

Despair and Redemption in the Feminist Nomos[†]

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INTRODUCTION

Men dominate and oppress women. The law facilitates this domination and oppression. Each effort at law reform on behalf of women essentially fails. Absent a radical transformation of the relations between men and women, none of this is going to change to any significant degree. This is what feminist legal scholarship tells us.

I hate this despairing message. That the message is true only makes me hate it all the more.

There is, however, another message in feminist legal scholarship. This other message does not deny the reality of domination and oppression. Instead, it adds a vision of redemption. In this redemptive strain of the scholarship, there is a bridge between the oppressive reality of today's world and the future, redeemed world in which being a woman does not make one a special object of domination, oppression, and physical violence. This redemptive vision does not depend on the illusion of an imminent and dramatic transformation of the world. Like all true redemptive visions, it offers instead a way of living and working within one's unredeemed reality.

This Article attempts to clarify further the redemptive vision of feminist legal scholarship without masking the reality of its despairing message. One can do this by viewing the work of the feminist legal scholars through the ideas derived from Robert Cover's extraordinary work, *Nomos and Narrative*.¹ Cover taught that we inhabit a normative universe, a *nomos*, within which "[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."² Feminist legal scholars are engaged in the activity of maintaining a feminist *nomos*. The law they create diverges from the State's law. The world they imagine is radically different from today's world. Their messages of despair and redemption manifest the tension between today's world and their imagined world.

The law that governs the lives of women, like all law, is a product of interpretation and an act of commitment. The interpretation truly becomes law only when someone is prepared to act on it. Judges, juries, prosecutors, police officers, and other state actors, must be prepared to act on their interpretation.

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1. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

2. *Id.* at 4.

For instance, the Justices of the Supreme Court must not only be prepared to interpret whether the Constitution assures women personal choice in their reproductive lives; they must also be committed to invoke the State's apparatus of force to assure or deny these women's choices. The police officer at the barricades in front of an abortion clinic must not only possess an interpretive understanding of the laws governing this civil disturbance; he must also act on that interpretation by wielding the apparatus of force and violence. Legal meaning emerges from the combination of interpretation and commitment to act on that interpretation.

The State's actors do not have a monopoly on commitment. The individuals who seek to block access to abortion clinics, as well as individuals who come to protect clinics and to escort women who seek abortions there, also possess an interpretive understanding and a commitment to that understanding. When an individual is committed to a law opposed to the State's law, the commitment may manifest itself in dramatic examples of civil disobedience. As the violence of the State was brought to bear upon the bodies of the civil rights marchers in the 1960's, the country was left with an indelible and shameful image of racism and an equally indelible but inspirational image of civil disobedience. But, society was also witnessing the creation of law when the State, committed to its interpretive understandings, clashed with persons equally committed to another understanding of law.

In this sometimes bloody struggle to create new law, one is used to seeing academic scholarship as merely the advocacy of the sideline observer. My claim is that feminist legal scholarship is different. Feminist legal scholars are engaged in the struggle to create an entirely new legal meaning and have demonstrated a commitment to that meaning. Their disagreement with the State is a disagreement of the most destabilizing sort. Feminist legal scholars deny the State's most basic assumptions about the law, unlike most scholars who take the State to task for particular errors in its laws but who otherwise accept the State's basic premises. While traditional legal scholarship says to the State, "You've made a mistake here," feminist legal scholarship says to the State, "You've wholly misconceived the world in which we live." By advancing this radically destabilizing message, feminist legal scholars have put themselves into the struggle to remake legal meaning. They are engaged in the maintenance of a feminist *nomos* that stands in complete opposition to the State. By this activity, they demonstrate a commitment to their law that is different from that of the traditional legal scholar.

The feminist scholars teach that the law that shall govern the lives of women will be the product of a web of interpretive commitments. The State's commitment to its law is a part, but only a part, of the web. Knowing this, one is left with the inescapable question—to what law is one committed, and what is the nature and strength of that commitment? There is no quiet, safe vantage point removed from the battleground from which one might view the creation of law that will signal oppression, or equality, for women. By each individual's acts, speech, and most commonly silence, we each participate in the creation and maintenance of the State's law.

I. FEMINIST LEGAL SCHOLARSHIP

Feminist legal scholars have created a rich and disturbing body of scholarship.³ They have revealed the various ways in which the rule of law has been the rule of men—a systematic domination and oppression of women. They have described the price women pay as victims of rape who are themselves put on trial,⁴ as victims of sexual harassment who find little meaningful shelter in the law,⁵ as battered women who when driven to self-defense find themselves unable to express their circumstances in the vocabulary of the law,⁶ as workers who are “protected” from gainful employment,⁷ and as persons who have only a limited say in what happens to their own bodies.⁸

Feminist legal scholars have also crafted their own methods of legal scholarship. Rejecting the abstract and tautological characteristics of traditional legal scholarship, they have emphasized context over abstraction and pragmatic solutions over devotion to general rules.⁹ But their most

3. Among the important works are ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (Rosemarie Tong ed., 1988); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*]; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter MACKINNON, *TOWARD A FEMINIST THEORY*]; MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) [hereinafter Estrich, *Rape*]; Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) [hereinafter Estrich, *Sex at Work*]; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Lucinda M. Finley, *Breaking Women's Silence in the Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) [hereinafter *Justice Engendered*]; Frances Olsen, *The Supreme Court, 1988 Term—Comment: Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989); and Lynne Henderson, *Law's Patriarchy*, 25 LAW & SOC'Y REV. 411 (1991) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); and CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989)). I also benefitted from reading Iris M. Young's wonderful book, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

4. See Estrich, *Rape*, *supra* note 3.

5. See Estrich, *Sex at Work*, *supra* note 3.

6. See, e.g., Holly Maguigan, *Battered Women and Self-Defense*, 140 U. PA. L. REV. 379 (1991) (discussing problems for battered women in the criminal justice system).

7. See, e.g., *Dothard v. Rawlinsong*, 433 U.S. 321 (1977) (holding that women could be prohibited from working as prison security guards because the likelihood of sexual assault by male prisoners would pose a threat to security).

8. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

9. See Bartlett, *supra* note 3, at 849 (“[Some feminists] say that women are more sensitive to situation and context, that they resist universal principles and generalizations, especially those that do

distinguishing trait is their insistence on a narrative form of expression.¹⁰ Feminist legal scholars tell stories of women battered, women raped, women humiliated in the workplace, and women oppressed in other ways. These narrative features are not unique to feminist legal scholarship. For example, much of the most important legal scholarship on race has relied on narrative.¹¹

Most traditional legal scholarship is directed toward justifying existing law or arguing for reform of existing law. Some feminist legal scholars see neither a justification for the law they study nor the possibility of meaningful reform. Feminist legal scholars have shown how ostensible law reform in areas such as rape and sexual harassment has produced little meaningful change in the legal outcomes for women.¹²

Feminist legal scholars thus have determined that the law is depraved, traditional scholarship is misconstrued, and the very enterprise of law reform is problematic, if not pointless. This may be the most powerful and destabilizing set of accusations ever directed at the law.

A. Feminist Legal Methods

To speak about feminist legal scholarship is to categorize. "Feminist legal scholarship" and "feminist legal scholars," like all categories, are reductive and potentially misleading.¹³ These categories sweep together writers of differing political ideologies who disagree about the desired law reform or the usefulness of legal reform per se. For example, the summary of feminist legal scholarship's despairing message outlined in the Introduction is a composite of various scholars' work. Not all feminist legal scholars, however, would agree with the message.

The above categories also obscure important differences in the experiences, perspective, and focus of women that derive from race, economic class, sexual

not fit their own experiences, and that they believe that 'the practicalities of everyday life' should not be neglected for the sake of abstract justice."); *c.f.* Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) (describing and critiquing traditional legal scholarship).

10. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing the feminist reliance on narrative); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 306 (1992) (describing feminist jurisprudence as a form of narrative).

11. The most notable example is the work of Professor Derrick Bell. See DERRICK BELL, AND WE ARE NOT SAVED (1987); Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). I have discussed the significance of narrative in matters of race in Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 39-40 (1990), and Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) [hereinafter Ross, *The Richmond Narratives*].

12. See, e.g., Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 81-82 (1987) (arguing that feminists need to go beyond recent law reforms and "shap[e] a different language for speaking of rape"); Estrich, *Rape*, *supra* note 3; Estrich, *Sex at Work*, *supra* note 3.

13. See Bartlett, *supra* note 3, at 834 ("[U]se of the label 'feminist' has contributed to a tendency within feminism to assume a definition of 'woman' or a standard for 'women's experiences' that is fixed, exclusionary, homogenizing, and oppositional . . .").

orientation, and other factors.¹⁴ There are many bases by which people deem others different and less worthy. In talking about a particular basis for discrimination, one can lose sight of the other bases. Moreover, a basis for discrimination against one group of women suggests a certain agenda for reform. Focusing on that agenda may do little or nothing for differently situated women. Still, one must use categories and labels to talk sensibly about anything. The challenge is to discern the particular and contingent quality of the focus.

There is a group of women scholars whose work reveals sufficient commonality that the name, "feminist legal scholarship," is in order. These writers share a set of basic assumptions and tools that give the category integrity. Katharine Bartlett described these assumptions and tools in her article, *Feminist Legal Methods*.¹⁵ Bartlett identified three methods that define feminist legal scholarship. First, feminist legal scholars "ask the woman question."¹⁶ They seek to identify the ways in which legal rules, typically gender-neutral on their face, disadvantage and oppress women. Second, they engage in what Bartlett calls "feminist practical reasoning," a pragmatic mode of reasoning.¹⁷ Third, feminist legal scholars tell stories of oppression as a "consciousness-raising" activity.¹⁸

"Asking the woman question" is a method that cuts across doctrinal areas, from rape to contract law. Bartlett described the method in the following terms:

Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. "Doing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognizing that the woman question always has potential relevance and that "tight" legal analysis never assumes gender neutrality.¹⁹

As with all methods, asking the woman question carries ideological baggage. To make this question the central activity of one's work makes sense only if one assumes, as legal feminists do, that gender oppression is a real and powerful force and that much of the law reflects and facilitates that oppression.

14. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (criticizing the tendency of legal scholarship to treat race and gender as mutually exclusive categories of experience and analysis); Harris, *supra* note 3, at 585 (discussing the work of Catharine MacKinnon and Robin West and arguing that, though powerful and brilliant, their work relies on gender essentialism with the result that some voices—those of black women—are silenced while others are privileged).

15. Bartlett, *supra* note 3.

16. *Id.* at 837-49.

17. *Id.* at 849-63.

18. *Id.* at 863-67.

19. *Id.* at 843.

