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Justice in context
Judging Battered Women Defendants: a
New Zealand Case Study

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A thesis submitted in fulfilment of the requirements for the degree of Doctor
of Philosophy in Political Studies, The University of Auckland.

Abstract

The purpose of the thesis is to analyse the practical limits and scope of the substantive concept and principles of justice in response to a growing philosophical scepticism about the relevance and substance of the virtue of justice in the modern world. This critical reflection on justice is set in an actual context of considerable controversy surrounding the commitment to justice and compelling claims about the failure of the ‘justice system’ to fulfil those commitments. This context encompasses debates and decisions about justice for battered women defendants.

The first part of the thesis develops an extended empirical case study of the New Zealand ‘justice system’ centred on the 1994 trial of Gay Oakes who killed her abusive husband and was convicted of his murder. Using this legal case as a critical point of departure for reflection on New Zealand’s commitment to justice for battered women defendants and for women victims of domestic violence more broadly, the case study includes a detailed overview of the legal, political and cultural aspects of New Zealand’s changing commitment to justice for battered women, concentrating on the twenty-year period between 1987 and 2007. The study overall reveals the complexity of the justice challenge in this context and raises serious concerns about the ongoing failure to meet the demands of justice in spite of significant progress made.

The second part of the thesis engages in analytical reflection on the key principles of justice conceptualised in western political philosophy and underpinning the institutionalised commitment to justice in New Zealand. Divided into three distinct principles of justice – the principle of equal treatment or formal justice, the principle of equal consent, and the principle of just deserts – the analysis in this part of the thesis endeavours to translate each principle of justice defined in abstraction, based on hypothetical and universal dilemmas, to apply in specific contexts of judging what justice demands for battered women defendants. Although serious complexities of ‘translation’ arise in each case, the analysis points to the conclusion that the sceptics are wrong to

doubt the substance and relevance of justice, and that justice remains an important legal, political and moral virtue capable of guiding judgments in complex contexts.

For Gay Oakes

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Introduction: Justice in context

Even in the simplest cases, justice is not simple...there is no possible formula...that will tell us how to judge such cases. Justice is contextual.

Robert Solomon, 1990¹

The case study

In September, 1994, at the Christchurch High Court, New Zealand, a woman by the name of Gay Oakes was found guilty of murdering her abusive partner, Doug Gardner, and sentenced to life imprisonment.

On a night in January 1993, in a state of panic and fear, Oakes had placed a fatal dose of various prescription drugs in the cup of coffee Gardner told her to make for him after he had come to her house in the middle of the night where she was living with her six children, demanding to be let in. In her statement to police and later in court, Oakes strongly denied that she had planned or intended to kill Gardner that night. When she discovered she had killed him some time the following day, in a state of shock and not knowing what else to do, having no means of transport, she told a friend and together they buried the body in the back garden of her house that night. She did not tell her children what had happened.

The body remained undetected for fourteen months during which time, Gardner's family reported him missing and police came to the property several times to question Oakes, on which occasions she lied about her knowledge of Gardner's death, believing that 'if anyone found out how Doug had died she would lose her children permanently',² as she later told a confidante in prison. At the time she killed Gardner, Oakes' youngest child

¹ *A Passion for Justice: Emotions and the Origins of the Social Contract* (Addison-Wesley Publishing, Reading, Massachusetts): 176.

² Ronda Bungay, *Scarecrows: why women kill* (Random House, Auckland, New Zealand, 1998): 166.

was four months old. Gardner's body was eventually discovered in March of the following year and Oakes was arrested and charged with murder.

Oakes' trial at the Christchurch High Court, beginning August 29, 1994, was recognised as one of the 'major criminal trials of the 1990s',³ receiving extensive media coverage and arousing intense public interest and debate. Following her conviction for murder, there were protests in support of Oakes conducted simultaneously in the three main cities of Auckland, Wellington and Christchurch, with protesters claiming that the legal system fails women charged with murdering abusive partners,⁴ and more generally fails women in delivering 'two sets of justice – one for men and one for women'.⁵ From these protests the feminist group: *Women for Justice for Women* was established in Christchurch immediately following the *Oakes* trial, with the wider intention of 'challenging attitudes, myths and stereotypes of domestic violence and campaigning for changes in the law'.⁶ Meanwhile in prison, Oakes reportedly received 'hundreds of letters of support from women'.⁷ One key supporter of Oakes and a leading campaigner for the NZ *Women for Justice for Women* group was prompted by the case to propose a new criminal defence tailored to meet the specific demands and circumstances of these cases.⁸

Oakes was one of the first cases in the country in which expert testimony on battered woman syndrome was relied upon. The apparent failure of the syndrome to successfully support a defence in this case, indeed its tendency to undermine that defence by suggesting that Gay's actions demonstrated a degree of 'initiative' inconsistent with the

³ Judith Ablett-Kerr QC 'Afterword: Not yet the final chapter' in Gay Oakes, *Decline into Darkness: The true story* (Harper Collins, Auckland): 181.

⁴ 'Protesters support murder appeal' *The Dominion Post*, 14 March, 1995, Ed. 3, p. 2.

⁵ A campaign led by NZ Women's Refuge (NCIWR), cited in Jenny Chapman's *Interest Groups: A Case Study of the Women's Refuge Movement in New Zealand* (MA Thesis), University of Auckland, 1997: 74.

⁶ The group adopts an explicitly feminist perspective aimed at exposing and changing a justice system 'developed by males [and] based on male reality' which fails to respond to women's reality 'distinct from the predominant male reality'. 'Prisoners of Violence', *Broadsheet*, Summer, 1994:17.

⁷ S. Bradwell, "Gay Oakes 'feels free'" *Sunday News*, 3 August, 1997, Ed. 1, p.4.

⁸ Suzanne Beri outlined her proposal for the partial defence of self-preservation in 'Justice for Women Who Kill: A New Way?' *Australian Feminist Law Journal* (1997) Vol 8, March, pp. 113-123. In her autobiographical account of her experiences, Oakes acknowledges her gratitude to Beri for her 'friendship and support...time and expertise...during the most difficult times (*Decline into Darkness*, op.cit): 7.

syndrome,⁹ prompted academic and public debate on this evidence¹⁰ and eventually a Law Commission review,¹¹ which led to the recommendation in its 2001 report that ‘all reference to the syndrome be dropped’.¹² The case went to the Court of Appeal and the Privy Council in London – New Zealand’s highest court at the time¹³ – and Oakes’ failure in each case to convince the judges that her murder conviction represented a significant ‘miscarriage of justice’, and the total lack of female representation among the many judges employed in the trial and appeal process, served to compound concerns and debate about a systemic gender bias against women in the New Zealand justice system.¹⁴ Oakes’ legal counsel on appeal to the Privy Council, Judith Ablett-Kerr; not incidentally, New Zealand’s only woman QC at the time of Oakes’ appeal,¹⁵ published her concerns that the case represented much more than the limitations of battered woman syndrome evidence or the under-representation of women in the judiciary. For her, the case served to expose the limitations of the criminal law itself, suggesting the need for ‘a fundamental...review...of [the] issue of culpability for killing and appropriate punishment’,¹⁶ even suggesting that this, along with other pressing issues arising, confirmed that the time had come for ‘a royal commission into justice in New Zealand.’¹⁷

⁹ Wendy Ball, ‘R v. Gay Oakes’, in Bungay, *Scarecrows*, op.cit: 177-178.

¹⁰ Examples of academic articles published in the wake of the *Oakes* case include, Nan Seuffert, ‘Battered Women and Self-Defense’ in *NZULR* Vol 17 (June 1997) pp. 292-328; and Elisabeth McDonald ‘Defending Abused Women: Beginning a Critique of New Zealand Criminal Law’ in *VUWLR* Vol. 27 (4) December 1997 pp. 673-696. Ablett-Kerr noted that ‘the very name’ battered woman syndrome ‘seems to divide society in two...[with] some who see recognition of the syndrome as a licence to kill husbands and others see it as an awareness of the consequences of domestic violence’, ‘Afterword’, op.cit: 184-185.

¹¹ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend*, NZLC PP41 (Wellington, 2000).

¹² New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* NZLC R73 (Wellington, 22 May, 2001): 6.

¹³ The *Supreme Court Act 2003* established the New Zealand Supreme Court to replace appeal to the Privy Council, as the country’s final point of legal redress. The Court began hearing appeals on 1 July 2004. See Andrew Beck ‘The Supreme Court: justice for all?’ *The New Zealand Law Journal*, Nov 2003 pp.409-412

¹⁴ For example, an advocate for victims’ rights questioned how the elderly male judges on Oakes’ appeal could be expected to ‘understand, and put themselves in the position of a woman who has suffered violence against her in the past’ (Doris Church, quoted in ‘Gender bias claimed in Oakes murder case’, *The Dominion*, 28 March 1995, Ed. 2, p.16).

¹⁵ Ablett Kerr became the sole woman QC in 1995 after the two standing women members were appointed to the High Court Bench. In June 1996 another woman was appointed bringing the total of women QC’s to two out of fifty-seven. See Gill Gatfield, *Without Prejudice: Women in the Law* (Brooker’s, Wellington, New Zealand, 1996): 136.

¹⁶ Judith Ablett-Kerr, ‘A Licence To Kill Or An Overdue Reform?: The Case Of Diminished Responsibility’, *Otago Law Review* (1997) Vol 9 No 1 pp. 1-13: 13.

¹⁷ Judith Ablett-Kerr, ‘The criminal justice system: crying out for a royal commission or merely crying over spilt milk?’ *Law Talk* (1998) 507 October 5, pp.13-15: 14

*

In October 2002, having served eight years in prison, two years less than the statutory minimum ten year life sentence, Gay Oakes was paroled from prison on grounds of battered woman syndrome and in light of a change of law replacing the mandatory life sentence for murder with a sentencing discretion.¹⁸ In its decision, the Parole Board placed an unprecedented condition on her early release: that she never speaks publicly about her case.¹⁹ This decision represented the culmination of more than a decade of debate, review and reform undertaken in New Zealand in response to concerns raised here, and elsewhere, about the failure of the justice system to deliver on its commitment to justice in cases where women kill their abusive husbands. That the decision, subsequent debate and reform, fails to suggest a concerted response to the substantive concerns about justice raised, confirms the serious nature of these concerns and tends to indicate the justice system's limited capacity or willingness to address them.

At the same time, the accumulated body of research and advocacy addressed to these concerns, while suggesting a general agreement on the need for substantive reform, does not present a cohesive case for reform and in certain critical respects is divided over what reform measures are needed and how these are to be defined, defended and delivered. Therefore, it could be argued that the ongoing debate and indecision over justice for battered women defendants implicates the wider 'justice system' of which the courts and formal legal system are one part, along with the political and cultural 'systems' and processes, and the principles of justice underpinning the wider 'system' that have a substantial impact on the commitment to justice in New Zealand. Thus, the *Oakes* case provides the focal point and critical point of departure for reflecting on the wider commitment to justice for battered women undertaken by the New Zealand 'justice system'. Because of the wide-ranging influence of this key criminal case, *Oakes* facilitates while providing the impetus for critical reflection on the broader challenge of

¹⁸ Part 4, s 102, *Sentencing Act*, 2002.

¹⁹ 'Gagging order as Oakes goes free', *The Dominion Post*, 4 Oct, 2002, Ed. 2, p.3.

delivering ‘justice in context’ that is undertaken in the thesis. This reflection extends to the philosophical debate about the meaning and purpose of the concept of justice and responds to the growing scepticism amongst political philosophers in particular, who seriously doubt the possibility and relevance of justice in the modern world. The second part of the thesis is devoted to reflecting critically on this more analytical debate that is situated, however, in response to the concrete challenges for justice that are raised in the wider case study.

Principles of justice

Using the *Oakes* case as a stable and detailed point of departure for reflecting on the wider commitment to ‘justice in context’ in New Zealand provides a real test for the prevailing theories and principles of justice as conceptualised in the dominant philosophical discourses on the subject within western political philosophy. This test recognises and highlights as a key problematic for justice in context the fact that such theories and principles are implicit in the commitment to justice upheld in societies like New Zealand, yet are rarely reflected upon or consulted explicitly in reference to the kind of specific and complex challenges of judging what justice demands in context. While it is argued here that our commitment to justice in practice could benefit from greater reflection on underlying principles, the meaning and relevance of these highly abstract principles is at once brought into question when reflected upon in light of the specific challenges of application in complex contexts, such as those highlighted in the case study. This questioning is supported by an extensive and growing scepticism articulated by a wide range of critics of the dominant philosophical discourse of justice,²⁰ not least

²⁰ Various pragmatists and deconstructionists have asserted a ‘messianic hope’ for justice in place of the rational ideal as a more relevant and realistic political ideal because a question of active and accessible processes of ‘democratic politics, imagination and art’ rather than rational formulas and principles (Richard Rorty, ‘Emancipating our Culture’ in Jürgen Habermas; Jozef Niznik and John T. Sanders (eds.) *Debating the State of Philosophy: Habermas, Rorty and Kolakowski*, Praeger, Westport, Connecticut, 1996: 26-27). Justice for these critics can never be realised but is always a promise; that which is ‘yet to come’ as the law ‘sits...between the call for justice and the imperatives of a violent ordering of the societies in which we

among them, various feminist critics.²¹ The general critique maintains that given the diverse social conditions of contemporary liberal democratic societies, and the growing moral pluralism these conditions give rise to, ‘there is no operative consensus concerning the ultimate...grounds of truth or justice’ and no formulas or principles of justice because ‘even in the simplest of cases’, the complexities of context challenge the usefulness of these principles.²²

Walter Kaufmann’s 1968 article *Doubts about Justice*²³ provides an early, and in some respects, definitive expression of this sceptical thesis in which fundamental ‘doubts about justice’ are identified as the ‘third phase’ of an even more fundamental ‘crisis in morality’ stemming from an increasing moral scepticism and questioning of the law’s authority amongst those who were ‘born into a world wounded by Auschwitz and Nagasaki.’²⁴ According to Kaufmann, once there is scepticism about the legitimacy of a single moral law ‘binding on all men’, there is no moral basis on which to build claims about justice. Indeed, in conditions of moral scepticism ‘justice cannot do the work it is supposed to do’ and so, we are better off placing our faith in less abstract, more humane

live’ (Austin Sarat (ed.), *Law, Violence and the Possibility of Justice*, Princeton University Press, Princeton, New Jersey, 2001: 12-13).

²¹ Political philosopher Joseph Carens attributes the recent expansion of this general critique of justice to feminist theorists who he says ‘have emphasised the moral importance of paying attention to the concrete and the particular’, Joseph H. Carens, *Culture, Citizenship, And Community: A Contextual Exploration Of Justice As Evenhandedness*, Oxford, Oxford University Press, 2000: 8. Key examples of the feminist critique are: Susan Moller Okin, ‘Reason and Feeling in Thinking about Justice’, *Ethics* 99, 1989: 229-249; Jane Flax, ‘The end of innocence’ in Judith Butler and Joan.W. Scott (eds) *Feminists Theorize the Political*, (Routledge, New York, 1992); Chantal Mouffe, *The Return Of The Political*, (London, Verso, 1993) and Carol Smart, *Feminism and the Power of Law* (London, Routledge, 1989). Smart challenges the presumed alliance of law and justice advancing a discourse of ‘legal-realism’ in which law is understood as ‘a complex system of knowledge’ which, like science, ‘makes a claim to truth...that is indivisible from the exercise of power’, a power that lies not merely in the exercise of casting judgments but in ‘disqualifying other knowledges and experiences’ (11). Other feminist critics have built on Carol Gilligan’s groundbreaking 1982 work *In a Different Voice* (Harvard University Press), to contrast the ‘ethic of justice’ with ‘the ethic of care’ as masculine and feminine ethics, respectively, and advance the ethic of care in place of justice because giving focus to ‘the critical moral issue of hurting’ seen as a more relevant and important issue than the justice focus on individual rights (71). For a recent application of this ongoing debate which seeks to avoid the ‘justice versus care’ approach and considers how to effectively ‘integrate’ the ethics of justice and care, see Virginia Held, *The Ethics of Care: Personal, Political and Global* (Oxford University Press, Oxford; New York, 2006): 95.

²² Anna Yeatman, *Postmodern Revisionings of the Political* (Routledge, New York, 1994): 106.

²³ Published in *Ethics and Social Justice*, Howard E. Kiefer Milton K. Munitz (eds.), State University of New York Press, Albany, 1970.

²⁴ *ibid*: 54. Kaufmann considers the implications of the moral skepticism that arose in the 20th century was first grasped by Nietzsche in the 19th century, gradually expanding after his death in 1900 (55).

virtues such as ‘courage, honesty and gentleness’.²⁵ The tradition challenged is that which, since Plato’s *Republic*, has undertaken to ‘civilise’ justice by abstracting it from the vagaries and complex particularities of life, to construct ‘justice’ as one of the most rational of the virtues, capable of the most systematic formalisation in principles that ‘owe nothing to sensory observation and everything to logical inference and analysis’.²⁶ Principles, which if followed strictly, can ‘create society anew’.²⁷ In this tradition, the principles of justice are expected to off-set criticism and disagreement on all substantive debates about how society’s institutions are to be regulated, even to the point of reducing the impulse to illegality and criminal activity by ‘specifying the boundaries that men’s systems of ends must respect...[thereby] restricting their desires and aspirations from the outset’.²⁸ Moreover, these are principles which all ‘rational’ persons are expected to agree upon regardless of context, which means they are principles that can be ‘insisted upon’ such that ‘if you fail to be convinced [by them], they are compelling nonetheless’.²⁹

In place of grand theories and rational principles of justice, the sceptics argue that if the virtue of justice makes sense at all, it is only in response to the complex and ‘irrational’ circumstances of our collective existence – the constant ‘states of arbitrariness...of lawlessness...and of injustice [which comprise] the overwhelming realities all theories of justice must cope with’.³⁰ Whereas the dominant philosophical tradition encapsulated in the ideal of legal neutrality defines and dismisses *injustice* as an ‘abnormal preliminary’, the sceptics emphasise the ‘intractability,...scope and endless detail’ of injustice that the law can never resolve, and that which we are all complicit in perpetuating when we do nothing to address it, all the while effectively ‘encouraging and maintaining the habits of unjust people’.³¹

²⁵ Ibid: 52-55.

²⁶ Theresa Man Ling Lee, *Politics And Truth: Political Theory And The Postmodern Challenge* (New York; State University of New York Press, 1997): 23.

²⁷ Solomon, *A Passion for Justice*, op.cit: 61.

²⁸ John Rawls, *A Theory of Justice*, Cambridge, Mass., Belknap Press of Harvard University Press, 1971:31.

²⁹ John R. Lucas, *On Justice*, Oxford: Clarendon Press; New York: Oxford University Press, 1980: 261.

³⁰ Agnes Heller, *Beyond Justice*, Basil Blackwell, Oxford, 1987: 179.

³¹ Judith Shklar, *The Faces of Injustice*, Yale University Press: New Haven and London, 1990: 17-21.

*

The considerable strengths of this critique lie in its questioning of the taken for granted view of justice as legality which opens the way for a more wide-ranging critique of the political, moral and cultural processes, rules and principles that underpin the commitment to justice in context. This is a critical perspective which highlights the practical constraints on our ability to deliver justice in context and directs us to focus our reflections on the principles of justice in light of these constraints. In response to the present case study this perspective and direction is particularly informative as the reality of domestic violence presents such a complex set of practical constraints and challenges for delivering justice that scepticism about a rational resolution of the debate seems the most ‘rational’ and realistic response. However, where this scepticism leads to a fundamental doubting of the possibility or promise of justice altogether, as it does for Kaufmann and others, then it effectively rejects the point of justice-related critique altogether.

In my view, the experiences of women like Gay Oakes show that we cannot afford to abandon justice in favour of pursuing more *humane* virtues – as Kaufmann suggests – as if these virtues were any more possible than justice, even as these experiences at once remind us of the considerable failings of the prevailing justice ideal. Rather, in accepting the immense rhetorical appeal of justice claimed by ‘every antagonist...in wars, in revolutions, in lawsuits, in clashes of interest...[to be] on his side’,³² the challenge of justice in context becomes a challenge of identifying injustice through critical social science research and providing clarification of this rhetoric through critical reflection on the principles of justice in the light of this research. Even if justice cannot resolve the ongoing ‘battle’ waged in its name, it ought to be worth trying to illuminate the principled terms of this battle or, indeed, trying to expose the absence of principle and the exercise of power in its place. This is the challenge established and addressed in the various chapters of the thesis.

³² Chaim Perelman, *Justice, Law and Argument; moral and legal reasoning*, Dordrecht, Holland; Boston: D. Reidel Pub. Co.; Hingham, MA., 1980: 2.

Method and structure

The reflective, critical task undertaken in this thesis can be conceptualised as an exercise in ‘practical political philosophy’; an exercise described by Robert Solomon as ‘a closely considered and felt engagement with the situation and the people involved in...[making] judgments regarding justice’,³³ and by Judith Shklar as a task involving ‘a style of thought...less abstract than formal ethics and more analytical than history’.³⁴ It is a method of analysis which considers the processes of deciding and framing what is ‘just’ – of defending and contesting, reviewing and reforming, always in contexts of disagreement – to be an integral part of the structural, institutionalised commitment to justice. This method of analysis also follows, as it tests, Joseph Carens’ claim that:

As political theorists we gain much if we begin our reflections...with the concrete judgements we make, the characteristic language we use, the particular principles we invoke, the specific problems we recognise, and the actual arguments we advance when we talk about questions of justice in ordinary life.³⁵

It accepts Shklar’s contention that the key challenge for delivering justice in context involves finding out ‘everything we should know about injustice’ first; a challenge which she considers political theorists are ‘ideally suited’ to addressing.³⁶ It is a challenge, moreover, that requires us to look beyond the rules of the game and in particular to think outside the ‘judicial mind-set’ to recognise the responsibilities of democratic citizenship and counter the tendency towards ‘passive injustice’.³⁷ While acknowledging that justice is an abstract concept which must be expressed in terms of general principles, reflection on ‘justice in context’ also recognises that, like all principles, the principles of justice ‘are only ever a part of practical reasoning’.³⁸ However, while being defined in the process of practical reasoning in contexts of injustice, a principled commitment to justice must

³³ *A Passion for Justice*, op.cit: 165.

³⁴ *Faces of Injustice*, op.cit: 16.

³⁵ *Culture, Citizenship, and Community*, op.cit: 27.

³⁶ *Faces of Injustice*, op.cit: 50.

³⁷ *Ibid*: 55.

³⁸ Onora O’Neill, *Bounds of Justice*, Cambridge University Press, Cambridge, 2000: 159.

always honour and substantiate ‘the *prima facie* duty of treating people as equals’.³⁹ Beyond this, a great deal of scope remains for interpreting and specifying the principles of justice in practical contexts of judging.

*

The thesis is divided into two distinct and contrasting parts with the *Oakes* case taken as the overall point of departure for reflecting on the challenges of delivering justice in context. Simply put, the first part considers the practice, and the second part, the principles of justice, with the conclusion reflecting on the limits and scope of justice for ‘the next Gay Oakes’, suggesting that this potential requires a reconciliation between the practice and principles of justice in context.

The first part of the thesis develops an extended case study of ‘the New Zealand justice system’ covering a twenty year period before and subsequent to the 1994 trial of Gay Oakes and encompassing reflection on the ‘cultural system’ influencing the judgment in *Oakes* and the surrounding debates and developments in the New Zealand commitment to justice for battered women defendants. The case study draws on a wide range of empirical and analytical research and data, including the official court proceedings of the *Oakes* case, parliamentary debates, extensive media reporting, police and government statistics and key Law Commission reviews and government initiatives in the wider domestic violence field impacting on the commitment to justice for battered women defendants. As the response to cases like *Oakes* in New Zealand and elsewhere has undergone such profound changes since women who killed their husbands were considered guilty of treason, and ‘wife beating’ was effectively sanctioned by law, the case study adopts a fairly broad-sweep approach in order to track these developments and measure their significance, while identifying themes of reform as well as resistance to reform which should help to illuminate the context of injustice.

³⁹ William Frankena, ‘The concept of social justice’ in Richard B. Brandt, *Social Justice* (ed.), Englewood Cliffs: Prentice-Hall, 1962: 17.

The first chapter of the thesis: 'Legal justice: *R v. Oakes*' begins by providing an overview of the structural commitment to 'legal justice' in New Zealand under the common law system. In light of this overview, a critical description and analysis of the Gay Oakes case follows which concentrates on a narrow subject matter – the trial process and conviction, the appeals and the decision to grant Oakes early parole, along with samples of the extensive public-media debate that surrounded this critical case – in order to provide a stable, unified and detailed point of reference on which the rest of the thesis will draw. The chapter also aims to illustrate the extent to which the commitment to 'legal justice' is entrusted to and influenced by factors that undermine the formality and neutrality of the process, suggesting that 'legal justice' is no more a cohesive and coherent system than any other aspect of the commitment to justice. A summary of key aspects of Gay Oakes' autobiographical account of her experiences written whilst she was in prison, is included as an appendix to this chapter to provide a fuller explanation of the defendant's perspective than the chapter on the formal legal system can accommodate.

The second chapter: 'Political justice: Key debates and initiatives 1987-2007' develops the case study of the New Zealand 'justice system' via reflection on the critical developments subsequent to *Oakes* and the wider political process of key debates and initiatives undertaken over the twenty-year period that influenced these developments. Once again, the structures of New Zealand's liberal democratic commitment to 'political justice' are outlined, and the reflections on the debates and initiatives impacting on the commitment to justice for battered women defendants are undertaken in the light of this structural framework. The twenty-year period of study was the most dynamic period in New Zealand history in terms of debates and initiatives in the wider domestic violence field,⁴⁰ and influencing the more specific commitments made to justice for battered women defendants. Given the number of related debates and initiatives in this wider

⁴⁰ As the study shows, in New Zealand as elsewhere, this period of time delivered major reforms in the wider domestic violence field including the first anti-domestic violence legislation recognising 'wife beating' as a form of serious violence, introducing tougher penalties for offenders and precipitating a dramatic increase in public awareness of the extent of the problem leading to an increase in the number of policies committed to understanding and addressing the problem of domestic violence as well as extensive debate and reviews of the criminal law's impact on battered women defendants, which encompassed the admission, controversy about and eventual rejection of the BWS.

field, it is only possible to give close consideration to the most critical developments impacting on the narrower commitment. The fact that it is difficult to separate out the commitments made to battered women defendants from the wider commitments undertaken in the domestic violence field indicates the difficulty of delivering substantive justice at the political level. Yet it also serves to confirm the critical point that ‘justice is coextensive with the political’⁴¹ and any failure of justice at this level is a failure of justice altogether.

The third and final chapter of the case study: ‘Cultural justice: “New Zealand’s most notorious man-killer”’ reflects on the ‘cultural’⁴² influences on the commitment to justice for battered women defendants, extrapolating from this description of Gay Oakes as the country’s ‘most notorious man-killer’ to consider the wider ‘cultural system’ in which such a remark makes some kind of sense. That is, the chapter suggests Oakes’ notoriety as a ‘man-killer’ is a cultural product that symbolises the intertwining of legal and cultural processes and highlights, in particular, the challenge of delivering ‘gender-neutral’ justice in a society where ‘man-killing’ is a concept of considerable cultural significance, whereas ‘woman-killing’ is merely a routine, empirical fact. There are no notorious ‘woman-killers’ in New Zealand, yet there are scores of murdered women, particularly wives. The ‘cultural system’ that supports this distinction underpins all judgments of women and men – that is all judgements – meted out by the ‘justice system’. The reflections undertaken in this chapter substantiate this point by highlighting the enduring influence of ‘cultural patriarchy’ as the dominant culture of the Anglo-western tradition which has come to prevail in New Zealand and which continues to override other cultural influences on the response to all domestic violence-related debates and initiatives.

⁴¹ Iris Young, *Justice and the Politics of Difference*, Princeton University Press, Princeton, New Jersey, 1990: 9.

⁴² The term ‘culture’ has been described as ‘one of the most difficult words in the English language’ (Raymond Williams, *Communications* 3rd ed., Harmondsworth; New York, Penguin, 1976: 76) and is often conflated and confused with terms like ‘ethnicity’ and ‘race’. Here, I refer to it and distinguish it from these proximate terms with due caution, to mean something like shared understandings, beliefs and values, often a common language, which exert a more or less constant influence on members of a particular community of people, such as the people of New Zealand.

The chapter reflects on the historical influence of these dominant cultural norms on New Zealand's response to domestic violence, highlighting the cultural mechanisms of resistance which have been particularly effective in undermining reform efforts in this field, confirming that 'culture has tremendous power'.⁴³ The purpose of the chapter is to demonstrate the nature and extent of this power in the justice process and to show, that the 'hands off' approach to culture adopted by the dominant theorists of justice,⁴⁴ fails to explain a critical aspect of the challenge to deliver justice in context – namely, to identify and overcome the mechanisms of cultural injustice.

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The second part of the thesis responds to the issues raised in the case study and reflects on what these issues reveal about the limits and scope of substantive justice in context. Dividing the principled commitment to justice into three, and reflecting on these three principles in three separate 'contexts of judging', it is hoped to reduce some of the vagueness and abstraction of the justice ideal. The expectation tested in this part of the thesis is that well formulated principles of justice hold the potential to guide practical judgments in a range of contexts towards fulfilling more substantive goals than they would otherwise aim for and achieve. The substantive material for this part of the thesis is drawn from the philosophical debate about justice which dates back to the Ancient Greeks who first posed the question 'What is justice?' and undertook to formulate a systematic response. The debate that has continued ever since, especially among political philosophers, provides a breadth and depth of analysis on the subject that prompts and facilitates ongoing reflection on that complex and, if Plato was right, ultimately unanswerable, question.

The first chapter: 'Equal treatment in the common law courts', considers the most recognisable principle of justice that is, at once, the most direct route to justice in context if correctly applied. The principle tells the agents of the formal legal system to 'treat like

⁴³ Virginia Held, *Feminist Morality: Transforming Culture, Society And Politics*, Chicago: University of Chicago Press, 1993: viii.

⁴⁴ Carens, *Culture, Citizenship, and Community*, op.cit: 44.

cases alike and different cases differently’ and prioritises the values of impartiality, generality and neutrality with the aim of ensuring the law is applied consistently, continuously and dispassionately in all cases. Those brought before the courts are to be judged on the merits of their case alone so that all are considered equal in the eyes of the law. In particular, the formal principle distinguishes ‘legal justice’ from ‘moral justice’ and the formal adjudication system is not considered to be responsible for securing moral justice’.⁴⁵ However, it is also understood that in the adjudication of ‘hard cases’, such as *Oakes* and cases like it, consistency of application or pure formalism cannot be relied upon to ensure ‘equal treatment’ so that the judge is expected to apply his or her ‘practical wisdom’ and ‘equity’ to determine what justice demands in the particular case. As Perelman explains; in hard cases ‘the judge...[must] use his powers of interpretation and evaluation in order to make his decisions conform to his sense of equity’.⁴⁶

Reflections on the principle of equal treatment in the light of the case study illuminate certain critical weaknesses of its application in contexts of gender inequality, ‘difference’ and injustice, weaknesses which arise with particular significance in the adjudication of cases like *Oakes*. With reference to various revised interpretations of the principle aimed at addressing this key weakness, the chapter helps to clarify the practical potential of the principle in general and as a guide for the common law’s adjudication of battered women defendants in particular.

Chapter five: ‘Equal consent in liberal democracies’ identifies and reflects critically on the core principle of liberal justice formulated by some of the most influential thinkers of the western Enlightenment and underpinning the constitutional commitments to justice upheld in modern liberal democracies, such as New Zealand. Based on the premise that all people are born free and equal with the same capacity for rational, autonomous ‘consent’, liberals defend the individual’s ‘natural right’ to choose how to live on his or her own terms without having to serve the interests of others or the general good. As Mill wrote in his classic 19th century treatise *On Liberty*; ‘One very simple principle [is] that

⁴⁵ Alvin Goldman, *Knowledge in a Social World*, Oxford, Oxford University Press, 1999: 273, 284.

⁴⁶ *Justice, Law and Argument*, op.cit: 39-40.

over himself, over his own body and mind, the individual is sovereign'.⁴⁷ This core liberal principle was developed into a substantive principle of justice as equal consent by the liberal-contractarians who reinforced the concept of individual sovereignty with that of individual rights – most importantly, the equal right to freedom from interference. According to the liberal-contractarians, the institution of the rule of law is to be thought of as a social contract or pre-political agreement between all rational and autonomous individuals who consent to give up their unlimited freedom in nature to be ruled and constrained by law, on the condition that others do the same and the law serves to protect and prioritise their individual rights. The laws and rules of governance are considered just in so far as they can be said to reflect the autonomous, rational and equal consent of all those who are constrained by the law.

Although widely challenged for its abstraction and accused of 'distracting [us] from the actual problems of justice and injustice',⁴⁸ the social contract model and principle of equal consent can provide a way of thinking critically about the substantive commitment to justice in the circumstances of democratic politics wherein the rigorous principles of justice and freedom tend to get superseded by more immediate challenges associated with upholding the democratic process. If the traditional models of the social contract excluded women's consent explicitly and implicitly,⁴⁹ then the ongoing challenge that all liberal societies face, is to develop an inclusive model where the concepts of 'consent' and 'contract' are defined less abstractly to address the contextual obstacles to meaningful consent in modern democracies, in particular, the obstacles to the meaningful consent of battered women. Indeed, endemic rates of domestic violence might be seen as the ultimate failure of the liberal contract, and from the perspective of this model, might be addressed as a more fundamental injustice than is currently the case. The chapter reflects on the possibility and potential of this expanded application of the principle of equal consent in the light of various illuminating critiques of the model and in response to the specific challenge of protecting the equal consent of battered women in New Zealand.

⁴⁷ John Stuart Mill, *On Liberty*, Harmondsworth: Penguin, 1974: 69.

⁴⁸ Solomon, *A Passion for Justice*, op.cit: 62.

⁴⁹ See Carole Pateman, *The Sexual Contract*, Cambridge, Polity, 1988.

The sixth and final chapter: ‘Just deserts in punishment’ considers the *virtue* of justice, reflecting on the generally taken for granted notion that justice is a moral good to be valued and pursued for its own sake over and above other goals, such as ‘law and order’, because it gives people what they *deserve*, whether rewards or punishments. Not only is this notion of just deserts provide the focus of sceptical doubts, given the reality of moral pluralism, but these doubts are most developed and convincing in relation to the claim that we can define and deliver ‘just deserts’ in punishment. For this reason and because of the growing influence of virtues and goals other than justice in the modern approach to punishment institutionalised in liberal democracies such as New Zealand, it could be argued there is more need to reflect on the commitment to justice in punishment than there is to reflect on any other aspect of the institutionalised commitment to justice. Although worked into the institutions of ‘criminal justice’, a closer consideration of the principles underpinning these utilitarian and ‘humanitarian’ goals reveals certain fundamental conflicts between their fulfilment and the fulfilment of the commitment to justice. The most recently introduced goals of ‘restorative justice’ and ‘victims’ rights’ have introduced a further conflict and confusion into the commitment to ‘criminal justice’ that some argue presents particular problems for the victims of domestic violence.⁵⁰ Distinguishing the principle of ‘just deserts’ from other principles of ‘criminal justice’ thus becomes a critical challenge for defining the commitment to justice in punishment in general, and specifically, for addressing the challenge of judging the ‘just deserts’ of defendants like Gay Oakes.

The conclusion: ‘Justice for the next Gay Oakes?’ draws together the critical reflections on the commitment to justice in the various contexts of judging defendants like Gay Oakes to decide what these reflections tell us about the substantive meaning of that commitment beyond its rhetorical application and from this, to decide, on balance, the relative value of the principles of justice in context.

⁵⁰ The concept of ‘restorative justice’, which New Zealand is said to have pioneered, is drawn from the Christian, ‘humanitarian’ values of ‘forgiveness and reconciliation’ which place pressure on the victims of crime to respond ‘generously’ towards those who have offended against them. See Jim Consedine, ‘Restorative Justice: Creative Peacemaking’, in Jane Ritchie and James Ritchie (eds.) *Overcoming Violence in Aotearoa New Zealand: A Contribution to the World Council of Churches Decade to Overcome Violence 2001-2010*, Wellington: Philip Garside Pub., 2002: 100-101.

Part I: Case Study – Battered Women Defendants and the New Zealand ‘Justice System’

The justice system is of such importance in the lives of all New Zealanders that it can be likened to a public building whose existence and location must be known by all.

NZ Law Commission, 1999¹

This statement provides the critical point of departure for the case study and thesis as a whole which explores the limits and possibilities of systemic justice in the particularly complex context of judging battered women who kill their abusers. The case study provides a detailed overview of this context, giving emphasis to the case of *R v Oakes* as a case which most effectively illustrates the practical challenges involved in building a stable and strong *system* of justice in New Zealand. In particular, the three chapters of the case study highlight the need to look beyond the workings of the formal court-based system of adjudication to grasp the extent of this challenge and to get a better understanding of the various practical obstacles that remain in the way of effectively addressing it.

¹ *Women’s Access to Legal Services*, NZLC, 1999 SP 1: 1.

Chapter One

‘Legal justice’: *R v. Oakes*

Domestic violence in New Zealand is a scourge...As with the rest of the community; the legal system has struggled to confront [its] reality and effects.

Hon Justice J Bruce Robertson, 1998²

The notion of ‘legal justice’ might be defined broadly to encompass all decisions made according to the rule (or rules) of law by those agents charged with its formal administration. Indeed ‘legal justice’ might also be conceptualised as ‘formal justice’ as in most respects its agents are bound to follow formalised rules and procedures although judges overseeing the higher courts of appeal, who have the power to make common law precedents, perform a more critical, less formal, task. Legal justice in the common law system at once relies upon the co-ordinated efforts of various agents, including legislators in their capacity to make and codify statutes; the police, chiefly in their enforcement and investigatory roles; lawyers, operating in a variety of roles in and outside the courtroom, and lay juries. It also encompasses the Parole Board as one of an increasing variety of ‘specialist government tribunals’ functioning in a ‘quasi-judicial’ capacity.³

For the purposes of the case study, which critically distinguishes three aspects or ‘branches’ of justice comprising the wider ‘justice system’, my focus is on a narrower application of the concept of ‘legal justice’. In particular, the focus is the formal courtroom-based system of adjudication and the key roles or institutions relied upon to

² ‘Battered woman syndrome: Expert evidence in action’, *Otago Law Review* (1998) Vol. 9 No. 2 pp. 277-300: 277

³ Andrew P. Stockley, ‘Judiciary and Courts’ in Raymond Miller, *New Zealand Government and Politics*. (Oxford University Press, Auckland, New Zealand, 2001: 63). The role of Governor-General is also partly encompassed within this system. In the capacity as the Queen’s representative, the NZ Governor-General holds a power to pardon convicted criminals by exercising a ‘royal prerogative of mercy... where there is serious doubt about proof of the convicted person’s guilt’ (www.gg.govt.nz). However, in the New Zealand context, this power is a very limited one, exercised with ‘extreme rarity’ (ibid).

uphold this system within common law jurisdictions, specifically as applied in New Zealand in the adjudication of criminal cases. The key roles of judge, jury, and opposing counsel, provide the most critical features of the ideal of ‘legal justice’ that is pivotal to New Zealand’s overall commitment to justice and can even be said to function as its core axis point. Here I treat this aspect of the commitment to justice as a point of departure for reflection on the wider ‘justice system’ as it effectively functioned in the *Oakes* case.⁴ After outlining the key structural elements of New Zealand’s formal legal system and describing their application in the *Oakes* case, I begin a more critical reflection on the challenges for justice that are raised by this key case and which extend through and beyond the commitment to justice undertaken by the formal legal system.

‘Legal justice’: Structural framework

The legal system encompasses not only the rules and principles but the institutions and people who make, enforce and administer the rules.

Margaret Wilson, 1992⁵

New Zealand’s formal system of legal adjudication is a common law system comparable to that operating in other liberal democracies, including Canada, Australia, the UK, and the US, all of which jurisdictions are derived from the system of law developed in England over many centuries, based on customs existing ‘time out of mind’, which have been ‘quietly adapted’ in precedents developed and modified by judges.⁶ Its distinctive conceptualisation as *common* law denotes a core commitment ‘to uphold the fundamental values, customs and practices thought to be common to all in that society’.⁷

⁴ *R v Oakes* 29/8/94, HC Christchurch, T74/93 Fraser, J.

⁵ ‘Towards a Feminist Jurisprudence in Aotearoa’ in Rosemary Du Plessis, *Feminist Voices: Women’s Studies Texts for Aotearoa/New Zealand*, (Oxford University Press, Auckland, 1992: 267).

⁶ Andrew Sharp, ‘Constitution’, in Miller, *New Zealand Government*, 2001: 40

⁷ Justice Durie, ‘Ethics and Values’, cited in NZLC, R 53: 2.

The common law system is also to be distinguished from the civil law system predominant in Western Europe as well as most countries of Latin America, Asia and Africa.⁸ Rather than a gradual adaptation of customs and legal precedents, the civil law system was established more decisively and substantively with reference to core principles based on Roman law. As McDowell and Webb explain:

The nations of Western Europe, at the turn of the eighteenth century, set out their laws in codified form. The codes represented the entire framework of the legal system...as is the case with statutes in [the English] system. The code was expressed as broad principles rather than a set of detailed rules...[and] European jurists were scholars who sought to develop a principled framework for the law, rather than doing justice in the particular dispute.⁹

Thus, the common law system is importantly distinguished by the emphasis it gives to the practical and incremental development of detailed rules of law in the hands of judges deciding on a case-by-case basis, rather than law developed from underlying principles. In this way, the common law generally shows a high level of respect for tradition and history whilst allowing comparatively greater flexibility and pragmatism than the civil law system. This pragmatism can be traced back to Aristotle who introduced into the notion of 'legal justice' the concepts of 'equity' – a principle thought more flexible than formal equality or justice – and 'phronesis' or 'practical wisdom'. The interpretation of these concepts, Aristotle considered should be entrusted to judges as seasoned *practitioners* of the law, rather than relying on intellectuals reflecting on theoretical principles of justice.¹⁰

However, the common law as we know it today diverges from the system envisaged by Aristotle who considered judges an elite group with wisdom and virtue far exceeding that

⁸ Morag McDowell & Duncan Webb, *The New Zealand Legal System: Structures, processes & legal theory*. (Third Edition, Butterworths, Wellington, 2002: 39).

⁹ Ibid. According to McDowell and Webb, the civil law system developed from the 'Romano-Germanic tradition' based on scholarship and theory more than the resolution of individual cases as in the common law system.

¹⁰ See, Jim Evans, 'Aristotle's Theory of Equity', in Werner Krawietz (et al), *Prescriptive Formality and Normative Rationality in Modern Legal Systems*, (Duncker & Humboldt, Berlin, 1994).

of the common man. Today, common law judges are fairly constrained in their role by having to follow detailed legal precedents made by earlier judges in the higher courts and statutory provisions made by Parliament. Indeed, in the Westminster system, which was adopted in New Zealand, there is a general preference for Parliament to draft laws more comprehensively than in other democratic system, thereby restricting the discretion and flexibility afforded judges.¹¹ This means that the judicial task of interpreting statutes requires common law judges to ‘discover the intention of the author as expressed in the instrument’ in an exercise that effectively demands more precision and neutrality than discretion or judgment.¹²

For this reason, judges under the civil law system are said to be granted more discretion than judges under the common law system yet are considered ‘far more principled and less pragmatic than their common law counterparts’.¹³ This difference is thought to develop in part because common law judges start out as adversarial lawyers before becoming ‘umpires’ in the trial process, whereas judges in the civil law system are specifically trained as judicial officers who then rise up through the ranks to become actively involved in the trial process as the chief ‘fact-finder’ acting more as an ‘inquisitor’ than an umpire.¹⁴

However, in the Westminster system there is considerable ambiguity in the rules governing the interpretation of statutory words and intentions, while some areas of society remain ‘outside the scope of detailed legislation, where the decisions of the courts are the only guidance on the law.’¹⁵ Moreover, the trend in New Zealand is said to be moving towards legislation ‘providing wider areas of discretion to Courts...to take into account the dictates of justice in individual cases’,¹⁶ while judges in the lower courts, including the Family Court, have always been afforded considerable discretion in being

¹¹ Rt. Hon Sir Ian McKay, ‘Interpreting Statutes – A Judge’s View’, *Otago Law Review* (2000) Vol 9 No. 4: 744.

¹² Ibid.

¹³ McDowell & Webb, *New Zealand Legal System*, op.cit: 42-43.

¹⁴ Ibid: 42.

¹⁵ J.B. Ringer, *An Introduction to New Zealand Government* (Hazard Press, Christchurch, 1991: 216).

¹⁶ R D Mulholland, *Introduction to the New Zealand Legal System*. Tenth Edition, (Butterworths, Wellington, 2001: 183).

‘permitted to disregard the normal rules of evidence and procedure’ in an effort to effect a more ‘conciliatory’, less adversarial process of adjudication.¹⁷

In addition, common law judges in the appellate courts¹⁸ are afforded some discretion in making and developing legal precedents in order to decide what is right, ‘even if [they] cannot justify [their] decision by pointing to a law [or precedent] that is indisputable and clear in all its terms’.¹⁹ In this process the judge ‘reasons by analogy’ identifying a connection between the present case and a like case decided in the past.²⁰ Furthermore, because of the cultural proximity and shared heritage of other common law countries, in particular England, Canada and Australia, legal precedents established in these larger jurisdictions provide guidelines for New Zealand courts, although not in any strict sense. This provides further variability and flexibility in the system.

In the final analysis, it is generally accepted that ‘much of our law [in New Zealand] is made not by Parliament but by the judiciary in exercise of their function of developing the common law’,²¹ even if this function is not officially considered to confer on judges ‘a true law-making power’.²² Considering that the vast majority of criminal laws, including self defence and provocation, were originally developed via the common law rather than by Parliament – even if today these laws have been codified in statutes²³ – this judicial power should not be underestimated. Overall, the question of which institution, the

¹⁷ *ibid*: 101.

¹⁸ Prior to October 2003 when the New Zealand Supreme Court was established by Parliament (Supreme Court Act 2003), the Court of Appeal was the only appeal court in NZ, with the highest point of legal redress being the Privy Council in London. The NZ Supreme Court replaces the right of appeal to the London Council and puts New Zealand in line with most other Commonwealth countries. The role of the Court as set out in the Act is reviewed in Andrew Beck, ‘The Supreme Court: justice for all?’, *New Zealand Law Journal*, November 2003: 409.

¹⁹ Chaim Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning* (D. Reidel Publishing, Dordrecht, Holland, 1989: 39).

²⁰ Mulholland, *Introduction*, 2001: 188.

²¹ Hon Justice Baragwanath, ‘What’s wrong with the law?’ 17 January, 2001 <http://www.lawcom.govt.nz/content/speeches/rcp%20170101.htm>.

²² Halsbury’s *Laws NZ* Statutes, para 126; 4th ed. 856. According to Mulholland, the entire judicial process under the common law system is ‘highly subjective and dependant upon the personality and competence of the individual Judges’ (*op.cit*, 2001: 179). He also argues that the 1990 NZ Bill of Rights effectively ‘gives the judiciary a very substantial degree of power to review the conduct of government’ (*ibid*: 114).

²³ The Crimes Act 1961 sets out almost all of New Zealand’s criminal law.

judiciary or Parliament, has sovereign law-making power, remains ‘the most puzzling constitutional conundrum’²⁴ under the common law Westminster system.

The ancient institution of trial by jury provided for as a matter of right under the common law system,²⁵ also serves a less than clearly regulated or principled function. As developed in England, the institution of trial by jury – considered ‘one of the great creations of the common law’²⁶ – is expected to provide a democratic ‘levelling’ mechanism in the system.²⁷ Comprised of a group of twelve lay persons randomly selected from the community of citizens, the common law jury is expected to apply community values to decide all questions of fact. Jurors are thought to ‘speak for the ordinary person’ in deciding how reasonable the motives and actions of the accused are in light of their ‘common sense’ values.²⁸ The relevant statutory law and evidence introduced at trial is summed up by the judge in an attempt to illuminate the legally pertinent issues involved and expressly not to guide or lead the jury towards a particular verdict. Indeed, in this process ‘It could be argued that...the jury is given a right to override the strict letter of the criminal law, as contained in statute, in favour of a solution which accords with the dictates of good conscience’.²⁹

Thus, the idea of a trial by a jury of one’s equals or peers³⁰ is expected to function something like ‘a little parliament’ providing a public ‘validation’ of verdicts, while acting as the community’s conscience ‘to safeguard against arbitrary and oppressive government and to legitimise and maintain public confidence in the criminal justice

²⁴ Sharp, ‘Constitution’, 2001, op.cit: 40.

²⁵ The right to trial by jury was one of the first constitutional rights recognised and enshrined in the Magna Carta. Today it is protected in New Zealand under s 25 (a) of the NZ Bill of Rights 1990.

²⁶ Charles Cato, ‘Criminal Defences and Battered Defendants’, *NZ Law Journal*, Feb 2002: 37.

²⁷ The systems of civil law developed in Western European countries influenced by Roman law, have generally placed much less importance on the role of the lay jury in the formal adjudication process than has the common law, with some countries more or less abolishing the institution http://en.wikipedia.org/wiki/jury_trial.

²⁸ Mulholland, *Introduction*, 2002, op.cit: 90.

²⁹ Ibid: 91.

³⁰ Originally, the concept of a ‘jury of peers’ meant a jury of persons actually known to the accused which was thought to give them a better understanding of the ‘reasonableness’ of the accused’s motives and actions. In larger societies, the group of peers was generalized to include members of the same community ‘who shared, or had some understanding of, [the accused’s] realities and beliefs’. Marina Angel, “Susan Glaspell’s *Trifles* and A Jury of Her Peers: Woman Abuse in a Literary and Legal Context”, (1997) 45 *Buffalo Law Review* 779.

system'.³¹ According to a past president of the New Zealand Law Commission, the institution continues to provide 'considerable resources of wisdom and common sense which play a valuable role in the administration of justice'.³² Moreover, juries are thought to be particularly valuable in trials where 'a person may be deprived of his or her liberty'.³³ Indeed, many consider a juror's 'common sense and experience of life' to be uniquely suitable to determining degrees of culpability and moral responsibility arising in cases involving partial defences to murder, such as provocation.³⁴

However, others have raised concerns about the ability of the average juror, who is statistically more likely to be both uneducated and unemployed, to comprehend the increasingly technical evidence presented at modern criminal trials. According to one Queen's Counsel in New Zealand, it is practically inevitable that 'juries [are] at best confused and at worst misled' in response to complex evidence such as that going to provocation and distinguishing manslaughter from murder in general.³⁵ He argues that the increasingly protracted jury trials in this country are evidence of this problem, while maintaining that the fundamental challenge of all cases to decide 'reasonable doubt' is impossible to meet with any consistency when the concept is defined without precision or objectivity such that jurors cannot be expected to 'understand or relate' to it.³⁶ It has also been argued that juries are inclined to apply 'stereotypical thinking and myths' which can undermine the credibility of some witnesses (defendants) more than others.³⁷

³¹ Justice Baragwanath, *Juries In Criminal Trials*, NZLC R69, 2001 'Introduction': 17-19.

³² Baragwanath, 'What's Wrong With The Law?' 2001.

³³ McDowell & Webb, *The New Zealand Legal System*, 2002, op.cit: 271.

³⁴ Cato, 'Criminal defences', 2002, op.cit: 35-36. See also, *Some Criminal Defences with Particular Reference to Battered Defendants*, NZLC, 2001 R 73 in which the Commissioners agreed that 'the community's sense of justice' delivered via the jury, is the fairest measure for deciding whether or not the force used by the defendant was reasonable: 14-15.

³⁵ Colin Withnall, QC, 'Reform of the Criminal Justice System – A View from the Coalface', *Otago Law Review*, 1998 Vol. 9 No. 2: 364.

³⁶ Ibid: 365. Withnall claims there is no practical substance to the notion of reasonable doubt; that 'a reasonable doubt is a reasonable doubt is a reasonable doubt'. The New Zealand Law Commission seemed to confirm these concerns when, in its review of the law of provocation (which it then recommended be abolished), it cited Lord Hobhouse's direction that 'It is not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied... [If] left to the essentially subjective judgment of the individual jurors who happen to be deciding the case [decisions are] apt to [be] idiosyncratic and inconsistent', *Some Criminal Defences*, 2001, op.cit: 41.

³⁷ The Rape Prevention Group argued this in its submission to the Law Commission's review of juries in criminal trials (*Juries in Criminal Trials*, NZLC R 69, 2001). It claimed that 'a thorough education in rape trauma' is required to deal with 'issues of credibility' arising in rape cases. Further, that myths, such as

These concerns might be thought further compounded by that other distinctive feature of the common law system, the adversarial trial. According to some practitioners and critics, the adversarial trial system involves a ‘battle for ascendancy’³⁸ between ‘ego-laden’ counsel for the Crown and the defence, each deploying ‘thespian gifts...sometimes greater than the strength of the evidence in the case’.³⁹ A chief aim of this process is to discredit witnesses for the opposing side if not ‘to intentionally mislead the jury...and [to] purposefully elicit behaviour from the witness that will incline the jury to think, falsely, that the witness is unreliable, untrustworthy or insincere’.⁴⁰ Although it may be hard to imagine anything less conducive to an impartial and just process of adjudication, the theory behind the adversarial trial is that the fairness and truth of the process is achieved because, and in so far as, this ‘battle’ provides the most thoroughgoing interrogation of ‘the facts’, with witnesses for both ‘sides’ vigorously cross-examined in an effort to uncover ‘the truth’ and jurors asked then to decide who is telling ‘the truth’.⁴¹ The judge is seen as a ‘neutral’ overseer responsible for ensuring all questions of law are accurately applied,⁴² while counsel for both sides must be roughly equal in the necessary resources required to present their opposing cases with comparable skill and vigour so that the jury are not unduly persuaded in favour of one side.

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The overall aim of the system is to ensure that all persons before the courts – defendants, witnesses and victims (on behalf of whom the Crown prosecutes) – are treated impartially and equally, and with the same degree of respect. This requires all legal-judicial agents to consistently apply well established and reasonably formalised procedures and rules at every stage of the adjudication process. In general, the more ‘the facts’ of each case are

‘date-rape’ not being ‘real’ rape, continue to prevail within the community. To address these issues, the group advocates ‘specialized panels’ to replace juries in rape trials.

³⁸ McDowell & Webb, *The New Zealand Legal System*, 2002, op.cit: 42.

³⁹ Judith Ablett Kerr, ‘The criminal justice system: crying out for a royal commission or merely crying over spilt milk?’ *Law Talk*, 507, October 5, 1993: 14.

⁴⁰ Alvin Goldman, *Knowledge in a Social World* (Oxford University Press, 1999: 297).

⁴¹ Ibid.

⁴² Ibid: 296.

brought to court and treated as the focus of the adjudication process, rather than the individual characteristics of the defendant, the more likely it is that the trial will achieve this key aim. As well, the independence of the judiciary from political interference is considered a particularly important feature of legal justice⁴³ and to this end, judges swear an oath ‘to do right by all manner of people...without fear or favour, affection or ill-will’ in all tasks.⁴⁴ In this way, judges have come to symbolise the impartiality and justice of the process,⁴⁵ although all agents of the formal legal system, including jurors, are in some degree bound by the same commitment to impartiality or non-prejudicial reasoning and judgment. In *Oakes*, the trial judge emphasised the importance of the jury’s impartiality by directing the jury to ‘put carefully aside any feelings of prejudice or sympathy which may have been aroused one way or the other and come calmly and impartially to the issue which you have to determine’.⁴⁶

The impartiality of the common law courts is further underpinned by the idea that trials should be relatively open and accountable to the general public as a matter of public record, so that justice is not only done, but seen to be done. In fulfilment of this requirement judges are required to ‘always do their conscientious best’ to provide clear reasons for their decisions.⁴⁷ In so far as this aspect of ‘legal justice’ depends on news media maintaining an objective and balanced perspective in their reportage of court cases, there would seem to be further cause for concern about the lack of clear regulation in the system beholden, in some part, to an institution ‘subject to no procedural or other constraints.’⁴⁸

⁴³ Judicial independence is protected at the constitutional level under the Judicature Act 1908.

⁴⁴ Judicial Oath, *NZ Oaths and Declarations Act 1957*.

⁴⁵ McDowell & Webb, *Legal System*, 2002, op.cit: 267.

⁴⁶ *R v. Oakes* 29/8/94, HC Christchurch T74/93 191 Fraser, J Summing up (p.3).

⁴⁷ Mulholland, *Introduction*, 2002: 185 quoting the pronouncement of the NZ Court of Appeal in *R v Awatere* (unreported, CA 95/82, 16 December 1982).

⁴⁸ David Nelken (ed), *Law as Communication*, 1996 (Dartmouth, Aldershot and Brookfield): fn. 2, xviii. In general, critics raise concern about the increasing capacity of the media to decide which issues and cases become important to the public and to frame the public debate on those issues. Critical media discourse is an extensive and expanding field of analysis and research beyond the scope of the present thesis to review. A key text in the analysis of media coverage of domestic violence and homicides is Marian Meyers’, *News Coverage of Violence Against Women: Engendering Blame* (1997) California, Sage Publications.

Finally, the impartiality of the common law courts relies on the consistent application of ‘the reasonable person’ standard; a hypothetical construct ‘laboriously’ developed by the common law courts to ensure a standardised assessment of blame based on the expected behaviour of the ordinary ‘good citizen’.⁴⁹ In the context of the present case study the extent to which ‘the reasonable person’ remains – as it was for much of common law history – ‘the reasonable *man*’, reflecting the interests and actions of men, but not women, provides a critical point of debate to be explored at length in this thesis.⁵⁰

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The complexity and variability of the provisions responsible for upholding the commitment to ‘legal justice’ suggests serious challenges for the consistent and impartial delivery of justice in all cases. This challenge is effectively highlighted and the claim comprehensively tested in the legal adjudication of *R v Oakes*; a classic – if particularly complex – case of its kind.

R v Oakes: The trial

Many writers have long suggested that the law and courts alike do not provide fair trials for women who kill their abusers...the judgement in Oakes will do nothing to dispel their fears.

Jeremy Finn, 1995⁵¹

Criminal trials in New Zealand require the prosecution (the Crown) to present its case first by laying the charge(s) that the accused person (or persons) denies and is given the

⁴⁹ A.P. Herbert writes: ‘The Common Law of England has been laboriously built about a mythical figure – the figure of ‘The Reasonable Man...the embodiment of all those qualities which we demand of the good citizen’ (‘The Myth of the Reasonable Man: The Case of Fardell versus Potts’ *Misleading Cases* in <http://www.geocities.com/bororissa/rea.html>: 2, accessed 5/08/02).

⁵⁰ See, Marina Angel, "Susan Glaspell's Trifles and a Jury of Her Peers: Woman Abuse in a Literary and Legal Context." (1997) *Buffalo Law Review* 45, no. 3: 779 – 844: 818, highlighting the common law’s long history of distinguishing ‘reasonable men and insane women’. The justice issues arising in judgments of battered women defendants are considered at some length in Chapter Four of this thesis.

⁵¹ ‘Oakes: Case & Comment’, (1995) 19 *Criminal Law Journal*: 293.

opportunity to defend themselves against. The onus is on the Crown to prove guilt ‘beyond reasonable doubt’ and there is a presumption of innocence until this proof is provided. Thus, as the judge in *Oakes* explained in his summing up to the jury: ‘An accused person does not have to prove anything’,⁵² only to raise a reasonable doubt about the charges laid against him or her.

All trials for serious crimes; murder being the most serious of all, are heard at the High Court in front of a jury. Accused persons are not required to testify, and whether or not they do is not to be seen as a reflection of guilt. There are strict rules governing the admissibility of evidence that preclude hearsay and speculation as well as, in most instances, the criminal history and personal character of the accused. The jury of twelve must be unanimous in its verdict and if agreement on a verdict cannot be reached, a mistrial is called.

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At the Christchurch High Court, beginning May 19, 1994, the Crown prosecutor laid the charge of murder against the defendant, Gay Oakes, putting to the jury that the accused had over some period of time sought and planned to kill Gardner and was, therefore, guilty of his murder.⁵³ Her motive, the prosecution said, was her expressed desire to rid herself of a man who would not go away and her belief that Gardner had sexually abused her eldest daughter.⁵⁴ In response, Gay Oakes pleaded not guilty to the charge of murder,

⁵² Summing Up of Fraser J in *R v Oakes*, HC Christchurch 6/08/94 T74/93.

⁵³ In New Zealand, the crime of murder is contained in section 167 of the Crimes Act 1961:

Culpable homicide is murder in each of the following cases:

- (a) If the offender means to cause the death of the person killed;
- (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
- (c) If the offender means to cause death, or being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;
- (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

⁵⁴ The prosecution case as summarised by Judith Ablett-Kerr QC ‘Afterword: Not yet the final chapter’ in Gay Oakes, *Decline into Darkness: The True Story*, Harper Collins, Auckland, 1997: 182.

admitting she had killed Gardner, but denying ‘emphatically’⁵⁵ any *intention* to kill. She claimed that suffering the symptoms of battered woman syndrome (BWS)⁵⁶ at the time that she poisoned Gardner, she felt helpless against Gardner’s violence, had a heightened sensitivity to his threats, and an impaired ability to think clearly.⁵⁷ The defence case relied on the laws of self defence⁵⁸ and provocation⁵⁹, both centrally supported by expert evidence on BWS. Accordingly, the defence argued that Oakes, in her state of fear, panic, and impaired reason on the night, lacked the necessary *intent* to murder and either:

[in] self defence against the further violence she feared...acted reasonably in resorting to the means closest to hand [justifiable homicide in self defence – full acquittal]; [or] alternatively that the deceased’s conduct amounted to provocation which in her particular psychological condition [BWS] caused her to lose her power of self-control [provocation – guilty of manslaughter].⁶⁰

To be convicted of murder the accused must have the *actus rea* for murder (the physical elements of guilt) as well as the *mens rea* for murder (the mental elements of guilt). In *Oakes*, the case revolved around proving/raising a reasonable doubt about the intent to

⁵⁵ *ibid.*

⁵⁶ BWS is based on the theory formulated by American psychologist Lenore Walker in 1984 (*The Battered Woman Syndrome*. Springer, New York). Dr Walker posited that women, who were repeatedly abused by their partners over a period of time became victims of a three-stage ‘cycle of violence’ - tension building, acute battering, and contrition on the part of the batterer, a cycle that escalates in severity over time. The realisation that they have no control over this cycle leads women to develop the psychological condition of ‘learned helplessness’. In this state, women were found to be effectively incapable of responding rationally to the threat of violence in order to identify opportunities to escape from it or to put into perspective the batterer’s promises to reform. ‘Repeated batterings...diminish the woman’s motivation to respond. She becomes passive...she cannot think of alternatives’: 49-50.

⁵⁷ Court of Appeal, *R v Oakes* [1995] 2 NZLR, 673 ss 40-45.

⁵⁸ Section 48 of the Crimes Act 1961 provides the relevant statutory provision on self defence:

‘Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.’

⁵⁹ The relevant statutory provision on provocation is codified in section 169 (2) of the Crimes Act 1961: Anything done or said may be provocation if-

- (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
- (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

⁶⁰ Restated by the Court of Appeal, *ibid*, 679 s 15. In New Zealand, manslaughter provides a full range of sentencing options including a conviction and discharge without penalty. At the time of Oakes’ trial a conviction for murder carried a mandatory minimum life sentence of ten years.

kill or the *mens rea* for murder.⁶¹ In pleading self defence supported by BWS, Oakes claimed that her mental state on the night she killed Gardner was one of panic and fear that her life and the lives of her children were in danger from a threat that she perceived, in her altered mental state of ‘learned helplessness’ and heightened ability to recognise the seriousness of the danger posed, to be real and inescapable, necessitating a defensive action to ward off the attack threatened. In self defence the reasonableness of the defendant’s actions must be judged in light of her perception of the circumstances on the night, not an objective standard, while the reasonableness of the force used is judged according to an objective standard which expects the reasonable person to use proportionate force against an imminent threat.⁶²

The plea of provocation invokes a very different, and in some respects contradictory defence, as it does not deny the intention to kill, but claims that the defendant lost control of his/her emotions at the time of the killing having been provoked to do so by the actions of the deceased and is, therefore, partly excused responsibility for the killing. While ‘the reasonable person’ would not have acted in this manner, provocation essentially makes an allowance for the emotional frailty of ‘the ordinary person’ and accepts that certain characteristics, such as ‘age, race [and] mental deficiency’,⁶³ if held by the accused, might create a special vulnerability (or sense of vulnerability) to be provoked by the particular words or actions cited as provocation. In *Oakes*, evidence of BWS was used to support her plea of provocation as it added weight to her claim that on the night she killed

⁶¹ For a discussion of the ‘rather technical area of law’ which governs the principle of intent or *mens rea* for murder, see Andrew P Simester and Warren J Brookbanks *The principles of criminal law*. Third Edition, Brooker’s, Wellington, 2007. The authors describe the concept of *mens rea* in practice as being ‘far more complicated’ than the general assumption made that it entails ‘the requirement that the defendant have a “guilty mind”’: 92. Recklessness sufficient to establish the *mens rea* for murder is set out in the Crimes Act 1961 s169 (2) (b) and (d).

⁶² The expectation that self defence must be in reaction to an imminent threat is not contained in the NZ statutory requirements for self defence but is evident in the case law where judges and juries (in NZ, as elsewhere) have been inclined to ‘read a requirement of imminence into self defence law’. As well, the requirement that the force used be proportionate and reasonable in the circumstances is not expected to impose a precise test but recognises that ‘ordinary people in peril might use more force than appears to be reasonably necessary in calm hindsight’. See Nan Seuffert, ‘Battered women and self-defence’, *NZULR*, Vol. 17, June 1997, pp. 292-328: 299-301.

⁶³ These are the possible characteristics relevant to provocation listed by the trial judge in *Oakes*, who went on to explain that ‘The only characteristic’ the defence considered relevant to the case was ‘that the accused was suffering from battered wives or battered woman’s syndrome’ (*R v Oakes*, summing up of Fraser J, 6 September 1994: 22/210). It might be asked why the characteristic of gender was not considered relevant.

Gardner, having the characteristic of someone who suffers from BWS, she was so traumatized and emotionally fragile that his threats and verbal assaults that night pushed her over the edge and caused her to ‘snap’, losing the power of self control.⁶⁴

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The evidence brought to bear by the Crown counsel in support of the charge of murder focused on the quantity of pills used, the testimony of their chief witness, Paula – the former friend of Oakes who had known all along of Gardner’s death and who had eventually reported it to police – who claimed that Oakes had talked often of wanting to kill Gardner, had borrowed books from the library on drugs, and had confessed to her that she had taken extra steps to kill Gardner on the night he died. Also, the Crown challenged the suggestion (by the defence) that Oakes was a battered woman suffering the symptoms of BWS at the time of the killing.

In support of the prosecution case, the pathologist called to give evidence testified that the number of pills ingested by the deceased was most likely between 45 and 70, though under cross-examination by the defense he admitted there might have been fewer.⁶⁵ The time taken to remove the packaging from and administer that number of pills the prosecution said implied considerable planning and intent on Oakes’ part. Their chief witness, Paula alleged that Gay had told her she suffocated the deceased with Gladwrap and administered more drugs to him through an eye-dropper after he had fallen asleep. She also testified that Gay had more than once spoken to her about wanting to kill Gardner⁶⁶ and had gone with her to the library to borrow books ‘mostly on drugs’.⁶⁷ She also testified that Gay had given Doug sleeping pills on one previous occasion when she

⁶⁴ Provocation is a particularly complicated defence which cannot be adequately explained in a single paragraph. See the Law Commission’s discussion in *Some Criminal Defences*, R 73, 2001 and my review of this report in chapter two of this thesis.

⁶⁵ Reiterated in *R v Oakes* [1995] 2 NZLR (CA) 673, 683 s30.

⁶⁶ *R v Oakes*, Christchurch High Court, August-September 1994, unreported: 24 s10.

⁶⁷ *Ibid*: 24 s20.

was present and that Gay had said ‘basically, that she wanted to kill him’ on that occasion.⁶⁸

A second woman, Joanne, a volunteer at Women’s Refuge who had helped Gay bury the body, testified that ‘pills...were put into cups of coffee to start off with’. She also thought Gay had ‘mentioned something’ about suffocating, but said: ‘I don’t remember what she said to me’ and ‘I took it that he suffocated from the pills...I presumed that’.⁶⁹ Under cross-examination by defence counsel this witness admitted her possible confusion over who used the word ‘suffocating’, accepting that her memory might have confused something Paula said with something Gay said.

Under oath, Gay categorically denied the essence of Paula’s testimony saying: ‘I did not introduce any other substance into his mouth in any way’ and ‘I wouldn’t have said something like that to Paula, why would I. Nothing like that happened’.⁷⁰ The pathologist report showed ‘there was no plastic with the body and none of the classic signs of asphyxia were present’.⁷¹ In her testimony Gay explained that she had once previously put sleeping pills in Doug’s coffee but only ‘hoping he would go to sleep for a while...I needed to have a rest’⁷² after he had kept her up all night with relentless demands to cook and clean for him.⁷³

Prosecution counsel called the mother of the deceased who testified that in 1992 Doug and the two youngest children were living with her when Oakes came to her house to ‘beg’ him to come back and live with her. This was flatly denied by Oakes who said the youngest children never lived with Doug’s mother and for her part she did not ask him to come back ‘I did not want him back’.⁷⁴ Under cross-examination, the prosecution suggested to Oakes that she had ‘invented’ the evidence she gave about being raped by

⁶⁸ Ibid: 25 s25.

⁶⁹ Ibid: 14 s10.

⁷⁰ Ibid: 138 ss 30, 35.

⁷¹ Reiterated in *R v Oakes* [1995] 2 NZLR 673 (CA), 679 s10.

⁷² *R v Oakes* 29/8/94, HC Christchurch, T74/93: 134 s 5-15.

⁷³ Ibid: 133 ss 5-35.

⁷⁴ Ibid: 131 ss 25-30.

Gardner',⁷⁵ and used the lies Oakes told to the police before the body was recovered to 'strongly attack' her credibility in general.⁷⁶ Oakes, again, flatly denied tailoring the evidence to fit her defence.

Gardner's family and friends were also called by the prosecution to give evidence that during the six month period prior to the killing, Gardner had stopped drinking, improved his attitude since being prescribed Prozac, and overall presented a diminished threat to Oakes.

The expert witness on BWS was grilled by Crown counsel as to the 'typical' effects of the syndrome with particular emphasis given to the 'initiatives' Oakes took over the years, like escaping to Refuge, her 'constant use of threats that she would go to the police' and, locking the deceased out of the house on one occasion so that he slept in the garden shed.⁷⁷ In response to the following statement by Crown counsel: 'There are some things about this woman...which are not typical of someone suffering from this syndrome. She took more initiatives than would be usual', the expert witness replied, 'I thought so'.⁷⁸ He then repeated his confirmation of the same point twice in response to the same question worded slightly differently.⁷⁹ And although testifying that in his expert opinion: 'Mrs Oakes [did] suffer from [the] syndrome...looking at the whole period of her relationship with Mr Gardner',⁸⁰ under cross-examination this witness (for the defence) affirmed the general line of prosecution questioning intended to undermine Oakes' key defence resting on her claim to be suffering from BWS.⁸¹ The prosecution also raised doubt about the competence of the particular 'expert' witness, extracting an admission that he had not 'researched existing books' as well as casting doubt on the syndrome itself, asking the witness to confirm the 'controversy' surrounding the

⁷⁵ Ibid: 161 s10.

⁷⁶ *R v Oakes* [1995] op.cit: 684 s25.

⁷⁷ *R v Oakes* [1994], op.cit: 168-9 s35.

⁷⁸ Ibid: 168 s30.

⁷⁹ Ibid: 169 ss 5-15.

⁸⁰ Ibid: 163 s35.

⁸¹ Ibid: 167 s 25 -170 s 30. The witness did reassert his positive diagnosis explaining the complexity and subtlety of the syndrome, the effects of which, in his expert opinion, he said were 'variable' so that, if it could be said that Oakes took initiatives 'inconsistent' with BWS, then it should also be said that 'how inconsistent, would be difficult to answer' (169 s 5).

syndrome and the fact that a 'major publication' registering psychiatric diagnoses does not recognise it.⁸²

The key defence witness was also asked by Crown counsel to discuss how he would 'treat...a woman who came to you with all these symptoms', suggesting 'an important part would be the re-education of the patient, teaching her other avenues, other modes of living...attendance at counselling' and so on, to which the expert simply replied 'yes'.⁸³ The credibility of the evidence given by Oakes' eldest daughter was also undermined under cross-examination by Crown counsel who alleged 'at some length' that this witness 'had plotted with her mother to kill the deceased' to which suggestions Oakes was 'firm in her denial'.⁸⁴ Police were also called by the Crown to read Oakes' statement made to the police after she had killed Gardner in which she lied about his whereabouts.

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The defence case focused on first establishing that Gay was suffering the symptoms of BWS at the time of the killing, in order to then explain and defend her actions as a consequence of those symptoms against the charge of murder. Although she was not required to, Gay took the witness stand as the chief witness for the defence, providing extensive testimony (over a three day period) of her experience of escalating and frequently life-threatening physical, sexual and psychological abuse at the hands of Doug Gardner over a period of eleven years, and the increasing fear, despair and exhaustion she felt as a result. Evidence was also presented of her many failed attempts to secure the help of the police, the courts, and social services, as well as the various escapes to Women's Refuge that were all unsuccessful in removing the threat that Gardner posed to herself and her children.

Gay testified that at first, she willingly reconciled with Gardner after these escapes, believing his promises of reform. However, for some years prior to the killing she had

⁸² Ibid: 167 s35-168 ss5-25.

⁸³ Ibid: 169 s30-170 ss5-10,

⁸⁴ Reiterated in *R v Oakes* [1995], op.cit: 683 s40.

tried to break away for good but had been thwarted in her attempts to do so by him tracking her down, threatening her and her children, and refusing to leave. The following passage from her testimony of the final year prior to the killing⁸⁵ provides a glimpse into this experience from Gay's perspective as told to the court from the witness box:

When I sat down on the edge of the bed to go to bed because I had been working all night, he woke up and started kicking me in the back and I ended up on the floor and he commenced kicking me on the floor because I had embarrassed him...Through January, February and March 1992, as far as the violence went the outbursts didn't happen so frequently. I threatened to go to the police and he was frightened of the police. The only word I have for what he did mentally was torture. Everything I did was wrong...Whatever I made he would complain about...I had learned long ago not to argue with him about anything he said. I would hardly ever say anything. I just couldn't cope...I was numb during this period...I got depressed, unhappy, which I hadn't been before...On 21 April I went with the children to Christchurch West Women's Refuge...there was lots of mental torture prior to me going to Women's Refuge, lots of verbal attacks on the kids, lots of making them constantly do things...I was so scared about having got away...Doug told me if I didn't come back he would go to Nick's house, get Dalane and kill her and I would never see her again. I took that threat seriously. He was in one of his evil moods...I came back to Grove Road...A couple of days after [that]...Doug came back one night really angry and he belted me and raped me and that's why I went back to Refuge the following day. I stayed at the refuge for some time...I continued with my Family Court application. I was granted interim non violence and non molestation orders. I contacted the bailiffs several times and they told me they were unable to serve the papers...One Tuesday morning I went to the bank...when I came out of the bank Doug stepped out of the doorway of a shop beside the bank...As I walked away he grabbed my jacket and pulled me back...He said he wanted money so I gave him money because I was frightened he wouldn't let me go if I didn't. He let me go after I promised to

⁸⁵ *R v Oakes* [1994], op.cit: 125 s25-133 s30.

meet him later...I wandered around the streets to make sure he wasn't following me and then went back to Refuge...One of the full-time workers arrived. She told me Doug was outside the refuge...I phoned the police and asked them to send someone, that I had orders. They told me they were too busy to send anybody...I made a written complaint [to police]. They were unable to find Doug in relation to that complaint...I found rental accommodation at Hutcheson Street...I was about seven months pregnant...I had health difficulties. I was supposed to have a hysterectomy prior to the pregnancy. I had a prolapsed uterus. I suffered from extreme tiredness, exhaustion, nervous complaints and some bleeding...I had been at Hutcheson Street for several weeks [when] Doug found out where I was...I think he followed me home from an access period...The court told me I had to let him see [the children]...I didn't want him there...I couldn't live like that any more...I told him I would prefer to meet him elsewhere for access. He didn't respect that...He wanted to look after the children while I was in hospital...I told him I didn't want to...I then approached social welfare and several other agencies to try and arrange care for the children when I had the baby. The social services agencies said they weren't able to help...I didn't have money to pay someone...I agreed to let Doug come to the house and mind the three younger children; his children...Joanne wouldn't stay there. Delane stayed [elsewhere]...I left it at that to save arguments...He came to live at Hutcheson Street...He wasn't welcome. He knew that...We had been ordered to counselling because of access arrangements. He refused to go...He spent three nights in the garden shed because I locked the doors...When he got back into the house...there was problems...he was really, really angry. He threatened to kill me. He said he would take his children, kill the older girls, all sorts of terrible things and went into grisly details about what he would do to us. That abuse turned to violence against me...His attitude to the children...was really mean. I knew he was on medication...That made no difference to his attitude...when he was in the house he was always complaining about something...I became worse emotionally than before...I switched my head off...it was the only way I could get through...I didn't stand up to him...On the night of 27/28 January 1993 I went to bed [and

locked the doors]...Doug was out somewhere...I was awoken at night...when Doug started shaking me...He told me to get out of bed and cook him a feed. I did that...When I went into the kitchen I noticed the back door was not there...[and] the sliding door at the back had been taken off the runners and that's how he got in...Something was wrong with the food...it made him angry. I was trying to fix the door...his plate of food hit me in the back while I was doing that and fell on the floor and broke...He commenced having a go at me...the food was inedible...he wouldn't give it to a dog...The floor was dirty, I had to wash the floor, the ash trays weren't emptied, I had to do that, make him a cup of coffee. That went on all night...Every time he saw something that wasn't perfect he would yell and scream at me to fix it up. I didn't argue with him. He threatened me that he would kill me, that I was a lazy bitch...I was useless...all sorts of things. I was scared of him. More than anything I was exhausted...upset, tired and scared.

Gay testified that on the night of the killing, about two days after this incident, Doug had again woken her in the night sounding 'very angry', this time pounding on the door and shouting to be let in: 'He was in a strange mood, it was his evil mood but there was something different about him, he seemed restrained...it frightened me, I hadn't seen him like that before'.⁸⁶ She testified that he 'seemed drunk at that point' and was telling her she 'wouldn't get as far as the police', that she 'should know by now', that 'they won't find you, nobody will ever find you'. This went on 'I can't say [for] how long but it felt like a long time. I was exhausted, drained, I just wanted to disappear so I wasn't there and he couldn't do that to me any more'.⁸⁷

She testified that she was 'expecting him to explode at any minute', that she was 'petrified' and that she 'knew' he intended to kill her. She said she 'didn't want to die', that she had 'six children to look after'. She was thinking of this and 'all the awful things he had done to me and my family' and of what he was capable of and of wanting to be

⁸⁶ Ibid: 136 ss20-35.

⁸⁷ Ibid: 136 s30-137 s5.

left alone, when, 'in a panic', she 'shoved the tablets' she found whilst looking to refill the empty sugar bowl into the cup of coffee he had 'ordered' her to make for him, not counting them 'just whatever was there'.⁸⁸ New Zealand court records of complaints Gay filed against Gardner were produced in support of this testimony as were Gay's medical records. Gay's eldest daughter, Joanne, who was sixteen at the time, was called to give evidence for the defence and substantially corroborated Gay's account.

The defence called the expert witness (a registered psychiatrist)⁸⁹ to provide medical (psychiatric) support for Oakes' claim that she was suffering from BWS. The expert began by explaining his understanding of BWS; how, 'in the past', the symptoms had been 'inadvertently minimised...[as] the woman's...over emotional dependency...[and seen as] a type of masochistic behaviour'.⁹⁰ He said that today the battered woman's behaviour is understood more in terms of 'survival' mechanisms and her efforts 'to maintain the family unit', as well as her developing a 'sense of helplessness' to escape the violence over time.⁹¹ The witness testified that in his opinion, the fact that Gay returned to the relationship after leaving it and believed Gardner's promises, were indications that she suffered from 'learned helplessness'.⁹² He also testified that throughout 1992 Gay had 'a stronger sense of desperation in trying to break free' than before, which 'intensified' towards the end of the year to 'increase her sense of vulnerability' and impair her 'ability to reason in terms of exactly how dangerous her situation was'. He said that all these factors combined around the time of the killing such that she would have been 'more frightened than at other times', indeed, 'at that time she was...terrified'.⁹³

After counsel for the defence and prosecution had each presented their 'final address' to the jury, the judge 'summed up' the case to the jury beginning by explaining their task in general, then outlining the legal issues involved before highlighting what he saw as the

⁸⁸ Ibid: 137 ss15-35.

⁸⁹ Dr Leslie Ding began his testimony by presenting his experience and qualifications to the court at some length, *ibid*:161-162 ss 25-35.

⁹⁰ Ibid: 162 ss10-16.

⁹¹ Ibid: 163 s5

⁹² Ibid: 164 s5.

⁹³ Ibid: 166 s30-167 s30.

most critical and/or complicated points raised in the trial that the jury should be concerned with in considering what verdict to deliver. He said:

You are required to come to your verdict solely on the evidence that you heard here in court...to determine...whether or not the Crown has proved its case against this woman beyond reasonable doubt...You are entitled to have such regard as you think fit to the manner and demeanour of the witnesses...and you are entitled to draw inferences...as you think fit from such facts as you find proved and in all of these matters you are particularly asked to bring to bear to the fullest possible extent your collective commonsense and experience of life.⁹⁴

In his summary of the evidence the judge began by recounting the lies Oakes told in her statement to the police before the body was discovered where, in his words, ‘she was not merely silent, [but] told positive untruths’. These lies he characterised as ‘a course of deception which went on for many months’.⁹⁵ He then ‘cautioned’ the jury against assuming lies ‘automatically’ indicate guilt, but followed this by outlining the Crown case that:

These lies showed an ability to spin a plausible story, brazenly maintain it under the pressure of a police investigation, and that that ability was shown again in the witness box when, according to the Crown, the accused tailored her evidence to introduce new elements and with great presence of mind explained apparent inconsistencies.⁹⁶

He added that this lying is ‘relevant as to her credibility because it may, and I stress may...lead you to the view that because she embarked on that course of conduct and maintained it that she is not to be relied on in respect of the evidence which she gave before you’.⁹⁷

⁹⁴ *R v Oakes*, Summing up of Fraser J, 6 September 1994: 3-4/191-192.

⁹⁵ *Ibid*: 196

⁹⁶ *Ibid*: 197.

⁹⁷ *Ibid*.

The judge then turned to discuss the question of her intent and state of mind in relation to self defence, saying that ‘actions sometimes speak louder than words’ and suggesting that:

For example, your view of her state of mind may be affected by the view you take of the Crown’s submission that this was a planned murder, that there was more than one administration of drugs and that following the deceased lapsing into unconsciousness, the accused placed Gladwrap around his face.⁹⁸

He did not reiterate Oakes’ firm denial of these allegations nor did he mention the pathologist’s findings that there was no evidence of suffocation or plastic on the body. By way of summarising the defence case, the judge read at length from Oakes’ testimony of the night of the killing which included Oakes’ somewhat confused and self-incriminating admissions that she didn’t ‘remember thinking anything else except what he had done’, that she ‘was frightened...[and] wanted to make him leave [her] alone’ as well as expecting him to ‘explode’ and not wanting that to happen.⁹⁹ There was no other reference to the defence case and no mention of BWS.

The judge went on to read from the pathologist’s testimony on the estimated quantity of drugs used, he said, ‘just to refresh your minds’. He devoted some time to reading excerpts from Paula’s testimony emphasising her claims that Oakes had said she wanted to kill Gardner and the steps she said Oakes had taken to prepare for that end. He also read Joanne Nicol’s testimony which included a further reference to the claim about Oakes’ ‘suffocating’ the deceased, as well as his ‘gagging over the pills...from his own vomit’,¹⁰⁰ surely a particularly graphic and disturbing image likely to illicit sympathy for the deceased and family. In relation to this testimony, the judge suggested that members

⁹⁸ Ibid: 168.

⁹⁹ Ibid: 199-200.

¹⁰⁰ Ibid: 200-203.

of the jury need to ask themselves ‘questions such as why would a friend and confidante of the accused make up things like this’.¹⁰¹

The law of self defence was then clarified, with the judge explaining ‘there is both a subjective and an objective element involved’. By way of illustrating the objective element of reasonable force used, he offered two contrasting examples:

If you think that somebody is about to slap you in the face, it could hardly be said that it would be reasonable to shoot that person...On the other hand if you or a member of your family was about to be attacked by somebody with an axe it may well be that shooting that person would be reasonable objectively in those circumstances.¹⁰²

He added that; while the defence submitted

the question of self defence really depended on the evidence of the accused,...you are not bound to accept it just because it was said. Moreover, it is important that the question of what is reasonable is, as I have endeavoured to explain, to be determined objectively, qualified only by an assessment of reasonableness on the basis of the circumstances as the accused believed them to be.¹⁰³

Again the judge posed a rhetorical question prompting the jurors to ask themselves ‘Why...did she not administer only sufficient pills to put him to sleep, why such a large dose?...you may wonder how that could be objectively reasonable to defend herself’.¹⁰⁴ Here the judge once again appeared to lead the jury to doubt the defence case that in a state of extreme panic and fear, Gay was incapable of making a calmly rational decision about what was a ‘sufficient’ quantity of pills.

¹⁰¹ Ibid: 204.

¹⁰² Ibid: 205.

¹⁰³ Ibid: 205-206.

¹⁰⁴ Ibid.

Turning to provocation, the judge set out the law as defined in the Crimes Act and interpreted this to mean that ‘If something done or said provokes you to the point that you lose self-control and in hot blood and in the throes of passion you kill another, that is not murder but only manslaughter’.¹⁰⁵ In relation to what was ‘done or said’ in this case, the judge reminded the jury of the ‘extensive evidence’ given by the defence as ‘background’ to Oakes’ testimony on the night. There was no mention made of the nature of this evidence. The judge made one reference to ‘battered wives or battered woman’s syndrome’ in his 23-page summing up, and only in the context of explaining provocation (not self defence) to the jury and their task of deciding ‘whether a person with the ordinary power of self-control would in the circumstances [as they were in this case] have retained self-control notwithstanding such a characteristic’ of the accused; namely her suffering the symptoms of this syndrome.¹⁰⁶ By contrast, the words favourable to the prosecution, such as ‘Gladwrap’, ‘eye-dropper’, ‘gagging’ and ‘suffocating’, as well as ‘quantity of drugs’, ‘wanting to kill’ and ‘eliminating him in a calculated and deliberate way’, were each repeated at least once throughout the summing up, and some were repeated many times.¹⁰⁷ The word ‘violence’ was mentioned only once in the judge’s summing up and this was in the context of summarising the Crown’s contention ‘that although this was a violent relationship, what the accused said is exaggerated or dressed up’.¹⁰⁸ Indeed, while the judge summarised the Crown case on its own terms, the defence case was largely summarised in relation to the Crown’s case.

