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Isabel Marcus:Activist Scholar

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I. INTRODUCTION

I intend for this to be a remembrance piece—remembering Isabel and my relationship with her. I also want to remember and honor her scholarship. Remembrance pieces are personal. That is something that is unusual for law review writing. I want to thank the *Buffalo Law Review* for making this sort of public remembrance possible.

II. MEETING ISABEL

In preparing to write this memorial tribute to Isabel and her scholarship, I tried to remember the first time I met her. I am someone who thinks "firsts" are important. And I do remember it well, although I can't remember how it happened, i.e., who connected us. Isabel had graduated from Berkeley with a Ph.D. in Political Science and a J.D. in Law. She came to Austin to interview for a faculty position in the Government Department at the University of Texas. But she wanted to make a connection with the law school and, if possible, teach a course there as a visitor or an adjunct. I was

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the first woman hired at UT Law on the tenure track and I think I was in my second year on the faculty. I was also about to become the Vice Chair of the Faculty Senate. That meant that I knew faculty members around the campus, outside of the law school, who may have been responsible for introducing me to Isabel. More likely, though, it was Beryl Radin, whom I knew through the Faculty Senate, and who was a co-founder, with me and Barbara Chance, of the Women's Faculty Caucus. Beryl and Isabel had known each other at Berkeley and were great friends, as I recall. In preparing to write this piece, I located Beryl in D.C. and called her. She affirmed that she was likely the person who connected Isabel and me at Texas.

Making connections, especially among early women in the academy, was an important skill to have in the 1970s. Isabel herself was quite an important "connector." Once we had met (probably in the fall of 1975)—at the Villa Capri in Austin (that is where all faculty recruits used to stay when they came to Austin for an interview)—she called me to insist that I come visit her in Berkeley. To put it clearly, she simply could not imagine that I had never been to California, much less Berkeley. Apparently, she thought I was the sort of person who belonged in Berkeley, so she was adamant that I at least visit.

And so I did, along with my then-partner, Jan Summer, who had just graduated from the University of Texas Law School. This visit must have been in the summer of 1976, when Jan was about to start clerking for Chief Justice Joe Greenhill of the Texas Supreme Court. Many important things happened during my visit with Isabel and her family in Berkeley. I met her children at her home on McGee Street, and they were wonderful. California was in the middle of a drought and Isabel, always the one who tackled these problems correctly, taught me many useful lessons about how to deal with a drought responsibly—lessons that have served me well now that I am back in drought-threatened California. Probably most important, though, was the fact

that Isabel had me go with her to Boalt Hall and meet Herma Hill Kay.

Remember that this was in the early 1970s. I had started teaching in 1974 and I had never seen a female law professor before. They just didn't exist in many parts of the country. But Herma Hill Kay had been teaching at Boalt since 1960. And she wasn't even the first woman Boalt (now Berkeley Law) had hired. They had hired Barbara Armstrong some forty years earlier.[1] Armstrong was the first female faculty member hired at an ABA[2] accredited/AALS[3] member school. Herma was famous enough that I knew of her existence. But what I couldn't believe was that she would take time out of her busy schedule to meet with me. But of course, she did. Herma was also an important "connector." She connected me with important professionals (mostly women, but not always) throughout our joint academic lives.[4]

Isabel also took Jan and me to an informal dinner (take-home Chinese in the office conference room) with the women who had started Equal Rights Advocates. The three original partners were there: Wendy Williams (who had recently joined the Georgetown Law faculty), Mary Dunlap (who

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1. *See generally* HERMA HILL KAY, PAVING THE WAY: THE FIRST AMERICAN WOMEN LAW PROFESSORS, Chapter 2 (Patricia A. Cain ed., 2021).

2. The ABA was formed in 1878 and began approving law schools in 1923. For a list of law schools that were officially approved in 1923, see *By Year Approved*, A.B.A, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved/ (last visited December 28, 2022). Formal accreditation of law schools began in 1952. For a timeline of ABA activities regarding law schools, see *ABA Timeline*, A.B.A, https://www.americanbar.org/about_the_aba/timeline/(last visited December 28, 2022).

3. The AALS was formed in 1900. *See History*, Ass'n Am. L. Schs., https://www.aals.org/about/history/#:~:text=AALS%20was%20formed%20in%201900,model%20for%20studying%20the%20law (last visited December 28, 2022).

4. Herma unfortunately died on June 10, 2017, my 72nd birthday.

became the first lesbian to argue a case before the United States Supreme Court[5]), and Nancy Davis (who later became a Superior Court judge in San Francisco[6]). These were incredibly important connections for someone like me who had not known a single female law professor before joining the Texas faculty and who also knew very few women engaged in the practice of law. Isabel made those connections possible over 45 years ago, and they have continued to impact and enrich my life.

