

LIBERAL DEMOCRACY AND THE PROBLEM OF PATRIARCHY

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This article addresses how and why liberal democratic constitutions, such as the United States, have come to recognise the tension between liberal values of equal liberty and patriarchy in three areas – contraception, abortion, and gay/lesbian sex acts – and to resolve them in the way in which they have: by extending constitutional protection to these activities on the basis of a constitutional right to privacy. The article begins with some historical understanding of the background of the rise of patriarchy, and why the control of sexuality in general, and women’s sexuality in particular, was so central to its aims. It then turns to how and why liberal constitutionalism has found these aims to be so problematic as a basis for law.

Keywords: liberal democracy, patriarchy, constitutional privacy, abortion, gay/lesbian rights, contraception

Patriarchy is an anthropological term denoting families or societies ruled by fathers. It sets up a hierarchy – a rule of priests – in which the priest, the *hieros*, is a father, *pater*. As an order of living, it elevates some men over other men and all men over women; within the family, it separates fathers from sons (the men from the boys) and places both women and children under a father’s authority.¹ It is a mistake to think of patriarchy as an exclusively contemporary term of criticism arising from and within feminism. John Locke, the father of liberal constitutionalism, begins the great argument of the *Second Treatise* only after he has refuted Filmer’s patriarchal defence of absolute monarchy in the *First Treatise*. It is a tribute to the power and influence of Locke’s argument for liberal democracy in the *Second Treatise* that hardly anyone, except a few feminists, even reads, let alone remembers the *First Treatise*. But the few feminists, such as Carole Pateman,² who have taken the *First Treatise* seriously are, I have come to think, on to something. It may be that Locke never grappled with the degree to which even he did not take seriously the ongoing tension between democracy and patriarchy, even in his own argument. In his very great novel, *The Scarlet Letter*,³ Nathaniel Hawthorne certainly thought so, and Carol Gilligan and I – in a recent book, in part inspired by Hawthorne – have tried to clarify how and why the tension between democracy and patriarchy still remains so unexamined in American politics to sometimes catastrophic effect.⁴ Why has this tension not been seen, and why does it remain so difficult to see?

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¹ Carol Gilligan, *The Birth of Pleasure* (Alfred A Knopf 2002) 4–5.

² Carole Pateman, *The Sexual Contract* (Polity Press 1988).

³ Nathaniel Hawthorne, *The Scarlet Letter* (Penguin 1983).

⁴ Carol Gilligan and David AJ Richards, *The Deepening Darkness: Patriarchy, Resistance, and Democracy’s Future* (Cambridge University Press 2009).

We argue that what explains this flawed understanding is the persisting psychological power of patriarchal political psychology that we illustrate through a study of the patriarchal psychology underlying the belligerent militarism of the Roman Republic and Empire. We were struck, in this connection, by the way Josephus, a close and respectful observer of the Roman army in action (in the imperial period), describes Roman men:⁵

[T]heir nation does not wait for the outbreak of war to give men their first lesson in arms; they do not sit with folded hands in peace time only to put them in motion in the hour of need. On the contrary, as though they had been born with weapons in their hand, they never have a truce from training, never wait for emergencies to arise. Moreover, their peace manoeuvres are not less strenuous than veritable warfare; each soldier daily throws all his energy into his drill, as though he were in action. Hence that perfect ease with which they sustain the shock of battle: no confusion breaks their customary formation, no panic paralyzes, no fatigue exhausts them; and as their opponents cannot match these qualities, victory is the invariable and certain consequence. Indeed, it would not be wrong to describe their manoeuvres as bloodless combats and their combats as sanguinary manoeuvres.

According to Josephus, Roman men are so steeped in militarism that they appear ‘as though ... born with weapons in their hand’.⁶

Of course, no baby is born this way. Quite the opposite; human babies are remarkable for their relationality, their desire for and responsiveness to human connection. Since Josephus’s Romans are neither relational nor emotionally sensitive, these human capacities have been blunted or stamped out of them. Our question, then, was how could Roman patriarchal culture structure both private and public life so as to render this outcome seemingly natural or inevitable?

We turned in this regard to the contemporary literature on trauma and its effects on human neurophysiology and psychology.⁷ The now well-documented consequence of trauma is a loss of voice and of memory – in particular, loss of the voice of intimate relationship. This loss or suppression of voice, however, is often covered by an identification with the voice of the person who imposed the trauma and an internalisation of the demands that this more powerful person imposes on one’s life. The crucial mechanism here is dissociation: the psychological process through which the surviving self separates itself from the self that was overwhelmed. A voice that speaks from experience is silenced in favour of a voice that carries more authority, leading to a replacement of one’s personal sense of emotional presence and truth with what Sandor Ferenczi, the Hungarian psychoanalyst, described as an ‘identification with the aggressor’,⁸ the taking on as one’s own the voice and demands of the oppressor. This process, leading to what

⁵ Josephus, *The Jewish Wars Books III–IV* (H St J Thackeray tr, Harvard University Press 1997) 27.

⁶ *ibid.*

⁷ Bessel van der Kolk, Alexander C McFarlane and Lars Weisaeth, *Traumatic Stress: The Effects of Overwhelming Experience on Mind, Body, and Society* (The Guilford Press 1996); Judith Herman, *Trauma and Recovery* (Basic Books 1997).

⁸ Jean Laplanche and Jean Bertrand Pontalis, *The Language of Psycho-Analysis* (Donald Nicholson-Smith tr, WW Norton 1973) 208–09.

Ferenczi observed as false compliance, is in itself largely unconscious, due in part to the loss of memory that follows the traumatic rupture of relationships.⁹

Josephus's observations suggest a personal and political psychology in which such traumatic breaks in intimate relationships are both normal and normative, justified by the demands of patriarchy: in effect, an institutionalised trauma that supports and sustains the required militaristic ethos. In the case of Roman patriarchy, these demands took the form of a highly gendered code of honour, coupled with institutionalised practices of shaming. The honour of a Roman citizen rested on his being willing and able, with the complicity of women, to engage in both Roman politics and their expression in continual imperialistic wars. This involved not only military service, with its risks of injury and loss of life, but also a willingness to disrupt personal relationships.

A family living under the rule of the Roman *patria potestas* experienced a form of oppression at the centre of intimate life, including control not only over inheritance and genealogy but also over the use of force to hold people in line.¹⁰ Even if many Roman fathers declined to exercise these powers oppressively, the very legitimisation of such power, as a model for what legitimate power is, makes the traumatic disruption of any intimate relationship acceptable, including that between fathers and sons. Polybius, a Greek whose home town had been damaged by Romans, noted in mixed horror and admiration¹¹ that:

there have been instances of [Roman] men in office who have put their own sons to death, contrary to every law or custom, because they valued the interest of their country more dearly than their natural ties to their own flesh and blood.

In place of intimate relationship, the son identifies with the honour of his father and of his father before him, honour descending through a line of fathers.

The mechanism of such honour codes is again beautifully illustrated by Polybius, who portrays the ritual he describes as very much at the heart of the psychology of Roman imperialism:¹²

Whenever one of their celebrated men dies, in the course of the funeral procession his body is carried with every kind of honour into the Forum to the so-called Rostra. ... The whole mass of the people stand round to watch, and his son, if he has left one of adult age who can be present, or if not some other relative, then mounts the Rostra and delivers an address which recounts the virtues and successes achieved by the dead man during his lifetime. By these means the whole populace ... are so deeply engaged that the loss seems not to be confined to the mourners but to be a public one which affects the whole people. Then after the burial of the body ... they place the image of the dead man in the most conspicuous position in the house. ... This image consists of a mask, which is fashioned

⁹ Sandor Ferenczi, 'The Confusion of Tongues between Adult and Child' (1949) 30 *International Journal of Psychoanalysis* 225.

¹⁰ For a good general treatment, see Susan Treggiari, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian* (Clarendon Press 1991); see also Richard P Saller, *Patriarchy, Property and Death in the Roman Family* (Cambridge University Press 1994).

¹¹ Polybius, *The Rise of the Roman Empire* (Ian Scott-Kilvert tr, Penguin Books 1979) 348.

¹² *ibid* 346–47.

with extraordinary fidelity both in the modeling and its complexion to represents the features of the dead man. ... And when any distinguished member of the family dies, the masks are taken to the funeral, and are there worn by men who are considered to bear the closest resemblance to the original. ...

They all ride in chariots ... and when they arrive at the Rostra they all seat themselves in a row upon chairs of ivory. It would be hard to imagine a more impressive scene for a young man who aspires to win fame and practice virtue. ...

[T]he most important consequence of the ceremony is that it inspires young men to endure the extremes of suffering for the common good in the hope of winning the glory that awaits upon the brave.