As a second defining method, feminist legal scholars employ what Bartlett calls "feminist practical reasoning." This form of reasoning is a search for "pragmatic responses to concrete dilemmas" rather than the intellectual manipulation of abstract precepts.²⁰ Although all reasoning invokes both context and abstractions, feminist reasoning emphasizes context. This attention to context has produced a parallel preference for precepts of a less specific and thus a less constraining nature. Bartlett observed: "[Feminist legal scholars] have argued that individualized fact-finding is often superior to the application of bright-line rules, and that reasoning from context allows a greater respect for difference and for the perspectives of the powerless."²¹

The focus on context over abstraction and the taste for less specific rules is not unique to feminist legal reasoning. Versions of these ideas can be found in a range of legal movements from legal realism to critical legal studies to the recent rediscovery of pragmatism by legal scholars.²² Still, the use of "practical reasoning" combined with "asking the woman question" has produced a distinctive mode of reasoning that permeates the scholarship of the legal feminists.

The last, and most controversial, of the feminist methods is the telling of stories—the use of narrative for what Bartlett and others call "consciousness-raising." "Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression."²³ Thus, feminist scholarship is replete with stories about the author's experiences, the experiences of other individual women, and the lives of women in general. Susan Estrich's classic article on rape, for example, begins with the story of her own rape.²⁴

Thus, feminist legal scholars start with knowledge of the oppression of women and the assumption that the law reflects and facilitates that oppression. In their analysis of the law, they focus on context, seeking to bring into the field of relevance considerations that traditional scholarship has shut out. In their narratives, they seek to raise the consciousness of their readers and perhaps to help heal the wounds of those who suffer.

20. *Id.* at 831.

21. *Id.* at 849 (citations omitted).

22. See, e.g., *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) (collection of articles and comments by various scholars from law and other disciplines including papers by several leading legal feminist scholars). Specifically, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990), and Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

23. Bartlett, *supra* note 3, at 864 (quoting Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 9 (1988)).

24. Estrich, *Rape*, *supra* note 3; see discussion, *infra* part III.A.

B. Standard Critique

Feminist legal scholarship has achieved recognized status within the academic community. There are symposia on various gender issues and on feminist legal scholarship itself.²⁵ Presumably, most law school curricula today have at least one course directed to gender issues in which the readings include exposure to feminist legal scholarship. Law schools also invite feminist legal scholars to participate with other influential speakers in lecture series. Feminist legal scholarship has a recognized place in the legal academy along with other disciplines such as law and economics.

The standard critical responses to feminist legal scholarship take various forms. Some resist, or reject, the basic premise of oppression. Much like a common reaction to arguments about racism, some critics accuse the feminist writers of overstating the phenomenon of oppression.²⁶ These critics recognize only the systematic and de jure domination and oppression of women. For these critics, women in the late twentieth century are not oppressed and certainly not oppressed by law. In their view, the sexism that remains is aberrational and not a source of real constraint for the overwhelming majority of women today.

There is, however, another more damning characterization of feminist legal scholarship. Critics may challenge the very status of feminist scholarship as real scholarship.²⁷ The feminist method of "asking the woman question" can trigger the charge that feminist legal scholarship is political tract. Similarly, the use of narrative can be described as undisciplined storytelling, not real analysis. This second kind of criticism seeks to exclude feminist legal scholarship from the realm of writings that are worth taking seriously. The criticism is powerful because it dismisses, rather than engages, the scholarship.

Other critics dismiss feminist legal scholarship in another way. These readers accept the reality of oppression that the narratives depict, yet profess to find no plan for action.²⁸ Law reform seems futile so long as the basic and ingrained sense of women as less worthy pervades the culture. Changing these basic assumptions seems daunting. Beyond its message of oppression, some readers may find no point to the work. These readers take away nothing from the scholarship except the message of despair.

25. See, e.g., *Feminist Jurisprudence Symposium*, 24 GA. L. REV. 759 (1990); *Symposium on Feminist Jurisprudence*, 25 TULSA L.J. 657 (1990); *Symposium on Gender and Legal Ethics*, 4 GEO. J. LEGAL ETHICS 1 (1990).

26. See, e.g., Peter Berkowitz, *Toward a Feminist Orthodoxy*, 3 YALE J.L. & HUMAN. 389 (1991) (reviewing MACKINNON, *TOWARD A FEMINIST THEORY*, *supra* note 3). But see Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991) (feminist response to the widely shared perception that gender inequality is not a serious problem).

27. See, e.g., Daniel A. Farber & Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives," 45 STAN. L. REV. 807 (1993) (criticizing in particular feminist legal scholarship's reliance on narrative).

28. See, for example, the critical responses to Catharine A. MacKinnon's *Toward a Feminist Theory of the State*, cited *infra* note 65.

Readers typically combine various forms of these responses when they encounter particular works of feminist legal scholarship. But whatever the particular critical response, the standard criticisms depend upon a commonly-held conception of legal scholarship. Readers commonly perceive legal scholarship as nothing more than academic work designed to analyze the law and, finding the law wanting, designed to promote the reform of law. When they apply this conception of legal scholarship to feminist work, they see feminist legal scholarship as just another form of the game played by legal scholars of the various academic camps. While it is true that feminist legal scholars do play the game—and often play it very well—they also do something else. Feminist legal scholars participate in the maintenance of a normative community and in the creation of law. This understanding of their work complicates the process of critical appraisal.

II. THE FEMINIST NOMOS

Understanding feminist legal scholarship as part of the maintenance of a feminist *nomos* derives from the work of Robert Cover.²⁹ From this understanding emerges a different sense of the nature and purposes of feminist legal scholarship, as well as a sharper sense of its redemptive qualities.

A. Cover's Vision

In his extraordinary article, *Nomos and Narrative*, Cover created an original and compelling vision of law.³⁰ The centerpiece of his paper is the *nomos*, the normative universe. The lessons he taught, although of the widest possible relevance, illuminate both feminist legal scholarship and the law to which it reacts in a special way. Through Cover's vision, one can see feminist legal

29. See the following works by Robert M. Cover: *PROCEDURE* (1988) (with Owen M. Fiss & Judith Resnik); *THE STRUCTURE OF PROCEDURE* (1979) (with Owen M. Fiss); *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); *Bringing the Messiah Through the Law: A Case Study, in NOMOS XXX: RELIGION, MORALITY AND THE LAW* 201 (J. Roland Pennock & John W. Chapman eds., 1988); *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986); *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter Cover, *Violence and the Word*]; *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985); *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982); *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981); *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981); *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (with T. Alexander Aleinikoff); Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84 (1967); and Book Review, 68 COLUM. L. REV. 1003 (1968) (reviewing R. HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)). See also *Tributes to Robert M. Cover*, 96 YALE L.J. 1699 (1987).

30. Cover, *supra* note 1; see also Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687, 1701-02 (1990) (discussing Cover's work as part of her analysis of redemptive legal movements and the transformative effect of interpretation); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992) (synthesizing the heart of *Nomos and Narrative* and applying those ideas to the legal profession).

scholarship as part of the process of creating law and maintaining a normative community.

Cover taught that individuals live in a normative universe composed only in part of the rules and institutions they commonly identify as their legal structure. This *nomos* is also composed of the stories each individual tells. Cover wrote:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.³¹

Legal rules and the stories that provide the essential context for those rules are inseparable. In Cover's words: "Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral."³²

This confluence of rule and narrative may be sufficient to yield a particular kind of meaning.³³ For example, one might sensibly answer the hypothetical question of whether a woman's choice to terminate a pregnancy does or does not implicate a "fundamental right" by resorting to the shared precepts of constitutional text and one's own personal narratives about that text and about the circumstances of women and abortion.

But this sort of hermeneutic activity is only a part of the construction of the constitutional law relating to abortion. The construction of the law of abortion is also a product of commitment—the commitment of the State certainly to its law and the narratives it chooses, but also the commitment of individuals to their law, which may be law opposed to the State's law. Cover wrote: "The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be."³⁴ Judges must act on their interpretations, as must police officers, doctors, lawyers, women seeking abortions, and opponents of abortion. It is this web of interpretive commitments that determines the law of abortion.

31. Cover, *supra* note 1, at 4-5 (citations omitted).

32. *Id.* at 5.

33. Cover did not focus on the concept of "meaning" but did describe it in the following terms: The problem of "meaning" in law—of legal hermeneutics or interpretation—is commonly associated with one rather narrow kind of problem that confronts officials and those who seek to predict, control, or profit from official behavior. A decision must be made about the incidence of a legal instrument. . . . There is a conventional understanding that a certain consequence follows from the instrument's classifying a thing as "X." There is a dispute about the appropriate criteria for classification. Such problems of official application of legal precepts form one important body of questions about meaning in law. But I want to stress a very different set of issues.

Id. at 6-7.

34. *Id.* at 7.

Not only the laws of abortion, but also those of rape, sexual harassment, and all the other important laws that govern the lives of women, are products of precepts, narrative, and commitment in a world in which the State has no monopoly on legal interpretation or commitment. Individuals can find their own meaning from precepts and narratives and can act on that meaning.

The State does, however, possess an imperfect monopoly on violence.³⁵ Only the State can summon its own apparatus of force and violence. Yet, the monopoly on violence is imperfect because an individual can also write her commitment in blood. When a community of committed individuals is prepared to live by its law in the face of the State's opposition, it is the State that may back down.³⁶

Cover provided a powerful example of the significance of narrative and commitment in the construction of legal meaning in his recounting of the *Bob Jones University* case.³⁷ In this case the Court held that the Internal Revenue Service had acted within their statutory authority in denying tax-exempt status to a school that discriminated on the basis of race, even though the school justified its racism on religious grounds. The Church of God in Christ, Mennonite, although it did not share the racist premises of the litigant, submitted a brief amicus curiae advancing the special significance of the First Amendment's guarantee of religious freedom. The Mennonite brief consisted of a narrative of the church's "torturous history."³⁸ The church's followers had been slaughtered by the thousands in the sixteenth century in Europe and had since that time consisted of migratory communities of "defenseless people looking for a place to be."³⁹ For the Mennonites, the meaning of the First Amendment's "free exercise" text was a product of this narrative. In their brief, they wrote: "[Our church history] has left within us an extremely high regard for religious liberty. We consider the religious liberty that this nation concedes as possibly its greatest virtue."⁴⁰ The church's narratives combined

35. Much of Robert Cover's work was devoted to unmasking the connection between violence and law. See, e.g., Cover, *Violence and the Word*, *supra* note 29. He also stressed the *imperfect* monopoly of state violence. "Violence at the hands of the state escalates the stakes of the interpretive enterprise, but so does the violence of any nonstate community in defining its bounds or implementing its redemptive program." Cover, *supra* note 1, at 51.

36. The saga of school desegregation provides an example. Communities committed to both racism and to a vision of constitutional law in which they were assured their right to live out their racism clashed with the federal judiciary. A generation after the decisions of *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), a combination of the sustained commitment of our communities, expressed in slogans like "neighborhood schools" and "no busing," coupled with the Supreme Court's weak commitment to the constitutional law of *Brown*, has together assured the phenomenon of pervasive de facto racial segregation in our public schools. See generally TONY FREYER, INDIANA UNIV. BICENTENNIAL OF THE U.S. CONST. LECTURE SERIES, THE CONSTITUTION RESISTED AND SCHOOL DESEGREGATION (1985); U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT (1979).

