Yearbook of New Zealand Jurisprudence

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EDITOR'S INTRODUCTION

This is the first volume of the *Yearbook of New Zealand Jurisprudence*, which will annually publish a collection of papers presented at the Staff Seminar Series of the University of Waikato School of Law. The School was founded in 1991 to provide a professional legal education, develop a bicultural approach to legal education and to teach law in the contexts in which it is made and applied. The presentations at the seminar series are made by both visiting scholars and permanent academic staff. The aims of the *Yearbook* are to stimulate and contribute to the development of New Zealand jurisprudence by publishing articles, essays and other forms of analysis and comment which directly address or are relevant to New Zealand jurisprudence. The collection for this first issue includes articles from both permanent and visiting scholars which focus on both developing a specifically New Zealand Jurisprudence and analysing the law in context, consistent with the Law School’s project.

Ruthann Robson’s topical article analyses *Quilter v Attorney General*, the recent High Court decision denying three lesbian couples the right to marry. She places her discussion in the contexts of recent legal developments in New Zealand and internationally, and the debates raging within lesbian and gay communities on the topic of same-sex marriage.

Paul Havemann’s article sketches out alternative theoretical frameworks useful for understanding at a conceptual level the neoliberal economic theory currently so popular with government policy-makers around the world. New Zealand’s policymakers may well lead this trend in their whole-hearted devotion and their determination to apply this theory to government activities. Havemann’s provision of alternative lenses through which to view, and critique, these government activities is therefore both urgently needed and appropriately contextually based in New Zealand.

The New Zealand government’s fervour in applying neo-liberal economic theory to state services has led to calls to require recipients of benefits to be “work-ready”, while at the same time minimising protections for workers in the labour force on the assumption that employers and employees have equal bargaining power. Nancy Dowd’s analysis of the implications of the interaction of labour and family law for women in variously-constituted families exposes the myths that women and children benefit from assumptions of formal equality such as those applied in these policies.
Analysing the law in the context in which it is made and applied has been integral to feminist analyses of the laws relevant to rape trials, and to reforms necessary to those laws to facilitate rape victims' participation in court processes without revictimisation. Elisabeth McDonald's article provides the results of the most recent New Zealand research on women's experiences of the legal system as rape victims. The women who reported the most problems with participating in the court process were those who were allegedly raped by someone they knew. Thus the crucial distinction in terms of women's experiences is not between those who give evidence in court and those who do not, but rather between those who allege rape by a stranger and those who allege rape by an acquaintance. This distinction carries a chilling resonance with the legal system's response to domestic violence, where it has often been noted that violence perpetrated on a stranger is more likely to be dealt with through appropriate sanctions than violence perpetrated on a family member.

McDonald's interdisciplinary approach to analysing the law in context utilises both social science and legal research to assess the interaction of court processes and women's experiences. Nan Seuffert's article addresses epistemological issues underpinning the production of knowledge in both law and the social sciences which are crucial to developing a bicultural analysis of law in context. Eurocentric epistemologies have been thoroughly critiqued for the production and legitimation of knowledges which, through false claims to universality and objectivity, reinscribe dominant perspectives in the production of knowledge in law and the social sciences. Developing bicultural research methods to facilitate the bicultural redesign of laws and institutions requires deconstructing false claims to objectivity and universality and situating knowledge. Recognition of the locations from which knowledge is produced focusses attention on the limitations and specificities of that knowledge; the contexts in which knowledge is produced are an integral part of the knowledge. Bringing the School of Law's project full circle, this approach shifts attention from analysing the law and the contexts in which it is made and applied as distinct concepts, to analysing law and context as mutually reproductive.

NAN SEUFFERT
12 November 1997
I. INTRODUCTION

In 1996 the legal regimes in many nations confronted the issue of same-sex marriage. In May the High Court of New Zealand/Aotearoa rendered Quilter v Attorney-General\(^1\) and declined to find that the female plaintiffs were entitled to obtain a marriage licence and marry. Although the applicable act, the Marriage Act of 1955, does not explicitly prohibit same-sex marriages or explicitly require male-female marriages, the Court concluded that "it must be Parliament which chooses to enact the necessary law."\(^2\) A few months later, the legislative body of the United States did enact a law on the subject, the Defense of Marriage Act (DOMA).\(^3\) This federal law does not permit same-sex marriage, but instead provides that states need not recognise same-sex marriages of other states\(^4\) and that the federal government will only recognise marriages between members of "the opposite sex." DOMA itself is a reaction to a ruling by the Hawai‘i Supreme Court in Baehr v Lewin,\(^5\) holding that the denial of a marriage license to a same-sex couple must be evaluated under the Hawaii state constitution’s equal protection clause which

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1 [1996] NZFLR 481. The six plaintiffs were three female couples who had applied to the Registrar General for marriage licenses and been denied.
2 Ibid, 505.
3 PL 104-199, 110 Stat 2419 to be codified at 28 USC §1738C.
4 Ibid. The statute provides:

   No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

5 852 P2d 44 (Haw 1993).
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* Professor of Law, City University of New York School of Law, United States. The author wishes to thank Nan Seuffert for her encouragement and patience, the anonymous referees for the New Zealand Yearbook of Jurisprudence for their comments, and CUNY School of Law students Julian Kahuna White and Jana Jacobson for their research assistance.

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5. 852 P2d 44 (Haw 1993).
includes discrimination on the basis of sex. The Hawai‘i Supreme Court found that unless the state could prove a compelling state interest, the denial of a marriage license to same-sex couples constituted a denial of equal protection and remanded the case for trial. On remand the Honourable Kevin Chang found that the sex-based classification in the Hawai‘i statute was unconstitutional on its face and as applied under the state constitution’s equal protection clause.

While this Article concentrates on developments in New Zealand/Aotearoa and the United States, these developments mirror conditions in other nations. For example, last year in Canada an Ontario judge declared the Family Law Act unconstitutional to the extent that it excludes same-sex couples from alimony provisions. This newest Canadian decision follows Canadian Supreme Court cases such as Re Attorney-General of Canada and Mossop, denying family status to same-sex couples for purposes of bereavement leave, and Egan v Canada, denying old age benefits to a same-sex partner of 45 years, as well as flurries of activity in the provincial legislatures. In the context of these activities a sophisticated legal theory of gay and lesbian

6 Article I. §5 of the Hawai‘i Constitution provides: No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. Haw Const art I, §5 (1978). In addition to the equal protection claim on which they prevailed, plaintiffs also argued that the denials of marriage licenses to same-sex couples was a denial of the right to due process under Article I, §5, and a denial of the right to privacy under Article I, §6 of the Hawai‘i Constitution which explicitly provides that “[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” The court, however, rejected both the due process and privacy claims, concluding that it did not believe that “a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions” or “that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.” 852 P P 2d at 57.

7 Baehr v Miike 65 USLW 2399, 1996 WL 694235 (Circ Ct Haw (December 3, 1996)). Lawrence Miike is the Director of the Department of Health, substituted for the previous director, Lewin.

8 M v H (1996) 27 OR (3d) 593, 132 DLR (4th) 538 (Ont Ct (Gen Div)).


equality has emerged.\textsuperscript{12}

In Australia last year the Attorney General of New South Wales stated that he would advocate a same-sex domestic relations act. With the approval of the Australian federal cabinet, the 1996 census counted same-sex couples as “family”. The Supreme Court of New South Wales rendered an important decision regarding termination of a lesbian relationship.\textsuperscript{13} In Europe, the Republic of Iceland joined the republics of Sweden, Norway, and Denmark in including same-sex couples in their respective Registered Partnership Acts. The Kingdom of the Netherlands passed a Marriage Bill which includes same-sex marriage.

Such global developments regarding same-sex marriage and relations raise a host of jurisprudential issues, including the structure of government itself and the government’s relationship with its citizens.

\section*{II. Jurisprudential Issues Raised by Same-Sex Marriage}

\subsection*{A. The Structures of Government}

Claims to legalise same-sex marriage often challenge the structures of legitimate government. For example, the New Zealand High Court in \textit{Quilter} abdicated responsibility for individual rights to Parliament, as if New Zealand were not a common law nation with an independent judiciary but a civil law state with an especially stunted notion of judicial review. Despite the gender neutral language of the Marriage Act and the High Court’s conclusion that the Marriage Act discriminates on the basis of sexual orientation in contravention of the Bill of Rights Act, the Court nevertheless refused to interpret the Marriage Act consistent with the Bill of Rights Act because that would require the Court “to interpret the law in a way I do not perceive Parliament to intend.”\textsuperscript{14} Section 4 of the Bill of Rights Act provides that the courts cannot “[d]ecline to apply any provision” of a Parliamentary enactment “by reason only that the provision is inconsistent with any provision” of the Bill of Rights.\textsuperscript{15} Nevertheless, the gender neutral language of the Marriage Act allows a court to interpret it \textit{consistently} with the Bill of Rights Act, as

\begin{footnotesize}
\begin{enumerate}
\item For an intelligent and comprehensive discussion of the Canadian context, see Didi Herman, \textit{Rights of Passage: Struggles for Lesbian and Gay Legal Equality} (1994).
\item \textit{W v G} (1996) 20 Fam LR 49.
\item Supra n 1 at 505.
\item New Zealand Bill of Rights Act 1990, s 4. I am indebted to an anonymous referee of the \textit{Yearbook} for bringing this argument to my attention.
\end{enumerate}
\end{footnotesize}
required by s 6. A judicial perception that "social policy" is a matter for Parliament even when the Bill of Rights Act requires redress renders the judiciary expendable and the Bill of Rights Act meaningless.

In contrast, Judge Epstein of the Ontario Court of Justice considered the uneven Ontario legislation with regard to recognising same-sex couples and concluded that the legislature’s failure to act in this specific instance made the judiciary’s obligation to remedy the discrimination even more pronounced. While Judge Epstein’s reasoning has special force under the Canadian constitutional scheme incorporating the Charter of Rights, his explication of the judiciary’s role is inherent in a democratic society. This role has been set out by Canadian Supreme Court Chief Justice Lamer:

As for the suggestion that judges intrude into the legislative sphere, the truth is that many of the toughest issues we have had to deal with have been left to us by the democratic process. The legislature can duck them. We can’t. Think of abortion, euthanasia, same sex benefits, to name a few. Our job is to decide the cases properly before us to the best of our abilities. We can’t say we are too busy with other things or that the issue is too politically sensitive to set up a royal commission. We do our duty and decide.

Under Justice Lamer’s view, a judiciary that does “duck” an issue is not fulfilling its duty in a democratic society.

In the United States context, struggles around the issue of same sex marriage have also implicated the structure of government, in particular the constitutionally mandated federalist structure of the nation. DOMA alters the relations between the states as well as the relations between the federal government and the states. Like other federalist governments, the United States Constitution sets out the operations of laws between its various states. The proper scope of relations among the states of the United States is expressed throughout the text and structure of the Constitution, and is addressed in particular in the “full faith and credit clause” which provides that full faith and credit shall be given in each state to the public acts, records, and proceedings of every other state. Marriage certificates fall into the category

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16 *M v H* supra n 8, OR at 614, DLR at 560.
17 The Canadian Charter is entrenched. It does not contain a section similar to s 4 of the New Zealand Bill of Rights Act.
18 Supra n 16, OR at 617-8, DLR at 563-564, *quoting* Speech of Chief Justice Lamer to the Empire Club of Canada, April 1995.
19 See Honourable Mr Justice WMC Gummow, “Full Faith and Credit in Three Federations” (1995) 46 South Carolina LR 979 (discussing the United States, Canada and Australia).
20 US Const art IV §1.
of public acts, records, and proceedings and the long-standing law has been
that a marriage valid in one state is valid in every other. This has been true
despite the fact that laws differ between states. For example, if the minimum
age for marriage in one state is 14 years of age, a 14 year old validly married
in that state still has a valid marriage even if she or he moves to a state in
which the minimum age for marriage is 16. Such problems can also be
analysed under conflicts of law doctrine, which allows “public policy”
exceptions to recognising the effects of laws from other jurisdictions. The
interface of the full faith and credit clause and choice of law doctrines has
prompted much scholarship given the prospect of same-sex marriage in Hawai’i.\(^ {21}\) DOMA attempts to supersede these interstate conflicts through
federal legislation.

DOMA also alters the federalist relation between the federal government and
the states. Unlike most other federalist nations, under the United States
Constitution the national government was intended to have only specifically
enumerated powers, and all residual general authority was to remain with the
states. Domestic relations and family law are considered matters to be
governed by the general powers of the states. Most federal statutes that require
definitions of marital relations, including social security and tax codes, rely
upon state definitions. Thus, the determination of whether a person is married
or not for purposes of the federal tax code, for example, would depend upon
the state laws where the marriage was validated. The differences between
state laws in this area are not considered to be a vital federal interest.

Recent legal developments in New Zealand/Aotearoa, the United States, and
Canada, demonstrate the manner in which a challenge to the marriage statutes
implicates the structural frameworks of government. Responses to the
controversial issue of same-sex marriage have resulted in alterations to well-
established respective roles of judiciaries and legislatures and the respective
roles of the state and the federal governments in the United States. Nevertheless, while responses to this issue may be destabilising state structures,
the root of the conflict is in the state’s relation to the persons claiming that the
state is acting unjustly.

\(^ {21}\) See eg, Robert L Cordell II, “Same-Sex Marriage: the Fundamental Right of Marriage
and an Examination of Conflict of Laws and the Full Faith and Credit Clause” (1994) 26
Columbia Human Rights LR 247; Barbara J Cox, “Same-Sex Marriage and Choice-of-Law:
If We Marry in Hawaii, Are We Still Married When We Return Home?” [1994] Wisconsin
LR 1033; Deborah M Henson, “Will Same-Sex Marriages Be Recognised in Sister States?:
Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding
the Status and Incidents of Homosexual Marriages Following Hawaii’s \textit{Baehr v Lewin}”
 Constitutional and Choice of Law Arguments for Recognition of Same-Sex
B. Individual Rights

Perhaps the most important jurisprudential issue raised by same-sex marriage is the legal regime's relationship with its citizens, especially its citizens who do not belong to dominant groups. The legalisation of same-sex marriage can be a litmus test of the state's willingness to recognise its sexual minority citizens as full members of the polity. From the perspective of the state, marriage is a civil relation of the highest order; excluding certain groups from marriage is thus an indication of the status of those groups.²²

In New Zealand/Aotearoa the Human Rights Act prohibits discrimination on the basis of sexual orientation, which is defined as "a heterosexual, homosexual, lesbian, or bisexual orientation."²³ Such a provision indicates that the nation of New Zealand/Aotearoa holds its sexual minority members in a regard equal to its other citizens. Honouring such a ban on discrimination would require the reinterpretation of any statutes, practices, or policies which discriminate on the basis of sexual orientation. The language of the Marriage Act does not limit marriage to members of the opposite sex and is thus not facially discriminatory. For the plaintiffs to prevail in Quilter, the High Court needed only to require the Registrar General to apply the Act in a non-discriminatory manner.

Instead, the High Court became entangled in tangentials.²⁴ It looked to the "traditional view" of marriage, concluding that "judicial dicta" since 1795 limited marriage to "one man and one woman."²⁵ The Court then considered other statutes, most of which referred to husbands and wives, and reasoned that such statutes should not be "interpreted in a way where language and ordinary interpretation rules have to be strained to produce the result sought."²⁶

²² However, the availability of legalised marriage does not necessarily mean that a group is considered equal. See Laura F Edwards, "The Marriage Covenant is at the Foundation of all Our Rights: The Politics of Slave Marriages in North Carolina after Emancipation" (1996) 14 Law and History Review 81.
²³ Human Rights Act 1993, s 21 (m).
²⁴ While some may consider this view harsh, once the court recognises that discrimination on the basis of sexual orientation is occurring, then remedying that discrimination should be paramount; all else is tangential.
²⁵ Supra n 1 at 486.
²⁶ Supra n 1 at 489. The statutes the Court considered included: Family Protection Act 1955; Administration Act 1969, as amended 1987; Joint Family Homes Act 1964; Judicature Act 1908; Legal Services Act 1991; Matrimonial Property Act 1976; Family Proceedings Act 1980; Parental Leave and Employment Protection Act 1987; Rates Rebate Act 1973; Social Security Act 1964; Status of Children Amendment Act 1987; Accident Rehabilitation and Compensation Insurance Act 1993; Adoption Act 1955; Government Superannuation Fund Act 1956; and the Holidays Act 1981. The Court reasons that because the words "husband" or "wife" appear in the statutes, these statutes would not be applicable to same-sex marriages.
Based upon the traditional common law view and statutes other than the one directly applicable, the Court concluded that the Marriage Act should not be interpreted in a manner consistent with the Bill of Rights Act. The result of Quilter is that the Bill of Rights Act ban on discrimination on the basis of sexual orientation is meaningless if it is contrary to "judicial dicta" or ancillary statutes. Such an impoverished interpretation of the right to be free from discrimination on the basis of sexual orientation exhibits a fundamental dismissal of gay and lesbian persons as equal to heterosexual persons in the polity.

In the United States context, DOMA exhibits a similar fundamental dismissal of the equality of gay and lesbian persons. Even the name of the act, Defense of Marriage Act, expresses a particularly parochial paranoia constructing gay men and lesbians as a threat which must be defended against. The legislative history of DOMA elaborates on this theme, stating that the "appropriately entitled" Act is a "modest effort" to "combat" the "orchestrated legal campaign by homosexual groups to redefine the institution of marriage" which is a "radical proposal that would fundamentally alter the institution of marriage."27 Such a fundamental alteration would occur, according to the House of Representatives Committee on the Judiciary, because marriage exists for the procreation of children.28

Even the Hawaii Supreme Court in Baehr v Lewin29 fails to accord full respect to gay and lesbian persons. The Hawai'i Supreme Court acknowledged that although there is a fundamental right to marry, this right does not extend to same-sex couples.30 Furthermore, in a rather disingenuous footnote, the Court

28 The House Report attempts to deflect the obvious objections to its articulation of procreation as the purpose of marriage by resorting to ipse dixit reasoning:
   There are two standard attacks for this rationale for opposing a redefinition of marriage to include homosexual unions. First, it is noted that society permits heterosexual couples to marry regardless of whether they intend or are even able to have children. But this is not a serious argument. Surely no one would propose requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce or to sign a pledge indicating that they intended to do so. Such steps would be both offensive and unworkable. Rather, society has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children. Second, it will be objected that there are greater threats to marriage and families than the one posed by same-sex "marriage," the most prominent of which is divorce. There is great force in this argument . . . . But the fact that marriage is embattled is surely no argument for opening a new front in the war.
29 Supra n 5.
30 Ibid, 57.
distanced its opinion from sexual orientation and in another footnote accused the state attorney-general of injecting the issue of homosexuality into a case in which it would otherwise be absent. The Hawai’i Supreme Court’s reliance on gender as a category can thus be interpreted as a failure to adequately consider the issue of sexual orientation by masking the issue as one of gender unrelated to sexuality.

C. Gender

As the Hawai’i Supreme Court opinion in *Baehr v Lewin* indicates, legal responses to same-sex marriage can elucidate the government’s position on the relevance of, and respect for, gender categories. The jurisprudence of sex discrimination is elucidated in same-sex challenges to marriage laws in jurisdictions in which discrimination on the basis of sexual orientation is not prohibited. This lack of protection requires the argument to proceed on the theory of sex discrimination. Prohibiting same-sex marriage is sex discrimination because it is a prohibition which is based upon the sex of one’s chosen partner. This is the argument accepted by the Hawai’i Supreme Court in *Baehr v Lewin*. However, most previous courts held that the prohibition of same-sex marriage was not sex discrimination because it applied equally to both sexes, even in instances in which there was an explicit state constitutional provision prohibiting sex discrimination.

The meaning of gender is explored not only through doctrines of sex discrimination, but also through precedent regarding transsexual marriages.

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31 Ibid, 51 n11. The court stated:

“Homosexual” and “same-sex” marriages are not synonymous; by the same token, a “heterosexual” same-sex marriage is, in theory, not oxymoronic. A “homosexual” person is defined as “[o]ne sexually attracted to another of the same sex.” *Taber’s Cyclopedic Medical Dictionary* 839 (16th ed. 1989). “Homosexuality” is “sexual desire or behavior directed toward a person or persons of one’s own sex.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 680 (1989). Conversely, “heterosexuality” is “[s]exual attraction for one of the opposite sex,” *Taber’s Cyclopedic Medical Dictionary* at 827, or “sexual feeling or behavior directed toward a person or persons of the opposite sex.” *Webster’s Encyclopedic Unabridged Dictionary of the English Language* at 667. Parties to “a union between a man and a woman” may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

32 Ibid, 52 n 12.

33 See *Singer v Hara* 522 P2d 1187 (Wash App 1974) (relying on Art 31 of the Washington Constitution which provides “[e]quality of rights and responsibilities under the law shall not be denied or abridged on account of sex.”)
For example, in *Quilter* the High Court had no difficulty distinguishing the transsexual cases, commenting that "in New Zealand for marriage to take place there must be parties who visually at least are male and female."\(^{34}\) The Court’s emphasis on the visual could be interpreted as an interest in mere appearances, except that the preceding sentence focuses on situations in which "one of [the] parties has undergone reconstructive surgery, by the removal of a male penis and the construction of a vagina in its place or the construction of a penis from a female vagina."\(^{35}\) Such an approach is similar to that taken in the United States cases. The most notorious of these cases is *M T v J T*, in which a New Jersey appellate court held a marriage valid where one party was a post-operative male-female transsexual and the other party was male.\(^{36}\)

In one sense, the court applied a broad nonessentialist definition of gender and reached the conclusion that a previously male person could become female. In another sense, the court’s conservatism mandated that marriage include persons of the “opposite sexes” and made gender determinations based upon stereotypical sexual functioning. As the New Jersey court stated, “it is the sexual capacity of the individual which must be scrutinized”, requiring the “coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or female.”\(^{37}\) Such scrutiny not only reifies gender roles, of course, but dictates heterosexuality.

Thus, legalisation of same-sex marriage raises jurisprudential issues concerning the structure of the government, the state’s treatment of its minorities, and the state’s understanding of sex/gender. It is also important, however, to explore the legalisation of same-sex marriage from another perspective - the perspective of the lesbian, gay, bisexual, or transsexual citizen and her or his relationship with the legal regime, as well as her or his intimate and community relations.

III. "QUEER" AND LESBIAN LEGAL THEORIES AND THE QUESTION OF LEGALISED MARRIAGE

The jurisprudential issues of same-sex marriage must also be addressed from the perspectives of lesbians and gay men. I am not suggesting that among these people there exists a single nonperspectival perspective or even a majority perspective.\(^{38}\) The debates within lesbian and gay communities regarding

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\(^{34}\) Supra n 1 at 486.

\(^{35}\) Ibid.

\(^{36}\) 355 A2d 204 (NJ App 1976).

\(^{37}\) Ibid, 209.

\(^{38}\) For a brilliant and comprehensive discussion of the range of theoretical approaches that might apply, see Margaret Davies, *Asking the Law Question* (1994).
marriage demonstrate the existence of a multitude of opinions on this subject.\textsuperscript{39} Furthermore, the demise of identity politics suggests that one cannot contend that being gay or lesbian means one has a radical or progressive political stance, or even that one believes that being gay or lesbian is significant to the construction of identity.\textsuperscript{40} Nevertheless, any jurisprudential analysis of the legalisation of same-sex marriage is incomplete without at least an attempt to theorise the issue from the subject positions of lesbians and gay men. Thus, the perspectives of lesbian legal theories\textsuperscript{41} and "queer" legal theories are relevant.

Invoking such theoretical perspectives involves an interrogation of the purposes of same-sex marriage for gay men and lesbians. Based upon the arguments, discussions, and discourses surrounding same-sex marriage, it seems that for gay men and lesbians, ensuring the availability of legal marriage is seen as a means of achieving three goals often expressed as desires. First, we want our relationships not to suffer in comparison to heterosexual relationships. Second, we want the legal system to be responsive to solving disputes among lesbians and gay men. Third, we want the legal reality and social perception of equality with heterosexuals. These goals are discussed in turn.

A. The desire that our relationships not suffer by comparison

Comparative suffering can occur when our relationships are rendered invisible in comparison with other relationships that are legally recognised. Sharon Kowalski's story exemplifies this problem.\textsuperscript{42} In November of 1983, Sharon Kowalski was in a car accident and suffered extensive physical and neurologic injuries limiting, among other things, her ability to communicate. Until her

\textsuperscript{39} For a cogent examination of what she calls the "We Are Family/We are Not Family" debate, see Brenda Cossman, "Family Inside/Out" (1994) 44 University of Toronto Law Journal 1. For a response to intra-community criticism that gay/lesbian marriage may be problematic, see Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique" (1994 - 1995) 21 NYU Review of Law & Soc Change 567.

\textsuperscript{40} For an overview of the problems of identity and identity politics, see Ruthann Robson, "The Specter of a Lesbian Supreme Court Justice: Problems of Identity in Lesbian Legal Theorising" (1993) 5 St Thomas LR 433. For a view that sexual orientation is an identity, see Fernando J Gutierrez, "Gay and Lesbian: An Ethnic Identity Deserving Equal Protection" (1994) 4 Law & Sexuality 195.


\textsuperscript{42} For a detailed discussion of the circumstances surrounding the litigation, see Karen Thompson & Julie Andrzejewski, Why Can't Sharon Kowalski Come Home? (1988).
accident, she had been living with her lover Karen Thompson in a house they were buying together. After her accident, the persons legally responsible for Sharon were her parents, who did not believe that their daughter was a lesbian or could be involved in a lesbian relationship with anyone, including Karen Thompson.43

The prospect of being excluded from visiting her lover prompted Karen Thompson to bring an action in court. In one of the many court papers filed in the litigation, a doctor testifying on behalf of Sharon's parents stated that "visits by Karen Thompson would expose Sharon Kowalski to a high risk of sexual abuse."44 Eventually, Sharon's parents withdrew their claim to be her guardian, but the trial judge still refused to name Karen Thompson as guardian. The trial judge expressed concerns that Sharon's parents still objected to Karen as guardian (in part on the basis of her lesbianism), that Karen had been involved with at least one other woman in the years since Sharon's 1983 accident, and that Karen invaded Sharon's privacy by revealing her sexual orientation to her parents and by taking her to lesbian and gay gatherings. Rather than naming Karen as guardian, the judge named a supposedly neutral third party.

Reversing, a Minnesota appellate court relied on the uncontroverted medical testimony that Sharon Kowalski had sufficient capacity to choose her guardian and had consistently chosen Karen Thompson.45 The court also noted that Karen Thompson was "the only person willing to care for Sharon Kowalski outside an institution."46 In a phrase that the lesbian and gay press reiterated in tones of victory, the appellate court also confirmed the trial court's finding that Sharon and Karen were a "family of affinity, which ought to be accorded respect."47

Although there was a successful outcome in the case, it resulted in eight years of litigation and perhaps permanent damage to Sharon's possibility of rehabilitation. These costs illustrate the suffering that lack of legal recognition of our relationships can perpetrate. Advocates of same-sex marriage correctly point out that if Sharon and Karen had been legally married,48 then Karen Thompson would have been Sharon Kowalski's legal guardian absent unusual circumstances.

A milder form of comparative suffering occurs when we cannot avail ourselves of the benefits available to married heterosexual persons. Such benefits may

43 Ibid, 26-32.
44 Ibid, 163.
46 Ibid, 794.
48 Sharon and Karen had "exchanged rings" in an extralegal ceremony.
include those imposed by laws such as tax differentials for married couples, inheritance laws, the ability to sue for wrongful death, entitlement benefits such as social security, and citizenship/immigration regulations, as well as those benefits afforded by private interests recognising the legal category of spouse, such as insurance benefits. Advocates of same-sex marriage argue that same-sex couples should be entitled to the same benefits as couples who can marry. Again, the availability of marriage would solve this problem.

B. The desire that the legal system respond to same-sex disputes

The recognition of same-sex marriage would also provide married lesbians and gay men with legal rights as against each other. Not all of our relationships are eternal, and of those that end, many do not end on amicable terms. Gay men and lesbians, like other members of society, may look to the legal system to solve disputes regarding the distribution of property accumulated during the relationship, or to make decisions about custody or visitation of children. Because the legal system does have rules for dissolution of marriages, the exclusion of gay men and lesbians from the divorce process could be theorised as "suffering by comparison." Nevertheless, I think it is more accurate to acknowledge that we want the legal system to protect us from ourselves.

