Power, legitimation, and drawing distinctions: Rendering of 'public' and 'private' in United States domestic violence policymaking

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POWER, LEGITIMATION, AND DRAWING DISTINCTIONS:

RENDERINGS OF ‘PUBLIC’ AND ‘PRIVATE’ IN

UNITED STATES DOMESTIC VIOLENCE

POLICYMAKING

by

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ABSTRACT

Power, Legitimation, and Drawing Distinctions: Renderings of 'Public' and 'Private' in U.S. Domestic Violence Policymaking

by

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Contested claims about the public/private distinction have always been central to liberal democratic principles, to feminist ideologies, and (more narrowly) to domestic violence policymaking. Historically, treatment of domestic violence as a phenomenon that is relegated to the so-called 'private sphere' has served as justification for limiting such public policy remedies as prevention, intervention and recovery initiatives.

From the grassroots battered women's movements of the 1970s to the current network of shelters, community agencies and advocacy groups, the last several decades have seen significant progress toward increasing public and political awareness of domestic violence. In the United States, many of these efforts culminated with the 1994 passage of the Violence Against Women Act (VAWA), the first comprehensive federal legislation to address the issue. Events since then, however, suggest that the public/private distinction continues negatively to restrict domestic violence policy responses, resulting in greater harm to victims as well as to the larger society. These circumstances call for further
examination of the distinction in light of domestic violence policy, and for the
formulation of alternate or supplemental policy recommendations.

This thesis will examine the theoretical underpinnings of the public/private distinction
in Western democratic traditions in the context of *United States vs. Morrison* and U.S.
domestic violence policymaking in general. In so doing, it seeks to establish a more
precise understanding of how various conceptions of 'private' and 'public' have bearing
on domestic violence policies. It will conclude by elucidating prescriptive policy
recommendations, with the ultimate aim of possibly improving lives.
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ACKNOWLEDGMENTS

In the late 1980s, women's studies and social activism changed my life, and inspired me to seek an undergraduate work-study job beyond the scope of serving food and autoclaving glassware. This search landed me at the door of a grassroots community agency that served women in transition. During the following eight years I ended up working there, I had the opportunity to individually work with hundreds of women from diverse backgrounds, a great many of whom were beaten regularly by their spouses and partners. My job was largely to provide emotional support and practical assistance—to listen to them, connect them with community resources, and bring them together to help each other. In this context, I first came to understand domestic violence, its patterns and complexities. I also witnessed the uglier side of what can happen as the state bureaucratizes what started out as a grassroots social movement. While I learned much from so many women during this experience, a few were especially influential: Sandy Lyons, Becky Logan, Edie Reagan, and my friend and mentor, Sandra Hill. Sandra, through her example and caring guidance, took me under her wing and taught me about social work, as well as the very meaning of professional ethics.

Several years into this work, a developing interest in domestic violence led me to volunteer on the governing board of another agency, one that provided prevention, intervention, and recovery services to battered women and child victims of sexual abuse. In this context, I first learned about the Violence Against Women Act (VAWA). During
my three-year term, the agency’s annual fiscal operations approximately doubled, due in large part to receipt of VAWA funds. I came to better understand the effects of this legislation on women’s lives. Again, this experience was tremendously rewarding and educational, largely because of the knowledge and humor shared among the women involved. I am particularly grateful to Joanne Farbman, Louise Miller, Arlene Richardson, and Gwen Wilkinson. Each of these women understands the problem of domestic violence far better than I ever will.

Shortly after my term on the board ended, I relocated and enrolled in the Ethics and Policy Studies (EPS) program at the University of Nevada, Las Vegas. My experience with this unique and much-needed interdisciplinary program has been immensely positive. With the encouragement of engaging and talented faculty, I was able to cultivate interests in a number of subjects—but especially in philosophy. This thesis, a culmination of these pursuits, has resulted in a new kind of journey, yet one that remains rooted in my days of working with women’s service organizations. I greatly value my learning experiences with Barbara Brents, Frank Chessa, Craig Walton, and Alan Zundel. I also very much appreciate the work and insights of my thesis committee, Craig Walton, Lynne Henderson, and Anastasia Prokos. These individuals—who, respectively, brought their keen expertise in philosophy, law, and sociology to the project—have significantly improved this thesis, and made the process of writing it more enjoyable. Further, I would like to thank Richard Jensen for enthusiastically agreeing to serve as the Graduate College representative on this committee.

Throughout my participation in the EPS program, I have also worked at the University, most recently in the Office of Institutional Analysis and Planning. While this
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imagine having done this without him by my side.
Contested claims about the public/private distinction have always been central to liberal democratic principles, to feminist ideologies, and (more narrowly) to domestic violence policymaking. During recent decades, domestic violence has gained widespread recognition in the United States as a serious social problem—one with significant criminal justice, public health, and civil rights policy implications. Such recognition is indeed a relatively recent phenomenon: for centuries, perpetrators of domestic violence have acted "with almost absolute impunity."¹

Historically, domestic violence and social responses to it have been profoundly shaped by social norms and beliefs associated with family and the home, where privacy stands alongside other culturally sanctified values. Relegation of domestic violence to the so-called private sphere, however, has served as justification for severely limiting such public policy remedies as prevention, intervention and recovery initiatives. From the grassroots battered women’s movements of the 1970s to the current network of shelters, community agencies and advocacy organizations, the last three decades have seen significant progress toward increasing public and political awareness of domestic
violence. In the United States, these efforts culminated with the 1994 passage of the Violence Against Women Act (VAWA), the first comprehensive federal legislation to address the issue.²

Events since the initial passage of VAWA, however, suggest that various renderings of the public/private distinction continue to detrimentally restrict domestic violence policy responses, resulting in continued harm to victims as well as to the larger society. This thesis seeks to develop a much-needed, further specified understanding of how various conceptions of ‘private’ and ‘public’ have bearing on United States domestic violence policymaking—with the ultimate aims of elucidating prescriptive policy recommendations and possibly improving lives. In this introductory chapter, I first set out to describe domestic violence as a prevalent, complex social problem with serious social consequences. Following this, I make the case that the public/private distinction’s role in United States domestic violence policymaking warrants further examination. Finally, I outline the method, chapter by chapter, by which this thesis undertakes such an examination.

Understanding Domestic Violence

Domestic violence is a complex, dynamic and multidimensional problem that has been studied extensively in a variety of disciplines, including sociology, psychology, criminal justice, public health, law, and social work. The complexity of the problem poses challenges to researchers and gives rise to a host of problem definition issues. Moreover, as several theorists have argued, the definitions and causes of domestic violence are culturally constructed.³ Such considerations are important because, in the
words of one scholar, "our choice of approach to define intimate violence has wide-reaching repercussions...from offering services to making laws to planning prevention." Additionally, how we conceptualize domestic violence (or any social problem) from the outset potentially informs our understanding of the broader power relations and social norms in which the problem occurs.

In addition to basic definitional issues, the theoretical frameworks employed in identifying the causes and consequences of domestic violence can serve to illuminate some aspects of the problem while obscuring others. At one end of the spectrum are theories that locate the origins of such violence at the levels of the individual and the family. At the other end are frameworks that connect the problem to larger societal structures. Increasingly, scholars are recognizing that any comprehensive empirical analysis of domestic violence requires a multidimensional approach that incorporates both individual and systemic factors. A general assumption as to the soundness of this standpoint underlies this thesis—as well as, more specifically, the following attempt to overview of the nature of the issue.

Since the 1970s, 'domestic violence' has referred to violence occurring between intimate adults who are living together or have previously cohabited. In more recent years, this definition has broadened to include any such violence that is perpetrated between current or former spouses, partners or dates—regardless of age or living arrangements. As such, terms like 'intimate partner violence' and (more simply) 'intimate violence' are increasingly used to describe the phenomenon. However it is labeled, this type of interpersonal violence typically connotes some degree of physical and/or sexual assault, especially as it is addressed from legal standpoints. Nevertheless,
emotional abuse and coercive control are almost always present as well, and are often the more significant factors from the perspectives of victims and survivors. One author defines domestic violence as “ongoing abuse and control of a woman by her relationship partner,” characterized by such behaviors as confinement, physical violence, sexual violence, threats, psychological abuse, economic exploitation, and control of the social life and work life of the victim. In this characterization, ‘abuse’ and ‘control’ are the core concepts, which are manifested through a fairly broad range of individual behaviors. Also notable about this definition is that it explicitly engenders victimhood as experienced by women, a question I discuss further below.

Several authors point to the importance of distinguishing domestic violence as typified by such coercive control from what has been referred to as ‘common couple violence.’ Common couple violence tends to emerge in large research samples, whereas coercive control is more common among clinical and shelter samples. Unlike coercive control, incidents of common couple violence may not be part of an ongoing pattern, are unlikely to escalate, are perpetrated equally by men and women, and tend to have little impact on those involved. To be clear, this thesis identifies domestic violence as that which falls under the coercive control model. Broadly speaking, however, much of the literature does not explicitly differentiate between the two phenomena, making it difficult at times to know whether that which is being measured and discussed operationally includes common couple violence as well.

The empirical analysis of social and behavioral phenomena usually poses a host of methodological challenges, and measuring domestic violence is no exception. In addition to complications introduced by the definitional ambiguities discussed above, violence
between intimates can easily be underestimated due to a range of factors. Such factors include the failure to report incidents of violence through formal channels, fear of disclosure among victims and perpetrators, and the sweeping silence that can result from general social stigma. As one report sums it up, "Domestic violence generally is a phenomenon associated with profound attempts to conceal its occurrence, even by victims." It is within the context of the methodological concerns and caveats touched on above that I now turn to examining what the research says about the scope of this problem in the United States.

Quantitative claims about prevalence range from 693,000 incidents of violence against a current or former spouse, boyfriend, or girlfriend per year to 4,000,000 women who experience serious assault by an intimate partner annually. A 1997 National Institute of Justice report estimates that, of 2 million women who are physically assaulted in the United States each year, 76 percent are assaulted by a current or former husband, cohabiting partner, or date. According to another study, 1.8 million women are severely beaten by intimate partners each year in the United States, and one quarter of all American women can expect to experience intimate violence at some time in their lives. A 1996 tracking survey conducted for the Advertising Council and the Family Violence Prevention Fund found that thirty percent of Americans say they know a woman who has been physically abused by her husband or boyfriend during the past year. More recently, a June 2003 study published by the Center for the Advancement of Women found that 92 percent of American women rank reducing domestic and sexual violence as one of their top priorities.
On what is perhaps a more encouraging note, a 2003 United States Department of Justice report claims that rates of intimate partner violence declined significantly between 1993 and 2001. During the two decades prior to this decline, from the mid-1970s to the early-1990s, domestic violence rates had been on the rise. Today, rates of assault and murder committed against women by intimate partners appear to be about what they were in the 1970s. Despite more recent trends, numerous studies suggest that intimate partner violence continues to occur at alarmingly high rates. Moreover, since 1994 the decrease in domestic violence assaults (15 percent) is considerably less than the overall reduction in violent crime (31 percent).

Domestic violence crosses socioeconomic strata and the demographic boundaries of age, ethnicity, race, geographic origin, religion and sexual orientation. While domestic violence is prevalent at all income levels, rates measure higher among those with lower incomes. This raises questions as to how the violence relates to economic factors in victim’s lives. A woman living in poverty faces multiple barriers to escaping abusive partners, and the violence itself impedes her ability to earn a living. While women of any age can experience intimate violence, young women, between the ages of 16-24 in dating relationships experience the highest rates. This suggests that factors associated with age, such as life experience and the ability to support oneself, may correlate with violence rates. Concomitantly, the prevalence of domestic violence is consistent across different racial and ethnic groups. However, cultural and material factors have a great deal of bearing on the manner and degree to which such violence is experienced, sanctioned and resisted. Immigrant women, for example, may suffer higher rates of battering than United States citizens because cultural factors may prevent them from
leaving their husbands, or because they have less access to legal and social services than citizens. As a second example, while violence occurring in same-sex partnerships mirrors its prevalence in heterosexual relationships, victims who are lesbian, gay, bisexual or transgender face multiple barriers to accessing crisis intervention and support services, and the legal system.

Within heterosexual relationships, men comprise the overwhelming majority of domestic violence perpetrators, women the overwhelming majority of victims and survivors. The United States Department of Justice estimates that women were victims in 85 percent of intimate violence incidents in 2001, an earlier report sets this estimate at as high as 95 percent. The same report states that intimate partner violence comprised 20 percent of violent crime against women in 2001, while intimate partners committed only 3 percent of violent crimes against men. While intimate violence by women against men has been documented, there is no evidence that such violence leads to the type and extent of suffering caused by intimate violence against women. For example, women are seven to fourteen times more likely to report suffering severe assaults from an intimate, and male perpetrators are four times more likely to use lethal force than females. There is also "no evidence that men become trapped in abusive relationships in the manner that has been observed in the lives of battered women."

As with many (if not all) social issues, domestic violence is characterized by systemic, gendered power relations, although precisely how this is so remains a point of controversy that is a critical to domestic violence policymaking. Many theorists argue that United States domestic violence is rooted in the social construction of the Western nuclear family, which places the husband in an authoritarian position at its head.
Although this violence was explicitly, socially and legally sanctioned for centuries, evidence suggests that countless women have resisted it. Insofar as gender is concerned, women’s resistance to violence—which can culminate in the assault and sometimes killing of her attacker in self-defense—is sometimes framed as ‘women’s violence against men.’ While this label is perhaps not technically inaccurate, it can serve to obscure the self-defense context, with problematic implications. As historian David Peterson del Mar reminds us, “The moral texture of a violent act is contingent on its context. Larger patterns of dominance and abuse must always be considered.”

Although the myth that ‘she would leave if it were really that bad’ persists, it can be extremely difficult, in some cases impossible, for victims to escape violent relationships. A prominent reason for this difficulty stems from the lack of needed resources. One study cited by the National Research Council finds that 56 percent of working battered women had lost a job as a direct result of the violence, while another estimates as many as 63 percent of all homeless women have been victims of domestic violence. The effects of the violence itself can also diminish a person’s capacity to get away. As one author points out, “Intimate partner violence is a causal factor in the development of mental health problems like depression, alcoholism and suicidality.” Moreover, violence is likely to escalate when a victim attempts to leave—and sometimes this escalation can be lethal. In a study that examines court processing of domestic violence cases, 47 percent of victims who escaped the violence by seeking assistance from the criminal legal system said that their partners threatened them with murder during the six months prior to the arrest. All too often, such threats are carried out: more than one third of all women murdered are killed by an intimate partner, and 65 percent of them were physically
separated from the perpetrator prior to their death. Some scholars have argued that research emphases ought to shift away from addressing why victims remain in abusive relationships, and focus instead on determining why perpetrators commit violence. While they make a cogent point, efforts to understand domestic violence as victims experience and respond to the problem remains key to developing effective policy remedies.

A number of scholars have compared domestic violence to the kinds of torture that political prisoners encounter:

The purpose and methods of domestic violence . . . and [those of] traditional forms of torture are similar in many ways. Perpetrators of domestic violence often use violence and control to dominate the victim in much the same way as the traditional perpetrator of torture, who represents the state. These perpetrators may use torture to elicit information, punish the victims, or diminish their capacity.国际人权组织也做出了类似的比较。例如，世界反酷刑组织，一个国际非政府组织联盟，详细描述了由国家代表的酷刑者和女性在其家庭和社区中所遭受的‘私有’酷刑的相似性。在一位研究者的说法中，“将一个被关在牢房中的男人和一个反复被家暴的女性放在一个地方，没有什么能区别他们的位置。”另一名学者认为，“国家支持的暴力可能在本质上与私人暴力不同。”虽然这种比较可以提醒我们家庭暴力的严重程度，并用以取得政策制定者的关注，但我认为我们应该看到家庭暴力的特殊性。正如诺曼·丹尼森所言，“家庭暴力的恐怖源于它是由亲密关系中的暴力而引起的事实。
that the subject is violently attacked by an other she had previously defined as safe." I have characterized domestic violence as a complex social problem. This complexity stems in large part from the fact that victims often share lives, homes and children with their assailants—and many continue to harbor feelings of love and loyalty toward them. Moreover, much of the violence occurring between intimates take place behind closed doors, in the home, a place which is often culturally regarded as a haven from public life. For the victim of domestic violence, however, the home may more resemble that prison cell of the tortured inmate; there are often no safe places to which she can retreat.

While a majority of intimate partner violence does take place within the home, such violence extends well beyond the household, a fact that has been obscured in some of the domestic violence discourse. According to the National Institute of Justice, more than one third of all incidents of intimate partner violence from 1993 to 1998 in the United States occurred outside the victim’s home. Another study found that 75 percent of battered women employed in the labor force experienced harassment by their partners while they were at work. The Bureau of Labor Statistics reports that homicide is the leading cause of death for women on the job, and that 20 percent of these deaths result from women being murdered by their partners while at the workplace. Recognition that domestic violence extends beyond the so-called private sphere of family home life and into such domains as paid workplaces has grown in recent years. This growth is marked by the emergence of organizations like the Corporate Alliance to End Partner Violence, which puts forth that “partner violence is not just a domestic matter” and aims to “reduce[e] the costs and consequences of partner violence at work.”

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The costs and consequences of intimate partner violence indeed warrant such efforts. The Bureau of National Affairs estimates that domestic violence costs employers $3 billion to $5 billion annually in reduced productivity and missed workdays. The material consequences of domestic violence are also reflected in a congressional report which asserts, “[G]ender-based violence bars . . . women . . . from full participation in the national economy. Even the fear of gender-based violence affects the economy[.]” The health care costs associated with domestic violence contribute to this picture, as do other service-related costs arising from the need for shelters and other prevention and intervention services. Social costs become manifest as a drain on law enforcement resources. According to one estimate, approximately one third of all police time is spent on domestic disturbance calls. Significant costs are also associated with the devastating effects of intimate partner violence on children, an estimated 3.3 million of whom witness such violence against their mothers or female caretakers each year. The American Psychological Association claims that 40-60 percent of men who abuse women also abuse children, and that fathers who batter mothers are twice as likely as non-violent fathers to seek sole physical custody of their children. Yet with all of these, harm to victims remains a most critical social cost. Victims experience human costs—such as unused potential and sometimes their very lives—as well as monetary costs, such as those associated with property replacement and relocation. As one author sums it up, “Victims of violence suffer physical, emotional, and psychological trauma that exhausts their energies and finally ends up depleting society’s financial, legal, and moral resources.”

Intimate partner violence is a serious, prevalent, complex problem that persists in the United States despite various remedial laws and policies. While there are many
theoretical points of departure from which to further develop empirical understandings of
the problem, as well as normative assertions toward its amelioration and ultimate
eliminination, the public/private distinction has figured centrally in both regards. The
pursuit of a more explicit and refined articulation of how various conceptions of ‘public’
and ‘private’ can and do influence domestic violence policymaking is of critical
importance. The following section builds an argument in support of this claim.

Domestic Violence Policy and the Public/Private Distinction:

Why Further Examination Is Warranted

In the previous section, I provided a descriptive overview of domestic violence as a
social problem. An understanding of what intimate violence is fundamentally shapes
prescriptive recommendations about the issue. In this section, I turn the discussion to a
concept that is central to both empirical and normative claims about domestic violence:
the public/private distinction. Throughout the history of United States domestic violence
policymaking (and the lack thereof), shifting conceptions of ‘public’ and ‘private’ have
pivotally informed perceptions about the problem and the sociopolitical contexts in which
it occurs. I will argue that the function of the public/private distinction is primarily, in
these regards, one of obfuscation—and that this has significant implications and
consequences for domestic violence policy. Problems impel solutions, and obfuscation
suggests the need for clarification. Thus, my overarching argument makes the case that
further examination of how renderings of ‘public’ and ‘private’ serve to frame domestic
violence is critical to improving policy remedies.
Although I have not yet discussed the paradigm explicitly in such terms, in the previous section I began to illustrate some of the ways that the public/private distinction frames intimate partner violence as a social problem. For one, the majority of domestic violence incidents occurs in victims' homes, hidden behind closed doors. This type of interpersonal violence is very much bound to the institutions of marriage and family, which are strongly associated with conceptions of the so-called private sphere. Moreover, the very term 'domestic violence' locates the problem within this realm. That intimate violence did not emerge as a 'workplace issue' until fairly recently—and the related assertion by corporate interests that it 'is not just a domestic matter'—underscore this point. However, this is just the tip of the proverbial iceberg.

Social values and institutional norms surrounding conceptions of 'public' and 'private' have resided near the core of domestic violence prevention and intervention policy efforts since the late nineteenth century. Until this time United States law, largely rooted in British common law, granted husbands the right of 'chastisement'—that is, legal sanction to coerce their wives' obedience by use of corporal punishment. This right was inherently tied up in the institution of marriage, an arrangement in which the wife, whose legal status was subsumed under her husband's, in certain formal regards became the property—and thus also the legal responsibility—of her husband. Although many would argue that the patriarchal underpinnings of chastisement doctrine persist today, a number of factors contributed to its widespread repudiation in the late 1800s. With this transformation, "a new body of marital violence policies . . . asserted that the legal system should not interfere . . . in order to protect the privacy of the marriage relationship and to promote domestic harmony." This legal emphasis on marital privacy was (and in
many ways, still is) also reflected in social norms. In addition to their impact on judicial
decision-making, for several decades privacy claims served as justification for a largely
non-existent policy response to domestic violence. In the 1970s, grassroots battered
women's movements began to effectively challenge the classification of domestic
violence as a 'private matter' by working to move the issue into the realm of public
awareness and public policy. So, the public/private distinction has played major
historical roles in shaping policy responses to domestic violence, in this example by its
relegation to the so-called private sphere of the family, as well as the more recent
emergence of the problem as a matter of public concern.

To be clear, I do not mean to suggest that locating intimate violence on either side of
the public/private distinction serves as the only explanation noninterventionist policies
that held during most of the twentieth century. I would argue that a range of other
factors, including corporate capitalism and the persistence of traditional authoritative
roles within the family, contributes to these tendencies as well. What makes the
public/private distinction particularly interesting is the extent to which it may function to
obscure these other factors. As we have seen, the distinction can substantially restrict the
contexts in which one might typically understand domestic violence to occur. In
actuality, the violence transcends whatever conceptual barriers we might place around the
home, the family—the 'private.' The effects of the violence do not stop when a battered
woman steps outside the door of her residence. On the contrary, she is far more likely to
be living in a state of perpetual anxiety and fear. Granted, she is also probably isolated,
such that she does not communicate much with others about the violence. I would argue,
however, that such silence and isolation do not equate to ‘privacy’—at least in part because ‘privacy’ connotes a degree of sovereignty.  

In addition to skewing our understanding of the contexts in which domestic violence occurs, its relegation to the ‘private’ has served to obfuscate underlying power relations, such as those acted out through gendered social norms. Various conceptions of ‘public’ and ‘private’ offer up frameworks for discussing the issue in seemingly power-neutral, gender-neutral rhetoric. The effect is one of depoliticization. As Nancy Fraser puts it, “The limits of ‘the political’ is a political question.” Relegation of an issue to the so-called private sphere tends to mask its sociopolitical functions and consequences. This obfuscation calls for further examination of how the public/private distinction informs the framing of domestic violence as a policy issue.

The scope of the public/private distinction’s impact on domestic violence policymaking, however, extends far beyond relegation of the problem to the so-called private sphere. The distinction strongly informs the very social and political contexts in which domestic violence occurs. Notions of ‘private’ and ‘public’ are inherently tied up with our most cherished and celebrated cultural values. In the United States, cultural and legal renderings of the public/private distinction, as with much of modern liberalism, are well reflected in the classical writings of John Locke. Locke maintains that individuals require a legal barrier from threats to self-preservation, including those that might come from a ruling power. Moreover, he broadens this notion to include not only a person’s life, but also that which “he hath mixed his labour with.” What emerges is the depiction of the private as a sphere, free from that which intrudes. This sets up a dualistic framework in which ‘private’ thus becomes regarded as that which is not public. The
ultimate effect is to construct these concepts as rigidly distinct, mutually exclusive, and
dichotomously oppositional.

In the United States, this conception of separate public and private domains has been
imbedded in law and doctrines concerning government’s relationship to the family. The claim that there ought to be restrictions on state powers, especially into domains
socially constructed (and thus commonly regarded) as ‘private’ has a strong tradition in
this country. Perhaps this tradition is most strongly supported by the claim that privacy is
an essential value—many would argue, an inherent human right. The importance of
privacy has been championed from opposing positions on the political spectrum in the
United States. Some, for example, have argued its basis for condemning governmental
interference in personal decisions regarding reproduction, while others have claimed it as
justification for entitling parents with more control in the discipline of children.

Furthermore, questions regarding privacy have emerged in recent discourse concerning
the appropriate reach of state power in this ‘post-September-11 era.’ The recent passage
of the federal Homeland Security Act, for example, has triggered a heated national debate
concerning privacy rights, and the circumstances under which such rights can be
justifiably violated in the name of national security. Philosopher James Rachels links the
importance of privacy to being necessary for the development of basic human relations,
claiming that “the right to privacy [is] a distinctive sort of right in virtue of the special
kind of interest it protects.” With regard to domestic violence, victims’ advocates have
noted that privacy is often an affirmative factor during recovery from violent
relationships. Widespread attitudes also reflect the valuing of privacy: most Americans
seem to believe that privacy is an important right worth upholding and defending.
Conceptions of ‘public’ have also been central to liberal democratic traditions, an idea that is reflected in the work of John Dewey, who developed principles of discussion and debate as an approach to solving social problems. Dewey’s work builds on the claim that “informed argument is a prerequisite of democracy and that self-government will flourish to the extent the public can communicate its own critically tested concerns.” This idea carries significant implications for shaping the normative role of ‘citizen’ in liberal democratic societies, as well as for how political decisions may be legitimized in such contexts. In encapsulating a common, major theme among five political philosophers, Kent Greenawalt states, “the grounds of [political] decision should have an interpersonal validity that extends to all, or almost all, members of [a liberal democratic] society.” Thus, ideas about ‘the public’ would appear to strongly undergird social values, as well as processes of political legitimation in the United States.

Much has been written about the liberalist public/private distinction, and critics have challenged that it presents an oversimplified, dualistic model of social and political life that is inherently mutable. One author, for example, suggests that we “take a look at the belief that there is still an intelligible distinction between the public and the private.” Another argues, “[T]he public sphere is ubiquitous; . . . arms of ‘public’ government define and mediate complex relations . . . in the context of ‘private’ life.” Such perspectives tend to characterize ‘public’ and ‘private’ as “contingent, transformable conceptions of how power ought to be allocated among individuals, social groups, and government.” In other words, the conceptual barriers between ‘public’ and ‘private’ are fluid rather than rigid and are delineated differently in different social and legal contexts—with the results depending largely on whose interests are at stake. With such
mutability, the distinction can function to obscure power relations. Along such lines, for example, Sandra Marshall claims that the public/private distinction is really “an ideological camouflage for the state’s actual interventions into the private realm.” Marshall maintains that the state has a significant political interest in families, but seeks to underplay its actual reach into this domain. While all of this suggests a good deal of ambiguity with regard to the state’s actual and normative relations to the family, the public/private distinction also surfaces in other arenas, such as those involving religion and the market. How ‘public’ and ‘private’ function to obfuscate power relations has important implications for better understanding broader political forces and evolving social mores.

I have argued that the costs and consequences of domestic violence, in conjunction with the history of policy response to the issue, warrant further specification of these ambiguities, particularly in light of the political functions of ‘public’ and ‘private.’ I suspect that the public/private distinction continues to influence domestic violence policymaking so as to restrict policy remedies and contribute to the perpetuation of resultant social harms. While the distinction between the two concepts may indeed reflect an oversimplified dualism, these terms carry enormous rhetorical potential, largely because they are so tied up with social values. Moreover, their different meanings can vary significantly with the specific and historical contexts with which they are used. The various applications of ‘public’ and ‘private’ readily reflect this ambiguity, while potentially bringing into conflict some of our deepest held values and norms. In scholarly contexts, there have been calls to move beyond the public/private distinction, as well as calls for its revival in feminist theorizing. So, in addition to meaningfully
informing prescriptions for domestic violence policy, an analysis of its relation to the public/private distinction may also serve to further inform critical social theory. The following section outlines how this thesis will carry out such an analysis.

Applied Method

Having described domestic violence as a complex and prevalent social problem with serious consequences, and having argued that the public/private distinction warrants further examination vis-à-vis United States domestic violence policymaking, I conclude this chapter by sketching how the remainder of this thesis undertakes such an examination.

In Chapter 2, I aim to establish theoretical foundations for the analysis by interpreting Jürgen Habermas’s *Structural Transformation of the Public Sphere (Strukturwandel der Öffentlichkeit)* as a point of departure. In this early work, Habermas charts the rise, transformation and decline of the bourgeois public sphere of eighteenth- and nineteenth-century Europe and analyzes the social and political ramifications of its deterioration in the late nineteenth and early twentieth centuries. First published in German in 1962 and translated into English in 1989, this book has had considerable influence on scholarship in a range of disciplines, including sociology, political and moral philosophy, law, communications, and feminist theory. I first came to *Strukturwandel* by way of feminist social theory addressing the categories of ‘public’ and ‘private’ as they relate to gendered, systemic patterns of dominance. With a specific interest in domestic violence as a policy issue that has been hugely shaped by contested claims about ‘public’ and ‘private’ as well as patterns of dominance, I began my investigation by looking into the
wide body of feminist literature that critically analyzes the public/private distinction. I soon found abundant reference to Jürgen Habermas, who is both heralded and critiqued for his historical/sociological account of the public sphere.

In the second part of Chapter 2, I evaluate *Strukturwandel* in light of the contributions of other thinkers who have written about the public/private distinction, especially those of Habermas’s feminist critics. Here, I present various critiques of the claims Habermas puts forth, and further examine the work’s usefulness for clarifying the ambiguities surrounding the public/private distinction. Namely, I set out to critically examine the role institutions play in mediating power relations and exchanges between so-called public and private spheres. In so doing, I seek to develop a synthesized theoretical framework for discussions of the public/private distinction in the chapters that follow.

In Chapter 3, I overview the history of United States domestic violence policymaking in order to provide social/historical context and to further explicate how, as a policy issue, domestic violence can and does shift between contested renderings of ‘public’ and ‘private.’ Here, I outline the social roots and major historical shifts of United States domestic violence law and policy. I also attempt to identify how ‘public’ and ‘private’ have related to various policy formulations and outcomes. This discussion culminates with an account of the passage and enactment of the Violence Against Women Act (VAWA) of 1994, the first comprehensive federal legislation to address the problem of intimate violence. This law enacted measures and allocated federal resources toward the prevention and intervention of such crimes as rape, stalking and domestic violence. One provision—Title III, commonly referred to as VAWA’s civil rights remedy—granted
victims of gender-motivated violent crimes\textsuperscript{80} the right to sue their assailants for compensatory and punitive damages in state or federal court.

In May 2000, the Supreme Court's decision in \textit{United States vs. Morrison} rendered Title III unconstitutional—and thus a fundamental piece of VAWA was overturned. In Chapter 4, I examine how this case played out, with particular attention to how conceptions of 'public' and 'private' come into play in the Court's arguments. The chapter begins with a review of this landmark civil rights remedy for gender-based violence. I describe its legislative journey from introduction to enactment, and present the major arguments that arise in \textit{Morrison}. I conclude the chapter with a critical evaluation of these arguments. In so doing, I make the case that the discursive and (otherwise) political functions of 'public' and 'private' continue to have considerable bearing on United States domestic violence law and policy.

In the final chapter, Chapter 5, I attempt to synthesize meaningful connections based on the analyses presented in the preceding chapters. It is my hope that out of this synthesis will emerge a set of well-founded normative claims about the role of 'public' and 'private' in domestic violence policy formulation, as well as a set of sound policy prescriptions toward ameliorating, and ultimately eradicating, this social problem.
Notes


6As with much of the literature, I employ the terms interchangeably. I tend to avoid the more general term ‘family violence’ because its scope is broader than the type of violence addressed here.

7That emotional abuse and coercive control are often of greater concern to victims than physical injury emerged as a pattern in my human services work with abused women between 1991 and 1998.

8Mahoney, Williams, and West, 145.


10Jasinski, 6.

11Mahoney, Williams, and West, 149.

12According to the Florida Governor's Task Force on Domestic and Sexual Violence, Florida Mortality Review Project, 1997, 3, for example, only about one seventh of all domestic assaults come to the attention of the police.


17Mahoney, Williams, and West, 143.


20Rennison, 2.


22Eng, 9.


According to this study, 15 to 50 percent of abused women report interference from their partner with training, education or work activities. Moreover, victims with limited financial resources are more likely to depend on the organizations through which such violence gets formally reported.


28 Moore and Baum, 5-10.

29 Rennison, 1. This study does not differentiate between common couple violence and coercive control, but uses physical assault as the indicator of abuse.


31 Rennison, p. 1.

32 Mahoney, Williams, and West, 146.

33 Tjaden and Thoennes, 7. These include incidents during which the partner “beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them.”

To be clear, I understand systemic, gendered power relations to play out in both same-sex and opposite-sex intimate relations.


American Bar Association Commission on Domestic Violence, *Statistics*.


Bond, 485.


49 Rennison and Welchans, 5.

50 Commission on Behavioral and Social Sciences and Education, 88. Other studies on homelessness cited in this report estimated domestic violence rates among the homeless at 27 percent and 41 percent.


55 Kakar, 77.


58 Kakar, p. 77.

59 I consider myself among those who would make such an argument.


61 For further development of this idea, see Catherine Wu, “Sovereignty As Privacy,” paper presented at the American Political Science Association Meetings (San Francisco, August 30 to September 2, 2001).


