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# WHY FEMINISTS CAN'T (OR SHOULDN'T) BE LIBERALS

*Tracy E. Higgins\**

I should confess right off the bat that I do not regard myself as a liberal feminist in part because I think of the term as a bit of an oxymoron. I do often wonder whether feminists have perhaps spent altogether too much time participating in this debate rather than getting on with other business. That said, I admire and am sympathetic to aspects of liberalism, including the liberalism elaborated eloquently in the work of John Rawls. Specifically, I agree with Susan Okin that liberalism's "radical refusal to accept hierarchy and its focus on freedom and equality of individuals[] is crucial to feminism."<sup>1</sup> Yet, I do not believe that liberalism has a monopoly on these virtues. Moreover, I would argue that certain core characteristics of liberalism—the centrality of the public/private divide and an overriding emphasis on pluralism within the private sphere—taken together, limit the usefulness of liberalism to a feminist agenda, even one defined in terms of liberal goals of equality and freedom for women.

In this commentary, I present more fully two important ways in which feminist legal and political theorists have criticized liberal theory as inadequate to secure women's equality. The first concerns the well-established feminist argument that the public/private distinction tends to insulate the private sphere from regulation and thereby contributes to women's subordination in that sphere. The second criticizes liberal reliance on the concept of voluntariness or choice to calibrate the boundary of permissible state regulation of the private sphere. In the second part of the Essay, I consider whether Rawlsian liberalism in particular is vulnerable to these critiques and conclude that, in important ways, it is. Finally, I suggest that feminists may have little to gain by pursuing what Okin calls this "unfinished debate."

Liberalism's core idea is a simultaneous commitment to equal

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\* Professor of Law, Fordham Law School. I would like to thank my colleague, Jim Fleming, for including me in this important conference and for his steadfast engagement both with liberalism and its feminist critics. I would also like to thank my co-panelists Susan Okin, Linda McClain, and Marion Smiley for their excellent contributions and helpful comments.

1. Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 *Fordham L. Rev.* 1537, 1546 (2004).

citizenship in the public realm and the accommodation of competing conceptions of the good in the private realm. Liberals surely disagree about precisely where the boundary between public and private should be drawn, or about how robust our conceptions of freedom and equality must be in the public realm. But for a theory to be recognizable as “liberal,” I suggest, this basic idea has got to be there. In any case, it is central to the work of John Rawls, who, in the introduction to *Political Liberalism*, states that “the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?”<sup>2</sup>

Feminist legal theorists, responding to liberalism, ask a different question: Can liberalism sustain a concept of equality that is sufficiently robust to eliminate women’s subordination in both the public *and* private domains? Of course, feminists disagree on the answer.<sup>3</sup> Yet even feminist fans of liberalism concede that feminists have elaborated two key ideas that, at a minimum, call into question the usefulness of liberalism to feminist objectives.<sup>4</sup> First, feminists have argued repeatedly and persuasively that private power, in whatever context it is exercised, is highly regulatory. Here, consider power as it is wielded within the patriarchal nuclear family, as Okin elaborates in her essay, or within broader community structures such as religious institutions, as McClain discusses in her essay. Second, feminists have argued that liberal reliance on the concept of individual choice or voluntariness to define the boundary of the private sphere often leaves patriarchal power intact within that sphere. I shall

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2. John Rawls, *Political Liberalism* xx (1993).

3. Compare Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* 135-65, 142 (1995) (arguing that “liberalism is premised on and perpetuates a sexual division of labor, the actual powers of which are obscured by the terms of liberal discourse”), and Catharine A. MacKinnon, *Toward A Feminist Theory of the State* (1989) (articulating the inherent tension in liberal definitions of equality as sameness and gender as difference), and Carole Pateman, *The Sexual Contract* (1988) (arguing that the social contract upon which liberalism is premised is inextricably linked to the sexual contract of the patriarchal nuclear family), with Linda C. McClain, *‘Atomistic Man’ Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. Cal. L. Rev. 1171 (1992) (defending a liberal connection of autonomy against various feminist critiques), and Martha C. Nussbaum, *Sex and Social Justice* 55-80 (1999) (critiquing the feminist critique of liberalism), and Susan Moller Okin, *Humanist Liberalism, in Liberalism and the Moral Life* 39-53 (Nancy L. Rosenblum ed., 1989) (articulating a liberalism that might accommodate some of the concerns of feminist critics).