The "selves" from whom we desire protection are not the "selves" willing to use alternative dispute resolution forms such as mediation.49 The gay men and lesbians at issue are those more likely to use problematic arguments against their former partners. For example, the Australian case of W v G, decided in 1996 by the Supreme Court of New South Wales, involved the termination of a lesbian relationship in which the plaintiff sought portions of real and personal property and "equitable compensation" for two children born through alternative50 insemination.51 The defendant argued that the relationship was one of "room-mates or flatmates" and that any child support should be claimed from the legal father - the sperm donor - and not from her. The defendant through counsel further argued that :

52 the formation of stable families is a socially desirable necessary aim and to visit legal obligations upon non-parents to support a child in a homosexual or lesbian relationship is contrary to public policy in that: it will encourage the conception of children by artificial insemination in the absence of a father; will present as "normal" a relationship which is

50 The term "alternative" is preferred by many lesbians, including me, to the term "artificial."
51 Supra n 13.
52 Ibid, 65.
not recognised by the child maintenance legislation; it will encourage the evasion of provisions of the Human Tissue Act; and will encourage the bringing into the world of children without a father.

The present state of the law, and the social context in Australia and elsewhere, encourages a gay man or lesbian to use homophobic arguments to escape responsibilities. For proponents of same-sex marriage, the solution to ending such destructive arguments is marriage. Legalised marriage would mean legalised dissolution of marriage and child custody/support determinations. Thus, we would be in the same position as our heterosexual counterparts, an end which is seen as desirable in and of itself in terms of equality.

C. The desire for the legal realities and social perceptions of equality

Third and last, we want equality. The desire for equality permeates the first two desires, but is also an independent desire. It can also override some of our own misgivings about the institution of marriage, especially as it has been persuasively criticised by feminist scholars. In common law countries, legal marriage historically meant the union of a man and a woman into a single person - the man. Until the Married Women's Property Acts in the 1900s, married women were not considered persons with legal status to own property or enter into binding contracts. The children of the marriage were owned by the father. In contemporary times, divorce continues to be controlled by the State. While marriage is considered contractual rather than a consequence of status, there are three parties to this contract: the man, the woman, and the State. Although the man and woman have limited power to alter the terms of the marriage agreement, through prenuptial agreements, for example, the State retains enormous power. A change in the State's understanding of the contractual terms can have devastating effects on women. For example, the phrase "displaced homemaker," refers to women who were married in the 1950s when the marriage contract terms included being a full time housekeeper, raising children, and supporting the husband's career, in exchange for a promise of longevity enforced by alimony. Many of these

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54 The notion of equality is itself problematic. For example, in seeking equality to heterosexuals, gay men and lesbians make heterosexuality the norm by which other sexualities are measured. This then raises other issues, such as whether other sexualities are entitled to formal equality or comparable equality, as evidenced by the so-called sameness/difference debates of feminist legal theory.
women were divorced 30 years later when the revised marriage contract included a year of rehabilitative alimony to allow the former wife to attend secretarial school.

Yet critiques of marriage, feminist or otherwise, are fundamentally irrelevant to the equality argument. Analogising marriage to an American automobile, such as the Ford Pinto, illustrates the irrelevance. One might criticise the Ford Pinto for its design flaws, which caused injuries and accidents resulting in protracted litigation. On such evidence, one might refuse to purchase a Ford Pinto. However, it is easy to imagine one’s reaction to a legal system which limited the availability of Ford Pintos to a certain select group. For those outside the group, the Ford Pinto would become a symbol of their exclusion. Just as for some of those included in the group, the Ford Pinto would become a symbol of their preferential status. The relative merits of the Ford Pinto become secondary when the issue is equality. Thus, arguments about the problems inherent in marriage as an institution are not convincing to those who perceive marriage as a symbolic issue of equality for gay men and lesbians.

IV. ABOLISHING MARRIAGE

It seems to me that all three of the goals lesbians and gay men seek to accomplish through legalised same-sex marriage would be more completely realised by the abolition of any state sanctioned marriage. For gay men and lesbians, the abolition of marriage would mean that our relationships would not be in a different legal category from other relationships. This would solve the problems of suffering by comparison and the larger issue of equality in this segment of the law. In terms of a desire to have rights as against each other, and which rights those would be, this would require revisiting the scheme of ordering intimate relationships through legal processes.

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55 The Ford Pinto was a subcompact car manufactured by the Ford Motor Company of the United States with a fuel tank positioned behind (rather than above) the rear axle, a series of bolts located near the fuel tank which could pierce the tank, a fuel filler tank prone to disconnect causing gasoline to spill, and an economic bumper. These specifications contributed to the Pinto’s propensity to burst into flames when the car was involved in a rear end collision. The Ford Pinto situation became especially notorious because there is evidence that the Corporation had knowledge of the design defects which could cause death, but performed a cost-benefit analysis (valuing each life at US$200,000) and determined that the costs of remediying the problems by a safety device which would have cost Ford one hundred thirty seven million US dollars did not outweigh the benefit of the lives lost which would cost Ford only thirty six million US dollars. See Grimshaw v Ford Motor Company 119 Cal App 757, 174 Cal Rptr 348 (1981); Gary T Schwartz, “The Myth of the Ford Pinto Case” (1991) 43 Rutgers LR 1013.
While the abolition of marriage may seem radical,\(^{56}\) it must be remembered that the marriage to which this Article refers is legal marriage. As such, the abolition of marriage could easily be accomplished through a swift legislative act. Or the judiciary in numerous nations could logically declare legal marriage as a contravention of many individual rights, not limited to discrimination on the basis of sexual orientation, but including gender and marital status discrimination. Such abolition of marriage would not mean that marriage as a social, as a spiritual or religious, or as a psychological matter would be outlawed.

Instead, the abolition of legalised marriage would mean that the State would not relate to its citizens on the basis of their intimate relations. Most of us would agree with the State's articulated practice of non-discrimination on the basis of gender in pay scales in public employment as well as with the State's imposition of non-discrimination on private employment. The practice of discrimination, however, was a product of thinking not only of gender roles but also of the "family wage" system that provided more pay for men who were supporting families. It seems to me that contemporary practices based upon familial relations are similarly problematic.

Abolishing legal recognition of marriage would also mean that a nation could not resort to formal marital relations to determine the rights of its citizens. This is especially pertinent in the national engagement with minority populations, including ethnic minorities and indigenous populations. The state sanctioning of intimate relations is an imperialist and colonising act. Even when the state seeks to recognise "common law" marriages, it forces persons into categories which may not accurately reflect social realities. The example of Hawai'i is instructive in that the categories of family and marriage are plastic and performative, with kinship being attributed to those who act as kin, including friends and lovers.\(^{57}\) It is not simply a matter of concluding that some cultures have a more expansive definition of "family," but a recognition that for some cultures "family" is not a meaningfully inherent category.\(^{58}\) The privileging of marriage as the primary legal expression of an intimate relationship, even if including same-sex couples, does violence to the complex configurations of intimate relations.

\(^{56}\) Although not so radical that other legal scholars do not agree. See generally, Martha Fineman, The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies (1995); Wayne Morgan, "Love is a Battlefield" Paper Presented at ALTA 1996. See also, Student Note, Steven K Homer, "Against Marriage" (1994) 29 Harv CR-CLLR 505.

\(^{57}\) Robert Morris (Kap_‘ihihilina), "Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture and Values for the Debate about Homogamy" (1996) 8 Yale J Law & Humanities 105.

\(^{58}\) For further discussion of the category of family, see Ruthann Robson, "Resisting the Family: Repositioning Lesbians in Feminist Legal Theory" (1994) 19 SIGNS 975.
Further, the abolition of marriage would assist those people resisting the privatisation of government responsibilities toward individuals. Much of the contemporary privatisation discourse seeks to encourage "family" responsibility while allowing the government to escape from its obligations. As Jane Kelsey notes in the New Zealand/Aotearoa context, attacks on the welfare state are rhetorically coupled with blaming breakdowns in traditional patriarchal family structures for all social ills. Moreover, specific reforms aimed at dismantling the welfare state often take direct aim at those who dare to be unmarried. For example, the government of New Zealand/Aotearoa altered the universal allowance for students over 20 to target unmarried students under 25, whose eligibility would be based upon parental income, whether or not the students lived at home or came from a non-university town. A typical pattern in privatisation is to limit support for "single adults" because such people possess no dependents, and then to limit family support on the basis that the disadvantages such people suffer are attributable to deviation from the requisite two-parent family. Thus, while no one is forced to marry under present legal regimes in the common law nations, the choice whether or not to marry is loaded with various incentives and disincentives which are enforced by state power.

The abolition of the legal institution of marriage would prevent the state from using marriage as a conduit to accomplishing its own ends, be they fiscal reorganisation or the maintenance of dominant gender, ethnic, racial, or sexual configurations. This is not to argue that the individual as the basic unit of society is without severe political and philosophical problems. However, the problems inherent in individualism are not solved by permitting the State to vary its relations to individuals based upon their marital status.

The same-sex marriage issue is an opportunity to challenge not only the status of gay men and lesbians, but the status of the State's recognition and imposition of intimate relations for its subjects through its legal regime. While legal regimes are presently confronting the issue of same-sex marriage and reaching disparate results, the larger question of the wisdom of the legal institution of marriage has yet to be seriously addressed by such regimes. The present state of marriage includes "the state" as a necessary actor; it is time to question whether all of us are being served by such an inclusion.

60 Ibid, 224.
MODERNITY, COMMODIFICATION AND SOCIAL CITIZENSHIP

Paul Havemann *

I. INTRODUCTION

In 1996 I gave a paper entitled Post-Fordism, the Risk Society and the Contract State: Implications for Rights Talk to a Waikato School of Law staff seminar. This essay is based on that presentation. I wanted to survey for colleagues some contextual frameworks and conceptual grids for understanding the condition of modernity. These frameworks and grids are interesting and useful for teaching law in context and for the contextual analysis of law, both core goals of the School of Law. To my mind, taking context seriously requires that we try to avoid “anything goes” eclecticism and “egoecentrism”; the latter is a tendency to examine social phenomena through a narrow legal lens.

The essay follows a long jurisprudential and sociological tradition of zeitdiagnostische sociologie in which intellectuals attempt to classify particular periods by identifying and describing the key attributes of the age. This tradition has included, for example, diagnosing the relationship between the social, political and economic structure and the legal form. Legal ideology is treated as a form of social consciousness expressed through legal doctrine.

Henry Maine’s statement that “the movement of progressive societies has hitherto been a movement from Status to Contract” 1 concludes a classic illustration of this approach to this type of socio-legal analysis. I am conscious, though, that Maine’s conclusion suggests a crude periodising “before and after” contrast, a type of theorising which fails to analyse the complex weave of periods. 2 It is tempting, therefore, to speak of modernisation as a process, rather than of modernity as a period.

Claus Offe draws the helpful distinction between modernisation and modernity. He defines the farmer as a sociological-historical term connoting “westernisation” and a euphoric view of progress. The latter is a theme of social scientific theorising involving a sceptical self-scrutiny of the structures

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1 Henry Maine, Ancient Law (1861) 174.

and normative premises, and crisis-ravaged features, of already “modern”
societies. 3

This essay is a sceptical inquiry into contemporary dystopian and utopian
trajectories of modernity. When the word “modernisation” is used here it
does not imply progress in the terms of “western” triumphalism.

The essay is structured around two themes: the pernicious consequences of
the commodification of social relations for notions of citizenship and human
welfare, notably contractualism and the rise of the contract(ing out) state;
and utopian realist readings of features of advanced modernity such as a
growing “ethic of humanity” through, for example, social citizenship and
second and third generation human rights.

In the contemporary New Zealand state, contractualism rules. By
contractualism I mean the use and appropriation of the contract form to
structure social exchange relationships in a commodified or re-commodified
form. Public and private are intentionally conflated, and the distinction
between them blurred. The apparently consensus ad idem based classical or
pure “contract” between equal market players is mimicked to legitimate a
variety of pseudo-contractual transactions between decidedly unequal parties.
Some of these transactions replace relationships between citizens and state in
the social contract equation with relationships between surrogates which are
neither citizen nor state. Others are “contractual” transactions, but with gross
power imbalances designed into them, contradicting their legitimating freedom
talk. The protective framework of the Keynesian Welfare State (“KWS”),
such as a citizen status conferring benefits as of right, is weakened or virtually
removed. The key element of the KWS, class compromise, is now moot or
negated. The social is re-imagined as a form of the economic, and the
individual human life increasingly lived as an “enterprise of the self” within
a culture of contractualism. 4

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3 Claus Offe, “Utopia of the Zero Option: Modernity and Modernisation as normative
political criteria” in Clause Offe, Modernity and the State: East and West (1996) 3-5.
4 Colin Gordon, “Governmental rationality: an introduction” in G Burchell, Colin Gordon,
“The soul of the citizen: Max Weber and Michel Foucault on rationality and government”
in S Whimster and S Lask (eds) Max Weber: Rationality and Modernity (1987); on the
widely imitated New Zealand manifestations of this culture see Jane Kelsey, The New
is an increasingly important feature of changing state-market relations in late modernity.
It represents a complex of forms and processes whereby social relations become
commodified. Contractualism must therefore be taken seriously. See Glyn Davis, Barbara
The hegemony of contractualism and its underpinning "rationality" is highlighted by a raft of recent legislation in New Zealand. The Employment Contracts Act 1991 removed status words like "union" from the labour law vocabulary. This Act's aim was to promote the individual contract rather than status as an employee employed under a collectively bargained award as the paradigm employment relationship. The State Owned Enterprises Act 1986 promotes corporatisation and privatisation of citizen-owned public utilities.

Entrepreneurial governance becomes the dominant form, in the jargon of the New Public Management ("NPM") "letting managers manage", separating "steering" (policy-making and funding) from "rowing" (service provision) through the State Sector Act 1988 using the medium of a synthetic contractualist form. This legislation introduces contractualist assumptions based on agency theory into the public sector; ministers of the Crown become the "owners" of departments and the public service becomes the agent from whom specified outputs are purchased. The management of public services is shifted into a "transaction costs" mode of economics based on accountability for contracted outputs rather than controlled inputs and medium-term outcomes. Notions of stewardship and responsibility for longer-range social goals are gradually disappearing from the "culture" of public administration and public service, to be replaced by a short-term compliance mentality merely concerned with a checklist of specific outputs.\(^5\)

The New Zealand experience is the stimulus for this essay but I am not here, offering a detailed critique of the New Zealand case in specific terms. I draw on literature from OECD countries to highlight general trends and issues concerning the rise of the contract state as a global phenomenon. My project is partially an exercise in what Giddens conceptualises as "utopian realism";\(^6\) at its core are general questions about the place of rights, social citizenship as a fundamental status, the threat posed to social citizenship by the currently

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\(^6\) Anthony Giddens, Beyond Left and Right: the Future of Radical Politics (1994). Giddens sets out a framework for utopian realist radical politics. He argues that restructuring the major institutional dimensions of modernity requires: the repair of damaged solidarities, for example gender and ethnic relations; reconciling individuality and interdependence; recognising the centrality of life politics - the politics of how we live together; generative politics - empowering individuals and groups to make things happen; dialogic democracy - dialogue and decision making beyond pre-established forms of power and representation; positive welfare - active mobilisation rather than reactive welfarism; and respect for an overriding ethic of non-violence in human affairs.
hegemonic ideology of commodification, the reduction of all human transactions to monetary equivalents for sale, and the technology of contractualism.

Part II of this essay highlights some dimensions of modernity, including social reflexivity, detraditionalisation, globalisation, and the "risk" society. Part III examines the logic of the commodity form after feudalism, questions the assumption of progress in the movement from status to contract, from *gemeinschaft* society to *gesellschaft* society, and identifies the power imbalances structured into "contractualised" social relations. Part IV explores the scope and limitations of the mid-twentieth century experiment to decommodify social relations through the KWS and a notion of social citizenship. Part V interrogates the conceptual underpinnings of post-Fordist contractualism, the contractualisation of citizen/state relations through the medium of the NPM and its ethos of entrepreneurial governance. Part VI sketches out signs of a revived notion of social citizenship to sustain the ethic of humanity and universalise membership in the social order beyond nationalism, as defined in traditional terms either as constitutional patriotism or as ethnic exclusionism.

The project is tentative and partial but aspires to identify not only the threats to, but also the prospects of, an alternative social order recognising social citizenship. Such an order is based, globally and locally, on a post-scarcity economy, dialogic democracy, negotiated power, and the sustainable reconciliation between nature and the needs of humanity.

**II. ADVANCED MODERNITY**

The contours of advanced modernity provide a contextual framework for exploring the trajectory of social, political, economic and legal change. Important features of the topography within the conceptual grid I am using include: simple and reflexive modernisation; detraditionalisation; globalisation; and the phenomenon of ecocidal manufactured risk—captured in the "risk society" concept.

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A. Simple and Reflexive Modernisation

Avoiding crude before-and-after theorising, sociologists Giddens, Lash, and Beck, jointly and separately, analyse the character of modernisation in terms of movement from "simple modernisation to reflexive modernisation", meaning in part a movement from post-feudal to post-traditional society.\(^8\)

The period in which we are living is presently characterised by the contract state and the post-Fordist, liberal productivist political economy.\(^9\) There remains a considerable interpenetration and interplay among dimensions of simple and reflexive modernisation in both local and global terms.

Briefly, \textit{simple modernisation} includes these attributes:\(^{10}\)

\begin{itemize}
  \item pre-Fordist and Fordist capitalism, characterised by the productivist ethic of economic growth and the conquest of nature;
  \item geographical segregation of peoples and cultures despite colonisation;
  \item an epistemology based upon Enlightenment truth derived from rationality and positivist methodology;
  \item majoritarian representative democracy principally for the bearers of civil and political citizenship rights and, briefly, social rights;
  \item the rise of the minimal\(^{11}\) or residual, pre-Fordist state, and subsequently the Fordist, Keynesian welfare state; and
  \item simple reflexivity in which conceptions of self and identity remain given by fate though founded on minimally re-negotiated traditional conceptions of status, social position and gender.
\end{itemize}

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\(^9\) On the political economy according to the Regulation School see Alain Lipietz, \textit{Towards a New Economic Order: Post-Fordism, Ecology and Democracy} (translated 1992). For the related analysis of 'after-Fordism' and generally on post-Fordism see Ash Amin (ed) \textit{Post-Fordism: A Reader} (1994). On 'after-Fordism' in relation to New Zealand see Mike O'Brien and Chris Wilkes, \textit{The Tragedy of the Market} (1993); Paul Havemann, "Regulating the Crisis: from Fordism to Post-Fordism in Aotearoa/New Zealand 1984–1993" (1994) 18 (1) Humanity and Society 74. After-fordism is probably preferable to post-fordism. See Mark Elam, "Puzzling out the Post-Fordist Debate: Technology, Markets and Institutions" in Amin, supra at 65 ('after Fordism' is probably a better label for the epoch than post-Fordism' since many traces of Fordism remain and the full character of the next epoch of modernisation is only emerging now).

\(^{10}\) Supra n 6 at 78-103.
Reflexive modernisation is characterised by, for example:

* the post-Fordist economic order evidenced by an acceleration of the massive polarisation of rich and poor;
* continuing local and global violence;
* continuing polarisation around competing ethno-nationalism;
* the emergence of social reflexivity;
* the rise of the ethic of humanity and the human rights nexus;
* de-traditionalisation and re-traditionalisation;
* globalisation and the continuing hegemony of international capitalism;
* the unprecedented de-naturing of nature through the manufacture of ecocidal risk;  
* epistemologies privileging and negating multiple truths;
* majoritarian "democracy" of elective dictatorships;
* increased surveillance and information control by unaccountable public and private entities controlling information and communication along the super highway;
* the demise of citizenship and the demand for post national membership; and
* the contracting out of the state.

Giddens summarises this in terms of four sets of global "bads" which threaten "modern civilisation" (Diagram 1, expanding on Giddens\(^\text{13}\)).

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\(^{13}\) Supra n 6 at 100.
Two aspects of the social reflexivity which is at the core of reflexive modernisation, namely detraditionalisation and globalisation, merit special attention by “utopian realists”. These aspects of social reflexivity offer prospects of “goods” to counter the avalanche of “bads”—even, possibly, the almost overwhelming spectre of ecocidal risk being manufactured by humankind in the name of progress which Beck describes as the “risk society”.

**B. De-traditionalisation and re-traditionalisation**

Social reflexivity\(^{14}\) provides the individual and the collectivity with a capacity for detraditionalisation,\(^{15}\) or liberation from some traditions and the ability to construct new ones. Tradition consists of sets of seemingly unchallengeable “givens” which have constructed, for example, class, ethnic, national, denominational and gender identities, as natural. Detraditionalisation, as used here, does not mean the radical demise of tradition conceived in terms of movement between oppositions (such as closed v open, fate v choice, security v risk) but the co-existence of the old with the new and indeed the construction of tradition.\(^{16}\)

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\(^{14}\) Ibid, 82-85.

\(^{15}\) Supra n 2.

\(^{16}\) Ibid, 2-3.
In individual terms, the consequence of theories of detraditionalisation is a focus on the possibility that the self and identity may be constructed through conscious and deliberate narratives for understanding and reconstituting one's ascribed and achieved identity. Everyday life is lived as an experiment in shaping identity, both body and soul. Either liberation or bondage can result, as the phenomenon of anorexia sadly illustrates. Detraditionalisation is likely to destabilise the equilibrium, such as it may be, of our dominant institutions including those of cultures such as indigenous First Peoples where traditions, invented and otherwise, continue to have great salience.

A key attribute of advanced modernity consists of social movements to challenge those traditions embedded in, and constituting, the authoritarian structures and ideological apparatuses of political, economic and interpersonal/familial governance which are inimical to human wellbeing. These challenges have come from the global and local "new social movements" for social equality, for minority and indigenous rights and racial tolerance, for peace and international understanding, for ecumenicalism, for women's rights, and for a post-material understanding of the relationship between humankind and nature.

These "new social movements" are examples of social reflexivity in action. Humble and beleaguered as they are, they generate the human rights discourses which constitute a vision of global and local social citizenship. The movements, and the individuals whose self-constituting narratives are influenced by and influence them, are at the heart of the process of detraditionalisation, creating a so-called "post"-traditional civil society. In post-traditional society traditions are declared, justified and re-invented in the face of a multiplicity of alternative practices, mores and identities.

Detraditionalisation and retraditionalisation lie at the core of what Gramsci would call counter-hegemonic struggles against hegemonic "commonsense" (traditional) ideological narratives, discourses which shape the way people understand reality and their place in the social order, constituting that social order.

Some theorists highlight a paradox posed by this focus on a greater social reflexivity in the process of identity construction: just as it should be possible to bring about meaningful social change to combat global and local "bads", a process of individualisation inhibits collective initiatives for change.


Heelas prefers to focus "on things not being worse" and argues that the essence of the counter-hegemonic struggles of the post-WWII epoch is the "ethic of humanity" represented by the proliferation of human rights.

From a utopian realist perspective, the ethic of humanity is now the dominant humanistic liberal tradition of advanced modernity and can provide some of the ideological material from which to build "glocal" (both global and local) social citizenship based on universal rather than national personhood.

C. Globalisation

It is important to distinguish between the meanings of globalisation. Is it an empirical assessment about, say, the economy? Or are we talking about trajectories of ideological change in, say, cultural values, or normative justifications for institutional design?

Paul Hirst and Graham Thompson argue cogently that the extreme thesis that we now have a globalised economy controlled by transnational companies ("TNC's") is a myth. They suggest, instead, that there is still predominantly a highly inter-nationalised economy. News of the demise of the nation state is exaggerated—indeed, the nation state and supra-national entities have become all the more important agents of international governance. Globalisation of the economy controlled by feral TNCs beyond the law and accountable to no organised polity, is but one scenario. It is one which is invited by the re-commodification of social relations and the contraction of citizenship.

I am principally concerned with globalisation in terms of the global and local trajectories of ideological change in advanced modernity. In particular I am concerned with dimensions of change which may be identified as countervailing forces against an amoral, global lawlessness. My focus is the aspect of globalisation reflecting processes through which the multiplicity of dystopian and utopian alternatives gets disseminated and popularised.

Ronald Robertson delineates phases of "political economy" globalisation culminating in the present uncertainty phase, which he identifies with the

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rise of human rights discourse. These phases are paraphrased as follows:

1. **the germinal phase** (mid-15th—18th century): inter-connected national communities arise while the medieval theocratic transnational system goes into demise;

2. **the incipient phase** (mainly in Europe mid-18th century—1870s): issue of nationalism/internationalism emerges; transnational entities evolve with conventions for peace and commerce;

3. **the take-off phase** (1870s—mid 1920s): internationalism takes institutional forms, nation is conflated with self; there is action and reaction on the international stage, including World War I and the League of Nations;

4. **the struggle-for-hegemony phase** (1920s—mid-1960s): East and West struggle to define the terms of the globalisation including World War II, the holocaust, the Cold War and mutually assured nuclear annihilation, and the United Nations;

5. **the uncertainty phase** (1960s—present): while crisis tendencies are displayed in the 1990s, there is also increasing global consciousness, inclusion of the Third World, accentuation of post-materialist values, polyethnicity and multiculturalism, etc. Conceptions of individuals are rendered more complex by gender, ethnic and racial considerations. Civil rights movements develop. International relations become more fluid and bipolarity ends. Concern with humankind as a species-community is greatly enhanced. Interest in world civil society and world citizenship grows. Consolidation of global media system.

Robertson argues that globalisation is not only about the modernisation of yet more voracious forms of capitalist development, the racialised international division of labour, and gross regional inequalities. His focus on “goods” as opposed to “bads” provides a useful counterbalance to the pessimistic, and possibly disempowering, analysis contained in this paper. The close juxtaposition of “goods” and “bads”, though, must be kept continually in sight.

Mass air transport and the information and communication ("I & C") "superhighways" produce a global culture. The question is whether these super highways promote understanding and active trust, or merely constitute

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a community of strangers consuming and coveting the same material symbols in the night-free business day, highlighting bizarre juxtapositions of wealth and poverty, traditional and post-traditional values, and so on?

Far from offering access to alternatives which empower individuals and communities and protect cultural identity, modern globalisation—like its precursor phases—may fragment and deskill local cultures. The mass tourist industry supposedly redistributes wealth while at the same time domesticating “difference”, which becomes commodified into synthetic and marketable exotica. A “McDonaldized” global society is emerging in which the choice of “good cheap food” diminishes for growing numbers of people. Race, ethnicity, region and gender continue to be markers of superiority and inferiority in numerous, high stakes, violent contests over scarce resources.

The new information technology has revolutionised access to local and global communication systems for countless people and serves many beneficial purposes. Yet new elites have emerged to control the information and communication expert systems. A “new” poor, incorporating the “old” poor and a few more besides, emerges whose impoverishment now acquires an added dimension through their lack of access to the I&C systems in the information age.

Whether social reflexivity is enhanced or stultified by the I&C “superhighway” will depend on how many free passes are allowed through its toll-gates. Some hope that the new I&C systems will enhance and universalise the capacity for social reflexivity. A real fear, however, is that as social public institutions are replaced by I&C systems organised on contractualist lines, people who are unable to access these largely commercial, user-pays, systems will be disenfranchised from incorporation as glocal citizens of the cyber-polity. They will thus become powerless non-persons in an age when information-based social reflexivity is the essence of identity and information is the key to participation in public affairs.

In after-Fordism, the state’s relationship with local and transnational capital has been significantly changed. Fordism was the era of mass production

28 In New Zealand the Labour Government 1984-1990 sold off the Government Print; a private sector retailer now sells access to the laws of New Zealand, and a licence to sell access is held by the Knowledge Basket, a user-pays electronic data base. The scene is set for creating prohibitively costly toll gates on the super highway unless rights of access to this type of information are quarantined into a decommodified ‘public’ domain.
29 Beck, supra n 8 at 110-113.
economies and KWSs. Capital is now re-organising itself into new forms of monopoly, oligopoly and transnational entities. The “community” of nations struggles to respond, rather than defining how to respond, institutionally and normatively, to modern aspects of globalisation such as ecological devastation, labour force mobility and continuing, geo-politically disruptive, regional inequalities of wealth.

One of the most dystopian dimensions of contemporary modernity is the risk society, which is the age of local and global ecocide and genocide that poses manufactured threats to all life on the planet. It is no coincidence that the most evident manifestation of social reflexivity has been the counter-hegemonic, post-materialist, new green social movements, alongside and in tandem with the women’s, peace, and social justice movements.

Rights talk reflecting the discourse of these movements has emerged at great pace since the 1960s. This talk articulates a multi-layered set of transformative human rights obligations within both national and international political-juridical structures which now inform and re-inforce each other. Underpinning this rights discourse is the universal application of the ethic of humanity to all by virtue of their personhood. This is intended to constitute a global social citizenship by challenging the gendered, ethnic and regional antagonisms arising out of structured inequality, as well as to promote stewardship of the ecosystem.

