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The Public-Private Distinction in American Law and Life

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The Public-Private Distinction in American Law and Life

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NOTHING is more central to our experience in American culture than the split between public and private.[1] It is the premise which lies at the foundation of American legal thought, and it shapes the way in which we relate to each other in our daily lives. We consistently take for granted that there is both a public realm and a private realm. In the private realm we assume that we operate within a protected sphere of autonomy, free to make self-willed individual choices and to feel secure against the encroachment of others. Private law, for example contract law, serves as a helpmate in this realm, facilitating and securing the autonomous world of private decision-making. In contrast, the public realm is a world of government institutions, obliged to serve the public interest rather than private aims. For the most part the public realm is accountable to the private and obligated to limit its intrusion into the world of private choice. Occasionally, however, it is supposed to override the private sphere, either to serve a greater public good or to solve problems that are poorly handled by private decision-making.

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1. That our discussion is about a peculiarly American version of public-private was emphasized to us by David Fraser, from his Canadian perspective. It is not his position that Canadians do not draw the public-private line. They simply draw it in a different place. But where they draw it indicates a qualitatively different ideological structure, one in which the public is experienced more directly by people. It is also experienced more frequently. While in many, if not most instances, this experience is little more than welfare statism, the room for an alternative, more political-communitarian experience is there, and *is* lived. For a fuller account of his position, see Fraser, *And Now for Something Completely Different: Judging Interpretation and the Canadian Charter of Rights and Freedoms*, 7 WINDSOR YEARBOOK OF ACCESS TO JUSTICE (1988) (in press).

Jane Smith, a former student, reminded us that one's experience of public-private in American culture may well differ according to one's situation with respect to race, gender, or class. For further discussion of this issue, see R. SENNETT & J. COBB, THE HIDDEN INJURIES OF CLASS (1972); Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUD. F. 59 (1985).

It is important to recognize the role of the private-public split in legal thought, but its real significance lies in the powerful way it informs our daily experience of the world. It is part of our lived reality to know that the public realm is different from the private, that they both exist, but are separate from each other, with different things happening in each one. That knowledge, in turn, molds our relationships even to our closest friends. We were reminded of that fact recently, during a phone conversation with a good friend. We had just produced a new baby, a fourth son in our busy household, and our friend said she hoped we would now stop reproducing. Then she quickly retreated into an apology, afraid that she had offended us. At first her fear seemed puzzling, but then it made sense. In our culture one is not supposed to tell people what one thinks of their reproductive behavior. Family planning choices take place in the world of family privacy, which is a world of private, autonomous decision-making. Even friends are expected not to intrude into that protected sphere with inappropriate comments about the adequacy of one's birth control. To do so is to violate the norms of privacy. Our friend's apologetic manner is what we mean by taking the public-private split for granted as part of our daily experience.

A few moments of reflection, however, show the extent to which that supposed realm of privacy is a product of cultural contingency, not objective reality. For example, since reproduction is the process by which a society reconstitutes itself, many cultures consider family planning an obvious matter of social concern and choose either to encourage or discourage large families. Even where matters of sexuality and reproduction are ostensibly understood as private, their experience is a socially constituted one. Unless one is prepared not only to head for the wilderness, but also to discard all previously acquired cultural baggage, the notion of raising children in pure privacy is an impossibility. We look, often frantically, to social experience for guidance and understanding of the parental role. The fact that we run to look up problems in Dr. Spock is more than just a metaphor for the social dimension of the experience. The privateness of reproduction is part of our consciousness, not a natural reality.

Once the public-private split is recognized to be merely an artificial construct, new possibilities for human contact are born. Erecting fantasy walls of privacy around each other causes the denial of access. Privacy means alienation. If some of those walls were dissolved and traditionally private questions were transformed into community concerns, then some of our experience of personal separation might turn into an experience of

connection. Because our sense of ourselves and others would change, our world would be altered.

Instead of seeking alternative connections through transformation of the public realm into one of authentic community, many of us seek authentic experience by retreating or escaping into the most private realms. In effect, we create a subset of the private in which real mutuality serves as an antidote to the alienated world of competitive, possessive individualism. Thus the family is experienced as the "haven in a heartless world."[2] Similarly, many of us try to find true meaning through religious experiences and the social life that accompanies them.[3] Or, alternatively, many of us think we achieve real interpersonal connection in the most private realm of all, when we fall in love.[4] Yet the relegation of those experiences to the supposed realm of pure privacy serves always to limit their significance. Because they are private they are contained, trivialized and rendered irrelevant to the real world, where love has no place.

Nevertheless, because our present world is dominated by the forms of liberal legalism,[5] which defines us as bearers of private rights, the rhetoric of militant privatism has provided an important weapon in specific contexts. In the abortion area, for example, gaining the right to private, autonomous, reproductive choice has seemed an important feminist victory. Yet the language of privatism is a double-edged sword. As women who struggle alone to raise children know, reproductive choice, conceived only as a private right, serves to isolate and to negate the right to call on the community for help and for a sharing of responsibility. To have the private choice is also to be left alone with it. Moreover, in the economic realm the rhetoric of privacy has traditionally been used to transform the social reality of poverty into a believed fantasy about autonomous choice, in which poverty results from individual failure. It is

2. *See* C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977). *See also* J. DONZELOT, THE POLICING OF FAMILIES (1979); E. ZARETSKY, CAPITALISM, THE FAMILY, AND PERSONAL LIFE (1976).

