

The Bottom of the Heap?

Why Maori Women are Over-Criminalised in New Zealand

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I INTRODUCTION

The fastest growing demographic in New Zealand's burgeoning prison system is Maori women. The female prison population overall has exploded in the past decade, for a number of complex and inter-related reasons. These include a general climate of punitiveness resulting in harsher sentencing trends, new legislative guidelines in sentencing, and the abolition of the suspended sentence.¹ While female offenders and inmates are often deemed invisible due to their low raw numbers compared to their male counterparts, the position for Maori women is even more dire.

In this article I will set out the historical and contemporary factors and experiences that place Maori women at higher risk of offending, and imprisonment. While other research has looked at Maori offending generally, in my view, the context of Maori female offending sets them apart from both Maori men and other women. The lack of specific data on Maori women's offending and incarceration is one of the reasons that the increasing gap between ratios of Maori men and women in offender and prison populations has occurred under the radar. It is crucial for government agencies and providers to consider Maori women as a group in order to effectively and appropriately provide for their rehabilitative and reintegrative needs.

In the first part I set out the 'problem' of Maori female offending and how it has been conceived. I do this by arguing:

- (i) That an intersectional analysis to criminal justice data is essential;
- (ii) That Maori women are a significant constituency in the criminal justice framework; and
- (iii) That their socio-economic and offending profiles define Maori women as a unique demographic.

I set out statistical profiles of offending in New Zealand by gender and race, as they are typically presented, to illustrate that it is difficult to identify clearly Maori women from within these sub-populations, as their experiences are not typical of either. I propose that it is essential to *start* with the experiences of Maori women, rather than

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¹ See J Tolmie, "Women and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *The New Zealand Criminal Justice System* (Lexis Nexis, Auckland, 2007) 295-297.

analyse them from either a gendered or ethnic perspective, and I briefly review the literature of theorists who support such an intersectional approach to dealing with the needs of minority women.

In the next section I explain the unique experiences of Maori women, and how they are over-criminalised both by our rates of offending and the response of the criminal justice system – compared with both non-Maori women and Maori men. I outline how tikanga Maori and the process of colonisation have specifically shaped the position of the Maori female, making her unique in this country. The principles and practices of Maori tradition provide for different life paths, roles and responsibilities for women compared with men. In addition, the overarching regulating principles of mana and tapu provide for a culturally specific framework that co-exists with gender constructs in Maori society.

This discussion of the process of colonisation demonstrates how the double whammy of both racism and sexism suffered by Maori women places us in a different position from both Pakeha women and Maori men. Ultimately, this process produces a unique combination of variables that influences the position of Maori women today – a population that is over-represented in all negative socio-economic indices relating to health, housing, education, poverty and offending.

The Problem of Maori Female Offending: Why it is Essential to Start With the Experiences of Maori Women

The problem of criminal offending in New Zealand is usually presented and analysed in terms of gender and race. In most instances these are presented as totally separate variables – so that where gender and race intersect, as they necessarily do for Maori female offenders, there is no separate statistical record of what makes that population unique from either of the statistical datasets for Maori offenders or female offenders generally. In this section I first will set out and interpret the statistical data relating to both Maori and women's offending in New Zealand, to demonstrate that Maori women have a unique offending profile that is often rendered invisible within the current system of data collation because gender and race are analysed as separate categories.

Secondly, I will introduce theories of intersectionality that aim to explain why we need to contextualise the lives of women of colour if their involvement in criminal offending and social harm is to be adequately and appropriately dealt with. Intersectional theory has developed from the experiences of women of colour in many jurisdictions, experiences that mirror the difficulties Maori women face when their lives are fragmented by race and gender.

Thirdly, I will provide a more qualitative analysis of the experiences of Maori women, in order to illustrate how the colonisation of Aotearoa has impacted uniquely upon Maori women in ways that are significant in shaping their patterns of offending and their treatment by the criminal justice system. The process of colonisation not only devastated and reconstructed Maori society and collective family support structures, but it also imported Western notions of gender, including misogyny and sexism, that fundamentally affected the perception and treatment of Maori women by both Maori men and Pakeha men and women.

Fourthly, I will discuss the treatment of women in the criminal justice system, including theories asserting the gender regulation of women, which frequently manifests

in a form of a paternalistic display of “chivalry” granted to those women who meet predetermined notions of gender expectations, in other words women who are seen to be “gender regulated”. I assert that Maori women are unable to meet these gender role expectations due to various cultural and practical barriers, with the result that, unlike non-Maori women, they are filtered in rather than out of, the criminal justice system at every stage of progress through it.

Statistical Profiles of Offending in New Zealand

In this part I will set out the typical presentation of criminal justice offending data in New Zealand. I look at the data on gender and the data on Maori before concluding that Maori women are atypical of either of those populations. It will be evident that there are significant gaps in what we know about Maori women as offenders, due to the manner in which criminal justice data is collated, within a generally single-axis framework. This means that nearly 60% of the female prison inmates in New Zealand is for all intents and purposes an invisible population within the Corrections sector insofar as our knowledge of their offence patterns and personal histories.