First generation civil and political rights, and second and third generation social and economic rights are now increasingly entrenched in municipal and international rights talk. For example, the International Covenant on Social, Economic and Cultural Rights (1976), the Maastricht Treaty on European Union, Protocol on Social Policy (1994), the European Union Charter of Fundamental Rights for Workers (1994) and some of the economic and social rights provisions of the new South African Constitution (1996) contain concrete provision for social and economic rights in increasingly justiciable forms. This concrete expression of the ethic of humanity is probably the most significant juridical-political statement made in the uncertainty phase of globalisation, and it provides a basis for global social citizenship anchored in nation states but carrying post-national membership in a supra-national polity.

Universality is inherent to such citizenship which must replace citizenship based on ethnic and national identity and their concomitant denotations of exclusivity.  


D. The Risk Society

Reflexive modernisation signals the end of nature and the end of tradition as they were previously understood:

Tradition, like nature, used to be an "external" context of social life, something that was given and largely unchallengeable. The end of nature—as the natural—coincides with the end of tradition—as the traditional. Social reflexivity is both condition and outcome of a post-traditional society.32

The age in which we live is one of "manufactured uncertainty"33 about unprecedented high-consequence risk. Beck's view is that post-traditional society is a world risk society: "risk societies are ... those societies that are confronted by the challenges of the self-created possibility, hidden at first, then increasingly apparent, of self-destruction of all life on earth."34

As territorial inequalities are magnified, international and local politics will increasingly become the politics of the management of scarcity and the management of high-consequence risks. Such risks frequently take the form of invisible but irreversible processes of ecological degradation and related pandemics.35 The new socially reflexive social movements such as the anti-nuclear movement must, therefore, continue to challenge the organic intellectuals (lawyers and scientists) of traditional state and corporate bureaux who have monopolised the social definition and construction of risk and the modes of harm attribution.

The costs of harm have been distributed via simplistic and monolithic causal paradigms in law, such as torts and criminal law. The hyper-specialised natural sciences reflected are employed to rationalise environmental policies based on the denial of, for example, the acid rain problem by the USA and UK, or the carcinogenic character of industrial chemicals almost everywhere. The "science" of positivist economics reduces harm to a transaction cost and the ecology to an externality. The limited and compartmentalised explanatory paradigms in science, law and economics divert us from an holistic understanding of the character of risk and harm for humankind.

Yet there are signs, such as the anti-nuclear and women's health movements, that detraditionalisation is gradually having the effect of decoupling the power-

32 Supra n 6 at 85.
33 Ibid, 78.
and-knowledge-about-"science" equation from the traditional experts and re-coupling the equation to a more democratised expertism. Hitherto specialised "professional" expert knowledge becomes politicised. The development of the precautionary principle\(^{36}\) in international environmental law and the recognition of inter-generational\(^{37}\) obligations and rights in municipal and environmental law perhaps signal an altered consciousness of risks, their aetiology and their consequences in the law.

In the risk society, avoiding risk involves fundamentally reorganising the political power and authority which presently legitimates the prevailing order, profit, and property interests. Today risk avoidance is not simply devising better "technical fixes", though much official discourse still sounds more like risk "evasion".\(^{38}\) Examples of this trend include attempts to commodify the uncommodifi able (irreversible ecological degradation, species extinction) through mechanisms such as carbon taxes, the commercial definition of "adverse effects" and other "economic instruments".\(^{39}\) Little robust institutional and normative legal regulation is yet in place at the municipal or international level to protect the environment and avert catastrophe. As Beck says: "the lack of provision for catastrophe exposes the bewitchment with reason...the false belief that the twentieth century is only a continuation of the nineteenth."\(^{40}\)

This mindset becomes all the more evident when we examine the resuscitation of nineteenth-century technologies for the re-commodification of social relations at the tail-end of the twentieth century. It is to commodification as a dimension of modernisation that I now turn.


\(^{40}\) Beck (1995), supra n 12 at 67-68.
Post-feudal industrial, or simple modernisation was effected by mass production and commodification in the form of coercive contractualism in the labour market. Deep class antagonisms resulted. By the 1930s an historic compromise of these class antagonisms was being forged to legitimate and sustain capitalism so as to "modernise" the modernisation process itself. The historic compromise (Fordism) consisted of the partial de-commodification of social relations through the KWS in the form of the proliferation of status relationships. This partial de-commodification was achieved under the umbrella of welfare state social citizenship and the moderating influence of consensual contractualism in the labour market.

In the twilight of the twentieth-century, which still eludes complete analysis, we are offered a range of labels for the present, such as advanced or high modernity, disorganised capitalism, "after-Fordist" or "post-Fordist".

The analysts of the new phase of modernisation on whose work I am drawing seem to agree that the current re-commodification of social relations is happening with the hegemony of the market, rather than the state, as an organising structure and dynamic. The current trend resembles the way law, state and social relations were engaged in the nineteenth century before the mediating influence of unions and humanitarians began to soften the hard-edged, draconian contractualism of the first industrial revolution. Social citizenship and other recently de-commodified status relations are again being commodified, while the state is being hollowed out by the use of innovative and traditional forms of the legal technology of contractualism.

A. The Logic of Commodity Form and Legal Form

Marx's critique of modernisation as he analysed it in Capital volume I centred on its "fetishism of commodities". Capitalism, he argued, fetishised the commodity form, "naturalising" the inherently unnatural, unequal, social exchange relations of the market. The process of commodification involved the construction of a coercive, though apparently consensual, social order in which every human transaction was seen as commodifiable, reducible to a

43 Post- or neo-Marxist sociologists, supra n 3; supra n 6; supra n 8; supra n 12; supra n 41; Scott Lash and John Urry, The End of Organised Capitalism (1987); Bob Jessop, Conservative Regimes and the Transition to Post-Fordism (1988).
monetary equivalent and able to be traded in the market. These transactions were legitimated by the fictive freedom to make voluntary contracts. Egalitarian, property-owning post-feudal social relations would thereby be established.

Contract and legal personality (bestowed on individuals and corporate entities) were the legal forms which underpinned the structuring of society in terms of the market. For capitalism to operate, "persons" must relate to each other almost exclusively as commodity owners who are equal before the law, and who exchange property rights through contract (or through treaties between indigenous First Nation peoples and colonists).

The universal legal subject, the recognisable legal person, is the entity, human or corporate, with the capacity to enter "freely" into contractual relations.

Contractualism lies at the centre of the societal paradigm of post-feudal modern society. Liberalism, the "Siamese twin" of capitalism, constructs citizen-state relations in terms of the "social contract" determining life, liberty and property. The social contract is both repressive in its contractualist form and emancipatory in its elevation of citizen and state into the relationship of "bargaining partners".

B. Commodification: from status to contract?

Maine's identification of movement in progressive societies from status to contract illustrates the thinking of the organic intellectuals of modernisation. The centre of this universe was the new possessive (male) individualist, the rational actor. He became the ideal-type, the template for the governing self-identity. The market became the organising framework for society's external forms of organisation to accommodate his activities. In liberal ideology, public and private spheres became dichotomised. This binary allowed social exchange relations, such as those in the family or altruistic caring for strangers, which were resistant to commodification, to be relegated to the peripheral realm of supposedly non-market transactions based on love.

46 Roberto Unger, Law in a Modern Society: Toward a Criticism of Social Theory (1976) 135.
and charity. The heavily gendered character of the public/private dichotomy is eloquently emblematic of the patriarchal capitalist societal paradigm. 48

The idealised goals of individuals in post-feudal society were to own private property and to accumulate wealth in the free market. Capitalism and liberalism epitomised by legal possessive individualism and rhetorical egalitarianism 49 were protected by the necessary but limited social contract-based state. Legal ideology expressed this form of social consciousness through the contractual form and the associated untrammelled "freedom" of contract which synthesised liberalism and capitalism. Interestingly, Weber even saw the exercise of public duties under feudalism as essentially contractual. 50

The liberal ideal of contractual, consensual, choice-based transactions is a most laudable aspiration. A self-enforcing exchange system in which both parties benefit and neither is exploited seems perfect. The feudal command chain, on the other hand, connotes coercion, hierarchy, and probably benefit for only one party. As even the most humble consumer knows from the standard form contracts governing access to the necessities of life, such as utilities, insurance, mortgages, wages, and workplace health and safety, 51 the promise of freedom and equality of bargaining power and the mutuality of being consensus ad idem are more rhetorical than real. Yet herein lies the contract-versus-command distinction which continues to make the post-feudal, commodified, modern social order so ideologically saleable.

For all but powerful people the contractualist freedom-talk and the rights talk which purports to execute it are empty. Economic liberals such as Hayek and his followers 52 have argued for the market as the best guarantor of freedom from serfdom. Yet the market is not a useful tool for distinguishing coercion from consent, or command 53 from choice, as economic liberals would have us believe.


Norman Lewis has recently responded to Thatcherite economic liberalism from a social democratic perspective. He argues cogently that choice is only really possible from a position of relative economic and psychological wellbeing in a participatory, pluralist communitarian civic order in which second generation social and economic human rights, citizenship, and community are recognised as core values by the constitutional order. Human rights in a positive, communitarian framework are a far cry from negative rights designed to protect the atomised, possessive individual from interference from the state or another while pursuing "his" chosen public and private activities. The new contract state is predicated on classical contract assumptions, yet little constitutional or institutional apparatus actually exists to enforce contracts for public services. The lack of such apparatus compounds the problems of adapting this private law technology to the public sphere, a subject to which I return in detail below.

For weaker parties, the contracts which make a real difference to material wellbeing and survival are usually "unfree". Only if we are wilfully blind to power differentials can we see a distinction between contract and command in these transactions. Choices are mostly between bad and worse deals.

Even obedience to general laws, which supposedly reflects an honouring of the "social contract", is obedience to rules for reasons of prudential self-interest. Obedience is obtained not necessarily because of voluntary "ownership" of the norms. Often the norms are ones that few have participated in crafting. Women, the working class and indigenous peoples and minorities, for example, have had precious little voice in constructing the dominant liberal legal order.

C. Commodification: From Gemeinschaft to Gesellschaft Society?

Nineteenth century analysts of the societal form, rather than students of the legal form, detected the end of simple reflexivity and the start of detraditionalisation. They also coupled modernisation with the rise of contractualism. Tönnies, a zeitdiagnostische sociologist, charted the passage from Gemeinschaft (organic community) to Gesellschaft (contractual association) societies. For Tönnies, Gemeinschaft feudal society was characterised by tradition and by hierarchies of status and identity embedded in the permanence of kin-based communities. Gesellschaft modern industrial
society is characterised by impersonal, bureaucratic, and transient relationships based on the voluntary contractual association of equals. Fraternal bonds and kinship are displaced by contractual relations between a community of strangers in the marketplace. 57

Even prior to the Fordist period of the mid-twentieth century a lament for something lost in the progress to Gesellschaft, or at least a warning of what progress would bring, manifests itself in the writing of Tönnies and Weber. Weber recognised that radical changes to the distribution of power between classes, defined by their relation to the means of production, had come about. He wrote in 1909:

In an increasingly expanding market, those who have market interests constitute the most important group. Their influence predominates in determining which legal transactions the law should regulate by means of power-granting norms. 58

The KWS reflected recognition of the limits of individualism, and yearning for some non-commercial Gemeinschaft. By the first third of the twentieth century Gesellschaft was not regarded as an effective basis for the legitimation of all fundamental legal and political attitudes in liberal democracies. The architects of the KWS of the Fordist era were aiming for the partial decommodification of social relations and the revival of the notion of "community", albeit in a synthetic form, to recapture the best dimensions of Gemeinschaft 59 society.

IV. DE-COMMODIFICATION

A. Citizenship: From contract to status?

The Fordist welfare state or KWS which began evolving in the 1930s represents an historic class compromise which was a trophy of working class struggle 60 as well as being profoundly functional 61 for capital and its growth. The KWS also reflected many aspects of the process of reflexive modernisation and progress towards a post-traditional society.

57 Ibid, 668.
58 Ibid, 669.
60 Lipietz, supra n 9.
In 1950 Tom Marshall, a British social theorist, argued that the core idea of the welfare state was the expansion of citizenship beyond civil rights (individual freedoms such as freedom of speech, religious freedom, and the freedom to enter into contracts) achieved in the eighteenth century and earlier, and beyond political rights (such as the near universal franchise achieved by the start of the twentieth century), to include social rights (such as rights to welfare, education, healthcare and old age security). Citizenship was a cumulative bundle of civil, political and social rights to be realised through the welfare state.

Marshall promoted this idea of citizenship as a means of closing the cleavages of class arising from both feudal and capitalist social relations in postwar Britain. Citizenship was to serve as the integrative and emancipatory status to counter divisive class status. Marshall based his integrative strategy on the assumption that there was a common “civilisation” or style of life to which citizenship would give everyone access. His ambition might now be construed as a social engineering programme to assimilate the working class into the middle class. Interestingly, though, his idea parallels Therborn’s proposition that the welfare state emerged out of a double historical process, “...a process of market expansion and a countermovement of protection against the market.”

The KWS revived status, not contract, to achieve a more egalitarian society. The welfare state, recently though only briefly, became a vehicle for de-commodifying some social relations through recognition of social rights conferred by citizenship status. Esping-Andersen explains the contingencies for this:

If social rights are given the legal and practical status of property rights, if they are inviolable, and if they are granted on the basis of citizenship rather than performance, they will entail a de-commodification of the status of individuals vis-à-vis the market.

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64 Supra n 61 at 240.
B. De-commodification? Citizenship, Fordism and the KWS

In the USA, citizenship-related welfare entitlements have been strikingly characterised as "the new property", rather than as "welfare rights", in order to legitimate their justiciable form. This development is consistent with Offe's assertion that the stability of the Fordist welfare state depends upon the reconciliation of divergent structural conditions by the incorporation of every citizen into a commodity relationship. Citizenship is an asset, yet the decommodification of some social relations is necessary to sustain the legitimacy of the welfare state compromise.

According to Lipietz, of the French Regulation School of political economy, Fordist modernisation rests on a tripod supported by: a mode of social regulation, a labour process, and a regime of accumulation. The mode of social regulation comprises the KWS social legislation, both regulating the labour market in terms of collective agreements and conferring decommodified welfare right entitlements which would sustain the citizen's ability to consume whether employed or not. The labour process is based on the scientific management principles of Taylorism which separate conception from execution, that is, mental from manual processes of production, within large vertically integrated enterprises. In compensation for the alienation arising from this labour process, workers are offered a share in productivity gains. The regime of accumulation is premised on mechanised mass production leading to substantial growth in productivity (and over-production) from economies of scale, stable profits, docile and productive workers, full production, and full employment.

The focus of this essay is the mode of social regulation and its role in balancing the tension between commodified and decommodified social relations. Aglietta, also of the Regulation School, usefully describes this mode of social regulation as comprising a complex ensemble of social norms and habits, state forms, institutionalised compromises, rules of conduct, and enforceable laws representing a set of codified social relations. In the Regulation school's paradigm of Fordism/after-Fordism for periodising phases of modernisation, the mode of social regulation can be understood as the social context, in particular the juridical-political framework, in which economic activity occurs. The mode of regulation guides and sustains the labour and accumulation processes. Social regulation and accumulation exist in a dynamic relationship.

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67 Amin, supra n 9 at 2-8.
69 Elam, supra n 9 at 65.
The mode of social regulation is defined by the political-economy of the regime of accumulation but also plays a significant part in shaping the course of accumulation. In their time Maine, Weber, and notably Marx, with his base/superstructure dichotomy, were all attempting to understand and explain this interactive relationship.

Much Marxist writing, such as Pashukanis', adopts a rather instrumentalist approach, tending to over-emphasise the extent to which the state is a mere creature of capital. The superstructure is seen as almost invariably determined by the economic base. The state, policy, and law are determined by the market. In the analysis of the Regulation school of political economy a more dialectical, "structurated", interplay between base and superstructure is recognised in the interactions between the mode of social regulation and capital accumulation. "Structuration" explains the dynamics of change in which structures such as the state and the market are understood as both constraining and changing in relation to each other.

Offe suggests four functional conditions for the maintenance of the political power which constitutes the KWS in its particular institutional form. These illustrate the structural interactions which constitute the Fordist phase of modernity:

Regime of Accumulation and associated labour process:
* private production guided by market rationality;
* private wealth accumulation which is beyond the power of the state to organise but upon which it is dependent.

Mode of Social Regulation and associated societal form:
* taxation constraints on private production generating the revenue to sustain the KWS political process;
* democratic legitimation flowing from the democratic process and the capacity of the state to deliver wellbeing in de-commodified and commodified forms.

71 Havemann, supra n 9.
72 Jamie Peck and Adam Tickell, "Searching for a New Institutional Fix: the Post-Fordist Crisis and the Global-Local Disorder" in Amin, supra n 9 at 281-315; Bob Jessop, "Post-Fordism and the State" in Amin, supra n 9 at 251-279.
74 Supra n 41 at 120-121.
The KWS is understood as a (crisis) management vehicle, in which de-commodification both mitigates the brutalising rationality of the market and promotes the viability of the market. The market is dependent upon non-market state interventions which are affordable only because of the market. The KWS maintains and protects the continuity of capitalism by establishing a set of institutions, rights and entitlements which transform it. This is the Fordist compromise.

Minimal (residual) states where commodification through contract defined social relationships and where the family and charity met private needs were replaced by the Fordist KWS. Successful welfare states compromised class antagonisms. They were a condition and outcome of increased reflexivity which came about through the extension of the franchise to all, the rise of labourist/social democratic parties, strong union movements, social democratic governments, sustained economic growth, class solidarity, weak ethnic, linguistic, or denominational cleavages, and war.

In the ideal, the proletarian welfare state of the Fordist period promised a mode of social regulation asserting workers' rights to a living, to occupational health and safety, to income security, to some redistribution of wealth, and to universal rather than selective access to public services. Social relationships would be significantly de-commodified beyond charity and family. De-commodification, while intrinsic to the Fordist societal paradigm (or organised capitalism), was not a harbinger of a socialist future. Yet de-commodification created important opportunities for a vulnerable yet expanded definition of social rights and citizenship. Such de-commodified social relations and notions of citizenship were, however, distorted to promote modernisation in a slightly more reflexive form.

The distortions created a compromised welfare state citizenship which privileged the productivist mode of capitalist development (reflected in the de-naturing of nature, fetishing of economic growth and racialising of the division of labour), and white male labour's interests.

New social movements from the Left (feminists, Marxists and anti-racists) and the Right (economic liberals or the New Right ("NR")), as well as those

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77 Goran Therborn, "Karl Marx Returning" (1986) 7(2) International Political Science Review 155.
aiming to transcend both Left and Right (the green post-materialists) roundly critiqued the KWS and the Fordist compromise.80

C. The Crises of Legitimacy for the KWS and Citizenship

In the 1970s the KWS faced two interrelated global and local crises, a fiscal crisis of the state and a crisis of legitimacy for the KWS consensus. The core contradiction of Fordism was the very essence of the local crises. It seemed no longer possible for many welfare states to sustain the compromise which allowed the conditions for profitable accumulation to continue and at the same time for sufficient tax revenue to be collected and for the spending power of individuals and the state to be sustained and enhanced in order to give legitimacy to the KWS.81

The most telling critique of the KWS came from the NR, which appropriated aspects of Left critiques. The welfare state was:

* **Uneconomic:** it created disincentives for capital and labour to perform rationally in the marketplace,

* **Unproductive:** it encouraged spending on the public sector rather than investment in productive enterprises,

* **Inefficient:** it was captured by public service provider monopolies to perpetuate their aggrandisement rather than respond to consumer needs,

* **Ineffective:** it perpetuated a "cycle of dependence" through hugely costly and disabling social programmes in defiance of evidence that "nothing works",

* **Oppressive:** it required a progressive, i.e. confiscatory, tax regime to provide services offered by a state monopoly, thereby denying citizens choice about what to do with their money,

* **Despotic:** it intruded arbitrarily and imposed social controls, justified in paternalistic terms, which resulted in institutionalisation, a culture of dependency and alienation.82

The readily perpetuated conclusion was that the KWS was inimical to the interests of the very citizens it purported to assist.

80 Supra n 76 at chapters 2 and 3.

81 James O'Connor, *The Fiscal Crisis of the State* (1973); supra n 76 at 141-178 (discussion of the contestation around this phenomenon).

82 Supra n 76 at 48.
In spite of the libertarian tone of some of the freedom talk in the NR critique (and the associated Left critiques) which one might have expected to translate into rights and citizenship talk, these were themselves also targeted. Citizenship, it was argued, was not a one-sided set of rights; it included obligations as a condition of shared entitlement. Citizenship was conceptualised in social contract terms. A line in the critique was that the Judaeo-Christian (and Marxian) ethic “from each according to their ability; to each according to their need” had simply become “to each according to their need (desire?) as of right” in the welfare paradigm. Ignatieff suggests that the ethical foundations of the welfare state were eroded by the steady trivialisation of rights and obligations by welfare rights talk; he calls on the Left to abandon nostalgia for the compassion of “the old civic contract”.

The fiscal crisis of the welfare state was even explained by social democrats in terms of the practice of welfare states to be needs- rather than resource-driven. It was argued that the insatiable needs of diverse interest groups endemic to the welfare state culture, when translated into rights, provided no criteria to rank competing claims for priority. Since the 1980s, rationing and regulating of social services, and the hegemony of market liberalism have displaced the so-called needs-driven Fordist welfare state in many OECD countries. Clearly emerging “after Fordism” and after the welfare state is a re-commodification of social relations. In particular this is evident in changes to the mode of social regulation, which is increasingly based on notions of contract rather than status. Many hitherto public services or publicly owned assets have been privatised. Selectivity and user pays access to public service is wider spread. The labour market is increasingly characterised by individual or site contracts rather than national collective awards. In the next part of the essay I turn to the phenomenon of entrepreneurial governance or the re-invention of government. There has been a radical redesign of administration of the state (re-invention of government) based on the principles of the NPM, especially contracting out the “rowing” while retaining the “steering”.

86 Supra n 83 at 52.
V. RE-COMMODIFICATION

After Fordism, the contract state and the re-commodification of social relations seem to have become the central features of the new mode of social regulation and the further modernisation of modernisation itself.

A. Political Economies After Fordism

The neo-Smithian and neo-Schumpeterian schools of thought in political economy\(^\text{87}\) attempt to explain the movement from Fordism to "after-Fordism" as a distinct epoch in economic or technological terms.

The *Neo-Smithian school* follows Adam Smith's postulate that the optimally functioning market uses each unit of labour to its fullest extent in executing a single task, thereby extracting maximum efficiency by the refined division of labour. The first epochal "industrial divide" was the industrial revolution, led by the division of labour which made economic growth possible by harnessing the technological innovation of mass production and, later, Taylorist scientific management techniques. The movement from Fordism to after-Fordism is explained in terms of an altered labour process which is bringing about a movement from rigid mass production to flexible, specialised production by means of another technological paradigm shift, the new information technology. This is described as the second industrial divide. After-Fordism market expansion is associated with an increasingly sophisticated division of labour, operating in many productive fora, using an increasingly specialised labour process yet exhibiting greater flexibility in its response to demands.

The *Neo-Schumpeterian perspective*\(^\text{88}\) focuses more on the actual waves of change associated with techno-economic paradigm shifts. These paradigm shifts are identified with fundamental epoch-altering changes in the political economy. The industrial revolution is understood in terms of the changed techno-economic paradigm which cheap coal and steam allowed, while after-Fordism is associated with the information technology paradigm, globalisation, and the emergence of the I&C superhighways.

The *Regulation school* of political economy highlights the structurated interplay between the labour process, the mode of social regulation and the regime of accumulation. The regime of accumulation and the labour process

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\(^{87}\) Supra n 69; Michael Piore and Charles Sable, *The Second Industrial Divide* (1984).

\(^{88}\) C Freeman and C Perez, “Structural Crises of Adjustment, Business Cycles and Investment Behaviour” in Dosi et al (eds) supra n 70.
have been radically altered. A globalisation of mass production in pursuit of economies of scale has taken place to compensate for losses of productivity in national markets. Production in the form of flexible specialisation for niche markets has also emerged, altering and being altered by new patterns of consumption nationally and globally. A declining rate of profit, a declining tax base and the growing cost of social expenditure built into the KWS mode of social regulation in OECD countries has generated a structural crisis in the nation-state. Crisis management has taken the form of the globalisation of production by transnational capital, while the KWS has adopted austerity programmes for "downsizing" the public sector: public asset sales; privatisation; contracting out of state services; and other programmes.

The advantage of the Regulation school perspective is that its recognition of structuration avoids conceptual frameworks which are excessively deterministic and it incorporates recognition of the continuing role of the state and the mode of social regulation. Other schools over-emphasise market forces or technological paradigm shifts in their explanations of Fordism, or their explanations for the shape of the political economy after Fordism, at the expense of analysing the scope and limits of the regulatory role of the state. The Regulation school perspective facilitates more contextual analysis of the changing legal forms and state structures in the post-Fordist phase of modernisation.

B. Contractualism

After Fordism, the mode of social regulation reflects and promotes structural competitiveness of the polarised, globalised marketplace in which the state must increasingly operate. Contract is the legal form which crystallises this competitiveness by facilitating re-commodification. All social relations and public goods can become commodities to be bought and sold. Social protections for workers are subordinated to accommodate labour market flexibility and the cost constraints imposed by international competition on the labour process. The KWS is hollowed out and its essential core functions sold off or contracted out. Not only is shedding of state roles a significant technical innovation for introducing market rationality in the public sector, but contractualism also signals "a major re-drafting of some of the strongest assumptions about altruistic social exchange integral to an understanding of the welfare state."  

89 Elam, supra n 9 at 64-65.
90 Jessop, supra n 72 at 264-266.
91 Supra n 83 at 81.
The classical contract was designed to simplify the rules about the enforceability of legal promises between parties in the private commercial arena. A former New Zealand Law Commissioner summarises the contract form well:

In principle [contracts] are agreements concluded on an equal footing by two or more parties who freely consent and who freely settle the terms of the agreement. The parties usually are concerned only with protecting and advancing their reciprocal private interests. 92

The liberal legal discourse of contract reflects the post-feudal ideology of individual choice, enforceable rights and obligations, and consumer sovereignty. At its most simple, classical contract seems to be predicated on four elements:

* Consent—the parties consent to assume mutual obligations through a process of offer and acceptance,
* Capacity—the parties must have the legal capacity to form the intention to assume the obligation to the other party,
* Consideration—mutual benefit or detriment flow between the parties,
* Privity—the contract made between the parties creates rights and duties between the parties only.

Mimicry of the classical contract form in the redesign of the processes and structures supporting exchange relationships in the "contract state" public sector occurs in a variety of settings. The elements of classical contracts are seldom, if ever, evident in these "contracts" from the citizens' viewpoint. They are really inter-agency compacts. Alford and O'Neill suggest that the chief forms are:

* Intra-agency contracts within the public sector: whereby the minister (the purchaser/funder) contracts with a dedicated public service agency (the provider) for the delivery of public services;
* Public-private service contracts: contracting out/outourcing the purchase by government (purchaser) of public services to be provided by a private supplier (provider); and
* Privatisation/corporatisation: the creation of a context in which a formerly publicly owned and provided service is provided by a private provider to the individual consumer on market contract terms. 93


In each instance there is an intermediary between the citizen and the state which triangulates their relationship so that it is no longer recognisable as a de-commodified, publicly delivered service delivered by an accountable state official or agency to the citizen. Nor is the exchange in the form of a classical contractual relationship between citizen and provider. A vagueness about the outputs the citizen can specifically expect abounds, as it did under the KWS. This vagueness is a phenomenon that gave rise to the welfare rights movement. Hence, from the citizens' point of view, these transactions merely mimic contracts, even though there is a contract between the funder and the provider.

A number of questions and issues arise when considering the vicarious relationship the citizen has with the state arising from these "contracts":

* How can the contract between the purchaser and the provider confer enforceable rights or benefits on the citizen in these circumstances, as there is no privity94 between them?

* How can citizens invoke and enforce their rights against surrogates for the state?

* To what extent have citizens been given the opportunity to consent to these changes in the characteristics of the parties delivering services and the rights and obligations which flow between the citizens and these parties?

* What direct benefits to citizens are guaranteed as a consequence of the changes?

The assertion of social citizenship to overcome this lack of enforceability will entail a re-politicisation of rights claims, and the redesign and reinforcement of rights-enforcement mechanisms.

