

AMERICAN FAMILY LAW: HISTORY — WHOSTORY

ANA M. NOVOA†

I. INTRODUCTION

My husband is fond of saying that I have a different last name from him because I have a different father. When we were married twenty years ago, I decided not to change my last name, not because of a deep commitment to feminism or even as a clue to the world that I am Mexican (“Novoa” doesn’t carry a great deal of ethnic recognition). Rather, I kept it as a standard that I carry high enough for my father to see. My father was an extremely dignified, intelligent, and powerful aristocrat. He was also capable of charm and wit, which slightly tempered his patrician bearing. He and my mother had three children who survived all of us women. I do not know how my father felt about not having a son, but when his brother, my uncle, learned that I had been accepted into law school he laughed. A woman lawyer was inconceivable, and in his family perhaps even an outrage. I hold my name because I am the product, and yes the standard, of my ancestors.

II. FAMILY LAW

I am a Roman Catholic, Mexican-American woman; a mother and wife; a teacher of Family Law, and a teacher in a clinical program that serves the homeless. From my perspective as a Catholic who believes and tries to live the message of justice, as a woman of color who confronts and fights discrimination on an almost daily basis, as a teacher who hopes to instill a commitment to social respon-

† Ana M. Novoa, Associate Professor of Law and Director, Civil Justice Clinic, St. Mary’s University School of Law. I wish to thank my colleagues, Rey Valencia, Amy Kastely, Emily Hartigan and Sue Bentch for their support and help, and especially Angela Sánchez for her hard work. I also want to express my thanks to my father with whom, twenty years after his death, I have finally come to some peace and understanding. My father, who was born to a rich, aristocratic, and powerful family, dedicated his professional career to the poor. My father who was the darling of his sisters and the center of my mother’s life, who was catered to and spoiled until the day of his death, was nonetheless heroic in his practical understanding and daily living of the “option for the poor.” From his youth, when he provided medical care to plantation workers in southern Mexico, until he died in his mid-seventies, he actively provided medical care for the marginalized, the powerless and the dominated groups of Mexico and the United States.

sibility, Family Law is all askew. Family Law deals with the most intimate and basic personal relationships—children and parents, wives and husbands, siblings, grandparents—yet it applies a legal process based on autonomous individual public and private economic rights to those intimate relational realities. Family Law should be rooted in preserving and protecting intimate relationships, in nurturing the young and the elderly, in identifying and preserving family stories. Instead, it is rooted in preserving those domestic systems that created or expanded the economic empire of the “Founding Fathers,” the white landed males of the colonial northeast.¹

In my research last summer, I found that “traditional” family historians assert that family in the United States is and has always been a nuclear grouping and that “households” are composed only of the traditional nuclear grouping. Such an assertion ignores the fact that the colonial and post-colonial white middle-class household was extended by economic relationship, in that the dominant households included servants, apprentices and slaves. More important, it ignores the multitude of cultural traditions in the United States, which extend the family by both horizontal and vertical kin relationships.² Retention of the limited and unrepresentative perspective has been excused by historian John Demos as appropriate because it is the perspective to which all Americans aspire.³ The excuse assumes first, that all people of color aspire to be white; second, that they want to adopt the social, political and cultural history of the Founding Fathers; and, third, that they want to give up their own rich heritage. I do not, and I suspect that you do not either.

For Latinas(os) the word “immediate” has no applicability to family. For us, family can include anyone with whom we can identify a common ancestor by blood, marriage, or affinity. Our family extends well beyond the limits of our cohabitation and our homes are frequently shared by several generations and by collateral relatives as well. In American law and society, on the other hand, the word “immediate” functions as a limit to family relationship. For example, the Immigration and Nationality Act⁴ defines immediate family as parents, spouses, and children. Most employers define family, for purposes of sick and emergency leave,

1. In the early years of our republic only White, landed men could vote, based on the theory that only the landed had a legitimate stake in society. See, e.g., CHARLES E. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 64-71 (1966); CHARLES S. SYDNOR, AMERICAN REVOLUTIONARIES IN THE MAKING 35-37, 42, 147 (1966) (originally published as GENTLEMEN FREEHOLDERS).

2. See generally STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992).

3. John Demos, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43, 45 (Virginia Tufte & Barbara Myerhoff eds., 1979).

4. 8 U.S.C.A § 1101 (1997).

and for inclusion on medical insurance policies, only as spouses and minor children. Some now include domestic partners, but not other family members.⁵ The concept of household, which implies an economic unit, is central in American law, society and family history. The Spanish language, on the other hand, has no word for household. We have a word for house and home, words for property and estate, and a word for family, but there is no word for household.

III. AMERICAN FAMILY HISTORY

The economic center in the American northeast in colonial times was the household. The lower classes, of course, did not form households; instead they frequently lived with their employers, and occasionally joined together to rent vacant dwellings or temporarily stayed in poor houses.⁶ Throughout this colonial period, "racism had already become a prevalent characteristic . . . and was expressed in societal acceptance of disparate treatment of individuals whose color . . . marked them different from English men and women."⁷ For example, in Jamestown, indigenous Americans who came to trade or visit, "were placed under guard," and inhabitants were prohibited from speaking "to them without the governor's permission."⁸

In contrast, an upper or middle-class man, whether he owned productive land, was a merchant or smith, or provided other reputable service, had the household as his center. His family was a community of shared activities in which his wife, children, servants and slaves, contributed to the wealth and success of his family. Upper and middle-class households consisted of the nuclear family, as well as the children of friends or relatives who lived in the household temporarily, plus the slaves, indentured servants, other servants, apprentices, children "bound out" to the man, and occasionally indigents and convicts who were placed with the family for rehabilitation in exchange for their services.⁹ The husband controlled all of the family wealth and indeed the family and

5. See Christine A. Littleton, *Does It Still Make Sense To Talk About "Women"?* 1 UCLA WOMEN'S L.J. 15, 33-37 (1991).

6. See Ralph J. Crandall, *Family Types, Social Structure and Mobility in Early America: Charlestown, Massachusetts, A Case Study*, in CHANGING IMAGES OF THE FAMILY, *supra* note 3, at 61, 75-79.

7. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 31, 392 (1978); see also DAVID HAWKE, THE COLONIAL EXPERIENCE 156-57, 182-83, 244, 252-53, 289-90 (1966).

8. HIGGINBOTHAM, *supra* note 7, at 30. See also, BEARD, *supra* note 1, at 24-25.

9. See Crandall, *supra* note 6, at 67-69, 77-79; Demos, *supra* note 3, at 47; Barbara Laslett, *The Significance of Family Membership*, in CHANGING IMAGES OF THE FAMILY, *supra* note 3, at 231, 236-37.

household itself. From colonial times until the beginning of the twentieth century, the law recognized the white man as the autonomous owner in family and household relationships.¹⁰ Whatever the individual relationship might have been between any man and his wife, children, servants and slaves, and whether he exercised the power granted to him by the law, he possessed substantial, if not complete, power over the person and property of his wife, children, servants and slaves.¹¹

The value of the free white man depended on the extent of his economic empire, and the status of each family member, including servants, was determined by the value of the man. He owned the benefit derived from the work of all those that surrounded him.¹² His wife, children, and slaves labored, without compensation, toward the success of his enterprise. As members of the household, they shared in his success, but only to the extent that he used his wealth to improve the family holdings.¹³

Any property the wife had owned prior to marriage or earned or acquired during marriage was controlled by the husband.¹⁴ The Married Women Property Acts had not yet come into existence, consequently all of the wife's property and all of the value of her personal attributes, including her business acumen belonged to and benefited her husband.¹⁵

Likewise the primary value of children was in their obedience and their services to the man/owner.¹⁶ Children were an asset; their economic value was greater than the cost to maintain them and their recognized value was in their potential as helpers and free laborers for their father. Like all other assets, the services of a child be-

10. See HAWKE, *supra* note 7, at 288.

11. See, e.g., 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433-36 (1822); Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819; see generally, HIGGINBOTHAM, *supra* note 7.

12. Demos, *supra* note 3, at 49-55. As time went on he maintained his position in the center of a workforce which supported him, even as he moved from the home to the factory.

13. See, e.g., McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336, 366 (1953) (noting that as long as the home is maintained, as if the parties are husband and wife, the wife cannot force her husband to spend money on her, if he chooses not to.); The ETNA, 8 F. Cas. 803 (D.C. ME. 1838) (No. 4,542) (father sued shipowner for son's wages).

14. See NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK 16-17, 20-21 (1982); BLACKSTONE, *supra* note 11; HORACE G. PLATT, THE LAW AS TO THE PROPERTY RIGHTS OF MARRIED WOMEN, AS CONTAINED IN THE STATUTES AND DECISIONS OF CALIFORNIA, TEXAS, AND NEVADA (1885); CHESTER G. VERNIER, III AMERICAN FAMILY LAWS, A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) (1935).

15. See Bradwell v. Illinois, 83 U.S. 130, 140-41 (1872).

16. See Crandall, *supra* note 6, at 73.

longed to the father.¹⁷ The father's rights over the children were complete even to the exclusion of the mother.¹⁸ Custody in reference to divorce was rare. In fact, when divorce or separation did occur, the children were awarded without question to the father.¹⁹ Additionally, a father could deny the mother control over her children even after his death by appointing a testamentary guardian.²⁰

Family Law was, as it had been in the past—and as it continues to be—rooted in property relationships.²¹ Consequently, Family Law had everything to do with the maintenance of the man as owner²² and little to do with personal relationship.²³ For example, Family Law assured the subservience of the wife to the husband²⁴ and the obedience of the children to the father,²⁵ but did not regulate the relationship between the mother and the children.²⁶ Furthermore, although Family Law regulated the relationship between master (a man) and servant,²⁷ it had little to do with the relationship between the male servant and his wife. To the extent that it authorized the binding out, or the indenturing of the children, the law did regulate the relationship between the male servant and his children.²⁸

17. The Father had the right to bargain away the services of the child, *Plummer v. Webb*, 19 F. Cas. 891, 892 (D.C. ME. 1827) (No. 11,233), or to recover as damages the wages paid directly to a child, *The PLATINA*, 19 F. Cas. 813, 814-15 (D.C. Mass. 1858) (No. 11,210). He did, however, also have an obligation to support his wife and children, and he could be deprived of the wages of the child if he refused to support his family. *The ETNA*, 8 F. Cas. at 804.

18. Children were not viewed as property (*see The ETNA*, 8 F. Cas. at 806) but they were certainly part of the vehicle for the acquisition and maintenance of the man's estate. In addition to whatever emotional bond he developed with his children, they were "good" children to the extent that they contributed positively to his estate.

19. *See PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 3-24 (1986).

20. *See BLACKSTONE, supra* note 11, at 441.

21. Professor O'Connell suggests that maintenance of property exchanged at marriage and the influence of the early church were the primary forces that formalized the institution of marriage. Mary E. O'Connell, *Alimony After No-Fault; A Practice In Search Of A Theory*, 23 NEW ENG. L. REV. 437, 445 (1988).

22. *See generally* BASCH, *supra* note 14.

23. The community and especially other members of the same sex provided the most important intimate relationships. *See COONTZ, supra* note 2, at 65-66.

24. *See generally* BASCH, *supra* note 14.

25. *See* Gail D. Hollister, *Parent-Child Immunity: A Doctrine In Search Of Justification*, 50 FORDHAM L. REV. 498, 491 (1982). In the mid-seventeenth century, Massachusetts and Connecticut enacted statutes that allowed for the death penalty for a child over the age of sixteen who was stubborn or rebellious or who cursed or struck his parents. *Id.* *See also* Lawrence Stone, *The Rise of the Nuclear Family in Modern England: The Patriarchal State*, in *THE FAMILY IN HISTORY* (Charles E. Rosenberg ed., 1975).

