# EXTENDING THE CRITICAL REREADING PROJECT

*Gabrielle Appleby & Rosalind Dixon**

We want to start by congratulating Kathryn Stanchi, Linda Berger, and Bridget Crawford for a wonderful collection of feminist judgments that provide a rich and provocative rereading of U.S. Supreme Court gender-justice cases.[1] It is an extremely important contribution to the growing international feminist judgments project—in which leading feminist academics, lawyers, and activists imagine alternative feminist judgments to existing legal cases—which commenced with the seminal UK Feminist Judgments Project.[2] The original 2010 UK Project was based on the initially online Canadian community known as the Canadian Women's Court.[3]

These works bring feminist critiques of legal doctrine from an external, commentary-based perspective to a position where such critiques might breathe reality into the possibility of feminist judgment writing. A feminist rewriting can change the way the story is told, the voices that are heard in the story, and the context in which it unfolds. Today, the feminist judgments project, having expanded across

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1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al., eds., 2010); *see also* AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al., eds., 2014); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al., eds., 2017); NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES' TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright et al., eds., 2017). There is also an international feminist judgments project to be published soon by Hart. *See* Loveday Hodson & Troy Lavers, *Feminist Judgments in International Law*, VÖLKERRECHTSBLOG (Apr. 24, 2017), https://voelkerrechtsblog.org/feminist-judgments-in-international-law/.

3 A number of the Canadian Women's Court judgments were published in special editions of the *Canadian Journal of Women and Law*. *See, e.g.*, Melina Buckley, Symes v. Canada, 18 CAN. J. WOMEN & L. 27 (SPECIAL ISSUE) (2006); Mary Eberts et al., , Native Women's Association of Canada v. Canada, 18 CAN. J. WOMEN & L. 67 (SPECIAL ISSUE) (2006); Dianne Pothier, Eaton v. Brant County Board of Education, 18 CAN. J. WOMEN & L. 121 (SPECIAL ISSUE) (2006).

the world, is now being joined by other critical rereading projects, such as the Wild Law Judgment Project and the Children's Rights Judgments Project.[4]

In this reflection, we want to explain a project in Australia that extends the feminist judgments project and adapts it specifically for the purpose of *teaching* critical theory, critical legal thinking, and the assumptions inherent in the legal method.

This is not to say, as Stanchi, Berger, and Crawford acknowledge in their introduction to the U.S. collection, that the feminist judgments project does not also have an educative objective. But its core objectives are elsewhere. As Stanchi, Berger, and Crawford explain, the feminist judgments project's goals are:

(a) To unmask the claims of neutrality and objectivity that continue and protect traditional power hierarchies;
(b) By unmasking these claims, exposing the possibility that the perspectives of decisionmakers may be broadened and result in change; and
(c) To provide an exploratory account of what feminist judicial decisionmaking might look like, how it might have practical application in judging and decisionmaking, and how that might change substantive outcomes, reasoning, and style.[5]

The editors of the U.S. Project also acknowledge this rereading project will have an important "educational function," for students to learn about the law and feminism, for the legal community and the wider public to "learn about the way law works, what cases mean, and how the identity and philosophy of judges matter," and to contemplate the arc of justice and the role of judges in achieving justice.[6]

Certainly, the feminist judgments project collections are helpful vehicles for teaching critical legal thinking to students and, since the publication of the first UK feminist judgments collection, have been employed as such across a number of courses and institutions.[7]

In our own project, *The Critical Judgments Project: Re-reading* Monis v The Queen,[8] we recognize the feminist judgments project as seminal, but we also recognize that feminist perspectives represent only a limited critical viewpoint from

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4 *See generally* LAW AS IF EARTH REALLY MATTERED: THE WILD LAW JUDGMENT PROJECT (Nicole Rogers & Michelle Maloney eds., 2017); REWRITING CHILDREN'S RIGHTS JUDGMENTS: FROM ACADEMIC VISION TO NEW PRACTICE (Helen Stalford et al., eds., 2017).

