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# Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Tears Later: Reflections on the State of Feminism Today

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# SYMPOSIUM

## **Mary Joe Frug's *Postmodern Feminist Legal Manifesto* Ten Years Later: Reflections on the State of Feminism Today**

Regina Austin\*\*

Elizabeth M. Schneider\*\*\*

### INTRODUCTION

*Liz:* On Saturday, March 31, 2001, a conference was held at New England School of Law in memory of Mary Joe Frug on the tenth anniversary of her death.<sup>1</sup> The theme of the conference was "Transgressing Borders: Women's Bodies, Identities and Families."<sup>2</sup> Regina and I spoke at the

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\*\* William A. Schnader Professor of Law, University of Pennsylvania Law School. I wish to thank Manthia Diawara, Deborah Post and Barbara Lewis for their helpful comments. I especially want to thank Liz Schneider for undertaking what has proven to be, for me, a most generous, stimulating and productive collaboration.

\*\*\* Rose L. Hoffer Professor of Law, Brooklyn Law School. This article is a revised version of the opening plenary session at the conference, "Transgressing Borders: Women's Bodies, Identities and Families," held at New England Law School on March 31, 2001. Thanks to Regina Austin for a very special experience of stimulating dialogue, collaboration and friendship that carried on Mary Joe's legacy. Thanks also to Judi Greenberg, Nan Hunter, Sylvia Law and Martha Minow for helpful comments, to Linda Gordon and Elinor Langer for useful conversation and to Lisa Pepe for helpful research assistance. The Brooklyn Law School Faculty Research Fund generously supported my work on this article.

1. Mary Joe Frug was a professor at New England School of Law from 1981 to 1991. On April 4, 1991, she was murdered on the streets of Cambridge, Massachusetts, not far from the home that she shared with her husband Jerry and their children Stephen and Emily. Though her death was tragic, we believe that how she lived her life is more important than how she died.

2. This conference was jointly planned by Professors Judi Greenberg, New

opening plenary session. In preparation for the conference, we reread Mary Joe's work, particularly her posthumously published Harvard Law Review article, *A Postmodern Feminist Legal Manifesto*,<sup>3</sup> and talked with each other about her and her ideas. We had some wonderful conversations generated by our memories of Mary Joe and her words. At the conference, we focused on our favorite quotes from the *Manifesto* (which we flashed on a screen for the audience to read) and offered our reactions and thoughts on them.

Our conversations continued after the conference. We discussed a range of topics: anti-feminism, differences among feminists, style, sexuality, middle age, the material world, activism and law reform. Our musings about Mary Joe's *Manifesto* provoked reflections, improvisations against the backdrop of a common riff, on the contemporary state of feminism, which we share with you here.

*Regina:* The conference was a homage to Mary Joe Frug's capacities as an academic impresario. She was instrumental in precipitating the breakaway moves of the FemCrits from the white male-dominated Conference on Critical Legal Studies, and in organizing FemCrit meetings both in Boston and around the country. Among the most pleasant memories I have of the year I spent in Cambridge as a visitor at Harvard Law School are of the dinners Mary Joe fed us and the conversations that erupted around her dining room table about everything under the feminist sun.

Mary Joe is vivid in our memories because she had the capacity to focus on you, *just you*, and make *you* feel as if *you* were the most special person on earth at that particular moment. But as alive as she remains in our hearts as a leader, organizer, confidant, and girlfriend, Liz and I feared that our recollection of her as a thinker and intellectual nudge was fading. So we thought that we would return to what she said in her *Postmodern Feminist Legal Manifesto*, and thereby, in essence, give her the chance to set the agenda for our dialogue, to call us to account for ourselves and what we have been thinking and doing these past ten years, and to force us to consider what remains of the postmodern legal feminism she envisioned and the challenges that lie ahead.

Liz and I came to the task from different places and arrive at somewhat different conclusions. Liz is an expert, activist, teacher, and theorist in the

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England Law School, Martha Minow, Harvard Law School, Clare Dalton, Northeastern University Law School and Liz Schneider, Brooklyn Law School. Special thanks to Judi Greenberg for her leadership and work in making the conference happen and for making it a wonderful event. There were many stimulating panels at the conference on topics such as welfare, employment, domestic violence, women's international human rights and reproductive rights; only a few of the presentations are included as articles in this symposium.

3. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

area of women's rights and domestic violence whose commitment to achieving women's equality as a lived experience has been unwavering.<sup>4</sup> I, on the other hand, immersed in researching the problem of antiblack economic discrimination, had let my "feminist intellectual" credentials lapse. Revisiting Mary Joe's ideas caused me to embark on a scholarly pilgrimage to locate contemporary race feminism. Along the way, I stumbled on the work of young, liberal, so-called Third Wave feminists.<sup>5</sup> The ideas and the energy exuded by these young, female writers of all colors left me reservedly optimistic. Liz, from her different vantage point, has more questions and concerns about some of what passes for feminism today. I see more subversive possibilities, more likelihood of producing changes in the real economic and social status of women, in the cultural/ideological take of young feminists than Liz does. Both of us, however, are concerned about the tendency of postmodern feminism to pay too little attention to the material world. We also agree that differences between and among female activists and theorists committed to the cause of women's liberation are important to the vibrancy of the Feminist Movement. Mary Joe passionately advocated this view in her *Manifesto*. Only time will tell whether we and other contemporary feminists are worthy successors of Mary Joe Frug.

#### TOTAL THEORY VERSUS LOCAL DISRUPTIONS

- *I am in favor of localized disruptions.*
- *I am against totalizing theory.*<sup>6</sup>

*Regina:* Local disruptions take advantage of narrative, contextualization, and attention to detail. Totalizing theories tend to be arrogant and elitist. As Third World Feminists have warned, feminism must avoid "becoming another homogenizing Western master discourse that can be imported, like any commodity or development program, to 'modernize' the developing world."<sup>7</sup> A "feminist" theory that works to liberate one group of women

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4. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

5. See, e.g., JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM AND THE FUTURE* (2000); *TO BE REAL: TELLING THE TRUTH AND CHANGING THE FACE OF FEMINISM* (Rebecca Walker ed., 1995); *THIRD WAVE AGENDA: BEING FEMINIST, DOING FEMINISM* (Leslie Heywood & Jennifer Drake eds., 1997); *LISTEN UP: VOICES FROM THE NEXT FEMINIST GENERATION* (Barbara Findlen ed., 1995).

6. See Frug, *supra* note 3, at 1046.

7. Edna Acosta-Belén & Christine E. Bose, *U.S. Latina and Latin American Feminisms: Hemispheric Encounters*, in *FEMINISMS AT A MILLENNIUM* 117, 120 (Judith A. Howard & Carolyn Allen eds., 2000).

(Western, bourgeois professional women, for example) may result in the oppression of another (poor immigrant domestic workers of color, for example).<sup>8</sup> The condescension of white bourgeois feminists pushing totalizing theories that seem culturally insensitive and materially naive has deterred many women of color from identifying themselves as feminists. The reality today is that totalizing feminism has given way to a plethora of feminisms that address gender inequality within contexts of racism, ethnocentrism, nationalism, religious fundamentalism, homophobia, class exploitation, ageism, etc., *i.e.*, whatever the situation calls for. In any event, women will not be liberated by theory alone; there must also be disruptions, local or otherwise, the more, the better.

*Liz:* I am sympathetic to the impulse behind both statements, but I am concerned that “localized disruptions” and “totalizing theory” seem to stand in opposition to each other. Setting up a dichotomy between “localized disruption” and “totalizing theory” is problematic. I think the best feminist work starts with the local, the experiential, the “particular,” then moves into the realm of the “general” and then moves back to the local, the “particular.” Indeed much of my work has focused on the need to challenge the dichotomy of theory and practice, to understand that localized disruptions can be a rich source of theory, and to embrace the notion that theory need not be totalizing.<sup>9</sup> Mary Joe may have thought that postmodern theory was the only theory that was not “totalizing” and true to “localized disruption.” If so, was she wrong?

