SPECIAL FEATURE: CONTEMPORARY FEMINIST THOUGHT IN AOTEAROA/NEW ZEALAND
Feminist legal theory in Aotearoa New Zealand: The impact of international critical work on local criminal law reform

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Abstract
In response to an invitation to contribute to an ongoing special feature on contemporary feminist thought in Aotearoa New Zealand, the author provides an overview of a number of strands or sites of feminist critical engagement with the law, such as the efficacy of equality theories and rights discourse. She applies aspects of the internationally developed theoretical work (primarily from the United Kingdom, North America and Australia) to specific local substantive and procedural criminal law examples, such as the regulation of family violence and the prosecution of sexual offending. The author then examines how criminal law and practice in Aotearoa New Zealand has been reformed as a result of feminist discussion, theory and analysis over the last 30 years and through at least three 'waves' of feminism. The piece concludes with the author's observations on both the added value of feminist legal theory to date, as well as reflections on its potential to inform the development of policy and law reform during the next 30 years, and as a consequence of the work of another generation of feminist legal scholars.

Key words
Feminist legal theory, law reform, gender and sexuality, criminal law

Introduction
Feminists have made significant contributions to law reform in Aotearoa New Zealand for more than 120 years – starting at least with the work of first wave feminist Kate Sheppard and her supporters who successfully lobbied for women's suffrage in the early 1890s. In feminist publications during the 1960s and 1970s, such as *Broadsheet*, second wave feminists pushed for changes to the legal regulation of contraception and abortion and reform of employment law and also criticised the sexist application of the partial defence of provocation (McDonald, 1993). It was not until the early 1980s, however, with the significant rise in the number of women law students, women lawyers and women legal academics, that the concept of feminist jurisprudence (first juxtaposed at Harvard Law School in 1978 but subsequently resiled from (Drakopoulou, 2013)) began to be explored as a way of critically analysing all aspects of the law, whether rules of substance or procedure, codified rules or the common law (Menkel-Meadow, 1988; Davies, 2013).

As an arts graduate who had studied under Phillida Bunkle in the Women's Studies Department at Victoria University in the early 1980s, I was pleased to be part of the first discussion of feminist jurisprudence at the law school (probably a first for any New Zealand law school), in 1985. The lecturer, Joanne Morris, had recently returned from research leave in North America and the newly emerging feminist legal theory work there had captured her attention. I also wanted to do more thinking about the contribution feminism could make to legal critique, and was privileged to be able to attend a feminist jurisprudence seminar co-taught by Frances Olsen and Christine Littleton at the University of Michigan in 1988, as part of my Master of Laws. In 1991, I taught a stand alone course entitled 'Feminist Legal Theory' at Victoria University and later reflected on two years of that experience in a special suffrage centennial issue of the Victoria University law review (McDonald, 1993). In that course, we primarily discussed the writings of feminist law academics from North America, the United Kingdom and Australia.

During the 1990s, feminist legal theory appeared in most of the local law school curricula, sometimes as a 'women and the law' module in general introductory law courses, or as part of a jurisprudence course. When a fifth law school, within the University of Waikato, was established in 1990, with Professor Margaret Wilson as the founding Dean, the unique contribution it promised to the legal education landscape was to teach every course in a way that acknowledged the significance of biculturalism and studying the law in context (including the gendered nature of law) (Seuffert, 1995). The significance and importance of feminist legal theory as a critical tool for the study of law was therefore expressly acknowledged.

Although not all law courses in the now six law schools in Aotearoa New Zealand reflect critically on the operation of the law, or employ feminist critiques of the law, there is no doubt that feminist legal theory has been accepted as a valid area of study. Outside of academia, the influence of third wave (Pilcher & Whelehan, 2004) feminist thought on law reform and policy development is also apparent – even though the word feminism is not always used (Coleman, 2009).

In this article, I will reflect on aspects of the contribution made by feminist legal theory and analysis to law reform in the local criminal law context. I provide an overview of a number of strands or sites of feminist critical engagement with the law, such as the efficacy of equality theories and rights discourse. This is, of course, just one possible approach to the consideration of the development of feminist jurisprudence – there are many other ways to undertake such an historical overview. Nor can an article-length project adequately represent the scope of feminist legal thought. This is a very modest contribution, which I hope will encourage readers of the *Women's Studies Journal* to seek out the writings of a range of feminist lawyers and academics.

In relation to each strand of feminist engagement, I then illustrate how aspects of the internationally developed theoretical work (primarily from the United Kingdom, North America and Australia) have informed specific local substantive and procedural criminal law reform, such as the regulation of family and sexual violence. I primarily draw on examples of statutory law reform as one indicia of (at least partial) success, but feminist lawyers have been effective advocates for change in the courts and by working with and for NGOs. I use criminal law as the example, as it is my area of interest and expertise, but feminist critique has also been of significance to many other legal issues – such as those arising in the context of family law (including family violence) (Busch, Robertson & Lapsley 1992; Boyd, 1999), labour law (Kelsey, 1993) and international law (Charlesworth, 2002; Engle, 2005; Otto, 2013). I conclude by reflecting on the potential of feminist thought to inform the development of policy and law reform during the next 30 years, and as a consequence of the work of another generation of feminist legal scholars. Importantly, the task for the future starts from a landscape that is much changed by the feminist work of the last 30 years:

> [W]hile it was once possible to see the broad contours of, and differences between, radical, cultural, socialist, liberal and postmodern feminism … it is no longer easy to categorize feminist approaches in a clear-cut way. While the ideas offered by these 'strands' of feminism remains important and influential, feminist thought is now increasingly a network of ideas and concepts which crystallize or recede according to context and strategy …
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> Feminist legal theory, then, is now comprised of complex histories and many lines of interdisciplinary engagement. It is applied and conceptual, international and local, as well as self-questioning and linked into the dynamics of social and political change. (Davies & Munro, 2013, p. 2)

Equality theories

Concerns about discrimination against women required feminists to develop equality theories. What is the basis for claims of unfair or unequal treatment? Following a liberal rights model, first wave feminists (during the mid- to late-nineteenth century up until the 1920s: Pilcher & Whelehan, 2004) wanted identical treatment – to be treated the same as men, in terms of access to political and economic power in particular (Auchmuty, 2008). The argument was not based on women being the same as men, but having some special moral characteristics that would enrich and improve public life (including their ability to practise as lawyers: Thornton, 1996). Such a model was relatively successful in the context of the suffrage movement and in relation to married women's property rights and succession (Bonthuys, 2013).

