Feminist Judgments of Aotearoa New Zealand

Te Rino: A Two-Stranded Rope

Edited by
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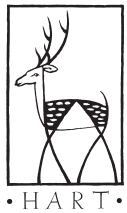

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Introducing the Feminist and Mana Wahine Judgments

ROSEMARY HUNTER, MĀMARI STEPHENS, ELISABETH McDONALD AND RHONDA POWELL

Our Place in a Global Movement

RH: The premise of all the feminist judgments projects is both simple and compelling. Imagine a feminist judge sitting on the bench alongside the original judge/s in a particular case. How might she have decided the case and written her decision? In writing her judgment she is subject to all the same constraints as the original judges. She is writing at the same time, against the same background, knows only the same facts and must apply the same law. She must decide the issue/s put to the court by the parties, work with the material put to the court, observe her jurisdiction's rules concerning the introduction of any extrinsic materials of her own, and abide by judicial norms of independence, fairness and impartiality. If, given all of these constraints, she can produce a legally plausible judgment which uses different reasoning and/or reaches a different result, that is both a powerful demonstration that the original decision was not inevitable, and a powerful illustration of the difference a feminist consciousness might make to judging.

The feminist judgment projects have come about because of the absence—or at least the shortage—of real feminist judges. As a result, there are still too many instances of cases being decided which fail to deliver gender justice. The first such project, the Women's Court of Canada (WCC), focused on a particular body of jurisprudence, the Canadian Supreme Court's decisions under s 15—the equality clause—of the Canadian Charter of Rights and Freedoms.[1] The Canadian Women's Legal Education and Action Fund (LEAF), a group of feminist academics and lawyers, had been intervening in s 15 cases since the advent of the Charter to advocate a substantive interpretation of the concept of equality. After some initial success they felt that the Court had stopped listening to them and considered there was nothing further to be done with regard to gender equality. In strategising about how they could recapture the Court's attention, they hit on the idea of not just making submissions,

[1] The Constitution Act, 1982, sch B to the Canada Act 1982 (UK), c 11, Pt 1 (Canadian Charter of Rights and Freedoms).

but showing the Court how it should be done.[2] They set themselves up as the WCC to 'review' Supreme Court decisions which took an overly narrow approach to s 15 and to demonstrate what a substantive view of s 15 would look like in practice.

The English project took a broader approach, not focused on a particular line of decisions but encompassing the whole of English law, and proceeding from the observation that while feminist theory had made a major impact on scholarship and teaching in the legal academy, it had had much less influence on legal decision-making. While the WCC's slogan was 'rewriting equality', that of the English project was 'from theory to practice', that is, showing how feminist legal theory could be put into practice in judgment form. The project of rewriting judgments also represented a shift—or certainly an extension—of feminist law reform efforts. Whereas feminist law reform initiatives have traditionally involved lobbying for legislative reform, feminist judgments moved the focus to courts and the development of case law. This has several advantages. First, the feminist judge is in control of the product, not just of the ideas but also the language and expression, the reasoning as well as the result. Secondly, making decisions in individual cases allows for greater nuance and particularity than can be achieved with general legislation. It is micro-politics compared to the grand theory of statutory reform. Thirdly, one of the persistent obstacles to the success of feminist law reforms has been the fact that once enacted, legislation must be implemented by judges and officials who are often uninformed about or actively unsympathetic to its objectives. A feminist judge is in a position to implement feminist-inspired law reform in the way it was intended to operate.[3]

Some of the things we discovered in doing the English project remain true of all the projects. First, the reasoning is at least as important as the result. While many feminist judgments are dissenting judgments, or reach a different conclusion from the original judge, this is not always the case. In some instances, the feminist judge reaches the same result but for different reasons. It is those different reasons that are important, that introduce new understandings, interpretations and analyses and add to law's knowledge of the world and of women's lives. Secondly, the facts are at least as important as the law. 'Facts' are not given but constructed, and very often the feminist judge begins by telling the story differently from the way it has been told by the other judges—emphasising different aspects of the narrative, paying greater attention to voices and experiences which have been traditionally silenced or side-lined, acknowledging the harm and trauma suffered by protagonists, or, indeed, restoring dignity and privacy to a party by not retelling their traumatic experience in exhaustive detail. Sometimes the different story provides the basis for a different analysis and application of the law. Sometimes it is simply important in itself that a different account is given.[4]

Each of the feminist judgment projects has made its own distinctive contribution to the genre. Following the Canadian and English projects, the Australian project branched out in several directions, incorporating new areas of law (constitutional, tax, immigration,

[2] D Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1.

[3] See, eg, R Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (New York, Cambria Press, 2008); R Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 *Current Legal Problems* 119, 139; R Hunter and D Tyson, 'Justice Betty King: A Study of Feminist Judging in Action' (2017) 40 *University of New South Wales Law Journal* 778.

[4] See R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2010).

environmental, torts, consumer protection), including first instance and sentencing decisions in addition to appellate cases, and introducing the distinctive voices of Indigenous women. The three Indigenous women who contributed to the Australian collection engaged with the project in three quite different ways. Heron Loban wrote a relatively conventional judgment in which her primary objective was to give speaking roles and credibility to the Indigenous women complainants, when the original judgment had relied on the evidence of a male anthropologist rather than that of the women themselves.[5] Irene Watson wrote an essay explaining why it was necessary for her to speak from a position of Indigenous sovereignty, and thus impossible to take on the persona of a judge in the Australian legal system whose very existence denied that sovereignty.[6] Nicole Watson rewrote a 1930s judgment not as at the same time, but from the perspective of an imagined future in which a treaty has been concluded between the Republic of Australia and Aboriginal and Torres Strait Islander nations. Pursuant to the treaty, a First Nations Court of Australia has been established to contribute to the decolonisation process by revisiting past decisions which had a significant impact on the ability of Aboriginal and Torres Strait Islander people to exercise their right to legal equality.[7]

The Northern/Irish feminist judgments project took as its theme 'judges' troubles and the gendered politics of identity'.[8] It also conceived of itself as a post-colonial project, interrogating the ways in which judicial decision-making has contributed to the construction of Irish national identity, and in particular the limited and subservient role attributed to women as mothers and bearers of children within that identity. In a country whose Constitution protects the right to life of the unborn and 'recognises' and protects the life of women within the home, there is much feminist work to be done. The US feminist judgments project returned to appellate decision-making and specifically focused on the US Supreme Court. Rather than inviting participants to choose their own cases to rewrite, the US project consulted widely on a list of Supreme Court cases calling for feminist revision.[9] The feminist international judgments project is engaged in rewriting decisions of a number of international courts and tribunals, with each judgment being reworked by a 'chamber' of judges, mirroring the working practices of the relevant body. At the time of writing an Indian feminist judgments project is underway, and a Scottish feminist judgments project is just beginning. The organisers of the US project are also planning a book series focusing on specific areas of law, with the first book, feminist judgments on tax law, in the process of being commissioned. All of this activity demonstrates not only the appeal of the methodology, but also the fact that there is no shortage of judgments which would benefit from feminist rewriting. As Carol Smart has observed, law is a gendering technology which has systematically disqualified feminist knowledge.[10] Bringing feminist knowledge into law in order to correct biases, render it more inclusive, and en-gender justice is a substantial task.

[5] Loban J, *Australian Competition and Consumer Commission v Ramon Lal Keshow*, in H Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford, Hart Publishing, 2014) 180.

[6] I Watson, 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell', in Douglas et al, *Australian Feminist Judgments* (n 5) 46.

[7] Watson J, *In the Matter of Djaparri (Re Tuckiar)*, in Douglas et al, *Australian Feminist Judgments* (n 5) 442.

[8] M Enright, J McCandless and A O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford, Hart Publishing, 2017).

[9] K Stanchi, L Berger and B Crawford (eds), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge, Cambridge University Press, 2016).

[10] C Smart, *Feminism and the Power of Law* (New York, Routledge, 1989).

The Need for Feminist Judges

EM: Just such a substantial task awaits our group of islands in the southern hemisphere. Aotearoa, as explored in Chapter 2, has a borrowed, but at the same time unique, legal system. Our uniqueness does not, however, render the need for a critical project such as this any less pressing. The critically important challenge for any local feminist judgments project was how to give voice to Māori women in a manner consistent with Te Tiriti o Waitangi (the Treaty of Waitangi). The concept of being partners in this work gave life to the image of Te Rino, a two-stranded rope. With this image was a steady reminder of the obligation of the Pākehā participants, and in particular the three non-Māori convenors, to be mindful of the impact of white, colonial, patriarchal laws on an indigenous population. Could our processes during this project and the eventual writings be a model for intersectionality in practice? Or would we be unable to avoid repeating historical patterns of disinterest and disengagement?

