

# THE FIRST AMENDMENT AND THE SECOND SEX

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*Modern American law describes speech in stereotypically masculine terms: it is a “marketplace” where participants “joust” for dominance. Predictably, today’s speech jurisprudence can be hostile to the female voice, implicitly condoning gendered death threats, rape threats, doxing, and trolling as the necessary price of a vibrant national discourse. Unpredictably, the American Civil Liberties Union (“ACLU”) and its leading women drafted the blueprint for this modern speech edifice. The First Amendment and the Second Sex traces the ACLU campaign to dismantle a nineteenth-century speech regime that silenced some men while protecting many women. And it suggests that ACLU feminists—intent on securing full legal and cultural equality with men—were complicit in this effort because they scoffed at the domesticated version of womanhood shielded by protective speech torts like slander.*

*This Article begins by surfacing the deep architecture of nineteenth-century life and law, with its bright boundaries between public and private. When speech regulation was commonplace and the First Amendment slept, public law was free to punish government criticism in the public sphere—a distinctly anti-democratic phenomenon. At the same time though, women in the private sphere targeted by domestic gossip had generous remedies in private law—a distinctly empowering phenomenon. It then shows how, throughout the twentieth century, the ACLU urged the Supreme Court to treat all law as public law and all life as public life. Across this new public terrain, the group argued, speech regulation should be replaced with self-help in the form of muscular counterspeech. ACLU luminaries on the distaff side joined this campaign, convinced that women were on the cusp of full public citizenship. Because this cultural turn would give women status to counterspeak, they were certain the protection of remedial speech torts would grow obsolete.*

*Today it appears that the women of the ACLU fatally miscalculated. American law has adopted the premise that all can navigate the deregulated marketplace of ideas*

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*by marshaling ideas and intellect. But American culture clings to the preference for private womanhood, producing gendered consequences for female speech. Modern women who bring their ideas into the public sphere are just as likely to be refuted with attacks on their domestic status or sexuality as they are with intellectual rejoinders. Stripped of the private law that used to repel such threats, these women are left either to counterspeak in ways that aggravate their personal peril or to withdraw from the speech arena altogether. The Article contends the time has come to acknowledge the tax that speech law extracts from women, and to ask whether today's expressive marketplace is fair or foul.*

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**INTRODUCTION**

The year is 1916. In the Chicago suburb of Wilmette, nestled on the shores of Lake Michigan, a menace has begun to infiltrate. Model T cars are bringing young ruffians from the city.<sup>1</sup> These fun-seekers arrive fully clothed, change into bathing costumes in the open air, and splash about in the lake water—often while imbibing demon rum. The sedate locals, alarmed by the skin, the liquor, and the excess of it all, decide to take action.<sup>2</sup> The women of the Wilmette Garden Club, a heretofore sleepy organization devoted to the care and keeping of backyard flowers, press Mrs. George L. Martin, “a social leader in local affairs,” into service as president of the newly created, nongovernmental, Wilmette Beach Improvement Association.<sup>3</sup> Mrs. Martin and the Association first tackle the problem of beach modesty, designating a place to change into bathing costumes.<sup>4</sup> Beachgoers balk. Several go so far as to write letters to the editor of the weekly Lake Shore News. In these letters, the writers, “perhaps jealous of the special privileges they enjoyed on the beach prior to the development of the improvement plan,” complain about Mrs. Martin’s attempt to restrict their dress and movement.<sup>5</sup> She is acting like a “mayoress,” they contend; a “czarina,” imposing her preferred morality on their behavior.<sup>6</sup> Eventually, Mrs. Martin collapses under the pressure and is “confined to her home.”<sup>7</sup> News coverage

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1. *Resent Anthony Comstockian Slur on Beach*, LAKE SHORE NEWS (Aug. 10, 1916), <https://news.wilmettelibrary.info/2303656/data?n=2> [<https://perma.cc/SXK8-2Z9V>] [hereinafter *Slur on Beach*].

2. *Id.*

3. *Mrs. Martin Is Ill by Worry of Beach Troubles*, LAKE SHORE NEWS (Aug. 31, 1916), <https://news.wilmettelibrary.info/2304948/data?n=4> [<https://perma.cc/F9ZK-DYC5>] [hereinafter *Mrs. Martin Is Ill*].

4. *Slur on Beach*, *supra* note 1.

5. *Mrs. Martin is Ill*, *supra* note 3.

6. *Id.*

7. *Id.*

suggests that “jealous criticism” of her efforts to influence development of the public lakefront “doubtless hastened the nervous breakdown.”<sup>8</sup>

Fast-forward a century. Veena Dubal, a law professor at the University of California Hastings, has spent her professional life “examining and writing about the rise of the gig economy and the loss of employment rights by workers in that sector.”<sup>9</sup> When the California Supreme Court announces a labor-friendly rule opposed by those employers, it cites one of Dubal’s scholarly articles.<sup>10</sup> And when those employers mount a referendum to overturn a California statute that codified worker protections, Dubal defends the law in writing and in interviews.<sup>11</sup> As the referendum initiative gains momentum in 2020, Dubal is depicted by its advocates as “the unelected puppet master” behind the law, and “a woman of privilege dictating how Californians can work.”<sup>12</sup> She notices “an unusual amount of hateful” language in her Twitter feed.<sup>13</sup> One typical critic posts, “Watching Veena . . . against the ropes is awesome but we have to keep up the pressure.”<sup>14</sup> Eventually, another critic posts Dubal’s home address, along with her salary and husband’s name.<sup>15</sup> Coming in the early days of California’s COVID-19 lockdown, Dubal fears that “these crazy people . . . know I’m at home. I’m a sitting target.”<sup>16</sup> Reflecting on the social media response to her public commentary, she remarks, “I didn’t realize until now why this kind of harassment is so common and so effective in silencing people.”<sup>17</sup>

In many ways, the experiences of Mrs. George L. Martin and Veena Dubal are indistinguishable. Both were unelected “private [women]”<sup>18</sup> who entered the public sphere to express opinions and exert influence over issues of public concern. Both were vilified by critics who framed their attempts to shape the public sphere as manipulative exercises of power that was not rightly theirs. Mrs. Martin was attacked as an undemocratic and haughty “czarina”;<sup>19</sup> Dubal, as an “unelected puppet master.”<sup>20</sup> And both experienced genuine emotional injury as a result of

8. *Id.*

9. Michael Hiltzick, *Column: How Millions from Uber and Lyft are Funding the Harassment of a Critic*, L.A. TIMES (Sept. 2, 2020, 5:00 AM), <https://www.latimes.com/business/story/2020-09-02/uber-lyft-veena-dubal-twitter-bullying> [<https://perma.cc/MA2Y-S4FR>].

10. *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 30 n.20 (Cal. 2018) (citing Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 72 (2017)).

11. Hiltzick, *supra* note 9.

12. Dara Kerr, “A Totally Different Ballgame”: Inside Uber and Lyft’s Fight over Gig Worker Status, CNET (Aug. 28, 2020), <https://www.cnet.com/google-amp/news/uber-lyfts-fight-over-gig-worker-status-as-campaign-against-labor-activists-mounts/> [<https://perma.cc/SH3E-6YQE>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Mrs. Martin is Ill*, *supra* note 3.

20. Kerr, *supra* note 12.

public condemnation that took aim at their personal legitimacy and personal safety, rather than the substance of their publicly expressed ideas.

In one way, however, they are remarkably different. Mrs. Martin's critics freely harangued her but claimed no special legal entitlement to do so. Dubal's critics, in contrast, claimed that their aggression was an expression of fealty to the Constitution itself. An attorney representing the person who tweeted Dubal's home address explained that her client was simply "exercising . . . First Amendment rights to critique" a fellow American.<sup>21</sup>

Martin and Dubal bookend 100 years during which the law and culture of American speech were radically transformed. At the start of the twentieth century, speech that harassed and endangered others (especially female others) was uncontroversially condemned: news coverage of Martin's predicament called her critics "jealous" and "petty."<sup>22</sup> Indeed, it was so disfavored that the law of the day empowered victims to seek vindication in court with private law tort suits and empowered states to criminally prosecute speech that might threaten public order. By the start of the twenty-first century, the same harassment and endangerment, when perpetrated against Dubal, was unapologetically defended as legitimate and productive. And unlike Martin, who was free to sue her detractors in tort or to seek state condemnation of their aggression, Dubal has virtually no analogous recourse today because the modern Supreme Court has hollowed out dignitary torts like defamation and invasion of privacy.

What explains this turnaround? It was engineered, in large part, by the ACLU, a group that counted among its founding members prominent American women like Jane Addams and Helen Keller. Yet, despite the many women on its early board, and the ascendance of women to leadership roles as the group matured, the ACLU has used its resources over the past several decades in ways that have flattened, deregulated, and implicitly masculinized speech culture and speech law. This Article uses a historical lens to trace that doctrinal progression, to surface the ACLU's role in it, and to ask how a group notable for its gender inclusion championed a theory of free speech that today provides constitutional cover for anti-female aggression.

The Article proceeds in five Parts. Part I offers a new, "topographical" description of American law and culture that is an essential starting point for describing and critiquing the gendered consequences of the twentieth-century free speech revolution. In the nineteenth century, American jurists drew a sharp line between private law and public law. At the same time, American citizens drew a sharp line between the cultural private sphere and the cultural public sphere. These lines bisected each other to create "sociolegal quadrants" within which speech disputes could be adjudicated. Public law could be applied to speech affecting the public sphere; public law could be applied to speech affecting the private sphere; private law could be applied to speech affecting the public sphere; and private law could be applied to speech affecting the private sphere. Nineteenth-century jurists feared dangerous speech and embraced a broadly regulatory jurisprudence across

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21. *Id.*

22. *Mrs. Martin is Ill, supra* note 3.

the entire speech terrain. But because speech was disputed within distinct quadrants, an ostensibly “neutral” preference for regulation produced uneven results from quadrant to quadrant. Public law limits on public sphere speech suppressed free expression by men attempting democratic change, but private law limits on private sphere speech empowered women to manage their reputational capital and thrive in domestic pursuits.

Part II documents the inversion of that system in the twentieth century. During that period, American jurists engineered three major shifts that have redrawn speech topography. First, they dissolved the boundary between public and private law. Second, they rejected “separate spheres” ideology as an outdated cultural artifact. Finally, they replaced a preference for speech regulation with a preference for speech deregulation. Twentieth-century jurists have extolled this reversal as a beneficial fix to the anti-democratic impact of speech regulation in the “public–public” quadrant without fully examining the nature of the costs extracted in a “private–private” quadrant whose existence they now deny.

Part III examines the outsized role of the ACLU in this reversal. Over the century, in brief after brief, it provided the Supreme Court with a blueprint for marrying private and public law and for rejecting the “separate spheres” ideology. True, it drafted this blueprint as part of a broader—and laudable—effort to expose the pernicious symbiosis between open government discrimination and a stealthy private caste system. But by reversing a body of law that overregulated civic expression in the public–public quadrant with a body of law that underregulated domestic slurs in the private–private quadrant, the group may have simply shown the Court how to replace one legal pathology with another.

Part IV asks why the women of the ACLU participated in a revolution that secured expressive freedom in the public sphere by trading away domestic protection in the private sphere. One answer can be found in the brand of feminism embraced by many of the leading ACLU women. Those who were “in the room” and had the opportunity to defend the value of private law protections for domestic security were unlikely to do so because they were equalitarian feminists. They valued female access to the public sphere of government and market and devalued a domestic version of womanhood. These women were confident that law and culture would progress in tandem, with law erasing distinctions between the sexes and culture encouraging men and women both to move freely between the domestic and the professional. In that emerging world, domestic slurs would lose their sting, and the body of law that deterred them would grow irrelevant. Consequently, trading it away seemed a low-cost strategy in the bid for public sphere status.

Part V comes to rest in the early twenty-first century. Culture, it seems, has not kept pace with law, and the modern woman finds herself in a double bind. When women today exercise public voice, the law treats their ideas as moves in a “joust,” inviting countermoves from intellectual antagonists. But culture continues to confine women to their private identities, leading many of those antagonists to forego engagement with female ideas and instead register objection to public womanhood with threatening speech that targets female safety and sexuality—speech the law no longer condemns.

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The Conclusion suggests that devotees have too long celebrated the benefits of the ACLU's work to modernize speech law without acknowledging how its blithe sacrifice of private law and private life have extracted real costs from real women.

### I. PUBLIC AND PRIVATE IN THE NINETEENTH-CENTURY SPEECH ARENA

Throughout most of the nineteenth century, American life and law were bisected by two bright lines. The first of these operated in the juridical dimension, separating private law from its public counterpart. During the early years of the republic, public law and private law were understood to be completely separate spheres with distinct and mutually exclusive purposes. The second of these lines operated in the social dimension, separating the so-called public sphere from its private counterpart. During the nineteenth century, the dominant cultural convention treated civic and commercial matters as the center of a "public" sphere, and domestic matters as the center of a distinct and separate "private" sphere. The public sphere was populated by American men and carried out according to values culturally associated with masculinity, like logic and competition. The private sphere was populated by both men and women but carried out according to values culturally associated with women, like emotionality and nurturing.

These two lines bisected each other, creating four quadrants where nineteenth-century legal contestation could take place. Public law could be applied to the public sphere; public law could be applied to the private sphere; private law could be applied to the public sphere; and private law could be applied to the private sphere. As discussed below, in the realm of speech law, nineteenth-century jurists assumed a universally regulatory approach, and although this ethos was ostensibly neutral with regard to the public and the private, in practice it produced differential results in each quadrant of legal contestation. When public law regulations were applied to the public sphere, they had the effect of suppressing democratic speech about governance, but when private law regulations were applied to the private sphere, they had the effect of empowering women to rebuff speech that injured their personal dignity and domestic aspirations.

#### A. *Public Law and Private Law*

Historians and cultural critics have observed that nineteenth-century Americans understood life to be divided into two contrasting spheres: the "state" and "civil society."<sup>23</sup> The "state" sphere was shaped by politics, and it was the forum for the conduct of "public" life. The "civil" sphere was said to be shaped by personal action and to be the forum for the conduct of "private" life.<sup>24</sup> "The distinction [between the state and civil society] was based upon a clear division between public

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23. See generally NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* (1986) (tracing the impact of social forces on the development of libel law in the United States).

24. *Id.*; see also Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1527 (1983).

and private sources of lawmaking.”<sup>25</sup> In the former, the “public will” produced regulations that aimed to control the polity at large for the collective benefit of the group, while in the latter, individuals could access the private law of property, contract, and tort to facilitate their own destinies as they interacted with other individuals.<sup>26</sup> Public law can be understood as a vertical system, which specifies the “scope of government authority to act upon individuals in society.”<sup>27</sup> Private law, in contrast, can be understood as a horizontal system, which specifies “the responsibilities nongovernmental actors in society have to one another.”<sup>28</sup>

The relationship between public and private law grew more salient in the Reconstruction period, when public lawmaking bodies at the state and local level proliferated, and many Republican lawmakers in those bodies adopted anti-racist laws designed to integrate Black Americans into the citizenry along with redistributive policies responding to “large aggregations of power . . . concentrat[ing] in business.”<sup>29</sup> As Congress and local officials began legislating for racial and economic equity, courts began to treat private law as a “neutral and apolitical” regime capable of offsetting the fluctuating policy preferences of the elected branches.<sup>30</sup> In truth, the judicial description of private law as a “neutral” was dubious. During the post-Reconstruction period, policing the boundary between public rights and private rights, and interpreting the content of private rights, often provided legal cover for “regressive and oppressive behaviors.”<sup>31</sup> Indeed, the Supreme Court’s invalidation of the Civil Rights Act of 1875 blunted legislative power to adopt socially progressive public law by treating the protection of private rights as a countervailing constitutional imperative.<sup>32</sup> States were permitted “reasonable” regulation of social arrangements, and those social arrangements were often the product of private racial hostility. So, the distinction between public law and private law “permitted a reconciliation between the legal norms mandating racial equality and social norms mandating white supremacy.”<sup>33</sup> The Court used private law in a similarly strategic fashion to strike down redistributive economic legislation by invoking the constitutional sanctity of contract principles.<sup>34</sup>

In response to judicial decisions like these, Legal Realist scholars and judges in the early twentieth century began to critique the assumption that private law was distinct from public law and unconnected to the sociological architecture of

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25. Anat Rosenberg, *Separate Spheres Revisited: On the Frameworks of Interdisciplinarity and Constructions of the Market*, 24 L. & LIT. 393, 398 (2012).

26. *See id.*

27. Lauren H. Scholz, *Privacy as Private Law* (unpublished manuscript) (on file with author).

28. *Id.*

29. *Id.* at 25.

30. *Id.*

31. *Id.*; *see also* Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 6–8 (2016).

32. *See* *The Civil Rights Cases*, 109 U.S. 3, 11–15 (1883).

33. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1967–68 (2000).

34. *See* *Lochner v. New York*, 198 U.S. 45, 64 (1905).



the state.<sup>35</sup> And they began to depict private law itself as an inherently regressive jurisprudence that invited judges to cement racial and class inequities.<sup>36</sup>

### ***B. Public Sphere and Private Sphere***

The period of public law–private law jurisprudence coincided with a period of public sphere–private sphere thinking in culture. As the United States shifted away from the rigid, status-oriented economic and social arrangements that marked agrarian society, and toward a liberal democratic ideal that was more socially fluid,<sup>37</sup> American culture gravitated toward new lines of demarcation that structured daily existence. Specifically, life was implicitly understood to take place within multiple and occasionally opposing “spheres.”<sup>38</sup> Understanding the world as cleaved into spheres allowed people grappling with change to categorize “identifiable areas answering to distinct logics and exemplifying typical patterns of relations.”<sup>39</sup>

Historians who have identified the emergence of a “separate spheres” ideology in the nineteenth century contend that Americans saw civil society as comprising two domains: the “market” and the “family.”<sup>40</sup> At the time, “as men’s work was largely removed to the factory while women’s work remained primarily in the home, there came to be a sharp dichotomy between ‘the home’ and ‘the [workaday] world.’”<sup>41</sup> The distinction between those worlds “took on many of the moral overtones developed in the theological dichotomy between heaven and earth.”<sup>42</sup> The “home” sphere was seen as the natural place for women, while the “market” sphere was considered the natural place for men.<sup>43</sup>

Over time, both home and market came to be equated with “distinct logics,” and those logics came to be equated with the female and male occupants of each, nowhere more so than among the white middle class:

[T]he world of the marketplace was decried for being selfish, debasing, and exploitative, [but] it was also admired and esteemed. Self-reliance, progress, modernization—each had positive connotations that were associated with the world of commerce and industry. Rationality, discipline, and a focus on

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35. See *infra* Part II.

36. See, e.g., Cristina Carmody Tilley, *Private Law, Public Law, and the Production of American Virtue*, 115 NW. U. L. REV. COLLOQUY 270, 273 (2020).

37. See generally Rosenberg, *supra* note 25.

38. *Supra* Section I.A.

39. Rosenberg, *supra* note 25, at 396.

40. See generally Olsen, *supra* note 24.

41. *Id.* at 1499 (alteration in original) (quoting N. COTT, *THE BONDS OF WOMENHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1835*, at 64–70 (1977)). See generally JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (1962) (identifying the development of a public sphere where non-government actors could learn, discuss, and influence governmental policies that affected their economic and other interests).