Under the formal equality model (under which all women are treated the same as all men), laws should be gender neutral in drafting and application, but such laws cannot support appropriate *different* treatment of women, in relation to sex-specific accommodation (Littleton, 1987). For example, women wishing to take leave from their employment either during pregnancy or to be able to breastfeed their baby could not make an effective claim based on formal equality. Some second wave feminists (part of a new period of collective political activism which emerged in the late 1960s) argued for an identical treatment model with biological differences. This model accepts that women should be treated the same as men, but acknowledges that women have some 'immutable' biological differences (primarily pregnancy related) which must be taken into account in the interests of fairness. The law should therefore allow special treatment of women in relation to biological differences, but should otherwise offer identical treatment (Rhode, 1989). However, such a strategy only served to underline the fraught nature of relying on a particular advantaged comparator group (i.e., men) – and exposed the need to consider other types of disadvantages faced by women apart from their biology:

> The essence of the feminist critique of formal equality and its concomitant focus on difference is that it fails to provide a satisfactory solution to the problems of social, cultural and economic structures of privilege and disadvantage, but often simply rationalises the status quo. (Bonthuys, 2013, p. 95)

Drawing on an increased understanding of the cultural privileging of men, even in the context of gender-neutral laws, other second wave feminists began to lobby for different treatment, with a view to enacting laws that would offer *substantive* equality. The different treatment model requires that the differences between men and women, whether physical, psychological, social, political or economic, must be taken into account when developing law and social policy in order that substantive equality can be achieved (Munro, 2007). The model does not assume that differences can disappear over time following a period of identical (legal) treatment. The benefits of a substantive equality model are that it recognises that people live in sexed and racialised bodies (and communities) and that legal and political differentiation may have both physical and social consequences (Lacey, 1998).

As another way of inquiring into how substantive equality could be achieved, Catharine MacKinnon's contribution, influenced by Marxist analyses of power, dominance and hegemony, was to propose a subordination model. Through this analysis patriarchy emerges as a problem of male dominance rather than a question of women's sameness to or difference from men – and so this model focusses on women's subordination to men rather than sex or gender differences. To use her words: 'difference is the velvet glove on the iron fist of domination' (MacKinnon, 1989, p.219). Instances of inequality are shown to be part of a complex and pervasive network that operates to control women's existence – rather than momentary lapses in an otherwise legitimate (legal) system (Munro, 2007). Laws and policies should therefore be evaluated to assess whether they operate in a way that leaves women in a position of rela-

tive powerlessness. The model then requires a redistribution of historical burdens and benefits (MacKinnon, 1991). Equality is therefore not equated with sameness or difference but the current and historical context of the problem determines which solution would best address the harm.

The limitations of claims based on substantive equality lies very much within the legal system itself (Graycar & Morgan, 2002). Common law, or case method, relies on the abstraction of people (as law students bemoan) (Naffine, 2011; Finley, 1989) and classification of problems based on precedent, which encourages looking at what is similar and what is different between various cases. Lawyers are not alone in being much more comfortable with the language and concepts of formal equality, while contextualising an issue is foreign and requires them to have a sound understanding of social and cultural dynamics in order to see how that information could be legally relevant (Smart, 1989).

More recently, feminist legal theorists have counselled a move from traditional claims of equality. Rosemary Hunter argues that while the focus on sameness and difference can assist political change, inequality as a concept fails to adequately describe women's oppression and it does not deliver meaningful or practical models for addressing gender-specific harms or injustice (Hunter, 2008). It remains an important task to identify when and why claiming equality may still be significant and what such a claim means.

In the New Zealand context, claims to both formal and substantive equality were part of the debate regarding the preservation of the offence of rape, as well as the existence (and potential introduction) of gender specific offences to respond to particularly harmful forms of family violence.

In 2005, the Crimes Amendment Bill (No 2) revised the law relating to sexual offending – including the re-drafting of existing defences to render them gender neutral. Such gender neutrality is consistent with formal equality – however, it may operate to render invisible the gendered nature of sexual violence (women and girls making up the majority of victims/survivors and men making up the majority of offenders). When the Bill was introduced the need to consider whether the gender specific offence of rape should be retained as one of the ways that the offence of sexual violation may be committed was raised on behalf of the Minister of Justice:

> There is one major exception to the general application of the gender-neutral principle of this bill, and that is with regard to rape. The current law specifies that a male rapes a female if he has non-consensual sexual intercourse with that female. It may be that the time has come when the public no longer believes that it is necessary to use the term 'rape' for one category of sexual violation, and that sexual violation should simply be 'unlawful sexual connection' regardless of the gender of the victim or offender … I would like to suggest that the select committee consider submissions from the public as to whether the provisions relating to rape should be retained. (Hansard, 2004)

Public opinion was divided on this issue, although many sexual violence sector workers and victim advocates considered that the specific offence of rape should be retained, and only applying to vaginal penetration by a penis, rather than extending the definition to include anal or oral penetration (by objects or body parts) as had been done in other jurisdictions. The argument to retain and limit the scope of what is referred to as 'rape' in the Crimes Act 1961 was based on the need to acknowledge the prevalence of this type of sexual offending and its impact on the lives of women and children.

The Select Committee ultimately recommended that rape should be retained as a specific offence as the 'term "rape" carries powerful and specific connotations, and is commonly used to refer to abhorrent sexual crimes against women deserving of significant punishment' (Law and Order Committee, 2004). Despite this acknowledgement of rape as a gendered harm, the

maximum penalty for (gender neutral) unlawful sexual connection is the same as for rape (20 years imprisonment), although flexibility within the sentencing guidelines allows judges to penalise different forms of penetration as more severe (McDonald, 1996). In the absence of any Sentencing Council in New Zealand, however (that would have a role in engaging with communities to set sentencing guidelines for types of sexual offending) there is ongoing work for feminists to provide input into what amounts to aggravating and mitigating features in the sentencing for crimes of sexual violence. This would allow for due reflection of the harm of rape at this stage of the criminal justice process, as well as under the statute.

