

2012

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Recommended Citation

Danaya C. Wright, *Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History*, [2012] ANZLH E-Journal, Refereed Paper No 2, (44), available at <http://scholarship.law.ufl.edu/facultypub/651>

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Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History

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There is an extensive scholarship on separate spheres, the public/private binary, and family history that reveals a nuanced understanding of the interconnections and constructedness of these metaphors and rubrics traditionally used in family law history. In exploring the current understandings and limitations of these subjects as analytics for doing my own history of English family law, I turn to Michelle Zimbalist Rosaldo's critique that we limit our subjects and reinforce power differentials when we use a lens of difference in our scholarship. I first explore the lessons learned about the enduring nature of separate spheres and the power imbalances of the public/private binary in terms of their implications for family law, and try to bring these diverse areas of scholarship together to reflect on the narrow project of family law history. Then I propose a new approach that focuses on the paths not taken, the reforms that were blocked, as providing one way to get around some of the limitations of separate spheres and reveal the stark relations of power in modern constructions of the family and the state.

IN 1835, Alexis de Tocqueville described what he saw in America as a distinct separation between the worlds of men and women, a description that has come to define modern life and feminist historiography.² Since Tocqueville, the metaphor of separate spheres has

¹ An earlier version of this paper was presented at the ANZLHS Annual Conference in December, 2011 in Brisbane. I would like to thank Andrew Buck, Nancy Wright, Kunal Parker, the Australia and New Zealand Legal History Society and anonymous referees for their comments on an earlier version of this paper. I would also like to thank Dan Ernst, James Oldham, Robin West, Erin Kidwell, Laura Bedard and the Georgetown Law Center for their support of this project. And I would like to thank the University of Florida, Levin College of Law for its support as well as the comments and contributions of Kendal Broad-Wright, Bill Page, Rachel Rebouche, Berta Hernandez, and the DC Area Legal History Roundtable.

² Linda Kerber identifies Tocqueville not as the originator of the idea of women's and men's distinct spheres, but as a proponent of a ubiquitous nineteenth century discourse that located women in the domestic world and men in the public and political world. Linda K. Kerber, "Separate Spheres, Female

become both an organizing constraint on modern society as well as a rhetorical device used by historians and sociologists for analyzing men's and women's activities in the nineteenth and twentieth century Anglo-American world. The defining aspect of separate spheres is that women act in and are influenced by the values of a domestic space focused on the needs of family, while men act in a public space focused on the needs of civil society.

The supposed separation of men's and women's spheres was closest to a reality in the nineteenth century, and perhaps also in the decades between world war II and the sexual revolution, in England and its colonies.³ But separate spheres have always been an ideal, never a perfect framework for ordering or explaining human affairs. After 1960, it became an historical trope, or metaphor, used extensively by feminist scholars to describe a wide range of differences between men's and women's activities, behaviors, and even physical spaces. It was relied on by women's historians as a "framework for thinking about women's and men's economic, labor, social, and cultural experiences as distinctly gendered, sometimes separate, and always in relationships of power."⁴ The metaphor of the *sphere* suggested that women's actions were bounded, encircled, limited to an area, both physical and intellectual, while men's spheres were global and universal. The emphasis on *separation* of the spheres directed scholars to focus on different treatment, different expectations, and physical segregation, evidence that was easier to locate in the

Worlds, Woman's Place: The Rhetoric of Women's History" *Journal of American History* 75/1 (1988): 9-39.

³ The focus on England and its colonies is important because one of the most important characteristics of the Commonwealth is the adoption of the common law, rather than the civil law, and the unique doctrine of coverture that defined the legal relationship between men and women in these countries.

⁴ Kim Warren, "Separate Spheres: Analytical Persistence in United States Women's History," *History Compass* 4 (2006): 1.

sources of history than evidence of similarities and uniformity of assumptions and experiences.

Implicit in the study and deployment of separate spheres has been an uneasy acceptance of the definitional character of those spheres: the public and the private. Scholars of the public sphere have, since the 1960s, also recognized the public/private binary as a physical or historical fact, as well as a metaphor or analytic framework for examining state power. Legal scholarship into the history of coverture, by which married women's legal existence was erased, has also relied on the public/private separation.⁵ Under coverture, married women had virtually no public persona; they were to remain in a private sphere regulated by public laws but not inhabiting or controlling the public spaces that defined their lives.

Recent work on the public sphere, coverture, and the trope of separate spheres has suggested that the idea of the public and the private are misleading historically and obscure important similarities in men's and women's lives and experiences.⁶ Some of

⁵ Coverture is a doctrine described by William Blackstone (*Commentaries*, Bk I, ch. 15) as a state in which a married woman is covered by her lord and husband. She cannot own her own property, make a will, sue or be sued in her own name, have custody of her children, enter into contracts, or control her own body or domicile. Although there were certainly exceptions to the law, the doctrine essentially required married women to act through a male agent in all legal public actions. Unmarried women could act on their own behalf but, as Martha Vicinus has shown, unmarried women and widows were often characterized as redundant women and admonished to marry as quickly as possible to further social order and stability. See Martha Vicinus, *Independent Women: Work and Community for Single Women, 1850-1920* (Chicago: U. Chicago Press, 1992).

⁶ See Michael Warner, *Publics and Counterpublics* (NY: Zone Books, 2002); Nancy Fraser, "Rethinking the Public Sphere: A Contribution to a Critique of Actually Existing Democracy," in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1992) 109-142; Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy," in *The Disorder of Women: Democracy, Feminism, and Political Theory* (Stanford: Stanford UP, 1989); Joan B. Landes, "Further Thoughts on the Public/Private Distinction," *Journal of Women's History* 15/2 (2003): 28-39; Amanda Vickery, "Golden Age to Separate Spheres? A Review of the Categories and Chronology of English Women's History," *The Historical Journal* 36/2 (1993): 383-414; Joan B. Landes, ed., *Feminism, the Public and the Private* (Oxford: Oxford UP, 1998); Susan Gal, "A Semiotics of the Public/Private Distinction," *Differences: A Journal of Feminist*

this work challenges whether there can even be a truly private space or a truly public space, arguing that each is constructed in opposition to the other and is dependent on certain characteristics that may serve a particular analytical purpose but are not practically accurate nor theoretically helpful. Important work also suggests that the public/private distinction covers up a power dynamic in which the existence of the private gives legitimacy to the universal hegemony of the public.⁷

