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# Contradiction and Revision: Progressive Feminist Legal Scholars Respond to Mary Joe Frug

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CONTRADICTION AND REVISION: PROGRESSIVE  
FEMINIST LEGAL SCHOLARS RESPOND TO  
MARY JOE FRUG

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Liz: Let me start by saying what Mary Joe's article<sup>1</sup> means to me. The importance of Mary Joe's article, I think, is in her effort to grapple with a number of contradictions. The first level of contradiction is between the *Hogan* decision's vision of equality as sameness, which Mary Joe criticizes, and the dissatisfaction with this approach represented by Carol Gilligan's *In a Different Voice*.

The second level of contradiction is within Gilligan's work itself. Mary Joe reveals the textual basis for the conservative interpretation of Gilligan's idea of difference, and then offers an alternative, progressive reading of Gilligan. Implicit in both levels of contradiction are the conservative and progressive effects of embracing femininity as women's separate experience, or different culture. Mary Joe experiences these contradictions within herself, and changes her position as the article develops.

In writing the article, Mary Joe reveals the contradictions within her own experience of Gilligan, her thoughts about femininity, and her perspectives on liberal equality. The acceptance of contradiction, in Mary Joe's view, requires an openness to constant revision of one's own thinking.

Judi: I agree. And I want to highlight two important themes that you raise: contradiction and revision. Through her discussions of *Hogan* and Carol Gilligan's work, Mary Joe shows that the same-

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<sup>1</sup> Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, in this volume at 37.

ness-difference debate is unproductive. Mary Joe recognizes that the "sameness" approach has been crucial in ensuring that a woman's sex is not used against her. Yet, Mary Joe also concedes that Carol Gilligan's work instills an empowering gender pride in women and, I might add, occasional gender envy in men.

While both the sameness and difference approaches have benefits, each is insufficient on its own to advance the position of women. The sameness approach is limited because it measures women by a male standard and is inapplicable to situations in which women are different from men. The difference approach is limited because conservatives have found in it fodder for reinforcing debilitating stereotypes of women. For instance, conservatives have used Gilligan's idea that, for women, justice is a "web" of interconnected relationships to prove that women are born nurturers. As Mary Joe says, Gilligan does not recognize that women may feel trapped in the stickiness of "the web."

In order to move beyond the suffocating sameness-difference dichotomy, Mary Joe offers a new reading of Gilligan's work. This new reading of *In a Different Voice* focuses on Gilligan's use of women's formerly silenced voices to reveal the exclusions and omissions in the dominant discourse of moral development. These points of omission open the dominant theory to reconception. Thus, Mary Joe's use of poststructuralist theory to expose contradictions is not an abstract game, but an effort to invest feminists with a powerful tool for reconceiving the debates that ensnare them.

Martha: Let me endorse everything that you have both said and also say that I understand this piece as a pivotal point in Mary Joe's own historical journey. Mary Joe was working on an analysis of Carol Gilligan's work for five or six years. This piece represents the final iteration of that project. She presented versions of the work at different conferences and talked with different people about it. Each of the points of endorsement and criticism of Gilligan's varied positions that you both have alluded to in some sense represent Mary Joe's own intellectual journey.<sup>2</sup>

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<sup>2</sup> Mary Joe's intellectual journey is also reflected in her scholarship. Her first law review article was the classic work and family piece *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979). Mary Joe's contracts

In this final, though incomplete, version, what does Mary Joe's article represent? It seems to me Gilligan became a template for Mary Joe's own discomfort with the narrowness of many of the debates that conjoin feminism and law reform. Asking whether women should be treated as if they are the same as men or as if they are different is too limited, in her view. Mary Joe does not ignore the sameness-difference debate. Instead she says, "Look, we have to engage with it. Whether we want to or not, other people are using notions of sameness and difference to define the terms of the discussion." At the same time, Mary Joe ruptures the dichotomy. She acknowledges thereby the paradox that so much of poststructuralist analysis reveals: if you focus on the dichotomy that you think is a problem, you may be reiterating the problem by focusing on the dichotomy.

Gilligan looks to gender and the attributions of gender difference, according to Mary Joe, as a clue to the defects in the historical construction of moral development theory. To pick up on your point, Judi, Mary Joe suggests that whenever there's a discussion of gender difference, there's a clue to something wrong in the discourse; there's a clue to the patterns of power that initiate the enterprise of differentiation itself. Gilligan's work reveals the defect in the enterprise of moral development theory: Piaget and Kohlberg left women and girls out of their studies either due to lack of interest or because their presence messed up the results.

