HISTORICISING CITIZENSHIP: REMEMBERING BROKEN PROMISES

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[This paper focuses on the construction of citizenship, conventionally conceptualised as a universal that has significance only within the public sphere or polity. The paper problematises civil society as a site where citizens assert their rights through litigation, a phenomenon that enhances the gendered notion of citizenship. Actions for breach of promise to marry in early twentieth century Victoria are considered as an example of litigation initiated almost entirely by women. The analysis shows how breach of promise suits sought to construct women as dependent, heterosexed and monogamous, just when it appeared that they had formally become citizens. The reclamation of these stories of the past assist us in rethinking citizenship as historicised and multifaceted, rather than as a bland universal.]

> According to ancient alchemists, the aleph is the point in which the past, the present and the future are condensed to form a picture where all time and space are embraced ... It is perhaps useful to see citizenship as possessing an alephian nature. For citizenship is that fluid juncture at which the past, the present, and the future coalesce into a collective identity, which is not a fixed image, but rather a terrain of conflicts.[1]

I INTRODUCTION: BODY POLITIC/S

Liberal legalism is strewn with universalised concepts that deny the particularity of difference. Citizenship is a paradigmatic example of such a universal, for it requires the citizen to erase all facets of his or her identity. Within legal discourse, 'the citizen' is not only an individual who is de-sexed, de-raced and de-classed, but he or she is also de-historicised. The one characteristic of identity that the juridical concept of citizenship purports not to suppress is that of nationality. Citizenship is therefore grounded in a very distinctive way. It signals homogeneity and a sense of belonging, but the community to which the citizen belongs is exclusively determined in relation to the nation state. The familiar communities of everyday life, such as those congregated around the workplace, club, school and suburb, are invisible to the juridical gaze. Indeed, this gaze is pathologically incapable of seeing multiplicitous and heterogeneous interests at all. The quintessential citizenship question, therefore, political as well as juridi-

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1 Roberto Alejandro, *Hermeneutics, Citizenship, and the Public Sphere* (1993) 1.

cal, is whether it is possible for a dimension of 'sameness' to be transmuted into a space of diversity?[2]

While the art of alchemy might be able to effect a radical refashioning of citizenship, my contention is that citizenship's universalising carapace is a technology that normalises and enhances the power of benchmark men. By 'benchmark men', I mean those who are white, Anglo-Celtic, able-bodied, heterosexual and middle class, and who constitute the normative standard within the dominant social script. In dislocating benchmark man as the paradigmatic citizen of the social script, I am seeking to rewrite the script.

As I have pointed out in 'The Legocentric Citizen',[3] liberal legalism has displayed very little interest in citizenship, other than in policing the boundaries. Its concern has been with whether an individual is 'in' or 'not in' the relevant national community. Policing has entailed a concern with issues such as immigration and emigration, visas, passports, and eligibility for welfare benefits.[4] Otherwise, the polity has not sought to delineate the rights and obligations of citizenship in express terms. Indeed, I would argue that the meaning of citizenship has been left deliberately vague within the social script. To this extent, the status of citizenship is like marriage, which the polity similarly regulates in terms only of getting in or out of it, while leaving the substance untouched. The absence of substance has permitted those with social power, notably benchmark men, to imbue seeming universals, such as marriage and citizenship, with a meaning that continually operates to their advantage. Even for those born overseas, the 'naturalisation' ceremony is singularly unhelpful in conveying the substance of citizenship.[5] However, it is clear that there are gendered, raced, sexualised and classed sub-texts to the meaning of citizenship that the universal endeavours to obscure. The normative predilection in favour of benchmark men has been written into the social script through a long period of exclusivity, and is filtered through religious, political, legal and popular discourses. This partiality ensures that liberty and equality for those confined to the status of 'others' are unrealisable within supposedly universalised terrains.

Within Western, democratic liberalism, citizenship, supported by legality, has meaning only within the public sphere, rendering the domestic sphere invisible within the rubric of 'private'. This bifurcation between public and private has potentially devastating citizenship consequences for those whose lives revolve around such paradigmatically private activities as caring for young children. The gendered incommensurability of the two spheres is no accident. Rousseau's metaphor of the polity as the *body* politic underscores the idea that it is the public realm, where the brain of law is located:

[2] Cf Alejandro, above n 1, 5.

[3] Margaret Thornton, 'The Legocentric Citizen' (1996) 21 *Alternative Law Journal* 72.

[4] See, eg, Ann-Mari Jordens, *Redefining Australians: Immigration, Citizenship and National Identity* (1995); Kim Rubenstein, 'Citizenship in Australia: Unscrambling its Meaning' (1995) 20 *Melbourne University Law Review* 503.

[5] Rebecca Peters, 'Citizen Peters and Aristotle: The Right to Park in a Loading Zone' (1992) 17 *Alternative Law Journal* 106.