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Having considered this summary presentation, and returning for clarification on three points later that day (6 September, 1994), the jury returned a guilty verdict. According to the verdict, Gay Oakes intentionally murdered Douglas Gardner and had not acted under provocation. Under New Zealand statutory provisions at the time, a conviction for murder

¹⁰⁵ Ibid: 208

¹⁰⁶ Ibid: 210.

¹⁰⁷ Including the testimonies selected for emphasis by the judge, I counted five references to ‘Gladwrap’ and one to ‘plastic’, seven references to ‘quantity of drugs’, five references to ‘eye-dropper’ and four references each to ‘gagging’ and ‘wanting to kill’.

¹⁰⁸ Ibid: 209.

meant the judge had no alternative but to sentence Gay to life imprisonment to serve a minimum non-parole period of ten years.

R v Oakes: The Appeal, Privy Council and Parole

It hardly needs to be said that a battered woman has no more right to kill or injure than any other person, man or woman.

R v Oakes, NZ Court of Appeal¹⁰⁹

Having been found guilty of murder, Oakes was immediately taken to prison to begin serving a life sentence. In March 1995, Oakes appealed the jury verdict.¹¹⁰ On appeal the tables are turned with the burden of proof shifting from the Crown to the defendant (appellant). In New Zealand, an appellant has approximately a one in four chance of succeeding in overturning a trial verdict.¹¹¹

Oakes' appeal¹¹² rested primarily on the grounds that in summing up the judge had 'misdirected the jury'¹¹³ by only briefly referring to BWS evidence, a central aspect of the defence case, and had failed to mention it at all in relation to self defence. In full, the grounds of appeal were that the judge had '(a) failed adequately to direct the jury about the syndrome [and] (b) downplayed the history of abuse by reading the passage from Oakes's evidence concentrating on the fatal night'.¹¹⁴ Also it was argued that the judge had erred in not intervening to 'direct the jury to ignore imputations' in questions put to

¹⁰⁹ *R v Oakes* [1995] 2 NZLR 673, 675 s25.

¹¹⁰ The right of appeal is not the right to a second trial, rather, 'an appellant has to show that there was a miscarriage of justice, either because the verdict could not be supported by the evidence or because there was a wrong decision on a question of law' (Ablett-Kerr's 'Afterword' in *Oakes Decline into Darkness*, 1997: 183).

¹¹¹ Stockley, 'Judiciary and Courts', 2001: 62.

¹¹² *R v Oakes* [1995] 2 NZLR 673 (CA), Justices Sir Robin Cooke, Mr. Hardie Boys and Mr. Heron JJ. presiding.

¹¹³ *Ibid*: 673 s15.

¹¹⁴ *Ibid*: 674 s5.

Oakes' daughter during cross-examination from the prosecution that 'suggested [her] participation in the crime'.¹¹⁵ Lastly, Oakes appealed on grounds that the jury had not been 'sufficiently' directed by the judge as to the relevance of the lies told earlier to police by Oakes enough to ensure these lies were not assumed by the jury to be 'evidence of guilt'.¹¹⁶ These failings, so said the appeal, amounted to a 'miscarriage of justice'.

The first of these grounds – the judge's 'scant reference' to BWS evidence and the history of abuse – duly received the most attention and comment by the Court with the other grounds of appeal allocated a 'subsidiary' position. In responding to these grounds of appeal the Court began by stating that on the evidence presented 'the jury were entitled to find Mrs Oakes guilty of murder either because she was not in fact suffering from the battered woman's syndrome or, if she were suffering from it, it was not in consequence of that syndrome that she acted as she did'.¹¹⁷

Due to the relative newness of BWS evidence in NZ courts at the time,¹¹⁸ key cases from other common law jurisdictions were cited as relevant legal precedents for the application of BWS evidence in New Zealand and to establish that 'the reality of the syndrome and its effects are not in question'.¹¹⁹ After quoting a key passage from *Wanrow*, the judges emphasised the caution delivered in this 1977 case 'against leaving the jury with the impression that the objective standard to be applied is that applicable to an altercation

¹¹⁵ Ibid: 673 s20.

¹¹⁶ Ibid: 673 s25.

¹¹⁷ Ibid: 675 ss10-15.

¹¹⁸ Oakes was the first murder defendant in New Zealand to introduce BWS evidence at trial; *R v Gordon* (1993) 10 CRNZ 430 (CA) had introduced BWS evidence on appeal.

¹¹⁹ *Oakes*: 675 s20. The cases cited were the 1977 judgment of the Supreme Court of Washington: *Washington (State of) v Wanrow* (559 P 2d 548), in which a legal precedent for the common law to recognise 'the physical limitations' of women in violent encounters with men was established. Also the English case: *R v Ahluwalia* [1992] 4 All ER 889; 96 Cr App R 133 (CA) in which the defendant's murder conviction was overturned based on new evidence accepted by the Court of Appeal, that in circumstances of domestic violence provocation could be interpreted 'beyond the immediacy principle' to take account of 'the slow burning emotion suffered by a woman driven to the end of her tether'. Susan Edwards, 'Battered Woman Syndrome' in *New Law Journal*, October 2, 1992. Also cited was the Canadian Supreme Court case *Lavallee* (1990 55 C.C.C. (3d) 97) in which the battered woman defendant was acquitted of murder on grounds of self defence, had this acquittal overturned on appeal, and then had it reinstated by the Supreme Court. Among other things, this case helped establish the critical importance of BWS to ensuring women like Oakes are not 'condemned by popular mythology about domestic violence' (p. 112) and to establish that in some cases abused women will be justified in taking a pre-emptive strike against their abuser in self defence.

between two men’ and the need to ensure instead, the jury’s awareness of the reality that: ‘In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons’.¹²⁰ The particular relevance of BWS evidence to deciding the ‘reasonableness’ of the force used in self defence was acknowledged, with the Court emphasising the importance of weighing this critical matter ‘in the light of [the accused’s] perception’ of the circumstances, which ‘might justify’ the use of a ‘pre-emptive strike’ or ‘more drastic means than might otherwise be thought appropriate’.¹²¹

The key facts disputed by the prosecution were outlined, with the Court granting: ‘There was physical violence, some of it quite extreme’, and accepting that ‘the level of violence grew steadily greater’ throughout the relationship.¹²² The judges also seemed to accept Oakes’ evidence of having been ‘assaulted and abused for the rest of the night’ on the occasion two days prior to the killing when Gardner broke into the house.¹²³

The entire passage of Oakes’ testimony from the night of the killing was repeated along with the events surrounding the killing. The Court stated the importance of Oakes’ testimony and defence being judged in light of her ‘emotional fragility and altered perception’ symptoms of BWS if her actions were to be explained as ‘reasonable’. This was backed up by a quote from the judge’s reasoning in *Lavallee*, explaining that ‘we need help to understand’ why a woman would ‘put up with this treatment’ and without this help (provided by BWS) the woman ‘faces the prospect of being condemned by popular mythology about domestic violence’.¹²⁴ The judges then referred to the opinion of the expert witness, that Oakes was suffering from the symptoms of BWS and that this

¹²⁰ *Oakes*: 676 ss30-35. This judgment recognised that traditionally, self defence has been interpreted and applied based on ‘how a reasonable man behaves in a fair fight’; namely, he ‘stands and faces his adversary...[and] isn’t frightened or provoked to violence by mere threats’. C K Gillespie, *Justifiable Homicide: Battered Women, Self-Defence and the Law* (1989): 99, cited in Seuffert, ‘Battered Women and Self-Defence’, 1997: 301 fn. 51.

¹²¹ *Oakes*: 676 s25.

¹²² *Ibid*: 676 ss45-50.

¹²³ *Ibid*: 677 s20.

¹²⁴ *Ibid*: 679 ss20-35.

was confirmed also by her doctor, but added that the Crown ‘did not accept that Mrs Oakes suffered from the syndrome’.¹²⁵

In response to the appellant’s claim that the judge should have added to the three questions he directed the jury to think about (intent, self defence and provocation), a fourth question about ‘whether Mrs Oakes suffered from the battered woman’s syndrome’, the judges said the syndrome ‘was not a separate issue’ but implied in the other three. They added that ‘Counsel...dealt with the subject [of the syndrome] at length...and so the syndrome...was at the forefront of the case when the judge came to sum up’.¹²⁶ Further to the appeal claim that the judge was too brief in mentioning BWS evidence, making only one reference to the expert testimony and then ‘only in passing’,¹²⁷ the panel repeated the trial judge’s directions to the jury where he had mentioned the defence claim that Oakes’ testimony be considered in the light of ‘all that had gone before’.¹²⁸

The judges concluded that the minimal reference to BWS evidence at summing up was ‘not so inadequate as to give concern that the jury may not have understood the issues, and that injustice may have resulted’, while accepting that the direction on BWS ‘could have been more comprehensive’.¹²⁹ The judge’s brevity, they said, was offset by the ‘extremely comprehensive’ testimony provided by Oakes, and in any case, ‘may well have been deliberate; and it was not necessarily disadvantageous to the defence’.¹³⁰ In response to the submission by the appellant that by concentrating his summary on the fatal night, the judge ‘downplayed’ the significance of the history of abuse, the judges said ‘we cannot accept this to be a valid criticism. Of course the prior history was relevant’.¹³¹ Also rejected was the submission that the judge did not make clear enough to the jury that the question of Oakes’ intent was relevant only to the time the pills were administered and not later when she disposed of the body or lied to the police. The judges

¹²⁵ Ibid: 679 s50-680 s5.

¹²⁶ Ibid: 682 s40.

¹²⁷ Ibid: 682 s50.

¹²⁸ Ibid: 681 s30.

¹²⁹ Ibid: 683 s5.

¹³⁰ Ibid: 682 ss 20-35.

¹³¹ Ibid: 683: s15.

considered: ‘The summing up overall could have left no doubt as to the time that was relevant’.¹³² Concern that the judge ought to have mentioned the pathologist’s admission under cross-examination by the defence that fewer than 45 pills might have been used is dismissed without explanation: ‘We do not see this as a significant matter’.¹³³

The judges dealt then with the ‘subsidiary’ issues submitted by the appeal and conceded that the examples chosen by the judge to illustrate proportionality of response ‘may not have been entirely apposite’, and that cross-examination of Oakes’ daughter ‘had been taken much too far’.¹³⁴ However they decided that ‘Any evidence that the jury may have been turned against Mrs Oakes by the cross-examination was surely more than offset by a very full retraction and apology that senior Crown counsel proffered in his final address’.¹³⁵ With respect to lies told by Oakes out of court that were used by the prosecution to ‘strongly attack [Oakes’] credibility [by] contending that the evidence [told in court] had been tailored to fit the defence’,¹³⁶ the judges disagreed, ruling that the summing up had provided ‘all that needed to be said’ on the matter and, moreover, that ‘lies are always relevant to credibility’.¹³⁷

The final point of appeal to be addressed concerned the submission that the prosecution’s chief witness (Paula) may well have had an ulterior motive for making up such damning claims against a friend (namely to avoid being implicated as an accomplice or charged for her part in covering up the killing) and the judge, therefore, should have instructed the jury, consistent with the Evidence Act 1908, of the need for ‘special caution’ in considering her evidence. The judges rejected this point of appeal, stating simply: ‘we do not consider any caution was required’.¹³⁸ To finish the judgment delivered on 12 April 1995, the Court held: ‘For all these reasons, and despite the comprehensive case advanced in support of the appeal, it cannot succeed and it is therefore dismissed’.¹³⁹

¹³² Ibid: 683 s25.

¹³³ Ibid: 683 s30

¹³⁴ Ibid: 683 ss5-40.

¹³⁵ Ibid: 684 s50.

¹³⁶ Ibid: 684 s25.

¹³⁷ Ibid: 685 s10.

¹³⁸ Ibid: 685 ss15-20.

¹³⁹ Ibid: 685 s40.

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Following their decision, Oakes petitioned the Privy Council in London for ‘leave to appeal’. This application enacted Oakes’ right as a subject of Her Majesty the Queen to seek her permission for ‘special leave’ to be granted for an appeal against her conviction and sentence to be heard.¹⁴⁰ Oakes’ petition was based on the same grounds of appeal she had put to the New Zealand Court of Appeal.

In February 1997, this petition was put before a panel of three Law Lords who heard it along with the prosecution case reiterated by Crown counsel. Oakes’ counsel for this appeal, Judith Ablett Kerr, summarises the result:

From the outset the committee stated that it was totally sympathetic to [Mrs Oakes’] plight...questioning Crown counsel closely as to just how fair it could be said it was for a judge to refer to Battered Woman’s Syndrome so little when the defence relied so much upon it. Indeed, the committee said the syndrome may have been Mrs Oakes’ only real defence. Nevertheless, despite its sympathy and concerns, the Privy Council dismissed Mrs Oakes’ application.¹⁴¹

Following this decision a further appeal for Oakes’ immediate release was made to the Parole Board, this time by a victims’ advocacy group who argued that Oakes’ murder conviction and life sentence failed to recognise the extent to which she had suffered at Gardner’s hands and the fact that she was a battered woman. These advocates also argued that the effect of Oakes’ lengthy imprisonment on her six children would be severe and unjustified in the circumstances. The board denied this application stating that:

¹⁴⁰ This petition was drafted and submitted on Oakes’ behalf by Judith Ablett-Kerr QC.

¹⁴¹ ‘Afterword’, 1997: 184. One of the main reasons cited for the constitutional reform to abolish appeal to the Privy Council in favour of setting up a NZ Supreme Court was the routine failure of petitioners to be granted a hearing by the Privy Council and then the rarity of their success when they were granted a hearing. In 1998, for example, the Privy Council heard seven New Zealand appeals, dismissing six of them (Stockley, ‘Judiciary and Courts’, 2001: 62). The granting and success of *criminal* appeals to the Council were the rarest of all (ibid).

It was not open to the Board to supersede the findings of the jury or to review the decision of the Court of Appeal. Therefore the Board must accept that Oakes was properly convicted by a jury which had been correctly advised that the existence of BWS could be an important factor...While Oakes's children must suffer from her incarceration, there was a degree of family support which did not always exist. Lengthy sentences commonly involved serious hardship to the inmate's family and that would not ordinarily justify early consideration. Only truly extraordinary circumstances could justify favourable consideration of the application.¹⁴²

A further request for a pardon from the Governor-General to 'right a perceived wrong' was made by Ablett-Kerr on Oakes' behalf. This was also unsuccessful.¹⁴³

A more successful appeal to the Parole Board on Oakes' behalf was lodged in March 2001, with the Board agreeing to consider Oakes' eligibility for parole in 2002 after she had served eight years of her life sentence, so two years short of the minimum life-sentence of ten years.¹⁴⁴ In the announcement accompanying Oakes' release from prison in October 2002, the newly formed National Parole Board¹⁴⁵ stated: 'We exercise our discretion against a background of a blanket provision of 10 years minimum applied to all cases which we think is now regarded as being unduly inflexible in the particular circumstances of battered women'.¹⁴⁶ It added that Oakes' release was called for 'in the interests of justice', while providing reasons for her release that included her 'contribution to prison life' and the fact that 'she did not pose a threat to public safety'.¹⁴⁷

The Board qualified its decision stating that the violence Oakes suffered 'did not reach the same benchmark' as the only other NZ case involving a battered woman convicted of murder who had been paroled early on grounds of BWS having served seven years of a

¹⁴² NZ Case Law Digest, www.brookers.co.nz. Accessed 5/9/98.

¹⁴³ The Governor-General at that time had been responsible for delivering the judgment in the Court of Appeal for *Oakes*. Sir Michael Hardie Boys was NZ Governor-General from 1996-2001.

¹⁴⁴ See 'Gagging order as Oakes goes free', *The Dominion Post*, 4 Oct 2002, Ed. 2, p.3

¹⁴⁵ Parole Act 2002, s108

¹⁴⁶ *The Press*, October 4, 2002.

¹⁴⁷ *The Dominion Post*, 4 Oct, Ed. 2, 2002.

life sentence.¹⁴⁸ As well, the Board placed a condition on Oakes' release that she never again talks in public about the case. This unprecedented 'gagging order' had been lobbied for by members of Gardner's family in their victim impact statement submitted to the Board.¹⁴⁹

R v Oakes: Critical perspectives on 'legal justice'

[Gay Oakes] did kill Doug [Gardner], but the basic unalterable fact is that she did not set out to kill him; she set out to preserve her own life and the lives of her children.

Wendy Ball, 1998¹⁵⁰

The trial and appeals in the *Oakes* case drew extensive media coverage,¹⁵¹ contributing to a level of public debate and controversy that led the Court of Appeal judges to acknowledge the considerable 'public interest' in the case and to try to 'clear away possible misunderstandings' that might arise about their decision as a result.¹⁵²

Protesters claimed that 'a man in Gay Oakes situation would not have been convicted of murder'.¹⁵³ Others raised concern that the verdict 'sent a terrible signal to women in

¹⁴⁸ Referring to *Gordon* [1993] 10 CRNZ 430. Oakes was the second person in New Zealand to be paroled early on grounds of BWS; June Gordon, who was also convicted of murdering her abusive husband, was paroled early on grounds of BWS. Significantly, this decision was made prior to the change of law in 2002 removing the mandatory minimum 10 year life-sentence for murder.

¹⁴⁹ See 'Gagging order as Oakes goes free', *The Dominion Post*, 4 October 2002, Ed. 2, p. 3.

¹⁵⁰ 'R v Gay Oakes', 1998: 179.

¹⁵¹ A 2005 survey of press coverage of this case using the database Newstext Newspapers, turned up 211 newspaper articles between 15 April 1995 and 27 November 2004 that made reference to Gay Oakes. See Ruth Glassey, *Some Understandings of domestic violence in New Zealand: A discursive approach to the case of Gay Oakes with a focus on battered woman syndrome*. (Thesis submitted in fulfillment of the requirements for the degree of Masters of Science in Psychology, Victoria University of Wellington, 2005). Chapter seven includes critical analysis of 63 of these articles from a 'discursive psychology' perspective.

¹⁵² *R v Oakes* [1995] 2 NZLR 673, 675 (CA).

¹⁵³ Comment by Doris Church, spokesperson for Victims' Advocates, 'Gender bias claimed in Oakes murder case', *The Dominion*, 28 March 1995, Ed. 2 p. 16.

violent relationships'.¹⁵⁴ Oakes' supporters also argued that the jury must have been swayed against Oakes to perceive her as 'threatening or at least disappointing',¹⁵⁵ by media coverage that they said focused on the burial of Gardner's body, 'giving scant attention...[to] the events leading up to and surrounding his death... and presenting Gay to the public as a cold, calculating killer'.¹⁵⁶ Oakes' legal representative for her petition to the Privy Council suggested that 'had there been a second-tier Appeal Court available as of right, [Oakes] may have succeeded in having her conviction for murder overturned'.¹⁵⁷

Those in favour of the *Oakes* decision included members and supporters of the Gardner family and critics of BWS. In one lengthy magazine article published in 1997, titled 'To be male is to beware', the 'other side' of the Oakes case was presented based on interviews with members of the Gardner family who claimed that Oakes was more violent than Gardner and suggested that she had arranged with Gardner to go to Refuge as a ploy to defraud Social Security.¹⁵⁸ Others raised concern about BWS evidence generating 'a climate of victimhood and a corresponding decrease of individual responsibility',¹⁵⁹ while Crown counsel on the case defended the verdict as a reflection of the single and simple fact, as far as the Crown saw it, that the jury did not believe Oakes: 'The case hinged on Oakes' credibility. The jury had considered the arguments about battered women's syndrome and did not believe them.'¹⁶⁰

¹⁵⁴ 'Verdict sent a "terrible signal"', *NZ Herald*, 8/9/94, 1. p.10.

¹⁵⁵ Bungay, *Scarecrows*, 1998: 168.

¹⁵⁶ 'Prisoners of Violence', *Broadsheet*, 1994: 18. The case is still referred to as the 'body in the garden' case. See M. Thomson and A. McCarthy 'Exclusive: The Christine King story' *Herald on Sunday*, Nov 22, 2005 p.21, with one reporter noting the "Eerie echoes of 'body in garden' murder". One of the first reports on the *Oakes* case, months prior to the trial, the Herald reported some wildly speculative and sensationalist claims about the case under the heading 'Trial over body in yard', *NZ Herald*, 20/5/94, p.16.

¹⁵⁷ Judith Ablett-Kerr, 'Afterword', 1997: 186.

¹⁵⁸ David McLoughlin, 'To be male is to beware' *North & South* (1997) August. See also, 'Syndrome 'not downplayed', *The Dominion*, 16 March 1995, Ed. 2, p. 3 and George Balani, 'It still spells murder to me', *Sunday News*, 19 Jan 1997, Ed. 1, P.20. Ed. 2, P. 16.

¹⁵⁹ Martin Van Beynen 'Do we need a new law for women who kill their abusive partners?' *The Press*, 26 Feb 1997, Ed. 2, P.1.

¹⁶⁰ Nicola Crutchley, Deputy Solicitor-General for the Crown in *Oakes*, reported in 'Loss 'devastates' *Oakes*', *The Press*, 8 February, 1997 Ed. 2, p. 1.

Notification of the parole board's intention to consider Oakes' early release from prison generated further controversy and protest.¹⁶¹ Once again, members of Gardner's family contributed their perspective with Gardner's sister telling *Radio NZ* the family was 'really, really hurt and angry', and wanted Oakes to serve 'at least ten years'.¹⁶² In their 'victim impact statement' submitted to the Parole Board,¹⁶³ the family demanded Oakes' deportation from New Zealand upon her release from prison.¹⁶⁴ The bid for Oakes' deportation was taken up in Parliament by some Opposition members, with one expressing the view that Oakes had 'ruined countless lives including those of her children'.¹⁶⁵ Others complained that her early release 'sets a dangerous precedent',¹⁶⁶ which gets 'tough on victims' instead of criminals, while 'sending a signal that the price for murder could be worth paying'.¹⁶⁷ According to these MPs, Oakes' situation might be 'a terrible position for anyone to be in, but the appropriate response is to leave or seek help, not plan a murder'.¹⁶⁸ Women's Refuge applauded the decision to release Oakes, stating its support for any decision that properly considered 'battered women's realities', and making the point that women who kill their abusers are 'extremely unlikely' to pose a threat to the community.¹⁶⁹

Various legal scholars and writers contributed to the debate, challenging the expert evidence on BWS given in Oakes' trial for not being 'of sufficient quality to allow the

¹⁶¹ 'Murderer Oakes to make early Parole Board bid', *The Evening Post*, 17 February, 2001.

¹⁶² Reported in, 'Oakes to walk free after eight years', *The Dominion Post*, 4 October 2002, Ed. 1, p. 3, quoting Wendy Johnston. Gardner's half-brother told *The Dominion Post*: 'I agree there is such a thing as battered woman's syndrome and I totally agree about the Northland woman who got off recently. But not in Oakes' case. She poisoned Dougie; buried him in the garden. At her high court trial, the jury didn't accept she was suffering from battered woman's syndrome. Why has that appeared to have changed now?' 'Brother, sister make plea to Parole Board', 9 March, 2001, quoting Mr. Hill.

¹⁶³ Under the Victims' Right Act 2002 s 4 and the Parole Act 2002, s 7(2d), the rights of victims are to be 'upheld [through] submissions by victims (as so defined)' to ensure 'any restorative justice outcomes are given due weight'.

¹⁶⁴ This submission included the family's request for 'Oakes to serve a full 10-year term and then be deported' from New Zealand, *The Dominion Post*, 4 October 2002, Edition 1, p.3.

¹⁶⁵ 'Oakes to walk free after eight years', quoting NZ First MP Ron Mark. One ACT party member asked 'If the parole board grants parole to Gay Oakes after she has served only 8 years of a life sentence... will the Immigration Service move to deport her?', Gerry Brownlee MP, *Hansard*, 19 September, 2002.

¹⁶⁶ Wayne Mapp MP, quoted in 'Goff gives off wrong signal in law reform' *The Press*, 23 July 2001, Ed. 2, p.8.

¹⁶⁷ *ibid*, quoting Act MP Stephen Franks.

¹⁶⁸ Wayne Mapp MP, quoted in 'Goff gives off wrong signal', *op.cit*.

¹⁶⁹ Quoting NCIWR head, Merepeka Raukawa-Tait, 'Oakes decision hailed by Refuge', *The Press*, 13 June, 2001, Ed. 2, p. 8.

historical abuse to become clear to the jury',¹⁷⁰ even describing the Court of Appeal's reasoning on the matter of the trial judge's minimal reference to BWS as plain 'wrong', 'remarkable', 'contradictory' and 'counter to the evidence given'.¹⁷¹ Concerns were raised about the inadequacy of Oakes' counsel at trial in failing to call any independent witnesses to the violence she suffered, and in not presenting to the Court the possibility that Gardner's use of Prozac at the time he was killed could have *worsened* his mood, while reducing the number of pills he would have needed to ingest to show a much higher level of concentration in his body.¹⁷²

Judith Ablett-Kerr QC wrote an article in which she contended that the legal defences available to Oakes create an 'almost insurmountable' obstacle to defending battered women who kill their abusers, and proposing the English law of diminished responsibility as a possible alternative.¹⁷³ She also argued that the problems seen in *Oakes* and other similar cases are unlikely to be resolved by 'passing the problem onto the shoulders of the sentencing judge.'¹⁷⁴ Professor of Law, Nan Seuffert, wrote a particularly comprehensive critique of *Oakes* that identified various difficulties with BWS evidence in relation to self defence and suggested expert evidence be focused on 'dispelling Judges' and jurors' misconceptions concerning domestic violence, rather than focusing on the individual psyches of the women subjected to violence'.¹⁷⁵

An article by Justice Bruce Robertson proposed 'some adjustment' to the traditional interpretation of what is 'imminent' in relation to self defence to apply to conflicts

¹⁷⁰ Ball, 'R v Gay Oakes' in Bungay's *Scarecrows*, 1998: 178.

¹⁷¹ Finn, 'Self-Defence - Provocation - Relevance Of Evidence Defendant Suffering From Battered Woman Syndrome', 1995: 293. See also, Elisabeth McDonald, 'Defending Abused Women: Beginning a Critique of New Zealand Criminal Law', *Victoria University of Wellington Law Review*, Vol. 27 (4) December 1997, 673.

¹⁷² Bungay, *Scarecrows* (1998): 161-164. Bungay interviewed Gay Oakes in prison during which she learnt of numerous aspects of the *Oakes* case that were not uncovered at trial. For example, she spoke to a minister who told her he regularly saw Gay at the back of his church with 'swollen eyes and bleeding lips', and heard from Gay's children, in the company of others, speak of how Gardner said he was going 'to chop Beth up' and how he used to make them stand still so he could throw knives at their feet: 180, evidence that was not heard in Court.

¹⁷³ 'A Licence to kill or an overdue reform?: The case of diminished responsibility', *Otago Law Review*, (1997) Vol. 9 No. 1: 4.

¹⁷⁴ *Ibid*: 13.

¹⁷⁵ Nan Seuffert, 'Battered women and self-defence', *NZ Universities Law Review*, June 1997, 292 :328.

between people of unequal size and strength.¹⁷⁶ Referring to the reasoning and judgment in the Canadian case *Lavallee*, Robertson suggested that trial judges be clearer in their directions to juries about the effects of ‘prolonged exposure to unpredictable spousal abuse’ on victims’ ability to perceive a threat ‘before it becomes obvious to others’,¹⁷⁷ while emphasizing the need for the careful selection and preparation of expert witnesses on BWS to ensure this evidence does not undermine the defendant’s testimony, with the overall goal being ‘for the accused to tell her own story’.¹⁷⁸

Others supported the decision in *Oakes*, accepting the trial’s emphasis on Oakes’ concealment of the body and lies told to the police, commenting that a more ‘ideal Battered Woman Syndrome defendant would stand by the phone, next to the body, after calling the police’.¹⁷⁹

In the wake of the controversy, the Minister of Justice announced his attention to review the mandatory life sentence for murder, accepting that a mandatory minimum sentence ‘for everybody who is convicted of murder, whatever the circumstances, seems...unnecessary’.¹⁸⁰ The Minister was also reported to have said that BWS evidence should not provide ‘a defence to murder’.¹⁸¹ Oakes’ early parole was partly decided in light of this review and the sentencing reform it delivered.¹⁸²

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¹⁷⁶ Hon Justice J Bruce Robertson, ‘Battered woman syndrome: Expert evidence in action’, *Otago Law Review* (1998), Vol. 9, No. 2: 279.

¹⁷⁷ *Ibid*: 280.

¹⁷⁸ *Ibid*: 285.

¹⁷⁹ Bill Hodge, ‘Battered Woman Syndrome and the Law’, in Bungay, *Scarecrows*, 1998: 154.

Criminologist, Greg Newbold, expresses the same approval of the decision in *Oakes* in his brief discussion of the case included in his chapter on ‘Women’s crime’, *Crime in New Zealand*, 2000: 62.

¹⁸⁰ Quoting National’s Justice Minister, Doug Graham, in Catriona MacLennan, ‘Going to bat for abused women’ *Sunday Star Times*, 2 Feb 1997, Ed. A. P.3.

¹⁸¹ ‘Domestic Murder Life Sentence Seen as Inappropriate’, *Waikato Times*, 11 January, 1997, 3 cited in Seuffert, ‘Battered Women and Self-Defence’, *op.cit*: 295 n. 21.

¹⁸² The review process and reforms leading up to Oakes’ early parole are discussed at length in Chapter Two.

The protests, debates and reviews the *Oakes* case gave rise to covered a wide range of issues and expressed a variety of points of view. This breadth and diversity of debate testifies to the complexity of the justice challenge involved in the formal adjudication of cases like *Oakes*. In my view it at once illustrates the failure of the majority of the agents entrusted to deliver justice in New Zealand within and beyond the formal legal system to identify and effectively address the complex challenges involved in cases like *Oakes*.

Indeed in many respects the reasoning and decisions of these agents in this key case of its kind can be said to have compounded the obstacles to justice and in so doing, exposed the myth that legal, court-based justice is an impartial, politically-neutral process equally accessible to all. Instead, the trial highlighted the cunning of Crown prosecutors, intent upon manipulating and discrediting defence witnesses, including the expert witness on BWS and *Oakes* herself. The apparent success of this strategy, in turn exposed the inherent difficulties with the kind of evidence a defendant like *Oakes* brings to the courtroom pitted against the more recognizable and quantitative evidence the prosecution will likely have in support of its case; in *Oakes* this evidence included the fact and act of killing, the defendant's lies told to police, and the prevailing mythology surrounding domestic violence and battered women that inclines people in general to disbelieve its victims.

Any tilting of the odds against *Oakes* in this case was likely further compounded by relatively inadequate counsel for the defence who, for some reason, possibly their own lack of empathy and understanding of domestic violence, consistently failed to expose the weaknesses in the prosecution case. The defence allowed *Oakes*' testimony of an increasingly manipulative, unstable and threatening man prior to the killing, to be systematically minimised and misrepresented to suggest a reduced threat – 'no evidence of recent abuse', while *Oakes*' numerous attempts to escape and protect herself from the threat posed, evidence which should have gone in support of the defence case, were used against her to suggest 'more initiative' on her part than was consistent with a person suffering BWS. Indeed, under aggressive cross-examination by Crown counsel, evidence of *Oakes*' 'constant threats to go to the police' and ability to force Gardner to sleep

outside in the shed (on *one* occasion), was turned around to suggest her resourcefulness, even bullying of Gardner, thereby diminishing the seriousness of *his* threats to kill and maim her and the children and the myriad occasions on which she failed to keep him away.

Oakes' testimony (supported by BWS) of the long, intimate and violent relationship she had with Gardner, told in the formality, strangeness and antagonism of the courtroom, struggled at times to explain in 'common sense' terms the conflicting emotions and deep scars caused, and to communicate the influence of these experiences on her actions on the fatal night. The jury's capacity to effectively grasp and weigh the significance of this complex, often counter-intuitive evidence, that judges and lawyers are not expected to comprehend without expert help,¹⁸³ must be questioned. Moreover, if it is accepted that the average juror is predisposed to misjudge and condemn battered women and, as such, expert evidence is needed to 'disabuse jurors' of these prejudices,¹⁸⁴ then it seems even less likely that the jury's 'common sense' response to the facts in *Oakes* met the most fundamental requirements of legal justice.

On the contrary, instead of disabusing the jurors of their likely held beliefs that women 'invent' stories about rape, are in general prone to lying, tend to 'exaggerate or dress up' their experiences of domestic violence – which is rarely much more than 'a slap in the face' – all the while being mentally 'impaired', paranoid and vindictive, rather than 'reasonable' or justified in their actions and fears of violence,¹⁸⁵ Crown counsel effectively exploited these common prejudices to their advantage with the judge further

¹⁸³ Robertson J argues that judges and lawyers need 'every available assistance' if 'the best possible justice is to be delivered...in those cases in which domestic violence or its consequences are factors' ('Battered woman syndrome', 1998: 300).

¹⁸⁴ Research has shown that 'lay persons are more likely...to believe that battered women are emotionally disturbed and masochistic and...have real choices to leave if they wanted to' (Seuffert, 'Battered women and self-defence', 1997: 294-295).

¹⁸⁵ See Ruth Busch, Neville Robertson and Hillary Lapsley, 'The Gap: Battered Women's Experiences of the Justice system in New Zealand', *CJWL/RFD* Vol. 8, 1995, 190 for an analysis of the justice system's systematic 'underestimation' of women's fears of violence, 'victim blaming' and reduction of domestic violence as 'a symptom of a problem relationship rather than a real problem in itself'. For an analysis of the common law's 'strong presumption' against believing women's claims of rape see Elisabeth McDonald, 'Gender Bias and the Law of Evidence: The Link between Sexuality and Credibility' *VUWLR*, Vol. 24 (2) 1994: 177. All quoted references in this section are taken from the judge's summing up in *Oakes*, highlighted earlier in the chapter.

reiterating them at numerous points in his summing up. Any possibility that the evidence on BWS might have helped to counter these myths and prejudices in *Oakes*, was further undermined by the judge virtually ignoring this evidence in his summing up, not mentioning it at all in relation to self-defence and mentioning it only in passing in relation to provocation.

Moreover, the summing up reflected the uneasy legal 'fit' for the defence case, compared with the evidence presented against Oakes, confirming the feminist critique that the criminal law is designed by men to defend the interests of men as defendants *and* victims.¹⁸⁶ This bias was again highlighted and reiterated by the judge at summing up with the masculine examples chosen to illustrate proportionate force for self-defence and loss of control in provocation, and suggested by Oakes' failure to convince the jury that Gardner's abuse and threats caused her to fear for her life, to panic or to lose control of her emotions. Rather than help the jury grasp Oakes' complex and lengthy testimony of suffering eleven years of abuse, by reading the passage of her testimony concentrating on the night of the killing the judge further emphasised *her* (violent) actions and de-emphasised, by omission, the history of violence, which is dismissed as mere 'background' to 'all that had gone before'. This history is also rendered insignificant by the judge in his reiteration of the Crown case that there was 'no evidence of recent assaults' and claim that Gardner had an 'improved attitude to life'. That there was no evidence for this 'improved attitude' was not mentioned by the judge.

At the Court of Appeal, three judges were called to consider various controversial aspects of the trial highlighted by the appellant (Oakes), and to draw a conclusion about the strength of her appeal that these aspects amounted to a miscarriage of justice sufficient to overturn the conviction of murder. The crux of Oakes' appeal was that the judge had 'misdirected the jury', particularly in failing to explain BWS and its (very different and complex) relevance to self-defence and to provocation. As BWS evidence had not been used in a murder trial in New Zealand prior, there was no clear precedent for its

¹⁸⁶ There is extensive research and critical analysis supporting the claim that both self-defence and provocation reflect and represent a male perspective. This research and analysis provides a critical component of the analysis presented in the remainder of the thesis.

application, apart from precedents established in other common law jurisdictions which were cited and quoted by the Court,¹⁸⁷ but ultimately dismissed. As well, a 1993 New Zealand case of attempted murder, did provide clear (and current) direction for the admission of BWS in relation to self-defence and for the judge's summing up which, by stark contrast with the summing-up in *Oakes*, 'dealt directly' and 'carefully' with the relationship between BWS, the defendant's testimony and self-defence.¹⁸⁸ In this case the jury found the defendant not guilty on grounds of self-defence. The Court of Appeal judges did not refer to this case.

In the international cases cited by the Court of Appeal, the same care and direct approach was taken to explain this complex evidence and its application in cases like *Oakes*, and in each of these cases the verdicts or appeal court rulings were considerably more favourable to the defendant than in *Oakes*. Indeed, the reasoning and judgments in all of these cases appeared to recognise the complexities of BWS and to accept the legal difficulties of defending battered women who kill their abusers with reference to the available laws of self defence and provocation. While the Court of Appeal judges in *Oakes* highlighted the most progressive and critical aspects of these cases, signalling their awareness of the relevance and importance of these decisions, they ruled against their application in *Oakes* at every juncture and in the final decision denying the appeal.

The reasons given by the judges were less than clear or convincing, particularly on the critical issue of the judge's brevity with respect to BWS. As well, the Court added further confusion to the case by speculating that the Judge's brevity 'may well have been deliberate' and 'was not necessarily disadvantageous to the defence' as it meant 'the jury were left free to form their own view of the facts', while the judge was able to avoid

¹⁸⁷ The main New Zealand precedent for *Oakes* was *R v Wang* [1990] 2 NZLR 529. In this case, evidence of BWS was relied on only at appeal after the trial judge did not allow self-defence to go to the jury. The defendant was convicted of manslaughter on grounds of provocation. The appeal court upheld the trial verdict. *Wang* is discussed in comparison with *Lavallee* in Seuffert, 'Battered women and self-defence', 1997: 297 n. 29. Seuffert argues that this case 'set a dubious precedent for the application of New Zealand self-defence law where battered women kill their abusers' (ibid: 318).

¹⁸⁸ *R v Zhou*, 8/10/93, HC Auckland T7/93, cited in Seuffert, ibid: 322-325. Seuffert compares critical aspects of the expert evidence on BWS and the judge's summing-up of this evidence in *Zhou* with the same in *Oakes* and identifies sharp contrasts that expose the inadequacy of the evidence presented in *Oakes*.

having to ‘underline that the battered woman’s syndrome...could provide a motive for murder’, a suggestion that could undermine the defence.¹⁸⁹ Other grounds of appeal, such as the judge’s use of ‘male-oriented’ examples to illustrate proportionate force, were dismissed with even less conviction, with the judges stating that the examples ‘may not have been entirely apposite but nonetheless they did demonstrate the need for proportionate force’.¹⁹⁰ Although the Court conceded that the cross-examination of Oakes’ daughter ‘was taken much too far’, it accepted that Crown counsel’s ‘full retraction and apology’ in the final address ‘surely more than offset...the slight danger that the jury may have been turned against Mrs Oakes by the cross-examination’.¹⁹¹

None of this reasoning directly or precisely answers the appellant’s case, much less does it put to rest concerns that the trial judge comprehensively ‘misdirected the jury’ and a ‘miscarriage of justice’ occurred as a result. On the contrary, the vagueness of the reasoning – ‘*may* have been deliberate’; ‘*may not* have been *entirely apposite*’; ‘was not *necessarily* disadvantageous’; ‘more than offset the *slight* danger’ of turning the jury against Oakes, and so on – combined with the flawed logic on key points at issue,¹⁹² confirms the seriousness of these concerns. It also confirms the high degree of discretion available, especially in the judicial aspect of the so-called *formal* adjudication process, to the agents involved in deciding what justice demands in the particular case.

In the decision of the Parole Board to release Oakes early, a further discretionary element was added to the judgments of the Courts. This discretion included a judgment that the violence Oakes’ suffered was not as severe as in another case of its kind, an acceptance of the need for greater ‘flexibility’ in the penalty for murder, an unprecedented order to prevent Oakes’ from speaking in public about her case, and – for good measure – an appreciation of Oakes’ ‘contribution to prison life’. Given the serious debate the case gave rise to about systemic gender bias in the legal system, and judicial incompetence at

¹⁸⁹ *Oakes* [1995] 2 NZLR 673 (CA): 682, ss20-30.

¹⁹⁰ *Ibid*: 683 s10.

¹⁹¹ *Ibid*: 683 s50.

¹⁹² In particular, the suggestion that BWS ‘could provide a motive for murder’, as Finn points out, is entirely contrary to the intended purpose of the syndrome to show that ‘the inference of deliberate killing should not be drawn’ (*Oakes*, 1995, op.cit).

the highest level, the Board's decision to release Oakes two years early in recognition of the need for greater *flexibility* in the system and a reward for her good behaviour in prison, seems a hollow, somewhat hypocritical, gesture rather than a genuine attempt to address the injustice of Oakes' murder conviction and life sentence.

If the eight years Oakes' served in prison and the numerous appeals and reviews that had to be made on her behalf before she received this small concession is compared with the sentences served by male perpetrators of domestic homicide in New Zealand, the gesture seems even less meaningful. To briefly highlight just one poignant example, in a case tried a few years earlier than *Oakes*, a man with a history of violence against his wife, who was convicted and sentenced to life in prison for her murder and the murder of their two young daughters – all of whom he burnt to death – was released on parole after serving just ten years – the *minimum* life sentence for murder.¹⁹³ There was little media attention drawn to this case or notoriety attached to this man and apparently little legal weight given to the comparatively horrific way in which he killed his victims or the fact that he killed *three* people, not one. Nor does there appear to have been any particular concern that this man might re-offend; which he eventually did.¹⁹⁴ Many other men who have killed their wives or ex-wives (but not their children), have been found not guilty of murder and received substantially reduced sentences for manslaughter on grounds of provocation.¹⁹⁵

The two years difference in the sentence served by this triple murderer and the sentence Oakes served, provides a particularly poignant illustration of the relative injustice delivered to Gay Oakes, as it suggests the substantive obstacles to 'legal justice' for the victims of domestic violence in New Zealand more generally. The fact that the same verdict and virtually the same punishment was delivered for these two, surely very different types of culpable homicide, morally speaking, and that there was hardly any

¹⁹³ I was unable to find any public record of the 1986 trial and conviction of Duane Shaw. The case came to light in 2004 when Shaw re-offended and was convicted on domestic violence charges against his new partner. See, 'Paroled killer beat partner', *The Dominion Post*, 16 December 2004. Ed. 2.

¹⁹⁴ *Ibid.*

¹⁹⁵ See Elisabeth McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"', (1993) *Women's Studies Journal*, 126.

media attention, much less public outcry, in response to the more serious of the two cases, shows a failure of justice that extends well beyond the mechanisms of the formal legal system and implicates the political and cultural processes that substantially shape this system.

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In the remaining chapters of the case study I expand upon and try to substantiate this key claim by reflecting critically on the political and cultural influences that shaped the legal decisions made in *Oakes* as well as subsequent debates and reforms in the domestic violence area. This reflection reveals some progress made subsequent to *Oakes* in certain aspects of the New Zealand commitment to justice for battered women defendants, but on the whole confirms the ongoing lack of a genuine and principled commitment to addressing the substantive claims of injustice raised in *Oakes*.

Chapter Two

‘Political justice’: Key debates and initiatives 1987-2007

Politics may be identified, in the first place, as a practical activity concerned with making a response to...a complex of events, the product of human sentiments, choices and actions...[to which] there is no necessary response.

Michael Oakeshott, 1991¹

While we tend to accept and assume the association of the formal court system of adjudication and the commitment to justice, we tend equally to overlook the political aspect of justice, even to assume that politics and justice are antithetical. Critics have increasingly sought to expose these assumptions to show not only the ‘inherent discrepancy between ‘law’ and ‘justice’’,² but the fundamentally political nature and function of law as an institution which has, in fact, ‘no existence independent of politics’.³ For some critics, such as Oakeshott, this reality suggests further the impossibility or irrelevance of ‘justice’ altogether. He says, given the contingent, practical nature of politics, there can be no ‘steady, unchanging, independent guide’ to political decisions, such as justice purports to provide.⁴

Taking this critique on board and specifying its general claim in the context of New Zealand’s commitment to ‘political justice’, the aim of the chapter is to show why politically conservative critics like Oakeshott, if right about the essential contingency and practical complexity of the political process, might be wrong to conclude from this premise that ‘all arguments drawn from ‘justice’...[are] irrelevant’.⁵

¹ *Rationalism in Politics and Other Essays*. New and Expanded edition, Liberty Press, Indianapolis, 1991: 70-71.

² D. Kirkby (ed) [1995] *Sex, Power and Justice: Historical perspectives on law in Australia*: xix. Kirkby attributes this sentiment to the postmodernist critique of law.

³ M. McDowell & D. Webb, *The New Zealand Legal System: Structures, processes and legal theory*. Third Edition. Lexis Nexis Butterworths, Wellington, 2002: 37. The authors are not defending this claim but representing it as a key component of the ‘critical legal studies’ perspective.

⁴ *Rationalism in Politics*, op.cit: 56.

⁵ *Ibid*: 58.

‘Political justice’: Structural framework

Justice is a fundamental right in any democracy.

Sir Ivor Richardson, 1995⁶

The idea that justice is protected as a fundamental right in New Zealand is not necessarily shared by all agents of the ‘justice system’, nor is it evident in every aspect of the structural commitment to ‘political justice’. A critical component of this commitment being the provisions protected at a constitutional level to regulate the exercise of public power, the Westminster constitutional system ‘simply uplifted’ from England and ‘transplanted’ in New Zealand in the 1850s,⁷ is understood to provide a somewhat pragmatic and adaptive approach to constitutional provisions including those protecting the ‘right’ to justice. This is an approach which prefers that public processes ‘work within rules and principles settled by tradition or agreement’ more than by fundamental constitutional provisions on justice or any other grand principle. Indeed, it is an ‘older and wiser’ system that assumes a decidedly ‘sceptical’ attitude towards such provisions.⁸

Adopting this approach to constitutional matters, New Zealand has generally eschewed written and formalised constitutional commitments,⁹ and in so doing, has distinguished itself from the majority of common law countries (including Australia and Canada), which have increasingly adopted more formalised constitutional provisions. New Zealand’s constitution, like Britain’s, is more of a ‘hotchpotch’¹⁰ of semi-formalised conventions, laws and rights, some dating back as far as the Magna Carta of 1066,¹¹ and others, such as the ‘rights of minorities’, introduced and codified by the New Zealand

⁶ ‘The Courts and the Public’, *New Zealand Law Journal*, January 1995: 11.

⁷ R. D. Mulholland, *Introduction to the New Zealand Legal System*, Tenth Edition. Butterworths, Wellington, 2001: 27-28. The Westminster system was formalised in *The New Zealand Constitution Act* of 1852 and the *English Laws Act* of 1854.

⁸ Andrew Sharp, ‘Constitution’ in Raymond Miller (ed), *New Zealand Government and Politics*, Oxford University Press, Auckland, 2001: 43.

⁹ A significant exception is the Treaty of Waitangi which is widely regarded as ‘the fundamental document which determines the relationship between the races in New Zealand’, Mulholland, *ibid*: 69.

¹⁰ A. Butler and P. Butler, *The New Zealand Bill of Rights Act: a commentary*. Lexis Nexis NZ Limited, Wellington, 2005:8.

¹¹ Sharp, ‘Constitution’, *op.cit*: 39. The English Magna Carta or ‘Great Charter’ includes the right to trial by jury and due process of the law.

Parliament as recently as 1990 under the *New Zealand Bill of Rights Act*.¹² This act is unusual among bills of rights established elsewhere, as it is not entrenched as ‘supreme law’, but can be overturned by a two-thirds majority in Parliament, while the scope of the act is also ‘quite limited’ comparatively speaking.¹³

Arguably, this incremental, pragmatic approach to constitutional matters, means the political system in New Zealand operates without clear guidelines protecting a separation of powers between the judicial, Executive and legislative branches of government. Indeed, in some aspects, the Westminster system is considered to be ‘entirely inconsistent with a pure separation of powers theory’.¹⁴

Under the Westminster system the chief value protected at the constitutional level is the doctrine of parliamentary sovereignty, which effectively grants the House of elected representatives an almost ‘untrammelled’ power to pass legislation, even ‘to exclude the courts from any effective supervisory role’.¹⁵ However, some judges maintain that the common law basis for the doctrine of parliamentary sovereignty suggests ‘judges could remodel [it] if necessary’,¹⁶ while others have observed a general trend in New Zealand towards increasingly wide areas of discretion being extended to courts by successive Parliaments.¹⁷ The Bill of Rights Act is also thought to have transferred to the judiciary a substantial degree of power to review the conduct of government,¹⁸ while the absolute

¹² BORA s20 provides: ‘A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language of that minority’. For extensive commentary on this and all other provisions of BORA see Butler and Butler, *New Zealand Bill of Rights*, 2005, op.cit.

¹³ *ibid*: 4. Among the absent rights noted by the authors are the ‘general right to property’, ‘family and children’s rights’, as well as the right to ‘equality before the law’.

¹⁴ McDowell and Webb, op.cit: 125, highlighting the office of attorney-general as being inconsistent with this theory. However, although a political office, the attorney-general has ‘traditionally been required to act in a more non-political manner as guardian of the public interest’ (Stockley, op.cit: 66) which suggests the office can function to facilitate and uphold an effective separation of powers.

¹⁵ Mulholland, *Introduction*, op.cit: 65-66. *The Constitution Act 1986* (s. 14 (1)) defines Parliament as ‘the sovereign in right of New Zealand and the House of Representatives’, cited in K. Jackson, ‘Parliament’, Miller, 2001: 76.

¹⁶ S Elias, ‘Sovereignty in the Twenty-First Century: Another Spin of the Merry-Go-Round’ (2003) 14 PLR 148, cited in Butler and Butler, *Bill of Rights*, op.cit: 8.

¹⁷ Mulholland, *Introduction*, op.cit: 183.

¹⁸ *Ibid*: 114.

sovereignty of Parliament is being ‘increasingly questioned’, particularly with regard to the Treaty of Waitangi.¹⁹

On balance, the commitment to ‘political justice’ in the Westminster system has a great deal to do with the quality of debate and deliberation undertaken in Parliament. This process is substantially influenced by the party system, which is in turn directly shaped by the electoral system. As in the majority of Western democracies, New Zealand has developed a two-party system,²⁰ with one party (National) occupying the traditional political ‘right’, and the other (Labour) occupying the traditional political ‘left’. For much of its history, New Zealand’s First-past-the-post (FPP) electoral system has strongly favoured the conservative National party, which governed for thirty-eight of the fifty years between 1949 and 1999.²¹ When in government, the Labour party was responsible for most of the radical reforms undertaken in New Zealand, including introducing in 1935, ‘arguably the capitalist world’s first universal welfare state’,²² and paradoxically, in 1984, some of the world’s most sweeping New Right, or ‘neo-liberal’, economic reforms, which ‘drastically reduced the role of the state’.²³

At the 1996 general election and largely in response to this radical reform, which was continued under National throughout the 1990s, New Zealand changed its electoral system introducing MMP (mixed member proportional), a system modelled on the German system of proportional representation.²⁴ MMP has substantially altered New Zealand politics by effectively necessitating the formation of coalition governments, thereby reducing the power of the two main parties as well as the power of the political

¹⁹ Keith Jackson, ‘Parliament’ in Miller (ed), *New Zealand Government*, op.cit: 77.

²⁰ See Peter Aimer ‘The changing party system’, *ibid*.

²¹ Miller, ‘Labour’, *ibid*: 226-228.

²² *Ibid*: 229.

²³ John Morrow ‘Neo-Liberalism’, *ibid*: 521. See Jane Kelsey, *The New Zealand Experiment: A World Model for Structural Adjustment?*, Auckland University Press and Bridget Williams, Auckland, 1995, for a particularly comprehensive and trenchant critique of these reforms.

²⁴ Under FPP, the winning party only needed to secure a majority of seats rather than overall votes, which favoured National whose votes were concentrated in a number of ‘safe seats’ compared with a more widely dispersed Labour vote. In the 1981 general election this system delivered a National government with 38.8% of the vote (47 seats) compared with Labour’s 39% (43 seats) (Miller, ‘Labour’, op.cit: 228). Under the new system the proportion of votes a party wins beyond a 5% minimum threshold (or one electorate seat), determines the number of members of parliament that party gains.

Executive relative to Parliament,²⁵ and by diversifying the composition of Parliament with smaller parties, representing a wider range of issues and people, gaining a much greater influence in the debating chamber. In the current 48th Parliament of 121 members, there are representatives from eight political parties and the Labour-led government is formally in coalition with three of these.²⁶ This diversity has led to a more robust cross-party debate in Parliament, which has in turn seen increased pressure on governments to modify or even abandon proposed reforms.²⁷

The experience of four MMP governments has led most commentators to agree that the new electoral system has improved Parliament's representative function and substantially undermined the previously 'unbridled' power of the Executive branch,²⁸ which had enabled both Labour and National governments to commit fairly spectacular abuses of power in the past. However, concerns have been raised about MMP slowing down the legislative process with endless debate and party wrangling serving to 'increase the difficulties for societal and political change'.²⁹ Furthermore, although MMP has appeared to favour the political left, with the Labour party under the leadership of Helen Clark – New Zealand's first elected woman Prime Minister – winning an unprecedented third term in 2005, the general trend in Western politics away from traditional ideological battlegrounds, has seen many of the major political parties, including Labour, adopt a pragmatic 'Third Way' politics of the middle-ground.³⁰ Indeed, when elected to power in 1999 after three terms in opposition, the Labour party 'recast itself as the party of middle

²⁵ Because coalition governments are less of a cohesive force under MMP, the power of the Executive to control the legislative process is reduced as evidenced in the 'marked growth' in the number of bills introduced into Parliament by members outside government (Jackson, 'Parliament', in Miller (ed.) *New Zealand Government*, op.cit: 81). While the majority of bills passed into law are still government bills introduced by ministers, the crucial select committee process through which proposed legislation is thoroughly scrutinised by MPs, as well as interested members of the public via submissions made, has achieved 'a greater degree of independence' from government influence under the MMP system (ibid:83).

²⁶ 'MPs and Parties'. www.parliament.govt.nz/en-nz/mpp. Accessed 6/8/07.

²⁷ Jackson, 'Parliament', in Miller (ed.) *New Zealand Government*, op.cit: 81.

²⁸ G. Palmer, *Unbridled Power*, Oxford University Press, Auckland, 1979.

²⁹ Margaret Wilson, 'Women and Politics', in Miller (ed.), *New Zealand Government*, op.cit: 383.

³⁰ In New Zealand, both major parties have moved towards this more populated 'middle-ground' leaving the smaller parties – keen to emphasise their point of distinction from the major parties – to focus on the more ideological debates.

New Zealand³¹ and committed the coalition government it led to delivering ‘responsible, pragmatic change in the interests of the many’.³²

Given that New Zealand’s political history has long been characterised as substantially ‘pragmatic’,³³ with a legislature historically ‘concerned predominantly...with the kinds of laws that win and lose elections’,³⁴ a further shift towards political pragmatism does not bode well for the achievement of a political process committed to substantive justice sector reforms. Indeed, some argue that because MMP has also increased the political influence of the fourth estate by ‘intensifying the competition for publicity’ between parties, it has further reduced the political process to an exercise in deception and manipulation over reasoned argument.³⁵ This, in turn, could be said to have facilitated a general de-politicisation of the public-political arena such that the more ‘complex issues of social and political justice’ are increasingly side-lined.³⁶

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The commitment to ‘political justice’ is substantially shaped by these constitutional foundations and the various key structures of the wider political system. Beyond this, a more explicit commitment to ‘political justice’ is institutionalised in the form of the Ministry of Justice and the multiple agencies of the wider justice sector that are overseen by the ministry. The Ministry of Justice is expected to provide ‘leadership of the justice

³¹ Miller, ‘Labour’, *New Zealand Government*, op.cit: 238.

³² *ibid*: 237 quoting a statement from the incoming Labour- led government in 1999 *NZ Parliamentary Debates*, 21 December 1999.

³³ Political theorist Richard Mulgan argues that New Zealand politics has always been guided more by ‘practical political experience’ than ideology or theory, with governments ‘preferring popularity over principle, pragmatism over doctrine’, though he adds that this preference has not necessarily meant a ‘politics without ideas’. According to Mulgan, NZ pragmatism means that ‘where there is a clash between any theory of what people ought to want and what they actually want, [governments] give preference to actual wants. *Democracy and Power in New Zealand*, Oxford University Press, Auckland, 1989: 49-50.

³⁴ Justice Baragwanath, president of the Law Commission between 1996 and 2001, considers New Zealand’s legislative system has always been predisposed towards ‘populist’ law, 2001: 1-2.

³⁵ Wayne Hope, ‘Media and Political Process’, in Miller (ed.), *New Zealand Government*, op.cit: 317.

³⁶ Joe Atkinson, ‘Tabloid democracy’, *ibid*: 296. Others predicted the political impact of MMP in relation to the media would be more positive with the media becoming a ‘more integral’ component of a ‘successful...political system’ as politicians are ‘inevitably’ forced away from the previous ‘culture of superficiality’ in media coverage of politics (Al Morrison, ‘Objectivity’, in J. McGregor and M. Comrie (eds.) *What’s News?*, Palmerston North: Dunmore Press, 2002: 38-41).

sector and the co-ordination of processes that ensure a collaborative, outcome-focused approach'.³⁷ This responsibility is expressed in the 'statement of intent' undertaken by Ministry of Justice summarised as follows:

The ministry exists to create a fairer and safer New Zealand. It contributes to the shared justice sector outcomes: Safer communities, being communities in which there is reduced crime and in which safety and well-being is enhanced through partnerships; a fairer, more credible and more effective justice system, being a system in which people's interactions are underpinned by the rule of law and justice services are more equitable, credible and accessible.³⁸

Beyond the agencies of the 'core sector',³⁹ the wider sector operating from more than 650 sites around the country includes a variety of Crown entities, such as the Law Commission and Human Rights Commission, as well as other agencies, such as the NZ Council of Victim Support Groups.⁴⁰ The Justice and Law Reform Select Committee also provides a vital role in the sector by ensuring all proposed 'justice-related' bills⁴¹ are subjected to a rigorous and open process of public consultation and critical evaluation prior to being passed as legislation. Increasingly, justice sector agents are regularly involved in collaborative exercises with various non-government organisations (NGO's), community groups and local authorities with a view to better co-ordinating outcomes across the sector and society as a whole. As well, justice sector agents are increasingly responsible for co-ordinating New Zealand's expanding commitments under various

³⁷ 'Part 1 Strategic Context and Direction', Ministry of Justice Statement of Intent 1 July 2006 – 30 June 2007 www.justice.govt.nz/pubs/reports/2006/soi-2006/part-1.html, p.8. Accessed 10/7/07.

³⁸ www.justice.govt.nz/ministry Accessed 2/4/06.

³⁹ Along with the Ministry of Justice, the core sector includes, the Department of Corrections (formally incorporated with the Ministry of Justice in October 2003), the Police, Crown Law Office, Serious Fraud Office, and Child, Youth and Family Services officially operating from within the Ministry of Social Development from 1 July 2006, but remaining part of the 'core sector' 'for the purposes of addressing youth offending and early intervention issues' (ibid: 1-2).

⁴⁰ Ibid: 2-5.

⁴¹ There are a number of other select committees that deal with matters conceivably related to justice reflecting the range of responsibilities involved in delivering justice.

international rights conventions, some of which place ‘detailed duties’ on signatory states to implement a variety of broad-ranging provisions.⁴²

The Minister of Justice is one of the more senior members of the political Executive who serves as the ‘lead minister’ to which the Ministry of Justice must answer and who is ultimately responsible for the justice sector overall.⁴³ While the minister is a member of the government of the day accountable to his/her own party caucus, as a public service provider the ministry is expected to remain politically independent and non-partisan by providing professional ‘free, frank and fearless advice’ to ministers, as a central principle of the Westminster system.⁴⁴ The expertise of the public service or bureaucracy is particularly valuable under the Westminster system wherein ministers are generally politically trained ‘amateurs’, rather than professionals or experts in their particular area of ministerial responsibility.⁴⁵

For a number of reasons, the public service ethic in New Zealand’s public sector has been increasingly eroded and replaced by the ‘public-choice’ model,⁴⁶ which is said not only to reduce the independence of the public service but to lead to its ‘fragmentation’, undermining the co-ordination of policies between the various government agencies and

⁴² Referring to the ‘women’s rights treaty’ or CEDAW (the Convention on the Elimination of all Forms of Discrimination Against Women), which places duties on signatory states ‘to promote women’s equality in all areas of life, from family to workplace to government’ functioning much like a ‘social contract’ between the state and women citizens. Elisabeth Friedman, ‘Women’s Human Rights: The Emergence of a Movement’ in Julie Peters and Andrea Wolper (eds.) *Women’s rights, human rights: international feminist perspectives*. New York, Routledge, 1995: 23.

⁴³ www.justice.govt.nz/ministry, p. 7. Accessed 2/4/06.

⁴⁴ The public service ethic dictates that all employees of government ministries and departments are constitutionally mandated to serve the Crown through the government of the day, but not to ‘serve the interests of the political parties that comprise that government.’ Richard Shaw, ‘Advisors and consultants’ in Miller, (ed.) *New Zealand Government*, op.cit: 147 quoting the State Services Commission, *Working under proportional representation: a reference for the public service*, Wellington, 1995: vii.

⁴⁵ Elisabeth McLeay, ‘Cabinet’, in Miller (ed.) *New Zealand Government*, op.cit: 94. The exceptions have always been the attorney-general and minister of justice who have almost always been lawyers (though not judges) prior to entering Parliament. This has changed somewhat since the introduction of MMP, with appointments to ministerial positions including a greater number of political novices who may be ‘expert’ in a ministerial area.

⁴⁶ The public choice model adopts an economically based rationale for the public sector which promotes reliance on formal contracts between ministers and bureaucrats rather than an implicit ethical obligation. The aim and effect of this model is to ensure ‘officials’ actions are closely aligned with ministers’ preferences... although [in New Zealand] it is still considered improper for a minister to provide advice that is tailored to the minister’s personal preferences’ (Shaw, ‘Advisers’, in Miller (ed.), *ibid*: 148).

ministries.⁴⁷ The dramatic reduction in the number of public servants in the last twenty years to almost a third of the number employed in 1984,⁴⁸ confirms this concerning trend.

Arguably, the public service ethic is particularly important to the justice sector given the complexity of the challenges involved in delivering on the commitment to justice and the critical public interest in seeing these challenges undertaken in a ‘fair and fearless’ manner. The Law Commission, set up in 1985 under a Labour government (*Law Commission Act 1985*) as New Zealand’s ‘first full time organisation...devoted specifically to the task of law reform’,⁴⁹ substantially improved the justice sector’s potential to fulfil its core commitments as a public service provider. The Commission is mandated as an ‘independent, publicly funded, central advisory body established by statute, to undertake the systematic review, reform and development of...law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.’⁵⁰ Since its inception, the Law Commission has facilitated substantial debate and reflection on a range of complex issues, including various key reviews and reports on subjects related to the present case study and thesis.⁵¹ However, the political influence of the Commission has proved somewhat limited to date, encountering ‘major problems’ in securing implementation of its advice, largely in spite of the support of successive ministers of Justice.⁵² It has also been suggested that the Commission’s constitutional role remains ambiguous⁵³ and further, that its advice is likely to be conservative, with commissioners being drawn largely from the judiciary (of retired and seconded judges) who continue to be a less than representative ‘legal and social elite’.⁵⁴

⁴⁷ Ibid: 150.

⁴⁸ In 1984, New Zealand’s public service employed 88,000, by 1999 this figure had dwindled to 30,000, the smallest public service in NZ since World War I (ibid: 152).

⁴⁹ Mulholland, *Introduction*, op.cit: 381.

⁵⁰ www.lawcom.govt.nz Accessed 5/2/02.

⁵¹ For example, the Study Paper on women’s access to justice: *Women’s Access to Legal Services*, NZLC SP1, Wellington 1999; the discussion paper: *Battered Defendants: Victims of Domestic Violence Who Offend*, NZLC PP41, Wellington 1999, and the subsequent report: *Some Criminal Defences with Particular Reference to Battered Defendants*, NZLC R 73, Wellington 2001.

⁵² The Hon. Justice David Baragwanath, NZLC R 63 *Annual Report*, 2000, NZLC

⁵³ According to Mulholland, ‘The constitutional position of the Commission may need to be clarified’ (*Introduction*, op.cit: 382).

⁵⁴ Stockley, ‘Judiciary and Courts’, in Miller (ed.) *New Zealand Government*, op.cit: 68. Stockley says ‘most judges continue to be drawn from the ranks of highly successful lawyers and have, as such, led reasonably competitive, wealthy, and urban lifestyles’. For an extensive analysis of New Zealand’s

The independence of the Commission was also challenged in a recent article claiming that in its 2003 review of the Family Court,⁵⁵ the Commission bowed to political pressure, making recommendations ‘without proper discussion, justification or reference to the text and purpose of the legislation’.⁵⁶ At the same time, a past president of the Commission has suggested that more work needs to be done to counter the general tendency for professionals within the justice system ‘to treat law as our own private preserve.’⁵⁷

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The specific policy review processes and legislative undertakings discussed in the case study, put many of these issues into context and tend to confirm in some part Oakeshott’s claim that the contingency of the political process precludes a systematic ‘steady, unchanging and independent’ commitment to justice, or any other grand ideal. However, the case study does not necessarily confirm his conclusion that this contingency therefore renders ‘justice’ irrelevant. On the contrary, it provokes critical reflection on the need for clearer, more substantive guidance from the justice sector. For the remainder of the chapter, the various key undertakings of the New Zealand justice sector impacting on battered women defendants, over the last twenty years, will be outlined and evaluated in terms of the commitment to ‘political justice’ they represent.

Beginning with the Roper Report in 1987,⁵⁸ which effectively inaugurated a more decisive political commitment to tackling violence in general, and domestic violence in particular,⁵⁹ the discussion tracks various public-political initiatives and reforms

systematic and ongoing discrimination against women’s equal employment within the legal profession in general, and the judiciary in particular, see Gill Gatfield, *Without Prejudice: Women in the Law*. Brooker’s, Wellington, 1996.

⁵⁵ *Dispute Resolution in the Family Court*, NZLC R82, Wellington.

⁵⁶ Wendy Davis, ‘Gender bias, fathers’ rights, domestic violence and the Family Court’, *Butterworths Family Law Journal*, Vol. 4, December 2004, Part 12: 5.

⁵⁷ David Baragwanath, ‘What’s wrong with the law?’ January, 2001, www.lawcom.govt.nz/content/speeches/ : 1-2.

⁵⁸ *The Report of the Ministerial Committee of Inquiry into Violence* (March 1987) was known as ‘The Roper Report’ after Sir Clinton Roper, the retired judge of the High Court who chaired the Committee.

⁵⁹ The feminist magazine *Broadsheet* published a review of the report describing it as ‘the most-liked report the government has yet commissioned’, and stating that ‘a real strength of the report is the emphasis it gives to domestic violence’, Pat Rosier, ‘Tackling Violence’, May 1987: 17.

implemented over the subsequent twenty-year period which have directly and indirectly affected the justice sector's response to cases like *Oakes*. Overall, the historical trajectory enables trends and themes to be identified in this response, to reveal the extent to which the same issues recur, and the sector fails to sustain a decisive and substantive commitment to justice in response to domestic violence.

1987-1995: The lead up to the Domestic Violence Act 1995

Apart from concern at public incidents of violence, the Committee...received significant numbers of submissions urging [it] not to lose sight of a very much more prevalent, much less reported...form of violence, namely domestic violence in all its forms...No one can afford to be complacent about the problem. Violence occurs by acts of commission and omission and we are all responsible.

The Roper Report, 1987⁶⁰

Given that the vast majority of women who kill their abusers first encounter the justice system when they appeal to it for protection against domestic violence, and given that it is ultimately the failure of that system to provide or effectively enforce this protection, which directly contributes to women like *Oakes* 'choosing' to take defensive/aggressive action against their abuser, the measures undertaken at the political level to tackle the problem of domestic violence, and to provide real alternatives for battered women, contribute significantly to the total commitment made by that system to deliver justice to battered women defendants.

In this report of the Ministerial Committee into Violence initiated by the Labour Minister of Justice in April 1986,⁶¹ 'public' and 'private' violence are linked, with both recognised as part of the serious problem of violence of concern to all in society, while the

⁶⁰ *Ministerial Inquiry into Violence*, op.cit: 13-15

⁶¹ The minister at the time was (Sir) Geoffrey Palmer.

prevalence of ‘family violence’ is defined unequivocally as ‘a problem of frightening proportions’⁶² and contrasted with ‘violence by strangers’ seen as a comparatively ‘rare occurrence’.⁶³ Moreover, the report acknowledges the complacency of justice sector agents in regard to family violence, with police being ‘unwilling to identify domestic assaults, as assaults’ indicated by their use of the term ‘domestic disputes’ to describe incidents of family violence, and the Justice Department failing to routinely record statistics for domestic assaults.⁶⁴ Most of the statistics on domestic violence at this time were supplied by Women’s Refuge.⁶⁵ The report also recognises the critical factor in family violence of ‘exaggerated sex role behaviour’ on the part of the ‘dominant adult male family member’, and acknowledges that this generates a family environment in which women are routinely ‘degraded to the level of slaves’.⁶⁶

In total, the report signalled the ‘mainstreaming’ of an issue that had previously been marginalised and dismissed by the majority as not ‘real’ violence; as ‘just a domestic’. As part of this process, those activists campaigning against domestic violence within Women’s Refuge and the wider women’s movement, were publicly branded and dismissed as feminist radicals and extremists; ‘marriage breakers’ and ‘man haters’.⁶⁷ Although the National Collective of Independent Women’s Refuges (NCIWR) had been granted some government funding in 1984 after more than a decade of operating on a purely voluntary basis and due to relentless political lobbying by women activists throughout that period,⁶⁸ this funding was considered by the political right to be

⁶² Ibid: 96.

⁶³ Ibid: 101.

⁶⁴ Ibid: 96-97.

⁶⁵ To reinforce the case for government funding, Refuge commissioned research on the status of family violence in New Zealand and service provision provided by Refuges and other services. This resulted in *A Socio-Economic Assessment of NZ Women's Refuges by Synergy Applied Research* (1983). The Synergy Report provided an important contribution to knowledge about family violence at this time and a basis from which future initiatives and budget bids to government were launched. *Historical development of the pro-arrest policy*. <http://www.courts.govt.nz/pubs/reports/2006/family-violence-pro-arrest-policy-literature-review/index.html> Accessed 6/9/04.

⁶⁶ *Ministerial Inquiry into Violence*, op.cit: 99-101.

⁶⁷ <http://www.womensrefuge.org.nz/index.cfm?objectid=0CFADFAD-1321-AE99-696215B211A0669E>. Accessed 1/4/00

⁶⁸ The first NZ Refuge was set up by women within the community in 1973, based on the models established overseas in Britain and America. Refuge was granted government funding to cover about 26% of its running costs in 1984 which helped establish the collective in 1985 (<http://www.womensrefuge.org.nz/index.cfm?objectid=0CFADFAD-1321-AE99-696215B211A0669E> .)

conditional on Refuge demonstrating a ‘commitment to family reconciliation’ by providing counselling services for *all* family members.⁶⁹ This condition was in many respects incompatible with Refuge’s core commitment to empowering women victims whilst raising public awareness and continuing to campaign against domestic violence at the political level.⁷⁰ This campaigning had been substantially responsible for pushing the National government in 1982 to pass the *Domestic Protection Act*;⁷¹ the country’s first piece of legislation to establish ‘a legal framework for addressing domestic violence’.⁷²

Indeed the Labour coalition government in 2005 paid tribute to Refuge and the wider women’s movement for this and other groundbreaking work in the domestic violence field. According to the then Minister of Women’s Affairs, Ruth Dyson, while ‘governments have played a part’ in facilitating awareness of the problem, the key impetus for reform has come from outside of government, from women working at the grass-roots level who ‘largely put the family violence issue on the agenda’ and were first to provide practical responses ‘working with the Police, the judiciary and others to

Accessed 1/4/00.

⁶⁹ National’s Opposition spokesman on Social Welfare, Venn Young, stated in Parliament that the funding for Refuge, which had been approved by his party the previous year, ‘should [be] reviewed by government... if the original conditions of Government help are not being met’ *Hansard*, 25 September, 1985 reported in the ‘Funding Women’s Refuges Questioned’, *NZ Herald* 26 September, 1985.

⁷⁰ The National Collective of Women’s Refuges (NCIWR) adopted a broad ‘Code of Ethics’, which included a ‘commitment to principles of feminism, women’s empowerment and self-determination’ as well as ‘lesbian visibility, anti-racism, living Te Tiriti o Waitangi, being non-judgmental, collectivism, and sisterhood between Refuges’ (<http://www.womensrefuge.org.nz/index.cfm?objectid=0CFAFADC-1321-AE99-696215B211A0669E>) Accessed 1/4/00). However, not all members agreed with this ‘code’ which they saw as moving Refuge ‘away from its original goal of helping battered wives and their children, [to] becoming a political movement’ (Quoting Doris Church of the Christchurch Battered Women’s Support Group). The West Auckland Refuge also resigned from the collective in protest at the Code, ‘No-men Code Splits Refuge Group’, *NZ Herald*, 25 September, 1985.

⁷¹ The act’s key provisions gave the recently established Family Courts (*Family Courts Act 1980*) the power to grant non-molestation and non-violence orders, to arrest and hold perpetrators for 24 hours without a warrant for breaches of non-violence orders, and to recommend counselling for one or both of the parties involved. The legislation also gave criminal courts jurisdiction to imprison perpetrators (for up to six months) and fine them \$500 for breaches of non-molestation orders. According to a previous principal Family Court judge, the legislation also challenged police as well as judges to change their previous emphasis on conciliation and mediation to focus instead on victims’ safety and perpetrator accountability. Judge P.D. Mahoney, ‘The response to family violence in NZ: The role of the Family Court’, 7 August, 2003 <http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=te-awatea-domestic-violence-centre.asp> Accessed 2/4/07.

⁷² Seuffert, ‘Women in and out of law’, op.cit: 1.

change their beliefs and practices'.⁷³ These activists were also supported by the international women's movement, which was particularly active in the 1980s campaigning for political recognition of women's right to personal security and control of their own bodies.⁷⁴

However, it was the Labour government elected in 1984, and for a second term in 1987, that was particularly crucial in providing a political environment more receptive to debate and reform in the domestic violence field, as reflected in the Roper Report commissioned towards the end of their first term. Considered to have been the first political party and government in New Zealand committed to a 'feminist agenda',⁷⁵ it provided more women MPs and members of the political Executive than ever before,⁷⁶ and established one of the world's first ministries of Women's Affairs (MWA) in 1986.⁷⁷ The MWA has since been recognised internationally for its contributions towards advancing equal rights for women, and specifically for its achievements in the area of domestic violence reform.⁷⁸

Under the leadership of Labour's first woman Minister of Social Welfare, Ann Hercus, Refuge was provided with the political support necessary to organise, in conjunction with Police, the first national conference on domestic violence in 1985. From this, the Family Violence Prevention Coordinating Committee (FVPCC) was established comprising various government agencies and community organisations to be managed by the Department of Social Welfare.⁷⁹ It was from this committee that the 'pro-arrest', or

⁷³ Hon. Ruth Dyson, Minister of Women's Affairs, 4 February, 2005 <http://www.mwa.govt.nz/news-and-pubs/speeches/speeches05/opening-christchurch-womens-refuge> Accessed 3/5/05.

⁷⁴ Wilson, 'Women and Politics', in Miller (ed.), *New Zealand Government*, op.cit: 270.

⁷⁵ Albeit, this was a feminist agenda understood as 'reformist/moderate', rather than radical. See Heather Devere and Jane Scott, 'The Women's Movement', in Miller, *ibid*: 367.

⁷⁶ Between 1933 and 1984 the number of women MPs averaged four (of 80-plus) with a gradual increase from the mid-1970s (John E. Martin, *The House: New Zealand's House of Representatives 1854–2004*, Dunmore Press, Palmerston North, 2004) and a leap from 8 to 12, with the election of the fourth Labour government in 1984. The 1987 government included 14 women MPs.

⁷⁷ The MWA is devoted to providing gender analysis and 'gender-specific' policy advice in consultation with community groups to ensure women's interests are taken into account across all government departments (www.mwa.govt.nz).

⁷⁸ Devere and Scott, 'Women's Movement', in Miller (ed.), *New Zealand Government*, op.cit: 370.

⁷⁹ FVPCC terms of reference were to facilitate and oversee coordination between the various agencies and departments involved towards the development of a culturally sensitive interagency response to family violence. Membership included the Chief Executives of Social Welfare, Education, Health, Manatu Maori, Women's Affairs, Justice, Youth Affairs, Pacific Island Affairs; Commissioner of Police; General Manager

‘mandatory arrest’, policy was adopted by the New Zealand police in 1987 replacing previous policies of ‘non-involvement’ and ‘crisis intervention’; criminalising domestic violence and removing police discretion.⁸⁰ Supported by MPs from various government departments as well as the principal judge of the Family Court, the police adopted the ‘power and control’ model of domestic violence based on the one developed in Duluth, Minnesota.⁸¹ The ‘Power and Control wheel’ incorporates an expanded understanding of domestic violence that includes an emphasis on its core gendered component in ‘male privilege’ and men’s sense of ownership and control over *their* women, which in turn recognises that battering is essentially a calculated campaign of psychological as well as physical intimidation and manipulation exacted by men for the purpose of engendering fear and submission in women.⁸²

The men’s movement against family violence was also a by-product of the ministerial committee, which further influenced the Labour government to part fund what remains today a critical agency in the field: *Te Kupenga Whakaoti Mahi Patunga / the National Network of Stopping Violence Services*. The service runs Family Court approved Stopping Violence Programmes for Men which rely on the Duluth model.⁸³ Also in 1987

ACC; NCIWR; Rape Crisis and Related Groups of Aotearoa; Principal Family Court Judge; Te Kakano o te Whanau; National Men for Non-Violence Network; Runanga Tane; Pacific Women’s Project. The Maori Women’s Welfare League attended in an observer/advisory capacity. The FVPCC was disestablished in 1992 and replaced by the Family Violence Advisory Committee and the Family Violence Unit. *Historical development of the pro-arrest policy in New Zealand* <http://www.justice.govt.nz/pubs/reports/2006/family-violence-pro-arrest-policy-literature-review/chapter-2.html>

⁸⁰ Ibid, citing Eve Buzawa and Carl Buzawa, *Domestic Violence: the Criminal Justice Response*. Third Edition (Thousand Oaks, California, Sage Publications, 2003).

⁸¹ The model was developed by Dr. Ellen Pence (1983) through the Domestic Abuse Intervention Project (DAIP) launched in 1980 with the Duluth Police Department resulting in the implementation of a mandatory arrest policy and an ‘educational curriculum for batterers’. See M. Shepard and E. Pence, 1999, *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond*, Sage Publications Inc. pp. 3-4. Other countries to adopt aspects of this model include Scotland and Germany, *ibid*: 4. New Zealand police officer, Greg Ford, presented a paper to the committee outlining the results of his trip to the US to study the model in operation, and his recommendation that its new ‘philosophy and approach’ be adopted in New Zealand. *Historical development of the pro-arrest policy in New Zealand*, *op.cit*.

⁸² The ‘Power and Control wheel’ also recognises the extent to which society facilitates domestic violence, especially by facilitating ‘male privilege’; the idea and belief in male superiority ‘leading to huge violence against women and children’ with women and children seen as objects or ‘owned possessions’. The model recognises: ‘There are lots of attitudes around that support men in thinking that they are entitled to more rights than women, and that they are in some way superior.’

<http://www.nnsvs.org.nz/whoaaffected/men.aspx> Accessed 23/6/02.

⁸³ *Ibid*.

the Labour government set up the Victims Task Force (VTF) as a government-appointed body administered by the Department of Justice under the *Victims of Offences Act 1987*.⁸⁴ The government was also influenced by the Roper Report in passing this legislation, as the report had conducted a study of *The Victims of Violence*⁸⁵ and received 269 written public submissions on ‘victims’, as well as 1600 ‘newspaper coupons’⁸⁶ and a petition with 2000 signatures in defence of ‘victims’ rights’.⁸⁷ The report concluded: ‘There is no doubt that our criminal justice system is overwhelmingly oriented in favour of the offender’.⁸⁸

Strengthened by a growing body of international research on ‘separation violence’, which highlighted the significantly increased risks to women after separation from a violent partner,⁸⁹ the committee went on to secure funding from the National government (1990) for the most substantial policy initiative to date in the domestic violence area launched in July 1991. Primarily funded by the Department of Justice (Ministry of Justice from 1995) in conjunction with the Department of Social Welfare, the *Hamilton Abuse Intervention Pilot Project* (HAIPP) was a three-year project modeled on the Duluth Abuse Intervention Project (DAIP), aimed at ‘providing an integrated approach to domestic violence’.⁹⁰ Bringing together key agencies including Women’s Refuge, the Police and courts, as well as men’s non-violence groups, HAIPP sought to ‘limit the discretion, and the associated variability in response of different agents within the criminal justice

⁸⁴ See Ruth Busch, Neville Robertson and Hillary Lapsley, ‘The Gap: Battered Women’s Experience of the Justice System in New Zealand’, *CJWL/RFD*, Vol. 8 (1), 1995 pp. 190-222: 190-191.

⁸⁵ *Ministerial Inquiry into Violence*, op.cit: 143-148.

⁸⁶ The report describes the popular ‘phenomenon’ of newspaper coupons, which involved ‘public minded’ citizens calling on readers to fill in a coupon responding to suggestions for tougher penalties for offenders, including the re-introduction of capital punishment. Ibid: 11. The host(s) of the coupon referendum signed off ‘The Wise Man’, ibid: 12.

⁸⁷ Ibid: 143.

⁸⁸ Ibid.

⁸⁹ For example, John Church and Doris Church, *Listen to me please! The Legal Needs of Domestic Violence Victims*, Battered Woman’s Support Group, Christchurch New Zealand, 1981. One Australian study conducted in 1986 found that nearly half of the women killed by their partners had left the relationship or were in the process of leaving when they were killed (Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics Research: 112). For a list of international research in this area, see Elisabeth Schneider, ‘Resistance to Equality’, *University of Pittsburgh Law Review*, Vol. 57, 477: 478-479 fn. 2.

⁹⁰ Neville Robertson, Ruth Busch, Karen Ave and Roma Balzer, *The Hamilton Abuse Intervention Pilot Project: the first three months* Report #1 for the Family Violence Prevention Coordinating Committee. http://www.justice.govt.nz/pubs/reports/1998/directory/part_6.html#F110.

system by introducing a co-ordinated set of policies and priorities for dealing with domestic violence matters' with the aim of providing a more consistent, decisive and effective response to domestic violence.⁹¹

According to Police, the HAIPP project 'provided the basis for changing police strategy in mid-1993 to define family violence as a crime, with an emphasis on prosecution'.⁹² Although a police policy was already in place to treat family violence as a crime prior to HAIPP, 'police sometimes smoothed over situations...dealing with it in a reactive way...Now we make a point of implementing a definite policy' based on the automatic arrest of offenders where there is evidence of a crime.⁹³ Reinforcement for this policy came in a Police campaign launched in 1993 to change police and wider community attitudes from one of dismissal – 'it's just a domestic' – to one of commitment and concern – 'family violence is a crime, call for help'.⁹⁴ HAIPP raised national awareness of family violence and created an environment in which a substantial number (83%) of battered women 'felt safer', with most of the women involved (89%) reporting that the level of violence/abuse they experienced decreased over the two-year survey period.⁹⁵

However in 1995, the National government chose not to extend the project nationwide. The Ministry of Health, which was assigned the responsibility for reporting to the government on HAIPP, considered the project had not succeeded well enough in enforcing attendance at men's education groups, while costing more than other projects, and building a bureaucracy of coordinators rather than service providers.⁹⁶ The project's coordinator, Roma Balzer, was critical of the government's 'lukewarm' response to

⁹¹ Julie Stubbs (ed.) *Women, male violence and the law*. Institute of Criminology, Sydney, 1994: 6.

⁹² D. Telford, 'Hitting Home', *Listener*, August 12, 1995: 25.

⁹³ *ibid*: 28 quoting police Inspector Athol Paul, the Family Violence Co-ordinator for the Hamilton police.

⁹⁴ Jane Prichard, (National Council of Women of New Zealand) 'Violence and Women: Moving the Agenda forward in New Zealand' Jan 4-8, 1998, paper presented for the *Asia-Pacific Watch Meeting* Chandigarh, North India. Also in the same year a review of the Family Court gave explicit recognition to the power dynamics involved in domestic violence, producing the recommendation that mediation practices previously applied in the court not be used in contexts of domestic violence (Boshier, J, Beatson, L, Clark, K, Henshall, M, Priestly, J, and Seymour, F, *A Review of the Family Court: Report for the Principal Family Court Judge* (1993).

⁹⁵ Clare Dominick, Alison Gray and Melissa Weenink, *Women's Experiences of the Hamilton Abuse Intervention Pilot Project (HAIPP)*, Wellington: Ministry of Health, 1995.

⁹⁶ *Ibid*.

HAIPP and its deliberate ‘playing up the project’s shortfalls to cloud the issue, when the overall results are positive’.⁹⁷ In particular, Balzer rejected the government’s claim that the project was not as ‘broadly based’ as the Justice department had expected it to be – namely, in dealing with men and children, not only women.⁹⁸ According to Balzer, due to the complications of the legislation involved, there was a deliberate decision made from the start ‘not to look at child abuse’, while the men’s program HAIPP did run, in hindsight, would have been better ‘handed over’ to another agency to be run separately.⁹⁹ In the end, the HAIPP initiative was abandoned at the political level in search of a ‘value-for-money service that is efficient and effective’.¹⁰⁰ The National party’s Minister of Justice at the time also considered his department was not ‘solely responsibility for this area of public policy’.¹⁰¹ From a more cynical perspective it has been suggested that the National government’s initial support for HAIPP was significantly influenced by the recent spate of deaths of women killed by their partners who had non-molestation orders out against them.¹⁰² These deaths received unprecedented prime time media coverage in 1990 as the feature item on the leading current affairs television programme of the day.¹⁰³

The commissioning of the first major research project on domestic violence and the justice system by the Victims’ Task Force that same year (1990)¹⁰⁴ can also be seen as a reaction to these killings. The central finding of the three hundred page report that resulted from this research, based on twenty ‘detailed case studies’ of battered women whose protection orders had been breached, as well as interviews with agents across the justice sector,¹⁰⁵ exposed the sector’s ‘systemic collusion’ in the perpetuation of domestic

⁹⁷ Quoted in Telford, ‘Hitting Home’, op.cit: 25-26.

