

WOMEN JUDGES, PRIVATE LIVES: (IN)VISIBILITIES IN FACT AND FICTION*

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I INTRODUCTION

Throughout the Western intellectual tradition, the separation of public and private life has been ubiquitous.¹ Although the line of demarcation changes according to time and circumstance, the conjunction of the public sphere with the masculine and the private sphere with the feminine has remained a constant in political thought. Influenced by Aristotle's belief that women suffer from an 'imperfect deliberative faculty',² the public sphere has traditionally been depicted as superior to the private sphere,³ the former being represented as the locus of rationality, culture and intellectual endeavour, whereas the latter is associated with non-rationality, nature and nurture.⁴

It was only with second wave feminism in the second half of the 20th century that there was a concerted endeavour to unmask the gendered ideological character of the claims about public and private.⁵ Despite the compelling nature of these critiques, law has been most resistant to deconstruction. In this article, we will show that substantive changes are occurring to reveal what was formerly

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1 See, eg, Jeff Weintraub and Krishan Kumar (eds), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (University of Chicago Press, 1997); Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45 *Stanford Law Review* 1; S I Benn and G F Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983); Frances E Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497.

2 Aristotle, *Politics and the Athenian Constitution* (John Warrington trans, Dent, 1959) 24 (s 1260a).

3 Hannah Arendt, *The Human Condition* (Chicago University Press, 1958).

4 Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (Methuen, 1984); Susan Moller Okin, *Women in Western Political Thought* (Princeton University Press, 1979); Michelle Zimbalist Rosaldo, 'Woman, Culture, and Society: A Theoretical Overview' in Michelle Zimbalist Rosaldo and Louise Lamphere (eds), *Woman, Culture, and Society* (Stanford University Press, 1974) 17.

5 See, eg, Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in S I Benn and G F Gaus (eds), *Public and Private in Social Life* (Croom Helm, 1983) 281.

invisible under the rubric of ‘private’,⁶ but invariably outside of the sovereign body of law – in fiction and swearing-in ceremonies – areas that Peter Goodrich might refer to as ‘minor jurisprudences’.⁷ These minor jurisprudences insidiously undermine law from the margins. Goodrich uses the Mediaeval Courts of Love to give women the voices denied them by the sovereign body of law in order to parody or deconstruct the dominant legal order, but there have been numerous other examples over the centuries.⁸ We consider the fictional representation of English High Court judge, Fiona Maye, in *The Children Act*,⁹ and the representation of an actual judge, Justice Sharon Johns, at her swearing-in ceremony in the Family Court of Australia.¹⁰ We then take a brief look at Justice Johns’ decisions once she had assumed her role on the Court.

In accordance with the enduring myth of the masculinist monopoly on rationality, only men could be lawyers and judges. The struggle by women to be permitted to study law and enter the legal profession was a marked dimension of first wave feminism at the turn of the 20th century.¹¹ Even after women were grudgingly admitted to the practice of law, the resistance towards the appointment of women to the judiciary continued for another century. The iconic thinkers of the Western intellectual tradition, such as Rousseau¹² and Freud,¹³ were of the view that women were incapable of developing a sense of justice. They accepted without question women’s *natural* association with the private sphere and the assumption that women were unable to transcend the particularity of the love and care they extended to their own families to develop the requisite sense of detachment and impartiality necessary for the universal act of judging. In other words, because love and justice were believed to be antagonistic virtues, women were not equipped to be judges.¹⁴ Since women have been ‘let in’ to the judiciary, ongoing doubts continue to linger in respect of corporeality and affectivity. However, rather than directly naming these characteristics, doubts are more likely to be expressed as deficiencies in respect of merit.¹⁵ Both fiction and

6 Prokhovnik, for example, argues for a notion of citizenship based on women’s ethically-grounded association with the private sphere, inverting the traditional public location of citizenship: see Raia Prokhovnik, ‘Public and Private Citizenship: From Gender Invisibility to Feminist Inclusiveness’ (1998) 60 *Feminist Review* 84, 97.

7 Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, 1996).

8 Ibid 4.

9 Ian McEwan, *The Children Act* (Jonathan Cape, 2014).

10 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013).

11 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

12 Jean Jacques Rousseau, *Émile* (Barbara Foxley trans, Dent, 1974) [trans of: *Émile* (first published 1762)].

13 Sigmund Freud, ‘Some Psychological Consequences of the Anatomical Distinction between the Sexes’ in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (Hogarth Press, 1961) vol XIX, 248, 257–8.

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

15 See, eg, Margaret Thornton, ‘“Otherness” on the Bench: How Merit Is Gendered’ (2007) 29 *Sydney Law Review* 391; cf Elsje Bonthuys, ‘The Personal and the Judicial: Sex, Gender and Impartiality’ (2008) 24 *South African Journal of Human Rights* 239, 249.

swearing-in ceremonies allow the antinomy between love and justice to be explored.

Of course, it is now trite to observe that women eventually overcame the centuries of bias regarding their historic exclusion from the public sphere,¹⁶ so much so that the legal profession is now on the cusp of becoming numerically feminised. Women currently comprise 62.3 per cent of Australian law students,¹⁷ 50 per cent of practitioners in private firms,¹⁸ and 21.44 per cent of barristers.¹⁹ While the feminisation of the lower echelons of the legal profession has occurred with surprising rapidity, the authoritative apex has been resistant to change, although the proportion of women judges has increased markedly since the millennial turn. In 1996, the percentage of women judges and magistrates Australia-wide was only 8.7 per cent,²⁰ whereas two decades later it had grown to 37.7 per cent,²¹ a pattern that is reflected internationally.²² As our examples come from family law, an area of practice conventionally deemed appropriate for women, it is notable that women comprised 42.3 per cent of Family Court judges in 2017.²³

Because of the residual concerns regarding the construction of merit²⁴ and female embodiment,²⁵ it is still not possible to provide an unequivocal answer to the provocative question posed by Canadian Supreme Court justice, Bertha Wilson, almost thirty years ago: ‘Will women judges really make a difference?’²⁶ Indeed, it would seem that only if women judges were able to incorporate into their adjudicative role the feminised values of affectivity and emotion associated with the private sphere would they in fact make a difference. Ironically, however, women judges have generally sought to bolster their authority by sloughing off those very values associated with the feminine and positioning themselves as closely as possible to masculinised constructions of objectivity, neutrality and

16 Aristotle, above n 2, 24 (s1260a).

17 Graduate Opportunities, *Graduate Stats & Salaries: Law – Bachelor Graduates (All)* (2015) <<http://www.graduateopportunities.com/graduate-salaries/law/law-bachelor-graduates-all/>>.

