

# NEW ENGLAND LAW REVIEW

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# Channeling Mary Joe Frug

LAURA A. ROSENBURY\*

*How does law participate in the construction of gender? How should law participate in the construction of gender? Who wins and who loses?*

These three questions have structured my teaching and scholarship for over a decade. Mary Joe Frug's work inspired the questions, and her work shapes my attempts to answer them. Indeed, I often find myself having imaginary dialogues with Frug, channeling her likely responses to recently published work and longing for her interventions.

I am therefore honored to be included in this celebration of Frug's life and work. This Essay first describes my path to Frug, detailing the role of her murder in my awakening feminist consciousness. Parts II and III then analyze the role of her work in my teaching and scholarship. Finally, in Part IV, I offer some brief concluding thoughts about the ways Frug's approach to feminism has influenced my emerging understandings of gender and leadership in my first year as a law school dean.

## I. From Protest to Theory

Looking back, I can best explain Frug's role in my feminist legal analysis by emphasizing timing, proximity, and resonance. I never had the opportunity to speak, meet, or otherwise correspond with Frug before she was murdered in April 1991, while walking down a Cambridge, Massachusetts street.<sup>1</sup> Indeed, I had never even read her work. As a junior at Harvard, I was still devouring the basics of the women's studies curriculum. I had just discovered feminist legal theory, but my introduction was limited to the work of Catharine MacKinnon and Robin West.<sup>2</sup>

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<sup>1</sup> See, e.g., *Murder Jolts Haven for Elite in Boston Area*, N.Y. TIMES (Apr. 9, 1991), available at <http://www.nytimes.com/1991/04/09/us/murder-jolts-haven-for-elite-in-boston-area.html>.

<sup>2</sup> At the time, my exposure was limited to chapters of MacKinnon's book *Feminism Unmodified* and West's powerful article in the *Wisconsin Women's Law Review*, both published

Frug's name entered my world when news of her murder spread across campus, prompting rallies on the steps of Widener Library, other teach-ins about violence against women, and a moment of silence at our annual "Take Back the Night March." Students and professors repeatedly invoked Frug's name as they decried the traditional tools of patriarchy, including the tool of brutal physical violence.<sup>3</sup> Interestingly, in my recollection, law was rarely included among those tools. Instead, law was framed as a tool of liberation, to be called upon to end the violence. Legally mandated patriarchy was a relic of the past.

I finally read Frug's *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*<sup>4</sup> in the fall of 1991 at the direction of my senior thesis advisor, Marjorie Garber. I was inspired by Frug's analysis even though I had never sat in a law school class and had no sense of the role casebooks played in those classes. Indeed, I had no idea what lawyers actually did other than what I had seen on TV, with my most recent exposure being the hearings considering Clarence Thomas's nomination to the Supreme Court. Despite my outsider status, or maybe because of it, *Re-Reading Contracts* made me realize that law's role in reinforcing gender hierarchy was far from over. Indeed, law's perpetuation of patriarchy was more insidious than the equal protection victories of the 1970s suggested,<sup>5</sup> going beyond overt state action to the rules that shaped seemingly private contractual agreements.

The next semester, my final semester of college, I enrolled in an undergraduate course on Women and Notions of Property, taught by Patricia Williams, who was visiting from Columbia Law School. The course brilliantly wove together case law with the historical and literary analysis I had come to expect from a women's studies course. Even though I had

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in 1987. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L. J.* 81 (1987).

<sup>3</sup> The same week that Frug was murdered, a woman was raped in her home just blocks from the Frug crime scene. See Ira E. Stoll, *Crime Wave*, *HARV. CRIMSON* (Apr. 12, 1991), available at <http://www.thecrimson.com/article/1991/4/12/crime-wave-pwithin-one-week-two/?page=1>.

<sup>4</sup> Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *AM. U. L. REV.* 1065 (1985).