Scholarship on the family and on family law has examined structural changes in private families, their legal boundaries, and their public impact, while recognizing that relegating families to a private sphere allows for violence, domination, and inequality to define the lives of women and children. The law of coverture is at the heart of family law, a field of law that arose in the late nineteenth century as the pressures of industrial capitalism led to profound upheavals in the stability of family institutions. Much of the gender inequality women face in the marketplace is blamed on social and structural inequalities women experience in the private sphere of the home. Just as Toqueville's articulation of separate spheres naturalized women's status as different and inferior, family law and coverture cemented women's legal incapacities through an apologetic of praise and adoration. Held up as the angels of the domestic realm, women have been trapped within the private sphere, prohibited from entering the public world of trade and politics, and punished if they deviate from their constrained norms of behavior. The boundaries between the public and private are policed in part by the forces of family law.

Cultural Studies 13/1 (2002): 77-95; and the forum on public and private and the future of women's history in *Journal of Women's History* 15/1 (2003).

⁷ See, e.g., Geoff Eley, "Nations, Publics, and Political Cultures: Placing Habermas in the Nineteenth Century," in Calhoun (ed.) *Habermas and the Public Sphere*.

This scholarship has obvious implications for my project, which is to write a history of family law in a manner sensitive to the theoretical questions and challenges of post-modernity. The simple notion of the family is undermined by its complex origins, manifestations, meanings, and referents. We cannot understand the family, as a social construct, without juxtaposing it to other social institutions like the state, the public sphere, or the household, all of which have shifting definitions and fluid borders. Once we reject a precise biological definition of the family, we find ourselves in murky waters trying to accurately describe the evolution of a set of legal doctrines that are as constitutive of the phenomenon being regulated as they are derivative of it

It is one thing to say that the characteristic that distinguishes family law from other forms of private law is that it is about a set of relationships that exist *a priori*. But why certain status relationships matter and not others, and how the state and the public sphere generally privilege certain of those relationships and not others, are questions implicit in any critique of family law. They force us to theorize how, if at all, we can separate the family from the state and bring about meaningful change. And although separation seems necessary for identity formation and ordering purposes, the apparent interdependencies require a theoretical understanding of the ubiquitous analytic framework of difference and separation that informs most scholarship on women, families, children, and the private sphere.⁸ To move beyond the traditional analytic of separate spheres requires at least some coherent theoretical ground for eschewing the public/private binary and some reasonably coherent substitute. This article is an attempt

⁸ See forum on public/private and the future of women's history, *Journal of Women's History* 15/1 (2003).

to offer a new path through the forest of immense data, conflicting historical conclusions, and shifting contexts that characterize post-modern historiography.⁹

The Ubiquitous Trope of Separate Spheres

The trope of separate spheres posits that men and women act in different worlds, with different motives, and in different ways. Accordingly, women, who are focused on relationships and emotions, tend to exert most of their energies on family relationships within a more or less constrained domestic sphere. Men, who are more hierarchical and rational, tend to exert most of their energies on labor and politics in the public sphere of government, the capitalist marketplace, and the outside physical world. While women mind the hearth fires, men travel the globe to build knowledge, acquire wealth, and bring civilization to primitive peoples. Men think globally, women locally. Men are educated for public service, women for domestic service.

However, even at the height of separate spheres practice, it never described reality; rather, it reflected a social and political ideal. In actual practice, women were important market actors and consumers, buying household food and goods, managing servants if they were in the upper classes, or working in the domestic economy, factories, or service economy if of the working classes. And men, of course, lived in these homes, governed many of the decisions involving the raising of children and certainly controlled much of the family's finances. Women labored both inside and outside the home and they formed

⁹ See Keith Jenkins, *Rethinking History* (London: Routledge, 1991). This is a pithy little book that tackles post-modernism's challenge to the traditional ways we do history. Although more sophisticated arguments and explanations exist, Jenkins' challenge acknowledges that much of what we do when we do history is reflect our own needs and desires onto the texts of historical evidence.

political associations that influenced government and politics. Men helped rear children, took an interest in family government, and even changed nappies.

At most, separate spheres described an ideal not of space but of intellectual focus - men were to occupy their minds with the public sphere of the market, politics, and law and women were to focus their energies on the domestic, household sphere. But again, that too wasn't quite accurate because the rhetorical ideal of the man in his castle, the haven in a heartless world, was a counter ideal that protected men's overriding dominance over the domestic sphere to the exclusion of women's interests. Women were to focus on making a home FOR men, on anticipating their needs and providing for them - thus structuring the private sphere to suit male, not female, needs.

It seemed to many historians that separate spheres really described a public sphere in which working-class men labored for the benefit of middling and upper-class men, and a private sphere in which all women labored for the benefit of all men.¹⁰ Both spheres were constructed to benefit elite men. But the scholarly endeavor of history had generally neglected women altogether, both by excluding them from histories of the public sphere and excluding the domestic sphere altogether from the historical gaze. Rewriting women's history was seen as a way to reclaim women's contributions and explore and undermine the constraints of women's domestic lives.

¹⁰ Amanda Vickery, "Golden Age to Separate Spheres," see above n. 6; Frederick Engels, *The Origin of the Family, Private Property, and the State* (1884).

Barbara Welter,¹¹ Aileen Krador,¹² Gerda Lerner,¹³ Joan Scott,¹⁴ Carroll Smith-Rosenberg¹⁵ and Linda Kerber,¹⁶ to name just a few, were all influential women's historians writing in the 1960s and 1970s who used the trope of separate spheres as a metaphor for discursively locating women in the historical genre and writing a new kind of women's history to counteract the male histories that generally focused on military exploits, economics, and government.¹⁷ Influenced by the work of Betty Friedan, who had pointed to the frustrating waste of intellectual human capital trapped in suburban domesticity,¹⁸ these and other women's historians turned their historical lens inward toward the domestic sphere by either critiquing the gender subordination caused by the separation of men and women, or later by exploring the ways in which female-identified spaces provided a realm for women's affirmation and a safe space for meaningful human interactions. Much of the new history focused on how women built friendships, made political allegiances, and created meaning in their circumscribed spheres of activity, and then how strong women resisted their constrained expectations to bring their uniquely female qualities to the world around them, to churches, benevolent associations, school

¹¹ Barbara Welter, "The Cult of True Womanhood, 1820-1860," *American Quarterly* 18 (1966): 151-174.

