Anti-Essentialism, Sexual Agency and Third-Wave Feminism: Approaches to Contemporary Legal Theory

by Darren Rosenblum* and Bridget Crawford**

A group of established feminist legal scholars are translating third-wave ideas and methodologies into a vibrant legal theory. These scholars do not acknowledge explicitly the influence of third-wave feminism, but they embrace its theoretical commitments as they attempt to redefine the relationship between feminism and the law. This paper explores three works in particular: Janet Halley’s book, Split Decisions: How and Why to Take a Break from Feminism; Joan Scott’s book, The Politics of the Veil; and Karen Engle’s article, “Feminism and Its (Dis)contents: Criminalizing War-Time Rape in Bosnia and Herzegovina.” Third-wave feminist writings (which focus on culture and politics and almost never law) instinctively reject essentialist presumptions of identity and embrace sexual agency and even libertinism.

Janet Halley’s Split Decisions proposes an anti-identitarian perspective in rejection of rigid adherence to certain strains of thought within second-wave feminist legal theory. To the extent that feminism portrays women as victims who lack meaningful agency over their lives and choices, Halley claims to reject, or want to “take a break from,” feminism writ large. But her critique is focused on certain strains of feminism that she finds theoretically restrictive. So, too, have young women proclaimed a new “wave” of feminism, when in fact they depart only from those certain aspects of feminism’s second “wave” that they find personally limiting. For neither Halley nor third-wave feminists is the break complete.

Both third-wave feminists and Joan Scott embrace women’s sexual agency as a core commitment. In The Politics of the Veil, Scott argues that Western feminists critique Muslim women who wear the veil because the French in general (and French feminists in particular) fail to understand different constructions of sexuality. Here Scott diverges from third-wave feminist theory at least in part. She rejects the concept of a feminist universalism, as do third-wave feminists, but Scott goes on to argue in favor of interpreting women’s choices in their cultural context. Third-wave feminists, in contrast, approach individual agency and freedom in a cultural vacuum; they believe that women have the ability to make choices untainted by male preferences (and presumably culture as a whole). Their embrace of self-determined choices is almost existential in scope.

Karen Engle’s “Feminism and Its (Dis)contents” embraces agency as a fundamental theoretical commitment for international law purposes. Engle critiques Catharine MacKinnon’s legal construction of rape as a war crime. Engle posits that such an approach to rape achieves the goals of international law but robs sexual agency from the very women it purports to protect. Third-wave feminists take a similarly critical view of MacKinnon’s work on pornography and its relationship to rape, instead asserting a positive role for minimizing rape as a war crime in Bosnia in particular.

Taken together, the work of Halley, Scott and Engle illustrate that third-wave feminist ideas already are incorporated into feminist legal theory, but in a purely sotto voce fashion. By making these underpinnings explicit, this paper opens the way for a deeper consideration of feminist futures.


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