42. Olsen, *supra* note 24, at 1499.

43. *Id.* at 1500.

objective reality were considered desirable aspects of the “male” sphere of the market.<sup>44</sup>

At the same time, “[b]y highlighting . . . morality, hard work, and self-control . . . these men continued to promote the era’s increasingly popular notion of the self-made man.”<sup>45</sup>

Identifying the home as a counterweight to the market meant that women were “exclud[ed] . . . from the world of the marketplace. . . [and] encouraged to be generous and nurturant but discouraged . . . from being strong and self-reliant; it insulated women from the world’s corruption but denied them the world’s stimulation.”<sup>46</sup> Within this sphere, women were expected to display “cardinal virtues [of] piety, submissiveness and domesticity.”<sup>47</sup>

Despite the understanding that the market and the home were “in radical opposition,” people in the nineteenth century considered each sphere interdependent on the other.<sup>48</sup> The aggression and opportunism called for in market conduct were considered acceptable only because they were constrained to a finite time and place that participants could leave behind when they entered the home.<sup>49</sup> And because the market was depicted as dangerous, though remunerative, it enhanced the popular narrative that women were fortunate to be provided refuge from its excesses.<sup>50</sup>

Academic depictions of the separate spheres’ dynamics can, admittedly, lapse into oversimplification. For one thing, the race segregation of the period detracts from the power of separate spheres ideology to describe the social location of Black men and women in the nineteenth century. Unlike their middle-class white counterparts, Black men were functionally excluded from the public sphere of political and economic power because of the “comprehensive legal, political, and social subordination” wrought by Jim Crow laws.<sup>51</sup> At the same time, while the prevailing “middle-class conception[] of the ideal woman” required a devotion to home and family, “it largely ignored the reality that many African-American women were compelled by their circumstances to seek economic stability through all available means.”<sup>52</sup> These women participated in the public sphere of work—

44. *Id.*

45. Jane E. Dabel & Marissa Jenrich, *Co-Opting Respectability: African American Women and Economic Redress in New York City, 1860–1910*, 43 J. URB. HIST. 312, 313–14 (2017).

46. Olsen, *supra* note 24, at 1500.

47. Dabel & Jenrich, *supra* note 45, at 314 (citing ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* 23 (1993)); Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151, 152 (1966).

48. Olsen, *supra* note 24, at 1520, 1524.

49. *See id.* at 1524.

50. *See id.* at 1500.

51. *See* James W. Fox, Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court’s Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 299 (2005).

52. Dabel & Jenrich, *supra* note 45, at 314. *See also* Nina Banks, *Uplifting the Race Through Domesticity: Capitalism, African-American Migration, and the Household Economy in the Great Migration Era of 1916–1930*, 12 FEMINIST ECON. 599, 603 (2006).

ironically, often as household workers facilitating white female performance of domesticity—and conceptualized “respectability” to include providing support for their families and achieving financial independence.<sup>53</sup>

For another, the modern rejection of separate spheres ideology as antiquated and oppressive is not universal. While many modern feminists decry the notion that women should be confined to social and legal expectations arising from gender alone, others have suggested that the concept of a private sphere can be congenial and useful. For example, Linda Kerber has observed that the nineteenth- and early twentieth-century private sphere brought women together without male scrutiny, allowing them to connect, organize, and generate a political agenda.<sup>54</sup> And Ruth Gavison has suggested that designating a sphere where “private” interests like emotional well-being, relational health, and personal privacy are located may validate those interests, while criticizing or dismantling a private sphere can devalue those interests.<sup>55</sup>

Although separate spheres ideology may not capture all the nuances of American cultural life in nineteenth-century America, the overarching reality was that men and women were expected to perform highly differentiated social roles and that the law implicitly relied on and perpetuated that reality.

### *C. The Nineteenth-Century Regulatory Ethos in the Four American Quadrants*

The two public–private axes running through American law and life in the early years of the republic bisected to produce “sociological quadrants” in which the law might provide a basis for contesting behavior: public law applicable to the public sphere; public law applicable to the private sphere; private law applicable to the public sphere; and private law applicable to the private sphere.

At the turn of the nineteenth century, both public and private law speech doctrines were built on the premise that speech had the potential to harm society at large in the public sphere and also individual members of society in the private sphere. Accordingly, both public law and private law featured robust causes of action that could be used to prohibit, punish, discourage, or burden speech deemed problematic by either the state in its police capacity or by private people who claimed to have been injured. This presumption applied to public law regulations aimed at the public sphere; to private law doctrines aimed at the public sphere; to private law concepts that had incidental effects on the public sphere; and to the assignment of private law consequences for private speech. The presumption that speech was capable of doing social and personal harm was so foundational that for the first century of the American experience, legal measures to suppress speech proliferated across all four quadrants without any serious First Amendment

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53. Dabel & Jenrich, *supra* note 45, at 315.

54. See, e.g., Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 15–16 (1988).

55. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 1–2 (1992).

objections to their validity.<sup>56</sup> As mainstream academic and popular culture in the nineteenth century disfavored both unorthodox public speech and injurious private speech, one value—a regulatory value—was assumed to govern all four quadrants of speech law.<sup>57</sup>

### *1. Public Law in the Public Sphere*

At the founding of the republic, the federal government and state governments took strong regulatory positions to control speech thought to imperil the public sphere. These regulations tended to be justified on one of two grounds: either they were said to discourage problematic critiques of public leaders, or they were defended as measures to protect the public peace.

**a. Criminalizing seditious criticism of government.** Throughout the late 1700s and the 1800s, state and federal governments freely used statutes and common law to tamp down seditious libels. These speech regulations were led, of course, by the notorious federal Alien and Sedition Act of 1798, which provided for fines and imprisonment of “any person who shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either House of Congress, or the President . . . or to bring them . . . into contempt or disrepute.”<sup>58</sup> The Act went unchallenged in court and became obsolete only through its internal sunset provision. But this federal law was just one example of the government impulse to regulate anti-government speech. During this period, it was common for state legislatures to adopt public law sedition statutes and for judges to apply common law sedition principles.<sup>59</sup> And like the federal sedition statute, these localized speech regulations went decades without drawing serious First Amendment challenges.<sup>60</sup>

Eventually, some critics began to assert that the First Amendment should limit the state’s power to prohibit or punish dissenting speech about government officials and government policies. However, constitutional objections to these regulations in the late nineteenth and early twentieth centuries gained little traction. From 1878 to 1915, the Supreme Court was asked repeatedly to disable federal legislation, state constitutional provisions, state statutes, and state judicial injunctions that had been used to silence criticism of government and businesses.<sup>61</sup> The Court denied those requests, instead endorsing government’s entitlement to

56. *But see* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2190 n.93 (2015) (noting that the constitutional distaste for prior restraints was longstanding despite the Supreme Court’s silence on the issue until *Near v. Minnesota*, 283 U.S. 697 (1931)).

57. *See, e.g.*, David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 522 n.24 (1981) [hereinafter Rabban, *Forgotten*] (citing Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 724 (1975) (noting that the “practical and doctrinal climate of the times” was “strikingly inhospitable to dissent”).

58. Act of July 14, 1798, 5 Cong. ch. 74 § 2, 1 Stat. 596, 596.

59. CLIFTON O. LAWHORNE, *DEFAMATION AND PUBLIC OFFICIALS: THE EVOLVING LAW OF LIBEL* 54–55, 67–69 (1970).

60. *See, e.g.*, Rabban, *Forgotten*, *supra* note 57, at 517.

61. *See* David P. Currie, *The Constitution in the Supreme Court 1910–1921*, 1985 DUKE L.J. 1111, 1145–55 (1985).

control, suppress, and punish problematic public speech.<sup>62</sup> For example, the Court permitted Congress to turn an “alien anarchist” from the country’s borders on the basis of his speech, over First Amendment objections.<sup>63</sup> The Court also held during this period that the First Amendment did not bar state judges from holding journalists in contempt for disparaging commentary on the judiciary.<sup>64</sup> Similarly, the Court found no First Amendment impediment to state judges issuing contempt citations against labor protesters who violated injunctions against publishing boycott information.<sup>65</sup>

**b. Criminalizing defamatory speech that threatened public peace.**

Throughout the same period, states adopted and local prosecutors deployed criminal libel laws to punish individuals whose speech was critical *not* of the government, but of fellow private citizens. The rationale for these “criminal defamation” statutes was to maintain order within the public sphere of life. Loose talk that libeled identifiable groups, accused community members of questionable behavior, aired family and business disputes, or besmirched the virtue of local women were all considered liable to trigger offended persons’ violent, vengeful tendencies, and to disrupt the public peace.<sup>66</sup> Governments feared that personal gossip could trigger violence because of the lingering cultural attachment to personal honor as a form of social capital to be protected at all costs.<sup>67</sup> Criminal libel prosecutions represented the state’s effort to preempt vigilantism by guaranteeing a government-administered response to problematic loose talk.<sup>68</sup>

From 1797 to 1936, there were hundreds of reported appellate cases involving state criminal libel prosecutions.<sup>69</sup> And, just as state and federal courts found sedition actions constitutionally tolerable throughout the nineteenth century, these courts resisted placing First Amendment restrictions on criminal libel prosecutions.<sup>70</sup>

*2. Public Law in the Private Sphere*

Throughout the nineteenth and early twentieth centuries, federal and state governments were equally aggressive in regulating speech occurring in or affecting the “private sphere.” For example, in the years following the Civil War, states across the country enacted bans on speech thought to “deprave and corrupt” readers and listeners.<sup>71</sup> In 1873, Congress passed a federal anti-obscenity law, known as the Comstock Act and enforced by morality crusader Anthony Comstock in his role as

62. *See id.*

63. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 291–94 (1904); *see also* Rabban, *Forgotten*, *supra* note 57, at 536–38.

64. *Patterson v. Colorado ex rel. Att’y Gen. of Colorado*, 205 U.S. 454, 458–64 (1907).

65. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 419–424, 452 (1911).

66. Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 *COMMUN. L. & POL’Y* 433, 440 (2004).

67. *Id.* at 442.

68. *See id.* at 460–61.

69. *Id.* at 466. These causes of action were ultimately held subject to First Amendment limitations in 1964. *Garrison v. Louisiana*, 379 U.S. 64, 77–79 (1964).

70. *See* Lisby, *supra* note 66, at 464–66.

71. DANIEL A. FARBER, *THE FIRST AMENDMENT* 127 (1st ed. 1998).

a “special agent” of the Post Office.<sup>72</sup> The Comstock Act criminalized the sending of “obscene, lewd or lascivious,” “immoral,” or “indecent” publications through the mail, a provision that covered “writings or instruments pertaining to contraception and abortion, even if written by a physician.”<sup>73</sup> Comstock also used his authority under the Act to attempt the regulation of other vices, like gambling and blasphemy, but he “never generated the same enthusiasm when the vice did not involve sex.”<sup>74</sup>

In 1878, the Supreme Court upheld Comstock’s authority to prosecute lottery dealers under a federal corollary to the Comstock Act that banned the mailing of lottery materials.<sup>75</sup> The Court concluded that the statute was not constitutionally problematic because it did not abridge the actual speech of the lottery dealers, but merely complicated the circulation of that speech.<sup>76</sup> The Court reasoned that Congress had uncontroversially found that obscene materials, contraceptives, and communications about gambling were “corrupting” and had a “demoralizing influence upon the people,” and that laws barring the use of the federal mails as tools of corruption and demoralization were consistent with the First Amendment guarantees of free speech and press.<sup>77</sup> Similarly, the Court permitted states to prohibit the exhibition of motion pictures offensive to “public morals.”<sup>78</sup> It also upheld a state law criminalizing the publication of material advocating sexually progressive conduct.<sup>79</sup> Having concluded that the First Amendment permitted the criminalization of information about nudity and free love, the Court was understood to be equally hospitable to state laws barring the publication and circulation of “obscene” material and information about birth control, both frequent subjects of prohibitory legislation.<sup>80</sup>

### 3. *Private Law in the Private Sphere*

Like its public law counterpart, private law in the nineteenth and early twentieth centuries unashamedly facilitated litigation that forced speakers to compensate those who claimed injuries arising from problematic words. Specifically, individuals were free to sue in tort for speech that damaged their reputation or invaded their privacy. The ancient slander and libel torts were understood specifically as interventions meant “to protect ‘private’ lives.”<sup>81</sup> These

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72. David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 55 (1992) [hereinafter Rabban, *Conceptions*].

73. Brandon R. Burnette, *Comstock Act of 1873 (1873)*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1038/comstock-act-of-1873> [<https://perma.cc/B48A-RBYJ>] (last visited Dec. 30, 2022).

74. Rabban, *Conceptions*, *supra* note 72 at 57–58.

75. *Ex parte Jackson*, 96 U.S. 727, 736–37 (1878).

76. *Id.* at 736.

77. *Id.*

78. *Mut. Film Corp. v. Indust. Comm’n*, 236 U.S. 230, 241–45 (1915) (discussing viewings in public by all and public morals).

79. *Fox v. Washington*, 236 U.S. 273 (1915) (concerning a publication encouraging “boycott” by those in favor of nudist colony).

80. Rabban, *Conceptions*, *supra* note 72, at 53.

81. See Andrew J. King, *The Law of Slander in Early Antebellum America*, 35 AM. J. LEGAL HIST. 1, 9 (1991).

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causes of action had deep roots in English and American law, and plaintiffs used them frequently in the earliest years of the Republic. The privacy causes of action were newer doctrines that began to gain acceptance in the first years of the twentieth century.<sup>82</sup>

And just as the First Amendment was dormant for the first century of public law speech regulation, it was considered inapplicable to the private law of speech injury during that same period. A survey of Supreme Court defamation jurisprudence shows the Court consistently embracing tort doctrines that permitted individual recovery for speech claimed to tarnish reputation or invade personal privacy. For example, in the 1876 case *Pollard v. Lyon*, pursuant to its original jurisdiction over appeals from the District of Columbia Supreme Court, the Court affirmed the dismissal of a slander cause of action brought by a woman against a man who had told several people that he saw her “in bed with Captain Denty.”<sup>83</sup> The Court resolved the question of whether that allegation was per se slander without mentioning the First Amendment or raising the possibility that state adjudication of the slander tort for “words spoken of a private person” could be subject to constitutional strictures.<sup>84</sup>

Similarly, in 1909, Justice Holmes for the Court reversed a libel judgment for the *Chicago Tribune* for erroneously publishing a picture of Elizabeth Peck, a “total abstainer from whisky and all spirituous liquors” in an advertisement touting Duffy’s Pure Malt Whisky.<sup>85</sup> As in *Pollard*, the Court did not mention the possibility that the First Amendment might constrain the adjudication of such a tort claim. In fact, Holmes endorsed the strict liability metric historically assigned to libels, quoting Judge Mansfield’s warning that “whenever a man publishes, he publishes at his peril.”<sup>86</sup> He acknowledged that there was a diversity of opinion within the community about the propriety of female whisky drinking, but held that the libel tort invited the plaintiff to persuade the jury that the libel “would hurt [her] in the estimation of an important and respectable part of the community.”<sup>87</sup> Again, in *Washington Post v. Chaloner*, the Court reversed a verdict against the *Washington Post* in a case brought by a Virginia socialite who had shot and killed the husband of a visiting guest.<sup>88</sup> The Court invoked the “applicable” rules of tort without mentioning the First Amendment.

#### 4. Private Law in the Public Sphere

The Supreme Court’s early defamation jurisprudence also demonstrates the prevailing view that the Constitution did not prohibit private law litigation about speech critiquing those in the public sphere. For example, in *White v. Nicholls*, a District of Columbia official sued individuals who had contacted the President to

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82. See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 72–73 (Ga. 1905) (first case to recognize a tort cause of action for invasion of privacy).

83. *Pollard v. Lyon*, 91 U.S. 225, 225, 238 (1875).

84. *Id.* at 234.

85. *Peck v. Tribune Co.*, 214 U.S. 185, 188, 190 (1909).

86. *Id.* at 189.

87. *Id.* at 189–90.

88. *Wash. Post Co. v. Chaloner*, 250 U.S. 290, 291, 294 (1919).

criticize his work.<sup>89</sup> The Court reversed the finding below in the defendants' favor, ignoring the possibility that the First Amendment might apply to limit the official's right to recover against critics of his public work. It even remarked that ill-founded gossip about officials was "an offense dangerous to the people . . . because the people may be deceived and reject their best citizens."<sup>90</sup> In 1912, in *Gandia v. Pettingill*, Justice Holmes wrote an opinion reversing a verdict in favor of the U.S. Attorney in Porto Rico against a local newspaper without mentioning the First Amendment or raising the possibility that constitutional principles were at all applicable to the libel tort.<sup>91</sup>

***D. The Costs and Benefits of Nineteenth-Century Speech Regulation Across the Four American Quadrants***

Supreme Court case law from the late nineteenth to the early twentieth century demonstrates that in all four quadrants where disputes over speech might arise, the Court applied the same regulatory ethos without taking seriously the notion that the First Amendment articulated a preference for deregulation in any of them. The Court's decisions "reflected a tradition of pervasive hostility to the value of free speech" without asking who was speaking, or who objected to the speech.<sup>92</sup> This broad embrace of speech regulation did not attempt to distinguish between public and private discourse or to consider whether each mode of communication might serve different purposes. Though the Court's jurisprudence was not quadrant-specific, the inevitable result of applying a flat rule to an uneven world was to produce uneven results in different parts of that world. Though the Court seemed unaware of this dynamic, a newly emerging class of speech scholars was beginning to point out that unitary speech regulation<sup>93</sup> offended constitutional values in some quadrants, while yielding constitutionally permissible results in others. In his

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89. *White v. Nicholls*, 44 U.S. 266, 274 (1845).

90. *Id.* at 290. Plaintiff had argued in favor of a generous opportunity to show malice:

Under the free dispensations of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decision that your honors may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation."

*Id.* at 281.

91. *Gandia v. Pettingill*, 222 U.S. 452, 456–57, 459 (1912). In 1913, the Court applied the common law rule extending a measure of privilege to those speaking on issues of public concern in remanding for further consideration a libel suit brought by a public-school teacher against the District of Columbia School Board for its statement in a court document that she lacked competence as a teacher. *Nalle v. Oyster*, 230 U.S. 165, 172 (1913). In other words, although the early twentieth-century Court welcomed state law efforts to introduce some flexibility into the private law of tort to guard speech in the public sphere, it did not consider that flexibility compulsory as a matter of constitutional law.

92. *See Rabban, Forgotten, supra* note 57, at 542. *But see id.* at 557 (noting that states could be somewhat more hospitable to unorthodox speech).

93. *See generally Rabban, Conceptions, supra* note 72.



seminal history of the “forgotten years” of free speech doctrine, David Rabban has identified five prominent scholars—Thomas Cooley, Ernst Freund, Henry Schofield, Roscoe Pound, and Theodore Schroeder—whose critiques of nineteenth-century speech law laid the foundation for the twentieth-century speech revolution.<sup>94</sup> In their scholarship, each began to express unease about the most extreme instances of speech suppression in public discourse and tolerance of speech burdens in private discourse. Though they did not speak the language of “quadrants” that I have adopted, their varying levels of condemnation for speech regulation map neatly onto that schema.

### 1. *Public Law in the Public Sphere*

Turn-of-the-century speech scholarship began to identify how state-sponsored suppression of political dissent struck at the heart of the constitutional speech protection by thwarting the processes meant to facilitate representative democracy. These scholars “emphasized social interests in freedom of expression, including the positive influence of the exchange of ideas on the development of civilization and, particularly, the importance of political discussion to democratic government.”<sup>95</sup> They also agreed that state suppression of dissent was “more likely to lead to actual violence” than state permission for such dissent.<sup>96</sup> For example, Cooley explicitly stated that the First Amendment was “essential to the very existence and perpetuity of free government,”<sup>97</sup> because it “check[ed] the abuse of power by enabling citizens to make just criticism of the conduct of persons in authority.”<sup>98</sup> Pound, too, argued that state-sponsored speech suppression was particularly pernicious to democratic governance and that the state actually protected itself from mutinous backlash by permitting free discussion and criticism of its conduct.<sup>99</sup> This core group of speech scholars rejected the English common law crime of seditious libel as incompatible with the First Amendment, along with legislative measures criminalizing seditious speech with a so-called bad tendency to produce violence.<sup>100</sup> Schroeder considered the First Amendment the Founders’ attempt “to insure that future Americans would have the legal ‘right to advocate sedition and revolution,’” and condemned public law efforts to gag speech on public sphere issues.<sup>101</sup>

### 2. *Private Law in the Public Sphere*

Though these early scholars concentrated their criticism of government speech regulation on the public law–public sphere quadrant of speech law, they also grasped that when participants in the public sphere sought private law remedies for journalistic speech about them, civic discourse and democratic self-governance could suffer. Consequently, to greater and lesser degrees, free speech theorists of the day all seemed to believe that the Court’s acceptance of a regulatory ethos in the

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94. Rabban, *Forgotten*, *supra* note 57, at 520–21.

