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Catharine A. MacKinnon

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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.

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 Camp¹⁹ 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 law²⁶ 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-

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 mon-

strous 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 jurisprudence³⁴ 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-

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

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

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.

