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Feminism's Family

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To take the pulse of feminist legal theory, a good place to start is family law. Feminist legal theory delves broadly and deeply into questions of structure and gendered assumptions in the law, but within this larger inquiry, feminist scholars perennially address issues that are the bread and butter of family law—domestic violence, reproductive freedom, compensation for care work, equal partnerships, and so on. Many family law scholars are engaged in an ongoing project of developing a critical understanding of the family by examining issues such as the role the family performs in society, the legal construction of the family and the relationships within it, and how the law perpetuates and potentially dismantles inequalities within and among families.

Despite popular accounts portraying feminism as moribund among young people, feminist legal theory is an energizing force for a new generation of family law scholars engaged in this larger critical project. The energy it provides, however, is not uncomplicated. The work of these "emerging family law scholars" (our name) demonstrates the maturation of feminist legal theory: scholars are embracing feminist legal theory as a resource but also not hesitating to adapt it or move beyond it when it becomes too restricting. In this twin approach—treating feminist legal theory as both an enabler and a constraint—I see healthy development. As evidenced by the work I describe below, emerging family law scholars are engaging with feminist legal theory in their own way, extending the insights of earlier generations to new challenges, merging feminism with other critical discourses, and exposing the still very much unfinished work of bringing feminist consciousness to mainstream legal thinking.

To develop this point, I begin with Janet Halley's wonderfully provocative book, *Split Decisions*. As Halley describes it, the purpose of her "book is to push against the idea that feminism—or any theory that the left has about power and sexuality—is somehow 'right.' I want to move the issues from that certainty to a place of hypothesis."[1] Halley defines feminism as being committed to reversing the subordination of women.[2] In her shorthand, Halley understands this commitment as "m/f, m > f, and carrying a brief for f."[3] To Halley, this formula means "a distinction between something m and something f; a commitment to be a theory about, and a practice about, the subordination of f to m; and a commitment to work against that subordination on behalf of f."[4] Halley contends

[1] John Sutherland, *The ideas interview: Janet Halley*, THE GUARDIAN (Aug. 8, 2006), available at http://www.guardian.co.uk/world/2006/aug/08/gender.academicexperts.
[2] *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 4 (2006).
[3] *Id.* at 5.
[4] *Id.* at 4-5.

that "[i]t's not necessary for feminism to hold to these three points, but my experience is that so far, in the United States, it always does."[5]

Although Halley acknowledges that feminist legal theory "has been highly productive both as a social force and as an idea generator for the Left,"[6] she argues that it has become totalizing because it demands that we develop *one* theory, rather than embrace multiple theories, and because this one theory is used not only as a descriptive tool but also to develop a normative agenda.[7] In lieu of an omnipotent and omnipresent Theory, Halley urges scholars to "see theory fragments lying about that we can use quite instrumentally, pragmatically, and disloyally to deal with problems we perceive and want to do something about."[8] More specifically, Halley wants to move the commitments to m/f, m > f, and carrying a brief for f to a place of hypothesis, and thus "take a break from them and try to see other arrangements of m and f and other kinds of power," as well as advocate for other interests, while still drawing upon feminist theory.[9] Halley contends that using multiple theories to develop hypotheses about the world complicates choices about what to do and that this uncertainty is "a vital and engaged moment."[10]

Although Halley's purposefully caricatured formula ignores many rich strands of feminist legal theory,[11] my intention in this essay is not to critique her book but rather to explore her insight that we are at a particular moment in the development of feminist legal theory and that this moment holds tremendous potential. Assuming that at least some of feminist legal theory reflects Halley's

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[5] *Id.* at 5.
[6] *Id.*
[7] *See id.* at 6.
[8] *Id.* at 7.
[9] *Id.* at 8 (emphasis in second quotation omitted).
[10] *Id.* at 8-9.
[11] To give just two examples, consider the work of Angela Harris at the intersection of feminism and critical race theory and Katherine Franke at the intersection of feminism and queer theory. Both scholars work within feminism, but both also actively work against Halley's formula. *See, e.g.*, Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1993). Thus, it surely cannot be correct, as Halley posits, that feminist legal theory in the United States "always" embraces her formula, *see* HALLEY, *supra* note 2, at 5, although her response likely would be that in these works, Harris and Franke (and others doing similar work) are taking a break from feminism, *see id.* at 20 (acknowledging that what she calls "hybrid" feminists do depart from the formula, but contending that they do so "by diverging from and thus suspending their feminism"). My aim in this essay is not to engage in an extended debate about the definition of feminism, but rather to take Halley's formula as sufficiently descriptive of at least some feminist legal theory and then explore how emerging family law scholars engage with this understanding of feminist legal theory.