95. *Id.* at 562.

96. *Id.* at 563.

97. *Id.*

98. *Id.* at 563–64.

99. *Id.* at 564.

100. *Id.* at 563.

101. *Id.* at 567.

private law—public sphere quadrant was almost as constitutionally problematic as its endorsement of public law regulations of the public sphere.<sup>102</sup> Absent a constitutional overlay to the private law of tort, they suggested, those who moved in the public sphere could deter institutional speakers like newspaper publishers from informing the public about government and civic affairs.

For example, Schofield asserted that judicial contempt citations against publishers who critiqued the courts were “intolerable.”<sup>103</sup> He contended that the First Amendment “legalize[d] published truth on all matters of public concern,” while not affecting liability for published falsehoods on such public matters.<sup>104</sup> Cooley, too, argued that judicial application of libel principles to hold newspapers liable in damages for disputed content was anti-democratic because it unduly burdened “one of the chief means for the education of the people.”<sup>105</sup> Freund argued that the reach of the First Amendment extended only to speech on public affairs, and therefore found no constitutional impediment to defamation liability—with the generous caveat that public affairs included discussions of art, literature, and science.<sup>106</sup> Unsurprisingly, proto-absolutist Schroeder contended that the First Amendment barred liability for speech on “matters of public concern” and did not just privilege speakers who could demonstrate that they acted “for good motives and for justifiable ends.”<sup>107</sup>

### 3. Public Law in the Private Sphere

Despite their frustration with public and private law measures targeting the public sphere, this quintet of early speech theorists was more tolerant of public law measures to control speech in the private sphere. Many of these scholars thought the Constitution tolerated public regulation of speech that threatened morality. Because they assumed that speech in that category lacked democratic or educational significance, they assumed that public law regulation of it left the private sphere no poorer.<sup>108</sup> For example, Schofield believed that “indecent, obscene, and immoral” speech was without value and could therefore be regulated through existing common law causes of action or state legislative prohibitions on them.<sup>109</sup> Cooley, too, considered existing common law prohibitions against obscene speech affecting “public morals” to be unproblematic from a constitutional perspective.<sup>110</sup> Freund

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102. See, e.g., *id.* at 561–67.

103. *Id.* at 561 (quoting Henry Schofield, *Freedom of the Press in the United States*, 9 AM. SOCIO. SOC’Y 67, 115 (1914), reprinted in 2 H. SCHOFIELD ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 510 (1921)).

104. *Id.* at 565 (alteration in original) (quoting Schofield, *supra* note 103, at 110).

105. *Id.* at 562 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 641 (7th ed. 1903)).

106. *Id.* at 567.

107. *Id.* (quoting Theodore Schroeder, *The Meaning of Unabridged “Freedom of Speech,”* in FREE SPEECH FOR RADICALS 37, 42 (1916)).

108. See Lakier, *supra* note 54, at 2182–92.

109. See Rabban, *Forgotten*, *supra* note 57, at 565–66 (quoting Schofield, *supra* note 103, at 82).

110. *Id.* at 566 (quoting COOLEY, *supra* note 105, at 615).

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joined this camp in placing regulations of obscenity and “speech corrupting ‘public morals’” beyond the reach of the First Amendment.<sup>111</sup>

Schroeder, an outspoken sexual progressive and avant-garde thinker, took a profoundly different view of the Constitution’s application to state regulation of speech that affected the private sphere. He resisted public regulation of morals, coordinating the resources of the Free Speech League to regularly contest prosecutions under the Comstock Act.<sup>112</sup>

### 4. *Private Law in the Private Sphere*

Finally, the prewar scholars pressing to modernize American speech law uniformly agreed that private law causes of action affecting the private sphere were simply outside the concern of the Constitution, in large part because the speech in this quadrant contributed nothing to public discourse and thus cost the public conversation little when the law deterred it. For example, Schofield concluded that the First Amendment does not reach “any statements, whether true or false, dealing with ‘private’ subjects.”<sup>113</sup> Cooley, too, concluded that the First Amendment did not apply to “speech on private topics unless there is a ‘reason in public policy demanding protection to the communication.’”<sup>114</sup> He urged that “common-law prohibitions against speech affecting ‘private character,’” such as libel, were “consistent with constitutional guarantees.”<sup>115</sup> Freund agreed “that the First Amendment d[id] not extend to communications lacking significant public interest,” and did not compel legal immunity for defamatory speech.<sup>116</sup> Even Schroeder contended that the interest in free speech was least compromised in the private–private quadrant, though—as a free speech absolutist—he insisted that speakers who discussed “the private affairs of private citizens” should escape liability when they did so “for good motives and for justifiable ends.”<sup>117</sup>

### E. *Gendered Quadrants, Gendered Speech Law*

Though speech scholars at the turn of the century were beginning to realize that a one-size-fits-all regulatory rule was producing a spectrum of costs and benefits in different speech contexts, they seemed unaware that those costs and benefits were distinctly gendered. The public and private spheres were tightly linked to men and women, respectively. So, when public law regulated speech in the public sphere, that regulation operated to constrain the men who were the primary occupants of that sphere. Conversely, when private law permitted compensation to those disparaged in the public sphere, that regulation operated as a subsidy to the public

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111. *Id.* at 567 (quoting ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 506 (1904)). However, he extended constitutional protections to any speech affecting public affairs and construed that category broadly to include “pursuit of art, literature and science.” *Id.*

112. Rabban, *Conceptions*, *supra* note 72, at 88–89.

113. Rabban, *Forgotten*, *supra* note 57, at 565 (quoting Schofield, *supra* note 103, at 79).

114. *Id.* at 566 (quoting COOLEY, *supra* note 105, at 615).

115. *Id.* (quoting COOLEY, *supra* note 105, at 604).

116. *Id.* at 567 (citing FREUND, *supra* note 111, at 509–13, 521).

117. *Id.* at 568 (citing Theodore Schroeder, *Presumptions and Burden of Proof as to Malice in Criminal Libel*, 49 AM. L. REV. 199, 208–09 (1915)).

men who ran government and industry, and when private law permitted compensation for slurs in the private sphere, that regulation operated as a subsidy and a shield to the private women trying to secure family stability within the home. State court judges responsible for applying the private torts of libel and slander never explicitly acknowledged this dynamic, but they implicitly responded to it during the early twentieth century. They adopted a series of common law privileges that stripped men of the private law subsidy available for unflattering speech about them, and they replaced it with a legal expectation that they would use intellectual brawn to defend themselves. And courts adopted a complementary set of common law doctrines that preserved and facilitated the private law subsidy for women defending their virtue.

### 1. *Private Law in the Public Sphere*

The private law tort of libel was distinct from the private law tort of slander at the turn of the century,<sup>118</sup> and each served distinguishable functions. The libel tort was limited to written speech, and because the written instruments of the day (newspapers, pamphlets, business letters, and the like) tended to transmit information about those participating in government or the commercial sector, the majority of libel plaintiffs—of which there were relatively few<sup>119</sup>—were male.<sup>120</sup> Consequently, litigating the private law of *libel* had more far-reaching consequences on the public sphere than litigating the private law of *slander*, and judges of the period growing more sensitive to the democratic value of journalistic speech about public men began to withdraw the private law subsidies that libel doctrine had traditionally extended to those men.

This development coincided with three nineteenth-century changes in the foundation of American law and society. First, a number of additional states had joined the union, and within each state, the number of municipalities and local governments such as counties and public school districts mushroomed.<sup>121</sup> Consequently, by the close of the century, the number of men holding or running for public office multiplied exponentially.<sup>122</sup> These men were using public money on

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118. As communications technology modernized, especially with the advent of radio, the two torts essentially collapsed into a single tort of defamation. *See, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 586–87 (1955).

119. King, *supra* note 81, at 1.

120. *See, e.g.*, Cristina Carmody Tilley, *Reviving Slander*, 2011 UTAH L. REV. 1025, 1025 (2011).

121. *See, e.g.*, *The Early Nineteenth-Century Newspaper Boom*, in *The News Media and the Making of America*, AM. ANTIQUARIAN SOC'Y., <https://americanantiquarian.org/earlyamericannewsmedia/exhibits/show/news-in-antebellum-america/the-newspaper-boom> [<https://perma.cc/5HL5-XC9Q>] (last visited Dec. 30, 2022) [hereinafter *Newspaper Boom*] (summarizing that the proliferation of government units at the national, state, county, and town levels went hand-in-hand with the proliferation of newspapers to cover each of those levels).

122. *See id.* Though the vast majority of those participating in this newly invigorated public sphere were male, there were, of course, women who held notable roles in political and cultural movements. *See generally, e.g.*, *Whitney v. California*, 274 U.S. 357 (1927) (involving state effort to suppress speech of Communist leader Charlotte Anita

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public projects that interested taxpayers and members of the community. Other unelected men participated in civic projects, whether as financiers, benefactors, or advisers.<sup>123</sup> Put simply, the United States was building physical and civic infrastructures using tax dollars and market funds, and members of the taxpaying public wanted information about that process.

Second, the number of newspapers in the nation had risen sharply.<sup>124</sup> New technology lowered the cost of newspapers, and public education drove literacy rates up, creating a vibrant market for journalism about public affairs.<sup>125</sup> As publishers attempted to satisfy the increased appetite for news about officials and powerbrokers by churning out more news more quickly, the number of reports containing apparent inaccuracies or unflattering characterizations multiplied. By the late 1800s, there was a noticeable uptick in the number of civil libel suits brought by public officials.<sup>126</sup> And the vast majority of plaintiffs in these suits were men.

Third, as the American economy had industrialized throughout the nineteenth century, the cultural expectation that men enjoyed “honor” correlating with their status at birth faded. Instead, late nineteenth-century culture embraced a narrative of social mobility, in which men were expected to bring their physical and mental prowess into the public sphere to compete for wealth, status, and power.<sup>127</sup> Commentators began to suggest that men who entered this sphere assumed the risk of disparaging commentary. These men “put their reputations into the ‘crucible of public opinion,’” and should not “solicit the suffrages of that opinion, either with a view to fortune, fame or station” if they could not endure negative commentary from strangers.<sup>128</sup> Men in the public sphere were expected to use their strength to either repel or endure public criticism; seeking the paternalistic shelter of the law came to be seen as a disfavored tactic.<sup>129</sup> Put simply, they argued that “the idea of public and private spheres of life should inform the law . . . . The law of defamation

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Whitney); Louis Stotesbury, *The Famous “Annie Oakley” Libel Suits*, 13 AM. L. 391 (1905) (recounting the libel lawsuits of Wild West entertainer Annie Oakley, whose \$42,000 recovery in damages and settlements was the largest for libel in U.S. history at the time).

123. See, e.g., *Newspaper Boom*, *supra* note 121.

124. *Id.*

125. Cristina Carmody Tilley, *(Re)categorizing Defamation*, 94 TUL. L. REV. 435, 483 (2020).

126. LAWHORNE, *supra* note 59, at 107–10.

127. Of course, the shift in the cultural narrative towards what might be called a Horatio Alger model of social mobility and meritocracy obscured the extent to which class privilege remained an outsized determinant of public success. The point of tracing the arc of American cultural imagination is not that the new narrative was accurate, but simply to note how it influenced the development of doctrines governing one’s claim of entitlement to a good reputation.

128. King, *supra* note 81, at 9 (quoting *Critical Notice*, 1 AM. Q. REV. 247, 255 (1844)).

129. See, e.g., LAWHORNE, *supra* note 59, at 82–85.

should . . . protect ‘private’ lives while permitting free reign to discuss[] public activity.”<sup>130</sup>

Together, these dynamics led to the adoption of private law doctrine that broadened press latitude in coverage of government affairs.<sup>131</sup> State courts during this period were “increasingly willing to relieve defendants of liability if their problematic statements fell into specific, socially valuable categories, such as good-faith commentary on matters of public interest or discussion on matters of shared interest to the community.”<sup>132</sup> In fact, between 1880 and 1900, “some type of privilege [to publish defamatory statements] was recognized in twenty-five of the twenty-eight jurisdictions in which appellate court decisions in public official libel suits were recorded.”<sup>133</sup> By the early twentieth century, all but three states accorded the press some kind of privilege for coverage of events and people within the public sphere.<sup>134</sup> To be sure, this development stripped *some* men—typically those with inherited power and wealth—of a private law subsidy, but it arguably redistributed that private law leverage to *other* men, including the owners of newspapers, the journalists who worked for them, and the readers who sought information about government so they could exercise the (male) franchise.

## 2. Private Law in the Private Sphere

Courts during the same period preserved the longstanding private law subsidy for those in the private sphere seeking compensation for speech injuries. And while the public sphere occupants losing their grasp on private law subsidies tended to be relatively powerful men, the private sphere occupants retaining their grasp on private law subsidies tended to be relatively powerless women. Slander, with its requirement of spoken speech, was associated strongly with female plaintiffs because information about women who occupied the domestic sphere tended to circulate through spoken conversations in domestic quarters like homes. In fact, evidence suggests that women were far more likely to sue for private speech injuries than men.<sup>135</sup> For example, between 1800 and 1830, states saw 271 reported slander suits, and just 39 reported libel suits.<sup>136</sup> In cultural context, this is unsurprising. For nineteenth-century American women (of a certain race and class), shelter, food, spending money, and social capital were all derived from marriage. Marriage, in turn, was contingent on a reputation for virtue and the ability to offer a husband

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130. King, *supra* note 81, at 9. The idea was picked up by select courts early in the century. For example, one South Carolina court refused to assign libel liability where the words complained of had not attacked “private character . . . moral conduct . . . or the sanctuary of domestic tranquility.” *Id.* at 10 n.33 (citing *Mayrant v. Richardson*, 10 S.C.L. (1 Nott & McC.) 347, 353 (1818)). A Pennsylvania court condemned libel, but clarified that genuine libel was speech that “affect[s] the reputation of individuals, and the peace of families,” not “publications on affairs of government.” *Id.* (citing *Andres v. Koppenhefer*, 3 Serg. & Rawle 254, 260 (Pa. 1817)).

131. See LAWHORNE, *supra* note 59, at 87–175.

132. Tilley, *supra* note 125, at 483–84.

133. LAWHORNE, *supra* note 59, at 109.

134. *Id.*

135. King, *supra* note 81, at 1.

136. *Id.* at 1 n.3.

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sexual exclusivity.<sup>137</sup> Loss of that reputation jeopardized a woman's marriageability, and thus her access to life's necessities. Thus, speech that cast doubt on a woman's virtue required formal and public correction if domestic viability was to be preserved.

The gravity of domestic slurs is reflected by the facts of the nineteenth-century slander docket; most female plaintiffs bringing these claims had been accused by the defendant of sexual promiscuity.<sup>138</sup> These allegations ran the gamut from explicit charges of "prostitution" to more vague charges of "dallying with men in suspicious circumstances."<sup>139</sup> The leading accusation against the female plaintiffs in these cases was one of fornication or lewd behavior, with 20 of the 48 female plaintiffs in the study litigating such accusations.<sup>140</sup> An additional 15 of the accusations involved prostitution.<sup>141</sup> Men rarely brought comparable suits; between 1820 and 1880, Indiana appellate courts heard 37 sexual slander cases; just 6 of those were brought by men.<sup>142</sup> Between 1807 and 1880, New York appellate courts heard 24 such cases; just 7 of those were brought by men.<sup>143</sup>

American slander law—thought to be the province of women—reflected the internal logic of the private sphere.<sup>144</sup> Marriage "was still expected to be the end point for young women," and allegations of "dallying," to say nothing of prostitution, could result in social ostracism.<sup>145</sup> Consequently, judges often exhibited "paternalistic responses" to assist female plaintiffs in rehabilitating their reputations through litigation.<sup>146</sup> For example, in the early days of American slander, plaintiffs were required to *show* pecuniary damages to prevail, whereas, in libel, damage to reputation resulting from a more permanent and public written slur was *presumed*.<sup>147</sup> Despite this rule, sympathetic judges willingly recognized social injuries such as the loss of "hospitality and society" or a broken marital engagement and the loss of "financial security associated with marriage" as sufficient to satisfy that element of the claim, thus lowering the bar to defamation recovery for female plaintiffs.<sup>148</sup> During the same period they were creating generous privileges for speech about those in the public sphere, state court judges left undisturbed the private law doctrines compelling compensation for speech about those in the private sphere.

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137. Andrew King, *Constructing Gender: Sexual Slander in Nineteenth-Century America*, 13 L. & HIST. REV. 63, 68 (1995).

138. *Id.* at 76.

139. *Id.*

140. *Id.* at 75 tbl.1, 76 tbl.2.

141. *Id.*

142. *Id.* at 75 tbl.1.

143. *Id.* at 76 tbl.2.

144. *Id.* at 72 (noting that judges realized sexual reputation was "linked . . . directly to marriage").

145. *Id.*

146. *Id.* at 73.

147. See, e.g., Laurence H. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733, 745 (1966).

148. Lisa R. Pruitt, "On the Chastity of Women All Property in the World Depends": *Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 969 (2003).

In a nineteenth-century legal topography with sharp cliffs between sociolegal regions, a single *regulatory* ethos prevailed, and the Constitution was thought irrelevant to the validity of that ethos. But by the turn of the century, scholars were beginning to point out that speech regulation was incompatible with the democratic aspirations of the First Amendment. Government regulation of speech in the public sphere was the height of autocracy, they suggested. And private law liability for speech affecting the public sphere, too, was coming to be seen as a culturally contested subsidy for powerful men. But they uniformly agreed that a deregulatory ethos was not appropriate for private law affecting the private sphere. Why not? Private law liability for speech affecting the private sphere was considered a culturally *condoned* shield for women in need of the law's succor.<sup>149</sup>

## II. PUBLIC AND PRIVATE IN TWENTIETH-CENTURY SPEECH LAW

The pro-regulation, anti-speech ethos of the nineteenth century gave way to an anti-regulation, pro-speech ethos in the twentieth. The anti-democratic results of state speech suppression in the public sphere were the first to be recognized by the Supreme Court and the first to be invalidated on constitutional grounds. From there, the midcentury Court tackled state suppression of speech affecting the private sphere and private law burdens on speech affecting the public sphere simultaneously, during a period when civil rights advocates were arguing that the dividing lines between public and private—in law and life—were pernicious constructs perpetuating racial and other injustices. Eventually, the Court disavowed the speech regulatory ethos altogether by invalidating even private law that burdened speech in the private sphere.

Although the Court's deregulatory path crossed all four quadrants of speech law, the twentieth-century justices followed their nineteenth-century forbearers by ignoring the distinctive values served by speech—and speech regulation—within each quadrant. By applying the same deregulatory zeal across all four sectors of speech law, they essentially swapped one speech pathology—anti-democratic regulation of the public law–public sphere quadrant—for another speech pathology—anti-dignitary deregulation of the private law–private sphere quadrant. And by ignoring the differential allocation of gender benefits within the four sectors, they aggrandized competition associated with masculine life at the expense of care associated with feminine life.

### A. Public Law Affecting the Public Sphere

The Supreme Court overhauled the constitutional status of public laws suppressing public speech in a series of cases from 1919 to 1969. The revolution in the public–public quadrant began in the landmark case *Abrams v. United States*.<sup>150</sup>

In *Abrams*, five Russian-born immigrants were convicted of conspiring to violate the Espionage Act by speaking and publishing words disloyal to the United

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149. The notion of gender-relative power offered here is, to be sure, immensely simplified. The men amassing power by virtue of wealth or elective office were likely to be white upper- or middle-class men. And the women expected, and subsidized, to conform to virtue stereotypes tended to be their white counterparts. See *supra* notes 52–54 and accompanying text.

150. 250 U.S. 616 (1919).



