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Reviving the Public/Private Distinction in Feminist Theorizing Symposium on Unfinished Feminist Business

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REVIVING THE PUBLIC/PRIVATE DISTINCTION IN FEMINIST THEORIZING

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> The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.
>
> —Carole Pateman[1]

The public/private distinction has been a target of thoroughgoing feminist critique for quite some time now. Indeed, attacking the public/private line has been one of the primary concerns (if not *the* primary concern) of feminist legal theorizing for over two decades. If Carole Pateman is correct, one would think that this particular problem might be assigned to the category of "finished business" by this time. In this Essay, I do argue that the critique is, in certain ways, finished business in that it is no longer particularly useful in its most common forms. More importantly, however, I suggest several ways in which various critiques of the public/private line have left much business unfinished.

The line between public and private has at least two distinct meanings within feminist theorizing. Feminists sometimes use the concept to refer to the demarcation of a zone of personal privacy protected from state regulation. This usage, in turn, has at least two variations,[2] sometimes referring to "decisional privacy," a concept related to personal autonomy,[3] and at other times referring to spatial

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1. Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S. I. Benn & G. F. Gaus eds., 1983).

2. The categories can be usefully subdivided further, *see* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999) (listing physical, informational, and proprietary privacy in addition to decisional privacy); however, these two categories describe reasonably well the scope of feminist concerns with privacy for my purposes.

3. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 25-26, 250-54 (1996) (justifying privacy by arguing that government "must not dictate what its citizens think about matters of political or moral or ethical

privacy, related to the sanctity of home and family,[4] both of which enjoy a degree of constitutional protection.[5] In other contexts, feminists use the concept of the public/private line to denote the limits of the application of constitutional constraints. In this sense of the term, actions falling on the public side of the line implicate the constitution and those on the private side do not.[6] Clearly the uses are related; however, just as clearly they are not the same. The first demarcates a constitutional limit on the reach of state action. The second demarcates a state action limit on the reach of the constitution.

In this Essay, I argue that feminist critiques of *both* uses of the public/private distinction tend to overstate the threat the concepts pose to women's liberty and equality and to understate or ignore altogether the potential value of the distinction for feminist theorizing. With respect to the first definition, the private as the personal, this "meta-critique" is not particularly new. Liberal feminists have always defended the value of privacy, and, increasingly, other feminists are beginning to rethink its value in a number of contexts.[7] With respect to the second definition of the public/private distinction, focusing on state action, feminists remain remarkably unified in the deconstructive project.[8] In this Essay, I hope to raise a challenge to this unity and provoke a reexamination of the public/private line, moving the critique from the category of "foregone conclusion" to "unfinished business."

Part I of this Essay addresses critiques of the public/private line that defines a zone of decisional or spatial privacy. First, Part I briefly describes the most important of these critiques. It then suggests that, notwithstanding assertions regarding the personal as

judgment"); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2, 7-16 (1995) (formulating the right of privacy as deliberative autonomy).

4. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 186-89 (1995) (discussing how the common law concept of privacy focused on the entity of the family).

5. *Roe v. Wade*, 410 U.S. 113 (1973), as reinterpreted by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), perhaps best articulates the constitutional protection of decisional autonomy. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), emphasizes spatial privacy in the form of the "sacred precincts of marital bedrooms." *But see* Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting the argument that the criminalization of sodomy violated respondent's constitutional right to privacy in the bedroom).

6. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1478-1536 (1986).

7. *See infra* notes 30-45 and accompanying text.

8. *See infra* notes 48-62 and accompanying text.

political, most feminists, including the strongest critics of the public/private line, find much that is worth preserving in the right of privacy. Part II addresses critiques of the public/private line in the second sense, as a limit on the scope of constitutional rights. Here again, after briefly describing two important types of critiques, Part II argues that neither of the critiques supports an elimination of the line altogether. Acknowledging that the issue is reform and not elimination of the distinction, Part III explores the utility of the public/private line, particularly the differential constitutional treatment of public and private power; suggests ways of refocusing and refining the critique; and lays out an agenda for further exploration.

I. PERSONAL PRIVACY

A. Personal Privacy—Traditional Conceptions and Feminist Critiques

Historically, the line between the home as private and the rest of civil and political society as public was defined by social norms as well as law, and that line was clearly gendered.[9] Legislative classifications that excluded women from public activities ranging from lawyering[10] to bartending[11] to voting[12] reinforced the notion that women's proper place was the private sphere of home and family.[13] Although largely premised on equality-based arguments, legal challenges to these statutes may be understood as an early attack on the public/private line in the sense that they called into question the notion that the state could properly regulate women based on the assumption that men and women were destined to occupy separate spheres.[14]

9. *See* Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990) (discussing gendered images of privacy).

10. *See* Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (involving a challenge to Illinois' practice of excluding women from the bar).

11. *See* Goesaert v. Cleary, 335 U.S. 464 (1948) (rejecting an Equal Protection Clause challenge to a Michigan statute restricting women's employment as bartenders).

12. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171-73 (1875) (rejecting a Privileges and Immunities Clause challenge to Missouri's gender-based restrictions on voting).

13. *See, e.g.*, *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) (noting that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother").

14. For a review of the development of constitutional litigation regarding gender, see Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1541-60 (1995).

Eventually, beginning in the 1970s, the Supreme Court began to strike down such legislation as violating the Equal Protection Clause, gradually moving toward a norm of gender blindness.[15] As these victories were won in the name of formal equality, feminists increasingly focused on more subtle reasons for the persistence of gender subordination, including issues that had not previously been regarded as implicating equality concerns. Under this analysis, the assault on separate spheres has given way to a different set of privacy critiques focusing on ways the constitutional protection of personal or family privacy insulates women within the private sphere even in the absence of formal legal barriers.[16]

These critiques have addressed privacy both as a protected space encompassing home and family and as decisional autonomy. Feminists have criticized both types of privacy rights as, at best, inadequately ensuring privacy for women and, at worst, shielding from public scrutiny private abuse of women.

With respect to spatial privacy, feminists have argued that a constitutionally-protected sphere of privacy shelters from state regulation a domain in which women have unequal power and are physically vulnerable.[17] Robin West has suggested that "if patriarchal control of women's choices and patriarchal domination of women's inner and public lives occur in the very private realm of home life[,] then the Constitution, above all else, protects the very system of

15. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (striking down male-only admissions policy at the Virginia Military Institute); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (holding that gender-based peremptory challenges were unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (striking down statute permitting girls to purchase alcohol at a younger age than boys); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down a statute establishing a lower age of majority for females than for males); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down use of different standards to establish dependency of male and female spouses); Reed v. Reed, 404 U.S. 71 (1971) (striking down a mandatory preference for men over women in the administration of estates).

16. Though the theoretical analysis was newly emerging, the problem had deep historical roots. *See, e.g.*, State v. Rhodes, 61 N.C. (Phil. Law) 349, 353 (1868) ("We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."); *see also* Reva B. Seigel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2154-74 (1996).

17. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 164, 165 (1994) (arguing that "at least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, [the Constitution] also aggressively *protects* the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination") (emphasis added); *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (stating that "the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability").

power and control that constrains us."[18] Acknowledging that women may be victims of men's privacy, West and others have thus characterized the protection of familial privacy as undermining rather than enhancing women's liberty.[19] To ensure women's equality and security, therefore, the state must cross the private boundary of home and family and regulate the distribution of power within that sphere.

With respect to privacy as decisional autonomy, feminists have also attacked liberal definitions of privacy on the grounds that, by equating liberty within the realm of the private with state noninterference in that realm, the right of privacy undervalues private inequality and overstates individual agency.[20] This critique has at least two distinct but related strands. The first and earliest strand emphasizes women's position in relationship with others—women as providers of care. According to this critique, liberal notions of privacy (and somewhat more broadly of autonomy) posit an unrealistically unencumbered individual, or "atomistic man."[21] Privacy protects this atomistic individual in his pursuit of his own vision of the good by freeing him from state intrusion or from the prying eyes of the press.[22] Yet, by positing the self as unencumbered or atomistic, privacy as liberal autonomy regards the work of caring as voluntarily assumed, private activity—in other words, as expressions of private choice rather than limitations on or threats to privacy as autonomy.[23] Thus, to the extent that the lives of most women are characterized by attachment and relations of dependence rather than atomism, this

18. WEST, *supra* note 17, at 119.

19. *See id.* at 114-21; *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 184-94 (1989) (offering a critique of the right of privacy as a foundation for abortion rights).

20. *See* MacKinnon, *supra* note 17, at 1311 (arguing that "the doctrine of privacy has become the triumph of the state's abdication of women in the name of freedom and self-determination").

21. *See* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

22. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-97, 204-06 (1890).

23. *See* ROBIN WEST, CARING FOR JUSTICE (1997). West emphasizes the severe consequences of this assumption for women. She warns:

> The many women and the occasional man who define themselves as not-selves suffer a decreased sense of personal autonomy, of independence, of individuation, and of integrity. There is no reason to celebrate these stunted selves whose very existence is dramatic evidence of massive societal injustice, by misconstruing the selflessness they exemplify as the virtue of compassion.

Id. at 83.

conception of privacy underprotects women relative to men.

This critique posits women as less capable of translating the conditions guaranteed by traditional privacy into the values informing privacy as autonomy. Taking into account this alternative conception of the connected self, feminists have argued that an account of privacy premised on women's experience would, at a minimum, acknowledge that simply leaving the individual alone within this relational web might not be sufficient to ensure privacy. From a liberal standpoint, this view leads to a paradoxical conclusion—that securing individual autonomy requires *greater* state regulation of the sphere in which that autonomy is exercised.