4. Note that both Okin and McClain, both feminist defenders of liberalism, accept the importance of a number of feminist critiques, particularly liberal reliance on the public/private line. See Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 *Fordham L. Rev.* 1569 (2004); Okin, *supra* note 1, at 1542-43, 1551-53.

explain each of these ideas briefly and then explore their implications for the feminist potential of Rawlsian liberalism.

First, with respect to the public/private distinction, feminists have argued that the exercise of private power threatens women's liberty and equality, regardless of whether it mimics the exercise of power by the state. Indeed, accepting provisionally the liberal distinction between public and private power, feminists have argued that the latter constitutes the principal threat to women's liberty and equality.<sup>5</sup> For example, some have argued that international human rights standards that forbid torture but regard domestic violence as outside the scope of international concern fail to address the central source of violent coercion in women's lives on a global scale.<sup>6</sup> The argument is not that the abusive husband acts under color of state law or to promote the interests of the state.<sup>7</sup> Rather, the argument is simply that a meaningful right to freedom, bodily integrity, and security for women must include effective remedies against private violence.<sup>8</sup> Feminists have made similar arguments in many other contexts ranging from pornography's silencing of women's speech<sup>9</sup> to the regulatory effects of stranger-violence on women's lives.<sup>10</sup> Although women are surely protected in certain respects by constraints on

5. Indeed, Catharine MacKinnon argues that private not state power serves as the foundation to women's inequality:

Unlike the ways in which men systematically enslave, violate, dehumanize, and exterminate other men, expressing political inequalities among men, men's forms of dominance over women have been accomplished socially as well as economically, prior to the operation of law, without express state acts, often in intimate contexts, as everyday life.

MacKinnon, *supra* note 3, at 161.

6. See, e.g., Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in *Women's Rights Human Rights: International Feminist Perspectives* 11 (Julie Peters & Andrea Wolper eds., 1995).

7. However, private violence may function in these ways. See Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *On Human Rights: The Oxford Amnesty Lectures* 83 (Stephen Shute & Susan Hurley eds., 1993) (describing mass rape of Muslim and Croatian women by Serbian forces in the early 1990s). And, of course, emphasizing the regulatory effects of private violence is not to suggest that the state is not implicated in such violence. Feminists have long argued that the state is complicit in structuring the exercise of power in the private sphere in myriad ways. See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835 (1985).

8. See Bunch, *supra* note 6, at 13-14 (arguing that states must be held accountable for sustaining conditions that enhance women's vulnerability to private violence).

9. See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 195 (1987) (noting that the Constitution's approach to free speech "tends to presuppose that whole segments of the population are not systematically silenced socially, prior to government action").

10. See Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 58-65 (1994) (using the marital rape exemption to argue for an interpretation of equal protection as targeting the denial of the state's protection to some of its citizens from private violence, aggression, and wrongdoing).

public power, these protections do not afford women the same degree of liberty and equality as men, nor do they address the most profound obstacles to equal citizenship for women.<sup>11</sup>

Second, feminists have done a lot of thinking about the way patriarchy creates gendered capacities for individual agency. In other words, recognizing that the exercise of individual choice is always constrained by culture and context, feminists have argued that under conditions of gender inequality, assumptions about choice and responsibility are not politically neutral.

This critique has at least two distinct but related strands. The first and earliest strand emphasizes women's position in relationship with others—women as providers of care. According to this critique, liberal notions of autonomy posit an unrealistically unencumbered individual, or “atomistic man.”<sup>12</sup> Beginning from this conception of liberal autonomy, some feminists have argued that liberalism undervalues care and connection and, as a result, is distinctly masculinist in its orientation. Both Okin and McClain in other contexts have defended Rawlsian liberalism against such critiques, insisting that Rawls's use of the heuristic device of the “veil of ignorance” compels the exercise of empathy in the original position.<sup>13</sup> Yet their defense does not respond fully to a more important relational feminist claim: that, by positing the self as unencumbered or atomistic, liberalism tends to treat the work of caring as voluntarily assumed, a private activity,<sup>14</sup> and, in so doing, renders it invisible.<sup>15</sup> This move, some feminists have argued, is convenient or even necessary for liberalism. As Wendy Brown explains, “the autonomous subject of liberalism requires a large population of nonautonomous subjects, a population that generates, tends, and

11. See Tracy E. Higgins, *Democracy and Feminism*, 110 Harv. L. Rev. 1657 (1997) (applying the argument about private violence to an analysis of equal citizenship for women).

12. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L.J. 81 (1987); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

13. See Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 Ethics 229, 238-39 (1989); McClain, *supra* note 3, at 1206-09.

14. See Robin West, *Caring for Justice* (1997). West emphasizes the severe consequences of this assumption for women. She warns:

The many women and the occasional man who define themselves as not-selves suffer a decreased sense of personal autonomy, of independence, of individuation, and of integrity. There is no reason to celebrate these stunted selves whose very existence is dramatic evidence of massive societal injustice, by misconstruing the selflessness they exemplify as the virtue of compassion.

*Id.* at 83.

15. As Okin herself points out, Rawls acknowledged reproductive work as socially necessary only very late in his career. See Okin, *supra* note 1, at 1563 (citing John Rawls, *The Idea of Public Reason Revisited*, in John Rawls: Collected Papers (Samuel Freeman ed., 1999)).

avows the bonds, relations, dependencies, and connections that sustain and nourish human life."<sup>16</sup>

The second, more recent, strand of the agency critique concerns itself less with the constraints of relationship—the bonds of family and emotional obligation—than with the more diffuse and subtle constraints of culture. This critique begins from the assumption that cultural norms, including language, law, custom, and moral norms, are not merely products of human will and action but define and limit the possibilities for human identity.<sup>17</sup> Feminists have argued that this social construction of identity is gender-differentiated, contributing to women's subordination. Thus, feminist social constructionists have been concerned not so much by the liberal preoccupation of state limits on individuals (implying external constraints), but by the way a combination of forces creates or defines gendered individuals (implying both internal and external constraints).<sup>18</sup> If women are socially constructed in ways that afford them less agency relative to men, then liberalism's tendency to regard liberty as the absence of external constraints (or, even more narrowly, the absence of state-sponsored external constraints) leaves women less free than men in ways that are not legally cognizable.<sup>19</sup>

Although this concept of internalized, socially-defined constraints on women's identity has long been a part of feminist theorizing,<sup>20</sup> recent work on social construction theory by feminist legal theorists in particular bears upon the question of freedom as it relates to choice or voluntariness. For example, Kathryn Abrams has developed a theory of partial agency in the context of women's sexuality that has important implications for any definition of decisional autonomy. Abrams argues for a feminist conception of the self that "juxtapos[es] women's capacity for self-direction and resistance, on the one hand,

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16. Brown, *supra* note 3, at 157.

17. See, e.g., Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 2 (1990) (emphasizing social construction of identity and arguing that "[f]eminist critique ought also to understand how the category of 'women,' the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought").

18. See, e.g., Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 *Pol. Theory* 46, 52 (1996) (suggesting that patriarchal rules constitute "not only . . . what women are allowed to do but . . . what they are allowed to *be* as well: how women are able to think and conceive of themselves, what they can and should desire, what their preferences are").

19. See Higgins, *supra* note 11 (making a related argument that internal constraints must be taken into account in any adequate theory of women's citizenship within a democracy).

20. Even a liberal theorist like Mary Wollstonecraft recognized the significance of social constraints on gender roles. She wrote: "I will venture to affirm, that a girl, whose spirits have not been damped by inactivity, or innocence tainted by false shame, will always be a romp, and the doll will never excite attention unless confinement allows her no alternative." Mary Wollstonecraft, *Vindication of the Rights of Woman* 129 (Miriam Brody Kramnick ed., Penguin Books 1982) (1792).

with often-internalized patriarchal constraint, on the other.”<sup>21</sup> Premising legal analysis of private choice on this model of individual agency, Abrams suggests, would lead to better interpretations of women’s sexual decision making—for example, identifying coercion and consent in rape cases.<sup>22</sup> Adopting her approach, however, would also have implications for the boundary between public and private because it entails scrutiny of the circumstances and internal motivations of private choices ordinarily shielded from view and invites a second-guessing of those choices that would narrow the scope of women’s decisional privacy as traditionally defined. In short, the agency critique renders untenable reliance on the concept of individual choice as a boundary for state regulation of the private sphere.

