

Heather Douglas, Francesca Bartlett, Trish Luker, and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting the Law*. Hart Publishing, Oxford, 2014. xxx+451pp. £35.00 (paperback). ISBN: 978-1-84946-521-2

*Righting and Rewriting the Law* is the first publication from the Australian Feminist Judgments Project (FJP). An edited collection of 27 chapters, it provides a collaborative provocation to the *doing* of judging and legal reasoning.

The purpose of an FJP is to rewrite the “missing” feminist judgments in significant legal cases. A driver of the methodology is to put feminist theory and critique into action, and to show how cases could have been reasoned and/or decided differently (R. Hunter, C. McGlynn, E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010), pp.30–43). Participants in FJPs are tasked with imagining themselves as practising judges, bound by the same strictures, conventions and temporal knowledge and evidence as the original decision-maker(s). The rewritten judgments provide very powerful—and tangible—resources (R. Hunter, “The Power of Feminist Judgments?” (2012) 20 *Feminist Legal Studies* 135–148), which challenge not only the enduring myth of the “disembodied judicial officer” (E. Rackley, “Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor” (2002) 22 *Legal Studies* 602)—in that they can demonstrate, for example, the gender bias inherent in the original case—but also predictable accusations that to be a judge who is “feminist” or somehow “Other” is synonymous with a lack of objectivity (M. Thornton, “‘Otherness’ on the Bench: How Merit is Gendered?” (2007) 29 *Sydney Law Review* 391), for the rewritten judgments have received significant praise for being not only convincing but extremely fair (B. Hale, “Foreword” in R. Hunter, C. McGlynn, E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010), pp.v–vi).

While feminist scholars are not the first to engage in rewriting judgments (see, for example, L. Fuller, “The Case of the Speluncean Explorers” (1949) 62 *Harvard Law Review* 616–645 and P. Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (New York: Routledge, 1998)), FJPs have been characterised by a distinctively collective ethos, whereby multiple feminist perspectives collaborate in an attempt to shift legal discourse and cultures (M. Davies, “The Law Becomes Us: Rediscovering Judgment” (2012) 20 *Feminist Legal Studies* 167). Inspired by the Women’s Court of Canada (which focused on the application and interpretation of the equality guarantee in the Canadian Charter of Human Rights and Freedoms by the Supreme Court, published in Special Issue: *Rewriting Equality* (2006) 18(1) *Canadian Journal of Women and the Law*), the English and Welsh FJP (which was broader in scope in terms of court jurisdiction and substantive legal areas), has been a model for FJPs in other common law jurisdictions, namely Australia, Ireland and Northern Ireland, the US and most recently, New Zealand/Aotearoa. There is also an International Law FJP.

As sister projects, the synergies and continuities between *Righting and Rewriting the Law* and the 2010 edited collection from the English and Welsh FJP (R. Hunter, C. McGlynn, E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010)) are clear. For example, both collections start with introductory framing chapters written by the directors of the FJP, followed by two-part chapters consisting of the rewritten judgment and a short commentary which outlines the context, significance and reasoning of the original case, and explains the distinctiveness, achievements and limitations of the feminist judgment. Both collections adapt Rosemary Hunter's seven-point "checklist" for feminist judging (R. Hunter, "Can Feminist Judges Make a Difference?" (2008) 15 *International Journal of the Legal Profession* 7–36): reproduce the rewritten cases in their original format; rewrite cases from different courts; and organise the chapters by substantive area of law (which in *Righting and Rewriting the Law* are as follows: Constitutional Law; Tax Law; Immigration Law; Environmental Law; Torts; Consumer Protection; Equity; Criminal Law; Evidence; Sentencing; Family Law; Discrimination Law; Treaty Law). Moreover, after finishing each book, the reader is left in no doubt that the primary motivation for participants—whether academic, practitioner or activist—was a sense of rage at the gendered injustices generated by law, even when better decisions *could* have been reached *within* existing legal strictures. Chapter 2 of this collection, which analyses the reflections of the feminist judges on the rewriting process in order to unpack the challenges and strategies of the feminist judging methodology, is particularly striking on this point. To quote but one participant:

"I remember [the judges'] phrase [from the original judgment], that what the six complainants had suffered was a type of sexual behaviour at the hands of the defendant that was entirely unremarkable. I thought 'goodness me ... so you can be sexually assaulted and it is entirely unremarkable?' 'So therefore, what's the problem?' That was almost what I felt they were saying ... As a woman, I've always felt that sexual assault was entirely remarkable." (Annie Cossins, p.31.)

However, despite anger at the law, this chapter makes clear that many of the feminist judges in the Australian FJP invoked legal formalism as feminist method, on the basis, for example, that their interpretation and application of the law gave proper effect to the political intentions behind the relevant statutory provisions (pp.32–34). Others spoke of how "restraint" in judicial reasoning may be more beneficial to women (p.23), in either fending off criticism that feminists had somehow "got it wrong" (p.33) or in calling law to account for past injustices (p.33). This invocation of legal formalism by many of the feminist judges is provocative, for it encourages us to think of feminist judging in terms of not only revealing the contingencies of law and the fallacies of how judicial impartiality is stubbornly understood, but also in terms of how a judge's understanding of their *purpose* may be important for the decisions that they

reach (M. Davies, “The Law Becomes Us: Rediscovering Judgment” (2012) 20 *Feminist Legal Studies* 167 at 173). In other words, whether judges are *willing* to promote equality and gender justice—in substantive, rather than just formal terms—in the decisions that they reach? The involvement of several practising judges in the Australian FJP makes clear that many are, and it is to be hoped that the sustained critical practice of FJPs, which are ultimately an effort to put decades of feminist scholarship and activism into practice, will help generate important dialogues amongst the various “agents of law” in what Margaret Davies describes as “a large and ongoing legal drama” (M. Davies, “The Law Becomes Us: Rediscovering Judgment” (2012) 20 *Feminist Legal Studies* 167).

There are many more reasons why this collection is provocative. I found it interesting, for example, that many of the gender stereotypes and expectations that I was familiar with in the jurisprudence of Ireland and the UK were very similar in the Australian cases; from the construction of women as “self-interested gold-diggers” in an equity case resting on the doctrine of unconscionability (pp.191–206) to the invocation of “selfish mothers” in family law cases pertaining to relocation (pp.361–374) and post-separation care of children (pp.375–390). What was also very striking was how the parameters of the FJP were clearly informed by Australia’s distinct historical and political context. The legacy of Australia’s settler-colonial history and its devastating and enduring impact on indigenous people, as well as the role of immigration in the development of the Australian national project, underpin some of the most interesting chapters in the collection. Indeed, it is this political history which provoked two participants to work outside the constraints that the original decision-maker would have operated under, on the basis that the patriarchal and colonial history of Australian law—which includes the elevation of written text—makes it impossible to hear or understand Aboriginal women’s voices and stories on their own terms, or to account for indigenous perspectives (pp.41–54 and 437–452).

I found it important that the feminist judging methodology was challenged in this way in the collection, and it reflects the editors’ explicit awareness of the limits of the methodology in terms of law reform (pp.7, 20–21, 36). This acknowledgment does not take away from the impressive achievements of this collection, and indeed the wider project, of which I hope there will be further publications. Instead, it reflects something that has always been vital to the development of feminist knowledge creation, which is the ability to reflect and change understandings of how power operates in society, whether through challenge, critique or hopefulness.

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