Contractualism has several other faces. Unions and collective awards, creating a status-like position for employees and employers, have been replaced by individual contracts in the labour market. Such contracts are now integral to the public service role, specifying outputs desired by government from senior public servants and offering incentives like performance bonuses to the public servants.

Governments are portraying the idealised public servant as super-efficient and ultra-accountable thanks to performance bonuses and rigorous output monitoring. The Schick Report raises questions about what has been lost as well as what has been achieved through contractualism. Schick speculates that the checklist approach to accountability may purge the ethic of public service responsibility.95 Job satisfaction, promotion and recognition within

94 Martin, supra n 92 at 39.
95 See Schick, supra n 5 at 52.
the service are not seen as sufficiently motivating to get the most out of public officials. Freedom of contract has become the rationale for de-regulation or re-regulation of market activities, environmental resource uses, and the labour market, privileging the needs of market players rather than the public good.

The revolutionary shift represented by contractualism can be highlighted by contrasting the distinctions between private enterprise and public service:

* **Private enterprise** through contract, *par excellence* between limited liability corporations, is geared for risk-taking, whereas
* **Public service** is about creating social safety nets for risk regulation and limitation and nation building, social harmony and social justice.
* **Private enterprise activity** is geared to profit maximisation utilising borrowed capital, whereas
* **Public service** is primarily non-profit and taxpayer-funded.
* **Commodification** is the essence of private enterprise, in which the tension between supply and demand is exploited for profit, whereas
* **De-commodification** is the essence of public service, in which the goal is to maximise access, i.e. to meet needs altruistically.

In the KWS model of public service provision, the state determined the eligibility of the individual citizen for services on the basis of rights, needs, and means. The state paid for or subsidised the service provided, and the state was the provider or selected the provider. Critics of the KWS consequently emphasised the paternalistic element of de-commodified state-citizen transactions, rather than its affirmation of citizenship as a status and the bundle of rights associated with freedom to live in modern society. In the private market model, by contrast, consumer sovereignty rules and the ethos of social Darwinism is affirmed. The "customer" decides whether or not to buy the service, "customers" pay for the service themselves, and "customers" choose the provider of the service. "The rich can sleep under bridges", if they choose, and public services "are open to everyone like the Ritz Hotel".  

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98 Supra n 83 at 83-97.
99 This passage is a popular paraphrase of two quotes. See Anatole France, *Le Lys Rouge* (1894) ch 7 "They [the poor] have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread"; RE Megarry, *Miscellany-at-Law* (1995) 245 "In England, justice is open to all like the Ritz Hotel" quoting Sir James Matthew (1830-1908).
The distinct approaches of the KWS and the contract(ing out) state to the management of needs, desires and scarcity are contradictory and difficult, if not impossible, to reconcile.

C. The Contract(ing [out]) State and New Public Management

The ideological underpinnings of contractualism and the contract state in the post-Fordist phase of modernisation are based on the deliberate conflation of public service and private enterprise. The clearest articulation of this administrative-legalistic technology is the NPM which has been very influential in New Zealand, the United Kingdom, the State of Victoria in Australia and the United States since the 1980s.\(^{100}\)

The NPM employs the contract form to facilitate the shift from needs-driven to resource-driven public services. The assumptions about human behaviour in the market which inform classical contract theory are extrapolated into the public sphere. The altruistic ethos of de-commodification is replaced by the egoistic ethos of commodification. The possessive individual of post-feudal modernisation is the rational actor in the contract state and the marketplace. The model of human behaviour as rationally egoistic, which was merely a heuristic device, an ideal type, for economic liberals, becomes the NR's defining paradigm for understanding human behaviour both normatively and ontologically.

At the heart of the NPM is rational (public) choice theory. Rational choice theory makes four basic assumptions:

* people's preferences are based on good information which they can rank and compare easily,

* people's preferences are logically consistent,

* people seek the greatest benefit for the least cost,

* people are egoistic and so base their choices on the consequences for their personal welfare.\(^{101}\)

When the public services/servants of the needs-driven KWS are understood this way then its vulnerability to "provider capture" by self-serving


\(^{101}\) Dunleavy, ibid, 3.
bureaucracies remote from “customer” needs, welfare fraud, benefit and service exploitation by the greedy middle class, and incessant demands for growth in public spending, can all be explained and remedied. The remedies take the form of NPM contractualist techniques which build in rational choice assumptions about individual customer and public service bureau behaviour such as agency theory and transaction cost economics.

Agency theory posits social, political and commercial life as a series of contracts for labour or services. In the contractual dyad, both principal (funder) and agent (provider) are assumed to be making rational choices by acting as self-interested utility maximisers. This rationality (including opportunism and guile) is assumed to make for efficient public service as well as profitable private enterprise.

Transaction cost economics is concerned with the optimal governance structures for organising the delivery of goods and services. It is assumed that rational actors will select governance structures that minimise aggregate production and delivery costs, by splitting “steering” from “rowing”, for instance, or separating the parts of a vertically or horizontally integrated enterprise.

The NPM model assumes that the form of governance chosen ought to follow the function to be performed by the enterprise. A key NPM paradigm for the governance of the contract state is that government “steers” (the minister decides what to purchase and from whom) while public, private, voluntary, or non-governmental organisations “row” (provide actual services). Contractualism assists this split by formalising the transaction in terms of highly specific, contracted-for outputs which the government pays providers to deliver. Competing providers tender in a contestable marketplace for the contracts. Ministers are “owners” of the government enterprise responsible for outcomes. Public servants are their agents selling specified outputs to realise these outcomes. Schick identifies a major defect in this output-outcome nexus—it bifurcates government into management and politics. Between management, narrowly conceived, and politics the citizen and public service are getting lost.

This NPM approach contrasts sharply with the KWS, outcome-oriented, approach. From the NPM perspective, Government now ceases to fund inputs to be processed through the “black box” of the state apparatus and converted

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103 Ibid, supra n 5 at 18-21.
104 Ibid; Osborne and Gaebler, supra n 100; Horne, supra n 100 (the classic popularisers of this approach); supra n 93 at 4-6.
105 Schick, supra n 5 at 62.
into nebulous outcomes. From the KWS perspective, however, outcomes were evaluated in terms of the provider’s definition of outcome objectives, and could also be subjected to some modest cost/benefit analysis.\textsuperscript{106}

The contract state’s NPM culture, in theory, promises numerous advantages over the KWS approach:

- \textit{Clear attribution of accountability} for outputs is obtained through transparent contracts, so that the opaque use of public power is reduced;
- \textit{Consumer empowerment and choice} is provided by the removal of the state monopoly on service delivery, and possibly enhanced through funding customers with vouchers instead of funding inputs to be captured by providers;
- \textit{Government bureaucracy is downsized}, since it is a steering mechanism, not a delivery system;
- \textit{Competition in Government-funded activities} is achieved through the rationality of the market, leading to allocative efficiency and increased quality;
- \textit{Risk and transaction costs} are transferred to the private (perhaps privatised) sector;
- \textit{Professional and business-like practices} rigorise public service systems, epitomised by “customer focus” rhetoric, value-for-money evaluations, and quality financial reporting systems; and
- \textit{Administrative discretion is checked, structured and reviewed} more effectively.\textsuperscript{107}

In empirical terms the contract(ing [out]) state approach has yet to demonstrate its value as the cheaper and more effective way to manage the state.\textsuperscript{108} The necessary link between contracts and competition, and privatisation, contracting out, and expenditure reduction, is not proven.\textsuperscript{109} Contractualism, however, leads to many power-conferring “compacts” between steerers and rowers which bestow enormous discretionary powers to unaccountable providers and few rights to “consumers” or citizens.

\textsuperscript{107} Supra n 93; Boston, supra n 5 at 19-30.
\textsuperscript{109} Supra n 83 at 29.
D. Contract State “Citizenship”: a customer focus?

In practical terms, the classical contract form frequently serves to mask asymmetrical power relationships. NPM pseudo-contracts are no different. The government, not the citizen, becomes the client of the provider. Public and private are conflated to the point where everything can be commodified, even prisons, optimal public service, human blood (in some jurisdictions), and possibly human organs. Performance as measured in outputs does not necessarily compute into accurate measures of long-term outcomes. Neither does NPM suggest ready solutions to problems endemic to societies aspiring to social and territorial justice and “citizenship for all”—problems which can not normally be solved through market mechanisms.

How are the outcomes of strategic coherence and territorial justice to be achieved in a fragmented world conceived as a set of isolated quasi-markets, for example the health care funder-provider market? How can these outcomes be achieved through a series of contracts between public sector principals and private enterprise agents? “Customer” access in such a world depends on whether it is profitable to set up shop in the customer’s area, and the quality of service is not enshrined in a universal right of citizens but depends on the exigencies of the local market where the customer happens to “shop” for services.

How are valuable outcomes basic to citizenship, such as access to services, equality of treatment, the Rule of Law, social justice, and cultural sensitivity constructed as measurable and enforceable outputs? Even the KWS found achieving and measuring these outcomes elusive; how will a series of quasi-markets fare?

The trend in education, for example, to create a quasi-market by funding schools on the basis of block grants, may reduce access to economies of scale, such as curriculum expertise, otherwise available in a national system. Budget allocation by the School within the devolved block grant/bulk funding/charter school contracts may be perverse in relation to wider citizenship goals. Schools may compete against each other for a market share of the middle class pupils at the expense of the rest.

Specified outputs in the health and welfare sectors also require an almost impossible degree of specificity about what constitutes need, which services are to be regarded as core services and which relegated to the penumbra, and how services are to be delivered. Need identification, monitoring, and accountability proved difficult for the KWS. These processes have proved equally difficult, if not more so, for the contract state as it steers a series of contracts through a maze of quasi-markets. “Contracts” have conferred new rationing powers upon providers, though few new binding obligations to citizens. But who defines the criteria for rationing?
Quasi-markets such as health may be colonised by insurance enterprises which have in effect become surrogates for the "customer/patient", just as providers in the quasi-market are surrogates for the state. Neither surrogate has an incentive to keep costs down, and the "customer" is left out of the transaction except to pay the premium. In quasi-market health systems, unless insurance is compulsory and state subsidised, there is no universal right to quality health care. Interestingly, surveys of attitudes in the European Union found a majority of citizens willing to pay more tax for health services. Citizens also rejected the notion of a mixed system based on public provision for so-called "essential" health care and private provision through insurance for "non-essential" services which would be available only to those people who could afford the insurance cover for them.

In the steering mechanisms of the contract(ing [out]) state each ministry has now grown a contract management bureaucracy in an attempt to reduce the transaction costs (not necessarily to improve services) of contracting out. One may ask, who ultimately bears the costs of bidding, evaluating bids and enforcing contracts, or the impact of contract failures? Who prevents provider capture by private monopolies? Who prevents "cream-skimming"? Cream skimming appears to be endemic to quasi-markets where providers who are paid a standard fee for services will consistently look for the cheapest "customers" to service. General Practitioners in the health quasi-market will shun the elderly for the young and fit. Similarly, educational providers will cater to the most able students, and custodial providers to the most docile clients. The weakest groups of citizens may become a residual category for whom the state might, itself, provide minimalist care, like the provision of health services for "indigents" in the USA.

The fetishising of the contract form found in the NPM culture is threatening to notions of citizenship because it lacks mechanisms for guaranteeing accountability to citizens and for enforcing obligations owed by state surrogates. Contract is a private law form, whereas citizenship is a public law status. As British analysts Lewis and Harden have pointed out, hybrid notions of public law contracts are in a very early stage of jurisprudential development.

110 National Advisory Committee on Core Health and Disability Support Services, Core Services for 1994-5 (1993); Steven Globerman and Aidan Vining, Cure or Disease? Private Health Insurance in Canada (1996).
112 The Economist, supra n 108.
113 Supra n 55 at 37-44; supra n 54 at 172-177.
Thatcher's much vaunted "Citizen's Charter" was set up in 1991 expressly as a quality assurance or standards-setting process, not as a rights-enforcement mechanism, despite the clever name. It has spawned a plethora of agency-specific charters: by 1994 there were 39 in Britain, covering agencies such as the London Underground, the Employment Service, and the Social Security Agency. British critics with insights from an advanced contract(ing [out]), after-Fordist state say that the result is a hollowed-out state, with a narrow, consumer-inspired conception of citizenship with little legal underpinning. This result is occurring despite the Charters, the Audit Commission, and other after-the-fact techniques for monitoring aggregate provider performance. They argue for combat with a robust Bill of (Citizens') Rights.114

New Zealanders have become keenly aware of the gap in the repertoire of remedies available to the citizen since the "success" of the Fourth Labour Government (1984-1990) in transforming the KWS into a contract state. In the quasi-marketplace "customers" may have considerable difficulty in invoking rights, and may even lack the right to services. For example a Code of Health and Disability Consumers' Rights, which elaborates on consumer rights and provider duties, became legally binding statutory regulations in 1996. However, New Zealand's Health and Disabilities Commissioner explains that it gives consumers rights in relation to how services are provided, but not rights as to whether they are provided.115 To have conferred the latter rights might have created a misunderstanding of the Commissioner's mandate. This mandate does not include scrutiny of whether or not the funder (state) ought to have purchased services from the provider on behalf of the consumer (citizen). In other words, no recognisable right of access to health care is codified and enforceable.

Wellington academic lawyer Janet McLean criticises the present constitutional vacuum with the charge that relatively little is said in the constitution about the provision of minimum services and the obligations which flow from the ownership of state assets: in fact, public choice theory represents "a very thin view of democracy". McLean calculates that the legislature is weaker than ever before (while the executive and administration are presumably stronger). Provider capture and self-serving interest group politicking are thus likely to be more effective than before.116

Even where the legislation enabling corporatisation explicitly attempts to

reconcile profit making and social responsibility, the citizen-focused obligations are subordinated to market forces. For example, the State Owned Enterprises Act 1986 section 4(1) requires that:

the principal objective of every state enterprise shall be to operate as a successful business and, to this end, to be—

(a) As profitable and efficient as comparable businesses...

(b) A good employer; and

(c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates...

Courts have chosen to avoid the issue of obligations to citizens imposed by the "social responsibility" requirement by saying it is too large and subjective a concept to give rise to public duties, and that any breaches of obligations are private contractual matters. The citizen as a juridical person to whom public duties are owing appears to be dead in the eyes of the courts of the contracting state.

Mike Taggart, the former Dean of Law at Auckland University, has challenged economic rationalists on the Court of Appeal who suggest that the public law which evolved under the KWS is no longer relevant. He writes:

The fundamental values of public law—openness, fairness, participation, impartiality and rationality—not only provide a yardstick against which to measure the activities of privatised enterprises with market power but should be embodied in the design of institutions and regulatory schemes at the outset.

How can we bring citizenship back into life? I will conclude by addressing this key question for the present after-Fordist phase of reflexive modernisation.

VI. SOCIAL CITIZENSHIP: A CONCLUSION

A. Institutionalising Altruism: Beyond Charity and Contract

Social citizenship synthesises civil, political and social rights in a synergistic dynamic which is necessary to empower people, locally and globally, to

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challenge and overcome the dystopian trajectory of the high risk society and the after-Fordist, contract(ing [out]) minimalist state order of the present phase of modernisation. Nancy Fraser and Linda Gordon identify our present predicament in the following terms:

The centrepiece of the cultural mythology is an ideological opposition between two very different forms of human relationship: contractual exchanges of equivalents, on the one hand, and unreciprocated, unilateral charity on the other. These perversely appear to exhaust all social possibilities. The result is that there seems to be no conceptual space for the forms of non-contractual reciprocity and solidarity that constitute the moral basis for social citizenship.¹¹⁹

Universal citizenship is essential for an inclusive rather than an economically polarised, undemocratic society. Communitarian values of solidarity, shared responsibility, and active participation in decision-making as well as material and post-material prosperity are essential to universal citizenship. Elites have recently privileged the rational actor of public choice theory to explain human conduct and constructed the contract state around this ideal type. Diversity can be accommodated in universal citizenship by recognising the right to diversity while stressing the affinities flowing from the hybridity of identity and hence multiplicity of memberships which are such a feature of the diaspora spaces growing up in advanced modernity.¹²⁰ Altruism and enlightened communitarian self-interest have a longer pedigree and more empirical support as explanations of human behaviour than economic rationalism; they also offer greater prospects for humankind’s survival.

Non-contractual reciprocity is only possible when exchange relationships are decommodified. To paraphrase Richard Titmuss,¹²¹ public policy must encourage and foster the individual and communitarian expression of altruism and regard for the rights and needs of others (intergenerationally and globally); altruism is the only bastion against, and fetter on, the egoism of the marketplace. Instruments of public policy such as social rights must enshrine values which must not and cannot be commodified. The social contract and the mutual obligations flowing from it in terms of citizens’ rights must be revitalised. Second-generation human rights, whether couched in substantive or procedural terms, must become justiciable. Above all, altruism must be re-institutionalised as part of a decommodified set of universalised social relationships defined with a sacrosanct status for all, namely “social citizenship”.

¹¹⁹ Supra n 7 at 60-61.
¹²¹ Supra n 47 at 12-13.
B. Utopian Realism and Citizens' Rights Talk

The state remains, for all its many dehumanising yet essential characteristics, such as sovereignty, the only public forum for articulating the local claims of citizenship in their national and global contexts. Social reflexivity offers the intellectual capacity to conceive of alternative and emancipating identities. Globalisation offers the technological medium and cultural climate of receptivity for claiming these alternative identities and potentially creating the institutional forms which make realisation of them possible. Citizenship rights, therefore, constitute a fundamental legal form for the change of structures.

Rights talk consists of both the politics of rights as ideological resources for counter-hegemonic social defence and change, and the active practice of rights enforcement by administrative agencies and the courts.

Giddens' "utopian realist" manifesto provides a framework of global and local "goods" for which social citizenship is a condition and an outcome:

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<tr>
<td>Capitalism</td>
<td>Post-Scarcity Economy</td>
<td>Industrialism</td>
<td>Humanised Nature</td>
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<td>Surveillance</td>
<td>Dialogic Democracy</td>
<td>Means of Violence</td>
<td>Negotiated Power</td>
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In human rights discourse within national and international law we can already find bundles of so-called first- and second-generation human rights which can be collected together towards some charter for social citizenship. For


125 Supra n 6 at 100-103.

example, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Right (ICESR) offer a glimmer of the sorts of social citizenship all human beings should enjoy. Yet how many citizens enjoy these rights, even in the First World after-Fordist contract(ing [out]) states?

The post-scarcity economy recognises the scarcities of supply and growing demands. Its defining character is that the pursuit of economic growth must not trump other claims: economic activity must be ecologically sustainable; suboptimal economic, social or cultural consequences must be avoided; and individuals and groups must be enabled to make post-materialist life choices. Social relations must not be commodified and polarised by the means of economic management imposed upon them.127

The humanisation of nature requires that, instead of being concerned with what nature can do to us, we must analyse individually and collectively what we have done and continue to do to nature in manufacturing the high-risk society. Ecological sustainability requires the harmonisation of economic and social activities within a holistic frame of analysis in which the enforcement of the precautionary principle in international environment law and the principle of inter-generational rights to a clean, bio-diverse ecosystem are crucial.128

Dialogic democracy requires public dialogue between citizens and mutual tolerance coming from a continuingly developed social reflexivity.129 Meaningful participation in political processes is a key to citizenship. Generative politics, to achieve dialogic democracy, require nurturing individual autonomy in spaces where hierarchies are flattened, active trust is earned, and power is decentralised and detraditionalised. Authoritarianism manifested in the control of knowledge and information must be rejected. Meaningful economic participation is also crucial for citizenship to serve as an integrative force. It is not liberation from work, or even from joblessness, that is required, so much as a radical re-definition of work.130

127 See ICESCR, Article 6: The Right to Work; Article 11: The Right to an Adequate Standard of Living; and Article 12: The Right to Physical and Mental Health.
128 Such so-called third generation human rights are, as yet, the least well developed human rights in both municipal and international law.
129 See ICCPR; ICESCR, Article 8: Trade Union Right; Article 13: Right to Education; Article 14: The Principle of Compulsory Education Free of Charge to All; and Article 15: Right to Take Part in Cultural Life and to Enjoy the Benefits of Scientific Progress and the Protection of the Interests of Authors.
Negotiated power must replace global, local and interpersonal violence in its psychological and physical manifestations. Damaged solidarities dividing people along ethnic, gender, sexual-orientation and class lines must be obliterated and new compromises achieved which are far more inclusive than the KWS could be.\(^{132}\)

Let us hope that there will be a thorough-going rejection of the ideology of commodification, of egoism over altruism. The imposed consensus around the competence of the market will, hopefully, soon look as shallow as the one which ushered in crude statism. Now is the time for the re-politicisation of claims for social citizenship, because radical peaceful change towards a socially just society and an ecologically sustainable world order surely depends on social citizenship.

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\(^{132}\) See ICESCR, Article 9: Right to Social Security; and Article 10: Protection of the Family, Mothers and Children.
"REAL RAPE" IN NEW ZEALAND: WOMEN COMPLAINANTS' EXPERIENCE OF THE COURT PROCESS

Elisabeth McDonald*

I. INTRODUCTION

The main criterion for determining the success or failure of reforms should be the impact of the changes made on the lives of the women involved.1

The study this article discusses was premised on what has been called the "radical position"2 of taking women seriously. We asked women about their experience of the criminal justice system as women who believe they have been raped.3 This paper will outline some of their experiences of going to court.4 These stories are placed in the context of the last decade of debate about rape law reform, both in New Zealand and overseas. The preliminary question this study, and this paper, poses is "have the reforms following the

* Senior Lecturer in Law, Victoria University, currently on secondment to the Law Commission as Research and Policy Manager, Evidence Project. This paper presents some of the findings of a research project undertaken during 1993-1996, together with Jan Jordan of the Institute of Criminology, Victoria University and funded by the Foundation for Research, Science and Technology. Our sincere thanks to the women participants in this study who so generously gave their time and energy. We are also very grateful for help from the employees of Rape Crisis, HELP, Safeline Trust, and the police who encouraged and supported women who participated in this research.

1 Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Canadian J of Law and Society 75, 76.

2 Kathy Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" (1993) 4 Criminal Law Forum 327, 328: Believing women represents a radical step forward because the world generally, and the law specifically, regards women as less worthy of belief than men for the sole reason that they are women.

3 In two of the cases, the defendant was charged with indecent assault, rather than attempted rape/sexual violation, although the women concerned identified their experiences as "rape." The lesser charge carries with it implications for both process and sentence.

4 The other part of the study, by Jan Jordan, concerns the women's experiences of reporting to the police.
1983 Rape Study improved the well-being of women?" This is a valid enquiry in light of the objective of the 1983 study, called for by the Minister of Justice: 5

To determine whether the law and/or the criminal justice system should be modified to accommodate the special problems encountered by the victim of rape, and if so, how.

The perspective of the victim will therefore be the point of reference for an analysis of any legal procedural changes that are deemed necessary to mitigate the ordeal to which rape victims are subjected.

This study does not analyse the effect of the 1985 reforms in terms of increased numbers of complaints or rate of convictions. Instead, this study was aimed at analysing the effect of the reforms by asking women complainants about the impact the changes have made on their lives.

By the conclusion of the study, however, it was apparent that the important distinction (in terms of experience of the court process) is not the distinction between women who gave evidence in court and those who did not. The distinction that made a difference was that between women who were raped by a stranger and women who were raped by an acquaintance. Although all the women found participating in the court process distressing and unpleasant to some degree, the women complainants who were most dissatisfied and traumatised were those who were allegedly raped by someone they knew. It is this dichotomy that was not adequately addressed by the 1985 rape law reforms and raises again the need for on-going substantive as well as procedural reform.

In this article, which considers some of the results of the study, I begin by outlining the research methodology, identifying the personal qualities of the women we interviewed and discussing offender information and case outcome. The next part of the paper, the findings, reports on the women's responses to questions about the trial process. The final section discusses the women's suggestions for change and recommends tasks for rape law reform in light of these suggestions.

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5 Warren Young, Rape Study: Volume 1: A Discussion of Law and Practice (Department of Justice, Wellington, 1983) 163.
II. STUDY METHODOLOGY

The original study methodology for analysis of the court process was designed to enable a comparison between:

(1) the experiences of women whose cases never went to court (for example, where the accused pleaded guilty prior to the preliminary hearing, or where no prosecution was brought);

(2) the experiences of women whose cases went to court, but who did not give evidence (where the accused pleaded guilty after the preliminary hearing, or there was no case to answer); and

(3) the experiences of women whose cases proceeded to a full defended hearing where the woman gave evidence in court and was cross-examined on that evidence.

It was initially planned to interview all women complaining to the police and/or going to court in the greater Wellington area within an 18-month period, with a goal of 10 interviews for each of the three categories. This plan was approved as an appropriate methodology by the funding agency and the then Department of Justice to reduce the possibility of interviewing a mainly self-selected group of complainants (for example, an over-representation of women who were dissatisfied with their experience).

However, we encountered difficulties with this plan. Due to confidentiality requirements, we were not able to make the initial contact with the women directly. Information about the research was given to the women by a support agency (including Rape Crisis, HELP, the Safeline Trust in Auckland) or the police. The women then either contacted us themselves, or gave permission to one of the agencies to pass on their contact details. It became apparent early on in the project that women whose cases were due to be heard in court during the months of the study were not easy to contact, nor very willing to participate in the project. Some were not willing to talk about their experience until after the trial, and then many wanted to forget the experience and not participate in the project. By way of contrast, women who were willing to talk to us included those who had returned to counselling many months after the trial, and now felt ready to reflect on their experience.

As a result of the difficulties in interviewing the appropriate number of women during the time frame of the study (as laid down by the funding agency) we

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6 This information was given to us by the police or support agencies and may not accurately reflect the women's reasons.
extended the time frame of the research (to include older cases), and interviewed women in other cities.

Although we still sought at least 10 cases in each category, we fell short of this number in the first 2 categories (with only 2 interviews in the first category and 5 in the second). However, recent overseas and local research and observation confirms that giving evidence is "the most humiliating and degrading" aspect of the court process.\(^7\) In the words of Justice Thomas: \(^8\)

> The extreme distress of a complainant giving evidence in a rape case and reliving the trauma of the ordeal in the witness box, can be seen in the Courtroom at any time. It is not an uncommon occurrence, and it is done in the name of justice. But there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons. It is inexplicable that the practice can be tolerated with such equanimity.

The most important comparison was therefore between the experience of those women who were not required to give evidence in an indictable proceeding (before a jury), and those who were. We interviewed 19 women in our final category, where the case proceeded to a defended hearing, usually involving a jury trial.\(^9\) The relatively high number in this category may well reflect the desire of women who have been to trial to talk about their experience in the hope of encouraging change in the criminal justice system.\(^10\)

### III. PERSONAL CHARACTERISTICS OF THE WOMEN INTERVIEWED\(^11\)

#### Location

With the exception of one overseas visitor who was raped on holiday here, and returned for the trial, all the women interviewed for this part of the study were living in Auckland (eight women), the Wellington region (including Lower Hutt, Upper Hutt, Porirua, Masterton) (11 women), or Christchurch.

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8. Hon Justice E W Thomas (now a member of the Court of Appeal), "Was Eve Merely Framed; or Was She Forsaken?" Part I [1994] NZLJ 368, 372.
9. In one case, the accused was under 17 years of age. The trial was therefore conducted in the Youth Court, heard by a judge sitting alone.
10. See also Sue Lees, Carnal Knowledge: Rape on Trial (1996) 30.
11. Unless otherwise stated, this information was given by the women as correct at the time of the interview.
(five women) at the time of the interview. Not all of the women went to court or were assaulted in the city in which they resided at the time of the interview. However, as the interviews did not focus on the details of the incident, it is unclear how many cases are in this category.

**Age**

Three of the women interviewed were between 16 and 19 years of age.\(^{12}\) Nine women were aged 20-29. Three women interviewed were aged 30-39. Six women were aged 40-49, two were aged 50-59 and one woman was over 60 years old.

**Relationship status**

Nine of the women interviewed were in relationships (including de facto relationships) at the time of the interview. Seven of the women were single and eight were divorced, separated or widowed. Therefore, 15 out of the 24 women interviewed were not in an intimate relationship at the time of the interview. No women identified as lesbian or bisexual.

**Living situation**

Two women were living with their parents at the time of the interview and four were living with a partner. Three women were living with a partner and children, and six were living with their child or children. Three of the women were sharing a house with friends or flatmates and six women lived alone.