63 For a concise discussion on the origins of the private in the liberal tradition, see Judith A. Swanson, The Public and the Private in Aristotle’s Political Philosophy (Ithaca: Cornell University Press, 1992), 4-8.

64 Swanson, p. 5.


74 Allen, 461.

75 Marshall, 100.

76 See Higgins, for example.

77 To be clear, I am referring here to critical theory in the general sense. I employ capitalization when referring to the Critical Theory of the Frankfurt School.

78 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into Category of Bourgeois Society* [original German publication 1962], trans. Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1989).

79 In *Structural Transformation*, Habermas is particularly concerned with Germany, France and Great Britain throughout the book, while occasionally referencing the United States.

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The legislation defines 'crime of violence motivated by gender' as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." (42 U.S.C. § 13981)
CHAPTER 2

JÜRGEN HABERMAS AND CRITICAL FEMINIST PERSPECTIVES
ON THE PUBLIC/PRIVATE DISTINCTION

In the previous chapter, I argued that the public/private distinction has played an integral role in shaping United States domestic violence policy. I also claimed that its scope extends to the much broader function of framing the larger social and political contexts in which domestic violence occurs. Indeed, competing conceptions of ‘public’ and ‘private’ centrally impact a wide range of policy issues and underlie critical tensions among the very principles of liberal democracy. The meanings of ‘public’ and ‘private’ and the distinctions drawn between these concepts are fundamental to the body of moral and political theory that puts forth models of public discourse and normative claims about democratic citizenship. Yet, while evoking an illusory straightforwardness on the surface of much liberalist discourse, ‘public’ and ‘private’ are broad, value-laden, mutable categories with vast rhetorical potential.

How ‘public’ and ‘private’ are rendered meaningful in Western social and historical contexts frames the general scope of my inquiry in this chapter. My aim here is to examine these terms and their meanings in the structural-political sense, by which I mean the sense that they pertain to institutionalized power and power relations, especially relations of domination. Toward this end, I undertake an interpretation and critical
evaluation of Jürgen Habermas's *The Structural Transformation of the Public Sphere* (*Strukturwandel der Öffentlichkeit*). This book, originally published in German in 1962 and translated into English in 1989, analyzes the rise, transformation and decline of a 'bourgeois public sphere' occurring in Europe during the eighteenth and nineteenth centuries. In the four decades since its original publication, *Strukturwandel* has come to be regarded as paradigmatic among sociologists, legal scholars, political and moral philosophers, media critics, and cultural theorists. As such, the book has spurred numerous points of departure among scholars. Given that its reach has been so expansive, I will briefly reiterate the particular interests that frame my reading and my discussion of the work in the sections that follow.

The feminist social theory by which I first discovered *Strukturwandel* has a tradition of deconstructing and challenging the public/private distinction insofar as it obscures systemic relations of gender domination. With a specific interest in domestic violence as a policy issue that is greatly influenced by contested claims about 'public' and 'private,' I approached this book with the following argument in mind:

(A) The various meanings rendered by 'public' and 'private' are transformable, and shift greatly according to social and historical context.

(B) Such renderings carry vast implications and consequences for moral and political life.

(C) Given (A) and (B): Morally and politically, we ought to better understand the contexts that gave rise to our understandings of these concepts, as well as the mechanisms by which such shifts occur.

In examining the bourgeois public sphere structurally, Habermas pivotally contributes to this 'better understanding'—both by "inviting concrete investigations of specific forms of
political and cultural life and by establishing groundbreaking directions for the situation of 'public' and 'private' in moral and political philosophy.

So, while many points of departure may be taken from *Strukturwandel*, the following questions frame this chapter: What, precisely, are the various meanings of 'public' and 'private' and how are these meanings rendered in different social and historical contexts? How might delineations among public/private conceptual boundaries serve to elucidate or obscure systemic power relations in contemporary American life? How do they shape political agendas in a heterogeneous society, and how do they serve to extend or constrain the domain of state intervention? How does Habermas's account inform contemporary cultural values and normative claims surrounding privacy rights and democratic citizenship? And, central to my overarching purpose here, how might his work contribute to our understanding of domestic violence and its remedies? I maintain that these questions are essentially bound up with one another. While they have important bearing on questions of social and political context, they also have direct relevance to a host of specific social issues. How, for example, are victims of domestic violence restricted from shaping the public agenda, and to what extent are they differentially affected by the boundaries of privacy rights? How have movements to increase public awareness of domestic violence served to politicize the issue, and why does such violence persist in the face of these efforts? While I cannot hope to conclusively answer these questions, I raise them here as a means of framing the interpretation and evaluation of *Strukturwandel* that follows.

This chapter has two main parts. In the first, I interpret the major points of Habermas's historical/sociological account of the emergence and transformation of the
bourgeois public sphere. In the second, I critically evaluate some of Strukturwandel's major claims and ideas. As a work of major influence, this book has drawn numerous critics, and my evaluation considers the insights of such critics, with an emphasis on feminist scholars who address the issue of a 'gender-blindness' in Habermas's work. To assess Strukturwandel's usefulness in making sense of the public/private distinction, I present and consider some of these criticisms, and attempt to reconcile them with Habermas's account. In concluding I argue that, while Habermas's analysis has some serious limitations, it is nonetheless an excellent point of departure for scholarly inquiry into matters of 'public' and 'private'—and sets out both a model and a direction that is worthy of 'dialectical alliance' among scholars concerned with the questions posed above.

An Interpretive Summary of Habermas's

Strukturwandel der Öffentlichkeit

At the outset of Strukturwandel, Habermas characterizes the bourgeois public sphere as "a category typical of an epoch" that must be investigated broadly, drawing on the tools and perspectives of several disciplines. He grounds his analysis in the social structural interdependencies that contributed to the emergence and transformation of the bourgeois public sphere over time, at the level of society as a whole. Such a historical understanding, he posits, along with the sociological clarification of the concept of 'public sphere' will result in "a systematic comprehension of our own society from the perspective of one of its central categories."
To understand the context with which Habermas discusses the bourgeois public sphere, it helps to note a couple of linguistic complications that arise within its translation to English. First, the German term *Öffentlichkeit* may be rendered variously as '(the) public,' 'public sphere,' or 'publicity.' Habermas further distinguishes between the 'political public sphere,' the 'literary public sphere,' and 'representative publicness'—concepts that I discuss further in the sections that follow. Second, *bürger* may be translated as both 'bourgeois' and 'citizen.' As translator Thomas Burger notes, the German word *bürgerlich* means 'civil,' 'civic,' and 'bourgeois'—and also 'middle class.' Importantly, the public sphere with which Habermas is primarily concerned pertains to the rise of liberalism and to a specific social stratum. While 'bourgeois' and 'citizen' carry unique connotations in contemporary American English, that they are represented by the same word in German fits well with the author's analysis.

Habermas acknowledges early on that the terms 'public' and 'public sphere' encompass many socially and temporally based meanings that can cause a good deal of confusion. In ancient Greece, for example, the public sphere represented a realm of freedom and permanence where citizens discussed issues in the *polis* and competed for excellence in visible arenas with one another. (3) Centuries later in eighteenth-century Europe, as we shall see, a reversal occurs in that freedom and pursuit of the good life became associated with the private rather than the public realm.

*Preconditions and Origins of the Bourgeois Public Sphere*

According to Habermas, an opposition between 'public' and 'private' did not exist during the early Middle Ages. While the contrast in Roman law between *publicus* and...
*privatus* was familiar during this time, it had no standard usage. Although a certain parallelism existed between these concepts and the 'common' and the 'particular,' this was reversed with feudalism when the 'common man' became in a sense the 'private man.' During this time, 'lordly' and 'publicus' were used synonymously, not in the sense of a social realm but as a status attribute—an 'aura' of status that was represented publicly. Thus the feudal lords "represented their lordship not for but 'before' the people." (8) That this 'representative publicness' started to diminish with early capitalism and the rise of national and territorial power states marks an important initial separation of public and private domains:

The final form of the representative publicness, reduced to the monarch's court and at the same time receiving greater emphasis, was already an enclave within a society separating itself from the state. Now for the first time private and public spheres became separate in a specifically modern sense. (11)

The German word *privat* emerged in the middle of the sixteenth century with the meaning "not holding public office or official position." (11) 'Private' then came to designate exclusion from the realm of the state. By the end of the eighteenth century, the carriers of representative publicness—the remaining feudal powers, the Church and the nobility—polarized and split into public and private elements. (11) Religion, Habermas asserts, became a private matter, and civil society emerged as a private autonomy opposed to the state, while bureaucracy and the military developed into public functions.12

Habermas directly links the origins of the bourgeois public sphere with aspects of early finance and trade capitalism.13 The new commerce developed according to rules that were determined by existing power structures. However, a network of new horizontal economic dependencies also materialized. These relationships could no longer
be accommodated by an estate system based on household economies, and the market
came to replace many household functions. Yet, so long as members of the old ruling
stratum participated as consumers, the political order remained largely unthreatened. (15)

The reduction in representative publicness, along with other transformations resulting
from the emergence of early capitalism, made way for a public sphere in the modern
sense: the sphere of public authority—that is, the state, with its monopoly over the
legitimate use of coercion and its various jurisdictions. (18) According to Habermas,
activities of the state became continuous and were increasingly oriented toward capitalist
aims. These aims also gave rise to new communications.14 The emerging press
developed as a unique power that, while born of the needs of commerce, soon became a
commodity itself.15 This power, a central thread in Habermas’s narrative, soon became
both an instrument of the state, as well as of civil society.

Emergence and Rise of the Bourgeois Public Sphere

Certain activities that had once been relegated to the domain of the household
emerged into the new public sphere.16 Official promulgations constituted new state
interventions into household activities. A scarcity of wheat, for example, would propel
officially decreed restrictions on bread consumption. (24) This type of state regulation,
according to Habermas, spurred the critical judgment of a public using reasoned
discourse. (24) Thus, civil society arose in opposition to the state, and “came into
existence as the corollary of a depersonalized state authority.” (19) Habermas conceives
of the bourgeois public sphere as private people who come together to form a public, and
integral to this conception is that the individuals participating made use of critical
reasoning in a political confrontation with state authority.17 (27)
While state officials addressed their decrees to ‘the public,’ they usually did not reach the common person in this way. Rather, they reached the educated classes that were comprised of a new stratum of bourgeois people who came to occupy a central position within society. Habermas describes this stratum as the abstract counterpart of state authority, an emergent ‘public sphere of civil society.’ (23) Here again, the press came to play a key role—both as a vehicle for communicating decrees of the state, and as a means of engaging critical, reasoned discourse among the emerging bourgeois public.**

Habermas regards this new function of the press as a momentous shift, whereby private people “readied themselves to compel public authority to legitimate itself before public opinion.” (25) Although the idea of public opinion was to emerge later, this shift was the genesis of the principle that the state could only legitimate its authority vis-à-vis ‘the will of the people.’

While Habermas connects the emergence of the bourgeois public sphere to the press, he also links it to the development of other institutions that organized public discussion, where private individuals could come together and freely debate with one another. The coffee houses in Great Britain, the *salons* in France and *Tischgesellschaften* (table societies) in Germany all shared certain criteria in common.* For one, Habermas maintains, they tended to disregard social status in favor of the parity brought about by ‘the better argument’ and notions of ‘common humanity.’** Although he acknowledges that such ideals were rarely achieved, the author points out that their ideas had become prevalent and would come to have far-reaching implications.*** Moreover, the bourgeois public’s emphases on critical reasoning and common concern contributed to the notion that the ‘public’ was inclusive, at least in principle. “The issues discussed became
‘general’ not merely in their significance, but also in their accessibility: everyone had to be able to participate.” (37) Consistent with his emphasis on communications, Habermas discusses how each of these institutions was also a potential publicist body that generated written discourse whereby “the public held up a mirror to itself.” (43) Thus, although the public sphere participating in these institutions was still in fact quite small, a new social category of bourgeois representation arose. (38)

Directly related to the emergence of the bourgeois public sphere was the patriarchal conjugal family, which became characterized as an intimate domain differentiated from the sphere of social reproduction. The conjugal family fundamentally shaped the political self-understanding of the bourgeois public sphere:

For the experiences about which a public passionately concerned with itself sought agreement and enlightenment through the rational-critical public debate . . . flowed from the wellspring of a specific subjectivity. The latter had its home, literally, in the sphere of the patriarchal conjugal family. (43)

Habermas connects the emergence of this dominant family type with centuries of transformation toward capitalism. (44) He discusses how the role of commodity owner combined with that of head of the family, and how ‘property owner’ merged with the idea of ‘human being’ per se. (28) He also points out an important conflict between the family’s self-image and its socioeconomic function:

Although there may have been a desire to perceive the sphere of the family circle as one independent, as cut off from all connection with society, and as the domain of pure humanity, it was, of course, dependent on the sphere of labor and of commodity exchange. . . . Thus it was a private autonomy denying its economic origins that provided the bourgeois family with its consciousness of itself. It seemed to be established voluntarily and by free individuals and to be maintained without coercion; it seemed to rest on the lasting community of love on the part of two spouses; . . . [T]he independence of the property owner in the market . . . was complemented by the dependence of the wife and children on the male head of the family; private autonomy in the former realm was transformed into authority in the latter and made any pretended freedom of individuals illusory. (46-7)
Thus the self-concept of the family erroneously projected a distinct separation from not
only the state but also the market. At the same time, this intimate sphere was also
subjectively oriented to an audience. Habermas connects this subjective orientation of
the family with the literary forms of the letter and the diary, which grew in popularity at
the time, as did book groups and reading circles. Like the critical public that had grown
out of the early coffee houses, salons, and Tischgesellschaften, these later institutions,
also held together through the press and its criticism, formed a public sphere of critical
reasoning in the world of letters.23

Politization and Codification of the
Bourgeois Public Sphere

The literary public sphere gave rise to what Habermas calls the ‘public sphere in the
political realm.’ In other words, the process by which private people came together to
form a critically reasoning public—one that both confronted absolutist state authority and
assumed the role of the public sphere governed by that authority—had its origins in
forums for discussion. In his account of the mechanisms by which the public sphere in
the world of letters was politicized, Habermas traces the political philosophy of Hobbes,
Locke and Montesquieu. He reveals that normative claims about rationality developed as
a basis for confronting monarchical authority. In opposition to claims of absolute
sovereignty, a political consciousness arose that demanded general and abstract laws, and
which asserted public opinion as the only legitimate justification for such laws. (54)

Habermas contends that the idea of ‘universalist’ rules was integral to the
 politicization of the bourgeois public sphere, at least to the degree that such rules created
a space for subjectivity while at the same time allowing for challenges to absolutist rule.
Institutions of the public sphere in the literary realm, together with the concept of the legal norm, brought about the emergence of the public sphere in the political realm. Notably, women and dependents were institutionally excluded from the political public sphere, both factually and legally. (56) At the same time, those private individuals who participated in the different forms of the public sphere did not make distinctions between these forms, for “in the self-understanding of public opinion the public sphere appeared as one and indivisible.” (56) This viewpoint had its roots in the ‘fictitious identity’ shared among those who came together to form a public: the role of property-owner combined with the role of human being. The notion of this one public, albeit false, was facilitated by positive consequences for the bourgeois stratum: the emancipation from absolutist rule.

In examining the development of the political functions of the public sphere, Habermas provides a comprehensive discussion on how related events unfolded in Great Britain, France and Germany, specifically with regard to the “interrelationship of public, press, parties and parliament.” (73) However, the author argues that such relationships only offer a partial understanding of the rise of the political public sphere. For a more complete picture, one must grasp the broader context of the historical phase during which commodity exchange and social labor were largely freed from state regulation. (74) The privatization of the market was, according to Habermas, a necessary precondition for a public sphere that normatively functioned as “the self-articulation of civil society with a state authority corresponding to its needs.” (74) The liberalized market—along with the ideological notion that ‘free’ exchange would enable justice to prevail over force—marked off a realm of social reproduction that granted property (and commodity) owners
'private' autonomy free from state intrusion. Habermas connects the very origins of the positive meaning of 'private' to the capitalist idea of the 'free' market. (74)

Thus, this liberalist model of the public and private spheres, which was to become constitutionally institutionalized, took shape within decisive economic and social contexts. The model was codified as civil law and a system of norms, according to which private citizens and institutions were guaranteed certain basic rights. These rights constituted: the political function of private persons publicly engaged in rational-critical debate; the private citizen's status as an autonomous human being within the patriarchal conjugal family; and the transactions of property owners in the realm of civil society.

The basic rights guaranteed: the spheres of the public realm and of the private (with the intimate sphere at its core); the institutions and instruments of the public sphere, on the one hand (press, parties) and the foundations of private autonomy (family and property), on the other; finally, the functions of the private people, both their political ones as citizens and their economic ones as owners of commodities. (83)

In Habermas's account, the new legal codes underwent the critical scrutiny of the bourgeois public sphere, providing the context in which this sphere attained its full political development as the 'very organizational principle' of the bourgeois constitutional state. (74) In addition to securing a 'free' private sphere, laws spelled out the functions of the public sphere, thereby linking state activity to legal, general norms that were legitimized through reasoned public opinion. Thus purportedly, "a legislation that had recourse to public opinion thus could not be explicitly considered as domination." (82)

As within the market, laws within the constitutional state were supposed to be equally binding for all citizens and thereby, in principle, prescribe a just set of rules for civil society. Within this context, "the character of executive power, domination itself, was supposed to change." (82) However, the liberal model of clearly defined public and
private spheres obscured the exclusive domain of ‘citizen’ and the arguably rigid boundaries of civil society. The bourgeois public sphere was but a fraction of the overall ‘public’ that it purportedly represented. Habermas makes clear that these constitutional models were predicated on an unrealistic view of civil society. (84) As such, while laws legitimated through public debate upheld the idea that, in the liberal model, reason would triumph over domination, the model did not render domination irrelevant after all. (88) Rather, existing power relations were upheld as the bourgeois class promoted its interests by assuming the guise of the common interest.

*Ideological Underpinnings of the Bourgeois Public Sphere*

To launch an analysis of the ideas and ideologies that informed the bourgeois public sphere, Habermas traces the emergence of ‘public opinion’ and its movement toward serving as the liberal justification for the legal norms.²⁶ Here, he discusses how ‘opinion’ and ‘public opinion,’ and the relations of these concepts to state power, develop in the political philosophy of Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Jeremy Bentham. Specifically, he describes how Locke’s ‘Law of Opinion,’ which tended to regard ‘common sense’ as unerring came to dominate by way of Rousseau’s social contract theory. (97) In this context, the idea of public opinion as formed from public use of reason promotes the emerging political functions of the bourgeois public sphere.²⁷ Bentham drew connections between public opinion and the principle of publicity, which put forth that with the latter “sound opinion will be more common and prejudices will have less dominion.” (99)
Habermas also discusses the considerable impact of Immanuel Kant’s political philosophy with regard to publicity as a critical link between politics and morality. (102)

He writes:

Kant’s publicity held good as the one principle that could guarantee the convergence of politics and morality. He conceived of ‘the public sphere’ at once as the principle of the legal order and as the method of enlightenment. (104)

According to Kant, reason needed to be ‘authorized to speak publicly’ in order to bring truth to light and promote autonomy among the citizenry. He held that the public use of a citizen’s reason must be free, for “it alone can bring about enlightenment among men.” (106) The political authority giving rise to legislation thus had its roots in “the will of the entire people” where “all men decided for all men and each decided for himself.” (107) A premise of ‘public agreement’ in turn supported the claim of such an authority, for Kant believed that all public reason, autonomously formed, would lead each citizen to the same conclusions, toward the formation of a ‘perfectly just order.’

In the framework of a comprehensively norm-governed state of affairs . . . domination as a law of nature was replaced by the rule of legal norms—politics could in principle be transformed into morality. . . . This progress [toward a ‘perfectly just order’] was postulated to result from nothing but the constraints of nature, without having to take into account the efforts that the laws of freedom obligated men to undertake themselves. Naturally, this progress did not consist in an ever growing quantity of morality but exclusively in an increase of the products of legality. (108)

Kant also developed sociological criteria for inclusion in the critical public sphere: only property owners were allowed to participate “for their autonomy was rooted in the sphere of commodity exchange and hence was joined to the interest in its preservation as a private sphere.” (110) Thus, only the property owners were seen by Kant as truly autonomous individuals fit for participation in the realm of critical public debate—and this was morally condoned on the grounds that, in a free market, everyone had an equal chance to become a property owner.28 Here again, Habermas discusses the economic
underpinnings of ideology. He also discusses the relationships between morality and legality in two versions of Kant’s political philosophy. The first equates moral politics with legal conduct from duty, whereas the second claimed that legality was to spring forth from morality. In any case, Kantian political philosophy was well suited toward a bourgeois public sphere that regarded itself as ‘the public,’ as well as for providing an effective rationale for reliance on legal norms. As it was thought to achieve the ultimate subjection of domination to reason, the liberal model was regarded at the time as ‘unpolitical.’ (117)

As Habermas continues his account of the ideological underpinnings that shaped this model, he turns the discussion to the critical writings of Georg W. F. Hegel and Karl Marx. Like Kant, Hegel also had strong expectations for public opinion. Importantly however, Hegel distinguished knowledge from its mere appearance and placed science outside the realm of public opinion. This idea challenged the liberal pretense that public opinion was grounded in unity and truth and “took the teeth out of the idea of the public sphere of civil society.” (122)

If Hegel removed teeth, then it would probably be fair to say that Marx performed a decapitation. “Marx denounced public opinion as false consciousness: it hid before itself its own true character as a mask of bourgeois class interests.” (124) A socialist, Marx critically analyzed the individual’s relation to the state as a whole, and critiqued capitalism concluding that it “could not without crises reproduce itself as a ‘natural order.’” (124) According to Marx, critical public reason did not triumph over domination: for one, the public sphere was by no means universally accessible, and two, ‘property owner’ does not equal ‘human being.’ On the contrary, he claimed, new power
relationships had emerged. Habermas claims that this socialist critique "demolished all fictions to which the idea of the public sphere of civil society appealed." (124) He argues:

As long as power relationships were not effectively neutralized in the reproduction of social life and as long as civil society itself still rested on force, no juridical condition which replaced political authority with rational authority could be erected on its basis. Consequently, the dissolution of feudal relations of domination in the medium of the public engaged in rational-critical debate did not amount to the purported dissolution of political domination in general but only to its perpetuation in different guise. (125)

Marx also predicted that to the degree that the non-bourgeois penetrated the public sphere of civil society, the "weapons of publicity forged by the bourgeoisie [would be] pointed against itself." (126)

As a result of Marxist critique, many liberalists adopted what Habermas calls an "ambivalent conception of the public sphere"—denying its organizational principle even as it was celebrated. (130) However, Habermas takes the position that the liberalist apologetic was better than the socialist critique because the former successfully challenged the very notion of rationalizing political domination. It held up the concept of ‘social preconditions’ to the question of a ‘natural order,’ resulting in a more realistic construction of the public sphere. As Marx had predicted, the bourgeois public sphere started to expand, marking the beginning its decline.

Decline of the Bourgeois Public Sphere

At this point in his narrative, Habermas turns to the work of John Stuart Mill and Alexis de Tocqueville. Mill discusses how workers, women, and African Americans pushed for the right to vote. (132) The public sphere lost its universalist basis and became characterized by compromise between competing interests. “Group needs that could not expect to be satisfied by a self-regulating market tended to favor regulation by
the state.” (132) Both Mill and Tocqueville were disappointed: the public opinion that
had once been thought to trump coercion with the ‘compulsion of reason’ had become a
mediocre yet coercive force itself, in the form of dominant public opinion. (133)
Tocqueville, for one, bemoaned public opinion as ‘compulsion toward conformity’ rather
than a critical force. (133) Mill advocated tolerance over criticism, given that public
reason did not reveal universal interests. Both thinkers understood public opinion as a
dangerous force, and they each developed theories of ‘representative government’ to
address the problem. Habermas sums up:

In the hundred years following the heyday of liberalism during which capitalism
became ‘organized’. . . the contours of the bourgeois public sphere eroded. . . . While
it penetrates more spheres of society, it simultaneously lost its political function,
namely: that of subjecting the affairs that it had made public to the control of a critical
public. (140)

The remainder of Strukturwandel examines the transformation of the public sphere as it
deteriorated, with an emphasis on the social structures that replaced it and their political
ramifications.35

‘Post-Bourgeois Public Sphere’

As bourgeois constitutional states transformed into social welfare states, Habermas
notes a blurring between ‘public’ and ‘private,’ or the “tendency toward a mutual
infiltration of the public and private spheres.” (142) Increased state interventionism and
the transfer of certain public functions to private corporate bodies characterized this
change. Classical principles of ‘free’ trade were abandoned for a new protectionism, and
the state’s regulation of markets came to prevail internationally. According to Habermas,
the boundary between ‘public’ and ‘private’ thus blurred.36 Further, contrary to earlier
moral claims about the inherent justice of the ‘free’ market, social stratification
intensified and political power remained concentrated among the relatively few. (144)
Citing Franz Neumann, Habermas notes, "[The state’s] role had always been as strong as the interests of the bourgeoisie required it to be in a given political and social situation." He suggests that the state’s role expanded because the market alone was no longer able to secure a stability that favored existing social privilege. The state, for example, took on increased roles of aiding groups in financial need, preventing changes to the broader social structure, and perhaps most notably, influencing private and regulating public investments. (147) Thus, the state merged with societal institutions such that they could no longer be demarcated along distinctions of ‘public’ and ‘private,’ which gave rise to a new realm of social legislation. (147)

As the public sphere disintegrated and gave rise to a ‘repoliticized social sphere,’ the conjugal family became dissociated from its connection with processes of social reproduction and drew back upon itself. (154) “With the loss of its basis and the replacement of family property by individual incomes the family lost, beyond its function in production (which it had already shed to a great extent), those for production.” (155) The family also lost some of its authority in bringing up, educating and protecting its members. Here, Habermas points out the emergence of a different kind of public/private distinction, stating, “[O]ne can say that the family became ever more private and the world of work and organization ever more ‘public.’” (152) Thus the occupationally defined ‘world of work’ became a sphere in its own right. Time not spent ‘on the job’ became ‘private time’ and human relationships within large organizations became more depersonalized. This ‘polarization of the social sphere and the intimate sphere’ marked the transformation of the family into a unit of consumption.37
With the demise of the bourgeois public sphere, consumption increasingly supplanted critical public debate, and "the web of public communication unraveled into acts of individuated reception." (161) The earlier institutions weakened and the family lost its connection to the world of letters. Social activities tended to exclude literary and political debate. Folks started watching a good deal of television. Yet concurrently, critical public discourse persisted, albeit in one fundamentally different regard: the discussion itself became commodified. (163) Consequently, political persuasion became tied up in "certain prearranged rules of the game," thereby directly shaping how public opinion was formed. (164) Granting the mass media a central role in this commodification of debate, Habermas bemoans the result, which offers a 'tranquilizing substitute' for social action, loses its function of critical publicity, and renders public consensus as largely unnecessary. (164) Watered down, depoliticized news accounts increased sales with a predigested product for which "the rigorous distinction between fact and fiction is ever more frequently abandoned."^ 38 (170) As such, the no-longer-critical public sphere is reduced to a market. 39 As the public sphere increasingly assumes advertising functions it loses its critical public functions:

The process of the politically relevant exercise and equilibration of power now takes place directly between private bureaucracies, special-interest associations, parties and public administration. The public as such is included only sporadically in this circuit of power, and even then it is brought in only to contribute to its acclamation. (176) Habermas characterizes this kind of publicity as staged and deceptive, as it fosters a "peculiar ambivalence of a domination exercised through the domination of nonpublic opinion: it serves the manipulation of the public as much as [or instead of] legitimation before it. Critical publicity is supplanted by manipulative publicity." (178) Thus, real
publicity loses its critical function, and our laws can no longer simply be validated as representing ‘the will of the people.’

Habermas contrasts this staged and manipulative publicity with a critical process of communication, describing them as two competing tendencies of the political public sphere in the social welfare state. He indicates that the upshot of this tension remains unclear and lays out two conditions for an effectively critical political public sphere: minimizing bureaucratization and ‘relativizing structural conflicts of interest’ so as to arrive at a standard of authentic universalism. (235) He argues against disqualifying these conditions as utopian and suggests that it is indeed possible to successfully democratize industrialized social welfare states. (235) He claims that critical publicity, as a constitutionally institutionalized norm, underlies many of the premises and ideas on which the balance and exercise of political power are factually based. (237) Finally, holding that such democratization is “not limited from the outset by an impenetrability and indissolubility . . . of irrational relations of social power and political domination,” Habermas somewhat optimistically concludes that “the outcome remains . . . open.” (235)

A Critical Evaluation of Habermas’s

*Strukturwandel der Öffentlichkeit*

The comprehensive, interdisciplinary analysis that Habermas presents in *Strukturwandel* is regarded as landmark among many social theorists—and with good reason. This work presents a sophisticated, interdisciplinary account of the emergence, ascent and deterioration of the bourgeois public sphere, a discursive realm of rational-critical publicity that has fundamentally shaped liberalist philosophy. The account has
significant normative implications, and, for Habermas, was propelled by an overarching aim toward the affirmative reconstruction of the normative framework that undergirds liberal democracy. As Pauline Johnson states, “Habermas wants to identify the social conditions which allowed reasoned discourse about public issues conducted by private persons willing to let arguments, not status or the authority of tradition, to be decisive.”

So, Strukturwandel may be evaluated broadly in two regards: one, by examining the strength of Habermas’s empirical account of the bourgeois public sphere and its structural transformation; two, by inquiry into the normative argument in which this analysis is situated. This argument claims that, with the decline of the bourgeois public sphere and other facets of late welfare state capitalism, we ought to build new democratizing institutions that will enable politically effective rational-critical public discourse.

Among the most interesting of Habermas’s critics are feminist social theorists, who themselves have a discursive history of challenging the ‘public/private distinction’ that is fundamental to liberalist ideology. Such challenges have often gone hand-in-hand with the assertion that ‘the personal is political’—which, along with an emphasis on valuing women’s experiences, is a central tenet of many contemporary feminisms. Among contemporary Western feminisms, concerns abound that a pervasive and flawed ‘public/private distinction’ wrongly depoliticizes familial and household matters—by relegating them to an ‘intimate sphere’ that systemically excludes them from consideration as ‘political.’ This claim represents a challenge to certain liberalist conceptions of ‘public’ and ‘private’ insofar as it calls for shifting much of what had ‘traditionally’ been considered ‘private’ into the realm of public reasoning and debate. Virginia Held speaks to this idea:
Part of what feminists have criticized has been the way the distinction has been accompanied by a supposition that what occurs in the household occurs as if on an island beyond politics, whereas the personal is highly affected by the political power beyond, from... the interconnected division of labor within and beyond the household, to the lack of adequate social protection for women against domestic violence.46

Feminist scholars have argued that the public/private distinction has served to reinforce gendered social divisions whereby women have been relegated to the domain of the household and excluded from full participation in public life.

From a range of disciplines and perspectives, feminist theorists have contested various aspects of the public/private distinction.47 Despite their differences, such arguments tend to commonly rely on a conception of ‘political’ that is inextricably tied to the notion of power, usually with a specific interest in the power that is evident in systemic, gendered relations of domination. Along these lines, Nancy Fraser discusses Michel Foucault’s account of the ‘capillary’ nature of modern power, which expands our sense of the scope of ‘political’.48 Moreover, she characterizes her analyses of the politics of knowledge as involving disputes over the boundaries between such categories as philosophical/political, politics/culture, and public/private.49 Fraser correctly interprets these as “struggles for cultural hegemony, that is, for the power to construct authoritative definitions of social situations and legitimate interpretations of social needs.”50

Upon the 1989 translation of Strukturwandel, many English-speaking feminist theorists were engaged in criticisms of the public/private distinction. Like Habermas’s analysis, this critique aimed at “unmasking the distorting images that conceal and legitimate the realities of power.”51 While Habermas and his feminist critics tend to share this objective, as well as his agenda to democratize, a critical normative tension
underpins Habermas’s work in relation to much of feminist social theory. That is, while many feminists have sought to dismantle the liberalist public/private distinction, Habermas amounts to the normative defense of separating ‘public’ and ‘private.’ Moreover, while Strukturwandel offers a complex analysis that sheds light on the renderings of ‘public’ and ‘private’ in various Western historical contexts, feminist theorists have consistently critiqued Habermas for a ‘gender blindness’ that runs throughout. They claim, for example, that he misjudges the inclusiveness of the bourgeois public sphere, which institutionally excluded women and others.

These factors alone suggest a need for further examination of, and if possible some reconciliation between, Habermas and his feminist critics. That the evaluation here centrally incorporates feminist critique is all the more fitting given the overarching aim of this thesis. After all, battered women’s movements have emerged from those broader social movements to which feminist social theory has been intrinsically connected. As a means to articulate my own evaluative claims, in the following sections I discuss the overlap and agreements, criticisms and contentions that surface in feminist critical evaluation of Habermas’s account of the bourgeois public sphere. Following two paths of evaluative inquiry discussed above, I address empirical questions concerning the accuracy and comprehensiveness of his account, as well as critiques of his normative argument for actualizing democratic principles through rational-critical public discourse. I aim to identify critical weaknesses in Habermas’s argument and work toward some reconciliation between his account and those of his critics, and conclude the chapter with some reflections about the normative separation between ‘public’ and ‘private.’
Recognizing Harmony: How Habermas and Feminist Theorists Overlap

Important and politically relevant truths emerge from *Strukturwandel*. Most fundamentally, Habermas "offers [an] important corrective to the standard dualistic approaches to the separation of public and private in capitalist societies."^55 His account demonstrates that the meanings rendered by 'public' and 'private' are determined within socioeconomic and historical context, and that these concepts are both changeable and mutably connected with one another.^56 As such, he sheds light on the historical underpinnings that give rise to the ambiguous dichotomy of these concepts as they arise in contemporary liberal-democratic societies. Moreover, Habermas's account of the bourgeois public sphere incorporates roles of the state, the market and the conjugal nuclear family—all institutions having strong associations with social conceptions of 'public' and 'private.' Such specifications are politically relevant inasmuch as these institutions mediate power relations, and insofar as an ambiguous, oversimplified public/private dualism may be exploited for political ends.