¹² Aileen Krador, ed., *Up From the Pedestal: Selected Writings in the History of American Feminism* (NY: Quadrangle, 1968).

¹³ Gerda Lerner, "The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson," *Midcontinental American Studies Journal* 10 (1969): 5-15.

¹⁴ Joan Scott and Louise Tilly, *Women, Work and Family* (NY: Holt, Rinehart, 1978); Joan Scott, "Women's History: The Modern Period," *Past and Present* 101 (1983): 141-157; Joan Scott, "Gender: A Useful Category of Historical Analysis," *American Historical Review* 91 (1986): 1053-75; Joan Scott and Debra Keates, eds, *Going Public: Feminism and the Shifting Boundaries of the Private Sphere* (Urbana: University of Illinois Press, 2004).

¹⁵ Carroll Smith-Rosenberg, "The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America," *Signs* 1 (1975): 1-29.

¹⁶ Linda Kerber, "Separate Spheres," see above n. 2.

¹⁷ The vast numbers of books and articles on women's history, and on the historiography of women's history, are too great to list here. Excellent summaries of the separate spheres issue in women's history, however, are Linda Kerber, "Separate Spheres," see above n. 2; Kim Warren, "Separate Spheres," see above n. 4 and the sources cited therein.

¹⁸ See Betty Friedan, *The Feminine Mystique* (NY: Norton, 1963).

boards and the like. In time, even average women, who remained content in their circumscribed domestic sphere, were studied to see how they embraced their feminine roles and brought their uniquely female perspective to all kinds of private and public circumstances.¹⁹

Historians of the industrial revolution relied on separate spheres as a historical trope for understanding what they depicted as the critical role gender difference played in the rise of modern capitalism, thus reinterpreting how gender differences worked in the early-modern and late medieval periods.²⁰ More sophisticated analyses of capitalism explored how the twentieth century challenges to separate spheres, such as Married Women's Property Acts and the expansion of women's employment opportunities, may have loosened patriarchal control of property, but not for the benefit of women. Rather, it was for the benefit of capitalism generally and the promotion of bourgeois political power.²¹ Marxist historians analyzed separate spheres as a socio-political structure, defined by economic relations that served the interests of the dominant classes such that the social constructions of gender and separate spheres were seen to camouflage social and economic services whose benefits were unequally shared.²² Women's historians drew from the Marxists numerous conclusions about how separate spheres created a

¹⁹ See, e.g., Blanche Wiesen Cook, "Female Support Networks and Political Activism: Lillian Wald, Chrystal Easeman, Emma Goldman," *Chrysalis* 3 (1977): 43-61; Nancy Cott, *Bonds of Womanhood: "Woman's Sphere" in New England, 1780-1835* (New Haven: Yale University Press, 1977); Carl Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (Oxford: Oxford University Press, 1980).

²⁰ See, e.g., Gerda Lerner, "The Lady and the Mill Girl," see above n. 13.

²¹ See Norma Basch, "Equity v. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson," *Journal of the Early Republic* 3 (1983): 297-318; Suzanne O. Lebock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43 (1977): 195-216.

²² E.P. Thompson, *The Making of the English Working Class* (NY: Pantheon, 1963).

mechanism for institutional exploitation of women's labor, bodies, and reproductive capacities.²³

After critics suggested that separate spheres was an inaccurate description of women's lives, that men and women did not lead separate lives and that the boundaries of these spheres were quite fluid, these and other scholars explained that separate spheres was not a physical distinction between men's and women's lives, but rather a descriptive rubric for men's and women's separate and gendered social roles that was deployed most effectively during the nineteenth century.²⁴ Thus, work in the late 1980s and 1990s, influenced by deconstructionism, began to examine how the two spheres of public and private defined each other, how they were both socially constructed, and that the public/private binary constrained men as well as women.²⁵ These historians also expanded their application of separate spheres analysis to the "entire chronology of human experience," not just 19th century Anglo-American society.²⁶ The focus, thus, was less on the idea of a physical separation between the sexes, but the social constructions of difference and gender that informed liberal, post-enlightenment ideology. Critics of language and rhetoric began to analyze separate spheres as a rhetorical construct used not only by historical actors, but by scholars today who

²³ See, e.g., Juliet Mitchell, *Woman's Estate* (NY: Vintage Books, 1971); Karen Sacks, "Engels Revisited: Women, the Organization of Production, and Private Property," in Michelle Zimbalist Rosaldo (ed.) *Woman, Culture, and Society* (Stanford: Stanford UP, 1974), 207-222.

²⁴ Nancy Cott, "Review of *A Shared Experience: Men, Women, and the History of Gender*, by L. McCall and D. Yacovone (eds)," *American Historical Review* 105 (2000): 171.

²⁵ H. Znaniecka Lopata, "The Interweave of Public and Private: Women's Challenge to American Society," *Journal of Marriage and the Family* 55/1 (1993): 176; Joan B. Landes, ed., *Feminism, the Public and the Private* (Oxford: Oxford University Press, 1998).

²⁶ Kerber, "Separate Spheres," see above n. 2 at 18.

reinforce the constraints of the ideology through their reliance on familiar gendered boundaries and structures.²⁷

Feminist scholars focusing on race and sexuality began sharply criticizing liberal women's historians and their analysis of separate spheres as a white, heterosexist ideology that legitimated racial and sexual hierarchies in the process of constructing a particular history of gender.²⁸ Michelle Zimbalist Rosaldo strongly critiqued the reliance on separate spheres as a failed scholarly enterprise. She explained that:

the most serious deficiency of a model based upon two opposed spheres appears in its alliance with the dualisms of the past, dichotomies which teach that women must be understood not in terms of relationship but of difference and apartness. Approaches that locate women's problems in a domain apart fail to help us understand how men and women both participate in and help to reproduce the institutional forms that may oppress, liberate, join or divide them.²⁹

In other words, she argued, scholarship that uses a lens of difference fails to see the many ways in which sameness may be a more valuable analytic tool.