**Ethnic identity**

All but one of the women interviewed for this part of the study identified as Pakeha/European. One woman was from South America. No women identified as Maori in this part of the study. Although we used Maori researchers to conduct the interviews in the Auckland area and made contact with Maori women's support networks, we were not able to speak to any Maori women who had been to court. The experiences of Maori women, whose involvement in the criminal justice system will also be affected by racism,\(^{13}\) are therefore not reflected in this study. Such work is clearly overdue and should be carried out by Maori researchers and funded accordingly.

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\(^{12}\) One participant was one month short of her 16th birthday at the time of the offence, and her trial experience was in the Youth Court. This is made apparent, where relevant to the study.

\(^{13}\) See Stephanie Milroy "Maori Women and Domestic Violence: The Methodology of Research and the Maori Perspective" (1996) 4 Waikato LR 58, 74.
Occupation

The women interviewed were employed in a wide range of occupations, including students, health and business professionals, those in the arts or entertainment industry and full-time mothers. There were no more than two women from each occupational group. The most significant finding in this context was that the two women on unemployment benefits had become sickness beneficiaries as a result of the rape.

IV. OFFENCE AND OFFENDER INFORMATION

Date of offence

The earliest alleged offence in this part of the study occurred in July 1982, the latest in December 1994. There were six incidents in 1991; six in 1992; eight in 1993 and five in 1994. By months, this sample reflects fewer incidents in the winter months (only three occurring from June to September inclusive), with 13 incidents in the period October to January and 10 occurring between February and May.

Relationship with the accused (if known to complainant)

All of the alleged offenders were male. Only six of the 25 accused (two offenders in one case) were unknown to the woman prior to the alleged offence. Of the 19 who were known to the woman, three were former partners, two were family members, one was a counsellor, one was a doctor, one was a prison inmate, two were employed by the women, and nine were social acquaintances. This last category includes men met at social gatherings, someone known by a friend of the woman, and men known through work or sports clubs. The prior relationship between the offender and the complainant will be discussed in more detail below.

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14 This case came to trial in 1994, as the result of a complaint by another woman against the same man.
15 See supra n 10 at 11:

Most of the women [in her study] were raped by men they knew. Of these, more than half were friends, colleagues or casual acquaintances - men with whom they had never had consensual sex. Most assaults appear to have been carefully planned. Men approached the women in a variety of situations, but most commonly in the social setting of a pub, club or party.
16 The two employees were a tradesman and a real estate agent.
Result

Treating the outcomes as related to 26 separate offences (one woman made two complaints against the same man), the results for this part of the study were 16 convictions and ten acquittals. Of those convicted, 11 had been found guilty at trial (including one who pleaded guilty during the trial, but after the complainants had testified), three had pleaded guilty post-depositions and two pleaded guilty prior to depositions. Of those acquitted, eight had been found not guilty at trial and in two cases the case did not proceed beyond depositions.

Sentence imposed

The breakdown of sentences for the 14 convictions for rape/sexual violation are as follows: in one case a sentence of imprisonment for one year was imposed; one offender was sentenced to two years imprisonment; six convictions attracted custodial sentences of between six and one-half and eight and one-half years; in four cases custodial sentences of between 10 and 12 years were imposed; and in two cases the defendant was sentenced to preventive detention.

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17 The convictions include a case where a retrial was ordered on appeal, but as the complainant did not wish to give evidence at a second trial, the defendant was discharged.
18 The acquittals include a case where a trial resulted in a hung jury. Subsequent to this study, the defendant was found guilty at the retrial and sentenced to six and one-half years. He appealed both the conviction and the sentence, but was unsuccessful.
19 In one case, excluded from this figure, the defendant was charged with, and found guilty of, indecent assault of a woman he had met through mutual friends. The defendant was sentenced to six months periodic detention and fined $6,000. He was not charged with attempted rape/sexual violation even though, while visiting her for coffee, "[h]e persisted in trying to kiss and fondle her when she said she was not interested. He then pushed her to the floor, held her down and pulled off her lower clothing. She screamed and fought, managed to break free and ran from the house." The Evening Post, Wellington, 16 August 1995, p 13. (Details of some cases have been taken from news reports, as the women interviewed were not asked to tell the story of the rape, but the story of their treatment by the criminal justice system.)
20 An offender can be sentenced to preventive detention (with no fixed release date) when the type of crime or nature of re-offending warrant it. See Criminal Justice Act 1985, ss 75 - 77. In one of these cases preventive detention was ordered on appeal from an eight and one-half year sentence.
In the 13 cases of "stranger rape", the offender was convicted and received a sentence of between six and one-half and 12 years, with two receiving preventive detention. Stranger rape includes the rape of a woman who knows the offender but has not been in an intimate relationship with him, where there are aggravating elements in the nature of the offence. For example, the rape of a prison officer by an inmate and the rape of a woman in her home by a workman are included in this category.

In comparison, the nine offenders who were acquitted of rape were either social acquaintances, ex-lovers, or family members of the women. In the two cases in which the defendant was convicted of "acquaintance rape" (one by jury, one after a guilty plea) they received the significantly lighter sentences of one year and two years. For this purpose, acquaintance rape is the rape of a woman by a man whom she knows, with whom she may or may not have had an intimate relationship, where the alleged rape occurred in the context of a social event and the defendant relied on the defence of consent or reasonable belief in consent.

The relationship between outcome and offender was also significant to the experiences of the women as rape complainants. This is discussed in the context of the findings, and in the conclusion.

**V. The Findings**

The women's experiences are presented here qualitatively, providing illustrations of the content of the women's comments. Where possible, the women's own words are used, avoiding translation of the narrative of the research participants by the researchers.

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21 See supra n 10 at 159 ff, for an exploration of the concept of "serial acquaintance rapists":

The devastating effect of acquitting guilty men is movingly portrayed by the victims of the assaults. The indignity of being disbelieved and held responsible for the man's violence is a searing indictment of our judicial system.

22 There was one exception to this stranger rape/acquaintance rape dichotomy. A doctor in the hospital where the woman complainant was a patient was also acquitted of rape. In this case the defence was fantasy/fabrication by the woman. The accused argued that because she was ill she was deluded.

23 See also supra n 10.

24 Not all interviews were recorded due to the lack of working equipment at all centres.

The findings are reported under separate headings which reflect both the focus of the study and the concerns of the women who participated. The article concludes with a discussion of some of the findings and recommendations relating specifically to improving women’s experiences of the court processing of rape complaints.

A. Preparation for the court process

1. Adequacy of information about the court process

Aspects which women found particularly distressing were the long wait before trial and the lack of information. Women were generally apprehensive about giving evidence because they did not know what would be expected of them in court. Many women thought that they had performed poorly as a witness [sic] as a result of lack of preparation.26

Most women said that the court process had been explained to them, although the information alone was not enough to prepare them for the trial. In their words:

I thought I was prepared but I realised very soon that nothing prepares a person for that.

However much I psyched myself up, I would never have been ready.

I thought I was prepared but I wasn’t - it was awful - like being raped all over again having to tell all those people.

Several women said that they felt prepared only because of their own determination.

The fact that women are not always given full and accurate information about the process and their part in it, is also indicated by the way women talked about their involvement. Some of the women seemed confused about why they went to court and how the outcome related to their role. For example, one woman stated that the defendant pleaded guilty after the depositions hearing, and then a date was set for the trial, but the prosecution decided not to proceed. Another woman gave oral evidence in court. From the woman’s description, it appears that this was at depositions, but the woman interviewed did not know whether it was a trial or not.

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26 Gerry Chambers and Ann Miller, Prosecuting Sexual Assault (Scottish Central Research Office, 1986) 91.
2. Adequacy of preparation for their role as witness

Most of the women’s concerns about the lack of preparation were connected with the time they spent with the prosecutor before the trial (see below). Women wanted their story to be presented to the court, and some saw their performance in court as essential to their recovery:

I want to believe that I’m prepared. Psychologically he’s had the control - today I want to take control, not only for me but for my partner as well. If I didn’t do something about it, what’s to say that he wouldn’t do it to somebody else. He’s got to be known for what he did.

One woman who received very good support from both the police officer in charge of her case and the prosecutor pointed out the difference it can make:

The prosecutor and the police officer and I met and the police officer explained how it would be set up, prepared me how to answer things. It built up my confidence, so I was confident.

3. Sufficiency of contact with the prosecutor prior to the trial or depositions

With the exception of two women who met the prosecutor several days before the trial, and talked through issues with the officer in charge of the case present, most of the women were dissatisfied with their contact with the prosecutor, particularly those whose cases resulted in an acquittal. They felt that the prosecutor had not done his or her job. One complainant who met the prosecutor for 30 minutes six days before the trial was still unhappy, saying that she “didn’t feel that [her] lawyer had gone over what he was going to do” and that she “would have liked to have a say in what lawyer [she] got.”

It is clear that some women, like this one, did not understand the different role of the prosecuting lawyer, compared to the defence lawyer, which may have led to the dissatisfaction in most cases. It seems that some rape complainants have an expectation that the prosecutor is there to present their case, in the same way that the defence counsel presents the defendant’s case. When they only meet the prosecutor briefly on the day of the trial, as happened in nearly all of the cases, they therefore feel let down. The following description of the limited role for the woman in the prosecution is apt, and yet clearly not what most complainants expect: 27

[T]he victim/survivor has very few rights in the criminal trial because she is merely a witness for the prosecution. She has no choice but to testify and submit to cross-examination. She cannot instruct legal counsel,

27 Donna Stuart, “No Real Harm Done: Sexual Assault and the Criminal Justice System” in Easteal, supra n 7 at 95, 101.
and will have had little, if any, preparation for giving evidence. She will
have no knowledge of the defence claims or even of other prosecution
evidence. She will have waited, perhaps for several days, until the court
attendant finally comes to usher her into the courtroom, past the expectant
audience. She will see the accused again, and will have to speak with
him watching her. She will probably have been told to leave the court as
soon as she has given her testimony. She will go home and continue
waiting.

The expressed wishes of the participants in this study to have more contact
with the prosecutor and feel adequately prepared as a witness (for example,
knowing what questions to expect), are echoed in overseas studies,28 as well
as the 1983 Rape Study.29 The analysis of submissions in the Rape Study
includes the following:30

A number of points are made by submissions regarding matters of
courtroom procedures and facilities. 12 submissions say that more should
be done by the police and/or the prosecution counsel to acquaint the
complainant with court procedures. A number recommend that the
“prosecutor should meet a rape complainant prior to the trial” and that he
[sic] should for example “ensure that she is familiar with the courtroom
and the procedures that she will encounter and ... be aware of any particular
concerns she has so that he might reassure her.

Feeling that they were not adequately represented during the trial was one of
the most common concerns stated by the women in this part of the study. The
argument for separate legal counsel for women survivors of rape has been
made convincingly in other jurisdictions.31

One woman summed up the feeling for most complainants, including the
nature of their investment in the process and the outcome:

I think there should be more contact [with the prosecutor] than just right
at the very end. Your life is in their hands and you’ve been given half an
hour with them before you walk into court.

28 See Easteal, supra n 7; supra n 26; Jennifer Temkin, Rape and the Legal Process (1987)
155 ff; Department for Women, New South Wales, Heroines of Fortitude: the experience
of women in court as victims of sexual assault (Department for Women, Sydney, 1996)
119.
29 Joan Stone, Rosemary Barrington, and Colin Bevan, “The Victim Study: Research Report
1” in Rape Study Research Reports Volume 2 (Department of Justice, Wellington, 1983)
1, 65 ff.
30 J Petterson, Submissions to the Minister of Justice on The Rape Study: An Analysis
(Department of Justice, Wellington, 1983) 31.
31 Temkin, supra n 28 at 162-190; Vivian Berger, “Man’s Trial, Women’s Tribulation: Rape
Cases in the Court Room” (1977) 77 Columbia LR 1, 84-87.
4. Role of support agencies (prior to participation in court process)

With one exception, all the women who contacted a support agency were very happy with the role played by the agency they relied on - in particular the Safeline Trust in Auckland and HELP. Women also reported positive experiences with Rape Crisis, local women's centres (especially Lower Hutt) and Victim Support Services, although these agencies tended to be used less often by the women in this sample. A number of women commented that the agency kept them informed when the police did not, and acted as a buffer between them and the legal system.

B. Experience in court

1. Giving oral evidence: issues of court layout, comfort and who should be present

A number of the victims ... reported that the presence of the accused in the courtroom caused them severe distress and affected their ability to give evidence clearly and accurately. This trauma was exacerbated by the layout of the courtrooms, some of which allowed a direct line of sight from the dock to the witness box.32

Some women raised issues about the waiting areas in the court building - they wanted a space that was away from the defendant's friends, family and witnesses. A number of women also spoke about the difficulty of talking about details of the incident in front of strangers: “the most uncomfortable thing is seeing all these eyes on you.”

Apart from vividly bringing back painful memories, having to go through the incident in such explicit detail may just prove too much for some women. They may be unfamiliar with some of the sexual terminology involved, and find it inordinately difficult to convey what happened in the intimidating and formal setting of a court.33

I felt uncomfortable and awful about the presence of other people in the court ... I felt it was awful giving evidence because of the things I didn’t want to say but had to say ... The police officer said that I would be able to give evidence from behind a screen but I never did. I just reckon he tried to soft soap me.

32 Melanie Heenan and Helen McKelvie “Towards Changing Procedures and Attitudes in Sexual Assault Cases” in Easteal, supra n 7, 361 at 366.
33 For other examples see Zsuzanna Adler, Rape on Trial (1987) 51; Heroines of Fortitude, supra n 28 at 141.
I’d have preferred just me and the lawyers or I was somewhere else ... some of the questions they ask are really upsetting and embarrassing.

What I found so difficult was having to say and I couldn’t see why this had to be said. Why, when they have forensic evidence, do they need people to say things so bluntly.

I didn’t want anyone else in there, or my family. I just felt really dirty ... I didn’t like talking in front of the jury about what happened to me.

A few women were indifferent about the presence of the defendant, most notably in cases where identity was an issue, and they may not have seen him before (for example, it was dark at the time of the incident). For all other women, the presence of the defendant was very disturbing, particularly when he pulled faces or shook his head when the women gave evidence. This made many of them feel frightened, scared or intimidated:

I had to walk past him when I walked out. I didn’t like him being there - he was too close. I felt sick. I looked at him because he kept sighing and making noises.

I was very frightened because he was watching me ... It upset me that he was there. I could feel him staring at me. It got to me. It was very unnerving ... I was frightened to see him. I still am today ... I was very nervous. I couldn’t speak properly. I cried and started shaking ... I felt as if it was me that was on trial.

One young woman summed up the unfortunate, but probable, result of this kind of confrontation:

I didn’t want the defendant there ... seeing him was scary and upsetting. He should not be in the same room; I would have told a lot more but his presence made me sick.

Almost all the women suggested that screens or videotaped evidence would be preferable, or at least available for women who wanted to use these methods.34 One woman thought that with videotaped evidence (recorded before trial) “the jury would see the damage, especially the emotional impact

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34 Although sometimes an adult rape complainant has been permitted to give evidence in an alternative way under the court’s inherent jurisdiction (see R v Kaio, unreported, High Court, Auckland, 12 March 1993 (T 259/92)), normally they are required to give evidence at trial in open court. Recently, the Law Commission in its discussion paper The Evidence of Children and Other Vulnerable Witnesses (PP26, 1996) has proposed that all witnesses should be eligible (on application) to give evidence in an alternative way (that is, on closed-circuit television or from behind a screen). See also Bridget Mackintosh, “The Rape Trial: Crown Prosecutor’s Perspective” in The Proceedings of Rape: Ten Years’ Progress? An Interdisciplinary Conference (Wellington, 1996) 97.
which gets lost with the passage of time.” When asked about reform in this area the women said:

The offender shouldn’t be there.

I don’t think the victim should be in court. It would be nice if you could give evidence from a glass box, where he can’t see me but everyone else can. He’s to be put out of sight somewhere.

It would be easier to give evidence if offender was in another room - where he could hear and see but not in the same room.

I would have preferred not to have been in the same room as him when I gave my statement. I was that tense, I thought I’d snap.

The most uncomfortable thing is seeing all these eyes on you. If I was facing the judge and the questions were coming from behind me, I could cope with that.

For women who couldn’t face the defendant again it would be excellent [to be able to give videotaped evidence]. In a way seeing the defendant makes you face up to it - but it depends if you are ready to accept and handle it.

2. The performance of the prosecutor

Women felt particularly let down by the prosecution who could in their view have acted in a more robust way to provide protection from character attacks.35

As mentioned above, many women were disappointed in the performance of the prosecutor. Many women felt that he or she made no effort to get to know them, or their evidence, or even to meet them before the day of the trial. This made them feel unrepresented (which, in the legal sense, they are), and unimportant:

I was really frustrated [that I didn’t meet the prosecutor before the trial] because I didn’t know what the defence was going to ask.

I should have been able to meet my lawyer more often and have him tell me what he was going to do and what the other lawyer was going to do. Mum and Dad didn’t meet the lawyer till the day of court. I would have liked to have a say in what lawyer I got. He treated me courteously, but that was it. He didn’t do a very good job at all.

He was all right. I hadn’t dealt with him before. I didn’t even meet him

35 Supra n 26 at 136.
until the day I was in court... I walked into court. He said "Hi. You sit here." It's like don't I get a say in this, don't I get to meet these people?

He seemed indifferent. I don't feel he did a good enough job.

Some women, notably those who felt their case had been successfully resolved, felt that the prosecutor had done well, had treated them with respect and had kept the defendant's lawyer "within the rules." It is perhaps unfortunate that this kind of response is the minority view, when a complainant could easily be put at ease and feel valued by more contact and a sense that her story is being presented.

3. The impact of the judge

There were very few negative comments about the trial judges' behaviour. One woman was disappointed that her support person was not allowed to sit next to her when she gave evidence, and another felt that the judge must have been deaf because he kept asking her to repeat things. "They need someone younger, or at least someone with a hearing aid." One woman was upset by the judge's summing up which she felt laid some of the blame with her because of her profession (which she did not want disclosed, in keeping with the law).36

Most women felt the judge was fair and impartial, and many went on to say how pleased they were with the judge in their case. However, it needs to be pointed out that almost all of the women interviewed left the court after they gave evidence so did not hear the judge instruct the jury. It may also be that many of the complainants did not understand the role of the judge in controlling the court room environment and made no connection between the inappropriate questioning of defence counsel, and the silence of the judge and the prosecutor.37

The importance of [the judge's role as the controller of court proceedings] cannot be over-emphasised, because it is the judge who determines the appropriateness of particular lines of cross-examination and rules on questions of inadmissibility... [Rape myths] could not be perpetuated in the legal system without judicial complicity.

36 The complainant in this case asked that her occupation not be disclosed in court; however at the trial the prosecution asked her what her occupation was during her evidence in chief. The complainant felt that she had to respond so as not to appear unhelpful, but she was very upset. The law specifically provides that the complainant need not state her address or occupation. Evidence Act 1980, s 23AA.

Clearly some women understood the judge’s role, as they commented that the judge had ruled some of the questions irrelevant. Most of the comments made, however, focused on the performance of the judge while the woman gave evidence:38

The judge was really nice. He was really good because I could talk to him and because he let me say what I wanted to, to the defence lawyer. He was really considerate and stopped court a couple of times to let Mum cuddle me and get a drink of water.

I thought he was nice and very compassionate. He seemed to understand what I was going through and he asked me a couple of times if I wanted to take a break.

I felt better when I just looked at the judge because he reminded me of Paul Holmes.

He seemed sympathetic and heard what I was saying.

He was really good. He let me stop and get myself together. He asked me if I was alright.

4. Cross-examination and defence counsel

[The] victims’ ... ordeal in court ... result[s] mainly from their experience of cross-examination.39

[H]er story becomes the subject of stringent testing, not the least in cross-examination. It is her behaviour and character, rather than those of her attacker, that becomes the focus of minute examination.40

Most women were anxious about going to court and the majority afterwards described their experiences as being even worse than expected. This was due in particular, to defence cross-examination which often made the complainant feel that her own character and behaviour was on trial.41

[M]uch of the complainant’s credit that is tested in a sexual assault trial is unrelated to her powers of observation and veracity. Her manner of dress, her perceived reaction to the crime and her lifestyle seem to be unfairly deemed relevant to the determination of the defendant’s guilt or innocence. The complainant often has the experience of being forced or

38 In New South Wales it has also been found that judges usually do respond well to women complainants’ needs while testifying: Heroines of Fortitude, supra n 28 at 127.
39 Supra n 29 at 65.
40 Supra n 37 at 356.
41 Supra n 26 at 136.
bullied into proving *herself* innocent.\textsuperscript{42} 

These passages demonstrate that the feelings of the women in this part of the study reflect results from many other jurisdictions, as well as the statements made in the 1983 *Rape Study*. In some cases of stranger rape, where identification was the issue, and the woman had, for example, been attacked in her own bed while asleep, the women found defence counsel tolerable, or "abrupt". However, the vast majority of women reported a much worse experience, especially when the issue was consent, or belief in consent. In such cases, there seems to have been very little control of the kinds of questions that defence counsel is allowed to ask in cross-examination.\textsuperscript{43} 

Evidence of the sexual history of the complainant is inadmissible except with the leave of the judge.\textsuperscript{44} However many women reported that they were asked questions about their sexual history. In addition, a number of the women were not informed that such evidence was inadmissible.

The overall feeling of the women about the substance of cross-examination and the behaviour of defence counsel is that they are extremely upsetting and inappropriate:

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He was a prick - just basically ran me into the ground. Got a guy I used
to work with to lie on the stand. Made me out to be sleazy and smutty ...
I felt fine about giving evidence until it came to the cross-examination.
[He asked me offensive and insulting questions] "[D]id you take your
shirt off in the night-club?" "Do you have sex with everyone who buys
you one drink?" "Is it true that you used to leave work without telling
anyone and go down the road to sleep with your boyfriend?" I was more
pissed off with defence counsel [than the jury] - it was like he was really
anti-women... the offender walked because of him.\textsuperscript{45} 
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He treated me badly - he said things that were never said and I couldn't
allow that... I thought it was disgusting what lies that lawyer told in front

\textsuperscript{42} *Heroines of Fortitude*, supra n 28 at 149.

\textsuperscript{43} Supra n 10 at 133-134:

In the trial transcripts I examined I found that the perfectly normal behaviour of young
women is presented as evidence that they provoked the man's attack or asked for it.
Questions addressed to the women ... included whether she was a single mother;
whether the man she was living with was the father of her children; the colour of her
past and present boyfriends; who looked after her children while she was at work;
... what underwear she had on; whether she wore false eyelashes and red lipstick...

\textsuperscript{44} See Elisabeth McDonald, "The Relevance of Her Prior Sexual (Mis)Conduct to His Belief
in Consent: Syllogistic Reasoning and s 23A of the Evidence Act 1908" (1994) 10(2)
Women's Studies Journal 41; *Heroines of Fortitude*, supra n 28 at 233 ff.

\textsuperscript{45} The accused was re-arrested and charged with another rape while on bail pending this
trial. The jury did not know this. In the later trial he was found guilty and was sentenced
to 18 months imprisonment.
of all those people... He said that I told Margie that the offender just “came over me”. It made me feel sick. It was disgusting. It was untrue. I have never told anybody else that [besides the police] and I have burnt my statement because I can’t stand it in the house.

He was a real arsehole to me ... his lawyer made me feel really small. He asked me if I had made it up because I didn’t want my parents to be angry. He [intimated] that I had had quite a few boyfriends. He said: “didn’t I go to the party to make my boyfriend jealous?” He asked me questions about my prior sexual experience but I wouldn’t answer them. I didn’t think it was relevant to the case. [He] asked me questions over and over again - I felt like no-one believed me.

He made me feel like shit. He twisted all my words round and made out that I had been hallucinating, taking drugs. Then when that didn’t work he tried to say that it was my father then he said that it was my counsellor that had put it into my head but I didn’t start seeing a counsellor until the Tuesday after it happened and my father was away at that time ... His lawyer made me feel as if it was my fault and I didn’t know what I was talking about ... I did not comment on the question about my sexual past because it was not relevant. The judge didn’t mind because he didn’t think it was relevant either.

I was asked how would I know that there was penetration - that would be typical of a man to ask a stupid question like that.

He treated me like I was stupid. He questioned every little thing and made me feel like I was on trial.

It was terrible. He accused me of lying. Put me through the wringer. Implied I was bored in my marriage.

I felt ripped about as a person ... violated again and again by the judicial system.

[Giving evidence] was one of the worst things I have ever done in my life.

5. Role of support agencies in court

Almost without exception, the women commented on the value of having a support person in court with them. Some felt that they did not want their parents or partner to be there because of what they had to say, but in these cases they were supported by a counsellor or other support agency representative. They said:
Even though my counsellor sat behind me and I couldn't see her, the thought of having someone there made it a bit easier ... it was like a security blanket type thing.

The presence of my counsellor gave me strength - I felt like other people really did care.

I felt her presence gave me added strength, that I wasn't going in alone.

I felt that I was believed and felt good because the police officer and counsellor said I had done well.

It is important to note that despite the result, or the response of the police or lawyers, all women, with one exception, who relied on the support agencies, felt supported, cared for, and believed. One woman felt that she needed a different kind of support than that offered, and felt that more information about the various options would be useful.

VI. REFORM RECOMMENDATIONS

Despite similar findings with respect to the trauma caused by cross-examination in the 1983 Rape Study, virtually no reforms to the process of cross-examinations have been implemented. This is the aspect of the court process reported by survivors to be the most humiliating and degrading. Reforms in this area have been slow because they are considered to be tampering with the basis of the adversarial system of law and the rights of the accused.46

It has been cogently argued from a legal perspective that the amendments to evidence laws in rape cases are inadequate, adding nothing to the protection already afforded a witness by existing general rules of evidence, should a court choose to invoke those laws. It is further pointed out that the negative experiences of women alleging rape in the court room stem from deeply embedded attitudes to sexuality and the role of women in sexual relationships, and as such are not amenable to the superficial procedural “tinkering” that has already occurred.47

The women's statements

[There is a] need to treat women with more dignity ... I walked out of that thing [the process] feeling like it was my fault that it happened.

46 Brynes and Kendall, supra n 7 at 64.
More education for people associated with the process [is needed] - the courts and the police - so they understand it more and are more compassionate.

I don’t really think that there was much that could have changed my experience. I know women don’t get the support I got. They should understand that it’s hard. I’d like to see other women dealt with the way that I was. It’s not easy - caring and understanding are needed.

[I did] not [receive] enough information - [I needed] more contact with the police or an intermediary.

The judge or your lawyer should object more because the defence are really nasty to you and they ask some stupid questions.

The victim should get a say in what type of lawyer she gets.

Goals of reform

Eliminating those features of the rape trial that make the woman feel as if she is the defendant and make the whole experience of testifying painful and degrading.\(^{48}\)

The reforms following the 1983 Rape Study have made a difference to the experience of women testifying in court. Prior to the implementation of these reforms, women were, for instance, required to give testimony in open court, to give oral evidence at depositions and to hear the judge give a warning to the jury that it is unsafe to convict on the uncorroborated evidence of a rape complainant.

It is apparent, however, that many of the women’s comments about the trial process, particularly in relation to the performance of the prosecutor and defence counsel, mirror the descriptions of the participants in the 1983 Rape Study. Women almost always still find cross-examination traumatic and intimidating. Women almost always still find they have little or no contact with the prosecutor before the trial and consequently feel that their story of the rape is neither understood nor presented in court.\(^{49}\)


\(^{49}\) Heroines of Fortitude, supra n 28 at 141:

Complainants in this study generally were not able to express their feelings about the sexual assault in court. Their stories were sanitised and confined within the narrow limits defined by the rules of law ... and by the discretionary decisions made by the Judge. The question and answer format for giving evidence did not allow the complainant to tell “her story” and may have led to relevant evidence being omitted or other evidence being given the wrong emphasis.
Women in this study who fared better under cross-examination or who had some time with the prosecutor before the trial tended to be those who were survivors of stranger rape. This finding indicates a continuing dichotomy between stranger rape (or "real rape") and acquaintance rape (or "simple rape") with a consequential impact on the perception of the woman in court and the kind of attacks on her character and credibility that seem permissible. This dichotomy operates to make women's culpability for the rape an integral part of the trial, making the trial an extremely unpleasant experience and leading to a "sophisticated discrimination in the distrust of women victims". As Rae Kaspiew comments in the Australian context:

[The real rape/simple rape dichotomy ... is also used by defence counsel as a powerful tool in the construction of their stories. In cases that have "simple" rape story features, where the victim/survivor may have been drinking or knew her attacker ... these features are continually emphasised to evoke the [rape] myths and thus create "reasonable doubt".]

