

THE AUSTRALIAN WILD LAW JUDGMENT PROJECT

NICOLE ROGERS and MICHELLE MALONEY

REFERENCES

1. Margaret Thornton, 'Authority and Corporeality: The conundrum for women in law' (1998) 6 *Feminist Legal Studies* 147, 156.
2. Carmel Rogers, 'How Legal Education Will Assault You as a Woman' (1993) 23 *Victoria University of Wellington Law Review* 167, 172.
3. Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *Journal of Law and Society* 448.
4. Thornton, above n 1, 153.
5. University of Queensland, *Australian Feminist Judgments Project* <<http://www.law.uq.edu.au/the-australian-feminist-judgments-project>>.
6. The Women's Court of Canada, *Rewriting equality, recire l'egalite*.
7. Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From theory to practice* (Hart Publishing, 2010).
8. University of Queensland, *Australian Feminist Judgments Project: Re-imagining and re-inventing Australian court decisions. Methodology* <<http://www.law.uq.edu.au/afjp-methodology>>.
9. Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20(2) *Feminist Legal Studies* 135, 137.
10. Thomas Berry, *The Great Work: Our Way into the Future* (Bell Tower, 1999).
11. Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2003).
12. Michelle Maloney and Peter Burdon (eds), *Wild Law: In Practice* (Routledge, 2014); Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011).

The development of an earth or wild jurisprudence requires us to interrogate from an ecological perspective the sacred texts of law, its regulatory instruments and its judgments, and to acknowledge some of the missing voices and perspectives: those belonging to other species and future generations and perhaps, even more holistically, the voice of Gaia herself. However in developing such a jurisprudence we need to do more than merely gesture towards the multiple silences and omissions. We need to provide constructive suggestions for a way forward.

Wild law scholars strongly support the enactment of new legislation in which the rights of nature are enshrined. However regulatory reform will not, of itself, address judicial anthropocentrism. The Australian Wild Law Judgment project, which draws its inspiration from various feminist judgment projects, poses a unique critical challenge to the dominant human-centred focus of the common law. In participating in this project, a group of academics and practitioners will open up Australian judicial decision-making to critical scrutiny from a wild law perspective.

In this article we describe feminist judgment re-writing projects, outline the development of the dynamic Australian Wild Law movement, introduce the Australian Wild Law Judgment project, and highlight the project's parameters, limitations and, most importantly, its transformative possibilities.

Feminist re-writings and wild re-writings

The narrative of common law is largely told by 'benchmark men'¹ from a white, middle-class, male and profoundly anthropocentric viewpoint. Feminist scholars have described legal reasoning as a 'fascist fiction',² as 'gendered and discriminatory' in its re-enforcement of the public/private dichotomy;³ its 'rhetoric of equality and neutrality ... effectively masks the play of power'.⁴

Feminist scholars, in tackling the task of 're-imagining' and 're-inventing' judgments from a feminist perspective, are deconstructing the male stories contained within sacred texts of law and contesting the much vaunted legal norms of neutrality and objectivity.

Feminist re-writings have taken a variety of forms. The current Australian Feminist Judgments Project 'investigates the possibilities, limits and implications of a feminist approach to legal decision-making' by re-writing existing judgments 'through a feminist lens'.⁵ This Australian project follows on from initiatives in

other jurisdictions, such as the Women's Court of Canada and the United Kingdom Feminist Judgments project. The Women's Court of Canada operates as a 'virtual court' and re-writes the *Canadian Charter of Rights and Freedoms* equality jurisprudence.⁶ The UK project resulted in an edited collection of 23 re-written judgments, each accompanied by a commentary.⁷ Importantly, such feminist projects have been collective, participatory and collaborative; contributors to the Australian project met together in a number of workshops to review and develop the draft judgments and commentaries during the writing process.⁸ In both the UK project and the Women's Court of Canada, there was discussion and debate on draft judgments within the larger group.⁹

We are inviting wild law scholars to draw inspiration from such feminist projects and join us in mounting an intellectual challenge to the hegemony of anthropocentrism in the common law, by re-imagining and re-inventing existing judgments from a wild law perspective.