New Zealand is sometimes held out as a leader in gender equality. We boast a long tradition of 'firsts' in female participation in government and the professions.[11] The legal profession is no different, with the first female law graduate, Ethel Benjamin, being admitted to the bar in May 1897 and the first female judge, Dame Augusta Wallace, being appointed in September 1975, ahead of or at pace with other common-law jurisdictions. New Zealand recently had, all in office at the same time, a female Chief Justice (Dame Sian Elias), as well as female leadership in the Court of Appeal (President Ellen France), High Court (Chief Judge Helen Winkelmann) and the District Court (Chief Judge Jan-Marie Doogue). Following Justice Helen Winkelmann's appointment to the Court of Appeal, on 5 August 2015, for the first time in 153 years, an all women bench of the permanent Court of Appeal sat in Wellington (President Ellen France, with Justices Helen Winkelmann and Christine French). The President of the New Zealand Law Society, Chris Moore called the historic event 'another step in the long road to equality', while also noting that 'the current statistics relating to the advancement of women in the profession are not something of which we should be proud'.[12] It must be noted however that none of the women mentioned in this paragraph of achievements are Māori.

The 2016 Snapshot of the Profession produced by the New Zealand Law Society records that while 61% of people admitted to the legal profession and 60% of law firm employees are women, only 24% of law firm partners, 17% of Queen's Counsel[13] and 29% of the judiciary are women.[14] This suggests that there are barriers preventing female progression to senior roles within the legal profession, including the judiciary. And while Māori

[11] N King, *Raising the Bar: Women in Law and Business* (Wellington, Thomson Reuters, 2014) 3.

[12] New Zealand Law Society, 'Law Society Applauds All-Woman Court of Appeal Bench' (New Zealand Law Society, 7 August 2015) www.lawsociety.org.nz/news-and-communications/news/law-society-applauds-all-woman-court-of-appeal-bench.

[13] G Adlam and A Jacombs, 'Snapshot of the Profession 2016' 883 *LawTalk* (11 March 2016).

[14] G Adlam, 'New Zealand's Judiciary and Gender' (New Zealand Law Society, 11 November 2015) www.lawsociety.org.nz/practice-resources/research-and-insight/practice-trends-and-statistics/new-zealands-judiciary-and-gender.

currently make up 15% of the population of Aotearoa,[15] only 6.1% of the legal profession are Māori.[16] Māori women are even more poorly represented in the legal profession—at a mere 1.6%.[17] Encouragingly, more Māori are entering law school; 9% of law graduates in 2014 were Māori.[18] But with only just over half of those expected to be admitted to the Bar, significant barriers to participation in the law profession clearly remain, and parity of representation and influence will require considerable time and commitment.

There is also uncertainty about whether increasing the number of female judges makes any difference to the practice and substance of judicial decision making—in particular, whether women judges make a difference to women's experience of the law.[19] Not all women are feminists and arguably a male judge could equally approach their task in a manner which is alive to potential gender issues, in the way they portray the story behind the case, the way they resolve a case and their awareness of the gendered impact of their decisions. We agree with the words of Reg Graycar, still disturbingly relevant nearly 20 years after she wrote them:[20]

> I certainly believe it is essential we have more women judges, indeed that we have a more representative judiciary in all the respects that divide members of our community (*e.g.* racialisation, sexuality, physical ability, class). But in order for our perceptions of these core values of representativeness and impartiality to move with the personnel, rather than remain fixed in the framework of a time when only a small part of the community was represented on courts, and legal doctrines and rules were framed from that partial perspective, we need to pay careful attention to judicial method and in particular to concepts such as judicial notice and "common sense". In doing so, we need to focus just as much on the facts as we do on the law … [we need] to question and reformulate the rules of the game, rather than focus all our attention on the people being "let in" to play.

To date, feminist engagement in Aotearoa aimed at 'reformulating the rules of the game' has had mixed success. A number of the women lawyers associations have been influential—for example, acting as amicus in the benefit fraud case of *Ruka v Department of Social Welfare*,[21] assisting the Court to understand the impact of family violence on a relationship (Auckland Women Lawyers) and making a submission which convinced the Justice and Electoral Select Committee to introduce a total bar on offering evidence of a rape complainant's reputation in sexual matters (Wellington Women Lawyers Association).[22] However, most of the Law Commission's proposals from the project on *Women's Access to Legal Services*[23] and *Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine*

[15] Statistics New Zealand: Tatauranga Aotearoa, 'Māori Population Estimates: At 30 June 2016—Tables' (Wellington, Department of Statistics) www.stats.govt.nz/browse_for_stats/population/estimates_and_projections/MaoriPopulationEstimates_HOTPAtJun16.aspx.

[16] Adlam and Jacombs, 'Snapshot' (n 13) 27.

[17] ibid.

[18] ibid 20.

[19] See, eg, U Schultz and G Shaw (eds), *Gender and Judging* (Oxford, Hart Publishing, 2013); E Chan, 'Women Trailblazers in the Law: The New Zealand Women Judges Oral History Project' (2014) 45 *Victoria University of Wellington Law Review* 407; J Glover, 'Women on the Bench' (2010) 134 *NZLawyer Online* (19 April) www.nzlawyermagazine.co.nz.

[20] R Graycar, 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *University of British Columbia Law Review* 1, 20–21.

[21] *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

[22] E McDonald, 'Complainant's Reputation in Sexual Matters' [2007] *New Zealand Law Journal* 251.

[23] New Zealand Law Commission, *Women's Access to Legal Services* (Wellington, NZLC SP1, 1999).

Māori e pa ana ki tēnei[24] or those from the Law Commission's work on *Some Criminal Defences with Particular Reference to Battered Defendants*,[25] all projects undertaken in response to calls from the public, have not been implemented. The Law Commission has recently had to repeat their recommendations concerning the necessary reform of self-defence in *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide*,[26] which have yet to be met with any substantive government response.

One of the re-imagined judgments in this volume is the Court of Appeal decision in *R v Wang*,[27] a case which was the focus of both those Law Commission reports. The Court of Appeal upheld the trial judge's decision that self-defence should not have been put to the jury. The judge said in his ruling that to allow the jury to consider the defence in such a situation would be tantamount to 'a return to the law of the jungle'.[28] A number of feminist lawyers criticised the decision, on the basis that the Court showed no understanding of the position of victims of domestic abuse.[29] As one of those who entered this public debate,[30] I received a letter from the trial judge, (then) Eichelbaum J, who wrote he had re-looked at the court file and that it was not a case about a battered woman, rather about a defendant with a depressive illness (attaching a copy of some pages of the trial transcript, highlighted, to support his view). It is certainly true that *Wang* has long been taught, and discussed, as a case of an immigrant woman who was subjected to abuse by her husband, and killed him while he was intoxicated following threats to her and her family he promised to act on. As part of the project, I suggested to those re-imagining the decision and writing the commentary, that it would be a valuable exercise to request access to the court file to see the notes of evidence first hand.

As the first of two powerful reminders of the importance of projects such as this, the notes of evidence disclosed much more violence than was reflected in the Court of Appeal's judgment—they referred to the dynamic in the house as reflecting a 'loveless, coercive marriage',[31] but not the extent of the physical and psychological abuse meted out by the deceased over many years. Nor did the decision disclose that the deceased was scheduled to fly to Hong Kong, which is where the family members he threatened to blackmail and kill resided. The notes of evidence also showed that on occasion Wang Xiao Jing (Mrs Wang) did indeed tell others about her experiences of abuse and feelings of helplessness, and friends testified they had told her to endure it. Others witnessed Mr Wang make threats and imply to Mrs Wang that he could easily kill and dispose of a body in New Zealand. All of this information goes directly to the issue of whether she believed that her husband would

[24] New Zealand Law Commission, *Justice: The Experiences of Mäori Women, Te Tikanga o te Ture: Te Mätauranga o ngä Wähine Mäori e pa ana ki tënei* (Wellington, NZLC R53, 1999).

[25] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (Wellington, NZLC R73, 2001).

[26] New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (Wellington, NZLC R139, 2016).

[27] *R v Wang* [1990] 2 NZLR 529.

[28] ibid 535.

[29] N Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand Universities Law Review* 292; F Wright, 'The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961' (1998) 6 *Waikato Law Review: Taumauri* 109; S Beri, 'Justice for Women Who Kill: A New Way?' (1997) 8 *Australian Feminist Law Journal* 113.

