Law Text Culture

Volume 8 *Challenging Nation* Article 11

2004

Rapunzel and the lure of equal citizenship

M. Thornton
LaTrobe University

Rapunzel and the lure of equal citizenship

Abstract
While 'the citizen' is believed to signify the universal, there is no universal sex. Because men monopolised the civic space until a century ago, the paradigmatic citizen has been constructed as male. Since enfranchisement, women have been wrestling with the phrase 'women and citizenship'. For men, the and is read as conjunctive; for women, it remains disjunctive.

Rapunzel and the lure of equal citizenship[1]

Margaret Thornton

Introduction: the universal fantasy

While 'the citizen' is believed to signify the universal, there is no universal sex. Because men monopolised the civic space until a century ago, the paradigmatic citizen has been constructed as male. Since enfranchisement, women have been wrestling with the phrase 'women *and* citizenship'. For men, the *and* is read as conjunctive; for women, it remains disjunctive.

Kant's distinction between active and passive citizens underscores the different meanings this gendered *and* connotes. The characteristics of an active citizen, according to Kant, are freedom, equality and independence (1785 [1991]: 126). Prior to First Wave Feminism, most (white) male citizens satisfied, or at least had the potential to satisfy, the criteria for active citizenship, but no women did. Women were consigned to the passive category, together with children and men without agency, such as domestic servants and apprentices: they were all 'mere underlings [*Handlanger*] of the commonwealth' because they lacked 'civil independence' (Kant 1785 [1991]: 126) in that they had to be under the direction or protection of others. Nevertheless, Kant was of the view that the passive designation seemed to contradict the very concept of citizenship (126), which suggests active participation of some kind. This ontological doubt seems to have affected the transition from the passive to the active category for women. It would seem

to be even more marked in the case of Indigenous people, men as well as women, who were denied even the passive descriptor until well into the 20th century, suggesting that the category of 'indigenous subjects' was more accurate (Peterson & Sanders 1998: 7). These distinct gradations of meaning within the rubric of citizenship clearly challenge its claim to universality. As Margaret Somers points out, there is a certain 'structural shallowness' (1994: 64) associated with the use of the term by political theorists. Nevertheless, the assumption of the universality of citizenship is pervasive.

First Wave Feminism tended to accept the lure of universal. In the late 19th century, women generally wanted to be 'let in' to the community of active citizens with its promise of freedom, equality and independence. They wanted to exercise the same civil rights as men, as well as to be admitted to universities, the professions and public office. Sameness was attractive because of the very low base from which women, particularly married women, began their struggle in light of the prevailing common law constraints. On marriage, a woman entered into a state of coverture, which meant that she was deemed to be under the cover, or wing, of her husband. In practice, this meant that she was denied all civil rights, including the right to enter into contracts and own property. When she became 'Mrs John Smith', she lost, not just her name, but also her identity as a person. As the 18th century jurist, William Blackstone, famously put it: the two became one and that one was the husband.[2] I suggest that the metaphysical notion of the indivisibility of the union of marriage that crystallised into the identity of the husband under coverture continues to detract from the idea that women are full citizens today, despite the reforms that have been effected.

I do not propose to traverse in any detail the well-trodden ground dealing with either the history of letting women into the community of Equals (Oldfield 1992), or citizenship as a legal concept (eg Rubenstein 2000, 2002), but to consider why citizenship continues to be such a highly problematic and ambiguous concept for women. It can readily be seen that the formal emancipatory changes that were effected in Australia, as in the West more generally, did not automatically give

rise to the acceptance of women as active citizens. Although enfranchisement is an important symbol of citizenship and full equality between the sexes (MacKenzie 2002: 30), it is not in fact synonymous with active citizenship. Indeed, a reductive approach towards enfranchisement enabled it to be interpreted as merely enabling women to place a ballot in a ballot box, not to confer on them the same civil rights that young men automatically attained at the age of majority. Every right had to be fought for separately by women, usually on a State-by-State basis. As feminist theorists have shown, the citizenship mosaic is still being assembled, at the same time that it is being corroded by postmodern critiques (Sypnowich 1993).

The resistance towards women moving from the category of passive to active citizens has been striking, albeit not surprising. How could women remain in the position of subordinated Others if it were formally recognised that they possessed independent wills — just like Benchmark Men — that is, those who are white, Anglo-Celtic, heterosexual, able-bodied and middle-class?[3] Agency and equal treatment would have to follow in accordance with the Kantian construction. Hence, the conferral of rights by masculinist legislatures and courts has been grudging so that each right becomes a site of contestation for years afterwards. Benchmark Men have been parsimonious in sharing power and authority in order to preserve their superiority and normativity. The liberal nation-state, the creation of Benchmark Men, certainly not women or Others (Grimshaw et al 1994, Magarey et al 1993) has been assiduous in supporting formal equality for women and Others in accordance with the neutral, inclusive and universal veneer of citizenship. The substantive reality is somewhat different.

The issue of political representation graphically illustrates the point. The right to be elected to parliament and to represent others, a key right of the universal citizen, was separated from women's right to vote in most Australian States from the outset (Thornton 1995). Even when legislation granted the right to representation at the same time as the grant of the franchise, as occurred in the case of the Commonwealth (*Commonwealth Franchise Act* 1902), it was a very long time before a woman was in fact elected — more than 40 years in fact —

when Dame Enid Lyons was elected in 1943.[4] Even then, it should be noted that her election was boosted by the fact that she was the widow of Prime Minister Joseph Lyons, who died in office in 1939. The 'halo effect' emanating from an authoritative man seemed to confer the seal of approval on her, as was the case for most other women candidates until relatively recently (Sawer & Simms 1993: 75).

The idea that women have a right to represent the general interests of the population as a whole, as opposed to the averred particularity of women's interests, has been a notable impediment on the rocky road from passive to active citizenship. As recently as 1959, the right of two women to stand for election to the South Australian Legislative Council was challenged on the basis of sex (*R v Hutchins*). This challenge occurred 65 years after South Australia's path breaking legislation, one of the first instances in the world of female enfranchisement, which, like that of the Commonwealth, simultaneously conferred the right to vote and the right to stand for election (*Constitution Amendment Act* 1894 (SA)). While the challenge was unsuccessful, the very fact that it was initiated underscores my point about the elusiveness of active citizenship for women. Despite the universality of citizenship discourse, women's association with particularity, which seems to have been interpreted as those activities in which men did not engage — most notably having babies and caring for them — has enabled the social construction of women as being incapable of dispassionately attending to matters of state (Pateman 1989: 17ff). Despite ongoing concerns about the character of liberal democracy (Phillips 1992), the comparatively low visibility of women in federal and State parliaments today continues to underscore women's marginality to the world of the active citizen and the public sphere (eg Whip 2003, Summers 2003: esp 199–224).

