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**The politics of the public and private spheres:
The High Court's decision in *Monis* and the gendered
privileging of free speech**

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Liberal democratic politics has long invoked the idea of a public sphere of politics and a separably distinct private sphere of citizen's activities nominally free from political interference. Not only has this idea been contested, the fact of separation has been largely illusory. This was brought out in two concurrently heard cases before the High Court of Australia in 2013, *Monis v The Queen*; *Droudis v The Queen*. The Court had to determine whether letters sent by Monis (aided and abetted by Droudis) enjoyed the constitutional protection of the implied freedom of political communication. The Court was evenly split between the men judges finding for Monis and Droudis and the women judges against—a significant event in itself. This paper explores the gendered politics of these judgments. They reveal how gendered meanings and hierarchies continue to shape judicial understandings, which in turn contribute to contemporary understandings of the public and private.

Key words: Gender; High Court; free speech; harm; masculinism

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The right to free speech is a touchstone for democratic practice. However, not all speech in the public domain gets to be protected. There are circumstances in which the state determines that it is appropriate to declare some types of speech to be outside the bounds of normal or acceptable political discourse. Determining which (and indeed when) particular speech content warrants being so excluded is complicated because it involves more than just identifying content. It also involves a prior view about the nature of political discourse as well as an interpretation of the ‘public’ of the public domain within which such discourse takes place. For the most part these presuppositions and their influence go unnoticed since they are often treated as part of the taken-for-granted attributes of the political landscape. However, in 2013 in a case before the High Court of Australia, *Monis v The Queen; Droudis v The Queen*¹ (‘*Monis*’), these presuppositions were pushed into the spotlight. The political communication in question took the form of letters sent to private homes of specifically identified recipients, requiring the Court to posit a constitutional interpretation of the scope of the protection that might be called for. That is, the Court had to determine the extent to which a private letter enjoyed the protection of the implied freedom of political communication. Not only did the judgments reveal various facets of masculinist undercurrents within the thinking of the Court, it also revealed how these undercurrents informed a redrawing of what the Court understood to be the boundaries defining the public and private.

Mr Man Haron Monis and his partner Ms Amirah Droudis lodged separate appeals with the High Court against their convictions in a NSW court for using the postal service to transmit material that was deemed offensive within the terms of s.471.12 of the *Criminal Code 1995* (Cth). They challenged their conviction on the grounds that s.471.12 infringed their right to freedom of political communication, an implied constitutional right established in 1992.² In a joint judgment, the three women judges, Crennan, Kiefel and Bell JJ found the provision valid, whereas in separate judgments French CJ, Heydon and Hayne JJ held that, in the circumstances, the provision

¹ *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92. The *Monis* decision subsequently became famous for a particularly tragic reason in December 2014. Man Haron Monis held 17 people hostage in Sydney at the Lindt Café where two hostages and Monis were killed.

² *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 concerned the validity of Part IIID of the *Broadcasting Act 1942* (Cth); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 concerned the validity of s 299(1)(d)(ii) *Industrial Relations Act 1988* (Cth).

amounted to an impermissible burden on the implied freedom. These views give us pause to consider what is valued and thus protected in Australia's constitutional framework, especially since the women and men judges conceptualised the nature and application of political communication in markedly different ways. For the men judges, offensive communication was seen as a necessary (if unfortunate) part of robust political debate, since they appeared to couch their understanding of the political system in gladiatorial terms. They considered it appropriate for what would ordinarily be understood as public activities, namely political debate, to be allowed a legitimate entry, whether or not invited, into a person's home (hitherto considered as a sphere ordinarily outside of that for the conduct of political activity). For the women judges, the law should reasonably be able to prohibit the harm caused by seriously offensive communications in the context of an intrusion into the private sphere. The *substance* of their judgment recognised that there were (or should be) limitations to the reach of whatever was taken to be political communication and hence in effect recognised an implicit boundary between public and private activities. However, the *form* of their judgment was very restrained in terms of its language, structure and narrative. Conversely, the men judges appeared to dismiss a need for drawing any boundaries between public and private arenas, paradoxically, invoking a variation on the theme of the personal as political. The gladiatorial tenor was further reinforced by their use of emotionally charged language to frame their judicial opinion.