Although limited recent work has been done in New Zealand regarding the substantive law of rape (including legislating a communicative standard of consent, for example (Pineau, 1989)), feminist law academics and community activists have long recognised the further harm done to victims/survivors of sexual violence by the criminal justice system. Recent reform discussions have therefore centred on improving the delivering of just processes, which requires acknowledging the particular (and different) harm of sexual offending and recognising how the historical and ongoing underreporting of rape continues to contribute to the social and cultural subordination of women (McDonald & Tinsley, 2011; Gavey, 2005).

Section 194(b) of the Crimes Act 1961 is a gender specific offence that does treat the gender of the victim as an aggravating feature – elevating what could be charged as a 'common assault' (maximum penalty 12 months imprisonment) to that referred to as 'male assaults female' (maximum penalty 2 years imprisonment). This offence is viewed as an important tool in combating violence in the home, with 92% of the offences committed under s 194(b) being coded as family violence (Cross, 2011, p. 3). In 2009, however, the New Zealand Law Commission recommended its repeal on the basis that it is an incoherent offence and unjustifiably victim-specific (New Zealand Law Commission, 2009, p.30). Such an approach is consistent with formal equality, but not with substantive equality – or with a model that seeks to address disempowerment on the basis of gender. It is argued that section 194(b) is *appropriately* unequal in application – '[r]educing intimate partner violence against women and thus reducing gender inequality requires that salient differences between men and women be recognised' (Cross, 2011, p. 18).

Section 194(b) remains on the statute books as I write this piece, and may yet be joined by a further offence that will seek to address family violence: the offence of non-fatal strangulation, recently proposed by the Family Violence Death Review Committee (2014). The form of this new offence is uncertain at this stage, although the Ministry of Justice is considering the merits of implementing the recommendation. It is most likely to be gender specific, given that non-fatal strangulation has been documented as regularly used to assert power and control by men over their female partners. Although non-fatal strangulation could be punished as an assault, a specific offence would acknowledge the severity of such an assault with a higher penalty. As non-fatal strangulation is identified as a red flag in fatality reviews (a predictor of escalating violence towards homicide), a specific offence would potentially allow preventative intervention – as long as the incident is brought to the attention of the police. Such a measure (that is, introducing a gender specific offence to address gendered injury) will both increase public awareness of the significance and harm of non-fatal strangulation, while also hopefully assisting in the reduction of fatal family violence.

The gendered harm that is family violence has not always been recognised or adequately addressed (Busch, Robertson & Lapsley, 1992). Part of the reason posited by feminists as explaining the silence and secrecy concerning intimate partner violence is the importance placed on the right to privacy and the sanctity of a man's home – a context which supported the lack of regulation of the family long after wives were no longer considered the property of their

husbands. Challenging the distinction made by legal liberalism between public and private, and 'exploding' the private, was therefore another early task for feminist legal theorists.

Public/private dichotomy

Feminists have critiqued the law's separation of the private and the public as a significant cause of excluding women's interests from the law. The public sphere was historically viewed as inhabited by men while the domestic or private sphere was the domain of women. The public is also represented as the privileged side of this dichotomy with the public sphere being the place of rationality, culture and intellectual endeavour, as opposed to the private sphere which is represented as the domain of nature, nurture and non-rationality (Thornton, 1996; Naffine, 1990). The 'private' is also constructed as a sphere of non-legal intervention and one in which universal norms such as equality and human rights do not apply.

Feminists have pointed out that the boundary between public and private is not natural or descriptive but a 'political, contestable designation' (Olsen, 1993, p. 319). As law plays a crucial role in constructing and maintaining the division it too is inherently political and reinforces power imbalances and inequities in what is deemed to be the private sphere (the family). In the context of international law, feminists have criticised the lack of regulation of 'private' rapes within war, noting that sanctions were historically only enforced when rape was part of an official policy of genocide (Engle, 2005). Feminists have also argued that the appeal to privacy is political and gendered – private freedom belongs only to those with power (mostly men), and for those without power (mostly women) privacy actually equates to fear and oppression (Olsen, 1993).

Second wave feminist attention therefore turned to women's unequal treatment when trying to participate in the public sphere (in work or politics, for example) and also on the law's failure to interfere in the private sphere to protect women from sexual, physical and psychological violence. An all too contemporary example of the law's failure to recognise 'private' harms was the belated criminalisation of rape within marriage in 1986 in New Zealand, which did not occur until 1991 in the United Kingdom. However, as Nicola Lacey points out, marriage is a publicly regulated relationship and the failure to extend the scope of the criminal law to this aspect of the relationship may not mean lack of intervention: 'abstention equates to a form of regulation' (Lacey, 1993, p. 96). Similarly, even though family violence has always been regulated (by the offences of assault, wounding with intent and so forth), the lack of actual responses has related to the inaction of state agencies, not the inaction of the legislators (Busch & Robertson, 1997). Vanessa Munro indeed counsels caution for feminists being co-opted by the State in the current concern about addressing family violence (Munro, 2013). However, despite feminist critiques of the public/private divide, there is no doubt that a focus on what the law does and does not attend to, through the lens of what is public and what is private, has exposed unsustainable anomalies which have been historically justified on the basis of women's primary place in the domestic sphere, subject to male control.

The vestiges of a lack of individual autonomy and protection for wives are still seen in the New Zealand criminal law. Section 24(3) of the Crimes Act 1961 provides that where 'a woman who is married … commits an offence, the fact that her spouse … was present at the commission of the offence does not of itself raise a presumption of compulsion.' The subsection was enacted to prevent the (presumably likely) inference that would be drawn by a jury that a married woman would only commit an offence at the behest of her husband – that is, it recognised the presumption of male control in the private sphere.