Early on in *Strukturwandel*, Habermas makes clear a distinction between 'the public' and 'the state as the public authority.' (7) That he distinguishes between these concepts is worth noting, as the concepts are frequently conflated in contemporary United States contexts and such conflation has profound implications for legitimating the bounds of state power.^57 Further, this confusion allows for the perpetuation of a dangerous kind of 'pseudo-democracy' that may be characterized by cultural misconceptions that the interests of the state in effect equate to the interests of citizens, and thus that the state yields its power in the interest of the citizenry. In stratified social contexts (such as those
that exist within the United States and at a global level), each of these notions is dubious. Arguably, to the extent that such distortion is widely propagated, individuals are at greater risk of harm, and the egalitarian principles of democracy are further undermined. By modeling a bourgeois public sphere that arose in opposition to state authority, Habermas conceives of an actual democratic institution, albeit one that he relegates to history and that is heavily criticized for some significant omissions. In any case, his model represents what may be a viable starting point for scholars who theorize toward the development of actual, functioning democracies.

Habermas’s account also exposes certain conflations within renderings of ‘the public sphere’ that surface in feminist challenges to the ‘public/private distinction’ as discussed above. Such renderings collapse ‘the public sphere’ to include everything that falls outside the domestic realm or ‘intimate sphere’—that is, the domain from which women have been historically and systemically excluded on various levels. The problem with this less precise usage, as Fraser points out, is that it conflates at least three distinct things: the state, the official economy, and arenas of public discourse. As with confusions between ‘the public’ and ‘the state,’ this conflation has political relevance. For example, the mechanisms that account for, say, how women have been historically restricted from participation in civic life (for example in voting, running for office, shaping movements for social change) may differ from those which constrain their participation in the official economy (that is, paid workplaces, markets, credit systems). Collapsing ‘civic life’ and ‘official economy’ under the one oversimplified rubric of ‘public sphere’ tends to obscure such differences. The collapse also contributes to other misunderstandings. For instance, exchanges in the official economy may thus be labeled
as both public (in the sense of being outside the domestic) and private (in the sense of being ‘free’ from incursions of the state). The language becomes counterintuitive: while these characterizations are not mutually exclusive, ‘public’ and ‘private’ are commonly regarded as binary opposites.

Fraser also specifies how the consequences of such a collapse extend beyond theoretical concerns, into very practical matters:

... when, for example, agitational campaigns against misogynist cultural representations are confounded with programs for state censorship or when struggles to deprivatize housework and child care are equated with their commodification. In both these cases the result is to occlude the question of whether to subject gender issues to the logic of the market or of the administrative state is to promote the liberation of women.61

One can raise similar questions about the actual effects of calling for increased state intervention in domestic violence cases.62 The terms of Habermas’s account of the bourgeois public sphere as an arena for critical public discourse—situated in specific relation to the state, the conjugal family, and the overarching socioeconomic context of classical capitalism—offers a helpful resource for overcoming the conflations of ‘the public sphere’ that arise in contemporary feminisms.

Habermas’s analysis consistently points out the economic underpinnings of specific institutional relations and ideological claims, which is another way that his contribution is both insightful and politically relevant. His account illuminates how traditional liberalist models tend to support bourgeois interests, largely because he makes explicit from the outset of *Strukturwandel* that his analysis centers on this specific social stratum. The ideological equivalency of ‘bourgeois’ and ‘homme’ parallels assertions of the bourgeois public sphere to be ‘the public.’ Both equations serve political functions.63 Habermas acknowledges a corollary function of the ideology surrounding the patriarchal conjugal

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nuclear family that emerged with classical capitalism. That is, “the representation of the conjugal family as the site of . . . autonomous human subjectivity cloaks the deep entwinement of the bourgeois family with specific class interests.”^64 A related legacy of these functions in the contemporary United States has been their obfuscation of the class-based roots of our so-called ‘democratic’ institutions. Habermas exposes these roots, largely by situating his account of the bourgeois public sphere within the larger socioeconomic contexts of classical and welfare state capitalism. That his account has such a strong material basis also suggests it may be well suited toward the further analysis of structural power relations.

Understanding the historical origins of contextual meanings of ‘public’ and ‘private’ and how such renderings shift over time informs us as to how the rhetorical legacies of these terms can play out in contemporary contexts. Habermas’s account is especially useful in this regard because it facilitates a greater-specified discussion of the social values that are inherently tied up with the terms. That ‘public’ and ‘private’ are categories with vast rhetorical potential is not only due to the definitional and contextual ambiguities surrounding the words; they are also incredibly value-laden. This combination of factors construes the terms as potentially exploitable toward a wide range of social/political ends. Insofar as Habermas’s approach succeeds in its precision and comprehensiveness of defining ‘public’ and ‘private,’ his analysis potentially lends further clarity to questions concerning why and how these are such culturally important concepts. Many would agree, for example, that ‘privacy’ is a fundamental value and that the ‘right to privacy’ is a basic principle of our political system. To understand such a concurrence requires a thorough examination of what ‘privacy’ can mean. In discussing

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Habermas’s model, Seyla Benhabib summarizes three distinct meanings of ‘privacy’: “a sphere of moral and religious conscience,” “non-interference by the political state in the free flow of commodity relations,” and “the ‘intimate sphere’ . . . of the household, of meeting the daily needs of life, of sexuality, and reproduction, of care for the young, the sick and the elderly.” Social values associated with ‘privacy’ reference each of these understandings (and likely others), and an analytical reliance on the more specific definitions potentially serves to better refine shared values for the purpose of improved decision-making. For instance, one can remain attuned to the importance of maintaining a certain scope of privacy rights, while effectively arguing that matters in the ‘intimate sphere’ ought not to be separated or removed from the realm of social justice.

In addition to the insights Strukturwandel offers concerning the various possible meanings of ‘public’ and ‘private,’ it provides an account of how delineations between the terms can blur over time. As such, Habermas provides a framework for interpreting the emergence of new social movements, as well as the social transformations that have taken place as a result of these movements. In a sense, he locates these movements at the boundary between ‘public’ and ‘private.’ Thus, while Habermas may have set out to identify the set of social conditions that allowed for reasoned political discourse within the bourgeois public sphere, social movement theorists may find his analysis most useful in that it describes a set of social conditions which enabled “new participants [to] increasingly [enter] the public sphere as claimants[,] as the bearers of unmet private needs.”

Included, of course, among these social movements are contemporary feminisms. Feminist theorists tend to champion Strukturwandel for its vast improvements over a
simple, dualistic public/private model. Especially helpful is its analysis of how specific ‘public’ and ‘private’ institutions are situated within broader socioeconomic contexts. Habermas’s rigorous empirical account elucidates many of the ambiguities inherent in ‘public’ and ‘private’ and illuminates political discourse by explicating some of the ways these terms can obscure power relations. As I have indicated, this account also has direct bearing on his larger normative argument.

Many scholars share Habermas’s emancipatory aims of developing new democratic institutions in this era of late welfare state capitalism. Such thinkers also rightly tend to share his concerns about mass media’s role in perpetuating consumerist manipulation. Giving voice to what seems like growing concern over the loss of a shared sense of civic duty within our social morality, such scholars have written about the disintegration of certain, once-common conceptions of critical publicity. John Durham Peters, for example, points out that the meaning of ‘publicity’ has changed over time:

In writings by theorists such as Jeremy Bentham . . . and John Stuart Mill . . . ‘publicity’ meant openness of discussion and commerce as well as popular access to government. Today publicity only suggests public relations. The semantic change of publicity thus mirrors Habermas’s thesis about a structural transformation from critical participation to consumerist manipulation.\(^{60}\)

Acknowledging the role of mass media, Johnson also addresses this shift in the meaning of ‘publicity’:

Nowhere was the effect of the transformation of the idea of publicity more evident than in the workings of the modern mass media. Here, publicity constructs its audience not as private individuals capable of rational argumentation, but as passive consumers of messages which, utilizing strategies of repetition, seduction and disavowal, rely upon and reproduce relations of power.\(^{70}\)

With this shift—and, as we have seen, with the deterioration/expansion of the bourgeois public sphere by Habermas’s account—a discourse of competition among rival private interests has increasingly supplanted critical public discourse toward the ‘common good.’
Benhabib maintains that *Strukturwandel* is decidedly useful for feminist thinkers because we urgently need to develop better models of critical public discourse.\(^71\) She points out that as the public agenda has expanded in recent years to include social issues previously cordoned off as ‘private,’ “more often than not a ‘patriarchal-capitalist-disciplinary bureaucracy’ has resulted [that has] frequently disempowered women and . . . set the agenda for public debate and participation.”\(^72\) Benhabib argues that new types of public discourse are needed to transcend the bureaucratization and ‘juridification’\(^73\) of social problems, and to thereby help bring about the emancipatory aims of feminist inquiry.\(^74\) I shall revisit her claims in Chapter 5.

So, as Johanna Meehan summarizes, Habermas’s work has been useful to feminist theorists “[b]ecause it offers a normative political framework for analyzing the structures of modern life and of assessing the emancipatory potential of modernity in view of simultaneous increases in political repression, market manipulation, and domination.”\(^75\)

However, as I discuss in the following section, many scholars dispute Habermas’s representation of the bourgeois public sphere and contest his reliance on universalistic (Kantian) norms. On these grounds, critics take on his normative argument for a structural separation between public and private spheres.\(^76\)

*Articulating Dissonance: Toward a Reconciliation of Habermas and His Critics*

While Habermas’s account of the bourgeois public sphere has earned widespread regard, critics claim that it fails to consider women’s discourse, and thus “misses the masquerade through which the (male) particular [is] able to posture behind the veil of the universal.”\(^77\) More specifically, they argue that Habermas misconstrues the bourgeois
public sphere as more accessible than in fact it was, that in actuality this sphere of
political participation was quite exclusionary. These thinkers tend to agree that
"inasmuch as Habermas's account suffers from a gender blindness that occludes the
differential social and political status of men and women, his model . . . falls short and
needs revision and reconceptualization."78

Some charge that in failing to examine other public spheres, Habermas’s analysis is
theoretically problematic, especially insofar as it shapes the basis for his broader
normative argument. Others maintain that he does not sufficiently address the gendered
foundations of the equation of ‘bourgeois’ and ‘homme,’ and that he is insufficiently
critical of certain values inherent in his conception of the conjugal nuclear family.79
Furthermore, evaluating Strukturwandel in light of the feminist deconstruction of the
public/private distinction has led some scholars criticize Habermas’s failure to account
for fluidity between public and private spheres.80 While I tend to agree with many of his
critics’ charges, I suggest that the analysis laid out in Strukturwandel remains a useful
point of departure for feminist projects that theorize about ‘public’ and ‘private’—and
that a feminist reconceptualization of Habermas’s broader normative argument is indeed
possible.81

Exclusionary Nature of the Bourgeois Public Sphere

Habermas largely portrays the institutions of critical public discourse that gave rise to
the bourgeois public sphere—the coffee houses, salons, and Tischgesellschaften—as
disregarding the roles of social status and instead favoring ideas of common humanity
and rational argumentation. He puts forth that the bourgeois public sphere emerged in
conjunction with the principles of inclusivity, accessibility and open participation. A
number of scholars have challenged this aspect of Habermas’s account, and have sought to expose the “fraudulent character of the professed openness of this idea of the public sphere.”

Joan Landes, for example, argues that “the ethos of a new republican public sphere in France was constructed in deliberate opposition to that of a more woman-friendly salon culture that the republicans stigmatized as ‘artificial,’ ‘effeminate,’ and ‘aristocratic.’” Landes claims that these efforts resulted in a different style of public speech promoted as ‘rational,’ ‘virtuous,’ and ‘manly’—and ultimately led to the formal exclusion of women from political life. She criticizes Habermas’s account for “effacing the way in which the bourgeois public sphere from the outset worked to rule out all interests that would not or could not lay claim to their own universality.”

Geoff Eley is another historian who holds that the bourgeois public sphere was rooted in exclusionary practices. He argues that in France, England, and Germany exclusions based on gender were inherently connected to exclusions based on class formation, whereby a bourgeois echelon of men asserted their suitability to govern by representing themselves as a universal class. As Eley notes, “It is perhaps unclear how far Habermas believes his ideal of rational communication, with its concomitant of free and equal participation, to have been actually realized in the classical liberal model of \( \text{Öffentlichkeit}. \)” On the one hand, Habermas makes clear from the outset that he is speaking about a specific stratum of society, and his analysis does acknowledge the property-based requirements for participation in the bourgeois public sphere. Indeed, he links the decline of the bourgeois public sphere at least in part to its expansion beyond these class boundaries. However, Habermas also stresses that the professed ideals of
open access and participation were central to the way this sphere actually and
deliberatively functioned.

Pointing out an irony that Habermas’s account ‘fails to fully appreciate,’ Fraser
suggests a sound inroad for making sense of this ambiguity:

A discourse of publicity touting accessibility, rationality, and the suspension of status
hierarchies [was] itself deployed as a strategy of distinction. Of course, in and of
itself this irony does not fatally compromise the discourse of publicity; that discourse
can be, indeed has been, differently deployed in different circumstances and contexts.
Nevertheless, it does suggest that the relationship between publicity and status is
more complex than Habermas intimates, that declaring a deliberative arena to be a
space where extant status distinctions are bracketed and neutralized is not sufficient to
make it so.

Habermas’s formulation requires revision insofar as it rests on an assumption that
bourgeois men were actually able to engage in the liberal public sphere as though they
were the social equals of excluded constituencies.

**Bourgeois Public As the Public**

Despite its universalistic self-representation as the public, the bourgeois public sphere
ultimately did not succeed in serving the interests of a ‘common humanity’—both by
Habermas’s own account and by those of his feminist critics. However, because
Habermas selectively fails to consider other public spheres—more specifically, non-
liberal, non-bourgeois, non-male or otherwise competing public spheres—he ends up
idealizing the bourgeois public sphere nonetheless. In support of this claim, Fraser cites
(among others) historian Mary Ryan, whose work examines a range of mechanisms
developed by nineteenth-century North American women to gain access to public
political life. Habermas notes that women were (factually and legally) excluded from
participation in the political public sphere. (57) As Fraser points out, however, this view
“rests on a class- and gender-biased notion of publicity, one which accepts at face value
the bourgeois public’s claim to be the public.” In other words, Habermas’s analysis does not adequately account for other competing publics or, to use Fraser’s term, ‘counterpublics’ that emerged at virtually the same time as the bourgeois public. He addresses competing, non-bourgeois interests, but marginalizes these interests, setting them up in opposition to bourgeois ‘universalism.’ As Jean Cohen argues, Habermas mischaracterizes “most contemporary social movements (including feminism in many of its moments) as purely particularistic and defensive and thus not furthering the universalistic emancipatory goals of modernity.”

Thus Habermas consistently casts the bourgeois public sphere as the central public by which all other publics must then be referenced. This may not be wholly inappropriate inasmuch as the bourgeois public was a dominant social and political force. The normative universalism on which Habermas’s formulation rests, however, is premised largely on conditions of open participation and a conception of the public. Revisionist historiography suggests that the bourgeois public sphere was (and is) in many ways exclusionary, and that bourgeois publics have always conflicted with other, competing publics. This calls for further examination of Habermas’s treatment of the universalistic norms of the bourgeois public.

**Universalism and the Bourgeois Public Sphere**

Habermas associates the decline of the bourgeois public sphere with the loss of its universalism. What remains unclear is how much of this decline represents the loss an ideal, that is, a set of moral principles concerning rational argumentation, open participation and the common good of humanity on the one hand, versus how much it represents a change in how the bourgeois public sphere actually functioned.
Nevertheless, I maintain that Habermas articulates both distinct claims—that is, he argues that the bourgeois public sphere lost both its universalistic ideals as well as its universalistic function. As Johnson states:

[O]nce the idea of a common abstract humanity which had underpinned the bourgeois public sphere was exposed to reveal the bourgeois character of 'homme,' it seemed that the foundation for a relatively homogenous public composed of private citizens engaged in rational-critical debate was also shaken.\(^6\)

Concomitantly, the revisionists cast doubt on each claim of loss, calling into question the degree to which the bourgeois public sphere ever had truly universalistic aspirations, as well as whether it ever succeeded in achieving such aims. As Fraser cogently points out, the revisionist historiography suggests a much ‘darker view’ of the bourgeois public sphere than Habermas implies:

The exclusions and conflicts that appeared as accidental trappings from his perspective become constitutive in the revisionists’ view. The result is a gestalt switch that alters the very meaning of the public sphere. We can no longer assume that the bourgeois conception of the public sphere was simply an unrealized utopian ideal; it was also a masculinist ideological notion that functioned to legitimate an emergent form of class rule . . . [and] the institutional vehicle for a major historical transformation in the nature of political domination . . . [that] secure[d] the ability of one stratum of society to rule the rest.\(^7\)

Whether we interpret Habermas’s account of the bourgeois public sphere as the utopian ideal he suggests, or as the instrument of domination suggested by revisionist historians, would tend to lead us down different paths of normative reasoning.\(^8\)

I am inclined to concur with the revisionists’ account and thus tend to regard the bourgeois public sphere more as an instrument of domination and less as a utopian ideal. I share Landes’ concern that “goals of generalizability and appeals to the common good may conceal rather than expose forms of domination, suppress rather than release concrete differences among persons or groups.”\(^9\) Moreover, I suggest that the expansion of the bourgeois public sphere that first took place in the late nineteenth and early
twentieth centuries was itself another 'historical transformation in the nature of political domination.' Arguably, non-bourgeois constituencies did gain sufficient access to power to effect some significant social and political changes. I do not want to underemphasize or oversimplify the relevance of such changes. However, also arguable is that the discursive balkanization from purported universalism toward explicitly competing interests has not done much to change the hegemonic order of things. I suggest that these competing interests may not so much rival each other as challenge the said order. That they are sold and reified as rival, particularistic interests in mass media (and elsewhere) functions to uphold a hegemonic order by which such interests 'compete for the crumbs' and thus leave major power relations unchallenged.

Retaining Habermasian Ideals: Critical Reasoning, Open Participation and the Common Good

All that said, we ought not wholly to discard any notion of the public, or for that matter some of Habermas's other democratizing principles. Regardless of whether the liberalist public sphere ever achieved them, with some qualification they remain good normative ideals. Further specifying three related components of Habermas’s normative model allows us to discuss each in turn; they are: critical reasoning, open participation in deliberative processes, and pursuit of the common good. Upon briefly discussing each of these aspects, I shall revisit the question of a critical public in the context of normative public/private distinctions.

Engaged, critical reasoning is an important and noble human practice. This practice takes on increased relevance in the context of the vast consumerist manipulation occurring in late welfare state capitalism. We live in a world in which wealthy, corporate interests exert much power over the range of decisions affecting peoples’ everyday
lives—including bureaucratic and juridical decisions made by agents of the state. These interests are profit-driven and have direct ties to the consumerist manipulation of which Habermas and others speak. Their influence is far-reaching, extending into processes of human identity formation and our very perceptions of the global contexts in which we find ourselves. Many of these realities of late welfare state capitalism suggest that engaging our rational-critical faculties is evermore important. At the same time, this environment fosters the lack of institutional mechanisms for critical engagement. Critical reasoning is a human faculty that contributes to the realization of individual potential, to the building of common ground, and to the perpetuation of social good; as a widespread practice, we ought to cultivate it. That is, we ought to build social mechanisms for developing skills in logic and argumentation. We ought to become better practiced at evaluating evidence in the rendering of normative judgments.

It may sound like I am making a rationalist argument. I am not. Let us not seek to reduce our humanity to certain functions of our oversized cerebrums. Let us not be fooled into thinking that the practice of argumentation is 'beyond the play of power' or that what we assess to be careful logic always leads us to 'the truth.' Commercials on television do not tend to draw so much upon our rational faculties, yet they seem to be rather effective. Perhaps to be sufficiently critically engaged in this late capitalist era, we need to look beyond the fundamental tools of language and argumentation. Landes, for example, raises a good point in her critique of Habermas’s possible ‘prejudice toward ‘linguisticality’’ as opposed to visuality or theatricality. She argues:

[A] singular emphasis on language may be misleading from both a methodological and an empirical perspective. . . . Political arguments, we may want to allow, may be communicated in discursive and non-discursive forms, and the two may interact in unanticipated ways.\textsuperscript{101}
Habermas does heavily emphasize the importance of discourse, arguably with good reason, for language (in some form) is generally the medium of argumentation. However, given the increasingly mediatized society in which we find ourselves, which Habermas himself decries, we would do well to acknowledge the power and effectiveness of non-textual communications and to develop more effective habits of critical listening/viewing of such forms. Nevertheless, I suggest that Habermas’s emphasis on the need for critical reasoning—despite critical objections to his overly rationalistic approach—is largely on the mark and necessary to developing the new discursive models that Benhabib advocates. Benhabib states, “[I]t is only the unconstrained process of discourse and not some moral calculus which will allow us to re-establish these [public/private] boundaries once their traditional meaning has been contested.”\textsuperscript{102} She is also on target in arguing such a critical public function to be necessary to effectively address the various problems inherent in the liberalist model of the public/private distinction.

The second of the three components identified above, open participation in deliberative processes is an aspect of Habermas’s formulation that provides a context in which engaged, critical argumentation ought to take place. Though usually not realized, this is an ideal that has characterized much of liberalist theory, and it is an ideal worth retaining. I would argue that such a claim supports Fraser’s conception of and normative preference for ‘a multiplicity of competing publics’ versus ‘a single, comprehensive public sphere,’\textsuperscript{103} especially given the current realities of social and economic globalization. Moreover, as Fraser suggests, societal equality is a corollary of open participation. As such, it is an ideal with many challenges that may rarely (or never
really) be achieved—but an ideal we ought to uphold nonetheless. Like Habermas and Landes, I see this as very much a radical project. “[T]o arrive at a process of deliberation and opinion formation from which no subject or person is barred”\textsuperscript{104} would require monumental social and political change. As Landes does, however, I too must support aims to democratize and feminize critical public spheres, for “these are utopian but not impossible goals.”\textsuperscript{105}

Finally, while we must reject any conception of the common good that is professed to be ‘universal’ and articulated only by a powerful few, pursuit of the common good nevertheless persists as a profoundly useful normative idea—one with direct practical ties to the principle of open participation. Like widespread critical reasoning, promotion of the common good does not seem to be a major objective of many powerful interests. Indeed, in some ways, the very notion of ‘common interest’ has become tainted by false, solipsistic claims of universalism. Some very real differences exist among people and their needs and aspirations, differences which are typically exacerbated in a stratified society, a stratified world. Like open participation, pursuit of the common good carries with it a host of problems and challenges, not the least of which is coming to some consensus about what the common good might look like.\textsuperscript{106} Still, it too remains a vital objective, at various social levels of ‘common’ ranging from families to more worldly contexts.

**Normative Implications for the Structural Separation of ‘Public’ and ‘Private’**

Having laid out the considerations addressed above, I conclude this chapter with a return to the question of Habermas’s normative defense of a public/private split. As I mentioned above, while there is a good deal of overlap between Habermas’s normative
aims and those of certain feminist theorists, this question remains a critical tension between them. To recap, Habermas links a “tendency toward a mutual infiltration of the public and private spheres” (142) to the decline of the bourgeois public sphere and the emergence of social welfare states. Prior to this, in liberal constitutional states, a more rigid public/private distinction was upheld. Further, Habermas asserts that such a distinction ought to upheld. Several of his feminist critics, however, argue that a good degree of fluidity has always existed between ‘public’ and ‘private’ in ways that Habermas’s account leaves unrecognized. Moreover, critics maintain that the very principle of separation between public and private domains confirms the exclusionary character of the bourgeois public sphere. Johnson nicely summarizes this position:

[T]he supposition that the idea of the critical public sphere requires a separation between private and public rests upon a repressive attempt to render some human attributes and modes of interaction foundational – beyond the realm of public discussion. This process of essentialization happens in both directions. If the procedural norms that govern interaction in the public domain are never tested against the claims of private dissatisfactions, then these norms can only finally entrench and absolutize certain forms and styles of intercourse as foundational, expressive of supposedly essential human attributes. At the same time, by quarantining ‘private’ concerns, Habermas’s early efforts to cement a division between public and private are seen to require a repressive essentialization of sets of power relations generated out of, and legitimated by, the conjugal family.107

While Habermas addresses some of the class-related implications concerning the liberalist equation of ‘bourgeois’ and ‘homme,’ he decidedly neglects the gendered dimensions of its meaning—as in, ‘citizen’ equals ‘property-owner’ equals ‘male.’ His critics demonstrate that Habermas’s aim to reconstruct the separation between public and private spheres “still bears the marks of a gendered and class equation between ‘bourgeois’ and ‘homme.’”108

If Habermas’s formulation is thus flawed then, to what extent and in what ways is his normative argument about the separation of public and private undermined? Jean Bethke
Elshtain asserts, “The complete collapse of a distinction between public and private is anathema to democratic thinking, which holds that the differences between public and private identities, commitments, and activities are of vital importance.” Is there not some truth to this? Elshtain goes on to argue against the feminist catchphrase ‘the personal is political.’ Although I share many of her concerns over what she labels a ‘politics of displacement’—such as the lack of civic institutions to focus shared dissent and concern—I disagree with much of her reasoning. Central to my point here is that she decries a landscape in which “all is defined as ‘political’ and watered down to the lowest common denominator.” Yet absent from Elshtain’s analysis is a definition of ‘politics’ that incorporates power relations. She uses the term to refer to “that which is, in principle, held in common and what is, in principle, open to public scrutiny and judgment.” Using such as a working definition, I too would decry the landscape Elshtain paints. However, in interpreting ‘the personal is political’ and evaluating beyond this slogan the rigorous feminist deconstructions of the public/private distinction, I opt for a usage of ‘political’ that elucidates power relations rather than obscures them.

None of the feminist scholarship that I have considered here calls for the complete collapse the public/private distinction that Elshtain argues against. As Benhabib states:

Any theory of the public, public sphere, and publicity presupposes a distinction between the public and the private. These are the terms of a binary opposition. What the women’s movement and feminist theorists in the last two decades have shown, however, is that traditional modes of drawing this distinction have been part of a discourse of domination that legitimizes women’s oppression and exploitation in the private realm.

I maintain that workable models of the public can be refined so as to account for multiple public spheres of critical discourse. Further, I suggest that theorists can and will continue to develop conceptions of public and private that transcend rigid dualism, account for the
mutability and ‘mutual infiltration’ of the terms, and effectively challenge rather than reproduce unjust power relations.

The feminist critiques of the Habermasian interpretation effectively make the case that such projects ought to recognize that many issues traditionally framed as ‘private’ according to the liberalist model are fair game for normative judgment in deliberating matters of social and political justice. History reveals that the social construction of so-called ‘private’ matters can and does serve to reinforce systemic power relations, including those characterized by patterns of gender domination. When this happens, such matters become appropriate topics for public deliberation, and the normative boundaries between public interests and private needs are further clarified. Such projects also ought to recognize that the principles of critical reasoning, open participation, and pursuit of the common good that underpin Habermas’s model are ideals that have application in families and workplaces, as well as in discursive publics. This opens a door for articulating a much-needed set of normative claims aimed at democratizing the family.¹¹⁵ This aim has strong relevance not only for ameliorating systemic patterns of violence that occur in families, but also, to the extent that “democracy begins in the intimacy of love and of the home,”¹¹⁶ for cultivating functional critical publics.

*Strukturwandel,* in conjunction with the invaluable responses it has elicited within feminist discourse, remains an indispensable theoretical resource for those “still committed to the project of radical democracy.”¹¹⁷ Habermas contends that critical publicity can potentially democratize social welfare states. I am not sure that I share his optimism. Unlike Habermas, I fear that such democratization is indeed “limited from the outset by an impenetrability and indissolubility . . . of irrational relations of social power
and political domination.” (235) That said, I can see no alternative but to retain the radical democratic commitment.
Notes

1Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into Category of Bourgeois Society* [original German publication 1962], trans. Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1989).

2Throughout his analysis, Habermas is particularly concerned with Germany, France and Great Britain, while occasionally referencing the United States.

3While I shall do my best to offer as balanced a portrayal of the work as possible, the interests with which I approached the book inevitably have bearing on my reading of it. Moreover, making such intentions clear will, I hope, better serve to disentangle the threads of this analysis.

4I further discuss this tradition at the beginning of the evaluative section of this chapter.


6Among the critics I discuss, some draw on *Strukturwandel* as well as Habermas’s later work including, Jürgen Habermas, *The Theory of Communicative Action*, vol. 2, *Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy (Boston: Beacon Press, 1987). To contextualize my inclusion of their critique, I will briefly discuss how *Strukturwandel* fits in with Habermas’s broader project at the beginning of the evaluative portion of this chapter.

7I borrow the phrase ‘dialectical alliance’ as used in this context from Seyla Benhabib, “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas,” in *Feminism, the Public and the Private*, ed. Joan B. Landes (New York: Oxford University Press, 1998), 65-99.

8Habermas, 5. This work is hereafter referenced parenthetically in the text with page numbers only, e.g., (5).

9These issues are discussed in greater depth in Thomas Burger’s Translator’s Note.

10These are points that the author makes clear in his preface: “Thus [the bourgeois public sphere in the liberal model] refers to those features of a historical constellation that attained dominance and leaves aside the plebian public sphere as a variant that in a sense was suppressed in the historical process” (Habermas, xviii).

11The *polis* can be contrasted with the *oikos*, the private sphere of the house where non-citizens such as slaves and women performed productive and reproductive labor under the master’s dominion. So, as Habermas points out, participation in the *polis* was “based upon status as the unlimited master of an *oikos*.” (4) For a comprehensive account of ‘public’ and ‘private’ in Aristotle’s philosophy, see Judith A. Swanson, *The Public and
the Private in Aristotle’s Political Philosophy (Ithaca: Cornell University Press, 1992). Habermas also charts the development of res publicus in Roman law.

12 Habermas goes into other examples here as well, as he attempts to provide a thorough account of this breakdown.

13 "On the one hand," he states, “this capitalism stabilized the power structure of a society organized in estates, and on the other hand it unleashed the very elements within which this power structure would one day dissolve.” (15)

14 Habermas states, “Almost simultaneously with the origin of stock markets, postal services and the press institutionalized regular contacts and regular communications.” (16) These communications, which soon became explosive, have their origins with merchants creating the first mail routes. Notably, at this time, readers were not interested in ‘public’ information.

15 As a commodity, the press was “subject to the laws of the same market to whose rise it owed its existence in the first place.” (21)

16 As Habermas notes (19), Hannah Arendt refers to this private sphere of society that has become publicly relevant. Arendt is another scholar whose work on models of public and private realms is well known. In one of her best-known theoretical works—Hannah Arendt, The Human Condition (Chicago: University of Chicago Press, 1958)—she argues for an agonistic public-sphere model similar to that of ancient Greece.

17 Habermas points out that such power claims against the state did not assert that official command ought to be divided or shared. Rather, the public debate among private persons “undercut the principle on which existing rule was based.” (28)

18 Habermas describes in detail how these developments transpired in Great Britain, France and Germany.

19 While I focus here on the similarities between the three institutions, it is important to note that they were each distinct in several ways. For example, women were prohibited from the coffee houses in Great Britain, whereas they had an active role in shaping the salons. Habermas discusses such differences in some detail.

20 In theory, “laws of the market were suspended as were laws of the state.” (37)

21 The three institutions also “presupposed a domain of ‘common concern’ via the problematization of areas that until then had not been questioned.” (37)

22 Emphasis added.

23 Within this sphere, the “subjectivity originating in the interiority of the conjugal family, by communicating with itself, attained clarity about itself.” (51)
While this discussion offers much insight into the concrete events that structure Habermas’s analysis, I will not attempt to summarize them here.

Habermas discusses the ideological premises of the ‘free’ market, pointing out that such a model was viewed as inherently just: “According to civil society’s idea of itself, the system of free competition was self-regulating . . . in a fashion that ensured everyone’s welfare and justice in accord with the standard of the individual’s capacity to perform” (79).

He begins with the Latin opinion, meaning both “uncertain, not fully demonstrated judgment” and “regard; what one represents on the opinion of others.” (89)

Habermas states, “The opinion of the public that put its reason to use was no longer just opinion; it did not arise from mere inclination but from private reflection upon public affairs and from their public discussion . . .” (94) Rousseau opposed institutionalizing widespread critical public debate.

To be clear, while Kant supports this claim as grounds for his larger argument, Habermas does not buy into this equal access argument.

He states, “The fiction of a justice immanent in free commerce was what rendered plausible the conflation of bourgeois and homme, of self-interest, property-owing private people and autonomous individuals per se.” (111)

Habermas writes, “A series of fictions in which the self-understanding of the bourgeois consciousness as ‘public opinion’ was articulated extended right into the Kantian system, and therefore it was possible to derive from it in turn the idea of the bourgeois public sphere precisely in its connection with the presupposition of a natural basis of the juridical condition.” (117)

That is, the liberal model that treats public opinion (involving a bourgeois public sphere engaged in critical debate) as authoritative.

“[Hegel’s] insight into the at once anarchic and antagonistic character of this system of needs decisively destroyed the liberal pretenses on which the self-interpretation of public opinion as nothing but plain reason rested.” (118)

Marx, of course, is primarily concerned with those between owners and wage earners.