3. For some different perspectives on the question, see F. FITZGERALD, CITIES ON A HILL 121-201 (1986) (describing Jerry Falwell, his church and community); A. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT (1984) (dealing with the black church and the civil rights movement); Ferber, *Religious Revival on the Left,* THE NATION, July 6, 1985, at 6 (describing the relation between religion and left politics). *See also* B. BERGER, THE SURVIVAL OF A COUNTERCULTURE: IDEOLOGICAL WORK AND EVERYDAY LIFE AMONG RURAL COMMUNARDS (1981) (study of the rural commune as a family-religion hybrid, and its relation to the outside world).

4. *See* D. TENNOV, LOVE AND LIMERANCE: THE EXPERIENCE OF BEING IN LOVE (1979). For a dialectical engagement with the issue, see D. Fraser, *What's Love Got to Do With It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity* 11 HARV. WOMEN'S L.J. 53 (1988).

5. *See, e.g.,* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941,* 62 MINN. L. REV. 265, 270-80 (1978).

therefore not surprising that the formal freedom to obtain an abortion does not mean the right to have one paid for by the community — the poverty of the woman who cannot afford an abortion is her own private problem. That was the lesson learned when the supposedly liberating decision of *Roe v. Wade*[6] was followed by *Harris v. McRae*,[7] which entitled the government to deny health benefits to cover the expenses of even "medically necessary" abortions.

Thus, within liberal legalism, privacy may be a weapon for gaining freedom from others in the short run, but it may also provide justification for abandonment by others in the long run. This short-run, long-run problem can best be understood against a more general theoretical backdrop. For the purpose of understanding the consciousness of private right, nothing has really improved upon Marx's classic account, *On the Jewish Question*.[8] The essay remains the fullest account of liberal ideology understood at the core level of experience. Despite the essay's heavy, dated Hegelian terminology (state and civil society rather than simply public and private, for example), it still remains the fullest account of liberal ideology.

Marx begins by describing the emancipation of the political state from the various status qualifications which once constituted it. Under the old feudal, hierarchical model, political life was inseparable from gradations of social privilege based on religious, economic and class background. Political status was bound up with social status, so that religious and property qualifications were attached to the right to vote. In contrast, in the new liberal state, citizenship was freed of those qualifications. As a citizen, the Jew was as free as the Christian, and the poor person was on an equal footing with the landed aristocrat. Thus, the state became the arena for the exercise of free political participation and the realization of true community. In that sphere, at least, alienating divisions of religion and class were dissolved. That liberation of the state was a "great step forward," a step away from separateness and toward community, or,

6. 410 U.S. 113 (1973).

7. 448 U.S. 297 (1980).

8. K. MARX, *On the Jewish Question*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 216 (1967). *See also* 1 L. KOLAKOWSKI, MAIN CURRENTS OF MARXISM: ITS ORIGINS, GROWTH, AND DISSOLUTION 122-27 (1981) (further discussion of the public-private distinction).

For a critique suggesting that both Marx and Marxism all too easily replicated the public-private dichotomy as systematic oppression and domination of women by men, see A. GOULDNER, THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY: THE ORIGINS, GRAMMAR, AND FUTURE OF IDEOLOGY 101-04 (1976).

using Marx's term, "species being."[9]

Nevertheless, the emancipation of the state is not complete human emancipation because the old distinctions are in fact retained outside the state, in the form of private rights. Religion, rather than being abolished, becomes a private whim, an expression of purely subjective, individualized values. Similarly, while property is removed as a precondition of formal political participation, it is nevertheless retained as a protected right, with which the state cannot interfere. Property as private right, stripped of the old notions of moral-political obligation (of, e.g., the feudal lords to their serfs) both presupposes and legitimates a realm of egoism, self-interest and atomization. Thus, in the private sphere there is only "*bellum omnium contra omnes*,"[10] as Marx says, "no longer the essence of *community* but the essence of *division*."[11]

Marx emphasizes the fact that he is describing concrete changes that took place with the emergence of liberalism, but he is also describing a change in consciousness, a change in the way that we experience the world. The split between public and private lies at the heart of that new liberal consciousness, for it means that we simultaneously view others as both fellow citizens in a true community and as separate, antagonistic, private others. Thus, as Marx says, "man leads a double life . . . . In the *political community* he regards himself as a *communal being*; but in *civil society* he is active as a *private individual*, treats other men as means . . . and becomes the plaything of alien powers."[12]

Moreover, because the most important daily activities—work, family life, moral choice—are all experienced as private and apolitical, the experience of community becomes increasingly abstract, realized at the level of fantasy and ritual rather than as a concrete reality. Most citizens have little direct experience of participation in collective decision making, so the citizen becomes "an imaginary member of an imagined sovereignty" with no direct control over the concrete facts of social life.[13] The state itself also becomes an abstract alien, rather than an arena for the experience of a community.

Notably, the public-private split also replicates itself *within* the realm of the private, most starkly in the market-family dichotomy.[14] In

9. K. MARX, *supra* note 8, at 226-28, 241.

10. *Id.* at 227.

11. *Id.* (emphasis in original).

12. *Id.* at 225 (emphasis in original).

13. *Id.* at 226.

