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ON "HAVING FUN AND RAISING HELL":

SYMPOSIUM HONORING THE WORK OF PROFESSOR ANN SCALES

NANCY EHRENREICH†

FOREWORD

Professor Ann Catherine Scales was a dedicated and innovative teacher, scholar, and lawyer who spent her career challenging liberal legal shibboleths and working for actual, on-the-ground justice. Her life was tragically and prematurely ended in June of 2012, after just sixty years on the planet.[1] This Symposium, the print version of an event held on March 30, 2013, at the University of Denver Sturm College of Law, honors her work and her memory.[2]

Scales was among the founders of the field of feminist legal theory[3] and the author of many influential works, including *The Emergence of Feminist Jurisprudence: An Essay*[4] and *Legal Feminism: Activism, Lawyering, and Legal Theory*.[5] She was also a lifelong lawyer, continuing to litigate cases throughout her academic career, and an inspirational and much-loved law professor.

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† Professor of Law, University of Denver Sturm College of Law.

1. On June 24, 2012, Scales succumbed to brain injuries she had suffered from a fall down the stairs in her home earlier that month.

2. I organized the Symposium, but it was very much a group effort. Thanks are due to: Sturm College of Law Dean Martin Katz and the D.U. Workplace Law and Constitutional Rights and Remedies Programs, for sponsoring the event; Edward Shaoul and Aaron Belzer, former and current Editors in Chief of the *Denver University Law Review*, and their staffs, for embracing this unanticipated project; Stephanie Carroll, D.U. Administrative Director for Academic Programs, for stellar event planning support; D.U. Visiting Professor Nicole Porter and Lalita Corman, D.U. Faculty and Adjunct Support Specialist, for invaluable planning and organizing assistance; D.U. staff and student volunteers too numerous to mention; and finally, all the speakers (including some who did not write papers for this volume) who made the live Symposium such a moving and stimulating tribute to Ann Scales.

3. Her first piece, *Towards a Feminist Jurisprudence*, Ann C. Scales, 56 IND. L.J. 375 (1981), wasn't the first article on the topic, although some say she coined the term. *See, e.g.*, Will Johnston, *A 'Conversation with . . .' Series to Host Author and Lawyer Ann Scales on Tuesday, Oct. 5*, WAKE FOREST U. SCH. L. (Sept. 24, 2010), http://news.law.wfu.edu/2010/09/a-'conversation-with-...'-series-to-host-author-and-lawyer-ann-scales-on-oct-5/. But it beautifully synthesized and structured the swirling thoughts of the time, making her instantly famous among feminist law professors. She was twenty-eight years old when it was published.

4. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

5. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY (2006).

Raised in Oklahoma and North Carolina, Scales graduated from Wellesley College[6] and then attended Harvard Law School, where she helped to found the *Harvard Women's Law Journal*.[7] After graduating from Harvard, she went to work for the firm of Hughes Hubbard and Reed LLP, where she helped defend Ford Motor Company in the infamous *Ford Pinto* case[8] (about a car whose gas tank was subject to exploding during crashes).[9] Years later, she described the epiphany that led her to leave Wall Street: At a Ford-sponsored event, she received a party favor that consisted of a cigarette lighter with a picture of the Pinto on it. The irony was too much for her after all, it was an incendiary device! Scales decided she had to quit.[10]

After practice, Scales moved into the "family business"—academia. Her father, James R. Scales, had served as President of Oklahoma Baptist University and then Wake Forest University, and her mother, Elizabeth Ann Randel Scales, had also been a professor.[11] Scales spent eighteen years on the faculty of the New Mexico School of Law before leaving to begin a second stint in the world of practice (this time on her own terms).[12] In 2003, she returned to law teaching—and we were fortunate that she landed here at the University of Denver Sturm College of Law.[13] Over the course of her career, she taught courses on Constitutional Law, Civil Procedure, Appellate Advocacy, Family Law, Torts, Products Liability, Drugs and Devices, Jurisprudence, Gender and Law, and Civil Disobedience (among others), as well as a seminar on Pornography and

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6. She earned her B.A. in History and Philosophy in 1974. Bridget Crawford, *In Memory of Ann Scales 1952-2012*, FEMINIST L. PROFESSORS (June 27, 2012), http://www.feministlawprofessors.com/2012/06/memory-ann-scales-1952-2012/.

7. While at Harvard, Scales also pushed the administration to increase the number of women in the law school. Here's how a friend and collaborator of hers, Fernande (Nan) Duffly, described the impact of that effort:

> [Ann] was an amazing force for change and good, and she emboldened others to follow—including me. Seeing how few women and minorities were enrolled at Harvard, we demanded to know why and were told by the administration that admissions were blind, and more women and minorities needed to apply if we wanted to see more enrolled; so we asked for and received funding to recruit. Several of us, travelling in teams, went to colleges and universities around the country where we met with women and minority students to encourage them to apply—Ann was passionate, eloquent[,] and convincing, and I was happy to be on her team. It was a heady time, and it seemed possible that we would change not just Harvard, but the profession. She was really a blazing thing [back then], so bright and unstoppable.

E-mail from Fernande R.V. Duffly, Assoc. Justice, Mass. Supreme Judicial Court, to author (June 25, 2012, 2:33 PM) (on file with author).

8. Grimshaw v. Ford Motor Co. (*Ford Pinto*), 174 Cal. Rptr. 348 (Ct. App. 1981); Ann Catherine Scales, Curriculum Vitae (on file with author).

9. *Ford Pinto*, 174 Cal. Rptr. at 358.

10. Wakelawschool, *Conversation with: Ann Scales*, YOUTUBE (Jan. 31, 2013), http://www.youtube.com/watch?v=FIhw5-CdJsE&feature=youtu.be.

11. *Ann C. Scales*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ann_C._Scales (last modified Oct. 25, 2013, 8:48 PM). Her mother also worked for many years with the Red Cross. *Id.*

12. *Ann C. Scales (1952-2012)*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, http://www.law.du.edu/index.php/profile/ann-scales (last visited Nov. 5, 2013).

13. *Id.*

Hate Speech.[14] In addition to teaching at New Mexico and Denver, she served as a visiting professor at the University of Iowa College of Law, Boston College Law School, the University of British Columbia, and the University of North Carolina School of Law.[15]

Scales was not only an influential scholar, but also a lawyer's lawyer, litigating cases during her years as an academic as well as while in private practice. Those efforts included a number of important cases involving the rights of women and sexual minorities. She was lead counsel on the landmark case of *New Mexico Right to Choose/NARAL v. Johnson*,[16] in which the New Mexico Supreme Court held that the state's restriction of abortion funding for Medicaid-eligible women violated those women's equality rights.[17] In *R. v. Butler*,[18] a Canadian case in which she was also involved, the Canadian Supreme Court upheld the constitutionality of the obscenity provisions of the Canadian *Criminal Codes*.[19] An ardent supporter of Title IX of the Education Amendments of 1972, Scales also consulted on the gang rape case involving the University of Colorado football program.[20] And she represented feminists who helped to bring the first women's marathon to the Olympics in 1984.[21]

As a number of papers in this Symposium describe, Scales's scholarship was greatly influenced by her instincts and experiences as a practicing lawyer.[22] Concomitantly, the legal arguments she deployed as an attorney were also deeply and organically grounded in feminist legal theory. For those reasons, her work epitomizes the radical feminist commitments to deconstructing false dichotomies (including that between theory and practice);[23] challenging abstract, decontextualized legal rules;[24] and crafting workable solutions to help real people.[25]

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14. Ann Catherine Scales, Curriculum Vitae (on file with author).

15. *Ann C. Scales (1952–2012)*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, http://www.law.du.edu/index.php/profile/ann-scales (last visited Nov. 5, 2013).

16. N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).

17. *Id.* at 844. The case used an equality argument (based on the state's Equal Rights Amendment to the state constitution), rather than the more traditional privacy argument, to hold that poor women are entitled to state-funded abortions and that reproductive restrictions should be subject to strict scrutiny. *Id.* at 850–54, 858.

18. [1992] 1. S.C.R. 452 (Can.).

19. *Id.* at 490.

20. Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007). The case involved a Title IX claim on behalf of women students alleging they were raped by C.U. football players and recruits during a recruiting event. *Id.* at 1172. The university eventually settled for close to three million dollars. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 216 (2009).

21. Jean Strout, *"I'm Only Gonna Tell you This One More Time:" Lessons from Ann Scales*, HARVARD J.L. & GENDER (July 28, 2012), http://harvardjlg.com/2012/07/im-only-gonna-tell-you-this-one-more-time-lessons-from-ann-scales/.

22. Catharine A. MacKinnon, *Raising Hell, Making Miracles: The Everlovin' Legal Imagination of Ann Scales*, 91 DENV. U. L. REV. 13, 14–15 (2013).

23. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 96–100 (2003).

24. Scales insisted that legal rules be grounded in the lived experiences and concrete histories of the individuals (and groups) those rules affected. *See, e.g.*, Ann Scales, *Law and Feminism: To-*

Yet her work definitely cannot be typecast. Scales was nothing if not her own person, and her writings include frequent engagements with race, class, and sexuality issues, in addition to gender issues. Moreover, her dry and incisive wit (fueled by a razor-sharp intelligence) combined with a conversational writing style to make her scholarship uniquely clear and accessible.[26] As one student reader put it, "She seems to be speaking directly to you, even responding to your questions."[27]

But Scales's plain-spokenness was as much a matter of political commitment as personal style. She was a "small *d*" democrat about legal scholarship, loving big ideas but adamantly maintaining that they didn't require big words. And for her the life of the mind was also the life of action; she had no patience for ideas that didn't have the potential to change the world, or for people who spouted fancy prose without working to further justice.

As a law teacher, Scales brought to the classroom not only her wacky sense of humor but also a litigator's intelligence and a passion for fairness, inclusion, and equality. Watching a video of her teaching Torts felt like being in a trial practice class. She constantly offered practice-oriented vignettes to help students visualize her points—asking them to imagine being the plaintiff's lawyer meeting with her client, the defense attorney questioning a witness, the person who got hit by a hockey puck, etc. And of course she acted out each role-play, to the delight of the onlooking students. I seriously doubt anyone was ever bored in a Scales class.

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gether in Struggle, 51 U. KAN. L. REV. 291, 292 (2003) ("Legal feminism constantly reminds us that law doesn't exist in a vacuum. Equality law, for example, must address whatever makes some groups unequal, and that is—in a word—history. Amnesia is our worst enemy."); *Id.* ("Feminist method is concrete. Even what we high-falutingly call 'feminist jurisprudence' follows entirely from real women's accounts of actual oppression. Though Justice Holmes would likely disapprove of feminist lawyers, he would have to admit that our theory fits the facts.").

25. *See, e.g.*, Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 589 (1986) (critiquing the Critical Legal Studies' "critique of rights" for ignoring the utility of rights arguments in "illuminat[ing] the common experience of women" and "affirm[ing] a sense of collective identity," and concluding that "a focus on rights cannot, by itself, achieve social reconstruction, but . . . properly understood, rights discourse is a necessary aspect of any political and legal strategy for change").

26. One representative example of her writing style:

> I am told that the topic of feminism makes some lawyers and judges nervous. In particular, the term "feminist jurisprudence" sounds oxymoronic, simply repostulating the central struggle of modern adjudication. This struggle is usually described as warring opposites: law vs. politics, objectivity vs. subjectivity, or judicial restraint vs. judicial activism. In the most apocalyptic terms, this is the struggle between principled decision-making and that most feared of all evils, what the judge had for breakfast.
>
> In order to advance the discussion, I think we must first be clear about what legal feminism is not. Legal feminism is not "political correctness" or victimology or untrammeled subjectivity or fluffy-headedness or anarchy or barnyard equity. Just as importantly, it is not a practice that makes claim to objective, universal truth in the way that, for example, some of the wilder versions of "law and economics" theory do.

Scales, *supra* note 24, at 291.

27. Strout, *supra* note 21.

But Scales wasn't just popular and effective; more often than not, she was adored.[28] I asked her why the students loved her so much, figuring I'd get a few helpful teaching tips. "I just give them lots of handouts," she said. But that wasn't the reason, of course. The daughter of academics,[29] she had an old-school reverence for the pedagogical mission. She treated teaching as a sacrament, and described it as a "labor of love"—and that wasn't hyperbole. Her devotion to teaching was so reverent that it was as if it was a sacrament to her.[30] Her goal was not only to create experts in legal doctrine and argumentation—or even to introduce students to feminist critiques of society and law. Rather, it was to inspire them to think critically about everything, especially their own assumptions, and to instill in them a confidence in both their personal moral views and their ability to succeed as lawyers.[31] As many testified during a vigil held for her at D.U., just one office visit with Professor Scales could mend a student's shattered confidence or turn a mediocre paper into a great one. Even when delivering a strong critique, she made clear to the students that she cared about and respected them.

* * *

Although the purpose of this Symposium is to honor Ann's work, I know that many of the authors published here, as well as many potential readers of this Issue, knew her personally. So I'd like to acknowledge for a moment a few additional aspects of this truly amazing person.

Although I had known her through her work for much longer, I met Ann only eight years ago when she joined the D.U. faculty. A bold and caring colleague, she spent her time here nurturing junior scholars, badgering the administration (only for principled reasons), and enthralling her students. I can still hear her at visiting scholars' colloquia, asking one of those questions that sounded simple and unassuming—until you realized that it zeroed in on the key question needing to be raised about the paper just presented. Or at faculty meetings—where she wasn't afraid to call out the dean or anybody else if she thought an issue of fairness, equality, or institutional integrity was at stake.

Many readers of Ann's work will have already gotten a sense of her impish and irreverent sense of humor, and of course those who knew her personally got to see it up close and personal. I imagine that each and every friend and family member has a favorite example; mine was the

28. She was awarded "Outstanding Faculty Member" in 2006–2007, and hundreds of students attended a vigil in her honor after her injury.

29. *See* WIKIPEDIA, *supra* note 11.

30. *See* E-mail from Ann Scales to confidential recipient (Apr. 1, 2005, 11:27 P.M.) (on file with author).

31. As one commentator nicely put it, she was "a strong believer in finding a place for every voice." Strout, *supra* note 21.

bumper sticker she used to have on her car, which read: "Militant agnostic: I don't know and you don't either."[32]

Finally, Ann's absolutely genuine and unfiltered persona was a true gift in the midst of the arid interpersonal climate of professional legal culture (ivory-tower version), in which we law professors work and live. I suppose some who knew her might have interpreted her casual vocabulary, her occasional bursts of laughter in the midst of "serious" discussions, and/or her whimsical sartorial style as indicating some sort of propriety deficit. But to me they constituted intentional political interventions—evidence of a committed and self-conscious resistance to a culture where "witty repartee"[33] often passes for friendship, where humor at others' expense can be confused with camaraderie, and where behind-closed-doors judgment too often stands in for collegiality and basic humanistic respect. Shortly after arriving at the Big House (as she called it) on a Tuesday morning to teach Torts, Ann would poke her head into my office, wearing khaki pants and her bright red tennis shoes,[34] to make some sardonic comment about the day's events or the latest political issue at the law school. And I knew that I could make it through another day.

* * *

In the spirit of open and critical engagement by which Ann Scales both wrote and lived, the pieces in this volume not only describe and applaud, but also challenge, critique, and expand, her insights and assumptions.

Catharine MacKinnon's essay, *Raising Hell, Making Miracles: The Everlovin' Legal Imagination of Ann Scales*, a vividly evocative meditation on Ann Scales as scholar, activist, and personal friend (first delivered at the memorial services held in Albuquerque and Denver), provides an overarching introduction to the Symposium.[35] The piece, by one who knew her as few have, vividly captures Scales's personality and prose—precisely because MacKinnon had the perspicacity to let Ann speak for herself. In this homage to a good friend, peppered with what MacKinnon

32. Another contender was the poster in her office proclaiming, "Gravity: it's not just a good idea; it's THE LAW."

33. "Witty repartee" is the name I have bequeathed to a particular form of verbal interaction that I first encountered while an undergraduate at Yale. Many law professors will be familiar with the phenomenon. It is characterized by clever, competitive, and rather content-less bantering that initially seems fun and even challenging—until you realize that it also serves as a barrier to anything resembling genuine human communication or connection. Those of us in my entryway (Yale's version of a dorm floor) eventually agreed to stop doing it so we could actually get to know each other.

34. A student told me she was known for calling them her "Friday shoes," so perhaps my memory is off in thinking she ever wore them on Tuesdays.

35. MacKinnon, *supra* note 22, at 13.

calls "Scalesisms,"[36] Ann virtually jumps off the page—a hint of sadness just visible behind the mischievous glint in her eye.

The Outsider Within: The Radical, Not-So-Scary Feminist Jurisprudence of Ann Scales presents the remarks of the first of two keynoters who spoke at the live Symposium, Kathryn Abrams.[37] In this piece, the author contrasts two quite different aspects of Scales's scholarship: her position as "the consummate 'outsider[]'. . . . exhort[ing] her fellow travelers to critical perspectives and transgressive behavior" and her role as the "pragmatic insider," trying to convince legal actors, especially judges, of the importance and utility of feminist legal theory.[38] Abrams reconciles these two sides of Ann Scales and her work by suggesting that they reflect Ann's view of law as both complicit in the subjection of women (and other outsider groups)[39] and "always already amenable to revision."[40] In other words, Ann saw law both as hegemonic and as a source of hope for transformation. This paper beautifully captures how Scales's "resistant engagement"[41] reflected a personality at once acutely pained by human suffering and inspired by the power of the human spirit to change the world.

In *Taking a Break from Acrimony: The Feminist Method of Ann Scales*, the second keynoter from the live Symposium, Katherine Franke, takes seriously Scales's call for scholars to apply feminist theory to concrete problems of real people.[42] Examining how existing marriage law might affect same-sex couples once they win the right to marry, Franke suggests that, for both lesbians and gay men, "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."[43] In calling for a more complex and individualized assessment of marital roles for same-sex couples, Franke raises the question of whether heterosexual couples would also benefit from a view of marriage that is severed from standard gender roles.[44]

In Her Own Voice: Ann Scales as Philosopher, Storyteller, Feminist, and Jurisprude, by Patricia Cain, takes the reader on a tour of Ann Scales's traits and truisms, first explaining why she sees Scales in terms of the four roles listed in her title and then going through her "top 10"

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36. *Id.* at 16.
37. Kathryn Abrams, *The Outsider Within: The Radical, Not-So-Scary Feminist Jurisprudence of Ann Scales*, 91 DENV. U. L. REV. 23 (2013).
38. *Id.* at 22.
39. *Id.* at 31–32.
40. *Id.* at 32.
41. *Id.* at 35.
42. Katherine Franke, *Taking a Break from Acrimony: The Feminist Method of Ann Scales*, 91 DENV. U. L. REV. 41 (2013).
43. *Id.* at 46.
44. *Id.* at 48–49.

Scales quotes.[45] Along the way, Cain shares her own thoughtful and engaging reactions to Scales's ideas and quips. The result is a delightfully entertaining, warm, and moving personal reminiscence that vividly captures Scales's mind and spirit—in her own voice.

In *Ann Scales "Imagines Us": From the Eco-Pornographic Story to the Medusan Counternarrative*, Jane Caputi explores Scales's concept of "ecological pornography,"[46] concretely illustrating this concept by contrasting parallel pairs of media depictions of women and the Earth—depictions that reveal the sexualized abuse of women and the instrumental exploitation of nature to be closely associated in the U.S. cultural imagination.[47] Deftly tying in Scales's thoughts on topics ranging from touristic commodification of indigenous cultures to reproductive cancers as environmental injustices, Caputi captures both Scales's tragic vision of the pervasiveness (and connectedness) of social and environmental injustices, and the spiritual commitments that spurred her not only to continue to fight those injustices, but also to laugh and love while doing it.

Jennifer Chacón's *Feminists at the Border* engages Ann Scales's insight that militarism affects judicial reasoning in doctrinal areas far removed from military law.[48] Taking off from Scales's discussion of the immigration case, *Nguyen v. Immigration & Naturalization Service*,[49] Chacón proffers several other instances of "constitutional reasoning in citizenship and immigration cases where the military is not necessarily invoked, but where militarism is in evidence."[50] Chacón argues that the national security and "border security" discourses undergirding current immigration policies have caused the courts to defer greatly to Congress in the immigration area (even when it violates rights that otherwise would be constitutionally protected), producing a legal regime in which "[m]ilitarism trumps equality."[51] Militarism in immigration policies, she contends, both supports and increases sex and gender biases already present in those policies.[52]

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45. Patricia A. Cain, *In Her Own Voice: Ann Scales as Philosopher, Storyteller, Feminist, and Jurisprude*, 91 DENV. U. L. REV. 53 (2013).

46. Jane Caputi, *Ann Scales "Imagines Us": From the Eco-Pornographic Story to the Medusan Counternarrative*, 91 DENV. U. L. REV. 65, 65 (2013) (internal quotation marks omitted). Upon seeing Mount Rushmore in the Black Hills of South Dakota, Scales had described the monument as pornographic: "Just as pornography portrays women as enjoying abuse, Mount Rushmore portrays nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do." *Id.* at 68 (quoting Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 95 (1990)).

47. *Id.* at 70–71.

48. Jennifer Chacón, *Feminists at the Border*, 91 DENV. U. L. REV. 85, 89–96 (2013).

49. 533 U.S. 53 (2001).

50. Chacón, *supra* note 48, at 91.

51. *Id.* at 106–07 (internal quotation marks omitted).

52. *Id.* at 107.

Shannon Gilreath's *Feminism and Gay Liberation: Together in Struggle* explores "the role that feminist jurisprudence has to play in the lives of gay men,"[53] arguing that, despite its moniker, much poststructuralist "queer theory" is actually heteronormative and thus of little use to the gay liberation project.[54] The essay powerfully conveys the strong emotions and firmly held intellectual commitments that have fueled some of the debates within (and between) feminist and queer theory—especially between writers who see themselves as poststructuralists and those who identify as radical feminists—while nevertheless paying obeisance to the subtlety of the position Ann Scales staked out in these debates and to her insistence that "[s]olidarity is possible."[55]

Lynne Henderson's *Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales* catalogues the numerous current threats to women's constitutional rights to abortion and contraception—rights that were supposedly "settled law" decades ago.[56] Drawing on Ann Scales's lifelong concern for reproductive justice, Henderson situates today's issues within Scales's feminist frames of reference. Citing Scales's flexible and nonjudgmental feminism, her rejection of false dichotomies, and her foundational concern with preventing harm, Henderson emphasizes that seeking coalitions across differences is an important component of modern reproductive-rights work.[57] This essay's compelling review of how Supreme Court precedents have opened the door to increased state regulation of abortions, as well as its discussion of current issues about access to contraception under both the Affordable Care Act and "Conscience Clause" statutes, provides ample evidence for Henderson's conclusion that continued and vigilant legal activism is imperative in the reproductive area.

In *"Stuck" on Love*, Tamara Kuennen asks why scholars writing about intimate partner violence don't consider the possibility that love for a partner might sometimes be the primary reason why a battered woman refuses to cooperate with a criminal prosecution, chooses to remain in the relationship, or both.[58] Instead, Kuennen maintains, authors often "[a]void and [a]pologize for [l]ove" as a motivator of battered women's behavior.[59] Drawing on Ann Scales's concept of places of "stuckness" in feminist theory—and in particular on her identification of

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53. Shannon Gilreath, *Feminism and Gay Liberation: Together in Struggle*, 91 DENV. U. L. REV. 109, 113 (2013).

54. *Id.* at 115–29.

55. *Id.* at 110 (quoting Ann Scales, *Poststructuralism on Trial*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 395, 407 (Martha Albertson Fineman et al. eds., 2009)).

56. Lynne Henderson, *Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales*, 91 DENV. U. L. REV. 141 (2013).

57. *Id.* at 164 ("[A]voiding abortion is optimal for all concerned, and we should not decline alliances on some issues unless the risks of co-optation are high.").

58. Tamara L. Kuennen, *"Stuck" on Love*, 91 DENV. U. L. REV. 171, 173–75 (2013).

59. *Id.* at 173.

false consciousness as one of those places—this essay raises important questions about the distinction between, on the one hand, everyday compromises a woman might make because she loves her partner and values their relationship and, on the other, choices that the law ought to consider coerced, even if prompted by love.

How Masculinities Distribute Power: The Influence of Ann Scales, by Ann McGinley and Frank Rudy Cooper, focuses on group sexual assaults such as the alleged gang rape by University of Colorado football players (and recruits)—discussed in Ann Scales's *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*[60]—to illustrate how masculinities "distribute power,"[61] In addition to discussing the "boys will be boys" attitude that communities often have towards such attacks, McGinley and Cooper also point out that not all young men benefit from that attitude. They illustrate this point through a discussion of constructions of black male masculinity operating in the George Zimmerman/Trayvon Martin case.[62] Turning to Scales's work on militarism, the authors argue that that work reveals parallels between the ways masculinity distributes power in sexual assault cases and in U.S. foreign policy. A local community might be invested in the "reflected masculinity" provided by its football team in the same way that a nation's identity might be invested in the strength of its military.[63] And the excuses provided for our military's aggressions are not that different, McGinley and Cooper suggest, from the "boys will be boys" narrative Scales condemns in sexual assault cases.

Last, but certainly not least, in *On* Surviving Legal De-Education: *An Allegory for a Renaissance in Legal Education*, Robin Walker Sterling presents a fictional depiction of the type of law school Ann Scales would have embraced.[64] Based primarily on Scales's 1990 piece, *Surviving Legal De-Education: An Outsider's Guide*,[65] this hilarious, creative, and at times inspirational narrative captures not only the substance of Scales's critique of modern legal education but also the irreverent sense of humor and deep commitment to humanistic education that permeate her positive pedagogical vision.

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60. Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 DENV. U. L. REV. 187, 188–89 (2013); Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 (2009).

61. McGinley & Cooper, *supra* note 60, at 188.

62. *Id.* at 104–208. In that case, George Zimmerman, a neighborhood watch captain, killed unarmed black teenager Trayvon Martin. *Id.* at 204.

63. *Id.* at 200–02.

64. Robin Walker Sterling, *On* Surviving Legal De-Education*: An Allegory for a Renaissance in Legal Education*, 91 DENV. U. L. REV. 211 (2013).

65. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990).

Ann Scales's blazing intellect, as well as her uncompromising humanism and boundless spirit, are all present in her scholarship, as the pieces in this Symposium vividly reveal. It is my hope that these essays will not only attest to and preserve the contributions her work has made thus far, but also inspire a whole new generation of readers to explore the wonderful and wacky world of Ann Scales.

RAISING HELL, MAKING MIRACLES: THE EVERLOVIN' LEGAL IMAGINATION OF ANN SCALES

CATHARINE A. MACKINNON†

We are blessed, as our girl might have put it, that Ann Scales was the writer she was, because we have her in her work. She herself is present, right there—"all in" as in poker—in every line. None of it could have been written by anyone else.

That inimitable, irreverent, ever-woman-identified voice speaks from every page—fresh, sharp, playful, pungent, pithy, hilarious by turns, with a certain towel-snapping quality. A true flamethrower, Scales took no prisoners but no cheap shots, either, and somehow always managed to be loving in her critical engagement, loving in the nonviolent sense. There was gentleness to her edge even while pulling no punches. Her 1985 analysis of Guido Calabresi on torts has all this, delivered with signature rapier precision: "[His] failure to consider . . . political realities renders the legal discussion almost whimsical."[1] So does her recent riposte to Janet Halley's (at minimum premature) recommendation to "[t]ake a [b]reak from [f]eminism."[2] Ann: "That which was never fully understood or embraced cannot be abandoned."[3]

Coming to law through philosophy, she ranged supplely from the elevated to the quotidian, dropping names of the big ones with perfect deadpan aim. On the binary in games, for instance, she said of Wittgenstein, "I hate to rely on a dead white man[,] . . . but I like his weird clarity."[4] Accessible, unpretentious, imaginative, her writing is often layered with unexpected meanings that ambush you, as in her observation that

† Elizabeth A. Long Professor of Law, University of Michigan Law School, and (long-term) James Barr Ames Visiting Professor of Law, Harvard Law School. With the addition of the long block quotation, *see infra* text accompanying note 18, the text of this piece is essentially as delivered at two remarkable, heartrending memorials to Ann Scales, one at the University of New Mexico Law School on September 19, 2012, the other at the University of Denver Sturm College of Law on September 21, 2012, each infused with her special spirit. Special thanks to Deborah Huerta for her incomparable assistance with the footnotes, Gerald Torres for his perceptive suggestion, and Anne E. Simon for her support and guidance.

1. Ann Scales, *Tragic Voices*, 4 YALE L. & POL'Y REV. 283, 292 (1985) (reviewing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985)).

2. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 10 (2006). If anyone is taking this "break," neither feminism nor those who do the real work of changing the world for women seems to have noticed.

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

4. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 154 (1990).

Ronald Reagan was wise to consult an astrologer because he "needed to be out of himself, to become one with his speckness."[5]

Trenchant and fearless, Ann had what my grandmother called gumption. In this vein, treasure her 1990 analysis of the Supreme Court's decision requiring universities disclose materials revealing their internal processes in tenure challenges.[6] "[This] should pose difficulties," she opined, "only for institutions that still allow reliance on gossip, encoded messages, and inarticulated (often inarticulable) standards."[7] Well, if the shoe fits . . .

Her plain-spoken downbeat punch lines were persuasive as hell, often with an "I dare you, I double-dare you to disagree with this" undertone. One talk at the University of Toronto in 1988, after an erudite rendition of the fraught philosophical question of making multiplicity rather than uniformity the standard of meaning, winds down with, "This is an incredibly difficult challenge, but I suspect that women are up to it."[8] Along with capital-*T* Truth, Ann's takedown of sports metaphors in law is equally on target, her facility with analogy likewise on display: "I am sorry, sports fans, but law is just more serious than baseball or football. Rape is not a game, racial violence is not a sport, and the deployment of first-strike nuclear weapons portends no comic relief."[9] The girl had rhythm.

What she knew from life made its way into her work, making it real that way. An early piece of intellectual autobiography gave us a hard-to-imagine Annie "struck dumb" in law school.[10] "[A]dded to one's feeling of incompetence," she recalled, "is self-hatred, the creepy sensation that one is [on] a long slide through angst, through ennui, to selling out."[11] The system rewards your silence with power, she said.[12] The silence and sell-out of Ann Scales, then as later, the system would have to limp along without. Her self-chosen "Pollyanna in Hell" posture was infectious and served her critique, evident in her story of law as told in law school being "the result of an ongoing white male encounter group," as being "what happens when you take millions of white male subjectivities, compare their responses to the challenges of being alive, write it all down, and

5. Ann C. Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710, 724 (1990).

6. *See* Univ. of Pa. v. EEOC, 493 U.S. 182 (1990).

7. Ann C. Scales, University of Pennsylvania. v. EEOC *and the Status of Peer Review: A Symposium*, ACADEME, May–June 1990, at 32.

8. Ann C. Scales, Remarks at the University of Toronto Legal Theory Workshop: The Women's Peace Movement and Law: Feminist Jurisprudence as Oxymoron? 64 (Feb. 26, 1988) (on file with author).

9. Scales, *supra* note 4, at 151.

10. *Id.* at 140.

11. *Id.*

12. *Id.* at 141.

work for centuries on hammering out the rough edges [to make] it all seem inevitable."[13]

You feel her joy, her excitement at cracking the code, how much fun she was having, as well as how exciting and fun and enlivening and enlightening law school her way could be. Surviving legal de-education, she said, called for "caretaking" and "a healthy infusion of grace."[14] Her students got this unstintingly from her. In contrast with Scott Turow's *One L* description of law students as "men and women drawn to the study of rules . . . with a native taste for order,"[15] she saw the day coming when law students could be described as "women and men drawn to the living of life, . . . with a native taste for survival, for diversity, and for freedom."[16] She knew and faced pain and sadness too, warning us against the "self-hater talking[,] . . . judging my insides by their outsides," insisting we trust ourselves to tell why we are "undermined, ineffectual, and unhappy."[17]

One extended meditation has it all: the highs and the lows, the method, the madness, and the message.

> Life for a woman in this society is about existential contingency.
>
> In my case, the existential undermining is not constant. I live in a sleepy southwestern community, and I have a comfortable life. Nevertheless, existential torpedoes hit me with some regularity. I recently got a letter from a guy who claimed that some of my mail mistakenly had been delivered to his house. He inferred from a postcard that I was a lesbian and inquired whether he and the woman with whom he lived could engage in a *ménage à trois* with me. He did not include much information about his partner, but he told me everything about his body. The letter was simply, and appropriately, signed "Randy."
>
> Now here was a torpedo that caused a dilemma. For my own sanity, I simply had to take it in stride. So, I told myself, hey, the misdelivery of my mail was an honest mistake. The letter was pleasant enough, except for the anatomical detail. Randy promised that he would never bother me again if I did not call the telephone number he enclosed. I did not and he has not. On the other hand, I spent the next few days wondering how Randy got my mail, speculating whether Randy had a violent streak, trying to discern if each passing male might be Randy, and writing down the license numbers of cars that seemed to be parked too long on my street. My energy was diverted, and I was a little crazy.

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13. *Id.* at 139, 144.
14. *Id.* at 146.
15. SCOTT TUROW, ONE L 300 (1977).
16. Scales, *supra* note 4, at 164.
17. Scales, *supra* note 5, at 716, 720.

This episode, however, was nothing compared to that endured daily by the women who lead less comfortable lives—women in poverty, women in abusive relationships, women in the sex industry, women in most employment situations. My anecdote is nothing compared to what happens thousands of times each day on the streets, or to what almost happens.

On my way to this Symposium, I stopped off to see my parents in North Carolina. Consider this excerpt from the letters to the editor in their hometown newspaper:

> Rape is a horrifying experience that stays with a person for the rest of her life. . . .
>
> In my files I have an article that estimates that 35 percent of all females will be sexually assaulted in their lifetimes.
>
> If this is true, why do so many women take such foolish chances of being the next victim of rape? This past week I was driving through a fairly well-lighted part of Winston-Salem. It was 9 p.m., and hardly anyone was on the streets.
>
> As I stopped at a red light, rounding a corner was an attractive young woman, I would say in her early 20s, wearing a skin-tight aerobic outfit with bike pants. As I watched her run I became increasingly angry and wanted to say something, but she was wearing a Walkman.
>
> Then I thought I would throw the soft-drink can I had in my hand at her to protest her foolishness.
>
> But I immediately ruled that one out, figuring it to be a bit too much. . . .
>
> I'm writing this letter in hopes that the jogger, or someone like her, will read it and realize that instead of being someone concerned for her well-being, *I could have been a rapist* and she my next victim.

I hereby nominate this letter as the lead item on the "No Shit News." The author does not have to have been a rapist; he does not have to have thrown the soft-drink can. He did not even have to write to the newspaper. All he had to do, in order to fulfill his patriarchal duty to control the night, was to blame the woman for existing and looking great.

So we live with it. And, the law of the land is that we are obligated to live with it.[18]

18. Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 101–02 (1990) (omissions in original) (footnote omitted) (quoting Steven E. Kerhoulas, Letter to the Editor, *Taking Foolish Chances*, WINSTON-SALEM J., Sept. 30, 1989, at 16 (emphasis added)).

Here we get a glimpse of her own oppression—characteristically minimized, laughing until she cried and vice versa—wrapped around one of the classiest comings out in print ever. Read aloud for full effect.

Humble about law's limitations and her own, yet open to the limitless potential of human consciousness and action, Ann's response to the direct action against nuclear arms by the Greenham Common Women's Peace Camp[19] produced some of her most inspired writing. These women made her question women's obligation to respect the authority of a law that does not respect us.[20] Compared with their unmediated activist relation to reality, Ann saw law as "a giant energy sponge."[21] Her illuminating 2006 book—one she had titled "Active Ingredients" but NYU Press changed to the "boring and misleading" (her description) *Legal Feminism*[22]—is accordingly divided into two parts: one, "Places of Stuckness" in law and philosophy and two, the "Places [B]eyond Stuckness" offered by feminist legal theory and, especially, practice.[23]

Knowing that law isn't everything did not lead her to think it is nothing. Law according to Scales "can either provide a little breathing room or tie plastic bags around women's heads."[24] It was untying those plastic bags that committed her to practice. As she put it at the end of her book, "My loyalty to the rule of law depends on its being able to reach through the grime of history and politics in order to achieve incremental measures of dignity for real people in real life situations. . . . If that is result-orientation, I'm proud of it."[25]

The pornography struggle for civil rights inspired some of my favorite Scalesisms. One rejoinder to the opponents of the anti-pornography civil rights law[26] has Ann's special genius for cutting things down to size, together with her incomparable feel for the ridiculous: "It is gross legal solipsism to assert that protecting the makers of *School Girl Zombies With Deep Throats* from a *civil rights action* is necessary to protect either the alleged independence of the fourth estate or the com-

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19. For information, see generally ALICE COOK & GWYN KIRK, GREENHAM WOMEN EVERYWHERE: DREAMS, IDEAS AND ACTIONS FROM THE WOMEN'S PEACE MOVEMENT (1983). Bringing their voices to the United States, a group of the Greenham women litigated the Reagan Administration's deployment of nuclear weapons in Europe. The federal courts were unsympathetic. *See* Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1340 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

20. *See* Scales, *supra* note 8, at 8–10.

21. *Id.* at 4.

22. E-mail from Ann Scales to author (July 3, 2006, 1:09 PM) (on file with author).

23. SCALES, *supra* note 3, at vii.

24. Scales, *supra* note 5, at 723.

25. SCALES, *supra* note 3, at 151.

26. *See* Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 6, 6 n.19 (1992). The anti-pornography civil rights law is a sex equality statute that makes proven harms of pornography civilly actionable by their victims. *See generally* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) (collecting hearings containing testimony of victims with versions of the proposed law).

prehensiveness of our children's education."[27] That same debate produced one of her more enigmatic lines—"You are a strange bedfellow when you sleep alone"[28]—as well as my nomination for all-time greatest Scales hit: "Mount Rushmore is ecologically pornographic."[29]

Ann Scales c. 1955, copyright © Ann C. Scales Trust, used with permission

Who we were to each other evidently called for new names. Me, she dubbed "Snakehead" after Medusa's and my flaming tendrily hair. Her, in retaliation, I called "Rodeo Gal" after her sheer bounce, readiness to jump onto anything, ability to get up off the ground, and the fearless energy she brought into every room she entered, harking back to rodeo riding in her younger years.

Her notes to me typically open with some version of "Monster Girl" or "Your massive snakeheadedness" and sign off "RG."[30] The monstrous honor of the Medusa moniker, from its conventional meanings to Ann's own gloss, is laid out in her *Disappearing Medusa*:

> By turning men to stone, she prevented "the male gaze," thus denying the possibility that women could be defined by men. . . . Her snakes represent unintimidatable self-possession. She had to be killed because, by her very existence, she could expose the contingency of the Law of the Fathers. . . . Her destruction required female complici-

27. Scales, *supra* note 26, at 14–15.
28. *Id.* at 9.
29. Scales, *supra* note 18, at 95.
30. *See, e.g.*, E-mail from Ann Scales to author (Oct. 7, 2011, 3:42 PM) (on file with author) ("Here's hoping for a very snakeheaded birthday."); E-mail from Ann Scales to author (Nov. 15, 2009, 2:58 PM) (on file with author); E-mail from Ann Scales to author (July 3, 2006, 1:09 PM) (on file with author); E-mail from Ann Scales to author (Mar. 27, 2006, 6:42 PM) (on file with author).

> ty, which was amply rewarded. . . . Medusa symbolizes female potential . . . the unvarnished, undomesticated—and incomplete—counternarrative to patriarchy . . . the possibility of a transformatively different consciousness.[31]

It does give a person quite a lot to live up to, as well as reminds you to get stuff done before they chop your head off.

We both identified, in the penetrating layered phrase of Andrea Dworkin (who also died way too soon), as "a feminist, not the fun kind."[32]

> You make me scream with laughter when you do your "feminist, not the fun kind." The best part, of course, is how much fun you are. How seriousness about changing the world is the last frontier of fun. That's why our hearts ache for Andrea. She was so much fucking fun.[33]

With Ann you never had to ask if we were having fun yet.

Ann was warm-heartedly generous to colleagues, especially to me. She deeply got what I say, ate it more than read it, went forward with it incorporated, made her own, taken fully on board in her own way. The analysis of sex inequality as biologically based in her earliest feminist jurisprudence[34] disappeared from her work after reading mine, a process she chronicled.[35] One precedent she established, that failure to cover abortions under Medicaid is sex discrimination under New Mexico's Equal Rights Amendment,[36] was my theory and her practice. Ann also correctly credited it to the judge: "Pam did good that day, didn't she."[37] Her warm celebration of my work was her last to appear in print during her lifetime.[38]

Ann was sisterly most of all. Rereading years of correspondence shows her giving you back to yourself like a well-written play. A few years ago, I told her how much I had adored climbing up on Annapur-

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31. Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 35 (1997) (footnotes omitted).

32. ANDREA DWORKIN, ICE AND FIRE: A NOVEL 110 (1st Am. ed., Weidenfeld & Nicolson 1987) (1986) (placing phrase in the mouth of a fictional character); *see* E-mail from Ann Scales to author (July 3, 2006, 2:56 PM) (using Dworkin's phrase) (on file with author); E-mail from Catharine MacKinnon to Ann Scales (July 3, 2006, 2:30 PM) (on file with author).

33. E-mail from Ann Scales to author (July 3, 2006, 2:56 PM) (on file with author).

34. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 425 (1981) ("[The] historical subjection of women is based upon biological differences between the sexes . . . .").

35. *See* SCALES, *supra* note 3, at 84 (citing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979)) (noting that reading *Sexual Harassment of Working Women* led her to think about equality in social terms).

36. *See* N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).

37. Telephone Conversation with Ann Scales (Sept. 2007) (referring to Judge Pamela B. Minzner in a discussion shortly after the judge's death).

38. *See* Ann Scales, *The World As She Found It*, 46 TULSA L. REV. 7, 7 (2010).

na.[39] Me: "Annapurna is my kind of gal—elegant, eloquent, edgy."[40] Ann: "My sense of it is that Annapurna was waiting to meet you."[41]

Multi-regional, raised largely in the Southeast, educated in the Northeast, Ann was a passionate Westerner with a special love for New Mexico. Driving back from North Carolina after helping Margot, her close friend of thirty-five years, fight (and later die) of cancer, Ann was hit with serious health issues of her own and was barely able to drive. On she forged as ever with grit, no whining, and much delectation.[42] "I am beside myself with glee: tomorrow morning, I'll be swooping into Tucumcari, . . . then across the very high plain, then crossing the Sandia Mountains into Albuquerque. Viva Nuevo Mexico! It has been a long year and a half, girl."[43] "[M]y eminent future is full of green chile—God's Perfect Food."[44] Ouray, Colorado, she wrote, "may be the most beautiful place in the world."[45]

She did not leave us adrift in moments like today either. "Ritual," Ann wrote,

> can be an opening to the great forces in life. . . . We need to reclaim ritual . . . . There has to be a way for us to say to ourselves and our students and our clients, it is okay for us to be alive, we belong here, this land *is* our land . . . . Here we are today, talking about all the things we are talking about: sharing hope, passion, communion, a new kind of ritual. It's a miracle.[46]

She was that miracle. And now, as we open to the great forces in life, she won't be telling us any of this even one more time.[47]

Hoping she wouldn't feel it too precious, I find myself thinking of Ann as a butterfly: volatile, beautiful, fragile but strong (who knew how strong), creatively distractible, energetically flying off after the next flower or the next long lonely migration in the company of thousands. As the butterfly of chaos theory, whose wing-beat in Brazil ultimately sets

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39. E-mail from Catharine MacKinnon to Ann Scales (May 23, 2008, 3:24 PM) (on file with author).

40. Telephone Conversation with Ann Scales (May 2008).

41. E-mail from Ann Scales to author (May 24, 2008, 2:57 PM) (on file with author).

42. *See* E-mail from Ann Scales to author (May 14, 2009, 7:32 PM) (on file with author); E-mail from Catharine MacKinnon to Ann Scales (May 12, 2009, 11:40 PM) (on file with author); E-mail from Ann Scales to author (May 12, 2009, 11:27 AM) (on file with author); E-mail from Ann Scales to author (July 3, 2006, 2:56 PM) (on file with author).

43. E-mail from Ann Scales to author (May 14, 2009, 7:32 PM) (on file with author).

44. E-mail from Ann Scales to author (April 24, 2009, 11:49 AM) (on file with author).

45. E-mail from Ann Scales to author (July 10, 2009, 4:02 PM) (on file with author).

46. Scales, *supra* note 5, at 726.

47. This passage channels Ann. *See* SCALES, *supra* note 3, at 7 ("Ordinarily I resist the requirement that every feminist on every occasion has to explain feminism again. I'm always tempted to say, 'I'm only going to tell you this one more time.' But that is what I will do, shortly.").

off that tornado in Texas.[48] And now, as some peoples native to this land believe, as a messenger between this world and the next.[49]

It's all there in her immortal gloss on "shit happens," which, according to her, "is about embracing the mystery and the paradox that make life worth living . . . acknowledg[ing] that we did not make this beautiful world, can never understand it completely, and do not have the authority to destroy it."[50] It is all there in her kiss-off to mortality in an email from North Carolina: "[W]hen I was here . . . for [Margot's] double mastectomy, . . . her last words going into surgery were (stage direction—LOUDLY): THEY'VE BEEN GREAT TITS, BUT IT'S TIME TO SAY GOODBYE. That is the level on which we are interacting: life is really THIS short. Let's live it."[51]

As we move along down our trail that she made her trail, reclaiming our rituals, struggling beyond our stuckness, becoming one with our speckness, Annie's spirit swooping about the Sandia gorged on green chiles, how about we fly Rodeo Gal's flag and "[d]o everybody a favor, raise some hell today."[52]

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48. *See generally* JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 11–31 (2008). The concept of the butterfly effect originated with Edward Lorenz. *Id.* at 329 (citing Edward N. Lorenz, Address at the Annual Meeting of the American Association for the Advancement of Science: Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas? (Dec. 29, 1979)).

49. GENE KRITSKY & RON CHERRY, INSECT MYTHOLOGY 115 (2000) (discussing the imagery of moths and butterflies in Blackfoot, Hopi, and Goajiro culture).

50. Scales, *supra* note 18, at 116–17 (internal quotation marks omitted).

51. Email from Ann Scales to author (July 3, 2006, 2:56 PM) (on file with author).

52. Scales, *supra* note 4, at 163.

THE OUTSIDER WITHIN: THE RADICAL, NOT-SO-SCARY FEMINIST JURISPRUDENCE OF ANN SCALES

KATHRYN ABRAMS†

ABSTRACT

In her aspirations for the law, in the methods by which she exhorted readers to engender change, in her unique, transgressive, often outrageous voice, Ann Scales was the consummate "outsider." But she also understood the importance of engaging those who could make change possible. Thus Ann not only spoke truth to power, but also knew how to communicate it in registers that legal decision makers could at least sometimes apprehend. This Essay explores the work of Ann Scales in both "outsider" and "insider" modes, and examines the ways her teachings resonate in contemporary controversies over abortion and military service.

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INTRODUCTION

It is a bittersweet task to take stock of the wonderful, challenging work of Ann Scales. It is hard not to feel sadness and anger about the occasion of these reflections; someone who did the world as much good as Ann did should have had 75, 80, 100 years in which to do her work. But I have been energized by the opportunity this Symposium has given me to return to some of this extraordinary work, and think about what it means for all of us, and for the feminist and queer advocacy—and other forms of contending for equality—that we will continue to do.

This task of figuring out "what the work means" is a little more challenging with Ann than with some other feminist theorists because there are different facets, orientations, and tones to her work. I will focus

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in this Essay on one tension that I have always found fascinating: Ann is sometimes the consummate "outsider"—in the words of this Symposium, "Raising Hell and Having Fun"—finding all kinds of interesting ways to exhort her fellow travelers to critical perspectives and transgressive behavior. But this is not the only Ann Scales I find in the work I have reread over the past few months. Later in her career, though not exclusively there, Ann seemed to move from happy warrior to skillful conciliator, trying to explain to legal actors why they needed feminist thought, or why it was not as scary, or as alien to their familiar concerns and practices, as they imagined. This was a more carefully controlled presentation, but it was no less committed and no less empathetic. Ann understood that it was hard for judges to move out of what she called their places of "stuckness" and she wanted to share with them resources—in many cases, feminist theoretical resources—that would permit them to do it. In this mode, she seems more like the early Ruth Bader Ginsburg (to whose modest, stealth innovations she would sometimes respond with sisterly frustration) than Catharine MacKinnon (with whom she so strongly identified in her work). So was Ann Scales a joyful, nonconforming outsider or a pragmatic insider? The answer, of course, is both—in a challenging, ultimately complementary, combination. In my comments, I hope to demonstrate how these parts of Ann's work fit together and what their juxtaposition reveals.

My effort to fit these pieces together will highlight four aspects of Ann's work: her affective or emotional range, her pragmatism, her view of law, and her view of human agency. In developing these ideas I will focus on specific examples of Ann's work, particularly pieces that strike me as being in one vein or another. My hope is to "show" as much as I "tell" because Ann was a wonderfully vivid writer; sometimes just hearing her language makes things clearer than I could ever make them by paraphrasing.

I. ANN SCALES AS IRREVERENT OUTSIDER

I will begin with a few of the works that capture Ann in her outsider mode—her sometimes outrageous, persistently nonconforming angle of vision on the legal world around her. Two of these works focus on legal education and one looks at another of her favorite substantive topics, militarism and jurisprudential method. *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, one of Ann's earliest works, describes a fabulous course that she co-taught to introduce first-year students to law.[1] The course was full of history, sociology, and philosophy, and it confronted students with the most emotionally charged examples possible (from pornography to nuclear holocaust). But much of the arti-

1. Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433, 433 (1986).

cle focuses on the way Ann and her colleague Karl Johnson began the course. First they read a quote by Woody Guthrie:

> I hate a song that makes you think that you're not any good. I hate a song that makes you think that you are just born to lose. Bound to lose. No good to nobody. No good for nothing. . . . Songs that run you down or songs that poke fun at you on account of your bad luck or your hard traveling. I am out to fight those kinds of songs to my very last breath of air and my last drop of blood. I am out to sing songs that will prove to you that this is your world and that if it has hit you pretty hard and knocked you for a dozen loops, no matter how hard it's run you down and rolled over you, . . . I am out to sing the songs that make you take pride in yourself and in your work.[2]

Then they led students in a rousing version of Guthrie's *This Land is Your Land.* The "seven reasons" of the title explain why it is entirely fitting to begin students' legal education with a song. These reasons are riveting because they confront just about everything law schools conventionally communicate to students about their legal education. Consider number one: "[W]hen you're down, it's hard to sing and even harder to learn," where she is telling us that legal education works better when it makes students feel good about themselves rather than confused, inadequate, or clueless.[3] Or number four: "[Y]ou could think about songs, but it's much better to sing them."[4] Here she celebrates the fact that Woody Guthrie does not "'think[]' like a traveler," he "roam[s] and ramble[s]" and follows his footsteps, and "[b]y the end of his journey, he knows more about the territory than any rational explanation of it could have told him."[5] In case readers have any doubt that Ann was advocating nonlinearity and departures from purely rational forms of cognition in law school, she adds that logic presses us toward dichotomies and critiquing logic and its dichotomies gains us only partial release: "[T]o go further, we must break the rules of logic. We must put ourselves at risk. We must dare, we must dream, we must act. We must sing."[6] And there are numbers five and seven: "[W]hy can't law celebrate our creativity the way singing can?"[7] and "[Y]ou don't have to sing someone else's songs; you can make up your own."[8] These reasons convey the unlikely message that you do not have to empty yourself out to be the blank and neutral receptacle of the law—your creativity and your perspective have value as you strive to learn the law and give it meaning.

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2. *Id.* at 434.
3. *Id.* at 437–39.
4. *Id.* at 446.
5. *Id.*
6. *Id.* at 448.
7. *Id.*
8. *Id.* at 453.

But because all students cannot start their education with Woody Guthrie, Ann wrote *Surviving Legal De-Education*, a guide for students who have to manage law schools as they are conventionally structured.[9] A key problem with this kind of education, according to Ann, is that it is premised on one kind of emotional experience: that of the autonomous individualist, whose occasional urges toward community or altruism can be easily satisfied.[10] Law schools then call this emotional experience "objectivity" and make it the focus of assigned readings and classroom discussions.[11] If this account tracks your experience, you are likely to feel ratified and no more than typically uncomfortable in law school.[12] As Ann explained:

> To that person, the [law school] story says, "You are not alone and your existential doubts are *exactly* the ones we are all working on. We can't actually have communitarian presumptions, of course, but we can have lots of exceptions to individualistic rules, so long as they are carefully managed. Just help us consolidate these limits. Good thing you're here to help!"[13]

If this account of human experience does not align with your life or inclinations, however, you must "divorce those experiences from the study of the story, and relegate feelings to a separate realm, perhaps never to be heard from again."[14] Performing this distancing operation on a daily basis can make you feel like you have "acid slowly dripping on [your] soul[]."[15] This disparate experience is particularly painful, as Ann observed, because the latter group tends to be composed of women and people of color.[16]

But Ann was not prepared to surrender to this grim reality: her goal is to create "happy outsiders" in law school. This is no small undertaking, and the article aims to give law students some direction for achieving it. Framed as a set of lively imperatives, the ideas she proposed tell us something about how Ann herself approached an imperfect law school world. They are to be applied, Ann proposed, in a "multilithic" way—"sort of randomly, when you feel like it. The combined effect, one hopes, will be like raindrops wearing away a stone."[17] Some of these proposals involve important elements of jurisprudential critique. "Question authori-

9. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990) [hereinafter *Surviving Legal De-Education*].

10. *Id.* at 142–43.

11. *Id.*

12. Ann notes that members of this group "are miserable, but in a homey way. They are being exhausted but well-nourished while in training for The Race." *Id.* at 142.

13. *Id.* at 143.

14. *Id.* at 142.

15. *Id.*

16. *Id.*

17. *Id.* at 147.

ty,"[18] Ann instructed; in particular, question meta-standards for evaluating legal rules (such as "predictability") that do not tell you anything about the ultimate ends of the law.[19] For Ann, as for her jurisprudential hero Lon Fuller, meta-standards and garden variety legal rules must be informed by the larger goals toward which legal practices are directed.[20] Assertions of authority that neglect or disavow the broader social goals that animate law should be viewed with skepticism. Other imperatives focus on language: for example, "Question sports metaphors."[21] Sports metaphors do not simply authorize the experience of men: they may emphasize dimensions of rule-based game playing that are alien even to women who played sports, and may starkly understate the stakes of legal decision making.[22] A better answer, Ann argued, is mothering metaphors, which capture more accurately the perpetually legitimating, justificatory task of the judge:

> Think about it: when you tell a child to do something, when you issue what you hope to be an authoritative command, the child's response very often is to ask why. . . . Successful mothering does not depend on making references to some higher authority. Rather, it depends upon judgment and justification (We might even call it "reasoned elaboration"). It depends on a willingness to explain the rule in some cases, and a willingness to suspend the rule when the situation indicates it . . . Sports are pre-arranged contests of strength, with very little flexibility in the rules. Mothering is a constant process of negotiation and judgment. It is a dialectic of persuasion. Like the authority of law, the mother's authority must be *earned* every day.[23]

Still other suggestions—some of my favorites—are tactical. "Use the power you have. You are the consumers of legal education today and the alumnae of tomorrow."[24] More colloquially, this means "do everybody a favor, raise some hell today"[25]: dog the path of the law school dean, mount letter-writing campaigns, organize boycotts. And finally, "Take care of yourselves and each other and have real fun."[26] This solidaristic note makes surviving—and potentially transforming—law school a collaborative, even celebratory, project.[27]

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18. *Id.* at 148 (emphasis omitted).
19. *Id.* at 148–49.
20. "We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: *toward what end is this activity directed?*" *Id.* at 148 (quoting L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 52 (1936)).
21. *Id.* at 149–52.
22. *Id.* at 150–51.
23. *Id.* at 152.
24. *Id.* at 162.
25. *Id.* at 163.
26. *Id.*
27. In this article, as in the others discussed in this section, Ann relished her role as an outsider, noting:

The final article in the outsider category is a different kind of article. In *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, Ann was concerned with the commanding, corrosive force of militarism on U.S. governance and society.[28] The article offers a challenging critique of militarism and law's relation to it, and a novel discussion of how feminists might resist it, from inside and outside legal institutions. Ann's highly original critique of militarism steps deftly beyond the most familiar feminist responses to the military: a claim to access that foregoes systematic institutional critique,[29] and a critical pacifism grounded in women's sometimes essentialized tendency toward nurturance.[30] Ann's focus was not on the military per se, but on the logic of militarism. She argued that it is driven by the same engines of dehumanization that fuel the oppression of women; in fact, the two operate as mutually reinforcing phenomena.[31] Moreover, the law defends militarism by insisting on a series of dichotomies that similarly serve to undergird women's oppression: the subjective, personal objections of the protesters versus the objective security interests of the nation; the lay judgments of citizens versus the opinions of military experts; the unruly behavior of the protesters versus the careful deference of the judicial posture.[32] Feminists are well situated to teach us how to take responsibility for militarism, and how to make whole the splits or dichotomies that protect it.

The primary exemplars of such responsibility, in Ann's view, are the fearless civil disobedients of the Greenham Common Women's Peace Encampment—a group of extraordinary women who camped out for years to protest Britain's installation of American nuclear missiles.[33] These women barricaded the base where the missiles were installed, danced on the siloes, suffered thousands of efforts at legal eviction and arrests for various forms of direct action, and served prison time for their committed work.[34] Some of them came to the United States and sued President Reagan and Secretary of Defense Weinberger for violations of

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> I would not wish to be anything other than An Other at this moment. . . . Women have reached a critical mass in law school. Outsiders in coalition are the majority. There is emotional and intellectual space for us to begin. If you don't believe it, just consider that you are reading this in a law review.

Id.

28. Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989) [hereinafter *Militarism, Male Dominance and Law*].

29. This kind of feminist position would seem to be exemplified in Justice Ginsburg's opinion for the Court in *United States v. Virginia*, 518 U.S. 515, 550–51 (1996).

30. *See, e.g.*, SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 17 (1989). A particularly sophisticated example of this kind of feminist argument, Ruddick's position avoided the essentialism that sometimes characterizes efforts to link women, mothering, and pacifism, because her argument is that pacifism arises from the habits of mind that are cultivated through the work of nurturance, particularly of young children, rather than from women's nature. *Id.*

31. *Militarism, Male Dominance and Law*, *supra* note 28, at 40–46.

32. *Id.* at 46–49.

33. *Id.* at 26–27.

34. *Id.* at 28.

international and constitutional law, in the placement of the missiles.[35] In this article Ann celebrated their efforts as a "successful story of contemporary feminist history-making," which made "cruise missile madness a matter of public debate."[36] She also interrogated the timid, dichotomous reasoning through which American courts rejected their claims, invoking the political question doctrine to justify reliance on military expertise and delegitimate both public questioning and judicial supervision. She concluded by sketching a more responsible judicial stance, which engages rather than reflexively defers to militarism. "It is my duty to decide this case," Ann's hypothetical, responsible judge announces:

> I can do so with as much confidence in this process as I have in the many other cases where fact-finding is very difficult. I'm sworn to uphold my oath of office; I must expect that the President will uphold his. If the executive branch is acting illegally, I must order it to desist. Such a confrontation will not be a constitutional crisis; that crisis results when the [C]onstitution is routinely ignored and when that action is ratified by judicial silence. If the executive ignores my decision, then that will become a *real* political question. The political branches and the people will have to decide.[37]

While this article is sober and urgent, rather than transgressive and energetic, it is equally in the outsider mode. It offers a serious, substantive critique that moves Ann's dominance feminist vision into a new institutional context.[38] It challenges courts for their evasions, and endorses a group of innovative, radical activists as the models of legal responsibility. It even ends with a song: "I cast my lot with those women, their methods and their goals, and send them this love song," Ann wrote, quoting a poem from Adrienne Rich.[39] I quickly discovered the dissident character of Ann's position when, in a fit of enthusiasm about this Essay,

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35. Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34, 37 (2d Cir. 1985) (per curiam) (dismissing constitutional claims as political questions).

36. *Militarism, Male Dominance and Law*, *supra* note 28, at 27.

37. *Id.* at 72.

38. The critique of militarism was new for dominance feminism. Catharine MacKinnon has since taken on the context of armed conflict by looking at rape as an instrument of war or genocide. *See, e.g.*, CATHARINE MACKINNON, *Turning Rape into Pornography: Postmodern Genocide*, *in* ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 160, 161–62 (2006); CATHARINE MACKINNON, *Rape, Genocide, and Women's Human Rights*, *in* ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 180, 187–88. But to my knowledge Ann's is the first and most systematic critique of militarism as a mindset, frame, or practice, to be undertaken from a dominance feminist perspective.

39. The lines quoted are:

> Your small hands, precisely equal to my own— / only the thumb is larger, longer—in these hands / I could trust the world, or in many hands like these, / handling power-tools or steering-wheel / or touching a human face. . . . / such hands might carry out an unavoidable violence / with such restraint, with such a grasp / of the range and limits of violence / that violence ever after would be obsolete.

Militarism, Male Dominance and Law, *supra* note 28, at 73 (quoting ADRIENNE RICH, *Twenty-one Love Poems, No. VI*, *in* THE DREAM OF A COMMON LANGUAGE: POEMS 1974–77, at 27–28 (1978)).

I rushed a professional responsibility colleague in the copy room, demanding to know his view of lawyers engaging in or endorsing civil disobedience. His chilly perplexity made clear the distance of this potentially transformative piece from the legal mainstream.

There is a lot on display in these articles that demonstrates why Ann was such an effective instigator of feminist hell-raising. In each of these pieces, we see a deep critique of our society's subjection of women and other "outsider" groups, and an equally deep critique of law's complicity, as reflected in doctrine, objectivist epistemology, dichotomizing, and deference to existing institutions. There is a vigorous endorsement of forms of engagement that involve not only thought but also direct action, not only linearity but also roaming and rambling, not only reasoned argumentation but also exhortation, poetry, and song.