37. Cover, *supra* note 1, at 62-67 (discussing *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

38. *Id.* at 26 (quoting Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 1-2, *Bob Jones University* (No. 81-3)).

39. *Id.*

40. *Id.*

with the First Amendment precepts yielded a particular and powerful interpretation of constitutional law.

The Mennonite example is also one of commitment. They are committed to the law of their normative community and are prepared to live by their commitment. They wrote in their brief:

Our faith and understanding of scripture enjoin respect and obedience to the secular governments under which we live. We recognize them as institutions established by God for order in society. For that reason alone, without the added distress of punitive action for failure to do so, we always exercise ourselves to be completely law abiding. Our religious beliefs, however, are very deeply held. When these beliefs collide with the demands of society, our highest allegiance must be toward God, and we must say with men of God of the past, "We must obey God rather than men" and *these are the crisis [sic] from which we would be spared.*⁴¹

This assertion is the statement of a normative community and not simply the argument of the advocate. The Mennonites are not merely seeking, like the advocate, a change in the State's law. They are also doing something much more powerful. They have created law and are asserting their commitment to that law in the context of a history in which the Mennonites' opposition to the State's law has demanded a real and high price.

Legal meaning always depends on precepts and narratives manifested by a web of interpretive commitments. This is equally true in less dramatic instances of law's creation. Most people are law breakers, even though they do not think of themselves in those terms. Individuals resist the State's law in a mix of important and less important contexts. In defiance of the State's law, people drive faster than the speed limit, overstate tax deductions, refuse combat service, defy police orders to disperse, trespass on private property, take illegal drugs, or seek to shut down abortion clinics. When they engage in these kinds of activity, individuals are relying on an oppositional law, a law that trumps the State's law. The oppositional law may be the understanding that it is not unlawful to cut through a person's backyard to avoid walking around the block. Or, it may be the law of one's religious community that calls for the cessation of abortion and for personal action to achieve that end. Even when someone acknowledges that he is just breaking the law because it serves his self-interest and there appears to be little risk of detection, he is not acting without principle. Some version of a principle that makes law breaking a sane and coherent way of behaving is present. This ceaseless activity of action, sometimes in conformity with the State's law, often in accordance with another sense of law, is a product of living within a normative universe that is as much a part of human existence as the physical world we inhabit.⁴²

41. *Id.* at 27 (emphasis in original) (quoting Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 3-4, *Bob Jones University* (No. 81-3)).

42. Cover wrote:

This *nomos* is as much "our world" as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world. Just as the development of increasingly complex responses to the physical attributes of our world begins

When a group of people share precepts and narratives and a sense of commitment to the realization of a redeemed world, they create law and constitute a normative community. Maintaining a normative community demands the teaching of shared precepts and narratives. The meaning that emerges from precept and narrative is the law for the members of the community. This law forms a bridge between the present reality and the vision of the world to come. In Cover's words, "Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative"43 This imagined alternative world is not simply a utopian vision. "A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision."⁴⁴ Each member of the community must have some commitment to acting on the law they share. Without such a commitment, the person is not a participant in the creation of law and the maintenance of a normative community.

The State has its law and possesses an imperfect monopoly on violence. The members of any normative community live within a state. A resulting clash between the State's law and the law of the community tests the commitment of both the State and the community. When the State is truly committed to its law, the community may formally defer to the State's apparatus of power and violence. Sometimes, however, the State gives way to the community's law. At no time, however, does the normative community understand "the law" to be only the State's version of law. They always possess their law, even as they sometimes yield to the State's law.

A normative community's vision of the State affects that community's law. A community's choice to give way or stand resolute in the face of the State determines the community's precepts and narratives of autonomy and resistance, which are as much a part of their law as any of the other normative texts of the community. Thus, the choice to yield or not to yield makes a difference in the life and the law of the community.

Nonetheless, the members of a normative community are more than advocates. Whether their commitment is written in the blood of the martyr or some lesser form, they create and possess law.

B. The Feminist Nomos

Feminist legal scholars are advancing a vision of law in order to redeem the world. They are creating law and participating in the maintenance of the feminist *nomos*. The methods they use are different from the methods used by apologists for the State's law precisely because the feminist scholars cannot

with birth itself, so does the parallel development of the responses to personal otherness that define the normative world.

Id. at 5 (emphasis in original).

43. *Id.* at 9.

44. *Id.*

create law using the same methods. It is not a matter of preference or feminine predisposition.⁴⁵ Their methods reflect their essential activity—the creation of law and the pursuit of redemption.

Feminist legal scholars are not simply engaged in advocacy or rhetoric. The advocate in law may fervently argue for a change in law yet essentially she must concede that the status of “law” is the State’s law, however vigorously she argues for change. The advocate does not identify himself as part of a community defined by the substance of her advocacy. She does not have a commitment to the legal interpretation she advances. She does not possess the law in the way that a person committed to law does.

Feminists, on the other hand, create law and constitute a normative community. However much they disagree, they share important common precepts and narratives.⁴⁶ They are committed to the realization of their vision of law in a transformed social reality. Feminists acknowledge the power of state law, with its imperfect monopoly on violence. Yet, they have their own vision of law and do not cede to the State a monopoly on “law.”

Legal feminist scholars “ask the woman question,” engage in practical reasoning, and tell stories because their activities are part of the maintenance of a normative community, or *nomos*. As part of a *nomos* with a vision of law opposed to the State, they must adopt distinctive methods. In doing so, they are creating legal meaning and committing themselves to that meaning—they are making law.

The basic precept of the legal feminist *nomos* is embodied in “asking the woman question.” When feminists “ask the woman question,” they are implicitly asserting the backdrop that gives the question its significance and sense: the reality of gender oppression; the role of law in the maintenance of that oppression; and the judgment that this condition is unjust. The more particular precepts that emerge from feminist legal scholarship, for example, the advancement of the rape shield law, all evolve from this basic set of assumptions.⁴⁷

Maintaining the feminist *nomos* also demands the pedagogical sharing of stories. The narratives combine with the precepts to yield legal interpretation. For example, the precept that women should be free of sexual harassment in the workplace combines with the narratives of the workplace to yield

45. Carol Gilligan has been the most prominent and controversial proponent of the idea that women reason differently than men. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Her ideas have engendered much debate and critical commentary. See Bartlett, *supra* note 3, at 871 n.174 (citing such critical commentary); see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

46. The disagreement within the community is vigorous and multi-faceted. It is also a reflection of the normative enterprise of the community. See *infra* text accompanying notes 62-70.

47. See generally Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988) (describing “feminist-inspired” legal reforms in the law of rape, sexual harassment, and sexual deception); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413 (analyzing evidentiary rules, including rape shield laws, from a feminist perspective).

meaning.⁴⁸ The mix of narrative and precept is what provides definition to the very term "sexual harassment." Thus, the different stories that men and women have about the workplace yield different senses of what is and what is not harassment. Also, the narratives of the workplace freight the rule with more or less significance. Sexual harassment is serious business for the feminist because her stories are about her humiliation and violation. It is less serious for someone who possesses stories of the workplace that are about "good-natured" give-and-take and the imagined desire of women for dirty talk.⁴⁹

When feminist legal scholars tell stories, they are teaching legal meaning. By the same method, they are defining and maintaining a community. The stories that women share establish interpersonal ties within the normative community. The knowledge that someone else has suffered in ways similar to one's own suffering is a powerful source for connection.⁵⁰ The narratives form a roughly shared discourse by which other women are brought into the community. The stories are at once both moralizing discourse, teaching the listener something about the reality of oppression, and a source of bond and community for those who tell and hear the stories.⁵¹

"Feminist practical reasoning" is an inevitable expression of the feminist vision of law. When the legal feminist rejects the dominant way of intellectualizing about law through the reliance on abstractions and syllogisms and instead insists on telling stories, she is effectively rejecting the apologist's stories that are imbedded in the abstractions. The apologist need not tell stories because the stories that he needs to make his law are already part of

48. See Estrich, *Sex at Work*, *supra* note 3; cf. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (challenging the notion that women choose to exclude themselves from higher-status, higher-paying jobs because they inherently have no interest in them).

49. Some version of these stories of the workplace would make coherent the trial judge's description of the workplace in a sexual harassment case: "Indeed, it cannot be seriously disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this." *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Susan Estrich's treatment of the *Rabidue* case is discussed in the text *infra* at notes 113-15.

50. Catharine MacKinnon has provided an extended account of the significance of "consciousness-raising" in Chapter 5 of *MACKINNON, TOWARD A FEMINIST THEORY*, *supra* note 3. See also Bartlett, *supra* note 3, at 863-67.

51. Hayden White has argued that an inherent connection exists between narrative and the teaching of morality.

If every fully realized story . . . is a kind of allegory, points to a moral, or endows events, whether real or imaginary, with a significance that they do not possess as a mere sequence, then it seems possible to conclude that every historical narrative has as its latent or manifest purpose the desire to *moralize* the events of which it treats. . . . And this suggests that narrativity . . . is intimately related to, if not a function of, the impulse to moralize reality, that is, to identify it with the social system that is the source of any morality that we can imagine.

Hayden White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE* 1, 13-14 (W.J.T. Mitchell ed., 1980) (emphasis in original).

the standard stories that most readers bring to the act of reading.⁵² The reader, with his established associations, assumptions, and storics, makes the apologist's abstractions vivid and meaningful without additional storytelling by the apologist. For example, the scholar or judge who seeks to justify the exclusion of women from combat service need not tell the stories of weak women who lack the blood lust necessary to be a killer in the high cause of patriotism.⁵³ Most people already know this story; the stories taught are the ones used to give meaning and context to the law.

The legal feminist thus tells stories aloud partly because she must overcome the other stories that are already powerfully present. The existing stories are culturally taught and reinforced so that men and women alike must struggle to escape them. Advertising, movies, and television typically foster stories about women as different and less worthy than men.⁵⁴ Beyond these fabricated depictions, most women's real lives are a reflection of these stories' influence. In reality and not just in television ads, women do laundry while men cope with developing strategies for financial security. Women are told and live these stories every moment of their lives.

Feminist practical reasoning is not merely rhetorically useful, it is an essential response to the abstract talk of the State's apologists. Legal feminists are not refusing to talk abstractions and syllogisms because they eschew tough-minded reasoning. They do tough-minded reasoning. But to get the initial premises right, legal feminists displace the culture's stories with their own stories. To advance their law, they provide not just new precepts but also new stories that fill those precepts with interpretive meaning.

