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# WOMEN AND THE LAW

FOURTH EDITION

*by*

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## INTRODUCTION FROM THE FIRST EDITION

These materials are organized around concrete legal problems of particular and current concern to women. The problems are grouped into three categories: women and work, women and the family, and women and their bodies. Chapter introductions briefly describe the focus and contents of each chapter and also situate the legal issues to be discussed in the context of one or more feminist theories. In addition to conventional legal readings, such as cases, current statutes and legislative proposals, the chapters typically include historical legal materials, psychological and social material about women, and critical commentary by feminist legal scholars. Each of the course sections contains one chapter specifically devoted to feminist theories.

As you will quickly observe, my (editorial and personal) stance toward the study of women and the law is that of a feminist. For me, this means a commitment to two goals: (1) advancing the position of women socially, economically, and in their personal relationships, and (2) undermining the effect of gender on the lives of women and men. (Gender, as it is used here, refers to a shifting but identifiable bundle of beliefs, qualities, and expectations which are linked to individuals because of their genital characteristics.) Although most feminist legal scholars share those general goals, there are lively and significant differences among the analyses and solutions they advocate for legal issues affecting women. You will find, therefore, feminist readings in these materials that represent cultural, liberal, radical, postmodern, lesbian, race-conscious, and socialist perspectives.

The unity of the course lies in the identification and study of themes and issues that cross conventionally segregated doctrinal categories, themes such as formal versus substantive equality, the public/private distinction, and the role of law in construction female sexuality. The chapters insistently question the role of law in the creation and destruction of social and economic conditions that disadvantage women. The structure and contents of the materials represent an effort to break away from a dichotomized tendency to assume either a practical or a theoretical approach to legal issues affecting women. Thus, although these materials focus on specific doctrinal questions, more exhaustive treatment of subjects

such as domestic relations or employment discrimination is left to other courses. Similarly, although the readings include a significant portion of theoretical materials, “feminist jurisprudence” or “feminist theory” is presented more as an array of alternative approaches to doctrinal issues than as a separate body of thought.

MARY JOE FRUG

January, 1991

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## INTRODUCTION FROM THE THIRD EDITION

Social and legal issues affecting and shaping gender have only increased in number and complexity since the last edition. The impact of changing legal treatment of sexuality, ongoing struggles over the regulation of women's bodies, the continuing elusiveness of equality in experience and treatment for women and men, and the intersections of race and poverty make this a field of great social, personal, and intellectual interest. The current edition includes problems that invite students to debate and also try to develop concrete resolutions even in the face of extremely difficult issues.

We reprint here the introduction to the second edition, which explains the origins of the book and the current editors' ongoing debt to and effort to honor our friend Mary Joe Frug.

JUDITH GREENBERG, MARTHA MINOW, AND DOROTHY ROBERTS

March 2004

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Mary Joe Frug was murdered on April 4, 1991 a few yards from our home here in Cambridge. At the time of her death, she had put together—and was in the process of revising—materials for a course in Women and the Law. She was always in the process of revising her materials. Not only were interesting new cases and articles continuing to pour forth but her own ideas about how best to present the subject were constantly being rethought. In 1992, I edited, with the help of a number of our friends, Mary Joe's course materials as they existed at the time of death, and they were published as the first edition of this casebook. Even at the time, it was clear that, to be consistent with her own ideas about the topic, a revised edition of the book would be necessary.

Happily, here it is. The three editors have done a remarkable job of keeping Mary Joe's vision of the course alive while, simultaneously, making a multitude of changes in the book. I would like to mention three notable aspects of the first edition that have been retained. The first is the division of the course into the topics Women and Work, Women and the Family, and Women and Their Bodies. This organization was Mary Joe's



invention, and many people in the field have found it an important way to think about feminist theory and feminist practice. The second is the emphasis on the role of law in fashioning ideas about and the everyday practice of sexuality. In Mary Joe's hands, this emphasis on the constructed nature of sexual difference did not reduce women to the status of being victims; in this version of the casebook as in her own, the joy of being a woman is a constant theme. Finally, both editions include a considerable amount of feminist theory throughout the book. More than that, both stress the debates within feminist theory, so that the richness and variety of feminist thought is allowed to illuminate every topic. And, unlike much work in the field, one aspect of feminist thinking that was important to Mary Joe—postmodern feminist theory—is as present in this book as it was in her version of it.