What do these feminist insights mean for Rawlsian liberalism? To what extent has Rawls responded to these critiques in a way that might satisfy feminists’ concerns? As Okin observes in her essay, when Rawls moves from the domain of moral philosophy in *A Theory of Justice* to the domain of political philosophy in *Political Liberalism*, he introduces a more explicit reliance on the distinction between public and private, or the political and the nonpolitical.<sup>23</sup> In other words, from a feminist standpoint, he moves in the wrong direction. Moreover, in his later work, he makes clear that the principles of justice apply only indirectly to the nonpolitical domain, including the family and civil associations.<sup>24</sup> Of course it is with the exercise of power in this domain that feminists have been principally concerned. The usefulness of Rawlsian liberalism to feminism depends, therefore, on the degree to which the indirect application of the principles of justice imposes meaningful constraints on the private sphere. Here, there is considerable disagreement even among liberal feminists, a point that is reflected in the very different readings of Rawls presented by McClain and Okin.

Beginning from what is, from a feminist perspective, Rawls’s astonishing assumption that the family is a just institution,<sup>25</sup> Okin

21. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304, 346 (1995).

22. See *id.* at 361-62.

23. See Okin, *supra* note 1, at 1554-57; Rawls, *Political Liberalism*, *supra* note 2, at xx-xxi (explaining the necessity of the political/nonpolitical distinction to the framework of political liberalism).

24. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 788 (1997) (noting that “[t]he principles of political justice are to apply directly to [the basic] structure [of society], but are not to apply directly to the internal life of the many associations within it”).

25. In *A Theory of Justice*, Rawls uses the phrase “*given that* family institutions are just.” John Rawls, *A Theory of Justice* 490 (1971) (emphasis added). In *Political Liberalism*, he notes only that “I do assume that in some form the family is just.” Rawls, *supra* note 2, at xxxi. This change in language suggests that, at least by the

treats his argument as presenting something of a puzzle: How could Rawls's theory be so thoroughly egalitarian in other respects and yet blind to patriarchy within the family? How could his theory rely centrally on the family as an institution of moral learning without envisioning radical changes to its structure? She goes on to make the powerful argument that to exempt the family from the scope of justice is both inconsistent within the broader theory of justice Rawls articulates and counterproductive to the function Rawls expects the family to serve: that of a site where justice is inculcated in the liberal subject.<sup>26</sup>

Although Okin notes that Rawls ultimately accepted the wisdom, if not the necessity, of most of the reforms she suggests to the family structure, she expresses some surprise that Rawls persists, in *Political Liberalism*, in his disregard of the implications of feminist criticism for his basic theory. Here she notes that Rawls invokes, much more explicitly than in *A Theory of Justice*, a distinction between the domain of the political and that of the nonpolitical, or in more familiar terms, between public and private. Okin explains the consequences of this move in this way: “[B]y reinforcing the distinction between the political and the nonpolitical and applying the principles of justice only to the former sphere of life, [Rawls] greatly reduces the potential for the development of a sense of justice in families.”<sup>27</sup> The scope of this problem depends, however, on whether the indirect application of the principles of justice has any bite. As evidence of the limited reach of justice indirectly applied, Okin notes that Rawls “made it abundantly clear that in his just, pluralist society, ‘reasonable’ conceptions of the good included religions that both preached and practiced highly sexist modes of life.”<sup>28</sup>

Okin emphasizes the way in which this move creates problems for the internal coherence of his theory by reducing the very social stability he hoped to achieve in *Political Liberalism* and further undermining the ability of the family to inculcate in its members a respect for justice.<sup>29</sup> From a feminist standpoint, these problems are less important than the simple point that Rawls's reliance on the public/private line means that the private domain is measured against a considerably less demanding standard of justice than the public domain.

But perhaps this less demanding standard is sufficient. McClain is certainly more optimistic than Okin about the indirect application of

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time he wrote *Political Liberalism*, he admitted of the possibility that the family may not *actually* be just.

26. See Okin, *supra* note 1, at 1549-51; Susan Moller Okin, *Justice, Gender, and the Family* 25-40 (1989) (presenting more fully the analysis summarized in the essay).

27. Okin, *supra* note 1, at 1556.

28. *Id.* at 1555.