⁹⁸ Ibid: 29.

⁹⁹ Ibid.

¹⁰⁰ Ibid: 30 attributed to Sandy Manderson, director of the Crime Prevention Unit.

¹⁰¹ Jenny Chapman, *Interest groups: a case study of the women’s refuge movement in New Zealand*. MA Thesis, Political Studies, University of Auckland, 1997 quoting Hon. Doug Graham: 10.

¹⁰² Ibid: 43. In 1989 alone there were 22 cases of this kind.

¹⁰³ ‘Domestic violence story’, *Holmes TVNZ*, 7 August, 1990.

¹⁰⁴ R. Busch, N. Robertson and H. Lapsley ‘The Gap: Battered Women’s Experience of the Justice System in New Zealand’ *CJWL/RFD*, Vol. 8 (1), 1995 pp. 190-222: 190-191.

¹⁰⁵ Busch, Robertson, Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders*, Hamilton: University of Waikato, 1992. The Domestic Protection Team of the University of Waikato was commissioned by the Task Force chiefly ‘to ensure the implementation’ of the Act, which was in turn the country’s first legislative undertaking committed to ‘making better provisions for the treatment of victims of criminal offences’. The research was at once intended ‘to inform government

violence¹⁰⁶ through attitudes and actions that ‘label [women] as paranoid and vindictive’, while ‘consistently underestimating’ their fears of future violence.¹⁰⁷ The research identified a systemic ‘gap’ between the reality and ‘commonplaceness of women’s terror’, and the justice sector’s ‘minimisation, trivialisation, and victim blaming...so often encountered [by women] seeking protection’.¹⁰⁸ Further, a ‘placatory’ approach to batterers was identified throughout the sector with offenders consistently treated as ‘pathetic victims’ rather than violent aggressors, especially where the woman’s behaviour was seen as ‘assertive’.¹⁰⁹ In the majority of cases, judges were seen to exploit and reinforce gender stereotypes effectively substituting ‘extra-legal criteria, interpolating their own attitudes and beliefs about what is fair and reasonable conduct in a domestic setting rather than applying the law consistently’.¹¹⁰ Overall, the research exposed a justice sector conveying the message that ‘women in the home are more appropriate targets for aggression than “the man in the street”’.¹¹¹

Within the conservative neo-liberal political climate of the day the report was not well received by the National government who moved to censor the critique of the justice sector by removing reference to ‘justice’ in the title, which became: *Protection from Family Violence: A Study of Protection Orders under the Domestic Protection Act 1982*. The analysis of the 21 Family Court cases and the names of the judges involved, as well as the ‘very words used by certain victims to describe their experiences of Family Court hearings and counselling sessions’, were also removed, with other words ‘substituted’ by a Justice Department lawyer.¹¹² The censorship was so severe the authors removed their names from the censored report in protest and published the key findings in the *Canadian Journal of Women and the Law* in 1995. The unabridged ‘nearly full’ version was made available to a restricted audience in New Zealand.¹¹³

about gaps in services for victims’ (ibid: 191). The VTF was disbanded by the National government in 1992.

¹⁰⁶ Busch et al, ‘The Gap’, op.cit: 194.

¹⁰⁷ Ibid: 200, 211.

¹⁰⁸ Ibid: 191.

¹⁰⁹ Ibid: 200-201.

¹¹⁰ Ibid: 211.

¹¹¹ Ibid: 214.

¹¹² Ibid: 218.

¹¹³ Ibid: 191.

In a classic political paradox, the controversy caused by this censorship served to –

...mobilize support for law changes in the area of domestic violence,...[make] judicial accountability a part of everyday conversation...[and] domestic violence a political issue, as the opposition Labour party repeatedly questioned the government as to when our recommendations would be codified.¹¹⁴

As a result, the comprehensive reforms of the *Domestic Protection Act* 1982 that were recommended in the report, were introduced into Parliament in November 1994 through the *Domestic Violence Bill*, which went on to become the *Domestic Violence Act* 1995. However, this was some time after the report had been submitted to the Victims Task Force in 1992.

Arguably, the decisive event leading to the passing of the DVA was the Bristol case, which occurred in early 1994. In this case, a man named Alan Bristol, with a history of wife abuse, who had been described in the Family Court as ‘a devoted father [and] a well liked man with a happy disposition’,¹¹⁵ and granted custody of his three young children, gassed himself and his children to death. It was this event that seemed to ‘galvanize the New Zealand public’ to put pressure on the government to act,¹¹⁶ while the mother, Christine Bristol, called for a Justice Department review, which resulted in a Ministerial Inquiry (Bristol Inquiry) led by the Chief Justice. Although concluding in June that the deaths ‘were not preventable’, the inquiry produced the key recommendation for ‘a statutory presumption that would deny custody or unsupervised access to perpetrators of either spousal or child violence’.¹¹⁷ When interviewed on National Radio about the Inquiry, the National Minister of Justice said: ‘I think we have reached the stage where society must take drastic action to prevent violence in domestic circumstances; to that

¹¹⁴ Ibid: 219.

¹¹⁵ Chapman, *Interest groups*, op.cit: 100.

¹¹⁶ Busch et al, ‘The Gap’, op.cit: 219.

¹¹⁷ Ibid.

extent I think the Bristol case has activated [us]'.¹¹⁸ Of course, 1994 was also the year of the *Oakes* trial, which no doubt added impetus to this debate and reform process.

Apart from the DVA, several key policy initiatives were launched in the National government's second and third terms. These included the groundbreaking nationwide study of men's attitudes towards domestic violence funded by the Department of Justice,¹¹⁹ and the government's public awareness campaign launched in March with the help of corporate sponsors aimed at 'raising awareness [of domestic violence] and to encourage reporting [and] deter offenders'.¹²⁰ The model was considered so innovative and effective it was 'applauded with international awards and...contributed to campaigns in other countries'.¹²¹ In December, the Department of Social Welfare reported back on similarly groundbreaking research into the 'economic cost' of family violence it had conducted in conjunction with an international accounting firm.¹²² This study produced further evidence of the seriousness of the problem of family violence in New Zealand¹²³ and proved very effective in 'budging' the (National) government of the day to commit some 'serious funding' to policies aimed at addressing family violence.¹²⁴

These initiatives were undertaken in an international climate of renewed emphasis on 'women's human rights', providing a heightened focus on politicising 'violence against women' by positioning key issues like domestic violence within a framework of

¹¹⁸ Doug Graham, *Nine to Noon*, RNZ, April 12, 1994, quoted in Chapman, *Interest groups*, op.cit: 101.

¹¹⁹ J. Leibrich, J. Paulin and R. Ransom, *Hitting Home: men speak about abuse of women partners*, Department of Justice, 1995. Surveying 2000 men randomly selected from across the country, this study found rates of abuse were twice as high as those reported by women; 21% of men admitted physically abusing their female partner in the past year, 53% admitted psychologically abusing their partner recently, 35% said they had committed at least one act of physical abuse and 62% admitted at least one act of psychological abuse against a woman partner in their life time. 25% condoned some sort of physical abuse and 56% only 'moderately disapproved' of a man hitting a woman, while the overall cause of domestic violence was identified in men's 'sense of powerlessness and a wish to regain power...when social expectations about 'what it is to be a man' cannot be met'. For a summary of the report see *Criminal Justice Quarterly Special Edition*.

¹²⁰ Prichard, 'Violence and Women', op.cit: 3. This campaign included three television documentaries, two music videos; sixteen television advertisements and the establishment of a national toll-free Helpline.

¹²¹ Ibid.

¹²² Susan Snively, Coopers and Lybrand, *The New Zealand Economic Cost of Family Violence*, December 1994.

¹²³ Calculated estimates put the costs as high as \$5.302 billion dollars annually.

¹²⁴ Brenda Pilott, *NZ Herald*, 26 August, 1999.

‘women’s rights as human rights’. At the 1993 UN World Conference on Human Rights, these issues ‘seized’ the focus of the conference, which then ‘moved very quickly’ into the national and regional levels ‘at a pace that far exceeded that of any previous movement on behalf of women’.¹²⁵ In 1995, the Fourth UN Conference on Women hosted in Beijing produced a *Platform for Action* that established ‘violence against women’ as ‘the most important international women’s issue, and the most dynamic new international human rights concern’.¹²⁶ The UN Secretary-General emphasised the point declaring that ‘Women’s issues are global and universal. Deeply entrenched attitudes and practices perpetuate inequality and discrimination against women, in public and private life, on a daily basis, in all parts of the world’.¹²⁷

All of these influences impacted in varying degrees on the passing and implementation of the *Domestic Violence Act* which came into force in July 1996 signalling – not least of all in the change of title from ‘domestic protection’ to ‘domestic violence’ – a more substantive and decisive political commitment to dealing with the considerable challenges posed by domestic violence in New Zealand.

1995-2000: The DVA and beyond – from National to Labour¹²⁸

The Domestic Violence Act 1995...is probably the world’s most innovative piece of legislation in this field.

Jane Prichard, National Council of Women, 1998¹²⁹

¹²⁵ Elisabeth Friedman, ‘Women’s Human rights: The Emergence of a Movement’, in Julie Peters and Andrea Wolper (eds), *Women’s Rights and Human Rights: International feminist perspectives*. New York, Routledge, 1995: 30-31.

¹²⁶ Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics*, 1998, Cornell University Press: 166.

¹²⁷ United Nations, 1996: 2, quoted in ‘Women’s access to legal services’, op.cit: 10.

¹²⁸ The National party was in government between 1990 and 1999. In 1996 National won a slightly higher percentage of the vote than Labour but managed to put the country’s first MMP government together as a centre-right coalition government. The Labour-led coalition was elected to govern in 1999 (Miller, ‘Labour’, *New Zealand Government*, op.cit: 228).

¹²⁹ ‘Violence and Women’, op.cit: 2.

The DVA¹³⁰ was drafted after an ‘extensive round of consultation’ with women’s groups, including the NCIWR working closely with the Ministry of Women’s Affairs.¹³¹ Section five of the Act establishes a fundamental commitment to ‘recognising that domestic violence in all its forms is unacceptable behaviour’, a statement described by the Family Law Service (FLS) as an ‘all-embracing proposition [that] leaves no room to argue that any form of domestic violence is morally defensible’,¹³² and challenging directly the political privatisation and trivialisation of domestic violence in the past.¹³³ The Act establishes a legislative commitment to reduce and prevent violence in domestic relationships by providing ‘more effective sanctions and enforcement’ for breaches of protection orders including mandating courts to impose compulsory attendance at stopping violence programmes.¹³⁴ There is a ‘deliberate and significant’ lowering of the threshold for granting ‘without notice’ protection orders¹³⁵ to victims to ensure courts err on the side of providing more, rather than less protection from as early a point in the process as possible.¹³⁶ The Act recognises the heightened risks to victims associated with having to wait for protection, given that an application for protection ‘directly challenges the abuser’s control’, which research has shown often provokes the abuser to try to ‘reassert his authority’.¹³⁷ To address this issue, section five of the Act provides that ‘access to the Court [is] as speedy, inexpensive, and simple as is consistent with justice’.¹³⁸

¹³⁰ The Domestic Violence Act 1995 came into force 1 July 1996.

¹³¹ *Status of Women in New Zealand*, MOWA, Wellington, 1998: 10.

¹³² Object of the Domestic Violence Act, LexisNexis <http://www.lexisnexis.co.nz>

¹³³ Ibid. The first ministerial evaluation of the DVA acknowledged New Zealand has ‘traditionally regarded [domestic violence] as a private matter’. H. Barwick, A. Gray, R. Macky, (2000) *Domestic Violence Act 1995: Process Evaluation*, Ministry of Justice: Wellington, drawn from the Family Law Service, No. 37, 1997.

¹³⁴ DVA s5(2) e) and d).

¹³⁵ Ibid: s13. ‘Without notice’ protection orders mean that protection is provided immediately rather than the recipient having to wait for the perpetrator to be physically served with the order, as Gay Oakes had to on numerous occasions, more often than not, without success.

¹³⁶ Wendy Davis, “Gender bias, fathers’ rights, domestic violence and the family Court” in *Family Law Journal* Vol 4, Dec 2004 Part 12: 4 citing DVA s13 (1).

¹³⁷ Sheryl Hann, *The Implementation of the Domestic Violence Act 1995: A Report from the National Collective of Independent Women’s Refuges*, August, 2004: 8 citing Carlin, 1998; Hart, 1996; Liss and Stahly, 1993. Fear of retaliation from the abuser is one of the most frequently cited reasons why women applicants who are made to wait for court protection, withdraw their application. Justice Ministry statistics in the year 2000, showed that more than half of the women whose applications were put ‘on notice’ withdrew. *Process Evaluation*, 2000, p. 56 cited in Hann, *ibid*.

¹³⁸ DVA s5 (2)b.

The new Act defines ‘domestic relationship’ much more inclusively than in the previous Act,¹³⁹ and broadens ‘domestic violence’ to include psychological, sexual and emotional abuse.¹⁴⁰ This broadening acknowledges the extensive body of research confirming that domestic abuse is a distinct and serious form of violence, and imposes on judges a requirement to ‘adopt a more contextualised approach to domestic violence ...to take into account the perception of the applicant about the nature and seriousness of [the] violence and its effects on him or her when deciding whether to grant a protection order’.¹⁴¹ It also significantly recognises the psychological harm done to children who witness/hear violence against a parent or close family member, and so, recognises the need to protect children from those who perpetrate such violence and abuse.¹⁴² This provision is reinforced in the 1995 amendment to the Guardianship Act 1968,¹⁴³ which introduces a ‘rebuttable presumption against a violent parent having custody of or unsupervised access to his or her children unless the court could be satisfied of their safety’, as recommended by the Bristol Inquiry.¹⁴⁴ Overall, and ‘above all’, the DVA is intended to ‘significantly’ reduce judicial discretion by requiring judges to take a consistently hard-line approach against domestic violence, and to err on the side of protecting its victims.¹⁴⁵

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¹³⁹ Under ss 4 and 13(1) and (2) of the Domestic Protection Act 1982, only married or previously married or de facto couples living together ‘in the nature of marriage’ could apply for protection. Under the new act (s4), all persons including same-sex couples and members of extended family and whanau ‘living in a close personal relationship’, can apply for protection.

¹⁴⁰ s3(2)c. This definition ‘closely resembles’ the definition of violence provided in the Declaration on the Elimination of Violence Against Women. *Status of Women in New Zealand*, 1996, op.cit: 10.

¹⁴¹ DVA ss 3(4) and 14(5). See Ruth Busch and Neville Robertson, ‘The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act’, *New Zealand Universities Law Review*, Vol. 17, December 1997 p. 337: 338.

¹⁴² DVA s3 (3).

¹⁴³ s16B (4), now the *Care of Children Act 2004*.

¹⁴⁴ Cited in Busch and Robertson, ‘The Gap goes on’, op.cit: 339. Under the previous Act, judges frequently ruled that ‘A parent’s performance as a parent is not to be judged by that parent’s behaviour to a spouse...’. The ruling of the Family Court judge in *N. v. N.* (1986) *Family Reports of New Zealand* 534 at 537 cited in Busch (et al), ‘The Gap’, op.cit: 206-207.

¹⁴⁵ Neville Robertson, *Reforming Intuition Responses to Violence Against Women*. Unpublished PhD thesis, Waikato University, Hamilton, 1999, quoted in Hann, *Implementation*, op.cit: 3.

The first five year period of implementation of the DVA began well with ‘overwhelming support’ for the Act as ‘a thorough and progressive’ piece of legislation,¹⁴⁶ identified across the justice sector. The National government further enacted ‘many supporting initiatives’, such as training seminars in domestic violence for agents across the sector.¹⁴⁷ In 1996, the government approved the Law Commission’s four-year long study on ‘Women’s Access to Justice’,¹⁴⁸ with researchers given a mandate to identify ‘principles and processes to be followed by policy makers and lawmakers...which will promote the just treatment of women’ in response to the criticisms of the law’s ‘fundamental structural bias’ in favour of (white, able-bodied, heterosexual) men.¹⁴⁹ The study also provided a context in which to reflect on the sector’s failed commitment to battered women, identifying ‘family/domestic relationships’ and ‘violence against women’ as two of the three ‘problem areas’ to be given ‘special focus’.¹⁵⁰ In the preface to the study, Justice Baragwanath highlights ‘the repeated failures of the common law to recognise the effect of physical and emotional abuse’ and describes these failures as particularly ‘striking and deeply troubling’.¹⁵¹

The study was undertaken in part fulfilment of New Zealand’s commitments under CEDAW,¹⁵² in recognition of the ‘comparatively little gender-specific research and writing on the justice system’ conducted in New Zealand,¹⁵³ and in response to the survey of New Zealand judges in which most agreed that ‘access to justice [in New Zealand] is really access to a male paradigm’.¹⁵⁴ However, in spite of this comprehensive mandate for the study to be focused on obstacles to justice for *women*, as compared with men, arguably the final emphasis of the study was shifted to focus on the ‘distinct’ needs and concerns of Maori women under the Treaty of Waitangi. The study resulted in a full report produced on Maori women’s access to justice: *Justice: The Experiences of Maori*

¹⁴⁶ Hann, *Implementation of the DVA*, op.cit: 4.

¹⁴⁷ Ibid.

¹⁴⁸ *Women’s Access to Legal Services*, NZLC SP 1, op.cit.

¹⁴⁹ Ibid: 3.

¹⁵⁰ Ibid: 163.

¹⁵¹ Ibid: xv.

¹⁵² Ibid: 7.

¹⁵³ Ibid: 21.

¹⁵⁴ Ibid: 173. Citing the results of the May 1997 Gender Equity Seminar for all New Zealand judges.

Women: Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e pa ana ki tenei,¹⁵⁵ with the wider project presented as a study or discussion paper, rather than a report, and was titled: *Women's Access to Legal Services*,¹⁵⁶ not justice.

A *Women's Safety Survey*¹⁵⁷ was conducted in 1996 as part of the first *National Survey of Crime Victims*.¹⁵⁸ This was intended to provide an alternative to police statistics on the extent of domestic violence against women, accepting that police 'traditionally...underestimate the extent of [domestic] violence'.¹⁵⁹ The survey found that almost one quarter (24 per cent) of women with recent partners 'reported that they had been afraid that their partner might kill them'.¹⁶⁰

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The Labour-led government elected in 1999 delivered the country's first elected woman Prime Minister, an Executive cabinet comprising a record (before or since) 42 per cent women up from 13 per cent under the National-led coalition, and one of the country's most outspoken advocates for feminist reform in the office of Associate Minister of

¹⁵⁵, NZLC R 53, Wellington, 1999. The specific commitment of the report was to respond to the concerns of the 900 Maori women consulted about the justice sector's 'cultural disregard' of Maori values (ibid: 1-7).

¹⁵⁶ See 'Current Policy Issues for Women: Women's Access to Justice Project: The Law Commission', *Women's Studies Journal*, 11: 1-2, August, 1995 for an overview of the original project's commitment to justice for women. For a useful, fairly current discussion of the particularly complex challenges of reconciling the commitment to justice for women and the commitment to justice for indigenous peoples and racial minorities, see Margaret Wilson's speech at a 2001 conference in Australia, highlighting the challenge facing New Zealand in trying to maintain a commitment to 'gender justice' while acknowledging and embracing Maori customary values. According to Wilson, the 'renewed...political will to address the foundations of racial discrimination' in New Zealand that has occurred in conjunction with the political rejection of substantive feminist principles, has undermined the commitment to justice for women, even to the point of providing a race based justification for violence against women. The key for Wilson is for the community and government to recognise the complexity of the territory to navigate when building a diverse, multi-cultural, and substantively just society. 'Gender, race and identity: The key conflicts, issues and challenges for the future' 19 August, 2001, *Brisbane Powerhouse*, Lamington, New Farm, Brisbane.

¹⁵⁷ Allison Morris, Victimisation Survey Committee, Wellington, 1997.

¹⁵⁸ Warren Young, Allison Morris, Neil Cameron, Stephen Haslett, *New Zealand Nation Survey of Crime Victims*, Victimisation Survey Committee, Wellington, 1997.

¹⁵⁹ M. Connolly (ed.), *Violence in Society: NZ Perspectives*, Te Awatea Press, Christchurch, NZ, 2004: 67.

¹⁶⁰ <http://www.justice.govt.nz/pubs/reports/1996/victims/Default.htm>

Justice, Margaret Wilson.¹⁶¹ A key ‘manifesto commitment’ of the Labour party was ‘to review sentencing and parole laws...[to ensure] sentences better fit the nature of the crime and offender’.¹⁶² This review was to deliver ‘tougher sentences’ for the worst offenders, and ‘more lenient’ sentences for cases involving mitigating circumstances, such as ‘battered spouses or mercy killings’.¹⁶³ The strength and focus of this commitment was arguably tempered by the modest nature of Labour’s electoral victory¹⁶⁴ and a public-political mood intent upon ‘getting tough’ on violent crime, more than addressing substantive injustices in the criminal justice system. Indeed, New Zealand in the 1990s, like all Western countries, experienced a ‘resurgence of retributivism in penal philosophy and practice’,¹⁶⁵ which was reflected in the National government’s Degrees of Murder Bill,¹⁶⁶ and the citizens’ initiated referendum¹⁶⁷ held in conjunction with the 1999 general election. The referendum, which asked: ‘Should there be reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum sentences and hard labour for all serious violent offences?’,¹⁶⁸ gained 92 percent support. Even as a non-binding referendum,¹⁶⁹ its

¹⁶¹ Margaret Wilson was the first woman in New Zealand to hold a Justice portfolio and the office of Attorney-general.

¹⁶² Hon. Phil Goff, Labour Minister of Justice, *Hansard*, 14 August, 2001.

¹⁶³ Hon. Margaret Wilson, “Degrees of Murder Bill: Consideration of Report of Law and Order Committee”, *Hansard*, 17 Oct 2001.

¹⁶⁴ Labour secured just 38.7 percent of the party vote. See Miller, 2001: 237.

¹⁶⁵ Jane Ritchie and James Ritchie (et al), *Overcoming Violence in Aotearoa New Zealand*. A contribution to the World Council of Churches Decade to Overcome Violence 2001-2010, August 2002: 83.

¹⁶⁶ This Bill was introduced in Parliament in 1996. It establishes the crime of murder in the first degree as culpable homicide committed ‘in a particularly sadistic, heinous, malicious or inhuman manner’ to be punished by a mandatory life sentence of imprisonment for the rest of the offender’s natural life (Outlined in *Battered Defendants* NZLC PP 41, op.cit: 46-47).

¹⁶⁷ See Helena Catt, ‘Citizens’ Initiated Referenda’ in Miller, *New Zealand Government*, op.cit, on the role of CIR in the NZ political system.

¹⁶⁸ Catt, *ibid*: 386. Known as ‘the Wither’s referendum’, the referendum was based on the petition Norm Withers led to collect support for a referendum on tougher penalties for violent offenders and compensation for victims following a violent attack on his mother by a paroled offender.

www.laworderreferendum.org.nz The victims’ rights movement in New Zealand was particularly active in the late 1990s and early 2000s. A spokesperson for the victims rights advocacy group VOICE (Victims of Invasive Crime) expressed a key sentiment of the movement: ‘The country doesn’t need flaky attitudes to offenders. It needs more police with more resources [and] zero tolerance to crime...’ (M. Revington, ‘Revenge’, *NZ Listener*, March, 2001: 19 quoting Greg Stenbeck). The influence of these sentiments has been somewhat tempered, especially in relation to youth justice, by commitments to ‘restorative justice’ (a Christian inspired response to crime that is anti-retributive in ‘forswearing lethal violence...renouncing revenge...to embrace [instead]...the principles of peacemaking justice’ and advocate community based, ‘relational [and]...collaborative’ strategies. See Ritchie (et al), *Overcoming Violence*, op.cit: 81-84. New Zealand is recognised as a world leader in restorative justice programmes. See J.M. McDonald and D.B. Moore ‘Community Conferencing as a Special Case of Conflict Transformation’ in H Strang and J.

political influence over the ‘criminal justice’ debate was assured by this emphatic support. In addition, the Labour government recognised the electorate’s general ‘weariness of radical restructuring’,¹⁷⁰ after more than a decade of large scale social and economic reforms, and promised a more ‘pragmatic’ approach to governing and reform in general.¹⁷¹

It was in this somewhat unfavourable political environment that the Law Commission review into criminal defences and sentencing for ‘battered defendants’ was approved by the Labour Minister of Justice in 1999. The ‘terms of reference’ for the project were:

- (1) [to] examine how the existing New Zealand law applies to those who commit criminal acts in circumstances where they are victims of domestic violence,
- (2) [to] consider developments and proposals in other jurisdictions [and]
- (3) [to] make proposals for reform, if appropriate.¹⁷²

This review project, which substantially shaped the 2002 reforms of the criminal law, provides a useful case study of the ‘practical’ challenges involved in attempting to address the obstacles to justice for battered women defendants at the political level – even when there is considerable political will to do so on the part of the government.

Braithwaite (eds.) *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge, 2001: 131.

¹⁶⁹ Helena Catt, ‘Citizens’ Initiated Referenda’, in Miller (ed.) *New Zealand Government* op.cit: 389.

¹⁷⁰ *NZ Parliamentary Debates*, 21 December, 1999, cited in Miller, ‘Labour’, op.cit: 237.

¹⁷¹ *Ibid.*

¹⁷² *Battered Defendants*, NZLC PP 41, op.cit: 1-2.

2000-2007: From sentencing discretion to ‘the cutting edge’- domestic violence reform into the 21st Century

Our approach throughout...is that domestic violence does not justify or excuse retaliatory killing or wounding...Generally, the law does not allow victims of violence to take the law into their own hands. In this respect, victims of domestic violence are no different. But the law recognises that there are extraordinary situations where retaliatory violence may be justified or excused.

New Zealand Law Commission, 2000¹⁷³

The opening sentence of the Law Commission’s discussion paper on ‘battered defendants’, reads: ‘DOMESTIC VIOLENCE IS A MAJOR SOCIAL PROBLEM in New Zealand’.¹⁷⁴ The highlighted text¹⁷⁵ serves to establish the wider framework and political purpose influencing the discussion and review undertaken beyond issues relating to the criminal law and sentencing. Specifically, the project is undertaken

in response to...increasing criticism that battering relationships have not been well understood by the community or the legal profession...[and more specifically] that some existing legal defences have not been available to some defendants who claim that their offending arose out of their situation as battered women.¹⁷⁶

From this critical premise, the project is launched as an ‘undertaking...to look at how the law applies to those people, whether male or female, who commit criminal offences as a

¹⁷³ Ibid: 3.

¹⁷⁴ Ibid: 1.

¹⁷⁵ Although the Commission deploys the practice of capitalizing the first few words of the opening sentence to each chapter, the choice to open with this statement suggests an intention to add emphasis to the sentiment expressed therein.

¹⁷⁶ Ibid: 1.

reaction to domestic violence inflicted on them by their partner.¹⁷⁷ Given its stated commitment to address misunderstandings surrounding ‘the major social problem’ of domestic violence and respond to concerns that the criminal law is failing battered *women*, as well as the prevailing research establishing the extent to which ‘the substantive law [fails to] address the abusive context in which women, as opposed to men, commit criminal acts’,¹⁷⁸ this ‘gender neutral’ framing introduces a significant evasiveness and ambiguity into the foundations of the project.¹⁷⁹ A partial explanation as to why the clarity and substance of the project might be sacrificed in this way is provided in the subsequent report which begins by reinforcing the project’s commitment to ‘gender neutrality’, stating that: ‘The approach throughout has been gender neutral’.¹⁸⁰ It also includes a lengthy discussion on ‘Battered heterosexual men, gay men and lesbians’,¹⁸¹ intended to address criticisms of ‘our failure to deal with domestic violence perpetrated by women on men and domestic violence in same-sex relationships’.¹⁸²

This framing demonstrates the extent to which the project’s authors were aware of the political climate of the day, which did not favour a review of the law with ‘particular reference to battered *women* defendants’, and recognised that whatever language was used to frame the project, the inevitable focus on women victims of domestic violence, as the paradigmatic ‘battered defendants’, would be controversial in the eyes of some members of the community.

Having posed several questions in the discussion paper with reference to international research and debate on similar subjects, along with New Zealand case law, research and

¹⁷⁷ Ibid.

¹⁷⁸ Elisabeth McDonald, ‘Defending Abused Women: Beginning a Critique of New Zealand Criminal Law’, VUWLR Vol. 27 (4) December 1997: 673. McDonald was one of two researchers (with Karen Belt) responsible for the research and writing for the Law Commission’s discussion paper on ‘battered defendants’ (*Battered defendants*, op.cit: vii).

¹⁷⁹ Leading scholar in this area of law, Elisabeth Schneider, has emphasised the critical importance for advocates and reformers in this ‘fundamentally misunderstood’ area of debate to be clear about the need to expose the ‘gender-bias in the concept of self-defense, and in the judicial application of the law’ as this bias ‘necessarily leads’ to the various other obstacles to justice in the formal adjudication of cases like *Oakes*. ‘Resistance to Equality’, *University of Pittsburgh Law Review*, 1996 Vol. 57 pp. 477-524: 487-488.

¹⁸⁰ *Some Criminal Defences*, NZLC R 73, op.cit: x.

¹⁸¹ Ibid: Appendix A: 79-86.

¹⁸² Ibid: x.

analysis,¹⁸³ the Commission called for public submissions. Forty submissions were received from individuals and groups as well as government departments. These included the NCIWR, the Ministry of Women’s Affairs, individual victims of domestic violence, the Chief Justice, Dame Sian Elias, on behalf of the judges of the High Court, along with other members of the legal profession and academic community, as well as representatives from a number of church-allied groups, women’s groups, and men’s groups.¹⁸⁴ Submitters were given a total of twenty-three questions on eleven subjects, with provocation and ‘sentencing for murder’ allocated the most attention.¹⁸⁵

In each case the Commission presents the proposals for reform it considers most relevant to the discussion, but refrains from expressing ‘a preference for any particular proposal’ other than to say, ‘we would prefer to avoid using the term BWS and instead call it “expert evidence on domestic violence”’.¹⁸⁶ The questions included: ‘Should it be possible for a defendant to be acquitted on the basis that he or she acted in self-defence where the danger sought to be avoided was inevitable but not imminent?’¹⁸⁷ and ‘Should the defence of provocation be abolished: (a) if the mandatory life sentence for murder is replaced with a sentencing discretion, [and] (b) if the mandatory life sentence is retained?’¹⁸⁸

Four pages of sixty-seven are devoted to discussing proposals for a new defence for battered defendants, which covers three proposals in total. These defences are distinguished from the other defences considered because none ‘are currently defences in any jurisdiction’, and all are targeted defences ‘aimed specifically at the use of force by

¹⁸³ The authors acknowledged their ‘extensive reliance on the work of others’, in particular the work of the Criminal Law Reform Committee, the Crimes Consultative Committee and the New South Wales Law Reform Commission (*Battered defendants*, NZLC PP 41, op.cit: 3).

¹⁸⁴ A full list of submitters is included in Appendix B, *Some Criminal Defences*, NZLC R 73, op.cit: 87-88.

¹⁸⁵ This assessment is based on the number of pages allotted which was significantly higher for these two subjects compared with the others. The other subjects each allocated a chapter were BWS, Self-defence; Excessive self-defence; A new defence for battered defendants; Diminished responsibility; Duress; Compulsion; Necessity, as well as an Appendix: ‘Homicidal heirs and battered defendants’. See ‘Summary of Contents’ *Battered defendants*, NZLC PP 41.

¹⁸⁶ *Ibid*: 3-9.

¹⁸⁷ *Ibid*: 17, question 2.

¹⁸⁸ *Ibid*: 32, question 6.

those in abusive or tyrannical relationships’,¹⁸⁹ whereas the other proposed defences have a more general application. The discussion on these ‘new’ defences includes a warning note for the public to keep in mind when considering the only gender-specific defence included,¹⁹⁰ that ‘it is not invariably the case that domestic violence is perpetrated by men against women...male children may be subject to domestic violence’, as are some men (and women) ‘in homosexual relations’.¹⁹¹ The proposed full defence of Tyrannicide, described elsewhere as a ‘remarkable contribution’ to the debate,¹⁹² is briefly discussed. Described as ‘a very different defence’,¹⁹³ the Commission raises the concern that ‘it does not set out with precision what level of tyranny and danger is required to justify killing the tyrant’,¹⁹⁴ while citing the concern raised by one submitter that ‘tyranny’ does not amount to ‘a measurable threat to life and health’ sufficient to justify killing.¹⁹⁵ In general, the Commission gives emphasis to submitters’ concerns that the special defences, such as Tyrannicide, ‘run the risk of introducing uncertain and unintended consequences into the criminal law’; are ‘ad hoc and unfair’; and because women ‘constitute the majority of battered defendants’, might suggest to some that women were getting ‘special treatment’. The ‘strong preference’ among submitters for a ‘gender-neutral’ defence, is also noted in the report.¹⁹⁶

Overall, the report produced from the discussion paper suggests a further shift of emphasis away from the substantive issues of injustice in the legal adjudication of cases like *Oakes*. This shift is signalled in the title which excludes the discussion paper’s reference to ‘domestic violence’ and its ‘victims’, and replaces it with an emphasis on ‘some criminal defences’, with ‘battered defendants’ becoming a ‘particular’ – no longer

¹⁸⁹ Ibid: 22.

¹⁹⁰ New Zealander, Suzanne Beri proposes her idea for a partial defence of self-preservation in the *Australian Feminist Law Journal*: ‘Justice for Women Who Kill: A New Way?’, (1997) 8 *Aust Fem LJ*.

¹⁹¹ *Battered defendants*, NZLC PP 41, op.cit: 23.

¹⁹² David Richards (ed.), ‘Introduction’ in ‘Symposium: Self-defense and relations of domination: Moral and legal perspectives on battered women who kill’, *University of Pittsburgh Law Review*, Vol 57, Spring 1996, Issue 3, pp. 457-824: 470. This symposium of more than 600 pages provides various substantive proposals for reform with contributions by more than ten of the leading scholars working in this field.

¹⁹³ *Battered defendants*, NZLC PP 41, op.cit: 24.

¹⁹⁴ Ibid: 25, referring to the proposal outlined by Jane Maslow Cohen in ‘Regimes of Private Tyranny’ in ‘Symposium’, op.cit, pp. 809-818. This and other substantive proposals for criminal law reform impacting on battered defendants will be discussed in depth in Part II of the thesis.

¹⁹⁵ *Some Criminal Defences*, op.cit: 29.

¹⁹⁶ Ibid.

the exclusive – referent. It is also signalled in the comparatively scant attention given the special defences for battered defendants, including the only defence proposed to provide ‘an acknowledgment of the seriousness of male abuse of women’ and to establish ‘a necessary distinction between killing in response to a threat to esteem, power, control and possession...and killing arising from...a history of prolonged abuse and fear of future abuse.’¹⁹⁷

Having briefly considered submissions on the ‘special’ defences, the report rejected all three proposals, citing the approval of the majority of submitters.¹⁹⁸ Preference instead is given to changing the interpretation of the general requirement of reasonableness in self-defence ‘so that it can incorporate the use of force in self-defence against violence that may not be imminent but which is necessary to save life or limb’.¹⁹⁹ The report adds that any difficulties with this reinterpretation of the law, given its ‘historical background’, could be ‘overcome by the calling of relevant evidence, judicial directions, and the reforms we propose’.²⁰⁰ The Commission also recommends, in agreement with ‘a large majority of submitters’, that ‘a new subsection be inserted in section 48’ to the effect that in a jury trial, where there is a ‘reasonable possibility’ that a defendant intended to act defensively, ‘the question of whether the force used was reasonable is always a question for the jury’, rather than be decided by the judge.²⁰¹

Submissions on BWS were in ‘strong support’ for the Commission’s stated preference to remove all reference to the word ‘syndrome’ as it ‘implies that battered women suffer from a condition of mental disability’.²⁰² There is also ‘general agreement’ that the theory

¹⁹⁷ These are aspects critical to Suzanne Beri’s gender-specific proposal of self-preservation outlined in ‘Justice for women’, op.cit: 124 quoted in McDonald, ‘Defending abused women’, op.cit: 689-690.

¹⁹⁸ Ibid: 28.

¹⁹⁹ Ibid: 29. The report recommends an amendment to section 48 of the Crimes Act 1961 ‘to make it clear’ that there can be cases in which ‘the use of force is reasonable where the danger is not imminent but is inevitable’, p.12.

²⁰⁰ Ibid: 29-30.

²⁰¹ Ibid: 15. The majority of submissions favoured allowing self-defence where there is an ‘inevitable’, rather than ‘imminent’, danger of an attack, reasoning that the focus on imminence ‘inclines the court to look for a one-off attack and to measure the use of force in relation to that attack’, which misrepresents domestic violence scenarios as ‘a series of discrete acts of physical violence between which the woman is not being abused and is free to leave’, p. 11.

²⁰² Ibid: 3.

described by Walker ‘did not adequately or comprehensively describe the nature of battering relationships or the effects of battering’.²⁰³ In conclusion, the Commission recommends that all reference to BWS be ‘dropped’ and replaced with ‘gender-neutral’ terminology referring to ‘the nature and dynamics of battering relationships and the effects of battering’.²⁰⁴

The emphasis of the project is given to reviewing sentencing for murder in general, and the mandatory life sentence in particular. The Commission recommends in favour of replacing the mandatory life sentence for murder with a ‘sentencing discretion’ to allow a sentence less than ten years in ‘strongly mitigating’ circumstances,²⁰⁵ including domestic violence ‘at the higher end of the scale’.²⁰⁶ However, this discretion is to be limited by a ‘strong presumption’ in favour of a life sentence for murder in recognition that ‘this is a sensitive area where a complete discretion may be less acceptable to the public than a limited discretion’, and in some cases where there are mitigating factors; there may be ‘countervailing reasons’ and ‘aggravating factors’ that ‘would make a life sentence appropriate’.²⁰⁷ These recommendations are considered to be in line with the sentencing reform announced by the government in its briefing paper presented to Parliament around this time.²⁰⁸

Considerable attention is also given to provocation, which the Commission ends up recommending be abolished.²⁰⁹ With reference to submissions made in support of this recommendation, the Commission lists five main reasons; the fifth being that ‘provocation is gender-biased’.²¹⁰ Other reasons include that the defence ‘confuses people’, while existing as ‘an historical anomaly...unnecessary once the mandatory life

²⁰³ Ibid: 4.

²⁰⁴ Ibid: 6.

²⁰⁵ Ibid: 52-53.

²⁰⁶ Ibid: ix

²⁰⁷ Ibid: 53.

²⁰⁸ Ibid. *The Sentencing and Parole Reform Bill Briefing Paper: Press Release by the New Zealand Government*, 3:06pm, 15th March 2001.

²⁰⁹ Ibid: 42.

²¹⁰ Ibid: 39. The concern about ‘gender-bias’ in the law of provocation extends to the worry that it places the defence ‘beyond the reach’ of most victims of domestic violence, while facilitating a legal defence for the perpetrators of domestic violence who have ‘successfully called on it for protection’ (ibid: 36).

sentence for murder is abolished.²¹¹ Submitters were divided over whether the defence should be abolished or reformed; some against abolition considered provocation provided ‘less culpable’ killers with a way to avoid ‘the stigma of a murder conviction’²¹² and could be reformed ‘to exclude certain conduct as the basis for provocation: for example, acts of sexual infidelity and other acts causing jealousy’.²¹³

However, the main reason provided for rejecting these submissions and for recommending the abolition of the partial defence of provocation – along with rejecting the introduction of any of the proposed partial defences – appears to have been that, like the other partial defences proposed, provocation becomes ‘unnecessary’ once the sentencing discretion for murder is introduced. Thus, the Commission considers it will be ‘easier’ if ‘matters of provocation [are] taken into account in the exercise of a sentencing discretion for murder’, rather than throughout the trial process, which has proven so ‘difficult in practice’.²¹⁴

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The final report containing these recommendations was presented to the Minister of Justice in May, 2001, the key recommendation being for the mandatory life sentence for murder to be replaced with a limited sentencing discretion. This recommendation became law in the *Sentencing Act* 2002. The introduced provision is worded in very broad and ‘gender-neutral’ terms, implying a presumption in favour of a life sentence: ‘An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust’.²¹⁵ The report was debated in Parliament with minimal attention given to its original purpose of addressing concerns that the criminal law was failing women victims of domestic violence who offend. Only Margaret Wilson (Associate Minister of Justice) signalled this core objective when referring to ‘the Law

²¹¹ Ibid: 39.

²¹² Ibid: 38.

²¹³ Ibid: 40.

²¹⁴ Ibid: 42.

²¹⁵ Section 102 (1).

Commission's report on battered women who kill their abusive partners'.²¹⁶ All other discussion in Parliament framed the report within the wider review of sentencing, which focused on providing 'a more flexible [sentencing] regime...applied to murder, requiring the court to take account of mitigating and aggravating factors.'²¹⁷

This framing effectively places the actions of women like Oakes on a violent crime continuum, which emphasises 'the safety of the community,... the rights of victims,...the concerns of New Zealanders about crime, reflected in the 92 percent support given to the [Withers] referendum,...[and the] strong presumption in favour of life imprisonment for murder'.²¹⁸ In this way, the legislation regards the experience of 'prolonged and severe abuse',²¹⁹ as merely one of various 'mitigating factors' to be taken into account alongside other, unrelated factors, such as age (youth), offering a guilty plea, showing remorse, and 'diminished intellectual capacity'.²²⁰ The recommended change to the wording of section 48 of the Crimes Act, and other recommendations of the Law Commission's, were not included in the reforms or debated in Parliament.²²¹

While the sentencing discretion was being debated in Parliament, the Parole Board agreed to consider Oakes' application for early parole. As seen in the previous chapter, protests accompanying the announcement of this decision, especially those coming from Gardner's relatives – the official 'victims' in the case – were given considerable attention in Parliament by Opposition members and were framed in terms of a defence of 'victims' rights' and 'getting tough on crime'. One member wanted to know, 'What assurance of respect can any victim of violent crime take from a government that would contemplate not deporting [Gay Oakes]...?'.²²² Another asked: 'Why would people believe that a

²¹⁶ *Hansard*, 17 October, 2001.

²¹⁷ Hon. Phil Goff (Minister of Justice), first reading of the Sentencing and Parole Reform Bill, *Hansard*, 14 August, 2001.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.* In other words, the abuse suffered by the defendant needs to be particularly serious for the sentencing discretion to apply.

²²⁰ *Sentencing Act, 2002* s9 (2).

²²¹ For an analysis of the key strengths and weaknesses of the Law Commission's recommendations, see Julia Tolmie 'Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas'

Waikato Law Review, 2002, Vol. 10.

²²² Winston Peters, *Hansard*, 19 Sep, 2002.

minimum non-parole sentence of any length works, when Gay Oakes, who had a minimum non-parole period of 10 years, is to be let out after 8 years?'.²²³

Arguably, both the parole decision in *Oakes*, and the debate about justice for battered defendants like Oakes, were the products of a political compromise at a time when public opinion had swung strongly in favour of 'victims' rights'. As one commentator noted, the sentencing and parole reforms introduced by the Labour-led government, contain 'some remarkably explicit provisions' on both 'victims' rights' and 'restorative justice'.²²⁴ Debate about Oakes' early parole effectively exposed the tension between the government's commitment to making the criminal law more substantively just for the victims of domestic violence who offend, and the political pressure to respond to the Wither's referendum. That the National party's alternative Degrees of Murder bill included more substantial provisions for victims, and more stringent punishments for the worst offenders²²⁵ than Labour's sentencing discretion, no doubt added political pressure on the government to resolve any tension in their proposed reforms in favour of 'victims'. This compromise is particularly evident in the statement made in Parliament immediately prior to Oakes' release, by Labour's Minister of Justice, Phil Goff, who described the sentencing discretion as intended to 'refer predominantly [to] mercy killings...[and] a very narrow range of cases...perhaps ...a seriously battered person who lashes out and kills a partner...[so] an out-of-the-ordinary situation'.²²⁶ By way of further appeasing detractors, while separating out the *Oakes* decision from likely future cases, the minister added that in these types of cases, 'the families of the victims would be quite understanding'.²²⁷

²²³ Steven Franks, Justice spokesperson for ACT, *Hansard*, 18 September, 2002..

²²⁴ Ritchie and Ritchie (et al), *Overcoming Violence*, op.cit: 83.

²²⁵ The Degrees of Murder bill proposed that the immediate family members of the deceased be granted the right to make an oral or written statement to the sentencing judge on the impact of the death on the family; to have a victim's representative sit on the Parole Board in cases of murder or manslaughter, and for murderers in the first degree to be sentenced to prison for the rest of their lives. See G. Turkington, 'Sentencing flexibility preferred over degrees of murder', *Law Talk* 507, 5 October, 1998.

²²⁶ Hon. Phil Goff, *Hansard*, Sep 5, 2002.

²²⁷ *Ibid.* Recall that members of the Gardner family were anything but 'quite understanding'.

Three years on, the remaining recommendations made in the Law Commission's report, including the abolition of provocation, were endorsed in a Ministry of Justice discussion paper.²²⁸ This discussion, according to one critic,²²⁹ continues to gloss over the complexities of the reforms for battered defendants by failing to properly consider the likelihood that should provocation be abolished, and the proposed alternatives dismissed, there could be increased sentences for 'battered defendants' who are denied a plea of provocation.²³⁰ Furthermore, she says not only are there are good reasons for 'exercising caution' with respect to abolishing provocation in the absence of a recommendation to introduce any other partial-defence, but there is an even greater need for caution and concern that the presumption in favour of life imprisonment, introduced by the *Sentencing Act 2002*, effectively *increases* the burden of proof placed on battered defendants to prove 'manifest injustice' sufficient to displace this presumption.²³¹ In other words, the new legislation resulting from the law review and reforms undertaken to address obstacles to justice for battered women defendants, might have actually created a further legal obstacle to justice for future defendants like Oakes.

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A more confident and secure Labour-led government in its second (2002) and unprecedented third (2005) terms,²³² held the promise of a concerted political commitment to substantive reform in the domestic violence area to address the obstacles to justice for battered women. Evidence of this commitment was delivered in 2002, with the launch of

²²⁸ Ministry of Justice, *Criminal Defences Discussion Paper: Provocation and Other Partial Defences, Self-Defence and Defences of Duress* (2004).

²²⁹ Julia Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation'. *NZLR* [2005], pp.25-52.

²³⁰ *Ibid*: 31.

²³¹ *Ibid*: 32-33.

²³² The Labour-led coalition secured an unprecedented level of public support over National in 2002 with Labour winning 41% of the vote compared to National's 21%, its lowest ever polling at a general election, '2002 General Election – Official Results', <http://2002.electionresults.org.nz>. The gap between the two major parties was substantially closed in 2005 with the left-wing coalition parties winning power by the slimmest possible majority. However, though National has won several third terms in power and even once a fourth term, this third term for Labour won in 2005, was an unprecedented victory for the political centre-left and so a cause for confidence (See Miller, 'Labour', *New Zealand Government*, op.cit: 228 for an electoral history of the two major parties).

Te Rito: New Zealand Family Violence Prevention Strategy,²³³ the first major policy initiative in this area. Launched by the Minister of Social Development, *Te Rito* provided the basis for a ‘five-year, all-of-government plan’ to work towards the vision of ‘families/whanau living free from violence’, and uphold the key principle that ‘all people have a fundamental right to be safe and to live free from violence’.²³⁴ In 2004, the Ministry of Women’s Affairs launched the *Action Plan for New Zealand Women*, a further ‘five-year whole-of-government plan’; this time ‘to improve the lives of New Zealand women’.²³⁵ Within this ‘action plan’, the goal to reduce the impact of violence on women was identified as an area of ‘special focus’. The same year, the Ministry of Justice published *Safer Communities: Action plan to reduce community violence and sexual violence*,²³⁶ and the Ministry of Social Development launched *Opportunities for All*; a long-term, ‘inclusive’ social policy, identifying ‘family violence prevention’ as one of five critical areas.²³⁷

In August 2004, Women’s Refuge, in consultation with the majority of Refuges and other non-government agencies working the field, published a damning report on the implementation of the DVA.²³⁸ The report highlighted an increased level of police and court inaction in response to breaches of protection orders, and an ‘increased burden of proof’ for applicants to convince judges, lawyers and police of their need for protection resulting in a ‘dramatic increase’ in the number of applications for protection orders being put ‘on-notice’, and an increasing ‘distrust’ in the system on the part of applicants who are then less inclined to apply for court protection.²³⁹ The report attributed this response to the same attitudes of ‘victim-blaming’ and the ‘minimisation’ of domestic violence, that were identified prior to the implementation of the DVA, ‘once again

²³³ <http://www.msd.govt.nz/publications/te-rito/index.html>

²³⁴ This is the first of five principles identified. Others include ‘recognising, providing for, and fully engaging’ Maori customary structures and practices of whanau and hapu in accordance with the Crown’s ‘unique’ obligations to Maori under the Treaty of Waitangi (principle 2), and placing a ‘strong emphasis on prevention and early intervention with a specific focus on the needs of children and young people’ (principle 5) <http://www.msd.govt.nz/publications/te-rito/vision-guiding-principles.html> .

²³⁵ <http://www.mwa.govt.nz/news-and-pubs/publications/action-plan>

²³⁶ Wellington, 2004.

²³⁷ www.msd.govt.nz/documents/publications/strategies/social-policy/opportunity-for-all

²³⁸ Hann, *The Implementation of the Domestic Violence Act*, op.cit.

²³⁹ Ibid: 7-9.

permeating the whole justice system’ to undermine the focus on providing safety for victims.²⁴⁰ This report gained substantial media coverage in part because its release coincided with the widely reported case involving the murder of a battered women and her baby son by her partner who had a protection order out against him (the Mercer case).²⁴¹ Media also reported the view of the Chief Family Court judge, Peter Boshier, who considered the report did not provide ‘the full story on a complex set of issues’.²⁴²

In 2005, a Family Violence Ministerial Team involving various ministers,²⁴³ was set up to provide leadership for government and community agencies in the sector, with a *Taskforce for Action on Violence within Families* established in June made up of Chief Executives from the key departments to support this team. The *Taskforce* reinforced existing initiatives like *Te Rito*, and added a heightened commitment to working towards a co-coordinated response from the sector ‘to provide leadership to end family violence and promote stable, healthy families.’²⁴⁴ In March, the *NZ Family Violence Clearinghouse* was established by Te Awatea Violence Research Centre at Canterbury University, which had been contracted by the Ministry of Social Development (MSD) to ‘collate and distribute family violence research...from a variety of sources’.²⁴⁵ The *Clearinghouse* is currently considering a proposal by the Ministry of Justice to establish ‘Family Violence Death Reviews’ to separate information on family violence related murders (which account for about half of the murders committed in New Zealand every year) from

²⁴⁰ Ibid: 11.

²⁴¹ The Mercer killings occurred in May, so the issues were still relatively fresh in the public’s mind when the report was released in August. See ‘Law “failing women”’, *The Press*, 12 August 2004, Edition 2, p. 5; and ‘Court orders need to be enforced’, *Waikato Times*, 13 August 2004, Ed. 2, p.6. In both articles, the author of the NCIWR report, Sheryl Hann, refers to the Mercer case as an example of the ‘ineffective’ policing of protection orders and battered women’s particular ‘vulnerability to retribution from an aggrieved partner’ when taking out a protection order against him. The Mercer case is also briefly discussed in the NCIWR report, (Hann, *The Implementation of the DVA*, op.cit: 25).

²⁴² Judge Peter Boshier, cited in ‘Judge doubts refuge report’, *The Dominion Post*, 13 August 2004 p. 6

²⁴³ These included the Ministries of Health, Social Development, Justice, Women’s Affairs and Police, Child Youth and Family and the Families Commission. <http://www.msd.govt.nz/work-areas/families-whanau/action-family-violence/ministerial.html>

²⁴⁴ Ibid.

²⁴⁵ (www.nzfvc.org.nz). Further government initiatives in this area undertaken by the MSD are listed at www.fpaid.org.nz.

murders in general. This gives recognition to the fact that, ‘While the overall murder rate is declining, domestic related murders [of women] are not’.²⁴⁶

Another spike in the number of women killed by their partners or ex-partners around this time, added impetus to the government’s commitment to do more to prevent ‘violence in the home’. In response, the all-party *NZ Parliamentarians’ Group on Population and Development* (NZPPD),²⁴⁷ began focused work towards CEDAW reporting (previously left to the Ministry of Women’s Affairs), and convened an Open Hearing into the Prevention of Violence Against Women and Children. The main aim of the hearing was to engender dialogue between key government and non-government agencies that would in turn ‘raise awareness amongst parliamentarians of the extent of the problem of violence against women and children’. This produced a report in August 2005 on ‘Creating a Culture of Non-violence’, which began by quoting Kofi Annan’s statement made in 2003, that: ‘Violence against women is perhaps the most shameful human rights violation [and]...the most pervasive’.²⁴⁸ It added the comment that:

New Zealand has reasonably sound legislative and policy frameworks in place to address the issues of violence against women and children...[indeed] seemingly endless strategies in place...[and yet] we need to do much more if we are to stop the violence.²⁴⁹

The report also comments that existing strategies like *Te Rito*, while continuing to provide ‘a solid framework’ for progress in this area, need to be ‘re-energised...and properly funded’,²⁵⁰ with more funds needed for service provision, particularly within the

²⁴⁶ ‘Family Violence Death Reviews’, paper presented to Taskforce for Action on Violence within Families meeting, % October, 2005: 1, cited in Justice R. Johnson, ‘The Evolution of Family Violence Criminal Courts in NZ’ *Police Executive Conference*, Nelson, 8 November 2005.

²⁴⁷ http://www.theword.org.nz/SITE_Default/SITE_fpaid/SITE_parliamentarians_group/default.asp The NZPPD was set up in 1998 in response to the Cairo International conference on population and development (ICPD) and its programme of Action (1995-2015). The network is funded by the UN with 179 countries subscribing. The NZ group includes 46 members from the five major political parties representing 38% of the House.

²⁴⁸ *Creating a Culture of Non-violence*, The Report of the NZPPD, August 2005: 1

²⁴⁹ *Ibid*: 4-25.

²⁵⁰ *Ibid*: 22.

non-government sector, which is ‘currently severely stretched [and suffering] a sense of fatigue’.²⁵¹ Some implemented policies are said to lack a firm basis in quality research, while an ‘extreme’ shortage in the number of people ‘adequately qualified to undertake independent research into violence against women and children in New Zealand’, is identified.²⁵² With reference to ‘the principled foundation’ of CEDAW,²⁵³ the report also acknowledges New Zealand’s ‘inadequate understanding of the gendered nature of violence’, a situation ‘made worse’ by the use of terms like ‘family’ and ‘domestic’ violence, that ‘obscure the fact that violence in the home is much more often perpetrated by men than women.’²⁵⁴ However, these significant acknowledgments are somewhat obscured and confused by the report’s overall grouping of women victims of ‘family violence’ with other ‘vulnerable persons’, namely ‘children...and older people’.²⁵⁵ Indeed, the report ends up giving overall emphasis to addressing the effects of ‘family violence’ *on children*, which reflects the increasing politicisation of children’s rights and interests in recent years as represented by *The Children’s Commissioner Act 2003* and *The Care of Children Act 2004*, both of which are cited extensively in the report.

After six women were murdered by their partners over the 2005-2006 Christmas period – most with protection orders out against their killer – the chief judge of the Family Court, previously dismissive of the report put out by Refuge, told media that the court ‘could – and should – have done more’ to prevent these murders.²⁵⁶ However, he couched this admission within an overall statement about New Zealand no longer being ‘the best place to raise kids’.²⁵⁷ By contrast, Women’s Refuge and the National Network of Stopping Violence Services²⁵⁸ responded by reinforcing their critique of the justice sector for its

²⁵¹ Ibid: 23-24.

²⁵² Ibid: 24.

²⁵³ Ibid: 6.

²⁵⁴ Ibid: 19. As well, the report accepts that effective implementation and action resulting from government initiatives was being undermined due to several systemic and ‘cultural’ factors including a lack of ‘strong leadership and sustained political commitment’ (ibid: 17), and enduring societal attitudes that ‘excuse, and even glorify, violence and traditional male power and control patterns’ (ibid: 18).

²⁵⁵ Ibid.

²⁵⁶ S. Collins ‘NZ best place to raise kids? Not any more says top judge’, *NZ Herald*, 28 March, 2006, quoting Judge Peter Boshier.

²⁵⁷ Ibid.

²⁵⁸ <http://www.nnsvs.org.nz/> Other than the NCIWR, which remains the main NGO working in this area, two key community organisations include, *The National Network of Stopping Violence Services*, a network

failure to properly implement protection orders under the DVA.²⁵⁹ Refuge also told *Radio New Zealand* that its staff of 500 volunteer and 200 paid workers were ‘at breaking point’, having been ‘so under funded for so long’, combined with the increasing demand for its services.²⁶⁰ In June 2006, the government granted Refuge a one-off payment of \$1 million, while \$11.5 million was allocated to support the *Taskforce* over a four year period.²⁶¹ Others used the heightened media attention on the issue to debate New Zealand’s level of violence in general,²⁶² and male violence in particular.²⁶³ Around the same time, ‘The Father’s Coalition’ (set up in March 2006) staged a series of 20 protests outside the houses of Family Court lawyers and judges against what they described as, ‘the false allegation game’, and the ‘feminist inspired father-removal project’ underway in the Family Court and the *Organisation for Preventing Violence in the Home*.²⁶⁴

Then, after Maori twin baby boys were killed by their father in June,²⁶⁵ community groups and government agencies came together to launch ‘the family violence awareness collaboration’.²⁶⁶ Following this, early in 2007, with further publicity surrounding a rising death toll of ‘court protected’ women killed by their partners,²⁶⁷ another major government initiative was announced in the form of a ‘multimillion-dollar campaign’ designed to change public attitudes surrounding domestic violence to be conducted along similar lines to the national campaigns to stop drink-driving.²⁶⁸ In March, the Minister for

of 33 community based organisations working to prevent violence in the home, and *Preventing Violence in the Home*, a ‘specialist agency’ providing ‘a practical approach to the problem of family violence’ <http://www.preventingviolence.org.nz/index.php?section=1>. See also www.dvc.org.nz and K. McMaster et al. 2000. *Evaluation of Community Based Stopping Violence Services*, Department of Corrections (unpublished).

²⁵⁹ See ‘Women believe law isn’t protecting them’, *The Timaru Herald*, 29 March 2006, p. 2. Also ‘Experts say too many barriers to gaining protection orders’, *Radio NZ* 28 March, 2006: 17:49.

²⁶⁰ Heather Henare (current head of the NCIWR) interviewed on *Radio New Zealand*, 8 May, 2006.

²⁶¹ <http://www.beehive.govt.nz/speech/women%E2%80%99s+refuge+2006+agm+opening+address>

²⁶² P. Focamp, ‘Are we getting worse?’ *The Press*, 21 March 2006, Ed. 2, reported findings of the Te Awatea, Christchurch research unit.

²⁶³ See ‘A violent man’, *Manawatu Standard*, 11 March 2006, Ed. 2, p. 9

²⁶⁴ ‘Fathers target judges home’, *Waikato Times*, 2 May, 2006.

²⁶⁵ See ‘The Kahui twins: Murder – and the cover-up’, *NZ Herald*, 24 June, 2006.

²⁶⁶ ‘Twins’ deaths highlight abuse issue’, June 26, 2006, 6:46 PM, *One News*, tvnz.co.nz .

²⁶⁷ At least six women were killed by their partners in the first 40 days of 2007. Some cases are yet to be decided. L. Cleave, ‘Home violence targeted as death toll rises’, *NZ Herald*, 9 Feb, 2007

²⁶⁸ *ibid.* According to Brian Gardner, head of the *National Network of Stopping Violence Services*, the campaign was supposed to start mid-year (2007), cost \$11.5 million, and operate in a similar way to road safety campaigns.

Courts announced the government plan to set up four new Family Violence Courts based on the regional models operating in Manukau and Waitakere cities since 2001.²⁶⁹ These specialist courts, aim to ‘fast-track’ family violence cases over common assault cases, while providing judges with dual family and criminal jurisdiction to encourage perpetrators to plead guilty rather than delaying women’s application for protection.²⁷⁰

In August 2007, the same academic research team responsible for the controversial report on police and judicial failures to implement non-violence and non-molestation orders under the Domestic Protection Act 1982, and the follow-up report on the DVA,²⁷¹ produced a substantive two-volume report on the implementation of the 1995 DVA: *Living at the cutting edge: women’s experience of protection orders*. The report, commissioned by the Ministry of Women’s Affairs in 2005, concluded that the Act had ‘failed to realise its promise’, largely because justice sector agents continued to consider that ‘ongoing contact with an abusive father trumps safety for women and children’.²⁷² The report provided 47 recommendations for the Justice Ministry to consider, including amendments to the DVA to further reduce judicial and police discretion so that all agents are made to ‘enforce the law as it is written not how they wish it were written’.²⁷³ Once again, the Chief Family Court judge, Peter Boshier, criticised the report, claiming its findings were ‘not supported by either the facts or the law and reflected the biases of its authors’.²⁷⁴

The Law Commission’s recommendation to abolish the defence of provocation was also revisited in 2007, this time in a review project devoted specifically to the subject.²⁷⁵ Once again, the Commission recommended the law be abolished, and the Labour government

²⁶⁹ Hon Rick Barker ‘Four new Family Violence Courts’, 6 March, 2007

<http://www.beehive.govt.nz/release/four+new+family+violence+courts>

²⁷⁰ For an analysis of the history of these specialist courts in NZ by the Chief District Court judge, see Judge Russell Johnson, ‘The Evolution of Family Violence Criminal Courts in NZ’, Police Executive Conference, Nelson, 8 November 2005 op.cit.

²⁷¹ Ruth Busch et al, ‘The Gap’, 1995, op.cit and Busch and Robertson, ‘The gap goes on’, 1997, op.cit.

²⁷² <http://research.waikato.ac.nz/cutting edge/>

²⁷³ Ibid: Executive Summary.

²⁷⁴ Quoted in S. Collins, ‘Judges soft on wife-beaters, say researchers’, *NZ Herald*, 28 August, 2007.

²⁷⁵ *The partial defence of provocation* (NZLC R 98, Wellington, 2007).

supported this recommendation in Parliament.²⁷⁶ The Commission also recommended the establishment of a Sentencing Council to provide guidelines for sentencing and parole based on the principles established in the Sentencing Act 2002 and the Parole Act 2002, with the overall aim being to improve judicial consistency and transparency.²⁷⁷ In 2007, the government passed the *Sentencing Council Act 2007* and the Law Commission is currently overseeing the drafting of these guidelines through the Sentencing Establishment Unit, with the Council due to be operational by 2009.²⁷⁸ The Commission considers these guidelines will be enough to ensure battered defendants are not disadvantaged by the repeal of the defence of provocation.²⁷⁹

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Considered historically, these various initiatives undertaken over a twenty-year period represent a considerable increase in the public-political awareness of the issues impacting on access to justice for the victims of domestic violence. However, I would argue that the political commitment to address these issues since the Roper Report in 1987 first exposed our collective complacency in this area, has not improved as decisively or effectively as it could and should have done, given the dramatic increase in public-political awareness of the seriousness of the issue. Moreover, although repeated commitments have been framed in terms of improved ‘access to justice’ and women’s fundamental human right to live free from violence, the core justice sector agencies continue to equivocate over the political priority to be allocated to these commitments, leaving much of the responsibility for active implementation to chronically under funded, non-government agencies, such as Women’s Refuge.²⁸⁰ These agencies operating on the margins of the political system, face

²⁷⁶ The recommendation was introduced in Parliament in the Crimes (Abolition of the Defence of Provocation) Amendment Bill, *ibid*: Appendix B, p. 106

²⁷⁷ *Sentencing Guidelines and Parole Reform*, NZLC R 94, Wellington, 2006.

²⁷⁸ See ‘Effective Intervention in the Criminal Justice Sector: Fact Sheet’, 2006, www.justice.govt.nz

²⁷⁹ The Commission discusses the concerns raised about this possibility in Chapter 6, *The partial defence*, *op.cit*: 84-86. See also ‘Murderers’ provocation defence set to be scrapped’, *NZ Herald*, October 26, 2007.

²⁸⁰ In 2007 Refuge estimated that the \$5.5million annual government funding they receive leaves a \$20million annual short fall. The concern expressed by all community agencies working in the field today is that ongoing ‘increases in the instances and severity of family violence’ combined with renewed public

a ‘constant battle to get issues on the political agenda’,²⁸¹ while struggling to meet the needs of victims for advocacy, intervention and safety.²⁸² Surely, justice cannot be protected as a ‘fundamental right’ when so much is reliant upon these marginalised and under-funded agencies. Yet the case study also shows quite clearly that without the dedicated work of these agencies, so many of the key initiatives in the domestic violence area, having been substantially driven and shaped by this work,²⁸³ would not have been undertaken.

The increasing number of cross-party, ‘all-of-government’ initiatives undertaken in the area of family violence prevention under Labour-led governments, suggests an attempt to mainstream the commitment to justice for battered women, rather than leave it substantially to ‘women’s groups’ or the Ministry of Women’s Affairs. However, these initiatives seem to risk a critical loss of focus on the substantive issues, namely the ongoing failure of the justice system to effectively address the causes and consequences of violence against women in the home. Indeed, considering how much has been achieved by Women’s Refuge with the help of just a few committed and focused (mostly women) members of Parliament, activists and academics, the move to broaden, rather than sharpen and strengthen, the political response to domestic violence seems unlikely to achieve greater justice for its victims. Ultimately, this approach to date has failed to achieve its principal objective of reducing the incidence of domestic violence, and some reports suggest battered women are worse off today than they were twenty years ago.²⁸⁴

awareness campaigns, is pushing the capacity of already under-resourced community services to breaking point. ‘Alarm at rising family violence’, *The Dominion Post*, Jan 30, 2007.

²⁸¹ Chapman, *Interest groups*, op.cit: 38.

²⁸² Refuge reports the limited capacity of their staff to provide the vital assistance women need in applying for protection orders due to lack of training, funding and time (Hann, *Implementation*, op.cit: 16).

²⁸³ In her address to the NCIWR AGM in 2006, Lianne Dalziel, Labour Minister of Women’s Affairs, acknowledged the ‘particularly valuable’ contribution of Refuge to the *Taskforce for Action* <http://www.beehive.govt.nz/speech/women%E2%80%99s+refuge+2006+agm+opening+address>

²⁸⁴ While dramatic increases in the reported incidence of domestic violence in recent years should not be interpreted as an indication of an *increase* in the incidence of domestic violence, the number of reported cases certainly does not provide any kind of reassurance of a reduction in the incidence. At the same time, the fact of increased reporting is a significant progression in itself, even if Police estimates continue to indicate ongoing ‘chronic underreporting’ of domestic violence, with an estimated 88% of cases never coming to the attention of the authorities (‘Domestic Violence Facts’, *Preventing Violence in the Home*, 2006 www.dvc.org.nz/index.php?section=28). In spite of this ongoing underreporting, statistics show there has been a doubling in the recorded incidence of domestic violence in New Zealand between 1996 and 2006. ‘Police family violence figures double over the last 10 years’ *NZ Family Violence Clearinghouse*,

In the final analysis, the responsibility for this failure must fall on the agents of the ‘political justice’ sector, in particular the sector’s core agencies of the Ministry of Justice and the Law Commission, expected (and funded) to provide substantive guidance and leadership for the sector. In turn, the failure to fulfil this responsibility consistently and effectively suggests a lack of cohesiveness in the structural commitment to ‘political justice’, and further, a lack of any clear and principled notion of ‘justice’ informing this commitment. This lack of cohesion, consistency and leadership in the political commitment to justice for battered women, rather than confirming the sceptics’ claim that a principled commitment to justice is unattainable and irrelevant in practice, confirms at least the inadequacy of a response to domestic violence that is not underpinned by a clear commitment to any principle of justice at the political level.

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Before moving on to consider what a principled commitment to ‘political justice’ for battered women and battered women defendants might consist of, in the final chapter of the case study I turn to reflect on the ways in which the New Zealand ‘justice system’ – in its legal and political aspects – has failed battered women by ignoring and reinforcing the mechanisms of cultural injustice. Recognising and addressing the cultural obstacles to justice provides a substantial and largely hidden challenge facing any *system* of justice as cultural influences cannot be isolated for the purposes of analysis (or regulation) in the way that legal and political influences can be. Nonetheless, cultural mechanisms influence and undermine justice in a systematic way and an effective commitment to justice depends on understanding and to some extent controlling this influence, as the following chapter should make clearer.

<http://www.nzfvc.org.nz/NewsItem.aspx?id=67> In 2005, the NZPPD reported that after a decade of implementation of the DVA there is ‘no discernable reduction in the incidence of violence’. As well, there are some who consider the provisions under this Act, such as men’s education programmes, have made matters worse for victims: ‘We now have a nation of male batterers who are better able to articulate their reasons for beating their partner’ and so better equip themselves in court. Submission from the Whakaruruhau Women’s Refuge, NZPPD, ‘Culture of non-violence’, op.cit: 21.

Chapter Three

‘Cultural justice’: New Zealand’s ‘most notorious man killer’

We all saw the media coverage of Gay’s trial: a woman, her face grim in repose, being pulled into court by a team of well-intentioned refuge workers...And some of us who know women are judged by all sorts of hidden criteria felt concerned and troubled by that portrayal...

Ronda Bungay, 1998¹

The final chapter of the case study highlights the ‘hidden criteria’ Bungay refers to and considers how these criteria help explain Gay Oakes’ enduring reputation as the country’s ‘most notorious man killer’.² The chapter at once seeks to explain the wider connotations of this culturally loaded construct by reflecting critically on the various ways in which the judgments in her case and others like it are sabotaged by these hidden criteria to the point that access to justice is systematically denied in both legal and political contexts. These ‘hidden criteria’ are cultural, and reflect the dominant normative system of beliefs and values operating in New Zealand society shaping the judgments of the people operating that system as well as the structures and principles that define the commitment to justice that system strives to uphold.

While the ‘cultural system’ is not embodied in recognisable institutional structures or processes, it is nonetheless a definable force illuminated through critical historical analysis, which reveals key axes of reinforcement and resistance to reform of the dominant values and beliefs. Historical analysis of the cultural influences on the commitment to justice for battered women defendants in New Zealand can be traced to

¹ *Scarecrows: Why Women Kill*. Random House, Auckland, 1998: 168.

² Bill Hodge, ‘Battered woman syndrome and the law’, *ibid*: 154. Law professor, Bill Hodge, describes Gay Oakes as ‘perhaps the best-known (or most notorious) man killer in New Zealand’.

the dominant cultural norms of the Anglo-western tradition³ which have prevailed in New Zealand since brought here by the English settlers in the early nineteenth-century. Although New Zealand is beginning to break away from this cultural tradition, especially in the area of indigenous ‘race relations’ and justice,⁴ in other areas, more critical to the response to domestic violence, the Anglo-western cultural tradition remains dominant and largely resistant to change.⁵

Moreover, the cultural influences impacting on justice for battered women defendants in New Zealand extend beyond this specific tradition to the much older, more enduring tradition of cultural patriarchy, described as ‘perhaps the most pervasive ideology of our culture’, that provides ‘its most fundamental concept of power.’⁶ Indeed, the key patriarchal principle that ‘male shall dominate female’,⁷ remains operational in virtually ‘all of the societies we know much about’,⁸ and having prevailed for ‘so long and so universally’, today ‘it scarcely seems to require violent implementation’.⁹ That is to say, in Anglo-western societies the cultural assent to patriarchal norms is so ingrained, that its violent implementation and reinforcement – not least of all in practices of domestic battery – is not recognised as a process of cultural reinforcement. The illumination and

³ The ‘Anglo-western tradition’ refers to the dominant cultural tradition developed in England and the UK and inherited by New Zealand and other English speaking western countries, such as Canada, the US and Australia, through the process of British colonization. The classification ‘Anglo-western’ is used for convenience and simplification but does not presuppose a cultural homogeneity in New Zealand or any of the other countries referred to. It is unavoidable to some extent that cultural classification and generalization is a reductive process that oversimplifies complex cultural variables and distinctions. See the critical analysis of this issue in Sonia N. Lawrence, ‘Cultural (in)sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom’, *CJWL/RFD*, Vol. 13, 2001p. 107. Also, Anna Yeatman and Margaret Wilson (eds.) *Justice & Identity: Antipodean practices*, Bridget Williams Books, Ltd, Wellington, 1995.

⁴ New Zealand has been described as ‘one of the most developed and interesting contexts of political debate and policy development bearing on an indigenous people’s claims on justice’, Yeatman and Wilson ‘Introduction’, *ibid*: vii.

⁵ The critical period of cultural development and resistance in the domestic violence area is documented most clearly in historical studies based on the UK experience. However, the few NZ studies that are available tend to confirm ‘the existence in broad detail of many of the patterns found elsewhere...in Britain, Europe and the United States’, Ruth Habgood, ‘On his terms: Gender and the Politics of Domestic Life’, in Rosemary Du Plessis (et al), *Feminist Voices: Women’s Studies Texts for Aotearoa/New Zealand*. Oxford University Press, Auckland, 1992: 174.

⁶ Kate Millet, *Sexual Politics*. Granada Publishing, London, 1969: 25.

⁷ *Ibid*.

⁸ Virginia Held, *Feminist Morality: transforming culture, society and politics*. University of Chicago Press, London, 1993: 142.

⁹ Millet, *Sexual Politics*, op.cit: 43.

deconstruction of this ‘vast cultural system’¹⁰ is the first step towards developing a critical understanding of the cultural obstacles to justice for battered women defendants in New Zealand.

‘Cultural justice’ for battered women defendants: key structural challenges
in the Anglo-western tradition

Cultural imperialism involves the universalization of a dominant group’s experience and culture...as the norm...[It] intersects with violence...as a systemic social practice...directed at members of a group simply because they are members of that group...[and because they] may reject the dominant meanings and attempt to assert their own subjectivity.

Iris Marion Young, 1990¹¹

Critical theories of ‘culture’, such as that provided in Young’s work on justice and the politics of difference, highlight the systematic ways in which dominant values, beliefs and interests are reinforced in public (and private) life as a form of ‘cultural imperialism’ that creates oppressed social groups whose access to justice is systematically undermined as a result. According to Young, in everyday practices and institutional norms, in the values, assumptions and beliefs people hold and communicate with, ‘the material and ideological conditions that make life easier for, provide greater real opportunities to, and establish the priority of the point of view of white heterosexual men’ are reproduced.¹² Cultural imperialism is perpetrated by the values, experiences and interests of the dominant group being represented as the norm, which marks and stereotypes ‘other’

¹⁰ Held, *Feminist Morality*, op.cit: 141.

¹¹ *Justice and the Politics of Difference*, Princeton University Press, New Jersey: 59-63. Young acknowledges that her US-based critique ‘cannot claim to speak’ from cultural or critical perspectives other than her own ‘white, heterosexual, middle-class, able-bodied, not old woman’ North American perspective. However, she also argues that her critical perspective ‘aims to speak from multiple positions’ and has been shaped by close reflection on different cultures and politics, *ibid*: 14.

¹² *Ibid*: 197.

groups as different and deviant ‘by bringing [these] other groups under the measure of [the] dominant norms’.¹³

The mass media is increasingly identified as a powerful site for this imperialistic process as it effectively promotes an ‘unquestioned acceptance’ of the dominant perspective as ‘common sense’ through the use of language and images that ‘disguise’ their cultural construction to appear as ‘simply natural’ and ‘normal’.¹⁴ Cultural imperialism and dominance is at once reproduced through violence, often deliberately inflicted by members of the dominant group upon members of oppressed social groups *because they are members of that group* and because they are, or are perceived to be, resisting the dominant group and cultural norms. This type of violence is therefore ‘systematic’ in a way that random acts of violence are not, and it is a form of injustice because facilitated by the wider cultural context ‘which makes it possible and even acceptable’.¹⁵

Domestic violence and its cultural sanctioning and trivialisation through the media and the institutions of the justice system can be effectively understood and analysed from this critical perspective. The most pervasive form of violence in the world,¹⁶ responsible for ‘the loss of more years of healthy life among women ages 15-44’ worldwide than any other cause: disease, war or accidents,¹⁷ domestic violence is perpetrated ‘by men against women *because they are women*, regardless of race, ethnicity or class’.¹⁸ Domestic abuse is therefore patriarchal violence, or ‘patriarchal terrorism’, as one critic defined it.¹⁹ Case studies of men who beat women partners reveal the following common attitudes and motives:

¹³ Ibid: 59.

¹⁴ Marian Meyers, *News Coverage of Violence Against Women: Engendering Blame*, Newbury Park, CA, Sage, 1997: 19.

¹⁵ Ibid: 61.

¹⁶ The 1995 *State of the World's Children* report declared ‘Violence against women by male partners...the most common crime in the world’, cited in Jan Pettman, *Worlding Women: A feminist international politics*. Routledge, 1996: 187.

¹⁷ www.un.org/womenwatch

¹⁸ Julie Stubbs (ed.), *Women, male violence and the law*. Institute of Criminology, Sydney, 1994: 11.

¹⁹ Michael P. Johnson, ‘Patriarchal terrorism and common couple violence: Two forms of violence against women’, *Journal of Marriage and the Family*, Vol. 57, Issue 2, May 1995. In this article the author distinguishes ‘common couple violence’, as the ‘occasional outbursts of violence from either husbands or wives or both’, from ‘patriarchal terrorism’, which he describes as ‘systematic male violence enacted in the service of patriarchal control’: 283.

Men's possessiveness and jealousy, disagreements and expectations concerning domestic work and resources, the sense of right to punish "their" women for perceived wrongdoing, the importance to men of maintaining or exercising their power and authority,...their belief that women do not have the same right as men to argue, negotiate, or debate,...[their tendency] to usually blame the women for their anger and their subsequent violence,...their general lack of empathy [and] a narcissism [that] elevates their needs and desires above all others.²⁰

These patriarchal attitudes, though clearly not common to all men, are thought to be so culturally embedded in all societies that in some degree they 'permeate the attitudes of all males...and set dysfunctional standards for all heterosexual relationships'.²¹ Indeed, research confirms the extent to which men use violence against women 'as a means of obtaining an end [and] as a product of [their] power over women'; a power that is 'deeply rooted in men's sense of masculinity'.²² Moreover, while most commentators in the field recognise the causes of male violence against women are complex and varied, the research in virtually all contexts and cultures 'eventually points to the simple fact that...a woman's life and dignity are [considered to be] worth less than a man's'.²³

In so far as New Zealand's laws, policies and various other justice mechanisms fail to acknowledge or effectively address this cultural support system for the values that underpin, excuse and perpetuate domestic violence, battered women in this country are systematically denied justice. In my view, the legal and political response to domestic violence highlighted in the previous chapters of the case study, reflects an ongoing failing

²⁰ These were the common themes identified among those men studied in the 1996 Violent Men Study conducted in the UK by experienced researchers Rebecca E. Dobash and Russell P. Dobash, *Rethinking Violence Against Women*, Thousand Oaks, California, Sage Publications, 1998: 144-163.

²¹ Richard Stordeur and Richard Stille, *Ending men's violence against their partners: One road to peace*. Sage, California, 1989: 34-35.

²² 'Violent Men and Violent Contexts' in Dobash and Dobash (eds.) *Rethinking Violence*, op.cit: 164.

²³ Marie Vlachova and Lea BIASON (eds.), *Women in an Insecure World: Violence against Women Facts, Figures and Analysis*, 2005, The Geneva Centre for the Democratic Control of Armed Forces (DCAF). See also the 2001 report released by Amnesty International 'Broken Bodies, Shattered Minds: The Torture of Women Worldwide', *Amnesty International New Release*, March 6, 2001 <http://www.amnesty.org/en/library/info/ACT40/001/2001> accessed 15/08/05

of this kind in spite of considerable progress made in terms of various reforms enacted and increased awareness of the problem. This failure, as well as the progress made, can be effectively illuminated and measured by reflecting upon the wider historical context in which the cultural response to domestic violence and battered women defendants has been shaped in the Anglo-western tradition.

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Cultural patriarchy and its violent reproduction have a long history in the Anglo-western tradition. Aristotle's views on natural law and women's subordinate place within it, which included the view that women are 'underdeveloped' human beings 'naturally' intended to serve men, particularly within marriage – 'The association of man and wife seems to be aristocratic, for the man rules in accordance with his worth'²⁴ – entered the western cultural lexicon more than two thousand years ago (335-322 B.C.). Some consider this view of gender relations, of natural male dominance and female subordination (especially within marriage), to have had a particularly profound and lasting influence on 'the whole of Western civilisation...constituting what we think of as traditional morality', and providing the normative concept of human nature underpinning Western systems of law and politics.²⁵

This cultural perspective was reinforced and further accentuated by the pervasive influence of Judeo-Christianity throughout Western countries. In the foundational Book of Genesis, the Bible establishes 'the authority principle of God...represented by man and the rebellious principle of Satan...domiciled in woman'.²⁶ The First Testament blames woman ('wife') for 'the fall of man' ('human civilisation'), with 'God' saying to Adam: 'Because you obeyed your wife's voice and transgressed my commandment, you

²⁴ *Nichomechean Ethics*, 8.10, *The Basic Works of Aristotle* (ed.) Richard McKeon, New York, Random House, 1941.

²⁵ Christine Pierce, *Immovable laws, irresistible rights: natural law, moral rights and feminist ethics*. Lawrence, Kan: University Press of Kansas, 2000: 31-36.

²⁶ Eva Lundgren, 'The hand that strikes and comforts: Gender construction and the tension between body and symbol', in Dobash and Dobash (eds.), *Rethinking Violence*, op.cit: 172-173.

will be condemned upon the Earth'.²⁷ Accepting this blame, Eve says to Adam: 'My lord Adam. Arise, give me some of your pain, so that I might receive and bear it, for these pains which have come upon you, came about because of me'.²⁸ For her sins, God condemns Eve to suffer pain in childbirth and commands her: 'Return to your husband and he will rule over you'.²⁹ From these foundational values, Christianity developed the core idea that the relationship between man and woman – husband and wife – revolved around men's 'honour and shame', with 'honour' signified in male displays of authority over *their* woman, and 'shame' associated with male weakness and passivity shown towards – and in comparison with – woman.³⁰ In this context, wife-beating both facilitated and symbolized male 'honour', with fundamentalist Christians considering batterers to be engaged in 'God's work'.³¹

In Western Europe throughout the middle-ages, women were 'looked upon as a species apart, without the same feelings and capacity for suffering that men have'.³² Built on Christian views of marriage as the foundational patriarchal institution, this perception saw various cruel punishments inflicted upon wives for any number of acts deemed threatening and offensive to their husband's 'honour' and authority. Women were burnt at the stake for miscarrying, for child neglect and for 'scolding or nagging'.³³ Other brutal and painful punishments and forms of 'ritualistic shaming' of women were devised and administered by male members of the community in public displays of patriarchal domination. In particular, for the offence of being 'quarrelsome or not under the proper control of their husbands', the 'gossip bridle' was devised as a cage and tongue-spoke attached to the woman's head with a chain that her husband held onto to lead his wife through the streets before leaving her hanging in the public square until such time as 'the evil-doer had repented and demonstrated in all external signs of humiliation and

²⁷ *Genesis* [44] 24.1.

²⁸ *Ibid*: [35] 9.2.

²⁹ *Ibid*: [44] 25.4.

³⁰ H. Moxnes, 'Honour and Shame', *Biblical Theology Bulletin*, Winter 1993: 167-176.

³¹ Lundgren, 'The hand that strikes', *op.cit*: 173.

³² Elisabeth Gould Davis, *The First Sex*. New York, Putnam, 1971: 254-255.

³³ *Ibid*. Other 'offences' punishable by death included 'threatening their husbands...adultery, bearing a child out of wedlock, permitting sodomy, even though the priest or husband who committed it was forgiven, masturbating [and] lesbianism'.

amendment'.³⁴ The Christian construct of female 'innate sexual treachery'³⁵ and man's deep-seated 'dread of woman',³⁶ were reflected and endlessly reinforced in countless cultural objectifications of woman by male authors. In all manner of literary and media representations woman is beaten, tortured, mocked and violently expunged 'in the most cynical terms', becoming 'malignant, capable of any crime, a beast of prey, a vampire, a witch, insatiable in her desires'.³⁷

This violent expunging and objectification was emphatically reinforced in many of the most influential academic texts in Western social and political thought. Indeed, with few notable exceptions,³⁸ Western scholarly works have reinforced patriarchal values to the point of condoning, even encouraging, its violent implementation. Jean-Jacques Rousseau, one of the most influential Enlightenment thinkers, provides a classic example in his influential philosophical treatise on the nature and education of man *Emile* (1762).³⁹ In this two volume treatise, Rousseau depicts man – Emile – as the ideal citizen; a being of 'generally limitless potential', whereas woman – Sophie (who becomes Emile's wife) – is bound by her reproductive role and confined to a life of 'continual deference' to men's wishes.⁴⁰ Sophie is at once seen as representing a fundamental danger to men's independence and self-sufficiency, who may be, when necessary, violently restrained or punished, especially for refusing men's sexual advances. For Rousseau, 'male force is

³⁴ Dobash, Dobash and Gutteridge, *The Imprisonment of Women*, Blackwell, London 1986: 18-20.

³⁵ Nancy F. Cott, 'Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850', *Signs*, Vol. 4, No. 2 (Winter 1978): 228.

³⁶ K. Horney, 'The Dread of Woman', *International Journal of Psychoanalysis*, 13 (1932).

³⁷ Ibid: 349. A particularly blatant example of this violent expunging of woman is found in Sade's famous work *La Nouvelle Justine* (1792) in which he describes woman as 'a miserable creature...always false, always nasty, always dangerous...a creature [so] far from man...that it is a question if it could have any pretensions to being human', quoted in H.R. Hays, *The Dangerous Sex: The Myth of Feminine Evil*, Methuen & Co, London, 1966: 190-192. See Millet's *Sexual Politics* for a close critical analysis of more modern works of 'literature' engaged in the same process of violent objectification and denigration of 'woman', including Henry Miller's graphic depiction of wife-killing as a heroic, sexually gratifying act.

³⁸ The chief exception remains John Stuart Mill's treatise on *The Subjection of Woman* (1869) in which Mill states: 'The principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to another – is wrong itself, and...ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other'. Carole Pateman pays tribute to Mill in her work describing him as 'one of the rare men who not only supported the feminist movement but attempted to put his sympathies into practice...[while] completely rejecting the legal powers that he would acquire as a husband', *The Sexual Contract*, Cambridge, Polity Press, 1988: 161.