Such rituals enacted the patriarchal relationship of fathers to sons, leading sons to identify with a sense of family honour stretching into the past. Since fathers were often absent from family life (either through absence in war or death in war or, given the significant age differences from their wives, through natural death), Roman matrons, as wives and mothers, became crucial players in the patriarchal system.

Women, in the terms of this gender ideology, did not exist as persons with a mind and sexuality of their own, for the terms of the Roman arranged marriage respected neither. Such powers of fathers, or even of brothers, over their sisters (Augustus married his beloved sister, Octavia, to Antony) were, under the republic, important means to social solidarity. This was particularly true among otherwise highly competitive Roman republican men, struggling for leadership and honour in politics and war. Such men often sought, by enlisting the power of fathers or brothers, to elevate their status and political appeal through marriage to a woman of higher status, as Octavian did through his marriage to Livia.¹³ Thus are new alliances formed. Pompey and Julius Caesar manage, for example, to cooperate politically as long as Pompey is married to Caesar's sister; when she dies and Pompey refuses Caesar's request that a comparable marriage be arranged,¹⁴ the cooperation collapses and civil war follows.

This function of arranged marriage under Roman patriarchy led to the particular weight that Romans traditionally placed on the chastity and fidelity of women, for only such limitations on women's sexuality could assure their husbands that the women's children were his. An honour code of this sort invests men's sense of honour in a control over women's sexuality that disrupts any relationships women might otherwise form or want to form. Indeed, such control is a prerequisite of male honour in such a patriarchal system, and any attack upon it constitutes an insult that elicits and justifies violence. The link between traumatic disruption of intimate relationships and violence is thus reinforced.

Carol Gilligan and I argue that this pattern of patriarchally required traumatic breaks in relationships, leading to identification with the requirements of patriarchal gender stereotypes (the gender binary), persists not only in the traumatic initiations of young boys into their patriarchal gender roles¹⁵ but in the forms of patriarchal religion. A notable example of this is Roman

¹³ See, in general, Judith P Hallett, *Fathers and Daughters in Roman Society: Women and the Elite Family* (Princeton University Press 1984).

¹⁴ Adrian Goldsworthy, *Caesar: Life of a Colossus* (Yale University Press 2006) 294.

¹⁵ On the psychological importance of the relatively early initiations of boys and the much later initiations of girls into patriarchy, see Gilligan and Richards (n 4) 90–91. Our view is that it is the developmentally later initiation of girls, when they are much more mature, that explains their sometimes more resilient resistance to patriarchal demands than is the case with boys and men.

Catholicism, whose model of religious authority – more Roman than Christian – was uncritically modelled on Roman patriarchy (for example, Augustine of Hippo’s traumatic break with the woman he sexually loved for a celibacy that was required, he believed, to experience the love of his patriarchal vision of God).¹⁶ We analyse the psychological basis of Christian anti-Semitism as arising from such patriarchal scapegoating of the role of sexuality in Jewish religious life.¹⁷ This patriarchal psychology remains so politically powerful, even in American political life, because patriarchal religions remain so uncritically powerful in American cultural life, a point I explore at length in a recent book.¹⁸ More recently, I have explored the explanatory power of this understanding of patriarchal psychology as the basis of the imperialisms, including the British Empire as well as Italian and German fascism, that modelled themselves on Roman imperialism.¹⁹

Finally, Carol Gilligan and I argue that resistance to patriarchy arises from an ethical voice that seeks to protect human relationships from the traumatic disruptions that patriarchy imposes on them. It is no accident that the resistance that led to Athenian democracy apparently included the protection of intimate relationships from tyrannical intervention: Harmodios and Aristogeiton killed Hipparkhos, the brother of the tyrant Hippias, in 514 BCE, and were regarded in popular tradition as having freed Athens from tyranny; a commemorative bronze statue of them stood in the Athenian agora (a marble copy may be found in the National Museum of Naples). Both Harmodios and Aristogeiton perished in consequence of their act; Harmodios was the homosexual lover of Aristogeiton, and the unsuccessful attempt by Hipparkhos to seduce him was the start of the quarrel which had the spectacular outcome of leading to the Athenian democracy.²⁰ Resistance to patriarchy is in its nature democratic and democratising, as we argue at length in our book, in various domains: religion, psychology, the arts and politics.²¹

My aim here, consistent with this larger argument, is to address how and why liberal democratic constitutions, like the United States, have come to recognise the tension between liberal values of equal liberty and patriarchy in three areas – contraception, abortion, and gay/lesbian sex acts – and to resolve them in the way in which they have. I begin with some historical understanding of the background of the rise of patriarchy, and why the control of sexuality in general, and women’s sexuality in particular, was so central to its aims. I then turn to how and why liberal constitutionalism has found these aims to be so problematic as a basis for law.

Moral philosophers differ in their sense of the basis for ethics – some pointing to reason, others to emotion. There is reason to doubt that any basis for ethics can be valid which so rigidly enforces the gender binary (reason as male versus emotion as female) and is so false to the

¹⁶ *ibid* 102–18.

¹⁷ *ibid* 129–37.

¹⁸ See David AJ Richards, *Fundamentalism in American Religion and Law: Obama’s Challenge to Patriarchy’s Threat to Democracy* (Cambridge University Press 2010). See also Nicholas Bamforth and David AJ Richards, *Patriarchal Religion, Gender, and Sexuality: A Critique of New Natural Law* (Cambridge University Press 2008).

¹⁹ See David AJ Richards, *The Rise of Gay Rights and the Fall of the British Empire: Liberal Resistance and the Bloomsbury Group* (Cambridge University Press 2013 forthcoming).

²⁰ See Kenneth J Dover, *Greek Homosexuality* (Duckworth 1978) 41.

²¹ Gilligan and Richards (n 4) 121–224.

interdependent role of reason and emotion in our ethical lives. I offer human relationality as an alternative, more reasonable, basis for the role played by ethics in human life. By human relationality, I mean our empathic capacity to read the human world: to enter into, interpret and give weight to the emotions and thoughts of humans, our own point of view as well as others. I believe its naturalistic basis can be seen in three remarkably convergent findings of the contemporary human sciences: neurobiology, the research on babies, and the evolutionary origins of mutual understanding.

What I found heartening and deeply validating was the extent to which that view of human nature, and the human condition that Carol Gilligan and I have come to in the course of our research, has been supported and elucidated by research in neurobiology, as well as the infant research and evolutionary anthropology. We had, it appears, been telling a false story about ourselves. Antonio Damasio, a neurobiologist, discovered from his studies of brain injury that the splitting of reason from emotion is a manifestation not of development but of trauma, and leads to significant loss of the ability to make decisions. His exploration of consciousness revealed that our nervous systems are hard-wired to connect mind and body, emotion and thought. More precisely, we register our experience from moment to moment in our bodies and our emotions, picking up the feeling or the music of what happens, which then plays in our minds, our thoughts. When injury or trauma splits mind from body and thought from emotion, we become lost in disassociation and lose our way in navigating the human world.²²

What the infant research has shown is that, when infants are studied in their relationship with their caretakers (usually, their mothers), they are relationally attuned to their caretakers, as their caretakers are to them, and relationally attune themselves to others as a way of seeking or confirming their caretaking interests in them.²³ As Alison Gopnik recently observed:²⁴

We used to think that babies and young children were irrational, egocentric, and amoral. Their thinking and experience were concrete, immediate, and limited. In fact, psychologists and neuroscientists have discovered that babies not only learn more, but imagine more, care more, and experience more than we

²² See Antonio R Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (Avon Books 1994); Antonio R Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (Harcourt Brace and Company 1999); Antonio R Damasio, *Looking for Spinoza: Joy, Sorrow, and the Feeling Brain* (Harcourt 2003).

²³ See Lynne Murray and Colwyn Trevarthen, 'Emotional Regulation of Interaction between Two-Month-Olds and Their Mothers' in TM Fields and NA Fox (eds), *Social Perception in Infants* (Ablex Publishing 1985); Lynne Murray and Colwyn Trevarthen, 'The Infant's Role in Mother-Infant Communication' (1986) 13 *Journal of Child Language* 15-29; Edward Z Tronick, 'Emotions and Emotional Communication in Infants' (1989) 44 *American Psychologist* 112-19; Edward Z Tronick and Katherine Weinberg, 'Depressed Mothers and Infants: Failure to Form Dyadic States of Consciousness' in Lynne Murray and Peter J Cooper (eds), *Postpartum Depression and Child Development* (Guilford Press 1997) 57; Edward Z Tronick and Andrew Gianino, 'Interactive Mismatch and Repair Challenges in the Coping Infant' (1986) 6 *Zero to Three* 1-6; Beatrice Beebe and Frank Lachmann, *Infant Research and Adult Treatment: Co-Constructing Interactions* (The Analytic Press 2002); Daniel N Stern, *The Interpersonal World of the Infant* (Basic Books 1998).

