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Taking a Break from Acrimony: The Feminist Method of Ann Scales

Katherine M. Franke
Columbia Law School, kfranke@law.columbia.edu

TAKING A BREAK FROM ACRIMONY: THE FEMINIST METHOD OF ANN SCALES

KATHERINE FRANKE[†]

ABSTRACT

In this Essay, written as part of a symposium honoring the work of Professor Ann Scales, Professor Katherine Franke explores how Professor Scales may have approached the cutting edge problem of same-sex couples divorcing. Professor Scales's work evidenced a deep commitment to the twin projects of recognizing structural gender disadvantage suffered by women and the tyranny of gender stereotypes. This Essay speculates that Professor Scales's feminist commitments would be unsettled by the application to divorcing same-sex couples of rules and norms of divorce forged in the heterosexual context where gender inequality set the parameters of justice. Indeed, Franke speculates that Scales would share her concern about the potential for divorce law to heterosexualize same-sex couples by slotting them into familiar social roles of husbands and wives. The problem of gendering lesbian husbands and gay wives ought to be a serious subject of feminist critique and is amenable to the feminist analysis Professor Scales left us in her written work.

† Isidor and Seville Sulzbacher Professor of Law and Director of the Center for Gender and Sexuality Law, Columbia Law School. This Essay derived from the keynote address I provided at the Symposium at the University of Denver Sturm College of Law in honor of Professor Ann Scales and her work. I thank Nancy Ehrenreich for this kind invitation to contribute to such an important tribute to Professor Scales's work. Thanks to Fred Hertz for many conversations about the complexities of folding same-sex couples into the domain of civil marriage.

Ann Scales left us too soon. As others have mentioned in this Symposium held in her honor, Ann was one of the founding mothers of feminist jurisprudence—it may be that she even invented the term itself.[1] She left us a rich legacy of work, cut short by her untimely death. In fact, I am at pains to note that 2012 was a year too full of losses in feminist legal theory and activism. Besides Professor Scales, we lost Jane Larson at the University of Wisconsin, Katherine Darmer at Chapman University, and Paula Ettelbrick who had taught at Barnard College, New York University, and the University of Michigan. Like Professor Scales, Professors Larson, Darmer, and Ettelbrick passed away tragically, far too early, and were among the nation's leaders in generating a body of scholarship that was nuanced in its explicitly feminist ambitions and theoretically sophisticated in its method.[2]

When Professor Scales returned to the academy in 2003, having taken a five-year hiatus from a highly successful career as a law professor, she openly lamented the direction and tone that much feminist legal scholarship had taken.[3] She expressed nostalgia for the early days when an explicitly feminist analysis of law and social disadvantage was being forged in the 1980s. This is how she put it:

> I . . . was a ground-floor participant in what came to be known as "feminist jurisprudence," . . . . As more voices joined the debate, it got pretty raucous. Even though there were sharp disagreements and discomforts, those were heady days. Most of the feminist jurisprudes knew one another, talked with one another, and kept track of one another's work. . . .
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> . . . . Upon my return to the academy, it seemed to me that much of feminist jurisprudence had gone missing at the same time that I had gone missing. Before my disappearance, I was already a bit grumpy about what I regarded as the encroaching domestication of feminist

1. BLACK'S LAW DICTIONARY 932 (9th ed. 2009) (referencing Professor Ann Scales as authoring the first publication to use the phrase "feminist jurisprudence").

2. *See, e.g.*, M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards a More Progressive Equal Protection Rights Discourse*, 18 AM. U. J. GENDER SOC. POL'Y & L. 439 (2010); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, at 9, 14; Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996); Paula L. Ettelbrick, *Who Is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1 (1997); Jane E. Larson, *The Sexual Injustice of the Traditional Family*, 77 CORNELL L. REV. 997 (1992); Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

3. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 2–3 (2006).

> legal theory, the dulling of some of the sharpest edges. Sure enough, as of my reentry, I discovered that we were in a "postfeminist" age.[4]

In fact, it was Janet Halley's invitation that we "take a break from feminism" that really put Ann over the edge.[5] I remember attending a conference on women and the law at the University of Texas in 2003 when Janet floated the notion of "tak[ing] a break," to the shock, if not outrage, of many of the participants.[6] Ann was among them, and I recall her reaction—fury, really—that somehow feminism had accomplished enough politically and institutionally that it was something from which we could productively take a break. But what I recall even more vividly were the women of color in the room who, for the most part, taught at public universities in the South, and who felt that Janet's invitation ignored the unequal distribution of the fruits of feminism across regions, classes, and races in the United States. When they spoke on the panel that followed Janet's they were indignant, but more than that, they were hurt. I sat next to a woman in the audience who was in tears, weeping at how invisible Janet's talk made her feel—as a woman, as a woman of color, and as a law professor working at a school where neither she nor her students enjoyed the privileges and riches of Harvard.