Any enterprise that results in a finding of gender difference suggests not that there are gender differences, but that the methodology of the enterprise is suspect. If you use the attributions of gender difference as a clue to reading a text, instead of using the text as a clue to gender differences, then you have a method for reformulating the enterprise. For example, in Mary Joe's

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piece, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985), marked a shift to a deliberately self-conscious method and concern for the relationship between readers and authors with their multiplicity of perspectives. Next, Mary Joe produced her post-modernism manifesto, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992); her article on the Sears case, *Sexuality Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. (forthcoming 1992); and her article on impossibility doctrine, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992), each of which work through the possibilities of postmodernism for feminism and for legal strategies.

analysis, assertions of gender difference in a contracts casebook are clues that teaching materials historically left women out or presented them as stereotypes. The same methodology applied to the college admissions or hiring process yields a justification for affirmative action. If you have a selection process that produces an all white-male result, you could say, "Well, now we've established that there are race and gender differences, using our neutral criteria." On the other hand, you could say the result demonstrates not inherent differences but a problem with the selection criteria. If you start with the assumption that in fact men and women, people of color and whites, are all eligible for society's opportunities and that talents are distributed well across the differences, there's something wrong with an enterprise that doesn't produce something resembling a proportional result.

Judi: Mary Joe's critique of the dominant power structure, or the enterprise, as you say, is not just a demand for participation. The claim isn't that diversity on its own would change the power structure. For example, Mary Joe begins to demand that Justice O'Connor represent her as a woman on the Supreme Court, but then abandons the demand because of its essentialist assumptions. Instead, Mary Joe suggests that the dichotomization of gender misrepresents the complexities of identity. Gender is a construct. She complicates our ideas about gender identity by noting her preferences for the decision of the male dissenters in *Hogan*.

Liz: One thing that's very interesting to me is whether or not the alternative Mary Joe offers is largely methodological or procedural, as opposed to substantive (although as a teacher of Civil Procedure I don't want to suggest that procedure and substance are necessarily opposite, to the contrary, procedure and substance are deeply linked). Postmodernism could be described as a primarily methodological commitment to revealing a multiplicity of meanings and a commitment to a process of reading for internal contradictions in texts.

Now, there is an interesting back and forth in Mary Joe's article between her commitment to methodology and her commitment to substantive issues. On the one hand, Mary Joe is interested in the reader's perspective and in developing a method for finding

“clues” to inequality in the structure of “neutral” texts. On the other hand, Mary Joe is very clear in the article about the substantive issues that she wants challenged, for example, the way in which the sameness-difference dichotomy has been used to disadvantage women in no-fault divorce, and the way in which the inattention to male fertility issues has shaped the debate about reproductive hazards in the workplace.

Mary Joe uses a process of revision and questioning, then, to come to terms with issues with which she is deeply concerned. However, the application of this process of revision to these larger substantive themes is, perhaps, the area of Mary Joe’s work that is least developed. If we began questioning substantive issues we felt deeply committed to, where would we take that?

Judi: Before we go on, I want to come back to the question of whether postmodern methodology is procedural or substantive. Mary Joe’s methodology, employing gender differences as a key to understanding the text, enables her to uncover a new substantive reading of Gilligan. Her methodology can also be called on to deconstruct the procedure/substance dichotomy. I think the substantive possibilities of postmodernism were important to her.

Martha: One of the portions of this article that struck me very powerfully is where Mary Joe describes quite candidly a feminist dismissal of Gilligan under the epithet “crude Gilliganism.” She has this wonderful sentence: “Although in my circle the reductive polarization of Gilligan’s argument is almost always drowned by the epithet ‘crude Gilliganism,’ our ritualistic denunciations cause me to suspect the dangers posed by conservative readings may be masked for feminists by our teasing, know-it-all dismissals and also in some cases by our desire to avoid examining too closely the question of our own feminine identities.” I want to have a little meditation on this sentence because I think that it is powerful, evocative, and unfortunately painfully true. It also illuminates the discussion that you both have just started on procedure versus substance and the politics of postmodernism.

The rereading of Gilligan that Mary Joe offers is, very simply put, that by including girls and women in a study of moral reasoning Gilligan found a different pattern of thought that has been given the name the “care perspective.” Gilligan contrasts the

"care perspective," which she imagines as a web, with the hierarchical "rights perspective," represented by a ladder. I think that it is absolutely clear in Gilligan's own work that she thinks males as well as females have access to this "care perspective." If you take that seriously, then instead of the one scale of moral development posited by Kohlberg and Piaget, there are different, interactive axes of development. Not only does Mary Joe demonstrate the complexity of Gilligan's idea of moral development, she demonstrates the internal contradictions in Gilligan's text. She furnishes ample evidence from the text for both conservative and progressive readings.

