BOOK REVIEW

The Hidden Gender of Law by Regina Graycar and Jenny Morgan (Sydney: Federation Press, 2nd ed, 2002) pages i–xxvi, 1–486. Price A$66.00 (softcover). ISBN 1 86287 340 2.

This is the second edition[1] of this popular casebook on feminism and law. Rather than setting out to present a systematic treatment of substantive areas of law, Graycar and Morgan follow the thematic approach adopted in the first edition.[2] They are anxious to demonstrate the inadequacy of conventional legal categories in light of the non-linear and non-normative nature of women's lives. The themes around which the book is structured are Women and Economic (In)dependence, Women and Connection, and Gendered Harms.

In terms of conventional legal typologies, particular attention is paid to areas that reflect the expertise of the authors, which include family law, personal injury, medical negligence, rape, sexual harassment and pornography. This list is intended to be illustrative rather than exhaustive. Hence, other less obviously feminised areas of interest, such as property law,[3] corporations law[4] and taxation law,[5] receive cursory treatment or are omitted altogether, even though feminist legal scholars are seeking to reconceptualise them. It is acknowledged that it would be impossible to deal comprehensively with the entire panoply of disparate issues impacting on women in one book.[6] Furthermore, the proliferation of feminist legal scholarship since the publication of the first edition has been astonishing.

The book insistently challenges law's predilection for categorisation and compartmentalisation, including a clear line of demarcation between public and private spheres of life. While the book's thematic and contextual treatment precludes an exhaustive consideration of legal doctrine, the authors nevertheless defer to orthodox understandings of the way law is constituted. Less conventional

1 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002).

2 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1st ed, 1990).

3 See, eg, Margaret Davies and Ngaire Naffine, *Are Persons Property?* (2001).

4 See, eg, Sandra Berns and Paula Baron, *Company Law and Governance: An Australian Perspective* (1998).

5 See, eg, Judith E Grbich, 'Taxation Narratives of Economic Gain: Reading Bodies Transgressively' (1997) 5 *Feminist Legal Studies* 131; Judith E Grbich, 'The Taxpayer's Body: Genealogies of Exertion' in Judith E Grbich, Pheng Cheah and David Fraser (eds), *Thinking through the Body of the Law* (1996) 136; Judith E Grbich, 'Writing Histories of Revenue Law: The New Productivity Research' (1993) 11 *Law in Context* 57; Judith E Grbich, 'The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship' (1990–91) 4 *Canadian Journal of Women and the Law* 512.

6 Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 6.

incarnations of legal knowledge, such as law and literature,[7] and law and popular culture,[8] are not addressed. Like feminist scholarship generally, however, the book challenges, over a broad terrain, the objectivity and neutrality of law, as well as the spurious masculinist claim to universality.

In articulating its theoretical framework, *The Hidden Gender of Law* acknowledges the influence of postmodernism,[9] but it generally accords with liberal understandings of law. The concept of equality, for example, receives extensive treatment.[10] However, a rigid boundary between liberal feminism and postmodernism does not exist. It could be argued that feminist scholarship of all hues is postmodern to a degree because of the way that it destabilises the foundational presuppositions of law. For example, the well-known aphorism of second wave feminism that 'the personal is the political' goes straight to the heart of the public–private dichotomy, the keystone of liberalism. Graycar and Morgan advert to the significance of the personal as a discursive mechanism for challenging legal abstractions in their consideration of feminist methods; namely, consciousness-raising and storytelling[11] — although the former, in particular, is not without its critics.[12] The corrosive power of these subjective methodologies in relation to legal universals is hinted at rather than explicitly referred to, although the experiential is stressed throughout, as it is central to the authors' concern with the reality of women's lives.[13]

The materials have been updated and reflect new developments, such as those pertaining to assisted reproductive technologies (ART),[14] access to which has been a contentious issue in Australia for 'unmanned' women, heterosexual as well as lesbian. There are also changes in approach, mirroring developments that have occurred within feminism more broadly. Most notably, there is acknowledgment of a more nuanced appreciation of the category 'woman', particularly so far as Indigenous women and lesbians are concerned.[15] The idea that the paradigmatic female legal subject is white, middle-class, able-bodied and heterosexual has imploded amid resounding cries of 'essentialism'.[16] In this regard, it would have been useful for the authors to explore the dilemmas of identity for

[7] See, eg, Richard Posner, *Law and Literature* (revised ed, 1998); Robin West, *Narrative, Authority and Law* (1993); Richard Weisberg, *Poethics and Other Strategies of Law and Literature* (1992).

[8] See, eg, Margaret Thornton (ed), *Romancing the Tomes: Popular Culture, Law and Feminism* (2002); Richard K Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (2000); Martha Fineman and Martha McCluskey (eds), *Feminism, Media and the Law* (1997).