> For Rousseau, the 'body politic ... may be taken as an organized, living body, resembling that of man.' Law and custom are the brain, business the mouth and stomach, and 'citizens ... the body which make the machine live, move and work' via a 'general will.' This will is the source of the law. It constitutes the conditions of intersubjectivity among 'members of the State' and with the state itself.[6]

This imagery is also startling because of the notion that the body politic possesses a masculine body. Despite the halting admission of white, middle class women into the public sphere a century or so ago,[7] the imagery associated with the body politic has not altered. It has not become an androgynous body. Indeed, there is no way that a woman's body can simply be subsumed within the body of man — either biologically or metaphorically — without doing some violence to the image. Universalism therefore effectively denies embodiment and subjectivity altogether. Such particularities are relegated to the private sphere, along with the family and the domain of the feminine, within the conventional schema.

PRIVATE		PUBLIC
Family	Market/Civil Society	Polity

As my diagram suggests, the private sphere may also encompass the market where, according to classical liberalism, citizens are free to enter into contracts without interference from the state. Indeed, the analysis of the public/private dichotomy by some political theorists draws the line between the polity and civil society/market, so that the private sphere *qua* family disappears altogether, or it becomes a small appendage to civil society. The private sphere encompasses the affective and the corporeal, reproduction and nurturing — notions that have all come to be associated with the feminine.[8]

Neither the polity nor the domestic spheres are unproblematically public or private, since there is a gendered symbiosis between them. Simply expressed, the domination of the polity by benchmark men has been contingent on women undertaking responsibility for nurturing, housework and caring work of all kinds. Furthermore, benchmark men as 'equals' within the *polis*, have made a pact to treat the domestic sphere as a sphere beyond legal regulation within liberal legalism, which is why violence in the home, for example, has been treated as qualitatively different from acts of violence perpetrated between strangers. Thus, it is the public sphere that is the arbiter of what is public and what is private. The

[6] Toby Miller, *The Well-Tempered Self: Citizenship, Culture, and the Postmodern Subject* (1993) 2.

[7] When some Australian States, such as South Australia and New South Wales, enacted legislation enfranchising women, they made no advertence to Aboriginal women, who were rarely informed of their rights. Entry on the electoral roll remained optional for Aboriginal people until 1984. See Ann McGrath, '"Beneath the Skin": Australian Citizenship, Rights and Aboriginal Women' (1993) 37 *Journal of Australian Studies* 99.

[8] I have dealt with the ambiguities of the public/private dichotomy elsewhere. See Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 2. See also the detailed study of Katherine O'Donovan, *Sexual Divisions in Law* (1985).

facets of life that the 'equals' choose to hide or discount are selectively accorded the private designation by the 'brain of law'. Hence, I want to stress the fluidity within the public/private dualism, which is reflected in the constitution of the citizen.

Despite the undeniable linkages between the polity and the domestic sphere, it is the realms of the market and civil society that obtrude themselves upon and disrupt altogether the idea that a simple public/private dualism exists. Thus, while the market claims the private appellation to itself, it has many public features, for it is regulated or deregulated according to the predilections of the government of the day. Conversely, the power of corporate and collective economic interests *vis-à-vis* the polity is immense, totally distorting the individualistic presuppositions underlying the liberal concept of citizenship. To the extent that liberal legalism denies both the nature and extent of corporate power, including the transcendant power of transnational corporations, it might be averred that citizenship is an effete concept, for it continues to privilege the individual. Benchmark men, as a class, nevertheless continue to predominate as the managers and directors of corporations, thereby adding to their personal power capital, as well as that of corporate capital.

II THE LIMITS OF CIVILITY

Civil society, like citizenship, also has an old-fashioned ring to it, and is sometimes omitted altogether from political analyses.[9] Civil society should nevertheless not be conflated with the polity or with the market.[10] Traditionally, it has been conceptualised as an important sphere of freedom, in which individual citizens can debate and associate, as well as acquire property and lobby governments to effect social change. Through civil society, private, or subjective interests are aggregated within public spaces for particular purposes. Thus, civil society is a sphere through which power is garnered, no less than through the market. Nevertheless, liaisons are likely to be spasmodic and fragmentary, and an individual may belong to many community, religious, educational and sporting groups at the same time.

It is self-evident that civil rights are grounded within civil society. The right to litigate, in order to assert or protect a right, undergirds the notion of civil rights. When we deconstruct civil rights, we find that they are lodged deep within Enlightenment thought, and are preoccupied with property. The linkage between property, citizenship, and civil society is made explicit by Rousseau:

> It is certain that the right of property is the most sacred of all the rights of citizenship, and even more important in some respects than liberty itself; either because it more nearly affects the preservation of life, or because, property being more easily usurped and more difficult to defend than life, the law ought to pay

[9] Cf Drude Dahlerup, 'Learning to Live with the State: State, Market, and Civil Society: Women's Need for State Intervention in East and West' (1994) 17 *Women's Studies International Forum* 117.

[10] Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497, 1501.