I recall Ann standing in the back of the room, arms crossed and brow furrowed, more apprehensive about the state of the field than assaulted personally by the suggestion that we had entered a time when we could and should move beyond feminism.

I recount this story to emphasize aspects of Ann's work—including her writing, her teaching, and her activism—that I think distinguished her in important ways from many of our peers. The first is how deeply committed Ann was not only to ideas, but also to ideas that had traction in the world. She insisted over and over in her work that theory must join hands with practice and that the two need to inform one another.[7] Making ideas do real work is difficult, but it's what she aimed for in all her work.

Second, she lamented the divisions within feminist legal theory and the ways in which we fought with one another on the page. She was a scholar who was at once quite radical in her politics[8] and other-regarding

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4. *Id.* at 1, 3 (footnotes omitted) (quoting Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989)).

5. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

6. *See* Janet Halley, *Round Table Discussion: Subversive Legal Moments?*, 12 TEX. J. WOMEN & L. 197, 224–25 (2003).

7. *See, e.g.*, Ann Scales, *Law and Feminism: Together in Struggle*, 51 U. KAN. L. REV. 291, 292–93 (2003); Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 10–11 (1992) [hereinafter Scales, *Feminist Legal Method*].

8. "[F]eminist legal method can be scary as hell." Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 36 n.10 (1997); "[The Senate hearings

in her ethics.[9] Her work took up the ways we could entertain disagreement as feminists on issues in which we have such important and vital personal stakes. By this, I mean she steered clear of the acrimony that she felt increasingly characterized feminist legal scholarship after her return to the academy ten years ago. Strongly influenced by the work of Catharine MacKinnon, Ann watched how MacKinnon's work was mischaracterized, parodied, or attacked in ways that personalized the debates among a community of scholars who no longer saw themselves as somehow engaged in a joint enterprise.[10] In Ann's view, this acrimony dishonored the important insights that MacKinnon's work had to offer. So too she felt it was counterproductive to larger feminist goals such as taking down patriarchy and women's systematic disadvantage through careful, smart, and grounded analysis of the built-in biases of law and legal structure.

Rather than take a break from feminism, Ann insisted that we expand feminism's range. She closed her book *Legal Feminism* with this: "Let's explicitly consider and apply the insights of feminist legal theory, and then get on with all the business at hand."[11]

So, taking this demand seriously, I want us to consider how Ann would have approached a newly emerging domain in American social and legal life that is ripe for careful feminist analysis but has not, for the most part, received feminist attention. This domain is that occupied by newly married same-sex couples.

As more and more same-sex couples legally marry, they find themselves governed by a set of rules that allocate rights and responsibilities, and distribute and redistribute property, in ways that were developed with heterosexual relationships in mind. Marriage law—and most importantly, feminist reforms to marriage law in the last fifty years—takes matrimony to be a legal relationship that is fundamentally structured by gender inequality. The rules of support within marriage and the rules of distribution upon divorce are designed to take that underlying structural gender inequality into account. The taken-for-grantedness of this evolution in the law of marriage and divorce we can chalk up as a victory for feminist lawyering and advocacy.

As we stand at the precipice of same-sex couples gaining the right to marry—maybe not in one fell swoop by the Supreme Court this term,

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on Clarence Thomas's nomination to the Supreme Court] indicated to me that patriarchy is running scared." Scales, *Feminist Legal Method*, *supra* note 7, at 1 (footnote omitted).

9. When the law must choose among realities, the principle of equality requires that we look to see whose dignity is most at stake, whose point of view has historically been silenced and is in danger of being silenced again, and that, in the ordinary case, we choose that point of view as our interpretation.

Scales, *Feminist Legal Method*, *supra* note 7, at 27.