Other than in its limited passive sense of conferring an entitlement to protection, the private sphere, the paradigmatic locus of the feminine, has generally been represented by key citizenship theorists as though it were irrelevant (Walby 1994: 379, Somers 1993).[5] The family, or the realm of necessity — involving reproduction and caring for others, the activities required for the basic survival of the species — is

constructed as antipathetic to those of the normative active citizen, namely, Benchmark Man, who has been able to use his power to embed gendered constructions of citizenship within authoritative discourses. This is despite the sustained endeavours by feminist scholars to expose the skewed nature of these discourses (eg Walby 1994, Riley 1992, Jones 1990, MacKinnon 1989, Minow 1985). Such constructions have served to underscore the congruence between universality and masculinity, and the way that the feminine, indigeneity, lesbianism, disability and other non-dominant characteristics are relegated to the realm of the Other, either at the fringes of the universal or outside its boundaries altogether.

Traditionally, citizenship has purported to govern the relationship between citizen and state in the public sphere, while the private sphere is obscured from view, thereby rendering the citizen/state relationship elusive and ambiguous for women and Others who lack public profiles. Civil litigation is one way in which issues are brought from the private sphere into the public domain. Within judicial sites, 'the citizen' continues to be constituted in deeply gendered ways through ostensibly private litigation. The way courts continue to uphold the Kantian binarism is nevertheless accorded short shrift in citizenship discourse. As progressive critiques have long established, law is not autonomous but deeply imbricated with prevailing political beliefs and the dominant discourses of the society more generally (Kairys 1990). With reference to selective Australian examples, I show how the judicial gendering of the citizen has constituted a sustained practice of resistance in the struggle for independence by women.

Reading down the universal

The Persons' Cases of the late 19th century graphically illustrate the attempt to retain the masculinity of the universal so as to exclude women, even if they were white, Anglo-Celtic, heterosexual, able-bodied and middle class, just like Benchmark Men. Sex constituted a disabling factor, so much so that the women who sought to be admitted to the community of Equals, the preserve of active citizens, were deemed

by gatekeepers to be non-persons for the purpose of holding office and gaining entry to the universities or professions. A range of cases was heard in the United Kingdom and Canada, as well as Australia, regarding the statutory interpretation of the word 'person' (Sachs & Wilson 1978, Mossman 1986). The legal profession, as the paradigmatic domain of rationality and authority, long remained a contested domain regarding the entry of women.

Thus, when Ada Evans sought admission to the practice of law in New South Wales in 1902 after graduating from law school, she was refused entry by the judicial gatekeepers on the ground of her sex (Thornton 1996: 56ff). Leaving aside the fact that Ada Evans satisfied the formal criteria for admission, the limited impact of enfranchisement is also apparent. Although New South Welsh women had been enfranchised at both federal and State levels in the same year, it clearly was not construed as an indicator of active citizenship.

Edith Haynes was not permitted to sit for her intermediate examination in 1904 by the Barristers' Board of Western Australia, even though the Board had agreed that she be articled to her father a few years before. When she appealed to the Supreme Court, relying on the phrase 'every person' in the *Legal Practitioners Act* 1893 (WA), the judges were of the view that the Act did not envisage that women could become legal practitioners (*In re Edith Haynes*). They chose to ignore the fact that (white) women had been enfranchised in Western Australia five years before, in 1899, as well as at the federal level in 1902. Instead, the judges relied on a homogeneous view of the masculinist legal world, which they sought to preserve by means of specious arguments, such as reliance upon the supposed intention of an Imperial Act passed in 1831, long before the Western Australian Acts pertaining either to legal practice or enfranchisement had been envisaged. In *Haynes*, we can see how the social meaning of citizenship for women was delimited by an authoritative judicial voice, which determined that women lacked legal personhood when they sought to challenge male monopolies in the professions and public office.

The courts did not succeed in excluding women permanently from the legal profession, but they did obstruct and delay the process. Western

Australian legislation was not enacted to admit women as legal practitioners until 1923 and the first woman was not admitted to practice until 1930, that is, 30 years after Edith Haynes' attempt. In every State, special legislation had to be fought for and enacted to enable admission; sex-neutral language in the relevant legal profession Acts was deemed to be inadequate (Thornton 1996: ch 2).

Even when women had been admitted to legal practice, formal attempts were made to delimit their authority. The case of Mary Kitson (Tenison Woods) is illustrative (*In re Kitson*). She had been admitted to practice in South Australia in 1916, but when she sought to be appointed as a notary public (a minor role involving the administration of oaths and certification of documents) she was found not to satisfy the test for inclusion in the universal 'every person'. As with *Haynes*, the legislature was found not to have *intended* that women be appointed notary publics. The fact that the relevant *Public Notaries Act* had been passed in 1859,[6] long before enfranchisement and the admission of women to universities and the legal profession, was deemed to be of no consequence. Similarly, even the existence of an *Acts Interpretation Act* allowing words importing the masculine gender to be construed so as to include the feminine was insufficient to persuade the judges when they encountered the pronoun 'his' in the *Public Notaries Act*.[7]

Through time-honoured hermeneutic practices of adjudication, we see how the universal is endowed with a totalising meaning equated with the masculine, which has the effect of disparaging the feminine or erasing it altogether. Litigation of the kind outlined, as well as the correlative campaigns for reform, illustrates how women had to struggle to assert their personhood (Oldfield 1992). They were far from being possessive individuals who could exercise free will and independence as active citizens just because they were entitled to vote.

Of course, you might say, that was 100 years ago and things have changed. Indeed, many things have, but one must be wary of adopting a progressivist approach, which avers that things are always getting better. Economic growth and the demand for more lawyers, rather than social justice, have been the catalysts for the changing profile (Thornton

1996: 268–75). Women now comprise more than 50 per cent of law students and more than 30 per cent of the legal profession in Australia (ABS 2003), as in other parts of the western world (Schultz & Shaw 2003: xxxv–xl), but are still not fully accepted as citizens of the jurisprudential community; a residual distrust of the feminine remains, particularly in authoritative positions. Thus only approximately 12 per cent of partners in law firms are women, compared with 12 per cent of barristers and 15 per cent of judges. Even more striking is the fact that only about 3 per cent of women barristers have argued cases before the High Court. Rather than being permitted to have 'speaking parts', women are preferred as the aphasic 'juniors' to senior male barristers (Kirby 1998, 2002). In contrast, when we look at the figures for employed solicitors, that is, 'managed' positions with little autonomy or agency, we see that the percentage of women is a disproportionate 48 per cent (ABS 2003). Although there is no longer any formal barrier to the 'letting in' of women to authoritative positions, the predominant image of autonomous and rational manhood presents an invisible barrier. The dangerousness and irrationality conventionally associated with female corporeality is apparent in the incidence of sexual harassment in the legal profession (Brockman 2001: 114–24, Sommerlad & Sanderson 1998: 175–84, Thornton 1996: 253–62), which is invoked to diminish the agency and autonomy of women lawyers, albeit rarely articulated.