> a greater attention to what is most easily taken away; or finally, because property is the true foundation of civil society, and the real guarantee of the undertakings of citizens; for if property were not answerable for personal actions, nothing would be easier than to evade duties and laugh at the laws.[11]

Although enfranchisement is no longer contingent on property ownership, it is no surprise to discover that the preponderance of civil litigation is about property interests, a factor that is probably unremarkable in a capitalist society. The hollowness of the rhetoric of rights tends to occlude the material basis of their claims. 'Rights' are nevertheless frequently expressed in progressivist and propertied terms.[12] Historically, women, like Aboriginal people, were generally denied access to property. The Anglo-Australian common law position was that a married woman's real property (houses and land) automatically became the property of her husband on marriage, unless she had effected a deed securing her interest in the property. The campaign for 'women's rights' was therefore intimately tied up with the right to own property. Indeed, married women were denied civil rights of all kinds, including the right to initiate litigation. Their non-citizen status only began to break down with the enactment of Married Women's Property Acts at the end of the nineteenth century. Thus, close examination reveals that civil society, at best amorphous and uncertain, is a very shadowy terrain for all 'others' who lack material assets and property.

The whole question of rights and 'rights talk' within liberal legalism is problematic. The abstract appearance of rights promotes faith in a positive and ostensibly neutral site of contestation, while simultaneously cloaking the differential histories of women and 'others' that unequivocally demonstrate the impossibility of neutrality. The contradiction is captured nicely by Roberto Alejandro:

> On the one hand, rights allow society to picture the past as a mirror of inequalities which have already been overcome. This description tends to obscure present inequalities, and in so doing, rights may become a spectacle of self-congratulatory rhetorics. On the other hand, rights constitute an indispensable arena in which the abstract universality of the political domain can be challenged to become a space of citizens participating in a common life.[13]

These contradictions inhere within the accounts of the pursuit of rights through litigation. Understanding the meaning of citizenship necessitates a remembering of the past. The 'letting in' of women to the body politic is not a simple step from one status to another. It is very much a moving picture in slow motion, revealing multifarious kaleidoscopic images. These images have to be interpreted to give meaning to contemporary moral claims by women, by Aboriginal people, by the

[11] Jean Jacques Rousseau, 'A Discourse of Political Economy' in *The Social Contract and Discourses* (1973) 151.

[12] Marshall, for example, develops a schema that moves from civil citizenship, to the political and then to the social, the present locus of struggle, which is concerned primarily with economic and material rights. In other words, the acquisition of proprietary interests seems to be the *telos* of the progression. See T Marshall, *Citizenship and Social Class and Other Essays* (1950).

[13] Alejandro, above n 1, 16.

Chinese settlers in Australia in the nineteenth century, by gays and lesbians, and all those consigned to categories of otherness within the social script.

The formal status of married women was long restricted by coverture, which meant that they entered into what amounted to a status of civil death, that is, they performed all legally cognisable acts under the *cover* of their husbands.[14] The struggle for emancipation included securing the right of married women to own property, the right of women generally to be admitted to universities and the professions, and the right to vote. Over the last century or so, women, Aboriginal people, people from non-English speaking backgrounds, and gays and lesbians have been engaged in struggles, not only to be admitted, but to be accepted, within the civic public and the polity. Enfranchisement has been a primary site of struggle, and has come to acquire more symbolic significance than it may have had in practice: 'It became the symbol of full equality of the sexes — before the law and in the access to education and employment, in marriage laws and sexual morality.'[15]

However, the symbolic significance of placing a ballot in a ballot box fell far short of substantive equality for women. The struggle to be 'let in' to the professions and to hold public office has been a protracted one. Indeed, what has been an entitlement for benchmark men on attaining the age of majority has constituted a site of contestation for others. For example, it was averred that the right to vote did not also confer on women the right to stand for election,[16] whereas the normativity of the conjunction between masculinity and the public sphere meant that standing for office was unproblematic for benchmark men. Their domination of the public sphere has permitted them to disclaim particularity even though, as Galeotti points out, '[t]he supposed universality of liberal theory ... turns out to be only a disguised form of particularism'.[17] Acceptance of the idea that women, associated with the particularity of the private and the familial, can represent generalised interests within the public sphere is still being contested, although the representation of women in politics has been described as 'the most salient affirmation of their citizenship'.[18]

Jury service, which has been regarded as one of the obligations of citizenship was perceived as a lesser obligation for women, and some Australian legislation may still include a provision excusing women — as a class — from the obligation of serving as jurors, particularly if responsible for the care of young chil-

[14] Blackstone's conceptualisation of the husband and wife as one person in law, whereby the 'legal existence of the woman is suspended during the marriage' succinctly captures the extinguishment of a wife's civil status. See Sir William Blackstone, *Commentaries on the Laws of England,* (1st published 1765, 1979 ed) vol 1, 442.

[15] Norman MacKenzie, *Women in Australia* (1962) 30.

[16] For details, see Thornton, 'Embodying the Citizen' in Thornton, above n 8, 198, 201.

[17] Anna Galeotti, 'Citizenship and Equality: The Place for Toleration' (1993) *Political Theory* 585, 589.

