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# JOURNALS AS A FEMINIST PLAYGROUND

*MARY ANNE CASE\**

When I told the organizers of this symposium I wished to take as my topic the problems of disagreement among feminists, they put me on a panel they had titled “Why Do We Eat Our Young?: Journals As a Feminist Battleground.” Like Katherine Franke, whose paper also proceeds from the premise that “we disagree badly as feminists,”<sup>1</sup> I, too, will resist the title given our panel by changing one word in it and explaining why the given title will not do. In speaking of journals as a feminist playground rather than battleground, I shall say something about the relationship I perceive between playgrounds and battlegrounds, play and battle. I will also take issue with the first half of our panel’s assigned title by arguing that the question to pose is not why (or even whether) we eat our young but how we honor our mothers.

My thoughts are prompted by comments given to me early in my career when I circulated an article of mine on feminist jurisprudence to a senior feminist theorist at a prestigious law school.<sup>2</sup> Although generally encouraging, she was quite troubled by one passage. In that passage, after noting that “I myself think it is important to remember that feminism is not simply about women”<sup>3</sup> and urging a “focus on how men as well as women fit into the world,”<sup>4</sup> I had dropped a footnote saying, “Not all feminist legal

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\* Arnold I. Shure Professor of Law, University of Chicago Law School. I am grateful to Katherine Franke for provoking reflection on this topic, to participants in this panel, in the twentieth anniversary conference of the Feminism and Legal Theory Workshop at the University of Wisconsin-Madison, and in the University of Texas Subversive Legacies closing plenary, as well as to Jane Cohen, Adrienne Davis, Martha Fineman, and Todd Preuss for facilitating my reflections, and to the staff of this journal and the Texas Journal of Women and the Law for providing transcripts.

<sup>1</sup> See Katherine Franke, On Discipline and Canon, 12 Colum. J. Gender & L. 639, 641 (2003) (delivered at the conference under the title “Why Do We Eat Our Girlfriends?”).

<sup>2</sup> Mary Anne Case, Of Richard Epstein and Other Radical Feminists, 18 Harv. J.L. & Pub. Pol’y 369 (1995). The article, which began with an introductory section offering my own definition of feminist jurisprudence, was originally commissioned for a Federalist Society conference on feminism held at the University of Virginia, where I was then teaching.

<sup>3</sup> *Id.* at 370.

<sup>4</sup> *Id.* at 371.

theorists would agree with me.”<sup>5</sup> As an example, I had cited Christine Littleton’s “making a claim” Littleton herself had described as one she had “only recently begun to understand as controversial: feminism is about women. . . . The claim is merely that, even though many feminists do sincerely care about men, caring about men is not what feminism is about.”<sup>6</sup> According to my reader, my mere admission of a clear disagreement among feminist theorists risked undermining the discipline as a whole. You cannot say that, she told me. You cannot say, “Some feminists think x and I think the opposite.” That is just what unsympathetic male critics are waiting for, she warned. They will reward you for saying such things, but they will use what you say to hurt other women.

I fear that one of the reasons we may disagree badly as feminists is that we have too thoroughly internalized the notion that we “cannot say that,” the warning that acknowledgement of disagreement is somehow dangerous. Notice something about the particular example I cite: the question of whether feminism should concern itself with the plight of men is one on which reasonable minds clearly can differ. That is to say, it cannot reasonably be thought to be either erroneous or evil to take either side of that debate; there are simply multiple perspectives on the question. Even if it were wrong in some sense to take one or another position on a question, that would not be a reason for silence, but for even more critical speech on the subject. If we cannot criticize ourselves and set standards for ourselves within the discipline, then unsympathetic outsiders will be more readily able to dismiss anything we say, even (indeed especially) the most laudatory things we say about each other’s work. In her presentation for this symposium’s panel on “Confronting Obstacles: Tenure Politics, Rankings, and New Solutions,” Elvia Arriola confirmed the dangers of our presenting too united and uncritical a front to the world. She noted that when her tenure committee received “glowing review letters” of her scholarship, the response of colleagues was to dismiss them as coming from “just a bunch of biased feminists, and all they want is for Arriola to get tenure here, so, no, [the glowing reviews] will not change [our] opinion.”<sup>7</sup> Thus, even if the goal is to avoid undermining other scholars in the field, holding off from honest disagreement may not be the best way to accomplish this goal.

But our unwillingness as feminists to exhibit disagreement goes far beyond an unwillingness to be publicly critical of the scholarly quality of

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<sup>5</sup> *Id.* at 370 n.5.

<sup>6</sup> Christine Littleton, Does It Still Make Sense to Talk About Women, 1 *UCLA Women’s L. J.* 15, 33 n. 84 (1991).