26. *See* O'Connell, *supra* note 21, at 464. This practice continued for some time, *see, e.g.*, *Larkin v. Woosley*, 19 So. 520 (Ala. 1896).

27. Early Virginia laws, for example, regulated the length of servitude, and the punishment available for runaway servants. One statute prohibited trade with a servant without the master's consent. *See HIGGINBOTHAM, supra* note 7, at 33; *HAWKE, supra* note 7, at 289-90.

28. All fathers had the right to the value of the services of their children and could

Family Law, however, had little to do with the families of the poor; in fact, an entirely separate area of the law was created to deal with them.²⁹ Family Law, of course, had nothing to do with slaves, leaving them to the law governing real estate and chattel.³⁰

The *traditional* Family Law perspective has developed from the wants and needs most commonly associated with powerful men. It does not include the perspective of poor white men.³¹ It ignores the stories of white women and the stories and families of slaves, free blacks, Asian immigrants, the indigenous peoples sometimes referred to as Native Americans, the indigenous peoples sometimes referred to as Mexican-Americans, and the poor. It further fails to take into account the legal heritage of the South and Southwest.³² In spite of the fact that the United States has grown in area and diversity, the northeastern colonial perspective continues to underpin most of the basic assumptions in family law.

IV. PATRIARCHY AND PATERNALISM

In discussing the changes in the family during the sixteenth and seventeenth centuries in England, Lawrence Stone defines patriarchy in the following way: "the man rides to work on a donkey or mule—if he goes to work at all—while the wife follows behind on foot with the heavy tools. The husband is legally and morally free to beat his wife, although not to the point of maiming or murder. . . . A wife serves the husband and eldest son at the table, but rarely sits down with them."³³

Ah, here is my family again! I remember my father walking several paces in front of my mother and we always followed behind her. We always had a servant at home, nonetheless, the meals were as Stone described. There were no male children in my family by the time that I was born, so meals began with my father alone at the table. My mother would carefully prepare his plate in the kitchen and bring it in to him. Once he was served, the rest of us were free to serve ourselves and sit with him. He had his own china plates that were different from ours and had to be washed by hand because he did not trust the electric dishwasher.

contract with others for the services of the children for which the father would be compensated. The ETNA 8 F. Cas. at 806.

29. See Crandall, *supra* note 6, at 76, 79.

30. See HIGGINBOTHAM, *supra* note 7, at 50-54, 169-70.

31. Crandall, *supra* note 6, at 75-79.

32. An analysis of the effects of the legal, religious and cultural heritage of the South and Southwest is beyond the scope of this article.

33. Stone, *supra* note 25, at 34.

England did not conform as fully to the "ideal" form of patriarchy, as did the southern and eastern Mediterranean countries.³⁴ However, during the sixteenth century, England experienced a strengthening of patriarchy and of the importance and power of the father.³⁵ So, it could be said of our English colonial and post colonial times that as "long as the family was intact, the common law treated only its head, the master of master-servant, the guardian of guardian-ward, and the baron of baron-feme."³⁶ The father's dominion over his children was viewed as ordained by natural and divine law,³⁷ the same law that gave him dominion over animals, land, women and people of color.³⁸

When I was growing up we had a nighttime ritual. I went first to my father and kissed his hand. Then, I went to my mother who made the sign of the cross on me, giving me her blessing for the night. I remember being in Mexico City, at my aunt's house. The father of one of the servants came to visit his daughter before returning to his native village. When she heard that her father was there, the girl ran to the front of the house, fell at his feet and kissed his hand. They visited for a short while before he left. I wondered about that incident because whenever I saw my father after a long visit away, I would kiss his cheek.

Most societies have a clear division of labor based on gender. Except for the care of young children, which is a female role. Any particular task might be performed by men in one society and women in another. However, those duties allocated to men generally carry the greatest status.³⁹ Although there is some evidence of various societies that are generally egalitarian, there is no evidence of the existence, at any time, of a matriarchal society.⁴⁰ There are "matrilineal societies, where property, rank, office, and group

34. *Id.*

35. *Id.*

36. BASCH, *supra* note 14, at 17.

37. The ETNA, 8 F. Cas. at 805; Mecein *ex rel* Barry, 25 Wend. 64 (1840); 3 Hill 399 (1842).

38. See Bowen v. Gilliard, 483 U.S. 587 (1987); McGuire, 157 Neb. 226; Bradwell, 83 U.S. 130; Dred Scott v. Sanford, 60 U.S. 393 (1856); COONTZ, *supra* note 2, at 47. See also Genesis 1:26-31; Ephesians 5:22-24, 6:1, 5-7. For a brief history of the Judeo-Christian tradition of male superiority, see Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 453-70 (1995). But see PAULA M. COOEY, FAMILY FREEDOM & FAITH: BUILDING COMMUNITY TODAY 17-22 (1996) (arguing that the scriptures present us with a more complex view of family and societal obligations).

39. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 32-44 (1988); Debra Renee Kaufman, *Professional Women: How Real Are the Recent Gains?*, in WOMEN: A FEMINIST PERSPECTIVE at 353; cf Kathleen Gough, *The Origin of the Family*, in WOMEN: A FEMINIST PERSPECTIVE 83, 84 (Jo Freeman ed., Mayfield Publ'g, 3d ed. 1984).

40. A matriarchal society is defined as a society in which either: men have no involvement with children or women after insemination or in which power is sited in women.

membership are inherited through the female line. . . . Even so, in all matrilineal societies for which adequate descriptions are available, the ultimate headship of households, lineages, and local groups is usually with men."⁴¹ Certainly in the Judeo-Christian tradition women were not allowed authority or rights,⁴² and in the English tradition, women were "protected" through a legal disability, as were children and idiots.