Martha Fineman’s observation more than ten years ago that feminist theory “drifts between the extremes of ‘grand theory’ which is totalizing in its scope and ambitions, and personal narratives, which begin and end with the presentation of one individual’s unique experience,”<sup>10</sup> seems relevant here. She argued, and I agree, that “[b]etween these extremes, in that space between something so exclusively personal as to be beyond generalization or political content, and something so general and abstract as to be removed from the everyday realities of women’s lives, lies fertile ground for feminist methodology.”<sup>11</sup> I want to see the connections between “localized disrupt-

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8. See Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race and Agendas of Reform*, 48 AM. U. LAW REV. 851, 853 (1999); Regina Austin, *Of False Teeth and Biting Critiques: Jones v. Fisher in Context*, 15 TOURO L. REV. 389, 397-99 (1999).

9. See generally SCHNEIDER, *supra* note 4; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Women-Abuse*, 67 N.Y.U. L. REV. 520 (1992).

10. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 25 (1990).

11. *Id.* at 25-26.

tion” and theory. I want theory to emerge from “localized disruption.” I want disruption to emerge from theory. I also want disruption to move beyond the “local.” Neither “localized disruption” nor “totalizing theory” will ever be enough to make for substantial change.

#### STYLE AND SUBSTANCE

- Style is important in postmodern work. The medium is the message, in some cases - although by no means all.*
- When style is salient, it is characterized by irony and wordplay that is often dazzlingly funny, smart, and irreverent.*
- Things aren't just what they seem.*<sup>12</sup>
- [T]he oppositional character of the [postmodern] style arguably coincides with the oppositional spirit of feminism.*<sup>13</sup>

*Regina:* In her *Manifesto*, Mary Joe states that she was uncertain that she had mastered postmodern literary style, but she produced other texts in which her mastery of the postmodern came through loud and clear, other texts that amplify the words of her *Manifesto*.

I told my husband so much about Mary Joe that he felt as if he had known her. My husband is a professor of literature and film. Here is his reading of Mary Joe as an archetypical postmodern feminist:

To participate in style, or to accept the hetero-normative construction of woman, or to accept the stereotype of yourself for the visual pleasure of the male gaze (as with black people playing minstrels) is, according to traditional feminist discourse, dangerous. Feminism seemingly constructed a new woman who, instead of being fully emancipated, was a prisoner of feminist discourse – anti-feminine, strong, against pleasure, aesthetics, and seduction.

Mary Joe was complex because she believed in agency, subjecthood and their opposites, objecthood and being beautiful for herself and others. She believed in self-fashioning herself, objectifying herself, and being the artificial material girl. Perhaps that also made her vulnerable.

Ultimately she was not playing it safe. Her body was one of her texts; her style constituted for us the resources of the postmodern feminism she was trying to develop. Our feminism made us believe that we could not have our cake and eat it too. For Mary Joe, true liberation and emancipation consisted of having them both. She was a feminist with a notion of pleasure, a feminist beyond binary oppositions. In legal terms, she sought women's well being

12. Frug, *supra* note 3, at 1047.

13. *Id.*

and the good life through full citizenship with a cosmopolitan flair.<sup>14</sup>

Has he read her right? Has he interpreted the style that Mary Joe deployed? If so, young advocates of Third Wave feminism<sup>15</sup> should find much to appreciate in Mary Joe's postmodernism. The Third Wave, in some ways, represents the legacy of her kind of styling and theorizing. Third Wavers eschew victimhood and anger; they extol the virtues of hybridity, flexibility, contradictions, and coalitions. To engage them is to engage Mary Joe intellectually.

*Liz:* Mary Joe lived out the dimensions of style, both intellectually and personally. She exemplified the interrelationship between style and substance in her persona. As a person, she was, to use her own words, "dazzlingly funny, smart and irreverent."<sup>16</sup> She also dressed that way: conscious of fashion, explicitly sexy, wearing short leather skirts and tight sweaters at a time when this was not the feminist norm. She was very consciously creating herself and using her body as a postmodern text. She dared to challenge feminist norms all the time.

There is a strong link between Mary Joe's postmodernism and Third Wave feminism. Perhaps the most startling aspect of reading Third Wave feminist literature was to see how much of it resonates with Mary Joe's work, ideas and persona.<sup>17</sup> The emphasis on culture, on using historic terms of derision such as "girl" affirmatively, on the sense of play and sexuality seems so directly linked to Mary Joe's postmodernism. At the same time, I have concerns. Style can be, but is not necessarily, related to substance. Oppositional style does not inevitably reflect or lead to oppositional substance. I certainly have reacted this way in the past to much of the Third Wave's emphasis on culture and style. Yet when I think of style in connection with Mary Joe, I have a renewed respect for its subversive potential.

#### THE F-WORD

*•[T]he emergence of different feminisms . . . [has] demonstrated that women stand in a multitude of places, depending on time and geographical location, on race, age, sexual preference, health, class status, religion, and other factors.*<sup>18</sup>

*Regina:* Unfortunately, these differences have led some of my sisters to

14. These words were written by Manthia Diawara, Professor, New York University, to Regina Austin. They were included among comments, long ago discarded, on an early draft of this work.

15. See *supra* note 5 and accompanying text.

16. Frug, *supra* note 3, at 1047.

17. See *supra* note 5.

18. Frug, *supra* note 3, at 1049.

stand totally outside of feminism. A case in point.

The students who run the multicultural umbrella organization at Penn Law School where I teach took it into their heads to commemorate Malcolm X's death and Women's History Month at the same time. (Malcolm X's choice of the remarkable Dr. Betty Shabazz as his spouse perhaps makes this less of a stretch than one might initially imagine.) They invited as a speaker a woman who was a poet, an actress, a professor, an entrepreneur, and a recent law school graduate. She had presence, she had style, and she commanded attention with her voice and her Afrocentric mud cloth hat. She read a poem entitled, *And Who Are We Not to Remember*, that even I, who hate poetry, found moving. She went on about how we needed to earn our X's by vexing and perplexing and excelling and exhaling or whatever. Then a member of the audience asked her about the linkage between women, Malcolm X, and Islam and the speaker turned into the human equivalent of a motor boat engine, sputtering and stuttering about how she was not a feminist and how misogyny was something foreign to black people that we experienced only because we had been set down, against our will, in a foreign Western culture. Ergo, there is no real imperative for black women to be feminists.

Feminism. The F-word. A foreign (read white racist) concept. Was I hearing a feminism that denies that it is feminism? Is that postmodern or what? I doubt it. Such an evasion of the power of the critique of the material world, which is one of the things feminism is, has its source in both a romantic nostalgia for a past that never existed and an unrealistic optimism about a future that will not become a reality without meaningful struggle. The speaker's sentiments in particular are more than likely the product of a misguided notion of African exceptionalism. Whatever or whomever we black Americans might have been if our ancestors had not been brought to America, we're here now and, like most Africans and other peoples of the African Diaspora, we are trying to hold our own in the Western-dominated modern/postmodern globalizing world! This cannot be done without women's full participation. We need feminism in some form more than ever!

*Liz:* Postmodernism opens up the possibility of exploring, acknowledging, and recognizing difference, and has the potential to promote anti-essentialism. At the same time, though, postmodernism does not give us a way of getting beyond anti-essentialism and of confronting anti-feminism.

As Regina suggests, the F-word continues to be a tremendous obstacle for many women, particularly younger women.<sup>19</sup> The wording of the dedication of the recent Third Wave book, *Manifesta, Young Women, Feminism and*

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19. See for example, Mary C. Dunlap, *The "F" Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L.J. 251 (1989-90), for an early discussion of this problem.



*the Future*,<sup>20</sup> reflects this equivocal attitude towards the word “feminist.” It reads: “To feminists everywhere—including those of our generation who say, ‘I’m not a feminist, but...’ and others who say, ‘I am a feminist, but’—with the faith that young women will transform the world in ways we haven’t yet imagined.”<sup>21</sup>

In one of my favorite New York Times pieces, entitled *And Now, Babe Feminism*, Anna Quindlen criticized the “do me feminists” with their “agenda heavy on sex when and how they want it, with no guilt, no regrets.”<sup>22</sup> She goes on to say, and I love this part,

it’s important to remember that feminism is no longer a group of organizations or leaders. It’s the expectations that parents have for their daughters and their sons too. It’s the way we talk about and treat one another. It’s who makes the money and who makes the compromises and who makes the dinner. It’s a state of mind. It’s the way we live now.<sup>23</sup>

Third Wave feminism operates in a historical time in which women’s equality is, in a sense, taken for granted. Yet I think often there is a profound lack of a sense of history, a lack of race and class consciousness, and a cultural myopia in this assumption. Ahistorical tendencies within feminism are not unique to the Third Wave.<sup>24</sup> But history generally, and Second Wave history in particular, can so easily be suppressed and distorted.