5 *See* FEMINIST JUDGMENTS, *supra* note 1, at 4–6.

6 *Id.* at 22.

7 *See, e.g.*, *supra* note 4 and accompanying text; *see also* Rosemary Auchmuty, *Using Feminist Judgments in the Property Law Classroom*, 46 LAW TCHR. (SPECIAL ISSUE) 227 (2012); Jennifer Koshan et al., *Rewriting Equality: The Pedagogical Use of Women's Court of Canada Judgments*, 4 CANADIAN LEGAL EDUC. ANN. REV. 121 (2010); Tamara Tulich, *Using Feminist Legal Judgments in Public Law Teaching*, U. WESTERN AUSTL. (Feb. 12, 2015), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/poster_presentation_t_tulich.pdf; *Teaching with the Feminist Judgments Project*, U. KENT, http://www.kent.ac.uk/law/fjp/resources/teaching.html (last visited Sept. 13, 2018).

8 THE CRITICAL JUDGMENTS PROJECT: RE-READING *MONIS V THE QUEEN* (Gabrielle Appleby & Rosalind Dixon eds., 2016) [hereinafter THE CRITICAL JUDGMENTS PROJECT].

which to approach judicial decisionmaking.[9] We have taken the view that there is a need to pluralize not just the feminist critique, but also the critical perspectives within such projects.

We also believe that the structure of the feminist judgments project books may not be ideal to encouraging *students*, rather than scholars, to grasp the full diversity of critical perspectives within the law. Most law teachers using the feminist judgments project will select only one or two cases for students to discuss. This selection may itself also privilege certain feminist perspectives, leaving others largely unexplored in certain students' educational experience.

In brief, our project has compiled a series of rereadings from leading critical scholars across Australia of a famous Australian High Court decision, *Monis v The Queen*. The project's focus on a single case was intended to encourage students to engage more directly and immediately with the theory presented. By focusing on a single case, this new project extends the teaching possibilities of the project, allowing teachers to expose students to a larger variety of critical legal perspectives without also needing to grasp changing factual and legal scenarios. Further, students will more easily identify those aspects of commonality and difference across the perspectives, allowing them to develop a nuanced understanding of the critiques.

The critical perspectives we have included in our project include feminism and the public-private divide, antisubordination feminism, critical race theory, intersectional theory, queer theory/poststructural feminism, the capabilities approach, international human rights theory, law and literature, political liberalism, law and economics, restorative justice, preventative justice, and deliberative democratic theory.

The case of *Monis* involved a constitutional challenge to a criminal prohibition on the use of the postal services in a manner that a reasonable person would find offensive. The challenge was based on Australia's constitutional implied freedom of political communication.[10] The challenge had been brought by Mr. Man Haron Monis and Ms. Amirah Droudis, who had been charged under the provision after sending a number of highly offensive letters to the families of soldiers killed in the war in Afghanistan.[11]

In *Monis*, all of the justices agreed that the provision amounted to an effective burden on the implied freedom of communication, which left the point of contention

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9 We are not alone in this observation. It is recognized in the feminist judgments project itself and is now recognized by the expansion of the project into wild law and child rights.

10 Monis was charged under section 471.12 of the Criminal Code with thirteen counts of using the post in a way that reasonable persons would, in all the circumstances, regard as offensive. *Monis v The Queen* [2013] HCA 4, ¶ 4 (Austl.). Ms. Amirah Droudis was charged with aiding and abetting Monis with eight of these counts. *Id.* Section 471.12 provides:

> A person commits an offence if:
>
> (a) the person uses a postal or similar service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.
>
> Penalty: Imprisonment for 2 years.

*Criminal Code Act 1995* s 471.12 (Austl.).

11 *Monis v The Queen* [2013] HCA 4, ¶ 1 (Austl.).

whether the provision was a proportionate legislative response to a legitimate state objective, consistent with Australia's constitutional democratic system. This question required the judges to grapple with deep issues about the appropriate role of the state in employing the criminal law to regulate civility of discourse and to protect vulnerable groups, and the ongoing influence of gender and race in approaching these issues.