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States, urging resistance to its war against Germany, and advocating a general strike to disrupt the production of material necessary to fight the war.<sup>151</sup> Writing for the majority, Justice Clarke followed three cases decided earlier that year: *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, each of which condoned government speech regulations designed to discourage public criticism of government policies.<sup>152</sup> The modernization of American free speech law has notoriously been traced to Justice Oliver Wendell Holmes's dissent in the *Abrams* case.<sup>153</sup> Writing for the majority in *Schenck*, Holmes had concluded the government could function as both a participant in public debate and a regulator of that debate, and was entitled to favor its interests by criminalizing its opponents' opinions.<sup>154</sup> But in *Abrams*, he reversed course, suggesting that the purpose of the First Amendment was to guarantee that debate over the conduct of government affairs be unregulated.<sup>155</sup> The constitutional provision was designed to let every citizen express preferences about government conduct and to let every citizen consider the views of others so that the polity retained control over the apparatus of the state.<sup>156</sup> In the new scheme he proposed, government actors remained combatants, arguing for their policy preferences, but were no longer vested with the power to secure a victory by manipulating the rules of the fight. Instead, their success would be determined solely by how powerfully their ideas persuaded the governed when compared with opposing viewpoints. In other words, *Abrams* introduced the idea that has come to dominate modern speech theory—namely, that the government's job is to deregulate the public sphere and allow a contest of citizen-generated ideas, rather than to regulate the public sphere and impose its ideas on citizens.<sup>157</sup>

For several decades, the *Abrams* theory of free speech hovered on the margins of the Court's jurisprudence, gaining intellectual momentum but producing no new speech law. Through the 1920s, 30s, and 40s, the Court continued to uphold federal convictions for subversive speech, though Justice Brandeis joined Holmes in objecting to government speech suppression.<sup>158</sup> However, as these cases were announced, each rested the exercise of state speech-suppressing power on increasingly narrow grounds<sup>159</sup> and incrementally moved the Court closer to the

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151. *Id.* at 617.

152. 249 U.S. 47, 52–53 (1919); 249 U.S. 204, 209 (1919); 249 U.S. 211, 216–17 (1919).

153. 250 U.S. at 624–31 (Holmes, J., dissenting).

154. *See* 249 U.S. at 51–52.

155. *See* 250 U.S. at 630–31.

156. *Id.*

157. *See, e.g.,* Rabban, *Forgotten*, *supra* note 57, at 592; G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 392, 438 (1992).

158. *See, e.g.,* *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring) (proposing a theory of free speech built around the shared, community benefits of information exchanges, rather than the individualistic benefits of speaking that Holmes stressed); *see also* FARBER, *supra* note 71, at 71–72.

159. *See, e.g.,* *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing conviction of speaker during violent demonstration because jury was impermissibly instructed that causing “public dispute” was punishable); *Yates v. United States*, 354 U.S. 298, 326–27 (1957)

*Abrams* theory. Indeed, throughout the 1930s, the center of the Court “began to accept . . . the libertarian values” asserted in Holmes’s *Abrams* dissent.<sup>160</sup>

Finally, in the 1969 case of *Brandenburg v. Ohio*, the Court adopted the *Abrams* theory as doctrine when it overturned the conviction of a Ku Klux Klan speaker under a state speech-suppressing law.<sup>161</sup> In *Brandenburg*, the Court suggested that speech about government was a presumptive social good that facilitated democratic values of citizen deliberation, rather than a presumptive social harm that threatened the ability of government actors to control citizens.<sup>162</sup> This ultimate embrace of a pro-speech position required the Court to adopt an antiregulatory approach to government speech suppression. Consequently, it held that speech advocating violence could only be prohibited when it attempted to incite imminent lawless action and was likely to succeed in that attempt.<sup>163</sup>

The Court’s progression from *Abrams* to *Brandenburg* reflected the modern acceptance that the constitutional aspirations of the First Amendment were at their apex when the government was attempting to thwart citizen discussion of politics and policy. The Court came to agree that where speech was directly related to representative government, the public sphere was indisputably implicated; and where the government was the actor attempting to suppress that speech, public law was indisputably implicated. In the public–public quadrant, the modern Court concluded, the guarantees of the First Amendment were the most relevant and expansive. Indeed, many modern theorists have described First Amendment jurisprudence as centering the right to political speech and operating most forcefully to limit government incursions on that right.<sup>164</sup>

### **B. Private Law Affecting the Public Sphere**

Once the Court began to accept the constitutional value of citizen speech about government and elected officials and began to dismantle doctrine that

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(overturning conviction under federal Smith Act because speech at issue merely advocated beliefs and was not actual incitement); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (together finding that membership in Communist Party could not constitutionally be prosecuted unless defendant had specific intent to accomplish illegal aims of party).

160. These values were repeated by Holmes in later cases and echoed by Justice Louis Brandeis. See Rabban, *Forgotten*, *supra* note 57, at 521 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931)).

161. 395 U.S. 444 (1969).

162. See *id.* at 447 (observing that *Whitney* had been “thoroughly discredited”).

163. *Id.* at 448–49.

164. See generally, Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977) (exploring the “checking value” of the First Amendment against governmental power); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (endorsing Justice Sanford’s viewpoint of limiting the Court’s ability to say what does and does not violate the First Amendment); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that freedom of speech is the most fundamental right of democratic government, and thus most in need of protection against government attack).

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permitted *public* law regulation of that speech, the constitutional status of *private* law causes of action burdening speech was inevitably subject to reconsideration. The Court set the stage for constitutional review of private law early in the modern speech revolution, by deciding in *Gitlow v. New York* that the Fourteenth Amendment incorporated the First Amendment and applied the provisions of the Constitution to the states.<sup>165</sup> Absent *Gitlow*, the Court would have had no authority to evaluate the impact of private law tort doctrines assigning compensatory obligations for injurious speech, which were meant to be the exclusive province of the states.<sup>166</sup> But once *Gitlow* allowed Supreme Court review of any state action affecting speech, private law doctrines were brought within the sweep of the Court's twentieth-century deregulation campaign. Although state courts had already taken initiative in the early twentieth century to broaden the common law privilege available to news organizations that discussed public men and public affairs, the Court was unsatisfied. When the *New York Times* challenged the constitutionality of private law burdens on newspaper speech about civil rights, the justices responded enthusiastically.

In the landmark case of *New York Times v. Sullivan*, the Court concluded for the first time that the private law of defamation was in tension with First Amendment principles.<sup>167</sup> In that case, a Montgomery, Alabama, city commissioner sued the *New York Times* for running an issue advertisement that inaccurately described the city's treatment of civil rights protesters. The commissioner won a large jury verdict, and the *New York Times* appealed. Reversing the verdict, the Court held for the first time that private law dignitary tort lawsuits were state action subject to the First Amendment.<sup>168</sup> Further, it held that permitting public officials to recover for faultless inaccuracies in news content amounted to empowering those officials to punish the media for seditious libel. *Sullivan* held that public officials could only recover for defamatory speech when they could show that the speaker knew or recklessly disregarded the possibility that he was circulating falsehoods.<sup>169</sup> Writing for the Court, Justice Brennan explained the modern view that "debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>170</sup>

Over the next two decades, the Court progressively subjected ever greater swaths of private tort law to free speech scrutiny. It did so in two dimensions. First, it conceptualized an ever-wider public sphere in which citizen speech was essential

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165. 268 U.S. 652, 666 (1925).

166. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

167. 376 U.S. 254, 276 (1964).

168. See *id.* at 265.

169. *Id.* at 279–80.

170. *Id.* at 270. The Court's commitment to relieving private individuals of tort burdens for speech aimed squarely at the conduct of government affairs was deepened. See *Rosenblatt v. Baer*, 383 U.S. 75, 78 (1966), in which the Court clarified that constitutional immunity from tort liability was not reserved for national newspapers circulating information about profound policy issues like racial segregation. Even the words of an obscure local newspaper about a local park district official had an impact on the public sphere and were therefore entitled to constitutional safe harbor.

to the Constitution's democratic aspirations. So, while *Sullivan* adopted the actual malice rule to prevent public *officials* from using defamation law to deter criticism of their work, the Court went on to apply the actual malice rule to prevent public *figures* from using defamation law to rebuff critics.<sup>171</sup> Second, in addition to redefining the public sphere to include both government officials and cultural notables, the Court also redefined the categories of private tort law considered regulatory and therefore forbidden. In *Time, Inc. v. Hill*, the Court held that invasion of privacy actions had the capacity to regulate speech and were therefore constitutionally suspect, and in *Falwell v. Hustler*, the Court held that intentional infliction of emotional distress ("IIED") actions, too, had the capacity to regulate speech and were therefore constitutionally suspect.<sup>172</sup>

### C. Public Law Affecting the Private Sphere

The nineteenth-century Court had repeatedly affirmed government authority to regulate speech considered harmful to the conduct of life in the private sphere, upholding limits on communications regarding gambling, sexuality, and louche lifestyles. This result was unexceptional in an age when the existence of a private sphere, and its perceived function as a cloak for the socially favored domestication and virtue of womanhood, were taken for granted. But the Court's treatment of laws that suppressed speech on sexual matters changed considerably midway through the twentieth century. Just as the Court gradually deregulated the private law–public sphere quadrant by expanding the definition of "public figure" to include those without government power, it gradually deregulated the public law–private sphere quadrant by contracting the definition of "obscene" speech unentitled to constitutional protections.

In *Roth v. United States*, the Court appeared to preserve a government right to regulate obscene materials, refusing to find that obscenity came within the sweep of the First Amendment. But in doing so, it adopted a modern and limited understanding of the kind of speech that could be considered obscene. Justice Brennan explained that the Constitution was designed to facilitate speech on "[a]ll ideas having even the slightest redeeming social importance."<sup>173</sup> Only when an "average member of the community" would find that a work appealed to the basest "prurient interests" could it be categorized as obscenity properly subject to government suppression.<sup>174</sup>

In other words, where the nineteenth-century Court was willing to consider any discussion of sexuality or reproduction obscene, threatening to the "cult of true womanhood,"<sup>175</sup> and regulable, the modern Court took a different view. It opined that both sexuality and reproduction were legitimate subjects of literary, political, and social significance. That theory destabilized the public law–private sphere quadrant of speech law in various ways. It called into question the ongoing existence of a genuine private sphere; if sexuality, marital relationships, and the female body were bona fide subjects of conversation in the world at large, they could properly be

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171. See, e.g., *Curtis Publ'g Co., v. Butts*, 388 U.S. 130, 154 (1967).

172. 385 U.S. 374, 397 (1967); 485 U.S. 46, 56 (1988).

173. 354 U.S. 476, 484 (1957).

174. *Id.* at 489.

175. See generally Welter, *supra* note 47.

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understood as residing in the public sphere. Further, by relocating female sexuality into the public sphere, where speech interests took precedence over private injuries, the government interest in regulating speech about female sexuality ebbed.

Apparently uneasy about these results, the Court adopted a somewhat expanded definition of obscenity in *Miller v. California*, asking whether an average person applying contemporary community standards would find the work prurient; whether the work depicted sexual conduct in a “patently offensive way”; and whether the work as a whole “lack[ed] serious literary, artistic, political, or scientific value.”<sup>176</sup> While more flexible, this test did not give governments carte-blanche authority to adopt public laws aimed at regulating private morality in the way the nineteenth-century Court seemed to do. For example, applying *Miller*, the Court in 1991 upheld an Indiana statute banning nude dancing.<sup>177</sup> The majority in that case held that the dancing the businesses wanted to offer was expressive conduct entitled to some First Amendment protection.<sup>178</sup> However, it ultimately approved the prohibition, finding that the state had permissibly balanced its legitimate interest in “order” and “morality” by permitting expression through dancing while deterring immorality by requiring clothing.<sup>179</sup> This modern obscenity regime reflects a degree of lingering ambivalence about whether female sexuality is best understood as a creature of the public or the private sphere. For example, city ordinances banning pornographic speech that depicts women as subordinate, or that perpetuates sex violence and sex discrimination, have been repeatedly rejected on First Amendment grounds because female subordination has been framed by reviewing judges as an idea entitled to circulation in the public sphere rather than a personal experience entitled to protection in the private sphere.<sup>180</sup>

And in an adjacent line of cases considering the application of public law to the private sphere in the context of rape prosecutions, the Court has been even more enthusiastically deregulatory. For example, in *Cox Broadcasting Co. v. Cohn*,<sup>181</sup> *Smith v. Daily Mail Publishing*,<sup>182</sup> and *Florida Star v. B.J.F.*,<sup>183</sup> the Court struck down as unconstitutional a series of state laws barring speakers from publishing the names of sexual assault victims. In each of these cases, the Court treated the public and private spheres as inversely proportional. It concluded that information about crime and its prosecution was of sufficient importance to the citizenry at large that it had to be protected at the expense of the individual women

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176. 413 U.S. 15, 23 (1973).

177. *Barnes v. Glen Theater*, 501 U.S. 560, 572 (1991).

178. *Id.* at 565.

179. *Id.* at 567–68.

180. See FARBER, *supra* note 71, at 141–44 (discussing Indianapolis ordinance overturned in *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (per curiam)).

181. 420 U.S. 469 (1975) (striking down a Georgia privacy statute criminalizing the publication of the name or identity of a rape victim).

182. 443 U.S. 97 (1979) (striking down a West Virginia statute criminalizing the publication of the name of a juvenile offender without the approval of juvenile court).

183. 491 U.S. 524 (1989) (striking down a Florida statute criminalizing the publication of the name or identity of victim of sexual assault).

who wished to keep information about their sexual assaults to themselves as part of their private sphere existence.<sup>184</sup>

#### *D. Private Law Affecting the Private Sphere*

Eventually, the twenty-first century Court completed the modern speech revolution by applying its broadly deregulatory speech ethos to the quadrant of private law affecting the private sphere. After the Court announced in *New York Times v. Sullivan*<sup>185</sup> that public official defamation plaintiffs had to prove speaker malice to secure private law compensation, it expanded that concept further and further into the private sphere. The Court first applied it to public figures holding no government office, then to private figures seeking per se or punitive damages from disparaging speakers,<sup>186</sup> and ultimately to private figures seeking damages from private speakers for speech in private circumstances.<sup>187</sup>

Notably, the midcentury Court began from an assumption that law and culture recognized a genuine private sphere within which private law could be applied in a regulatory fashion without straining the Constitution. This assumption is apparent in its early attempts to define who counted as a “public figure” subject to the new, constitutionally deregulated version of defamation law. After limiting the reach of deregulated defamation law to *public* figures, it concluded in quick succession that a society wife,<sup>188</sup> the nephew of suspected Soviet agents,<sup>189</sup> and a government-funded scientist scrutinized by Congress<sup>190</sup> were all *private* figures entitled to tort recovery without proving actual malice. However, the Court’s assumption that the “public” category of plaintiff and the corresponding scope of deregulated tort law were both narrow has not carried the day. Over the past five decades, lower courts have adopted an expansive understanding of the “public” category in defamation law.<sup>191</sup>

The Court also indicated some interest in preserving a legally significant private sphere when it concluded in the 1980s that speech on matters of “purely private” concern was not subject to the deregulatory *Sullivan* scheme.<sup>192</sup> Again though, lower court holdings have eroded any bulwark the Court attempted to erect, repeatedly construing the “purely private” category as a null set. They have concluded that virtually no speech is “so truly private, and so far removed from

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184. *Cox Broad. Co.*, 420 U.S. at 496; *Smith*, 443 U.S. at 104–05; *Florida Star*, 491 U.S. at 541.

185. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

186. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–50 (1974) (establishing that private figures had to show at least speaker negligence to recover pecuniary damages, and that if they wished to recover presumed or punitive damages, they would have to prove intent or recklessness).

187. *Snyder v. Phelps*, 562 U.S. 443 (2011).

188. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

189. *Wolston v. Reader’s Dig. Ass’n*, 443 U.S. 157 (1979).

190. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

191. See generally David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 500 (1991) (depicting the expansion of the category).

192. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 759 (1985).

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public discourse, that [it] should be exempted altogether from [constitutional] restraints.”<sup>193</sup>

The Court has done little to dissuade lower court judges from interpreting its somewhat restrained doctrines in ways that have accelerated contemporary speech deregulation. In fact, by the twenty-first century, the Court firmly endorsed the idea that there is no meaningful distinction between the public and private spheres, or between public and private law, when it comes to speech. In *Snyder v. Phelps*, the Court held that the father of an obscure lance corporal who sued religious zealots for disrupting his son’s funeral was prohibited from recovering tort damages for IIED.<sup>194</sup> The Court held that because the disruptive speech was motivated by anti-military bias, it was therefore speech on a matter of public concern.<sup>195</sup> As a result, even though the speech took place in the uniquely private setting of a church funeral, was articulated by private people, and injured a private plaintiff, the Court held that its deregulatory speech ethos meant that assigning private law consequences to it was constitutionally impermissible.<sup>196</sup> This result indicates that the Court has fully extended its deregulatory ethos into the quadrant of speech contestation involving private law applied to private sphere speech<sup>197</sup>

### *E. Masculinization of the Judicial “Shared” Sphere*

The modern Court has firmly rejected its forebears’ uncritical acceptance of the cultural separation of public and private spheres, and it has taken on the project of speech lawmaking for an incipient shared sphere. But rather than approaching that ostensibly new sphere from first principles and designing a legal scheme reflecting a new set of values, it has instead repurposed the male public sphere and the masculine values ordering it to be shared by all. Through its speech deregulation cases, the Court has repeatedly described speech as a great leveler in a democratic society, but it has simultaneously depicted speech and speakers in terms that track and reify hegemonic masculinity, sending the message that all may enter the public arena but not all are welcome.

In his notorious *Abrams* dissent, Holmes repositioned the government from interested combatant to impartial observer.<sup>198</sup> In doing so, he intended to create an atmosphere that encouraged individuals to do intellectual combat with each other. The most famous passage in his *Abrams* dissent introduced a set of metaphors for speech that retain their vitality today:

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193. FARBER, *supra* note 71, at 106.

194. 562 U.S. 443, 451–58 (2011).

195. *Id.* at 454.

196. *Id.* at 454–55.

197. That said, some justices have recently expressed doubt about the soundness of the *Sullivan* line of cases, with Justice Gorsuch specifically questioning whether the generous rule has had untoward results in part because of the breadth of the “public figure” category. See *Berisha v. Lawson*, 973 F.3d 1304 (11th Cir. 2020), *cert. denied*, 151 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting) (noting that “[i]ndividuals can be deemed ‘famous’ because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most”).

198. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.<sup>199</sup>

In this short passage, Holmes used language that explicitly portrays the freedom to speak as bound up with the public sphere historically thought the province of men. He twice analogized speech with the commerce that was associated with the public sphere, saying that ideas were subject to “free trade” and that truth was determined by success in “the market.”<sup>200</sup> In addition to equating speech with market participation, Holmes also described the truth-seeking endeavor using the language and imagery of physical strength and physical contestation. Holmes alluded to the long history of “fighting” over faith conflicts, endowed thought with “power,” depicted ideas as “competing” for acceptance, and addressed his defense of government speech deregulation explicitly to “men.”<sup>201</sup>

This single sentence—possibly the most-cited sentence in American speech jurisprudence—positioned speech as a creature of the public sphere. Moreover, it established the ethos of the sphere as unapologetically masculine in character. Within the public sphere, participants were expected to fight, trade, compete, and wield power in favor of their preferred ideas and outcomes.

Holmes’s history and personality reveal a preoccupation with “manliness” that may have led him to place his most cherished intellectual values in the public sphere and to anthropomorphize those values as masculine.<sup>202</sup> He saw courage as an inherently individualistic trait, resisting the notion that strength could arise from cooperation or relationality.<sup>203</sup> Holmes seemed to think that when government shielded citizens from frightening ideas, it was enabling mass cowardice. But when they were forced to confront unorthodox ideas, they would sharpen their critical thinking and improve their capacity to self-govern.<sup>204</sup> He challenged his fellow Americans to be “tougher, more manly, if they expected to live in a world of political freedom.”<sup>205</sup>

Interestingly, although Holmes had occasionally penned “paean to chivalry,” Kang points out that in his free speech philosophy, Holmes insisted that both men and women had a civic obligation to confront unpleasant ideas in the name

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199. *Id.* at 630.

200. *Id.*

201. *Id.*

202. See John M. Kang, *Prove Yourselves: Oliver Wendell Holmes and the Obsessions of Manliness*, 118 W. VA. L. REV. 1067 (2016) (explaining how Holmes’s experience as a soldier in the Civil War led him to equate intellectual courage with the physical courage demanded by the battlefield). In a letter explaining that he was withdrawing from service, Holmes told his mother, “I have laboriously and with much suffering of mind and body *earned* the right . . . to decide for myself how I can best do my duty to myself [and] to the country . . .” *Id.* at 1105.

