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MIDNIGHT TRAIN TO US¹

Ann C. Scales†

You're catching me at a funny, introspective time, between projects, so to speak. Just last week I signed off, as they say in the law review biz, on a manuscript entitled *Militarism, Male Dominance, and Law: Feminist Jurisprudence as Oxymoron?*² It was about how law and militarism are intimately related, how militarism and male dominance are intimately related, and how feminism is inconsistent with all of them. The legal work and the analysis and the making of my argument are done. What you're hearing today is the residue in my brain, the *swimmy* thoughts I've been left with, a commentary on participating in the enterprise of feminist legal theory. I want to speak today from the heart, as Nixon used to say. I want to talk about the possibility of being happy as a lawyer. The pathology I describe is my own. But because I suspect that law school is the domain of the self-hater, maybe there is something here you can use.

I came to law from philosophy. I was always drawn to abstraction and systemization. Law was an attractive career for a philosophy student. It has nearly the same intellectual appeal. Law is applied philosophy of a sort, but better than "pure" philosophy in two ways. First, it is not as rigorous; it has no requirement of logical consistency. Indeed, for law to work and move, it can't be logically consistent. Second, though philosophy in my opinion has amazing persuasive power (ideas matter), there are no winners or losers. In law, at least theoretically, if you've got the best argument, you win, and the world changes. Law is second-rate philosophy backed by the force of the state.

I was impatient for the world to change, as I was forged in the sixties. It was an ambivalent time to choose to become a lawyer. Vietnam changed the way we think about law and undermined any

¹ Copyright © Ann C. Scales 1990. This is the text of a speech to the Feminist Jurisprudence Symposium at Cornell Law School, March 4, 1989. Many women's voices are heard throughout, and I would like to call their names: Anne Simon, Gwyn Kirk, Rheba Rutkowski, Frankee Nesta, Roz O'Reilly, Lily Tomlin, Jane Wagner, Clare Dalton, Aretha Franklin, Catharine MacKinnon, Andrea Dworkin, the women of the Cornell Law School. Most of the footnotes here are parts of the text I cut out just before the speech or as I was going along in order to save time. I have added other footnotes and citations only where absolutely necessary.

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² Ann C. Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25 (1989).

residual faith in the constitutional *qua* constitution. It exposed the *Realpolitik* of our structure of government: the executive branch runs everything; the Congress manages public opinion by farting away its energy; the judiciary primarily sits back and says, "hey, this is all legitimate, this is what makes the U.S.A. great." Those of us who made the choice to become lawyers then had to have known we were devoting our lives to a largely cynical enterprise, but I thought I was ready for it.³

But law school really did a number on me. I fed right into the law school trip, into Duncan Kennedy's description of how law school systematically takes potential ethical and political actors out of those arenas by de-moralization.⁴ On the intellectual level, what I learned in law school was this: oh, law is *much* more complicated than you think it is. It *is* consistent, it *does* make sense. If you don't know the answer or if you don't know why we're talking about what we're talking about, its just you. You, alas, are not Holmes. You haven't learned enough. You'll need to spend the rest of your life studying even to begin to understand how it all fits together.⁵

Politically, the lesson of law school was this: government is important, law is important, you therefore have a really important job. The hierarchy, harshness, and slow movement of the law are all *necessary and fair*. So go to it, and accept the big bucks as just compensation for the frustration you will encounter.

I was in a serious downward spiral, ending up on Wall Street. I've indulged for years in the standard rationalizations about that. Some of them may have some validity in some cases. But while I still have your attention, let me take the opportunity to urge you not to go to work for a big firm. There are three reasons not to, as listed by the wise and, I think, happy lawyer Anne Simon:⁶ (1) you get used to the money; (2) you're helping them; (3) you learn bad hab-

³ Coming from the sixties, I have recently realized, had a personally disabling effect on me. One of the lessons of the sixties for teenagers, from the slaughter of Vietnam to the killing of Bobby Kennedy, was "only the good die young." The negative implication of this lesson was if you didn't die, you were not good, or tender-hearted, or really idealistic, or committed, or at least not sufficiently so. The best you could hope for was to make the world safe for the good.

⁴ Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 40 (David Kairys ed. 1982).

⁵ I think law teachers often at least implicitly believe this. They are, in spite of twentieth-century efforts to de-mystify the law, very much engaged in the pursuit of Right (Legal) Reason. The conviction that the dispositive tests can be found in legal literature is part of what gives the study of law its monastic character. I suspect that in the end, this learned conviction is a defense against creeping cynicism, as in: given a room full of shit, there must be a pony in there somewhere.

⁶ I am grateful to Anne Simon for talking about this with my Feminist Legal Theory class at Boston College Law School in the Fall of 1988. The text here is an application and elaboration of her insight.

its. I wasn't around big firm practice long enough to get used to the money. But I did help them. I was part of the crackerjack kamikaze associate troops who got the Ford Motor Company out of a real scrape in the Pinto cases. I can't say I'm proud of that.