29. *Id.* at 1558.



the principles of justice to institutions within the nonpolitical or private domain. Although she acknowledges that “Rawls does not insist upon ‘congruence’ between the values and virtues of the political order and those of civil society,”<sup>30</sup> McClain emphasizes his suggestion that the principles of justice place constraints on the institutions of civil society and on the structure of the family.<sup>31</sup> Specifically, she cites Rawls’s acknowledgment that civic associations “may be restricted . . . by what is necessary to maintain the basic equal liberties.”<sup>32</sup> She also finds some reassurance in Rawls’s acknowledgment of the existence of a “gender system” and his embrace of “‘the freedom and equality of women’ as part of public reason,” and not merely one of a number of reasonable comprehensive doctrines.<sup>33</sup> In this connection, she cites the extension of equal protection doctrine in United States constitutional law to challenge de jure gender discrimination as an example of how a liberal political regime could embrace the concept of women’s equality as foundational to a “well-ordered society.”<sup>34</sup>

McClain concedes that her feminist reading of Rawls depends almost entirely on the nature of the “essential constraints” that political justice imposes on the institutions of civil society.<sup>35</sup> If, according to Rawls, political principles do not apply directly to the internal structure of associations in civil society, what is at stake in the distinction between the direct and indirect application of those principles? Unlike Okin, McClain finds support for the proposition that political liberalism would exclude “a conception of the good requiring the repression or degradation” of women.<sup>36</sup> But how far would this principle permit the state to go in regulating the internal life of associations such as the family or religious institutions? Rawls’s own examples of conceptions that involve sufficient repression or degradation so as to justify such exclusion are rather narrow: “slavery in ancient Athens, or in the antebellum South.”<sup>37</sup> Nevertheless, McClain suggests that this boundary between reasonable and unreasonable comprehensive views could be drawn so as to exclude fundamentalist Christian education teaching the inferiority of women to men or possibly even the difference and complementarity of gender

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30. McClain, *supra* note 4, at 1573.

31. *Id.* at 1573-74.

32. *Id.* at 1574 (quoting Rawls, Political Liberalism, *supra* note 2, at 261).

33. *Id.* at 1574-75.

34. *Id.* at 1579. McClain’s invocation of equal protection doctrine as evidence of the promise of liberalism for women is somewhat surprising in view of the now well-established critique of the liberal conception of equality premised on sameness, a conception embodied by equal protection doctrine. See MacKinnon, *supra* note 3, at 163-67.

35. See McClain, *supra* note 4, at 1575 (quoting Rawls, Political Liberalism, *supra* note 2, at 196).

36. *Id.* at 1580.

37. Rawls, Political Liberalism, *supra* note 2, at 196.

roles.<sup>38</sup> As she explains, if “the practical effect of education in Christian fundamentalist and Catholic schools is to teach female students that “they are by virtue of their gender, inferior human beings”<sup>39</sup> then “[p]olitical liberalism’s concern for children’s developing the capacity to be fully cooperating members of society would *surely* lead to some constraints on associations’ perpetuating these sorts of messages.”<sup>40</sup> I am not so sure.

Although Rawls leaves many questions unanswered with respect to the place of associations, he is not silent on the issue. First, as Okin notes, he accepts all the main historical religions as reasonably comprehensive doctrines.<sup>41</sup> Second, he states that “liberal principles of political justice do not require ecclesiastical governance to be democratic. Bishops and cardinals need not be elected . . .”<sup>42</sup> Nor, we can probably assume, must the positions be open to the full range of members, both men and women. And yet, one might argue that such a structure conveys more effectively than gender-stereotyped parochial school curriculum the fundamental inferiority of women.

More importantly, extending his analysis of the family to other associations in civil society suggests that the indirect application of the principles of justice leaves considerable room for the perpetuation of gender hierarchy.<sup>43</sup> For example, Rawls notes that the principles of justice “do not inform us how to raise our children, and we are not required to treat our children in accordance with political principles.”<sup>44</sup> He adds, “at some point society has to rely on the natural affection and goodwill of the mature family members.”<sup>45</sup> Moreover, in addressing the structure of families, he notes that “a liberal conception of justice may have to allow for some traditional gendered division of labor within families,”<sup>46</sup> even though feminists

38. McClain, *supra* note 4, at 1581.

39. *Id.* (quoting Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community, and Women’s Equality* 63 (2003) (unpublished manuscript, on file with author)).