²⁴ Alison Gopnik, *The Philosophical Baby: What Children's Minds Tell Us about Truth, Love, and the Meaning of Life* (Farrar, Straus and Giroux 2009) 4.

would ever have thought possible. In some ways, young children are actually smarter, more imaginative, more caring, and even more conscious than adults are.

Such relationality takes the form, early on, of empathy and shared intentionality, and even forms of moral life: altruism, distinguishing good acts from bad, and demands of justice (that a good act should meet with a positive response and a bad act with a negative one).²⁵

Sarah Hrdy has integrated the infant research with convergent data from anthropology, palaeontology and animal research to make a powerfully convincing case that a crucially important aspect of our evolution as a species was in the flexible forms of caretaking we developed (alloparenting).²⁶ In contrast to our closest genetic family, the great apes and chimpanzees, human alloparents (which include grandmothers, siblings, husbands, brothers, sons, etc.) crucially assisted in caring, nurturing and feeding highly vulnerable and fragile human babies during the Pleistocene when we began our distinctive evolutionary trajectory to larger brains. Hrdy argues that the development of shared parenting led to the kind of intimate relationality of babies to caretakers which was necessary, indeed imperative, to enable babies to read and respond appropriately to the reliability of caretakers, who were necessary for their survival. At a very early age, practically from birth, human babies scan faces, make eye contact, and engage the attention of others. They show the rudiments of a finely tuned empathy, an ability to read others' intentions, a desire for connection with others, attentiveness to their responses and curiosity about their emotions. Hrdy takes the view that this relationality developed long before our cortical enlargement and, indeed, made it possible; so we may say that such relationality is fundamental to everything else in our species development. This might explain the role of music in our lives as an emotional language we could share communally long before we were capable of intellectual language.²⁷ What Hrdy makes clear is that throughout most of our history as a species we were hunter-gatherers. During this period, when the human population was quite small and vulnerable to extinction, relationships between men and women were both egalitarian and flexible; and, as Bowles and Gintis have recently argued, cooperation over limited resources within groups, not always related by kinship, may have been crucial to our survival in peace and even in war.²⁸ Such flexible arrangements may have included what we find today in some contemporary hunter-gatherers – men acting as alloparents as women crucially play economic roles in gathering nuts and fruits. Our evolutionary selection for alloparenting explains why, in the human species, women live much longer after menopause than females of other species. Such

²⁵ *ibid* 202–33; Michael Tomasello, *Why We Cooperate* (MIT Press 2009); Paul Bloom, 'The Moral Life of Babies: Can Infants and Toddlers Really Tell Right from Wrong', *The New York Times Magazine*, 9 May 2010, 44–49, 56, 62–63, 65; David Brooks, 'The Moral Naturalists', *The New York Times*, 23 July 2010, A23.

²⁶ See Sarah Blaffer Hrdy, *Mothers and Others: The Evolutionary Origins of Mutual Understanding* (Belknap Press of Harvard University Press 2009).

²⁷ For an argument along these lines, see Steven Mithen, *The Singing Neanderthals: The Origins of Music, Language, Mind, and Body* (Weidenfeld and Nicolson 2005). On the similarities between music and language, see Aniruddh D Patel, *Music, Language, and the Brain* (Oxford University Press 2008).

²⁸ See, on this point, Samuel Bowles and Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton University Press 2011). See also Elliott Sober and David Sloan Wilson, *Unto Others: The Evolution and Psychology of Unselfish Behavior* (Harvard University Press 1998).

human grandmothers play an evolutionary crucial role not only in shared parenting (helping and training their daughters in the demands of birth and parenting) but in the crucial role of the food gathering of tubers that only someone quite experienced would know how to gather. Because, during this period, there was little access to meat and fruits, such knowledge of gathering tubers may have been vital for the survival of our species, in particular, in light of the demands our larger brains placed on high-calorie intake.

Contrary to the impression fostered by some of the dioramas one sees in natural history museums as well as by conservative politicians, it is not the nuclear family or exclusive maternal care that are coded in our genes, but the capacity for mutual understanding and alloparenting or communal child-rearing. The so-called traditional family, the nuclear or patriarchal family, is neither traditional nor original in an evolutionary sense. Quite the contrary. As Hrdy observes, ‘patriarchal ideologies that focused on both the chastity of women and the perpetuation of male lineages undercut the long-standing priority of putting children’s well-being first’.²⁹ Putting children’s well-being first requires not the traditional patriarchal family but care for the infant by at least three alloparents, gender unspecified. Hrdy argues that much of contemporary sexist and homophobic family politics about the conventional mother/father family is the reading back of contemporary patriarchy into a history that, in fact, shows just the opposite – namely, the importance of flexible shared parenting (alloparenting) to our species survival.³⁰

For Hrdy, patriarchy enters the human picture in the Neolithic, when we become agrarian and urban. Since patriarchy did not prevail during the long period of human history when we were hunter-gatherers, Wendy Wood and Alice Eagly have powerfully argued (consistent with Hrdy’s argument) that it is not an empirically reasonable reading of the evolutionary record that our species was hard-wired for patriarchy.³¹ What marks our species is its intelligent flexibility in changing its survival strategies as circumstances changed. From this perspective, what explains the relatively late development of patriarchy is what Wood and Eagly call a biosocial model of ‘the interactive relations between the physical attributes of men and women and the social contexts in which they live’.³² Under the new pattern of settled life and agriculture, in which men’s upper-body strength became important for ploughing, human population exploded and there was now competitive pressure on scarce resources governed by property rights. Men are now pulled into closer patriarchal relationships with other men for purposes of politics and war, with the associated consequences for the role of women.³³ As Wood and Eagly put it:³⁴

[S]ex-differentiated social arrangements emerge because women’s childbearing and nursing of infants enable them to efficiently care for very young children and cause conflict with roles requiring extended

²⁹ Hrdy (n 26) 287.

³⁰ *ibid* 239–43, 264–65.

³¹ Wendy Wood and Alice H Eagly, ‘A Cross-Cultural Analysis of the Behavior of Women and Men: Implications for the Origins of Sex Differences’ (2002) 128 *Psychological Bulletin* 699–727.

³² *ibid* 701.

³³ Hrdy (n 26) 204–08, 239–43, 261–65, 287–90.

³⁴ Wood and Eagly (n 31) 704.

absence from home and uninterrupted activity. Similarly, men's greater speed and upper-body strength facilitate their efficient performance of tasks that require intensive bursts of energy. Thus, the cross-cultural pattern of each sex's activities should reflect women's reproductive roles and men's size and strength.

In these circumstances, patriarchy arises in high civilisations, as a cultural practice that enforces a gender binary that may have made no comparable human sense previously (a matter to which we return shortly) and that we increasingly resist today.

Both the baby research and Hrdy's evolutionary argument place relationality at the centre of a distinctively human psychology. Human babies are so relationally sensitive and their caretakers so sensitive to them because a caring relationship plays the pivotally important role it does in the care required by a remarkably exposed, fragile and vulnerable human baby to survive and flourish. Moreover, our human species could not have evolved and survived in the way it has if relationality had not been at the heart of human psychology, available to men as well as to women, flexibly sharing caretaking as circumstances required.

It is this relationality of both babies and their caretakers that is the naturalistic basis of the psychology I call the 'ethics of care': both the sensitivity of babies to those who care for them and the caretakers who give such care make possible the relationships of love, trust and sociability that make possible and sustain the complex personal and social intelligence of a fully human life lived in community and in time – one that flexibly adjusts to changing circumstances, including ecological changes.³⁵ The ethics of care arises from the natural facts of the fragility and long relational dependencies of human young, and the continuing role of the caring relationship throughout human life.³⁶ It is because our lives so depend on relationships that an ethics of care takes as its central tenet that we are responsible for one another, as equal members of a common moral community, and that we must extend to others the same care as we require for ourselves. The ethics of care is thus in its nature a democratic ethics, and one that rejects the gender binary because it fails to do justice to relationality as a human developmental competence. Such a set of ethics also calls for respect for the values of equal liberty on which constitutional democracy rests. Prominent among these values of equal liberty is finding and speaking in one's free voice, as the expression of one's own reasonable convictions and the relationships to which they give rise. It is these values that make possible and sustain real relationships between equals, and thus support democracy.³⁷

We are by nature *homo empathicus* rather than *homo lupus*. Cooperation is wired into our nervous system, and our brains light up more brightly when we opt for cooperative rather than competitive strategies – the same area of the brain that is lit up by chocolate. Findings in

³⁵ Richard Potts, *Humanity's Descent: The Consequences of Ecological Instability* (Morrow 1996).