18 A national demographic profile of the practising profession in 2014 revealed that women comprised 48.5 per cent of solicitors, with the proportion of women increasing more rapidly than that of men in all jurisdictions other than the Northern Territory: Law Society of New South Wales, ‘2014 Law Society National Profile: Final Report’ (April 2015) 3–4.

19 Australian Bar Association, ‘Australian Bar Association Statistics 2015: A Statistical Profile of Australian Barristers’ (Report, 30 June 2015) <<http://archive.austbar.asn.au/wp-content/uploads/2015/11/ABA-PC-hldr-and-Mbr-stats-2015.pdf>>.

20 Australian Institute of Judicial Administration Incorporated, 1995, figures reproduced in Thornton, *Dissonance and Distrust*, above n 11, 294.

21 Australasian Institute of Judicial Administration, ‘AIJA Judicial Gender Statistics – Judges and Magistrates (% of Women)’ (Report, March 2017) <<http://aija.org.au/online/JudgesMagistrates.pdf>>.

22 This percentage is comparable with other common law countries: see Ulrike Schultz and Gisela Shaw, ‘Introduction: Gender and Judging: Overview and Synthesis’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart, 2013) 3, 9–13.

23 As at 8 March 2017. Compiled from Family Court of Australia, *Judges of the Family Court* <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/judges-senior-staff/judges/>>.

24 Thornton, ‘Otherness’, above n 15.

25 Bonthuys, above n 15, 252.

26 Justice Bertha Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *Osgoode Hall Law Journal* 507.

rationality, values long claimed to represent the universal. This has conventionally been the case even if women judges do in fact see things differently from their fellow judges.²⁷ Given this dilemma, it is generally why it is only at the margins, such as in fiction or swearing-in ceremonies – Goodrich’s minor jurisprudences – that we see women judges acting in a way that is discernibly different.

Conventionally, ‘the judge’, whether male or female, is assumed to be able to divest him or herself of all vestiges of subjectivity at the courtroom door in order to personify objectivity and impartiality. As Berns points out, ‘the death of the author has long been a central conceit of jurisprudence’.²⁸ However, this is the nub of the problem for a woman judge. Can she continue to slough off all vestiges of the feminine, including embodiment, with which the seeds of invidiousness in the Western intellectual tradition have for so long been imbricated? We note that the line of demarcation between public and private is becoming more friable as the carapace around ‘the judge’ disintegrates. Indeed, judges are now sometimes prepared to reveal information about their sexuality which was formerly unimaginable, such as being gay,²⁹ lesbian³⁰ or HIV-positive,³¹ although such revelations invariably occur prior to appointment, ex cathedra or after retirement; never in the course of a judgment.³²

Carol Gilligan’s thesis that women speak in a ‘different voice’³³ has been highly controversial in the context of judging.³⁴ The thesis is that women are more concerned about the impact of their decisions on others than a conventional rights-based approach in which the impact on individuals is incidental. That is, affectivity is invariably favoured over abstract notions of justice which, ironically, echoes the concerns of Rousseau and Freud about women in the public sphere. Gilligan’s ethic of care is clearly apparent in *The Children Act* and Justice Johns’ swearing-in ceremony, as well as the family law decisions of Justice Johns to which we refer.

27 Ruth Herz, a retired German judge, reflects on this gender difference in her memoir: Ruth Herz, ‘Gendered Experiences of a Judge in Germany’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart, 2013) 255.

28 Sandra Berns, *To Speak As a Judge: Difference, Voice and Power* (Ashgate, 1999) 218.

29 Michael Kirby, *A Private Life: Fragments, Memories, Friends* (Allen & Unwin, 2011); Leslie J Moran, “‘May it Please the Court’”. Forming Sexualities as Judicial Virtues in Judicial Swearing-in Ceremonies’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart, 2013) 337.

30 Bonthuys, above n 15, 241–2, citing the documentary, *Two Moms: A Family Portrait* (Directed by Andile Genge and Luiz de Barros, Underdog Entertainment, 2004).

31 Edwin Cameron, *Witness to Aids* (I B Tauris, 2005). See also Bonthuys, above n 15, 239.

32 For further discussion, see below n 35 and accompanying text.

33 Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982).

34 See, eg, Jennifer L Peresie, ‘Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts’ (2005) 114 *Yale Law Journal* 1759; Elaine Martin, ‘Women on the Bench: A Different Voice?’ (1993) 77 *Judicature* 126; Joan Brockman, ‘A Difference without a Distinction?’ (1993) 8 *Canadian Journal of Law and Society* 149; Sue Davis, ‘Do Women Judges Speak “In a Different Voice”?’: Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit’ (1993) 8 *Wisconsin Women’s Law Journal* 143; Carrie Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Woman’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law Journal* 39. See also the discussion in Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) ch 4.

