Review of Regina Graycar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society*, Sydney: Allen & Unwin, 1990. pp v-xi; 1-131. $17.95

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OUT OF THE "MALESTREAM" - MARGINALISATION OR LIBERATION?

Regina Graycar introduces the seven essays which make up *Dissenting Opinions* by acknowledging their eclecticism. Despite this, she suggests that "the contributors share a common concern with exposing the ways in which legal rules, practices, doctrines and policies have a fundamental impact on women's lives".[1] The authors are Australian, Canadian, English and American - mostly lawyers, but they include a sociologist and a town planner too. Their topics range over criminology and juvenile justice, family law and government housing policies, legal practice and scholarship. The essays range from Sophie Watson's on women's access to accommodation following divorce, to Mary Jane Mossman's on women lawyers in Canada.

Together the essays form a group of thorough, theoretical deconstructions of the place accorded to women in law. Moreover, the contributors share in the development of a vision of a new theory and practice (and teaching) of law in a society which no longer relegates women to the margins. Thus this collection operates on a number of levels, maintaining a scholarly, yet by no means muted, approach.

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1. Regina Graycar (ed) Dissenting Opinions: Feminist Explorations in Law and Society (Sydney: Allen & Unwin, 1990) viii.

Not all articles are equally successful however. Mari Matsuda's advice to the legal academic on how to ensure that the voice of "outsiders" - by which she means "white women, women of colour and men of colour"[2] in particular - is heard and considered in the law school, struck me as patronising, both to the academic and to the "outsiders" whose cause she promotes.

Carol Smart's article is something of a disappointment too. It is essentially a precis of her fine book *Feminism and the Power of Law*.[3] Unfortunately the ideas developed fully there are here too summarily translated and at times rather garbled and lacking support.

Nevertheless, some readers may find in just these essays the intellectual key to the underlying themes of the entire collection. One such theme, introduced by Smart, is that law is "alien territory" for women.[4] Mossman takes up this theme when describing the refusal of Canadian provincial law societies and courts in the late nineteenth and early twentieth centuries to permit women to be admitted to the practice of law.

From the starting point of alienation, Smart discusses the ways in which women's status in law is "imbued with specific meaning arising out of their gender". They come to the law as "mothers, wives, sexual objects, pregnant women...".[5] The Canadian lawyers in Mossman's article cannot therefore be both women and lawyers since women entering the legal profession are (still) judged by the standard of maleness.[6] Thus, another common theme of these essays is the debunking of the claimed (by men) gender-neutrality of law.[7] Law is in fact thoroughly gendered; law's method is inherently male.[8]

The central concern of the majority of these essays is with the concept of equal opportunity in current legal scholarship and practice. This concept fundamentally ignores the social inequalities between women and men and then (covertly) sets up the male norm as the standard for both sexes.[9] When

2. Ibid, 98.
3. C Smart *Feminism and the Power of Law* (London, New York: Routledge, 1989).
4. Ibid, 6.
5. Ibid, 7.
6. Ibid, 90.
7. This is a theme more fully developed in R Graycar and J Morgan *The Hidden Gender of Law* (Sydney: Federation Press, 1990).
8. A wealth of feminist legal scholarship over the past two decades has amply demonstrated this. See L Finley "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 *Notre Dame L Rev* 886; C MacKinnon *Feminism Unmodified* (Cambridge Mass: Harvard University Press, 1987); M J Mossman "Feminism and Legal Method: The Difference it Makes" (1986) 3 Aust J of L & Soc 30.
9. See S Liden "Difference and Exceptionality" (1990) 15 *Leg Serv Bull* 118.

"equality of opportunity" is judged according to a male standard, the effect can be profoundly discriminating.[10] Gender-neutrality, in other words, does not lead to gender equality.

Graycar's article, for example, is concerned with describing the ways in which the ideology of equality betrays women's interests and needs in the context of family law. Her conclusion is that "women's social and economic positions have not been significantly advanced"[11] in spite of the professed aim of equality.

Thus, gender-neutrality is rejected by these authors not only as a description of the law as it is but also as a claim for law as it should be. A gender-neutral legal system will always be masculine in fact. We must aim for gender-specific theory and practice to ensure effective equality for all.

This program is most effectively explained and supported in two central essays in this collection. Judith Allen surveys criminological approaches to the question "why are offences committed more by men than by women?". She concludes that the prevailing focus, even by some feminist criminologists, on the "masculinity" of crime has had the effect of displacing men qua men as the principal criminal actors.

Feminists have been naturally wary of the labelling and denigration of women which typically accompanies theories of crime (or its absence) based on biological determinism. However, these fears have led many feminist criminologists to wholly disavow sex (biological characteristics) in favour of gender (socially attributed characteristics) as predictive of criminal involvement. In doing so, however, we too disavow the role of men as men and thereby develop a distorted picture of both criminality and victimisation. Allen concludes that we need to "reinsert the male body into the discourses from which it has been expunged".[12]

10. See C MacKinnon supra n 8, 37.

> Why should you have to be the same as a man to get what a man gets simply because he is [a man]? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender, so that it is women - women who want to make a case of unequal treatment in a world men have made in their image ... - who have to show in effect that they are men in every relevant respect...?

11. Supra n 1, 70.
12. Ibid, 39.

Adrian Howe's proposal for a new theory and practice of juvenile justice also derives from an understanding of the failure of gender-neutrality to deliver a fair outcome to women.

Her program for progressive reform of the juvenile justice system is to give gender/sex a central place. She urges that the system should achieve this, in the case of young women, by recognising the harms and injuries with which they typically enter the juvenile justice system, and the fact that young women are subject to formal and informal control and discipline in their homes, in their schools, by males and even by their female friends. Young women's gender-specific harms and injuries - which can include father-daughter rape, a history of sexual harassment, experiences of sexual discrimination - are not purely private harms. They ought not any longer to be harms and injuries which the law considers to be irrelevant to disposition in the juvenile justice system. Ignoring these harms for the purposes of legal consideration of young women effectively discriminates against them, by ignoring the context of their court appearance and because these harms are overwhelmingly experienced by young women.

As a whole, then, this collection is not content merely with criticism. It goes further and forges the first outlines of a new system of law - one responsive to the needs and interests of women as well as of men. Scholarship of this kind is rare and valuable, and these essays are deeply empowering for women in law. They give us a language and the beginnings of a framework in which to celebrate our dissent.