³⁶ Melvin Konner, *The Evolution of Childhood: Relationships, Emotion, Mind* (Belknap Press of Harvard University Press 2010).

³⁷ For fuller elaboration of an ethics of care, connecting the developmental psychology of Carol Gilligan to the political theory of John Rawls, see David AJ Richards, *Resisting Injustice and the Ethics of Care in the Age of Obama: 'Suddenly, ... All the Truth Was Coming Out'* (Routledge 2013 forthcoming).

neurobiology and evolutionary anthropology converge with findings in developmental psychology to shift the paradigm by changing the question. Even under the most unfavourable circumstances, humans display capacities to resist injustice, as in the Christmas truce of 1914 when British and German soldiers stopped fighting in the First World War and the soldiers exchanged small gifts,³⁸ or the women who took astonishing risks under the Nazis – for example, Magda Trocmé, the pastor's wife in Le Chambon-sur-Lignon, who responded when Jews knocked at her door by saying 'Come in', and Antonina Zabinska, the zookeeper's wife in occupied Warsaw, who hid Jews in the zoo in the centre of the city. What they say, when asked how they came to do this, is that they were human.³⁹ Naturalistic observations of resistance in young girls, as well as young women, in making the abortion decision display the role of anti-patriarchal voice in such resistance. Niobe Way's revelatory study of adolescent boys shows the human depth of loving relationships between and among boys, a humanity shared by women and men but difficult to see because the patriarchal gender binary still remains so powerful in our ostensibly democratic culture.⁴⁰ Why is it so difficult to see what is before our eyes, our common humanity? Rather than asking how do we gain the capacity to care, how do we develop a capacity for mutual understanding, how do we learn to take the point of view of the other or to overcome the pursuit of self-interest, I am prompted to ask how do we lose the capacity to care: what inhibits our ability to empathise with others and read their intentions, what stunts our desire to cooperate with others and, more painfully, how do we lose the capacity to love? It is the absence of care, or the failure to care, that calls for explanation.

If Sarah Hrdy is right, relationality and democracy held sway during much of human prehistory.⁴¹ Patriarchy, however, is inconsistent with democracy because it accords hierarchical authority to priest-fathers over women and other men and boys, rationalising its authority on the basis of the repression of the moral voices of well over half the human species. In contrast, democracy calls for equal care and respect for all persons, including their equal human rights to free conscience and voice. Accordingly, patriarchy, being inconsistent with democracy, could only have achieved the power it has by attacking the relationality of the ethics of care and of democracy. What makes this psychologically possible for our otherwise relational human natures is the way in which patriarchy requires traumatic breaks in relationship in the initiation of both boys, quite early on, and girls, later on, into patriarchy. It is the experience of such traumatic loss that replaces real relationship with identification with the gender stereotypes and gender binary required by patriarchy. The psychological power of trauma is shown both in loss of voice and memory, making problematic our relational human natures, in effect, enacting and re-enacting in our lives a false story of ourselves. The traumatic violence that patriarchy inflicts in turn gives rise to propensities to repressive violence directed at any challenge to the patriarchal gender

³⁸ See discussion of this episode in Carol Gilligan, *Joining the Resistance* (Polity Press 2011).

³⁹ *ibid* 164.

⁴⁰ Niobe Way, *Deep Secrets: Boys' Friendships and the Crisis of Connection* (Harvard University Press 2011).

⁴¹ On the egalitarianism of hunter-gatherer societies, which was human life for most of our history, see Christopher Boehm, *Hierarchy in the Forest: The Evolution of Egalitarian Behavior* (Harvard University Press 2011). See also Christopher Boehm, *Moral Origins: The Evolution of Virtue, Altruism, and Shame* (Basic Books 2012).

binary. Since these challenges (in the form of resistance to injustice) arise from an ethical voice rooted in our relationality, patriarchy expresses itself in attitudes that rationalise the repression of this voice and thus our relationality.

The aim of my argument here is to clarify how patriarchy has historically done this, focusing, in particular, on the patriarchal legacy of Western Christianity and the role it has played in rationalising anti-Semitism. I use anti-Semitism as an illuminating model for a range of irrational prejudices (including not only extreme religious intolerance, but racism, sexism and homophobia) that are, I argue, supported and rationalised by patriarchy. This study includes the role of patriarchy in the twentieth century totalitarianism regimes that almost brought civilisation, as we know it, to an end.

We cannot be sure that at least some forms of patriarchal arrangement may not have existed before the Neolithic, and certainly forms of violence within and between human communities existed: even though human societies may in this period have been quite small, levels of violence, arising from vendettas among kin groups, may have led to higher percentages of loss of life than would exist after the rise of civilisation and states, which would replace such vendettas with more impartial dispute-settling mechanisms.⁴² Indeed, the appeal at this time even of the patriarchal state may have arisen in part from its more effective control of violence, at least within the state.⁴³ The appeal of democracy is that it guarantees equal justice on terms that offer, inter alia, even better control of violence, in particular, patriarchal violence based on the repression of equal voice.

Bernard Chapais has also argued that a distinctively human society arose from pair-bonding, including the role that the exogamous marriage of women outside her family of origin may have played in supporting larger cooperative kinship networks.⁴⁴ The support of larger patterns of human sociability of such arrangements made women, in Lévi-Strauss's words, the 'most precious possession',⁴⁵ prefiguring the idea of women as property that developed under patriarchy.

Gerda Lerner, in her important treatment of the rise of patriarchy in the high civilisations of the Neolithic, finds no convincing evidence for an earlier period of more matriarchal forms of culture.⁴⁶ Consistent with Wood and Eagly, Lerner offers a complex and nuanced account of why patriarchy became so dominant in the high agricultural, sedentary civilisations of the Neolithic – one that regards the objectified exchange of women, as reproducers, as the first form of private property, an institution common in those civilisations.⁴⁷

⁴² See Lawrence H Keeley, *War Before Civilization: The Myth of the Peaceful Savage* (Oxford University Press 1996). See also Azar Gat, *War in Human Civilization* (Oxford University Press 2006) 1–145; Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking 2011) 2–4, 36–56.

⁴³ See, on this point, Jared Diamond, *The World until Yesterday: What Can We Learn from Traditional Societies?* (Viking 2012) 79–170.

⁴⁴ See Bernard Chapais, *Primeval Kinship: How Pair-Bonding Gave Birth to Human Society* (Harvard University Press 2008).

⁴⁵ Cited at *ibid* 248.

⁴⁶ See Gerda Lerner, *The Creation of Patriarchy* (Oxford University Press 1986) 15–35.

⁴⁷ *ibid* 36–53. For a more recent study along similar lines, see Kent Flannery and Joyce Marcus, *The Creation of Inequality: How Our Prehistoric Ancestors Set the Stage for Monarchy, Slavery, and Empire* (Harvard University Press 2012).

Patriarchy in these high civilisations takes the form of according autocratic hierarchical authority to a father-priest, rationalising his hierarchical authority over all others – men, boys, women and girls.⁴⁸ Patriarchal religion is thus at its heart, defining religious, ethical and political authority in terms of hierarchy and the splits that the gender binary requires. Such authority resides in an autocratic priest-father who alone has access to ultimate religious and ethical truth. The imperial authority of the Roman and Chinese emperors rested on their roles as the hierarchically supreme apex of patriarchal religions, an authority that also rationalised leadership in war and conquest, which include the extraordinary levels of conflict in early China and the endless wars under the Roman Republic and Empire.⁴⁹ The linkage of religious and political authority reached an extreme in the long history of ancient Egypt – the pharaoh himself being god, continually reincarnated.⁵⁰

Such forms of patriarchal religion enforced the gender binary by calling for traumatic breaks in real relationships in sons to mothers and men to women, the loss in relationship covered by identification with gender stereotypes, including the idealisation of good women and men and the devaluation of bad women and men. Such loss also expressed itself in codes of honour so that any threat, real or imagined, to one's honour as a man elicited violence, thus explaining the close connection between patriarchy and male violence, including the willingness to die in imperialistic wars. One important aspect of such male honour was patriarchal control over women often in loveless arranged marriages to advance patriarchal ends, and close controls over women's sexuality in the service of such ends. Lerner argues that under patriarchy the 'oppression of women antedates slavery and makes it possible' as the enslavement of men built on the experience of the subordination of women. 'Women's sexuality and reproductive potential became a commodity to be exchanged or acquired for the service of the family',⁵¹ and slavery, including the enslavement of women as well as men, built on this model.⁵² Patriarchal control over women's sexuality was ferociously enforced: under Babylonian law, both the wife and the adulterer must be put to death,⁵³ and the Assyrian penalties for a self-induced abortion were its severest punishments: 'impalement and refusal of burial'.⁵⁴ Patriarchal ideology even erased the role of women in procreation, which was regarded as essentially a male act – a view the Greek playwright, Aeschylus, would have Apollo espouse in the last play of his great trilogy, *The Oresteia*.⁵⁵ It shows the ideological power of these assumptions that Aristotle, otherwise a careful observer, would argue that this was not mere mythology but scientific truth.⁵⁶

⁴⁸ *ibid.*

⁴⁹ Walter Scheidel, *Rome and China: Comparative Perspectives on Ancient World Empires* (Oxford University Press 2009); Fritz-Heiner Mutzschler and Achim Mittag, *Conceiving the Empire: China and Rome Compared* (Oxford University Press 2008); Kimberly Kagan, *The Imperial Moment* (Harvard University Press 2010).