[18] Maureen O'Neil, 'Citizenship and Social Change: Canadian Women's Struggle for Equality' in William Kaplan (ed), *Belonging: The Meaning and Future of Canadian Citizenship* (1993) 314, 319.

dren.[19] Jury service, as well as military service, which is also problematic for women,[20] are examples of obligations that are exacted in return for access to political avenues.[21] The weaker obligations of women confirm what we already know about their restricted access to politics. Holding even minor public office, such as serving as a notary public, has required litigation and legislation to admit women. In *In re Kitson*,[22] for example, such was the antipathy against women that the ostensibly neutral word 'person' in the relevant legislation was construed so as not to include women, even though the applicant, Ms Kitson, was a practising solicitor with her own firm.

Women faced a particularly difficult task in entering the legal profession and becoming agents of legality, as I have shown in *Dissonance and Distrust.*[23] While women were admitted in increasing numbers to accommodate the dictates of the market from the 1970s, the struggle still continues for women to be accepted in authoritative positions. These struggles reveal the qualified and contingent nature of citizenship for women, which has been cured neither by enfranchisement nor by a century of remedial legislation, including anti-discrimination legislation.[24]

The normativity of the conjunction between masculinity and the public sphere has been such that the idea of the feminine in the public sphere has been so unsettling that the feminine has come to be construed as a metaphor for disorder.[25] Indeed, the image of 'public woman' is sharply contrasted with 'public man' within the social script. The concept of a public woman means a woman who is sexually available to all comers for money — that is, a prostitute — whereas the latter has only positive connotations, for it refers to a man who has altruistically devoted himself to the public good, normally through the holding of public office. In addition to the formal struggle to be 'let in' to the public sphere, women have had to struggle against countervailing images of distrust and dangerousness emanating from the construction of them as sexed bodies. The conjunction between public office and masculinity has permitted reason and rationality to be claimed as the prerogatives of benchmark men, as signified by the metaphor of the body politic. These images are constantly being produced

19 See, eg, Jury Act 1929 (Qld) s 10(2). The New South Wales Act permits an exception as of right for a *person* having 'the care, control and custody of children under the age of 18 years'. See Jury Act 1977 (NSW) Schedule 3, art 6. The sex-neutral 'person' thinly disguises the fact that it is women who are the invariable full-time carers of children. The provision is indirectly discriminatory in its over-inclusive impact. For further examples, see the Gender and Citizenship Materials prepared as part of the Gender Issues in the Law Curriculum Project by Sandra Berns, Paula Baron and Marica Neave (1996).

20 When Australia ratified the Convention on the Elimination of all Forms of Discrimination Against Women in 1980, it reserved on the question of armed combat. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 1981).

21 Cf Linda Kerber, 'A Constitutional Right to be treated like American Ladies: Women and the Obligations of Citizenship' in Linda Kerber, Alice Kessler-Harris and Kathryn Kish Sklar (eds), *U.S. History as Women's History: New Feminist Essays* (1995) 17.

22 [1920] SALR 230.

23 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996).

24 For a detailed critique of the efficacy of anti-discrimination measures, see Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

25 Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989).

and reproduced in social and legal discourses. They do not disappear once women are 'let in'. In fact, 'letting in' may provoke concerted anti-feminist and misogynistic campaigns, as was apparent at the time of the French Revolution, for example, when images of disorderly and grotesque women were used to support the view that the entry of women into the public sphere could only corrupt it, despite the prevailing rhetoric of equality.[26]

Thus, the narrative of 'letting women in' is by no means a linear narrative, but a narrative that consists of breaks and retrograde steps. As law is the master narrative, the legal milestones, endorsed by the polity, have secured the limelight, relegating other accounts to the shadows. However, it is the stories of civil society that challenge the master narrative, while simultaneously affirming the passivity of legocentric citizenship. In order to elaborate on the gendered role of civil society, I would like to take a brief look at the initiation of litigation as a mechanism for remedying wrongs.

Equality before the law is a central premise of liberal legalism, which entails treating in the same way those who are similarly situated. This notion of formal equality may make sense in the case of the application of the criminal law, for example, but the concept has little meaning at all when we turn our eyes to civil law, for this branch of law has nothing to say about how we get to law to resolve disputes in the first place.[27] Indeed, the overwhelming preponderance of litigation is initiated by benchmark men or by corporations which, as I have already suggested, tend to comprise collectivities of benchmark men. Civil law is characterised as 'private' law, thereby constituting a further gloss on public and private, since the entire panoply of courts and court infrastructure is provided at public expense. It can be seen that formal equality is by no means synonymous with equality of outcome.[28]

I do not want to focus on the ontological perplexities of 'justice', the nature of wrongs, or modes of dispute resolution, but rather to show how civil society has been, and continues to be, a site of the active constitution of citizenship. A focus on the subjectivity of embodied citizens exposes the sexed nature of the citizen, in contradistinction to the objectified (or neutered) citizen of legality. On the one hand, the absence of women from civil litigation has denied them the opportunity to be full citizens of the polity. On the other hand, the domination of civil litigation by men legitimises and enhances their power capital, which can then be used to consolidate their status within the polity, as well as within the market and the domestic sphere. Although women have moved into the market and now constitute approximately 46% of those in paid work in contemporary Australia,

[26] Joan Landes, *Women and the Public Sphere in the Age of the French Revolution* (1988); Dorinda Outram, *The Body and the French Revolution: Sex, Class and Political Culture* (1989); Lynn Hunt (ed), *Eroticism and the Body Politic* (1991).