The sense of a feminist *nomos* is also revealed in the internal debate about who can rightfully name herself a "feminist" and who cannot.⁵⁵ A good example of this debate is the question of whether a man can be a feminist. Legal feminists are split on this question.⁵⁶ In this debate, the boundaries of the normative community are at stake.

Every normative community must have a sense of boundaries, a sense of exclusion and inclusion. A sense of belonging within the normative community is possible only with a correlative sense of who does not belong. There must be outsiders to have any meaningful sense of being an insider. It is an inescapable part of the maintenance of a normative community.

52. I have explored this point in the context of race in Ross, *The Richmond Narratives*, *supra* note 11.

53. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that the Military Service Act, which provided for the draft registration of males only, was constitutional).

54. See generally Kimberly Blanton, *Amid the Uproar, Sex Still Sells*, BOSTON GLOBE, Oct. 18, 1991, at 1; Ronald K.L. Collins, *Bikini Team: Sexism for the Many*, L.A. TIMES, Nov. 20, 1991, at B7; Michael Griffin, *Sexism—Not Sex—Helps Advertisers Sell, Sell, Sell*, STAR TRIBUNE, Feb. 19, 1992, at 13A.

55. See, e.g., Gloria Steinem, *Sex, Lies & Advertising*, MS. MAG., July-Aug. 1990, at 18 (discussing the difficulty of getting "real" feminist ads for the magazine). See generally Bartlett, *supra* note 3, at 833-36; Rhode, *supra* note 3, at 626.

56. Compare, e.g., Bartlett, *supra* note 3, at 833 n.7 (giving an affirmative response) with Littleton, *supra* note 3, at 1294 n.91 (asserting that although "[p]ro-feminist men can play an important role in disseminating and implementing feminist ideas" they cannot speak as feminists).

Because a normative community is essentially defined by its sense of reality coupled with its vision of redemption, every normative community is wracked with the tension between the world as it is and the other world that is to come. The law that tension creates stands as the bridge between the two worlds, spanning the void between here and there.⁵⁷

Those who experience this tension between reality and vision express the alternative responses of redemption or insularity. Robert Cover described these responses in the context of the nineteenth century abolitionist movement.⁵⁸ The radical Garrisonian abolitionists agreed that the Constitution countenanced slavery. The Garrisonians responded, however, by a move to insularity. They turned away from the Constitution, refusing to accept it as the sacred text. As part of a philosophy of perfectionism, they eschewed the State and its law.⁵⁹ In contrast, the abolitionists who Cover names the "radical constitutionalists" insisted on a constitutional law that repudiated slavery and the legal apparatus that propped up the horrific institution.⁶⁰ This redemptive response was expressed in Frederick Douglass' conclusion:

[T]hat the Constitution of the United States—inagurated to "form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty"—could not well have been designed at the same time to maintain and pcrpetuate a system of rapine and murder like slavery⁶¹

Douglass and the other radical constitutionalists responded to the tension between the reality of slavery and the vision of a world without slavery by holding on to the redemptive possibilities posed by their constitutional law, however much the State's constitutional law remained opposed.

The legal feminist *nomos* has also displayed the tension between reality and vision. A powerful example of this tension can be found in the work of Catharine MacKinnon.⁶² MacKinnon has devoted much of her work to law

57. Cover wrote:

If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation. All utopian or eschatological movements that do not withdraw to insularity risk the failure of the conversion of vision into reality and, thus, the breaking of the tension. At that point, they may be movements, but they are no longer movements of the law.

Cover, *supra* note 1, at 39.

58. *Id.* at 35-40.

59. *Id.* at 35-37. The Garrisonian movement and its theory of perfectionism in which the State would wither away before a people made perfect by their faith in Jesus Christ are analyzed in Chapter 10 of WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848* (1977).

60. Cover, *supra* note 1, at 37-40.

61. *Id.* at 38 (quoting FREDERICK DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 261-62 (R. Logan ed., 1967)).

62. MacKinnon describes her vision of the brutal reality of the contemporary liberal state in the following terms:

The rule of law and the rule of men are one thing, indivisible, at once official and unofficial—officially circumscribed, unofficially not. State power, embodied in law, exists throughout society as male power at the same time as the power of men over women throughout society is organized as the power of the state. . . . Male power is systemic. Coercive, legitimated, and

reform, particularly in the areas of sexual harassment and pornography.⁶³ In her work, she expresses redemptive possibilities. She devotes herself to building the bridge between reality and vision. Yet, in other aspects of her work, she expresses what seems like an insular response. She seems to forsake the possibilities of law reform and stresses radical social transformation.⁶⁴ Her expression of the horrific nature of the present reality and the radically different world that must be created seems to signify such a large void between here and there that she has put aside any real redemptive possibilities.⁶⁵

MacKinnon's dual, and apparently contradictory, responses are the inevitable responses to the tension within the feminist *nomos*. When a feminist is unable to hold to any form of redemptive response, she leaves the legal feminist *nomos* and enters another overlapping but distinct normative community composed of those who accept the essential teachings of the legal feminist community but who have given up on law as an instrument of reform. Catharine MacKinnon's work suggests that she lives at various times in each normative community.

The tension within the legal feminist *nomos* is also revealed in the sectarian splintering of the community. Legal feminists split on ideological grounds, with liberal feminists espousing the possibilities for change within existing structure and radical feminists doubting that law reform will accomplish much in the absence of radical social transformation.⁶⁶ The "essentialism" debate

epistemic, it *is* the regime.

MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 3, at 170 (emphasis in original).

63. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 3, at 195-214 (discussing the constitutional protection of pornography as the legitimation of trafficking in women). MacKinnon's controversial promotion of an anti-pornography law is described in Fred Strebeigh, *Defining Law on the Feminist Frontier*, N.Y. TIMES, Oct. 6, 1991, § 6 (magazine), at 28.

64. In her introduction to *Feminism Unmodified*, MacKinnon bluntly describes this transformation:

Women have been deprived not only of terms of our own in which to express our lives, but of lives of our own to live. . . . A feminism that seeks to understand women's situation in order to change it must therefore identify, criticize, and move those forms and forces that have circumscribed women in the world and in the mind. Law, like pornography, inhabits both. To remake society so that women can live here requires a feminism unqualified by preexisting modifiers.

MACKINNON, FEMINISM UNMODIFIED, *supra* note 3, at 15-16.

65. The critical reaction to MacKinnon's *Toward a Feminist Theory of the State* reflects this sense of despair and lack of redemptive programs in her work. See, e.g., Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146, 1170 (1990) (book review) ("By insisting that male domination is all-encompassing and that we need to explain women's inequality in society through a framework that insists that men overtly subordinate women, MacKinnon does not provide a basis for change in society."); Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247, 2248 (1991) (book review) ("[U]ltimately [MacKinnon] does not fully develop her program . . . because she is unable to affirm feminine sexual difference as other than victimization."); see also Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991) (review essay); Angela Harris, *Categorical Discourse and Dominance Theory*, 5 BERKELEY WOMEN'S L.J. 181 (1990) (book review); Tracy E. Higgins, Book Note, 13 HARV. WOMEN'S L.J. 325 (1990); Stephanie M. Wildman, *The Power of Women*, 2 YALE J.L. & FEMINISM 435 (1990) (book review).

66. See Henderson, *supra* note 3 (providing an excellent discussion of some of the divisions within the feminist community).

is perhaps the most vivid reflection of the tension within the community.⁶⁷ Feminist legal scholarship often speaks of “women” as though “women” constitute a single, homogeneous category. The stories told often make sense only in the context of a white, heterosexual woman not living in poverty. MacKinnon’s work, for example, has spawned its own “essentialism” debate. MacKinnon portrays women as essentially victims of male sexual domination.⁶⁸ Other feminists have rejected this depiction of women as essentially sexual victims, noting the obvious alternative of lesbian relations.⁶⁹

The sectarian splintering of the feminist community is not unique. Every normative community is inherently unstable. The very process that gives rise to its creation, the generation and teaching of new precepts and stories, continues and erodes the integrity and stability of the *nomos*.⁷⁰ The legal feminist *nomos* arose in opposition to the State, creating its own understanding of law through its precepts and stories. As soon as it became a community, the process of its own disintegration inevitably began. Members of the community challenge the dominant precepts and narratives. When the differences become large, the sectarian splintering begins. This splintering is a reflection of the tension between reality and vision. The legal feminists have not, and will not, bring forth the millennium, and in this real and oppressive world some feminists will seek their own way. Because the feminist *nomos*, like the State, is unable to stop the jurisgenerative process, the proliferation of new narratives will ceaselessly bring about new visions of law and the sectarian splintering of the normative community.

State law is privileged by the State’s imperfect monopoly on violence. But state law can be privileged in another, although related, way. When courts choose to deny the competing legal vision of feminists, judges are engaged in

67. See generally Crenshaw, *supra* note 14; Harris, *supra* note 3; Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Minow, *Justice Engendered*, *supra* note 3.

68. MacKinnon’s introduction to *FEMINISM UNMODIFIED* includes a theme that unifies her work: “[T]he social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex.” MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 3, at 3. In the same vein, she writes: “I think the fatal error of the legal arm of feminism has been its failure to understand that the mainspring of sex inequality is misogyny and the mainspring of misogyny is sexual sadism.” *Id.* at 5.

69. See Ruth Colker, *The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug*, 105 HARV. L. REV. 1084 (1992); Cornell, *supra* note 65.

70. Cover explained this “simple and very disturbing” notion as follows:

[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must “have meaning,” but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.

Cover, *supra* note 1, at 18.

their jurispathic activity.⁷¹ When the State's apologists seek to portray the feminists as merely scholars and advocates, they are engaged in a parallel activity. Judges kill the feminist's law through the force and violence of the State. Apologists may deny the very existence of the feminist law by treating it as mere advocacy.

In this way the State's apologists have reason to care very much about the name attached to the legal feminists' activities. While they can do nothing to stop the jurisgenerative activity—the feminists will go about the creation of their own law in any event—the apologists can obscure the nature and significance of the work. In this obscured conception of the feminists' work, the scholarship is measured and judged by the degree of its influence outside the feminist *nomos* and by its connection with any formal changes in the State's precepts. For example, because MacKinnon's early work on sexual harassment is connected with the State's adoption of the rule against sexual harassment in the workplace, it is often considered successful work. At the same time, her more recent work is denigrated because of its apparently impossible demand for radical social transformation.⁷²

When feminist scholarship is measured by its converts and its connection to formal law reform, it is easy to dismiss the work as a failure.⁷³ The converts seem few; the law is mostly unchanged. When feminist legal scholarship is seen as part of the maintenance of a normative community, the bases for judgment are more complex. Feminist legal scholarship has proliferated the narratives of the oppression of women. By this work, feminist legal scholars have helped to maintain a community of women committed to the redemption of the world. They have also altered the dominant discourse about women in today's culture and, thus, contributed to the surest form of meaningful law reform. In the face of a mostly unrepentant State, they have achieved much.

