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CONSTITUTIONAL LAW: FEMINIST CRITIQUES OF THE PUBLIC/PRIVATE DISTINCTION

*Frances Olsen**

Most of the work that I have published that deals with the topic of this symposium ("Private Power and the Constitution") raises questions about the "private" part of the title.¹ "Private" is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation.² Thus, for me, the topic suggests such questions as, "What does the person who wields power gain by successfully characterizing his power as 'private?'" and "What role does our written Constitution play in that advantage?"

One of the main things a power-holder gains from successfully characterizing his power as "private" is a degree of legitimacy and immunity from attack. Thus, it is predictable that people will try to characterize *their* use of power as "private" and to characterize power deployed *against* them as "not private"—that is, as public,

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1. E.g., Frances Olsen, *Does Enough Work Make Women Free? Part-Time and Full-Time Work Strategies for Women in the United States and Germany*, 53 *Indian J. of Social Work* 599 (1992); Frances Olsen, *Sex Bias in International Law: The UN Convention on the Rights of the Child*, 53 *Indian J. of Social Work* 491 (1992); Frances Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 *Int'l J.L. & Family* 192 (1992); Frances Olsen, *Unraveling Compromise*, 103 *Harv. L. Rev.* 105, 109-17 (1989); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. Mich. J.L. Ref.* 835 (1985) ("Myth"); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *Tex. L. Rev.* 387, 387-90 (1984); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983) ("Family and Market").

2. There is more to the assertion that privacy is contestable than simply that "public" and "private" are matters of degree rather than all-or-nothing: If one thing seems less public than another, the first may be considered private with respect to the more public thing, even though it might seem public if compared to something more private. More than this, however, public and private are used as normative claims about how something should be treated rather than just descriptions of the nature of that thing (or the agreed perceptions in our society about the thing). Privacy can be asserted or denied in numerous and varied contexts. Cf. Olsen, *Myth* at 835, 858-61 (cited in note 1) (illustrating some of the ways that state "intervention" in the family may be perceived as taking place or not taking place, even in similar circumstances).

oppressive, unjustified and unconstitutional. Struggles over power inform, fuel, and permeate the debate over the public/private dichotomy. At issue is support for or opposition to the status quo.

An actor who can successfully characterize his activity as "private" may gain either of two quite different constitutional advantages. First, the designation of conduct as "private" relates to the state action doctrine.³ If behavior is "private," those harmed by the action cannot successfully invoke the Fourteenth Amendment or most other provisions of the federal Constitution.⁴ In general, the Constitution protects against "public" violations, not "private" violations. The state action doctrine limits the scope of constitutional rights and limitations.

Second, "privacy" may be invoked as a right which itself provides a substantive limit on state action permitted by the constitution. Thus, some so-called "private" activity receives a degree of protection against state action that might interfere with the "private" action.⁵ An actor who can successfully characterize his activ-

3. For a discussion of the state action doctrine and the public/private distinction, see Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982). The state action doctrine maintains that most provisions of the Constitution protect individuals only from governmental action and do not limit or restrict private action. Therefore, private actors can engage in activity, such as discrimination, that would be unconstitutional if practiced by the government. The state action doctrine is premised on the notion that the Constitution defines the relationship between the government and the individual, not the relationship between private individuals. Concerned with personal liberty, the state action doctrine effectively protects private action as well as restricting government action.

As the papers in this symposium point out, the state action doctrine has been defined at some times broadly and at other times narrowly. In recent years, the state action doctrine has been narrowly defined, so most activity has been defined as private. The government must be significantly involved with the private activity, or the private activity must be something which is usually a public function. However, even if the government financially supports the activity, *Blum v. Yaretsky*, 457 U.S. 991 (1982), or licenses and regulates the activity, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), there is not enough government interaction to constitutionally protect those who have been harmed by the action. There is some indication that there must be either state decisionmaking or state compulsion before the state action doctrine will limit behavior. See *Blum*, supra, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

4. An important exception is the Thirteenth Amendment, which provides that neither slavery nor involuntary servitude "shall exist within the United States." For a creative and important argument that this provision should be read to provide a constitutional right for children against child abuse, see Akhil Reed Amar and Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992). See also Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 Yale J.L. & Feminism 207 (1992) (examining the relationship between involuntary servitude and intimate violence). The Fourteenth Amendment provides in contrast merely that "no state shall" abridge the privileges and immunities of citizens, "nor shall any state" deprive a citizen of various things "without due process" or deny "equal protection of the laws."