These articles also demonstrate an emotional range that made Ann quite unique as a feminist, and even more unique as a dominance feminist. Her work is characterized by joy—in creativity, in solidarity, and in that moment when we make demands that could make the law and the world better. It is also characterized by love, a very rare emotion in law and legal scholarship. She does not simply model it—she specifically talks about it. "Taking a stand and saying what you really see is a tough assignment," she said in *Surviving Legal De-Education*.[40] "When anyone who is committed to liberation does that, love her for it."[41] And the speaker's view of liberation does not have to be the same as Ann's view for that love to be forthcoming. Ann thought differences of opinion among allies were the stuff of lively, hard-fought discussions; not the basis for longstanding divisions. "If we can't agree, or I'm being obstinate, go ahead and call me a bitch," she famously stated, "then give me a hug and let's make plans to collaborate in the future."[42] Love for women whose plight she takes as central, for women and men who try to say something honest and revealing in face of power, for human possibility and for what law might be are all present in Ann's work. Ann could also be fierce, as her work on militarism illustrates best. But her tone in this work is unusual as well: Ann does not so much seem angry—though anger would clearly be justified—as she seems serious, aggrieved, and even disappointed. The law is falling disastrously short, and she knows it could be doing better. This recognition points to a final affective characteristic which marks Ann's work. There is a kind of courage—a bold civic commitment—that infuses her scholarship: a quality she sees not as idiosyncratic but as a stance we should all aspire to. This boldness arises partly from an understanding that unjust power perpetuates itself when teachers, students, and citizens fail to confront it. And it arises partly

40. *Surviving Legal De-Education*, *supra* note 9, at 161.
41. *Id.*
42. *Id.* at 162.

from a belief that each of us has more resources to bring to the confrontation than we may suspect, and we owe it to each other—and to our shared communities—to use what we have to call institutions to account. Ann worried about people who let themselves off too easily—be it students who sought to avoid the hard work of "legal de-education" or judges who wanted to anesthetize themselves to the forward march of the military-industrial complex. But Ann worried in a way that was empathic, moral but not moralizing: not "I'm here, what the hell is wrong with you?" but "you can do this too, let's do it together!" Her sense of empowered commitment was solidaristic and, for many of us, contagious.

II. ANN SCALES AS PRAGMATIC INSIDER

I turn now to two works in which Ann functioned more as an insider. The works are linked together in Ann's personal story. In the early 2000s, she was invited to speak about law to a group of Tenth Circuit judges—the talk became her article *Law and Feminism: Together in Struggle*.[43] In that talk, she offered an eminently peaceable narrative of feminist/judicial convergence in a case that recognized that sexual harassment could reflect racial as well as gender subordination,[44] and she called for future collaboration between judges and feminist legal scholars. This approach seemed carefully calibrated to win the assent of her audience, even if it was a little well-behaved by what I tend to think of as Ann's usual standards. But this was not the way it turned out; she later noted that with the exception of Judge Henry, who had invited her, her audience found her talk to be the special pleading of "just another whiny interest group who wanted its subjective preferences enshrined in law."[45] Instead of being put off by this unexpected chasm, Ann set out to bridge it. She wanted to help readers understand the legal assumptions that led judges to classify her as the representative of a whiny, subjectively-inclined interest group. At the same time, following the suggestion of her friend Judge Henry, she sought to offer judges "a dejargonized account of why legal theory, and feminist legal theory in particular, should matter to them."[46]

When you venture into *Legal Feminism: Activism, Lawyering, and Legal Theory*, you know you are in a different kind of Ann Scales work. There is no talk here about raising hell, or acid dripping on souls—although there is a lively introduction in which she raises such questions as "Does she have to use the t-word?" (for theory) and the "f-word?" (for

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43. Ann Scales, *Law and Feminism: Together in Struggle*, 51 U. KAN. L. REV. 291, 291 n.a1 (2003).

44. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1408 (10th Cir. 1987); *see id.* at 294–96.

45. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 3 (2006) [hereinafter LEGAL FEMINISM].

46. *Id.* at 4.

feminism).[47] The book is moderate in tone, non-colloquial in style, and expansively learned. Ann's broad knowledge of philosophy is on offer here, as is her intimate knowledge of bodies of law, such as tort. Ann also builds the case for the relevance of feminist legal theory in a distinctive, non-inflammatory way; she does not cut to the chase of women's disadvantage. Rather, she begins from a broader, jurisprudential perspective. She focuses in on some of the ongoing gaps or failings of the legal system—problems that might be experienced by judges or other mainstream legal actors, as well as by feminists. For example, judges and lawyers find it hard to arrive at a shared definition of the rule of law because law lacks an understanding of its ultimate goals—what Lon Fuller called the end to which "this activity [is] directed."[48] Law also suffers from examples of what Ann calls "unexamined certainty"[49]—it frames dominant or preferred positions as "objective" and everything else as "subjective,"[50] or it confuses "epistemology" with "ontology" when it comes to assessing the adequacy of evidence.[51] In each of these cases, law has gravitated, to its detriment, toward an unreflective resolution; her argument is that legal theory could inform a fuller examination and better answers.

The second half of the book fleshes out feminist legal theory. Legal feminism begins, Ann declared, "with the principle that objective reality is a myth."[52] This statement was probably a bit jarring for her judicial readers, but Ann elaborated it with nuance and moderation. Myths are not necessarily without value, Ann noted; what this means is that we need "modesty in matters of knowledge. . . . 'Knowledge' is always open to revision."[53] Introducing feminism in this way meets judges where they live; starting not with the situation of women, but with the objectivist assumptions (instilled in lawyers from the first days of law school) that make responding to women's inequality difficult. Moreover, Ann frames the critique of objectivism in terms of doubts about what we can know that judges have surely experienced (and can therefore relate to). In the chapters that comprise the rest of the book, she offered an account of feminist legal theory that is indeed dejargonized, in part by boiling it down to pithy, accessible principles. These principles are similar in sub-

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47. *Id.* at 4–10. This introduction—I might add—is the first thing I give my undergraduate students when I teach them Feminist Jurisprudence—so it serves as a path into the field for college students, as well as for judges.

48. *Id.* at 30 (quoting Fuller & Perdue, *supra* note 20, at 52).

49. *Id.* at 34. Ann describes unexamined certainty, in this case among members of the judiciary, as "an invaluable attribute of privilege." *Id.*

50. *Id.* at 33 (offering the example of Justice Scalia's critique of the majority's position in *Atkins v. Virginia*, in which he objected that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members," 536 U.S. 304, 338 (2002) (Scalia, J., dissenting)).

51. *Id.* at 51–62.

52. *Id.* at 86.

53. *Id.* at 87.

stance to (if more calibrated in presentation than) the cheerful imperatives that punctuate her more transgressive works: "Challenge false necessities"[54] (such as long-standing dichotomies that may be blurrier or more historically contingent than we think); "Deconstruct the status quo from the level of knowledge";[55] or "Find the best answer for now," recognizing that legal approaches are always "provisional."[56]

When I finished this book I was impressed: Ann had done precisely what she aspired to do. She distilled feminism down to some plausible, accessible principles, and explained how it applied to certain problems that must have nagged at most judges at some point in their careers. But it also struck me that she had gone to a great deal of trouble to begin by describing shortcomings of law with which judges might more readily agree; to define feminism in terms of broad goals and methodological characteristics so that it overlaps more evidently with judges' concerns; to keep the tone measured and reassuring—quite different from Ann's more characteristic, searing, cut-to-the-chase critiques. At some level, I marveled that Ann found it worth the effort to persuade the kind of judges who had been so cool and dismissive toward her earlier, conciliatory approach. And while I deeply admired the erudition and thoughtful progression of the argument, I found myself missing her funny, energetic, sometimes outrageous incitements. But the more I thought about Ann's pragmatic bridge-building efforts, the more I thought there was something worth pondering here. We can learn some valuable things about who Ann was, and what was distinctive about her feminist legal theory, by trying to understand why it was important to her to write works of this kind—perhaps I should say, works of both of these kinds.

III. THE OUTSIDER WITHIN: RECONCILING THE STRANDS OF SCHOLARSHIP

Ann's capacity to write in two divergent styles and tones, highlighting different aspects of the feminist legal project, says something about the woman herself. Ann was a Whitman-esque character who contained multitudes[57]: it is not everyone, after all, who can be a lawyer *and* a rodeo rider.[58] But she was also a pragmatist who believed in innovation, experimentation, and having all hands on deck. Ann wanted women, men, people of color, whites, students, and faculty to join her in making law accountable to projects of inclusion and justice. As one of the few law faculty who actually took time away from academia to work as a

54. *Id.* at 104–05.

55. *Id.* at 107–09.

56. *Id.* at 111–12.

57. WALT WHITMAN, *Song of Myself*, *in* LEAVES OF GRASS 49, 152 (2013). ("Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.)").

58. Jean Strout, *"I'm Only Gonna Tell You This One More Time:" Lessons from Ann Scales*, HARV. J.L. & GENDER (July 28, 2012), http://harvardjlg.com/2012/07/im-only-gonna-tell-you-this-one-more-time-lessons-from-ann-scales/.

lawyer, she also knew how much difference it could make to have judges on board. So it is no surprise, given these pragmatist commitments, that she would approach multiple groups in different contexts and appeal to them differently.

But this tension—or, more accurately, this variety—in her work also speaks to the complexity of her view of the law. Law is not some foundational, univocal edifice. It reflects the way that a hierarchized but heterogeneous group of actors have spoken to each other and to the public over time. It clearly bears the marks of those who have enjoyed the most power to shape it; but it is not monolithic. There have been moments of sanity and perspectives of distinctive legal actors to which we can also appeal. Some of its practices can—even now—have a feminist valence: think, for example, of Ann's discussion of the analogy between law and mothering.[59] Though, as a legal culture, we may currently be "stuck," there is nothing necessary about the current state of the law. The law, like all of us, as Ann was wont to say, is subject to forces of evolution.[60] And this is an interesting choice of term: not revolution or even transformation, but evolution. The law can change—perhaps will change—because it bears within itself some of the seeds of that revision (strands that overlap, in the Wittgensteinian metaphor Ann favored,[61] with the strands of feminism). This potential invites legal actors to think about how it might be remade differently. It is not—as, for example, in MacKinnon's work[62]—a vision of before and after brought about by the systematic introduction of a feminist perspective. In Ann's vision, law is always already amenable to revision, by large steps and small. Given this amenability, there is no excuse not to jump in immediately and do what you can.

Finally, Ann's willingness to write in two registers also speaks to her view of the human subject. Women may be beset, but they always retain the possibility of agency. In what is probably the most cheerful sentence that ever employed these words, Ann wrote "The good news about hegemony is 'counter-hegemony.'"[63] Women and other outsiders are, in Ann's view, "guerilla warriors of life in a system of white male dominance—taking little victories where they can, operating covertly,

59. *See supra* text accompanying note 23 (discussing *Surviving Legal De-Education*).

60. LEGAL FEMINISM, *supra* note 45, at 77.

61. *See, e.g.*, *Surviving Legal De-Education*, *supra* note 9, at 160 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 67 (G.E.M. Anscombe trans., 2d ed. 1972)) ("And the strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres.").

62. This conception of achieving transformation by using a feminist perspective on the subordinating practice in question to restructure legal doctrine is evident in many facets of MacKinnon's work, most notably in sexual harassment and pornography. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 217 (1979); ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 17–18 (1988).

63. LEGAL FEMINISM, *supra* note 45, at 135.

without any apparent organization, on the edges and in a thousand unexpected ways."[64] This is a striking, enlivening view of women's agency and how it can be exercised. Ann was not in the business of lifting the flag and demanding that people fall in behind it; she was not wary of women's agency, for fear it might be exercised in ways that did not fit with her vision. She seemed to be delighted by resistance of all kinds—who knows, in the end, what strategy might work best? Her role was to provide a possible endpoint, some markers along the way, and the cheering, cajoling, inspiring forms of solidarity that made transitions from stuckness to not-so-stuckness possible.

With the agency of judges, there are some differences in her approach; they are the beneficiaries and defenders of privilege rather than those who stand to lose most under current arrangements. But her empathy—and her uncanny ability to see the human at the same time as the hierarchy—enabled Ann to see that judges may be more similar to outsiders than we think. They too may feel overwhelmed by the powers arrayed against them. One of the funniest—and most telling—moments in Ann's work on militarism was her trip inside the head of a judge deferring to military expertise. When a judge ruling on a challenge to militarism says, this question "is 'textually committed to another branch" or "there are no 'judicially . . . manageable standards,'" Ann told us, he actually meant, "This is freaking me out. There is so much information flying around and somebody is obviously lying. But World War III can't really happen, can it? I need to go to chambers and take a Valium."[65] Judges may be defenders of the status quo, but they are prone to elaborate schemes of self-anesthetization, just like the rest of us. However, relying on judges is not always a "triumph of hope over experience."[66] Judges are also capable, like Ann's judicial hero Harry Blackmun, of struggling and muddling their way to ethical positions.[67] Ann's role in supporting such agency on the part of judges is subtler and less celebratory than her approach to feminist law students—after all, this is a somewhat more settled crowd. But she brings to judges who want to do better the message that they are not alone; they can think about Fuller, who always wanted to know the end to which the activity was directed, and Holmes, who saw the life of the law in experience.[68] Dipping a toe in the waters of legal theory—and feminist legal theory in particular—is not

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64. *Surviving Legal De-Education*, *supra* note 9, at 147.

65. Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. SOC. JUST. 541, 552 (2003) (emphasis omitted) (internal quotation mark omitted).

66. Catharine MacKinnon used this phrase to describe her habit of hoping for good decisions from women judges on cases involving gender inequality. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 215, 220 (1987).

67. LEGAL FEMINISM, *supra* note 45, at 150.

68. *Id.* at 192 n.24 (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 125 (Little, Brown, & Co. 1923) (1881)).

so scary, and it is also important, because maybe legal reasoning is not working quite as well as we tend to tell ourselves.

I will close by suggesting that Ann was not only capable of sustaining this kind of heterogeneity in her approach; but that she was also capable of a riveting kind of synthesis, or integration, as in the dazzling final chapter of *Feminist Jurisprudence.* In this chapter Ann challenges readers to consider what she calls a "contemporary solidarity imperative," recognizing that protecting the right to abortion is "the queerist issue there is"[69] and that we all need to be at the barricades. Highlighting this issue is a fascinating choice, not only because of the surprising yet compelling grounds for collaboration Ann finds here, but also because it brings together the two strands of her work. In her outsider mode, she is trying to mediate an ongoing tension between mainstream feminists (who see "woman" as more fixed in what the term "woman" signifies) and poststructuralists, recently exemplified by queer theorists (who are critical both of that fixity and of the increasingly state-identified repertoire of feminist activists). Reframing and ameliorating disputes among feminists was one of the things Ann saw as necessary to feminist solidarity.[70] In this chapter, she explains that abortion is both a paradigmatic women's issue *and* an issue of bodily discipline, sexual normalization, and imposition of shame,[71] which highlights the convergence of these feminist and queer theorists and activists, and their respective bodies of work. But at the same time as she is working on relations between feminist structuralists and poststructuralists,[72] Ann, in her insider mode, had judges in her sights. Abortion is an issue on which we cannot afford judicial abdication. It is also an important example because it permits her to spotlight the career of Harry Blackmun—the Justice most strongly associated with

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69. *Id.* at 147–49.

70. To take another example, her article, *Disappearing Medusa*, was a dexterous effort to bridge a painful rift between Catharine MacKinnon and anti-essentialist feminists of color. Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 37–41 (1997).

71. LEGAL FEMINISM, *supra* note 45, at 148–49.

72. *Id.* at 145–47. Here Ann attempts a deliberately brokered *entente*, suggesting eighteen "aspects of discussion that we could conditionally agree upon." *Id.* at 145. These include interestingly paired propositions such as:

> 10. "Gender" is "performative." Gender, in all its manifestations, is also a function of existing social power. In all the ways that reality bites, but to a degree of gruesomeness that is impolite to acknowledge, gender hurts. 11. Suffering exists. . . . 13. It is a legal, political, and ethical good thing to do whatever one can to reduce suffering, one's own and that of all others.

Id. at 146. Or:

> 14. "Statism" is not the point. . . . Power exists in many shifting forms. It is not statism to ask government to intervene on behalf of people who do not possess power on their own in the world as now constituted. . . . [A]lthough we should continue debate about the nature and limits of invocations of state power, it is naïve to accuse feminists of statism. . . . 15. Access to government, however, is not automatically cool. Professor Ruthann Robson has been right in . . . consistently illustrating the "domesticating" effects of voluntarily engaging with and seeking legitimation from the law.

Id. at 147.

women's reproductive rights—who began as a skeptic of feminism and traveled a bumpy, anguish-ridden path to become an ardent proponent of women's equality. Blackmun, Ann noted, was

> a man who was scared of various things at various times, but who always eventually rose to the occasion and attempted to do the right thing. . . . [H]is papers show a man paying close attention, grappling with his own biases, and overcoming his own lawyerly reticence and conservative ideology. By the end, as his opinions show, he understood that abortion was an equality issue, and part of a larger vision of human dignity.[73]

That self-awareness, and refusal to abdicate responsibility for hard decisions, even when they bring pain or controversy, was the commitment Ann demanded and expected from members of the judiciary. Guiding judges toward responsible decision making, as she subtly negotiated a collaboration between structuralist and poststructuralist feminists, was Ann Scales at her best.

IV. CODA: BACK TO THE FUTURE

Ann's insistence on resistant engagement, in a variety of modes and contexts, and her aspirations to solidarity, whether between feminists and judges or between women's rights and queer activists, are the hallmarks of her distinctive, enlivening body of work. They are also reminders to those of us who aim to continue her efforts, whether through activism or scholarship. The year since Ann's death has been marked by important developments in the very fields that elicited her passion, fields that demand challenging, solidaristic response.

Some of these developments concern the military, and as Ann might have added, the persistence of *militarism*. The repeal of "Don't Ask, Don't Tell" in 2011 was followed by a recommendation by the Joint Chiefs of Staff to re-evaluate the restrictions on women's service in combat.[74] Yet if these changes mean unprecedented access for two groups of "outsiders" to the military, they have left intact many of the norms of the institution. Female service members must negotiate a world where they may enter into combat, but are still subject to massive pressures of sexualization and devaluation. An epidemic of sexual assaults in the military has rendered women service members twice as likely as civilians to be sexually victimized, and the system of internal review and courts martial has utterly failed to respond.[75] Military authorities estimate

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73. LEGAL FEMINISM, *supra* note 45, at 150.

74. Julian E. Barnes & Dion Nissenbaum, *Combat Ban for Women to End*, WALL ST. J. (Jan. 24, 2013, 10:49 AM), http://online.wsj.com/article/SB10001424127887323539804578260123802564276.html .

75. Molly O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims as Defense Department Fails Females*, HUFFINGTON POST (Oct. 6, 2012, 9:36 AM EDT), http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-

that only fourteen percent of assaults are reported, and only six percent of those reports yield convictions by courts-martial.[76] Moreover, changes in the modes and settings of armed conflict that may have made the integration of outsiders more acceptable to the military mainstream are posing their own risks. Serving with women or gay men may seem less of a daunting prospect when war is waged not in a foxhole or even a Humvee, but by remote-controlled drones, which now threaten to infiltrate civilian life, and enable soldiers, commanders, and citizens to distance themselves from the costs of warfare.[77] Both these newer service members and their heterosexual, male counterparts may also be supplemented, or even replaced, by private contractors whose omnipresence underscores the entrenchment of the military-industrial complex.[78] Though access may be broader—a serious step forward for those who aim to vindicate their civic commitments or experience equal citizenship through military service—the "megamachine," Ann might say, "rolls on."[79] The damage perpetrated by objectifying norms, and the continuing distance between military decision making and public scrutiny, invites a collaborative effort by feminist and LGBT activists to interrogate the structure and direction of the institution into which we are now being accepted.

Other developments concern the domain of reproductive and intimate choice. On the one hand, the parties to Ann's proposed "solidarity initiative" might seem to be divided by recent developments. Access to abortion and even birth control have become ever more contentious, as the 2012 election gave rise to a "Republican war on women."[80] At the same time, gay marriage is approaching a high-water mark of acceptance,[81] with leaders from President Obama to Republican Senator

department_n_1834196.html. As a woman service member who suffered multiple sexual assaults in Afghanistan explained: "Suicide bombers in pieces, [people] pulling dead American soldiers out of Humvees. . . . [D]eath was something I had to deal with. I never, ever thought I was gonna have to deal with my supporters being the ones that did the most damage." *Id.* (internal quotation marks omitted). *See also* Amy Goodman & Denis Moynihan, *Addressing the Epidemic of Military Sexual Assault*, DEMOCRACY NOW (May 9, 2013), http://www.democracynow.org/blog/2013/5/9/addressing_the_epidemic_of_military_sexual_assault.

76. O'Toole, *supra* note 75.

77. *See, e.g.*, David Sirota, *How Drones Deceive Us: The Advantage of Technologized Warfare Is Also Its Most Worrying: The Perception of Decreased Risk to the Aggressor*, SALON (May 9, 2013, 12:00 PM MST), http://www.salon.com/2013/05/09/how_drones_deceive_us/ (describing how drones provide distance from conflict, perceived risk reduction, and how the simplicity of drone strikes remove critical deterrents to violence).

78. *See* Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms*, 35 HASTINGS INT'L & COMP. L. REV. 29, 38–42 (2012) (discussing the rise of private military contractors and the challenge of imposing legal accountability).

79. LEGAL FEMINISM, *supra* note 45, at 97.

80. Frank Rich, *Stag Party: The GOP's Woman Problem Is that It Has a Serious Problem with Women*, N.Y. MAG. (Mar. 25, 2012), http://nymag.com/news/frank-rich/gop-women-problem-2012-4/.

81. *See, e.g.*, Daniel Politi, *New Poll Shows Huge Surge in Support for Marriage Equality*, SLATE (Mar. 18, 2013, 3:54 PM), http://www.slate.com/blogs/the_slatest/2013/03/18/gay_marriage_poll_support_for_marriage_equality_reaches_new_high.html.

Robert Portman celebrating the formation of same-sex-led families.[82] It is a period during which, as Kenji Yoshino noted, students are more comfortable coming out as gay or lesbian than admitting that they once got an abortion.[83] But if we recall that the bridge Ann sought to build in the final chapter of *Legal Feminism* was between feminists and queer activists,[84] we may see the ground for more productive collaboration. The forms of gay and lesbian identity that are most readily accepted, as queer scholars and activists have observed, are those which most closely approach the norm of the heterosexual nuclear family: sexuality is domesticated within the confines of quasi-marital relationship and childrearing.[85] The advent of same-sex marriage may render those who practice serial monogamy, or live out their sexuality in sex clubs or public spaces rather than in the confines of the marital bedroom, as vulnerable as a woman who seeks an abortion or a sexually active college student who objects to her Jesuit university's failure to subsidize birth control.[86] All these expressions of sexual agency stand at great distance from the norm of the "natural family"—a regulative fiction which is making a surprising comeback in some quarters[87]—or its emerging homonormative counterpart. This resurgent, normalizing sexual politics demands a spirited coalitional response, which can take Ann's "solidarity initiative" into new territory.

And so the work continues. Formal equal opportunity—crucial though it may be—will always come more easily than the more search-

82. Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1; Michael Falcone & Z. Byron Wolf, *Republican Rob Portman Supports Gay Marriage*, ABC NEWS (Mar. 15, 2013), http://abcnews.go.com/Politics/OTUS/republican-rob-portman-supports-gay-marriage/story?id=18736731.

83. Kenji Yoshino, "*Lawrence* as Ur-Text," Conference on Gender, Sexuality and Democratic Citizenship, Cardozo Law School, Nov. 14, 2010.

84. For an illuminating discussion of the differences between gay/lesbian politics and queer politics, see Janet Halley, *Sexuality Harassment*, *in* LEFT LEGALISM/LEFT CRITIQUE 89, 100 (Wendy Brown & Janet Halley eds., 2002).

85. This pattern has led Lisa Duggan and others to coin the term "homonormativity" to describe the pressure to conform to this newly acceptable version of a homosexual self-presentation. Duggan notes, "[Homonormativity] is a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption." Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, *in* MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS 175, 179 (Russ Castronovo & Dana D. Nelson eds., 2002); *See also* Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008) ("Resisting the normative and epistemic frame that values nonmarital forms of life in direct proportion to their similarity to marriage," and embracing the goal of "unseat[ing] marriage as the measure of all things").

86. *See, e.g.*, *Rush Limbaugh vs. Sandra Fluke: A Timeline*, THE WEEK (Mar. 9, 2012), http://theweek.com/article.php?id=225214 (detailing sequence of events through which conservative talk-show host Rush Limbaugh called Sandra Fluke, the Georgetown Law student who testified before Congress about the need for subsidized birth control, a "slut").

87. For a discussion of the resurgence of the "natural family" in the discourse of the contemporary Right, see Kathryn Abrams, *Disenchanting the Public/Private Distinction*, *in* IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY 25, 25–26 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds. 2012).

ing normative and institutional reassessments that would give such opportunities more lasting impact. This is why Ann so often focused on these latter challenges. They are challenges to be undertaken by the outsiders now within: those who cannot only speak truth to power, but can communicate it in registers that those in power can at least sometimes apprehend. The often glacial character of the progress, the sense of taking two steps forward and one step back, should motivate rather than disturb us—as they did Ann. "Doing this is a lifetime's work," she memorably reminded us, "not doing it is moral idiocy."[88]

88. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 32 (1992).

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.

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† Isidor and Seville Sulzbacher Professor of Law and Director of the Center for Gender and Sexuality Law, Columbia Law School. © 2013 by Katherine Franke. 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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> . . . .
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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

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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.

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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

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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-

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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.

IN HER OWN VOICE: ANN SCALES AS PHILOSOPHER, STORYTELLER, FEMINIST, AND JURISPRUDE

PATRICIA A. CAIN†

ABSTRACT

This Essay references numerous articles written by Ann Scales and discusses ways in which she spoke as a philosopher, a storyteller, a feminist, and a jurisprude. The author's favorite lines from these articles are reproduced and explored in the context in which they were written. Many of the quotes are witty and capture the gist of a situation or a feminist point without the need for further explanation. Others express a point of view in such creative ways that they bring new insights to those of us who grapple with feminist issues.

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INTRODUCTION

My chosen title for this Symposium Essay is "*In Her Own Voice: Ann Scales as Philosopher, Storyteller, Feminist, and Jurisprude.*" I'm not sure I have the order exactly right in the title—it sort of came to me by cadence rather than by ascending or descending order of importance.

First, I will say a word about why I chose these four words to describe Ann and her work. Then I will move to a description of my ten favorite passages from her work. And, of course, these passages will be "in her own voice"—because no one could say things quite the way Ann did.

I. THE FOUR ATTRIBUTES

A. Ann Was a Philosopher.[1]

I use the term "philosopher" to describe Ann for several reasons. I certainly mean to reference the fact that Ann was a scholar and a thinker; *Der Denker*,[2] so to speak.[3] The Rodin sculpture comes to mind, in part, because it seems so contrary to the way I picture Ann as "the thinker." Yet I can also picture her with furrowed brow, biting her knuckles as she tried to unravel the tricky problems of things like causation. And I couldn't resist including the reference to *Der Denker* because it reminds me of her close friendship with Sheila James Kuehl, who, if you are of my era, you would have fallen in love with when she played Zelda on the Dobie Gillis sitcom. Each episode began with Dobie sitting by a replica of that Rodin statute, *Der Denker*, as he typically wrangled with a knotty teenage romance problem. (This is the sort of connection that Ann would have appreciated.)

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1. Ann herself might contradict me. *Contra* Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 99 n.10 (1990) ("Because I am neither philosopher nor anthropologist . . . .").

2. "Der Denker" is German for "The Thinker" or for "Le Penseur" as the Rodin sculpture is generally referred to in French. "Der Denker" seems more appropriate given Ann's frequent reference to German philosophers (thinkers) such as Kant.

3. I also like the following alternative definition of "philosopher" from the Merriam-Webster dictionary: A philosopher is "a person whose philosophical perspective makes meeting trouble with equanimity easier." MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/philosopher (last visited Nov. 12, 2013).

But the Rodin sculpture reminds me of Ann for other reasons and not just because it is an image of a person thinking big thoughts. When Rodin was asked about his sculpture and what it meant, he replied in part: "*The Thinker* has a story. In the days long gone by I conceived the idea of the Gates of Hell. Before the door, seated on the rock, Dante thinking of the plan of the poem behind him . . . ."[4]

And so the image is of a thinker who is a poet. And, as Rodin said in further explanation of who *Der Denker* was: "Guided by my first inspiration I conceived another thinker, a naked man, seated on a rock, his fist against his teeth, he dreams. The fertile thought slowly elaborates itself within his brain. He is no longer a dreamer, he is a creator."[5]

Ann, like the Rodin image, was a thinker who was also a poet and a creator. She painted images for us with her words; images that make us smile and help us to understand big thoughts in deeper ways.

I describe Ann as philosopher for an additional reason: I mean to acknowledge that philosophy was important to Ann and that fact is reflected in her work. She uses the work of many dead, white philosophers to make her points from time to time. And when she does, she typically describes them gleefully in very put-down ways, while according them a partial stamp of approval for what she thought they got right.

She often invoked Ludwig Wittgenstein in her writing. Once, when explaining the problems of universalizing experience, she said: "The philosopher Ludwig Wittgenstein did a good job of showing how either/or categorizations actually disable the usefulness of concepts. I hate to rely on a dead white man to illustrate this, but I like his weird clarity."[6]

Of course, she often added some weird clarity of her own after explaining what these earlier thinkers had opined.

She described Immanuel Kant as the stodgiest, most sweeping systematizer of all. She added that, though he was undoubtedly wrong about many things, he was right about at least one thing:

> Whatever else we as human beings may perceive, understand, or judge, and however we may differ in those pursuits, we could not do anything without using the underlying notions of time, space, and causality. They are percepts of reason: these are notions the truth of which cannot be proven but without which we could not think or be human. I can imagine space and time as empty, but I cannot comprehend a nonspatial object nor a nontemporal event. I can understand the difficulties in causal analysis, but I cannot help but believe that

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4. Joseph Phelan, *Who Is Rodin's* Thinker?, ARTCLYCLOPEDIA (Aug. 2001), http://www.artcyclopedia.com/feature-2001-08.html.
5. *Id.*
6. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 154 (1990).

> the orange juice got cold because I put it in the fully operational refrigerator. All of us rely on contingently reliable measurements of time, space, and causality in everything we do.[7]

Then comes her own twist. Having agreed with stodgy old Professor Kant that time, space, and causality are ideas without which we cannot function, she says: "I do not believe that everyone has the same concept of these percepts. On the contrary, I claim that in legal education, for example, we inculcate the percepts of reason from a white male legal point of view, a point of view substantially at odds with other experiences."[8]

It is this combination of philosophy and feminist critique that I most love about her work. And I list "philosopher" first because it is a connection Ann and I always had. We both came to law from philosophy. She majored in it at Wellesley and I minored in it at Vassar and then did postgraduate work in philosophy at the University of Liverpool. And while we both studied the work of dead white men like Kant and Wittgenstein (and in my case, Sartre), we have both found some of their work relevant to the development of our feminist theories of the law.

B. Ann Was a Storyteller.

My next attribute for Ann as teacher and scholar is storyteller. She used storytelling in her scholarship and in her teaching with tremendous success. Storytelling is an important part of feminist theory. It is what makes the abstract concrete. In 1990, Martha Fineman made the point that what we need is more feminist theory of the middle range—something between abstract grand theory, unconnected to women's everyday reality, and a series of individual stories from which it is hard to generalize.[9] Ann didn't generalize from her own stories, but she used them effectively to make abstract points become more concrete. And she listened well to the stories of others so that they could be used to similar effect.[10]

And I know she told stories in class that her students have never forgotten. She and I shared a student recently; a student who did her first year at Denver Law and then transferred to Santa Clara Law. When I learned that this student had been at Denver, I immediately asked her if she had taken a class from Ann Scales. "Yes," she said, with much enthusiasm. It was obviously her favorite course in law school. As fate would have it, it was this shared student who sought me out when she

7. Scales, *supra* note 1, at 99–100 (footnotes omitted).

8. *Id.* at 100.

9. *See* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 U. FLA. L. REV. 25, 25 n.1, 28–29 (1990).

10. Consider her effective use of her knowledge and experience with the Greenham Common Women's Peace Camp in England. *See* Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 26–29 (1989).

first heard of Ann's accident. The student needed to talk about Ann and so she shared several Ann Scales stories with me; one of which I loved and ultimately clarified with another one of Ann's Denver Law students.

The story she told me involved a question that Ann posed to her constitutional law class. The question Ann posed was: Do you know why each successive Article of the Constitution gets shorter and shorter? Well, she explained to the class, the Constitution was drafted over the summer in Philadelphia, and it was very hot in Philadelphia that summer, and so, you know, by the time they got to the final Article it was 4:00 p.m. on one of the hottest days—and you know what that means—why it's "Miller time." I think I laughed out loud—it sounded so like Ann. Yes, Ann was a storyteller, both in her scholarship and in her teaching.

C. Ann Was a Feminist.

Ann was an unrepentant feminist and was forever reshaping what that meant. When researching my 1989 article called *Feminist Jurisprudence: Grounding the Theories*,[11] I was curious about the phrase "feminist jurisprudence." I wondered where the phrase had come from and who might have conjured it up. "Women and the Law" conferences, which had started in the 1970s, were hosting panels on feminist jurisprudence by the early 1980s[12]—so I had some sense of when use of the phrase had begun—but I wanted more precise information. Ann's first article, published in the 1981 issue of the *Indiana Law Journal*, gave me my first clue.[13] In that article, Ann told the story of a conference at Harvard in 1978, which celebrated the first twenty-five years of women at Harvard.[14] The student organizers, including Ann, decided to do a panel called "Towards a Feminist Jurisprudence." The panel was to be an inquiry into the question of whether or not there should be something called feminist jurisprudence, and if so, what it should look like. Ann later told me that the panel was not well received. Why? Because critics viewed the question as one about establishing special legal rights for women and that is not jurisprudence. Jurisprudence is the "view from nowhere" and cannot be established from the special perspective of one group. "Really?" was Ann's response. And so she titled her first article *Towards a Feminist Jurisprudence*. Of course. Unrepentant.

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11. Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989–90).

12. The first conference to sponsor such a panel was the 1983 conference hosted in Washington, D.C. Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN'S L.J. 367, 370 (1997).

13. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981).

14. *Id.* at 375 n.2.

D. Ann Was a Jurisprude.

Finally, I use the word "jurisprude" to describe Ann. I wasn't sure this actually was a word and so I looked it up. The Merriam-Webster Dictionary defines it as "a person who makes [an] ostentatious show of learning in jurisprudence and the philosophy of law or [someone] who regards legal doctrine with undue solemnity or veneration."[15] "Right," I said to myself. I am, of course, using the term jurisprude tongue in cheek.

II. IN HER OWN VOICE

These are the attributes of Ann and her scholarship—the philosophical slant, the storyteller, the feminist, and the smirky jurisprude—that drove me to curl up in a corner and start rereading her work when I learned of her death. I wanted to re-engage with that bouncy person I first encountered in the spring of 1989 at a conference at the Harvard Law School entitled "Conference on Sexual Orientation and the Law School Curriculum." I was there to talk about teaching wills in a way that would include issues about same-sex couples and their estate plans. I had no idea who Ann Scales was. All I remember is being in a large room somewhere in the bowels of the law school when a young woman got up to give a keynote-style address. I didn't catch her name. I didn't recognize her. I couldn't for the life of me figure out who she was. She was talking about the military, male dominance, and law. With great clarity and lots of bright rhetoric, she explained why sexual dominance was necessary to make the military possible and why the military was necessary for the continuation of sexual dominance. There were lots of mentions of objectification and "thingification."

As I began to remember Ann by rereading her writings, I decided that I wanted to share with you my favorite passages from her work, in her own words, because no one could say it better than Ann. And I'll do this in the style of David Letterman, starting with the passage I rank at number ten and working my way to the top-ranked passage. These are the ten things that many of us wish we could have said ourselves because the words capture some inner truth that we already know, but alas, we are not all philosophical, poetic, feminist storytellers. Thank God, Ann was.

Number 10: "There is no woman who has not had some practice at trying not to exist too loudly."[16]

Most professional women of my era complain that they can never be heard.[17] Women often speak out at meetings where men predominate

15. MERRIAM-WEBSTER.COM, http://unabridged.merriam-webster.com/unabridged/jurisprude (last visited Sept. 7, 2013).

16. Scales, *supra* note 10, at 43.

and no one acknowledges what they have just said until a man says it. How ironic that women can't be heard when we want to be heard and yet we also practice not existing too loudly.

Let me put Ann's single sentence in context by quoting from the published version of that first speech I ever heard Ann give:

> [M]ilitarism *normalizes* the oppression of women. It supplies the moral authority for relations of dominance and submission. . . .
>
> . . . .
>
> . . . The military produces a class of false moral agents, a class of persons who have been forced to internalize the commands of an absolute authority. Furthermore, the militaristic individual has been drilled in the necessity and legitimacy of the use of force. . . . When force is legitimated, it is a constant potentiality. Those threatened by it have no choice but to "imitate nothingness in their own persons." And that is a definition of woman's otherness. Women have been imitating nothingness for a long time. . . . There is no woman who has not had some practice at trying not to exist too loudly. The needs of militarism serve as a legitimating basis for subjecting others to this process of silencing.
>
> Just as militarism normalizes the oppression of women, the oppression of women normalizes militarism. The men at the front need to be expert at thingification before they can pull that trigger or push that button.[18]

"Women have been imitating nothingness for a long time. . . . There is no woman who has not had some practice at trying not to exist too loudly."[19] That's it. No more words are needed. Every woman and probably most men in that Harvard Law School room understood those words. At the time I heard her speak, the connection she made between women imitating nothingness and the military's practice of subjecting troops to a silencing in order to erase their subjectivity sent a chill down my spine. And it certainly gave me renewed insight regarding the import of *Goldman v. Weinberger*,[20] the case she was analyzing; the case in which the Supreme Court upheld the military's right to prohibit a Jewish solider from wearing a yarmulke.[21] Subordination of individuality—*thingification*, in Ann's words—is necessary to the military's success.[22]

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17. *See, e.g.*, Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. Legal Educ. 147 (1988) (collecting references).

18. Scales, *supra* note 10, at 42–44 (quoting SIMONE WEIL, THE ILIAD, OR THE POEM OF FORCE 7 (Pendle Hill Press 1983)).

19. *Id.* at 43.

20. 475 U.S. 503 (1986).

21. *Id.* at 510.

22. Scales, *supra* note 10, at 43–44.

Number 9: "Law is second-rate philosophy backed by the force of the state."[23]

When I first read this sentence I disagreed—not about the force of the state, but about the proposition that law is second-rate philosophy. For I think that law is *applied* philosophy, and that is what made me choose law over philosophy. From this perspective, law is superior to philosophy.

My personal view of the relationship between philosophy and law is influenced by my own past academic connections with philosophy. In 1970, I was in Liverpool working on my master's thesis, which focused on existentialism and free will, a fairly impossible topic. I was toying with the idea of law school. I remember at the time reading Simone de Beauvoir's book, *The Ethics of Ambiguity*.[24] I immediately connected with a statement she makes in her conclusion to the book. She had been reading Hegel in the *Bibliotheque Nationale* and experiencing a great sense of calm when confronted with the abstractness and theory of his great system.[25] I suspect the calmness was derived from the ability to rise to the plane of the universal, the infinite. But then she returned to the street, and described the following feeling:

> [O]nce I got into the street again, into my life, out of the system, beneath a real sky, the system was no longer of any use to me: what it had offered me, under a show of the infinite, was the consolations of death; and I again wanted to live in the midst of living men.[26]

In my own experience, the calmness of the truly abstract has always been momentary. The comfort of the concrete is more lasting. So, if philosophy is the abstract and law is the concrete, which one is truly second-rate?

I returned to Ann's article, *Midnight Train to Us*,[27] to see if she had something more to say on this topic. Here's what she said:

> Law is applied philosophy of a sort, but better than "pure" philosophy in two ways. First, it is not as rigorous; it has no requirement of logical consistency. Indeed, for law to work and move, it can't be logically consistent. Second, though philosophy in my opinion has amazing persuasive power (ideas matter), there are no winners or losers. In law, at least theoretically, if you've got the best argument, you win, and the world changes.[28]

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23. Ann C. Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710, 710 (1990).
24. SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY (Bernard Frechtman trans., Citadel Press 5th ed. 1970) (1948).
25. *Id.* at 158.
26. *Id.*
27. Scales, *supra* note 23.
28. *Id.*

Law is better than "pure" philosophy, but it is second-rate because it can't be "pure." That is because law is real and concrete, not abstract and universal. When I reread Ann's sentence in context, it made me smile, not in disagreement this time, but in appreciation. She and I share the value of law as applied philosophy after all, and that value makes it better than philosophy. And I have a new understanding of law as second-rate philosophy.

Number 8: "'Choice' is that essential conjure. It has the same meaning as if I chose to be Aretha Franklin or the Princess of Wales."[29]

As you may recall, the United States Supreme Court has held that it is not sex discrimination to refuse to provide governmental assistance for poor women who want to have abortions.[30] The explanation appears to be that states can refuse to provide the funding, so long as the poor woman can still choose to have an abortion.[31] Ann's rejoinder: "'Choice' is that essential conjure. It has the same meaning as if I chose to be Aretha Franklin or the Princess of Wales."[32]

Fortunately, the New Mexico Supreme Court listened to Ann's argument and ruled differently from the United States Supreme Court, finding that failure to provide funding violated the state's Equal Rights Amendment.[33] This, in my view, is law as *applied* philosophy. And, in this instance, "law" appears pretty first-rate.

Number 7: "[S]tuckness."[34]

This is such an Annie word. It is a favorite of mine. It showed up for the first time in a law review article, as in "[i]t was a time of stuckness for me."[35] It then becomes the organizing principle of her book, which she divided into two parts: "Places of Stuckness" and "Places [B]eyond Stuckness."[36]

I love it now that I can explain my lack of total comprehension, or my inability to explain something, by saying I am in a place of stuckness. Ann gave the word such a dignified meaning. And she showed us that we will all, if we think hard enough, get beyond it.

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29. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 12 (1992).
30. *See* Harris v. McRae, 448 U.S. 297, 314 (1980); Maher v. Roe, 432 U.S. 464, 469–471, 475–76 (1977).
31. *Harris*, 448 U.S. at 316–17 (explaining that a woman's constitutionally protected choice does not entitle her to the funds that might be necessary to make it possible for her to exercise that choice in reality).
32. Scales, *supra* note 29, at 12.
33. *See* New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (1998).
34. Scales, *supra* note 29, at 11.
35. *Id.*
36. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, & LEGAL THEORY (2006).

Number 6: "The law is organized around a set of bottom lines, presented as unquestionable. These false necessities are the conversation-stopping arguments, as in 'when you say Bud, you've said it all.'"[37]

I now imagine sharing this passage with a class of first year law students. Too many students arrive at law school believing that the law provides absolute answers. They need to learn that law is full of contingencies. Facts matter, and sometimes facts matter more than the abstract principles or rules. Ann Scales continuously taught her students to question. Law is not the same as a mathematical proof of the inevitable. There is no QED. in law. "Bud" is the replacement for QED., and in this one phrase, she has enlightened us all, with a smile of course, as to law's contingency.

Number 5: "[T]here is no sex discrimination when pregnant men and pregnant women are treated the same."[38]

If you haven't used this statement to introduce the *Geduldig*[39] case to your students, then you have missed the boat. Here's what Ann said in full: "*Dwight Geduldig v. Carolyn Aiello*, decided the year I was admitted to law school, and holding essentially that there is no sex discrimination when pregnant men and pregnant women are treated the same. Nobody at law school could explain that."[40]

Number 4: "Men in need of abortions."[41]

Building on the *Geduldig* dig, Ann made a similar point when she discussed *Bray v. Alexandria Women's Health Clinic*,[42] a case in which the government relied on *Geduldig* to argue that blocking access to abortion clinics was not motivated by gender discrimination.[43] Here is what she said: "Last fall, the U.S. Supreme Court heard argument on whether blocking access to abortion clinics might discriminate against women, or whether, one supposes, men in need of abortions might be discriminated against as well."[44]

37. Scales, *supra* note 29, at 13.

38. Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 39 (1997).

39. Geduldig v. Aiello, 417 U.S. 484 (1974).

40. Scales, *supra* note 38, at 39 (footnote omitted).

41. Scales, *supra* note 29, at 12.

42. 506 U.S. 263 (1993).

43. Brief for the United States as Amicus Curiae Supporting Petitioners at 12–13, 29–33, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (No. 90-985), 1991 U.S. S. Ct. Briefs LEXIS 941 (Current Chief Justice John G. Roberts authored this brief for the Solicitor General and relied on *Geduldig* even though the Petitioners that the brief supported did not, as can be seen in Brief for Petitioner at 1–64, *Bray*, 506 U.S. 263 (No. 90-985)).

44. Scales, *supra* note 29, at 11–12.

Number 3: "You are a strange bedfellow when you sleep alone."[45]

Enough said.

Number 2: "[P]atriarchy is Running Scared."[46]

Ann wrote this passage in 1992, after the 1991 confirmation hearings of Justice Clarence Thomas. In the midst of the horror and excitement we all felt while living through the Anita Hill and Clarence Thomas episode,[47] Ann had an optimistic insight. A flash came to her and she said: "[P]atriarchy is running scared."[48]

Surely this is a Roy Orbison reference.[49] "Just runnin' scared . . . ."[50] But Ann is using Orbison's words with reversed roles. In the song, Orbison was the one running scared and the other guy, the big one, the old flame, is the one he's scared of. Despite "running scared," in the end Orbison wins against the other guy. Ann's emphasis is in the opposite direction. She thinks it is a good thing that patriarchy is "running scared" and I don't think she thought it meant patriarchy would win out in the end in the way that Orbison did.[51] Here's my new interpretation of the Orbison lyrics using patriarchy as the other guy: "Yeah, patriarchy might show up . . . and if he does . . . which one will you choose?

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45. *Id.* at 9.

46. *Id.* at 1 (footnote omitted).

47. At these confirmation hearings, then-Professor Anita Hill accused Thomas of sexual harassment in the workplace. Thomas denied the charges completely calling the affair a "high tech lynching." PBS NewsHour, *Supreme Court Moments in History: Clarence Thomas & Anita Hill*, YOUTUBE (June 29, 2010), http://www.youtube.com/watch?v=1lEEDD2vxaE (depicting PBS news account of the event in 1991).

48. Scales, *supra* note 29, at 1.

49. I should note that Aretha Franklin had more of an impact on Ann than Orbison did. Ann cites Aretha Franklin in footnotes at times. *See, e.g.*, *id.* at 8–9 n.26. She also names Aretha Franklin in the first footnote of one article as one of the women whose voices can be heard throughout the article. Scales, *supra* note 23, at 710 n.1.

50. The full lyrics to the Orbison hit, Running Scared, are:

Just runnin' scared each place we go
So afraid that he might show
Yeah, runnin' scared, what would I do
If he came back and wanted you

Just runnin' scared, feelin' low
Runnin' scared, you love him so
Just runnin' scared, afraid to lose
If he came back which one would you choose

Then all at once he was standing there
So sure of himself, his head in the air
My heart was breaking, which one would it be
You turned around and walked away with me.

ROY ORBISON, *Running Scared*, *on* CRYING (Monument Records 1962), *available at* http://www.lyrics.com/running-scared-lyrics-roy-orbison.html.

51. Ann's sense that patriarchy was running scared, and thus women were gaining ground, was based on events after the Thomas hearings. Thomas was confirmed, but in the process the power of one woman who stood up to speak truth to power and participate fully in the political process was alarming to many men. The entire event suggested harder battles might lie ahead to keep women out of the process and in their proper places. *See* Scales, *supra* note 29, at 1–2.

Yeah, we've been runnin' scared, afraid to lose. But in the end, when patriarchy is all at once standing there, so sure of himself with his head in the air, what happens? We all turn around and walk away with Ann." Patriarchy loses just like the guy in the Orbison song. And if you've never heard the song that way, go back and listen to it and try it out. It's quite a trip.

Number 1: "The last Article of the Constitution, Article VII, is so much shorter than the others because it was drafted at the end of a very hot summer day in Philadelphia. And when it gets that hot, you know, it's 'Miller time.'"[52]

I still smile every time I imagine her explaining this to her students.

III. CONCLUSION

Ann had her favorite dead white philosophers and she quoted from them regularly. I'd like to end with a quote from one of my favorite such philosophers, sometimes known as the father of existentialism, Søren Kierkegaard. It expresses a sentiment that reminds me of Ann and her scholarship: "To dare is to lose one's footing momentarily. Not to dare is to lose oneself."[53]

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52. *See supra* Part I.B.

53. Attributed to Søren Kierkegaard. THINKEXIST.COM (last visited Nov. 28, 2013), http://thinkexist.com/quotation/to_dare_is_to_lose_one-s_footing_momentarily-not/14796.html.

ANN SCALES "IMAGINES US": FROM THE ECO-PORNOGRAPHIC STORY TO THE MEDUSAN COUNTERNARRATIVE

JANE CAPUTI†

> Wherever in this city, screens flicker with pornography . . .
>
> [W]e also have to walk . . .
>
> No one has imagined us. We want to live like trees, sycamores blazing through the sulfuric air, dappled with scars, still exuberantly budding . . ."
>
> —Adrienne Rich[1]

ABSTRACT

Drawing upon the MacKinnon/Dworkin understanding of pornography, Ann Scales introduced a feminist application of "ecological pornography" in her 1990 article *Feminists in the Field of Time.* She critiques Mount Rushmore as a "scar" on the sacred, a form of ecological pornography which proselytizes "nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do." Ecological pornography is enacted in popular culture, where images of the Earth, animals, and land are cast into the convention of sexually subordinated, demeaned, used, marginalized, consumed, and violated women (and those used in the place of women). In a subsequent article, Ann Scales invokes the ancient Goddess Medusa as signifying "the unvarnished, undomesticated—and incomplete—counternarrative to patriarchy." She calls for the reclaiming of "Medusa, in wholeness and in solidarity." Wholeness is key to solving the crisis of ecological devastation, founded in the splitting of culture from nature, with elite humans seen as over and above nature and all oppressed deemed "closer to nature." A related hierarchical splitting is that of life over death. Professor Scales's Medusan counternarrative understands time not as linear, but as

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1. ADRIENNE RICH, *Twenty-One Love Poems: No. 1*, *in* THE DREAM OF A COMMON LANGUAGE: POEMS 1974–1977, 25 (1978).

a continuum. In the former, death is feared as termination, leading patriarchal men to seek immortality, in part by conquering nature. Professor Scales opens *Feminists in the Field of Time* by naming the ecologically pornographic story conveyed by Mt. Rushmore. She concludes by imagining us as whole, as "mere specks in the plasma of the universe," but nonetheless "part of something entire," something enduring.

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INTRODUCTION

I am at the point in life where something that just yesterday looked like an everyday—if uncommonly cherished—object, today looks more like something infinitely precious, irreplaceable. One of these is a souvenir coffee mug from Wimminfest '92, a festival that used to be held annually in Albuquerque. It lists the names of the musicians as well as the speakers, the latter including "Jane Caputi and Ann Scales." Sometime in April 2012, I was looking at the mug and realized that I didn't want to risk anymore its everyday use. I took it out of my cupboard and placed it on a shelf reserved for sacred things. Now I wonder: Was this a premonition regarding my impending loss?

Ann Scales died on June 24, 2012, some twenty-two years after we first met. Both of us were teaching at the University of New Mexico (UNM) in Albuquerque—she in the Law School, I in American Studies. When the culture theorist and poet Gloria Anzaldúa came to UNM to give a talk, Ann and I both attended, and that is when we first met, immediately connecting, not only as friends of the very first order, but also as sisters/collaborators vowing to "stand shoulder to shoulder" ever afterward.

One of our first collaborations was the Wimminfest talk, which we built upon an illustrated presentation I had been doing called *The Por-*

nography of Everyday Life.[2] As a framework for this presentation, we drew upon the work of Andrea Dworkin and Catharine MacKinnon, who wrote an ordinance that defines pornography as the "sexually explicit subordination of women, graphically depicted" as well as "men, children, or transsexuals in the place of women."[3] They define this subordination as being enacted by women "presented dehumanized as sexual objects, things or commodities" or in "postures of sexual submission."[4] Such subordination also is enacted when "[W]omen's body parts . . . are exhibited, such that women are reduced to those parts, . . ." and when women are presented as whores by nature" and in "scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual."[5] There has been enormous controversy over this definition and the ordinance based upon it.[6] My purpose here is not to go over that ground. Rather, I want to suggest some of the ways that this framework holds great value in revealing how a complex of related injustices subordinates women and those used in the place of women, whom we might think of as *womenkind*,[7] a group including feminized and marginalized human groups, as well as all the other-than-human beings we lump under the term *nature*.

I. ECOLOGICAL PORNOGRAPHY

This complex speaks directly to my theme here,—"ecological pornography," which Professor Scales invoked in a 1990 article, as she narrated a particularly heartsickening moment of epiphany:

> Last summer, I drove from Boston to Albuquerque. On the way, I traveled through South Dakota to see the Badlands and the Black Hills. The trip made me heartsick. The history of South Dakota is the

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2. I have continued to elaborate this concept in a film and article. *See* THE PORNOGRAPHY OF EVERYDAY LIFE (Berkeley Media 2006); *see also* Jane Caputi, *The Pornography of Everyday Life*, *in* GENDER, RACE, & CLASS IN MEDIA, 311, 311–18 (Gail Dines & Jean M. Humez eds., 3d ed. 2011).

3. *See* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 428–29 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM'S WAY].

4. *Id.* at 428.

5. *Id.* at 428–29.

6. *See, e.g.*, Lisa Duggan, Nan D. Hunter & Carole S. Vance, *False Promises: Feminist Antipornography Legislation*, *in* THEORIZING FEMINISMS 311, 311–24 (Elizabeth Hackett & Sally Haslanger eds., 2006).

7. *Womenkind** includes female humans, other humans (intersexed or transgender) who identify (as Ann Scales might see it, "in wholeness and in solidarity") with and as women, and reaches out to those who are identified and treated as women against their wills. *See* Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 46 (1997). I include the asterisk because I intend *womenkind** to be a temporary word, one meaningful only for as long as patriarchal cultures continue to ordain hierarchical and oppositional meanings of sex and gender, setting up a class—*men*—formed by deliberate separation from and annihilation (physical and symbolic) of the class, *women*. The meaning of *womenkind** is informed by background meanings of the word *kind*, including: "a natural grouping without taxonomic connotations . . . a group united by common traits or interests." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1243 (Philip Babcock Gove et al. eds., 1986). *Womenkind** conjures solidarity around both traits and interests.

> history of many Indian peoples, particularly the Great Sioux Nation, who have suffered countless inequities, including treaty violations and massacres such as the one at Wounded Knee. The South Dakota air reeks of it. At the same time, the South Dakota land cries out with its fantastic, ever-diminishing prairies and enchanting mountains. South Dakota is a sacred, and perhaps irretrievably scarred place.
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> The culmination of my nausea was visiting Mount Rushmore. I could not stop myself from going there. Mount Rushmore leaps like the proverbial sore thumb out of a wondrous part of the Black Hills. The attraction is not the mountain, but its defacement. The image is familiar: enormous carved faces of dead United States Presidents George Washington, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt. I was disgusted—and not just because I am profoundly ambivalent about these Presidents' roles in United States history. Mount Rushmore is ecologically pornographic. Just as pornography portrays women as enjoying abuse, Mount Rushmore portrays nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do.[8]

In her footnotes, Professor Scales mentions that some folks are thinking of adding the face of Ronald Reagan to Mt. Rushmore.[9] Never one to pull her punch, she opines, well, why not; "[a]s long as we are defacing," we might as well add the faces of Edward Teller, the "Father of the H Bomb";[10] Ivan Boesky, the prototype for the "greed is good"[11] Wall Street criminal;[12] and Richard Speck, one of the most notorious mass sex killers, who, in 1966, invaded a dormitory to torture and murder eight women, six of whom were student nurses and two of whom were registered nurses[13] from South Chicago Community Hospital.[14]

In this brief story, Professor Scales gives a unique and deliberately feminist interpretation of the then nascent concept of ecological pornog-

8. Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 95 (1990) (footnotes omitted).

9. *Id.* at 95 n.2.

10. *See Edward Teller, Ph.D.*, ACAD. ACHIEVEMENT, http://www.achievement.org/autodoc/page/tel0bio-1 (last updated Dec. 11, 2013, 21:04 EST) (crediting Edward Teller as the "Father of the Hydrogen Bomb").

11. The line, "[G]reed, for lack of a better word, is good," was uttered in Oliver Stone's 1987 film *Wall Street* by the character Gordon Gekko. WALL STREET (Twentieth Century Fox Film Corp. 1987).

12. *See* Myles Meserve, *Meet Ivan Boesky, the Infamous Wall Streeter Who Inspired Gordon Gekko*, BUS. INSIDER (July 26, 2012, 1:53 PM), http://www.businessinsider.com/meet-ivan-boesky-the-infamous-wall-streeter-who-inspired-gordon-gecko-2012-7.

13. The names of the women murdered by Speck are: Gloria Jean Davy, Patricia Ann Matusek, Nina Jo Schmale, Pamela Wilkening, Suzanne Farris, Mary Ann Jordan, Merlita Gargullo, and Valentina Pasion. One woman, Corazon Amurao, survived by hiding under a bed. *See* Edward C. Burks, *Speck Is Guilty and Faces Death: But the Judge Can Soften Jury's Recommendation with Prison Sentence*, N.Y. TIMES, Apr. 16, 1967, at 1.

14. Scales, *supra* note 8, at 95 n.2.

raphy.[15] She identifies an underlying identity between white patriarchal heroes and villains.[16] She points to the reversal[17] underlying the claim that women enjoy abuse.[18] I interpret Scales' comments to mean that an "attraction" like Mount Rushmore is actually a defacement. Hence, we can draw from her critique to suggest a connection between the defacement of the mountain that resulted in Mt. Rushmore to the defacements that characterize much of what passes for feminine attractiveness (achieved through cosmetic surgeries, hair taming potions, foot-binding fashions, relentless depilations, starvation dieting, skin bleaching, and so on). Professor Scales, most significantly, I believe, suggests in this piece that there is a connection among *gynocide*,[19] *genocide*, and *ecocide* (the destruction of earth and earth beings). In this way, she is expressing an "ecological feminist" perspective. Karen Warren defined ecological feminism as "the position that there are important connections between how one treats women, people of color, and the underclass on one hand and how one treats the nonhuman natural environment on the other."[20] These oppressive, shared paradigms, of both treatment and perception, structure an ecological pornography of everyday life, where the Earth and nonhuman nature generally are put in "scenarios of degradation, injury, [and] abasement," positioned as objects, commodities, victims, and defined as

15. The first to use the term probably was Jerry Mander in 1972, who intended the term to be synonymous with greenwashing (disinformation that promotes as environmentally friendly that which is actually harmful). For more information, see Bart H. Welling, *Ecoporn: On the Limits of Visualizing the Nonhuman*, *in* ECOSEE: IMAGE, RHETORIC, NATURE 53, 54 (Sidney I. Dobrin & Sean Morey eds., 2009).

16. I am referring here to Professor Scales's commentary suggesting that the notorious criminal, Richard Speck, also be added to the faces on Mount Rushmore. Scales, *supra* note 8, at 95 n.2.

17. Reversal is a concept developed by radical feminist theologian and philosopher Mary Daly. Reversal is the "fundamental mechanism employed in the world-construction and world-maintenance of patriarchy; basic method employed in the making of patriarchal myths, ideologies, institutions, policies, and strategies . . . *Examples* a: the absurd story of Eve's birth from Adam. . . ." *See* MARY DALY & JANE CAPUTI, WEBSTERS' FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE 93 (1987).

18. *Id.* at 95.

19. Many theorists and activists use the word *femicide*, defined by Diana E. H. Russell as "the killing of females by males *because* they are female" and as "lethal hate crimes." Diana E. H. Russell, *Introduction* to FEMICIDE IN GLOBAL PERSPECTIVE 3, 3–4 (Diana E. H. Russell & Roberta A. Harmes eds., 2001). Femicides are motivated by misogyny as well as influenced by masculinist notions of manhood and resulting distortions taking form around honor, love, pride, pleasure, envy, religion, culture, and sense of ownership of women. Femicides take many forms, including honor killings, witch-burnings, selective destruction of female fetuses and infants, boyfriends and husbands killing their girlfriends and wives, and stranger sex killings. For a full discussion, see FEMICIDE: THE POLITICS OF WOMAN KILLING (Jill Radford & Diana E. H. Russell eds., 1992). Other theorists and activists prefer *gynocide* to convey the full historical weight of these atrocities. Mary Daly first spoke of *gynocide*. MARY DALY, BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION 194 (1973). So did Andrea Dworkin. ANDREA DWORKIN, WOMAN HATING 95 (1974). Mary Daly and I define *gynocide* as "the fundamental intent of global patriarchy: planned, institutionalized spiritual and bodily destruction of women; the use of deliberate systematic measures (such as killing, bodily or mental injury, unlivable conditions, prevention of births), which are calculated to bring about the destruction of women as a political and cultural force." MARY DALY & JANE CAPUTI, WEBSTERS' FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE 77 (1987).

20. Karen J. Warren, *Introduction* to ECOFEMINISM: WOMEN, CULTURE, NATURE xi, xi (Karen J. Warren ed., 1997).

"whores by nature."[21] These practices and definitions are enacted and reflected in everyday popular culture, readily apparent when images of the Earth, animals, and land are compared to conventional representations of women (and those used in the place of women).