³⁹ Susan Moller-Okin, *Women in Western Political Thought*, Princeton University Press, 1979. Moller-Okin considers Rousseau work in general provides an 'adamant defence of liberal sexism' : 99-100.

⁴⁰ Ibid.

paramount [and] women's stated wishes and needs are not taken seriously'.⁴¹ As one critic explains: 'The fulfilment and happiness of man being Rousseau's primary goal, [he] could only regard the female species as a manipulable aspect of man's environment. Man was to be nurtured to fruition, woman to be moulded to accommodate man's needs'.⁴²

In the foundations of modern moral and political philosophy, the 'state of nature' scenario conceptualised in various forms, is consistent on one key point; namely, that 'In the beginning man was alone'.⁴³ From this foundation, an entire philosophical tradition is constructed in the image of man 'where neither mother, nor sister, nor wife exists', and 'woman is simply what man is not', her identity, 'a series of negations'.⁴⁴ While practically all liberal theory has 'presupposed the male head of a patriarchal household',⁴⁵ the very idea of politics and the public sphere constructed in Western political thought has envisaged a fraternity of 'ancient warrior-heroes', which reflects an underlying 'masculine fear of and hostility towards women'.⁴⁶

The common law has consistently reinforced these values. Until late into the 19th century, the law denied married women independent legal status, which effectively rendered wives the property of their husbands. Under the common law of coverture 'a wife, like a slave, was civilly dead'; upon marriage, man and woman became one person – the person of the husband.⁴⁷ In the United States and Britain wives were traded and sold at public auctions from the 16th century through to the 20th century.⁴⁸ For most of history, the family was regarded as man's private sanctuary; a kingdom and 'castle' over which he ruled as 'head of house' with effective rights to do as he pleased with *his* wife (and

⁴¹ John Darling, 'Rousseau on the education, domination and violation of women', *British Journal of Educational Studies*, Vol. 42, No. 2, June 1994, p.115: 117.

⁴² Ibid: 120. Darling argues that the abuse of women in today's society is an 'inevitable' consequence of these pronouncements: 117.

⁴³ Seyla Benhabib, *Situating the self: gender, community and postmodernism in contemporary ethics*. New York, Routledge, 1989: 156.

⁴⁴ Ibid: 155-157.

⁴⁵ Susan Moller Okin, *Justice, Gender and the Family*, New York, Basic Books, 1989: 14.

⁴⁶ Held, *Feminist Morality*, op.cit: 143.

⁴⁷ Pateman, *The Sexual Contract*, op.cit: 119.

⁴⁸ Ibid: 121.

children). A wife had no property rights in herself or her children and was in all legal and economic matters, subject to the will of her husband. A husband could legally force his wife to return to him and she could not divorce him, though he could divorce her, invariably leaving her economically destitute as he assumed ownership of any assets she had brought to the marriage.⁴⁹ Finally, a husband's rights as head of house gave him the authority to beat his wife for the purposes of 'disciplining' her, 'provided the stick he used was no thicker than a man's thumb'.⁵⁰ Research shows this standard pronouncement of the English 'rule of thumb', was being cited by judges to excuse domestic abusers in Britain as late as 1915.

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The weight of this cultural tradition could not help but have a profound influence on attitudes towards women who kill; and in particular, on women who kill their husbands, and conversely, on men who kill their wives. This influence is clearly evident in William Blackstone's famous *Commentaries on the Laws of England* (1765-1769) in which he compares the two crimes:

If a baron kills his feme it is the same as if he had killed a stranger, or any other person; but if a feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason...the sentence of women [is] to be drawn and burnt alive.⁵¹

⁴⁹ Shanley, Mary Lyndon. *Feminism, Marriage and the Law in Victorian England, 1850-1895*. Princeton, Princeton University Press, 1989.

⁵⁰ See Elisabeth Wilson, *What is to be done about violence against women?: Crisis in the Eighties*. Penguin, England 1983: 84.

⁵¹ Sir William Blackstone, *Commentaries* 418 n. 103 (R. Welsh & Co. ed. 1897) cited in Elisabeth Schneider, 'Resistance to Equality', *University of Pittsburgh Law Review*, Vol. 57, 1996, p. 477: 484 n. 21.

Indeed, the crime of ‘husband-killing’ was for much of history considered the highest in guilt in English criminal law.⁵² As the Western attitude to crime and punishment relaxed substantially in terms of the harshness and cruelty of the punishments sought for all crimes,⁵³ this distinction between the crimes of ‘wife-killing’ and ‘husband-killing’ was if anything, further accentuated in England via the common law of provocation. Developed in England in the late nineteenth century as an allowance for ‘human frailty’, the law was mostly applied to excuse men who killed their wives or girlfriends in a sudden rage of ‘passion’ upon finding her with another man. Research of cases of provocation across common law countries shows ‘an increasingly relaxed attitude’ to wife-killing throughout the 19th and 20th centuries, with less and less evidence required to excuse men of murdering their wives.⁵⁴ Whereas in France, women were also being excused the killing of an intimate partner on grounds of *Le crime passionnel*, in England:

There was no question of [‘husband-killing’] being excused as a crime of passion...[It] was [so] terrifying to the general public because...subversive...it was swiftly dealt with...to leave no doubt in the public mind that the murder of Englishmen would not be tolerated.⁵⁵

Moreover, although ‘wife-beating’ had been ‘discovered’, and ‘radically deligitimated’ among the English middle-class in the late 19th century⁵⁶ consistent with the rise of Victorian moralism, which saw middle-class women valorised as ‘domestic goddesses’

⁵² Judith Knelman, *Twisting in the wind: The murderess and the English press*. Toronto: University of Toronto Press, 1998: 98

⁵³ See Michel Foucault, *Discipline & Punish: The Birth of the Prison* (1977), Vintage Books, New York, (Second Edition, 1995). Foucault identifies this change of attitude in Western Europe from the 18th century which he describes as a ‘profound...mass of subtle and rapid changes’ delivering ‘a whole new morality concerning the act of punishing’ involving an ‘increasing leniency’: 12-22.

⁵⁴ Jenny Morgan, ‘Provocation Law and Facts: Dead Women tell no tales, tales are told about them’, *Melbourne University Law Review*, Vol. 21, 1997: 247.

⁵⁵ Knelman, *Twisting in the Wind*, op.cit: 88.

⁵⁶ Linda Gordon, ‘Women’s agency, social control, and the construction of ‘rights’ by battered women’, in Sue Fisher and Kathy Davis (eds.) *Negotiating at the Margins: the gendered discourse of power and resistance*, Rutgers University Press, New Brunswick, N.J., 1994:129.

and male brutality in general denounced as ‘cowardly’ and ‘unmanly’,⁵⁷ in many respects these changes in values actually increased men’s resentful ‘antipathy’ towards women.⁵⁸ The contradictions of Victorian gender norms also saw women who killed at this time regarded with ‘particular fear and perplexity’ and punished more severely for transgressing (and exposing) expectations of ideal womanhood.⁵⁹ And the more women were seen to be failing to conform to cultural expectations, the more likely they were to be executed for their crimes.⁶⁰

Thus, throughout the Victorian period at a time when wife-killing was a ‘very prevalent’ practice in England,⁶¹ and well into the 20th century, women who killed adults were more often executed than men who killed adults.⁶² And particularly in cases of domestic killing, the public and justice system alike showed little sympathy for women who killed their husbands; ‘responding in kind by viciously attacking the character of the perpetrator and then doing away with her’.⁶³ By contrast, men who killed their wives were often exonerated entirely or convicted of manslaughter and imprisoned at a time when various relatively minor crimes incurred the death penalty. Eventually this blatant discrimination drew a small public outcry in England, with John Stuart Mill contributing his view that the bias reflected the fact that juries were made up of *men* ‘of low character’.⁶⁴ However, the majority attitude as reported by the mainstream media remained in support of these decisions. In response to a case in 1872 in which a clergyman escaped execution for the crime of bludgeoning his wife to death, one letter in the *Times* vitriolically proclaimed:

⁵⁷ Ann Jones, *Next time she’ll be dead: battering and how to stop it*. Boston, Beacon Press, 1994: 98.

⁵⁸ Hays, *The Dangerous Sex*, op.cit:200. Hays documents men’s ‘antipathy towards the Victorian goddess’ in literary representations for the period which depicted women as ‘domestic animals...to be fed and cared for and beaten regularly’ in ways that went ‘farther than ever from any conception of women as people’.

⁵⁹ Knelman, *Twisting in the Wind*, op.cit: 230.

⁶⁰ Anette Ballinger, *Dead Woman Walking. Executed Women in England and Wales 1900-1955*. Aldershot, Vermont and Sydney: Ashgate, 2000: 329.

⁶¹ Knelman, *Twisting in the Wind*, op.cit: 88.

⁶² Ibid: 2. Knelman’s research of cases in the UK in the 19th century found that towards the end of the century some middle-class women convicted of murder had their sentences commuted to life imprisonment: 160-161.

⁶³ Ibid: 89.

⁶⁴ Ibid: 88, emphasis added. Mill and his wife, Harriett Taylor, published their views in an 1870 edition of the *Morning Chronicle*. There were other protests published around the same time in the *Examiner*, the *Times* and the *Daily News*.

‘An Englishman’s house is his castle; it is also but too often his prison and a prison from which the gaoler is never absent’.⁶⁵

Meanwhile, the common law at this time was still a long way from recognising wife-beating as a crime, much less from acknowledging its part in the majority of domestic homicides. In general, convictions for wife abuse in the lower courts in Britain, as well as the United States, remained rare occurrences, with criminal indictments disallowed ‘unless the battery was so great as to result in permanent injury, endanger life and limb, or be malicious beyond all reasonable grounds’.⁶⁶ The majority of magistrates at this time reasoned in favour of maintaining the privacy of the family – ‘drawing the curtains, shutting out the public gaze, and leaving the parties to forgive and forget’.⁶⁷ Records also show that the majority of women victims were reluctant to see themselves as abused and expressed concern that their lives would ‘become harder if they named themselves as victims’. The view that male violence was ‘inevitable’ was widespread amongst women, and many ‘did not seem to believe they were entitled to freedom from physical violence’.⁶⁸ Among middle-class women in particular there was also a strong desire to protect the ‘respectability’ of the family.⁶⁹ All of these factors combined to produce a major disincentive for women to report their husband’s abuse.

The first text on female criminality *The Female Offender* was published in 1895 by the founders of the discipline of criminology.⁷⁰ This highly influential text systematically appropriated Victorian notions of ‘normal’ womanhood as pious, passive and pure, to

⁶⁵ Ibid: 89.

⁶⁶ Del Martin, *Battered Wives*, San Francisco, Glide Publications, 1976: 32

⁶⁷ Ibid; quoting the Judges of the Supreme Court of California in *State v Oliver* (1874).

⁶⁸ Gordon, ‘Women’s agency’, in Fisher and Davis (eds.) *Negotiating at the Margins*: 130.

⁶⁹ Ibid: 129-130. Gordon argues that although feminist protests were integral to the process of ‘delegitimization’ of wife-beating in the late 19th century, ‘most feminists as well as more conservative moralists preferred that it remain hidden’, *ibid*: 129. Gordon’s case studies in Boston between 1880 and 1960 reveal a ‘class based’ response to domestic violence, which meant ‘the victimisation of the well-to-do women remained better hidden by the collusion of relatives, friends and professionals concerned with respectability’ (126). As well, the ‘focus on family’ that this response assumed until the 1930s, saw women complain to authorities in terms of ‘husband’s non-support rather than abuse’ (132). See also Linda Gordon, *Heroes Of Their Own Lives: The Politics And History Of Family Violence Boston, 1880-1960*. New York, Viking, 1988

⁷⁰ Cesare Lombroso and William Ferraro, *The Female Offender*, London: T.F. Unwin, 1895.

construct a ‘science’ of female criminality that defined women criminals as biological anomalies; not ‘real women’, in contrast to the norm. Its authors posited the theory that:

[While] her normal sister is kept in the paths of virtue by many causes, such as maternity, piety, [and] weakness...when these counter influences fail, and a woman commits a crime, we may conclude that her wickedness must have been enormous before it could triumph over so many obstacles.⁷¹

This ‘science’ also involved elaborate documentation of the ‘masculine’ traits of female offenders to support the theory that women who commit crime were ‘aberrations of womankind’.⁷² Ironically, these ‘masculine’ traits were not identified in male offenders whose gender identification – ‘masculine’ or otherwise – never became a subject of criminological inquiry in the way that gender identification and ‘deviance’ became the focus of studies of female criminality.⁷³

In the twentieth century these ideas were further reinforced under the influence of Freudian psychoanalysis which ‘resurrected the much older, more misogynist images of the seductive daughter, the nagging wife, and the lying hysteric’ to generate ‘a more sustained inquiry into the victim’s complicity in having caused abuse’.⁷⁴ In particular, Freudian analysis renewed interest in the long-held cultural prejudice that women’s nature as well as society predisposes them to develop ‘powerful masochistic impulses’.⁷⁵ From this key premise, psychiatrists and others working in the field developed a series of increasingly fantastic explanations for wife abuse, all of which denied the seriousness of women’s experiences by shifting the blame onto the sexual and biological ‘problems’ of

⁷¹ Ibid: 152.

⁷² Susanne Davies, ‘Captives of their bodies: Women, law and punishment, 1880s-1980s’ in Diane Kirkby, *Sex, Power And Justice: Historical Perspectives Of Law In Australia*. Oxford University Press, Melbourne, 1995: 100.

⁷³ Ibid. According to Davies, ‘Maleness and masculinity have been ignored in conventional studies of men’s offending’, citing Carol Smart’s seminal work, *Crime and Criminology: A Feminist Critique*, (Routledge & Kegan Paul, London, 1976) in support of this claim (ibid: n. 4).

⁷⁴ Elisabeth Pleck, *Domestic Tyranny: The Making Of American Social Policy Against Family Violence From Colonial Times To The Present*. New York, Oxford University Press, 1987: 146-147.

⁷⁵ Millet, *Sexual Politics*, op.cit: 191 n.99 quoting Freud (*Femininity*, 1933: 116)

women.⁷⁶ According to the theory that came to dominate the discourse on wife-abuse in Western countries well into the second half of the twentieth century, ‘Wife beating...can only occur with the tacit permission of its victims...the chronically abused wife...remains in the same situation so that she may be beaten again.’⁷⁷

Critical studies confirm that the more we have analysed criminal and psychological behaviour in general, the more we have moved to blame and ‘pathologise’ women victims, while ‘exonerating violent men’.⁷⁸ This has reinforced the existing cultural mind-set that violence is more ‘natural’ and ‘instinctive’ for men than for women, and a degree of social acceptance of male violence, with female violence – however *less* violent in actuality – ‘simply seeming worse’ with reference to the male norm.⁷⁹ In particular, killing is constructed and rationalised as a distinctly ‘masculine phenomenon’.⁸⁰ Moreover, women who kill their abusive male partners are most severely disadvantaged by this cultural mind-set because it not only minimises the seriousness of the violence they are reacting to, characterised as weakness rather than a violent intent to harm,⁸¹ but it judges women by the extent to which they can be stereotyped and pathologised ‘as having contributed to or provoked the violence against them’, rather than by the facts pointing to the seriousness of the violence they are reacting to.⁸²

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⁷⁶ Susan Edwards, *Policing “Domestic” Violence: Women, the Law and the State*. London, Newbury Park: Sage Publications, 1989: 164.

⁷⁷ Ibid: 165. This claim was made by an Australian clinical psychologist and marriage counsellor (James Kleckner) in 1978. He further elaborated his claim that ‘A woman who stays passive and allows herself to be beaten, is accepting the validity of beating as a method of communication and interaction’.

⁷⁸ Ibid: 168.

⁷⁹ Debra Kirkwood, ‘Female Perpetrated Homicide in Victoria Between 1985 and 1995’, *The Australian and New Zealand Journal of Criminology*, Vol. 36, Number 2, 2003 pp. 152-172: 167-169.

⁸⁰ Ibid: 153. Kirkwood cites Polk’s analysis in *When Men Kill* (1995) in which Polk states ‘there is a wealth of literature that establishes the indisputable proposition that homicidal violence is masculine in its makeup’.

⁸¹ See Schneider, ‘Resistance to Equality’, op.cit: 484-485, for a comprehensive list of studies providing critical analysis and research on this subject.

⁸² Marian Meyers, *News Coverage of Violence Against Women: Engendering Blame*, Thousand Oaks, Sage Publications, 1997: 71.

The distortions and biases of this cultural tradition are evident in most aspects of the New Zealand justice sector's response to domestic violence over the last twenty years and specifically in the legal, political and public response to the *Oakes* case. Before turning to reflect directly on the lasting influence of this cultural tradition in the New Zealand context, I want to turn to reflect critically on the attempts made throughout history to challenge this tradition, highlighting the progress made, as well as the key axes of resistance. This dialectic of 'reform and resistance' I argue provides a critical aspect of the ongoing process through which 'cultural justice' is forged, revised and undermined in practice.

In the domestic violence context, the deeply entrenched values and norms of cultural patriarchy have systematically constrained reform efforts on behalf of battered women and facilitated resistance to reform on behalf of the dominant cultural group – a group which includes the vast majority of perpetrators of domestic violence. While much of this resistance is waged via ongoing inaction and complacency shown towards the culturally privileged male norm implicit in the laws, principles and practices of the 'justice system', resistance becomes more active at periods throughout history when reformers seem to be making significant headway. Arguably, Anglo-western countries including New Zealand, are currently experiencing such a heightened level of resistance or 'backlash' against reforms in the domestic violence field, and further, this resistance is undermining the process of reform and justice. Situating this resistance historically helps to show the extent to which history repeats itself, and the extent to which it does so because of the persistence of formally outmoded cultural norms, attitudes and prejudices that cling on in spite of the introduction of progressive laws and policies. Indeed, this reflection suggests that a serious commitment to justice for the victims of domestic violence cannot be effectively implemented until the mechanisms of cultural injustice are identified and addressed.

‘Cultural justice’: reform and resistance into the ‘post-feminist’ age

Decades after first bringing the problem [of domestic violence] to public awareness, feminist activists now confront a growing chorus of researchers and political activists...suggesting that policy-oriented efforts for women have been misplaced...[and who are] motivated by a desire to undermine or dismantle those initiatives that administer to women victims.

Michael Kimmel, 2002⁸³

Historical analysis exposes this ‘growing chorus’ of resistance to feminist campaigns on behalf of battered women as part of a recurring cycle of resistance to the activities of the woman’s movement in general; a consistent line of resistance waged on behalf of the dominant cultural group and from certain members of this group, reluctant to concede cultural dominance. This history reveals the extent to which reform efforts in the domestic violence field have been undermined by this concerted resistance such that much of the progress made towards combating domestic violence has been achieved largely without the help of the formal institutions of justice. Furthermore, historical reflection highlights the systematic nature of this resistance and the extent to which it is underpinned by the deeply embedded norms of cultural patriarchy that stigmatise, misrepresent and dismiss woman as ‘Other’, and in the process give greater weight to the protests and interests of the normative citizen – ‘the reasonable *man*’ – in debates about what is just. This enduring prejudice impacts on battered women victims and defendants in attitudes and judgments that continue to minimise rape, especially within marriage, that show reluctance to condemn domestic abusers as serious offenders, and that suggest a predisposition to deny self-defence to women who kill their violent partners combined with a readiness to believe that women ‘provoke’ men to beat and kill them.

⁸³ “‘Gender Symmetry’ in Domestic Violence: A Substantive and Methodological Research Review’, *Violence Against Women*, Nov. 2002, 8(11): 2.

Historical reflection on the periods of particularly active reform and resistance in the Anglo-western response to domestic violence, confirms the profound and lasting influence of this dominant cultural frame, and highlights the enduring challenges this cultural context poses for delivering justice to battered women victims and defendants.

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Mary Wollstonecraft's influential early feminist treatise *Vindication of the Rights of Women* (1792),⁸⁴ was substantially addressed to challenging Rousseau's patriarchal pronouncements on woman's 'natural' subordination and subservience to man. However, at the time it was written, the widespread acceptance and religious sanction of these views meant that Wollstonecraft's liberal-feminist treatise had to be couched in terms that reassured men that her aim (principally to defend women's right to education), was not for women 'to have power over men, but over themselves'.⁸⁵ This was achieved in part by Wollstonecraft reasoning that educated women would be less likely to be 'domineering' mothers and, therefore, would be better equipped with the resources needed to nurture the freedom of spirit so critical to the healthy education of Emile (man).⁸⁶

However, Wollstonecraft's liberal treatise was still widely condemned and mocked in a public outcry (from women as well as men) of 'barely printable insults'.⁸⁷ The opposition to this early attempt to develop a discourse on women's rights, ensured its marginalisation for many years to come and the stigmatisation of the broader feminist cause as a subject of ridicule and hasty dismissal; a stigmatisation that has arguably

⁸⁴ Miriam Brody (ed.), 'Introduction', *Vindication of the Rights of Women*. London, Penguin, 1985.

⁸⁵ *Vindication*, p. 135.

⁸⁶ *Ibid*: 154.

⁸⁷ Brody, 'Introduction', *op.cit.* The majority pronounced Wollstonecraft a 'hopeless victim' of that 'incurable affliction' – penis envy.

endured ever since, with the public and media remaining ‘always more inclined to denounce [feminism] than study it’.⁸⁸

The first-wave of feminist campaigns against ‘wife-beating’ (as ‘domestic violence’ was initially referred to), which got underway some decades later, were tainted by this stigma and struggled to be taken seriously, as a result. Indeed, for at least the first century after the ‘discovery’ of wife-beating in Britain, the public and media regarded it as such a joke that ‘it was virtually impossible for women to get anyone to believe that they were being persistently brutalized and even tortured’ within the ‘sacred purity’ of the home.⁸⁹ These early campaigns included a ‘staunchly feminist’ petition published in 1825 by William Thompson, defending the necessity of political rights for women to ‘bring an end to the secrecy of domestic wrongs’.⁹⁰ Several decades later, a book titled ‘Wife torture in England’ (1878) was published by feminist activist Frances Power Cobbe.⁹¹ Mid-century, John Stuart Mill delivered a speech in the English House of Commons protesting the hypocrisy of laws that allowed so many women to be ‘annually beaten to death, kicked to death, or trampled to death by their male protectors’.⁹² Mill also wrote several newspaper articles campaigning for battered women to have some means of effective escape.⁹³

However, although successful in achieving significant legal reforms including the *Matrimonial Causes Act* passed in England in 1878, which allowed women to legally separate from a husband convicted of aggravated assault upon her and to claim maintenance from him,⁹⁴ these campaigns were ultimately unsuccessful in generating a sustained public-political commitment against wife-beating or a any decisive change of

⁸⁸ Rhonda Hammer, *Antifeminism and Family Terrorism: A critical feminist perspective*. Rowman & Littlefield, Maryland, USA, 2002:18 quoting Susan Faludi, *Backlash* (1995: 33).

⁸⁹ Elisabeth Wilson, *What is to be done about Violence against Women? Crisis in the Eighties*. Penguin, England, 1983: 58. Wilson says that wife-beating was widely caricatured in the media as a ‘music-hall joke’ through to the 1970s, when ‘the issue was raised sharply’, *ibid*: 47.

⁹⁰ Dolores Dooley (ed.) *Appeal of One Half of the Human race, Women, Against the Pretensions of the Other Half, Men to retain them in Political and thence in Civil and Domestic, Slavery* (Reprinted by Cork University Press, Ireland, 1997) cited in Pateman, *The Sexual Contract*, *op.cit*: 156.

⁹¹ Wilson, *What is to be done?*, *op.cit*: 86.

⁹² Pateman, quoting Mill’s speech delivered in Parliament in 1858, *The Sexual Contract*, *op.cit*: 123.

⁹³ Wilson, *What is to be done?*, *op.cit*: 85, citing articles published in the 1850s.

⁹⁴ *Ibid*: 86. Other achievements of this period of early feminist activism more generally, included the Married Woman’s Property Act 1882 which went a long way towards ending the law of coverture, as well as an 1885 law to prohibit the sale of wives, discussed in Pateman, *The Sexual Contract*, *op.cit*: 120.

attitude away from the patriarchal values that underpinned it. As a result, after this early period of public attention and reform, the issue ‘sank once again into oblivion’.⁹⁵ By the early 20th century in Britain, a public mood swing against further reforms becomes evident, with the popular British philosopher, Bertrand Russell, speaking out publicly against the loss of ‘rights husbands once had’, and claiming that husbands had become ‘a downtrodden race’.⁹⁶

In the United States, feminist campaigners had managed to ‘score points’ against wife-beating more ‘obliquely, without attacking marriage or men in general’. Again the strategy used was one of focusing on women’s role as mothers, such that ‘the social necessity...in raising healthy, disciplined children...became the reason wife-beating was bad’.⁹⁷ Similarly, temperance campaigners in the US, as elsewhere, made some headway by highlighting the role that alcohol played in perpetuating men’s violence against women and children in the home. However, the early 20th century in the US, generally known as the Progressive era (1890-1920), tends to be regarded by feminists as a ‘period of discouragement’.⁹⁸ This is particularly true for campaigns against wife-beating, which began to be dismissed as ‘old-fashioned moralism’ and believed to be ‘a problem of the past’, with reformers in the US, as in Britain, finding ‘other social problems more interesting and pressing’.⁹⁹ Various attempts by feminists to counter this backlash by incorporating their campaigns into a wider platform of ‘complete citizenship’, ended up backfiring, and eventually led to a ‘fracturing’ of the movement with lasting effects.¹⁰⁰ Moreover, because the issue was not confronted directly as a problem of male aggression, much less of systemic cultural sexism, wife-beating ‘never gained recognition as a widespread social problem’,¹⁰¹ while victims tended to assume much of the blame.¹⁰² This indirect approach also resulted in various social and legal agencies set up to deal with the

⁹⁵ Wilson, *What is to be done?*, op.cit: 86.

⁹⁶ Ibid: 87.

⁹⁷ Gordon, ‘Women’s agency’, op.cit: 131.

⁹⁸ Susan Breckinridge, *Women in the Twentieth Century: A Study of Their Political, Social and Economic Activities*, New York: McGraw-Hill, 1933: 268-9.

⁹⁹ Pleck, *Domestic Tyranny*, op.cit: 126.

¹⁰⁰ Wendy Sarvasy, ‘Beyond the Difference versus Equality Policy Debate: Postsuffrage Feminism, Citizenship and the Quest for a Feminist Welfare State’, *Signs* 1992, Vol. 17, No. 2.

¹⁰¹ Wini Breines and Linda Gordon, ‘The New Scholarship on Family Violence’, *Signs*, Spring 1983: 490.

¹⁰² Gordon, ‘Women’s agency’, op.cit: 140.

problem, including the Family Court, adopting a ‘curative non-punitive’ approach, which ‘had little, if anything, to do with...concern about family violence’ or its punishment, but rather, was concerned to ‘preserve the family [and] act in the best interests of the child’.¹⁰³

Finally, the two World Wars (1914-1918 and 1939-1945) brought an end to feminist activism, with many feminists reluctant to resume public campaigning after the cessation of conflict following the first war.¹⁰⁴ The preoccupation with war throughout this period at once provided men with a ‘ready excuse’ for violence in the home, which once again became seen as ‘merely an extreme form of appropriate masculine behaviour’.¹⁰⁵ Jock Phillips’ historical study of gender relations in New Zealand, attributes the ‘common’ occurrence of wife-murder in the period between the wars to the macho male stereotype, which Phillips argues was systematically reinforced and glorified by war. Indeed, in his view, married women have been ‘the first and greatest victims of the male stereotype in New Zealand’.¹⁰⁶ Following the Second World War, sympathy for the returning heroes and a post-war emphasis on the traditional family ideal, further reinforced the ‘cult of domesticity’, which then served, among other things, to intensify the pressure on battered women to keep silent about their husband’s abuse.¹⁰⁷

More than a period of discouragement, the mid-twentieth century (1930-1960) is described by feminist, Kate Millet, as a period of active cultural ‘counterrevolution’, with ‘a new frankness’ shown in expressions of masculine hostility and resentment towards women.¹⁰⁸ In one book Millet describes as ‘an extremely influential popularization of Freudian theory’, published in New York (1947) under the title *Modern Woman, The Lost Sex*, she finds a ‘definitive statement of [the] counterrevolutionary attitude’, with feminism openly and relentlessly attacked as a ‘deep illness’ and ‘neurosis’ to be

¹⁰³ Pleck, *Domestic Tyranny*, op.cit: 126-127.

¹⁰⁴ Anne Phillips, ‘Feminism and the Politics of Difference. Or, Where Have All the Women Gone?’, in Susan James and Stephanie Palmer, *Visible Women*, Hart Publishing, Oxford – Portland Oregon, 2002: 12.

¹⁰⁵ Wilson, *What is to be done?*, op.cit: 87.

¹⁰⁶ *A Man’s Country? The Image of the Pakeha Male – A History*, Revised edition, 1996: 260.

¹⁰⁷ Wilson, *What is to be Done?*, op.cit: 87.

¹⁰⁸ *Sexual Politics*, op.cit: 43.

condemned along with other dangerous discourses (those listed include nihilism, anti-Semitism, anarchism, Communism and racism) for ‘preaching hatred and violence’.¹⁰⁹

When ‘radical feminists’ (such as Millet) revived the woman’s movement in the 1960s, and began again to politicise wife-beating,¹¹⁰ there was an outcry from various critics in defence of the family ideal with several books published attacking reformers for ‘taking power away from the working class father’.¹¹¹ As a result, much of the research on family violence that ‘burst forth’ in the 1970s, ‘discouraged analysis of the problem in the context of male supremacy...[in favour of] a gender-neutral perspective’, applying a quantitative analysis that tended to conflate child abuse and wife beating as common indicators of a ‘breakdown in social order’ within violent, ‘dysfunctional’ families.¹¹² In turn, there was no recognition given to the power context of the violence or distinction made between men’s and women’s violence, while the traditional family ideal provided a ‘consistent barrier to reform’.¹¹³

The first feminist text on the subject to challenge family violence as a problem of patriarchal domination,¹¹⁴ identified the ‘power and control’ tactics of male batterers and the key structural aspect of family violence as violence ‘directed at women by men’. This research was generally dismissed as unscientific, ‘emotionally charged’, ideology that

¹⁰⁹ Ibid: 206-207.

¹¹⁰ Edwards, *Policing ‘domestic’ violence*, op.cit: 155. Edwards traces the revival of campaigns against family violence in Britain to the 1960s: ‘Since the 1960s women have been researching, interviewing and writing about victims of marital violence’. However, others point to a delayed focus on family violence by feminists concerned with issues ‘less frightening and unpleasant’ and a little more ‘modern’, such as pornography, Wilson, *What is to be done?*, op.cit: 202.

¹¹¹ This was the main theme of publications in the 1970s such as *The Policing of Families* (Donzelot, 1977) and *Haven in a Heartless World: The Family Besieged* (Lasch, 1977) cited in Pleck, *Domestic Tyranny*, op.cit: 128.

¹¹² Breines and Gordon, ‘The new scholarship’, op.cit: 508-511.

¹¹³ Pleck, *Domestic Tyranny*, op.cit: 7. Gordon maintains that ‘concern with family violence has been a weather vane identifying the prevailing winds of anxiety about family life...and gender relations, quoted in Carol Bacchi, *Women, Policy And Politics: The Construction Of Policy Problems*. London, Thousand Oaks, California, Sage, 1999: 166.

¹¹⁴ Rebecca and Russell Dobash, *Violence against Wives: A case Against the Patriarchy*. New York, Free Press, 1979. The data collected for this publication included 3,020 cases in two Scottish cities in 1974 which established that 90% of family violence cases conformed to a ‘power and control’ model of patriarchal domination.

‘jumped’ from empirical data to claims about sexism.¹¹⁵ Lenore Walker’s feminist inspired texts *The battered woman*, followed by *The battered woman syndrome*,¹¹⁶ were similarly dismissed to begin with, amidst the constant refrain: ‘what about battered husbands?’,¹¹⁷ and in light of less than serious research already available at the time on ‘battered husband syndrome’, which claimed ‘husband-beating’ was a more prevalent crime than wife-beating.¹¹⁸ In Britain, this catchcry became the standard response to campaigns against wife-abuse as part of a deliberate and systematic attempt to ‘to minimize or flatly deny’ such abuse, and construct it as a trivial and joking matter.¹¹⁹ The lack of public outrage and ‘media-sustained indignation’ in response to cases of wife abuse – compared with other types of violence – was also noted at this time in Britain.¹²⁰

In this context, much of the progress achieved by the second-wave of feminist activism occurred at the grass-roots level of the battered woman’s movement, especially through women’s refuges and shelters set up to provide practical help ‘organising material resources and emotional support to enable women to escape male violence’.¹²¹ This work made a profound difference, not least of all because for the first time, ‘women were [being] listened to and believed’ with recognition given to the ‘brutally material reasons’ why women are so often prevented from escaping the violence, and without the usual expectation of reconciliation.¹²² From this initial practical help, as seen in the New Zealand example, Refuge developed into a social movement (the battered woman’s movement in the US and Canada),¹²³ raising awareness of domestic violence in hard-

¹¹⁵ Breines and Gordon, ‘The New Scholarship’, op.cit: 509-520 quoting Richard Gelles’ review of the Dobashes’ text published in *Society*, Sep-Oct, 1980.

¹¹⁶ Lenore Walker, *The Battered Woman*. New York, Harper & Row, 1979 and *The Battered Woman Syndrome*. New York, Springer Publishing Co., 1984.

¹¹⁷ Wilson, *What is to be done?* op.cit: 84.

¹¹⁸ One of the first of these articles was ‘The battered husband syndrome’ by Susan Steinmetz, which was published in *Victimology* 2, 1977-78, p. 499. Steinmetz cites several studies in the US purporting to show that women and men share the same motives for partner abuse.

¹¹⁹ Wilson, *What is to be done?*, op.cit: 84.

¹²⁰ Ibid: 83. Faludi claims the US media pronounced the second-wave of the woman’s movement a ‘fad’, a ‘bore’, or ‘dead’, by the early 70s, and in doing so took ‘a rather active role in hastening the movement’s last rites’ (*Backlash*, 1995: 33) cited in Hammer, *Antifeminism*, op.cit: 18.

¹²¹ Wilson, *What is to be done?*, op.cit: 222.

¹²² Ibid.

¹²³ Elisabeth Schneider, ‘Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse’, 67, *New York University Law Review*, 520, 1992: 523. Schneider describes a ‘depth and

hitting public campaigns, providing legal advocacy and support for battered women, influencing legislative reform, conducting independent research while challenging Police for failing to provide effective intervention and protection for victims of domestic violence.¹²⁴ Through these activities, the movement responded to and helped facilitate an emerging social awareness and ‘sisterhood’ among women who came together in various groups within the community to express ‘a rising anger at the roles [they] were being forced to play’.¹²⁵ The size of the practical and political void filled by Refuge is reflected in the rate at which refuges and shelters were set up throughout Anglo-western countries, with close to 500 established between 1976 and 1981 in the US alone.¹²⁶ By 1985, the battered woman’s movement in Canada was regarded as ‘the most powerful lobby in the country’.¹²⁷

However, as seen in the New Zealand context, the Refuge movement struggled to achieve mainstream recognition, with the media reinforcing the construction of Refuge as ‘man-hating’,¹²⁸ and with funding withheld for the first decade of operation and then made conditional on Refuge working towards family reconciliation.¹²⁹ Indeed, when the national collective moved in the mid-1980s to establish its code of ethics incorporating feminist principles of women’s empowerment and self-determination, the government threatened to withdraw its funding, and some member refuges broke away from the organisation in protest at what they perceived as ‘a betrayal of the original goal of helping battered wives and their children’.¹³⁰ This response reflected a wider cultural backlash against the ‘radical’ feminist cause to expose and eliminate patriarchal

breadth’ of work undertaken by the battered woman’s movement in the US based on her own nation-wide survey.

¹²⁴ See Jenny Chapman, *Interest Groups: A Case Study Of The Women’s Refuge Movement In New Zealand*. MA Thesis, University of Auckland, Political Studies, 1997. Chapman’s thesis provides an outline of the political advocacy undertaken by the Refuge movement in NZ from its inception.

¹²⁵ Suellen Murray, *More Than Refuge: Changing Responses To Domestic Violence*. Perth W.A. University of Western Australia Press, 2002: 23-24.

¹²⁶ Del Martin, *Battered Wives*, op.cit, revised and updated, 1981: 275. The first Refuge in NZ was set up in 1973. By 1981 there were eleven refuges nationwide and today there are 51 as part of the national collective (NCIWR). Each Refuge employs two paid staff and several volunteers. In 2007 28,845 women and children used the service. www.womensrefuge.org.nz/about_services Accessed 20/1/ 2008.

¹²⁷ Laurel S. Weldon, *Protest, policy, and the problem of violence against women: a cross-national comparison*. Pittsburgh, University of Pittsburgh Press, 2003: 149.

¹²⁸ Chapman, *Interest groups*, op.cit: 8.

¹²⁹ http://www.womensrefuge.org.nz/about_herstory.asp Accessed 9/9/2005.

¹³⁰ ‘No-men Code Splits refuge Group’, *NZ Herald*, 25 September, 1985.

oppression,¹³¹ and generated ‘a new wave’ of resistance against feminist activism in the battered woman’s movement that saw ‘everything blamed on the victimised woman and on feminist women trying to help her’.¹³²

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The influence of this history of reform and resistance on cases involving battered women who kill their abusers, is effectively summed up in the development – and rejection – of Walker’s ‘battered woman syndrome’ (BWS). Walker’s feminist inspired model was specifically intended to expose and correct the prevailing ‘victim-blaming’ myths about battered women, and to explain how ‘battered women are victims...[who are] physically and psychologically abused by men and then kept in their place by a society that [is] indifferent to their plight’.¹³³ It succeeded in increasing the possibility of conviction for some wife beaters who had previously found it easy to deny criminal charges,¹³⁴ and in general ‘gave women a voice, a language and legal recognition’, previously denied them.¹³⁵ The complexity and controversy of the syndrome’s application in cases like *Oakes* at once spawned a ‘cottage industry’ of academic discourse and debate on the criminal law’s application in contexts of domestic violence.¹³⁶

However, having first shown a reluctance to accept BWS evidence, the courts began to apply it ‘with a vengeance...whittling the legal understanding of “battered woman” to

¹³¹ A backlash that extended to many feminists who rejected the ‘simple ideas with strong moral appeal...identifying clear “goodies” and “baddies”’ that were associated with radical feminist theory. See Alison Jones and Camille Guy, ‘Radical feminism in New Zealand: from Piha to Newtown’, in Rosemary Du Plessis et al (eds), *Feminist Voices: Women’s Studies Texts for Aotearoa/New Zealand*. Auckland, Oxford University Press, 1992: 307.

¹³² Jones, *Next time*, op.cit: 165. See Hammer, *Antifeminism*, op.cit, for an analysis of the anti-feminist backlash in the US through the 1980s and 1990s. According to Hammer, feminism served and continues to serve ‘as a prominent target in the new-right’s witch-hunt’: 19.

¹³³ Walker, *The Battered Woman*, op.cit: 15.

¹³⁴ Martin, *Battered Wives*, op.cit: 272. See Elisabeth McDonald, ‘Defending Abused Women: Beginning a Critique of New Zealand Criminal Law’, *Victoria University of Wellington Law Review*, Vol. 27 (4) Dec (1997) pp. 673-696 for an overview of the introduction of BWS evidence in New Zealand courts in a variety of cases.

¹³⁵ Susan Edwards, ‘Battered Woman Syndrome’, *New Law Journal*, 142, 1992, p.1350: 1351.

¹³⁶ Schneider, ‘Resistance to Equality’, op.cit: 478.

such a fine point that few living women fit the description'.¹³⁷ Moreover, the breakthrough case in which BWS was successfully applied to support the defendant's plea of self-defense,¹³⁸ seems to have been substantially due to the 'sensitivity to gender issues' and 'agenda for feminist reform' on the part of the presiding (female) judge.¹³⁹ In subsequent interpretations of this ruling in similar common law cases, such as *Oakes*, this sensitivity and agenda have been conspicuous by their absence, as has acceptance of BWS in support of a plea of self-defence.¹⁴⁰ While much has been written about the inadequacies of the BWS,¹⁴¹ not least of all its tendency to reinforce the stereotype of women's 'inherent irrationality' and 'helplessness' in the hands of judges predisposed to believe the stereotype,¹⁴² this response says more about the sexism of the majority of judges (and other agents) responsible for adjudicating criminal cases like *Oakes* than it confirms about the inherent limitations of Walker's model.

Indeed, the point is effectively highlighted by the controversy that dogged the syndrome from the outset in accusations of an underlying 'feminazi' agenda; 'special treatment' for women; 'a licence to kill and maim [men]'; even 'a threat to the very tenets of democracy'.¹⁴³ Under the title: 'Battered justice syndrome', one opponent dismissed BWS as 'simply a sign of the times...in a nation of victims everything can be justified on the basis of claiming abuse of some sort'.¹⁴⁴ In New Zealand the same controversy was observed with the mere mention of the term (BWS) seen to 'divide society in two without

¹³⁷ Jones, *Next Time She'll Be Dead*, op.cit: 103.

¹³⁸ Namely, the 1990 case of *Lavallee* decided by the Canadian Supreme Court presided over by Canada's first woman judge of the Supreme Court, Madam Justice Bertha Wilson (*Lavallee v R* [1990] 1 SCR 852). In this case, the defendant, Lyn Lavallee shot and killed her abusive husband as he turned to leave, so was not reacting to the standard, 'imminent' threat.

¹³⁹ As interpreted in Julie Stubbs and Julia Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australia Case Study', *CLWL/RFD*, Vol. 8, 1995 pp. 122-158: 123. Tracing application of the syndrome in Australian jurisdictions following *Lavallee*, the authors argue that the courts applied the reasoning and decision in *Lavallee* 'stripped of its feminist agenda' and completely reinterpreted the syndrome without any reference to gender analysis: 124.

¹⁴⁰ *Ibid.*

¹⁴¹ See, for example, M. McMahon, 'Battered Women and Bad Science', in *Psychiatry, Psychology and Law*, Vol. 6, No. 1, 1999, for a critical overview of the arguments presented against the syndrome.

¹⁴² Hope Toffel, "Crazy Women, Unharmful Men and Evil Children" in *Southern California Law Review*, Vol. 70, 1999: 351.

¹⁴³ Schneider, 'Resistance to Equality', op.cit: 482-483, highlighting the claims made by Professor Alan Dershowitz in *The Abuse Excuse and Other Cop-Outs, Sob Stories and Evasions of Responsibility* (1994).

¹⁴⁴ Michael Fumento www.fumento.com Accessed 22/3/2004.

any discussion taking place'.¹⁴⁵ The protests suggested a deeper resistance to the battered woman's movement for 'giving credence to the malicious and unsubstantiated accusations of violence' by women who kill – 'in a rage of jealousy' – and then rely on 'the discredited myth that it is men who are exclusively responsible for family violence'.¹⁴⁶

By the 1990s, and substantially fuelled by this kind of backlash against reforms seen by some to provide 'special treatment' for women, a 'post-feminist' age was beginning to emerge throughout Anglo-western societies in which feminism as a whole 'is increasingly depicted as a self-interested lobby which seeks rights without responsibility, and is negligent as to the consequences for children and the family'.¹⁴⁷ The backlash is characterised by the catchcry that the woman's movement has been taken 'too far', together with a rejection of so called 'victim feminism' and claims that men – especially fathers – have been 'betrayed' by the implementation of feminist reforms.¹⁴⁸ This backlash has seen some 'post feminists' promoting women's gun ownership as an alternative means of 'empowering' women, rather than reliance on government and law.¹⁴⁹ And activists working in the area of violence prevention and advocacy for victims (via the formal channels) have been targeted by this resistance in campaigns that some consider 'tantamount to goading or inciting attacks on women'.¹⁵⁰

¹⁴⁵ Judith Ablett-Kerr, 'Afterword' in Gay Oakes, *Decline into Darkness*, op.cit: 184.

¹⁴⁶ 'FARE Condemns Gendered Excuses for Murderers', *Scoop: Independent News*, July 20, 2001. Press release, quoting Daryl Ward, spokesperson for FARE (Families Apart Require Equality). See also, Theodore Dalrymple, 'Oh, to be in England – What causes crime?' in *City Journal*, Spring 1998, 1 Vol. 8, No. 2, commenting on crime in New Zealand in light of the *Oakes* case in particular.

¹⁴⁷ Carol Smart, *Feminism and the Power of Law*, London, Routledge, 1989: 146.

¹⁴⁸ Much of this 'post-feminist' discourse has been written by women 'ex-feminists' or rather, women who once identified with the feminist cause but who now claim feminism has lost direction. See, for example, Susan Faludi, *Stiffed: The betrayal of the American Man*. New York, William Morrow, 1999 and Tammy Bruce, *The Death of Right and Wrong: Exposing the Left Assault on Our Culture and Values* (Roseville, California: Forum, 2003). A former member of NOW (the feminist-based National Organization of Women), Bruce argues that modern feminists are a serious danger to women and expresses outrage at these 'so-called feminists still claiming that ours is a "patriarchal, oppressive" society when it is due in great part to actions of men that we have the freedom and equity we enjoy today': 70. Also Naomi Wolf, *Fire With Fire: The New Female Power and How it Will Change the 21st Century*. London: Chatto & Windus, 1993.

¹⁴⁹ A classic example of this strain of resistance is found in the collection of articles edited by Wendy McElroy, *Liberty for Women: Freedom and Feminism in the Twenty-first Century*. Chicago: Ivan R. Dee, 2002, which collectively promote a 'new individualist feminism' heavily influenced by Camille Paglia and other prominent 'feminist-bashing "feminists"', Hammer *Antifeminism*, op.cit: 43.

¹⁵⁰ Hammer, *Antifeminism*, op.cit: 56.

Claims of ‘gender symmetry’ in domestic violence, that have been effectively used by ‘fathers’ rights’ campaigners to undermine implementation of domestic violence legislation in the Family Court, have become a focal point and trump card of the ‘post-feminist’ backlash. These claims draw on ‘conflict tactics scale (CTS)’ research that produces a rough ‘symmetry’ between male and female domestic abuse by not measuring the psychological effects of abuse, such as fear, or comparing the seriousness of the physical injuries caused by domestic violence; by not including sexual abuse or post-separation violence (both almost exclusively male perpetrated forms of abuse); by ignoring motives for violence, such as self-defense, and in general by failing to ascertain the dominant aggressor.¹⁵¹ In a study conducted in 2002, more than 100 articles and reports claiming gender symmetry were located, all of which referred to CTS research.¹⁵² From this perspective, both women and men within marriage can ‘choose...to become dominated by powerful figures and lose the capacity to think for themselves’; gender victimisation is not a factor.¹⁵³

Although more critical and balanced research continues to provide ‘overwhelming evidence that gender *asymmetry* in domestic violence remains in full effect’,¹⁵⁴ resistance framed in these terms is persuasive in part because it exploits the stigma of ‘special treatment’ associated with reforms undertaken in the domestic violence field. To date it would seem that no comparable terms of popular insult have been attached to these protests to match those levelled at feminist activists campaigning against domestic violence. On the contrary, protests in the name of ‘fathers’ rights’ have been legitimised by principled notions of ‘rights’ and ‘natural justice’, which have been attributed to their cause almost automatically.¹⁵⁵ However, critics reveal that far from an interest in rights and justice, the major impetus behind these campaigns remains an abiding hostility

¹⁵¹ See Leslie Tutty, *Husband Abuse: An Overview of Research and Perspectives* (Ottawa, Health Canada, 1999).

¹⁵² Kimmel, ‘Gender Symmetry’, op.cit: 2.

¹⁵³ Greg Newbold, *Crime in New Zealand*. Palmerston North, Dunmore Press, 2000: 74. Newbold rejects outright the claim that ‘choosing...to put up with years of psychological and physical abuse from their spouses’ is a condition ‘unique to females’: 73.

¹⁵⁴ Kimmel, ‘Gender symmetry’, op.cit: 18-19, emphasis added.

¹⁵⁵ Specifically, fathers’ rights protesters across common law countries have been supported by the International Covenant on Civil and Political Rights article (s23 (1)), which provides that ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the state’.

towards women, with the majority of advocates ‘holding women in particular responsible...for the plight of the contemporary...male’.¹⁵⁶ This hostility continues the long history of patriarchal resistance in which ‘battle terminology’ – women *versus* men – has been used to frame and undermine campaigns for justice and rights for women, obscuring the power imbalances involved. Moreover, as Millet argued many years ago, ‘the battle of the sexes’ terminology has been deployed by men as an effective euphemism that serves to ‘justify any heinousness’ against ‘the enemy’ who is dismissed as inferior and attacked as necessarily hostile.¹⁵⁷

With their campaigns for equality and justice increasingly represented in terms of a battle *for* women *against* men, as seen in the New Zealand context, activists for battered women have been forced to frame their campaigns to accentuate their gender ‘neutrality’ and pragmatism, and de-emphasise their commitment to women, even though this commitment has always been about *overcoming* gender conflict, rather than engaging men in a ‘battle’ for dominance. The clemency movement in the United States, which succeeded in securing the release from prison of a significant number of women serving lengthy life sentences for killing their abusive husbands (sentenced prior to the admission of BWS evidence), is an example of a strategy of this kind, where advocates deliberately adopted ‘a rhetoric of compromise...framing their demands in terms more likely to resonate with authorities and the public...in a time inhospitable to movement goals’.¹⁵⁸ The relatively modest and short-lived success of the clemency movement, securing the release of only a very small percentage of imprisoned battered women overall, and with a steady decline in the number of clemencies granted throughout the 1990s,¹⁵⁹ testifies to the long-term limitations of this kind of compromised strategy.

¹⁵⁶ McBride, *War, Battering and other Sports*, op.cit: 195-197.

¹⁵⁷ *Sexual Politics*, op.cit: 46. See also Sandra Coney, ‘Comment’, *Broadsheet*, October, 1980.

¹⁵⁸ Patricia Gagne, ‘Identity, strategy, and feminist politics: clemency for battered women who kill’, *Social Problems*, Feb 1996 v43 n1: 93. These clemencies, which occurred in 1990 and 1991, were isolated to two states (Ohio and Maryland) and were also attributed to activists’ ability to co-opt the support of the ‘first lady’ who had been active in the battered women’s movement since the 1960s (79), as well as the consciousness raising of imprisoned women who ‘went from believing they deserved to be punished’ to developing a ‘politicised collective identity’ and a belief that they deserved to be released (93).

¹⁵⁹ Schneider, ‘Resistance to Equality’, 1996: 517-520, citing US statistics for the period between 1978 and 1995 in which 88 battered women received clemencies across 21 states. In 1996, 2,000 women were in prison in the US for killing a husband, ex-husband or boyfriend of which estimates suggest the majority

In the late 1990s, the New Zealand Refuge movement made a similar attempt to avoid provoking a 'battle' with men's groups by adopting a 'deliberately low key' and 'practical' approach in their campaigns in a deliberate effort to 'neutralize the whole area of domestic violence'.¹⁶⁰ In 1999, Refuge re-branded itself under the leadership of a woman with a background in business (rather than the woman's movement); indeed, a Maori woman with a polished corporate-executive image.¹⁶¹ Part of this re-branding included a shift in emphasis from the battery of women as the primary focus to violence against children. Together this strategy helped secure Refuge a significantly higher public profile, and in 2000, Save the Children agreed to fund the 'Children first project' for Refuge.¹⁶² According to a leading activist in the field and former head of Refuge, Roma Balzer, this re-branding was in direct response to protests from 'fathers' rights' groups who were 'instrumental' in generating 'much more resistance within the justice sector to discussing battering against women' than in the early and mid 1990s.¹⁶³ Further evidence of a cultural swing against support for battered women was seen in Australia where the Refuge movement adopted a similar pragmatism in its fundraising campaigns in response to research showing that 'damage to partner is...unlikely to motivate change by those identified as "perpetrators" and other men in the general community'.¹⁶⁴ This research conducted in 2000 included findings that thirty percent of the community in Australia continue to think violence against women is 'justified in some circumstances', while forty percent consider 'men's violence is provoked by women's behaviour'.¹⁶⁵

(possibly as much as 97%) are likely to have been battered by the person they killed. Schneider notes that precise data on the number of imprisoned battered women is unavailable due to the high number of cases tried without defence counsel giving much or any attention to the issue.

¹⁶⁰ Roma Balzer (NCIWR), 'Nine to Noon', RNZ, May 11, 2004. A trend towards "'gender neutralising" of policy and strategy in the family violence field' was identified by the NZ Women's Health Organisation in 2004 (<http://www.womens-health.org.nz/papers/subwap.htm>). Accessed 13/8/2005.

¹⁶¹ Merepeka Raukawa-Tait ran the NCIWR from 1999 to 2002. Her background in business and corporate image helped her to promote the brand 'Refuge' to mainstream NZ. Her position at Refuge was effectively undermined when she was seen attending a strip show with her husband. She then ran unsuccessfully for Parliament as a candidate for the conservative Christian Heritage party.

¹⁶² www.womensrefuge.org.nz/about_herstory (Accessed 18/4/2004).

¹⁶³ 'Nine to noon', op.cit. Balzer led Refuge from 2002-2005.

¹⁶⁴ Murray, *More than Refuge*, op.cit: 175. This approach is evident in the 1998 Refuge campaign slogan: 'every time you hurt her he [male child pictured] feels it too'.

¹⁶⁵ Ibid: 182-183 citing the study reported in 'Post-separation violence: The male perspective', *Journal of Family Studies*, Vol. 6 no. 1: 96-97.

More generally, this ongoing resistance to the feminist cause and the failure to achieve widespread cultural and attitudinal change needed to ensure sustained commitment to key reforms, has led to a growing weariness and frustration amongst researchers and activists tired of ‘having to keep going on about women’, and an attempt, in response, to show that feminism is not ‘just about women’.¹⁶⁶ The international ‘paradigm shift’ towards ‘gender mainstreaming’ can be seen largely as a reflection of this collective weariness and frustration.¹⁶⁷ ‘Mainstreaming’ at once aims to avoid the historical marginalisation of ‘women’s issues’ by reframing strategies to deliver a more ‘inclusive and relational’ approach to gender politics that ‘addresses women and men, along with the relations between them’, to reflect and facilitate the historical shift from women to gender.¹⁶⁸

In the domestic violence context, ‘mainstreaming’ potentially avoids the ongoing marginalisation of campaigns against violence and the stigmatisation of these campaigns as anti-men or anti-family. There is also the potential to shift the focus from battered *women* to the gendered context of the violence – to see the batterer as a gendered being too – and in the process to avoid the essentialist term ‘battered woman’ to which gender stereotypes have been readily attached ‘as if [battered] were an attribute, or a part of her own nature...what she somehow chose to be’.¹⁶⁹ ‘Battered’ is an attribute, moreover, which has disqualified many women, including Oakes, in the eyes of many judges and jurors.¹⁷⁰ With the focus on ‘battered women’, cases of domestic homicide committed by men – namely the majority of cases – are ‘seldom recognised as belonging to the universe

¹⁶⁶ Anne Phillips, ‘Feminism and the politics of difference’, op.cit: 11-12.

¹⁶⁷ The concept and strategy of ‘gender mainstreaming’ can be traced to the 1985 Women’s Conference in Nairobi and was later reaffirmed at the 1995 Fourth World Women’s Conference in Beijing where the Platform for Action promoted ‘an active and visible policy of mainstreaming a gender perspective at all levels’, cited in Kathleen Staudt, ‘Gender mainstreaming: conceptual links to institutional machineries’ in S. Rai (ed.) *Mainstreaming Gender, Democratizing the State?*, Manchester, Manchester University Press, 2003: 55-56.

¹⁶⁸ Staudt, *ibid*: 48-51. See also Rona Fitzgerald, ‘Making Mainstreaming Work’, May 2002, *European Policies Research Centre*, Glasgow University.

¹⁶⁹ Jones, *Next time she’ll be dead*, op.cit: 84.

¹⁷⁰ Application of the term ‘battered woman’ in the common law courts has seen many cases in which judges and/or jurors ‘refused to believe that the woman, who appeared assertive at trial, was battered’, Schneider, ‘Resistance to equality’, op.cit: 498. Schneider, who applies the terms ‘battered woman’ and ‘battered women who kill’, nonetheless considers the rigidity of the term problematic as well as the stereotypes attached to it, which produces a no-win situation for many defendants constructed as either ‘battered, helpless victims’ or ‘not “real” battered women’: 499. She cites numerous studies by others who draw a similar conclusion.

of ‘domestic violence’ killings’.¹⁷¹ In theory, a ‘mainstreaming’ approach to these cases could redress the imbalance in favour of a contextualised gender analysis situating both types of cases in the context of domestic violence from which a clear comparison – or, rather, contrast – could be more effectively drawn.¹⁷² ‘Mainstreaming’ at once promises a heightened public-political commitment to involvement in the domestic violence field beyond the traditional, somewhat knee-jerk, assignment of responsibilities to ‘women’s agencies’.¹⁷³

However, the fulfilment of this potential in the 21st century will continue to depend upon cultural and attitudinal reform to address the ongoing power imbalance in favour of the dominant cultural group – and gender – that is built into the social, legal and political structures that shape the justice sector’s response to domestic violence issues. As ‘mainstreaming’ tends to imply if not assume a level playing field, the danger is that the structural gender imbalance will be compounded via further rationalisation and obfuscation, as it has been throughout history. Indeed, seen from an historical perspective, a ‘mainstreaming’ approach seems somewhat wishful and premature, and potentially threatening to the critical analysis and debate on subjects like domestic violence, only recently recognised as worthy of serious public-political attention. It risks, moreover, the loss of the hard won critical (feminist) focus on challenging the historical presumption of the male norm – a focus that is vital to exposing the injustices suffered by battered women defendants.¹⁷⁴

¹⁷¹ Ibid: 493.

¹⁷² This contextualised analysis would expose what some argue to be an absolute difference between female homicide and male homicide, so different ‘that women and men may be said to live in two different cultures, each with its own “subculture of violence”’, Katherine O’Donovan, ‘Defences for battered women who kill’, *Journal of Law and Society*, Vol. 18, No. 2, Summer 1991 p. 219: 220 citing L.J. Taylor, ‘Provoked Reason in Men and Women’ (1986).

¹⁷³ An illustration of this approach in NZ is the assignment of the responsibility to oversee the four-yearly reports to CEDAW to the Ministry of Women’s Affairs, a significant aspect of which involves reporting back on NZ’s shameful record in the area of domestic violence prevention. The sixth report to CEDAW *The status of women in New Zealand* (March 2006), covering the period between March 2002 -2006, can be read at <http://www.mwa.govt.nz/news-and-pubs/publications/international/cedaw-report.html> Accessed 8/1/2007.

¹⁷⁴ See Sandra Walklate, *Gender, Crime and Criminal Justice* (Collompton, Devon UK: Willan Publishing, 2004).

The practical resolution of these broad-ranging debates and challenges must ultimately be considered in the context of a specific time, place and culture. In the remaining section of the chapter, and the final section of the case study, I turn to reflect more directly on New Zealand's 'cultural context' as it impacts on the response to domestic violence and, in particular, as it affects our various judgments about justice in cases involving battered women defendants.

'Cultural justice' for battered women defendants in New Zealand: Swinging
'too far' or swings and roundabouts?

[T]he pendulum of justice has swung away from a focus on safety for victims [of domestic violence] and more towards allowing natural justice processes for respondents...[with] judges, lawyers [and] police...more disbelieving of women's realities of violence,...[requiring women] to show that they are "deserving" victims...not manipulating, vindictive women using the system to punish men.

NZ Women's Refuge, 2004¹⁷⁵

I am sick of hearing about the deficit model in which, as red-blooded heterosexual men, we are supposedly the creators of all that is bad and evil in this world...the pendulum of political correctness has swung too far...

John Tamihere MP, 2004¹⁷⁶

¹⁷⁵ Hann, *The Implementation of the Domestic Violence Act*, August 2004, op.cit: 9-10.

¹⁷⁶ 'John Tamihere: It's time men stood up to be counted', *The New Zealand Herald*, July 30, 2004. Tamihere added: 'I am concerned as a Kiwi male, and as a political leader, and perhaps I am most concerned because I am the father of young sons...If any other segment of our society demonstrated the difficulties I have just listed (and there are plenty more) all hell would break loose'. See also, 'Tamihere waves the male flag' *NZH*, July 30, 2004, late edition. These kinds of comments and other openly sexist remarks made about women, contributed to Tamihere's electoral defeat in the 2005 general election.

These opposing viewpoints on the gender ‘pendulum’ of justice or ‘political correctness’ confirm and encapsulate the cultural ‘battle’ ongoing in contemporary New Zealand society in the domestic violence arena; a ‘battle’ which takes the same form – in the basic attitudes of the parties involved – of the ‘battle of the sexes’ waged since male dominance was first challenged in the Anglo-western tradition. However the differences between this contemporary New Zealand ‘battle’ and that waged over two centuries ago between Wollstonecraft and Rousseau, are significant and telling. They include the fact that those challenging the abuse of women in the home and highlighting society’s failure to provide effective protection from this abuse are supported by comprehensive legislation and policy (such as the DVA). These activists also wage their campaigns from a considerably less marginalised position in the community than Wollstonecraft faced, while the contemporary voice of resistance is much more defensive and less direct than Rousseau’s assertions on the importance of male dominance were. That Tamihere spoke as a *Maori* Member of Parliament arguably indicates a further relevant factor in the contemporary New Zealand ‘battle’, as Maori (men) occupy an increasing and distinct position of authority in contemporary New Zealand society.¹⁷⁷

However, in the more general features of the competing claims made, and in the fact that we are still constructing the debate in terms of a ‘battle’ between ‘vindictive’ women and proud, ‘red-blooded’ men¹⁷⁸ standing up for what is ‘naturally’ and ‘rightfully’ theirs, these samples of the public discourse on domestic violence in contemporary New Zealand reveal a distinct lack of cultural progress beyond the patriarchal tradition. In the remainder of the chapter I elaborate and substantiate this claim and reflect critically on what it means for the pursuit of justice in cases like *Oakes*.

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On the surface, New Zealand appears to be a comparatively advanced society in terms of its commitment to gender equality. Casually observed from an outsider’s perspective,

¹⁷⁷ This controversial and complex issue will be discussed further on in the chapter.

¹⁷⁸ The Oxford compact English dictionary (2000) defines the term ‘red-blooded’ as follows: ‘(of a man) vigorous or virile’; ‘having strength, energy and a strong sex drive. Vigorous, strong and manly’.

New Zealand has even been said to ‘exude a confident, intelligent feminism that spreads across all generations and sectors’.¹⁷⁹ In support of this perception, there are a number of women in places of political power, not least of all the Prime Minister and Chief Justice,¹⁸⁰ as well as a number of firsts that New Zealand can claim, including the first country to grant women the right to vote,¹⁸¹ and the first to ordain a woman bishop in the Anglican Church,¹⁸² as well as one of very few ever to elect a woman to lead. This perception is substantially confirmed in a comprehensive recent study of thirty-six ‘stable democracies’ which ranked New Zealand one of the eight ‘most responsive’ countries in its commitment to addressing violence against women,¹⁸³ although New Zealand was not considered one of the two most responsive countries in this study (these were Australia and Canada).¹⁸⁴ While the presence of women in certain key positions of power is no guarantee of a substantive commitment to gender equality and justice being upheld, it certainly increases the likelihood of such a commitment, as the New Zealand experience tends to confirm overall. On the other hand, the presence of women in prominent positions of power and high public profile might be responsible for conveying the impression of a greater level of gender equality and justice than is actually the case, and

¹⁷⁹ Paola Totaro, ‘Forget the Joneses, keep up with the Kiwis’, *The Sydney Morning Herald*, Oct 13, 2005, p. 12.

¹⁸⁰ The Rt. Hon. Helen Clark was elected to lead the Labour party in 1993 becoming Prime Minister in 1999 (Miller, ‘Labour’, *New Zealand Government*, op.cit: 28) and has remained in the role since, with the next general election scheduled for October 2008. The Rt. Hon. Dame Sian Elias was appointed Chief Justice in 1999 and remains in that role to this day. She also became a member of the Supreme Court in January 2004 when it was established. <http://www.courtsofnz.govt.nz/about/judges/current-chief.html> Accessed 4/1/08.

¹⁸¹ New Zealand granted the vote to women in 1893, Australia in 1902, Canada in 1917, Britain in 1918 (for women over 30 and for all women in 1928) and the United States in 1920. The majority of other countries were even later to enfranchise women. In France, for example, women were not granted the vote until 1944 and even then this right did not extend to all women. http://en.wikipedia.org/wiki/Women's_suffrage#Women.27s_suffrage_by_country

¹⁸² In 1990 Rev Penny Jamieson was ordained as Bishop of Dunedin, becoming the first woman diocesan bishop in the global Anglican Communion, ‘Anglican Church in Aotearoa, New Zealand and Polynesia’ <http://www.anglican.org.nz/history.htm> Accessed 7/5/2007.

¹⁸³ S. Laurel Weldon, *Protest, Policy, and the Problem of Violence against Women: A Cross-national Comparison*, University of Pittsburgh Press, 2003.

¹⁸⁴ *Ibid*: 141-164. Weldon provides a qualitative analysis of the legislative, policy and wider commitments to addressing violence against women in Australia and Canada to explain the differences in commitment level and capacity of these two countries compared with others, like New Zealand, also considered more responsive than the majority.

in the process, might fuel and facilitate a cultural backlash against a movement having come ‘too far’.¹⁸⁵

Indeed, a closer look at New Zealand’s cultural history reveals that, like all other countries which have taken steps to address legal and political inequalities between men and women, the cultural aspects of injustice, including ‘most differences in the ways males and females are treated...[and] gender-related patterns of socialisation’, continue to embody and maintain patriarchal domination.¹⁸⁶ More specifically, New Zealand’s ‘frontier’, settler tradition in which men predominated suggests to some a cultural history that facilitated an ‘intensification of gender distinctions’¹⁸⁷ and the development of a particularly ‘rugged, independent and fraternal’ ideal of masculinity.¹⁸⁸ Furthermore, research shows that this tradition produced a distinct ‘ambivalence’ towards marriage on the part of men, many of whom regarded it as ‘a thoroughly unpleasant duty...[that] took all the fun out of life’; a perspective that was further reinforced in the media in a joking, frequently ‘cold’ attitude shown towards wives who were routinely portrayed as ‘materialistic, nagging and prudish’, sometimes to the point of conveying an ‘extraordinary degree of hostility between husband and wife’.¹⁸⁹ Some historians have applied the same critical analysis to explain the decision to grant women the vote; namely as a conservative ‘reward for dutiful womanhood’, rather than an expression of a

¹⁸⁵ The current Speaker of the House, Margaret Wilson, expressed the opinion in a 2001 article, that ‘The novelty of a few high-profile women has created an impression of many, where there are, in reality, very few’, and this impression, along with the general backlash against feminism, is partly responsible for the growing ‘marginalization of women in [NZ] politics’ (‘Women and Politics’, in Miller, *New Zealand Government*, op.cit: 382).

¹⁸⁶ Joseph Carens, *Culture, citizenship and community: a contextual exploration of justice as evenhandedness*. Oxford, New York, Oxford University Press, 2000: 101-103.

¹⁸⁷ Charlotte Macdonald, ‘Too Many Men and Too Few Women: Gender’s ‘Fatal Impact’ in Nineteenth-century Colonies’ in Caroline Daley and Deborah Montgomerie (eds.) *The Gendered Kiwi*. Auckland University Press, Auckland, 1999: 32. Macdonald notes the opposite view that colonial New Zealand allowed ‘more permeable gender boundaries’ to develop than in 19th century Europe.

¹⁸⁸ Jock Phillips, *A Man’s Country? The Image of the Pakeha Male – A History*. Revised edition, 1996, Auckland, Penguin: vii.

¹⁸⁹ *ibid*: 245-248, 251-252. Phillips documents a ‘staple diet’ of cartoons, novels and newspaper items published in New Zealand between 1920 and 1950 promoting these stereotypes and attitudes. Phillips also describes the period after WWII until the mid-sixties in New Zealand as a period of ‘triumph’ for the traditional macho male stereotype. Further, in Barry Crump’s widely popular 1960s serialized portrayal of ‘good keen men’, he identifies a still cruder and ‘appallingly misogynic’ image of New Zealand manhood, which he says, people laughed at ‘but always with a secret admiration’, *ibid*: 263-267.

genuinely progressive commitment to women's liberation, gender equality and justice, least of all within marriage.¹⁹⁰

From this basis, and following the British example, New Zealand was slow to intervene in the 'private sanctuary' of the home, with men given 'considerable freedom to discipline...their wives' and domestic violence rarely reported and still more rarely punished if reported, prior to the 1980s.¹⁹¹ Court records show the same difficulty faced by battered women in Britain and the US in trying to convince judges of their status as unambiguously 'innocent and legitimate victims'.¹⁹² Following the English example, criminal courts in New Zealand developed as strictly 'male domains' with men and 'male narratives' dominating in a 'highly gendered' environment that invariably judged female defendants differently from male defendants.¹⁹³ Even when this treatment meant women were ostensibly favoured by the criminal justice system,¹⁹⁴ as seen in other jurisdictions, the standard developed for the assessment of female criminality 'strongly' reflected patriarchal stereotypes of woman as 'biologically driven, lying [and] manipulative'.¹⁹⁵ This standard at once incorporated a 'chivalrous' attitude on the part of male adjudicators, counsel and jurors, who 'bolstered their own position...[as] women's protectors' in gestures of compassion shown towards those women who confirmed that role by appearing frail and dutiful, whilst condemning those who were seen to threaten it by acting 'unnaturally'.¹⁹⁶

Phillips argues that as traditional ideals of masculinity and femininity began to change in New Zealand (as elsewhere), many men clung onto the traditional stereotype 'to give

¹⁹⁰ Macdonald, 'Too many men', op.cit: 18. Macdonald attributes this explanation to Raewyn Dalziel, 'The Colonial Helpmeet; Women's Role and the Vote in Nineteenth-Century New Zealand', *New Zealand Journal of History*, 11, 2, 1977. Phillips suggests a similar analysis (*A Man's Country*, op.cit: 54).

¹⁹¹ Newbold, *Crime in New Zealand*, op.cit: 120.

¹⁹² Charlotte Macdonald, 'Crime and Punishment in New Zealand, 1840-1913: a Gendered History' *NZJH*, Vol.23 No.1, April, 1989: 17.

¹⁹³ Bronwyn Dalley, 'Criminal Conversations: Infanticide. Gender and Sexuality in Nineteenth-Century New Zealand' in Daley and Montgomerie (eds.), *The Gendered Kiwi*, op.cit: 70.

¹⁹⁴ Case studies in the 19th century show that women convicted of infanticide often received a reduced sentence or went unpunished 'as the courts, the police and the public struggled to grasp the notion of women harming their offspring', *ibid*: 68.

¹⁹⁵ *Ibid*: 80.

¹⁹⁶ *Ibid*: 80-81.

themselves a sense of superiority...mastery and possession over [women]...and reassure themselves that as males they were different'.¹⁹⁷ The emphasis placed on aggressive male team sports in New Zealand, particularly rugby, widely regarded as the national game, has served to reinforce and perpetuate this cultural attitude into the twenty-first century. Outsiders have observed the particular 'fervour' and 'devotion' shown by New Zealanders towards the national All Black team,¹⁹⁸ whose international reputation as perhaps the world's best rugby team ensures a public-media obsession with the game and with those physically tough, 'red-blooded' men who play it, many of whom are mythologised as national heroes. Given this cultural obsession with rugby, it is unsurprising to find an absence of New Zealand-based studies of the connection between aggressive male team sports and domestic violence. In studies done overseas, a causal relationship between aggressive male sports (in particular football) and domestic violence has been clearly shown, with significantly increased rates of domestic violence occurring at times when the critical games are being played. This relationship is explained with reference to the theory that aggressive male team sports, like domestic violence (and not unlike war), are social performances 'which continually reinscribe gender identities on and in the bodies of men and women', and are similarly 'predicated on the use of violence against the Other...[who] is "woman"'.¹⁹⁹ New Zealand's particularly high rate of domestic violence compared with other common law countries,²⁰⁰ and comparatively high female murder rate amongst all industrialized countries – a significant proportion of which are domestic violence related killings²⁰¹ – strongly suggests the need for critical analysis of this kind.

¹⁹⁷ *A Man's Country?*, op.cit: 246.

¹⁹⁸ Peter Focamp, 'Are we getting worse?' *The Press*, 21 March 2006, Edition 2, p. 1, noting remarks made by players from other rugby teams touring New Zealand.

¹⁹⁹ James McBride, *War, Battering and Other Sports: The Gulf between American Men and Women*, New Jersey, Humanities Press, 1995: 30-31.

²⁰⁰ While it is difficult to ascertain an 'accurate' picture of the rate of domestic violence, not least of all because most of it goes unreported, based on interviews with New Zealand men randomly surveyed, New Zealand's rate seems to be 'much higher' than the rate in America, Canada, Australia and England (*Some Criminal Defences*, NZLC R 73, op.cit: xii. See also Janet Fanslow and Elisabeth Robinson, 'Violence against women in New Zealand: prevalence and health consequences', *NZMJ* 26 November 2004, Vol. 117 No. 1206.

²⁰¹ Harvard University research into the murder rates in the top 25 industrialized nations placed New Zealand fifth worst for its rate of female murder, with most of these women killed by a current or former intimate partner. Reported in R. Walsh, 'NZ has high female murder rate', *NZ Herald*, April 20, 2002.

As indicated in the previous chapter, New Zealand's response to domestic violence has in some respects, and increasingly, been focused on identifying and addressing the distinct issues involved for the indigenous Maori, a focus which has arguably been developed at the expense of gender-based research of this kind.²⁰² Indeed, both the Ministry of Women's Affairs and Women's Refuge have devoted considerable resources to developing a formalised commitment to bi-culturalism in application of the principles of the Treaty of Waitangi.²⁰³ While in the domestic violence field, this focus gives recognition to the disproportionately high rate of domestic violence experienced by Maori women; to some extent it tends at once to accentuate this difference almost to the point of conveying the impression that domestic violence is exclusively a Maori problem. Certainly the perception that domestic violence predominantly occurs amongst Maori, remains a common misconception in New Zealand and one that is all too convenient for the dominant (non-Maori) cultural group to believe and promote; the majority of victims of domestic abuse in New Zealand are non-Maori.²⁰⁴ In turn, this focus places conflicting pressures on many Maori women victims of abuse who feel they cannot speak out about the abuse for fear of adding to 'all the myths associated with being Maori', so that, rather than the men being made to deal with their violence 'it is Maori women who [put up with it] so that their man can go ahead'.²⁰⁵

²⁰² In recent years, many of the projects undertaken by government agencies in the area of gender justice and specifically domestic violence have adopted a Maori focus as well as undertaking separate and larger projects on Maori, such as the Law Commission's report on Maori Women's Access to Justice (NZLC R 53, 1999) all of which in some respects de-emphasise gender. This report begins: 'Many of the problems identified in this report could apply equally to Maori men' (p. xi) and expresses the hope that 'the solution to [family] violence may be something which is uniquely Maori' (p.7).

²⁰³ The comprehensive and largely Treaty-based *Responsiveness to Maori Plan* was adopted by the MOWA in 1993. See Brenda Tahi, 'Biculturalism: The Model of Te Ohu Whakatupu', in Wilson and Yeatman, *Justice & Identity*, op.cit. Refuge has been committed to Maori-Pakeha 'parallel development' (Kaupapa) since 1986 and in 1996 the Treaty was established as the 'guiding document' for the collective's 'strategic plan'. Twelve of the 51 refuges nationwide are devoted to providing for Maori women and children exclusively <http://www.womensrefuge.org.nz> Accessed 5/6/2002.

²⁰⁴ See J. Koziol-McLain (et al), 'Prevalence of intimate partner violence among women presenting to an urban adult and pediatric emergency care department', *NZMJ* 26 Nov. 2004, Vol. 117 No. 1206 Table 2, p.5. This study provides the most recent data collected on domestic violence in New Zealand which reveals Maori women's ongoing overrepresentation among victims of domestic violence at 57.1% (of the 35 Maori women surveyed visiting an urban emergency care department who reported experiencing partner violence at some time in their adulthood) compared with 47.4% of the 76 NZ European women surveyed, 32.6% of the 46 Pacific Island women surveyed and 44.8% of the 6 'Other' women surveyed. Thus, non-Maori make up the majority of victims in total due in to the fact that Maori make up just 15% of the New Zealand population, while other ethnic groups, including NZ European, record a fairly comparable rate of abuse.

²⁰⁵ Roma Balzer (et al), *Maori Family Violence in Aotearoa*, Ministry of Maori Development, 1997: 24.

Furthermore, by obscuring the long cultural tradition of patriarchal oppression that underpins domestic violence and the justice sector's continued reluctance to recognise the seriousness of the issues involved, a significant aspect of Maori history and cultural oppression is obscured. That is, whereas women in traditional Maori culture were valued for their close connection with nature, as 'progenitors of everything on or under the earth, sea and skies', the imposition of Western patriarchal and Christian values constructed male pleasure 'increasingly [in terms of] the power of dominance' over women and nature.²⁰⁶ According to some Maori, the recent renaissance of Maori culture has further exacerbated this process by facilitating 'strange new cultural practices in which [Maori and Pakeha] men are bonding to each other, through patriarchy,...in ways which exclude...[and] oppress...Maori women',²⁰⁷ not least of all through domestic violence.²⁰⁸

Thus, while it is important to avoid a 'simple additive approach' in analysis of domestic violence across cultures where the 'presumption of white race' is implicit but remains 'unarticulated',²⁰⁹ it is also critical to keep in mind that in a patriarchal society it will always be 'unfashionable...to demand that the interests of women...be put before those of men where there is a conflict, as there undoubtedly is in the case of family violence'.²¹⁰

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In many ways, the general burden and legacy of this cultural tradition on New Zealand's response to domestic violence, and specifically on cases of domestic homicide involving domestic violence, can be summarised in an ongoing resistance to believing battered women and regarding their claims of abuse and terror with appropriate seriousness. The

²⁰⁶ The role of women in general was less prescribed in traditional Maori culture and women were in no sense considered the property of men. Women's role within the family and local community was valued particularly highly and expected to provide a 'complementarity' with the roles of men. *Justice: The Experiences of Maori Women* (NZLC R 53, 1999): 11-19.

²⁰⁷ Kathie Irwin, 'Towards Theories of Maori Feminism' in Du Plessis (et al), *Feminist Voices*, op.cit: 18-19.

²⁰⁸ Maori men who admit abusing their partners overwhelmingly blame the women they abuse and claim they 'have a right to engage in controlling [their wives'] behaviour or punishing for a perceived wrong' (Balzer, *Maori Family Violence*, 1997: 29). In the 1996 *Women's Safety Survey*, 44% of Maori women reported being afraid that their partner might kill them (Cited in NZLC R 53, 1999: 47).

²⁰⁹ Stubbs and Tolmie, 'Race, Gender and the Battered Woman Syndrome', op.cit: 127-129.

²¹⁰ *ibid*: 139.

damaging effects of this cultural legacy are particularly evident in the criminal law where, according to Judith Ablett Kerr QC, the decisions of the courts demonstrate a systematic bias against believing women's testimonies in general with 'men as a group perceived as more credible' than women when giving evidence.²¹¹ In recent years, particularly in contexts of domestic violence, the historical attitude that 'women are lying, vindictive creatures who ought to be presumptively disbelieved',²¹² is frequently demonstrated in the Family and Criminal Courts. This attitude is reflected in the extremely low conviction rate for rape in New Zealand,²¹³ and deviates little from the 17th century precedent established in the English courts (by Sir Mathew Hale), which described rape as 'an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent'.²¹⁴

In his 2000 book *Crime in New Zealand*, criminologist Greg Newbold expresses the same sentiment and presumption by dismissing, without substantiation, the data collected by Rape Crisis as 'extravagant' and 'unreliable', and claiming there are a 'mounting number of cases where women or girls, out of malice, jealousy or simple caprice, have falsely accused men of sexually violating them'.²¹⁵ Moreover, the rapid and top level response of the justice sector to the same kind of allegations levelled at women seeking protection from domestic violence in the Family Court, despite an 'almost complete' lack of evidence to support their claims,²¹⁶ confirms the enduring and systemic influence of this cultural bias against believing women who claim they have been the victims of male

²¹¹ Judith Ablett Kerr, 'A licence to kill or an overdue reform?' *Otago Law Review*, 1997 Vol. 9 No. 1: 11.

²¹² Wendy Davis, 'Gender bias, fathers' rights, Domestic Violence and the Family Court', *Family Law Journal*, Vol. 4, Dec 2004 Part 12: 12. Davis claims that this old English myth continues in some degree in the response of the NZ Family Court and the justice sector to women's claims of domestic violence.

²¹³ The conviction rate for rape in New Zealand has recently been calculated to be as low as 1 in 60. Mike Doolan, 'Violence in Society: An Overview' in Marie Connolly (ed.), *Violence in Society: New Zealand Perspectives*, Christchurch New Zealand, Te Awatea Press, 2004.

²¹⁴ Published in England in *The History of the Pleas of the Crown* (1680) cited in Elisabeth McDonald, 'Gender bias and the law of evidence: the link between sexuality and credibility', *VUWLR*, Vol. 24 1994: 175-176.

²¹⁵ *Crime in New Zealand*, op.cit: 85, 137.

²¹⁶ Davis, 'Gender bias', op.cit: 11-12. Davis remarks that the international influence of fathers' rights groups on family law is particularly 'striking' given 'the almost complete absence of empirical data or reliable research' to support their allegations.

violence.²¹⁷ Indeed, the speed of this response might be considered in comparison with the centuries taken the justice sector (in all common law jurisdictions) to recognise and respond to women's claims of abuse, given the comparative abundance of evidence available to support their claims. In fact, the vast majority of research in the domestic violence field continues to show that women in general tend to understate the extent of their victimisation rather than exaggerate it, and on average experience 35 incidents of abuse before contacting the police.²¹⁸ Australian research conducted in 2001 confirms that less than twenty percent of the women who have experienced violence from a partner in the last twenty years sought help from the authorities.²¹⁹

The cultural reluctance to believe women's claims of abuse goes hand in hand with the cultural readiness to believe – excuse and empathise with – men by blaming women for 'provoking' men's violence. In cases of domestic homicide between men and women the bias is compounded by the common law of provocation, which for over a century has excused men who have killed their female partners or ex-partners for perceived insults to the male ego – accepted as 'the ultimate provocation'.²²⁰ When the defence first arose,²²¹ it was 'strictly limited' to cases where a husband caught a wife in the act of committing adultery with another man, and acted 'in the heat of passion caused by sudden provocation'.²²² This common law rule, based explicitly on a husband's 'property right in

²¹⁷ In 2001 Daryl Ward, spokesman for FARE, claimed that 'malicious and unsubstantiated accusations of [male] violence are...routine practice in the Family Court', 'FARE condemns gendered excuses for murderers' 20 July, 2001, www.scoop.co.nz/stories/p00107/s00071.htm See also the cover story 'Family Court of Injustice?' which addresses the question: 'When fatherlessness is one of the most serious social issues facing this country, why is our Family Court seemingly so anti-men?' *North & South*, June 2001. Both the Law Commission (*Dispute Resolution in the Family Court*, NZLC R 82, Wellington, 2003) and the Law Society (*Without Notice Applications*, NZ Law Society Seminar, V Crawshaw and Judge O'Dwyer, October 2004) responded to these protests with the Commission recognising the 'anger among separated fathers' about the granting of protection orders and, in spite of finding no evidence in support of this anger, expressed a concern about the 'perception of a pro-feminist, anti-male bias...undermining Court integrity' (*Dispute Resolution*, op.cit: 197) cited in Davis, 'Gender bias', op.cit: 4.

²¹⁸ This estimate came from the Auckland Domestic Violence Centre which receives around 7500 call-outs a year. Reported in Diana McCurdy, 'When violence hits home', *The New Zealand Herald*, May 29 2004.

²¹⁹ Murray, *More than Refuge*, op.cit: 185.

²²⁰ Mike Bungay and Brian Edwards, *Bungay on Murder*, Christchurch, Witcoulls, 1983. Bungay (QC) writes that 'For many men personal identity and self worth are inextricably bound up with concepts of masculinity and sexual prowess...[so to] be branded a failure as a lover, to be unfavourably compared with another man...is the ultimate insult to the male ego, the ultimate provocation'.

²²¹ Provocation was codified in New Zealand in the Criminal Code Act 1893. See, *Battered Defendants*, op.cit: 26-33 for an overview of the development of the NZ law of provocation.

²²² *Ibid*: 26.

the body of [his] wife',²²³ has had to become 'substantially more liberal',²²⁴ in modern common law societies where this property right no longer exists, and to apply in cases where the parties need not be formally married or living together and women's 'words alone may constitute provocation'.²²⁵ Effectively, this interpretation of the law in defence of men who kill women for alleged verbal insults is openly defiant of the modern awareness that male perpetrated domestic violence (and homicide) is a deliberate tactic used by men as a means of controlling women.

The patriarchal underpinnings of the modern 'liberal' interpretation of the law of provocation are particularly evident in one of the most talked about New Zealand provocation cases *R v Minnitt*.²²⁶ In this 1980 case, a man with a history of violence against his wife, was acquitted of her murder on grounds of provocation after shooting her in the back of the head with a rifle at point-blank range because she told him she intended to leave the marriage of 14 years, and allegedly made derogatory remarks about his sexual competency.²²⁷ Convicted of manslaughter and sentenced to four years' imprisonment, the defendant, Dr. David Minnitt, served less than three years and returned to practice medicine. At the trial, Minnitt's defence counsel described him to the jury as 'a man of impeccable character', and the prosecution counsel accepted that *his* life had been 'substantially destroyed' by the killing. The judge at summing up described his victim, Leigh Minnitt, as 'unfaithful' and 'heartless', dismissing the history of violence against her as 'domestic disharmony...with faults on both sides'. At sentencing, accepting the accused 'must have been emotionally battered', the judge suggested 'the case did not call for anything other than a merciful sentence' stating that there was 'no need for the sentence to reflect any deterrent element' other than against the use of firearms.²²⁸ No appeal was lodged by the Crown.

²²³ Elisabeth McDonald, 'Provocation, Sexuality and the Actions of Thoroughly Decent Men', *Women's Studies Journal*, 9, 126, 1993: 128.

²²⁴ *Battered Defendants*, op.cit: 26.

²²⁵ McDonald, 'Provocation', op.cit: 128.

²²⁶ Wellington High Court, May-September, 1980, unreported.