Gender infused the opinions of the judges in many nuanced ways that went beyond the obvious fact that the men upheld the appeal and the women dismissed it. Rather, the political significance of the divergent opinions of the judges reflects and revisits some of the tensions feminist theorists have exposed in the law's dichotomous conceptions of its own reach into public and private spheres. The peculiarly gendered implications around free speech and representative democracy have each been of particular interest to feminist scholars (see e.g. Pateman 1983; Phillips 1991; Irving 1996). For example, in the context of reviewing the decision in *Monis*, Irving (2013) noted that 'women have long been sensitive to the down-side of free speech' since women have not necessarily been the beneficiaries of free speech to anything like the same extent as men. In their analysis of the decision, Appleby and Naffine (2015) drew attention to the role of gender in shaping the judges' understandings of the nature and limitations of free speech with respect to what was deemed acceptable or necessary for democratic

political discourse in Australia. Similar themes were revisited in Appleby and Dixon's (2016) edited collection, *The Critical Judgments Project: Re-Reading Monis v The Queen* where legal scholars wrote re-imagined *Monis* judgments.³ For Appleby and Dixon (2016: 5), *Monis* presented a particularly apposite vehicle for critical judgment writing because it required judges 'to grapple with deep issues about the appropriate role of the state in employing criminal law to regulate civility of discourse and protecting vulnerable groups'. Two of these re-imagined judgments will be discussed below as they provide a useful foil for illuminating the contested but nonetheless gendered values embedded in the real life judgments in *Monis*.

However, of particular interest for us is the way in which the notions of 'harm' and 'home' as understood within the Court's reasoning were gendered when it came to determining the legitimate reach of s.471.12. Curiously, the judgments, despite their differences, all pivot around the idea of minimising harm: for the men judges it was about minimising harm to the sort of free political communication they considered to be necessary for the effective working of Australian democracy, for the women judges it was about minimising harm to embodied citizens and their capacity to enjoy those freedoms. In addition, the women judges recognised the gendered implications of what was at stake in treating the issue as simply about protecting a right to free political communication. On the other hand, the implications of the men judges' position in averring that there was no intrusion to be considered seemed to favour protecting the rights of the intruder.

While their judgments make important claims about what should properly be protected within the presupposed view of representative democracy, they also tell a story about what the justices considered to be acceptable as political communication and in what spaces it could be articulated. Hence in what follows we are concerned with what *Monis* might tell us about the limits of legislative power in terms of what justifies the reach of that power into the private sphere, in this case the homes of its citizens. *Monis* may shed

³ Perhaps the most well-known critical judgment project is the Feminist Judgments Project which rewrote well-known cases through a feminist lens to explore the possibilities and limitations of feminist jurisprudence. Although Appleby and Dixon's (2016: 3) collection presents a diverse collection of critical judgments, drawing not only on feminist theory but also, for example, critical race theory, queer theory, and political liberalism, they note that their collection was inspired by the Feminist Judgments Project—particularly Hunter, McGlynn and Rackley's (2010) *Feminist Judgments: From Theory to Practice*.

some light on contemporary judicial understandings of public and private spheres. Our analysis begins with a brief discussion of the discovery of the implied right of political communication and the masculinist understanding at the time of the Australian political system and the nature of its democracy. This understanding also involved an often implicit naturalising of a division between the public and private spheres, which in turn formed the context within which the Australian Constitution was created and its ongoing interpretation has been conducted. The masculinism that shaped the Australian Constitution still casts a long shadow as we shall demonstrate in our discussion of the judgments handed down in *Monis*.

The State and the Demarcation of Public and Private

Although we recognise that the Court's judgments do not necessarily bind future courts in any direct way,⁴ they do serve as a reminder that the High Court is a key arbiter of the meaning of Australian democracy, if not the legitimacy of the very political system itself. We can see this from the Court's 1992 "discovery" of an implied right to freedom of speech in the Constitution. To arrive at that position the Court first of all had to link up the fact of the Constitution with the political system it was purporting to constitute. This determination came in the 'twin cases' *Australian Capital Television Pty Ltd v Commonwealth*⁵ and *Nationwide News Pty Ltd v Wills*,⁶ though it was complicated by divergent views as to the precise source and scope of the freedom, largely resulting from how members of the Court at the time conceived of the relationship between representative democracy and the text and structure of the Constitution. However, in 1997 the Court's unanimous decision in *Lange* settled the uncertainty generated by these divergent views of the source of the freedom. In *Lange* the Court successfully anchored the implied freedom of political communication to the text and structure of the Constitution. Specifically it argued that 'to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant

⁴ A split decision such as this is in itself a rarity because normally the Court's full complement of seven judges would prevent such an occurrence. However, at the time *Monis* was heard there were only six judges available as Justice Gummow was due to retire and Justice Gageler had not yet been sworn in. This result meant that *Monis* and *Droudis*' convictions stood: *Judiciary Act 1903* (Cth) s 23.

⁵ *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106 concerned the validity of Part IIID of the *Broadcasting Act 1942* (Cth).