II. EVERYDAY ECOLOGICAL PORNOGRAPHY

When internationally famous fashion photographer Juergen Teller used Victoria Beckham in an ad for Marc Jacobs's designs, he didn't present her as "a glamorous celebrity," but as "an abstraction, a living doll;"[22] in other words as a sexualized object. For one photo, she is dumped into a shopping bag; we see only her bare, high-heeled legs flopping spread-eagled over its side. A similar image of the planet appears in an ad for Chaseshop.com. The setting is outer space, where the Earth, now also just another commodity, is stuffed into a brown shopping bag. The tag line urges us to "[s]hop the [w]orld."[23]

Everyday pornography regularly shows women as victims of all kinds of glamorized and sexualized abuse, up to and including murder, particularly in fashion imagery, and most explicitly in slasher films and all kinds of serial killer cult offerings.[24] Concomitantly, the Earth often is positioned in ways that suggest victimization by a rapist, sex murderer or both.[25] For example, a serial killer trading card[26] pornographically fantasizes a leering Richard Speck holding a knife against the skin of a young, svelte, pretty blonde nurse (none of his actual victims were blonde).[27] She is bound with ropes and dressed only in a fetish-type bra.[28] A similar structure can be found in an ad for InterContinental Hotels: it depicts an orange, whose peel is carved into the familiar shapes of the continents.[29] A knife rests up against its now Earth-identified skin.[30]

Years ago, Ann gave me an ad, which she perceived as perfectly illustrating ecological pornography. The ad for a Nissan Patrol GR appeared in British Esquire; it showed a mountain wilderness area and in-

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21. IN HARM'S WAY, *supra* note 3, at 428. For a discussion of everyday pornography involving animals, see CAROL J. ADAMS, THE PORNOGRAPHY OF MEAT (2003).
22. Cathy Horyn, *When Is a Fashion Ad Not a Fashion Ad?*, N.Y. TIMES, Apr. 10, 2008, at G1.
23. This ad appeared as a full page in the *New York Times*, sometime around 2002.
24. JANE CAPUTI, THE AGE OF SEX CRIME iii (1987).
25. This was also the underlying gallows humor in the classic Stanley Kubrick film, *Dr. Strangelove, Or: How I Learned to Stop Worrying and Love the Bomb*, where the aptly-named Air Force General, Jack D. Ripper, sets into motion world nuclear destruction. DR. STRANGELOVE, OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures Corp. 1964).
26. BARI KUMAR & SAMANTHA HARRISON, *Richard Speck*, *in* 52 FAMOUS MURDERERS (Mother Prods. 1991).
27. Pictures of all of the victims can be found at the *Murderpedia* website. Juan Ignacio Blanco, *Richard Franklin Speck*, MURDERPEDIA, http://www.murderpedia.org/male.S/s/speck-richard-photos.htm (last visited Jan. 18, 2014).
28. *See* KUMAR & HARRISON, *supra* note 26.
29. This ad is from the early 1990s.
30. *Id.*

corporated a stick-on replica of the SUV, removable by the viewer.[31] The copy read: "Stick it where the hell you like."[32] This underlying cultural project of masculine sexual subordination of a feminine or feminized landscape, so evident here, is even more explicitly stated in a caustic cartoon by David Levine, depicting Henry Kissinger on top of and *fucking* a prone woman whose head is planet Earth.[33] It was Kissinger who gave us the aphorism: "[Power] is the great aphrodisiac."[34] The pornographic paradigm (with both personal and planetary implications) of such sexualized and gendered-masculine power is perfectly expressed in that most telling word, *fuck*. The first two meanings of *fuck* as a verb are (1) "to engage in heterosexual intercourse involving the penetration of the penis into the vagina with (a person)," and (2) "to harm irreparably; finish; damage; spoil; botch; (chiefly in *passive*) to put into a difficult or hopeless situation; doom."[35]

Perhaps nature is understood through feminine metaphors like Mother Earth only because culture has been defined as separate and masculine. Or, perhaps, the Earth and what we generally call Nature in some non-heterosexist and non-dualistic way we can barely imagine, does represent a maternal principle; one that contains female and male and everything else in between or beyond.[36] Certainly, oral traditions around the world have long associated nature with a sacred feminine principle (one that includes the masculine), the maternal *and* sexual source of life, nurturance, death, transformation, and renewal.[37] Some contemporary environmental justice organizations deliberately invoke this association. For example, the group "Hands off Mother Earth," (H.O.M.E.) describes itself as a "global campaign to defend our one precious home, Planet Earth, against the threat of geoengineering experiments."[38]

Eco-pornographic representations continue this association, but now are linked in ways that frame anyone defined as "closer to (feminine)

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31. *See* Jane Caputi, *Everyday Pornography*, *in* GENDER, RACE, AND CLASS IN MEDIA 434, 437 (Gail Dines & Jean M. Humez eds., 2d ed. 2003) (internal quotation marks omitted) (describing the advertisement).

32. *Id.*

33. David Levine, Cartoon, *Screwing the World*, NATION, Feb. 25, 1984, at 215.

34. *See* Hedrick Smith, *Foreign Policy: Kissinger at Hub*, N.Y. TIMES, Jan. 19, 1971, at 1.

35. THE F-WORD 83, 88 (Jesse Sheidlower ed., 3d ed. 2009).

36. *See, e.g.*, PAULA GUNN ALLEN, GRANDMOTHERS OF THE LIGHT: A MEDICINE WOMAN'S SOURCEBOOK 180–83 (1991); VANDANA SHIVA, STAYING ALIVE: WOMEN, ECOLOGY AND DEVELOPMENT 40 (Zed Books Ltd. 1988). We also might ponder all the variations of "Mother" and "mothering" that do not follow a completely female and/or biological relationship (for example, the "Mothers," such as Angie Xtravaganza, of the intentional families and their affiliated "Houses" created by gay and transgender Latino and Black New Yorkers, who are the subject of the 1990 film *Paris Is Burning*). PARIS IS BURNING (Miramax Films 1990).

37. For an analysis of this in Pueblo Indian literature, see Patricia Clark Smith & Paula Gunn Allen, *Earthy Relations, Carnal Knowledge: Southwestern American Indian Women Writers and Landscape*, *in* THE DESERT IS NO LADY 174, 174–96 (Vera Norwood & Janice Monk eds., 1987).

38. ETC Grp., *About*, HANDS OFF MOTHER EARTH, http://www.handsoffmotherearth.org/about/ (last visited Dec. 20, 2013).

nature" as inferior.[39] For example, in numerous popular representations, young, desirable white women are cast on the floor, signifying their abjection by associating them with the "lower," earthy sphere. Sometimes women are represented literally *as* the ground (as in an ad for car audio speakers that shows one such figure prone, her skin covered with road maps).[40] Desirable, young, white women appear most often because, in the United States, they still pass as the "universal" woman, as well as the trophy-object elite men, at least publicly, most want to possess. When a dark-skinned woman is subjected to the same identification with nonhuman nature, land, or with animals, there are different inflections.

Alice Walker once made the intersectional[41] observation that although white women are represented as "objects" in pornography, black women are represented as "shit."[42] This is also true in everyday pornography including everyday ecological pornography. Each year, the men's magazine *Esquire* names a "sexiest woman alive" and features her in a photo spread. In 2010 and 2012, white women were named and they were shown posed in conventional ways stressing their availability—in lingerie or laid out on a bed.[43] But the Jamaican Rihanna, who was named in 2011, received different treatment. For her photo spread, Rihanna is naked, and, in most of the pictures, she is outside and on the ground.[44] Dirt particles are shown clinging to her skin, and she is covered with sticks and other sorts of debris, even what looks like washed-up seaweed.[45]

III. MARGINALIZED AND FEMINIZED MEN IN ECOLOGICAL PORNOGRAPHIC REPRESENTATIONS

Occasionally a marginalized and often feminized man plays the role of the land. For example, a series of 2010 Old Spice ads that claim that their product will allow you to "become one of the freshest smelling places on Earth" feature a dark-skinned man, Isaiah Mustafa, who is shown as literally a place on Earth, his skin embedded with features most U.S. consumers would associate with "exotic-vacation" type lands.[46] I

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39. Susan Griffin, *Split Culture*, *in* HEALING THE WOUNDS: THE PROMISE OF ECOFEMINISM 7, 7–8, 11–12 (Judith Plant ed., 1989).

40. JENSEN AUDIO, *Advertisement*, FEEL THE RAW NAKED POWER OF THE ROAD (c. 1999).

41. *Intersectionality* involves dealing with the intersections and interactions of multiple oppressions, resulting in, for example, sexism being experienced differently by women of different, and differently privileged, ethnicities. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

42. Alice Walker, *Coming Apart*, *in* TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 95, 103 (Laura Lederer ed., 1980) (internal quotation marks omitted).

43. Ryan D'Agostino, *Minka Kelly: Is the Sexiest Woman Alive*, ESQUIRE, Nov. 2010, at 120; Ross McCammon, *The Sexiest Woman Alive 2012*, ESQUIRE, Nov. 2012, at 118.

44. Ross McCammon, *The Sexiest Woman Alive Is Rihanna*, ESQUIRE, Nov. 2011, at 110.

45. *See id.*

46. Old Spice, *Fiji*, ADS OF THE WORLD, http://adsoftheworld.com/media/print/old_spice_fiji (last visited Dec. 21, 2013).

cannot recall any such instances of seeing a white man positioned with the earth or land until very recently in an illustration for an article in *Rolling Stone* on "Gangster Bankers, Too Big to Jail."[47] This article detailed the impotency of U.S. and British justice agencies in stopping the abuses of HBSC, "the storied British colonial banking power" that helped to launder money for Mexican drug mobs, various terrorist organizations, and "countless common tax cheats."[48] The illustration depicts a miserable, diminutive white man, whose head is planet Earth.[49] He is dressed in a buttoned-up shirt and bow tie (adopted in 2013 as a symbol of the marriage equality movement),[50] bound with ropes, held down, and threatened by a huge, conventionally masculine, big-nosed and phallic, white man who pushes a large gun into his eye.[51] This image still employs the conventional "feminization" of the Earth, but now with homophobic bullying as the metaphor for the gendered and implicitly sexual domination.

IV. WHORES BY NATURE/NATURE AS WHORE

One part of the MacKinnon/Dworkin definition of *pornography* that some find particularly problematic is the one that identifies pornography as presenting women (and those used in place of women) as whores by nature. For example, Duggan, Hunter, and Vance find that this term (along with *sex object*) negates the reality of women as autonomous sexual agents.[52] I find this criticism perplexing, for isn't it, rather, being defined as a whore by nature that does precisely that? The designation *whore by nature* means that women are the very embodiment of *sex* in a context where sex is stigmatized, put squarely on the "wrong" side of that invidious—and foundational—culture/nature divide.[53] That culture/nature divide is one of several related hierarchal dualisms: male/female; top/bottom; mind/body; pure/dirty; light/dark; and spirit/flesh. In this framework, "the man" (with variations based on intersecting factors like race or sexuality) is identified with all the favored sides, paradigmatically *culture/mind*, whereas "the woman" (again with intersecting factors intervening) is *nature/body/sex*, understood to be inherently antithetical to *mind*. Historically, this definition of women as utter carnality, veritably as whores by nature, has supported the religious per-

47. Matt Taibbi, *Gangster Bankers: Too Big to Jail*, ROLLING STONE, Feb. 28, 2013, at 51.
48. *Id.*
49. *Id.*
50. *See* Ashley Lee, *Jesse Tyler Ferguson Promotes Marriage Equality in New York with New Bow Tie Collection*, HOLLYWOOD REPORTER (Feb. 28, 2013), http://www.hollywoodreporter.com/news/jesse-tyler-ferguson-promotes-marriage-425068.
51. Taibbi, *supra* note 47.
52. Duggan et al., *supra* note 6, at 317.
53. For ecofeminist critiques of the culture/nature divide, see Griffin, *supra* note 39, at 7–17; VAL PLUMWOOD, FEMINISM AND THE MASTERY OF NATURE 41–68 (1993).

secution of women as witches.[54] It has criminalized sexually autonomous women, while also absolving rapists who contend that their victim, all along, was asking for it. It allows pimps (of any ilk) to contend that it is women who commodify ourselves, that women are veritably made to be used[55] and used up (rather like the long-suffering female tree in that perennially popular children's story, *The Giving Tree*, by Shel Silverstein).[56]

I bring up that sorry story deliberately; for nature, though often understood through a sexist lens as an all-loving and forgiving "Mother," is simultaneously understood and treated as a "whore." Sometimes, nature is the "Pretty Woman"[57] type whore, the one a wealthy, white man might even marry. We see this, for example, in the touristic promotion of exotic "island therapy,"[58] or some conservationist exhortations to preserve those "[l]ast [g]reat [p]laces."[59] Other times, nature is the bitch type of whore, the one who will trick and ruin you with tsunamis, hurricanes, and so on. But, mostly, nature is treated in consumerist and militaristic cultures as the quintessentially cheap and dirty whore (*dirt*, of course, is a synonym for *earth*)—the one who is always available; the one whom you don't really even have to pay; the one with no power to set limits on what you can do to her; the one who gets so used up she ends up wasted, dumped, and unmourned.[60] Meanwhile, Nature, that paradigmatic whore by na-

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54. The Dominican priests who wrote the quintessential, officially papal-approved, witch-hunting and torturing manual, *The Malleus Maleficarum* (1484), avowed that "all [witchcraft] comes from carnal lust, which is in women insatiable." HANS PETER BROEDEL, THE *MALLEUS MALEFICARUM* AND THE CONSTRUCTION OF WITCHCRAFT 26 (2003) (alteration in original) (quoting André Schnyder, *MALLEUS MALEFICARUM, KOMENTAR ZUR WIEDERGABE DES ERSTDRUCKS VON 1487*, at 40 (1993)).

> To conclude. All witchcraft comes from carnal lust, which is in women insatiable. See *Proverbs* xxx: There are three things that are never satisfied, yea, a fourth thing which says not, It is enough; that is, the mouth of the womb. Wherefore for the sake of fulfilling their lusts they consort even with devils.

THE *MALLEUS MALEFICARUM* OF HEINRICH KRAMER AND JAMES SPRENGER 47 (Montague Summers trans., Dover Publ'ns 1971) (1928).

55. Andrea Dworkin originally theorizes the meaning of women being defined as whores by nature. She writes: "The metaphysics of male sexual domination is that women are whores. . . . One does not violate something by using it for what it is: neither rape nor prostitution is an abuse of the female because in both the female is fulfilling her natural function . . . ." ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 203 (1989).

56. *See* SHEL SILVERSTEIN, THE GIVING TREE (1964).

57. I am referring to the 1990 film, *Pretty Woman*. In this film, Julia Roberts plays the "pretty woman," who is ultimately able to leave prostitution and marry a rich capitalist. PRETTY WOMAN (Touchstone Pictures 1990). The beginning of the movie refers to a decidedly less lucky, and perhaps less "pretty," prostitute, whose murdered body has been found, tossed in a dumpster. *Id.*

58. This is the title of a tourism promoting piece, aimed at American travelers. Adam Pitluk, *Island Therapy*, GOHUB, http://hub.aa.com/en/aw/therapist-pim-blue-steel-door-dirk-jan-recourt (last visited Dec. 21, 2013).

59. The rhetoric of saving the "[l]ast [g]reat [p]laces" is employed, for example, by The Nature Conservancy. *See, e.g.*, Jay Harrod, *Arkansas: Saving the Last Great Places Under Earth*, NATURE CONSERVANCY (Apr. 2006), http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/arkansas/explore/saving-the-last-great-places-under-earth.xml.

60. I am thinking here of one of the opening scenes, referring to a murdered prostitute, whose body is found in a dumpster in the 1991 "comedy" *Pretty Woman*, the fate that the "pretty" prostitute

ture, is expected to demonstrate that proverbial "heart of gold;" willing, despite all maltreatment, to keep accepting and recycling wastes (even the most toxic) and to continue to provide such essential "services" as nourishment (spiritual and physical), shelter, clean air, and water.

In her last, unfortunately unfinished, article, *The Burden of Uncertainty: "Chemical Body Burden" as Sex Discrimination*, Professor Scales takes up the theme of environmental pollution in relation to cancer, but still within a framework critical of pornography, writing at the outset of this piece that "pornography is the glue that holds the worldwide oppression of women together."[61] Upon first reading this, I countered, saying that I believed it to be religion that performs that function. But, on reflection, there really is no debate when we grasp the underlying *identity* of patriarchal religion and pornography. I consider this in detail elsewhere,[62] but briefly, we can note the ways that both collaborate to support the culture/nature divide. For patriarchal religion, "God the Father" is male, though asexual, disembodied, and heavenly—pure spirit. There is no female divine and women are dogmatically inferior to men due to their alleged tendency to sin and innate carnality (whorishness). For patriarchal pornography, the same structure adheres: Women are "body" and "sex" in a cultural context that understands these as degraded, as matter divorced from and even antagonistic to spirit. Pornography, thought of in this way, is not deviant. Rather, it is the secret twin of patriarchal religion.

V. ECOLOGICAL PORNOGRAPHY AND RAPE OF LAND AND PEOPLE

Since Professor Scales first wrote about ecological pornography, other scholars and activists also have elaborated this concept. In a 2009 article, Bart Welling defines "ecopornography" as those practices of visual culture (particularly voyeuristic nature photography) that appear beautiful, but actually obscure abuse.[63] Like Professor Scales, Welling links ecopornography to the "genocidal oppression of native peoples and the colonization of their lands by European settlers . . . ."[64] Andrea Smith, in her book *Conquest: Sexual Violence and American Indian Genocide*, analyzes the ways that "colonial relationships are themselves

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seems to escape by marrying a much older and very rich man. PRETTY WOMAN (Touchstone Pictures 1990).

61. Ann C. Scales, The Burden of Uncertainty: "Chemical Body Burden" as Sex Discrimination 7–9, 32 (Nov. 15, 2011) (unpublished manuscript) (on file with the Denver University Law Review).

62. *See* Jane Caputi, *Re-Creating Patriarchy: Connecting Religion and Pornography*, 1 WAKE FOREST J.L. & POL'Y 293 (2011).

63. Welling, *supra* note 15, at 53–55, 57. For example, many photos of creatures, like the near-extinct Florida panther, suggest that this is a beautiful, free animal in the wild but actually the scene is a posed one with a captive animal. The panther's habitat has been largely destroyed, building highways through it and cars and trucks regularly kill the remaining panthers. Their visage, then, is put on a license plate with a plea to "save" them. *See id.* at 54, 63.

64. *Id.* at 57.

gendered and sexualized,"[65] including ways that are sexually violent, encompassing rape, murder, and mutilation. These actions, Smith argues, established the "ideology that Native bodies are inherently violable—and by extension, that Native lands are also inherently violable."[66] This founding atrocity is then mined for humor in the work of a *Playboy* cartoonist,[67] showing two Pilgrim men at the first Thanksgiving, off to the side of the feast and raping Native women, with one remarking, "You know, this might be the start of a great American tradition."[68]

Smith further analyzes the ways that colonizers represent themselves as masculine and hence "naturally" dominant, while representing those they conquer as naturally inferior—feminine, animalistic, savage, more nature than culture, and marked by filth, "sexual perversity," and "unbridled sexuality;" in short, as innately "whorish."[69] Smith writes that "Native peoples are constantly equated with nature, which is in turn equated with unbridled sexuality."[70] She compares the abuse of prostitutes with colonizers' abuse of Native Americans, noting that "prostitutes are almost never believed when they say they have been raped because the dominant society considers the bodies of sex workers undeserving of integrity and violable at all times."[71] Scholar and activist Haunani-Kay Trask also shows such connections, taking the institution of prostitution as paradigmatic of oppression, in that it defines the female "as an object of degraded and victimized sexual value for use and exchange."[72] Trask finds this analogous to "the utter degradation of our culture (Hawaii) and our people under corporate tourism."[73] In that system, the tourist is told: "Everything in Hawaii can be yours, that is, you the tourist, the non-native, the visitor. The place, the people, the culture, even our identity as a 'Native' people is for sale. Thus, Hawaii, like a lovely woman, is there for the taking."[74]

In 2010, Professor Scales gave a speech honoring the work of Catharine MacKinnon, whom she unwaveringly and profoundly esteemed. Professor Scales defines the essence of MacKinnon's work as requiring "solidarity with all people everywhere, particularly those who are femi-

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65. ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 1 (2005).

66. *Id.* at 12.

67. PLAYBOY, Nov. 2007, at 130. The name of the cartoonist is written on the cartoon but is illegible.

68. *Id.* (internal quotation marks omitted).

69. SMITH, *supra* note 65, at 10, 129.

70. *Id.* at 129.

71. *Id.* at 10.

72. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 185 (1993).

73. *Id.* at 185, *quoted in* SMITH, *supra* note 65, at 125.

74. For a classic ad promoting this ideology, see one photographed by Edward Steichen for Matson Cruise Line, which appeared in the November 1, 1941, issue of *Vogue* magazine on the inside back cover. *See* ONLY SKIN DEEP: CHANGING VISIONS OF THE AMERICAN SELF 373 (Coco Fusco & Brian Wallis eds., 2003).

nized, those who are systematically tortured, traded, abused, diminished, and otherwise treated as the raw materials for eventual consumption as highly-processed things."[75] And, as the logic of an ecological feminist critique demands, "raw materials" themselves should never be treated as "raw materials;" that is, as objects for instrumental use. The association between "those who are feminized" (beginning with women) and raw materials dates back to the historical origin of patriarchy.

VI. ECOLOGICAL PORNOGRAPHY AND THE PATRIARCHAL PARADIGM

Historian Gerda Lerner provides an analysis of the development of patriarchy as a historical system, by analyzing how it developed in one form in the ancient Near East from the third to the first millennia B.C.E.[76] The key element was men's appropriation and control over women's sexual and reproductive capacities, which effectively turned women into a form of raw material, into a resource to generate wealth for men.[77] This equation of women with property, Lerner argues, led not only to the institutions of marriage and prostitution, but also to the invention of slavery as well as private ownership of land.[78] Land/Nature, like women, was redefined, turned from creative source into (exploitable) resource, "raw material."[79]

These foundational constructs inform an Annie Leibovitz cover for the November 2012 issue of *Vanity Fair*.[80] It features Daniel Craig as the latest James Bond, but invokes the 1964 Bond film *Goldfinger* and the Ian Fleming novel on which it was based.[81] In the novel, the villain, the obscenely wealthy Goldfinger, is basically a hoarder. A popular reality-TV show features mostly poor and cluttered women as those abject beings, but in truth, it is the wealthiest men who manifest that obsession. Goldfinger, like Christopher Columbus, is marked by an "obsession with gold"[82] and Goldfinger expresses this mania through both hoarding and sexual domination. He pays women to submit to being painted gold and then to have intercourse with him.[83] This allows Goldfinger to feel that he is "possessing gold . . . marrying it."[84] Usually, he leaves the women's backbone skin exposed so that they don't epidermally suffocate—but not always.[85] Goldfinger retaliates against Bond for having sex with his mistress by having her painted gold all over, killing her.[86] Presumably, he

75. Ann Scales, *The World as She Found It*, 46 TULSA L. REV. 7, 7 (2010).
76. GERDA LERNER, THE CREATION OF PATRIARCHY 8–9 (1986).
77. *Id. passim.*
78. *Id. passim.*
79. *Id. passim.*
80. VANITY FAIR, Nov. 2012, at cover.
81. IAN FLEMING, GOLDFINGER (Penguin Books 2002) (1959).
82. LAURENCE BERGREEN, COLUMBUS: THE FOUR VOYAGES 179 (2011).
83. FLEMING, *supra* note 81, at 162.
84. *Id.* (internal quotation marks omitted).
85. *Id.* at 162–63.
86. *Id.*

also rapes her first. The image of this "attractive," raped and murdered golden woman went on to become the most recognizable icon associated with Bond.[87] The Leibowitz photo shows Craig's smirking face set against the backdrop of a svelte, curvy, and sectioned golden female body, his head placed literally over her sex.[88] Women, defined as whores by nature, have long been told that we are "sitting on a gold mine."[89] Men, variously, seek to stake their claim. The message transmitted here is that male sexual gratification—as well as status, wealth, and power—all derive from possession of women/slaves/stuff/land. This gratification is a kind of necrophilic one, as it requires, one way or another, that a being is killed into a thing; something also evident in Mount Rushmore, where the living, "sacred, and perhaps irretrievably scarred"[90] mountain has been defaced and replaced by a monument intended to immortalize not only those particular presidents, but the white, masculinist ego and its conquests.

VII. THE MEDUSAN COUNTERNARRATIVE

To continue our collaboration, and at her suggestion, Ann and I developed and co-taught two interdisciplinary courses at the University of New Mexico in 1994–95.[91] Ann was a consummate teacher—knowledgeable and always prepared, but equally dazzling when something unexpected came up. She put forth an ideal of teaching in "a matrix of unconditional love,"[92] and in my experience, she realized that goal. During the 2013 Symposium on her work held at the University of Denver, Professor Nancy Ehrenreich told the audience that she once had asked Professor Scales for the secret of her successful teaching. In reply, Professor Scales quipped: "I give a lot of handouts."[93] How apt, I

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87. To deliberately pay "homage" to this icon, the Bond film, QUANTUM OF SOLACE (Eon Productions 2008), included a scene showing another of Bond's sexual partners drowned in oil, with her dead, oil-covered body laid out on a bed in a manner identical to the *Goldfinger* scene.

88. VANITY FAIR, *supra* note 80, at cover.

89. "Sitting on a gold mine" is an idiomatic phrase meaning to be "in control of something very valuable." Farlex, *Sitting on a Gold Mine*, THE FREE DICTIONARY, http://idioms.thefreedictionary.com/sitting+on+a+gold+mine (last visited Dec. 21, 2013). Many women are told that we are literally "sitting on a gold mine," which is understood to mean that female sexual and reproductive powers have commodity value, whether in virginal status ensuring proper marriage or as something to be prostituted. For example, one blogger states:

> Ever since I can remember my grandmother has told me that I am sitting on a gold mine. Even at a young age I knew what she was talking about because she had no problem whatsoever elaborating. I grew up knowing that my "gold mine" was precious and that no matter what, I should take the best care of it at all costs! She told me to wait until I was married to a man who loved me with all of his heart. To save it as a gift.

Raylina Robinson, *Sitting on a Gold Mine*, PARDON MY AUDACITY (June 3, 2013), http://uniqueluxury.wordpress.com/2013/06/03/sitting-on-a-gold-mine/.

90. Scales, *supra* note 8, at 95.

91. The first, in the UNM Law School, was "Pornography, Sexual Representation, Culture"; the other, taught through American Studies, was "Sex, Gender and the Law."

92. Scales, *supra* note 8 at 95, 112.

93. Nancy Ehrenreich, Professor, Sturm Coll. of Law, Opening Remarks at the University of Denver Sturm College of Law Symposium Honoring the Work of Ann Scales: On "Having Fun and Raising Hell" (Mar. 30, 2013).

thought; for Ann so generously doled out the only real currency—love and attention—to her students. She was, moreover, witty, charismatic, and impassioned in the classroom, inspiring many students with a life-long commitment to social justice.

Ann always made it real, feeling herself obliged "to name what is happening."[94] To show just how sacred that task is, she wrote a piece called *Disappearing Medusa: The Fate of Feminist Legal Theory?*, warning against the ways that legal theory can work to silence and quash the transformative powers of feminism.[95] Medusa, an ancient Serpent Goddess who signifies wisdom and the sacredness and powers of nature,[96] including the death power, is defamed in patriarchal myth as an ugly and terrifying monster, needing to be slain by a hero. The hero's "death defying" act is then rendered in numerous, often vividly sexualized, depictions. One of the most egregious is *Perseus and Medusa*,[97] a sculpture by Benvenuto Cellini that shows the hero holding the decapitated head and trampling on her fallen body.[98] The popular arts regularly rehash this ritual scarring of the sacred. Medusa is stalked and killed, for example, once again in the popular film, *Clash of the Titans*, in both the 1981[99] and 2010[100] versions. Meanwhile, popular representations, from slasher films through fashion displays and corporate advertising, regularly display similar scenes of decapitation and dismemberment of women as well as the Earth.[101]

Obviously, because this ritual re-enactment (literal and symbolic) of her death and debasement continues to be performed, Medusa is not so easily disposed of. Rather, she still is present, relevant, potent, and threatening. Professor Scales explains exactly what it is about Medusa that makes her so dangerous:

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94. Scales, *supra* note 7, at 46.

95. *Id.* at 37–38.

96. The serpents associated with Medusa appear throughout world sacred narratives as manifestations of "the holiness of nature" and "the principle of life itself," which necessarily includes death. JEAN CHEVALIER & ALAIN GHEERBRANT, A DICTIONARY OF SYMBOLS 845 (John Buchanan-Brown trans., Penguin Books 1996) (1969); *see also* JOSEPH CAMPBELL & BILL MOYERS, THE POWER OF MYTH 45 (Betty Sue Flowers ed., 1988).

97. This piece was sculpted from 1545–54. Michael Cole, *Cellini's Blood*, 81 ART BULL. 215, 215, 232 n.10 (1999).

98. The statue stands in the Piazza Signoria in Florence. MARY D. GARRARD, BRUNELLESCHI'S EGG: NATURE, ART, AND GENDER IN RENAISSANCE ITALY 286 (2010). Cellini's commission did not include sculpting Medusa's body, but he took that on, gloating that he had based the figure upon that of his mistress. *Id.* The sculpture itself, art historian Mary Garrard writes, is a work of "unparalleled gender violence . . . a gory decapitation [in which] . . . Perseus triumphantly displays Medusa's head and its dripping ligaments, his feet planted on her twisted body. From her neck a gruesome mess of blood and gut erupts . . . . Cellini's debasement of the feminine is complete." *Id.*

99. CLASH OF THE TITANS (Metro-Goldwyn-Mayer 1981).

100. CLASH OF THE TITANS (Warner Bros. 2010).

101. I elaborate in Jane Caputi, *The Pornography of Everyday Life*, *supra* note 2, at 311–18, and in my forthcoming film, tentatively titled, *Our Planet/Ourselves: Connecting the War on Womenkind* to the War on the Earth.*

> By turning men to stone, she prevented "the male gaze," thus denying the possibility that women could be defined by men. . . . Her snakes represent unintimidatable self-possession. She had to be killed because, by her very existence, she could expose the contingency of the Law of the Fathers. . . . Her destruction required female complicity, which was amply rewarded. . . . Medusa symbolizes female *potential*. . . .
>
> In short, Medusa is the unvarnished, undomesticated—and incomplete—counternarrative to patriarchy.[102]

Professor Scales closes this piece by urging us "to reclaim Medusa, in wholeness and in solidarity."[103] This language directs us to the need to heal the broken and fragmented consciousness that produces the culture/nature divide and related hierarchical dualisms. Finally, a key feature of the assault on Medusa is her *disarticulation* (dismemberment), including her decapitation, which philosopher Hélène Cixous recognizes as a *silencing*.[104] Reclaiming Medusa, Professor Scales loudly took on patriarchy's "sacred" institutions—not only pornography, but also football, which, she recognized as a sport that "normalize[s] and encourage[s] harms to women, including educational and sexual harms."[105]

A. Scars and the Sacred

Ann was not only an ideal person to hash out ideas with, but also a true friend whom I trusted implicitly. She was a most valued advisor in any number of realms—intellectual, political, legal, emotional, and spiritual. She had exceptional wisdom, humor, compassion, strength, and resilience. She also grappled with serious depression and had scars left by sexual harms inflicted on her when she was young, by familial and social homophobia, and by cancer. She lost her only sister as a teenager to that disease and then received her own diagnosis of breast cancer a few years before her death.

In *The Burden of Uncertainty: "Chemical Body Burden" as Sex Discrimination*, Professor Scales sought to establish a legal framework for victims of environmental sexism, resulting in cancer:

> My interest here is the burden on the element of causation-in-fact, especially in the context of toxic torts, and with special attention to breast cancer.

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102. Scales, *supra* note 7, at 35 (footnotes omitted).

103. *Id.* at 46.

104. Hélène Cixous, *Castration or Decapitation?*, 7 SIGNS 41, 49 (Annette Kuhn trans., 1981). For elaboration see Susan Griffin, *Split Culture*, *in* HEALING THE WOUNDS: THE PROMISE OF ECOFEMINISM 7, 7–17 (Judith Plant ed., 1989); VAL PLUMWOOD, FEMINISM AND THE MASTERY OF NATURE 59–60 (1993).

105. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 208 (2009).

> Here, I propose a judicial burden-shifting doctrine on the element of causation in cases of injuries sufficiently correlated with exposure to approximately 80,000 "ordinary chemicals," those chemicals that pervade our daily lives in multiple ways, from food to plastics to fabrics to cosmetics to household cleaners. Focusing particularly on ordinary "endocrine disrupting chemicals," I will refer to this problem henceforth as "Ordinary Chemical Exposure," or "OCE." Moreover, I will argue that such a burden-shifting doctrine in OCE cases [is] justified by our social commitment to eliminate sex discrimination.[106]

Cancer of the reproductive and sexual organs is specifically a matter of environmental injustice, Professor Scales and others argue.[107]

The title, *The Burden of Uncertainty: "Chemical Body Burden" as Sex Discrimination*, could not help but reflect Ann's own pain of living with a cancer diagnosis as well as the toll of the various treatments—radiation, pharmaceutical, and surgical—that she bore. It also reflected her awareness, which she discussed in the 1990 article, that her mother had been dosed with what probably was the drug DES during her two pregnancies.[108] Both daughters then ended up with cancer. As I reflect on Ann, her life and her work, I realize newly the profundity of the insight that she received that day from the Black Hills; the awareness that patriarchy, "perhaps irretrievably," scars the sacred.[109] But Ann, like those "sycamores blazing . . . dappled with scars, still exuberantly budding," invoked by Adrienne Rich,[110] also continued to bud, to dazzle, to open out and flower, despite her pain. One of her favorite compliments was to tell someone that "the Goddess shines through you." And, of course, that was eminently true of her.

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106. Scales, *supra* note 61, at 3–4. Scales notes that her proposal owes much to the "Environmental Racism" or "Environmental Justice" movements. *Id.* at 4 n.7 (internal quotation marks omitted).

107. For example, certain ethnic groups (for example, Mexicans, because so many work in pesticide-laden fields) as well as adult women (with variations resulting from their ethnicity and region) have far higher blood levels of what is known as "Ordinary Chemical Exposure." This is due to a variety of reasons including women's greater store of body fat, as well the feminine gender role requiring daily interactions with chemical-laden beauty and household cleaning products. For more information on this issue and the concerns of environmental justice, see STACY ALAIMO, BODILY NATURES: SCIENCE, ENVIRONMENT, AND THE MATERIAL SELF 116–18 (2010).

108. DES is the common designation for Diethylstilbestrol, which is a synthetic form of estrogen. Doctors prescribed it to pregnant women between 1940 and 1971 to prevent miscarriage, premature labor, and other complications associated with pregnancy. Numerous health problems are known to be associated with the daughters and sons of these women, including greater risk for a variety of cancers, including breast cancer. For more information see the fact sheet on this drug and its relation to cancer on the website for the American Cancer Institute. *Diethylstilbestrol (DES) and Cancer*, NAT'L CANCER INST., http://www.cancer.gov/cancertopics/factsheet/Risk/DES (last updated Oct. 5, 2011).

109. Scales, *supra* note 8, at 95.

110. RICH, *supra* note 1, at 25.

B. Wholeness, Endurance, and Eternity

Now on to another of her enduring pieces, one that makes me laugh more than cry, an article on how to survive what Ann calls "Legal De-Education."[111] The article is brimming with choice advice applicable to most any school (or situation) we find ourselves in. Once again, telling that Medusan counternarrative is requisite: "Taking a stand and saying what you really see is a tough assignment. When anyone who is committed to liberation does that, love her for it."[112] Professor Scales continues, reminding her readers that it is okay to disagree, even with her, even with the ideas in that very article. And, she says, "[i]f we can't agree, or I'm being obstinate, go ahead and call me a bitch, then give me a hug and let's make plans to collaborate in the future."[113]

Reading this, at first I want to say, "damn," more than anything I wish that I could. But even without her actual, living presence in my life, Ann is and always will be an essential part of me; someone I can't completely lose, for she indelibly changed me for the better, changed me for good.[114] She continues to inhabit, inform, and transform my consciousness and my spirit and she always will. Re-reading *Feminists in the Field of Time*, Ann's reflections on this very phenomenon newly caught my attention.

In this piece, Professor Scales explores the legal and spiritual implications of the patriarchal linear, progressive sense of time, enshrined in the Mount Rushmore monument that "portrays puny, genocidal United States history as more important than the timelessness of the Black Hills."[115] She draws on the philosopher Julia Kristeva, who finds that women's sense of time is "measured by cycles, gestation, biological rhythms, and cosmic events," and is one where time is viewed as "an illusion, as not really passing."[116] Professor Scales continues:

> I recognize these approaches in the wise women I know. They acknowledge that they are "in the field of time," in the sense of living a life bounded by birth and death. However, they see birth and death as mere markers in a much larger cycle. They pursue their daily tasks and make plans in accordance with linear time measurement. But these are practical accommodations, not expressions of allegiance.

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111. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990).
112. *Id.* at 161.
113. *Id.* at 162.
114. At the memorial for Professor Scales at the University of Denver on September 21, 2012, her former student, Julie Nichols, eulogized her magnificently by invoking the song "For Good" from the musical *Wicked*. Elphaba and Glinda sing to each other in love and enduring commitment about the effect they have had on each other: "I do believe I have been changed for the better / And because I knew you . . . I have been changed for good." KRISTIN CHENOWETH & IDINA MENZEL, *For Good*, *on* WICKED (Decca Broadway Records 2003).
115. Scales, *supra* note 8, at 96.
116. *Id.* at 109.

> These women could not endure life except in their conviction that they—that all of us—are part of an expression of eternity.[117]

Although Professor Scales writes of "life," she is referring not only to the general phenomenon, but to the experience of life for women in a pornographic culture; that "city" where, as Adrienne Rich puts it, "screens flicker with pornography," but where "we also have to walk."[118] Professor Scales finds that it is an awareness of ourselves as part of eternity that makes this endurable.[119] Significantly, she speaks of *eternity*, not immortality.[120] The drive for immortality is a distinctively patriarchal and egocentric one.[121] It manifests in that obsessive need to make a mark—*a scar*—on the sacred, mountains, and otherwise.[122] It is expressed mythically in horrific heroism like Gilgamesh's razing of a primal forest,[123] as well Perseus' assault on Medusa. It motivates blood sacrifice, resulting in genocide, gynocide, and ecocide.[124] It takes religious form in what ecological feminist philosopher Val Plumwood calls patriarchal "heavenism,"[125] and philosophical and scientific forms in the "live-forever" aspirations of contemporary post-humanists and synthetic biologists.[126] Professor Scales recognizes that this lust for immortality is based in the egotistic denial that all of us are "mere specks in the plasma of the universe."[127] In the linear, patriarchal sense of time, death is feared as the end of the line; as termination.[128] But, an ecological understanding instead knows death as a continuum of being, what Professor Scales invokes as *eternity*, which is always "here and now."[129] A Medusan sense of time realizes the impossibility of isolating either a beginning or an ending; it recognizes the cycle of existence as a timeless process of birth,

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117. *Id.* at 110.

118. RICH, *supra* note 1, at 25.

119. Scales, *supra* note 8, at 110.

120. *Id.*

121. *See id.* at 96; NANCY JAY, THROUGHOUT YOUR GENERATIONS FOREVER: SACRIFICE, RELIGION, AND PATERNITY 144–45 (1992).

122. Scales, *supra* note 8, at 96.

123. ROBERT POGUE HARRISON, FORESTS: THE SHADOW OF CIVILIZATION 13–18 (1992).

124. I elaborate on gynocide and the quest for immortality in Jane Caputi, *The Gods We Worship: Sexual Murder as Religious Sacrifice*, *in* GODDESSES AND MONSTERS: WOMEN, MYTH, POWER, AND POPULAR CULTURE 182, 182–206 (2004).

125. For an ecofeminist philosophical analysis of patriarchal fear of death, as well as the articulation of a counternarrative, see Val Plumwood, Visiting Fellow, Fenner Sch. of Env't & Soc'y, Austl. Nat'l Univ., Canberra, Remarks at Harvard Forum on Religion and Ecology: Tasteless: Towards a Food-based Approach to Death 3 (Oct. 2007), *available at* http://valplumwood.files.wordpress.com/2008/03/tasteless.doc.

126. This is particularly obvious in contemporary post-human discourse, exemplified by such thinkers as Max More and Raymond Kurzweil. I offer an extended discussion of this in Jane Caputi, *Feeding Green Fire*, 5 J. FOR STUDY RELIGION NATURE & CULTURE 410, 430 (2011). For its representation in advocacy for synthetic biology, see GEORGE CHURCH & ED REGIS, REGENESIS: HOW SYNTHETIC BIOLOGY WILL REINVENT NATURE AND OURSELVES 219–220 (2012).

127. Scales, *supra* note 8, at 112.

128. *See* Plumwood, *supra* note 125.

129. CAMPBELL & MOYERS, *supra* note 96, at 67. Much of Ann Scales's orientation in *Feminists in the Field of Time* seems influenced by the thought of Joseph Campbell on such concepts as eternity and "the field of time."

growth, decline, death, transformation, and renewal. There is loss, and we greatly mourn those we love, but there is no actual "passing away" in the same ecological sense that there is no "away" for us to safely dispose of toxins like nuclear waste. Everything really *is* everything.[130] Everything is one ecosystem; everything is inescapably interconnected.

While fear motivates the drive for immortality, a sense of happiness and wholeness accompanies immersion into eternity, as beautifully expressed by Willa Cather, describing a young boy's epiphany in an actual, earthy field—a pumpkin patch:

> I kept as still as I could. Nothing happened. I did not expect anything to happen. I was something that lay under the sun and felt it, like the pumpkins, and I did not want to be anything more. I was entirely happy. Perhaps we feel like that when we die and become a part of something entire, whether it is sun and air, or goodness and knowledge. At any rate, that is happiness; to be dissolved into something complete and great. When it comes to one, it comes as naturally as sleep.[131]

Ann Scales opens her profound piece *Feminists in the Field of Time* by naming the heart-sickening, egotistical, and ecologically pornographic story conveyed by Mount Rushmore. She concludes by taking up Adrienne Rich's challenge to begin the work of "imagin[ing] us,"[132] which I take as those of us, Lesbian and otherwise, who seek a world other than patriarchy. Professor Scales thus imagines us in solidarity and in wholeness, as "mere specks"[133] to be sure, but "part of something entire . . . something complete and great,"[134] something enduring, something scarred, but still, irretrievably, sacred.[135]

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130. LAURYN HILL, *Everything Is Everything*, *on* THE MISEDUCATION OF LAURYN HILL (Ruffhouse Records 1998).

131. WILLA CATHER, MY ÁNTONIA 11–23 (Barnes & Noble Books 1994) (1918).

132. RICH, *supra* note 1, at 25.

133. Scales, *supra* note 8, at 112.

134. CATHER, *supra* note 131, at 12.

135. I am grateful to Kathryn Boundy for sharing her insights with me on how "scars must be made part of the sacred past/present." E-mail from Kathryn Boundy to author (Aug. 30, 2013, 12:59 PM) (on file with author).

FEMINISTS AT THE BORDER

JENNIFER CHACÓN†

ABSTRACT

Ann Scales was a critic of militarism. She challenged her readers to engage in "a radical critique of all of the excuses for and covers for the use of force—that is, a radical critique of militarism—in whatever context it appears." She also cautioned that this critique is perhaps most important in contexts where the influence of militarism is less obvious. This Essay takes up Scales's challenge to call out and critique militarism, and to do so in a context where the influence of militarism may be less obvious, by focusing on immigration law and policy. Part I of this Essay summarizes Scales's critique of militarism. Part II uses Scales's analysis of *Nguyen v. Immigration and Naturalization Service*, which involved a failed sex-based equal protection challenge to a citizenship law, as a starting point for tracing out the broad influence of militarism on immigration law doctrines. Part III explores the obvious ways in which militarized immigration policies legitimate state-sanctioned violence, using the Sixth Circuit's 2013 decision in the case of *Villegas v. Metro Government of Nashville* as an illustrative example. Part IV argues the less obvious point that this violent enforcement is used in the service of an immigration regime that is structured to reinforce gender hierarchies.

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† Professor of Law, University of California, Irvine, School of Law. J.D., Yale Law School; A.B. Stanford University. I would like to thank the participants at the University of Denver Sturm College of Law Symposium to honor Ann Scales. Their ideas and questions were inspirational to me. I would also like to thank Namita Thakkar for her helpful research assistance on this project and the librarians of the U.C. Irvine School of Law, without whom I would get nothing done. Special thanks to Dean Erwin Chemerinsky for his support of my research. This Essay is for my sisters, Cat and Liz.

INTRODUCTION

I think you can tell a lot about a person from the way she is memorialized: the people who gather, the things they talk about, the memories they share. I didn't know Ann Scales in life, but I was given the wonderful opportunity to honor her life at the Symposium held in her honor on March 31, 2013, at the University of Denver Sturm College of Law. I learned a great deal about her that day.

The gathering was diverse. It held students and teachers. It held clinicians and doctrinal faculty and faculty who seek to break down the borders between those groups. It held lawyers and nonlawyers, scholars from across the academy, and many who work outside of the academy. It held men and women of many races, ethnicities, and nationalities. The room was full of people who are gay, lesbian, straight, bisexual, or still questioning their sexual orientation. The room contained feminist scholars and queer scholars who profoundly disagree with one another about many fundamental questions but who all agreed about the importance of Scales's contributions to scholarship and to society. Indeed, keynote speaker Katherine Franke observed that two individuals whose methodological approaches were often in tension or at odds with Scales's own gave the keynote speeches at the Symposium.[1] Even in her passing, Ann Scales gave us an important space in which to "[t]ake a [b]reak from [a]crimony."[2] All of this says something very important about Professor Scales's capaciousness as an intellectual and a human being.

1. Scales's writing exhibits a unique capacity both to articulate her own strongly-held views and to make space for views that others might read as hopelessly oppositional to hers. My favorite example of this, but certainly not the only one, is her rereading of Angela P. Harris's *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Some feminist legal scholars had excoriated Harris's piece. *See, e.g.*, Catharine A. MacKinnon, *Keeping It Real: On Anti-"Essentialism," in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 71, 73–74 (Francisco Valdes et al. eds., 2002). Professor Scales's views on poststructuralist attacks on feminist theory certainly aligned with those of Harris's critics. *See* Ann Scales, *Poststructuralism on Trial, in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 395, 405 (Martha Albertson Fineman et al. eds., 2009). Yet, ultimately, Scales read Harris's work more generously and attentively than many of Scales's allies. Most notably to me, Scales noted that Harris's opening epigraphs set forth both the Constitution's "[w]e, the people" and a quote from Jorge Luis Borges's *Funes the Memorious*, in which the character "could recount experience only by taking more time than it took to live it." *Id.* (alteration in original) (internal quotation marks omitted) (discussing Harris, *supra*, at 581–82); *see* U.S. CONST. pmbl.; JORGE LUIS BORGES, FUNES THE MEMORIOUS (1942). The import was that it was certainly important to avoid the essentialism that effectively disappears some experiences systematically, but that it was also important to avoid "a kind of under-generalization that leads to communicative failure." Scales, *supra*, at 405. Scales understood Harris to be "talking about the need for conversation always to proceed in the territory between saying everything and saying nothing." *Id.* Notwithstanding the admittedly "confrontational" title of her chapter, *id.* at 395, Scales reminded the reader that conversations and progress were possible even among those with distinct theoretical commitments.

2. Katherine Franke, Isidor & Seville Sulzbacher Professor of Law & Dir., Ctr. for Gend. & Sexuality Law, Columbia Law Sch., Keynote Address at the University of Denver Sturm College of

There was a lot of laughter in the room, and there were tears, too. Those who were dearest to Professor Scales were able to say to those who only really knew her through her writing that they recognized "Ann" in our comments. This means that Scales not only wrote what she really thought but also put herself into her writing. Her scholarship not only reflected her thoughts and beliefs but also reflected some essence of her.

I did not know Ann Scales, but at her memorial Symposium, I learned that I would have liked to have known her. With this Essay, I attempt to explore, apply, and perhaps expand one aspect of her feminist jurisprudence: her critique of militarism. Part I of this Essay summarizes Scales's critique of militarism. Part II uses Scales's analysis of *Nguyen v. Immigration and Naturalization Service*,[3] which involved a failed sex-based equal protection challenge to a citizenship law, as a starting point for tracing out the broad influence of militarism on immigration law doctrines. Part III explores the ways in which militarized immigration policies legitimate state-sanctioned violence, using the Sixth Circuit's April 2013 decision in the case of *Villegas v. Metro Government of Nashville*[4] as an illustrative example. Part IV argues the frequently overlooked point that this violent enforcement is used in the service of an immigration regime that is structured to reinforce gender hierarchies.

I. ANN SCALES'S CRITIQUE OF MILITARISM

Ann Scales was a critic of militarism. She theorized that "law and militarism are intimately related, . . . militarism and male dominance are intimately related, and . . . feminism is inconsistent with all of them."[5] Scales defined militarism in slightly different ways over time. In a 1989 article, she defined it as "the pervasive cluster of forces that keeps history insane: hierarchy, conformity, waste, false glory, force as the resolution of all issues, death as the meaning of life, and a claim to the necessity of all of that."[6] Later, she defined militarism as

> the manifestation at every level of policy—military and otherwise—of the logic of war. . . . Every policy, including every domestic policy, must be measured by its effect on military capability and readi-

Law Symposium Honoring the Work of Ann Scales: Taking a Break from Acrimony: The Feminist Method of Ann Scales (Mar. 30, 2013).

3. 533 U.S. 53 (2001).

4. 709 F.3d 563 (6th Cir. 2013).

5. Ann C. Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 710, 710 (1990) [hereinafter Scales, *Midnight Train*] (describing her article *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989) [hereinafter Scales, *Militarism*]).

6. Scales, *Militarism*, *supra* note 5, at 26. Other feminist scholars have offered similar definitions to similar concepts. Cynthia Enloe, for example, writes that "[t]o become militarized is to adopt militaristic values (e.g., a belief in hierarchy, obedience, and the use of force) and priorities as one's own, to see military solutions as particularly effective, to see the world as a dangerous place best approached with militaristic attitudes." CYNTHIA ENLOE, GLOBALIZATION AND MILITARISM: FEMINISTS MAKE THE LINK 4 (2007).

> ness, lest some rival gain any small advantage. Cost is no object. Disproportionality is part of the expectedly exorbitant price.[7]

In Scales's view, the forces of militarism and gender "account . . . for the oppression of women in whatever patriarchal institution—religion, state, family, academy—and by whatever method—rape, battering, economic exploitation, rendering invisible."[8] She believed that "[w]e can't overcome gender oppression without demilitarizing ourselves and our world."[9]

Scales noted that the gendered nature of militarism poses a problem for the law because law is "a system of social order backed by the force of the state."[10] The state's ability to fine, arrest, detain, shame, exclude, deport, and even kill lawbreakers is what often gives the law its power. Militarism thus undergirds law; unsurprisingly, judges often in turn use the tools of law to avoid confronting militarism. Specifically, Scales claimed that courts frequently use legal doctrines such as the political question doctrine to dodge their obligations to resolve challenges to militarism.[11] But for Scales, the fact that legal doctrine can be wielded in ways that avoid confronting militarism does not completely undermine the possibility that law can be a tool by which militarism can be confronted.[12]

Scales also recognized that law is not exclusively legitimated by force or the threat of force. Law also functions because it is, at least theoretically, a system of mutual obligation—one that is the product of "mutual promises to abide by agreements."[13] Scales observed, however, that not all of those individuals subject to the law have the same agency with respect to the law, which gives the lie to the purported mutuality of the obligation.[14]

Scales's work illuminates the fact that whether law is a system of rule backed by militaristic force or a set of mutual obligations premised on imperfect mutuality, or some combination of these two things, the law draws its sources of legitimacy from social ordering principles that structurally and historically have excluded women. For Scales, the challenge for feminist jurisprudence is to "change the way law views women and to make possible the autonomy presumed by traditional theory."[15] In her

7. Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 371 (2005).
8. Scales, *Militarism*, *supra* note 5, at 26.
9. *Id.*
10. *Id.* at 30.
11. *See id.* at 65–68.
12. *Id.* at 72.
13. *Id.* at 32 (relying on theories of H.L.A. Hart and Hannah Arendt, Civil Disobedience, in Crises of the Republic 49, 79 (1972)).
14. *Id.* at 34.
15. *Id.* at 36.

view, we must move away from a system of law that is legitimated primarily through militaristic force or that is imposed (forcibly) on those as to whom there is no mutual obligation.[16] Law itself can be a tool toward that end, but Scales also argued in favor of challenging unjust laws through civil disobedience—or "nonviolent direct action."[17] Such challenges allow individuals who are structurally disempowered to participate in legal decision-making, while also "invit[ing] the courts to be directly participatory" in the legal decision-making structure, including "the military decision-making structure."[18]

While attentive to the transformative possibilities of law, Scales realistically acknowledged that the law most often serves the goals of militarism and the exclusionary projects of the liberal state. This is true not only insofar as legal doctrine is manipulated to keep courts from confronting militaristic structures,[19] but also to the extent that the invulnerability of militarism "shapes the debate" over constitutional questions on issues as diverse as abortion, citizenship, self-defense, and doctrines of sovereign immunity in tort law.[20] Recognizing the ubiquity of militarism in legal doctrines and legal logic, and convinced that militarism is "busy reinforcing gender, in its worst non-fluid forms," Scales challenged her readers to engage in "a radical critique of all of the excuses for and covers for the use of force—that is, a radical critique of militarism—in whatever context it appears."[21] She also cautioned that this critique is perhaps most important in contexts where the influence of militarism is less obvious.[22]

This Essay takes up Scales's challenge to call out and critique militarism, and to do so in contexts where the influence of militarism may be less obvious. I focus on immigration law and policy. Scales posited a link between militarism and the construction of oppressive gender norms, but it is often difficult to visualize this link in the abstract. Focusing on one concrete example helps to illustrate both the legitimacy of Scales's assertion, as well as its limits.

II. MILITARISM AND IMMIGRATION POLICY

In *Soft on Defense*, Scales used the case of *Nguyen v. Immigration & Naturalization Service* as a vehicle for exploring "how militarism shapes constitutional jurisprudence in unspoken ways."[23] The case involved an equal protection challenge to U.S. citizenship laws, which

16. *See id.* at 29–30, 33–34.
17. *Id.* at 56 (internal quotation marks omitted).
18. *Id.* at 59.
19. *Id.* at 65–70; *see also* Scales, *supra* note 7, at 374–75.
20. Scales, *supra* note 7, at 377–85.
21. *Id.* at 390, 392.
22. *Id.* at 392.
23. Scales, *supra* note 7, at 377 (discussing Nguyen v. INS, 533 U.S. 53 (2001)).

allowed the children of unmarried U.S. citizen mothers to become U.S. citizens automatically but required unmarried U.S. citizen fathers to satisfy certain additional statutory requirements before their children could become citizens.[24] The Supreme Court rejected the challenge, upholding the differential standards on intermediate scrutiny by a 5–4 vote.[25] The majority concluded that Congress could take account of biological difference to achieve its desire to ensure a genuine biological connection between the citizen parent and the child.[26] The majority reasoned that, unlike a mother, who will always be present at a child's birth, an unwed father may not even know about the child.[27] Justice Kennedy wrote for the majority:

> Given the [nine]-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.[28]

The Court was noticeably concerned that the children of male U.S. citizen soldiers might claim U.S. citizenship. Scales noted that "[t]o grant automatic citizenship to their children, thereby subjecting each and every soldier-father to the possibility of paternity suits, child support payments, and the like, might deprive combat of some of its appeal."[29] In the *Nguyen* decision, Scales saw the Court's investment in the ideas that soldiers need to be able to have sex with women abroad without concern that the consequences may follow them home, and that the nation needs to be

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24. *Nguyen*, 533 U.S. at 57–60.
25. *Id.* at 56.
26. *Id.* at 63.
27. *Id.* at 65.
28. *Id.* at 56, 65.
29. Scales, *supra* note 7, at 379. It is not just wartime service, but also "peacekeeping" that raises this possibility. This is evident in Dina Francesca Haynes's description of Arizona Market, a marketplace that developed in the Brčko District after it was flooded with American troops and made into an American protectorate in the wake of the Dayton Peace Accords. Dina Francesca Haynes, *Lessons from Bosnia's Arizona Market: Harm to Women in a Neoliberalized Postconflict Reconstruction Process*, 158 U. PA. L. REV. 1779, 1792–93 (2010). In time, it became a hotspot of human trafficking, where naked women were sold for sex. *Id.* at 1794–95. Haynes writes:

> By 1999, it was well-known that peacekeepers and other internationals were spending time in Arizona Market—purchasing sex, buying women, and sometimes even selling them. Nevertheless, when High Representative Wolfgang Petrisch belatedly tried to shut down Arizona Market, calling it a "lawless wasteland," an American colonel argued to keep it open, pointing out by way of comparison that Times Square in New York City was far from perfect with its own host of pimps and prostitutes. Such statements suggest that a "boys will be boys" mentality was accepted by some as a justification for the improper behavior of military and international personnel participating in postconflict reconstruction work. The reasoning was that military personnel who were involved in risky and demanding work so far from home ought at least to be allowed the comfort of sex.

Id. at 1796–97 (footnotes omitted).

sure that the spoils of war do not come home in human form to claim the benefits of U.S. citizenship.

Concerns about the military clearly affected the Court's reasoning in *Nguyen*, even though *Nguyen* was not a case about a soldier's child—or even a case about a child abandoned abroad. Scales viewed this as an example of militarism warping constitutional doctrine.

There are, unfortunately, many other examples of constitutional reasoning in citizenship and immigration cases where the military is not necessarily invoked, but where militarism is in evidence. The law around immigration and citizenship is permeated with "the logic of war." Indeed, the constitutional cases undergirding immigration law, which cede largely unreviewable power to Congress to decide the terms of admission and removal of noncitizens, rely quite explicitly on a rationale of national security to justify the abdication of review.[30]

Since national security provides the legal justification for immigration restrictions, militarized interventions in defense of those restrictions are also easily justified as a matter of law and policy. It is therefore unsurprising that our borders have become increasingly militarized. This is true in the case of the physical land border as well as in the interior of the country, where a great deal of extended border enforcement takes place.[31]

One could conceive of many possible models for immigration control, ranging from a fairly *laissez-faire*, open-borders policy in which the

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30. *See* Demore v. Kim, 538 U.S. 510, 522 (2003) ("'[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.'. . . [T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976))); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. . . . Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest.").

31. *See, e.g.*, DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 11–13 (2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (detailing both border and interior enforcement measures and concluding that immigration enforcement "now represents the federal government's most extensive and costly law enforcement endeavor"); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 633–34 (2012) (discussing the militarization of the U.S.–Mexico border); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1572–73 (2010) [hereinafter *Diversion*] (describing the rise of interior enforcement); Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 30, 2010, at A1 (noting that border sweeps actually extend deep into the interior of the country); Kirk Semple, *Report Faults Border Patrol on Tactic Miles from Border*, N.Y. TIMES, Nov. 9, 2011, at A27 (describing a recent report that shows the extensive use of border transportation checks).

state plays little role[32] to a fully militarized, closed-border model like that existing in the inaptly named Korean "Demilitarized Zone."[33] The U.S. model of enforcement is inching ever closer to the latter.[34]

This is not a mere product of right-wing politics. At the grand bargaining tables over comprehensive immigration reform that are currently assembled, almost all parties at the table insist on the objective of border security as a precursor to any further meaningful immigration reform bill. The immigration reform bill that passed in the Senate in June 2013 includes border security goals that must be met before the provisions legalizing the immigration status of qualifying noncitizens will take effect.[35] The border security plan includes a multi-billion dollar expenditure on drones and border fence construction, border patrol agents, stations and bases, additional border crossing technologies, and increased prosecutions of illegal entry and felony reentry crimes.[36]

President Obama has resisted the idea that the border is too insecure to allow for immigration reform.[37] Obama Administration officials urge that the border has never been more secure.[38] But the decision to embrace

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32. *See, e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 18–19 (2007) (advocating for such an open borders model).

33. *See* Joe Havely, *Korea's DMZ: 'Scariest Place on Earth,'* CNN INT'L (Aug. 28, 2003, 03:21 GMT), http://edition.cnn.com/2003/WORLD/asiapcf/east/04/22/koreas.dmz/ ("The Demilitarized Zone (DMZ) that divides the two Koreas is the most heavily fortified border in the world, bristling with watchtowers, razor wire, landmines, tank-traps and heavy weaponry.").

34. For arguments that our border security measures are trending in that direction, see, for example, Mark Koba, *Immigration Bill 'Could Create DMZ' Like Korea*, CNBC (May 24, 2013, 07:19 EST), http://www.cnbc.com/id/100761353 (quoting law professor Mark Noferi's statement that the immigration bill creates "a DMZ like North and South Korea, except [it's] between the U.S. and Mexico—our third largest trading partner" (alteration in original) (internal quotation mark omitted)).

35. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3 (2013).

36. The exact price tag is still being negotiated. The initial bill carried a price tag of approximately $6.5 billion in border security measures such as these, and that number increased in subsequent hearings. *See, e.g.*, César Cuauhtémoc García Hernández, *Crimmigration Provisions of Immigration Bill*, CRIMMIGRATION (Apr. 18, 2013, 4:00 AM), http://crimmigration.com/2013/04/18/crimmigration-provisions-of-immigration-bill.aspx (discussing, among other things, the price tag of various border policing proposals). Those numbers were not high enough to garner bipartisan support. In June, the Senate passed a bill that provides for $46 billion in border security expenditures. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (as passed by Senate). *See also* Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES, June 28, 2013, at A1 (discussing the passage of the bill and describing its contents). The House of Representatives has not yet enacted companion legislation.

37. Press Release, President Barack Obama, Remarks by the President on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011), http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas ("We have gone above and beyond what was requested by the very Republicans who said they supported broader reform as long as we got serious about enforcement. All the stuff they asked for, we've done."). Recent independent policy analysis of border security has also reached the conclusion that the borders are quite secure and border enforcement mechanisms are sophisticated and extensive. *See* MEISSNER ET AL., *supra* note 31, at 46–47, 143.

38. *See, e.g.*, Jim Avila & Serena Marshall, *Napolitano on Immigration: Border Is Secure So 'Fix the Entire System,'* ABC NEWS (Mar. 1, 2013),

the militaristic and nationalistic metrics of security long espoused by restrictionists shows that, in some senses, the terms of the debate have shifted. Immigration policy is now measured in the metrics of militarism.

Of course, when one looks to life in Mexican cities like Ciudad Juárez or Tijuana, or contemplates the fate of many migrant border crossers, it is clear that our purported border security actually countenances a great deal of human insecurity in the form of lost lives on both sides of the border.[39] Our conception of border security is narrow. Within the narrowed parameters of the border security discussion, it is not entirely clear how much border security is enough. Border apprehensions have fallen drastically[40] and net migration from Mexico is currently zero,[41] but when four U.S. Senators recently visited Nogales, Arizona, on the Mexican border, they were convinced that the border is still not secure enough.[42]

The term *border security* as it is currently used in the national discourse is a post-9/11 phenomenon. In fact, the term that we have come to view as synonymous with immigration issues has only been a part of this discourse for the last seven years or so. A search of the *New York Times*' online database reveals that the term was never used by that newspaper

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http://abcnews.go.com/Politics/OTUS/napolitano-immigration-border-secure-fix-entire-system/story?id=18630676 ("The amount of manpower, technology, everything else that we have put on that border is simply amazing . . . . This is not the same border that was." (quoting Department of Homeland Security Secretary Janet Napolitano) (internal quotation marks omitted)); Press Release, Press Secretary Jay Carney, Press Briefing (Jan. 28, 2013), http://www.whitehouse.gov/the-press-office/2013/01/28/press-briefing-press-secretary-jay-carney-1282013 ("[O]ur borders now are more secure than they have ever been in history.").