Two recent wonderful books on Second Wave feminism, the feminism of my generation, provide a remedial historical account. Rachel Blau DuPlessis and Ann Snitow’s edited collection of essays, *The Feminist Memoir Project, Voices from Women’s Liberation*<sup>25</sup> and Rosalyn Baxandall and Linda Gordon’s edited collection of original documents, *Dear Sisters*,<sup>26</sup> detail the richness and diversity of Second Wave activist work. In their Introduction, Rachel Blau DuPlessis and Ann Snitow poignantly describe this process of suppression and distortion with respect to Second Wave feminism:

As we write in 1997, celebration of a feminist past is entirely out of style. Old rhetoric is like last decade’s clothes: nothing dates worse. Feminism is not only repressed as an obstreperous act by one’s parents, it is also com-

20. BAUMGARDNER & RICHARDS, *supra* note 5.

21. *See id.*

22. Anna Quindlen, *And Now, Babe Feminism*, N.Y. TIMES, Jan. 19, 1994, at A21.

23. *Id.*

24. Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing The Past Into The Future*, 2 VA. J. SOC. POL’Y & L. 1 (1994).

25. THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN’S LIBERATION (Rachel Blau DuPlessis & Ann Snitow eds., 1998) [hereinafter DUPLESSIS & SNITOW].

26. DEAR SISTERS: DISPATCHES FROM THE WOMEN’S LIBERATION MOVEMENT (Rosalyn Baxandall & Linda Gordon eds., 2000) [hereinafter BAXANDALL & GORDON].

pressed into a narrow set of gestures. Ambivalent or hostile acts of memory can give rise to caricature as feminism ages in a culture that detests age, receding fast into what Henry Louis Gates, Jr. calls a recent bygone era.<sup>27</sup>

Yet DuPlessis and Snitow do not want to extol the past, indeed they argue that extolling the past is not enough. They say, "... we want more from the past than a safe sense of its limitations. The task is to entertain doubts and develop new formulations without censoring memory or deprecating an earlier self."<sup>28</sup> This is such an important statement. The development of new feminist formulations *without censoring memory* is a challenge for all of us. We cannot move forward without understanding the strengths and limitations of the past. But it is a special task for a new generation. Rosalyn Baxandall and Linda Gordon express this idea in dedicating their book "[t]o the feminists of the future, may you learn from our achievements and our mistakes."<sup>29</sup> Critical memory of both Second Wave achievements and mistakes is necessary to the development of new feminist formulations.

#### THE BODY

- *Despite . . . [significant challenges to the concept of a singular feminine identity], there remains a common residue of meaning that seems affixed, as if by nature, to the female body. Law participates in creating that meaning.*<sup>30</sup>
- *Legal discourse . . . explains and rationalizes the [ ]meanings [of the female body] by an appeal to the "natural" differences between the sexes, differences that the rules . . . help to produce.*<sup>31</sup>

*Legal rules and discourse permit and sometimes mandate:*

- *The terrorization of the female body.*
- *The maternalization of the female body.*
- *The sexualization of the female body.*<sup>32</sup>

*Regina:* I view what the law does to women's bodies differently now that I am older. More literally, less figuratively. Whereas the postmodernists were very much taken with the idea of the body as metaphor, I find myself

27. DUPLESSIS & SNITOW, *supra* note 25, at 22.

28. *Id.*

29. BAXANDALL & GORDON, *supra* note 26.

30. Frug, *supra* note 3, at 1049.

31. *Id.*

32. *Id.* at 1049-50.

compelled to address the subject of the body as the material, concrete embodiment of the person. Legally sanctioned sexism, racism, ethnocentrism, ageism, homophobia, and religious intolerance leave their marks all over women's bodies, like a plague of poxes. The bodies of women of color especially bear evidence of a legacy of forced excessive childbirth which supported various systems of slavery whose perpetuation was dependent upon the reproduction of children. The bodies of women of color also bear evidence of their involvement in the hard labor of subsistence agriculture (which made those of their children who survived infancy—and many did not—valuable as field hands). Finally, the bodies of women of color bear evidence of the most ubiquitous form of terror women experience, the terror that facilitates the exploitation of their labor power, that is the terror of material poverty. The lupus, the diabetes, the hypertension, the heart disease, the alcoholism, the virulent cancers, and the AIDS minority women suffer from are the marks of a history of oppression and degradation inscribed on their bodies.

The law is not there for women of color. It does not adequately police the medical profession, call discriminatory employers and insurers to account, penalize polluters in the name of environmental justice, or liberate drugs developed in part with government funding from the clutches of greedy pharmaceutical companies. In this regard, unlike ten years ago, many of us no longer draw a distinction between women at home and abroad. If the law tells white, Western, and/or privileged woman that they must be weak, nurturing, and sexy, it has been telling colored, non-Western, and/or unprivileged women something different and it has taken a tremendous toll on their bodies. There is nothing natural about that.

*Liz:* Understanding the body as the concrete, material embodiment of the person is crucial. Third Wave feminism has tended to focus on sexuality, agency and pleasure without a fuller analysis of other aspects of the body, reproduction, violence, childbirth, menopause, and aging, and the way these other aspects impact on sexuality, agency and pleasure. I do think age comes in here, or at least a perspective on women's experiences of our bodies over time. The body is not just theoretical but very concrete. You experience the body differently when you are young and healthy and have a sense of omnipotence of your own life and health. The material dimensions of women's bodies, of health, of reproduction, of sexual assault, pregnancy, AIDS, menopause: these are concrete problems that women face throughout our lives. I probably didn't think about these issues in the same way when I was twenty-five. Sexuality and sexual pleasure are very important, and certainly they are not just the province of the young, but these broader concrete, material aspects of women's seem missing.

In Mary Joe's work the themes of the body had all these various forms. I think that she understood the body in all of these dimensions. Her exploration of issues of maternalization and sexualization were very developed,

particularly on issues concerning women and work, pornography and prostitution. But the terrorization aspect is what I want to talk about. In the *Manifesto*, she says “[o]ne meaning of ‘female body,’ then, is a body that is ‘in terror,’ a body that has learned to scurry, to cringe and to submit.”<sup>33</sup> This is such a vivid sentence; the words “scurry,” “cringe” and “submit” convey the experience of terror so graphically.

Terrorization was the subject of my last conversation with Mary Joe, the morning that she was killed. I was in Cambridge that academic year, visiting at Harvard Law School and teaching a course on Battered Women and the Law for the first time. We spent a lot of time together. We went to her gym that morning and we talked about many things, including the course. Students at New England School of Law had asked Mary Joe if she would be interested in teaching a course on domestic violence, and we made arrangements to talk about it at a date and time that tragically ended up being the date and time of her memorial service. This conversation about domestic violence, and this theme of terrorization, has also remained, sadly, linked in my mind to the terrible circumstances of her death. But happily, Judi Greenberg, Mary Joe’s close friend and colleague at New England School of Law, has carried on Mary Joe’s legacy and taken on the work that Mary Joe wanted to move on to, teaching a course and supervising students in work on domestic violence.<sup>34</sup>

#### THE IMPORTANCE OF LAW REFORM PROJECTS

- *[L]egal discourse should be recognized as a site of political struggle over sex differences.*<sup>35</sup>
- [tab]• [C]ontinuous interpretive struggles over the meaning of sex differences can have an impact on patriarchal legal power.*<sup>36</sup>
- *What law (at least in part) constructs, law reform projects can re-construct or alter.*<sup>37</sup>

*Liz:* In the *Manifesto*, Mary Joe is most optimistic about the potential for

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33. *Id.* at 1049-50.