According to Habermas, “The right to the free expression of opinion was no longer called to protect the public’s rational-critical debate against the reach of the police but to protect the nonconformists from the grip of the public itself.” (134)

While I will outline his major points, I will cover this deterioration in less detail than that which is reflected in the interpretive sections above.
Here, Habermas claims that “a repoliticized social sphere emerged to which the distinction between ‘public’ and ‘private’ could not be usefully applied.” (142)

Along these lines, Habermas states, “[T]here arose an illusion of intensified privacy in an interior domain whose scope had shrunk to comprise the conjugal family only insofar as it constituted a community of consumers.” (156)

In Habermas’s account, the mass media are more likely to “give rise to an impersonal indulgence . . . than to a public use of reason.” (170)

In Habermas’s words, “[The media] draw the eyes and ears of the public under its spell but at the same time . . . deprive it of the opportunity to say something and to disagree.” (171)

To contextualize the account, Habermas’s work stems from the Critical Theory of the Frankfurt School, which is rooted in Western Marxism and shares the “aim of developing a theory of society that is critical in a number of . . . intimately related respects.” (Barry Hindess, “Marxism,” in A Companion to Contemporary Political Philosophy, eds. Robert E. Goodin and Phillip Pettit (Oxford: Blackwell Publishers, 1993), 319.) This author classifies these respects into four major components: first, as critique “involving an overriding concern with the conditions of possibility of knowledge and of reason”; second, as “a reflection on the development of Reason, now conceived as the subject of history”; third, as “the critique of ideology as unmasking the distorting images that conceal and legitimate the realities of power in modern societies”; and, finally, as “a moral critique of political power based on the ideal of a society of rational and autonomous individuals.” (Hindess, 319.) Nancy Fraser, moreover, characterizes Critical Theory as involving the stance that “politics requires a genre of critical theorizing that blends normative argument and empirical sociocultural analysis in a ‘diagnosis of the times.’” (Nancy Fraser, Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory (Minneapolis: University of Minnesota Press, 1989), 6.) What notably distinguishes Habermas from many of the early members of the Frankfurt School—who include Theodor W. Adorno, Max Horkheimer, and Herbert Marcuse—is his adherence to a specific (Kantian) normative conception of rationality. As Johanna Meehan states, “He embraces the Enlightenment convictions that rationality—reconceptualized as communicative rationality—is potentially liberatory and that the promises of democracy remain unfulfilled as long as the Enlightenment project remains unfinished.” (Johanna Meehan, “Communicative Ethics,” in A Companion to Feminist Philosophy, eds. Allison M. Jaggar and Iris Marion Young (Oxford: Blackwell Publishers, 2000), 414.) In his later work, especially in volume two of The Theory of Communicative Action, Habermas further situates the concepts of ‘public sphere’ and ‘private sphere’ in his development of a critical social theory that incorporates the concepts of ‘system’ and ‘lifeworld’ as well as the normative role of communicative power. (Jürgen Habermas, The Theory of Communicative Action, vol. 2, Lifeworld and System: A Critique of Functionalist Reason, trans. Thomas McCarthy (Boston: Beacon Press, 1987).)

Interestingly, as Habermas himself states in Jürgen Habermas, concluding remarks to *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Massachusetts: MIT Press, 1992), 462-3, “The book was criticized when it appeared in Germany for confusing descriptive and normative aspects. The concept of the public sphere, Öffentlichkeit, is meant as an analytic tool for ordering certain phenomena and placing them in a particular context as part of a categorical frame. This concept also has inevitable normative implications, of course, and is related (and this is the confusing part) to certain positions in normative political theory. These are connotations that link the historical analysis with our value-laden and future oriented enterprise of making some sort of diagnosis of our present situation, particularly for those who are still committed to the project of radical democracy.”

In addition to ‘public/private distinction’, the phrase ‘public/private dichotomy’ and similar variations have also been used to label this concept in feminist discourse. I do not go so far as to speak to the difference between them.

As a tenet, ‘the personal is political’ is certainly not uncontested, as I shall discuss further below. For one interpretation concerning that which essentially characterizes ‘feminism’, see Jane Mansbridge and Susan Moller Okin, “Feminism,” in *A Companion to Contemporary Political Philosophy*, eds. Robert E. Goodin and Phillip Pettit (Oxford: Blackwell Publishers, 1993): 269-290.


Mansbridge and Okin describe what it can mean to challenge the public/private distinction on feminist grounds. “Challenging the dichotomy of public and private does not mean denying any distinction between the meanings of the words, demeaning the value of privacy, or making all behavior similarly subject to state action. . . . The challenge does, however, mean seeing every action as potentially infused with public meaning. It means . . . that the reason which constitutes much of public persuasion is not so universal as to be untouched by assumptions, emotional connotations and linguistic patterns formed in the most private of relations. [It] means insisting on the non-triviality, the non-exclusion from central public debate, of intimate, domestic concerns.” (Mansbridge and Okin, 274.)

Fraser, *Unruly Practices*, 4. Notably, Habermas and Foucault disagreed about power, as summed up by Micheal Kelly in his introduction to *Critique and Power: Recasting the Foucault/Habermas Debate*, ed. Michael Kelly (Cambridge, Massachusetts: The MIT
Press, 1994), 1: “Foucault introduces power while analyzing the genealogy of various forms of knowledge and nondiscursive practices; he claims that power is, in fact, productive of both knowledge and practice. While acknowledging power, Habermas insists that it be tempered by a critical theory able to make normative distinctions between legitimate and illegitimate uses of power.”


51 Hindess, 319.

52 Of course, these objectives are shared among scholars engaged in a range of disciplines and theoretical perspectives. For example, cultural historian John L. Brooke states, “The Habermasian public sphere . . . serve[s] the critical function of helping historians to organize, discuss, and assess the dimension of ‘culture’ with an eye toward the power relations in society usually bundled together simply as ‘politics.’” (John L. Brooke, “Reason and Passion in the Public Sphere: Habermas and the Cultural Historians,” *Journal of Interdisciplinary History* 29, no. 1 (1998), 48.)

53 Fraser, *Unruly Practices*, 122.

54 Again, my overarching aim is to better understand how various renderings of ‘public’ and ‘private’ shape and prescriptively inform United States domestic violence policymaking.

55 Fraser, *Unruly Practices*, 123.

56 The sophistication of his analysis is made possible by the interdisciplinary method Habermas used. As Habermas himself notes, in Jürgen Habermas, “Further Reflections on the Public Sphere,” trans. Thomas Burger in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Massachusetts: MIT Press, 1992), 421, “[T]he original study emerged from the synthesis of contributions based in several disciplines, whose number even at that time almost exceeded what one author could hope to master.”

57 A simple example of such a conflation would be the common practice of referring to state-controlled funds as ‘public funds.’

58 This is not to say that such exclusions have not changed over time. For example, recent decades have seen expanded opportunity for women in the paid labor force; however, certain inequities persist (e.g., salary differentials, lack of opportunity within certain fields, etc.).

59 Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Massachusetts: The MIT Press, 1992), 110.
I employ the term 'official economy' as Fraser does "so as to avoid the androcentric implication that domestic institutions are not also economic." (Fraser, *Rethinking the Public Sphere*, 138.) See also Nancy Fraser, "What's Critical About Critical Theory? The Case of Habermas and Gender," in *Unruly Practices*, 113-143.

Fraser, *Rethinking the Public Sphere*, 110.

Indeed, many scholars and advocates have already raised such questions, as I shall discuss substantially in chapter 5.

I shall further discuss some of these functions in the section that follows.

Johnson, 222.


Benhabib, 86. For another specification of different conceptions of privacy, see Allen.

I further develop these ideas in chapter 5.

Johnson, 224.


Benhabib, 91.

Benhabib, 91.

Benhabib specifies that by 'juridification' she means what Habermas calls *Verrechtlichung*.

Habermas raises concerns about bureaucratization as a response to social problems in volume 2 of *The Theory of Communicative Action*, in which he discusses the client role in late welfare state capitalism. In her evaluation of this work, Fraser notes that the client role is a feminine role representing "a change in the character of male dominance, a shift, in Carol Brown's phrase, 'from private patriarchy to public patriarchy.'" Fraser goes on to argue that "that this [client] role, qua feminine role, perpetuates in a new, let us say 'modernized' and 'rationalized' form, women's subordination. (Fraser, *Unruly Practices*, 132, citing Carol Brown, "Mothers, Fathers and Children: From Private to Public..."
Patriarchy” in *Women and Revolution: A Discussion of the Unhappy Marriage Between Marxism and Feminism*, ed. Lydia Sargent (Boston, 1981.)

75 Meehan, 412.

76 As one author specifies, Habermas supports a separation “that can support the conditions under which the principle of reasonable communication might practically be defended against the tide of an irrational conformism.” (Johnson, 225.)

77 Landes, *Public and Private Sphere*, 143.

78 Meehan, 415.

79 Johnson, 228.

80 Meehan, 415.

81 To be clear, Habermas likely considered what are today considered feminist considerations. For example, he likely knew about John Stuart Mill’s analysis in “The Subjection of Women.”

82 Johnson, 221.


84 Fraser, *Rethinking the Public Sphere*, 114.


87 Eley, 293.

88 Fraser, *Rethinking the Public Sphere*, 115.

89 Fraser, *Rethinking the Public Sphere*, 115.

90 Fraser, *Rethinking the Public Sphere*, 115 also makes this point.

91 My discussion here continues to draw heavily from Fraser, *Rethinking the Public Sphere*, 112-118.
Fraser, *Rethinking the Public Sphere*, 116. In this context, Fraser is speaking to the more general notion of women’s exclusion from public life, rather than to a specific claim made by Habermas.

Fraser, *Rethinking the Public Sphere*, 116. According to Fraser, these competing publics included “nationalist publics, popular peasant publics, elite women’s publics, and working-class publics.” Notably, as Calhoun points out in the introduction to *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, Massachusetts: MIT Press, 1992), 37, it “seems a loss simply to say that there are many public spheres . . . for that will leave us groping for a new term to describe the communicative relationships among them.” For now, I shall leave the task of such groping to others.


This of course echoes the ambiguity Eley discusses, referenced above. However, I am concerned here about how this plays out in Habermas’s argument specifically at the stage of the bourgeois public’s decline.

Johnson, 222.

Fraser, *Rethinking the Public Sphere*, 116-7. This legitimation of class rule was, of course, also grounded in other ‘ideological notions’—such as institutionalized racism and heterosexism.

Nevertheless, his framework in still valuable.

Landes, *Public and Private Sphere*, 144.

Meehan, 411, citing Judith Butler, *Gender Trouble: Feminism and the subversion of identity* (New York: Routledge, 1990), 39. The larger context of the citation follows: “No theory is benign because ‘the recourse to a position – hypothetical, counterfactual, or imaginary – that places itself beyond the play of power, and which seeks to establish the metapolitical basis for the negotiation of power relations, is perhaps the most insidious ruse of power.’”

Landes, *Public and Private Sphere*, 153-4. While I share Landes’s concern, I disagree with any assessment that discourse is Habermas’s “singular emphasis.” Habermas is not merely concerned with language for its own sake, but rather for its application in critical public reasoning.

Benhabib, 89.

Fraser, *Rethinking the Public Sphere*, 117.
This includes questions about sharing what *is* common, as well as how to share and still be different.

I do not elaborate on all of these contentions here.

The same can be said for democratizing workplaces.
CHAPTER 3

A SOCIAL HISTORICAL ACCOUNT OF UNITED STATES DOMESTIC VIOLENCE LAW AND POLICY

At the outset of this thesis, I described domestic violence as a complex and consequential contemporary social problem. I also put forth that contested conceptions of ‘public’ and ‘private’ have had significant bearing on policy responses to the issue. In Chapter 2, I interpreted and evaluated Jürgen Habermas’s *Structural Transformation of the Public Sphere (Strukturwandel der Öffentlichkeit)* as a means to analytically frame such conceptions, their meanings and their histories in the development of Western political thought and practice. In this chapter, I develop a social/historical account of domestic violence law and policy in the United States. What cultural, economic and political processes have shaped these laws and policies over time? How have different ideologies and social moralities come into play? In what ways have religious, scientific and legal authorities—and various challenges to these authorities— informs legal and policy responses to the problem? These are some of the fundamental questions with which I proceed.

While intimate violence has always existed in the United States, research suggests that its frequency and severity have changed across time and place; so too has the degree to which women have effectively resisted such violence through legal and social means.
Legislative policy responses to domestic violence have also changed over time, though until the mid-1970s they were scant and largely nonexistent. Despite this policy vacuum, domestic violence cases have been adjudicated in the United States court system (and its colonial predecessors) for hundreds of years. As such, historians concerned with domestic violence in the United States regard the records of these cases as an indispensable yet inherently limited resource. For one, an array of factors has resulted in vast underreporting and underrecording of matters concerning domestic violence. Larry Eldridge, for example, who researched spousal violence during colonial America, found that court records from that era often left punishment unrecorded. Omissions such as these present considerable challenges in studying the history of the issue. Moreover, while history reveals that violence between intimates has been both hidden and socially sanctioned, many influential historical renderings have tended to ignore women's experiences and discourse. This presents a further methodological challenge in disentangling the roots of the problem.

The account presented here begins by examining the social and legal norms surrounding marriage and violence against women that were predominant in Europe before European settlers colonized what was to become the United States. Here, the scope of my analysis extends beyond violence perpetrated against women in the domestic realm, as I examine different forms of violence as means by which women are socially controlled. For example, in addition to domestic violence, I examine the European witch-hunts. While as manifestations of violence against women each is distinct, I maintain that important connections may be drawn between them—and that in many ways they have served the same purpose: to keep women in 'their place.' Moreover, the histories
of both forms importantly reflect the broader social and legal contexts that give rise to contemporary attitudes and laws about domestic violence.

Following this discussion, I trace, from colonial America through the late twentieth century, the major trends informing domestic violence law and policy in the United States. In doing so, I attempt to situate these trends within the larger historical contexts in which they unfolded, with an emphasis on broader social patterns of male dominance and female subjugation. This account closes with a focus on the federal legislative response to domestic violence in the late 1900s, which began as legislative rumblings in the late 1970s and early 1980s. These stirrings culminated largely with the 1994 enactment of the Violence Against Women Act (VAWA), the first comprehensive federal legislation that aimed to remedy the problem. In my discussion of VAWA, I consider policy process questions related to its emergence and passage. How and why did it arise on the congressional agenda when it did? What were the key factors that brought attention to domestic violence in these policy-making arenas, especially after so many years of dormancy? In what ways did the social visibility of the issue, or lack thereof, contribute to problem recognition?

In many ways, VAWA was well received among policymakers and the general public. However, a part of the legislation—Title III, VAWA's civil rights remedy—generated a great deal of controversy, and was ultimately overturned by the United States Supreme Court in United States v. Morrison. In Chapter 4, I discuss the Morrison case and further address the controversies surrounding Title III.
Agrarian Patriarchy and Chastisement Doctrine

European Roots

Domestic violence in the United States is historically rooted in patriarchal norms, laws, values, and practices that together served to explicitly sanction wife beating in Europe. Dating to 1750 B.C.E., laws governing marriage and sexuality in the Code of Hammurabi "emphasized that women of various classes were relegated to an inferior status vis-à-vis their fathers, brothers, and husbands." Anthropologists suggest that this status, largely involving women as property, had its origins in the exchange of women in early tribal societies. In the Judeo-Christian creation myth of Adam and Eve, Eve caves to evil forces, and they both disobey divine authority. Among God's punishments for the transgression are increased pain for women during childbirth and husbands' dominion over wives. As Linda L. Ammons points out, "While many persons of faith find God's love and liberation unifying themes of the Bible, examples of misogyny abound." Ammons expounds on this claim:

[I]n biblical stories where women are central characters, rape, incest, murder, battery, or some other brutality are often common themes. Sanctions for female misconduct were severe. For example, a woman unable to prove her virginity could be stoned to death. A wife could be mutilated if, in coming to the rescue of her husband, she touched the genitals of her husband's assailant. Old and New Testament prophets relied on the metaphor of the adulterous women to describe the misconduct of religious leaders. The prophets used this image to shock the consciences of the people so that they would return to the worship of Yahweh. Judeo-Christian theologies have, over time, blended with other ideologies and philosophies to fundamentally shape dominant Western social and legal norms. Among these norms are those which place husbands (and fathers) in supreme, authoritative roles within the family. Concomitantly, wives (and mothers), regarded as inherently weak and evil, have been rendered subservient, oftentimes as chattel. While particular
ideological threads and mechanisms of social control that ascribe to women this inferior status have emerged and changed over centuries, Biblical renderings of gender have consistently played a fundamental part in shaping these processes.\textsuperscript{19}

Within early Christian sects, asceticism grew in popularity, and the practice of sexual abstinence gained widespread acceptance. Some women, especially rich women, embraced celibacy as a means toward greater independence.\textsuperscript{20} However, misogyny had a strong foothold in these communities. Women were abhorred for the sexual desire they aroused in men, thought to imperil men's souls to eternal damnation, and referred to as "the devil's gateway" among church leadership.\textsuperscript{21} Women were also regarded as fundamentally different from men, who mirrored the image of (a male) God. Over time, these factors contributed to a moral culture in which women were both feared and coercively controlled. Citing prescriptions for the use of such coercion within the marital relationship, Angela Browne writes:

\begin{quote}
In the late 1400's, Friar Cherubino of Siena, in his \textit{Rules of Marriage}, operationalized the process by which a husband was to rule his wife, recommending: "when you see your wife commit an offense, don't rush at her with insults and violent blows . . . Scold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body . . . then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good."\textsuperscript{22}
\end{quote}

Not surprisingly, some women resisted this moral climate. Medieval writer Christine de Pizan, for example, questions what were popular conceptions about women's inherent qualities:

\begin{quote}
Men, especially writing in books, vociferously and unanimously claim that women in particular are fickle and inconstant, changeable and flighty, weak-hearted, compliant like children and lacking all stamina. . . .

. . . Let me ask you where there was ever a woman's heart so frail, so fearful, so utterly vulgar, and so inconstant as that of Emperor Claudius?\textsuperscript{23}
\end{quote}
This author also refutes the claim that chaste women want to be raped and imagines a law
"whereby a man would be executed for raping a woman, a law which is fitting, just, and holy." While a certain cause for execution was to become prominent throughout Europe, as I shall discuss below, it was far from that which de Pizan envisaged.

The Roman Emperor, Constantine—who had his wife, Fausta, killed when she was "no longer of use to him"—joined the early Christian church around 300 C.E., beginning a process whereby, over centuries, church rules grew inexorably entwined with state laws. Established in 664, the English church adopted early Roman canon law, which became the legal authority on domestic matters. Such church-state entwinement persisted into the Middle Ages, during which time:

Popes amassed considerable power and set up ecclesiastical courts which administered canon law (jus commune). The Pope was the supreme legislator and judge. Canon law set the general principles for all of Europe on issues concerning women and marriage. While in many regards church law and secular law were indistinguishable, "secular courts had no doctrine of marriage." Together with the church, however, the state came to take on a different (though systemically related) role in the domination of women—in publicly and brutally executing thousands upon thousands of them.

The European witch craze spanned several centuries, from the 1300s to the 1700s, though historian Anne Llewellyn Barstow characterizes 1560 to 1760 as "the major period of witch-hunts." As "an ‘invisible’ crime that provides no witnesses," witchcraft was widely recognized as a major crime during the sixteenth and seventeenth centuries. During this major period, on average, 80 percent of those accused of the crime—and 85 percent of those executed for it—were women. Older women and uppity women were especially targeted. Published estimates range from 110,000 accusations and 60,000

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executions to figures in the millions. Barstow, whose analysis keeps a count of arrests and killings that took place across Europe, puts forth 200,000 accused and 100,000 dead as reasonable estimates that are “sufficient to document an intentional mass murder of women.”

Historically, the European witch-hunts overlapped with the rise of commerce, of nation-states, and with religious reformations. The invention of the printing press and increased literacy rates are among the factors that contributed to the craze. According to Barstow, “The witch-hunts took place at the same time as colonial expansion and the Atlantic slave trade, and they were made possible by some of the same ecclesiastical policies and legal changes.” The craze also coincided with overpopulation, increased social stratification, and general economic upheaval in Europe; the ruling class looked for scapegoats, and found them. Those targeted for the crime of witchcraft were usually among the very poor, although women of all economic means were accused. Barstow states:

That the accused persons, mostly poor themselves, were not responsible for this economic suffering was beside the point; they were perceived as the cause, and that perception served to justify scapegoating them.

At the other end of the economic spectrum, upon executing wealthy women (usually widows) for witchcraft, the state would seize their assets. Those whose means fell between the rich and the very poor “used witch accusations to establish their social position” and “took out their frustrations over crop failure and the high death rate of infants on those who were least able to fight back.”

While their options were limited and varied with economic class, women performed a range of work in medieval Europe. “[T]heir contribution to Europe’s economic life was impressive and essential.” Healer, midwife, and pharmacist were among the
occupations they held, as "healing had traditionally been the prerogative of women."

However, the expansion of capitalism across much of Europe during the 1500s "markedly affected women's work and was a direct factor in the spread of witch accusations."

Barbara Ehrenreich and Deirdre English write:

The charges leveled against the "witches" included every misogynist fantasy harbored by the monks and priests who officiated over the witch hunts: witches copulated with the devil, rendered men impotent, . . . devoured newborn babies, poisoned livestock, etc. But again and again the 'crimes' included what would now be recognized as legitimate medical acts—providing contraceptive measures, performing abortions, offering drugs to ease the pain of labor.

The witch-hunts especially targeted healers and midwives. The *Malleus Maleficarum*—which was written by two German monks and was "the Catholic Church's official text on witch-hunting for three centuries"—specifies that "witch midwives . . . surpass all others in their crimes." It states:

We must add that in all these matters witch midwives cause yet greater injuries, as penitent witches have often told to us and to others, saying: No one does more harm to the Catholic Faith than midwives. For when they do not kill children, then, as if for some other purpose, they take them out of the room and, raising them up in the air, offer them to devils.

According to Barstow, alleged witches were "both scorned and considered essential to the community." Ehrenreich and English make the case that the witch-hunts served to eliminate female lay healers, so that male medical professionals would no longer need to compete with them for business.

That midwives were in particular targeted followed also from the belief that women's sexuality was the conduit of witchcraft. Barstow writes, "It is the high level of sadistic sexual torture that tells us most about how power functioned in early modern European society and about how men and women related to each other." According to the *Malleus Maleficarum*, "All witchcraft comes from carnal lust, which is in women..."
insatiable."48 Women in general were hypersexualized, and thought to be, in their inherent weakness, readily seducible by the devil. Charges brought against women accused of witchcraft reflected these beliefs: “flying to the sabbat on phallic broomsticks, being seduced by demon lovers, joining in orgiastic dances, kissing the devil’s ass, copulating indiscriminately with men, other women, relatives, demons, or the devil himself, and giving birth to demon children.”49

The witch-hunts reinforced increasingly patriarchal family structures. Outspoken wives were suspected of witchcraft,50 and a “surprising number of husbands . . . joined others in accusing their wives.”51 Protestantism played a role in this regard: Martin Luther put forth that the disobedient wife, rather than the over-sexed woman, was the conduit of sorcery.52 Connections between the (public) witch-hunts and women’s social and legal status within the (private) patriarchal family yield important insights about how systems of power can function.

Public executions and family status operated in conjunction with one another, within the same normative frameworks constructed about women, to systemically subjugate women in all areas of life. The church and the state insisted that wives submit to their husbands in virtually every regard. A sixteenth-century church homily advised wives, “[If] thou canst suffer an extreme husband, thou shalt have a great reward therefore: but if thou lovest him only because he is gentle and courteous, what reward will God give thee therefore?”53 This echoes a prescription for virtuous women cited in the Malleus Maleficarum: “If a woman hath a husband that believeth not, let her not leave him. For the unbelieving husband is sanctified by the believing wife.”54 The Malleus goes on to contrast this image of the good wife with that of the wicked wife:
O evil worse than all evil, a wicked woman, whether she be poor or rich. For if she be the wife of a rich man, she does not cease night and day to excite her husband with hot words, to use evil blandishments and violent importunations. And if she have a poor husband she does not cease to stir him also to anger and strife. And if she be a widow, she takes it upon herself everywhere to look down on everybody, and is inflamed to all boldness by the spirit of pride.\textsuperscript{55}

The punishments doled out for such wickedness were brutal and sexualized. Confessions of witchcraft were elicited via sexual torture, and a convicted woman’s breasts were commonly mutilated—at times cut off and placed in her mouth—prior to her execution.\textsuperscript{56} Typically, she was killed publicly, impaled on a stake, as she burned alive.\textsuperscript{57}

With the transfer of jurisdiction of witchcraft from the ecclesiastical courts to secular courts in the sixteenth century, witchcraft was, over time, “transformed from being solely spiritual apostasy into treason.”\textsuperscript{58} Barstow points out that the witch-hunts transformed the legal status of women in Europe. Although unable to give legal testimony in their own defense,\textsuperscript{59} women were no longer perceived as too dependent to stand trial. She writes:

That European women first emerged into full legal adulthood as witches, that they were first afforded independent legal status in order to be prosecuted for witchcraft, indicates . . . their vulnerability.\textsuperscript{60}

In England, although new splits arose between the church and state,\textsuperscript{61} both systems agreed on principles of male supremacy and authority—and both effectively controlled women through the public display of execution and through the enforcement of patriarchal family structures.

In seventeenth-century England, social norms around marriage changed, reflecting a shift from arranged, nonconsensual unions to marriage as a mutual contract.\textsuperscript{62} Marriage was idealized in conjunction with emerging attitudes about the home and domestic virtue.\textsuperscript{63} Women were still, however, portrayed as weak and in need of guidance and
punishment. British law "held that men were responsible for the actions of their wives and therefore authorized to control them."64 Corollary to this responsibility was a husband’s duty to protect his wife. This paternalism built on the legacy of 'the wicked woman' and served to promote the belief that women who are beaten by their husbands provoke—and therefore must somehow deserve—this violent treatment. These are among the attitudes and beliefs that came to take root in British America.

_Chastisement Doctrine in British America_

_and the Early United States_

As British emigrants colonized the so-called 'new world,' they brought their patriarchal beliefs and family structures across the ocean—and here again, religious authority played an especially strong role in determining the social norms of the day. Ammons states:

Protestantism was so fundamental to the English identity that the law of the new land often mirrored the religious beliefs of the settlers. In 1665 the General Court of Connecticut decided that it would apply the word of God when no other law existed. Because the church and government were so intertwined, it was possible for any perceived moral violation to be sanctioned by law.65

Puritanism was a powerful force in shaping patriarchal laws and customs in the Massachusetts Bay Colony. What had been a traditional version of the Fifth Amendment to honor both parents was replaced with "Honor thy father."66 The new version was "recited to women to remind them of their obligation to male authority."67 Ehrenreich and English characterize this morality as follows:

Religion projects the rule of the father into the firmament where it becomes the supreme law of nature—and then reflects this majesty back on each earthly father in his household.

He was her superior, the head of the family, and she owed him an obedience founded on reverence. He stood before her in the place of God: he exercised the
authority of God over her, and he furnished her with the fruits of he earth that God had provided.

"Under the rule of the father," these authors point out, "women have no complex choices to make, no questions as to their nature or destiny: the rule is simply obedience."

Punishment for breaking this one rule was harsh. As I stated in the previous section, the European witch-hunts overlapped with colonial expansion in America. As was the case in Europe, the arrest and public execution of women on charges of sorcery was used to socially control women in colonial New England. The private subjugation of women also persisted: husbands used violence against their wives as a tool for maintaining patriarchal authority within the family. Such violence was overtly condoned, and at times prescribed as being good for women, as something needed to improve their character and keep them (often sexually) in line. "The subordination of women in law, custom and practice was as natural to the colonists as breathing."

Nonetheless, among colonial women whose husbands abused this power, some sought relief in the courts. Ammons describes a 1681 case that sought to impose some limits on a husband’s behavior:

In a 1681 case, the court sent an order to the sheriff of Charles County, Maryland, requiring that the sheriff bring John Bread before him to accept the penalty for threatening the life of his wife Jane and for the ‘mutilation of her members.’ In the same order the court instructed the sheriff that he was to tell John Bread that he could not do any damage or evil to his wife’s body ‘otherwise than what to a husband, by cause of government and chastisement of his own wife, lawfully and reasonably belongeth.’

This leaves one wondering what penalty John Bread might have ended up having to accept. As I noted earlier in the chapter, Eldridge found that most colonial cases of spousal abuse left punishment unrecorded. He was, however, able to determine that the most common official response during the 1600s was the court’s attempt to reconcile the
couple. This is not surprising, given that divorce was not a legal option during that
time. “[P]atriarchy . . . was reinforced at every level of social organization and belief.
For women, it was total, inescapable.”

The patriarchal order of families and churches was also mirrored in the governing
structures of towns, colonies, and the emerging federation of states. Women were
excluded from formal participation in these structures. Of course, colonial women’s lives
varied with geography, and the settlement era spanned hundreds of years. However,
these differences amounted to what Ammons calls “varying degrees of limited
autonomy.” Throughout the new world, “government heavily regulated the lives of
white women, African slaves, and native inhabitants.” Paula Gunn Allen documents
the patriarchal form such regulation took in British dealings with the Cherokee people.
Prior to colonization, Cherokee women held strong, decision-making roles in governance;
however, this changed:

During the longtime colonization of the Cherokee along the Atlantic seaboard, the
British worked hard to lessen the power of women in everyday affairs. They took
Cherokee men to England and educated them in English ways . . .

In the ensuing struggle, women endured rape and murder, but they had no voice in
the future direction of the Cherokee Nation.

Women, of course, were also denied a voice in setting the future direction of the United
States, largely because their legal status was severely restricted.

The exclusion of women from formal participation in civic affairs was directly linked
to her legal status as a wife, and was reinforced with church doctrine. A seventeenth-
century English legal text illuminates some origins of this system of control:

Eve, because she had helped to seduce her husband, hath inflicted on her, as espcciall bane. . . .

See here the reason of that which I touched before, that Women have no vo[i]ce in
Parliament. They make no Lawes, they consent to none, they abrogate none. All of
them [women] are understood either [as] married or to be married and their desires
are subject to their husband[s] . . . . The common Law here shaketh hand with Divintie.\textsuperscript{80}

Women in early America, as we saw in Europe, continued to hold a virtually non-existent independent legal status. In promoting the husband’s authoritative role in the family, Western law has a strong tradition of merging the wife’s legal status with that of her husband, especially with regard to the management and ownership of property.\textsuperscript{81}

Ideological roots of this tradition are reflected in Puritan beliefs, which justified male supremacy within the family by citing biblical passages that “described the metamorphosis of two persons into one flesh through marriage.”\textsuperscript{82} The resulting marital entity, though purportedly representing both persons, translated as the ruling husband.\textsuperscript{83}

Legally, this came to be expressed as unity doctrine. The eighteenth-century English jurist and law professor William Blackstone was pivotal in shaping early American law. “Because few legal texts existed when America was founded, Blackstone’s Commentaries were the Bible for the American lawyer, and Blackstone’s words became law.”\textsuperscript{84} “Populariz[ing] the legal fiction of marital unity known as coverture,”\textsuperscript{85} he states:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; . . . and her condition during her marriage is called her coverture.\textsuperscript{86}

So, a married woman’s legal status—what is more, her ‘very being’—essentially disappeared with marriage. She was not permitted to represent herself in court, and her husband was legally liable for her behavior. Thus, as the argument went, he would be required to beat her, to chastise her, in order to control her behavior. Blackstone specifies bounds for the degree of violence husbands could legally use to coerce their wives’ obedience:

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The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children . . . But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to with wife . . . [otherwise than lawfully and reasonably] belongs to the husband for the due government and correction of his wife. The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors . . . [to beat his wife severely with scourges and sticks]; for others, [only moderate chastisement].

Reflecting changes in social norms of the family discussed above, Blackstone's words placed legal limits on the husband’s 'power of correction.'

In fact, into the nineteenth century, a coalescence of social forces would increasingly call the patriarchal chastisement prerogative into question. In 1829, England abolished the husband’s absolute power of chastisement. Norms concerning corporal punishment in general became a popular topic of social debate in antebellum America. Still, spousal violence persisted. During most of the nineteenth century, courts provided limited avenues for remedying domestic violence, and judges continued to give husbands dominion over wives. Moreover, divorces were rarely granted. In an 1836 case in which a battered wife sued for divorce on the grounds of cruelty, a New Hampshire court advised:

Let her return to the path of duty . . . she will join that meekness, patience and kindness which the religion she professes inculcates, and temper all conduct towards her husband . . . we think she will have no reasonable grounds to apprehend any further injury to her person.

These statements embody the malignant side of what some might call 'reconciliation.'

An 1824 Mississippi case, Bradley v. State, cites Blackstone and sets limits on acceptable degrees of ‘correction.’ It also articulates another rationale for chastisement:

Family broils and dissensions cannot be investigated before the tribunals of the country, without casting a shade over the character of those who are unfortunately engaged in the controversy. . . . [L]et the husband be permitted to exercise the right of
moderate chastisement . . . without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.92

As I shall discuss in the following section, this kind of justification—grounded more in privacy discourse and less in explicit patriarchal roles—would come to supplant the preexisting legal and social prescriptions addressing violence between spouses.

