

# BOOKS

POSTMODERN LEGAL FEMINISM by Mary Joe Frug,  
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*Postmodern Legal Feminism* is a collection of Mary Joe Frug's essays, posthumously published from unfinished material edited and arranged by Gerald Frug. Produced as a testament it cannot be read without reference to her murder. The fact and circumstances of her death, encase the aspiration of her text: a scandalous closure on thought committed to undoing closures of gender and essentialism.

There is a sense in which that closure is ultimate. The arguments and conversations which Mary Joe Frug carried on with herself and colleagues, and which texture her writing, have ceased. The sense she had of herself as a woman, a law teacher and feminist scholar, professionally socialised into a male institution was unique. But the quality of that uniqueness, a reflexive maintaining of faith with both self and institution, combined with the unfinished nature of her project, make it possible to acknowledge her as a living spirit in feminist legal scholarship and politics and to engage with her work on that basis.

The book has three parts, the essays in the first, "Feminist Doctrine" and the last, "A Postmodern Feminist Legal Manifesto" post-dating the middle section, "Re-reading Contracts: a Feminist Analysis of a Contracts Casebook" which is her 1985 essay of the same name. The opening chapter locates the author's work in a genre ("feminist doctrine") constructed by a typology and evaluation of the strengths and weaknesses of earlier litigation strategies for women's liberation and of feminist writings on law in the United States. The genre is demonstrated and amplified in other chapters of the first and third parts of the book. Feminist doctrine has the search for equality of women through law as its dominant objective. What differentiates it from liberalism and other feminist approaches with the same objective, is that it pursues its aim by turning itself back on its own categories — women, equality and to an extent law.

This focuses, so far as notions of women are concerned, in a critique of essentialism in feminist theory and, in relation to equality, as an attempt to break out of the constraints imposed by the sameness/difference paradigm. Essentialism, in this context, may take the form of the valorisation of women's different identity or the insistence that women are defined as what men are not. Feminist doctrine meets up with postmodernist theory along both lines. Thus the critique of essentialism extends into deconstruction of the subject that leaves it polymorphous and contingent: woman as subject must be stripped of coherent meaning if oppression by sex is to be undermined. Rejection of the sameness/difference paradigm leads into a strategy based approach in which legal discourse, as a site of political struggle over sex differences, sees continuous interpretive struggle against patriarchal legal power on behalf of specifically located, marginalised groups. Participation in that struggle involves bringing this theoretical apparatus to bear on legal doctrine as a gendered discourse.

Placed between Frug's more recent writings, "Re-reading Contracts" underlines her enduring concern with and opposition to gender as a reductive, dualistic classification of human characteristics based on sex. This, she consistently argues, hinders both men's and women's self-understanding and understanding of others. Gender in this sense works us, obscuring by naturalising connections that are matters of choice, value and preference. Frug's approach here is to try to reverse this unconscious process by using gender oppositionally. By displacing it on to (on one view: on another by identifying its imprint on) texts and discourses, she seeks to demonstrate that gender entails exclusion of relevant context and appropriate standards, and that it limits and undermines understanding of legal doctrines. Curiously, in a point I shall return to later, one of her arguments against unconsciously gendered legal discourses, is that they may lead student readers to think that "law itself" is gendered (p86).

While I share Frug's opposition to gender, in the defined sense, the argument that a feminist use of gender is conscious and oppositional cannot be taken on faith. Especially dubious, to my mind, is the characterisation of abstract and analytical thought as male, of context sensitive and relational thought as female. True enough the identification is not sex based. It is made from the speculation that dichotomous positions may mirror gender stereotypes (p112). But if the speculation is well grounded in the unconscious, why should it be supposed that a feminist consciousness escapes it? Use of a psychoanalytic framework announces a project. It carries no assurance that it will be carried through with the intended, culturally disruptive, politically emancipatory effect. Opting in might be prompted by the conviction that any (other) project is impossible. The conviction may reach apparently as far as reason will go by erasure of the bracketed "other". But for all the sophistication of the play, feminism is faced here with the perception, that it has set itself up as the stern super-ego of normative repression.

Reason is limited, as perceptions and representations are not. This is one of the spaces which politics fills out and into which feminism has come. Feminist scholarship is political. It stays away from scholasticism in philosophy: and disagreements within feminist philosophy such as those aired above may be seen as arguments about how to do that. But where does it go in law? The importance of this question in Frug's work cannot be overstated. It is the moving force of her work, tied to her experiences in legal education in the United States and to the ideal of attaining the equality of women through law. From her conservative and progressive readings of Carol Gilligan's *In a Different Voice* and her application of those readings to an assessment of Sandra Day O'Connor's judgments on the United States Supreme Court, to her loyal but seared retrospection on the legal anti-pornography campaign, the politics of United States legal feminism frames her work.

They are a difficult politics with their own specificities of nation and place. The difficulties raise questions which transcend jurisdictional boundaries: the specificity invites caution in transposition. As a politics of *legal* feminism, they consider social practices (such as pornography) in terms of legal responses. There is of course a wide range of such responses, from punitive to permissive with a variety of regulative regimes in between. The width of range is deepened by the perception of legal power as constitutive as well as repressive. But the question of whether our ideas about pornography, insofar as they are formed in public debate, are sensibly furthered by discussing it in

relation to legal responses is drowned out by the supposition that law will have an "appropriate" response. Additionally, a suggestion that it does not is captured by an interventionist/non-interventionist structure deriving from liberalism to make a radically different point: sanctity of the private sphere, for example — an idea which many concerned with domestic violence reject outright.

If difficulties such as these transcend jurisdictional boundaries, ways taken with them within a particular country may not. Liberalism has a specific and historical affinity with legal forms and these forms retain, at least in doctrinal and jurisprudential discourse, quite some shaping power. The actuality of that affinity however is socially, politically and culturally diverse. It is not the same affinity in the USA as it is in Australia; not the same in Australia as in England. The sameness/difference paradigm which Frug struggles to deconstruct, for example, acquires its depths of meaning in its context of United States jurisprudence and decades of political struggle through constitutional litigation. Constitutional differences are but a part of the specificity of these struggles. Organisational forms and their institutional locations, their expression of community within configurations of class, race, ethnicity as well as sex-gender, are another. Yet another, in the politics of law in the United States, is the overarching bourgeois revolutionary ideal of law which endows it with the capacity to structure a just society. This latter ideal, articulated in the central part of *Postmodern Legal Feminism* as an aspiration to keep "law itself" pure of gender, is never quite brought within the range of Frug's deconstructive fire. The content of laws which "permit and sometimes mandate" terrorism, maternalisation and sexualisation of the female body comes within her scrutiny, as does the unconscious gendering of legal texts previously discussed. But she stops or is stopped short of this ideal form: of law beyond the law.

I think it is important to make these observations in the face of factors which tend to obscure them: the construction of a common law tradition, the export of culture and the globalisation of the market of ideas, the dominance of United States notions of liberalism as a successor to previously dominant British notions. They should not, in their turn, be allowed to obscure the fact that they are owed as responses to Mary Joe Frug's work. She wanted, it seems to me, less to be agreed with or to receive laudatory recognition as an individual, than to continue the political project of making her society a better one for women.

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