34. At New England School of Law, Judi Greenberg teaches a seminar on domestic violence and supervises an externship program in which students work with legal services offices, battered women’s shelters, child advocacy organizations, and occasionally District Attorney’s offices and the courts. She has also taught a course, “Comparative Approaches to Protecting Victims of Intimate Violence: India, South Africa, Ireland and the U.S.,” in a summer law program in Ireland.

35. See Frug, *supra* note 3, at 1046.

36. *Id.*

37. *Id.* at 1048.

law reform. Much of my own work over the last decade has dealt with the impact of feminist law reform on social change. The question that I continually ask and explore in different contexts is how much reconstruction or alteration of sex differences is possible through law. If anything, experience over the last ten years has made me more skeptical about the role of law in social change, for there has been a tremendous backlash, a fierce resistance to change, and a sense in many areas of feminist lawmaking of the need to "reinvent the wheel."<sup>38</sup> Just as we think we have moved forward in one area of the law, judicial interpretation of doctrine on that front or on another front thwarts progressive development. One step forward, two steps backward is the name of the game. But law is always a mirror of social ambivalence, so it is to be expected. Ten years later, I think the reconstruction and alteration process of lawmaking is even more complex.

I have focused on this problem in the specific context of domestic violence in my book, *Battered Women and Feminist Lawmaking*.<sup>39</sup> But I think we see this in other areas of law as well. I'm particularly struck by this development in the law of sexual harassment. We have seen dramatic progress with regard to the recognition of sexual harassment as a legal wrong. Then the courts have begun to whittle away the protections, particularly on procedural issues. Recent judicial decisions have made it harder to prove sexual harassment.<sup>40</sup> There is tremendous resistance from employers and deep social ambivalence about what it is, and whether or how often it happens. Evidence of the minimization of the problem can be found both in the culture and among younger women who are just entering the work force. Some number of younger women and men in my gender classes are shocked that sexual harassment exists, while others are shocked at the pervasiveness of the sexual harassment that they have already experienced, particularly in legal workplaces.

*Regina:* The social ambivalence of which Liz speaks is as much the product of the proliferation of feminisms as it is of a generalized hostility to feminism. There are many younger women who came to feminism, not through activism, but by virtue of growing up in a time graced by the freedoms feminists past have wrought. As these younger women attempt to create a feminist identity of their own, they may be reluctant to accept without question the manifestoes of those who came before them, however much they may enjoy their fruits.

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38. See generally SCHNEIDER, *supra* note 4.

39. *Id.*

40. See *Meritor v. Vinson*, 477 U.S. 57 (1986) (recognizing legal harm of sexual harassment); *Harris v. Forklift Systems*, 510 U.S. 17 (1993) (recognizing the harm of hostile work environment claim of sexual harassment); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerin*, 524 U.S. 742 (1998) (limiting employer liability in sexual harassment cases).

Consider the case of Rebecca Walker. In the introduction to *To Be Real*, Rebecca Walker (daughter of Alice, author of *The Color Purple* and *Possessing the Secret of Joy*) reveals the misgivings she had about collecting and editing the essays included in her book. By Walker's own admission, the book is not "filled with the incisive critique of . . . patriarchy, plenty of young women from every background fighting against all manner of oppression, and inspirational rhetorical prose meant to uplift, empower, and motivate."<sup>41</sup> Rather, as Angela Davis says, *To Be Real* is "a gathering of 'introspective' voices examining their own personal histories for signs of feminist influence and evaluating the usefulness of what they identify as 'feminism.'"<sup>42</sup> This equivocal focus prompted Walker to ask the following rhetorical questions about herself:

Am I being a bad feminist by making a book that isn't about welfare reform, environmental racism, and RU486? What about the politics? What about the activism that people need to hear about? What about the expectations that this book will be an embodiment of what I seem to represent to the outside world: young feminist activism and organizing? On some level, an internal voice is still saying: how dare you make a book that is about ideas and not about problems, how dare you be a feminist in this way and not that way?<sup>43</sup>

Can we forgive her? Can we forgive Rebecca Walker for editing such a book? Can we forgive her for suggesting that feminism is victim-fixated or narrowly action-oriented?

Perhaps. At least she is being honest. Anyway, she is not a lawyer and there may be something that law reformers can learn from her ambivalent feminism.

Rebecca Walker's qualms about her book project, when viewed most generously, are implicitly addressed by Alain Locke in his essay, *The New Negro*, the first selection in the historic volume edited by Locke and bearing the same title.<sup>44</sup> *The New Negro* is considered "the definitive text" of the Harlem Renaissance.<sup>45</sup> In his essay, which was written in 1925, Locke suggests that prior to that time, "[t]he chief bond between [the American Negro had] been that of a common condition rather than a common consciousness; a common problem rather than a life in common."<sup>46</sup> But he found abundant

41. Rebecca Walker, *Being Real: An Introduction*, in *TO BE REAL*, *supra* note 5, at xxix, xxxix.

42. Angela Davis, *Afterword*, in *TO BE REAL*, *supra* note 5, at 279, 281.

43. Walker, *supra* note 5, at xxxix.

44. Alain Leroy Locke, *The New Negro*, in *THE NEW NEGRO* 3 (Alain Leroy Locke ed., with Introduction by Arnold Rampersad, 1992) (1925).

45. Arnold Rampersad, *Introduction*, in *THE NEW NEGRO*, *supra* note 44, at ix, ix.

46. Locke, *supra* note 44, at 5.

evidence of a "New Negro," however, not only "in the latest phases of social change and progress, but still more in the internal world of the Negro mind and spirit."<sup>47</sup> Capitalizing on the economic and political gains that black Americans had achieved in the post-World War I North, the artists and writers of the Harlem Renaissance embarked on a course of "self-expression," "self-determination," and "self-portraiture"<sup>48</sup> that produced an extraordinarily rich cultural movement that exemplified the intelligence, creativity, the very humanity of a whole people.

I do not mean to suggest that Rebecca Walker is part of a wave of feminist writers and cultural workers whose achievements will match those of the Harlem Renaissance, but there are parallels between our time and that. Now, like then, social problems seemed to have receded in importance, and mass protests have died down; as a result, the culture wars have heated up. The fiercest race and gender battles being fought today are occurring along the cultural front lines. Women of all colors and minorities of various colors and creeds are making strides in the worlds of music, art, drama, cinema, and literature as opposed to the social or political spheres. They are capitalizing on the material gains and social tolerance won by identity politics and struggling to find a way to combine group consciousness with self-acceptance or individuality, as well to pursue a political commitment that is more of an integral part of their everyday existences than the occasion for extraordinary sacrifices of exceptional (but fleeting) intensity or all-consuming dedication that is never to be required. The fuzzy focus of these cultural warriors may seem self-indulgent and a copout to feminist activists and Black Power militants of a bygone era, but culture is where it's at today.

Nonetheless, there are limits to how far young feminists can go in questioning or doubting the efficacy of the Second Wave's action agenda. If they think that they have a great deal of rope to play with, I suspect that they are sadly mistaken. The material conditions of women and/or minorities have not improved that much. Title VII and Title IX mean something even to young women who are not lawyers. The protections of these laws have to be defended. Indeed, there are Third Wavers who are activists in the more traditional sense, in the social and political spheres. Jennifer Baumgardner and Amy Richards, authors of *Manifesta: Young Women, Feminism and the Future*,<sup>49</sup> have much to say about activism. They say that activism requires a "clear intention, a realistic plan, and an identifiable constituency."<sup>50</sup> Among the topics that they believe merit activism are the following: the exclusion of women in the military from combat; the exclusion of gender persecution

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47. Alain Leroy Locke, *Forward*, in *THE NEW NEGRO*, *supra* note 44, at xxv.

48. *Id.*

49. BAUMGARDNER & RICHARDS, *supra* note 5.

50. *Id.* at 295.

as a basis for granting political asylum; the motion picture industry's practice of according lower ratings to films depicting female sexual pleasure as opposed to male sexual pleasure; the lack of provision of reproductive health care services for female prisoners; disparities in the reimbursement by insurance companies for female gynecological and obstetrical services as compared with urological services obtained by men; and the practice of the National Honor Society of denying membership to expectant females as opposed to expectant males.<sup>51</sup> Lawyers should have something to contribute to the debate of any one of these items.