Wild law in Australia

Earth jurisprudence, a term coined by deep ecologist and 'geologist' Thomas Berry, challenges the human-centred and pro-development origins of industrial society's legal system and suggests a re-imagining of systems of law and governance such that they nurture the whole earth community, not just the homosphere.¹⁰ In *Wild Law: A Manifesto for Earth Justice*, Cormac Cullinan examined the specific challenges which must be addressed in western industrial legal systems if they are to operate in accordance with the philosophy of earth jurisprudence.¹¹ The origin of the Australian wild law movement lies in an inspirational conference which took place in 2009 in the Adelaide Hills. During this three-day event, organised by Peter Burdon of the University of Adelaide, participants examined principles of earth jurisprudence and wild law in an Australian context. The event brought together a core group of people who have continued to develop the wild law movement in Australia.

This group organised other Australian wild law conferences in 2010, 2011 and 2013 and contributed to two edited Australian publications on wild law.¹² In the lead-up to the 2011 conference, the organisers agreed that they would create a permanent space for interested people to continue exploring the theory and practice of wild law and earth jurisprudence in Australia. Author Michelle Maloney — environmental

The project poses a subversive challenge to the very foundations and meaning of law, by contesting the place of humanity at the centre of existing notions of justice.

lawyer, activist and PhD candidate at Griffith University — volunteered to convene a new organisation, with formal membership and board oversight. Input was invited from the 150 participants at the 2011 conference and, in March 2012, the Australian Earth Laws Alliance ('AELA') was created. AELA's mission is to promote the understanding and practical implementation of earth jurisprudence and wild law in Australia. It does this through the core themes of changing culture, reconnecting with what matters, building community, building alternatives and transforming law and governance.¹³

Changing culture involves raising awareness about earth-centred law and governance. During 2012 and 2013, AELA conducted workshops, seminars and public lectures around Australia,¹⁴ inviting local people to share stories of their existing work and to engage with earth jurisprudence and wild law. AELA now has a national network of around 1000 people connected by a shared interest in systemic change of our legal and governance systems.

As part of AELA's commitment to the development of alternative legal narratives, the organisation staged a rights of nature mock trial at its 2013 conference and is currently participating in the International Ethics Tribunal on the Rights of Nature, described below.¹⁵ Other environmental law organisations have also staged mock trials in recent years, with the Victorian Environmental Defender's Office hosting *Green Sea Turtles v The State of Queensland and the Commonwealth of Australia* in 2012.¹⁶ This trial was conducted in accordance with formal courtroom procedures and presided over by Justice Brian Preston, Chief Judge of the New South Wales Land and Environment Court.¹⁷

In the Australian Wild Law Judgment project, the task of each participant is to choose an Australian judgment and re-write it from a wild law perspective. The original judgment might be found in any area of law, including constitutional law, administrative law, torts, corporations law, property law, contracts, criminal law and taxation law. In the original judgments, we may well find corporate rights of legal personhood protected at the expense of the rights of human and non-human beings, property rights enshrined at the expense of the environment, and parties constructed as autonomous individuals engaged in competitive activities in an open marketplace rather than as interconnected beings in a set of broad and even global ecological communities. In a wild re-writing of these judgments, a different set of assumptions will come into play.

The Wild Law Judgment project is intended to disrupt and unsettle the established human and property-centred practices of the common law. It places all life, and all of life's support systems, at the centre of judgments. The project poses a challenge to the powerful corporate and political institutions which have shaped and continued to shape our legal system. More importantly, the project poses a subversive challenge to the very foundations and meaning of law, by contesting the place of humanity at the centre of existing notions of justice. Writing becomes dangerous when we doubt or question the 'normal' and the 'natural'.¹⁸

Why re-write judgments?