⁶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 concerned the validity of s 299(1)(d)(ii) *Industrial Relations Act 1988* (Cth).

sections'.⁷

This was not the first instance in which rights or freedoms were drawn by implication from the Constitution (Blackshield and Williams 2010: 1257), but for our purposes the decisions of 1992 and 1997 represent a watershed moment in Australia's political development. Of some importance is the fact that the discovery of an implied freedom did not create a 'right' to free speech, but rather, came to be set up as a fetter on legislative power; it thus 'provides *freedom from* interference'.⁸ The High Court's approach to the implied freedom means that it 'is a "negative" rather than a "positive" right which means that it provides freedom from interference, rather than the right to engage in certain activities' (Stone 2001: 376).

Defining the legitimate reach of the state and the freedom to engage in certain activities has been an ongoing source of tension within liberal democratic thought. One classic formulation centred around the issue of prevention of harm, most famously expressed by John Stuart Mill in *On Liberty*, namely, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others' (Mill 1859: 223). However, built into the formulation of his 'harm principle' was a further convenient demarcation, namely that between a public sphere of the state (of politics) and a private sphere of individual interests that ideally remained outside of the State's reach. In the former the state could (and should) act, in the latter the state should only act to prevent harm to others. This private sphere was largely the sphere of the market within which individuals (or families headed by men) pursued their own interests. This way of understanding the dichotomy between public and private is characteristic of most modernist political thought, regardless of the particular ideological orientations.

Numerous feminist scholars of varying persuasions suggest that this way of understanding the private and public division is crucial to maintaining men's power and advantages (Motiejuniute 2005; Thornton 1995a; MacKinnon 1989; Pateman 1983, 1988; Okin 1979). Just as the emergence of a so-called private sphere of the market

⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

⁸ *Ibid.*, 520, 566-567.

presupposed, indeed helped to bring into being, a form of state willing to guarantee in varying degrees its operations, so too has the state structured and sanctioned the personal relations of individuals in the so-called private sphere of the family. Marriage and divorce, sexual practices (both inside and outside of marriage), reproductive rights (e.g. abortion, contraception, in vitro fertilisation, and so on), child abuse, domestic violence, stalking and sexual harassment in the workplace are also areas of concern for the state. Many of these have been brought under the purview of the state largely as a result of feminist agitation and are usually seen as a positive development. As one feminist legal scholar has described it, '[t]he public sphere (law) is invading the private sphere (sexuality)—a radical notion for liberal legalism and, from a feminist perspective, a cause for celebration rather than complaint' (Morgan 1995: 97). This is a graphic restatement of the feminist observation that the personal is political (Hanisch 1970), and one that recognises that such action by the state is often a necessary intervention (Okin 1979, 124; MacKinnon 1987, 100).

A key rationale for feminist support for the state to 'invade' or 'intrude' into the private sphere has been and continues to be a concern to establish and protect the rights and well-being of women (and children). In part, it is a variation on the liberal precept of the prevention of harm, but one that is fully cognisant of the gendered dynamics shaping the possibilities for freedom within this so-called private space, and hence 'that what occurred in the so-called private sphere should be the legitimate concern of the polity' (Thornton 1995a: 9). While many feminist theorists have been mindful of the dangers of justifying these (legal/political) intrusions into private spaces in terms of the idea that 'the personal is the political', the fact remains that the public and private spheres are interconnected; they 'cannot be dealt with in separate worlds, as if one exists in a rhythm separate from the other' (Phillips 1991: 95). Further, this interconnectedness is both structured by and varies with prevailing social, political, and legal dynamics.

These dynamics were fully operative in the late nineteenth century when the Constitution was being debated and drafted. This was a time when women may have gained the vote in the public sphere on federation, but at the same time were considered on marriage to be subsumed within the person of their husband and hence subject to his (more or less) absolute authority economically and sexually (Karpin and O'Connell 2005; Hasday 2000; Seigel 1998; Oldfield 1992). The boundaries were much more

visibly articulated and the creation of the new nation under a new Constitution was represented, both then and for many decades to follow, as men's business (Grimshaw, Lake, McGrath and Quartly 1994). The way in which women were situated in that process has shaped interpretations of the Constitution in important ways (Irving 1996). Reflecting on the silences in the Constitution as far as women are concerned Priest and Williams (2010: 417) note 'the problem is not what Australia's Constitution says about women, but what it fails to say'. This silence as to women is emblematic of the masculinism embedded in the Constitution and has ongoing implications for the way in which women are situated within Australia's constitutional framework. It might be tempting to dismiss these features as a matter of past history, particularly given more recent events which have seen women exercising authority at the peak of Australia's Constitutional framework. Nevertheless, the very text and structure of the Constitution, particularly with respect to the system of government it creates, bears the masculinist hallmarks of its creation.