14. For this section we are indebted to Fran Olsen for her thorough and sensitive treatment of

theory, the market offers a free range for atomized, competitive self-interest, while in contrast the family gives expression to the yearning for warmth, selflessness and interconnectedness. Thus conceived, that dichotomy in turn represents the conventional, stereotypical split between male and female roles. In the market, the most public and powerful of the private realms, men can play out their maleness by being aggressive and dominating others with their superior skill and economic advantage, while, contained within the family sphere, women play out their female roles by providing a safe, nurturing home. Therefore, the traditional rigidity of gender identification is inextricably linked to the supposed boundary between market and family, which in turn is an integral subset of the basic liberal split between public and private.

A crucial ingredient in liberal ideology, as described by Marx, is the fact that the public-private split actually entails a tripartite structure of self, state and other. Because of that structure there is always an alienating third which mediates the relationship between self and other.[15] Other private individuals are experienced, not in direct relationship, but rather by reference to a state that will set the ground rules of the relationship and determine the extent of each person's rights and duties. In every relationship the state is a potential ally and a potential foe to each person. At the same time, the other as citizen in the state, as part of the collectivity, is always experienced simultaneously by reference to the world of private right-holders. The state can never be simply the community, because the community is always composed of individuals who also define themselves as right-holders, with private interests potentially at odds with each other and with the collective experience. Just as each of us leads a double life as both citizen and private right-holder, so we must constantly experience others, not simply as people, but rather as both members of the democratic collectivity and as atomized individuals.

There are four important notions which help to maintain that triadic structure within our consciousness and make it powerful as ideology. Those four can be termed limit, illusion, legitimation and contradiction. They operate simultaneously at the level of legal thought and at the level of day-to-day consciousness.

The first, the notion of limit, means there will be a line separating

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the issue. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

15. *See* J. P. SARTRE, CRITIQUE OF DIALECTICAL REASON 100-09 (1982); *see also* F. JAMESON, MARXISM AND FORM 206-305 (1972); M. POSTER, EXISTENTIAL MARXISM IN POSTWAR FRANCE: FROM SARTRE TO ALTHUSSER 264-305 (1977).

public from private, a boundary where one ends and the other begins. That line can be moved dramatically over time, and it can sometimes be perceived as hard to find, or quite fuzzy around the edges, rather than as a clear either-or boundary. Differences in where the line is drawn or how it is perceived may be interesting and significant for some purposes, but the key point is that the line is always felt to be present, *somewhere*. On the public side of the line we assume that there is an obligation to act responsibly, with a sense of accountability for harsh or oppressive consequences to the community of others. The fact of a boundary, however, means that at some point accountability ends. When the line between public and private is crossed, community concern for the outcomes produced by social life ceases because those outcomes are conceived as merely the result of private choice.

The "state action" cases are all cases about the dual message of responsibility and limit.[16] In those cases the Supreme Court has been called upon to interpret the provision of the fourteenth amendment of the United States Constitution mandating that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[17] That provision makes racial discrimination and other deprivations of rights a matter of public concern if the entity responsible for the discrimination can be regarded in some sense as the state, i.e., public not private. In many instances the legal line between state action and the private realm has shifted dramatically, often in ways we want to see as progressive.

One can applaud, for example, the change in doctrine from the 1880s to the 1960s. In 1875 Congress had enacted a law barring discrimination in places of public accommodation such as hotels and theaters.[18] The theory was that Congress had been granted that power by the Civil War amendments, especially the fourteenth amendment. In *The Civil Rights Cases*,[19] however, the Supreme Court, invoking classic public-private assumptions, announced that the statute was an unconstitutional intrusion into the sphere of private social life. The limit to public accountability had been exceeded, since the fourteenth amendment only

16. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164 (1978) (state "authorization"); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (state "regulation"); Burton v. Wilmington Parking Authority, 365 U.S. 715, 720 (1961) (state "involvement").

17. U.S. CONST. amend. XIV, § 1.

18. Civil Rights Act of 1875, ch. 114, §§ 1,2 (these sections were ruled unconstitutional in one of The Civil Rights Cases, United States v. Stanley, 109 U.S. 3 (1883)). *See infra* note 19 and accompanying text.

19. 109 U.S. 3 (1883).

prohibits discriminatory action by the state. Not until the modern civil rights movement, almost one hundred years later, would similar legislation again be enacted. Then, as we know, it was upheld.[20] Yet the change in doctrinal result did nothing to undermine the basic proposition that there was a line beyond which it was inappropriate to hold the public accountable for racially discriminatory results. Thus, despite all of the supposed legal advances in the area of anti-discrimination law, it is still legitimate to treat concrete social facts like continuing high rates of unemployment among minorities, high rates of poverty and basic exclusion from mainstream American life as somehow outside the sphere of direct public responsibility.[21]

The notion of a limit on accountability works powerfully, not just in setting legal limits, but also in shaping our responses to the world we see. For example, it allows us to experience the social reality of minorities trapped in ghettos as a fact, however regrettable, of private rather than public life. Therefore, it is something outside the range of our direct concern, something about which we do not have to feel utterly outraged. As a result, potentially direct responses of empathy are always distorted by the assumption that the reality being witnessed lies in a realm of privatism, beyond the scope of public concern.

This is not to say, of course, that the notion of privatism is the only distancing mechanism at work on our perceptions. The older model of divinely ordained hierarchy, now supposedly defunct, remains in the form of stereotypical assumptions about lower classes, women and minorities. "They" are not really like "us," they do not really mind what we would mind, it is more natural for them to live like that. A more sophisticated version of the hierarchical view, one more consistent with the public-private split, is the notion of merit. The assumption is that there is a

20. Congress enacted the 1964 Civil Rights Act which prohibited discrimination in public accommodations. Civil Rights Act of 1964, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. § 1971, 1975a-1975d, 2000a-2000h-6 (1982 & Supp. III 1984)). Lest precedent be too hastily tampered with, however, the Supreme Court, in validating the law, relied not on the fourteenth amendment, but instead on the federal power to regulate interstate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (holding the 1964 Civil Rights Act applicable to Ollie's Barbecue, because the restaurant bought $70,000.00 of food from interstate sources).