The second, more recent, strand of the agency critique concerns itself less with the constraints of relationship than with the more diffuse and subtle constraints of culture. This critique begins from the assumption that cultural norms, including language, law, custom, and moral norms, are not merely products of human will and action but define and limit the possibilities for human identity.[24] Feminists have argued that this social construction of identity is gender-differentiated, contributing to women's subordination. Thus, feminist social constructionists have been concerned not so much by the liberal preoccupation of state limits on individuals (implying external constraints) but by the way a combination of forces creates or defines gendered individuals (implying both internal and external constraints).[25] If women are socially constructed in ways that afford them less agency relative to men, then liberalism's tendency to regard liberty as the absence of external constraints (or even more narrowly the absence of *state-sponsored* external constraints) leaves women less free than men in ways that are not legally cognizable.[26]

Although this concept of internalized, socially-defined constraints on women's identity has long been a part of feminist

24. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 2 (1990) (emphasizing social construction of identity and arguing that "feminist critique ought also to understand how the category of 'women,' the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought").

25. *See, e.g.*, Nancy J. Hirshmann, *Toward a Feminist Theory of Freedom*, 24 POL. THEORY 46, 51-52 (1996) (suggesting that patriarchal rules constitute "not only . . . what women are allowed to do but . . . what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are").

26. *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (making a related argument that internal constraints must be taken into account in any adequate theory of women's citizenship within a democracy).

theorizing,[27] recent work on social construction theory by feminist legal theorists in particular bears upon the question of freedom as it relates to privacy. For example, Kathryn Abrams has developed a theory of partial agency in the context of women's sexuality, which, though not framed as a critique of privacy per se, has important implications for any definition of privacy as decisional autonomy. Abrams has argued for a feminist conception of the self that "juxtapos[es] women's capacity for self-direction and resistance, on the one hand, with *often-internalized* patriarchal constraint, on the other."[28] Premising legal analysis of private choice on this model of individual agency, Abrams argues, would lead to better interpretations of women's sexual decisionmaking—for example, identifying coercion and consent in rape cases.[29] Adopting the approach, however, would also have implications for the boundary of public and private in that it entails scrutiny of the circumstances and internal motivations of private choices ordinarily shielded from view, and invites a second-guessing of those choices that would narrow the scope of women's decisional privacy, at least as traditionally defined.

B. Critiquing the Critique

The persistence of these critiques—often under the banner "the personal is the political"—suggests that feminists have very little use for the notion that the private sphere is worthy of protection from government regulation or government scrutiny. This turns out not to be the case. Indeed, some feminists have defended a liberal conception all along. For example, both Anita Allen and Linda McClain, among others, have consistently argued that a modified liberal conception of privacy is central to women's liberty interests.[30]

27. Even a liberal theorist like Mary Wollstonecraft recognized the significance of social constraints on gender roles. She wrote: "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative." MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 43 (Carol H. Poston ed., W. W. Norton & Co. 1975) (1792).

28. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346 (1995) (emphasis added).

29. *See id.* at 361-62.

30. *See* ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988); Anita Allen, *Privacy*, *in* A COMPANION TO FEMINIST PHILOSOPHY 456 (Alison M. Jaggar & Iris Marion Young eds., 1998) [hereinafter Allen, *Privacy*]; Anita L. Allen, *The Jurispolitics of Privacy*, *in* RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 68 (Mary Lyndon Shanley & Uma Narayan eds., 1997); Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995); Linda C.

While taking feminist critiques of liberal privacy seriously, McClain has challenged feminists to clarify and refine their arguments with respect to the core concerns of privacy.[31] She has made a compelling case that decisional privacy is central to women's freedom and need not unduly limit affirmative efforts by the state to secure women's equality.[32] Anita Allen has advocated a liberal conception of privacy that would simultaneously preserve those values served by a right of privacy and respond to feminist critiques of traditional definitions of both spatial and decisional privacy.[33] Like McClain, Allen's theory of privacy would not preclude state intervention in the private realm where necessary to secure women's equality and security.[34]

But self-described liberals like Allen and McClain have been skeptical all along of wholesale feminist attacks on the private sphere. More telling for my argument are feminists who have been critical of the traditional protections of the private and have engaged in the project of deconstructing the public/private line, but who nonetheless defend—either explicitly or implicitly—certain core values protected by the right of privacy. For example, Martha Fineman has long criticized assumptions about the family premised on both spatial and autonomy-based definitions of privacy. For Fineman, viewing the family as private, either because it represents the locus of intimate association and personal relationships or because it is a voluntary union of equals, misdescribes the modern family in ways that disempower women.[35] More recently, however, Fineman has begun to reexamine the usefulness of the right of privacy for women, particularly for single mothers.[36] She has criticized the

McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992); Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999).

31. *See, e.g.*, Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992) (challenging the feminist characterization of the liberal self as atomistic and arguing that liberalism accounts sufficiently for values of connection and responsibility).

32. *See* Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998).

33. *See* Allen, *Privacy*, *supra* note 30.

34. *See, e.g.*, Allen, *supra* note 2 (arguing in favor of government intervention to limit the voluntary surrender of privacy under some circumstances).

35. *See, e.g.*, Martha Albertson Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 265, 265-79 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

36. *See* FINEMAN, *supra* note 4, at 177-200.