Neither representative democracy nor representative government appear in the actual text of the Constitution. Yet the juridical process has invested particular significance in these notions, most notably in the discovery of an implied freedom of political communication. And as noted this discovery has involved claims about what representative government requires. The gendered nature of these claims—particularly insofar as the law's role and reach into public and private domains—came to the fore in *Monis*. The judgments are now dealt with in turn, beginning first with a consideration of the separate opinions of the men judges, before moving to the joint judgment handed down by the women judges.

On the Judgements of the Men Justices

In separate but concurring judgments French CJ, and Hayne and Heydon JJ found for the appellants, essentially on the basis that s.471.12 infringed the second limb of the *Lange* test.⁹ For French CJ and Hayne J the matter was resolved first by an

⁹ In *Lange* the Court specified [at 567] that two questions needed to be answered in determining whether a 'law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution':

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the

interpretation of the impugned s.471.12 which denied its protective purpose and second, by characterising the kind of ‘robust’ free speech necessary to underpin a healthy representative democracy in wide and trenchant value-laden terms (Appleby and Naffine 2015). Heydon J saw the issue a little differently in that he took seriously the idea that the letters would inflict harm (indeed in his Honour’s view, the seriousness of the harm and the legislature’s inability to prohibit it made a compelling case against the implied freedom). Nonetheless he concurred with French CJ and Hayne J.

For French CJ and Hayne J the breadth and purpose of s.471.12 meant that it went too far and therefore impermissibly burdened the implied freedom of political communication. Although there were some divergences in their reasoning (notably around the specific purpose of the provision) they agreed that even though ‘robust political debate’ might cause its participants to experience harm, the fact of such debate was a necessary requirement of representative government, notwithstanding the fact that there was no debate in the normally accepted sense of two parties mutually engaged in discussion. Neither judge was especially concerned with the facts which had prompted the appeal as these were only given fleeting reference.¹⁰ Their Honours both acknowledged that the letters contained expressions of condolence written ‘in intemperate and extravagant language,’¹¹ and that they contained similarly expressed criticisms of Australia’s military involvement in Afghanistan. Despite differing about the interpretation of the purpose of s.471.12, they agreed that its breadth of application amounted to an impermissible burden (as per the second limb of *Lange*), which in turn meant that the purpose was inconsistent with the maintenance of the constitutionally prescribed system of government. This finding rested on the breadth of the conduct caught by the section and the rejection of a range of submissions as to possible legitimate ends. The construction of the purpose of s.471.12 adopted by French CJ and Hayne J meant that their Honours dismissed any significance attaching to the protection of individuals from being subjected to offensive materials in their homes or indeed any harm arising from it.

maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

¹⁰ *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92, [3] French CJ; 135 [78] (Hayne J).

¹¹ *Ibid*, 135 [78] (Hayne J).

Neither the Chief Justice nor Hayne J was convinced by the ‘intrusion in private spaces’ submissions made by the Commonwealth. The delivery of mail whether (at home or work) was regarded as an unremarkable feature of everyday life and hence not an intrusion as such.¹² What took precedence was the importance of robust political debate. French CJ noted that ‘the common law and the freedoms it encompasses have a constitutional dimension’ and that since ‘freedom of speech is a common law freedom’ it forms part of ‘the ultimate constitutional foundation in Australia’.¹³ For French CJ ‘reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed “robust” debate.’¹⁴

Similarly, for Hayne J political communication and causing offence went hand in hand as necessary parts of representative government. Political communication cannot be curtailed or eliminated ‘without radically altering the way in which political debate and discourse is and must be continued if “the people” referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.’¹⁵ In Hayne J’s view the ‘very purpose of the freedom is to permit the expression of unpopular or minority points of view’ because free speech itself is about the protection of unpopular opinion and therefore cannot be restricted to what “right-thinking” members of society would consider appropriate.’¹⁶

Heydon J’s judgment—his last before his retirement from the High Court—was both succinct and acerbic in its critique of the implied freedom of political communication. Although Heydon J agreed broadly with French CJ’s conclusions, much of his judgment was devoted to justifying why those very conclusions were themselves evidence of the deficiency of the law. Although he did not express explicitly as such he appeared to harbour some misgivings about the status of the letters as political communication. Heydon J also critiqued the origins of the freedom, emphasising its status as a judicial invention that was not necessary for the effective conduct of Australia’s ‘representative

¹² Ibid, 170 [206] (Hayne J).

