Books

THE HIDDEN GENDER OF LAW, by Regina Graycar and Jenny Morgan, second edition, Sydney, The Federation Press, 2002, 486pp, ISBN 186 287 3402

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As a teenage first-year law student in 1991, I read an article by Jenny Morgan in Week 17 of the Legal Institutions course, the week dedicated to Feminist Legal Studies. I still have the notes I made, meticulously detailed, hand-written in pencil on re-used paper.

Reading those notes recently, I was reminded that the article was my first real acquaintance with feminism as a body of knowledge, as a theory, a discipline, as a way of thinking about my world, indeed as *anything* more than a word. Emphatically underlined were the conceptual dichotomies: public/private, sameness/difference, Jake/Amy. Now brittle and faded, the notes mark a crucial divide in my life: before these notes were taken, I'd never heard of patriarchy or Patricia Williams or Critical Legal Studies. I recalled a time when, for me, these names and ideas were new.

I dug those handwritten old notes out of a box in 2000 when I taught first-year Law for the first time. I took them into the classroom, together with the first edition of *The Hidden Gender of Law*, frilled with post-it notes. Speaking for about half an hour, the students' heads were bent over their books, writing furiously.

The first edition was published in 1990. Both authors teach in Australian law schools and have been tribunal members and law reform commissioners or consultants. The book quickly acquired a reputation as the leading Australian text on law and gender. The High Court has referred to it in cases on battered women's syndrome[1] and the value of women's work.[2] Both authors were commissioners at the Australian Law Reform Commission during its inquiry into equality before the law.[3] Since then, both have initiated and participated in major law reform projects.[4]

After my lecture to students, I fielded a barrage of questions and compliments. 'Finally I *get* it'. 'It's so *interesting*'. 'It's so *scary*'. 'Could MacKinnon and Dworkin's pornography legislation *really work*?' 'What's the difference between

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1 *Osland v The Queen* [1998] HCA 75 (Kirby J).

2 *Van Gervan v Fenton* (1992) 175 CLR 327 (Gaudron J); *Singer v Berghouse* (1994) 181 CLR 201 (Gaudron J).

3 Australian Law Reform Commission 69, *Equality Before the Law: Justice for Women* (1994).

4 Reg Graycar was a co-author of *The Family Law Reform Act: The First Three Years* (with Helen Rhoades and Margaret Harrison), University of Sydney and Family Court of Australia (2000). Jenny Morgan's most recent law reform publication is *Who Kills Whom and Why: Looking Beyond Legal Categories*, Victorian Law Reform Commission (2002).

postmodernists and anti-feminists?' They began discussing the applications of their new knowledge, articulating their new vocabulary with an easy confidence, identifying in their earlier studies evidence of 'masculine hegemony', of the 'univocality' of legal discourse, of now-insupportable assumptions about objectivity, impartiality, reasonableness, equity.

Whilst the students absorbed their knowledge as though they'd never not known it, my little lecture reminded me of a time *before* feminism, and gave me the pleasure of experiencing that time *in between*, that moment where blindness becomes insight. And I recall, after class, a student approached my desk, pointed to *The Hidden Gender of Law* and asked, 'Is this a good book?'

What he meant, of course, was 'I'm smart and I'm curious, but there are other demands upon my teenage time. Should I bother to read this?' I think I nodded enthusiastically and used a regrettable term, like 'key' or 'foundational'. But since I have this opportunity to review the book's second edition, I've begun to reflect upon how else I might have responded to his question.

This *is* a good book. For anyone who has questions about feminism, or about law, or the seductive power of rhetoric and doctrine, this book has value. The reader who approaches this book with questions will finish it with still more questions: better questions, harder questions. As a place to start, it offers a rigorous introduction. For readers already experienced in the literatures or practices of law, this book offers a space for critical reflection. Because aside from their contribution to feminist legal scholarship, the authors teach us how to scrutinise any systems that operate around and upon us.

The second edition is an almost entirely new text, having been revised, updated and re-written. It maintains a similar structure to the first edition, often reflecting upon changes that have made this new edition necessary. The authors construct a dialogue amongst feminist authors, selecting substantial extracts from other writers and placing them beside each other. Of course, Graycar and Morgan are themselves participants in the dialogue. Their choice of extracts, the decision to group certain writers together, the way they elicit a conversation between them, and their own contributions to these conversations makes the reader feel that she is in the midst of a vibrant debate.