In 1997, Linda Kerber explained where our historiographical understanding of separate spheres then lay:

²⁷ Susan Gal, "A Semiotics of the Public/Private Distinction," see above n. 6; Rosalind Rosenberg, *Beyond Separate Spheres: Intellectual Roots of Modern Feminism* (New Haven: Yale UP, 1982); Michelle Zimbalist Rosaldo, "The Use and Abuse of Anthropology: Reflections on Feminism and Cross-Cultural Understanding," *Signs* 5 (1980): 389-417.

²⁸ See, e.g. Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (NY: Basic Books, 1985); Deborah Gray White, *Ar'n't I a Woman?: Female Slaves in the Plantation South* (NY: Norton, 1985); E. Boris, "The Power of Motherhood: Black and White Activist Women Redefine the Political," in S. Koven and S. Michel (eds), *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (NY: Routledge, 1993) 213-245; E. Barkley Brown, "Negotiating and Transforming the Public Sphere: African American Political Life in the Transition from Slavery to Freedom," *Public Culture* 7 (1994): 108-124.

²⁹ Michelle Zimbalist Rosaldo, see above n. 27 at 409.

As we discuss the concept of separate spheres, we are tiptoeing on the boundary between politics and ideology, between sociology and rhetoric. We have entered the realm of hermeneutics; . . . One day we will understand the idea of separate spheres as primarily a trope, employed by people in the past to characterize power relations for which they had no other words and that they could not acknowledge because they could not name, and by historians in our own times as they groped for a device that might dispel the confusion of anecdote and impose narrative and analytical order on the anarchy of inherited evidence, the better to comprehend the world in which we live.³⁰

Despite Rosaldo's cautionary tale, Kerber's view of separate spheres seems the most enduring, in large part because it provides a rubric for both critiquing and endorsing gender difference. Scholars can praise women's individual actions of resistance while simultaneously critiquing the institutional constraints that limit women's lives. Women's unique and valuable experiences and methods of understanding can be applauded while also acknowledging the inequality and subordination that separate spheres constructs. We can impose meaning and analytical order on the "anarchy of inherited evidence" and still rail against the limited categories by which that order is created. In many respects, separate spheres is enduring because it is partially true (men and women are separated in schools, in the workplace, and in their access to economic wealth and political power), it is helpful as an analytic tool (the evidence of difference is easier to discern from the anarchy of inherited evidence than sameness), and a satisfactory alternative has not appeared. It is almost always easier to focus on difference when sameness is rarely discursively produced.

Yet even as we understand that separate spheres is profoundly enduring, both as a social ideal and as an historical trope, we continue to rely on it uncritically, simply dropping a footnote that we understand it is a metaphor that doesn't describe actual reality but

³⁰ Kerber, see above n. 2 at 39.

because everyone else uses it, we are going to deploy the customary analytic in its relatively straightforward meanings without tackling the implications of its application. But one of the most valuable insights from thinking a bit more critically about separate spheres lies in the difficulty of doing as Rosaldo suggests, focusing on sameness, when difference is discursively produced. As we view the textual sources of history, it is much easier to spot evidence of differential treatment than evidence of sameness. It is hard to impose order on large categories of evidence that appears to be the same. And that is precisely the attractiveness of separate spheres – it provides a way to order the evidence before us without having to do the difficult task of explaining the unremarkable or finding new ways of making connections among things that appear the same.

Only when we accept that separate spheres is a methodological tool, that is effective at certain tasks but not others, can we begin to unpack how our historical analytic imposes a particular kind of order on the anarchy of inherited evidence and obscures other possible patterns or relationships. The same can be said of most binaries, and in particular the public and the private binary. When we try to impose narrative order on things as diverse as governments, markets, and households, the public/private binary is an attractive framework. It is only when we understand their interdependencies and interpenetrations, and when the boundaries become blurry, that we need to face the way our analytic tools define and limit the projects before us.

The Public and the Private

At the same time as the trope of separate spheres was being used, picked over, analyzed, critiqued, and ultimately begrudgingly retained as an analytic that reinforces power differentials while purporting to unmask the forces that impose that very power differential, notions of public and private were undergoing the very same kind of analysis. Of course, separate spheres relies on notions of public and private as the fundamental basis for its analytic effect, so the two are inexorably linked. Men and women, public and private, culture and nature, reason and emotion, are all binaries that are fundamental to the doctrine of separate spheres. But as women's historians were unpacking the private sphere, usually used synonymously to mean the domestic sphere, historians were also unpacking the public sphere as a rhetorical and ideological construct.

Jürgen Habermas's *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* is the foundational work challenging naturalized understandings of public and private.³¹ Habermas identified late seventeenth century England as providing the pivotal conditions for the creation of a bourgeois public space that was distinct from, and oppositional to, the emerging modern state. Thus, while we tend to speak of the late medieval period as one in which state power was represented to the general populace through grand courtly demonstrations,³² the public sphere came into existence as an entity separate from the Crown in the late seventeenth and early eighteenth centuries as a result of economic developments that institutionalized a counter force to the Crown's position of dominance. Through the rise of print media, coffee houses where private persons assembled to discuss political events, published literature,

³¹ Jürgen Habermas, *The Structural Transformation of the Public Sphere*, (Cambridge, MA: MIT Press, 1989).

³² See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (NY: Vintage Books, 1995).

and the salons of the elite, private persons began to discuss illegitimate uses of state power and ultimately created a literary public stage on which public opinion could be appropriately referenced.³³

After Habermas we can't really speak of a public/private binary anymore; the state and social institutions exist more as a complex spectrum or even möbius strip. We can envision public and private institutions on a spectrum, with the state, quasi-state institutions and even private corporations on one end and the private home or bedroom on the other. But Susan Gal's work on the fractalic nature of public and private shows how even within private organizations there are public and private spaces, and vice versa.³⁴ Thus, the private home is private compared to the street out front, but the living room is public in contrast to the bedroom or bathroom. Similarly, private spaces may be more or less private depending on the occupants or the time of day. And certain public spaces, like the state house or court house, are public, but there are private offices within those buildings that are not open to the public. This fractalic aspect of public/private embeddedness illustrates how even the concepts of public and private shift and change depending on context and referent. Religious beliefs may be private, but religious institutions are profoundly powerful public institutions. The bedroom or the doctor's office may be private spaces, but extensive governmental regulation controls what can be said and done behind those doors. From regulation of abortion to consumption of pornography to sexual abuse of minors to the flammability of mattress and pajama materials, the state regulates countless private acts. Similarly, many private acts have

³³ *Id.* See also Craig Calhoun, "Introduction: Habermas and the Public Sphere," in Calhoun (ed.) *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1991) 6-9.