¹³ *Monis v The Queen; Droudis v The Queen* (2013) 249 CLR 92, 128 [60] (French CJ) (Citations omitted).

¹⁴ Ibid, 131[67].,

¹⁵ Ibid.

¹⁶ Ibid, 146 [122] (Hayne J).

democracy.’ Democracy in Australia had operated, in his view, quite well for a hundred years or more before this implied freedom was ‘invented’ in 1992. Irrespective of the substance of his point the underlying logic rests on a particular understanding of what representative democracy entails which belies the exclusion of those who were not adequately represented. In addition to expressing concerns about the origin of the law, Heydon J further critiqued its substance in describing the reasonably appropriate and adapted test as ‘mysterious’ and ‘self contradictory’ and thus queried how ‘the application of so amorphous a test avoid the dangers of judicial legislation?’¹⁷

The facts which had prompted the appeal served as a powerful rhetorical device in Heydon J’s judgment in demonstrating his view about the deficiencies of the freedom. He queried why such a freedom should be applied ‘when it permits persons like the appellants to disregard the relatives of soldiers as ends, and treat the infliction of pain on them only as a means of achieving their own ends?’¹⁸ Crucially for Heydon J, the fact that the legislature cannot protect the family members from harm was especially incongruous given the breadth of the law’s protection against bodily harm or emotional harm caused by a prank.¹⁹ Heydon J clearly accepted that the letters were both intrusive and harmful. However, despite canvassing the deficiencies in the process and the reasoning by which the implied freedom was found—and the very test upon which it is based—Heydon J nonetheless found in favour of the appellant. In his view this conclusion was the only one possible based on the existing law and was therefore a result ‘which, some may think, demonstrates how flawed that law is.’²⁰

On the Judgment of the Women Justices

In a joint judgment the women judges, Crennan, Kiefel and Bell JJ, found against the appellants in holding that s.417.12 went no further than was reasonably necessary to achieve its purpose of preventing the misuse of postal services to effect an intrusion of seriously offensive material into a person’s home or workplace.²¹ Their conclusion was based on what they regarded as the protective purpose of s.471.12. For the joint judgment the kind of conduct captured by the word ‘offensive’ was ‘at the higher end

¹⁷ Ibid, 182 [246].

¹⁸ Ibid, 182-183.

¹⁹ Ibid, 181 [242].

²⁰ Ibid, 184 [251] (Heydon J).

²¹ Ibid, 214-215 (Crennan, Kiefel and Bell JJ).

of the spectrum.’²² In their view the content of the letters meant that level of offensiveness, and as such they noted recipients of the letters would be ‘confronted with accusations that the dead soldier was a murderer of innocent civilians and children and, in some cases, was to be likened to Hitler.’²³

A significant point of departure for their Honours was their view of the purpose of s.471.12 which was not, as one submission contended, ‘merely to ensure civility of discourse between users of the postal service.’²⁴ Crennan, Kiefel and Bell JJ accepted as real the risk of physical harm (and the fear) arising from objects and substances sent by post. Their understanding of the purpose of the section (and ultimately its validity) rested on the importance afforded to the home. In this regard, they acknowledged ‘it may immediately be observed that offensive, menacing or harassing communications will almost certainly be unsolicited.’²⁵ In this respect the women judges understood s.471.12 as not concerned with mutual discourse. Further, s.471.12 did not qualify an offensive communication as unsolicited, but the circumstance that it was sent unsolicited would be a circumstance relevant to the method of use to which the section refers.²⁶

Significantly, the joint judgment considered the importance of freedom from intrusion in their interpretation of the impugned section. The women judges afforded a particular importance to the personal domain in their reasons by making pointed reference to the conceptions in English law which observed that ‘[e]very man’s house is his castle’ as justifying the conditions placed on search warrants (conditions that remain commonplace in contemporary Australia).²⁷ Their Honours also referred to similar jurisprudence from the United States:

In *Rowan v United States Post Office Department* Burger CJ referred to the continuing “vitality” of the concept of the home as castle when considering whether there was a “right to communicate offensively with another”. In that case, it was observed that people are often “captives” outside the sanctuary of the home, but that this does not mean that they must be captives everywhere.²⁸

²² Ibid, 210-211 [336].

²³ Ibid, 185 [255].

²⁴ Ibid, 205 [318].

²⁵ Ibid, 205 [318].

²⁶ Ibid.

²⁷ Ibid, 205-206 [321].

²⁸ Ibid, 206 [322] (citations omitted).