40. *Id.* (emphasis added). Curiously, McClain suggests that the role of the state may be limited to the exercise of discretion with respect to public funding of religious schools. *See id.* at 1581-82. From a feminist standpoint, however, it is difficult to see why public funding should matter if the school is teaching principles of gender subordination. McClain’s argument responds to the constraints of U.S. constitutional doctrine but surely is not required by liberalism viewed more broadly.

41. *See* Rawls, *Political Liberalism*, *supra* note 2, at 170.

42. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 789.

43. As Okin points out, important differences exist between the family and other associations. *See* Okin, *supra* note 1, at 1566. Nevertheless, Rawls himself invites a direct comparison between the family and other associations within civil society, placing them within the same category for the purposes of analyzing the indirect application of principles of justice. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 788-89.

44. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 790.

45. *Id.*

46. *Id.* at 792.

have argued that such division of labor helps to reproduce gender hierarchy within the broader social structure by inculcating gender stereotypes.<sup>47</sup> If Rawls is prepared to accept the potential for gendered education in the family, an institution which Rawls acknowledges (indeed relies upon) as the main site for the development of individuals' moral capacity, it seems unlikely that he would regard as unreasonable such education in the context of religious institutions.

And yet, Rawls insists that "[t]he adult members of families and other associations are equal citizens first: That is their basic position. No institution or association in which they are involved can violate their rights as citizens."<sup>48</sup> He adds, with respect to the family, that "[s]ince wives are equally citizens with their husbands, they have all the same basic rights, liberties, and opportunities as their husbands; and this, together with the correct application of the other principles of justice, suffices to secure their equality and independence."<sup>49</sup> He even acknowledges that insofar as the family "inculcate[s] habits of thought and ways of feeling and conduct incompatible with democracy . . . the principles of justice . . . can plainly be invoked to reform the family."<sup>50</sup>

How can these statements be reconciled with Rawls's insistence that, for example, the gendered division of labor within families or the sexist doctrine of major religions must be tolerated within political liberalism? Here Rawls turns to the concept of choice or voluntariness: With respect to the family, a gendered division of labor must be tolerated only so long as it is "voluntary and does not result from or lead to injustice."<sup>51</sup> Similarly, with respect to religious institutions, the patriarchal internal life of associations such as churches does not compromise the principle of political justice so long as "members of churches are always at liberty to leave their faith."<sup>52</sup>

This move provides little reassurance to feminists. First, as I have already discussed, feminists have long criticized the liberal concept of "voluntariness" and individual choice as a limit on the regulation of gender hierarchy.<sup>53</sup> Second, although Rawls acknowledges that a thin definition of voluntariness will not suffice, his placing of families within the same category as other associations suggests that his criteria for voluntariness are not particularly robust. As Okin points

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47. This literature is vast, but for an early example of such work, see Nancy Chodorow, *The Reproduction of Mothering* 109, 150-51 (1978) (discussing how gendered roles in parenting help to recreate gender identity within children and gender hierarchy within society).

48. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 791.

49. *Id.* at 789-90.

50. *Id.* at 790-91.

51. *Id.* at 792.

52. *Id.* at 789.

53. See *supra* text accompanying notes 12-19.

out, families of origin are never voluntarily entered and family exit is often exceedingly difficult, not least because it is highly regulated by the state.<sup>54</sup> Moreover, the definition Rawls adopts seems to require only the elimination of discriminatory economic conditions influencing the division of labor within families,<sup>55</sup> and thus stops well short of interrogating the thoroughgoing gendered socialization that informs individual choice.<sup>56</sup> Finally, it is not clear how the voluntariness criterion responds to the concern that the family not “inculcate habits of thought and ways of feeling and conduct incompatible with democracy.”<sup>57</sup> After all, from the standpoint of daughters, the gendered lesson of the family division of labor is not chosen but suffered.