It is unclear whether, and to what extent, attributes associated with women are biologically mandated rather than social or cultural.⁴³ It is clear that some attributes and some *functions* have been associated with women for centuries.⁴⁴ It is also clear that in the United States, the cooperative and the competitive virtues⁴⁵ became gender-specific and venue-specific during the eighteenth and nineteenth centuries.⁴⁶ Of course, any trait, whether culturally associated with women or men, might be possessed by either;⁴⁷ and in fact, many now believe that women and men are personally most successful when they possess and are able to express both female and male attributes.⁴⁸ Nonetheless, gender identification of personality attributes, whether natural or imposed, is an integral part of our

41. Gough, *supra* note 39, at 84, 85.

42. See Abrams, *supra* note 38, at 465-67. But see Stephen P. Wink & Walter Wink, *Domination, Justice And The Cult Of Violence*, 38 ST. LOUIS U. L.J. 341, 346-47 (1993-1994) (describing several preliterate peoples with an absence of domination hierarchies).

43. See CYNTHIA FUCHS EPSTEIN, *DECEPTIVE DISTINCTIONS* (1988); Sally Lehrman, *Woman*, STANFORD TODAY, May-June 1997, at 47; Lenore J. Weitzman, *Sex-Role Socialization: A Focus on Women*, in *WOMEN: A FEMINIST PERSPECTIVE*, *supra* note 39, at 157.

44. In the majority of cultures women care for children and perform tasks associated with shelter and preparation and storage of food. See Gough, *supra* note 39, at 83-84, 91.

45. I use the word "virtue" to describe the positive side of any human characteristic. For example, the virtue of tenacity is basically the same human characteristic as stubbornness.

46. Generally, virtues related to cooperation (patience, generosity, loyalty, interdependence, empowerment) became associated with women, and virtues associated with competition (assertiveness, logic, tenacity, hard work, entrepreneurial skill, shrewdness) with men. See Ana M. Novoa, *The Removal of Adam's Rib: The Creation and Polarization of Male and Female Virtues*, 35 U. LOUISVILLE J. FAM. L. 755 (1997). It is unclear when the cults of Domesticity/True Womanhood and of the Self Made Man emerged but most commentators seem to agree that they were both well entrenched by the middle of the nineteenth century. See COONTZ, *supra* note 2, at 63; Demos, *supra* note 3, at 52; Arlene Skolnick, *Public Images, Private Realities: The American Family in Popular Culture*, in *CHANGING IMAGES OF THE FAMILY* *supra* note 3, at 297, 306.

47. See Weitzman, *supra* note 43, at 182.

48. Femininity and masculinity are not mutually exclusive traits that exist on a linear continuum, where possession of one necessarily diminishes the other, rather any individual may, for example be both assertive and passive, demonstrating one or the other as the situation requires, with a freedom and flexibility that is unavailable to a strongly sex-typed individual. See Sandra L. Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING & CLINICAL PSYCHOL. 155 (1974); Weitzman, *supra* note 43, at 182.

history.⁴⁹ Additionally, we clearly demonstrate a higher societal value for attributes and functions identified with men. In writing about American employment, sociologist Debra Renee Kaufman suggests "that the anticipation of greater participation by women in high-status occupations has resulted in a decline in the prestige and desirability of these occupations by both males and females. The converse was found in female-dominated occupations entered by males."⁵⁰

American women have moved into the world of business, commerce, law and politics primarily by exercising those individual talents that society allocated to the public/male sphere; men, for the most part, have not moved into the sphere of care-givers.⁵¹ Those women who are unwilling to give up the traditional role of caregiver are generally rewarded with low status, and if they are separated from men, a life style at or below poverty level.⁵²

49. See Kaufman, *supra* note 39, at 360; Weitzman, *supra* note 43, at 157-159.

50. Kaufman, *supra* note 39, at 358.

51. See S.M. Miller, *The Making of a Confused Middle Class Husband*, 2 SOC. POL'Y. 33 (July/August 1971); Catherine Ross, *The Division of Labor at Home*, 65 SOC. FORCES 816, 829 (1987). Economist Victor Fuchs observes, "It is only the extraordinary woman who can succeed in a demanding career while doing full justice to the needs of a spouse and children. Most men have never even tried." FUCHS, *supra* note 39, at 61. In describing the results of a 1987 study, on the division of labor in the home, the author wrote, "[a]lthough the possible range of this index is 1 (wife always does the housework) to 5 (husband always does the housework), the actual range is from 1 to 3 (housework shared equally). Only one husband out of 680 actually usually does the housework." Ross, *supra*, at 824; see generally RUTH SIDEL, ON HER OWN: GROWING UP IN THE SHADOWS OF THE AMERICAN DREAM (1990); RUTH SIDEL, WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA (2d ed., Penguin Books, 1992); Abrams, *supra* note 38, at 474; Michele Hoffnung, *Motherhood: Contemporary Conflict for Women*, in WOMEN: A FEMINIST PERSPECTIVE, *supra* note 39, at 124.

52. Women earn less than men do. They always have. Fuchs reports that while Cleopatra was the absolute ruler of Egypt, men earned twice as much as women. In the mid-1980s women's wages reached an all-time high, when the average "woman earned . . . two-thirds as much as the average man for each hour of work." FUCHS, *supra* note 39, at 49; see also SIDEL, ON HER OWN, *supra* note 51, at 170-81. Currently, women earn 74% of what men earn, according to the Bureau of Labor Statistics. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: TABLE D (Mar. 1994). But according to a salary survey conducted by *Working Woman*, the percentage is higher (85% to 95%) in some fields. See Diane Harris, *How Does Your Pay Stack Up*, WORKING WOMAN, Feb. 1996, at 27. In a report on the top earning women executives, it was reported that of the women on the list, fewer than half "occupy the top spot at their company" and even worse, that a total of 615 men on the Forbes ranking of CEOs earn "more than the 20th person" on the list. Katherine & Richard Greene, *The 20 Top Paid Women in Corporate America*, WORKING WOMAN, Feb. 1996, at 44. Ruth Sidel reports that the median income of women, among physicians, was just over half that of men, in 1986. The number of women entering the medical profession is increasing, but they tend to choose specialties with regular hours, or that have strong doctor-patient interaction, they also work fewer hours, and see fewer patients than men. SIDEL, ON HER OWN, *supra* note 51, at 171-73.

