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Why Feminist Legal Theory Still Needs Mary Joe Frug: Thoughts on Conflicts in Feminism

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MARY JOE FRUG MEMORIAL SYMPOSIUM EXTENSION

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Mary Joe Frug was murdered in Cambridge, Massachusetts in 1991, more than twenty-five years ago. Some of us who were close to Mary Joe, or whose lives and/or work have been influenced by Mary Joe, were invited to contribute the *New England Law Review's* Memorial Symposium on the twenty-fifth anniversary of her tragic death. The first issue of this Symposium has already been published.[1] Mary Joe was a dear friend of mine, and I have written several previous articles, both on my own and with others, that have explored her contributions to feminist legal theory and practice in a number of different ways.[2] The last of these efforts was on the twelfth anniversary of her death.[3]

Today, twenty-five years after her death, I see even more of a need for the integration of Mary Joe's perspectives into ongoing work on feminist legal theory and practice. We are in the midst of a very fragmented time,

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[1] Symposium, *Mary Joe Frug Memorial Symposium*, 50 NEW ENG. L. REV. 269–318 (2016).

[2] Elizabeth M. Schneider, *Violence Against Women and Legal Education: An Essay for Mary Joe Frug*, 36 NEW. ENG. L. REV. 843 (1991–92); Judi Greenberg, Martha Minow & Elizabeth M. Schneider, *Contradiction and Revision: Progressive Feminist Legal Scholars Respond to Mary Joe Frug*, 15 HARV. WOMEN'S L.J. 65 (1992) [hereinafter Greenberg, Minow & Schneider, *Contradiction and Revision*]; Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1 (2001); Regina Austin & Elizabeth M. Schneider, *Musings on the Issues of the Day, Inspired by the Memory of Mary Joe Frug*, 16 COLUM. J. GENDER & L. 660 (2003) [hereinafter Austin & Schneider, *Musings on the Issues of the Day*].

[3] Austin & Schneider, *Musings on the Issues of the Day*, *supra* note 2.

where there seems to be little appreciation of, and sensitivity to, the history of feminist legal theory and practice, and there has been considerable scholarly and activist dispute. Recent attention to the scourge of sexual assault on campuses has led to spirited debates about the limits of Title IX remedies for educational institutions and whether criminal prosecution should ever be used in these contexts.[4] Feminists who accomplished major law reforms on domestic violence and international human rights are called "governance feminists" by some as a term of derision.[5] There is controversy about "slut shaming," trafficking, and what has been called "carceral feminism."[6] Hillary Clinton's lost race to be the first woman President of the United States has raised new questions about the meaning of feminism, especially in the face of Donald Trump's explicit and extreme misogyny, and sexist and racist pandering.

In this brief essay, I want to pick up on themes touched on by Martha Minow and Laura Rosenbury in their contributions to the first symposium volume.[7] Like Martha Minow, in many situations, I am "continually re-thinking what Mary Joe Frug (would) do" and what she would think.[8] One of the areas in which Mary Joe would have a lot to say is how to think about conflicts in feminism. She was a person who had the intellectual inclination, the emotional capacity, and the desire for engagement with people to consider a wide range of perspectives. She also had the rare ability to do this in a non-judgmental way. I hope this essay will assist feminist legal scholars to think about how to approach tensions and disagreements concerning feminist legal perspectives differently.

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[4] *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016); Symposium, *Sexual Assault on Campus*, 64 KAN. L. REV. 861 (2016); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881 (2016); Susan Frelich Appleton & Susan Ekberg Stiritz, *The Joy of Sex Bureaucracy*, 7 CAL. L. REV. ONLINE 49 (2016); Nancy Gertner, *Complicated Process*, 125 YALE L.J. F. 442 (2016).

[5] *See* Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 336 (2006).

[6] *See* Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights and Freedom in Antitrafficking Campaigns*, 36 SIGNS J. WOMEN IN CULTURE & SOC'Y 45, 47 (2010); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1462 (2014).

[7] *See generally* Martha Minow, *Continually Re-Thinking: What Would Mary Joe Frug Do? (A Preface to Symposium Discussions)*, 50 NEW ENG. L. REV. 269 (2016); Laura A. Rosenbury, *Channeling Mary Joe Frug*, 50 NEW ENG. L. REV. 305 (2016).

[8] *See generally* Minow, *supra* note 7.

I. Dimensions of Mary Joe Frug's Feminism

Mary Joe called herself a post-modernist but her approach had many different dimensions. She was not simple and reflexive. Both Minow and Rosenbury highlight the flexibility of her thinking and her constant questioning and re-questioning of her own views. Martha Minow identifies several aspects of Mary Joe's thinking: she "introduced, elaborated, or demonstrated a range of strategies and tactics" in every situation, and saw "the danger of turning any form of critical analysis into a formula or mechanical application . . . ."[9] There was no freezing of one single approach; no rigidity. Laura Rosenbury emphasizes the complex dimensions of Mary Joe's attitude toward law: she saw law as not simply a tool of repression or liberation. Law could also play a constructive force, and law reform strategies were important to her in concrete settings.