³⁴ See Susan Gal, "A Semiotics of the Public/Private Distinction," see above n. 6.

public meaning: one's clothing speaks about one's private identity, one can privately publish one's memoirs, and publicity about one's private affairs can be broadcast to the world or consumed in the privacy of one's laptop.

And Michael Warner's work on counterpublics is useful to consider as well. Counterpublics are groups of people who use their so-called private experiences, identities, and discourses to make public statements. They are publics that are "defined by their tension with a larger public[; t]heir participants are marked off from persons or citizens in general."³⁵ Queers, Goths, Hippies, internet hackers, chat room participants, breast cancer survivors, and so on are all examples of counterpublics, i.e. individuals whose participation in some group by virtue of a private characteristic (usually ones of race, sexuality, or gender) gives them a political meaning.

On the flip side, presumably, are counterprivates, associations and identities that have public meaning but which are brought into the private to influence domestic relationships and private thoughts. Like the counterpublic of breast cancer survivors, whose quintessentially private experiences link them together into intentional political associations, counterprivates could be private associations, behavior, or beliefs that reflect and produce public meanings. The polygamous marriage, the second-parent adoption, and the home-schooling of one's children are private actions motivated by particular public meanings, with all of their attendant public and private consequences.

³⁵ Warner, *Publics and Counterpublics*, see above n. 6 at 56.

This dynamic relationship between public and private, as reflected in the work of scholars like Gal and Warner, further challenges feminist historians to explore the methodological implications of separate spheres. Kim Warren, in 2003, claimed that separate spheres' endurance was because it has helped gender scholars recognize when and where women have crossed the boundaries of their prescribed roles.³⁶ The line between the public and private is one of those boundaries, but to the extent it is a constantly shifting boundary, it becomes very difficult to identify when the behavior has actually crossed over and what meaning should be attributed to the transgression.

One important insight of recent work on the public/private binary is that it too, like separate spheres, reinforces power inequalities through subordination of all things private and female. Carole Pateman wrote that “the dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about,”³⁷ noting the importance of the binary to gender subordination. Michael Warner also explained the power imbalance in the public/private binary:

The economic separation of the male public from the female private, in short, was never a static system. It was one normative strand among others in the elaboration of public and private. To say this is not to minimize its power or to underestimate the degree of male domination that it represented. In fact, because the interweaving of gender, labor, and publicness was indirect rather than definitional, it could often go unrecognized, and still does. To see this might help us to understand why inequality persists despite the apparent breakdown of the most static form of the gendered division of labor.³⁸

³⁶ Kim Warren, “Separate Spheres,” see above n. 4.

³⁷ Carole Pateman, “Feminist Critiques of the Public/Private Dichotomy,” see above n. 6 at 118.

³⁸ Warner, *Publics and Counterpublics*, see above n. 6 at 38-39.

Even the simple discursive differences (men *work* and women *labor*) have led to structural inequalities that privilege male actions and disempower female actions.

What we can glean from a more nuanced analysis of both the public/private binary and separate spheres are two important points. The first is that the public and the private are interconnected, definitionally and discursively, and our continued reliance on the binary obscures the extent to which the separation maintains hierarchies of domination and subordination. Inequality is a product of the public/private distinction, and that inequality generally falls along lines of race, class, gender, and sexuality. These qualities are defined as personal even as they are given public meanings. Second, the ubiquity of separate spheres as an analytic framework blinds us, in many ways, to alternative modes of analysis and to the continuing way our feminist historical focus on difference reifies the gender subordination we are trying to defuse.

Bringing what we know about the power effects and domination of the public/private to the historical project of separate spheres challenges us to think about any project involving traditional notions of family, law, the state, domesticity, gender, childhood, and the market (to name just a few) as analytical tools that may reify and perpetuate inequality.

Historicizing the Family and the State

One of the historical errors many family law scholars and family historians make is taking the modern nuclear family as a static institution. Even when they go back and consider the early-modern extended family as the precursor to the less fluid traditional family structure of today, they rarely put the family into its public and political context, especially in contrast to the feudal family of the late medieval period that thrived before the rise of the modern bureaucratic state. But if we begin our analysis of family and family law further back, at a time when the medieval family was the most powerful political institution, the decline of the family becomes quite apparent and the changes in its public and private meanings reveal powerful social and institutional forces at work that may elucidate our theoretical project.

Medieval and late-medieval society was structured around a family-based economy. The family consisted of a large political alliance with public, political, and legal meaning and power. Elite and powerful families ruled large territories and gave their protection to the working people resident in their area. Political power was associated with familial birth-right and loyalties were to particular families, not to an abstract state. Large extended families worked together to cement power, and lesser families attached themselves to the great families in feudal alliances. The great families included not only their biological relatives but their serfs, villeins, tenants, and servants as part of their family. And the serfs and villeins working on lands held by their lords and gentry families considered themselves part of a family-based economy that saw their fortunes rise and fall with that of their social superiors. The royal family was simply the leading family, and it cemented its power with strategic alliances to other powerful families. Without the

assistance of a sufficient number of powerful families, the king risked political weakness and potential overthrow. And with the right amount of support, a particular family could rise to the top and demand allegiance in exchange for the granting of lucrative privileges.³⁹

When we talk about the feudal family in this way, we mean not only the group of persons directly connected by affinity and consanguinity, but the vast army of servants and tenants, their families and kin, and those living within the protection of the feudal lord's peace. The family in its feudal form comprised the ruling power structure, and it made little sense to speak of one's membership in the small, nuclear family of one's parents and children, because social meaning and political power attached to the larger kin groupings and allegiances of the family-based economy.