The re-written judgments of both feminist judgment projects and the Australian Wild Law Judgment project have no legitimacy or 'force of law'.¹⁹ Nevertheless such judgments, which compel us to interrogate existing legal principles, practices and findings through a feminist, or a wild law lens, can contribute to a paradigm shift in existing legal systems. The editors of the UK collection of feminist judgments state in their introduction that:

these feminist academics dressed up as judges powerfully denaturalise existing judicial and doctrinal norms, exposing them as contingent, and as themselves (the product of) performances.²⁰

In this sense, such judgments are similar to the forthcoming decisions of the first International Ethics Tribunal for the Rights of Nature,²¹ in which a number of prominent lawyers and non-lawyers will not only denaturalise dominant judicial and doctrinal norms but challenge the very legitimacy of existing legal systems which sanction and facilitate the ongoing desecration of the natural world. The Tribunal, which was created by the Global Alliance for the Rights of Nature,²² sat for the first time in January this year and has begun to hear nine cases regarding alleged violations of the Universal Declaration of Rights of Mother Earth,²³ adopted in Cochabamba, Bolivia, on 22 April 2010. The Tribunal's decisions will also lack the 'force of law' but it nevertheless has performative significance as a forum in which an alternative 'rights of nature' legal discourse can be articulated and developed. AELA is participating in this Tribunal and presenting a case on the threats facing the Great Barrier Reef. This engagement signals the willingness on the part of the Alliance to contribute to the development of alternative legal narratives.

Robert Cover described the purpose of a similar pseudo-tribunal, the 1967 International War Crimes

13. Australian Earth Laws Alliance, *What we do – Australia* <<http://www.earthlaws.org.au/what-we-do-australia>>.

14. Australian Earth Laws Alliance, *Past Events* <<http://www.earthlaws.org.au/past-events/>>.

15. *Great Barrier Reef v Queensland Government*; see Australian Earth Laws Alliance, *Rights of Nature Mock Trial* <<http://www.earthlaws.org.au/wildlaw-conference/rights-of-nature-mock-trial>>.

16. Environmental Defenders Office, *Green Sea Turtles v The Commonwealth and the State of Queensland Mock Trial* (18 February 2012) <https://envirojustice.org.au/downloads/files/seminars/2012/edo_mock_trial_background.pdf>.

17. The hypothetical judgment is available at Brian J Preston, *Green Sea Turtles by their representative, Meryl Streef Applicants v the State of Queensland and the Commonwealth of Australia Respondents Mock Trial judgment 18 February 2032* (18 February 2012) <<http://ebookbrowse.net/edo-mock-trial-judge-s-decision-pdf-d344113519>>.

18. Fleur Johns, 'On writing dangerously' (2004) 26 *Sydney Law Review* 473, 480.

19. See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992).

20. Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist judgments: An introduction' in Hunter, McGlynn and Rackley, above n 7, 8.

21. Global Alliance for the Rights of Nature, *First Global Tribunal on Rights of Nature hears 9 cases* (17 January 2014) <<http://therightsofnature.org/rights-of-nature-laws/rights-nature-tribunal>>.

22. *Ibid.*

23. World People's Conference on Climate Change and the Rights of Mother Earth, *Proposal Universal Declaration of the Rights of Mother Earth* (22 April 2010) <<http://pwccc.wordpress.com/programa>>.

Tribunal, as 'dramatization, or instruction'.²⁴ This tribunal was established by philosophers Bertrand Russell and Jean-Paul Sartre; its objective was to determine whether the United States had committed acts of aggression during the Vietnam War. Such tribunals, described by Cover as 'an anarchist version of a state institutional response'²⁵ and 'a philosopher's realization of an ideal type',²⁶ are, similar to the Wild Law Judgment Project, performing or inventing a form of law which has no legitimacy within existing legal systems. Sartre stated at the outset:

We are powerless: it is the guarantee of our independence ... What is certain, in any case, is that our powerlessness ... makes it impossible for us to pass a sentence.²⁷

In contrast to feminist judgments projects and the Wild Law Judgment Project, such tribunals deliver judgments in cases not yet heard in conventional courtrooms, on issues which would be dismissed as non-justiceable. Nevertheless judges sitting on such tribunals, judges presiding over mock trials, and contributors to alternative judgment re-writing projects are engaged in the same enterprise: that of articulating alternative legal narratives.

