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The Idea of the "Private": A Discussion of State Action Doctrine and Separate Sphere Ideology

*Hester Lessard**

1. INTRODUCTION

This essay is a discussion of the formalization in law of a dichotomy between a natural, private order on the one hand, and a public sphere of state action and citizenship on the other. The discussion takes place in the context of equality rights and of the philosophical tensions that underlie the delineation of rights in general. Two legal phenomena are examined: state action doctrine as it has developed in American equal protection jurisprudence under the Fourteenth Amendment and separate sphere ideology as a rationalization for sexual discrimination. Under each doctrine, judicial denial of relief is predicated on a pre-ordained and natural compartmentalization of human experience and on a refusal to perceive the dichotomy as socially created and legally enforced discrimination. The contradictions inherent in state action jurisprudence are a microcosm of the contradictions inherent in liberal theories regarding the nature of rights and of the state. A critique of separate sphere ideology in the context of women's rights offers a macrocosmic view of social transformation. Although I shall refer largely to American jurisprudence, the underlying

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philosophical questions are of critical importance in Canadian judicial treatment of the *Canadian Charter of Rights and Freedoms.*

The essential message of state action doctrine is that a constitution protects individuals only from violations of their rights by governments and not from violations by other individuals. Confronted with this fundamental rule, which in Canada is the ostensible import of section 32(1) of the *Charter* and which in the United States is the ostensible import of the negative phrasing of the Fourteenth Amendment, i.e., "No State shall . . . abridge . . . ", the judiciary must answer the politically loaded question; "What is state action?", and by implication, its counterpart: "What is private action?" The premise of both questions is that the state/private distinction is one that courts can legitimately make. Progress within the liberal state has often meant the enlargement of the state sphere and the diminution of the private sphere. A countervailing force is the *in terrorem* conservative vision of a totalitarian intrusion of government into every aspect of human experience. Feminist critique of separate sphere ideology goes beyond the progressive/conservative debate with its assertion that the personal is by definition political.

Part 2 of this essay examines the tension between natural law and positivist theories of rights which has undermined the coherence of state action doctrine since its inception. Part 3 discusses the denial of full citizenship for women through the positing of a naturally determined division of life into separate spheres. Although this ideology persists today under the guise of privacy rights, the attainment of juridical equality by women contains its own public/private split which also must be overcome in order to achieve substantive equality. Part 4 briefly traces the development of state action doctrine and examines the apparent resolution of its contradictions in the context of defamation law and First Amendment freedoms. Part 5 of the essay examines the chimerical nature of equality theories that focus on juridical equality and consign to legal irrelevance, the "private" experience of victims of discrimination as members of a socially and historically oppressed class.

2. STATE ACTION DOCTRINE: THE IDEOLOGY OF THE PRIVATE DOMAIN

Historically, state action doctrine has been most coherent when linked to the natural law tradition with its developed and affirmative notion of rights derived from a pre-government state of nature. Within this framework, nature entails a necessarily private sphere of

individual choice, and the public good is comprised of the maximization of the assertiveness of the self which occurs through choices made within the private sphere. Constitutional entrenchment of rights is a means of preserving atomized areas of choice from government intrusion. This philosophy, which is most familiarly articulated in the writings of John Locke,[1] became linked with a conservative economic ideology in which choice was economic choice exercised in the private sphere of the marketplace with the consequent constitutionalization of liberty of contract.

Active judicial protection of this version of economic rights was given its fullest expression in the case of *Lochner* v. *New York*.[2] Although there is earlier judicial support[3] for the Lockean notion that constitutions protect rights which pre-date political institutions and which therefore do not require a clear textual basis for their enshrinement, *Lochner* has come to typify that approach with regard to economic rights.

The issue in *Lochner* arose from an employment contract whereby a New York baker "required or permitted" his employee to work more than sixty hours per week, contrary to a New York statute. The natural liberty of the employer to contract for the purchase of labour without state-imposed constraints was successfully asserted to impugn the constitutionality of the statute. Although no one on the Bench viewed that liberty as absolute, most adhered to a natural law approach to the values presented for protection in the case. Justice Peckman, for the majority, invalidated the offending law in the name of the "general right of an individual to be free in his person and in his power to contract in relation to his own labour."[4] Justice Harlan, in dissent, referred to the power to contract as one of the "inherent rights belonging to everyone."[5] Only Justice Holmes, also in dissent, viewed the issue from a philosophical position which differed significantly from that of his colleagues. He opened his short opinion with the remark that the case "is decided upon an economic theory which a large part of the country does not entertain."[6] Then with an acuity which foreshadows the Legal Realists and the political and historical

1 See J. Locke, *The Second Treatise of Government*, ed. T.P. Peardon (New York: The Bobbs—Merrill Co., 1952).
2 (1905), 198 U.S. 45, 25 S. Ct. 539.
3 See for example *Calder* v. *Bull* (1798), 3 Dall. 386, 1 L. Ed. 648.
4 *Supra*, note 2 at p. 58.
5 *Ibid.*, p. 65.
6 *Ibid.*, p. 75.

developments of the thirties, he contrasted the notion of liberty on which that economic theory is based with the reality of public intervention in public life. He wrote:

> The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[7]

In Justice Holmes' view, the Fourteenth Amendment notion of liberty is "perverted" if it is used to invalidate legislation which embodies majority's opinion and conforms to "fundamental principles as they have been understood by the traditions of our people and our law."[8] For Justice Holmes the positivist then, there is nothing inherent about rights and freedoms. Rather, they have their source in those peculiarly human artifacts, tradition and law.

State action was not an issue in *Lochner* because of the obvious involvement of a state actor in the passage of legislation. However, what if the courts below invoking a judge-made doctrine of unconscionability had refused to enforce the baker's contract? On one view of state action, the absence of a specific legislative or executive act would pose no problem. The judicial act of applying common law rules to private contractual choices would constitute state action and consequently, the action would find itself subject to constitutional constraints. In this situation, Justice Peckman for the majority might find that the courts, not the legislature, had infringed the baker's natural liberty to freely bargain for the purchase of labour. The underlying thesis remains the same: government's role, be it through judicial, legislative or executive acts, is to ensure that the civil order conforms to the natural order. The judicial task of measuring the constitutionality of state action is relatively simple so long as there is a social consensus on the natural/civil split and the content of the natural order.

However, such a consensus, as Justice Holmes was quick to point out, has for the most part been illusory. The liberal tradition not only borrowed from and expanded upon pre-liberal theories of natural

7 *Ibid.*
8 *Ibid.*, p. 76.

rights but it also gave rise to the positivist denial of those theories.[9] The persistence of both approaches has created confusion whenever the test for state action is concerned. In the positivist universe, the seemingly sensible proposition that judicial action is state action threatens to place constitutional constraints on all private choices and relationships. For without the natural law assumption of a pre-ordained natural/civil split, jurists are left with no clearcut test of constitutionality. If rights have their source in law apart from any divine or natural order of morality, then presumably the efficacy and legitimacy of private choice is wholly dependent on law. The consequence is a retreat to a narrow test, of who or what is a state actor, which excludes judicial actors and removes common law rules and doctrine from constitutional scrutiny. The retreat, however, is also accompanied by a failure to provide a coherent explanation for either the general immunity of private choice or the limited exceptions to that immunity.[10]

The starting point for the development of state action doctrine in the context of Fourteenth Amendment guarantees is Justice Bradley's 1883 decision in *Civil Rights Cases*.[11] As with most state action decisions, it contains both of the contradictory theses regarding the nature of legal rights. In *Civil Right Cases*, several black plaintiffs complained of racial discrimination in the provision of services, by private entrepreneurs, contrary to newly enacted federal civil rights legislation.[12] The defence countered successfully with the argument that the legislation was unconstitutional because the Fourteenth Amendment allowed congressional remedial action only where a state had interfered with Fourteenth Amendment rights. The impugned law penalized the behaviour of private actors and therefore went beyond the "corrective" posture permitted by the Fourteenth Amendment.