V. INDUSTRIALIZATION AND CONSUMERISM

My mother's sister told me that my mother was the first Mexican ever to graduate from the public nursing school in San Antonio. They both came here, in the early 1920s, from Eagle Pass. My aunt, however, never finished. She said that it was too hard and that there was too much prejudice. But my mother finished and went to work as a public health nurse. However, my mother gave up nursing after she married my father. It was her job to stay at home, care for the house and cater to my father's whims.

With industrialization, work took place in the factory or office and relaxation in the home; men worked, children played, women cared for others. As Michele Hoffnung stated, "things done outside the home are for money, inside the home they are for love."⁵³ Since the care of children and dependent family members has no public status, and therefore no public value, women provided the care of home, children, and the elderly and sick, and women were expected to provide for them out of a sense of obligation and commitment.⁵⁴ To become a middle-class wife was to answer a "call" to provide for the common good,⁵⁵ to be unselfish, and to be primarily concerned with the good of others.⁵⁶ In the nineteenth century, young white women sacrificed their own freedom to become wives and mothers. After marriage, many women from the middle and upper classes, who were unable to give voice to the pressures of maintaining the moral superiority that was then expected of middle-class wives, suffered from a variety of physical ailments.⁵⁷ As a result, the "ideal" American woman was thought to be delicate by nature.⁵⁸ Women of color and poor women of course were not delicate by nature. They continued to work as domestics, in the fields, and in the factories. Even today, the concepts of femininity derived from the Cult of Domesticity are not generally applied to women of color.⁵⁹ Black women are stereotyped as "independent, competent,

53. Hoffnung, *supra* note 51, at 125.

54. See *United States v. Dyce*, 8 Fed. Sent. Rep. 183 (D.C. Cir. 1996).

55. See *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

56. See *Bradwell*, 83 U.S. at 139-42 (Bradwell, J., concurring).

57. See Ann Douglas Wood, "The Fashionable Disease:" *Women's Complaints and Their Treatment in Nineteenth Century America*, 4 J. INTERDISC. HIST. 25-52 (1973). "Books written in the period between 1840 and 1900 consistently . . . assert that a large number, even the majority of middle-class American women, were in some sense ill." *Id.* at 26.

58. "[I]ll health in women had become positively fashionable and was exploited by its victims and practitioners as an advertisement of genteel sensibility and an escape from the too pressing demands of bedroom and kitchen." *Id.* at 27.

59. "The hegemony of the upper-class WASP image is still very much a part of our symbol of success and belonging and legitimate authority in this society." SIDEL, ON HER OWN, *supra* note 51 at 74. There is a well founded assumption that "the public equates progress for black women with imitation of white women. Because being black

worldly, and tough [while] white women [are] . . . dependent and infantile."⁶⁰ The competitive traits when applied to black women are not viewed in any positive way, but instead are used to place "black women outside of any definition of womanhood."⁶¹ Latinas are stereotyped as hot-blooded temptresses or as domesticated and servile housekeepers.⁶² Professor Ontiveros relates that Mexican women are imported as housekeepers and are then sexually abused and harassed. Partly because of the Hispanic cultural mores' emphasis on submissiveness, and because our American "society considers Latinas naturally sexual. . . . often perceived as readily available and accessible for sexual use, with few recriminations to be faced for abusing them,"⁶³ many of these women have difficulty in seeking and getting help.

The extreme individualism of powerful white men in the United States existed only in conjunction with the supportive domesticity and moral superiority of their women. It was only because cooperative traits were enshrined in their homes, that men were able, during the industrial revolution, to abandon interdependence and cooperation in the competitive market.⁶⁴ During the American colonial period, personal and social dependent relationships were recognized as an integral part of the lives of all individuals and as an essential component of communal life.⁶⁵ Dependence on, participation in the community, recognition of that dependence and of the need for participation were the norm. Even after the American revolution, collective activities continued in the business community, and families

is an occasion for oppression, avoiding blackness and its attached cultural associations becomes the essential mechanism of liberation." Paulette M. Caldwell, *A Hair Piece: Perspectives On the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 391.

60. Caldwell, *supra* note 59, at 394.

61. *Id.*; see also Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1034-55; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (1993). Professor Roberts writes:

A popular mythology about Black women, . . . was the character of Jezebel, a woman governed by her sexual desires. The ideological construct of the licentious legitimated white men's sexual abuse of Black women and defined Black women as the opposite of the ideal mother. Jezebel contradicted the prevailing image of the True Woman, who was virtuous, pure, and white.

Id. at 11, 12.

62. See Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817 (1993).

63. *Id.* at 820.

64. "[U]se of the term individualistic to describe men's nature became acceptable only in the same time periods, social classes, and geographic areas that established the cult of domesticity for women." COONTZ, *supra* note 2, at 53.

65. See COONTZ, *supra* note 2, at 211-15; Crandall, *supra* note 6, at 65-66, 71-72; Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 676 (1992); Robert D. Putman, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY 65 (Jan. 1995).

"[w]ere expected to work together with economic and political institutions in a system . . . that reconciled liberty with duty, self interest with altruism, and male principles with female ones."⁶⁶ Honor, self-reliance and independence were civic virtues; virtues of the collective community, not of the individual.⁶⁷ Soon after the rise of competitive capitalism, however, the public⁶⁸ community began to shed its acceptance of interdependence and cooperation, traits which become acceptable only among women and the religious community. In order to promote and advance the free market, competitive market attributes—such as ambition, power, and calculation—were liberated from the restraints of communal and cooperative transactions that had previously existed. The emerging myth of the self-made-man required not only that men succeed, but that they do so through the use of competitive individualism and self-reliance.⁶⁹ The "cult of home" became a necessary component to the country's growth and development because it allowed people "[t]o release the full range of aggressive and assertive energies . . . [and to] still anxiety and ward off guilt about their own contributions" to the evolving competitive market.⁷⁰ Consequently, the competitive virtues became necessary for successful men in the public sphere, whether market or political, and simultaneously forced the divestiture of the cooperative virtues from the public and private lives of men. The cooperative virtues, however, continued to exist, and indeed were required of, and enshrined in women.⁷¹ In other words, caring emotional relationships were banished from the public arena and made personal. Men experienced them only in the home, where the woman was held "as hostage to the values that men both cherished and violated in their daily lives."⁷²

Using Demos' description of the period, as the home became a refuge, it became a refuge *from society*, a refuge *from the community*. Taking refuge *from* the community rather than *in* the community, was a monumental societal change. Today, the prevalent belief

66. COONTZ, *supra* note 2, at 54.

67. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 55-56 (1985); COONTZ, *supra* note 2, at 99; GARY WILLS, *INVENTING AMERICA* 184-92, 234-39, 316-19 (1979).