⁵⁰ Toby Wilkinson, *The Rise and Fall of Ancient Egypt* (Bloomsbury 2010).

⁵¹ Lerner (n 46) 77.

⁵² *ibid.* 99–100.

⁵³ *ibid.* 113–15, 170.

⁵⁴ *ibid.* 120.

⁵⁵ *ibid.* 184–88, 204–05.

⁵⁶ *ibid.* 205–11.

What the cultural creation of patriarchy shows us, as Lerner makes quite clear, is how myth, religion, science and politics – all features of high patriarchal cultures – unite in an ideological attack on what must have been obvious even then, the facts of human relationality. At the centre of its patriarchal demands is control of women's sexuality, which included an aggressive war on women's free sexuality as an expression of their own convictions and the relationships to which they give rise (including whether and when to have children).⁵⁷ However, the same control patriarchally exercised over women extends also to men, as the repudiation or denial of relationality within the family forges there a hierarchical absolutism⁵⁸ which then makes psychologically possible the acceptance of absolutism in religion and in politics, including absolute rule by priest-kings⁵⁹ under male creator gods (as in the case of Babylonia and Assyria).⁶⁰

It is ethical resistance to such demands that gives rise to a constitutional democracy based on respect for human rights. One of these demands has been what Carol Gilligan and I call 'resistance to the patriarchal Love Laws', as I now explain.

In 1965 the US Supreme Court, in *Griswold v Connecticut*,⁶¹ constitutionalised the argument for a basic human right to contraception that had been persistently and eloquently defended and advocated by Margaret Sanger for well over forty years, a decision which Sanger lived to see.⁶² The Court extended the right to abortion services in 1973 in *Roe v Wade*⁶³ (reaffirming its central principle in 1992⁶⁴) and, after denying its application in 1986 to consensual homosexual sex acts in *Bowers v Hardwick*,⁶⁵ reversed itself in 2003 in *Lawrence v Texas*, holding that gay/lesbian sex was fully protected by the right, and that laws criminalising such acts were unconstitutional.⁶⁶

The arguments put forward by Margaret Sanger and Emma Goldman for the right to contraception were rooted in rights-based feminism, a feminism that challenged the traditional grounds on which women had been denied respect for the basic human rights long accorded men. Sanger's and Goldman's arguments had two prongs, both of which were implicit in the Supreme Court's decisions in *Griswold* and later cases: first, a basic human right to intimate life and the right to contraception as an instance of that right; second, the assessment of whether laws that abridge such a fundamental right met the heavy burden of secular justification that was required.

That right can be justified only by a compelling public reason, not on the grounds of reasons that are today sectarian (internal to a moral tradition not based on reasons available and accessible to all). In fact, the only argument that could sustain such laws (namely, the Augustinian⁶⁷ and

⁵⁷ For a brilliant interpretation of the Adam and Eve narrative in Genesis along these lines, see *ibid* 196–97.

⁵⁸ *ibid* 140.

⁵⁹ *ibid* 123–40.

⁶⁰ *ibid* 153.

⁶¹ *Griswold v Connecticut* 381 US 479 (1965).

⁶² See Ellen Chesler, *Woman of Valor: Margaret Sanger and the Birth Control Movement* (Anchor Books 1993) 11, 230, 376, 467.

⁶³ *Roe v Wade* 410 US 113 (1973).

⁶⁴ *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992).

⁶⁵ *Bowers v Hardwick* 478 US 186 (1986).

⁶⁶ *Lawrence v Texas* 539 US 558 (2003).

⁶⁷ Augustine, *Concerning the City of God against the Pagans* (Henry Bettenson tr, Penguin 1972) 577–94.

Thomistic⁶⁸ view that it is immoral to engage in non-procreative sex) is not today a view of sexuality that can reasonably be enforced on people at large. Many people regard sexual love as an end in itself and the control of reproduction as a reasonable way to regulate when and whether to have children, consistent with their own personal interests and the larger ethical interests of their children and of an overpopulated society at large. Even the question of having children at all is today a highly personal matter; it is certainly no longer governed by the once compelling secular need to have children for work in a largely agrarian society with high rates of infant and adult mortality.⁶⁹ From the perspective of women in particular, as Sanger and Goldman made so clear, the enforcement of an anti-contraceptive morality on society at large not only harms women's interests and those of an overpopulated society more generally, but impersonally demeans women to a purely reproductive function; this deprives them of the rational dignity of deciding as moral agents and persons, perhaps for the first time in human history, whether, when, and on what terms they will have children consistent with their other legitimate aims and ambitions (including the free exercise of all their basic human rights). The enforcement of such a morality rests on a now conspicuously sectarian conception of gender hierarchy in which women's sexuality is defined by a mandatory procreative role and responsibility. That conception, the basis of the unjust construction of gender hierarchy, cannot reasonably be the measure of human rights today.⁷⁰

Similar considerations explain the grounds for doubt about the putative public, non-sectarian justifications for laws that criminalise abortion. Anti-abortion laws, grounded in the alleged protection of a neutral good such as life, unreasonably equate the moral weight of a foetus in the early stages of pregnancy with that of a person, and therefore abortion with murder. Such laws fail to take seriously the weight that should be accorded a woman's basic right to reproductive autonomy in making highly personal moral choices central to her most intimate bodily and personal life against the background of the lack of reasonable public consensus that foetal life can be equated with that of a person.⁷¹ It is for this reason that most people do not believe that abortion is murder. Religious fundamentalists argue that it is. If they really believed that, the woman seeking the abortion would be the most culpable person. But even fundamentalists who believe in the death penalty do not call for her execution or for the execution of her doctor; most call only for fines and imprisonment. Certainly, punishing the doctor but not the woman makes no sense. In addition, a fair number of evangelical fundamentalists (10 per cent) allow abortion in the case

⁶⁸ Thomas Aquinas elaborates Augustine's conception of the exclusive legitimacy of procreative sex in a striking way. Of the emission of semen apart from procreation in marriage, he wrote: 'After the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded': Thomas Aquinas, *On the Truth of the Catholic Faith: Summa Contra Gentiles* (Vernon Bourke tr, Image Books 1956) 146.

⁶⁹ On how personal this decision now is, see, in general, Elaine Tyler May, *Barren in the Promised Land: Childless Americans and the Pursuit of Happiness* (Basic Books 1995).

⁷⁰ For further discussion of the right to privacy and contraception, see David AJ Richards, *Toleration and the Constitution* (Oxford University Press 1986) 256–61.

⁷¹ For further discussion, see *ibid* 261–69; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Knopf 1993) 3–178.

of rape or incest, and 19 per cent of conservative Christians would permit abortion if the women's health is threatened. Neither view makes moral sense if the foetus is a person.⁷²

There are legitimate interests that society has in giving weight at some point to foetal life as part of making a symbolic statement about the importance of taking the lives of children seriously and caring for them, which is analogous to the symbolic interest society may have in preventing cruelty to animals or in securing humane treatment for the irretrievably comatose, to advance humane treatment of persons properly understood. But such interests do not constitutionally justify forbidding abortion throughout all stages of pregnancy.⁷³ Rather, such interests can be accorded their legitimate weight after a reasonable period has been allowed for the proper scope of a woman's exercise of her decision whether or not to have an abortion.