"individualization" of the constitutional right of privacy as excluding single mothers (and other nontraditional notions of intimate association),[37] but at the same time has argued for the revival of the common law protection of privacy for the family as an entity.[38]

Of course, this conception of the family entity as private, and therefore shielded from government regulation, is precisely the definition of privacy that has for so long been the target of feminist critique. Fineman in no way argues for the revival of the definition of privacy that shielded male violence in the home from public scrutiny; however, she has begun to question feminists' wholesale rejection of the concept. Her recent work suggests simply that the discredited concept of familial privacy might be reconfigured to serve the interests of women who have become increasingly vulnerable to state regulation in many aspects of their lives.

Similarly, though less explicitly, Robin West's recent work offers a qualification of her earlier critiques of privacy as well. As discussed above, West has been an important critic of a conception of privacy that insulates the domestic sphere and assumes the autonomy or agency of individuals within that sphere. She has argued that "[r]elationships of care, untempered by the demands of justice, resulting in the creation of injured, harmed, exhausted, compromised, and self-loathing 'giving selves,' rather than in genuinely compassionate and giving individuals, are ubiquitous in this society, and it is far more often women than men who are injured by them."[39] Focusing on the negative effects of intimate relationships on individual autonomy, this critique seems to sever entirely the link between traditional definitions of privacy and liberty. West revives this link, however, in her proposed solution to the compromised private individual: she advocates a model of the self that accounts fully for women's experience, acknowledging connection, dependence, and caring, but validating caring only when it is the product of legitimately motivated individual choice.[40] This approach, like Abrams' model of partial agency, entails a scrutiny of the private that extends beyond traditional boundaries. Nevertheless, it

37. *See id.* at 180-86.

38. *See id.* at 186-93.

39. WEST, *supra* note 23, at 81; *see also* Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 LAW & SOC. INQUIRY 477 (1999) (reviewing West's book and characterizing West's proposal as a turn to liberalism).

40. WEST, *supra* note 23, at 88-93.

represents a strong reaffirmation of the value of privacy as autonomy for women.

Finally, Catharine MacKinnon, one of the most steadfast and longstanding feminist critics of privacy, can also be read as rejecting a particular formulation of the right of privacy without rejecting the central values it purports to protect. For example, MacKinnon has offered a powerful critique of privacy as the basis for women's right to abortion.[41] She has argued that women's private inequality means that women are unable to control fully their sexual availability and, in this sense, have no real privacy.[42] Moreover, this gap in women's privacy is entirely ignored by constitutional privacy doctrine.[43] At the same time, defining privacy as nonintervention by the state in reproductive decisions means giving (some) women access to abortion and thereby increasing men's sexual access to women by removing one consequence to that access—unintended pregnancy.[44] Thus, privacy doctrine perfectly serves men's interests.

This critique, however, does not diminish—indeed it is premised on—the importance of sexual self-determination for women, a critical aspect of privacy for women. Though imperfectly protected under existing doctrine, this value is at the center of MacKinnon's argument for an equality-based theory for abortion rights.[45] Although MacKinnon prefers the language of equality, perhaps because it makes gender subordination central to the analysis, the substantive value in the equation is autonomy—or privacy. Her argument reveals simultaneously how women's lack of autonomy contributes to their inequality and their unequal power leaves their autonomy unrealized. Even under MacKinnon's equality-based analysis, women's subordination must be addressed in part through the reconceptualization of privacy to ensure women's sexual autonomy relative to men.

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None of this is to suggest that feminist critiques of privacy have been misdirected or counterproductive. On the contrary, they have

41. *See* MACKINNON, *supra* note 19, at 190-92.
42. *See id.*
43. *See id.*
44. *See id.*
45. *See* MacKinnon, *supra* note 17.

powerfully reshaped thinking about privacy doctrine on both the common law and constitutional level. This success, in turn, seems to have created some space for a qualified reexamination of the uses of privacy for women. The same cannot be said, however, for the second use of the public/private distinction, denoting a state action limit to the constitution's reach. It is to that set of critiques that I turn in Part II.

II. STATE ACTION AND PRIVATE POWER

A. *Two Types of Feminist Critiques*

The second conception of the public/private line that has been a target of feminist critique is that in which the line denotes the scope of the constitutionally relevant exercise of power. As Frank Michelman has explained, the public/private distinction, in this sense, means that "although someone may have suffered harmful treatment of a kind that one might ordinarily describe as a deprivation of liberty . . . that occurrence excites no constitutional concern unless the proximate active perpetrators of the harm include persons exercising the special authority or power of the government of a state."[46] Here the state action doctrine defines the public/private boundary.

As with the first definition of the public/private distinction, much ink has been spilled by scholars attacking, defending, defining, and redefining this line.[47] Here again, the feminist ink has largely focused on two types of critiques. The first emphasizes the *state* in the state action requirement and takes up the legal realist challenge to a formalist emphasis on state power as opposed to private power. The second emphasizes the *action* in the state action requirement and argues that the negative formulation of constitutional constraints leaves states unaccountable for their inaction, thereby reinforcing the scope of private power.