39. *See, e.g.*, Andrew Rice, *Life on Line*, N.Y. TIMES, July 31, 2011, at MM20 (contrasting the rising violence in Juárez against the high levels of security on the U.S. side and noting that "[m]any analysts believe that the absence of violence here is due to a rational choice by the cartels, which calculate that creating chaos in the United States would disrupt this fairly free flow of goods. 'The nature and the cause of violence in Mexico is driven in part by the border itself,' says David Shirk, director of the Trans-Border Institute at the University of San Diego."). For examples of discussions concerning the increase in migrant deaths as a result of increased border militarization, see STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 121–28, 135 (2003) (presenting analysis of Latino stereotypes and culture including the perilous conditions of immigrant border crossings); LUIS ALBERTO URREA, THE DEVIL'S HIGHWAY: A TRUE STORY 24 (2004) (documenting the true story of a border crossing in southern Arizona in 2001); Fernanda Santos & Rebekah Zemansky, *Death Rate Climbs as Migrants Take Bigger Risks to Cross Tighter Borders*, N.Y. TIMES, May 21, 2013, at A14 ("The number of migrant apprehensions declined precipitously in recent years, one of the strongest indicators that fewer people have tried to cross the border illegally. But the number of migrant deaths has remained high. 'Less people are coming across,' said Bruce Anderson, the chief forensic anthropologist at the medical examiner's office, 'but a greater fraction of them are dying.'").

40. U.S. BORDER PATROL, NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2012, *available at* http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy11_stats/25_10_app_stats.ctt/25_11_app_stats.pdf.

41. JEFFREY PASSEL ET AL., PEW HISPANIC CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS 6 (Apr. 23, 2012), *available at* http://www.pewhispanic.org/files/2012/04/Mexican-migrants-report_final.pdf.

42. Fernanda Santos, *Immigration in Spotlight as Senators Tour Arizona*, N.Y. TIMES, Mar. 28, 2013, at A14 ("Senator John McCain, Republican of Arizona, whose office organized the tour, said that while there has been progress, the border 'is still not as secure as we want it to be or expect it to be.'").

in general discussions of U.S. immigration during the period from 1996 to 2001—and this included the period in the mid-1990s when Congress was enacting bills that were explicitly intended to address issues relating to both immigration and national security.[43] The term "border security" was nowhere to be found in the debates or media coverage. When used at all, the term was used in reference to foreign countries in war zones or with border regions characterized by serious armed conflict.[44]

In the month of March 2006, however, the term burst into the popular discourse. Seventeen *New York Times* stories referenced border security in March 2006.[45] A similar pattern unfolds in other major media outlets. "In the *Los Angeles Times*, the term 'border security[']' appears in twenty articles or editorials in March 2006. But between January 1996 and August 2001, the *Los Angeles Times* search engine turns up no story that contains both the terms 'immigration[']' and 'border security.[']'"[46]

Of course, the United States can date its preoccupation with securing the southern border back much further than 2006. The process of converting the U.S.–Mexico border into a meaningful barrier to entry began in earnest in the mid-1920s, and proceeded in starts and stops from that time.[47] Periodic waves of interior enforcement accompanied this project, as evidenced by the so-called repatriations of Mexicans in the 1930s[48] and Operation Wetback in the 1950s.[49]

In the mid-1990s, sealing the border became a national craze. During the Clinton Administration, U.S. citizens witnessed a spike in the use of military-style operations in which our national government attempted to "secure" fragments of the southern border through the aggressive use of armed force.[50] And in 2003, when the Department of Homeland Security (DHS) was formed and immigration agencies were placed under its auspices, the transformation of immigration policy from a labor issue

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43. For a brief summary of the relevant provisions of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 303(a), 110 Stat. 3009–546, 3009–646 (codified as amended at 8 U.S.C. § 1103(a) (2012)), and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, title IV, § 439, 110 Stat. 1276 (1996) (codified at 8 U.S.C. § 1252c (2012)), both of which contained immigration security provisions, see, for example, Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827, 1842–46, 1851–53 (2007).

44. *See* Chacón, *supra* note 43, at 1853 n.146.

45. *Id.*

46. *Id.*

47. *See* KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 12–14 (2010) (explaining the growth of the U.S. Border Patrol and fortification of the U.S.–Mexico border throughout the 1900s); *see also* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 292–96 (2010) (discussing the historical and contemporary militarization of the southern border).

48. FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995).

49. JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954, at xiii–xiv (1980).

50. *See, e.g.*, Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 127–30 (2001) (describing and criticizing these border militarization operations).

(managed by the Department of Labor) to a crime issue (managed by the Department of Justice) to a national security matter (managed by DHS) seemed complete.

But it was not until 2006 that we, as a national community, latched on to the term "border security." Why did we suddenly become so interested, as a nation, in border security in 2006?

In 2006, comprehensive immigration reform proposals were wending their way through Congress. There was a bipartisan spirit to the whole project.[51] Citizens and denizens were advocating for change. Spanish-language media were calling for reform, and activist DJ Piolín began calling for marches.[52] By May 1, the supporters of reform were sufficiently organized to stage nationwide marches in support of immigration reform.[53] Wearing white, marching peacefully, and waving American flags, these people—citizens and denizens, students and eldercare providers, gardeners and journalists, domestic workers and construction workers, farm workers and academics, restaurant workers and lawyers—took to the streets nationwide to demonstrate in favor of the right of long-term residents to some sort of stable and legal status in exchange for their long-term contributions to U.S. culture and the economy.[54]

Restrictionists offered two main responses to these calls for reform. One was a law-and-order narrative: Respect for the rule of law demands that we punish, not reward, the lawbreakers. The second was the militaristic response: The very presence of these masses of unauthorized migrants is a testament to our insecure borders. We can't even talk about legalizing migrants until the border is secured.

Both of these responses are appeals to militarism. The second one quite obviously appealed to classic fears of invasions and infiltration. Less obviously, the rule-of-law claims are also rooted in militarism. The legal violations that are actually at stake here—civil infractions such as

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51. One of these bills ultimately passed in the Senate in May 2006. Rachel L. Swarns, *Senate, in Bipartisan Act, Passes Immigration Bill; Tough Fight Is Ahead*, N.Y. TIMES, May 26, 2006, at A19. The process repeated itself again the following year. Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal on Broad Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1. Both times, the deal ultimately foundered and no legislation came to pass.

52. Editorial, *Piolín's Progress; He Rallied Latino Listeners to March for Immigration Reform; Now He's Behind a Push for Citizenship*, L.A. TIMES, July 16, 2007, at A14 (noting that he "rallied thousands of May Day marchers in 2006 and . . . worked all [of 2007] for immigration reform").

53. Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1.

54. For discussion of the marches and the use of the legacy of the civil rights movement see, for example, Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99–102 (2007) (arguing that the marches offered only an incomplete and nascent attempt at a new, multi-racial civil rights movement and noting obstacles to future collaborations); Cristina M. Rodríguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 125, 145–46 (2010) (arguing that a civil rights paradigm offers an incomplete framework for immigration reform).

visa overstays, misdemeanors such as entry without inspection, felony reentry offenses, and visa fraud offenses—are not *malum in se* offenses. They are only crimes because our legislators have made them so, invoking the prerogative of sovereignty as a justification. The individuals who have broken these particular civil and criminal laws have run afoul of laws designed to protect state sovereignty. Here, the law is operating not to defend citizens from particular wrongs, but to protect the body politic from violations of the nation's borders and to repel individuals who are characterized, oddly, as simultaneously so dependent as to be undesirable and so superhumanly criminal as to require violent containment. Taken together, these responses were sufficient to drown out the call for reform, and comprehensive immigration reform initiatives were scuttled in 2007, leaving millions of immigrant families and workers in limbo.

How did the fever-pitched determination to secure the border in that time period manage to trump all other purported value goals in immigration, including family reunification, labor and workforce needs, and humanitarianism? Scales cautioned about that: "If militarism is working its magic, [the disproportionality of the response it engenders] is largely invisible; it is treasonous to notice it, much less question it."[55] She is right. It is bad form to call attention to our border excess. Nevertheless, it is important to scrutinize these practices.

III. MILITARISM IN ENFORCEMENT

The consequences of our militarized immigration regime are harsh. Our sovereign prerogative to be free of the sometimes-wanted, sometimes-unwanted migrant becomes a logic that justifies a host of violent state practices, including protracted and indefinite civil immigration detention, sometimes under highly punitive conditions;[56] the fragmentation of mixed-status families;[57] and the pervasive fear of over-reaching law

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55. Scales, *supra* note 7, at 371–72.

56. DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 10 n.32 (2013), *available at* http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf (noting that the current system of "immcarceration" now takes in over 400,000 noncitizens each year); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43–45, 50–51 (2010) (describing and proposing reforms from the growing system of "immcarceration"); Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1476 (2012) (describing some of the violent and demeaning conditions in immigration detention); Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1; DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2-3 (Oct. 6, 2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf (documenting widespread, systemic problems in immigration detention and recommending solutions and improvements).

57. Jacqueline Bhabha notes that citizen children whose parents are being deported cannot assert the rights of their parents to stay in the United States. The standard results in "exceptional and extremely unusual hardship," and she notes that "[r]ather than acknowledging and mitigating the trauma of family separation, particularly for young children, the rule requires decision makers to revoke deportation only when the applicant demonstrates that the hardship incurred is 'substantially different from, or beyond, that which would normally be expected from the deportation of an alien

enforcement in communities like Maricopa County, Arizona, with large immigrant and Latino populations.[58] And these are just the domestic costs.

There are also a host of externalities that we ought to take more time to internalize: the violence in Mexico that occurs as a result of our drug demands, our guns, and our militarized border policies—with the deaths of hundreds of women in Juárez[59] being only one poignant example of how this violence touches the lives of vulnerable populations.

The Sixth Circuit's March 2013 decision in *Villegas v. Metro Government of Nashville* provides a microcosmic window on the pain and suffering inflicted by our border militarization schemes.[60] According to Judge Clay, who wrote for the panel majority:

> Plaintiff Juana Villegas's saga began on July 3, 2008[,] when her car was stopped by Berry Hill, Tennessee police officer Tim Cole-

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with close family members here.'" Jacqueline Bhabha, *The "Mere Fortuity of Birth"? Children, Mothers, Borders, and the Meaning of Citizenship*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER 187, 209 (Seyla Benhabib & Judith Resnik eds., 2009) (quoting *In re* Monreal-Aguinaga, 23 I.&N. Dec. 56, 65 (B.I.A. 2001)); *see also* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 52–53 (2005) (recording the difficulties—including separations—encountered by mixed-status families in U.S. family courts); *Frontline: Lost in Detention* (PBS television broadcast Oct. 18, 2011), *available at* http://www.pbs.org/wgbh/pages/frontline/lost-in-detention/ (recording Cecilia Muñoz, an Obama White House official and long-time immigrants rights activist, justifying the Administration's policy of enforcing laws that separate families).

58. In December 2011, Assistant Attorney General Thomas E. Perez of the Civil Rights Division of the Department of Justice wrote a letter to Bill Montgomery, the County Attorney for Maricopa County, summarizing the results of a prolonged investigation of the Maricopa County Sheriff's Office (MCSO). The Department found "that MCSO, through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices . . . ." Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Bill Montgomery, Cnty. Attorney, Maricopa Cnty., Ariz. (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf. That same month, the Civil Rights Division issued findings of similar misconduct by the East Haven, Connecticut police. Assistant Attorney General Thomas E. Perez stated that the Department had found that

> [East Haven Police Department] engages in discriminatory policing against Latinos, including but not limited to targeting Latinos for discriminatory traffic enforcement, treating Latino drivers more harshly than non-Latino drivers after a traffic stop, and intentionally and woefully failing to design and implement internal systems of control that would identify, track, and prevent such misconduct. The pattern or practice of discriminatory policing that we observed is deeply rooted in the Department's culture and substantially interferes with the ability of EHPD to deliver services to the entire East Haven community.

Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Joseph Maturo, Jr., Mayor, Town of E. Haven, Conn. (Dec. 19, 2011), *available at* http://www.justice.gov/usao/ct/Press2011/East%20Haven%20Findings%20Letter%2012-19-11.pdf. And on May 24, 2013, Judge Snow of the federal district court in Arizona ruled that the Maricopa County Sheriff's Office had unlawfully instituted a pattern and practice of targeting Latino drivers and passengers in Maricopa County during traffic stops under the guise of immigration enforcement. Ortega Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *1–3 (D. Ariz. May 24, 2013).

59. Rice, *supra* note 39.

60. 709 F.3d 563 (6th Cir. 2013).

> man. At the time of the stop, Plaintiff was nine months pregnant. When Plaintiff failed to produce a valid driver's license, Coleman arrested Plaintiff and transported her to the jail operated by the Davidson County Sheriff's Office ("the jail"). Once there, a jail employee, working as an agent of the United States through Immigration and Customs Enforcement's 287(g) program, *see* 8 U.S.C. § 1357(g), inquired into Plaintiff's immigration status and determined that Plaintiff was not lawfully in the United States. Due to her illegal status, a detainer was placed on Plaintiff, which meant that federal immigration officials would delay taking any action until after resolution of Plaintiff's then-pending state charges. After being unable to post bond, Plaintiff was, as a result of the immigration detainer, classified as a medium-security inmate.
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> Plaintiff was held in the jail from Thursday, July 3, 2008[,] until late on Saturday, July 5, 2008. At 10:00 p.m. on July 5, 2008, Plaintiff informed a jail guard that her amniotic fluid (or "water") had "broke" and that she was about to have her baby. Plaintiff was transported to the jail infirmary where a nurse confirmed that Plaintiff's water had broken and summoned an ambulance to take Plaintiff to Nashville General Hospital (the "Hospital"). For transportation in the ambulance, Plaintiff was placed on a stretcher with her wrists handcuffed together in front of her body and her legs restrained together. . . .
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> . . . .
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> . . . . According to hospital records, when the shackles were removed, Plaintiff had only dilated to 3 centimeters ("cm"). . . . Plaintiff gave birth without any complications at approximately 1:00 a.m. on July 6, 2008—roughly two hours after Peralta removed her shackles. Plaintiff remained unshackled until shortly before Peralta's shift ended at 7:00 a.m., when he re-restrained Plaintiff to the bed at one of her ankles. Plaintiff was never handcuffed postpartum.
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> At the time of Plaintiff's discharge from the Hospital, Defendant did not allow Plaintiff to take the breast pump that the Hospital staff had provided her. Defendant justified this based on safety concerns, and that under its policy, it did not consider a breast pump to be a "critical medical device," which would have allowed Plaintiff to take it back to the jail.[61]

The district court was concerned by these facts and granted Plaintiff's partial summary judgment motion, allowing a jury to deliberate on damages, which the jury awarded.[62] The Sixth Circuit, however, reversed the trial court's grant of summary judgment. Although it concurred that shackling during labor and delivery is generally considered a rights violation, the Sixth Circuit noted that there are exceptions where the shack-

61. *Id.* at 566–67 (footnote omitted).
62. *Id.* at 567.

led individual poses a "security or flight risk," and Ms. Villegas was classified as a medium-security inmate.[63]

Why was Villegas a flight risk? She was a flight risk because, after her arrest by Nashville authorities, Immigration and Customs Enforcement (ICE) issued a detainer for her. Her arrest prompted ICE to issue a detainer because she was in the country in violation of the law—a civil immigration violation. With the logic of militarism driving immigration policy, the commission of a civil immigration violation was enough to establish that Villegas was frighteningly risky from a security perspective—risky enough to require shackling throughout early labor and shortly after childbirth; risky enough to deprive her of a breast pump on "safety" grounds.

These risk characterizations are raced of course. The fact that she is Latina probably helps to account for the stop of her vehicle in the first place.[64] But Villegas's threat was evident to her jailer not just because of her race but also because of her sex. The potent act of birth itself—her giving birth to an American citizen—was a frightful border breach.[65] We have seen the trope of the threateningly fertile Latina in the context of the discussion around birthright citizenship and anchor babies.[66]

The Sixth Circuit was therefore unconvinced that the local agents who shackled Ms. Villegas were aware that they were violating her rights. The facts of her case did not establish their deliberate indifference as a matter of law. The circuit court determined that it was not clear as a matter of law that Ms. Villegas's captors understood that shackling posed a risk to her childbirth process. "On remand," the court wrote,

> a jury will need to determine whether Plaintiff was a flight risk in her condition and whether Defendant had knowledge of the substantial

63. *Id.* at 573–74 (internal quotation mark omitted).

64. The ACLU of Tennessee concluded that the 287(g) program in Davidson County, Tennessee, had increased the racial profiling of Latinos in the County, which includes Nashville. LINDSAY KEE, ACLU-TN, CONSEQUENCES AND COSTS: LESSONS LEARNED FROM DAVIDSON COUNTY, TENNESSEE'S JAIL MODEL 287(G) PROGRAM 11 (Dec. 2012), *available at* http://www.aclu-tn.org/pdfs/287g%28F%29.pdf. Similar reports had emerged elsewhere. MEISSNER ET AL., *supra* note 31, at 1592–93 (noting these reports and explaining the incentives for profiling inherent in the governing Fourth Amendment jurisprudence).

65. *See* LEO R. CHAVEZ, COVERING IMMIGRATION: POPULAR IMAGES AND THE POLITICS OF THE NATION 215 (2001). Chavez's analysis reveals "magazine covers that reference Mexican immigration . . . ha[ve] been overwhelmingly alarmist." *Id.* Of particular note, some magazine covers deploy images of women in ways that "suggest a more insidious invasion, one that includes the capacity of the invaders to reproduce themselves." *Id.* at 233.

66. *See generally* Rachel E. Rosenbloom, *Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism*, 51 WASHBURN L.J. 311, 324 (2012) (critiquing the misleading deployment of "anchor baby" rhetoric in debates around birthright citizenship (internal quotation marks omitted)). For an example of such an argument made in a more scholarly tone, but still tellingly invoking the visual image of the "border crosser," see Peter H. Schuck, Op-Ed., *Birthright of a Nation*, N.Y. TIMES, Aug. 14, 2010, at A19 (arguing that "anchor babies"—the children of a mother who "briefly crosses the border to give birth"—are not entitled to and should not be granted birthright citizenship (internal quotation marks omitted)).

> risk, recognized the serious harm that such a risk could cause, and, nonetheless, disregarded it, recognizing that such knowledge may be established through the obviousness of the risk.[67]

Regarding the deprivation of the breast pump, the court wrote that "[a]bsent proof that the breast pump was prescribed, as is necessary under a diagnosed medical-needs theory, Plaintiff must show that it was so obvious that even a layperson would recognize the need to provide Plaintiff with a breast pump."[68]

The dissenting judge, Judge Helene White, critically engaged the majority's characterization of Villegas as a flight risk in terms that apply quite well to almost all of the categorical risk determinations that are currently acceptable in immigration law and yet unacceptable in almost any other context. She wrote:

> Here, Defendant maintained that Villegas's restraints were "consistent with" her medium-security designation and that illegal immigrants *in general* pose a danger of flight. But Villegas's medium-security designation did not take into account her late-term pregnancy or that she had gone into labor, nor was it based on any assessment of flight risk or risk of harm—it was automatic because of the Immigration and Customs Enforcement (ICE) detainer. Villegas was not being held for a crime of violence and had not been convicted of any crime. She was not individually assessed for flight risk or risk of harm to herself or others, and she had not engaged in any conduct evidencing such. . . . Neither the ICE detainer's automatic designation of Villegas as "medium-security" nor generalized evidence that illegal immigrants may pose a flight danger constitute "clear evidence" that Villegas was a security or flight risk.[69]

Judge White also noted that the laboring Villegas was at all times accompanied by an armed guard.[70]

To me, what is extraordinary about Villegas's case is the ordinariness of so many of its features in the universe of immigration enforcement: the inhumane conditions of detention—even detention itself—without individualized assessments of risk, and the invocation of national security as a justification to detain individuals for long periods of time and separated from families and from counsel.[71]

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67. *Villegas*, 709 F.3d at 578 (citation omitted).
68. *Id.* at 579.
69. *Id.* at 582. (White, J., dissenting) (internal quotation marks omitted).
70. *Id.*
71. The 1996 amendments to the immigration detention provisions have obviated the need for individualized determinations regarding detention in a wide range of immigration cases. *See* Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 344 (David A. Martin & Peter H. Schuck eds., 2005); *see also* Kalhan, *supra* note 56, at 43. For a discussion of the problematic conditions of immigration detention, see, for example, RUTHIE EPSTEIN & ELEANOR ACER, HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S.

The *Villegas* case, and the many cases and stories that it stands in for, also illustrate just how right Scales was when she asserted that militarism is "gendered to the ground."[72] This is true not simply because the "logic of war" is used to justify the use of shackles and the threat of arms against a woman in labor who poses no actual threat to anyone, but also because militarism in immigration enforcement exacerbates the sex and gender inequalities that permeate our immigration policies.

IV. MILITARISM AND THE REIFICATION OF GENDER INEQUALITY IN IMMIGRATION LAW

We like to think of our post-1965 immigration admissions policies as facially neutral—a product of the civil rights revolutions of the time. Certainly, the code is now free of any express reference to race and free of the national origin quotas of old. That said, the laws are not neutral in their application. Some of this is probably by design on the part of at least some of the laws' drafters; some of this is the result of unconscious bias and policy blinders that infect most of the work that all of us do in a society so long characterized by its social hierarchies of race, class, gender, disability, and sexual orientation.

Elsewhere, I have written, as have many others, about the persistent racial bias in our immigration policies.[73] In similar ways, the immigration categories also contain sex and gender bias. The admissions criteria tend to reproduce patriarchal, heteronormative family structures. Ann Scales was keenly aware that "laws that privilege traditionally gendered families reinforce the social marginalization of sexual and gender minorities, and not just (not even primarily) by excluding the minorities from those institutions."[74] Unfortunately, immigration law is unquestionably a site of such privileging.

One obvious example is immigration law's refusal to acknowledge same-sex unions as recently as the summer of 2013. Until 1990, gays and lesbians were explicitly barred from admission on medical grounds.[75]

IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 25 (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf (noting a host of problems with conditions of detention); Urbina & Rentz, *supra* note 56.

72. Scales, *Militarism*, *supra* note 5, at 52 n.102 (quoting Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 655 (1983)) (internal quotation marks omitted). There are plenty of other examples we might use to illustrate Scales's perspicacity in this regard, including the ongoing sex abuse scandal in the military and the stereotypical gender norms enacted to achieve the sexual humiliation and torture of the prisoners held by U.S. soldiers at Abu Ghraib. Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

73. *See, e.g.*, Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 347–48 (2007); Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV 1361 (2011).

74. Scales, *supra* note 1, at 398.

75. INA § 212(a) formerly contained a provision that excluded individuals of "psychopathic personality" and this was interpreted to include homosexuals. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 271–72 (5th ed. 2009) (internal

Although that bar was revoked, there were still barriers to entry. Most significantly, notwithstanding the Obama Administration's declaration that the Defense of Marriage Act (DOMA) was unconstitutional, prior to the Supreme Court's decision in *United States v. Windsor*,[76] U.S. Citizenship and Immigration Services (USCIS) continued to deny the spousal visa applications of legally married same-sex couples.[77] In immigration law, marriage was still bureaucratically defined as between a man and a woman.[78] This affected not just those seeking a green card, but could also affect long-term nonimmigrant visa holders[79] who had to rely upon discretionary work-arounds to bring their spouses to the United States.

Hope for a legislative fix as part of a comprehensive immigration reform package in 2013 seemed to die with Senator Leahy's proposed amendment to achieve marriage equality in immigration; he withdrew that amendment in the Senate Judiciary Committee when it became clear that he lacked the support to get the amendment passed.[80] But when the United States Supreme Court declared DOMA unconstitutional in *Windsor*,[81] the Administration finally ended the long history of discrimination in immigration law—United States Citizenship and Immigration Services announced that it would accord married same sex-couples the designa-

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quotation marks omitted). This provision was later revised to include "sexual deviation," which Congress intended to encompass homosexuality. *Id.* at 271 (internal quotation marks omitted). For references to the ban, see Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) (using the ban as evidence that Congress could not have intended "spouse" to include a same-sex spouse (internal quotation marks omitted)); *see also* Rosenberg v. Fleuti, 374 U.S. 449, 451, 462–63 (1963) (avowing application of the ban through an interpretation of the statute that treated Fleuti as if he had not left the country).

76. 133 S. Ct. 2675 (2013).

77. The USCIS Adjudicators Field Manual included a reference to DOMA's admonition that "[f]or a relationship to qualify as a marriage for purposes of Federal Law, one partner must be a man, and the other a woman." USCIS, ADJUDICATOR'S FIELD MANUAL § 21.3(a)(2)(I), *available at* http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-15.html. Shortly prior to *Windsor*, the Administration granted deferred action status to avoid breaking up same-sex couples, but this was discretionary. Kirk Semple, *U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage*, N.Y. TIMES, June 30, 2011, at A16.

For descriptions and criticisms of the failure of immigration law to recognize same-sex couples, see generally Chacón, *supra* note 73, at 361–62; Matthew Lister, *A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples*, 37 U. MEM. L. REV. 745, 746 (2007); Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis,"* 56 U. MIAMI L. REV. 537, 537–38 (2002).

78. *See, e.g.*, *Adams*, 673 F.2d at 1042 (finding that Congress intended to "confer spouse status under section 201(b) [of the INA] only upon the parties to heterosexual marriages" and that this policy "has a rational basis and therefore comports with the due process clause and its equal protection requirements").

79. The INA generally uses the term "nonimmigrants" to refer to individuals who are entering the country but who have no intent to remain permanently. Examples include student visa holders and tourist visa holders, as well as certain categories of short- and medium-term work-related visas.

80. David Welna, *Fears of Killing Immigration Bill Doomed Same-Sex Amendment*, NPR (May 22, 2013, 5:18 PM), http://www.npr.org/blogs/itsallpolitics/2013/05/22/186075168/fears-of-killing-immigration-bill-doomed-same-sex-amendment.

81. *Windsor*, 133 S. Ct. at 2695.

tion of a "spouse" under immigration law.[82] Moreover, the Board of Immigration Appeals recently granted immigration benefits to a same-sex spouse, citing *Windsor*.[83]

This monumental change to immigration policy is an important breakthrough. Nevertheless, immigration laws continue to promote and replicate traditional family structures. Only those individuals who are eligible under the immigration code's highly technical definitions of "spouses" and "children" are eligible for family-based immigration at all.[84] Individuals in civil unions, for example, do not qualify as "married" for immigration purposes. Those who wish to acquire family unification privileges must marry in jurisdictions where their marriages are lawful.

Immigration law and policy have also reified traditional gender roles in other ways. Economic migration and humanitarian migration, which, along with family-based migration form the three major legal paths to admission in western countries such as Australia, Canada, and the United States, "have created patterns [of] reinforcing notions of women's dependence and men's independence."[85] In the category of economic migrants, many of the admissions categories tend to favor highly educated workers who, in many sending countries, are predominantly male. At a March 2013 hearing held by the Senate Judiciary Committee, Mee Moua of the Asian-American Justice Center testified

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82. Press Release, Secretary of Homeland Security Janet Napolitano, Napolitano Statement on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

83. Zeleniak, 26 I. & N. Dec. 158, 2013 WL 3781298, at *159 (B.I.A. July 17, 2013). The Board concluded:

> The Supreme Court's ruling in *Windsor* has . . . removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated. This ruling is applicable to various provisions of the Act, including, but not limited to, sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status), 8 U.S.C. §§ 1101(a)(15)(K), 1153, 1154, 1157, 1158, 1182, 1227, 1229b, and 1255 (2012).

Id.

84. The terms "child" and "parent" are defined for immigration purposes at 8 U.S.C § 1101(b) (2012). Additional requirements are imposed in certain cases for citizenship purposes. 8 U.S.C. § 1401 (2012).

85. Seyla Benhabib & Judith Resnik, *Introduction* to MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 9; Catherine Dauvergne, *Globalizing Fragmentation: New Pressures on Women Caught in the Immigration Law–Citizenship Law Dichotomy*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 333, 337–39. For analyses of the ways in which immigration law has operated historically to create and define gender categories, see generally NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 132–55 (2000); MARTHA GARDNER, THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870–1965 (2005); *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 648 (2005) (arguing that "the regulation of sexuality, morality, and marriage was a pervasive regulatory force in the development of immigration law").

that women are significantly underrepresented in employment-based visas and rely on family-based migration as a means to immigrate.[86]

Consequently, under the current system, it is most often wives and children who enter with immigration statuses that depend upon their relationship with the primary employment visa holder. For many of the spouses of workers who enter on nonimmigrant visas, the right of entry does not even carry with it a right to work,[87] which only deepens their dependency and fuels the replication of traditional gender roles that could just as easily be subverted through other conscious choices in immigration policy.

There are several significant implications that flow from the policy choice to deny work eligibility to the dependents of primary visa holders. The first is that, to the extent current immigration reform proposals favor a reduction in immigration visas based on family ties in favor of granting more visas to individuals with certain professional skills, these proposals run the risk of further aggravating the gender gap that already exists in terms of access to channels for legal immigration. An express commitment to gender equality in immigration reform might significantly alter the terrain of reform proposals, but existing reform proposals purport to promote security without regard to the effects of the resulting policy choices on equality.

Second, the current system—where women are often dependent on men for their status—has resulted in exploitation in some immigrant families. The structure of U.S. immigration law actually provides power to potential abusers by rendering other family members dependent on the primary visa holder for both financial support and immigration status.[88] Recognizing this, Congress has devised legislative mechanisms aimed at insulating dependent immigrants from abuse and exploitation by the primary immigration visa beneficiary, but these legislative solutions are not always adequate and raise problems of their own.

One legislative solution has been to allow victims of domestic abuse to self-petition for lawful permanent resident status so that they are not

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86. *Senate Judiciary Has Hearing on Women and Family Issues Under Immigration Laws*, 90 NO. 12 INTERPRETER RELEASES, 747, 747–48 (2013) ("Ms. Mee Moua, President and CEO of the Asian American Justice Center . . . not[ed] that women are significantly underrepresented in employment-based visas and thus must rely on family-based immigration to immigrate to the U[nited] S[tates] on their own or rely on their spouses to immigrate through employment channels.").

87. USCIS cautions that

> [o]nly a few nonimmigrant classifications allow you to obtain permission work in this country without an employer having first filed a petition on your behalf. Such classifications include the nonimmigrant E-1, E-2, E-3[,] and TN classifications, as well as, in certain instances, the F-1 and M-1 student and J-1 exchange visitor classifications.

Temporary (Nonimmigrant) Workers, U.S. CITIZENSHIP & IMMIGR. SERVS. n.1, http://www.uscis.gov/working-united-states/temporary-workers/temporary-nonimmigrant-workers (last updated Sept. 7, 2011). This list does not include the spouse of H-1B visa holders, for example.

88. H.R. REP. NO. 103-395 (1993).

dependent on an abusive spouse to provide long-term, lawful permanent resident status.[89] This is sometimes known as VAWA self-petitioning, because the right was created as part of the Violence Against Women Act.[90] Another has been to provide special U visas that offer legal immigration status to individuals who are the survivors of domestic abuse and who are willing to testify against their abusers.[91]

VAWA self-petitioning and U visa eligibility are helpful to individual immigrants, but they are band-aids on structural problems, and they in turn reinforce the gender assumptions and norms that lead to the underlying problems of partner dependency and exploitation in the first place. They leave dependent spouses and children in a supplicant position not faced by the primary visa holder—needing to establish abuse in order to be allowed to regularize their immigration status. In the case of U visas, this requires cooperation with law enforcement,[92] which can be daunting to individuals with little knowledge of the U.S. legal system. And it requires law enforcement to certify the helpfulness of applicants, which can be a dicey proposition when law enforcement is undereducated or simply hostile to such claims.[93]

Immigrant women are critical contributors to the U.S. economy. Some of these women are themselves the recipients of visas as highly skilled immigrant workers. Sometimes, women are able to accompany partners with visas that also allow them to work in the formal economy, and they do so. Some of them are entrepreneurs and small business owners who have found creative and economy-boosting work-arounds to prohibitions on employment.[94] Many women work under the table as home elder-care providers, nannies, and maids.[95] Almost all of them do work within their households.

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89. 8 U.S.C.A. §§ 1154(a)(1)(A)(iii)–(iv), (B)(ii)–(iii) (West 2013).

90. 8 U.S.C.A. § 1154(a)(1)(K) (West 2013).

91. 8 U.S.C.A. § 1101(a)(15)(U) (West 2013).

92. *Id.* § 1101(a)(15)(U)(i)(III); 8 U.S.C.A. § 1184(p)(1) (West 2013) (requiring cooperation).

93. 8 U.S.C.A. § 1184(p)(1) (West 2013) (requiring law enforcement certification). For a discussion of the variability of law enforcement attitudes to U visa certification, see Tracie L. Klinke & Alpa Amin, *U Non-Immigrant Status: Encouraging Cooperation Between Immigrant Communities and Law Enforcement Agencies*, 5 J. MARSHALL L.J. 433, 461–63 (2012). For a discussion of the benefits and limitations of U visas, see Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 323–25 (2010).

94. SUSAN C. PEARCE ET AL., IMMIGRATION POLICY CTR., OUR AMERICAN IMMIGRANT ENTREPRENEURS: THE WOMEN 15 n.14 (Dec. 2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Women_Immigrant_Entrepreneurs_120811.pdf ("575,740 foreign-born women who immigrated as adults reported that they were self-employed in their own incorporated or unincorporated businesses . . . .").

95. Richard Dunham, *Top Jobs for Undocumented Workers: For Men, Construction; for Women, Housekeeping*, TEX. ON POTOMAC (May 10, 2013), http://blog.chron.com/txpotomac/2013/05/top-jobs-for-undocumented-workers-for-men-construction-for-women-housekeeping/ ("Nearly half of the women working in the U.S. without proper legal documents are in housekeeping or child-care jobs.").

With the exception of the primary visa holders, however, the law reduces the complexity and contribution of these immigrant women into three categories: (1) the dependent beneficiary of a spouse's employment-based immigrant or nonimmigrant visa who has no independent labor significance; (2) the supplicant of the state who seeks to terminate the dependency on the primary visa holder by providing law enforcement assistance to the state; and (3) the "illegal alien" worker who is outside the law. In none of these categories is the woman migrant a prototypically "desirable" neoliberal actor.

Nor are the legal limits on economic and family migration the only ways that immigration policy facilitates gender stereotypes. Scales's analysis of the *Nguyen* case highlights how citizenship requirements that impose higher barriers to the children of unmarried U.S. citizen men as compared to the children of unmarried U.S. citizen women both reflect and institutionalize sex and gender stereotyping around parenthood.[96] Scholars have also written about how the public–private distinction has resulted in the favoring of male asylum applicants over female applicants who suffer violence at the hands of nonstate actors.[97] There are other examples, but the above discussion suffices to sketch out the ways that neutral laws result in a situation where, generally speaking, women and men often enter the United States as immigrants on very different legal terms. Reform proposals have tended to ignore the significance of this fact and have not made sex and gender equality an objective of immigration reform legislation.

Ann Scales's work helps to illuminate how these policy choices—and the constitutional doctrines that make them possible—are rooted in militarism. Catherine Dauvergne has pointed out that there is a "widely shared assumption . . . that sovereign nations 'are morally justified in closing their borders, subject to exceptions of their choosing.'"[98] In the United States, this justification has translated into the Court's acknowledgement of Congress's plenary power to define who can come to and who can stay in the United States.[99] This power supersedes constitutional protections on the rights of noncitizens and citizens, including their First Amendment rights, their right to equal treatment under the law, and their right to due process. The courts do little to scrutinize these congressional choices because immigration powers are viewed as rooted in national security. This is true whether or not national security is actually implicat-

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96. *See* discussion *supra* Part II.

97. *See, e.g.*, Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 392–94, 400–01 (2001); Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 111–13 (1999); *see also* Talia Inlender, *Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims*, *in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 57, at 356, 356–79.

98. Benhabib & Resnik, *supra* note 85, at 11 (quoting Dauvergne, *supra* note 85, at 336).

99. *See* cases cited *supra* note 30 (discussing the plenary powers doctrine).

ed by the discriminatory laws. Militarism trumps equality and justifies replicating prevailing hierarchies in immigration law.

Once the inequalities that undergird the current immigration admission system are exposed, it becomes easier to see the damage that these inequalities wreak on immigration policy more broadly. When the woman migrant is frequently placed by law into the categories of a dependent, a supplicant, or a lawbreaker, it is not surprising that lawmakers are not actively seeking to improve avenues of legal admission to women workers. The structural inequalities embedded in immigration law ultimately work to reinforce the recurring trope of migrant women as state dependents who seek to anchor themselves to the country through pregnancy and childbirth. This in turn, provides fodder for arguments in favor of limiting channels of immigration and also of eliminating birthright citizenship.[100]

These distorted understandings of women migrants that emerge from policy choices also result in policy choices purportedly undertaken to assist victimized migrant women that actually worsen the plight of these women. I have written elsewhere about how domestic strategies designed to combat human trafficking have perversely increased the vulnerability of migrants because anti-trafficking is used to justify a host of militarized immigration enforcement strategies that make migrant crossings more dangerous and costly, drive unauthorized migrant workers further underground, and fuel a myth of migrant criminality that further justifies militarization of border enforcement in a tragic feedback loop.[101] These policies frequently exacerbate the sexual exploitation of and violence against men, women, and children both as they migrate and in the workplace. I see our approach to human trafficking as a further reflection of our nation's outsized fear of dependent, non-contributory, and criminal immigrants. This world view has resulted not just in self-defeating anti-trafficking approaches, but in a sweeping militarization of immigration enforcement.

CONCLUSION

Ann Scales ends *Militarism, Male Dominance and Law* with a poem by Adrienne Rich that hopes for the obsolescence of violence.[102] I do not think it is surprising that Ann Scales made the mission of peace so central to her equality agenda. In so doing, she was echoing the calls made

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100. *See* Rosenbloom, *supra* note 66, at 314–16; Schuck, *supra* note 66 (discussing the discourse around "anchor babies" and birthright citizenship).

101. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3009–12, 3032–39 (2006).

102. Scales, *Militarism*, *supra* note 5, at 73 (quoting Adrienne Rich, *Twenty-One Love Poems, No. VI*, *in* THE DREAM OF A COMMON LANGUAGE: POEMS, 1974–1977, at 21, 27–28 (1978)). Scales's work places women at the center of these efforts toward an end to violence. *Id.*

by great equality activists like Dr. Martin Luther King.[103] Dr. King recognized the power of militarism to replicate existing social hierarchies and stamp out quests for equality. Scales's work draws upon the hard-fought lessons of Dr. King, as well has his belief that change requires not only activism that relies upon the law but also activism that is not afraid to act peacefully outside the law.[104]

Ann Scales's work on militarism is important because it asks us to bring to the surface and question the logic of war wherever it taints our quest for gender equality. I can see militarism's influence in immigration policy and have focused on those issues here, but I also recognize its influence in many other spheres as well.[105] Much more work needs to be done to understand the role that militarism plays in engendering social inequality, but Ann Scales has given us a magnificent running start. May she rest in peace.

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103. For a discussion of King's peace activism, see, for example, Russell Baker, *Bravest and Best*, 45 N.Y. Rev. Books 6 (Apr. 9, 1998) (book review) (describing how in the later days of his activism, King "saw race, war, and poverty as evils inextricably bound and decided that all three must be tackled as one.").

104. *Compare* Scales, *Militarism*, *supra* note 5, at 56 (calling for "nonviolent direct action" (internal quotation marks omitted)), *with* MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 293–94 (James Melvin Washington ed., 1986) ("One may well ask, 'How can you advocate breaking some laws and obeying others?' The answer is found in the fact that there are two types of laws: there are *just* and there are *unjust* laws. I would agree with Saint Augustine that '[a]n unjust law is no law at all.' . . . An unjust law is a code that a majority inflicts on a minority that is not binding on itself. This is difference made legal. On the other hand a just law is a code that a majority compels a minority to follow that it is willing to follow itself. This is sameness made legal. . . . There are some instances when a law is just on its face and unjust in its application.").

105. President Obama recently offered his view that the "war on terrorism" also needs to be defined and limited. Press Release, President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university. That is a welcome acknowledgement, but it is unlikely to demilitarize national policy. Mary Dudziak has pointed out that war is an "enduring condition" that is strategically invoked to justify deviations from peacetime legal norms. MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 5, 11–32 (2012).

FEMINISM AND GAY LIBERATION: TOGETHER IN STRUGGLE*

SHANNON GILREATH†

ABSTRACT

The thesis of this Essay is that any successful movement for equality—indeed, any movement for freedom—for gay people needs the insights and theories of feminism for sustenance and for flourishing. Drawing heavily on the work of radical feminist scholar Ann Scales, and with special emphasis on the importance of feminism to the lives and political aspirations of gay men, the Essay compares the theoretical matrices of feminist legal theory and queer legal theory. By exploring the relevance of issues generally thought of as "feminist issues," such as pornography and abortion, to gay men's lives, the Essay shows that, rather than abandon feminism as much of queer theory suggests, gay men—and all LGBT people—should embrace feminism as a fundamental component of an ethical movement toward substantive, social, and legal equality.

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* © 2013 Shannon Gilreath. The title of this essay directly invokes Ann Scales's essay *Law and Feminism: Together in Struggle*, 51 U. KAN. L. REV. 291 (2003).

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I want to offer special thanks to Dean Martin Katz and especially Professor Nancy Ehrenreich of the University of Denver Sturm College of Law for arranging this Symposium to honor Professor Scales and her feminist work. Under their guidance, an earlier, more personal memorial was held at the University of Denver Sturm College of Law on September 21, 2012. My remarks there are published as Shannon Gilreath, *In Memory of Ann Scales*, 3 WAKE FOREST J.L. & POL'Y, at v–viii (2013).

> Solidarity is possible. . . . Solidarity is also the only viable option for progressive people. The liberal ideal of absolute individualism makes no sense in a world of inevitably interdependent language users. . . . Solidarity requires constant reevaluation of issues and constant rejuvenation of commitments and coalitions.
>
> —Ann Scales[1]

> Outsider jurisprudence asserts . . . that oppression on the bases of race, gender, sexual orientation, disability, and class is unjust if anything is unjust.
>
> —Ann Scales[2]

> I would not wish to be anything other than An Other at this moment.
>
> —Ann Scales[3]

A NECESSARY PROLOGUE

I have to say that I have been and remain ambivalent about being a part of this Symposium. It is, without question, the most difficult writing I have undertaken in my professional life. This kind of occasion, in which a friend is memorialized, is a splendid thing. It invites us to remember that Ann is present, all of her, in her written work, and that she lives on in it, continues to speak to us through it. For those of us close to her, that offers some comfort. Nevertheless, an event like this also requires one to practice an ethics of interpretation on one's friend. It asks that a whole human life, and the body of work from which that life was in ways large and small inseparable, be cut to pieces. The fact that one must be *dis*membered in order to be *re*membered is, in my opinion, the saddest of ironies. So I struggled.

Because of the breadth and depth of Ann's insight, I could have gone in many directions with this piece. At first, I thought I would write something about legal education. That would have been easy; there's plenty wrong with it, as Ann knew well. Had I read her incredible article, *Surviving Legal De-Education*, before going to law school, I would have been a better law student. At the least, I would have understood what law

1. Ann Scales, *Poststructuralism on Trial*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 395, 407 (Martha Albertson Fineman et al. eds., 2009).

2. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 28–29 (1992).

3. Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 163 (1990).

school was doing to me, why my energy was drained—why I was a little crazy. In *Surviving Legal De-Education,* Ann riffed on Scott Turow's *One L,* in which he described law students in a way that assumed a lot about who law school, and by extension the law, was really for.[4] Of course, Turow was writing about that law school "Shining on a Hill," as it were, the prestigious[5] Harvard, where students and faculty are thought of as Olympians.[6] Ann and Turow were classmates, and she makes an appearance, albeit a background one, in *One L.*[7] Of course, the problems in legal education that Ann identified don't just exist at Harvard. They are systemic. In short, the late, great Derrick Bell would have to have blown up more than just Harvard Law School in order to save us.[8] In the end, I felt I couldn't improve on what Ann saw and addressed, returning as she did to the theme in *Midnight Train to Us*[9] and *Feminists in the Field of Time,*[10] and in other work. I abandoned the theme.

Then I pondered the question with which Ann began her beautiful book, *Legal Feminism*: "Does [legal feminism] have a future?"[11] If it does, what does it look like? I remembered Adrienne Rich's observation, a lifetime ago now, that so very little work had imagined a feminist utopia.[12] I noted that little has changed since Rich originally penned this observation in 1974. So, I set about the work of imagining such a thing. A friend had encouraged me to write a narrative piece. Now, I thought, was the time to do it. After all, Ann had been emphatic about storytelling's importance to liberation.[13] So, I imagined that Ann, now abiding in the Feminist Future, came to visit me. I imagined our conversations about what this future would be like and what those of us here, now, could do to realize its possibility. Hearing Ann's voice in my head, reveling, again, in her sharp wit and keen sense of humor, and of course her

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4. Turow had written of his first year classmates: "We are men and women drawn to the study of rules, people with a native taste for order." SCOTT TUROW, ONE L 300 (1977). Ann improved substantially upon this perspective, writing: "The day is coming soon when some right-minded successor to Scott Turow can write about her first-year classmates: We are women and men drawn to the living of life, people with a native taste for survival, for diversity, and for freedom." Scales, *supra* note 3, at 164.

5. I am always mindful that the original meaning of the word prestige is a "trick." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 983 (11th ed. 2003) (defining the word *prestige*).

6. *See* TUROW, *supra* note 4, at 10, 12.

7. *See* Scales, *supra* note 3, at 164.

8. *See* Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory,* 87 MICH. L. REV. 2382, 2382 (1989).

9. Ann C. Scales, *Midnight Train to Us,* 75 CORNELL L. REV. 710, 710–11 (1990).

10. Ann C. Scales, *Feminists in the Field of Time,* 42 FLA. L. REV. 95, 97–98 (1990).

11. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, & LEGAL THEORY 1 (2006).

12. ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE: SELECTED PROSE 1966–1978, at 153 (1979) ("I have been trying to think of a celebrated literary utopia written by a woman. . . . Even minds practiced in criticism of the status quo resist a vision so apparently unnerving as that which foresees an end to male privilege and a changed relationship between the sexes.").

13. *See, e.g.,* Ann Scales, *supra* note 3, at 148 ("Included in these alternative realities are transformative versions of authority, power, and order. . . . [I]n Robin West's words, . . . we [must] 'flood the market with our own stories,' until they are heard, until there is room for us simply to be who we are." (quoting Robin West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1, 65 (1988))).

masterly feminist philosophy, was a beautiful experience. I wrote all of these conversations down. But something wasn't quite right. How would these "conversations" translate in a forum requiring a live address to a room full of people? In short, how could this project translate as anything other than schizophrenic? I may yet take this quantum leap with my friend, but now isn't the time. So I put it all away and started over again.

I think the reason for all of this grasping, the fits of starting and stopping, was that I resisted saying what needed to be said. I didn't want to talk about what this Essay ended up discussing. I didn't want to talk about the relationship of radical feminism to gay men's lives—at least not now. Mostly, I think, I didn't want to do it because it risks contributing to the well-worn criticism that feminism should be avoided because it is too contentious.[14] And certainly I didn't want to take this moment about Ann, rightly perceived as a moment about women, and turn it into something about men (thus reinforcing the suspicion that many women have about male feminists). And most assuredly I didn't want to be perceived as taking a moment that is supposed to be all about Ann and making it all about me. Basically, my fear was that in saying what I wanted to say for this occasion Ann might be, somehow, lost. What I finally realized, what made this Essay finally possible, was that far from being lost in it, Ann's work is essential to any discussion uncovering why and how gay liberation goes "off the rails," as one of my readers put it,[15] when it attempts to separate from radical feminism. It was Ann's great love for gay people—for gay women and men—that led her to insist that feminism matters in our lives, *even* in the lives of gay men, and led her to take unpopular positions on gay pornography.[16] And it was Ann's friendship—her love for me and mine for her—that made so much of my work possible.

Ann was always interested in what she called feminism's sharpest edges, by which we continually shape its possibilities. And so I joined

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14. See Diane Richardson, *"Misguided, Dangerous and Wrong" on the Maligning of Radical Feminism*, *in* RADICALLY SPEAKING: FEMINISM RECLAIMED 143, 143–54 (Diane Bell & Renate Klein eds., 1996), for a discussion.

15. E-mail from Jeffrey Vanek to author (Aug. 28, 2012, 12:48 PM).

16. Ann supported an equality-based regulation of pornography in Canada, in the landmark decision *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), and opposed excepting gay marketed materials from that definition. *See* Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of* Butler, 7 CAN. J. WOMEN & L. 349, 349 (1994). In fact, Ann was called as an expert witness for the Little Sisters Book and Art Emporium, a distributor of gay porn at issue in the Canadian case *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (Can.), in which several gay groups lobbied for gay porn to remain unregulable under the *Butler* standard because it, according to them, isn't harmful. *See* Scales, *supra*, at 352 n.4. Ann very nearly was not called when these groups found out that her position was that gay pornography did produce equality-based harms to gays as a group and should be subjected to the *Butler* analysis. *See* Audrey Fannin, *'Conversation with...' Speaker Advises Students to Not Do Work They Hate*, WAKE FOREST U. SCH. L. (Oct. 7, 2010), http://news.law.wfu.edu/2010/10/a-'conversation-with-...'-ann-scales/. She was careful to underscore that gay pornography should not be marked for any especially burdensome legal targeting simply because it was gay-oriented. Scales, *supra*, at 356.

this Symposium to talk about the role that feminist jurisprudence has to play in the lives of gay men, not because I enjoy doing it, but because I think it is what Ann would have wanted me to say in relation to her work. I think the most striking possibility feminism brings to gay men's lives is the possibility of love unmodified. As Ann emphasized, quoting Robin West, "I can't imagine any project more crucial, right now, to the survival of this species than the clear articulation of the importance of love to a well-led public life."[17] I haven't had the opportunity to hear or read Katherine Franke's keynote address before drafting these thoughts, but if this is what she is reflecting when she describes Ann's feminist method as "[t]aking a [b]reak from [a]crimony," then she will have done Ann's life and work some justice.[18]

Ann believed in solidarity. Although it may not be apparent on the surface, the practice of solidarity flows directly from the feminist practice of relating political ideas and actions to personal experiences through seeking in one's own oppression a basis for solidarity with others. In this very real sense, emotional support becomes political support, laying aside forever the false dichotomy posed by the patriarchalists that tells us that choosing the values of connectedness necessarily means walking away from moral agency.[19]

INTRODUCTION

Ann Scales dedicated her life to "[f]eminism [u]nmodified,"[20] which is to say Radical Feminism, which is to say exactly what Ann

17. Scales, *supra* note 9, at 718 (quoting West, *supra* note 13, at 65 (1988) (internal quotation marks omitted)).

Ann's focus on a "public life" makes her revelation here no less relevant to queer theory, despite queer theory's preference for an explanation of the world centered on individual choices, as opposed to recognition of group-based realities. As I have noted:

> The political and civic institutions that create, shape, and enforce laws and define communities—and our active and conscientious involvement in them—are necessary because without them many of the intensely private and personal aspects of our lives would not be possible. . . . [O]ur neglect of our public responsibilities will not only perpetuate our public inequality but also will ultimately threaten the privacy we often prize above all else.

SHANNON GILREATH, SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY 86–87 (2006).

18. Katherine Franke, Isidor & Seville Sulzbacher Professor of Law & Dir., Ctr. for Gend. & Sexuality Law, Columbia Law Sch., Keynote Address at the University of Denver Sturm College of Law Symposium Honoring the Work of Ann Scales: Taking a Break from Acrimony: The Feminist Method of Ann Scales (Mar. 30, 2013).

19. *See* Scales, *supra* note 9, at 718 n.25 ("I am not suggesting that we have to choose the values of connectedness and caring and survival over our individual freedom or well-being or moral agency. To posit that either set of values must be relinquished in favor of the other is simply to buy right back into the same destructive dichotomy between self and world.").

See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 306–07 (1995), for a discussion on the role of the concept of "agency" in feminist theory, particularly for its centrality to strains of feminism critical of radical feminism.

20. This is, of course, a direct reference to the work of Catharine MacKinnon. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 262 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED]. Ann was proud to be associated with MacKinnon. Time and again in her written work and public speeches on feminism, Ann invoked MacKinnon. For Ann, feminism was synonymous with the "antisubordination theory" or dominance femi-

said—and meant—when she said "feminist jurisprudence"—a field, it is useful to remember, that she named.[21] So I would feel somehow dishonest contributing to a symposium remembering her and celebrating her work without taking a close look at what feminist jurisprudence is, what it looks like, and what it does in the real world, which Ann's work taken in its totality emphatically tells us is the only place it matters. In sketching out what feminism means for gay men, I can do little better than build on the definition Ann provided:

> Positively, the feminism I know is concrete, antiessentialist, contextual, instrumental, eclectic, and open-minded. It is concrete because it grew from and answers to the real experiences of subordination caused both to women and men by gender hierarchy. It does not depend on any transcendental moral principle, unless a commitment to equality is that. Indeed, the feminism of which I speak is antifoundationalist . . . because it recognizes that foundationalist explanations usually are excuses for social inequalities. The feminism of which I write is antiessentialist because not only is point-of-view the primary referent for social action but point-of-view is itself an elastic and contextual phenomenon. All of the ways that each of us participates

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nism MacKinnon has done so much to shape. *See* SCALES, *supra* note 11, at 9, 13 (internal quotation marks omitted).

In her book, *Legal Feminism*, Ann described the importance of MacKinnon's theory to her own feminist theory and activism.

> Before critics dismiss the book solely on [the ground of its reliance on MacKinnon's work], I would ask them to consider why they would do so. Even those who vehemently disagree with MacKinnon must acknowledge that much contemporary legal theory is inspired by her work or transpires in (sometimes saliva-sputtering) response to her work. As a purely academic matter, it is distressing to me how MacKinnon has been caricatured. I have observed, again and again, how often MacKinnon's critics have not read her writings, or not read them with care, or have failed to reread those works as circumstances required. . . . [O]ne needs to understand . . . that much of contemporary United States jurisprudence is connected to MacKinnon. No serious treatment of feminist legal theory can fail to engage her work.

Id. at 13.

Ann also describes her own feminism being in a place of "stuckness," until she encountered MacKinnon's "inequality approach," presented in CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 174 (1979) (emphasis omitted). *See* Scales, *supra* note 2, at 11. In 1997, Ann wrote:

> I read Professor MacKinnon's first book, *Sexual Harassment of Working Women*, and I began to feel that an explanation (maybe even a better world) was possible. . . . I spent many hours mapping her dominance approach against everything I knew about law, and testing it against my entire experience of politics and human misery. It rang not only true, but transformative.

Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 39–40 (1997) [hereinafter Scales, *Disappearing Medusa*] (footnote omitted).

21. *See* BLACK'S LAW DICTIONARY 932 (9th ed. 2009) (crediting Ann Scales with the first published use of the term "feminist jurisprudence" (quoting GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 129–30 (1995)) (internal quotation marks omitted)). *Compare* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 193 (1989–1990) (identifying a panel moderated by Ann Scales as the inaugural forum for "feminist jurisprudence" (internal quotation marks omitted)), *with* Sheila James Kuehl, *For the Women's Reach Should Exceed Their Grasp, or How's a Law Journal to Be Born?*, 20 HARV. WOMEN'S L.J. 5, 9 (1997) (crediting Ann Scales with coining the term "feminist jurisprudence" (internal quotation marks omitted)).

> in our various identities are constituted by historical, cultural, and individual practices. The sources of essentialism are beyond feminist control. Existing modes of power attempt to essentialize our identities, the better to capture each and every new incarnation as a market niche. My feminism is built from resistance to that.[22]

In order to expand on this kind of definitional project, it is necessary to include some things and exclude others. This is bound to make some in my audience nervous, if not bitterly resentful. This is a risk I feel is worth bearing in this moment, in the name and memory of the woman whose life and friendship meant so much to me, who taught me just exactly what the well-worn feminist quote "[t]he personal is political" means.[23] Our friendship was simultaneously personal and political, the two inseparable, fiercely both at all times, and in hindsight left me doubtful of my own admonition that "lov[ing] [someone] for political reasons" might be an impossible thing.[24] Ann's place in my life as a strong lesbian mother–sister–friend, thus her feminism *and* magnificent gayness, and my experience of it, has taught me that.

In honor of that presence, I want to use the space allotted me here to draw, as directly as I know how, the links between radical feminism and gay male liberation. In so doing, I will engage the poststructuralist theoretical project generally named "queer theory," in order to show just exactly what its engagement with reality on a contingency basis only (making it an antithesis of feminism) costs.[25] My many conversations with Ann infused my last book, *The End of Straight Supremacy*.[26] Although most of the reviews of that book have been praiseful, I was struck by one review, by Dennis Altman, that chastised me for "[t]he application of an

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22. SCALES, *supra* note 11, at 8. To Ann's final point, I would add these illuminating observations about queer life, generally of the trend in consumerism experienced as politics and

> a more mainstream cultural trend that both invites and disavows queer . . . identity . . . . To cite a few prominent examples: the rise of a new gay and lesbian niche market in the 1990s; the new "cultural visibility" of queers in public life; the cultural fascination with the figure of the "metrosexual"; the recycling and mainstreaming of lesbian sartorial styles, ranging from the campiness of drag king culture to the refined and sexy androgyny of the L.A. lesbian look (popularized by the *The L Word*); and the neutralization of "queer" through shows such as *Queer Eye for the Straight Guy*, which cemented the association of homosexual aestheticism with a particularly vapid and rationalized notion of lifestyle.

ELISA GLICK, MATERIALIZING QUEER DESIRE: OSCAR WILDE TO ANDY WARHOL 162 (2009).

23. *See* Robin Morgan, *The Personal Is Still Political*, 16 NEW PERSP. Q. 53, 53 (1999) (internal quotation marks omitted).

24. SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION 43 n.46 (2011) (internal quotation marks omitted).

25. Queer theory and queer legal theory are not monoliths. And not all work identifying with queer theory or as queer aligns itself with straight supremacy in the ways I critique in this Essay. Professor Francisco Valdes's work is a notable example. *See, e.g.*, Francisco Valdes, *Outsider Scholars, Critical Race Theory, and "OutCrit" Perspectivity: Postsubordination Vision as Jurisprudential Method*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 399, 399 (Francisco Valdes et al. eds., 2002). However, much of, if not most of, queer theory and queer legal theory shares the characteristics I critique below.

26. GILREATH, *supra* note 24, at xiii.

anti-porn feminism to mainstream gay pornography . . . ."[27] As grateful as I am for Ann's mentorship that so shaped the theory that emerged in *The End of Straight Supremacy*, I find myself grateful to her, again, for the context to address this important criticism of *our* work.[28]

I. FEMINISM AND GAY MEN

To query what feminism has to offer gay men—why it is essential to our lives—requires me to define feminism. Notwithstanding the general history of feminist infighting for theoretical primacy, one reason that *my* defining feminist jurisprudence will be a source of unease is, frankly, that I am a gay man. I think a lot of people become uncomfortable when a gay man starts talking about feminism.[29] When straight men do it there is, naturally enough, suspicion. Yet, somehow the straight man can be accepted because perhaps he is one of those darling men who has gotten in touch with his "feminine side" and has made the absolutely Herculean effort to learn to cry. My own experience, in some cases, is that when a gay man speaks of feminism there is outright contempt from some women. Does he think he is a woman? Is he co-opting women's experiences and women's oppression for his own ends? Surely it is not news to any of us that a historical tension has existed between some radical feminists and some gay men.[30] There have been some good reasons for this, namely that gay male culture is infused with a most recalcitrant form of misogyny.[31] There is no denying that. It is also the case that in its rush to an ethic of sexual limitlessness, much of so-called queer theory has inadvertently or intentionally exalted the very sexual sadism and ritualized violence radical feminism opposes.[32]

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27. Dennis Altman, *Can the Revolution Be Recovered?*, GAY & LESBIAN REV., Mar.–Apr. 2012, at 30, 30–31 (reviewing SHANNON GILREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION (2011)).

28. I say our work because Ann too believed a sex equality theory of pornography was essential to gay liberation. In many ways, her work prefigured my own. *See* Scales, *supra* note 16, at 350, 358.

29. There is absolutely no question that most feminist work, not to mention feminist writing, has been done by women—men have rarely and exceptionally participated in the project. *See, e.g.*, Brian Klocke, *Roles of Men with Feminism and Feminist Theory*, NAT'L ORG. FOR MEN AGAINST SEXISM, http://www.nomas.org/node/122 (last visited Dec. 5, 2013).

30. DAVID FERNBACH, THE SPIRAL PATH: A GAY CONTRIBUTION TO HUMAN SURVIVAL 18 (1981) ("Gay men start out from a very different relationship to the gender system than do women, and the same applies to lesbians in so far as they struggle on the specific basis of their gayness. While women are oppressed by being what the gender system requires them to be, offering them a certain reward of legitimacy for being a 'proper' woman and accepting oppression, gay people are oppressed by our inability—or refusal—to be 'proper' women or men. . . . The minimum starting-point of the gay struggle, accordingly, is the demand for our right to exist, for a basic social tolerance. These two very different starting-points explain how it is that the women's and gay movements have by no means immediately recognized each other as allies.").

31. See GILREATH, *supra* note 24, at 173–76, for discussion of male-over-female dominance in gay pornography.

32. *See, e.g.*, *id.* at 169–203 (discussing the dehumanization of gay pornography and women in pornography); *see also* Marc Spindelman, *Sexual Freedom's Shadows*, 23 YALE J.L. & FEMINISM 179, 191–200 (2011) (reviewing TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009)) (discussing the idea of sexual freedom).

I think there has been, too, a self-imposed "gotcha" of sorts by some radical feminists, whereby, in the attempt to shore up the distances separating individual women, and thus create some solidarity in sisterhood, seclusion from men was deemed necessary. This move alienated women from a group—gay men—that should be a natural ally to feminist causes. The late Mary Daly comes to mind with some prominence here. She once wrote that women who identify as "gay" cannot be "Female-identified."[33] In contrast, I have argued that solidarity between women and gay men is essential to both groups.[34] This is in the tradition of radical feminists, like the late Andrea Dworkin, who understood the connections we share in a gender system that operates to constrain and subdue us.[35]

Some of my male colleagues in the academy seem to think that my work is accepted or better regarded by women in the academy because I am a gay man, that the fact of my gayness somehow gives us, the women and me, a common denominator of sorts. Naturally, I am, on account of this, immediately suspect to these same male colleagues. I think, at times, the phenomenological reality I always bring with me as a gay man helps. For example, I think the fact that I can begin to explain a point in a faculty meeting without relying on some asshole sports analogy is probably appreciated by most of my women colleagues (and, for that matter, in class by my women students).[36] And I think this is where the link that my straight male colleagues believe they have identified between me, as a gay man, and women stops in their minds. There is something more, of course: there is the special bond between people who struggle together for liberation from patriarchy—be they male or female. I have always liked the way Andrea Dworkin put it when she said, "Women and male homosexuals are united in their queerness . . . ."[37] Ann could be counted with Andrea and with me in this understanding.[38] Her feminism was un-

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33. MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM 376 (1990) (internal quotation marks omitted).