Contemporary moral arguments for the prohibition of abortion claim that the foetus is a person and that abortion is morally the same as murder. But there is doubt whether even those who claim to believe this in fact believe it, although some may. Rather, under the impact of the move of sectarian fundamentalist religion into American politics, fundamentalist Americans have organised around what is largely a symbolic issue for them about the proper role of women. Their views cluster around certain traditionally patriarchal conceptions of the natural processes of sexuality and gender, in which real women barely exist as moral persons and agents. Such patriarchal conceptions divide women into good asexual women on the pedestal and bad sexual women who are denigrated. This virgin/whore dichotomy is a gender mythology now very much under threat from real women and men who resist its demands in a different, anti-patriarchal voice.⁷⁴ It is as a way of polemically quashing their resistance that reactionary religious fundamentalists have focused on abortion: women who choose to have abortions are transformed from real women, who responsibly cope with difficult moral choices, into an unreal stereotypical image of bad (because selfish) women, indeed, murderers. As one member of the Army of God, which advocates killing abortion doctors, starkly put the point, 'abortion is the worst thing a woman can do'.⁷⁵ Another, dividing idealised asexual from bad sexual women, observed: 'A perfect women is a good mother. Most women are vile.'⁷⁶

However, once it is taken seriously that foetal life is not a reasonable public value sufficient to outweigh the right of reproductive autonomy, as the Supreme Court did in *Roe v Wade*, the argument for criminalising abortion is not a constitutionally reasonable argument for regarding abortion as homicide. Instead, it becomes a proxy for complex background assumptions that are often no longer reasonably believed in the society at large – namely, a now controversial, powerfully sectarian ideology about proper sexuality and gender roles. From this perspective, the prohibitions on abortion encumber what many now reasonably regard as a highly conscientious choice by women regarding their bodies, their sexuality and gender, and the nature and place of

⁷² Garry Wills, *Head and Heart: American Christianities* (Penguin Press 2007) 525.

⁷³ See David AJ Richards, *Tolerance and the Constitution* (Oxford University Press 1986) 261–69.

⁷⁴ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982).

⁷⁵ Quoted in Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (Ecco 2003) 152.

⁷⁶ *ibid* 160.

pregnancy, birth, and child rearing in their personal and ethical lives. The traditional condemnation of abortion fails, at a deep ethical level, to take seriously the moral independence of women as free and rational persons, lending the force of law (like comparable anti-contraceptive laws) to theological ideas of biological naturalness and gender hierarchy that degrade the constructive moral powers of women themselves to establish the meaning of their sexual and reproductive life histories. The underlying patriarchal conception appears to be at one with the sexist idea that women's minds and bodies are not their own, but the property of others, namely, men or their masculine God, who may conscript them and their bodies, like cattle on the farm, for the greater good.

It is striking that, in condemning abortion, the interpretation accorded life as a moral absolute by fundamentalists makes no mention of women, except as incidentally condemned for intending murder when they have abortions.⁷⁷ Such silence and denial bespeak the source of the sectarian religious assumptions that motivate their views – namely, unjust sexist assumptions about women's proper gender roles, which rest on the suppression of women's ethical voice. Women's ethical voices, as responsible moral agents, disappear or are not heard or listened to, because pro-life activists 'experience the need to look up'⁷⁸ vertically to a patriarchal man rather than to be in a horizontal relationship in dialogue with the moral voices of real women, as their democratic equals. What they tend to look up to, or look to, are idealised images of good women or denigrated images that include objectified visual images of aborted fetuses, gruesome images that they mythologically assimilate with the murder and dismemberment of babies.⁷⁹ Objectification rationalises irrational prejudice – namely, misogyny – that arises from the repression of voice. The objection to abortion is thus not only defended on the ground of the right to life of the foetus but, more importantly to many anti-abortion activists, on the ground that a woman, making the abortion choice, is not exercising her sexuality procreationally and maternally.

Emily Jackson has cogently observed that the imposition on a woman, who does not want to bear or have a child, of a legal or moral duty to have such a child imposes on women (and women only) a compulsion to use their bodies to save another, an obligation we accept nowhere else.⁸⁰ Such injustice supports a sexist culture and psychology of 'maternal self-abnegation'.⁸¹ What we believe really exercises fundamentalists about abortion is its statement about women exercising their free sexuality in a non-procreational and non-maternal way, something the new natural lawyers object to generally but particularly so when exercised by women free of patriarchal controls on their sexuality. It is difficult to take seriously the papacy's view that it has some superior insight into the wrongness of such taking of life and that such taking of life uniquely arises at

⁷⁷ For further discussion of the views of Catholic natural law theorists along these lines, see Nicholas C Bamforth and David AJ Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law* (Cambridge University Press 2008).

⁷⁸ Stern (n 75) 156.

⁷⁹ *ibid* 149.

⁸⁰ Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart 2001) 73–74, 76, 133.

⁸¹ *ibid* 3.

fertilisation, a view neither Augustine nor Thomas shared.⁸² Why dogmatically assimilate a fertilised ovum to a person without acknowledging the range of alternative reasonable views of the competences (sentience, brain activity, self-consciousness) of the many reasonable persons who reject such an assimilation, including many women? Fundamentalists adopt their position dogmatically,⁸³ claiming that their case rests on natural sources of knowledge when the very lack of reasonable consensus over the weight to be given to the facts shows this is not so.⁸⁴ Their choice of fertilisation is itself highly sectarian, resting on ideas of ensoulment and women's procreative duties that are not reasonably appealing views to those outside the tradition.⁸⁵ What drives their view is a highly sectarian condemnation of both contraception and abortion, which for them are instances of the same wrong. Abortion particularly exercises them because of the view of women's free sexuality it demonstrates, to which traditional patriarchal conceptions of gender and sexuality take the strongest objection.

If I am right on this point, what really drives the fundamentalist rage at abortion is not the belief that the foetus is a person (which many of them do not believe), but rather the loosening of patriarchal controls over women's sexuality, which has long been one of the main props of patriarchy. This is shown by the ways in which the conservative politicians, who have mobilised fundamentalists, have called for abstinence rather than sex education in contraception as patriarchal controls on women's sexuality require abstinence or virginity, whereas contraception allows women a responsible sexual freedom to make their own decisions on intimate life. The consequence of their ideological success has, paradoxically, not been to reduce the amount of sex young Americans have (teenage children of evangelicals have as much sex as other young people), but to reduce the use of contraceptives, thus increasing the numbers of teenage mothers and abortions. This suggests that the fundamentalist concern has never been with abortion, which is a symbolic issue, but with patriarchal controls on sexuality. Paradoxically, fundamentalist families experience much higher rates of teen pregnancy and divorce, which suggest that their patriarchal assumptions in contemporary circumstances impose unreasonable public costs on them as well as on society generally.⁸⁶ What explains the division in American politics between red states and blue states is thus the reactionary persistence of patriarchy in the former and the resistance to patriarchy in the latter, as I argue at length elsewhere.⁸⁷

When the Supreme Court in *Lawrence v Texas*,⁸⁸ overruling *Bowers v Hardwick*,⁸⁹ struck down statutes that criminalise sex between persons of the same gender, it recognised a basic right that had long been accepted constitutionally in the many nations subject to the European

⁸² Garry Wills, 'The Bishops vs. the Bible', *The New York Times*, 27 June 2004.

⁸³ See John Finnis, 'Abortion, Natural Law, and Public Reason', in Robert P George and Christopher Wolfe (eds), *Natural Law and Public Reason* (Georgetown University Press 2000) 75–105.

⁸⁴ Wills (n 82) 14.

⁸⁵ On the sectarian character of the choice of fertilisation, see Dworkin (n 71).

⁸⁶ On all these points, see Naomi Cahn and June Carbone, *Red Families v. Blue Families: Legal Polarization and the Creation of Culture* (Oxford University Press 2010).

⁸⁷ Richards (n 37). On red versus blue state families, see Cahn and Carbone, *ibid.*

⁸⁸ n 66.

⁸⁹ n 65.

Court of Human Rights.⁹⁰ An elaboration of this basic right was extended by the Supreme Judicial Court of Massachusetts under its state constitution to protect the right to marriage of homosexuals and heterosexuals in accordance with the principle of equality underlying *Lawrence v Texas*.⁹¹ It should be obvious that the ire of patriarchal control of women would be aroused by resistance to compulsory heterosexuality and the role it has played in arranged marriage, but it may be less obvious why patriarchy would be aroused by male homosexuality, which thrived in ancient Greece and Rome, both highly patriarchal cultures. The forms of ancient patriarchy were, in fact, defined by its sexist contempt for the passive role in gay sex, and was thus associated, as in Rome, with slave boys and, in Greece, with boys and often slaves.⁹² Modern gay rights, in contrast, contests these stereotypes, and its advocates usually condemn, often quite vehemently, all forms of non-consensual sex and sex with underage boys, especially paedophilia. Rather, modern forms of male homosexuality often aspire to long-term personal relationships between adult men that, with the addition of adopted or natural children in many gay relationships, are increasingly indistinguishable from marriage. Moreover, I think no gay man (and I speak from personal experience here) who has had the good fortune to find enduring love with another man, his equal in every way, has not struggled deeply (and I mean deeply) against the patriarchal assumptions that divide men competitively from one another. Patriarchy is, I believe, hostile to love, and indeed thrives on the degree to which cultures (including patriarchal religions) endorse this hostility.⁹³

Why should love have become so central to the modern understanding of liberal constitutionalism?

