THE HISTORICAL FUNCTIONS OF MARITAL PRIVILEGE: A DISTRIBUTIVE ANALYSIS OF FAMILY LAW

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INTRODUCTION

Serena Mayeri's important new book, *Marital Privilege*, challenges scholars and teachers to reconsider the definition of "family law."[1] Almost fifteen years ago, the legal theorist Janet Halley called for a distributive analysis of the field.[2] She traced the origins of the family/market distinction to the development of classical legal thought during the second half of the nineteenth century.[3] In this period, the construction of an ideological opposition between status and contract generated the idea that family law was "exceptional."[4] It represented a residual arena of conservative normativity, located outside of both the economic realm and the general principles of private law.[5] Halley argued that the exclusion of questions of welfare, insurance, public benefits, employment, and property from 'family law' marginalized the field, distorted its pedagogy, and obstructed understanding of the law and its societal effects.[6]

Wielding the tools of a historian—contingency, humanist empathy, and archival analysis—as well as the analytic skills of a brilliant legal scholar, Mayeri does the work Halley urged. Mayeri analyzes how, even as the structures of family life changed dramatically in the last decades of the twentieth century, law and policy reinforced the primacy of marriage within numerous distributive regimes. The most moving parts of Mayeri's book describe the material hardship and social stigma such privilege placed on cohabiting couples, nonmarital children, gays and lesbians, and single mothers—often women of color.

The story of *Marital Privilege* is one of both "continuity and change."[7] The book offers the most comprehensive existing historical account of how family laws evolved, from sex-differentiated gender roles to sex neutrality. Mayeri highlights Justice Ruth Bader Ginsburg's litigation strategy as an attorney in

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[1] SERENA MAYERI, MARITAL PRIVILEGE: MARRIAGE, INEQUALITY, AND THE TRANSFORMATION OF AMERICAN LAW (2025)

[2] Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J. L. & HUM. 1 (2011).

[3] *Id.*

[4] *Id.*

[5] *Id.* at 3.

[6] *Id.*

[7] Obergefell v. Hodges, 576 U.S. 644, 659 (2015).

Weinberger v. Wiesenfeld,[8] challenging sex discrimination in survivors' benefits.[9] In 1975, the Court held that widowers caring for young children had a constitutional right to receive the same Social Security benefits statutorily provided to widows in that position.[10] Four years later, the Court struck down a state law that required husbands, but not wives, to pay alimony.[11] By the decade's close, there emerged a new constitutional understanding that state and federal law could not presumptively treat husbands as wage-earners and wives as caregivers.[12]

Despite the advent of formal sex equality in family law, however, law and policy reinforced marriage's distributive primacy. It served as the mechanism for distribution of government benefits, for the adjudication of priority within the common law of inheritance as well as immigration statutes, and for the determination of which households and individuals merited public housing and employment. In this short Response, I reflect upon the question of what governance purposes marital privilege served. What made it endure in the face of social movement challenges and legal pressures, and why was it so consequential? I argue marital privilege had at least four functions in late-twentieth century governance: the preservation of racial hierarchy despite civil rights advances, the maintenance of a conservative sexual order even as gender roles became less rigid, boundary drawing in state administration, and the privatization of dependency.

I. PRESERVING RACIAL HIERARCHY

After the Second Reconstruction tore down much of Jim Crow's legal edifice, marital privilege helped preserve key pillars. Even to readers familiar with the history of race and welfare in the United States, Mayeri's narrative offers new insight into state discrimination and cruelty. In the early 1960s, Louisiana barred Black women from voting if they gave birth while unmarried or in a common law marriage.[13] Maryland criminalized the act of giving birth to more than one child outside of marriage.[14] A convicted mother faced penalties far more grave than fines—sterilization and the loss of custody over her children.[15] As anti-welfare politics took hold in ensuing decades, cuts in already meager assistance regimes disproportionately affected families of color.[16]

Mayeri explains the constitutional erosion of "illegitimacy," which advanced the rights of nonmarital children, for example, to inherit from their fathers and

[8] 420 U.S. 636 (1975).

[9] MAYERI, *supra* note 1, at 81-87.

[10] *Id.*

[11] *Id.* at 94.

[12] *Id.* at 110-12.

[13] *Id.* at 15.

[14] *Id.* at 39-41.

[15] *Id.*

[16] *Id.* at 60-62.

to recover damages in suits for their parents' wrongful death, was insufficient to advance welfare justice more broadly.[17] Some legal advocates, notably Jacobus tenBroek—a fascinating scholar who championed welfare and disability rights in the 1940s and 1950s—argued that the Court should apply heightened constitutional scrutiny to laws that entrenched poverty.[18] Others connected litigation aimed at recognition of nonmarital to struggles for racial equity and sexual freedom.[19] Yet the Court ultimately struck down illegitimacy rules in the 1970s on the basis of the harm they rendered 'innocent children.'[20] This limited rationale, Mayeri argues, made it harder for advocates to challenge the paucity of public assistance for single mothers and their children.[21]

II. MAINTAINING THE SEXUAL ORDER

In addition to racial hierarchy, marital privilege also maintained sexual norms that subordinated those who did not conform. Mayeri examines court rulings that upheld localities' constitutional authority to zone out communalists and restrict benefits to heteronormative families.[22] Even superficial victories for liberalism, simultaneously set forth limits on the associational rights of people who wanted to form households beyond 'blood' ties.[23] In addition to more well-known Supreme Court cases, Mayeri tells the stories of people not previously entered into the historical record. These include those of teachers and other school employees who lost their jobs because they cohabited—even in straight relationships—outside marriage.[24]

Gays and lesbians and their children were among those most harmed by marital privilege. The functional turn in the laws of public employment did not much help LGBTQ public school teachers, for example. School boards successfully argued that these teachers' sexual orientation shared a "nexus" with their job performance, which involved interacting with impressionable children.[25] A question that remains is *why* sexual freedom proved so threatening, even though law made "marriage safe for equality."[26] The right to same-sex marriage ultimately domesticated sexual liberation in ways that made LGBTQ people less threatening to normative cultural orders.[27] Thus, one lesson from *Marital Privilege* is that the suppression of sexual freedom proved both more enduring and injurious than discrimination on the basis of identity.