Throughout the book are sections called 'Notes', but which would be more properly described as critical interjections. These Notes ask the reflective reader to join in the debate. These sections urge the reader to approach the book with curiosity, scrutiny and an open mind. Sometimes she is pushed in radical or unanticipated directions; sometimes she may be unsettled by the questions. Sometimes these notes are a detour, but they are always worthwhile.

Before they approach legal doctrine, the authors start with law's fundamental concepts, testing the assumptions upon which we place our faith in law's ordering and remedial capabilities: neutrality, fairness, merit, knowledge. Through a consideration of law's recourse to stock stories, they consider the power of narrative, of a text's capacity for silence, discipline and dispossession. The book critiques traditional methods of legal 'truth-seeking', where 'facts' are separated from 'opinions', 'issues', and 'law', and where 'relevance' is determined

according to unwritten rules of intuition. It explores the consequences for particular groups when law prefers voices that speak in a particular register and a certain language, and where one person is bound by another's intuition.

The authors provide what is one of the most accessible and transparent introductions to feminist discourse, and a bibliography demonstrating the enormous diversity and breadth of scholarship in the area. At every juncture, case studies illustrate the theoretical arguments under discussion. Acknowledging that there are multiple feminisms, the book engages with 'classical' approaches based upon public/private and sameness/difference distinctions. These dichotomies have already become the well-used tools of scholars and practitioners who do not regard their work as feminist. They have analytical applications in areas as diverse as privacy and health, publicity and reputation, difference and discrimination, sameness as reasonableness. Thus far, at least, the language of feminism has provided a critical vocabulary to a wider range of speakers.

The book then explores criticisms of these dichotomies from the perspectives of critical legal studies, critical race theory, postmodernism and poststructuralism. The book places extracts from authors who call for feminist unity alongside authors who caution against creating a 'universal' from white, western, heterosexual and middle-class positions. These ideas are brought together in a case study of the Hindmarsh Island case.[5] The case serves as a complex example of how categories such as public and private, race and gender, truth and essentialism operate when they are exposed to law.

The book engages with arguments that the constructedness of gender renders it a false category giving legitimacy to a monolithic structure imposed upon us. By accepting that we belong to the order of 'women', are we complicit in our own marginalisation? The authors consider these views, as well as those who argue that, whilst artificial, gender is nevertheless a powerful identity, one that remains the most useful strategic tool available to women in resisting oppression. Conflicts between idealism and pragmatism arise constantly in the materials under discussion, just as they do in the lives of women. Here they cite Margaret Davies, who writes, 'There is a tension between envisaging fundamental social and conceptual change and the necessity of negotiating with a system of oppression which just keeps on reasserting itself'.[6]

One of the most powerful contributions of the book's first edition, which has been preserved in the second edition, is the authors' refusal to accept legal taxonomies without scrutiny. They re-imagine a legal system that might reflect women's lives. For example, one section of the book conflates the discrete legal doctrines applying to family law, employment law, social security, succession, and women's unpaid work, arguing that all of these laws govern women's relationship to money. By focusing on what law might mean for women, the authors test the consequences of structuring laws in ways that create separate categories from what may, in the lives of women, constitute related phenomena.

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5 *Kartinyeri v Commonwealth* [1998] HCA 22.

6 Margaret Davies, *Asking the Law Question* (1994) at 218. Davies' book has been revised in a second edition, 2002.

The authors also interrogate each of these established legal categories to examine the consequences of applying terms or tests like 'equality'. In the case of family law, for example, they ask questions arising from a legal assumption of equality where family relationships may include differences in financial and non-financial contributions, in the value ascribed to different skills, in sacrifices made and in the experience of violence. They contemplate the possibility that law might also consider 'negative contributions', such as gambling, alcoholism or abuse. By scrutinising law's claims to equality, the authors demonstrate that law's blindness to these inequalities serves to legitimise them.

One of the book's central themes is the question of harm. It asks how law might respond to harms suffered by women and, further, how law might actually perpetrate additional harms upon women. The authors address the need to take a broad approach to harm, beyond that captured by criminal law, as the criminalisation of certain acts has not provided effective processes or remedies for women. For this reason, the book addresses violence against women together with medical harms, sexual harassment and pornography.