This alternative way of understanding feminist legal scholarship will have little impact on the State's apologists. They will either refuse to accept this understanding or simply see the matter in their own terms, feeling no discomfort whatsoever in the State's rejection of the law of the feminist *nomos*. There is, however, another sort of reader. For those who share many of the precepts of the feminist *nomos*—those who are troubled by the State's law as it contributes to the oppression of women—this understanding of

71. The term "jurispathic" was created by Cover:

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.

Id. at 40. Thus, courts are essentially jurispathic, they seek to kill all law but the chosen one.

72. See sources cited *supra* note 65.

73. Even when feminist scholarship helps bring about law reform, it can be branded as a failure. See *Talking Dirty*, NEW REPUBLIC, Nov. 4, 1991, at 7, 7 (criticizing the "hostile environment" test for sexual harassment, as "invented . . . by the feminist legal theorist Catharine MacKinnon," for trivializing the "real" harms suffered by women in the workplace).

feminist legal scholarship as part of the maintenance of the feminist *nomos* poses some problems. The sympathetic outsider cannot simply see this as a rhetorical battle between the feminist and the State's apologists in which the sympathizer's explicit support for the feminist position is a full discharge of his responsibilities. The recognition of the scholarship as part of the maintenance of a *nomos* forces upon the sympathetic outsider a realization of his essential outsider status. The realization of a harder and more demanding choice begins to appear. Part III of this paper will bring into sharper focus the nature of that choice.

III. DESPAIR AND REDEMPTION

Feminist legal scholarship is work of despair and redemption. The despair arises from several interrelated considerations. First, the reality of domination is personal and powerful to these scholars. Second, the roots of that domination could hardly run deeper. Faced with such a harsh specter, the feminist legal scholars have a limited number of moves.

It may seem, as a practical matter, that they cannot make the move to insularity. They cannot pretend to retreat to a world apart from the oppression. For them no such world exists. Moreover, the feminist scholars cannot, like the nineteenth-century white abolitionists, choose to live in a free state as free persons. As a practical matter, there is no place where discriminatory conditions are wholly absent.⁷⁴ Thus, for feminist legal scholars, and for women generally, the obvious choices are to despair or to pursue a redemptive vision.

On the other hand, women do have moves that are insular in quality. While a retreat to a distinct place free of the oppression of law and man seems impractical, women can and do turn away from the State's law in various ways. The shelters for abused women and their children constitute communities of temporary and partial refuge from the violence of men. The shelters provide a security not given by the State's law and the police agents of the State.

Perhaps the most striking current insular move by women is the turn to self-induced abortion, whether by the drug RU486 or by "menstrual extraction."⁷⁵ As the State's constitutional law on abortion erodes and the regulatory laws become ever more intrusive, the use of agents of self-induced abortion and the

74. Women committed to their vision of law can make a version of the move to insularity. They can create communes, for example, and construct their lives in ways that minimize the intervention of the State. But no such place will be wholly outside the influence of the State's law.

75. See *Planning for the Day that Abortions are Restricted*, U.S. NEWS & WORLD REP., May 11, 1992, at 64; Elaine Herscher, *Women Seek Abortion Know-How; Preparing for Overturning of Roe vs. Wade*, S.F. CHRON., June 28, 1991, at A1. Lorraine Rothman, an abortion rights activist and the inventor of Del-Em, a menstrual extraction kit, expressed the move to insularity in these terms: "We are concerned for our bodies, our health, our lives. If laws and legislatures, medical professionals and the powers that be are unwilling to protect our rights, we have to take care of ourselves. I don't see any other way." Judy Foreman, "Home Abortion" *Safety Issues a Pro-Choice Dilemma*, BOSTON GLOBE, Aug. 26, 1991, at 33, 37.

advocacy and teaching of those methods constitute a turning away from the law that seeks to restrict and deny abortions. Women are saying, in effect, "We need not change the State's law, we may simply render it irrelevant for us."

The State of course can be expected to counter any such insular moves. Until recently, the State has resisted the importation of the drug RU486.⁷⁶ Other means of self-induced abortion, if they become too visible and significant a response, will surely become the subject of coercive intervention by the State. Feminists, as is true of each normative community that stands in opposition to the State, will engage in a range of evolving responses to the State's ever changing law. Their moves will inevitably embody redemption, insularity, and despair.

Although there are many powerful examples of despair and redemption in feminist legal scholarship, I have chosen as an extended example the work of Susan Estrich. Estrich's work is especially rich in its articulation of each message.⁷⁷ Her work is a powerful statement of the horrors of rape and the humiliation of sexual harassment. It is also a study of the limits of law reform on behalf of women. The message of despair is obvious and powerful in her work. Yet, the redemptive theme is there as well.

A. Rape

Estrich's article on rape, which was subsequently published in her book,⁷⁸ begins with the story of her own rape. "Eleven years ago, a man held an ice pick to my throat and said: 'Push over, shut up, or I'll kill you.' I did what he said, but I couldn't stop crying. A hundred years later, I jumped out of my car as he drove away."⁷⁹ Her choice to begin this way is important. She has told a story about the rape of a woman who, at the time she wrote the paper, was a Harvard Law School professor. She tells of the racist and sexist assumptions of the police. The man who raped her was black; the police called him a "crow" and assumed that he must have been a stranger to the white woman victim.⁸⁰ When she told the police that the rapist had taken money, they were pleased. It meant that the rapist had committed armed robbery, a really serious crime. The police told her how difficult it would be to prosecute a mere rapist. The law was against her, they said.⁸¹

Estrich's article then discusses the stigma that attaches to the victims of rape:

76. See *A Boost for RU486*, N.Y. TIMES, Feb. 27, 1993, § 1, at 18.

77. See, e.g., Estrich, *Sex at Work*, *supra* note 3; Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989) [hereinafter Estrich & Sullivan, *Abortion Politics*]; Estrich, *Rape*, *supra* note 3.

78. SUSAN ESTRICH, *REAL RAPE* (1987).

79. Estrich, *Rape*, *supra* note 3, at 1087.

80. *Id.*

81. *Id.* at 1088.

At first, it is something you simply don't talk about. Then it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it all the time. Rape is much more serious crime. If it isn't my fault, why am I supposed to be ashamed? If I shouldn't be ashamed, if it wasn't "personal," why look askance when I mention it?⁸²

She acknowledges the significance of this stigma by choosing to begin her paper with a story that she knows will startle the reader, precisely because no one expected her to reveal her victimization so directly.

From the beginning narrative, the balance of her work is freighted with the meaning that comes from the story of her own rape. She intersperses stories of other rapes in her analysis of the law of rape. For example, Estrich tells the story of *State v. Alston*.⁸³ In *Alston* the woman had been living with her assailant but moved out because he had been physically abusive. Some time later, the man intercepted her at her school and grabbed her by the arm. Estrich tells of the rape:

At one point, the defendant told the victim he was going to "fix" her face; when told that their relationship was over, the defendant stated that he had a "right" to have sex with her again. The two went to the house of a friend. The defendant asked her if she was "ready," and the victim told him she did not want to have sexual relations. The defendant pulled her up from the chair, undressed her, pushed her legs apart, and penetrated her. She cried.⁸⁴

The North Carolina Supreme Court reversed the defendant's conviction concluding that, even while viewing the evidence in the light most favorable to the prosecution, there was insufficient evidence of "force," an element of the crime of rape.⁸⁵ The grabbing of her arm, the history of physical abuse, and the threat to "fix" her face were all insufficient.⁸⁶ Although such acts may have made her fearful, the court found them insufficient because, in the judge's sense of things, the force and threat were not directly applied to induce the act of intercourse. Estrich noted: "The undressing and the pushing of her legs apart . . . were not even mentioned as factors to be considered."⁸⁷

The North Carolina Court of Appeals applied the law of *Alston* in *State v. Lester*,⁸⁸ a subsequent rape case in which the defendant was the father of the fifteen-year-old victim. Estrich tells the story:

Prior to the parents' divorce, the defendant frequently beat the children's mother in [the children's] presence. . . . He had a gun and on one occasion pointed it at his children. He engaged in sexual activity with all three of his daughters. . . . [The] mother found out and confronted the defendant. He swore never to touch [the daughter] again, and then threatened to kill

82. *Id.* at 1088-89.

83. *Alston*, 312 S.E.2d 470 (N.C. 1984).

84. Estrich, *Rape*, *supra* note 3, at 1108 (quoting *Alston*, 312 S.E.2d at 471-73).

85. *Alston*, 312 S.E.2d at 476.

86. *Id.*

87. Estrich, *Rape*, *supra* note 3, at 1109.

88. *Lester*, 321 S.E.2d 166 (N.C. Ct. App. 1984), *aff'd*, 330 S.E.2d 205 (N.C. 1985), *overruled by State v. Etheridge*, 352 S.E.2d 673, 681 (1987); see discussion *infra* at text accompanying notes 100-03.

both mother and daughter if they told anyone of his actions. On both of the occasions in question, the victim initially refused her father's demand to take her clothes off and "do it." In both cases, she complied when the demand was repeated and she sensed that her father was becoming angry. The court held that the defendant could be convicted of incest, but not of rape⁸⁹

The court somehow concluded that although there was evidence that the intercourse had been against the will of the daughter, there was insufficient evidence of forcible rape.

In the instant case there is evidence that the acts of sexual intercourse between defendant and his fifteen-year-old daughter . . . were against her will. There is no evidence, however, that defendant used either actual or constructive force to accomplish the acts with which he is charged. As *Alston* makes clear, the victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant *forcibly* raped his daughter⁹⁰

Estrich uses the stories of *Alston* and *Lester* in two ways. First, she points out that the cases can be criticized on doctrinal grounds:

The courts' unwillingness to credit the victim's past experience of violence at the hands of the defendant stands in sharp contrast to the black letter law that a defendant's knowledge of his attacker's reputation for violence or ownership of a gun is relevant to the reasonableness of his use of deadly force in self-defense.⁹¹

The element of "force" in rape could be constructed to include: the force that a man exerts when he demands sex in the face of the woman's verbal resistance, the implicit force that arises from a history of abuse, and the manifested force of shoving the woman's legs apart to penetrate her. Or, instead, the element of force can be interpreted, as the court interpreted it, to mean the direct application of physical force beyond the force of the intercourse itself, which was absent in the two rape cases discussed above. It all depends on the stories one brings to the case.

If a judge brings stories of how difficult it is to determine the consensual quality of a woman's participation in intercourse, if he contrasts the "de minimis" violation of penetration with the "real" violation of assault, it is easy for him to conclude that there was no *forcible* rape. If, on the other hand, the judge were to bring to the case a sympathetic reading of the stories as told by Estrich, a very different sense of the element of force in rape law might emerge. This is the second thing Estrich does with her stories. She tells them. For a reader who has never experienced rape, she provides some new stories that may, or may not, become part of his understanding of what rape means.