Mary Joe admonished her readers to be cognizant of the way in which the law enters into debates over sex differences and urged us to pursue legal reforms that challenge the law's role in their construction. Feminist lawyers should not be strangers to the gender and race culture wars being fought by our younger, more equivocal sisters who may be blind to the law's complicity in their struggles. Their concerns may provide a road map as to where legal activism is needed. If their analysis is insufficiently critical, they should be called on it.

#### POLITICS AND THE ELUSIVE "WOMAN"

- *If, or when, the social construction thesis seems about to deconstruct the basic category of woman, its usefulness to feminism is problematized.*
- *How can we build a political coalition to advance the position of women in law if the subject that drives our efforts is 'indeterminate,' 'incoherent,' or 'contingent?'*<sup>52</sup>

*Liz:* To me, this last question is one of the most important underlying concerns that critics have raised about postmodernism. While postmodernism opens up the possibility of appreciating variance and difference, there is a certain necessity for "strategic essentialism" in order to facilitate political mobilization and coalition building. I suspect that herein lies one of the real dangers of Third Wave feminism. The more fractured, hybrid, perhaps postmodern dimensions of Third Wave feminism do not lend themselves to an embrace of an activist women's agenda, with a notion of a struggle for women's rights at the core. The reluctance to identify with feminism and with a notion of women's rights seems to me to limit the possibilities of activism and organizing.

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51. See *id.* at 299-302.

52. Frug, *supra* note 3, at 1051.



## FEMINIST CLEAVAGES, HEALTHY DIFFERENCES

- *Although a powerful, broad, and coherent political community is critical to feminist law reform projects, I believe it is a mistake to fear or avoid or condemn differences among feminists as we pursue these projects.*
- *Accepting . . . our differences, in my view, is a critical component of challenging the ideology of gender difference, which includes the assumption that there is a feminine essence that unalterably unites women, binding us together under the generic category 'woman.'*<sup>53</sup>

*Liz:* The dilemma that Mary Joe identifies is how to acknowledge difference without “fracturing community.” She talks about this in the *Manifesto* in a number of different legal contexts: differences among women based on race, class, ethnicity, age, and sexual orientation. She particularly focuses on this in the discussion of the antipornography campaigns, where she manages to be critical of the way in which these campaigns did “fracture community,” while also seeing how the campaign opened up new ideas.

As I began to explore these issues of Third Wave feminism as a reflection of Mary Joe’s work, I began to think of a new dimension of this issue of “fracturing community” -- namely, intergenerational differences. I was struck by the complex navigation of intergenerational differences many of these Third Wave books describe. Regina’s quote from Rebecca Walker very much sums this up. Acknowledgment of, and respect for, intergenerational differences is a critical aspect of where we are now.

*Regina:* I recently came across a case involving a black woman who was turned away from the Stadium Club, a restaurant at Yankee Stadium, because she was wearing a “tank top.”<sup>54</sup> Tank tops, thongs, and any other abbreviated attire were strictly forbidden according to the dress code printed on the back of the admission pass to the Stadium Club.<sup>55</sup> Unfortunately for the Yankees, she was not the only woman wearing a “tank top” that day; for one, her white friend was also wearing a “tank top.” Additionally, there were other white women present who were wearing skimpier tops than the

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53. Frug, *supra* note 3, at 1070.

54. Joseph v. New York Yankees Partnership, No. 00 Civ. 2275 (SHS), 2000 WL 1559019, at 1 (S.D.N.Y. Oct. 19, 2000).

55. *Id.* at 1. Shorts and t-shirts were also prohibited except during day games, while “quality SNEAKERS and JEANS” were permitted at all times. Exhibit A to Affidavit of David M. Bernstein in support of Defendant’s Motion for Judgment on the Pleadings or Summary Judgment, Joseph v. New York Yankees Partnership, No. 00 CIV. 2275 (SHS) (S.D.N.Y. Oct. 19, 2000).

black woman's.<sup>56</sup> After discussions with Stadium Club and Yankee personnel, the black woman went to her car, put on a T-shirt, and was admitted to the restaurant.<sup>57</sup> She capitulated because she wanted to make the outing the best possible one for her kids.<sup>58</sup> *Black* Mom, apple pie, and *white* baseball!

The black woman sued and defeated the Yankees' motion for summary judgment. The case was ultimately settled. Her lawyer was not at liberty to speak freely about the case; and there were many questions I could not expect him to answer, such as: When did tank tops make the transition from underwear to a garment suitable for leisure activities outside the home? How old was the plaintiff? What did she look like? How skimpy was that tank top? Doesn't she know that the sun is bad for your skin and that mosquito bites carry the threat of the West Nile virus? Whatever happened to black women's quest for respectability?

Black women's bodies are dangerous because they allegedly bespeak excessive sexuality, immodesty, and aggression. For whatever reason, they make white people feel uncomfortable. Perhaps the plaintiff was saying in essence: "What if I do? That's their problem!" Would that have been a black feminist response? I think so, but I am not sure. Black women's expressions of sexuality are so often misread and our ability to control the misreading is so very limited. Repression and suppression, however, are hardly formulas for challenging stereotypes. Still, sometimes it is hard for me to discern when young black women are being sexy in defiance of external control of their sexuality or when they are being sexy as a manifestation of their submission to the demands of a racist misogyny. Which was this?

A review of the official court record in *Joseph v.N.Y. Yankees* together with a few discrete inquiries put many of my factual concerns to rest. The events took place on a very hot day in July toward the tail end of the first game of a doubleheader.<sup>59</sup> The plaintiff got the tickets from her best friend's husband, an employee of Major League Baseball, and they included passes to the Stadium Club.<sup>60</sup> The Stadium Club is reputedly a stodgy, overpriced, pretentious place that is primarily for season-ticket holders. It was originally a white male leisure space and the practices to which Ms. Joseph was subjected may reflect vestiges of that. The dress code, which is as readily appli-

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56. *Joseph*, 2000 WL 1559019, at 1, 5.

57. *Id.* at 1.

58. Deposition of V. Whitney Joseph, July 25, 2000, at 56, *Joseph*, 2000 WL 1559019, (excerpted and attached to the Reply Affidavit of Thomas F. Wong, Jr., Defendant's Attorney).

59. Deposition of V. Whitney Joseph, at 26-31, *Joseph*, 2000 WL 1559019, (excerpted and attached as Exhibit A to the Affidavit of Aaron J. Schindel, Defendant's Attorney).

60. *Id.* at 22-23.

cable to men as women, likely originated at a time in the not so distant past when men wore coats and ties to daytime ball games.<sup>61</sup> In any event, minority attendance at professional baseball games is generally considered poor, although statistics for the Yankees are unavailable. Blacks' presence in special seating or concession areas like the Stadium Club is probably equally rare.<sup>62</sup>

There is nothing per se illegal about restaurant dress codes.<sup>63</sup> Such codes generally reflect bourgeois values regarding the maintenance of order and decorum in public places and the impact one's physical appearance can have on the good opinion, comfort, and enjoyment of others. Good taste/Tastes good? Dress codes tend to elevate the social status of a venue through an appeal to fashion snobbery or by creating a certain visual aesthetic.<sup>64</sup> Prohibiting some forms of dress may even promote civility and public peace.<sup>65</sup> Dress codes become legally problematic, however, when their enforcement becomes the opportunity for the exercise of invidious discrimination. Given that blacks are viewed as being bad for business be-

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61. See Charlie LeDuff, *Office Dress: Baseball Casual*, N.Y. TIMES, July 27, 2001, at A17 (reporting on the impact of casual dress in the office on the attire of daytime baseball game patrons).