Swearing-in ceremonies, in which the judge is inaugurated into judicial office, constitute one of the rare quasi-formal occasions where it is legitimate to make visible facets of the judge's life that are normally invisible. It represents an opportunity not only to celebrate the judge's achievements, but to acknowledge that he or she is a real person with a family and a life outside of the law, and to do so within the four corners of the courtroom.³⁵ To emphasise the individuality of the judge and to add spice and humour to the ceremony, witty anecdotes are likely to be recounted about the judge's early life and subsequent career. However, this is the last opportunity for such levity in the courtroom until retirement. As McEwan says epigrammatically of Fiona, the fictional English judge at the centre of *The Children Act*, when she was being sworn in: 'she knew the game was up, she belonged to the law as some women had once been brides of Christ'.³⁶

After a judge has been sworn in, there is a taboo on revealing anything about the judge's private life, a taboo that Bonthuys suggests is more strongly enforced against women than men.³⁷ As a result of the discrimination to which the South African judge, Annemarie De Vos, was subjected as a result of participating in the documentary film, *Two Moms*, which dealt with her lesbian relationship, she felt that she had to leave the bench, unlike her fellow gay judge, Edwin Cameron, who received only support after he announced that he was HIV-positive.³⁸ Not only that, he was elevated to the Supreme Court of Appeal *after* the announcement.³⁹ Justice Johns' lesbian relationship is openly acknowledged at her swearing-in ceremony, as we will discuss.

Although swearing-in ceremonies are quasi-public, they are unlikely to attract the degree of attention accorded a commercially-released book or film. The announcement of a swearing-in ceremony may appear on a court's website or in the daily press. The affair, however, is only one degree away from being private, with a focus on the presence of family members and intimates of the neonate judge. The ceremonial element is created by the presence of robed judges and senior officials, such as the Attorney-General or his or her representative.

In fiction, however, nothing is impossible. Thus, a different outcome could be imagined regarding what actually happened to Judge De Vos, for there is then no artificial separation between public and private life, and no restriction as to how justice might be realised, however subversive. Fiction allows the judge to break free from the adjudicative straitjacket; it allows the invisibility of the intimate life of a judge to become visible and that which is normally ineffable to

35 For a thoroughgoing analysis of Australian swearing-in ceremonies, see Heather Roberts, 'Telling a History of Australian Women Judges through Courts' Ceremonial Archives' (2014) 40 *Australian Feminist Law Journal* 147; Heather Roberts, 'Women Judges, "Maiden Speeches", and the High Court of Australia' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 113.

36 McEwan, above n 9, 45.

37 Bonthuys, above n 15, 247.

38 Ibid 243.

39 Ibid 240.

be given voice. We turn first to a consideration of the fictional representation before turning to Justice Johns' swearing-in ceremony.

II IAN MCEWAN, *THE CHILDREN ACT*

In the portrait of English High Court Judge, Fiona Maye, in *The Children Act*, McEwan turns upside-down the conventional positivistic paradigm of the judge, where the public and private facets of his or her life are strictly separated, as we have discussed. Fiona is not only a rare example of a woman judge with a leading role in fiction. Her private life, including her interior life, is shown to be intimately entwined with her public life. Her specialty, after all, is family law, 'where so much marital conflict came [her] way',⁴⁰ conflict that is now mirrored in her own life.

The futile search for work/life balance, which challenges all professional workers, particularly women, results in an inevitable blurring of the boundary between public and private as we see the drift of life into work and work into life.⁴¹ It is not just a question of working at home, with judgments strewn across the living room floor that bothers Fiona, but that her commitment to work with its 'fourteen-hour days'⁴² and her elevation to the bench have caused regret for her 'almost existing children'⁴³ to recede. Nevertheless, while she rued her childlessness and experienced periodic anxiety about elderly gravids, autism, adoption and surrogate mothers,⁴⁴ she was by no means consumed by the idea of motherhood. Although it is clear that she did not intend to be defined conventionally in terms of motherhood, the close relationship that she develops with Adam is resonant of a mother/child relationship.

The moral dilemma concerning Adam forms the backbone of the novel. If Adam does not have a blood transfusion, he will die. However, as a Jehovah's Witness, his religion prohibits a transfusion and his parents decline to give their consent. Adam is both brilliant and beautiful but, as he is three months shy of his 18th birthday, the issue of consent must be referred to a court to determine what is in his best interests. The Introduction to the *Children Act 1989* (UK), from which the title of the novel is taken, emphasises that a child's welfare should be the paramount concern of a court. When making a decision, the court is obligated to take into account the child's wishes, as well as a range of specified factors, including the age of the child. Under the Act, Fiona is the judge charged with making a decision as to whether the parents' wishes prevail or not. She consults Adam and decides that the blood transfusion is in his best interests and orders that it take place. Adam's story is henceforth entwined with Fiona's in a way that the formal adjudicative process would normally preclude.

40 McEwan, above n 9, 132–3.

41 See, eg, Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23 *International Journal of the Legal Profession* 13.

42 McEwan, above n 9, 44.

43 Ibid 46.

44 Ibid 45.

Fiona is a powerful and successful woman, like many of the female characters McEwan portrays;⁴⁵ she is neither subordinate nor deferential – to her husband or to her judicial colleagues. Indeed, she is much admired as a judge:

Among fellow judges, Fiona Maye was praised, even in her absence, for crisp prose, almost ironic, almost warm, and for the compact terms in which she laid out a dispute. The Lord Chief Justice himself was heard to observe of her in a murmured aside at lunch, ‘Godly distance, devilish understanding, and still beautiful’.⁴⁶

Her standing enabled her to exercise an unusually high degree of autonomy and authority in relation to her fellow judges. For example, at a dinner in Newcastle with four male judges when she was on circuit, ‘it was agreed that, for the sake of symmetry, Fiona should sit at the head’.⁴⁷ Despite her superior standing as a judge, Fiona has flaws like any human being and can even engage in petty instances of retribution – just like the divorcing couples who come before her – as illustrated by changing the locks of the apartment so that Jack cannot regain entry.⁴⁸ Fiona is nevertheless passionate about their (former) life together, as well as her work as a judge and her commitment to music. Her love for Jack suggests that love and justice are not antagonistic, as Rousseau and Freud would have us believe.