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neat mathematical formula,[12] a new generation of scholars is taking up the challenge of rejecting this cramped view of feminism while still drawing upon feminist legal theory as an energizing force.

The scholars I describe below do not present their work as explicitly taking a break from feminism, but I see at play some of the ideas in *Split Decisions* and particularly the idea that feminism can be both enabling and constraining. From within my chosen generational cohort, I selected three pieces of work from three different scholars—Melissa Murray, Clifford Rosky, and Jeannie Suk—because their scholarship exemplifies this enabling/constraining approach to feminist legal theory. I see these three scholars using aspects of feminist legal theory to develop key arguments in their scholarship. But I also see these scholars not hesitating to reject feminist legal theory when parts of it do not serve their purposes. Each scholar moves beyond Halley's mathematical formula to do something different. And in this move, there is no sense of betraying a cause. There are no hang-ups about loyalty. Rather, there is a commitment to a new discourse, not bound by the constraints of orthodoxy. Further, these scholars combine feminism with other theories of power and domination, tailoring these theories to their own needs.

I begin with Melissa Murray's article, *The Networked Family*.[13] In this piece, Murray contends that the legal construction of caregiving recognizes only parents as caregivers and fails to acknowledge the many other, non-parental, individuals who help raise children—grandparents and other family members, close family friends, babysitters, and day care workers, to name but a few.[14] In seeking to expose the gap between doctrine and practice,[15] Murray's normative move is to argue that the failure to recognize non-parental caregivers means the law does too little to help support the important networks of care upon which parents rely.[16] For example, the Family and Medical Leave Act, although taking a functional approach to parenthood, allows leave only for "parents" to care for their "children," excluding all other caretakers who may play an important role in a family's network but who would not be considered a parent or parent equivalent.[17]

Murray contends that family autonomy is part of the reason why law fails to recognize the networked family. She argues that by placing most parental decisions beyond the reach of the law, family autonomy obscures the law's

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[12] References in this essay to "feminist legal theory" thus embrace Halley's definition, if only for purposes of argument and illustration.
[13] Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).
[14] *See id.* at 390-94.
[15] *See id.* at 388-89.
[16] *See id.* at 410-15.
[17] *See id.* at 407-08.

understanding of how families operate.[18] In developing this argument, Murray draws upon the work of feminist legal scholars who have maintained that family privacy provides cover for dysfunctional, often violent, marriages.[19]

Murray argues that legal recognition of a broad array of caregivers would better align the legal conception of the family with the reality of families' lives. It would benefit parents by acknowledging that all parents need and use non-parental caregivers, thereby easing the guilt and anxiety many parents feel when relying on others to care for their children and helping to lessen the perception of pathology that often surrounds non-white families who, statistically, are more likely to rely on non-parental caregivers. Murray suggests that this legal recognition would strengthen the network and also benefit caregivers by expressing state approval for carework.[20]

In this article, Murray draws from feminist legal theory but also moves beyond it to develop her own understanding of the relationship between the state and caregivers. For example, when Murray analogizes the covering of non-parental caregivers by parental caregivers to the covering of family dysfunction by family privacy, she is able to do so in a single sentence.[21] She can use this shorthand precisely because feminist legal theory is so well entrenched in our legal minds that the vast majority of readers will know she is referring to a rich intellectual history produced by feminists deconstructing family privacy. Thus, even though Murray does not invoke feminist legal theory as the overarching frame for her article,[22] there is no doubt that she stands on the shoulders of feminist legal theorists. Their insights allow Murray to make an important predicate clearly and then move on to her specific point about the discrepant legal recognition for parental and non-parental caregivers.

In Murray's presentation, I see reflections of Halley's counsel that we move beyond gender as an all-encompassing explanatory factor and embrace other dichotomies and divisions (e.g., parental caregivers versus non-parental caregivers), while still not rejecting feminism and its lessons altogether. Feminist legal theory is a resource for Murray in that it helps her build an understanding of the salience of family autonomy. It also could have constrained her, however, if she had felt that she had to address gender more explicitly, developing such

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[18] *See id.* at 396-97.
[19] *See id.* at 397-98.
[20] *See id.* at 409-15.
[21] *See id.* at 397-98 ("Just as feminist legal scholars argued that coverture and its protection of family privacy prevented the state from identifying and remedying dysfunction within marriages, parental rights create a zone of privacy that prevents the state from seeing into the black box of family life to understand how caregiving responsibilities are actually performed.").
[22] By contrast, *see, e.g.*, Naomi Cahn, *Accidental Incest: Drawing the Line—Or the Curtain?—For Reproductive Technology*, 32 HARV. J. L. & GENDER 59, 62 (2009) ("This article examines the issue of inadvertent consanguinity raised by third party gamete use through a feminist lens.").