21. Kenneth Casebeer emphasizes causation as the crucial construct in preserving the illusion of the public-private split in recent state action cases. The relevant question has become whether discrimination was caused, in some objective sense, by the actions of a state official. The effect is that wrongs done within the permissiveness of the state, but not directly ordered or caused by officials, are legitimated. Casebeer calls for a rejection of this image-building approach, and for a reunion of power and responsibility which would redefine public-private and transform a notion of "public autonomy" from oxymoron to status quo. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983).

natural ordering of abilities, one independent of class, sex or race, which determines outcomes in a free society. Given equality of opportunity, the skillful, the daring and the hard working will be the ones who come out ahead. The belief in objective merit has of course played a key role in the ideology of the free market—success in the marketplace reflects natural ability rather than socially constituted hierarchy.

The point here, however, is that one can reject all such assumptions about the legitimacy of social hierarchies, yet still be unable to transcend the distancing effect of the public-private split. In fact, we are almost inevitably trapped by it. Even if we attempt to recognize that the problems of others are within the scope of our own concern, we hardly know where to begin. In the absence of true, shared communal responsibility, gestures of concern are quickly turned into idle, private and probably condescending acts of charity. If we donate money to toys for tots, or to the church soup kitchen, we are, to be sure, providing a toy for a child, or a meal for a hungry person. However, we are also affirming the regime of nonresponsibility that makes the act of charity one chosen by subjective whim. Given the public-private split, we are forced to be selfish as much as we are free to be selfish, for in the absence of a real community we are pressed back into the world of our own private lives. In the private realm, where free choice is presumably protected, not one of us is free to choose the rejection of privacy itself, because others will quickly respond to such efforts as intrusive, threatening or simply crazy.

This lack of freedom to choose a community of real sharing is closely connected to the second notion that makes the public-private split so effective—that of illusion. The belief in a public realm allows us to feel that despite whatever goes on in the private sphere, at least in the public we are together as citizens, participating equally and fully. The public realm constantly holds out the possibility of community, even while the reality of daily life denies it. Because those daily denials are taking place, the ideal of public community must be constantly affirmed through the social production of imagery, lest we directly confront our loneliness and isolation. Community must seem to be experienced, even if it is not. The media have become especially effective purveyors of this illusion, for the shared television viewing of national events provides the feeling that we are all participating together in national life. Although in fact we are only passive viewers of an image, we feel that we are joined with others, taking part in the life of the country. The recent Miss Liberty and Constitutional Bicentennial celebrations provided a ceremonial version of that illusory experience, but so-called national tragedies have a similar effect.

President Reagan has been especially adept at using funerals for this purpose, often masking underlying problems of corruption and ineptitude at the same time, as with the attack on the U.S.S. Stark and the space shuttle explosion.[22]

As Reagan also seems to understand, the illusion of the public community may depend upon the periodic identification of enemies. Nothing works quite so well as constituting a group through shared negative energy. The group hate serves neatly to buttress the illusion of togetherness. We have seen it happen with Khomeni, with International Terrorism and, most effectively, with Khadafy. Figures like Khadafy serve a useful ideological purpose. However separate and private we are otherwise, at least we can share our hatred for him as a nation— that is, as members of a compensatory, illusory community.

Enhancing the image of public togetherness in turn facilitates the third notion associated with the public-private split, the notion of legitimation. With the illusion of togetherness intact in the public sphere of our consciousness, in the private sphere it is acceptable to be acquisitive and competitive, to scorn others and take advantage of their weakness. Disparities of wealth and power that result from this social and economic "*bellum omnium contra omnes*"[23] are by definition legitimate because they are a function of private, freely-willed choice, not the public exercise of political power. To redress those disparities would be to invade the protected sphere of private rights.

Legitimation requires an elaborate structure of law in order to maintain the theoretical distinction between public and private activity. It is the conception of legally enforceable rights which gives credence to the

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22. President Reagan's adeptness at funereal-like ceremonies in general, and in the U.S.S. Stark episode in particular, was noted in a report of the Stark incident in a weekly news magazine.

> COFFINS COMING HOME: During his years in office, Reagan has endured several foreign policy fiascoes, especially in the Middle East, and along the way, he has become an expert practitioner of public grief. "This president has probably met more returning bodies than any president in history," says a retired naval officer. Reagan's complete sincerity and his natural flair for poignant ceremony save him from being skewered when his own policies lead to disaster overseas and another shipment of coffins arrives home. But this time the questions aren't likely to fade away. "We all want to know why did this have to happen," said Ernestine Foster, whose husband, Vernon, died on the Stark, leaving seven fatherless children.

A Tragedy in the Gulf, NEWSWEEK, June 1, 1987, at 17. That Reagan's own grip on reality may be tenuous at best may explain his skill in fashioning illusory images for a public desperately seeking their reality. *See generally* G. WILLS, REAGAN'S AMERICA: INNOCENTS AT HOME (1987); M. ROGIN, RONALD REAGAN, THE MOVIE: AND OTHER EPISODES IN POLITICAL DEMONOLOGY (1987).