5. The constitutional right to privacy has been invoked to protect intimate family decisions from state intervention. The protected activity is generally personal in nature, and the

ity as "private" may gain the advantage of constitutional protection against state interference.

There is also a third important use of characterizing behavior as "private," which is less discussed in constitutional law but is particularly relevant to feminist critiques of the public/private distinction. Private may mean personal and domestic, as opposed to commercial; of the family rather than of the marketplace; home rather than work. An actor who can successfully characterize his activity as "private" in this third sense may or may not be able to invoke a constitutional "right to privacy" (that is, "privacy" in the second sense) but he may nevertheless be able to discourage state action that would inhibit his use of power, on the basis that domestic life *should* remain more free of government regulation than other aspects of life.⁶

Criticisms of the public/private dichotomy may relate to the state action doctrine, to the right to privacy, to the family/market dichotomy, or to some combination of these concepts.

Most of the papers in this symposium presuppose a familiarity with the public/private distinction and with standard criticisms of

issues revolve around a respect for individual autonomy and human dignity. But almost all protected activity is within the framework of the family. The court has generally relied on the Fourteenth Amendment Due Process Clause, not the right to privacy, to protect individuals' rights outside the family structure. See, e.g., *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).

The right to privacy has covered a wide range of personal choices. See, e.g. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (child rearing); *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978) (marriage); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (family living arrangements); *Roe v. Wade*, 410 U.S. 113, 152-56 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (contraception); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (education of children).

6. Domestic violence has traditionally not been investigated or prosecuted, in part because it is a "private concern." Because it occurs within the family, police and courts have been hesitant to intervene. See William A. Stacey and Anson Shupe, *The Family Secret: Domestic Violence in America* 153 (Beacon Press, 1983); Margaret Martin, *Battered Women*, in Nancy Hutchings, ed., *The Violent Family: Victimization of Women, Children, and Elders* 82 (Human Sciences Press, 1988); see also Nadine Taub and Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in David Kairys, ed., *The Politics of Law: A Progressive Critique* 151, 154-57 (Pantheon, 2d ed. 1990); Carol H. Lefcourt, ed., *Women and the Law* § 9.01 at 9-3 (Clark Boardman Callaghan, 1992) (discussing conception of domestic violence as a "private privilege of marriage"). Domestic violence is also a crime which is difficult for the victim to report, due to its situation within the family. Consequently, it is one of the most underreported crimes. Stephen R. Couch, *Research on Wife Abuse: A Scan of the Literature*, in Joseph J. Costa ed., *Abuse of Women: Legislation, Reporting, and Prevention* 2 (Lexington Books, 1983).

Similarly, child abuse has often been allowed to continue because it is considered within the domain of parental discretion. See Roberta Gottesman, *The Child and the Law* 33-34 (West Pub. Co., 1981) (emphasizing the primacy of parental discipline), Laurence D. Houllgate, *The Child & the State: A Normative Theory of Juvenile Rights* xii (Johns Hopkins U. Press, 1980) (positing that children are similar to the property of parents, in that parents have original rights).

the public/private distinction. Many of the papers treat the attack on the distinction as old hat or as obvious, as having no critical bite, or as probably exaggerated or wrong. This talk is a prelude to a brief, lucid, description of feminist critiques of the public/private distinction—a paper which I decided to write because last year I was teaching a legal theory course at the University of Frankfurt, *Neuere Entwicklung in der anglo-amerikanischen Rechtstheorie*, and very much wanted to give my students such a description but couldn't find one.

Criticism of the public/private distinction takes place on at least three levels. The first level of criticism questions the particular allocation between public and private. As students in the lower half of our classes put it, "Gee, the public/private distinction is *hard*." Or, as our better students are more likely to recognize, "Aha! The public/private distinction is open to interesting manipulation by a skillful constitutional lawyer." This first level of criticism presupposes that there is *state* action and there is *private* action. The problem is sorting out the middle—or more radically, that all private action can be made to look public and vice versa.⁷

Many feminist critiques take place on this first level. The so-called first wave of American feminism in the nineteenth century focused much attention upon women's exclusion from public life, challenging the particular divide between public and private life.⁸ It also offered some interesting critiques of privacy as concealment of information about domestic or personal lives, which I won't go into here. The so-called second wave of feminism is sometimes said to have focused primary attention upon the public/private distinction.⁹ Women in the anti-war and civil rights movements began politicizing the traditional sexual division of labor that was perpetrated within these protest groups that were ostensibly struggling for major social change. An illustration of this focus on the public/private distinction is the familiar slogan "the personal is political." Consciousness-raising groups—a crucial institution of feminism in the late 1970s and 1980s¹⁰—played an important role in the wo-

7. See generally Olsen, *Myth* (cited in note 1). See also Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982).

8. See, e.g., Elizabeth Cady Stanton, *Address to the Legislature of New York on Women's Rights*, reprinted in *Elizabeth Cady Stanton, Susan B. Anthony: Correspondence, Writings, Speeches* 44-52 (Ellen C. DuBois, ed., Schocken Books, 1981).