As to the first, feminists, like legal realists before them, have criticized the focus on state action as the touchstone for constitutional

46. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989).

47. See, e.g., *Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); Symposium, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1213 (1994), and countless individual articles. For a summary of feminist critiques, see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

constraints.[48] According to the familiar realist critique, the exercise of private rights involves the exercise of power, not always (and certainly not exclusively) the exercise of free choice. Focusing on unequal economic power, realists argued, for example, that contractual relations were better understood as coercive rather than voluntary.[49] Translating this critique of power to the realm of constitutional interpretation, realists argued (with only very limited doctrinal success) that under some circumstances private entities and actions were functionally equivalent to public ones and should be regarded constitutionally as such.[50]

Feminists have taken this critique several steps further to argue that the exercise of private power threatens constitutional values such as liberty and equality, regardless of whether it mimics the exercise of power by the state. Private entities need not be the functional equivalent of public entities in order to implicate foundational concerns about women's liberty. This point is, of course, central to the feminist critiques of personal privacy already discussed, but feminists have also raised the argument as a direct attack on the state action concept. For example, feminists have argued that international human rights standards that forbid torture but regard domestic violence as outside the scope of international concern fail to address the central source of violent coercion in women's lives on a global scale.[51] The argument is not that the abusive husband acts under color of state law or to promote the interests of the state.[52] Rather, the argument is simply that a meaningful right to freedom, bodily

48. For representative examples of realist critiques, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 3-18, 393 (1960); L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435-38 (1934); and Mark Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1384-88.

49. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

50. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (subjecting a company town to the federal government's First Amendment obligation to allow religious proselytizers access to its "public" spaces, despite the technically private status of the town); Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of racially-restrictive covenants violated the Equal Protection Clause despite the fact that the covenants were themselves private agreements).

51. *See, e.g.*, Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, *in* WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 11 (Julie Peters & Andrea Wolper eds., 1995).

52. Though sometimes "private" violence does function in these ways. *See* Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 83 (Stephen Shute & Susan Hurley eds., 1993). Moreover, emphasizing the regulatory effects of private violence is not to suggest the state is unimplicated in such violence. *See infra* at p. 862.

integrity, and security for women must include effective remedies against private violence.[53]

Feminists have made similar arguments in many other contexts ranging from pornography's silencing of women's speech[54] to the regulatory effects of stranger violence on women's lives.[55] The critical claim that emerges from all of these examples is that the principal threat to women's liberty and equality comes not from public power but from private power.[56] Although women are surely protected in certain respects by constraints on public power, these protections do not afford women the same degree of liberty and equality as men nor do they address the most profound obstacles to equal citizenship for women.[57]

The second type of critique, emphasizing the *action* component of the state action doctrine, in some ways supplements the first. The argument goes like this: It is bad enough that only state action and not private action is considered relevant to the question of whether one's liberty or equality has been violated. It is even worse that a state's systematic failure to respond to abuses of private power will rarely, if ever, implicate constitutional concerns. Moreover, because state action is constitutionally relevant while private action is not, state efforts to intervene in the existing balance of power in the private sphere are viewed as unconstitutional violations of the rights of the powerful rather than an effort to balance or regulate conflicting

53. *See* Bunch, *supra* note 51, at 13-14 (arguing that states must be held accountable for sustaining conditions that enhance women's vulnerability to private violence).

54. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 195 (1987) (noting that the Constitution's approach to free speech "tends to presuppose that whole segments of the population are not systematically silenced socially, prior to government action"); Michelman, *supra* note 46, at 294-95 (invoking feminist arguments regarding the silencing effects of pornography to analyze Judge Easterbrook's opinion in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-29 (7th. Cir. 1985)).

55. *See* WEST, *supra* note 17, at 58 (using the marital rape exemption to argue for an interpretation of equal protection as targeting the denial of the state's protection to some of its citizens from private violence, aggression, and wrongdoing).

56. Indeed, Catharine MacKinnon argues that private not state power serves as the foundation to women's inequality:

> Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life.

MACKINNON, *supra* note 19, at 161.

57. *See* Higgins, *supra* note 26, at 1694-99 (applying the argument from private violence to an analysis of equal citizenship for women).

rights.[58]

Here again, examples abound. State-sponsored affirmative action programs violate the rights of *innocent* whites unless they directly and narrowly respond to state action violating the rights of minorities.[59] State action on the basis of racial categories is the only constitutionally meaningful act. Advantages whites enjoy because of societal discrimination are not relevant to the equation.[60] Campaign finance reform violates the speech rights of wealthy donors, distorting the political marketplace of ideas.[61] The disproportionate voice of the wealthy within that marketplace is not constitutionally relevant. Similarly, though more controversially, the regulation of pornographers violates their First Amendment rights, though the regulation of women's speech by pornographers is again constitutionally irrelevant.[62]

B. Limitations and Qualifications

Unlike the first set of privacy critiques involving the private sphere of home and family, this second set of critiques involving state action has yielded very few (if any) feminist dissenters.[63] It is easy to see why. The deconstruction of the public/private dichotomy is

58. MacKinnon deployed this argument quite effectively in her critique of the prevailing legal conception of equality. She explained that "in the view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not." MACKINNON, *supra* note 54, at 42.

59. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that "all governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the law has not been infringed") (citation omitted).

60. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (rejecting societal discrimination as a basis for affirmative action); Shaw v. Reno, 509 U.S. 630, 657 (1993) (warning that "[r]acial gerrymandering, *even for remedial purposes*, may balkanize us into competing racial factions") (emphasis added).

61. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

62. *See* CATHARINE A. MACKINNON, ONLY WORDS 75-78 (1993); *cf.* Michelman, *supra* note 46, at 295 (noting that Judge Easterbrook in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328-29 (7th. Cir. 1985), adopted MacKinnon's theory regarding the impact of pornography on women's speech as a basis for state regulation).

63. A recent experience served to demonstrate to me the centrality of the critique to feminist orthodoxy. After presenting a related argument at a symposium at Cornell Law School in which I suggested the usefulness of the public/private distinction in certain contexts, I was warned repeatedly that the argument could be put to dangerous uses. It was as if feminists had somehow succeeded in persuading a reluctant Court to embrace our view and that to question that view now would undo all that hard work. *See* Tracy Higgins & Laura Rosenbury, *Equality, Anti-Discrimination Law, and the Liberal State*, CORNELL L. REV. (forthcoming 2000).

elegant and powerful and addresses (albeit at a fairly abstract level) a broad range of feminist concerns. It exposes the way an apparently neutral concept like state action operates to entrench existing hierarchies of private power while simultaneously reinforcing the equation of private action with freedom. At the same time, the critique has yielded very few concrete results. The Supreme Court has adhered steadfastly to the state action doctrine[64] and has shown little inclination to expand the set of circumstances under which either private action or public inaction might be constitutionally relevant.[65] Ironically, this entrenchment of the public/private dichotomy has relieved feminist critics of the need to consider more precisely the implications of eliminating the distinction altogether. Nevertheless, doing so might reveal reasons for maintaining the distinction for certain purposes as well as strengthen existing critiques by making them more precise.

III. PUBLIC AND PRIVATE POWER—MAINTAINING THE DISTINCTION

In this section, I offer three reasons feminists may want to reconsider our wholesale rejection of the public/private dichotomy in the state action context. At the end of the section, I return briefly to the first type of privacy critique in an effort to link together my agenda for addressing unfinished business.

A. Descriptive Differences

The first and simplest reason for maintaining the public/private distinction for certain purposes is that it may actually capture a difference that is meaningful to women's experiences. For example, consider the critique of the emphasis on state action in the context of

64. For example, in *Lugar v. Edmondson Oil Co.*, the Supreme Court stated:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.... A major consequence is to require the courts to respect the limits of their own power as directed against... private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

457 U.S. 922, 936-37 (1982).

65. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (rejecting the argument that the state, through its system of child protective services, had insulated a child to the degree that the state should bear responsibility for its inaction or failure to intervene in severe child abuse).

international human rights.[66] Although it is certainly correct that a human rights regime that focuses exclusively on harms directly perpetrated by the state fails to address important threats to women's lives and liberty, it may also be correct that state sponsored violence is qualitatively different from private violence. This view is consistent with the reports of victims of human rights abuses.[67] Acts of private violence indisputably have an impact on the lives of individual victims that may include profound and long-lasting physical and psychological consequences.[68] When rape and torture are perpetrated by soldiers or police, however, those physical and psychological consequences are compounded by political powerlessness and vulnerability that often extend beyond the individual to the broader community.[69] This distinction may justify different approaches to regulating the harm, including different theories of state responsibility.[70]

This defense of the public/private line requires some immediate qualifications. First, the difference I describe does not track perfectly the contours of public and private action. Certain forms of private violence such as that based on racial or religious hatred can have a collective, political impact comparable to state-sponsored violence.[71] To the extent that it does, it ought to be viewed as implicating the

66. *See supra* notes 51-53 and accompanying text.

67. *See, e.g.*, Tracy E. Higgins et al., *Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey*, 22 FORDHAM INT'L L.J. 2129 (1999) (describing the effects of state-sponsored rape and torture as reported by victims and linking such effects to the political community).

68. *See* MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR (1989) (analyzing the effects and costs of female fear of rape); Judith V. Becker & Meg S. Kaplan, *Rape Victims: Issues, Theories, and Treatment*, 2 ANN. REV. SEX RES. 267 (1991) (discussing psychological and physical consequences of rape); Deborah W. Denno, *Panel Discussion: Men, Women and Rape*, 63 FORDHAM L. REV. 125, 127-33 (1994) (arguing that rape is a unique crime due to the shame, stigma, and resulting psychological harm).