The profile of the legal profession reveals how the familiar gendered pyramid of authority attaches itself to and shapes an occupation, to which women are relative newcomers, no less than to more traditional occupational areas (eg Game & Pringle 1983). Variations of this narrative could be told about the entry of women to other professions and to universities, as well as to public life (Pringle 1998, Theobald 1996, Oldfield 1992, Sawer & Simms 1993). My point is that being 'let in' is by no means the end of the story, for entry has been grudging and qualified. Even 100 years after First Wave Feminism, the acceptance of women into authoritative positions is equivocal. The dominant social script chooses to depict the feminine association with affectivity, corporeality and sexuality as being likely to exercise a corrupting and

dangerous effect on the body politic (Hunt 1991), underpinning the idea that women's agency cannot be trusted. Hence, the socially preferred position for women in the public sphere is as ancillary aids to important men. What is more, this relationship is believed to be grounded in nature, for it mirrors popular understandings of heterosex, with a dominant male and a subordinate female. While women constantly challenge this pattern of social relations, judges seek to instantiate it. Authoritative positions remain an ongoing site of contestation for women everywhere in the struggle for independence and full citizenship. Perhaps, the most significant by-product of the under-representation of women in authoritative positions is that the dominant legal discourses remain irredeemably masculinist.

Sloughing off the seeds of passivity

Mesmerised by equality

The frustration arising from the injustice of exclusion, or quasi-acceptance, has meant that equality with men has been a powerful animating cry of the women's movement. To understand the struggle for equality as a visceral reaction against the way things are, rather than an aspirational norm as to the way things ought to be, gives us a window onto this problematic concept, about which women are nevertheless so ambivalent. As well as constituting one of the characteristics of active citizenship, equality is also a key prong of liberal legalism in its formal incarnation (known variously as equality before the law, procedural equality or equal treatment). The focus is on sameness, which purports to treat characteristics of identity, including sex, as irrelevant (Graycar & Morgan 2004). In other words, the prevailing version of equality is one that comports with the universal standard, which is designed to paper over differences so that they are unseeable and depoliticised (Young 1989). A formalistic interpretation, as we see with the 'persons' cases, camouflages the normative preference for benchmark masculinity and the relegation of the feminine to the status of disfavoured Other. It is in this way that the universal is constructed so as to exercise a totalising effect.

Equality is also epistemologically slanted towards benchmark masculinity by being confined to the public sphere, an idea that can be traced back to Aristotle and the Greek democratic tradition. The *polis* is where all citizens, restricted to free men, came together to deliberate on matters of state. In contrast, the *oikos*, the private or domestic sphere, was regarded as a sphere of inequality because it necessarily comprised a master who exercised power over subordinates — a wife, children and slaves (Aristotle 1959: §§1253b–1260b). This idea of the male citizen as head of the household, or *pater familias*, continued to be formally recognised by the state until comparatively recently. The hierarchisation of spheres in which the public is privileged over the private, has also formally gone. If anything, it has shifted the other way because neoliberalism privileges the pursuit of private interests over public good. However, this new incarnation of 'private' privileges the private sphere qua market, rather than the private sphere qua family. The vestigial seeds of invidiousness nevertheless continue to attach to the family with which women are indelibly associated within Western political thought, a congruence that is constructed as detracting from active citizenship. Legal, as well as political discourse is discomforted by affectivity, corporeality and sexuality, although law selectively regulates family and intimate relationships (O'Donovan 1985, Olsen 1983). The classical liberal position is that the private sphere *qua* family is a space of respite and realisation of desire for (male) citizens that is beyond law.[8] The privileging of the universal (masculinist) prescripts has meant that the subjectivity of women and Others is treated as though it were incidental, the exposure and critique of which has been a major project of feminist poststructural scholarship (eg Editorial 1993: 1).

'The personal is the political', the singular aphorism of the women's movement since the late 1960s, encapsulates the attempt to make public what had long been concealed within the 'hidden transcripts'[9] of family life — particularly gendered harms, such as domestic violence and sexual assault. The idea that what occurs within the home is beyond law has nevertheless been highly resistant to change. The Benchmark Men of Law have acted as assiduous guardians of the public/private

dichotomy within the liberal state. Only in 1991 did the Australian High Court determine that the spousal immunity, which protected a husband against a charge of raping his wife, be abolished (*R v L*; cf *R v R*). Prior to that, the wife's absence of consent was irrelevant. The assumption was that her consent to the marriage was proof that she consented to all subsequent acts of intercourse with the husband, regardless of the circumstances. The vitiation of the wife's free will on marriage constitutes graphic evidence of her status as passive citizen and inability to exercise agency.

This point is further illustrated by the juridical resistance to the idea of a husband and wife entering into contracts with each other, which necessitates two independent wills coming together (*Balfour v Balfour*, Thornton 2001b). Of course, this would have been impossible at common law because the wife lacked the requisite will to contract with anyone, let alone her husband (Berkowitz & Thorne 1700 [1979]: 214f). The absorption of her will into his on marriage meant that she became completely will-less. The vestigial construction of a married woman as lacking an independent will continues to be invoked (Shanley 1989: 46), which sustains her status as passive citizen. Correlative to the absence of will and the inability to enter into binding contracts was the assumption that the wife was economically dependent on the husband. While women can no longer be assumed to be in dependency relationships, the common law has continued to resist moves towards independence. The shadows of coverture and its willless state remind women, particularly married women, that they have not yet effectively made the transition to active citizenship.

The marriage discount

The ambivalence towards female independence is apparent in the reluctance to do away with archaic laws, more appropriate to pre- rather than post-modernity. An example is the so-called 'marriage discount' of tort law, as illustrated by the recent Australian High Court decision of *De Sales v Ingrilli* (hereinafter *De Sales*). Although the majority judges allowed the appeal by a Western Australian woman whose damages had been reduced by $120,000, the cause of action itself was not abolished.[10]

The anachronistic principle underpinning the marriage discount allows damages paid to a widow arising from the wrongful death of her husband to be 'discounted' if she is considered to have reasonable prospects of remarriage. Her prospects are determined by a judicial assessment of her looks, age and personality.[11] Kirby J acknowledged that there was a 'distasteful' element in having to weigh up a woman's marriage prospects (*De Sales* §148 per Kirby J), whereas McHugh J (dissenting) gave the objection short shrift, pointing out that judges have to assess damages in difficult areas, such as 'mental impairment, scarring or loss of libido or sexual function' (*De Sales* §106, cf Callinan J at §189). But such injuries are not commensurable, for the marriage discount is gender specific, and parallels the gaze of the (heterosexual) male judge. What would [he] see, we might ask, if he were to gaze upon the body of a claimant widower? He would see a man who may have suffered grief upon the death of his wife, but probably not one who had lost his source of economic survival. Rather than looking at an/Other from his elevated position of benchmark superiority, the judge could be looking at a man who looked like [him/self]. Because of the discomforting reflexivity, it is almost unthinkable to imagine the judge seeking to gauge a widower's remarriage prospects by subjectively assessing *his* sexual attractiveness. In any case, reversing the sex of a claimant is not rational because Benchmark Men as a class were never assigned to the Kantian category of dependency, certainly not dependency on a wife. Indeed, coverture precluded such a possibility.

The infantilising effect of the assumption of dependency ensured that women could never be possessive individuals at common law (Davies & Naffine 2001: 15). Retention of the marriage discount clearly runs counter to the idea of women becoming possessive individuals, and hence active citizens in contemporary society. The conjunction of the feminine and corporeality is also underscored by the marriage discount because of the manner in which remarriage prospects are assessed. The juridical construction of women as primarily embodied and non-rational is contrasted with the rationality and responsibility of the Benchmark Men of law, the paradigmatic inhabitants of the public sphere and the triers of fact who are authorised to gauge a woman's

marriageability by gazing at her body. Reducing a woman to the status of the objectified Other represents a graphic contemporary attempt to reclaim and reify the increasingly friable line of demarcation between it and the masculinist norm. As the active citizen has been historically constructed as disembodied (Lister 2003, Lloyd 1984), corporealisation effectively retards the transition of women from the passive category.