62. Ken Shropshire, a black colleague of mine who teaches at the Wharton School and is an expert on sports law, suggested that black attendance at sporting events, especially major league baseball, is disproportionately low. As a result, gatekeepers and ticket takers may not see many blacks and may accord them the type of treatment that can flow from a lack of interaction. When he sits in the better seats at an event (i.e., on the floor or in a luxury box), Shropshire says that he on his guard in the same way that he would be if he walked into a jewelry store or was driving an expensive car and being followed by the police. E-mail from Kenneth L. Shropshire to Regina Austin (May 23, 2001) (on file with the author).

63. See *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87 (1980) (mere ejection of a patron wearing "open-toed 'dress' sandals sans socks" by a nightclub requiring "elegantly casual" dress did not support a claim for intentional infliction of emotional harm).

64. See JOANNE FINKELSTEIN, *DINING OUT: A SOCIOLOGY OF MODERN MANNERS*, 81, 87, 97 (1989) (comparing the dress requirements of a bistro mondain, a café mundane, and an ethnic restaurant). A male friend told me that he went to a restaurant that required that gentlemen wear a coat only while walking to and from their tables; they were free to remove their jackets after they were seated. The restaurant floor was in essence hyper-public while the customers' tables were quasi-private. Proper patron attire was an integral aspect of the ceremony of escorting customers to their tables.

65. For example, in *Hessians Motorcycle Club v. J.C. Flanagans*, 86 Cal. App. 4th 833, 103 Cal. Rptr.2d 552 (2001), a sports bar was found not to have violated California's public accommodations law by denying admission to anyone wearing "colors," i.e., patches indicating membership in a particular motorcycle club. The policy was intended to prevent fights between members of rival motorcycle gangs and was enforced without regard to any of the ascriptive characteristics (like sex, race or color) addressed by the law.

cause they may inject a note of tension and disharmony into a white-dominated leisure venue by their mere presence,<sup>66</sup> black restaurant patrons are very likely prime targets for biased invocation of dress codes. Indeed, the plaintiff claimed that she was not the only black person harassed that day at the Stadium Club. She spoke with a scantily-clad white female who had no trouble entering the restaurant, but was nonetheless very disturbed because her black male companion was admitted only after he borrowed a pair of socks to wear with sandals.<sup>67</sup>

Finally, the plaintiff and her friend were not technically wearing “tank tops.” A tank top is similar to a man’s undershirt; it is sleeveless and has “deep armholes shaped toward the shoulder to form narrow straps” and a scooped or U-shaped neckline.<sup>68</sup> The plaintiff, on the other hand, had on a knit top manufactured by Inc. that was cut almost like a halter at the sleeves; the neckline in front was a shallow V; and unlike a halter, the top fully covered her back except around the shoulders.<sup>69</sup> Her friend was wearing a DKNY sleeveless cable knit swallow V-neck sweater.<sup>70</sup>

Stylish young women today are wearing classic white ribbed tank tops, which they reportedly refer to as “wifebeaters.” That term is said to have “caught on less because of its crude shock value than for its jokey irony as a combination of put-down and form of appropriation.”<sup>71</sup> It supposedly calls to mind a stereotype of “lumpen brutes” like Stanley Kowalski of *A Streetcar Named Desire* and Ralph Kramden of television’s *The Honeymooners*.<sup>72</sup> For young women to wear in public the underwear of the hypermasculine, aggressive working-class male represents a turning of the tables of sorts. Their use of the term “wifebeaters” perhaps also suggests a belief in their own invulnerability (“too hip to be hurt”). Some feminists might object to

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66. See Regina Austin, “Not Just for the Fun of It”: *Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667 (1998) (describing how and why whites attempt to privatize public spaces so as to exclude blacks) [hereinafter, Austin, *Governmental Restraints on Black Leisure*]; Regina Austin, “Bad for Business”: *Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207, 230-42 (2000) (discussing the construction of blacks as bad customers in the fast food context).

67. See Deposition of V. Whitney Joseph, *supra* note 58, at 53-55.

68. See CHARLOTTE MANKEY CALASIBETTA, *FAIRCHILD’S DICTIONARY OF FASHION* 582-83 (2d rev. ed. 1998).

69. Ex. F, Reply Aff. of Thomas F. Wong, Jr., Defendant’s Attorney, *Joseph*, 2000 WL 1559019.

70. Ex. G, Reply Aff. of Thomas F. Wong, Jr., Defendant’s Attorney, *Joseph*, 2000 WL 1559019.

71. Tom Feran, *Getting the Hang of Slangy Topper*, THE PLAIN DEALER, May 6, 2001, at 1L.

72. See Elizabeth Hayt, *An Undershirt Named . . . What?*, N.Y. TIMES, Apr. 22, 2001, at 1.

the term for making light of the pain and vulnerability of battered women as well as underestimating the pervasiveness of domestic violence among young people.<sup>73</sup> But public campaigns and legal efforts, much of which are documented in Liz's excellent book on the domestic violence movement,<sup>74</sup> have made domestic violence very much a part of the public discourse and generated weapons with which to combat it. Fashion and style are tools or ammunition that facilitate the struggle. Purity of purpose and point of view cannot always be expected where culture is put to the service of a good cause.<sup>75</sup>

Feminists who prize hip hop confront somewhat the same problem in dealing with a male-dominated art form that can be ironic and playful, but that, as a matter of course, refers to women as "bitches" and "hoes" and otherwise puts them down. Liberal use of "nigger" and its variations also abound. Of course, with regard to "nigger," the hip hopsters can claim they are turning a term of derision into one of affection so as to reduce its sting and to put others on notice that blacks are on to their game. I see little of that ironic or preemptive spirit behind the derogatory references to black women in rap music.

Despite this, black feminist aficionados of hip hop defend their enthusiasm for the genre. For example, in an essay entitled, *Sexism and the Art of Feminist Hip-hop Maintenance*, Third Waver Eisa Davis asserts that the derision of women found in rap does not oppress her because she knows that it does not refer to her;<sup>76</sup> it is the product of an imaginary, reactionary performative bravado that produces lyrics that she sometimes finds humorous because of the possibility that they may be mistaken for reality.<sup>77</sup> She believes that women can resist being bound by hip-hop's sexist representations of them. She finds positive aspects in the internal debate about the sexism that is being led by strong female rap figures like Queen Latifah. As

73. See Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572, 572 (2001) (reporting that approximately twenty percent of female Massachusetts public high school students surveyed reported experiencing physical or sexual violence from dating partners); Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 C. L. REV. 423 (1994) (describing the problems incurred by teenagers involved in battering relationships, though the victims are living at home with their parents).

74. See generally SCHNEIDER, *supra* note 4.

75. See Jennifer Reed, *Roseanne: A "Killer Bitch" for Generation X*, in *THIRD WAVE AGENDA*, *supra* note 5, at 122, 124 (arguing that the second wave of feminism revealed the limits of the politics of purity and the need to negotiate the desirable counterhegemonic and the inescapable hegemonic in culture and politics).

76. Eisa Davis, *Sexism and the Art of Feminist Hip-Hop Maintenance*, in *TO BE REAL*, *supra* note 5, at 127, 133-34.

77. See *id.* at 133-34, 137-38.

Davis puts it, the female artists should be given credit for “relentlessly transform[ing] the taboo into the cool because we all privilege from the truth.”<sup>78</sup> Davis places her hopes on the capacity of women to engage in “dialogue [with hip-hop’s misogynists and nihilists] that doesn’t turn on the axis of anger, blame, or victimology.”<sup>79</sup> If hip hop is defensible, then surely “wifebeaters” is too.

Finding safety in a closet of sort, many black feminists have chosen to be silent about black women’s sexuality.<sup>80</sup> They feared that expressions of support of sexual freedom would be too easily misconstrued because of the power of stigmatizing stereotypes about black women’s sexual promiscuity.<sup>81</sup> Black feminists tended to emphasize the restrictive, repressive, and dangerous aspects of sexuality rather than its association with black women’s own pleasure and agency.<sup>82</sup>

In lieu of sexual freedom, traditional black bourgeois feminism promoted respectability. Respectability was both black women’s primary weapon against social denigration and legal discrimination, as well as their most cherished possession or prize. It is hard to imagine sexuality replacing either. But consider the views of one of the shining examples of black Third Wave feminists:

But while women today still experience sexism, we do so in markedly different ways. Many of us are empowered enough to combine our erotic power with resources that were unimaginable to our mothers—money, education, talent, drive, ambition, confidence, and the freedom to just “go for ours.”