And I learned lots of bad habits. I learned how to do things the most expensive way possible. As an associate, pursuing to death a little piece of someone else's case, I learned very little about very little. I learned that legal judgments are the end of the matter, the end of the relationship with clients and their aspirations. I learned that lawyers are free to walk away from someone else's time and money, badly invested. And I learned that it has to be that way—that practicing law is necessarily an expensive and exhaustive accumulation of details and delays, which may or may not get anywhere or mean anything.⁷ I've worked hard to unlearn my big firm bad habits and to recover from the experience. I would say I'm very lucky, but my witch friends say to give myself and the goddess a little credit. My spirit survived.

Teaching more or less happened to me. It was incredibly good news for me that contemporary feminist jurisprudence also happened. I fell into a new field, into its construction from the ground up. It is wildly exciting to be able to have this community, to know these distinguished women, to participate in something that at least seems to be living. The bad news is that, as a law teacher, I am still helping them. I'm a good teacher. I can clearly and efficiently train people to do lawyerly evil clearly and efficiently. And even when my students avoid those pitfalls, I wonder how many fine young minds am I helping to send off to be wasted as lawyers.

Well, you're wondering where the women's peace movement comes in.⁸ I was in the midst of the crisis of conscience when I visited London in the winter of 1984. There I first learned about the Greenham Common Women's Peace Camp. It captured my imagination and set me on fire. I'm an admirer of the efforts of the women at the Seneca Camp nearby.⁹ My own experience, however, has

⁷ Contrary to some feminist criticisms of law and legal education, I don't think that law school taught me to be a cut-throat adversarial person. Law school may do that to some people, but I think I already *was* that way. I was impatient for the world to change, and prepared to *force them to be free*. Law is, after all, about social policy backed by force. Insofar as there is a meaningful division between nonviolent activism and armed struggle, I suspect lawyers like me tend more toward the armed struggle camp. We are soldiers of a sort, only very inefficient ones.

⁸ In the Cornell Law School publicity, this lecture was called "The Women's Peace Movement and Law."

⁹ The oldest continuous women's peace camp in the U.S. is (along with Ithaca) in the Finger Lakes region, near the U.S. Army Depot at Romulus, New York. For further information, write Women's Encampment for a Future of Peace and Justice, 5440 Route 96, Romulus, New York 14541.

to do with Greenham, so I will recount a brief history. In September 1981, a small group of women and children and a few men marched from Cardiff, Wales, to United States Air Force (USAF) Greenham Common near Newbury, England to protest the North Atlantic Treaty Organization's (NATO) plans to deploy Cruise missiles there. Their intention was simply to stimulate public debate about this, as there had been none in Britain. It was a NATO *fait accompli*, to be effectuated and controlled entirely by the United States. The women planned to protest for a few days, but getting insufficient publicity, they stayed. The Cruise missiles were deployed in November 1983. There are ninety-six of them there now, each a first use weapon, each with the fire power of sixteen Hiroshimas.

The women's protest became a permanent encampment outside the base—for eight and a half years now, round the clock, winter and summer, braving the vicissitudes of the brutal British eighties. They have been evicted and have had to relocate on an average of five times per week. There have been well over a thousand civil disobedience prosecutions of them and many jail sentences. But they have “won.” Those ninety-six missiles are among those to be “destroyed” under the Intermediate Range Nuclear Force (INF) treaty.¹⁰

The Greenham women will never get any official credit for that, and I didn't know in 1984, didn't imagine, that their sanity could prevail over Cruise insanity. But I was lit up even then. Because, unlike the projects of lawyers, theirs wasn't an expensive campaign, indeed it was predicated on the possibility that they could just *live* there, reliant on the kindness of strangers, and *be* their politics. Unlike law, they weren't stuck with the task of attacking tiny parts of tiny problems. They were attacking the biggest problem there is, and all at once. And most important, there is no possibility in the Greenham campaign of walking away. For Greenham is not just a place but a movement. It is about peace in the broadest sense. It is about the interconnections between nuclear and other forms of male violence and male organizations. It is about the interconnections between these and starvation. It is about the future being dependent on a blend of passionate politics and humility. The INF treaty is just the first victory, the beginning of the struggle. The Greenham women aren't going anywhere. As the banner over one

¹⁰ S. EXEC. REP. NO. 15, 100th Cong., 2d Sess. (1988). Publicity surrounding the treaty spoke of destroying the Cruise missiles. However, the only components of the weapons to be destroyed are the missiles themselves, the vehicles for the warheads. The warheads and/or “weapons grade radioactive materials” will be disassembled and saved for use in the emerging generations of weapons. The rumor in Albuquerque, New Mexico, is that some of these things will be stored inside the nearby Manzano mountains, a place of enormous beauty that is also sacred to local Native American peoples.

of the Greenham camps the day after the treaty signing read, "HERE TO STAY, HERE TO VERIFY."