²²⁷ The case reviewed by Anne Else, 'The killing of Leigh Minnitt' in *Broadsheet*, November, 1980: 25-29.

²²⁸ *ibid*: 28.

In a 1990 case,²²⁹ a man who beat his wife to death over a trivial financial matter was convicted of manslaughter on grounds of provocation and received a non-custodial sentence of nine months periodic detention. The trial judge accepted as mitigating circumstances the defendant's 'helpful and kindly' reputation (supplied in court by members of his family), the absence of a weapon used (he beat her to death with his bare hands), the victim's 'deceit' over the \$50 amount, which the judge said 'provided a strong element of provocation', and the defendant's 'substantial embarrassment' as well as concerns for the defendant's eight year old son, should the father be sent to prison. The Court of Appeal overturned the sentence, accepting it was too lenient. However, it imposed only an 18-month term of imprisonment and expressed sympathy for the accused in agreement with the trial judge's assessment of the need for a 'compassionate sentence'.²³⁰ The case prompted little if any public protest or media attention.

There is virtually no comparison between the judgments in these cases and the *Oakes* case, except for the constant factor that in all three cases the perspective of the violent man involved was prioritised and regarded with considerably more sympathy and acceptance than the perspective of the woman involved, with all three women stereotyped as dishonest and provocative.²³¹ Judicial concern for the welfare of Oakes' six children, three of whom were under the age of eight at the time she was convicted of murder and sentenced to life imprisonment for a minimum term of ten years, was notable for its absence.²³² In a 2001 case, a woman responsible for the care of twelve children, who killed her husband after suffering twenty years of his abuse, was sentenced to seven and a

²²⁹ *R v Panoa-Masina*, unreported, Court of Appeal, 7 October 1991 (CA 309/91).

²³⁰ Comments by the trial judge and Court of Appeal judge in this case are reviewed by Ruth Busch in 'Don't Throw Bouquets at Me', Stubbs (ed.), *Women, Male Violence and the Law*, op.cit.

²³¹ In a critical review of the *Minnitt* case, the author argues that 'the process by which the defence was conducted [in this case] depended upon demonstrating that Leigh [Minnitt] was a slut', Pat Rosier, 'Geraldine McDonald: Her Life, Her Times, Her Research', *NZ Women's Studies Journal*, March 1988, 17: 28.

²³² As seen in the discussion of this case, this issue was raised by victim support after Oakes' failed appeal and dismissed by the Parole Board. For further cases and analysis of provocation applied in NZ revealing the same bias, see Ruth Busch, 'Don't Throw Bouquets at Me', op.cit, and McDonald, 'Provocation', op.cit. For analysis of NZ cases involving battered women defendants see Elisabeth McDonald, 'Defending Abused Women: Beginning a Critique of New Zealand Criminal Law', *Victoria University of Wellington Law Review*, Vol. 27 (4) Dec 1997. For comparable Australian case studies and analysis see Jenny Morgan, 'Provocation, Law and Facts', *Melbourne University Law Review*, Vol. 21, 1997: 264. For the most critical research and analysis on judgments of battered women defendants to date, see Elisabeth Schneider's US based research.

half years for manslaughter, with the judge describing her conduct as ‘brutal’ and ‘callous’, and accepting the Crown’s contention that the killing was a ‘cold-blooded’ act. There was no consideration given to the welfare of this defendant’s children either.²³³

In a 2005 case, with facts very similar to *Oakes*,²³⁴ the defendant, Christine King, succeeded in her plea of provocation on the basis of which she was acquitted of murdering her abusive husband and convicted of his manslaughter. However, in spite of her suffering abuse the judge described as ‘at the top end of the medium range’,²³⁵ which included frequent ‘ritualised punishments’ of violent beatings, rape and sodomy over an eight year period, and a clear threat of further ‘punishments’ of this kind on the night she killed him, the judge handed down a sentence of four years and three months imprisonment. Like *Oakes*, King pleaded self-defence, claiming that she acted in fear of a fatal attack and felt unable to escape, but said she had not intended to kill her husband only to put him to sleep for a while so she could get some rest.²³⁶ At sentencing, the judge expressed his disbelief of King’s claims, and described the provocation she suffered on the night as being ‘at the low end’; allowing her ‘ample opportunity’ to ‘choose’ an alternative route. He also said King ‘wanted to do more than put her husband to sleep’.²³⁷

While King was in general treated more sympathetically than *Oakes* by both the Court and media; with one reporter describing her as ‘engaging, warm, philosophical [and] still vulnerable’, with ‘astonishingly clear eyes and [long] fine hair’,²³⁸ this treatment stopped well short of the sympathy and compassion shown the ‘helpful and kindly’ man who received an 18-month sentence for beating his wife to death when she ‘deceived’ him

²³³ *R v Suluape*, June 2001, Auckland High Court, unreported. On appeal, the sentence was reduced to five years, partly in view of the judges’ sympathy for the defendant’s ‘lifetime of service to her family’, *R v Suluape*, CA 249/01 27 March, 2002.

²³⁴ *R v King*, Hamilton High Court, November 2005. King killed her husband in 1988 with an overdose of sleeping pills, and with the help of a friend, buried him in the garden of her house where he lay undetected for 17 years. Like *Oakes*, King said that she buried the body in a state of panic, rather than report what happened to the police, so that she could be home to raise her children.

²³⁵ Quoting Justice Young, Hamilton High Court, 16 December, 2005 in ‘Woman convicted of sleeping-pill killing’, *Waikato Times*, 17 December, 2005.

²³⁶ According to King, her husband used the term ‘punishment’ to describe his violence against her during their eight-year relationship. She recorded this in her diary. See, Margie Thomson and Angela McCarthy, ‘Diary of a killer’, *Herald on Sunday*, November 20, 2005.

²³⁷ Quoting Justice Young, Hamilton High Court, 16 December, 2005, ‘Woman convicted’, op.cit.

²³⁸ *Ibid*: 20.

over a \$50 amount.²³⁹ There is also the sense that this sympathy for King, that was denied Oakes, had more to do with King's diminutive stature and comparatively 'feminine' appearance (Oakes had short hair and a more solid build); an image further enhanced by King's openly submissive, non-threatening, 'vulnerable' demeanour in court and her decision not to testify – an assertive act. King's religious convictions and claim that she 'pleaded with God' for guidance, as well as the openly loving support of her present husband in the court room (whereas Oakes was supported by Refuge workers), no doubt facilitated this sympathy, making it easier for the average juror (and judge) to believe she was a genuine victim and not a vindictive woman seeking revenge.²⁴⁰

Media coverage of this case further serves to highlight the persistence of traditional gender stereotypes surrounding domestic violence and to suggest the extent to which sympathy for women victims is conditional upon their behaviour and demeanour conforming to traditional 'feminine' stereotypes. Critical media analysis of cases involving women murder defendants confirms that the increased level of media coverage, the emphasis on visual images of the women defendants and the frequency of references to 'wife' and 'killing' in the titles of the news items covering these cases,²⁴¹ all reflects a public-media predisposition to sensationalise and pathologise women's violence, especially in the domestic violence context, while de-emphasising men's violence against

²³⁹ King's sentence was also longer than Minnitt received for shooting his wife in the back of the head when she said she was leaving him. Minnitt served two years and seven months of his four year sentence and returned to practice medicine. See, Anne Else, 'The Killing of Leigh Minnitt, op.cit, and Rosemary McLeod, 'Exile in Westport', *North & South*, May 1986.

²⁴⁰ While it is difficult to assess the influence of these differences on the verdict and sentence in these two cases, research conducted in other common law jurisdictions highlights the increased difficulty for battered women who appear assertive or angry at trial and in general fail to conform to the stereotype of the battered woman as a 'helpless' woman with 'low self-esteem, traditional beliefs about the home, the family, and the female sex role', to successfully defend a charge of murder. In virtually every respect King conformed to this stereotype and Oakes did not. This definition of the stereotype was provided by the justices of the Rhode Island Supreme Court in a 1992 case, cited in Schneider, 'Resistance to Equality', 1996: 498, fn. 82. For further analysis of the stereotype applied in judgments of battered women defendants, see Holly Maguigan, 'Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals', 140 *University of Pennsylvania Law Review*, (1991). The jury (and judge) might also have noted the fact that, unlike Oakes, King took her husband's name when she married him.

²⁴¹ These included 'Diary of a killer' (Herald on Sunday, November 20, 2005), 'Woman convicted of sleeping-pill killing' (*Waikato Times*, 17 December, 2005) and 'Wife guilty of sleeping pills manslaughter' (Simon O'Rourke, *NZ Herald*, 17 November, 2005). 'Diary of a killer' included four full pages with huge images of King in close-up. During King's trial the public gallery was filled to capacity and remained so for the seven hours it took the jury to deliver its verdict at nearly eleven o'clock at night.

their wives. In one Australian study of media coverage of ten domestic homicides occurring over a two month period, researchers found that the word ‘murder’ was reserved for the headlines of the three articles that covered the two cases where the victim was male; the word ‘wife’ was used fifteen times but the word ‘husband’, not once.²⁴² The study also highlighted the media’s reluctance to report the ‘standard’ domestic homicide of the ‘husband shoots wife, commits suicide’ variety. In the opinion of one reporter, these cases are ‘a dime a dozen now, like the car crash. You don’t run them’.²⁴³

In New Zealand, this media framing was again evident in the coverage of a 2004 case in which a man, with a history of domestic violence against his wife that included several breaches of the protection order she had out against him, arrived at her house early in the morning and stabbed her multiple times before setting her alight; stabbed and killed their baby son and seriously injured their two young daughters before setting himself alight. The public broadcaster, *Radio New Zealand*, reported the case as a ‘tragic incident’ and, under the heading ‘Kelvin Mercer’s wife demanded drug counselling’, speculated about the murdered woman’s blame for the ‘tragedy’, suggesting ‘Mercer’s anger at his estranged wife’ was ‘triggered’ by her relationship with another man.²⁴⁴ *The Herald* led with ‘Killer father had drug problem’,²⁴⁵ suggesting a more convenient and ‘masculine’ explanation for the man killing his son than vengeance against his ex-wife, while detracting attention from the history of domestic violence by emphasising the killing of the son, rather than the wife, who was clearly the principal target. In most of the reports the victims ‘died’ rather than being killed or murdered. Overall, this type of media framing confirms the ongoing cultural predisposition to want to ‘control the damage done

²⁴² Lisa Evans ‘Desperate lovers and wanton women: Press representations of domestic violence’ *Hecate*, Oct 2001 v27 i2 p.149-151. The research also showed consistent use of evasive and euphemistic terminology like ‘domestic dispute’ and ‘troubled marriage’, which the author suggests is a deliberate strategy used to ‘normalise’ such incidents. There is also an absence of ‘moral outrage’ shown and a ‘dependence upon familiar gender stereotypes’ including the ‘nagging wife’, ‘vindictive woman’ and the ‘spurned lover’ to suggest ‘men are abusive as a demonstration of their love for the victim’.

²⁴³ *Ibid*: 156.

²⁴⁴ ‘Kelvin Mercer’s wife demanded drug counselling’ *RNZ*, 22 May, 2004: 22:13. Also, ‘Police still interested in determining exact motive behind stabbing’ *RNZ* 22 May, 2004: 14:16.

²⁴⁵ ‘Killer father had drug problem’, *The New Zealand Herald*, May 24 2004 5: 02 AM.

to the mythic man’ –especially ‘husbands’ – at the expense of women – especially ‘wives’.²⁴⁶

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In a 2004 seminar of the New Zealand Law Society, a case was put for ‘returning to the principles of natural justice’.²⁴⁷ The claimants, in opposition to the non-notice protection orders provided for under the DVA, argued that a better ‘balance’ between the ‘competing interests’ of the parties involved in ‘domestic disputes’ was called for. The ‘competing interests’ referred to were those, on the one hand, of the ‘desperate battered party who needs security and safety instantly’; and, on the other, of the batterer ‘who perceives unfairness and injustice leading to enduring bitterness’.²⁴⁸ As concluded by the authors: ‘sometimes it is necessary to go back in order to move forward’.²⁴⁹ The fact that certain agents of New Zealand’s justice system in the 21st Century, can define as ‘competing’ – or equivalent – interests a woman’s right to be protected from potentially life-threatening violence and an abusive man’s need to be saved from feelings of ‘enduring bitterness’, given all that we know today about the reasons behind this bitterness and the seriousness of this threat, ironically confirms our failure to have moved very far forward in the direction of justice and out tendency, instead, to move in circles, repeating the same mistakes and reinforcing the same injustices over and over.

The critical historical reflection undertaken in this chapter comprehensively challenges any case for ‘going back’ in order to achieve justice in the domestic violence context, while highlighting the enduring obstacles to genuine forward progression towards justice

²⁴⁶ Jenny Morgan, ‘Provocation law and facts’, op.cit: 264. The same framing in reverse is evident in media coverage of the 2001 case involving a female accused (*R v Suluape*), in which there is no attempt made to construct the case as a tragedy or to shift blame for the killing onto the man who had been steadily unfaithful and violent to the accused throughout their twenty-year marriage. Instead, the accused and her actions – ‘Suluape killed her husband with an axe’ and ‘wife who axed spouse’ – are emphasised throughout with images and captions that suggest ‘retaliation’ was the motive, even in coverage of the appeal court decision that went in her favour. See ‘Appeal Court cuts sentence of wife who axed spouse’, *NZ Herald*, March 28, 2002.

²⁴⁷ Vicky Crawshaw and Judge O’Dwyer, *Without Notice Applications*, NZ Law Society, October 2004: 18, 49 cited in Davis, ‘Gender bias’, op.cit: 5.

²⁴⁸ *Ibid*, ‘Forward’ by Judge Peter Boshier, Chief Judge of the Family Court.

²⁴⁹ *Without Notice*, op.cit: 49 cited in Davis, *ibid*: 6.

in this field. It at once reveals how every step forward on behalf of battered women, such as represented by the Refuge movement, the DVA and the BWS, has been met with some level of resistance, which has significantly impeded the reform process. Moreover, the fact that this resistance is waged in the name of *justice*, while the reform movement is framed as a quest for better ‘security’ for battered women, at best; a vindictive ‘feminazi’ strategy to manipulate the justice process, more often, reveals that conceptions of justice impacting on the response to domestic violence remain profoundly limited by the legacy of cultural patriarchy.

Overall, my reflections in this chapter substantially confirm the key claim made by various critical theorists of justice who argue that the ‘hands off approach to culture’ adopted by the dominant theorists of justice, obscures more than it facilitates an understanding of the complex challenges of delivering justice in context. As a key component of this ‘hands off’ approach to justice includes a commitment to ‘gender neutrality’, its application in contexts of domestic violence is particularly problematic. This concern is central to the issues addressed in the second part of the thesis in which I turn to reflect critically on the substantive principles of justice underpinning the New Zealand ‘justice system’, and consider the influence of these principles on our judgments of battered women defendants.

Part II: Principles of Justice in Contexts of Judging Battered Women Defendants

The notion of systemic justice is basically flawed...a mature concept of justice must necessarily reflect values that are immanent in the community at any given time.

Rt Hon. E. W. Thomas, 2005¹

The case study began by highlighting the expectation that the ‘justice system’ in New Zealand should function like an important public building, clearly visible and accessible to all. In the light of the various processes, judgments and decisions attributed to this ‘system’ throughout the case study, the building metaphor, and the notion of ‘systemic justice’ it suggests, does indeed seem unrealistic and flawed. However the proposed alternative of a commitment to justice informed by values ‘immanent in the community’, is also exposed by the case study as a less than straightforward if not distinctly problematic basis on which to develop a just response to cases like *Oakes*.²

In the second part of the thesis I turn to consider the possibility that a greater reliance on certain substantive principles of justice could address some of the issues raised in the case study and provide the basis for a less flawed, more open and accessible, but still systematic commitment to justice in contexts of domestic violence than has operated in New Zealand to date. This task confronts the core justice challenge of reducing a complex of particulars – both fixed and dynamic – to a general principle or set of principles capable of providing a relatively stable guide to practical judgments across a wide range of areas. In the specific context of developing principles capable of guiding

¹ *The Judicial Process: Realisms, Pragmatism, Practical Reasoning and Principles*. Cambridge University Press, Cambridge: 129. Justice Thomas is a Judge on the NZ Supreme Court and a member of the Privy Council.

² In particular, the dominant cultural values highlighted in Chapter Three.

the various judgments impacting on cases like *Oakes*, the task addresses both the general skepticism about the practical relevance of justice, as well as the feminist critique of justice as an inherently patriarchal ideal, reflecting and reinforcing male interests at the expense of women. In the final analysis, whatever the conclusions reached about justice in response to these concerns, and in light of the case study, my aim is to show that critical reflection on the principles of justice in context is an important political and philosophical task giving meaning to the practical and theoretical claims made in the name of justice.

Chapter Four

Equal treatment in the common law courts

In seeking justice, men look for some neutral authority, which is the law.

Aristotle, 335 B.C.³

The law is not inherently neutral. On the contrary, the law is a vast system of rules and classifications reflecting value judgments about what are, and what are not, relevant distinctions between persons, things, circumstances and acts for the purposes of judging them.⁴ In Aristotle's view, legal neutrality and justice means a system of rules and classifications that maintain critical distinctions between different 'ranks' or classes of persons to ensure members of each class are treated according to their distinct rank and in this way, are treated 'equally'. Or in other words, judges are encouraged to 'adopt a different attitude towards the members of the various classes' in order to treat them in accordance with their very different and unequal worth.⁵ As suggested in Part I of the thesis, Aristotle's ranking system included a fundamental distinction drawn between the status of men and women, with women – alongside slaves – accorded the lower status and value. Indeed, there was nothing egalitarian about the principle of equal treatment according to the law as established by Aristotle and incorporated into the foundations of the common law.⁶ Rather, never believing 'that two people could be each other's equals',⁷ Aristotle eschewed the ideal of substantive equality in favour of a system of formal equality to be achieved by consistency and impartiality of judgments based on rules, and the avoidance of arbitrary, prejudicial decisions corrupted by personal whim or political partisanship.

³ *Politics: The Athenian Constitution*, Book III: State and Citizen. John Warrington (ed.) Heron Books, J. M. Dent & Sons Ltd, 1959: 58.

⁴ H.L.A. Hart, *The Concept of Law* (Second edition) Clarendon Press, Oxford, 1994: 124.

⁵ Chaim Perelman, *Justice, Law and Argument*. D. Reidel Publishing Company, Dordrecht, 1980:17

⁶ Jim Evans, 'Aristotle's Theory of Equity' in W. Krawietz (et al), *Prescriptive Formality and Normative Rationality in Modern Legal Systems*, Berlin, Dunker & Humbolt, 1994.

⁷ Agnes Heller, *Beyond Justice*, Basil Blackwell, Oxford, 1989: 2.

Today, in modern liberal democracies such as New Zealand, legal justice and ‘neutrality’ is interpreted much more inclusively and substantively to give expression to the core justice value ‘so deeply embedded in modern man...that prima facie human beings are entitled to be treated alike’.⁸ Thus, the modern common law incorporates a principle of equal treatment that respects people as equals and, as such, aims to provide ‘a formal guarantee of fair [and] inclusive treatment’.⁹ By this definition, justice still involves distinctions drawn (and formalized) between different types of *cases*, but not distinctions based on differential rankings of persons as more or less worthy. The commitment to ‘legal neutrality’ is maintained in so far as these distinctions are consistently and continuously upheld, with the law aiming to treat like cases alike, and different cases differently, while all persons are to be treated *as equals*. But because no two cases are ever exactly the same, the modern commitment to equal treatment specifically ‘does not [preclude] differential treatment’ for like cases,¹⁰ but rather precludes ‘inaccurate’ categorizations of cases focused on ‘the wrong similarities and differences’.¹¹

Legal justice, in other words, remains a commitment to system and form. Indeed legal justice *is* formal justice by another name, and the principal aim is to avoid prejudicial judgment influenced by unruly forces that threaten a commitment to form – such as emotional attachments, vested interests, subjective beliefs and opinions – so that like cases can be treated *alike*, but not the same, and different cases can be treated ‘*differently yet equally*’.¹² The key is to maintain the critical distinction – ‘of the highest importance’¹³ – between different and ‘double standards’; the former being the essence, and the latter being the antithesis, of legal justice. Double standards involve a regular ‘inconsistency in comparing *groups*...[that] is attributable to social bias’.¹⁴ So, for example, if African American convicted criminals are consistently sentenced to death at a

⁸ Hart, *The Concept of Law*, op.cit: 162

⁹ Iris Marion Young, *Justice and the Politics of Difference*. New Jersey, Princeton University Press, 1990:11.

¹⁰ Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory*. Dordrecht: D. Reidel Pub. Co, 1985: 81.

¹¹ William K. Frankena, ‘The Concept of Social Justice’, in *Social Justice*, edited by Richard B. Brandt. Englewood Cliffs: Prentice-Hall, 1962: 10.

¹² Ibid: 11, emphasis in original.

¹³ Heller, *Beyond Justice*, op.cit: 9.

¹⁴ Ibid, emphasis in original.

rate higher than white Americans convicted of like crimes, this is a double standard, reflecting a social bias against one group of people (and in favour of another) that emphasises the wrong ‘differences’ in judging like and unlike cases.¹⁵

Critics argue that the principle of equal treatment as formulated by Aristotle, ‘fails to tell us anything very helpful about how to recognize when two cases are alike or what particular characteristics are relevant for the purposes of this “likeness”’.¹⁶ They claim that the principle is too abstract to provide an effective guide for distinguishing ‘different’ from ‘double’ standards and, given entrenched social biases, a commitment to formal equality and legal ‘neutrality’ effectively justifies the very different and unequal treatment of marginalized social groups, not least of all women. Or in other words, in an unequal society, ‘the more the existing social reality of inequality is reflected in law – the more accurate the rule – the more inequality is reinforced’.¹⁷ Indeed, the persistence of very different judgments for male and female domestic homicide defendants delivered by the modern criminal law *after* formal gender biases and double standards have been removed, tends to confirm the limited ‘neutrality’ of the formal justice principle in practice. Moreover, that this partiality is increasingly hidden behind the principle of equality before the law and the formal commitment to ‘gender neutrality’, which are more or less taken for granted in the modern common law, suggests an increasing limitation of the principle as an effective guide to the delivery of justice in context.

However, rather than abandon the principle, if instead the pretence of legal neutrality associated with it was abandoned, and the reality of non-neutrality and entrenched social bias confronted, a commitment to the principle of equal treatment and formal justice could then be expanded and re-defined to include the identification of *critical* likenesses

¹⁵ This is not a hypothetical example. US research of death sentences handed down for convicted rapists consistently reveals that black men are much more likely to receive a death sentence and be executed especially where the victim is a white female, than white men convicted of rape. See Hugo Bedau, ‘Capital Punishment Redistributive Justice’ in Robert C. Solomon and Mark C. Murphy (eds.), *What is Justice? Classic and Contemporary Readings*. Oxford University Press, New York, 1990: 277.

¹⁶ Robert Solomon, *A Passion for Justice: Emotions and the Origins of the Social Contract*. Addison-Wesley Publishing, USA 1990, reprinted 1991: 158. See also Michael Oakeshott, *Rationalism in Politics and Other Essays*. Liberty Press, Indianapolis, 1991: 67-68.

¹⁷ Catherine MacKinnon, ‘Towards feminist jurisprudence: Review of Anne Jones’ *Women who kill*’, *Stanford Law Review*, February 1982, Vol.401 pp.703-737: 732.

and differences that recognize social bias and injustice as relevant points of comparison and differentiation between like and unlike cases. If the principle was substantiated in this way, then the common law method of adjudication based on the following of formalized rules and precedents laid down in previous like cases, could avoid the tendency to ignore and obscure critical differences of the kind that otherwise perpetuate the mechanisms of entrenched social injustice.

This reliance on more critical, contextualised distinctions reflecting an awareness of the actual historical context in which the courts operate, and the need to counter social (cultural) biases inherent in this context, should not preclude some degree of formalization or necessitate a more fundamental reliance on community values. The BWS, for all its flaws, could be seen as a reasonable example of a contextualized and critical classification of this kind. At the same time, the difficulties of applying the syndrome consistently and effectively in judgments of various defendants like Gay Oakes, at once highlights many of the complex practical challenges of applying critical classifications in a formal system of justice underpinned by the principle of equal treatment.

Indeed, the cultural backlash against the syndrome, especially the cries of ‘special treatment’ for women,¹⁸ along with its tendency to reinforce gender stereotypes and its ultimate failure to support women’s claims of self-defence, confirms the substantial political and cultural obstacles in the way of developing a contextualized and critical principle of equal treatment in contexts of domestic violence. However, the fact that the syndrome was introduced into the courts in the first place, and accepted by some judges and members of the community as an important development in giving recognition to an experience that law and society had previously misjudged, suggests to me that there is considerable scope in the present common law system and principle of formal justice for effective movement and adaptation in the direction of a more substantive commitment to equality and justice.

¹⁸ While some New Zealanders saw the BWS as ‘a licence to kill husbands; others saw it as an awareness of the consequences of domestic violence’, Judith Ablett Kerr, ‘Afterword’ in Oakes, *Decline into Darkness*, op.cit: 185.

To show how this movement might be achieved in practice, and in the particular context of judging battered women defendants in the common law courts, is the justice challenge illuminated and critically reflected upon in the remainder of the chapter.

Formal justice: ‘Like treatment for like cases’

Respect for formal justice...requires equal treatment for essentially similar cases.

Chaim Perelman, 1980¹⁹

Under the common law system, the courts are held responsible for the practical application and administration of the law, which in turn is expected to embody the constitutionally protected right of non-discrimination or equality before the law. One of the most fundamental and ancient of the rights protected by the common law is the right to a ‘fair trial’, which means a trial conducted in an impartial court wherein the accused person is deemed ‘innocent until proven guilty’, and is entitled to be treated *like* any other accused person in being tried and judged according to the same formalised procedures and standards. In this way, a court of law must be impartial and objective, enabling judgments that are a ‘true’ and ‘accurate’ interpretation of the facts or ‘merits’ of the particular case.²⁰ This ‘objectivity’ is achieved via the steady development of general rules and legal categories, which when applied in the courtroom ensure a systematic detachment from personal ‘likings and dislikings’ on the part of all the agents of the formal justice system called upon to establish, in any given situation, ‘what the case is’.²¹

The commitment to formal justice is reliant upon judgments being informed by a full appreciation of all the relevant facts, which in turn depends on laws that treat people

¹⁹ *Law Justice and Argument*, op.cit: 36-7.

²⁰ Goldman, *Knowledge in a Social World*, op cit: 272.

²¹ Heller, *Beyond Justice*, op.cit: 12.

equally, as well as equality-minded agents operating across the formal justice sector. Although the particulars of legal cases vary endlessly, such that the identification of relevant likenesses and differences is never an exact science, as critics point out, ‘we forgo justice if we get stuck on the potentially endless matter of explaining uniqueness’,²² so should not expect precision in formal adjudication. Indeed, an impartial and just court of law is largely engaged in the task of making general comparisons and identifying approximate likenesses between cases with reference to rules and laws that also generalize between types of cases, none of which can be done with mathematical precision. The commitment at once upholds the basic premise that we cannot pass judgements on other people ‘unless it is assumed that there are standards of judgment accessible to others as well as ourselves, which allow...people to know what they are doing is right or wrong’ in a legal sense.²³ The commitment to formal justice is then a commitment to deliver judgments in accordance with these established standards that are ‘clear, dependable and certain’.²⁴ This process of judgment, as Hart says, is ‘obviously very close’ to the idea of ‘proceeding by rules’,²⁵ though there remains a necessary discretionary component in a system based largely on rules (precedents) established by judges.

The formal justice system also presupposes our ability to consistently and ‘equally’ compare different actions (persons, experiences, things) by distinguishing and likening their general features and holding these to a single standard of ‘reasonableness’ that defines a recognizable, minimum standard of behaviour achievable by all ‘reasonable persons’.²⁶ The law itself encapsulates this standard. For example, the law of self-defence says it is *reasonable* to defend yourself against a serious threat to life and limb providing proportionate force is used. Furthermore, the process of judging in which cases the standard of reasonableness has been met relies on the jury’s ability to recognize and

²² Heller, *Beyond justice*, op.cit: 171.

²³ Hadley Arkes, *First Things* (1986) quoted in Austin Sarat and Thomas R. Kearns ‘Making peace with Violence: Robert Cover on Law and Legal Theory’ in Austin Sarat (ed.) *Law, Violence and the Possibility of Justice*. Princeton University Press, 2001: 69.

²⁴ Hart, *Concept of Law*, op.cit: 125.

²⁵ Ibid: 161.

²⁶ Caroline Forell and Donna Mathews, *A law of her Own: the Reasonable Woman as the Measure of Man*. New York University Press, New York, 2000: 6.

apply the same standard when determining whether or not the force used was reasonable in the circumstances.²⁷ This standard presupposes our capacity to generalize about what is ‘reasonable’ in most circumstances so as to establish, in advance, general rules and guidelines according to which all number and variety of cases can be consistently compared and judged. This standard reflects the view that ‘reason...adapts itself to the most diverse situations and circumstances...showing itself...to be logical and systematic and indifferent to particular cases’.²⁸ It also incorporates an ethical claim about the quality of formalised ‘reason’ as distinct from the subjective, opinionated reasoning of the ‘ordinary’ person. Formal reason achieves a higher standard of ‘truth’ and ‘impartiality’ by embodying the Golden Rule of formal ethics which tells us to treat others as ourselves in respect of the belief that ‘what is right or wrong for one person must be right or wrong for any similar person in similar circumstances’.²⁹

So the general standard of reasonableness central to the rule of law and the process of legal adjudication that judges what behaviour complies with or fails to comply with the law, reflects an expectation of behaviour that is generally more considerate and prudent than typically occurs otherwise in areas of personal life not regulated by law. That is, the principle of equal treatment according to the law makes its claim to justice based on the view that the kind of reasoning that can be formalized – ‘all respectable reasoning can be formalized’³⁰ – is systematically distinguishable from less respectable, ‘everyday’ reason, which is ‘a matter of personal whim, varying from man to man arbitrarily’.³¹ ‘Respectable reason’, by contrast, allows consistency between judgments being underpinned and strengthened by the generalization principle, which tells us to ‘act as everyone should act in a similar situation’.³²

²⁷ This is a complex idea of ‘reasonableness’ because while ‘reason’ is generally conceptualized as an objective, general standard, in the law of self-defence the test of ‘reasonable force’ has a subjective component in being assessed according to ‘the circumstances [of risk] as the defendant believed them to be’ at the time of the killing.

²⁸ Perelman, *Justice, Law and Argument*, op.cit: 102.

²⁹ Ibid: 38.

³⁰ J. R. Lucas, ‘The Philosophy of the Reasonable Man’, *The Philosophical Quarterly*, Vol. 13, issue 51 (April 1963) pp. 97-106: 98.

³¹ Ibid: 100.

³² Heller, *Beyond Justice*, op.cit: 10.

At the same time, as seen most clearly in the example of provocation, the criminal law makes certain allowances for human failings and weaknesses considered ‘typical’ or characteristic of all persons or of particular groups of persons, such as men suffering a fragile ego in the face of insults to their ‘sexual prowess’.³³ Although the ‘reasonable’ person is expected to retain a degree of self-control in the face of such ‘provocation’, if the elements of provocation are established in the particular circumstances of the case, the law is understanding to a point, and partly excuses those who lose self-control in a situation deemed to be sufficiently ‘provocative’. In short, the law does not uphold such a high standard of reasonableness that people are not allowed to make mistakes, or are expected to act in a cool and calm, altruistic or heroic manner.

Nonetheless, it is only by upholding this higher form of reason, indeed by acting according to ‘the rule of reason’ – which is at once ‘the rule of law’ – that the courts can deliver consistent and ethical comparisons between ‘like’ and ‘unlike’ to judge all cases and persons equally. This higher standard of judgment is achieved in the common law courts by strict rules governing the admissibility of evidence to ensure the objective facts or merits of the particular case are focused upon in determinations of ‘relevancy’, and ‘the rationality of the fact finding process’ is thereby maintained.³⁴ Indeed, under the common law system, there is a particularly ‘large mass and density of ... exclusionary rules barring certain types of evidence from reaching the trier of fact’.³⁵ In general, these rules preclude witnesses ‘expressing opinions’ when giving evidence. However, as seen in *Oakes*, the rule of reason upheld in the common law courts has been increasingly relaxed in order to accommodate the admission of ‘expert evidence’, such as BWS, which tends to be less than objective or scientifically verifiable evidence. Indeed, even though expert witnesses are required to be ‘properly qualified...on a matter which is beyond the knowledge or expertise of the trier of fact’,³⁶ expert testimony is regarded by some judges with considerable suspicion. This suspicion rests on the concern that expert

³³ According to Bungay (QC), such insults provide the ‘ultimate’ provocation. *Bungay on Murder*, op.cit.

³⁴ Schneider, ‘Resistance to equality’, op.cit: 495.

³⁵ Goldman, *Knowledge in a Social World*, op.cit: 291.

³⁶ Robertson, ‘Battered woman syndrome’, op.cit: 295-296.

testimony is unfounded reason, based on the personal opinions and beliefs of the witness, which can be adapted too easily to suit the interests of the parties who rely on it.³⁷

A key challenge of court-based adjudication is the achievement of a consistent balance between application of the general rule, and the formal rule of reason so that cases are judged according to *type*, and careful attention paid to the specifics of the particular case, which are never the same in any two cases. This process is facilitated by the prior classification of all potentially ‘relevant’ types of persons, acts, things and circumstances so that the fact-finder can eliminate some particulars from the outset and as the case progresses. However, as seen in the very similar cases of *Oakes* and *King*, the challenge to find ‘likeness’ and achieve a consistency of judgment based on only the relevant facts,³⁸ is an ideal that is at best approximated in practice to achieve more rather than less equality and uniformity of treatment. The adversarial trial is supposed to further enhance the rationality or reason of the fact finding process by exposing lies and balancing biases on either side with the help of the impartial judge acting as referee.³⁹ However, again as seen in the *Oakes* case, this ideal appears to allow for considerable unevenness between sides depending on the evidence presented, and the different skills of opposing counsel. In summing up, the judge also appears to have considerable discretion to go beyond the role of ‘impartial referee’ in suggesting to the jury which aspects of the evidence presented are most relevant to an assessment of guilt, and in framing these aspects variously, even emotively.⁴⁰

The least formalised aspect of the commitment to formal justice and equal treatment in the common law system is the ancient and particularly distinctive institution of trial by

³⁷ Ibid: 295 citing the views expressed by Taylor in his *Treatise on the Law of Evidence*, (1858, 3rd edition: 69).

³⁸ See my comparison of these two cases in Chapter Three. Only some of the differences in the adjudication, convictions and sentences in these two cases can be attributed to factual differences, such as King’s defence not referring by name to the BWS, the quantity of pills used in *King* being less than in *Oakes*, and Oakes having confided in friends about the killing, friends who then acted as key witnesses for the Crown.

³⁹ Goldman, *Knowledge in a Social World*, op.cit: 291.

⁴⁰ In Chapter One I highlighted a number of examples of this judicial framing that suggest to me a less than impartial or objective summing up of the relevant facts in *Oakes*. The appeal in this case was also based largely on concerns of this kind.

jury. Trial by jury brings a particular type of reason to the courtroom; a reason which is characterized as ‘common sense’ and which is expected to reflect the values and collective life experiences of the community at large. With a unanimous verdict between twelve diverse individuals of various ethnicities, ages and occupations required for a conviction, trial by jury is considered if anything to favour the defence and is provided as a matter of right in all common law jurisdictions. ‘Common sense’ is the judgment of ‘the average person’ produced when a randomly selected collection of diverse individuals, each most likely having different strong views and prejudices on certain issues, is brought together and through open group discussion is able to arrive at a moderation of views or a consensus that is reasonable and sensible. ‘Common sense’ is not ‘educated’ reason based on formal training in law, or in any other specialized discipline, but is reason drawn from the lessons of life; lessons which are thought to teach sense and understanding – perhaps an ability to empathise – that cannot generally be learnt through more formal channels of knowledge acquisition. ‘Common sense’ is drawn from human instincts, honed over years of living and interacting with others, to discern, albeit with the aid of more formal rules of probability, when, how and why a witness is lying.

The rationality (and equality) of the court adjudication process is facilitated by ‘the reasonable person’ standard, which is expected to provide a constant, stable and more, rather than less, impartial and objective reference point for guiding these intuitive and instinctive ‘common sense’ judgments. Under the common law system ‘great weight’ has been placed on this standard to the extent that legislators have relied on it where and when they are not prepared or able ‘to specify exactly what ought to be done in all circumstances’, leaving it up to the courts and, specifically, to the jury to decide ‘what a reasonable [person] would in the circumstances do.’⁴¹ Of course up until about twenty-five years ago,⁴² the common law conceptualized this standard as the Reasonable Man standard, such that ‘reasonableness’ was defined according to masculine traits and interests. It further compounded this discrimination by excluding women from jury

⁴¹ Lucas, ‘The Reasonable Man’, op.cit: 97.

⁴² The semi-formal replacement of ‘the reasonable man’ standard with ‘the reasonable person’ standard in common law jurisdictions is traced to the early 1980s, Forell and Mathews: *A law of her own*, op.cit: 16.

service even long after they were granted the right to vote.⁴³ Although the standard was said officially to be gender inclusive or ‘neutral’ – as would be expected of a formal standard – according to many feminist critics, the Reasonable Man standard has the characteristics of a man; indeed often of an ‘irrational, jealous and violent’ man.⁴⁴ Moreover, the recent move to adopt a Reasonable Person standard in place of the Reasonable Man, has not reassured these critics who maintain that the new term retains the old meaning, which continues to define ‘reason’ in masculine terms; indeed to reflect ‘patently male’ characteristics.⁴⁵

*

On the one hand, the formal adjudication process is expected to ensure the general law – as the law-maker intended it and as specified in legal precedents – is followed and applied as accurately and systematically as possible, with the various agents in the process effecting a consistency and precision in their reasoning and decisions between cases. On the other hand, in the common law ‘neither laws nor precedents are applied mechanically’ with judges afforded considerable ‘powers of interpretation’ and discretion to decide what is right, ‘even if [they] cannot justify [their] decision by pointing to a law that is indisputable and clear in all its terms’.⁴⁶ Although not granted as a matter of rule, this discretionary element is held to be justified in order to avoid ‘the excessive rigidity that generates injustice’ in the face of changing values.⁴⁷ Indeed, even those who generally oppose the relaxation of the commitment to legal formalism,⁴⁸ today recognise

⁴³ Women in New Zealand were denied the right to sit on juries before 1942 when the NZ Juries Act was broadened to allow ‘women of good character’ between the ages of 15 and 60 to volunteer for jury service. The first woman juror was selected the following year (Reported in the *Auckland Star*, 15 October 1943 p. 5). Women’s jury service remained voluntary until 1959 and was not ‘completely equal’ with men until 1976 when the automatic exemption for women to serve was removed. Te Ara – The Encyclopedia of NZ, <http://www.teara.govt.nz/NewZealandInBrief/GovernmentAndNation/7/ENZ-Resources/Standard/2/en>

⁴⁴ Marina Angel, ‘Susan Glaspell’s Trifles and A Jury of Her Peers’, op.cit: 817.

⁴⁵ Forell and Mathews, *A Law of Her Own*, op.cit: 183. The critical issues raised here will be dealt with in full later in the chapter.

⁴⁶ Perelman, *Law, Justice and Argument*, op.cit: 39-40.

⁴⁷ Ibid.

⁴⁸ Generally those adhering to the doctrine of ‘legal positivism’, which is today considered to be dominated by H.L.A Hart. See Dworkin’s comments in Jeremy Waldron, *Law and Disagreement*. Clarendon Press, Oxford, 1999: 35.

that a strict adherence to the positive law runs the risk of ‘obscuring the need for choice and blindly prejudging what is to be done in a range of future cases’.⁴⁹

The Aristotelian concepts of ‘equity’ and ‘phronesis’ (or practical wisdom) have been relied upon by the common law courts to support the commitment to equal treatment in the adjudication of particularly hard or unusual cases when it is accepted that a ‘correction’ or modification of the formal rule is necessary with reference to a concept and process less ‘unconditional’ than formal equality or justice.⁵⁰ An appeal to equity modifies and improves the formal principle in judging difficult cases because it allows judges to apply their ‘practical wisdom’ acquired and honed in their experiences of judging – a practical challenge after all. Although Aristotle considered practical judgments based on equity to be ‘not legal justice but a rectification of legal justice’,⁵¹ this somewhat semantic distinction is challenged in modern times by critics of the formal approach to legal justice who argue that ‘the [very] reason we have judges is that justice requires sensitivity and experienced judgment and not merely the mechanical grinding of an already established decision procedure’.⁵² Because equity is a broader, more flexible concept than justice, ‘sometimes used as a general term of praise in a sense wide enough to embrace other virtues than justice’,⁵³ it is thought to allow adjudicators to make right decisions based on the facts before them, which the law-makers can never fully anticipate or include when ‘speaking generally’.⁵⁴

In this way, defenders of common law jurisprudence from Aristotle onwards, have recognized that legal justice is ‘less of an accurate science than...mathematics’,⁵⁵ not least of all because we are constrained by the ‘connected handicaps...of our relative ignorance

⁴⁹ Hart, *The Concept of Law*, op.cit: 129-130.

⁵⁰ ‘Justice is always unconditional’ (Heller, *Beyond Justice*: 34). Aristotle’s theory of Equity which became the ‘Aristotelian Doctrine’ under the English common law in 1524 is considered ‘an important part’ of the common law tradition, Evans, op.cit: 226-227

⁵¹ Quoted in Perelman, *Law, Justice and Argument*, op.cit: 38.

⁵² Solomon, *A Passion for Justice*, op.cit: 166. See also Thomas, *The Judicial Process*, op.cit.

⁵³ Evans, ‘Aristotle’s Theory of Equity’ op.cit: 228.

⁵⁴ Ibid: 230.

⁵⁵ Alasdair MacIntyre, *Whose justice? Which rationality?* Notre Dame, Ind., University of Notre Dame Press, 1988: 114.

of fact...[and] our relative indeterminacy of aim'.⁵⁶ However, there is ongoing debate about to what extent this means that the legal process of adjudication is not a systematic or formalised process at all, but rather 'a discussion of values...aimed at ending controversies and obtaining legal peace'⁵⁷ or, more cynically still, a highly discretionary and 'politicized' process of law-making, substantially influenced by judges' personal and political persuasions.⁵⁸ Either way, the level of debate tends to confirm that in common law jurisdictions the commitment to legal justice is differently understood and considerably more complicated in practice than a simple and systematic application of the principle of equal treatment before the law, particularly in the adjudication of 'hard cases'.

In view of the case study and the discussion in Part I of the thesis, it would seem that the formal system and principle of justice is particularly challenged by cases like *Oakes* and those involving judgments of the victims and perpetrators of domestic violence more generally. Arguably, the debate about the relevance and purpose of this principled commitment needs to be addressed in a specific context rather than dealt with at the level of theory. Given the difficulties the formal system has had with delivering justice in cases like *Oakes*, their legal adjudication provides one of the clearest contexts in which to reflect critically on the claim that a commitment to the formal principle of equal treatment cannot deliver justice at all, least of all in complex contexts of injustice, such as domestic violence. After reflecting on the application of the principle of formal justice in this context, with reference to the specific dilemmas raised in the case study, I then move on to consider the application of various proposed revisions of the formal principle in the same context.

⁵⁶ Hart, *The Concept of law*, op.cit: 128.

⁵⁷ Perelman, *Law, Justice and Argument*, op.cit: 145.

⁵⁸ In New Zealand, the establishment of the Supreme Court in 2003 sparked protest on this issue with some expressing opposition to the court on grounds that it would assume a 'politicized' and 'activist' role with judges 'readily departing from established common-law rules when they think it is in the interests of justice'. Steven Price 'Supreme Silliness' *NZ Listener*, June 7, 2003.

The principle of formal justice – judging battered women defendants

Killing is one of the clearest cases for a general, formalized rule.

H.L.A. Hart, 1994⁵⁹

Because of the extremely high value placed on human life in virtually all contexts and cultures, laws prohibiting and punishing the act of killing have generally been considered to rest on the most straightforwardly justifiable legal grounds and the laws against murder – killing with the necessary intent – considered the most straightforward of all. The clearer the general rule to be applied, the simpler the formal adjudication process ought to be. Hart elaborates the commitment to formal justice in cases of murder as follows:

We say that the law against murder is justly applied...[when] it is impartially applied to all those and only those who are alike in having done what the law forbids: no prejudice or interest has deflected the administrator from treating them equally.⁶⁰

However, the case study reveals that application of the laws against murder and manslaughter in contexts of domestic violence is far from a straightforward matter of applying and following the general principle of treating like cases alike. This is not to say that application of the law in these cases could not be made simpler – and with reference to this formal principle. Rather, it is to say that in the common law courts as they have developed in the Anglo-western tradition, and more specifically in New Zealand, in application of the laws against killing and through the processes of ascertaining guilt in cases of domestic homicide, has been anything but simple or systematic.

⁵⁹ *The Concept of Law*, op.cit: 133.

⁶⁰ *Ibid*: 160.

The legal changes implemented in common law countries over the past one hundred to two hundred years have gradually removed the formal discriminations based on gender that saw women who killed their husbands charged with treason and punished much more severely than all other killers excepting those who killed the (actual) king. These reforms are consistent with the general reform of the common law making it illegal to discriminate against any person on grounds of gender (sex). On this basis, virtually all laws, as well as the people responsible for applying and reviewing them, are expected to be 'gender neutral', that is, to treat women and men *alike* in all relevant respects. The 'gender neutral' application of the equal treatment principle means that 'except where gender [or sex]...is itself a material fact [such as in a case of rape]...it is irrelevant to, and [a] totally unreliable indicator of, the material facts in legal cases'.⁶¹

Given that until recently 'the reasonable woman' was regarded as an 'oxymoron' by the common law, and women were classified along with 'lunatics and idiots',⁶² it is unsurprising that the formal decision to re-define gender as legally 'irrelevant' has not exactly effected the legal revolution in favour of gender equality and actual neutrality that it formally represents. Moreover, the assumption of 'neutrality' has worked to mask the continuation of highly gendered and patriarchal decisions in cases involving female defendants and victims. This is seen clearly in the context of the criminal law's response to cases like *Oakes*, especially in contrast with the response to male perpetrated domestic homicides. Indeed, the ongoing bias has suggested to some that in the adjudication of case like *Oakes* 'notions of petty treason remain but are not articulated'.⁶³ If we consider that the introduction of BWS evidence as expert testimony is really the only formal (or semi-formal) change to the common law's response to these types of cases since 'husband killers' were tried for treason, it is again unsurprising to find the enduring influence of old, patriarchal judgments and values on present cases.

⁶¹ Goldman, *Knowledge in a Social World*, op.cit: 281.

⁶² Forell and Mathews, *A Law of Her Own*, op.cit: 16. See also A.P. Herbert's reflections on the subject published in the 1960s, noting the absence of 'a single mention made of a reasonable woman' in the history of the common law and commenting that this state of affairs is not due to 'some prejudice of Man but ...the considered judgments of Nature', 'The Myth of the Reasonable Man: the Case of Fardell versus Potts' at <http://www.geocities.com/bororissa/rea.html>. Accessed 5/8/2002.

⁶³ O'Donovan, 'Defences for Battered Women', op.cit: 221.

Indeed, the extent of the formal inequalities between men and women throughout history and the depth of the cultural ‘resistance to equality’ for battered women in general and battered women defendants in particular, that is ongoing within Anglo-western countries,⁶⁴ practically ensures the continuation of unequal treatment in the common law courts unless these obstacles to equality are directly addressed. Positioning the ‘patently male’ reasonable person behind a pretence of gender neutrality only serves to further reinforce these obstacles. Considering that the law of provocation has always been formally ‘gender neutral’; as stated in the English House of Lords in 1978: ‘For the purposes of the laws of provocation the ‘reasonable man’ has never been confined to the adult male. It means an ordinary member of either sex’⁶⁵ – the official ‘outlawing’ of this ‘reasonable man’ promises little in the way of substantive progress towards genuinely equal and impartial treatment for women defendants. At most, as seen in the *King* case, the ‘reasonable person’ has been translated by the courts into demonstrations of ‘considerable sympathy for the miserable lives of women living in violent relationships, while continuing to deny that a battered woman has reasonable grounds for her belief in the existence of the danger faced and her assessment of the need for deadly force’.⁶⁶ Being conditional on the defendant conforming to prevailing gender stereotypes and the jury’s prejudice, this ‘sympathy’ not only fails to deliver like treatment for like cases involving battered women who kill their abusers, but because unsupported by a standardized measure of reasonable conduct, it further undermines equality of treatment across all cases.

Altogether, the formal justice system continues to fail to conceptualize and deliver equal treatment for battered women defendants because it fails to recognise and deal with injustice – specifically gender injustice. The formal commitment to a so called ‘neutral’ standard, fails to deal with injustice by simply denying it. As feminist, Catherine MacKinnon, argues, there can be no ‘gender-neutral’ standard in law when ‘no gender-

⁶⁴ Schneider, ‘Resistance to equality’, op.cit: 480-481.

⁶⁵ O’Donovan, ‘Defences for Battered Women’, op.cit: 225-226 quoting Lord Diplock speaking in the House of Lords in 1978 pointing out that ‘provocation is a relative concept’ that takes account of the particular characteristics of the defendant and the ‘social standards of the day’: 225.

⁶⁶ Rebecca Bradfield, ‘Is near enough good enough? Why isn’t self-defence appropriate for battered women?’, *Psychiatry, Psychology and Law* 5-6, 1998, Vol. 5 No. 1, pp. 71-85: 80.

neutral universe exists'. For as long as women and men are socially unequal 'they cannot be presumed to be similarly situated for legal purposes'.⁶⁷ Indeed, feminists argue that to assume women and men are the same for legal purposes is to 'forget' sexism and 'elevate ignorance to a virtue' while penalizing those who cannot or will not forget.⁶⁸ In cases of domestic homicide, where there is a particularly strong asymmetry between male and female perpetrated killings,⁶⁹ a 'gender neutral' approach overlooks the gendered context of abuse as explained by the 'Power and Control wheel'⁷⁰ from which perspective the woman's experiences and the batterer's tactics and motives can be most effectively explained.

Furthermore, under a 'gender-neutral' standard, victims of domestic violence who kill are systematically disadvantaged relative to domestic abusers who kill (and any other male homicide defendant) because of the comparative rarity of their cases specifically, and cases involving female defendants in general. Indeed, the established criminal defences and standards of 'reasonableness', even the norms of judicial 'wisdom' and juror 'common sense' that are applied in common law jurisprudence, have all been honed on the experiences, actions and reactions of men, not women. As seen in *Oakes*, application of this male-based model is inclined to systematically distort the experiences and perspective of a female defendant at every stage of the process such that she is effectively penalized for deviating from the male norm. Adherence to this so called 'gender neutral' standard has even been defended 'lest some women are disadvantaged'.⁷¹ That is, in the case of provocation it has been argued that certain women who might kill 'as a consequence of jealous possessiveness following a breakdown of their relationship',

⁶⁷ Catherine MacKinnon, 'Towards Feminist Jurisprudence: Review of Anne Jones' *Women Who Kill*.' *Stanford Law Review* (1982) vol. 401, no. 34 pp. 703-37: 718.

⁶⁸ Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care*. Routledge, London 1993: 73.

⁶⁹ 'Most often women who kill their sexual partners are responding to precipitating masculine violence', men who kill their partners typically have a long history of violence against their victim. See Morgan, 'Provocation', op.cit: 257.

⁷⁰ The Power and Control wheel recognizes the core gendered component of domestic violence in men's misplaced sense of ownership of *their* women and calculated campaigns of psychological and physical intimidation exacted for the main purpose of engendering fear and submission in women. See Chapter Two for further explanation of the critical breakthrough that this model represented in New Zealand's Police response to domestic violence.

⁷¹ Morgan, 'Provocation', op.cit.: 259.

might be penalized if a different, ‘reasonable woman’ standard were to be applied to defend and judge her actions, given how rare it is for women to kill in these circumstances.⁷² By this logic the ‘reasonable’ – violently jealous and possessive – man, who is provoked to kill women who they fail to control by other means, should be retained as the basis for a criminal defence for the sake of the extremely rare if not hypothetical woman.

The alternative of a ‘different’ standard for women or a gender-specific response – such as expert evidence on BWS effectively provides (albeit as an adjunct to the ‘gender neutral’ standard, not as a defence in its own right) – also tends to compound the obstacles to justice for some defendants who, like Oakes, are perceived as atypical (battered) women. In general, a ‘different’ standard applied to women in a sexist, non-neutral world, resistant to recognising the inequality of the norm, is likely to label and stigmatize women defendants such that ‘even those women who receive fair and equal treatment are likely to be thought of as having gotten away with something’.⁷³ Indeed, the defendant in the Canadian case of *Lavallee* who was one of the first battered defendants, of few ever to succeed in a plea of self-defence on grounds of BWS, was described in New Zealand as ‘the *luckiest* man-killing defendant’.⁷⁴

The negative effects of this stigmatization, which underpins the wider cultural backlash against reforms in the domestic violence field observed in New Zealand and other common law countries, should not be underestimated. As seen in Part I of the thesis, claims of ‘special treatment’ for women have contributed significantly to a growing hesitancy and readiness to compromise on the part of various agents across the justice sector who are responsible for implementing prevention and protection measures in the domestic violence field. In short, women in general and battered women in particular are given ‘two options’ under the formal system, neither of which provides access to justice consistent with the principle of equal treatment. Again, Mackinnon explains the basic dilemma effectively:

⁷² Ibid.

⁷³ Jones, *Next time she’ll be dead*, op.cit: 119.

⁷⁴ Bill Hodge, ‘Battered woman syndrome’, op.cit: 158. Emphasis added.

The gender question is a question of difference. There are two options under it. The first I call the ‘male standard’: women can be the same as men. In law, it is called gender neutrality. The other option I call the ‘female standard’: you can be different from men. In law it is called special protection... You can be the same as men, and then you will be equal, or you can be different from men, and then you will be women.⁷⁵

She adds – lest there is any confusion – that both standards ‘conceal...the substantive way in which man has become the measure of all things’.⁷⁶

In cases where women kill their abusive partners, neither standard recommends itself as a path to equal treatment as neither provides a justification or excuse for female ‘aggression’ – women’s most ‘counter-stereotypical’ behaviour.⁷⁷ Rather, women like Oakes are penalized twice for failing to conform to either standard of ‘reasonable’ force. The normative ‘gender neutral’ standard, which in principle ‘permits [women] to ‘equally’ injure, terrorise [and] kill’,⁷⁸ in practice punishes women when their aggression takes a different form from that recognised as excusable or justified for men. Oakes’ plea of self-defence failed in part because she did not ‘shoot an assailant wielding an axe’,⁷⁹ and because she defended herself against an unarmed attacker – the ultimate example of ‘cold’ calculated aggression (in men). Because of the time involved in killing by poison, compared with a bullet (or axe), this method of killing (used by both Oakes and King), also presents significant obstacles to a plea of provocation. Indeed it has been said that ‘to defend a fatal poisoning as a provoked killing...would be near impossible’.⁸⁰ The defence, developed on the experiences and reactions of men, generally requires a sudden loss of self-control and minimum time delay between this loss and the aggressive act of killing lest the law sanctions revenge killing – ‘Revenge is not self-defence; getting even

⁷⁵ ‘Difference and dominance’, op.cit: 297.

⁷⁶ Ibid.

⁷⁷ MacKinnon, ‘Toward feminist jurisprudence’, op.cit: 706.

⁷⁸ Forell and Mathews, *A Law of Her Own*, op.cit: xxi.

⁷⁹ The example chosen by the judge in *Oakes* to illustrate to the jury the objective test for self-defence.

⁸⁰ Hodge, ‘Battered woman syndrome’, op.cit: 150.

is not provocation'.⁸¹ By contrast, as seen in the case study, men who have beaten their wives to death with their fists have been excused by the common law on grounds of provocation because their fists are not recognised as weapons of calculated killing. Extending this standard to women so that they too may be excused beating their partners to death, is clearly not going to facilitate a defence for many (if any) women in reality, but rather, 'smacks of equality with a vengeance...granting formal equality to women where they do not want it or need it'.⁸²

In principle a gender-specific approach to the adjudication of battered women defendants, which gives legal recognition to experiences that are in most respects distinct to women and, moreover, understood these experiences as the products of a thoroughly sexist cultural tradition, has considerably greater potential to effect a substantive legal equality than the 'gender neutral' approach. However, the confusion and controversy surrounding application of the BWS in the common law courts suggests that in practice, the effective application of such a gender-specific approach in the adjudication of cases like *Oakes* is beyond the majority of common law courts to consistently and impartially deliver. At least one member of the New Zealand judiciary has conceded that BWS has not been given a fair chance in the New Zealand courts with the majority of judges failing to apply the 'careful and proper direction' needed to make its legal relevance clear to the jury.⁸³ Others have noted the judicial reluctance to follow the *Lavallee* decision which effectively spelt out in great detail the syndrome's legal relevance and importance; indeed to dismiss this and other decisions like it as 'exercises in mercy and compassion, rather than of principled justice'.⁸⁴

⁸¹ Hodge, 'Battered woman syndrome', op.cit: 149. Hodge is here quoting a law professor 'whose class I took many years ago'. For a more critical perspective see O'Donovan, 'Defences for Battered Women', op.cit: 225.

⁸² Morgan, 'Provocation', op.cit: 259.

⁸³ Robertson, 'Battered woman syndrome', op.cit: 286-287.

⁸⁴ Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular' in Wendy Chan, Dorothy E. Chunn and Robert Menzies *Women, Madness and the Law: a feminist reader*, 2005: 209. The authors argue that judges subsequent to *Lavallee* have 'selectively deployed' BWS evidence so as to avoid self-defence.

As well, the legal application of BWS demonstrates the considerable challenge of defining a gender-specific model for expert evidence on battering that is inclusive of the majority of battered women who seek to rely on it, and that avoids re-inscribing the terms of female oppression, including stereotyping women as deviant and irrational; passive and helpless victims. Indeed, the case study suggested that part of the reason for the success of the BWS was precisely because it conformed to common cultural prejudices and misconceptions about women in general, and battered women in particular, rather than giving legal recognition to those alternative, research-based explanations for why women stay in or return to abusive relationships. These explanations that emphasize battered women's well-honed survival skills, their desire to keep the family together, along with the real dangers and women's *rational* fears of leaving violent relationships and the external – social – obstacles preventing them from doing so,⁸⁵ differ radically from those that fit prevailing cultural prejudices.

In *Oakes*, the evidence allowed into court and deemed relevant to the formal criminal trial process was abstracted from its social context and rendered personal. BWS essentially facilitated this personalization by constructing Oakes' actions and reactions as psychological symptoms peculiar to individuals like her. The syndrome's claim to established 'scientific' discourse,⁸⁶ and focus on the clinical pathology of 'the battered woman', provided an approximate 'fit' with the standard evidentiary model. A more socially situated and reflective perspective on the evidence in her case that endeavoured instead, 'to connect [her] personal experiences to the subordination of women in society',⁸⁷ would not have fit so easily with the formal system's emphasis on the

⁸⁵ See Rothenberg, 'The success of the battered woman syndrome', op.cit. Rothenberg considers the success of the BWS reflects its ability to 'resonate, or align itself with larger social and cultural patterns': 82. See Nancy J. Hirschmann, 'Domestic Violence and the Theoretical Discourse of Freedom', *Frontiers*, Vol. XVI, No. 1, 1996 pp. 126-149, for a particularly critical analysis of the complex reality of the battered woman's experience which precludes a simple explanation in terms of her reasons for enduring violence and her options to leave.

⁸⁶ The 'science' of the BWS has been questioned by various critics and, as seen in *Oakes*, the model ultimately did not stand up to technical scrutiny as a cohesive explanation for why battered women remain in or return to abusive relationships. See Marilyn McMahon, 'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome', *Psychiatry, Psychology and Law*, 5-6 Vol. 6 No. 1, 1999, pp. 23-49.

⁸⁷ Nan Seuffert, 'Lawyering and Domestic Violence: Feminist Pedagogies Meet Feminist Theories', *Women's Studies Journal*, 10, 2 (September, 1994): 87.

individual, or the strictures regulating the type of evidence admissible in court. Overall, the syndrome's application in cases like *Oakes* tends to confirm the wider critique of the formal justice system's conservative bias in favour of the status quo and the courts' predisposition to resist incorporating new and revisionary concepts, regardless of how compelling and important these revisions are.⁸⁸ Cases like *Oakes* expose the limits of this formal approach to deliver equal treatment and consistency between cases in contexts where the evidence fundamentally defies objective or 'scientific' classification. Many of the problems of legal adjudication illuminated by the case study, suggest that the formal predisposition to 'look for likeness' while focusing on the individual at the expense of the social and cultural, systematically misrepresents the experiences of battered women by forcing the complex facts involved into rules and categories intended for other, less complex purposes and contexts.

Critics have argued that the formal justice model as upheld by the courts fundamentally constrains our capacity to understand complex and 'different' experiences by forcing us to think in terms of essentialist categories with fixed and immutable boundaries that reinforce the status quo by 'transposing problems into [ones] that have legal solutions' rather than correctly identifying and addressing them.⁸⁹ This transposing is centrally facilitated and legitimized by the formalist's faith in the ideal of impartiality which, in practice becomes 'an impossible ideal' because judgments cannot be morally 'detached, dispassionate, and universal'.⁹⁰ As Young argues, the ideal of impartiality 'entails a 'logic of identity...[that] urges us to think things together, to reduce them to unity...to find the one principle, the law',⁹¹ which is inherently conservative and anything but impartial. Resisting diversification, the ideal systematically distorts our treatment of experiences perceived as 'different' from the norm, 'identifying equality with sameness and difference with deviance or devaluation'.⁹² The ideal at once 'demands that people are

⁸⁸ Rt. Hon Justice E.W. Thomas, 'Fairness and Certainty in Adjudication: Formalism v Substantialism', *Otago Law Review* (1999) Vol. 9 No. 3, 459: 480. Thomas argues that in general the courts apply the existing rules 'subject to defeasibility'.

⁸⁹ Smart, *Feminism and the power of law*, op.cit: 144.

⁹⁰ Young, *Justice and the politics of difference*, op.cit: 102.

⁹¹ *ibid*: 98.

⁹² *Ibid*: 11.

related to as individuals only...ignoring [social] facts of sex, race [and] ethnicity [as if] these facts...make no difference to how we treat one another'.⁹³

At the same time, critics challenge the core assumption of the formalist method – and of legal reasoning more generally – that expects people and human experiences to fit ‘naturally and inevitably’ into categories rather than being understood as unique and complex; ‘each one an intersection of countless categories’.⁹⁴ In particular, the reduction of complex experiences and people into legalistic categories of ‘like’ and ‘unlike’, ‘same’ and ‘different’, misses and obscures the relationships *between* people; ‘relationships marked by power and hierarchy’, and relationships that are far from natural or inevitable.⁹⁵ Effectively this process provides agents of the legal system, in particular, judges, with a ‘retreat to formalism’ by which the deeper moral dimensions of various complex issues raised in the trial process, and the ‘empathic’ perspective needed to understand or relate to these issues – and people – can be systematically avoided. Indeed, ‘legality gives judges a number of ways to block human pain and escape responsibility’.⁹⁶

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In many respects, the adjudication of the *Oakes* case and the wider response of the New Zealand courts to cases involving domestic violence, confirms this critical analysis. The courts have repeatedly shown an unwillingness to recognise the social complexities and power context of domestic violence, particularly its patriarchal basis and purpose, which makes it a *more* predictable, dangerous and devastating form of violence than most others dealt with by the criminal courts and law. Instead of recognizing the serious and systematic nature of domestic violence, the courts across common law jurisdictions have repeatedly underestimated the risks associated with this form of violence and judged

⁹³ Ibid: 132.

⁹⁴ Martha Minow, *Making all the difference: Inclusion, exclusion and American law*. Cornell University Press, London, 1990: 20-22. Minow introduces this phrase, the ‘dilemma of difference’.

⁹⁵ Ibid: 22-23.

⁹⁶ Lynne N. Henderson, ‘Legality and Empathy’, in Patricia Smith (ed.) *Feminist Jurisprudence*. Oxford University Press, New York, London, 1993: 248-249.

those involved in domestic violence cases – the perpetrators and victims – in terms of prevailing gender stereotypes such as women are vindictive, dishonest and provocative while men are ‘naturally’ and excusably jealous, possessive and violent when ‘provoked’ by women. Moreover, society’s increasing awareness of the extent and seriousness of domestic violence in terms of the number of women killed and injured annually, is generally not reflected in the formal legal system’s response to cases like *Oakes* where judges continue to question women’s claims of serious abuse and juries continue to deny that retaliating or defending yourself against domestic violence is ‘reasonable’. As seen in the New Zealand context, the impetus for much of the reform in the domestic violence field has come from beyond the formal justice sector, with little progress made by judges developing precedents in the higher courts, even when a clear *likeness* with progressive decisions made in other jurisdictions is identified.

On the other hand, the common law has demonstrated considerable ‘flexibility’ in its readiness to adapt the law of provocation to meet the increasingly tenuous claims of male defendants, in particular those who claim they were provoked to kill by their women partners leaving, or threatening to leave the relationship ‘often in a context of previous violence by him’.⁹⁷ The courts have demonstrated such ‘flexibility’ that they have gone from defending a man’s ‘honour’ in the face of a serious insult; namely upon discovering his wife committing an adulterous act at a time when society at large ‘supported an angry retaliation for slights against a man’s “honour”’,⁹⁸ to excusing men’s ‘extreme brutality’ and apparent premeditation in stalking their victim for days, weeks, and even months prior to the killing.⁹⁹ And this more recent application arose at a time (and in cultures) when and where social and legal norms had long since accepted women’s right to leave a relationship, especially one that is violent. In one New Zealand case tried in the late 1990s, the courts accepted that a woman who rang the police to report that she was being ‘severely beaten’ by her husband after allegedly promising him that she would not call

⁹⁷ Morgan, ‘Provocation’, op.cit: 237. Morgan notes that the provocation cases law students are required to study ‘invariably involve the killing by a man of his wife or de facto partner, who has left him, sometimes (apparently) for a new partner, sometimes (apparently) to “screw everyone in the street”, often (but less apparently) in a context of previous violence by him’.

⁹⁸ *Some Criminal Defences*, NZLC R 73, op.cit: 42.

⁹⁹ Forell and Mathews, *A Law of Her Own*, op.cit: 179.

police, had ‘provoked’ her own violent death at his hands.¹⁰⁰ In general, research in common law jurisdictions shows that where and when the law is ‘vague’ the ‘sexual possession’ of women by men is particularly likely to receive validation by the courts.¹⁰¹ In cases involving domestic violence, legal ‘vagueness’ and the absence of clear direction has seen many judges using their discretion to give batterers ‘explicit support for the idea that the law conceives of “domestic disputes” as trivial’.¹⁰²

Overall, the response of the common law courts to domestic violence and cases like *Oakes* in particular, demonstrates a less than strict adherence to the principle of formal justice as equal treatment. The compassion shown for violent men who beat and kill their female partners, the trivialization of domestic violence, the assumption that women provoke abuse, the increasingly narrow interpretation of BWS excluding women who show ‘initiative’ or actions perceived as ‘aggressive’, and the reluctance to uphold laws that protect women against domestic violence, all indicate court processes and outcomes that are more discretionary and subjective than formalised and principled. At the very least the case study leads to the conclusion that the common law does not provide for a sufficiently principled system of adjudication in contexts of domestic violence. On the contrary, many of the decisions made in these cases reflect a conservative bias in favour of the dominant values and norms. This bias has at times been reinforced by judges applying the formalist method too strictly and failing to recognize the legal significance of changing values. But at other times, judges and juries have more actively adapted the law to facilitate culturally outdated and fundamentally unjust social norms in judgments that demonstrate the limitations of a more discretionary model of legal justice reliant upon judicial wisdom or equity as well as juror ‘common sense’.

The development of the law of provocation is a case in point. Introduced as a partial defence of male ‘honour’, provocation was always inconsistent with the generalization principle central to the commitment to formal justice because the law was never intended

¹⁰⁰ *Some Criminal Defences*, NZLC R 73, op.cit: 37, citing *R v Tepu* (December, 1998).

¹⁰¹ McDonald, ‘Provocation, Sexuality’, op.cit: 128.

¹⁰² Jane Maslow Cohen, ‘Regimes of private tyranny: what do they mean for morality and for the criminal law?’, *University of Pittsburgh Law Review*, Vol. 57, 1996, pp 757-808: 779.

to apply 'equally', if at all, to women. As this value has become outdated, instead of adapting the law to fit modern values of gender equality and freedom, the courts have actively reinterpreted the concept of male 'honour'¹⁰³ to fit the needs of those men who refused to let go of traditional patriarchal privileges, even to the point of demonstrating a heightened sympathy for male insecurity and violent possessiveness. In this way, the courts effectively manipulated the law 'to reinforce the conditions in which men are perceived and perceive themselves as natural aggressors and in particular women's natural aggressors'.¹⁰⁴ Certainly it is difficult to imagine a judgment less conducive to facilitating a commitment to equal treatment and formal justice for the victims of domestic violence. Indeed, this manipulation has rendered the law even less accessible to female defendants like Oakes, and in the process, has compounded – when it might have relieved – the obstacles to the law's equal treatment of women and men.

It could also be argued that the courts' response to domestic violence has been limited by the commitment to the formal principle of 'equal treatment'. This is most evident in the reluctance to extend the law of self-defence to accommodate the very different circumstances in which women victims of domestic violence perceive the need for deadly or potentially deadly force against a violent male partner. That expert evidence was needed to support battered women's pleas of self-defence, and the ultimate failure of this evidence to succeed in this task,¹⁰⁵ reflects the limits of the formalist method and principle of justice to adapt the law to accommodate new understandings of human behaviour as well as evolved values. However, the fact that some common law courts have demonstrated a readiness to adapt the law to accommodate defendants like Oakes, and

¹⁰³ Originally, killing in defence of male 'honour' was understood as a 'controlled' act of retaliation and the duty of an honorable man to prove his 'spirit' and lack of cowardice, rather than a loss of control, though killing was considered an over-reaction, so was only partially excused. Before the 18th and 19th centuries a man 'invariably' defended his honour against an adulterous wife by killing the adulterous male. Morgan, 'Provocation', op.cit: 262-263.

¹⁰⁴ Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992): 192, cited in *Battered Defendants*, NZLC PP41, op.cit: 30.

¹⁰⁵ Only a small percentage of women accused of killing their violent partners are acquitted at trial. In the US 72-80% are convicted or accept a plea, most receiving longer sentences (16-17 years) than the average convicted killer (Schneider, 'Resistance to Equality', op.cit: 520). Only one battered woman defendant in New Zealand has been acquitted of killing her abusive partner. Luciana Hereora Manuel was acquitted of killing her partner William Reti (*R v Manuel* High Court Rotorua, T7/97, 19 September 1997, Robertson J). See Robertson J, 'Battered woman syndrome', op.cit, for a critical review of the trial and decision in this case in which he served as the presiding judge.

more generally have been seen to ‘frequently [deliver] decisions that challenge prevailing stereotypes and disrupt the way we live’,¹⁰⁶ suggests that the formalist principle as potentially upheld by the common law courts, need not be a conservative force in society. The analysis presented here in light of the case study suggests that in the adjudication of cases like *Oakes*, the application of the formal principle of justice as equal treatment has yet to be effectively developed or tested in the common law courts. As such, conclusions about the limits and scope of the formal commitment to justice through application of this principle cannot yet be drawn.

In the remaining section of the chapter I turn to consider various compelling proposals for developing this principle in ways that illuminate its potential as an effective guide for achieving legal justice for battered women defendants.

Different proposals for treating battered women defendants equally

I want to make sure that lawyers who represent battered women and judges who decide their cases...[are] sufficiently self-reflective to challenge our own resistance to the complex and nuanced insights of equality.

Elisabeth Schneider, 1996¹⁰⁷

In contexts of entrenched injustice and inequalities of power between social groups, the principle of formal justice – of like treatment for like cases and different treatment for different cases – oversimplifies by abstracting from the complex, practical challenge of distinguishing relevant likenesses and differences for the purposes of legal adjudication.

¹⁰⁶ Jody Armour, ‘Just Deserts: Narrative, Perspective, Choice, and Blame’, *University of Pittsburgh Law Review*, Vol. 57, 525: 543. See also Minow, ‘Making all the difference’, op.cit: 368. Minow’s analysis of American law also identifies various cases in which ‘judicial action’ has facilitated a critical approach to issues of gender difference and inequality providing ‘one among many tools for making government more responsive’.

¹⁰⁷ ‘Resistance to Equality’, op.cit: 523-524.

Indeed, in contexts of entrenched inequality, the challenge of applying the law equally to ensure legal justice, involves confronting the reality that ‘those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one’s entitlement to be equally treated is measured’.¹⁰⁸

As the case study has shown, the commitment to justice institutionalized in and through the common law courts has proven particularly inadequate to meet the challenge of distinguishing what equal treatment for battered women defendants practically entails. This is firstly because the rules, principles and practices of legal justice have presupposed the male norm and ‘taken on sex-specificity when applied to women’, judging women as ‘other’, whether actual gender difference is recognised or ignored.¹⁰⁹ The implicit male norm applied to the adjudication of cases like *Oakes* reinforces a gender double standard according to which the law treats men and women differently and unequally, with male defendants in domestic homicides favoured in relation to and at the expense of female defendants in domestic homicides. Given Hart’s assurance that killing provides ‘one of the clearest cases for a general rule’, the consistent application of this double standard in the adjudication of domestic homicides suggests a particularly significant injustice and cause for critical reflection and reform.

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One of the most comprehensive proposals for reform to address the various complex issues raised in the legal adjudication of domestic homicides is developed by Forell and Mathews in their 2000 text: *A Law of Her Own*.¹¹⁰ In this work, the authors propose the introduction of a ‘reasonable woman standard’ to adjudicate all cases of domestic homicide and any case in general ‘where men’s and women’s life experiences and views on sex and aggression diverge and women are overwhelmingly the injured parties’.¹¹¹ The proposal aims to confront directly and explicitly the inherent maleness of the ‘reasonable

¹⁰⁸ MacKinnon, ‘Difference and Dominance’, op.cit: 306-307.

¹⁰⁹ MacKinnon, ‘Towards Feminist Jurisprudence’, op.cit: 720.

¹¹⁰ Caroline Forell and Donna Mathews, op.cit.

¹¹¹ *ibid*: xiii-xvii. Other suggested applications include cases of rape and sexual harassment in the workplace.

person' standard, by effectively constructing a standard that makes 'woman the measure of man'¹¹² – a gendered but not sexist; different but not double standard. Rather than replacing one gender bias with another, the authors argue that the 'reasonable woman' standard, applied in those contexts where the application of the implicit male standard has had particularly harmful and unjust effects, would facilitate a more 'meaningful equality'. By replacing the unreasonable 'warrior code' of the present standard with a more genuinely reasonable, 'respectable and antiviolence standard of conduct', the 'reasonable woman' standard would update and improve justice by centralizing the universal modern values of 'respect for bodily integrity, agency and autonomy'.¹¹³

The gender double standard is avoided because the 'reasonable woman' is simply the 'ordinary' person who does not use violence and intimidation to control others and lash out with lethal force when they fail to achieve this end. Thus, Forell and Mathews argue that the vast majority of people 'already behave according to the reasonable woman standard',¹¹⁴ and consider it ironic that the 'reasonable man' standard in law has been developed on the basis of the actions of the least reasonable men. Indeed, the proponents of this reform expect that if the reasonable woman standard comes to prevail and such a 'rebalancing' occurs, then, over time, society and the law will evolve sufficiently 'so that a reasonable *person* comes to mean not just a man in disguise' but a person of either gender, such that the reasonable *woman* standard will be superfluous.¹¹⁵ In the meantime, however, the reasonable woman standard would ensure that battered women's experiences were not constructed in a legal context to seem inherently different or deviant in relation to an unreflexive male norm. Granting that in contexts of entrenched inequality and injustice there is no universally 'reasonable' or 'neutral' standard available for courts to rely on that when applied will not have some impact on existing social norms and behaviour, the reasonable woman standard concedes the law's social role in shaping values and behaviour and, as such, aims to help facilitate progressive social reform. By contrast, the 'reasonable man' effectively works to maintain and reinforce the

¹¹² Ibid: xiii.

¹¹³ Ibid: xvii-xix.

¹¹⁴ Ibid: xviii.

¹¹⁵ Ibid: xxi.

established order of violent male domination. More specifically, the reasonable woman standard would serve as ‘a basis for condemning and reducing gendered violence and abuse of power, rather than for excusing it’.¹¹⁶ Recognising the seriousness of gendered violence; its comprehensive denial of bodily integrity and, in the case of domestic violence, its devastating social effects and extensive cultural reinforcement, the reasonable woman standard would seize the opportunity available through the law and the courts to actively counter these profoundly destructive and discriminating values, instead of squandering the opportunity as the ‘reasonable man’ has effectively done.

In the adjudication of domestic homicides, the reasonable woman standard would recognise and emphasise the likeness between cases in which men and women kill their domestic partners, with both seen as ‘representing extreme outcomes of male violence against women’.¹¹⁷ In judging these cases for the purposes of treating the defendants equally, the focus of the tests of ‘reasonableness’ would shift from the woman’s ‘choices’ to remain in a relationship and her responsibility for ‘provoking’ the violence, to the deliberate power and control tactics of the abuser and their devastating effects on the reasonable, non-violent, autonomous woman.¹¹⁸ In circumstances where women kill their abusers, the reasonable woman standard would define reasonable fear so as to recognise that ‘women [reasonably] experience fear in situations where men do not...[and] in our culture, men and women are not similarly situated when it comes to being able to defend themselves from others’.¹¹⁹ So the legal standard would ask ‘what would cause a reasonable woman to be afraid for her safety?’, and given similar circumstances, such as a history of abuse and aborted attempts to escape it: ‘[Would] a reasonable woman...have responded with deadly force?’¹²⁰

In both types of killings the reasonable woman would hold batterers responsible for their own anger rather than deflecting blame onto the victim by presuming her behaviour to be

¹¹⁶ Ibid: 12.

¹¹⁷ Ibid: 157-158.

¹¹⁸ Ibid: 167.

¹¹⁹ Ibid: 133.

¹²⁰ Ibid: 160.

‘unreasonable’.¹²¹ In other words, ‘If a reasonable woman would not have killed in those circumstances, it should not be a mitigating circumstance for a man to do so’.¹²² Rather than an implicit change, the authors propose an explicit and formal change to the language and to ‘the reality reflected and created by that language’, as an essential part of the process of equalizing the legal treatment of women and men. Without this formal equalizing ‘violent men will continue to manipulate the system...and crimes against women will go on being minimized and downgraded’ by that system.¹²³

In contrast with the reform proposed by Forell and Mathews, Elisabeth Schneider proposes what she describes as ‘the radical idea that battered women’s experiences...be articulated, heard and listened to’ at trial on an equal footing with all other defendants.¹²⁴ Schneider considers equality of treatment cannot be achieved by the development of either ‘a “special” defense or “special” rules for battered women’.¹²⁵ Indeed, she regrets that ‘the original arguments’ for equal treatment in these cases have been so ‘fundamentally misunderstood’ as claims for ‘special treatment’, suggesting an automatic defense applying in all cases involving battered women defendants. She says there was never any claim made ‘that all battered women were entitled to self-defence’.¹²⁶ Rather, the point was and is to address the gender-bias in the criminal law and legal processes that systematically undermine battered women’s ‘equal rights to trial’ – the equal right to self-defence; not ‘a special right’.¹²⁷

Schneider’s proposal intends to address the ‘deep societal resistance’¹²⁸ against accepting the gender equality issues arising in these cases and the trivialization of domestic violence because a form of violence that is done to women within the ‘private’ sphere of the family. She says, if the same violence was committed in a public setting we would call it ‘torture’ or ‘terrorism’; ‘involuntary servitude’ or hostage taking; and we would

¹²¹ Ibid: 179.

¹²² Ibid: 180.

¹²³ Ibid: 195-196.

¹²⁴ ‘Resistance to Equality’, op.cit: 521.

¹²⁵ Ibid: 512.

¹²⁶ Ibid: 486-487.

¹²⁷ Ibid: 482. Schneider says that the goal has always been ‘to ensure that the full range of defences were available and explored for battered women defendants, just as for all other criminal defendants’: 496.

¹²⁸ Ibid: 480.

respond accordingly.¹²⁹ Thus, if individual battered women are to be treated equally at trial then the first and most important change that needs to be made is for due legal weight to be given to the seriousness of their experiences of abuse. Schneider argues that the existing general defences are adequate and preferable to achieving this purpose, providing they are applied in an 'equality framework' which allows 'the particular facts and circumstances of each case [to] be evaluated in light of the general problem of gender-bias'.¹³⁰ This in turn requires all judicial agents to be educated in 'a feminism of process and particulars';¹³¹ to understand the essential relevance of the social context of battering and gender subordination to the determination of guilt, and to recognize the 'extreme complexity' of determining the reasonableness of the defendant's actions as a result.¹³² For Schneider, equal treatment in these cases is particularly dependant upon lawyers being 'self-critical about their own assumptions' and seeking out every available resource to 'educate judges and juries...on the common misunderstandings about battering and about battered women, about gender and other inequalities in the criminal law as applied to these women...that may impede fair trials'.¹³³

This critical process and perspective would at once seek to avoid the homogenization of battered women's experiences and facilitate an understanding of the complexity of their choices beyond 'the false dichotomy' which constructs the defendant as either, battered and completely helpless victims, or agents with a range of choices like any other and, in particular, with the freedom to choose to leave if she wants to. A feminist analysis recognises battered women's 'simultaneous' victimisation and agency so that those who show 'initiative' in trying to escape or fight back are not effectively disqualified (as Oakes was) from the status of 'deserving' victim and 'real' battered women.¹³⁴ Schneider strongly opposes any reference to a 'battered woman syndrome', which she says has served to 'heighten the general confusion' surrounding the trials of battered women, and shift the focus of the trial and the public's perception of blame for domestic violence

¹²⁹ Ibid: 488.

¹³⁰ Ibid: 487.

¹³¹ Ibid. The phrase is borrowed from Stephen Schulhofer, *The Feminist Challenge in Criminal Law*, 1995.

¹³² Ibid: 501.

¹³³ Ibid: 502-503.

¹³⁴ Ibid: 499.

‘away from the perpetrator’, all the while ‘sounding like a form of “mental disease or defect”’.¹³⁵ With the overall goal being to improve the rationality of the adjudication process in these cases, the emphasis must be on clarifying the obstacles to equality and clearing away the ongoing misconception that battered women are asking for special treatment.

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These two proposals have been suggested as alternatives to substantive law reform. Other critics argue that substantive reform of the criminal law is needed to address the fact that the available defences have been developed over a long period of time based on male experiences and criminal behaviour. As seen in the New Zealand context, there has been a range of proposals for law reform made to address the legal difficulties faced by ‘battered defendants’, from the removal of the mandatory life sentence for murder to the introduction of a ‘a new complete defence’ for battered defendants.¹³⁶ The New Zealand Law Commission considered a dozen or more proposals for substantive reform and, as seen in the case study, rejected all except the sentencing discretion and the proposal to abolish provocation, which it recommended.¹³⁷

One of the most substantive reforms proposed and rejected was the defence of ‘tyrannicide’ or ‘tyranny-murder’ proposed by American legal scholar, Jane Maslow Cohen.¹³⁸ Tyrannicide would provide a complete defence for those defendants who can show objectively that that they are attempting to free themselves from a private tyrant and that killing the tyrant is ‘reasonably necessary’ according to the traditional standards of ‘necessity’ and ‘reasonableness’.¹³⁹ Cohen intends the defence to apply in principle to

¹³⁵ Ibid: 505-512.

¹³⁶ See *Battered Defendants*, NZLC PP41, op.cit: 22. See also *Some Criminal Defences*, NZLC R73, op.cit.

¹³⁷ The Commission also recommended several more subtle reforms such as re-wording the law of self-defence to ‘make explicit’ that ‘the use of force is reasonable where the danger is not imminent but inevitable’ (ibid: 12) and the insertion of a new subsection in section 48 of the Crimes Act 1961 to the effect that in a jury trial whenever there is ‘the reasonable possibility’ of self-defence that the question ‘of whether the force used was reasonable’ be left to the jury (ibid: 15).

¹³⁸ ‘Regimes of Private Tyranny’, op.cit. The proposal is discussed briefly by the NZ Law Commission, *Battered Defendants*, op.cit: 24-25, and *Some Criminal Defences*, op.cit: 28-29.

¹³⁹ Cohen, *Regimes of Private Tyranny*, op.cit: 802.

men and children who might also be subjected to the kind of ‘heavily ritualized...regimes of domination’ that characterize private tyrannies. However, she says that ‘the vast majority’ of victims of private tyrannies are women.¹⁴⁰ Critically, the availability of the defence is to be ‘contingent on the availability and efficacy of the community’s own efforts to end such tyrannies through police and judicial practice’.¹⁴¹

A number of important reform proposals have been formulated around the concept of ‘self-preservation’ intended to act as an alternative to or extension of the traditional law of self-defence.¹⁴² A variety of partial and complete defences of self-preservation have been proposed in New Zealand, Australia, the UK and other common law jurisdictions. Some of these have been gender-specific, such as the New Zealand proposal by Suzanne Beri for a partial defence to reduce murder to manslaughter when a battered woman believes that killing is necessary for her self-preservation.¹⁴³ A critical feature of Beri’s proposal is the establishment of ‘a necessary distinction between killing in response to a threat to esteem, power, control and possession...and killing arising from, and out of, a history of prolonged abuse and fear of future abuse’; only the latter being excused based on the defence of self-preservation.¹⁴⁴ As well, the defence would replace any reference to BWS, which Beri considers ‘excludes the experience of Maori women...whose experience of abuse is also shaped by racism’. Instead Beri would incorporate in her proposed defence, a broadened definition of abuse to include ‘racial abuse’.¹⁴⁵

A new complete defence proposed to be run ‘alongside traditional self-defence’, has been proposed by the West Australian Taskforce on Gender Violence.¹⁴⁶ This is a ‘gender-neutral’ defence to be applied in cases where an adult person (female or male) kills ‘in response to a history of personal violence’ against her/himself or another person in the

¹⁴⁰ Ibid: 762-763. Cohen says that the relationships that characterize private tyrannies ‘are not identical to battering relationships...[a]lthough battering may well play a role.

¹⁴¹ Ibid: 802. Cohen’s proposal will be considered at greater length in subsequent chapters.

¹⁴² See *Battered Defendants*, op.cit: 22-24.

¹⁴³ ‘Justice for Women Who Kill: A New Way?’ (1997) 8 *Australian Feminist Law Journal*, 113.