The 'marriage discount' is not the only example of residual legal paternalism that could be said to constitute an impost on a married woman's free will, but it is a striking example. Other recent instances that involve the vitiation or diminution of the will of the wife include sexually transmitted debt (Fehlberg 1997, Thornton 1997). The Australian High Court has recently taken the view that wives are still in a unique position of vulnerability by virtue of the marital relationship (*Garcia v National Australia Bank*, based on the pre-World War II decision of *Yerkey v Jones*). The effect of determining that a wife may not be held liable for her husband's debts as a result of a guarantee that she has signed because of the likelihood that she would succumb to pressure from her spouse is to construe her as less than fully autonomous, even though it may capture one dimension of reality. If women in heterosexual relations are still constructed as having defective wills, how can they present themselves in the public sphere or the labour market as independent agents of rationality and legality, that is, as active citizens?

Corroding the public/private dichotomy

Deconstructing the myth of the autonomous worker

A major focus of Second Wave Feminism has been directed to challenging the conditions on which women are 'let in' to public life and the market. In late 20th century Australia, women were less starry-eyed about the attractions of universality than their First Wave sisters, for they recognised that formal equality with men was not enough (Lake 1999: 231ff). Anti-discrimination legislation is the most notable example of a measure designed to counteract egregious instances of

discrimination. No such concept as discrimination existed at common law. Indeed, as already made clear, the common law tolerated and perpetuated gross inequalities, regardless of sex (as well as race, sexuality, disability, or any other attribute). Anti-discrimination legislation proscribes discrimination on grounds such as these in the context of recruitment and the terms and conditions of employment. However, as I have argued elsewhere, the preference has been displayed for a formal rather than a substantive understanding of equality in accordance with the liberal norm (Thornton 1990). It is perhaps unsurprising in light of the central argument of this paper that almost every step in favour of active citizenship for women has been politically, judicially and socially delimited.

To make out a case of direct discrimination, the complainant generally has to establish that she was treated less favourably than a man in the same or similar circumstances.[12] The accommodation of difference, such as caring responsibilities, constitutes a virtually insuperable hurdle for complainants. 'Women's work' that is reflective of what women do in the home is particularly problematic. In addition to the issue of comparability, the legal line of separation between public and private life, which underpins anti-discrimination legislation and liberal legalism generally, has operated to cordon off the domestic sphere from scrutiny in the age-old way. Hence, despite feminism's best endeavours, the symbiotic link between private and public spheres, which has sustained Benchmark Men and enabled them to become active citizens, has remained intractable to change through anti-discrimination legislation. Harking back to Aristotle again, male citizens have been free to participate in the public life of the citizen because women and subordinated others have taken the preponderance of responsibility for the world of necessity — reproduction and caring for others, including adult men perfectly able to care for themselves. By and large, equality has substantive meaning within the public sphere for women today only if they enter on the same terms as men, that is, as free and autonomous individuals. However, the majority of women are not free, at least for part of their lives, for reproductive and caring responsibilities render them connected and unfree. When the masculinist

standards of equality are applied to them, they are also found wanting, for they are not similarly situated to their comparators — Benchmark Men. I illustrate the proposition by reference to the case of *Schou v State of Victoria* (hereinafter *Schou*), in which the complainant directly challenged the public/private dichotomy, as well as the assumption that the normative worker is autonomous and free.

The *Schou* case involved a woman who was employed as a Hansard reporter and sub-editor by the Department of Parliamentary Debates for the State of Victoria. Ms Schou had two young children, the younger of whom was an asthmatic. She had entered into an individual workplace contract with her employer, which had guaranteed to promote 'flexible and progressive work practices and reasonable changes in the way work is organised'. This acknowledgment of her lack of freedom and independence was designed to help ensure a modicum of equality at work for her, an important dimension of active citizenship. Nevertheless, her attempts to negotiate part-time work were unsuccessful. Instead, Ms Schou sought to work from home for two days per week when parliament was sitting, because of the long hours, in order to accommodate her childcare responsibilities. It was believed that the arrangement could be facilitated by the provision of a fax and a modem. Initially, the Department agreed to the arrangement but then failed to provide the necessary equipment. Ms Schou resigned and lodged a discrimination complaint under the *Equal Opportunity Act* 1995 (Vic) (hereinafter EOA). She succeeded initially, not on the ground of sex, but on the ostensibly gender-neutral ground of parental status or status as a carer.[13]

The focus of the complaint was one of indirect discrimination, based on the effect of the requirement or condition that employees carry out their work at the worksite. Unsurprisingly, the tribunal found that a higher proportion of the population who did not have the status of parent or carer could comply with the requirement. The nub of the case, as with most indirect discrimination complaints, turned, not on proportionality but on the meaning of reasonableness (see for example *Secretary Department of Foreign Affairs and Trade v Styles* at 63 per

Bowen CJ & Gummow J). If an employee can do the job properly at home with the appropriate facilities, is it reasonable to require her to be physically present in the workplace?

Initially, the tribunal found that the requirement that the complainant should carry out her work in the workplace was not reasonable, and she was awarded more than A$160,000 for economic loss (*Schou* 2000). However, this was by no means the end of the matter, for the outcome was hotly contested by the State of Victoria. In the first of two appeals to the Supreme Court, Harper J held that the tribunal erred in focusing the reasonableness question on Ms Schou's use of the modem and ability to work from home for part of the week (*Schou* 2001). He was of the opinion that insufficient attention had been paid to the assessment of reasonableness from the employer's perspective, that is, the requirement that Ms Schou attend the worksite at Parliament House.[14] The case was remitted to the tribunal, which affirmed its original decision (*Schou* 2002), but the State appealed again. Phillips JA, writing the majority opinion for the Court of Appeal, endorsed the finding of Harper J, observing that he found it 'almost inconceivable that the attendance requirement for sub-editors to attend the house on sitting days should be regarded as not reasonable' (*Schou* 2004: §24).

Thus, the challenge to employer prerogative becomes the focus of the *Schou* case. Just imagine what it would mean for the concept of female agency and independence if millions of women wanted to work from home in an unsupervised and 'unmanned' capacity? The question of discrimination is accorded short shrift. What is seen to be special consideration — being present for a child with a chronic condition — is understood by masculinist judges to constitute a lesser claim than upholding managerial prerogative. It would seem that their homosocial world is devoted to protecting dominant social norms, including those that prevail within the workplace (cf Adams 2002: 99). More significantly, I suggest that the effect of *Schou* is to undermine discursively the propulsion in favour of substantive equality between the sexes.