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themes as whether the law is more willing to privatize caregiving and recognize it as an exclusive job of parents because we typically think of caregivers as women. Adding this analysis to the article might have provided some additional explanatory power, but I understand her aim to be providing something other than a gendered analysis of caretaking. Murray is arguing that feminist concerns with caregiving can be universalized in the conception of the "networked family."

In other words, focusing on a dynamic other than m/f and m > f, Murray still addresses feminist concerns—caretaking—but she does not frame this as an issue affecting only women. Of course, given what we know about the continued unequal distribution of caretaking responsibility between opposite-sex couples, the state's failure to recognize the networked family likely affects women more than men. But in her discussion, I see Murray rejecting the demands of this narrow view of feminism and focusing on the aspects of the issue that interest her. Murray's approach allows the reader to see a different dichotomy—between parental caregivers and non-parental caregivers—opening the door to a new understanding of the issue.

Clifford Rosky's *Like Father, Like Son* more directly addresses issues of gender.[23] In this article, Rosky reviews all reported custody and visitation decisions involving gay, lesbian, and bisexual parents between 1950 and 2007. In his analysis of these opinions, Rosky argues that the gender of the parent, the child, and the judge informed the outcome of the custody or visitation dispute. Beginning with parents, Rosky contends that gay fathers are subject to two stereotypes that lesbian mothers are not—they are perceived as HIV agents and as perpetrators of child sexual abuse.[24] Turning to the gender of the child, Rosky asserts that this is a salient feature of a custody or visitation dispute because although both gay fathers and lesbian mothers are thought to recruit their children to be homosexual, this fear is more pronounced for male children than it is for female children and is noticeably absent when the relevant parent-child relationship is between a gay father and his daughter.[25] Finally, Rosky argues that the gender of the judge is relevant because, the cases show, male judges are more likely to accept these stereotypes than female judges.[26]

From these findings, Rosky concludes that the stereotypes he identifies are part of a larger patriarchal system where fathers play a key role in producing the next generation of masculine, heterosexual men.[27] More broadly, Rosky contends that gender and homophobia have a reciprocal relationship but that legal scholars

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[23] *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J. L. & FEM. 257 (2009).
[24] *See id.* at 279-94.
[25] *See id.* at 294-311.
[26] *See id.* at 311-13.
[27] *See id.* at 294-311.

have overlooked this important dynamic because they lump all gay and lesbian parents together and have not teased apart the ways in which gay fathers, in particular, are treated by the courts.[28] Rosky believes that by exploring the relationship between homophobia and gender, advocates can better strategize on behalf of gay, lesbian, and bisexual parents.[29]

Rosky explicitly positions his scholarship in feminist and queer legal theory, claiming that "with a long list of caveats, I can generally say that my perspective on parenthood is 'feminist,' my perspective on homosexuality is 'queer,' and my perspective on gender is both 'feminist' and 'queer.'"[30] In a lengthy footnote, Rosky elaborates these caveats. Rosky uses Halley's formulaic definition of feminism as a starting point, but then contends that he is engaging both feminist and queer legal theory in ways that neither theory might appreciate. For example, he invokes the first clause in the mathematical formula (m/f) by assuming that there is some distinction between m and f, but in so doing he readily acknowledges that his "analysis of gender could be legitimately criticized as insufficiently 'queer.'"[31] Rosky departs from the second clause of Halley's formula (m > f) because he is interested in the subordination of gay men, as compared with both heterosexual men and lesbians, arguing that "it is not always lesbians who stand at the intersection of sexism and homophobia."[32] Finally, Rosky clarifies that although his article contributes to the effort to work against female subordination, "it squarely rejects the notion that feminists have an obligation to work specifically on behalf of women or lesbians to the exclusion of others."[33] Instead, Rosky claims that "a good theory of feminism" should address disparities for both women and men.[34]

Feminist legal theory is clearly an energizing force for Rosky. Without feminist legal theory, Rosky could not have written the article he did. It provides both the theoretical framework and the methodological tools necessary for his inquiry. Rosky, however, feels free to reject any aspects of (at least Halley's version of) feminist legal theory that are constraining, adapting it to his own needs and using it on his own terms.[35] Rosky improvises and mixes feminist legal

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[28] *See id.* at 313-14.
[29] *See id.* at 314.
[30] *See id.* at 277.
[31] *See id.* at 277 n.87.
[32] *See id.* In this regard, his conclusion has a wonderful quote from a gay rights' advocate who readily concedes that, as a strategic matter, it will better serve the movement to use lesbians as the faces of gay parenting. *See id.* at 349. This is what Rosky means by the gender of homophobia.
[33] *See id.* at 277 n.87.
[34] In this footnote, Rosky also describes his relationship to queer theory. *See id.*
[35] Again, my aim is not to engage with Halley's descriptive claim that *all* feminists embrace m/f, m > f, and carrying a brief for f. *See* HALLEY, *supra* note 2, at 5. She supports this claim by excluding so much work under other categorical headings that her definition of feminism is

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theory with queer legal theory to serve both theoretical and practical ends. He sees limitations in each theory, with feminist legal theory missing the homophobia of gender and queer theory missing the gender of homophobia,[36] and so combines the two.

