primarily at the violation of prescribed gender roles, not at sexual acts." Law, supra note 288, at 188. For a discussion of feminizing the passive male homosexual partner in Roman antiquity, see Richlin, supra note 277, at 225.
VI. Law, Coercion, Violence, and Patriotry

The law has been a crucial means of power for most of our history. It has been one of the strongest threads in the fabric of society's normative discourse. In political terms, the law clearly reflects the nature of power. On the one hand, power has the potential to protect, encourage, support, and liberate. On the other hand, it has the potential to intimidate, confine, harm, and destroy. In terms of civil rights, power works positively by allocating privileges and immunities, yet it works negatively by denying such rights on the basis of improper distinctions.

In reality, power is closely linked to force. The employment of force is one method of transforming power from a potential to a concrete act. Enforcement proceedings make power actual, and they manifest power effectively. Furthermore, there is a mutual correlation between force and power: the application of force can enhance power, and this increased power may in turn strengthen its acts of coercion.

Patriarchy's success formula combines two fundamental elements—a myth and an executive instrument. The myth of masculine gender is that the male sex implies superiority, thus identifying inferiority with the female sex and gendering subordinate persons as "feminine." The executive instrument is the monopoly over coercion as a means of expressing and actualizing men's alleged superiority. Conversely, the

301. As Rifkin notes:

Law is powerful as both a symbol and a vehicle of male authority. This power is based both on an ideology of law and an ideology of women that is supported by law. One function of ideology is to mystify social reality and to block social change. Law functions as a form of hegemonic ideology.

Rifkin, supra note 9, at 84 (footnotes omitted). See also supra part I.B., rule 5.


Justice Blackmun criticizes the biased, narrow approach of the majority in his dissenting opinion. Bowers, 478 U.S. at 199 (Blackmun, J., dissenting). "The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Bowers, 478 U.S. at 206 (Blackmun, J., dissenting).

Blackmun further states: "Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy." Bowers, 478 U.S. at 208 (Blackmun, J., dissenting).

303. See supra part I.B., rules 7 and 8.

304. See MacKinnon, Difference, supra note 13, at 40.
monopolization of coercion affirms the masculine gender by identifying masculinity with effectiveness.

Patriarchal supremacy is effectuated by (highly monopolized) coercive force that appears in two forms: violence and legal enforcement. Violence functions as the intrinsic, vital component of collective and individual masculinity. Every man is gendered as masculine through some initiation into violence. This initiation may assume a variety of forms, from actual physical combat to inconspicuous processes such as the participation in structural violence. Violence is the source and sustenance of male supremacy.

Unlike violence, which has the connotation of being vile and vicious, legal enforcement is presumed proper and positive. However, the legal regime, a system that by definition includes coercive actions, reveals some close structural resemblance to violence-based power holding. From this critical perspective, legal coercion and violence are comparable in their use as force.


307. Ann Scales notes:

By “militarism” I mean the pervasive cluster of forces that keeps history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that. Ultimately, force and gender are parts of the same death-seeking process. For these same forces account in turn for the oppression of women in whatever patriarchal institution—religion, state, family, academy—and by whatever method—rape, battering, economic exploitation, rendering invisible.

Thus, militarism should not only be on the feminist agenda. It should be viewed as being in fundamental symbiosis with gender oppression.


308. See MACKINNON, Difference, supra note 13, at 40–41.

309. The death penalty highlights the delicacy of the distinction between legal enforcement and violence. It is either supported as legally correct and socially expedient or rejected as brutal, illegitimate, and immoral.
The law is defined as the set of norms connected with official enforcement. Therefore, it is by its very nature intrinsically linked to state force. The law’s coercive facet makes it one of the most valuable weapons within patriarchy’s arsenal. Coercive force, which is the vital strength of male hegemony, must be strictly reserved for men. Thus, the maintenance of male supremacy requires rejecting, minimizing, or at least controlling women’s active participation in a substantially force-endowed section of the regime—the courts.

Conclusion

Patriarchy is an oppressive regime. The nature of oppression warrants criticism and calls for opposition. Opposition to the patriarchal regime is all the more legitimate and desirable because patriarchy oppresses more than one half of the world’s population. Such opposition means political activity, including practical political strategies.

A prudent political strategy must define its goals, evaluate its means, and assess its obstacles. The historical analysis presented in this article contributes to the assessment of the obstacles one will encounter in a strategic challenge to patriarchal dominance.

Societal attitudes have shifted and equality for women has become an often-stated phrase in everyday political rhetoric. Yet it remains an open question whether this change in discourse reflects an improvement in gender equality. Considering the endurance that patriarchal methods, arguments, and patterns have shown, the path to gender equality seems neither smooth nor short.

310. "For feminist jurisprudence, the more serious aspect of law is its relationship to force." Scales, supra note 307, at 30.
312. "In the United States, it is acknowledged that the state is capitalist; it is not acknowledged that it is male." MACKINNON, STATE, supra note 5, at 215. See also MACKINNON, STATE, supra note 5, at 237-49; MORELLO, supra note 4, at 248-49. Morello argues:

It is tempting to point to these significant gains and to believe that the battle for equality is almost over. But history indicates otherwise. At nearly every stage of their development women attorneys incorrectly believed that once they themselves had proven their competence, acceptance for women in the next generation would be assured.