It is also notable that the relevant anti-discrimination legislation is the creature of the State, which was itself the respondent that so trenchantly opposed Ms Schou's complaint. Furthermore, the majority judge,

Phillips J, appeared to be openly hostile to the anti-discrimination jurisdiction, averring that the dispute was a matter for management, not a complaint of indirect discrimination (*Schou* 2004: §33). The cost and psychological burden for individual complainants in mounting challenges of this kind operate to maintain the status quo by deterring others from lodging complaints. The inequality between Ms Schou, the individual complainant, and the State respondent in terms of resources, legal representation and access to the appellate process was dramatic.[15]

The *Schou* case confronts head-on the line of demarcation between public and private life which is central to liberal theory and the constitution of the nation-state. Moreover, whether we look at discourses pertaining to citizenship, economics or law, the universal is an abstraction that has been deployed for the exclusive benefit of Benchmark Men. Attempts to accommodate the particularity and the embodiment associated with the feminine and the private sphere have been trenchantly resisted. The mandate of anti-discrimination legislation pays lip service to new understandings of gender equality through the objects clauses of the Acts (eg *Sex Discrimination Act* 1984 (Cth), s3, EOA (Vic), s3), and through the inclusion of the grounds of pregnancy and parental responsibility. However, actual attempts to alter the ambit of operation of the non-discrimination principle falter and stumble. Cases, such as *Schou* (cf *Hickie v Hunt*, *Bogle v Metropolitan Health Service Board*), permit an oblique glimpse of 'private' life, not a major interrogation of it, because judicial attention is deflected by the complex legalistic test relating to indirect discrimination. Beth Gaze, in her critique of the first Supreme Court decision in the *Schou* case, attacks the somewhat feeble attempt by judges, such as Harper J, to come to grips with equality and anti-discrimination law (2002: 351).

However, it is not really surprising that the traditional sentinels of the boundary between public and private life are so resistant to the radical potential of the non-discrimination principle. In light of the trajectory of 'letting women in' to public and professional life that I have outlined, this metaphysical boundary has now become a major site of contestation. The reality is that technology has revolutionised the nature of work so that it is no longer necessary to remain in a fixed

location (although this can be a mixed blessing). The stakes are high, for the challenge goes to the heart of liberal theory and the gendered Kantian dichotomy between passive and active citizens, which has the potential to threaten the comfortable life world of Benchmark Men — not just in terms of the gendered notion of managerial prerogative within the workplace, but also the gendered division of labour within the family.

The conundrum of care

The fundamental citizenship question pertaining to the public/private symbiosis, on which relatively little headway has been made, as *Schou* suggests, relates to the valuation of women's work in the home. Marilyn Waring has argued compellingly that this work counts for nothing in the computation of the Gross National Product and other internationally recognised indices (Waring 1988). Work performed for 'love and affection' is characterised as economically unproductive. The significance of this not only serves to diminish the social value of caring for others, but it also operates to prevent women acquiring property, which Rousseau referred to as the 'true foundation of civil society' (1979: 151). The classical liberal position was that those who did not own property could not be free and independent. They were effectively denied legal personality and their wills deemed to be defective by virtue of this lack; they could not be possessive individuals (Davies & Naffine 2001: 15). Women may no longer be automatically assigned to Kant's passive category, but one of the reasons why active citizenship remains elusive is because the work they do in the home continues to be characterised as unproductive. While the commodification of that which is done for love and affection is problematic, the linkage between property and active citizenship in a capitalist society is indubitable. There is an inchoate recognition of caring work on relationship breakdown, but it has not crystallised into active citizenship. As Jocelyn Pixley compellingly argues, the opportunity to engage in paid employment is a basic condition of being a citizen in contemporary society (1993, cf Lister 2003: 138ff).

If women are able to combine paid work with pregnancy, motherhood and caring responsibilities as a result of maternity leave and flexible work policies (Sex Discrimination Commissioner 1999), they acquire citizenship capital. However, the struggle to do so continues to be contested. The consistent refusal to recognise child care expenses as a legitimate work-related deduction for income tax purposes underscores the role of the nation-state in maintaining a gendered conceptualisation of citizenship.[16] 'Working mums' are treated as transient workers with little commitment to the workplace (Charlesworth 1999). The inference is that they also have little commitment to the public sphere. As suggested, requiring employers to take cognisance of what is still conceptualised as an employee's private responsibilities, such as caring for a chronically sick child, as in the *Schou* case, would be a radical step, despite the inchoate attempt by anti-discrimination legislation to do so. But even more radical would be the recognition of a direct linkage between unpaid caring work and active citizenship (Lister 2003: esp 167ff). We are reminded once again that the *and* in 'women and citizenship' remains highly gendered.

Conclusion: Rapunzel goes to war

Finally, I would like to question the meaning of citizenship itself in a neoliberal climate where social justice has virtually disappeared from the public agenda. Contemporary politics have moved away from an inclusive ideal of collectivism and common good to one that prioritises the interests and desires of individuals. The site in which these interests are pursued has also moved — from civil society to the market. Thus, current debates over paid maternity leave and flexible work are more likely to be couched in terms of the cost to the employer than equity and social justice for women. Individuals as market players are careless of the needs of others, although neoliberals propound the rhetoric of the free market as a maximiser of overall societal well-being (McCluskey 2003: 787). The focus is not just on the subjectivity of the self and the satisfaction of individual desire, but the maximisation of profits. Within a market discourse, competition is all-important which

means that *in*equality, as well as equality, between citizens is an undeniable social norm.[17] This has occurred by stealth because the growing inequities are unseeable within the universalising rhetoric of citizenship. As I have already argued, the totalising and repressive tendencies of the universal smothers the Other, thereby allowing the citizen definition that comports best with that of Benchmark Man to prevail. Similarly, the demise of social liberalism, after our brief flirtation with it, means that it is once again harder for the voices of women and racialised Others to be heard.

In Marshall's typology, social citizenship was identified as the third stage of citizenship, after civil and political rights (1950). Social citizenship encompasses material rights, including rights to education, health and employment, but even then, the notion of *rights*, rather than *privileges*, was contentious, particularly for women (eg Sarvasy 1997). Under neoliberalism, there has been a resiling from social citizenship and the possibility of material rights, in favour of a re-instantiation of merely abstract rights. Thus, the nation-state will create the framework for the acquisition of social goods, such as education, but individuals will take responsibility for their own education by assuming the cost themselves (Chapman 2004).

Civil society, the metaphysical space where citizens are free to congregate, associate and debate, has withered under neoliberalism. So pronounced is this trend that we are now encountering phrases, such as the 'death of the social' (Rose 1996). Rather than public goods, regulation and accountability, neoliberalism favours privatisation, deregulation and secrecy. Instead of the Aristotelian notion of the good life, which was traditionally pursued through the public sphere on behalf of the common weal, the pursuit of private gain is privileged above all else. For the most part, this means that neoliberal citizens, men as well as women, are valued for their 'use value' — as either new knowledge workers or consumers — not as citizens in their own right (Lyotard 1984, Brett 2003: 166–8). A range of neoliberal policies, such as enterprise bargaining, contractualism and casualisation, have also had a deleterious impact on low paid, indigenous and NESB (non English speaking background) women workers. Collective movements,

including women's groups and unions, have dramatically declined in membership. What do the principles of equality and non-discrimination mean in this context? To be treated as equally badly as everyone else?