Parameters of the Wild Law Judgment project

The Australian Wild Law Judgment project will rely on contributions from academics, practitioners and judges who are prepared to re-write a judgment in a particular area of law from a wild law or earth-centred perspective. The project could adopt a similar methodology to that of the feminist re-writing projects, with one person re-writing a judgment and another providing a commentary on that judgment. Alternatively the writer of the judgment could provide this commentary and highlight where their reasoning has departed from the reasoning in the original judgment and the reasons for this departure. The collaborative approach in the feminist re-writing projects and in particular participation in ongoing workshops will assist contributors with the challenges of defining a wild law perspective, and how this perspective can best be incorporated into judicial decision-making.

There are, in fact, many challenges for such a project; these reflect the challenges facing the legal system if it is to embrace rights of nature and other earth-centred legal concepts. One contentious issue which may arise is the prioritisation or valuing of rights of different species. Decisions protecting the rights of one non-human species may not necessarily serve the interests of other species. Furthermore, any attempt to speak in another's voice, particularly when we can never discover what the 'other' is thinking or feeling, is inherently problematic. This point has been made by feminist lawyers, in relation to the 'silenc[ing of] the voices of "others" and ... replac[ing] them with our own more privileged voices'.²⁸ This form of ventriloquism is particularly problematic when the 'other' does not and cannot have a human voice. We can only extrapolate from our human needs and

desires in speaking for other species, but this does not necessarily ensure that the needs and wishes of other species, ecosystems and ecological communities are appropriately and adequately articulated.

Participants in the project will need to explore the implications for judicial decision-making of the adoption of a different cultural worldview. Wild law is characterised by deep respect for, and a call to connect with, indigenous wisdom and knowledge. The organisers of the UK Feminist Judgments project chose to make the re-written judgments as plausible as possible,²⁹ but this creates particular constraints which may prove to be incompatible with a wild law paradigm. Is it possible to re-write Western judgments wildly and retain the reliance on legal abstractions, positivist reasoning, the concrete-like and seemingly impenetrable legal logic? Or should we draw on concepts such as the Council of All Beings, created by John Seed and Joanna Macy in the 1980s,³⁰ or perhaps the traditional legal knowledge and processes of Aboriginal and Torres Strait Islander and other cultures, in order to develop new modes of legal reasoning more suited to the wild law paradigm?

Arguably the project will need to embrace a pluralistic definition and analysis of law and this will require participants to be open to experimenting with different forms and processes of 'judiciality'. These sorts of problems and dilemmas with wild re-writing are best canvassed in a workshop setting.

Working within the strictures of legal reasoning, which is so profoundly anthropocentric, might well prove both disabling and empowering for participants. It is disabling because, as Laurence Tribe observed so many years ago in writing about environmental law, 'a subtle transformation is likely to be occasioned by the philosophical premises of the system in which the effort is undertaken'.³¹ It is also empowering because such an exercise can highlight possibilities for judicial discretion and open-ended decision-making even within such an anthropocentric system.³² Rosemary Hunter, writing about the UK Feminist Judgments Project, has observed that 'there is considerable (if not unlimited) scope for judges to manipulate the tools of legal reasoning, categorisation, precedent and statutory interpretation'.³³

However the wild (and other) possibilities inherent in all judicial decision-making present a further issue for consideration in relation to a Wild Law Judgment project. Sarmas points out that challenging official narratives or 'stock stories' may be counter-productive; 'it is sometimes preferable, indeed necessary, to employ strategies which utilise dominant narratives towards the end of winning the case'.³⁴ All Australian lawyers are familiar with the story of how the High Court's interpretation of key sections of the Australian Constitution in 1983 ensured that an area of Tasmanian wilderness was protected from devastation, without any judicial endorsement of the intrinsic value of wilderness and non-human species.³⁵ Keith Hirokawa has argued against the effectiveness of putting forward various radical theoretical positions on environmental

24. Robert Cover, 'The Folktales of Justice: Tales of Jurisdiction' in Martha Minnow, Michael Ryan and Austin Sarat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (University of Michigan Press, 1992) 201.

25. Ibid 200.

26. Ibid 201.

27. Ibid 199.

28. Lisa Sarmas, 'Storytelling and the Law: A case study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701, 727.

29. Hunter, McGlynn and Rackley, above n 7, 6.

30. Joanna Macy, *The Council of All Beings* <<http://www.rainforestinfo.org.au/deep-eco/joanna%20Macy.htm>>.

31. Laurence Tribe, 'Ways Not to Think about Plastic Trees: New foundations of environmental law' (1974) 83 *Yale Law Journal* 1315, 1331.