<sup>7</sup> See Elvia Arriola’s remarks as a panelist at the April 4 symposium (transcript on file with the *Columbia Journal of Gender and Law*). See also Elvia R. Arriola, Tenure Politics and the Feminist Scholar, 12 *Colum. J. Gender & L.* 532, 535 n.8 (2003) (quoting the letter one critical colleague wrote to the Chair of her Tenure Committee).

other feminists' work and extends to a reluctance to engage one another on those issues where reasonable disagreement is only to be expected. Among the things we may be reluctant to do, which scholars in other fields often do quite productively, is to play with ideas, to toss out possibilities that, in the end, we may not wish to have taken seriously. This may in part be because many of the issues we deal with are deadly earnest matters in which women's lives are at stake; play is easier and safer for scholars whose subject matter is less directly a matter of life and death. But we also could use a playground, a safe space in which to play rather than do battle to the death. You might think that the simple and neat thing for me to say in a conference whose subject is "Why a Feminist Law Journal?" is that journals like the Columbia Journal of Gender and Law are the feminist playground, in which we can safely bat around potentially dangerous ideas. But, unfortunately, I cannot think that. Like my fellow panelist Taunya Lovell Banks, I have done research on sex-segregated toilets, also often seen as a safe space for women to retreat.<sup>8</sup> My research has confirmed in me the view that there are no safe spaces. Feminist law journals in particular, precisely because of their increasing accessibility on Lexis and elsewhere, are no longer a space in which we can have a private conversation the world cannot overhear and use against us or against those we care about.

But it would be unwise to focus too much on fear of how "the boys" may react. At least as big an obstacle to productive disagreement among feminists may be a fear of wounding or being hurt by the other women in the conversation. Another sort of playground, the literal one we experienced as children, may have some relevance here. Consider the research done by Janet Lever in the 1970s, when many of today's feminist theorists were growing up, in *Sex Differences in the Games Children Play*.<sup>9</sup> What Lever observed was that boys learn early on to play complicated games in which disputing and dispute resolution are incorporated as part of the process. Girls' games, by contrast, tend to be simpler, turn-taking games, in which the first bit of disagreement causes a halt to the game. The boys attack each other vigorously on the playground and in the academy, but often manage to walk away without necessarily taking the dispute too personally. As Janet Halley noted in her remarks at this symposium, when little girls on the playground fall down, they are likely to meet a reaction of "poor dear, you must have hurt yourself badly," which prompts them to dissolve into tears and stop playing rather than to get back into the game. Little boys are prompted to get back into the game even if they are very

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<sup>8</sup> See Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 Berkeley Women's L.J. 263 (1990-91); Mary Anne Case, *Toilet Paper: Public Toilets as Gendered Spaces* (unpublished paper on file with author).

<sup>9</sup> See Janet Lever, *Sex Differences in the Games Children Play*, 23 Soc. Probs. 478 (1976). For a summary of Lever's findings, see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 9-10 (1982).

badly hurt. These experiences on the playground may prepare them very differently for adult battlegrounds, literal and figurative. In the words of the Duke of Wellington, “The battle of Waterloo was won on the playing fields of Eton.”<sup>10</sup>

I do not mean to privilege a male, masculine style of disputing,<sup>11</sup> or necessarily to encourage feminists to beat each other up in sparring matches or in genuine combat only to shake hands afterward like gentlemen, but I do think we would do well to realize that a boxing ring may be a safer space in which to play than we may imagine, safer at times than the women’s room may be. We need to learn not to be hurt as easily, not to be as fearful of hurting others, and to incorporate strategies in which hurtfulness is not part of the project. Nor do I mean to suggest we are biologically predestined to disagree badly, only that most of us spent our youth playing with the girls in their corner of the playground and may tend to incorporate what we learned there in our scholarly lives. Perhaps the generation of girls who spent their time on the playground in the shadow of Title IX will eventually reveal Lever’s results to be outdated.

One model for productive disagreement among feminists that can be seen to incorporate well the strengths of both masculine and feminine approaches is Martha Fineman’s series of “uncomfortable conversations,” the closest thing to an ongoing structured dialogue among people who disagree profoundly about important issues I have yet experienced within the feminist legal academy. Martha is a nurturing mother who can pick up participants when they fall down, but she is also a product of the University of Chicago Law School, perhaps the quintessential boys’ playground, and that may have conditioned her to encourage some of the sorts of play “the boys” seem more readily to engage in.

Although I generally resist drawing analogies to the habits of non-human primates, so long as I am, in the very spirit I endorsed above, playing with the sort of sociobiological accounts of gender differences I usually strongly resist, let me also take on the second half of the title imposed on our panel. To conceptualize the difficulties feminists have with disagreement as a problem of us “eating our young,” is, at least in sociobiological terms, odd. One oversimplified story about the difference

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<sup>10</sup> Arthur Wellesley, Duke of Wellington, *quoted in* John Bartlett, *Familiar Quotations* 506 (Emily Morison Beck ed., 14th ed. 1968) (1855) (referring to Eton College, an elite British secondary school).