Although further changes in the process may be made (for example, more communication with the prosecutor, provision to give evidence in the absence of the defendant) without a fundamental change in societal attitudes towards the crime of rape, women's experience in court, including the outcome, will not be fundamentally different over the next 10 years.

One change within the existing system that may well have a significant effect is a change to the legal definition of rape/sexual violation. If there is a different emphasis on the inquiry into consent, women's experience of reporting rape and being believed may be very different. In other words, a starting point of believing women and requiring proof of actual consent (rather than belief in consent) to defend a rape charge, would alter the assessment of culpability. Another option would be the adoption of s 37(a) of the Victorian Crimes Act 1958, which requires the judge to direct the jury that:

[The fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement.]

51 Ibid, 29.
52 Supra n 37 at 376.
53 Rape/sexual violation is currently defined as penetration of a woman's genitalia by a penis without the woman's consent and without the man having a reasonable belief that she was consenting: Crimes Act 1961, s 128.
54 See Bernadette McSherry, "Legislating to Change Social Attitudes: The Significance of s 37(a) of the Victorian Crimes Act 1958" in Easteal, supra n 7 at 373-383.
This provision attempts to counter the view that women may say no when they really mean yes. This kind of mythology still operates to prevent women being treated as fully autonomous sexual beings.\textsuperscript{55} Whatever reform options are proposed in the future,\textsuperscript{56} including alternative methods of dealing with criminal charges, it is essential that views about women, sexuality and sexual violence are informed by reality, not myth.

\textsuperscript{55} See the recent direction to a jury in a rape case by Justice Morris: “if every man throughout history had stopped the first time a woman said no, the world would be a much less exciting place.” \textit{The Dominion}, Wellington, 4 July 1996, 1.

\textsuperscript{56} For proposals in Australia that have significant relevance to the New Zealand situation, see \textit{Heroines of Fortitude}, supra n 27 at 1 ff. On the issue of the character and credibility of a rape complainant, see Law Commission, \textit{Evidence Law: Character and Credibility} (PP27, 1997).
EQUALITY AND FAMILIES

Nancy Dowd *

I. INTRODUCTION

Single-parent families have become the focus of renewed stigma and stereotype in the war to reform social welfare systems.1 Blamed as the cause of their family’s poverty, criticised for the absence of two parents, condemned for their sexuality, single-parents - usually single mothers - are viewed largely in negative terms. Those negatives are used to justify policies of deterrence and punishment, and the consequences are often visited upon children who have the misfortune of being born into or becoming part of a single-parent family. The focus of this article is the role of law in stigmatising single parents in the United States. Particular legal regimes vary between the US and New Zealand, but the overall patterns and justifications are remarkably similar. Indeed, the marked constriction of the welfare state in New Zealand has erased the sharp difference in public support of single parents between New Zealand and the US.

The negative view of single parents is particularly strong for non-marital single parents, although this is not the largest group of single parents in the United States. Separation and divorce create most single-parent families (60% of the total), while the failure to marry is the origin of half as many single-parent families (30%).2 The death of a parent creates less than 10% of single-parent families.3 The negative image of single parents is strongly tied to single mothers. On the one hand, this image accurately reflects the primary caregivers of children in single-parent families: almost 90% of children raised

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3 Ibid. Single-parent families in the United States constitute 30% of families with dependent children. The rise in single-parent families is a pattern that dominates the post-industrial countries, with the proportion of single-parent families averaging 10-15% of families with dependent children, and therefore the U.S. proportion of nearly 30% represents one of the highest proportions. Ibid, 29. This proportion represents more than a doubling of single-parent families in the United States.
in single-parent households are raised by mothers. On the other hand, this image renders nearly invisible fathers who provide primary care as well as fathers who are legal parents but provide little caregiving and begrudge financial support. Single fathers are often visible only through the negative image of the "deadbeat dad" who fails to pay child support.

As I have argued at length elsewhere, the justifications for negative policies towards single-parent families are largely based on myths and unsubstantiated stereotypes. The poverty of single-parent families is made, not chosen. It is connected not to family form, but to the consequences of entrenched gender roles, failure to acknowledge and deal with dependency, and the consequences of ongoing racism. Poverty is not a choice; it is a punishment. Similarly, the structure of single-parent families does not cause psychological harm. Father absence is not significantly different from marginal father presence in two-parent families. But even more fundamentally, the view that fathers are unique caregivers, distinctive and different in what they offer children, is simply unsupported by what we actually know about what fathers do in families. When fathers nurture children, they do so like mothers. More often, however, fathers support mothers in their nurturing, and thereby indirectly care for their children, rather than directly caring for their children. Furthermore, justifying stigma on the basis of moral condemnation of single parents is, like poverty, a constructed, not an inherent, judgment. This stigma is strikingly anachronistic and contradictory given our sanction of no-fault divorce and our retreat from treating children born out of wedlock, or their parents, as outcasts. Moreover, sacrificing children's welfare for the perceived moral lapses of their parents should raise moral objections. Finally, the explicit justifications for stigma hide implicit racial and gender stereotypes that are simply that, unsubstantiated generalisations that support racial and gender hierarchy.

Nevertheless, law, like other disciplines and much of popular culture, operates in a variety of ways to reinforce and construct negative outcomes for single-parent families. First, legal rhetoric contributes to the ideology and mythology of stigma by continuing to name children born outside of marriage illegitimate, which literally means unlawful. Even if those children are legally protected against discrimination of the basis of that status, the name itself powerfully connotes a disfavoured status. Stigma is also apparent in the structure of paternity determinations, which remain designed more to protect fathers rather than to connect them to, or require them to support, their children. Second,

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6 Dowd, supra n 1 at chapter 1.
the law permits, and even arguably constructs, negative outcomes for single parents in the legal regimes that most frequently impact on their lives: divorce and welfare. The level of economic support under both of these regimes, alone or in tandem, is inadequate to support most single-parent families. The law incorporates negative stereotypes as the premise for denial or limitation of benefits or rights. The constriction of welfare is the prime example of this. The amount of welfare support has never permitted recipients in any state to live above the poverty line. Recent welfare reform has eliminated support as an entitlement, and imposes significant limitations, including lifetime limits, on receipt of benefits. Finally, the law fiercely protects the privileged status of the patriarchal marital nuclear family even to the detriment of children.

Many of these negative legal outcomes are hidden behind the relationship between the concepts of equality and families. Concepts of equality operate in strange ways to hide real barriers to the success of single-parent families, as well as failing miserably to ensure minimal standards of support for children. In this essay I focus first on the interlocking work and family paradigms that hide inequality and foster the notion that individual choices, bad choices, are the cause of bad outcomes. Second, I also describe how equality concepts, when applied to families, have failed to include respect for diversity and support for equal opportunity for children. Equality concepts operate quite differently in these two respects. In one instance equality obscures reality; in the other, achieving real equality in the context of inequality requires affirmative policies of support. In order to reorient our concepts of equality and families, we require a notion of fundamental rights for children that includes real equality of opportunity, as well as fundamental rights for families that limit the state’s ability to disadvantage particular families on irrational grounds.

II. Equality, Work and Family

Concepts of equality in work and family law explain the negative circumstances of single-parent families as the consequence of individual choice rather than as the result of structural inequality. Equality thereby hides inequality. Legal definitions of equality ignore social inequality tied to structural and cultural discrimination. By emphasising guarantees of equal access to existing structures, law perpetuates those structures, regardless of whether they are inherently or historically discriminatory. Both family and work have been sites of inequality, as has the relationship between family and work. The impact of inadequate equality concepts affects all families; the results are simply more apparent and dramatic in single-parent families. But equality does more than shield structural inequality from view; it also constructs, and perpetuates, that inequality. Legal concepts of equality
contribute significantly to the poverty of single-parent families, which has so much to do with the negative outcomes experienced by these families.

The principle of equality in family law describes families as composed of equal partners who equally share the responsibilities of family.\(^7\) Any allocation to the contrary is read as the product of choice, and any unequal or differential allocation of familial responsibilities is understood as capable of being readily changed. Difference and inequality can simply and easily be replaced by the paradigmatic equality pattern of gender-neutral parental sameness. At divorce, equal parents share parenting responsibility. To the extent that financial resources and capabilities are unequal, the law engages in limited redistribution of income, but with respect to caregiving it presumes equal capability and responsibility, again changed or reconfigured by choice.

Gender neutrality is integral to the family law equality principle.\(^8\) Because men and women are equal, without any significant gender differences, each can play the gender-neutral role of parent. This is reflected in custody rules that no longer incorporate nineteenth century paternal preference or twentieth century maternal preference, but rather assign custody based on the best interests of the child. In its strongest model, equality and gender neutrality underlie the joint physical custody model of post-divorce childrearing, a model whereby each parent plays an equal role and children physically spend half their time in the home of each parent. Even under a primary caretaker model, equality ensures that both parents have equal rights to serve as the primary parent.\(^9\)

Racial colour-blindness is also integral to the family law equality principle. Indeed, constitutional norms reject colour-conscious discriminatory laws or their application with respect to marriage and child custody.\(^10\) On its face, family law doctrine does not differentiate on the basis of race, in contrast to a history of legal disruption and undermining of African-American families.\(^11\)

The family law model of equality operates upon a context of work-family relationships and structures that are highly unequal, strongly gendered, and


\(^8\) Ibid.

\(^9\) Ibid.


racedually stratified. The preferred two parent equality model of family reflects the dominant family form of white families, but not the dominant family form of African American or Hispanic communities. Single-parent families are the dominant family form in African-American families, roughly 60% of families. The structure of single-parent families has deep historical roots in the rending apart of slave families, the economic pressures of Reconstruction and post-Reconstruction, and the impact more recently of welfare policies and continued lack of economic opportunity. The dominant origin of single-parent families in the African-American community are couples who do not marry rather than couples who divorce. Least numerous are those single-parent families created by the death of a spouse.

The existing structures of family law, however, are most generous to the children of widows and widowers, providing benefits nearly twice those provided to children whose parents are on welfare. Children who receive both survivors' benefits and welfare benefits are overwhelmingly white; Black children are disproportionately represented as recipients of welfare benefits only, rather than survivors' benefits or both survivors' and welfare benefits. Divorce law, the next best legal structure, (at least from the perspective of benefits to children) also predominantly serves white families. Although the custody and child support structures of divorce are theoretically available to non-marital children, they are functionally unavailable to many non-marital children because they can be triggered only by establishment of paternity. The rate of paternity establishment for non-marital children is an alarmingly low 30%. For 70% of non-marital children, there is no access to the preferred structure because of inability or failure to establish paternity. The "neutral" structure of family law, then, in the context of the form and structure of Black families, provides the most minimal, most stigmatising level of support. Finally, that structure also largely fails to recognise the role of extended family structures more prevalent among African-American families.

Family law also operates upon a strongly gendered family structure. Historically, gender divisions in the workforce and gendered roles in the family were accepted as a given. Ideally, men engaged in wage work to support their families; women raised children and performed the household work.

The pattern of a sole male breadwinner and a stay-at-home wife raising children

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12 Rawlings, supra n 4.
13 Supra n 11.
14 Rawlings, supra n 4.
15 Dowd, supra n 1 at chapter 2.
16 Ibid, chapter 4.
has become the exception rather than the norm. Under 10% of American families with children under the age of 18 conform to the traditional pattern. In two-parent households, both parents are in the workforce. This shift in work-family patterns is evidence to some of the adoption of gender-neutral, equal work and family roles. However, gender patterns in both work and family persist despite the abandonment of the traditional pattern. In effect, that model has been modified but not discarded.

The traditional gender pattern persists in the work patterns of women with children under the age of four: of those women, nearly half are at home. Once women enter the wage workforce, furthermore, they are more likely to accommodate work to family responsibilities, as reflected in their choice of work and their greater likelihood of working part-time. At the same time, their choices are constrained by the limited employment opportunities for women. To the extent the work structure remains hostile to parenting, women are disproportionately disadvantaged. Ongoing barriers of sex segregation that relegate a significant portion of women to “women’s work” also limit women’s choices. Employers’ expectations about women’s family responsibilities are strong, so strong that they affect the opportunities for all women, not simply women with children.

Women’s predominant, even sole, role in caring for children persists despite women’s increased participation in wage work. Men have not significantly expanded their household or child care responsibilities. Instead, women do a double shift. Thus, amidst an enormous shift in the work-family balance for women, there is this remarkable persistence of traditional roles, albeit significantly reconfigured. The reconfigured work-family roles persist across class and race lines, and along the life course of employment for women. If traditional and reconfigured families are compared, women’s roles are remarkably similar. The work patterns of women in married and single-parent households also are remarkably similar. In fact, women spend less time working on home-related responsibilities in single-parent households. The two family types do not significantly differ in areas of job-family management, role strain, or degree of problems with children. Household work in two-parent families is still women’s work: women perform 2 to 3 times more tasks than do men.

The impact of women’s real and perceived family responsibilities in

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18 Ibid.
19 Ibid.
20 Ibid. See also Vicki Schultz, “Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument” (1990) 103 Harvard LR 1749; Dowd, supra n 5 (1995).
22 Dowd, supra n 1.
combination with the very real difficulties they face in the wage labour market means that women are both economically and socially unequal. That inequality, and in particular women's economic impoverishment, is largely hidden within marriage. Women are poor, or become poor, within marriage particularly once children are added to the family. Their poverty is linked to the impact of children upon their opportunities in the wage labour market, the lack of value attached to the unwaged work done in the household, and their consequent dependency on another wage earner. Their poverty becomes starkly apparent at divorce, when women are expected by the equality doctrines of family law to maintain their familial responsibilities while shouldering greater (more equal) economic responsibility. Their inability to do so is caused not by lone parenthood; its roots are in the sexual division of labour in the family and continuing sexual discrimination in the workplace.

Placed in the social context of work and family, the typical single-parent family develops within the marital family. In that sense, every parent is a single-parent. Mothers' parenting includes all or the vast majority of unwaged household work and caretaking, combined with wage work. Fathers' parenting, in contrast, is predominantly focused on economic caretaking, combined with minimal social caretaking and household work.

The legal rhetoric of equality, however, hides this unequal context especially well with respect to two-parent marital families. It thereby hides the inequalities within families that often are the result of the interaction of this unequal context with a "neutral" equality principle for families. However, inequalities are apparent at divorce.

At divorce the legal system reconstitutes the single-parent family structure within marriage as a devalued post-divorce family form. The creation and perpetuation of poverty is the price the law imposes upon post-divorce single-parent families through an inadequate economic support structure. Furthermore, the law permits fathers' abandonment of their children by allowing fathers to lessen or even ignore their psychological and social commitments to their children, as well as their financial support of their children. In addition, at divorce the ideology of choice justifies disparate roles. The myth of equal job opportunity theoretically provides a cure for any past or present familial inequality. Equal availability of jobs, it is presumed, will permit ongoing support as well as a chance to reconstruct, albeit outside the vows of marriage, two co-equal parents. These are widespread patterns which the law does little or nothing to correct.

The stigmatisation of single parents is accomplished at divorce by the operation of a system premised on equality laid upon a work-family context of inequality. Certain principles inform the current divorce structure. They include the following: no party should be held at fault; each party should leave the marriage with roughly half the property created or acquired during the marriage; neither
party should bear long-term obligations to the other spouse; parenting and financial responsibility for children should be shared after divorce; and all allocations of property and childrearing responsibilities should be done on gender-neutral principles. Marriage is viewed as a partnership of equals who share work and family responsibilities equally, and who have equal opportunities to structure their private as well as work lives. It is assumed that post-divorce each spouse can function independently on the same terms as he or she did during marriage, limited only by individual accomplishment and effort. Any interruption of wage work or modification of work behaviour in response to family responsibilities is presumed remediable.

Although employment law is clearly separate from family law, assumptions about the wage labour market and the protections afforded by employment law pervade divorce law. The economic structure of divorce presumes the ability of single parents to support themselves and the children of the marriage on one salary. Divorce law also presumes that parents either remain in the wage labour market during the marriage, or that the market permits short-term withdrawal, accommodates children's needs, and welcomes workers who wish to resume full-time wage work. If family law fails to achieve shared child support and parenting, family law relies on an assumption that the labour market is flexible and permits time to parent or to generate sufficient income to buy parenting or household services. The presumptions about the wage labour market are grounded in the operation of the non-discrimination principle of employment law that ensures equality of opportunity and treatment.

The realities of divorced single-parent families are starkly at odds with these presumptions of family and work law. Economically, men's position improves, while that of women and children markedly declines. The inequalities of the wage labour market frustrate women's attempts to close the gap. A substantial proportion of jobs do not provide sufficient income to support a family. Women's mere presence in the workforce, and working full time, does not ensure the same rate of return in income as that of men. Withdrawal from the labour market, even for a short term, has significant consequences which are disproportionately felt by women. Part-time work is not a viable alternative either. Overall, the labour market has shifted only slightly to accommodate the combination of work and parenting. The accommodations tend more toward the episodic and temporary rather than a reorienting of the structure of the workplace. At the same time, post-divorce caretaking patterns are remarkably gendered. Women retain primary or sole custody in roughly 90%

23 Ibid.
24 Ibid.
of divorces. Men not only do not share caretaking, they frequently abandon their relationships with their children within 2 years of divorce. A significant portion also abandon their financial responsibilities as well.26

Rather than supporting equality, the structure of divorce law seems designed to create stigma or to do nothing to prevent it. Under the guise of equality and choice, divorce law has recreated, or even worsened, the explicit gender hierarchy of earlier legal regimes. Divorce law penalises single custodial parents, predominantly women, by creating their poverty. In turn, they are blamed for the consequences of the poverty of their children. At the same time, until recently, the legal system has largely permitted non-custodial parents, who are mostly fathers, to escape financial responsibility without consequence, blame, or stigma. Half of the children raised by single mothers are below the poverty line.27 Single fathers, whether with or without their children in their household, do not share this high poverty rate. The poverty of single mothers is directly tied to their limited opportunities in the wage labour market, the inadequacy of child support and the frequency with which it is still not paid, and the lack of any state support to either replace lost child support or supplement the gap created by labour market discrimination and current parental responsibilities. The consequences of poverty are well known and tragic. Seventy percent of children will spend some time in a single-parent household before reaching the age of majority; the consequences of poverty for single parents are therefore profound.28

The economic status of women and men after divorce is remarkably different, and that difference is accepted within the equality regime. Both the role of unwaged work in the family economy and the consequences of children’s dependency are missing from the current legal regimes structuring family and work. Work and family have not been reconceptualised to reflect the necessity of more than one income for most families. In addition, we lack a vision of gender equality based upon non-subordinating gender roles.

Amidst the context of ongoing inequalities in both families and work, law takes equality as its goal but fails to provide the structures to ensure equality or to address issues of dependency. When a marriage dissolves, family law revives the myth of work equality of opportunity and connects it to the family law goals of gender neutrality, gender equality, and self-sufficiency. Divorce, however, exposes the hidden construction of impoverished single parenting within the marital family, which is the consequence of the combined equality regimes of family and work law. Family law conceptualises employment patterns and family responsibilities as private. Employment law conceives

26 Dowd, supra n 1.
27 Ibid.
workforce positions and income as matters of choice.

By ignoring the context of inequality as well as the consequences of legal structures, law is an active creator of stigma. Law ignores unequal gender roles and the perpetuation of a highly gendered work-family structure. Law also ignores dependency. Previous legal models of family presumed dependency; the current equality model rests on a presumption of independence. We ignore dependency created within marriage by walling it off as private. By ignoring gender roles and dependency, it is easy to undervalue or disregard entirely unwaged work.

If we were to face squarely the equality issues that family and work law ignores, we would have to consider a number of troubling, difficult issues. First, we would have to decide whether equality should be based on a single-parent or dual parent model. Our current model of parenting is a single-parent model. We presume that one parent will be the sole or primary parent, while the second parent, whether within or without the household, will be far secondary. To the extent that we continue that model, we have to think through what that means in equality terms. It might mean that the single-parent should as often be the father as the mother. It might also mean that a single-parent model creates dependency for the caregiver that must be taken into account. We can support all single parents, whether within dual parent households or single-parent households, to ensure equal opportunities for children. On the other hand, if we base equality on at least two parents for each child, then we need to envision what that might mean. If it means two parents equally involved in caregiving all the time (not seriatim), then we must foster the structural change to permit, or even mandate, that to happen. We have functioned from a notion of presumed gender neutrality for a long time. That presumption has only provided the opportunity for actions contrary to traditional gender roles; it has not undermined the gendered allocation of familial roles in the vast bulk of families.

Second, dealing with the particular problems of single-parent families requires us to be very gender-specific in addressing the problems of mothers and fathers. The agenda for single mothers most immediately is economic: ensuring sufficient income while not denigrating their caretaking role. The agenda for fathers most immediately is reconstructing fatherhood into a non-dominating, caregiving role. Gender distinctions relate to differences constructed within marriage and in the relationship between work and family, therefore the issues of single parents are inevitably the issues of all parents.

Finally, a different understanding of equality must incorporate race differences as well as gender differences. For example, the economic disadvantage experienced by African-American men as compared to white men confounds the assumptions about the gender differential and shifts the agenda of what needs are most urgent for single parents. It requires attention to race differences
to avoid further marginalising Black men. In addition, the bulk of single-parent Black families are the result of parents never marrying rather than the result of divorce. Attention to the interlocking equality paradigms of divorce and employment law should not be used to separate or segregate single-parent families, particularly when the result is a racial separation.

What we now have is a single-parent model that is supported to some extent within marriage, but is wholly unsupported and discouraged outside of marriage. This harms two-parent families and it is devastating to divorced and never-married single parents. It is an irrational distinction for children. If we truly envision equality to mean a dual parent family where children have the benefit of twice as much parenting, or even of parenting equally divided among mothers and fathers, then we must construct a system with that set of assumptions. In particular, we have to think through how to reorient fatherhood to create a different norm of parenting within and outside of marriage or shared households.

III. Equality, Children and Families

The equality principle operates in a different way when the perspective from which you view single-parent families is the perspective of the children in those families. Rather than legitimating and obscuring the context in which these families operate, and functioning as an active creator of the poverty and stigma that single-parent families face, from the perspective of children, the equality principle is instead silent, seemingly inoperative. Theoretically, children have a strong claim to an equality principle that would ensure rough equality of opportunity as a fundamental entitlement in a democratic society. Since so much of children's future livelihood is connected to the family context in which they are raised, and because all the evidence on family form and structure indicates it is irrelevant to family success, it would further seem that children could argue that equal treatment of various forms of family is fundamental. These arguments would prohibit, then, differential family treatment based on form to the detriment of children's opportunities. However, we recognise the state's interest in promoting family by permitting certain family forms to be valued over others. Challenging the state's ability to value certain families and stigmatise others pits equal protection against the state's ability to make moral and/or social judgments.

The second way in which equality principles might operate to the benefit of children is not only to value all their families, but rather to ensure resources that ensure opportunity. This is a harder equality argument to make because it requires affirmative support rather than simply prohibiting negative action. Yet without a concept of equality that encompasses affirmative support, equal acceptance of various forms of families ensures little more than ideological
support for single-parent families. In order to expand substantive support and to mandate a minimum threshold of support, equality principles must encompass a reconception of the relationships of families to community and to the state. The justification would be to ensure equal opportunity for children, as well as making real a social commitment to, and taking responsibility for, children.

The affirmative valuing of single-parent families, indeed of all families, is rationally premised on the evidence that structure or form does not dictate the success or value of particular families. When socio-economic status is held constant, children succeed just as well in single-parent families as they do in two-parent families. Form does not dictate whether a family is functional or dysfunctional. It may simply mean that families are different. Indeed, single-parent families have their own dynamics, including some benefits as compared to two-parent families. These families are models of networking and extended family systems. The children are more likely to be more independent, self-reliant, and more committed to gender equality.

The value of family differences is not limited to single-parent families. There are other forms of family that do not conform to a two-parent, heterosexual, marital norm that work for children. Relatives other than parents, non-relatives with close relationships, multiple parents exceeding the two-parent norm—all the myriad variations of family succeed or fail for reasons other than structure. Most notably, the argument that a rational basis does not exist to exclude gays and lesbians as parents, as families, and as married couples, is implicated here.29

Focusing on the definition of “family,” the goal is to entitle single-parent families to the same or similar benefits as those afforded to two-parent marital families, or at a minimum, equal respect. While there is no doubt that single-parent families are families, constitutionally it has nevertheless seemed permissible to elevate two-parent marital families and stigmatise single parents.30 One strategy would be to attack that favouritism and include single-parent families within the circle of preferred families. A more radical strategy would be to attack the state’s entitlement to prefer a particular form of family at all. A more inclusive understanding of family then might be a basis to remove stigma, for example by eliminating entirely the legal concept of illegitimacy, or might be the basis for providing equal benefits to single-parent families as those enjoyed by two-parent marital families. A middle ground

29 Barbara Bennett Woodhouse, “It All Depends on What You Mean By Home” (unpublished manuscript on file with author); Ruthann Robson, “Resisting the Family: Repositioning Lesbians in Legal Theory” (1994) 19 Signs 975.
strategy between these two would allow the state to show a preference for particular structure of family, but not to stigmatise all others.

In order to provide real change in the material circumstances of single-parent families, however, we must reconceptualise the relationship between family and community. Our individualistic, privatised view of family precludes a collective, communal responsibility for children. A reoriented relationship between state and families must be grounded in principles of equality and children’s rights.31

The basis for that reorientation is in thinking about families, and children, from gender and race perspectives. Privileging one family form and stigmatising others, resulting in disproportionately valuing the majority family structure of white Americans over the majority family structure of African-Americans and other people of colour, constitutes discrimination. Similarly, stigmatising a family form overwhelmingly headed by women, particularly on the basis of the absence of an opposite-sex partner, also constitutes discrimination. If families are critical to individual growth and development, as well as benefiting social interests, then families must be supported in order to afford every child this primary, critical social structure and in order to maximise individual opportunity as well as social benefit. If equality principles require that gender and race not be determinants of individual accomplishment, then providing support for the most immediate and influential of social structures in order to ensure individual development should be required. The role of the state is to ensure that equality of opportunity by ensuring that sufficient resources are present for every child to maximise her potential.

Our concept of children’s rights will define the substance of the opportunities to be provided to all children. From what we know about single-parent families, the needs of the children in those families most clearly are for economic support, nurturing support, and access to society’s opportunity structure, especially education. Providing for economic needs requires redistribution of wealth and recognition of social as well as individual responsibility for, and benefit from, children. There may be debate over defining the outer limit of economic needs, the extent to which adult inadequacies should be compensated for, and what level of opportunity constitutes equality. However, there is a large gap of basic need to be closed; surely that can be a floor from which to start. From that base, we can argue about when we have reached a ceiling that ensures equal opportunity.

It is also critical that equality encompasses non-economic support. Dependency is not simply economic; it is social as well. As Martha Fineman

has pointed out, there are two dependencies with which we must grapple: the "inevitable dependency" of children (and others), and the "derivative dependency" created by the caretakers giving care. Law's withdrawal from overt support of caregiving and caretakers has contributed to rendering dependency invisible and therefore unsupported, to the significant detriment of children.

A constitutional basis for ideological and practical support for single-parent families rests on principles of pluralism, freedom, and social responsibility, as well as equality. Principles of pluralism and support for difference and diversity are the basis to reject a privileging of any particular family form. Freedom to choose one's family and to make choices about family have been the justifications for considerable privacy accorded to families. Instead of ensuring that family privacy is respected, however, what is needed is the assurance of support for family. As Dorothy Roberts has argued, a purely negative right precludes meaningful autonomy for many families. An affirmative right, in her view, would ensure that hierarchies of race, gender and class would not impact on free choice-making. It is clearly important for single-parent families that the conventional role of privacy doctrine should be retained, in order to limit the reach of state regulation and intrusion. But that need not be the sole understanding of privacy. The protection of diversity because of the valuing of what families do can best be accomplished by ensuring a threshold of economic and non-economic support. This threshold is consistent with, and perhaps even mandated by, a different understanding of privacy. The protection of diversity and its support would encompass an affirmative vision of equality for children.