‘Preservation through Transformation’

and the Industrial Revolution

Emergence of the Feminine Household/

Masculine Market Dichotomy

As ubiquitous as American patriarchy was during the colonial and early national eras, “the skills and work of women [were] integral to survival.”93 The domestic economy of the household required their productive labor. Women:

kept house, tended gardens, raised poultry and cattle, churned milk into butter and cream, butchered livestock, tanned skins, pickled and preserved food, made candles, buttons, soap, beer, and cider, gathered and processed medicinal herbs, and spun and wove wool and cotton for family clothes . . . [and] often helped in their husbands’ businesses as well.94

Granted, women held a subordinate status in all spheres of life—but there was really, essentially only one sphere of life. And within this sphere women were, of course, fundamental. Ehrenreich and English characterize this pre-industrial state of affairs:

[L]ife, for the great majority of people has a unity and simplicity that will never cease to fascinate the ‘industrial man’ who comes later. This life is not marked off into different ‘spheres’ or ‘realms’ of experience: ‘work’ and ‘home,’ ‘public’ and ‘private,’ ‘sacred’ and ‘secular.’ Production (of food, clothing, tools) takes place in the same rooms or outdoor spaces where children grow up, babies are born, couples come together. The family relation is not secluded in the realm of emotion; it is a working relation.95
From an early-twenty-first-century feminist perspective, one must take pause to begin to comprehend how women from these earlier eras experienced daily life. Issues such as 'balancing work and family' and 'finding childcare' and 'equal pay' simply did not exist—not because women were relegated to the home per se, but because households (and villages) were the centers of human interaction. "There [was] not yet an external 'economy' connecting the fortunes of the peasant with the decisions of a merchant in a remote city." Commerce developed slowly, over centuries, largely in cities. Prior to industrialization, more than 95 percent of people lived agrarian lives. When people went hungry, it was "not because the price of their crops fell, but because the rain did not." The nineteenth century saw a "fundamental social transformation, of which even industrialization was a correlate and not a cause, . . . the triumph of the Market economy." With industrialization, "the Market [came] to replace nature as the controlling force in the lives of ordinary people." One cannot overstate the significance of this revolutionary transformation and its social ramifications.

This shift, momentous, though it took place over the course of many years, brought about massive changes in how individuals went about their lives. The family came apart along gendered divisions of the household and the market. Family size shrunk, as did the domestic economy that had productive household labor as its core. Loci of production moved to factories, to the public (male) world of (private) industry. Whole villages were emptied to feed the factory system with human labor. People were wrested from the land suddenly, by force; or more subtly, by the pressure of hunger and debt—uprooted from the ancient security of family, clan, parish. A settled, agrarian life which had persisted more or less for centuries was destroyed in one tenth the time it had taken for the Roman Empire to fall, and the old ways of thinking, the old myths and old rules, began to lift like the morning fog.¹⁰⁰
In addition to supplying the emerging market with labor, the household took on the consumer function, in varying degrees. "[P]rosprous families, urban dwellers, and those living in the older settled areas of the East led the way in the substitution of store-bought goods for homemade ones." The market, in turn, supplied families with goods and the earnings with which these goods were purchased. The household and the market were (and are) in these fundamental ways integrally connected, and males held a dominant status in both domains. Nonetheless, a split emerged that had not before existed—between men in the market and women in the home. "Life would now be experienced as divided into two distinct spheres: a ‘public’ sphere of endeavor governed ultimately by the Market; and a ‘private’ sphere of intimate relationships and individual biological existence." This ‘public/private distinction’ would later surface as a recurrent theme in twentieth-century feminist discourse.

*Old Patriarchy Declines; New Masculinism Rises*

With the massive changes that came about during the nineteenth century, “there a appeared a glimmer, however remote to most women, of something like a choice.” The old patriarchal ideology—what had reflected an entrenched way of life for centuries—was publicly coming into question. The religious authority that underpinned this ideology was challenged by new, critical ways of thinking. “[Women of the middle class] learned how to challenge male supremacy within the anti-slavery movement. They discovered that sexism, which seemed unalterable inside their marriages, could be questioned and fought in the arena of political struggle.” During the 1850s, “woman’s rights advocates organized . . . conventions, . . . published newspapers, and conducted petition campaigns seeking for women the right to vote and demanding various reforms
of marriage law." At the Seneca Falls women’s rights convention, the first gathering of its kind, attendees signed the Declaration of Sentiments, which states:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.

... He has made her, if married, in the eye of the law, civilly dead.
He has taken from her all right in property, even to the wages she earns.
... In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master – the law giving him power to deprive her of her liberty, and to administer chastisement.
He has so framed the laws of divorce, as to what shall be the proper causes of divorce, in case of separation, to whom the guardianship of the children shall be given; as to be wholly regardless of the happiness of the women – the law, in all cases, going upon a false supposition of the supremacy of man, and giving all power into his hands.

Importantly, the document locates issues concerning legal status, property rights, marital relations, and wife-beating within a broader system of male power. “For woman’s rights advocates, a structural diagnosis of male violence required a structural remedy.” Their efforts yielded some results in the 1850s, “first giving wives the right to hold property in marriage, and then the right to their earnings and the rudiments of legal agency.”

However, the doctrine of interspousal immunity prohibited wives from taking legal action against their husbands. Analyses of power relations between men and women continued to be developed and articulated. John Stuart Mill in 1861 argued:

That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.

Perhaps it is because those with power have an interest in maintaining it—and perhaps because of basic human greed and rapacity—that Mill’s prescription never actualized.
From man’s perspective in the market, the realm of the family, the intimate, private sphere occupied by women “look[ed] like a pre-industrial backwater, or a looking-glass land that inverts all that is normal in the ‘real’ world.” The domain their wives occupied—and in new ways, the women themselves—took on the role of the ‘other.’ As other, woman was idealized and romanticized, pathologized and controlled, from a position that failed to consider her experiences, knowledge, and opinions. As Erhenreich and English point out, this masculinist standpoint “reflects not some innate male bias but the logic and the assumptions of . . . the capitalist market.” With this new logic, prescriptions grounded in religious justifications were increasingly supplanted with those legitimized by scientific authority:

Science grew with the Market. It took the most revolutionary aspects of the business mentality—its loyalty to empirical fact, its hard-headed pragmatism, its penchant for numerical abstraction—and hammered them into a precision tool for understanding and mastery of the material world.

Rooted in liberalist rationalism, a “cultural framework [emerged] which equated science with goodness and morality,” and heralded science as the approach to solving social problems and injustices. Scientific ‘experts’ provided ‘the answers’ to both empirical and moral questions. Some saw science as a liberating force, insofar as it challenged the authority of the old order. However, history reveals that the emerging role of science did not embody “the inevitable triumph of right over wrong, fact over myth.” In many ways, it came to paint an authoritatively inaccurate portrait of women as it sought to “‘define’ her natural physical and mental constitution,” the “sources of her frailty,” and “the biological limits of her social role.” This can be illustrated with the rise of the eugenics movement in the late nineteenth and early twentieth centuries.
Eugenics has roots in late-nineteenth century misinterpretations of Darwin’s theory of evolution, which is based on the ideas of natural selection and ‘survival of the fit.’ Darwin proposed that humans evolved over time from less complex forms of life. What came to be known as Social Darwinism was a school of thought that applied this theory to group competition within human society. Upon the rediscovery of Gregor Mendel’s breeding experiments around the turn of the century, ‘genetics’ was coined as a new field of study. With evolutionary theory in mind, scientists studied in earnest the transmittal of inherited traits from one generation to the next. Many traits that were then thought to be genetically inherited—criminality and pauperism, for example—have since widely been acknowledged as stemming from social roots. Such genetic determinism, however, became a strong premise for eugenic rationale during this time and for decades to follow. Adopting this deterministic framework, eugenicists concluded that humans could effectively control the processes of natural selection within human populations. Certain groups of people—poor folks, non-white folks, for example—were deemed inherently less ‘fit’ and as such, eugenicists argued, did not have the right to bear children. By contrast, wealthy and powerful white folks, concerned with maintaining the ‘purity’ of their own genetic stock, were socially encouraged to breed with each other in droves. Moreover, as evolutionary theory was used to explain social hierarchies, women were cast as less a evolved group. Darwin states:

Woman seems to differ from man in mental disposition, chiefly in her greater tenderness and less selfishness; It is generally admitted that with woman the powers of intuition, of rapid perception, and perhaps of imitation, are more strongly marked than in man; but some, at least, of these faculties are characteristic of the lower races, and therefore of a past and lower state of civilisation.

Because women were understood to be more primitive, they were also seen as “non-varying and identical in evolutionary function, and that function was to reproduce.”

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Prescriptive writings of the day that were geared to the middle class emphasized and romanticized (white) women as mothers, the mother/child dyad, and a host of domestic and reproductive duties that applied to woman’s role in the home. Historians refer to this phenomenon variously as the cult of domesticity, the cult of motherhood, and the cult of true womanhood.124 “Magazines and books stressed the four cardinal virtues of true womanhood—piety, purity, submissiveness and domesticity.”125 Reva Siegel summarizes the phenomenon:

With a growing number of men working outside the household, norms and practices of parenting began to focus on the relationship between mother and child rather than father and child. As idealized in the prescriptive literature of the middle class, the family emerged as a site of specialized domestic activities.126 Maxine L. Margolis reminds us that this emerging emphasis on the mother/child dyad “would have been almost inconceivable” during the period preceding the nineteenth century because “the conditions allowing women to devote themselves exclusively to child care simply did not exist [then].”127

What had previously been characterized as the explicit authority of husbands was increasingly couched in terms of wives’ selflessness and altruism. In the 1850s, for example, William Alcott prescribed, “However elevated the character of woman—however influential she may be, and however great the duties she owes to herself to qualify herself for fulfilling her mission—she will do most for herself while laboring most for others.”128 Rationales grounded in such prescriptions for women’s ‘natural’ domestic duties are also reflected in court cases of the day. In *Bradwell v. State*, for example, the Supreme Court decided the women did not have a constitutional right to practice law, finding:
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 paramount destiny and mission of women are to fulfill the noble role of wife and mother. 129

This is but one example of how changes in family structures coincided with shifts in the ideological and practical underpinnings of male authority.

Women’s selflessness and submission were increasingly instilled through the prescriptive discourse of biological and medical ‘science,’ which described women’s ‘natural’ roles as mothers and housewives, intrinsically linking the very ‘nature of woman’ with reproductive and domestic duties. “A new science—gynecology—arose . . . and concluded that the female body is not only primitive, but deeply pathological.” 130

The ovaries were said to be responsible for ailments ranging from headaches to tuberculosis—and for controlling women’s personalities. 131 As a universal remedy for this range of afflictions, thousands of ovary removals were performed in the United States in the late nineteenth and early twentieth centuries. The uterus was understood to directly oppose and compete with the brain, a claim that ‘expertly’ supported arguments against granting women access to educational opportunities. 132 Reading, studying, anything that taxed the mind, would take away from the organ that fulfilled woman’s ‘true’ function of reproduction. 133 In addition to surgery, nineteenth-century doctors used leeches, cauterization, uterine injections, sensory deprivation and social isolation to ‘cure’ the host of female dysfunctions. “Patients were often brought in by their husbands, who complained of their unruly behavior. . . . [Treatments were] judged successful if the woman was restored to a placid contentment with her domestic functions.” 134

In previous centuries, the social control of women was maintained through such mechanisms as the doctrine of marital unity and, earlier, the public execution of ‘witches.’ During the nineteenth and early twentieth centuries, visits to the physician and

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psychologist performed a similar function. For some (white, middle and upper class) women, however, ‘sickness’ was an escape from the socially prescribed and enforced roles of wife and mother. As Ehrenreich and English point out, “[T]he experts could not have triumphed had not so many women welcomed them, sought them out, and even (in the early twentieth century) organized to promote their influence.” Still, “The experts’ rise to power over the lives of women was neither swift nor easy... The authority of science had to be promoted as if science were not a critical method, but a new religion. Many women resisted, ... organizing new networks of mutual support and study.”

**Privacy Rationale Supplants Chastisement Doctrine**

The social transformation of women’s role in the family, along with feminist reform efforts of the nineteenth century, challenged the old patriarchal order of things. Women’s organized opposition succeeded in changing juridical practice largely insofar as it was able to exploit tensions between the old laws and the new social norms of the family. “As early as 1816, Tapping Reeve, author of the first American treatise on family law, observed that there was a tension between the chastisement prerogative and prevailing mores of the family.” The decline of chastisement rationale is reflected in nineteenth-century court cases. For example, *Commonwealth v. McAfee* ruled, “Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband.”

The spatial, gendered, household/market split that was experienced in the everyday lives of husbands and wives came into conflict with the principles of marital unity on which the legal chastisement prerogative was largely based. Siegel states, “[T]he demise of chastisement was linked to wider changes in the law of marital status—in particular, to statutory reform of the doctrine of marital unity and the rule of gender hierarchy that it
embodied." Moreover, the romanticized image of the (white) altruistic mother and wife was psychologically at odds with chastisement prerogative. "As conversation about marital relations shifted from the framework of obedience and submission to that of asking and giving, the domestic relation began to take its character, not from the husband's ability to compel his wife's obedience, but instead from the wife's magnanimity in yielding to his desires." Concerns about this shift away from explicit patriarchal authority were heavily reflected in the sociological discourse of the early twentieth century. The ideological shift was also reflected in judicial decision-making.

Ammons writes:

To maintain a homosocial public sphere and a male-dominated private sphere, courts relied on protectionist ideology as a pretext to maintain separate spheres for men and women. Privacy instead of obedience became the mantra of the courts and others who did not want to challenge or correct the imbalance of power in the home.

With challenges to and ultimately the abandonment of legal chastisement rights of the husband, the language of 'privacy' and the noninterference in matters concerning the 'sanctity of the home' supplanted the older reasoning. However, this shift served to reinforce rather than challenge ideological and social aspects of male authority. "Once translated from an antiquated to a more contemporary gender idiom, the state’s justification for treating wife beating differently from other kinds of assault seemed reasonable in ways the law of chastisement did not."

Toward the end of the nineteenth century, "many lawyers and judges still followed old court decisions that said a husband, as the superior moral and legal creature in the family, had the responsibility to discipline, control and chastise his wife." Still, judicial decision-makers increasingly justified spousal violence "in the language of privacy and love associated with . . . marriage in the industrial era"—especially when
considering cases involving middle- and upper-class men. An 1864 North Carolina case, *State v. Black*, found that unless the cruelty was extreme, “the law will not invade the domestic forum, or go behind the curtain.” Four years later, in another North Carolina case, *State v. Rhodes*, the judge “mentioned the Blackstonian rule of the husband’s enforcement powers” and then “articulated a justification for ignoring certain kinds of domestic violence based on a privacy theory.”

The ideological and discursive shift from patriarchal prerogative to privacy rationales involved the defense of existing structures of male power, and the creation of new ones. Furthermore, power relations embodied in such factors as race and class found new means of expression and control. Underlying social power relations were largely maintained. Jurists who condemned chastisement doctrine found new rationales to condone violence in marriage—and to inconsistently try and punish male perpetrators. Siegel characterizes this “modernization dynamic” as “preservation through transformation”:

Efforts to reform a status regime do bring about change—but not always the kind of change that advocates seek. When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend.

With the shift to privacy doctrine as a response to spousal abuse, social relations of male dominance persisted, albeit by employing different language and with a logic that better aligned with the social norms and discourses of the day. The shift reflected not only the social norms and prescriptions framed in terms of gender, but also class and race biases in the prosecution of men who beat their wives. Wife beaters were selectively prosecuted, and privacy doctrine was most often used in cases where middle and upper class white
men were accused. "[W]hen the legal system did prosecute wife beating, it treated the crime as a deviant social act rather than as conduct recently condoned by law, selecting men for prosecution in ways that suggest that concerns other than protecting women animated the punishment of wife beaters."¹⁵²

The courts used "the prevalence of domestic violence among the 'coarser' classes . . . as a reason for intensifying the criminal prosecution of poor men who beat their wives."¹⁵³ According to Siegel, another kind of change occurred as wife beating in the late nineteenth century "began to shift in political complexion from a 'woman's' issue to a 'law and order' issue."¹⁵⁴ With this shift, groups such as the Ku Klux Klan developed a new interest in wife beating, and "began to invoke [it] as an excuse for assaults on black men."¹⁵⁵ Siegel also discusses two spousal violence cases, *Fulgham v. State* and *Harris v. State*, that "repudiate chastisement doctrine, but [with] opinions [that] seem more interested in controlling African-American men than in protecting their wives."¹⁵⁶

Around the turn of the century, a number of states considered 'whipping post' laws that would specify punishments for wife-beaters; three states enacted such laws.¹⁵⁷ While this remedy was advocated under the guise of protecting women, "the appeal of the whipping post lay in its capacity to break men . . . [and] articulated class and racial conflict among men."¹⁵⁸ The ideals of equality between men and women that were espoused by some during the nineteenth-century may have contributed to chastisement's demise. However, "chastisement law was supplanted by a new body of marital violence policies that were premised on a variety of gender-, race-, and class-based assumptions."¹⁵⁹

The whipping post laws were fairly short-lived and spousal violence was again decriminalized in the 1920s. Local municipalities established a system of domestic
relations courts that channeled intimate violence cases to social workers who pushed for reconciliation and aimed to "preserve the relationship wherever possible." Supported by justifications couched in privacy language, law enforcement officials practiced nonintervention and mediation in domestic violence matters, and directed cases out of the criminal justice system and into counseling. This amounted to a sort of "therapeutic" regulation of intimate violence, in which physical assault was treated not as criminal behavior but as reflective of emotional problems requiring attention within the marital relationship. This approach reflects how domestic violence cases were handled in the United States for much of the twentieth century. Feminist organizing, however, also persisted throughout the twentieth century, and continued to challenge systems of male domination, including the privacy rationale that allowed spousal violence to go unchecked for over a hundred years. With an emphasis on federal developments in domestic violence law and policy, I now turn to further discussion of these movements.

Battered Women Organize; Federal Lawmakers Respond

_Battered Women's Movement Emerges in 1970s_

The 1960s and 1970s brought new challenges to the social and legal mechanisms that uphold male power. Women's rapidly increasing employment rates and growing expectations for self-fulfillment "fueled a feminist revolution both inside and outside the home." The civil rights movement provided a template for emerging equality legislation. Birth control advances and legal gains around abortion rights granted women unprecedented sexual and reproductive freedoms. Books questioning women's domestic roles as wives and mothers were widely read and discussed. By 1972 in the United States,
more than half of mothers of school-aged children were employed in the paid labor market. The inherent contradiction between the ideology of full-time motherhood and the economic fact of women's large-scale employment was simply too great. The developing feminisms manifested in a variety of ways, including the push for equal labor market opportunities and challenges to 'traditional' male domination within the family. Activists organized anti-rape campaigns, and promoted women's self-defense. Networks of women's community centers and feminist bookstores emerged, as did women's health clinics that challenged the authority of the male medical professional. Women sought legal changes in matters of divorce and credit, entered the legal profession in record numbers, organized around childcare concerns, and proclaimed such slogans as 'fuck housework' and 'sisterhood is powerful.'

As women's independence grew, so too did the violence perpetrated against them. In an unprecedented response to this escalation of violence, and in connection with the broader feminist movements of that era, a grassroots battered women's movement developed in the mid-1970s. Women throughout the country organized to create networks of crisis lines and safe houses, and started to push for a federal policy response to the issue. Feminist analyses, such as Del Martin's Battered Wives, situated domestic violence within broader structures of male power. Such analyses challenged the privacy justifications of noninterventionist policies that created a policy vacuum around the issue and effectively granted violent husbands informal immunity.

In 1977, at the National Women's Conference in Houston, delegates approved a National Plan for Action that called upon Congress and the President to improve services for battered women. During the late-1970s, the terms 'domestic violence' and
'battered woman' surfaced in the legislative lexicon, and the issue continued to gain public visibility. In a case that became the basis for Faith McNulty’s *The Burning Bed*, Francine Hughes was acquitted on grounds of ‘temporary insanity’ for the murder of her violent husband. Organizations such as the National Communication Network for the Elimination of Violence Against Women publicized accounts of women murdered by their husbands and women who killed in self-defense. Born from a consultation on battered women held by the United States Commission on Civil Rights—as well as the years-long organizing efforts of activists across the country—the National Coalition Against Domestic Violence was founded in 1978. Lenore Walker’s groundbreaking *The Battered Woman* describing the ‘cycle theory of violence’ was published the following year.

The battered women’s movement came after an era of silence in which violence systematically perpetrated against women was not addressed in public discourse. Thus, the movement played a critical role in increasing the visibility of intimate violence as a policy problem: it brought the issue back into the realm of public debate and served as an important impetus to get domestic violence onto the Congressional agenda.

*Domestic Violence Emerges on the Federal Legislative Agenda*

Given the long history of the state’s sanction of intimate violence against women, that attitudinal and political constraints initially blocked domestic violence issues from gaining much legislative headway is not surprising. In the courts, domestic violence incidents were still largely written off as ‘private matters’ or ‘family squabbles’ and commonly treated as natural expressions of male authority best handled within the
family. Nevertheless, juridical decision-makers were changing their stance that family violence matters were off limits for the state.

In 1977, two federal domestic violence bills were defeated, and in 1978 another piece of legislation, the Domestic Violence Assistance Act, failed to pass. In 1979, President Carter established an Office of Domestic Violence with an annual budget of $900,000; however, the Reagan administration closed the office in 1981. The Senate blocked passage of the Domestic Violence Prevention and Services Act in 1980. During the same year, Senator Jesse Helms criticized providing any federal support to domestic violence programs, claiming that they constitute “social engineering” and challenge the husband’s rightful position as “head of the family.” Despite the attention sympathetic legislators gave the issue, right-wing opposition prevented federal assistance until 1984, when Congress passed two pieces of legislation that provided some funding for domestic violence intervention programs. The Family Violence Prevention Services Act provided small-scale grants to support shelters, counseling and related services for victims of domestic violence. Also, the Victims of Crime Act, which earmarked $150 million in grants to aid survivors of various crimes, included domestic violence among its priority areas. Although the 1980s saw limited success in federal legislative reform, by that time most states had enacted laws to remedy domestic violence. These and other developments helped to set the stage for the more comprehensive federal response that followed.

For instance, due to legal liability concerns, law enforcement administrations were increasingly revising their nonintervention policies with regard to domestic violence. These concerns arose largely as a result of a much-publicized 1984 case, Tracey.
Thurman, et.al. v. City of Torrington, Connecticut, which Eve S. Buzawa and Carl G. Buzawa summarize:

Ms. Thurman and other relatives had repeatedly called the police, pleading for help to protect her from her estranged husband, but had received virtually no assistance, even after he was convicted and placed on probation for damage to her property. When she asked the police to arrest him for making threats to shoot her and her son, ... they told her to return three weeks later and get a restraining order in the interim. ... [S]he did obtain the court order but the police then refused to arrest her husband, citing a holiday weekend. After the weekend, police continued to refuse to assist based on the fact that the only officer who could arrest him was on vacation. ... [F]ollowing a delayed response to a call for emergency police assistance, Thurman was attacked and suffered multiple stab wounds to the chest and neck, resulting in paralysis ... and permanent disfigurement.

Thurman's attorneys argued two theories of police liability that were upheld in many subsequent cases. The first put forth that the police failed in their duty to take reasonable action to prevent victim injury from a known offender. Second, her lawyers argued that the police violated Ms. Thurman's Constitutional rights of equal protection under the law, based on differential treatment accorded to a man who batters his spouse versus an assault by a stranger. Thurman and similar cases motivated police departments to develop requirements for stronger justification of police actions and, in some cases, to adopt policies of mandatory or presumptive arrest. These trends also served to politically align the interests of law enforcement agencies with those of domestic violence victims, survivors and their advocates.

The Violence Against Women Act: 1990-1994

Senator Joseph R. Biden, Jr., introduced the first version of VAWA on June 19, 1990, and the Senate Judiciary Committee began hearings the following day. "In America, in 1990, 'domestic' violence was a term associated with 'natural' violence ... [and] was perceived as a product of victims' 'choice.'" During the hearings, survivors of domestic violence testified as to their experiences of judicial insensitivity, especially as
related to attempts to prosecute their attackers. They documented the systemic nature of gender violence, its impact on the national economy and the failure of state court systems to provide equal protection under the law. The Senate Judiciary Committee unanimously passed the bill in October. However, the full Senate did not vote on the bill, and Senator Biden reintroduced it in 1991. He worked closely with Representative Barbara Boxer, who introduced House versions of VAWA in 1990 and 1991. Action by Congress on the bill was slow throughout 1991. Due to crowded agendas and shifting priorities among members of Congress, the bill did not come up for vote during that year.

Throughout 1992, the bills in both the House and the Senate continued to generate attention and attract cosponsors. Despite a press conference held by Senator Biden in a likely attempt to move the bill through Congress more swiftly, there was a lack of action by the Senate in 1992. In the House, the bill underwent a line-by-line mark-up in 1992. By the end of 1992, Barbara Boxer had been elected to the Senate and the Congressional Caucus for Women’s Issues had made preparations to push the measure in 1993. In January 1993, Senator Boxer, working closely with Senator Biden, introduced the bill in the Senate. One month later, four Representatives introduced the bill in the House. By the end of 1993 both the House and the Senate had approved some version of the act. However, it was decided that VAWA should be incorporated into a broader crime bill in 1994, which again delayed the process. On August 21, 1994, the House approved a version of the bill by a vote of 235-195. That same week, the Senate voted 61-38 to pass the bill exactly as it came out of committee, thus readying VAWA for the President’s signature. A few weeks later, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994, in which VAWA was enacted as Title IV.
The enactment of VAWA, which allocated $1.62 billion to be spent over six years, promised an unprecedented federal commitment to addressing domestic violence, as well as other forms of violence against women and children. The “Safe Homes for Women” section of the act—Title IV, Subtitle B—included several provisions for preventing domestic violence and providing support for its victims. This section of the act included: establishing a national domestic violence hotline, improving interstate enforcement of orders of protection, strengthening protections for victims, and directing various federal agencies to collect data and conduct research on domestic violence. It also allocated funds to state and local governments to: improve the tracking of victims; increase coordination among police, prosecutors, and the judiciary; strengthen local advocacy, service and prevention programs; educate judges about the issue; and implement mandatory arrest policies.

Concomitantly, VAWA’s Title III provided a landmark civil rights remedy for gender-based violence, “entitl[ing] victims to compensatory and punitive damages through the [state or] federal courts for a crime of violence if it is motivated, at least in part, by animus toward the victim’s gender.” Title III, the was significant in that it established violence motivated by “gender animus” as a “proper subject of a civil rights action.” Not surprisingly, Title III generated a good deal of controversy, both before and after VAWA’s enactment. The testimony given during the legislative hearings built a case for establishing Congressional authority under the Commerce Clause and the Fourteenth Amendment. Valerie Jenness, who analyzed congressional hearings and reports of VAWA, puts forth that “support for Title III was based less on direct pressure from those engaging in collective action, and more on the previously established logic
used to justify the status provisions now taken for granted in [federal hate crime law].”

Rachelle Brooks confirms that most of the early action on the bill was the result of hard
work by insiders. While there was a good deal of insider support for the bill, Title
III generated opposition from both the American Civil Liberties Union (ACLU) and the
federal judiciary prior to its enactment. This controversy “stalled the bill at various
points on the road to final passage.” In Chapter 4, I further discuss the controversy
surrounding Title III and United States v. Morrison, the Supreme Court case that
rendered this part of VAWA unconstitutional.

Political pressure from both inside and outside of Congress were critical to the
passage of VAWA and the larger Crime Bill of which it was a part. Also key to
VAWA’s passage were the efforts and influence of Senator Biden during the four-year
period spanning the bill’s legislative journey. Brooks contends that public pressure
caused Congress to ultimately take action on the Crime Bill, legislation it might have
otherwise been unable to agree upon. Congressional elections in 1994 motivated
legislators to listen to their constituents, who indicated that crime was an important issue
affecting their lives. Despite Democratic defeats in both houses of Congress, VAWA
became an area that no one seemed willing to consider cutting. Brooks suggests that this
was because VAWA had taken on symbolic significance as a measure to offer evidence
of congressional support for women’s issues.

Public opinion around domestic violence may have played a pivotal role in the final
preservation of VAWA. The media frenzy around the O.J. Simpson murder trial, which
began in 1994, may have served to focus national attention on the problem of domestic
violence. A number of sources mention the significance of this case in influencing
VAWA's passage. For example, one writer claims, "The O.J. Simpson trial help[ed] put
domestic violence on the national frontburner." Another states, "The Nicole Brown
Simpson case has now put a famous face on all the statistics." In a published
interview, Patricia Ireland, then-President of the National Organization for Women, said,
"Nicole Brown Simpson . . . get[s] murdered and we finally use that public attention to
get the Violence Against Women Act out of Congress." It appears that the Simpson
trial could aptly be described as what John Kingdon calls a ‘focusing event’—it focused
public attention on domestic violence as a policy problem.

As the above discussion illustrates, a coalescence of factors aided VAWA’s
enactment. In most regards, opposition to VAWA within Congress was minimal, and
VAWA as a whole generated a good deal of bipartisan support. However, some right-
wing opposition surfaced as claims alleging the law’s negative effects on the family. An
article published by the Independent Women’s Forum (a conservative, antifeminist think
tank) asserts, “Since its passage in 1994, we have been warning that the VAWA is not
helpful to assault victims, and it has produced harmful effects on women and families.”
A piece published by the National Coalition for Free Men states:

VAWA allowed spending of $1.5 billion a year [sic] of your tax dollars to help
promote feminism. Consider the irony: while men are out working to support their
families, their federal tax dollars are going to support feminist policies that destroy
families and the lives and rights of men.

The American Coalition for Fathers and Children puts forth similar claims: that domestic
violence legislation encourages divorce culture, and illegitimacy and fosters a court bias
against fatherhood. These claims demonstrate that general opposition to domestic
violence programs persists—and that such opposition continues to find a basis in
patriarchal values and social prescriptions concerning women and the family. Articulated
as such, however, this opposition seems relatively weak when compared with the unprecedented degree of political support and attention that domestic violence prevention and intervention policy has garnered over recent decades.

Conclusions

Examining the historical roots of a social problem—in this case, tracking domestic violence over centuries of changing socioeconomic environments—invaluably illuminates our understanding of that problem’s persistence in contemporary contexts. Very broadly speaking, such a pursuit improves our capacity to assess what things change, how and why they change, and what seems to persist more or less continuously. Inevitably, the analysis sheds light on our current perspectives, by reminding us of what is possible and of what assumptions we may be taking for granted. When researching the witch-hunts, for example, I found myself going about my daily tasks and imagining what life must have been like for women in seventeenth century Europe, what it must have been like to witness gruesome public executions, to fear being the next one selected to burn alive while my children watched. I also found myself seeking connections, wondering as to the relation of events then and events now. As I walked to buy a cup of coffee, my mind drifted to the burning stake, then to the televised coverage I saw of a woman being shot in the head, in a spectator-filled stadium in Taliban Afghanistan. Sitting in traffic, I found myself pondering the Texan woman who was killed by lethal injection, who had likened her days approaching execution to the experience of waiting for an abusive husband to come home. Reading the words penned a by friar over five hundred years ago—“Scold her sharply, bully and terrify her”—I recalled a woman who
came to the human service agency where I worked in the early 1990s. What I remember most about her now is that her husband made her lick the floor.

The systemic coercion of women takes on different forms. It finds social and political legitimation in different bases, including religious doctrine, rule of state, 'natural' law, and scientific authority. Such bases, in turn, shape legal rules and social norms. Systems of knowledge and power are mutually constitutive. That said, people make ideology, and thus, with varying degrees of power, people are able to change it. People, mostly men, also make laws. Laws premised on 'the word of God' in one century may fully contradict laws supported by 'empirical fact' or liberalist ideology or jingoism (or, again, 'the word of God') in another century. What appears to be a constant, however (albeit varied in form, degree and expressed justification), is the societal imbalance of power in relations between constructions of femininity and masculinity, between women and men. To be clear, I am talking about systemic power, which to begin to grasp requires both the birds eye view and the understanding that power inequities actualize in very real social interactions and contexts. However systems of power are maintained—through slavery, public execution, oppressive legal doctrine, reproductive coercion, domestic violence, and countless other mechanisms—this maintenance is frequently legitimized in terms of social conceptions of what 'woman is' and what 'woman does.' Whether social norms upholding male power are framed as women actively submitting (for example, the masochistic housewife) or more straightforwardly framed as simple, explicit obedience to authority (for example, wife as servant, chattel), the resultant effect is essentially the same: men's authority over and control of women is maintained.
The use of violence to maintain statuses of privilege is pervasive today in our increasingly globalized world. Although sometimes morally justified and downright necessary, violence is a devastating social harm. While many Americans 'get off' on virtual or sensationalized violence, there is arguably something inherently 'unstomachable' about real violence. This feeling is magnified, I find, when a violent act is clearly the expression of larger systems of domination. Events like the murder of Matthew Shepherd and the surgical experimentation Marion Sims performed on black female slaves again drive home David Peterson del Mar's point: "The moral texture of a violent act is contingent on its context." Even those who perpetrate such acts—perhaps especially those who perpetrate them—must make cognitive accommodations and/or seek to somehow justify these acts on some moral basis. Along related lines, Barstow discusses how the witch-hunters' accounts tend to fall silent when it comes to the actual death of an executed witch; she poses the question, "Had they no stomach for seeing their projects through to the end?" I suspect such a 'lack of stomach' to also largely account for the positive correlation between domestic violence and alcohol abuse, in that alcohol can mask the feelings and consequences associated with committing a violent act. As Martin Luther King so wisely said, violence begets violence. However, violence also begets moral dissonance, the need for moral justification, and the efforts to erase and suppress.

As the analysis in this chapter shows, various authoritative sources have articulated a range of moral justifications for intimate violence. Such justifications have served to facilitate the perpetuation of violence as a means to socially control women. They have included moral claims about beatings being good for women, and such corollary
prescriptions as: a husband should beat his wife “not in rage but out of charity and concern for her soul.”227 Justifications have been based on claims of religious authority, as in, ‘God gives husbands dominion over wives’ and ‘God rewards wives who submit to extreme husbands.’ They have also, as we have seen, been rooted in philosophical and scientific claims about what is ‘natural.’