Finally, in her essay, *Is Privacy a Woman?*, Suk analyzes several recent Supreme Court opinions to argue that the justices draw upon gendered conceptions of privacy.[37] She develops this thesis within the context of arguments concerning the constitutionality of police searches, abortion laws, and sodomy restrictions. Suk dissects the use of gendered language, such as Justice Scalia's invocation of "the lady of the house tak[ing] her daily sauna and bath" to justify the idea that what goes on behind closed doors is intimate and therefore protected by the Fourth Amendment.[38] Suk contends that through this and numerous other references to women and women's concerns, most particularly domestic violence, the Court closely aligns privacy with women. Suk shows this is true even when women are not factually present. For example, she discusses the majority opinion in *Lawrence v. Texas* and Kennedy's depiction of the homosexual sex at issue in that case as but one aspect of an ongoing, intimate relationship, notwithstanding facts showing that it was a casual encounter.[39] Kennedy analogized the relationship at issue in the case to marriage, arguing that marriage cannot be said to consist only of sex. In so doing, Suk contends, the Court brought women into the picture of privacy, changing the male-only tableau to fit our conception of privacy. Suk concludes that "[t]o theorize privacy is to imagine a woman, and the way she is imagined is bound up with the conceptions and the stakes of privacy both articulated and unspoken."[40]

Feminist legal theory infuses Suk's essay, implicitly and explicitly. One of the central aims of the piece is to expose the salience of gender in the face of Court protests of equal treatment. Like Murray, Suk draws upon the familiar feminist argument that legal privacy obscures sex inequality, particularly violence, from public view.[41] Suk also makes a larger point about feminist legal theory: that just as we see divisions within the field, say as between formal equality and dominance feminism, the Supreme Court decisions reflect these splits, with the Court uncertain how to frame women—As "ladies"? As victims of domestic violence? As co-equal partners with men? As necessary parties in intimate relationships? Suk contends that these competing images of Woman are

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dangerously close to a tautology. My point is that to the extent her formula reflects at least a pattern in feminism, emerging family law scholars do not feel compelled to follow it.

[36] *See* Rosky, *supra* note 23, at 260.

[37] *See* Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485 (2009).

[38] *See id.* at 488 (quoting Kyllo v. United States, 533 U.S. 27, 38 (2001).

[39] *See id.* at 510-13.

[40] *Id.* at 513.

[41] *See id.* at 501-02.

really about "which feminist idea of the woman will shape constitutional doctrine."[42]

Although Suk draws upon feminist legal theory as an energizing force, she does not allow constraining disputes about True Feminism (power feminism, cultural feminism, and so on) to dictate her work. Instead, she uses this tension to build the insight that Supreme Court doctrine also is conflicted about women and Woman. In other words, Suk feels no need to declare allegiance to a particular strain of feminism and instead critiques it all. As a reader, I found this essay far more interesting than a piece of scholarship committed to one form of feminism, determined to find evidence of a single kind of feminism and then deploy that for normative purposes. Suk's detachment from debates within feminism makes for more interesting reading, and, as Halley predicted, more useful insights, because Suk's conclusions are less driven by her normative commitments than they might be if she were wed to a particular understanding of feminism.

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I see these three pieces of scholarship as evidence that feminist legal theory is an energizing force for a new generation of family law scholars, but that feminist legal theory is, as Halley wishes it to be, merely one tool among many, and that the dissension within and among theories is productive. The articles show that when a scholar is not wed to one theory for both explanatory and normative purposes, the ensuing insights can be substantial. In this way, feminist legal theory, at least as reflected in these texts, has reached a significant stage, where scholars can view it as both an enabling and a constraining force, using this fruitful tension to help build important new insights. In this, I see the healthy development of feminist legal theory: scholars can use it where needed, adapt it when necessary, and move on when ready. Even if Halley overreaches in her characterization of feminism's past, she is surely right that there is much to be gained from abandoning orthodoxy. A new generation is not hesitating to do so. Regardless of how I might characterize this approach—as taking a break or simply moving along—I am sanguine about the future of feminist legal theory.

[42] *Id.* at 506.

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