¹⁴⁴ Ibid: 124. See also McDonald, ‘Defending Abused Women’, op.cit.

¹⁴⁵ Beri, ‘Justice for Women’, op.cit: 116; *Battered Defendants*, op.cit: 23.

¹⁴⁶ *Report of the Chief Justice’s Taskforce on Gender Bias* (Perth, 1994), cited in *Battered Defendants*, op.cit: 24.

belief that such conduct is ‘necessary’ to ward-off the violence. The defence sought to give legal recognition to the ‘qualitative difference’ between killing in response to repeated violence, which is ‘highly predictive of future violence’, and killing in response to one-off violent threats. It is also intended to give legal recognition to the fact that in circumstances of ongoing violence, there will likely be fewer ‘reasonable and realistic alternatives’ to the use of force than where there is a single incident of violence.¹⁴⁷

In all of these reform proposals legal justice for ‘battered defendants’ who kill their abusers depends on situating the actions of these defendants in a wider social-political context of the defendant’s experiences and, critically, on reflecting on the gender and moral dimensions of this context beyond the criminal courts’ traditionally much narrower focus. A focus on the wider context of abuse in which these defendants act at once reduces the courts’ emphasis on ‘what kind of person the accused is’,¹⁴⁸ to emphasise, instead, the endemic problem of violence against women and, given this, ‘the absence of other realistic means of self-preservation’.¹⁴⁹ None of these proposals for substantive law reform have been introduced in any of the common law jurisdictions. As seen in the New Zealand context, the sentencing discretion to allow a lesser sentence than life for murder where there are mitigating circumstances such as battering, was preferred over any ‘special defence’ for battered defendants, much less for battered *women* defendants. Indeed, this was a discretion already available to the Parole Board to grant ‘in special cases’,¹⁵⁰ prior to the lengthy process of law review that raised some of these reform proposals for consideration. Where ‘special’ legislation for battered women defendants was introduced in some US jurisdictions, according to Schneider it amounted to more of a “‘quick fix’” effort to appear to do something about domestic violence’ rather than a

¹⁴⁷ Ibid. *Report* : 214.

¹⁴⁸ Julie Stubbs and Julia Tolmie, ‘Defending Battered Women on Charges of Homicide: The structural and Systemic Versus the Personal and Particular’ in W. Chan, DE Chunn and R. Menzies *Women, Madness and the Law: a feminist reader*, 2005: 201.

¹⁴⁹ Ibid: 203. In *Oakes* the narrow focus meant the trial concentrated on the quantity of pills, the conflict between Oakes and Gardner on the day of the killing, Oakes’ fears and thoughts about Gardner immediately prior to, during and after the killing, the time and precise cause of death, and the disposal of the body. Past incidents of horrendous abuse, and the inevitable fear these instilled in Oakes, along with other aspects of the generally more contextualised evidence brought in support of the defence compared with the Crown case, were effectively dismissed by the court, particularly by the judge at summing up.

¹⁵⁰ Under ss 97(5) and 97(9) of the Criminal Justice Act 1985, cited in *Some Criminal Defences*, NZLC R73, op.cit: 57.

genuine and carefully considered attempt to correct the inadequacy of the legal response.¹⁵¹

In general, reforms in the criminal law's response to judging battered defendants have taken an inclusive 'gender-neutral' form to give legal recognition to the wide 'variability in blameworthiness among murderers'¹⁵² and to avoid singling out any specific type of killing for 'special' attention by the law. In New Zealand, following an English direction on the subject, this variability is understood to range from 'the most brutal [and] cynical' offences to 'the almost venial, if objectively immoral "mercy killing" of a beloved partner'.¹⁵³ The implication being that the intentional killing of an abusive partner is to fall somewhere between these two extremes in terms of moral culpability. Moreover, the expectation built into a sentencing discretion to accommodate this variability is that judges and the public alike are intuitively capable of consistently distinguishing these various degrees of blameworthiness between cases.¹⁵⁴ In New Zealand, considerable faith is placed in this capability to the extent that the sentencing discretion is supported in place of introducing or retaining any of the partial defences, including provocation,¹⁵⁵ albeit the recently established Sentencing Council aims to provide guidelines to facilitate consistency in sentencing.¹⁵⁶

While it has been suggested that were provocation or any other partial defence not available to battered women who kill their abusers defence counsel could be

¹⁵¹ 'Resistance to Equality', op.cit: 513.

¹⁵² *Some Criminal Defences*, NZLC R73, op.cit: 51.

¹⁵³ Ibid, quoting Lord Hailsham of St Marylebone in *R v Howe* [1987] AC 417, 433 (HL).

¹⁵⁴ Ibid: 52. The Commission cites various studies of public opinion conducted in other common law jurisdictions suggesting that the public 'adopt a very discriminating approach when assessing different homicide scenarios'. Although there has been no research of this kind done in NZ, the case of *Albury-Thomson* ((1998) 16 CRNZ 79 (CA)) in which the defendant who deliberately killed her autistic 17 year old daughter was not convicted of murder, is cited as an example of this intuitive capacity to distinguish 'killers driven by unbearable pressures' from more calculated killers and killings.

¹⁵⁵ 'The Commission does not support the retention or creation of partial defences once a sentencing discretion is available for murder' (which it has been since 2002). Ibid: 56. The Commission has recently made a further recommendation in favour of abolishing provocation (*The Partial Defence of Provocation* NZLC R98, 26 October 2007 <http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=138> Accessed 17/12/07). The Government is expected to support this second recommendation. See Derek Cheng, 'Murderers' provocation defence set to be scrapped', *NZ Herald*, October 26, 2007.

¹⁵⁶ Sentencing Council Act 2007.

‘forced...into pushing the bounds of the doctrine of self-defence’ to fit these cases,¹⁵⁷ there have also been serious concerns raised about the removal of the partial defences disadvantaging battered women defendants. As briefly discussed in Chapter Two, the concern has been expressed in New Zealand that by removing the ‘firm basis’ that a partial defence provides for a judge to hand down a lesser sentence for manslaughter, we remove questions of justice from ‘the more rule-based...publicly visible and scrutinized’ trial stage of the adjudication process.¹⁵⁸ Furthermore, some consider it unfair to burden less culpable killers with ‘the stigma of a murder conviction’ and in general prefer that the criteria of ‘moral accountability’ distinguishing mitigating factors be set out in the law, or be decided by the jury ‘through consideration of the partial defences at trial’, rather than be left to the discretion of the judge.¹⁵⁹

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If we consider these developments and ongoing concerns in light of the wider case study, and in terms of the general skepticism about the courts upholding a principled commitment to ‘equal treatment’ and formal justice, several critical points can be made. The first is that the serious and widely substantiated claims about battered women defendants being systematically denied access to justice throughout common law jurisdictions are not answered by a sentencing discretion for murder that creates a ‘flexibility’ in the system affording judges the option to impose a sentence less than life imprisonment for defendants like Gay Oakes. The second is that this type of response as adopted in New Zealand, does not uphold the principle of equal treatment and formal justice because it relies so centrally on discretionary judgment in place of judgment guided by clear rules, standards and laws. This discretionary approach represents a serious compromise on the commitment to consistency, impartiality and equality of legal judgments in cases involving domestic violence (if not altogether), and in view of the

¹⁵⁷ Morgan, ‘Provocation’, op.cit: 274.

¹⁵⁸ Tolmie, ‘Is the partial defence an endangered defence?’ op.cit: 31-33. Tolmie also argues that NZ’s sentencing reform places an additional burden of proof on the defendant to ‘displace’ the presumption of a life sentence for murder.

¹⁵⁹ These were some of the reasons submitted to the Law Commission in favour of retaining the partial defences. *Some Criminal Defences*, NCLC R73: 55.

case study, adds to existing concerns about injustice in domestic homicides given the tendency for judicial leniency to be shown to men who beat and kill their female partners and the converse tendency for judges to disbelieve women's fears and claims of serious abuse. If both types of killing are placed on the continuum of mitigating and aggravating circumstances affecting calculations of moral culpability for murder, and the traditional cultural context remains substantially unchallenged, then based on the judgments in previous cases where judicial discretion has been a key factor in the sentencing of these defendants, there may be little difference in the sentences handed down to battered defendants and battering defendants convicted of murder. If the continuum recognises 'mercy killings' at one end and killings involving particular brutality and cruelty at the other, given the ongoing trivialization of domestic violence,¹⁶⁰ neither type of domestic killing is likely to be considered close to these extremes.

The third point to be made is that this compromised response implicates the political system as much if not more so than the formal legal system, because as seen in the New Zealand context, the legal agents of justice are substantially constrained by the political agents who in turn are constrained by the parliamentary process that presents serious obstacles in the way of substantive law reform, not least of all reform that might be construed as 'feminist' or 'anti men'. The political system is in turn influenced by the cultural system, which, as demonstrated in the case study, is substantially structured to uphold the values of the dominant cultural group – a group historically predisposed to de-value the interests of the reasonable woman, particularly when these interests are in conflict with the interests of the 'reasonable' (aggressive, patriarchal) man, which they definitely are in contexts of domestic violence. In this context, discretionary judgment is unlikely to be critical or reflective enough to deliver equal treatment for battered women defendants, a problem compounded by the fact that the judiciary continues to be comprised of members drawn primarily from the dominant cultural group who in general show 'a lack of awareness of the effects of gender'.¹⁶¹

¹⁶⁰ In New Zealand, this trivialization is reflected in the increasing unwillingness of Family Court judges to grant non-notice protection orders to women victims of domestic violence.

¹⁶¹ *Women's Access to Legal Services*, NZLC SP1, op.cit: 161. The Commission noted the absence of any women judges in the NZ Court of Appeal and the general lack of diversity among New Zealand lawyers

Reflecting on these issues in relation to the wider question and challenge of delivering a principled and ‘systemic’ commitment to justice in the particular context of the legal adjudication of cases like *Oakes*, it is easy to conclude with the sceptics that ‘systemic justice’ is a flawed and unrealistic concept in practice. More particularly, it is easy to conclude that the principle of equal treatment in legal adjudication is an impossible ideal because there is no impartial perspective from which to compare cases for the purposes of judging likenesses and differences. Furthermore, in practice, the accumulating particularity and ‘infinite diversity’ of the relevant facts means that courts are increasingly faced with a ‘comparison between like and unlike’.¹⁶² The much delayed legal classification of ‘domestic violence’, which led to the acceptance of ‘battering’ (or BWS) as a relevant ‘fact’ in the legal adjudication of cases like *Oakes*, has definitely presented the common law courts with one of the most complicated tests for the equal treatment principle. As seen in the case study, adjudicators across common law jurisdictions have struggled to identify the relevant likenesses between different cases involving ‘battered women defendants’ charged with murdering their abusive partner, even when most of the material facts were very similar, as in *Oakes* and *King*. The challenge to accurately and consistently compare these types of cases with other killings and violent crimes more generally is obviously much greater still.

The social and political ramifications of solidifying a separate defence or expert evidence specifically for ‘battered women’ are also well documented and suggest that in the present cultural context, if not in principle, ‘a gender-limited claim of justification should represent an unwelcome pursuit’ in the legal adjudication of cases like *Oakes*.¹⁶³ However, an effective ‘gender-neutral’ defence, given the gendered nature of domestic

and judges such that ‘access to justice is really access to a male paradigm’ in New Zealand (173-175). See also Gill Gatfield, *Without Prejudice: Women in the Law*. Brooker’s, Wellington 1996. Gatfield notes the ‘limited opportunities’ available to women lawyers to ‘satisfy the career criteria for judicial appointment’. In 1996 there were only two women QC’s representing less than 4 percent of all current QC’s and those who held the position, such as Judith Ablett Kerr, who was the third woman appointed to the position in the country, had on average more than three times as many years’ experience as a barrister sole before being appointed to the position than the men who were appointed (280-282).

¹⁶² Rt Hon Justice E. W. Thomas, ‘Fairness and Certainty in Adjudication: Formalism v Substantialism’, *Otago Law Review* (1999) Vol. 9 No. 3: 466.

¹⁶³ Maslow Cohen, ‘Regimes of private tyranny’, op.cit: 800.

violence and the physical differences between women and men, remains a complicated challenge in principle and practice that would, at the very least, involve a ‘feminist’ re-education of the various agents responsible for the legal adjudication of these cases, such as proposed by Schneider.¹⁶⁴ The historical analysis provided in the case study tends to suggest ongoing serious obstacles to this re-education and even point to an increasing cultural resistance to recognising the reality of gender-bias in the law, particularly in the context of domestic violence.

In conclusion I would argue that the commitment to the principle of formal justice in the adjudication of cases like *Oakes* remains an ongoing and relevant challenge for common law countries like New Zealand. Recognising the practical limits and complexities of applying the principle of equal treatment in these types of cases means accepting that in contexts of entrenched gender inequality ‘the generalization principle fails because we cannot act as everyone should act in a similar situation’.¹⁶⁵ This also means that a strict formalism and impartial application of general rules of law is neither possible nor desirable in the adjudication of cases like *Oakes*, which require instead an empathetic and reflective engagement with the culturally situated subject. However, if we accept that ‘impartiality does not imply that one cannot pursue interests’ in applying a general rule,¹⁶⁶ then based on this acceptance we can posit a modified and contextualised general rule and commitment to formal justice that expresses a particular interest in preventing violent gender domination. Instead of the traditional standard of ‘reasonableness’ applied in the formal adjudication of cases like *Oakes* that has seen judges frequently deliver ‘strong statements about the need to deter violent self-help and [emphasise] the precious nature of human life’,¹⁶⁷ a standard more cognizant of and interested in addressing the life-destroying gender injustice that is domestic violence would make strong statements of a

¹⁶⁴ See also Seuffert, ‘Lawyering and domestic violence’, op.cit.

¹⁶⁵ Heller, *Beyond Justice*, op.cit: 10.

¹⁶⁶ Ibid: 12.

¹⁶⁷ Bradfield, ‘Is Near Enough Good Enough?’ op.cit: 80. Justice Robertson considers New Zealand courts and legal system have been ‘strongly weighted...in favour of the sanctity of human life’ and cites as a clear example of this, the trial judge’s statement in the case of *R v Wang*, rejecting the battered woman’s plea of self-defence by saying that to allow self-defence would be ‘close to [permitting] a return to the law of the jungle’ (‘Battered Woman Syndrome’, op.cit: 279, 287). The Court of Appeal’s statement in *Oakes* that ‘It hardly needs to be said that a battered woman has no more right to kill or injure than any other person, man or woman’ could also be interpreted in this light.

different kind. These statements might be closer to the remarks made by Justice Bruce Robertson presiding in a 1991 domestic violence case in which he described the abuser's violence as 'unacceptable, inexcusable and cowardly' and then elaborated by highlighting society's (and judges') general complacency and prejudice in response to domestic violence. He said:

Too often we use the phrase "domestic violence" to describe assaults which occur within families as if they are somehow less serious than other assaults. In my judgment they are probably more serious because the home is one place where people ought to be secure. I reject any suggestion that because there had once been a relationship between this man and this woman, the matter should be viewed in a different way.¹⁶⁸

This kind of statement and emphasis 'too rarely seen' in other domestic violence cases,¹⁶⁹ should be more formally encouraged if not insisted upon in all cases involving domestic violence including domestic homicides, rather than being left to the discretion of the presiding judge. These cases should be compared and judged according to the same standard of formal justice, which should reflect this kind of strong statement about the wider social harm domestic violence causes, and make an explicit attempt to counter our enduring tendency to minimize its seriousness and deflect blame onto its victims. Moreover, judgments in domestic violence cases should reflect a general commitment to anti-violence in a way similar to Forell and Mathews' proposed reform of the reasonable person standard; a reform that would at once recognise that women are overwhelmingly the injured parties in all such cases.

Male and female perpetrated domestic homicides should be compared so their differences can be highlighted and judged accordingly. Because in contexts of violence, especially domestic violence, women and men are differently situated, rather than an inclusive 'reasonable person' or 'reasonable woman' standard, there could be two standards – one

¹⁶⁸ *Harris v The Police*, Unreported, High Court, New Plymouth Registry, AP 15/91, 2 July 1991: 3-4.

Cited in Busch, 'Don't Throw Bouquets at Me...', op.cit: 127-128.

¹⁶⁹ Ibid: 128.

female, one male – that are equally ‘different’ so that neither draws the stigma of ‘special treatment’ nor reaps the advantage of representing the unspoken norm. The female standard would recognise women’s ‘reasonable fear’ in contexts of verbal threats backed up by a history of physical and psychological abuse and intimidation. It would also be contextualized in a way that acknowledges the high incidence of separation assault and homicide of women by their male partners and ex-partners, and the ongoing failure of society to effectively enforce protection orders against such risks. This wider social context distinguishes women’s ‘retaliatory’ actions as a consequence of their reasonable fear from all other forms of criminally culpable retaliation. The female standard of ‘reasonableness’ should be developed according to changing social conditions, not least of all those affecting the level of risk associated with leaving an abusive relationship.

The male standard should be similarly situated and adapted to changing social conditions and values. In particular, the male standard should no longer make excuses for ‘the fragility of the male ego’ in the face of insults to a man’s ‘masculinity’ as society now formally recognises that this idea of masculinity is fundamentally destructive and unjustified – ‘inexcusable and cowardly’. Moreover, when no such allowances are made for the fragility of the female ego, this allowance represents a double standard contrary to the fundamental principle of formal justice. As Forell and Mathews point out, the elevation of the legal standard of reasonable conduct is justified because the ordinary man does not use violence to intimidate, control and terrorise *his* woman. Most men do not react with jealous, possessive rage when they lose control, and those men who do – albeit still a significant percentage – should no longer be facilitated by the law. Together, these revised standards applied to cases of male perpetrated ‘domestic violence homicide’ of women should rank such killings one of the worst forms of homicide while giving ‘battered women defendants’ like Oakes, improved access to the established law of self-defence.

*

The chapter has reflected on the complex application of the principle of equal treatment and formal justice in contexts of domestic violence; in particular, male and female

perpetrated ‘domestic violence homicides’. The conclusions reached hardly resolve the complexity of the challenges posed, but suggest a revised direction for application of the principle that addresses some of the key justice issues raised in the case study. In my view, this revision is preferable to providing an expanded judicial discretion to compare and contrast all killings by distinguishing degrees of mitigation and aggravation. As stated at the outset, the practical challenge of delivering a principled commitment to justice in contexts of domestic violence extends beyond the courtroom to encompass the wider political and cultural mechanisms by which the commitment to justice is substantially shaped, revised and implemented. The achievement of the revisions suggested in this chapter will depend on the development and achievement of revisions in the commitment to justice undertaken politically and culturally. Thus, before any general conclusions can be drawn about the limits and scope of the principle of formal justice in judging cases like *Oakes*, the principles of justice underpinning judgments made in these other ‘fields’ must be reflected upon critically and in the light of the practical challenges highlighted by the case study. In the final analysis, a substantive commitment to justice in context relies on an effective integration of the various principles of justice.

Chapter Five

Equal consent in liberal democracy

Women are not by any means to blame when they reject the rules of life which have been introduced into the world, seeing that it is men who made them without their consent.

Michel de Montaigne, 1588¹

Beyond the principles and practices of formal justice by which courts deliver judgments in individual cases lie various principles and practices of substantive justice by which laws and policies are justified and implemented by the agents and institutions of the wider justice sector operating within a contemporary liberal democracy such as New Zealand.² Generally speaking practitioners are less inclined to focus critical attention on these substantive principles of justice compared with the attention given to the principles and practices of the formal legal system. By contrast, political theorists and philosophers of justice are more inclined to focus critical attention on the substantive principles and to neglect the formal aspect of justice upheld by judges and those other agents responsible for applying and developing the law through the courts. Indeed ‘most modern theories of justice have little to say about justice in law’.³

¹ ‘On Some Lines of Virgil’, *The Essays*, quoted in Judith Shklar, *Faces of Injustice*. New Haven, Yale University Press, 1990: 107

² In Chapter Two I outlined the various core and secondary agencies of the wider justice sector as institutionalized in New Zealand consistent with the Westminster political system. The core institutions include the Constitution; in New Zealand this is largely embodied in the rights protected under the Bill of Rights Act 1990, the Parliament of elected representatives, the Ministry of Justice answerable to the Minister who in turn answers to the political party in government, and the Law Commission and panel of judicial commissioners also answerable to the Minister of Justice.

³ Tom Campbell, *Justice: Issues in Political Theory* London, Macmillan Education, 1988 (Second edition, 2001) : 29. See also Jeremy Waldron ‘Legislatures in Legal Philosophy’ in *Law and Disagreement*, Clarendon Press, Oxford, 1999, pp.21-48. Waldron includes an interesting discussion of the traditional disjuncture between the study of legal philosophy and jurisprudence on the one hand, and the study of legislatures, political theory and science on the other. Waldron cites Ronald Dworkin’s work in *Law’s Empire* (1986) as providing ‘the most prominent exception’, to this norm; *ibid*: 27-28.

As argued above, the commitment to justice in cases like *Oakes* requires an integrated commitment connecting the legal, political and cultural ‘aspects’ of justice via principles that demonstrate and facilitate this integration in practical contexts of judging. Reflection on the substantive principles of justice involves more philosophical questions to do with the political and moral justifications for the rule of law and public institutions regulating conduct and imposing punishments for infringements of the rules. When we make claims about injustice and question the law’s application in a particular case and context, and when we commit to reviewing and reforming the law where it seems to be unjust, our reference is to principles of justice other than the formal principle of equal treatment regulating the court-based system of legal adjudication. This wider reflection, review and reform of the substantive commitment to justice in response to claims of injustice, needs to occur in a systematic fashion if the overall commitment to justice is to be upheld as a ‘justice system’ and provided for as a matter of right to all citizens.

Overall the wider case study suggests a general lack of principled guidance for the agents of justice operating outside the courts resulting in a fragmented, unsustainable, equivocal and reactive response to concerns about injustice in the domestic violence field, and in the criminal law’s response to cases like *Oakes* in particular. More specifically, the response of the New Zealand justice sector reflects a less than clear and principled commitment to justice in the processes of review, and in the recommendations and decisions made for legislative reform as a result of the review process. Much of the impetus for key initiatives and reforms undertaken in the domestic violence field – an area of law and policy directly impacting on the provision of basic rights to freedom from violence – came from outside the core justice sector through non-government agencies, such as Women’s Refuge, which continue to be staffed in large part by volunteers. Moreover, initiatives undertaken in this field are increasingly overseen by a variety of government agencies other than ‘justice’, including departments and ministries of Health, Social Development and Women’s Affairs. That key legislative and policy reforms representing the core justice sector’s improved commitment to the victims of domestic violence and acknowledgment of past failures to provide access to justice for these victims continue to be resisted and undermined in the name of justice, further confirms

the lack of clear direction and principled guidance in the substantive commitment to justice provided for in New Zealand at the political level.

More broadly, the wider case study of the Anglo-western response to the various justice challenges presented by domestic violence tends to implicate the political institutions of the modern liberal democratic state, at the very least by exposing their tendency towards complacency and conservatism in response to well-founded claims of substantive injustice. In general, these political institutions have provided structural obstacles in the way of directly identifying and confronting the complexity of the justice challenge; diluting and diminishing the response to injustice by entangling it with other political commitments. In particular, the commitment to uphold the democratic right of participation in the political decision making process, including the complex process of reviewing and developing the law, has seen key justice agencies increasingly influenced by public opinion and devoting considerable resources to finding out what the public want and expect of the 'justice system' by directly asking them.⁴ Arguably, the right to political or substantive justice is sacrificed in some degree in this process, particularly in the most controversial and complex areas of debate. In the common law system the institution of trial by jury already affords members of the general public a direct role in the delivery of formal justice; a provision which could be said to sacrifice consistency and impartiality for the sake of democracy. However, this aspect of the commitment to formal justice is guided by various procedural rules and has a relatively limited impact on the overall commitment to justice compared with the democratic mechanisms provided at the political level. In the light of the case study, any increase in the emphasis placed on public participation in the justice sector at the political level raises serious concerns.

The present chapter is addressed to this concern, and to considering the specific issue that the formulation and delivery of a substantive commitment to justice in the context of domestic violence is increasingly threatened by the liberal democratic process through

⁴ The Law Commission's stated commitment 'to achieve laws that are just, principled, accessible, and that reflect the heritage and aspirations of the peoples of New Zealand', arguably entails a conflict of principle, with potentially negative consequences for the development of a substantive commitment to justice. <http://www.lawcom.govt.nz/AboutUs.aspx> (Accessed 5/11/2006).

which ‘justice’ effectively becomes an expression of the public’s will and desire, rather than a commitment to any substantive virtue or principle. In the absence of a clear commitment to principle, ‘power can always assume the appearance of justice without fear of contradiction’,⁵ and in the process; ‘silence or trivialize the articulation of dissent...dismissed as mere squabbling’.⁶ The case study amply demonstrates the tendency for the commitment to justice to be appropriated in this way, with the interests of the powerful and dominant in society repeatedly reinforced in the name of justice and the reform movement stigmatised and marginalised as vindictiveness and ‘special treatment’.

The political premium placed on individual freedom in modern liberal democracies sets up a further tension in the commitment to justice in so far as freedom is conceptualised as ‘the pursuit of personal advantage without the violation of the law’.⁷ From this perspective, freedom becomes a bedrock value and right, the provision of which renders all other public virtues – not least of all justice – ‘superfluous’.⁸ Indeed, the liberal view that public morality is simply the expression of the individual’s will and desire effectively provides a rationalisation for the state to adopt a less than principled approach to conceptualising and delivering justice. Furthermore, this rationalisation of a liberal society ‘beyond virtue’ in which the protection of individual self-interest supersedes the commitment to substantive justice, has been particularly influential in the ‘criminal justice’ sector where it has led to a decisive shift from the historical focus on ‘retributive justice’ in punishment, to a utilitarian focus on criminal deterrence and reform – principles which ‘have nothing to do with justice’.⁹

In general, any assumption of a natural alliance between the commitment to liberal democracy and the commitment to substantive justice, systematically underestimates the

⁵ Perelman, *Law, Justice and Argument*, op.cit: 25.

⁶ Onora O’Neill, *Bounds of Justice*. Cambridge University Press, Cambridge, 2000 (Reprinted 2003): 166.

⁷ Heller, *Beyond Justice*, op.cit: 159, citing Beccaria’s attack on the principle of retribution in criminal law (*On Crimes and Punishments*, 1963).

⁸ Ibid.

⁹ Ibid: 163-166. Heller argues that both ‘deterrence’ and ‘reform’ are values inconsistent with the core principle of justice in punishment that insists upon ‘proportionality between crime and punishment’: 162. These arguments will be considered in full in Chapter Six of the thesis.

complex challenges involved in delivering substantive justice. In my view, the case study attests to fact that in New Zealand we have underestimated these challenges and in doing so, have failed to develop a response to the problem of domestic violence that is substantively just. At the same time, the case study highlights the considerable practical obstacles in the way of delivering such a response in the complex context of domestic violence. If there is to be a substantive commitment to justice developed and implemented at the political level in this context, then it must be provided for as a matter of 'equal right'. While this provision cannot be upheld at the expense of individual freedom, neither is it likely to be delivered through democratic processes of public consultation and negotiation. Indeed, a substantive commitment to justice will have to deal with conflict and controversy if for no other reason than the fact that, as Hart says, 'very few social changes...are agreeable to or advance the welfare of all individuals alike'.¹⁰ The ongoing challenge remains to develop principles of justice that facilitate social change in the direction of improved welfare overall and the assent of all reasonable persons to its effective and sustained implementation.

*

In the liberal concept and principle of justice as 'equal consent', there is a potential resolution of the dilemma of justice in contexts of disagreement among people born free and equal in nature. Generally considered one of the clearest 'indicators of ethical progress' to have come out of the western Enlightenment,¹¹ the idea that people have the right and reason to self-legislate so that laws cannot be just if the people have not freely consented to them, has become an increasingly influential and dominant idea among theorists of justice in the Anglo-western tradition.¹² Although developed into a complex and highly abstract theory of justice by the dominant theorists,¹³ the principle of equal

¹⁰ *The Concept of Law*, op.cit: 166-167.

¹¹ Heller, *Beyond Justice*, op.cit: 156.

¹² The tradition began with the Enlightenment theorists Hobbes and Locke and was further developed by Kant and Rousseau, then was revived much more recently by John Rawls in his profoundly influential 1971 treatise on liberal justice *A Theory of Justice* Harvard University Press, Cambridge, Mass. Oxford University Press.

¹³ Ibid. Rawls describes his intention to 'carry to a higher level of abstraction' the theory of the liberal contract: 11.

consent is more practically (if incompletely) embodied in the institution of the rule of law reinforced by constitutionally protected rights that guarantee the freedom of all those governed by law in exchange for their conformity to the rules.

However, an increasing number of critical theorists argue that in practical contexts the principle of ‘equal consent’ embodied in legal-constitutional provisions cannot provide for any kind of meaningful freedom or justice in communities ‘too diverse’ to agree on their substantive design or implementation.¹⁴ In the context of the present study, one of the most important arguments of this kind, that echoes the point made by Montaigne as far back as the sixteenth century, is that the conformity of women – whose consent was neither sought nor given in the designing of the contract – cannot be presumed. On the contrary, as feminists such as Carole Pateman have long maintained, the liberal ‘social contract’ actually excludes women’s meaningful consent and freedom by conceptualising rights under the contract that effectively protect ‘men’s political right over women’; indeed that provide for the political right by which ‘modern patriarchy is constituted’.¹⁵ Moreover, it has been argued that this contract, even as formulated in the second half of the twentieth century, ignores justice issues within the private sphere of the family, while presupposing traditional patriarchal relations therein.¹⁶

In practice, however, we continue to rely on a consent or rights-based ideal of justice and the rule of law. Indeed in New Zealand, legislators have recently taken steps to formalise this ideal in the Bill of Rights Act 1990.¹⁷ Given this reliance, and given the particular significance of the critique of the principle of equal consent to debates about justice for women, critical reflection on this principle of justice in light of the issues raised in the case study about justice for battered women should help to illuminate the wider political challenges of delivering justice in a contemporary liberal democracy such as New Zealand. Furthermore, although the critique of the dominant liberal tradition of consent-

¹⁴ Shklar, *Faces of Injustice*, op.cit: 27.

¹⁵ *The Sexual Contract*, op.cit: 2.

¹⁶ See Susan Moller Okin, ‘Justice and Gender’, *Philosophy and Public Affairs*, 16 (1987) pp. 42-72, reflecting in particular on Rawls’ *Theory of Justice*.

¹⁷ Albeit New Zealand was slow to take this step compared with other common law countries with the exception of Britain, which is yet to formalize a Bill of Rights. See Ronald Dworkin’s proposal for *A Bill of Rights for Britain* discussed in Waldron, *Law and Disagreement*, op.cit: 212.

based justice gives substance to many of the concerns raised in the case study about the obstacles to justice for battered women defendants,¹⁸ a more critical and contextual application of the principle of equal consent also serves to illuminate the potential of this principle to substantiate meaningful laws and rights that extend justice to battered women in general, and battered women defendants in particular. This key claim is critically developed in the remainder of the chapter.

Liberal justice and the principle of equal consent

*Men being...by Nature, all free, equal and independent, no one can be put out of this Estate and subjected to the Political Power of another, without his own **Consent**.*

John Locke, 1690¹⁹

From the seventeenth century, leading political philosophers in the Western tradition have built theories of justice based on this premise of men's innate freedom and equality, and from this premise, have posited theories of just rule based on the idea of their mutual or equal consent to the rule of law. John Locke, the most influential of the early liberal contract theorists, wrote in his *Second Treatise of Government*: 'There [is] nothing more evident than that creatures of the same species...born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection'.²⁰ Challenging the patriarchal right of kings to impose absolute and arbitrary rule, Locke followed his predecessor, Thomas Hobbes, in positing a 'state of nature' from which the origins of legitimate political power and just

¹⁸ This critique is considered directly later on in the chapter.

¹⁹ *Two Treatises of Government*, ed. Peter Laslett, (Cambridge: Cambridge University Press, 1960): 330. Locke opens Chapter VIII of his *Second Treatise* 'Of the Beginning of Political Societies' (s95) with this statement (emphasis in the original).

²⁰ *Ibid*: 269.

laws can be logically deduced.²¹ For Locke; the essential problem with ‘The Law of Nature’ is that it allows everyone to be ‘judge, interpreter and executioner’ in his own right, such that no person ‘hath...force enough to defend himself from injuries or punish delinquents’.²² In this natural state, in order to ‘avoid [those] inconveniences which disorder men’s properties,...men unite [contract] into societies that they may have the united strength of the whole society to secure and defend their properties’. And in so doing, they ‘give up all their natural power...or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature’.²³

Critically for Locke, the consent of free persons cannot be deduced from a system of rule which fails to provide the protection and security of everyone’s natural rights. Because ‘The liberty to follow [one’s] own Will in all things...and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man’,²⁴ provides the only justification for the rule of law, where this liberty of will is not provided, the law is no longer justified. As such, Locke considered that free people retain the power and right to withdraw their consent and reject any system of rule that effectively fails to fulfil its end of the bargain. He says:

Having erected a legislative with an intent they should exercise the power of making laws, either at certain set times or when there is need of it, when they are hindered by any force from what is so necessary to the society, and wherein the safety and preservation of the people consists, the people have a right to remove it by force.²⁵

²¹ This comparison is made notwithstanding the fact that Locke deduced a very different system of political power and governance from his ‘state of nature’ – roughly the principles of liberal democracy on which the English Westminster political system is based – than deduced by Hobbes who defended a system of monarchical rule. Thus, according to Hobbes, ‘[Men] being thereby bound by Covenant, to [obey] the Actions, and Judgments of *one*, cannot lawfully make a new Covenant, amongst themselves...without his permission. And therefore, they that are subjects to a Monarch cannot without his leave cast off Monarchy’, *Leviathan*, (C.B. Macpherson, ed. Penguin Books, London, 1968): Chapter XVIII ‘Of the Rights of Sovereigns by Institutions’: 229.

²² *Two Treatises*, op.cit: 358.

²³ Ibid.

²⁴ *ibid*: 284.

²⁵ Ibid: 370-371.

Thus, unlike his less than liberal predecessor²⁶ who considered freedom impossible without a stable system of law and governance obeyed by the citizenry without question,²⁷ Locke explicitly conceptualised the preservation of the individual's freedom and rights in nature as the only just reason for rules and laws of governance restricting freedom such that; 'could [we] be happier without it, the Law, as a useless thing would of it self vanish'.²⁸ In other words, the rule of law is not an end in itself or a system intended to limit and regulate the free individual. Rather, 'The Law, in its true Notion, is...*the direction of a free and intelligent Agent to his proper Interest...* So that, however it may be mistaken, *the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom...*'.²⁹

However, both Hobbes and Locke considered the social contract consented to by all free, intelligent, or 'rational' persons, to be a tacit, pre-political agreement confirmed by essentially *passive* acts of conformity to law, such as residency in a particular country and private property ownership, rather than any *actual* agreement or consent. The rights protecting the basic liberties, from which the mutual consent of all rational persons can be deduced, are conceptualized as negative rights of non-interference rather than positive rights to engage in the political, legislative process. This is because in the state of nature, interference from others caused by the unrestrained competition for limited resources provides the most obvious threat to the 'rational' individual. Thus, according to Hobbes, those consenting to the rule of law would 'restrict' themselves to the virtues necessary to achieve the ends we all require; namely peace,³⁰ rather than aspiring to any 'higher' positive virtue such as the Greeks envisaged when they conceptualised justice as 'the

²⁶ While Hobbes' defence of the Sovereign's absolute right to rule is quintessentially illiberal and Hobbes himself was politically conservative, not liberal, his defence of the rule of law against the arbitrary rule of kings is generally considered to be 'the minimum condition of any association among individuals...[and not] destructive of individuality'. In fact, his 'individualism' is considered to be 'so strong' that it had 'more of the philosophy of liberalism [in it] than most of [liberalism's] professed defenders'. Oakeshott, *Rationalism in Politics*, op.cit: 282-283.

²⁷ Hobbes likens the 'renouncing' or 'voiding' of one's own consent to the Sovereign rule of law to be an 'INJUSTICE, and INJURY', even '*Absurdity*', finding evidence of the wrongness of this act 'in the controversies of the world' *Leviathan*, op.cit: 191 (emphasis in the original).

²⁸ *Two Treatises*, op.cit: 305.

²⁹ Ibid: 305-306, emphasis in the original.

³⁰ Hobbes argues that 'it is a precept, or general rule of reason, *That every man, ought to endeavour Peace*', *Leviathan*, op.cit: 190, emphasis in the original.

good life for all'.³¹ And Locke's emphasis on the individual's natural right to private property; if defined more inclusively as '*Property in his own Person*', largely amounts to a negative right to non-interference from others in the possession of one's own material property.³²

In more recent formulations of liberal consent-based justice, the principle of consent is specified to mean something more substantial and positive than rights against interference. These theories draw on the Kantian ideal of the 'rational autonomous' individual, defined as a moral being of unconditional worth who is 'capable of formulating and pursuing different conceptions of the good' and of 'caring about how [she is] treated'; a being quite distinct from and much more important than 'mere things'.³³ In Kant's words, a rational being 'necessarily wills that all his faculties should be developed, inasmuch as they are given to him for all sorts of possible purposes'.³⁴ The notion of Consent encapsulates a fundamental respect for the individual's right to exercise this moral, rational will and as a basis for just law, insists that the law treats individuals as 'ends-in-themselves' rather than being used as means to the ends of another or for the purposes of the common good. Having inherent value and moral purpose, the Kantian individual enters a rational contract that gives him (her) positive rights of entitlement, rather than tacit reassurances of mutual non-interference. Specifically, Kantian rights are intended to 'trump decisions rendered by democratic institutions that may otherwise legislate for the collective welfare' and against the individual.³⁵

³¹ Solomon, *A Passion for Justice*, op.cit: 69.

³² *Two Treatises*, op.cit: 287, emphasis in original.

³³ Pierce, *Immovable Laws*, op.cit: 31, interpreting Kant's theory of 'moral personhood'.

³⁴ Ibid: 29, quoting Kant, *The Foundations of the Metaphysics of Morals* New York, Bobbs-Merrill, 1959: 41.

³⁵ Bruce Ackerman, *We the People* Cambridge, Mass. Belknap Press, Harvard University Press, 1991: 11-12.

John Rawls' particularly influential theory of justice,³⁶ builds on this Kantian ideal of justice to develop an elaborate model of the social contract to protect the 'equal consent' of the rational, autonomous individual in situations of profound diversity. A critical purpose of the Rawlsian contract is to distinguish the commitment to justice from utilitarianism, which he says, fails to 'recognise as the basis of justice that to which men [sic] would consent', while not taking seriously 'the plurality and distinctness of individuals'.³⁷ Positing an 'original position' comparable to the Lockean 'state of nature', Rawls adds a hypothetical 'veil of ignorance' from behind which the parties to the contract are to choose the principles of a just society based on their equal, rational consent. The purpose of the veil is to show that when reasoning from a position of not knowing one's personal circumstances and interests; knowledge which 'sets men at odds and allows them to be guided by their prejudices',³⁸ all rational and autonomous persons would consent to be governed by the principles of 'justice as fairness' by which 'the accidents of natural endowment and the contingencies of social circumstance' are 'nullified'.³⁹

The first of the two principles of justice as fairness requires 'equality in the assignment of basic rights and duties', while the second – the Difference Principle – holds that 'social and economic inequalities; for example, inequalities of wealth and authority, are just only if they result in compensating benefits for everyone and in particular for the least advantaged members of society'.⁴⁰ Moreover, Rawls argues that 'it seems reasonable to suppose...that the parties in the original position are equal',⁴¹ and that the basic rights and freedoms consented to by the parties would be 'the most extensive liberty compatible

³⁶ *A Theory of Justice*, op.cit. The influence of 'the Rawls phenomenon', which began with the publication of this text, is considered 'difficult to overemphasize' in view of 'the outpouring of political philosophy' witnessed since its publication, Brian Barry, *Democracy, Power and Justice: Essays in Political Theory* (Clarendon Press: Oxford, 1989): 19.

³⁷ *A Theory of Justice*, op.cit: 29.

³⁸ Ibid: 19. Rawls lists the 'essential features' of this state of ignorance behind the veil as follows: 'No one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence [or] strength...even [his] conception of the good or [his] psychological propensities', ibid: 12.

³⁹ Ibid: 15.

⁴⁰ Ibid: 14-15.

⁴¹ Ibid: 19.

with a like liberty for all'.⁴² Rawls envisages these principles providing 'the ground rules' of the social order to be enshrined in something like a constitution or 'foundation charter', which is decided upon in advance of the setting up of public-political institutions in recognition of the primary importance of justice.⁴³ The foundation charter at once serves to ensure that 'men's propensities and inclinations...are restricted from the outset by the principles of justice which specify the boundaries that men's systems of ends must respect'.⁴⁴ Indeed, according to Rawls, a society governed by the principles of justice as fairness is 'inherently stable' because applying the principles, 'eliminates the conditions that give rise to disruptive attitudes' such as envy and vanity, 'affection and rancor'.⁴⁵ Rawls also considers that the parties deciding the principles of justice, while being 'capable of a sense of justice',⁴⁶ would reason and consent from a perspective of 'mutually disinterested rationality', which means they 'attempt to win for themselves the highest index of primary social goods' without being concerned to achieve gains relative to any other party.⁴⁷ However, he says, 'the combination of mutual disinterest and the veil of ignorance achieves the same purpose as benevolence',⁴⁸ while 'racial and sexual discrimination' are 'inevitably' eliminated by the rational parties in the original position, as both are evidently 'unjust' and 'irrational', 'arbitrary and pointless'.⁴⁹

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The liberal contract model continues to provide 'the starting point for our thinking and the ground rules for our conceptions and discussions about justice' in contemporary liberal democracies.⁵⁰ In New Zealand, the principles of 'justice as fairness' as formulated

⁴² Ibid: 64.

⁴³ Ibid: 11-12. For Kant, whose social contract model Rawls draws on heavily, 'the words contract and constitution [are used] interchangeably' to mean not an actual agreement but 'an a priori rubric of justice' to be either drawn up in a formal document or 'rationally assumed to govern relations in society', Carl Raschke, 'Kant on Theory and Practice' (note 75), in Terence Ball ed. *Political Theory and Praxis: new perspectives* (Minneapolis: University of Minnesota Press, 1977): 251.

⁴⁴ *A Theory of Justice*, op.cit: 31.

⁴⁵ Ibid: 144.

⁴⁶ Ibid: 145.

⁴⁷ Ibid: 144.

⁴⁸ Ibid: 148.

⁴⁹ Ibid: 149-150.

⁵⁰ Solomon, *A Passion for Justice*, op.cit: 54.

by Rawls, are said to be ‘firmly imbedded in the judicial consciousness...applying to procedural matters as well as substantial issues’ of justice.⁵¹ However, this practical influence and embeddedness is not so clear to the critical observer. Indeed, the application of the liberal contract and principles of justice in a *judicial* context is technically inconsistent with the model, which was intended to support constitutional provisions to guide and constrain legislators, more than judges.⁵²

In general, critics argue that the principles of justice deduced from the liberal state of nature and social contract are too abstract and ‘impractical’ to apply in contemporary societies. In particular, critics of the Rawlsian contract argue that behind a ‘veil of ignorance’, there is no genuine diversity of moral subjects because ‘the equivalence of all selves qua rational agents’ cancels out any differences between the parties to the contract, such that ‘the other as distinct from the self disappears’.⁵³ This in turn precludes a meaningful *consent* as an active process involving embodied, differentiated selves making real choices.⁵⁴ Philosopher, Jeremy Waldron, argues that the rights protected by the liberal contract cannot help democratic agents to deal with ‘the circumstances of politics’ or to understand that the point of politics, as well as law, is ‘to act in the face of disagreement’.⁵⁵ Rights that are supposed to curtail, ‘trump’ or ‘finesse’ disagreement, he says, simply miss the point of the practical pursuit of justice in liberal democracies, which is ‘to make laws in a way that take differences seriously’.⁵⁶ According to Waldron, both legal and political philosophers in general fail to appreciate the practical dynamics

⁵¹ Ivor Richardson, ‘The Courts and the Public’, *New Zealand Law Journal* (1995) pp. 11-16: 11, editor’s note.

⁵² Rawls is somewhat evasive on the ‘practical’ application of his theory and principles of justice except to say that ‘they belong to an ideal theory’ which is set up ‘to guide the course of social reform’ in ‘a well-ordered society’, not to guide institutions in addressing specific instances of injustice, which he says ‘is a very different problem’ from the one his theory deals with, namely of providing the principles for designing ‘a perfectly just basic structure...under the fixed constraints of human life’, *ibid*: 245.

⁵³ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Polity Press, Cambridge, 1992): 166-167; Young, *Justice and the Politics of Difference*, *op.cit*: 100.

⁵⁴ The ‘barrage of criticism’ Rawls provoked led to ‘the collapse of his theory’ in ‘Anglo-American academia’ by the late 1980s, a trend which some said marked ‘the end of an era, perhaps the death of liberalism, the demise of the Enlightenment tradition’. Thomas Pogge, *Realizing Rawls* (Cornell University press, Ithaca and London, 1989): 1-2. Certainly the practical or concrete application of Rawls and the wider theory of the social contract is the subject of considerable controversy amongst modern political philosophers.

⁵⁵ *Law and Disagreement*, *op.cit*: 7.

⁵⁶ *Ibid*: 27.

of the democratic legislature as ‘a place where many things are said but only some of them enacted’, and a place which comprises ‘not just one person, [but] people with quite radically varying states of mind’.⁵⁷ Waldron argues that once we accept that politics is all about dealing with difference and disagreement, we should reject the liberal contract model of rights and justice in favour of granting all citizens ‘the right to participate on equal terms in social decisions on issues of high principle’. Instead of being supported by theories or principles of *justice*, Waldron argues that this right should be supported by ‘theories of public policy...[and] authority, whose function it is to determine how decisions are to be taken when members of a community disagree about what decision is right...in the face of changing circumstances and social controversies’.⁵⁸

Similarly, Anna Yeatman contends that the only fundamental right we can all be said to have ‘consented’ to is ‘the right to give voice and be listened to within the dialogical process of decision making’.⁵⁹ This right recognizes that meaningful autonomy depends on ‘ongoing positive encouragement and affirmation from others’,⁶⁰ as well as the practical reality that effective rights have to be forged politically by being ‘won from the opposing forces that deny them’,⁶¹ rather than being enshrined in a ‘foundation charter’. Instead of departing from an ‘original’ position in which free individuals are constantly threatened by the ‘equal freedom’ of others, radical democrats, such as Waldron and Yeatman, argue that on the one hand we need to place more trust in people to truly embrace a conception of the ‘dignified moral autonomy’ of the freely consenting individual.⁶² On the other hand, we need to concede that in ‘the postmodern condition’ in which we now live,⁶³ a foundational consensus or contract on the principles of justice is unrealistic. According to Yeatman, the social contract and autonomous ‘sovereign self’

⁵⁷ Ibid: 42-43.

⁵⁸ Ibid: 213.

⁵⁹ Anna Yeatman, *Postmodern Revisionings of the Political* New York, Routledge, 1994: 90.

⁶⁰ Ibid: 79.

⁶¹ Ibid: 74.

⁶² Waldron, *Law and Disagreement*, op.cit: 222.

⁶³ Although ‘postmodernists’ recognise that ‘the postmodern is undoubtedly a part of the modern’, the idea that our social conditions in the West have changed significantly since the ‘modern’ theories of the Enlightenment were developed, such that ‘all that has been received, if only yesterday, must be suspected’, was identified as a distinctive feature of ‘the postmodern era’ by Jean-Francois Lyotard in his influential early treatise on the subject: *The Postmodern Condition: A Report on Knowledge* (1979). Translated from the French by Geoff Bennington and Brian Massumi (Manchester: Manchester University Press, 1984): 79.

supporting it, can no longer ‘command legitimacy’ due to the radically differentiated subjectivity of democratic citizens, and the systematic failure of the contract to deliver equal sovereignty to all. Indeed, she argues that instead of generating meaningful freedom and autonomy, the liberal contract has produced groups of dependant selves beholden to the contracting, sovereign (male) self for protection.⁶⁴ This condition, she says, gives rise to the need for ‘a new social contract’ forged politically via ‘a continuous process of legitimation and re-legitimation’ undertaken by all decision making bodies.⁶⁵

The radical democratic critique echoes Pateman’s feminist argument that the liberal contract entails a ‘sexual contract’ that obscures as it presupposes the patriarchal ‘consenting’ subject. For Pateman, once ‘the unwritten history of women and consent’ is exposed and the ‘suppressed’ question of *who* consents is brought to the surface, it becomes clear that the consent of some – namely men – is premised on the non-consent of others – namely women. Meanwhile, ‘consent’ is not an actual process, much less an empowering political act. Rather, it is ‘merely an inference from...the existence of specific social practices and institutions’, which effectively serves to reinforce existing power relations.⁶⁶ As such, Pateman concludes that ‘unless refusal of consent or withdrawal of consent are real possibilities’, we can no longer speak of ‘consent’ in any genuine sense.⁶⁷

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This final point brings together the critical issues for consent-based theories of justice considered in the context of the case study and in the light of the practical challenges of

⁶⁴ Anna Yeatman, ‘Justice and the sovereign self’ in Margaret Wilson and Anna Yeatman (eds.) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995): 208

⁶⁵ Ibid: 210. Yeatman is quoting Norberto Bobbio, *The Future of Democracy* (1987) reflecting on the discourse of ‘neo-contractarianism’, which advocates ‘a new social contract’ in response to ‘the growing ungovernability of complex societies’.

⁶⁶ Carole Pateman, *The Disorder of Women* (Cambridge, Polity Press, 1989): 72-73. Pateman’s comments refer specifically to the theories of consent posited by the classical contractarians, especially Locke. However Pateman argues that ‘Most contemporary discussions of consent are little more than modernized version of Locke’s social contract’ in which future generations are effectively bound by the contract made by their forefathers: 73.

⁶⁷ Ibid: 72.

delivering justice for battered women defendants raised therein. In so far as the principle of ‘equal consent’ can be and is deployed as a rationalisation for the established social order and ‘justice system’, it obstructs more than it illuminates the path to justice for the victims of domestic violence. Because tacit consent ‘can always be said to be given if individuals are going peacefully about their daily lives’,⁶⁸ battered women’s ‘consent’ to the established rules and laws can be read into their endurance of abusive relationships, thereby obscuring the variety of reasons – including fear of violent retaliation – why many women, indeed the majority of women, still do not report domestic abuse.⁶⁹ Moreover, from this reading of consent-based justice, ‘unless a man has physically enslaved, bound, or trapped a woman’, she is thought to have the same opportunity to leave that any non-battered person has and, as such, cannot claim the right of self-defence if she takes action against the abuse.⁷⁰ The general reluctance of the common law courts to admit BWS evidence in support of self-defence reflects this strict interpretation of consent.⁷¹

However, a less strict interpretation of the principle of equal consent, and one which captures more of the spirit of the founding Enlightenment premise that all people are born free and equal in nature with an inalienable right of self-determination and autonomy, could support a more robust, gender-equal ‘social contract’ enabling the meaningful consent of battered women and women more generally. Such a contract would tie consent to the liberal state’s prioritization of protections against the fear of being harmed in one’s home – the ‘one place where people ought to be secure’.⁷² It would at once recognise and give practical meaning to the free individual’s right of dissent against unjust laws, rather than disabling ‘consent’ as an implicit duty of obedience and conformity to the established order. An enabling contract would also resist the increasing influence of

⁶⁸ Ibid: 73.

⁶⁹ As discussed in Part I of the thesis, in spite of dramatic increases in reporting of domestic violence, recent NZ Police statistics show ongoing ‘chronic underreporting’ of domestic violence with an estimated 88% of cases never coming to public attention.

⁷⁰ Nancy J. Hirschmann, ‘Domestic Violence and the Theoretical Discourse of Freedom’, *Frontiers*, Vol. XVI, No. 1, 1996 pp. 126-150: 132.

⁷¹ Ibid: 135.

⁷² Justice Bruce Robertson; quoted in Chapter Four, p.198 of the thesis.

utilitarian principles on Western norms and practices of punishment,⁷³ even suggesting significant revisions of the law's response to domestic violence, recognized as a fundamental breach of contract on the part of the liberal state.

Indeed, this revised and expanded notion of the liberal contract and principle of equal consent is rigorously tested in cases like *Oakes*, which present particular challenges for consent-based justice in principle, and an interesting contemporary context in which to reflect on the practical limits and scope of this principle. Before moving on to consider the constraints on implementing a substantive commitment to the principle of equal consent for battered women in the New Zealand context, I want to turn first to consider the potential of this principle applied in the adjudication of cases like *Oakes*.

'Equal consent' for battered women defendants

For as long as every man holdeth this Right, of doing any thing he liketh; so long are all men in the condition of Warre...if other men will not lay down their Right, as well as he; then there is no Reason for any one, to devest himselfe of his: For that were to expose himselfe to Prey.

Thomas Hobbes, 1651⁷⁴

[I]t being reasonable and just I should have a Right to destroy that which threatens me with Destruction. For by the Fundamental Law of Nature, Man being to be preserved, as much as possible, when all cannot be preserved, the safety of the Innocent is to be preferred: And one may destroy a Man who makes War upon him.

John Locke, 1690⁷⁵

⁷³ Heller, *Beyond Justice*, op.cit: 158. Heller notes the increasing 'substitution' of the principle of retribution for the utilitarian principles of 'deterrence' and reform.

⁷⁴ *Leviathan*, op.cit: 190.

⁷⁵ *Two Treatises*, op.cit: 279.

For the early contractarians, the right of self-defence is the fundamental natural right, far too important to be contracted away. Because the state cannot protect everyone at all times, the natural right of self-defence must be retained by individual parties to the social contract as a right to be exercised in the event that state intervention and protection against harm is not available. Even the essentially conservative, Thomas Hobbes, held that ‘no man can be understood...to have abandoned or transferred...the right of resisting them that assault him by force, to take away his life’.⁷⁶ Indeed, the modern law of self-defence, providing a complete defence and justification for killing, is largely derived from the liberal justification prior to which the common law considered self-defence killing ‘at best a matter of excuse’, rather than justification.⁷⁷ In short, the value placed on the free individual as a person capable of Reason, translates into a law of self-defence that places particular weight on the *reason* for killing, by recognising that while ‘injuring or killing a human being remains a harm’, when this harm is ‘inflicted for good reason’ – namely to ward off an attack – it is justified.⁷⁸ In effect, this principle places the values of freedom and autonomous life above the value of life as corporeal existence. Thus for Kant; ‘not the body but the person as a *free person* was inviolable’.⁷⁹

As discussed above, this ‘free person’ was implicitly or explicitly male in the theories of consent posited by the early contractarians, even to the point that ‘women’s restraint in the private sphere was [considered] one of the things that made...liberty in the public sphere possible for men’.⁸⁰ Indeed, Kant considered women ‘too emotional’ and

⁷⁶ *Leviathan*, op.cit: 192.

⁷⁷ The development of the law of self-defence from its ‘crude’ expression in early English common law where it is not distinguished from the law of ‘misadventure’, to its modern liberal formulation as a full defence and justification for killing, such as recognised in New Zealand common law, according to Thompson, was only ‘completely established in England by statute in 1828’, cited in Simester and Brookbanks, *The Principles of Criminal Law*, op.cit: 679-682.

⁷⁸ George Fletcher, ‘Domination in the Theory of Justification and Excuse’ in ‘Symposium: Self-defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill’, *University of Pittsburgh Law Review*, Vol. 57, Spring 1996, pp.457-824: 553. According to Fletcher, this development was first recognised by Thomas Aquinas and marked ‘a critical advance in the Western understanding of self-defense’: 561.

⁷⁹ Heller, *Beyond Justice*, op.cit: 162, emphasis in the original. Heller says Kant and Hegel were in agreement on this point.

⁸⁰ Hirschmann, ‘Domestic Violence’, 1996: 131. Although Locke said least about women’s exclusion from the contract, according to Pateman (*The Sexual Contract*, op.cit: 11), his notion of ‘what it means to be an “individual”, a maker of contracts and civilly free’, includes an assumption of women’s ‘natural’ subordination to male heads of house within the family, and exclusion from civil life.

‘irrational’ to be free and autonomous persons in the way that men were.⁸¹ And not surprisingly, when these liberals postulated the Fundamental Law of Nature as the free person’s natural right of self-defence and preservation, they did not have in mind the free woman’s natural right to preserve herself against an aggressive husband. Nonetheless, the principle need not exclude women and indeed it makes no sense according to the logic of liberalism to automatically exclude half the human race from the group of people ‘born free and equal in nature’. Rather, as seen in the more recent formulations of the liberal contract, and as formally protected in modern ‘human rights’ provisions, such as the New Zealand Bill of Rights Act 1990,⁸² the principle of equal consent explicitly excludes discrimination on grounds of sex.

On the other hand, the formal inclusion of women in this group; the assumption that women can ‘lay down their Right as well as [men]’ to form a mutually beneficial contract protecting their ‘equal’ freedom and consent, is exposed in contexts of domestic violence, and specifically in our modern attempts to apply the law of self-defence *equally* to battered women. As seen in previous chapters, nothing could be less simple for the established system of law in modern liberal democracies like New Zealand to recognise and protect women’s equal right of self-defence or self-preservation⁸³ in contexts of domestic violence. As this is virtually the only context in which women ever appeal to the law of self-defence,⁸⁴ if it is denied in this context then the right of self-defence is effectively denied to women. Moreover, if the law fails to provide this most fundamental of all ‘natural rights’ to women, then women’s consent to the rules of law in general cannot be presumed, and the state’s right to punish women for infringements of those rules is brought into serious question. In other words, there is a great deal at stake in

⁸¹ Ibid.

⁸² Section 19 (1) of the NZ Bill of Rights Act 1990 provides that ‘everyone has the right to freedom from discrimination on the grounds of discrimination [recognised] in the Human Rights Act 1993’. Section 21(1) of the HRA lists ‘sex’ as one of several relevant grounds on which discrimination is prohibited.

⁸³ The term ‘self-preservation’ proposed as a basis for a legal defence specifically for battered women defendants has been suggested as a full defence and alternative to self-defence as well as a partial defence and alternative to provocation or ‘diminished responsibility’. See *Battered Defendants*, op.cit: 22-24 and the discussion of the New Zealand proposal for a partial defence of self-preservation in the previous chapter.

⁸⁴ Unlike men, ‘it [is] extremely rare for women to kill strangers’ in self-defence or for any other reason. Kirkwood, ‘Female perpetrated Homicide’, op.cit: 163.

terms of the legitimacy of the liberal state and rule of law when we deny battered women access to the right of self-defence.

In practice, judges and legislators continue to make light of this issue by failing to properly recognise the significance of the right underpinning an appeal to self-defence in contexts of domestic violence. When judges interpret a battered woman's appeal to self-defence as her claiming a special 'right to kill or injure',⁸⁵ – they substantially misrepresent the rights context in which these types of killings should be understood and judged. Legislation that reshapes the criminal law to recognise the circumstances of battering as a potentially 'mitigating' factor in cases like *Oakes*, effectively does the same thing, and compounds the judicial misrepresentation of the rights context, by establishing a legal preference for what is essentially a sympathy-based response to these cases in place of proper consideration given to battered women's potential *right* of self-defence.

The difference between a sympathetic response and a rights-based response reflects a fundamental distinction of principle upheld by the criminal law that distinguishes justified from excusable (but unjustified) behaviour.⁸⁶ A sympathetic response recognises excuses for criminal conduct and tends to be focused on the personal characteristics and circumstances of the choices made by the accused. By contrast, 'Justification appeals to universals' accepting that if 'anyone under those circumstances would have so acted' the law and society cannot call that action criminal;⁸⁷ sympathy does not come into it. Thus, the legal distinction between a partial and full defence reflects a substantive moral distinction, which in turn indicates the world of difference that exists – for justice –

⁸⁵ As highlighted in Chapter One, the judges deciding *Oakes*' appeal made the comment early on in their decision that 'It hardly needs to be said that a battered woman has no more right to kill or injure than any other person, man or woman' (*R v Oakes* [1995] 2 NZLR 673, 675 s25).

⁸⁶ The critical distinction underpinning the criminal law differentiates justified from excused actions as follows: 'To excuse is to say this: What was done was morally wrong; but because of certain factors about the agent (e.g., insanity), it would be unfair to hold the wrongdoer [fully] responsible or blame him [her] for the wrong action. To justify is to say this: what was done was prima facie wrong; but, because of other morally relevant factors, the action was – all morally relevant factors considered – the right thing to do'. Jeffrie Murphy 'Forgiveness and Resentment' in Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* Cambridge University Press, New York, 1988: 20

⁸⁷ George Fletcher, *Rethinking Criminal Law*, Boston: Little, Brown, 1978: 759.

between a conviction and reduced sentence for manslaughter based on an excuse, and an acquittal on grounds of self-defence based on a justification.

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Although contract theory has scarcely been considered in relation to questions of criminal law and punishment,⁸⁸ as suggested here, an expanded contract model underpinned by the principle of equal consent provides considerable potential to illuminate and address some of the key justice challenges arising in the criminal law's response to domestic violence in general, and to battered women who kill, in particular. Indeed, this potential has been substantially realised in a rare symposium on the subject published in the *University of Pittsburgh Law Review* (1996), which frames the debate about justice for battered women defendants in terms of the application of self-defence in 'relations of domination'.⁸⁹ This substantial body of work is notable for the range of perspectives provided, which include several applications of liberal consent theory, both in support of the traditional law of self-defence and against this law, in favour of a consent-based justification for killing in contexts of violent domination. These contributions to the debate provide a valuable critical framework within which to reflect on the limits of the reforms undertaken in the New Zealand context from the perspective of substantive justice.

In his contribution to the symposium, George Fletcher⁹⁰ argues that the retention of the traditional limits on the law of self-defence in situations of 'imminent' danger⁹¹ is

⁸⁸ Because political theorists tend to avoid the subject of criminal law and punishment, and when they do mention the subject the tendency is to reduce the justice challenge involved by suggesting that penal sanctions should be established 'for the sake of liberty itself', which leaves considerable room for interpretation (Rawls, *A Theory of Justice*, op.cit: 241). Locke actually provides a theory of the law's *utility* in deterring criminal behaviour (so nothing to do with protecting/defending individual rights), and reasons that 'every man...may bring such evil on any one, who hath transgressed that Law [of Nature], as may repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief...[and], each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the Offender', quoted in Heller, *Beyond Justice*, op.cit: 158.

⁸⁹ David Richards (ed.) 'Symposium: Self-defence and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill', op.cit.

⁹⁰ 'Domination in the Theory of Justification and Excuse', pp. 553-77. Fletcher is described in the Symposium as 'surely the leading theorist of criminal law of our generation', David Richards, 'Introduction': 465.

⁹¹ In New Zealand, the law of self-defence provided for under section 48 of the Crimes Act 1961 does not require 'imminence' as a rule of law but rather this requirement exists as an 'evidential presumption'. See *Battered defendants*, op.cit: 14.

necessary in order to give legal recognition to the community's understanding of 'the exceptional nature of self-defence in response to imminent attacks'.⁹² He says, because of this common understanding, we can 'reasonably suppose' the rational consent of all legal subjects to allowing *this* 'exception' (but no other) to the rule against persons 'taking the law into [their] own hands'.⁹³ In all other circumstances, the police and state alone have the authority to 'prescribe the parameters under which an individual can assert his view of rightful conduct...[rather than be free to] pick the time, the place, or the victim of his judgment'.⁹⁴ Fletcher argues that the traditional, narrow interpretation of self-defence is necessary to maintain the terms of the political 'contract' between the liberal state and the free individual, which fundamentally relies on the mutual reassurance between the contracting parties not to put themselves in 'the position of judge and executioner'.⁹⁵ He says, the state's 'monopoly over the use of force...and authority to keep the peace' through means of punishment, even, where necessary, 'to make judgments that impose uncompensated costs on some people',⁹⁶ is all consistent with and vital to the upkeep of the liberal contract.

On this basis, Fletcher insists that a clear distinction be upheld between the right to use lethal and proportionate force to repel an 'objectively imminent' attack – a right held equally by all⁹⁷ – and the authority or 'right' to judge when the interests of public safety are at stake, and to punish wrongdoers. To uphold this distinction we must 'reasonably reject' attempts to broaden the defence to justify 'pre-emptive strikes' against 'non-imminent threats'.⁹⁸ Thus, he says, while it might be reasonable to feel sympathy for the 'tragic' situations many victims of domestic violence find themselves in, even to feel a sense of 'justice' in the batterer's dying, this 'is not a form of justice that the legal system can readily accommodate'.⁹⁹ Instead, our *sympathies* for battered women defendants and other victims of domestic violence who offend against their abusers are to

⁹² Fletcher, 'Domination', op.cit: 571.

⁹³ Ibid: 556.

⁹⁴ Ibid: 569.

⁹⁵ Ibid: 556.

⁹⁶ Ibid: 569-571.

⁹⁷ Ibid: 562.

⁹⁸ Ibid: 557.

⁹⁹ Ibid: 556.

be recognised as unlawful but judged less blameworthy because motivated by the excusable but unjustifiable ‘instinct for self-preservation’.¹⁰⁰

This judgment incorporates a critique of what Fletcher sees as an increasing tendency for self-defence law to be successful when based on the subjective test of the defendant’s ‘reasonable belief’ in the necessity for lethal force. For Fletcher, ‘Reasonable beliefs can excuse wrongful aggression against another person but they cannot justify aggression’.¹⁰¹ As the judge sought to emphasise in *Oakes*, Fletcher argues that the critical test for self-defence must be based on the establishment of ‘objective facts obtaining in the real world’; namely an imminent threat of ‘an actual unlawful attack’.¹⁰² Indeed Fletcher maintains that these ‘real world facts’ were not present in the case he draws on. In this case of particularly horrific and sustained domestic abuse he himself describes as ‘systematic’ and ‘dehumanizing’, there extensive evidence of ‘a clear relationship of dominance’ and ‘a threat to the wife sufficiently great to warrant a deadly response’, all ‘amply corroborated’ by witnesses.¹⁰³

A key assumption underpinning Fletcher’s argument against an extension of self-defence to defendants like Gay Oakes reflects the widely held belief that cases of domestic homicide committed by battered women are essentially ‘retaliatory’ in nature; acts that seek to ‘even the score’,¹⁰⁴ rather than fear-driven acts of desperation and survival in

¹⁰⁰ Ibid: 577.

¹⁰¹ Ibid: 564. Emphasis added.

¹⁰² Ibid: 562-563. Fletcher argues that a ‘subtle transformation... in the theory of self-defence’ has occurred in American jurisprudence towards acceptance of the defender’s ‘reasonable belief’ in the need for deadly force as ‘the necessary and sufficient condition for justifiable self-defence’. In his view this reflects ‘a deep misunderstanding’ of the liberal principle against ‘private punishment’ underpinning this justification.

¹⁰³ Ibid: 555-556. The case of Judy Norman (*State v. Norman*, North Carolina, 1989) involved a 20-year relationship of abuse and degradation inflicted on the defendant by the husband which included the husband withholding food from his wife and their four children for three days prior to the killing; his killing of their fifth child *in utero* after he pushed her down a flight of stairs whilst she was pregnant causing the premature birth and death of the baby the next day; her repeated escapes and attempts to have him arrested or treated with counseling; his repeated threats to kill and maim her witnessed by *his* friends and an ‘all day long’ beating of the defendant immediately prior to her shooting him. See Cohen, ‘Regimes of Private Tyranny’ (op.cit: 786) for a detailed description of the facts in this case and its legal adjudication in the courts.

¹⁰⁴ The score is evened when harm is inflicted ‘because harm has been suffered in the past’, ‘Domination’, op.cit: 558.

response to the ‘real world’ danger that is domestic violence.¹⁰⁵ According to Fletcher, ‘the standard maneuver in battered-wife [killings]’ is to shift the focus from past to future violence; ‘from retaliation to an argument...that the actor feared a recurrence of the past violence’.¹⁰⁶ From this perspective, even those most horrific and clear cases of domination, he thinks ‘cannot and should not’ be justified as self-defence because this justification is not to be affected by ‘past relationships of dominance’.¹⁰⁷ Again he is able to draw on a narrow interpretation of the liberal contract to argue that the law is ‘first and foremost’ intended to rule out ‘private punishments’, which requires a clear commitment to the principle that ‘private citizens...have no authority to pass judgment and to punish each other for past wrongs’.¹⁰⁸ Less explicitly, Fletcher’s argument draws on the long-established and empirically unfounded mythology that stereotypes battered women as vengeful creatures, intent upon ‘evening the score’ and *punishing* men.¹⁰⁹

Altogether, Fletcher’s analysis and argument provides a justification for the established and unrevised common law of self-defence, which could be said to reflect a narrow and culturally biased interpretation of the principle of equal consent. Effectively, this limited version of the principle upholds that all ‘free and rational’ persons would only consent to give up their natural freedom in exchange for the protection of the law, provided the law insisted upon the most rigorous and ‘objective’ test for the use of defensive force against

¹⁰⁵ As highlighted in Chapter two of this thesis (especially pp. 100-110), there is an extensive body of international research documenting the reality of the danger battered women fear, and confirming that male-perpetrated domestic violence remains the most common cause of serious injury and premature death among women of all cultures. This reality is further confirmed within New Zealand by statistics showing that, in spite of a gradual decline in the murder rate overall, the murder of women and children within the home remains high – accounting for more than half of all murders committed annually – and unchanging, in spite of increased justice sector interventions.

¹⁰⁶ ‘Domination’, op.cit: 558.

¹⁰⁷ Ibid: 564.

¹⁰⁸ Ibid: 558.

¹⁰⁹ The extensive research with women victims of domestic violence conducted throughout common law jurisdictions confirms the complex emotions underpinning the various decisions involved in trying to survive an abusive relationship. Vengeance is not one of them. Overwhelmingly the research shows that ‘those who kill do so because they know if they don’t they will die’ (Kathleen Kreneck, policy co-ordinator of Wisconsin Coalition of Domestic Violence, cited in Ball, ‘R v Gay Oakes’, op.cit: 174). See also Paula C. Barata, ‘Abused women’s perspectives on the criminal justice system’s response to domestic violence’, *Psychology of Women Quarterly*, 31 (2007), 202-215 for a useful overview of research in this field highlighting the complex perspectives of battered women regarding the effectiveness of the justice system’s intervention and the central role that fear plays in their decision not to seek help or try to escape: ‘Fear of the batterer...cannot be understated’, ibid: 203.

an attacker by a private person, thereby minimising the opportunity for ‘private punishment’ and in the process, maintaining the authority of the law. However, the argument only makes sense given a hypothetical ‘genderless’ consenting party, as it overlooks the reality of domestic violence – a systematic form of ‘private punishment’ endemic in all ‘liberal’ societies – thereby misrepresenting the perspective and reality of those persons whose consent is most vulnerable given this reality. Indeed, behind a Rawlsian ‘veil of ignorance’ where the parties do not know their own physical strength or their gender, it could hardly be assumed that they would consent to limit the use of defensive force in the way that Fletcher proposes. It might be assumed, however, that ‘rational’ persons who are ignorant of their own gender but aware of the reality of domestic violence, would choose to restrict self-defence to apply to women only, in circumstances where the threat posed is less than imminent and ‘objective’, in recognition of the limited ‘real world’ threat to public safety that women pose in both the private and public spheres.

Arguably this type of restriction of the law of self-defence is more consistent with the spirit of the liberal contract – its emphasis on the individual’s right to live autonomously and freely without fear of unwanted interference from others – than is the restriction Fletcher defends, which, given the reality of domestic violence, effectively consigns a significant number of ‘free’ persons to live in a state of constant fear for the sake of an essentially hypothetical ‘rational’ ideal. Indeed, it is more consistent with the fundamental liberal premise that the state should not make some suffer for the sake of others or, if this sacrifice cannot be avoided, that the innocent and vulnerable be least disadvantaged by such an arrangement. Thus, according to a Rawlsian version of the contract, substantive *justice* delivers a special obligation to facilitate and protect the consent of the vulnerable by recognising that the consent of those ‘who lack the capacity or opportunity to do anything but “consent”’, and whose agency is effectively ‘disabled’ by the established institutional arrangements, cannot be considered genuine or legitimating.¹¹⁰ Moreover, where people are systematically ‘disabled’ by the established

¹¹⁰ O’Neill, *Bounds of Justice*, op.cit: 163.

rules and laws, 'justice provides the opportunity for dissent'.¹¹¹ Women's significantly higher vulnerability to domestic abuse and murder than men's, arguably delivers a 'special obligation' of this kind on the part of the state, and where this obligation remains unfulfilled by the state, delivers the opportunity for justified dissent.¹¹²

Other contributors to the symposium have applied the liberal contract and principle of equal consent more in line with this broader, less conservative interpretation. Rather than emphasise the lack of 'objective imminence' in the danger responded to by battered women who kill their abusers, these alternative applications of the contract emphasise the comprehensive abuse of rights and loss of autonomy inflicted on the victims of domestic violence, especially when inflicted by men against women as part of a wider system of gender domination, and the state's failure to provide the promised protection from such violent domination. Anthony Sebok, for example, contends that in a truly liberal 'society of equals', battered women 'would have far wider avenues of escape... [and] batterers would be less able to repeat [their] offence' and, it might be added, would be less likely to offend in this way to begin with than is currently the case.¹¹³ In these unequal social conditions, he argues, the current restrictions on self-defence effectively impose a utilitarian trade-off in which battered women are made to carry a greater share of the burden of risk to life (if they try to leave)¹¹⁴ and to their well-being and autonomy (if they stay), for the sake of minimising the general burden of risk to life shared by all. He says 'this utilitarian balancing obliges the innocent party...to absorb potentially huge psychic

¹¹¹ Ibid: 167.

¹¹² In contexts of domestic violence, justified dissent could take the form of a woman's refusal to be forced out of her home to escape violence and, particularly in cases where state protection has been sought and failed to remove the threat posed, a decision to defend herself against this violence, if necessary using pre-emptive means. Critics argue that the standard of 'imminent danger' effectively imposes a 'duty to retreat' on battered women by allowing self-defence only when retreat is 'objectively' impossible. See Hirschmann, 'Domestic Violence', op.cit: 137.

¹¹³ 'Does an objective theory of self-defense demand too much?' in 'Symposium', op.cit. pp. 725-756: 756.

¹¹⁴ The significantly increased risk of being killed after or during attempts to leave an abusive relationship is well documented. See especially Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation', *Michigan Law Review* 90: 1, October 1991; Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York, Harper and Row, 1989). Forell and Mathews (*A Law of Her Own*, op.cit), highlight the 'overwhelming' number of women murdered in the US by men who 'stalk' them, including the majority of battered women who are murdered by their husbands and ex-husbands: 134-138.

(and physical) injuries in favour of preserving the criminal's life'.¹¹⁵ Sebok suggests, instead, we shift our focus from 'the human life maximising model' of the current law to consider how the law can serve 'to make women's well-being [and autonomy] matter more'.¹¹⁶ He suggests we reflect seriously on our tendency to 'privilege...the biological life of a batterer [over] the autonomy of an innocent woman'.¹¹⁷ This point recalls Locke's emphasis on the right of self-defence serving to protect the lives of the innocent against the lives of those intent upon destruction.

Describing the Rawlsian contract as 'the best developed social contract model',¹¹⁸ Benjamin Zipursky applies an 'extended version' of Rawls' contract model to challenge the restrictions on self-defence law supported by Fletcher and 'to explain why facts about [gender] domination *are* relevant to self-defence as a justification...as opposed to a mere excuse'.¹¹⁹ For Zipursky, rational persons behind a Rawlsian veil of ignorance would not necessarily rule out self-defence for persons using lethal force to escape violent domination where there is a clear 'lack of access to genuine alternatives; typically, because of the proven ability of the aggressor to stymie any retreat, and the proven inability of the authorities to effect protection'.¹²⁰ He argues that if self-defence is denied women who kill their abusers in these circumstances of 'no-access', as he calls them, then the state's punishment of these women is effectively 'coercion without consent', a punishment which truly rational parties – 'especially those who, when the veil is lifted, turn out to be women' – could not be expected to consent to.¹²¹

Furthermore, if the 'backdrop' of gender power relations is recognised as a 'pervasive and fundamental' *system* of male domination, of which the physical and psychological battery of women by stronger and controlling men is but a part,¹²² then we could expect

¹¹⁵ Sebok, 'Objective theory', op.cit: 752.

¹¹⁶ Ibid: 753.

¹¹⁷ Ibid: 754.

¹¹⁸ Benjamin Zipursky, 'Self-defense, Domination, and the Social Contract' in 'Symposium', pp. 579-614: 586.

¹¹⁹ Ibid: 580, emphasis added.

¹²⁰ Ibid: 584.

¹²¹ Ibid: 592-594.

¹²² Ibid: 591.

all rational persons to consent to laws intended to undermine this pervasive system of domination, including laws that ‘permit the use of force to prevent it from happening’.¹²³ This kind of law might even succeed, where others have consistently failed, in sending the message to batterers that they ‘can no longer count on being able to rape and terrorise [women]...without facing the risk of defensive homicide’, and at the same time, ‘motivating...the state to provide alternative avenues of relief’.¹²⁴ However, Zipursky stops short of arguing that this degree of pervasive domination currently exists sufficient to justify an extended right of self-defence to all women victims of domestic abuse. Rather, he seeks to challenge the current assumption that any degree of domination is irrelevant to establishing the boundaries of self-defense law. Whereas the law supported by Fletcher recognises the state’s limited ability to provide protection against an *imminent* and ‘objective’ threat, Zipursky’s ‘putative no-access defence’¹²⁵ accepts as ‘objective’ proof of danger and the need for defensive force, the proven limits of the state’s ability to protect the victims of domestic violence and provide realistic alternatives enough to make leaving an abusive relationship an expression of ‘rational’ consent. He says, if we each of us ‘impartially consider...the possibility of being a person who is dominated in this way’, and consider ‘the nature and magnitude of our interest in remaining free from such domination’, we would arguably be mutually agreeable to ‘foregoing a certain degree of security against purported self-defenders’ in order to secure our right to protect ourselves against domestic abusers.¹²⁶

The contribution by Jane Maslow Cohen,¹²⁷ considered briefly in previous chapters (as well as in the Law Commission’s 2001 review of criminal defences for battered

¹²³ Ibid: 590.

¹²⁴ Ibid: 591.

¹²⁵ Zipursky considers the advantages of this defence over an ‘objective no-access defence’ include its greater ‘pragmatism’ and rhetorical appeal as it does not force courts or juries to determine ‘what would, in fact, have happened’ and so to rule in some cases ‘that the system would in fact have failed...and murder was in fact the only option’. Instead, it only needs accept that the defendant ‘reasonably perceived’ a life threatening situation and a reasonable person in her situation would have perceived the same (ibid: 610-611). As well, the defense ‘clarifies why separation assault is relevant to the justifiability of self-defence’ (ibid: 612).

¹²⁶ Ibid: 613. Arthur Ripstein develops a similar argument from a Rawlsian position but takes it even further than Zipursky in claiming that the long history of the state’s failure to provide equal protection for battered women effectively undermines the state’s right to punish in cases where women kill their abusers, ‘Self-defence and equal protection’ in ‘Symposium’, pp. 685-724.

¹²⁷ ‘Regimes of Private Tyranny’, pp. 757-816, in ‘Symposium’, ibid.

defendants),¹²⁸ and described in the symposium as a ‘remarkable...provocatively original’ contribution,¹²⁹ makes most of the analogy between the liberal ‘state of nature’ scenario and the classic domestic violence situation. From this perspective, Cohen argues that the right of resistance or dissent against a ‘public tyrant’ that Locke grants as a vital component of the liberal contract, could apply to justify a battered person’s use of lethal force against a ‘private tyrant’. Cohen contends that domestic abusers effectively thrust their victims into a Lockean state of nature by imposing such a ‘heavily ritualised regime of ultra-private politics and law’¹³⁰ that they must be viewed from the point of view of liberal morality as a fundamental breach of contract ‘deserving a special rubric’ of their own.¹³¹ Cohen considers these regimes to be rational and calculated systems of ‘one man rule’, imposing ‘radical constrictions’ on the victim’s freedom to speak, to disagree, to show authority or make decisions, to form allegiances with others outside the relationship and, ultimately, to leave the relationship, such that the ‘violence and the threat of violence usually play [only] a complementary role’.¹³² She says private tyrants are ‘so persistently devoted’ to the domination of their subject that their tyranny could not be matched by any government system in ‘the constancy of pressure on individual liberty and freedom of will [involved]...the immediacy of its presence and intricacies of its carefully tailored design’.¹³³

When the dynamics of systematic domination and denial of freedom are properly understood, and combined with a greater appreciation for the lack of ‘reliable’ (immediate, interested, non-biased) help from the agencies of the state,¹³⁴ Cohen argues that ‘it is not difficult to understand why the resolve of many subjects of regimes of private tyranny would not sustain a run for freedom’, especially when the lives and safety of dependant loved ones are put at risk in the process.¹³⁵ While we might hope that such a

¹²⁸ NZLC R73, op.cit.

¹²⁹ Symposium editor David Richards describes Cohen’s thesis in these terms, ‘Introduction’, op.cit: 470-472.

¹³⁰ Ibid: 761.

¹³¹ Ibid: 783.

¹³² Ibid: 771-773.

¹³³ Ibid: 783.

¹³⁴ Ibid: 764.

¹³⁵ Ibid: 780.

bid for freedom succeeds, and ‘our law triumphs over the tyrant’s’, Cohen maintains that ‘we are a very long way from being able to offer the subjects of private tyrannies the certainty – even a likelihood – that our preferred outcomes can be achieved’.¹³⁶ These realities lead Cohen to the conclusion that ‘tyranny-murder’ is justified to escape regimes ‘so humanly intolerable and radically unjust...whatever force is necessary to avoid their imposition is morally justified’.¹³⁷ Critically she adds that the standard of justification for applying the defense must be largely ‘objective, general, even universal’, and not gender-specific, with ‘proof’ of a regime of private tyranny and the conditions of ‘reasonable necessity’ required.¹³⁸ Moreover, the availability of the defence is to be ‘contingent on the availability and efficacy of the community’s own efforts to end such tyrannies through police and judicial practice’.¹³⁹

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The above reflections on the law of self-defence applied in cases like *Oakes* suggest there is considerable scope for the key principle of justice developed by the liberal contractarians to provide substantive support for a right of self-defence and full justification, rather than a partial excuse, for the lethal force used against domestic tyrants by the victims of those tyrannies. These reflections at once confirm the concerns and claims of those who argue that the existing law of self-defence denies justice to defendants like Gay Oakes, while showing that there are principled and substantive alternatives to the established law. However, as Cohen acknowledges, her own proposals for reform are ‘unapologetically disagreeable’, while being ‘radically under-conceptualised’ in the established law.¹⁴⁰ Both ‘realities’ point to the considerable practical obstacles in the way of realising the potential of this expanded principle in a modern day liberal democracy such as New Zealand.

¹³⁶ Ibid: 785.

¹³⁷ Ibid: 790-796.

¹³⁸ Ibid: 800-802.

¹³⁹ Ibid: 802.

¹⁴⁰ Ibid: 758.

In the final section of the chapter I turn to reflect on the practical-political obstacles to implementing the substantive reforms proposed by Cohen and the other critical theorists highlighted herein, with a view to testing the theory that practical politics and principles of justice are mutually exclusive. This is part of the ongoing reflection undertaken in the thesis that seeks to test the so called ‘pragmatist’s’ claim that judgments regarding justice in context are not amenable to systematic formulation in compliance with any abstract ‘universal’ principle, such as the principle of equal consent;¹⁴¹ instead, practical judgements are ‘learned through experience and participation’¹⁴² and forged in ‘a context of disagreement’ about justice and rights that is ongoing and unavoidable.¹⁴³

In the light of the case study and the analysis presented in this chapter it could be said that the prevailing political response to delivering ‘justice’ in the domestic violence field in New Zealand, combines principled commitments with more pragmatic attempts to accommodate the various factions of the community who disagree over what is to be done to meet the demands of justice in this field; indeed who disagree over what this commitment means in principle. As the case study also suggests that battered women continue to be denied access to justice as a result of these disagreements, the question remains to consider to what extent this failure to deliver justice is the result of a political compromise on the commitment to its substantive principles, specifically the principle of equal consent, in a misguided effort to ‘keep the peace’ in the short-term or worse, to appease and reinforce the dominant social group. This is the question I turn to consider in the final section of the chapter with reference to the New Zealand system and practice of ‘political justice’ as reflected in the key initiatives highlighted in Chapter Two of the thesis.

¹⁴¹ This claim underpins much of the ‘sceptical realism’ or ‘pragmatism’ in the debate about justice among political theorists such as Oakeshott and Kaufmann. Refer to ‘Introduction: Justice in Context’. See also the debate earlier in the present chapter led by theorists known as ‘radical democrats’ who could also be categorized under this wider umbrella of political ‘pragmatism’.

¹⁴² Solomon, *A Passion for Justice*, op.cit: 155. Solomon makes this argument with particular force against what he calls the ‘remarkably single-minded obsession with contracts’ in Western political thinking on justice, *ibid*.

¹⁴³ Waldron, *Law and Disagreement*, op.cit: 213. Waldron argues that ‘we must assume a context of disagreement’ and from this assumption reject ‘any simple conception of rights as “trumps”’, *ibid*.

‘Equal consent’ as equal rights: Obstacles to ‘political justice’ for battered women in New Zealand

Advocates for women’s human rights have made a clear case that governments, while not directly responsible for private-agent abuse, can be seen as condoning it – through inadequate prosecution of wife abuse – and thus be held accountable.

Elisabeth Friedman, 1995¹⁴⁴

As the structural overview of New Zealand’s commitment to ‘political justice’ suggested in Chapter Two of the case study, compared with other countries developed from the British Westminster system, New Zealand has favoured a less ‘contractual’ approach to politics, and so to justice, placing emphasis instead on public participation and consultation underpinned by the core democratic doctrine of parliamentary sovereignty. The formalisation of the Bill of Rights Act in 1990 countered this tradition to some extent,¹⁴⁵ but the introduction of MMP in 1996 establishing coalition governments as the norm, combined with a global trend towards a pragmatic ‘politics of the people’, has effectively revived what could be seen as a ‘non-contractual’ approach to ‘political justice’; an approach reflected in the development of law and policy in the domestic violence field.

¹⁴⁴ ‘Women’s Human Rights’, op.cit: 21.