I want to address Isabel's scholarship in the rest of this Essay. Her written legal scholarship began after she left Texas, but we did discuss it, even if from a distance. We got together at some important scholarly conferences, notably the first ever meeting of the Feminist Legal Theory Workshop at the University of Wisconsin in the mid-nineteen-eighties, hosted by Martha Fineman. This conference was a forerunner of many of Martha Fineman's feminist legal theory conferences to come. Because I had visited Wisconsin in 1977, I was able to suggest and support the offer of a visit to Martha at Texas years later. That visit led to an important connection between Martha and Isabel, who was for years an important contributor to Martha's workshops. Much of Isabel's important early scholarship was published in the books that Martha put together based on her early workshops.[7]

III. SOME THOUGHTS ABOUT LEGAL SCHOLARSHIP GENERALLY

Those of us who entered the academy in the 1970s or earlier were taught to write in the third person, to be balanced and produce evidence and arguments on both sides

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5. The case was San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987).

6. Nancy L. Davis retired from the bench in 2017.

7. *See, e.g.*, ISABEL MARCUS, REFRAMING "DOMESTIC VIOLENCE": TERRORISM IN THE HOME 11 (Martha Albertson Fineman, ed., 1994).

of any issue, and not to take a position. It seemed as though many academics really believed that we could all write in the same neutral voice, with a perspective one might call "the view from nowhere."[8] I have never been sure that a view from nowhere is really possible.[9] But even so, the aim was to come as close to that as possible. It was widely believed to be bad form (at least in my circle at the University of Texas) to provide any sort of autobiographical footnote at the beginning of any scholarly piece that might identify your own personal relationship with the topic you were writing about.[10] In other words, the scholar should distance herself from the subject matter. She should write "what is" rather than "what should be." One might describe this type of writing as "legal positivism."[11]

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8. This latter phrase is also the title of a book. *See generally* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

9. *See* Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1955 (1988) (suggesting that a judge might sometimes transcend a sense of self in the process of judging, but also that it is fairly difficult to take one's self out of the judging process completely). Oversimplifying Nagel's point in *The View from Nowhere*, it might be said that each of us can have both a subjective and an objective view ("the view from nowhere") and we need to have both to get to truth. I have trouble imagining the view from nowhere unless (in a Sartrean sense) my ego has transcended consciousness in such a way that I am not really aware of my ego at that moment. *See generally* JEAN PAUL SARTRE, TRANSCENDENCE OF THE EGO (1936). I am not at all sure that I have ever fully understood Sartre's point in this essay, but there are times (especially when I am particularly captured by a book which I am reading) that I seem to be unaware of my own ego, indeed of my own existence. Is that nowhere? But then I do not have any view that I can claim is mine when I am in that "nowhere" space. In other words, I believe that whenever we intentionally make statements meant to convey information about the world, we are speaking in terms of a view from somewhere—for me, that would be from "my world."

10. For an interesting disagreement on this point between two faculty members at the University of Texas in those years, see Mark Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

11. *See generally* Margaret J. Radin & Frank Michelman, *Pragmatist*

Law is also about justice, and justice is about what law "should be." Some people would call writing about justice normative scholarship. It is scholarship that argues for legal reform.[12] Those that criticize normative legal scholarship often ask a basic question: what makes a legal scholar writing within her silo qualified to tell anyone what the law should be? Instead, we should simply be teaching our students to question, to question "what is" and "what should be."[13] That process is more likely to lead to the discovery of "what should be."

Others argue that legal scholarship has become too abstract, too infused with theories like postmodernism and too removed from law. A subset of legal scholars who are feminists have similarly criticized the various forms of feminist scholarship. At one extreme, there are feminists who engage in personal narrative as a means of consciousness-raising and as a means of making visible those harms that have not been visible before. At the other extreme are those that engage in grand theory, which some view as too far removed from the reality of women's everyday experience. Martha Fineman, by contrast, has called for feminist theory to be in the "middle range."[14] Although I have labelled Isabel's scholarship as "activist scholarship," I would also characterize it as being in the "middle range."

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and Poststructural Critical Legal Practice, 139 U. PA. L. REV. 1019 (1991).

12. For a full discussion about the types of legal scholarship and how they are regarded both within and outside the legal academy and also presenting a defense for normative scholarship, see Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6 (2016).

13. *See, e.g.*, STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2012).

14. For discussion of these various strands of feminist theory, see Barbara Stark, *Bottom Line Feminist Theory: The Dream of a Common Language*, 23 HARV. WOMEN'S L.J. 227 (2000).