We have the luxury of choosing both our battles and our artillery. We know that sometimes winning requires utilizing whatever confrontational measures are necessary. We’re not afraid of lawsuits, boycotts, organized protests, or giving a deserving offender a good cussing out. But we also recognize that there are times when winning requires a lighter touch. And sometimes a short skirt and a bat of the eyes is not only easier but infinitely more effective.<sup>83</sup>

I cannot imagine the impact young black feminists’ explicit quest for and

78. *Id.* at 140.

79. *Id.* at 138.

80. See Evelyn M. Hammonds, *Toward a Genealogy of Black Female Sexuality: The Problematic of Silence*, in *FEMINIST THEORY AND THE BODY* 93, 97 (Janet Price & Margrit Shildrick eds., 1999).

81. See, e.g., Lori A. Tribbett, *Saying Nothing, Talking Loud: Lil’ Kim and Foxy Brown, Caricatures of African-American Womanhood*, 10 *S. CAL. REV. L. & WOMEN’S STUD.* 167, 198 (2000) (concluding that the force of stereotypes undermines the ability of two representatives of the newer generation of female hip-hop artists to define black womanhood through reliance on erotic personas).

82. See Hammonds, *supra* note 80, at 99.

83. JOAN MORGAN, *WHEN CHICKEN-HEADS COME HOME TO ROOST: A HIP-HOP FEMINIST BREAKS IT DOWN* 221-22 (1999).

utilization of greater sexual freedom will have on critical race feminism or its law reform agenda. Perhaps black feminists will be less fixated on notions of respectability or freer to explore new formulations of the concept. Non-bourgeois black women may find that more social and material resources will be put into the defense of their sexual freedom and reproductive health. The alarming rate of AIDS and HIV among poor heterosexual black women in the United States cries out for a frontal assault on ideological and material sources of their sexual and economic disempowerment.<sup>84</sup> Economic hard times may also send the Third Wavers into retreat. Of course, uneven development means that some segments of black womanhood have yet to benefit from the formal equality and legal entitlements that are associated with the Second Wave of feminism. A renewed commitment to the old agenda will work for them. The quest for black women's full political, social and material equality such as envisioned by the Third Wavers may move the locus of activism into areas that were once considered frivolous and unimportant because of their association with bodily pleasure and agency . . . like wearing a tank top at a baseball game!

While I admire the optimism young black feminists express about their ability to put their sexual freedom on the agenda or to use their sexuality as tool in the struggle for equality, in my view, they will not be able to project a more sexualized image of themselves and be taken seriously without gaining greater control over the interpretation of their images. The power to control the interpretation depends on their effectively amassing and welding economic, social, and political capital. Black women will not know that they have arrived at the point where they can be sexy for the sake of being sexy unless they have the resources to choose to be something else instead. It is dangerous to think that cultural expression can be wholly divorced from the material and political reality. By all means be sexy, but never take your eye off the material ball.

At base, I suspect that Ms. V. Whitney Joseph was more concerned about being cool and comfortable than sexy and stylish when she wore a "tank top" to the Yankee's Stadium Club, but what if she were not. Excerpts from her deposition reveal her to be a smart, persistent, down-to-earth, courageous, and savvy advocate of equal rights. She took on a bastion of white male privilege and won. How much has not been disclosed. She claimed an entitlement to enjoy a place of leisure, pleasure, and enjoyment on an equal basis with whites, an entitlement that I have elsewhere argued is too rarely claimed and fought for.<sup>85</sup> There was nothing objectionable about the manner

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84. See Kevin Sack, *Epidemic Takes Toll on Black Women*, N.Y. TIMES, July 3, 2001, at A1.

85. See generally Austin, *Governmental Restraints on Black Leisure*, *supra* note 66 (describing the importance of black leisure and arguing that leisure restraints must be challenged in and out of courtrooms).

in which she objected to her treatment. She kept her emotional cool in circumstances in which many black women lose it (and not without justification). Though embarrassed and humiliated, Ms. Joseph moderated her tone during an encounter with a Yankee Stadium security guard; according to her:

I was determined not to fulfill any low expectations that man had of me. I did not scream, I did not shout, I did not get ugly because I knew that that would be exactly what would justify the treatment that I was receiving in his mind.

So I dug way down, found my self-reserve and used the best words from the education I've got to try to speak with that man.<sup>86</sup>

A black woman in shorts and a "tank top," she was a credit to her race and her gender. What more can we ask?

#### LET'S TALK ABOUT SEX

- *If women's oppression occurs through sex, then in order to end women's oppressions in its many manifestations the way people think and talk and act about sex must be changed.*<sup>87</sup>

*Liz:* I thought about Mary Joe recently, and the difficulty of changing the ways that people think and talk and act about sex, when I went to the Valentine's Day mega-benefit performance in Madison Square Garden of Eve Ensler's *The Vagina Monologues*. For several years now some friends and I have had season tickets for the WNBA's New York Liberty. As we would attend these games, with the Garden filled with women of every color, age and sexual orientation – all pumped up from watching women's basketball and rooting for an extraordinary group of women athletes – we would talk about how wonderful it would be if the Garden could be filled for a feminist political event.

Well this night it *was* filled with women for such an event—women thinking about sex and sexual power—thinking about their vaginas. It was V-Day!!! My friend Susan Herman and I went to the Garden with our early-twenties daughters looking forward to an intergenerational feminist evening! But it proved much more complicated than I expected. I had seen and enjoyed *The Vagina Monologues* before, and knew that it focused exclusively on women's vaginas and affirming the importance of women's sexuality, but seeing it again at the Garden in this mega-version, I was struck by the fact that the *Monologues* do not mention anything other than sexuality, such as jobs, education or health, or even the way in which women's sexuality impacts these areas. Sexiness was the answer to women's inequality;

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86. Deposition of V. Whitney Joseph, *supra* note 58, at 61.

87. Frug, *supra* note 3, at 1073.



women's freedom was the freedom to flaunt our sexuality, like the riff of Calista Flockhart, TV's *Ally McBeal*, on the freedom to wear skirts as short as she wants. There *was* the ritual of linking women's sexuality to the situation of women in countries where clitorodectomies are performed and of women under the Taliban, with Oprah Winfrey dramatically lifting the burka off a woman from Afghanistan, who entered the Garden with lights and a drum roll, after a brief rap by Oprah on global feminism. But I came away with some very uneasy feelings about the degree to which the event had to do with feminism, and so did my companions. When I read a story in *The Village Voice* a few days later, written by a skeptical commentator relating the "cuntism" of the event to ambivalence about feminism, my discomfort was reinforced.<sup>88</sup>

Last Saturday's V-Day celebration reached what you might call its climax with Glenn Close's reading of "Reclaiming Cunt." She savored the word, slipping her tongue around its letters (c as in "cute," u as in "urge") until, by its end (t as in "tangy"), she was down on her red pantsuited knees on the red stage at the center of Madison Square Garden, screaming, "Cunt! Cunt! Cunt!" at the top of her lungs. In a mass simultaneous experience, the audience of 18,000 was screaming with her. . . .

But even as "hoochie," "pooter," "twat," and "coochi snorcher" rolled off celebrity tongues and Enslar waved a vibrator at her delighted fans, another word seemed to stick in the throats of even the most vagina-loving Hollywood icons: feminist. Ask about it at the Hammerstein Ballroom gala - - which, along with the performance, raised more than \$2 million to fund antiviolence programs and more V-Day performances -- and it's as if you've defamed the clitoris or something.

"I don't know about feminist," said Isabella Rossellini. "Is this about feminism really? Violence against women is a feminist issue? I don't think it is." OK, but does she consider herself a feminist? Rossellini looked as if she were smelling something unpleasant. "Well, I don't know what you mean. I would not label tonight a feminist night; it's a women's night. I mean, there are Republican women, there are Democratic women, there are feminist women, and women who don't define themselves, they're just women against violence."