[17] *Id.* at 62-71.
[18] *Id.* at 22-24.
[19] *Id.* at 27-30.
[20] *Id.* at 62-71.
[21] *Id.*
[22] *Id.* at 119-31.
[23] *Id.*
[24] *Id.* at 169-75.
[25] *Id.* at 175-81.
[26] *Id.* at 75.
[27] *Id.* at 175-81.

III. DRAWING ADMINISTRATIVE BOUNDARIES

An explanation lurking beneath Mayeri's historical narrative is that the state needs ways to classify populations and thereby rationalize administration. Marital status offered a ready classification tool. For example, given the reality or at least the perception of limited resources, food stamps could not extend to all persons in any household. Marriage and "blood" ties provided policymakers a ready means to set benefit boundaries. The use of marriage to count, control, and manage populations was most powerfully evident in the immigration context. A particularly compelling section of Mayeri's book tells the tragic stories of parents and children, in transnational, nonmarital families of mixed immigration status, who could not confer on each other citizenship rights.[28] These families did not enjoy the same protections immigration law extended to marital families.[29] Marriage literally functioned as the nation's border patrol.[30]

IV. PRIVATIZING DEPENDENCY

A longstanding theme in feminist theory concerns the ways in which law privatizes dependency. Notwithstanding substantial socioeconomic change, law preserves the cost of biological reproduction, care, and social sustenance as the responsibility of families rather than the larger society.[31] This dynamic was particularly evident in a chapter that compares the relative success of unmarried pregnant women, whose employment discrimination claims ultimately enabled their own economic independence, with the lesser success of single mothers attempting to enlist, whose cases laid claim to military welfare benefits.[32] Unmarried mothers claiming the right to access public assistance without disclosing their child's paternity fared even worse.[33] In this comparison, Mayeri comes closest to a materialist causal explanation in which marital privilege's prime function is to preserve the public fisc.[34] Other sections of the book, however, place more emphasis on ideological and cultural accounts for the strange endurance of marital privilege.[35]

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[28] *Id.* at 212-15.

[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

[32] MAYERI, *supra* note 1, at 185-211.

[33] *Id.*

[34] *Id.* at 105 ("The success of challenges to marital primacy often tracked their fiscal impact: the state safely could ignore marital status when doing so helped to privatize dependence in the family.").

[35] *See., e.g.*, *id.* at 93, 96 (locating Phyllis Schlafly's STOP-ERA in defense of traditional gender roles); *id.* at 246, 252 (attributing opposition to functional definitions of family relationships to religious morality and a social conservative "family values" movement).

CONCLUSION

A last set of lessons to draw from this provocative book have to do with the nature of law myself. This book, through no fault of its own and rather as a consequence of its bold investigation, has made me more of a legal pessimist. As in her first book about the role of race-sex analogies in feminist legal advocacy,[36] Mayeri shows once again how claims and legal arguments that start out embedded in complex social experience, intersectional, and multidimensional thin out in the course of litigation. In this light, even apparent victories show pitfalls. I am curious whether Mayeri thinks that such limitations are indicative of the historical period she studies, in which the New Right took hold, gained dominance in the Republican Party, and exerted influence over the courts. Or are there more inherent features of United States common law and constitutional reasoning that limit the law's capacity to realize substantive equality and real freedom? The answer might well have tangible implications for social movements today.

Relatedly, *Marital Privilege* offers insight into how legal meaning evolves over time through iterative appeals to precedent. In law school, professors often teach doctrine as if the holding of a case is static; holdings must have stable, legible meanings for students to apply them in response to issue-spotter exams, after all. Yet Mayeri shows that the meanings of cases only take shape historically over time, in relationship to subsequent litigation and rulings. For example, the 1965 case of *Griswold v. Connecticut*[37] might have stood for privacy in sexual relationships among consenting adults. This right might have been sufficiently expansive to support a challenge to "substitute father" regulations that restricted Aid to Families with Dependent Children when a mother cohabited with a male romantic partner.[38] But the Court recharacterized *Griswold* as a case limited to the privacy rights of married couples.[39]

In conclusion, I am left to reflect upon how I would teach a family law course that encompassed the multiple lessons of *Marital Privilege*. The question of who counts as "family" would come prior to the question of what law regulates the family. This course would dismantle the boundaries between family and property law—from zoning to public housing administration. Similarly, the course would make multiple areas of employment law visible as family law, from pregnancy discrimination laws to the regulation of family leave to questions surrounding how family care responsibilities intersect with unemployment insurance. I would need to make the structure of the welfare state central to the class, including both public benefits—social insurance and welfare entitlements—and private benefits, such as health insurance. There are

[36] SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011).

[37] 381 U.S. 479 (1965).

[38] MAYERI, *supra* note 1, at 52-54.

[39] *Id.*

casebooks that move in the direction of dismantling marital privilege,[40] but our pedagogy still needs to travel quite a distance. That would be a small step toward justice for all families.

[40] For a leading casebook that seeks to decenter marriage from the curriculum see, DOUGLAS NEJAIME, R. RICHARD BANKS, JOANNA L. GROSSMAN & SUZANNE A. KIM, FAMILY LAW IN A CHANGING AMERICA (2d ed. 2024).