Amidst these variations, a pattern emerges: women are socially rendered as selfless. This occurs in at least two distinct regards. Some justifications portray women as not being of themselves, that is, as having no self. Examples of these would include woman as chattel, marital unity doctrine, and women’s lack of independent legal status. In the other regard are justifications that render woman as not for herself. This meaning of selflessness is reflected in Darwin’s claim about women being ‘less selfish’ and in Alcott’s advice about ‘doing most for herself while laboring most for others.’ Robin West characterizes how such selflessness works in the life of a battered woman:

The battered woman is . . . for another within an abusive marriage precisely to the extent to which it is too frightening and too dangerous to even contemplate being for oneself . . . If you are going to be at all, you are going to be for him. And you are going to be, so you are going to be for him.228

Regardless of which type of selflessness is employed, such social rendering of women makes the perpetration of violence against them seem less immoral.

In addition to the mechanisms discussed above, domestic violence has been sanctioned by the minimizing of its severity—by characterizing assault, battery, sexual terrorism, and sometimes murder as ‘domestic disputes’ and ‘family squabbles.’ The suppression of intimate violence is also accomplished by the silence surrounding the issue, by its omission from public discourse, and by the selective framing of certain ‘family matters’ as beyond the purview of state intervention.
But, one may ask, has not much of this changed? Did the battered women's movement not successfully challenge, for example, privacy rationale? I contend that in many ways, yes, the movement did accomplish just that. That a law such as VAWA was enacted at all is evidence in support of this claim. In many ways, women have also achieved greater freedom and independence in recent decades. Gendered divisions between the household and the market have blurred as more and more women have entered the job market. Moreover, many women have gained access to social resources that were heretofore entirely off limits. Despite women's gains, however, the structural imbalances persist; domestic violence persists. Why?

In recalling the demise of chastisement doctrine, we saw that it was undermined by broader structural changes, economic changes that transformed the family. Using liberalist discourse to exploit the resultant social tensions, women's rights advocates posed challenges to chastisement doctrine. The old doctrine was supplanted, over time, with privacy rationale that better fit with woman's prescribed roles as homemaker and mother. Thus privacy rationale reflected the social norms and prescriptions of the day. The shift away from chastisement doctrine seemed rather emancipatory in the 1800s. The twentieth century, however, revealed the true colors of privacy doctrine—that is, its functioning as a kind of informal immunity—which was in turn challenged by 'second wave' feminisms. Again, this shift mirrored economic changes and transformations in family structures. In the middle and late 1900s, women increasingly moved into the job market. Again exploiting tensions between existing ideologies and changing social norms, feminist challenges undermined much of the logic of privacy rationale.
We now have federal laws addressing violence against women. So, where has this shift left us? Has domestic violence gone away? No, of course not. Power relations have in many ways been maintained despite the social and political gains experienced by some women. Not unlike the role privacy discourse played in the 1800s, contemporary emancipatory discourse relies on such tropes as ‘equality’ and ‘independence.’ History suggests we ought to further examine these terms, and question the extent to which they accurately reflect the current status of women. We also ought to look at changing economic structures, for example those resulting from globalization and corporate capitalism, to better understand how power relations are shifting, yet being maintained—or, as Siegel would say, transforming yet being preserved. We ought to question the efficacy of legal remedies in ameliorating the problem of domestic violence, as history suggests a pattern of limitations in this regard. In the following chapter, I continue to pursue such questions, by further examining the controversy surrounding VAWA’s Title III and the Supreme Court case that overturned this legislation.
Notes

1 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into Category of Bourgeois Society* [original German publication 1962], trans. Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1989).

2 In this thesis (and thus this account) I am primarily concerned with law and policy at the national level. For a review of literature on the history of state and local policy responses to domestic violence in the United States, see David Peterson del Mar, prologue to *What Trouble I Have Seen: A History of Violence Against Wives* (Cambridge, MA: Harvard University Press, 1996).

3 The sources I examined, however, indicate a clear need for more research in this area.


5 I elaborate on a specific example of this claim in Chapter 2: Habermas’s historical account, which draws on a number of influential Western thinkers has been criticized for its failure to address women’s discourse.

6 In its focus on the history of domestic violence law and policy, this chapter also tends to focus on the history of dominant Anglo/American social and legal norms surrounding the issue. In my discussions of colonial America, for example, I do not consider here how Native American cultures either embraced or contested such norms. The further pursuit of answers to such questions is indeed warranted, however, especially given the findings of a 1999 U.S. Department of Justice report, which states: “Most striking among American Indian victims of violence is the substantial difference in the racial composition of offenders in intimate violence incidents when contrasted with family violence. Among violence victims of all races, about 11% of intimate victims and 5% of family victims report the offender to have been of a different race; however, among American Indian victims of violence, 75% of the intimate victimizations and 25% of the family victimizations involved an offender of a different race. Intimate and family violence involve a comparatively high level of alcohol and drug use by offenders as perceived by victims — as is the case for Indian and non-Indian victims. Indian victims of intimate and family violence, however, are more likely than others to be injured and need hospital care.” (Lawrence A. Greenfeld and Steven K. Smith, “American Indians and Crime” [report online] (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, February 1999, accessed 11 January 2004) available from http://www.ojp.gov/bjs/pub/pdf/aic.pdf; Internet, 8.

7 Both, for example, have been used as punishment against disobedient wives, as I discuss further below. I also contend that a public/private distinction functions to make these forms of violence seem more different than they in fact are, as in ‘private’ domestic violence versus the public execution of witches.
Ammons, 1227. Ammons also points out here that rich widows often financed the early church.

Ammons, 1228.


24. de Pizan, 7-8.

25. Ammons, 1229.


27. Ammons, 1229.

28. Ammons, 1231.


31. These figures represent an average across Europe. In some specific areas, as many as 95 percent of accused persons were women. Typically, men who were accused of witchcraft were familially related to a woman already convicted, or they already had felony criminal records.

32. Barstow, 27. Moreover, a look at local hunts reveals that sometimes all but one or two women in a given village were accused. (Barstow, 24.)


34. Ammons, 1234.

35. Barstow, 12. Barstow develops further connections between the witch-hunts and themes of imperialism and racism in *Witchcraze*, especially in chapter 8.

36. Barstow, 100.


39. Barbara Ehrenreich and Deirdre English, *For Her Own Good: 150 Years of the Experts Advice to Women* (Garden City, New York: Anchor Press, 1979), 34. European at this time were also engaged in a range of other types of work.
Barstow, 103.

Erhenreich and English, 35.

Erhenreich and English, 36.


Kramer and Sprenger, 147.

Barstow, 29.

Erhenreich and English, 38-39. These authors point out that physicians were often called upon to diagnose whether the cause of an ailment stemmed from witchcraft, as well as to search the body of an alleged witch for marks of the devil.

Barstow, 12.

Kramer and Sprenger, 114.

Barstow, 135.

Barstow, 28.

Barstow, 41.

Ammons, 1237.

Ammons, 1242, citing “An Homily of the State of Matrimony,” in *Certain Sermons or Homilies Appointed to be Read in Churches* 452 (Oxford Univ. Press 1547).

Kramer and Sprenger, 101, citing 1 Corinthians vii.

Kramer and Sprenger, 113.

Barstow, 149-150. Ammons, 1238-1239 n.190, discusses some of the “striking similarities between the witch executions and the lynching of black men and women in the southern United States.

Often numbering in the thousands, the crowds that witnessed these inhumanities received a very strong message about state/church power. Barstow discusses the ritual meaning that the torturous executions took on: “As a public purging of evil, it declared that the land was rid of demonic enemies... [T]hey affirmed that the ruler who ordered them was godly, and even more important, that his power was greater than the forces of evil.” (Barstow, 143.) This author further states, “Ritual is display. This execution,
through the elaborate procession of ecclesiastical and secular officials, displayed the absolute power of the state over the individual, of the church over Satan and the individual, of public law over the private realm of the family.” (Barstow, 149.)

58 Ammons, 1236.
59 Barstow, 25.
60 Barstow, 41.
61 Henry VIII broke with Rome in 1545 over tensions regarding divorce. (Ammons, 1243.)
62 Ammons, 1243.
63 Ammons, 1243.
65 Ammons, 1245.
66 Ammons, 1247. ‘Honor’ in this context implies obedient reverence.
67 Ammons, 1247. Some women were sanctioned for the particular threats they posed to this authority. For example, “Women who preached threatened the hierarchical relationships between minister and member and, more importantly, between husband and wife.” (Ammons, 1248.)
69 Ehrenreich and English, 7.
70 According to Barstow, 181, of 334 persons accused of witchcraft in New England, 35 were executed. These counts, of course, reflect a small fraction of those arrests and killings that took place in Europe over centuries.
72 Ammons, 1248.
73 Ammons, 1255-1256, citing Bread’s Case, 2 Bland’s Chancery rep. 535, 535 (1681).
74 Eldridge, 258.
James Kent, for example, assesses divorce options in the colony of New York. "During the period of our colonial government, for more than one hundred years preceding the revolution, no divorce took place in the colony of New York; and for many years after New York became an independent state, there was not any lawful mode of dissolving a marriage in the lifetime of the parties, but by special act of the legislature." (Ammons, 1256, citing James Kent, 2 Commentaries on American Law 97 (5th ed., 1827).

Ehrenreich and English, 7.

Ammons, 1250. Ammons goes on to offer an example of this variability, stating, "Before the Revolutionary War, for example, women had the right to vote in some of the colonies. However, suffrage was eliminated after the Declaration of Independence."

Ammons, 1249.


Roberta L. Valente, et.al., "The Violence Against Women Act of 1994: The Federal Commitment to Ending Domestic Violence, Sexual Assault, Stalking and Gender-based Crimes of Violence," in Sourcebook on Violence Against Women, eds. Claire M. Renzetti, Jeffrey L. Edleson and Raquel Kennedy Bergen (Thousand Oaks: Sage Publications, 2001), 280. Valente, et.al., trace this tradition into the twentieth century. They cite, California law, for example, which until 1951 gave husbands complete control over their wives earnings. Moreover, they state, "as recently as 1988 the family law systems in most states assumed that married women were the legal dependents of their husbands unless evidence to the contrary was presented to the court." (Valente, et.al., 281.)

Ammons, 1247.

Ammons, 1247.

Ammons, 1252.

Ammons, 1252.

Ammons, 1253, citing Blackstone, 444-45.

Howard and Lewis, 2.


Teays, 59.

Ammons, 1261, citing *Poor v. Poor*, 8 N.H. 307, 319 (1836).

Bradley v. State, 2 Miss. (Walker) 156 (1824).

Ehrenreich and English, 8.


Ehrenreich and English, 6.


Ehrenreich and English, 7.

Ehrenreich and English, 9.

Ehrenreich and English, 9.

Ehrenreich and English, 5.

Margolis, 23.

To be clear, I mean this in the sense of the split’s magnitude and significance, not in the sense that paid workplaces had never before existed outside the home.

Ehrenreich and English, 10.

Ehrenreich and English, 13.


Siegel, 2130. This author states, “It was the antebellum temperance movement that first initiated public conversation about wife beating. As temperance advocates demonstrated the social evils of alcohol, they drew attention to the violence that drunken husbands so often inflicted on their families.” (Siegel, 2129.) She then indicates that the women’s right movement broke with the temperance movement. (Siegel, 2131.) This account differs somewhat from Ammons, who notes, “The temperance movement, which
was spun off from the activism for suffrage, often used the beaten wife as the reason to outlaw alcohol.” (Ammons, 1262, citing Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence 254 (1988) and Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present 49-66 (1987).)

Elizabeth Cady Stanton, A History of Woman Suffrage, vol. 1 [report online as part of the Internet Modern History Sourcebook] (Rochester, N.Y.: Fowler and Wells, 1889, accessed 24 January 2004) available from http://www.fordham.edu/halsall/mod/Senecafalls.html; Internet, 70-71. Quaker abolitionists and a network of relatively well-off white women organized this first women’s rights convention. By focusing on this decidedly liberalist version of ‘first-wave’ feminism, I do not want to obscure the political diversity of this social movement. An account of Sojourner Truth’s “Ain’t I a Woman” speech given at an 1851 women’s right convention in Ohio underscores the importance of recognizing that ‘womanhood’ in the nineteenth century, as today, translated into major differences in women’s lives along such social boundaries as race and class. In addition to being whitewashed as such, much of the historical rendering of first-wave American feminisms oversimplifies the movements as equating to the push for suffrage. Not all feminisms placed equal importance on suffrage. For example, in the early twentieth century, Emma Goldman writes, “I see neither physical, psychological, nor mental reasons why woman should not have the equal right to vote with man. But that cannot possibly blind me to the absurd notion that women will accomplish that wherein man has failed.” (Emma Goldman, “Woman Suffrage,” in The Traffic on Women and Other Essays on Feminism, reprinted from an edition published in 1917 by Mother Earth Publishing Association, New York (New York: Times Change Press, 1970), 53.

Siegel, 2131.

Siegel, 2130.

Ammons, 1262.

This practice has, of course, continued through the present day.


Ehrenreich and English, 18.

Ehrenreich and English, 18.

Ehrenreich and English, 17.

Ehrenreich and English, 116.

Ehrenreich and English, 33.
118 Ehrenreich and English, 116.

119 Ehrenreich and English, 116.


123 Ehrenreich and English, 119. As these authors also emphasize, “[W]oman’s total submission to the ‘sex function’ did not make her a sexual being. The medical model of female nature, embodied in the ‘psychology of the ovary,’ drew a rigid distinction between reproductivity and sexuality.” (Ehrenreich and English, 121.)

124 See, for example, Ehrenreich and English, and Margolis.

125 Ammons, 1257.

126 Siegel, 2129.

127 Margolis, 17.

128 Siegel, 2145, citing William A. Alcott, Gift Book for Young Ladies 85 (Buffalo, Derby, Orton & Mulligan 1853). Recall that a women’s movement was emerging when Alcott’s Gift Book was published.

129 Ammons, 1259, citing Bradwell v. State, 83 U.S. 141 (1872). Interestingly, the court cited not scientific but religious authority in rendering its decision, stating, “This is the law of the Creator.”

130 Ehrenreich and English, 19.

131 Ehrenreich and English, 122-124.

132 Ehrenreich and English, 125-131.
As further ‘evidence’ that higher education drove women insane, a 1902 study found that 42 percent of women committed to asylums were well educated, compared to only 16 percent of the men. (Ehrenreich and English, 128.)

Ehrenreich and English, 124. These treatments were expensive and thus primarily given the middle and upper class women. However, other women—among them the black female slaves and indigent Irish immigrants operated on by Marion Sims—endured these experimentation phases of these treatments. (Ehrenreich and English, 124-125.)

Ehrenreich and English, 28.

Siegel also makes this claim.

Siegel, 2142.


Siegel, 2141.

Siegel, 2146.

Ehrenreich and English, 12.

Ammons, 1263.

Siegel, 2122.

Valente, 281. I suggest that the phrase “superior moral and legal creature” is reminiscent of the evolutionary theories of the day.

Siegel, 2122.

Siegel, 2123.

Ammons, 1260, citing State v. Black, 60 N.C. (Win.) 163 (1864).


Siegel, 2132.

Siegel, 2122.

Siegel, 2132.

Siegel, 2136.
Siegel, 2160.

Siegel, 2160.

Siegel, 2160-2161, discussing Fulgham v. State, 46 Ala. 143, 146 (1871) and Harris v. State, 14 So. 266 (Miss. 1894).

Siegel, 2138. Whipping post laws were passed in Maryland (1882), Delaware (1901), and Oregon (1906). For a comprehensive historical of spousal violence in Oregon, see Peterson del Mar.

Siegel, 2139.

Siegel, 2122.

Siegel, 2153. The remainder of this paragraph also draws heavily from Siegel here.

Peterson del Mar, 140.

Margolis, 101.

Margolis, 101.


Notably, these efforts were oriented to the stranger-criminal early on, and did not orient until intimate partners until later.

Some of these health centers published books. See, for example, The Boston Women's Health Collective, Our Bodies, Ourselves: A Book By and For Women (New York: Simon and Schuster, 1971), and The Federation of Feminist Women's Health Centers, How to Stay Out of the Gynecologist’s Office, eds. Carol Downer, Rebecca Chalker, and Lorraine Rothman.

Peterson del Mar’s analysis further delves into the relationship between women’s social and legal independence and the levels of violence perpetrated against them.

Howard and Lewis summarize the highlights of the emergence and development of this movement. See also Peterson del Mar, 121-125.


171 Valente, 279.


173 Howard and Lewis, 14.

174 Howard and Lewis, 14.


177 Valente, 280.

178 Teays, 59.


180 Brooks, 68.

181 Brooks, 68.


183 Brooks, 68.

184 Brooks, 68.

185 While this case received a good deal of publicity, many other cases against police departments during the 1970s and 1980s failed. See Howard and Lewis, 8, 12.

186 Buzawa and Buzawa, 102.

187 Buzawa and Buzawa, 102.
Another development that may have helped to set the stage for a stronger federal legislative remedy was the criminalization of hate-motivated intimidation and violence as a response to increased bias-related crimes in the United States. Valerie Jenness argues that what was to become a significant and controversial piece of the federal Violence Against Women Act—Title III, its civil rights remedy—was closely modeled after hate crime legislation, specifically the Hate Crimes Statistics Act (HCSA) of 1990. (Valerie Jenness, “Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the U.S., 1985-1998,” Social Problems 46, no. 4 (1999), 552.) While other scholars emphasize Title III roots in civil rights law (see for example Victoria Nourse, “The Violence Against Women Act: A Legislative History,” in Violence Against Women (West Group, June 1997).), Jenness claims that the HCSA provided lawmakers a template that was “easily extended to women’s victimization.” (Jenness, 562.)

Brooks, 69. My account here draws heavily from Brooks and Nourse.

Nourse, 3.

See Hearings before the Committee on the Judiciary, United States Senate, One Hundred First Congress, Second Session on Legislation to Reduce the Growing Problem of Violent Crime Against Women, August 29 and December 11, 1990, Part 2, Serial No. J-101-80. Tracey Motuzick (formerly Tracey Thurman) was among those who gave testimony.

This stage of the legislative process illustrates well how delay can happen even without organized opposition.

Nourse, 44, 46.

Nourse, 46.

Nourse, 50.

Buzawa and Buzawa, 129.


Jenness, 562.

Jenness, 562. Nourse also discusses how critics argued that Title III was importantly different from previous civil rights initiative; she also discusses how the act drew upon previous equality legislation. (Nourse, 4.)
However, Jenness and Brooks assert what may be conflicting claims regarding the roles played by victims' advocacy groups early on in the legislative process. Jenness argues that "there is no evidence to suggest that feminist-sponsored anti-violence projects were central in the ... early formulation of the VAWA"—i.e., prior to 1993. (Jenness, 564.) Brooks, on the other hand, describes active involvement of the National Organization for Women Legal Defense and Education Fund (NOW LDEF) as early as 1991. Perhaps NOW LDEF's early involvement did not include direct testimony in congressional hearings, which, given Jenness' stated methodology, could account for the discrepancy.

See Jenness; see also Brooks.


Nourse, 6.

The media were drawn to the issue during the pre-enactment phase as well. However, media attention did not focus on the pending legislation or the controversy surrounding Title III, but rather on sensationalized court cases. One case that generated much publicity early on involved a former model who was slashed by her attacker with a razor.


Interestingly, none of the sources that I encountered mentioned the significance of the Clinton Administration's possible role in getting the VAWA enacted (with the obvious exception of actually signing the bill into law). During the 1980s, the Reagan administration actively and effectively suppressed efforts toward passing domestic violence legislation. It seems that President Clinton would have been in a position to provide important support for the VAWA during the early years of his first term in office. His influence in this regard, however, remains unclear.

See Jenness for elaboration on this point. Another factor in VAWA's passage may have been to the extent to which domestic violence was successfully framed as what
Baumgartner and Jones call a “valence issue”—an issue “in which only one side of the debate is legitimate.” Baumgartner and Jones, p. 150. (Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993), 150.) Again, while I briefly discuss here broad reactions to VAWA as a whole, I further address the controversy surrounding Title III in Chapter 4.


217 I do not recall (nor did I make a note of) the which program this was or when, specifically, I watched it, except to say that it was a documentary about Afghanistan, one of many that was aired on U.S. cable channels in the months following September 11, 2001. The woman was publicly executed for killing her husband, and was one of many who were killed that day. Several of her children, relatives and neighbors had plead in her defense, claiming that the act was in self-defense, that the husband beat her frequently and brutally, but their pleas did not prevent the execution.

218 The woman was Betty Lou Beets. She was put to death for murdering her abusive husband. According to writer Dana Cloud, Beets’ history of abuse was never presented in her defense. (Dana Cloud, “Celebrating an execution-free year,” *The Daily Texan* 101, no. 83 [report online] (30 January 2001, accessed 29 January 2004) available from http://tspweb02.tsp.utexas.edu/webarchive/01-30-01/2001013004_s07_Celebratin.html; Internet.

219 This implies that individual relations, relations of a more granular level, can vary quite a bit in terms of power imbalance versus power equity—and a systemic pattern of imbalance persists nonetheless.

220 Public execution can connote executions that members of the general public directly witness, as well as executions performed under the authority of the state. Both connotations apply here.

221 Social ideas can also challenge male power and promote women’s emancipation.

222 I discuss specific harms that result from intimate violence in Chapter 1. Explicating the distinction between what may be appropriately considered ‘just violence’ vs. ‘unjust violence’ is not a task I undertake here.
Here I am invoking a Humean argument that “morality is determined by sentiment... [V]irtue [is] whatever mental action or quality gives to a spectator the pleasing sentiment of approbation; and vice the contrary.” David Hume, “The Principles of Morals,” excerpted in Tom L. Beachamp, Philosophical Ethics: An Introduction to Moral Philosophy, 3rd ed. (Boston: McGraw Hill, 2001), 226.

Ehrenreich and English, 125. These authors further specify here that Sims “operated on one of them thirty times in fours years, being foiled over and over by post-operative infections.”

Peterson del Mar, 7. I first reference this quotation in Chapter 1.

Barstow, 149.

Browne, 64.

Thus far, I have reviewed domestic violence in the contemporary United States, and traced social/historical roots of law and policy responses to the problem. I have also described mutable conceptions of ‘public’ and ‘private’ over time—within the context of Jürgen Habermas’s work in Chapter 2, and in discussing industrialization and ‘privacy rationale’ in Chapter 3. As we have seen, a reliance on privacy rationale in juridical decision-making emerged with the decline of chastisement doctrine during the nineteenth century. The battered women’s movement and the broader feminist movements from which it sprang have publicly challenged this rationale since the 1970s.

Efforts toward such challenges, especially those geared toward legislative reform, culminated largely with the 1994 passage of the first Violence Against Women Act (VAWA). In May 2000, the Supreme Court overturned the most controversial part of the act—Title III, VAWA’s civil rights remedy—in rendering its 5-4 decision in United States v. Morrison. The Court’s majority opinion in the case, authored by Chief Justice William Rehnquist, asserts that in passing Title III, Congress acted beyond the scope of its constitutional authority as granted under the Commerce Clause and the Fourteenth Amendment. The Court arrived at its decision despite volumes of testimony that
Congress gathered over a period of four years which supported the claims that violence against women substantially affects interstate commerce and that state actors were not providing women equal protection under the law. In this chapter, I further examine the dispute surrounding Title III and the *Morrison* ruling.

Conceptions of ‘public’ and ‘private’—especially insofar as they frame domestic violence—come into play a great deal in the discourse surrounding Title III. Sometimes they are used rather explicitly, as when Senator Joseph Biden states, “Only when this violence is seen as a public injustice rather than a private misfortune, will we truly begin to confront the problem.” At other times, ‘public’ and ‘private’ function more obscurely to frame policy responses to the problem. In the pages that follow, I examine these relationships in greater depth. I begin by discussing issues that arose during the pre-enactment phase of VAWA, and then turn to the *Morrison* case. Upon summarizing the case and reviewing the Court’s findings, I critically evaluate its basic arguments and positions. Here, I analyze the discourse of these arguments in light of their framing domestic violence as ‘public’ versus ‘private.’ Broadly speaking, I aim to shed new light on recent manifestations of these frames insofar as they continue to shape domestic violence law and policy. I contend that the Court’s decision reflects a similar ‘hands-off’ approach to that supported under explicit privacy rationale, albeit one expressed in different language. I conclude that the outcome of *Morrison* suggests that shifting applications of ‘public’ and ‘private’ continue harmfully to restrict legal and policy remedies for domestic violence.
Title III: Legislative Foundations and Pre-Enactment Opposition

The inclusion of Title III in the VAWA bill was supported by findings obtained during the Congressional hearings in which survivors and others with expertise in violence against women testified. Their accounts provided evidence that cases of crimes like rape, stalking, and domestic violence were treated differently in the courts than cases of violent crime against strangers. During the hearings, survivors testified that the police ignored their calls for help, and the courts failed to remedy the violence perpetrated against them. They asserted that state actors did not take the crimes seriously. Their testimonies addressed the persistence of patriarchal values within the family, such as in the treatment of wives as servants and the pervasive belief that ‘a man’s home is his castle.’ Also expressed was that state actors regularly regarded the family’s privacy as superseding the need for intervention by law enforcement officials. Batterers were able to manipulate the legal system, and judicial decision-makers tended to treat them with great leniency. For example, Sarah Buel, an attorney and a survivor of domestic violence, testified about differences between prosecuting stranger assault versus domestic assault:

I can try two cases back-to-back. If it is a stranger assault, I have no trouble getting the maximum, absolutely none. I get the married couple in there and the judge wants to talk about, ‘Now, are you sure you don’t want to go to marriage counseling, and how can you do this after 30 years,’ and just complete denial about her danger. If am terrified for her life, and the judge wants to talk about this illusion of mom, pop, bud, sis, and dog Spot, we have to preserve...

Buel also indicated that threats to witnesses typically prosecuted for drug crimes were typically ignored in domestic violence cases. She and the others who testified during the hearings made the case that the legal system was failing women who were abused in
their homes. They supported VAWA, and argued the need for legislative funding and direction from the federal government. Indeed, the bill drew many supporters from both inside and outside the legislative process.

Proponents of VAWA claimed that the states “had historically failed to provide women adequate protection from violent, sexualized assault.” While much of the legislation was modeled after existing state laws, VAWA’s civil rights remedy was unprecedented in that it “analyzed violence against women as a form of sex discrimination.” This remedy, founded on an equal protection rationale, granted cause of action to victims of ‘gender-motivated violence,’ allowing them to sue their assailants for compensatory and punitive damages in state and federal court. Title III aimed to extend the scope of existing gender anti-discrimination laws. That women had legal protections in the workplace but not the streets or the home was a recurring theme throughout the hearings. Victoria Nourse states:

Massive efforts had been made in the 1970s and 1980s to ensure equal opportunity for women: equal opportunity in employment, in education, in the application of family and criminal law. Experience had proven, however, that these formal advances were no match for private violence.

In addition, the legislation, especially the cause of action provision, was modeled after existing civil rights legislation. Nourse points out, however, that Title III also differs from civil rights statutes. For example, the latter, in some cases, requires that “the defendant consciously intended to deprive another of ‘equal rights,’” whereas Title III stipulates violent crimes that are ‘motivated by gender.’

The scope of what constitutes ‘gender-motivated violence’ has been sharply disputed over various phases of VAWA’s legislative journey. The American Civil Liberties Union (ACLU), for example, opposed the provision on grounds that ‘gender motivation’
would be too difficult to prove in court.\textsuperscript{20} Formal judicial opposition to Title III emerged in 1991. The Conference of Chief Justices articulated concerns that ‘gender-motivation’ was too all-encompassing, putting forth, “[T]he very nature of marriage as a sexual union raises the possibility that every form of violence can be interpreted as gender-based.”\textsuperscript{21} The Judicial Conference of the United States noted that the “subject of violence based on gender and possible responses is extremely complex.”\textsuperscript{22} The George Bush Justice Department also raised strong concerns that the bill did not clearly distinguish between crimes that are based on gender and those that are not.\textsuperscript{23} Concerns stemming from this ambiguity raised early on influenced modifications to the language of the bill. As it was finally passed in 1994, Title III defines ‘crime of violence motivated by gender’ to mean “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.”\textsuperscript{24} The remedy explicitly excludes random acts of violence, and the determination of whether an act constitutes gender-motivated (and not random) violence was to be made on a case-by-case basis. Thus, upon VAWA’s enactment (and prior to the \textit{Morrison} decision), the actual scope of ‘gender-motivated violence’ would be largely left to the interpretation of the courts.

Although claims about the ambiguity and complexity of ‘gender-motivation’ gave rise to objection to Title III, opposition to this part of the bill really coalesced amidst a broader federalism controversy. According to Nourse, “State and federal judges had, for some time, raised concerns that Congress was legislating ‘too many’ remedies for federal courts that could and should be addressed by state courts.”\textsuperscript{25} In addition to the concerns it raised about the potential scope of ‘gender-motivation,’ the Conference of Chief Justices opposed the civil rights remedy on grounds that it would dislocate “domestic
relations” cases through its use as a “bargaining tool within the context of divorce negotiations.” The federal judiciary echoed these concerns in its opposition, claiming that the remedy would “embroil the federal courts in domestic relations disputes” and “threaten the American family” because it would “be invoked as a bargaining tool within the context of [often acrimonious] divorce negotiations.” Chief Justice William Rehnquist raised similar objections in a separate, well-publicized statement of his own, stating that the “new private right of action [is] so sweeping that the legislation could involve the federal courts in a whole host of domestic relations disputes.” Judges worried that cases brought under Title III would flood their courts and add to already daunting backlogs.

The judicial opposition prompted the authors of the bill to build a stronger case for the constitutionality of Title III. In 1991, the Senate Judiciary Committee held a hearing on VAWA that addressed these concerns. While some authors indicate that opposition to VAWA among legislators was relatively weak, Senator Strom Thurmond, then-ranking minority member of the Senate Judiciary Committee, raised public concerns about Title III, though he also expressed support for VAWA as a whole. In early 1992, Senator Biden acknowledged mounting criticisms of the legislation, and publicly disagreed that VAWA’s civil rights remedy “was inconsistent with the proper scope of federal jurisdiction.” He likened Title III to existing civil rights remedies:

No one would say today that laws barring violent attacks motivated by race or ethnicity fall outside the Federal courts’ jurisdiction. Then why are they saying that violent discrimination motivated by gender is not a traditional civil rights violation?

Biden argued that Title III is consistent with federalist principles insofar as it addresses gaps where state laws have failed to protect federal interests. Nonetheless, controversy surrounding the civil rights remedy spurred significant revisions to the bill.
In 1993, Senator Orrin Hatch introduced his own bill addressing sexual assault and domestic violence. Soon thereafter, Senators Biden and Hatch agreed to negotiate a compromise version of the legislation, based on Biden's VAWA but integrating provisions from the Hatch bill as well. The redrafting of Title III aimed to impose further restrictions on the scope of 'gender-motivated crimes of violence,' and to address federalist concerns. The crimes encompassed in the provision were limited felonies only, and cases involving divorce were excluded altogether. The legislators added provisions granting concurrent jurisdiction to the state and federal courts, and limiting the scope by which the federal courts could remove cases from state jurisdiction.

The reach of 'gender-motivated' was also further restricted as part of the compromise, as the clause, 'due, at least in part, to an animus based on the victim's gender' was added at this time. This left to the courts the task of interpreting the meaning of 'animus,' which could entail 'malice' or 'animosity' in the more restrictive sense, and 'purpose' or 'motivating force' in the more inclusive sense. Senator Hatch, who illustrates the more restrictive interpretation of the remedy, described the crimes covered by Title III as follows:

We're not opening the federal doors to all gender-motivated crimes. Say you have a man who believes a woman is attractive. He feels encouraged by her and he's so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let's say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, "You're wearing a skirt! You're a woman! I hate women! I'm going to show you, you woman!" Now, the first one's terrible. But the other's much worse. If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus.

So, according to such a restrictive interpretation, a violent crime motivated by 'love' or even 'lust' would not be cause for suit under VAWA's civil rights remedy, regardless of the brutality of the act or the consequences to the victim. A more open interpretation of
‘animus’ would not require "consciousness of bias" and would include "acts used to enforce, by violence, stereotypical gender-roles, to punish the victim for the exercise of rights guaranteed to all citizens, or to use forced sex as a weapon of intimidation or degradation."**42** However the redrafted legislation would come to be interpreted in the courts, the revisions alleviated some of the opposition that had been building against Title III. For example, the federal judiciary rescinded its stated opposition, and adopted a stance of "no position" on the remedy.**43**

Despite the carefulness with which the final version of Title III was drafted to acquiesce to judiciary opposition, the Supreme Court overturned VAWA’s unprecedented civil rights remedy roughly six years after its enactment. When the majority decision in *United States v. Morrison* rendered Title III unconstitutional, it did so on grounds that Congress had acted beyond the scope of its authority because the law falls beyond the purview of the federal government. The legislation put forth the constitutional basis by which Congress enacted Title III, as "pursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment . . . as well as under section 8 of Article I.**44** The former grants Congress a role in enforcing equal protection under the law. The latter, known as the Commerce Clause, confers upon Congress the power to regulate interstate commerce. While the Constitution grants specific powers to Congress, the Tenth Amendment also sets limits on such powers: those which are not explicitly delegated within the federal government or prohibited to the states are "reserved to the States respectively, or to the people." In the following section, I present how the *Morrison* case ruled, on the basis of federalist principle, against both the Commerce Clause and the Fourteenth Amendment justifications for Title III.
An Overview of *United States v. Morrison*

The same month that Congress enacted VAWA, shortly after she enrolled as a first-year student at Virginia Polytechnic Institute, Christy Brzonkala alleged that two football players, Antonio Morrison and James Crawford, assaulted and repeatedly raped her. Brzonkala became severely depressed, stopped going to her classes, and attempted suicide. In the months following the rape, Morrison announced publicly that he “liked to get girls drunk and fuck the shit out of them.” Brzonkala later filed a complaint under Virginia Tech’s Sexual Assault Policy, and school officials conducted two disciplinary proceedings. The first found Morrison guilty of sexual assault under that policy, and the second found he had violated the institution’s Abusive Conduct Policy.