The magic for me in the Greenham movement is that it is an example of women having an *unmediated* relationship to their reality, to history itself. For centuries, women's intelligence and politics have been imprisoned in the home, surviving, as Andrea Dworkin says, on crumbs brought by fathers and husbands and brothers.¹¹ But here at Greenham were women taking history by the horns and refusing to abide by history's exhaustion of remedies requirements. Just as men have always earned political authority by leaving home for war, here were these women, *leaving home for peace*. A Greenham friend summed this up in regard to a very famous photograph of Greenham women dancing on a missile silo.¹² The action during which that photograph was taken got a lot of publicity, and on New Year's Day, 1983, that photograph was taken up by the press all over the world. My friend told me that on that day, for the first time in her life, she wished she had a television. For once it would show something important, and for once it would be about us.

It was so exciting. For most women this has not seemed possible. Not only is women's reality mediated, our political judgments are subjectivized, turned into personal problems. This is both an external and internal phenomenon. Internally, we learn that the problems are too big for us, we should leave them to the experts, and if we're still dissatisfied *it's just us*. We need some self-actualization therapy and some shopping to help us feel better. We focus on ourselves, so do not excise what Russell Jacoby calls the "scar tissue" of the human history of violence.¹³ The world of politics becomes "other," and must be obliterated. And so we are disabled from acting. We fall for what Jacoby calls "the fetish of subjectivity."¹⁴

When we do act, our political actions must be trivialized by external means. I gave some examples of this last night.¹⁵ It *always*

¹¹ ANDREA DWORKIN, *RIGHT-WING WOMEN* 38 (1983).

¹² The photograph, taken by Raisa Page, is reprinted among other places in ALICE COOK & GWYN KIRK, *GREENHAM WOMEN EVERYWHERE* 52-53 (1983).

¹³ See RUSSELL JACOBY, *SOCIAL AMNESIA: A CRITIQUE OF CONTEMPORARY PSYCHOLOGY FROM ADLER TO LAING* (1975).

¹⁴ *Id.* at 40.

¹⁵ The first example is the case that led to the development of the problematic "battered women's syndrome" defense. In *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977), a woman killed a man who had threatened some children and molested one of them. The Washington Supreme Court reversed her murder conviction on the ground, *inter alia*, that the equal protection clause requires that the jury be allowed to consider her subjective impressions of the situation, and her unequal physical strength. *Id.* at 558-59. This can be seen as subjectivization and trivialization of women's perception of oppression, because "[t]he Wanrow court did not take the next step; to consider whether the objective self-defense standard embodies a male standpoint." Catharine

happens to women, and it always happens to all people who speak out against war: they, after all, stand in the shoes of women. To call conscientious objectors effeminate is the best way to silence them and minimize their numbers. The same thing happens with civil disobedience prosecutions. The Thoreauian formula says civilly disobedient citizens have to suffer the punishment. It means that they must pay for divergent subjectivity; it means they weren't objective, they were silly and arrogant and wrong.

We can't cave in to that. I love the Greenham women because, though working with two strikes against their credibility (as women and as peace activists), they never caved in to *anything*. They wouldn't obey court orders to leave, they forced arresting police to talk about what their wives thought of them, they refused to pay fines, they put the police and judges and the military on trial in the courtroom, they sang and chanted through their own trials, they subverted the other jail inmates, they broke into the jails and danced on *those* roofs, and upon release they were all right back out there.

It was surely an important lesson for me, to be forced to see the narrowness of my lawyerly view of the world. But there came to be a downside to that lesson. I began to wonder, does it always have to be that hard to be part of history? The peace-activist women I met seemed to me to be so serious, so single-minded, so intent upon a consistent feminist politics and process. And I didn't think they approved of me. I hadn't lived in the mud for eight years, and, being a lawyer, I was pretty clearly from the other side, an emissary from the belly of the beast. In working on that project since 1987, I sometimes felt like a plaintiff's malpractice lawyer at a convention of the College of Obstetricians and Gynecologists. I felt that I had to work harder at it, so I did. I was living and breathing nuclear war, and its connections to absolutely everything. I found myself thoroughly redefining "fun." I questioned all of my judgments. I couldn't listen to Gladys Knight sing "Midnight Train to Georgia," because it

MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 725 n.96 (1982) (emphasis deleted).

The Washington court clarified its view of women in a later case. A woman was not allowed even to try to prove sexual abuse by her father on the ground that the harm was too subjective, therefore unverifiable, despite expert psychiatric testimony. *Tyson v. Tyson*, 107 Wash. 2d 72, 727 P.2d 226 (1986) (refusal to apply "discovery rule" to toll statute of limitations).

The last example is *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985). When the Greenham women came to this country to demonstrate the illegality of the deployment of Cruise missiles in England, they were thrown out of court pursuant to the political question doctrine. United States Attorney Rudolph Giuliani argued that they had vastly oversimplified defense matters (girls are dumb), and that their real problem was that they didn't know how to cope in a necessarily dangerous world (girls are fluffy).

was sentimental and politically incorrect for *her to rather live in his world than be without him in hers*.¹⁶ I seriously considered giving up teaching and law and becoming a peace pilgrim.