In the early-modern period, with the rise of the modern state under the Tudors, the family-based political economy was slowly eroded by the increasingly more powerful bureaucracy of the civil government. Family certainly continued to matter, but the power of the great families lessened as allegiances turned to the centralized state which slowly acquired a monopoly on military force and political power. After the Restoration of the limited monarchy in 1680, the family as an institution of power was fully subordinated to the parliament and the civil government. Out of that transition, the family was legally (re)defined to include only those persons related by affinity and consanguinity, and by the end of the eighteenth century to those persons living together in a single household

³⁹ See Peter Laslett, *The World We Have Lost: England Before the Industrial Age* (NY: Scribner, 1965), esp. pp. 170-199.

related by biological or marriage ties.⁴⁰ In time, the nuclear family, defined as a husband and wife, and their natural-born children, became the ideal archetype of the family and legal rights and duties were distributed accordingly. Everyone else, from grandparents, to adopted children, to apprentices, and servants, were viewed as outsiders by a legal regime that required bright lines for identifying family-based rights and privileges.⁴¹

It was coincidentally during the chaotic Civil War years that coverture became firmly institutionalized as a way of regulating the legal property rights of married women, a mechanism that was notably different from other regimes on the continent that continued to protect kin group rights in inherited property well into the eighteenth century.⁴² By adopting laws that gave husbands virtually sole legal control over all property brought by a wife to her marriage, and all property acquired during marriage, the English dramatically cut wives off from their extended kin networks that, in other countries, had retained an interest in marital property and exerted greater influence over the conjugal unit.⁴³ The harsh patriarchy that resulted from the adoption of coverture, which was unique to England and its colonies, further enforced the subordination of women and the construction of artificial boundaries between the public and the private. As the family

⁴⁰ Holly Brewer, *By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority* (Chapel Hill, NC: UNC Press, 2005). Brewer notes the importance of the Civil War and Restoration in the transition from a diffuse family power-base, to a patriarchal institution with legally-protected paternal rights at its core.

⁴¹ See Lawrence Stone, *The Family, Sex, and Marriage in England: 1500-1800* (NY: Harper & Row, 1977) for an extensive discussion of the rise of the affective, nuclear family.

⁴² See Maria Ågren, *Domestic Secrets: Women and Property in Sweden, 1600-1857* (Chapel Hill, NC: UNC Press, 2009).

⁴³ The work on coverture is too extensive to recite here, but a few classics include: Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge, Mass: Harvard UP, 1990); Amy Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993); David Lemmings, "Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1755," *The Historical Journal* 39 (1996): 339-359; Margaret Hunt, *The Middling Sort: Commerce, Gender, and the Family in England, 1680-1780* (Berkeley, CA: UC Berkeley Press, 1996); Margot Finn, "Women, Consumption and Coverture in England, c. 1760-1860," *The Historical Journal* 29 (1996): 703-722.

ceased being a political force and became, instead, an entity of consumption, the boundary between public and private became more ruthlessly policed through the laws of coverture.

Although one cannot claim that the industrial revolution or capitalism or the creation of the public sphere necessarily caused this redefinition of the family, there is no question that these grand events were occurring simultaneously with changing practices within elite families and with a changing discourse about who made up one's family. Ironically, however, most family historians today are focused more on subtle changes within families than on the family's relationship to the modern state.⁴⁴ There has been a tremendous amount of scholarship on the two questions of whether the nuclear family has longer roots back into the late medieval period and whether strong kinship ties have longer branches into the modern period. And although the answer to both seems to be yes, that English society was much more diverse and rich in terms of kinship relations and dependencies, as well as more companionate and sentimental than continental forms, that debate operates entirely within the existing framework of public and private and separate spheres.. Because scholars continue to focus on kinship (i.e. ties by consanguinity and affinity) rather than on political ties and allegiances, the modern scholarship of the family places it almost entirely within a private context, either of the nuclear conjugal family or the private marketplace.

⁴⁴ See Naomi Tadmor, *Family and Friends in Eighteenth Century England: Household, Kinship, and Patronage* (Cambridge: Cambridge UP, 2001) 3.

I would suggest that with the shift away from a family-based politics and its replacement by the modern state, the family was redefined as a collective based on marriage and biological ties, and it was recharacterized as a private, non-political entity. This recharacterization led to a new discourse about the family as private, intimate, emotional, consuming, and patriarchal, which has been the starting point of most family histories. The rise of separate spheres, which locates women in the domestic and familial realm, and which disempowers the family as a political institution, relied on a discourse of public and private that obscured the older interpenetrations and similarities. Locating the family in the newly constructed private sphere was necessary to undermining the competition and political power of the family. Thus, separate spheres, the public/private binary, and the newly emerging focus on the nuclear family all worked together to bolster political power in a ruling male-centered elite distanced from the competing power centers of the late medieval family.

Applying the same analytic tools to the family as we have applied to the public/private binary and to the trope of separate spheres allows us to think of the family as an institution that has been progressively weakened, narrowed, and redefined into disparate conjugal units whose existence is validated almost entirely within the private sphere. There has been a tendency to focus on the continuity/change debate in the historiography of the family to the exclusion of the political disempowerment that has occurred as a result of the family's relegation to the private sphere.⁴⁵ Coming back to Rosaldo's critique that a focus on separation obscures the similarities and the participation of both men and women in the social construction of the family allows us to step back from the

⁴⁵ See Naomi Tadmor, *Family and Friends*.

debates and see the family as a politically contested terrain that is not neatly distinguishable from the realm of courts and lawmakers. The boundaries between family and state dissolve when we focus our lens on the contradictions inherent in the discourse of privacy that characterizes modern family law and policy.

The Paradox of Family Law

It seems almost an oxymoron to talk about family law because the family has been constructed as quintessentially private and the law as quintessentially public. But the development of family law in the nineteenth century reflects the continuities and interpenetrations of the public/private binary and the contradictions of separate spheres. To the extent the state is interfering in the domain of the private family, it seems much like the stranglehold that the public has over the private sphere, where the latter is claimed to be the domain of women while men exploit the labor and wealth of their dependants who are imprisoned within. To the extent the family has become an important focus of political attention,⁴⁶ it has taken on a public meaning that is quite powerful. The modern private family may not be the influential feudal institution of the past, but it remains a site of political struggle precisely because it is where individuals learn the importance of privacy, the realities of domination and subordination, and the hypothetical boundaries between the family and the state.