Data relating to offending in New Zealand is collated by several different agencies, including the Ministry of Justice, the New Zealand Police and the Department of Corrections.

i. Statistics by Gender

Theorists have long commented on what has been termed the “gender ratio” problem of crime – that most reported crime is committed by men. This phenomenon is confirmed by the data on offending in New Zealand, where in 2005, only 19% of Police apprehensions for crime were for female offenders.² Of those apprehended women, only 55.39% were prosecuted, compared with 66.91% of apprehended men.³ Of all people convicted in 2005, women were responsible for only 19% of traffic offences, 24% of property offences, 12% of violent offences, 17% of drug related offences, 18% of offences against justice, and 12% of offences against good order.⁴ Women accounted for only 17% of all convictions and 4% of those sentenced to a custodial sentence.⁵

Aside from the *quantitative* differences in the scale of male compared with female offending, there is also a stark *qualitative* difference in relation to patterns of offending. Traffic offences are the most common offences committed by both men and women, accounting for 43.23% of women’s offences and 40.55% of men’s offences for 2005.⁶ When traffic offences are removed from the equation, women’s offence categories in 2005 can be disaggregated as follows, as compared with men: 9.47% of women were convicted of good order offences (cf 14.69% of men), 8.18% drug offences (8.24% of men), 6.9% miscellaneous (8.7% of men) and 2.37% for other offences against the person

² *Statistics New Zealand, Focusing on Women 2005* (Statistics New Zealand, Wellington, 2005) 117. See J Tolmie, “Women and the Criminal Justice System” in J Tolmie and W Brookbanks (eds) *The New Zealand Criminal Justice System* (Lexis Nexis, Auckland, 2007) 297.

³ Above n1, 297.

⁴ *Ibid*, 299.

⁵ *Ibid*, 297.

⁶ *Ibid*, 298.

(2.93% of men).⁷ But, in proportional terms, women commit more property offences (39.84% of women's crimes compared with 26.98% of men's) and fewer violent offences than men (12.25% of women's crimes compared with 18.8% of men's).⁸

ii. Statistics by Ethnicity

Statistical profiles of offending in New Zealand in modern times reflect a trend of serious habitual offending by Maori, vastly disproportionate to our 15% of the population.⁹

Maori are 3.3 times more likely to be apprehended for a criminal offence than non-Maori.¹⁰ Maori men and women are more likely to be prosecuted than non-Maori.¹¹ Ministry of Justice figures from 1999 reported a prosecution rate for young Maori people aged 10-16 at 76.2 per 1000 population compared with 16.95 per 1000 population for young non-Maori.¹² Maori adults were 3.8 times more likely to be prosecuted than non-Maori and 3.9 times more likely to be convicted of an offence.¹³ Nine times as many Maori than non-Maori are remanded in custody awaiting trial.¹⁴ Of all the cases that resulted in conviction in 2005 where the ethnic identity of the offender was known, 43% involved Maori, compared with 45% for Caucasians.¹⁵

In relation to young people, the youth justice scheme in New Zealand was overhauled in 1989, with a new emphasis on keeping young offenders (those aged 10-17) out of institutions. Despite these changes, in 2004, 54% of the 6,269 young people prosecuted for offending were Maori.¹⁶

In terms of the type of offence committed by ethnicity, in 2004, Maori accounted for 47% of all convictions for violent offences (compared with 38% for NZ Europeans), 48% of all convictions for property offences (42% for NZ Europeans), 40% of all drug offences (54% for NZ Europeans), and 32% of all traffic offences (40% for NZ Europeans).¹⁷ These statistics are not broken down by gender which, as Julia Tolmie states, results in the experience of Maori women disappearing into the separate categories of 'women' and 'Maori', although their experiences "are unlikely to be typical of either."¹⁸

⁷ Ibid.

⁸ Ibid.

⁹ Maori constitute 14.6% of the overall population of New Zealand - Statistics New Zealand, *Census of Population and Dwellings 2006*.

¹⁰ P Doone, *Hei Whakarururanga Mo Te Ao* (Crime Prevention Unit, Wellington, 2000) ch 4.

¹¹ Ministry of Women's Affairs, *Maori Women: Mapping Inequalities and Pointing Ways Forward* (Wellington, 2001) 117.

¹² Ibid, 116, Table F4.

¹³ Ibid, 117.

¹⁴ M Burton, "The Effective Interventions Initiatives and the High Number of Maori in the Criminal Justice System" (speech given at Ngakia Kia Puawai, New Zealand Police Management Development Conference, 28 November 2006) Paper last accessed 12 November 2010 at www.labour.org.nz/MarkBurton/speeches_and_releases/policecollege281106/index.html.

¹⁵ N Soboleva, N Kazakova and J Chong, *Conviction and Sentencing of Offenders in New Zealand: 1996-2005* (Ministry of Justice, Wellington, 2006) Executive Summary.

¹⁶ Ibid, Table 7.11a.

¹⁷ Ibid, 2.14.