23. *See supra* note 10.

assumption that private activity is in fact purely private, so that the exercise of private power does not appear to be publicly sanctioned oppression. Thus, the public law promulgated by governing bodies exercising sovereign authority in the public realm is clearly to be distinguished from private law—property, torts, and contracts—which simply facilitates the private ordering of social and economic life. Private law doctrine, in its classic form, was thus a long and detailed meditation on the idea of protected free choice within judicially determined limits which also protected the rights of others. Legally determinable rights meant that each person was secure as against both public coercion and oppressive private power.

The private rights which are about freedom, however, are also necessarily about exclusion. The possibility of liberty and free choice always carries with it a negativity—this is mine, therefore it is *not* yours. I've got it so you *do not*. Similarly, while there is a positive respect of another's autonomy and right to choice in recognizing the other as rightholder, there is a negativity to that respect, for it is always premised on the denial of the freedom to share. "Because you have it, it is not mine; because it is yours, I cannot have it without your consent." Of course, a major premise of traditional marketplace theory was that consent was something that must be purchased, and thereby experienced as an alienating barrier.

That the line between public and private is logically incoherent has been apparent since the Legal Realist movement of the 1920s and 1930s. The realist scholars, part of the general twentieth-century revolt against formalism and conceptualism,[24] convincingly undermined all faith in the objective existence of rights by challenging the coherence of the key legal categories that gave content to the notion of bounded public and private spheres.

Property, for example, is thought to be the paradigmatic private right. In his famous essay, *Property and Sovereignty,* Morris Cohen pointed out that property is necessarily public, not private, since property means the legally granted power to withhold from others.[25] As such, it is created by the state and given its only content by legal decisions that limit or extend the property owner's power over others. Thus, property is an always conditional delegation of sovereignty, and property law is sim-

24. *See generally* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957).

25. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

ply a form of public law. Similarly, with respect to freedom of contract, the power to exclude or withhold is central to the supposedly freely entered bargain. Free consent to the other's terms is in fact forced consent, for it derives from the other's legally sanctioned threat to withhold what is owned except upon the demanded payment.[26] It is the state that delegates the power to exclude and, therefore, to set the terms. Without public coercion there would be no private freedom of contract. Thus, the line between private right and public power dissolves, with the former collapsing into the latter.[27]

Despite its apparent incoherence, however, the language of public and private persists, both in legal discourse and as part of our experience. Its continuing viability and power to legitimate may be due, in large part, to its manipulability. It can easily be turned inside out precisely because it has no logical content at all.[28] The legal literature is filled, for example, with theoretical invocations of public welfare, used to justify the consolidation of what are merely hierarchical property relations. Therefore, in the typical exclusionary zoning case, the supposedly free private market would allow developers to subdivide building lots and erect cheap housing, in otherwise fancy, usually all-white, neighborhoods. In such situations the community is allowed to establish rules that prohibit such unhampered irresponsible market activity, despite the fact that the community, with its police power, is being invoked simply to cement into place the product of private, acquisitive, racist behavior.[29]

Similarly, the public purpose doctrine has been invoked repeatedly to justify subsidies to enterprises that otherwise claim the right to be treated as private. Historically, railroads were notorious beneficiaries. The state's eminent domain rights were granted to railway companies on the theory that the public would benefit from an expanding transporta-

26. *See* Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUMBIA L. REV. 603 (1943); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

27. Arthur Jacobson argues that the whole law of associations, agency, partnership, trust, joint stock companies, corporations, and the "fundamental and pervasive concept of fiduciary relations" can properly be understood only as a "distribution of sovereignty to private persons beyond the precincts of the state apparatus." Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 BUFFALO L. REV. 599, 600 (1980).Thus relations usually conceived of as private actually involve direct participation in sovereignty, and "theories of state and economy that divorce sovereignty from the daily business of private life are in error." *Id.* at 600.

28. For a history of the early development of the public-private distinction, demonstrating its manipulability, see H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983).

29. *See generally* K. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (development of suburbs as insular enclaves).

tion system, even while the companies, of course, retained their right to a private profit.[30]

Modern examples abound. Conventional free-market ideology extols the virtues of private capital accumulation, entrepreneurial skill, and the harsh reality of risk. Yet tax breaks are granted to entice industries to invest or remain in localities. Cities compete for the opportunity to provide sports teams with ever more luxurious stadiums. Huge companies get government help when they face financial ruin. Private companies rarely turn down the opportunity to feed greedily at the public trough.

Two recent cases serve to illustrate the point.[31] In *Poletown Neighborhood Council v. City of Detroit*,[32] the court invoked the public character of large private enterprise in allowing a whole neighborhood in Detroit to be destroyed, at a huge personal cost to displaced neighborhood residents, so that General Motors could build a plant on that location. The theory was that the public good would result from the plant's opening, for of course the plant meant jobs. As companies bargain with municipalities for favors, it is always the workers who are held hostage. Conversely, however, in *Local 1330, United Steelworkers v. U.S. Steel*,[33] an appellate court affirmed the privateness of large corporations and refused to stop the closing of two plants in Youngstown, Ohio, despite the court's stated awareness that the move would cause "an economic tragedy of major proportion" in the area.[34] Rejecting the argument that the local community had gained a recognizable property interest or community "right" in the plants over the years, the court held that because the company was privately owned, its economic decisions were beyond public reach.[35]

The point here is not that the courts got it wrong in attempting to make their public-private decisions, but rather that anything can be described as either public or private. Decisions during the 1985-1986 United States Supreme Court term illustrated that point vividly. The Court refused to hold airlines sufficiently "public" to be required to comply with anti-discrimination laws with respect to the treatment of the

30. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 63-66 (1977).