<sup>5</sup> For a general overview of those cases, see CYNTHIA GRANT BOWMAN, LAURA A. ROSENBURY, DEBORAH TUERKHEIMER & KIMBERLY A. YURACKO, *FEMINIST JURISPRUDENCE: CASES & MATERIALS* 25–45 (4th ed. 2011); FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* (2009). I had been exposed to the cases in 1991 when I took a sociology course on Women and Law taught by Lenore Weitzman. My teaching assistant for the course, Harvard Law student Andrea Kramer, who is now the Chief of the Civil Rights Division of the Massachusetts Attorney General, helped me understand the doctrinal backdrop of those cases and the progress they represented.

previously read Foucault,<sup>6</sup> it was not until this class that I truly grasped the nuanced ways that law was not a self-contained system, but rather intersected with other social forces to regulate behavior and maintain power and privilege.

One day in April 1992, Professor Williams walked into class, began to lecture, and then stopped. She put aside the reading for the day and began to talk about something that had recently happened at the *Harvard Law Review*. As with law school casebooks, I really did not understand what a law review was, other than one at American University had published *Re-Reading Contracts*. But the emotion in Professor Williams's voice—her frustration, her anger, and then her anguish and tears—helped me through the confusion.

Professor Williams said that Frug had been writing an article when she died. The *Harvard Law Review* agreed to publish it in its unfinished state, with the title *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*.<sup>7</sup> Apparently that decision was controversial. Soon after Frug's article was published, some law review editors also published a parody of the article, with the title "He-Manifesto of Post-Mortem Legal Feminism" and a byline of "Mary Doe, Rigor-Mortis Professor of Law."<sup>8</sup> They distributed this parody at a banquet that happened to take place on the one-year anniversary of Frug's death.<sup>9</sup>

Professor Williams went on to detail all of the ways this parody did violence to Frug's postmodern feminist analysis.<sup>10</sup> The parody mocked Frug's word choice, suggested that Frug was unfashionable and dour, described her husband as a wimp while at the same time implying that her article was published only because her husband was a Harvard Law School professor, and shockingly stated that women's proper place was in the home.<sup>11</sup> As I took it all in, I realized that these words came from law

<sup>6</sup> 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1980) (1978).

<sup>7</sup> Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) [hereinafter Frug, *Manifesto*].

<sup>8</sup> Daniel M. Steinman, *Parody of Frug Article Draws Angry Response*, HARV. CRIMSON (Apr. 11, 1992), available at <http://www.thecrimson.com/article/1992/4/11/parody-of-frug-article-draws-angry/>.

<sup>9</sup> *Id.* For an in-depth discussion of the parody, see ELEANOR KERLOW, *POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* 169–275 (1994).

<sup>10</sup> Of course, I cannot remember all of the ways Williams critiqued the parody. For some of her thoughts written much later, see Patricia J. Williams, *The Disquieted American*, THE NATION (May 8, 2003), <https://www.thenation.com/article/disquieted-american/>.

<sup>11</sup> The parody was never distributed beyond the banquet, and the law review asked attendees not to share it. I therefore have never seen an actual copy of the parody. My understanding derives from Professor Williams's class and news articles describing the

students not much older than I was. Misogyny and patriarchy were not confined to the older generation of law professors, judges, and legislators. Instead, Harvard Law School was producing a new generation of lawyers who resisted gender equality and maybe actively thwarted it.

At that year's "Take Back the Night March," just days later, we marched to the law school campus and surrounded the white house that housed the *Harvard Law Review*. We lit candles and had a moment of silence in honor of Frug and her work. We then yelled "shame" repeatedly at the house. Faces appeared in the third floor windows, looking down on us. I could not read their expressions. When I finally read *A Postmodern Feminist Legal Manifesto*, I was shocked that the students in this white house had so disrespected Frug's path-breaking work.

I graduated and struggled to find a post-college path. After two years of working in jobs that did not seem to hold a future, I found myself going back to Harvard for law school, in large part because of Frug's work. The first year was jarring. Most days, voices like those in the parody seemed to dominate.<sup>12</sup> Luckily, Martha Minow was my civil procedure professor, but I struggled to find other voices like those of Frug and Williams. I received my worst 1L grade, indeed my worst law school grade, in contracts.