As a corollary of the changed mindset, neoliberalism has also seen a resiling from the gains of Second Wave Feminism, which are very much associated with the social liberalism of the 1970s and 1980s (eg Cossman & Fudge 2002, Hunter 2002). Since the election of conservative Australian Prime Minister, John Howard, in 1996, there has been a devastating reversal of policies designed to benefit Australian women at the federal level (Whip 2003: 81–6, Summers 2003: esp 121–41). They include severe budget cuts to the Office of Status of Women, increased child care costs, the abolition of bodies designed to enhance the representation and profile of women, including the Register of Women, and the watering down of *Affirmative Action (Equal Opportunity for Women) Act* 1986 (Cth), now *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) (Thornton 2001a). A particularly bizarre illustration of the changed orientation, with its contempt, not just its disregard, for women, is provided by the fact that a 12-person delegation to an International Labor Organization conference on pregnancy and the workplace held at Geneva in 2001, led by the then Minister for Industrial Relations, Senator Reith, did not include a single woman (Whip 2003: 85).

The discourse of citizenship is also being changed by globalisation and events on the world stage. Neoliberalism has seen a withdrawal of funding for public goods, such as health and education, and a diversion to militarism, defence, security, border protection, and the incarceration of refugees. The latter cluster underscores most vividly the line of demarcation between those who are in and those who are outside but want to be let in to the community of citizens. War and other manifestations of state-legitimated violence serve to revive the militarist norms that have underpinned citizenship since Antiquity (Young 1989: 253). Throughout history, able-bodied male citizens have had the responsibility of defending the state and protecting women and children. In this way, gender has been historically mapped onto the active/passive binary of citizenship discourse. The post-World War II

period of economic growth and the ascendancy of social liberalism, with its egalitarian rhetoric, blurred the starkness of the dichotomy, but the contemporary discourses of war, terrorism and border protection invariably operate to revive the Kantian construction. The reversal has also suited the moral conservatism of neoliberalism.

While a small number of women now participate in the defence forces, the televising of the war in Iraq in 2003 reminded us on a daily basis of the masculinist character of military service. Only one woman received extensive media coverage in the West — Private Jessica Lynch of the US army.[18] Her story represents another piece of the mosaic of women and citizenship. It is a modern variation of the fairytale of Rapunzel, who was locked in a tower and had to be heroically rescued.[19] Private Lynch, also young, blond and beautiful, was captured in an ambush by Iraqi soldiers and then dramatically rescued by United States commandoes — not on white chargers — but in Black Hawk helicopters. Not only did this contemporary version of the fairytale receive worldwide media coverage, it was soon made into a film that was shown on prime-time television.[20] The publication of a massively promoted biography/autobiography (Bragg 2003) was also timed to coincide with the showing of the film. It thereby instantiated in popular culture the tale of hapless maiden rescued from a terrible fate by valiant heroes.

Private Lynch's presence within the theatre of war threatened to disrupt the conventional gendered binarism of citizenship, but the account of her rescue served to reify it at the very point of challenge. We subsequently learned that the account of the rescue itself contained fairytale elements — devised for the American propaganda machine, as well as for the titillation of the consumers of popular culture, but this was of little consequence. Indeed, Jessica Lynch's doctors found that she had no recollection of the events and probably never would. The fabrication acquired its own 'truth' via the mediation of 'reality TV' and the 'autobiography'. The Jessica Lynch story illustrates Baudrillard's proposition that the 'hyperreal' does indeed become the 'real', that is, more real than the real, so that 'the reality of the world is a total illusion' (1987: 44).

'Rapunzel goes to war' is therefore an apt metaphor with which to conclude my brief consideration of a further moment in women's ongoing struggle to become active citizens. It completely disrupts a linear narrative of progress. Liberal feminists initially sought to be 'let in' on the same terms as men to demonstrate that they too possessed free will, independence and agency. They were anxious to slough off the stereo-typical straitjackets of passivity, but they underestimated the pitfalls of equality — even when they were on the same side. Rather than being respected for their competence, they continued to be constructed as Others. If they could not be contained in the private realm, judges, employers, colleagues and comrades would seek to diminish their independence by trivialising, corporealising or paternalistically protecting and rescuing them. If legal and political discourses did not succeed in denying women's subjectivity, their stories would be rewritten in order to construct a new reality. The path to active citizenship is akin to manoeuvring through a minefield.

Nevertheless, if Rapunzel wishes to go to war, we must let her go. We cannot construct a complementary totalising stereotype, which avers that all women are morally superior, caring, and committed to peace and the protection of life. Rapunzel is entitled to choose her own path of self-realisation now that she has been released from to the tower. The choices open to her represent an ostensibly significant advance over the rigidity of exclusion associated with the Kantian binarism. However, the Rapunzel metaphor underscores the ideologically laden nature of those choices for women, which suggests that citizenship is likely to continue to be a contested site of gender politics.

Notes

1 Versions of this paper were presented at the 32nd Triennial Conference, Australian Federation of University Women, Melbourne, April 2003; St John's College, University of British Columbia, Vancouver, October 2003; Socio-Legal Research Centre, Griffith Law School, Brisbane, September 2004. Warm thanks are extended to Catherine Dauvergne and Wes Pue for inviting me to participate in the Challenging Nation Speaker Series and for

arranging financial support, to Marian Quartly who organised the AFUW Conference and to Pam Adams, Richard Johnstone, Bill MacNeil, Jan McDonald and Steven White who organised my trip to Griffith Law School.

2 'By marriage the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing.' (Blackstone 1765–9 [1979]: 442).

3 'Benchmark Men' is a shorthand term I coined to encapsulate the idea of the normative comparator in discrimination complaints (Thornton 2001a: 78).

4 Senator Dorothy Tangney was elected to the Senate in the same year.

5 Judith Brett, in her study of the Australian Liberal Party, suggests that the private sphere engendered a somewhat different conceptualisation of citizenship. The evangelical religion and middle class morality that shaped the origins of the Party formed a bridge between civic virtue and domestic life. Brett suggests that the connection of public and private spheres in this way facilitated the attainment of formal citizenship for women (2003: 59–60).

6 *Public Notaries Act 1859* (SA).

7 *Acts Interpretation Act 1915* (SA). The impediment arising from sex was legislatively cured by the *Sex Disqualification (Removal) Act 1921* (SA).

8 Nicely encapsulated by Lasch's phrase 'a haven in a heartless world' (1995).

9 Scott uses this term to capture the 'critique of power spoken behind the back of the dominant' that initially cannot be avowed without reprisal (1990: xii).

10 The view is that a specific legislative amendment is deemed to be necessary in each State to give effect to the ruling and alter what is, after all, a creation of the common law. The Victorian Attorney-General announced that the law would be abolished in Victoria, although Ms De Sales' attempts to have the law changed in Western Australia were unsuccessful (Munro 2003).

11 The *Fatal Accidents Act* 1959 (WA), like the UK model generally emulated in Australia, is designed to compensate relatives for economic loss, not for grief: 'Historically, the paradigm case under the *Fatal Accidents*

Act was a claim by a dependent wife for damages arising from the death of her husband, who was the family breadwinner.' (*De Sales* §12 per Gleeson CJ).