The institution neither reported the incident to the police nor encouraged Brzonkala to do so. In fact, rape was the “only violent felony that Virginia Tech authorities [did] not automatically report to the university or town police.” Morrison was suspended for a year, a punishment that was upheld by the dean of students. However, the school later reversed this decision, and instead imposed a ‘deferred suspension’ that was to last until Morrison graduated. Upon reading in a newspaper that the institution had delayed suspension and continued Morrison’s full athletic scholarship, Brzonkala dropped out of school and sought psychiatric counseling for the rape.

In December 1995, Brzonkala filed suit against Morrison and Crawford under VAWA’s civil rights remedy. The federal district court that heard the case dismissed the action, finding that Congress lacked the constitutional authority to enact VAWA’s civil rights provision. On appeal, a panel of the United States Court of Appeals for the Fourth Circuit reversed, reinstating Brzonkala’s claim and upholding the constitutionality
of Title III. However, the full Fourth Circuit subsequently vacated the opinion of the panel in March 1999, and affirmed the district court’s decision by a 7-4 vote. Soon after this ruling, the Supreme Court agreed to hear the case, and the United States intervened on Brzonkala’s behalf to defend the constitutionality of Title III.

*United States v. Morrison* was argued on January 11, 2000 immediately following announcement of the Court’s decision in *Kimel v. Florida Board of Regents*. This decision, grounded in a federalist argument, exempted state government employers from a civil rights law that redressed age discrimination. Announced by Justice Sandra Day O’Connor, who is often considered to cast a pivotal vote in federalism cases, the decision set the tone for the *Morrison* argument. Solicitor General Seth Waxman and Julie Goldscheid, representing Brzonkala on behalf of the NOW Legal Defense and Education Fund, made the case for upholding Title III. Michael Rosman of the Center for Individual Rights, a conservative public interest law firm, argued the law was unconstitutional. One journalist described the hearing as “an hour of contentious oral argument.”

Goldscheid led off by arguing Title III’s constitutionality under the Commerce Clause, claiming that evidence gleaned from four years of Congressional hearings shows that violence against women ‘substantially affects’ the national economy. She stated that such violence restricts women’s participation in the labor force and deters them from pursuing education. Goldscheid also pointed out that attorneys general from 38 states formally supported VAWA’s civil rights remedy. Justice Antonin Scalia interjected with a series of questions asserting that if violence against women affects interstate commerce, then all crime affects interstate commerce. Justice O’Connor complained that
using Goldscheid’s reasoning, “Congress could find evidence of discrimination in alimony and enact a federal alimony law.” Echoing Justice Scalia, Rosman claimed, “You can’t distinguish the effects of gender from the effects of overall crime.” Rosman also argued that, while violence against women may ‘indirectly affect’ the economy, upholding the law could “relegate the states to a trivial and unimportant role in our federal structure.” Further, in speaking to the question of Congressional authority under the Fourteenth Amendment, Rosman stated that this amendment governs only official state action, and thus could not serve as the grounds for a law that sanctions private behavior. While Goldscheid’s and Waxman’s argument time elapsed before they could address the equal protection argument, Justice Ruth Bader Ginsburg challenged Rosman’s reasoning. She said that Congress did not aim to displace state authority, but to provide an alternate forum. “We are just complementing what the states do. Why can’t Congress do that?” Rosman replied, “This is violence, interpersonal violence, the kind of thing states have had as their exclusive province ever since the start of our country.”

In deciding *Morrison*, the Court first examined whether Title III could be upheld on the grounds of the Commerce Clause, acknowledging that acts of Congress are granted a “presumption of constitutionality.” Only a “plain showing” that Congress had exceeded the scope of its authority would justify the Court’s invalidation of the act. In the majority opinion, the Court upheld three categories of activity that Congress may regulate under the Commerce Clause, as established in United States v. Lopez. The category pertaining to Title III’s constitutionality specifies “those activities that substantially affect interstate commerce.” The Court set about determining whether a ‘substantial effects’
test was warranted in the case—that is, whether to go about determining if gender-motivated violent crime substantially affects interstate commerce. The Court decided that such a test was not warranted because it had only been used in the past when "the activity in question has been some sort of economic endeavor." The Court ruled that Title III is not consistent with this precedent, as "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Moreover, the Court rejected as grounds for constitutionality the activity’s "aggregate effect on interstate commerce," and emphasized the need for "a distinction between what is truly national and what is truly local."

Upon rejecting the Commerce Clause as grounds for upholding Title III, the Court turned to of the Fourteenth Amendment, Section 1 of which states:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Amendment grants Congress the powers to enforce these provisions. The Morrison Court found that, since the Fourteenth Amendment protects against discrimination by states, and Title III sanctions violence committed by private actors, the law has no constitutional grounds under this argument either. In other words, the Court determined that "penalizing private conduct could not be interpreted as an enforcement of the Fourteenth Amendment, because private conduct is not prohibited by the Amendment." The majority decision cites two precedents from 1883, United States v. Harris and the Civil Rights Cases. In Harris, the Court ruled, "[P]rovisions of the fourteenth amendment have reference to state action exclusively," and thus do not cover "the action of private persons." Similarly, the Court’s Civil Rights Cases decision placed
"purely private conduct" in public accommodations outside the scope of congressional powers, as granted under the Fourteenth Amendment. Both cases set federalist constraints on existing civil rights law, and were held shortly after the adoption of the Fourteenth Amendment. The Morrison Court justified its argumentative reliance on these cases with "the length of time they have been on the books" and "the [Court's] familiarity [at that time] with the events surrounding the adoption of the Fourteenth Amendment." Concomitantly, however, the Court added that even if its decision could not rest on the precedents of Harris and the Civil Rights Cases, Title III is unconstitutional under Section 5 because it fails the congruence and proportionality test of City of Boerne v. Flores in that its remedy fails to address States or state actors.

Thus, while acknowledging, "[N]o civilized system of justice could fail to provide [Brzonkala] a remedy for the conduct of respondent Morrison," the Court ruled that the United States is powerless to provide such a remedy. Although Justice Stephen G. Breyer cast doubt upon the Court's reasoning in the equal protection argument, none of the Justices fully dissented with the majority opinion in this aspect of the case. Rather, the dissenting opinions, and for that matter the concurrence of Justice Clarence Thomas, focus upon the Commerce Clause justification for Title III's constitutionality.

In his dissent, Justice David H. Souter stated that gender-motivated violence and discrimination affect commerce in much the same way that racial discrimination did when the Court approved the constitutionality of the Civil Rights Act of 1964. Justice Souter argued that the Commerce Clause authorizes Congress "to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce." He cited Wickard v. Filburn, a case that "upheld the application of the Agricultural Adjustment
Act to the planting and consumption of homegrown wheat on the premise that "wheat grown at home for personal consumption could either be drawn into the market by rising prices, or relieve its grower of any need to purchase wheat in the market." The Court's reasoning in *Wickard* suggests that an activity (in this case a domestic activity) falls within the regulatory scope of the Commerce Clause when it affects "supply and demand in interstate commerce." Moreover, Justice Souter reasoned that the Court's distinction between economic and noneconomic activity had already been abandoned in *Heart of Atlanta Motel, Inc. v. United States*, a case that "declined to limit the commerce power through a formal distinction between legislation focused on 'commerce' and statutes addressing 'moral and social wrong[s].'" Justice Souter's dissent put forth that the Court's "nominal adherence to the substantial effects test is merely that" and criticized the Court for promoting a vision of federalism through jurisprudence that is inconsistent with precedent.

While Justice Souter argued for upholding the 'substantial effects' test, Justice Thomas, in his brief concurrence, opined, "[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." Whereas Justice Souter criticized the Court's application of the test, Justice Thomas bemoaned the standard itself as "rootless and malleable," allowing Congress to wrongfully "appropriat[e] state police powers under the guise of regulating commerce." Justice Thomas's concurrence points to the need for a standard more consistent with 'original understanding,' but says nothing about how such a standard would be defined.
Justice Breyer’s dissent, on the contrary, emphasizes the importance of determining the regulated activity’s effects on interstate commerce. He questioned the problematic nature of the Court’s difficult-to-apply “‘economic/noneconomic’ distinction.” More importantly, however, he dismissed the constitutional relevance of this distinction altogether, arguing that only the effects on interstate commerce, and not the local or economic nature of the cause, are pertinent to the question at hand. Further, Justice Breyer maintained that “within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate federal/state balance.” He observed that VAWA’s civil rights remedy seems to represent an overlap of state and federal interests that “help[s] solve a mutually acknowledged national problem.” Nonetheless, as I have discussed, the Court’s decision in Morrison overturned Title III on federalist grounds, and thus victims can no longer sue for damages under its remedy.

Critical Analysis

Having reviewed the Morrison case and the arguments put forth in its opinions, I now turn to further evaluation of these arguments, with an overall emphasis on how renderings of ‘public’ and ‘private’ come into play. I begin by considering the Commerce Clause rationale for Title III’s constitutionality, and then further examine the equal protection grounds of the Fourteenth Amendment. I also address the federalist grounds on which the law was overturned, and speak briefly to the institutional relationship between Congress and the Court. Throughout the discussion, I frequently step outside the framework of constitutional normativity, and address the Morrison decision from a broader moral standpoint.
In its Commerce Clause argument, the majority’s reasoning hinges on two premises regarding the activity that VAWA’s civil rights remedy aimed to legislate, that is, ‘gender-motivated crimes of violence.’ Specifically, the Court maintains that the activity is both ‘noneconomic’ and ‘local’—and thus the ‘substantial effects’ test does not apply. I agree with Justice Breyer’s assessment that determining a regulated activity’s effects on interstate commerce remains the constitutionally relevant question. In the context of this analysis, however, the Court’s premises about the (noneconomic and local) nature of the causal activity warrant further examination. These claims are relevant both because they underpin the logic of the Court’s decision—that is, within the context of satisfying the condition of ‘substantially affecting interstate commerce’—and because both claims rely upon a transformation of existing ‘public/private’ frameworks.  

For one, the slippery ‘economic/noneconomic’ distinction parallels the public/private split between the market and the household. If the market is the de facto realm that defines the (official) economy, and insofar as the domain of the market is conceptually separated from that of the household, the household dichotomously renders as ‘noneconomic.’ It follows that if one associates domestic violence with the household itself, or even minimally as existing within the domain of the family, domestic violence also becomes readily regarded as ‘noneconomic’ activity. That the language of the VAWA hearings and legislation consistently conflates ‘domestic violence’ with ‘violence in the home’ inadvertently serves to reinforce such reasoning. The Court relies on these associations in demarcating the bounds of congressional authority. As Robert C. Post and Reva B. Siegel state, the Morrison Court “tend[s] toward equating national power with power to regulate ‘economic’ events, activities, and transactions . . . to restrict
Congress from . . . intrud[ing] upon 'traditional' areas of state regulation, like . . . the family." Characterizing domestic violence as 'noneconomic' facilitates claims, such as those made by groups opposing the Title III legislation, that gender-motivated violence only ‘remotely’ and ‘indirectly’ affects interstate commerce. These claims further undergird the argument that upholding the law would justify Congress’s regulation of virtually any activity under the Commerce Clause.

As Chapters 2 and 3 of this thesis illustrate, history suggests we ought to be suspect of justificatory logic that hinges on a rigid market/household distinction, especially when the issue at hand involves the expression of gendered power relations. Households (and the families who populate them) are inextricably connected with the market, and serve decidedly economic functions. On a basic level, they supply the market with its labor force and consume goods and services produced therein. Despite its exclusion from standard economic indicators (like the Gross National Product), unpaid labor performed by household members in the so-called domestic sphere literally allows the market to function as it does. Viewed in this context alone, domestic violence can arguably be characterized as 'economic activity.' When a violent spouse sabotages his partner’s access to paid work—for example, by withholding transportation or beating her before a job interview or harassing her at work upon her move to a shelter—this may be more intuitively labeled ‘economic activity’ because of the activity’s situation with regard to the market. However, even when a violent spouse coercively controls his partner within the household, behind closed doors, this too can be framed as economic activity—because the family household is structurally and fundamentally an economic unit. The ‘mountain of data’ amassed by Congress that evidences the substantial effects of gender-
motivated violence in the (official) economy of the market only further strengthens the claim that 'gender-motivated crimes of violence' constitute 'economic activity.' However, like distinctions drawn between 'public' and 'private,' the categories of 'economic' and 'noneconomic' activities are inherently mutable.

In addition to imposing the 'economic activity' condition, the Court requires a "distinction between what is truly national and what is truly local." Whereas the gender-violence-as-noneconomic claim relies on the juxtaposition of the market and the household, the gender-violence-as-local rationale more directly draws upon the logic of federalism. Here, the 'national/local' distinction mirrors "subliminal associations of federal law with . . . the public sphere; and state law with . . . the private." In this rubric, the family appears even more 'local' (more 'private') than state government, making it seem to fall, even more so, outside the bounds of federal jurisdiction. Justice O'Connor draws upon such parallels in her intimations about justification for a federal alimony law. Domestic violence takes place in families, and the regulation of families generally falls under the purview of state, not federal, government—or does it?

As Libby S. Adler compellingly argues, "[T]he axiom that family law belongs exclusively within the state domain is both empirically untrue and theoretically unsound." In truth, the federal government concerns itself with legislating many 'family issues,' and only selectively adheres to this kind of federalist application. Adler reasons:

Proponents of the liberal model might contend about some family matter which receives federal attention, "it's not family law, it's taxation" or "it's not a domestic relations case, it's a tort" or "it's not like most family litigation, it involves the constitutional right to privacy." These areas of family law are exceptionalized because they implicate rights or the market or some other aspect of the public sphere from which family is supposed to be our refuge. As it turns out, however, this
[incoherent] vision of family . . . also provides an unsound basis for the role against federal governance; that is, the ideal is a falsehood, in theory and in reality.  

From health care initiatives to poverty definitions to recent talk of a constitutional amendment to ban same-sex marriages, exceptions to the federal ‘hands-off’ approach to the family abound. While federalism is indeed a “dynamic system, expressed in institutional relationships that evolve in history,” the Commerce Clause itself has arguably, like ‘public’ and ‘private,’ become an ambiguous, transformable conception. Nonetheless, this ambiguity stems less from an inherently ‘rootless and malleable’ standard as Justice Thomas puts forth, and more from the Court’s selective application of the standard as Justice Breyer argues.

Still, one might ask, are there not conceptual dangers in collapsing ‘economic/noneconomic’ and ‘national/local’ distinctions as I have done here? While it may indeed be true that “any conduct in this interdependent world of ours has an ultimate commercial origin or consequence,” I do not mean to suggest an interpretation that imposes no limits whatsoever on Congress’s power under the Commerce Clause. As I have stated, when arguing within the normative framework of constitutionality, questions pertaining to causal activities do not necessarily address their effects on interstate commerce, and thus do not frame the relevant argument. However, even if we were to suspend this framework and suppose that the conditions of ‘economic’ and ‘truly national’ activity are argumentatively pertinent, flaws in the majority’s reasoning persist. The distinctions I have elaborated here frame continua of meaning, not rigid dualisms—and continua can have the nasty effect of making fallacious slippery slope arguments seem plausible. The Court’s ruling in *Morrison* is rife with slippery slope argumentation that generally posits: If Congress is empowered to legislate gender-motivated violence, then Congress is
empowered to legislate *anything*. Several of the considerations discussed above—a
them, the careful, narrow crafting of the Title III legislation—effectively call such a
claim into question. Moreover, I suggest that when reasoning is predicated upon
discerning between opposing concepts with very mutable boundaries and historically
important political import (*e.g.*, ‘public/private,’ ‘economic/noneconomic’), the sound
approach examines and tries to account for such complexities. The Court’s *Morrison*
decision is logically weak in that it abandons such an approach in favor of arbitrarily
imposing rigid, dualistic constructs.

The Court’s reasoning in rejecting the Fourteenth Amendment basis for Title III is
also arguably flawed. The majority opinion holds that Section 5 of this provision only
grants Congress the authority to regulate ‘state action’ and not ‘the action of private
persons.’ The federalist underpinnings of this rationale claim that abandoning this state
action requirement would in effect grant Congress unauthorized general police powers.
Here again, the Court’s reasoning turns on yet another formulation of the ‘public/private’
distinction, in this case a distinction between ‘state actors’ and ‘private actors.’ This
distinction, because it is more clearly legally defined, is perhaps less ambiguous than the
‘economic/noneconomic’ and ‘national/local’ distinctions. However, the discursive
function of ‘private actors’ readily extends into other meanings. For example, the *New
York Times* reports, Rosman argued the Fourteenth Amendment “could not be a basis for
* a law that applies to private behavior*” because it “governs only official action.”107

Given that the argument is about the constitutional status of *a law that applies to
domestic violence*, in this context, ‘private behavior’ and ‘domestic violence’ rhetorically
align. In another example, Ann Coulter, refers to VAWA (as a whole) as “some crazy overreaching law enacted by Congress that regulated wholly private conduct.”

In any case, the state action requirement of the Fourteenth Amendment remains a contentious point of debate. Recall that Section 1 specifically addresses state action—that is, “No state shall make or enforce any law . . . nor shall any state deprive . . . nor deny . . .” Section 5 makes no such specification, but simply grants Congress the “power to enforce, by appropriate legislation” the provisions of the Amendment. While the *Morrison* decision “conceive[s] of the legitimacy of Section 5 power as ancillary to judicial authority to enforce Section 1,” Post and Siegel argue that this approach “misconceives how the constitutional meaning of the Equal Protection Clause is established.”

As I have discussed, the Court’s ‘state action’ reasoning is predicated largely on the 1883 *Harris* and the *Civil Rights Cases*. Yet neither case is explicitly prohibitive of Congress’s regulation of private actors. As Post and Siegel explain:

> Although both *Harris* and the *Civil Rights Cases* insist that Section 5 legislation must be “corrective of [a] constitutional wrong committed by the States,” neither opinion purports to impose a restriction on Section 5 legislation that is otherwise properly remedial. They are each fully consistent with federal regulation of private parties, so long as that regulation is properly “corrective,” which is to say “adapted to counteract and redress the operation of prohibited State laws or proceedings of State officers.”

In *Morrison*, the ‘constitutional wrong committed by the states’ is gender-based discrimination in state enforcement of violent crimes like rape, stalking, and domestic violence. Overwhelming evidence from the congressional hearings suggests that state actors were not fully prosecuting these crimes, in part because of pervasive stereotypes about women and the family. Under state law, women were not receiving equal protection from assault. Title III was ‘properly corrective’ in that in provided an
alternate, federal forum by which victims and survivors of violent, gender-motivated assault could seek justice. Such a remedy seems especially ‘proper’ when viewed in the tradition of civil rights law. As Nourse states, “[N]o civil rights remedy directly mandates that a state change its legal rules or practices. Indeed, all civil rights laws proceed by a kind of indirection, allowing individuals to bring to light the prejudice that has left them unprotected by official sources.” With these considerations in mind, it is not surprising that both Harris and Civil Rights Cases resulted in restrictions to existing civil rights law.

That the Court defends its reliance on these cases with claims of stare decisis—their ‘length of time on the books’ and the 1883 Court’s familiarity with the adoption of the Fourteenth Amendment—seems almost laughable. One must question, is it wise to decide an anti-discrimination case in the year 2000 with precedents that rely on late-nineteenth-century ‘familiarities’ as a touchstone? Since that time, “the landscape of federalism ha[s] been fundamentally altered.” The Court acknowledges its “interpretation of the Commerce Clause has changed as our Nation has developed.” Why does it construe the Fourteenth Amendment so much more immutably? More specifically, why does the Court circumscribe the major changes in civil rights law that evolved during the 1960s? After all, by this time “[t]he struggle against discrimination by private actors had become a legitimate end of our federal government.” For decades, common public understanding has ascribed a federal role to prohibiting discrimination. As Post and Siegel point out, the Morrison decision fails to engage this understanding.

Even the Court’s assertion that Title III fails the congruence and proportionality test set forth in Boerne is logically problematic because the application of the test in Morrison...
differs conceptually from its use in *Boerne.¹¹⁸* In *Boerne*, the Court is concerned with drawing the distinction between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."¹¹⁹ Toward making such discernments, the Court asks if "a congruence and proportionality [exists] between the injury to be prevented or remedied and the means adopted to that end."¹²⁰ In other words, the test aims to determine whether the legislative remedy reflects an actual attempt to enforce constitutional rights.¹²¹ In *Morrison*, the Court holds that Title III does not meet the conditions of the proportionality test. But in enacting Title III, unlike the legislation which was evaluated in *Boerne*, Congress was clearly not attempting to "substantively reinterpret" the Constitution.¹²² As such, according to the standards set out in *Boerne*, Congress ought to be granted "wide latitude" in legislating remedies that violate the Fourteenth Amendment.

From the pre-enactment phase of VAWA through the *Morrison* ruling, Title III’s journey raises important normative questions about the institutional relationship between Congress and the courts. Congressional findings established the need for a legislative remedy for unconstitutional judicial action. Women were not obtaining equal protection in the courts. In a sense, VAWA correctly slapped the courts’ wrist.¹²³ The Supreme Court, in turn, threw out the law’s “major attempt to change the legal terms in which we understand [violence against women] – the civil rights remedy.”¹²⁴ While a ‘presumption of constitutionality’ is acknowledged in the majority opinion, one must question the extent to which the Court is merely paying lip service to this principle. Further, Senator Biden has argued that with the long record preceding VAWA’s enactment, the Court is
not constitutionally authorized to overturn Title III. That some maintain *Morrison* was really about Congress and the Court competing for power is not surprising.

How these power relations between the two branches play out in *Morrison* is cause for great concern, which is reflected among the many legal scholars whose *amici curiae* brief warns, “[T]he Court must take care not to initiate a new era of judicial second-guessing.” Moreover, Post and Siegel question “the court-centered model of constitutional interpretations” of *Morrison* and other recent Court decisions. The strong empirical evidence assembled by Congress further validates such protests. If the state judiciary has problems with systemic gender bias, can we not assume that this problem likely persists at the federal level as well? Might the congressional evidence extend to support the claim that the Court wielded too much power in overturning this legislation? “At stake . . . is the survival of the very institutional ecology in which social and legal understandings of equality have provoked, inspired, and shaped each other over the last four decades.” Not only is *Morrison* hugely relevant to the uncertain future of federal anti-discrimination law, it also undermines the democratic principles that give rise to the separation of powers as laid out in the Constitution.

Competing normative claims about the intra-governmental distributions of “the power surrendered by the people”—be they focused on the separation of powers or the balance of powers—dominate the Court’s reasoning in *Morrison*, as well as much of the legal discourse surrounding the case. While the judiciary is so occupied with its federalist “distrus[t] of power,” however, its arguments fail to address the very abuses of power that VAWA sought to remedy. As Siegel puts it, “[T]he issue of gender bias that prompted VAWA’s enactment recedes from view, and sexualized assault appears as
a problem concerning 'family matters.' The judiciary focus on federalism obscures the purpose of the Title III legislation, and thus functions to maintain existing social status arrangements. As I have discussed, much of the *Morrison* Court's reasoning, albeit expressed in modernized federalist discourse, pivots on 'public/private' classifications. That it inheres in privacy rationale dating to the nineteenth century makes such logic seem plausible. For victims of gender-motivated assault, the Court's decision parallels the 'hands-off' approach of explicit privacy doctrine. What had been a widespread policy of state nonintervention grounded in 'family privacy' concerns, transformed as federalist doctrine that rendered the United States powerless to provide a civil remedy. In each context, judicial actors make claims of insufficient authority, and effectively uphold existing status relations. Ultimately, this shifting application of 'public/private' reasoning, while yielding some positive reform, results in continued injustice for victims and survivors of domestic violence.
Notes

1 By ‘privacy rationale’ I refer to the framing of domestic violence as a private matter to serve as justification for the widespread informal immunity granted to violent husbands.


6 The hearings also covered related crimes, such as acquaintance rape and stalking, though domestic violence (which can include rape and stalking) is my explicit focus here.


8 Senate Hearings, 90.

9 Senate Hearings, 163-164.


11 Throughout the Senate Hearings, as was the commonly the case at during the early 1990s, ‘domestic violence’ is conflated with ‘violence in the home’. While the conflation persists, since that time, that domestic violence extends beyond the boundaries of the home has become more widely acknowledged. I shall discuss this further later in the chapter.


13 Siegel, 2196.

14 This section of Title III states, “A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from such violence] shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.” (§ 13981(c).)


Frazee, 44. According to this author, the ACLU also held this position on grounds that Title III would adversely affect other civil rights lawsuits, and that perpetrators might not be able to pay the damages. (Frazee, 42.) Although the ACLU opposed Title III on these grounds, the organization would later take a stand against the federalist reasoning of *Morrison* that ultimately overturned this section of VAWA. (ACLU Newswire, “Supreme Court Strikes Down Federal Rape Law,” [report online] (May, 15, 2000 accessed 17 January 2004) available from http://archive.aclu.org/news/2000/w051500a.html; Internet.)


§ 13981(d)(1). The legislation also further specifies ‘crime of violence.’ The phrase “because of gender or on the basis of gender” was added in 1991. (Nourse, “Legislative History,” 20.) The stipulation regarding the crimes being “due, at least in part, to an animus based on the victim's gender” was added later, when Senators Biden and Hatch together made revisions. (Nourse, “Legislative History,” 36.)


27Frazee, 45.

28Frazee, 45. This author also suggests that the federal judiciary’s open opposition to Title III prior to its passage raises ethical questions concerning judicial policy process, noting, “Judges are not normally in the habit of commenting on legislation they might someday enforce.”


31Nourse, “Legislative History,” 18. Senator Bob Dole also criticized the civil rights remedy in VAWA. (Nourse, “Legislative Hearings,” 42.)


35Nourse, “Legislative History,” 33. The compromise bill also resulted in changes to VAWA’s Title II.


37Nourse, “Legislative History,” 34.

38Nourse, “Legislative History,” 36.

39See Nourse, “Legislative History,” 37 and Siegel, 2201.


§ 13981(a). Interestingly, during the Congressional hearings, one witness also suggested the privileges and immunities clause and the Thirteenth Amendment as grounds for Title III. (Nourse, “Legislative History,” 25.)


After the first hearing, Virginia Tech informed Brzonkala that a second hearing was necessary because Morrison had threatened to legally challenge the first hearing on grounds that the Sexual Assault Policy under which he was tried had not been widely circulated to students. The school told her that they had been in error in prosecuting her complaint under the Sexual Assault Policy and would conduct a second hearing under the pre-existing Abusive Conduct Policy. With this second hearing, the record of Morrison’s offense was, with no explanation, changed from ‘sexual assault’ to ‘using abusive language.’ Charges against Crawford were dismissed due to lack of evidence.

The school also required Morrison to attend a one-hour educational session with an equal opportunity/affirmative action compliance officer.
Brzonkala also filed suit against Virginia Tech under Title IX claims of sex discrimination. These claims were later settled by the parties.


Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997).

Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820 (4th Cir. 1999).


Mauro, “States’ Rights Triumph.”

One state, Alabama, filed a brief asking the Court to find Title III unconstitutional.

National Public Radio, “Supreme Court Reviews.”

National Public Radio, “Supreme Court Reviews.”

National Public Radio, “Supreme Court Reviews.”

National Public Radio, “Supreme Court Reviews.”

National Public Radio, “Supreme Court Reviews.”


that might, through repetition elsewhere, have such a substantial effect on interstate commerce.”

67 The other two include that Congress may regulate “the use of the channels of interstate commerce” and “the instrumentalities of interstate commerce, or persons or things in interstate commerce.”


74 Dimino, 897.

75 United States v. Harris, 106 U.S. 629 (1883).

76 Civil Rights Cases, 109 U.S. 3 (1883). According to Erwin Chemerinsky, in the Civil Rights Cases, “the Court suggested that slavery was a thing of the past and that there was little need for civil rights legislation to protect blacks.” (Erwin Chemerinsky, Constitutional Law: Principles and Policies, 2d. ed. (New York: Aspen Law and Business, 2002), 283.)


80 City of Boerne v. Flores, 521 U.S. 507 (1997). This decision states, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”


82 Justice Breyer addresses this point explicitly, stating, “Despite my doubts about the majority’s §5 reasoning, I need not, and do not, answer the §5 question, which I would
leave for more thorough analysis if necessary on another occasion. Rather, in my view, the Commerce Clause provides an adequate basis for the statute before us."


87Justice Souter also notes that Heart of Atlanta "reaffirmed the cumulative effects and rational basis features of the substantial effects test."


90Offering an example of a mugger who mugs for money, Justice Breyer questions, "Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute?" He also points out that the Court allows Congress to regulate "'noneconomic' activity taking place at economic establishments" and questions, "[C]an Congress save the present law by including it, or much of it, in a broader 'Safe Transport' or 'Workplace Safety' act?"


93I use the term 'transformation' here in the sense that Siegel employs it in characterizing what she calls 'transformation through preservation.'


96I employ the term 'families' here very loosely, to include a vast array of intimate, relational cohabitation.

97For a range of analyses supporting such claims, see Lourdes Beneria and Catharine R. Stimpson, eds., Women, Households and the Economy (New Brunswick: Rutgers University Press, 1987).
For a summary of economic evidence, see "Law Professors as Amici Curiae in Support of Petitioners," 3.

Again, all sorts of activity, whether classified as ‘economic’ or ‘noneconomic,’ affect interstate commerce, which is really the constitutionally relevant matter here.


Adler, 253.

Adler, 254.

For examples of such exceptions, see Adler. For a discussion of exceptions to privacy rights made in such contexts as those based on race and class, see Kathleen J. Ferraro, "The Dance of Dependency: A Genealogy of Domestic Violence Discourse," Hypatia – A Journal of Feminist Philosophy 11, no. 4 (Fall 1996), 77-91.

Post and Siegel, 485. Here, these authors discuss changes the Court’s federalist stance toward the regulation of employment: “Today, the employment relationship, which the Court once confidently declared beyond Congress’s power to regulate, now appears to us as quintessentially a sphere of ‘national’ regulatory concern.”

United States v. Morrison.

David A. Conway and Ronald Munson, The Elements of Reasoning (Belmont, CA: Wadsworth/Thomas Learning, 2000), 147. As these authors state, “The mistaken idea behind the slippery slope fallacy is that when there is little or no significant difference between adjacent points on a continuum, then there is no important difference between even widely separated points on the continuum.”

Greenhouse, A18. [Emphasis added.]

Ann Coulter, “Depends on What the Meaning of ‘State’ Is,” Human Events 56, no. 20 (June 2, 2000), 6. Coulter is not alone in her conflation of Title III and VAWA as a whole. Jeremy Rabkin, for example, takes such confusion several steps further, conflating VAWA with Title III, but also with the legislation, domestic violence awareness and the Clinton administration in an attempt to denounce all three. Rabkin goes on to . . . suggest that Brzonkala really “wanted sex” and only afterward decided to “cry rape.” (Jeremy Rabkin, “Federalism vs. Feminism,” American Spectator 32, no. 12 (December 1999/January 2000), 60.

Post and Siegel, 445.

Post and Siegel, 445-446.

Post and Siegel, 476, citing Civil Rights Cases 109 U.S. at 18, 14.


Post and Siegel, 496.

United States v. Morrison.

Post and Siegel, 497.

Post and Siegel, 502.

Post and Siegel, 477.


"Law Professors as Amici Curiae in Support of Petitioners,” 26. The Court has in the past held that gender discrimination can violate the equal protection clause.


National Public Radio, “Supreme Court Reviews.”


Post and Siegel, 442.
Post and Siegel, 446.

This is a central conclusion made by Post and Siegel, who also address these concerns as they arise in *Kimel*.

The legislative branch is arguably the most closely in touch with the interests and concerns of citizens. The passage of VAWA reflected a growing national recognition of domestic violence as a problem gender-based discrimination; see Martha Matthews, “Addressing the Effects of Domestic Violence on Children,” *Youth Law News* 19, no. 4 (July-August, 1998), 2.


Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820, 825 (4th Cir. 1999). The majority opinion of this case, authored by Judge Luttig, begins, “We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government...”

Siegel, 2202.

For another argument supporting this claim, see Catherine A. MacKinnon, “Disputing Male Sovereignty: On *United States v. Morrison*," *Harvard Law Review* 114, no. 1 (November 2000), 135-177. Joyce Gelb and Marian Lief Palley offer additional insights into the mechanisms of status regime enforcement. These authors suggest that a policy change is more likely to succeed if it is perceived as dealing with ‘role equity’ as opposed to ‘role change’ for women. They define role equity “in terms of providing women political and economic opportunities commensurate with those of men.” Role change “implies a basic alteration of the distribution of sex roles in society” and “involves movement away from women’s primary role as mother, wife and housekeeper, economically dependent on her husband toward an independent and self-reliant individual.” (Joyce Gelb and Marian Lief Palley, “Women and Interest Group Politics: A Comparative Analysis of Federal Decision-Making,” *The Journal of Politics* 41, no. 2 (1979), 362-392.)