31. We are grateful to our colleague, Fred Konefsky, for suggesting the juxtaposition of these two cases.

32. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

33. Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).

34. *Id.* at 1265.

35. *Id.* at 1281-82. For a detailed and insightful discussion of these issues, see Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

handicapped,[36] despite the quite apparent subsidization of commercial airlines through the air traffic controller system. Recall, however, that when the air-traffic controllers went on strike and were subsequently fired by President Reagan, the President specifically noted that the controllers were part of a public service. He could not have fired them if the controllers were part of the private sector.

Only a of couple of weeks later, in the infamous *Bowers v. Hardwick*[37] case, the Court announced that even voluntary consensual sexual acts were not sufficiently private to preclude state regulation. While the Act that was upheld was apparently directed against homosexuals, on whom the Court has never conferred rights as such, the Court did not seem to preclude regulation of sexual acts even between husband and wife. In effect, that which seems at the experiential level most private—sex—is declared public, while that which seems most public—air traffic—is declared private. Paradoxically, the legal system defines the world for us as public and private, informing every aspect of our lives. Then, in its particular definitions, it is free to stand in dramatic contradiction to our daily experience.

The indeterminacy, which helps to make the public-private split so powerful as legitimation, is closely related to the fourth associated notion, that of contradiction. As the airline-sexuality pairing demonstrates, neither public nor private, as a category, has any objective content.[38] As a result, contradictory arguments about whether or not something is a private right can always be generated. As a matter of pure logic, nothing is excluded from the state's legitimate concern for the public welfare. Similarly, as between two conflicting private rights, logical arguments can always be made for either side. My private right to be secure from the invasion of a nuisance, like the smelly chemicals a neighbor sprays on her lawn, conflicts with her right to use her property freely. My right to be secure from oppressive competition conflicts with her freedom to engage in unbridled freedom of contract on the market. The state cannot

36. United States Dept. of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986).

37. Bowers v. Hardwick, 106 S.Ct. 2841 (1986), reh'g denied by Bowers v. Hardwick, 107 S.Ct. 29 (1986).

38. Karl Klare demonstrates both the indeterminacy and incoherence of the public-private distinction as it is used in the rhetoric of American labor law. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). He also argues that "the use of such rhetoric obscures rather than illuminates, and that the social function of the public-private distinction is to repress aspirations for alternative political arrangements by predisposing us to regard comprehensive alternatives to the established order as absurd." *Id.* at 1361. He calls for a new vision of solidarity, transcending the public-private split, which would simultaneously be a vision of autonomy—a "form of social life that nurtures the capacity of every individual to experience self-realization." *Id.*

simply protect rights, but instead must always decide between two perfectly logical and mutually exclusive rights.

The problem of contradiction has been written about elsewhere, chiefly as impairing the legal system's claim to be a neutral protector of rights.[39] It also plays itself out at the level of experience, in our sense of how we should relate to others. The contradiction between market freedom and security of expectations, which pervades private law discourse, reflects deeply held beliefs about how we should act in the world. What we find is that we end up believing in contradictory values. At one level we believe we should be free to take advantage of another's weaknesses in the market. On another level we feel obliged to act with some regard for the interests of others. First-year law students are genuinely troubled when they discover that contract law, for example, does not have a convincing answer to the question of where self-interest should end and where concern for another's security should begin. What their unhappiness reveals is that they believe in both the free exercise of self-interest and in the good-faith protection of others, and yet they know that they cannot have it both ways. They then find themselves feeling immobilized. How can one make a strong moral choice in the face of evident contradiction? What law students begin to recognize self-consciously is experienced by most people as an inarticulated sense of moral immobilization.

The fact that contradiction undermines the legal system's claim to be a neutral protector of rights also intensifies the degree to which the triadic structure of state/self/other pervades our relationships. At any given time, one's position with respect to another has to be seen as a function of a series of logically incoherent choices that the state has made. These choices have sometimes been favorable and sometimes antagonistic. If you complain about your neighbor's barking dog, the police may give your neighbor a hard time, or they may tell you that barking dogs are to be endured as a fact of neighborhood life. The police may show up next time, having been called by your neighbor, and request that you mow your overgrown weed-filled lawn. However, you may convince them that you are an ecologist experimenting with a natural lawn. The state always has had a past history as friend or foe, and always has a potential future of favoring self over others, or vice versa. The fact that those choices cannot be preordained, or logically compelled, makes the presence of the state as a wielder of power more acutely felt.

Some commentators have pointed to a weakened legal confidence in

39. *See, e.g.*, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 697 (1985).

the distinction between public and private as it relates to economic questions.[40] This is probably a legacy of the New Deal regulation of business activity and the tenor of that era's Court, although the current Court may be headed back in the direction of resurrecting the old bright-line boundary between state and market. It is common, however, especially among liberals, to consider some areas problematic while at the same time assuming that there is some core, intrinsic meaning to the notion of privacy, one that is natural rather than simply a creation of legal-political ideology. Consequently, one might willingly concede that Con Edison is not obviously and perfectly private, but what about my home, my body, my thoughts?