Now I see that it wasn't women in the peace movement laying this trip on me. It was my self-hater talking. I was judging my insides by their outsides. I had embarked on a fetish for myself which was the opposite of the fetish of subjectivity. Not opposite in the sense of being a fetish of *objectivity*, because that, after all, is the justification of male dominance. Rather, I thought, maybe this is a *fetish of politics*: a view whereby the self is defined and the self's existence justified solely or primarily in terms of political activity and political correctness. In this view, there is still a dichotomy between the personal and the political, between self and world. There is still annihilation of some "other." But in this view, the *world* trumps other interests. The work to be done trumps fun, taking care of oneself, intimate relationships, and other "non-political" activities.

I felt like a monster. The categorization of everything, the objectification of some, and then obliteration of those "others" is a tidy approach to life. It is what the brutality of patriarchy is all about.¹⁷ The fetish of politics I describe has the same structural defect. Women can recognize and practice connectedness, but still fall for some hierarchy of loves, among self-love, love of others, and love of politics. There has to be some dialectical middle ground somewhere, or better yet, some way of understanding self/others/world that requires no categorization.

Achieving this healthy relationship among self, others, and world is a very tough mission. There is strife in personal relationships. As Adrienne Rich says, two people together is a miracle.¹⁸ There are immense difficulties that arise among people of different cultures. In my state of New Mexico, the coexistence of Indian and Hispanic and Anglo peoples is a miracle. The authorities tell us that there is inevitable conflict among different sovereigns. That the world still exists is, indeed, a miracle.

Feminist theory discloses a particularly poignant struggle with the tension between individual and community. I have found it to be best explained in Robin West's wonderful article, *Jurisprudence*

¹⁶ Jim Weatherly, *Midnight Train to Georgia*, (© Eric Records 1971).

¹⁷ This approach is socially sanctioned for men. It is said that in his youth, Teddy Roosevelt discovered that bringing down five starlings with a single blast of his shotgun cured him of his asthma. Therefore, Roosevelt considered war from the perspective of the tonic physical and moral effect it would have upon him. It led to his "splendid little war" in Cuba that was to keep the nation from lapsing into effeminacy. Thanks to my wonderful friend Margaret Monsell for the anecdote.

¹⁸ Adrienne Rich, *Love Poem No. XVIII*, in *THE DREAM OF A COMMON LANGUAGE* 34 (1978).

and Gender.¹⁹ The “official” story about women’s lives is that told by “cultural feminists”: for women, connection is existentially and morally *prior* to individual autonomy. The official harm women face, therefore, is the harm of separation. The downside, or unofficial version, of this is that told by radical feminists: women’s connectedness is the source of women’s oppression. Intimacy becomes intrusion. The unofficial harm women face, therefore, is the threat of the dissolution of our individual boundaries. In Robin’s words, we “secretly wish that everyone would get the hell out of our lives so that we could pursue our own projects.”²⁰ This desire is not for mere solitude or individual achievement. Rather it is the residue of a long history of women’s invisibility. I don’t fear that my selfness will be silenced; rather that I will never have a self. I fear that I can never heal from my internalized non-personhood.²¹

As an example of this struggle, consider the fortunes within the feminist community of Carol Gilligan’s book, *In a Different Voice*.²² You will recall that Gilligan’s book described her findings that little boys tended to address moral problems in a hierarchical, rights-based, formalistic way. Little girls tended to address the same problems in a contextualized, relationship preserving, equitable way. When this book was published in 1982, we fell over ourselves to embrace it. Very soon after that wave of acceptance, there was an equally large wave of suspicion, some outright rejection.²³

¹⁹ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

²⁰ *Id.* at 36.

²¹ West distinguishes this from a more familiar, masculine version of the tension between individual and community expressed in the legal system. From the male point of view, the official value of law, represented by traditional legal liberalism, is autonomy. The official harm threatened by existence in society is annihilation of the self. What West calls the “unofficial story” is that told by critical legal studies. The individual values autonomy, but has a perpetual longing for connectedness. The harm he fears is alienation, loneliness, and isolation. *Id.* at 7-12.

The stories for men and for women are not just mirror images of each other. The subjectivity craved by spokesmen for the unofficial male story is not the same subjectivity depicted by cultural feminists. They value intimacy because it helps them overcome their separateness—intimacy is hard for them. For us it is “ridiculously easy.” Likewise, liberals fear annihilation from without. Women’s is a fear of annihilation from within; a fear of having my emerging self overcome, not ended. *Id.* at 40-41.

²² CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

²³ The criticisms were of different types. Feminists in the social science community criticized Gilligan’s methodology, though in fairness to her, she admitted the limitations of her small samples and disclaimed any intention to make any generalizations. Some liberal feminists thought her work gave away our hard-fought gains in the area of equality. I argued that the book was dangerous because it *was* so popular, and its findings so easily generalized and co-opted. I see this in various law school curricula: a few pages of *In a Different Voice* get assigned sometime in the first year, usually as a way of opening the subject of alternative dispute resolution. So we leap to suggest that somehow women’s voices can be incorporated into a thoroughly incompatible male scheme, without fully discussing the pathology of that scheme. So Gilligan’s observations get lost. As