10. This is one of the central, early arguments of her book, SCALES, *supra* note 3, at 13.

11. *Id.* at 151.

but soon—it is worth, if only for a moment, shifting our attention from gaining the right to marry to the social, legal, and economic consequences of *being* married. What will it mean for lesbians and gay men to be governed by a set of norms that never had them in mind? How might we anticipate forms of injustice and disadvantage that will ensue when family court judges, accustomed to adjudicating the fair dissolution of heterosexual marriages, are faced with applying the law of marriage to couples whose lives and values may not squeeze easily into the roles of husbands and wives? Even more so, how might the heterosexual presumptions that undergird the current law of marriage perversely provide leverage to one or both parties in divorcing same-sex couples whose position would be advantaged by exploiting stereotypic and gendered notions of the roles, vulnerabilities, and powers of husbands and wives?

The project of thinking through marital justice for same-sex couples should be both queer and feminist in nature and could benefit enormously from the feminist analysis Ann Scales left us.

Let me offer two examples to illustrate the challenges of applied feminist theory in this larger context.

First, a few months ago I was invited to give a talk at St. Bartholomew's Episcopal Church on Park Avenue in New York. The church was founded in 1835 and has a rather affluent membership that is surprisingly diverse.[12] Their lesbian and gay fellowship invited me to talk to them about the marriage cases that were before the Supreme Court.[13] I don't get asked to talk at church very often, so I welcomed the opportunity to reach a new and different audience.

About seventy-five people showed up, including one woman whom I'll call Beth who lived in New Jersey and came in to mass at St. Bart's every Sunday. She raised her hand at the end of my talk and shared the following story:

After divorcing a man fifteen years ago, Beth was set up on a blind date with a woman—let's call her Ruth—and they dated on and off for nine years. Beth bought, renovated, and flipped houses and had become quite successful doing so. Ruth, on the other hand, was a licensed electrician working through the electrician's union. Their relationship was very volatile, but they wanted to try to figure out how to make it work. There were some deep issues of conflict—largely having to do with class differences and money—that they could not resolve and kept returning to in their fights. Beth, the more affluent of the two, had two teenage children from her prior marriage and had primary custody of the kids. Three years ago Beth and Ruth reunited after having broken up for about nine

12. *See* St. Bart's, http://www.stbarts.org (last visited Oct. 16, 2013).

13. United States v. Windsor, 133 S.Ct. 2675 (2013); Hollingsworth v. Perry, 558 U.S. 183 (2010).

months, and they went to a counselor to set out some ground rules about their separate and joint financial lives. Together with the counselor they agreed not to commingle their assets but to live together and jointly contribute to their daily living expenses. Their contributions would not be the same, as Beth would contribute 80% and Ruth 20%. They both agreed in front of the counselor to the terms of the financial arrangement, hoping that this would minimize future conflict in the relationship.

Not surprisingly, it didn't. Beth then told me that they did something that really surprised me: "We decided to get married in Massachusetts." As Beth explained it to me later:

> We just thought that getting married would allow us to work things out without the threat of breaking up. We both thought it would make us feel safer to work through the hard stuff if we had the legal structure of marriage around our relationship. I don't know what I was thinking; it's like people deciding that having a baby will help keep them together.[14]

Fifteen months later they had a terrible fight and Ruth moved out. Beth then filed for divorce and Ruth's lawyer demanded her equitable half share of all of Beth's assets, as well as ongoing support. They never put their premarital financial agreement in writing, but the counselor with whom they worked out the agreement testified in the trial to its details.

Here's how the judge ruled:[15]

- She ignored the prenuptial agreement because it wasn't in writing, and under New Jersey law a prenuptial financial agreement must be in writing.[16]

- She backdated their marriage to when they started living together rather than to when they actually legally married, therefore rendering all of their property accumulated in the six years prior to the marriage marital property.

- She did not consider the periods in which the two were broken up and living separately as "breaks in the ongoing relationship" because Ruth returned to Beth's home a few times a year to visit the kids for birthdays and holidays, thus evidencing, in the judge's view, an ongoing relationship.

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14. Conversation with Beth, St. Bart's attendee (March 28, 2013).

15. These details are from my conversations with Beth in which she described the judge's ruling to me.

16. N.J. STAT. ANN. § 37:2-33 (West 2013) ("A premarital or pre-civil union agreement shall be in writing, with a statement of assets annexed thereto, signed by both parties, and it is enforceable without consideration.").

• She found that during a yearlong period when Ruth wasn't able to get work, Ruth stayed home and took care of the kids and did other unremunerated housework, which amounted to her contribution to the family's well-being.

• She treated all of Beth's assets as marital property and granted Ruth a half share in all of it.