[30] E McDonald, 'Women Offenders and Compulsion' [1997] *New Zealand Law Journal* 402; E McDonald, 'Battered Woman Syndrome' [1997] *New Zealand Law Journal* 436.

[31] *Wang* (n 27) 540.

carry out the threats to kill and what options she had to avoid those threats—yet this information remained, until now, hidden from public view and therefore could not add weight to the many calls for reform.

The second reminder came with *Director of Human Rights Proceedings v Goodrum*.[32] When researching for this re-imagined decision, Selene Mize, who had been motivated to join the project on the basis of the reasoning given in the reported decision, discovered that there had in fact been a dissenting minority member of the Tribunal, Leah Whiu, a Māori woman lawyer and academic with affiliations to Ngāpuhi and Ngāti Hine. We can find no reason why her dissent was not published, nor even referred to by the majority of the Tribunal. Even if it was the practice of the legal publisher at the time to only produce the majority's finding, that does not explain the lack of reference to her views in the published decision. Selene Mize's decision now stands, published, with Leah Whiu's reasons given visibility and support. To us, it was a deeply troubling example of the silencing and invisibility of Māori (and minorities in both senses of the word) within the legal system, even if done unintentionally and without malice.

Feminist Judging in Action

What makes a judgment feminist? The growing number of feminist judgment projects provide an increasing number of answers to this question,[33] supplemented by theoretical literature on feminist legal methods[34] and empirical studies of feminist judges.[35] The following section discusses some of the common themes evident in the feminist approaches adopted by the judgment writers in this collection (with more detail on each judgment to be found in the accompanying commentary). These themes include applying various aspects of feminist theory; recognising women's experiences and perspectives; and challenging gender bias.

Feminist Theoretical Approaches

RH: While feminist judges all draw on feminist theory at some level, this will rarely be explicit within their judgments or necessarily obvious to the general reader. The judgments

[32] *Director of Human Rights Proceedings v Goodrum and City and Country Real Estate Limited* [2002] NZHRRT 13, 7 NZELC 96, 934.

[33] See, eg, R Hunter, 'An Account of Feminist Judging', in Hunter et al, *Feminist Judgments* (n 4) 30; H Douglas et al, 'Reflections on Rewriting the Law' in H Douglas et al, *Australian Feminist Judgments* (n 5)19.

[34] See, eg, KT Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829; C Boyle, 'Sexual Assault and the Feminist Judge' (1985) 1 *Canadian Journal of Women and the Law* 93; PA Cain, 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *Southern California Law Review* 1945; R Hunter, 'Can *Feminist* Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7; SE Rush, 'Feminist Judging: An Introductory Essay' (1993) 2 *Southern California Review of Law and Women's Studies* 609.

[35] R Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in U Schultz and G Shaw, *Gender and Judging* (n 19) 399; Hunter and Tyson, 'Justice Betty King' (n 3); E Sheehy (ed), *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto, Irwin Law, 2004); S Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543.

are conventional in the sense of being based on legal authorities and applying law to facts. Feminist theory is not a source of legal authority, and so while feminism informs the approach, it does so implicitly. This is a constraint with which some of the feminist judges disagreed. Joanna Manning, for example, maintained that her conception of a feminist judge included referring to feminist sources within her judgment, and she insisted on citing Carol Gilligan[36] in her rewriting of *Seales v Attorney-General*.[37] Mark Bennett's judgment in *Lankow v Rose* also contains direct references to feminist literature, alongside other social science literature, to establish gendered patterns in paid and domestic work which form the essential background to his legal analysis. More usually in this collection, however, the identification of the particular feminist theoretical approach taken by the judgment-writer will be found in the commentary rather than in the feminist judgment itself.

The feminist judgment projects, both individually and as a whole, clearly demonstrate that feminism is not monolithic. There are multiple strands within feminist legal theory and the judgments do not take a uniform position. To put this another way, it is not possible to 'read off' either the reasoning or the result in many cases from the mere fact that it is a feminist judgment. Each judge made their own decisions about which feminist approach/es they wished to take to their chosen case. These approaches were discussed and sometimes debated, challenged and revised in the workshops on the draft judgments. Others might have disagreed with the approach or preferred to adopt a different feminist theoretical frame. Ultimately, however, it was a matter for the judge themselves to decide on their own theoretical stance.

A strong, anti-subordination theme runs through many of the judgments, that is, a concern that legal rules should not perpetuate structures of male power and female subordination. Such rules do nothing to challenge men's exploitation and abuse of power—particularly manifested in the multiple forms of violence against women—and leave women unsafe and unprotected by law. By contrast, the feminist judges are concerned to interpret the law in ways that are attentive to its implication with male power and that are designed to end women's subordination. This theme can be found, for example, in the feminist judgments in *R v S*,[38] *R v Sturm*,[39] *Vuletich v R*[40] (criminal and evidence law relating to sexual violence), *Police v Kawiti*,[41] *R v Wang*[42] (criminal law defences), *R v Taueki*[43] (sentencing guidelines for cases involving serious violence), *Air Nelson v C*,[44] *Brooker v Police*[45] (harassment) and *Ruka v Department of Social Welfare*[46] (the treatment of de facto relationships in social welfare law).

A number of the judgments engage with feminist critiques of the public/private distinction within liberalism, and in particular the ways in which women's work in the private

[36] C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass., Harvard University Press, 1982).
[37] Manning J, *Seales v Attorney General*, this collection [228].
[38] Benton-Greig J, *R v S*, this collection.
[39] Croskery-Hewitt J, *R v Sturm*, this collection.
[40] Cross J, *Vuletich v R*, this collection.
[41] Quilmie J, *Police v Kawiti*, this collection.
[42] Midson J, *R v Wang*, this collection.
[43] Gourlay J, *R v Taueki*, this collection.
[44] Catran and Coleman JJ, *Air Nelson Ltd v C*, this collection.
[45] McLean J, *Brooker v Police*, this collection.
[46] Stephens J, *Ruka v Department of Social Welfare*, this collection.

sphere of the home, nurturing their children and families, is socially and legally devalued compared to the work men do in the public world of commercial and political activity. This is evident in the family law cases of *V v V*,[47] *Caldwell v Caldwell*[48] and *Lankow v Rose*.[49] In the latter case, the feminist judgment also shows how Ms Rose's contributions to the success of Mr Lankow's business were subsumed into her 'private' role and thereby rendered invisible, resulting in the court deciding that her equitable claim could apply only to the couple's domestic assets and not also to the business assets. The same devaluation of the private and the feminist judgment's concern to accord more appropriate legal recognition and value to the home, privacy and care are found in the cases of *Stephens v Barron*,[50] *Brooker v Police*[51] and *Lawson v Housing New Zealand*.[52] In *Stephens v Barron*, Victoria Stace does not accept that company law should insulate commercial actors from accountability and liability when their negligence has caused serious damage to the plaintiffs' home and family. In *Lawson v Housing New Zealand*, the neoliberal privatisation of public housing resulted in Housing New Zealand introducing commercial rents which were unaffordable to Mrs and Mr Lawson. The consequence would be their eviction from the home they had occupied for almost 50 years. While the High Court considered that the commercial and discretionary character of the policy to increase rents rendered it not amenable to judicial review, Natalie Baird works harder to avoid this obvious injustice to the Lawsons. In *Brooker v Police*, Janet McLean likewise works to ensure that the invasion of a woman police officer's privacy is not trivialised compared to the male defendant's freedom of expression.

Brooker v Police also provides a good example of the feminist critique of rights. Guarantees of civil and political rights within liberalism frequently give rise to conflicts of rights between individuals, and in these circumstances, the liberal response is to weigh up the respective rights to determine which should prevail. Feminists have observed, however, that in this balancing process, there is a persistent tendency for women to lose out as their interests are often considered less important (consistent with the forms of devaluation just discussed).[53] In *Brooker v Police*, the issue was presented as a clash between the complainant's right to privacy and the defendant's right to freedom of expression, and the latter predictably was valorised. Janet McLean's careful analysis of the facts shows, however, that the right to freedom of expression was not engaged. On examination, the defendant's actions could not be characterised as a public protest, but rather constituted an act of private intimidation which ought not to have attracted legal protection. Similarly, in *Hallagan v Medical Council of New Zealand*,[54] the applicants' rights to freedom of conscience and religion were pitted against women's rights to reproductive autonomy. Abortion is notoriously a context in which women's rights have been subordinated and seriously curtailed. Rhonda Powell finds a solution which respects the applicants' rights while preserving to the fullest extent possible women's rights to choose to have an abortion.