¹⁴⁵ The NZ Bill of Rights (BORA) has been described as ‘a comprehensive statutory affirmation of the rights and freedoms of New Zealanders’ replacing the previous ‘ad hoc and piecemeal’ provisions for human rights. See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005): 47. However, philosopher Jeremy Waldron challenges the assumption that a theory of justice invoking the social contract and principle of consent, such as Rawls’, necessarily supports a commitment to a Bill of Rights, *Law and Disagreement*, op.cit: 212. While it is important to avoid this assumption, my interpretation of the Rawlsian contract is compatible with the general institution of a Bill of Rights such as formulated in New Zealand, albeit Rawls’ would favour an entrenched Bill and broader ‘charter’ on substantive liberty rights than New Zealand has adopted.

The majority of government initiatives undertaken in New Zealand over the last twenty years aimed at preventing domestic violence, providing more effective protection for its victims and realistic alternatives, as well as greater offender accountability, have in general reflected this pragmatic rather than liberal contract, rights-based approach. At least, none of the government initiatives and reforms implemented, including the Domestic Violence Act 1995 (DVA), has framed the need for action and change explicitly in terms of fulfilling a commitment to *justice* or the *right* to protection from violence, nor have any conceptualised domestic violence as an abuse of rights. Indeed the DVA – framed as ‘An Act to provide greater protection from domestic violence’¹⁴⁶ – could be interpreted as a government policy document expressing a political desire, rather than a duty, to provide better protection from domestic violence. This non-principled framing could be said to effectively make room for the kinds of criticisms that the Act has faced in recent years for its core provisions, in particular the ‘non-notice’ protection orders that battered women’s advocates fought so long and hard to see implemented, but are increasingly being questioned by some judges and denied some applicants on the basis that they threaten the rights of *respondents* to ‘natural justice’; rights that are defined as being in competition with and, in effect, more important than, the *needs* for ‘security and safety...of the desperate battered party’.¹⁴⁷

The New Zealand Law Commission also seemed to accept this interpretation of the Act in its report on the Family Court in which the issue of protection orders was again ‘conceptualised...as one of competing interests; [women’s] safety on one hand and natural justice [for men] on the other’.¹⁴⁸ Although the legislation could be said to *imply* a right to safety or non-violence for the victims of domestic violence, and the provisions of the Act have been found not to contravene the principles of ‘natural justice’ protected

¹⁴⁶ *Domestic Violence Act* 1995, Public Act 1995 No 86 <http://www.lexisnexis.com> pp 1-68: 5 (Accessed 21/9/06).

¹⁴⁷ The Chief Judge of the Family Court (Peter Boshier) was one of the judges who authored the law Society Seminar booklet *Without Notice Applications* (2004), that advocated the achievement of a ‘correct balance’ between the ‘competing interests’ of battered women and male respondents in applications for non-notice protection orders made under the DVA, cited in Davis, ‘Gender bias’, op.cit: 5.

¹⁴⁸ *Ibid*, citing, *Dispute Resolution in the Family Court* (NZLC R 82, Wellington, 2003).

under the Bill of Rights,¹⁴⁹ the Act has generally failed to provide an effective tool for *asserting* the rights of victims over the rights of respondents. And of the many and various government initiatives undertaken in the domestic violence field over the last twenty years, funding for Women's Refuge is effectively (albeit indirectly) the only commitment undertaken explicitly in the name of upholding the individual's 'fundamental *right* to live free from fear and violence'.¹⁵⁰ Moreover, this funding, which continues to leave a considerable shortfall, is administered by the Ministry of Social Development, not Justice.

Some have argued that this experience reflects the limits inherent in rights-based commitments in general, and specifically in terms of addressing the complex obstacles to *justice* facing women. In patriarchal contexts, not least of all within the institution of heterosexual marriage, this gender 'competition' is almost inevitably weighted in favour of men, as the New Zealand experience bears out. Since an early reliance on formal rights, feminists in general have become increasingly critical of the abstract and adversarial nature of rights discourse, highlighting its tendency, in contexts of male domination, to be 'pushed towards selfish individualistic ends'.¹⁵¹ This critique is often expressed in terms of rights failing to impose any concrete obligations on actual agents – private and public – such that rights become 'mere pretence' without specifying who has a responsibility to respect them.¹⁵² It is also argued that 'if we think about justice primarily in terms of rights, we are more or less bound to find not only that we do not or cannot live up to it, but that we cannot work out what we are trying to live up to'.¹⁵³ Furthermore, these limits have been identified in the domestic violence context with women's and men's claims frequently constructed in terms of competing rights such that,

¹⁴⁹ Edward Clark, *Ex parte orders in the Family Court and the New Zealand Bill of Rights Act 1990* (2003, 4 BFLJ 205: 208, cited in Davis, 'Gender bias', op.cit: 5.

¹⁵⁰ From its inception the NCIWR has been committed to upholding 'the right of all women and children to live free from fear and violence' as its most fundamental commitment <http://www.womensrefuge.org.nz/> (Accessed 4/8/03).

¹⁵¹ Pierce, *Immovable Laws*, op.cit: 64-65. Pierce traces 'the feminist criticism of rights' to the publication of Carol Gilligan's 1982 book *In a Different Voice* (Harvard University Press, Cambridge, Massachusetts). Gilligan theorized that women's moral concerns and 'voice' could not be expressed in a notion of justice understood in terms of 'competing rights' and rules, but rather was expressed in terms of concepts of 'responsibility and relationships': 19.

¹⁵² O'Neill, *Bounds of Justice*, op.cit: 97.

¹⁵³ *Ibid.*

a husband's 'right to live in "his" home...and to see "his" children' is upheld against a woman's 'right not to be molested', except in extreme cases where this right is 'reluctantly' admitted by the courts.¹⁵⁴

To counter the implicit conservatism and 'deep evasiveness' of the rights we endorse as neutral and universal protections against abuses of power, we need to be much more specific about the political and moral obligations we attach to the rights we uphold,¹⁵⁵ lest they work to reinforce and obscure the institutional abuses of power built into the legal, political and cultural justice systems. While 'all normative principles and standards, including principles of justice, are always, inevitably and properly abstract'¹⁵⁶ in some degree, where this abstraction facilitates evasiveness the rights provided will generally fail to extend meaningful freedoms and powers to combat structural injustice. As O'Neill argues, the challenge is to incorporate a critical aspect into the abstract discourse of rights and justice that focuses on concrete obligations whilst avoiding the idealism that comes from a reliance on false and 'rigidly unchanging' conceptions of 'reason and actions, persons and situations'.¹⁵⁷

This kind of critical analysis can be usefully applied to assess the rights provisions protected in New Zealand under the New Zealand's Bill of Rights Act (BORA) in terms of their capacity to identify and address the specific challenges involved in protecting, promoting and facilitating the 'equal consent' of battered women (defendants). This recently formalised Act provides Civil and Political Rights that protect the 'Life and security of the person' as fundamental.¹⁵⁸ It at once establishes the 'Right not to be deprived of life' as the first and foremost, or 'most basic', human right,¹⁵⁹ which provides that 'No one shall be deprived of life except on such grounds as are established by law

¹⁵⁴ *Feminism and the Power of Law*, op.cit: 145.

¹⁵⁵ *ibid*: 97-101. See also Nancy Hirschmann, *Rethinking Obligation: A Feminist Method for Political Theory* (Cornell University Press, Ithaca, New York, 1992).

¹⁵⁶ O'Neill, *Bounds of Justice*, op.cit: 67-68.

¹⁵⁷ *Ibid*.

¹⁵⁸ BORA Part 2 ss 8-11.

¹⁵⁹ 'The right to life is the most basic human right' protected in most Bills of Rights, Butler and Butler, *The NZ Bill of Rights Act*, op.cit: 211.

and are consistent with the principles of fundamental justice'.¹⁶⁰ The second right provided under BORA is the 'Right not to be subjected to torture or cruel treatment' elaborated as follows: 'Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment'.¹⁶¹ These two key rights underpin the law's response to cases like *Oakes* and are critical to deciding what substantive issues of justice arise in these, and other domestic violence cases, as they provide for the right to protection from violent degradation as well as the right of self-defence. Indeed, it could be argued that both rights engender a *positive* obligation on the part of the state to intervene decisively in contexts of domestic violence, given that this violence regularly involves 'situations of torture...and a whole series of things' that the human rights community is more generally committed to fighting.¹⁶²

A comprehensive critical commentary on the substance and application of these rights provided for under BORA,¹⁶³ does not rule out such an application, though the authors highlight the considerable complexity of establishing any positive obligations of the state in particular cases. With reference to the state's obligations under the 'right not to be deprived of life', the authors consider that:

Very few laws "authorise" state officials to ignore specific known threats of harm to individuals, when the state is aware of the potential harm. Accordingly, if the failure of the state to intervene amounts to a deprivation of life then a finding of breach of s 8 of BORA will follow.¹⁶⁴

Moreover, these obligations could be invoked under the same right where serious harm but not 'deprivation of life' resulted. The authors highlight a South African case in which the Constitutional Court in that country upheld that the decision of the police not to oppose the bail application of a man accused of attempted murder of a woman against

¹⁶⁰ BORA s 8.

¹⁶¹ *Ibid*, s 9.

¹⁶² Charlotte Bunch, director of the Centre for Women's Global Leadership, quoted in Friedman, 'Women's Human Rights', *op.cit*: 20.

¹⁶³ Butler and Butler, *The NZ Bill of Rights Act*, *op.cit*.

¹⁶⁴ *ibid*: 214.

whom he had a record of violent offending sufficient to establish ‘a specific threat to [that] particular individual’, who raped and assaulted her while on pre-trial release, *had* breached her constitutional right, which *did* impose a ‘positive obligation [on the state] to adopt protective measures’ in these circumstances.¹⁶⁵ However, the authors comment that decisions like this ‘do not necessarily represent orthodoxy in this field’, and note that in a number of other jurisdictions ‘even recklessly indifferent state conduct resulting in loss of life does not trigger right to life or bodily integrity guarantees’.¹⁶⁶ On the other hand, the authors consider that if such a ruling were to be followed in New Zealand it could impose positive duties on a variety of public agencies to intervene in the affairs of ‘troubled families’ where there is a known ‘real and immediate’ threat to the life of a family member, child or adult.¹⁶⁷

The New Zealand right not to be subjected to ‘torture or to cruel, degrading, or disproportionately severe treatment or punishment’ should also provide some scope for victims of domestic violence to make rights-based claims against the state for a failure to fulfil its positive obligation under this right ‘to ensure that persons within [its] jurisdiction are not subject to ill-treatment by private persons’.¹⁶⁸ However, these commentators claim that the general issue of the extent to which a bill of rights concerns the acts of *private* as well as public persons is ‘one of the most vexed issues in human rights law’.¹⁶⁹ Moreover, in the New Zealand version, the language establishing the ‘reasonable limits’ placed on the application of the Act ‘as can be demonstrably justified in a free and democratic society’, is open to varied interpretations and ‘can be misleading’.¹⁷⁰ Similarly, there is room for confusion surrounding the concept of ‘fundamental justice’ as the grounds on which a person may be justifiably ‘deprived’ of life, or justified in killing to defend their own right not to be so deprived.¹⁷¹ However, no

¹⁶⁵ Ibid: 215. In this case: *Carmichele v Minister of Safety and Security* (2001), the woman’s claim had been struck out in the lower Courts.

¹⁶⁶ Ibid. Citing decisions in various US jurisdictions and one in Ireland.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid: 234-235. The UK case illustrative of this application is *A v United Kingdom* (1998). This case involved the administration of corporal punishment by the applicant’s stepfather.

¹⁶⁹ Ibid: 6.

¹⁷⁰ Ibid.

¹⁷¹ Ibid: 212. The White Paper draft version of BORA highlighted the ‘uncertainty’ arising from use of this concept in application of the Canadian Charter.

where in the discussion is it suggested that such confusion could give way to a justification of domestic homicide committed in circumstances where killing was demonstrably necessary to preserve (reinstate) the autonomy ('life' in a more qualitative sense) of a woman who would otherwise remain subjected to a radically unjust, rights-denying 'regime of private tyranny'.¹⁷²

Even more remote from the discussion is any suggestion that these rights could found a gender-specific defence as justified dissent on the part of battered *women* whose 'rational consent' is so violently expunged by the united force of the private-public tyrant (patriarch), that it can no longer be said to be 'rational' or un-coerced in the liberal, freedom-affirming sense.¹⁷³ Neither is there recognition given to the positive duties of rights holders to respect the rights of others, which batterers systematically deny their victims, or any room made for the possibility that the calculated and total breach of contract committed by domestic abusers, might give rise to a forfeiture of their right not to be harmed. Rather, as Shklar says of formalised commitments to justice in general, the 'unjust citizen', who 'harms not only [by] assaulting [people] directly but [by] ignoring their claims', is overlooked and effectively protected by 'justice' under these provisions.¹⁷⁴ To this end, BORA provides an array of further rights, including 'the right to the observance of the principles of natural justice'; a right considered so fundamental it is framed in the New Zealand version as simply, 'the Right to justice'.¹⁷⁵ Indeed, half the rights provided under BORA are designed to protect persons suspected and accused of criminal actions,¹⁷⁶ none of which helped Gay Oakes achieve justice.

¹⁷² Such as proposed by Cohen, 'Regimes of Private Tyranny', Symposium, op.cit.

¹⁷³ A defence of this kind of law and justification is the core of the proposals discussed earlier (Sebok, Zipursky) suggesting a broadening of the law of self-defence to give greater weight to women's right to autonomy (greater than is currently the case, not greater than men's) by recognising the comprehensive denial of this right in contexts of domestic violence and gender domination.

¹⁷⁴ *The Faces of Injustice*, op.cit: 48-49.

¹⁷⁵ BORA s27(1). The principles of 'natural justice' are said to guarantee 'the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law"', as defined in art 14 (1) of the International Covenant on Civil and Political Rights 1966 (ICCPR), quoted in New Zealand's White Paper commentary to draft art 21(1), Butler and Butler, *NZ Bill of Rights Act*, op.cit: 943.

¹⁷⁶ The 'Right to justice' is one of the seven detailed rights (ss 21-27) protected under the overarching right guaranteeing lawful 'search, arrest and detention'.

On the contrary, as seen in Part I of the thesis the right to ‘natural justice’ has indirectly authorised a successful campaign to undermine key provisions of the DVA intended to ensure victims are granted effective, fast and safe access to the law’s protection.¹⁷⁷ More directly, this right has founded successful appeals by abusive men to overturn protection orders granted on an *ex parte* basis.¹⁷⁸ In principle, the right to ‘natural justice’, which is supposed to guarantee a ‘fair, competent, independent and impartial tribunal’ for all accused persons, could ground a successful appeal by a ‘notorious man-killer’ such as Gay Oakes, given the ‘incontrovertibly’ gender-biased nature of the court adjudication system in dealing with these types of cases.¹⁷⁹ However, in practice, the right and principles of ‘natural justice’ have never been explicitly or directly invoked in this manner. Part of the reason for this has to have something to do with the fact that rights in general ‘have not been the subject of any sustained judicial analysis’ or public-political debate in New Zealand.¹⁸⁰ Without ongoing critical analysis, the established institutional structures and processes are assumed to uphold the principle of ‘natural justice’ and commitment to impartiality, and are only invoked to challenge the introduction of new laws and principles, such as those recognising the seriousness of domestic violence and seeking to ensure the law errs on the side of providing safety and justice for its victims.

There are further rights provided under BORA that battered women might appeal to. In conjunction with the Human Rights Act 1993 (HRA), BORA provides rights against discrimination on grounds of ‘sex’ along with twelve other criteria.¹⁸¹ However, the right to freedom from discrimination on the basis of ‘sex’ leaves unspecified whether or not the right protects against wider gender-based discrimination, but implies that it does not

¹⁷⁷ In one study of 208 applications for *ex parte* (no-notice) protection orders that were rejected and put on-notice by the Family Court judges, 61% were found to involve ‘severe abuse’. Christopher Perry, *An Empirical Study Applications for Protection Orders made to the Christchurch Family Court* (2000) 3 BFLJ 139, p. 143, cited in Davis, ‘Gender bias’, op.cit: 5.

¹⁷⁸ *Y v X* [2003] 3 NZLR 261 (HC) and other cases cited in Butler and Butler, *NZ Bill of Rights Act*, op.cit: 945.

¹⁷⁹ A system that, according to possibly the common law’s most experienced practitioner in these types of cases, is ‘preoccupied with men and male perspectives’, Schneider, ‘Resistance to Equality’, op.cit: 483.

¹⁸⁰ Butler and Butler, *NZ Bill of Rights*, op.cit: 944.

¹⁸¹ Section 21 of the HRA prohibits discrimination on grounds of ‘sex’ as well as ‘marital status’, ‘religious belief’, ‘ethical belief’, ‘colour’, ‘race’, ‘ethnic or national origins’, ‘disability’, ‘age’, ‘political opinion’, ‘employment status’, ‘family status’ and ‘sexual orientation’. <http://gpacts.knowledge-basket.co.nz/gpacts/public/text/1993/se/082se21.htm> (Accessed 4/11/2005).

in stating that ‘sex...includes pregnancy and childbirth’.¹⁸² Whereas ‘sex’ denotes biological differences, ‘gender’ denotes the culturally constructed differences between ‘man’ and ‘woman’, ‘masculine’ and ‘feminine’, which, as argued in Part I of the thesis and previous chapter, are key sites of discrimination undermining battered women’s access to justice. In countries like New Zealand, where virtually all sex-based discriminations have been formally prohibited, the wider concept of ‘gender’ helps to explain ‘why discrimination against women [remains] a resilient feature of social organisation’ in this, and every other Western country.¹⁸³ Whereas a right against sex discrimination suggests the ideal of a ‘gender-neutral’ approach to the development of law and policy, rights against gender discrimination would assume a more critical, less idealistic, point of departure, giving recognition to the systemic obstacles to neutrality, and imposing a ‘special obligation’ on the state to implement measures to combat gender-bias against women.

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW), ratified by New Zealand in 1985, entails provisions of this kind. Under CEDAW detailed duties are imposed on signatory states:

To *condemn* discrimination against women in all its forms [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women...To embody the principle of equality of men and women...and ensure...the *practical* realisation of this principle...[by providing] legal protection of the rights of women on an equal basis with men.¹⁸⁴

Every four years signatory states are required to report to CEDAW on the practical-political steps taken to fulfil the duties imposed in the sixteen articles of the Convention. These duties include the ‘acceleration of equality between men and women in all areas of

¹⁸² Ibid s21(a).

¹⁸³ Law Commission, *Women’s Access to Legal Services*, op.cit: 7.

¹⁸⁴ CEDAW Article 2 (a), (b) and (c) emphasis added
<http://www.ncwnz.co.nz/documents/CEDAW%20Articles.pdf> (Accessed 9/6/04).

life' (Article 4); anti-discrimination in 'sex roles and stereotyping' (Article 5); promoting 'equality before the law' (Article 15), and in 'marriage and family life' (Article 16).¹⁸⁵

However, in spite of these apparently comprehensive and substantive rights against gender-based violence, New Zealand's most recent report to CEDAW addressed 'family violence' under article 16 as only *one* form of continuing 'violence against women', while 'violence against women' in general is not directly addressed under any of the other categories. Moreover, with reference to article 15, 'sexual offending' is briefly discussed, and the 2005 law reform making sex offences 'gender-neutral' so that females can now be prosecuted for having sexual relationships with boys under 16, highlighted as a key development in fulfilment of this article.¹⁸⁶ Furthermore, 'family violence' is defined inclusively to cover violence within 'a variety of close personal relationships' with 'violence between partners', being just one of the several 'varieties' listed. And the statistics provided to report on this 'partner violence' are practically gender symmetrical, showing 26% of women and 18% of men being victimised by 'family violence' in their lifetime.¹⁸⁷ No mention is made of any qualitative differences in the level of injury or 'suffering' experienced by men and women victims, nor of the dramatic difference in the number of women killed by a male partner (54) compared with the number of men killed by their female partner (3) in contexts of 'family violence', an omission which may have something to do with the fact that such statistics are not officially collated in New Zealand.¹⁸⁸ Under the same article 16 (anti-discrimination against women in marriage and family life) the report noted the government's increased 'support for families' and

¹⁸⁵ CEDAW Report (6th) *The status of women in New Zealand* (2006) <http://www.mwa.govt.nz/news-and-pubs/publications/international/cedaw-report.html#art4> (Accessed 15/8/07).

¹⁸⁶ Ibid, article 15, referring to the Crimes Amendment Bill No.2 passed in 2005. In order to achieve this 'neutralising' of the law, Parliament extended the concept of 'sexual intercourse' to include 'all forms of sexual connection', CEDAW Report (6th) *The Status of Women*, op.cit, article 15

¹⁸⁷ Ibid, article 16, statistics taken from the 2001 National Survey of Crime Victims.

¹⁸⁸ These statistics are from a personal request made to police in 2007 (26 June) which produced the 'provisional' results of a 'one-off exercise' undertaken by police showing that 54 women (17+ years) were killed by their male partners and 3 men (17+ years) were killed by their female partners in contexts of 'family violence' between 2000 and 2004. The request was for statistics on domestic homicides in New Zealand committed by women and men against their partners where there was a recorded history of male domestic violence. Formally, the request was 'refused in reliance upon section 18(c) of the Official Information Act 1982', and the 'provisional data' supplied considered by Police, to be not useful for making a 'reliable comparison' with official crime statistics. Gavin Knight, National Statistics Manager, Organisational Performance, Police National Headquarters. Wellington, 9 July 2007.

commitment to provide ‘special protection’ for children, highlighting the changes to ‘parental rights’ introduced under the Care of Children Act 2004 establishing ‘the interests of the child’ as the ‘paramount’ consideration.¹⁸⁹

As seen in Part I of the thesis, New Zealand’s commitment to CEDAW was a significant factor influencing the design and undertaking of a number of important public-political initiatives impacting on the response to domestic violence and violence against women in general. These initiatives included the country’s first substantive study ‘focused on [exposing] systemic gender bias in...the justice system’,¹⁹⁰ and the 2004 *Action Plan for NZ Women* prioritising ‘violence against women’ and ‘family violence’ as areas of special concern.¹⁹¹ As well, the Ministry of Women’s Affairs was established in the same year New Zealand ratified CEDAW, a move repeated in other signatory countries suggesting that CEDAW helped ‘lend legitimacy to political demands’ for serious action to combat gender discrimination against women, and even that its purpose and power could extend to establishing a ‘social contract’ between the government and the women citizens of the country.¹⁹² However, a meaningful social contract relies on a relationship of mutuality and trust, of reciprocal rights and responsibilities established between the individual consenting parties to the contract, as much as it binds citizen and state. In societies suffering endemic rates of patriarchal violence (or terrorism¹⁹³) against women, a contract that fails to include and bind men, while adopting ‘gender-neutral’ framing and terminology, is a contract that repeats the historical marginalisation of ‘women’s issues’

¹⁸⁹ The Care of Children Act 2004 came into force on 1 July 2005 replacing the Guardianship Act 1968. Section 4(1) establishes that ‘the best interests of the child’ is to be ‘the first and paramount consideration’ in all proceedings impacting on the rights and welfare of children. The chief Family Court judge considers the new act represents ‘a major change in the legislative framework on which the Family Court operates’ to incorporate a quite distinct and improved notion of ‘guardianship’ from the previous act to give emphasis to the ‘responsibilities of guardians...rather than their rights’. Judge Peter Boshier, ‘New Counselling Options under the Care of Children Act, and Parent Information Programmes to Help Families in Conflict’, www.justice.govt.nz/family/publications/speeches-papers/relationship-services-1, 16 August 2005.

¹⁹⁰ *Women’s Access to Legal Services*, op.cit: 11.

¹⁹¹ See Chapter Two for further details of these and other initiatives undertaken since New Zealand signed CEDAW.

¹⁹² Friedman, ‘Women’s Human Rights’, op.cit: 19-23.

¹⁹³ The term ‘patriarchal terrorism’ has been suggested as a replacement for the somewhat euphemistic ‘domestic violence’ and denotes ‘systematic male violence enacted [against wives] in the service of patriarchal control’, Johnson, ‘Patriarchal terrorism’, op.cit: 283. See Chapter Three for further argument and analysis supporting this framing of the debate.

and in the process, minimises the political commitment to reducing the obstacles to substantive justice for battered women.

New Zealand's recent undertakings in fulfilment of CEDAW can be understood in these terms, not least of all the further 'de-gendering' of domestic violence to 'partner violence' and the extension of the law against 'sexual offending' so that women might be punished on 'equal terms' with men. This approach not only smacks of 'equality with a vengeance', but, as an expression of a country's commitment to enabling women's rights and exposing the limits of 'gender-neutral' law, it is sadly lacking and tends to confirm the concerns of those who argue that rights-based provisions, such as CEDAW and BORA are more inclined to reinforce than challenge entrenched social injustices. As critics have argued, rights to 'non-discrimination' assume there is a 'neutral' point of view – that of the privileged, rights-bearing group. From this perspective, policies and laws are set up to try to *compensate* for past discrimination, when what is needed is positive and affirmative measures to undermine the ongoing oppression that reinforces discrimination and rights abuses in a multitude of complex ways. As Young argues, the 'non-discrimination' frame constructs 'affirmative action' policies as 'exceptions to an otherwise operative principle' rather than as policies justified 'to mitigate the influence of current biases and blindnesses of institutions and decision makers'.¹⁹⁴

Thus, in spite of CEDAW's express commitment to affirmative action measures to *condemn* discrimination against women and *accelerate* gender equality,¹⁹⁵ the original framing of the commitment to eliminate discrimination – defined as exclusion from the operative (male) norm – has favoured initiatives that deliver formal but not substantive 'equality' between women and men, while de-emphasising the more complex challenges of eradicating entrenched cultural and structural biases. And it is these biases that undermine the effective implementation of measures such as the DVA, as seen in Part I of the thesis. Indeed, the original 'discrimination as exclusion' framing of CEDAW saw

¹⁹⁴ Young, *Justice and the Politics of Difference*, op.cit: 195-198.

¹⁹⁵ BORA also contains a general provision on 'affirmative-action' in section 19(2), which provides that 'Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination'.

‘no mention’ made of the very issues: ‘violence, rape, abuse [and] battery’¹⁹⁶ that account for the most severe injustices suffered by women around the world, and the worst abuses of their rights. A contract that continues the pretence of a ‘gender-neutral’ approach to combating violence against women, and specifically, domestic violence – the most culturally embedded and systematic form of gender abuse – cannot protect the equal consent of battered women.

This is not to suggest the practical limits of the principle of equal consent in contexts of domestic violence. Rather, considered from the point of view of the wider case study, I would argue that the potential of this key justice principle and the Enlightenment spirit it embodies, remains essentially untested in this critical context. Furthermore, the ongoing political reluctance to frame the debate and take action against domestic violence as a serious abuse of women’s rights and breach of the liberal contract underpinning the rule of law, suggests limits inherent in the democratic decision-making process more than in the principle of equal consent. To conclude otherwise is to overlook the fact that, as Judith Shklar observes; one of the simplest and most intractable ‘reasons why there is no cure for injustice, is that even reasonably upright citizens do not want one’.¹⁹⁷ Or in other words, the trouble is not, as some critics have argued, that free and diverse citizens invariably fail to agree on a just interpretation of this principle or the rights necessary to uphold it.¹⁹⁸ Rather, the problem is more enduring than that. As seen in the wider case study, the majority of people fail to care enough to confront injustice, as reflected in the relative lack of submissions from the general public made to the New Zealand Law Commission’s review of sentencing for battered defendants.¹⁹⁹ As well, a comparatively powerful and vocal minority continue to sway public opinion away from justice sector

¹⁹⁶ Keck and Sikkink, *Activists Beyond Borders*, op.cit: 168. Although CEDAW has been developed to recognise cultural biases and specifically ‘violence against women’ as significant forms of ‘discrimination’, arguably it still bears the mark of this original framing and emphasis on ‘discrimination’ as exclusion or restriction.

¹⁹⁷ *The Faces of Injustice*, op.cit: 45.

¹⁹⁸ *Ibid.* Shklar argues that the reluctance to fight injustice is generally ‘not due to disagreements about what is unjust’ or just’.

¹⁹⁹ See *Some Criminal Defences*, NZLC R 73, op.cit: 87-88 for a list of public submissions. The majority of the forty submissions made to this sentencing review project were from members of the legal profession and vested interest groups, albeit a few came from various churches that could be said to represent a broader public base.

reforms in some areas, such as domestic violence prevention. That the democratic process has so consistently facilitated the protests of resentful, angry, often violent men, against effective reforms to combat domestic violence, says much about the need for and lack of substantive justice principles underpinning the justice sector's response to domestic violence.

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In summary, critical reflection on New Zealand's rights-based provisions in the light of the wider case study confirms that existing rights provisions have failed to protect the equal consent of battered women (defendants), and in some respects have worked to further obscure the challenges and compound the obstacles to justice involved. However, if the cultural contexts of gender domination and male privilege are acknowledged politically as enduring and fundamental obstacles to justice in the domestic violence field, then in theory, there is no reason why the social contract protecting individual's equal consent to the rule of law could not be put to use to combat this fundamental form of injustice. To this end, a right against gender domination suggests itself as a useful revision and expansion of the existing right against sex-based discrimination. Behind a veil of ignorance, free and rational persons informed about the social reality and gender dynamics of domestic violence, but unaware of their own gender, physical size and strength, would reasonably consent to such a right. To abstract liberal rights and principles of justice from the context of gender domination, is to construct an ideal that exists beyond power; beyond politics. An ideal and 'contract' that is of little practical use to battered women.

However, in practice, as seen in the New Zealand context, there are significant obstacles in the way of recognising and enforcing such a right, not least of all the ongoing reluctance to conceptualise the harms done to women within contexts of domestic violence as substantive injustices that fundamentally infringe the social contract between citizens and state to protect the autonomy and consent of all persons equally. Ongoing campaigns by Women's Refuge that expose the concrete and systemic obstacles to women's right to live free from violence, suggest something close to the kind of

politicised process through which a more substantive social contract might be forged in contexts of power and domination. These politicised, grass-roots campaigns facilitate justice because they enable the voice and consent of those – namely battered women – who have been systematically excluded from the political consent process. Indeed, those who have been fundamentally ‘overlooked’ in liberal conceptions of the social contract, or have had their silent, tacit ‘consent’ to a contract that fundamentally reinforces their unfreedom, systematically presumed.

On the other hand, in a modern-day patriarchal society such as New Zealand, a substantive right against gender domination should not be gender-specific. Nor should its enactment be reliant upon the efforts of activists working outside government, substantially without public funding, and operating as an agency that is generally understood and stigmatised as a special interest group for women (and against men).²⁰⁰ Reflection on the New Zealand context highlights the political limitations of initiatives undertaken, or perceived to be undertaken *for women*. Women’s Refuge, the Ministry of Women’s Affairs, as well as CEDAW have all encountered obstacles to the effective implementation of their reform and advocacy work in New Zealand, while many feminists reject the stigma and connotations of ‘special treatment’ that are invariably attached to gender-specific commitments in a sexist society. Indeed, a non-specific right against gender domination would recognise that the stigmatisation of measures undertaken to combat domestic violence as ‘anti-men’ or ‘political correctness gone too far’, remains a key aspect of the rights-denying process of cultural resistance and imperialism that perpetuates patriarchal domination.

A contextualised right against gender domination could provide a constitutional safeguard in the form of a specific obligation on the part of the state to facilitate the autonomy of those most vulnerable to domination as a result of historical and ongoing injustices. This obligation would bind all agents of the political process broadly defined, and could extend to responsibilities imposed upon wider cultural and media agencies to

²⁰⁰ See Chapman, *Interest groups*, op.cit., for an analysis of the New Zealand Refuge movement seen from its inception as an interest group representing the interests of women *against* men.

work against practices known to promote a patriarchal interpretation of the world, particularly in matters impacting on the response to domestic violence and violence against women more generally. With all that we now know about the nature of domestic violence, a right to freedom from gender domination ought to support a political prioritisation of strategies to combat domestic violence and – according to the terms of the liberal contract – not for the sake of security and safety but in the interests of justice. In the light of the wider case study it is evident that in order to ensure this prioritisation in practice, core justice sector agents within the Ministry of Justice, the Law Commission and the Courts must be required and empowered to provide co-ordination and leadership across the sector sufficient to ensure all initiatives undertaken in the domestic violence field are underpinned and strengthened by a commitment to counter gender domination. This commitment ought to challenge all justice sector agents to think more critically about the issues of substantive principle involved, which in turn ought to help reduce the fragmentation that comes when such a variety of agents – political and judicial, government and non-government, individual and collective – are responsible for delivering justice, as they are in contexts of domestic violence.

While no right can ever guarantee practical agents take responsibility for enforcement, a constitutional right to freedom from gender domination should help to direct the debate and response to issues of substantive principle, and provide political consequences for clear failures of enforcement. Recognising that domestic violence is a particularly serious form of gender domination in breach of core liberal rights to justice, at once acknowledges that until entrenched social injustices such as gender domination are recognised and addressed at the constitutional level, the right to justice will remain an unachievable if not oppressive ideal in modern liberal democracies such as New Zealand.²⁰¹

²⁰¹ Ibid: 28. This final point is inspired by the analysis provided in Judith Shklar's *Faces of Injustice* which highlights the disjuncture between standard theories and models of justice and the 'complex and intractable' reality of injustice as ongoing personal and political experience; not simply the formal absence of justice.

Chapter Six

Just deserts in punishment

The good men deserve is as incalculable as the suffering they deserve.

Walter Kaufmann, 1970¹

Finally, reflection on justice in context, particularly in contexts of violence, crime and punishment, must address the *moral* aspect or principle of justice that tells us it is just to reward ‘the good’ and punish ‘the bad’; to identify and uphold the distinction between ‘right’ and ‘wrong’ and, in short, to give people what they *deserve*.

Not only does our basic understanding of justice reflect the ‘just deserts’ sentiment, but the principle (and sentiment) provides the primary justification for the criminal law as institutionalised in Western liberal democracies. The essential task of the criminal law and courts is to rank and compare various moral considerations in order to judge the seriousness of the crime committed and determine the appropriate blame and punishment (if any) that is deserved. Indeed, the important distinctions in the criminal law between murder and manslaughter, provocation and self-defence – distinctions critical in deciding cases like *Oakes* – are distinctions of a moral nature. The criminal law defines justice according to a moral scale that weighs competing values to judge degrees of wrongfulness in an act (of killing) that is always *prima facie wrong*; but ‘all morally relevant factors considered [might be] the *right* thing to do’; namely in the case of self-defence.²

¹ Kaufmann maintains that Hamlet’s remark: ‘Use every man after his desert and who should escape whipping’, provides the ‘most suggestive’ or apt comment on the subject of just deserts, implying that the principle so called is a useless guide for directing our moral judgments, whether rewards or punishments, because we are all equally deserving. ‘Doubts about Justice’, op.cit: 58.

² Murphy, ‘Forgiveness and resentment’, op.cit: 20, emphasis added. Murphy’s elaboration of the criminal law’s distinction between excuse and justification is described in Chapter Five, fn:86.

Indeed, the principle of ‘just deserts’ in punishment expresses a retributive sentiment that is arguably the most recognisable and certainly the oldest principle of punishment, if not the original principle of *justice*. The retributive sentiment lies at the heart of the idea of justice captured in the Old Testament as expressed in the commandment: ‘An eye for an eye, a tooth for a tooth’³, an idea that has been a more or less universal principle and practice of punishment throughout most of human history.⁴ The notion that justice is giving people their ‘due’ – another word for ‘desert’ – provided the essence of Plato’s theory of justice. Plato maintained that the worst injustice occurs when a person is ‘wronged without the power of revenge’.⁵ Moreover, the influential Enlightenment philosopher, Immanuel Kant, considered that fulfilment of the principle of just deserts in punishment is of such importance that the failure to ‘crave retribution’ indicates our lack of humanity.⁶ In more recent years the argument has been made that the desire for vengeance remains the ‘conceptual core of justice’ such that if we ‘suppress our urge for vengeance’, we run the risk of losing the compassionate aspect of justice – effectively the two sides of the ‘just deserts’ coin.⁷ Into the twenty-first century, Western countries like New Zealand have experienced something of a revival in support for the retributive sentiment, with certain ‘victims’ rights’ advocates, and other campaigners for ‘tougher sentences’, promoting the view that ‘someone who causes someone else to suffer should [be made to] suffer just as much’.⁸ More generally, in popular moral thinking support for the notion of desert remains high.⁹

³ The full injunction pronounced in Exodus 21 is: ‘He that smiteth a man so that he die shall be surely put to death...Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe’.

⁴ Susan Jacoby, *Wild Justice the Evolution of Revenge*. New York: Harper and Row, 1983. Excerpt quoted in Solomon and Murphy (eds.), *What is Justice?* op.cit: 287. The retributive sentiment is an equally ‘essential’ theme in Homer’s *Iliad* as well as in the Koran, if in the Muslim Holy Book it is ‘tempered throughout by mercy’, *ibid*: 15-49.

⁵ Exchange with Thrasymachus, Book II, trans. G.M. Grube, Hackett Publishing Co., 1973, quoted in Solomon and Murphy (eds.), *What is Justice?*, op.cit: 33. Albeit, this principle is established in a circuitous way through the lengthy (and difficult) dialogues between Socrates and several of his Athenian colleagues represented in the many volumes of Plato’s *Republic* (427 B.C – 347 B.C.).

⁶ Discussed in Heller, *Beyond Justice*, op.cit: 160.

⁷ Solomon, *A Passion for Justice*, op.cit: 42-43. Solomon suggests that the denial of vengeance as a ‘legitimate motive’ may be ‘a cultural and psychological disaster...suppressing our sense of care and compassion too’.

⁸ Stephen Franks MP (Act spokesperson for justice) quoted in Mark Revington, ‘Revenge’, *NZ Listener*, February 24, 2001 p 17-21: 19.

⁹ Geoffrey Cupit, *Justice as Fittingness*. New York: Oxford University Press, 1996: 55.

However, in spite of the enduring popular appeal of the retributive sentiment, Western societies have steadily moved away from conceptualising and institutionalising the commitment to criminal justice in accordance with this sentiment, reflecting, as some argue, ‘an increasingly deep unease’ in modern men and women about the principle of just deserts in general and, in particular, as it supports a system of ‘retributive justice’.¹⁰ Indeed, from the period of the Enlightenment attitudes towards punishment have steadily shifted towards ‘liberal-humanitarian’ norms of individual worth and freedom, which has in turn provided rights against cruel and degrading forms of punishment of the kind that a retributive approach once delivered. Foucault describes ‘a mass of subtle and rapid changes’ inaugurating the ‘age of sobriety’ in punishment throughout Western Europe by the beginning of the nineteenth-century, whereby the torturous ‘spectacle’ of punishment, intended to maximise the offender’s suffering, was replaced with penal practices involving ‘less pain, more kindness, more respect [and] more “humanity”’.¹¹ By the second half of the twentieth-century political philosophers had decisively rejected the whole notion of desert,¹² leading to the ‘collapse’ of the idea of retributive justice, with some critics finding the very notion ‘utterly repugnant’ and ‘incredible’.¹³

In its place, a more ‘civilised’, compassionate and functional approach to punishment was introduced based on principles of criminal deterrence, prevention and rehabilitation, the justification for which had been developed initially by liberal thinkers such as Locke and Mill. According to Locke,

[H]e who declares himself to live by another Rule, than that of Reason and common Equity [may be punished with]...such evil...that he may repent the doing of it, and thereby [be] deterred...and by his Example [deter] others from doing the like mischief...[Therefore] each transgression may be punished to that

¹⁰ Jacoby, *Wild Justice*, in Solomon & Murphy (eds.), *What is Justice?*, op.cit:287.

¹¹ *Discipline & Punish*, op.cit: 16-17.

¹² Cupit, *Justice as Fittingness*, op.cit: 55.

¹³ Kaufmann, ‘Doubts about Justice’, op.cit: 57, citing in particular the views of William Frankena, *Ethics*, (1963) op.cit: 59.

degree, and with so much severity, as will suffice to make it an ill bargain to the Offender.¹⁴

Indeed according to Heller, Locke's contract theory is essentially about justifying the deterrence of criminal acts.¹⁵

The Harm Principle that provided the conceptual core of Mill's liberal (utilitarian)¹⁶ thesis overall, is fundamentally anti-retributive in establishing that 'the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others'.¹⁷ This influential defence of punishment as criminal deterrence and prevention was underpinned and reinforced by an increasingly loud insistence and 'cry from the heart' that 'punishment be "humane"', which became a fundamental and 'insuperable' principle of punishment from the eighteenth-century on.¹⁸ The 'humanitarian principle' as it is generally understood, defends a system of punishment committed to the relief, rather than the revenge, of suffering. Support for this quintessentially modern principle is clearly indicated in the New Zealand Law Commission's critical reflections on the efficacy of the provocation defence in its 2001 report. According to the commissioners:

[T]he basic value of any civilised society [is] the protection of the humanity of each of its members and the humanity of the community as a whole...[and one]

¹⁴ 'Second treatise' Chapter II, ss8-12, op.cit: 272-274.

¹⁵ *Beyond Justice*, op.cit: 158.

¹⁶ Although liberals and utilitarians are fundamentally in conflict over the possibility and 'ends' of justice, there is something of a convergence between the two doctrines on the justification of punishment, at least for some theorists; a 'convergence' which technically entails a liberal compromise given that the goals of deterrence and prevention are more consistent with utilitarian commitments to maximizing the good than the core liberal commitment to individual freedom and autonomy. For an example of the conflict see Rawls' critique of Mill's Harm Principle which he says provides 'no reason in principle why the greater gains of some should not compensate for the lesser losses of others; or more importantly, why the violation of the liberty of a few might not be made right by the greater good shared by many', *A Theory of Justice*, op.cit: 26.

¹⁷ John Stuart Mill, *On Liberty* (1859), Gertrude Himmelfarb (ed.), Penguin, London, 1974: 68.

¹⁸ Foucault, *Discipline & Punish*, op.cit: 74-75.

expression of [this] value is the recognition of the part compassion must be allowed to play in the criminal justice system.¹⁹

In the criminal justice reforms introduced in New Zealand in the wake of this report,²⁰ there is a further clear expression of the government's desire to 'distance' the law from considerations of retribution and desert and reaffirm a commitment to 'functional justifications' for punishment.²¹

The sentimental notions of 'humanity' and 'compassion', and the utilitarian notions of criminal deterrence, prevention and rehabilitation, seem comparatively non-controversial aims alongside retribution and revenge. That is, it is difficult to ignore the great practical importance of policies aimed at crime prevention and criminal deterrence, as it is to discount the great ethical value of a rule of law underpinned by a commitment to treating all living creatures with compassion and 'humanity'. However these essentially ill-defined notions entail a potentially serious conflict for *justice* as they tend to confuse our weighing of the relative moral good (and bad) of single criminal (and virtuous) acts on which is based our ability to compare different cases and decide our response. If the law is governed by the humanitarian principle to relieve suffering, how are we to calculate and compare the suffering of the victims of criminal acts in relation to the suffering imposed on offenders via punishment? Moreover, in treating offenders with compassion, respect for the 'humanity' of the victim(s) is sacrificed in some degree if not inherently, a sacrifice suggested in cases involving the law of provocation applied in defence of domestic abusers.²²

Similarly, crime prevention, criminal deterrence and reform are morally ambiguous 'principles' of punishment that treat the individual offender as a *means* to the 'greater' good of maintaining the social order. As critics argue, this approach essentially renders

¹⁹ NZLC *Some Criminal Defences*, op.cit: 42.

²⁰ The Sentencing Act 2002 and the Parole Act 2002.

²¹ Andrew P. Simester and Warren J. Brookbanks, *Principles of Criminal Law* (Third Edition, Thomson Brookers Ltd, Wellington, NZ, 2007): 17-19.

²² The commissioners acknowledged this conflict identifying a fundamental 'collision' at the heart of provocation between the competing 'public interests' of showing respect for 'the preservation of human life' at the same time as showing compassion for each individual member of the community. *Ibid.*

punishment a type of ‘guesswork’, which can be ‘entirely out of proportion as well as arbitrary’, which, at best, ‘resembles charity rather than justice’.²³ Moreover, such an arbitrary and ‘charitable’ approach to ‘criminal justice’ generally fails to meet public expectations and notions of justice, while being inclined to provoke a retributive backlash, such as seen in New Zealand in recent years.²⁴ Indeed, the impact of this backlash in contexts of domestic violence, and particularly in the adjudication of cases of domestic homicide involving battered women, exposes the limitations of the so called ‘humanitarian’ model. As well, the criminal justice measures enacted in the legislative reforms of 2002 in answer to this backlash, which endeavour to ‘toughen up’ this model in the name of protecting ‘victims’ rights’,²⁵ deliver significant complexities and potential confusions in the overall commitment to ‘criminal justice’. This complexity is made worse by the addition of anti-retributive measures such as embodied in the increasingly popular notion of ‘restorative justice’.²⁶

Overall, the mix of principles and purposes underpinning New Zealand’s current sentencing legislation incorporates goals that are diverse and potentially conflicting; namely, ‘offender accountability’, ‘the interests of the victim’, community ‘denouncement’ of the offence, ‘deterrence of the offender or other persons’, and ‘the offender’s rehabilitation and reintegration’. These varied measures are to be considered alongside the ‘gravity’ and ‘seriousness’ of the type of offence, and any ‘restorative justice processes’ occurring,²⁷ all listed and combined in no ‘particular order of priority’.²⁸ The list of various ‘aggravating and mitigating’ factors to be considered at sentencing adds a further complexity to the task of determining the appropriate sentence and

²³ Heller, *Beyond Justice*, op.cit: 166.

²⁴ See Chapter Two for a brief summary and discussion of these campaigns in New Zealand.

²⁵ These include provisions under the Victims’ Rights Act 2002, the Sentencing Act 2002 and the Parole Act 2002, which provide that the ‘rights’ and ‘interests’ of victims are considered at sentencing, and with regard to bail and parole notifications and decision making processes via the submission of Victim Impact Statements (VRA II ss 17-27, III ss 34-48; SA s 7(c); PA s7(d)). The VRA also ‘encourages meetings between victim and offender’ consistent with ‘the principles of restorative justice’ (s7(b)).

²⁶ The ideal and practice of ‘restorative justice’ is generally understood to reflect a ‘rejection of the punitive paradigm’ and promotion of an ethic committed to ‘restoring the good’, rather than ‘punishing the bad’; ‘healing rather than hurting’. See Heather Strang and John Braithwaite (ed), *Restorative Justice and Civil Society* Cambridge; Melbourne, Cambridge University Press, 2001: 1-13.

²⁷ Sentencing Act 2002 ‘Purposes of sentencing’, s7 (a-i), ‘Principles of sentencing’ s8 (a-j).

²⁸ Simester and Brookbanks, *Principles of Criminal Law*, op.cit: 18.

punishment.²⁹ Given the inherent complexity of identifying, ranking and comparing the ‘morally relevant factors’ involved in any particular criminal case in order to judge all cases ‘equally’, any increase in the number and mix of factors deemed relevant to the determination of the punishment *deserved* in each case, can only serve to add complexity, and further risk undermining consistency of judgments across cases.

*

I have argued in the wider case study that New Zealand’s sentencing legislation reflects a compromised response to the complex issues raised in judging cases involving battered women who kill their abusers. Although any commitment to justice in complex contexts will entail compromise, the ongoing challenge is to reduce compromise as far as possible while providing clarification of the substantive issues and principles affected by the particular compromise. In my view, the adjudication of cases like *Oakes* and the broader response to domestic violence in Anglo-western countries like New Zealand reflects an unacceptable and difficult compromise on the commitment to justice in punishment. This in turn reflects the limitations of an approach to criminal justice that gives insufficient regard to the principle of just deserts (retribution). A more critical look at the competing principles appealed to in modern systems of ‘criminal justice’ reveals that ‘the principle of retribution is the sole principle of punishment which can legitimately be called a principle of *justice*’.³⁰ Furthermore, the language of compromise serves to excuse justice sector agents and the wider public from debating the particularly difficult dilemmas of moral principle involved in delivering justice in complex contexts of crime and punishment, such as cases of domestic homicide.

Arguably New Zealand’s process of criminal justice review and reform impacting on ‘battered defendants’ reflects this compromised approach that continues to deny access to substantive justice for defendants like Gay Oakes. The moral distance between this

²⁹ The Sentencing Act 2002 lists twelve ‘aggravating’ factors including ‘the extent of loss, damage or harm’ resulting; any ‘particular cruelty’ shown, and any ‘abuse of trust or authority’ involved (s9 (1) a-j). There are seven factors considered relevant to ‘mitigation’ including ‘the age of the offender’ and ‘the conduct of the victim’ (s9 (2) a-g).

³⁰ Heller, *Beyond Justice*, op.cit: 160, emphasis in the original.

approach and that which takes a more principled view of the moral issues involved in judging what justice requires in cases like *Oakes* is considerable. Critical reflection on the moral dimensions of these cases, such as undertaken in the aforementioned *Symposium*,³¹ has led some philosophers to conclude that ‘we should regret the necessity [of these killings] more than their occurrence’, and give expression to the moral intuition that these agents in many cases ‘deserve the freedom they killed to obtain’.³² The New Zealand justice sector’s response to cases like *Oakes* and *King* was so far from this intuition that at the very least it would seem further reflection and debate, in a field ‘radically under-conceptualised’ within the law,³³ is required. The chapter is in part a response to the challenge set by these critics to substantiate the moral intuition that some if not most battered defendants who kill their abusers deserve their freedom, and in another part it is a response to the prevailing skepticism amongst political philosophers such as Kaufmann, who maintain that the pursuit of a moral *principle* of just deserts is pointless and impossible – ‘circular and vacuous’.³⁴

‘Just deserts’: rewarding the good and punishing the bad

What is just, then, is what is proportionate...When one wounds and the other is wounded...the [benefits] and the [burdens] are unequally divided...[the agent] has more of the good and the victim less...The [law] tries to restore the [balance] to a position of equality.

Aristotle, 364 B.C. – 322 B.C.³⁵

The principle of ‘just deserts’ expresses the moral intuition that good deeds ought to be rewarded and bad deeds ought to be punished. This, in turn, appeals to our basic human

³¹ ‘Self-defence and Relations of Domination’, op.cit.

³² Cohen, ‘Regimes of private tyranny’, *ibid*: 758; 788 emphasis added.

³³ *Ibid*: 758.

³⁴ Kaufmann, ‘Doubts about Justice’, op.cit: 58.

³⁵ *Nicomachean Ethics*, Book V, 5.5: ‘Justice in rectification’, quoted in Solomon and Murphy (eds.), *What is Justice?*, op.cit: 45.

desire for ‘order and coherence in our moral universe’³⁶ to counter the apparent arbitrariness of nature which allows the unjust to prosper and the virtuous to suffer. Aristotle defined desert as a principle of distribution to be distinguished from other distributive principles such as the ‘egalitarian’ principle ‘to each the same’, and the ‘welfarist’ principle ‘to each according to his [or her] needs’.³⁷ In contrast with these principles, the principle of desert – to each according to his or her desert – provides a moral scale for comparing and weighing the relative worth of a person’s actions, motives and ‘character’, so that morally ‘fitting’ or proportionate rewards and punishments can be distributed accordingly. In this way, the concept of desert ‘invokes the language of morals [through which] we praise and we blame, we commend and condemn, we applaud and deride, we approve and disapprove’.³⁸

For the inegalitarian Aristotle, this distribution of praise and blame, approval and disapproval, is measured according to a great ‘chain of being’; a natural moral hierarchy among beings which ‘attaches moral superiority to various classes of beings [such that]...the purposes of some beings supercede the purposes of others...because of their greater moral value’.³⁹ Each class of being is morally bound to serve the ends of the higher being, indeed to be ‘the living instruments of others’;⁴⁰ women are to serve men and men are to serve God, with rewards and punishments distributed in proportion to a person’s *relative* moral worth depending on what class of person they are.⁴¹ In post-Enlightenment times all individuals are (in principle) of equal moral worth, which means an egalitarian moral scale for ranking and comparing the relative deserts of persons and their deeds must be constructed artificially rather than deduced from any perceived ‘natural’ order of being.

³⁶ Wojciech Sadurski, *Giving desert its due: social justice and legal theory*. Dordrecht; Boston: D. Reidel Pub. Co, Hingham, MA, USA, 1985: 119.

³⁷ Perelman, *Law, Justice, and Argument*, op.cit: 2. Somewhat confusingly Perelman lists these principles along with three more he considers equally valid yet ‘irreconcilable’ versions of the one principle of ‘distributive justice’ to make the point that ‘It is vain to try to enumerate all the possible meanings’ or to single out any one formula as the most valid.

³⁸ Arkes, *First Things*, op.cit: 20.

³⁹ Pierce, *Immovable Laws*, op.cit: 30-31.

⁴⁰ Hart, *The Concept of Law*, op.cit: 162.

⁴¹ Pierce, *Immovable Laws*, op.cit: 30.

It is this challenge that has led various sceptics to reject the concept of ‘desert’ because of its reliance upon an arbitrary and subjective conception of the moral good that invariably values some virtues and attributes above others and, they argue, ‘eventually comes to rest on some “underserved” characteristic of individuals’.⁴² As seen in the previous chapter, liberal-contractarians assert that a social contract protecting the equal consent of all free and rational individuals with compensations for the least advantaged, serves to cancel out the morally arbitrary contingencies of nature and social circumstance through principles of justice chosen from a ‘morally neutral’ original position. From this point of view, there is no need for a moral scaling of persons or deeds to ensure proportionate or equal distributions based on desert because a contract protecting the principles of justice as fairness ensures an equal and fair – amoral – basic structure.⁴³

However, in spite of the advantages of the liberal-contract model in support of constitutional protections against gender domination and an expanded right of self-defence, without a moral scale there is no guidance for determining degrees of mitigation and aggravation – blame and punishment – in proportion to the specific harm caused or suffered. Indeed, the liberal-contract model is generally silent on the matter of sentencing or, as seen with Locke, tends towards a deterrence-based system. Given the issues raised in the case study highlighting the moral dilemmas involved in judging cases like *Oakes*, many of which revolve around controversial claims about the extent to which domestic violence deserves our moral condemnation and mitigates blame for its victims who offend, the substantive justice of our response to these cases and domestic violence more broadly seems to depend centrally upon the kind of moral reflection and judgment that liberal theory tends to reject and desert theory aims to provide. Moreover, the

⁴² William Galston, ‘Liberal Justice’ in James Sterba (et al) *Morality and social justice: point/counterpoint* Lanham, Md. : Rowman & Littlefield Publishers, 1995: 167. Galston disagrees with this critical stance which he attributes largely to Rawls.

⁴³ Rawls, *A Theory of Justice*, op.cit. Rawls essentially rejects the desirability and importance of desert-based distributions stating that ‘The essential point is that the concept of moral worth does not provide a first principle of distributive justice’: 312-314. However, some critics argue that the concept of ‘desert’ is implicit in Rawls’ theory, which otherwise would be suggesting that we accept, with the justice sceptics, the simple fact that life is unfair, rather than trying to construct a theory of justice in an attempt to make it fairer. See Sadurski, *Giving desert its due*, op.cit: 127. See also Galston’s critique of Rawls’ ‘hardly decisive’ objection to desert on grounds that the distribution of natural endowments is arbitrary from a moral point of view. Galston argues that Rawls’ view of moral personhood ‘is just too parsimonious’ to ground a realistic ‘social theory’ of justice. ‘Liberal Justice’, op.cit: 167.

increasingly subtle and varied moral distinctions invoked in the name of modern ‘criminal justice’, which include a substantial broadening of the principles and purposes of punishment beyond the retributive principle of ‘just deserts’, creates increased challenges for legislators and adjudicators to consistently judge and compare the moral dimensions of individual cases. And as these changes have occurred in a less than open and systematic manner within the criminal justice sector, critical explication is required to clarify and make explicit the substantive issues of principle involved. Theoretical reflection on the principle of just deserts should help to provide this clarification from which point reflection on the moral substance of the judgments and claims made in specific contexts of ‘criminal justice’ can be undertaken.

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Compared with philosophical reflections on the social contract, there are relatively few modern philosophical accounts devoted to formulating theories and principles of just deserts. One of the main reasons for this is that the concept of desert, unlike that of consent, is seen as comparatively if not inherently inegalitarian and contrary to our modern sense of obligation to meeting *needs*.⁴⁴ Indeed desert claims *are* ‘significantly constrained by claims based on need’,⁴⁵ and the satisfaction of basic human needs must occur before any justice system can reasonably apply measures consistent with the principle ‘to each according to his desert’.⁴⁶ However, needs calculations do not automatically override desert-based claims. Rather, because needs are never met in full and meeting one person’s needs often means denying the needs of another, the distribution of resources according to needs is often controversial and desert-based considerations can help to show how this deceptively simple and inclusive obligation to meet needs can – and should – be more fairly regulated consistent with a commitment to justice. Furthermore, distributions based on need and desert are not necessarily in conflict, while it remains critical to distinguish distributions based on the principle of

⁴⁴ Cupit, *Justice as Fittingness*, op.cit: 55.

⁴⁵ Galston, ‘Liberal Justice’, op.cit: 167.

⁴⁶ Sadurski, *Giving desert its due*, op.cit: 163-164.

desert (and justice) from distributions based on other principles, such as needs, as they make very different claims about justice.

According to one modern proponent of desert-based justice,⁴⁷ we can better distinguish desert-based obligations by conceptualising ‘desert’ more narrowly than it tends to be conceptualised to mean an ‘easy but trivial’ notion that is ‘wider’ than justice.⁴⁸ In his theory of *Justice as Fittingness*, Geoffrey Cupit argues that this narrowing can be achieved by understanding desert as ‘fitting treatment’, which he says means being treated ‘as you are’, while injustice is ‘to treat [people] as lesser or lower than they are’.⁴⁹ This requires establishing what he calls ‘status classes’ into which people are effectively ranked according to their virtuous acts, rather than any intrinsic or ascriptive ‘status’ attribute. These acts are in turn to be measured with reference to ‘cultural perceptions and norms about “good” and “bad” behaviour’, though only some attributes are ‘status-affecting’. These are the things we recognise as ‘virtuous’; having a core moral element. So, for example, trustworthiness/untrustworthiness is a status-affecting attribute but being in need is not, because ‘neediness’ in general is not a moral harm in the way that an abuse of trust is.⁵⁰

The virtues relevant to ‘status’ are at once to be understood as *practical* virtues because justice is primarily a virtue concerned with the practical – not purely philosophical – matter of ‘how we should act’.⁵¹ In this way, desert-based claims do not rule out actions simply because they are ‘wrong’ without considering their practical manifestation. This, according to Cupit, helps distinguish desert-based claims from moral claims in general. In other words, what is wrong or bad from the perspective of general morality is not necessarily unjust from a ‘just deserts’ perspective. However, the principle of desert rules out those actions ‘for which we can find a reason why [they] should not have been

⁴⁷ Geoffrey Cupit *Justice as Fittingness*, op.cit.

⁴⁸ Ibid: 36, 48.

⁴⁹ Ibid: 2.

⁵⁰ Ibid: 2-3.

⁵¹ Ibid: 4.

performed’, without having to refer to ‘the beliefs or actions of others’.⁵² These ‘reasons’ are to be measured according to the core – and uncontroversial – ethical notion that people are responsible for their actions/inactions and can be fairly judged on that basis.⁵³ According to Cupit, his ‘status system’ offers a comparatively simple system of classification because measuring agreement on *levels* of virtue (desert status), rather than quantities of the good, which ‘presumes [less] about human nature, cause and effect’.⁵⁴ Whereas the utilitarian calculus projects into the future and enters into debate about what ought to be, ‘Justice as fittingness’ works from how things are ‘assuming existence and debating how we ought to act given it’.⁵⁵ This, he says, at once precludes reliance on a pre-institutional contract on what people consent to (or deserve), which would presuppose responsibilities that do not exist.⁵⁶

Although accepting that his status system is somewhat ‘vague and indeterminate’, Cupit argues that justice must be indeterminate in some degree if it is to remain ‘open to addressing and preventing injustice’.⁵⁷ Importantly, because it makes no sense to say people ‘*deserve* not to suffer’, although we can desire that they ‘should not suffer’,⁵⁸ and because there can be no desert-based claim to mercy, even though we generally expect judges to show mercy, a commitment to the principle of just deserts can be distinguished from – and claimed against – these kinds of humanitarian obligations. Thus, if so called ‘merciful’ treatment can be justifiably claimed it is effectively not mercy but justice – namely *deserved* treatment – while the exercise of mercy proper ‘leads inevitably to injustice’.⁵⁹ Cupit’s theory of justice also leads to the claim that retribution or punishment imposed for the sake of suffering should be a ‘discretionary’ obligation of the just state, whereas punishment ‘to reassert the status of the victim’ could be a necessary obligation

⁵² Ibid: 4-5. One example he gives of beliefs justice is not to be concerned with is ‘the social estimation of honour’.

⁵³ Ibid: 39.

⁵⁴ Ibid: 8-9.

⁵⁵ Ibid: 12.

⁵⁶ Ibid: 55.

⁵⁷ Ibid: 56-57.

⁵⁸ Ibid: 41-42.

⁵⁹ Ibid: 154. Cupit explains that ‘either merciful treatment is treatment the recipient cannot claim, in which case the exercise of mercy leads inevitably to injustice; or the treatment can be claimed, and it is therefore not mercy’.

of the just state.⁶⁰ Cupit stops short of arguing that this principle of punishment *should* be an obligation of the just state.

This basic framework for conceptualising a desert-based theory of justice is substantiated in Wojciech Sadurski's more comprehensive thesis: 'Justice as equilibrium'. For Sadurski, the principle of desert establishes a moral obligation to ensure that the distribution of rewards and punishments achieves a 'balancing [of] the benefits and burdens [of our] social existence'.⁶¹ He explains:

Justice-as-desert is all about an attempt to make a person's situation dependent upon his own free choices, and to liberate, to the largest possible extent, people from the operation of uncontrollable forces in a social distribution. It is a protest against the reduction of social life...to a lottery, and it is a defence of the relevance of morality to [the] social allocation of desired goods.⁶²

Sadurski's model of justice as an equilibrium accords special moral weight to the bearing of burdens in recognition of the moral importance attached to effort and sacrifice – virtue by another name.⁶³ This moral weighting reflects our intuitions about self-ownership,⁶⁴ along with our conviction that 'we do not deserve anything that comes to us as a result of circumstances over which we do not have any control'.⁶⁵ Distinguishing his desert-based theory of justice from theories claiming universal truth, Sadurski argues that justice as equilibrium provides a clarification of the moral demands of justice 'given particular values'.⁶⁶ These values emphasise the moral importance of taking responsibility and the moral burden imposed on society when we fail to take responsibility through our actions and inactions.⁶⁷ Sadurski applies this theory to assert a principle of justice in punishment which seeks 'to remove the unfair advantages from the criminal' and restore the moral

⁶⁰ Ibid: 155.

⁶¹ *Giving desert its due*, op.cit: 221.

⁶² Ibid: 157.

⁶³ Ibid: 116.

⁶⁴ Ibid: 167

⁶⁵ *ibid*: 275.

⁶⁶ Ibid: 127.

⁶⁷ Ibid.

‘disequilibrium’ generated by his/her actions.⁶⁸ This principle would justify ‘restitution’ or compensation for the victims of crime for having incurred ‘unfair burdens’. However, he argues that given the much greater challenge of justifying the state’s moral right to ‘deliberately inflict harm upon human beings’ by punishing them, the commitment to ‘criminal justice’ should not be focused on the victim aspect.⁶⁹ He says, punishment and restitution for victims are distinct moral issues with restitution addressing ‘the losses of the victim’, while punishment aims to restore the equilibrium of benefits and burdens by focusing on a wider social balancing of the offender’s ‘illegitimate benefits...without necessarily bringing any benefits to the victim’.⁷⁰

Because the criminal law essentially exists to protect against harm, it carries with it a ‘burden of self-restraint’ for all those who stand to benefit from the law’s protection. As such, those who commit crimes can be said to gain a ‘fundamental’ and underserved benefit of ‘non self-restraint’, which makes their actions wrong ‘irrespective of their more tangible consequences’.⁷¹ It is therefore just to make calculations of the severity of the punishment deserved in proportion with the degree of illegitimate benefit gained, and moral burden cast off. The key is that punishment is given a strong moral basis in being focused on criminal guilt and responsibility rather than deterrence or reform. Only this focus can ‘delimit the scope of those who deserve punishment [while] also providing moral grounds for penalty-fixing...[to guard against] the punishment of the innocent as well as the excessive punishment of the guilty’.⁷² In this way, the principle of just deserts supports subtle distinctions in punishments imposed, including lesser penalties for wrongdoers who ‘have suffered some burden as a result of the offence’.⁷³ On the same scale, the insanity defence is justified because the insane by definition gain little from the commission of an offence.⁷⁴ Sadurski recognises the practical difficulty of balancing benefits and burdens with consistency and precision. However he does not agree with the

⁶⁸ *ibid*: 227.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*: 243.

⁷¹ *Ibid*: 229

⁷² *Ibid*: 237.

⁷³ *Ibid*: 230. Sadurski suggests that one example might be the suffering incurred by some due to the publicity given to [their] case from the mass media.

⁷⁴ *Ibid*: 231.

sceptics that the task is 'hopeless', nor does he accept the claim that in punishment just deserts is 'vindictive' or 'hateful'.⁷⁵ Sadurski argues that the challenge of deciding the relative importance of various moral harms and benefits is essential to the theory and practice of justice as a whole, and to the delivery of a substantial and principled system of justice that 'takes the notion of human responsibility seriously', in particular.⁷⁶ At the same time, Sadurski accepts that 'justice is not the only standard of a proper punishment';⁷⁷ all the more reason to understand its distinct purpose and define its limits.

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If we can distinguish the moral commitment to justice in accordance with the principle of just deserts so defined, does our understanding of this principle help us to weigh the importance of the virtues it upholds in comparison with the other purposes we have come to associate with punishment in modern liberal democracies such as New Zealand? The question of the relative moral value or virtue of justice is again a long standing philosophical debate dating back to the Ancient Greek philosophers who conceptualised justice in the inclusive sense as the sum of all the virtues, as well as distinguishing justice as a part of virtue, or as a particular virtue.⁷⁸ In practice, this question is particularly pressing and complex in modern contexts of criminal justice where the intuitive moral appeal of humanitarian notions of forgiveness and compassion, as well as more utilitarian principles of criminal deterrence and rehabilitation, increasingly compete with the commitment to justice. As seen in the foregoing discussion, there is an important moral

⁷⁵ Ibid: 238-239 citing Kaufmann's claim that it is impossible, for example, to decide, with any precision, 'What a man deserves for raping a child, or for arson or treason', as well as Weihofen's contention that the retributive element of the just deserts thesis is 'fundamentally vindictive'. Sadurski argues that any appearance of cruelty and severity in the application of the retributive principle is for the most part a misapplication of the principle: 240.

⁷⁶ Ibid: 239-241.

⁷⁷ Ibid: 251.

⁷⁸ Kaufmann, 'Doubts about justice', op.cit: 56. As far as I can deduce from my readings, there remains considerable debate about the relative weight Plato and Aristotle assigned to the virtue of justice. However, following Kaufmann's confessedly 'oversimplified' interpretation, Plato's theory essentially defined justice as the sum of all the virtues whereas Aristotle distinguished justice as a particular virtue. Much later, Rawls opened his magnum opus on justice by pronouncing justice to be 'the first virtue of social institutions'. However a little further on into the work he accepts that 'the principles of justice are but a part, although perhaps the most important part...of a complete conception defining principles for all the virtues of the basic structure'. *A Theory of Justice*, op.cit: 3-9.

purpose to justice that is distinguishable from other appealing notions such as the humanitarian relief of suffering. If we are to insist upon justice in punishment then we need to show why justice can be a *more* important goal than the various other principles and purposes of punishment.

At the philosophical level, this issue has tended to be framed as a debate between ‘utilitarians’ and ‘retributionists’, with the utilitarian perspective encompassing basic ‘humanitarian’ aims,⁷⁹ and the retributionist perspective, stepping back from the uncompromising absolutism of the Kantian position,⁸⁰ to assert that punishment is primarily the payment of a ‘debt’ to society, which says to the offender: ‘You have done something bad, for which you must pay’.⁸¹ This principle at once insists that the appropriate punishment necessary to repay the debt must achieve a moral proportionality – fittingness, equilibrium or balance – between crime and punishment. To achieve this, punishment must be strictly focused on criminal responsibility, being past-oriented, rather than being focused on the consequences and future resolution of criminal acts. The retributive principle at once considers punishment an act of social and moral condemnation which imposes suffering not for its own sake, but ‘to impress on [the offender] that he has done wrong’. In this way, punishment ‘cannot be right unless it is for a bad [wrongful] act’⁸² rather than for an act with unfortunate, but unintended consequences. Punishment gives wrongdoers what they deserve by attributing blame and suffering in proportion to the wrongfulness of their actions. However, wrongfulness is not to be measured according to the *amount* of harm caused, but the *degree* of intent to harm

⁷⁹ As Heller explains, the introduction of utilitarian principles of punishment ‘was accompanied by great humanitarian concern for the criminals’, suggesting a fairly natural alliance between the two normative doctrines, *Beyond Justice*, op.cit: 159.

⁸⁰ The debate between Kantian retributionists and Benthamite utilitarians is a long-standing debate which has increasingly sought a degree of reconciliation and compromise between the two opposing perspectives. Key contributions include: A.C. Ewing, ‘Punishment as a Moral Agency: An Attempt to Reconcile the Retributive and the Utilitarian View’, *Mind*, New Series, Vol. 36, No. 143 (July 1927) pp. 292-303: 292 <http://www.jstor.org>; R. E. Gahringer, ‘Punishment and Responsibility’, *The Journal of Philosophy*. Vol. 66, No. 10 (May 22, 1969) pp. 291-306; D. J. Crossley, ‘Bradley’s Utilitarian Theory of Punishment’, *Ethics*, Vol. 86, No. 3 (April 1976), 200-213 and R. Burgh, ‘Guilt, punishment and desert’ in Ferdinand Schoeman (ed) *Responsibility, Character and the Emotions*, Cambridge University Press, New York (1987).

⁸¹ Christopher Slobogin, ‘The Civilization of the Criminal Law’, *Vanderbilt Law Review*; Jan 2005; 58, 1 pp. 118-168.

⁸² Ewing, ‘Punishment as a moral agency’, op.cit: 295.

or to risk harm.⁸³ This critical distinction in the criminal law ensures that people are treated and judged as responsible moral agents with the capacity to make good, and bad, right and wrong choices, and not as the hapless victims or benefactors of circumstance. Indeed, the retributive principle regards human freedom – in the Kantian sense of autonomous, moral existence – as the ‘supreme universal value’, to be valued above life in the material sense.⁸⁴

According to the retributionist, no person can be justly punished for that which they did not mean to do, or had no choice but to do, nor for that which they have not yet done but might be expected to do, based on prior behaviour. Retribution also rules out the excessive punishment of the guilty – ‘people should never be punished more than they deserve’⁸⁵ – while not expecting ‘imperfect agents’ to behave heroically or infallibly by risking their own lives or the lives of loved ones. Moral agents cannot be justly held to a standard of behaviour that forbids mistakes, such as might be made when calculating the risk of harm warranting defensive force.⁸⁶ In this way, just deserts in punishment is that which fits the precise *degree* of criminal guilt and culpability to restore small or large imbalances in the moral order. Thus, the retributive principle underpins the distinction between full and partial criminal defences for crimes that result in the same material harm, such as the death of a person. The principle delivers the critical distinctions upheld by the criminal law between murder (unjustified and inexcusable killing), manslaughter (unjustified but partly excusable killing), and self-defence (justified killing).

In seeking moral coherence by distributing punishments in accordance with the principle of just deserts, the retributionist is clearly distinguished from the utilitarian who essentially tries to side-step moral questions by looking ahead to the future to determine

⁸³ Stephen Morse, ‘Reason, results and criminal responsibility’, *University of Illinois Law Review*, Vol. 2004, No. 2 pp.363-442, expounds at length this critical and controversial distinction challenged by those who argue that harmful *results* are relevant to calculations of criminal desert.

⁸⁴ Heller, *Beyond Justice*, op.cit: 161-162, interpreting the views of Kant and Hegel. According to Kant, ‘Punishment can never serve merely as a means to further another good either for the offender himself or for society, but must always be inflicted simply and solely because he has done wrong’, quoted in Ewing, ‘Punishment as a Moral Agency’, op.cit: 292.

⁸⁵ Ibid: 385.

⁸⁶ Ibid: 406-407. The right not to be subjected to ‘disproportionately severe treatment or punishment’ (BORA II s9) could be defended on retributive grounds.

the appropriate punishment based on projected goods; namely, the prevention of future harms. In place of the retributionist's 'backward-looking' approach, which says to the offender: 'You have done wrong and deserve to be punished', the 'forward-looking' approach of the utilitarian, says to the offender: 'You have done something harmful, which you must not let happen again'.⁸⁷

In the early nineteenth-century, Jeremy Bentham, the founder of the utilitarian doctrine, established the principle that 'general prevention ought to be the chief end of punishment, as it is its real justification'.⁸⁸ Cesare Beccaria later elaborated the utilitarian rationale for punishment, incorporating the humanitarian sentiment that punishment should not entail suffering. He wrote:

[T]he purpose of punishment is neither to torment and afflict a sensitive being, nor to undo a crime already committed...The purpose can only be to prevent the criminal from inflicting new injuries on citizens and to deter others from similar acts.⁸⁹

Utilitarians (and humanitarians) arrive at this very different approach to 'punishment' – technically an approach that does not actually entail punishment⁹⁰ – by regarding life as the supreme value and the only 'essential property' of the person. All other values, including freedom and justice, are secondary, because 'accidental'.⁹¹ From this starting place, utilitarians argue that suffering, deliberately inflicted for no other social purpose or utility, is both cruel and pointless. Moreover, not only does retribution serve no social purpose, but, according to the utilitarian, it fuels resentment and vengeance in the

⁸⁷ Slobogin, 'The Civilization of the Criminal Law', op.cit: 132-133.

⁸⁸ Bentham, 'Principles of penal law', in John Bowring (executor) *The Works of Jeremy Bentham* Edinburgh, William Tait Publishing, 1843: 396.

⁸⁹ *On Crimes and Punishments* (1963) quoted in Heller, *Beyond Justice*, op.cit: 158. Foucault provides a particularly illuminating critical appraisal of Beccaria's influential ideas on punishment in his chapter: 'The gentle way in punishment': 104-131, *Discipline & Punish*, op.cit.

⁹⁰ 'Punishment' by definition requires moral condemnation and the infliction of suffering for a *past* wrong. To punish is 'to cause (a person) to undergo pain, loss, or suffering for a crime or wrongdoing', which forward-looking preventative measures do not do. See Paul H. Robinson, 'Punishing dangerousness: Cloaking preventative detention as criminal justice', *Harvard Law Review*. Vol. 114, March 2001, No. 5 pp. 1429-1456: 1432, quoting Webster's definition of 'punishment'.

⁹¹ Heller, *Beyond Justice*, op.cit: 161.

community so that ‘everybody loses’, except those who ‘get pleasure and a feeling of virtue from seeing others suffer.’⁹²

By focusing instead on the *utility* of punishment, utilitarians seek a more constructive, less condemnatory alternative that de-emphasises its blame-laying function, considered an ‘untenable relic of a less enlightened era’.⁹³ Utilitarians argue that we are unable to accurately calculate degrees of blame given so many indeterminable variables affecting different individuals’ self-control and choices. Thus:

It is impossible to ascertain the degree of moral badness implied in any crime...[and] equally impossible to ascertain the amount of suffering that a given penalty will bring to a man without intimate knowledge of his nature; and [even]...if we could know, we should still have no means whatever of determining the degree of pain which a given degree of moral badness deserved.⁹⁴

The modern reliance on imprisonment as the chief form of punishment tends to reinforce the utilitarian argument. As one critic put it, imprisonment is ‘in a deep sense not commensurate with blame’; the deprivation of freedom to *repay* crimes of rape and killing is ‘a gigantic moral non sequitur’.⁹⁵ According to this critic, the utilitarian focus on prevention (deterrence and reform), not only avoids controversial normative claims, but relies on less dubious science.⁹⁶ The principle of utility determines appropriate punishments in individual cases and in law based on the empirically verifiable measure of what works, and what is likely to work best to achieve the comparatively uncontroversial

⁹² Ibid: 41 fn. 38, quoting Armstrong (1961).

⁹³ Kyron Huigens, ‘Dignity and desert in punishment theory’, *Harvard Journal of Law and Public Policy*; Fall 2003; 27.1, pp. 33-49: 41.

⁹⁴ Ewing, ‘Punishment as a Moral Agency’, op.cit: 293.

⁹⁵ Slobogin, ‘The Civilization of the Criminal Law’, op.cit: 147.

⁹⁶ Ibid. Foucault implies agreement with this critique when he argues that the modern ‘diagnostic’ approach to the determination of criminal guilt relies upon ‘a strange scientifico-juridical complex’ that demands answers to a range of questions in place of the previous ‘simple assertion of guilt’. He says questions like: ‘What is this act of violence or murder? To what level of reality does it belong? What is the role of instinct, consciousness, environment [and] heredity?’ can never have simple or clear answers to, or proportionate punishments devised for. *Discipline & Punish*, op.cit: 18-19.

goals of an integrated, efficient and minimally punitive system of harm prevention and community-centred rehabilitation.⁹⁷

On the other hand, as Heller points out, utilitarian measures are less than scientifically grounded, given the inherent reliance on ‘guesswork’ involved in calculating the future effects of particular punishments; crime prevention and rehabilitation measures.⁹⁸ Whereas desert-based calculations stipulate the priority of reasons and principles justifying particular punishments, ‘punishing’ past crimes for the sake of preventing future crimes or for the sake of achieving future goals, leaves much to the individual practitioner to decide how and why the various, often conflicting priorities are to be effectively combined. Indeed, critics of the utilitarian approach to punishment argue that without guidance from the retributive principle, decision makers are afforded ‘uncontrolled and undisclosed discretion’ to be selective about the purpose and severity of the punishment imposed, and given considerable scope to choose the purpose ‘that justifies the result he or she prefers for whatever reason’.⁹⁹ In this way the utilitarian approach effectively ‘cloaks preventative detention as criminal justice’.¹⁰⁰ By imposing measures that allow power to masquerade as principle, this deceptively challenging and controversial response to crime has facilitated the growth of ‘an enormous state apparatus’ of crime control, promoting law and order for its own sake, and increasingly moving the institution of punishment away from valuing human dignity and justice.¹⁰¹ Furthermore, the fundamental confusion of punishment and prevention under this model, not only ‘perverts the justice process’ by combining two, profoundly different purposes, but in the long run, it undermines the system’s capacity to control crime.¹⁰² Indeed, the research on the effectiveness of prevention, deterrence, and rehabilitation measures designed to reduce crime, tends to support this claim.¹⁰³

⁹⁷ Slobogin, ‘The Civilization of the Criminal Law’, op.cit: 147-148.

⁹⁸ *Beyond Justice*, op.cit: 166.

⁹⁹ Paul H. Robinson, ‘Criminal law Scholarship: Three Illusions’, *Theoretical Inquiries in Law*; Jan 2001; Vol. 2, No. 1, Article 10, pp. 1-36: 8.

¹⁰⁰ Robinson, ‘Punishing dangerousness’, op.cit: 1432.

¹⁰¹ Huigens, ‘Dignity and desert’, op.cit: 33.

¹⁰² Robinson, ‘Punishing dangerousness’, op.cit: 1432.

¹⁰³ The numerous studies undertaken in the US on the effectiveness of criminal rehabilitation since the ‘rehabilitation movement’ began in the 1950s (over two hundred studies involving hundreds of thousands of individuals), established by the mid-1970s that our capacity to effectively rehabilitate criminals was

The ‘humanitarian’ rationalisation that underpins the present anti-retributive approach to punishment,¹⁰⁴ has provided an additional complicating ‘purpose’ to be considered by decision makers when determining appropriate punishment/treatment, without providing any clear guidelines as to the substantive principle involved, or the order of priority to be assigned to this purpose and principle.¹⁰⁵ If the commitment to show ‘humanity’ in general is defined as ‘a disposition to treat human beings and animals with consideration and compassion and to relieve their distresses [through] kindness [and] benevolence’,¹⁰⁶ then it would seem to be a much broader and less determinate measure than the commitment to the principle of just deserts. Suggesting a degree of sacrifice and compromise involved in terms of the achievement of other goals and principles of punishment, the directive to show compassion and ‘humanity’ provides ‘no firm criterion for the *amount* of sacrifice required’ for decision makers to determine ‘where the line is to be drawn’.¹⁰⁷ For these reasons, critics argue that ‘sensible talk about humanity’ as well as utilitarian measures, depends on a ‘baseline set by justice’.¹⁰⁸ In the criminal justice context this means that the law and those charged with applying it ought to ‘consider deterrence, reform and prevention as modifiers of the [judgment] determined by the principles of justice, and not the other way round’.¹⁰⁹

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extremely limited with the research giving us ‘very little reason to hope’ that rehabilitation provides ‘a sure way’ of reducing crime. Robert Martinson, *What Works? – Questions and Answers About Prison Reform* (1974), quoted in Robinson, *ibid*: 1449. Evidence of the effectiveness of deterrence-based sentencing remains inconclusive. Much of the research in this area studies the deterrent effect of the death penalty in the thirty-five US jurisdictions where capital punishment is imposed for certain crimes. This research shows ‘no convincing empirical evidence either supporting or refuting’ its effectiveness as a deterrent. See Solomon and Murphy, *What is Justice?* *op.cit*: 269.

¹⁰⁴ The humanitarian commitment to relieve suffering and the utilitarian commitment to maximize collective happiness, tend to converge in support of a ‘non-retributive’ approach to punishment that gives emphasis to the value of ‘life’ over freedom. See Heller, *Beyond Justice*, *op.cit*: 159, highlighting the coincidence of humanitarian and utilitarian values in Beccaria’s approach to crime and punishment.

¹⁰⁵ Foucault, *Discipline & Punish*, *op.cit*. Foucault argues that ‘the lyrical insistence that... punishment must have “humanity” as its measure [has arisen] without any definitive meaning being given to this principle’: 74-75.

¹⁰⁶ Brian Barry, *Democracy, Power and Justice*. Clarendon Press, Oxford, 1989: 434, quoting the definition of ‘humanity’ given in the *Oxford English Dictionary*.

¹⁰⁷ *Ibid*: 439, emphasis added.

¹⁰⁸ *Ibid*: 461.

¹⁰⁹ *Ibid*: 282.

The strength of the arguments presented on both sides of this debate can be further illuminated and tested in a concrete context, such as that outlined in the wider case study. Furthermore, the debate at the level of principle suggests a challenge to Kaufmann's sweeping dismissal of the 'just deserts' principle as a pointless measure that delivers no clear guidelines for determining an appropriate distribution of rewards and punishments. Given the need for some form of regulated public response to crime (and virtue), the measures proposed by Kaufmann and other justice sceptics,¹¹⁰ fail to provide a convincing alternative with substantially clearer, more determinate principles than those provided by justice. Moreover, these alternative measures of utility and humanity serve to complicate and confuse the various challenges involved in treating offenders in an open and consistent manner, while masking the exercise of power and injustice. Reflection on this critical debate in the context of the wider case study helps to further illuminate the limits and scope of the principles of justice in context, while highlighting the particular challenges involved in delivering substantive justice to battered women defendants.

'Just deserts' for the perpetrators and victims of domestic violence:
punishment versus prevention

The criminal justice system should be used for her safety, for his rehabilitation, and for justice despite its problems.

Paula Barata, 2007¹¹¹

As explained in the foregoing discussion, the principle of just deserts directs us to focus on moral culpability and defines this as a relative concept which measures *degrees* of moral responsibility and irresponsibility, praiseworthiness and blameworthiness, and seeks an equilibrium or balance where and whenever the moral order is deemed to be

¹¹⁰ Kaufmann advocates replacing the commitment to justice (in rewards and punishments) with a commitment to 'decency and humanity', among other more pragmatic (utilitarian) values. 'Doubts about Justice', op.cit: 67.

¹¹¹ 'Abused women's perspectives on the criminal justice system's response to domestic violence', *Psychology of Women Quarterly*, 31, pp. 202-215: 202.

thrust out of balance. So defined, the commitment to just deserts in punishment has very little to do with the various other objectives underpinning the modern criminal justice systems currently operating in countries like New Zealand; namely crime prevention and community safety, criminal deterrence and rehabilitation. Indeed, proponents of the just deserts principle consider the moral desert of an offender ‘*sufficient* reason to punish him or her’, and maintain that these other reasons ought not to be a part of the *justification* for punishing at all, being ‘starkly’ different from just deserts,¹¹² and in principle, having nothing to do with *justice*.¹¹³

Indeed it could be argued that just deserts is the only principle that demands reflection on the substantive reasons for the practice of punishment altogether, whereas the other principles tend to take the purpose and value of punishment (or rather, crime prevention) for granted, assuming that the occurrence of criminal behaviour justifies the need to control it. As a key aim of the thesis in general is to clarify the commitment to justice in context, especially to identify conflicts between the fulfilment of this commitment and other commitments that are most easily confused with it, it remains critical to distinguish and keep separate the various elements of the ‘criminal justice’ response, while not taking any aspect of this response for granted, least of all the response to domestic violence. Arguably, in societies like New Zealand this response has been insufficiently principled and as a result, our conviction to combat domestic violence; to understand its causes, to punish its perpetrators and to protect its victims, has wavered. Considering our long-standing tradition of dismissing domestic violence (wife abuse) as a private matter, too trivial and personal to be taken seriously by the criminal justice sector, our recent criminalisation of the problem can be seen as a relatively sudden and reactive change of heart, lacking the necessary reflection on the complex injustices involved. As one commentator noted with concern as early as 1982:

Feminists were the first to analyse violence against women as part of the power dynamics operating between men and women in a sexist society...Professionals

¹¹² Michael S. Moore, ‘The moral worth of retribution’, in Schoeman (ed.), *Responsibility*, op.cit: 179-181. Emphasis in the original.

¹¹³ Heller, *Beyond Justice*, op.cit: 156-179.

then moved in to claim violence as a mental health or criminal justice problem. The political analysis disappeared, was changed or was considered beyond the scope of professional concern.¹¹⁴

As seen in the New Zealand example, this heightened ‘criminal justice’ response involved a significant number and range of strategies introduced over a ten to twenty year period. These included the policy of ‘mandatory arrest’ (1987), the battered woman syndrome (1990), court-imposed stopping violence programmes for offenders, non-notice protection orders (1995), and various long-term, ‘all-of-government’ programmes committed to domestic violence awareness and prevention.¹¹⁵ Although these and other measures marked a dramatic increase in the political commitment to do *something* about domestic violence, what this was in terms of the principles involved, in particular in terms of the commitment to justice, was far from clear, and as a result the overall strategy substantially failed to improve battered women’s access to *justice*, while doing little to reduce the incidence of domestic violence.¹¹⁶ Indeed, some research has shown that aspects of the expanded criminal justice response have made matters worse for battered women by ‘disempowering’ victims and exacerbating the risk of violence for some women.¹¹⁷ Moreover, in spite of the various reforms implemented in recent years, in many respects the perpetrators of domestic violence continue to be more successful in appealing to the discourse of justice and rights than its victims.¹¹⁸

¹¹⁴ Carol Lee Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (Sage Publications, London 1999): 165, quoting A. Schechter (1982).

