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Introduction

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WHAT IS FAMILY LAW?

There is a canon of family law.[1] Those of us who teach family law know the cases that appear in almost every family law casebook, and that are the stand-out examples of core family law doctrines. Even though there are numerous cases from which to choose, picking iconic cases to rewrite was one of the easier tasks of my job in editing a *Feminist Judgments* volume on family law.

Editing a volume of rewritten cases from a feminist perspective, however, is a project that I approached with some trepidation. So much of family law has been influenced by feminist theory and feminist thought. Decades of scholarly writings map the intersection of feminism and gender rights and the laws governing, for example, marriage, divorce, cohabitation, parentage, child custody, and child support. The chapters in this book describe the history of feminist engagement in family law and the major shifts that have occurred (and continue to occur) in the field. Authors canvass the demise of legally enshrined coverture, the introduction of no-fault divorce and the equitable distribution of property, changing custody presumptions, standards for enforcing pre- or post-marital contracts, the increasing reliance on assisted reproductive technologies, recognition of various sexual identities, and the extension of relationship rights to couples of the same sex and to nonmarried partners. Given the earliest case in this book was decided in 1879 (on polygamy) and the most recent in 2018 (on asylum law), there is a lot of ground to cover.

The strength of this volume is not just its relationship to traditionally defined family law topics; it is also the authors' expertise in the family law issues that suffuse other legal fields. In cases that span welfare law, criminal

[1] Jill Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L. REV. 575 (2011).

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justice, immigration, education, and civil procedure, this book pushes the boundaries of how family law is defined. In this vein, the volume resists "family law exceptionalism," or the tendency to conceive of the field in narrow terms, which too often has discounted how various laws across disciplines govern and shape intimacy, sexuality, dependency, and relational exchange.[2] The regulation of the family and definitions of family are important in almost every legal area, even those which are not, unfortunately, captured in this volume. Were it not for the limitations of space, rewritten decisions in tax, employment, corporations, and torts could have easily captured how family law and feminism inform each other.[3] As it stands, I selected the cases for this book after consulting with an Advisory Panel, which suggested dozens of decisions from various courts and jurisdictions.[4] The Advisory Panel, composed of leading family law scholars and thanked in the acknowledgments, provided invaluable guidance in choosing the fifteen decisions that comprise the chapters of this book.[5]

Each chapter reflects longstanding and important feminist debates in the field of family law. For instance, chapters implicitly and explicitly push at the so-called divide between public and private regulation, drawing on an ongoing conversation about public and private spheres in family law.[6] Commentaries and rewritten opinions draw in other debates at the intersection of family law and feminist legal theory. How and why should intimacy be treated distinctly from, say, commercial, relationships, and what legal status should express that intimacy? When and why do feminists pull the legal levers of state punishment, such as in child support enforcement or in criminal consequences for domestic violence, and what are the lived effects that result? How does feminist legal theory embrace agendas for racial justice and aid in resisting old and new forms of discrimination? What theories of

[2] For an ongoing conversation about "family law exceptionalism" among family law scholars, see Harvard Law School, *Up against Family Law Exceptionalism*, http://www.law.harvard.edu/faculty/jhalley/plst/Halley.pdf.

[3] See the other volumes of the Feminist Judgment series in these areas.

[4] I did not consider cases that were rewritten for the *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* volume or that will be rewritten for other volumes in this series, such as on Reproductive Justice. I also avoided, to a significant extent, cases that have been the subject of projects like *Family Law Stories* (West Academic 2007).

[5] Authors responded to a call for papers that I issued nationally and ranked their top three case choices; some judgments received a lot of interest and others were selected by only one or two applicants.

[6] *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1498 (1983); Maxine Eichner, *The Privatized American Family*, 93 Notre Dame L. Rev. 213 (2017).

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masculinity emerge in feminist accounts? This introduction can only set forth an incomplete list of complicated questions, and responses to these queries depend on what one means by "feminism." The chapters of this book offer a range of answers.

WHAT IS A FEMINIST JUDGMENT?

Each chapter begins with a short commentary that provides context for the original case and introduces the approach of the rewritten decision. The new version of the iconic or important opinion follows, as a reimagined majority, concurring, or dissenting opinion, and relies only on materials available at the time of the original decision.