[47] Judge Adams, *V v V*, this collection.
[48] Judge Ballantyne, *AMO'H v AJO'H ('Caldwell v Caldwell')*, this collection.
[49] Bennett J, *Lankow v Rose*, this collection.
[50] Stace J, *Stephens v Barron*, this collection.
[51] McLean, *Brooker* (n 44).
[52] Baird J, *Lawson v Housing New Zealand*, this collection.
[53] See U Cheer, 'Rights Balancing Rejected', this collection.
[54] Powell J, *Hallagan v Medical Council of New Zealand*, this collection.

Further aspects of the feminist critique of rights concern the fact that the rights articulated in domestic and international human rights instruments tend to be rights that are important to men, while rights important to women (such as freedom from private violence) are not recognised, and the difficulties women experience in being able to exercise their rights equally with men. *Hallagan v Medical Council of New Zealand* provides an example of the former issue, where the substantive right to abortion on demand is nowhere provided for in domestic or international law. *Lawson v Housing New Zealand* is another example, where the lack of an express right to housing in New Zealand law left Mrs Lawson with limited legal protection. Examples of the second issue are found in *Taylor v Attorney-General*,[55] where a blanket ban on prisoners voting had an adverse impact on women prisoners, and *Caldwell v Caldwell*,[56] where family law rules concerning relocation have a systematically adverse impact on women who are typically the primary carers of children and therefore typically the ones who have their autonomy and freedom of movement curtailed in the interests of maintaining contact between children and non-resident fathers.

Another prominent theme is the employment of a feminist ethic of care, informing both the approach taken by the feminist judge towards the parties in the case, and the judge's view of how other legal actors should exercise their discretion, and the standards of behaviour the law should require. Victoria Stace in *Stephens v Barron* evinces a strong ethic of care towards Mrs Barron and her family, whose lives were seriously affected by the Stephens' negligence, and her decision also suggests that company law would benefit from an infusion of the ethic of care more fully realised within tort law.[57] In the two environmental law cases, *Squid Fishery Management Company v Ministry of Fisheries*[58] and *West Coast ENT Inc v Buller Coal Limited*,[59] Nicola Wheen and Estair Van Wagner both advocate the incorporation of an ethic of care for the environment, for non-human species and for future generations within environmental decision-making. This ethic of care is central to both Wheen J's ecofeminist approach and Van Wagner J's relational materialist feminism,[60] which emphasises the need for sustainable relationships between humans and the natural world considered not in a generalised or abstract way but in terms of the specificity of places, things, beings and processes.

In *Seales v Attorney-General*, as noted above, Joanna Manning cites Carol Gilligan's work showing that women have a greater tendency to adopt an ethic of care and to see themselves in relational terms.[61] In her view, this renders women vulnerable in situations where they are incapacitated and dependent, as they are more likely to wish to avoid being a 'burden' on others. For this reason, she considers a legal option of assisted suicide would pose particular dangers for women. Her conclusion, then, is that in order to *care for* women, they need to be protected from their own desires to *care about* the interests of others, hence assisting suicide should continue to be criminalised. This result shows how an ethic of care can be

[55] Yarwood and Pirini JJ, *Taylor v Attorney-General*, this collection.
[56] Ballantyne, *Caldwell* (n 48).
[57] Stace, *Stephens* (n 50).
[58] Wheen J, *Squid Fishery Management Company Ltd v Minister of Fisheries*, this collection.
[59] Van Wagner J, *West Coast ENT Inc v Buller Coal Ltd*, this collection.
[60] See C Iorns, 'Broadening an Ethic of Care to Recognise Responsibility for Climate', this collection.
[61] Manning, *Seales* (n 37).

paternalistic.[62] Although Manning calls into question whether choosing assisted suicide in these circumstances is an exercise of autonomy,[63] other feminists might disagree. By contrast, in *Re Williams [PPPR]*,[64] Holly Hedley rejects legal and medical paternalism and seeks to maximise the autonomy of a mentally ill pregnant woman, while also recognising her vulnerability and need for support. Judge Hedley's application of an ethic of care seeks to promote both rights and best interests within a relational context which includes querying why no-one has thought to ascertain the availability of trusted family members or friends who might assist Ms Williams in making decisions about the impending birth of her child.

Recognising women's stories and experiences

RP: The way in which a judge tells the story that led to a court case has the effect of solidifying the particular narrative adopted by the judge. If the judge ignores certain details deemed to be legally irrelevant, those details are lost from the story. The way in which a judge constructs and interprets the facts of a case becomes a legal 'truth'. One of the ways in which a judge can be 'feminist' is by listening to women's stories, hearing the perspectives of woman litigants and recognising women's experiences in the way that they recount the facts of cases, so that these experiences also become legal truths.[65]

This technique could be seen to relate to the process of judgment-writing rather than the outcome of the case.[66] However, the way in which the facts are framed may also influence the reasoning and thereby the outcome. The way in which a judge tells the story of the case also plays a potentially therapeutic role for the parties, even if the outcome is disappointing. Sensitive use of language has the potential to enhance the mana of people involved in the proceedings, which is especially important for those who have been treated inhumanely already. Also, given that a well-written judgment would speak to a range of audiences, including the parties themselves,[67] in the event that they are unsuccessful, recounting the perspectives of the litigants may make the pill easier to swallow.

Like previous collections of feminist judgments, many of the feminist judges in this collection saw the importance of recognising women's stories and experiences and employed story-telling in their judgment-writing. In *Brooker v Police*, McLean J's blow by blow account of Ms Croft's experience of threatening and intimidating behaviour is particularly effective in grounding the case in the lived experience of Ms Croft. He went to her house. He knocked on her door. She told him to leave. Rather than downplaying this behaviour by treating it as part of a day in the life of a police constable, McLean J reminds us that Mr Brooker directed this abuse against Ms Croft in the privacy of her own home,

[62] See R Hunter, K Mack and S Roach Anleu, 'Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches' (2016) 12 *International Journal of Law in Context* 337; *cf* J Herring, 'Commentary on *Sheffield City Council v E*' in Hunter et al, *Feminist Judgments* (n 4) 346, 349–50 (discussing the difference between 'paternalism' and 'maternalism').

[63] Manning, *Seales* (n 37) [218].

[64] Judge Hedley, *Re Williams [PPPR]*, this collection.

[65] See the discussion of this point in Hunter, 'Can *Feminist* Judges' (n 34) 11 and Hunter, 'An Account of Feminist Judging' (n 33) 36–37; E Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project' in Hunter et al, *Feminist Judgments* (n 4) 45–46.

[66] Hunter, 'An Account of Feminist Judging' (n 33) 35.

[67] JC Raymond, *Writing for the Court* (Toronto, Carswell, 2010) 10.

when she was off-duty. The feminist judge supports this contextualisation by reference to literature[68] about women's experiences of covert threats and psychological abuse. McLean J's open ear to the way Ms Croft experienced Mr Brooker's behaviour leads to the conclusion that the charge was incorrectly substituted by the trial judge, and that had the correct charge of intimidation[69] been before the court, the conviction would have been safe.

The woman's story is also emphasised by Judge Hedley in *Re Williams [PPPR]*.[70] Judge Hedley was asked to make highly intrusive orders allowing Ms Williams' (the pseudonym given by the feminist judge in place of the dehumanising 'W') clinical team to proceed with a range of medical procedures without her consent, during her labour and birth. Judge Hedley queries whether Ms Williams' apparent inability to communicate with the doctors over her care may indicate a lack of trust rather than a lack of capacity. She also notes that Ms Williams had been excluded from the proceedings, which was an unjustified procedural error because the legislation requires the person subject to the proceedings to be present.[71] Judge Hedley was unable to hear Ms Williams' voice because she was absent. This is a key factor in Judge Hedley's decision to adjourn the proceedings.

The original decision in *Re W [PPPR]* included little information about Ms W herself, which made it difficult for Judge Hedley to tell her story. Due to the sensitive nature of the case Holly Hedley would have been unable to obtain the court file in search of further information. This was not the case for *Lawson v Housing New Zealand*, a judicial review of Housing New Zealand's decision to move to market rents for state houses.[72] Rather than becoming trapped in the legal complexities, Baird J sought to put Mrs Lawson at the centre of her decision.[73] She starts by stating that 'Mrs Joan Olive Marion Lawson and her husband Thomas have been tenants in a two-bedroom state house at 27 Oranga Ave, Onehunga, Auckland for nearly 50 years.'[74] She tells of their health concerns, the fact that they raised their children there, and the serious impact on their day to day lives of the move to market rents. The reader is left with a real understanding of the human issues that lie behind the legal issues, including the potential outcome of Mrs Lawson being forced from her community. This story-telling is essential context for the legal analysis that follows.