[9] See, eg, Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 78–81, 300–1.

[10] Ibid ch 3.

[11] Ibid 71–7.

[12] Ibid 72–3. See also Rosanne Kennedy, 'The Logic of Metonymy: Reading Catherine MacKinnon' in J Neville Turner and Pamela Williams (eds), *The Happy Couple: Law and Literature* (1994) 342, 345–6, 357.

[13] Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 1.

[14] Ibid 249–57.

[15] Ibid 7.

[16] Ibid 48–50.

law reform. The postmodern preoccupation with difference can detract from the political force of the unitary legal subject, unless deployed strategically.

The book is written and structured so as to be readily accessible to general readers. The pithy extracts, together with the notes and questions, are designed to win over the student market. Graycar and Morgan also set out to appeal to an international readership, at least in the English-speaking, common law world, for they rely heavily on Canadian and American, as well as Australian, material. There is some British material, but not very much, which may reflect a certain initial reluctance on the part of the 'imperial centre' to embrace feminist legal scholarship, a situation that has now changed. The book would be a useful adjunct to teaching in a range of disciplines, as well as courses in family law, discrimination law, labour relations, tort law, criminal law and jurisprudence. For a stand-alone course in feminist jurisprudence, the book might need to be supplemented by further readings because of the brevity of some of the extracts.

'Beginners' who could profit from reading, or at least dipping into the book might include practitioners and academics, men as well as women, particularly those unfamiliar with feminist ideas but who may be intimidated by the somewhat arcane style of some feminist theory. After all, it was only in 1993 that Bollen J of the Supreme Court of South Australia caused such a stir as to create a cause célèbre with his view that 'rougher than usual handling' was acceptable on the part of a husband towards a wife who was less than willing to engage in sexual intercourse.[17] The statement of Bollen J, together with other evidence of masculinist partiality on the part of judges, resulted in campaigns for gender education.[18] The resistance to the feminine is one reason why there has been so little headway in reconceptualising legal norms. This book is intended to contribute to that project by targeting practitioners, as well as students. The authors are anxious to engage with law *as it is*, as well as rethinking the way it *ought to be*.

Graycar and Morgan pose the question as to whether there is a need to rename the book, as has been suggested to them, since the 'gender of law is no longer hidden', but they have resisted the suggestion as many of the questions 'remain ... pertinent'.[19] My riposte would be that the title is more appropriate than ever today. Although many egregious forms of sex discrimination have been excavated and exposed during the life of second wave feminism, others lie

[17] *R v Johns* (Unreported, Supreme Court of South Australia, Bollen J, 26 August 1992) 12–13.

[18] The initial focus of the Commonwealth government was to establish the Gender Issues in the Law Curriculum Project. As part of this initiative, gender-sensitive materials for the core curriculum were prepared, on the theme of citizenship by Sandra Berns, Paula Baron and Marcia Neave, and on the themes of work and violence by Regina Graycar and Jenny Morgan. I chaired the Advisory Committee for the Gender Issues in the Law Curriculum Project. See Sandra Berns, Paula Baron and Marcia Neave, 'Gender and Citizenship: Materials for Australian Law Schools' (Gender Issues in the Law Curriculum Project, Department of Employment, Education and Training, 1996); Regina Graycar and Jenny Morgan, 'Work and Violence Themes: Including Gender Issues in the Core Law Curriculum' (Gender Issues in the Law Curriculum Project, Department of Employment, Education and Training, 1996). See also Regina Graycar and Jenny Morgan, 'Legal Categories, Women's Lives and the Law Curriculum — Or: Making Gender Examinable' (1996) 18 *Sydney Law Review* 431.

[19] Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 7.

undisturbed, not only because they reside deep within the social psyche, but because they are closely entwined with bona fide and seemingly neutral factors.

The authors note that much of the early activist work done by feminists was concerned with violence because of its 'central relevance to women.'[20] Although this proposition is uncontentious, at least so far as the second wave is concerned, I would add that physical violence against women in intimate relations is a manifestation of injustice that is both readily apparent and virtually impossible to defend. Violence also carries with it a strategic power in the context of law reform, since that which is overt is invariably more likely to be tractable to remediation. The point is clearly illustrated by the history of discrimination jurisprudence. Initially, the focus was on direct discrimination, involving instances close to the surface.[21] Later, there was a move towards the more subtle instances of indirect discrimination with which we are still wrestling. What may be conceptualised as the third phase — the focus on systemic discrimination — represents a huge, untapped reservoir because of the way the gender of law permeates social norms. For example, activities that are prima facie neutral, such as managing, conveniently serve to occlude discriminatory treatment at work.[22]