34. *See, e.g.*, GILREATH, *supra* note 24, at 25–27.

35. See ANDREA DWORKIN, *Biological Superiority: The World's Most Dangerous and Deadly Idea*, *in* LETTERS FROM A WAR ZONE 110, 110–15 (1993), for a discussion of the downfalls of superiority based on immutable traits, such as gender.

36. Ann had something to say about sports metaphors. She wrote with characteristic lucidity that "the function of sports metaphors is not only to illustrate, but to legitim[ize] [male supremacy]." Scales, *supra* note 3, at 149–50.

37. ANDREA DWORKIN, WOMAN HATING 90 (1974) ("Women and male homosexuals are united in their queerness, a union which is real and verifiable . . . which contributes to the cultural oppression of both.").

38. Of course, other feminists have also understood the need to include men in the struggle against male supremacy. Bell Hooks, for example, wrote in 1984 that

> [s]eparatist feminist rhetoric suggested that all men share equally in male privilege, that all men reap positive benefits from sexism. Yet the poor or working-class man who has been socialized via sexist ideology to believe that there are privileges and powers he should possess solely because he is male often finds that few, if any, of these benefits are automatically bestowed on him in life. More than any other male group in the United States, he is constantly concerned about the contradiction between the notion of masculinity he was taught and his inability to live up to that notion.

modified but it was inclusive. As she put it, "[F]eminism" is not "a way of thinking available only to persons born female. Rather, . . . feminism . . . [is] the critique of objectivity in epistemological, psychological, and social—as well as legal—terms."[39] Ann understood as well as anyone I have yet encountered the importance of feminist writing that speaks to everyone who might resist sexist oppression. She understood that real feminist revolution happens when patriarchy is actually recognized and resisted by women and men galvanized to challenge male supremacy.

Claiming radical feminism as my ground means that I challenge the queer theoretical project, which has been antagonistic to the insistence of feminist jurisprudence that real sexual injuries to real people, even when those people are gay men, be acknowledged by the law and responded to in concrete ways. This is a point of critical importance: feminist jurisprudence—in the way that Ann conceptualized and practiced it—means to use the law to respond to and undermine social hierarchy in whatever form, and not merely peripherally, but as the heart of feminist practice. This feminism is, simply put, a theory of inequality based on the realities of male-over-female domination, which has been the model for all forms of systemic and systematic oppression. It is concrete and specific in this regard, with the realities of women's lives lived under male dominance forming the crucible from which a new way of knowing (not merely of thinking)—an epistemology—emerged and continues to develop. The work of legal feminism has been to connect this knowledge to the law, to the coercive power of the state, and thus to speak truth to power.

The method of this feminism has been exposing the lies of male supremacy, which are mostly backed by the authority of the state through the force of law—a law that takes the male point of view as the objective, neutral universal. As Ann put it, it is a system of law that "made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality."[40] Significantly for the application and importance of radical feminism to gay liberation—and to gay men specifically—this feminism was never, and never aspired to be, a claim to *female subjectivity*. It was never a quest to supplant patriarchy for matriarchy. As Ann put it, "Feminism does not claim to be objective, because objectivity is the basis for inequality."[41] The feminism Ann embraced, worked for, sacrificed

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BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 75 (2d ed. 2000).

I agree with the sentiment Hooks expressed here. Classism—and virtually every other "-ism"—is a functionality of male supremacy. I do think, however, it's a shame that Hooks doesn't engage gay male reality here, especially since she stresses that lower-class men "[m]ore than any other male group" suffer from male supremacist norms. *Id.* I should think that of all men who suffer from the "contradiction" between socialized masculinity and the "inability to live up to that notion," gay men deserve, at least, a mention. *Id.*

39. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1373 n.2 (1986).

40. *Id.* at 1377.

41. *Id.* at 1385.

for, and practiced was not about access to a subject position or its corollary power of objectification.[42] Rather, this feminism was about naming the reality of patriarchal oppression, establishing its contours, and changing them for the good of women and men. And surely no men suffer this oppression more acutely than gay men. To accomplish this goal, it is necessary, as Ann put it, to "resist[] abstraction."[43] In that sense, feminism cannot be "a practice that makes claim to objective, universal truth in the way that, for example, some of the wilder versions of 'law and economics' theory do."[44] Nor is radical feminism interested in the "oppression sweepstakes,"[45] in that it does not insist that women's experiences as women are superior or constitutive of a metanarrative or metatheory that must exclude all men. It acknowledges that women *and* men are defined and controlled by gender.

This brings me to my first point of engagement with feminist jurisprudence and its relationship to queer theory. Whereas feminism has been in many important ways a practice before it was a theory, with the theory emerging from the practice of establishing an account of reality under patriarchy based on lived experiences, queer theory has been an academic enterprise, the result of postmodern theory, which has as its basis a suspicion, even rejection, of claims to reality. Like everything postmodern or poststructural, queer theory is an idolatry of the unreal; it disputes that there are such creatures as "homosexuals" or "gays" or such a thing as "gay identity."[46] Again, this is simply an extension of the old

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42. As I have said, "In a subject–object culture, one must be a subject in order to be objective about much. To be objective about being objectified is to be dead." GILREATH, *supra* note 24, at 21.

43. Scales, *supra* note 39, at 1374.

44. Ann Scales, *Law and Feminisim: Together in Struggle*, 51 U. KAN. L. REV. 291, 291 (2003).

45. Scales, *supra* note 3, at 160 (defining "oppression sweepstakes" as "a heated discussion about whose treatment has been worse" (internal quotation marks omitted)).

46. One recent example is Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1 (2012). Franke's is an extremely nuanced piece that resists simplification, but despite its many qualifications, the article reveals the risk that poststructuralism poses for gays (I suppose I should write "same-sexers" or something here, because "gay" as an identity is anathema to queer theory poststructuralism) who do not have even the meager protections liberal legal concepts afford. Franke writes:

> Once we recognize that the normative homosexuality that undergirds human rights discourse is not merely a "fact" in the world, but more of a complex value, it becomes easier to see how the state's embrace of the sexual citizenship of these new human rights holders risks rendering more vulnerable a range of identities and policies that have refused to conform to state-endorsed normative homo- or heterosexuality. This is true both for queers whose desires refuse to orient themselves ineluctably toward marriage, *as well as for Muslims with sexual norms and practices of polyamory, homosociality, and modesty.*

Id. at 40 (emphasis added). Professor Franke seems to make a (very nuanced) apology for Iran's President Ahmadinejad's insistence that there "is no such thing" as a homosexual in Iran. *Id.* at 34. For Franke, Ahmadinejad is possibly a victim of Western, imperialist misinterpretation. Quoting an Iranian colleague translating Ahmadinejad, Franke explains:

> [N]ow the other issue is that when the second time he says "In Iran there is no such thing" the phrase that he uses is literally "such a thing has no external presence/*vojud e khareji nadareh*"—now this phrase. "*[V]ojud e khareji nadareh*" idiomatically means "does not exist" but literally means "has no external existence"—yet another polyvalent phrasing that has embedded in it the suggestion that homosexuality is not a socially ac-

antifeminist bugaboo that feminist jurisprudence is flawed for asserting such a human being as "woman," or for claiming that women could have a point of view or constitute a community or share a common experi-

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> ceptable behavior in Iran, namely we do not see it in public space—adding credence to . . . a sympathetic reading of Ahmadinejad that in Iran these are private matters.

Id. at 34–35 (first alteration in original) (quoting an E-mail from Hamid Dabashi, Hagop Kevorkian Professor of Iranian Studies & Comparative Literature, Columbia Univ., to Katherine Franke (Feb. 12, 2011, 12:29 PM EST) (on file with Katherine Franke) (internal quotation marks omitted)). Actually, the price of a public queer identification in Iran is state-sanctioned (often state-mediated) death, a fact to which the string of citations Franke collects attests. *See id.* at 35–37; *cf., e.g.*, Iranian Queer Org., *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and Homosexuality in the Islamic Republic of Iran*, INT'L GAY & LESBIAN HUM. RTS. COMMISSION, 1–3, 6–7 (Oct. 5, 2011), http://iglhrc.org/sites/default/files/537-1. (identifying Iranian statutes that punish homosexual acts by death); BE LIKE OTHERS (Tanaz Eshaghian 2008) (documenting experiences of men and women seeking gender reassignment in Iran). But Franke seems to take Iran's position that documented executions of gays in Iran are perhaps not really obvious examples of the murder of gay men at all, but actually only documented executions of pedophiles (again, a misinterpretation by Western imperialists with a human rights agenda?). Franke, *supra*, at 36–37 ("It turns out, however, that the young men in this picture were very likely prosecuted for sexually assaulting a thirteen-year old boy, not for consensual homosexual conduct."). And, interestingly, here, unlike for Ahmadinejad, there is no laborious examination of alternative interpretations. *See id.* I'm not sure on what grounds, or with what evidence, Franke is convinced that those executed in the particular episode to which she refers, youths who were, in fact, adolescents themselves, were pedophiles.

In any event, there is sympathy in Franke's piece with Joseph Massad's idea that there is no such thing as a gay identity in the Muslim Middle East. *Id.* at 33–34; *see* Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 363 (2002). I suppose it's all in whom you ask: Maybe it's reasonable to consider Ahmadinejad a reliable source. What is most distressing for me about this particular aspect of Franke's article is that it moves to erase the state's complicity in producing gay identity as always and only a private identity because the penalty for public identification is death. Franke diminishes the price of public queerness exacted from gays in Iran and all around the world. Feminists and gay liberationists have the pesky habit of asking gay people for an account of their experiences and then believing what they tell us. So here are some questions I'd like to put to queer theorists: If there is no such thing as gay people in the Middle East or in Africa, as is widely claimed by multiculturalist theorists, then why was Hassan El Menyawi tortured and exiled? Why is David Kato dead? Why did Abdellah Täia flee Morocco? Why do roving death squads in Iraq target certain kinds of men for brutalization and death? Why do countless men in Iran mutilate their bodies in order to conform their homosexuality to the mandated gender dichotomy in an act of transsexualism sanctioned by the Iranian government—often undertaken at state expense—and glorified by queer theory? This latter query alone should stand as an unassailable indictment of the public price of queerness in Iran. What norm of modesty explains all of this? And where, exactly, is the murder of gay people not an expression of religious or cultural (often the same thing) values? *See* Shannon Gilreath, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 WM. & MARY J. WOMEN & L. 7, 17–23, 27–30 (2011) (documenting assault, murder, and terrorization of gay people in the Middle East and the United States by citing various reports).

I believe Franke and I are in agreement on the rudiments of the larger argument she makes about resisting cooptation. I'm all for resisting essentialism, and cooptation and universalization, but to take the real life experiences of gays in "foreign" places and to make of them merely a figment of the Western mind seems a lot like cooptation to me. To say to gay women and men who have claimed a gay identity, affirmatively and courageously, in the Middle East and Africa, and who have suffered appallingly *real* experiences on account of it, that their identity is always a non-identity, seems awfully essentializing to me. And a culturally relative defense of the murder of gays anywhere is a defense (to borrow from Martin Luther King, Jr.) of the murder of gays everywhere. *See* MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 290 (James Melvin Washington ed., 1986) ("Injustice anywhere is a threat to justice everywhere."). That seems pretty universal.

I thank Hassan El Menyawi for pointing out Professor Franke's article to me and for his always-clarifying conversation.

ence.[47] When Will Roscoe said of gays, quite profoundly, in my opinion, that he could "think of no other contemporary minority whose intellectuals are so deeply invested in erasing their [identity],"[48] he could have added to these anti-identitarian censors the "anti-essentialism" critics of feminism, who have engaged, whatever their motivation, in the same kind of cover-up enterprise.[49]

You know Ann, despite her dazzle as a classroom teacher and her genuine love for and appreciation of her students and her groundbreaking writing, never really identified as an academic. She saw herself as a feminist activist. I think the academic obscurantism just summarized explains why. Ann agreed with Catharine MacKinnon that to be a good theory, a theory has to be good in practice.[50] In other words, for her, feminist theory was not the playground of the especially enfranchised—a group at whose apex lawyers must surely be placed. Ann was the child of academics (her father was a university president); she was educated in the privileged cocoons of Wellesley and Harvard; she got "the job" with a fancy Wall Street law firm—the kind of job that tells law graduates they've "made it."[51] But Ann was not the sort of person to luxuriate in the comfort of academic degrees or family privilege. She did what academics do not have to do: she faced reality. She cared about women—and men—for whom sexual subordination *is* reality.

For Ann, feminist jurisprudence meant seeing sexual injury as a form of discrimination. It also meant realizing that women's subordination to men is not natural or inevitable, but political, thus structural. From the perspective of radical feminism, sexuality itself is structural. This is the central tenet of feminism, and it is the central importance of feminism to gay male liberation—the realization, as Andrea Dworkin put it, that "[e]very social form of hierarchy and abuse is modeled on male-over-female domination."[52] To understand this is to see, in the light of feminism, that the gay sexuality gay men experience is, in fact, produced

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47. *See, e.g.*, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 158–59 (1988).

48. Will Roscoe, *Afterword* to HARRY HAY, RADICALLY GAY: GAY LIBERATION IN THE WORDS OF ITS FOUNDER 331, 347 (Will Roscoe ed., 1996). *But see* Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 133–35 (Michael Warner ed., 1993) (noting "a turn in poststructural gay theory beyond a critique of identity politics to a politics against identity").

49. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585–601 (1990) (criticizing Catharine MacKinnon's dominance theory as "flawed by its essentialism").

50. *See* Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 13 (1991) ("It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?").

51. *See* Audrey Fannin, *'Conversation with...' Speaker Advises Students to Not Do Work They Hate*, WAKE FOREST U. SCH. L. (Oct. 7, 2010), http://news.law.wfu.edu/2010/10/a-'conversation-with-...'-ann-scales/.

52. ANDREA DWORKIN, OUR BLOOD: PROPHESIES AND DISCOURSES ON SEXUAL POLITICS 68 (1976).

in the subject–object context of straight male supremacy. In other words, the reality of sexuality for gay men, no less than women, is forged on the anvil of straight male power. As MacKinnon put it, the "situation offers no outside to stand on or gaze at, no inside to escape to . . . no place else to go."[53] If you doubt this is true, take a moment to really look at gay male pornography. Here you see in technicolor the hermetic precision of sexual hierarchy at work. In gay male pornography the structural dominance of heteronormative sexuality—that sexuality in which sex is "gendered to the ground"[54] and wielded as a weapon—is twisted open for all but the willfully blind to see.[55] The fact that so many gay men do not see it is testament to the ontological and epistemological perfection of straight male supremacy. This is precisely why consciousness-raising became synonymous with feminist method as a form of political practice.[56]

II. QUEER LEGAL THEORY AND GAY LIBERATION (QUEER THEORY AS ANTITHESIS)

The best point of entry to engage queer theory jurisprudentially is *Oncale v. Sundowner Offshore Services, Inc.*[57] and the queer theoretical debate that emerged from the case.[58] Ann certainly thought *Oncale* was profoundly important.[59] The case established that same-sex sexual harassment was actionable;[60] thus, men could no longer sexually dominate other men in the workplace and be untouchable. As Marc Spindelman put it, because *Oncale* disrupted the conventional social understandings of men subordinating other men as simply "boys [being] boys" and of the

53. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 639 (1983).

54. *Id.* at 655.

55. GILREATH, *supra* note 24, at 169–70. *See also infra* Parts III, IV.

56. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 543 (1982) ("The pursuit of consciousness becomes a form of political practice."); Scales, *supra* note 39, at 1401 ("Feminist method proceeds through consciousness raising."); Scales, *supra* note 2, at 29 ("The historical and personal experience of the oppressed, revealed through consciousness-raising, is amply persuasive. In the meantime, lawyers must give up on monolithic reality and believe that there is something to be learned and a better society to be achieved by listening to formerly silenced people.").

57. 523 U.S. 75 (1998).

58. In reality, Joseph Oncale's life was one of pornographic torture. While working on an oil rig in the Gulf of Mexico, he was subjected to sexual torture by several male co-workers and supervisors. Oncale v. Sundower Offshore Servs., Inc., 83 F.3d 118, 118–19 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998). He was sexually assaulted on several occasions, during which he was held down while a co-worker placed his penis on Oncale's body. *Id.* at 118. He was threatened with rape and only narrowly escaped one rape attempt perpetrated in a communal shower. *Id.* at 118–19. Eventually, fearing for his safety, Oncale quit his job. *See Oncale*, 523 U.S. at 77. His claims of sex discrimination through same-sex sexual harassment were held actionable under Title VII of the Civil Rights Act of 1964 by the United States Supreme Court. *Id.* at 76–79.

59. *See infra* notes 79–80 and accompanying text.

60. *Oncale*, 523 U.S. at 79.

victims committing the normative infraction of failing to "take it like a man," *Oncale* was a blow to male-supremacist thinking.[61]

Professor Janet Halley, however, assails the result as an invitation for the Supreme Court to license homophobia in legal decision making, particularly criticizing the brief filed by Professor Catharine MacKinnon in support of Oncale's sex discrimination claim.[62] Setting aside Halley's various interpretive distortions of MacKinnon's brief and, by extension, radical feminism,[63] what I find most disturbing is Halley's reimagining of Joseph Oncale's complaint. In truth, Oncale was the victim of attempted gang rape and various other sexual assaults while employed on an oil rig in the Gulf of Mexico. His assailants were all men.

Proclaiming that she is going to "put [Oncale's] allegation of unwantedness aside, as a mere allegation"[64] (as if that's somehow new, instead of the standard male-supremacist response to any unwanted sexual attention by men), Halley proceeds to turn Oncale's life into pornography by making of his attempted rape the "fantasy" of gay male sexuality that male supremacy dictates as truth: Oncale wanted this rape as a gay man.[65] He, as gay men do, wanted to be sexually dominated by (ostensibly) straight men. Halley writes:

> We can imagine that a plaintiff with these facts willingly engaged in erotic conduct of precisely the kinds described in Oncale's complaint, or engaged in some of that conduct and fantasized the rest, or, indeed, fantasized all of it—and then was struck with a profound desire to refuse the homosexual potential those experiences revealed in him.[66]

Halley's pornographic fantasy of Oncale's real life is an extension of the ethic of derealizing the real that flavors queer theory as, itself, an extension of postmodernism. It also clearly demonstrates how "[q]ueer theory . . . has in significant ways aligned itself with male supremacy and its regulation of the general erotic economy that gives meaning to women's and men's sexual lives."[67] You see, queer theory as an epistemological project—as an explanation of how we know who we are as gay men and women—effectively turns "the Closet" inside out. The Closet ordi-

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61. Marc Spindelman, *Discriminating Pleasures*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 201, 201 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003) (internal quotation marks omitted).

62. Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 61, at 182, 189–93.

63. Marc Spindelman lucidly illumines Halley's misperceptions in his piece in the book. *See* Spindelman, *supra* note 61, at 204–16. Professor Spindelman subsequently revised and expanded his argument while maintaining his disagreement with Halley. *See* Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 10–47 (2004).

64. Halley, *supra* note 62, at 192.

65. *Id.*

66. *Id.*

67. Spindelman, *supra* note 61, at 202.

narily functions as a shroud. It is the place to which gay men and women retreat in order to escape persecution and stigma. The price for this escape is invisibility. Thus, in order to be "free" from stigma (and consequently to have or retain any value whatsoever) in this basest conceptualization of what that means, queers must accept their place in the heterosexual hierarchy. Just as gays had forced the door of this existential deathtrap open, queer theory came along and said that in order to live meaningful, fulfilled lives—indeed, in order to *be*—queers should open themselves to the erotic possibilities of the very sexual hierarchy that is the engine of male supremacy, which means for gay men (as Halley reveals in her *Oncale* critique) that to be fucked by a straight man is the apogee of sexual liberation.

Thus, in the insistence on the absence of limits as the meaning of sexual liberation, Halley and queer theory suggest something much more alarming than that lesbians and gay men cannot be legally liable for the sexual injuries they cause, but rather that (at least in most cases) such sexual injuries are not possible or, more precisely, are a function of the victim's own internal homophobia—his refusal to live outside of the Closet. If this is what Halley means when she says that queer theory deemphasizes the differences between heterosexual and homosexual, then we should all—gay and straight alike—be terrified.[68] Whatever other conclusions may be drawn from it, it certainly illumines what she means when she says that queer theory "thinks it is fine to be 'queer in the streets, straight in the sheets.'"[69] For the materialization of this revelation in the daily reality of gay men's lives, gay male pornography serves as the perfect propaganda.[70] Now, how you can realize this and fail to see that straight male supremacy is metaphysically nearly perfect is beyond me. I'm still waiting for gay men to resent it.

Extending her critique, Halley insists that queer theory's objection (and antagonism) to radical feminism stems from radical feminism's perceived failure to understand that surrendering to such "pleasures" "rearranges conventional associations of the feminine with subordination and the masculine with power."[71] Halley provides as her example the fact that lesbians and (according to her) increasing numbers of straight women fuck their partners with strap-on dildos.[72] Here, Halley's argument

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68. *See* Halley, *supra* note 62, at 194.

69. *Id.*

70. *See* GILREATH, *supra* note 24, at 169–203. Indeed, Halley could be simply describing gay male porn when she explains that queer theory "tends to minimize . . . the differences between same-sex eroticism and cross-sex eroticism." Halley, *supra* note 62, at 196. Sadly, as I argue in *The End of Straight Supremacy*, much of the mainstream gay rights movement serves this same function, as in, for example, the push for assimilation into the marriage paradigm. *See* GILREATH, *supra* note 24, at 207–32; *see also* Nelson Tebbe et al., Debate, *The Argument for Same-Sex Marriage*, 159 U. PA. L. REV. PENNUMBRA 21, 28–35 (2010) (including Shannon Gilreath's rebuttal argument about gay marriage at the debate).

71. Halley, *supra* note 62, at 196.

72. *Id.*

reveals queer theory as little more than a manifestation of an aggressive, reductive, and assimilationist transsexualism. At its most successful, queer theory aspires to little more than gender role reversal. It might fairly be called transintellectualism, for like the false claim of transsexualism to any real gender disruption,[73] queer theory merely tinkers with the system of sexual hierarchy from which straight supremacy is ontologically and epistemologically inseparable. As a normative project, queer theory remains committed to that same system. After all, if a central tenet of male power is that the penis is a weapon,[74] how does a lesbian using it in the way it normally functions—to effectuate subordination through sex—disrupt anything? And if gay men, in the porn they produce for themselves, merely follow the script set for them by male supremacy, how is the sex held aloft as "fantasy" not simply heterosexuality in drag? But queer theory cannot see this, refuses to see it, since its preferred conceptual framework makes power an individual plaything—something to be "perform[ed]"[75]—and thus renders structural critique impossible. By contrast, feminist jurisprudence as a normative project works to undermine male supremacy. In this, it is queer theory's anathema, and it is for gay women and men (and for all women and men), unlike queer theory, a possible path to liberation.

To understand the connection between gay pornography, sexual violation, and queer theory in this way is to understand the truth in Ann's definition of feminism with which I began: "Existing modes of power attempt to essentialize our identities, the better to capture each and every new incarnation as a market niche. My feminism is built from resistance to that."[76] It is also to underline the life force of feminist jurisprudence, the belief that in order for any of us to exercise any legal right—certainly the right to free speech or the right to equality or the right to privacy—we must first have an integrity of the body that is absolute. This is a plausible reading of what Ann meant when she said, "Gender literacy is among the most serious pro-life work that anyone can undertake."[77] It is also what led her to understand same-sex rape as a sex equality issue and abortion as a queer issue.[78]

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73. GILREATH, *supra* note 24, at 271.

74. ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 23–24 (1981) ("The seventh tenet of male supremacy is that sexual power authentically originates in the penis. Masculinity in action, narrowly in the act of sex as men define it or more widely in any act of taking, is sexual power fulfilling itself, being true to its own nature.").

75. The notion of "performativity" is most closely associated with the work of Judith Butler. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 139–46 (1990).

76. SCALES, *supra* note 11, at 8.

77. *Id.*

78. *See generally* Scales, *supra* note 1, at 407–10.

Ann saw *Oncale* as "the most positive queer case ever decided in the U[nited]S[tates] . . . more important than *Romer v. Evans* . . . or *Lawrence v. Texas*."[79] More specifically,

> *Oncale* opened the wider range of gender issues, including abuse by sexualization in circumstances that no one can mistake for flirting. In that case, the court came as close to understanding as it has yet that sex discrimination is centrally about the production and manipulation of gender norms: the issue was not that Joseph Oncale was harassed because he was a man—he was harassed because of the kind of man he was perceived to be. It had to be a sex discrimination case under federal law, but it was also a victory for the principle, dear to the hearts of feminists and queer theorists and all combinations thereof, that no one should be forced "to occupy a gender norm that is undergone, experientially, as an unlivable violation."[80]

Understanding this "force," however, remains problematic for queer theory, because queer theory, not unlike liberalism, is obsessed with "choice," and its legal equivalent, "agency." Indeed, in a rhetorical frame in which nearly everything is up for grabs, in which hardly any facts can be established and where every experience is merely contingent, "choice" seems to be the only thing that is absolute; hence Halley's bottom line that Joseph Oncale should simply have surrendered to the eroticism offered him by his assailants in her (only just) imagined version of what happened to him, and her proffer of the "lesbian phallus" as a revolutionary culture shift.[81]

In queer theory's version of liberation, sexual liberation hinges on seizing the dominant role by turns—on having the "option" to assume the dominant position in sexual hierarchy, thus on sexualizing inequality. Here we see queer theory most closely aligned with the trans-politics that has emerged from it (and, I think, eclipsed it). Essentially, gay men no less than gay women are told that we should become "male impersonators," claiming the gender-specific power of which the masculinized dominance of male supremacy robs us by gendering us feminine based on our refusal to sexually dominate women—in other words, for siding with the girls. This is supposedly revolutionary because, even though some of us must necessarily assume the "submissive" role some of the time, we have the option of trading it off for the dominant role. For gay men especially, this means we have the option to be men again, in a system in which to be a man is defined as being socially permitted to sexually dominate a feminized "other." ("Man fucks woman; subject verb object."[82]) This is the revolutionary potential queer theorists see in the "bot-

79. *Id.* at 403–04.

80. *Id.* at 404 (quoting JUDITH BUTLER, UNDOING GENDER 213 (2004)).

81. Halley, *supra* note 62, at 194 (citing Judith Butler's discussion of the "lesbian phallus" in BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 57–91 (1993)).

82. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989).

tom" having the option of becoming the "top," to use gay male cultural lingo.[83]

Missing entirely from this analysis is the fact that in this vision of liberation gay men are liberated to do nothing not already scripted for us by heterosexuality. Lesbians in strap-ons, too, are left in the same bind, "liberated" to do little more than mimic sexually how male supremacy says women are to be touched and fucked. What is jettisoned in all of this pornographic "performing" is the ability to claim a space in which some substantively equal alternative to this catatonia-inducing repetition might be formulated.[84] Queer theory, then, mistakes a sexuality embodied by gender as an escape hatch from sexual inequality when, in fact, this very sexuality is "the linchpin of gender inequality."[85] It is also, it should be said, a theory that does absolutely nothing for women, including for lesbians qua women. As Andrea Dworkin explained, "devalued males can often change status, escape; women and girls cannot."[86] Certainly, the female usurpation of the dominant role socially, especially sexually, is usually delimited by what women can work out with men on male terms. In every conceivable incarnation, the sexuality aspired to by queer theory reflects the hierarchical absolutes of male supremacy. It is straight "in the streets" and "in the sheets."

III. PORNOGRAPHY

I want to probe further the ways in which queer theory reifies male sexual power as the substance of culture, as well as expose this cultural root in "gay male" pornography, through a reading of Janet Halley's reading of Duncan Kennedy's *Sexy Dressing*.[87] In her claiming of Kennedy's avowedly heterosexual perspective as "queer,"[88] Halley quite clearly summarizes what Kennedy intended to say when he wrote *Sexy*

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83. *See, e.g.*, Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857, 886, 892 (1992) (internal quotation marks omitted). The "top" is the insertive partner; the "bottom" is receptive.

84. Radical feminism, by contrast, has always supposed that such an alternative is possible, indeed, that it already exists in certain counterfactual instances. So much for the old canard that radical feminism theorizes all sex as "bad."

85. MacKinnon, *supra* note 56, at 533.

86. DWORKIN, *supra* note 74, at 61.

87. *See* DUNCAN KENNEDY, SEXY DRESSING ETC. (1993). By concentrating on Halley's work as I have in this Essay, I hope I am not interpreted as making some normative evaluation of Halley's work as the best representative of queer theory, although it certainly is representative. I focus on Halley here only because her work fetishizing sexual injury in the name of queer theory handily translates queer theoretical concepts to the realm of jurisprudence (by which I mean, as Ann did, "legal theory generated by lawyers, as opposed to theories about law emerging from other disciplines." *See* SCALES, *supra* note 11, at 153 n.1); because Halley, openly lesbian, claimed to articulate queer theory in a male voice; and because Ann used Halley's work specifically as an example of the limitations of poststructuralism. *See, e.g.*, *id.* at 3, 139–40.

To avoid any possible misunderstanding, Ann Scales thought Janet Halley's prescription to "'take a break from feminism['] . . . is a bad idea." *Id.* at 3.

88. Janet Halley *sub nom.* Ian Halley, *Queer Theory by Men*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS, *supra* note 1, at 9, 17–18.

Dressing, which in fact espoused nothing particularly new. What is so interesting about her gloss on Kennedy is how neatly it exposes the heteronormativity of what masquerades in theory circles as "queer." It is precisely the unabashed heterosexual-ness of Kennedy's theory that makes Halley, notably writing here *sub nomine* Ian Halley (I suppose thus as a "queer man"), claim it as "queer" and, thus, antifeminist. Halley writes:

> *Sexy Dressing* takes women's sexy dress as a semiotic system that registers, in subtle and dynamic ways, the degree to which women are able to enter as strong, self-interested bargainers into sex and sexually fun symbolic play with other women and with men. He argues from a position of highly identified "erotic interests"—his own—which he bluntly characterizes as those of a heterosexual white middle-class male who wants there to be women (on the street, in the media, at work) who can afford to be erotically thrilling to him. . . . The project is unequivocally pro-sex.
>
> To me, moreover, it is distinctly "queer" in its analysis of sexuality, power, and knowledge. It fragments and "flips" the male/female model—and because its reasons for doing so emerge not from Freud but from social theory—the resulting pattern of sexual complexities is explicitly political. . . . It's not feminist. It "Takes a Break from Feminism." Moreover, seeing it as "queer" instead—because of its embrace of male heterosexual erotic interests—provides deep satisfaction to my own ambition that queer work would be able to "Take a Break" not only from these feminist strictures, but also the homo-and bi-supremacy that more or less go with the term so far.[89]

First, Halley's synopsis of Kennedy's argument that he takes women dressed in sexually-objectifying ways as a/the way in which women can "enter as strong, self-interested bargainers into sex . . . with men," as if it is somehow radical, strikes me as extraordinarily dim.[90] If Kennedy is articulating the point of view of heterosexual male-ness, then, of course, this is his theme. This is little more than a restatement of the role male supremacy has always allotted women. Women should be sexually desirable and accessible everywhere for men. Women are told by the same men who want to keep them this way that this is what makes women strong. (How convenient.) Historically, even when viewed as somehow ruinous (think Eve), a woman's carnality has been propagandized as her source of power. Even when the truth is closer to a woman's sexuality being defined as the reason she is to be subdued, harassed, raped, subjected, married, and bred, the fiction is that men do everything in life to win her sexual attentions. The male orgasm at the hands of a woman is so powerful a motivator that he is powerless before her sinister, manipu-

89. *Id.*

90. *Id.* It is also consonant, I think, with the postmodern trend of taking a very simple concept and smothering it with language in the hope that it will become unrecognizable and thus "novel."

lative charms. Via this fiction, "[t]he male, through each and every one of his institutions [the public street, the media, any place of employment], forces the female to conform to his supremely ridiculous definition of her as sexual object."[91] And if any lawyer or law professor needs "proof," I should think the overwhelming content of any law library would suffice.[92] Halley's spin on this as being somehow sharp seems to me to implicate exactly what I think Ann Scales meant when she criticized "poststructuralism" for continually covering ground that has already been covered.[93] In any event, Halley names Kennedy's stance of (hetero)male subjectivity and female–feminine objectivity unequivocally as "pro-sex."[94] This is no surprise for anyone familiar with Halley's take on the sexual assault endured by Joseph Oncale. To be pro-sex in the queer theoretical model is to be pro-objectification.

Next, and most interestingly, Halley moves to call Kennedy's straight-male "algorithm" for maintaining straight male supremacy "queer."[95] In so doing, she lays queer theory's cards on the table. In her reimagining of Oncale's ordeal, the acme of homosexual male sexual experience is taken to be rape. In her reading of Kennedy, she broadens this to include sexual objectification generally.[96] As in the general thrust of the transintellectual project, and following on her critique of *Oncale*, Halley claims this "'flips the male/female model," thus undermining structuralism of the feminist sort that Professor Kennedy claims is "paranoid."[97] But, of course, nothing is flipped here. Assigning to women the power of sex, when men in fact have it, has been an important way male supremacy has perpetuated itself. (And in what universe is this not political?) The fact that some women no doubt do feel powerful in this frame proves little more than its metaphysical perfection. As Andrea Dworkin once put it: "When those who dominate you get you to take the initiative in your own human destruction, you have lost more than any oppressed people yet has ever gotten back."[98] Finally, and in this light, Halley's "ambition" that queer politics become more hetero-affirming aspires to precious little.[99] The thoroughly heterosexual, assimilationist value register of most of mainstream gay and queer politics is already nearly total, as I have documented at great length.[100]

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91. DWORKIN, *supra* note 74, at 22.

92. A large and growing body of feminist work critiques the male supremacist bias of the law's "objectivity" in nearly every facet of law. Ann contributed to this criticism. *See, e.g.*, Scales, *supra* note 9, at 718–23.

93. Scales, *supra* note 1, at 404.

94. Halley, *supra* note 88, at 17.

95. *Id.* at 17–18 (internal quotation marks omitted).

96. *See id.*

97. KENNEDY, *supra* note 87, at 143, 145.

98. ANDREA DWORKIN, INTERCOURSE 143 (1987).

99. Halley, *supra* note 88, at 18.

100. *See generally* GILREATH, *supra* note 24, at 77–79, 223.

Halley's recurring insistence that what is "queer" "flips" the male/female structure is delusional. One needs to look no further than gay male pornography for evidence.[101] A popular genre of this pornography is "gay for pay" porn, in which an ostensibly straight man is induced into sex with a gay-identified man by one of two manipulations: either the straight man is persuaded to have sex with the gay man by the mediating influence of a woman, either for promise of sex with the woman (whom he really wants), or because she tells him it turns her on sexually to see him with another man. Or, he is induced into pornography through an exploitation of sheer economic desperation, i.e., by the promise of money, hence the "gay for pay" styling of much of this material.[102] In the first scenario, wherein a straight man is induced to have sex with a gay man because he wants a woman, the intractability of the male/female model, as Halley styles it, should be obvious enough.

The second scenario, in which money serves as a form of force, may need more unpacking. In the system of male supremacy, money is acutely sexual and is, indeed, indistinct from heterosexuality in operation, such that heterosexuality as we know it would cease to exist if the money were extracted from it. As Andrea Dworkin observed,

> Money is primary in the acquisition of sex and sex is primary in the making of money: it is tied into every industry through advertising . . . or items are eroticized in and of themselves because of what they cost. In the realm of money, sex and women are the same commodity. Wealth of any kind, to any degree, is an expression of male sexual power.[103]

"Gay for pay" pornography is in keeping with this general script of male supremacy because what makes sex with straight men sexy is that in each of these cases gay men work out the "objectification" of the straight men in explicitly straight male terms. In other words, this pornography reveals that masculinity follows from the use of money as force, primary in the acquisition of sex, and internalized in gay men as a function of the masculine process taken as the route to value. "A commitment to money as such follows as an obvious and public commitment to the display of

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In 1986, Ann described the hegemonic method of patriarchy as: "[I]ts aims are united within a social fabric by assimilating the subordinated classes into the dominant one, and by allying those classes with it." Scales, *supra* note 39, at 1379. If there is a more lucid description of what is going on in the liberal support of same-sex marriage, I wish someone would clue me in to it.

101. Halley argues that queer theory emerged, at least in part, as an opposition force to the MacKinnon/Dworkin anti-pornography civil rights ordinance. *Compare infra* note 110 and accompanying text, *with* Halley, *supra* note 88, at 26 ("[W]e probably wouldn't have queer theory if there had not been the need for articulate pro-sex opposition . . . to male/female model regulatory ambitions (for example, anti-pornography ordinances).").

102. *See generally* GILREATH, *supra* note 24, at 174–75 (explaining the two manipulations: promises of money or sex with women).

103. DWORKIN, *supra* note 74, at 20–21.

masculinity as an aggressive and an aggrandizing drive."[104] Thus, in both form and function, this "gay" pornography is compulsorily heterosexual, and so is the queer theory that endorses the primacy of its message. No "break" from "homo-supremacy" need be taken.[105] Straight men remain in control ontologically, because their existence as straight men drives the fantasy and shapes its parameters.[106] They are still firmly on top hierarchically because this gay experience is little more than their desires, and the process for achieving them, functionally translated, however briefly, into "queer" form.[107] Gay men have negotiated this "liberation" only on the terms allowed them by the oppressor. A theory aggrandizing this as subversive is a case of The Emperor Having New Clothes.[108] As I have noted elsewhere, "[i]n gay pornography we see what heterosexuality is";[109] in Halley's explication of queer theory, we see it too.

IV. FEMINISM AND GAY LIBERATION: TOGETHER IN STRUGGLE

Ann Scales was a fervent supporter of the anti-pornography civil rights ordinance proposed by Catharine MacKinnon and Andrea Dworkin. The ordinance, to date the only serious legal proposal to deal with pornography's harms, defined pornography as "the graphic[,] sexually explicit subordination" of women, men, children, or transsexuals.[110] Of the effort, Ann wrote:

> It is possible that pornography regulation would cut into the vicious cycle of gender hierarchy. The social construction of gender could change, and that would be to everyone's benefit. Both women and men are significantly eaten up by genderization. The gender hierarchy deprives men of their humanity; it deprives women of their lives.[111]

Radical feminists, like Ann, who have opposed pornography because of the recognition that it is the nerve center[112] of male supremacy, have at-

104. *Id.* at 22.

105. Halley, *supra* note 88, at 18.

106. *See* GILREATH, *supra* note 24, at 173–76 (discussing the masculine archetype).

107. *Id.*

108. *See* HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (Naomi Lewis trans., Candlewick Press 1997). Or, if the reader prefers an analogy better made to high literature, perhaps "a tale / Told by an idiot, full of sound and fury, / Signifying nothing" fits. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

109. GILREATH, *supra* note 24, at 169–70.

110. See MACKINNON, FEMINISM UNMODIFIED, *supra* note 20, at 262, for a discussion of the ordinance. Although MacKinnon and Dworkin proposed their ordinance in slightly different versions at different times, the structure reflected here was unaltered. *See id.*

111. Scales, *supra* note 2, at 32 (footnote omitted). I think Ann would permit me a correction here. Pornography does deprive gay men of our lives in myriad ways. *See* GILREATH, *supra* note 24, at 190–201 (detailing the correlation between an upsurge in "bareback" pornography and spiking HIV infection rates, the risk to performers in gay pornography in terms of sexually transmitted infections as well as substance addiction, and the connection between pornography and pervasive rates of sexual abuse within male-male homosexual relationships).

112. *See, e.g.*, DWORKIN, *supra* note 74, at 24–25. ("The harmony and coherence of hateful values, perceived by men as normal and neutral values when applied to women, distinguish pornog-

tacked its role in the subordination of women *and* men. Gay men, mostly blind to pornography's harms, have not been as quick to see the relationship of "women's issues" to their lives or their politics. But as I noted before, in her analysis of queer theory, Ann gave us this gem: "[A]bortion is the queerest issue there is."[113] Abortion is a sex equality issue, to be sure, but Ann illumines it as a gay liberation issue as well. She wrote:

> One is ineluctably reminded of the ongoing kerfuffle about what "causes" homosexuality . . . . It is convenient to the powers-that-be to portray homosexuality as an unconstrained "choice" that could simply be . . . remedied by the advances of science. Abortion is another context where "choice" is portrayed by opponents as a matter of destructive petulance on the part of women with unwanted pregnancies. In real life, reasons for abortion vary hugely, and simply must not be constrained by some legislature's schedule of acceptable considerations.[114]

Abortion, like pornography, constructs women and men as such. Restrictions on abortion for women (necessarily, since only women need abortions), who have virtually always less say over the when, how, and why of pregnancy in the first instance, is a function of sexual hierarchy. Gender is not irrelevant to the abortion question, and gender's meaning produces men and women in its image.[115] Anti-abortion restrictions operate as sexual politics forming an integral part of the male-supremacist process that makes gender hierarchy—inequality—into social reality. For many, if not most, women seeking an abortion, as Ann pointed out, choice is not how they got there. I am reminded of a line from a Maya Angelou poem that reads: "She stands / before the abortion clinic, / confounded by the lack of choices."[116] The focus on choice or agency, or whatever other convenient legal synonym can be thought of, merely serves to invisibilize the overwhelming force that is ineluctably a part of the environment that produces the need for abortions and the restrictions that limit access to them. This conceit, this fiction of autonomy masking a reality of force, is what keeps male supremacy running like a well-oiled machine. As Adrienne Rich asked, "[W]hose interest is served, and whose fantasies expressed, by representing abortion as the selfish, will-

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raphy as message, thing, and experience. The strains of male power are embodied in pornography's form and content, in economic control of and distribution of wealth within the industry, in the picture or story as thing, in the photographer or writer as aggressor, in the critic or intellectual who through naming assigns value, in the actual use of models, in the application of the material in what is called real life . . . .").

113. Scales, *supra* note 1, at 407.

114. *Id.*

115. This is crucial to understand: Gender hierarchy is never not relevant. Males learn, practice, and affirm heterosexual values because mastery of these values is the only way to win the acceptance of fathers and male peers.

116. MAYA ANGELOU, *Our Grandmothers*, *in* I SHALL NOT BE MOVED 33, 36 (1990).

ful, morally contagious expression of *woman's* predilection for violence?"[117] Following Rich, Ann provided much needed clarification:

> The abortion decision is too much like history-making: it is morally complex, it is often morally compromised, it is a matter of taking responsibility for difficult and sometimes unanticipated results. It is important for the right-wing to describe the abortion decision as capricious. In the context of the oppression of women, arguments against abortion often involve perverse attempts to portray the violated as the violent. . . . But "violent" is precisely what women cannot be, according to the law, and the legal power to do "violence," however narrowly defined, is a credential for the autonomy that the law presumes men and women to possess equally.[118]

Ann illuminated how the seemingly contradictory faces of the "pro-life" movement in fact pose no contradiction at all. While it is true that many members of the "pro-life" movement condemn abortion but "support the death penalty and the moral righteousness of war," there is no actual tension in these positions because "*those* are decisions traditionally made by men in legislatures and situation rooms; a woman *qua* woman just doesn't have the capacity to decide any matters of life and death."[119]

I began this Essay with an explanation of just how far queer theory is willing to go. Taken at face value, it stands for the principle that sexual injuries to gay people are a virtual impossibility. How one can express a devotion to gay/queer people and yet embrace that position is hard to understand. And yet I think Ann, through her careful attention to the abortion question and her linkage of the abortion issue to gay liberation, has given us the building blocks for the best explanation of queer theory's embrace of gender and death.[120]

Gay people have been denied by compulsory heterosexuality the capacity to decide matters of life and death. Queer theory purports to claim that capacity, in the process eschewing anything that smacks of victimization, including, generally, any admission that gay men raped by straight men didn't want what they got. It is a theoretical posture purporting to give gays what male supremacy and its Closet have stolen from us:

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117. RICH, *supra* note 12, at 17.

118. Ann Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 37 (1989).

119. *Id.*

120. Ann wrote that, "[u]ltimately, force and gender are parts of the same death-seeking process." *Id.* at 26. When you couple this with Simone Weil's observation of the kind of "force that does *not* kill, i.e., that does not kill just yet . . . [but rather has] the ability to turn a human being into a thing while he is still alive," you see why those threatened with this force feel they have little alternative but to "imitate nothingness in their own persons." SIMONE WEIL, THE ILIAD, OR THE POEM OF FORCE 4, 7 (Mary McCarthy & Dwight Macdonald trans., Pendle Hill 1983). We also see exactly what queer theory (and liberal theory) risks by invisibilizing force through a rhetoric of "choice" or "performativity." See generally Marc Spindelman, *supra* note 32, at 179–222, for an especially lucid look at how gender and death are equally generative principles for queer theory.

the capacity to choose sexual autonomy. What the queer theorists seem to miss is that they have provided no choice that the dichotomization of the Closet did not already offer: the choice between existential destruction and physical destruction.[121] To miss this is to miss much.

What "academented"[122] theory obscures, pornography makes plain. Gay porn mogul Chuck Holmes said that his legendary porn production company, Falcon Studios, presented characters "who looked like they wouldn't ever do anything but be the best little fellows—the little businessmen, the good members of their community—and all of a sudden they'd just kiss each other, and all hell would break loose, and they'd just try to fuck one another to death."[123] If in pornography straight men are actualized by the fuck, both in the films and in the application of pornographic values in the real world (which civil libertarian defenders of pornography encourage us to think of as two separate spheres), gay men are actualized too, each according to his purpose. What Chuck Holmes elucidates is the stark difference in what this actualization means—the difference in what the fuck means—for gay men submerged in pornography and pornographic culture, fucking is annihilation. And it is more than just self-annihilation; it is mutual annihilation, not merely suicidal, but homicidal.[124] So much for contingency; so much for choice.

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121. MacKinnon, *supra* note 53, at 654–55 ("Whose subjectivity becomes the objectivity of 'what happened' is a matter of social meaning, that is, it has been a matter of sexual politics. One-sidedly erasing . . . violation or dissolving the presumptions into the subjectivity of either side are alternatives dictated by the terms of the object/subject split, respectively. These are alternatives that will only retrace that split until its terms are confronted as gendered to the ground.").

122. *See* MARY DALY & JANE CAPUTI, WEBSTERS' FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE 184 (1987) (defining "academentia" as "*n* : normal state of persons in academia, marked by varying and progressive degrees; irreversible deterioration of faculties of intellectuals" (attributing Diana Beguine with the invention of "academentia")).

123. JEFFREY ESCOFFIER, BIGGER THAN LIFE: THE HISTORY OF GAY PORN CINEMA FROM BEEFCAKE TO HARDCORE 134–35 (2009) (quoting *Falcon: The Bird's-Eye View, How Founder Chuck Holmes Built a Sex-Video Giant,* UNZIPPED, Apr. 13, 1999, at 16, 21 (internal quotation marks omitted)).

Ann Scales understood that death and mass murder were supreme pornographic values enacted by male supremacy on a worldwide scale. "Mount Rushmore is ecologically pornographic. . . . Mount Rushmore portrays nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do." Scales, *supra* note 10, at 95. And then, with regard to the images carved into Mount Rushmore, she added, "Mount Rushmore might as well be sublimely ridiculous. As long as we are defacing, let's add Edward Teller, Ivan Boesky, and Richard Speck." *Id.* at 95 n.2.

124. In most heterosexual pornography, the assumption is that the used female bodies will survive. Thus, as Dworkin notes, "[r]uthless blame—'you provoked me'—is used to encourage the individual and social silence which is the most hospitable environment for the continuation of conquest." DWORKIN, *supra* note 74, at 24. In gay male pornography, by contrast, there is apparently no presumption of survival. As Marc Spindelman explains of gay sexuality, expanding on Catharine MacKinnon's rendering of male supremacy into grammar ("Man fucks woman; subject verb object."): "Man fucks man, man kills man." *See* Marc Spindelman, *Sexuality's Law*, 24 COLUM. J. GENDER & L. (forthcoming 2013) (manuscript at 198) (on file with Ohio State University, Moritz College of Law).

One wonders, given Janet Halley's pornographic reframing of Joseph Oncale's experiences, what she would have said to Konerak Sinthasomphone, a fourteen-year-old victim of Jeffrey Dahmer, who briefly escaped but was returned to Dahmer by Milwaukee police, despite his head

Gay men have our situation, generally on the bottom of male-supremacist hierarchy, propagandized as a choice, in the way that Ann notes—that our sexuality is a function of choice—but in other important ways too. When, as boys, we are tormented and abused by other males, we are told that "boys will be boys" and that if we are going to be so openly gay we should simply expect abusive treatment.[125] When we are sexually assaulted and sexually harassed out of our jobs as adults, we are told by bourgeois law professors that we wanted it and that we should choose to enjoy it. And the pornography in which and through which we are objectified is defended as a choice, too. In fact, we are told it is *our* choice, and when we refuse to accept that, we are told that it is somebody else's choice to objectify us, which also happens to be these same somebodies' free speech or art or fantasy. We are told that their choice to objectify us is more important than our desire not to be an object—not to be their speech or art or fantasy. When we are told that pornography and our objectification in and through it is an idea, or an expression, or a fantasy, we are not told that it is a process. We are encouraged not to see that pornography is a process of objectification. The objectification I am talking about cannot be admitted by most liberals or by queer theory or by other poststructuralist strains that claim to be "pro-sex" because something real is going on here in which choice—at least for those being objectified—is merely an illusion. In order to be objectified, one must first be a subject—a status in which choice is said to reside. But through the process of objectification the subject becomes an object, a thing defined always only by the potential use to which it can be put. Choice is alien to this frame. A chair does not choose to be sat upon. A car does not choose to be driven. They are objects existing merely as an extension of their use. They are made for this use. To be objectified for the purpose of sex, which is to be made for sex, which is to be made into a "sex object," is to be in exactly the same place as the chair or the car.[126]

Thus it is not enough to say simply that pornography *depicts* gay men—those in pornography and by extension the majority of gay men who are overwhelmingly the consumers of pornography[127]—as wanting

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bleeding from the obvious wounds where Dahmer had attempted to drill holes in his skull with a power drill, because the officers believed they were witnessing typical gay sex gone slightly awry. *Milwaukee Panel Finds Discrimination by Police*, N.Y. TIMES, Oct. 16, 1991, at B8; GILREATH, *supra* note 24, at 200. Let's imagine (as queer theorists like to do) that Sinthasomphone, a Laotian immigrant who spoke nearly no English, made it to Harvard and encountered queer legal theory in all its macabre grandeur. Should he have taken Halley's advice to embrace this torture—experienced as sexually arousing by Dahmer, thus as sex—to the point of death? This is not a rhetorical question.

125. *See* Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (internal quotation marks omitted).

126. *Accord* MACKINNON, FEMINISM UNMODIFIED, *supra* note 20, at 173 ("A sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure, such that both the looking—the quality of the gaze, including its point of view—and the definition according to use become eroticized as part of the sex itself.").

127. *See* GILREATH, *supra* note 24, at 170 n.3. Of the "multibillion dollar per year business" that is pornography, "revenues from sales of gay male pornography constitute approximately half of

to be humiliated, subjected, battered, possessed, ultimately sexualized—*to be* sex—because here, again, the conceit of choice is preserved. But an object exists only as a function of its use. Pornography is a process of objectification that, by definition, obliterates the choices of those pornographed to make it and those who internalize its meaning through consumption of its message.[128] We are made things. Things do not choose. Things are acted upon according to their purpose. To see choice here is an option available only to a very few—usually, it seems to me, an artifice contrived by the patriarchalists and those most useful to them for perpetuating the system, mostly academics and the criminally insane. One thinks here of the various theories of how the Jews, systematically slaughtered by the Nazis, went willingly to the ovens.[129]

Once objectification has been accomplished, the dominant succeed ontologically on their own terms: the force necessary to sustain the system is invisibilized. Pornography is a process by which heterosexuality remains compulsory, no less for gay men than for anyone else, since in gay pornography the images we see of gay sex are merely reflections of the heterosexual norm. The only fantasy involved is the fantasy that we choose any of it. You see, for all the queer theoretical posturing about role choice, "topping" and "bottoming," fucker or fuck-ee, a sexuality locked in genderized hierarchy through eroticized dominance and submission permits no real choice. In pornography—on film and in everyday life—we do not choose a role; we are assigned a role. And as MacKinnon noted, "Gender is an assignment made visually."[130]

Building on Simone Weil's observation that force "is that *x* that turns anybody who is subjected to it into a *thing*,"[131] Ann Scales observed that "[t]he patriarchal combination of force and gender accounts for our frustrating experience of patriarchy as a house of mirrors as well as an imposing monolith. . . . It requires that men thingify women in order to be worthy to be thingified themselves."[132] And anyhow, if being a "sex object," or if being pimped on film or otherwise is such a great "choice," one has to wonder why more straight men aren't doing it. Or, for that matter, why more tenured law professors aren't "choosing" it. As

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[the profit]." *Id.* Since estimates putting us at around ten percent of the total population are considered generous, this fact is really quite astonishing. *Id.*

128. *See id.* at 130 ("The oppressed person begins to wonder if he, indeed, may be that thing that his oppressors say he is. Dehumanization is a very effective means of changing someone into nothing because it ensures that the messages one hears from *others* about oneself eventually become the messages one hears from oneself about oneself, and that is all the more damaging.").

129. *See* Samuel P. Oliner, *Jewish Heroes and the Wilhelm Bachner Story*, HIDDEN CHILD (Anti-Defamation League of B'nai B'rith, New York), 2012, at 7, 19–20 (discussing the myth of Jewish passivity during the Holocaust and noting that "[t]he distortion by anti-Semites, and even by some Jews, that Jews didn't care about themselves or their family and that they walked passively to their death, is far from the truth. It is a falsehood that needs to be corrected.").

130. MACKINNON, FEMINISM UNMODIFIED, *supra* note 20, at 173.

131. WEIL, *supra* note 120, at 3 (emphasis added).

132. Scales, *supra* note 118, at 26.

Ann Scales explained: "Being on the bottom of a hierarchy is not a pose, it is not a choice, there is nothing safe about it, and it only looks brave and defiant to those for whom its choicelessness and violation and dead-ended chances look romantic and elevated because they are not real."[133]

Queer theory, with its celebration of sexual violence and death and its pointed rejection of law as a means to change, is anchored in this kind of unreality because it is detached from gay people's experiences. This is not to say, of course, that those people postulating queer theory are not entitled to a claim to experiences that matter or are real, but only to say that queer theory proceeds from a posture that is swallowed by its particularities. Until very recently, gay people have not had much of a claim to choice or to the law. Instead, choice and agency and, indeed, law itself, have been only alien concepts. If it weren't for the fact that queer theory comes primarily from those who have had a choice, or at least are now at the apex of choice, being mostly in the academy, the surrender posited by queer theory might be an understandable response to a lethally anti-gay culture. Instead it is a willful abandonment of law and the state by people who should know better. When law is thus abandoned, left to the devices and prerogatives of the already powerful, that power is consolidated and strengthened. How can it escape notice that in this environment the physical force to which Joseph Oncale was subjected, and to which countless women and gay men are subjected daily, *is the law* and, thus, *is reality*?[134] Queer theory is, in this respect, either remarkably cruel or its progenitors are really quite far removed from the realities most women and gay people face. Force and sexual abuse seem a lot less like a lovely academic game of charades when you are the one with the fist in your face.[135] As an opposite of queer theory, "A feminist theory and practice attempts to account for the fracturing of reality, and then to make reality whole again."[136]

Ann once told me that what drew her to the law was the law's ability "to make itself stick." I have always found that explanation incredibly appealing. It is this power of the law to change circumstances and power realities that make it a necessary tool for gay liberation, not something to run away from or satirize. Several years ago, Jamie Nabozny, the gay plaintiff in *Nabozny v. Podlesny*,[137] the case establishing that same-sex sexual harassment of one student by another in school, when the school administration discriminates in its response on the basis of sexual orien-

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133. Scales, *supra* note 39, at 1392.

134. *Compare* GILREATH, *supra* note 24, at 137–39 (discussing violence against gays generally), *with id.* at 199 (discussing the high degree of physical and sexual violence within same-sex relationships).

135. ANDREA DWORKIN, LIFE & DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 118 (1997) ("There's nothing abstract about it. This is a war in which his fist is in your face.").

136. Scales, *supra* note 118, at 52.

137. 92 F.3d 446 (7th Cir. 1996).

tation, could be the basis for a sustainable constitutional suit,[138] told me how much his victory in that case meant to him. What the law did for Nabozny was to give him back the hope his abusers had taken from him. It allowed him to go from a sullen, suicidal, defeated youth to the remarkably well-spoken, confident, witty grown man I met. It also gave him the drive to devote his life to other victimized gay youths. It gave him back his humanity. And what Nabozny's case did for gay children was to give them a tool to reclaim this same hope, without which there is no humanity. Any theory that purports to have as its focus the lives and hopes of the sexually marginalized can do nothing if it cannot do that. Right now I can hear Ann saying, "I'm [o]nly [g]onna [t]ell [y]ou [t]his [o]ne [m]ore [t]ime"[139]: A theory not good in practice is not a good theory.[140]

CONCLUSION

In April 2005, only a little before Ann delivered her critique of queer theory at Emory Law School, Andrea Dworkin died. In the last couple of paragraphs of that paper, Ann remembered her friend. It is hard not to see the parallels between these two women, both of whom were brilliant, tough, warm, empathic, and humble. Ann wrote:

> Andrea Dworkin died the same week as Pope John Paul II. Millions of people mourned publicly for the Pope. I wished that there were a women's St. Peter's Square where those of us who loved and respected and owed so much to Andrea could gather to grieve. This will have to do.[141]

I am grateful that Ann is getting this Symposium, which she deserves. It's something that Andrea, to date, hasn't gotten, at least not in the United States.

Ann continued, with Andrea's memory as context:

> There is nothing to be gained by portraying any particular experience of oppression as inevitable or primary. At the same time, there is much to be lost from refusal to recognize the regularity of some kinds of injuries. There is no reductionism or essentialism, nor anything intellectually passé about recognizing the suffering that women undergo as women, simply because they are women. Ditto for the injuries suffered by transgendered people because of that status, and by gay people because of that status, and by anyone else who isn't measuring up to the dictates of sacred and narrow institutions. We should always engage in debates about the difficulty of grounding

138. *Id.* at 457–58.

139. Scales, *Disappearing Medusa*, *supra* note 20, at 36 n.10.

140. *See* MacKinnon, *supra* note 50, at 13 ("It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?").

141. Scales, *supra* note 1, at 409.

> normative claims, and the dangers of normativity being transformed into normalization. Those disputes will never be over. In the meantime, however, we should put more energy into opposing demonstrable instances of injustice.[142]

I can't really think of a better way to close this Essay, except to remember a facet of Ann's life that she definitely would have wanted remembered: Ann never let anyone forget that she was a Westerner—an Okie—a real cowgirl. As a young woman, in fact, she was a successful rodeo rider, earning her among her close friends the honorific title "Rodeo Gal." These experiences gave her an authentic pioneer spirit—a real freedom of mind and spirit that made all of us who came close to her a little freer. Certainly, experiencing her freed me to say all of this. Perhaps now Ann is freer still, for as Ann's dear friend and mine, Jane Caputi, recently reminded me, energy does not "pass away," as we like to say, but is simply transformed.[143] So, in the words of Ann's beloved Kitty MacKinnon, "precious rodeo gal, ride on."[144] As for me, I'll keep on doing my best to live what Ann taught me, which is to say: I'll see you on the barricades, which is exactly where Ann wanted us to be.[145]

142. *Id.* at 409–10.

143. *See* Jane Caputi, Professor, Fla. Atl. Univ., Remarks at the University of Denver Sturm College of Law Symposium Honoring the Work of Ann Scales: Ann Scales on the Patriarchal/Pornographic Paradigm, with Meditations on the Ongoing Medusean Makeover (Mar. 30, 2013).

144. E-mail from Catharine MacKinnon to Ann Scales (Jan. 12, 2009, 6:58 AM) (used with permission).

145. These are the words with which Ann closed her remembrance of Andrea Dworkin. Scales, *supra* note 1, at 410 ("See you on the barricades, where Andrea would want us all to be.").

FLEXIBLE FEMINISM AND REPRODUCTIVE JUSTICE: AN ESSAY IN HONOR OF ANN SCALES

LYNNE HENDERSON[†]

ABSTRACT

Professor Ann Scales began her distinguished career by taking feminism and reproductive justice seriously. She became a leading feminist voice and influence on a number of topics. In later years, she returned to concerns about reproductive justice by presciently emphasizing the need to preserve women's access to abortions.

This Essay discusses Professor Scales's concerns and feminist method and then turns to reproductive justice. The Essay notes that, with Scales, a right to abortion is foundational for reproductive justice. The Essay then examines the increasing narrowing of access to abortion through law. The Essay next examines a current crisis over access to contraception, including arguments that some contraceptives are abortifacients and therefore should not be available and the debate over insurance coverage for contraception under the Affordable Care Act.

The Essay concludes with an examination of what reproductive justice advocates can do to stop what appears to be a steady undermining of rights to abortion and contraception, drawing in part on Professor Scales's concern with always examining women's voices and using political as well as litigation strategies.

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INTRODUCTION

The loss of Professor Ann Scales is incalculable. Her contributions to Feminist Legal Theory, practice, and education cannot be overstated, as participants in this Symposium can all attest.[1] With a humanity and honesty that will be sorely missed, she bravely worked on many subjects throughout her all-too-short life, negotiating dangerous territories among feminists, LGBT activists, and legal scholars. She never deserted feminism as a worthwhile and, forgive me, essential lens through which to view the law and the world as a necessary ground for study for scholars and lawyers.

This Essay examines one of the primary issues of concern to Professor Scales (hereinafter Ann, if it is not too disrespectful) throughout her career: the fact that most females, and no males, have the ability to become pregnant and bear children. This fact, that females after a certain age have the ability to reproduce human life, poses enormous existential questions, but that is not my concern here. My concern is more concrete—I think Ann would like that term—it is that after a brief moment in time that gave females in the United States more power over their reproductive capacities than they had ever had, those who oppose women's power to reproduce have deployed the law again and again to deny them choice and their capacity to decide when and how to bear children.