¹⁸ Above n1, 303.

iii. Offending Rates For Maori Women

A comparison between male and female statistical profiles and their treatment in the pre-prison process does not address general disparities between Maori and non-Maori embedded in those statistics or more particularly between Maori and non-Maori female profiles. For example, in 1999 prosecution rates for young Maori women aged 10-16 were six times the rate for young non-Maori women.¹⁹ Within the adult population the prosecution rate in 1999 for Maori women was over five and a half times that of non-Maori females.²⁰ Non-Maori females had the lowest rate of criminal prosecution, at 1.1%.²¹ Conviction rates illustrate similar disparities, with 54.4% of all women convicted identifying as Maori, at a time when Maori made up 12.7% of the adult female population.²² At sentencing Maori women received custodial sentences in 6.2% of cases, compared with 4.3% of cases involving non-Maori female offenders.²³

In 2005, 45.83% of women apprehended were Maori, and Maori women represented 50.52% of women prosecuted, compared with 43.07% of apprehensions identifying as Caucasian women, who made up 40.1% of women prosecuted.²⁴ Non-Maori women are therefore filtered out of the system in greater proportion to Maori women at the point of apprehension, often by way of a Police warning or caution.²⁵

The comparisons between non-Maori and Maori females cited above illustrate that the gap between ethnic groups is wider than that which exists between the genders. Ethnic disparities in the risk of imprisonment for women are evident from statistical studies conducted in the United States, England and Wales, Canada and Australia. In each of these jurisdictions, black and Aboriginal women are imprisoned at far greater rates than white women; and in England and Canada, as in New Zealand, the over-representation of these minority women within the female prison population is greater than that for minority men within the male population.²⁶ In other words, the experience of racism and race modifies the effects of gender for women in a striking fashion in all jurisdictions in which such data is recorded.

The general profile of Maori offending also fails to show the significant differences between male and female Maori offenders. The scale and type of offending, as well as the likely outcome in sentencing, all differ significantly between Maori men and women. For example, the youth prosecution rate which shows that Maori youth are prosecuted at rates almost four and a half times that of non-Maori, fails to demonstrate

¹⁹ Above n1, 116.

²⁰ Ibid, 117.

²¹ Ibid, 118.

²² Ibid.

²³ Ibid, 119.

²⁴ Above n1, 302-303.

²⁵ Ibid, 302-303.

²⁶ In the United States, black women are imprisoned at six times the rate of white women, and Hispanic and Indian women at double the rate of white women: Bureau of Justice Statistics, *Correctional Populations in the U.S. NCJ-177613* (U.S Department of Justice, Washington D.C., 2000). In England and Wales, black women are ten times more likely than white women to be imprisoned: Home Office, *Total Monthly Prison Population by Sex (Offenders and Corrections Unit, London, 2001)*. Aboriginal women in Canada make up 23% of inmates and only 2% of the general population: A Finn, S Trevehan, G Carriere and M Kowalski, "Female Inmates, Aboriginal Inmates, and Inmates Serving their Life Sentences" (1999) *Juristat* 19. A similar disparity exists for Aboriginal women in Australia: B Hampton, *Prisons and Women* (University of New South Wales Press, Sydney, 1993).

that young male Maori are prosecuted at five times the rate of their Maori female counterparts.²⁷ Data also shows that property offences accounted for almost half (48.1%) of Maori female offending, and only a third of Maori male offending. 22% of Maori male offending involved violence.²⁸ There are no statistics kept in relation to violent offending by Maori females, although of the women in prison in 2004, approximately 60% of those convicted for violent offences identified as Maori.²⁹

Although we have already established that men are more likely than women to receive a prison sentence, and Maori women more likely than non-Maori women, Maori men are two and a half times more likely than Maori women to be incarcerated.³⁰ What this demonstrates is that, although over-represented in the female offending and prison populations compared to Maori men in the male population, they are still numerically a significantly smaller population within the justice system than Maori men. What this means is that the effects of gender are operational in Maori women's lives (as they are in Maori men's), even if they are mediated by ethnicity in ways not experienced by Pakeha women (or men).

Although some data does exist, it is not consistent and frequently it is, in fact, difficult to extrapolate data in relation to Maori women's offending, as separate from both Maori men and non-Maori women. Given the huge over-representation of Maori women in offending and imprisonment statistics, it is therefore imperative to take an approach to data collation that allows the relevant authorities to understand the unique positioning of Maori women, to allow for a more nuanced approach to their incarceration and rehabilitation.

In the following section I will set out some of the key tenets of intersectional theory, arguing that this is the appropriate approach to take in respect of a population as important as Maori women are in the criminal justice system.

The Intersection Between Gender and Ethnicity

i. Intersectional Feminism in the International Context

The fact that we feel our Aboriginality more strongly than our gender is a reflection that the repercussions of racism in Australia are often greater than those of sexism. Aboriginal women and non-Aboriginal women in Australia do not have a shared experience. This is due to a potent combination of racism and sexism in the lives of black women.³¹

The above quote from Aboriginal legal academic Larissa Berendt, illustrates the difficulties faced by women of colour, and the dilemma of what has been termed the

²⁷ The rate of Maori female prosecutions is 25.4 per 1000 population compared with 127 per 1000 for young Maori males: see above n11, 116.

²⁸ Above n 11, 118.

²⁹ Department of Corrections, Risk Assessment of Recidivism of Violent Sexual Female Offenders (Wellington, 2005) 3.

³⁰ Above n 11, 119.

³¹ L. Behrendt, "Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourses" (1993) 1 Australian Feminist Law Journal 27.