89. Estrich, *Rape*, *supra* note 3, at 1109-10.

90. *Lester*, 321 S.E.2d at 168 (emphasis in original).

91. Estrich, *Rape*, *supra* note 3, at 1111.

Estrich does one other, and powerful, thing in the recounting of the stories of the women victims in *Alston* and *Lester*. She connects them with her own story of rape. Estrich wrote:

I am not at all sure how the judges who decided *Alston* would explain the victim's simultaneous refusal to consent and failure to resist. For myself, it is not at all difficult to understand that a woman who had been repeatedly beaten, who had been a passive victim of both violence and sex during the "consensual" relationship, who had sought to escape from the man, who is confronted and threatened by him, who summons the courage to tell him their relationship is over only to be answered by his assertion of a "right" to sex—a woman in such a position would not fight. She wouldn't fight; she might cry. Hers is the reaction of "sissies" in playground fights. Hers is the reaction of people who have already been beaten, or who never had the power to fight in the first instance. Hers is, from my reading, the most common reaction of women to rape. It certainly was mine.⁹²

Through her stories of rape, Estrich thus offers to the reader a new understanding of the element of force in the substantive law of rape.

One of Estrich's central theses in the article is that law reform in this area has not produced real and meaningful change for women. Despite the advent of rape shield laws restricting the introduction of evidence of the victim's sexual history, the elimination of the spousal exemption in many states, and other apparent reforms, rape victims, especially those who are not "real" rape victims, are still essentially put on trial.⁹³ "Real" rape, says Estrich, is rape by strangers who threaten and inflict physical violence on a physically struggling woman.⁹⁴ Other sexual encounters with men known to the woman, or without actual physical violence, or with a woman who offers no physical resistance, are not stories of "real" rape.

Law reform falters because the legal elements of "consent" and "force," as conceived by police officers, prosecutors, judges, and juries, are loaded with the meaning of men's stories. Thus, women who experience some version of "real" rape are taken seriously as victims of crime while other women are not seen as victims at all.

While rape shield laws may bar the introduction of testimony about the woman's sexual history for the blunt purpose of impugning her character, the legal issue of consent and the legal definition of the requisite force allow the stories of rape to shape the outcome of the cases. The point is not that

92. *Id.* (citations omitted).

93. See ESTRICH, *supra* note 78 (Estrich's book-length treatment of the subject of rape).

94. Estrich explains the term "real rape" by reference to her own experience:

In many respects I am a very lucky rape victim, if there can be such a thing. . . . I am lucky because everyone agrees that I was "really" raped. When I tell my story, no one doubts my status as a victim. No one suggests that I was "asking for it." No one wonders, at least out loud, if it was really my fault. No one seems to identify with the rapist. His being black, I fear, probably makes my account more believable to some people, as it certainly did with the police. But the most important thing is that he was a stranger; that he approached me not only armed but uninvited; that he was after my money and car, which I surely don't give away lightly, as well as my body. As one person put it: "You really didn't do anything wrong."

Id. at 3.

changes in the rules do not matter. Rape shield laws and the elimination of the spousal exemption have made a difference. Similarly, the adoption of "fresh complaint" rules that require prompt reporting by the victim also matter. But, in Estrich's words, "the problem has never been the words of the statutes as much as our interpretation of them."⁹⁵ So long as the officers of the State are inclined to view a rape victim as a willing participant turned spiteful liar or as responsible for the rape, as a provocateur of her assault, or simply as a woman who carelessly put herself in harm's way, the meaning of rape law will be shaped by those stories.

Rape shield laws, the new precepts, may keep out evidence of the victim's sexual history. But the relevance of that evidence always came from the acceptance of the provocateur story. Until the story loses currency, one can expect to see the influence of it in law. For example, the evidentiary focus may shift to what a woman was wearing, the absence of physical evidence of violent assault, or to some other evidence that connects with the stories.⁹⁶ After all, the sexual history that is excluded by the rape shield law always drew its influence from the underlying images of the woman as the sexually compliant lover turned spiteful liar. If judges and jurors continue to hold these images, they are likely to find corroboration of those preconceived images in the testimony of the witnesses and in the demeanor of the victim.

Nonetheless, rape law changes. The North Carolina Supreme Court changed the precepts of its rape law in a series of cases following *Alston* and *Lester*. In a 1987 rape case, *State v. Strickland*,⁹⁷ the defendant relied on the *Alston* rule that "general fear" based on prior violent conduct by the assailant was insufficient to satisfy the "force" element of rape. The court, citing Estrich's article and noting her critical reading of the case, ruled that "[the] 'general fear' theory is applicable only to fact situations similar to those in *Alston*."⁹⁸ The court distinguished the *Strickland* case by noting that, unlike the fact pattern in *Alston*, the defendant in *Strickland* had no prior history of sexual intercourse with the victim and that in any event the defendant had applied actual physical force. Subsequent decisions by the court make it clear that the precedential value of *Alston* is severely limited and that, at the least, a prior history of sexual relations is an essential precondition for application of the *Alston* rule.⁹⁹

95. Estrich, *Rape*, *supra* note 3, at 1093.

96. See *Defendant Acquitted of Rape; "She Asked for It," Juror Says*, N.Y. TIMES, Oct. 7, 1989, § 1, at 6 (reporting statements of jurors in a Fort Lauderdale rape trial; they acquitted defendant because they felt the woman "was up to no good the way she was dressed."); Carolyn Pesce, *Delicate Bra is Permitted as Evidence*, USA TODAY, Oct. 31, 1991, at 3A (reporting pre-trial ruling by the judge in William Kennedy Smith rape case).

97. *Strickland*, 351 S.E.2d 281 (N.C. 1987).

98. *Id.* at 283.

99. See *State v. Brown*, 420 S.E.2d 147 (N.C. 1992) (concluding that *Alston* may be "sui generis"); *State v. Scott*, 372 S.E.2d 572 (N.C. 1988) (stating that *Alston*, among other factors, presented a prior consensual sexual history between defendant and alleged victim).

In another rape case, *State v. Etheridge*,¹⁰⁰ decided one month after *Strickland*, the court reconsidered *Lester*. In *Etheridge* the defendant was convicted of raping his twelve-year-old daughter and thirteen-year-old son. The defendant relied on the "general fear" rule of *Alston*, as extended to the alleged rape of a minor in the *Lester* case. The court expressly overruled *Lester* noting that "sexual activity between a parent and minor child is not comparable to sexual activity between two adults with a history of consensual intercourse."¹⁰¹ The court again cited Estrich's work.¹⁰²

The North Carolina Supreme Court's reconsideration of its rape jurisprudence reveals both the power and limits of work like Estrich's.¹⁰³ *Lester* is overruled; the "general fear" rule is unavailable in North Carolina if one rapes a child. The court strictly limits the precedential import of *Alston*. Still, the North Carolina Supreme Court is unwilling simply to kill off *Alston* by expressly overruling it. The court also continues to attach great significance to the prior history of sexual relations and remains unwilling to see the unwanted physical penetration of the woman as a sufficient act of force. The court remains committed to the idea that a man may pull off a woman's clothes, push her legs apart, and penetrate her body, while the woman explicitly says "No," and still not have committed rape because the element of "force" is absent. Some things changed in North Carolina rape law, apparently due in part to the influence of Estrich's work. Yet, much remains the same.

B. Sexual Harassment

Susan Estrich has taught us some similar lessons about the law of sexual harassment in the workplace. Through the decisions of the courts and the policies of the Equal Employment Opportunity Commission ("EEOC"), a federal cause of action under Title VII for workplace sexual harassment has emerged.¹⁰⁴ The U.S. Supreme Court acknowledged the existence of the cause of action in *Meritor Savings Bank v. Vinson*.¹⁰⁵ In *Vinson*, the Court endorsed both the "quid pro quo" cause of action in which sex is demanded as a condition of the job, as well as the "hostile environment" cause of action

100. *Etheridge*, 352 S.E.2d 673 (N.C. 1987).

101. *Id.* at 681.

102. In the midst of the court's explanation of why *Lester* is to be overruled, the court says: "As one commentator observes, force can be understood in some contexts as the power one need not use." *Id.* at 682 (quoting Estrich, *Rape*, *supra* note 3, at 1115).

103. Susan Estrich's published works have apparently influenced other courts as well. *See, e.g.*, *Commonwealth v. Lavalley*, 574 N.E.2d 1000, 1004 (Mass. 1991); *State in Interest of M.T.S.*, 609 A.2d 1266, 1274-75 (N.J. 1992); *State v. Hill*, 578 A.2d 370, 376 (N.J. 1990); *State in Interest of J.F.S.*, 803 P.2d 1254, 1259 (Utah App. 1990); *U.S. v. Apilado*, 34 M.J. 773, 779 (A.C.M.R. 1992).

104. *See generally* Estrich, *Sex at Work*, *supra* note 3; Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299 (1991) (arguing that Title VII should be amended to allow recovery of compensatory and punitive damages and to incorporate appropriate evidentiary standards and burdens of proof).

105. *Vinson*, 477 U.S. 57 (1986).

in which the woman can show the existence of a hostile working environment arising from sexually-oriented verbal or physical conduct.¹⁰⁶

Building on her work on rape, Estrich's article, *Sex at Work*, shows how the apparent victory in the *Vinson* case is not likely to provide women with meaningful remedies for being subjected to sexually hostile working environments.¹⁰⁷ The essential problem with the "hostile environment" cause of action arises from the Court's creation of the element of "unwelcomeness."¹⁰⁸ Although consent by the woman is not an issue in the hostile environment cause of action, the woman must show that the advances were "unwelcome." This element shifts the focus to the behavior of the woman, allowing the admission of evidence of the woman's "sexually provocative speech or dress."¹⁰⁹ A woman who wears tight clothing and uses sexually explicit words thus "welcomes" a sexually abusive working environment. By manipulating this element, lawyers can transform a woman's claim against her employer into a trial of the woman's virtue and an inquiry into whether she "asked for" the sexual comments and contact that male employees imposed on her.

In *Vinson*, the woman employee, a bank teller, was subjected to repeated sexual advances from her supervisor. Estrich described the environment in the following terms:

At first she refused, but, afraid of losing her job, she eventually agreed. Over the next three years, Taylor repeatedly demanded sexual relations with Vinson. She testified that she had intercourse with him forty or fifty times. He fondled her in front of other employees, followed her into the women's restroom, exposed himself to her, and forcibly raped her on several occasions.¹¹⁰

The *Vinson* court accepted the EEOC's interpretation of Title VII as the source of a "hostile environment" cause of action. At the same time, the Court added the unwelcomeness element to the cause of action. The Court declared: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . ." ¹¹¹ Thus, Mechelle Vinson's sexually provocative speech or dress became relevant.