It's at that point that I personally get very worried. Sometimes it seems to me that the embrace of contradiction may lead to paralysis. But I am then taken aback by the particular sentence of Mary Joe's that I read a moment ago. It's not as though the people who try to shield themselves from complexity and from ambiguity are so much better off when it comes to political mobilization or when it comes to the search for truth. When we deny the complexity of issues, we deny complexity and diversity within the group we want to mobilize. Mary Joe challenges not only readers of texts, but people interested in social change.

Liz: I strongly agree with what Martha has said. I want to emphasize that the acknowledgment of complexity and, simultaneously, of our need to avoid being paralyzed by complexity, is fundamental to the development of feminist theory and to legal theory generally.

One aspect of complexity is the self-reflective nature of Mary Joe's article. In fact, her interest and commitment to a postmodern methodology and her interest in the contributions that postmodernism makes to feminist theory has a great deal to do with the natural self-reflectiveness evident in Mary Joe's writing and in her constant effort to challenge her own assumptions. Her capacity to refashion herself, her commitment to change, to revision, to openness, was just extraordinary. Part of what we have seen as the enormous outpouring of mourning, and the energy that people have devoted to her work in response to her loss, is attributable to the unique role that Mary Joe played, both in personal interaction and in her work, in challenging many people

to get beyond their automatic assumptions and their automatic frameworks.

For instance, I believe that the sentence Martha read is central to the article and Mary Joe's work. I loved the phrase "our teasing, know-it-all dismissals" the first time I read it, and thought: there are other things in Mary Joe's writing that show her awareness of our tendency to categorize, but there's nothing that says it so clearly and so sharply. Mary Joe challenges us to share her rejection of categorical, simplistic, dichotomized tendencies. Feminist theory has not been immune to these tendencies. Mary Joe urges us to talk honestly about points of commonality and difference, and to develop political commitment without simplification.

Judi: I absolutely agree that the phrase "our teasing, know-it-all dismissals" shows Mary Joe's openness to other ideas, even ideas that might have been anathema to people who formed her "circle."

Mary Joe says that our desire not to look at "crude Gilliganism" masks our desire to avoid examining our feminine identities. When she discusses *Hogan*, Mary Joe looks anxiously for a feminine identity in Justice O'Connor's voice. She doesn't find a feminine voice, but the question is, what would it have sounded like? What did she anticipate finding? Or hope to find?

We have identified Mary Joe's frustration with the constraint of "crude Gilliganism," but what I find so important is Mary Joe's use of postmodernism to liberate herself from this constraint. Justice O'Connor's voice really interested Mary Joe because Justice O'Connor herself broke the limits of that crude image of femininity. So, in uncovering Justice O'Connor's experience as a woman, Mary Joe asked questions of her such as: What was her experience in the law firm? How did she react when no one offered her a job when she graduated from law school? Mary Joe wanted to understand Justice O'Connor's voice in context, not in the abstract.

Liz: One thing I want to add to that, Judi, is that all of us, including Mary Joe, struggle with Gilligan's appeal to essential femininity. That appeal is not something to minimize. After using *In a Different Voice* in teaching gender discrimination for a num-

ber of years now, I find it an extremely useful vehicle for exploring notions of women's different experience. Reading Gilligan for many students is an extremely powerful affirmation of a crudely essentialistic but nonetheless recognizable vision of women's experience. When students read Gilligan, they respond to it in an emotional, gut manner that is important to them psychologically.

Martha: My mother-in-law couldn't put it down. She said that it explained to her so much she knew from her own life.

Judi: Although one of the things that Mary Joe notes as a political danger of Gilligan's work is that it valorizes a white middle-class vision of femininity. I also think Mary Joe would have found danger in the seductiveness of Gilligan's work exactly because of its propensity to reinforce the traditional image of women.

Liz: Mary Joe's characterization of Gilligan's web as a spider web is particularly useful because I have found that, in years of working with Gilligan, in conversations and classes, Gilligan's web imagery has always had great appeal. Mary Joe's vision of the spider web as a trap; the sticky, yucky dimensions of it, is brilliant. The web expresses the contradiction in our yearning for something that both connects us to each other and traps us. The spider web is an image of death.