The modernist political techniques of state-imposed terror that Hannah Arendt identifies and describes in *The Origins of Totalitarianism*⁹⁴ arose in Nazi Germany and Stalinist Russia – states that rested ostensibly on secular ideologies, deeply hostile to conventional religions, not only Judaism but Christianity as well. These secular ideologies were certainly supposed by their advocates to be scientific (not religious), but the science was the pseudo-science of Hitler's racism or of what Stalin supposed the iron laws of history required. These ostensibly scientific demands rationalised the total repression of the ethical constraints and sensitivities that had held earlier forms of Christian anti-Semitism under at least some measure of control (exemplified by Augustine himself). Without any such controls, totalitarianism expanded earlier modes of state repression to embrace the forms of state-enforced terror that, as Arendt argues, were aimed at crushing the faculties of the human mind, making psychologically possible a form of extraordinary romantic, abject devotion to the patriarchal leader, no matter how wrong or vicious his aims. Elisabeth Young-Bruehl has observed that the mechanism of such crushing of our humane faculties centred on the attempt by totalitarianism to substitute 'anti-natural technologisation' by the

⁹⁰ See *Dudgeon v United Kingdom* (1981) 45 ECHR (ser A) 52.

⁹¹ *Goodridge v Department of Public Health* 798 N E 2d 941 (Mass 2003).

⁹² Kenneth J Dover, *Greek Homosexuality* (Duckworth 1978); Craig A Williams, *Roman Homosexuality* (2nd edn, Oxford University Press 2010).

⁹³ Gilligan and Richards (n 4).

⁹⁴ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1976).

state for the intimate relationality of family life.⁹⁵ Heinrich Himmler thus spoke of the heroism required to execute the Holocaust, and his adjutant addressed recent recruits: ‘You are disciplined, but stand together hard as Krupp steel. Don’t be soft, be merciless, and clear out everything that is not German and could hinder us in the world of construction.’⁹⁶

The power and appeal of patriarchy are nowhere better exemplified than in the modern period, as it is a modernist form of patriarchy that shapes Nietzsche’s influential attack not only on feminism and liberal values of equality and human rights but also on Judaism and Christianity⁹⁷ – all in the name of a kind of ethical perfectionism that takes as ultimate values such human excellences as courage and artistic creativity that, in his view, only very few people possess.⁹⁸ Nietzsche’s appeal to a Superman reveals the fundamentalist roots of this conception, calling on such ostensibly perfectionist grounds for a return to a Greek form of radical patriarchy, hierarchically ruled by the patriarch who displays this human excellence, all else being in his service.⁹⁹ What is striking to me is that Nietzsche should have been taken so seriously, striking a chord of patriarchal rage at modern values of liberal equality and thus revealing how powerful and resonant patriarchy was, particularly in nations with undeveloped and insecure liberal democratic constitutional institutions, institutions which at least raised reasonable doubts about patriarchal culture and values. It was the power and appeal of patriarchy, we suggest, that led Nietzsche’s nihilistic attack on liberal equality to be taken so seriously, including by Mussolini and, later, Hitler.¹⁰⁰

Benito Mussolini forged in Italy a politically successful fascist ideology and practice on which Hitler was later to model his own form of German fascism. As a political movement, Mussolini’s movement was, in contrast to liberalism or Marxism (both of which it opposed as enemies), remarkably empty of any coherent political theory;¹⁰¹ what marked fascism was, rather, its ‘legitimation of violence against a demonised internal enemy’.¹⁰² Because the appeal of fascism was never in its ideas, its force lay in political psychology, which reflects the Roman patriarchal psychology that we have studied at length in this article. Our point is not merely the cosmetic one that fascism first arose and flourished in modern Italy on the ruins of the Roman Empire, but that the roots of the political psychology of fascism lay in the traumatic experience

⁹⁵ Elisabeth Young-Bruehl, *Where Do We Fall When We Fall in Love?* (Other Press 2003).

⁹⁶ For Himmler on heroism, see Ian Kershaw, *Hitler: 1936–1945: Nemesis* (WW Norton 2000) 604–5; for Himmler’s adjutant, see 42–43.

⁹⁷ Friedrich Nietzsche, *The Birth of Tragedy and On the Genealogy of Morals* (Francis Golffing tr, Doubleday 1956) 134–35.

⁹⁸ On Nietzsche’s ethical perfectionism and its normative consequences, see David AJ Richards, *A Theory of Reasons for Action* (Clarendon Press 1971) 116–17.

⁹⁹ On the personal psychological roots of Nietzsche’s rage in repressed homosexuality, see Joachim Kohler, *Zarathustra’s Secret: The Interior Life of Friedrich Nietzsche* (Ronald Taylor tr, Yale University Press 2002).

¹⁰⁰ On Hitler’s reading of Nietzsche and, at one point, giving Mussolini a complete copy of his works, see Ian Kershaw, *Hitler: 1889–1936: Hubris* (WW Norton and Company 1998) 240; Kershaw (n 96) 597. See also Kohler, *ibid* xix.

¹⁰¹ On this point, see Robert O Paxton, *The Anatomy of Fascism* (Vintage Books 2005) 3–23.

¹⁰² *ibid* 84. Mussolini himself defined fascism not positively, but solely in terms of its enemies: Benito Mussolini, *My Autobiography: With the Political and Social Doctrine of Fascism* (Jane Soames tr, Dover Publications 2006) 227–40.

of soldiers in the First World War (in which both Mussolini and Hitler served) – a psychology that Mussolini self-consciously came to understand and mobilise in terms of support for the violence, against internal and external enemies, modelled on the violence of ancient Rome. A few weeks after Mussolini first took power, his triumph was marked by a new national symbol – not ‘the fasces of the Risorgimento’ but ‘the Roman version, presumably to cleanse its emblem of a past that included a symbol of liberty, the Phrygian cap’.¹⁰³

Mussolini found in the traumatic war experience of the Italian soldiers the basis for a political psychology he was to rationalise, mobilise and extend into what Emilio Gentile has properly called the modern political religion of fascism, a religion very much modelled on Roman patriarchal religion.¹⁰⁴ It included mass parades and rituals that centred on honouring the dead war heroes or heroes of the fascist revolution (the audience identifying themselves with the dead hero by responding collectively ‘present’, when his name was called),¹⁰⁵ an heroic idealisation covering desolating loss in the familiar pattern of Roman patriarchal political psychology. Roman funeral rituals, in which family members wore masks of deceased heroes, come to mind. Mussolini’s political religion, like that of Augustus earlier, also included massive building programmes that were self-consciously to connect modern Rome with its Roman past,¹⁰⁶ as well as new forms of historic representation and education: Augustan Rome culminating in Mussolini, the modern imperial autocrat, the patriarchal Caesar.¹⁰⁷ In fact, Mussolini thought of his improvisatory politics as more that of Julius Caesar than Augustus,¹⁰⁸ but he publicly identified himself not only with Augustus but with ‘a Constantine or a Justinian’,¹⁰⁹ a secular and religious autocrat.

The success of Mussolini shows us the power of Roman patriarchal psychology in the modern world. It flourishes specifically when the experience of traumatic modern warfare is rationalised and supported in terms of a humiliated patriarchal manhood. What makes Mussolini’s success so important is that it shows the continuing malign power of Roman patriarchal psychology, quite self-consciously invoked and supported by the forms of political religion Mussolini innovated, appealing always to the example of Rome.¹¹⁰

If anything, Hitler’s experience as a soldier in the First World War was more traumatic than Mussolini’s,¹¹¹ and his fascism was correspondingly more fanatical, more lethal, and probably more sincere. Like Mussolini’s, Hitler’s politics appealed to the traumatised war experience of defeated German soldiers that expressed itself in the political violence, for example, of the

¹⁰³ Emilio Gentile, *The Sacralization of Politics in Fascist Italy* (Keith Botsford tr, Harvard University Press 1996) 44.

¹⁰⁴ See, in general, *ibid.* For a good general study, see Michael Burleigh, *Sacred Causes: The Clash of Religion and Politics, from the Great War to the War on Terror* (Harper Collins 2007).

¹⁰⁵ Gentile (n 103) 27.

¹⁰⁶ Borden W Painter Jr, *Mussolini’s Rome: Rebuilding the Eternal City* (Palgrave Macmillan 2005).