Estrich concludes that the unwelcomeness element "performs the doctrinal dirty work of the consent standard in rape law."¹¹² Just as the consent issue and the evidence it allows discourages women from reporting rapes, the unwelcomeness issue in sexual harassment cases discourages pursuit of federal remedies.

The unwelcomeness element in sexual harassment cases is a product of the stories told about women—stories of repressed desire unlocked by male

106. *Id.* at 66.

107. Estrich, *Sex at Work*, *supra* note 3, at 839-47.

108. *Vinson*, 477 U.S. at 68.

109. *Id.* at 69.

110. Estrich, *Sex at Work*, *supra* note 3, at 823 (citing *Vinson*, 477 U.S. at 60).

111. *Vinson*, 477 U.S. at 68.

112. Estrich, *Sex at Work*, *supra* note 3, at 830.

aggressiveness or simple stories of the office slut. This element also invites judges and juries to import their version of these stories into the litigation brought by women employees who have experienced some version of Vinson's nightmare.

Estrich shows how the definition of a hostile environment can reflect such stories. She tells the facts of *Rabidue v. Osceola Refining Co.*¹¹³

According to the dissenting judge, pictures of nude and scantily clad women abounded, including one, which hung on a wall for eight years, of a woman with a golf ball on her breasts and a man with his golf club, standing over her and yelling "fore." The language was equally offensive: One co-worker, never disciplined despite repeated complaints, routinely referred to women as "whores," "cunts," and "pussy." But the Sixth Circuit found all this de minimis.¹¹⁴

The judgment that these acts are "de minimis" depends upon the importation of certain stories. One may suppose that women consent to the environment. After all, they stay on the job. Perhaps, one might imagine, they secretly enjoy the rough talk and "erotic" posters.¹¹⁵

Similarly, Estrich shows how the "quid pro quo" cause of action provides little real hope for the woman employee. The typical "quid pro quo" plaintiff has been fired because she refused to have sex with a male supervisor. She must prove a threat and that the firing was in response to her refusal.¹¹⁶ These elements seem obvious and not problematic. Estrich demonstrates, however, the ways in which these formal elements, as actually applied, hinder women seeking relief for sexual harassment.

Sexual demands are typically not conveyed in writing or spoken in public by the male supervisor. Thus, proving the threat itself is often difficult. Even when the "quid pro quo" advance by the man is proven, the employer typically asserts apparently legitimate reasons for the dismissal: the woman's work was deficient; she was habitually tardy; she had difficulty working with others; and so on. The subjective quality of an employee evaluation permits an employer to offer a range of reasons for the dismissal, none of which can be easily disproven.

Neither the "unwelcomeness" element in the hostile environment cause of action nor the basic elements of the "quid pro quo" case are facially unreasonable legal principles. The principles open the dispute, however, to all the stories told about women at work. For example, through the "unwelcomeness" element, the male fantasies about the sexual availability of women who wear tight sweaters and tell dirty jokes become part of the law of sexual

113. *Rabidue*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); see also Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1193-1214 (1990) (analyzing the *Rabidue* majority opinion).

114. Estrich, *Sex at Work*, supra note 3, at 844 (citations omitted).

115. The recently exposed "Tailhook" affair, in which Navy officers subjected women to a "gauntlet" of physical sexual assault, is a compelling example of the ability of men to somehow imagine that women enjoy or accept a working environment that is patently hostile, degrading, and repulsive. See Eloise Salholz & Douglas Waller, *Tailhook: Scandal Time*, NEWSWEEK, July 6, 1992, at 40, 40.

116. See Estrich, *Sex at Work*, supra note 3, at 834.

harassment. Stories of the scorned lover turned vengeful liar are played out in the "quid pro quo" cases through the elements of that cause of action. If stories about women enjoying imposed sex and about women saying "no" when they mean "yes" continue to thrive in today's culture, the law of rape and sexual harassment, as applied, will provide only limited shelter for women.

Thus, in both the areas of rape and sexual harassment, Susan Estrich has exposed the depth of the problem and the severe limitations of law reform. There is a despairing quality to Estrich's work. On the other hand, she is engaged in redemptive work. By telling the stories of rape, hers and those of other women, she is using her power as a writer to make new law. Each reader hears her stories. Even as she recounts the explanation for the limits of law reform, she is engaged in discourse that would yield a truly changed law of rape. She cannot make any reader adopt her stories as his stories. But to the extent any reader does so, his law, his combination of rules and narratives, is changed. For example, the meaning of "consent" in rape law changes when a person hears and adopts Estrich's story of a woman fearful for her life "allowing" a man to push her legs apart or her story of a fifteen-year-old daughter who "consents" to intercourse with her violently abusive father.

Similarly, Estrich's work on sexual harassment is both despairing and redemptive. She shows how the ostensible victory of *Vinson* is hollow. Yet, Estrich's narratives of abuse in the workplace can affect the meaning of the "unwelcomeness" element. Imagine two judges, one of whom embraces some version of the story of women secretly enjoying dirty talk and the other embracing Estrich's narratives as accurate depictions of the experience of women at work. Although these judges will each accept the abstract legal precept that a hostile work environment must be "unwelcome" to be actionable under Title VII, each is likely to attach different meanings to the concept of "unwelcomeness."

The doctrinal dirty work of "consent" in rape law and "unwelcomeness" in sexual harassment law has always been a product of the discourse and stories that surround those doctrines. After all, consent is a coherent defense to a charge of rape, and a hostile environment sensibly does not arise when a woman welcomes the behavior that creates the environment. The error is in the legal meaning that emerges from stories about women and sex and the way those stories make consent and unwelcomeness the tools of doctrinal self-deception.

Reforming the formal precepts of law, on the other hand, is not pointless. First, women do benefit from the application of the new precepts. Rape shield laws spare victims at least some of the pain and humiliation that was routine under the old rape laws. Repeal of the spousal exception allows women at least the possibility of charging their husbands with rape. Women experiencing sexual harassment at work can employ Title VII. Moreover, the very existence of the sexual harassment causes of action provides incentives for employers to pay some attention to workplace conditions in a way not

demanded by the old precepts. These gains, however, can be easily overstated, as the work by scholars such as Estrich suggests.¹¹⁷

Most importantly, law reform can help women by generating different stories about women and their lives. The process of reforming rape law generated important stories about the way the State treats rape victims.¹¹⁸ These stories had been quieted. Even though many people still do not know these stories, or resist accepting them as reality, some do hear and accept the stories about the further victimization of rape victims within the legal process. These stories become part of their understanding of what the rape law ought to be.

To the extent law reform fosters new narratives that are assimilated by those who administer the law, women's lives under the law will change. To the extent law reform only changes the formal rules, leaving in place the old stories about women, women's lives under the law will reflect the old reality and contradict the new vision.

Feminist legal scholars like Susan Estrich have told stories of despair as a means of working toward redemption. In judging their work, Robert Cover's appraisal of the nineteenth century abolitionist movement seems apt:

While their movement lasted, the radical constitutionalists contributed to an immense growth of law. They worked out a constitutional attack upon slavery from the general structure of the Constitution; they evolved a literalist attack from the language of the due process clause and from the jury and grand jury provisions of the fifth and sixth amendments; they studied interpretive methodologies and self-consciously employed the one most favorable to their ends; they developed arguments for extending the range of constitutional sources to include at least the Declaration of Independence. Their pamphlets, arguments, columns, and books constitute an important part of the legal literature on slavery, which, I believe, would substantially eclipse contemporaneous writings in, say, American tort law. . . . In the workings of a committed community with common symbols and discourse, common narratives and interpretations, the law undeniably grew.¹¹⁹

Feminist legal scholars have also contributed to an immense growth in law. They have enriched legal thought with innovative arguments and methodologies; they have already produced a body of literature that would eclipse the legal literature in most doctrinal areas; and they have stimulated the growth of law. Their narratives have entered the realm of discourse beyond their own community and will have unknowable, but potentially powerful, influence.

117. For an especially interesting discussion of the limits of law reform in the context of battered women who claim they acted in self-defense, see Maguigan, *supra* note 6. Professor Maguigan argues that law reform proposals creating special substantive rules of self-defense for battered women are misguided. The existing doctrine of self-defense in most jurisdictions could accommodate the circumstances of battered women. The problem is that judges and juries do not apply the existing doctrine in an even-handed way.

118. See, e.g., Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

119. Cover, *supra* note 1, at 39-40 (citations omitted).

IV. COMMITMENT AND ABORTION

Law is meaning executed through commitment. Knowing this puts one in an uncomfortable position. It is difficult to imagine that one can profess an interpretive position and be free of the necessity to act on it. Interpretation without a willingness to act on that interpretation may be the derivation of meaning but it is not *legal* meaning. No law can exist without commitment. The point of this paper is to make this abstract admonition a real and meaningful one with regard to law that governs the lives of women. I have chosen as the particular example the constitutional law of abortion.

The centrality of commitment in the construction of the law that affects women's lives is well revealed in the wrenching issue of abortion.¹²⁰ The feminist normative community shares the central precept that women should have the right to choose what happens to their bodies and, thus, the right to choose to end an unwanted pregnancy. The narratives of the community include stories of impregnation by coerced intercourse, whether by rape or by overbearing husbands; stories of hideous experiences of self-induced abortion or abortion by back room "butchers"; and other stories about the context of gender oppression within which pregnancy and abortion arise.¹²¹ These stories about today's unredeemed reality imply a vision of a redeemed world in which women are accorded respect and autonomy. Moreover, the members of the feminist *nomos* understand and accept the commitment demanded of those who embrace a vision of law that is in opposition to the State's law.

Those who seek to blockade abortion clinics are also creating and advancing law. They share as their central precept the principle that any fetus is an innocent life that should not be taken by abortion. Their stories are often "told" pictorially. Using pictures of aborted fetuses, or even the fetuses themselves, has been a persistent part of the discourse of the "life" community.¹²² The pictures reveal a resemblance between a fetus and a newborn infant, thus suggesting that abortion is analogous to infanticide. Members of the "life community" also tell stories about the "happy" alternative of adoption.¹²³ They act on their law; they back their interpretation with their commitment.

120. See generally FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (1989) (an accounting of the abortion conflict in Fargo, North Dakota that contains "life stories" of women on both sides of the conflict); Estrich & Sullivan, *Abortion Politics*, *supra* note 77; Olsen, *supra* note 3.

121. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1635-37 (1987) (includes excerpts of women's letters collected by the National Abortion Rights Action League in its Brief as Amicus Curiae in Support of Appellees, *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986) (Nos. 84-495 & 84-1379)); Olsen, *supra* note 3, at 125 (listing examples of situations in which women are forced or coerced into having sex).

122. See, e.g., Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 10-25, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) (containing pictures of fetuses at various stages of development).

123. See, e.g., Stuart Elliott, *Anti-Abortion Campaign Causes Debate in the Industry*, N.Y. TIMES, Apr. 15, 1992, at D20.