⁴⁶ Consider the current power of such family-based US social movements as Focus on the Family, the Family Research Council, the Family Research Institute, and the like. These groups have a dedicated mission of trying to reclaim a traditional family structure that eschews women's rights, contraception, the so-called homosexual agenda, same-sex marriage, and furthers other socially conservative causes.

Martha Fineman's valuable work questioning the naturalness of the family and the necessity of revisiting the legal regulation of the privacy protections granted to the family in light of changing constructions of the state is insightful in this regard. She sees the family and the state not as binaries, but as dynamic interdependent constructs.

If one believes the family is not inherently limited to any essential or natural form, but is as contrived as any other societal institution, it affects one's perspective of the relationship between state and family. The metaphor of 'symbiosis' seems more appropriate than the separate spheres imagery: the family is located within the state. In this conceptualization, family and state are interactive; they define one another.⁴⁷

Fineman's work, and that of other feminist legal theorists, is quick to point out the problems about assertions of family privacy where protection from public view allows for violence and domination of dependents within the family sphere.⁴⁸ And she also critiques the legal and political definition of family as limited to the traditional heterosexual nuclear family while suggesting that we need to move toward a reorientation of family law to reflect the realities of modern family life. But recognizing that separate spheres is a metaphor that perpetuates gender inequalities, and that the family/state binary is a social construction that reifies gender difference gets us only part of the way there. If family laws are going to change to reflect the needs of modern families, we need a new way of breaking down the family/state binary using a postmodern feminist historiography that challenges the basic, foundational assumptions of privacy and family law themselves.

⁴⁷ Martha Fineman, "What Place for Family Privacy?" *George Washington Law Review* 67 (1999): 1207, 1208-1209 (citations omitted).

⁴⁸ *Ibid.*

Family law, in its current instantiation, focuses almost exclusively on the triad of marriage/divorce, custody of minor children, and control over marital property. It does not concern itself with health care, with substandard housing, with insurance, with employment, with environmental health, with quality and quantity of the food supply, or any of the hundreds of important things that make family life possible. It is obsessed with the legal status of marriage and the sexual acts of the conjugal pair, the legal rights of control over children, and wealth distribution between members of the partnership. But family is so much more than these three things, and patriarchy is not the only organizing principle upon which to distribute the legal rights to make decisions and benefit from the accumulated wealth or debts of human cooperation and collective labor. Corporations, partnerships, and trusts are all fictional legal entities, just like the marital unit, that have complex rules about decision making and about wealth distribution that could provide alternative models, and yet family law remains outside these legal modes, mired in the discourse of privacy.

Because the family is treated differently, is treated as a private partnership, courts hesitate to impose strict fiduciary obligations or contractual alignments of rights and duties. Lawmakers exclaim how sacred the private family is, while they routinely pass laws interfering in intimate family behavior. Judges deplore having to air a couple's dirty laundry and yet they will spell out in excruciating detail visitation schedules and tax deductions. Nothing is truly private in the sense that it is free from state intervention, yet we continue to insist, as we do with separate spheres, that the family is different, is deserving of special treatment, and that separation makes us feel better about the way we

have constructed society and law. Consequently, gender inequalities and the principles of coverture continue to operate.

It seems to me that we have been very adept at critiquing all the mis-steps, the places where decisions were made, both private and public, that resulted in institutionalizing inequality. And we are very skilled as historians at unearthing the complex ways in which separation and difference reified gender subordination and inequality throughout the early-modern and modern periods. But as Martha Fineman so aptly points out, despite having made significant progress in reforming many of our family laws, we still remain mired in the same basic inequality that the abolition of coverture was supposed to remedy. As historians we have been able to locate great evidence of separation and difference and their effects on the lives of men and women. And we have uncovered the power dynamics that underlay the family laws of coverture. What we have not been very successful at doing, however, is moving beyond separate spheres to see a more dynamic view of gender history, a view that ironically may very well require that we look not at gender difference but at gender sameness, not at the decisions that were made, but the decisions that were not made. If our predecessors could have envisioned a different path in the dynamic forge of history, then we should be able to uncover the lost, ignored, and forgotten paths of state building and family relationships to see if they could have led to a different destination.

By reclaiming the historical power of the medieval family, a space not known for its favorable treatment of women, perhaps we can better identify how coverture became such a crucial element of industrial capitalism, how capitalism defined the birth of the

modern state, and how the modern state redefined the nuclear family as the ideal archetype with all of its corresponding gender inequality.

A New Metaphor

As historians, we tend to focus our scholarly lens on the events and persons that influenced change, be it for the better or the worse, because change, like difference, is generally easy to spot. But as family historians have shown, continuity is very important as well, especially in the face of social or legal pressures to change. As we have generally ordered our family and gender history around differences, however, we fall into the trap Michelle Zimbalist Rosaldo identified, of missing the important ways our analytic rubric defines and constructs the gender inequality historians are describing. It is not only in construction that the commonplace aphorism applies: if one's only tool is a hammer, all problems look like nails. If our historical metaphors are separate spheres and the public/private binary, we not only create an order based on difference that exudes gaps in which inequality seeps in, but we perpetuate the inequality by continued use of our analytic rubric.

Writing a history of family law that is sensitive to the social constructions of gender, family, the state, the private, and law requires focusing on the discursive sources of family law through a lens of sameness as well as one of difference and separation. The enduring quality of separate spheres helps us to locate gendered constructions of family in the discursive data of cases, journals, memoirs, letters, political pamphlets, and earlier

histories. Locating sameness is much more difficult because it is often located in the unspoken subtext of political policies, judicial decisions, or legal arguments. One of the best ways to uncover the connections may very well be to locate the missed opportunities, the roads not taken, the rulings and laws that were possible in light of the social context but which were not made. When we begin to focus on the missed opportunities for different outcomes, we can better see how the choices that were made appear far more intentional perhaps and certainly more significant in the development of complex social systems of inequality. In other words, could courts have realistically rejected certain aspects of coverture in ways that might have prevented it from resulting in the repressive legal disappearance of Anglo-American married women for close to four centuries? Could assertions of women's rights have worked to avoid the erasure of women from the public sphere?

