Introduction
LEGAL PATRIARCHY AND ITS AFTERMATH

Patriarchy is our judge
That imprisons us at birth
And our punishment
Is the violence you DON’T see.

Women chanted this anthem at protests throughout the world, beginning in Santiago, Chile, in the autumn of 2019. Pointing to the persistence of sexual violence and reproductive injustice, women around the world have been marching to end the violence that is often unseen, namely, the law’s active neglect of women’s full personhood. American women brought this anthem to New York outside the courthouse where the culminating event of the #MeToo movement was unfolding: the rape trial of Hollywood power broker Harvey Weinstein. From the #MeToo movement to demands for equal pay, abortion rights, childcare, and even brand-new constitutions, women in constitutional democracies throughout the world are remaking the law after patriarchy. Feminist protesters performed this anthem in Chile, Argentina, Colombia, Mexico, the United States, Ireland, South Korea, India, and points in between. They sought state responsibility for realities that they could only marginally control.
Patriarchy is our judge
That imprisons us at birth,
And our punishment
Is the violence you CAN see.
It’s femicide.
Impunity for my killer.
It’s our disappearances.
It’s rape.

Titled “A Rapist in Your Path,” it was chanted by a self-proclaimed “feminist flash mob” outside the Chilean Supreme Court during a wave of popular protests that culminated in the drafting of a new constitution for the nation. Femicide, impunity, disappearance, and rape are some of the manifestations of misogyny that raise the central questions of this book: Why does the law remain indifferent to women’s deaths, disappearances, and rape a generation after most constitutional democracies officially ended legal patriarchy and guaranteed women equal protection of the laws? Why does misogyny remain palpable within legal orders that have proclaimed gender equality? And what can feminists do to overcome these failures of law? This book examines the strategies, successes, failures, and challenges of feminist lawmaking after the laws of patriarchy have been repealed.

It’s the cops.
It’s the judges.
It’s the state.
It’s the president.
The oppressive state is a macho rapist.
The rapist is you.

Misogyny, this book proposes, endures after patriarchy because patriarchy loses its force as law. People who embrace patriarchal gender relations maintain them through other legal means. Misogyny is conventionally understood as woman-hatred, but it is much more, and much worse for women, than hatred. Misogyny is the set of practices that keep women down in order to keep everyone and everything else up. Misogyny entails plenty of violence, much of it hateful, as unsavory men beat, rape, and kill women because they are women. But something about women’s
disappearances points to what is often missing when we approach misogynyny as synonymous with woman-hatred. In Latin America, women disappeared under military dictatorships like the one in Chile, and were subject to torture, often of a sexual nature, hidden from public view. But the defining feature of disappearance was not violence; it was violence for which the state held nobody accountable. Disappearances were not unique to women in authoritarian regimes—men disappeared too. Yet the state’s failure to prevent or respond to violence against women was not unique to military dictatorships or authoritarian government. Even in liberal constitutional democracies that celebrate the rule of law, enforce legal gender equality, criminalize violence against women, and prohibit sex discrimination in the workplace and schools, the state fails persistently to investigate, punish, eradicate, and prevent violence against women, from rape to femicide to workplace sexual harassment to campus sexual assault. The law enables men, and the society designed to fulfill their vision, to benefit from keeping women down, albeit in ways that are hidden from view.

It is this failure of law to which women in all corners of the world are saying “No more.” The law’s failure goes far beyond disappearances in distant lands. In the United States, a society controlled by men benefits enormously from women’s invisible reproductive work, which it extracts from women by failing to support mothers while increasingly restricting access to abortion.

Patriarchy was a set of legal rules that lost their validity when constitutional democracies committed to gender equality throughout the twentieth century. Yet after patriarchy, the harms women endure are still escaping legal notice or accountability, and women’s needs and contributions to society often remain invisible to the law. A range of expectations and entitlements maintain patriarchal gender relations, even after the laws that structured patriarchy as a legal system have fallen away. Misogyny, this book argues, is this aftermath of patriarchy. In a legal and social order that officially embraces gender equality rather than patriarchy, men’s sense of entitlement to women’s sacrifices is misplaced; it rests upon an illegitimate undervaluation of women’s worth and contributions to the common good. At the same time, women’s unpaid work remains essential to men’s continued survival and to the survival of their offspring. Men, and the society founded and framed to meet their needs, derive irreplaceable
benefits from women when women bear the enormous burdens of biological and social reproduction. This book argues that continued enjoyment of these reproductive benefits is a form of unjust enrichment and that continued extraction of these benefits is an abuse of power. Misogyny is this engine of overentitlement and overempowerment that continues even after it is no longer driven by patriarchal legal rules. With this fuller definition and analysis of misogyny, this book examines how the law fails women after patriarchy, even under laws of gender equality, and what to do to remake the law after misogyny.

THE LAWS OF PATRIARCHY

There is no more thorough account of patriarchy as a legal system than Simone de Beauvoir’s founding text of twentieth-century feminism, The Second Sex, the French book that sparked an intellectual epiphany in American legal icon Ruth Bader Ginsburg. The late justice Ginsburg, now recognized as a founding mother of modern American legal feminism, pioneered legal strategies that were shaped by feminist thinkers and legal developments around the world.