But in spite of this critical storm, Gilligan's work has shown amazing staying power. It just hit too close to home. As Robin West says, "I don't know of any woman who hasn't recognized herself somewhere in this book."²⁴ So the task is to use Gilligan's insights without being demoralized by criticisms. Yes, it is dangerous to institutionalize a "women's point of view," without due diligence to thwart those who would exploit these findings. Yes, it is cultural imperialism to discuss a women's point of view without regard to race and class. Yes, it is possible that the nurturing, relationship-boundedness that women express is a result of violent inculturation into the system of dominance and submission. And, yes, women have learned to use nurturing as a means of manipulation. But that doesn't make the values expressed by women in Gilligan's book bad or unimportant or unnecessary to the survival of the planet. It just makes them heretofore unchosen. We need to choose them now. As Robin West—she certainly no fluffy sentimentalist—says, "I can't imagine any project more crucial, right now, to the survival of this species than the clear articulation of the importance of love to a well-led public life."²⁵

Now let me bump this discussion into the realm of law and lawyering. A lot of mainstream jurisprudence focuses on the nature of the obligation to law, both the immediate obligation to obey it and the widespread sentiment that it *should* be obeyed. And as usual, mainstream jurisprudence has been desperate to come up with some objective-looking account. All those accounts are very unconvincing. I think we need to admit that it is a matter of feeling, of giving a hoot.

When I give a hoot, I feel exhausted or inauthentic or both.²⁶

Gilligan observed, when little Jake and little Amy speak at the same time, Amy's voice gets drowned out.

Other radical feminists argued that the ethic of care described by Gilligan tended to reify women's powerlessness, to glorify women's lack of self-esteem in the moral realm the same way that we have been taught to eroticize submission in the sexual realm. Or as MacKinnon put it with characteristic pithiness, we're not talking about a brave new world in a different voice, we're talking about the same old oppression in a higher register. See Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 25 (1985).

²⁴ West, *supra* note 19, at 20.

²⁵ *Id.* at 65. I am not suggesting that we have to choose the values of connectedness and caring and survival over our individual freedom or well-being or moral agency. To posit that either set of values must be relinquished in favor of the other is simply to buy right back into the same destructive dichotomy between self and world.

²⁶ I think that for an individual to feel an obligation to law as it is, she needs to be convinced of two things. There is plenty of room for dispute in both. First, social organizations need rules. Society is just too big and pluralistic to establish the patterns and unspoken norms that suffice in smaller groups. Second, the order established by rules needs to be able to be counted on, in most or at least in the important instances. So, I

Two options readily appear. First, we can stagger on holding up our end. (This is how I felt consulting on a brief in the *Webster*²⁷ abortion case: citing cases that were beside the point, relying on doctrine that no one really believes in, never getting to say what the point was.) Or we can get mad and tell the government to stuff it, go in for direct action and try not to get caught (like the government does). These options correspond to what MacKinnon in 1983 called feminism's schizophrenic relationship to the state.²⁸ We have oscillated, she said, between liberal trust in a liberal state as potentially principled, on one hand, and a leftist abandonment of the state on the other.

I don't think there's any question anymore that liberalism has backfired, as the *Webster* case illustrates. I don't think there's much dispute anymore that the state as constituted is male, in the sense that it embodies and ensures male control over female sexuality, in MacKinnon's words, "occasionally cushioning, qualifying, or de jure prohibiting its excesses when necessary to its normalization."²⁹ There is the justified fear, therefore, that when we rely on the state or seek its protection, we feed it and endorse its legitimizing and normalizing activities. The problem with the leftist position, of course, is that abandoning the state also means abandoning "those women whom the state does not ignore or who are, as yet, in no position to ignore it."³⁰ Abandoning the state abandons us to unchecked male power in society.

The development of a feminist political theory must be very high on our agenda. There are so many important questions here: whether we believe in the very idea of a state,³¹ whether we must

need to feel that the police will eventually respond to my entreaties; I need to feel that the government feels obligated to obey the rules it establishes; I need to believe my rights will be enforced, etc. You see the problem here. The government is not holding up its end of the bargain. From Iran-Contra to Agent Orange to the failure to restrain the military in preparation for nuclear war to the nature of rape prosecutions to the abortion case, government treats its obligation cynically if indeed it will acknowledge an obligation at all.

²⁷ *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (Supreme Court upheld Missouri law restricting the use of public employees and facilities for performance or assistance of nontherapeutic abortions).

²⁸ Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 643 (1983).

²⁹ *Id.* at 644.

³⁰ *Id.* at 649.

³¹ The state as constituted and understood just doesn't have very much to do with us. As Robin West points out, the creation of a state is a very male response to a male idea of the state of nature. In that male state of nature, all people, meaning all men, are created equally. They thereby have equal separate personhood, and equal physical force with which to protect that personhood. Implicit in this realm is the threat of mutual assured destruction, should they have to resort to physical force to protect their space. The response to that vulnerability is the creation of a state that required respect for that

have a theory of human nature; how to deal with the actual inequality in distribution of resources; what a feminist understanding of community is; whether there should be rules at all; how rules should work; whether feminist processes we use among ourselves can serve in international relations; and whether sovereignty is a concept that makes sense anymore. We need to get to these questions, but in the meantime we have to deal with the state as constituted in other than a schizophrenic way.