[27] Graycar and Morgan, for example, have addressed gender disproportionality in the allocation of legal aid; see Regina Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death for Women in the 1990s' (1995) 17 *Adelaide Law Review* 49, 50-63. See also *Australian Law Reform Commission — Equality before the Law: Justice for Women*, Report 69 (1994) 91-109; Mary Jane Mossman, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15 *Sydney Law Review* 30.

[28] Thornton, above n 24, 9-23.

and employment is an important indicium of active citizenship, as Jocelyn Pixley argues,[29] the occupation of subordinate positions within sex-segregated occupations, where most working women are located, is likely to do little to enhance active citizenship.[30] I wish to argue that benchmark masculinity is augmented by means of civil litigation, thereby allowing us to place 'the abstract universality of citizenship within the context of struggles and principles in which the fusion of the past and the present takes place'.[31]

III BROKEN PROMISES

With its adversarial mode, its formalism, its cost and its declaration of a winner and a loser at the end of the day, the practice of law reflects the competitiveness of (masculinist) sporting contests. Initiating formal suit may not necessarily be the best way of resolving disputes; this is not my point. What I wish to argue is that initiating suit is an indicium of active citizenship within liberalism. It confirms the masculinist monopoly over civil rights, property, corporate life and the market, in addition to facilitating the linkage between civil society and the polity. Not only is there a dearth of civil litigation initiated by women, but the litigation that has occurred has invariably reproduced conventional notions of the feminine.

I propose to focus on breach of promise suits, of which a large number were reported in some detail in *The Argus*, a leading Melbourne newspaper. I consider 125 of such cases which were reported between 1910 and 1925, most of which were Victorian — metropolitan and regional — although a sprinkling were reported from other Australian States, with the occasional overseas case making the news.[32] In view of the haphazard nature of the reporting and indexing, I am unable to comment on the extent of breach of promise suits throughout Australia. However, if the Victorian situation is anything to go by, the numbers were likely to have been considerable for the first half of the twentieth century, after which they began to decline.

The memories of breach of promise suits have been virtually lost in the annals of legal history, although the action was abolished in Australia as recently as 1976.[33] Only a few appellate cases made the official law reports, when considered to have raised 'significant' issues of law — that is, abstract rules with prospective operation.[34] However, one has to look more closely at the initiation

[29] Jocelyn Pixley, *Citizenship and Employment: Investigating Post-Industrial Options* (1993).

[30] I acknowledge here that the adoption of paid work as a defining feature of citizenship is a choice that supports the 'prevailing economic structure of capitalist-liberal societies'. See Alejandro, above n 1, 33.

[31] Alejandro, above n 1, 34-5.

[32] For example, the London case of *Mandham v Lebaudy* in which the substantial sum of £20,000 in damages had been sought. See 'Multi-Millionaire Sued: Breach of Promise', *The Argus* (Melbourne), 11 July 1924, 11; 'Multi-Millionaire Sued: Breach of Promise Case', *The Argus* (Melbourne), 12 July 1924, 31.

[33] Marriage Act 1961 (Cth) s 111A.

[34] For example, the nature of discovery (*Hughes v Logan* (1888) 14 VLR 647); the status of a promise made by a minor (*Watson v Campbell (No 2)* [1920] VLR 347); disputes as to jurisdiction (*Weckstrom v Hyson* [1966] VR 277).

of a suit, not just the abstract *ratio decidendi* of an appellate decision, to appreciate that there is a sphere of difference and heteroglossia behind the universals of legality. I would therefore argue that the newspaper reports of breach of promise suits are significant indicia of the socio-legal constitution of masculinity and femininity, as well as of heterosexuality and monogamy.

Breach of promise cases are described as having been the subject of 'lively transatlantic debate' between 1850 and 1890.[35] The concern was the 'perceived tendency of the action to impose monetary values on love and matrimony and its "commercialization" of courtship and marriage'.[36] This criticism does not seem to have been linked to the struggle for enfranchisement, which generally was achieved much later in Canada, the United States and Great Britain than in Australia and New Zealand.[37] Indeed, I wish to stress that the large number of breach of promise cases occurred in twentieth century Australia *after* women were enfranchised, underscoring the chequered narrative of citizenship. Opposition to the action also appears to have occurred at a later stage in Australia and, even then, it does not appear to have been the subject of 'lively' public debate.[38]