“oppression sweepstakes.”³² This term refers to the competition amongst variables such as race or gender in the lives of women of colour as to which attracts more discrimination and oppression, with many women feeling that they must choose one part of themselves to identify with in their political or legal struggle against inequality. This is the first criticism of feminist theory – that it does not account for difference amongst women. Black/Latino scholar Trino Grillo speaks of the dilemma:³³

[I] understand a little better the anti-essentialist lesson which says I should not permit myself to be pressed, to be made to choose which part of myself is most important to me. The lessons of anti-essentialism and intersectionality are that the oppressions cannot be dismantled separately because they mutually reinforce each other. Racism uses sexism as its enforcer.

Much modern criminological and penological theory has tended to focus on women as a distinct class to male offenders. Alternatively, the classification and theories relating to criminality offenders focus on another variable, such as race or ethnicity. The theory of intersectionality, and aspects of Critical Race Theory in the Realist tradition of jurisprudence, assert that these differentiations fail to account for the effect of *intersecting* variables, such as the “potent combination” of race and gender.³⁴

The development of feminist theory in the mid-20th century initially presented the experience of women as a monolithic construct. This approach was soon criticised for essentialising women, and ignoring the foundational influence of other factors such as race, ethnicity, religion, sexual orientation or class. As the influential black female theorist, Kimberle Crenshaw, claimed:³⁵

The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intragroup differences.

The second major criticism of early forms of feminism, particularly liberal feminism, was the reliance on equality theory, in which the goal was the attainment of

³² R Austin, “Sapphire Bound” [1989] Wis.L.Rev. 539, 546.

³³ T Grillo, “Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House” (1995) Berkeley Women’s Law Journal 16, 19.

³⁴ The extensive literature on intersectional theory, which largely derives from the United States includes: K Crenshaw, “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” in D K Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple, Philadelphia, 1993); A Harris, “Race and Essentialism in Feminist Theory” (1990) 42 Stanford L Rev 581; E V Spelman, *Inessential Woman* (Beacon Press, Boston, 1998); M Kline, “Race, Racism and Feminist Legal Theory” (1989) 12 Harvard Women’s Law Journal 115; J Scales-Trent, “Black Women and the Constitution: Finding Our Place, Asserting Our Rights” (1989) 24 Harvard Civil Rights/Civil Liberties Law Review 9. There is some research deriving from the United Kingdom, including: S Fredman and E Szyszczak, “The Interaction of Race and Gender” in B Hepple and E Szyszczak (eds), *Discrimination: The Limits of the Law* (Mansell, London, 1992) 214; D Ashiagbor, “The Intersection Between Gender and Race in the Labour Market” in S Sheldon (ed) *Feminist Perspectives on Employment Law* (Cavendish, London, 1998) 139.

³⁵ K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241, 1242.

similar treatment for women and men. The goal of equal treatment with men was problematic when applied to women of colour. Which men were they talking about? Women of colour and of the working class began to deconstruct the values and standards implicit in this vision of equality as white, male and middle class. For example, the assumption that women wanted access to work and the professions ignored the history of working class women who had always worked, with no chance of entering the professions. In other words, the “equal treatment” theory seemed to be appropriate for white middle class women, striving to be treated the same as white middle class men. The goal of equal treatment between genders does not transfer to indigenous or minority women. Given their shared history of colonisation, oppression and disadvantage, no aboriginal or minority woman would aspire to be in the place of an aboriginal man, who will have also suffered discrimination. To women of colour therefore, liberal feminism replicated the racial hierarchy through “the unarticulated presumption of white race”.³⁶

Parallel criticisms were made with respect to the influence of race and ethnicity (and the non-consideration of other identities) in Critical Race Theory. Critical Race Theory grew out of the Critical Legal Studies movement of the late twentieth century, which deconstructs the notion of neutral, positivist law. Whereas Critical Legal Studies scholars asserted that the law reflects the privileged class subjectivity of those in power, Critical Race Theorists went further in insisting that race was more important than previously thought by examining the relationship between race, racism and power.³⁷ Just as feminists criticise the gendered nature of law and its application, Critical Race Theorists argue that law preserves the cultural and ethnic mores of the people who shape, influence and apply its content. Overlapping some of the feminist critiques of liberalism, Critical Race Theorists, such as Richard Delgado, argue against essentialism, promoting subjective positioning instead. The idea is to debunk liberal claims to objectivity, and expose the law for perpetuating the dominance of white racial and ethnic superiority.³⁸

There are a number of key tenets of Critical Race Theory, as argued by Richard Delgado and others.³⁹ The first is that “racism is ordinary”, in that it is so embedded in society and in our legal and political structures as to be almost invisible. Racism serves both material and psychic interests. For white people with power, racism is materially advantageous, while for white people of lower or working class, there is at least a psychic advantage to promoting whiteness over non-whiteness.⁴⁰ The second tenet was put forward by one of the founding fathers of Critical Race Theory, Derrick Bell, who argues that the interests of blacks were only advanced by white people when their interests coincided – this is the notion of “interest convergence”. Bell’s analysis puts a different spin on the litigation of the American civil rights era – in that he claims the interests of blacks were only advanced when they did not threaten the real social and hegemonic status of whites.⁴¹ The third key tenet of Critical Race Theory is that the notion of race is purely a social construction, not tied to any fixed biological or genetic reality.⁴² At

³⁶ J Stubbs and J Tolmie, “Race and the Battered Woman Syndrome: An Australia Case Study” in (1995) 8 Canadian Journal of Women and the Law 122, 127.