Their conceptualisation of the importance of being free from intrusion further noted how this issue had been framed in English case law, specifically referencing cases where the broadcast of images of aborted foetuses into homes led the Court to determine that ‘people have the right to be protected in their homes from grossly offensive and indecent letters, so too, in general terms, do people in the workplace.’²⁹ Crennan, Kiefel and Bell JJ’s construction of s.471.12 therefore took seriously the notion that ‘home’ could be construed as a sanctuary from ‘the intrusion of offensive material into their personal domain’ and that this could be done ‘according to *Lange*, and relevantly, so long as it does not go too far.’³⁰

Construing a protective purpose was not especially controversial. Their Honours did not dissent from the orthodoxy that the implied freedom operates in an institutional rather than individual sense. However, they did emphasise that the freedom itself was not absolute but rather ‘[i]t implies a freedom of political communication which operates to restrict the exercise of legislative power in a manner that is incompatible with, or is likely to unduly restrict, that freedom’.³¹ Thus, for the women judges the protective purpose of the impugned law and its restriction to preventing ‘seriously offensive material’ meant that they could by and large frame their case that the legislation was compatible with a constitutionally prescribed system of government without making claims about the appropriate nature of political discourse. In applying the first limb of the *Lange* test, their judgment acknowledged that the operation of s.471.12 amounted to a burden on political communication, but in their view ‘it only incidentally burdens them in its operation.’³² Nonetheless, the satisfaction of the first limb test required examination of the second and it was here that their interpretation of the purpose and operation of s.471.12 was determinative.

Their Honours noted that the ‘restriction of the offence to higher levels of offensiveness will limit the number of political communications which are caught by it’ and the requirement of proof of fault would ‘exclude from the scope of the offence those cases

²⁹ Ibid, 206 [323] (Citations omitted).

³⁰ Ibid, 205 [320].

³¹ Ibid, 206-207 [324].

³² Ibid, 212 [342].

where the conduct could not be said to be intentional or reckless.’³³ Hence their judgment further pointed out that ‘a distinction has been drawn between laws of this kind and laws which prohibit or restrict communications that are inherently political.’³⁴ Their Honours further argued that it was not possible to ‘read down’ the degree of offensiveness of a communication given the legislative history of the section which supported ‘a construction which applies a degree of offensiveness to the quality of the communication which is intended to be prohibited; they do not support the creation of an exception by reference to its subject matter.’³⁵ Significantly then, for the women judges, ‘[a] purpose of protecting citizens from such intrusion is not incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom which supports it.’³⁶ Hence they came to their ultimate conclusion that the provision was valid because the burden was proportionate to the ends sought.³⁷

While their judgment did not subvert the institutional basis of the implied freedom, they saw another freedom situated within the private sphere that for them reflected an individual’s *desire* to be free from intrusion. Although this freedom was not to be confused with the far loftier freedom of political communication and its associated role in facilitating representative government, it is nonetheless significant that the joint judgment afforded value and weight to these matters. Crennan, Kiefel and Bell JJ’s understanding of notions of harm and home did not align with the men judges’ (liberal masculinist) delineation of the public and private spheres, especially the men’s willingness to overlay their conception of the public sphere onto the private sphere (to have the law invade to borrow Morgan’s apposite description). The women judges recognised that the separation of public and private was an artificial construct that was often arbitrarily demarcated and legitimised by judicial judgments and arguments. This set them apart from the men judges in a way that was reminiscent of certain iterations of feminist thought. But this is not to say that this was explicit in any overt sense in their judgment. Rather, their judgment set out in a very restrained fashion the protective purpose of the relevant legislation and its appropriate place within the constitutional framework. This in itself signalled that their views were expressed within the

³³ Ibid, 212 [340]-[341].

³⁴ Ibid. 212 [342].

³⁵ Ibid, 214 [345].

³⁶ Ibid, 215 [349].

³⁷ Ibid, 215 [350]- [351].

boundaries of the prevailing masculinist norms of judicial writing—restrained, formal and mostly unemotional.

Privileging the Public, Eliding the Private?

The rationale for the implied freedom of political communication as protecting the institutions of government (rather than individuals) revisits a familiar liberal sleight of hand that feigns disinterest in what happens in the private sphere while conceiving of a universal individual as a constitutive member of the liberal state. In this traditional way of viewing the demarcation of the public from the private (and vice versa), ‘the apparently universal criteria governing civil society are actually those associated with the liberal conception of the male individual, a conception which is presented as that of the individual’ (Pateman 1983: 285), the so-called generic individual who in reality is an embodied man. That is, the individual is regarded as an abstraction from his embodied being and his ‘ascribed familial relations and those with his fellow men’.