Even in such cases, however, the supposed core right to privacy can be collapsed into the utterly conventionalized contradictory arguments made in the economic area. Therefore, my freedom to keep a goat in my home and yard conflicts with my neighbors' collective right to be secure in the respectability of the neighborhood in which they have invested. Similarly, one person's right to the free enjoyment of sexual fantasy conflicts with another's right to be secure against degrading and exploitative use of bodies. Moreover, as in the market, even within the family we can have no faith in the supposed purity of private, subjective consent, because consent is always in part a function of role and social expectation. A wife's consent to sexual relations with her husband, for example, is in part publicly constructed. This is true since we inescapably act out the social representations of the roles assigned to us. As a result, the wife's consent is inevitably consent by a person who thinks of herself by reference to the category wife, and the publicly created consciousness of "wife" informs even her most private, subjective decisions.[41]

If the structure of private right and state power renders incoherent the vocabulary of rights, how then can we affirm the values that seem most important to us? Feminists, for example, feel deeply divided within themselves on the question of pornography. In the face of the debasing use of female bodies we are tempted to seek protection. The state should ensure our security as against exploitation, irrespective of the pornographer's invocation of a private right to freedom of speech. Yet the same state that might side with us on this issue could also end up as

40. *See, e.g.*, Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

41. The example comes from Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985) (containing a thorough discussion of the public-private issue as an elaboration of the core liberal dilemma of subject and object).

the ally of the Phyllis Schlafflys of the world, who would oppress us with their convention. Similarly, the same first amendment invoked by our exploitative enemy may, in another situation, be our protector against oppressive state power.[42]

In that sense, the triadic structure of self/state/other alienates us, not just from each other, but from our own values as well. We think we sense evil and domination, yet we feel disempowered by our very subjectivity from asserting its existence and even from knowing what we really believe. For that reason, paradoxically, at the experiential level the belief in rights and protected, autonomous subjectivity in fact leads us to doubt, rather than trust, our own beliefs. If we have nothing to go on, except our own privatized subjectivity, the fear of the disapproval of others is heightened. Consequently, rampant individualism may in fact lead to tightened social conformity.[43]

That particular dynamic of privacy and conformity may serve always to undermine the freedom which the category of privacy theoretically protects. The freedom held out by subjectivity is so frightening, in its imposition of awesome responsibility, that one is driven always to seek objective answers from some authoritative other. As Foucault has pointed out, for example, nothing in Western culture has been labelled so deeply private and related to self as sexuality, yet nothing has been so subject to social discussion and dissection.[44] The more intensely we feel sexuality to be the most private thing there is about ourselves, the more we are drawn to make it part of an incessant public discourse, obsessively holding every detail up for public scrutiny.[45]

That final, paradoxical contradiction raises some difficult questions

42. Ruth Colker has argued that women, as an oppressed group, stand more to lose than gain from the traditional legal conception of privacy, with its individualistic perspective. Colker, *Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy*, 1 LAW & INEQUALITY 191, 198-99 (1983). Focusing on the law's failure to protect women in the area of pornography, she states, for example, that "[p]rivacy doctrine has confined women to the private sphere, beyond the reach of public law, beyond protection from offensive intrusions. . . . It preserves, protects, strengthens, masks, hides, distorts, and neglects women's sexual abuse." *Id.* at 198-99. She calls instead for a theory of group-based oppression, which, among other advantages, would not exclude poor women from protection. *Id.* at 200-01. *See also* Colker, *Published Consentless Portrayals: A Proposed Framework for Analysis*, 35 BUFFALO L. REV. 39 (1986).

43. *See* R. BELLAH, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 146-63, 167-95 (1985).

44. *See* M. FOUCAULT, THE HISTORY OF SEXUALITY (1978).

45. Consider, for example, the visual assault of magazine and tabloid headlines at the typical supermarket checkout counter: "The Role of Sexual Fantasy in the Lives of Nice Girls;" "Men Over 50 Can Have Multiple Orgasms;" "Foreplay: Those Sweet Tender Moments. A Thing of the Past? *Not if You Do This*;" "Are You and Your Mate Sexually Compatible?"

about the use of legal categories to promote social change and, ultimately, about how we might begin to conceive of alternative human relationships with new and different notions of selves and others. A recent New York City criminal case, *People v. Graydon*,[46] illustrates these issues. The defendant was arrested and charged with the crime of "sexual abuse in the second degree," committed when he "repeatedly rubbed the leg of an eleven year old girl prior and subsequent to her demands that he cease."[47] The statutory definition of the crime required "sexual contact," which in turn required "the touching of the sexual or other intimate parts."[48] Thus the court had to decide whether the victim's leg was an "intimate part."

The case raises some obvious and less obvious issues about legalism, and ultimately, about the extent to which we are hopelessly caught up in the public-private dilemma. First, the easier issues. The simplest way to think about the case is as a problem in semantics. Does the definition of "intimate part" include or exclude "leg?" The assumption here is that people are free in the private realm to do whatever they want, unless the law of the public realm says otherwise. To be guilty of unconsensual leg rubbing in a context like the one in *Graydon* requires a prior announcement by the criminal code that the conduct is not legal. Related to the definitional approach would be concerns about rights of the accused, as, for example, whether the statute was clear enough to give adequate notice to persons contemplating the behavior that they might end up criminally liable. Thus, we cannot deal with the definitional issue even in semantic terms until we decide whether the words must be strictly or liberally construed. One quickly discovers that the issue cannot be dealt with as a definitional matter at all. "Intimate part" is not an objective feature of reality, but a question of social construction built on the always manipulable line between public and private.