Perhaps, as McClain argues, the additional qualification that the inculcation of gender stereotypes not “lead to injustice” provides an independent liberal basis for challenging such inculcation within the family or religious institutions.<sup>58</sup> Yet, Rawls declines to develop this qualification as a requirement independent of voluntariness. He explains that “to try to minimize gendered division of labor means, in political liberalism, to try to reach a social condition in which the remaining division of labor is voluntary.”<sup>59</sup> He adds that “[i]f the gendered division of labor in the family is indeed fully voluntary, then there is reason to think that the single system realizes fair equality of opportunity for both genders.”<sup>60</sup> In other words, the full realization of the voluntariness criterion simultaneously satisfies any concern about injustice. That even the voluntary gendered division of labor in families might compromise the equality of girls and women through

54. See Okin, *supra* note 1, at 1566.

55. See Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 792. He explains:

To say that this division of labor is in this case fully voluntary means that it is adopted by people on the basis of their religion, which from a political point of view is voluntary, and not because various other forms of discrimination elsewhere in the social system make it rational and less costly for husband and wife to follow a gendered division of labor in the family.

*Id.*

56. In a somewhat cryptic footnote, Rawls defines voluntary as “doing the rational thing when all the surrounding conditions are also fair.” *Id.* at 792 n.68. He then suggests a distinction between “subjective conditions of voluntariness (whatever they may be)” and objective conditions of voluntariness, addressed in the text. *Id.* McClain finds in this assumption a prerequisite for measuring voluntariness and, as such, an invitation to feminist theories of limited agency. See McClain, *supra* note 4, at 1583. Perhaps this is a plausible reading, but one wonders why Rawls would simply bracket it in a footnote, explaining that “[a] full discussion would lead us far afield.” Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 792 n.68.

57. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 790-91.

58. McClain, *supra* note 4, at 1582 (quoting Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 792).

59. Rawls, *The Idea of Public Reason Revisited*, *supra* note 24, at 792.

60. *Id.*

the inculcation of gender stereotypes seems not to have occurred to him.

However problematic these limitations are for Rawls's own theory, Okin does not see them as undermining completely the usefulness of his work to feminist goals. Indeed, she suggests that feminists can use the heuristic device of the original position to imagine the very changes to family structure that might, in turn, enable it to inculcate a commitment to justice in its members.<sup>61</sup> Among these changes, she suggests policies that "would encourage men and women to share the public and the domestic, the paid and the unpaid roles and responsibilities of family life, equally, so that both might participate on an equal footing in their various roles . . . in the non-domestic spheres of life."<sup>62</sup> More broadly, Okin maintains that a conception of justice shorn of "traditional liberal assumptions about public versus private, political versus nonpolitical spheres of life" would provide a tool "with which to think about how to achieve justice between the sexes."<sup>63</sup>

I find Okin's argument entirely convincing as a critique of liberalism's blindness to gender inequality. And I share her optimism that the original position can be co-opted by feminists in productive and interesting ways. At the same time, I am less convinced that the theory can accommodate her critique in a way that simultaneously satisfies both liberals and feminists. Put differently, I suspect that the structure that emerges from a radical feminist deployment of the original position is what one might term feminist egalitarianism and would not be recognizable as liberalism at all. Indeed, Rawls's resistance to his constructive feminist critics supports this reading.

### CONCLUSION

In the end, the tensions and inconsistencies in Rawls's discussion of religion, gender, and the family reflect a tension within liberalism itself: Insofar as Rawls embraces political liberalism as the innovation that permits democratic self-governance under conditions of cultural, moral, and religious diversity, he can accommodate only so much deconstruction of the line between the public and private spheres. At the same time, feminist work on the family and its role in the perpetuation of gender hierarchy makes the line more and more difficult to sustain in view of the liberal commitment to women's equality. The response, too often, is not to extend the principle of

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61. See Okin, *supra* note 1, at 1553-54.

62. *Id.* at 1554. Within this category, Okin includes subsidized child care, flexible working hours for care givers, gender-neutral leave policies, and robust enforcement of anti-discrimination laws. To this she adds compensatory policies designed to protect women who "choose" to undertake the bulk of care giving responsibilities at the expense of their own earning power and control of financial resources. *See id.*

63. *Id.* at 1553.

equality fully into the private realm but to extend the public/private boundary into the definition of equality. The result is an embrace of political equality among citizens in the public domain and a toleration of inequality in the private.

In short, whereas Okin sees Rawls as unaccountably resisting the logical implications of his commitment to equality, and McClain sees him as quietly (or maybe only implicitly) embracing an equality robust enough to support a version of feminist perfectionism, I see him as adhering consistently to the only conception of equality that is thin enough to fit comfortably within his liberal framework.

*Notes & Observations*