Fiona’s passion can nevertheless result in impetuosity, dramatically and ambiguously revealed by the act of kissing Adam on the lips.⁴⁹ For a woman judge to kiss a minor who is appearing before her represents a potentially shocking manifestation of the feminine in the public sphere, hinting at the disorder that has periodically been predicted.⁵⁰ We can only imagine what Freud would have said about it! While the kiss is highly charged and transgressive, as a symbol of love it is more platonic and maternal than erotic. It would nevertheless spell the immediate end of Fiona’s career if it were to be exposed. This would be nothing short of a personal catastrophe in view of how much she has invested in her work.

The kiss is a temporary aberration, however, and Fiona quickly regains her composure and packs Adam off to his aunt. Fiona’s concern is always to prioritise the welfare, happiness and wellbeing of minors who come before her, as with any family law judge charged with ensuring their best interests. The affective side of Fiona’s personality is most evident in her concern for Adam, culminating in her devastation on learning of his death. Fiona is far from a caricature of a judge who acts as a mere conduit for the law, automatically producing ‘right’ answers devoid of feeling. She appreciates the need to focus on the particular in order to secure justice. While it has been suggested that a turning away from legal formality could lead to impressionistic and idiosyncratic

45 Angela Roger, ‘Ian McEwan’s Portrayal of Women’ (1996) 32 *Forum for Modern Language Studies* 11.

46 McEwan, above n 9, 13.

47 Ibid 152.

48 Ibid 49.

49 Ibid 169.

50 See, eg, Lynn Hunt, ‘Introduction’ in Lynn Hunt (ed), *Eroticism and the Body Politic* (Johns Hopkins University Press, 1991) 5; Thornton, *Dissonance and Distrust*, above n 11, 16–20.

decision-making,⁵¹ the particularity of the context is all-important. Nevertheless, like any good judge, Fiona is also rational and objective and, bizarrely, even thought of taking notes as Jack proposed to embark on the affair.⁵²

Does it make a difference that Fiona is a woman judge? Possibly not so far as the decision to authorise the blood transfusion is concerned, or even to visit the hospital to talk to Adam. But what of the intimate conversations, the poetry, the playing of the violin, the singing during the hospital visit and, most significantly, the kissing of Adam on the lips? If we were to substitute a male judge for Fiona, it would be impossible to construe the kiss in neutral terms; even the poetry, the music and the singing in the hospital would be likely to be viewed with greater suspicion if performed by a male judge. McEwan's portrait of Fiona – competent and caring, with some minor imperfections – is one that allows us to imagine a woman judge as a fully rounded human being, rather than one irredeemably stunted by the flaws projected onto her by the canonical thinkers of the Western intellectual tradition. Far from love and justice being antagonistic, the novel suggests that the possibility of justice in the public domain is enhanced, not delimited, by affectivity and care, virtues that are not confined to the private sphere. *The Children Act* also shows that storytelling is important as a judicial method. Rather than judges writing their judgments at a high level of abstraction, storytelling is a reminder of the human concerns that affect the people who come before them.⁵³

How then does McEwan's sensitive and nuanced portrayal of an imaginary woman judge compare with the reality? As the private life of 'real' judges is not visible without negative consequences, as suggested in the case of Judge De Vos, we now turn to the portrait of a woman judge in another minor jurisprudence, the judicial swearing-in ceremony.

III SWEARING IN JUSTICE SHARON JOHNS

Justice Sharon Johns was sworn in as a judge of the Family Court of Australia in 2013, making her ceremony the same vintage as *The Children Act*. Section 22(2) of the *Family Law Act 1975* (Cth) ('FLA') provides that a judge 'shall not be appointed [to the Family Court] unless ... *by reason of training, experience and personality, the person is a suitable person to deal with matters of family law*' (emphasis added). The Court's jurisdiction, like that of Fiona's court in *The Children Act*, deals with the breakdown of relationships, including property settlements and child custody disputes. The inherent jurisdiction of the Court also empowers Family Court judges to determine issues of child safety, a jurisdiction that could include ordering minors to receive medical treatment.

In the ceremonial sittings of the Family Court, speakers provide rare glimpses into judges as people – individuals with families and hobbies, moulded by

51 Toni M Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' (1989) 87 *Michigan Law Review* 2099.

52 McEwan, above n 9, 7.

53 Massaro, above n 51, 2105.

professional and private relationships,⁵⁴ and who exhibit idiosyncratic personality traits and even the occasional flaw. For women judges, there is always a danger that advertence to their private lives may reinforce their 'otherness' in legal spaces where they are expected to suppress all characteristics associated with the feminine. In their speeches of welcome to women judges, speakers have struggled to accommodate *female* identity within the conventional social script designed to welcome (benchmark male)⁵⁵ judges to the Court. Instead, the speakers have tended to fall back on the all-too-familiar stereotypes of women judges as mothers and wives.⁵⁶

In accordance with the swearing-in convention, the speakers who honoured Justice Johns had no difficulty in praising her legal acumen and expertise in the practice of family law. However, the judge's ceremony is remarkable for both the nature and extent of the discussion of her 'private' life, which went far beyond any of its predecessors and, in some respects, even the fictional representation of McEwan's Fiona, particularly in respect of sexuality.

The opening gambit in the speech of the Attorney-General's representative, Dr Smrdel, symbolises a number of these differences. He commenced his remarks with a warm welcome to Justice Johns' family:

It is wonderful to see so many of your family here today to mark this special occasion, including your partner, Sue Soding, your parents, Justine and Bruce, your brother, Mark, and members of Ms Soding's family. I would like to extend a special warm welcome to your Honour's young son ... I understand that [he] received his very own invitation in the mail from the Chief Justice inviting him to today's ceremony, causing a great deal of excitement.⁵⁷

Within this statement, Dr Smrdel took two significant symbolic steps. First, he acknowledged Justice Johns' lesbian relationship openly and warmly.⁵⁸ Secondly, by noting the thoughtful decision of Chief Justice, Diana Bryant, to send a personalised invitation to Justice Johns' son, Dr Smrdel not only evokes images of the noisy exuberance of an excited child, and normalises the presence of young children, normally excluded from the courtroom and relegated to the private sphere, but he also acknowledges that the child is the offspring of lesbian parents.