Beth and I have talked quite a bit since the meeting at St. Bart's, and I have gotten a pretty good sense of what she's going through. She is, as you might imagine, outraged that the laws of equitable distribution applied to their divorce even though they agreed otherwise. "I want my experience to be a cautionary tale for others—gay people should be wary of marriage," she told me. "You have no idea what you're getting yourself into."

So here are a few things to think about as *feminists* when considering this case: Beth's perspective reflects what I've come to call the "lesbian husband" position. She feels like she earned her own money fair and square, not due to any gender-based advantage that a male husband married to a female wife might have. Ruth should not have any legal entitlement to her money; in fact, Ruth agreed not to make such a claim before they got married. In so many ways, Beth's position is not unfamiliar in divorce cases—it's the husband position, seeking to minimize financial exposure in a divorce from a wife who has lower wage-labor market power and trying to limit that exposure through a prenuptial agreement.

On the other hand, Ruth looks a lot like a "lesbian wife"—going in and out of the wage-labor market, earning less money, and contributing less financially to the family's joint support. The court even understood her to be a "housewife" for part of their marriage, performing unpaid domestic labor with which family court judges and divorce law are quite familiar. On this view, Beth should not be able to just walk away from Ruth, leaving her destitute while Beth retains all of her substantial assets. Given that same-sex couples were not able to marry at the point that Beth and Ruth got together, it is only fair and just that the judge backdate the marriage to early in their relationship on the notion that they would have married if they could have. In this sense, the shadow of the law of marriage[17] is cast backward as a kind of restitution for a status injury the couple faced, having been barred from marrying for much of their relationship.

17. Ariela Dubler has updated Mnookin and Kornhauser's work on the shadow of marriage in ways that might inform the equities of the illustrative cases I offer in this essay. *Compare* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how marriage laws affect bargaining powers with respect to divorcing couples), *with* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003) (discussing how women outside of the institution of marriage have been legally defined by marriage laws).

On this telling, Beth and Ruth's case looks a lot like a traditional heterosexual divorce—the husband, the one with more assets, trying to part with as few of those assets as possible, and the wife, the one with fewer resources, trying to gain as capacious an interpretation of equitable distribution as possible.

Let me offer another story—a briefer one, but one that illuminates another way in which marriage law "unmodified" (to borrow Catharine MacKinnon's term[18]) may not be up to delivering justice in the context of same-sex couples divorcing.

A friend of mine practices family law in the Bay Area and has been doing so for years—since long before same-sex marriage or civil unions. He tells me that he's seeing a trend emerging in a number of the gay-male divorces he has handled. Where the two men in the couple have different earning power or assets, the less affluent spouse is declining to demand his half share at the time of divorce because it genders him as a wife to do so. He would rather leave the marriage with his masculinity intact than be turned into an ex-wife receiving alimony. For gay men in this situation, the fear of marriage law gendering them motivates them to forgo economic advantage. This dynamic contrasts with my first example where the gendering of the weaker party provides her with an economic advantage she is more than happy to seize.

With the guys, just as with the women, the law of marriage and divorce imposes—if not imprints—status-based and gendered identities on the parties in ways that clearly change how they might have seen themselves had marriage law not been on the scene. The desirability of these identities may cut in opposite directions depending upon whether masculinity or femininity is at issue.

The new world we live in, one in which lesbian and gay couples are increasingly marrying, holds out two different ways of thinking about the subversive feminist potential of this important change in the law.

We could see the revolutionary project as disassociating gender from sex. That is to say, we could entertain the notion that women can be husbands and men can be wives. That's pretty "gender-y" as Eve Sedgwick once said.[19] I suspect that that project would not satisfy a feminist like Ann Scales. She would want to do more.

The lesbian-husbands and gay-wives analysis surfaces and illuminates gender differences and advantages that are quite familiar in marriage and in society more generally. Yet this account ratifies marriage as

18. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

19. *See* Eve Kosofsky Sedgwick, *"Gosh, Boy George, You Must be Awfully Secure in Your Masculinity!"*, *in* CONSTRUCTING MASCULINITY 11, 16 (Maurice Berger et al. eds., 1995) (emphasis omitted).

essentially a status-based relationship populated by stock characters locked into roles that predetermine their relative rights and responsibilities, and powers and vulnerabilities. It risks turning back the modern reconceptualization of marriage as more contract than status.