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9 For the classic articulation of the positivist view, see T. Hobbes, *Leviathan* (New York: The Bobbs-Merrill Co., 1958).

10 An analysis of state action doctrine in terms of the conflict between natural law and positivist theories of rights is undertaken in Paul Brest's article: "State Action in Liberal Theory: A Casenote on *Flagg Bros.* v. *Brooks*" (1982), 130 U. Penn. L.R. 1296; Ira Nerken's article: "A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory" (1977), 12 Harv. Civ. Rts.-Civ. Lib. L.R. 297; and Lawrence Tribe's chapter on state action in *American Constitutional Law* (New York: Foundation Press, 1978). Parts 2 and 4 of this essay are particularly indebted to Ira Nerken's exhaustive and informative commentary.

11 (1883), 109 U.S. 3, 3 S. Ct. 18.

12 *Civil Rights Act*, 18 Stat. 35 (U.S.A.).

By itself, this argument departed from the natural law conception of state action by assuming that a line could be drawn between public and private acts without examining the relationship between the act and the natural order.[13] Justice Bradley appeared to accept this position in the statement: "Individual invasion of rights is not the subject of this amendment."[14] Indeed subsequent cases cite his opinion for that proposition.[15] On the one hand, the decision embodies the state action test in its narrowest and most cryptic form. On the other hand, perhaps the terseness of Justice Bradley's pronouncement conceals an assumption that because entrepreneurial rights are involved, natural liberty in the sense of Justice Harlan's inherent right to contract has been invaded. A look at the rest of Justice Bradley's decision reveals that he clearly believed that state action could take the form of judicial enforcement. Later in the decision he declared:

> It [the Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights: but to provide modes of redress against the operation of State laws, and the action of State officers executive or *judicial*, when these are subversive of the fundamental rights specified in the amendment.[16]

Today, the unqualified statement on the one hand that "an individual invasion of rights" is *not* subject to constitutional constraints, and on the other that court settlement of private disputes *is* subject to constitutional constraints seems paradoxical. If individuals cannot enforce contracts or seek damages in a way that violates the constitutional rights of other individuals, surely this means that "individual invasions" are indeed the subject of the constitution, albeit only by way of defence in private litigation.

Ira Nerken in his article on state action[17] explains the seeming paradox by looking at Justice Bradley's decision in its historical and philosophical setting. According to Nerken, the pressures of the Reconstruction era required the North to make concessions toward the conquered South on the question of racial emancipation under the

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13 The same argument under section 32 of the *Charter* would limit judicial action to a similar corrective posture when faced with a *Charter* argument in the context of private litigation.

14 *Supra*, note 11 at p. 11.

15 See *Corrigan* v. *Buckley* (1926), 271 U.S. 323, 299 F. 899.

16 *Supra*, note 11 at p. 11.

17 *Supra*, note 10.

guise of states' rights.[18] Justice Bradley accommodated this pressure by drawing on prevailing notions of liberty and proprietary rights in order to fashion a decision which in outcome was a step backward from his previous vision of equal protection expressed in his *Slaughter House Cases*[19] dissent. Nerken argues that Justice Bradley's statement on "individual invasions" should not be read apart from the rest of his opinion which implicitly relies on natural law theories of rights. The first step in Justice Bradley's analysis was to posit a separate sphere where "individual invasions" no doubt do take place but where such invasions by definition, cannot "destroy or injure" rights. Only state invasions can do so. The second step was to justify the immunity of this private sphere of choice from judicial action by reference to a diminished notion of equal protection or, what Nerken calls, the "fictive option" of bargain and resort to State law. Private actors may interfere with the enjoyment of one's rights, but in such situations, the victim may seek better bargain elsewhere or else resort to state laws like any other citizen. Implicit in this view is the notion that equality consists of equal access to legal remedies. This is a far cry from an earlier meaning of equal protection which, in the fervor of the post-Civil War decade, diretly addressed the historical fact of black oppression.

This earlier perception viewed the Fourteenth Amendment as protection from "discrimination against Negroes as a class"[20] and as an "exemption from legal discriminations implying inferiority in civil society, lessening the security of their enjoyment of their rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."[21] Ironically, Justice Bradley's dissent in *Slaughter House Cases,* which was decided ten years before *Civil Rights Cases,* is one of the more vigorous articulations of this view of racial equality.

That fervor and willingness to give credence to the collective experience of the black people's subordination is entirely absent from Justice Bradley's *Civil Rights Cases* decision. On the contrary, here he reasoned:

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18 Many commentators point out that state action was originally devised to serve two purposes: the perservation of individual liberty and the maintenance of federalism. See Tribe, Brest and Nerken *supra,* note 10.

19 (1873), 16 Wall. 36 at 111, 21 L. Ed. 394.

20 *Ibid.*, p. 81.

21 *Strauder* v. *West Virginia* (1880), 100 U.S.A. 303 at pp. 307–308, 25 L. Ed. 664.

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favourite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[22]

In a way, what Justice Bradley is saying is that, state action considerations apart, the discriminations experienced by these black plaintiffs are not subversive of their fundamental rights of equality because they can resort to "ordinary modes" of protection.

The device of the "fictive option" as described by Nerken is a triumph of legal formalism. Through its operation, Justice Bradley was able to characterize the Court's non-recognition of black plaintiffs' claims as a favour, as a form of deference to the black person's dignity, by treating him or her equally rather than as a "special favourite of the laws". Any uncorrected violation of rights was the victims' fault—here symbolized by the failure to resort to state laws that do not attract corrections by the courts or Congress because they are cosmetically neutral and apply equally to all. This laissez-faire approach to civil rights, like the laissez-faire approach to economic rights under a contract, avoids considerations of systemic inequalities and historical deprivations by focusing on the discrete transaction. Widespread discrimination becomes a nonjusticiable matter of isolated, private, bargained for and "consented to" choices.

Although Justice Bradley's decision came to be viewed as posing a threshhold test for constitutional application, the actual opinion makes no sense unless it is read in the light of an affirmative notion of liberty of contract, which foreshadows *Lochner*, and a correspondingly diminished notion of equality, which foreshadows *Plessy* v. *Ferguson*.[23] Thus, even without the state action bar the black plaintiffs in this case would have been unlikely to succeed. Their experience of racial discrimination as a class of victims was both privatized and particularized by "fictive option" reasoning and by the privilege of juridical equality. State action doctrine merely underscored this privatization, and perhaps more importantly, served the political need to assure the South that state sovereignty would be respected.

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22 *Supra*, note 11 at p. 25.