IV. CONCLUSION

The rhetoric of support and respect for family is sharply at odds with the realities of the difference in the ways families, and particularly the children within those families, are treated. Nowhere is this more evident than in the rate of child poverty: in 1995 three out of every ten children were poor; by the end of the century it is estimated that four out of ten children will be poor. Equality concepts are used in some strange ways in this area. Mostly they are used to hide inequalities in existing contexts that lead to outcomes that perpetuate or aggravate those in equalities, while remaining strangely silent when it comes to ensuring equal opportunity. If law fails to acknowledge

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33 Dorothy Roberts, "The Value of Black Mothers' Work" (1991) 26 Conn LR 871.
context, and refuses to measure by outcome, then promises of equality are hollow. More meaningful equality that would guarantee that men and women be equally committed to children is essential.
CIRCUMSCRIBING KNOWLEDGE IN AOTEAROA/NEW ZEALAND: JUST EPISTEMOLOGY

Nan Seuffert *

I. INTRODUCTION

Eurocentric epistemologies, ¹ as theories of knowledge, have underpinned the production of knowledge across disciplines, including knowledge produced in law and in the social sciences. A consideration of epistemology is therefore one of the necessary inquiries for a research project into Laws and Institutions for a Bicultural New Zealand² that seeks to develop bicultural³ research.

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¹ I use “Eurocentric philosophy” to denote what is often known as philosophical modernity in order to emphasise the cultural specificity of this philosophy. For a concise discussion of philosophical modernity see Margaret Davies, Asking the Law Question (1994) 221-223.

² The University of Waikato School of Law received funding for this research project from the Foundation for Research, Science and Technology in the 1996 funding round; the project began on 1 January 1997.

³ “Biculturalism” is an often contested term created by Maori activists and academics in response to policy discourses of multiculturalism in Aotearoa/New Zealand developed in the later 1970s and 1980s. It was argued that a focus on multiculturalism was an excuse for “doing nothing” and a means by which the state could “quieten Maori demands for their language and culture to be taught in schools, as well as to placate mainstream New Zealand and encourage tolerance and restraint”. Kuni Jenkins, “Maori Education: A Cultural Experience and Dilemma for the State—A New Direction for Maori Society” in Eve Coxon, Kuni Jenkins, James Marshall and Lauran Masey (eds) The Politics of Learning and Teaching in Aotearoa-New Zealand (1994) 153. Arguments for biculturalism based on the Treaty of Waitangi 1840 were also expounded in reports of the Waitangi Tribunal:

We do not accept that the Maori is just another one of a number of ethnic minority groups in our community. It must be remembered that of all minority groups the Maori alone is party to a solemn treaty made with the Crown. None of the other migrant groups who have come to live in this country in recent years can claim the rights that were given the Maori people by the Treaty of Waitangi.

Because of the Treaty Maori New Zealanders stand on a special footing reinforcing, if reinforcement be needed, their historical position as the original inhabitants, the tangata whenua of New Zealand, who agreed to allow our European forbears to come and settle here with them.

Waitangi Tribunal, Te Atiawa Report, Te reo Report section 5.11, 37 (Wai-6, Wellington, 1983).
methodologies as a preliminary step for the development of bicultural laws and institutions. The project begins from the position that the existing law, legal system and legal and political institutions of New Zealand, as well as the dominant methods of social science research, are generally monocultural. The first objective of the research is therefore titled “Bicultural Methodology and Consultative Processes”. It requires creating and identifying epistemologies, methodologies and methods for bicultural socio-legal research.

My interest in the project springs in part from my conviction that law and society are inextricably intertwined and mutually reproductive, and from the recognition that social change is necessary to produce a just society for Aotearoa/New Zealand. Any analysis of the laws and legal system that purports to be conducted outside of, or separate from, the society in which that system operates will have a severely limited potential for social change. My work in the past therefore has been interdisciplinary, involving both social science research and legal analysis. Two aspects of these past projects resonate with this project: a focus on locating knowledge and an interdependent focus on the processes of knowledge production.

Traditional Eurocentric theories of epistemology have claimed universal applicability across disciplines, cultures and historical periods. These theories have been styled as quests for the theory of knowledge, meaning one universal theory of knowledge. This approach has logically and politically circumscribed the legitimation of knowledge. Logically, these theories of knowledge have developed and used the criteria of objectivity, universality and rationality to legitimate and limit the production of knowledge. Politically, these criteria reproduce the dominant social order; the criteria produce and legitimate knowledge that reflects and reproduces power in the already powerful groups in society. Through the processes of imperialism and colonisation, traditional Eurocentric epistemology has been imposed throughout the Commonwealth and the United States. It is reflected in the dominant approaches to producing knowledge in law and in social science research methodologies and methods.

Challenges to Eurocentric epistemology have come from, among others, Anglo-American and other feminists, and Maori women and men. The claim to the production of objective knowledge has been thoroughly critiqued, resulting in convincing arguments for recognition of the stakes of the location of the production of knowledge, including the position in society of the knowledge producer, and the historical, geographical and political context in which knowledge is produced. One powerful argument has been made by the American feminist Donna Haraway, critiquing claims to objectivity in the production of knowledge as “god tricks”. Haraway argues for the recognition

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of the partiality of knowledge production, and for situating knowledge in the particular historical, political, social and legal contexts in which it is created. Haraway’s argument has been interpreted by some theorists as defining all knowledge as situated. Focusing on the location of knowledge production also highlights issues of the process of production. When can knowledge legitimately claim broad applicability?

Maori women, feminists and others in Aotearoa/New Zealand have questioned the relevance of Anglo-American theories to Aotearoa/New Zealand, discussing issues surrounding importing, recreating and situating such theory in Aotearoa/New Zealand. This essay considers the implications of importing Haraway’s argument for use as a tool of feminist epistemology in Aotearoa/New Zealand; Haraway’s argument is itself particular to its situation as an American critique of the dominant Eurocentric epistomological traditions. I first discuss traditional Eurocentric epistemology and its Anglo-American critiques, making the argument for situating knowledge production in response to the hegemony of these epistemologies. I then consider the implications of using this argument in the context of Aotearoa/New Zealand, beginning with the argument that traditional Eurocentric epistemology has facilitated the process of colonisation in Aotearoa/New Zealand. The particular context of relations between Maori and Pakeha women in Aotearoa/New Zealand is central to situating feminist theories here. Finally, I consider assertions by Maori women that Anglo-American postmodern theories, adopted by Pakeha feminists and others in Aotearoa/New Zealand, are culturally specific to the dominant culture and exclude some Maori women’s conceptions of aspects of identity. I conclude that feminist epistemology requires theories of situated knowledges that are internally circumscribed, both deconstructing the universalist, exclusive umbrella of the dominant Eurocentric theories, and leaving space for multiple theories of knowledge which may be inconsistent.

6 See eg Sneja Gunew and Anna Yeatman, “Introduction” in Sneja Gunew and Anna Yeatman (eds) Feminism and the Politics of Difference (1993) xiii (citing Haraway); supra n 4 at 11 “all scientific knowledge is always, in every respect, socially situated”.

7 Feminists in Aotearoa/New Zealand and Australia have engaged in re-creating feminist theory from the US and elsewhere into theories with local relevance and significance. See eg Vicky Kirby, “Feminisms, reading, postmodernisms’: Rethinking complicity” in Gunew, supra n 6 at 20, 21; Wendy Larner, “Theorising Difference in Aotearoa/New Zealand” (1995) 2(2) Gender, Place and Culture 177, 182-184.

8 “Pakeha” is a Maori term, used by Maori to refer to descendants of colonisers, to persons of predominantly European descent, or to all non-Maori people in Aotearoa. See HW Williams, Dictionary of the Maori Language (1992) 252. Use of the term by white people has been contested and described as part of a politics that marks the dominant group racially and culturally. Paul Spoonley, “The Post-Colonial Politics of Pakeha” in Margaret Wilson and Anna Yeatman (eds) Justice and Identity: Antipodean Practices (1995) 96-115.
This essay therefore focuses on developing the epistemological stance for the first objective of the Laws and Institutions for a Bicultural New Zealand project, leaving the development of research methodologies and methods for further work. Both critiquing the dominant traditional epistemologies and circumscribing the feminist epistemology of situated knowledges, it aspires to just epistemology.

II. SITUATING TRADITIONAL EUROCENTRIC EPISTEMOLOGY

Any attempt at a concise exposition of the voluminous works that have contributed to the development of Eurocentric epistemologies, the critical work of Anglo-American feminists and the deconstruction of its facilitation of colonisation by Maori people and others, is inevitably reductionist and distorting. Here I attempt only to discuss some general aspects of traditional theories that assist in highlighting the gender and culture specificity of those theories in the analyses that follow.

A. Traditional Eurocentric Epistemology

An epistemology is a theory of knowledge. Traditionally in Eurocentric philosophy it has been assumed that one universal theory of the nature and limits of knowledge existed a priori, and that the philosopher’s quest was one to discover this theory. The term epistemology was used to indicate the theory of knowledge, “[e]pistemology, or the theory of knowledge, is that branch of philosophy which is concerned with the nature and scope of knowledge, its presuppositions and basis, and the general reliability of claims to knowledge...”. In fact, the proponents of many different theories argued for acceptance of their theory as the theory. Many of these theories share a number of epistemological beliefs. The first belief is that there are simple rules ordering the behaviour of matter and the evolution of the universe. The second belief is that there are eternal, objective, extrahistorical, socially neutral,

9 Sandra Harding, “Introduction: Is There a Feminist Method?” in Sandra Harding (ed) Feminism and Methodology (1987) 1. Harding’s definitions are not the only ones for these terms, and there has been debate among feminists about both the categories and the contents of the categories that she proposes. Mary Maynard, “Methods, Practice and Epistemology: The Debate About Feminism and Research” in Mary Maynard and June Purvis (eds) Researching Women’s Lives From a Feminist Perspective (1994) 10.


external and universal truths. Finally, it is assumed that natural laws can be discovered that are universal, genderless and verifiable.  

The central epistemological belief that knowledge can be “objective” has had several interconnected meanings. The first of these meanings is that the producer of knowledge is the subject and knowledge is produced about an object of study. Objectivity also implies that the subject producing the knowledge has no interaction with or effect upon the knowledge produced, so that knowledge can be verified by interchange knowledge producers without affecting the knowledge. The knowledge produced is therefore universal truth, distanced or “free” from the knower’s position in society and his or her political beliefs. The subject who is the producer of knowledge is autonomous and instrumental and produces universal objective knowledge (knowledge about objects) using the rational mind. Reason as a tool is unconnected to both the knowledge producer’s position in society and his or her body. The mind is therefore privileged over the body and the emotions in the production of knowledge. The assumption that knowledge produced by the mind will be the same regardless of who the producer is, that the scientist or academic only “reveals” the “Truth”, has freed the knowledge producers from any responsibility for the knowledge.

The mind/body dichotomy is one example of the predominant dichotomous manner of organising phenomena and legitimating knowledge that is integral to traditional Eurocentric epistemology. The assumptions that underlie this method of organisation include: that all relevant phenomena is captured by the two dichotomous categories; that each category represents a universal, homogenous essence; that the categories are mutually exclusive; and that therefore any phenomena not captured by the two categories represents an “abnormal” case. For example, traditional Eurocentric epistemology is based upon the assumption that all people fall into one of the two categories in the dichotomy man/woman, that all men and all women share in the essence of

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12 See Lorraine Code, “Taking Subjectivity into Account” in Alcott, supra n 10 at 15,16.
15 Ngaire Naffine, “Sexing the Subject (of Law)” in Margaret Thornton (ed) Public and Private: Feminist Legal Debates (1995) 21-26 at ftnt 22 “My focus here is on English legal thought from about the late eighteenth century.”
16 Maynard, supra n 9 at 18.
17 Ibid.
18 See eg Sneja Gunew and Anna Yeatman, “Introduction” in Gunew, supra n 6 at xiii, arguing that binary logic is “homogenizing and universalist, built on the principle of exclusion and the tyranny of the familiar.”
“being” a man or a woman, that the two categories explain everything that we need to know about sex, and that anyone who does not fit into one of these categories is abnormal. Hermaphrodites, transsexuals, transgendered people, gays and lesbians and indeed anyone who does not conform to the dominant discourses’ construction of gender is therefore considered abnormal.19

Other dichotomies that have been central to traditional epistemology include: subject/other; objective/subjective; neutral/biased; universal/particular; and rational/irrational. Traditional epistemology links the categories on each side of the dichotomy to each other. Each characteristic which is important to the legitimation of knowledge in Eurocentric epistemology is found on the left side of the dichotomy; conversely association of knowledge with the categories on the right side is considered delegitimizing.

These three aspects of the legitimation of knowledge—the centrality of objectivity, the interconnected meanings of objectivity, and the use of dichotomies—are all reflected in the production of knowledge in both law and the social sciences. For example, in law the assumption that judges are objective legitimates their decisions: it is assumed that their decisions are uninfluenced by their positions in society and their political beliefs. Many substantive areas of law assume that a rational subject is the actor of the law.20 It has been argued that the ideal of the autonomous rational subject is central to the idea of law itself.21 The mind/body binary has also been central to mainstream Anglo-American legal theory; it is the rational mind, using the power of reason, that obeys the law.22 The substantive law has reflected the dichotomous ordering of the binary man/woman by, for example, criminalising gender “abnormalities”,23 restricting marriage to opposite-sex couples,24 and prohibiting women from practising as lawyers.25 The connections between the two sides of each dichotomous pair are also reflected in the law:

19 See Amy Kastely, “Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law” (1994) 63 U Cin LR 269, 277 “I have met people whose gender I could not discern....If I cannot figure out a person’s gender I do not know how to act; and if a person’s gender is unclear, then the person must be a strange character, no matter what.”
20 Supra n 1 at 223.
The mind/body polarisation has historically functioned hand-in-hand with the ways in which the relations between the sexes are conceived and particularly, with the social, cultural and legal homogenisation of women's specificities into models produced by and functioning in the interests of a universalism that disguises its affinity with patriarchy.\textsuperscript{26}

The mind/body binary reflects and is reflected in the man/woman binary. The influence of these epistemological traditions in the social sciences has produced, for example, the assumption (or aspiration) that good social science research can be duplicated by any competent researcher; thus the researcher's position in society and political beliefs are irrelevant to the knowledge produced.\textsuperscript{27} In order to maintain the distance necessary to the production of objective knowledge the researcher is traditionally taught not to reveal anything about his or her background or beliefs, and not to engage in any information exchange with the research participant (or object of study).\textsuperscript{28} Any relationship between the researcher and the research participants is seen to "taint" the study and is therefore inappropriate.\textsuperscript{29}

Traditional Eurocentric epistemologies have underpinned the production of knowledge in law and in the social sciences, resulting in claims that knowledge produced in these disciplines is objective and therefore universally applicable across cultures and historical periods. The next two sections focus on critiques of these claims to universal applicability that insist on recognising the limitations of the traditional theories as both gender and culture specific.

\textbf{B. The Gender-Specificity of Traditional Eurocentric Epistemologies: Anglo-American Feminist Critiques}

Anglo-American feminists and others have critiqued Eurocentric epistemological beliefs and the use of dichotomies as an organisational tool. While these critiques have been multiple and interconnected, at least two major strands are identifiable. The first is the critique of objectivity and the related concepts of rationality, universality and impartiality as the legitimators of knowledge and knowledge production. The second major strand critiques the pervasive use of binary categories as the underlying foundation of epistemological theory. Iris Young provides an excellent analysis of the theoretical interconnections between objectivity (or impartiality) and

\textsuperscript{26} Supra n 22 at 4.
\textsuperscript{27} Michael Quinn Patton, \textit{Qualitative Evaluation and Research Methods} (2d ed 1990) 54-56.
\textsuperscript{29} Supra n 27 at 54.
dichotomous ordering, and the link between these concepts and the perpetuation of power:

The stances of detachment and dispassion that supposedly produce impartiality are attained only by abstracting from the particularities of situation, feeling, affiliation, and point of view. These particularities still operate, however, in the actual context of action. Thus the ideal of impartiality generates a dichotomy between universal and particular, public and private, reason and passion.... the ideal of impartiality serves ideological functions. It masks the ways in which the particular perspectives of dominant groups claim universality, and helps to justify hierarchical decision making structures.\(^{30}\)

The first strand of feminism critiques objectivity as a “myth” that masks the dominant epistemological stance of knowledge, perpetuating the production of a partial world view consistent with the interests of certain groups who have traditionally produced knowledge, usually privileged white men.\(^{31}\) Knowledge produced from these very particular and partial perspectives therefore masquerades as universal Truth. Donna Haraway uses sight as a metaphor to highlight the partiality of knowledge production. She argues that claims of objectivity in knowledge production have been false claims that the knowledge producer can see the “object” of the knowledge from all perspectives equally at once without actually being situated anywhere, “the god-trick of objectivity”.\(^{32}\) Human beings are always located in a very specific place in relation to the subject of knowledge. As a human being, one can never “objectively” see from every perspective at once, without actually being situated anywhere. Claims of objectivity are therefore false claims of superhuman vision.

The second strand, critiquing the pervasive use of binary categories, notes that each dichotomy also represents a hierarchy, with one category constructed as subordinate to the other.\(^{33}\) For example, the use of the subject/object dichotomy in epistemology, linking the producer of knowledge with the subject and objectifying the person or thing studied, has been critiqued for its tendency to reproduce the power of those usually in the privileged position of producing knowledge. It has also been pointed out that any “knowledge” which transgresses traditional epistemological structures by starting from the particular position of the subject or (worse still) from her political beliefs, or by challenging the mind/body dichotomy, cannot by definition be “objective” or “rational”, is obviously not scientific, and therefore has a dubious status as “knowledge”:\(^{34}\)


\(^{32}\) Supra n 5 at 190-91.

\(^{33}\) Supra n 31 at 113-120.

\(^{34}\) I am indebted to Margaret Davies for this particular phrasing.
[A] process will be considered to be “scholarship” to the extent that it appears to conform to norms of objectivity, rationality, and so on; and it will be considered to be “not scholarship” to the extent that it overtly attempts to take account of women’s social experiences, as expressed through a deconstruction of falsely universalized knowledge and theory.35

Similarly, races that are constructed as “other” to “white” tend to be marked by traditional Eurocentric epistemology with subordinate characteristics: emotional, irrational, savage, uncivilised, earthy, unable to escape the constraints of the body for the pure rationality of the mind and therefore producers of inferior knowledge (if any).36

Haraway’s argument interweaves aspects of the second strand of feminist critique. Relativism is the mirror opposite of objectivity, a binary integral to traditional epistemology’s binary logic. Relativism is also constructed as subordinate to objectivity. The assumption that a critique of objectivity leaves relativism as the only option perpetuates the dominance of binary logic. Haraway and others have argued that highlighting the partiality of knowledge production does not mean that any perspective is as good as any other.37 Relativism, like objectivity, relies on the assumption that knowledge can be produced that does not reflect the knowledge producer’s position in society or political beliefs. To argue that we are faced with an illimitable variety of perspectives of equal value is also an argument which purports to start from a position outside the cultural context. Further, responses to critiques of objectivity that assume relativism as the only, and inferior, option, have historically been made when this dominant binary logic is under attack in order to preserve the status quo.38

Haraway’s insistence on the location of knowledge production as an integral element of knowledge moves beyond the objective/relative dichotomy.39 All knowledge is located in particular social contexts: situating knowledge is

35 Kathleen A. Lahey “...Until Women Themselves Have Told All That They Have To Tell...” (1985) 23 Osgoode Hall LJ 525.
37 Supra n 5 at 191; Hurtado, supra n 36 at 36; supra n 4 at 152-156.
38 Supra n 4 at 152 “Historically, relativism appears as a problematic intellectual possibility only for dominating groups at the point where the hegemony of their views is being challenged.”
39 For a critique of Haraway suggesting that she unwittingly sets up further dichotomies, see Kirby, supra n 7 at 23-25.
about recognising the stakes in that location. The recognition that perception is inevitably located, and therefore political, leaves a space for criticising knowledge-claims on the basis of what Haraway calls their “irresponsibility”40. This irresponsibility includes failure to locate the knowledge as situated, unreflective assumptions of objectivity, and the perpetuation of invisible power structures which universalise certain forms of perception. Haraway argues that we should value knowledge that recognises its own partiality, (the beliefs and value systems of the communities through which it is produced) and takes responsibility for that partiality.42 In other words, knowledge producers are accountable for the knowledge produced. We cannot claim that we are not responsible for the “truth” that we “reveal”43.

Anglo-American feminist critiques of the traditional Eurocentric epistemological focus on objectivity as a criteria legitimating knowledge have had both logical and political dimensions. Knowledge cannot logically be objective as objectivity is traditionally defined (and therefore is not). Knowledge is always produced and interpreted by a subject who knows.44 Claims to objectivity in knowledge production are politically a way of protecting the privileged point of view of the group of people who have the power to define what counts as truth. In Eurocentric society, educated white men have created knowledge in their own images as a dominant minority, and have presented this knowledge as universal, and themselves as therefore unaccountable. Reliance on binary logic in the production of knowledge is ubiquitous, simplistic and irrational; its use is also pervasive and deeply rooted.

Anglo-American feminist critiques of traditional Eurocentric epistemological assumptions and logic are also reflected in feminist critiques of law and social science research. For example, drawing on the critique of objectivity, Martha Minow has argued that justice requires recognition of the partial perspectives of judges:

Justice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them. Rather than securing an illusory universality and objectivity, law is a medium through which particular people

40 Supra n 5 at 191.
41 For excellent discussions of community epistemology, or epistemological communities, see Lynn Harkinson Nelson, “Epistemological Communities” in Alcott, supra n 10 at 161.
42 Supra n 5 at 190.
43 Supra n 4 at 149, 152, 156.
44 Catharine MacKinnon, Feminism Unmodified (1987) 55 “Objectivity is a stance only a subject can take. . . . Anyone who is the least bit attentive to gender since reading Simone de Beauvoir knows that it is men socially who are subjects, women who are objects.”
can engage in the continuous work of making justice. 45

The critique of objectivity and the resulting universality in law has sometimes resulted in feminists focusing on the particular narratives of women's experiences, and using women's narratives in legal arguments. 46

In the social sciences feminists have argued that the irrationality of claims of objectivity require researchers to situate themselves in their research projects and reflect on and analyse the implications of their locations. 47 Rather then creating distance from the research subjects, it has been argued that researchers who share experiences with research participants produce better knowledge about those experiences. 48 These critiques have resulted in the production of knowledge in which the researcher's position is acknowledged as an integral part of the knowledge. 49

These Anglo-American critiques of the traditional Eurocentric epistemology underlying the law and social sciences contributed to a crisis of legitimacy. This global crisis of legitimacy exhibited its own specificities in Aotearoa/New Zealand. 50 One aspect of this crisis particular to Aotearoa/New Zealand is the form of claims for Maori sovereignty.

48 Maynard, supra n 9 at 15-16; supra n 13; Nancy Harstock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Harding, supra n 9 at 157.
The Cultural Specificity of Traditional Eurocentric Epistemologies

Aotearoa/New Zealand was colonised by the British beginning in 1769. In 1840 the Treaty of Waitangi was signed by the British and some leaders of the various Maori iwi. The British quickly proclaimed absolute sovereignty over Aotearoa/New Zealand. However, the Treaty guarantees Maori te tino Rangatiratanga (loosely translated as chieftainship), and control over taonga (treasures) and resources, such as fishing. The discussions of Maori surrounding their signing indicate that most Maori did not believe that they were ceding sovereignty, or granting control of their land to the British. The most logical and well-developed analyses of the Treaty signing suggest that what Maori people were agreeing to, and what the British knew that Maori people were agreeing to, was the British coming into the country to govern the British, while the guarantee of te tino Rangatiratanga ensured that Maori people retained the right to govern Maori people. Implementation of this agreement would have been likely to result in two systems of governance, contrary to the British claim to absolute sovereignty.

The physical processes of colonisation in Aotearoa/New Zealand, as elsewhere, were facilitated and legitimated by traditional Eurocentric epistemology. The ubiquitous binary logic that underpinned the definitions of Eurocentric knowledge as universal, and the Eurocentric subject that it produced as the measure of all things, resulted in all other knowledges and peoples being labelled partial and inferior, justifying the imposition of colonisation:

those who embrace the Euro-derivation of “universal knowledge” are considered by definition to be the normative expression of intellectual advancement among all humanity....having inherent rights to impose themselves and their “insights” everywhere and at all times, with military force if need be...

The assumptions regarding one universal, correct theory of knowledge also legitimated the imposition of one absolute sovereign as legal ruler.


52 One influential Maori leader at the time described the effect of the Treaty in the debates surrounding the signing as “the shadow of the land goes to the Queen but the substance remains with us”. Ranganui Walker, Ka Whawhai Tonu Matou: Struggle Without End (1990). Maori also had concerns with the lawlessness of British and thought that the Treaty would clarify the need for British to rule their own.

53 Supra n 51 at 263-265.


Colonisation involved not only the physical imposition of "settlers" on the lands of indigenous peoples and the imposition of a British form of law, but also the domination of the production and legitimation of knowledge and culture. The term "epistemic violence" has been coined to represent the colonisation of the processes of the production of knowledge:

the discourses on the colonized that the colonizer produced were, for the most part, distorted at best, fabricated at worst. The notion of 'epistemic violence' captures the idea that associated with West European colonial expansion is the production of modes of knowing that enabled and rationalized colonial domination from the standpoint of the West, and produced ways of conceiving 'Other' societies and cultures whose legacies endure into the present.56

These Anglo-American critiques of the colonisation of knowledge production were preceded here in Aotearoa/New Zealand by Maori critiques of epistemology. Linda Tuhiwai Smith has been one of the leading commentators in this area, arguing that:

In creating a 'new' nation, the colonisers placed great emphasis on how different they were from (and much 'better' than) the native inhabitants. The emphasis placed on the constructed dualisms of savage and civilised, heathen and Christian, immoral and moral, provides examples.57

Consistent with use of the ubiquitous binary logic that Smith recognises, from the colonisers' perspectives knowledge produced consistent with Eurocentric epistemology was defined as superior to knowledge produced by Maori knowledge processes:

In general, consistent with traditional epistemology's dichotomous and hierarchical ordering, Maori knowledge processes were devalued by colonisers at the same time that Eurocentric knowledge production was valorised.58

An important aspect of these critiques is the focus on the cultural specificity of the production of knowledge consistent with Eurocentric epistemology. Not only is this knowledge gender-specific consistent with constructions of the male gender as the subject producing the knowledge, but it is also culturally specific to the West European colonising cultures.

These critiques are, of course, applicable to the production of knowledge in both law and the social sciences generally. Moana Jackson’s eloquent indictment of the racism of the New Zealand Criminal Justice System in 1988 critiqued its basis in a monocultural philosophy and the substantive outcome of criminal convictions. 59 He concluded, based on the argument that the Treaty of Waitangi guaranteed te tino Rangatiratanga to Maori, that the effects of the cultural specificity of the colonisers’ legal system mandated culturally appropriate parallel legal systems for Maori and non-Maori. 60

Traditional Eurocentric research epistemology has also been critiqued from a Maori perspective:

Traditional research epistemologies have...developed methods of initiating research and accessing research participants that are located within the cultural preferences and practices of the Western world as opposed to that of Maori people themselves. For example, the preoccupation with neutrality, objectivity and distance by ... researchers has emphasised these concepts as criteria for authority, representation and accountability and has distanced Maori participants from participation in the construction, validation and legitimation of knowledge. 61

This critique encompasses research methodologies and research design. Research designs based on Eurocentric epistemology, often used by Pakeha researchers studying Maori, have tended to objectify Maori people by transforming them into objects of study. 62 Maori researchers have explicitly used Maori processes to locate the power and control in the research process with the Maori research participants. 63 This centring of Maori processes in the production of Maori knowledge is consistent with an epistemology “based within Maori cultural specificities, preferences and practices”. 64

60 Ibid Pt 1 at 42; Pt 2 at 265.
61 Supra n 58 at 14-15.
62 Ngahuia TeAwekotuku, “He Tikanga Whakaaro: Research Ethics in the Maori Community” (Manatu Maori, Wellington, 1991); Jackson Pt 1, supra n 59 at 3.
64 Supra n 58 at 15 (citing Kathie Irwin, “Maori Research Methods and Processes: An Exploration and Discussion” Paper presented to the joint New Zealand Association for Research in Education/Australian Association for Research in Education Conference, Geelong, Australia, 9).
Eurocentric epistemology as the basis for the production of "universal", "objective" knowledge in both law and social sciences has been thoroughly critiqued as both gender and culture specific. In response, arguments for recognition of the situated aspects of knowledge, such as Haraway's, have proliferated. In Aotearoa/New Zealand, both the critiques of traditional Eurocentric epistemologies and the calls for situating knowledge have been most clearly mediated and reconstructed in the practical and theoretical relations between Maori and Pakeha women. An analysis of those relations is therefore useful to both situating knowledge in Aotearoa/New Zealand and to analysing the relevance of Haraway's analysis for this context.