Although feminism and family law are a seemingly natural fit, taking family law's important cases and rewriting them is an exercise in creativity. Of course, some decisions lend themselves to a feminist rewrite. Judicial decisions spurred feminist activism because a court's interpretation of law – or the law itself – disadvantaged women or entrenched sexism. In these decisions, authors chose to rewrite majority opinions and reach opposite conclusions. Other original opinions track closely the feminist thinking of the era and could be called then, as they are likely thought of now, feminist judgments. Contributors to this book embraced that time period's thinking but wrote concurrences or differently styled majority opinions to reach a different result or to offer a different remedy. And then some rewritten opinions, because of the era or the arguments of the court, take the form of strong dissents, expressing feminist reasoning through disagreements with the majority's decision at that time.

In incorporating an array of feminist ideas, authors performed innovative and original research for their chapters. They searched the archives at the Library of Congress; retrieved original trial transcripts in litigation that occurred decades ago; interviewed the attorneys and, in one instance, a party of cases. Contributors dug into the facts of decisions, spotlighting details that showed the litigants in very different lights. They uncovered writings from scholars and advocates that reveal the early roots of feminist thinking – all materials available at the time of the original opinion's writing, but sources that were overlooked or ignored. Again, each author of a rewritten opinion was bound to the rules that govern the Feminist Judgments series: authors could only rely on the record of the original case and the precedent at the time of original writing. In tackling this endeavor, the process for each chapter varied based on the writer, but each chapter benefited from collaboration and dialogue between judgment and

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commentary authors. And as will be apparent in chapters that follow, some commentators and opinion authors disagreed, highlighting the diversity of feminist approaches.

A judgment can be feminist in numerous ways. The reader familiar with feminist legal writings readily will identify explicit and implicit invocation of prominent strands of feminist thought. These most frequently include liberal feminism, dominance feminism, cultural feminism, intersectional feminism, and sex-positive feminism.[7] This introduction will not affix definitions to these categories of feminisms; many of the commentaries that follow explain what they mean by these terms. Moreover, employing labels like "liberal feminism" risks ignoring divisions and contestations within feminist theory and can fail to recognize how feminisms overlap, inform each other, and conflict.[8] Instead, this volume tries to capture the timelessness and timeliness of feminist debates, bridging generations of feminist thinking and advocacy. This is an important moment for feminist legal theory to affirm its contemporary relevance and to map its future trajectories. Feminist theory must interrogate the deepening inequalities that characterize the distribution of resources. Racial justice and gender identity demand more attention. Feminist theory historically marginalized race and sexuality (as well as other sources of vulnerability) in its analysis of the harms that most affect its traditional subject – women.

Thus, perhaps the more interesting aspect of this book answers the question, why rewrite decisions in the first place? Is this project self-indulgent? It is no doubt a privilege and a luxury to imagine yourself a judge and pass judgment in your own voice. But what emerged from the process of writing this book – discussed among contributors at a number of conferences and workshops – is how generative reimagining the law can be. Among the reasons for writing these chapters and editing this book are to see more clearly the paths not taken: ideas, facts, and sources that could have supported alternative justifications or outcomes. Many commentators and opinion authors found a source of empowerment in rediscovering feminist ideas that were alive all along. Had their visions been made real, law and law reform strategies could have taken different courses. Imagine a U.S. Supreme Court that interpreted the Constitution to require the state to ensure people's basic

[7] See Martha Chamallas, Introduction to Feminist Legal Theory (3d ed., Aspen 2013); Bridget J. Crawford & Anthony C. Infanti, *Introduction*, *in* Feminist Judgments: Rewritten Tax Opinions (Bridget J. Crawford & Anthony C. Infanti eds., 2018).

[8] Janet Halley, *What Forms of Feminism Have Gained Inclusion in the Legal Order?*, in Governance Feminism: An Introduction (Janet Halley et al. eds., 2018).

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needs were met, as Professor Susan Appleton writes in her reimagined *Dandridge v. Williams* opinion (Chapter 4). Seeing the Constitution as a source of positive rights to minimum welfare would change people's entitlements to food, security, and shelter.

In this vein, envisioning new directions and other possibilities for family law in 2019 is a politically salient project. Taking a feminist perspective can be a complicated endeavor, but it can also help transform law, to which the field of family law is a testament.