9. The first wave of feminism challenged women's exclusion from public life and sought to inject women into the public sphere. The second wave of feminism, however, sought to politicize this distinction, stressing the utility of one's private experience as a basis for public action.

10. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 83-105 (Harv. U. Press, 1989); Anita Shreve, *Women Together, Women Alone* 6 (Viking, 1989) (discussing

men's movement to politicize the so-called "personal" domination that individual women experienced in their domestic and sexual lives.¹¹ Some husbands were distressed by the "public" discussion of their intimate relations in consciousness-raising groups.¹²

Many of the feminist arguments for more state intervention in the family are based on this first level of criticism of the public/private distinction. Feminist lawyers have objected to the withdrawal of the law from the so-called domestic sphere on the basis that the withdrawal left women unprotected from abuse and gave the ideological message that domestic life was less important than commercial life or other aspects of society governed by law.¹³ It should no longer be overlooked that while police and district attorneys have tended to treat the matter as private when a husband beats his wife, and to suggest that they should let the couple work out their differences, police and district attorneys have always treated it as public when the wife shoots the husband, never seeing that as one way for the couple to work out their differences.¹⁴

The movement against sexual violence against women and against sexual abuse more generally pointed out how the asserted "privacy" of things sexual resulted in very limited protection for women against sex crimes. The slogan that "rape is about violence not sex" was an effort to move rape from the "private" realm, where it was all too often tolerated or subjected to minimal controls,¹⁵ to the "public" realm, where one might expect the criminal

the impact of consciousness-raising groups on the women's movement); see also Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 863-67 (1990) (discussing consciousness-raising as a means to translate personal experience into a basis for social change). Consciousness-raising groups, predominant in the 1970s, met so that women could share their common experiences, and from that knowledge, understand the political nature of their individual subordination. Consciousness-raising was meant to "break down the barriers between women, encourage open communication among them, and help them develop pride in their sex." Shreve, *Women Together, Women Alone* at 12.

11. Consciousness-raising groups were effective because they facilitated women's realization that their personal subjugation was in fact political oppression. "By realizing that an individual problem was in reality a common problem, and by discovering that the personal was really collective, a woman might begin to understand how a sexist society had limited her opportunities." Shreve, *Women Together, Women Alone* at 14-15 (cited in note 10).

12. See *id.* at 86.

13. See Taub and Schneider, *Perspectives on Women's Subordination and the Role of Law*, in Kairys, ed., *The Politics of Law: A Progressive Critique* at 151-57 (cited in note 6).

14. If society were serious about stopping domestic abuse, there are methods that might be more effective than permitting battered women to kill their abusers. For example, instead of narrow injunctions against violence that are notoriously unenforceable, courts could issue orders preventing known abusers from drinking alcohol or doing whatever other activities typically precede the abuse. In those cases in which an abused partner can identify a set pattern of behavior preceding violence, it could be possible to break the pattern—whether by a consent decree, as a condition of probation or dropping charges, or under the courts' equity powers.

15. Feminists have complained that rape is not forbidden, but merely regulated. See

law would be applied in a reasonable manner to punish and deter rape.¹⁶ This critique was expanded into a critique of the complex and subtle ways in which the power that men as a group exercised over women as a group was seen all too much as private.¹⁷

In a similar vein, women have questioned why it is that men are so able to see the appeal of laws placing limits on the rights of the homeless to beg for money, especially as some of them do so aggressively and threateningly, and so unable to see any justification for laws limiting the rights of men to beg for sex, even when many of them do so aggressively and threateningly. Indeed many more men seize sexual pleasure of one form or another from women than homeless people seize money or other property from those who choose not to engage in the gratuitous transfer requested.