³⁷ R Delgado and J Stefanic, *Critical Race Theory: An Introduction* (New York University Press, New York, 2001) chapter 1.

³⁸ R Delgado, *Critical Race Theory: The Cutting Edge* (Temple University Press, Philadelphia, 1995)

³⁹ Above n37.

⁴⁰ *Ibid.*

⁴¹ R Delgado and J Stefanic (eds) *The Derrick Bell Reader* (New York University Press, New York, 2005) chapter 1.

⁴² Above n37.

different times, depending on need or social circumstances, the law may racialise certain groups for particular purposes, such as immigration or the needs of the labour market.

For early Critical Race Theorists, being 'of colour' was the primary consideration in their analysis of the construction and application of the law and legal system, with general assumptions that the legal subject was also male and heterosexual. In early Critical Race Theory, it was the female aspect that was invisible, subverted by the figure of "the oppressed black man". Women from minority groups were discouraged, for example, from raising concerns about domestic violence on the basis that such concerns would feed into criticism and negative stereotypes in the broader community and result in a backlash against the group.⁴³

While both feminism and Critical Race Theory provided valuable scholarship in and of themselves, they were criticised as essentialising *either* race or gender as the primary indicator of identity and experience – effectively establishing binaries of black/white and male/female. Differences between the individuals of a particular gender or race were deemed invisible. Richard Delgado reports that the movement came to realise that "no person has a single, easily stated, unitary identity" and that "everyone has potentially conflicting, overlapping identities, loyalties and allegiances."⁴⁴ As Crenshaw states:⁴⁵

Feminist efforts to politicise experiences of women and antiracist efforts to politicise experiences of people of colour have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains.

The result was that women of colour, in particular, were at the "intersection" of several systems of oppression and fell into the gaps in both bodies of knowledge and politics because each theorised only one system of oppression. Intersectional theory developed to account for and explain the overlap between the two theories. Mohawk scholar Patricia Monture-Angus describes the phenomenon from the perspective of an indigenous woman:⁴⁶

Aboriginal womens' experience is both gendered and racialised. Often these two grounds of discrimination cannot be distinguished in the examination of specific acts, policies or programmes. Race (including colonialism) and gender are not discrete categories but overlapping and independent experiences.

The key tenet of intersectional theory is that people are made up of a combination of *indivisible* biological, social, and cultural characteristics, and that it is unrealistic to

⁴³ See for example the discussion on "political intersectionality" in Part II of K Crenshaw, "Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan. L. Rev.* 1241, 1251-1282.

⁴⁴ *Ibid.*, 1251-1282.

⁴⁵ *Ibid.*, 1241.

⁴⁶ P Monture-Angus, "The Lived Experience of Discrimination: Aboriginal Women Who Are Federally Sentenced" (unpublished paper, submission to the Elizabeth Fry Society of Canada, 2002). Found at www.elizabethfry.ca/submissn/aborigin/1.htm, 8, last accessed 12 November 2010.

place these characteristics in a hierarchy. In terms of the application of laws, it is asserted that subjects such as women of colour are discriminated against as a result of a particular combination of their race and their gender.

Furthermore, the unique circumstances of ethnic minority women cannot be quantified by reducing their membership of two different groups to a mathematical equation for discrimination. The experience of discrimination by ethnic minority women is a specific *combination of*, rather than addition, to the various disadvantages suffered by women and the ethnic minority in question. The issue is clarified by Crenshaw:⁴⁷

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet they often experience double [or additive] discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes they experience [intersectional] discrimination as Black women – not the sum of race and sex discrimination, but as Black women.

Angela Harris criticises the theory that an individual's social characteristics can be quantified and separately addressed, asserting that this produces a distorted essentialism.⁴⁸

The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to additional problems: "racism + sexism = straight black women's experience", or "racism + sexism + homophobia = black lesbian experience". Thus, in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis.

Similarly, Carol Alyward describes the difficulties the law has had in addressing multiple sources of discrimination in a distorted as opposed to fragmented fashion.⁴⁹

The inclination has been to address multiple grounds of discrimination in an additive or cumulative way. Rather experiences of multiple sources of discrimination are most often interdependent, overlapping and intersectional. The challenge is to approach these issues by addressing the way gender is racialised or race is gendered, as this is the way it often feels to those subjected to multiple forms of discrimination.

⁴⁷ K Crenshaw, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" in D K Weisberg (ed) *Feminist Legal Theory: Foundations* (Temple, Philadelphia, 1993) 385.

⁴⁸ A Harris, "Race and Essentialism in Feminist Theory" (1990) 42 *Stan. L Rev.* 581, 588.

⁴⁹ C Alyward, *Canadian Critical Race Theory: Racism and the Law* (Fernwood Publishing, Halifax, 1999) 5.

Intersectional analysis identifies qualitatively and quantitatively different experiences as a result of the combination of an individual's or group's experiences of multiple oppressions. The aim of intersectionalism therefore, is to stop the fragmentation of social characteristics, so that none of them is considered in isolation from the other when attempting to redress inequality.