“This world has always belonged to males, and none of the reasons given for this have ever seemed sufficient,” de Beauvoir wrote in 1949. Patriarchy’s triumph was “neither an accident nor the result of a violent revolution.” Rather, patriarchy emerged as a reaction against primitive practices regarding kinship, property, and matrilineal descent. Because the mother was necessary for the birth of a child, whereas the father’s role in procreation was more difficult for early peoples to establish, communities produced children recognized as belonging to them through their association with the mother. This account drew on Friedrich Engels, who in turn deployed the work of anthropologists Lewis Morgan and Johann Jakob Bachofen to depict a transition from matrilineal to patrilineal kinship orders that was driven by the rise of private property ownership and its protection by law. Men could not accumulate property and increase wealth across generations by bequeathing their private property to their own children without some means of identifying children as their own offspring.
The legal protection of marriage fulfilled this function, insofar as marriage required the wife to limit her procreative activities, that is, sexual relations, to her husband. Hence, the legal protection of marriage enabled the legal recognition of paternity. The legal inequality of the husband and the wife, achieved by the legal authority of the husband over the wife, and the economic dependence of the wife on the husband, enabled legal protection of private property and its intergenerational growth. Whereas in matrilineal communities child-rearing and the management of the household could be seen as public services with a public character, once the family became a legally protected social unit that maintained private property across generations, the wife became the head servant to the man who headed the household.

As Gerda Lerner has noted, Engels showed how men’s political and economic dominance was enabled by their control over female sexuality. The German socialist thinker August Bebel built on Engels’s and Bachofen’s accounts of the transition to patriarchy in *Woman under Socialism*, an important intellectual source for women constitution makers on the left at Weimar in 1919 and Bonn in 1949. Bebel explicitly linked the rise of patriarchy to reproductive control: “The mother-right vanished; the father-right stepped into its shoes. Man now became a private property-holder: he had an interest in children, whom he could look upon as legitimate and whom he made the heirs of his property: hence he forced upon woman the command of abstinence from intercourse with other men.”

Patriarchy became a core feature of Western legal systems that defined families and protected private property. Patriarchy was established and enforced in Roman law, which shaped the Western legal tradition in the civil law systems of continental Europe and many bodies of law in the common law of England and America. Roman law established rights, obligations, and authority within the family—the most important social unit in Roman society. The family was the group of persons subject to the power of the male head of the household, the *paterfamilias*. The law was patriarchal in the sense that it legitimized the nearly absolute power of the *paterfamilias* over his children. *Patria potestas* included the right of life and death (*ius vitae necisque*) over the children, which appeared to allow the father to kill his own children at will, without facing legal
punishment. The law gave the *paterfamilias* a similar power—*manus*—over his wife. Through various periods of Roman legal history, the status of women varied—from no legal personhood under the law to some legal rights independent of their husbands or fathers. Roman women, married or not, were generally subject to some limitation on their capacity for independent legal action; their authority to act was almost always derived from a man, such as a husband, father, or guardian. Roman law criminalized adultery asymmetrically. A married woman was guilty of adultery if she had sexual relations with a man other than her husband, but a man was guilty of adultery only if he had sexual relations with a married woman, whether he was married or not.

The modern legal orders established in the eighteenth and nineteenth centuries in Europe and the United States adopted some of the legal features of Roman law that empowered men and disempowered women. Blackstone’s *Commentaries* famously articulated the doctrine of coverture: “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into her husband.” In other words, marriage made the woman disappear from legal personhood. Exclusive male entitlement to the control of marital property and undivided male legal authority over children of a marriage were features of the common law in most states throughout the nineteenth century. Patriarchal law set this supreme male entitlement and empowerment as the natural and legitimate baseline distribution of entitlements. In the United States, before the law began to recognize the political and legal equality of women, patriarchy was enforced through various bodies of law, including common-law doctrines of coverture. Married women had no legal personhood independent of their husbands; they were deprived of all civil and political rights on the assumption that every man represented his wife and children in the exercise of his own legal rights. In many states, any property that a woman owned prior to marriage came within her husband’s control. Women could not enter into contracts, sue, or be sued independently of their husbands. Even if a married woman engaged independently in market work, her earnings belonged to her husband, who exerted exclusive control over how they were spent. From the eighteenth century or earlier, the common law, as described in Lord Matthew Hale’s
treatise, entitled husbands to sexual intercourse with their wives at will by making marriage an exception to the criminalization of rape.  

In 1873, the US Supreme Court upheld a state’s decision to exclude women from the legal profession on the grounds that a person who was unable to enter into contracts on her own could not represent clients as a lawyer. In *Bradwell v. Illinois*, Justice Bradley famously justified the exclusion of women from independent rights to property, contract, and work in his concurring opinion, emphasizing that “man is, or should be, woman’s protector and defender” and that “the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.” Women bore and raised children, worked within the home to maintain the household to meet men’s and children’s survival needs, and cared for the family to enable it to be the fundamental unit of social reproduction. Men in power—including the justices of the Supreme Court—justified women’s exclusion from the public economic sphere by enforcing women’s role in the private nonmarket sphere of the home.

By subsuming married women under the legal personhood of their husbands, the laws of patriarchy enforced men’s expectation that women provide sexual and reproductive services according to men’s will. The law entitled every husband to sexual intercourse, the bearing and care of his children, and household work from his wife on demand. It also entitled the husband, as master of the household, to secure his wife’s obedience by subjecting her to corporal punishment or chastisement should she defy his commands. In exchange, the law obligated husbands to support their wives and to represent them in the legal system, and married women remained economically and legally dependent on their husbands. While the law imposed duties on men to represent their wives’ and children’s interests, it respected men’s significant, nearly unlimited discretion in carrying out these responsibilities.

**FROM PATRIARCHY TO GENDER EQUALITY UNDER LAW**

From the mid-nineteenth century, the movement for women’s rights fought to eradicate each of these common-law rules. The 1848 Declaration of Sentiments, authored by Elizabeth Cady Stanton and presented at the