The longstanding rule that prevented a woman from testifying against her husband in a criminal trial (even if she wished to – she was seen as 'incompetent' in this regard) stemmed from the rule against self-incrimination. As a wife was not considered a separate legal entity, testifying against her husband was seen as contrary to this privilege. The removal of the spousal non-compellability rule and the rule of universal eligibility to testify (with very limited exceptions) only took effect on 1 August 2007. It was the most disputed aspect of the reform of the law of evidence but one that the Law Commission, prompted by submissions from women lawyer groups, saw as essential given the lack of sound rationale to single out marriage as a special category, especially given its contentious historical roots (New Zealand Law Commission, 1999). The rule's controversial abolition indicates that in the very recent past many supported a law that *prevented* married women (regardless of their own desire) from divulging any incriminating information about their husbands – a rule which reinforced the historical subordination of wives to their husbands as well as limiting the consequences of the privileged, gold standard status of matrimony to heterosexual, State-sanctioned relationships (Seuffert, 2006).

Some feminists have argued that the damaging effects of the public/private distinction for women may be overcome by extending the 'public' values of justice, rights and equality to the private sphere – hence the current regulation of family and sexual violence. Others have made the reverse argument: values traditionally associated with the private such as care, connection and empathy, should be extended the public sphere. The feminist ethics of care (which relies on the view of human beings as living interconnected not disembodied or abstract lives) has developed over time, from articulations subsequently critiqued as too essentialist (Gilligan, 1982; West, 1987) as they relied on some innate nurturing characteristics of all women – to a focus on resolving conflicts not by resorting to hierarchical normative principles, but by using a contextual analysis that pays attention to relationships, needs, dependency and care (Munro, 2007).

There is therefore no consensus among feminists about 'the fix required in the face of the exclusionary functioning of liberalism's public/private split' (Young, 2013, p. 186). Some argue for drawing the line in a different place – while others argue for doing away with the public/private divide (Prokhovnik, 1998). In the words of Nicola Lacey: '[I]t sometimes seems that the more we criticize the public/private dichotomy, the more we get trapped within its conceptual framework' (Lacey, 1993, p. 93). However, despite the debate about how to effectively transcend the public/private dichotomy, there is no doubt it has been one of the important sites of feminist engagement with the law:

> [T]he public/private binary remains a useful analytical tool. It has the capacity to identify areas of exclusion, even when its boundaries are in a state of flux or have acquired new dimensions. It has, more generally, been pivotal in alerting feminists to the value-laden nature of legal categories … The benefit of a feminist analysis is that it constantly precipitates a series of inquiries that encourage a critical examination of who participates in the drawing of boundaries, who are disadvantaged by them and how far they reinscribe gendered or other hierarchies. (Samuels, 2013, p. 141)

The feminist scrutinies of the public/private binary included noting the tension inherent in the binary (and other legally relevant binaries: subjective/objective (Davies & Seuffert, 2000); self/other; male/female) – and feminists have also exposed the political difficulties of resolving that tension. The conflict between the right to (public) protection and the right to privacy (which as feminists have pointed out, has operated to allow men to abuse women one at a time: MacKinnon, 1987) also exposes the indeterminacy or incoherence of rights claims (Olsen, 1984; Tushnet, 1984). Whose right prevails? Who makes that decision? What factors are taken into account? Critiquing the claims to rights and unpacking the gendered resolution of such claims was also fruitful work for early feminist legal theorists, developing some of the analyses done within the critical legal studies movement (Davies, 2002).

Rights discourse

The idea of legal rights was a major focus of the critical legal studies movement's analysis of liberal ideology. Rights were criticised as 'alienating' as mere ideals that do not adequately reflect people's real needs (Gabel, 1984). Defending one's rights also requires money and access to the legal system – so rights only really have meaning for the wealthy in a capitalist society (Tushnet, 1984). One woman enforcing her rights may solve an occasional case of discrimination but will usually leave the position of other women unchanged – unless the successful claim results in broad ranging law reform (for example, the short-lived Employment Equity Act 1990 (NZ)). The feminist contribution to this critique was to agree that claiming (and even achieving) formal rights does not necessarily deliver substantive equality, as noted above. Further, when there are competing rights (for example, when the right to be free from violence in the home conflicts with the right to a private family life) the right that gets legally enforced is likely to be that which perpetuates conservative political purposes (Davies, 2002; Smart, 1989).

The rights approach to achieve equality is also fraught as some rights can operate to the detriment of women. For example, the right to freedom of religion can have differing effects on women and men. Freedom to exercise all aspects of religious belief does not always benefit women because many accepted religious practices involve reduced social and economic positions for women and less status:

> Rights discourse is taxed with reducing intricate power relations in a simplistic way. The formal acquisition of a right, such as the right to equal treatment, is often assumed to have solved an imbalance of power. In practice, however, the promise of rights is thwarted by the inequalities of power: the economic and social dependence of women on men may discourage the invocation of legal rights that are premised on an adversarial relationship between the right holder and the infringer. (Charlesworth, Chinkin & Wright, 1991, p. 635)

Reliance on rights may therefore operate to reproduce and reinforce the existing inequities, even if women may be in a strong enough social and financial position to enforce their rights. For feminists, the challenge lies in giving meaning to rights that are responsive to women's lived realities without shutting out the possibility that other methods of political and moral engagement might be more appropriate or productive (Munro, 2007).

Frances Olsen has provided a powerful critique of the failure of rights to resolve the appropriate scope of statutory rape laws. Statutory rape laws (relating to the legal age of consent) allow prosecutions even where there may have been consent. In Olsen's words these laws 'pose a classic political dilemma for feminists' (Olsen, 1984, p. 401). On the one hand they protect young women from exploitation – but they also restrict the sexual activity of young women and reinforce a double standard of sexual morality (what is appropriate for young men is not appropriate for young women). At the time Olsen was writing, the Californian law prohibited 'any act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18'. To use the language of rights analysis 'statutory rape laws violate the female's right to privacy and her right to be as free sexually as her male counterpart' (Olsen, 1984, p. 405). Feminists argue that gender-based statutory rape laws also reinforce the sexual stereotype of men as aggressors and women as passive victims. This example illustrates that the right to privacy (freedom) and the right to protection (security) exist in fundamental conflict – or 'vie for hegemony in a changing world of sexuality' (Weeks, 2004, p. 34). As Olsen (1984, p. 388) points out:

> The central problem of the sexuality debate is that women are oppressed by moralistic controls society places on women's sexual expression, yet women are also oppressed by violence and sexual aggression that society allows in the name of sexual freedom.