68. Public and private are used to describe two different dichotomies; first, the distinction between the private/female/home and the public/male/market and political spheres; and second, between the public state, and the private civil society.

69. See COONTZ, *supra* note 2, at 64. In fact, upper and middle-class families are not and never have been independent and self-reliant, they have received and continue to receive considerable subsidies. See also *id.* at 72-73, 84; Martha Fineman, *Masking Dependency: The Political Of Family Rhetoric*, 81 VA. L. REV. 2181, 2205-06 (1995).

70. Demos, *supra* note 3, at 53.

71. See COONTZ, *supra* note 2, at 55-67; Demos, *supra* note 3, at 53; Skolnick, *supra* note 46, at 304-07.

72. Skolnick, *supra* note 46, at 306-07.

is still "[t]hat it is only within the family that one can find intimate relationships. . . ." ⁷³ However, cooperative virtues now appear to be retreating from the home to the individual. ⁷⁴ While emotional relationships are still conceived as centered in the home, independence, self-reliance and freedom have retreated to the individual. According to Bellah et al., "[t]he present ideology of American individualism has difficulty . . . justifying why men and women should be giving to one another at all. Traditionally, women have thought more in terms of relationships than in terms of isolated individuals. Now we are all supposed to be conscious primarily of our assertive selves." ⁷⁵ These authors go on to comment on the need to "reappropriate a language in which we could all, men and women, see that dependence and independence are deeply related, and that we can be independent persons without denying that we need one another." ⁷⁶ We Americans do not perceive ourselves as an independent and self-reliant community, or even as independent and self-reliant families or households, but rather as independent and self-reliant individuals. ⁷⁷

We are communal beings. Our identity should be firmly rooted in a social network, ⁷⁸ but American society interferes with the development or maintenance of such a network. Professor Mary Ann Glendon writes,

[T]he problem is that, although we have a highly developed linguistic and conceptual apparatus for thinking about and dealing with individuals, market actors, and the state, we lack adequate concepts to enable us to consider the social dimensions of human personhood, and the social environments that individual men, women, and children require in order to flourish. ⁷⁹

The American myths of independence and self-reliance insist that the worth and identity of an individual are based on personal and independent achievement. In other words, worth is tied to personal glorification, not to communal identity. Added to that are the facts that communal virtues are no longer acceptable in the public sphere and that the worth of the private sphere has shifted to its ability to service the individual rather than the community.

73. Laslett, *supra* note 9, at 246; *see also*, Skolnick, *supra* note 46, at 305-07.

74. *See* COONTZ, *supra* note 2, at 60-67, 172, 175-78.

75. BELLAH, *supra* note 67, at 111.

76. *Id.*

77. *Id.* at 55-84.

78. Professor Putman concludes that "[m]any major civic organizations have experienced a sudden, substantial, and nearly simultaneous decline in membership over the last decade or two." Putman, *supra* note 65, at 70. He further points out that many of the organizations that showed an increase in membership (such as the Sierra Club and AARP) provide no social connectedness, in that the members have little or no contact with each other. *Id.* at 70-71.

79. Glendon, *supra* note 65, at 674.

Concurrently with the increased privatization of the cooperative virtues, Americans have developed an excessive preoccupation with self and a cult of consumerism.⁸⁰ Industrialization and the inevitable emergence of the competitive national market required increased consumerism and materialism for growth.⁸¹ By 1920, consumption was well established and accepted as a necessary, public, American trait.⁸² Both through instilling in the American people a perceived need for luxuries and through creating constant change, improvement and variety in those products deemed to be necessities, new market segments were created.⁸³ The substitution of need for want, and the requirement of variety for happiness, in the mind of the American public, occurred through the use of advertising.⁸⁴ Advertising increased dramatically after the middle of the nineteenth century.⁸⁵ Between 1945 and 1960 alone, it increased by 400%.⁸⁶ Since the middle of this century, consumption has been synonymous with freedom and patriotism.⁸⁷ The import of American freedom is contained in consumer choices. The idealized American liberation from oppression has been actualized as a multiplicity of market choices, which allows us to gladly "shop 'til we drop." As citizens of a mature nation, Americans "have learned to experience liberation as . . . the freedom to choose everything at once."⁸⁸

Consumerism has driven American society toward increased individualism and narcissism. The American dream has shifted and now promises that one can become whatever one chooses⁸⁹ simply

80. See SIDEL, ON HER OWN, *supra* note 51, at 101-02; David E. Stannard, *Changes In The American Family: Fiction and Reality*, in CHANGING IMAGES OF THE FAMILY, *supra* note 3, at 83, 88.

81. As Stephanie Coontz said, "By the late nineteenth century, political economists realized that the ethic of hard work and self-restraint that had helped to industrialize America had serious drawbacks now that most industries had the capacity for mass production. If everyone deferred gratification, who would buy the new products?" COONTZ, *supra* note 2, at 169-70.

82. *Id.* at 169-73.