IV. ISABEL'S SCHOLARSHIP AS ACTIVIST SCHOLARSHIP

Isabel and I shared "feminism" but not much else of a scholarly nature. I started my teaching career teaching tax courses, with an accounting or real estate transaction course thrown in. Isabel's Ph.D. thesis was on the topic of health reform.[15] While at Texas, she taught Women and the Law in the law school. At Buffalo, her teaching and research focused on domestic violence, labor law, and family law. Later on, she taught and wrote about international law topics related to domestic violence and family law. During her career at Buffalo, she coined her now famous phrase about domestic violence, calling it "Terrorism in the Home."[16]

Isabel's early family law articles have always been what interested me the most. Perhaps I'm influenced by my many years of teaching with Linda Kerber at the University of Iowa,[17] but the historical explanations of how we ended up with today's family law rules always fascinated me, even in tax law, where husband and wife, in my opinion, are too often treated as one taxpayer.[18] Isabel understood these coverture issues from the start. She was, after all, a student of Herma Hill Kay, so it is not surprising that the historical connections that Herma taught so well appear in Isabel's scholarship.

It is also clear that Isabel's scholarship was informed by her activism as well as her historical sense of feminism. She came to understand her activist stance as a scholar, and

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15. Isabel published a book based on her thesis in 1981. *See* ISABEL MARCUS, DOLLARS FOR REFORM: THE OEO NEIGHBORHOOD HEALTH CENTERS (1981).

16. *See* MARCUS, *supra* note 7.

17. As an example of the point about six degrees of separation, I cannot refrain from noting here that the second half of my academic career was enriched by my work with Linda Kerber at Iowa, who just happened to be Isabel's debate partner when they were undergraduates at Barnard. Amazing!

18. I call this Tax Coverture.

therefore used the phrase "activist research" to describe her own work. When focusing on domestic violence in Eastern Europe, she pondered:

> Why, then, in the face of such challenges have I undertaken research over the past few years into the theory and practice of handling domestic violence cases by officials and professionals in Poland, Hungary, Russia and Romania? I hope and believe my work is part of a co-operative process which can be characterized as "activist research." I use this phrase quite deliberately to acknowledge my standpoint in the research process-recognizing the traditional academic notions of objectivity are inaccurate, misplaced and, often, self-serving. In so doing I do not assign my work to a lower rung in the ladder of hierarchy. Rather I recognize my inspiration from and connection to the women's rights activists in the region who are challenging prevailing practices and attitudes regarding domestic violence in their respective countries and to scholars from within and outside the region who can assist the activists' work by providing them some of the necessary documentation and studies.
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> As an outside scholar I am committed to an intellectual perspective which holds that a more complete understanding of the processes in a legal system in response to allegations of domestic violence must be grounded in an analysis of the actual practices and beliefs of officials and professionals charged with handling such cases. These include: police, prosecutors, judges and lawyers as well as medical and mental health professionals, social workers, clergy, academics and journalists whose work involves contact with domestic violence cases. To be more complete this understanding must be embedded in a cultural context which includes: women's roles (especially in the home), women's relationship to the state, citizenship in its gendered dimensions, and the role of law. In applying this intellectual perspective to the region, I am following a method for research and teaching purposes on domestic violence which I have used for my work in the U.S.[19]

Indeed, Isabel's research from the beginning was grounded in her activism, and her activism was based on her feminist visions of a more just world for women. While still at Texas and not yet engaged in the type of legal scholarship that law professors are expected to write for tenure, Isabel

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19. Isabel Marcus, *Preliminary Comments on Dark Numbers: Research on Domestic Violence in Central and Eastern Europe*, 21 U. ARK. LITTLE ROCK. L. REV. 119, 119–20 (1998).

became engaged in supporting military wives, who were being divorced by their military husbands. The husbands were refusing to share their pensions at divorce and Isabel took the position that the pensions were community property. She was right of course, until the U.S. Supreme Court ruled in the *McCarty* case that federal preemption controlled, and therefore state community property law could not be applied.[20] *McCarty* was quickly reversed by Congressional action.[21] This topic was never the subject of any published scholarship by Isabel. But it stands out as an example of how her research informed her activism and her activism informed her research. She wasn't writing about the topic. Instead, she was actively informing the people who were most affected by these rules about the substance of the rules.

Of course, lawyers do similar work on behalf of their clients. But that usually occurs after the client has entered the lawyer's office with a problem that needs to be solved. An activist like Isabel takes her research to "clients" who have never walked into her office. She was engaged in scholarly work that involved public presentations rather than the written word. Many of us in the academy engage in that activity, and it is not the same as lawyering. The research is more broadly focused and the resulting knowledge more broadly shared.

Isabel's first two published law review articles can be described as activist scholarship—moving beyond activist research and into the scholarship arena. She took a particular interest in the development of New York's marital property, divorce, alimony, and property division law. And she didn't just critique the divorce system through her

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20. McCarty v. McCarty, 453 U.S. 210 (1981) (Rehnquist, J., dissenting). Justice Rehnquist was one of the few justices to ever understand community property principles.