The current crisis over abortion in many states, and the fights over provisions for contraception under the Patient Protection and Affordable Care Act (ACA),[2] are not only historically familiar, but also encompass

1. *See, e.g.*, Kathryn Abrams, *The Outsider Within: The Radical, Not-So-Scary Feminist Jurisprudence of Ann Scales*, 91 DENV. U. L. REV. 23 (2013); Patricia A. Cain, *In Her Own Voice: Ann Scales as Philosopher, Storyteller, Feminist, and Jurisprude*, 91 DENV. U. L. REV. 53 (2013); Jane Caputi, *Ann Scales "Imagines Us": From the Eco-Pornographic Story to the Medusan Counternarrative*, 91 DENV. U. L. REV. 65 (2013); Jennifer Chacón, *Feminists at the Border*, 91 DENV. U. L. REV. 85 (2013); Nancy Ehrenreich, *On "Having Fun and Raising Hell": Symposium Honoring the Work of Professor Ann Scales*, 91 DENV. U. L. REV. 1 (2013); Katherine Franke, *Taking a Break from Acrimony: The Feminist Method of Ann Scales*, 91 DENV. U. L. REV. 41 (2013); Shannon Gilreath, *Feminism and Gay Liberation: Together in Struggle*, 91 DENV. U. L. REV. 109 (2013); Tamara L. Kuennen, *"Stuck" on Love*, 91 DENV. U. L. REV. 171 (2013); Catharine A. MacKinnon, *Raising Hell, Making Miracles: The Everlovin' Legal Imagination of Ann Scales*, 91 DENV. U. L. REV. 13 (2013); Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 DENV. U. L. REV. 187 (2013); Robin Walker Sterling, *On* Surviving Legal De-Education*: An Allegory for a Renaissance in Legal Education*, 91 DENV. U. L. REV. 211 (2013).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

one of Ann's major concerns. I deeply regret that Ann is not here for me to thank her personally for bringing reproductive issues back to my attention in a powerful way and to guide all of us on the difficult road ahead.

The term reproductive justice seems to encompass all that Ann cared about: it captures all the legal, social, cultural, and economic concerns raised by women's ability to give life. The term evades the dichotomy of "pro-life" (whose?) and "pro-choice" (under what circumstances?). It stands for the proposition that women should not be forced into stereotyped roles or treated unequally because they bear children. It escapes the frame of either/or that Ann opposed. And, from my point of view, that dichotomy was always a loser: Who can be "anti-life" at a general level, even if "pro-choice" fed into the increasingly atomistic discourse of the late twentieth century? Those frames created a false dichotomy of benefits and burdens that consistently overlooked females. Ann was always against false dichotomies.

Part I of this Essay connects Ann's work and advocacy to reproductive issues. Part II discusses the current crisis status of legal, safe, and rare abortion under U.S. law, long a concern of Ann's. Part III discusses renewed resistance to access to birth control, an issue too easily shrugged off after many victories in courts over forty years ago. Part IV asks what we, as feminists, can do to restore reproductive justice for females.

However one defines feminism, I simply do not believe that anyone can deny that the disadvantages females encounter by virtue of their capacity to give life are feminist issues. Men created the religious beliefs and secular laws about women, sexuality, and human reproduction throughout our history. While we cannot ignore the role(s) of men in ensuring reproductive justice and freedom, we must focus on the unique experiences of females and the effects that regulating or prohibiting abortion and contraception have on women, their lives, and their relationships to others. If we conscript men of goodwill in this fight, all to the good.[3] This is especially crucial now, as I hope to make clear in the following Essay.

I. SCALES AND REPRODUCTIVE JUSTICE

From the beginning of her career as a Harvard Law student, Ann was concerned with reproductive justice for women. She just knew that the Supreme Court's decision in *Geduldig v. Aiello*[4] was wrong and made no sense.[5] I remember seething at the notion that there was no vio-

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3. I know some feminists who believe men support abortion so they can maintain sexual access to women. That may be a "masculinities" problem. *See* McGinley & Cooper, *supra* note 1. There are men who pressure women to have abortions, but others who do not and who support their partners in their choices.

4. 417 U.S. 484 (1974).

5. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 376–77 (1981).

lation of the Equal Protection Clause because, as the opinion infamously noted, a state law that discriminated against pregnant women in disability coverage was not "discrimination on the basis of sex" because there were "pregnant women and nonpregnant persons."[6] I seethed, but Ann did something about it: *Geduldig* led her to found the *Harvard Women's Law Journal* in order to give women a voice in the law and to commit herself to feminism and gender justice.[7]

Ann's first article, *Towards a Feminist Jurisprudence*, specifically criticizes *Geduldig* for denying women equal status as human beings.[8] Her next article, *The Emergence of Feminist Jurisprudence: An Essay*, noted that legal feminists "have, for example, squandered over a decade discussing what legal standard could have prevented the outrage of *Geduldig* . . . ."[9] She argued that the problem was "not that the Supreme Court used the wrong legal standard. The problem was much more serious: It was that our highest court cavalierly allowed California to disadvantage women with respect to their reproductive capabilities."[10] In her clear statement about reproductive justice, she noted that the Court "endorsed a modern version of a centuries-old method of domination" that legal feminists failed to address adequately.[11] Unless feminists confronted the built-in gender bias of the law and the habit of the law to exclude women's experiences and voices, the law would not change. At that time, many believed "liberal feminism" could not get the job done because it was part of a pre-existing legal vision of the human that had excluded women. For many of us, including Ann, "dominance feminism," as grounded in Catharine MacKinnon's work, held the promise of "freedom from systematic subordination because of sex."[12] The antisubordination path does not depend on a theory solely grounded on male dominance, however. An antisubordination approach also creates opportunities to examine other forms of oppression and advantage based on race, LGBT identity, and class, which fits much of Ann's work.

A. Scales's Flexible Feminism

Ann may have started with an outrage over inequalities in law based on women's reproductive abilities, but she moved on to use feminism to critique vast swaths of law, from causation in torts to the growth of militarism in the United States, from pornography and sexual violence to

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6. *Geduldig*, 417 U.S. at 496 n.20, 501.

7. *Ann C. Scales (1952–2012)*, U. DENV. STURM C. L., http://www.law.du.edu/index.php/profile/ann-scales (last visited Jan. 3, 2014).

8. Scales, *supra* note 5, at 377.

9. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1398 (1986).

10. *Id.* at 1399.

11. *Id.*

12. *Id.* at 1395 (citing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117 (1979)).

Queer Theory and beyond.[13] Because she was committed to what I term a "flexible feminism," she deployed her intellect and respect for others in a way that I believe set an example for anyone who refused to abandon the "f-word" and who pursued gender justice.[14]

For Ann, feminism was broadly defined as those who believe women (or females of any age) are full human beings who should have full rights and responsibilities and whose experience and suffering should matter in the law. The law had ignored women for centuries, because it was a male field, and it was feminist jurisprudence's duty to introduce women's voices and experiences. Although Ann was strongly influenced by Catharine MacKinnon's work, she never asserted that there was any one path or "right way" to "do feminism."

For Ann, feminism became a "method" based on women's experiences as a gender/sex category, rather than an "essentialist enterprise."[15] While it is true that the original feminist legal scholars and litigators did not attend to the other dimensions of subordination of women based on race and class—because they were drawing on what they "knew" through consciousness raising—at least they were in positions privileged enough to start giving women a voice in the law. Thus, Ann did not label them as hopeless or take an aggressive stance toward them in her work. She saw that we tangled ourselves in knots over issues,[16] only to let the male-dominated system remain in power. Despite hurtful disputes and fragmentations about what feminism was or was not, and whether we should just forget feminism altogether, Ann saw through our respective myopias and reconciled what she could. In her articles, she was respectful and thoughtful about divisions as they developed.

I agree with Ann that the category "female" should not be abandoned. For example, in the introduction to her book published in 2007, she stated that "the feminism I know is concrete, antiessentialist, contex-

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13. *See, e.g.*, Ann Scales, *"Nobody Broke It, It Just Broke": Causation as an Instrument of Obfuscation and Oppression*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 269, 269–86 (David M. Engel & Michael McCann eds., 2009) [hereinafter Scales, *"Nobody Broke It, It Just Broke"*] (discussing causation and gender bias in torts); Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 369–93 (2005) (criticizing the gendered nature of militarism and condemning war); Ann Scales, *Poststructuralism on Trial*, *in* FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 395, 398–99 (Martha Albertson Fineman et al. eds., 2009) [hereinafter Scales, *Poststructuralism*] (describing her work with Equality New Mexico in amending the state Human Rights Act to include "sexual orientation" and "gender identity" (internal quotation marks omitted)). *See also* other essays for this Symposium cited *supra* note 1.

14. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 9 (2006) (internal quotation marks omitted). In her book, *Legal Feminism: Activism, Lawyering, and Legal Theory*, Ann explained why "feminism" is the most useful term for female-focused study and analysis. *Id.* at 83 (internal quotation marks omitted).

15. Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 HARV. WOMEN'S L.J. 34, 38–39 (1997); SCALES, *supra* note 14, at 8.

16. SCALES, *supra* note 14, at 8.

tual, instrumental, eclectic, and open-minded."[17] She eschewed orthodoxy in favor of what she termed "pragmatism" in many of her works. My interpretation is that she was less a formal philosophical pragmatist in her works—although as a person trained in philosophy, she certainly knew the pragmatic philosophical literature—and more a "pragmatist" in the sense of political flexibility and practicality: If something does not work, abandon it; do not cling to a theory or principle if it does not fit facts or reality; learn from experience. In other words, she was a practical and flexible scholar, teacher, and lawyer.

Ann learned and grew; she saw things from different points of view; she changed or modified her positions when she thought she had been mistaken or had not prevailed. She recognized that human knowledge is never absolute and that facts and circumstances change. Despite her Humean skepticism, or a skeptical attitude towards empiricism, she was willing to venture into that field in her later writings.[18] Throughout her life, she never stopped growing in understanding, while remaining insistent that the category female matters.

Ann did adhere to one basic principle or moral position: Human suffering is deeply wrong. Law should not cause human suffering. And throughout her life, she continued to insist suffering was wrong. She stressed that "[s]olutions once embraced can cease to be useful or can be coopted by others for bad ends."[19] Thus, there are no ultimate "right" or "wrong" answers. Her perspective reflects her pragmatism or practicality: When what worked once for violence against women or rape reform as a step forward at a latter time might have been co-opted or abused by existing legal habits.[20] For Ann, paying constant attention to developments and gendered hierarchies was crucial.

It is no wonder her feminist "sensors" were out as anti-abortion and anticontraception forces started to pick up political influence in the United States, just as other issues she cared about were also exploding. Thus, in some of her later work, she returned to the issues of pregnancy and gender, especially as the somewhat unclear right to an abortion became increasingly threatened.

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17. *Id.*

18. *See* Scales, *"Nobody Broke It, It Just Broke," supra* note 13, at 274–75 (noting empirical evidence is "never . . . enough" for feminists or anyone challenging power).

19. SCALES, *supra* note 14, at 111.

20. *See* ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013) (critiquing and examining unanticipated consequences of rape reform; noting new areas that developed and arguing for addressing these issues); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9–17, 28 (2012) (critiquing domestic violence reform and unintended consequences; making suggestions for new approaches in response).

B. Scales's Concern for Reproductive Justice

In her book on feminist jurisprudence, and her chapter, *Poststructuralism on Trial*, Ann returned to the theme of reproductive justice.[21] She emphasized the need for legal feminists and queer theorists to turn their attention back to abortion rights.[22] In her book, she used the issue of abortion to illustrate how feminist legal methods could apply to a major legal area involving gender. While writing, "abortion [is not] an end in itself," she said "[it] is a necessary option for now, and feminists should portray it as such."[23] Access to abortion is so intertwined with women's lives and opportunities, including efforts to combat gender stereotypes and stereotypical role assignments, it simply cannot be ignored as an integral part of women's lives.[24] And, as I shall discuss in more detail later, she was correct in observing that, "winning abortion cases is not nearly enough . . . . If the federal right goes away, the matter will move back to the states and the streets."[25] Ann presciently concluded that "[t]his is one of those situations where I suspect I'll tire political muscles that I didn't know I had."[26]

In *Poststructuralism*, she urged that "the right to abortion . . . is the most critical solidarity imperative at the moment."[27] She envisioned a link between feminists and queer theorists that had not existed before. Because abortion is so linked to disciplining the body, recognizing full sexual equality, and the valuing of certain lives over others because of gender, she argued, feminists and queer theorists have many interests in common and should work together in solidarity to preserve the rights of women to obtain safe, legal abortions.[28] Solidarity among those oppressed because of gender and sexuality was not only possible, it was "the only viable option for progressive people."[29]

I agree with Ann that reproductive justice is a core issue for feminist work, broadly defined as working to resist and overcome subordination and oppression of females. First, abortion and access to contraception have been the way for women in the United States and throughout the world to be safe sexual beings without being forced into a role or status.[30] Forcing women to bear children at whatever cost to them places

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21. SCALES, *supra* note 14, at 147–51; Scales, *Poststructuralism*, *supra* note 13, at 407–10.
22. *See* Abrams, *supra* note 1, at 36–37.
23. SCALES, *supra* note 14, at 112.
24. *Id.*
25. *Id.* at 114.
26. *Id.*
27. Scales, *Poststructuralism*, *supra* note 13, at 407.
28. *See* SCALES, *supra* note 14, at 148–49.
29. *Id.* at 147.
30. *See* NANCY L. COHEN, DELIRIUM: HOW THE SEXUAL COUNTERREVOLUTION IS POLARIZING AMERICA 9–16 (2012) (describing reactions to the "sexual revolution" started by the birth control pill as being based in "traditional family" values); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 92–94 (1984); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 439–46 (2013) (discussing stereotypes and roles as well as Luker's work);

them back into stereotyped roles and imposes duties on them no men have ever had to bear. Perhaps the core issue is whether females should be required to be "mothers" or bear children by the laws still shaped mostly by men. Even with adoption as a possible choice once the baby is born, forcing women to become pregnant and to carry a pregnancy to term against their own decisions is a denial of a woman's full human status, because someone else has determined she must give her life and body to another being—presumably because they doubt her full human capacities as a moral and competent decision maker.[31] Abortion opponents also argue that the regret of women who have had abortions justifies prohibition.[32] Opponents omit the grief women may experience in giving up their babies for adoption and the harms to adoptees themselves. Moreover, many infants—especially mixed-race, minority status, and disabled infants—may never be adopted.

By focusing on *Roe*, Ann was perhaps not quite as explicit as she could have been about just how much the right to obtain an abortion had already eroded when she wrote. Perhaps she believed, as she mentioned, that *Maher v. Roe*[33] and *Harris v. McRae*,[34] in which the Court held that there was no right to government-funded abortions for poor women reliant on government healthcare, had already substantially eroded abortion rights. She probably was also more than aware that in those early post-*Roe* years, the Court permitted states to prohibit access to abortions in publically funded hospitals, even when the affected woman could pay full costs and the state would not have to pay for the procedure.[35] Unfortunately, she did not really develop any arguments about the continuing erosion of abortion rights after the decisions in *Planned Parenthood v. Casey*[36] and *Gonzales v. Carhart (Carhart II)*.[37]

Jack M. Balkin, *Balkin, C.J., Judgment of the Court*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 31, 41, 45 (Jack M. Balkin ed., 2005) (presenting a "revised" opinion for *Roe v. Wade*); Reva B. Siegel, *Siegel, J., Concurring*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra*, at 63, 76.

31. *See* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1628–30 (1987) (discussing that women are "somehow blameworthy" and have "'odious' motives" (quoting Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 175 n.49 (1985))); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV 1569, 1569, 1621 (1979) (arguing Good Samaritan laws should not require such personal sacrifices and articulating non-subordination principle); Robin West, *West, J., Concurring*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 30, at 121, 130 (discussing Good Samaritan laws); *see also* Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 492 (2013) (noting *Carhart II*'s doubt about women's ability to recognize the goodness of pregnancy until after the abortion occurs).

32. *See infra* p. 164 and note 147.

33. 432 U.S. 464, 464 (1977) (upholding state's refusal to fund abortions for poor women).

34. 448 U.S. 297, 302, 326 (1980) (upholding the so-called Hyde Amendment prohibiting Medicaid funding for abortions for poor women unless their lives were at stake or, in this iteration, the pregnancy was a result of rape or incest).

35. *See* Poelker v. Doe, 432 U.S. 519, 521 (1977) (upholding ban on abortions in public hospitals in St. Louis); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 491–92 (1989) (upholding ban on use of public hospitals and facilities for abortions in Missouri).

36. 505 U.S. 833, 874–76 (1992) (upholding all but one restriction on abortions under Pennsylvania law and adopting an "undue burden" test for state regulation).

II. THE EROSION OF ABORTION AS PART OF REPRODUCTIVE JUSTICE

Those who support abortion as part of reproductive justice have lost so much ground in the past few years that *Time Magazine* recently published a cover story on the erosion of abortion rights.[38] Indeed, countless news stories have appeared in the past year noting numerous new state restrictions and virtual, if not total, attempts to abolish abortion after the 2012 elections. When *Time Magazine* declares that we are worse off than we were forty years ago, when the Court held 7–2 that women had a liberty right or interest in access to abortion in *Roe*, we should be alarmed. This Part discusses the steady erosion of protections for women that has occurred.

Casey undermined the strength of a woman's liberty interests in abortion, subordinating those interests to the "[s]tate's profound interest in potential life" from conception—whatever that means.[39] "[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures *do not further a health interest*."[40] Therefore, states could go far in promoting "life" over women's health and physical, psychological, and social well-being.

Abortion opponents have used *Casey's* weakening of a woman's "interests" in obtaining abortions and its increased focus on fetal and states' interests and rights to justify increasing restrictions on abortion. In *Casey*, three Justices set the standard of review for abortion regulations: Regulations that do not impose an "undue burden"[41] or that were not enacted for the "purpose or effect of presenting a substantial obstacle" to a woman's access to abortion[42] are constitutional. The three Justices undertook a cursory review of a number of Pennsylvania's regulations, and ignored the district court's factual findings with one exception: The opinion drew heavily on the district court's fact-finding and other information about domestic violence to hold that obtaining the consent of a husband was an undue burden because of dangers married women might face.[43]

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37. 550 U.S. 124, 132, 166 (2007) (upholding the federal "Partial-Birth Abortion Ban Act of 2003" as prohibiting a certain late-second trimester procedure as, I guess, within the Commerce power. I say "I guess" because Justice Kennedy's opinion for a 5–4 Court only adverted to congressional power to regulate under the Commerce Clause). The Court had struck down a state's ban on all partial-birth abortions in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Id.* at 922.

38. Kate Pickert, *What Choice?: Abortion-Rights Activists Won an Epic Victory in* Roe v. Wade. *They've Been Losing Ever Since*, TIME, Jan. 14, 2013, at 38.

39. *See* 505 U.S. at 878. *From conception* could mean once an egg is fertilized or when there is implantation in the uterus. As untold—and unknown—numbers of fertilized eggs never reach implantation for reasons beyond birth control, such as a regular menstrual cycle or other factors, it seems surreal to say conception begins at fertilization.

40. *Id.* at 886 (emphasis added).

41. *Id.* at 874.

42. *Id.* at 878.

43. *See id.* at 887–98. The Justices also mentioned the history of legal subordination of married women as a factor in striking this provision, providing a hint of equality concerns. *Id.* at 897.

The three Justices looked at each individual regulation separately, rather than noting the cumulative effects that so many regulations would have in creating obstacles to abortion. Thus they myopically overlooked the coercive effect that the regulations as a whole could exert on women. Waiting times, travel requirements, requirements that doctors tell women the risks of abortion and childbirth along with the "probable . . . age of the unborn child[,]"[44] parental notification requirements (as long as there was some form of "judicial bypass" for minors),[45] the requirement that women hear readings on the "father's duty" to support the child even if the pregnancy was caused by rape,[46] and everything else—although clearly intended to create obstacles to abortion—passed constitutional muster. Moreover, the state could prohibit abortions altogether once the fetus became "viab[le]" unless the woman's life or health were at stake.[47]

Exactly what "the life or health" of the woman meant—or means—remains unclear.[48] Perhaps worse, the three Justices implied that women could not comprehend the "full consequences" of having an abortion and suggested that women would be psychologically devastated unless the state mandated that doctors inform them of the nature of the procedure, the age of the fetus, and the loss of life involved.[49] The arguments of anti-reproductive rights advocates about the harm of abortion to women, and judicial doubt about women's moral decision-making capacities became part of the Court's reasoning, if not the specific "law," as *Carhart II* illustrates.

In *Carhart II*, the Court upheld the Federal Partial-Birth Abortion Ban Act of 2003, which prohibited the performance of one type of procedure used in late-second trimester abortions.[50] Not only did Congress have the power to regulate abortion, presumably under the Commerce Clause, but also Justice Kennedy's opinion made it clear that he doubted women's capacity to engage in moral decision making. Congress could step in because women were not moral agents who could make decisions about the procedure used.[51] So much for "informed consent"! The majority seemed to take note of abortion opponents' co-optation of the argument feminists had used that women are harmed by unwanted pregnancy by observing women might be harmed by having had an abortion, espe-

44. *Id.* at 881 (internal quotation marks omitted). I dispute that *in utero* human development can be reduced to this image. A fertilized egg is not an unborn child.
45. *Id.* at 946.
46. *Id.* at 903.
47. *Id.* at 861, 879.
48. *See id.* at 866, 878–80 (concluding that the interpretation of the circuit court was "sufficient[]").
49. *Id.* at 882.
50. Gonzales v. Carhart (Carhart II), 550 U.S. 124, 124, 168 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012)).
51. *See id.* at 159.

cially of this rare type, instead of carrying the pregnancy to term and giving birth.[52]

Since the Court decided *Casey* and *Carhart II*, opportunistic state legislatures and governors have enacted a proliferation of restrictions on abortions and abortion providers. .[53] The recent trends to require ultrasounds, to require doctors to "show the pictures" from the ultrasounds to women in the interests of "informed consent,"[54] and so on, are troubling. Trends in many states require doctors to tell women that the fetus is a full human being from the time of conception—in some laws, from the time of fertilization, not implantation[55]—and increasingly regulate abortion clinics on such matters as hall space and medical technologies in order to force them to close.[56] In several states now, doctors who perform abortions must be admitted to practice at a local hospital, but there are no hospitals that give these doctors admitting privileges.[57] Most recently, several state legislatures have passed laws prohibiting doctors from performing abortions once a fetal heartbeat can be detected—at six or twelve weeks, depending on how intrusive the procedure used to hear it is—effectively criminalizing even first trimester abortions. North Dakota's legislature passed a ban on abortion "if a fetal heartbeat can be detected, or as early as six weeks into a pregnancy."[58] Wisconsin recently joined this group of Republican-controlled states.[59] "Supporters say their goal is to challenge the Supreme Court's 1973 *Roe v. Wade* ruling . . . ."[60] Arkansas passed a ban on "most abortions" after twelve weeks "when a fetal heartbeat can be detected using an abdominal ultrasound."[61] Texas has enacted restrictions perhaps making many abortions

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52. *See id.* at 159–60; *see also* Bridges, *supra* note 31, at 479–80 (discussing the effectiveness of the argument in *Carhart II* that abortion harms women); Cahill, *supra* note 30, at 439–46.

53. John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 27, 2013, at A1.

54. See Michael P. Vargo, *The Right to Informed Choice: A Defense of the Texas Sonogram Law*, 16 MICH. ST. U. J. MED. & L. 457, 458 (2012), for an article that argues this is good for women, does not harm them, and helps in making a moral choice.

55. *See* H.B. 2253, 85 Leg., 119 Sess. (Kan. 2013).

56. Associated Press, *Abortion Clinics Face Strict Rules Under New Bill*, S.F. CHRON., Apr. 4, 2013, at A7.

57. Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416, 421–24 (S.D. Miss. 2013) (enjoining enforcement of law requiring admitting privileges as an undue burden because women would have to leave the state); Michael Martinez & Greg Botelho, *Alabama Gov. Robert Bentley Signs Law Raising Requirements for Abortion Clinics*, CNN, http:/www.cnn.com/2013/04/09/politics/alabama-abortion-law (last updated Apr. 9, 2013, 19:05 EDT) (describing Alabama law requiring doctors to have admitting privileges and clinics to meet stringent requirements).

58. Associated Press, *Most Restrictive Bans on Abortion in Nation Advance*, S.F. CHRON., Mar. 16, 2013, at A6.

59. Associated Press, *Court Challenge Filed to Restrictive Abortion Rules*, S.F. CHRON., July 6, 2013, at A10.

60. Associated Press, *Most Restrictive Bans on Abortion in Nation Advance*, S.F. CHRON., Mar. 16, 2013, at A6.

61. *Id.*

impossible in that state, despite efforts to oppose the legislation.[62] Maybe these states will agree that abortion is only permissible if a woman's life is endangered, resulting in judicial and medical fear of even determining whether the woman will die.[63]

At the federal level, the House passed a bill to prohibit abortions after twenty weeks.[64] Other bills introduced in Congress have come close to defunding Planned Parenthood entirely because it provides some small number of abortions.[65] Congress also excluded abortion from required coverage under the Affordable Care Act.[66]

As it stands now, the laws of most states forbid any insurance funding for abortions.[67] Since *Harris v. McRae*, Congress has forbidden federal funding for most abortions under Medicare and has allowed states to refuse funding under Medicaid.[68] Therefore, I have to disagree respectfully with advocates and scholars I admire deeply who have argued the abortion issue should be "left to Congress." We will need to work with courts and states right now; if times change, then we can change our approach—a pragmatic approach Ann might approve. Yet many states are not promising either.

Many of the new state laws seem to violate even *Casey*. The laws appear to be designed to reach a conservative Supreme Court that abortion opponents believe may now overturn *Roe* and *Casey*. After all, if corporations are persons under the First Amendment, how can unborn humans not be?[69] Thus, the Court could hold that a fetus or unborn child

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62. *See* Manny Fernandez, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, N.Y. TIMES, June 26, 2013, at A14 (noting that the bill sought to ban abortions after twenty weeks, require clinics to meet the standards of other surgical centers, and require doctors to have admitting privileges); Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES, July 19, 2013, at A12 ("The measure, House Bill 2, bans abortions after [twenty] weeks of pregnancy, requires abortion clinics to meet the same standards as hospital-style surgical centers and mandates that a doctor have admitting privileges at a hospital within [thirty] miles of the facility where he or she performs abortions."); Christy Hoppe, *Federal Judges Question Whether Texas Abortion Law Has Forced Clinics to Close*, DALL. MORNING NEWS, Jan. 7, 2014. The case is currently in the Fifth Circuit. *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012). Attempts to stay the implementation of the law failed; Justice Scalia denied a stay on September 29, 2011. *See* Supreme Court of the U.S., *No. 11A335*, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11a335.htm (last visited Feb. 5, 2014).

63. Associated Press, *Bill Allowing Life-Saving Abortions Passers 1st Round*, S.F. CHRON., July 3, 2013, at A3.

64. Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. § 3(b)(2)(A) (2013).

65. *See, e.g.*, H.R. 217, 113th Cong. (2013); H.R. 61, 113th Cong. (2013).

66. *See* 42 U.S.C. § 18023 (2012); 45 C.F.R. § 156.280 (2012); Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 392–93, 416–17 (2012).

67. The State of Washington may go the opposite way and approve a requirement that health care insurers in that state cover abortion. Associated Press, *Legislation Seeks to Make Insurers Cover Abortion*, S.F. CHRON., Mar. 24, 2013, at A12.

68. *See supra* note 34 and accompanying text; Soohoo, *supra* note 66, at 392.

69. Citizens United v. FEC, 558 U.S. 310, 342, 372 (2010) (holding that corporations are persons under the First Amendment for purposes of the Free Speech Clause).

is a person under the Fourteenth Amendment. That would effectively nullify any right to abortion, as "life" trumps "liberty" and presumably women's equality.

At minimum, the "right to life" could create procedural hurdles to abortion under the Due Process Clause similar to those the Court rejected in *Doe v. Bolton* in 1973.[70] Or, more likely, the Court could simply hold that abortion regulation should be left entirely up to the states on the basis that *Roe* was wrong from the beginning and should be entirely reversed. To preserve women's access to safe, legal, and rare abortions, feminists will have to use every tool and all the energy we have. No woman or girl should have to endure an unwanted pregnancy because the state coerces her into that "decision"—no matter what the circumstances.[71]

Not only do we face difficulties in providing reproductive justice for women in the abortion context, but we are also facing a crisis in birth control. Not only is abortion at issue, so is contraception. First, there is a spillover effect—opponents to contraception, abortion, or both have become adept at characterizing certain methods of contraception as abortifacients. An abortifacient can range from anything that interferes with fertilization under some religious doctrines to anything that interrupts implantation in the uterus. Second, the Affordable Care Act overlooked the subterranean controversy over payment for birth control that had been brewing. Whether employers—or pharmacists or whoever—should have to obey laws requiring payment for insurance coverage against their religious or moral beliefs has become a battleground under the ACA. The one leading case on requiring employer insurance payments for birth control was the California Supreme Court's decision in *Catholic Charities of Sacramento v. Superior Court*,[72] but California has been quite protective of abortion rights for many years. In the meantime, "conscience clauses" enacted in many states had already exempted employers, insurers, and pharmacists from providing contraception to employees or customers on religious grounds.[73] Now the fight is obvious and national. The next Part discusses the obstacles for women needing contraception.

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70. Doe v. Bolton, 410 U.S. 179, 198 (1973).

71. As Donald Regan noted in 1979, "Anyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion." Regan, *supra* note 31, at 1617

72. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 80 (Cal. 2004) (setting out four-point test for insurance coverage for those employed by religious businesses).

73. *See* Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237, 241–45 (2006); *Protecting the Rights of Conscience of Health Care Providers and a Parent's Right to Know: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Commerce*, 107th Cong. 29–31 (2002) (statement of Lynn Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:80684.pdf.

III. EROSION OF THE "RIGHT" TO ABORTION AND SPILLOVERS INTO CONTRACEPTION

In *Griswold v. Connecticut*,[74] the Supreme Court held that the choice whether "to bear or beget a child"[75] was a "fundamental right"[76] for heterosexual married people under the Constitution.[77] A few years later, in *Eisenstadt v. Baird*,[78] the Court held that the right to access to birth control was an "individual right" that did not depend on marital status.[79] That right, of course, did not require government subsidies under the Constitution, but it did reinforce the importance of every individual's "decision whether to bear or beget a child."[80] Over the past forty years, the growth of Republican "social conservatism" and power has endangered even the fundamental right to contraception.

As the Managing Editor of the *Thirteenth Annual Review of Gender and Sexuality Law* in the *Georgetown Journal of Gender and the Law* noted in the *Foreword*, "Who would ever have guessed that birth control would be *the* issue at the dawn of the 2012 election?"[81] Yet it was a major issue.[82] Religious organizations and socially conservative Republican and Democratic members of Congress opposed coverage for birth control. For example, House Republicans refused on procedural grounds to allow then-law student Sandra Fluke to testify before the House Oversight and Government Reform Committee on rules regarding "Conscience Clause Exceptions" to contraception.[83] Subsequent attacks on her when she spoke to the House Democratic Steering and Policy Committee on the need for insurance coverage for contraception made it quite clear that there are those who would deny access to insurance coverage for contraception for women under the ACA—or under any insurance policies.[84]

As we know, opposition to birth control is a part of our country's history. Obtaining access to birth control became a major, and long-

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74. 381 U.S. 479 (1965).
75. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
76. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).
77. *Id.* at 485 (majority opinion).
78. 405 U.S. 438.
79. *Id.* at 453.
80. *Id.*
81. Dustin F. Robinson, *Foreword*, 13 GEO. J. GENDER & L. 107, 108 (2012).
82. The Democratic Party tried to portray these issues as part of a "War on Women" by the Republicans in the 2012 presidential election campaign. *See* COHEN, *supra* note 30 (discussing the evolution of arguments over sexuality, contraception, and reproductive choice that dominated both parties from the 1960s up to the 2012 election).
83. *See* Jenna Johnson, *Sandra Fluke Says She Expected Criticism, Not Personal Attacks, over Contraception Issue*, WASH. POST (Mar. 3, 2012), http://www.washingtonpost.com/local/education/sandra-fluke-says-she-expected-criticism-not-personal-attacks-over-contraception-issue/2012/03/03/gIQAJq1UpR_story.html.
84. *Id.*; Robinson, *supra* note 81, at 107 ("[W]e believe in civilized discourse . . . . We stand by our fellow Journal member to the fullest, and we condemn those who would use vile and vitriolic rhetoric to disparage and shame anyone who calmly and rationally expresses an opinion.").

fought, feminist issue.[85] Since the decisions in *Griswold* and *Eisenstadt*, states may not prohibit the sale, use, or access to birth control. Federal laws governing Medicaid insurance provide for birth control coverage. But financing for over-the-counter, non-prescription sales of contraceptive drugs is doubtful.[86] Religious organizations and others frequently frame arguments against access, sales, and even approval, of particular forms of birth control as abortifacients, and therefore a violation of a right to life. Many opponents would deny access to artificial methods of birth control entirely on religious grounds, others on less specific grounds. In either case, women in many states could lose access to many forms of contraception, which undoubtedly leads to unwanted pregnancies, which of course leads back into the abortion loop.

A. Rape and Emergency Contraception

Current federal funding for the poor that prohibits the use of public funds to pay for abortions does have an exception for "rape or incest" or the "life of the mother."[87] But to qualify, a woman must meet the onerous requirements for coverage—the victim must cooperate with law enforcement, for example, in order to be eligible.[88] Moreover, because much of law enforcement still disbelieves women who say they were raped, it is a slim thread upon which to rely.[89] Despite decades of reform in rape law, police and prosecutors, as well as medical providers, are still wedded to biases about what "real rape" is.[90] Worse yet, funding for Emergency Contraception (EC)—most commonly referred to as "Plan B" contraception, although a generic exists—for rape victims who are brave enough to go to Emergency Rooms (ERs) has become ensnared in the battle over abortion. Therefore, even in the case where the law does provide an exception to the prohibition on abortion funding, finding coverage is still difficult.

For rape victims, access to EC that prevents conception can be difficult if not impossible. Even if a majority of Americans believe that a rape victim should get contraception, there is a horrible disconnect be-

85. *See generally* C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL (1972) (discussing history from Comstock laws through *Griswold*); LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1976).

86. Probably someone could argue that over-the-counter sales of so-called barrier methods also should not be allowed in this topsy-turvey universe. For example, spermicides, condoms, and so on are endangered; diaphragms and cervical caps require prescriptions still, so I haven't a clue where that leads us.

87. H.R.J. Res. 440, 96th Cong. § 109 (1979). At one point, the so-called Hyde Amendment did not even have a "rape or incest" exception. Harris v. McRae, 448 U.S. 297, 302–03 (1980) (internal quotation marks omitted) (citing Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976)).

88. *See, e.g.*, 42 C.F.R. § 457.475 (2012).

89. CORRIGAN, *supra* note 20, at 82–95.

90. *Id.* at 69–74, 82–103.

tween "real rape"[91] and who is really a rape victim. An example: The claim that "legitimate rape victims"—an oxymoron if ever there was one—cannot become pregnant was a factor in the 2012 elections and continues to be.[92] As easy as it is to dismiss extremist statements that victims of "legitimate rape" cannot become pregnant,[93] abortion opponents continue to make that argument. Moreover, Roman Catholic Bishops and others oppose contraception even when the pregnancy is a result of rape. So for a rape victim who seeks contraception, there may be no option—even if she acted "fast enough" and was a "good girl" and went to an ER. Many rape victims/survivors do not go to ERs in time, but for those who do, being denied EC worsens the trauma and horror of rape.

Rose Corrigan's empirical study of rape crisis centers and counselors in six states, and her book *Up Against a Wall*, make it clear that hospitals may refuse to give rape victims EC either because of religious affiliation or conscience clauses that exempt them from dispensing such medications. Only thirteen states *require* hospital ERs to dispense EC to rape victims "upon request"; six other states only require hospitals to "inform" victims that such contraception exists.[94] Stranger still is that, although in 2009 the FDA approved nonprescription sales of EC for women eighteen years and over and subsequently modified the rule to allow seventeen-year-olds to purchase EC over the counter,[95] doctors in ERs still believe they have to write prescriptions and refuse to do so.[96] Thus the trauma is compounded.

Because Roman Catholic hospitals may fall within religious exceptions, and some hospitals or individual doctors in ERs refuse to inform or administer EC even in states with such laws,[97] rape victims are left to flounder. In areas where hospitals refuse to give victims EC, victims over

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91. *Id.* at 83 (describing law enforcement and prosecutorial skepticism in her study); SUSAN ESTRICH, REAL RAPE (1987); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 41 (1993).

92. Associated Press, *Republican: Akin 'Partly Right' on Rape Comment*, USA TODAY (Jan. 11, 2013, 15:16 EST), http://www.usatoday.com/story/news/politics/2013/01/11/gingrey-akin-rape/1827489/ (quoting Rep. Phil Gingrey, R-Georgia, an OB-GYN, asserting that adrenaline can sometimes prevent ovulation); Jonathan Weisman, *Obama Camp Seizes on Republican's Abortion Comments*, CAUCUS: N.Y. TIMES BLOGS, Oct. 24, 2012 (mentioning both Akin's "legitimate rape" comment in Missouri, and Mourdock's "God's will" comment in Indiana).

93. CORRIGAN, *supra* note 20, at 158.

94. *Id.* at 166.

95. *See* Tummino v. Hamburg, 936 F. Supp. 2d 162, 164–69 (E.D.N.Y. 2013) (summarizing FDA changes). The FDA recently announced that Plan B One Step could be sold to fifteen-year-olds and that the medication should be placed on pharmacy shelves instead of behind the pharmacist's counter. Pam Belluck, *Drug Agency Lowers Age for Next-Day Birth Control*, N.Y. TIMES, May 1, 2013, at A10.

96. *See* CORRIGAN, *supra* note 20, at 162 (discussing that some, often Catholic, hospitals do not have EC on the premises and suggesting that doctors will write prescriptions for it, but will force women to go elsewhere to fill the prescription. Ultimately, then, these hospitals are not providing any assistance to women seeking EC).

97. CORRIGAN, *supra* note 20, at 178–89.

a certain age may have to travel long distances to obtain what is now an over-the-counter medication to prevent pregnancy, and they must do it in a short period of time.[98] Given "conscience clauses" that allow pharmacies to refuse to sell EC (or any contraception), it may not be possible for a victim who promptly went to the hospital or care facility to obtain EC, even over the counter.

The failure to provide EC for the victim within a few days of the rape—24 hours is optimal, 72 hours may be too late—may mean that a rape survivor will have to find a doctor willing to prescribe RU-486, a medication that causes miscarriage and can be more dangerous to a woman's health,[99] and a pharmacist willing to sell it to her, or she will have to seek an abortion, a perverse result. Of course another perverse result is that failing to give women the power to decide whether to have an abortion or get EC may increase inaccurate or false claims of rape by women simply to obtain the care they need. Indeed, the original plaintiff in *Roe* initially told the Texas hospital she was pregnant because of a rape, because she did not know the Texas law prohibiting abortion had no exception for rape.[100] These factors argue for requiring EC for rape victims.

B. Contraception More Generally

Although "[o]ver half of all states have passed legislation that protects women's right[s] to insurance coverage of contraceptives,"[101] not all states require that health insurance cover contraceptive costs. Even in states that require payment for prescription contraceptives, health insurance may not be required to cover payments for over-the-counter medications, such as Plan B/EC. This issue became more public and apparent with the passage of the ACA, upheld 5–4 by the Supreme Court in *National Federation of Independent Business v. Sebelius.*[102] Under Department of Health and Human Services (HHS) regulations, the ACA has required that health insurance provide coverage for contraception for all women as part of preventive medical care.[103] These regulations have in turn led to numerous challenges from religious groups and individuals,

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98. *Id.* at 161–65, 180–82, 195–96.

99. RU-486 is known generically as mifepristone, and now a battle is going on in the United States Supreme Court over whether Oklahoma doctors can prescribe mifepristone and misoprostol for their off-label prescription effects that minimize health damage under the FDA off-label allowances. *See* Cline v. Okla. Coal. for Reprod. Justice, 133 S. Ct. 2887, 2887 (2013) (granting certiorari and remanding to Oklahoma Supreme Court); Erik Eckholm, *In Mexican Pill, a Texas Option for an Abortion*, N.Y. TIMES, July 14, 2013, at A1; Lyle Denniston, *New Test on Abortion Rights*, SCOTUSBLOG (June 27, 2013, 3:50 p.m.), http://www.scotusblog.com/2013/06/new-test-on-abortion-rights/.

100. Texas at the time had no rape exemption. Roe v. Wade, 410 U.S. 113, 117–18 (1973).

101. Kelly Lyall & Nicholas Schneider, *Access to Contraception*, 13 GEO. J. GENDER & L. 145, 149 (2012).

102. 132 S. Ct. 2566, 2575 (2012).

103. *See id.* at 2577.

once again making contraception a major political issue.[104] No matter how hard the Obama Administration has tried to accommodate the Free Exercise Clause concerns, the battle has continued.

Troublingly, the authors of *Access to Contraception* in the *Georgetown Journal of Gender and the Law* declared, "Reconciling the controversy over access to contraception necessarily involves a balancing of the conflicting rights of those who are pro-life and those who are pro-choice, of health care providers and their patients, and of employers and their employees."[105]

Exactly where did the rights and interests of women fall out of consideration in this summary? Exactly why do the authors see a dichotomy between "pro-life" and "pro-choice" when it comes to the right to contraception? Perhaps the authors were so accustomed to typical court frameworks for analyzing abortion that gender disappeared from the consideration of, at a minimum, the fact that "the patient" is always female. The utter silence—or silencing—of organized women's groups and voices about the importance of reproductive control in their lives because of the dichotomies and doctrinal frameworks that define what is "permissible discourse" or what the mass media thinks deserves attention may have led to exclusion of an Equal Protection analysis. Or, the answer may lie in how successfully anti-choice groups, including Feminists for Life, have managed to characterize many, if not all, methods of birth control into abortifacients.

In fact, the *Georgetown* authors examined EC and concluded that because "EC can prevent the implantation of a fertilized embryo" it is probably an abortifacient, e.g., a method that kills a fetus.[106] That assumption is not true.[107] But even if it were true that EC may prevent implantation of a fertilized egg, it does not stop a pregnancy after implantation. To be effective, EC must be taken within 24 hours, and at most 72 hours, after sexual activity that can produce pregnancy.[108] The "implantation" argument does render RU-486 an abortifacient, as well as DES (Diethylstilbestrol, the emergency medicine available at the time I was raped), because it leads to the expulsion of an implanted embryo. Many think intrauterine devices (IUDs) are abortifacients, because they prevent

104. *See* Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 29, 2013, at A1.

105. Lyall & Schneider, *supra* note 101, at 150.

106. *Id.* at 152.

107. *See* Tummino v. Hamburg, 936 F. Supp. 2d 162, 164–69 (E.D.N.Y. 2013) (discussing the medical knowledge about Plan-B and dismissing claim it prevents implantation).

108. "Sexual activity" can mean so many things, and many sexual activities can have nothing to do with heterosexual intercourse. It is a euphemism for anything that could produce a pregnancy. Rape, sexual assault, being drunk when intercourse occurs, or even ejaculation outside the vagina can lead to pregnancy. I guess "sexual activity" here is a stand-in for desired, wanted heterosexual intercourse, which of course does not fit women's circumstances in all instances. *See* Henderson, *supra* note 91, at 57–61(discussing women's experiences of heterosexual intercourse).

implantation of fertilized eggs. Other forms of birth control prevent implantation too, by interfering with the build-up of the uterine wall—are they too, then abortifacients? How far out will the arguments go that any birth control is indeed an abortifacient or analogous to one? Some of these questions may have to be decided by the courts, but we cannot possibly depend on the courts alone to restore the ability of females to obtain legal, safe contraceptives wherever they live.

The Free Exercise Clause of the First Amendment also provides the basis for current major opposition to the interpretation of the ACA that requires employers of fifty or more employees in secular business enterprises, including education and hospitals, to provide health care coverage for contraceptives for women, the subject to which this Essay now turns.

C. Religion and Contraception

Religious organizations that run businesses and individual employers of more than fifty employees have sued to be exempt from the requirement that they provide insurance coverage for women's reproductive health, including contraception, based on the Free Exercise of Religion Clause.[109] Despite a series of modifications to regulations proposed by HHS allowing religious organizations under many circumstances to refuse to pay for coverage for contraception, the suits are continuing as of this writing. Although HHS has recently promulgated a "final" rule that could moot the following discussion, the matter is by no means settled.[110]

The Roman Catholic Church, a major employer in schools and hospitals that are subsidized by insurance, taxpayers, and non-Catholics, opposes the use of any "artificial" contraception.[111] A serious battle on abortion has been going on over contraception for some time: Some Bishops have gone so far as to call for refusing communion to pro-choice political candidates who are members of the Church.[112] This battle has extended to contraception with the enactment of the ACA. The U.S. Conference of Catholic Bishops, unhappy with any compromises thus far proposed, filed suit opposing any requirement that Catholic employers provide insurance coverage for contraception under any circumstances.[113]

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109. Rachel Zoll & Ricardo Alonso-Zaldivar, *Final Gov't Birth Control Rule for Faith Groups*, ASSOCIATED PRESS: BIG STORY (June 28, 2013, 18:05 EDT), http://bigstory.ap.org/article/final-govt-birth-control-rule-faith-groups.

110. *See* Michael D. Shear, *Obama Waves White Flag in Contraceptive Battle*, N.Y. TIMES, June 12, 2013, at A19; Revised rules, 45 C.F.R. § 147.131 (exempting religious non-profits).

111. Robert H. Brom, Bishop of San Diego, *Birth Control*, CATHOLIC ANSWERS (Aug. 10, 2004), http://www.catholic.com/tracts/birth-control; *see The Catholic Church in America: Earthly Concerns*, ECONOMIST, Aug. 18, 2012, at 32.

112. John Thavis, *Cardinal Ratzinger Lays out Principles on Denying Communion, Voting*, CATH. NEWS SERV. (July 6, 2004), http://www.catholicnews.com/data/stories/cns/0403722.htm.

113. *See, e.g.*, Memorandum Opinion at 1–3, Roman Catholic Archbishop of Wash. v. Sebelius, 920 F. Supp. 2d 8 (D.D.C. 2013) (Civ. No. 1:12-cv-00815-ABJ); Ivan E. Bodensteiner, *Are*

Other employers that are not religious organizations have filed suit claiming that the law would violate their personal religious beliefs, and therefore, the First Amendment bars requiring them to pay for insurance coverage for at least some forms of contraception.[114] Thus far, the lower courts have split on whether private employers have a strong Free Exercise claim.[115] As this Essay was going to print, the Supreme Court granted certiorari on this issue.[116]

It is beyond the scope of this Essay, and beyond the scope of my knowledge, to analyze fully the religious issues. But it is not a promising picture. While the ACA requirements might have passed muster under *Employment Division v. Smith*,[117] because they are laws of general applicability and not intended to discriminate against any particular religion, they may not hold.[118] Congress enacted the Religious Freedom Restoration Act (RFRA)[119] in an effort to overturn *Smith*.[120]

In *City of Boerne v. Flores*,[121] the Court held that Congress could not overrule *Smith* to require applying a compelling interest test to state laws.[122] The majority did not say whether Congress could bind itself to a higher standard. In 2006, however, the Court held 8–0 that the federal government was bound by the "compelling interest" and "substantial governmental interest" tests of RFRA in a case quite similar to *Smith*. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[123] held that the sacramental use of a controlled substance was protected by RFRA's required tests for Free Exercise cases, but left open whether RFRA ap-

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Catholic Bishops Seeking a Religious Preference or Religious Freedom? 3–4 (Valparaiso Univ. Legal Studies, Working Paper No. 13-1, Feb. 2013), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209772.

114. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 738 (2013).

115. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012), *rev'd and remanded*, 723 F.3d 1114 (10th Cir. 2013) (denying preliminary declaratory and injunctive relief from HHS regulations to privately-held corporate employers); Korte v. Sebelius, 528 F. App'x 583 (7th Cir. 2012) (issuing injunction against regulations on grounds of substantial burden on Free Exercise under the Religious Freedom Restoration Act); Order, O'Brien v. Dep't of Health and Human Services, No.12-3357 (8th Cir. Nov. 28, 2012) (summarily granting injunction pending appeal).

116. Conestoga Woods Specialties Corp. v. Sebelius, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

117. 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to Native American Church members who were fired for their use of peyote, a sacramental drug for some Native American religions).

118. *See id.* at 892 (O'Connor, J., concurring).

119. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2012)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

120. *See Smith*, 494 U.S. at 890 (holding that the Constitution does not require a religious practice exception to federal laws).

121. 521 U.S. 507 (1997).

122. *Id.* at 511.

123. 546 U.S. 418 (2006).

plied across the board.[124] The Court has also held 9–0 that a teacher at a religious school could not sue for discriminatory firing under the Americans with Disabilities Act, using a broad interpretation of her job duties as "ministerial."[125] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[126] suggested that the "ministerial" role of employees of religious organizations meant they could lose their rights under federal antidiscrimination laws.[127] Title VII's prohibition on discrimination against an employee "because of sex" would not apply if the employee is "ministerial."[128] The Free Exercise Clause could override federal statutes under either the compelling interest standard or under the definition of employment, because sex discrimination has never had the highest level of protection under the Equal Protection Clause. Thus, a religious employer may not have to contribute to insurance costs for contraception.

If the federal government is bound by RFRA, Free Exercise claims could trump women's claims of discrimination for denial of contraception under the Equal Protection Clause. At no time has the Court held that discrimination against women is subject to strict scrutiny under the Equal Protection Clause.[129] Insurance coverage might be a closer case, as contraception is a fundamental right subject to strict scrutiny. But the government has no duty to pay for the exercise of even fundamental rights such as birth control; thus, employers could argue they also have no duty under the Free Exercise Clause. Thus, when faced with a balancing between religious freedom and women's equality, the eventual outcome in the courts is far from clear.[130]

IV. SO WHERE DO WE GO FROM HERE?

As Ann wrote, the abortion and contraceptive laws and cases require the exercise of political muscles we may not have used or did not

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124. *Id.* at 423 (finding that the compelling interest test applies to a Controlled Substances Act case under federal law).

125. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 698 (2012).

126. *Id.*

127. *Id.* at 706–07 (holding RFRA and First Amendment preclude anti-discrimination suits by "ministerial"—in the religious sense—employees in a case involving possible retaliatory discharge of teacher in violation of the Americans with Disabilities Act).

128. If the employee's religion is a Bona Fide Occupational Qualification (BFOQ) under Title VII, she would not have statutory or probable constitutional protection against discrimination on the basis of her use of contraception or pregnancy; if she were a ministerial employee, she would probably have no protection under federal civil rights statutes. Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 1016–18 (2013); *see also* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000e-2(e)(1) (2012) (defining BFOQ as including membership in a religion).

129. The Court first established gender discrimination's governing standard to be intermediate scrutiny in *Craig v. Boren*. 429 U.S. 190, 197 (1976) (rejecting strict scrutiny and requiring a substantial relationship to "important governmental objectives" in sex-based classification cases); *see also* United States v. Virginia, 518 U.S. 515, 531 (1996) (explicitly shifting the burden to the state and requiring an "exceedingly persuasive justification" for sex-based classifications (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (internal quotation marks omitted)).

130. Bodensteiner, *supra* note 113, at 16–20 (discussing weakness of Establishment Clause arguments under current cases); Griffin, *supra* note 128, at 997–99.

know we had. As Carol Sanger wrote in 2012, all of U.S. politics, from school board elections up to the Presidency, has been in part "infected" by the issue of abortion.[131] As others have urged, abortion always should have been left to the political process—and perhaps unfortunately, the time is now. As reproductive justice is now on the defensive, and as political organizing takes time, I first discuss the need to continue litigating. Then, I discuss the silencing of voices for reproductive freedom in the public sphere and politics. Finally, in thinking about how to engage the political process, I pay homage to Kate Michelman's "*Who Decides?*" campaign[132] because it brings home just how personal and contextual all the things Ann cared about are to the abortion decision and contraception for women.

A. Litigation

Justice Ginsburg is often cited for the proposition that the "political process" would have been better than the Supreme Court's decision in *Roe*.[133] But, to quote another controversial decision, *Brown v. Board of Education (Brown I)*,[134] "we cannot turn the clock back."[135] Although recent historical scholarship has challenged the accepted belief that *Roe* set off the current potent opposition to abortion (and birth control?),[136] there is no question that widespread academic and political criticism of the opinion in *Roe* has existed since the case was decided.

Because of increasingly repressive laws in some states and challenges to the ACA, we cannot abandon litigation as a strategy, even though it is reactive and perhaps confined to current doctrinal approaches, at least in the lower courts. Indeed, several lower federal courts have struck down extremely restrictive legislation in many states,[137] although what happens on appeal remains unclear. Even in litigation, there is room for some creativity. As a recent article suggests, although abortion may still be framed as a liberty interest and litigators are too overwhelmed to

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131. Carol Sanger, *About Abortion: The Complications of the Category*, 54 ARIZ. L. REV. 849, 857–58 (2012).

132. NARAL: REPRODUCTIVE FREEDOM & CHOICE, *Kate Michelman: Biography*, http://web.archive.org/web/20000815055758/http://www.naral.org/about/kate_bio.html (last visited Jan. 4, 2013).

133. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985). With all due respect to Justice Ginsburg, whom I admire greatly, Equal Protection themes haunted these cases, but Equal Protection doctrine for women was still quite underdeveloped.

134. 347 U.S. 483 (1954).

135. *Id.* at 492.

136. *See* BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (Linda Greenhouse & Reva B. Siegel eds., 2d ed. 2012); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2073 (2011).

137. *See, e.g.*, Stuart v. Loomis, No. 1:11-CV-804, 2014 WL 186310, at *16 (M.D.N.C. Jan. 17, 2014) (holding Right to Know Act violated women's First Amendment rights); Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 900–01 (W.D. Tex. 2013) (holding admitting-privileges provision lacked rational basis).

develop equality arguments,[138] there is no reason that litigators have to abandon equality themes that have been developing.[139] Nor need litigators give ground to law review articles and groups claiming women are harmed by abortion. In fact, as Professor Carol Sanger has noted, "[t]here is reliable data on [whether abortion harms women], and studies indicate that the primary emotion women experience after an abortion is relief and a feeling of well-being."[140] Moreover, although Feminists for Life has promulgated the historical argument that the first major feminists opposed abortion, a recent article persuasively disputes that claim.[141] A number of articles and empirical studies also dispute the use of "judicial bypass" procedures as an adequate protection for minors seeking abortions without parental consent.[142]

At least legal scholars can do the research to help correct the record. We can also work to see that those people litigating cases actually get that scholarship and information in time—something the anti-abortion and anti-contraception forces have managed to do. Certainly in the age of the Internet and online research sources, it should be easier to link practicing lawyers and advocacy groups with current data and information.

B. The Silencing of Women

One mistake abortion supporters made was to let opponents capture the term "pro-life" as if there were only one life involved in abortions. Rhetorically, "pro-choice," though it drew on a strand of liberty and freedom arguments deep in U.S. history, was and is weak. "Pro-choice" also missed the point that abortion supporters were also pro-life—the life of the woman, the lives of her existing children, the lives of so many others affected. "Pro-choice" may have resonated in the early 1970s and 1980s under the increasingly individualistic rhetoric of the times, but by then, when pictures of fetuses had already appeared in the Texas brief in *Roe*[143] and "social conservatives" had gained an upper hand in politics, that "libertarian" approach was doomed. Complicating matters further were feminist critiques of choice and consent, as those critiques could

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138. Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 403–06 (2011).

139. *Id.* at 383–84, 407–12 (noting Pregnancy Discrimination Act cases and Equal Protection themes in some Court opinions).

140. Sanger, *supra* note 131, at 876. Sanger also observes that relief doesn't mean the decision was not difficult or made without regret; however, it was the best decision under the context and circumstances at the time. *Id.*

141. Tracy A. Thomas, *Misappropriating Women's History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 8–10, 19, 28–31 (2012) (critiquing Feminist for Life' representations of the historical record, with particular emphasis on statements by Elizabeth Cady Stanton).

142. Thayer Hardwick & Hillary Hodsdon, *Abortion*, 13 GEO. J. GENDER & L. 109, 116–18 (2012) (discussing judicial bypass and whether it is effective in terms of treating adolescents with respect).

143. Henderson, *supra* note 31, at 1621.

easily, although mistakenly, undermine women's power to choose.[144] Thus the term "reproductive justice" may be the better one to use now.[145]

The 2013 *Time Magazine* cover story and others overlook the fact that for many years feminists tried to work with anti-abortion groups to find common ground, using support for women's equality and opportunity, along with access to contraception and healthy families to bridge the gaps.[146] We may be able to work with Catholics for Choice and others on obtaining access to contraception and promoting healthy families and adoptions, but only with the realization that they may not help when we advocate the right to abortion. Still, avoiding abortion is optimal for all concerned, and we should not decline alliances on some issues unless the risks of co-optation are high.

Women's voices in favor of abortion and contraception have been lost—in the legislatures, in the courts, and in the media—especially since *Casey*. Speaking out is crucial if we are to recover the stories of women who support abortion and who have had abortions and are relieved. While abortion opponents have emphasized studies that women regret abortion and posit a non-scientific "post-abortion syndrome" as a harm to women, most, if not all studies demonstrate that women have been helped by abortion and are better off than they would have been had they been forced to bear a child.[147] The framing matters, and so do the stories of the millions of women who have had abortions (and millions more who use contraception!).

C. Politics: Who Decides?

Carol Sanger has rightly pointed out that "abortion politics" have infected every election from school boards on up.[148] Women may whisper amongst themselves, but few women of prominence, not to mention the rest, speak up publically about having had abortions.[149] Kate

144. *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326–27 (1995) (examining tensions in feminist theory over women's capacity to choose under constrained conditions).

145. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1408, 1425–27 (2009) (emphasizing issues of pregnancy and child care as connected to all parts of reproductive justice, as well as using Critical Legal Studies' rights critique and criticisms of consent and choice in sexuality and pregnancy categories).

146. Pickert, *supra* note 38.

147. *See* Sanger, *supra* note 131, at 875–76. Sanger also notes that the "relief" doesn't mean that the decision was not difficult or that there is no regret, *id.* at 876; but life is full of hard choices, and we make the best ones we can. There are no algorithms for moral and life choices unless one obeys rules no matter how stupid they are. *Id.*

148. *Id.* at 857.

149. *Id.* at 868. "Coming out" can be dangerous, but maybe our LGBT friends can assist us in finding ways to do this. I have often imagined distributing an anonymous questionnaire to female law professors, lawyers, and students on this issue. Women in power would be next—especially politicians. But I lack the empirical expertise to design a "good instrument" and get past a Human Subjects Committee. This seems so lame now. Maybe I should learn how to do the survey and develop a plan.

Michelman, former director of the National Abortion Rights Action League (NARAL), is one of the few I can recall.[150] Sarah Weddington, the lawyer who argued *Roe* as a young lawyer, is another.[151] *Ms.* magazine submitted to Congress a petition signed by thousands of women who had had abortions that only yielded a few thousand signatories—but maybe *Ms.* as print media could not mobilize the Internet capacities we have now.[152] Prominent women avoid the topic in terms of their stories and personal history for many reasons, including, most important, their personal safety. Indeed, a current Internet effort to gather women's stories of their abortion decisions, in order to counteract claims that women do not know what they are doing, has succeeded in gathering numerous posts, but many contributors have posted as "anonymous."[153] I personally am not surprised, because who wants to be harassed by zealots, much less threatened and trashed by other anonymous commenters?

I believe that violence and threats against clinics, doctors who perform abortions, and local women who are abortion activists and speak in favor of abortion, have silenced many who support the right to decide whether to bear a child. Retaliation has its psychic costs for a sex-class vulnerable to violence to begin with. Protestors near abortion clinics force women seeking abortions to run a gantlet, although the Court has held that some restrictions on proximity to clinics and confrontation with patients do not violate the First Amendment.[154] The protests intimidate legal abortion providers and counselors as well. The Court has held that

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150. Linton Weeks, *Kate Michelman, the Public Face of a Woman's Right to Privacy*, WASH. POST, Jan. 12, 2006, at C1.

151. I thank Pat Cain for pointing this out at the conference. *See also* SARAH WEDDINGTON, A QUESTION OF CHOICE 13–17 (Feminist Press 2d ed. 2013) (discussing the abortion she had as a graduate student in the late 1960s).

152. *See We Had Abortions*, MS. MAG. (Fall 2006), http://www.msmagazine.com/fall2006/abortionmag.asp. I thank Khiara Bridges for telling me a *Ms.* petition naming names existed and Stanford Law Library for finding the reference.

153. *See Sharing Our Stories: I Was 16 Years Old...*, MY ABORTION. MY LIFE., http://myabortionmylife.org/pages/sharing-our-stories.php#Iwas16 (last visited Feb. 5, 2014).

154. *See* Hill v. Colorado, 530 U.S. 703, 781 (2000) (upholding regulation prohibiting abortion protestors from approaching persons, distributing literature, and displaying signs within eight feet of a health care facility that provides abortions); Schenck v. Pro-Choice Network, 519 U.S. 357, 377–81 (1997) (upholding "fixed" fifteen-foot buffer zone and striking down the "floating buffer zones" on free speech grounds); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769–76 (1994) (upholding injunction barring picketing within thirty-six feet of a clinic on public property but exempting private property, and upholding noise injunction but striking down a 300 feet restriction). It is possible, however, *Hill* will be overruled by the United States Supreme Court. The Court granted certiorari in *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013), *cert. granted*, 133 S. Ct. 2857 (2013). The case is part of a long-running challenge to a Massachusetts law making it a crime for speakers not involved with a "reproductive health care facility" to come within thirty-five feet of entries. *Id.* at 3 (internal quotation mark omitted). Question two of the grant specifically asks if *Hill* "should be limited or overruled." Petition for Writ of Certiorari, *McCullen*, 133 S. Ct. 2857 (No. 12-1168), 2013 WL 1247969, at *i.

One of the most outrageous stories about anti-abortion protestors I've heard was from a friend whose very-wanted baby died *in utero*, through no one's fault. Apparently, the safest place for her to have the fetus removed was an abortion clinic; imagine how she felt being yelled at and called a "baby-killer."

picketing private residences may be regulated or prohibited.[155] But still, the threat of violence remains: As the director of the only clinic in North Dakota, Tammi Kromenaker, a social worker, said, she "takes different routes to work every day to avoid falling into a routine that might make her a target . . . . 'Even if I'm at Target looking at clothes, I never let my guard down.'"[156]

Even being associated with reproductive justice has cost individual women in other ways: Professor Dawn Johnsen, an extremely well-qualified nominee to head the Office of Legal Counsel (OLC) in the Obama Administration's Justice Department, was pilloried by Republicans for her decades-old association with abortion rights at the American Civil Liberties Union (ACLU) and as Legal Director of what is now NARAL-Pro Choice America.[157] Eventually, she withdrew from consideration,[158] and there still is no permanent Assistant Attorney General running the OLC.[159] I personally recall Senator Harry Reid, now Senate Majority Leader, trying to negotiate difficult political terrain by "smuggling" Kate Michelman into Nevada to speak to selected Democrats about insurance coverage for contraception under federal law. There was no general public announcement and no local coverage of the meeting. Further, Texas Governor Rick Perry recently attacked Texas State Senator Wendy Davis's filibuster against an extremely restrictive law, and said that if abortion had been available to Ms. Davis's mother, Davis would not have "managed to eventually graduate from Harvard Law School . . . . It is just unfortunate that she hasn't learned from her own example that every life must be given a chance to realize its full potential and that every life matters."[160]

155. Frisby v. Schultz, 487 U.S. 474, 487–88 (1988) (upholding ban on focused picketing of abortion doctor's residence under First Amendment).