¹¹⁵ See Chapter Two for an outline of the various strategies and programmes implemented in New Zealand between 1987 and 2007.

¹¹⁶ For a general, critical discussion of the criminal justice response to domestic violence, see Joanne C. Minaker, ‘Evaluating Criminal Justice Responses to Intimate Abuse through the Lens of Women’s Needs’, *CJWL/RFD*, Vol. 13, 2001 pp. 74-106: 76-77.

¹¹⁷ The public-legal response to BWS provides a case in point. See Paula C. Barata and Frank Schneider, ‘Battered women add their voices to the debate about the merits of mandatory arrest’, *Women’s Studies Quarterly*, Fall 2004; 32, 3/4 pp. 148-163, for a useful review of the controversy surrounding the policy of mandatory arrest. In NZ various agencies including Women’s Refuge have reported that in recent years some male batterers have been facilitated by the justice system to ‘extend their control and to punish women, emotionally and financially’, even giving them the opportunity to cross-examine their victim in court. See Hann, ‘Implementation’, op.cit: 12.

¹¹⁸ The joint NGO submission to the ‘Open hearing into the prevention of violence against women and children’ raised concern about this issue in claiming that the Family Court was ‘increasingly seen to be overriding the safety of women and children in favour of “men’s rights”’. NZPPD, *Creating a Culture of Non-Violence*, op.cit: 21.

While there are various reasons for this ongoing gender disparity, the wider case study highlights as a definitive factor, the lack of co-ordinated leadership from the justice sector, especially the Ministry of Justice, in the response to domestic violence. This lack of leadership could in turn be attributed to the focus placed on utilitarian measures, which fail to provide a governing principle or purpose for the response to crime, and which allow and facilitate a discretionary approach that is insufficient to fulfil a substantive commitment to justice in contexts of domestic violence. If the strategy instead was designed to uphold the principle of justice, or ‘just deserts’, it would require judges and others within the criminal justice sector to focus on wrongdoing; to reflect on the degree of trust abused and emphasise the moral importance of condemning the offence by ensuring the offender is held accountable for the full extent of the injustice perpetrated. This approach overall would effectively treat victim protection ‘as a useful side-effect’, rather than see protection as the reason for or chief purpose of legislation and policy in the domestic violence field.¹¹⁹ Similarly, by deploying the moral authority and persuasive power of the criminal law ‘to label as morally condemnable conduct that was not previously seen as such’, significant punishments for domestic abusers could have beneficial prevention effects.¹²⁰

As highlighted in the broader case study, the authority and power of the criminal law has not only failed to condemn domestic violence, but has been used to shield batterers from the full force of the law, indeed to deflect blame from perpetrators onto victims, especially through the law of provocation. Admittedly the law of provocation upholds the principle of ‘just deserts’, and in application in cases involving domestic violence has revealed a key weakness of this principle in practice; namely, its facilitation and reinforcement of moral prejudice. That is, the moral scaling of virtues underpinning the concept of ‘desert’ and defining the ideal moral order by which the benefits and burdens of our social existence are to be justly distributed and redistributed, risks importing the prejudices of the dominant cultural group wherever the principle is applied. Because just deserts takes account of the *character* of the person to determine what

¹¹⁹ Robinson, ‘Criminal law scholarship’, op.cit: 29-30.

¹²⁰ Robinson, ‘Punishing dangerousness’, op.cit: 1443.

rewards/punishments he or she deserves by measuring ‘the kind of person’ he or she is,¹²¹ it is susceptible to serious distortions based on stereotypical notions of a person’s generic or group ‘character’. In contexts of domestic violence, judgments of women’s ‘character’ are particularly susceptible to distortions via patriarchal prejudices and stereotypes which perceive women as deviant and provocative. Because ‘desert’ distributes blame and praise, approval and disapproval, judgments in its name are susceptible to systematic distortion according to the patriarchal predisposition to find fault with and blame women, particularly when perceived as a threat to men, and, conversely, to mythologise man, particularly by protecting him from such perceived threats.

As seen in the wider case study, the concept applied in a patriarchal society has even suggested that women, essentially by virtue of being women, *deserve* violent mistreatment and punishment by their husbands, and by the law. Meanwhile, ‘desert’ has been shamefully silent in defence of the victims of domestic violence and at times has facilitated an open resistance to accepting that a battered woman might be ‘owed...a righting of the wrong which has been done to her’.¹²² However, this ‘righting’ is precisely the kind of moral balancing that the principle of just deserts should and could insist upon if applied beyond the prejudice that women deserve less and men deserve more of the moral good. Indeed a commitment to justice that seeks to balance the benefits and burdens of our collective existence by placing importance on human responsibility and demanding that any social debt incurred by morally irresponsible and blameworthy behaviour be repaid, suggests itself as a potentially powerful principle in contexts of domestic violence. When this context is properly understood it reveals a profoundly unbalanced distribution of benefits and burdens between the abuser and the victim, and a total lack of moral responsibility shown by the abuser.¹²³

¹²¹ Fletcher states that ‘a judgment about character is essential to the just distribution of punishment’. *Rethinking Criminal Law*, 1978, quoted in Jody Armour, ‘Just deserts: Narrative, perspective, choice, and blame’ pp. 525-548, *Symposium*, op.cit: 529.

¹²² Marilyn Friedman, ‘Beyond caring: the de-moralization of gender’ in Mary Jeanne Larrabee (ed.), *An Ethic of Care: Feminist interdisciplinary perspectives* (Routledge, New York, 1993): 265.

¹²³ Recall Oakes’ testimony that Gardner: ‘did as he liked when he liked, took what he wanted, came and went when it suited him, but I could do hardly anything without his permission’. *Decline into darkness*, op.cit: 154. See Appendix.

The concept and principle of 'just deserts' provides a language suitable for challenging the unequal relationship between the victims and perpetrators of domestic violence over and above the physical and psychological harms resulting. In this way, 'just deserts' in response to domestic violence could hold perpetrators to account in order to redress the lowered status of the victim relative to the offender, and to 'reaffirm the victim's equal worth' in a judgment that 'symbolizes the correct relative value of wrongdoer and victim'.¹²⁴ However, according to proponents of the recently popularised 'restorative justice' model, the traditional institutions and punishments of the 'criminal justice system', not least of all their retributive aspect, are decidedly incompatible with any kind of victim 'reaffirmation'. Instead, 'restorative justice' defends a non-retributive process of value restoration through negotiation, conciliation and consensus building between offender and victim, rather than through the punishment and condemnation of wrongdoers.

Whereas punishment proper can be said to involve a competitive and antagonistic process between victim and offender in which the victim's status is reasserted by the degradation of the offender, a restorative process suggests a more cooperative rebalancing of the unequal status between victim and offender. Thus, restoration seeks to 'heal' the relationship between the parties by 'promoting understanding and consensus through dialogue, voice and mutual respect, apology and forgiveness'.¹²⁵ This healing process depends centrally on the offender accepting moral responsibility for his/her wrongdoing and 'endorsing the values' violated by his/her offence, which in turn requires the offender to 'be made to understand' these values and taught his/her responsibilities towards them.¹²⁶ The desired end result of the process is for any restitution or 'punishment' imposed on the offender to be a negotiated agreement between the parties rather than an

¹²⁴ Jean Hampton, 'The Retributive Idea' in Murphy and Hampton, *Forgiveness and Mercy*, op.cit: 125-126.

¹²⁵ Michael Wenzel and Ines Thielmann, 'Why we punish in the name of justice: just deserts versus value restoration and the role of social identity', *Social Justice Research*, Vol. 19, No. 4, December 2006 pp. 450-470: 451-452.

¹²⁶ *Ibid*: 455-456.

exercise in blame-laying or condemnation.¹²⁷ The agreement is to be facilitated by a neutral mediator.

As socially progressive as the restorative justice model seems, there is something of a poignant irony in the fact that just as domestic violence is beginning to be recognised as a serious criminal offence the criminal justice sector is pulling back from the desire to ‘punish’, in the sense of imposed suffering and condemnation for wrongdoing, and adopting a more conciliatory approach committed to the avoidance of blame and the pursuit of ‘consensus’ through compromise. Although the model suggests progress in the direction of taking victims seriously by acknowledging their suffering in a more direct and meaningful way than the ‘criminal justice system’ has been able or willing to in the past,¹²⁸ what it achieves for victims in this direction it seems to take away elsewhere by expecting their forgiveness, cooperation and readiness to compromise.

In the context of domestic violence, the limitations of this approach are rather obvious, although some have suggested the potential of the model applied in this context.¹²⁹ In practice, concerns have been raised about the appropriateness, safety and justice of asking battered victims to enter into negotiations with their abusers. Essentially these are the same concerns that have long been raised about the formal justice system; namely, the minimisation of the violence as a ‘relationship problem’, rather than a crime, and the consequent ‘muting [of] the perpetrator’s responsibility’ for ‘the conflict’, the abuser’s ability to use the process to further intimidate the victim and her fear of retaliation, which undermines her ability to participate freely in the process. As well, the prejudices of the mediators involved, who, even with appropriate training, cannot be expected to be ‘immune from the minimising, trivialising and victim-blaming attitudes towards battered

¹²⁷ One of the principles of restorative justice is the avoidance of ‘scolding or lecturing’, another is to see ‘conflict’ (crime) as an ‘opportunity for learning’ (Braithwaite and Strang, *Restorative Justice*, op.cit: 12).

¹²⁸ Research throughout western countries has shown that the vast majority of victims forced to engage with the various agents of the criminal justice system report feeling ‘angry and bewildered’ by the experience and being given the sense that no one cares or is prepared to take responsibility for helping them, *ibid*: 72.

¹²⁹ See the studies referred to in Stephen Hooper and Ruth Busch, ‘Domestic violence and restorative justice initiatives: the risks of a new panacea’,

www.waikato.ac.nz/law/wlr/special_1996/4_hooperbusch.html (Accessed 14/11/2006): notes 5, 6 and 7.

women which are so commonly found in...discourses about domestic violence'.¹³⁰ Ultimately, the emphasis on participation, cooperation and conciliation can come at the expense of a focus on victims' needs and rights.¹³¹ In terms of its affect on the wider commitment to 'criminal justice', the incorporation of restorative justice processes and values adds an additional complexity of purpose and principle to a commitment that is already too fragmented and conflicted to deliver consistency of judgment between cases. A commitment focused instead on offender accountability and 'just deserts' as the primary, governing principle of the 'criminal justice' response to domestic violence, could reduce the inconsistencies and discretionary judgements that arise when too many agents, purposes and principles are relied upon to deliver justice.

In my view, the suggestion that we 'segregate' the commitment to *justice* in punishment from the various other commitments too often made in its name, but which actually uphold values distinct from and potentially in conflict with justice,¹³² makes a lot of sense in the domestic violence context. Much of the discussion so far points to a systemic failure to measure the distinct wrongs associated with domestic violence (wife abuse), and a tendency instead to lump wife abuse with other forms of abuse, while judging the wrongs it perpetrates as less significant than those associated with other violent crimes. This not only denies justice to battered women but signifies a failure to reflect on the injustice that is domestic violence, which in turn suggests a failure to develop a coherent justice response that weighs the relative moral injustices of every type of crime and delivers proportionate punishments accordingly. Such a moral scaling would 'segregate' the commitment to justice in punishment from other commitments upheld by the criminal justice system, making decision makers in the system more accountable to principle and less likely to indulge their personal prejudices. As Robinson argues, the segregation of punishment and prevention provides 'a more open and honest alternative to the present integrated approach'.¹³³

¹³⁰ Ibid: 3-4.

¹³¹ Ibid: 7. Other serious problems encountered include the mediators feeling intimidated by abusers and worrying for their own safety and the process serving to re-privatize domestic violence by 'operating under a mantle of confidentiality' where there is no accountability to the wider community (8-9).

¹³² Robinson, 'Punishing dangerousness', op.cit: 1432.

¹³³ Ibid.

The need for the criminal law to conceptualise and appropriately punish wife abuse remains particularly pressing in cases of domestic homicide where the concept of ‘provocation’ has created a systematic distortion in the distribution of blame and calculations of responsibility involved. This distortion has even generated longer sentences for some victims of domestic violence who kill their abuser than the perpetrators of abuse who eventually kill their victim.¹³⁴ This distortion not only reflects the inherent difficulties and limitations of the law of provocation,¹³⁵ but as argued elsewhere in this thesis, the law’s application in these cases reflects entrenched prejudices and persistent misunderstandings surrounding domestic violence that influence their adjudication *in spite of* the essentially sound principle underpinning the law – a version of the just deserts principle. This principle upholds the moral intuition that killing in anger when one has ‘good reason for being angry in virtue of some wrong or impropriety suffered at the victim’s hands’, is less bad and blameworthy than killing in cold-blood.¹³⁶ However, the critical substance of this principle has not been upheld in most of the cases where domestic abusers have successfully claimed provocation. To uphold the principle of justice underpinning the law of provocation, the agent’s anger must only be considered relevant and persuasive when – and in so far as – it ‘testifies to the soundness, not to the deficiency, of his [or her] moral judgment’.¹³⁷ In cases like *Minnitt*, where the law was clearly used in defence of the fragile male ego – surely a moral deficiency rather than a strength – the principle of just deserts was systematically denied.

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¹³⁴ Several NZ cases have been highlighted for comparison in Chapter Three.

¹³⁵ These problems were considered at some length by the NZ Law Commission, which recommended abolishing the defence. See *Battered Defendants*, op.cit: 30-33 and *Some Criminal Defences*, op.cit: 31-42. See also Chapter Two.

¹³⁶ A. von Hirsch and N. Jareborg, ‘Provocation and Culpability’, in Schoeman (ed), *Responsibility*, op.cit: 248-250.

¹³⁷ Ibid: 251. Technically, the law of provocation, which is recognized in New Zealand under s169 of the Crimes Act, no longer requires the provocative conduct to be ‘wrongful’ or ‘offensive’; though it once did. However, while the law allows ‘that lawful conduct may be provocation’; under s169 (5), there is an ‘express’ provision that ‘the lawful exercise of any ‘power conferred by law’ cannot ‘suffice’ for provocation. Simester and Brookbanks, *Principles of Criminal Law*, op.cit: 517-518.

The principle of just deserts can only determine the *relative* degree and proportionate amount of punishment deserved for particular crimes in relation to other crimes and in relation to the specific moral norms and values recognised in the particular society beyond the broad values of freedom and human responsibility. These specific values will determine the overall form and severity, quality and quantity of punishment and fix the extremes of penalties warranted for those offences deemed least and most blameworthy. For example, although the retributive principle is often said to provide a justification of capital punishment for murder in the first degree, the principle does not require this extreme form of punishment and some say, is not consistent with it.¹³⁸ Indeed, the philosopher Agnes Heller argues that ‘the abolition of the death penalty does not contradict the logic of retribution, but rather follows from it’.¹³⁹

So the values consulted in the process of interpreting the principles of justice inevitably and legitimately shape their practical application. The point is to ensure consistency and transparency of interpretation, a process not helped when confusion and deception surrounds the various motives underpinning discretionary judgments made in and through the law. Similarly, at the other end of the moral spectrum, establishing a ‘criminal justice’ response to crimes of ‘mercy’, including ‘mercy killing’, is a question for the particular society to decide at the political level, rather than deduce from principles of justice. Justice requires only that any ‘humanitarianism’ introduced into the ‘criminal justice’ system, be capable of a degree of systematisation so that its distribution does not depend on the ‘humanitarianism’ of the presiding judge or law maker. The degree of public commitment to these values, as well as other, more punitive, values along with basic

¹³⁸ The claim that just deserts in punishment demands ‘a life for a life’, which only the death penalty fulfils, is challenged on various grounds of principle, the most convincing of which emphasise the moral disproportion between criminal murder and state sanctioned murder, which is either ‘too deliberate and monstrous’, or in some cases, not sufficiently ‘horrible’ to achieve a moral equivalence between crime and punishment. Hugo Bedau, ‘Capital Punishment Redistributive Justice’ in Solomon and Murphy (eds.), *What is Justice?*, op.cit: 276-277.

¹³⁹ *Beyond Justice*, op.cit: 162. Heller’s complicated argument in defence of this point includes the claim that proof ‘beyond reasonable doubt’ is not rigorous enough to support the principle of retribution which forbids the punishment of the innocent above all else. She considers, however, that ‘crimes against humanity’ are exceptions to this rule and required by the principle of retribution because the offender’s guilt is ‘absolute and incontestable’ (162-163).

utilitarian notions of ‘community safety’ and ‘non-violence’, will significantly influence and vary the distribution of ‘just deserts’ in any particular society.¹⁴⁰

This consistent moral scaling and distribution of blame across such a wide variety of harms perpetrated is far from a straightforward task. In the case of domestic violence, its sheer prevalence – roughly one-third of the community, according to some estimates – and the overrepresentation of indigenous and minority persons among offenders (and victims),¹⁴¹ present certain practical, even ethical, obstacles to punishment that do not arise in other criminal justice contexts. No society would welcome the prospect of having up to one-third of its population of men, mostly young, racially marginalised and oppressed men, incarcerated at any one time. Certainly, such a response seems less than desirable by any standard and a long way from a ‘solution’ to the problem. Clearly, prevention and rehabilitation measures are preferable to punishment in many respects, and remain essential components of a concerted commitment to addressing the problem of domestic violence. However, it is equally clear that the failure to punish domestic abusers in the past has substantially contributed to the perpetuation of the problem. Moreover the need to challenge still widespread perceptions of domestic violence as a trivial, relationship problem, and the victim-blaming that invariably goes with this dismissal, reinforces the importance of punishing domestic abusers and, in the process, of sending clear messages to the community about moral responsibility. Most importantly, punishing domestic tyrants is required by justice; no other utilitarian or humanitarian compromise can ever fulfil this requirement. As all measures undertaken in the domestic violence field remain experimental in terms of their practical effectiveness, the commitment to deliver ‘just deserts’ in this context at least ensures that these measures are underpinned by a substantive commitment to principle.

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¹⁴⁰ The principle of equal consent could place constraints on these determinations.

¹⁴¹ In New Zealand domestic violence comprises roughly 40% of all reported violence. Maori and Pacific islanders are four times as likely as other groups to be convicted of domestic assault charges and over half of the women and children using women’s refuges are Maori. See Newbold, *Crime in New Zealand*, op.cit: 265.

In the next and final section of the chapter the principle of just deserts is considered in the adjudication and punishment of battered women defendants. In these cases involving defendants who are the victims of crimes ‘frequently more heinous than the one [they] have committed’,¹⁴² the moral calculus of ‘just deserts’ is substantially more complicated than in most other types of killings. From a wider critical perspective, these cases force us to question society’s moral authority to judge and condemn those whose criminal actions stem from a cultural victimisation and injustice that we, as members of the same society, must share some responsibility for. And in sharing this responsibility, we should admit that we cannot hold these offenders fully responsible for their actions and must accept ‘a lower standard of judgment’.¹⁴³ If it is true that ‘most criminal offences are now committed under social constraints’ of one kind or another,¹⁴⁴ then from a moral point of view, criminal offending could be seen as ‘restoring, not upsetting, the balance of benefits and burdens’.¹⁴⁵

No criminal cases bring this difficult and defining justice challenge to light more directly and comprehensively than cases like *Oakes*.

‘Just deserts’ for battered women defendants

It cannot be morally objectionable for the individual who has intentionally and unilaterally created [such] risks to find himself at risk [because] this dreadful state...is the residue of his own acts, his will, his purpose...

Jane Maslow Cohen, 1996¹⁴⁶

¹⁴² Elisabeth McDonald, ‘Women offenders and compulsion’, *NZ Law Journal*, November 1997, 402-404: 403, quoting Susan Appel, ‘Beyond Self-defence: The Use of Battered Woman Syndrome in Duress Defences’ [1994] *University of Illinois Law Review*, 955: 977-8, referring to battered women who injure or kill their abusers.

¹⁴³ Heller, *Beyond Justice*, op.cit: 172-175.

¹⁴⁴ *ibid*: 175. For Heller the critical social constraints that undermine our moral authority to hold criminal offenders fully responsible include ‘dire poverty, ignorance, education in crime and social discrimination’ (172).

¹⁴⁵ Sadurski, *Giving Desert its Due*, op.cit: 231.

¹⁴⁶ ‘Regimes of Private Tyranny’, op.cit: 793-795.

We need to begin this reflection by assuming the critical premise that moral justice or ‘just deserts’ is not always achieved by punishing those who commit criminal offences. That is, while other principles require the consistent punishment of the guilty, ‘just deserts’ is not one of them.¹⁴⁷ Although the criminal law aims to reflect and uphold the virtues of moral justice – namely, of freedom, human responsibility, an equilibrium in the distribution of social benefits and burdens, ‘fittingness’ and moral coherence – it is challenged in this task by the sense and experience of injustice. This sense and experience is inherently resistant to formalisation and demands that we continue to question who ‘deserves’ our blame and in the process to ask ‘what is and what is not inevitable or necessary’.¹⁴⁸

The sense of injustice is a critical, intuitive and empathetic sensibility historically responsible for identifying the disjuncture between laws supporting slavery, racial discrimination, female subordination and wife abuse, as well as laws that criminalised homosexuality, abortion and so on. As history shows, these laws were also sanctioned by the general moral code. This history confirms that the sense of injustice and the principle of justice which attempts to address it are distinguishable from both law and morality, upholding a higher more demanding standard of virtue.¹⁴⁹ Cohen’s claim that it cannot be morally objectionable for a person, who has intentionally created a ritualised regime of violent domination and tyranny, to face a risk of being killed by the target and victim of that regime, appeals to this higher virtue and principle of justice beyond the prevailing morality and law. As seen in the previous chapter, Cohen develops a compelling case to support her claim that the criminal law should adopt this moral stance and provide a full defence of ‘tyrannicide’ to be available to women like Gay Oakes, as the only way to express ‘our deep condemnation’ of these regimes and to acknowledge their ‘profound wrongness’.¹⁵⁰

¹⁴⁷ From a positivist interpretation of the principle of formal or legal justice, it is always unjust to break the law and just to uphold it. The law can be defended by virtue of the social order it alone can provide, that is, on various utilitarian grounds.

¹⁴⁸ Shklar, *Faces of Injustice*, op.cit: 50-51.

¹⁴⁹ See Hart’s reflections in ‘Justice and Morality’ (*The Concept of Law*, op.cit: 155-184) for an elaboration of the complexities and confusions of the relationship between justice, law and morality.

¹⁵⁰ ‘Regimes of Private Tyranny’, op.cit: 795.

A central purpose and mechanism of the criminal law is to identify, measure, and condemn ‘morally defective’ choices.¹⁵¹ Generally, the law judges the choices of accused persons, but as seen in the law of provocation, the moral quality of the victim’s actions can also be relevant to calculations of criminal culpability and desert. In cases like *Oakes*, the ‘choice’ to kill, or to risk killing, is considered morally defective when, and in so far as, there was an opportunity to make an alternative ‘choice’ – namely to leave, call the police for help or to stay and endure abuse that posed a less than ‘imminent’ danger to life or limb. If we set aside the *practical* difficulties of leaving,¹⁵² and the battered woman’s fear that trying to leave or calling for help might exacerbate the situation and escalate the risk of harm (to her and her children, in many cases), then based on the past history of non-lethal abuse¹⁵³ the woman’s opportunity to make a ‘choice’, other than killing the abuser, can be reasonably deduced in the majority of abusive situations.¹⁵⁴ In reality, though, these considerations cannot be set aside and must be factored into calculations of moral responsibility and blame in cases like *Oakes*. On the other hand, where the threat is clear and imminent, the ‘choice’ to kill is clearly not morally ‘defective’ because, and in so far as, it is intended to ward off a greater wrong, namely the killing of an innocent person – the justification for the law of self-defence.

Taking these considerations into account, accepting the practical difficulties and real fear confronting battered women who contemplate leaving their abusive relationship, as well as the unreliability and limits of police interventions, especially where the battered woman has personal experience of police indifference and ineffectiveness already (as in *Oakes*), laws that do not allow battered women to stay in their own homes and defend themselves against threats of significant harm effectively consign them to live with the

¹⁵¹ Simester and Brookbanks, *Principles of Criminal Law*, op.cit: 9.

¹⁵² Recall that for *Oakes* these difficulties included the fact that it was the middle of the night, she had six children, including a baby whom she could not have left the house without, and no means of transport.

¹⁵³ Sebok makes the point that while we can never accurately predict the risk of future harms, the ‘threshold of probability’ that any claim about future risk of grievous injury must pass to satisfy self-defence, is unlikely to be met in the paradigm domestic abuse situation given the ‘small proportion’ of domestic abuse cases that do end in killing or grievous wounding. ‘Objective theory of self-defence’, op.cit: 746.

¹⁵⁴ This is not to deny *Oakes*’ self-defence case that she was reasonable in fearing death or serious injury to herself and her children on the night and in believing that she had to take the action she took to avert the risk posed by Gardner if she was to guarantee her own survival and that of her children’s otherwise. Nor is it to deny her claim that she acted in a panic without forming the intention to kill.

knowledge that they will be, if not seriously injured or killed, subjected indefinitely to the threat of such harm. In the vast majority of cases that end as *Oakes* and *King* did, the past abuse has at times – if not regularly – inflicted extreme pain, injury and terror such that the fear of this possibility remains an ongoing and apparently inescapable reality in these women’s lives. By denying self-defence in such cases where the battered person kills instead of enduring, leaving or calling for help, the law applies a utilitarian ‘trade-off’ that errs clearly on the side of preserving life (and punishing those who take it) at the cost of imposing a substantial burden of fear on the battered woman. Indeed, this trade-off effectively ‘obliges the innocent party to the criminal interaction to absorb potentially huge psychic (and physical) injuries in favour of preserving the criminal’s life.’¹⁵⁵ In short, by denying self-defence in these cases, the law trades the principle of freedom for life – justice for utility.¹⁵⁶ In a significant number of domestic violence cases this trade-off fails, and a women who has been burdened with this extra risk of harm for the sake of the ‘greater good’ of preserving life in general, loses her life, typically in horrific circumstances involving torture. In simple terms, it could be argued that the utilitarian application of the law of self-defence trades the lives of battered women for the lives of male aggressors.

Anthony Sebok proposes an alternative to this unacceptable moral trade-off. He suggests

We shift our focus away from trying to fit the crime of battery into the conventional “human life” maximising model of self-defence law and ask instead whether the law should promote the life of the batterer above all interests other than the life of the abused spouse.¹⁵⁷

¹⁵⁵ Sebok, *ibid*: 752, referring also to arguments and analysis presented in John Q. La Fond, ‘The case for liberalizing the use of deadly force in self-defence’ (1983).

¹⁵⁶ Justice Robertson explains that in the New Zealand context where the law of self-defence does not formally require an objectively imminent threat of violence, the courts have tended to require ‘an immediacy of life-threatening violence’ which he says reflects ‘how strongly weighted our legal system has been in favour of the sanctity of human life’. ‘Battered woman syndrome’, *op.cit*: 279.

¹⁵⁷ ‘Objective theory of self-defence’, *op.cit*: 753.

By ‘shifting’ the moral focus off life (and death) and onto those virtues that matter more to justice, namely those that ‘give meaning and value’ to life,¹⁵⁸ we would be less inclined to dismiss the history of abuse and the battered woman’s ongoing fear when distributing responsibility and blame for these killings. Moreover, this shift of focus should also open the criminal law to take account of the injustices that factor directly into the moral ‘choices’ to commit criminal offences, such as the injustices of gender oppression. These injustices constrain the choices open to the victims of domestic violence, while giving batterers a degree of licence to abuse women without proper penalty. Such an extended and contextualised ‘just deserts’ calculus applied in the criminal adjudication of cases like *Oakes*, could measure and compare the moral deficiency of the ‘choice’ to kill alongside various other morally relevant choices made by the perpetrator and victim of abuse, namely those choices that unbalance the distribution of benefits and burdens between the parties and impact on this final, fatal, ‘choice’.

This calculation could begin by recognising the ‘one-sided relational exploitation... between women and men...[that] often masquerades in the guise of love or care [and] which constitutes [the] first sort of injustice’.¹⁵⁹ Abusive relationships typically entail the most extreme instances of this endemic injustice and, according to some, create ‘special vulnerabilities to harm’ which give rise to ‘special duties of justice’.¹⁶⁰ The most obvious example of battered women’s special vulnerabilities and duties arise when dependant children are involved in an abusive relationship. In these common situations batterers are often successful in exploiting women’s sense of responsibility and concern for the welfare of their children to gain increased control over the relationship and submission from their victim. As amply demonstrated in *Oakes*, ‘children may be beaten or otherwise abused whenever the tyrant wants to demonstrate his requirement of total control...[or] to instill in the prime subject of the regime a sense of futility of any efforts she might make to protect them – and, by extension, herself’.¹⁶¹ Threats to maim and kill the children, to

¹⁵⁸ Ibid: 754.

¹⁵⁹ Friedman, ‘Beyond Caring’, op.cit: 265.

¹⁶⁰ Ibid: 264-265. Friedman considers the trust and intimacy of a close personal relationship makes commonly recognised harms ‘more feasible’ to perpetrate, whilst providing the opportunity for certain ‘uncommon emotional harms not even possible in impersonal relationships’ (265).

¹⁶¹ Cohen, ‘Regimes of private tyranny’, op.cit: 774-775.

take them away, to sue for custody or to abandon them to economic hardship, are also common tactics of manipulation and control used by batterers¹⁶² that are not available to aggressors outside of intimate relationships and that would not be quite so threatening if not for gender-based injustices.

A system of justice committed to balancing the distribution of social benefits and burdens and to taking human responsibility seriously, should not ignore the fundamental disturbance to the moral order that occurs when abusive men are able to exploit to their advantage the fact that their victims care more about and assume greater responsibility for the welfare of their children than they do. In *Oakes*, this type of exploitation was a key feature of the relationship undermining Oakes' ability to break away from Gardner and contributing substantially to the sense of despair and panic that led her to place a lethal dose of pills in his coffee. However, the criminal justice process that judged, blamed and punished her 'choices' as morally defective, effectively considered this systematic exploitation and manipulation morally irrelevant.

But judges do not always disregard this background of inequality and moral abuse. In the *Suluape* case,¹⁶³ the Court of Appeal appeared to give some weight to moral considerations of this sort. In reducing the defendant's sentence from seven and a half years to five years, Justice Baragwanath noted the deceased's 'unsupportive' behaviour and the generally 'unequal' relationship between the two, as well as the appellant's 'exemplary past behaviour', which he described as a 'life-time of service to her family in the face of spousal abuse...and gross humiliation'.¹⁶⁴ The Court also rejected the trial judge's assessment of the defendant's behaviour after the killing as 'callous', along with

¹⁶² Ibid. In the US research shows that the threat of economic abandonment' is 'among the most common weapons in the arsenal of private tyrants' in relationships involving young children in particular. Also that women's experience of domestic violence combined with having primary responsibility for children are key factors contributing to homelessness among women. See Jean Calterone Williams, 'Domestic Violence and Poverty: The Narratives of Homeless Women', *Frontiers*, 1998; 19, 2 pp. 143-165.

¹⁶³ *R v Suluape*, Baragwanath J, CA, 27 March, 2002. See Chapter Three.

¹⁶⁴ Ibid. Suluape killed her husband when he told her he was leaving her for another woman. Suluape had been married to her husband for 24 years and during that time had cared for their five children, the four children of her first marriage, his mother who was confined to a wheelchair, and his brother's eight children since their mother had died, seemingly with no help from her husband or anyone else. The relationship was characterized by the Probation Officer as 'chronically dysfunctional...physically and emotionally abusive...and unsupportive on his part', with Mrs. Suluape and the children living in fear of Mr. Suluape.

his weighting of this as an aggravating feature of the killing. The judges on appeal completely disagreed with this assessment, stating that there was ‘nothing to suggest callousness was any part of her character’.¹⁶⁵

Rather than a mere extension of sympathy for the defendant in this case, the Appeal Court’s judgments redistributed some of the responsibility and blame for the killing from the appellant onto the deceased, which involved a re-assessment of the moral character and virtues of both parties. Instead of applying ‘the usual inference’ of blameworthiness and ‘bad character’ from the decision to kill,¹⁶⁶ further ‘aggravated’ by the apparent indifference to the result of that decision shown by the defendant afterwards, the judges on appeal looked to the context and causes of that behaviour and inferred a significantly less condemnatory assessment of the appellant’s ‘character’ as a result. In my view, this judgment gets much closer to the principle of ‘just deserts’ in punishment interpreted in a somewhat expanded sense to accommodate considerations of the underlying circumstances of injustice that impact on most offenders’ choices and that alter the calculus needed to achieve moral coherence. It also shows that while there may not be a precise or universal measure for achieving this coherence and for calculating desert in a consistent and formalistic way in all criminal cases, it is possible to make a more, rather than less genuine attempt to meet the demands of this core principle of justice in practice and to give convincing reasons for doing so.

However, the *Suluape* judgment at the same time highlights the considerable variability among judges in their preparedness and ability to apply a more searching, contextual and qualitative assessment of moral character and blame. As seen in the case study, where the discretion is afforded judges to apply a more critical assessment of the relevant ‘facts’ in cases like *Oakes*, few have demonstrated the capacity and readiness to do so. And the exceptions might be said to prove the rule that overall the formal adjudication process provides judges with a systematic ‘retreat’ from having to face the moral dimensions of

¹⁶⁵ Ibid.

¹⁶⁶ The ‘usual’ approach of the criminal courts is to make an ‘inference from the [illegal] act to the actor’s [bad] character’. Fletcher, *Rethinking Criminal Law* (1978) cited in Armour, ‘Just deserts’, op.cit: 536 fn. 24.

problems and deal with human pain and responsibility, while demonstrating that most judges lack the necessary ‘empathetic understanding’ needed to know (feel or intuit) when this ‘retreat’ is fundamentally inconsistent with the demands of moral justice.¹⁶⁷ Although some argue that by diminishing the legalistic commitment to formalism and expanding judicial discretion judges will be freed to express empathy and to exercise their own sense of justice with reference to substantive moral principles beyond the established rules of law,¹⁶⁸ the wider case study tends to suggest the reverse is true. Namely, that without formal regulation requiring judges to ‘look beyond the law’ to a more engaged and principled analysis of the moral facts in cases like *Oakes*, most judges will continue to take a less than empathetic view of the facts, given enduring prejudices surrounding domestic violence.

As seen in *King*, although there was much more public and jury sympathy for the defendant than in *Oakes*, and most seemed willing to accept the defendant was the victim of serious abuse and ‘a hard life’, as one reporter expressed it, the judgment and sentence did not suggest significant progress on previous judgments in terms of this sympathy working to substantially mitigate moral blame and responsibility for the killing. Much less did it reflect acknowledgment of the profoundly unjust conditions, much like sex slavery, that the defendant had endured for many years at the hands of the deceased. To classify and partly excuse these conditions as ‘provocation’, or see them as ‘mitigating’ blame in the same way as expressions of remorse, a guilty plea, the age of the defendant, and various other ‘mitigating’ criteria are regarded, cannot deliver just deserts because these criteria are too different morally speaking from those criteria that should be relevant in deciding moral blame in cases like *Oakes*.¹⁶⁹ That is, while mitigating factors generally take account of some aspect of the offender’s underlying moral character, the experience

¹⁶⁷ Henderson, ‘Legality and Empathy’, op.cit: 247-250. Henderson considers that ‘empathetic understanding’ on the part of the Supreme Court judges provided the ‘breakthrough’ decisions that led to the dismantling of racial segregation in US schools (*Brown v. Board of Education* (I)(1954)) as well as improved welfare rights for the poor (*Shapiro v. Thompson* (1964)).

¹⁶⁸ Thomas, ‘Fairness and Certainty’, op.cit.

¹⁶⁹ Consider simply two aspects of the moral weighing involved in the *Suluape* case. In this 2000 case the battered woman’s conduct *after* killing her husband, suggesting an absence of remorse, was regarded by the trial judge as an ‘aggravating’ factor, while her age of 54 years was considered to partly mitigate moral responsibility and blame and perhaps the ‘utility’ of punishment. See Chapter Three for further details and discussion of this New Zealand case.

of being battered and a victim of injustice say nothing about the offender's character. In fact, the experience of injustice is said to 'mask our "true character"' such that choices made in response to unjust pressures do not reflect choices that we would have made otherwise, and so do not indicate blameworthiness or desert.¹⁷⁰ Rather, they reflect the society's failure to uphold justice and so undermine our ability to accurately measure the demands of justice and our moral authority to condemn and punish crimes committed under unjust constraints, such as domestic violence.

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Some argue that if we acknowledge this diminished ability and authority to deliver 'just deserts' in contexts of injustice, we have to 'give up the entire institution of blame and punishment' because the vast majority of persons engaged in criminal offending are *victims* of one kind or another; that is, are persons socially disadvantaged by poverty, racial discrimination and, more often than not, an abusive childhood.¹⁷¹ According to Heller and others, convicted criminals are also – as are most people in some degree – 'victims' of a pervasive amorality in societies that value and teach 'the norm of success' as the ultimate goal, and fail to instil respect for the moral norms of 'honesty and decency'.¹⁷² Heller argues that 'people raised by the norm of success will never be able to curb their desires, to restrain their impulses, to resign certain interests, and to do so for *moral reasons*'.¹⁷³ And until such a time that all people are raised with the benefit of a moral education, retributive punishment for the vast majority of crimes will not be just.¹⁷⁴ In other words, given our collective complicity in causing (or failing to combat) the conditions that undermine moral responsibility and perpetuate crime, justice is morally bound to share the blame for crime and deliver reduced sentences almost across the

¹⁷⁰ Armour, 'Just deserts', op.cit: 536.

¹⁷¹ Fletcher maintains this slippery slope would arise if the criminal law recognised socially disadvantaged backgrounds as mitigating blame for particular crimes (1978), cited in Armour, *ibid*: 541 fn. 46.

¹⁷² *Beyond justice*, op.cit: 174-175.

¹⁷³ *Ibid*: 174, emphasis included.

¹⁷⁴ *Ibid*: 175. Heller considers crimes committed 'simply for pleasure' as an exception to this rule, but she reasons that most of these crimes stem from an original crime committed under social constraints or because of greed so are not true exceptions. True exceptions, she says, 'must be [a] minute and socially insignificant' number, not worth our critical attention.

board. By this standard it could be argued that the increasingly favoured right-wing policy of ‘zero tolerance’ to crime and punishment is fundamentally unjust.

In the final analysis, a criminal justice system that distributes punishments by assigning proportionate blame and responsibility for morally ‘deficient’ choices, a system that must take account of complex variables such as entrenched injustice and pervasive immorality, is preferable to the available alternatives, even if only ever approximated in practice. Alternatives to ‘just deserts’ in punishment devalue the victims of injustice relative to other victims, using the catch-all notion of ‘victims’ rights’, which treats all victims as equally ‘deserving’, while authorising even more broad-ranging and punitive measures in their defence. In the process, as argued above, these alternatives systematically mask both the failure of justice and the exercise of power. Moreover, the pursuit of justice need not impinge significantly upon the other responses to crime, whereas the reverse is not true.

So the question becomes, do we or do we not want to continue the pursuit of ‘criminal justice’ against the odds and out in the open, admitting our shared responsibility for unjust constraints; and if we do, what priority are we prepared to give to this pursuit in relation to the other values and goals already incorporated into the criminal justice system?

My hope is that the thesis helps to provide something of an answer to these questions in the context of domestic violence, and specifically in the comparison between domestic homicides committed by male batterers on the one hand, and the female victims of abuse on the other. Only the principle of just deserts identifies the profound moral difference between these types of homicide by weighing the unjust distribution of burdens in the violent relationship and fitting blame with responsibility to achieve a balanced and morally proportionate response to the killing in each case. From a utilitarian ‘law and order’ perspective, punishment is focused on the actual and projected consequences of the breach of law, rather than the magnitude of the offence itself. Given all that we know about the inter-generational cycle of violence that is systematically perpetuated by domestic violence, indeed a great deal more than we know about the long-term effects of

any other form of violent crime, this perspective could and should generate particularly serious sentences for domestic abusers. However, a law and order focus on consequences will tend to overlook the qualitative differences between the two types of domestic homicide and emphasise the main consequence of both crimes, namely the loss of life. Given enduring patriarchal prejudices and victim-blaming stereotypes that continue to prevail in the domestic violence context, the focus on consequences might be inclined to generate a more severe 'criminal justice' response to domestic homicides committed by women than by men. Indeed the research and cases examined in this thesis seems to confirm concerns about inequalities in this context, with a significant number of people continuing to hold the view expressed in the *Minnitt* case that domestic violence is a comparatively trivial form of violence; even that the community at large 'does not need protection from...the exasperated husband who kills his wife'.¹⁷⁵ At the same time, pervasive prejudices, such as demonstrated in the backlash against battered woman syndrome and the determined cultural resistance to acknowledging men's responsibility for domestic violence, will not be easily eradicated, and in the meantime, will ensure the increased notoriety and condemnation of defendants, like Oakes, who kill their husbands and do not fit prevailing stereotypes of demure femininity and noble victimhood.¹⁷⁶

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Thus, while prevention, protection and rehabilitation strategies might provide the answer to the social problem of domestic violence in the long term, a sustained and consistent commitment to these strategies, given the enduring prejudices of the dominant cultural group, will substantially depend upon a baseline commitment of principle being set by justice. This commitment will incorporate a response to the profound injustices of domestic abuse by focusing on batterers' intent to dominate women, which justice must give more relevance to in calculations of blame in crimes involving domestic violence.

¹⁷⁵ Ernst van der Haag, 'Deterrence and Uncertainty' (1969), in Solomon and Murphy (eds), *What is Justice?* op.cit: 280.

¹⁷⁶ There are various utilitarian objections to excusing or justifying battered women who kill their abusers, including the possibility that more lenient sentences or acquittals in these cases could effectively condone the use of violence in domestic settings in general, which would 'tend to favor men over women in actual practice'. See Zipursky, 'Self-defence', op.cit: 592.

Justice must also show concern for society's shared responsibility in this domination and these crimes, given that batterers' intent to harm women is systematically facilitated through the cultural and institutional mechanisms of male privilege that continue to enable batterers. Justice should insist upon a much stronger social message of condemnation being sent to batterers through mechanisms of punishment, including in cases of domestic homicides. As seen in the case study, the wording and framing of the laws and the policies, and the reasoning given for the sentences handed down in cases involving domestic violence, even in the judge's summing up, can make more of a difference in terms of whether or not these judgments and practices serve the wider social and moral interests of justice, than the length of sentence or the extent of resources committed to policies of prevention.

The commitment to justice in punishment in the context of domestic violence, as in any other context, is not about 'getting tough' on offenders, whatever that means in actuality. It is about giving people what they deserve as clearly and consistently as we can while showing how justice works and why it works, perhaps differently between some apparently 'like' cases, but always reasonably in terms of the substantive principles involved. Justice in context must provide clear reasons for punishing offenders underpinned by principle. If we have limited moral authority to punish in general, we surely have the least authority to punish offenders like Gay Oakes, whose victimisation by unjust constraints is more directly and causally related to her (their) offending than in virtually any other type of 'socially constrained' offence. Moreover, justice requires us to mark – through punishment (and rewards for virtuous behaviour) – the moral difference between cases like *Oakes*, and those, such as *Minnitt*, in which abusive, controlling men kill their wives rather than let them leave the relationship. Justice must recognise that 'how the law treats [the] two extreme deadly outcomes of male violence strongly influences the extent to which society and law condone [or condemn]...that violence'.¹⁷⁷

In comparing and distinguishing the moral adjudication of these two types of domestic homicide in terms of the principle of just deserts, there is a substantial opportunity to

¹⁷⁷ Forell and Mathews, *A Law of Her Own*, op.cit: 158.

improve the effectiveness of domestic violence prevention strategies while developing the commitment to justice for battered women – and for all, including batterers, who also deserve to be treated justly. A substantive commitment to justice insists that we seize this opportunity and maintain our commitment to principle in all judgments made in the domestic violence context. However, the question of whether or not we will remains a pressing *political* one. While justice cannot force the democratic process it can and must help to keep the process committed to combating injustice. The analysis and arguments presented in this chapter suggest that a concerted, consistent and open commitment to the principle of just deserts in punishment is one of the mechanisms by which this worthy goal can be understood and achieved over time.

Conclusion: Justice for the next Gay Oakes?

The good life is beyond justice...

Agnes Heller, 1987¹

People are generally fond of decrying the absence of justice but are less prepared to take the time to engage in serious debate about why that is, or to consider what we might be able to do to change that reality and perspective. More than anything else, this basic complacency stands in the way of justice for ‘the next Gay Oakes’.² However, the bigger questions and challenges posed in response to the thesis, and underpinning the rhetorical question posed in conclusion to the thesis, concern the possibility and desirability of pursuing *justice* in context and, specifically, in the context of cases like *Oakes*.

In order to reflect on these wider questions underpinning the pursuit of justice for ‘the next Gay Oakes’, the philosophical skepticism that raises serious doubts about our ability to define the concept and principles of justice with any certainty or precision, must be answered. This skepticism encompasses substantive feminist concerns that the language and ideal of ‘justice’ is inherently masculine, as well as the wider claim that ‘the normal model of justice’, as institutionalized within modern liberal democracies such as New Zealand, fails to understand and respond to the complex circumstances of injustice, dismissing it as simply the absence of justice or an ‘abnormal preliminary’. Indeed, the thesis tends to confirm Judith Shklar’s basic contention that ‘It is not enough... simply to match the claims of the aggrieved against the rules of justice in order to settle firmly

¹ *Beyond Justice*, op.cit: 323.

² By referring to ‘the next Gay Oakes’, I do not mean to imply that all battered women are the same, or to ignore the fact that children, men, and homosexual partners are not victims of domestic abuse. But from the analysis undertaken in the thesis I have concluded that, as far as justice is concerned, women victims of male domestic abuse are victimized in a distinct way and justice needs to recognise this distinctiveness. As such, ‘the next Gay Oakes’ is meant to capture that distinctiveness and suggest that if there is another criminal defendant in the future to which the analysis provided in this thesis particularly applies, that defendant will be a *woman* – an ‘ordinary’ woman of any age, race, ethnicity and class – who is victimized by a male partner who might also be anyone, but who will always be a patriarchal tyrant intent upon dominating, intimidating and abusing her into submission by way of asserting his misplaced sense of entitlement to rule over and possess *his* woman.

whether [they] were treated unjustly'.³ In the context of domestic violence, the established rules and systems of justice have generally failed to accurately measure and judge the extent of the injustice experienced by battered women.

In the thesis I have taken this skepticism on board, accepting its critical, questioning stance and attempted to illuminate and test this stance in a practical setting. Rather than address these doubts about justice directly, I have undertaken to develop an extended case study of the commitments made in an actual and specific 'justice system' – namely that which is institutionalized in New Zealand – and in relation to the reality and challenges involved in the domestic violence context. Providing an overview of the core structures of the New Zealand justice system, broadly defined to extend well beyond the formal structures and mechanisms of the legal system, the wider case study extrapolates from this underlying structural commitment to develop an understanding of the commitment to justice in context through reflection on the processes of debate, adjudication, decision making, revision and reform.

This contextual commitment to justice is revealed and tested in response to claims and concerns about injustice. The case study focused on the New Zealand justice system's response to the concerns expressed about the injustices experienced by battered women who kill their abusive male partners and women victims of domestic violence more generally. Illuminated and contextualised in and through the complex details of a specific case, time and place, these claims about injustice were substantially verified in the wider case study, which revealed serious and myriad instances of injustice, all underpinned by an ongoing trivialization and obfuscation of the suffering experienced by women victims of domestic violence. Historical reflection on the dominant values and prejudices of the Anglo-western cultural tradition, revealed an extensive support system for this response to domestic violence in the norms of cultural patriarchy built into the foundations of the commitment to justice developed in these societies. The wider case study highlighted the various strategies deployed over time and into the twenty-first century by those sectors of the community resistant to reforming patriarchal norms, and noted the success this

³ *Faces of Injustice*, op.cit: 14.

resistance has had in undermining the development and effective implementation of critical reforms in the domestic violence field.

While the case study illuminated the contextual dimensions of injustice in cases like *Oakes* and the wider domestic violence field, it might be said to have revealed more about what justice is not than answer directly the question: What is justice? To some extent, the difficulty of defining with precision the commitment to justice in context confirms aspects of the skeptics' thesis that the ideal of justice is at once beyond our reach and, as conventionally understood, inadequate to our needs. Accepting the basic logic of the point that justice cannot be delivered if we do not know what it is, the wider case study of the New Zealand justice system confirms many of the concerns raised about the confusion and uncertainty surrounding the substantive commitment to justice. Indeed, in reflection on the *Oakes* case and developments subsequent to *Oakes*, the institutionalized commitment to justice in New Zealand was revealed to be a less than well-coordinated and systematic set of commitments administered by a diverse and fragmented number of agents and processes operating without clear guidance from substantive principles. As a result, the core institutions of the New Zealand 'justice system' – the common law courts, the liberal rights-based constitution, the democratic parliament and legislature, the Justice ministry and the Law Commission – did not consistently or effectively provide the leadership for the sector that would be necessary to uphold and prioritise the key principles of justice, at least not in the context in which they were reviewed. Instead, various other, perhaps easier or less controversial principles and goals, assumed priority over the principles of justice, while references to 'justice' tended to assume a narrowed, less than substantive definition, namely the application of the law through the court system in compliance with the principle of 'legalism' or formalism, rather than justice.

As seen in the wider case study, this narrowed definition of the commitment to justice, limits recognition of the injustices experienced by battered women, which extend well beyond the mechanisms of the formal legal system to include moral, political and cultural dimensions. In response to domestic violence the formal commitment to 'neutrality' was

seen to be particularly problematic because of the highly gendered nature of domestic violence specifically, and more broadly, because of the absence of a gender-neutral universe. The influence of the ‘neutrality’ frame on the public-political process of law review and reform produced generally conservative recommendations, while substantive issues of justice principle were effectively side-lined in favour of meeting the narrower, largely pre-determined legislative agenda. The increasingly loud public voice in the ‘criminal justice’ debate ensured that any review process in the domestic violence field was particularly susceptible to influence from largely unpredictable swings in the public mood. The long overdue review of sentencing for battered defendants was influenced by a public swing in favour of ‘tougher sentences’ for violent crimes that followed the 1999 citizens’ initiated referendum. The ‘neutrality’ of this process is entrusted to the inclusiveness of the consultation that feeds it, but this is substantially challenged by the quest for a majority opinion which carries many of the assumptions of the dominant cultural group. In contexts of domestic violence the preferred outcome for the dominant voices and pragmatic (reelection-minded) decision makers is laws that de-emphasise the gendered aspect of abuse and fit with wider goals of community safety and getting ‘tough on crime’.

The sentencing discretion delivered by the core agents of New Zealand’s justice system in response to concerns about injustice in the adjudication and punishment of battered women defendants like Gay Oakes, reflects this narrowed and conservative ‘justice’ focus. Moreover, it could be argued that this process and outcome reflects the limits of justice in context, confirming Oakeshott’s view that politics is too contingent to deliver substantive justice. This sceptical view is further confirmed by the fact that much of the progress made in the domestic violence field in terms of improved awareness of the problem and protection for its victims has come from agents operating outside the justice sector who were motivated by practical goals of providing shelter and support – a short term refuge from abuse for women and their children – rather than any more principled goal. Without this grass-roots commitment from agencies like Women’s Refuge, it is doubtful that the formal agents of the justice sector would have identified the urgent need for intervention and reform. When the criminal courts moved to acknowledge domestic

violence and give recognition to the distinct experiences of battered women, these experiences were rendered in syndrome form to fit the so called 'neutral' norms of the formal adjudication process. But still the gender specificity of 'the syndrome' proved too challenging for the formal 'justice system', built on the values and experiences of men, and forced the pragmatists to develop a compromised, 'gender-neutral' version, rather than commit any serious public resources to addressing the structural bias.

However, if this response appears to confirm certain doubts about the limits of formal or legal justice in complex contexts, it hardly confirms the contextual limits of the concept of justice, given that 'neutrality' is not a principle of justice. Thus, in the second part of the thesis, three principles of justice were reflected on with the intention of defining and testing a substantive commitment to justice in context. The principles formulated for this task drew on the theories of various political philosophers influential in the Anglo-western tradition and responded to the key concerns about injustice raised in the wider case study. The relevance of the principles was tested in specific 'contexts of judging', which the case study had shown to be lacking in principled guidance in judgments impacting on the delivery of justice for battered women defendants.

My reflections in this part of the thesis highlighted certain fundamental limitations in the accepted interpretation of the principles of justice, as institutionalized in the New Zealand 'justice system'. The principle of 'equal treatment' or formal justice applied through the courts, worked to compound the obstacles to justice for battered women by relying on a standard of 'reasonableness' that systematically privileged the excuses and actions of abusive men by judging their women victims as provocative, aggressive and 'doubly deviant' if they took lethal action to stop the violence. The principle of equal consent, interpreted narrowly as a foundational social contract protecting the private individual against public interference, supported limited rights against discrimination that fell well short of imposing positive obligations on specific justice sector agents to protect and empower the consent of battered women. The principle of 'just deserts' in punishment has been increasingly side-lined in the criminal justice debate such that domestic violence related crimes are rarely dealt with in these terms in favour of reliance on more

pragmatic, utilitarian measures of prevention, rehabilitation and women's (short-term) safety. The general notion of 'just deserts' has at once been interpreted in recent years to support claims of victims' rights and restorative justice; an interpretation that has given a voice to some victims and their families, but, as seen in *Oakes*, has done little to empower the victims of domestic violence who in many cases continue to be seen as less 'deserving' victims.

My reflections on the three principles of justice at the philosophical level revealed an unfulfilled potential in these standard and revised interpretations, and suggested, in some respects, an inconsistency with the core justice sentiment expressed by the principle. The principle of equal treatment upheld by the courts, is specifically intended to rule out the kind of double standard that was seen in the adjudication of *Oakes* and other domestic homicides, which effectively treats some groups of people more harshly than others, and in the process, fails to meet the basic requirements of formal justice; namely, consistency, generality and equality of treatment. Moreover, the common law courts seem particularly well suited to develop this principle in full. As values change to recognise a more substantive notion of legal equality in view of our growing awareness of complex social injustices, common law judges on the precedent-setting courts are given the discretion to adapt the law accordingly. Indeed, this potential was clearly demonstrated in the Canadian Supreme Court case of *Lavallee* in which the existing law of self-defence was adapted to apply to a battered woman who killed in circumstances that were not recognized by the formal rule. However, the discretion granted other comparable courts, such as the New Zealand Court of Appeal, to override this expanded interpretation of the principle of formal justice and the attempt to develop the law to accommodate the complex realities of domestic violence and gender-based injustice, suggests that in this context at least, judicial discretion might be more of an obstacle to equal treatment than an aid.

Elisabeth Schneider, one of the most experienced judicial practitioners in this area of criminal law, has argued that the commitment to formal justice in cases like *Oakes* continues to be hampered by judges, and other agents of the formal justice system,

lacking appropriate education and training in the realities of domestic violence. Critical reflection on *Oakes* and the wider case study confirmed an ongoing judicial prejudice and public mythology surrounding domestic violence that is not conducive to equality of treatment through the courts in cases of domestic homicide. In particular, this re-education process is necessary to counter the tendency for ‘the reasonable person’ to assume the qualities of ‘the reasonable man’. Rather than assume a ‘gender-neutral’ standard, critically informed adjudicators and counsel would actively seek to facilitate counter-stereotypical, empathetic (not necessarily sympathetic) responses from the jury to develop a genuinely ‘common sense’ response to cases involving domestic violence. The prejudice that women victims have ‘provoked’ or in some way asked to be abused, would need to be challenged in favour of a recognition that women’s governing motive in the majority of domestic violence scenarios is fear – mostly ‘reasonable fear’ – of the situation escalating out of control. The need to incorporate into the test of reasonableness, women’s proven responses in situations like domestic violence – not only the heightened sense of danger but the desire to protect children and the family unit – is also suggested if the courts are not to force women defendants to ‘fit’ into categories shaped on the experiences and values of men. As argued in Chapter Four, these changes would be more effective if developed within an explicit framework of equality and commitment to the principle of formal justice involving an ongoing debate amongst practitioners about the subtle and fairly dynamic challenges that a commitment to ‘equal treatment’ entails.

The principle of equal consent underpinned by the Kantian imperative to treat all free and rational beings as autonomous, self-legislating agents also provides a potentially progressive principle of justice on which to base the development of a more substantive political response to domestic violence and cases like *Oakes*. If the circumstances of domestic violence can be likened to a Lockean state of nature in which the victim suffers a calculated, rights-denying regime of domination and tyranny, then the fight for justice for the victims of domestic violence can be recognized as a fight for fundamental freedoms and rights. Based on the principle developed in liberal political thought, the idea that obedience to the rule of law in a liberal democracy is conditional upon that law protecting and empowering the equal consent of all citizens is substantially challenged by

the circumstances of domestic violence. The history of the liberal state's indifferent and tolerant response to domestic violence is a history of coercion and breach of contract on the part of the agents of the state in relation to the victims of domestic violence. Given this breach, the state's right to punish defendants like Gay Oakes cannot be presumed, and the reforms implemented in recent years must be evaluated in light of their capacity and intention to amend this serious injustice and do much more to empower the consent of battered women. In cases like *Oakes*, the principle of equal consent gives rise to critical reflection on the law of self-defence as it appears, in most cases, to deny women victims of domestic violence the right of self-defence – the most fundamental liberal right.

Interpreted in light of the reality of domestic violence and an awareness of the number of women threatened, dominated, injured and killed in their homes in domestic violence scenarios, the principle of equal consent provides a particularly strong basis for establishing a substantive right against gender domination, or a positive right of self-preservation for the victims of 'domestic tyrannies'. These rights would be activated in situations where a battered woman has sought protection from the law and been effectively denied that protection, to undermine the state's authority to punish her for taking action to preserve and protect herself against the threat of serious injury or death. They might also be available to counter and trump any rights-based claims of men accused of domestic abuse in view of the greater risk to autonomy and consent associated with denying rights that protect battered women from potentially lethal violence compared with a limitation of the right to 'natural justice' or so called 'fathers' rights'.

The fact that women victims of violence have been systematically denied the protection of the law in favour of these lesser 'rights' confirms the need for a stronger and clearer constitutional commitment to the principle of equal consent that establishes its critical importance to justice. The wider case study also confirms that gender domination is a systematic and violent form of injustice that the liberal 'justice system' and democratic legislative process have failed to effectively identify and substantively address. Rather than being entrusted to the democratic process – an alternative promoted by critics of the

liberal contract – the thesis points to the need for a less open and participatory political process where matters of substantive justice are concerned. Arguably, in New Zealand at least, there are too many voices in the ‘criminal justice’ debate, with too few reflecting on matters of substantive principle. The increasing role of sensationalist media in this process further undermines and dilutes its reflective and critical substance. Nowhere has this undermining been more evident and damaging than in coverage of cases involving domestic violence. Thus, while domestic violence remains one of the most fundamental obstacles to women’s autonomy and ‘equal consent’ in modern liberal democracies, justice in these countries will depend upon expanded constitutional provisions against gender domination. These provisions would prioritise justice sector commitments to protecting and empowering the victims of domestic violence and could support a full or partial gender-specific right of self preservation for victims of domestic tyranny.

The principle of justice that tells us to give people what they deserve by rewarding the good and punishing the bad; to hold people responsible for their moral choices in order to achieve a balance in the moral order overall, was shown to be particularly helpful in clarifying the issues of principle involved in judging what justice demands in contexts of domestic violence. Reflection on this principle also helped distinguish the commitment to justice in punishment from the commitment to other principles, highlighting the challenges involved in reconciling conflicting values in the ‘criminal justice’ system, and suggesting the need to prioritise justice. At the same time, the sceptics’ claim that we cannot precisely measure criminal desert, because a significant degree of the responsibility for criminal conduct rests with the wider society, seems particularly compelling in the case of domestic violence in light of all that we now know about the wider cultural context – and causes – of that violence. This social reality should lead justice practitioners to reflect more critically on the purposes of punishment altogether.

However, this critical reflection cannot proceed effectively without some notion of moral responsibility – minimally, the responsibility to think of others and to avoid causing harm – and some scaling of good and bad moral choices developed from this notion. The importance of this moral scaling was highlighted in cases like *Oakes* and in contrast with

more utilitarian responses to crime, which have proven, if anything, less practicable than responses based on calculations of criminal desert. As well, our enduring desire for moral coherence and balance has been demonstrated in recent years with the return of public support for the retributive sentiment; especially in campaigns for victims' rights. 'Just deserts' is the only principle that substantiates the subtle gradations of punishment in recognition of degrees of wrongdoing that these campaigns call for, or should call for if they were focused on achieving justice for victims. Justice for the perpetrators of crime, including battered women defendants, cannot be achieved in punishments that fail to weigh degrees of moral blame and responsibility.

Moreover, as I argued in the chapter, and as the wider case study amply testifies, battered women – whether offenders or victims in the criminal justice system – often do worse than other agents where and when this system adopts a discretionary, pragmatic and unprincipled approach to 'punishment'. While calculations of just deserts do not eliminate the need for discretion in judicial and wider justice sector judgments, the principle provides the most substantive basis for ensuring that these judgments are less arbitrary than they otherwise would be. If clearly underpinned by the principle of just deserts, judgments in cases like *Oakes* could do much more than they have done in the past to clarify the complex and serious injustices involved in domestic violence cases, and in the process, to deliver stronger messages of condemnation backed up by substantive principle. Providing a strong moral basis for punishment is particularly important for judging cases like *Oakes* to challenge perceptions of 'special treatment' for women. Overall, battered women's access to justice depends upon a clear commitment to justice in punishment, which only the principle of just deserts can provide.

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In conclusion, I argue that the principles of justice highlighted in the thesis are capable of providing a meaningful response to the concerns about injustice that arise in the adjudication of cases like *Oakes*. The principles separately and collectively expose the workings of power behind the pretence of legal neutrality and add substance, clarity and

direction to the legal, political and moral judgments that make up the justice system's response to domestic violence. For 'the next Gay Oakes', the benefits of this enhanced commitment to justice, if upheld by every agent of the wider justice sector, could be as fundamental as a minimisation or total eradication of the abusive context in the first instance so that she never has to contemplate killing in fear for her life or the lives of her children, much less killing the man she once loved – and may still love. An operative justice system upholding the principles of justice would coordinate its resources to prioritise this goal in its response to domestic violence. A right against gender domination would help to ensure this prioritization.

If the system fails to deliver this primary justice goal, and this woman is forced to confront the reality of an abusive partner, then an otherwise operative justice system would provide surer, more decisive means of escape and protection for her than are currently available. Rather than having to flee her home in fear for her life and risk being caught by the abuser, she would be supported as far as possible to remain in her place of residence, minimizing the disruption to her life, and provided with much more reliable assurances of her safety from the abuser. He, in turn, would be held accountable for his wrongdoing and recognised as presenting a serious risk to his partner, their family, and the wider community. For these measures to be effective, the victim would have to be dealt with by trained professionals who understood the controlling, manipulative tactics routinely deployed by batterers intent upon maintaining their private tyrannies. These professionals would be capable of identifying, and committed to addressing, the justice issues involved rather than seeking a compromise between the so called 'competing interests' of the parties. Most importantly, they would be inclined to believe, rather than doubt, women's claims of abuse; a small leap of faith, given the considerable body of evidence available.

If these measures failed to provide sufficient reassurances of protection from abuse, and the woman was left feeling that her life, or the lives of her children, were in danger from the abuser, who continued to pose a real threat from which she felt she was unable to escape, the failure of justice at this point would be akin to a total system's failure.

However, this state of fear and unprotection is today a reality for a significant number of women living in New Zealand, as elsewhere, and a percentage of these women will have their worst fears realised if the domestic homicide rate remains unchanged. Justice for the next Gay Oakes demands that these murders are publically recognized and condemned as particularly grave injustices given the total suffering involved, and all that society might have done to prevent their occurrence, but failed to.

In a much smaller percentage of cases, the woman's fear and state of unprotection will trigger a desperate self-preserving reaction to the threat posed by the abuser, which will result in *his* death, instead of hers. In these cases, the means by which the abuser is killed will vary in detail, but the woman's motive will be very similar to Oakes', as far as the principles of justice are concerned.⁴ In recognising this motive and upholding the principles of justice, the criminal courts will not necessarily acquit the defendant. But the courts will do much more to allow and facilitate the possibility of an acquittal by recognizing the notion of women's 'reasonable fear' in circumstances of domestic violence, and by being aware of the limited options for escape available. The further notion of a woman's right to self-preservation and non-domination would be known by the jury, and in some cases of domestic tyranny, would lead jurors to the verdict that, having no real or lasting alternative to being abused, the defendant deserved the freedom from this abuse, and the threat of abuse, she killed to achieve.

If the morally relevant factors were the same as they were in *Oakes*, then the jury – and law – would allow an acquittal on grounds of just deserts. If these factors were not sufficient in the particular case to support an acquittal on these grounds, justice would

⁴ In cases where a victim of abuse kills her abuser out of pure frustration and anger having reached the end of her endurance, rather than out of fear and desperation, a case perhaps like *Suluape* (2000) where she killed her abusive husband in reaction to him telling her he was leaving her, then from a justice perspective this type of killing would not be seen as a 'like' case to those such as *Oakes*, and would warrant different treatment. Equally, in cases where the abuser poses a clear and imminent threat of serious injury or death the motive will be simple self-defence as recognised by the criminal law. The case of *Manuel* (1997), the only New Zealand case in which a battered woman defendant successfully pleaded self-defence, is probably a case of this kind. These somewhat atypical cases in which a battered woman kills her abusive partner, are more clearly recognised by the existing criminal defences (namely, provocation and self-defence, respectively), and so are not the focus of the critical reflections on the commitment to justice undertaken in this thesis or the conclusions drawn from these reflections.

require the defendant to be substantially excused from blame for the killing on grounds that recognised the moral complexities of abusive relationships, and acknowledged the batterer's substantial responsibility for any criminal consequences that resulted from this abuse.

In most cases of this kind, the law and concept of 'provocation' with its associated reliance on a 'loss of self-control' will not provide a sufficiently subtle measurement of the abusive situation or the defendant's reaction to it. From all that we know about men's violence against their partners, we can say with some assuredness that the victims' self-control is not the issue. Justice requires the criminal law to define a more precise and relevant distinction to accurately describe and judge battered women's lethal actions and reactions in these types of cases. The concepts of self-preservation and tyrannicide are two of the most reasonable and progressive suggestions to have been made by critics committed to developing the law to better fit the experiences of women victims of domestic violence and the principles of justice. More certainly, justice requires that in every type of case in which a woman is effectively forced to kill to free herself from the threat of violence, and in every case involving domestic violence, the presiding judge send a clear and strong message of moral condemnation for the abuse. At the very least, battered women are owed this much from their justice system.

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To return to Heller's assertion that the good life is 'beyond justice', and to consider this together with Shklar's assertion that justice 'calms our fears but thwarts our highest aspirations',⁵ the thesis could be said to confirm both assertions in some degree. In agreement with these claims, the thesis points to the need for virtues and principles other than justice to be asserted alongside, and in some cases, ahead of justice if we are to move societies like New Zealand towards a future without endemic rates of domestic violence. Indeed, the 'morality of nonviolence', to use Gilligan's term, is a morality that

⁵ *Faces of Injustice*, op.cit: 105, referring to Giotto's Justice, which is represented by a 'calm and majestic woman...[with] a benign...[otherwise] expressionless face...radiating no emotional appeal' (103), in sharp contrast to Giotto's Injustice (46-47).

exceeds justice in expressing a mutual ‘injunction against hurting’ and a ‘universal obligation’ to care.⁶ The ethical and practical commitment to help the victims of domestic violence that has mostly been undertaken by volunteers in the Refuge and wider women’s movement could be said to reflect this kind of morality of nonviolence and open obligation to care. As seen in the wider case study, the pursuit of institutionalized, systematic ‘justice’ through the rule of law failed, where this more practical commitment succeeded, in identifying and delivering an effective response to the serious problem of domestic violence. Indeed the ‘justice system’ put obstacles in the way of this response and, in certain critical respects, continues to do so. Moreover, the appeal to ‘justice’ in this context has been inclined to provoke a cultural backlash against perceived ‘special treatment’ for women and ‘man-bashing’, which has damaged the more practical, grass-roots movement.

The thesis confirms there are no sure or simple formulas for delivering justice in context, and suggests that where the principles of justice fail to remain open and responsive to the complex circumstances of injustice, which, as Young reminds us, always ‘precede and exceed the philosopher’,⁷ they will fail to deliver justice, or even to understand what it means. However, the thesis also confirms that justice principles can be responsive in this way, and further, that certain key principles of justice have an important and unique role to play in articulating the terms of a more substantive response to the circumstances of injustice and, therefore, to the circumstances of violence and uncaring in which we all, inevitably, live. Indeed, the thesis shows that if we – women and men alike – are to overcome many of the most enduring obstacles to ‘the good life for all’, caring and pragmatic measures will need principled reinforcement of the kind that the morality of justice is particularly suited to providing. The expanded principles of justice outlined in the thesis suggest various forms this reinforcement might take in response to the specific injustice of domestic violence and the specific challenge of judging what justice demands

⁶ Gilligan (1977) posits ‘The morality of nonviolence’ as the ultimate stage of moral development to be valued above the morality of justice as ‘universal abstraction’. For Gilligan, the morality of nonviolence expresses the primary commitment to a ‘moral equality between self and other’. For a useful discussion of Gilligan’s thesis, see Mary Brabeck, ‘Moral Judgment: Theory and Research on Differences between Males and Females’ in Larabee (ed.), *An Ethic of Care*, op.cit: 34-37.

⁷ *Justice and the Politics of Difference*, op.cit: 5.

in cases like *Oakes*. But in the end, it remains up to all of us to find the courage in ourselves and the resources in our particular society to fight for justice in context. In other words, when it comes to justice, principles are no substitute for passion.

Appendix:

Decline into Darkness¹

Female homicide defendants may be exceptional because they are rare, but they may not be exceptional women; they may be ordinary women pushed to extremes.

Katherine O'Donovan, 1991²

Oakes' account of her experiences leading up to the night she killed Gardner suggests a critical 'missing narrative' in the legal and wider public response to this case. Told in her own words free of the constraints of the courtroom,³ it offers a rare insight into experiences all too common, but all too often hidden from public view, only to be minimised, misunderstood and misrepresented by that same public once brought to light.⁴ In a powerful way, Oakes' account exposes the presumption, futility, and injustice of condemning to a lengthy prison term a person like her who has suffered and endured so much already, and, in the process, depriving her children, who have also suffered, of the benefit of being raised by their mother.⁵

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Gay Oakes met Doug Gardner in Australia in 1979 having moved there from her birthplace in England to be with her mother. At just nineteen years of age Gay had already been married (to Wesley Oakes) and had two daughters (Joanne and Dalane). She had experienced a series of broken and unhappy relationships including the separation of

¹ Gay Oakes, *Decline into Darkness: The True Story*. Harper Collins, Auckland, New Zealand, 1997. Gay wrote this account from prison and dedicated it to her children.

² 'Defences for Battered Women', op.cit: 227.

³ Lenore Walker, who formulated the BWS in large part to counter this problem, describes how battered women are often 'paralyzed' with fear in a courtroom, rendering their testimony 'ineffectual' at best, *Terrifying Love*, op.cit.

⁴ Stubbs and Tolmie, 'Race, Gender, and the Battered Woman Syndrome', op.cit: 122.

⁵ During her eight years in prison Gay was only allowed to see her six children for two hours once a week. Bungay, *Scarecrows*, op.cit: 160.

her parents when she was young, which resulted in her living in a children's home. She had experienced violence at a young age, being raped when she was thirteen and later beaten by her step-father who was also violent towards her mother. Her marriage at sixteen was in large part an attempt to escape this violence but this too ended in betrayal and a 'long and vicious' custody battle for her daughter during which time Gay was prescribed anti-depressants and turned increasingly to alcohol and other drugs. She describes 'drifting into a relationship' with Gardner some time later, having found him initially 'arrogant and offensive' but growing in sympathy and affection for him partly due to their mutual estrangement from their families; he was separated from his wife and two daughters who were living in New Zealand.

When Gardner was first violent towards Oakes they had been living together for about six months in a very remote part of Australia where he had moved them to separate Gay further from her friends and family. Drunk one night, Gardner flew into a jealous rage 'kicking and punching me until he was too exhausted to lift his fist one more time, then [for] the rest of the night sitting on the bed threatening and abusing me'. Gays says that afterwards, 'with face and eyes swollen...and arms covered in bruises...teeth loose and my lips mashed', the people she had come to regard as friends in the small community turned away from her: 'you would have thought I was contagious'. When the police said they were going to charge Gardner with assault, a charge that would mean his release on bail, Gay said she had to 'beg' them not to until she could find a way to escape 'terrified of what he would do once he was released'.

After this first beating, Doug was contrite, repeating his apology over and over, saying that he had lost his temper and, being so intoxicated, had become convinced she would leave him for another man as his first wife had done. She writes, 'He managed to convince me that it would never happen again' telling her how much he loved her and she, 'desperately wanting to be loved by someone', forgave him. But, she never forgot what he was capable of and her fear of another beating, she says, gave him 'complete control' over her as she 'tried desperately not to do anything that might incite his anger'.

So began the ten-year cycle of abuse followed by periods of apology and loving attention when he could be 'charming and thoughtful'. On his whim, and at frequent intervals, they would move to a different town, disrupting the children's schooling and undermining Gay's attempts to build a more stable future: 'every time I got settled and made friends we were off again'. Gay became pregnant once more. Throughout the pregnancy Doug was violent and abusive towards her causing her to haemorrhage on several occasions. But, she recalls, 'every time I got to breaking point and planned to leave' he would 'become the caring, helpful man he used to be'. She was admitted to hospital to investigate the cause of the bleeding which the doctors never found. Gay says she was too 'ashamed and embarrassed' to tell anyone of the violent mistreatment she was subjected to and at this stage still hoped things would 'soon come right'. The baby, Quinn Steven Gardner, was born fourteen weeks premature, the day before Gay's twenty-third birthday. She was told he would not live through the night but, against the odds, he survived.

The cycle continued. Twice Gay made concerted attempts to leave in the middle of the night, but with two young children and a baby, and with no outside help, she did not get very far and was beaten when Doug caught her. Eventually, 'on the spur of the moment', and without anything packed, she bought bus tickets for an unknown destination, just as far as the money she had would take her and the three children. They were taken in at a women's refuge and provided with the 'barest essentials'. They spent three weeks there before Doug tracked them down. Gay writes, 'the girls were miserable and I was lonely' so that when Doug appeared wanting them to come back she agreed on condition that the abuse was to stop and they were to live where she chose. For a brief time he complied and they were happy living in a large house centrally located in Brisbane close to friends and other families. When the abuse resumed Gay once again escaped with the children in the night.

Some months later, Gay received a letter from Doug who had returned to New Zealand. He said he had found a good job, given up drinking and was much happier there, that he never liked living in Australia and he missed his family. He admitted how much he had hurt her but said it was because he was unhappy which made him drink. He promised that

everything would be different if she came to live with him in New Zealand. She threw the letter away.

Gardner was persistent, writing several more letters ‘begging’ her to forgive him. Gay says, ‘All this time, Doug had blamed me for his behaviour and his admission that he was responsible for his own actions had me fooled.’ She says she ‘struggled with herself’ over this decision but in the end ‘had to admit’ that she still loved him, so set aside her ‘remaining fears’ and in May 1985 travelled with her three children to New Zealand. There she met up with Doug who was – ‘true to his word’ – not drinking and working full-time. She says, ‘this new Doug was a totally different person’ who for a while ‘fooled everyone, including me’.

The abuse began again, first with the public put downs ‘threats, insults and orders...about anything and everything that annoyed him’, then the physical abuse that he now turned also on Gay’s daughters who were beaten for making a mess: ‘he was “the boss” and the girls and I would do as we were told, “or else”’. The children were banned from playing in the lounge and ‘many times they had to watch him throw a favourite toy or book into the fire or the rubbish because they had brought it out of their room’. He devised ‘drawn out’ forms of punishment making the girls stand for hours with their hands on their heads while their dinner went cold. Gay says she became ‘a nervous wreck’ trying in vain to anticipate his demands and prevent an outburst, but no matter what she did or said, it was wrong by Doug.

In 1986 she was working two jobs when she became pregnant again. When her second son, Steven, was six weeks old she returned to work, but with Doug’s drinking and gambling habits she says the family was ‘constantly in debt’. The family car was repossessed. Little over a year later, with Steven just a few months old, and while taking the pill, Gay became pregnant again. ‘Devastated’, she secretly arranged a termination (knowing Doug would never allow it), but on the morning it was planned Doug woke earlier than usual and refused to let her out of the house causing her to miss the appointment, which could not be re-arranged before she was too far into the pregnancy to

have a legal abortion. She writes: 'By Christmas 1987, things had become intolerable. 'Doug had left his job and was drinking more heavily and being more violent than ever'. Gay also discovered that Doug was having an affair and confronted him about it at the pub where he was drinking; telling him to pack his bags and leave. Furious and drunk, he returned home threatening to kill her and the kids, saying 'no one else was going to have us'. She writes, 'He chased me through the house and beat me up. I had tried to lock myself in the bathroom but he caught me and threw me into the coat cupboard...I was four months pregnant at the time.' After that, she says she was too frightened to tell him to leave.

Instead, Gay resolved (once again) to leave. Having persuaded her mother to move to New Zealand, after she arrived, they worked together on a plan of escape. Women's Refuge was contacted and another secret meeting arranged. Gay was too frightened to stay at the local refuge so arrangements were made for them to travel from Christchurch to Timaru (166 kilometres) the following morning. Several weeks later, Gay came face to face with Gardner in the streets of Timaru. He wanted custody of Quinn (five) and Steven (not yet twelve months) which meant Gay was forced to return to Christchurch to attend a Family Court hearing. Gay was granted interim custody and Doug given access. Still at the refuge, she would meet Doug in the township for access visits during which Doug would tell Quinn it was his mother's fault he was not around. Quinn's behaviour deteriorated and, unable to cope and having trouble with her pregnancy, Gay agreed that he could go and live with his father if he wanted to. From then on, she says, Doug was able to use Quinn to get at her.

When her daughter, Beth, was born in June, 1988, Gay had moved from Refuge into a house at an undisclosed address. Not wanting Doug to know where she was living, she continued to meet him in the town for access visits. But when Beth was a few weeks old Gay became very ill with asthma and the weather turned cold. She felt forced to let Doug come to the house to avoid having to take Beth on public transport to meet him. Doug, once again on his best behaviour, eventually worked his way back into Gay's life and they started living together again.

For several months, she says, 'things were okay' until she went out one night with some friends against his wishes:

I was in the bathroom [when] he came in punched me in the face and tried to drag me up the hall. I broke free and tried to get out of the front door but Doug caught me and threw me against the wall. He tried to punch me in the head but I moved and he put his fist through the wall, which made him furious. He dragged me up the hall and into the bedroom, where he threw me on the bed and viciously raped me.

Gay says the 'mental and emotional scars' of this sexual attack and two subsequent sexual attacks have never left her: 'Doug had discovered a new way to make me even more afraid and compliant, and he used it to control me further.'

By 1990, 'the good times were almost non existent'. When Doug took off for the white baiting season on the West Coast leaving no money for food, Gay packed the kids into the car and left. She ended up in Blenheim where she again stayed at a refuge for several weeks before moving into another 'safe house', not telling Social Welfare for fear that Doug would trace her through a friend he knew who worked there. But Social Welfare suspended her benefit until she supplied the address. The next day Doug tracked her down in Blenheim, going to the children's school where he presented court papers that said he was Quinn's legal guardian and taking Quinn back to Christchurch before Gay could even say goodbye. If she wanted to see Quinn, and because Doug had access to Steven and Beth, she had to keep in contact with him.

By 1991, having developed a prolapsed uterus during Beth's birth, Gay was bleeding so profusely she had to go into hospital for an operation. Exhausted from this she agreed to let Steven stay with Doug until she recovered. Eventually she moved back to Christchurch to make things easier with access. She recalled:

Doug spent a lot of time at my house and was continuously pressing me to let him move in, or for me to go and live with him...I was trying to get my life together but he just wouldn't let me live in peace...He was very drunk. When I refused to let him take my car, he flew into a rage...picked up the television and hurled it across the room...Steven, who had been watching the television, was frozen in terror...I screamed at Doug... for smashing the kids' television, he flew at me and started hitting me. I tried to fight back but he was too strong. Joanne tried to help...I could hear Beth and Quinn crying and Dalane trying to settle them down...Doug got me on the floor. I was still shouting at him to get out of my house but he kept putting his hand over my mouth and nose so I couldn't breathe. He said he was going to take all of the kids and that I would never see them again...He sat on me with his knee in my throat. I couldn't breathe and was terrified that he was going to kill me.

On this occasion, a neighbour intervened threatening to call the police if Doug did not leave. He left, pulling the spark plugs from Gay's car. A few hours later he returned and tried to kick the back door in.

I told Joanne to climb out of the bedroom window and go next door to call the police...He caught Joanne...made her climb back through the window and climbed in after her. He pushed Joanne down the hall in front of him and started beating me up again...Steven had gone into shock again and wouldn't move, but Doug picked up Beth, grabbed Quinn by the hand and took off. I ran out of the door after him and struggled with him for the kids...By the time the police arrived Doug had long gone...I laid an assault charge but the police said that I didn't look too bad...I kept ringing and going to the police station to see whether they had arrested Doug yet but they said they didn't know his whereabouts...I informed them several times when I saw him as I drove past the pub where he drank...but they were completely uninterested. I became very depressed and couldn't sleep for fear that Doug would break in during the night and take the kids or hurt us. I found it impossible to function normally...He started watching the house and

following me everywhere until eventually, the fear and stress [and] arguments over my not letting him move in permanently and the threats to take the children and hurt me, Dalane and Joanne escalated. I was so afraid that I let him move in.

Shortly after this Joanne revealed she had been sexually abused by Doug from when she was five years old up until she was eleven. Gay admits at this time she told friends she wanted to kill Doug for what he had done to her daughter. When Social Welfare was told they threatened to remove all the kids from Gay's care if she didn't get Doug out of the house. Counselling was ordered by the Family Court to arrange access. Gay explained to the counsellor that she didn't want to have contact with Doug, how she had tried to leave him many times. She was desperately afraid she would lose her kids and knew she needed the help of the authorities to keep Doug away from them 'but all I ever seemed to get from them was threats...I felt there was no way I could win'. Gay struggled to understand the court's insistence that he have access to the children when both police and welfare said they were at risk.

Over the years, Gay had applied for and been granted many non-violence and non-molestation orders but every time Doug avoided being served with the papers. Gay had to pay fifty dollars for each order and came to see them as 'a waste of time and money'. She would call the police for assistance when Doug was stalking her but they would tell her they were too busy. The Family Court ordered Doug to attend anger management and alcohol abuse programmes: 'He flatly refused...it was a complete farce'.

Doug did as he liked when he liked, took what he wanted, came and went when it suited him, but I could do hardly anything without his permission...I had sex with him when he wanted me to because it was easier and less painful to submit than to suffer being raped...I was an emotional mess...I realised that it was only a matter of time before Doug seriously hurt, or killed, me and I knew I had to get away, once and for all. I left in March (1992).

Gay escaped to Women's Refuge on two more occasions that year only to be tracked down by Doug, threatened and forced back. In spite of near constant bleeding from the prolapsed uterus and while scheduled for a hysterectomy, Gay became pregnant again. Her sixth child, Dawn, was born in August, 1992.

At this time, Gay and Doug were not living together but in November 'he moved in on me again'. Of this period Gay recalls:

It got to the point where, in order to survive, my brain would shut off. Doug made me feel like a waste of space on earth...Life seemed hopeless – or, rather, I didn't have a life...If I read about someone dying in a car accident, or from an illness or disease, I would cry and often ask 'Why not me?'

One night in January, 1993, Doug broke into her house by lifting the back sliding door off its runners and told her to make him a meal. Complaining about the food 'not fit for a pig' he threw the plate hitting Gay in the back as she was trying to replace the door. He spent the rest of the night 'telling me all the awful things he was going to make me watch him do to Joanne and Dalane' (his step-daughters). In the morning, the 'cursing and abusing' continued as Gay tried to make breakfast and get the children off to school. She was greatly relieved when a friend, Paula, arrived providing a temporary reprieve. As she made his coffee, Gay noticed her container of sleeping pills on the windowsill and asked Paula what she thought would happen if she gave them to Doug. Feeling as if she was 'watching someone else do it' she mixed six or eight tablets into his coffee. Doug slept for several hours and woke; it seemed to Gay, 'in a much better mood'. Doug spent the next day at the TAB and lost the money she needed for food that week. They argued over that, he 'left in a huff', and she rang the St Vincent de Paul society to ask for help with groceries.

As she was about to go to bed that night Doug returned shouting and banging on the door to be let in. Gay opened the door and repeated her intention to call the police. They argued and he left again. Gay locked the house and went to bed. In the early hours of the

morning and ‘sounding very angry’ he returned, again banging on the door to be let in. ‘Knowing he would get in if he wanted to’ Gay opened the door once more. He came in and stood over her, his face ‘menacingly close’ to hers as he told her he would kill her before he let her go to the police: ‘He was in a vicious mood...The nagging and threats went on and on’. Ordering her to make another cup of coffee he then ‘lurched into the toilet’. Gay said at that point she ‘thought about running away’ but knew she couldn’t get six children out of bed in time.

‘In a haze of fear’ she made his coffee. Reaching for the sugar, she came across an assortment of prescription drugs. ‘In a panic’ she grabbed the pills scattering their containers across the kitchen bench and threw them into the cup just as Doug came out of the toilet: ‘I didn’t really think about what I was doing – I just remember putting the tablets in his cup as fast as I could, and hoping he would leave me alone’. He drank the coffee, continuing to tell her ‘all the awful things’ he would do to her if she went to the police. Eventually he fell asleep.

Gay says she doesn’t know why she didn’t take the children (five of her six children were asleep in the house that night) as she spent the rest of the night worrying that he would wake up, but she ‘was simply not functioning’ properly. The next day, a Saturday, Gay returned from taking the children shopping and ‘went to see if Doug was awake’. ‘When I knelt down beside him and touched his face, it was cool...I somehow knew that he was dead and felt the blood drain from my body...my worst fears were realised’.

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