At that point someone will suggest that we must consider the purpose of the statute, since a well-trained legal mind could decide the case by reference to purpose without pretending to find a formal definitional answer. But what is the purpose? Is it to build a wall of protection around the bodies of all eleven-year old girls from head to foot since consent is not a defense? Or is it to divide the world of touchings into

46. People v. Graydon, 129 Misc. 2d 265, 492 N.Y.S.2d 903 (N.Y. Crim. Ct. 1985).

47. *Id.* at 265, 492 N.Y.S.2d at 904.

48. *Id.* at 266 n.1, 492 N.Y.S.2d at 904 n.1 (quoting N.Y. PENAL LAW § 130.00(3) (McKinney 1984)).

innocent and not so innocent touchings depending on the part of the body touched, or the intent of the violator?

At this point, a now somewhat outraged feminist will tell us, not without justification, to stop the legalistic fussing. The feminist will contend that what is really happening is that a disgusting male, steeped in a sexist, patriarchical culture that regards the bodies of women, especially young women, as arenas for the pursuit of male pleasure, is engaging in degrading, exploitative behavior that serves to perpetuate traditional patterns of domination over women. And if the purpose of the law is not to stop that, it has no purpose at all. In fact, the easy answer to the definitional problem is that the young woman's entire body is an intimate part.

But the story can be told differently. The court does have to choose between conflicting claims: On one side, the girl's right to protected bodily security; on the other, the man's right to freedom from interference with spontaneous sexual behavior. All costs are reciprocal.[49] To confer security on the girl infringes on the man's freedom. To protect the man in his choice restricts the girl's right to say no. One could also describe the story as that of an otherwise lonely, isolated, sad man, a man accustomed to no human contact at all, and merely reaching out toward someone in a furtive, hopefully anonymous gesture.

Many people do not even want to hear that version of the story. And for good reason, given the social reality of abuse, sexual and otherwise, of women and girls by men. But, in our society and culture, that takes us right back to the public-private dilemma. The question that pervades this case is how we relate to our own bodies. One model might be called the conservative model. That model says that our bodies belong to the state, or to God, with questions about our bodies being appropriate matters of public decision making in the name of the moral authority of the state, or the church. On that view, the state can decide that the bodies of eleven year old girls are morally off limits, whether or not the individual in question wills otherwise. That same state, however, could decide to ban

49. The point of reciprocity was most forcefully made by Ronald Coase, whose Coase theorem is now the (in)famous foundation for the law and economics approach to legal decision making. As part of his analysis, Coase pointed out that the recourse to commonsense notions of cause does not adequately describe the imposition of social cost. For example, where a factory spews out offensive smoke onto nearby houses, one is inclined to say that the factory owner is imposing a cost on the residents. Nevertheless, it is equally true that if the residents successfully claimed a right to be free from smoke, then they would be imposing a cost on the factory owner, who would be forced to move elsewhere, pay for smoke prevention, or buy off the residents. Thus the relevant legal question is not "should the factory owner be forced to pay for the cost she is imposing on the residents," but rather, "which of the two parties—owner or residents—should be entitled to impose a cost on the other?" *See* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

abortions, or what it deems immoral sexual behavior between even consenting adults.

The conservative model is simply a decision that bodies, unlike, for example, economic decisions about capital mobility or plant closings, are on the public side of the public-private line. The liberal retort is not to dispute the line, but to move it. The body then becomes one's property, with which one can deal and consent, in a contractual way, to have touched or intruded upon by others. The basic model, like private property itself, is the exclusion of others, the primacy of mine, and an affirmation of our alienated distance from one another protected and guaranteed by the state. To assert privacy in the name of protecting our bodies against oppression is still to assert the liberal worldview. "It's my body, keep others away." "It's my factory. Keep the angry local citizens out while I close it down, so I can move to the Mexican border and find cheaper non-union labor."

On the other hand, one cannot dispute, and one should not demean, the liberating force of "It's mine and you cannot touch it, or touch *me*" as asserted, for example, by an abused wife invoking the state to control and punish her abusive husband. In contexts of oppression, one cannot deny the rhetorical and political power of the imagery of privacy.[50] The dilemma is the extent to which what generates a moment of liberation soon serves to replicate, by use of the very same arguments, the world we are trying to change.

Is there an even imaginable radical alternative view of bodies that does not require us to go on living the public-private split? Two related agendas suggest themselves. One is to recognize that the decision to employ the rhetoric of privacy is just that, a strategic move. The real problem is contexts of oppression, relations of domination that must be undone, old habits of power that must be untrained. From that perspective, the issue is not the privacy of bodies as such, but how to fashion a world without our current hierarchies of power, one of which is the physical abuse of women by men. That suggests the other agenda—the fashioning of communities where one need not hide behind the private for either protection or self-aggrandizement. Communities where relationships might be just "us, you and me, and the rest of us," deciding for ourselves what we want, without the alienating third of the state.[51] In

50. For a vivid and chilling depiction of a setting so oppressive that the most minimal experience of privacy becomes the only basis of freedom, see M. ATWOOD, THE HANDMAID'S TALE (1986).

51. Our doubt about the degree we can trust one another, embedded in the public-private split,

that setting, however remotely possible it may seem, we might even make group decisions about reproduction, replacing our pervasive alienation and fear of one another with something more like mutual trust, or love.

leads to reliance on an outside authority to resolve the problem. Yet, so long as the authority remains *outside*, the doubt cannot be overcome. *See, e.g.*, Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).