32. See Hunter, above n 9, 139.

33. Ibid 139.

34. Sarmas, above n 28.

35. *Commonwealth v Tasmania* (1983) 158 CLR 1.

Is it possible that in some important instances a strict adherence to traditional legal reasoning and positivism may be more successful in achieving wild outcomes than wild re-writing?

reform. In espousing a philosophical approach of eco-pragmatism, Hirokawa maintains that it is preferable to make effective use of conventional legal narratives.³⁶

A re-written wild law judgment can sometimes generate the same outcome as the original judgment. For instance, a wild re-telling of the *Tasmanian Dams* case would surely have the same outcome. Is it possible that in some important instances a strict adherence to traditional legal reasoning and positivism may be more successful in achieving wild outcomes than wild re-writing?

Lucinda Finley points out that the use of dominant narratives 'creates a stark dilemma: in light of the power of existing meanings, can we change the meanings of terms while still using those terms?'³⁷ Lawfulness is, as one of us has written, a two-edged sword.³⁸ Activists can indeed adopt dominant ways of thinking and speaking in order to achieve concrete outcomes. However, the tradition of legal positivism is not politically neutral and, by working within this tradition, they are reinforcing the status quo.

By way of contrast, wildly re-written judgments constitute both a challenge and a threat to traditional modes of legal reasoning. Importantly, irrespective of outcome, wild re-writing is a process by which the dominant paradigm can be shifted. It allows us to envisage different possibilities and new realities. When we view judgments through a wild law lens, we can see more clearly the anthropocentric fictions and cultural

stereotypes which support legal abstractions and real-world destruction, and we can contest their continued legitimacy and authority.

Conclusion

In this article, we have identified the possible dimensions and possibilities of a Wild Law Judgment project. We urgently need an alternative cultural narrative to the dominant 'tale of capital'³⁹ which has shaped and continues to shape the development of common law. The personal, the emotional, the importance of place and the rights of other species to exist and thrive are all important components in this narrative. In imagining, discussing and participating in wild law judgment re-writing, we can assist in the creation of this new narrative.

NICOLE ROGERS teaches law in the School of Law and Justice, Southern Cross University. MICHELLE MALONEY is a PhD candidate at Griffith University, and National Convenor of Australian Earth Laws Alliance.

© 2014 Nicole Rogers and Michelle Maloney

Those interested in participating in the project and/or attending the first workshop, to take place in Sydney on 12 November 2014, should contact Nicole at <nicole.rogers@scu.edu.au> or Michelle at <convenor@earthlaws.org.au>.

36. Keith Hirokawa, 'Some Pragmatic Observations about Radical Critique in Environmental Law' (2002) 21 *Stanford Environmental Law Journal* 225.

37. Lucinda Finley, 'Breaking Women's Silence in Law: The dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886, 908.

38. Nicole Rogers, 'Climate Change Litigation and the Awfulness of Lawfulness' (2013) 38 *Alternative Law Journal* 20, 21.

39. James Thornton, 'Our World Needs a New Renaissance', *Sydney Morning Herald* (Sydney), 6–7 June 2009, 16.



MENTIONS

The 2014 Castan Centre Gala Dinner

Date: Thursday, 23 October 2014

Time: 7–11 pm

Venue: Carousel, 22 Aughtie Drive

Albert Park Lake, 3205

Dress code: Lounge suit

Be sure to come along for a night of festivities with Melbourne's human rights community. We'll have a great evening, and we've lined up our best selection of auction and raffle prizes ever. The Keynote speaker will be Jon Stanhope, and Melbourne comedian Claire Hooper will be our MC.

About Jon Stanhope

Mr Stanhope is about to complete his term as Administrator of the Indian Ocean Territories, including Christmas Island, where he has witnessed the controversial detention of asylum seekers. He was previously Chief Minister of the ACT and introduced Australia's first Human Rights Act while in office.

For further details, please go to <http://www.law.monash.edu.au/castancentre/public-events/events/2014/gala-dinner.html> or call 9905 3327.