69. *See, e.g.*, Vera Folnegovic-Smalc, *Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and Bosnia-Herzegovina*, *in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 174-79 (Alexandra Stiglmayer ed., 1994) (describing psychological impact of rape in ethnic conflict); Ruth Seifert, *War and Rape: A Preliminary Analysis*, *in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA, *supra*, 54-72 (describing the function of rape in ethic conflict).

70. Even Catharine MacKinnon, one of the strongest feminist critics of the public/private dichotomy, invokes it in her work on rape as a war crime in Bosnia. *See* MacKinnon, *supra* note 52, at 88-89.

71. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 467-76 (1999) (discussing the deterrence theories underlying enhanced penalties for hate-motivated crimes). *See generally* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 29 (1998) (discussing theories of harm and punishment in the context of crimes motivated by identity-based hatred).

allocation of political power in a way that affects the public sphere.[72] Second, private violence that is pervasive and without legal remedy contributes to political oppression in a way that is increasingly and appropriately regarded as implicating the state.[73] Finally, acknowledging the existence of a qualitative difference between private and state-sponsored violence does not lead to the conclusion that one matters while the other does not. The feminist deconstruction of the distinction between public and private violence responds to the tendency to ignore or downplay the private. However, one need not collapse the categories analytically to argue that both should be taken seriously. Indeed, maintaining the distinction may prove useful for the purposes of understanding the nature of the harm and developing appropriate responses both on the individual and the policy level.

B. Theoretical Distinctions

A second reason why feminists should consider working within the public/private dichotomy and perhaps reshaping it is that a distinction between public and private is implicit within the theoretical critique itself. Specifically, the first critique—that the public/private dichotomy inappropriately restricts state but not private action—is almost always an argument for the greater regulation of the private action viewed as harmful.[74] Similarly, the second critique—that the public/private dichotomy emphasizes action and ignores inaction—is almost always an argument for the exercise of public power (or location of a constitutional obligation to act) as a

72. This exception in some ways proves the rule in that the prevention of racially or ethnically motivated violence has long been regarded as an important human rights obligation of states. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, art. 4(a), 660 U.N.T.S 195 (*entered into force* Nov. 20, 1994) (requiring states to criminalize "all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin").

73. This view is increasingly reflected in international human rights documents, particularly with respect to the issue of violence against women. *See, e.g.*, Vienna Declaration and Programme of Action, adopted by the United Nations World Conference on Human Rights, U.N. Doc. A/CONF. 157/24 (Part I) (1993) (providing that "[g]ender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated"); Beijing Declaration and Platform for Action, U.N. Doc. A/CONF. 177/20 (1995) (providing that "[g]overnments should take urgent action to combat and eliminate all forms of violence against women in private and public life, whether perpetrated or tolerated by the State or private persons").

74. *See supra* notes 51-57 and accompanying text.

check on private power.[75] This argument is advanced only so far by collapsing public and private power and regarding them as equally threatening to individual liberty. Indeed, a much more powerful argument can be made that, given the differences between public and private power, there are good reasons to prefer the exercise of public power over the default allocation of private power in the face of competing liberty or privacy concerns.

For example, Frank Michelman has argued that

> [a] confirmed optimist about the deliberative character of popular political action would tend to see the regulatory alternative to private or market oppression as at least somewhat more likely to be considerate of all the interests involved, not least including people's interest in preventing the accretion of totalitarian, citizen-shaping power by any social agency—the government among others.[76]

On this view, the exercise of public power through the institutions of deliberative democracy should cut in favor of rather than against its legitimacy. This move reverses the presumption of the state action doctrine, which regards state, not private, action as the greater threat.

This is not to say that, categorically, state action should be regarded as legitimate and private action suspect. It would be a mistake for feminists to underestimate the very real threat posed by tyranny of the majority by focusing our attention only on the consequences of private power and the virtues of public power. Feminists need no reminder that women's equality has been and continues to be threatened by the exercise of public power. Yet, maintaining the distinction does not require choosing sides in a categorical way. The point is not simply to favor one form of power over the other but to recognize their differences and to theorize more carefully about the kind of threats each may pose.

At a minimum, arguments that begin from a recognition of both the threat of private power and the democratic legitimacy of public power may help tip the balance in favor of state intervention when conflicting claims to liberty or equality are involved. For example, policies such as affirmative action or hate speech regulation that are designed to enhance equality by altering the private allocation of resources may be characterized as encroaching on individual liberty.[77]

75. *See supra* notes 58-62 and accompanying text.

76. Michelman, *supra* note 46, at 315.

77. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (involving an equal protection challenge by a white male contractor to a federal affirmative action program benefiting minorities and women); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)

The Supreme Court has frequently resolved the conflict between equality and liberty (or competing equality claims) in favor of the status quo and against government intervention.[78] Yet, if the exercise of public power carries with it the legitimacy of deliberative democracy, it is difficult to see why the preexisting private allocation of power should be favored.