> Rights theory does not indicate which of the two values – freedom or security – the decision maker should choose in a given case. Because it cannot transcend this fundamental conflict of values, rights theory does not offer an adequate basis for legal decisions.

Olsen concludes that 'only by ignoring at least half the rights that could be asserted can rights rhetoric even appear to solve concrete problems' (Olsen, 1984, p. 391). Rather, she says, we should recognise these multiple rights and try to achieve balance – in this way 'we wind up politically talking about how to live our lives, not abstractly talking about rights', or 'stop trying to fit our goals into abstract rights arguments and instead call for what we really want' (Olsen, 1984, p. 430). This argument, made in the context of a discussion about sexual offending, clearly invites a broader discussion of the regulation of sexuality, which is an area feminists have also focussed on (but outside the scope of this piece) – especially in relation to pornography (MacKinnon, 1985; Dworkin, 1985), sexual harassment (Estrich, 1991; Franke, 1997), and sex work (MacKinnon, 1987; Cooper, 1989). These areas also provide examples of the limitations of calls for equality and rights as traditionally conceptualised.

In New Zealand, the statutory rape law was also amended in 2005, as part of the reform package that focussed on gender neutrality. The previous provision was a gender specific offence with a defence based on age differential (a man under 21 would not be guilty if he believed on reasonable grounds the girl was 16 or over). The initial proposed reform removed any reference to gender (therefore removing the historical connection between gender and power imbalance), but retained an age differential defence. This provided a young person with a 'similarity of age' defence if there was no more than two years age difference between the two parties and the person charged could prove to the court that the other person consented. Numerous submissions from feminists on this provision followed, pointing out the odd consequences of the reform as well as the ability of the defence to undermine the protective aspects of a statutory rape law:

> Section 134A(1) assumes that the older party is likely to be the one 'in charge' and therefore should be held liable if the age difference is too great. In this [draft] section, the difficulty of making some of these types of offences gender-neutral is apparent. For example, if both the participants are under 16 – one is 14 and male and the other is 13 (female), then both have a defence to any charge if the act is consensual (the 14 year old because he is less than two years older and the 13 year old because she is younger). However, if one is 12 (male) and the other is 15 (female) then the 15 year old is guilty of an offence, even if the 12 year old initiated the contact. The 12 year old cannot be guilty of an offence as a party (section 134(5)) and he has a defence if the act is consensual because he is younger.
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> Because there is no defence available to a young girl in this context, the new defences do not seem to support the notion of 'acceptable' teenage experimentation. As well, the new defences do not operate to protect young girls from the expression (and power) of masculine sexuality, one of the purposes of the original section 134. The gender-neutral drafting of this section therefore obscures the fact that it is mostly young women who are pressured into consenting to sex, or who are the victims of non-consensual sex. The availability under this revised section 134 of a defence to even those who know a young girl is not 16 removes a powerful reason for a young girl to say no to sexual connection. The WCG is therefore of the view that sexual connection with a young girl under the age of 16 should remain an offence (with the only defence being that currently provided under the existing section 134(4)) (Women's Consultative Committee, 2003, p. 8).

In response, the Select Committee deleted the defence, saying:

> The intention of the provision was to convey the message that while prosecution and potential imprisonment are appropriate responses to predatory and exploitative sexual conduct against children and young persons, it is highly questionable whether these sanctions are an appropriate response to the difficult issue of consensual teenage sex.

The result of that deletion is that the current provision (section 134 of the Crimes Act 1961) criminalises sexual connection with a person under the age of 16, regardless of whether they

consent. The only defence available (section 134A) is where the person charged proves that they took reasonable steps to find out that the young person was 16 years or over, had reasonable grounds to believe they were 16 or over, and the young person consented. However, what remains criminal conduct, with no defences available, is the situation of a 17 year old having consensual sex with a 15 year old, knowing they are 15. In this situation, it would only be prosecutorial discretion not to lay a charge that would prevent the 17 year old being liable to a maximum penalty of 10 years imprisonment. Further, even when there may be power imbalances, the section does not make it clear which of two consenting 15 year olds should be subject to State intervention – it merely criminalises the conduct of both.

The superficially appealing gender neutrality model is, however, not responsive to the difficulties of managing an appropriate balance between the competing rights of freedom and security, privacy and protection. Rather than thoughtfully engaging with the real harm a statutory rape provision should address, the Select Committee opted for a formal equality approach (offering young people of all genders the same rights), instead relying on the police and the courts to deliver substantive justice, or to make the decision about whose right 'trumps'. Further, the (in)ability of the police and the courts to deliver substantive justice has been exposed by feminist scholars and activists, especially in the context of sexual offending, where the operation of the criminal justice system seems only to reinforce contestable messages about female sexuality (Temkin, 2002; Ellison, 2001; Young, 1998; McDonald, 1994).

The feminist and critical legal studies attack on rights has not been unchallenged. The strongest criticism of the critique has come from racial minority scholars and activists in the United States. Patricia Williams (Williams, 1991), among others, argues that claiming rights has been a source of empowerment, solidarity and politicisation for African Americans. The critique of rights in fact merely reflects an insular and privileged point of view. In New Zealand too, claiming rights have been an important community defining tool for activists – with much focus being placed on the grounds of prohibited discrimination in the Human Rights Act 1993 (McDonald, 2007). The debate about the importance of rights sits within a wider concern about the limitations of feminist theory, critique and activism that is situated solely in the experience of economically and socially privileged able-bodied, straight, white (Pakeha) women. Māori, lesbian and differently-abled feminists in New Zealand (Seuffert, 2002; Milroy, 1996; Whiu, 2001), as with racial and LGBTIQ minorities in other countries (Robson, 1998; Harris, 1990; Behrendt, 1993), argue that the feminist orthodoxy can itself be exclusionary and its solutions and models essentialist. These legitimate claims necessitated thoughtful feminist responses – responses which required feminist legal theorists to engage with how to incorporate other forms of oppression, beyond those based on gender alone, into (perhaps) an intersectional model.