In *R v Wang*,[75] Mrs Wang had attempted to tell her story a number of times, but her claims of violent abuse were dismissed. In considering whether the defence of self-defence should have been put to the jury in her murder trial, the feminist judge emphasises the importance of Mrs Wang's subjective experience. By telling Mrs Wang's story, the context in which she killed her husband becomes clear, and the significance of the majority judgment

[68] R Busch, 'Don't Throw Bouquets at Me … (Judges) Will Say We're in Love: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence' in J Stubbs (ed), *Women, Male Violence and the Law* (Sydney, The Federation Press, 1994) 105; L Mills, 'Killing Her Softly: Intimate Abuse and the Violence of State Intervention' (1999–2000) 113 *Harvard Law Review* 550.

[69] Summary Offences Act 1981 (NZ), s 21(1)(d).

[70] Hedley, *Re Williams* (n 64).

[71] Protection of Personal and Property Rights Act 1993 (NZ), s 74.

[72] *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

[73] Much like the approach taken in H Carr and C Hunter, '*YL v Birmingham City Council and Others*' in Hunter et al, *Feminist Judgments* (n 4) 318.

[74] Baird, *Lawson* (n 52).

[75] Midson, *Wang* (n 42).

in conflating the subjective and objective limbs of the legal test for self-defence[76] is exposed as a tool to avoid having to believe her.

The way a judge tells the story has the potential to render a witness's evidence appear more or less credible to the reader. This is particularly important in sexual violence cases, a context in which women's allegations are commonly dismissed, and the experience of the legal process can exacerbate women's trauma.[77] In the employment case of *Air Nelson v C*,[78] the Employment Court had relied on the evidence of one of airline pilot C's colleagues, even though he had no specific knowledge of the events in question, over the corroborated evidence of flight attendant FA that she had been sexually abused, leading commentator Annick Masselot to note that the situation 'has the distinct flavour of an "old boys' network", which contributes to perpetuating male power and privileges, while disregarding women's interests and ultimately undermining the law on sexual harassment'.[79] Instead, Catran and Coleman JJ validate the woman's experience of harassment, using social science research to emphasise how rare it is for a woman to make a false accusation of sexual abuse,[80] and conclude that the Employment Court made an error of law in questioning the woman's credibility in the circumstances.

Women's stories sometimes emerge indirectly in the collection. In *Bruce v Edwards*,[81] Johnston and Hori Te Pa JJ beautifully describe the social history of the Taranaki whenua, the subject of the dispute. The woman in this story is papatuanuku. By recounting the story of the whenua the feminist judges connect the customary owners to the whenua and illustrate its cultural significance, which underlies the legal principles in Te Ture Whenua Maori (Maori Land) Act 1993, and provides the key to determining the legal dispute. In *Hallagan v Medical Council of New Zealand*,[82] women's experiences emerge in another way. Powell J identifies that the case was not just about the parties—doctors and the New Zealand Medical Council—but also about the access of women to abortion. Women's rights as patients are therefore an essential part of the legal context for the decision, even though this perspective was not represented before the court.

Sometimes a feminist judge might deliberately refrain from telling parts of the story. As it was irrelevant to the issue of her capacity to make decisions about her healthcare, in *Re Williams [PPPR]* Judge Hedley saw no need to dehumanise Ms Williams by describing the circumstances by which she came to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[83] Similarly, in *Caldwell v Caldwell* Judge Ballantyne chose to discuss the medical care Mrs Caldwell was receiving for her depression at a very

[76] Crimes Act 1961 (NZ), s 48.

[77] See, eg, E McDonald, 'Complainant Desire for Information, Consultation and Support: How to Respond and Who Should Provide?' in E McDonald and Y Tinsley (eds), *From Real Rape to Real Justice: Prosecuting Rape in New Zealand* (Wellington, Victoria University Press, 2011) 168; V Kingi et al, *Responding to Sexual Violence: Pathways to Recovery* (Wellington, Ministry of Women's Affairs, 2009); EW Thomas, 'Was Eve Merely Framed, or Was She Forsaken?' [1994] *New Zealand Law Journal* 368.

[78] Catran and Coleman, *Air Nelson* (n 44).

[79] A Masselot, 'She Said, He Said: From Myth to Reality', this collection.

[80] A Grubb and E Turner, 'Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming' (2012) 17 *Aggression and Violent Behaviour* 433, 445.

[81] Johnston and Hori Te Pa JJ, *Bruce v Edwards*, this collection.

[82] Powell, *Hallagan* (n 54).

[83] Hedley, *Williams* (n 64).

general level, to protect her dignity and privacy.[84] Stephens J starts her feminist judgment in *Ruka v Department of Social Welfare* with a brief and compassionate description of Ms Ruka's relationship with 'T', just long enough to make her plight clear so that the context in which she claimed a domestic purposes benefit, despite living with 'T' could be properly understood.[85] The feminist judge deliberately refrains from going into unnecessary detail which might further dehumanise Ms Ruka.

Challenging Gender Bias and the Delivery of 'Equality'

> In the context of talking about gender bias, we need also to scrutinise the concept of "bias". "Bias" is a term that connotes some deviation from what is presented as an otherwise objectively ascertainable correct or neutral position.[86]

EM: In defining bias in this way, it is apparent that in order to expose it, there must be a challenge to a statement's assumed neutrality. Early feminist critiques of the law took to task the standard of a 'reasonable man' and exposed the standard's inability to accommodate at least half the population, even when the word 'man' was replaced with 'person'. The link between gender bias and claims for equality is also apparent. The setting of a particular (male) standard of behaviour and requiring all others (including women) to meet that standard in order to receive equal treatment was exposed as inequitable when the gender bias inherent in the standard was articulated. Giving all people, regardless of gender, the same rights and responsibilities does not ensure substantive equality when only one gender (cis men) can meaningfully access those rights. For example, a law that criminalises sexual offending against all people does not deliver equality of outcome if it is only enforced when it occurs in particular places and in particular ways. Feminists have therefore exposed the gender bias of legislation and judgments that are seemingly objective and 'equal' as written, by demonstrating how legislation impacts unevenly and judgments are partial.

Claims seen in judgments such as 'experience has shown us', 'as far as I am aware' and 'from what I have observed', are statements intended to present some sort of universal truth. In fact, often such claims merely reflect the background, life experience and world view of the particular judge or decision maker. These and other pronouncements about shared human experiences are red flags for feminists. In the context of criminal law, claims about what a reasonable person might have thought underpin assessments of culpability. If there is no actual reasonable person and this standard is a fictional creation in order for others to make a judgement about someone's behaviour, then the gendered nature of that standard should be of concern. In the context of the rules of evidence, the fundamental inquiry of relevance is also based around notions of what world view a reasonable person has. This reasonable person, in terms of admissibility inquiries, is the judge. Their world view must then be unbiased, free from their own particular experiences and opinions. But can it ever really be so?

[84] Ballantyne, *Caldwell* (48).
[85] Social Security Act 1964 (NZ), s 63(b).
[86] Graycar, 'The Gender of Judgments' (n 20) 4.

Part of the work of feminists has therefore been to 'disrupt law's underlying adherence to a "common sense" that reflects a partial view of the world'[87] and to 'confront the epistemological processes by which legal discourses construct reality and give authority to particular versions of events'.[88] The feminist judges in this volume do these things by exposing gender bias and problematising those claims which are presented as universally true.

This is not to say that judges are unaware of the risk of acting on their own biases. In Aotearoa New Zealand judges are 'provided with education to assist them in identifying how decision making is shaped by unconscious prejudices, to acknowledge that modern science and research on this topic applies to judges and to neutralise the impact of those prejudices when they come to make a decision.' As Winkelmann J acknowledges: 'The effect of unconscious prejudice is particularly acute for judges because of the nature and importance for society of the work we do. Because we are human, we all come with our settled ways of thinking about things'.[89]

In acknowledgment of Glazebrook J's support for these projects, and her inspirational willingness to confront her own perspectives and assumptions, I first consider the work of Cross J in her reimagining of one of Glazebrook J's own decisions for the Court of Appeal. In *Vuletich v R* the appellant had been charged with raping a former girlfriend as well as the sexual violation of a recent acquaintance. He appealed against the decision to join the trials and to allow the evidence of the second violation to be used as propensity evidence. Cross J, in the feminist judgment, emphasises the unlikely coincidence of two such events independently occurring close in time, as well as the importance of bolstering the credibility of young women in acquaintance rape cases. The feminist judge seeks to correct misconceptions about acquaintance rape as part of her decision, and in doing so arrives at a different view about admissibility. The modus for those who prey on young women need not be any more of a signature than the fact it demonstrates a repeated willingness to proceed even in the face of a lack of consent—to look for more means propensity evidence of prior acquaintance rapes will rarely be admissible.