156. Pickert, *supra* note 38.

157. Professor Johnsen's curriculum vitae reveals that she was Acting Assistant Attorney General in charge of the OLC during the Clinton Administration. She has also been the Legal Director of the National Abortion and Reproductive Rights League (now NARAL-Pro Choice) from 1988 to 1993, and a lawyer for the ACLU Reproductive Freedom Project. Dawn Johnsen, Curriculum Vitae, *available at* http://newsinfo.iu.edu/pub/libs/images/usr/6107_h.pdf. The Republicans never let her nomination to head OLC go forward, and she eventually withdrew from consideration. Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16. Of course, she also had the temerity to be a Democrat in Indiana. I proudly admit, I am a former colleague of hers.

158. Savage, *supra* note 157.

159. Caroline Diane Krass became the Acting Assistant Attorney General in charge of the Office of Legal Counsel on December 21, 2013; however, as of this writing, she has not been confirmed by the Senate. *See Meet the Leadership: Acting Assistant Attorney General Official Biography*, U.S. DEP'T JUST., http://www.justice.gov/olc/meet-olc.html (last updated Jan. 2014).

160. Igor Volsky, *Rick Perry Attacks Wendy Davis: 'She Was a Teenage Mother Herself,'* THINKPROGRESS (June 27, 2013, 11:57 AM), http://thinkprogress.org/health/2013/06/27/2227101/rick-perry-attacks-wendy-davis-she-was-a-teenage-mother-herself/. Exactly how does Governor Perry know that? Who appointed him the ultimate arbiter over women's decisions?

No wonder people run scared, especially in an age of tweets, Internet defamations from anonymous sources, push-polls implying pro-choice female candidates for elected office had an abortion, and a discourse of trashing, all protected by the First Amendment's Free Speech or Free Press Clauses.

The *Time Magazine* article also speaks of a split between the original activists and younger women who do not identify with the old guard of the feminist movement.[161] The younger women reject the term pro-choice and wish to focus more broadly on "reproductive justice."[162] They have energy and skills to mobilize in new and promising ways; I just hope that intergenerational conflicts can be bridged. Ann built bridges, and there is no reason not to build bridges across generations here because so much is at stake.

One idea I had for mobilization was Kate Michelman's "*Who Decides?*" campaign. It may not work now, but it is worth exploring. Who, indeed, has the power to decide what "reasons" are "good enough" to have an abortion or have access to contraception? A state legislature that decides a rape victim cannot get an abortion because a born child would be "evidence" of the rape? Or one that declares that once a doctor can detect a fetal heartbeat—maybe just as the woman is realizing she is pregnant, having missed a period—there can be no abortion no matter what? Or the legislature that decides abortion is permissible only if the woman's life is in danger? Who decides? What "counts"? For the medical review committee in *Doe v. Bolton*, the companion case to *Roe*, it was not enough that Mary Doe had already lost custody of three children. As Robin West has pointed out, this "mentally unwell, emotionally unstable, economically impoverished, noncustodial mother[,] and abandoned wife" could not obtain permission from a medical panel to have an abortion.[163] While this might smack of eugenics, it also indicates that decisions by supposedly neutral parties may result in anguish and pain.

As for feminist method, women's voices matter. Women I know and love may have wildly varying stereotypes or stories about when and why a woman's reasons for abortion are "good enough." Moral intuitions can vary deeply, and unless one takes an absolutist position against all abortion, moral intuitions provide little guidance for general laws.[164] I keep hearing secondhand stories about women who use abortion as their primary method of birth control and that seems careless. I might think it "enough" reason in a case of a bullied sixteen-year-old who was raped because she became intoxicated at a party, or that it is "enough" reason

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161. Pickert, *supra* note 38.

162. *Id.*; *See also* West, *supra* note 145, at 1426–32 (summarizing arguments for changing from "choice" to "reproductive justice").

163. West, *supra* note 31, at 123.

164. *See generally* ROBERT AUDI, THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE 197–202 (2004) (detailing the concept of intuitionism as moral philosophy).

for a terrified nineteen-year-old in college who had a scholarship and would have had to lose it if she had to carry the fetus to term. Then there is my own story of a "real" rape when I was in the ER demanding DES, and that makes me think any form of unwanted sex is "enough." For another person, a good enough reason is taking antidepressants or other medications that carry risks to a fetus. For another, it is a boyfriend or husband who has abused her. For another, a woman learns of severe birth defects that her family cannot afford to support. For another, all the woman's precautions failed, and maybe the man is telling her to "get an abortion." Or maybe it is only "enough" if the unborn child suffers from a fatal defect and will not survive or the mother's life is in extreme danger.[165]

What reasons are "good enough?" Should the burden be placed on women to perform according to someone else's opinions and expectations? Surely the woman or teenager or child who has to bear the pregnancy is in the best position to decide—under the facts and circumstances of her life—whether to carry the fetus to term, not to mention the tragedies when the fetus cannot survive or would have a short life. A woman is certainly in a better position to decide than a legislature or anyone else when she can have a child.

Ultimately as scholars, we may think we lack political skills. But Ann worked diligently with LGBT groups in New Mexico to get modifications to the state antidiscrimination statute for LGBT persons.[166] We have a voice. The result was a substantively important change in the law.[167] Working with local politicians and the legislative process is important. The Democratic Party in Texas may have "failed," but Wendy Davis and abortion-rights advocates put up an important fight without much time to organize.

We may be naïve about our particular legislature or local government, and the current Congress may be dysfunctional, but there is information out there on how to be effective politically, even without billionaire funding. Understanding how legislators and legislatures work may be difficult, but lawyers are an important category of legislators and staff, so finding common ground and working on proposals is possible.

President Obama recently came out in support of Planned Parenthood, even though anti-abortion attacks quickly followed.[168] But

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165. *See* Associated Press, *Bill Allowing Life-Saving Abortions Passes 1st Round*, S.F. CHRON., July 3, 2013, at A3 (noting that Ireland's complete ban was revisited after death of woman because doctors refused to perform surgery).

166. Scales, *Poststructuralism*, *supra* note 13, at 398.

167. *Id.* at 398–99.

168. Peter Baker, *In Speech to Planned Parenthood, Obama Criticizes New Abortion Laws*, CAUCUS: POLITICS & GOVERNMENT BLOG TIMES (Apr. 26, 2013, 1:27 PM), http://thecaucus.blogs.nytimes.com/2013/04/26/in-speech-to-planned-parenthood-obama-criticizes-new-abortion-laws.

we have an ally for a while. Many of us may not be good lobbyists, but may know of good lobbyists and have connections through our local bar associations and other groups. Nonprofits may be barred from direct funding or campaigning, but they contribute to dialogue. I am sure there are many other ways to work towards reproductive justice, and I hope that we will find them. Ann did, and we could do worse than follow her courageous example.

CONCLUSION

Ann Scales was a brilliant and loving scholar. I have tried to carry through one of her messages as best I can. We can all honor her by trying to carry her love and passion for her work forward.

May the Goddess, Spirits, God, whatever, be with you, dear Ann. You will always be alive in our hearts, and the work you started will continue, as this Symposium attests.

"STUCK" ON LOVE

TAMARA L. KUENNEN[†]

ABSTRACT

Professor Ann Scales wrote about places where legal feminism has become stuck, and how it might become unstuck. This Essay focuses on a particular point of "stuckness" in legal feminism: how to treat women who love intimate partners who are abusive. This Essay argues that although feminist legal scholars have discussed in great depth the many reasons a woman in an abusive relationship might *need* to preserve her relationship, they have inadequately exposed, or even acknowledged, the reasons she might *want* to preserve her relationship. In particular, this Essay argues, feminist legal scholars avoid or ignore the fact that a primary reason many women stay in abusive relationships is for love. According to many feminist legal scholars, love is a product of false consciousness. With more and better information, abused women would come to understand that they don't "really" love their partners, and that leaving, rather than staying, is the solution. Scales argued that false consciousness is a weak analytical tool for a variety of reasons, discussed in this Essay in subpart II.B. More importantly, she argued that within legal feminism, false consciousness is a "conversation stopper" and a "thought stopper." In short, Scales attempted to get feminist legal scholars out of the muck of false consciousness. This Essay documents how feminist legal scholars are stuck on love in the context of intimate partner abuse, and applies Scales's lessons for getting unstuck.

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I. INTRODUCTION

Ann Scales wrote about places where legal feminism has become stuck, and how it might become unstuck.[1] One place of stuckness is the concept of "false consciousness."[2] This is the notion that an oppressed group (such as women in a patriarchal society) might falsely buy into the ideology of an oppressive social system, and that these internalized beliefs both conceal and act against the oppressed group's (women's) real interests.[3] One example, observed by Scales, is the view that women who have been physically abused by their male partners, but who do not wish to end their relationships with those partners (such as by refusing to cooperate with the criminal prosecution of them), are deemed to be suffering from false consciousness.[4] By internalizing any number of dominant ideologies—for example, that a "little bit" of domestic violence is acceptable in intimate relationships[5]—women perpetuate their own physical oppression by men.

In my own work in the field of intimate partner violence, I have observed that, while feminist legal scholars have discussed in great depth the many reasons a woman might *need* to preserve her relationship,[6] we have done a poor job exposing, or even acknowledging, the reasons she might *want* to preserve her relationship.[7] In particular, we ignore the fact that a primary reason many women stay in abusive relationships is for love.[8] From a feminist perspective, love is a product of false consciousness.[9] With more and better information, abused women would come to

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1. ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY *passim* (2006). Scales divides her only book, a culmination in many respects of her corpus of scholarship, into two parts: "Places of Stuckness: Roles, Rules, Facts, and the Liberal View of Human Nature," and "Places Beyond Stuckness: Feminist Notions, Controversies, and Promises."

2. *Id.* at 44, 120 (describing "false consciousness" as a term that signifies "a continuing source of feminist infighting and paralysis").

3. *Id.* at 124 ("Most political theorists define false consciousness as a belief that is 'false,' that is both produced by and reinforcing of an oppressive social system, and that conceals and acts against the believer's real interests.").

4. Ann Scales, handout from presentation of her book LEGAL FEMINISM, *supra* note 1, at the University of Denver Sturm College of Law (Apr. 2007) (on file with author). For a review and critique of this argument, see Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 561–73 (2010).

5. *See, e.g.*, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 628 (2000) ("Though not as prevalent as it once was, the view that occasional violence is a normal part of family life persists. Many decisionmakers either hold this view or empathize with individuals who do. Predictably, these decisionmakers refuse aggressively to enforce condemnatory domestic violence laws." (footnote omitted)). Kahan argues generally that when the law is much more condemnatory of a social norm than the average decision maker tasked to enforce it, the decision maker resists enforcing it. *Id.* at 607. This, in turn, reinforces the very norm that lawmakers seek to change. Kahan calls this a problem of "sticky norms," and describes intimate partner violence as falling squarely within it. *Id.* at 628.

6. *See infra* note 15.

7. *Id.*

8. *See infra* note 17 and accompanying discussion.

9. As observed recently by Leigh Goodmark:

understand that they don't really love their partners, and that leaving, rather than staying, is the "real" solution.[10]

Scales argued that false consciousness is a weak analytical tool for a variety of reasons, discussed in subpart II.B. of this Essay.[11] More importantly, she argued that within legal feminism false consciousness is a "conversation stopper and a thought stopper."[12] Scales attempted to get us unstuck. In this Essay, I document how feminist legal scholars are stuck on love in the context of intimate partner abuse, and I apply Scales's lessons for getting us unstuck.

II. THE LACK OF LOVE IN THE LITERATURE

A. How Legal Feminists Avoid and Apologize for Love[13]

Within the literature on intimate partner violence, many scholars have observed that the law provides a one-size-fits-all solution: separation of the parties.[14] To illustrate why separation cannot be the only solu-

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> Rather than listening to women who want to stay in their relationships, though, those women are said to have traumatically bonded or are told that they are rationalizing away the abuse in order to protect their emotional commitments. . . .
>
> . . . Hesitation or unwillingness to end a relationship means that the woman is being coerced, threatened, or controlled; from the feminist perspective, such women might be accused of "false consciousness."

LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 100 (2012).

10. *Id.* ("We must focus on love, the literature argues, in order to show women that they don't really love their partners, but rather are bonded with them in an unhealthy manner, and that separation, not saving their relationships, should be their goal.").

11. *See* discussion *infra* II.B.

12. SCALES, *supra* note 1, at 120.

13. For the purposes of this Essay, I include the work of legal scholars who have written extensively about how the law might more effectively address intimate partner violence, and who have grappled with the tension between protecting women and respecting their autonomy of decision making (or agency). The list quite certainly is non-exhaustive but includes a number of the most prolific scholars on the subject, including Kathy Abrams, Donna Coker, Clare Dalton, Deborah Epstein, Sally Goldfarb, Leigh Goodmark, Cheryl Hanna, Margaret Johnson, Laurie Kohn, Tamara Kuennen, Christine Littleton, Martha Mahoney, Holly MacGuigan, Kris Miccio, Linda Mills, Emily Sack, and Elizabeth Schneider, to name several but not all.

14. *See, e.g.*, GOODMARK, *supra* note 9, at 80–105 ("[D]omestic violence law and policy continues to rely almost exclusively on separation-based remedies. The focus on separation springs from a core belief that women in violent relationships should not remain in those relationships."); Cheryl Hanna, *Because Breaking up Is Hard to Do*, 116 YALE L.J. POCKET PART 92, 94 (2006) ("We should always rethink our strategies and avoid one-size-fits-all approaches. The criminalization of domestic violence is still in its infancy, and we have much to learn about what works best and for whom."); G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 307 (2005) ("Both law and popular culture equate existence of violence with separation from the relationship."); *id.* at 305 (describing the predominant, or "[p]rotagonist[]," ideology underlying the current criminal justice system approach as emphasizing the need for victims to leave their relationships as a deeply problematic one-size-fits-all approach); Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456 (2008) ("In many jurisdictions domestic violence cases, identified principally by evidence of physical violence, are handled on a one-size-fits-all basis."); *see also* DONILEEN R. LOSEKE, THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE 20 (1992) ("The collective representation of wife abuse leads to the common sense conclusion that a woman *should* leave such a relationship, and this prescription is part of the collective representation: A woman experiencing wife abuse must

tion, several scholars have brilliantly unearthed the many rational reasons that victims of intimate partner violence need, or want, to preserve their intimate relationships. Amongst these are safety (the well-documented fact that separation is the most dangerous time for victims), finances, cultural norms, religion, and immigration status, to name but a few.[15] Feminist legal scholarship, addressing intimate partner violence, richly and deeply covers this particular topic.

Rarely in this body of work, however, do scholars explore in any depth the idea that love for a partner may be the primary reason a woman wants to preserve her relationship.[16] This dearth of discussion is remarkable, considering that empirical data clearly show that women explicitly state that love is a key reason explaining why they stay.[17]

Even more remarkably, those few scholars who acknowledge love rarely use the word *love* in their writing. Rather, we opt for more clinical, sanitized terms. Instead of love, scholars use terms such as "connection"

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leave her relationship." (emphasis added)); Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, *in* IDENTITIES, POLITICS, AND RIGHTS 271, 304 (Austin Sarat & Thomas R. Kearns eds., 1995) (arguing that the price women pay for going to court is separation, and that the law expects women to sever connections with violent men); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1498 (2008) ("The cumulative effect of these [mandatory] reforms was a transformation of legal policy from the assumption that battered wom[e]n should stay to the assumption that they should leave."); Leigh Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004) ("[A]lmost all of these legal interventions are premised on the notion that battered women want to end their relationships, invoke the power of the legal system to keep their batterers away, and ultimately sever all legal ties with their abusers."); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 59 (2006) ("A decision to effectively end a relationship is initiated by the prosecutor on behalf of the state, adjudicated as a criminal matter, and criminally enforced. It becomes an extension of the imperative to treat DV as a crime.").

15. *See* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 530–36 (2010) (reviewing the literature discussing the multiple reasons that explain why a woman might want or need to preserve the intimate relationship).

16. There are just a handful of exceptions where love is explored as a reason for staying in a violent relationship. *See* Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1474–75 (2001) (reviewing ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000)) ("[Women] do not necessarily want to be in a position where they can just leave. They want to be in relationships in which they forgive. They may even want to be in relationships that involve some relinquishment of self, autonomy, and power. And what is more, they are not alone. Women who are not in battering relationships and men who do not batter want these kinds of relationships too." (footnotes omitted)); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19–21 (1991) (observing that women's response to violence in a relationship relies on numerous goals: their experience of the violence, economic security, love of partner, and view of life outside of the relationship, among others). *See generally* LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 25–31 (2003); Cheryl Hanna, *Rethinking Consent in a* Big Love *Way*, 17 MICH. J. GENDER & L. 111 *passim* (2010) (discussed in detail *infra* Part III).

17. *See* Catherine Donovan & Marianne Hester, *'I Hate the Word "Victim"': An Exploration of Recognition of Domestic Violence in Same Sex Relationships*, 9 SOC. POL'Y & SOC'Y 279, 282 (2010) (reviewing a body of empirical studies that have concluded that "[l]ove for a partner and hope for the future of the relationship are amongst key reasons given by people in heterosexual and same sex relationships for staying in or returning to domestically violent relationships").

and "emotional attachment."[18] To fully appreciate the degree of discomfort such sanitized words display, one need only imagine saying, "I feel emotionally attached to you," or "I am deeply connected to you," rather than, "I love you," to one's spouse or partner before hanging up the phone or turning in for the evening. Or imagine explaining to someone outside of the relationship how you feel about your partner by saying: "I feel very emotionally connected to her."

Worse, on the rare occasions when scholars explicitly acknowledge that women may love their partners, we frequently are apologetic,[19] suggesting that we (feminist legal scholars) resign ourselves to "accept" the reality that the women we are advocating for do, indeed, love their partners.[20]

If listening to women subjected to abuse is important to feminist legal scholars, as they claim, and if women are "experts on their own lives, attuned to the likelihood of future abuse," why do we not defer to a woman's expression of love, and her desire to continue an intimate relationship, even when it is abusive?[21] Our treatment—whether it be avoidance or apology—illustrates our stuckness with regard to how to treat women who love their abusive partners.

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18. *See, e.g.*, Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 476–79, 493 (2003) (describing in detail the multiple "[r]elational [f]actors" that go into a woman's decision making regarding whether to preserve the relationship, using "emotional connection" and "emotional attachment," though mentioning the word *love* one time, on page 493 ("A woman may love her partner but also be afraid of him.")); Goldfarb, *supra* note 14, at 1500 (describing "*mutual emotional commitment*, companionship, intimacy, and sharing," but never using the word *love* (emphasis added)); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1113–14 (2009) ("The current [civil protection order] laws are particularly well situated to permit petitioners to construct a remedy that redefines a relationship that is tainted by abuse but nonetheless is meaningful—connected by children, economics, *emotional, and psychological ties*." (emphasis added) (footnote omitted)); Kuennen, *supra* note 15, at 537 ("A victim may choose to stay in a relationship that she knows is dangerous because the *intimate connection* is worth the risk." (emphasis added)).

19. *See* GOODMARK, *supra* note 9, at 98 ("The domestic violence literature tiptoes carefully around the concept of love. The literature accepts the idea that some women subjected to abuse do, in fact, continue to say that they love their partners despite the abuse. But the literature explains this love away, almost apologizing for the desire of women to continue their relationships.").

20. *See, e.g.*, LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 90 (2008) ("We need to ensure that every battered woman has the opportunity and ability to leave her relationship, receives sufficient counseling to make the most independent choice possible, and is fully informed about available alternatives. But *we also need to understand and accept that some women will decide to continue a connection* with an abusive partner. . . ." (emphasis added)); Goldfarb, *supra* note 14, at 1500–01 (describing the multidimensional emotions that abusive relationships produce, such as "mutual emotional commitment, companionship, intimacy, and sharing," and thus concluding that the aspiration of many women to remain with their partners "*should not be dismissed as naïve or misguided*" (emphasis added)).

21. This is a central question posed by Leigh Goodmark. *See* GOODMARK, *supra* note 9, at 100.

B. Love As a Product of False Consciousness

Scales traced the concept of false consciousness to political theorist Friedrich Engels and discussed its heritage prior to becoming associated, in this country, with dominance feminism in the 1970s.[22] Pertinent to the present discussion is Scales's working definition of false consciousness as "a false belief that is produced by and reinforces existing power arrangements in society, and that is held in spite of being contrary to the holder's own interests."[23]

This concept of false consciousness comes up in two ways for scholars who write about intimate partner violence. The first is that women in abusive relationships do not really understand the danger they are in.[24] More specifically, women who say that they love their abusive partners, and thus choose not to support criminal prosecution, or choose not to seek restraining orders, or who otherwise generally do not avail themselves of legal remedies designed to separate them from their partners, are unable to fully or realistically or rationally appraise their risk of danger.

Empirical data, however, make indisputably clear that women in abusive relationships appraise their danger more accurately than any assessment tool out there.[25] To date, there is no tool social science has to offer that women who have experienced abusive relationships cannot more accurately outscore.[26]

The second, much more complex argument is that a woman in an abusive relationship doesn't really love her partner; rather, what she experiences as "love" is actually an unconscious, conditioned reflex to living in a sexist, oppressive culture that tells her she *must* be with a man at all costs. This is what Scales called the "cult of true womanhood."[27] The argument proceeds that if the woman was conscious of her own oppression, she would be able to make an authentic choice. In this instance, the choice would be either: (1) not to love a partner who is abusive, or (2) desire to leave a partner who is abusive.

Scales argued, persuasively, that false consciousness is a weak analytical tool for several reasons. First and foremost, an accusation of false consciousness implies that "there is a 'true' consciousness accessible to the critic against which the consciousness of the criticized can be con-

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22. SCALES, *supra* note 1, at 123–29.

23. *Id.* at 129.

24. *See* Johnson, *supra* note 4, at 559–61 (describing an important part of danger assessment as whether "women suffer from a false consciousness of their risk of future violence or a diminished capacity" in decision making).

25. *See id.*

26. *See id.*

27. SCALES, *supra* note 1, at 132 (internal quotation marks omitted).

trasted."[28] Scales flatly rejected this notion. One cannot claim to objectively know another's interests.[29]

Even if an outsider could gain access to another's "true" consciousness or genuine interests, another of "the obvious analytical problems"[30] with false consciousness is figuring out how to measure whether the person is choosing beliefs that are consistent or inconsistent with their genuine interests. As Scales stated, "Even if we could presume to interfere in another's interests, what interests would we need to be talking about? Short- or long-term interests? Individual or group-based interests? What interests can we isolate and which should we include? Economic, psychological, communicative, technological, sexual, intellectual, political?"[31]

Finally, Scales asked: "Could it never be said that I have a genuine interest in undermining my own interests . . . ?"[32]

For all of these reasons, Scales rejected the term false consciousness, which she characterized as "debilitating for feminist efforts."[33] Rather, she argued, what is important is recognizing what the concept has meant or could mean. "For all the postmodern critique and other sources of destabilization of political action, we have got to have some concepts (and names for) the traps and, yes, falsehoods, that invite people without power to participate in their powerlessness."[34]

Scales did not coin a new term, but she thoughtfully described two levels of responsible inquiry into oppressive falsehoods: personal and political.[35] Regarding the personal, she observed:

> When I have thought of people (especially those I like and otherwise trust) as being wrong or deluded, my conclusions tend to follow from having observed similar mistakes or delusions among my own internalized oppressions. I have no doubt that it is my responsibility to continue to take that self-inventory, nor any doubt that I will uncover more sources of self oppression.[36]

Consequently, the political:

> The responsibility of being a political actor, a lawyer, an author, a teacher, a parent—a human—is to find evidence and good arguments

28. *Id.* at 129.

29. *Id.* ("The now widespread belief in the social character of knowledge renders suspect any suggestion of objective knowledge about other people's interest or even one's own interests.").

30. This is Scales's characterization. *Id.* at 129–30 (internal quotation marks omitted).

31. *Id.* at 130.

32. *Id.*

33. *Id.* at 133.

34. *Id.* at 134.

35. This allusion to the personal and political, or personal is political, is not lost on Scales's audience.

36. SCALES, *supra* note 1, at 134.

> and alternatives in every situation where it appears that a person or group could profitably reinterpret her or their own experience. And it is never that "you are completely wrong and worthless." These interactions are always partial; it is *this* [partial] aspect of experience that could be reinterpreted . . . .[37]

Rather than ignoring, denying, or patronizing women who experience and express love for their intimate partners, even in the context of abuse, we must ask women to examine their own feelings and beliefs. We might probe whether the love they feel is only loosely, or rather is quite closely, tied to the cult of true womanhood. We might ask if the love they feel causes them to surrender to the identities of their partners.[38] We might not like their answers. We might also ask if the love that women feel is a source of strength.[39] Or a source of safety. Or even a source of survival.[40] Perhaps it is any and all of these; perhaps it is none. Examining, rather than denying, love in the context of intimate partner violence should be the business of feminist lawyers. And examining, rather than denying, our discomfort with love in the context of intimate partner violence should be the business of feminist legal scholars.

C. Other Reasons Explaining Why We Don't Talk About Love

There certainly are reasons, other than false consciousness, explaining why feminist legal scholars do not explore, let alone address, the love a woman may feel for an abusive partner. First, it could be a political disaster for the battered women's movement, for it could jeopardize the hard-fought battle to get the state to take domestic violence seriously, and to treat domestic violence as a serious crime rather than a private "relationship problem" to be dealt with in the home.[41] "How could we possibly take seriously women's accounts of love and hope without undermining the little protection from male violence women have been able to wrest from the legal system, without indeed increasing our already

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37. *Id.*

38. *See* Baker, *supra* note 16, at 1474 (arguing that some women may desire to relinquish their selves to that of another).

39. E-mail from Evan Stark, Assoc. Professor of Pub. Admin. & Dir. of Master's in Pub. Health Program, Rutgers University, Dir. of Div. of Urban Health Admin., UMDNJ School of Pub. Health to author (Mar. 20, 2013, 3:47 PM) (on file with author).

40. *See id.*

41. Scholars in the field do indeed make these arguments. *See, e.g.*, Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 51 (1989) ("Often it appears as if feminist questioning of the [law's] impulse toward separation should at least wait until women can count on the *law* allowing them to separate."); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1688–90 (2004) (warning that the divide amongst feminists with regard to aggressive state interventions threatens the ground gained: "Isn't this where we were over twenty-five years ago?").

overwhelming vulnerability?"[42] This is indeed a dilemma for battered women's advocates and activists.

One piece of this political problem is, as Leigh Goodmark describes, "the need to prevent a return to [outdated and] discredited theories about why women subjected to abuse stayed with their abusers."[43] She cites as examples masochism and learned helplessness.[44] If feminist legal scholars were to fully bring to light the fact that many women love their abusive partners, they risk that women will once again be seen as pathological.

This is indeed a problem, but is not insurmountable. We have new theoretical constructs to temper, if not alleviate, this concern.[45] In the past two decades, researchers have done extraordinary work to differentiate among types of physical aggression that occur in intimate partnerships.[46] These theories call for critical examination of the context of aggressive acts and words, and specifically of the intent of the perpetrator and the effect on the victim. Aggression, according to lead theorists, exists on a continuum: at one end, there is situational "fighting" that is not uncommon or outside of community norms; at the other end, there is the use of coercively controlling tactics—including, but not limited to, violence—that are deliberately intended to restrict the victim's liberty and to control every aspect of her life.[47]

Perhaps some degree of aggression in intimate relationships is acceptable. Renowned sociologist Evan Stark argued that if scholars writing in the area of intimate partner violence accepted the possibility that not all violence in relationships is abusive (and the flip side of this coin, that many forms of coercive, but nonviolent, conduct *are* abusive), we might better understand, explain, and address the most dangerous, and always-gendered, type of intimate partner violence: "coercive control."[48] Currently, what the law labels "domestic violence" is a misnomer. A woman who slaps her husband once is as much a perpetrator of the crime of domestic violence under the current legal regime as a man who is both

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42. GOODMARK, *supra* note 9, at 98 (quoting Littleton, *supra* note 41, at 47) (internal quotation marks omitted).

43. *Id.*

44. *Id.* ("Researchers once theorized that masochism kept women from leaving.... [S]ome have claimed that learned helplessness is simply masochism devoid of its erotic component.").

45. This is not to say that Goodmark's concerns are exaggerated or misplaced; I too worry, despite these new constructs.

46. Goodmark provides an overview of these theories. GOODMARK, *supra* note 9, at 38–40.

47. *See* EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 104–06 (2007).

48. Evan Stark's work is highly respected by legal scholars who argue for law reform in domestic violence cases. Stark's differentiation amongst types of "domestic violence" has been widely discussed. He argued that there is a difference between "fights," "assaults," and "coercive control," the latter being the most serious and debilitating, perpetrated by men against women for the purpose of restricting the woman's freedom and dignity and, consequently, where feminists should focus their attention. *See id.*

violent *and* dominates every aspect of his partner's life, such as what she wears, whether she may have friendships outside of the relationship, and how much money she has. The current legal definition is problematic not only because it focuses too narrowly on discrete incidents of physical violence, without capturing the many coercive tactics shy of using violence that a perpetrator may use to control every aspect of a victim's life, but also because it is too broad; within its net is caught fighting—what couples in intact relationships do, sometimes, that simply does not fall outside of a community norm.[49]

If feminist legal scholars were more discerning in targeting legal sanctions on the intent and consequences of coercive control, portraying it as the domination of a life, rather than continuing to use less politically charged words such as abuse or control, they could broaden

> the demand for justice beyond the relatively narrow emphasis on violence-free relationships, put[] the attainment of substantive equality back on the table, and suggest[] an agenda of rights and redistribution that would attract constituencies from civil rights and labor that have kept their distance because of our emphasis on policing.[50]

Still, Stark recognizes the political risk:

> [R]eintroducing domination as the focus of concern will cost us allies with no particular sympathy for feminist issues, including those opponents of "violence against women" who accept traditional gender hierarchies and view women paternalistically. . . . In the current climate of reaction, the media may counter talk of domination by putting our battered sisters and their supporters back into jumpsuits; picturing them as crocks, cranks, harpies, or worse . . . .[51]

But, he argues, "ledgers have two sides. Reassigning attention to domination could constitute a new audience, attract a cohort of activists energized by a desire to be free rather than merely safe, and lay the foundation for new alliances to replace those we lose."[52]

In addition to attracting new allies, the systematic differentiation of intimate partner violence into types and degrees could generate a productive conversation between scholars who do not write in the field of intimate partner violence and those who do. Many legal scholars who write about the law and intimate relationships (such as family law scholars and "law and emotion" scholars) write as if marriage and "normal" intimate

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49. Goodmark attempts to resolve these problems when she redefines the crime of domestic violence in Chapter 2. GOODMARK, *supra* note 9, at 29–53.

50. STARK, *supra* note 47, at 371.

51. *Id.* at 370.

52. *Id.* Stark here refers to activists in civil rights and labor who have been repelled by the law-and-order and policing emphases of the battered women's movement, and to thousands of men and women who have been turned off by the current victimization narrative. *Id.* at 370–71.

relationships do not involve fights, physical aggression, or coercion.[53] Kathy Abrams observed that because the law does not engage with intact-intimate and familial relationships, but rather with relationships that are breaking up, scholars have under-investigated the fear, pain, despair, and abuse that occur in "normal" relationships.[54]

It has long been interesting to me to read family law articles suggesting comprehensive, forward-looking reforms, and then to see a carefully worded exception qualifying the reforms as inapplicable to relationships marked by intimate partner violence.[55] Given the prevalence of intimate partner violence, these scholars' reforms likely do not apply to nearly half of all the relationships they describe.[56] On the flip side of this coin, scholars writing in the area of intimate partner violence have under-investigated, if not dismissed, many of the emotions that occur in intact relationships.[57] Namely, love.

III. GETTING "UNSTUCK"

That feminist legal scholars writing in the field of intimate partner violence are stuck on love would be of less concern to Scales than if we

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53. *See, e.g.*, Steven K. Berenson, *The* Elkins *Legislation: Will California Change Family Law Again?*, 15 Chap. L. Rev. 443, 489 (2012) ("There is virtually universal agreement that except in rare cases involving domestic violence[,] . . . negotiated agreements in family law cases benefit both the parties to the dispute, the court system as a whole, and the children who are the subject of the dispute."); Deborah Cantrell, *The Role of Equipoise in Family Law*, 14 J.L. & FAM. STUD. 63, 63 (2012) (reviewing the legal scholarship in family law over the last twenty years, and proposing that "courts and court-annexed programs build out practices of equipoise," defined as a "mode of processing information and emotions that disrupts habituated and unhelpful interactions between persons and instead encourages thoughtful engagement with emotions, resulting in reduced adversarialness and constructive problem solving," but never mentioning or addressing cases involving domestic violence); Andrew Schepard, Kramer vs. Kramer *Revisited: A Comment on* The Miller Commission Report *and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 679 (2007) (arguing that lawyers should have the obligation to advise clients regarding mediation and alternatives to litigation in family law cases, but stating, "[M]ediation may not be appropriate in cases involving serious allegations . . . of domestic violence."); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 246 (2004) ("It is well established that secure relationships with parents contribute in critical ways to healthy child development and that family dissolution imposes financial and psychological costs on children. Other than in situations of domestic violence, . . . children's development usually is enhanced if their parents' relationship endures.")

54. Kathryn Abrams, *Barriers and Boundaries: Exploring Emotion in the Law of the Family*, 16 VA. J. SOC. POL'Y & L. 301, 307–08 (2009) (explaining the barriers to acknowledging emotion in family law, one of which being that the legal system does not engage with intact families and thus we have scant understanding of the feelings of despair, jealousy, and pain that are normal parts of relationships).

55. A wonderful exception to this norm, and one I hope to see replicated, is Clare Huntington's discussion of the typologies of violence and how her proposed "reparative model" of family law could apply to some types of abusive relationships in which there has been a history of violence. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1312–16 (2008).

56. Martha Mahoney beautifully made this point more than two decades ago. Despite the statistics showing domestic violence to be "extremely widespread in American society," and the fact that the statistics themselves are "widely reproduced, there is little social or legal recognition that domestic violence has touched the lives of many people in this society . . . . This radical discrepancy between the 'mysterious' character of domestic violence and repeatedly gathered statistics reflects massive denial throughout society and the legal system." Mahoney, *supra* note 16, at 10–11.

57. For a detailed discussion on this theory of "Getting Unstuck," see *infra* Part III.

stayed stuck. Any place of stuckness is a place, and an opportunity, to be recognized; and Scales argued, to be constantly reinterpreted.[58]

A. An Illustration of Getting Unstuck

In a recent article, Cheryl Hanna discussed love in the context of intimate partner violence.[59] Her article is exceptional not only for this reason, but also because it is a departure from her previous work; she reinterprets her prior, closely held and widely cited position regarding the value of women's personal autonomy in intimate partner violence.

In the article, Hanna observed: "What to do about the role of love in relation to those choices that we make creates a particular dilemma for feminist legal theory."[60] A key strand of her argument is that while women may not choose to be involved in intimate relationships that are abusive, they may accept the relationships nonetheless. After all, she observes, the "nearly universal desire [for love and] to be in a relationship . . . often leads us to accept situations we never anticipated or wanted."[61] "Yet, the law, neither in theory nor in practice, does a very good job at understanding the role love plays when we consent to things that may cause us heartache and harm."[62]

The article explores the question, left open after *Lawrence v. Texas*,[63] of under what circumstances individuals should be allowed to consent to activity that occurs in the context of their private, intimate relationships. Hanna examines, among others, a case involving intimate partner violence.[64] When the police responded to the home, the victim told them that her husband had threatened to "kill her by snapping her neck and that he told her he had a gun in the house."[65] The victim did not support the prosecution, and she recanted during trial. As of the writing of Hanna's article—ten years after the trial—the couple was still married and living together.[66]

In that case, Hanna argues, the victim did not necessarily consent to the discrete threat, but Hanna asks us to think more expansively about consent and what it means.[67] While a victim may not "choose" her part-

58. SCALES, *supra* note 1, at 38 (describing how points of stuckness can be chalked up to "essentially contested concept[s]"—ones that have "permanent potential critical value" to be examined and reinterpreted (quoting W. B. Gallie, *IX. Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169, 193 (1956)) (internal quotation marks omitted).

59. Hanna, *supra* note 16.

60. *Id.* at 128.

61. *Id.* at 113.

62. *Id.* at 127.

63. 539 U.S. 558 (2003).

64. Hanna, *supra* note 16, at 145–48 (examining *People v. Brown*, 117 Cal. Rptr. 2d 738, 743 (Cal. App. Dep't Super. Ct. 2001), in which football star Jim Brown was accused of threatening his wife, Monique).

65. *Id.* at 145.

66. *Id.* at 148.

67. *Id.* at 146–47.

ner's anger or aggression, she may "put up with it."[68] She understands the risks to herself. She values the relationship. Perhaps the consent, then, is to the relationship as a whole.[69] Why should the state intervene, Hanna asks, particularly after *Lawrence*, in which the Supreme Court recognized that love can be an expression of autonomy and thus protected as a liberty interest?[70]

The problem is where to draw the line. Hanna asks a number of questions: Are there "instances in which the law ought not respect an individual's expression of love?"[71] Such as when she is at risk of lethal violence?[72] In that circumstance, should not a prosecutor prosecute, despite the victim's desire to preserve the relationship because she loves her partner?[73] And if individual women, rather than state prosecutors, decide whether to prosecute men for crimes of physical and sexual violence, is this not the practical equivalent to allowing a defense of consent?[74] The state is allowing the woman to consent both to the discrete act of violence that is the subject of the prosecution, and it is allowing her to consent to remain in a risky relationship.[75]

Hanna grapples with each of these questions, and she concludes that there is no right answer.[76] In each case, there is the potential for men to exploit women, and in each case, the women "derive some benefits, . . . pleasure, . . . joy, or . . . love[,]" and "also suffer some harm . . . from both male . . . aggression[] and . . . state intervention."[77]

Hanna concludes that feminist legal scholars must continue to struggle with these tensions.[78] To remain relevant, feminist legal theory should "persuade us to accept ambivalence, and to be open to changing our minds because of the complicated nature" of women's (and men's) lives.[79] Indeed, Hanna herself, as evidenced by the article, changed her mind; she acknowledges that in past scholarship, she did not give adequate weight to the privacy and liberty interests of victims, and to the

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68. *Id.* (internal quotation marks omitted).

69. To be clear, Hanna does not equate consent with choice; women who love their abusive partners do not choose to be abused. Rather, Hanna argues that women who remain in abusive relationships may be willing to risk being abused because of their love. *Id.* at 136, 146–47.

70. *Id.* at 128 (discussing *Lawrence*, 539 U.S. 558).

71. *Id.* at 129.

72. *Id.*

73. *See id.* at 138–39.

74. *See id.* at 139–42.

75. If the law allows women in violent, intimate relationships to decide when the state should intervene (i.e., allows women to consent to remain in risky relationships), "the consequence would be less legal restraints on men in the fulfillment of their sexual and aggressive desires." *Id.* at 135.

76. *Id.* at 155.

77. *Id.*

78. *Id.* at 156.

79. *Id.*

damage to women's overall autonomy when the state intervenes against their wishes.[80]

B. Moving Forward

A fundamental tenet of feminism is listening to women's voices.[81] Catharine MacKinnon (who Scales was devoted to) described listening to and believing what women say as the "methodological secret" of feminism.[82] As stated previously, feminists working in and writing about the battered women's movement have described women subjected to abuse as "the experts on their own lives, attuned to the likelihood of future abuse."[83] This description is not ideological gloss; it is grounded in fact. Women in abusive relationships are the best predictors of their risk of re-abuse. As discussed previously, victims outscore every metric designed by social scientists to assess future risk.[84]

It is not only risk of re-abuse (in an already abusive relationship) that poses a danger to women. It is the existence of the intimate relationship itself. Relationships, like sex, can be dangerous.[85] When women choose, in the face of such risk, to both enter into and to preserve their relationships for love, perhaps it is because they value love more than, or at least as much as, physical safety. To remain relevant, feminist legal scholars must grasp the importance of love and intimate relationships in women's lives.[86]

IV. CONCLUSION

Feminist legal scholars are stuck on love in the context of intimate partner violence. This stuckness presents an opportunity to become unstuck if we accept it instead of chalking it up merely to false consciousness or some other conversation stopper.[87] If we do not take the opportunity to consider the importance of love, then we will base the laws, policies, and decisions we make about intimate partner violence on seriously incomplete or erroneous information. But if we examine, rather

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80. *Id.* at 144.

81. GOODMAN & EPSTEIN, *supra* note 20, at 90; ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 71–73 (2000) (discussing the importance of accounting for women's particular experiences when crafting law and policy); *see also* Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1225–32 (2000) (discussing two different forms of feminist critique within the context of constitutional theory and empiricism).

82. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 5 (1987).

83. GOODMARK, *supra* note 9, at 100.

84. For a review of empirical work illustrating that women are the best predictors of future violence, see Margaret Johnson, *supra* note 4, at 559–60.

85. *See* Baker, *supra* note 16, at 1475 ("Relationships of any kind—platonic, sexual, or familial—can be emotionally and physically dangerous, but they may also be inevitable or at least desirable.").

86. *Id.* at 1460–61 (reviewing SCHNEIDER, *supra* note 81).

87. *See* SCALES, *supra* note 1, at 120–21.

than deny via the vehicle of false consciousness, the importance of love, we could better dismantle the notion that women who stay in abusive relationships are helpless or crazy. Scales's dismantling and reinterpretation of the concept of false consciousness provides feminist legal scholars with this opportunity.

HOW MASCULINITIES DISTRIBUTE POWER: THE INFLUENCE OF ANN SCALES

ANN C. MCGINLEY[†] & FRANK RUDY COOPER[‡]

ABSTRACT

Ann Scales's scholarship on masculinities in relation to sexual assault and militarism prompted us to consider exactly how power is distributed by assumptions about what is masculine. For instance, men privileged by association with hegemonic masculinities—those most dominant and preferred—are sometimes excused for acts of violence against people who are denigrated as unmasculine or excessively masculine. In one set of examples, communities excuse football players for sexual assaults on grounds that "boys will be boys." The implication is that boys should be allowed to act out before taking on adult responsibilities, and that they need to do so in order to become men. Moreover, the "boys will be boys" narrative suggests the victims were asking for it. In another set of examples, certain types of men are granted exemptions from the normal rules of self-defense because they are seen as manly protectors of their communities. Men such as George Bush and George Zimmerman are allowed to preemptively strike men such as Saddam Hussein and Trayvon Martin because the latter's denigrated masculinities suggested they were asking for it. Scholars should continue to explore the ways such hierarchies of masculinities distribute privileges and vulnerabilities.

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I. INTRODUCTION: MULTIDIMENSIONAL MASCULINITIES THEORY THROUGH THE PRISM OF ANN SCALES

Masculinities distribute power. One way to demonstrate this fact is to ask a few questions: Who must fear walking alone in secluded places at night? Who must fear encounters with the police? Who is thought to look like a corporate leader? The answers—women,[1] poor minority men,[2] upper-class white men,[3] respectively—are revealing. Women and minorities are disempowered by their vulnerabilities while majority men are empowered by their status identities.[4] Being a woman or a certain type of man is disempowering. Being a man, especially a specific type of man, has material benefits. Assumptions about what behavior is appropriately manly distribute power by creating and reinforcing hierarchical relationships among people.

One scholar who understood the importance of masculinities was Ann Scales. Before the live portion of this Symposium, we knew Ann and her work but had not yet felt the full force of her presence. Hearing Ann's close friends speak at this Symposium gave us a sense of Ann's deep but impish intellectual curiosity. She would, therefore, have been proud of this Symposium. It was that most rare of occasions where profound analytical rigor was met with equal parts of emotional caring. We feel lucky to have been invited to speak about Ann's work on masculinities and have learned much in the process.

Scales's scholarship helps us understand both why men act in aggressive ways and why some men are more likely to be granted exemptions from criminal law sanctions while other men are more likely to be victims of those exemptions. In *Student Gladiators and Sexual Assault:*

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1. *See, e.g.*, ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN'S LIVES *passim* (1997) (discussing women's beliefs that they can avoid harm by being good).

2. *See, e.g.*, Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies,* Terry *Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 676 (2009) (discussing conflicts between police and male suspects).

3. *See, e.g.*, Ann C. McGinley, *Hillary Clinton, Sarah Palin, and Michelle Obama: Performing Gender, Race, and Class on the Campaign Trail*, 86 DENV. U. L. REV. 709, 712 (2009) (discussing why leadership looks masculine).

4. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 707 (2001) (distinguishing status identities from performative identities).

A New Analysis of Liability for Injuries Inflicted by College Athletes, she explores sexual assaults on female college students by football players, and the courts' and society's reaction to them.[5] In *Soft on Defense: The Failure to Confront Militarism*, she concludes that military values that derive from concepts of masculinity provide certain men with exemptions from the usual rules.[6] Scales's analyses are consistent with the principles of multidimensional masculinities theory that we helped develop in our edited collection, *Masculinities and the Law: A Multidimensional Approach*.[7]

In the edited collection, we explained that "multidimensional masculinities theory assumes that law distributes power by relying upon assumptions about human behavior that reproduce preexisting social relations."[8] This theory draws from masculinities scholarship, which has its origins in sociology and social psychology. It also draws from critical race theory, feminist legal theory, and multidimensionality theory.[9] The original masculinities scholars were men who responded to feminist arguments by examining men's identities. They agreed with the premise of feminists that society views women as inferior to men, but they believed that feminists often see men as an undifferentiated mass.[10] They posited that it was incorrect for feminists to see men as undifferentiated because not all men fully adopt the hegemonic, or dominant, form of masculinity,[11] and men are not equally privileged by that masculinity.[12] The hegemonic masculinity in U.S. society has generally reflected the types of masculinity embodied by well-educated, middle-class, straight, white, Christian men.[13] Most men, however, cannot fully achieve this type of hegemonic masculinity.[14] Their inability to live up to the expectations of hegemonic masculinities puts them in a penalty status[15] and leads to attempts to perform masculinity in a way that compensates for their penalty status.[16] Since masculinity is not a biological imperative but a social

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5. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 *passim* (2009).

6. Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 BERKELEY J. GENDER L. & JUST. 369, 379, 389 (2005).

7. MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

8. Ann C. McGinley & Frank Rudy Cooper, *Introduction* to MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 1, 1.

9. *Id.* at 2.

10. *Id.* at 3–4.

11. *Id.* at 5.

12. *Id.*

13. *See id.*

14. *See id.*

15. *See* Frank Rudy Cooper, *Masculinities, Post-racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 22 (2010) ("Penalty status is the condition of already having something about your identity that makes your masculinity suspect.").

16. *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 900 (2006) (discussing effect of being "one down" in hierarchies); Nancy Ehrenreich, *Subordination and Symbiosis: Mech-

construct, men can craft their masculine identities through behaviors, albeit while subjected to societal pressure to perform in particular approved ways.[17] In light of their observation of the pressures men are under to perform their masculinities in hegemonic ways, masculinities scholars accepted that men as a group are powerful, but also saw that individual men often feel powerless.[18] This powerlessness, they argued, comes not from women or feminism, but from societal pressure on men to compete to prove their masculinity to themselves and others.[19]

In the West, the most important proofs of masculinity have been showing that one is not feminine and not gay.[20] One means of asserting those qualities, and thereby promoting one's masculine esteem, has been by demonstrating sexual prowess.[21] Women often become props or pawns in this proof.[22] Young men engage in group homosocial behaviors that use women as sexual objects to bond with other men. For instance, Michael Kimmel explains that some young men watch pornographic videos together[23] and others engage in group sexual assaults or harassment of women.[24] Men's acquisition of women can also be used to gain masculine esteem relative to other men.[25] Moreover, groups of young men engage in hazing, harassment, and even sexual assault of other young men in order to establish group norms, enforce loyalty, secure silence about aberrant behavior, or force weak or effeminate males out of the group.[26] Especially in neighborhoods and workplaces where achieving the hegemonic masculinity is nearly impossible, members of the community might engage in hyper-masculine behaviors such as sexual harassment or fighting in order to prove their masculinity.[27] Whereas those who can perform a preferred masculinity are privileged, those whose performances of masculinity are denigrated become more vulnerable to violence.

Multidimensional masculinities theory recognizes that concepts of masculinity interact with other identity concepts in different ways in var-

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anisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251, 291–92 (2002) (discussing partly-denigrated men's temptation to engage in compensatory subordination of others).

17. NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 60 (2010).

18. *Id.* at 63.

19. *See* McGinley & Cooper, *supra* note 8, at 3–4.

20. DOWD, *supra* note 17, at 62.

21. *See* MICHAEL KIMMEL, GUYLAND 206–07 (2008) (discussing how "hooking up" is an effort to determine a man's status compared to other men).

22. McGinley & Cooper, *supra* note 8, at 3–4.

23. KIMMEL, *supra* note 21, at 186–87.

24. *Id.* at 237–40; Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1218–19 (2008).

25. *See, e.g.*, Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 693 (1999) (arguing that some young men are so intent on proving their masculinity through sexual conquest that the woman's consent becomes irrelevant to them).

26. McGinley, *supra* note 24, at 1219–30.

27. *See* McGinley & Cooper, *supra* note 8, at 5.

ious legal contexts.[28] Identities are intertwined and co-constituted.[29] We are all simultaneously gendered, raced, classed, and so on. The intersecting nature of our identities means that being male and white and rich can be very different from being male and black and poor, even in the same social context. Moreover, what is deemed masculine changes as one moves within different social groups or social spheres.

Part II of this Essay analyzes the law's and society's reactions to sexual assaults, which often include the "boys will be boys" narrative. That is, people sometimes assume it is natural for boys to be raucous, and use that assumption as a basis for excusing anti-social and even criminal behavior. Part II also considers how these reactions construct a narrow, hegemonic form of masculinity that governs the appropriate response to victims of sexual assault and harassment. Part III then discusses the law of self-defense in international law and domestic criminal law. It demonstrates that exemptions from the usual rules are deployed based on concepts of preferred and denigrated masculinities that are not only gendered, but also raced and classed. Our prime example is (presumptively) white[30] neighborhood watch captain George Zimmerman's slaying of unarmed black teenager Trayvon Martin. Part IV concludes that masculinities protect some—mostly upper-class white—men and victimize other—often poor, racial-minority—men.

II. "BOYS WILL BE BOYS"

Ann Scales understood that men sometimes commit assaults to boost their own or their group's masculine esteem and that men and women sometimes forgive that behavior because of their assumptions about what it means to be masculine. In *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, Scales discusses the problem of members of athletic teams (primarily football teams) gang raping young women.[31] She debates the possibility of legal liability of universities for the behavior of the student athletes.[32] She demonstrates that Title IX of the Education Amendments of 1972, which prohibits gender discrimination in education, has onerous standards to meet, and that it is nearly impossible to get injunctive relief under Title IX.[33] Her solution is to use state constitutional law, especially in states with equal rights amendments, to find universities liable for encouraging the rape culture in athletic programs.[34] *Student Gladiators* is

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28. *Id.* at 2.
29. *Id.*
30. Zimmerman is technically half Latino. He is white-skinned and, we would contend, white-acting.
31. Scales, *supra* note 5, *passim*.
32. *Id.* at 236.
33. *Id.* at 236–37, 239.
34. *Id.* at 261–69.

an interesting article in particular because of its acknowledgement of the cause of gang rape by football players: societal norms of masculinity.[35]

A. Societal Norms of Masculinity: Simpson v. University of Colorado[36]

Scales focuses on the story of *Simpson v. University of Colorado*, a case where the plaintiffs—female students at the university—alleged that they were raped repeatedly by football team members and recruits.[37] According to the allegations, the plaintiffs decided to stay at home one evening.[38] A roommate, who was also a tutor for the football team, invited a group of football team members and recruits to their apartment for a party.[39] Simpson, who knew none of the players, was allegedly raped by multiple football players in her room while simultaneously another roommate, who was too drunk to consent, was harassed and assaulted by three other players and recruits.[40] After the two women publicized their rape allegations to the university community, they faced hostility and threats that led to Simpson dropping out of college and the other plaintiff taking a year's leave of absence.[41] The complaint also alleged that the football coach had for years refused to change recruiting practices that included heavy use of alcohol and access to strip shows, lap dances, and prostitutes because of the fear that such limitations would lead to a recruiting disadvantage.[42] The federal district court granted summary judgment to the defendant university, concluding that there was insufficient evidence for the plaintiffs to meet the Title IX standards: that the university knew about the behavior and that it exhibited deliberate indifference to it.[43] On appeal, the Tenth Circuit Court of Appeals overturned the grant of summary judgment.[44] The case settled for more than $2.8 million to the two plaintiffs.[45]

There are many cases alleging that groups of boys or men engaged in assault or harassment of girls or of weaker, gender-non-conforming boys.[46] Frequently, the attackers belong to the same athletic team.[47] And,

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35. Scales, *supra* note 5.
36. 372 F. Supp. 2d 1229 (D. Colo. 2005), *rev'd*, 500 F.3d 1170 (10th Cir. 2007).
37. Scales, *supra* note 5, at 213–14.
38. *Id.*
39. *Id.*
40. Scales, *supra* note 5, at 213; *Simpson*, 500 F.3d at 1180.
41. Scales, *supra* note 5, at 213–14; *Simpson*, 500 F.3d at 1180.
42. *Simpson*, 500 F.3d at 1181–84.
43. Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005), *rev'd*, 500 F.3d 1170; *see* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 646–47 (1999) ("[R]ecipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." (alteration in original)); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) ("[I]t would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district . . . without actual notice to a school district official.").
44. *Simpson*, 500 F.3d at 1185.
45. Scales, *supra* note 5, at 216.
46. *See, e.g.*, Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996); Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 665 (7th Cir. 2005).

frequently, authority figures cover up the alleged wrongdoing or diminish its importance.[48] The assaultive behaviors themselves are horrific, but the responses afterwards by adults who are neither drunk nor acting in the heat of passion are inexplicable.

B. Social Construction of Masculinity in Our Guys

It is our theory that much of group sexual assault that occurs, and community responses thereto, result from the social construction of masculinity. That is, masculinities theorists conclude that masculinity is not a natural result of biology. Rather, it is performed by individuals in response to societal or group pressure. Masculinities scholars note that the most important indicator of manliness is that one is neither gay nor a girl.[49] Boys and young men in group situations use penetration of the vagina, the anal cavity, and the mouth as means of degrading a victim and of proving their own membership in the group. Masculinities scholars explain that masculinity is such a fragile commodity that boys and young men often engage in competitive behavior in order to prove their manhood to other boys and men.[50] It is this competition and a need to impress others that impels men and boys who act in groups to commit gang rapes and other sexual assaults. "Running a train" (gang rape) is one means of demonstrating the superior masculinity of the rapists.

These rapes are often normalized by the community. When a young woman is a victim, it is her fault for being in the wrong place at the wrong time or for being intoxicated.[51] If the victim is a man, the behavior is just "horseplay."[52] The victim is ridiculed for not taking it "like a man" and ostracized for reporting the violation to the authorities.[53] Our understanding of the community responses to sexual assault as reflecting assumptions about masculinity is supported by the cases. For instance, the *Simpson* facts resemble a case described in *Our Guys* by Bernard Lefkowitz, which we use in our book, *Masculinities and the Law: A Multidi-*

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47. *See, e.g.*, *Simpson*, 500 F.3d at 1172; *Seamons*, 84 F.3d at 1229; BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 16 (Vintage Books 1998).

48. *See* LEFKOWITZ, *supra* note 47, at 284–86.

49. *See id.* at 1163–64.

50. *See* McGinley, *supra* note 24, at 1163–67.

51. *See, e.g.*, Warner Todd Huston, *Fmr Pres of Local Chapter of Ohio NAACP: Steubenville Rape Victim Was 'Drunk and Willing,'* WIZBANG (Apr. 1, 2013), http://wizbangblog.com/2013/04/01/fmr-pres-of-local-chapter-of-ohio-naacp-steubenville-rape-victim-was-drunk-and-willing (discussing the culpability of the young woman from Steubenville, Ohio who was raped after she passed out at a party).

52. *See, e.g.*, Shafer v. Kal Kan Foods, Inc., 417 F.3d 663, 666 (7th Cir. 2005) (concluding that the plaintiff did not have a case even though the defendant's employee had committed four serious sexual violations against him); Linville v. Sears, Roebuck & Co., 335 F.3d 822, 824 (8th Cir. 2003) (affirming the lower court's grant of summary judgment where the plaintiff was backhanded repeatedly in the scrotum because the behavior did not occur "because of sex" (internal quotation marks omitted)).

53. *See* Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996) (internal quotation mark omitted).

mensional Approach, to illustrate the concept of "boys will be boys."[54] In *Our Guys*, a group of high school football players enticed a teenage girl whom they knew was mentally impaired to the basement of the home of two of the players.[55] Once she was there, they demanded that she remove her clothing and perform oral sex on one of the players.[56] The behavior escalated when a number of the boys inserted a broom handle, a baseball bat, and a stick into her vagina.[57] At the time, there were between thirteen and sixteen boys in the basement.[58] A few of the boys left when they saw what was happening, but not one of them reported the rape.[59] And, although rumors of the rape abounded in the school, it took weeks before one student finally reported the rape to a school official.[60] The book describes the trial of the boys who were charged with rape and sexual assault. The crime itself was heinous, and the book's study of how the town normalized the boys' behavior and shifted blame to the victim is at once fascinating and startling. Moreover, the defense lawyers' depictions of their clients' behavior as normal and the teenage girl as a promiscuous "Lolita"[61] demonstrates how law can be perverted to the ends of preserving dominant assumptions about masculinity.[62]

The boys described in *Our Guys* were a group of athletes who lived in the suburban, white-collar town of Glen Ridge, New Jersey, about forty minutes from Manhattan. The town was proud of its schools, its children, and of the community.[63] This particular group of boys had engaged in pranks and even criminal behavior for years, but they had never been subject to more than fleeting discipline. Some of them had been caught stealing money from the girls' purses at a dance;[64] many engaged in weekend parties where there was plenty of alcohol.[65] Most attended the parties and had sex with willing young girls while other boys watched from inside the closet, "a practice they called 'voyeuring.'"[66] The boys relived these bad acts by talking about them incessantly and alluding to them in their high school yearbooks.[67] The boys watched pornography as a group and may have engaged in group masturbation.[68]

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54. *See* McGinley & Cooper, *supra* note 8, at 9.
55. LEFKOWITZ, *supra* note 47, at 13–23.
56. *Id.* at 23–24.
57. *Id.* at 25.
58. *Id.* at 24.
59. *Id.* at 23–24.
60. *Id.* at 29.
61. "Lolita" is a common term for a young woman who may be a seductress. *See* VLADIMIR NABOKOV, LOLITA (Van Rees Press 1955) (creating the concept in the now-canonical novel); *see, e.g.*, THE POLICE, DON'T STAND SO CLOSE TO ME (A&M Records 1980) (referencing the book in a popular song about a potential teacher–student sexual relationship).
62. *See* LEFKOWITZ, *supra* note 47, at 361–62.
63. *See id.* at 5–6.
64. *Id.* at 177–81.
65. *Id.* at 138–39.
66. *Id.* at 184.
67. *Id.* at 185.
68. *Id.* at 183.

From the time he was in middle school, one of the boys spent much of his time in class masturbating and revealing his penis to the other students.[69] A number of the boys used racial epithets to refer to a football player who played on an opposing team, including in front of the only black member of their own football team.[70] Other boys who were marginal members of the group were thrilled to be invited to the parties and were unwilling to sacrifice their invitations by not going along with the behavior.[71]

Girls who Lefkowitz calls the "Little Mothers" took care of the boys.[72] These girls were friends whom they did not date, but the girls decorated the boys' bedrooms before games, made food for the parties, and tutored them when they needed help in school.[73] Even when the parties were over, the group of boys would arrive at one Little Mother's home and pull food out of the refrigerator and leave her to clean up their mess.[74] There was one girl who was an outsider who invited the school to her house for a party. The group totally destroyed the girl's home.[75] She was so upset that she threatened to commit suicide by jumping off a balcony. They urged her to jump.[76]

The boys' behavior was not hidden. It occurred over many years, and yet the adults in the town, parents and teachers alike, allowed it to occur.[77] The boys were lauded for being "the guys," treated as heroes because they were athletes, and never held accountable for their actions. After the rape occurred, the Little Mothers came to their defense. They told reporters that the victim was a "slut."[78] In other words, she "asked for it." Few adults had sympathy for the victim either. The school district hid behind a screen of neutrality, never willing to express judgment or to allow students to judge "the guys'" acts.[79] In fact, many members of the community expressed sympathy for the boys and regret that the publicity in the media would destroy their property values.[80] Many in the community even treated the boys as victims.[81] The rape victim and her family were, for many, invisible.[82] For instance, the father of one of the boys who inserted the broomstick into the victim's vagina reportedly stated,

69. *Id.* at 90, 166–67.
70. *Id.* at 137–38.
71. *See id.* at 24, 143.
72. *Id.* at 144 (internal quotation marks omitted).
73. *Id.* at 144–45.
74. *Id.* at 150–51.
75. *Id.* at 153–59.
76. *Id.* at 158.
77. *Id.* at 167–71.
78. *See id.* at 270 (internal quotation marks omitted).
79. *Id.* at 270–71.
80. *See id.* at 7.
81. *Id.*
82. *Id.*

when his son was offered a plea agreement of one year in prison, "I can't see Kevin doing a year for this."[83]

C. Our Guys *as an Example of the "Boys Will Be Boys" Attitude*

The community's reaction was the classic "boys will be boys" attitude. This attitude is an important constructor of masculinity.[84] The idea is that boys are young, naturally aggressive, competitive and physically active, that they will engage in pranks and even criminal behavior, but that they will outgrow this immature behavior.[85] It is as though adulthood is a burden for which boys should be compensated in advance: "This is the best time in their lives," the adults say, "let them go." "Soon, they will be saddled with a job, a family, and a mortgage. Let them have some fun before they grow up." With these types of comments, adults normalize behaviors that would never be tolerated from girls as biological responses to the boys' growing bodies. And girls are made responsible for the boys' behaviors. If a girl whose IQ is only 49 is enticed to the boys' basement by one boy who promises that his popular brother will date her,[86] she deserves what she gets. She wanted it. Even though the "it" is a painful prodding with a baseball bat, a broom handle, and a stick.