*Monis* also presented an ideal vehicle for *The Critical Judgments Project* for another reason. The judges in *Monis* split evenly three to three on the question of whether the provision was in breach of the implied freedom. The three male judges—Chief Justice Robert French, Justice, Kenneth Hayne, and Justice Dyson Heydon—found that the purpose of the provision was simply to prevent the postal service from being used in a menacing, harassing, or offensive manner.[12] In determining whether such an objective was compatible with the maintenance of the system of government prescribed by the Constitution, both Chief Justice French and Justice Hayne held that the Australian system of government rested on a commitment to "robust" debate,[13] often offensive and insulting.[14]

The joint judgment of Justices Susan Crennan, Susan Kiefel, and Virginia Bell construed the purpose of the statute very differently. They held that a key aim of the provision was to "recognise a citizen's desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive."[15] They found that this objective was consistent with the constitutionally prescribed system of representative and responsible government.

Divided three to three, *Monis* was ultimately decided by a procedural rule. For the purposes of this project, it therefore suggests a natural opening for critical constitutional analysis: if members of the High Court of Australia were themselves unable to agree on a majority position in the case, this suggests a particular value in turning to other ways of thinking about constitutional law, or constitutional values, in trying to understand and address the problem the Court confronted.

The case was also an ideal vehicle because it was the first in which the High Court split along gender lines. Helen Irving notes not only the gender split in the judgment as significant, but also comments on the different approaches taken by the female judges.[16] Gabrielle Appleby and Ngaire Naffine have observed that the male judges in the case, and particularly Justice Hayne, present offensive speech as a legitimate, if not essential, part of political discourse in Australia: "[A] constitutional imperative to be defended."[17] They observe, for instance, that "[Justice] Hayne []

12 *Id.* ¶ 73 (French, C.J.); *id.* ¶ 97 (Hayne, J.).

13 *Id.* ¶ 67 (French, C.J.).

14 *See generally* Adrienne Stone, *'Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication*, 30 U. QUEENSL. L.J. 79 (2011).

15 *Monis v The Queen* [2013] HCA 4 ¶ 320 (Austl.) (Crennan, J., Kiefel, J. & Bell, J.); *see also id.* ¶ 348.

16 *See* Helen Irving, *Constitutional Interpretation: A Woman's Voice?*, U. SYDNEY (Mar. 20, 2013), http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html.

17 Gabrielle Appleby & Ngaire Naffine, *Civility, Gender and the Law: Critical Reflections on the Judgments in* Monis v The Queen, 24 GRIFFITH L. REV. 616, 625 (2015).

conflates the experiences of all members of society, the experiences of men and women in public discourse, and majority responses and minority responses."[18]

A case in which the identity of the various justices was clearly so salient is also a particularly natural one for introducing students to the idea that *who* judges are, and how they understand notions of constitutional justice, may matter to the resolution of concrete constitutional questions.

Finally, the case of *Monis* became one of enduring public interest in Australia because of the subsequent hostage terrorist actions of Mr. Monis in the Lindt Café in Sydney's Martin Place in December 2014, in which two of those hostages and Monis were killed.[19] One of those killed was a Sydney lawyer and University of New South Wales graduate, Katrina Dawson.[20] This occurred just days after Monis's request for special leave to the High Court to rehear the matter was refused.

As a focused and directed teaching tool, *The Critical Judgments Project* is different in structure from the feminist judgments project in another way. Rather than providing a commentary to each judgment, which explains the case, its political, historical, social and economic context, and engaging in an explanation and critique of the approach adopted in the judgment, each judgment author in *The Critical Judgments Project* was asked to select a small number of extracts from canonical texts on which the relevant approach is based, supplemented, if necessary, by a short commentary explaining the approach. This gave students, often coming to the theories for the first time, the necessary grounding in the seminal thinkers and concepts on which the judgment is based.