It is all well and good to assert that we should refocus our historical gaze on the paths not taken, the possibilities that never came to fruition, the infinitudes of 'could have beens' rather than what actually happened. But how do we see them, how do we decide what is important, and most of all how do we attribute meaning to things that did not happen? In an area like the history of family law, where we have stumbled over the contradictions and stubborn intransigence of social problems like domestic violence, dependency, child abuse and neglect, the feminization of poverty, and the divorce epidemic a new perspective is clearly needed. Because family law is so heavily dependent on the public/private binary, and because it is a product of coverture and family formation in an era of embedded separate spheres, it is an ideal subject for reanalysis.

The trope of separate spheres has led us to a binocular view of history. Rejecting the monocular view of traditional history that was usually focused on male leaders, wars, and grand public events, women's historians took a binocular approach. They focused one lens on the grand public events of traditional history, and then focused another lens on the lives of women, of the underclasses, of the private realm and then they juxtaposed the two to create a more complete three-dimensional picture of human lives and situations. This binocular view purported to give a deeper and more accurate view of the past by bringing to the fore people and events that were otherwise hidden in private spaces. But for the binocular view to work well, one had to focus the two lenses differently and train them on different subjects. It was in the contrast between the public and private that we could see how inequality was generated and maintained. But this historical methodology has stunted legal and social reform in part by characterizing the problems in a discourse of binaries.

Looking instead to what might have been, to the paths not taken, is an archaeological project that looks to the healed scars, the abortive attempts, and the ruins of social changes that were tried but ultimately stopped. The marks on the earth of the razed Nazi extermination camp, Sobibor, are being uncovered and read, even after the area was reclaimed by the forest, and scientists and archaeologists are piecing together what happened from the hidden marks and scars left by the horrific acts of genocidal policies. Like the hidden scars of Sobibor, legal archaeology may be able to augment the binocular view of history by looking to the legal outcomes that did not happen and try to piece

together why they didn't. Because historians must order the anarchy of inherited evidence in ways that make sense to people today, it may be possible to use a methodology that does not reify difference and inequality and acknowledges the role played by all people, not just men, in gender subordination while sidestepping the constructions of difference in a methodology that further reifies the inequality.

To that end, my larger project is to look at the development of family law beyond separate spheres and public and private to uncover the layers of legal doctrine and look for evidence of what might have been. A classic example lies in the claims and wishes of mid-nineteenth century English women advocating for divorce law reform. What they sought was the disaggregation of their marital and maternal roles through legal rules that would allow them to be mothers even if they could no longer be wives. The 1858 divorce court, however, developed complex rules that premised maternal rights on performance of marital duties, a linking that the women of the time soundly rejected.⁴⁹ By seeing the marks of the failed endeavor on the final rules that developed, I believe we can unearth a better view of family law and its effects on the people who live their lives under its shadow. Moreover, by recognizing the dynamism and social constructedness of family law and the private sphere, we can begin to see how legal power in certain hands changed the way people behaved, thought, and ultimately acted.

Conclusion

⁴⁹ See Danaya C. Wright, "Well-Behaved Women Don't Make History: Rethinking English Family, Law, and History," 19 *Wisconsin Women's Law Journal* 19 (2004): 211-318.

My goal in this paper has been to explore the analytic frameworks and theoretical conundrums of writing a history of family law in light of recent work on separate spheres ideology, the public/private binary, and the historiography of the family. Far more work on these subjects has been done than I have been able to give in this brief foray, but much of it illustrates the theoretical problems inherent in the project. The family, as a political institution, is no less constructed than law or the public sphere. And it is no staggeringly novel argument to suggest that artificial binaries obscure important linkages and dependencies. Rather, what I have tried to do is bring together relatively disparate academic work to see how they might reflect on the very narrow topic of the history of family law and perhaps offer a way to analyze the historical evidence to uncover a new perspective on the role of coverture and family law in perpetuating the subordination of women. We know that family law is of relatively recent origin as a distinct subfield of private law, but its origins like in coverture, a repressive doctrine akin to slavery.⁵⁰ The term wasn't used until the late nineteenth century. But while family scholars have been quite sophisticated in their theoretical frameworks for analyzing the modern family, historians of family law have taken categories like the family, the private sphere, and the state somewhat uncritically, and I include myself in that group.

As I grapple with the problem, I think there is a profound lesson for my project in the historiography of separate spheres, and that is its enduring quality. Despite recognizing that separate spheres was merely a metaphor that did not accurately or fully describe the reality of nineteenth century lives, nor the discourse of nineteenth century actors, it

⁵⁰ The connections between coverture and slavery were quite pronounced and routinely commented upon during the nineteenth century. Although the actual experiences of wives and slaves were quite different, the legal limitations were remarkably similar.

remains an enduring analytic tool because it helps us make sense of the anarchy of inherited evidence that defines the historical undertaking. Bringing into our study the insights of theorists like Michael Warner allows us to see in the comparisons the way modern constructions of public and private create and harden inequality. Quoting Eli Zaretsky, Warner summarized the effects of inequality in the public/private binary quite well: “The separation between public and private occluded the perpetuation of relations of domination – those beyond legitimate authority – into modern society. It did this politically by rendering those relations ‘private.’” The curbing of the state, in the name of private liberty, had entailed a curb on politics as well, freezing in place all those for whom the private was the place of domination rather than liberty.⁵¹

Without an understanding of domination in the construction of the private sphere we perpetuate the family as a space for legalized rape, exploitation, and human bondage. Without seeing the implications of separate spheres discourse we legally encode the family as a privileged institution while turning a blind eye to the state’s role in constructing the family as natural and powerless at the same time. Without challenging our analytic framework, we don’t understand that we have adopted separate spheres in large part because we are uncomfortable with earlier tropes, like naturalism or deism. To the extent the public and private are socially constructed metaphors on which we base so many of our laws (family law, the law of privacy, public law, private law) then reliance on separate spheres and the public/private dichotomy occludes the way in which men and women are primary actors in constructing the legal constraints that define us all. Perhaps

⁵¹ Warner, see above n. 6 at 42.

by revisiting our historical analytics we can finally understand the construction of the boundaries that limit us, both in practice and in our scholarship.