While a number of the boys were ultimately convicted, their lawyers, who are agents of the law, also constructed their behaviors as normal masculine behavior. One of the defense lawyers, Michael Querques, repeatedly impugned the victim's reputation, calling her "Lolita" and arguing that the boys were helpless when put up against the seductress.[87] In his view, the boys needed protection from her; it was not the other way around. "Boys will be boys," he said.[88] "Pranksters. Foolarounds. Do crazy things. Experiment with life and disregard their parents. Boys will be boys."[89] And, despite the presence of a New Jersey Rape Shield Law, the judge ruled that much of the victim's sexual history was admissible evidence to prove whether she was capable of consenting to the behavior that occurred in the basement.[90] The court thus welcomed the "she asked for it" defense. This ruling led the way to the introduction of much humiliating evidence that destroyed the victim's reputation.[91]

In the trial and outside the courtroom, the defense lawyers engaged in misogynist behavior that mirrored that of their clients. Outside the courtroom, defense attorney Tom Ford referred to a distinguished female

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83. *Id.* at 341 (internal quotation marks omitted).
84. *See* McGinley & Cooper, *supra* note 8, at 9 (claiming "they learned from their parents and the community that their behavior was acceptable").
85. *Id.* (noting the assumption that "the boys will outgrow it").
86. LEFKOWITZ, supra note 47, at 20.
87. *Id.* at 361–62, 396, 445 (internal quotation marks omitted).
88. *Id.* at 362 (internal quotation marks omitted).
89. *Id.* (internal quotation marks omitted).
90. *Id.* at 334.
91. *Id.* at 334–35, 377, 382.

prosecutor as a "[b]ush," a crude reference to the female anatomy.[92] He also commented on the testimony of a female police investigator: "See what a witch she is. Did you see the slit in her skirt? Did you see her blouse? She just used those looks to seduce that poor kid."[93] Querques also referred to the female detective as "[t]hat bitch" and stated, "Who's gonna believe her?"[94] Outside the courtroom, Querques called the victim a "pig" and contended that the boys needed protection from her.[95] In court, he opened and spread his legs because he wanted "to show the jurors how she was enjoying it."[96] A newspaper covering the trial reported that some of the defense attorneys referred to two representatives of the National Organization of Women (NOW) who attended the trial as the "Twin C–s."[97] This behavior by the defense attorneys, combined with the judge's ruling, demonstrates a strong attitude that boys (at least white, suburban boys) should not be bothered by cases like this.

D. Similarities between Our Guys *and Scales's Description of* Simpson v. University of Colorado

Coach Barnett also displayed the "boys will be boys" attitude at the University of Colorado. According to Scales's account, Barnett tolerated or covered up a number of incidents of sexual harassment and alleged rapes during his career.[98] Perhaps the most interesting is the story of a team member, Katie Hnida, who "was recruited by Barnett's predecessor" as a place kicker for the all-male team.[99] Hnida was subject to sexual harassment, about which her father complained, and after the rapes were alleged, Hnida came forward to allege that she too had been raped by another team member.[100] Subsequently, Coach Barnett demeaned her in a news conference, in which he was discussing the alleged rapes on the team, stating that "Katie was a girl, and not only was she [] a girl, she was terrible."[101] As Scales implies, this is an odd response to a rape allegation.[102] Perhaps by discrediting Hnida as a player, Barnett believed that he established her as a liar. More likely, by claiming that Hnida was a bad kicker, the coach was distancing her from the real boys; the real players who sexually assaulted her to prove their masculinity. Both in the Colorado cases and in the Glen Ridge case, adults who should know better—teachers, superintendents, parents, coaches, and defense lawyers—

92. *Id.* at 384 (internal quotation marks omitted).
93. *Id.* at 391 (internal quotation marks omitted) (referring to the victim as the "poor kid" and asserting that the female police officer used her charms on the victim to encourage her to lie about the assault (internal quotation mark omitted)).
94. *Id.* at 393 (internal quotation marks omitted).
95. *Id.* at 445 (internal quotation marks omitted).
96. *Id.* at 446 (internal quotation mark omitted).
97. *Id.* (internal quotation mark omitted).
98. Scales, *supra* note 5, at 214.
99. *Id.*
100. *Id.*
101. *Id.* at 215.
102. *See id.*

minimized the bad behavior of the responsible male athletes and blamed the female victims.[103]

E. Male Victims and Social Construction of Masculinity

We observe similar adult responses when young men are the victims of a group of male harassers. When young women are victims, adults blame the victim: "she shouldn't have been at that party"; "she shouldn't have been wearing that outfit"; "she shouldn't have had so much to drink." In essence, it was the young woman's fault that she was assaulted.[104] She invited the assault. She wanted it. In the male victim cases, the victim is expected to endure the attack and not complain about it because the attack was merely hazing or roughhousing.[105] The attack of young men by a group of other young men is, in essence, a way of imposing group values on the weakest or newest member of the group. In these cases, the male victim of sexual assault, rape, or harassment is ridiculed for not being a "real man." He is expected to "take it like a man" and not complain. If he does complain, he proves that he is a girl, not a real man.

In *Seamons v. Snow*,[106] for example, the plaintiff, Brian Seamons, was a football player at a Utah high school.[107] In full view of the entire team, five of his upper-class teammates assaulted Seamons in the high school locker room.[108] They grabbed Seamons "as he came out of the shower, forcibly restrained" him, and bound him, nude, "to a towel rack with adhesive tape."[109] They also taped Seamons's genitals.[110] A teammate then brought Seamons's former girlfriend "into the locker room to view him."[111] Seamons complained to the coach, other administrators, and the high school principal.[112] "The coach brought Brian before the" whole team and demanded that he apologize to his teammates for betraying them by reporting their behavior.[113] When he refused, Seamons was dropped from the team.[114] The five players who taped "Brian were per-

103. LEFKOWITZ, *supra* note 47, at 7–8, 492–93.

104. *See, e.g.*, Alexander Abad-Santos, *The Steubenville Rape Case is Back—Are Parents at Party Houses to Blame?*, WIRE (Apr. 8, 2013), http://www.thewire.com/national/2013/04/steubenville-parties-suits/63995/; Huston, *supra* note 51.

105. *See* Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996); *see also* Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 207, 218–23 (describing cases where groups of male athletes sexually assaulted women and/or men).

106. 84 F.3d 1226.

107. *Id.* at 1229.

108. *Id.* at 1230.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

mitted to play in the next football game."[115] Finally, the school board cancelled the last game of the season, a playoff game.[116]

Seamons brought suit for violation of his civil rights and for violations of Title IX, which prohibits gender discrimination in education. Most likely because of the strict standard for institutional liability under Title IX—proof of notice and deliberate indifference to the violation of the individual's federal rights—Seamons's suit focused on the behavior of the coaches and the administration in response to the physical attack.[117] Courts applying Title VII hold that discrimination based on a person's failure to live up to stereotypes attached to one's gender is discrimination occurring "because of [] sex."[118] There was good reason to assume the *Seamons* courts would apply this definition to the Title IX cases as well.[119] The lower court granted the defendants' motion to dismiss the Title IX cases and concluded that the coach and administrators did not create a hostile educational environment because their behavior did not occur because of sex.[120] The Tenth Circuit agreed.[121]

In concluding that Seamons's harassment was not "because of sex," both the lower court and the court of appeals ignored key evidence that Seamons's treatment was the result of assumptions about masculinities. Seamons's complaint alleged that the coach had told Seamons that the behavior was "hazing" and that "boys will be boys."[122] Moreover, Seamons alleged that the other administrators treated Seamons poorly because of his failure to live up to male stereotypes. According to the complaint, they told him that he "should have taken it like a man."[123] Nonetheless, the *Seamons* courts, and the law in general, implicitly construct the appropriate masculine behavior by determining that sports team harassment is legitimate and resistance to it is not.

Media reports on the incident reveal that the adult community also censored Seamons's behavior and supported that of his teammates.[124]

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115. *Id.*

116. *Id.*

117. *See id.*

118. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (concluding that it would be discrimination because of sex to refuse to promote the plaintiff because she was too aggressive for a female).

119. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 636, 647 (1999) (concluding that school districts may be liable for sexual or gender-based harassment of their students); *see also* Erin Kate Ryan, Note, *A "Queer" by Any Other Name: Advocating a Victim-Centered Approach to Title VII and Title IX Same-Sex Sexual Harassment Claims*, 13 B.U. PUB. INT. L.J. 227, 237–38 (2004) (arguing that *Davis* indicated its intent to incorporate the *Price Waterhouse* sex-stereotyping standard into Title IX cases).

120. *Seamons*, 84 F.3d at 1230–31.

121. *Id.* at 1232–33.

122. *Id.* (internal quotation marks omitted).

123. *Id.* at 1230 (internal quotation marks omitted).

124. Vaughn Roche, *Football Hazing Penalty Splits Tiny Utah Town: Student Is Threatened After His Complaint Ends His Team's Season*, L.A. TIMES, Nov. 22, 1993, MN, at 5.

Although there was support for Seamons, he was the object of criticism and threats. Just as assumptions about appropriate masculinities distributed cultural power in Glen Ridge and at the University of Colorado, masculinities distributed cultural and legal power in the *Seamons* cases. For example, one woman called his home repeatedly to tell him that she planned to burn down his house.[125] When the police tapped the phone, they discovered that the caller was the grandmother of another football player.[126] Many adults may feel a strong sense of injustice when boys' normalized behaviors are disrupted.

But let us complicate this narrative a bit. The "boys will be boys" attitudes may excuse criminal behavior of white, middle-class football players living in a New Jersey suburb or Utah. They may even extend to athletes and recruits at the University of Colorado who are not white, but they will not protect boys growing up in poor neighborhoods in Latino or black communities who have not been accepted as members of university athletic teams. Instead, even as potential victims, boys with a denigrated masculine identity often find their victimhood questioned because of their failure to perform their masculinity in a preferred way. Seamons evidently performed his masculinity inadequately because he did not demonstrate appropriate toughness: by reporting his assault to authorities, he violated a code of masculinity. Black and Latino victims in poor neighborhoods, too, have a denigrated masculinity, but unlike Seamons, they perform their masculinity in a manner that is too intense. In fact, the white community and the police often consider black and brown boys who live in poor neighborhoods to be hyper-masculine and dangerous. As potential perpetrators, then, they do not enjoy the same benefit of the doubt granted by the "boys will be boys" narrative. This is said to cause their own victimhood.

Ironically, then, black and Latino male victims may actually be treated like girls who are victims of sexual assaults. By performing their gender in an inappropriate way, they "ask for it." In this case, the "it" is police harassment and brutality coupled with white indifference or even tacit support. As legal scholar Ian Haney-López notes, "For many Americans, racial disparities in the criminal justice system not only fail to evoke a sense of moral outrage, but engender instead a belief in the basic fairness of the world as currently organized."[127] The assumptions that largely-racial-majority police forces act for good reasons and that racial minorities are crime-prone are built into some people's understandings of the world. The treatment of certain perpetrators as "our guys" and certain victims as "asking for it" helps ensure the hegemony of white, middle-class masculinity.

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125. *Id.*

126. *Id.*

127. Ian F. Haney-López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1064 (2010).

III. MULTIDIMENSIONAL MASCULINITIES AND EXEMPTIONS FROM THE USUAL RULES

One way of thinking about the "boys will be boys" narrative is that it is a way that we justify a call for an exemption from the usual rules when particular types of boys and men act out, especially if they do so against girls or women or certain other types of boys and men. At the University of Colorado, we were asked to deploy an exemption from the normal rules of sexual assault and rape because football is a big business operating in a very competitive environment. As one of Coach Barnett's successors at Colorado, Dan Hawkins, famously screamed in response to a claim that he did not give his players enough time off: "It's Division I football! It's The Big 12! It ain't int[ra]murals!"[128] In other words, we should excuse football players' misbehavior because football is really important. In Glen Ridge, we were supposed to grant the same exemption because the boys were young and should be allowed to enjoy themselves before having to grow up. In *Seamons*, we were explicitly asked to exempt the harassment and sexual assault because this is how boys become men. These are, then, exemptions claimed in the name of masculinity. This part of the Essay utilizes another Ann Scales essay to advance a theory of masculine exemptions. It then uses the Zimmerman slaying of Martin to show how certain privileged men are allowed to position themselves as protectors of the community. Those men are exempted from the normal rules when they commit acts of violence against others whose masculinities are denigrated.

A. A Theory of Masculine Exemptions

In addition to her use of masculinities theory in analyzing gang rape, Scales criticizes the masculinist assumptions at the heart of American militarism. In her important essay, *Soft on Defense: The Failure to Confront Militarism*, Scales defines militarism as "the manifestation at every level of policy—military and otherwise—of the logic of war."[129] That logic includes the idea that every policy of all kinds "must be measured by its effect on military capability and readiness."[130] We must win, no matter the cost. Militarism, defined as the requirement that we win all wars regardless of the means necessary, leads to the promulgation of a set of exemptions from the normal rules. Dropping a nuclear bomb would usually be seen as overkill, but it is deemed to have been necessary to subdue the Japanese.[131] We usually try to balance liberty against

128. Optimum00, *Dan Hawkins*, YOUTUBE (Feb. 22, 2007), http://www.youtube.com/watch?v=9S3RbRifTSk (containing audio of Hawkins's rant as played on an episode of *The Best Damn Sport Show Period*). Of course, by focusing on football, we do not mean to suggest that sexual assault is not a pervasive problem elsewhere.

129. Scales, *supra* note 6, at 371.

130. *Id.*

131. *See* John Christoffersen, *Hiroshima, Nagasaki Atom Bombs Was Right Decision According to Majority of Americans: Poll*, HUFFINGTON POST (Aug. 4, 2009, 1:54PM ET),

security, but some believe that a majority of the members of the Supreme Court became "loyal foot soldier[s]" in support of the War on Drugs.[132] Preemptive strikes are usually deemed unjustified, but one was deemed necessary in Iraq to prevent Saddam Hussein from using weapons of mass destruction.[133] And so on. The insidious power of this logic is that "it is treasonous to notice it, much less question it."[134] Militarism thus operates like masculinities; it is an often-invisible assumption that drives results.[135]

The point here is that, like the "boys will be boys" narrative, militarism leads to the granting of an exemption from the normal rules. We see precisely how the military exemption works when we consider criminal law. Scales observes that "international law prescribes greater caution and self-restraint than is required in [U.S.] criminal self-defense law."[136] U.S. criminal law would normally say that if someone physically touches another with the mental state of desiring to harm him, that touching constitutes the offense of battery.[137] One defense to a battery charge is to claim self-defense. The defendant argues that although the prosecution can prove the elements of battery, the defendant can demonstrate that he was not the aggressor, that he reasonably feared his victim was imminently about to do him harm, and that he responded with proportionate force.[138] As Scales says, the United States' militarism is evident in its creation of an exemption from the imminence requirement, as well as international law, when it preemptively attacks countries like Iraq.[139] Scales demonstrated her courage as a scholar by speaking out against the Iraq War well before it was considered appropriate to do so. Then, as now, it was "treasonous to notice" U.S. militarism.[140]

The link between the granting of exemptions and norms of masculinity is highlighted by reconsidering preemptive strikes. Why does the United States grant itself an exemption from international law's ban on preemptive strikes? As University of Denver legal scholar Nancy Ehrenreich explains, we wish to bask in the "reflected masculinity" of the nation.[141] Having our nation look masculine raises our own masculine es-

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http://www.huffingtonpost.com/2009/08/04/hiroshima-nagasaki-atom-b_n_251108.html?view=print&comm_ref=false.

132. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting) ("[T]his Court has become a loyal foot soldier in the Executive's fight against crime.").

133. *See* Scales, *supra* note 6, at 380–81 (criticizing the preemptive strike on Hussein).

134. *Id.* at 371–72.

135. *See generally* Michael Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181, 183–85 (1997) (explaining how masculinities invisibly influence law and culture).

136. Scales, *supra* note 6, at 381.

137. *See* MODEL PENAL CODE § 211.1 (2012).

138. *See id.* § 3.04 (stating requirements for self-defense); *see also id.* § 3.09 (requiring reasonableness for deadly force).

139. Scales, *supra* note 6, at 381.

140. *Id.* at 372.

141. Nancy Ehrenreich, *Disguising Empire: Racialized Masculinity and the "Civilizing" of Iraq*, 52 CLEV. ST. L. REV. 131, 132 (2005).

teem, even if we are women. In the second Iraq War, President George W. Bush implicitly acknowledged that he was going to war because Saddam Hussein "tried to kill my dad."[142] We as a country go to war to protect the family that is the United States. Bush's reasoning is an extension of the usual logic that we go to war to protect women and children.

Part of the reason it is treasonous to challenge militarism may be that its call for an exemption from the usual rules is grounded in a need to bask in the reflected masculinity of the nation. To challenge the exemption is not just to challenge militarism, but also to challenge the United States' symbolic manhood. After all, what kind of man does not defend his family's honor? A "wimp." An accusation hurled at both George H.W. Bush and his son, George W. Bush.[143] Symbolically, when the United States was attacked on September 11, 2001, the United States' family honor was attacked, as was the masculinity of the nation. We were challenged and defeated by a small group of radicals from the Middle East. We could not maintain our masculinity as a nation without retaliating. That is why, even though there was no proof that Saddam Hussein was involved in the September 11 attacks, we granted ourselves an exemption from the normal rules of self-defense.

Let us now think about when an exemption from the usual rules is not granted. Battered women sometimes attack their batterers, but rarely do they satisfy the traditional self-defense standard. Normally physically smaller and weaker than, as well as afraid of, their batterers, battered women sometimes launch preemptive strikes. Those preemptive strikes run afoul of self-defense law's imminence requirement.

If the United States can hypothecate weapons of mass destruction as grounds for attack, why do battered women lose when they launch preemptive strikes? Perhaps because, as legal scholar Susan Estrich and others have pointed out, the self-defense requirements reflect "boys' rules" in that they imagine a prototypical schoolyard fight.[144] So self-defense law rewards people for being appropriately manly. In the schoolyard, people would think a boy is justified in flattening the local bully if, and only if, the bully is threatening the boy right then and the boy doesn't respond to a punch with a bazooka. Similarly, in the schoolyard fight, boys are supposed to confront their bully face to face (or expected to just "take it like a man," as in the *Seamons* case above). When a battered woman instead stabs her batterer in the back or while he

142. HectorzHouse, *Bush "This Is the Guy Who Tried to Kill My Dad,"* YOUTUBE (Nov. 30, 2006), http://www.youtube.com/watch?v=uL6OGwsp9_o.

143. Carl M. Cannon, *Romney, Bush and Newsweek's "Wimp Factor,"* REAL CLEAR POL. (Aug. 2, 2012), http://www.realclearpolitics.com/articles/2012/08/02/romney_bush_and_newsweeks_wimp_factor.html (critiquing the "wimp" accusation (internal quotation marks omitted)).

144. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (internal quotation marks omitted) (coining the term "boys' rules").

is sleeping, the harm is not deemed to be imminent. The requirement that the harm one reasonably feared be imminent does not make sense when imposed on battered women. Battered women are constantly, reasonably in fear that they will soon be harmed again. So gender is certainly at work in that the exemption from self-defense rules is granted to men in battle with other men, either literally or figuratively, but not to women unless they can make out a special battered women's syndrome defense.[145] Women are underprivileged, even when most obviously justified in using violence. Thus, exemptions are granted not only because some men are privileged by the hegemonic masculinity, but also because women and some other men are denigrated.

B. A Case Study: George Zimmerman Slays Trayvon Martin

To explore the interplay between privilege and denigration in the granting of masculine exemptions, it is helpful to think about a complicated example where the exemption is both granted and withheld based on a combination of privileges and disabilities. George Zimmerman's slaying of Martin provides such a case study. What we find is that Zimmerman was privileged both by his race and the masculine role he was playing, while Martin's race-gender combination made him more readily available to be seen as having "asked for it." Shifting lenses, from the difference gender makes to the difference race and gender make together, allows us to see the utility of a multidimensional masculinities approach.

Consider the facts of George Zimmerman's alleged murder of Martin. Shortly before 7:15 p.m. on February 26, 2012, in Sanford, Florida, white-skinned, half-Latino neighborhood watch captain George Zimmerman called the police.[146] He told the dispatcher there had been break-ins in his gated community recently, so he was following a "real suspicious guy."[147] When that guy, seventeen-year-old black youth Trayvon Martin, started to run, the dispatcher told Zimmerman, "[W]e don't need you to [follow Martin]."[148] Two minutes later, Zimmerman killed Martin with one shot to the chest at close range.[149] The Sanford police quickly

145. *See* Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 790 n.47 (2000) ("The criminal doctrines of 'heat of passion' manslaughter and self-defense provide insight into local and national cultures of male honor.").

146. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. REV. 1555, 1557 (2013). Zimmerman's complicated racial identity is noted by Sifat Azad. Sifat Azad, *George Zimmerman Race: White, Latino, or Jewish? In the Trayvon Martin Case, It Shouldn't Matter*, POLICYMIC (Mar. 23, 2012), http://www.policymic.com/articles/5925/george-zimmerman-race-white-latino-or-jewish-in-the-trayvon-martin-case-it-shouldn-t-matter. For other insightful views on the Martin case, see L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 316–17 (2012), and the materials cited in *Trayvon Martin Case Bibliography*, U. FLA. LEVIN C. L., http://www.law.ufl.edu/_pdf/academics/centers/csrrr/Trayvon_Martin_Bibliography_by_medium.pdf (last visited Dec. 9, 2013).

147. Lee, *supra* note 146, at 1557 (internal quotation mark omitted).

148. *Id.*

149. *Id.* at 1557–58.

released Zimmerman without charges under Florida's National Rifle Association-created "Stand Your Ground" Law, which grants "immun[ity]" from prosecution for shooting someone unless there is "probable cause" that the shooting was "unlawful."[150] A jury of his peers acquitted Zimmerman on the state criminal charges.[151]

In this context, we see Zimmerman as having been granted an exemption from the usual requirements of self-defense. There were at least three ways the Sanford police could have found probable cause that Zimmerman violated the self-defense rules. These bases should have been obvious given the Supreme Court's definition of probable cause. Probable cause is based upon a "common-sense" assessment when considering "the totality-of-the-circumstances."[152] The quantum of evidence required is that there is a "fair probability" that a crime is afoot and this suspect is involved.[153] A "fair probability" is a low standard.[154] It can be found even when there is a mere 33% chance of criminality. For instance, in *Maryland v. Pringle*,[155] the Court upheld a determination of probable cause even when assuming that only one of three suspects committed the crime and that each was equally likely to have done so.[156]

Zimmerman seems to fall within the probable cause standard because he admittedly shot Martin and seems to have violated the rules for asserting self-defense. First, by pursuing Martin, Zimmerman violated the rule that one not be the initial aggressor.[157] While Florida does not have a clear prohibition on being the initial aggressor, Zimmerman's pursuit seems all the more unlawful in light of the dispatcher's instruction not to follow Martin. Moreover, Zimmerman could easily have been found not to have been reasonably in fear of death or serious bodily harm from the slighter and unarmed Martin, even after allegedly having been knocked down (in what would surely be lawful self-defense by Martin against his pursuer).[158] Finally, Zimmerman's deadly response to the knockdown seems not to have been a proportionate response.[159]

Why, then, did the Sanford police refuse to charge Zimmerman with Martin's murder, and thereby grant Zimmerman an exemption from the usual self-defense requirements? It could have been a result of Zimmer-

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150. *Id.* at 1559. *See* FLA. STAT. §§ 776.012, 776.032 (2013) (providing immunity from prosecution for self-defense unless there is "probable cause" the response is "unlawful").

151. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1.

152. Illinois v. Gates, 462 U.S. 213, 238 (1983). Florida sets its criminal procedure law as exactly the same as Supreme Court law. *See* State v. Hankerson, 65 So. 3d 502, 506 (Fla. 2011).

153. *Gates*, 426 U.S. at 238.

154. Blalock v. State, 98 So. 3d 118, 121 (Fla. Dist. Ct. App. 2012).

155. 540 U.S. 366 (2003).

156. *Id.* at 368.

157. *See* MODEL PENAL CODE § 3.04(2)(b)(i) (2012) (stating bar on being aggressor with deadly force).

158. *See id.* § 3.09(2) (withholding imperfect self-defense from unreasonable attackers).

159. *See id.* § 3.04(2)(b) (limiting crimes warranting deadly force).

man's privileged racial status. As legal scholar Cynthia Lee's insightful article on the case says, "Had Zimmerman been an African American man who followed and then shot an unarmed Caucasian teenager during a fistfight, it is unlikely that police would have released Zimmerman without any charges."[160] Lee thus proposes implicit racial bias as the explanation for the exemption. Implicit bias is the set of subconscious assumptions an observer draws because of the status of the subject.[161] Lee explicates the extensive evidence that most people's default position is to assume that blacks are crime prone.[162] Unless police officers are primed to acknowledge that race is a factor in their decision making, says Lee, they will subconsciously explain the facts based on the black-man-as-criminal stereotype.[163]

Another way that race played into Zimmerman's immediate release was the geographical context. As legal scholar Bennett Capers has pointed out, there is a racialized policing of space.[164] Black men in particular are closely surveilled and often harassed when they are racially "out of place."[165] Zimmerman, as a watch captain, participated in the policing of space. Gated communities, such as the one in which Zimmerman killed Martin, are often especially vigilant about excluding people who are racially out of place.[166] It should not surprise anyone that incidents like this one occur more frequently in the U.S. South, which has traditionally been more racist than other parts of the country.[167] Implicit bias against blacks and the racialized policing of space go a long way toward explaining the Sanford Police Department's uncritical acceptance of Zimmerman's fear of Martin as reasonable. Accordingly, Zimmerman's white appearance, which probably matches his self-perception, might explain his being granted an exemption from the normal self-defense rules.

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160. Lee, *supra* note 146, at 1566.

161. *See* JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 1–2 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf.

162. Lee, *supra* note 146, at 1569–86.

163. *Id.* at 1580–86. *See generally* Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185 (2013) (arguing attributed identity of black men as criminal in culture and law has led black men to incorporate the possibility of being imprisoned into their self-identities).

164. *See* I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43–47 (2009) (detailing police enforcement of segregated uses of space).

165. *Id.* at 69–70 (internal quotation marks omitted). *See also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002) (describing racialized police harassment).

166. *See* Haney-López, *supra* note 127, at 1037 (discussing racism in gated communities).

167. Anyone with knowledge of U.S. history and present culture should require no footnote here. Consider, for instance, the White Citizen councils formed after the *Brown* decision threatened to desegregate the South and the regional disparities in white voting for the first black major party nominee for President. *See also* Tamara F. Lawson, *"Whites Only Tree," Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 123, 144–55 (2008) (detailing racist use of space at a Southern high school and the local District Attorney's racist treatment of its students).

While several scholars have noted the operation of Zimmerman's racial privilege, few have noted the way he benefitted from his gender status. Here is where Zimmerman's role as "watch captain" should be considered. He saw himself as the protector of his gated community. As legal scholar Valorie Vojdik explains in her chapter in the book *Masculinities and the Law*, men's role as protectors of women is constitutive of the common understanding of the nation as masculine.[168] As we noted with respect to the bombing of Iraq, nations have often been seen as protectors in whose reflected masculinity we may all bask. At the micro-level, the National Guard, the police, and even neighborhood watches draw upon the legitimacy of their roles as masculine protectors. Zimmerman's figurative likeness to the military and police for his community could have subtly led the Sanford Police Department to grant him an exemption from the normal self-defense rules.[169] That Zimmerman is both male and (presumptively) white heightens the implication that the Sanford Police saw him as a legitimate protector rather than a reckless vigilante. In that sense, Zimmerman's gender privileged him in his confrontation with a racially distinct intruder. So Zimmerman was privileged by race and gender; especially so in the context of a Southern, gated community.

The identity of the person he was following also seems to have been crucial in allowing Zimmerman not to act with restraint. As Lee says, "It is unlikely that Zimmerman would have thought Martin was 'real suspicious,' 'up to no good,' and 'on drugs or something' if Martin had been [w]hite."[170] If Zimmerman's victim had been white, would the Sanford Police have been as likely to set him free? Probably not. A study found that there are racial disparities in how Florida's Stand Your Ground immunity is applied.[171] Zimmerman's exemption was relational; he could be overprivileged because Martin was underprivileged.

Reinforcing the sense that Martin's race–gender combination made him more readily accepted as the villain in Zimmerman's story is the fact that Martin was acting appropriately. He was minding his own business when Zimmerman started stalking him. Even in Zimmerman's narrative, Martin only hit Zimmerman after Zimmerman chased him. In fact, this sounds like a good scenario for Martin to have claimed self-defense against Zimmerman. The cultural legitimacy of Martin's actions extends as well to his exercise of masculinity. He was acting as we might expect

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168. *See* Valorie K. Vojdik, *Masculinities, Feminism, and the Turkish Headscarf Ban: Revisiting* Şahin v. Turkey, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 270 (explicating masculine assumptions in the Islamic headscarf debate).

169. Perhaps the police were also granting him the exception because he was a quasi-lawman based on his watch captain status.

170. Lee, *supra* note 146, at 1565–66.

171. *See* Rmuse, *Stand Your Ground's Hideous Double Standard of Prosecuting African-Americans*, POLITICUSUSA (Apr. 15, 2012, 10:00 AM), http://www.politicususa.com/whites-only-stand-your-ground.html (arguing that Stand Your Ground Laws are disparately applied).

a man to do: walking where he pleased.[172] Seeing Martin's actions as inappropriate requires implicitly drawing on the idea that he was racially out of place. Because he was a young black male, the Sanford Police readily understood Martin's presence in a gated, white community as questionable despite the appropriateness of his response to being pursued by Zimmerman.

We can sum up the insights of this inquiry with another question: Would Zimmerman have shot Martin if Martin had been a black girl? The idea that Martin could be a girl is complicated, in large part because some female masculinities involve girls looking like black boys. Consider for example, Snoop from the critically acclaimed television show, *The Wire*.[173] She is a baggy-pants-wearing drug war assassin who presents as very masculine. But assuming the female Martin was not that type of girl, what result? It seems to us that the female Martin would not have been shot. She might have been assumed to be a thief,[174] but she would not have pricked Zimmerman's masculine esteem. She would not have been such a threat to the purity of Zimmerman's community. As a consequence, Zimmerman would have been less likely to hunt her down and shoot her. Nor would the Sanford Police have been as likely to credit Zimmerman's self-defense claim. As a young black woman, the female Martin would have faced other threats, but she would have been more likely to live another day.

Thus, it seems that both the law and society did not give Martin the benefit of any doubt about his intentions because he was a young black male. The "boys will be boys" exemption did not apply to him. When Zimmerman pulled the trigger, he was acting like a man by protecting his neighborhood from an intruder. His behavior mirrored that of the U.S. military when we preemptively attacked Iraq. In this sense, narratives about preferred and denigrated masculinities empowered Zimmerman to kill Martin in contradiction of the usual self-defense rules.

C. Similarities Between "Boys Will Be Boys" and Exemptions to Self-Defense Rules

The assumption of Martin's wrongful presence brings us back to the "boys will be boys" narrative. Some boys do not have the privileges of the University of Colorado or Glen Ridge rapists. Some boys—black boys, for example—are presumed criminal. The predominant narrative about black boys is also based on a sociobiological narrative. Black boys are presumed to be more agitated. An example of this presumption is the

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172. As we noted in the Introduction, *see supra* p. 182, this is not a privilege that women have, at least not without risking being depicted as having "asked" for harassment.

173. *The Wire* (HBO 2002–2008).

174. *See* Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 280–93 (2003) (detailing racial profiling of women of color).

movement for teaching black boys separately from girls, which legal scholars Verna Williams and David Cohen have criticized.[175] We also see this presumption in the ways that black boys are disproportionately punished for initial infractions in school, which implies that even as small children they are already incorrigible.[176] Another example of the belief that black boys are presumed to be criminal is the disproportionate punishment, instead of rehabilitation, that juvenile courts mete out to boys of color, which University of Denver legal scholar Rashmi Goel has documented.[177] All of these assumptions depict black boys as presumptively bad and inherently dangerous.[178] They are "failed men" as Devon Carbado describes it.[179] Consequently, black boys are not accorded the "boys will be boys" exemption.

Another link between the "boys will be boys" narrative and the granting of exemptions from the self-defense rules is that, like women who are in the wrong place, victims such as Hussein and Martin are depicted as having "asked for it." Racial otherness seems to have done the work of blaming the victim in both cases. Like Seamons, they were seen as performing their masculinity in an inappropriate manner. While Seamons was insufficiently masculine, Hussein and Martin were presumed to be excessively masculine. In all three cases, the denigrated masculinities of the victims were crucial to the ability of privileged men to commit violence against them.

IV. CONCLUSION: PREFERRED MASCULINITIES, RACE, AND CLASS

Ann Scales's work acknowledges the importance that our society places on invisible concepts of masculinity when we judge individual, group, and even our nation's actions. With reference to Scales's articles and through the use of masculinities theories, we have analyzed the law's and society's reactions to sexual assault of young women and men, as well as the exemption that some boys receive from the usual rules for criminal assaultive behavior through the "boys will be boys" narrative. This narrative is particularly strong where the boys who are accused of criminal sexual assault perform the most preferred form of masculinity. Female victims are blamed for inviting the assault, whereas male victims are blamed for not "taking it like a man." The assault, then, enhances the

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175. *See* David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 174 (2009); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 21–26 (2004).

176. *See* Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 201–02, 204–07 (2002) (citing statistics on disproportionate school punishment of blacks).

177. *See* Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 LAW & INEQ. 1, 28–40 (2009).

178. *See* Cooper, *supra* note 16, at 857–59 (explicating bipolar black masculinity thesis).

179. Devon W. Carbado, *Masculinity by Law*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 7, at 51, 53 (discussing the social construction of black men as having "surplus" or "failed" masculinity (internal quotation marks omitted)).

masculinity of the perpetrators by demonstrating their superiority over the victims—both male and female. But the "boys will be boys" narrative is available only to those boys who behave consistently with the preferred modes of masculinity. Racial minority boys and men, especially those living in poor communities, are considered to perform a dangerous, hyper-masculine identity that precludes them from the benefit of the doubt expressed in the "boys will be boys" narrative. And, because of the presumption of dangerousness of some males, white males may enjoy exemptions from the self-defense rules if they harm people with denigrated masculinities.

Ann Scales reminds us that this distribution of power occurs in a similar way when we consider military and national power. Even though the U.S. military has significantly more might than its Iraqi and other Middle Eastern opponents, we presume that our weaker foes are exceedingly dangerous, and we take an exemption from the rules by engaging in preemptive strikes. As Zimmerman's killing of Martin shows, the exemption results from both the privileging of some boys and men as well as the denigration of women and certain other men. We may not use the term "boys will be boys" when condoning preemptive strikes, but we excuse masculine demonstrations of power based on our fear of "the other." Power, then, is distributed to and among men based on race, class, and the performance of masculinity. Scales's work reminds us that when masculinities distribute power, lives stand in the balance.

ON *SURVIVING LEGAL DE-EDUCATION*: AN ALLEGORY* FOR A RENAISSANCE** IN LEGAL EDUCATION

* Use of an allegory sits squarely at the intersection of critical race theory and critical feminist jurisprudence. Critical race theory "is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity." Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899 (1995). This technique was used most famously by Professor Derrick Bell, one of the founders of critical race theory, in writings throughout his career. *See, e.g.*, *id.* As Professor Bell explained in the introduction to *And We Are Not Saved*, his seminal collection of the "Chronicles" of a lawyer–heroine dedicated to civil rights and equal justice, there is "an ancient tradition in using fantasy and dialogue to uncover enduring truths." Bell's examples range from Plato, to noted legal philosopher Lon Fuller (who used a series of hypothetical appellate cases in *The Case of the Speluncean Explorers* to examine whether settled legal principles can adequately address situations beyond the imagination of lawmakers), to every other law professor who today engages in Socratic dialogue to "effectively illuminate[] essential principles." DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 6 (1987) [hereinafter BELL, AND WE ARE NOT SAVED]; *see* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). Professor Kimberlé Crenshaw wrote that

> allegory offers a method of discourse that allows us to critique legal norms in an ironically contexualized way. Through the allegory, we can discuss legal doctrine in a way that does not replicate the abstractions of legal discourse. It provides therefore a more rich, engaging, and suggestive way of reaching the truth.

BELL, AND WE ARE NOT SAVED, *supra*, at 6 (quoting Kimberlé Crenshaw, From Celebration to Tribulation: the Constitution Goes to Trial (unpublished manuscript)). Critical race feminism also relies on "a technique of storytelling and narrative analysis to construct alternative social realities." Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gangs, and Critical Race Feminism*, 4 AFR.-AM. L. & POL'Y REP. 1, 3 (1999). Critical race feminism "stresses conscious consideration of the intersection of race, class, and gender by placing women of color at the center of the analysis and reveals the discriminatory and oppressive nature of their reality." *Id.* at 4. Several excellent sources that cover the origins of critical race theory include CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) and CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). For additional information on critical race feminism, see generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003).

** In *Surviving Legal De-Education*, Professor Ann Scales deconstructed why law school can be so disorienting and foreign for students who are outsiders—students of color, women, and lesbian, gay, bisexual, and transgender students—and prescribed seven ways that someone who is not a member of the majority in law school can survive an experience that she described as a "white male encounter group." Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139, 144 (1990). At least, that was what the article did on the surface. In fact, *Surviving Legal De-Education* was more than a rallying cry for outsiders to unite, more than a list of suggestions for ways that outsiders could navigate law school with their identities intact. By the time Professor Scales published her article in 1990, law schools had become much more diverse. As she reported in the article, the proportion of women had risen from 3% to 42%, and the proportion of people of color had risen from less than 2% to 13%. *Id.* at 139. In 2013, twenty-three years after Professor Scales's article, the statistics were these: women were 46.7% of law students, and people of color were 25.8%. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (Feb. 2013), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf; *First Year J.D. and Total J.D. Minority Enrollment for 1971–2012*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_minority.authcheckdam.pdf (last visited Nov. 16, 2013). Her ideas, examined in three dimensions, provided a blueprint for what legal education might look like if, in Professor Scales's words, it was changed from a highly "effective funnel of society's resources into the pockets of the already rich" that was "designed by white men for white men" to a

ROBIN WALKER STERLING†

They had done it. After three long years, three of the members of the graduating class of 2035 of Denver Law sat together over burgers at Crimson & Gold, the local student hangout that had sustained them through countless hours of studying, memorizing, outlining, and learning. Geneva Johnson[1] could not believe that she had just graduated from law school. Just a few hours earlier, she walked across the stage in the auditorium, shook the Dean's right hand, accepted her diploma in her left, turned her tassel, and walked off the stage. For years after, whenever her mother would crow to anybody who would listen about her daughter's law school graduation, her mother would say, "We were in the nosebleed seats in the stadium, so when Geneva walked across the stage, all we could see were four-inch heels and a huge smile."

All three of the students at the table had jobs. The reforms[2] that had swooped in to save legal education from the crises that threatened to cripple it in the first quarter of the twenty-first century made sure of that.[3] To address the crisis in legal employment, or "The Rock," as it was

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model that successfully accommodated every student, regardless of difference. Scales, *supra*, at 139, 155. With its seven suggestions, *Surviving Legal De-Education* was as subversive a piece as any law professor could publish. The combination of Professor Scales's wit (imagining "a megalomaniacal official deciding on the basis of his level of intoxication, what he had for breakfast, and—oh no—his unfettered *subjectivity*. 'Sure! You can have *five* strikes if you want!'"), pull-no-punches attitude (assailing sports metaphors with "I am sorry, sports fans, but law is just more serious than baseball"), and inimitable voice (describing that by the end of the first year of law school, the outsiders "have the sensation of acid slowly dripping on their souls") made for the apotheosis of persuasion. Scales, *supra*, at 142, 150–51. The article made a radical argument in such an engaging way that even those who might have disagreed listened. Indeed, in this allegory recounting the graduation day conversation between Geneva, John, and Teresa, the results of the reforms stemming from Ann's article are reified. *See id.*

† Assistant Professor of Law, University of Denver Sturm College of Law. Heartfelt thanks to Professor Nancy Ehrenreich and the *Denver University Law Review* for inviting me to participate in this Symposium. I would also like to thank my colleagues at Denver Law and in particular the participants in the Rocky Mountain Collective on Race, Place & Law (RPL). I would like to express special appreciation to Professors Christopher Lasch, Nantiya Ruan, and Lindsey Webb. Kasey Baker and Christopher Linas provided superlative research assistance. Finally, I would like to extend my abiding gratitude to Mickey and Jeannie Klein for their generous support, keen and thoughtful interest, and gracious encouragement.

1. Ms. Johnson was named after Geneva Crenshaw, the brave African-American civil rights attorney whose experiences were most famously chronicled by Professor Derrick Bell in several seminal works of critical race theory, including AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 7 (1987) [hereinafter BELL, AND WE ARE NOT SAVED], FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM ix (1992), and AFROLANTICA LEGACIES 7 (1998). Moved after reading *And We Are Not Saved*, Ms. Johnson's mother would later name her only daughter Geneva.

2. Many of these reforms were inspired by Professor Ann Scales's *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990), first published in the Vermont Law Review in 1990.

3. Starting in 2011, the *New York Times* was only the most high-profile of a host of periodicals to publish a scathing series of articles spotlighting the shortcomings of legal education and, with increasingly foreboding language, sounding the death knell for legal education as it then existed. *See, e.g.*, Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1; Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11; Adam Cohen, *Just How Bad Off Are Law School Graduates?:*

dubbed in an infamous and scathing July 2017 *New York Times* article titled *Scylla, Charybdis, and the Fall of Legal Education*, schools shifted their focus from preparing students to work in law firms to preparing students to take public interest jobs in under-served areas that would mean substantial loan forgiveness.[4] To slow the skyrocketing costs of legal education, dubbed "The Whirlpool," schools found ways to cut costs and lower tuition.

But these were just the beginning of the improvements. Law schools across the country shifted their focus, so that learning to practice like a lawyer became as important as learning to think like a lawyer. Some schools converted their third-year curriculum into an all-experiential year, so that students could start practicing the day after they were sworn in to the bar.[5] Many more schools redoubled their efforts to make sure their students were prepared to take and pass the bar.[6] Slowly enrollment crept back up, classes filled, and legal education had pulled off one of the best comeback stories of the century.

Each of these three excited students, in his or her own way, was a product of this shift. John was set to move to the Western Slope to work for the Farmworker Alliance. Geneva was going to the Colorado Public Defender's Office. And Teresa, one of the few students in their class

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Faced with a Dismal Job Market, the Legal Profession May Be Undergoing Fundamental Change, TIME (Mar. 11, 2013), http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1; Maura Dolan, *A Thin Jobs Docket for Law Grads: As Technology Has Reduced Openings, Some Graduates Have Sued Schools over Employment Claims*, L.A. TIMES, Apr. 2, 2013, at 1; Debra Cassens Weiss, *Judge Allows Suit Against Widener Law School over Job Stats, Cites 'Thread of Plausibility,'* A.B.A. J. (Mar. 25, 2013, 06:30 CDT), http://www.abajournal.com/news/article/judge_allows_suit_claiming_widener_law_school_posted_misleading_job_stats_c/; Jordan Weissmann, *Law School Applications Are Collapsing (as They Should Be)*, ATLANTIC (Jan. 31, 2013, 13:19 EST), http://www.theatlantic.com/business/archive/2013/01/law-school-applications-are-collapsing-as-they-should-be/272729/.

4. In 2013, much of the crisis in legal employment arose not from a lack of demand, but from a lack of lucrative jobs. For example, due to a "chronic undersupply" of lawyers in rural areas, South Dakota passed a law subsidizing lawyers who live and work in rural areas. Ethan Bronner, *No Lawyer for 100 Country Miles, So One Rural State Offers Pay*, N.Y. TIMES, Apr. 9, 2013, at A1. Furthermore, there were "millions of middle class and indigent Americans who need[ed] but c[ould] not afford legal assistance," but crushing student debts financially discouraged lawyers from taking such jobs even when they were available. Chris Fletcher, *A Message to Aspiring Lawyers:* Caveat Emptor, WALL ST. J., Jan. 3, 2013, at A11. In New Jersey, ninety-nine percent of defendants in landlord–tenant disputes were unrepresented in 2012. John J. Farmer, Jr., *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17.

5. Washington and Lee University's law school adopted such a curriculum beginning with its class of 2010. Daniel de Vise, *Third-Year Law Students Trade Class for Court*, WASH. POST, Dec. 18, 2009, at B1. In addition, in 2013 Denver Law launched its Experiential Advantage Curriculum, which allows Denver Law students to spend a full year of their law school career in real or simulated legal practice. For more information, see http://www.law.du.edu/index.php/experiential-advantage.

6. Michelle Weyenberg, *Diversity Part II: What Law Schools Are Doing*, NAT'L JURIST (July 12, 2010), http://www.nationaljurist.com/content/diversity-part-ii-what-law-schools-are-doing.

going into for-profit work, was headed to Hogan & Hartson on a two-year fellowship meant to encourage students to return to corporate law.

Smiling from ear to ear, Geneva thought back to her first year. "I remember meeting you on the first day of our first year when we sat together." John replied, "I remember, too. It was a Monday, and the class was Jurisprudence." Teresa added, "I remember Mondays and Wednesdays were killer that first semester. We had Jurisprudence, Human Behavior in the Law, and Professional Responsibility Lab on Mondays, Wednesdays, and Fridays, and then on Tuesdays and Thursdays we had Lawyering Process and From Idea to Law." John nodded his head in agreement and said, "I remember Professional Responsibility Lab the most because that class immediately made me realize that being a lawyer meant more than knowing what terms to use in a contract or what case to refer to in an argument. That's where I started to think about the kind of lawyer I want to be—to develop a professional identity." John added, "I also remember Professional Responsibility because it was at the end of the day. Our schedule was just brutal!"

Teresa said, with a mouth full of fries, "Second semester first year wasn't much better. We had Preventive Law and Constitutional Law on Mondays and Wednesdays, Social Justice Lawyering and Lawyering Process on Tuesdays and Thursdays, and Client Counseling Lab on Fridays. I loved Client Counseling Lab. I remember when I first read that it was co-taught by a professor and a former client of the professor's, I was worried, but hearing from a client firsthand about his experiences with the legal system, and having my professor show us—and not just tell us—that we should always be ready to learn from our clients gave me a better understanding of the lawyer–client relationship. I understood on a deeper level that we should work in partnership with a client instead of just thinking that the lawyer's job is to tell the client what to do."

Teresa went on, "Preventive Law was one of my favorite classes. It was so interesting to think of my role as broader than that of a legal adviser who parachutes in once the crisis has happened—a lawyer can also think of ways to head off crises. The readings were so varied. In one assignment we would have a poem like *The Ambulance Down in the Valley*,[7] a report from an advocacy organization about, say, the school-to-

7. The version of this poem read in Teresa's class included the original anonymous poem along with a second part contributed by Joe Galano in 1988. *Tribute to George Albee*, WM. & MARY, http://www.wm.edu/as/psychology/faculty/facultydirectory/galano_retires/poem/index.php (last visited Nov. 16, 2013). This reform, including many different kinds of reading sources, was inspired by the example Professor Scales provided in *Surviving Legal De-Education*, relying on typical sources like law review articles and case law, and other sources as varied as Audre Lorde's *The Master's Tools Will Never Dismantle the Master's House* and a commencement address by Adrienne Rich. Scales, *supra* note 2; Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES BY AUDRE LORDE 110 (Nancy K. Bereano ed., 1984); Adrienne Rich, Commencement Address at Smith College: What Women Need to Know (1979).

prison pipeline,[8] a law review article or two,[9] a case about trying to end it,[10] and then a writing assignment encouraging us to come up with our own proposal about how to end it. The topics we talked about in that class—especially whether the lawyer's role is to be proactive or reactive—helped me realize that the lawyer's role is so broad that there is room for me to be the kind of lawyer I'd like to be, instead of being the kind of lawyer people might expect me to be."

John added, "Don't forget—we also had an elective. That Status Regime Modernization seminar was really eye-opening. That class radicalized me!" Geneva laughed, "No kidding. Every time we had that class you came into the classroom ready for a sit-in chanting 'What do we want? JUSTICE! When do we want it? NOW!.'" Laughing as well, John offered, in his defense, "I wasn't the only one. The readings in that class were amazing. What a concept—that social institutions recycle themselves in ever more acceptable forms. This seems to be true across so many areas. We studied status regime modernization in gender relations,[11] in race relations in the criminal justice system,[12] and in race relations in immigration policy.[13] What energized me in that class was learning that status regime modernization has an equal and opposite foe in status regime revolution—that the same way that a status regime sheds its skin to become more socially acceptable, civil rights reform changes shape to meet it. Between that and Lawyer as Hero, I knew I was headed for public service."

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8. *School to Prison Pipeline*, NAACP LEGAL DEF. FUND, http://www.naacpldf.org/case/school-prison-pipeline (last visited Nov. 16, 2013).

9. *See, e.g.*, Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 345 (2011); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 385 (2013).

10. Harris et al. v. Atlanta Independent School System: *Atlanta Alternative School Case*, ACLU (Dec. 18, 2009), http://www.aclu.org/racial-justice/harris-et-al-v-atlanta-independent-school-system; B.H. et al v. City of New York *(Challenging the NYPD's School Safety Policies and Practices)*, NYCLU, http://www.nyclu.org/case/bh-et-al-v-city-of-new-york-challenging-nypds-school-safety-policies-and-practices (last visited Nov. 16, 2013).

11. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996) (defining status regime modernization as a phenomenon in which "status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom," and discussing how civil rights reform "modernizes the rules and rhetoric" that reinforce the status hierarchy instead of "abolish[ing] a status regime").

12. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 14–15 (2010) (drawing parallels from United States chattel slavery to convict leasing, to Jim Crow, and then to mass incarceration to demonstrate "the ways in which systems of racialized social control have managed to morph, evolve, and adapt to changes in the political, social, and legal context over time").

13. *See, e.g.*, Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. (forthcoming 2014) (drawing the connection between present-day immigration rendition and antebellum fugitive slave rendition); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 185 (2007) (linking the United States' undocumented immigrant population to "the days of slavery and Jim Crow in the United States, with a racial caste of workers subject to exploitation and abuse in the secondary labor market").

Geneva said, "Lawyer as Hero was great. We just read biographies, including the biographies of Nelson Mandela,[14] Mahatma Gandhi,[15] Bryan Stevenson,[16] Ann Scales,[17] Catharine MacKinnon,[18] Abraham Lincoln,[19] Sonia Sotomayor,[20] Thurgood Marshall,[21] Barbara Babcock,[22]

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14. Before becoming South Africa's first democratically-elected president, Nelson Mandela spent twenty-seven years as a prisoner for his activities as an anti-apartheid revolutionary. *The Life and Times of Nelson Mandela: Biography*, NELSON MANDELA FOUND., http://www.nelsonmandela.org/content/page/biography (last visited Nov. 16, 2013). At his sentencing, and facing possible execution, Mandela declared the following:

> I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.

Id. (internal quotation marks omitted).

15. Like many new lawyers, Gandhi had difficulty finding employment upon graduation. *Mahatma Gandhi*, HISTORY, http://www.history.co.uk/biographies/mahatma-gandhi (last visited Nov. 16, 2013). He became employed on a short-term contract with an Indian law firm in South Africa. *Id.* Setting the precedent for many members of Geneva's generation, Gandhi proceeded to enter the public interest field. *Id.* He stayed in South Africa for twenty-one years, during which time he founded a political movement known as the Natal Indian Congress. *Id.* Upon returning to India, Gandhi became a leader in the movement to liberate India from British rule, practicing non-violent civil disobedience until he was assassinated in 1948. *Id.*

16. Bryan Stevenson is a New York University School of Law professor, founder of the Equal Justice Initiative, and a lifelong advocate for capital defendants and death row prisoners in the Deep South. *Bryan A. Stevenson*, N.Y.U L., https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=20315 (last visited Nov. 16, 2013).

17. Ann Scales was a founder of the field of feminist legal theory. *Ann C. Scales (1952–2012)*, U. DENV. STURM C.L., http://www.law.du.edu/index.php/profile/ann-scales (last visited Nov. 1, 2013). Her innumerable accomplishments include arguing a "case in which the New Mexico Supreme Court became the first" state high court to recognize an equality right to abortion funding, founding the *Harvard Women's Law Journal*, and inspiring countless students and colleagues. *Id.* She was also an incredible example as an educator, who was known to refer to teaching as a sacrament. Brilliant, funny, irreverent, fearless, and kind, she was loved by her students and colleagues alike.

18. Professor MacKinnon is a pioneer in legal feminism. She was instrumental in developing the legal claim for sexual harassment, and her theories have influenced rulings by the Canadian Supreme Court on equality, pornography, and hate speech. *MacKinnon, Catharine A.*, MICH. L., http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo (last visited Nov. 16, 2013).

19. Posterity remembers Lincoln as among the greatest American presidents and a central figure in the abolition of slavery. Lincoln was also a self-taught lawyer, having learned the law primarily through reading William Blackstone's *Commentaries on the Laws of England*. *Abraham Lincoln*, BIOGRAPHY, http://www.biography.com/people/abraham-lincoln-9382540?page=2 (last visited Nov. 16, 2013).

20. Justice Sotomayor was born in the South Bronx area of New York City to parents of Puerto Rican descent. *Sonia Sotomayor*, BIOGRAPHY, http://www.biography.com/people/sonia-sotomayor-453906?page=1 (last visited Nov. 16, 2013). Although she entered the illustrious Princeton University, she struggled initially and pursued extra help with her English and writing skills. *Id.* Thanks to her hard work, she graduated *summa cum laude* and proceeded to Yale Law School. *Id.* Her pro bono work in private practice caught the attention of U.S. senators, leading to her appointment as a U.S. District Court Judge for the Southern District of New York. *Id.* In 2009, Sonia Sotomayor became the first Latina United States Supreme Court Justice. *Id.*

21. The great-grandson of a slave, Thurgood Marshall worked as legal counsel for the NAACP. *Thurgood Marshall*, BIOGRAPHY, http://www.biography.com/people/thurgood-marshall-9400241?page=1 (last visited Nov. 16, 2013). There, he won many landmark civil rights cases, the most famous of which was *Brown v. Board of Education*. *Id.* In 1967, he was sworn in as the first African-American Supreme Court Justice. *Id.*

22. Barbara Babcock is the first woman appointed to the regular faculty at Stanford Law School. *Barbara Babcock*, STAN. L. SCH., http://www.law.stanford.edu/profile/barbara-babcock (last

Barbara Jordan,[23] and, of course, Geneva Crenshaw.[24] They were all heroes in different ways—politicians, jurists, scholars—but all activists in the sense that they used the law to make the world better for more people. Every class was so inspiring."[25]

Geneva laughed, "Remember Constitutional Law? We started out with *Marbury v. Madison*,[26] and the professor cold-called Julie and asked her the significance of the case. Julie said the significance of the case was that it demarcated the limits of Article III judicial review, and the professor said no, that's the holding. Then Julie said the significance of the case was that the Court decided it could not force Secretary of State Madison to deliver Marbury his commission. The professor said no, that's the ruling. Then the professor explained the significance was that the Court installed judicial review to keep the Court out of the fight over the expansion of slavery between slave states and free states."[27]

Teresa laughed along with her, "That's when I knew law practice was about real issues and real problems." John said, "And the professor stopped at that point to teach us the skill of briefing cases with five sections," and they all said together, "Issue, Facts, Holding, Ruling, Significance!"[28]

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visited Nov. 16, 2013). She served as the first Director of the Public Defender Service of the District of Columbia and Assistant Attorney General for the Civil Division in the Carter Administration. *Id.*

23. Barbara Jordan was a civil rights leader who became the first African-American congresswoman from the Deep South, as the first woman elected to the Texas Senate. *Barbara Jordan*, BIOGRAPHY, http://www.biography.com/people/barbara-jordan-9357991 (last visited Nov. 16, 2013).

24. *See* BELL, AND WE ARE NOT SAVED, *supra* note 1, at 42.

25. "Law school gets characterized as characterless, as impersonal and cold. But I don't think that is right. In fact, legal education tells a very emotional story, over and over again." Scales, *supra* note 2, at 142.

26. 5 U.S. (1 Cranch) 137 (1803). In the years immediately preceding *Marbury*, slavery was a hotly contested issue of national prominence. For more on this topic, see BELL, AND WE ARE NOT SAVED, *supra* note 2, which contains a partially-imagined debate at the Constitutional Convention. Bell's advocate, Geneva Crenshaw, debates the delegates at the Convention, and much of the language in favor of slavery is drawn from the actual debates themselves. *Id.* John Kaminski's *A Necessary Evil?: Slavery and the Debate over the Constitution* is an edited collection of primary materials from the late eighteenth century, documenting not only the Constitutional Convention but also the regional debates about slavery. A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION (John P. Kaminski, ed. 1995). Finally, *Marshall Misconstrued: Activist? Partisan? Reactionary?* has additional information that might be helpful. Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109 (2000).

27. Professor Robin Walker Sterling, a contemporary of Geneva's mother, told Geneva that, when Professor Walker Sterling was lucky enough to take Constitutional Law with Professor Derrick Bell at New York University School of Law, Professor Bell began his Constitutional Law class with this description of the import of *Marbury*.

28. Scales wrote:

> [We substitute] "policy" for "justice" in legal discourse. You know what "policy" is: It is everything that isn't law, and it is amazing how quickly law students can be taught to devalue everything that isn't law.
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> We teach that policy arguments are supplements to legal argument, and often as the last resort. We teach that policy is epistemologically and persuasively *inferior* to law. Consider what that division assumes: that the law *is* necessarily separate from morality and politics, that the law is *better* than morality and politics, that it is largely worthless to en-

John added, "We chased that case with *Brown v. Board of Education*[29] and *Keyes v. School District No. 1*.[30] I'm glad we started with such interesting cases.[31] I particularly liked when we read cases along with the cases they'd overturned. So, when we first read *McCleskey v. Kemp*,[32] and then we read the case that overturned it, *Johnson v. Gleason*,[33] it made me feel very hopeful about how we as lawyers can effect social change."

Geneva added, "My mother told me the first year of law school used to be very different from that—you would take Torts, Property, Contracts, Criminal Law, and Civil Procedure." John said, "That's weird. How do you know how to think critically about any of those subjects unless you've had Jurisprudence? I mean, you need a context for things." Teresa added, "No labs? Why go a whole year before you start working with people? It's a service profession!" John remarked, "That description of law school sounds terrible! Why'd you go?" Geneva answered, "My mother admired a famous civil rights attorney. I guess that's what happens when you have role models who seem happy in their work—you follow in their footsteps."

Wistfully, Geneva said, "I loved my first-year classes so much, I wished we had first-year grades. I understand why we don't,[34] but we

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> gage in the discourse of morality and politics because we can never agree on anything anyway, and that human beings are horrid aggressive creatures who will only be persuaded, ultimately, by coercion.

Scales, *supra* note 2, at 145 (footnote omitted).

29. 347 U.S. 483 (1954).

30. 413 U.S. 189 (1973).

31. According to Scales,

> Studying constitutional law could be engaging and fun. But no. Before students can get to the inherently interesting parts, they have to trudge through McCullough v. Maryland and the interminable implications of the [C]ommerce [C]lause. . . . Why not start law school with Brown v. Board of Education, or Roe v. Wade, or Bowers v. Hardwick? . . . In the conventional format, students learn that the Constitution, or at least the important stuff, is not about rights, or even about people.

Scales, *supra* note 2, at 156 (footnotes omitted).

32. 481 U.S. 279 (1987).

33. In *Johnson v. Gleason*, the Court held that statistical evidence of "racially disproportionate impact" at any of the discretion points in the criminal justice system—including arrest, indictment, plea offers, and sentencing—can win relief for the individual petitioner, even in the absence of a showing of a "racially discriminatory purpose." 685 U.S. 322, 328 (2027) (quoting *McCleskey*, 481 U.S. at 298) (explaining the outcome of this case). The case was brought by a Denver Law alumna who said, in an interview, that she had been looking for the case that would overturn *McCleskey* since she discussed it in a law school seminar where the professor gave the class an assignment. The professor said,

> You have homework. I'll give you about 15 years to complete it. The assignment is to find the case that will convince the Court that the *McCleskey* Court was wrong to give up, because "[a]pparent [racial] disparities in sentencing are" not "an inevitable part of our criminal justice system," and move the Court past eradicating overt, first-generation racism, to addressing covert, second-generation racism, like implicit bias.

Interview with alumna of Denver Law 2018 (quoting one of her law professors at Denver Law (quoting *McCleskey*, 481 U.S. at 312)).

34. According to Scales,

were all so excited to be learning these new things. I can't remember a time when I felt more engaged and empowered as a learner!" Teresa added, "Yeah, first year was great! Man, those were good times. In fact, law school has been great. I have always felt right at home and never doubted that there's a place in the law for me. I've loved law school. I'd do it all over again. I am so happy and excited to start my career. I hope everyone feels this way about law school and about law practice."[35]

Tired of reminiscing, the students picked up their belongings and went off to join their families for the law school's community-service trip in honor of the students' graduation.

> First year grades are stupid, even stupider than other grades, for we do not teach discrete subject matters in law school. Rather, law is a language, a way of thinking, and a culture. It is ridiculous, therefore, to expect that one can have "gotten it" by the end of four or nine months. . . . [F]irst year grades cannot measure anything "learned" in that year. Rather, the grades can discern only who already knows the stuff, and are therefore unfair to the rest of us.

Scales, *supra* note 2, at 141.

35. There is a vast amount of information about law students, lawyers, and how miserable they were before the recent trends in legal education. The most widely cited study analyzed the prevalence of depression in 104 different occupations to find that lawyers were the most depressed occupation when adjusted for socio-demographic factors. *See* William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1080, 1085 tbl.3 (1990). According to this study, lawyers were 3.6 times as likely to be depressed as members of the general population. *See id.* at 1083. An article published in a Yale journal almost twenty years later focused on law students to find that although law students entered school with normal levels of psychological distress, their distress dramatically increased and continued to increase over the three years of law school. *See* Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 367 (2009). "One study found that 44% of law students" had "clinically significant levels of psychological distress." *Id.* at 359. The switch to experiential learning had the lucky benefit of making happier law students. A 2023 study that set out to document why the majority of law students were choosing public interest work over private work found that schools' increased focus on experiential learning produced the epiphenomenon of happier law students. Students who were able to be rewarded for learning in new ways, and to be connected each day with the reasons that they went to law school, were ultimately happier in law school and in their careers.