You know, I was struck when I read the part about Justice O'Connor because it reminded me of the contradictory responses we had many years ago when she was appointed to the Supreme Court. We yearned for a woman Justice in the essentialist hope that that woman would bring a unique set of perceptions to her work on the Court. We hoped that Justice O'Connor would not disappoint us, and we searched her prior opinions for some sign of her experience as a woman; for a "different voice." Given Justice O'Connor's politics and what she'd done up to the time of her appointment, that hope was not realistic.

Martha: I recall a meeting with a group of women judges during which Gilligan's theories were presented. All the women judges were up in arms. They were just outraged. In talking with several women judges I heard them say essentially, "You have no idea.

We've struggled our whole lives to be taken seriously as persons, as lawyers, and now we have you young whippersnapper law professors telling us that we're different. That's just the idea people used to impede our success in the past." Let's locate this view in history. That sameness strategy was crucial to women seeking equal rights in the 1960s and 1970s. Then, as Mary Joe's paper says quite well, there was a coincidence in the timing of the publication of Gilligan's book and the recognition among many feminist litigators that the sameness strategy was not achieving a revision of the world. Gilligan's book appealed both to those who had never been interested in claiming women were the same as men and those who saw the theory of difference as a new strategy for empowering women.

Judi: Certainly Mary Joe shows that Suzanna Sherry's attempt to find Justice O'Connor's voice as a woman is a false victory. Mary Joe cites various cases demonstrating that the inclusionary aspects of Justice O'Connor's communitarianism require the exclusion of groups, such as homosexuals, that she chooses not to admit to the community. If the "different voice" described by Gilligan is inclusionary, then it's not Justice O'Connor's voice.

Liz: Mary Joe's decision to use the term "feminine," sometimes in quotes, but not in quotes consistently throughout the piece, reflects the conflicting responses she felt toward the idea of femininity. In this article, Mary Joe rejects femininity, or at least identifies the artifice in the concept and the social construction of femininity. I think there is a fundamental contradiction in the acknowledgment of a desire for O'Connor to articulate a feminine voice and the struggle over what the social construct "femininity" means.

Martha: One thing we could do is talk briefly about *Hogan*, since it provides one element of the article that we haven't discussed. One issue implicit in Mary Joe's discussion of *Hogan* is whether there is a justifiable defense of schools that are segregated by race or gender where the school is for the group that has been excluded, historically, from other schools. Mary Joe identified the defense of women's schools as an issue that was neglected by Justice O'Connor and recognized by the dissenters. Yet Mary

Joe didn't like the dissenter's way of justifying segregated schools either. Is there another way of justifying all-female or all-black schools? This question speaks, for example, to political strategies related to the Detroit effort to have an all-black-male public high school.<sup>3</sup>

Judi: I think that Mary Joe is disappointed by how little the issue of single-sex education surfaces in *Hogan*. As a graduate of Wellesley College, this issue may have been particularly important to Mary Joe. She certainly would have been the first to recognize that her experiences there give her a particular perspective on women's schools.

Another interesting aspect of Mary Joe's discussion of *Hogan* is that she finds to her surprise the rudiments of a feminine voice in the male dissenters' opinion. This discovery shores up Mary Joe's non-essentialistic understanding of gender.

Martha: You know, I'm just making this up as I speak, but I wonder if the method of this paper offers a way to think about the Detroit proposal. Let me just try it. If there's an argument for race segregation and sex segregation in public schooling, this paper would suggest that we shouldn't get into a big discussion about whether people are really different and would different school programs be better. We should instead ask, "How does the imprint of a legacy of sex and race dichotomies tell us something about what's wrong in the whole construction of the enterprise of schooling, the allocation of resources to schooling, and so forth?" Is that a way that this paper might speak? Recently, I have been persuaded by those who say that a plan like Detroit's is writing off black women.

Liz: I agree, although I have changed my opinion on the issue of single-sex education. I use *Hogan* when I teach to talk about the values of single-sex education, which then leads to a discussion of Gilligan. The issue of sex-segregated education is obviously linked to the issue of race-segregated education. Our

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<sup>3</sup> See, e.g., *Shawn Garrett v. Bd. of Educ. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991); Ron Russell, *1,200 Want In At 3 All-Male Academies*, THE DETROIT NEWS, June 25, 1991, at 1A; Editorial, *Male Academy*, THE DETROIT NEWS, Feb. 2, 1991, at 8A.

reactions to sex-segregation and race-segregation show both a desire for and a recognition of the need for specificity. Segregated institutions can have an impact that is empowering, by creating a liberated zone and space for a particular kind of growth. At the same time, we reject the notion of segregation. For example, Martha pointed out that the Detroit school plan to segregate black men leaves out women of color.