A ROADMAP FOR THE BOOK

The following roadmap provides a brief guide to what the chapters offer and suggests what themes circulate throughout the book. The cases appear in order of their date of original decision.

Professor Laura Kessler writes a dissent in the case of *Reynolds v. United States*, 98 U.S. 145 (1879). Contrary to original majority opinion, in which the U.S. Supreme Court upheld the convictions of Mormon polygamists, Kessler would have found a violation of polygamists' First Amendment right to free exercise of religion. Her reasoning is not only grounded in First Amendment principles, but also shines a light on the Court's contradictory jurisprudence on women's rights in marriage. She questions the majority's reflexive defense of monogamy as liberating for women and probes how the decision of the Court undercut the agency of Utah women in polygamous unions – wives who refused to testify against their husbands, who protested the federal government's treatment of Mormon communities, and who were the among the first to vote. Professor Marie Failinger's commentary contributes to the rich history in which Utah men and women were prosecuted for their marital arrangements. Rather than universally hurting women, both the imagined dissent and the commentary ask what happened to the women that the Supreme Court purportedly tried to save.

Professors Martha Ertman and Zvi Triger rewrite the majority opinion in the Nebraska Supreme Court case, *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953). In the original decision, the court held that spouses cannot sue each other for financial support while the parties remain living together in a marriage. Professor Ertman with Professor Triger, who joined as a concurring judge, would have allowed Mrs. McGuire to assert an equitable claim against Mr. McGuire for reasonable support, having received the bare minimum of support during the marriage. They note the then-recent changes in property distribution and spousal support that, though only relevant in divorce, recognize the rights of both spouses as partners to share in marital wealth. A claim

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for restitution or unjust enrichment would help Mrs. McGuire receive a return on what she invested over the course of the relationship without requiring her to seek a divorce. Writing the commentary, Professor Mary Anne Case disagrees with the premise of the rewritten judgment and focuses on Mrs. McGuire's agency. In Professor Case's view, Mrs. McGuire received what she bargained for in marrying an extraordinarily frugal man (to paraphrase the original decision) and by keeping separate her property (both by her labor and from a first marriage). Professor Case argues that the original decision allows couples to arrange their financial affairs and living arrangements in ways that suit their individual and potentially idiosyncratic needs.

Professor Susan Frelich Appleton rewrites the majority opinion in *Dandridge v. Williams*, 397 U.S. 471 (1970), a case upholding Maryland's limits on public assistance based on the number of dependents in a household. In the original opinion, the U.S. Supreme Court concluded that the law violated neither the Social Security Act nor the Constitution's Equal Protection and Due Process Clauses. Professor Appleton would have reached the opposite conclusion. Relying on then contemporary case law and writings on equal protection, she holds that distinctions affecting procreation based on income are subject to strict scrutiny analysis. Perhaps Professor Appleton's most robust justification for striking down welfare caps is a positive right to minimum welfare. That is, the Constitution guarantees "a right to the basic necessities of life, in turn imposing on society, that is, the state, an obligation to provide such basic necessities." As this introduction has already asked, how different would U.S. law and policy be if there was a right to minimum welfare? Professor Maya Manian takes up that question and reflects on how the rewritten *Dandridge* could have shaped the Court's reproductive rights jurisprudence, assessing a line of cases allowing states and the federal government to limit government funding of abortion. If alleviating the conditions of poverty is the responsibility of the state, then denying medically necessary abortion care under a state Medicaid program is difficult to justify.

The rewritten *Wisconsin v. Yoder*, 406 U.S. 205 (1972), by Professor Kristen Murray, would have upheld a Wisconsin law compelling Amish parents to send children to public school after the eighth grade – a law the Supreme Court held violated parents' rights under the Due Process Clause and the First Amendment. Professor Murray gives compelling reasons why the state's interest in education outweighs the Amish parents' desire to shield children from worldly influences after a certain age. Like the dissent offered by Justice Douglas in the original decision, Professor Murray considers the hardships imposed on youth who are deprived of a high school education. But unlike Justice Douglas, Murray's feminist account focuses on the role of daughters

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in Amish societies, who may have limited freedom to exit communities without education, having devoted themselves to skills that may not be rewarded – rightly or wrongly – outside Amish society. Professor Lisa Fishbayn Joffe brings an important historical and feminist perspective to the "right of exit" for Amish youth once they become adults. Professor Fishbayn Joffe demonstrates how the freedom to leave, as a safety valve for withdrawing from school, is illusory at best. Seldom are those leaving Amish communities, particularly women leaving marriages, financially or socially equipped to enter non-Amish society.