I don't think this has to be so hard. I think we make it hard by internalizing the logic of the fathers that says we have to be consistent in their linear terms, and that we have to believe in the state in order to use it. To throw an all or nothing choice at us is to say we can't tell the difference between oppression and liberation. We can. We can resist the pressure to idealize the state, and rights, and law. The issue is knowing the difference in a particular case. The issue is knowing that we can *trust ourselves* to do that.³²

This corresponds to what I would say is the third option in our relationship to law and the state. It is based on the process of recovering from an addiction. It is a matter of critical disengagement that allows for careful attending to the important things that are going on, with our abilities and sanity intact. You are probably tired of hearing about addiction.³³ Indulge the addiction model one more time, for I think it does help to explain how we become undermined, ineffectual, and unhappy.

Anne Wilson Schaeff, sort of the Grace Slick of the co-depen-

equal freedom and potential force. As West points out, if it makes any sense to postulate a state of nature at all, females would not likely presume equality. We're not equal in physical strength of the kind assumed by the male model, and our experience of life is of unequal vulnerabilities and strengths. If our response to this natural inequality were to create a superstructure, it would by definition not be neutral or abstract. West, *supra* note 19, at 63.

³² People of color have articulated this in their critique of the critique of rights. Beginning with the centrality to liberalism of "rights," critical legal theory portrayed rights as powerful tools of legitimation for an unprincipled capitalist regime. Rights, in that critique, are otherwise indeterminate and meaningless. I understand part of the "minority critique of the critique of rights" this way: hey, don't talk to us about how rights are worthless when you've never needed any. Reliance on rights (hence, on the state) has been a powerful focal point of the civil rights struggle. We know rights can be used to oppress; but they can also be used to liberate. To say that it has to be one or the other is to say to us that we can't tell the difference. See, e.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); Patricia S. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

³³ I understand there are now over 2000 twelve-step meetings per week in Los Angeles alone, and I have heard the criticism that twelve-stepping is just another trendy, quasi-religious self-improvement hoax. I don't know whether the program has really become trendy. I do know that, for substance abusers a step away from dying, it works. I also know that it has nothing to do with religion, and teaches that there are no pre-packaged easy answers.

dence movement, has written a book entitled *When Society Becomes an Addict*.³⁴ Her thesis is that the violent, lying, cheating state of the world and the widespread malaise among the citizenry constitutes an addictive system. She defines addiction as anything in our lives over which we are powerless. Now power is the most addictive thing ever invented. The government, business, and other agents of "civilization as we know it" are very strung out on power. These entities can't get around to doing anything they might usefully do because they are too busy consolidating their own power. Ordinary people are co-dependent with respect to the power addiction of government, where co-dependence is defined as an addiction to another entity and its problems. We feel, and largely are, powerless with respect to the big guys' power addiction. So we tolerate it, and cover for it, and live as if it weren't there. In the parlance, we enable it.

The manifestations of addictive behavior on both sides are dishonesty, denial, self-centeredness, the need for control, and crisis orientation. Let's just consider these briefly to illustrate.

Dishonesty: It is everywhere—it's our way of life. The prominence of "spin-doctors" in the presidential campaign leaps to mind. My favorite example comes from corporate America. Pepperidge Farm Cookies, itself owned by Campbell's—the world's largest soup company—has opened a product line called the "American Collection." You can get Nantucket Cookies and Santa Fe Cookies and so on. The package of each of these states that Pepperidge Farm has made "classically American cookies," and "that meant making each cookie one of a kind, with an individual personality all its own. So [we] gave them rugged, irregular shapes, just as if someone had lovingly shaped each cookie by hand."³⁵ Dig it. No one made them by hand. Pepperidge Farm spent millions of dollars earned from us to design and build a machine that can regularly make the cookies irregular. It's a hoax. And they are bragging about it. And we are eating cookies and loving it. And "classically American"? You bet. Multi-layered lies are as American as homemade cookies.

Denial: Denial is the engine of nuclearization. Consider the concept of "limited nuclear war" (or, as defense strategists call it, "sub-holocaust engagement"). Consider nuclear weapons production. From Hanford to the Savannah River to Rocky Flats, the truth is that we have been poisoning ourselves for national security. And the defense industry is admitting and denying in the same breath. "Ethics in Government" stuff is about denial. Why was it even

³⁴ ANNE WILSON SCHAEF, *WHEN SOCIETY BECOMES AN ADDICT* (1987).

³⁵ This example is discussed in Joel Achenbach, *Creeping Surrealism: Does Anybody Really Know What's Real Anymore?*, reprinted in *UTNE READER* Nov.-Dec. 1988, at 112.

imagined that John Tower could be Secretary of Defense? Not because of alcoholism or "womanizing," but because of his intimacy with defense contractors. And we, the people, in the name of "realism," enable this, allow the government to get away with it.