III. LOCATING KNOWLEDGE IN AOTEAROA/New Zealand

The Anglo-American "second wave" of feminism(s), and the movement(s) for Maori sovereignty contributed to the construction of relations between Maori and Pakeha women in Aotearoa/New Zealand that were mediated through complex local and global discourses. These discourses included feminist theories and practices produced in the United Kingdom, North America and Australia, all of which were sometimes enthusiastically and uncritically appropriated and sometimes critically reproduced and recreated in light of local conditions. Also influential were both international and local constructions of discourses of self-determination, and especially the claim, made most powerfully by Maori women, to absolute Maori sovereignty in Aotearoa/New Zealand.

Crucial to the analysis of relations between Maori and Pakeha women in Aotearoa/New Zealand is the historical context of colonisation. While the dearth of information on women's histories generally is even more pronounced in the area of relations between Maori and Pakeha women, it is clear that Pakeha women, even during the "first wave" of feminism, were heavily implicated in colonisation. The role of Pakeha women in colonisation often included "civilising" Maori women and girls by teaching them domestic roles consistent with the colonisers' culture. This cultural colonisation resulted

66 See Barbara Bookes and Margaret Tennant, "Maori and Pakeha Women: Many Histories, Divergent Pasts?" in Barbara Bookes, Charlotte Macdonald and Margaret Tennant (eds) Women in History 2 (1992) 25, 37 when a ban on the employment of Maori women by Asians was urged in 1929 representatives of the National Council of Women and Miriam Slojak defended Maori women's right to choose for whom they worked, but this may be explained partly by the fact that the work was seen to be appropriate for Maori and not Pakeha women.
67 Ibid at 35.
in Maori women reporting that denial of their Maori identity was necessary in order to secure and ensure continued employment, avoid racial slurs and protect their children.\(^{68}\) Maori women also reported discrimination on the part of Pakeha landladies and condescending attitudes on the part of Pakeha women.\(^{69}\) In the rare instances of recorded support of Pakeha women for Maori women, even that support was likely to be made within the Eurocentric construction of Maori culture as inferior and uncivilised, "Maori girls have as much pride, and every right to have it, as their more civilised sisters".\(^{70}\)

Further, there is much evidence to support the argument that colonisation impacted severely on the traditional roles of Maori women in many areas, often resulting in rewriting those roles to be more consistent with the colonisers' gender hierarchy.\(^{71}\)

Traditional Eurocentric epistemology's persistent use of binary logic structures oppression along a series of axes according to discreet categories such as gender, race, culture, class, sexual orientation, and others. While there are multiple manifestations of both "first wave" and "second wave" feminism in its Anglo-American and Aotearoa/New Zealand formulations, many of these manifestations, especially those dominated by white and Pakeha feminists, although profoundly challenging gender roles, failed to challenge this underpinning binary structuring as a whole. This approach resulted in movements addressing almost exclusively only one category of oppression, oppression on the basis of sex. The exclusive focus of these various movements has been challenged by women of colour, working-class white women, and lesbians with various local manifestations all over the world.\(^{72}\)

In Aotearoa/New Zealand, as the "second wave" of Pakeha feminism was gaining force in the 1970s and 1980s, political activism on the part of Maori women was also increasing and diversifying. The Pakeha-dominated liberal feminists focused on gender oppression, resulting in struggles for legal rights such as those concerned with control of their own bodies and economic

\(^{68}\) Ibid at 38.

\(^{69}\) Ibid.

\(^{70}\) Ibid at 36 (emphasis added).


independence. 73 During the same period, claims to absolute Maori sovereignty were made by a number of vocal, articulate and powerful Maori women. 74 Maori women were then, as now, central to the movement for Maori sovereignty in Aotearoa/New Zealand, 75 and to demands for the return of Maori land. For example, the Maori Land March of 1975 was lead by Dame Whina Cooper, 76 and Maori women played active leadership roles in the Bastion Point occupation. 77

In 1981 the National Government of New Zealand allowed the all-white South African Springbok rugby team to tour the country despite international agreements and boycotts of high-profile racism in sports. This tour mobilised protest against racism in New Zealand for non-Maori, 78 and especially for Pakeha women. Maori and Pakeha women often marched in the front lines in the protests against the tour in 1981. 79 As Maori activists challenged Pakeha willing to protest racism in foreign countries to deal with the racism in their own backyards, the tour became a catalyst for recognition among Pakeha of past and present injustices to Maori. 80 This recognition spurred the anti-racism movement among Pakeha in Aotearoa/New Zealand. Many of the Pakeha women who were involved in the anti-racism movement were also feminists 81 and some of these women were also involved in developing critiques of the traditional Eurocentric epistemology’s approach to production

73 Supra n 25 at 270.
78 Supra n 65 at 49.
79 Supra n 76 at 250.
80 Supra n 65 at 49.
of knowledge. Some Maori women also recognised a connection between colonisation and sexism:

men are the owners and perpetrators of oppressive institutions, governments, and systems... it is necessary to be where the struggle is—for when it is women, the male-white-supremacist-power-oppression cycle will continue unopposed once again—because we are not there.

It has been controversially argued that a convergence of interests, or recognition of a parallel set of interests, occurred between Maori women separatists and Pakeha lesbian separatists in the 1970s and early 1980s. Donna Awatere argued in 1981 that during their work together on the tour white lesbians and black women had a parallel analysis. When Ripeka Evans challenged the racism of the fourth national United Women’s Convention in 1979, Pakeha lesbian separatists vociferously supported her.

However, analysis presented by Maori women suggests that they do not necessarily see themselves as similarly situated in relation to feminism or to the Maori movement for self-determination. In 1979 Awatere challenged all Pakeha feminists to expand their analysis from one that focused exclusively on gender to one that included an analysis of race and class. Another Maori academic woman felt alliances to both the feminist and the Maori sovereignty movements. Other Maori women, while acknowledging some relevance of the feminist movement to Maori women, cautioned against subsuming Maori women’s struggle within feminism:

One of the difficulties in subsuming our struggle as Maori women under existing feminist analyses is that we deny the centrality of our identity and the specific historical and cultural realities we endure.


Supra n 76 at 248 (quoting Jan Farr (1978)).

Ibid at 243-245; see Larner, supra n 7 at 184 “Dominy’s analysis of the identity formation of Maori activist women was greeted with considerable scepticism, and some hostility, by both Pakeha and Maori feminists.”

Supra n 76 at 249 (quoting Awatere).

Ibid at 244.

Alison Jones and Camille Guy, “Radical Feminism in New Zealand: From Piha to Newtown” in Du Plessis, supra n 25 at 300, 306.


Smith, supra n 57 at 47 “[i]t would be useless to deny the relevance of the feminist struggle for all New Zealand women.”

Ibid at 35.
This comment is a local response to the Aotearoa/New Zealand manifestation of second wave feminism that is linked globally to the challenges of indigenous women and other women of colour to these forms of feminism. Maori women have been positioned as subordinate by Eurocentric epistemology's binary axes in the categories of gender and culture,\(^91\) and often class as well.\(^92\) Feminist theorising addressing only the gender axis, without explicitly recognising the limitations of the use of binary logic, implicitly constructs all women as similarly situated. As a result, women who fit into the most privileged categories, usually white, heterosexual, educated middle-class women, are empowered to speak for all women. The specificities and diversity of Maori women's identities and experiences are silenced and subordinated. The unquestioned use of theories developed from the same or similar sources as traditional epistemological theories, which do not challenge this structure, are therefore seen by some Maori women to have the same colonising potential as traditional Eurocentric epistemology, and have been resisted, at least in part, as a form of "neo-colonialism".\(^93\) For these reasons and others, some Maori women therefore make the powerful argument that Eurocentric and American feminist theories cannot be assumed to be free of the colonising potential of Eurocentric epistemologies generally.\(^94\) Chandra Mohanty makes a similar point about western feminist writing on women in the third world:

> western feminist writing on women in the third world must be considered in the context of the global hegemony of western scholarship—i.e., the production, publication, distribution and consumption of information and ideas. Marginal or not, this writing has political effects and implications beyond the immediate feminist or disciplinary audience. One such significant effect of the dominant "representations" of western feminism is its conflation with imperialism in the eyes of particular third world women.\(^95\)

Some Maori women have explicitly argued for the rejection of Eurocentric/colonising knowledges and for the centring of Maori knowledge:

> for many Maori women there is an ongoing struggle to centre ourselves, to deconstruct colonial representations, and to reconstruct and reclaim knowledge about ourselves. Maori women have been struggling with

\(^91\) For analyses of the positions of Maori women that seem to assume that they must choose whether theirs is a "race" or a gender struggle see supra n 76; Radhika Mohanran, "The Construction of Place: Maori Feminism and Nationalism in Aotearoa/New Zealand" (1995) National Women's Studies Journal 50-69.

\(^92\) Binney, supra n 71 at 23; Elizabeth Murchie, *Rapuora: Health and Maori Women* (Wellington, 1984) 82; Rangiheuea, supra n 75 at 106-107.

\(^93\) Supra n 65 at 54-55.

\(^94\) Awatere, supra n 72.

\(^95\) Mohanty, supra n 72 at 61 (note omitted).
such a process from the margins and many have articulated that in order to fully realise such a process we must locate ourselves in the centre.\textsuperscript{96}

In the mid-1980s these types of local arguments, made in the global context of challenges of women of colour, resulted in Maori women making claims of and demands for space in which to enable this centring. The practical implementation of this idea included the development of both Maori women’s organisations\textsuperscript{97} and parallel Maori/non-Maori women’s organisations that incorporated self-determination with full resourcing for Maori women.

For example, in the years from 1984-1988 the National Collective of Independent Women’s Refuges\textsuperscript{98} implemented a parallel Maori/non-Maori structure for the organisation in response to demands from Maori women.\textsuperscript{99} The organisation is run by a core group of eight women elected from the individual refuges that make up the national collective. Four of these positions are for Maori women and four are for non-Maori women. During the 1980s and early 1990s the national office also employed Maori and non-Maori national co-ordinators and trainers. At the individual refuge level, in towns where there is sufficient population to support two refuge houses, Maori and non-Maori women run two separate refuges. This means that Maori women respond to crisis calls from Maori women and non-Maori women respond to other crisis calls. In towns too small to support two houses, each refuge collective has a Maori and non-Maori caucus. At meetings, the Maori and non-Maori women caucus separately on specific issues, then meet to make decisions. A type of parallel structure was also implemented in the Ministry of Women’s Affairs.\textsuperscript{100} Recently, the National Collective of Rape Crisis and Related Groups has commenced implementation of a bicultural structure.\textsuperscript{101}

\begin{footnotes}
\item[96] Johnston, supra n 36 at 84.
\item[97] See eg Tania Rae, Geraldine McDonald, and Ngahuia Te Awekotuku, “Nga Ropu Wahine Maori: Maori Women’s Organisations” in Else, supra n 99 at 3-17.
\item[99] Ibid.
\item[100] See Brenda Tahi, “Biculturalism: The Model of Te Ohu Whakatupu” in Wilson, supra n 8 at 61-77.
\end{footnotes}
The implementation of parallel structures, the use of the term “non-Maori”, and the ordering of “Maori/non-Maori” in these organisations reflect recognition of the theoretical critiques of Eurocentric knowledge production and a conscious political attempt to implement these critiques into practice by centring Maori women and shifting power from the dominant to the colonised group. Aida Hurtado has recently discussed this strategy in the United States context with respect to power reversals shifting authority to previously silenced groups in specific social interactions such as feminist conferences. She argues that these strategies accomplish more than just substituting one oppression for another:

reversal is a necessary prerequisite to healthy and authentic coalitions, however uncomfortable it may be for all parties involved....What is being accomplished through temporary, context restrained reversals is the knowledge of what it is to be treated according to group membership either for privilege or for oppression....many white feminists find it difficult even to see their white privilege and how the history of such privilege creates a divide between themselves and feminists of Color.

These attempts to implement feminist theory into practice also facilitated awareness and scepticism among Pakeha women of unquestioned importation of Anglo-American feminist theories to Aotearoa/New Zealand, and resulted in attempts to develop feminist theories unique to Aotearoa/New Zealand. Both Maori and Pakeha feminists are therefore often engaged in critically recreating and reproducing Anglo-American feminist theory in a process that challenges the hegemony of these theories and their interpretations. In addition, Pakeha feminists are sometimes aware of the limitations of the knowledge that they produce in relation to Maori women, and explicitly acknowledge these limitations. It could be argued then, that both Maori and Pakeha feminists in Aotearoa/New Zealand commenced the project of situating feminist knowledges here in the 1980s.

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102 Hurtado, supra n 36 at 31.
103 Ibid at 32-33.
104 See eg supra n 25 at 266; Larner, supra n 7 at 183-184; Mohanran, supra n 91 at 53.
105 Kirby, supra n 7 at 20, 21 describing what may be a similar process for Australian feminists: “Taking a critical distance from the hegemony of both Anglo-American feminism and Anglo-American interpretations of postmodern criticism, many feminists in Australia have been engaged in grafting, re-reading and recycling these exotic imports into products with different and local use values.”
106 Supra n 25 at 266 “[t]his chapter will be written from the perspective of Pakeha women... [t]he monocultural perspective adopted in this chapter means that it cannot be comprehensive in its assessment of the questions it poses and attempts to answer.”; Larner, supra n 7; Nan Seuffert, “Lawyering and Domestic Violence: A Feminist Integration of Experiences, Theories and Practices” in Julie Stubbs (ed)Women, Male Violence and the Law (1994) 79; supra n 49 at 312-313.
It is sometimes also argued however, that these types of strategies, including the parallel structures of organisations, are based on a binary politics of Maori/non-Maori that is open to all of the critiques of binary logic that have been discussed above. For example, some recent analysis argues that feminisms in Aotearoa/New Zealand have been constructed and interpreted along bipolar lines as Maori and Pakeha feminism, with little interaction between the two. Others have argued, also using a bipolar analysis, that the feminism of Maori activist women has privileged gender as the primary basis of oppression. In response, the argument has been made that Maori feminism is a construction of Maori nationalism rather than subsumed under the feminist movement. While this latter argument counters the analysis of Maori feminism as privileging gender, it also uses the underlying assumption of bipolar logic that Maori women must choose either other women or Maori men as allies.

While these theoretical arguments may identify or use a bipolar analysis, it is important to note that the practices of feminism in these parallel organisations do not reflect any type of pure separatism. The day to day work engaged in by women’s organisations requires a constant interaction, negotiation of boundaries, and recognition of difference within each group, all of which challenge the characterisation of these as structures as implementing a simple binary. Thus theorising that assumes that separatism is the practice or the goal of these organisations fails to reflect the complexities of that practice, and the fact that in these instances Maori women have demanded these structural configurations rather than having them imposed upon them. Similarly, theorising that imposes the binary structuring of Eurocentric epistemology on Maori women by assuming that their politics must be either manifestations of the feminist movement or manifestations of Maori nationalism also distort the complexities of the positions taken by Maori women, and ignore Maori women’s arguments about the necessity of centring themselves. What is needed is theorising that reflects the complexities of these local political practices and facilitates the development of further local and global political struggles that avoid reproducing subordinating aspects of binary logic and replicating and imposing the colonising aspects of Eurocentric theories on Maori women. Analysing the implications of situating knowledge in the Aotearoa/New Zealand context, to which I turn in the next section, is helpful to this project.

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107 Lamer, supra n 7 at 177. I do not understand Lamer to be arguing necessarily that the two feminisms have in fact been discrete entities, but rather that feminists have tended to analyse them in a bipolar fashion.
108 Supra n 76 at 254.
109 Mohanran, supra n 91.
110 For example, recognition of diversity among non-Maori women, perhaps spurred in part by the arguments of Maori women, has resulted in an Auckland refuge for Pacific Island women.
This section has presented a situated, particular and partial history of relations between Maori and non-Maori women. It is a history influenced by my own perspective as a Pakeha participant in the movement to end violence against women in both the United States and in Aotearoa/New Zealand. In an iterative process, this history has been shaped by feminist theories of situated knowledges as much as it shapes those theories by providing the location for their analysis. It provides a context and location for considering more explicitly the relevance of Haraway’s Anglo-American theory for Aotearoa/New Zealand.

IV. CIRCUMSCRIBING KNOWLEDGE IN AOTEAROA/NEW ZEALAND

I have argued that Anglo-American feminists and others have thoroughly critiqued Eurocentric epistemologies’ pervasive reliance on binary logic; gender and cultural hierarchies integral to dichotomous ordering have been termed ‘epistemic violence’. Simultaneously however, some feminist theorising has continued to employ this (ubiquitous) logic without addressing the stratification of society into other hierarchical categories. Attempts to empower women that do not address the ways in which binary logic structures hierarchies among women often result in empowering only women in the most privileged groups in society. Some of this theorising also oversimplistically constructs and reproduces complex feminist practices into these simplistic categories. In Aotearoa/New Zealand many Maori women and some Pakeha feminists have thus argued that the unquestioned importation of feminist theories based upon or influenced by these Eurocentric theoretical tendencies is problematic.

I contend that Donna Haraway’s argument that knowledge is situated is useful to analysing these problems in feminist theorising. However, logically, the argument for situating knowledge is itself situated in the context in which it was produced, as part of a critique of traditional Eurocentric epistemology and scientific knowledge production. Universalising this argument in response to claims about knowledge production from women who have already been constructed as subordinate by Eurocentric epistemology has the potential to reproduce the epistemic violence of those epistemologies.

In Theorising ‘Difference’ in Aotearoa/New Zealand Wendy Larner notes that she and other feminists, using postmodern constructions of identity, have explored the “notion that women are multiply organised subjects whose

111 See Judith Binney, Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki (1995) 5 (the act of writing history is an encounter between a multifaceted human past and the individual who is constructing the present narrative).

112 See Mohanran, supra n 91 at 53-55.
identities are actively created and recreated in response to contested political, economic and social power relations".113 “This approach to theorising identity situates identity in political, historical and social contexts. It suggests that identity, like knowledge, is mediated through multiple layers of contested contexts. Situating knowledge and theorising identity as socially constructed thus share a focus on the contexts in which knowledge and identity are produced. This type of focus is sometimes labelled “postmodern”.114

Two Maori women, Patricia Johnston and Leonie Pihama, have challenged feminist postmodern theoretical constructions of identity, including the notion that identity is socially constructed, as culturally specific:

the works of feminist postmodern authors...remain located fundamentally within a framework of the dominant culture and therefore fail to provide space for Maori women.115

This argument is consistent with Maori women’s earlier claims for space to centre their experiences. It may be interpreted as claiming that aspects of Maori women’s identities are essential in some way rather than constructed. In making this assertion I use “may” to indicate an awareness of the complex and political process of translation. The argument is made in English; the authors have thus engaged in the translation themselves. However, the English language is part of the framework of the dominant culture in which the postmodern feminist theory that they reject as culturally specific is located. The assumption that transparent translation from one cultural context to another is possible has aided the process of colonisation by European countries.116 Further, the process of translation from a culture with an oral tradition involves both transcription and translation. Transcription presents the danger of creating static knowledge from knowledge that was intended to be living.117 The dangers of the process of translation when communication is between colonisers and a colonised culture are therefore great:

At each of these points—transcription and translation—there may be errors, misunderstandings, slippages; and these problems, universal to all acts of translation, become much more serious when the encounter between two different languages and two different modes of cultural reproduction is also an encounter between colonizer and colonized.118

113 Lamer, supra n 7 at 178.
115 Johnston, supra n 36 at 84.
117 See supra n 111 at 24.
118 Supra n 116 at 222 (citation omitted).
For these reasons I would not assume that Johnston and Pihama are arguing that Maori women have an essence as that concept has been endlessly debated in the Anglo-American feminist literature. However, they are clearly asserting that their conception of identity is based on a knowledge base, or theories of knowing, that are not encompassed by postmodernist strategies and epistemologies.

Some feminist theorists have argued in response to these types of assertions:

The suggestion that minority writers are inappropriately read in terms of postmodernist strategies is one of the more patronizing gestures of “well meaning” theorists. They simply have, so it is argued, primitive stories which renders them fair game for salvage operations.

This passage, occurring in the context of a discussion of the interaction with “minority” texts of “sophisticated” readers, suggests that postmodern strategies are usefully applied to all writers. The authors assert that identities of excluded people come into being “only within the political relationship of a contested universalism” and argue that the identity then constructed is projected backwards as pre-given. Indeed, Johnston and Pihama argue that Maori women need to “reclaim...cultural constructions of identity”. The argument above seems to be that these types of identity claims by Maori women must be seen only as constructed within the context of the colonisers’ claim to the production of universal knowledge and the universal subject. This approach is consistent with the authors’ assertion that all knowledge is situated. Further, its silence about the sources of its location and its implication that postmodern strategies must be applied to all texts can be interpreted as claims to universality, thereby slipping into the same universalising tendencies of traditional Eurocentric epistemology that have been thoroughly critiqued. Postmodern theory supposedly repudiates these universalising tendencies.

Assuming for the moment that Johnston and Pihama’s argument is a reclaiming of some aspects of Maori women’s identities from a pre-colonisation culture, what are the implications of arguing that these claims can be seen only through the lens of postmodern strategies as current constructions of the past? When

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119 The authors note that they are discussing “identification of particular underlying essences which, in the present academic climate, we are so often steered away from.” However, they also reject the label “essentialist”. Johnston, supra n 36 at 84-85. See generally Diana Fuss, Essentially Speaking: Feminism, Nature & Difference (1989).

120 Gunew, supra n 6 at xxiv.

121 Ibid at xxii.

122 Johnston, supra n 36 at 84.

123 Supra n 6.

made by prominent non-Maori academics in the context of a still dominant Eurocentric epistemology that validates knowledge claims consistent with its criteria, does the argument invalidate the Maori women's claims? Ella Shohat has argued that these types of feminist arguments:

risk an anti-essentialist condescension towards those communities obliged by circumstances to assert, for their very survival, a lost and even irretrievable past....the question is: who is mobilizing what in the articulation of the past, deploying what identities, identifications and representations, and in the name of what political visions and goals?125

Even Shohat's articulation of the issues, however, situates indigenous women within a postmodern framework.126

Situating knowledge suggests recognition of the limitations of postmodern theory. As Larner points out, arguments that seem to claim universality, especially if made by privileged Pakeha academics to invalidate Maori women's claims, must be analysed in the historical and political context of colonisation in which the arguments occur.127 Situating knowledge requires recognising the cultural specificity of theories of knowledge, as well as leaving space for other theories even when those theories may be inconsistent, or even contradictory. Feminist knowledges may be competing and incommensurable, separated by gaps that cannot be bridged by more communication or dialogue, or filled by universalising transcendence.129

Situating knowledge production leads to recognition of multiple theories of knowledge underpinned by complex and contradictory epistemologies. It focuses critical attention on the stakes of the locations from which knowledge is produced, the processes of producing knowledge and the politics of its production.130 Situating knowledge moves this focus from a simple identity politics to a complex analysis of, for example, the political stakes for Pakeha women in academia in arguing for the universalism of a "feminist" postmodern strategy in the context of ongoing colonisation of knowledge.

Situating knowledge also focuses activist attention on the political utility of theories. What do theories of knowledge tell us about what types of political struggles are possible?131 These crucial questions are equally applicable to the production of knowledge in law and in the social sciences. It foregrounds

126 Mohanran, supra n 91 at 54.
127 Larner, supra n 7 at 184-188.
128 Jen Ang, "I'm a feminist but ... ‘Other’ women and postnational feminism" in Barbara Caine and Rosemary Pringle (eds) Transitions: New Australian Feminisms (1995) 57, 64.
129 Supra n 49 at 307-311.
130 Gunew, supra n 6 at xix.
131 Larner, supra n 7 at 187.
consideration of the interpellation\textsuperscript{132} of knowledge, context and subject. Critiquing the traditional Eurocentric epistemologies in order to replace them with other universal, absolutist theories leaves those new theories open to the same critiques. The claim that knowledge is situated is itself situated.

V. CONCLUSION: IMPLICATIONS FOR BICULTURAL LAW AND INSTITUTIONS IN AOTEAROA/NEW ZEALAND

The Laws and Institutions for a Bicultural New Zealand project involves the production of knowledge in both law and the social sciences. This discussion of epistemology has raised a series of questions regarding the production of knowledge that are central to this project. Critiques of traditional Eurocentric epistemologies' false claims that "objectivity" results in universality suggest a focus on situating knowledge. Focusing on the situated aspects of knowledge highlights the process used to produce knowledge and issues of accountability for knowledge production. The production of knowledge in Aotearoa/New Zealand in the context of colonising forces of traditional Eurocentric epistemology suggests recognition of the co-construction of that knowledge and colonisation. This is not an argument for relativism; it focuses on the stakes of the locations from which knowledge is produced. Both objectivity and relativism ignore the stakes of location. Arguments that challenges to the traditional criteria of objectivity and universality are calls for relativism redeploy a binary system that has created and perpetuated oppression. Situating knowledge involves continued visibility of the political contexts in which knowledge is produced, and arguments about the value of knowledge within those contexts. Crucial questions about who has access to resources to make those arguments and how credibility is conferred by the dominant approaches to knowledge production are therefore raised. Situating knowledge does not, however, involve a universal claim that only knowledges consistent with this theory can be legitimate; logically this theory must limit itself to its situation. Thus situating knowledge suggests a critique of arguments that postmodern strategies of knowledge production should be applied universally to all knowledge claims, without consideration of the context in which those strategies are employed.

Critiques of the implications of traditional Eurocentric epistemology in both gender oppression and colonisation suggest recognition of the situated aspects of knowledge production, including recognition of knowledge produced

\textsuperscript{132} See Judith Butler, "Conscience Doth Make Subjects of Us All" (1995) 88 Yale French Studies 6 “Althusser's doctrine of interpellation continues to structure contemporary debate on subject formation, offering a way to account for how a subject comes into being after language, but always within its terms.”
consistent with competing and incommensurable epistemological underpinnings. Little attention has been paid to the implications of the recognition of the situated aspects of knowledge for research practices in a research project involving more than one culture, which will be the focus of further development in the *Laws and Institutions for a Bicultural New Zealand* project. Situating knowledge suggests recognition of the interpellation of knowledge, context and subject in this process of development. For example, a recent focus on the consideration of "epistemological communities" highlights the community process of the production of knowledge, including the historical and political context and the prevalent belief systems that legitimate the knowledge. This approach suggests analysis, for example, of the construction of historical gender power differentials which contributed to the creation of the community of knowledge producers, to the production of knowledge that perpetuated that community, and to the ways in which that community and that knowledge construct gender difference. It also suggests analysis of the co-construction of the colonisation of Aotearoa/New Zealand, the knowledge that validates the existence of the dominant knowledge producers, and the knowledge that those constructed as powerful in the production of knowledge are producing. Situating knowledge also suggests that knowledge producers should be accountable for the knowledge that they produce. Analysis of the growing trend of funding the production of knowledge by, and accountability for the production of the knowledge to large corporations is therefore also suggested. To what extent does this process of knowledge production redress disadvantages suffered by groups in society as a result of the traditional Eurocentric criteria for legitimating knowledge?

The potential of the *Laws and Institutions for a Bicultural New Zealand* project to create and influence social change that will redress the monocultural bias of the current legal system will be enhanced by an analysis of the co-construction of epistemological communities and knowledge. For example, Maori women in lower socio-economic classes have been marked by Eurocentric epistemology as "other" on the bases of culture/race, gender, and class and therefore have been acknowledged rarely by the dominant legal system as producers of legitimate knowledge. Redressing that exclusion will require centring rather than ignoring perspectives such as theirs. Analysis of the co-construction of colonisation and the legitimation of knowledge requires a consideration of the potential of the knowledge produced in this project for ongoing colonisation. Situating the knowledge produced here in the context of relations between non-Maori and Maori women suggests the expectation that incommensurable knowledges will be produced by this project; conflicting and contradictory knowledges should be expected and those knowledges

133 Larner, supra n 7 at 180.
134 See supra n 41.
should not be harmonised or assimilated. In particular, this includes avoiding the universalising tendencies of some postmodern feminist knowledge. Finally, accountability in this project is clearly focused on “end-users”; the project’s recognition of a monocultural bias in the legal system suggests that biculturalism will require greater recognition of Maori cultures and Maori people. Achieving this will require a focus on accountability to Maori end-users.

Deconstructing the hegemony of traditional Eurocentric epistemology is a fluid and ongoing process which results in context-specific responses that may be conflicting and contradictory. The challenge for this project in the context of a society that is already producing irreconcilably contradictory knowledges is the reflection of those conflicts and contradictions without attempting to resolve, harmonise or universalise those tensions. This is not a recipe that reassures those in dominant positions of continued security and safety in their dominance, but rather one that seeks to create safe and secure spaces for all.