203. *Id.* at 1115–16.

204. *Id.* at 1117.

205. *Id.*



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of democracy.<sup>206</sup> He “serenely forced women to bear the same risky experiment of constitutional democracy as did their men. Dulcineas were not exempted from having to toughen themselves to opinions that ‘we loath and believe to be fraught with death.’”<sup>207</sup> Holmes “belittled [female] intellectual capacities”<sup>208</sup> in private conversation, and he believed the law could take “private sphere” thinking into account to withhold complete legal equality from women in, for example, the workplace.<sup>209</sup> But in his free speech philosophy, he “accorded women equal treatment”<sup>210</sup> by declining to exempt them from the competitive, combative demands of the public sphere.

Holmes’s *Abrams* language has been lauded as “the greatest utterance of intellectual freedom by an American,”<sup>211</sup> and it has received abundant, positive praise from speech theorists. But canonizing *Abrams* has implicitly canonized Holmes’s masculinized understanding of speech as power, action, and combat, without regard for the harm those characteristics may produce.<sup>212</sup>

Subsequent justices writing in the free speech tradition have added to the canon of speech metaphors that valorize stereotypically male characteristics.<sup>213</sup> In *Sullivan*, Brennan created another free speech “motto,”<sup>214</sup> when he contended that American law valued speech that is “uninhibited, robust, and wide-open.”<sup>215</sup> Of course, these characteristics all overlap with those of “hegemonic masculinity,” which “exalt . . . aggression, activity, sports-obsession, [and] competitiveness.”<sup>216</sup> That such speech might amount to an “attack” or might be a “caustic” agent of injury

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206. *Id.* at 1120.

207. *Id.*

208. *Id.* at 1120 n.359 (quoting Judge Posner).

209. *See generally* *Adkins v. Children’s Hosp.*, 261 U.S. 525, 569–70 (1923) (expressing a belief that women were essentially different from men, and less fit for work outside the home by observing that “[i]t will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account”).

210. Kang, *supra* note 202, at 1120.

211. Yosai Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1387 (1984).

212. *See, e.g.*, Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205, 205–06 (2019) (critiquing Justice Holmes’s dissenting opinion in *Abrams* other than the often-cited final paragraph).

213. The Court’s use of metaphors in constitutional discussion has been said to create enormous cultural traction for the principle described with that language. *See generally* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004) (tracing the use of “fire” metaphors throughout American legal history).

214. Brett G. Johnson, *What is “Robust” Public Debate? An Analysis of the Supreme Court’s Use of the Word “Robust” in First Amendment Jurisprudence*, 23 COMM. L. & POL’Y 335, 335–36 (2018) (noting that as of 2018 this line had been cited in 63 Supreme Court cases, 247 federal circuit court cases, and 408 federal district court cases).

215. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

216. Jamie Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 711 (2010).

was deemed legally insignificant, again stating a position consistent with the expected stoicism of the hegemonically masculine.<sup>217</sup>

In *Texas v. Johnson*, Brennan intensified the metaphor of speech as combat, describing the interest protected by the First Amendment as a “joust of principles.”<sup>218</sup> Justice Scalia joined in the use of combat metaphors to continue the Court’s deregulatory path in *R.A.V. v. City of St. Paul*, suggesting that an ordinance criminalizing viewpoint-oriented hate speech was unconstitutional because it “license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”<sup>219</sup> It appears no accident that the proliferation of combat-oriented metaphors to emphasize the *value* of free speech has coincided with the Court’s modern disdain for the notion that “fighting words” are sufficiently low-value to be freely regulable and outside the ambit of the First Amendment.<sup>220</sup> And the Court has repeatedly described the personal cost arising from speech as “offense,” rather than “hurt,” seeming to render even the downside of speech in terms of threats to one’s public-facing identity rather than threats to one’s private well-being.<sup>221</sup>

#### ***F. The Costs and Benefits of Twentieth-Century Speech Deregulation Across the Four American Quadrants***

At the start of the twentieth century, American speech law was bisected by two sharp lines: between public law and private law, and between the public sphere and the private sphere. By the close of the century, the Supreme Court had erased both of those lines. One result of this erasure is a modern expectation that *any* legal burden on speech—whether an *ex ante* legislative prohibition or an *ex post* jury verdict compelling compensation—must withstand constitutional scrutiny. Another result is that there is no legal differentiation between the public and private spheres—for constitutional purposes, *everyone* belongs to a “shared” sphere.

This flattening of the speech regulation terrain has been hailed by many, and it has produced undeniable benefits to American society. In the nineteenth century, when regulation was allowed across all four quadrants of speech law and the state could silence men expressing dissatisfaction with the state and the market, reversing the legal preference for regulation freed them to speak. But during the same regulatory century, women striving for security through marriage and home were legally empowered to repel speech that impaired their domestic viability, and reversing the legal preference for regulation has disempowered them.

Justice Brennan stated matter-of-factly in 1971 that under modern speech law, “we are all public men.”<sup>222</sup> The prevailing response to this conclusion is

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217. *Id.*

218. 491 U.S. 397, 418 (1989).

219. 505 U.S. 377, 391–92 (1992).

220. *See, e.g.*, FARBER, *supra* note 71, at 116 (noting that “[i]t is no longer clear whether the [fighting words] doctrine retains any vitality”).

221. *See, e.g.*, Schauer, *supra* note 212 at 218, 220.

222. *Rosenbloom v. Metromedia*, 403 U.S. 29, 48 (1971).

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celebratory.<sup>223</sup> But a few modern thinkers have objected that flattening and deregulating speech terrain produces lopsided legal results because jagged edges between the genders and races persist in culture. Catharine MacKinnon, for one, has observed that “First Amendment law . . . blatantly side[s] with dominant status and power . . . [and white] masculinist gendered voices,”<sup>224</sup> a reality that “effectively mute[s] other voices] and expose[s] them] to further abuse and silenc[ing] through subordinating attacks, verbal and otherwise, in the name of freedom of speech.”

### III. THE AMERICAN CIVIL LIBERTIES UNION AND THE COLLAPSE OF PUBLIC AND PRIVATE

Modern speech law has been critiqued for adopting neutral doctrines that produce biased results. Critics who seek changes to First Amendment doctrine have acknowledged that to reconstruct speech law, they must first deconstruct it; they must determine “[h]ow . . . this happen[ed].”<sup>225</sup> Some lay blame at the feet of the ACLU.<sup>226</sup> This charge is somewhat counterintuitive, as the ACLU is known today as a champion of expanded rights for women and Black Americans. Throughout the twentieth century, the civil rights–civil liberties bar advanced a speech jurisprudence designed to protect expression on topics ranging from racial equity to sexual autonomy. And its theory of free speech was virtually inextricable from its quest to secure equal access to the public sphere and eradicate a private law that often operated to shelter private bias. However, it pursued this agenda through two tactics that have produced unanticipated results: first, it chipped away at the legitimacy of private law; second, it sought to discredit a private sphere that perpetuated discriminatory attitudes and behavior. In other words, the group litigated in favor of a fully public world subject to complete speech deregulation. This process was carried out in the name of an equality-enhancing discourse, but it inadvertently traded away private law protections historically enjoyed by women to secure public law freedoms likely to subsidize men.

#### *A. The Intellectual Campaign Against Public–Private Distinctions in Law and Life*

The bright line between public law and private law began to come under fire in the twentieth century. In the legal academy, Legal Realist scholars like Roscoe Pound suggested that American private law “exaggerate[d] private right at the expense of public right.”<sup>227</sup> Subsequent Realists like Leon Green in the 1950s

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223. See, e.g., Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn, who called the sea change in *Sullivan* “an occasion for dancing in the streets”).

224. MacKinnon contends that speech law equally sides with “economically wealthy and upper-class, White racist” voices. Catharine MacKinnon, *The First Amendment: An Equality Reading*, in LEE C. BOLLINGER & GEOFFREY R. STONE, *THE FREE SPEECH CENTURY* 140 (2019).

225. *Id.* at 140–41.

226. See, e.g., MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 107–17 (2019).

227. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457 (1909).

suggested that tort law specifically was no more than “public law in disguise.”<sup>228</sup> Increasingly, legal scholars were charging that ostensibly “neutral” private law doctrines actually functioned to create or perpetuate social arrangements that shaped the contours of public life. And they concluded that without collapsing the artificial distinction between public law and private law, race, class, and gender inequities were intractable.<sup>229</sup> In extralegal areas of the academy, too, scholars were fiercely critiquing cultural tropes about the “appropriate” social location of women, minorities, and the poor. For example, Simone de Beauvoir famously wrote that “it is the masculine code, it is the *society* developed by the males and in their interest, that has established women’s situation in a form that is at present a source of torment.”<sup>230</sup>

The ACLU, one of the midcentury “great groups”<sup>231</sup> trying to deploy constitutional principles on behalf of civic equality, was instrumental in transforming these academic critiques into litigation strategies. Legal Realist scholars like Pound, who was in regular communication with ACLU litigators,<sup>232</sup> had a deep influence on the organization’s advocacy and tactics. Deregulating the American law of expression was a crucial part of the ACLU–NAACP joint effort to open a national conversation about racial and gender equality. Accordingly, over the course of the twentieth century, the ACLU took aim at both the technical distinction between public law and private law, and the cultural commitment to separating the public and private spheres.

### ***B. The Functional Marriage of Public and Private Law***

The ACLU was instrumental in persuading the Court to take down the wall between public law and private law in order to achieve the kind of justice that they considered critical. The opening salvo in this campaign was the 1925 *Gitlow* case,<sup>233</sup> in which the ACLU argued that states were constrained by the Fourteenth Amendment from adopting or applying legal rules that inhibited citizen speech. The Court agreed that some liberty guarantees in the Bill of Rights were applicable against the states, a decision that opened the door for legal challenges to private law doctrines that produced anti-democratic and rights-inhibiting results.<sup>234</sup>

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228. See generally Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1959).

229. See, e.g., Pauli Murray, *Should the Civil Rights Cases and Plessy v. Ferguson Be Overruled?* (1944) (unpublished manuscript) (on file at the Schlesinger Library, Harvard Radcliffe Institute).

230. SIMONE DE BEAUVOIR, *THE SECOND SEX* 482 (1949) (emphasis added).

231. See, e.g., Lynda Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before Brown*, 85 IND. L. J. 1599, 1633 (2010) (describing the ACLU and the NAACP as the two organizations that provided most of the civil rights litigation infrastructure in the twentieth century push for racial and gender equity).

232. See, e.g., John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 759 n.285 (2004).

233. *Gitlow v. New York*, 268 U.S. 652 (1925).

234. *Id.* at 666, 670 (concluding that New York state law was subject to constitutional speech principles, but ultimately letting the challenged New York statute stand). Non-lawyer Roger Baldwin was disappointed by the outcome in *Gitlow*. But Walter

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The ACLU leveraged this opening in *Shelley v. Kraemer*, submitting an amicus brief challenging state court enforcement of private restrictive covenants that prohibited home sales to Black purchasers.<sup>235</sup> The NAACP and local lawyers representing Black homeowners consciously covered the “main” arguments against the covenants, highlighting the policy pitfalls associated with racially segregated housing, the sociological evidence against covenants, and the position that judicial enforcement of the covenants amounted to state action.<sup>236</sup> The NAACP trusted the ACLU to bring its institutional expertise to the constitutional issues in the case.<sup>237</sup> The ACLU devoted 21 pages of a 32-page brief to the proposition that private law principles invoked by private individuals in their interpersonal dealings should be treated as indistinguishable from legislative commands from government to its citizens.<sup>238</sup>

The ACLU acknowledged that the private covenant under review was not the action of a legislature<sup>239</sup> but nevertheless insisted that “judicial action” to enforce that private instrument was equally limited by the Constitution.<sup>240</sup> From there, the group argued that when the application of private law principles to private arrangements produced de facto public housing segregation, the Court should treat the private law as public law. The restrictive covenants at issue were “substantially zoning ordinances,”<sup>241</sup> and therefore the Court did not need to consider the troublesome doctrinal distinction between government action and private action:

These covenants are not simply agreements among individuals limiting the use of land owned by them; they are, in effect, racial zoning ordinances, an instrument through the use of which the exclusion of one or more races from living space in the community is sought to be achieved, and is in fact achieved . . . . [I]t is without legal consequence . . . whether the discrimination is essentially that of private persons which the courts simply enforce or whether the state, by attaching the sanctions of its courts and officers to the covenants, is itself guilty of direct discrimination. The more recent decisions of this Court reveal an approach to the question of state action far too realistic to permit the court to be misled by the appearance of private action where essentially public matters are involved . . . .<sup>242</sup>

The Court’s opinion closely followed the logic of the ACLU brief, beginning with the proposition that action by the judicial branch of the government

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Pollak, Walter Nelles, and other ACLU litigators of the 1920s recognized that *Gitlow* opened a new door to challenge private law doctrines that produced anti-democratic and unjust results. See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

235. Brief for American Civil Liberties Union as Amici Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos.72, 87, 290, 291).

236. Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 CASE W. L. REV. 101, 144 (1955).

237. *See id.* at 136.

238. ACLU Brief at 1–21, *Shelley*, 334 U.S. 1 (Nos.72, 87, 290, 291).

239. Brief for the Petitioner at 6, *Shelley*, 334 U.S. 1 (Nos.72, 87, 290, 291).

240. *Id.*

241. *Id.* at 8.

242. *Id.* at 12–13.

was no more outside the scope of state action than initiatives of the legislative branch.<sup>243</sup> It went on to reject the formal distinction between privately negotiated covenants to limit the geographic residence of Black homeowners and government-sponsored analogs, remarking that the Constitution was not impotent to protect the Black homeowners' rights to equal protection of the laws "simply because the particular pattern of discrimination . . . was defined initially by the terms of a private agreement."<sup>244</sup>

Having persuaded the Court in *Shelley* that the Constitution applied without distinction to both public law and private law, the ACLU was poised to argue that private law protections of reputation and other dignitary interests must give way to the superior constitutional interest in free speech. It advanced this argument in the *Sullivan* case, both in its own amicus brief and through careful coordination with *New York Times* counsel Herbert Wechsler.<sup>245</sup>

Wechsler understood that his bold push to overturn the Alabama jury verdict on constitutional grounds was doomed if he could not persuade the Court that a private law verdict amounted to state action. He made a strategic decision to treat the issue matter-of-factly—devoting just 80 words of a full brief to the question. He was able to do this in part because the ACLU had successfully argued in *Shelley* that judicial equitable action to enforce a contract with public ramifications was state action. Wechsler cited *Shelley*<sup>246</sup> at the close of his three-sentence passage on state action and left the matter at that.

The ACLU freed Wechsler to devote the balance of his brief to free speech issues by filing an amicus brief that devoted several pages to the state action question, urging a functional collapse of private law into public law.<sup>247</sup> The ACLU brief began by noting that "the alleged libel was a criticism of the conduct of public affairs in a matter of intense public concern," and it went on to argue that the public official plaintiff was using the private law of libel as a subterfuge for what was really an impermissible government-imposed fine for critical speech.<sup>248</sup> The ACLU observed that, just as "it was without legal consequence" whether the racial

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243. *Shelley*, 334 U.S. at 18.

244. *Id.* at 20.

245. Brief for the Petitioner at 38, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

246. *Id.* at 40. The string citation following this passage included two other cases supporting the argument that judicial action could amount to state action, both of which had been the product of ACLU briefing. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Barrows v. Jackson*, 346 U.S. 249 (1953) (brief submitted by ACLU of Southern Cal.).

247. It seems no accident that the ACLU tackled this issue and freed Wechsler to treat it as a *fait accompli*. The ACLU attorneys who wrote the amicus brief appeared to be coordinating with Wechsler. In fact, one member of the ACLU team was his sister-in-law, Nancy Wechsler. Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amici Curiae, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39, 40).

248. Brief for the Petitioner at 10–11, *Sullivan*, 376 U.S. 254 (No. 39) (questioning whether the state of Alabama can, "under the label of libel, penalize these petitioners by a \$500,000 judgment in favor of a public official because of publication by them of an appeal for political and social change").

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discrimination in *Shelley* was accomplished by private persons or by the state, it was “constitutionally immaterial” that the suit against the *New York Times* was styled as a private tort cause of action because it “actually” functioned to “control speech.”<sup>249</sup>

In addition to urging the Court to ignore the distinction between public speech prohibitions and private damage lawsuits, the ACLU also argued that there was no substantial separation between the plaintiff commissioner’s presence in the public sphere and the private sphere. He did not sue “to right a personal wrong against him,” they argued, but rather used a fraudulent claim of injury in the private sphere to drive his agenda in the public sphere by “prevent[ing] the exercise of free speech [about his opposition to civil rights] in Alabama.”<sup>250</sup>

The Court accepted the joint position of Wechsler and the ACLU that the judicial application of Alabama’s private law of libel to permit a damage award to the city commissioner in his private capacity was state action subject to constitutional requirements.<sup>251</sup> Further, it accepted the argument that when claims of defamation made by a public official were at issue, the Constitution discouraged the regulatory approach represented by Alabama’s strict liability rule. Instead, it adopted a new rule, barring damages in the absence of intent, partially deregulating speech torts in the public sphere.<sup>252</sup> To exert authority over private law governing the public sphere, the Court casually “dispose[d] . . . of” the idea that public law and private law were meaningfully different in the speech arena.<sup>253</sup> Writing for the majority, Justice Brennan observed:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.<sup>254</sup>

Brennan’s breezy dispatch of the state action issue in the case enshrined in Supreme Court jurisprudence the Realist mantra that “all law is public law.”<sup>255</sup> Once the Court elevated the functional impact of law on speech as the crucial constitutional question and rejected formalist objections about the application of constitutional principles to state common law, the deregulatory ethos associated with modern free speech theory was deemed applicable not only to legislative speech suppressions but to common law speech torts.

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249. *Id.* at 13.

250. *Id.* at 33, 36.

251. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

252. *Id.* at 279–80.

253. *Id.* at 265.

254. *Id.*

255. See, e.g., John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1641 (2012).

### *C. The Functional Melding of the Public and Private Spheres*

The ACLU labored over the course of the twentieth century to erode the conceptual boundary between private law and public law, a division that it condemned as a safe harbor for speech suppression and private discrimination. The group simultaneously nudged the Court to discard the background assumption that American lives were led in separate public and private spheres, a trope that it considered out of step with the ideal of equal civic status regardless of race or gender. The dialogue between ACLU litigators and the Justices grew fluid over time, and it culminated in the legal depiction of American culture existing in a single sphere shared equally by all.

Just a few years after the Court likened defamation suits brought by officials in the governmental sphere to seditious libel actions, it was urged to apply constitutional limitations to defamation suits brought by those exercising power in the private sphere. Reprising his role in *Sullivan*, Wechsler represented the *Saturday Post* in *Curtis v. Butts*, a defamation action brought by a college football coach in response to an article alleging he had fixed a game.<sup>256</sup> In his brief, Wechsler repurposed the ACLU's *Sullivan* argument that there was no functional difference between behavior in the public sphere and the private sphere, and that burdening speech in either sphere offended the Constitution. "The integrity of college football," he argued, "is a matter about which the public has important and legitimate concern, whoever the participants."<sup>257</sup> Requiring non-governmental actors to prove intent before recovering for reputational injury was just as "essential" to free expression as requiring government officials to prove it, he argued, because the difference between the two was "artificial."<sup>258</sup> "[T]he relationship between government and private enterprise assumes . . . many diverse forms," he observed, leading to a "magnitude of private power" often built upon "public subsidy."<sup>259</sup> Because there was no functional dividing line between government power and private power, he suggested, there should be no difference between the burden on government plaintiffs and other plaintiffs with stature in the public sphere to show media intent before recovering damages for private reputational harm.<sup>260</sup> This position made its way into the Court's *Curtis* opinion and several that followed on its heels. In *Rosenbloom v. Metromedia*, the Court overturned a jury verdict for a bookshop owner who was identified in a radio report to have been arrested for selling obscene material.<sup>261</sup> Extending the *Sullivan* protections to speech about purely private figures mentioned in connection with issues of public concern, Justice Brennan wrote that

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256. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 135–38 (1967).