12 Some of the more bizarre examples induced by a comparability requirement that arose in early United States sex discrimination litigation, such as those dealing with male medical analogies to pregnancy (*Geduldig v Aiello* per Brennan J), have been obviated in Australia by the inclusion of express legislative proscriptions of discrimination on the ground of pregnancy.

13 Australia ratified ILO Convention No 156: *Workers with Family Responsibilities* in 1990. In 1992, the ground of family responsibilities was included as a proscribed ground within the *Sex Discrimination Act* 1984 (Cth). All States and territories, except South Australia, now include parental status, or a cognate term, as a ground in their anti-discrimination legislation: *Anti-Discrimination Act* 1977 (NSW), s49(s); EOA (Vic), s6(1); *Anti-Discrimination Act* 1991 (Qld), s7(1)(d); *Equal Opportunity Act* 1984 (WA), s35A; *Anti-Discrimination Act* 1998 (Tas), s16(i); *Discrimination Act* 1991 (ACT), s7(1)(e); *Anti-Discrimination Act* 1992 (NT), s19(1)(g).

14 The legal test is concerned with the disparate effect on the complainant of not permitting her to work from home rather than with the denial of a favour not granted to other employees. Harper J conceptualises the test as one of comparability that relates to direct, not indirect, discrimination. As Gaze also points out, Harper J paid scant attention to what assistance might be gleaned from the relevant case law (2002: 349, cf Adams 2002).

15 The complainant wished to appeal to the High Court from the Court of Appeal decision. A law firm was prepared to act for her in a pro bono capacity provided that the State undertook not to seek costs if Ms Schou were unsuccessful, but the State was not prepared to give this undertaking.

16 For a detailed analysis of the issue of childcare as a tax deduction, see Johnson 2002. While Johnson's study is based on a late 20th century Canadian Supreme Court case, *Symes v Canada*, litigation in common law jurisdictions, in which courts oppose the deduction, has a long lineage. See, eg, *Bowers v Harding* (UK), *Henry C & Lillie M Wright v Commissioner* (US), *No 68 v Minister of National Revenue* (Can), *Lodge v Federal Commissioner of Taxation* (Aust).

17 Summers' analysis of anti-feminist policies associated with the millennial turn is not analysed in the context of neoliberalism as such, but the title of

her study, *The End of Equality* (2003), is particularly apt.

18 The ambush and wounding occurred on 23 March, and the rescue on 1 April 2003 (Wright 2003).

19 Judith Grbich uses the Rapunzel fairytale in her imaginative reading of the film, *Pretty Woman*, as a metaphor for property law theory (2002).

20 *Saving Jessica Lynch* was shown on US and Canadian TV on 9 November 2003.

References

Australian Bureau of Statistics (ABS) 2003 *Legal Practices: Australia 2001-02* (8667.0) ABS Canberra

Adams K L 2002 'A Step Backward in Job Protection for Carers' *Aust J Labour L* 15: 93–103

Allen J, Braham P and Lewis P eds 1992 *Political and Economic Forms of Modernity* Polity Cambridge

Aristotle 1959 *Politics and Athenian Constitution* Ed and Trans J Warrington J M Dent London

Baudrillard J 1987 *The Evil Demon of Images* Mari Kuttna Memorial Lecture Power Institute Publications U Sydney Sydney

Berkowitz D and Thorne S 1979 *Baron and Feme: A Treatise of the Common Law concerning Husbands and Wives* Garland New York (first published 1700)

Blackstone W 1979 *Commentaries* U Chicago Press Chicago and London (facsimile of 1st edition 1765–9)

Bragg R 2003 (As told by Jessica Lynch) *I am a Soldier Too: The Jessica Lynch Story* Knopf New York

Brett J 2003 *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* CUP Cambridge

Brockman J 2001 *Gender in the Legal Profession: Fitting or Breaking the Mould* UBC Press Vancouver

Chapman B 2004 'A Critical Appraisal of the New Higher Education Charges for Students' *Dialogue* 23/1: 61–72

Charlesworth S 1999 'Working Mums: The Construction of Women Workers

in the Banking Industry' *Journal of Interdisciplinary Gender Studies* 4/2: 12–28

Cossman B and Fudge J eds 2002 *Privatization, Law, and the Challenge to Feminism* U Toronto Press Toronto

Davies M and Naffine N 2001 *Are Persons Property? Legal Debates about Property and Personality* Ashgate/Dartmouth Aldershot UK & Burlington USA

'Editorial' 1993 *Aust Feminist LJ* 1: 1–2

Fehlberg B 1997 *Sexually Transmitted Debt: Surety Experience and English Law* Clarendon Press Oxford

Game A and Pringle R 1983 *Gender at Work* George Allen & Unwin Sydney

Gaze B 2002 'Context and Interpretation in Anti-Discrimination Law' *MULR* 26/2: 325–54

Graycar R and Morgan J 2004 'Examining Understandings of Equality: One Step Forward, Two Steps Back' *Aust Feminist LJ* 20: 23–42

Grbich J 2002 'Language as the "Pretty Woman" of Law: Properties of Longing and Desire in Legal Interpretation and Popular Culture' in Thornton 2002: 131–46

Grimshaw P, Lake M, McGrath A and Quartly M 1994 *Creating a Nation* McPhee Gribble Melbourne

Hunt L ed 1991 *Eroticism and the Body Politic* Johns Hopkins University Press New York

Hunter R 2002 'The Mirage of Justice: Women and the Shrinking State' *Aust Fem LJ* 16: 53–74

Johnson R 2002 *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* UBC Press Vancouver

Jones K B 1990 'Citizenship in a Woman-Friendly Polity' *Signs: J Women in Culture & Socy* 15/4: 781–812

Kairys D ed 1990 *The Politics of Law: A Progressive Critique* Pantheon New York (rev edn)

Kant I 1991 *The Metaphysics of Morals* Trans Mary Gregor CUP Cambridge (first published 1785)

Kinnear P 2002 *New Families for Changing Times* Discussion Paper No 47 Australia Institute Canberra

Kirby Hon Justice M 1998 'Women Lawyers — Making a Difference' *Aust Feminist LJ* 10: 125–36

—— 2002 'Women in the Law – What Next?' *Aust Feminist LJ* 16: 146–56

Lasch C 1995 *A Haven in a Heartless World: The Family Besieged* W W Norton New York

Lake M 1999 *Getting Equal: The History of Australian Feminism* Allen & Unwin Sydney

Lister R 2003 *Citizenship: Feminist Perspectives* Palgrave Macmillan London (2nd edn)

Lloyd G 1984 *The Man of Reason: 'Male' and 'Female' in Western Philosophy* Methuen London

Lyotard J L 1984 *The Postmodern Condition: A Report on Knowledge* Manchester UP Manchester

McCluskey M T 2003 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State' *Indiana Law Journal* 78/2: 783–876

MacKenzie N 1962 *Women in Australia* F W Cheshire Melbourne

—— 2002 'Women as Citizens' (from MacKenzie 1962) in Simms 2002: 11–42

MacKinnon C A 1989 *Toward a Feminist Theory of the State* Harvard UP Cambridge Mass