Here again, I borrow ‘discourse modernization’ from Siegel’s analysis.
CHAPTER 5

NORMATIVE RENDERINGS OF ‘PUBLIC’ AND ‘PRIVATE’ AND DOMESTIC VIOLENCE POLICY PRESCRIPTIONS

Renderings of ‘public’ and ‘private’ and the distinctions drawn between these concepts encompass a vast range of meaning and normative claims-making. The examination of various public/private distinctions laid out in the preceding chapters yields insight into domestic violence policymaking and raises a host of normative questions about liberal democratic governance. Thus far, I have aimed to integrate a range of disciplinary approaches and analytic perspectives in the hope that such an undertaking would enable a new synthesis of information potentially useful to domestic violence policy formulation.

Chapters 2 and 3 are similar in that each presents social/historical accounts of Western conceptions of ‘public’ and ‘private’—yet each paints a unique picture. While in many regards the accounts overlap, at times they seem to tell different stories altogether. Interweaving Habermas’s (masculinist) interpretation of ‘public’ and ‘private’ with a (feminist) social/historical account of domestic violence policy gives rise to some interesting contrasts. For one, the rise of nation-states in Europe yielded both a bourgeois public sphere and public displays of state authority manifested through the mass execution of women. In this context, charges of ‘gender-blindness’ from
Habermas’s feminist critics arguably take on new meaning. In addition, what Habermas characterizes as a “tendency toward a mutual infiltration of the public and private spheres” in the nineteenth century may seem to contradict the contemporaneous public/private split of market and household so often addressed in feminist discourse. Such a contradiction is, of course, illusory: the Habermasian ‘mutual infiltration’ and the market/household split rely on very different meanings of ‘public’ and ‘private.’ Still, such contrasts in emphasis are generally informative—and specifically pertinent to domestic violence policymaking insofar as they might suggest differing normative conclusions.

Later in Chapter 3 and in Chapter 4, my focus turns to more recent events of the late twentieth century. Beginning in the 1970s, in certain regards, the widespread social and legal interpretations of domestic violence as a ‘private’ phenomenon have been challenged. Enactment of the Violence Against Women Act (VAWA) in 1994 represented an unprecedented change in the federal response to intimate violence. This holds true despite the Supreme Court’s ruling in United States v. Morrison, which overturned VAWA’s landmark civil rights remedy. Nevertheless, domestic violence persists as a complex and consequential social problem, as I argue in Chapter 1. In some ways, the entrenched ideas that have served historically to sanction domestic violence endure in the form of patriarchal social values and shared understandings of domestic violence as ‘private.’ At the same time, however, the state’s longstanding policy of nonintervention has largely given way to aggressive arrest and prosecution policies. This shift, in turn, has given rise to a new set of policy-related concerns.
While acknowledging that I have likely raised more questions than I could hope to answer here, in this final chapter, I aim to draw some meaningful conclusions from the analyses laid out in the previous chapters. I begin by examining how disputes over public/private boundaries are employed to both challenge and defend existing status relations. Structured power relations are a recurring theme in these discussions in at least two important regards. First, as innumerable factors suggest, systemic power disparities and differential access to social resources exist between men and women. Such relations are rooted in traditions of male domination, yet are also mutable and rather complex—as the histories of witchcraft and normative domesticity and intimate partner violence (to name a few) suggest. Moreover, gendered power relations are further complicated by the fact that they can play out (or not) very differently at more individualized levels of analysis and within different social contexts and institutions. With an eye toward how public/private distinctions serve to frame these relations in matters of domestic violence, I discuss how such violence tends to occur within culturally perceived frameworks of ‘love,’ such as the institution of marriage.

I conclude this thesis by making prescriptive recommendations for domestic violence policy directions. These recommendations are largely grounded in the normative claims I put forth about public/private distinctions. I argue that such distinctions, when invoked as justification for policy measures, always ought to be further specified. I offer considerations toward departing from the basic liberal public/private model, and examine some of the problems with confining social attitudes and practices to legal normative frameworks. Further, I reconcile my overall argument against framing domestic violence as ‘private’ with claims about the importance of privacy. Finally, I critically examine the
criminalization of domestic violence, and advocate a holistic approach to domestic violence prevention, intervention and recovery. Policy initiatives with these ends ought to articulate an emancipatory approach that is informed by the real-life needs and experiences of victims—and that grants victims and survivors of domestic violence greater agency and control over their lives.

Obfuscatory Power of ‘Public/Private’: Taking a ‘Harder, More Critical Look’

The previous chapters illustrate that conceptions of ‘public’ and ‘private’ have been used throughout history to both challenge and maintain systemic power relations. The terms have been rhetorically powerful in these regards largely because they are mutable, value-laden, and seemingly dichotomous, with contestable boundaries. Moreover, at a fundamental level, distinctions between the two concepts lie at the definitional bounds of individuals and communities, and thus deeply inform cultural ideologies about shared governance. Since liberalist ideologies supplanted monarchical rule, the concepts have become increasingly relevant to Western political philosophy. Often more effective than explicit coercion, hegemonic renderings of ‘public’ and ‘private’ function to control what counts as ‘political,’ and thus what policy issues are deemed to fall within the purview of state authority. Along similar lines, Anita Allen aptly characterizes ‘public’ and ‘private’ as “transformable conceptions of how power ought to be allocated.” As we see in United States v. Morrison, these concepts are also invoked to delimit boundaries of institutional authority within the state. In all their influence, the discursive functions of ‘public’ and ‘private’ tend to be rather deceptive. In liberalist frameworks, for example,
‘privacy rights’ suggest restrictions on the state’s reach into the family—but as we have
seen, this framework is not at all consistently applied in different juridical contexts.
Thus, public/private distinctions, while powerful, have little to do with setting actual
limits on state power. However, they do have the strong potential to obfuscate
institutionalized power relations.

‘Preservation through Transformation’ – Historical Patterns

In the historical analysis of such power relations put forth in this thesis, important
patterns emerge. Many of these patterns reflect Reva Siegel’s ‘preservation through
transformation’ model, in which discourse initially employed to challenge existing status
relations shifts and later functions to uphold these relations. For example, rationalist
claims about critical reasoning and legal norms championed by liberalists centuries ago
were once used to defy monarchal authority. As I discuss in Chapter 2, such philosophies
were thought to confront the very notion of domination. Of course, history shows that
this did not happen. The glorified rationalism of such philosophies, once portrayed as
emancipatory, gave rise to new forms of oppression—as seen, for example, in the
‘scientific’ discourse that pathologizes women (and other socially marginalized groups)
and relegates them to an inherently inferior status. At the same time, first-wave feminists
were mainly successful insofar as they drew upon a liberalist ideology that was largely
never intended to include women.6

While this shift subverted explicit uses of force for more ‘democratic’ hegemony—
and indeed achieved some significant reforms—structured power relations were largely
maintained. This is evident in the case of intimate violence, as an abandonment of legal
chastisement gave rise to state nonintervention grounded in ‘privacy rationale.’7 Second
wave feminist challenges to ‘privacy rationale’ emerged in part from a legal discourse of anti-discrimination and equal opportunity. Such latter efforts resulted in changes to existing laws to word them in gender-neutral language. The legal language of what had once been explicitly regulated on the basis of sex was changed to accommodate discrimination concerns. Like chastisement’s decline, this shift carried some negative consequences for those working for such reform. For one, the history of sex-based regulation was soon treated as though it never happened that way. In addition, the new language served to obscure the very power relations that activists had sought to remedy.

As Iris Young points out:

A gender-neutral theory of family values ignores the fact that, in the current gender structure, stable marriage means that women are often dependent on men and often suffer power inequality and various degrees of domination by men both in and outside the home.8

In Morrison, we see evidence of Title III’s gender-neutral language turning against the law’s intentions, as well as further transformation of ‘privacy rationale’ into a discourse of federalism.

‘Public’ and ‘Private’ – The Need to Further Specify

Historical patterns, along with the vast political potential of normative ‘public’ and ‘private’ renderings, suggest that when these concepts are invoked as part of a justificatory policy rationale, they ought to be well specified. In other words, we ought reject normative policy arguments that fail to adequately specify these terms, or that logically build upon an illusively rigid public/private model. When inferentially relying on ‘public’ and ‘private’ claims, the sound argument involves acknowledging the inherent mutability of the terms, and striving for clarity and specificity.9 In the words of Nancy Fraser:
In general, critical theory needs to take a harder, more critical look at the terms 'private' and 'public.' These terms, after all, are not simply straightforward designations of societal spheres; they are cultural classifications and rhetorical labels. In political discourse they are powerful terms frequently deployed to delegitimate some interests, views, and topics and to valorize others. So long as they are effective in such deployment, renderings of these terms will continue to obscure entrenched and unjust power relations. Thus, truly emancipatory aims call for the explication of how this takes place, for the analytical unmasking of public/private distinctions, so as to bring to light their obfuscatory functions. Among the benefits of such an approach are strengthened empirical understandings of oppressive systems of power, and improved normative arguments and strategies toward positive social change.

Inherent problems with the dominant liberalist model of the public/private split also call for a 'harder, more critical look' at 'public' and 'private.' In several regards, this model does not reflect empirical realities. For one, it is built upon the premises of 'private' markets and 'free trade.' However, the state has regulated markets for some time, and arguably, 'free trade' is hardly 'free' given that vast power differentials at work in global markets exert considerable influence in state policymaking. In a different (but related) regard, the ideals of democratic citizenship espoused in constitutional frameworks are increasingly abandoned for such practices as direct marketing to voters. As one journalist puts it, "What candidates know about voters" has become more crucial in determining elections than "what voters know about candidates." Moreover, constitutional models of citizenship are also structurally unsound in that historically they have excluded women (and other socialized marginalized groups). As Judith Shklar states, "The equality of political rights, which is the first mark of American citizenship, was proclaimed in the accepted presence of its absolute denial." At the very least, this contradiction raises questions as to whether these normative legal frameworks are
structurally even capable of ameliorating certain social problems. Luce Irigaray, for example, speaks to such questions in her discussions on the limitations of existing legal frameworks:

I do not think that [sexed civil rights] can be defined in the face of existing civil codes: for example, by entrusting women juridically with a right to ‘autonomy’ or ‘self-determination’ only. This . . . is rather like granting the daughter subjective permission with a great national or supranational family built on a patriarchal model.¹⁵

A related structural concern arises in liberalist government’s ambiguous relationship to the family and the household. Taken together, weaknesses in the liberalist model further suggest the need to develop alternative public/private frameworks. Such an undertaking, in turn, would have a great deal of relevance for domestic violence policy concerns.

Privacy Rights

Liberal democratic societies thrive on the notion of closed personal and familial relations, a fact that enables the harms of intimate violence to go undetected in the United States.¹⁶ Indeed, “a whole range of concerns came to be labeled as private and treated as improper subjects for public debate.”¹⁷ As we have seen, the selective exclusion of certain social problems from the domain of state authority has had enormous ramifications for domestic violence policymaking.¹⁸ Wanda Teays states:

One reason domestic violence has been so badly handled legally and socially is that we have erected walls around the arena where it generally takes place—the home. That is, the premium placed on rights of privacy means certain actions have fallen outside the public eye. And we have been reluctant to change that; for to do so has been seen as a violation of privacy and of the perceived need to keep government ‘off our backs’.¹⁹

Is the answer then to forsake privacy rights and allow no action to ‘fall outside the public eye’—or what is possibly more, the eye of the state? Certainly not. Serious institutional restrictions ought to be placed on state surveillance powers.²⁰ Still, it would seem that a
‘privacy rights’ justification does not suffice in defending a brutal assault or an act of murder—and that is precisely what domestic violence often involves. As Teays goes on to point out, “Justice dictates that human rights considerations not be forsaken for the right of privacy.”

So, if at least some ‘private’ issues ought to be considered fair game for normative public judgment, as matters of social justice, how to draw a line and uphold any kind of privacy rights at all? Is this not possibly advocating a creepy sort of ‘talk show’ prescription whereby a person’s personal life can be aired for endless public consumption and judgment? Consistent with the ‘analytical unmasking’ approach described above, further specifying what is meant by ‘privacy rights’ helps in employing a more sophisticated moral framework, one that equips us to better draw such distinctions—and happily, if only in theory, circumvent the dreaded ‘talk show’ scenario.

Elizabeth Schneider, reminding us of the importance of privacy, states, “The challenge is to develop a right to privacy which is not synonymous with the right to state noninterference with actions within the family, but which recognizes the affirmative role privacy can play for battered women.” Anita Allen and Iris Marion Young are two scholars who have taken on such a challenge. Allen breaks privacy down into three sub-categories: physical, informational, and decisional. The first signifies “freedom from unwanted physical observation or bodily contact” and is often also associated with the sanctity of the home. The second implies “the secrecy, confidentiality, or anonymity of information.” The third, decisional privacy, suggests “the ability to make one’s own decisions and to act on those decisions, free from governmental or other unwanted
interference.” Such a breakdown is useful in that it sets out a more specified understanding of what ‘privacy rights’ can mean.  

Perhaps even more useful than this rubric are the arguments advanced by both of these thinkers claiming that privacy rights ought to be framed in terms of individual persons. In this regard Young observes, “[P]erhaps the most important defense against the legitimation of patriarchal power is an insistence that privacy is a value for individuals, not simply or primarily households.” As battered women routinely experience violations of privacy rights in each of the regards that Allen outlines, Young’s observation is revealing. I suggest that this approach to privacy rights embodies the spirit of Schneider’s challenge, and, more to the point, enables the promotion of such rights for everyone. While in some contexts the two may be related, the notion of individualized privacy rights extends well beyond the idea of limitations of state power into the realm of the family. We can claim that there ought to be limitations to state power, but such a claim does not embrace the full scope of privacy rights.

Love/Hate Considerations

As I have discussed at length, domestic violence is a social issue that has been especially susceptible to public/private normativity, and challenging notions of domestic violence as a ‘private’ phenomenon has been a central focus of battered women’s advocates during recent decades. I have also shown that marital norms and policy responses to domestic violence have changed over time. Prior to the emergence of ‘privacy rationale’ in the nineteenth century, the state explicitly granted husbands the prerogative to chastise their wives. In a parallel vein, Western marriage has also transformed: whereas wives were once regarded as their husbands’ property and legal
liability, husbands’ explicit dominion transformed into a framework of asking and giving.²⁷

However, in my focus on the concepts ‘public’ and ‘private,’ I do not mean to suggest that these are the only such factors that powerfully frame domestic violence. While explication of these terms is crucial and remains a primary focus here, this is of course only part of the picture. Also important is recognizing that dominant framings of intimate partnership and marriage are couched in the language of affect. Of course, ideas about love and marital intimacy often go hand in hand with those of familial privacy.²⁸ Culturally however, love and marriage are commonly conflated, which can be traced back to Habermas’s observations about the emergence of the patriarchal conjugal family. As I discuss in Chapter 2, Habermas claims that the (bourgeois) family emerged in denial of its economic origins. Thus, “It seemed to be established voluntarily and by free individuals and to be maintained without coercion; it seemed to rest on the lasting community of love on the part of two spouses.”²⁹ As a result, the intimate sphere has been culturally romanticized and falsely idealized.

While most brutal assaults are perceived as a manifestation of animus or hatred, intimate violence is often committed in the name of love. Violent relationships are further complicated by the fact that both victims and perpetrators often experience feelings of love for each other. Understanding violence that is perpetrated among intimates requires a different set of questions and assumptions than those which underpin violence between strangers. This becomes especially evident in examining VAWA’s civil rights remedy. Victoria Nourse astutely characterizes Title III’s legal journey as “a story of the law working against its own language and rhetoric, a law struggling to try to
change its own understanding of violence against women." While the legislation, with its gender-animus requirement, was based largely on hate crime statutes, much of intimate violence simply does not take place within cultural frameworks of hate.

**Conflating Coercive Control and Common Couple Violence**

In addition to marriage, love is also often conflated with sex, which has its own relation to social constructions of 'private.' Such confusions, in turn, serve to facilitate confusions between the coercive control and common couple violence models I discuss in Chapter 1. Recall that coercive control is characterized by confinement, physical violence, sexual violence, threats, psychological abuse, economic exploitation, and control of the social life and work life of the victim. Unlike coercive control, incidents of common couple violence may be sporadic or 'isolated,' are unlikely to escalate, are generally perpetrated at equal rates by women and men, and tend to have minimal impact on those involved. Because these differences are significant, failure to distinguish between the two types can serve to misrepresent both. This failure can have the harmful effect of minimizing the violence, obscuring the social isolation that victims experience, and perpetuating the stigma and silence surrounding the issue.

Media representations, for example, commonly sensationalize isolated incidents as 'domestic violence,' which serves to obscure the frequency and severity of coercive control. In one recent incident, a celebrity's wife threw a glass at him in their Las Vegas hotel room. Cursory evidence does not suggest that this act was representative of a larger pattern of violence, yet reports highlighted that the woman was arrested on domestic violence charges. At the same time, research suggests that the media underreport 'coercive control' violence, unless such violence culminates in homicide.

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Such representations serve to minimize the patterns of gendered domination that emerge within coercive control. Like relegating the problem to the so-called private sphere, this conflation further serves to depoliticize domestic violence such that it no longer cognitively registers as violence. When the brutality is minimized in this way, privacy rights arguments (for state nonintervention) may seem to carry more weight. In addition, ‘privacy’ takes on a different significance in matters of coercive control, as the social isolation of the victim and the ‘profound attempts to conceal’ the violence are typically linked to this model. Thus, along with further specifying ‘public’ and ‘private,’ domestic violence policy discourse should seek avenues for more readily distinguishing between coercive control and common couple violence, two very different phenomena that often get lumped under one label.

Considerations of ‘Public/Private’ and the Formulation of Domestic Violence Policy Prescriptions

Building upon the normative claims I put forth in the preceding section, I conclude this thesis with a look at how these claims—along with the various analyses undertaken previous chapters—inform directions for domestic violence policy formulation. New policy issues have arisen from increased state intervention in domestic violence cases. Many of my broader normative assertions about ‘public’ and ‘private’ frameworks suggest the need for new models of public discourse that focus on eradicating domestic violence. As I argued in Chapter 2, the democratic principles articulated in Habermas’s model of critical publicity also normatively hold within the context of the family. In developing such models we ought to continue to work within—but also be willing to step
outside of—existing juridical frameworks. Effective policy remedies are built on solid understandings of intimate violence as experienced by victims and survivors, as well as the systemic factors involved. At the same time, we must seek to better understand how perpetrators of intimate violence account for and construct their behavior. Holistic prevention, intervention and recovery services with explicitly emancipatory aims are our best chance at ameliorating this devastating social problem.

*Criminalization of Domestic Violence –

*Unintended Consequences*

By channeling federal resources and national public attention to violence against women, VAWA has no doubt enabled countless women to escape abusive relationships. The legislation continues to have influence; the original act has been strengthened and reauthorized through 2005. As I discuss in Chapter 1, reports suggest that rates of domestic violence steadily decreased between VAWA’s 1994 enactment and 2001. Domestic violence homicides also declined during this period, as did the number of women who kill their intimate partners. This suggests that legislative remedies are having a positive effect. Since 1996, calls to the National Domestic Violence Hotline have steadily increased by 133 percent, and presently average about 15,000 per month. Law enforcement agencies have largely abandoned policies of nonintervention, and several states have adopted mandatory arrest policies as a result of VAWA grant incentives. Clearly, victims of domestic violence have more places to turn for help, and the police are much less likely to turn a blind eye to domestic assault than they once were. At the same time, however, new questions and concerns are being raised about the criminalization of domestic violence and increased state intervention.
In many regards, the actual effects of increased state intervention in domestic violence cases remains unclear. Some are raising concerns about an over-reliance on the criminal legal system in addressing violence against women, indicating that an overemphasis on criminal legal remedies has led to an exclusion of prescriptive alternatives. Criminal legal remedies may be more concerned with prosecuting and punishing offenders than with ensuring victims' safety. Moreover, such remedies may involve harmful consequences for poor women, immigrant women, and women of color. Studies show that poor men, African American men, and Latinos represent disproportionately high numbers of domestic violence arrests. A lack of trust in the legal system stemming from institutionalized racism and other structural factors may prevent battered women of marginalized communities from turning to state actors for help.

Such concerns are reflected in the current debate over the efficacy of mandatory/presumptive arrest and aggressive prosecution policies. Those who support such policies argue that they are an effective deterrent to abusers, and have finally gotten law enforcement and prosecution officers to at long last take intimate assault seriously. Cheryl Hanna, for example, claims that aggressive prosecution policies can result in reduced homicide and recidivism rates, and "communicate a stronger message that domestic violence will not be tolerated." Another advocate of such policies, Donna Wills, argues, "We need to be able to say that despite a battered woman's ambivalence, we did everything within our discretion to reign in the batterer, to protect the victim and her children, and to stop the abuser." Wills points out that the scope of domestic violence extends well beyond its effect on individual victims, and characterizes the
problem as a public safety issue that affects all of society. She also suggests that giving victims the discretion to prosecute only allows the perpetrator to further manipulate the legal system and endanger lives. This claim raises normative questions about specifically how much and what kinds of discretion victims ought to have in the handling of their cases.

While Wills makes a good point in depicting domestic violence as a 'public safety issue,' we ought to remember that the victims, and often their children, are by far the most harmed by such violence. Linda Mills and others who oppose aggressive arrest and prosecution policies conclude that "battered women are safest—and feel most respected—when they willingly partner with state actors to investigate and prosecute domestic violence crimes." Such arguments tend to emphasize the importance of increasing the victim's agency and ability to control her own life. As a Ms. Foundation for Women report states, "Unfortunately, when state power intervenes, it often takes over. Many people who call for assistance end up having no say in the intervention once the legal system has entered into their lives." Some point out that police represent the 'legitimate' use of violence, and are largely male. Others claim that forcing victims to testify vastly increases chances of escalated violence against them. Mills emphasizes battered women's clinical needs:

Clinically speaking, a battered woman needs a healing response to the intimate abuse, one that nurtures her strengths and empowers her to act. Mandatory state interventions, even when sponsored by feminists, not only disregard these clinical concerns, but also are in danger of replicating the rejection, degradation, terrorization, social isolation, missocialization, exploitation, emotional unresponsiveness, and close confinement that are endemic to the abusive relationship.

Thus, the treatment victims of intimate violence receive in the legal system is likened to the abusive relationship itself.
Such parallels certainly seem easy to draw in the case of Sharwline Nicholson, whose boyfriend smashed her face and broke her arm while her son was at school and their baby daughter was asleep in the next room. Nicholson arranged for childcare with a trusted neighbor and sought medical attention at a local New York City hospital. While at the hospital the next morning, she received word that local authorities had placed her children in foster care, and charged her with child neglect under an offense called “engaging in domestic violence.” For Nicholson, the removal of her children was far more traumatic than the physical assault she endured. It took three weeks for her to get her children back, and during that time one of them reported being hit by an abusive foster parent. Nicholson’s experience represented a larger pattern. In a class-action lawsuit charging violations of the civil rights of Nicholson, nine other mothers in similar situations, and their children, the judge found that the mothers had been accused of child neglect “simply for being battered.”

Another result of increased state intervention is that more women are being arrested. Conservative groups argue that this undermines the claim that the vast majority of batterers are men, and that women are becoming more aggressive. Notably, such arguments aim to deny the role of male power. More likely, women are being arrested at higher rates for incidents of common couple violence and self-defense. According to the Ms. Foundation report, “Over the years, more battered women are being arrested in domestic violence situations, even when they act to defend themselves or when their batterer commits the violence.” The same report points out that some batterers have learned to manipulate the system by making false accusations against their partners.
Another contributing factor may be that, with increased public awareness about domestic violence, women may indeed feel more empowered to fight back.

Among those who support and those who oppose aggressive arrest and prosecution policies, both sides raise cogent points. So, how are we to reconcile their arguments toward better informing policy recommendations? By suggesting explicit goals against which to measure state intervention, Barbara Hart suggests what may be a sound beginning. These goals encompass: safety for battered women and children, stopping the violence, accountability of perpetrators, challenging perpetrators’ beliefs of entitlement to batter, and restoration of battered women, including enhancing their agency. Hart maintains that, while arrest may serve some of these goals, domestic violence calls for “the employment of multiple, synchronized strategies by the legal system.” Moreover, she emphasizes that law enforcement officers and other ‘first-responders’ ought to share these goals:

Without this perspective, first-responders in “mandatory arrest” or “preferred/presumptive arrest” jurisdictions will devise their own rationale for chosen responses to domestic violence. If an officer’s perspective is that “women provoke violence” or “it takes two” or “domestic violence is nuisance behavior,” then that perspective will shape intervention.

Arguably, a crude emphasis on criminalization—or a singular aspect thereof, such as arrest—does not adequately address the question of shared goals that challenge existing status relations. Nor does it necessarily make distinctions between coercive control and common couple violence. Notably, a United States Department of Justice report on the criminalization of domestic violence puts forth that this phenomenon has developed along three tracks: criminal punishment and deterrence of batterers, batterer treatment, and restraining orders designed to protect victims through the threat of legal action. These remedial strategies only partially address the goals Hart and others set out.
Several of the points I have raised thus far suggest that there are limitations as to the effectiveness of legal solutions that seek to remedy domestic violence. While such remedies remain an important piece of the puzzle, legal normative frameworks ought not be mistaken for more comprehensive frameworks of moral reasoning. As this analysis illustrates, legal doctrine can both reinforce and challenge immoral status regimes. Perhaps more importantly, the legality of an act (or the manner in which such legal rules are selectively enforced) does not equate to its moral status. With an over-reliance on criminal legal remedies, the law’s reach in effectively ameliorating violence against women (or in reinforcing it, for that matter) remains a fundamental question.

In considering this question, the words of Emma Goldman reflect a helpful, practical wisdom: “The right to vote, or equal civil rights, may be good demands, but true emancipation begins neither at the polls nor in the courts. It begins in woman’s soul.” Truly emancipatory aims call for alternatives and supplements to legal remedies. Indeed, a complex social problem like domestic violence calls for a thoughtful, integrated, multidimensional response. Alternatives to criminal legal remedies need to be further explored. At the same time, the limitations and complexity of the criminal legal system’s role in ameliorating domestic violence needs to be further examined. Not only is the legal system in many ways still failing to help victims of intimate violence, too often it actively harms them. As courts are real sites of remedy (or not) in women’s lives, effective legislation and sound judicial findings must be a part of the response. Still, we must be careful not to reduce the problem to one of criminalized physical assault, the
overemphasis of which serves to obscure the unique needs of victims of intimate violence.

*New Models of Critical Public Discourse*

Perhaps a beginning to meeting this challenge lies in the Habermasian approach that Seyla Benhabib advocates. She points out that as public agenda have expanded in recent decades to include social issues previously cordoned off as ‘private,’ “more often than not a ‘patriarchal-capitalist-disciplinary bureaucracy’ has resulted [that has] frequently disempowered women and . . . set the agenda for public debate and participation.” Benhabib argues that developing new models of critical public discourse are needed to challenge such ‘juridification.’ Her argument is on the mark, and if such models embrace the Habermasian aims of minimizing bureaucratization and promoting the articulation of shared interests, all the better. One aim for such models, as I argue above, involves devoting continued critical attention to explicating how ‘public’ and ‘private’ function in domestic violence contexts. Attempts to situate domestic violence on either side of a public/private divide are argumentatively suspect. Historically, such suspect behavior involves relegating the problem to the ‘private’ domain as a mean to justify state nonintervention. We also saw this play out in *Morrison.* However, to relegate domestic violence wholly to a ‘public’ realm (such as the realm of state power) would also potentially jeopardize women’s autonomy in ‘transformed, yet preserved’ ways. Such an approach, for example, may not adequately protect privacy rights.

Likewise, future discourse ought to remain keen to other factors that obscure or misrepresent gendered power relations as they pertain to intimate violence. This does not mean blindly adhering to the rigid equations of ‘man as perpetrator’ and ‘woman as
victim/survivor.’ To do that would be logically and discursively misguided.\textsuperscript{59} However, it does suggest that we ought to aim to illuminate the important distinctions between male and female violence, such as that males overwhelmingly use violence as a means to \textit{control} females.\textsuperscript{60} Such vigilance also implies that we focus less on attempting to locate the problem on one side of a rigid public/private split, and more on comprehending the problem within the full scope of women’s public and private lives.

Robin West characterizes life for battered women as a ‘life of fear’—a life involving ‘no subjectivity’ and ‘no preferences’—not just in the home but in all arenas of life. The perpetual state of fear in which most battered women live tends to readily permeate public/private boundaries. While recognizing that intimate violence is a systemic social phenomenon, policy remedies ought to appropriately acknowledge and account for the psychology of this terror, and consider the implications for healing and recovery.\textsuperscript{61}

\textit{Holistic and Emancipatory Approach}

Remedial domestic violence policy models ought to embrace a holistic, emancipatory philosophy, and encompass a comprehensive range of prevention, intervention, and recovery strategies and services.\textsuperscript{62} Policy measures ought to include legal remedies for battered women, such as improved access to legal resources, gains in employment-related rights, and protections against housing discrimination. However, as I have argued, these models ought to extend beyond legal realms. Education and prevention initiatives are needed to familiarize children and adults with the history of violence against women, and with everyone’s right to be free from coercive control. Safe environments and other basic resources needed to escape violent partners all need to be made publicly available. While these resources include fundamentals like food, transportation, and shelter, they
also encompass longer-term needs such as decent jobs, childcare, and broader economic justice.

Policy discourse should continue to examine and shine a light on the relationship between domestic violence and poverty. In his discussions about the origins of the patriarchal conjugal family, Habermas links a dominant status in the market with a dominant status in the family. Deconstructing public/private distinctions reveals strong interconnectedness between the market and the household. Such relations play out critically in the lives of battered women. From the nineteenth-century judicial discourse that characterized spousal violence as common among the 'coarser classes' to disproportionately high rates among low-income populations today—the economic needs of battered women can be neglected no longer. Successfully escaping a violent intimate partner requires being able to discontinue financial dependence. Welfare policies ought to accommodate the unique needs of battered women and their children. Policy remedies ought to develop programs that promote survivors' long-term economic security and independence.

For these and other reasons, pro-marriage initiatives such as those backed by the current Bush Administration ought to be wholly rejected. (What happened to those grave concerns over federalism and the family?) Such policies promote women’s economic dependence on men, and make it dangerously more difficult for women to escape violent husbands. Democratization of families is far preferable to the blind and restrictive promotion of marriage. However, I am not sure that is primarily the state’s role. In any case, the state’s normative relationship to the family is far too ambiguous and needs to be more clearly articulated, if not considerably reformed—and with the important normative
connections already drawn between family life and democratic citizenship, the stakes are quite high indeed.
Notes

1Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into Category of Bourgeois Society* [original German publication 1962], trans. Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1989), 142.


4Here I refer to ‘communities’ inclusively in the broad sense of varying scope (e.g., local, national, international).


6Perhaps this gave new meaning to the emancipatory potential of liberalism.

7As I discuss in Chapter 3, privacy doctrine was especially applied to cases involving well-to-do white folks.


9This thesis is largely an exercise in such specificity.

10Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA: The MIT Press, 1992), 131.

11For example, such ‘analytical unmasking’ undertaken in this thesis illustrates how federalism rationales turn a blind eye toward systemic relations of male dominance. Concomitantly, this analysis makes the case that new models of critical public discourse are needed to effectively challenge such power relations. Seyla Benhabib also makes this latter claim in “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas,” in *Feminism, the Public and the Private*, ed. Joan B. Landes (New York: Oxford University Press, 1998), 65-99.

12To be clear, I maintain that economic freedoms are very important, but that the idea of ‘free trade’ tends to obscure differential access to such freedoms.


Allen, 462.


Of course, enormous ramifications also extend to other social issues, like child abuse, rape and sexual assault, care-giving, divisions of labor, marital law, and international human rights.


While I stand by this statement in the context of my overall argument, I also find it somewhat problematic. I maintain that in actual liberal democratic contexts, such restrictions on state authority are largely illusory. Rather, I suspect Habermas is correct in claiming that (bourgeois) class interests largely dictate the (mutable) bounds of this authority.

Teays, 60.


Allen, 458-460.

For example, this framework allows us to see that Young is largely referring to physical privacy when she states, “A person does not have a place of her own and things of her own if anyone can have access to them. To own a space is to have autonomy over admission to the space and its contents.” (Young, 162.)

Young, 163.

This also makes sense in that privacy rights, when granted by the state, do not necessarily prevent abuses of state power.

28 Reva Siegel’s use of the term ‘affective privacy’ captures this well.

29 Habermas, 46. (Emphasis added.)


32 Mahoney, Williams, and West, 149.


34 The reauthorized version of VAWA (VAWA II) creates new initiatives to address domestic violence in the lives of children, and older, disabled, and immigrant women.


36 These figures were published on the National Domestic Violence Hotline web site (accessed 26 February 2004) available from http://www.ndvh.org/; Internet.


38 Safety and Justice, 12.


Safety and Justice, 1.

Diane Rosenfeld, et.al., “In the Name of Love: Understanding Gender-Based Violence,” Berkman Center for Internet and Society at Harvard Law School [report online] (accessed 31 January 2004), available from http://cyber.law.harvard.edu/vaw00/module2.html; Internet. Some researchers also allege that domestic violence is disproportionately perpetrated among police officers.


Mills, 551.


Safety and Justice, 13.

Safety and Justice, 13.


Hart, 207.

Hart, 207.


Safety and Justice, 13.

Benhabib, 91.

Here again, I am drawing on Siegel’s model of ‘preservation through transformation.’

An important example of such misguidance: this usage does not account for battering within gay, lesbian, and transgender relationships.

Lyon, 253. According to this author, women on the other hand, tend to use violence out of frustration and/or in self defense.

Mills also makes this claim.

Integrating a wide range of institutional dimensions, the Coordinated Community Action Model developed by Mike Jackson and David Garvin seems to strive for such aims. This model summarizes policy prescriptions for: government; social service providers; health care, justice, and education systems; clergy; media; and employers. It is available from http://www.mincava.umn.edu/documents/ccam/; Internet.

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