This section of the book opens with an important theoretical debate about the efficacy of approaching law as women. Here they show a feminist theorist, Adrian Howe, engaging in the very feminist practice of self-reflection and perpetual self-scrutiny. In 1994, Howe revisited the position she took in 1987, where she had argued that it was not sufficient simply to render public all those harms that women experienced privately, thus eliminating the private sphere on the grounds that it hid harms suffered by women. She had argued that it was necessary instead to contextualise these harms as social harms, and therefore social concerns; a position that preserved privacy without ignoring the social responsibility to intervene where harms take place in private spaces. In Howe's 1994 work, she considered the effect on her position by subsequent interventions from postmodern theory.[7] Here, Graycar and Morgan select key extracts from Nancy Hartsock and Judith Butler to illustrate two examples of intervening work, the kinds of theorists with whom Howe is speaking.[8]

Howe argues that postmodern critiques of universality attacked the very basis upon which women could approach law as women; the identity of 'woman' was attacked as an essentialising fiction that did not address the limitless differences between women. Hartsock noted that postmodern critiques of the subject position emerged at the very moment when women were beginning to succeed in having

7 The authors refer to Adrian Howe, 'Social Injury Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423; Adrian Howe, 'The Problem of Privatised Injuries: Feminist Strategies for Litigation', in Martha Fineman (ed), *At the Boundaries of Law: Feminism and Legal Theory* (1990); Adrian Howe, 'Sweet Dreams: Deinstitutionalising Young Women', in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations of Law and Society* (1990). Howe revisited these ideas in: Adrian Howe, *Punish and Critique: Towards a Feminist Critique of Penality* (1994).

8 Nancy Hartsock, 'Foucault on Power: A Theory for Women', in Linda Nicholson (ed), *Feminism/Postmodernism* (1990). Judith Butler, 'Contingent Foundations: Feminism and the Question of Postmodernism', in Judith Butler and Joan Scott (eds), *Feminists Theorize the Political* (1994).

the subjectivity of experience recognised institutionally, suggesting that postmodernism thwarted women's claims to recognition. Butler took the view that postmodern critique simply questioned the subject position without eliminating it altogether, reminding us that it remained a very powerful political tool, especially in the United States where identity politics is strategically effective.

Howe decided that, in light of these arguments, her social harm model remains useful, as it makes law available to any group or individual who perceives themselves to be harmed in a way that ought to invoke a socially sanctioned remedy. Presenting this debate, Graycar and Morgan note the additional trouble that emerges from the very language of harm: terms such as 'injury' and 'victim' carry a heavy load and are themselves risky tools when used by or for women.

This cautionary note is sounded throughout the book, and the conclusion draws together a range of concerns and possibilities that arise when we approach law as women. Whilst we may have successes to acknowledge, the authors ask the necessary question about whether law's recognition and codification of women's experiences is cause for feminist optimism. By engaging with law, do we limit our claims in the act of articulating them? Do we create new loopholes through which oppression may be practiced? Do we ignore the motivations that drive us towards law?

The book addresses these questions from the perspectives of feminist philosophy and feminist legal practice. It asks whether campaigns for legislative reform are limited by the institutionalisation of the law reform process; whether litigation can have broad value to women in the absence of a Bill of Rights. In its consideration of alternative forms of dispute resolution, it considers theoretical arguments about ADR together with its application in cases of institutional abuse. Examining law's potential to deal with institutional harms, they consider a Canadian example in the Grandview case.[9] Here, they show law's response to the systemic abuse of girls in an Ontario residential facility. In the model established, ongoing consent and agreement enabled the development of a process and a range of possible remedies. Convening a specialist tribunal to hear and consider claims, law's response here was to offer therapeutic, medical and financial recognition to women arising out from their experience of harm.

Philosophically, the book's conclusion is deliberately ambivalent about whether or not women should engage with law in pursuit of remedy, recognition or rights. Does our participation in law risk the possibility that we become the agents of our own exclusion? Or do we have an overriding responsibility to address law directly, with our eyes open to its limits, so we may contribute to its reform in our own interests?

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9 See Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000). The Grandview Healing Package process is described at www.grandviewsurvivors.on.ca/gsummary.htm. More information about Canadian responses to institutional child abuse is available on the Law Commission of Canada's website at http://www.lcc.gc.ca/en/index.asp.