Still, there are many differences between this edition and the first one. That's why this second edition was written. These differences are not limited simply to the inclusion of the new cases and articles that have appeared since 1992—although there are plenty of these. Important substantive areas have been added or significantly expanded: Women and the Professions, Sexual Harassment, The Pregnant Body, Domestic Violence, and Education. The editors have written notes for, and have included a problem in, each chapter of the book—something Mary Joe surely would have done if she had been able to publish the first edition herself. Finally, although the original edition paid attention to the problems affecting women of color, this edition gives so much more sustained attention to these issues that it seems to me proper to label this aspect of the book a difference from, rather than a similarity with, her own materials.

I am personally very grateful to Judi, Martha and Dorothy for their considerable work on this edition. I'm sure that teachers and students who use this book will share my gratitude to them. Without their work, Mary Joe's materials on Women and the Law would have become an historical artifact. The editors have kept her work alive. Because Mary Joe's materials on Women and the Law were so important not only to her but to the field itself, this is simultaneously a wonderful act of friendship and of scholarship.

GERALD E. FRUG

July, 1998

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## INTRODUCTION TO THE FOURTH EDITION

Beginning with Mary Joe Frug and then her husband Jerry Frug, seven different editors now have left their distinct imprints on this book. Our interests and perspectives diverge in myriad ways, but it is fair to say that all seven share a notion that can be found in Mary Joe's work, as well as in that of other postmodern thinkers, that the law does not merely regulate, it also *produces*. In particular, the law participates in the very making of the categories of sex and gender as we perceive them. The species of women and men emerge as identifiable subjects *at the very moment at which the law addresses them*, ostensibly merely regulating them as pre-existing natural objects. Among our chief goals in the fourth edition is to highlight further law's productive capacities in the domain of sex and gender.

Moreover, we are interested in how the law, perhaps especially by its instruction in the form of a *Women and the Law* casebook, renders *gender* synonymous with *women*, leaving maleness an invisible—and therefore quite powerful—norm. One effect of the book's title and focus on women might be to neglect the importance of constructions of maleness and masculinity to a feminist project. This edition represents an early attempt to enhance the presentation of gender in its multiple dimensions. The transformation to what might fairly be called a "gender and the law" text is by no means complete, but the casebook is a work-in-progress and should be read as an ongoing effort to further the kind of analysis for which Mary Joe Frug is best known.

In *Postmodern Legal Feminism*, Mary Joe deftly demonstrated how rules regulating prostitution "invite a sexual interrogation of every female body: Is it for or against prostitution?"—that is, the specter of the proscribed sexual practice prompts a persistent set of questions, questions that might burden a woman's decisions about how to dress, or plague a woman with doubts about her reasons for having sex. Laws against prostitution play a role in forming the categories of legitimate and illegitimate or good women and bad women, and anxiety over the instability of those categories might easily feed back into the regulatory regime. Our updates to this book are designed to suggest the possibility for multiple deployments of this kind of analysis.

We have maintained Mary Joe's three part organizational scheme, but we have moved what was the last part—Women and their Bodies—up front, to emphasize and update the interrogation of the categories of *women* and *men* with the addition of materials on identity, including gender identity, transsexuality, and intersexed bodies. These additions are meant to raise the profile of law's role in creating identity categories, and how, in turn, anxiety about sustaining those categories manifests itself in this relatively new area of law.

Mindful of the maxim that “women's rights are human rights,” we have increased the amount of human rights materials and analysis included in the book. Human rights regulate gender, women and men domestically and internationally. For example, attempts to expand the category of *citizen* have met with some success; *non-discrimination*, including equality between men and women, is (at least formally) a universal human rights norm, though the meaning of non-discrimination continues to be contested. Even those countries that have signed treaties such as the *United Nations International Convention on the Elimination of All Forms of Discrimination Against Women* limit their effect and compromise the purported universality of the rights contained therein. Our additions in this vein can be read to demonstrate how contests over the scope and meaning of such aspirational norms affect women and men not only as objects of regulation but as subjects with gendered and national identities.

Finally, in an effort to fortify the book's already strong current of “pro-sex” feminism, we have incorporated additional ideas regarding sexuality. In particular, we have included materials that highlight the vagaries of consent and autonomy-based analyses throughout the book. We also have moved the subparts on prostitution and pornography to the chapter on Women and Work, adding materials on exotic dancing, in an effort to align the book even more explicitly with Mary Joe in her battle with a version of feminism that is largely consumed with women's status as victims.

LIBBY ADLER, LISA CROOMS,

JUDITH GREENBERG, MARTHA MINOW, AND DOROTHY ROBERTS

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## EDITOR'S PREFACE

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