In the judgments themselves, some of the authors focused directly on the facts and legal issues as they were presented in case. Others used the broad factual background or legal framework to explore broader issues relating to hate speech, intimidation, racial and gender justice, and the public sphere, or constitutional issues concerning the relationship between the implied freedom of political communication and prohibitions on offensive speech more generally. Like many of the judgments in the feminist judgments project, some judgments focus directly on relevant legal issues. Others focus on questions of style and method in legal reasoning, and the need to engage with more expansive legal and nonlegal contexts in which offensiveness is regulated and has an impact, or the consequences of the law through, perhaps, social research or different assumptions of knowledge. The chapters pluralize readers' understanding of substantive values that are protected and promoted by the law, or those that should in fact underpin it.

The nature of the exercise of rewriting the *Monis* judgment undertaken by authors in this book has necessarily constrained them. Some liberties with judicial method have been taken that might stretch the boundaries of the judicial role, but the chapters each produce alternative imaginings *of the judgments*, an alternative imagining *of the law*. For many of the contributors writing from a highly critical perspective, this has meant working within the confines of quite artificial, and indeed

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18 *Id.*

19 *The Many Faces of Lindt Siege Gunman Monis*, ABC NEWS (May 22, 2017), http://www.abc.net.au/news/2017-05-22/lindt-cafe-sydney-siege-gunman-man-haron-monis/8375858.

20 *Id.*

sometimes quite personally difficult, constraints. The judgment of Anne Macduff and Wayne Morgan, for example, is prefaced by explaining the inherent contradiction in the concept of a queer or poststructural feminist judgment on the basis that queer theory and poststructuralism are deployed as tools of deconstruction and critique of law and the legal system and thus are in necessary and inherent opposition to them.[21] A queer/poststructural judgment "would either not be 'queer,' or it would not be a 'judgment.'"[22] Their judgment is framed as one *informed by* the critique of the theories, and in this more limited way brings the critical perspective within the legal paradigm. For the project as a whole, it has also meant that it is impossible to include within the main section of the book certain critiques of the law, which question law itself as a helpful structure or discourse for achieving social and political change. We have sought to address this, however, by ending the collection with a chapter from Margaret Davies providing a form of truly external critical reflection on the contributions found earlier in the final chapter.[23]

As a focused teaching tool, students are given a series of questions at the commencement of the book to assist them in navigating the critical perspectives and reading the judgments, and to also understand the purpose of the rereading project, which captures the objectives to which all of the critical judgments projects are directed. These questions are:

Did the judgment noticeably depart from traditional formal legal methods of reasoning, and if so, how? Did, for example, the judgment employ empirical research, or other information/knowledge? Do you think any identified departure is an important addition to legal decisionmaking?

How is the "story" of the case told in the judgment? Do you think this has an influence on the reasoning and outcome?

What are the different groups within the community who are represented in the judgments: Who is included, who is excluded? Why these groups and not others? What does this mean for the development of the reasoning, if any? What might it mean for the selection and appointment of judges who can deliver such judgments in like cases in the future?

Does the reasoning reveal that apparently neutral, objective norms have discriminatory implications for historically excluded groups, including women, Indigenous Australians, and racial or religious minority groups?

Do you think the judgment results in a more "just" decision than those reached by the High Court judges in *Monis*, either in terms of its reasoning or outcome?

What are the flaws that you can identify in the judgment as rewritten, either from a traditional legal approach, the critical perspective adopted, or from another perspective? How might these be remedied?

Is the judgment transparent about the reasoning employed to reach its outcome?

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21 Anne Macduff & Wayne Morgan, *Queer Theory and Poststructuralist Feminism*, *in* THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 73.

22 *Id.*

23 *See* Margaret Davies, *Critical Judging*, *in* THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 218.

How, if at all, did the rewritten judgment show the contingency of existing legal approaches and theoretical approaches to questions of constitutional law of this kind?

What critical perspective/s are not included in the book? How would you rewrite the judgment from other perspectives?[24]

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24 *See* Gabrielle Appleby & Rosalind Dixon, *Critical Thinking in Constitutional Law and* Monis v The Queen, *in* THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 1.