Kimberle Crenshaw explains the operation of experiences of intersectionality through a three-part framework.⁵⁰ The first stage is "structural intersectionality", referring to the socio-economic or structural factors that result in minority women having quantitatively and qualitatively different life experiences than either minority men or non-minority women.

The second stage in Crenshaw's framework is "political intersectionality", where she discusses how belonging to at least two subordinated groups can result in torn loyalties where minority women have to choose between the sometimes conflicting political agendas of feminism versus anti-racism.

In a criminal law context, political intersectionality is demonstrated by Maori women not speaking out about domestic violence by Maori men, for fear of attracting a racist response to claims from the broader community. This issue was raised in a Ministry of Justice evaluation of the use of domestic violence legislation in 2000, with 13 of the lawyers surveyed claiming their Maori female clients were under cultural or family pressure not to pursue protection orders against their (generally Maori) partners.⁵¹

The final stage of Crenshaw's framework refers to "representational intersectionality", where women of colour are marginalised by particular constructions or imagery of themselves in popular culture and mass media. As Julia Tolmie observes in the New Zealand context:⁵²

Western constructions of femininity include not just female gender roles, but qualities that it is appropriate for women to possess, such as vulnerability, dependency and emotionality. Accordingly, it is argued that female offenders are also responded to positively within the criminal justice system according to the degree to which they can be constructed as vulnerable and victimised.

This insight provides a possible explanation as to why Maori women do not get the same lenient treatment in the criminal justice system [as non-Maori women].

Tolmie is alluding to the popular imagery of Maori women as strong, stropic and vocal – characteristics that defy the vulnerable, victimised construction of women. Traditional artistic representations of Maori women have portrayed them as overly sexualised, fallen women, of dubious morals, and some argue that these historical images contribute to the perpetuation of racist and sexist stereotypes of Maori women today.⁵³ As

⁵⁰ She sets out this framework in K Crenshaw, "Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 Stan. L. Rev. 1241.

⁵¹ H Barwick, A Gray, R Macky, *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice, Wellington, 2000) 4.7

⁵² Above n1, 305-6.

⁵³ J Sutton Beets, "Images of Maori Women in New Zealand Postcards After 1900", in A Jones, P Herda and T Suaalii (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000) 31; M Sheffield, "Film – Images of the Indigene: the Exotic Other in the South Pacific" in (2000) 6 Deep South, 1-8.

a result, Maori women are filtered into the criminal justice system rather than out, as most women are, and they are seen as *belonging* in the justice system in ways that Pakeha women are not. This is a clear example of race modifying the effects of gender. The use of discretion and notions of chivalry granted by male decision makers to women are not bestowed on Maori women in the way that they are for Pakeha. Maori legal academic Stephanie Milroy isolates this issue in the context of the courtroom:⁵⁴

Most lawyers and judges are white middle class males and females. They cannot help but have stereotypes of Maori women in their minds and it is difficult for even the most sensitive person not to apply inadvertently those stereotypes (and there are always those who are deliberately offensive).

Intersectional Theory in the New Zealand Context

Intersectional and Critical Race Theory have been adopted and developed to some extent in New Zealand through the Maori feminist, or mana wahine movement. Mana wahine is necessarily intersectional as it intertwines issues of race and gender as present in the lives of Maori women. Maori women such as Donna Awatere in the 1970s and 1980s took up feminist theory to challenge the dominant discourse of Pakeha feminism in New Zealand, arguing that reclamation of our sovereignty, not the elimination of patriarchy, was the primary concern for Maori women, and that this meant their allegiance was first and foremost to being Maori.⁵⁵ She was severely critical of Pakeha women, who she says are allied with Pakeha men in their denial of tino rangatiratanga for Maori, and use their race, power, privilege and status to suppress Maori aspirations:⁵⁶

The oppression of women *does not* exist in a vacuum: economic and racial privileges cannot be separated from sexual power.

This dynamic fits within what Crenshaw would later term “political intersectionality” – the dilemma faced by minority women in having to choose to side either with fellow non-minority women, or alongside minority men.⁵⁷ Notwithstanding her claims in relation to Maori women and tino rangatiratanga, Awatere is cognisant of some common ground with Pakeha women, and the need to eliminate oppression on the grounds of gender, as well as class and race.⁵⁸ Maori educationalist Professor Linda Smith is similarly torn – asserting on the one hand that the feminist struggle is relevant for all women of Aotearoa/New Zealand, and on the other that “[o]ur rage as an

⁵⁴ S Milroy, “Maori Women and Domestic Violence: The Methodology of Research and the Maori Perspective” (1996) 4 Waikato Law Review 9.

⁵⁵ D Awatere, *Maori Sovereignty* (Broadsheet Publications, Auckland, 1984) 42.

⁵⁶ *Ibid.*

⁵⁷ K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241. L Behrendt, “Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourses” (1993) 1 Australian Feminist Law Journal 27.