R v S is another decision in which the feminist judge challenges contemporary iterations of rape mythology—also by focusing on the representation of male sexuality. In this case, unusually a Crown appeal from an acquittal in a judge alone trial on a question of law, Benton-Greig J disagrees with the majority that a defence of reasonable belief in consent is available, even where the defendant knows the young woman (his partner at the time) was unconscious, as a result of drug-taking. In her judgment she seeks to expose that the majority's interpretation of the legislation introduces a 'consent gap'—where there is by law no consent, yet no rape may actually be established. The majority's conclusion seems to undermine the efforts of advocates who supported the change to s 128A, which the feminist reimagining does not.

In *R v Sturm* the feminist judge critiques the type of 'consensual' sexual interactions which are envisaged by the common law consent structure, and reinforced in the Court of Appeal's other judgments. As Croskery-Hewitt J argues, viewing the choice to become intoxicated as indicative of consent to sex treats a complainant's willingness to take intoxicants (whether drugs or alcohol) as suggestive of an entirely unrelated desire, and implies a

[87] ibid 21.
[88] ibid 20.
[89] 26 August 2015, letter to Law Foundation in support of the project.

degree of prior fault on behalf of the complainant. Such a view of complainant behaviour and of its impact on the existence of consent exposes judicial misconceptions of appropriate sexual interaction, and the misapplication of blame in such situations—which should instead be placed on the person who knowingly exploited the intoxicated state of the young men.

The feminist judge in the self-defence case of *R v Wang* is not swayed by the majority's view that 'no reasonable person' would have thought it was necessary to kill an abusive partner. Midson J's reimagining exposes such a pronouncement as lacking in any understanding of the situation of a terrified and socially isolated woman, in an unfamiliar culture. To hold her to the standard of what a reasonable person might do (call the police, leave the house, drive away), demonstrates the gender bias inherent in such a standard. All the feminist judge really needs to do to get to a different result is to believe Mrs Wang's evidence of her experiences.

Women's experiences of violence and abuse also inform Gourlay J's additional judgment in the sentencing guideline decision of *R v Taueki.* While agreeing with the need for guidelines in cases of serious violence, the feminist judge challenges the suggested starting points in each band, while also making the case for a different application of the mitigating and aggravating factors in s 9 of the Sentencing Act 2002. In her view, the guidelines as proposed treat all serious violence as the same in nature, whereas an understanding of the dynamics of domestic violence must lead to a much more nuanced and responsive application of the legislated factors.

In *Director of Human Rights Proceedings v Goodrum* the experience of a female real estate agent in being overlooked for an auctioneer's position led her to make a discrimination claim against her employers. In justifying promoting an untrained young male estate agent to the role, ahead of the highly successful and trained Ms A, the management team said it was because Ms A did not have the essential qualities to be an auctioneer—she had a lack of physical stature, no X-factor and was not a team player. In her imagined minority decision, Selene Mize compellingly demonstrates that all these unwritten requirements for the role were subjective and highly susceptible to unconscious bias. This feminist decision makes a different, but significant, contribution to the existing work which exposes the gendered nature of employment law.

Unconscious bias is also challenged by the feminist judges in the other employment law decision, *Air Nelson v C.*[90] In that case the Employment Court judge had preferred the evidence of a man he deemed to be of 'great acumen and common sense' who had no actual knowledge of the events in question, over the corroborated evidence of the female complainant of sexual abuse.[91] The feminist judges approach the questions with greater neutrality.

The relationship property cases further challenge gender bias and seek substantive equality by examining the gendered realities of domestic relationships and looking beyond the artificial limits which have often prevented women from receiving a just share of the former couple's assets. In *Lankow v Rose* Bennett J identifies that unjust enrichment is a more appropriate doctrine through which to determine disputes between former de facto partners because it is less likely to ignore or devalue the contribution made to the

[90] Catran and Coleman, *Air Nelson* (n 43).
[91] *C v Air Nelson Limited* [2011] NZEmplC 27 [59].

relationship by the female partner. In *V v V*[92] Judge Adams recognises that the detailed calculation of compensation for post-separation economic disparity served to undo the potential for gender justice and (although he refrains from using the term) substantive equality to be achieved and makes a substantially higher award to the woman than he did in the original judgment.[93]

In her rewrite of *Quilter v Attorney-General*,[94] Abaffy J tackles equality directly by finding a way to interpret the Marriage Act 1955 so that a same-sex couple could marry. Drawing on the contemporaneous legislative recognition of human rights, including the freedom from discrimination, she takes a step further than the Court of Appeal was willing to do at the time of the original judgment in order to correct this injustice.

The final feminist approach to be mentioned is, of course, intersectionality. While this theme has appeared in feminist judgments in other projects, Te Rino takes it much further by seeking to develop a specifically mana wahine framework and to apply it to judgment-writing.

Hei Turuturu Whatu: Defining and Upholding Mana Wahine

> *After the land wars, a Māori woman from Taranaki successfully asserts her right to fish in tidal waters to feed her family. The Court decides that, as an exercise of a customary right, she is entitled to fish with methods not permitted by the general fishing regulations, especially when she is a customary owner of the land on which the fishing takes place. In making this decision, the Court declines to follow numerous doctrines of colonial law, finding them contrary to higher authority or principle. Instead, it reaches a decision informed by an ethic of care.*[95]

In vew of the importance of the concept of mana in Māori legal thinking, how are we to understand mana *wahine*? In particular, how is mana wahine to be understood as distinct from, or co-existent with feminism? To start, it is important to recognise that mana wahine is an approach that derives from kaupapa Māori.[96] There is significant literature defining and articulating kaupapa Māori,[97] but for our simple purposes kaupapa Māori is a method, framework or approach that genuinely places Māori people, and Māori practices at the centre of a given initiative or project. Linda Smith identified kaupapa Māori as being broader than a research methodology or conceptual framework. Kaupapa Māori is actually:[98]

[92] Adams, *V v V* (n 46).

[93] *V v V* [2002] NZFLR 1105.

[94] Abaffy J, *Quilter v Attorney-General*, this collection.

[95] This section includes short summaries of the cases applying a method based on mana wahine. This first summary derives from the rewritten judgment in the case of *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC).

[96] J Hutchings, 'Mana Wahine me Te Raweke Ira: Māori Feminist Thought and Genetic Modification' (2005) 19 *Women's Studies Journal* 48.

[97] L Pihama, K Southey and S Tiakiwai, *Kaupapa Rangahau: A Reader: A Collection of Readings from the Kaupapa Māori Research Workshops Series* (Hamilton, Te Kotahi Research Institute, 2015).

[98] LT Smith, *Decolonizing Methodologies: Research and Indigenous People* (Dunedin, University of Otago Press, 1999) 191.

> a social project; it weaves in and out of Māori cultural beliefs and values, Western ways of knowing, Māori histories and experiences under colonialism.

Mana wahine then, at its broadest, is an approach to an initiative or project that places Māori women, and the primary concerns of Māori women, at its centre. There is an aspect of both kaupapa Māori, and its daughter, mana wahine, that is restorative. By placing Māori at the centre of design and operation of any project, and by normalising and legitimising Māori ways of thinking, over a century of effective marginalisation of Māori ways of life and thought is rolled back, just a little. Kaupapa Māori and mana wahine are inevitably 'decolonising methodologies' after all.[99]

An approach based on mana wahine must therefore be intersectional. Māori women experience sexism and homophobia or transphobia, as well as discrimination based on ethnic or cultural identity, as well as deprivation and marginalisation based on the legacy of colonialism. Māori women are more likely than other ethnic groups in New Zealand to be poor, in poor health, reliant on social assistance, to have experienced loss of land, language and culture in recent generations, as well as other kinds of loss and vulnerability arising from gender discrimination. Along these intersecting lines 'of power and resistence' can be seen the experiences and realities of women's lives,[100] including Māori lives and experiences. Somewhere between the intersecting lines of being Māori, female, often socio-economically disadvantaged, and living with the legacy of colonisation, are spaces where those lines connect. It can certainly be argued that those of us working within the mana wahine strand of this project reside then at the 'messy intersection:'[101] This can be a marginal place, but may not remain so.[102]

> From the borders of the vast and expanding territory that is the margin, that exists 'outside' the security zone, outside the gated and fortified community.