Ricki Lake . . . was similarly dodgy about the term. "I don't like labels," said Lake, adding that she does support women's rights. Marisa Tomei admitted to considering herself a feminist, though quickly pointed out that she's not sure what that is. "I always was a feminist, but without definition," said Tomei.

Even the Queen of Cunt herself wouldn't own the F-word. "I have this cli-

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88. Sharon Lerner, *Clit Club V-Day's Charismatic Cuntism Rocks the Garden*, VILLAGE VOICE, Feb. 20, 2001, at 60.

ched image of what a feminist would be, and I don't want to be that way," said Glenn Close . . . . And what way are feminists perceived exactly? "They don't like men -- you know, kind of, um, butch," said the rabbit-killer of *Fatal Attraction* fame. So feminist stays in the verbal gutter, while Close carries cunt to redemption? "That, to me, is about humanity," the actress said . . . . "It's about something that's bigger than what I always kind of thought feminism was."

Therein lies the marvel of this V-movement, which has turned the stuff of the old take-back-the-night rallies into a hot ticket. Rape, domestic violence, even homelessness, when it happens to women -- Enslar has transplanted these issues into a context that seems edgier and yet is somehow more palatable than the dread feminism. "Vaginism" doesn't get all mucked up in messy issues like abortion or unequal pay. And though it often references lesbians -- or their vaginas, anyway -- the V-movement doesn't get in the way of being attractive to men. . . .

V-day, which the program refers to as "a movement . . . a vision . . . a spirit," is about seeing sexiness as the source of women's power. . . .<sup>89</sup>

"Cuntism"--having women thinking differently, and arguably more affirmatively, about their own sexuality--doesn't change much in terms of women's power; "cuntism" is simply not the same as feminism. I do agree with Mary Joe that, in order to change the condition of women, the way women talk and think about sex and sexuality must be different. But the V-Day story resonates for me because talking about sex or sexuality does not necessarily translate into feminism. This is very tricky stuff and goes back to the way in which sexuality can be simultaneously a tool of oppression and empowerment. Many Third Wavers seem to see sex, sexuality and sexual pleasure as primary. Women's interest in sexual freedom, agency and autonomy has the potential to, but does not necessarily, translate into a broader understanding of women's experience and oppression in the world. And sex and sexuality has to be understood in a larger material context.<sup>90</sup>

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89. *Id.*

90 To be fair, V-Day event fundraising has raised nearly \$7 million for educational programs on violence against women around the globe so Enslar has certainly attempted to give this work on women's sexuality a material impact. See Cindy Richards, *Enslar Asks That We Envision World Without Rape*, WOMEN'S E-NEWS (December 3, 2001) at <http://www.womensenews.org/article.cfm/dyn/aid/741/context/archive>.

## MOVING FROM SEX! TO SEX?

- *Only when sex means more than male or female, only when the word “woman” cannot be coherently understood, will oppression by sex be fatally undermined.*<sup>91</sup>

*Regina:* Essentialism can be strategic. I don't know that we have to go the whole way in deconstructing womanhood. This may be an area where Mary Joe, the person, diverges from Mary Joe, the Manifesto writer. As hip-hop feminist Joan Morgan says in her book *When Chicken-Heads Come Home to Roost*,

Am I no longer down for the cause if I admit that while total gender equality is an interesting intellectual concept, it doesn't do a damn thing for me erotically? That, truth be told, men with too many 'feminist' sensibilities have never made my panties wet, at least not like that reformed thug nigga who can make even the most chauvinistic of 'wassup, baby' feel like a sweet, wet tongue darting in and out of my ear."<sup>92</sup>

I think Mary Joe would have loved this.

My hormones, or the lack of them, tell me that women are both biologically *and* socially constructed. In any event, neither social construction, nor biology can be the basis for vibrant politics. Feminism is, at base, a range of social practices, cultural understandings, and political approaches. Unless it proposes to be a form of fascism, feminism must socialize; it must proselytize. Women are not born feminists. Though they may be born free, over time they come to know constraint and too many of them consent to its strictures. Liberation does not come without a struggle, without crossing boundaries, without opening up possibilities that once seemed naturally foreclosed. Feminism should not be another obstacle; it should grease the path.

That said, I can see how liberating it would be if critical race theory, for example, embraced the subtlety, generosity, and mischievousness that would come with fully acknowledging and challenging the role that sexuality plays in racial subordination. It makes me sad and then furious, but mostly sad, when I hear black women accept the foolish idea that sexual liberation is about sexual orientation. They cannot see that the varieties of sexual oppressions are largely indivisible, and that racial oppressions cannot be divorced from sexual oppressions.

I have changed and matured a great deal since Mary Joe died. I marvel at how much of Mary Joe's work seems predictive of the path my thinking has followed. I understand better now that the style she exhibited in word and

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91. Frug, *supra* note 3, at 1075.

92. *See id.*

deed, and the praxis it promotes, would be beneficially applied across the range of struggles for human liberation.

*Liz:* It has been wonderful to reread the *Manifesto* and think about Mary Joe. Mary Joe's work addresses the important questions that we continue to grapple with—the role of theory, the possibility and limits of law and social change, the salience of the category “women” as the basis for political engagement. Yet rereading her work at this time, talking with Regina, and thinking about where we are today has forced me to confront my many complicated feelings about the contemporary state of feminism, shaped by my own locale, the law school.

On the one hand, there is the excitement and power of global connections, and the fact that there is a women's international human rights movement. On the other hand, I teach in law school classrooms that are filled with women, who sometimes compose more than half the class, yet so few of them understand that they would not be in law school were it not for the struggles of First and Second Wave feminists. On the one hand, there are the tremendous accomplishments directed at reducing and preventing domestic violence over the last thirty years. On the other hand, there are “wifebeater” t-shirts that legitimize and render ordinary woman-abuse although claiming to use the term subversively. On the one hand, there is the fact that courses and clinics on women's rights, domestic violence and advocacy work continue to attract an extraordinary group of smart, committed and diverse women who are desperate and hungry for this work (and for teachers and mentors who can guide them in this work) at every law school where I teach, whether Brooklyn, Harvard, or Columbia. On the other hand, it is only because of these courses that many students understand for the first time that issues of equal pay, discrimination and harassment in the workplace, and problems of work and family responsibilities continue to be material real-world problems that will affect their lives and must be fought. In effect, there is little knowledge of, and therefore little “memory” of First and Second Wave struggles. For many of these students, aspects of women's equality may have been absorbed “in the culture” in some sense. But many do not recognize or appreciate the importance of material struggles for women's equality both for themselves and for women around the globe.

Mary Joe's work focused on culture and its subversive possibilities, but it saw the material world, both the physicality of the body, and the structure of economic power, discrimination, wages, poverty, racism, economic inequality as the most potent source of feminism and the most important site of struggle.<sup>93</sup> For both Regina and I, rereading Mary Joe and reflecting on

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93. See, e.g., Mary Joe Frug, *Securing Job Equality for Women*, 59 B.U. L. REV. 55 (1979); see also Mary Joe's course materials for Women and the Law, now published as JUDITH G. GREENBERG, MARTHA L. MINOW & DOROTHY E. ROBERTS,

feminism has highlighted the importance of this material dimension and the need for this dimension to be developed in contemporary feminist struggle. As Regina eloquently puts it, "it is dangerous to think that cultural expression can be wholly divorced from material and political reality." Use of the term "wifebeater" cannot be ironic and subversive until the reality of violence against women has changed.

I too have changed since Mary Joe died. The world has changed. It has certainly dramatically changed since September 11. Engaging with the *Manifesto* has made me think more deeply about feminism today, if only because I see so much resonance of Mary Joe in what has happened. As a movement across generations, we need to "develop new formulations without censoring memory."<sup>94</sup> I hope that engaging with Mary Joe's work and thinking about these issues with Regina has made me more generous and open to the perspectives of many of the younger women that I teach and work with (who carry on her legacy, even if many of them don't know it). Remembering Mary Joe and her inimitable capacity to facilitate human and intellectual connection has made me want to forge deeper intergenerational links that are so important to our struggle.

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MARY JOE FRUG'S WOMEN AND THE LAW (2d ed. 1998)

94. DUPLESSIS & SNITOW, *supra* note 25, at 22.