While these opposed normative communities demonstrate the depth of their commitment by their sometimes violent clashes at barricades surrounding abortion clinics,¹²⁴ the Supreme Court shows only a shallow commitment to its constitutional law of abortion. Beginning with *Roe v. Wade*,¹²⁵ and continuing in the post-*Roe* abortion cases, including the recent *Planned Parenthood* case, the Court has demonstrated a weak commitment to its law.¹²⁶ Justice Blackmun's opinion in *Roe* created legal meaning by using the Constitution to circumscribe the State's power to prohibit abortion.¹²⁷ Yet, the Court adopted neither community's competing vision of law. By circumscribing the State's power to prohibit abortion, the Court showed that it did not embrace the "life" community's vision of law. On the other hand, the Court limited state power according to the trimesters of pregnancy, granting to the State the power to take the abortion decision away from the woman at some temporal marking point before birth. In this sense of the opinion, the feminist vision of law is likewise not fully accepted.

Many criticize the *Roe* opinion as poorly constructed, incoherent, or contradictory.¹²⁸ Yet, the *Roe* opinion's greatest shortcoming is the Court's minimal commitment to any vision of constitutional law on abortion. The *Roe* compromise is the product of an unwillingness to embrace the feminist's vision of woman's autonomy, and an unwillingness to embrace the "life" community's vision of innocent life. Allowing state power to intrude on the medical choices of women in the second trimester and ceding to the State the power to prohibit abortions in the third trimester is inconsistent with the precept of autonomy. The Court just as surely rejects the precept of innocent life by restricting the State's power to prohibit abortions. Moreover, merely to cede state power in the third trimester, and not to declare abortion the unconstitutional deprivation of innocent life, is inconsistent with the "life" community's law.

The "relentlessly formalistic catechism" of the post-*Roe* cases also exhibits the weakness of the Court's commitment to abortion law. These cases expanded the permissible State intrusion during the first two trimesters,

124. See generally Catherine S. Manegold, *Abortion War, Buffalo Front: Top Guns Use Battle Tactics*, N.Y. TIMES, Apr. 25, 1992, at 1; Mary B.W. Tabor, *Life's Turns Lead to Abortion Barricades in Buffalo: Four Women and Two Men Talk of How the Issue Has Moved Them Into the Streets*, N.Y. TIMES, Apr. 28, 1992, at B1.

125. *Roe*, 410 U.S. 113 (1973).

126. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989).

127. "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe*, 410 U.S. at 154.

128. See generally Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991) (arguing that the right of privacy, relied on by the Court in *Roe* has failed to protect a woman's right to choose abortion and that the principle of bodily integrity can better protect women from state interference); Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1986) (arguing that the medical technology upon which fetal survivability depends should not unilaterally determine abortion law and proposing the concept of "late gestation" as a more appropriate principle for determining when the state may proscribe abortion).

allowing the State to burden, yet not prohibit, the woman's choice.¹²⁹ Even while doing this, the majority of the Court insisted on the continuing vitality of *Roe* as a source of law.¹³⁰ While *Roe* was gutted by the expansion of state power to intrude in the first two trimesters, this evisceration was facilitated by the Court's initial unwillingness in *Roe* to commit itself to any coherent and meaningful vision of constitutional law.

Even those on the Court poised to overrule *Roe* show a weak commitment. Justice Scalia, the most prominent of the *Roe* critics, apparently would simply stand aside and permit the deployment of state power without meaningful constitutional restriction.¹³¹ In this way, abortion would be treated like the regulation of the sale of used cars. The State would be free, but in no sense compelled, to intrude. When the State chose to intrude, the law would be measured against an impotent rationality standard. Although this can be understood as a complete rejection of the feminist vision of law, it is hardly an embrace of the concept of "innocent life." The Court is "committed" to getting out of the way of the orderly deployment of state power and privilege, whatever form that deployment happens to take.

The Court's most recent abortion decision, *Planned Parenthood v. Casey*,¹³² exemplifies the weakness of its commitment to the creation of legal meaning in the realm of the constitutional law of abortion. Justice O'Connor, writing the plurality opinion, initially expresses her fealty to *Roe*: "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."¹³³ Thereafter, she proceeds to discard virtually all of the constitutional meaning created in *Roe*.¹³⁴ The strict scrutiny standard is replaced by an "undue burden" standard that sanctions substantial and intrusive regulation that is explicitly intended to dissuade, discourage, and make more difficult a woman's choice to have an abortion. O'Connor dismisses the trimester structure because it interferes with her choice to extend the State's regulatory power to the moment of conception. In the process she upholds virtually all of the Pennsylvania abortion law, a law that was simply and clearly inconsistent with the principles of *Roe*.

After *Planned Parenthood*, there is little constitutional meaning and little judicial commitment that might restrict the deployment of state power against the choice of women to have abortions. On the other hand, no member of the

129. See *Casey*, 112 S. Ct. 2791; *Rust*, 111 S. Ct. 1759; *Hodgson*, 497 U.S. 117; *Webster*, 492 U.S. 490.

130. Justice Rehnquist, in *Webster*, asserted: "This case therefore affords us no occasion to revisit the holding in *Roe* . . . and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases." *Webster*, 492 U.S. at 521 (citation omitted).

131. In his separate opinion in *Webster*, Justice Scalia wrote: "As to Part II-D [of Rehnquist's opinion], I share Justice Blackmun's view, that it effectively would overrule *Roe v. Wade*. I think that should be done, but would do it more explicitly." *Id.* at 532 (citations omitted).

132. *Casey*, 112 S. Ct. 2791 (1992).

133. *Id.* at 2804

134. *Id.* at 2805-21.

Court appears willing to create constitutional law that would protect "innocent life." It is no wonder that both of the competing normative communities are angry and deeply critical of the decision.

Commitment is always the central part of law. But in the abortion context, where the State's commitment is weak, the significance of the commitment within the competing normative communities is increased. The competing normative communities must turn to the new political battleground of the state legislatures, where their success will turn on not only the number of voters each group commands but also on the depth of the commitment of their members.

The commitment of those who hold a particular vision of abortion law is also especially important because the weakness of the Court's commitment creates a vacuum within which each competing *nomos* has a special opportunity to realize its vision. When the State has a strong commitment and stands ready to exercise its imperfect monopoly on violence to impose its law, the commitment of the opposed normative community is expressed through resistance, civil disobedience, or denunciation. The State's opposition typically overshadows the vision of law advanced by the community as a particularly loud noise overshadows a quieter sound. This does not mean that the members of the community accept the State's law; they do not. Nor does it assure compliance with the State's law. In the abortion context, the Court's weak commitment means that there is no overshadowing effect. The competing normative communities each advance their vision of law and seek the realization of their law as state law. The noises they make are the only ones to be heard.

As the "life" community and feminist community advance their competing visions of law, they participate in a special moment in history. The law of abortion may become a patchwork quilt of differing state laws or the product of a national consensus imposed by federal law, or something else. But whatever form it takes, that law will be a product of the commitment of the competing normative communities.

CONCLUSION

To understand feminist legal scholarship and the law to which it speaks through the ideas of Robert Cover is to see with greater clarity. But as is commonly the case, to see with greater clarity is to experience a sense of greater discomfort.

So long as readers view feminist legal scholarship as advocacy, they can easily accommodate it, whether as sympathizers or as critics. As critics, readers can dismiss this scholarship because of its unconventional methods. Or, they can judge it to be a weak rhetorical effort because of its limited influence on law and its apparent failure to convert its critics. As sympathizers, they can express support and assume that they have done all that can sensibly be done.

Yet the moment one considers feminist legal scholarship and its law through the ideas of precept, narrative, and commitment, everything changes. First, the scholarship assumes a different cast. It helps maintain a community of committed individuals who share basic precepts and the narratives that supply legal meaning. The scholarship does not take the form of the rhetoric of the State's apologists precisely because the feminist scholarship is part of an altogether different activity. Most importantly, the feminists' use of narrative is not a rhetorical gambit; it is the essential teaching of the normative community. Precisely because the State's narratives and the narratives of the opposed normative communities are in the discourse, the feminist must keep telling and retelling her stories to maintain the community and to work toward redemption.

Thus, feminist scholarship cannot be judged simply by its success in achieving formal law reform. It is part of a nomic enterprise. Feminist legal scholarship will stand as a remarkable body of teachings, a rich set of stories, and an imaginative reconstitution of law. This legacy does not depend on the State's adoption of the feminist vision. This is not to say that the State's law is unimportant. The lives of women and men will be shaped meaningfully by state law on the issues of rape, sexual harassment, abortion, and other gender issues.

To understand these points and to examine the matter through Cover's vision leads us to the point of this paper. The choice is much harder than one would like to imagine, especially for those who cast themselves in solidarity with the feminist agenda. They seek to stand in solidarity with a normative community in the midst of a struggle with the State and other competing normative communities. The struggle that is currently being played out at the abortion clinic barricades, before the Supreme Court, and in the courtrooms, bedrooms, and workplaces of this country, is no mere matter of words. In this struggle there is no sensible position of solidarity as an outside observer, any more than there is a sensible position of solidarity as a bystander to any violent struggle. If this were nothing more than a rhetorical battle of words, feminists could join in the battle fully and simply with their own words of support. But because this is a struggle by a *nomos* facing at once the violence of the State's law and the commitment of opposing normative communities, solidarity does not come so cheap.

The unavoidable choice is one that every normative community poses for anyone who would claim its law as his law. Each person must take a side, or stake out his own normative vision. If one wishes to take the side of the feminist *nomos*, one must enter, to the degree one can, their *nomos*. Hearing the stories is a beginning. Accepting those stories as real and important is essential to becoming part of the *nomos*.

Each person also must determine the degree and nature of his commitment to the vision of law that emerges from the precepts and narratives of his normative universe. Even when that commitment simply takes the form of verbal opposition to the other competing visions of law, each individual needs to see it as a matter of commitment. In choosing the degree of commitment,

one must discern the commitment of the State and those who stand in opposition. Not everyone is prepared to be a martyr to his vision of law. Yet each individual must understand that some version of the martyr's commitment is demanded of anyone who seeks to live a life of reflection and integrity within his normative universe.

If everyone understands feminist scholarship and its law in these terms, each will see that the price of true solidarity with the feminist *nomos* is high indeed. While individual commitment may not be written in blood, no one can pretend that this is a bloodless matter.

Robert Cover concluded *Nomos and Narrative*, written in 1983, with a reference to the "unruly moment":

The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices, accustomed as they are to casting their cautious eyes about, ferreting out jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege. It will likely come in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state.¹³⁵

A decade after Cover wrote these words, society is at the threshold of just such a time. The abortion issue that looms so large and pressing at this moment is only part of the set of choices each person must make about the law that shall rule the lives of women. At every moment, but especially at such an unruly moment, the questions are simply put. To what normative vision of law are we committed, and what is the depth of that commitment?

135. Cover, *supra* note 1, at 67-68.