On the second level of criticism, "public" and "private" are shown not to be *analytic* categories at all. On this level of critique, the problem is not just that private actions can be made to look like state action and vice versa, but rather that there really is *no way* to say that certain action *is* private action.¹⁸ I have often used the example of state intervention in the family to illustrate this point.¹⁹ Is the state intervening or not intervening if it allows a deceased man's same-sex lover instead of his parents to make funeral arrangements? What is the non-interventionist state response, for example, if parents try to reclaim their child from an aunt to whom the child has fled?²⁰

For most of us, what *we* want to do and be left alone to do seems like private action—thus beating up one's son, oppressing one's workers, supporting a political party, discriminating against African-American customers, and publishing Salmon Rushdie's address or the name of a rape victim are all considered private by the person who engages in the activity. The laws that facilitate the injury of one person by another seem like state action when they seem

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635, 651 (Summer 1983). Men have been allowed to rape—at various times in history—any woman who was not a virgin, any woman with whom he had previously had a relationship, or his wife. Some states continue to allow a man to rape his wife, even quite brutally, if she and he were still living together as a family at the time of the rape.

16. Susan Brownmiller is the best-known writer associated with the claim that rape is about violence, not sex. She argues that rape is a primary mechanism of women's subordination. "[Rape is] not only a male prerogative, but man's basic weapon of force against woman, the principal agent of his will and her fear . . . [Rape] is nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear." Susan Brownmiller, *Against Our Will: Men, Women and Rape* 14-15 (Simon & Schuster, 1976).

17. See Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1177 (1986).

18. See *supra* note 7.

19. See Olsen, *Myth* (cited in note 1).

20. These examples are loosely drawn from Olsen, *Myth* at 858-59 (cited in note 1).

unjust, but go unnoticed or are treated as a neutral background of law to those who support the rules. Acts of racial discrimination which are now widely seen as state action used to seem like private action to those who supported discrimination.²¹ The interesting question is how the particular behavior is *successfully* characterized as private or public, and why the legitimation or delegitimation works.

The important critical point is that injustice cannot be justified by means of the public/private distinction. Thus, I disagree with the assertion in Larry Alexander's paper that "absolutely nothing follows" from this criticism of the state action doctrine or of the public/private dichotomy.²² What follows from the criticism is that the asserted presence or absence of state action is not a justification for an otherwise unjust decision.

On a third level of critique, deeper political meanings are found behind the appeal of privacy. Notions of individualism,²³ of choice²⁴ and of desire,²⁵ and the reasons *why* we value privacy²⁶ are deeply related to the peculiar importance placed on the male/female distinction and to the subordination of women. Privacy is related to manhood; "private parts" are sexual; and the classical liberal individual is not an asexual "person" but the male head of a family. Privacy is most enjoyed by those with power. To the powerless, the private realm is frequently a sphere not of freedom but of uncertainty and insecurity.²⁷ On this level of critique, the point is

21. E.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down laws prohibiting discrimination by private companies providing public services, because there was not state action); see supra note 3.

22. Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 Const. Comm. 363, 369 (1993).

23. See generally Carole Pateman, *The Sexual Contract* (Stanford U. Press, 1988) (arguing that theories of individualism and social contract presuppose male dominance).

24. See Catharine A. MacKinnon, *Feminism Unmodified* 90 (Harv. U. Press, 1987) (discussing the coercive nature of the gender hierarchy in the context of sex); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1800-15 (1990) (describing the fallacy of choice in the context of employment decisions).

25. See, e.g., Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 Cornell L. Rev. 644, 689-96 (1990) (describing the gendered nature of desire).

26. See MacKinnon, *Feminism Unmodified* at 99-100 (cited in note 24).

27. Those without power are most likely to experience uncertainty within the realm of privacy. For example, forced sterilization has often been imposed on poor women. See *Walker v. Pierce*, 560 F.2d 609 (4th Cir. 1977), cert. denied, 434 U.S. 1075 (1978) (civil rights action for sterilizing patients based on race, number of children, and receipt of public assistance). Another example would be police harassment of minorities. See *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968) (minorities often complain of wholesale harassment by the police); *Rizzo v. Goode*, 423 U.S. 362, 366-67 (1976) (class action suit claiming pervasive pattern of mistreatment of minorities by police). From 1987 to 1990, 4400 complaints were filed against the Los Angeles Police Department. Forty-one percent of these complaints were filed by African-Americans, although African-Americans account for only thirteen percent of the popula-

not just that men enjoy a kind of privacy in the family that women and children do not enjoy (but rather too often suffer under). Rather, the standard situation in which one enjoys privacy and freedom is not a situation of equality but one of hierarchy. We virtually never all enjoy privacy equally, and the pretense that equality is the norm, and situations of domination an exception, is simply another way of maintaining the status quo.