Essentialism and intersectional oppression

Essentialism was originally defined by second wave feminists as the mode of thinking that assumes all manifestations of gender difference are innate, transcultural and historical. Claims that feminist theory and activism was (and is) essentialist was a not unexpected corollary of the adoption of woman-centredness as a political strategy. Feminist scholars sought to build theory from the ground up – from personal testimonies, consciousness-raising and story telling. These feminist methods were (and are) aimed at gaining insights and exposing realities and perspectives previously ignored by traditional narratives – and by the law:

> The objective is the generation of new knowledges which have the capacity both to liberate women (by giving them voice and authority) and subvert the hegemonic power of men (by revealing the partial and contingent

> content of their universalising discourses). In this way, a woman-centered epistemology operates to displace and destablize dominant understandings of social and legal phenomena. (Conaghan, 2000, p. 364)

A related strategy to woman-centeredness (or empiricist feminism) is standpoint epistemology. In the context of feminist theory, standpoint epistemology reflects the position that women's reporting of their experience (of oppression) is a better basis for a truth claim than the more limited perspective taken from the position of power. Standpoint epistemology, and the qualitative research to which it gave rise, was used in a number of different doctrinal areas 'to prioritize women's experiences and import alternative narratives into the analysis of law' (Davies, 2013, p. 69).

However, it became apparent that experiential and standpoint perspectives could not be generalised into a collective and authentic truth for women: The 'truth-status of such approaches was challenged by the sheer diversity of possible perspectives and their equal authenticity' (Davies, 2013, p. 69). Who is 'woman' for the purposes of a women-centered strategy? And does 'woman' exist other than as a discursive construct with regulatory and controlling effects? (Munro, 2007). When feminists invoke the experience of women to challenge the dominance of male points of view they risk creating another type of dominance – to claim to speak for all women inevitably excludes the voices and experiences of some while privileging those of others (Hunter, 1996; Conaghan, 2000). It also carries the risk not only of suppressing marginal female voices, but overstating the extent to which gender matters in particular contexts and the extent to which gender can be worthy of attention of itself:

> The political implications of what has become known as the 'critique of essentialism' in feminism are potentially far-reaching. Not only does it provide disillusionment within feminism with what has proved to be a valuable political asset, woman-centeredness, it also threatens to strip feminism of its political constituency because it appears that no shared identity exists to unify women and justify their political grouping … [M]oreover, the characterization of gender categories in discursive terms raises difficult questions about the grounds upon which (women's) experience can claim to be authoritative … Of what value, in other words, are 'woman-centered strategies' if the experiences upon which they rely are not *genuinely* 'women's'? (Conaghan, 2000, p. 368)

Not unsurprisingly, feminists have been drawn to the task of deconstructing – to disrupt categories and open up possibilities of many different ways of being 'women' (Hunter, 1996; Davies & Seuffert, 2000; Munro, 2007).

Other feminist responses to the essentialist critique have included 'strategic essentialism'; incorporating race, ethnicity, class and sexual orientation into 'mainstream' feminist analyses (Mahoney, 1991); creating separate legal theory (Robson, 1998) and recognising intersectionality (Crenshaw, 1989). African-American academic Kimberlé Crenshaw compellingly argues that discrimination law can manage race discrimination (where the norm is a Black man) or sex discrimination (where the norm is a white woman) but fails to manage the combined effect of both forms of discrimination on a Black woman. The intersectional approach advocated by Crenshaw directs attention to the particular interactions of gender, race, class and sexual orientation. Intersectionality emerged as a theoretical and political response to the complex experiences of individuals – and provided another way of critiquing the (essentialising) failures of the law and the legal system.

An example of the intersectional approach as applied to Australian Aboriginal women's experience of family violence can be seen in the work of Julia Tolmie and Julie Stubbs (Hunter, 1996). One of the three possible readings of *R v Hickey* (in which the defendant was acquitted of the murder of her abusive partner on the grounds of self-defence following expert evidence of battered woman syndrome) posited by Stubbs and Tolmie is an intersectional one – that would attend to Hickey's particular experience in the context of gender and race relations

within the Aboriginal community and between that community and white Australian society (Stubbs and Tolmie, 1995).

In the New Zealand context, Māori women lawyers and academics have been mindful of the difficulties of adopting feminism as a label to situate their concerns about the multiple disadvantages faced by Māori women in a post-colonial society, including the connection between sexual violence and colonialism (Mikaere, 2008). They too, however, have recognised the potential value of considering an intersectional approach to name and make visible levels of inequality:

> An intersectional analysis would demonstrate that Maori women fare worse than both 'Maori' and 'women' as separate categories, in that their ethnic identity causes their gender to be read in a certain way. This is likely to be evident in their treatment by police, Judges and jurors. If there are cultural expectations and stereotypes of Maori and gender expectations and stereotypes of women, Maori women are not likely to meet either. (Quince, 2007, [12.4].)

Māori women law academics discuss not just the disproportionate numbers of Māori in prison, but the extent to which colonisation and the importation of English law has contributed to that statistic (Sykes, 1993):

> The Crown has been responsible for a relentless campaign of criminal violence against us. Every day that it continues to assert its authority in this land, it demonstrates that violence carries its reward and that crime pays. It has viciously attacked our physical, social, emotional and spiritual well-being over a long period of time, thus setting in train a crippling cycle of violence from which some of us, unsurprisingly, have struggled to escape. (Mikaere, 2008, p.10)

Kylee Quince has also documented how Department of Corrections policy continues to impact unevenly on Māori women (Quince, 2009). The work of Māori women lawyers has therefore of significance not just in identifying the multiple oppression Māori women are subject to, but also exposing how the lack of legal attention to te ao Māori contributes to their subordination. Such insights offer deeper levels of critique of the Western liberal notions of equality, rights and the protection of privacy.

Te Tiriti o Waitangi remains a contested site for challenging the uneven impact of law in Aotearoa New Zealand. Some Māori women lawyers do not believe in the legitimacy of the existing legal system – in the same way, but for different reasons, that feminist lawyers express doubts about relying on a system that has pervasively contributed to the oppression of women. What Māori women do not overlook is that they are differently situated with regard to the law and the State, and intersectional analysis allows some way of making that difference visible – although it comes with its own challenges.