257. Brief for the Petitioner at 41, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (No. 37). Notably, the "public" being referenced here is not the "polity" that required information about the civil rights movement in Alabama in order to participate in political debate about segregation laws throughout the nation, but a "public" consisting of private individuals desiring information about recreation and defined as public by virtue of its size rather than its purpose. *Id.* at 54.

258. *Id.* at 42.

259. *See id.*

260. *Id.*

261. 403 U.S. 29 (1971).



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“a simple distinction between ‘public’ or ‘private’ individuals [is] artificial[.]”<sup>262</sup> Later, writing for himself in *Gertz v. Robert Welch, Inc.*, Brennan was emphatic that “we are all ‘public’ men to some degree.”<sup>263</sup>

In addition to spearheading the effort to apply constitutional deregulation “all the way down”<sup>264</sup> in defamation doctrine, the ACLU was also instrumental in urging the Court to apply deregulation “all the way across” the private law of tort. For example, it filed an amicus brief in *Hustler Magazine v. Falwell* arguing that public figures could not recover under the IIED tort for speech that caused them private anguish, in part because it was impossible to fully separate public discourse from private life.<sup>265</sup> The ACLU observed that the magazine speech at issue “was contained in a mass publication addressed to the public rather than to the respondent personally.”<sup>266</sup> Although the magazine speech was about intensely private matters—the plaintiff’s sexual history and maternal relationship—the fact that it was addressed to people other than the plaintiff himself meant that it was inherently public and therefore beyond the reach of private law.<sup>267</sup> To the extent the ACLU brief acknowledged the existence of a private sphere, it suggested that individuals who spoke in any way could no longer seek the aid of the law to protect any residuum of life in the private sphere. Indeed, it asserted that “religion and morality” were an “area of public life,” and that “heated debate” about them was “essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”<sup>268</sup> Permitting private people to collect damages for speech that disturbed their emotional security, it argued, would suppress speech too “severe[ly] . . . for a pluralistic society committed to free and open debate.”<sup>269</sup> The brief crystallized the ACLU’s position that participation of any kind in the public sphere amounted to acceptance of a deregulated life, in which personal harms were to be redressed by counterspeech rather than by private law remedies, arguing that “[r]ules which encourage more speech rather than lawsuits are in keeping with one of the fundamental principles of our democracy.”<sup>270</sup>

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262. *Id.* at 41.

263. 418 U.S. 323, 364 (1974) (Brennan, J., dissenting) (quoting *Rosenbloom*, 403 U.S. at 48). For a discussion of the Court’s majority opinion in *Gertz*, see *infra* Section V.B.1.

264. See, e.g., *Nomination of Elena Kagan as Associate Justice of the Supreme Court: Hearing on S.1044 before the S. Judiciary Comm.*, 111th Cong. 103 (June 30, 2010) (statement of Elena Kagan), <https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf> [<https://perma.cc/328H-5QC8>].

265. Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the American Civil Liberties Union Foundation, American Civil Liberties Union of Virginia, CBS Inc., Capital Cities/ABC, Inc., National Broadcasting Company, Inc., and National Association of Broadcasters in Support of Petitioners, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (No. 86-1278). In addition to finding that the Constitution compelled it to displace the private law of defamation and of IIED, the Court also (but not at the behest of the ACLU) subjected private law privacy torts to constitutional scrutiny. See *Time, Inc. v. Hill*, 385 U.S. 384 (1967).

266. Brief of ACLU at 6, *Hustler*, 485 U.S. 46 (No. 86-1278).

267. *Hustler*, 485 U.S. 46.

268. Brief of ACLU at 13, *Hustler*, 485 U.S. 46 (No. 86-1278).

269. *Id.* at 6–7.

270. *Id.* at 14.

The ACLU struck its final blow in this progression in *Snyder v. Phelps*, urging the Court to prohibit tort recoveries for even obscure and wholly private figures harmed by speech about public affairs.<sup>271</sup> Citing cases it had successfully briefed over the past decades,<sup>272</sup> the ACLU argued that “the rationale for distinguishing between public and private figures . . . makes little sense where the speech at issue is an opinion on matters of public concern, incapable of being proven true or false.”<sup>273</sup> The fact that the protesters deliberately intruded on a private person during a private funeral rite did not render the resulting injury a private one that could be the subject of private liability, according to the ACLU. Indeed, the fact that the speech had the capacity to injure was the “reason for according it constitutional protection.”<sup>274</sup> Where the speech did “not describe actual facts” about the plaintiff’s son, his claim of personal injury was specious.<sup>275</sup> The Court fully accepted this reasoning, doing away with any remaining vestiges of a genuine private sphere.

#### ***D. The Tradeoff Underlying the Erasure of Public and Private***

Over the course of decades, the ACLU played a canny long game to wipe out the nineteenth-century distinctions between public law and private law, and to discredit a cultural assumption that life could be carried out in separate public and private spheres. In many ways, this game was worth the candle. As long as private law permitted individuals to lock in regressive cultural biases with the tacit support of the state, it impeded racial and gender progress. By the twenty-first century, the Supreme Court had embraced the “great groups” vision of sociolegal equity, reconceptualizing private law as a subset of public law and the private sphere as an obsolete cultural artifact.

But the ACLU victory in this game was not cost-free. The group undoubtedly helped the Court diagnose and treat an anti-democratic pathology by deregulating speech that inhibited public discourse. At the same time, it may simply have replaced that pathology with its opposite, by suspending legal consequences for private slurs in the legally obsolete, but culturally relevant, private sphere.

### **IV. ACLU WOMEN AND THE FORFEITURE OF THE PRIVATE**

When the ACLU undertook to disrupt the nineteenth-century scheme of regulation across the four “sociolegal quadrants,” it counted almost as many women as men among its leadership.<sup>276</sup> This tees up a puzzle. Nineteenth-century speech jurisprudence constrained occupants of the public sphere—typically, male occupants—who wanted to participate in discussion of public affairs. So, ACLU men seeking an unregulated legal frontier they could navigate with intellect were trying to throw *off* the burden imposed on them by law. But nineteenth-century speech jurisprudence empowered occupants of the private sphere—typically,

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271. Brief for the Petitioner at 22, *Snyder v. Phelps*, 562 U.S. 443 (2011) (No. 09-751).

272. *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); and *Hustler*, 485 U.S. 46).

273. *Id.* at 24.

274. *Id.*

275. *Id.* at 25.

276. *See infra* Section IV.A.

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women—who wanted to repel personal slurs against them. So, ACLU women who joined in the free speech revolution were throwing *away* a boon gifted them by law. Why? It turns out that ACLU leaders on the distaff side shared an avant-garde, equalitarian version of feminism that resisted the embrace of values associated with the private sphere. Accordingly, in a bid for legal equality in a cultural public sphere, they happily traded away antiquated protections of private law they considered unnecessary and infantilizing.

### A. A Brief History of the Early ACLU

Organized free-speech activism was rare at the turn of the twentieth century. But in the years leading up to World War I, the American Union Against Militarization (“AUAM”) was formed to “guard against militarism” and “build toward world federation.”<sup>277</sup> The group pledged to assist conscientious objectors, a pledge that led it to take on the free speech cause. But the free speech initiative caused division within the group. AUAM leaders like Jane Addams, Lillian Wald, and Paul Kellogg were social workers<sup>278</sup> by training and valued cooperation with government officials rather than confrontation. At the same time, Crystal Eastman played a key “organizational role” in the AUAM; as an attorney, she valued confrontation and debate.<sup>279</sup> The friction among AUAM leaders came to a head when Eastman was forced to take leave during a pregnancy that jeopardized her health.<sup>280</sup> She returned from childbirth to find that the executive committee had appointed Roger Baldwin associate director and had “given [him] charge of the emerging legal defense work for conscientious objectors” even though he was not a lawyer.<sup>281</sup> Eastman continued her work for the organization, but thereafter labored in Baldwin’s “shadow.”<sup>282</sup>

Together, Eastman and Baldwin decided to concentrate their free speech efforts in a National Civil Liberties group under the auspices of the AUAM. In her press release announcing the National Civil Liberties Bureau’s (“Bureau”) creation, Eastman said it would protect “free speech, free press, freedom of assembly, and freedom of conscience.”<sup>283</sup> The move to isolate speech advocacy from anti-militarism failed, and AUAM leader Lillian Wald ultimately resigned her position. The AUAM soon withered away,<sup>284</sup> while the Bureau gained strength. Eastman and Baldwin eventually transferred the Bureau’s work to an independent organization, the ACLU.<sup>285</sup>

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277. Andrea DeKoter, *“Life is a Big Battle for the Complete Feminist”: Women’s Roles in the American Civil Liberties Union, 1915–1940*, at 44 (May 11, 2012) (PhD dissertation, Binghamton University) (on file with author).

278. See WALKER, *supra* note 234, at 17, 19.

279. DeKoter, *supra* note 277, at 59.

280. See *id.* at 52.

281. AMY ARONSON, *CRYSTAL EASTMAN: A REVOLUTIONARY LIFE* 179 (2020).

282. When Baldwin was sent to prison for his conscientious objection, Eastman continued her leadership of the group’s work and communicated with Baldwin about the group’s direction while he was in prison. DeKoter, *supra* note 277, at 59.

283. *Id.* at 54.

284. See *id.* at 57–58.

285. *Id.* at 58–59.

The early ACLU featured great gender diversity. A number of notable American women joined leading male lawyers and activists in its initial efforts. However, this diversity did not translate into an explicit agenda to advance female interests, most likely because the women of the group were politically riven. The suffrage movement had brought several forceful women activists from the labor movement, the social work movement, the communist movement, and other power bases into a strong coalition.<sup>286</sup> But upon winning the vote, those women splintered. The more radical activists wanted to continue the push for female equality through an Equal Rights Amendment (“ERA”) and a cultural deemphasis on marriage and motherhood. But their more traditional colleagues objected to this so-called equalitarian agenda. They feared that if the law required completely equal treatment of the genders, women would lose the benefit of protective laws that acknowledged their unique social and physical circumstances.<sup>287</sup> This internal tension played out at the ACLU, “[an] organization that drew women of both liberal and radical persuasions into its ranks in the early twentieth century.”<sup>288</sup>

Even if the women of the ACLU had agreed on a feminist agenda, they had limited power to execute it. Most of them belonged to the 60-member National Committee, a “letterhead group, created to give the ACLU an air of respectability.”<sup>289</sup> These women were bestowed “paper titles” but had “little real influence.”<sup>290</sup> True power in the early ACLU was concentrated in the Executive Committee, a “self-perpetuating group of New York City residents.”<sup>291</sup> The members of this small group were almost exclusively male, tended to come from wealth and privilege, and like the members of their social class, often believed that women were not fit for organizational leadership because their work style was considered nurturing and emotional.<sup>292</sup>

The ACLU’s attitude toward its female members may be attributed in large part to Baldwin, the group’s first executive director. There is no doubt that Baldwin, a “cult”<sup>293</sup> figure, built the organization in his image. He was solely responsible for recruiting Executive Committee members, and therefore it is unsurprising that the group he chose conducted itself in ways that mimicked both his positive and negative qualities. Baldwin has been lauded for his charisma, his “ebullient personality,” and his “unflagging efforts to promote social justice.”<sup>294</sup> At the same

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286. *See generally id.*

287. *See generally* WALKER, *supra* note 234.

288. DeKoter, *supra* note 277, at 43–44.

289. WALKER, *supra* note 234, at 67–68.

290. DeKoter, *supra* note 277, at 17 (quoting JUDY KUTALAS, *THE AMERICAN CIVIL LIBERTIES UNION AND THE MAKING OF MODERN LIBERALISM 1930–1960* (2014)).

291. WALKER, *supra* note 234, at 67.

292. DeKoter, *supra* note 277, at 18. *See also* WALKER, *supra* note 234, at 29 (“Most of the wartime advocates of free speech—Baldwin, DeSilver, Nelles, Thomas, and Chafee—were from wealthy families or comfortably respectable Protestant backgrounds.”).

293. DeKoter, *supra* note 277, at 7.

294. *Id.* at 13–14.

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time, Baldwin has also been decried as an “autocrat,” who manipulated the group to do his bidding,<sup>295</sup> and as a sexist.<sup>296</sup>

On examination, Baldwin’s philosophy of gender relationships was nuanced and is worth appreciating because it was ultimately reflected in the ACLU’s litigation strategy. Like many of the male feminists who lived and worked in Progressive Era Greenwich Village, Baldwin professed a belief that women should remake themselves as the equals of men. An equal woman should, he suggested, leave the “deadening grip” of the private, domestic sphere where she was “shackled” and “subservient,” in order to join “free society.”<sup>297</sup> To the extent that Baldwin had a policy position on female advancement, it was a position that seemed to align with the avant-garde equalitarians, perhaps explaining his contempt for the protectionist ACLU committeewomen.<sup>298</sup>

In casting feminism as a quest for the same sexual and professional autonomy sought by men, Baldwin joined other male feminists of the Progressive Era Village, who understood feminism as an invitation for women to join the male sphere rather than an opportunity to think critically about the ethos of a new, shared sphere:

[They found] the unconventional aims and behavior of the [equalitarian] feminist . . . delightful. They liked her because [she] “was comparatively freed from the home and its influences; because she was more with us, and more like us; because she took the shock and jostle of life’s incident more bravely, more candidly and more lightly.”<sup>299</sup>

### ***B. Crystal Eastman: The ACLU’s “Complete Feminist”***

Alongside “founding father” Baldwin, Eastman is considered the “founding mother” of the group.<sup>300</sup> Indeed, the modern ACLU credits her original philosophy as “still very much a part of our organization’s DNA.”<sup>301</sup> One might have expected the “woman in the room” at the inception of the ACLU to have pushed for a free speech regime that preserved the legal protection long given to the private sphere where women were most likely to reside and be injured. But Eastman brought into her ACLU work two distinct qualities hostile to a private-sphere-privileging speech jurisprudence. First, unlike the many women who served on the group’s powerless National Committee, she was an avant-garde, equalitarian feminist who urged women to deemphasize private, domestic aspirations in favor of public

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295. WALKER, *supra* note 234, at 67.

296. JUDY KUTALAS, *THE AMERICAN CIVIL LIBERTIES UNION AND THE MAKING OF MODERN LIBERALISM 1930–1960*, at 33 (2014).

297. WALKER, *supra* note 234, at 45.

298. See DeKoter, *supra* note 277, at 17.

299. June Sochen, “*Now Let Us Begin*”: *Feminism in Greenwich Village: 1910–1920*, at 8–9 (1967) (dissertation) (on file with author) (quoting FLOYD DELL, *INTELLECTUAL VAGABONDAGE* 161 (1926)).

300. Susan N. Herman, *Crystal Eastman, the ACLU’s Underappreciated Founding Mother*, ACLU (Jul. 12, 2019), [www.aclu.org/issues/free-speech/crystal-eastman-aclus-underappreciated-founding-mother](http://www.aclu.org/issues/free-speech/crystal-eastman-aclus-underappreciated-founding-mother) [https://perma.cc/Z7JT-WESJ].

301. *Id.*

participation in government and the market. Second, because of her early career as a scholar of work injury and drafter of New York's workers' compensation scheme, she saw private law as a repository of antiquated class privilege in need of public law override.

### 1. *Equalitarianism*

The passage of the Nineteenth Amendment “opened a surprisingly difficult era for the American women’s movement. While the decade began with victory in the suffrage cause, the achievement of that goal, pursued for generations, had a paradoxical effect . . . .”<sup>302</sup> Women who had banded together to secure the vote for very different reasons now lacked common cause, and what separated them grew weightier than what joined them together. The protectionist or maternalist wing of feminism has been defined as believing in a “uniquely feminine value system based on care and nurturance”; that by virtue of their motherhood, women had a claim on citizenship because they were raising future citizens and a claim on policy influence because they were “responsib[le] for all the world’s children”; and, most crucially, that “ideally men should earn a family wage to support their ‘dependent’ wives and children at home.”<sup>303</sup> The equalitarian wing of Progressive Era feminism believed in “equality with men in all aspects of life—political, legal, economic, and social.”<sup>304</sup>

Eastman was an unabashed equalitarian. “[I]t never occurred to [her] that women were meant to be timid, domestic creatures who listened to men rather than talked,” and her political tactics were described by detractors as “confrontational” and “flamboyant.”<sup>305</sup> Some also objected to her lifestyle—she had divorced her first husband and for a time cohabited with her eventual second husband, Walter Fuller.<sup>306</sup> Others objected to her policy positions, in which she objected to “maternalist, emotionally charged language that advocated for special protections for women, children, the working class, or other ‘weak’ members of society.”<sup>307</sup>

Although the ACLU took no formal stance on the equality versus protection debate raging within the post-suffrage coterie of women’s organizations, Eastman’s pivotal role in the group gave her leverage to advance her vision of complete gender equality and the melding of the public and private spheres into one shared legal and cultural space. Early free speech theory quickly took on a masculine

302. ARONSON, *supra* note 281, at 227.

303. DeKoter, *supra* note 277, at 33 n.65 (citation omitted); *see also* ARONSON, *supra* note 281, at 226–27.

304. DeKoter, *supra* note 277, at 33.

305. DeKoter, *supra* note 277, at 26; CRYSTAL EASTMAN: ON WOMEN AND REVOLUTION 14 (Blanche Weisen Cook ed., 1978).

306. EASTMAN, *supra* note 305, at 14.

307. DeKoter, *supra* note 277, at 32. One manifestation of her avant-garde position on women’s rights was her co-authorship of the ERA in 1923. ARONSON, *supra* note 281, at 3–4. She presumably would have favored ACLU advocacy on its behalf, but the early leaders of the group declined to take on gender equality as one of its causes. The group notes this position “corresponded with the preference of most 1920 suffragists, who regarded the passage of the 19th Amendment as having achieved their goal and who feared that any declaration of equality might undermine hard-won protectionist legislation [for women and children.]” and identifies its modern “vibrant women’s rights docket” as one “Eastman would have admired.” Herman, *supra* note 300.

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cast, and eventually the ACLU came to argue that all the world was a public sphere that should be freed from speech-suppressive rules that tamped down the competition and trade in ideas.<sup>308</sup> The men who used the law to expand areas of contestation that privileged self-interested exertions of power did not appear to see any cost in demolishing a sphere where contrary values prevailed or were legally protected. And Eastman, the sole woman with a voice in early strategy, was not a protectionist feminist inclined to perpetuate separate spheres for women or to protect their domestic comfort. Unlike Florence Kelley and other opponents of the ERA, Eastman wanted to wipe out the public–private divide altogether and assign the same basic rights of workplace dignity and homemaking duty to men and women alike.<sup>309</sup> Progressive legal theorists followed Roscoe Pound in criticizing courts for “exaggerat[ing] private right at the expense of public interest,” and Eastman was very much in Pound’s corner.<sup>310</sup>

The valorization of the public sphere in early ACLU litigation, arguably at the expense of considering the value of private sphere protections, is therefore a natural outgrowth of Eastman’s particular brand of feminism. Speaking at the First Feminist Congress in New York just months *before* Congress adopted the Nineteenth Amendment, Eastman surveyed “the[] status [of women] in this republic.”<sup>311</sup> Most of her focus was on deficiencies in public law, including the lack of franchise, wage inequality, state marriage laws that “perpetuate the economic dependence of a wife on her husband,” the denial “by law” of the right to “that scientific knowledge necessary to control the size of their families [or guarantee] voluntary motherhood,” and the legal treatment of sex workers—but not sex consumers—as “forbidden.”<sup>312</sup>

Speaking months *after* the ratification of the Nineteenth Amendment, Eastman reiterated that legal as well as cultural change was necessary for women to achieve complete parity with men:

“What is the problem of women’s freedom?” she asked. “It seems to me to be this: how to arrange the world so that women can be human beings, with a chance to exercise their infinitely varied gifts in infinitely varied ways, instead of being destined by the accident of their sex to one field of activity: housework and child-raising.”<sup>313</sup>

In her quest for complete equality in the public sphere, Eastman discouraged women from asking for gender-specific rules of engagement. For example, she opposed protectionist legislation that barred women from working nights.<sup>314</sup> She quoted a British activist, who had started working in a shoe factory at the age of ten and who, after the death of her mother ten years later, lived a “double

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308. See discussion *supra* Part IV.