Self-Centeredness: Everything that happens in the world is either for or against the United States, from the Persian Gulf to Nicaragua. When tragedy strikes, the sole focus for the evening news is how many "American lives" were lost. During Grand Slam tennis tournaments, the commentators obsess about how many Americans are left to compete. (Notice how Martina Navratilova almost never fits this bill. But that's another sad story.)

The need for control: This is the meaning of contemporary life, and we call it INS, IRS, State Department, abortion, sexual preference. The legal expression for the pathological need to control, and the "justification" we co-dependents enable, is "the slippery slope." If I'm allowed to make love with a consenting adult woman, anything goes, and incest has to be accepted. As if it weren't already. If pornography is recognized as a violation of civil rights, then instant total censorship will kick in and *Bingo*—it's a police state. And on and on.

Crisis orientation: In the lives of addicts, to portray whatever happens as a crisis is to give the illusion of being alive. In the life of a government, to portray the president's cold as newsworthy, to make events out of non-events is an argument that the government is doing something, and diverts attention from what the government is really doing or allowing.³⁶

If you accept or will entertain the addiction model, the next process is recovery. And the first step to recovery is detachment. Recovery requires radical detachment in the case of chemical dependencies, but a more complex kind of detachment in the cases of other addictions. That is to say, when it comes to lots of what are called co-dependent systems, we don't reject the addictive thing. Food addicts can't give up food, sex addicts don't give up sex, law/state addicts shouldn't give them up either. Instead, we have to detach in a way that is radically *re-evaluative* of the relationship between ourselves and the addictive thing, person, or process.

Detachment does not mean *disengagement*. To the contrary, detaching in the way I advocate is a way of engaging more authentically and more effectively. The benefits of detachment from law are wonderful: conservation of energy, ability to choose battles, thwart-

³⁶ The war on drugs is the best example of this. Lump together all illegal drugs, whether life-threatening or not, ignore the most pervasive killers, tobacco and alcohol, turn it into a full time crusade for individual will power, and don't worry about homelessness and poverty and the deficit and nuclear war.

ing build-up of resentment. Detachment eventually gives us the ability to talk to the adversaries.³⁷

Such a detachment allows us to recognize our role as lawyers. The law is not wonderful, does not itself make a better world. Mainly, the law oppresses people. What we do as lawyers is stand between the law and the people it is hurting. We arrange *breathing room* for people who are being smothered. Once in a while, we assist those engaged in other political activities; we keep the law off their backs so they can make a better world. This is the rub in the abortion battles.³⁸ The authors of the brief are argle-bargling about how to portray the right to privacy as constitutionally sound. I say, fine, guys, if it works. But the issue in this case is not constitutional integrity. The issue is women's survival. Calling abortion illegal doesn't stop abortions. But that's exactly what the Supreme Court can't understand: that what they say makes no difference in what people will do. The law can't decide what practices there will be. The law can only make it easier or harder, can either provide a little breathing room or tie plastic bags around women's heads.

A legal example of this sort of detached re-evaluation of the legal process comes from Greenham. In 1984, a group of Greenham women came to this country to sue President Reagan, Defense Secretary Weinberger, and others under the Alien Tort Claims Act for the unconstitutional and illegal deployment of those Cruise Missiles. The Center for Constitutional Rights in New York City did a hell of a job, but they got clobbered in the Second Circuit, on the ground that the nuclear policy of the United States is a political question, undecidable by the judiciary.³⁹ But it was an incredible success on other levels. Very important research got done and put in an accessible format. Papers from that case went out all over the

³⁷ Communicating with adversaries takes a lot of work for many reasons. Salient among them is that the system to which we are addicted doesn't allow detachment as an option. You're with us or against us. You're involved in law or not. Win or lose. Life or death. In detaching from the law, we have to first go through a period of being characterized as spoil-sports. Johan Huizinga distinguishes between cheats and spoil-sports, and rightly points out that the latter are much more harshly treated. JOHAN HUIZINGA, *HOMO LUDENS II* (1955). A cheat breaks the rules, but at bottom acknowledges the worth of the game. Ollie North will not be harshly treated, for though he broke the rules, he did it *because* he consents to this government and its metarules. A spoil-sport, on the other hand, not only transgresses the rules, but says openly that they don't mean anything. This shatters the play world, brakes the magic circle, reveals the contingency of the game, robs it of its illusion of importance. The spoil-sport must be cast out, because she threatens the existence of the play community. We have to get called weenies and run off the playground. This is a risk I'm willing to take, because we are already characterized that way. Women who act are always subjectivized and characterized as unable to play right. See *supra* note 15.

³⁸ See, e.g., Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

³⁹ Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

world, became a model for similar kinds of cases, and a vehicle for international Cruise Missile education. The Greenham plaintiffs toured the United States and talked to thousands of Americans who knew nothing about these governmental exploits. And look—the missiles are leaving.