Professor Kate Sablosky Elengold writes a concurrence to the majority opinion in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), which recognized that cohabiting partners in nonmarital relationships may bring claims for property and support against each other based on express and implied contracts. Professor Sablosky Elengold writes a concurrence in order to emphasize the different treatment of married and unmarried partners and to provide guidance to lower courts for hearing the contract claims of unmarried partners. To the last point, she argues that future courts should rely on theories of trust. Theories of constructive or resulting trust sidestep questions of contribution, focusing on intent rather than the earnings invested in the accumulation of property jointly enjoyed. Professor Aníbal Rosario Lebrón supports the rewritten opinion's approach, explaining how and why, on remand, Michelle Marvin received nothing from her oral agreement with Lee Marvin. Professor Rosario Lebrón champions the feminist argument that courts recognize the financial value of nonwage domestic labor. And he explores how the rewritten decision could confer recognition on contracts made during the course of a range of relationships, not just those relationships that look like a contemporary marriage.

In the rewritten *Kulko v. Superior Court*, 436 U.S. 84 (1978), Professor Katherine Macfarlane dissents from the original Supreme Court opinion, which held that a father was not subject to personal jurisdiction in the state in which his children, to whom he owed child support, lived with their mother. Professor Macfarlane emphasizes the subtle bias against the mother's choices: the implication that her decision to divorce and then move to another state (with children who elected to voluntarily relocate there) was what severed the relationship between the father and the children, and created an impediment to forming ties with the new state. As Professor Macfarlane notes, the majority decision ignored the many ways in which a noncustodial father avails himself of the benefits provided by the state where the custodial parent resides; for example, relying on tax, education, transportation, and other systems, all publicly funded. Professor Mary-Beth Moylan highlights the

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salient gender critiques that followed *Kulko*.[9] She puts the case in its modern context by explaining the federal legislation that addressed the jurisdictional problems of child support and custody enforcement highlighted by *Kulko*.

In perhaps one of the most moving cases in the book, Professor Nancy Polikoff rewrites the majority decision of the Nevada Supreme Court in *Daly v. Daly*, 715 P.2d 56 (Nev. 1986). In *Daly*, the court upheld the termination of parental rights of Suzanne Daly, a father who had sex-reassignment surgery. Relying on Nevada's criteria for the termination of parental rights, Professor Polikoff holds that the lower courts misapplied the state statute. She demonstrates how the trial court's decision relied on discriminatory stereotypes about transgender parents and embraced the bias that motivated the mother's obstruction of visitation with Suzanne. In his commentary, Professor Raff Donelson probes how anti-trans tropes continue to exist in family law and circulate in popular opinion. In this vein, he tracks the still-current debate among feminists about how to recognize and to represent the rights of the trans community.

The original *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) upheld California's statutory provision that a husband is conclusively presumed to be the parent of a child born during marriage, even in the face of genetic proof that he is not the biological father. Professor Albertina Antognini's rewritten majority opinion holds that the California presumption violates the Constitution on two grounds. Professor Antognini writes that the statute violates the Equal Protection Clause by discriminating on the basis of sex and the Due Process Clause by refusing to acknowledge the parent-child relationship that had developed between the nonmarital biological father and the child. In short, Professor Antognini recognizes legal rights for more than two parents, testing both marriage and biology as definitions of parentage. In doing so, she expands both our legal and cultural notions of what constitutes a family. Professor Suzanne Kim's commentary notes the implications of a decision that confers parental rights on married as well as unmarried fathers and explains what that recognition would mean for parents who have children within same-sex relationships. She notes how contemporary approaches to parentage, such as those contemplated by the 2017 Uniform Parentage Act, move away from gendered language and from the status-driven distinctions of marriage or biology.

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), is a case infamous for its tragic facts. A child's mother, the

[9] Judith Resnik, *"Naturally" without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. Rev. 1682 (1991).