309. See, e.g., EASTMAN, *supra* note 305, at 46–47.

310. See, e.g., Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 L. & SOC. INQUIRY 187, 208, 210 (2009).

311. EASTMAN, *supra* note 305, at 49.

312. *Id.* at 50.

313. *Id.* at 53–54.

314. See *id.* at 170–72.

life—cooking, sewing, washing for a family after her day’s work at the factory was done,” saying that “you can’t protect women without handicapping them in competition with men. If you demand equality you must accept equality. Women can’t have it both ways.”<sup>315</sup>

Eastman fervently believed that men and women were on the cusp of living in a shared sphere, where women would be welcome to participate in government, the market, and the arts, and men would enthusiastically participate in child-rearing and home-keeping. “Within ten years,” she predicted, “the battle of the protective [program for woman] versus [the equalitarian program] will be won. The question will be a dead issue. There will no longer be any possible dispute as to whether or not women are on an equal footing with men.”<sup>316</sup> Eastman’s vision of equality was capacious. She contended that gender injustice was “bolstered not only by public law but everywhere propped up by cultural attitudes,” and she hoped to remake them both.

Eastman acknowledged that cultural equality could “[m]ost assuredly [not be accomplished] by laws or revolutionary decrees.”<sup>317</sup> Rather, she suggested, culture needed to dissolve the distinction between social spheres assigned to men and women and replace them with a single sphere inhabited by both sexes, leaving room for both the logic of competition and the logic of relationship. “[F]undamentally,” she concluded, “it is a problem of education, of early training—we must bring up feminist sons.”<sup>318</sup> What would that entail? “It must be womanly as well as manly to earn your own living, to stand on your own feet. And it must be manly as well as womanly to know how to cook and sew and clean and take care of yourself in the ordinary exigencies of life.”<sup>319</sup>

Further, she urged, society had to abandon the notion that home was an “island of liberty” for women, who would find no relaxation in it so long as they were “responsible for every detail of its comfort.”<sup>320</sup> And to the extent placement in the private sphere *did* afford women some privileged remove from the harshness of public life, Eastman asserted that women had begun to chafe at those privileges and ask whether their enjoyment was worth the forfeiture of access to the values of the public sphere.<sup>321</sup> Ultimately, she sought and predicted a “cheerful Utopia of women and men” together.<sup>322</sup>

## 2. *Private Law Skepticism*

Eastman did not just take a dim view of the public–private divide in culture, she also took a dim view of the public–private divide in law. Soon after graduating from law school, Eastman was hired by sociologist Paul Kellogg to do research for his landmark study of social conditions in Pittsburgh.<sup>323</sup> At the close of her tenure,

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315. *Id.* at 171–72.

316. *Id.* at 370.

317. *Id.* at 56.

318. *Id.*

319. *Id.* at 54.

320. *Id.* at 105.

321. *Id.*

322. *See id.* at 373.

323. ARONSON, *supra* note 281, at 72.



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she produced an influential in-depth statistical analysis of local working conditions called *Work Accidents and the Law*.<sup>324</sup> The book documented the circumstances leading to, and following, more than 500 workplace deaths in Allegheny County in 1906 and 1907.<sup>325</sup> Eastman found that the widows and children of men who died on the job were forced to sue in tort for compensation that would replace the breadwinner's salary, but they were unable to recover from employers without proving that the fatal accidents at issue were entirely the employers' fault.<sup>326</sup> This burden was impossible to meet in a substantial number of cases because few accidents could be attributed solely to employer wrongdoing:

While sometimes the workmen's carelessness is exasperating heedlessness, oftener it is ignorance, or inattention due to long hours and intensity of work, or recklessness inevitably developed by a trade which requires daring; that while sometimes the employer's carelessness is deliberate disregard for safety in the construction of his plant, oftener it is the human frailty of his agents, the hasty mistaken orders of foremen, or the putting off of necessary repairs from day to day so as not to delay the game – an ordinary outcome of competition. In short, one must conclude that these accidents seldom can be laid to the direct personal fault of anyone. They happen more or less inevitably in the course of industry.<sup>327</sup>

Based on her findings, Eastman critiqued the law's treatment of work accidents, which were rising precipitously in New York at the time.<sup>328</sup> “[O]ur laws,” she wrote, “do not furnish just and proper compensation to workmen injured at their work, or to the widows and children of workmen killed . . . .”<sup>329</sup> The legal system was deficient, she argued, because it treated industrial workplace safety as a matter of relational morality between individual workers and their employers, rather than a social problem to be tackled by the state. Her fervent aim was to “replace outmoded tort rules” grounded in individual rights and duties with social schemes designed for the benefit of all.<sup>330</sup>

Frustrated with the impotence of private law to provide workplace safety, she focused her energies on public law as a guarantee of equity for working men and women. In 1909, New York Governor Charles Evans Hughes appointed Eastman to the “otherwise all-male” Employers' Liability Commission.<sup>331</sup> This body drafted one of the nation's first workman's compensation statutes. Notably, the bill was

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324. Christopher Robinette, *Harmonizing Wrongs*, 80 MD. L. REV. 343, 358–59 (2021) (citing CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* (1910)).

325. *Id.* at 358.

326. *See* EASTMAN, *supra* note 305, at 3–6.

327. *Id.* at 270–71.

328. *See* Robinette, *supra* note 324, at 357–58 (citing JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 59 (2004)) (observing that “[b]etween 1870 and 1890 ‘the number of accident suits being litigated in New York City’s state courts grew almost eightfold; by 1910 the number had grown again’ more than five times”).

329. EASTMAN, *supra* note 305, at 269–70.

330. Weinrib, *supra* note 310, at 191.

331. EASTMAN, *supra* note 305, at 6.

adopted by the New York State Legislature only to be invalidated by the New York Court of Appeals one day before the Triangle Shirtwaist Factory fire.<sup>332</sup> It was eventually revived by the state legislature without judicial objection.<sup>333</sup>

In an interview about her work on the Commission, a reporter suggested that female factory workers like the shirtwaisters who picketed for better working conditions in 1909, many of whom died in the fire, should not have been working outside the home to begin with. They “were motivated by ‘vanity, a love of pretty things beyond . . . their pursestrings,’” the reporter offered, and Eastman objected “vehemently” to the characterization, as part of her campaign for women to “extend the contours of [their] strength and women’s sphere far beyond suffrage.”<sup>334</sup> In conversation about the workers’ compensation scheme, Eastman consciously avoided the “maternalist” rhetoric of protection and paternalism that she loathed in her social worker colleagues.<sup>335</sup> She framed the scheme as one that guaranteed worker safety as a matter of public fairness rather than one that granted financial protection as a matter of private employer generosity.<sup>336</sup>

Eastman’s rejection of private law tort as a mechanism of interpersonal equity was not limited to her experience as a labor advocate. She was frustrated with aspects of the tort system plaintiffs were required to use to secure compensation when no legislative compensation insurance scheme was available to cover injury.<sup>337</sup> Among these were the provocative tactics of “ambulance chasers,” the “enormous contingent fees” associated with tort lawsuits, the courts’ lengthy lag in “determin[ing] fine points of legal negligence,” and the “inevitable delay” in litigation that advantaged wealthy corporate defendants and disadvantaged poor plaintiffs.<sup>338</sup>

In her personal life, too, she disavowed tort lawsuits as a means of seeking dignity or personal protection. During a two-year residence in Wisconsin with her first husband, Wallace Benedict, Eastman was active in the local suffrage movement and other “radical” undertakings.<sup>339</sup> In a letter to her brother, Max, she voiced “frustration with ‘lying’ accounts about her being published in the newspapers.”<sup>340</sup> But though she had recourse to libel suits against these outlets, she seemed uninterested in pursuing legal liability, and instead “tried to make the best of it.”<sup>341</sup>

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332. The New York State Workers’ Compensation Board, Centennial: Celebrating 100 Years of New York State Workers’ Compensation and Leading the Way Forward for the Next Century, at i (2014), [http://www.wcb.ny.gov/WCB\\_Centennial\\_Booklet.pdf](http://www.wcb.ny.gov/WCB_Centennial_Booklet.pdf) [<https://perma.cc/EF5E-7XL6>].

333. *Id.* at 6–7.

334. *Id.* at 8.

335. DeKoter, *supra* note 277, at 34.

336. *See id.* at 33–34.

337. EASTMAN, *supra* note 305, at 274.

338. *Id.* at 274–75.

339. DeKoter, *supra* note 277, at 36–38.

340. *Id.* at 36.

341. *Id.* at 36–37.

### C. *The Eastman Effect on ACLU History*

Eastman's commitment to an equalitarian version of feminism and to a rejection of private law doctrine that obscured oppression behind "neutral" rules is evident in some of the ACLU's most notable achievements. The group has been celebrated in recent years for advancing the cause of women's rights, particularly through the ACLU Women's Rights Project. It has secured this progress by centering an explicitly equalitarian version of feminism that emphasizes female entitlement to an embodied version of liberty and market participation that have long been tropes of masculine privilege. By decentering traditionally female values like emotional well-being and domestic tranquility, the group has submerged the extent to which its victories on behalf of female access to the public sphere have traded away aspects of female well-being long associated with the private sphere, and have cast female autonomy in the male image.

#### 1. *Market Agency*

Beginning in the 1930s, the organization began to challenge public law that disadvantaged women in the public spheres of labor and the marketplace. Several of its first cases embracing an explicitly feminist agenda involved constitutional challenges to local school board rules that prohibited married women from working as schoolteachers.<sup>342</sup> In the 1940s, the group extended its employment discrimination work into occupations outside education.<sup>343</sup> And the group formalized its commitment to strategic litigation on behalf of the market equality of women when it launched the Women's Rights Project in 1972 under the leadership of Ruth Bader Ginsburg. In choosing and litigating Equal Protection Clause cases for the project, Ginsburg described her goal as securing for women "the opportunity to participate in full partnership with men in the nation's social, political, and economic life."<sup>344</sup> In pursuit of that goal, she focused repeatedly on the importance of sex-neutral access to the public sphere by targeting inequitable laws applied to the workplace<sup>345</sup> and to the administration of the legal system.<sup>346</sup> And although she did not present work and home as mutually inconsistent, the value of participation in the market sphere was described in laudatory terms ("develop[ment] of individual talents and capacities"<sup>347</sup>) while the value of participation in the private sphere was invested with less implicit value ("a hearth-centered existence"<sup>348</sup> that leads to a "dependent, subordinate status in society"<sup>349</sup>). One admirer has said that Ginsburg's litigation goal was to discredit the "legal imposition of . . . roles historically

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342. See WALKER, *supra* note 234, at 167.

343. *Id.* at 167–69.

344. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143–44 (1978).

345. *E.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 677 (1973) (employment benefits); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (Social Security benefits).

346. *E.g.*, *Duren v. Missouri*, 439 U.S. 357 (1979) (jury service); *Reed v. Reed*, 404 U.S. 71, 71 (1971) (probate representation).

347. Brief for the Petitioner at 38, *Struck v. Sec'y Def.*, 409 U.S. 947 (1972) (No. 72-178).

348. *Id.* at 37.

349. *Id.* at 38.

associated with the separate spheres tradition.”<sup>350</sup> In her campaign for female parity with men, Ginsburg’s ACLU work appeared to reify Eastman’s assumption that legal guarantees of female equality would go hand-in-hand with cultural adoption of gender equality.

## 2. *Bodily Agency*

The ACLU commitment to a version of feminism cast in masculine terms can also be seen in its reproductive rights advocacy. Dorothy Kenyon, a near-contemporary of Eastman, struggled from 1930 onward to convince her male board colleagues that abortion should be part of the group’s civil liberties agenda. In urging the board to take on the issue, she leveraged their commitment to a physically embodied notion of liberty that had long undergirded the masculine public sphere, insisting that state prohibitions on abortion interfered with a female “right to choose what shall happen to their bodies,” and amounted to “bodily slavery.”<sup>351</sup> Notably, the ACLU litigators most closely associated with challenges to state laws banning contraception and abortion were ACLU general counsel Morris Ernst and his law firm associate and protégé Harriet Pilpel, both of whom were simultaneously leading the ACLU initiative to deregulate speech in the *Sullivan* case.<sup>352</sup> Again and again, they protested state laws depriving women of reproductive agency and information about medical options as, among other things, impermissible regulations of free speech.<sup>353</sup> These rhetorical strategies were anchored in their commitment to a deregulated public sphere where autonomy of speech and body were the preconditions to fulfillment, and in their commitment to an equalitarian version of feminism seeking legal neutrality between men and women. As one observer has summarized, Pilpel and Kenyon won over their male colleagues by pointing out that ostensibly neutral public law prohibiting reproductive information and choice produced different regimes of bodily autonomy for men and women.<sup>354</sup>

## 3. *An Intersectional Valence on the Quest for Equal Agency*

As they recast both public and private law to further an equalitarian version of feminism, Ginsburg, Kenyon, and Pilpel were following a template first conceived by ACLU “founding mother” Eastman. But they were equally indebted to another ACLU matriarch, Pauli Murray, for the central insight driving their quest

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350. Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 66 (2013).

351. Leigh Ann Wheeler, *The Making of the Right to Abortion*, ACLU (October 18, 2019), <https://www.aclu.org/issues/reproductive-freedom/abortion/making-right-abortion> [<https://perma.cc/GC3J-ZFQH>].

352. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (challenging Connecticut contraception statute); *Poe v. Ullman*, 367 U.S. 497, 497 (1961) (same). Ernst and Pilpel were listed as counsel to the Planned Parenthood Federation of America in these cases, rather than counsel to the ACLU. But given their deep, simultaneous immersion in civil rights advocacy on behalf of the ACLU and their executive roles in the group, it is fair to say that their equalitarian arguments against birth control and abortion regulations reflected the same general orientation whether they were representing Planned Parenthood or the ACLU.

353. See, e.g., Motion for Leave to File a Brief with Brief and Appendices as Amicus Curiae for Plaintiff at 1, 25, *Griswold*, 381 U.S. 479 (No. 496).

354. See generally Wheeler, *supra* note 351.

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for an equalitarian ethos in a flattened sociolegal topography. As a law student in the 1940s and as an attorney in the 1950s, Murray leveraged Legal Realist techniques to document how the ostensibly neutral public law guarantee of racially “separate but equal” accommodations in education and elsewhere produced functionally discriminatory results in the private sphere.<sup>355</sup> Murray observed in 1945 that when the law carved out inviolate space for private transactions, the use of judicial power to enforce those transactions was state power; in 1948, the NAACP and ACLU leveraged that argument in *Shelley* to challenge restrictive covenants as a dimension of unconstitutionally discriminatory zoning.<sup>356</sup> In *States’ Laws on Race and Color*, Murray identified a host of ostensibly “equal” classificatory laws at the state level that produced unequal experiences for racial minorities because of persistent cultural divides.<sup>357</sup> Murray’s book was called the “Bible” of midcentury civil rights litigators with the NAACP and the ACLU, who argued successfully in *Brown v. Board* that ostensibly neutral public classifications, when applied to a culturally biased world, produced de facto inequality and were unconstitutional.<sup>358</sup>

Murray brought the same insights to her work as a member of the 1962 Presidential Commission on the Political and Social Rights of Women, arguing that “[w]hen the law distinguishes between ‘the two great classes of men and women,’” even without intending to distribute legal entitlements differently, it inevitably “gives men a preferred position by accepted social standards.”<sup>359</sup> As Murray “floated in and out, or across organizations”<sup>360</sup> at the forefront of the midcentury civil rights–civil liberties movement, she echoed Eastman’s view that distinctions between public and private law, and between public and private sphere, were often employed to insulate from scrutiny those intent on discriminating on the basis of race, gender, or both. And she was as skeptical as Eastman about the value of private law or the sanctity of private life.

To Murray, Eastman, and the women who carried out their mission in the later years of ACLU advocacy, the prize of racial and gender equity required the erasure of public–private boundaries and the flattening of sociolegal topography. These women sought an embodied and capitalized kind of power in the public world while rejecting an emotional and relational kind of power in the private one. Consequently, securing constitutional parity in the public sphere was worth the sacrifice of private law protections for the private sphere. If sacrifice it was. These equalitarians assigned little worth to private law mechanisms that repelled intimate gossip and maintained domestic viability. Culture, they believed, was on the cusp of freeing women from antiquated requirements of sexual virtue and muted voice. And in a new sphere that released both men and women from stereotyped behavior roles,

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355. Braham Dabscheck, *Pauli Murray: The U.S. Firebrand’s Unique Opportunity to Influence a Continent*, 30 *ECON. & LAB. RELS. REV.* 566, 566 (2019) (reviewing ROSALIND ROSENBERG, *JANE CROW: THE LIFE OF PAULI MURRAY* (2017)).

356. See *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

357. See, e.g., Dabscheck, *supra* note 355, at 574–75.

358. *Id.* at 574.

359. Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 *GEO. WASH. L. REV.* 232, 239 (1965).

360. Dabscheck, *supra* note 355, at 569.

sexual slurs would lose their sting and private law responses to them would be useless.

## V. CULTURE, LAW, AND THE MODERN WOMAN

The speech revolution of the twentieth century succeeded in producing a flat and deregulated legal frontier. But private attitudes have not followed suit as equalitarians trusted they would.<sup>361</sup> American culture clings to a preference for private womanhood, which translates into suspicion and hostility toward many women who project public voice.<sup>362</sup> Internalizing a constitutional rhetoric that implicitly valorizes aggression, competition, and the “joust,” many modern “counterspeakers” often disagree with female speakers in violent, threatening, and degrading terms that ignore their ideas and assault their physical or sexual security. Modern speech law withholds protective private law mechanisms from injured women, instead forcing them to spar with their detractors—a tactic that often escalates the threats against them. Given the choice between perpetual vulnerability and complete exit from the “shared” sphere, many women are tempted to choose exit. Today, a body of law inspired by complete feminist Eastman, sure of cultural equality by midcentury, has stranded the modern woman.

### A. Progression and Regression in American Culture

Eastman predicted a century ago that women, having secured “their civic standing within the public realm as electors,”<sup>363</sup> would by the 1930s also shed their cultural standing as doyens of the home.<sup>364</sup> But cultural commitment to private womanhood has abated little over the past century. Although popular histories discuss “major gains for women since the feminist movement of the 1960s,” more recent histories acknowledge that “progress towards gender equality has stalled in

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361. As Catharine MacKinnon has summarized, [T]he social preconditions, the presumptions, that underlie the First Amendment do not apply to women. The First Amendment essentially presumes some level of social equality among people and hence essentially equal social access to the means of expression. In a context of inequality between the sexes, we cannot presume that that is accurate. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 129 (1987).

362. I refrain from categorizing *all* women who speak in *any* context as “public women,” though modern speech jurisprudence has established a baseline expectation that *any* exercise of voice may amount to a functional forfeiture of private status. Though the Court appears to assume that “public” status would be the exception rather than the rule, lower courts have come to adopt virtually the opposite assumption. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974) (noting that people who enter the “vortex” by speaking on an issue of public interest may render themselves public, and predicting that “truly involuntary public figures” would be “exceedingly rare”); *cf. Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (stating “one can assume that the wife of a public figure . . . more or less automatically becomes at least a part-time public figure herself).

363. Gretchen Ritter, *Gender and Citizenship After the Nineteenth Amendment*, 3 *POLITY* 345, 346 (2000).

364. *See supra* Subsection IV.B.1.