23 (1896), 163 U.S. 537, 16 S. Ct. 1138. Discussed *infra*, at Part 4.

3. SEPARATE SPHERES: THE IDEOLOGY OF WOMAN'S DOMAIN

Justice Bradley's state action test as interpreted by subsequent courts came to mean that a whole area of social arrangements was removed from constitutional constraints because of the absence of an appropriate public actor in the role of perpetrator. Judicial action, in spite of Justice Bradley's clear statement to the contrary, was not state action.

In *Bradwell* v. *Illinois*,[24] Justice Bradley again asserted a demarcation between public and private spheres of action as a basis for denying Fourteenth Amendment protection, this time in the context of women's rights. The Supreme Court of Illinois had refused to grant Mrs. Myra Bradwell a licence to practise law on the grounds of the ineligibility of females. State action was not an issue as the court in its licensing capacity conformed to even the most narrow formulation of the public actor. Mrs. Bradwell challenged the decision by arguing that pursuit of a livelihood as an attorney was one of the "rights, privileges, and immunities of citizenship" protected by the Fourteenth Amendment. Again, one is confronted with the spectacle of Justice Bradley flatly contradicting a position he took in *Slaughter House Cases*, this time only a couple of weeks before the *Bradwell* decision. His dissenting opinion in *Slaughter House Cases* reads in part:

> If my views are correct with regard to what are the privileges and immunities of citizens, it follows that any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing lawful employment, does abridge the privileges of those citizens . . . does deprive them of liberty as well as property . . . (and) also deprives those citizens of the equal protection of the law, contrary to the last clause of the section.[25]

How does Justice Bradley resolve the contradictions? Again, he invokes a separate sphere of lesser privilege for female citizens, which is sanctified by the "nature of things." In stark contrast to his *Slaughter House* dissent, his decision in *Bradwell* asserts as follows:

> It certainly cannot be affirmed, as an historical fact, that this (right to pursue any lawful employment for a livelihood) has ever been established

24 (1872), 16 Wall. 130, 21 L. Ed. 442.

25 *Supra*, note 19 at p. 122.

> as one of the privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women . . . . Man is, or shall be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[26]

Theoretically, the *Bradwell* analysis goes farther than state action doctrine because it removes the domestic sphere from legal ordering altogether. A natural rights formulation of state action doctrine is based on what Karl Marx[27] described as the state/civil society dichotomy. *Bradwell* rests on a civil society/woman's domain dichotomy, or what Fran Olsen[28] calls the family/market split. However, an examination of the "fictive option" reasoning of *Civil Rights Cases* reveals that the public/private split asserted by state action doctrine was as much a refusal to give content to equality rights as the public/private split invoked in *Bradwell*. In both instances, the court by ostensibly deferring to the sanctity of certain private choices—that of entrepreneurs in the market place or that of husbands within an authoritarian family structure—was ensuring the continuance of the *status quo* of pervasive inequality. From another point of view, the cases can be described as constitutionalizing an affirmative notion of contract rights on the one hand and of familial privacy rights on the other hand, both at the expense of an enlarged notion of equality.

The legal history of the exclusion of women from full participation in "civil society" is well documented.[29] The exclusion took its most extreme form in the unity principle or the doctrine of marital merger of identity whereby "under the common law when a woman married her identity became submerged in that of her husband with a resultant fusion of their legal personalities."[30] From this principle

26 *Supra*, note 24 at p. 141.

27 See Marx, "On the Jewish Question" in *Karl Marx: Early Texts*, McClellan ed. (Oxford: Basil Blackwell 1971).

28 F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harv. L.R. 1497.

29 This section of the essay is indebted to McCaughan, *Legal Status of Married Women in Canada* (Toronto: Carswell, 1970) and to Olsen, *supra*.

30 *Ibid.*, pp. 2–4.

flowed a host of rulés which served to deny women control over property, the ability to contract, and the legal redress of disputes arising in the domestic sphere. Indeed part of the State of Illinois' argument against Mrs. Bradwell was that as a married woman she had no contractual capacity apart from her husband and therefore no way of establishing attorney-client relationships. As Justice Bradley points out, civil society is merely reflecting nature in this respect. Although the decision does not address state action questions, the implication is that for the state, here represented by the U.S. Supreme Court, the "act" by giving Mrs. Bradwell her remedy would be unconstitutional state action in much the way state intervention into the play of the "natural" forces of the market would have been unconstitutional state action in the pre-New Deal era. The logical outcome of further judicial treatment of *Bradwell* type claims would have been the constitutionalization of the husband's right of dominion, much in the way liberty of contract jurisprudence constitutionalized the dominion of accumulated wealth. In fact, an argument can be made that the traditional notion of the family as a sacrosanct institution has indeed been constitutionalized under the guise of a constitutional right to privacy. Thomas Grey[31] maintains after a review of the jurisprudence on privacy rights:

> These cases strongly suggest that the Court meant what it said in *Griswold*: that the right or privacy protects only the historically sanctified institutions of marriage and the family, and has no implication for laws regulating sexual expression outside of traditional marriage . . . . The contraception and abortion cases are simply family planning cases. They represent two standard conservative views: that social stability is threatened by excessive population growth; and that family stability is threatened by unwanted single parent families, irresponsible youthful parents, and abandoned or neglected children.[32]

Catherine MacKinnon, expanding on Grey's position, writes:

> To fail to recognize the place of the private women's subordination by seeking protection behind a right to that privacy is thus to be cut off from collective verification and state support in the same act. The very place (home, body), relations (sexual), activities (intercourse and repro-

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31 T. Grey, "Eros, Civilization and the Burger Court" (1979–80), 43 Law and Contemporary Problems 83.

32 *Ibid.*, pp. 87–8.

> duction), and feeling (intimacy, selfhood) that feminism finds central to women's subjection form the core of privacy doctrine.[33]

The severance from state support addresses the immunizing effect of separate sphere thinking which lives on in the constitutionalization of marital privacy. The severance from collective verification addresses the further privatizing and particularizing of the experience of subordination under the aegis of formal, juridical equality. MacKinnon goes on to argue that the feminist response to inequality has been to politicize the personal rather than transcend it in the manner of liberal efforts at reform.[34]

Feminists in Mrs. Bradwell's era sought to break the bondage of a public/private split imposed on women by drawing parallels between the status of a slave or serf and that of women. Ironically, they drew on the individualist ideology of the marketplace in order to buttress their demands for equal rights and freedom of choice and to inform their critique of the authoritarian structure of the family.[35] Their efforts were partially rewarded by legislative reforms which repealed the more egregious common law rules. As women were slowly granted juridical equality with its full panoply of "fictive options" within the marketplace and to a certain extent within the family, the Lochnerian notions that provided the fuel for women's demands were crumbling in the area of economic inequality, allowing massive government intrusions into the marketplace to correct the abuses of private power. Furthermore, the shift from state neutrality toward preexisting power relationships within the family to state neutrality toward husband and wife as juridical equals, had the same effect on women's subordination that a comparable shift from slavery to citizenship had on black subordination. Olsen describes it as a shift from a direct to an indirect mode of legitimizing oppression.[36] I would suggest, additionally, that the shift was from the overt public/private split of separate sphere ideology to the more covert public/private split contained within the notion of formal equality. The "fictive option"

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33 C. MacKinnon, "Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence" (1983), 8 Signs: Journal of Women in Culture and Society 635 at 657.