The presence of a four-year-old child in a legal context was also mentioned in another anecdote by Ms Kayler-Thomson, who recounted that when the child attended a conference-meeting with his barrister-mother, he

became a bit fidgety and asked when [he and his mother] were planning to go home because he said, 'I've got a lot of work to do.' When asked by Mr Bartfeld

54 When speaking of her ceremony, Justice Victoria Bennett observed that swearing-in ceremonies 'stir up the eddies of the past. ... I have reflected on the way that many people have touched my life and played a part in moulding me professionally and, without a doubt, personally': Transcript of Proceedings, *Ceremonial Sitting of the Family Court of Australia for the Swearing In and Welcome of Justice Victoria Bennett* (Family Court of Australia, 30 November 2005) 13.

55 Thornton, *Dissonance and Distrust*, above n 11, 2.

56 See, eg, the ceremonies discussed in Roberts, 'Ceremonial Archives', above n 35, 150–8.

57 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 3.

58 While lesbian judges were appointed to Australian courts before 2013, the open acknowledgment of the relationship by the Attorney-General would have been unusual.

[the Queens Counsel], ‘What work?’ [he] replied, ‘I’ve got a big brief to work on’.⁵⁹

Parents attending Justice Johns’ ceremony would easily recognise the scene – the mimicry of a young child, and his impatience – and would likely empathise with the complicated daily mechanics of work/life balance for modern parents. Further, references to family are neither marginalised nor overemphasised in these speeches. It is Justice Johns who remains central to the ceremony, but her story is told in such a way that her ‘private’ relationships are sensitively accommodated within the retelling, and their role in her life made visible and treated as valuable within the court’s ‘ceremonial archive’.⁶⁰

Beyond reference to her son, the ceremony also bore witness to Justice Johns’ extra-legal interests and personal qualities. Of particular note were her sporting pursuits. Dr Smrdel, for example, reflected on Justice Johns’ competitive nature, noting that she participated in netball teams named ‘the Black Beauties’ and ‘the Scorchers’ with their ‘*enviable reputation*’ for beating high school teams.⁶¹ A later speaker described the judge as a ‘*tragic*’⁶² supporter of the North Melbourne Football Club, and her penchant for sending ‘particularly unsportswoman-like text messages’ to friends who supported rival teams,⁶³ be it only in the National Family Law Conference ‘dog-paddle’ swimming competition. Ms McLeod, President of the Australian Bar Association, also drew attention to Justice Johns’ keen interest in AFL (Australian Football League). She recounted that when the judge had been asked as a young barrister to speak about a topic to which she was ‘passionately committed’, Justice Johns eschewed legal topics and instead elected to speak ‘*fervently*’ at the Bar Readers’ course, ‘about the North Melbourne Football Club. And never one to let pass an opportunity for *dressing up*, you bedecked yourself with a blue and white scarf’.⁶⁴

What did all this talk of football have to do with law? Perhaps, the allusion is to a judge who liked to win; competitiveness, of course, being an attribute traditionally associated with the exemplary (male) lawyer,⁶⁵ and a trait frequently referenced in swearing-in ceremonies.⁶⁶ Or perhaps more broadly, the reference alluded to Justice Johns’ immersion in mainstream (Victorian) culture, thereby illustrating her ability to appreciate the values of the community she would serve.

59 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 10.

60 This phrase was coined by Roberts, ‘Ceremonial Archives’, above n 35.

61 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 4–5 (emphasis added).

62 Ibid 8 (emphasis added).

63 Ibid.

64 Ibid 5 (emphasis added).

65 See also, Thornton, *Dissonance and Distrust*, above n 11, 172.

66 On sport (whether participating, or enthusiastically supporting a sporting team) as a judicial virtue, see, eg, Transcript of Proceedings, *Ceremonial Sitting on the Occasion of the Swearing-in of the Honourable Robert Shenton French as the Chief Justice of the High Court of Australia* [2008] HCATrans 318 (1 September 2008); Transcript of Proceedings, *Ceremonial Sitting to Mark the Occasion of the Swearing-in of the Honourable Stephen John Gageler as a Justice of the High Court of Australia* [2012] HCATrans 258 (9 October 2012). On masculinist values in law, see *ibid*.

Allusions to Justice Johns' penchant for 'dressing up' recur throughout the speeches. For example, Ms McLeod relayed that at the Readers' Course Review, Justice Johns participated in a 'Spice Girls' performance, where she played 'Family Spice' and adapted a Spice Girls' song lyrics to a legal theme.⁶⁷ Through these varied anecdotes, Justice Johns emerges as a well-liked, gregarious and fun loving personality – a highly skilled and respected lawyer who wholeheartedly embraces music, dance, sport and the companionship of friends at the end of the working day – a judge with a sense of humour, who does not take herself too seriously.

At one point in the ceremony, however, the 'dressing up' anecdotes take an unexpected turn. In her speech, Ms Kayler-Thomson, on behalf of the Law Council of Australia, describes at length Justice Johns' performance at the 2004 National Family Law Conference Ball, held at Queensland's Movie World. Repeating the theme that 'Your Honour is fond of dress-ups', Ms Kayler-Thomson continued:

in keeping with the theme of the venue your Honour's partner, Sue, came to the ball dressed as Wonder Woman. Your Honour came dressed as Cat Woman ... Your Honour adopted the latex suit-wearing version played by Michelle Pfeiffer, mixed with the whip-bearing version played by Eartha Kitt. I can share with your Honour that the emails circulating since your appointment was announced and that you have missed out on have included a photograph of your Honour that night.