Martha: There's an intriguing phrase in Mary Joe's piece that she doesn't develop: the social control dimension of Justice O'Connor's opinions, not just in *Hogan*, but also *Hardwick*. When the distinctions we have been discussing are used to serve the interests of those in power, we should take it as a warning.

Liz: On the other hand, I think it is very hard to give up our yearning for difference, a yearning for group identity on the basis of group characteristics, narrow and limited though they may be.

I see yearning for identity in so many things. I see it in the Detroit debate. I see it in the arguments about sex-segregated colleges. Gilligan brings those issues to the surface, but they have been part of our struggle in many different contexts for a very long time. We can't ignore the desire for identity that these debates reflect: the deep, underlying, human desire for affirmation of identity. One of the strengths of Mary Joe's article is that she acknowledges that yearning for identity at the same time that she rejects any simple dichotomy as a way of resolving it.

Judi: Mary Joe recognizes the irony of simultaneously trying to fight prescribed gender norms and having to use the language of gender to break out of them. I agree with Liz that Mary Joe understood the power of group identities and the politics of group identities. But Mary Joe was very self-conscious about not using essentialist forms of identity politics. That tactic would have been simply too exclusionary, too restrictive.

Martha: I think that's right, and if I have a worry about this enterprise it's that it is scary and difficult. At times I want something that can go on a bumper sticker. I want a banner. And this is not that. This problematizes (which is itself too complicated a word) every word.

Judi: "Question Authority"?

Martha: That *is* a bumper sticker. Actually, I tend to give as baby gifts T-shirts that say "Question Authority." I've been told that's not a very nice thing to do to parents.

Liz: I was just going to identify as the parent in that context. I have a divided consciousness here.

Martha: I'm very taken with this new book by Tom Grey, our friend at Stanford.<sup>4</sup> He has argued that Wallace Stevens, the poet, was trying in his poetry to shift people's aesthetic sensibility from the desire for romantic Victorian images that are clear and have representational references to an acceptance and indeed an appreciation of complexity and ambiguity and difficulty. Mary Joe's work is insisting on complexity, contingency, and constant revision. I admire it and yet I worry because I think that this moment of economic crisis and international instability is the moment when someone like David Duke appears. And David Duke has slogans. David Duke says, "I have answers." I worry about failure on our part to respond to people's need for answers.

Liz: I think there are two important dimensions to what you're saying, Martha. One dimension is the need to accept long-term struggle. The recognition of complexity does not have to be paralyzing. Complexity doesn't mean that we can't adopt strategies at particular historical times, but that we understand the contingent nature of those strategies, and the degree to which strategies chosen at particular times will necessarily have to undergo revision. We need the maturity, tolerance for instability, and tolerance for complexity that we, as feminists and social activists, have not always had.

On the other hand, our desire for slogans shows a desire for images that can easily be translated by the mass of people on a grassroots level. We want slogans with a simple message to combat the David Duke phenomenon and the rise of racial and ethnic hatred. We see, for example, the appeal of a simple idea, such

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<sup>4</sup> THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991).

as national health insurance, in the Harris Wofford Senate victory against Richard Thornburgh in Pennsylvania.<sup>5</sup> But learning to speak more directly to the needs of people and making strategic choices about how to get our message across does not necessarily conflict with recognition of the complexity of issues in the long-term, theoretical debate.

Judi: The problem of slogans is the dilemma of difference: slogans can't capture complexity in a way that's useful. Eventually, they come around and hit us on the back. Because we have a variety of constituencies, we can't envision the public as "a public" having identical interests, needs, and understandings. Too easily, slogans can simply reinforce the views of a dominant group.

But slogans are also fun and funny. Maybe there's some critical political potential in their irony. Mary Joe had a sticker on her bulletin board depicting a child's drawing of a skirted school girl, white with black braids and made-up red lips. It read: "Girls are Super! Girls are Terrific! Boys Stink!" It's funny in part because of its expansive gender claims. These gender claims immediately undercut themselves—they're too preposterous. The slogan simultaneously asserts gender identity and questions it.

Martha: Actually, my favorite slogan is the button that says, "Wearing buttons is not enough." And I think in many ways that Mary Joe's article is saying the same thing. It's saying, "A different voice is not enough. Asserting it is not enough." We have to have question marks in each of our enterprises so that contingency and attention to context, as Judi just mentioned, become part of the process of change, not something that we accidentally find, time after time.

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<sup>5</sup> See, e.g., Richard L. Berke, *The 1991 Election: The Winner Man in the News: Harris Llewellyn Wofford Jr., Backstage No Longer*, N.Y. TIMES, Nov. 7, 1991, at 1A.