One notable illustration of how the gender of law continues to exert an influence while remaining hidden is apparent in the notion of the indivisibility of the wills of a man and woman in marriage. The idea that a woman may assume the debts of her partner as a result of sexually transmitted debt (STD), discussed by Graycar and Morgan,[23] illustrates the point that it is *her* will that is deficient. The presumption of indivisibility within marriage is an example of vestigial heterosexism that has been resistant to modernisation. It is not only imbricated with a particular manifestation of heterosexual sex in which *he* has *her*,[24] it is also imbued with the assumption that women perennially care for others for love and affection.[25] The idea that the freedom of men is predicated on the 'unfreedom' of women is an example of the way that discrimination is lodged deep within the social psyche. No law reform, however subtle, is capable of capturing, categorising, proving and providing a remedy for such an elusive harm. The public–private dichotomy serves a significant ideological purpose in enhancing the freedom, equality and independence of active citizens,[26] who have traditionally been men. While women can no longer be relegated to Kant's passive category, as the primary caregivers in our society women continue to remain less than full

[20] Ibid 443.

[21] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 6.

[22] I have recently argued that within the rubric of sex discrimination law, it is easier to recognise complaints of sexual harassment conceptualised in corporeal terms rather than as a manifestation of systemic discrimination: Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 422.

[23] Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 114–26.

[24] Davies and Naffine, above n 3, 79–83.

[25] *Balfour v Balfour* [1919] 2 KB 571, 579; Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 15–17.

[26] Immanuel Kant, *The Metaphysics of Morals* (first published 1797, Mary Gregor trans, 1991 ed) 125–6 [trans of: *Metaphysik der Sitten*].

primary caregivers in our society women continue to remain less than full citizens.

Although the work of Graycar and Morgan makes an important contribution in exposing gendered harms, it is apparent that we still have a long way to go in overcoming inequities that are disguised by the liberal carapace. The problem has been compounded by the privatising imperative of neo-liberalism, which has had a dramatic effect on women in recent years. Graycar and Morgan discuss the impact of the move away from a centralised wage-fixing system to enterprise bargaining,[27] albeit not in the context of the embrace of neo-liberalism. The resiling from a social justice to a neo-liberal agenda, in which women have become consumers or commodities within a market-driven society, demands a major rethink of the future directions of feminist theory. Neo-liberalism also poses difficult questions for the meaning of equality, one of the idealised end-points of the feminist project in law. Despite manifold challenges to Law's Empire, the book remains curiously depoliticised in light of the collapse of the welfare state. Ironically, a depoliticised stance is of course the essence of legal positivism, with its attempt to slough off the social, as well as the political.[28] The centripetal pull of the technical, which lies at the heart of legal method, facilitates this separation.[29]

The methods and techniques of *The Hidden Gender of Law* are critical, but the desire to receive the approbation of legal practitioners, particularly judges, causes the authors to falter. (Women) judges are cited on the back cover extolling the book and as authorities on the future of women in law.[30] The forewords to both editions are also by women judges.[31] The ambivalence of the authors in regard to critique typifies a familiar dilemma for reformist legal academics; that is, how should the contradictory aims of legal practice and the academy be reconciled? Legal practice requires loyalty to the dominant norms of doctrinalism and hierarchy, whereas the academy (ideally) requires the disinterested pursuit of truth. In Australia, judges rarely read, or at least rarely acknowledge, academic commentators. A circular self-referentialism is central to the prevailing positivist paradigm, which avers that the primary source of law is law itself. The contemporary scenario is complicated by the exigencies of economic rationalism, the depredations of which are disproportionately impacting on poor women, Indigenous women and refugee women.

The dilemma of standpoint underscores the question posed by the authors in the conclusion of the book as to whether it is worthwhile for feminists to engage with law or not.[32] The answer: it depends. One hopes that judges, together with

27 Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 163–5.

28 See, eg, H L A Hart, *The Concept of Law* (1st ed, 1961) 253.

29 Margaret Thornton, 'Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same' (1998) 36 *Osgoode Hall Law Journal* 369, 370.

30 Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 423–8.

31 See Justice Mary Gaudron, 'Foreword to Second Edition' in Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, vii; Justice Elizabeth Evatt, 'Foreword' in Graycar and Morgan, *The Hidden Gender of Law* (1st ed), above n 2, v.

32 Graycar and Morgan, *The Hidden Gender of Law* (2nd ed), above n 1, 448–9.

other legal actors and policy-makers, will read this book and seriously address its insights in an endeavour to grapple with the perennial questions of gender justice. The neo-liberal agenda, however, demands that they pay heed to the question posed by Aristotle more than two millennia ago: equality in respect of what?

MARGARET THORNTON*

* BA (Hons) (Syd), LLB (UNSW), LLM (Yale), FASSA; Professor of Law and Legal Studies, La Trobe University.