Your Honour is staring into the camera with your trademark steely glare. At your feet with your Honour's whip around his neck is a partner of a Melbourne family law firm with a look of pure pleasure on his face. The captions that have circulated to go with the photo are best not repeated at this ceremony. Your Honour's performance that night brought you to the attention of the wider Australian family law profession.

So much so that ever since many interstate family lawyers identify your Honour only by reference to the Cat Woman suit. There is one currently serving judge of the Sydney Registry, who, whenever your name is mentioned in dispatches, never fails to mention – how do I put this delicately – his interaction with your Honour's whip that night. Judges' meetings just got a whole lot more interesting.⁶⁸

What are we to make of the speaker's decision to depict these scenes in such detail in a welcome address to a judge? In part, the anecdote may be taken to confirm the legal profession's acceptance of Justice Johns' lesbian relationship (as the couple appear openly together in costume). Affectivity and sexuality are conventionally secreted behind the bland words of law reports or are totally invisible but, here, the audience is treated to the spectacle of a judge who, while demurely robed before them – in a courtroom – is being described as a dominatrix dressed as Cat Woman, wielding a whip, and who they are being invited to imagine engaging in transgressive and erotic behaviour with what appears to be more than one *male* legal practitioner? What is the *raison d'être* for the inclusion of this anecdote? Perhaps the detailed description of the photograph was intended to place the image 'out' in the open. Although it was suggested that captions circulated with the photographs were 'best not repeated' in court, the

67 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 5.

68 Ibid 9–10.

inference seems to be that express advertence to sexuality at the swearing-in ceremony meant that it could not then be raised subsequently to undermine the judge's judicial authority.

This reading, however, does not account for the emphasis by the speaker on the *male* responses to Justice Johns' performance. Given that many members of the assembled audience would have been aware of the photographs (as we are told that they had been extensively circulated by email), the focus on the anecdote is surprising. Would not simply alluding to the 'memorable' instance of Justice Johns' dressing up at Movie World have sufficed? While amusing at one level, the detailed retelling in the court hints at a darker side, for it resonates with the cultural script of the dangerous, eroticised female figure in the public sphere, which suggests a destabilising, threatening and sexual force that in no way comports with the conventional image of the asexual judge. While the overall tenor of the speaker's remarks denotes the high esteem in which Justice Johns is held by her peers, the anecdote of the whip, as recalled by the Sydney judge, is framed in terms of Justice Johns' impact on *men*. This might suggest that for some (male) judges, Justice Johns' ambiguous sexualised performance (S&M?) could now be regarded as *the* defining feature of her legal persona.

As we asked of Fiona, in the context of kissing Adam, does it make a difference that Justice Johns is a woman? What if a male (transgender?) judge had been photographed dressed as Cat Woman or in an S&M outfit? It would almost certainly have been regarded as scandalous, even if it related to an incident that had occurred a decade before, as in Justice Johns' case. However, there is no such parallel. Indeed, it is unimaginable, just as the image of a male judge kissing a minor appearing before him is unimaginable, as we suggested in the context of *The Children Act*.

In concluding our consideration of Justice Johns' swearing-in ceremony, we would also draw attention to another unique aspect – albeit less dramatic. This is the issue of class, which is not raised by any of the legal representatives, but by Justice Johns herself in her speech of thanks. She mentions that she was the first member of her family to become a lawyer and that her father worked for the MLC Insurance Company, although we are not told in what capacity. Most significant, however, is what Justice Johns says about her partner, Sue, whom she met at a Grand Final Day (football) barbecue:

She is a hairdresser and commenced her business in the year that I came to the Bar. Accordingly together we have shared the trials and tribulations of developing our respective careers ... As a lawyer and a hairdresser we make a great team.⁶⁹

In the conventional swearing-in ceremony, in which the male judge occupies centre stage, he thanks his partner, usually 'the loving patient and long suffering wife',⁷⁰ for her support but she is generally very much a background figure with no role other than that of support person, taking responsibility for the children

69 Ibid 15.

70 Justice Margaret Beazley discusses this trope in Transcript of Proceedings, *Ceremonial Sitting to Welcome the Honourable Mr Justice Whitlam and the Honourable Justice Beazley* (Federal Court of Australia, 8 February 1993) 11. See also the discussion of the phenomenon by Roberts, 'Ceremonial Archives', above n 35, 154 ff.

and household, preparing his meals and generally taking care of *him*.⁷¹ When this devotion was expected also of the female barrister, the emphasis on her elevation to the bench would then shift from the ‘long suffering wife’ to the heroic husband.⁷²

In Justice Johns’ case, her partner is depicted as her equal, not just in their relationship but in their careers. There is no suggestion that the career of a hairdresser is in any way inferior to that of a judge or that her partner, Sue, is relegated to the role of support person. When Justice Johns stated that she was ‘part of a thoroughly modern family’,⁷³ the egalitarian aspect, like the sexual, cannot be gainsaid. Coincidentally, in 2013, the same year as Justice Johns’ swearing in, Tim Mathieson, the partner of the first female Australian Prime Minister, Julia Gillard, attracted considerable media attention.⁷⁴ Apart from the fact that they were not married, much was made of the fact that Tim too was a hairdresser. However, in the absence of evidence, we can only speculate that this encouraged Justice Johns to make a point of speaking out in support of her partner’s occupation.