New ideas and new interconnected ways of understanding women's experiences can place women at the centre of analysis, rather than the margins, in ways that do not erase the experience of women of colour.[103] In fact, approaches based on mana wahine may well claim the gated and fortified community of that very centre. As Linda Smith identifies, such intersectional spaces are not limited, and in Māori thinking can be broad indeed:[104]

> Making space within such sites has become characteristic of many Maori struggles in education, health research, and social justice. What is slightly different between this notion and the idea of struggles in the margins is that, when attached to a political idea such as *rangatiratanga,* often translated as sovereignty or self-determination, then *all space in New Zealand can be regarded as Māori space* [emphasis added].

[99] See generally, ibid.

[100] C Mohanty, 'Cartographies of Struggles: Third World Women and The Politics of Feminism', in C Mohanty, A Russo and L Torres (eds), *Third World Women and the Politics of Feminism* (Bloomington, Indiana University Press, 1991) 1, 2.

[101] ibid.

[102] See generally LT Smith, 'Choosing the Margins: The Role of Research in Indigenous Struggles for Social Justice' in NG Denzin and M Giardina (eds), *Qualitative Inquiry and the Conservative Challenge* (London, Left Coast Press, 2006) 152.

[103] K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

[104] Smith, 'Choosing the Margins' (n 102) 152.

This project then can claim, or lay claim to, this broad Māori space.

> *Bruce v Edwards is the story of a Māori whānau trying desperately to cling to the legal ties that connect them with their whenua tūpuna, their ancestral land. Although they no longer reside on the whenua as their tūpuna did in ancient times, the whānau have deep connections with Oeo as Papatūānuku, as their waiū, as their taonga tuku iho. Oeo, in the shadow of Taranaki maunga, has always been of great significance to the whānau and hapū of Ngāti Tama-Ahuroa, Ngāti Titahi, and Ngāti Ruanui hundreds of years before colonisation, before the devasting Taranaki Wars, and will remain so even after all legal ties have been cut between the whānau and hapū and their ancestral land, land that is and always will be a taonga tuku iho.*[105]

It is at the point of claiming *rights*, however, that tensions may be clearly seen between the universal goals of feminism, and the more culturally specific goal of upholding mana wahine.[106] A simple example might suffice to illustrate the tension. In Māori pōwhiri, or welcome rituals, in most tribal areas, women will carry out karanga, and waiata, but not whaikōrero, usually considered to be the domain of men.[107] Pōwhiri have consequently been subject to anti-discrimination cases.[108]

Advocacy of a right to participate in an event without discrimination on the basis of gender would fall within the sphere of feminism. Broadly stated, these rights include the right to freedom of expression,[109] if women so wished; and to pursue such activities in a manner free from gender discrimination.[110] Such activities might include sitting with men at the front of a pōwhiri, or speaking on the marae.

Seeking the affirmation of a cultural right to preserve and uphold karanga, as a customary practice, for generations of Māori women, might be considered to be the proper domain of mana wahine. Those rights are sourced within Māori law, and are also protected under international law and in the domestic human rights framework including the rights to participate, on a collective basis, in the culture of a minority group free from discrimination, and to the language of that minority group on its own terms.[111] Such individuals can also call upon a set of specific rights protected pursuant to Articles 2 and 3 of the Treaty of Waitangi, whereby the Crown owes an active duty of protection over taonga, including the Māori language and tikanga Māori.

Judges operating from the perspective of mana wahine must negotiate how to keep the broader needs, rights and rangatiratanga of Māori women at the centre of their analysis,

[105] *Bruce v Edwards* [2002] NZCA 294, [2003] 1 NZLR 515.

[106] Or perhaps of cultural justice. For a discussion on the notion of cultural justice and the politics of recognition see B Baum, 'Feminist Politics of Recognition' (2004) 29 *Signs* 1073, 1075.

[107] It is not unknown to have Ngāpuhi males call in response to karanga, for transgender women to carry out karanga, or Pākehā women to karanga as discussed in episodes 10 and 11, Series 2, *Karanga: First Voice* (Māori Television Service) available to view at www.maoritelevision.com/tv/shows/karanga-first-voice.

[108] *Bullock v Department of Corrections* [2008] NZHRRT 28. The Human Rights Review Tribunal found that a limitation on a woman's speaking rights and direction that she sit at the back during a graduation ceremony constituted discrimination on the grounds of sex.

[109] New Zealand Bill of Rights Act (NZBORA) 1990 (NZ), s 14.

[110] NZBORA 1990, s 19(1), Human Rights Act 1993 (NZ), s 21(1)(a).

[111] As protected under NZBORA 1990, s 20.

while not losing sight of cultural particularity that, perhaps by definition, embraces the margins of women's experiences.

> *Auē, te mamae. When we think of what our moko suffered at the hands of that man, we weep. Yet she survived; she got a benefit, and she worked, and the whānau survived. That at least comforts us. Marriage? Those two? Kao. If we could have reached down through time and whakapapa, the moment he laid hands on her, that 'relationship' would have been dead and buried. Where was his people's regard for her mana, her tapu? What about that boy? His/Theirs was the hara, the breach, not hers. How could there be a true marriage of any kind when our moko was so alone? Without the safety of matua rau? Our moko was doing all she could, with all she had. And she survived. And we are with her still. Ko tērā te mea nui.*[112]

Weaving the Cross Threads: A Framework for Judgment Writing

At first glance, and with subsequent glances, the clutch of cases denoted 'mana wahine' are diverse, rewritten without a particular, obvious method. How then may they be claimed as 'mana wahine' cases in the first place? It has only been in the writing and in the months of word-wrestling that our mana wahine approach has become clearer. Among other things, mana wahine analysis is not essentialist: there is no threshold of cultural or blood quantum Māoriness that qualifies someone to operate from a mana wahine perspective. On the other hand, this is not a free-for-all, and the six judgments and related commentaries do reveal five aspects in common, despite the wide variance in subject matter, law and legal argument and authorship. None of the authors collaborated on other judgments and commentaries after the initial workshops. These five aspects perhaps comprise a unifying framework,[113] and include:

— **Claiming visible space** for Māori women, and for Māori people generally. This approach also seeks to make visible Māori ways of life in the language of the judgments;
— **Identifying rights and obligations** that, if affirmed, would uphold the mana of Māori women and their families. These rights and obligations are sourced in Māori law, and protected by the Treaty of Waitangi, and by international law.
— **Placing Māori concerns and Māori people at the centre** of the factual and legal analysis, rather than restricting things Māori to the margins.
— **Applying legal tests so as to include Māori everyday reality**, rather than an abstract or idealised notion of Māori life.
— **Paying respect to Māori values and principles** including whakapapa, manaakitanga, whanaungatanga, aroha, and utu.

[112] An imaginative take on one of the rewritten judgments, in this case, for *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA), from the perspective of an ancestor of the woman at the heart of the case.

[113] Considerable work has begun in theorising an indigenous five-point framework as a method of indigenous judgment writing. See V Napoleon, 'Tsilhqot'in Law of Consent' (2015) 48 *University of British Columbia Law Review* 873. See also H Friedland and V Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' (2015) 1 *Lakehead Law Journal* 16.

> *When we were called on to that marae on the day of the unveiling, there was some of what you'd expect; words of welcome, singing, greetings between us and them … So we were all supposed to be one, right? They were supposed to be my people too. They were supposed to know my name. But there was no safety for me, no poho to rest in. So when the attacks, the kicks, and punches came that night, where was I to go? Not to them. Never to them. So I did it. I drove to the hospital in the red fug of alcohol and pain. It was all I could do.*[114]

Claiming visible space

Judges recognise Māori women's agency, authority and status as individuals and as members of a collective. All participants name the Māori plaintiffs, applicants or defendents, using appropriate titles, identifying tribal affiliations, where known.[115] Māori words, phrases and sometimes whakatauākī are employed that encapsulate some important aspect of the case, perhaps, but more importantly, of the person or people affected by the context in which the case occurs.[116] In this aspect, judges by and large seek to avoid homogenising the Māori female experience, thus paying due respect to the realities of postcolonial and post-urbanisation Māori lives rather than assuming similarity of experience.