He is a “private” individual, but he needs a sphere in which he can exercise his rights and opportunities, pursue his (private) interests and protect and increase his (private) property. If all men (“individuals”) are so to act in an orderly fashion, then, as Locke is aware, a public “umpire” (rather than a hidden—private?—hand), or a representative, liberal state, is required to make and enforce publicly known, equitable laws (Pateman 1983: 285).

When those public umpires, judges, are also men, it is perhaps also not surprising that what is known about the public and private (and the manner in which the individual is situated within it) reproduces the universalism of a masculinist individualism.

What is clear from Pateman’s discussion above is that this so-called private sphere has a double presence that involves a convenient sleight of the not so invisible theoretical hand. This is clearly illustrated in the following conceptualisation of the public and private.

The paradigmatic private sphere contains the realm of domestic and family life, whereas the paradigmatic public sphere encompasses the realm of politics—decisionmaking concerning the welfare of society as a unit. The economic realm, which includes production and marketing, lives in-between (Gavison 1992: 21).

However, this economic realm does not ‘live[.] in-between’, it is part of the public sphere insofar as it is separate from domestic life. It is central to both the political arena of governing and the world of work. The private sphere in this context shrinks to that of the family and personal relationships, the supposed natural habitat for women. It is the sphere that is supposed to be, in principle, largely beyond the reach of the state and comes to be idealised as ‘the space around the private self (or family) that constitutes a buffer against the rest of the world, conceptualised as an undifferentiated “public”’ (Thornton 1995a: 6). In this context it is the sphere of intimacy, a ‘haven in a heartless world’ to borrow Lasch’s (1977) gendered phrase, where men and women are able to recuperate from the travails of the public sphere with an assumed degree of privacy.

Yet feminist theorists have been mindful of the dangers of the epithet ‘the personal is political’ in terms of what it could mean about the further (legal/political) intrusions into the private space (Thornton 1995a: 16). Some political theorists have argued that employing this division is to remain trapped within a binary approach to theorising contemporary problems that is both ‘androcentric and Eurocentric’ (Bargetz 2009). While it may be that binary thinking is ‘androcentric and Eurocentric’ we disagree that invoking a differentiation between public and private spheres necessarily entails becoming trapped within a binary mode of theorising. Rather, differentiating between public and private spheres enables a mapping of different understandings of lived reality that appear to be separate but are interconnected in a myriad of ways, not the least of which are the laws and regulations created and enforced by the state. Indeed, these tensions were also in the critical judgments drafted by feminist legal scholars. Perhaps unsurprisingly then Thornton’s (2016) re-imagined *Monis* judgment draws upon feminist challenges to the public/private divide in coming to the same conclusion as Crennan, Kiefel and Bell JJ as to the validity of s.417.12. Thornton argued that

while the Constitution privileges the public sphere and the political, the implied freedom of political communication also should not be used to entrench the anachronistic idea that the private sphere is inferior to the public sphere, nor should ‘the personal is political’ be used to allow the public qua political to seep into the private sphere and eviscerate it (Thornton 2016: 39).

That is to say that acknowledging that what is understood as ‘private is determined by norms and laws does not invalidate the presumption of non-interference with private

arrangements' (Gavison 1992: 16).

On the other hand, Macduff and Morgan's (2016) critical re-imagined judgment rejected Thornton's position on the public/private divide because to frame the problem in terms of finding a constitutional basis for protecting the private space from intrusion 'would undermine the gains achieved by feminist, sexuality and gender identity activists in bringing the private/domestic sphere into the field of state regulation' (Appleby and Dixon 2016: 15). There were two issues for Macduff and Morgan. One concerned the applicability of the reasonable person test. While Macduff and Morgan accepted that the reasonable person test did not limit s.471.12 they rejected it because it was 'a vehicle for judicial subjectivity and partiality, in the sense that a judge cannot avoid filtering the test through their own experiences of identity: gender, race, class and any other aspect of personhood' (MacDuff and Morgan 2016: 60). The second issue was the view put to the Court that 's.471.12 has special significance because it regulates communication that reach a person "at home"' (MacDuff and Morgan 2016: 58). They rejected this position on the basis that it entailed that such private spaces should be free from political communication. For them this was a variation on the idea that a 'man's home was his castle' and which they argued 'was an effective barrier to the recognition of women's political claims to equality for centuries' (MacDuff and Morgan 2016: 58). In this respect Macduff and Morgan's position on this point remained consistent with feminist arguments about the personal being political. However, they reach this conclusion by predicating their argument on a mistaken view that what was being sought by those wanting to uphold the constitutionality of s.417.12 was to create a space free from political communication.