34 *Ibid.*

35 See Easton, "Feminism and the Contemporary Family" in *Heritage of Her Own*, Cott, N. and E. Pleck, eds. (Oregon: Touchstone Books, 1980), p. 555 and pp. 557–561.

36 *Supra*, note 28 at pp. 1529–1560.

of equal access to the protection of neutral laws is a device which removes the private experience of the oppressed as members of a discriminated class from legal relevance. So long as oppressors and oppressed are treated equally by the laws, the patterns of actual choices exercised by oppressors are constitutionally irreproachable because they are private. Thus formal equality assumes an ideal world where discrimination consists of isolated deviations from the norm rather than dealing with the real world whose starting point is a widespread historically determined imbalance.

MacKinnon's strategy of politicizing the personal is a challenge to the sexist bias of privacy doctrine which promotes women's subordination within the private sphere of the family. I suggest, in Part 5 of this essay, that this strategy necessarily entails a collapse of the internal public/private split entailed in "fictive option" reasoning.

4. BENDING THE STATE ACTION RULE: EXCEPTIONS AND ANOMALIES

The social and political pressures of the depression years led the courts to reformulate accepted notions of liberty in order to allow urgently needed public intervention into the private sphere of economic ordering. Formerly unconstitutional labour legislation on the Lochnerian analysis passed constitutional scrutiny on the *West Coast Hotels* v. *Parrish*[37] analysis. Notions of the inviolability of contractual choice were translated into "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."[38]

The demystification of private choice was spurred on by the Legal Realist movement of the 1920s and 1930s and entailed an inevitable blurring of public/private distinctions. Morton Horwitz describes the impact of the Realists on that distinction as follows:

> Parallelling arguments then current in political economy, they ridiculed the invisible-hand premise behind any assumption that private law could be neutral and apolitical. All law was coercive and had distributive consequences, they argued. It must therefore be understood as a delegation of coercive public power to individuals and could only be justified by public policies. Contract, that most "private" of nineteenth-century legal

37 (1937), 300 U.S. 379, 57 S. Ct. 578.
38 *Ibid.*, p. 391.

> categories, was reconceptualized as simply a delegation of public power that could be justified only by public purposes.[39]

This essentially positivist vision of legal ordering undermined natural law notions of constitutional rights. It had an equally devastating effect on state action doctrine, creating what Paul Brest describes as the "positivist dilemma". Without a social and political consensus regarding the natural ordering of human experience into exclusive public and private spheres, Justice Bradley's assumption that judicial action could be state action seemed to lead logically and inevitably to the intrusion of the state into every area of daily life—a totalitarian nightmare. As Brest points out, "more fundamentally, since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the State in every 'private' action not prohibited by law."[40] In other words, without a "natural" public/private split to channel our expectations of what it is proper for governments to do and not do, constitutional rights become affirmative rights which impose affirmative duties on governments to intervene to redress deprivations in civil society.[41]

The consequence of this dilemma was that a narrow test for state action was adhered to in spite of the theoretical inconsistencies it engendered and long after the Reconstruction era's need to defer to state sovereignty had passed. Paul Brest uses the recent case of *Flagg Bros. v. Brooks*,[42] which concerned property rights and the constitutionality of self-help credits' remedies, to demonstrate the continuing survival of those inconsistencies and of ambivalence with regard to the relationship of the citizen to the state. In that case, Justice Rehnquist took an extremely positivist view of property rights, declaring that they do not exist somewhere out in the "legal stratosphere" but that they are comprised of the "statutory and decisional law" of the jurisdiction. However because, as he pointed out, it would "intolerably broaden" the scope of the Fourteenth Amendment to hold that the "mere exis-

39 M. Horwitz, "The History of the Public/Private Distinction" (1982), 13 U. Penn L.R. 1423 at 1426.

40 *Supra*, note 10 at p. 1301.

41 It has in fact been suggested to me by Professor McBride that an alterriative way of addressing the public/private split in section 32(1) of the *Canadian Charter* is to argue that section 7 does impose affirmative duties on the state, and that therefore it makes no sense to interpret section 32(1) as posing a threshhold test for constitutional application.

42 (1978), 436 U.S. 149, 98 S. Ct. 1729.

tence of a body of property law" is state action, he fell back on the essential dichotomy between public and private acts.[43] In the course of his reasons, Justice Rehnquist cited *Civil Rights Cases* for the proposition that "most rights secured by the Constitution are protected only against infringement by governments."[44] This characterization of Justice Bradley's decision as creating a narrowly defined threshold requirement of state action, which precludes any discussion of the substantive issues, remains a testimony to the judiciary's tenacious self perception of being a neutral arbiter in providing rememdies to private litigants. However, where the inter-relationship between public and private power either via public acquiescence in private acts or judicial redress of private claims has resulted in such gross transgressions of constitutional rights that the Court feels compelled to intervene, it has spawned a host of unworkable and extremely malleable exceptions to the strict public/private split.

On the face of it, *Marsh* v. *Alabama*[45] seems to offer the most viable of those exceptions. In *Marsh*, the private owners of a company town sought to prevent a Jehovah's Witness from distributing religious literature on its sidewalks. The town managers had told her that she needed a permit to distribute literature and that no permit would be issued to her. Upon her refusal to leave the sidewalk, she was arrested and charged under an Alabama statute for remaining on the premises of another after being asked to leave. Her defence to the charge was that to penalize her in this manner constituted an infringement of her rights to freedom of the press and of religion under the First Amendment.

Read by itself, the *Marsh* decision could be viewed as a return to a notion of state action that flows from a natural law conception of rights. Although the case later came to stand for the "governmental function" exception to the state action rule, Justice Black writing for the Court approaches the issue in terms of balancing proprietary rights against rights of expression. However, in Justice Black's view, the liberty of the citizen to own property must give way to fundamental rights of expression—in contrast to Justice Bradley's balancing of equal protection against contractual rights. This is because rights of expression are essential to the integrity of the democratic process. He wrote:

43 *Ibid.*, p. 160, and note 10 at p. 165.
44 *Ibid.*, p. 156.
45 (1946), 326 U.S. 501, 66 S. Ct. 276.

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights." *Schneider* v. *State*, 308 U.S. 147, 161. In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.[46]

Although Justice Black did take time to point out the ways in which the corporate proprietor resembled a state actor, his decision does not seem to be overly concerned with the state action problem. Rather it seems to assume, in the style of *Lochner* and parts of *Civil Rights Cases*, that the boundary line between public and private is evident. However, unlike those cases, the line must give way because the processes of decision-making in a democratic community are at stake.

Later cases, however, emphasize the peculiar aspects of the fact situation in *Marsh* and treat the case as a limited exception to the narrow state action rule. The erosion began in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*.[47] There, the Court applied *Marsh* reasoning to a dispute between the proprietor of a supermarket and its employees who sought to exercise their rights of expression by picketing in front of the parcel pick-up and in the shopping centre parking lot. The Pennsylvania Supreme Court upheld the issuance of an injunction on the basis of trespass. The Supreme Court reversed that decision, invoking the "goal of free expression and communication that is at the heart of the First Amendment." However, Justice Black in dissent objected strongly to this use of his reasons in *Marsh*:

> In affirming petitioners' contentions the majority opinion relies on *Marsh* v. *Alabama*, *supra*, and hold that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers,

46 *Ibid.*, p. 509.
47 (1968), 391 U.S. 308, 88 S. Ct. 1601.

> stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact that it "is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U.S., at 502. Again toward the end of the opinion we emphasized that "the town of Chickasaw does not function differently from any other town." 326 U.S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town".[48]

And later:

> But I respectfully suggest that this [the majority's] reasoning completely misreads *Marsh* and begs the question. The question is, under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, i.e., "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U.S., at 502.[49]

The erosion became more evident in *Lloyd Corp.* v. *Tanner*[50] which narrowed the majority's reasons in *Logan Valley* by holding that the exercise of rights in shopping centres must somehow relate to the business of the shopping centre. Thus union picketers were constitutionally acceptable; anti-war leafleters were not.

Finally, in *Hudgens* v. *NLRB*,[51] the Court decided that the distinction drawn in *Lloyd* was unmanageable. The Court retreated to the apparent safety of a tidy public/private split and vindicated Justice Black's narrow interpretation of his own reasons in *Marsh*. In sum, *Marsh* came to stand for a governmental function test in which the descriptive attributes of state power were more important than the actual impact of corporate power on community life.

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48 *Ibid.*, pp. 330–331.
49 *Ibid.*, p. 332.
50 (1972), 407 U.S. 551, 92 S. Ct. 2219.
51 (1976), 424 U.S. 507, 96 S. Ct. 1029.

A second exception to the state action rule emerged from the case of *Burton* v. *Wilmington Parking Authority*.[52] Here the Court, rather than undertake the treacherous task of fashioning a logical exception, or worse yet, of re-examining the theoretical foundations of state action doctrine, proposed that the key was to find an appropriate degree of government involvement in the transaction at issue by examining each case in its context. In *Burton*, a restaurant, which leased its premises from a state owned and operated parking garage, refused to serve coffee to the appellant solely because of the appellant's race. The Supreme Court of Delaware denied relief on the basis that the restaurant was acting in a purely private capacity. Justice Clark, writing for the majority, began his analysis with Justice Bradley's "individual invasions" formula. However, he went on to explain that the state can become involved in private conduct to such a significant extent that the threshold requirement of a state actor is met. Once again, the focus was not on the negative impact of private power on fundamental rights but rather on the descriptive aspect of the particular situation before the Court. The financial arrangements between the Parking Authority and the restaurant were examined along with the physical integration of the two functions within the building. The degree of public involvement required in order to trigger constitutional application remained obscure. Justice Clark asserted that "to fathom and apply a precise formula for recognition of state responsibility under the Equal Protection clause is an impossible task."[53] He proposed instead that "only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance."[54] Thus once more, the Court tailored the exception to the state action rule to the details of the dispute before it. This myopic focus left out the broad contextual facts of pervasive racial discrimination and its relationship to the exercise of private power.

Finally, in *Reitman* v. *Mulkey*[55] the Court again skirted the issue by reference to yet another extremely elusive standard, that of "authorization and encouragement." The case involved the repeal by a State legislature of a State constitutional provision which prohibited racial discrimination in housing. The repeal effectively immunized the housing market from equality constraints. This put the Court in a

52 (1961), 365 U.S. 715, 81 S. Ct. 856.
53 *Ibid.*, p. 722.
54 *Ibid.*
55 (1967), 387 U.S. 369, 87 S. Ct. 1627.

difficult position. If it found that the repeal itself was unconstitutional, the implication would be that a legislative failure to enact protection where racial discrimination pervades private transactions is also unconstitutional. Thus the public/private distinction could dissolve and the State would find itself encumbered with a positive duty to correct the abuses of private power. Instead the Court rested its decision on the finding that the repeal "authorized and encouraged" racial discrimination. The Court reiterated Justice Clark's sentiments that articulating an "infallible formula" for determining state action is an "impossible task".

Against this background, the cases of *Shelley* v. *Kraemer*[56] and *New York Times* v. *Sullivan*[57] seem to be curious anomalies. They cannot accurately be described as exceptions to the state action rule. Rather they are more in the nature of a different conceptual approach to the state action problem, an approach in some ways reminiscent of Justice Black's initial balancing of substantive rights in *Marsh*.

Shelley v. *Kraemer* is especially anomalous because, unlike *New York Times* v. *Sullivan*, it never became a case of any precedential weight. Decided in 1948, just two years after *Marsh* and several years before the shopping centre cases, *Burton* and *Reitman*, it cursorily rejected state neutrality in the provision of court remedies. Chief Justice Vinson declared:

> It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.[58]

Presumably the reason subsequent cases avoided *Shelley* and fell back on either the public function analysis in *Marsh* or developed equally unsatisfactory alternative standards for finding state action is because of the fear that *Shelley*, in Justice Rehnquist's words in *Flagg Bros.* v. *Brooks*, would "intolerably broaden" the reach of the constitution, i.e., the positivist's dilemma. Chief Justice Vinson has been faulted for his claim in *Shelley* that he was not overruling previous law. Although it is difficult to reconcile his decision with cases that dealt with similar covenants,[59] he was in fact simply reviving Justice

56 (1948), 334 U.S. 1, 68 S. Ct. 386.
57 (1964), 376 U.S. 254, 84 S. Ct. 710.
58 *Supra*, note 56 at p. 17.
59 *Supra*, note 15.

Bradley's original statement that judicial action was indeed state action. Only now it was no longer accompanied by Justice Bradley's assumption that the natural order with its separate compartment for "individual invasions" would of course provide a workable test for separating constitutional judicial action from unconstitutional judicial action.

Unlike *Shelley, New York Times* v. *Sullivan* has not been relegated to obscurity. It concerned a libel suit between private litigants in which the defendant raised a First Amendment defence. The Court found no need to go through the contortions of public function analysis or *Burton* type "sifting and weighing" of the circumstances to find an appropriate degree of government acquiescence. Instead, Justice Brennan announced in a manner reminiscent of Chief Justice Vinson:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has been exercised.[60]

Why is the implication of the state in private law adjudication so obvious as to be unremarkable in *Sullivan,* while the same implication in *Shelley* has been treated as a radical and dangerous step towards an intolerable constitutionalization of daily, private life? I believe the answer lies in judicial attitudes toward the underlying substantive claims. The nature of the First Amendment values of free speech and free press required the *Sullivan* court to consider the private dispute before them "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[61] Thus, in order to avoid imposing a regime of self-censorship on the press via the common law rules of libel which could result in suppression of truthful speech and ultimately in damage to political health, the Court felt obliged to allow some leeway for the expression of possibly defamatory, untruthful speech.

60 *Supra,* note 57 at p. 265

61 *Ibid.*, p. 270.

The change in approach becomes even clearer in the subsequent case of *Gertz* v. *Robert Welch*[62] which modified the *Sullivan* rule. In *Sullivan*, the plaintiff was a police chief who claimed he had been implicitly maligned by an ad placed in the *New York Times* by four civil rights activists. In *Gertz*, the plaintiff was a lawyer who had prosecuted a notorious civil suit and was consequently labelled a communist in a magazine article. The suit against the magazine failed at the state level on the basis of the *Sullivan* rule. However, the Supreme Court in *Gertz* limited the rule to public debate on public figures by invoking the countervailing value of "the essential dignity and worth of every human being" and the "protection of private personality."[63] Thus constitutional protection was denied, not because the defendant was a private actor but because a balancing of the substantive claims favoured a privacy right that fostered human dignity.