Magarey S, Rowley S and Sheridan S eds 1993 *Debutante Nation: Feminism Contests the 1890s* Allen & Unwin Sydney

Marshall T H 1950 *Citizenship and Social Class and Other Essays* CUP Cambridge

Minow M 1985 '"Forming Underneath Everything that Grows": Toward a History of Family Law' *Wisconsin Law Rev:* 819–98

Mossman M J 1986 'Feminism and Legal Method: The Difference it Makes' *Aust J L & Socy* 3: 30–52

Munro I 2003 '"Widow discount" law to be abolished in Victoria' *The Age* 28 February 2003: 5

Naffine N, Owens R and Williams J eds 2001 *Intention in Law and Philosophy* Ashgate/Dartmouth Aldershot UK & Burlington USA

O'Donovan K 1985 *Sexual Divisions in Law* Weidenfield London

Oldfield A 1992 *Woman Suffrage in Australia: A Gift or a Struggle?* CUP Melbourne

Olsen F E 1983 'The Family and the Market: A Study of Ideology and Legal Reform' *Harv LR* 96: 1497–578

Pateman, C 1989 *The Disorder of Women: Democracy, Feminism and Political Theory* Polity Press Cambridge

Peterson N and Sanders W 1998 'Introduction' in Peterson and Sanders 1998

Peterson N and Sanders W eds 1998 *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* CUP Cambridge

Phillips A 1992 'Must Feminists Give Up on Liberal Democracy?' *Pol Studies* 40: 68–82

Pixley J 1993 *Citizenship and Employment: Investigating Post-Industrial Options* CUP Cambridge

Pringle R 1998 *Sex and Medicine: Gender, Power and Authority in the Medical Profession* CUP Cambridge

Riley D 1992 'Citizenship and the Welfare State' in Allen et al 1992: 179–210

Rose N 1996 'The Death of the Social? Re-figuring the Territory of Government' *Economy & Society* 25/3: 327–56

Rousseau JJ 1979 'A Discourse of Political Economy' in *The Social Contract and Discourses* Trans G D H Cole Dent London (first published 1755)

Rubenstein K ed 2000 *Individual Community Nation: Fifty Years of Australian Citizenship* Australian Scholarly Publishing Melbourne

—— 2002 *Australian Citizenship Law in Context* Lawbook Sydney

Sachs A and Wilson J H 1978 *Sexism and the Law: A Study of Male Beliefs and Judicial Bias in Britain and the United States* Martin Robertson Oxford

Sarvasy W 1997 'Social Citizenship from a Feminist Perspective' 12/4: 54–73

Sawer M and Simms M 1993 *A Woman's Place: Women and Politics in Australia* Allen & Unwin Sydney

Schultz U and Shaw G (eds) 2003 *Women in the World's Legal Professions* Hart Publishing Oxford

Scott J C 1990 *Domination and the Arts of Resistance: Hidden Transcripts* Yale UP New Haven & London

Sex Discrimination Commissioner 1999 *Pregnant and Productive: It's a Right not a Privilege to Work while Pregnant* Report of the National Pregnancy and Work Inquiry Human Rights and Equal Opportunity Commission Sydney

Shanley M L 1989 *Feminism, Marriage and the Law in Victorian England, 1850-1895* Princeton University Press Princeton NJ

Simms M ed 2002 *A Hundred Years of Women's Politics* Occasional Paper Series 1/2002 Academy of Social Sciences in Australia Canberra

Somers M R 1993 'Citizenship and the Place of the Public Sphere: Law, Community, and Political Culture in the Transition to Democracy' *American Sociological Rev* 58: 587–620

—— 1994 'Rights, Relationality, and Membership: Rethinking the Making and Meaning of Citizenship' *Law & Social Inquiry* 94: 63–112

Sommerlad H and Sanderson P 1998 *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* Ashgate/ Dartmouth Aldershot UK & Brookfield USA

Summers A 2003 *The End of Equality: Work, Babies and Women's Choices in 21st Century Australia* Random House Australia Sydney

Sypnowich C 1993 'Some Disquiet about "Difference"' *Praxis International* 13: 99–113

Theobald M 1996 *Knowing Women: Origin of Women's Education in Nineteenth-century Australia* CUP Cambridge

Thornton M 1990 *The Liberal Promise: Anti-Discrimination Legislation in Australia* OUP Melbourne

—— 1995 'Embodying the Citizen' in Thornton ed 1995

—— 1996 *Dissonance and Distrust: Women in the Legal Profession* OUP Melbourne

—— 1997 'The Judicial Gendering of Citizenship: A Look at Property Interests During Marriage' *J Law & Socy* 24/4: 486–503

—— 2001a 'EEO in a Neo-Liberal Climate' *J Interdisciplinary Gender Studies* 6/1: 77–104

—— 2001b 'Intention to Contract: Public Act or Private Sentiment?' in Naffine et al 2001: 217–37

Thornton M ed 1995 *Public and Private: Feminist Legal Debates* OUP Melbourne

—— 2002 *Romancing the Tomes: Popular Culture Law and Feminism* Cavendish Publishing London

Walby S 1994 'Is Citizenship Gendered?' *Sociology* 28/2: 379–95

Waring M 1988 *Counting for Nothing: What Men Value and What Women are Worth* Allen & Unwin Wellington

Whip R 2003 'The 1996 Australian Federal Election and its Aftermath: A Case for Equal Gender Representation' *Aust Feminist Studies* 18: 73–97

Wright G 2003 'Hollywood eyes the saving of Private Lynch' *The Age* 5 April 2003: 7

Young I M 1989 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' *Ethics* 99: 250–74

Cases

Balfour v Balfour [1919] 2 KB 571

Bogle v Metropolitan Health Service Board (2000) EOC ¶93-069 (WA EOC)

Bowers v Harding (1891) 3 TC 22 (UK)

De Sales v Ingrilli [2002] HCA 52 (14 November 2002)

Garcia v National Australia Bank (1998) 194 CLR 395

Geduldig v Aiello 417 US 48 (1974)

Henry C & Lillie M Wright v Commissioner 40 BTA 1038 (1939), aff'd 113 F2d 114 (CA 2d Cir) (1940) (US)

Hickie v Hunt (1998) EOC ¶92-910 (HREOC)

In re Edith Haynes (1904) 6 WALR 209

In re Kitson [1920] SALR 230.

Lodge v Federal Commissioner of Taxation (1972) ACC 4174 (Aust)

No 68 v Minister of National Revenue (1950) 52 DTC 236 (TAB) (Can)

R v Hutchins; ex parte Chapman and Cockington [1959] SASR 189

R v L (1991) 103 ALR 577

R v R [1991] 2 All ER 257

Schou v State of Victoria (Department of Victorian Parliamentary Debates) (2000) EOC ¶93-101 (VCAT)

Schou v State of Victoria Melbourne (Department of Parliamentary Debates) (2002) EOC ¶93-217 (VCAT)

Secretary Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251

State of Victoria v Schou [2001] VSC 321, (2001) EOC ¶93-170 (Vic SC)

State of Victoria v Schou (2004) EOC ¶93-328 (Vic CA)

Symes v Canada [1993] 4 SCR 695

Yerkey v Jones (1939) 63 CLR 649