⁵⁸ Above n55, 44.

oppressed group is directed at dominant white structures which sit over us, and so encompasses white women as much as white men.”⁵⁹ Legal academic Leah Whiu is also forthright in her scepticism of allegiances with non-Maori women: “What affinity can we share with white women if they refuse to acknowledge and take responsibility for their colonialism?”⁶⁰

Nearly twenty years later, Maori criminologist Tracey McIntosh more clearly asserts the need for intersectional approaches.⁶¹

Race, gender, sexuality and class are interlocking: each of these factors impacts on the way the other is experienced... There is a tendency to privilege cultural discourses that stress the differences between Maori and Pakeha cultural values and to ignore the way that oppressive relationships are inflected by gender and class... Maori women continue to bear the greatest burden of social, political and economic oppression.

In the past two decades many more Maori feminists have explored the relationships between Maori and non-Maori feminists.⁶² The complex dynamics involved are identified in a nutshell by Johnston and Pihama:⁶³

As women we have been defined in terms of our differences to men, as Maori we have been defined in regard to our difference to the coloniser. As Maori women we have been defined in terms of our differences to Maori men, Pakeha men and Pakeha women.

Legal academic Ani Mikaere concludes however, that there is a role for Pakeha feminists in the struggle for recognition of Mana Wahine.⁶⁴

So long as they resist the temptation to define Maori culture and practices in terms of their own culture-specific understandings and accept their responsibilities as a relatively privileged group (relative to Maori women that is) to promote changes

⁵⁹ L Smith, “Maori Women: Discourse, Projects and Mana Wahine” in S Middleton and A Jones (eds) *Women and Education in Aotearoa 2* (Bridget Williams Books, Wellington, 1992) 34, 47.

⁶⁰ L Whiu, “A Maori Woman’s Experience of Feminist Legal Education in Aotearoa” (1994) 2 *Waikato Law Review* 161, 164.

⁶¹ T McIntosh, “Contested Realities: Race, Gender and Public Policy in Aotearoa/New Zealand”, a paper prepared for the United Nations Research Institute for Social Development Conference on Racism and Public Policy, September 2001, 9-10.

⁶² See for example N Te Awakotuku, *Mana Wahine Maori* (New Women’s Press, Auckland, 1991); M Szasy, “Maori Women in Pakeha Society” in C MacDonald (ed) *The Vote, the Pill and the Demon Drink* (Bridget Williams Books, Wellington, 1993); K Irwin, “Towards Theories of Maori Feminisms” in R Du Plessis (ed), *Feminist Voices* (Oxford University Press, Auckland, 1991) 2; CTK Hoskins, “In the Interests of Maori Women? Discourses of Reclamation” in A Jones, P Herda and T Suaalii (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000); L T Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (University of Otago Press, Dunedin, 1999); P Johnston and L Pihama, “The Marginalisation of Maori Women” (1994) 20 *Hecate* 2.

⁶³ P Johnston and L Pihama, “The Marginalisation of Maori Women” (1994) 20 *Hecate* 2.

⁶⁴ A Mikaere, “Maori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 *Waikato Law Review* 125, 147.

sought by Maori women, their insights into the workings of white patriarchy may well be of use to Maori women. This commonality of interest should not, however, disguise our differences in experience. Maori women's interests are, in the end, our own.

Aside from differences from Pakeha women, there are also issues between Maori men and Maori women. Clea Te Kawehau Hoskins is critical of the role that Maori men have played in the process of disempowerment of Maori women, so that Maori men are now viewed as the “legitimated keepers, interpreters and promoters of what is considered authentic, traditional tikanga and kaupapa Maori”, with the result that it is men who are articulating the social, economic and cultural goals for Maori.⁶⁵ Kathie Irwin also observed the cross-cultural alliance formed between Maori men and Pakeha men in the process of colonisation as “the evolution of strange new cultural practices in which men are bonding to each other, through patriarchy, to give each other participatory rights across Maori and Pakeha culture, in ways which exclude Maori women.”⁶⁶ The primary historical example of such a phenomenon in Aotearoa was the British Crown's inability to recognise Maori women as leaders capable of negotiating and signing the Treaty of Waitangi on behalf of their hapu.⁶⁷ Mikaere challenges Maori men to confront their collaboration with Pakeha men to oppress Maori women, as part of our collective struggle against colonisation.⁶⁸

McIntosh articulates the tensions identified by the various Maori feminists for Maori women vis a vis Maori men:⁶⁹

Maori women continue to want to be linked to and stand by Maori men. We recognise that to achieve our aims and to maintain our own cultural values, continued solidarity is essential; we must however continue to strive for equal positions of power and responsibility... An emphasis on cultural solidarity obscures the very real difference of social class and social relations in Maori society in the same way that it obscures the inequalities between men and women.

The key to an intersectional analysis is to ground subjective experiences to contextually allow for a more nuanced understanding of the subject/s in question. In this next section therefore, I will set out the cultural and historical experiences of Maori women deriving from tikanga Maori, and will follow through to the process of colonisation that, in my view, establishes the structural framework in which Maori women are forced to operate today. This analysis fits into the structural aspect of Crenshaw's intersectional schema – illustrating the qualitatively different experiences of Maori women throughout the pre and post-contact period of New Zealand history.

⁶⁵ CTK Hoskins, “In the Interests of Maori Women? Discourses of Reclamation” in A Jones, P Herda and T Suaali (eds) *Bitter Sweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin, 2000) 39.