The intersectional approach, although encouraging mindful consideration of different sites of oppression, continues to assume 'the existence of stable subjects located at definable intersections' (Hunter, 1996; Jhappan, 2002). Jennifer Nash argues that '[t]wo decades after Crenshaw coined the term "intersectionality", intersectionality has been institutionalised' (Nash, 2013, p. 132), and problematically 'renders black women the quintessential intersectional subject'. Peter Kwan makes the point that intersectionality is required to select which intersections matter more which is 'theoretically no different than a pre-intersectionality approach' (Kwan, 1997, p. 1277).

> It can generate a rich stock of data, for example, about how categories of women are differently situated in relation to educations, the family, the labour market, and the political system. However, intersectionality is less able to capture the processes through which these disparities are produced or the relations of subordination of which they are expressive. (Conaghan, 2009b, p.41)

Further, intersectionality does not provide an impetus for coalition building or political organising across or outside of identity categories. Post-intersectionality scholars suggest jettisoning

intersectionality altogether and instead thinking about the relationship between structures of domination and identity differently (Nash, 2013).

This critique of intersectionality indicates that the move to deconstructing categories may be more valuable to the feminist legal theory project, as a way to avoid the essentialist trap: 'The careful and contingent deployment of categories in particular circumstances, in a way that enhances possibilities for women rather than sustaining stereotypes, is a practice not of "strategic essentialism" but of non-essentialism.' (Hunter, 1996, p. 161). Hunter emphasises the value of consultation and coalitions as a possible way to avoid reinforcing traditional power structures and policy choices that may exclude or disadvantage some groups of women.

One issue that has divided feminists is the criminalisation of all forms of genital cutting – most often referred to as female genital mutilation by those opposed to the non-Western cultural practice. In 1996 section 204A of the Crimes Act 1961 created a gender and culturally specific offence, punishable by up to 7 years imprisonment. The offence only refers to female genitalia (male circumcision is not the subject of the criminal law, unless undertaken without consent as an assault), and criminalises all forms of genital cutting unless done by a medical professional for the mental or physical health of the person (which includes gender conforming surgery on transgender men). Concerns about the mental health of the person cannot include those based on cultural beliefs, and it is no defence that the person consented to the procedure.

The section was clearly intended to criminalise (and therefore deter) non-Western genital alteration of young girls, and was enacted despite submissions from women's groups supporting immigrant women who argued that education and support was a better response to the actual harm being addressed (McDonald, 2004). Feminists in New Zealand and elsewhere have pointed out that the law also criminalises non-essential gender normalising surgery on intersex infants and genital cosmetic surgery on adult women (McDonald, 2004; Ehrenreich & Barr, 2005; Braun, 2010). These practices can only be outside the scope of the section (and so not criminal) if the meaning of 'culture' is limited to mean culture of the Other – not that of Pakeha New Zealand. This example illustrates the need for 'mainstream' feminists to be mindful of the consequences of law reform that reinforces a particular worldview and may not be a source of protection but indeed further oppression.

Forming coalitions and undertaking consultation has also challenged feminists to re-think the meaning of sex and gender and to consider how feminists should engage with issues of inequality based on sexual orientation and gender identity. For example, lesbian feminists have different political aims and social needs from straight feminists. Further, how can feminist strategies assist the recognition of transgender women's rights and identity? The deconstruction of identity categories and the problemitisation of gender as distinct (or not) from sex (Dreyfus, 2012) has required feminists to consider their place within larger societal and legal concerns relating to sexuality, sex and gender identity (Conaghan, 2009a).

Sexuality, sex and gender identity

It was second wave feminism that brought with it a move to distinguish between sex and gender – with gender being understood as a culturally prescribed practice rather than an inherent trait: 'Sex might be taken to be biological and therefore [legally] determined, but the parameters and concern of appropriate gender roles could now be politically and legally challenged' (Cowan, 2013, p. 106). Second wave feminists also began to theorise sexuality as a core aspect of the patriarchal oppression of women, and so gender and sexuality had to be considered together.

Catharine MacKinnon made an explicit link between the construction of gender and the construction of sexuality, claiming: 'sexuality is the lynchpin of gender inequality' (MacKinnon, 1989, p. 113). Feminist analyses of the law's representation of female sexuality have, as already mentioned, focussed on pornography, the treatment of sex work and the prosecution of sex offences (McDonald, 1994 and 2014). Women's sexuality, some feminists have argued, is socially constructed (Cowan, 2013); however, others viewed such a categorisation as underplaying women's agency and denigrating male (homo)sexuality and women's heterosexual desire (Smart, 1989) – as well as ignoring the construction of lesbian sexuality (Cain, 1990). Lesbian legal theory has itself been criticised as 'essentialist and ahistorical in its portrayal of a fundamental and authentic lesbianism which is different to, and oppressed by, compulsory heterosexuality' (Cowan, 2013). Judith Butler and others have argued that since categories of sex/gender are forced on us as social realities when they are constructions, the only way to achieve meaningful change is to dismantle our discourse on sex and gender and reconceptualise sex, gender and sexuality as performative. To the understanding of the gendered consequences of power imbalance has therefore been added the acknowledgment that the law also reinforces heteronormative constructs (Monk, 2011).

Queer theorists have challenged feminism to take the social construction of gender and sexuality further and to explore the ways that sex as an identity is also fractured and contingent, and that sex as well as gender may also be constructed (Butler, 1990) – that is, to challenge the binary categories of male and female. The postmodern deconstruction of identity and subjectivity has led to a move away from the development of one 'grand theory' (Fineman, 1990) to many interlocking social and legal struggles and theories. Queer theorists have disaggregated sex/gender and sexuality so to allow sexuality to be the focus of study of itself. Butler argues that gender must be seen as distinct from sexuality but in a way that recognises its centrality to the regulation of sexuality – the 'non-causal and non-reductive connection between sexuality and gender' (Butler, 1993, p. 238).