Is there any way in which we might, as feminists, be inclined to resist the application of a traditional heterosexual frame of reference for these cases? Queer theory has certainly been up to this project for some time.[20] But what might a *feminist* critique contribute? Need we take a break from feminism to appreciate the risks of returning to good old-fashioned status when analyzing a marriage like Beth and Ruth's or the gay-male divorces I described?

It can't be that the only way that power inequalities in marriage can become legible to family court judges is through the epistemic violence of casting them in familiar gendered roles that have already been scripted by traditional notions of marriage. What if we were to see this as an opportunity to disorganize marriage and gender altogether? By this I mean, what if the increasingly common phenomenon of same-sex spouses had the effect of blowing up the very notion of roles in marriage completely?

Let's turn to Ann's work to see if it can help. Her brand of feminism, as she described it, is "concrete, antiessentialist, . . . instrumental, eclectic, and open-minded."[21] Concrete insofar as it grows out of real experiences of subordination caused by gender-based hierarchies. Antiessentialist in that it is not tied to any foundational moral principle. Instrumental to the extent that law should not be understood to be "a fixed mirror of human rationality,"[22] but must always be used to address human needs and ends. And eclectic to the extent that we have to be open to revising our "beliefs and strategies when necessary because experience is too complex to be captured by" adherence to any rigid approach.[23]

Given these precepts, as applied to the challenges of rights and responsibilities in same-sex marriages, one might be inclined to reject the return to status through the translation of lesbian and gay relationships into the vernacular of legal marriage. Instead, let's start with the concrete contexts and values of lesbian and gay relationships that have evolved before marriage was ever a reasonable possibility. Outside the structure of marriage law, same-sex couples were not strangers to the notion of interdependency, commitment, and care. Rather we forged what many self-consciously understood to be alternatives to the off-the-shelf, gendered binary of marriage, and we constructed webs of care and commit-

20. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE vii (1999).

21. SCALES, *supra* note 3, at 8.

22. *Id.*

23. *Id.* at 9.

ment that were not necessarily bound by erotic attachment. So too, we created erotic attachments that did not necessarily entail care or commitment. Perhaps most importantly we elaborated loving, caring selves in contexts that were not principally structured by gender inequality. Unleashed from the preordained roles of husband and wife, gender turned up in lesbian relationships, if it turned up at all, in often unpredictable, fluid, and interesting ways. It could be used like a lash ("stop acting like a man") or as a repertoire of erotic exchange, such as in butch/femme role-play or the familiar description of someone as "butch in the streets, femme in the sheets." What you saw on the outside wasn't necessarily what you got on the inside. Of course this is true of men and women in straight relationships as well, but with lesbians, gender—however fluid—has been less likely to produce structural inequalities in the same way that it has with heterosexual couples.

I think Ann would urge us to reject the translation of lesbian spouses into essentialized husbands and wives, and instead use the presence of same-sex couples in marriage as a productive opportunity to further de-essentialize marriage *tout court*. Rather than turning to familiar tropes, I think she'd prefer a more functional approach to the assignment of rights and responsibilities at the point of lesbian divorce. Rather than asking whether they functioned like a married couple and then marrying them retroactively, the court should attempt an inquiry into how their relationship functioned. What kind of commitment had they made to one another, and how can the law of marriage reflect and value what lay at the heart of the relationship when it was working well? These are feminist values that do not merely come to the rescue of women who occupy subordinate positions relative to men, but that resist the essentialization of women as always already the weaker party. In this sense I think that when it comes to same-sex divorces we need to abandon the structural approach that most judges bring to heterosexual divorce cases—a structure many feminists have urged them to take,[24] but one that can only understand inequalities between the parties as necessarily the product of gender-based power.

Disorganizing gender roles in marriage may help transform the way that so many wives seem to surrender all manner of self-sovereignty in marriage, starting with "taking" their husbands' names, to "letting" their husbands do most if not all of the driving, to the way that marriage as an economic unit tends to incentivize the making of "choices" that render one party—typically the wife—more economically vulnerable (such as not investing in her career, working part-time or not at all, or moving for his job).

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24. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 171 (1989).

This could be the kind of project Ann might have had in mind when she insisted that we bring "concrete, antiessentialist, instrumental, . . . eclectic, and open-minded" feminism to bear on the business at hand.[25] Like you, I'm just heartbroken that she can't be here to help us think it through, because I, for one, cannot figure it all out on my own.

25. *Id.* at 8.