The commercial analogue of breach of contract is noteworthy for, in the same way, the bargain had to be protected once the agreement was reached in order to protect the interest of the state in marriage. However, the equitable remedy of specific performance, that is, ordering the marriage to take place, would have been absurd in light of the breakdown of the relationship, although there is some suggestion that was the case when the ecclesiastical courts had jurisdiction over the action.[39] What I want to stress is the idea of freedom of contract, the characteristic marker of the change from feudalism to liberalism. This change, signifying the transition from status to contract, is the hallmark of legal modernisation, as noted by Henry Maine.[40] Thus, although marriage itself remained a status of a premodernist kind, the preliminary entry into a contract of marriage acquired, to a large extent, the characteristics of a commercial contract entered into freely.[41] While women who initiated litigation temporarily assumed an active role in civil

[35] Rosemary Coombe, '"The Most Disgusting, Disgraceful and Inequitous Proceeding in our Law": The Action for Breach of Promise of Marriage in Nineteenth-Century Ontario' (1988) 38 *University of Toronto Law Journal* 64, 64-5.

[36] Ibid 68.

[37] New Zealand in 1893; South Australia in 1894; Western Australia (white women) in 1899; Australia (excluding some Aboriginal women) in 1902; Canada (excluding indigenous women) in 1918; United States 1920; Great Britain in 1928.

[38] Surprise was expressed by an *Argus* editorial in 1927 that a Sydney women's club had proposed that 'a woman should have no redress for a breach of promise of marriage': see Editorial, *The Argus* (Melbourne), 5 July 1927, 14. Concerted attacks were mounted against the action in the United States in the 1920s and 1930s when States began to enact 'heartbalm' legislation in which the action was either severely curtailed or abolished altogether. See, eg, Mary Coombs, 'Agency and Partnership: A Study of Breach of Promise Plaintiffs' (1989) 2 *Yale Journal of Law and Feminism* 1.

[39] Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985) 34.

[40] Sir Henry Sumner Maine, *Ancient Law: Its connection with the Early History of Society and its Relation to Modern Ideas* (1970 ed) 295.

[41] Pateman, in her analysis of the marriage contract, does not address entry into the marriage so much as the status of marriage itself: see Carole Pateman, *The Sexual Contract* (1988).

society, the privatised and feminised nature of the breach they were alleging underscored their desire to be the publicly recognised sexual partners of benchmark men. I suggest that these cases, in which women actors had to present themselves as vulnerable to male irresponsibility, thereby requiring the protection of courts (normally a judge and a jury of six), undermined the notion of women as equal members of the polity. Simultaneously, this propensity also undermined the official account of the universal citizen.

Nevertheless, I do not want to suggest that the women were stereotypically frail maidens waiting for Prince Charming to arrive on his white charger. During the period of this study (1910-1925), it is worth noting that most of the women were in paid work of a modest kind. They were housemaids, typists, barmaids, machinists and 'tailoresses', as well as nurses, teachers, boarding house proprietors, farmers' daughters and widows. The class factor challenges the notion that civil litigation is the preserve of the middle class and the wealthy. Although the wealth of the defendant was a relevant factor in assessing damages, defendants were also often working class and lower middle class, rather than well-to-do. The men were labourers, carpenters, carters, blacksmiths, shearers, railway workers, policemen, clerks, piano tuners, dental mechanics and salesmen, as well as farmers, merchants, naval officers, doctors, clergymen and members of parliament.

Some women (and men) were also from non-English speaking backgrounds. Theodora Dendiros had come from Ithaca to marry Panos Boolieros, who then declined to marry her 'as she [was] not so beautiful as when I left her'.[42] While such cases disrupt the idea of the courts as an Anglocentric preserve, they formally underscore the significance of female attractiveness as a form of currency within civil society. Breach of promise suits are beset with ambiguities of this kind.

The woman had quite often lost her virginity, which also 'devalued her currency in the marriage market', and there may have been a child of the union. Unless there was doubt concerning paternity, the defendant was likely to be given short shrift by the courts, as revealed by a case in which the plaintiff was a domestic servant to Mrs Deakin (wife of Alfred Deakin):

> The father's evidence showed that they were in the relation of affianced people for a considerable period, which culminated in the two of them going to the statist's office, and giving notice of an intended marriage. There could be no better evidence of a promise of marriage. The defendant appeared to have repented of his endeavour to right a wrong, and thought he would rather leave the wrong as it stood, the woman to bear the brunt, and himself to escape. This promise was clear and there was no justification for the refusal to carry it out. The plaintiff was entitled to a verdict, and the question was purely one of amount. He had to look to the pecuniary loss the plaintiff had sustained, and the

[42] *Dendiros v Boolieros* (Supreme Court of Victoria); see 'Romance of Ithaca: Panos and Thoda: Breach of Promise', *The Argus* (Melbourne), 19 December 1912, 15.

injury that had been inflicted. Under the circumstances, a verdict for £200, with costs, would meet the case.[43]