5. BEYOND PUBLIC/PRIVATE: A REVISED THEORY OF EQUALITY

There are two essential lessons in terms of state action doctrine and equality that may be gleaned from the defamation cases. The first is that the abandonment of a formalistic dichotomy between private and public action does not necessarily entail a totalitarian intrusion of the state into our private lives. The fact that constitutional application is an issue of substantive policy which is linked to the right asserted, does not rule out consideration of countervailing values. The second is that although it is a good deal more satisfying to tailor the boundaries of state responsibility to the scope of the substantive claim rather than rely on an arbitrary and unworkable test, the consequences for equality claimants are not likely to be very significant if notions of equality retain their own internal public/private split, thus remaining largely procedural in content. In order to give substantive content to equality rights, the private—in the sense of legally irrelevant—world of the victim's actual experience of oppression must be given credence. A review of the cases discussed so far and equality jurisprudence in general makes this latter point clearer and perhaps explains the feminist strategy of politicizing the personal.

In *Civil Rights Cases*, Justice Bradley quite clearly made the point

62 (1973), 418 U.S. 323, 94 S. Ct. 2997.

63 *Ibid.*, p. 339.

that action by judicial officers could be state action. However, he was able to avoid a direct examination of the consequences of that position because the corrective legislation at issue made no distinction between states with differing common law responses to discrimination. Thus he could state that it was unnecessary to go on to decide the very different question of whether there actually is a constitutional right to enjoy equality in the provision of services. However, as discussed in the earlier part of this essay, his use of "fictive option" reasoning suggests that he was actually relying on a notion of "equal protection of the laws" which was entirely procedural in content. This description of equality has very little to do with an articulation of equal protection which guarantees non-discrimination "against the negroes as a class, or on account of their race,"[64] a notion which looks at transactions in the context of social and historical conditions. Instead, equality as articulated in the subsequent case of *Barbier* v. *Connelly*,[65] is viewed as a value-neutral principle which corrects the over-inclusiveness or under-inclusiveness of legislative or common law classifications in relation to their purposes. Such an approach examines technique rather than content, means rather than ends. Thus it would be somewhat illusory to argue that Justice Bradley would have reached an entirely different decision if the focus of the impugned legislation and of the evidence led, had been on specific state common law or statutory rules that effectively discriminated against "negroes as a class." This contention is borne out by later cases which did proceed on that footing, most notably *Plessy* v. *Ferguson*,[66] which sanctioned widespread Jim Crow legislation under the "separate but equal" doctrine. As Nerken points out, after *Plessy*, resort to state law by black people would do no more than vindicate their right not to be put in the same railway cars or schools as white people, much in the way that after *Attorney General of Canada* v. *Bliss*,[67] resort to legal redress of pregnancy discrimination would do no more for Canadian women than vindicate their rights not to be treated differently than other pregnant women. Although American equal protection jurisprudence has sought to stretch the focus on legislative technique to achieve substantive goals, the limitations of a process-oriented definition of equality

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64 *Supra*, note 20.

65 (1885), 113 U.S. 27, 5 S. Ct. 357.

66 *Supra*, note 23.

67 [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 23 N.R. 527, 92 D.L.R. (3d) 417 (S.C.C.).

often result in those efforts backfiring. The affirmative action/reverse discrimination cases provide a good illustration of this.[68] Furthermore, although a value choice may be implicit in a choice of technique—for example that certain classifications are suspect—the effect of claiming that judicial decision-making merely involves the application of neutral, means-oriented rules is not only to remove the complaint from the setting which compelled the implicit value choice in the first place, but also to present it as a one-dimensional, ahistorical phenomenon.[69] Thus, *Brown* v. *Board of Education*,[70] which in fact did look at social patterns of subordination and exposed the sophistic reasoning of *Plessy* in favour of equality of opportunity, ultimately gave black children neither the right to an integrated education[71] nor a right to equality of resources of their schools.[72] Rather, as *Brown* was interpreted in later cases, it gave them a right to remain in black and impoverished school districts so long as district boundaries had been arrived at in a neutral manner.[73] This approach to equality attests to the positivist emphasis on procedural justice which stems from the conviction that it is philosophically impossible to resolve normative conflicts. Thus in positivist terms, a substantive normative theory of equality is philosophically and legally untenable.

It is no wonder then that the collapse of the public/private dichotomy is of no consequence in *Sullivan* and is threatening in *Shelley*. *Sullivan*, like *Marsh*, is a vindication of a right which has traditionally been linked to the legitimation of the democratic political process rather than to any substantive goals that the process is purportedly setting out to achieve. It is significant that in the "white primary" cases where the claim centres around the frustration of the right to vote by private associations, the Court also has comparatively little trouble with the state action issue.[74] Thus the critical difference between *Civil Rights Cases* and *Sullivan* does not lie in the approach to

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68 See *Regents of the University of California* v. *Bakke* (1978), 98 S. Ct. 2733, 438 U.S. 265.

69 This analysis draws on Alan Freeman's discussion of equal protection in "Legitimizing Racial Discrimination through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1977–78), 62 Minn. L.R. 1049.

70 (1954), 347 U.S. 483, 75 S. Ct. 753.

71 *Milliken* v. *Bradley* (1974), 418 U.S. 717, 402 F. Sup. 1096.

72 *San Antonio Independent School District* v. *Rodriguez* (1973), 411 U.S. 1, 93 S. Ct. 1278.

73 *Supra*, notes 70 and 71.

74 See *Terry* v. *Adams* (1953), 345 U.S. 461, 73 S. Ct. 809.

state action. Indeed, a closer examination of Justice Bradley's decision reveals that the two decisions are not that far apart on that issue. Rather, the difference occurs in the replacement of the market process with the political process as the institution that legitimates judicial deference to private choices. On the other hand, *Shelley* implies a public interest that is not purely procedural in that it does indeed include a substantive right to provision of services, in this case housing, and abandons "fictive option" reasoning and a notion of equality that is satisfied by equal access to cosmetically neutral laws. As Lawrence Tribe points out, an assertion that *Shelley* was rightly decided is an assertion that "neutrality does not suffice in matters of racial segregation in housing."[75] The finding that judicial action is state action is not nearly so threatening as the finding that this is unconstitutional state action. It is on this point that *Shelley* radically departs from Justice Bradley's analysis, namely through its requirement of real alternatives, rather than "fictive options".

The requirement of real alternatives by the *Shelley* court unfortunately can only be implied. I have suggested above that this is the heart of the *Shelley* decision and the true reason why subsequent courts refrained from following its lead. I would further suggest that the inquiry into the historical and social factors surrounding a complaint, which this requirement of alternatives automatically entails, contains the only workable measuring stick for unconstitutional state action in a legal regime that professes to give substantive content to equality without reference to a divine or natural order of rights. The unconstitutional discrimination in *Shelley* cannot be distinguished from the discrimination inherent in any contractual choice, without attention to context. At some point in the spectrum, contractual choices are legitimately private; that is, they are legitimately discriminatory in the broad sense of that word. That point is reached by taking account of social and historical realities.