I almost dropped out, despite accumulating about \$40,000 in debt to cover my 1L year. A conversation with Professor Minow convinced me to stay. She emphasized that I could forge my own curricular path during my second and third years. To my surprise, she also strongly encouraged me to do the law review competition.

That is how I ended up inside that white house in August 1995 as an editor of the *Harvard Law Review*. I learned that the white house was called Gannett House, that the editors alone selected all of the articles published in the eight issues per year, and that we painstakingly edited all of those articles. Of the forty or so new 2L editors selected through the competition,

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contents of the parody. See, e.g. Andrea Sachs, *Hiring Splits Harvard Law*, 78 ABA J: 20 (1992); Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle*, N.Y. TIMES (Apr. 27, 1992), available at <http://www.nytimes.com/1992/04/27/us/parody-puts-harvard-law-faculty-in-sexism-battle.html?pagewanted=all>; Ceci Connolly, *Critics Say Parody of Murdered Professor Illustrates Harvard Misogyny*, AP NEWS ARCHIVE (Apr. 13, 1992, 6:14 PM), <http://www.apnewsarchive.com/1992/Critics-Say-Parody-of-Murdered-Professor-Illustrates-Harvard-Misogyny/id-dbac93bdaae73a1807d0590f7f4af989>; David Margolick, *At the Bar, In Attacking the Work of a Slain Professor, Harvard's Elite Themselves Become a Target*, N.Y. TIMES (Apr. 17, 1992), available at <http://www.nytimes.com/1992/04/17/news/bar-attacking-work-slain-professor-harvard-s-elite-themselves-become-target.html>; Steinman, *supra* note 8.

<sup>12</sup> I realized that this problem was not unique to Harvard when I later read Lani Guinier's analysis of law school classrooms, published during my 1L year. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 37-38, 59-67 (1994).

only nine of us were women. Luckily, a woman from a previous competition had deferred her start date to complete PhD coursework, so the female membership of our volume reached double digits. The volume ahead of us had more women, and they held important leadership positions, but the law review still felt very male.<sup>13</sup>

At times, I too felt male, as I modified my speaking style—learning to talk in points—in the hopes of being more persuasive in article selection meetings and meetings exploring the competition's gender disparities. Each time I did so, I remembered Frug's words about the importance of language and style.<sup>14</sup> Was I reforming a system or being coopted by it? How would Frug have challenged the dominant speaking style of the editors?

Working late at night in the library on the third floor, I often remembered my first encounter with Gannett House. Now that I was inside, I better understood the entitlement and disdain that led to the parody of Frug's work. The law review had changed to some extent; the tradition of an annual parody issue had been abandoned, and many more articles exploring feminist topics had been published.<sup>15</sup> I even published a feminist student note.<sup>16</sup> Yet the baseline of what was considered serious legal scholarship remained far from feminist.

When the drama society put on its yearly parody performance during the spring of my 3L year, a character that appeared to be modeled after me repeatedly yelled that she wanted to turn the *Harvard Law Review* into the

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<sup>13</sup> This gender disparity persisted long after I left the law review. Women comprised only 20% of the editors from the class of 2012. See Erin Fuchs, *Harvard Law is Finally Dealing with its Huge Sexism Problem*, BUS. INSIDER (Dec. 10, 2013, 9:56 AM), <http://www.businessinsider.com/is-harvard-law-school-sexist-2013-12>. In response, the law review finally adopted an "affirmative action plan" for women, similar to those that had been proposed since the 1980s (including when I was on the law review). The plan has begun to close the gender gap, with women comprising 38% of the editors from the class of 2015. *Id.*

<sup>14</sup> Frug, *Manifesto*, *supra* note 7, at 1047–48.

<sup>15</sup> See, e.g. Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997); Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549 (1996); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING*); Cheryl Hanna, *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Tracy E. Higgins, *Democracy & Feminism*, 110 HARV. L. REV. 1657 (1997); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994); Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973 (1995).

<sup>16</sup> Note, *Cheering on Women & Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627 (1997).