Justice Johns’ ceremony stands in stark contrast to the earlier rituals in the degree to which the speakers draw on her ‘private’ life to craft her judicial virtues. This difference may simply reflect the judge’s own outgoing personality, including her openness regarding what she described as her ‘thoroughly modern family’. This openness no doubt contributed to both the array of colourful anecdotes upon which the speakers drew, and their level of comfort in sharing such stories in open court. While not wishing to endorse a liberal progressivist view – that things are always getting better – it is unlikely that a gregarious judge with a propensity for acting in exotic roles and who was in an openly lesbian relationship with a young son would have been appointed to an Australian court – Family Court or otherwise – a few years before. As such, the enthusiastic tenor of Justice Johns’ welcome to the Court, and the ready integration of the private facets of her life into the welcome ritual undoubtedly reflects a shift in community attitudes in the construction of the woman judge.

The speakers, nevertheless, display ambivalence regarding how far the connections between life and law can be drawn even though issues such as same-sex marriage were very much on the public agenda in 2013. While Dr Smrdel noted that Justice Johns had experience working in ‘parenting matters, *same sex matters* and surrogacy issues’,⁷⁵ and had spoken on talkback radio on same-sex marriage, no speaker was prepared to go so far as to suggest that Justice Johns’ *experience* of a same-sex relationship was an asset in the modern Family Court. Only the judge herself alluded to such a connection, stating, ‘I come to the

71 But contrary to the norm, note former Chief Justice Robert French, who provided an extensive recitation of the career achievements of his wife, Judge Valerie French: see French, above n 66.

72 See Roberts, ‘Ceremonial Archives’, above n 35.

73 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 16.

74 *Tim Mathieson* (21 February 2017) Wikipedia <https://en.wikipedia.org/wiki/Tim_Mathieson>.

75 Transcript of Proceedings, *Ceremonial Sitting of the Family Court for the Swearing In and Welcome of the Honourable Justice Johns* (Family Court of Australia, 29 July 2013) 4 (emphasis added).

position with the attitudes and experiences of my generation [Generation X]. ... All I can say now is watch this space'.⁷⁶ Although somewhat ambiguous, this may be construed as a bold statement of intent in the context of contemporary swearing-in speeches.

IV JUSTICE JOHNS IN THE FAMILY COURT

By and large, the swearing-in ceremony is treated as an aberration, a mere diversion in a judicial career. Tales of the love of sport, eroticism and dressing-up are likely to be soon forgotten as the judge moves into a formal court setting where she is expected to be deferential to the rule of law, particularly the principles set out in the *FLA*.

Justice Johns' decisions from the time of her swearing-in (29 July 2013) to the end of 2016 reveal that she presided over almost 200 matters, dealing predominantly with disputes pertaining to children and/or property. Her judgments are generally short, dispassionate and to the point, many being delivered ex tempore; matters of law are adverted to only in the more complex cases as the focus is generally on effecting a practical resolution to a problem, such as facilitating arrangements for parent/child access. Rarely does Justice Johns insert her own views regarding the conduct of those appearing before her, although many of the decisions deal with allegations of violence,⁷⁷ sexual abuse,⁷⁸ alcoholism,⁷⁹ drug addiction⁸⁰ and mental instability.⁸¹ Every effort is made to protect children from violence in accordance with Part VII of the *FLA*.⁸² At the same time, Justice Johns is assiduous in ensuring that children have a positive relationship with both parents.⁸³ It is only in the exceptional case that she expresses what seem to be her personal views, such as evincing impatience with the mother who refused consent for the release of documents to a hospital regarding a child with psychiatric issues who was self-harming.⁸⁴ Justice Johns was critical of the mother for her 'lack of insight as to what is required to ensure that the child maintains good health and that she achieves the best possible outcomes in life'; the mother is described as being 'motivated by her own needs and not the needs of the child'.⁸⁵

Despite the prominence of the issue of same-sex relationships in the swearing-in speeches, there was limited opportunity to explore such issues in the initial tranche of decisions. Nevertheless, an exception was a landmark case

76 Ibid 16.

77 See, eg, *Kim & Scilian* [2013] FamCA 600; *Every & McNaught* [2014] FamCA 977.

78 For example, *Donella & Donella [No 2]* [2014] FamCA 1009; *Bendon & Bendon [No 3]* [2015] FamCA 1065.

79 See, eg, *Morelli & Morelli* [2015] FamCA 1231.

80 See, eg, *Bruce & Douglas* [2014] FamCA 80.

81 See, eg, *Hamilton & Logan* [2015] FamCA 647.

82 See, eg, *Fabre & Palmer* [2016] FamCA 399.

83 See, eg, *Simon & Peters [No 2]* [2013] FamCA 1104; *Gurnay & Watson* [2013] FamCA 1091.

84 *Wilson & Wilson [No 2]* [2015] FamCA 932.

85 Ibid [4], [5].

involving two gay men who sought shared parental responsibility for a child born to a surrogate mother in India.⁸⁶ One of the men was the biological father of the child and the anonymous egg donor was sourced from the Ukraine. A term of the surrogacy agreement was that the surrogate mother and her husband (the respondents) surrendered any claim to the child. Although named as the child's father on the Indian birth certificate, providing 'genetic material' to enable artificial conception to occur does not give rise to a presumption of parentage under Australian law.⁸⁷ In granting the application, Justice Johns held that the relationship between the same-sex couple and the child, with whom she had resided since birth, was determinative. Justice Johns held that it was in the child's best interests to make an order granting the men equal shared parental responsibility for the care, welfare and development of the child:

All the evidence indicates that the child is a much-wanted and loved child. The applicants have gone to extraordinary lengths to become parents and the child is the product of their efforts. The evidence indicates that the child is well cared for and that the applicants have the capacity to meet all of her physical, emotional and intellectual needs.⁸⁸

In *Green-Wilson*, we see a very positive image of a same-sex relationship in a parenting context, comparable to that alluded to by those who welcomed Justice Johns at her swearing-in ceremony and hinted at somewhat obliquely by the judge herself in reply.