Placing the *Shelley* decision in its context makes the case seem less peculiar, less radical. That the *Shelley* court had access to those sociological facts is made very clear by Richard Kluger in his account of the background of the case.[76] Kluger points out that by the time *Shelley* reached the Supreme Court the use of racially restrictive covenants had become so widespread that the Federal Housing Authority drew up a model covenant and promoted its use in the interest of

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75 *Supra*, note 10 at p. 1168.

76 *Simple Justice* (New York: Knopf, 1976), pp. 245–55.

social stability. Under the separate but equal doctrine of *Plessy,* public housing projects were officially segregated, thus creating a situation in which white units would remain vacant due to a lack of applicants while black applicants were put on long lists for black units.[77] Three of the Justices who were to hear the *Shelley* case disqualified themselves, and as Kluger has noted, the "inference most widely drawn (by the disqualification) was that they themselves owned or occupied premises covered by restrictive covenants."[78] However, what is perhaps more significant is that by 1948, the black housing crisis had generated enough political pressure to alter attitudes at the executive level of the federal government. A presidential committee urged the Justice Department to enter into the fight against restrictive covenants. Consequently, the Department submitted an *amicus curiae* brief to the *Shelley* Court which maintained that the segregation of black people in urban slums which resulted from restrictive practices was contrary to the national interest. For its part, the N.A.A.C.P. team of lawyers who litigated the case presented voluminous "Brandeis briefs" incorporating a wide range of economic, sociological and medical data. The Court was literally inundated with material on the social effects of discrimination; the Court had clear signals that the political will was receptive to a change. Although today the decision seems legally insecure and perhaps radical, in actuality the Court chose an outcome that was comparatively safe. A week after the Supreme Court agreed to hear *Shelley,* President Truman declared in an address to the N.A.A.C.P.: "The extension of civil rights today means not protection of the people against government, but the protection of the people by the government."[79] That statement by itself should have indicated to the Court that it was time to dismantle state action doctrine, as well as to revise notions of equality. The *Shelley* decision in effect performed both of those tasks, unfortunately without setting out a framework to guide analysis in future decisions.

In some aspects feminist critique can be viewed as an attempt to deal with the analytic gaps left by equality theories which fail to give legal relevance to that collective experience of women in the way that the *Shelley* court gave relevance to the historical and social facts of black experience. The attainment of juridical equality for women in the early 20th century within the family, the market, and at the polls

77 *Ibid.*, pp. 246–47.
78 *Ibid.*, p. 254.
79 *Ibid.*, p. 250.

has proven as illusory as the attainment of juridical equality for black people after the Civil War. The position articulated by writers such as Catharine MacKinnon and Fran Olsen that substantive equality requiries the abrogation of the public/private split is a response to the historical fact that formal equality exists side by side with societal acceptance of informal and private treatment of women as men's inferiors. The granting of a legal capacity to a woman to bargain with her husband for a share of family property or with her employer for better wages does little to remedy the overall economic dependence of women in society. Instead of deferring to the separate sphere of authoritarian hierarchical arrangements within the traditional family, the law is now deferring to the separate sphere of private individualized choices which to a great extent preserve the expectations of a white male hierarchy and of a sexual and racial division of labour. As with the covenant in *Shelley*, discrete transactions between men and women are constitutionally irreproachable (apart from state action considerations) if considered on an individual basis and if measured against an "equality of opportunity" standard of justice. Reforms which achieve formal equality thus only privatize and particularize inequality, encouraging society and women themselves to blame the victim of her failures, much in the way Justice Bradley impliedly blamed the black plaintiffs in *Civil Rights Cases* for their deprivations. Thus one private domain, that of "fictive options," has replaced another, that of male hierarchy, with basically the same outcome.

MacKinnon's critique in *Feminism, Marxism, Method and the State*[80] sets out to develop a feminist theory of the state which is predicated on a perception of the state as we know it, as a male institution. She writes:

> The state's formal norms recapitulate the male point of view on the level of design. In Anglo-American jurisprudence, morals (value judgments) are deemed separable and separated from politics (power contests), and both from adjudication (interpretation). Neutrality, including judicial decision-making that is dispassionate, impersonal, disinterested and precedential, is considered desirable and descriptive. Courts, forums without predisposition among parties and with no interet of their own, reflect society back to itself resolved. Governments of laws not men limits partiality with written constraints and tempers force with reasonable rule following. . . . But the demarcations between morals and politics, the personality of the judge and the judicial role, bare concern and the rule

80 *Supra*, note 33.

> of law, tend to merge in woman's experience. Relatively seamlessly they promote the dominance of men as a social group through privileging the form of power—the perspective of social life—feminist consciousness reveals as socially male. The separation of form from substance, process from policy, role from theory and practice, echoes and reechoes at each level of the regime its basic norm: objectivity.[81]

She uses the public/private split as a central example of the state's "recapitulation of the male point of view." Thus in her analysis of rape laws, she concludes that, here, privacy means that consent can be presumed unless disproven. The standard for criminality for an act of rape is based on how the act is viewed by the assailant. This excludes consideration of the assailed woman's viewpoint from which purportedly consensual sex is experienced in a social climate that condones and eroticizes male domination.[82]

Her analysis in many respects parallels Alan Freeman's critique of racial equality jurisprudence in which he maintains that the existing law recapitulates the perpetrator's perspective, rather than the victim's perspective.[83] From the perpetrator's view, Freeman writes, inequality consists of a bundle of specific violations. Therefore a justiciable complaint and its legal remedy begin and end with the individual violation at issue. State action doctrine focuses in on the nature of the individual actors, further limiting the range of justiciable violations and on a more fundamental level denies the pertinence of the individual, private experience of inequality. From the victim's perspective, inequality is a social condition comprised of lack of jobs, money, housing, and the consciousness associated with being a member of a permanent underclass. Thus the content of equality for the oppressed individual is inextricably bound up with the social experience of widespread substantive inequality of the oppressed class. What should be determinative from the victim's viewpoint in *Shelley* is not the nature of the actors nor the damage inflicted by that particular covenant, but the historical and social fact of a national housing crisis for black people. Constitutional application—the intrusion of public into private—should be attuned to context, to the historical fact of widespread subordination.

Indeed, one might argue that the Court in *Marsh* v. *Alabama* was doing just that in its consideration of the breadth of the private com-

81 *Ibid.*, pp. 655–56.
82 *Ibid.*, p. 650.
83 *Supra*, note 69.

pany's power to effectively terminate fundamental rights and its implicit rejection of the dissent's reliance on the "fictive option" of travelling out of town to exercise those rights. Presumably the same situation would have existed if the company had wielded their power in a less governmental form to require town dwellers to sign covenants excluding Jehovah's Witnesses. However, unless the court approved a methodology that tailored constitutional application to context, state action doctrine and the governmental function test would preclude relief in the latter situation. State action doctrine in this sense stands for the proposition that context is irrelevant because it is private, that "civil society", the very social conditions that inform the victim's perception of inequality, are hermetically removed from constitutional regulation. To reject the public/private premise of state action doctrine is to validate the victim's perspective, to give credence to the individual experience of a social condition, and at the same time to allow that experience to give substance to an equality right.