¹⁰⁷ Claudio Fogu, *The Historic Imaginary: Politics of History in Fascist Italy* (University of Toronto Press 2003).

¹⁰⁸ Jan Nelis, ‘Constructing Fascist Identity: Benito Mussolini and the Myth of Romanita’ (2007) 100 *Classical World* 391, 405–07.

¹⁰⁹ Richard JB Bosworth, *Mussolini* (Hodder Arnold 2002) 243.

¹¹⁰ See Nelis (n 108) 391–415; Romke Visser, ‘Fascist Doctrine and the Cult of the Romanita’ (1992) 27 *Journal of Contemporary History* 5–22.

¹¹¹ See Kershaw (n 100) 101–05. On Mussolini, Bosworth (n 109) 114–20.

Freikorps against what they took to be the left-wing enemies of Germany.¹¹² Of course, anti-Semitism was much more at the centre of Hitler's sense of the enemy than it was for Mussolini. Hitler drew upon Nietzsche as had Mussolini. Nietzsche, however, hated the form of political anti-Semitism that was developing in Germany and elsewhere, and all forms of irrationalism and nationalism,¹¹³ but his highly patriarchal views were all too easily interpreted by Hitler, not only as debunking liberal values of equal human rights but also as legitimating the untrammelled expression of a political anti-Semitism that manipulatively rationalised a pseudo-science of race in support of its genocidal aims. What we see so starkly in the modern period is how powerful patriarchy really is, not only distorting politics and religion (as we saw in our studies of Rome and Augustinian Christianity) but also undermining science and ethics itself. As with religion and politics, ethics and science can be corrupted by patriarchy.

The great historical lesson of the totalitarianisms of the twentieth century, which almost brought civilisation as we know it to cataclysmic destruction, is the terrifying price we pay when our technology is so much in advance of our ethics and politics. We know that the political violence of fascism was motivated by an aggressively political anti-Semitism, and that it fed upon and cultivated a sense of manhood based on codes of honour at least as old as the *Iliad*. Unjust gender stereotypes were quite central to a Nazi manhood hardened to the genocidal murder of six million Jews.¹¹⁴ And the bloody totalitarianism of Stalin's communism (including the starvation of at least five million peasants)¹¹⁵ was crucially actuated by an indoctrination into an ideal of the soldier constantly on duty,¹¹⁶ which, as with Hitler's fascism, bizarrely justified state-imposed mass killing as self-defence.¹¹⁷ It is no accident that there are close links in totalitarian political method between fascism and Soviet communism, based, as they are, on conceptions of a hardened manhood committed to violence against any dissent to or doubt about the terms of state-enforced structural injustice.¹¹⁸ In light of modern technologies of violence, both forms of totalitarianism achieved appalling levels of genocidal murder and mayhem.

Anti-Semitism is seminal to my analysis because its historical development so clearly exemplifies the pivotal role of patriarchy both in giving rise to and in sustaining such an irrational prejudice. Not only is it the historically most ancient and enduring of such prejudices, but its structure also gives us a model for how patriarchy uses such prejudices in rationalising its unjust demands. Recall that it is the traumatic loss imposed on intimate life by patriarchy that leads, through the repression of personal sexual voice, to identification with the patriarchally imagined

¹¹² See Klaus Theweleit, *Male Fantasies* (University of Minnesota Press 1987).

¹¹³ For a defence of Nietzsche along these lines, see Walter Kaufman, *Nietzsche: Philosopher, Psychologist, Antichrist* (4th edn, Princeton University Press 1974).

¹¹⁴ For a general study of this gender issue in German fascism, see Claudia Koonz, *The Nazi Conscience* (Belknap Press 2003); see also Claudia Koonz, *Mothers in the Fatherland: Women, the Family, and Nazi Politics* (St Martin's Press 1987).

¹¹⁵ See Robert Conquest, *Stalin: Breaker of Nations* (Viking 199) 163–65.

¹¹⁶ See Walter Laqueur, *The Dream that Failed: Reflections on the Soviet Union* (Oxford University Press 1994) 13.

¹¹⁷ On all these and other points in this paragraph, see François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (Deborah Furet tr, University of Chicago Press 1999).

¹¹⁸ On these points, see Arthur Koestler, *Darkness at Noon* (Daphne Hardy tr, Bantam Books 1968) 124–29, 134–37, 153, 182–85, 189–90, 205.

voice of the father, dividing love from desire through an idealisation of women one loves as asexual and a denigration of the sexual women one desires. For these reasons, patriarchy imposes two demands on men and women: a sharp and quite rigid gender binary that places men and women in their approved roles, and a gender hierarchy that places men above women. Augustine thus patriarchally forges a conception of Christian manhood (idealised sexually ascetic men, denigrated sexual women) that places the Jews, who challenge this conception of gender and sexuality, in a hierarchically subordinate status (as women) to Christians (as men). What patriarchy found in thus forging anti-Semitism was that it could create differences where none exist, and accord them fundamental religious and political importance in rationalising its authority.

If patriarchy could do this with the Jews, it could, of course, do this with any group that it wants to place into a position of moral slavery to serve its ideological ends. The Jews were subjected to such moral slavery by dominant Christian institutions because they were deprived of the range of basic rights accorded Christians and were thus made subject to Christians on the basis of dehumanising stereotypes that, because of the abridgement of basic rights, they were never permitted to resist or rebut. It is on this model that patriarchy created and sustained the subordinate status of people of colour, of women and of homosexuals on the basis of irrational prejudices that, like anti-Semitism, crucially denigrate the group in terms of a rigid gender binary that rationalises hierarchy (the dominant group of men over the subordinate sexualised group, whether people of colour, women or homosexuals). What Carol Gilligan and I call the Love Laws of patriarchy – establishing who can be loved, how, and how much – then enforce this hierarchy.

Our analysis thus explains a striking common feature of all these forms of irrational, dehumanising prejudice in terms of what the novelist Arundhati Roy has called ‘the Love Laws ... The laws that lay down who should be loved, and how. And how much’.¹¹⁹

The Love Laws at the heart of patriarchy have a tragic impact on our lives and loves. They enforce the demands of patriarchy that separate and divide us from one another and from our common humanity. The form of the Love Laws is historically familiar: prohibitions on sexual relations, including marriage, between Jews and non-Jews, between people of colour and not of colour (anti-miscegenation laws), between married women and men who not their husbands (Augustus’s ferocious anti-adultery legislation), or on non-procreative sex between married couples (laws criminalising heterosexual sodomy, use of contraceptives, or access to abortion), between gay men or between lesbians, between the touchable and the untouchable.

The Love Laws arise from the disruption of loving sexual relationships, indeed, from their repudiation as unmanly by the light of patriarchal manhood. Such disruption is pivotally important to patriarchal psychology, because it is the traumatic breaking of such relationships that leads to loss of voice and memory, aligning one’s own voice with the patriarchal voice that required such disruption, as a condition of manhood. It is identification with such an idealised patriarchal voice that leads to the narcissistic idealisms that underlie prejudices like anti-Semitism, racism,

¹¹⁹ Arundhati Roy, *The God of Small Things* (Harper Perennial 1998) 33.

sexism and homophobia, and that rationalise atrocity. Our analysis is consistent with Elisabeth Young-Bruehl's psychoanalytically informed interpretation of the ways in which such prejudices are best understood as social mechanisms of defence that exemplify features of hysterical, obsessional and narcissistic disorders, rooted in repression that expresses itself in forms of violence.¹²⁰ What our account adds to Young-Bruehl's *The Anatomy of Prejudices* is a historically informed understanding of the pivotal role of patriarchy with respect to sustaining both the repression of voice underlying prejudice and its expression in violence.

If we can kill as powerful and connecting a human emotion as sexual love, we can, as patriarchy requires, kill all sympathy and its expression, humane ethical imagination and relationality, forging the enemies and scapegoats required by patriarchy and visiting on them illimitable atrocity as what manhood and honour both permit and indeed require. All forms of such prejudice war on loving connection across the barriers such prejudices artificially impose, precisely because such loving connection exposes the lies that such prejudices enforce. What supports the stability of the practices underwritten by patriarchy is the repression of a free and loving sexual voice and the relationships to which such a voice would otherwise lead. The Love Laws direct patriarchal violence against this very real threat to its authority. It is for this reason that the values of liberal democracy, which express themselves in resistance to patriarchal demands, have focused, as they have, on contraception, abortion and gay/lesbian sex acts, all of which protect the right to an intimate sexual life on terms of democratic equality.

¹²⁰ Elisabeth Young-Bruehl, *The Anatomy of Prejudices* (Harvard University Press 1996). See also Young-Bruehl (n 95).