We also draw attention to two cases involving a young man and a young woman, both aged seventeen, whose competence to make significant decisions about treatment resonates with the situation of Adam in *The Children Act*. The facts are quite different, however, as both Spencer⁸⁹ and Kate⁹⁰ were diagnosed with gender dysphoria,⁹¹ Spencer having been born biologically female and Kate male. In both cases, the parents were supportive of the proposed hormonal treatment but permission to undertake the controversial procedures transcended their ability to consent and fell within the Court's *parens patriae* jurisdiction. Like Adam, both Spencer and Kate were intelligent and well-informed about their condition. In Spencer's case, his mother sought a declaration that she was competent to give informed consent, which was granted. More significantly, in Kate's case, the parents sought a declaration that Kate herself was competent to make decisions as to her medical treatment, which was granted.⁹² In these cases,

86 *Green-Wilson & Bishop* [2014] FamCA 1031. See also Kay Dibben, 'Same-Sex Surrogacy: Landmark Decision in Victoria as Gay Man Recognised by Courts as Father of Child Born through Surrogacy', *The Courier Mail* (online), 26 November 2014 <<http://www.couriermail.com.au/news/queensland/samesex-surrogacy-landmark-decision-in-victoria-as-gay-man-recognised-by-court-as-father-of-child-born-through-surrogacy/news-story/e61b6395e2f63c26b2ee50752279e2a7>>.

87 *Green-Wilson & Bishop* [2014] FamCA 1031, [21]–[27], [32].

88 *Ibid* [55].

89 *Re Spencer* [2014] FamCA 310.

90 *Re Kate* [2015] FamCA 705.

91 See, eg, Alexandra Jane Finemore, 'The (Fe)male Conundrum' (2014) 88(7) *Law Institute Journal* 36; Kate Parlett and Kylie-Maree Weston-Scheuber, 'Consent to Treatment for Transgender and Intersex Children' (2004) 9 *Deakin Law Review* 375.

92 She was found to be 'Gillick competent', that is, to have achieved sufficient understanding and intelligence to enable her to understand fully what is proposed, based on *Gillick v West Norfolk and*

the ‘winds of change’, mentioned by Justice Johns at the close of her swearing-in speech, are clearly in evidence.

When Justice Johns exhorted her audience to ‘watch this space’, it may be that she intended to bide her time before speaking out publicly, waiting until she had acquired greater seniority or had been appointed to the Full Court where there is more scope to engage in law reform. Nevertheless, she is not theoretically precluded from making *ex cathedra* pronouncements on matters of concern. Although not common for Australian judges to do lest they appear to compromise their impartiality, some judges have been less hesitant. For example, once Michael Kirby was established as a justice of the High Court of Australia and had made the decision to ‘come out’ as gay,⁹³ he frequently addressed issues pertaining to discrimination against gays and lesbians, as well as same-sex marriage.

As one would expect, there is no sign of Cat Woman, Sue or Justice Johns’ son in her judgments. They have been relegated to the private sphere and their doings have once again become invisible and ineffable – at least in a formal legal context – until Justice Johns retires, which could be in more than 20 years’ time.⁹⁴

V CONCLUSION

Despite the numerical feminisation of the legal profession, there is a valiant attempt to maintain the conventional line of demarcation between public and private life in formal adjudication, as revealed by Justice Johns’ judgments, but it is becoming more difficult to do so, particularly in the case of family law. Furthermore, the ubiquity of social media and its preoccupation with the private life of public figures has also unsettled the notion of separate spheres. Through two examples of minor jurisprudence – a fictional account of an English High Court judge and the swearing-in ceremony of an Australian Family Court judge – that which is invisible and ineffable in formal jurisprudence is made visible and given voice.

The question that Bertha Wilson posed thirty years ago – would women judges really make a difference?⁹⁵ – still cannot be answered unequivocally. Numerous empirical studies of the formal decisions of women judges have been undertaken and compared with those of men, but the conclusion seems to be that it is only in a very small component of cases – mainly those dealing with sex discrimination – that a gender difference is discernible, as women judges are then

Wisbech Area Health Authority [1986] AC 112. The principle was endorsed by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 (‘*Marion’s Case*’).

93 Michael Kirby took this step in 1998, two years after his appointment to the High Court. See A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011) 295; Kirby, above n 29, 185.

94 Seventy is the compulsory retiring age for judges in Australian federal courts: *Commonwealth Constitution* s 72. As Justice Johns noted that she was 45 at the time of her swearing-in, she would not be due to retire until 2038.

95 Wilson, above n 26.

more likely to find for the plaintiffs.⁹⁶ A residual fear of the feminine in positions of authority persists even though there is some evidence, based on US data, that women judges may perform better than men.⁹⁷ We have not set out to conduct a comparable empirical exercise, which is complicated by the fact that women may be less advantaged as students and new graduates than men,⁹⁸ particularly because of the lingering suspicion of the feminine in what is still regarded as a predominantly masculine space, but to show how the positive values associated with the feminine are illuminated through minor jurisprudences, such as fiction and swearing-in ceremonies. The initial judgments of Justice Johns support our thesis that the minor jurisprudences of fiction and swearing-in ceremonies are fruitful sources for exploring the affective voice.

The feminised values of affectivity and corporeality tend to be hidden behind the carapace of private life in formal jurisprudence, but these characteristics are central to the construction of the woman judge as revealed by *The Children Act* and Justice Johns' swearing-in ceremony. While eschewing an essentialist gendered construction, it is apparent that the 'woman judge' is much more than a neutered version of the benchmark man of law. Indeed, she has the potential to rethink conventional modes of adjudication in new and diverse ways. The dramatic re-imagining of the woman judge that we see in both the fictional Fiona Maye in *The Children Act* and the real Sharon Johns, particularly in the closing remarks of the latter's swearing-in ceremony, augurs well for the future of adjudication.

96 See, eg, Peresie, above n 34.

97 Stephen J Choi et al, 'Judging Women' (2011) 8 *Journal of Empirical Legal Studies* 504.

98 Ibid 506.