Bringing the infant to court may have been a successful ploy to prevail upon the sentiments of the judge and/or jury in awarding damages,[44] which were generally modest. While £1,000 was the figure most commonly sought, £50 was the figure most commonly awarded between 1910 and 1925. As for comparable tortious harms, such as defamation, general damages were awarded for injury to feelings and humiliation. The nature of the harm can be appreciated in the case of a plaintiff who had been jilted at the altar,[45] or one who had waited for 19 years for the marriage to take place.[46] In such a case, the age of the plaintiff was also then a compensable issue, since her chances in the 'marriage market' had diminished. However, one wonders about the appropriateness of a breach of promise action in the case of a defendant who had threatened the plaintiff with a revolver because she would not go to a dance with him.[47] The cases signify the centrality of marriage to women's lives so that the loss of a chance to marry appears to have been conceptualised as a greater harm than the loss of a husband who was a 'bad egg'.

Special damages included costs ancillary to the wedding, such as travel and purchase of a trousseau, provided that the cost was reasonable and not enough to start 'an underclothing shop'.[48] Legal costs were usually awarded, which could be considerable as a hearing could go on for several days in an endeavour to ascertain the nature of the relationship and the promise. Whether the plaintiffs ever received the money or not, we do not know for sure, as defendants frequently claimed to be impecunious, sometimes having had themselves declared bankrupt as a ploy to evade liability.[49]

Extensive coverage of the case sometimes appeared in *The Argus*, particularly if prominent local identities were involved about whom salacious details were revealed, such as in the case of *Daniels v Culverhouse*,[50] involving a dancing duo known as Daisy Yates and Sydney Yates.[51] It is clear that the hearing of such

[43] *Ashton v Hill* (First Civil Court, Melbourne); see 'Breach of Promise: Mrs Deakin Intervenes', *The Argus* (Melbourne), 25 February, 1913, 5.

[44] See, eg, *Fountain v Symons* (Supreme Court of South Australia); see 'Heartless Betrayal: Breach of Promise Case', *The Argus* (Melbourne), 7 September 1912, 18.

[45] *Warner v Pearce* (District Court, Brisbane); see 'Absent Bridegroom: £200 Damages Award', *The Argus* (Melbourne), 10 April 1920, 20.

[46] See, eg, *Troon v Bucknall* (Practice Court, Melbourne); see 'Engaged for 19 years: Breach of Promise Action: £2000 Damages Claimed', *The Argus* (Melbourne), 25 March 1919, 4.

[47] *Wilson v Berecry* (Practice Court, Sydney); see 'Breach of Promise Claim: Girl Seeks £400 Damages', *The Argus* (Melbourne), 21 October 1913, 12

[48] *McQuilkin v Grogan* (First Civil Court, Melbourne); see 'Breach of Promise Case: Widow Claims Damages: A Question of Religion', *The Argus* (Melbourne), 17 August 1915, 4.

[49] *Womersley v Liley* (Victorian Prothonotary); see 'Sailor's Love Letters: Breach of Promise Action: Damages Awarded', *The Argus* (Melbourne), 19 March 1912, 6.

[50] (First Civil Court, Melbourne).

[51] 'Daisy and Sydney Yates: Breach of Promise Action' *The Argus* (Melbourne) 20 February 1920, 6; 'Theatrical Dancer's Suit: Alleged Broken Promise: Daisy Yates Claims £2000 Damages' *The Argus* (Melbourne), 19 May 1920, 11; 'Theatrical Dancer's Suit: Miss Yates Cross-Examined: "Simply Crazy with Love"' *The Argus* (Melbourne) 20 May 1920, 8; 'Theatrical Dancer's Suit: Defendant Gives Evidence: Denial of Promise', *The Argus* (Melbourne), 21 May 1920, 13;

cases also constituted a form of popular entertainment as one of the reports in *Daniels* indicated that police had to be stationed at the doors of the court 'to prevent congestion'.[52]

Although initiation of breach of promise actions was not the exclusive preserve of women, they were the plaintiffs in almost all the cases. A man who initiated an action for breach of promise could be subjected to ridicule for seeking to place himself in what was perceived to be a feminised subject position. In *M'Kenzie v Macvean*,[53] the plaintiff was a farmer who sought £3,000 in damages (more than that sought by the typical woman plaintiff of the time) from a woman whose father was reputed to be wealthy. He was awarded £25 by a judge for his 'mental disturbance and annoyance'. The judge noted that he would have been awarded 'a contemptuous farthing' by a jury, a fate that befell another male plaintiff.[54] Similarly, there appeared to be little sympathy for a man who sought to recover jewellery given as engagement presents.[55] It can be seen that men were entrusted with a particular social responsibility to ensure that marriage took place and to ensure that they did not trifle with the affections of young women. If men were jilted, they were expected to bear the injury to feelings stoically and, presumably, turn their attentions elsewhere; there was something improper about a man seeking monetary damages for a feminised harm.