Compare what I said earlier about walking away from clients and their bad investments when the decision comes down. The law of the fathers *wants* us to think that what it has to say is the end of the matter. But is only one stage of the real proceedings, often only the beginning. A different kind of lawyering must be a matter of four principles: (1) *don't do work you hate*, in law school or in practice;⁴⁰ (2) don't represent clients who are doing bad things; (3) try to engage in a critical and constructive relationship with your clients and their cause, their aspirations, their vision; (4) take every lawyering job as an opportunity to be in a critical relationship *with yourself*, and to *learn something*.⁴¹

When you have clients with whom you can do that it is a wonderful experience. It is powerful medicine for solipsism or for any feelings of lonesomeness or ineffectuality. It is as close as people ordinarily come to the dream of actually sharing or exchanging experience, being karmically connected. And it will represent a major therapeutic reconstruction of law.

Being able to do this requires a deep reservoir of hope and clarity, both of which seem in short supply these days. But there are ways. In my opinion, Reagan did one wise thing during his presidency: he consulted an astrologer. (Well, he also bought a dog for Nancy. That was wise.) The presidency requires clarity, readiness, awareness of currents of change, and of our place in universe. Whether one believes in the art and power of astrology or not, it is a healthy ritual. It is a ritualized putting us in our right place: specks under the stars, participants in, not controllers of, a great cosmic adventure. God knows, Reagan needed to be out of himself, to become one with his speckness. We all need some means of grounding and contextualizing ourselves. And I think we can do that happily and constructively only by some apparently irrational means, by some ritualized assurance, some leap of faith.

When I use words like "faith" and "miracle," I'm not advocating passivity. I advocate active surrender, and it is only an apparent paradox. Just as alcoholics must first admit powerlessness in order to achieve some agency in their lives, we must detach from law in order to achieve peace with ourselves and clarity in our projects.

⁴⁰ Mari Matsuda said this at a conference at Harvard in 1987. It has stuck with me.

⁴¹ This is another wise comment from Anne Simon, in her talk to my Feminist Legal Theory seminar.

There is a mystery in it, something difficult to explain or even understand. And that is something central to the revolutionary method of feminism. MacKinnon put it this way:

Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world; for a sexuality, a history, a culture, a community, a form of power, *an experience of the sacred*.⁴²

Nor do I advocate religion. We mustn't confuse spirituality with religion. To do so, I think, is a peculiar disease of white people (as Grace Paley calls us, especially appropriate here, people of colorlessness⁴³). Rather, I am responding to another false dichotomy, that between rationality and irrationality. It's a split we see even among feminists—between "cultural feminists" and some other kind of feminists, I suppose the rational, political kind. It is false, because to say that only so-called rational knowledge counts is not to make the so-called irrational go away, it is only to devalue it. That is exactly what patriarchy has done to women's traditional ways. And the feminist critique of patriarchy adds up, I believe, to an allegation that what counts as "rational" knowledge is simply male subjectivity, hence male belief, hence male faith—elevated to the status of objective reality.

How can we possibly account for the pervasiveness and staying power of patriarchy except by seeing the ideological significance of ritual?⁴⁴ Ritual is patterned action—the way culture enacts and confirms its values. Look at the available rituals, how pervasive, and how *incredibly effective*. Look at the rituals of sex-role differentiation, wherein, for women, the values enacted and confirmed are that we are fodder for the cannon, here to be consumed, ultimately irrelevant to history. Look at the rituals of education. These, it must be said, become high church in law school: the importance of authority, our own inadequacy, the competition for grades, law review, jobs in the "good firms." (What makes them good firms? Do they

⁴² MacKinnon, *supra* note 28, at 637 (emphasis added).

⁴³ Grace Paley, quoted in personal conversation between me and Gwyn Kirk.

⁴⁴ For example, in 1984, the Department of Energy considered an amazing proposal to deal with high-level nuclear waste, which has a minimum half-life of 10,000 years. The idea was to train and lay the groundwork for perpetuation of what the Department of Energy called "an atomic priesthood"—persons who by myth and parable and instilling faith could get across the necessity of staying away from dump sites, and who could still do the job—due to the power of ritual—even if languages disappear and other social structures become extinct, even if the world as we know it comes to an end. *The Albuquerque Tribune*, Nov. 12, 1984, at A-7, col. 1.

do any good?) Look at the empty and expensive rituals of electoral politics.

Now, ritual went wrong somewhere in here. The values enacted and consolidated by patriarchal ritual are that the self and others are to be feared, the self and the universe must be rigidly controlled, and value is given only in exchange for obedience where we are isolated in silence.⁴⁵ But ritual doesn't have to be that way. Ritual can be an opening to the great forces in life. Greenham is an ongoing ritual,⁴⁶ enacting and affirming an unmediated experience. We need to reclaim ritual—to create 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, regardless of the allegations of the government or the corporations or the military. 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.

Given the world as it is, how is it possible that we can even get out of bed every morning? If you're a corporate CEO or a Congressman or a law professor, it can be titles, money, power over others, false glory. For the rest of us it is faith and other inexplicable phenomena: spirit, eros, immanence, being here now, laughter, enchantment, pleasure, believing that there can be healing. It is an Experience of Love, and an Experience of Grace.

⁴⁵ STARHAWK, TRUTH OR DARE: ENCOUNTERS WITH POWER, AUTHORITY, AND MYSTERY 66 (1987).

⁴⁶ *Id.* at 149.