# TABLE OF CONTENTS

**ACKNOWLEDGEMENTS**  vii  
**TABLE OF CONTENTS**  xi  

1. Introduction  1  

## PART I: LIBERALISM AND THE PUBLIC-PRIVATE DISTINCTION  

2. The Public-Private Distinction in Liberal Political Philosophy  15  
   2.1. Introduction  15  
   2.2. The Public-Private Distinction in the History of Western Political Thought  16  
      2.2.1. Thomas Hobbes and the Leviathan  16  
      2.2.2. John Locke and the Body Politic  17  
      2.2.3. Jean-Jacques Rousseau and the Transformation of Man  20  
      2.2.4. Immanuel Kant, Private Happiness and Public Welfare  22  
      2.2.5. G.W.F. Hegel and the Spirit  24  
      2.2.6. Jeremy Bentham and the Logic of Obedience  26  
      2.2.7. Jürgen Habermas and the Public Sphere  27  
   2.3. Concluding  33  

## PART II: CRITIQUES OF LIBERALISM'S PUBLIC-PRIVATE DISTINCTION  

3. Marx's Early Critique  37  
   3.1. Introduction: Away from, or Against, the Liberal Public-Private Divide  37  
   3.2. Karl Marx and the Critique of Alienation  39  
   3.3. Concluding  42  

4. The American Legal Realist Critique  43  
   4.1. Introduction  43  
   4.2. The Critique of Laissez-Faire Economics  45  
   4.3. The Critique of Contract Doctrine  46  
   4.4. The Critique of Property Law  47  
   4.5. Evaluating the Legal Realist Critique and its Impact  49
5. Critical Legal Studies (CLS) and its Critique
   5.1. Introduction 52
   5.2. CLS and the Public-Private Distinction: Selected Works 55
      5.2.1. Duncan Kennedy on the Structure of Blackstone’s Commentaries 55
      5.2.2. Gerald Frug on the City as a Legal Concept 68
      5.2.3. Karl Klare on the Public-Private Distinction in Labor Law 77
      5.2.4. Paul Brest on State Action and Liberal Theory 83
      5.2.5. Frances Olsen on the Family and the Market 87
      5.2.6. Duncan Kennedy on the Decline of the Public-Private Distinction 96
   5.3. Common Traits in the CLS Critique of the Public-Private Distinction 101
      5.3.1. An Emphasis on Logical Contingency or Indeterminacy 101
      5.3.2. An Emphasis on Historical/Contextual Embeddedness 108
      5.3.3. An Emphasis on Ideological Function 110
      5.3.4. Structuralism and the CLS Critiques 115
   5.4. Concluding: The Legacy of CLS for our Thinking About the Public-Private Distinction 121

6. New Approaches to International Law (NAIL) and its Critique 123
   6.1. Introducing NAIL 123
   6.2. Koskenniemi’s Structural Analysis of International Legal Argument 126
   6.3. Concluding: the Public-Private Distinction as Structuring a Grammar 132

7. Feminist Critiques of the Public-Private Distinction 133
   7.1. Introduction 133
   7.2. Feminism in a Nutshell 134
   7.4. Feminist Public-Private Critiques of Human Rights 155
   7.5. Feminist Pursuit of Social Change and the Theory-Action Dichotomy 167
   7.6. Concluding: Living Within and Against a Conceptual Framework 177
# PART III: THROUGH THE LOOKING GLASS: INTERNATIONAL HUMAN RIGHTS LAW OBSERVED IN THE PRISM OF THE CRITIQUES

8. The General Human Rights Theory and Idea
   8.1. Introduction: Through the Looking Glass
   8.2. International Law, Human Rights, and the Public-Private Distinction
   8.3. Human Rights and its Histories of the Public-Private Distinction
   8.4. CLS Critiques of Rights
   8.5. Indeterminacy and the Public-Private Distinction as Deferral
   8.6. Ideology and Structural Bias in Human Rights
   8.7. Concluding Observations

   9.1. Introduction
   9.2. Verticality Lost and Regained: Horizontal Effect and Positive Obligations
   9.3. Managing Europe's Public-Private Distinction: the Margin of Appreciation
   9.4. Concluding

10. The Distinction at its Most Concrete: Reading the Public-Private in the European Court of Human Rights’ Case Law on Homosexuality
    10.1. Introduction: Practices of Reading
    10.2. Common Readings
    10.3. Alternate Readings
       10.3.1. Public, Private, and Gay: Dudgeon, Norris, and Modinos
          10.3.1.1. The General Structure of the Cases
          10.3.1.2. The Applicants and Their Facts
             10.3.1.2.1. Dudgeon
             10.3.1.2.2. Norris
             10.3.1.2.3. Modinos
          10.3.1.3. The Domestic Law
             10.3.1.3.1. Dudgeon
             10.3.1.3.2. Norris
10.3.1.3.3. Modinos 268
10.3.1.4. The Merits of the Cases 270
  10.3.1.4.1. Interference with an Article 8 Right 270
  10.3.1.4.2. A Legitimate Aim 275
10.3.1.4.3. Necessity in a Democratic Society 276
10.3.2. After Decriminalization: Salgueiro da Silva Mouta, Lustig-Prean & Beckett, Smith & Grady, and A.D.T. 288
  10.3.2.1. The Applicants and Their Facts 289
    10.3.2.1.1. Salgueiro da Silva Mouta: Homosexuality and Family Law as Private and Public Politics 289
    10.3.2.1.2. Lustig-Prean & Beckett, and Smith & Grady: Dragged Out of the Army Locker 298
    10.3.2.1.2.1. The Applicants, Their Ordeal, and Their Politics 298
  10.3.2.1.2. The Policy Concerning Homosexuals in the Army 304
  10.3.2.1.3. A.D.T. v. U.K.: Group Sex and Videotapes 309
10.3.2.2. Selected Public-Private Themes 311
  10.3.2.2.1. Salgueiro: the Politics of Difference 311
  10.3.2.2.2. The Army Cases 313
    10.3.2.2.2.1. Unity and Fragmentation in the Domestic Constitutional Setting 313
    10.3.2.2.2.2. Who Knows Best? The Locus of Authority and the Public-Private Distinction 316
    10.3.2.2.2.3. Gays, Women & Racial Minorities: Private Conduct vs. Public Categories 319
10.3.3. The 'Rather Curious Activities' of Laskey, Jaggard, and Brown 323
  10.3.3.1 Laskey, Jaggard, and Brown in Dialogue with the Other Cases 323
  10.3.3.2. The Question of Consent 328
  10.3.3.3. Sadomasochism and Homosexual Behavior 335
10.4. Concluding 337

11. Conclusion: The Public-Private Distinction After the Critiques 345
  11.1. Cumulative Critiques 345
  11.2. The (Non-)Responses to the Critiques 350
    11.2.1. The Critiques Are Wrong 352