Identifying rights and obligations

All of the judgments refer to, and uphold, Māori law and customs, including practices associated with:

— marriage and divorce;[117]
— collective responsibility for wrongs;[118]
— rituals of welcome and acknowledgment;[119]
— looking after family and guests;[120]
— affirming intergenerational rights to land and fisheries;[121]
— rights of participation in group-based decision-making, including democratic processes;[122]
— deferring to Māori civic authority such as local marae.[123]

[114] An imagined observation derived from the facts of *Police v Kawiti* [2000] 1 NZLR 117 (HC), from the woman at the centre of that case.

[115] Gattey J, *Waipapakura v Hempton*, this collection, Johnston and Hori Te Pa, *Bruce v Edwards* (n 81) and Yarwood and Pirini, *Taylor* (n 55).

[116] Stephens, *Ruka* (n 46); Johnston and Hori Te Pa, *Bruce v Edwards* (n 81); L Hasan-Stein and V Toki, 'The Truth about Sentencing Māori Women: Giving Context to the Meaning of Mana Wahine', this collection; M Wilson and JA Whaipooti, 'Disengaging the Disengaged: the Case of Prisoner Voting', this collection and Quilmie, *Kawiti* (n 41).

[117] Stephens, *Ruka* (n 46).

[118] Quilmie, *Kawiti* (n 41) and Toki J, *R v Te Tomo*, this collection.

[119] Quilmie, *Kawiti* (n 41).

[120] Gattey, *Waipapakura* (n 115) and Quilmie, *Kawiti* (n 41).

[121] Gattey, *Waipapakura* (n 115) and Johnston and Hori Te Pa, *Bruce v Edwards* (n 81).

[122] Yarwood and Pirini, *Taylor* (n 55).

[123] Toki, *Te Tomo* (n 118).

More than mere reference to such practices, the judgments take these practices seriously, assuming such rights and obligations have gravity and consequences, regardless of whether they are recognised in the general legal system. Judges also recognise that these customary practices are sourced in tikanga Māori, but are also protected in some way, such as by Articles 2 or 3 of the Treaty of Waitangi, s 20 of the New Zealand Bill of Rights Act 1990 (NZ), or at international law.[124]

> *Māori women are exposed daily to discrimination, which, along with the breakdown of familial structures, often relegates Māori women to dependence, rather than exercising tino rangatiratanga. By understanding this, we see the significant challenges that faced Shashana Te Tomo and other Māori women in similar situations. Legislative provisions that allow cultural considerations during sentencing are often ignored or misapplied. Given the disproportionate imprisonment statistics, a fresh approach using the 'tools' on hand is needed.*
>
> *Papatūānuku, whom we love and respect, is the primordial earth mother symbolising balance and beauty. When man as the 'conscious mind of mother earth' perceives her as a commodity he will pillage and rape until he relearns the obligations to society and the environment. By analogy, colonisation has also devastated Māori women. Only by returning to tikanga Māori can we regain the balance and harmony Papatūānuku symbolises. This commentary and rewritten judgment rekindles aroha and respect for Papatūānuku, and remind us of her importance.*[125]

Placing Māori concerns and Māori people at the centre

All participants identified *portals* through which a mana wahine approach could be employed within the rewritten judgments, as ways to centralise and normalise Māori considerations. In most of the original judgments, the fact the people involved are Māori at all is not commented on. While this caution might seem to ensure, as Glazebrook J identifies, that judges 'take care not to replace one set of biases for another.'[126] On the other hand the overall effect of such abstention is failure to acknowledge the complete context within which Māori individuals before the court reside. Arguably legal and factual analysis is then carried out on a basis of incomplete information. The judgments in this part of the collection identify women and their identity.[127] This aspect is also upheld by deliberate use of the work of Māori female scholars, as appropriate, within the texts of the judgments and commentaries.

[124] Rights to culture can be found in several instruments, the following being binding on New Zealand at international law: Art 27 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (Art 27 has no force in domestic law, but it may well be considered binding at international customary law); Art 15 of the International Covenant on Economic, Social & Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI); Art 27 of the International Covenant on Civil and Political Rights, and Arts 30 and 31 of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25.

[125] A precis, written by the authors, of the rewritten sentencing decision in *R v Te Tomo* [2012] NZHC 71. See also M Marsden and T-A Henare. *Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Māori* (Wellington, Ministry for the Environment, 1992) 17.

[126] 'Foreword', this collection.

[127] Yarwood and Pirini, *Taylor* (n 55); Toki, *Te Tomo* (n 118); Stephens, *Ruka* (n 46).

Applying legal tests so as to include Māori everyday reality

One of the fruits of utilising the orthodox tools of legal and factual analysis is that it becomes entirely possible to see how different and credible (from the perspective of the general legal system) results could have been achieved, simply with a change in perspective. *What if* determining the choices available to a 'reasonable person' could have included choices made by a Māori woman that were informed by culture including collective responsibility for harm caused?[128] *What if* broad administrative discretion could have been exercised, taking into account customary factors, that could lead to a woman avoiding conviction for benefit fraud on the basis that the indicia of Māori customary marriage were absent?[129]

Paying respect to Māori values and principles

Values and practices cannot be extricated from each other. The mana wahine judges all make express or implied reference to Māori values as they pursue their analysis. Interpreting legislation with a view to achieving the statutory object of land retention, understanding that land provides sustenance for future generations,[130] upholds the value of whakapapa[131] and kaitiakitanga. Recognising a woman's right to fish for her whānau and hapū recognises the value of manaakitanga.[132] Providing for a woman to serve her sentence at a marae-based programme upholds the value of aroha, among other things.[133] Protecting opportunities for Māori (and others) to participate in voting, and potentially, in political dissent, upholds rangatiratanga.[134]

This project gave us a taste of what mana wahine judging looks like in the context of New Zealand's existing general legal system. Inevitably the next stage must be to investigate what Māori judging released from the strictures of that system looks like, in the context of other indigenous judging initiatives around the world.

Heoi anō. Ā tōnā wā ka kōrero anō tātou.[135]

> *Silencing the disenfranchised, silencing our prisoners, silencing Māori and invisibilising wahine Māori. The fight to allow prisoners the right to vote, perpetuates the struggle we see throughout the justice system; where the numbers speak, Māori experience worse outcomes than non-Māori. In the fight to bring fairness for Māori, the voice of wahine Māori can be lost. Māori women are our fastest growing prison population, and this reality is lost in the 'normalisation' of the*

[128] Quilmie, *Kawiti* (n 41).
[129] Stephens, *Ruka* (n 46).
[130] Johnston and Hori Te Pa, *Bruce v Edwards* (n 81).
[131] ibid; Stephens, *Ruka* (n 46).
[132] Gattey, *Waipapakura* (n 115).
[133] Toki, *Te Tomo* (n 118).
[134] Yarwood and Pirini, *Taylor* (n 55).
[135] Enough. In good time we'll speak again.

> *'overrepresentation of Māori in prisons'. The case of prisoners voting, is a case against the further disengagement of Māori. But when we think prisons, we think 'Māori' and we think 'men'. The irony is that fighting to be engaged and heard in a democratic system, further invisibilises Māori women … In te ao Māori the woman's voice is the first, in karanga. To be wahine Māori who happens to be a prisoner, means your voice may never been heard. That's the democratic system of NZ.*[136]

Anei mātou te rōpū whaimana wahine:

Those who initially identified themselves, or were invited to join the rōpū whaimana wahine, included the following individuals, working on six judgments and commentaries.

— Khylee Quince (Ngāpuhi, Ngāti Porou, Ngāti Kahungungu).
— Māmari Stephens (Te Rarawa and Ngāti Pākehā).
— Valmaine Toki (Ngāpuhi, Ngāti Wai and Ngāti Whātua).
— Linda Hasan-Stein, Hamilton.
— Mihiata Pirini (Ngati Tuwharetoa and Whakatohea).
— Julia Whaipooti (Ngāti Porou).
— Jacinta Ruru (Raukawa and Ngāti Ranginui).
— Kerensa Johnston (Ngāti Tama, Ngāruahine and Ngāti Whāwhakia).
— Mariah Hori Te Pa (Muaūpoko, Ngāti Raukawa me Ngāti Rārua).
— Emma Gattey, Wellington and Wairarapa.
— Lisa Yarwood, Wellington.
— John Dawson, Dunedin.

[136] A response to issues raised by the decision in this collection *Taylor v Attorney General* [2015] 3 NZLR 791 (HC).