While breach of promise litigation was partly about property, like other civil actions, it contained some distinctive elements in the way it brought the affective and the private to the fore. It is also significant that women featured overwhelmingly as plaintiffs, so that a small space in civil society was accorded them in which to be actors. At the same time, however, these cases marked them as women destined to be dependent or, at least, to be properly 'manned' within marriage. Constituting women (or 'others') as dependent ensures them an inferior status within liberal theory.[56] Correspondingly, the superior position of benchmark men as generators and providers of property was entrenched. The ideological sub-texts of heterosexuality and monogamy, together with the legitimacy of children, were also underscored through breach of promise suits.

'Theatrical Dancer's Suit: Verdict for Plaintiff: £500 Damages Awarded', *The Argus* (Melbourne) 22 May 1920, 22.

52 Note that the headline was sub-titled 'Simply Crazy With Love'. See above n 51, 8.

53 (Supreme Court of Victoria); see 'Breach of Promise: The Lady Sued: Man Tells His Story', *The Argus* (Melbourne), 11 June 1910, 19; 'Breach of Promise: Lady Pays Damages: The Judge's Comments', 14 June 1910, 9.

54 *Clapott v Marsh* (Supreme Court of NSW); see 'Breach of Promise Action: Plaintiff a Man: Jury Awards a Farthing', *The Argus* (Melbourne), 19 October 1915, 11. A woman plaintiff could also be awarded a farthing, as occurred in the case of the plaintiff whose conduct had been inconsistent with that of an engaged woman while the defendant had been on active service during World War I. For example, *Brownlee v Watson* (County Court, Bendigo); see 'Soldier's Love Affairs: Alleged Breach of Promise', *The Argus*, 23 November 1920, 5; 'Soldier's Love Affairs: Alleged Breach of Promise', *The Argus* (Melbourne), 24 November, 1920, 5; 'Soldier's Love Affairs: Girl Awarded a Farthing Damages', *The Argus* (Melbourne), 25 November 1920, 4.

55 *Davis v Cyfer* (St Kilda Court); see 'Engagement Presents: Young Lady Sued', The *Argus* (Melbourne), 31 January 1912, 4.

56 Iris Young, 'Mothers, Citizenship, and Independence: A Critique of Pure Family Values' (1995) 105 *Ethics* 535, 546-50.

IV Conclusion: A Mutable Body Politic

I have sought to show, following Alejandro, that citizenship is a 'space of memories and struggles where collective identities are played out'.[57] A focus on the gendered memories of breach of promise suits causes us to question the citizen as a bland abstraction. My brief consideration of these suits disturbs the universalised carapace and highlights the ambiguities of citizenship. It would seem that, just at the point that women were admitted to formal citizenship, with its universal facade and claim to effacement of difference, the initiation of a plethora of breach of promise suits reasserted the conventional male/female, masculine/feminine binarisms.

Breach of promise suits stress the importance of what is averredly private in the constitution of the citizen. These cases affirm the conjunction between the affective and the feminine within the social script, characteristics which have been consistently resisted in the juridical construction of the citizen. While the men who populate breach of promise suits have generally been regarded as 'bounders', men who were duplicitous and deceitful in their relations with the plaintiffs — hardly the rational inhabitants of the public sphere at all — it has been in the interests of benchmark men to suppress these stories of fallible masculinity. This convenient amnesia has permitted the privileging of the tales of rational public men, such as the judges and lawyers of legal texts. The selective public accounts of the latter befit the metaphorical brain of the masculinist body politic.

Looking at the historical space behind the universal citizen reveals that citizenship, to date, for women, whether white, Aboriginal, from a non-English speaking background, or lesbian, has been what Walby calls 'a transition from private to public patriarchy'.[58] Breach of promise litigation highlights the way in which the assertion of 'rights' by women, after the formal demise of coverture, was used as a mechanism to maintain a form of de facto coverture. The 'private' appellation attached to the domestic sphere by the 'brain of law' continued to be invoked in a rearguard attempt to disguise the fact that coverture, with its subliminal messages of heterosexism and indivisibility of husband and wife, continued to be informally sustained. The location of the juridical citizen within the public domain, supposedly disconnected from the quotidian realities of private life, is another clever artifice devised by the 'brain of law'.

Alejandro's metaphor of the aleph as a fluid juncture in time encourages us to reject the one-dimensional citizen of liberal legalism, who bears a remarkable resemblance to benchmark man. While I acknowledge that aspiring to an ideal of impartiality may be tactically significant in the pursuit of justice in certain cases,[59] ideas of difference and of history need to be invoked to reshape juridical concepts to render them meaningful in contemporary society. Modernist concepts of the eighteenth century, propped up by the 'brain of law', cannot be relied upon

[57] Alejandro, above n 1, 36.
[58] Sylvia Walby, 'Is Citizenship Gendered?' (1994) 28 *Sociology* 379, 392.
[59] Cf Christine Sypnowich, 'Some Disquiet about "Difference"' (1993) 13 *Praxis* 99.

in the light of gendered breach of promise stories, and many other stories yet to be told. As they are remembered, not only do they serve to dislocate benchmark man as universal citizen, but they necessarily disrupt the nature of the body politic itself.