MacDuff and Morgan (2016) agreed with the men judges that s.417.12 placed a burden on free political communication. However, the more restrained manner of their argument stands in stark contrast to the trenchant masculinism in French CJ and Hayne J's judgment. They reach the same conclusion about the validity of s.471.12 but in a way that is much more sensitive to how social power is filtered by gendered, raced and classed hierarchies, as many feminists have argued (MacKinnon 1989: 336-337; Hawkesworth 2016). In so doing, they provide a defence of free speech that was not framed by the masculinist bravado present within the opinions of the men judges.

This is not to argue that the women judges adopted an explicitly ‘feminist’ judgment. Rather when it is juxtaposed against the men’s judgments (and the fictional judgments) it underscores the rampant masculinism embedded in the men’s judgments. The tone, measure and substance of the women judges’ reasoning stands in marked contrast to that of the men. The strident manner in which the men judges emphasised that giving offence was simply part of ‘robust political debate’ prompted Appleby and Naffine (2015) to examine what this meant for the civility of political discourse in Australia. Of particular interest for Appleby and Naffine (2015) was the gendered logic of the men judges vis-à-vis their own focal point about civility. Hence the capacity for women’s marginalisation from public debate about civility meant ‘women may speak as women alongside women about women and about men and about civility, but choose not to present it as such’—which is what Appleby and Naffine (2015: 4) suggested occurred in *Monis*. The men judges on the other hand (and also MacDuff and Morgan in their re-imagined judgment) regarded free speech as not just associated with rough and robust speech, but that free speech was defined as rough and robust. In the context of the *Monis* judgments, this conception of free speech fails to acknowledge that the experience of public and private spheres is not universal but instead shaped by the fact that they are also arenas of social power framed by and reflective of raced, classed and gendered hierarchies and occupied by embodied individuals who are themselves raced, classed and gendered.

Conclusion

Monis illuminates how contemporary judicial understandings of the public and private spheres are shaped by gendered meanings and hierarchies and, as importantly, how those judicial understandings in turn contribute to contemporary understandings of the public and private. The divergent conceptions of the purpose of s.471.12, and by extension its validity, rest on markedly different approaches to the law’s reach. Notably, the way in which the women judges conceived of the protective purpose of the s.471.12 and by extension, the reasonableness of protecting individuals from intrusions into their private domain, is the most obvious evidence of the distinct contribution of women judges. What the men judges failed to acknowledge was the point made explicitly by Thornton J in her imagined judgment, referencing a similar view expressed by the United States Supreme Court, namely that ‘a home cannot be transmuted into a political space merely by virtue of a letter being delivered to a resident’s mailbox’ and nor can

a letterbox ‘be regarded as a public forum comparable to a street or a park’ (Thornton 2016: 38). While Crennan, Kiefel and Bell JJ saw a need to afford a degree of protection to the private space of the home, they did not go as far as Thornton.

French CJ, and Hayne and Heydon JJ clearly favoured privileging the public by extending it into the private (the home space). But the justification for this extension was not to secure the rights of those inhabiting that space or to ensure that they were protected from harm. Rather it was to protect a privilege that in this context was of dubious value and which also appears to negate a right to privacy so that some forms of communication might be given space/air-time despite a clearly demonstrable capacity to inflict harm. The men judges argued explicitly, to a greater or lesser degree in their individual opinions, that the right to free political communication trumped a right to privacy. Or put more starkly, that the state could enforce turning the private space of the home into a public space for the purposes of airing political communications. Further, that it was acceptable and lawful to use the postal service to convey those communications. The fact that they were offensive with the potential, in the context, to inflict harm was not sufficient to prohibit their transmission.

In balancing the requirements of representative government and notions of free speech, judges necessarily make decisions about the value of both. These decisions are not always overtly gendered but a judge’s understanding of the meaning of political communication and its role in representative government are nonetheless imbued with certain masculinist conceptions of the relationship between the state and the individual. In *Monis* these divergent conceptions about the state and the individual collided not only around the notion of minimising harm, but also around the appropriate reach of the law into public and private realms. For the men judges it was about minimising harm to the sort of free political communication they considered to be necessary for the effective working of Australian democracy. In so doing they purported to restrict the law’s reach and in the process made value-laden claims about the robust kind of speech individuals might expect to make (and encounter and experience) for the sake of maintaining a system of representative government. For the women judges it was about minimising harm to embodied citizens and their capacity to enjoy those freedoms. By restricting certain kinds of speech within the private sphere, the women judges balanced the requirements of a representative system of government and the citizens’ right to be

protected from harm in a manner that evidenced at least some awareness of the problematic dichotomy between the public and private spheres.

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