83. An economy of abundance, like that in the United States in the early part of this century, "cannot count on any reserve of demand . . . (having already) appeased most . . . necessities. It can all too easily produce more than what most of its members, left to their own unaided imaginations, might consider amenities. It must therefore stimulate appetites relentlessly." Michael Zuckerman, *Dr. Spock: The Confidence Man*, in THE FAMILY IN HISTORY 192 (Charles E. Rosenberg ed., 1975). In recent years, "Americans have been taking on credit faster than their incomes have risen" resulting in a steady increase in personal bankruptcy filings. Fred R. Bleakley, *Personal Bankruptcy Filings Are Soaring*, WALL ST. J., May 8, 1996, at A1; see also, Vicki Vaughan, *Credit Cards Blamed for Bankruptcy Rise*, SAN ANTONIO EXPRESS-NEWS, Jan. 10, 1997, at 1E.

84. See SIDEL, ON HER OWN, *supra* note 51, at 180, 191.

85. See COONTZ, *supra* note 2, at 170.

86. *Id.* at 171.

87. *Id.*

88. *Id.* at 176.

89. See SIDEL, ON HER OWN, *supra* note 51, at 96, 99.

by buying the right products.⁹⁰ In the first half of this century, consumption was viewed as a vehicle for satisfying general and communal needs and desires.⁹¹ Advertising was aimed at women and, through them, at families. Products, such as washers, dryers, stoves and vacuum cleaners were advertised to help the wife and mother in creating the perfect home-refuge for family members. However, after the 1950s, market strategists began to “pander to American youth,”⁹² and by the 1970s, spending became “oriented more toward personal recreation.”⁹³ The shift from communal needs to personal recreation occurred as a result of an effort to create additional market demand through a proliferation of market segments. The shift is not indicative of a decrease in the purchase of washers, dryers, stoves and vacuum cleaners, but rather of a substantial increase in the purchase of products for individual use. For example, most middle class families own one washer, dryer, stove and vacuum cleaner, but own a separate television and stereo system for each member of the family and sometimes for each room of the house. As a result, consumerism has become highly individualized and has served to fuel increased isolation.⁹⁴

A by-product of the increased individual-consumer culture is the mistaken belief that our personal values and security depend on the things each of us has yet to acquire, rather than on our relationships with others.⁹⁵ The consumer culture encourages us to belittle the value of others and instead to accept “a world view in which every thing or person we encounter is evaluated by its ability to satisfy [our] needs or improve [our] self-images.”⁹⁶ In her book, *On Her Own*, Ruth Sidel reports on a systematic evaluation of fourteen women’s magazines, where she found that “virtually everyone pictured is clearly middle class” or upper middle class, and even more disturbing that some of the magazines “openly disparage the lower

90. The message of advertising aimed at women is that “the American Dream is alive and well. If you work hard, believe in yourself, and consume relentlessly, you too can be a success in America.” *Id.* at 101.

91. See COONTZ, *supra* note 2, at 170.

92. *Id.* at 171.

93. *Id.* at 174.

94. Television, computer games, and the new virtual reality games all provide individual recreation, and are “disrupting many opportunities for social-capital formation.” Putman, *supra* note 65, at 75.

95. Bellah, et al. report that “the alternative idea of work as a calling is conspicuously absent” and therefore work is valued “in terms of what it yields to a self” so that the “self stands apart from what it does, and its commitments remain calculated and contingent on the benefits they deliver.” By contrast a calling requires the giving of oneself in a commitment to the work and the quality of the work, so that the self is anchored “within a community practicing” the skill. Work as calling “connects the self to those who teach, exemplify, and judge these skills. It ties us to still others whom they serve.” BELLAH, *supra* note 67, at 68.

96. COONTZ, *supra* note 2, at 175.

middle and working classes." She goes on to say that, "among the hundreds of features, viewpoints, articles, occasional fiction, advice, and how-to columns, there was not one instance of members of the working class being depicted in a positive light." She found only two magazines (*Essence* and *Ms.*) where, "the well-being of the individual is at all connected with the well-being of the larger group."⁹⁷

VI. STRENGTHS OF DOMINATED GROUPS

The traditional Family Law history views the modern era, starting at the beginning of the twentieth century, as the time when women moved "up" from the confines of the private sphere into the "egalitarian" public sphere. Taking seriously the language of freedom and equality in our constitution, champions for the oppressed have lessened the systemic domination of women that is prevalent among many of the varied cultural traditions and the official subordination of non-white groups, which was taken for granted at our inception.⁹⁸ The apparent liberation of women and other dominated groups came through the grant of a series of rights intended to advance us from a position of subservience to one of equality.⁹⁹ The advance is apparent but insufficient.¹⁰⁰ It is insufficient because it

97. SIDEL, ON HER OWN, *supra* note 51, at 96-97, 99.

98. Francisco Valdes argues that because the American promise of liberty and equality "[w]as intended only for the privileged, the scourge of non liberty/inequality became embedded in the nation's heart and soul." Further, dominant forces in the United States sought to "[e]xclude 'minorities' from the liberty and equality that they enshrined as principal values of the new nation." He concludes that "[t]he Constitution's design included defects that, because they were of a fundamental nature, have generated acute and continuing tensions throughout the nation's history." Francisco Valdes, *Diversity and Discrimination In Our Midst: Musings On Constitutional Schizophrenia, Cultural Conflict, And "Interculturalism" At The Threshold of A New Century*, 5 ST. THOMAS L. REV. 293, 296-305 (1993). Judge Higginbotham makes a similar argument. HIGGINBOTHAM, *supra* note 7, at 371-89. He wrote: "If the authors of the Declaration of Independence had said—'all white men are created equal' or even 'all white men who own property . . . ' they would have more honestly conveyed the general consensus." And, later, "The irony of the unfulfilled American dream of equality is that of all those . . . who have sought . . . [a] just society, none had to seek out alien sources for moral authority . . . " unless, of course, they are women. *Id.* at 384.

99. And yet, Paulette Caldwell recently wrote:

Black women cannot wear their hair in braids (in the work place) because Hispanics cannot speak Spanish at work. The court cedes to private employers the power of family patriarchs to enforce a numbing sameness, based exclusively on the employers whim. . . . Like Rogers, the Garcia case is a fascinating study of the extent to which antidiscrimination law perpetuates the allocation to employers of a kind of property right in the person of women and minority employees.