It is sometimes asked how women can criticize the public/private distinction and still support privacy rights in other contexts: abortion rights and privacy rights for rape victims not to have their names published in the newspapers or to be forced at trial to discuss their private sexual lives.²⁸

My answer to this question is twofold. First, it would be inconsistent and unfair to women to create privacy rights in general but to exclude from that collection of rights a woman's choice regarding procreation, whether by using birth control or by abortion.²⁹ In addition, I see anti-abortion activity as simply a form of hassling or controlling women on the basis of their sexuality. It really has nothing to do with whether the woman involved or the state should make the private or non-private choice. The state's "choice" to protect embryos and fetuses or the fertilized and implanted egg and not, for example, to protect the sperm is not *natural* or *logical* any more than it is natural or logical to prefer male executors over female executors, which was found in *Reed v. Reed*³⁰ to be irrational and thus a violation of equal protection. Men who consider it perfectly reasonable to restrict women wouldn't for an instant tolerate such controls on their own activity.³¹

Regarding rape shield laws, the issues here are relevancy and trying to reverse the serious underreporting and underenforcement of the crime of rape.³² Beyond the rape shield law issue, I believe

tion. Jerome H. Skolnick and James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 3 (The Free Press, 1993).

28. Cf. Sylvia A. Law, *Equality: The Power and Limits of the Law*, 95 Yale L.J. 1769, 1778 (1986) (reviewing Zillah R. Eisenstein, *Feminism and Sexual Equality* (Monthly Review Press, 1984)) ("Feminists criticize the state's role in patriarchy, yet at the same time insist that collective responses are needed to protect vulnerable people and to organize the work that the patriarchal culture has traditionally assigned to women.").

29. See Olsen, *Unraveling Compromise* at 111 and 116-17 (cited in note 1).

30. 404 U.S. 71 (1971).

31. See Frances Olsen, *A Finger to the Devil: Abortion, Privacy, and Equality*, 38 Dissent 377 (Summer 1991); Olsen, *Unraveling Compromise* at 129-30 (cited in note 1) (discussing controls that could be put on men to "protect unborn life").

32. Rapes are far underreported and underprosecuted. Jennifer Temkin, *Women, Rape and Law Reform* in Sylvania Tomaselli and Ray Porter, eds., *Rape* 21-24 (Blackwell, 1986).

According to the Department of Justice, twenty-seven percent of unreported rapes are stated to be unreported because it is a "private or personal matter"; twenty-two percent are

that if it were not for our habits of thinking about public and private, it would perhaps seem peculiar that what a victim of rape might have done that titillated the defendant is considered legally relevant while what a slain wife-beating husband did to terrorize his wife before she killed him is often not considered legally relevant.

The experience of all too many women whose name appears in the newspapers, especially if it appears in any "sexual" context, is that they are targeted for harassing phone calls and further terrorized.³³ Under these circumstances, concealment is necessary though not sufficient. Rapists and those who support the abuse of women use the threat of publicity to reduce the reporting and prosecution of their crime and to intimidate rape victims. Women do not want to be "private" victims of rape; they want sexual abuse and terrorism against women to stop.

In conclusion, feminist critiques of the public/private distinction are multi-faceted and important. Although it might be possible to have a gender hierarchy without any public/private distinction,³⁴ the particular manner in which our present society draws distinctions between public and private perpetuates the subordination of women. The point is not that everything should be public or that everything should be private; nor is mere tinkering around with the details of what belongs in the public category and what belongs in the private category likely to bring about significant and far-reaching improvement in the role and status of women. What the best versions of the feminist critique of the public/private distinction try to achieve is a rethinking of how the categories "public" and "private" are structured, a deeper analysis of how the status quo is maintained, and new approaches to theorizing social change.

unreported because the victim perceives that the authorities would not care or would be unresponsive. U.S. Dep't of Justice, *Criminal Victimization in the United States, 1990* 110-11.

33. See *Florida Star v. B.J.F.*, 491 U.S. 524, 528 (1989) (rape victim whose name was published in the paper was subsequently harassed, forcing her to move, change her phone number, and seek both counseling and police protection). According to a recent poll, forty-six percent of women said they would be less likely to report a rape if they knew their names would be made public. Sandra Sanchez, *Rape Poll: No Names. Say 91%*, U.S.A. Today, Apr. 18, 1991, at 1A.

34. See Olsen, *Unraveling Compromise* at 116 (cited in note 1).