<sup>11</sup> Indeed, I have spent my scholarly career arguing for exactly the opposite. *See, e.g.,* Mary Anne Case, *Two Cheers for Cheerleading: The Noisy Integration of VMI and the Quiet Success of Virginia Women in Leadership*, 1999 U. Chi. Legal F. 347, 366 (“[W]e are not yet asking the right questions of either law schools or military schools if we continue to assume unhesitatingly . . . that tough, potentially abusive masculine educational methods are, of course, the best, (or indeed, the only adequate) preparation for lawyering or soldiering, let alone citizenship.”).

between non-human primate social structures built around alpha females and ones built around alpha males is that alpha females are not typically forcibly displaced through competition with the younger generation; females remain subordinate daughters until their mothers die, with their rank determined at birth.<sup>12</sup> Aggressive interactions among females do not typically determine their rank; females may fight, but the outcome is rarely a change in status. The only way females can typically improve their position is to leave the group. Unlike males, females rarely have something tactical to be gained from aggression; most female aggressive encounters are situational blow-ups. Among males in a group, by contrast, there tends to be a more constant jockeying for position, with siblings sometimes cooperating to overthrow the dominant male and kill the young he produced with females they now are in a hurry to impregnate themselves.<sup>13</sup> Perhaps the totemic animals of feminist theorists should not be common chimpanzees, whose males sometimes do kill the young, but bonobos, among whom females are dominant and there is very little aggression, but much evident anxiety, within the group.

While I am playing with explanations for difficulties feminists may have with disagreement, let me expand on Katherine Franke's suggestion that part of the difficulty may be traceable to our tendency to "autobiographize our theoretical work."<sup>14</sup> Not only do we ourselves do so, I fear it is all too often done *to* us as feminists.<sup>15</sup> Among the many different ways in which the personal is the political, one worth highlighting is that both for participants in the debates within feminism and for those outside of them, our lives as feminists are seen necessarily to determine or to contradict our argument, or at least to be relevant to its validity. The details of our personal lives are often made relevant by people not internal to the

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<sup>12</sup> Cf. Franke, *supra* note 1, at 640 ("[W]e risk being disciplined by the field, by the canon, and by our more prominent scholars."). Honoring our mothers may have its down side: It may make it more difficult to advance beyond the paradigms of our mothers' generation.

<sup>13</sup> See generally, e.g., Barbara B. Smuts, Gender, Aggression and Influence, in Primate Societies 400 (Barbara B. Smuts et al. eds., 1987). Smuts's description of "sex differences in the quality of agonistic interactions" among primates bears some resemblance to Lever's studies of playground disputes. According to Smuts, "several observers have noted that ritualized threats nearly always precede male attacks on other males whereas females often attack other females without warning." *Id.* at 401.

<sup>14</sup> Franke, *supra* note 1, at 641.

<sup>15</sup> Within legal academics, the fact that those concerned with subordinated populations seem to have a special affinity for narrative is not entirely the doing of feminists and scholars of color. For example, Catharine MacKinnon, who rarely, if ever, uses personal narrative in her own writings, is nevertheless regularly subject to the sort of underground narrative critique I describe here. Similar gossip surrounds the benefits scholars of color may have received from affirmative action and the privileges to which Marxist and Critical Legal Studies scholars may cling.

feminist conversation. I cannot tell you how often people have recounted to me more or less accurate, more or less lurid details about the perceived sex or family lives of famous feminist legal theorists by way of saying, “She only says this because she . . .” or, alternatively, “How can she say this when she herself . . .” Much more rarely do I hear similar speculation or reporting with similar diligence about, say, the investment portfolio of a proponent of the efficient capital market hypothesis; yet if such a person could be shown to make at least some irrational or sentimental investment decisions, this might cast at least as much doubt on the hypothesis as a scholar’s personal sex life does on her feminist theories. I agree with Martha Fineman and Carol Weisbrod that “what is centrally relevant is the argument not the speaker.”<sup>16</sup>

And I hope that we get better at disagreeing, so that not only if you say *potato* and I say *potahto*,<sup>17</sup> we will realize that we are speaking, if not the same language, then mutually comprehensible ones, but even if you say *potato* and I say *meat*, we can still keep the conversation going and not call the whole thing off.

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<sup>16</sup> Carol Weisbrod, Divorce Stories: Readings, Comments and Questions on Law and Narrative, 1991 BYU L. Rev. 143, 189 n.181 (1991) (citing Martha Fineman, Challenging Law. Establishing Differences: The Future of Feminist Legal Scholarship, 42 Fla. L. Rev. 25, 41 (1990)).

<sup>17</sup> See the song by George and Ira Gershwin, “Let’s Call the Whole Thing Off,” on Shall We Dance? (RKO 1937).