Caldwell, *supra* note 59, at 380.

100. Economist Victor Fuchs, in *Women's Quest for Economic Equality*, concluded that "[t]he economic well-being of women as a whole (in comparison with men) did not improve . . ." since 1960. He further found that although the "[w]omen/men ratio of money income almost doubled, . . . women had less leisure while men had more, . . .

judges the essential equality of women from the male perspective,¹⁰¹ and in a parallel line of thought, the essential equality of people of color from the white perspective.¹⁰² It completely fails to recognize the intersection of gender and race/ethnicity.¹⁰³ It has sometimes recognized male virtues in women,¹⁰⁴ rather than recognizing the essential value of female virtues, as expressed by either white women, women of color, or men.¹⁰⁵ Rather than embracing the richness of multiculturalism, it has enshrined a White perspective.¹⁰⁶

Many "minority" ethnic and racial groups offer to American culture a communal spirit, the American culture. For example, "Native American tribes subscribe to communal values as the guiding principle for the laws that govern an individual's conduct. . . .

women [were more] dependent on their own income, and women's share of financial responsibility for children rose. . . ." FUCHS, *supra* note 39, at 76.

101. In discussing women in the professions in *On Her Own*, Ruth Sidel quotes about doctors: "The male model is the working model" SIDEL, *supra* note 51, at 172; about lawyers: "[i]t is no coincidence that so many women lawyers are unmarried and so few have children." *Id.* at 174; about other professionals: "The deck is stacked against women. . . . Unless somebody acts like a man, she is not perceived as management material." *Id.* at 175. *But see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (if a woman exhibits characteristics that are too aggressive, such as using foul language, and being harsh, impatient, and demanding she is equally punished).

102. Paulette Caldwell very touchingly writes:

Some of us choose the positive expression of ethnic pride not only for ourselves, but also for our children, many of whom learn, despite all of our teachings to the contrary, to reject association with black people and black culture in search of a keener nose or bluer eye. Many of us wear braids in the exercise of private, personal prerogatives taken for granted by women who are not black.

Caldwell, *supra* note 59, at 369.

103. *Id.* Ontiveros, *supra* note 62. Angela Davis suggests that women of color "[h]ave a right to be who we are. We have a right to emerge together from the historically imposed invisibility to which we have been subjected." Angela Y. Davis, *Women of Color at the Center, Keynote Address before the Third National Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175, 1177 (1991).

104. Although, women and especially women of color are often criticized for their expression of male virtues. For example, "African American women have been characterized as strong and independent (and consequently) . . . are blamed for the breakup of their families. Often the strength of black women to survive and progress despite the almost insurmountable obstacles is labeled as pathological at one extreme and disloyal at the other." Ammons, *supra* note 61, at 1054; *see also* Price Waterhouse, 490 U.S. 228.

105. *See* Bem, *supra* note 48, at 159; *see also* Sandra L. Bem, *Sex Role Adaptability: One Consequence of Psychological Androgyny*, 31 J. PERSONALITY & SOC. PSYCHOL. 634 (1975).

106. Luis Rodriguez states:

It's true many of us become 'Anglicized' whether we like it or not, but no one fools anybody. This is mostly strategizing one's way in the world. . . . The issue, then, is not to assimilate, but to get rooted again, to honor our ancestors, our rituals, our men and women. To know our real names. Our real languages. To celebrate our diverse histories, stories, tongues, faces, and songs.

Luis J. Rodriguez, *On Macho, in MUY MACHO: LATINO MEN CONFRONT THEIR MANHOOD* 187, 197 (Ray Gonzalez ed., 1996).

Tribal societies are built on community or relational foundations.”¹⁰⁷ Similarly, although Mexican immigrants come from a culture that is highly patriarchal with a strong tradition of overt male strength, they also come from a culture where “maleness” includes free expression of emotions and of the co-operative virtues. We also bring a strong sense of celebration and humor with an ability to freely laugh at ourselves. We are fiercely committed to family and have an inclination to extend the bounds of family to include others. Related to our commitment to family is a tradition of hospitality and generosity. Unfortunately, the hegemonic¹⁰⁸ process of Americanization neutralizes these and other communal traits offered by non-dominant groups and threatens the continued acceptance of the co-operative virtues among all men, among women who participate in the public/business/professional sphere, and at an increasing rate, among all other women as well.

VII. CONCLUSION

My father was a doctor who chose to work in the *barrios* of San Antonio. Sometimes people would appear at our house with a basket of eggs, a couple of chickens, or a turkey. Eventually I understood that they were his patients. Every weekday he made hospital rounds in the morning and housecalls in the afternoon. Sometimes on Sundays I went with him to the *barrio*, the westside, where he visited the homebound. The compassion and kindness of his work contrasted poignantly with the cold hierarchical experience in our home.

My father sent us all to the Catholic school, where I was again confronted with a hierarchical gloss on the virtues of compassion and justice. Both experiences called out the message of prophetic song. The prophet speaks justice to power, but is able to do so only after having learned justice by listening to the authentic voice of the powerless. My father, the patriarch, and my patriarchal Church clearly, but unconsciously, proclaimed that it is the call of the pilgrim church to infiltrate and humanize institutional structures: as prophet to confront and challenge power, as priest-mediator to seek solidarity, and as servant-king to minister to the needs of the marginalized.

107. Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 86 (Winter/Spring 1995); see also NATHAN GLAZER & DANIEL P. MOYNIHAN, *BEYOND THE MELTING POT* 194-216 (2d ed. 1970) (discussing the importance of the Italian family).

108. Ruth Sidel reports that in her interviews with young women, a “lively, bright, articulate twenty-one-year-old” Mexican-American reported that in school “she ‘had to learn white ways.’” Another young woman reported that in an effort to escape her outsider status she “tried to be white.” SIDEL, *ON HER OWN*, *supra* note 51, at 70.