There are two objections to such a radical switch in methodology. First, to replace a mechanical rule with attention to context is to introduce flexibility at the expense of certainty in the law. However, I would suggest that the contextual facts which should be determinative, verge on the sort of pervasive social conditions that judges traditionally acknowledge under the rubric of judicial notice. Furthermore, as in *Shelley* such "legislative facts" often play a pivotal if hidden role in judicial decision-making, thus sacrificing judicial credibility on the altar of the abstract value of certainty. What is proposed is the opening up of a process that is, to a large extent, already in place. In Canada there is the additional possibility of using section 1 of the *Charter* to characterize contextual, historical facts of widespread subordination as a limit which can be "demonstrably justified" on the equal treatment standard in section 15(1). Section 15(2), which expressly exempts affirmative action programs from being struck down under section 15(1), reinforces this interpretation. Furthermore, section 15(1) itself, which includes a guarantee of "equal benefit of the law," would seem to invite a focus on the substantive impact of laws that otherwise appear to treat men and women equally. Although judicial treatment of these features remains to be seen, their appearance in the *Charter* can be viewed as a shift from the perpetrator's perspective to the victim's perspective, from a liberal emphasis on form to a post-liberal emphasis on substance.

The second objection resembles the positivist dilemma discussed earlier. MacKinnon's statement that the personal is political is a demand that the victim's perspective be given legitimacy. However, it

also seems subversive of the equally legitimate desire to safeguard the privacy that engenders intimacy, affection, and altruism, as well as the value of human dignity protected by *Gertz*. A corollary of this is the view of some feminists that the values associated with woman's traditional role are worthwhile and should not be jettisoned in the process of equalizing sexual relations.

I would suggest that the collapse of the private/public or family/ market split seems threatening because privacy rights have seldom been articulated in affirmative terms. Instead, privacy has been viewed as a negative space in hostile opposition to the public sphere and where one can do as one pleases. Impliedly, intimacy, affection,and the altruism of familial relations can flourish only within such negative space. The same "delicate flower" theory is also used to resist governmental tampering with the balance of the forces of the marketplace.[84] MacKinnon's frontal attack on the public/private split threatens to devastate these fragile balances and to shatter the climate which is assumed to be necessary to foster selflessness, caring for others, and love. In this regard it is as important to extricate altruistic values from their association with hierarchy as it is to extricate the values of freedom and equality from their association with the individualist ethic of the market. MacKinnon's exposé of the sexist bias of our institutional structures must be accompanied by an affirmation of non-sexist values. Otherwise we remain locked into a pattern of repeated mistakes. Olsen uses the example of state attempts at reform which are based on the altruistic model of the family rather than the individualist model of the market. Because of the failure to separate altruism from hierarchy, these efforts reproduce and sometimes increase subordination. Thus within the market, labour legislation such as that condoned in *Muller* v. *Oregon*[85] ultimately underscores and justifies sexual hierarchy. Laws designed to ensure that, within the family, a husband will support his wife and children are likewise altruistically motivated. However, although they limit the husband's ability to abuse his power, they nonetheless leave most of the power in his hands.[86]

An alternative approach would start from a definition of privacy that rejects an interdependency based on need in favour of one based

84 For a discussion of the development and implications of the "delicate flower" argument, see Olsen, *supra*, note 28.
85 (1908), 208 U.S. 412, 28 S. Ct. 324.
86 *Supra*, note 28.

on human dignity and the enrichment of the human personality through social relationships. State intervention would not take the form of a paternalistic response to need but rather would democratize social institutions in order to make relationships based on sharing and intimacy possible in a non-hierarchical context. Within this philosophical framework, the public, in the sense of civil society, becomes integral to the private in the sense of personal fulfillment. An example of this inter-relationship is illustrated in a series of cases before the European Commission on Human Rights in which the right of a transsexual to have public registries reflect his or her gender change was seen to flow from Article 8 of the European Convention on Human Rights,[87] which protects an individual's right to respect for his or her private life. In *VanOosterwijck* v. *Belgium*,[88] Judge Van Der Meesch stated in his concurring opinion:

> A man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person, will be unable to play his or her full role in society. As has been said, the right to such recognition is a general principle of law.[89]

An analogous argument from the feminist point of view would maintain that legal rules which impose male norms on women are a form of non-recognition by the state which interferes with personal fulfillment and with the concomitant ability to "play a full role in society." Thus public and private are no longer in hostile opposition but verify and support each other. The "private" remains a valid distinction as in legitimately "discriminatory" contractual choices or *Gertz* type values of human dignity, but the reference to community can no longer be evaded by an invocation of an *a priori* public/private split.

6. CONCLUSION

An analysis of the state action doctrine forces one to re-examine the assumptions that underlie the ideal of constitutions as contracts between governments and citizenry whose terms outline inviolable boundaries of power. That essentially natural law theory of govern-

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87 Signed Nov. 4, 1950, entered into force Sept. 3, 1954, 213 U.N.T.S. 222. My thanks to Professor P. Girard for alerting me to the European Commission cases.

88 (1981), 3 E.H.R. 557. See also *X* v. *Federal Republic of Germany* (1977), 11 D.R. 16 (1979), 17 D.R. 21.

89 *Ibid.*, p. 557.

ment ignores the phenomenon of modern corporate power, which, because of the accepted deference by government to private action that our culture identifies with freedom, can and often does effectively terminate individual rights. On the other hand, the positivist view of rights, as having their source in law, in its extreme form rejects the possibility of a substantive normative theory of rights and thus offers no guidance for limiting state intrusion into individual private lives.

The tension between natural rights and positivist theories manifests itself in the inconsistencies of state action jurisprudence. From the point of view of equality claimants, the resolution of the conflict in defamation case law is ostensible only. In *New York Times* v. *Sullivan* and *Gertz* v. *Robert Welch,* constitutional application was impliedly treated as an issue of substantive policy rather than as a threshhold issue to be determined by an unworkable distinction between private and public actors. However, the core values that were being protected by this change in methodology, freedom of speech and of the press, were procedural in nature. A comparable methodology which tailored constitutional application to the scope of equality rights as they have been defined in liberal theory would not change the outcome of most cases. Because liberal theories of equality have been preoccupied with equal access, opportunity, and treatment rather than with inequalities in outcome and condition that are rooted in social and historical imbalances, they in a sense contain their own internal public/private split. A process-oriented, formal theory of equality focuses only on the even-handedness of the application of legal rules and thus treats as legally irrelevant the private experience of victims of discrimination as members of a class of victimized individuals. Thus to subject common law as well as statutory rules and judicial as well as legislative action to constitutional scrutiny is to alter the formal structure of judicial analysis without effecting a difference in terms of remedying the substantive inequalities which define the experience of inequality from the victim's viewpoint. A coherent doctrine of state action requires a shift in focus from the search for a sufficiently "public actor" to the contextual facts of widespread subordination.

Feminist critique which links substantive equality to abrogation of an arbitrary public/private split mandates not only that judicial weight be given to the private experience of subordination but also that the values traditionally associated with privacy rights be redefined. Only when privacy has been linked to affirmative, non-authoritarian notions of human fulfillment and dignity will the tension between substantive equality and human freedom achieve a balance that is acceptable to a diverse human community.