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noncustodial parent, sued Wisconsin social workers after the father's abuse resulted in the child's severe brain damage and a lifelong coma. The Supreme Court held that the failure of the state agency to protect the child did not violate the child's Fourteenth Amendment right to liberty. Professor Jessica Dixon Weaver rewrites the majority opinion and holds the agency accountable under the Constitution – both because the agency had established a special relationship by previously investigating child abuse and, under Section 1983, because of the state's "deliberate indifference." She shows how the ratification of the Fourteenth Amendment was a response to states' indifference to African Americans' suffering after slavery and connects that history to the state's historic treatment of children as property. The result is a judgment that obligates the state to protect the populations subject to historic discrimination. In her commentary, Professor Macarena Saez notes how Professor Dixon Weaver's opinion would have set the application of Section 1983 on a different jurisprudential course, specifically strengthening protections for survivors of intimate partner violence whose state protective orders had been ignored or unenforced.

Professors Alicia Kelly and John Culhane address the fairness of premarital agreements and reimagine the pro-contract case, *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990). The Supreme Court of Pennsylvania held that courts should enforce premarital contracts so long as couples signed them voluntarily and with full disclosure, meeting the requirements of any contract. Professor Kelly, writing for the majority, struck down the contract in *Simeone* for failing tests for procedural and substantive fairness. The premarital agreement at issue would have left the wife, who had almost nothing in the way of assets and limited earning capacity, with far less than she would have received at divorce. Professor Culhane's concurrence emphasizes the power imbalances that continue to characterize marital relationships, especially when one spouse performs the bulk of unremunerated labor in the home and one spouse is a high-income earner. He challenges the conclusion of the original majority, which justified the decision to uphold a lopsided bargain on the purported basis of sex equality in bargaining power. Professor Jamie Abrams notes the introduction of no-fault divorce as well as reform in property division and spousal support laws, which signal the state's recognition that marriage is a partnership. However, she concludes, as Professor Kelly does, that even though many of wives' previous legal incapacities have been removed from statute books, gendered scripts in marriage remain and can produce unfair bargaining between spouses.

Distinct from premarital agreements, *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (1st Div. 1993), concerned a contract between spouses made during

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marriage. A wife entered into a contract with her late husband to provide nursing care for him at home in exchange for property at his death. A California appellate court held that contracts between spouses to provide care for compensation violate public policy and provide no consideration because spouses have a preexisting duty to deliver care. Writing for the court, Professor Jo Carrillo rejects the doctrines of consideration and public policy as reasons to deny Mrs. Borelli relief. In an innovative twist, she holds that the spouses' oral contract was a modification of the couple's premarital agreement, and enforcement of the contract is the obligation of the estate based on the fiduciary duty established during the marriage. Professor June Carbone's commentary addresses the feminist ambivalence about during-marriage contracts and about bargaining generally. At the heart of this ambivalence is a desire for some measure of autonomy, so that couples can negotiate in relationships, in tension with protections for spouses who might face financial and emotional coercion, particularly if that spouse has exchanged unpaid or domestic care for property.

The rewritten *Turner v. Rogers*, 564 U.S. 431 (2011), brings to the fore the intersection of feminism, racial justice, and poverty. In *Turner*, the Supreme Court held that the state need not provide an attorney to an indigent father who had been repeatedly imprisoned for child support arrears. Professor Elizabeth MacDowell writes a concurrence, agreeing that parents have no categorical constitutional right to counsel in child support enforcement cases. She holds, however, that the Due Process Clause requires procedural safeguards that balance "the interests at stake in child support enforcement." Describing a punitive system that disproportionately targets fathers of color and penalizes the poor, she outlines a robust screening and evaluation process to determine the noncustodial parent's ability to pay prior to incarceration. Professor Warren Binford, in her commentary, largely agrees with Professor MacDowell's approach, but concentrates on the connection between failure to pay child support and child poverty. In this regard, she finds unlikely common ground with the original opinion's dissent by Justice Clarence Thomas. Binford diverges from Justice Thomas's dissent, however, in introducing comparative examples of modern constitutions that recognize children's rights.

The enforceability of surrogacy arrangements – the subject of *In the Matter of the Parentage of a Child by T.J.S. and A.L.S.*, 54 A.3d 263 (N.J. 2012) – provides a snapshot of family law's dynamism. The Supreme Court of New Jersey held that gestational surrogacy agreements were unenforceable in the state. The court dismissed a couple's claim that law's different treatment of

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