A current challenge for feminists is their relationship with transgender activism (Otto, 2013). Some feminists have argued that transgender people's struggles to be socially and legally accepted have undermined the foundational concept of womanhood upon which feminist struggles for equality are based (Jeffreys, 2014). Other feminists say socialisation as a woman has too much cultural meaning and significance so that transgender women cannot, and should not, occupy the same space or join in the same rights campaigns (Mathen, 2004). However, as Sharon Cowan suggests, 'that there are some common feminist/trans goals seems uncontrovertible':

> The constraining heteronormative assumptions and ideologies about sex and gender that underpin the dominant medico-legal and social discourses on what it means to be trans also shape the sexed/gendered lives of cisgender (that is, non-trans) people. Maleness and femaleness, as medico-legally understood, seems always to implicate normative ideals of heterosexuality (not homo-, bi-, a-, or pan-sexuality; monogamy (not polygamy or polyamory); marriage (rather than non-marital relationships); conjugality (rather than intimacy or friendship); life-long commitment (rather than short-term, casual or intermittent connections); dual (rather than solo or multiple) systems of partnership; and family life (based on the primacy of relationships with children, spouses, and relatives rather than friends, workmates, neighbours or non-spousal intimates). (Cowan, 2013, p. 118)

Members of the LGBTIQ communities do share common concerns about the operation of the criminal law (especially regarding hate crimes) – although for transgender and intersex people the pressing priorities are around access to health care, legal recognition of sex and an end to non-essential genital surgery on intersex infants. However, the communities' concern about being the target of violent crime on the basis of their gender identity or sexuality did motivate their involvement in the debate to repeal the partial defence of provocation. The ongoing

significance of provocation as a mitigating factor in homicide is an issue that continues to be unsatisfactorily resolved in New Zealand – and illustrates the desirability of coalitions and consultation. It is generally accepted that the partial defence of provocation applied unevenly – to benefit straight men, and to disadvantage women, gay men and transgender people (McDonald, 1993 and 2006). Not only are the disadvantaged more likely to be the victims of homicidal violence at the hands of straight men, they are unlikely to be able to successfully rely on provocation in contexts where they might kill (McDonald, 1997; Seuffert, 1997; Tolmie 2005).

Feminists and queer activists have demonstrated the heteronormative operation of the defence for decades (Douglas, 2008; McDonald, 1993 and 2006; Morgan 1997) – but in New Zealand it took the excessively violent killing of a young, straight, attractive Pakeha girl at the hands of her ex-partner (who attempted unsuccessfully to rely on the defence), and in particular the televising of his unpalatable explanation for his offending, for law reform to occur (McDonald, 2011). In this case it was not feminist or queer activism, or carefully crafted academic critiques, that led to abolition but rather the public outrage at the narcissistic behaviour of Clayton Weatherston, beamed into living rooms around the country.

Although the abolition of the defence was initially supposed to be accompanied by community engagement on the issue of what may be relevant provocation for mitigation purposes, this has not happened. Instead, juries are returning inexplicable verdicts of manslaughter in cases of the killing of gay men, and there is no clear guidance to judges on how to assess and rank the seriousness of any alleged provocation. Despite the repeal of the defence looking like formal equality (treating all alleged murderers in the same way) the homophobic and misogynist aspects of homicide are rendered invisible. Further, no work has addressed the difficulty of victims of family violence accessing a defence when they (rarely) kill their abusers (Tolmie, 2005). Here is an issue that could be valuably addressed by a coalition of feminists and LGBTIQ activists – acknowledging the ongoing uneven application of the criminal law, which continues to reinforce particular representations of male and female sexuality and gender identity and offers no meaningful protection from family or homophobic violence.

Conclusion

> It is important for feminism to sustain its challenge to the power of law to define women in law's terms. Feminism has the power to challenge subjectivity and to alter women's consciousness. It also has the means to expose how the law operates in all its most detailed mechanisms. (Smart, 1989, p. 25)

Although Carol Smart's claims that legal method is closed and antithetical to feminism and that law reform projects are universally ineffective for women have been widely disputed (and seem unsustainable looking back on the work of feminist lawyers over the last 30 years) (Hunter, 2012), it remains important to be critical of the role of law and for feminists to continue to deconstruct judicial authority and legal decision-making (Hunter, 2013).

> [P]ositing the value of law in stark 'either or' terms – as either an instrument which feminists can usefully deploy or an oppressive hegemonic discourse which they should resist – is to miss the complex inter- (or intra-) action of the material and discursive in a legal strategic context. (Conaghan, 2013, p. 47)

In this piece I have attempted to demonstrate the importance of applying feminist theory to legal issues, while also documenting the extent to which political activism and the attempts by academics to influence law and policy makers may ultimately be unsuccessful (McDonald, 2011; McDonald & Tinsley, 2013). Lack of uniform public opinion, lack of political will – or even disputes among lawyers or between feminists – may mean no meaningful change occurs despite intervention in court cases or participation in the legislative process.

Feminist legal theorists have not been, and are not, a homogeneous group nor have they

been unwilling to be critically self-reflective. They have not always agreed about the role of theory as compared to activism – but at this point it is important to resist the notion that feminist legal engagement is either reform-based or theoretical, material or discursive, modern or postmodern – these 'are simply two sides of an intellectually contrived divide' (Conaghan, 2013, p. 47). To restate a quote used in the introduction:

> Feminist legal theory, then, is now comprised of complex histories and many lines of interdisciplinary engagement. It is applied and conceptual, international and local, as well as self-questioning and linked into the dynamics of social and political change. (Davies & Munro, 2013, p. 2)

So what now for the feminist legal theory projects in Aotearoa New Zealand? There is no doubt there is more work to be done. In my area of research, it remains apparent that law reform is incapable of preventing and appropriately addressing family and sexual violence *of itself*, although there are initiatives which, if enacted, could make a real difference to the experience of victim/survivors of sexual and family violence who choose to engage with the current criminal justice system (McDonald & Tinsley, 2011). As yet, no feminist judgments project has begun in New Zealand – yet such a project could well be an important focus of contemporary critical legal and interdisciplinary work (Hunter, 2012).

What is clear from this modest and space-limited overview of the strands of feminist debate and engagement is that there is still a need for feminists to engage with the law, both at the level of critique and theory as well as a site for activism and reform. Although the landscape of the debate and the formulation of the most pressing issues have changed over the past 30 years, the importance of feminist engagement with the law has not. It is hoped that a future generation of feminist lawyers will continue the work others have begun – not doubt with their own questioning, challenges and limitations.

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