MORELLO, supra note 4, at 248-49.
313. See supra parts I.A. and I.B.
The patriarchal regime has a special interest in excluding women from the exercise of official power. History bears rich evidence of this tradition, which is still in force. Resorting to the allegedly feminine virtues of "modesty" and "privacy," the patriarchs tend to create examples that confirm the rule of banishing women from the public domain. In creating such examples, the patriarchal regime disregards those women who actually participate in public power and who could serve as affirmative role models for women's power holding. Instead, the patriarchs select or devise scandalous incidents and use them as examples to justify barring women generally from official power. In ensuring this exclusion, patriarchy finds it expedient to defame, silence, incapacitate, and even dehumanize women.

The law of Roman antiquity and most of the American legal discussion in the eighteenth and nineteenth centuries degrades women primarily in terms of "nature." According to this concept of "nature," women are disabled in such a way that precludes their participation in public life or official functions. New variations of patriarchy's exclusionary tactics appear in the late nineteenth and the twentieth centuries. First, liberal legalism produces formal, purportedly ungendered correctness. In reality, however, this rhetoric serves to institute and promote gendered policies and decisions. Second, twentieth century patriarchy upholds the stereotyping regime by treating the proscribed gender roles as if they stem from experience and reflect common sense. This approach allows patriarchy to create insidiously appealing arguments, such as the tenet that a woman's role lies at "the center of home and family life," in addition, this tactic avoids the earlier and exhausted use of "nature" as a justification for keeping women out of the public realm.

314. See supra parts II.B., III.A., and IV.B.
315. See supra part I.C.
316. Compare supra part III.B. (discussing the incident of electoral fraud that led to the abolishment of women's suffrage in New Jersey in 1807).
317. See supra parts II. and V.A.
318. Compare supra part IV.D. (discussing Martha Copleman's experience of sexism in the courtroom).
319. See supra parts II.B., III.A., and IV.B.
320. See supra part III.A.
322. See supra part IV.C.
The various texts discussed in this article reveal the highly manipulative character of the patriarchal gender regime. The regime relies on the power of definition as one method of manipulation. This power of definition is particularly manifested in two devices: patriarchy both “feminizes” male homosexuals and stereotypes the role of women in “domestic” terms, thus inhibiting society’s capacity to envision women in official power.

Historically, patriarchy ostracized powerful women by depicting them as witches. A more recent strategy used against women who seek positions of official power entails labelling them as “disgusting political demagogues” or degrading them for otherwise contravening the patriarchal rules of female delicacy. Today, these discriminatory images of women remain but are mostly relegated to extra-legal spheres of society. In contrast, patriarchy still overtly stereotypes homosexual men as non-masculine in ways that often lead to explicit legal discrimination.

In recent decades, the struggle for women’s civil rights has effected some change in the legal discourse. Some of the demands for gender equality and equity, such as suffrage, free access to jobs, equal pay, and feminist affirmative action, have been established as principles under the law. These principles cannot be blatantly attacked or explicitly refuted in the legal discourse. However, women’s recent achievements encounter substantial opposition. The resistance at the legal level mainly

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323. For example, Rhode states that

[w]omen’s “nature” has legally disqualified them from a vast range of pursuits, ranging from shoe-shining to legal practice and Little League baseball. At different times in different jurisdictions, the same “special” attributes of womanhood have dictated opposite results; ... Not only have sex-based differences been overvalued, they have also been overlooked.

Rhode, supra note 2, at 318.

324. See supra part VA.

325. See supra text accompanying notes 105–106.

326. See supra part VB.


328. On account of its intrinsically patriarchal character, the law recommends itself as an instrument for resistance to women’s liberation. “The male-dominant paradigm of political power is also the paradigm of law. The historical image of maleness—objective, rational and public—is the dominant image of law.” Rifkin, supra note 9, at 92 (footnote omitted). See also supra note 223.
operates by denying that an issue is a gender issue\textsuperscript{329} or by denying the relevance of a gender issue.\textsuperscript{330} 

A main source of male supremacy is monopolized force—be it violence or other forms of coercion.\textsuperscript{331} In the patriarchal view, abandoning this monopolized position by admitting women to coercive force would mean losing dominance. Since the law is a system inherently related to coercion, patriarchy's hegemonic regime must vigilantly reserve the operation of the law to men and actively resist women who participate in official power, particularly those who perform legal functions in the courts.\textsuperscript{332}

Fundamental progress toward gender equality will require exploring and deconstructing the male domain of coercion—including both the discourse of illegitimate violence and the discourse of legitimate enforcement. The fight for women's opportunity to share and cultivate power will not end until the masculine structure of coercive force is torn down. In the future, society's treatment of homosexuals, especially of gay men, will serve as an important test of whether, or how far, patriarchal dominance has given way to a culture of shared power. As long as characterizing a man as "effeminate" degrades him (or subjects him to even more severe sanctions), the term "feminine" will remain a weapon in the hands of the patriarchs. The power of this weapon is the result of two manipulations. First, the patriarchs define "femininity." Second, the patriarchs assert their distinction that anyone "feminine" is necessarily inferior to those who are masculine.

Patriarchal dominance continues. Yet, the call for fairness and justice still resounds, challenging the regimes in power. If fairness and justice—two fundamental goals of the law\textsuperscript{333}—are pursued in earnest, this call will not be silenced until gender cooperation has replaced gender subordination.

\textsuperscript{329} See supra part I.B., rule 12.
\textsuperscript{330} See supra text accompanying notes 210–225.
\textsuperscript{331} See supra part I.B., rule 13.
\textsuperscript{332} See supra part VI.
\textsuperscript{333} "Law can be a focal point for political organization and popular education; it can validate injuries and in some instances deter or redress them. It can also help redistribute power and increase the number of voices that are heard in distributive decisions." Rhode, supra note 2, at 321.