Mary Joe focused on specifics, such as: a particular doctrinal issue, the contested interpretation of a particular legal strategy. Contingency and context were both central to her approach to law.[10] An article discussing Mary Joe's work that Martha Minow, Judith Greenberg, and I wrote was titled *Contradiction and Revision* to call attention to these dimensions of Mary Joe's thinking.[11]

II. Current Disagreements Among Feminists

There is a long history to conflicts in feminism. The "first wave" of the feminist movement in the nineteenth century was filled with strife.[12] A more recent example that was particularly important—and has been widely chronicled—was the so-called "equal treatment" or "special treatment" struggle over pregnancy discrimination in the 1980s with the *California Fed. S. & L. v. Guerra* case in the United States Supreme Court.[13] There are many other examples of these conflicts. But, increasingly, feminist legal views tend toward the extreme, and are either-or, black or white. Some gray, but perhaps not enough.

There are several recent areas that deserve mention. Throughout the range of issues in recent feminist legal theory, one immediately stands out:

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[9] *Id.* at 271.

[10] *See* Laura A. Rosenbury, *Postmodern Feminist Legal Theory: A Contingent, Contextual Account, in* FEMINIST LEGAL THEORY IN THE UNITED STATES AND ASIA: A DIALOGUE (Cynthia Grant Bowman, ed., 2016 Forthcoming).

[11] Greenberg, Minow & Schneider, *Contradiction and Revision, supra* note 2.

[12] *See* KATHARINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 11–21 (2013).

[13] *See* Stephanie M. Wildman, *Pregnant and Working; The Story of California Federal Savings & Loan Association v. Guerra, in* WOMEN AND THE LAW STORIES 253 (Elizabeth M. Schneider & Stephanie M. Wildman eds. 2011); California Fed. S. & L. v. Guerra, 479 U.S. 272 (1987).

claims of too much criminalization and victimization in feminism. "Carceral feminism" is a term used by critics to argue that feminist legal theory has an emphasis on criminal sanctions at the expense of other approaches and/or remedies. The debates concerning sexual assault on campus, Title IX, and criminal sanctions are one example of alleged "carceral feminism." Everything is criticized. Any use of a criminal sanction is part of the "carceral state," and Title IX implementation efforts constitute "sex bureaucracy." All the reforms that have been developed are wrong and should be junked. Similarly, trafficking becomes a struggle between rescue and sexual agency. "Slut-shaming" is a rejection of sexual agency. All criminal sanctions are wrong.

Then we have had the reaction to the perceived prevalence of "dominance feminism" to "take a break from feminism." Feminism is seen as inherently binary—bad and constraining. These efforts show little appreciation of many other feminist legal approaches. There were no other possibilities but to leave it and walk away? And when feminists make reforms and "work with the state" in any way, this is "governance feminism"—bad. Any concrete accomplishments of feminist reform efforts are seen as bad.

There is not much gray here. Yet there should be. We are lawyers, not just academics. Part of our task as law professors is to try to grapple with real-life problems and help students learn to do this. Our scholarship, teaching, and activism should be part of this process. We cannot just criticize without offering ways to make things better. Yes, relying on criminal sanctions exclusively is problematic. Yes, there has been a tendency in much law reform work to do that. Yes, Title IX implementation has problems. Yes, "dominance feminism" has serious limitations. Yes, legal reforms can be limited, and "governance feminism" can in some contexts point out how dimensions of feminism may suppress other points of view that are useful. But law often has to work with the state, and we can't hide from that.

III. What Mary Joe Contributes

Variation is good; disagreement is healthy. Mary Joe looked at feminist legal dilemmas in particular contexts; nuance was key, and her views were not totalistic. She vigorously rejected gender stereotypes, including the stereotype of victim. Constant re-thinking, not rigidity, was the name of the game. Also, flexibility over time.

Mary Joe saw the complexity of legal feminism, depth of the issues, variety of perspectives and the contributions of postmodernism—but variation and context did not affect her commitment to legal reform. What does it mean to constantly question? You might be wrong. Or this view that you are expressing now might be wrong or you might want to revise it

later in light of new information. Maybe you will have a different view later. We need to be open to other perspectives and to rethinking and revising our own approaches. All of us make mistakes. We cannot always anticipate how a reform or struggle in theory will play out in practice. We should have a historical perspective, a long view of feminist legal struggle, and we should be learning from history. Many aspects of the dilemmas we are seeing now may have happened in some form before.

Mary Joe was post-modern in her intellectual method and process of analysis, but she was open to legal reforms in result. And she knew that legal reforms were never perfect. She embraced and recognized contradiction and was always open to revision.

I think Mary Joe would have liked the idea of "uncomfortable conversations," a format that Martha Fineman developed many years ago for some of her Feminism and Legal Theory Conferences, and that still continues today.[14] It is an effort to bring people together who might disagree and feel uncomfortable talking with each other to explore their differences. It is important to be able to talk, process ideas and strategies, and debate them together. There is a need to develop new and innovative approaches.

We need feminist legal thinking that is both deep and nimble, but also generous. We need to acknowledge other work and other perspectives and the history that has come before. We need to be able to see how contemporary struggles can contain the seeds of old ones and replicate the past. Not blaming and pointing the finger at others, but introspective, thoughtful, and collaborative. This does not mean that we all have to, or will, agree, but that we can point out different perspectives with respect and appreciation. "Here is why I think the approach that I am offering is better, although I can appreciate the value of a different view." The development of feminist legal approaches that both recognize history but move us forward in new ways is so important because crises and problems will be emerging every day. The daily barrage of shocking issues concerning feminism that we have been experiencing with such intensity in this election cycle shows that so clearly. And now, in January 2017, we need all our allies to do the moving forward together.

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[14] Holly Cline, *A Global "Uncomfortable Conversation": Professor Martha A. Fineman Develops a Paradigm*, EMORY LAWYER 28–30 (Summer 2012).

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