C. *Instrumental Assessments*

Finally, there are practical reasons for maintaining the public/private distinction in feminist theorizing. Michelman articulates the view of a "confirmed optimist" about the democratic process.[79] I suggest that his view of public power might also be appealing to the confirmed feminist, not only for theoretical but also for instrumental reasons. I suggest as much simply because there are good reasons to believe that women may have greater access to public power than to private power. Because women are a majority of the population, in a well-functioning democracy one would expect that women's interests would be well reflected in the legislative process. Yet, owing to the exclusion of women from the political realm, both *de jure* and *de facto*, women have never exercised as much political power as is their due. Nevertheless, even before women were entitled to vote, they were often successful at influencing legislative bodies. For example, married women gained property rights through legislative change before women could vote.[80] Later, women achieved income support for widows and workplace protections through legislative means.[81] More recently, women have won changes in rape statutes,[82] child support standards, and child support enforcement.[83]

(involving an equal protection challenge by a white business owner to an affirmative action plan designed to benefit minority-owned businesses).

78. *See Adarand Constructors*, 515 U.S. at 236-37 (adopting strict scrutiny standard and remanding the case); Adarand Constructors v. Pena, 965 F. Supp. 1556 (D. Colo. 1997) (granting summary judgment in favor of white contractor); *J. A. Croson*, 488 U.S. at 469 (plurality opinion) (affirming Fourth Circuit's decision to strike down program under strict scrutiny standard).

79. Michelman, *supra* note 46, at 315.

80. *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1398 (1983); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA, 81-86, 97-100 (1986).

81. *See* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 208-21 (rev. ed. 1975); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 373-74, 424-28 (1992).

82. *See* SUSAN ESTRICH, REAL RAPE 80-91 (1987) (discussing changes in the legal

During the last decade, Congress has passed two important pieces of legislation protecting women's rights: the Family and Medical Leave Act[84] and the Violence Against Women Act.[85]

On the other hand, the democratic process has also generated legislation that is profoundly harmful to women's interests. Nineteenth-century statutes criminalizing abortion are one example.[86] Today, states continue to restrict access to abortion in a variety of ways. On the federal level, welfare reform legislation passed during the Clinton Administration has had devastating effects on poor women.[87] Nevertheless, even acknowledging that women's power in the public sphere is limited, one might argue that, to the extent that women are more equal participants in the public than in the private sphere, their interests are served in general by the broader exercise of public power. *Roe v. Wade* notwithstanding, the most important advances in women's rights have come through the exercise of legislative power rather than the exercise of judicial review in the name of privacy. Moreover, judicial review exercised in the name of individual liberty, equality, or, more recently, federalism has become an increasingly potent weapon in the hands of those who also wield private power. The challenge for feminists is therefore to develop and deploy arguments that will, at a minimum, help to balance this private power through democratic means.

CONCLUSION

In a sense, the reexamination of the distinction between public and private power proposed in this Essay is simply a call for more extensive feminist theorizing about the role of the state. Feminists

definition of rape and standards for determining consent).

83. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, 734-43 (2d ed. 1987) (discussing Congressional efforts to make child support prospectively enforceable through wage withholding).

84. Family and Medical Leave Act, 29 U.S.C §§ 2601-2654 (1994).

85. Violence Against Women Act, 42 U.S.C. § 13981 (1994). *But see* United States v. Morrison, Nos. 99-5, 99-29, 2000 WL 574361 (U.S. May 15, 2000) (striking down portions of the Violence Against Women Act as exceeding Congress' power under both the Commerce Clause and Section 5 of the Fourteenth Amendment).

86. By 1900, every state had laws banning abortions, and many imposed criminal sanctions. *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 15 (1984).

87. *See* Randy Albelda, *Off the Welfare Rolls to Where? The Luckiest Join the Uncared-for, Benefit-less Working Poor*, BOSTON GLOBE, Nov. 22, 1998, at E3; *see also* Dorothy E. Roberts, *The Only Good Poor Woman*, 72 DENV. U. L. REV. 931 (1995) (discussing the impact of the welfare reform legislation's family cap on poor women's reproductive rights).

must move beyond a critique of the liberal framework of state power limited by individual rights to a thorough reconceptualization of the relationship among individual freedom, private power, and the state.

This project has already begun in the feminist theorizing about personal privacy described in the first part of this Essay. Having revealed the ways in which traditional conceptions of privacy are either inadequate for or affirmatively harmful to women, feminists have begun to reimagine privacy rights in a way that might more fully realize for women the values informing liberal privacy.[88] Significantly, much of this work on privacy does not track the traditional public/private boundary but instead entails affirmative state intervention in the private sphere to alter the allocation of private power.

Although this work represents an important beginning, the business is unfinished. Feminists need to expand the project to encompass broader questions of the proper role of state power. What constitutes a legitimate exercise of state power within a well-functioning deliberative democracy? How should individual rights be defined against state and private power? What are the affirmative obligations of the state to intervene in the allocation and exercise of private power? How can power be allocated among institutions, both public and private, to enhance simultaneously individual liberty and equality? Bearing in mind these large questions will help to move feminist theorizing beyond a critique bounded by traditional notions of public and private and toward a possible transformation of the roles of public and private power in ensuring women's liberty and equality.

88. *See supra* notes 30-45 and accompanying text.