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recent decades.”<sup>365</sup> Responses to the General Social Survey from 1977 through 2016 show that Americans cling to the idea of distinct public and private spheres, and assign different behavioral expectations within each.<sup>366</sup> Though people experience both spheres interrelatedly, “work and family have distinct cultural meanings.”<sup>367</sup> Surveys show that average Americans “increas[ingly] support . . . gender egalitarianism in the public realm of work / politics” at the same time that they “accept[] gendered responsibilities in the private realm of families” in part because women are still perceived as “more naturally nurturant and, therefore, responsible for caregiving.”<sup>368</sup>

Further, Americans have grown to accept women in the workplace because they have concluded this development “does not necessarily challenge gender hierarchy if women are concentrated in less rewarding and more feminized occupations than men,” and if women who participate in the workforce are being indoctrinated into “contemporary ideals of liberalism and free choice,” ideals that are, of course, consistent with the male ethos of competition and aggression.<sup>369</sup> The prevailing cultural attitude in modern America is that women “have the choice to choose to work for pay if they wish,” but have no choice about culture’s preference that they bear children or insistence that they will take the “primary parenting role.”<sup>370</sup> Simultaneously, some scholars have documented a cultural disdain for the very logic and values that culture assigns to women, framing the stereotypically female “care ethic” as inferior to the stereotypically male “justice ethic.”<sup>371</sup> Modern attitudes appear to “support[] equality in one sphere of social life while opposing it in another.”<sup>372</sup>

Put another way, and consistent with the premise underlying modern free speech jurisprudence, women are not barred from entering the public sphere on male terms but are expected to simultaneously conform their behavior to the female norms of domesticity, virtue, and caregiving. A study of male executives reinforced this dynamic; in interviews, these subjects “reveal[ed] a tacit preference for traditional gender roles in the private sphere that is at odds with practices of gender equality in the public sphere.”<sup>373</sup> Further, some framed women’s “paid employment as optional and, in some cases, as morally inappropriate.”<sup>374</sup> Finally, when asked about impersonal employment practices related to work–life balance, the respondents with stay-at-home wives tended to express personal opinions about wanting to retain their

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365. William J. Scarborough et al., *Attitudes and the Stalled Gender Revolution: Egalitarianism, Traditionalism, and Ambivalence from 1977 through 2016*, 33 GENDER & SOC’Y 173, 174 (2019).

366. *Id.* at 178, 184.

367. *Id.* at 176.

368. *Id.*

369. *Id.* at 176–77.

370. *Id.* at 177.

371. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

372. Scarborough et al., *supra* note 365, at 174.

373. Sarah J. Tracy & Kendra Dyanne Rivera, *Endorsing Equity and Applauding Stay-at-Home Moms: How Male Voices on Work-Life Reveal Aversive Sexism and Flickers of Transformation*, 24 MGMT. COMM’N Q. 3, 10 (2009).

374. *Id.* at 17.

freedom to invest in work by subcontracting out emotional labor to their wives.<sup>375</sup> These answers reflected both an ongoing investment in separate cultural spheres and an imposition of their cultural preferences onto others in their workplaces.<sup>376</sup>

Finally, modern psychological literature suggests that the modern treatment of the public sphere as one that women may *choose* to enter—on male terms—and the private sphere as one that women may *not* choose to exit is at the root of a substantial portion of anti-female violence and aggression:

Traditional masculine norms prescribe that men should be agentic, pursuing self-benefiting goals such as amassing status, power, and competence, while devaluing, as being ‘feminine,’ communal goals, such as joining with others to build and nurture emotionally intimate relationships. Similarly, many cultures’ predominant gender scripts for heterosexual interactions prescribe proactive, agentic roles for men but reactive, receptive, communal roles for women, justifying patriarchal expectations that women should subserviently gratify men and affirm men’s self-views of superiority.<sup>377</sup>

Consequently, researchers have found that, when activated, men with high agentic tendencies are most likely to target aggression at heterosexual women because they consider those women “key resources . . . in [their] quest for gratification, patriarchal power, and status.”<sup>378</sup> The so-called theory of ambivalent sexism describes a mindset that produces hostility toward women who frustrate their expectations but benevolence towards women who “conform to patriarchal norms of female subservience and submission” and holds to the belief that “women are deficient in agency (e.g., competence and status) and so should accept being dependent upon men to be their protectors and providers.”<sup>379</sup> Both hostile and benevolent sexism “prescribe[] polarization of gender roles and justify men’s dominance over women.”<sup>380</sup>

It is as true today as it was 100 years ago that women who step outside the private sphere of home and family often draw harsh responses for doing so—responses that do not turn on the content of their ideas, but solely on their gender. That is, the marketplace that Holmes positioned as the natural forum for speech and speech law, and that Eastman encouraged the ACLU to aggrandize because of a faith that it would soon be gender-neutral, remains essentially a male marketplace.<sup>381</sup> And the domestic sphere that Eastman imagined to be gender-neutral remains essentially a female sphere. Consequently, a century of speech law that was premised on predictions of equality has culminated in an aggrandized public arena that lashes out

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375. *See id.* at 16.

376. *See id.* at 19.

377. Scott W. Keiller, *Male Narcissism and Attitudes Toward Heterosexual Women and Men, Lesbian Women, and Gay Men: Hostility toward Heterosexual Women Most of All*, 63 *SEX ROLES* 530, 531 (2010).

378. *Id.*

379. *Id.* at 532.

380. *Id.*

381. *See, e.g.,* MACKINNON, *supra* note 361, at 28.



against female voices, and a neutered private law that is impotent to compensate them for the harms they sustain when they speak.

### ***B. Neutrality and Hostility in American Law***

The private injuries that private speech has inflicted on women throughout the twentieth century are manifold. As one scholar has observed, “The threat of male violence anywhere chills women’s speech everywhere—in public, in private, at work, at home, in the street, online.”<sup>382</sup> And a modern body of speech law that flattens public and private while applying an explicitly neutral, but implicitly male, deregulatory ethos amplifies and reifies this dynamic.<sup>383</sup> For example, women are legally vulnerable to traditional reputational harms caused by untrue statements because the reputation torts have been constitutionalized. They are legally vulnerable to sociocultural harms linked with depictions of women as the objects of male oppression because regulating that material has been deemed speech suppressive.<sup>384</sup> And they are legally vulnerable to privacy and emotional harms stemming from online behavior like trolling, revenge porn, and doxing because statutes and constitutional jurisprudence have negated private law tort remedies.

#### *1. Slander and defamation*

In *Gertz v. Robert Welch, Inc.*, the Supreme Court described several categories of “public figure” who would have to satisfy the actual malice standard before recovering for defamatory speech.<sup>385</sup> Aside from “all-purpose” public figures, who had achieved general notoriety for their contributions to the public sphere, they identified “limited purpose” public figures and “involuntary” public figures, each of whom would be held to the more demanding *Sullivan* standard.<sup>386</sup> Limited purpose public figures are those who have “thrust themselves into the forefront of particular controversies in order to influence the resolution of the issues involved.”<sup>387</sup> Involuntary public figures are those who “become a public figure through no purposeful action of [their] own,” a category the Court predicted would be “exceedingly rare.”<sup>388</sup> Once the category was created, however, lower courts began to use it, and one appellate court commented that it was an especially apt description for “relatives of famous people.”<sup>389</sup> Notably, the people whom that court used to illustrate the involuntary public figure category were the children of Soviet

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382. Mary Anne Franks, *Beyond “Free Speech for the White Man”*: *Feminism and the First Amendment*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 4 (Cynthia Bowman & Robin West eds., 2018).

383. See, e.g., Catharine MacKinnon, *Weaponizing the First Amendment*, 106 VA. L. REV. 1223, 1224–25 (2020) (noting how a “purported equality principle” has “supported intensifying hierarchies of power”).

384. See, e.g., *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

385. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974).

386. *Id.*

387. *Id.* at 345.

388. *Id.*

389. *Marcone v. Penthouse Int’l Mag. For Men*, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985).

spies Julius and Ethel Rosenberg, and the wife of talk show host Johnny Carson.<sup>390</sup> In both cases, people who were culturally assigned to the private sphere and who had done nothing to exit that sphere were legally reassigned to the public sphere by virtue of relational ties over which they lacked full agency. And as a result of the reassignment, they were unable to show the requisite level of fault by the speaker or to win legal vindication for the injury they experienced.

## 2. Pornography

A similar phenomenon is on display in the legal treatment of pornography. In the 1980s, Catharine MacKinnon and Andrea Dworkin advocated for an Indianapolis ordinance providing a right of action to those who claimed injuries arising from trafficking, coercion, or abuse via pornography.<sup>391</sup> The Seventh Circuit invalidated the ordinance, and the Supreme Court affirmed that result.<sup>392</sup> The appellate court concluded that while it was clear that the depictions of humiliation, mutilation, and degradation about which the ordinance permitted women to complain did “perpetuate” subordination of women in employment outcomes, domestic abuse, and rape—those downstream results actually demonstrated the power and legitimacy of the underlying pornographic speech.<sup>393</sup> The court reasoned that government action empowering women to seek compensation for injuries correlated with that speech essentially positioned the state as the arbiter of speech value, and thus violated the First Amendment.<sup>394</sup> Anti-pornography advocates treated this problematic speech as a public health problem and encouraged a public law response. But under a First Amendment jurisprudence that has adopted an implicitly male ethos to govern the public sphere, the government is disabled from protecting those vulnerable to speech, who are instructed to “joust” more vigorously with their assailants.

## 3. Trolling, Revenge Porn, and Doxing

This dynamic has repeated itself as speech has migrated to the online environment. Women who participate in social media report experiencing threatening and violent responses at a remarkable level, especially compared to men who undertake similar online behavior.<sup>395</sup> Specifically, trolling and harassment online is a documented phenomenon; the practice of posting intimate images of women without their consent (known colloquially as nonconsensual porn or revenge porn) has attracted the attention of scholars and legislators; the practice of “doxing,” or posting private information that facilitates real-world contact with women (including phone numbers, home addresses, work addresses, and schedules), has

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390. See *id.* (first citing *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974); and then citing *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976)).

391. Franks, *Beyond*, *supra* note 382, at 24.

392. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

393. *Id.*

394. See *id.* at 334.

395. Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374–75 (2009) (“The majority of targeted individuals [online] are women.”).

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grown commonplace; and threats of live, in-person violence in response to online speech are de rigueur.<sup>396</sup>

Women who comment on public affairs using social media frequently experience violent, gendered trolling<sup>397</sup> from strangers who bombard them with responses. Aside from the anonymity that protects internet trolls, the architecture of online fora aggravates the way this violent speech is experienced by women. Individual social media users can reach vast networks of like-minded critics who “coalesce into cyber lynch mobs, firing off near identical messages with the relentlessness of profanity-powered machine guns.”<sup>398</sup> One woman who started an online campaign urging the Bank of Britain to consider including images of women on the country’s currency reported that in response, she began to receive 50 rape threats an hour, and enough rape and death threats over the course of one weekend to fill 300 police report pages.<sup>399</sup> The content of these online threats is telling. Rarely do they challenge the speaker’s ideas, facilitating the kind of intellectual combat that First Amendment theory claims to relish. Rather, they suggest opposition to female viewpoints by threatening female safety, often in combination with the message that women should never have left the private sphere. One troller pithily conveyed his objection to video gaming activist Anita Sarkeesian’s bid for public influence by telling her to go “[b]ack to the kitchen, c\*\*\*!”<sup>400</sup> In many sectors of the internet, graphic rape threats have become a “lingua franca—the ‘go-to’ response for men who disagree with what a woman says.”<sup>401</sup> Private advice to those targeted by this language tends to track the deregulatory First Amendment message that speakers must fend for themselves in a deregulated space while the law stands by. “[T]hey are frequently instructed to stop complaining and toughen up. ‘It’s just words,’ they are told. ‘It’s just the internet.’”<sup>402</sup>

Anti-female aggression online can also involve more targeted and intentional efforts to breach a woman’s privacy and dignity. Chief among these efforts is the posting of intimate images without a woman’s consent. So-called revenge porn “is disproportionately perpetrated by men against women,” and because it can derail women in the workplace, the educational space, and social relationships, it often isolates women and drives them into “silence and invisibility.”<sup>403</sup>

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396. See, e.g., *id.* at 374.

397. EMMA A. JANE, MISOGYNY ONLINE: A SHORT (AND BRUTISH) HISTORY (2016). Some have dismissed “trolling” as a problematically vague term that has historically been associated with mild opposition to a post, and prefer the terms “technology violence” or “cyber violence against women and girls.”

398. *Id.*

399. *Id.* at 1–4.

400. *Id.* at 1 n.6.

401. *Id.*

402. *Id.* at 3.

403. Franks, *supra* note 382, at 4–5.

According to one study, 72.5% of revenge porn targets are women.<sup>404</sup> As of 2021, 46 states have adopted legislation to criminalize the posting of nonconsensual pornography.<sup>405</sup> However, many of these laws explicitly exempt the posting of material that involves “a matter of public concern or public interest,”<sup>406</sup> and others exempt postings that are motivated by amusement or profit rather than a desire to intimidate.<sup>407</sup> Further, statutes criminalizing revenge porn are vulnerable to constitutional challenges on First Amendment grounds. Laws in Arizona, Illinois, Indiana, Rhode Island, Texas, Vermont, and Wisconsin have already been the subject of First Amendment lawsuits.<sup>408</sup> A federal statute was pending as of 2021, and it too is likely to be challenged on First Amendment grounds.

The privacy torts are theoretically promising causes of action for plaintiffs whose images have been posted against their will, but they are of limited practical use—in large part because they have been deactivated by the Supreme Court’s First Amendment jurisprudence. For example, the public disclosure of private facts tort appears to be a good match for nonconsensual pornography, but that tort has been described as “‘dead’ in the common law due to its chilling effect on speech protected by the First Amendment.”<sup>409</sup> The intrusion upon seclusion tort appears applicable at first glance, but liability under that tort turns on whether a “reasonable person” would consider the intrusion “highly offensive,” and that standard is thought difficult to meet when the person at issue shared the original image voluntarily with the poster.<sup>410</sup> The same difficulty complicates the plaintiff’s case in the IIED context, where the posting of the image must be found “outrageous” for the defendant to be held liable.<sup>411</sup> In each of the latter two cases, the decisions of women to extend trust to an intimate partner in the private sphere are being used as evidence of her willing exposure to public scrutiny. And the male, market ethos has infiltrated the “postfeminist” female consciousness to a sufficient extent that when young women are surveyed about their sharing of private sexual images, many focus exclusively on their own agency and responsibility in controlling those choices and resist the language of victimization when those images are non-consensually shared, without

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404. See, e.g., DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 13 (2014) (“Of the 3,393 individuals reporting cyber harassment to [the Working to Halt Online Abuse group] from 2000 to 2011, 72.5 percent were female and 22.5 percent were male (5 percent were unknown).”).

405. Jessica Magaldi et al., *Revenge Porn: The Name Doesn’t Do Nonconsensual Pornography Justice and the Remedies Don’t Offer the Victims Enough Justice*, 98 OR. L. REV. 197, 217 (2020).

406. *Id.* at 218.

407. *Id.* at 219.

408. *Id.* at 220. The Texas law was upheld in 2021. Anna Canizales, *Texas Court of Criminal Appeals Upholds “Revenge Porn” Law*, TEX. TRIB. (May 26, 2021), <https://www.texastribune.org/2021/05/26/texas-court-revenge-porn-law/> [<https://perma.cc/MVR5-Z8FT>]. The Indiana law was upheld in 2022. *Indiana High Court Upholds State’s “Revenge Porn” Law*, CHI. TRIB. (Jan. 22, 2022), <https://www.chicagotribune.com/news/breaking/ct-indiana-revenge-porn-law-20220122-pb7igk5bqna3laotwgsksbottle-story.html> [<https://perma.cc/5ULP-95KB>].

409. Magaldi et al., *supra* note 405, at 216.

410. *Id.* at 215.

411. *Id.* at 216.

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interrogating the culture of online communities that confer social capital on men who share the images.<sup>412</sup>

The exposure of women to public scrutiny is even more pronounced in the case of doxing. Doxing, or the online revelation of personally identifying information about a target on social media or public websites like Wikipedia, originated in hacker culture as a tactic to harass fellow hackers but has become “a mainstream phenomenon” in recent years.<sup>413</sup> Like other kinds of cyberharassment, doxing disproportionately affects women.<sup>414</sup> In one early example of doxing, an anonymous poster created a dating profile for an actress that shared her phone number and home address, along with the information that she preferred violent sex with strangers. Though the woman was forced to move with her toddler to a new residence, her eventual suit against the dating site was unsuccessful.<sup>415</sup> And threats that respond to female speech often manifest in the physical world. When gaming activist Sarkeesian was invited to speak at Utah State University, the school received an anonymous e-mail from someone claiming ownership of “a semi-automatic rifle, multiple pistols, and a collection of pipe bombs,” and pledging to “write my manifesto in [Sarkeesian’s] spilled blood, [so] you will all bear witness to what feminist lies and poison have done to the men of America” unless her scheduled talk there was canceled.<sup>416</sup> She asked the school to bring in metal detectors or pat down attendees, but it declined, claiming that the “threat was not imminent or real.”<sup>417</sup>

Just as informal response to trolling and revenge porn denies the reality of private injury, doxing is often met with complacency in the popular narrative. When a Fordham Law School professor of privacy law challenged his students to compile a dossier of Justice Antonin Scalia’s intimate information, the justice shrugged off the students’ discovery of his home phone number, home address, wife’s e-mail address, and other personal information.<sup>418</sup> “It is silly to think that every single datum about my life is private,” he scoffed.<sup>419</sup> Scalia positioned the harm as negligible without acknowledging that he enjoyed layers of protective privilege (a federally funded security detail and deference from law students who refused to divulge what they had found) unavailable to most doxed women.

The modern reality is that women—whether public officials, public activists, or the ordinary woman with an Instagram or Twitter account—are

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412. Rikke Amundsen, *The Price of Admission: On Notions of Risk and Responsibility* in WOMEN’S SEXTING PRACTICES IN ONLINE OTHERING PALGRAVE STUDIES IN CYBERCRIME AND CYBERSECURITY 146–47 (Karen Lumsden & Emily Harmer eds., 2019).

413. Nellie Bowles, *How “Doxing” Became a Mainstream Tool in the Culture Wars*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html> [<https://perma.cc/G6XG-KDJY>].

414. E.g., CITRON, *supra* note 404, at 13.

415. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1119–20 (9th Cir. 2003).

416. Franks, *supra* note 382, at 21–22.

417. *Id.* at 22.

418. Noam Cohen, *Law Students Teach Scalia About Privacy and the Web*, N.Y. TIMES (May 17, 2009), <https://www.nytimes.com/2009/05/18/technology/internet/18link.html> [<https://perma.cc/Q3MU-THPW>].

419. *Id.*

increasingly exposed to aggressive, violent, and threatening speech. This speech does not engage with the ideas these women express in a metaphorical intellectual “joust,” and it cannot be effectively negated with counterspeech—despite legal celebration of counterspeech as a neutral and deregulated tactic that can protect the individual while informing the community at large. This speech delegitimizes female contributions to the public sphere by isolating the characteristics that are purely private—physical appearance, home addresses, sexual practices, relational and emotional lives—and intentionally inflicting private injuries by assailing those characteristics alone. Women, stripped of the legal wherewithal to deter or be made whole for these assaults, often rationally conclude that public silence is the most effective mode of self-help available to them. So, while the twentieth-century deregulation of an ostensibly open public sphere has been hailed as a boon to democracy, the simultaneous deregulation of private law to respond to the cultural closures of that sphere has not been sufficiently condemned as the bane of modern women.

### CONCLUSION

After a century-long drive to modernize free speech law, women have virtually no legal ability to deter private speech attacks or recover for the injuries they cause. The dismantling of private law as a weapon against speech that injures in the private sphere appears to be the inadvertent work of equalitarian feminists at the helm of the ACLU. Crystal Eastman led the women of the organization in forfeiting female-centered claims on private life and private law. And her heirs in later generations carried on an unexamined commitment to equalitarian versions of feminism that privileged bodily autonomy and market participation, while implicitly devaluing the legal significance of emotional well-being and domestic security.

Nineteenth-century speech law overregulated public speech in the public sphere, and the twentieth-century speech revolution is rightly celebrated for eradicating that pathology in the American experience. But twentieth-century speech law underregulates private speech in the private sphere, and it is wrongly given a pass for introducing that pathology to the American experience. The time has come to acknowledge the subsidy that modern speech law extracts from women, and to ask whether today’s expressive marketplace is fair or foul.