

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

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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 re-read 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 non-linearity 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.

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

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: I*, 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

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,

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

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-

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 multitudes⁵⁷: 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 work⁶²—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

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

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

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 child-rearing.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 quarters⁸⁷—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).