21. *See* Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (1982).

knowledge of history, or from either a scholarly silo or an ivory tower. She worked to obtain inside information about how the rules in action were playing out in the lives of real women. This is why I characterize her activist scholarship as "middle range." It is closely connected to the real lives of the participants. It is informed by the reality of what goes on in the world.

As it turned out, Isabel's attempts to gather information (such as what equitable distribution in New York *actually* did to improve the property ownership of divorcing women) was thwarted by another fact in the real world. Information shared between lawyers and clients is confidential. Settlements, including property settlements at divorce, are typically confidential as well. It is very difficult to obtain any large sample of such settlements. Even the inability to obtain desired resources was a fact in the real world that spoke to her about how law operates. She explained the problem as follows:

> Researcher access to sealed court files requires the permission either of the chief administrative judge of a judicial district, or of the individual parties, or their attorneys. Efforts by the author to undertake a pilot study to determine the distributional patterns in out-of-court settlements revealed that her plan to develop a random sample of out-of-court settlements from court files would be difficult to implement. Powerful matrimonial practitioners in the locale selected for the pilot study convinced the chief administrative judge not to allow the files to be unsealed for the study by threatening to enjoin him. Their reasons for non-cooperation included technical concerns of time and money, seemingly unallayable concerns regarding confidentiality, regardless of the safeguards built into the research protocol, and lawyer biases against the utility of social science research.[22]

Nonetheless, based on partial information, as well as results of smaller studies, she was able to conclude that women were not faring well. As a result of bargaining in the

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22. Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 466 n. 341 (1988).

shadow of a rule called "equitable distribution," women in New York were likely receiving only 25% to 30% of the marital property.[23] She and I both reacted to this information by thinking back to the traditional right of dower held by married women under the common law rules of coverture, a right to a life estate in one-third of the real property owned during the marriage. The new equitable distribution rule in New York, although better than the old rule of distributing property according to title, was not making that much of an "equitable" impact in the lives of divorcing women. Isabel commented that it wasn't "bargaining in the shadow of the law, but rather in the shadow of the culture,"[24] a culture where women's contributions are typically undervalued.

V. THE DEPTH OF ISABEL'S SCHOLARSHIP

Isabel's scholarly projects are of two types. She often writes essays, comments, or reflections.[25] These pieces tend to include no footnotes. They are extremely engaging, and they often make me feel as if I am in her space sharing that experience with her. The more traditional scholarly projects are well researched and minutely footnoted. I am a great fan of law review-style footnoting. Often the footnotes seem to be a totally separate article, explaining tangential issues or issues that are relevant to the main topic but not worth textual treatment. Isabel was a master of such footnoting, an art that illustrates the breadth of the author's general knowledge. Everything seems related to everything else. Those relationships require some elaboration, some demonstration of the connection.

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23. *Id.* at 467, n. 342.

24. *Id.* at 467.

25. *See*, *e.g.*, Isabel Marcus, *Preliminary Comments on Dark Numbers: Research on Domestic Violence in Central and Eastern Europe*, 21 U. ARK. LITTLE ROCK L. REV. 119 (1998).

The article she published in the *Buffalo Law Review* on New York Divorce Law, *Locked In and Locked Out*,[26] is a prime example of this talent. Most pages are half text and half footnotes. On some pages, the footnotes take up more space than the text. Page 384 contains seven lines of text and over forty lines of footnotes. Some readers hate such footnotes, but when I read them, I feel as if I have discovered a hidden treasure.

CONCLUSION

I collected all of Isabel's published scholarship when I first contemplated writing this Essay. Much of it required a short re-read. But then I realized I had never read her short piece on her time in Beijing, a time I think of as her Tiananmen Square experience. I remember her being there. I remember reading about Tiananmen Square and the students being attacked. I heard from her shortly after her return and she told me she had managed to get on the last flight out. I read the piece she had written, which she called "Report from China."[27] I found it very moving as she vividly described the threat to her students, her desire to help them, and all the vivid details surrounding what was going on at Tiananmen Square. Then there was her escape. It wasn't clear whether they could find a van to get to the hotel they needed to reach in order to get to the airport the next morning. Could they travel by bicycle? But then someone found a van, and the driver agreed to take them to the airport the next day. The van had four bald tires and no spare and just enough gas to get her to the airport for a United flight out. They made it, of course. As I read her account, I felt almost as though I had experienced all of this with her. And instinctively I wanted to pick up the phone to talk to her a bit more about the experience. For a moment I looked at my

26. Marcus, *supra* note 22, at 375.

27. Isabel Marcus, *Report from China*, CLS (1989), https://digitalcommons.law.buffalo.edu/journal_articles/402.

phone as though it might be possible. And then the moment passed.

Rest in peace, my friend, and thank you for being part of my life.