⁶⁶ K Irwin, “Towards Theories of Maori Feminisms” in R Du Plessis (ed), *Feminist Voices* (Oxford University Press, Auckland, 1991) 2, 18.

⁶⁷ A Mikaere, “Collective Rights and Gender Issues” in N Tomas (ed) *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, Auckland, 1998) 96.

⁶⁸ *Ibid.*, 97.

⁶⁹ Above n61, 14-15.

Tikanga Maori and the Process of Colonisation

I will not set out here a detailed description and analysis of the key concepts and processes underlying the normative framework of tikanga Maori that existed prior to contact with Pakeha. I will only briefly allude to this system, that was irreparably damaged upon contact and colonisation.⁷⁰ Tikanga Maori was and is underpinned by inter-related principles of tapu, mana and utu, and an ethic of whanaungatanga that saw people strive to maximise the collective health and wellbeing of their communities. Maori women were valued members of this pre-contact society, where one's status in terms of tapu and mana were more determinative of one's standing than gender, unlike Western society. There is however a place for gender, so that for Maori, the interplay between men and women reflects a complementary relationship, mirroring the overall desired norm of balance in the Maori worldview. Women had particular gender roles and responsibilities and were valued as wives, mothers, leaders and the glue that held the fabric of their whanau and kainga together.

The process of colonisation impacted upon Maori women in ways that were different in kind to the experiences of Maori men. It will be evident that the process described fits within Kimberle Crenshaw's intersectionality framework, in that these historical and cultural factors and processes set Maori women up to be over-represented as offenders, victims and inmates in the contemporary criminal justice system in New Zealand. In other words, it is asserted that the current positioning of Maori women as offenders and inmates is the result of a complex interaction of factors, that are unique to them as a sector of the New Zealand population.

The Breakdown of Tikanga Maori

Numerous factors are relevant in a discussion as to why the experience of the criminal justice system is different for Maori than non-Maori in New Zealand. At a philosophical level, the legal system of New Zealand is far removed from the tikanga based system of Maori law. Pakeha law emphasises individual responsibility, neutral or third party adjudication and an adversarial process. Punishment is meted out to individuals and options to be considered include imprisonment, an alien concept to Maori.

In contrast, a Maori system of punishment is largely forward looking – aimed at repairing relationships, whilst also accounting for past wrongs. The emphasis on the future however, prioritises a desire to reintegrate offenders, heal victims and maintain a balance between punishment and moving on. There was no traditional concept of imprisonment, as this would defeat both collective responsibility by isolating an individual offender, and also the desire for integration and healing. A traditional Maori system of dispute resolution is also reliant upon community cooperation and secure, healthy, cultural, family and economic identities and lifestyles.

Although this Maori world view and its principles and processes of dispute resolution are generally not accommodated or provided for in Pakeha law, cognisance

⁷⁰ For a more detailed analysis of the tikanga of offending, see K Quince, "Maori and the Criminal Justice System in New Zealand in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand* (2007, LexisNexis, Wellington) 336-341.

and recognition of tikanga Maori is necessary both due to legal and ethical obligations pursuant to international and domestic law, and also in order to effectively treat Maori offenders. Currently, Maori are forced to operate within a system that is culturally alien to our psyche, which does not allow for imperatives within tikanga to operate, such as reintegration of offenders within their communities.

The journey from the early days of Pakeha colonisation to the contemporary situation in relation to the position of Maori in the criminal justice system has been, for Maori, a painful one. Maori initially played a minor role in the law and administration systems established by the colonisers. For the most part in the initial decades of colonial settlement, Maori remained rural peoples, and the traditional systems of social organisation and living continued.

As colonial expansion took hold, more intrusive policies of assimilation and dispossession began to affect the every day lives of Maori. Large scale land alienations and colonisation had a monumental impact on Maori communities. Land holdings were alienated as a result of dubious dealings, confiscation or debts incurred during the Native Land Court's title investigation process. Generations of Maori knowledge and philosophies were either discarded or reframed to fit within Christian doctrine and oral history narratives were distorted and recorded in the Native Land Court.

The education of Maori children was regulated and controlled by the native schooling system, which proscribed both racialised and gendered education. The effect of racial segregation saw Maori as a whole deemed incapable of academic study, so they were schooled in manual trades, with little possibility or expectation of tertiary education. Within the segregated Native Schools there was further separation by gender, with Maori boys tagged as agricultural workers, and Maori girls set on the path to domestic servitude for Pakeha households, or as Maori farmers' wives. The purpose built Native Schools also allowed for the blocking of cultural transmission of Maori language, ideas and philosophies. Maori children were punished for speaking their native tongue, and inculcated in the virtues of learning the English language and Pakeha values.⁷¹ Anthropologist Michael Goldsmith has referred to the result of these policies as a "vertical holocaust", meaning a holocaust of identity, so that Maori could not pass on knowledge of their language and traditions to younger generations.⁷²

Although some commentators, both historical and contemporary, have argued that the treatment of Maori was the high watermark in terms of treatment of indigenous peoples by a colonial power, these policies and practices had a devastating effect on Maori society. Whilst Maori were relatively well-viewed and treated in comparison with the first peoples of North America and Australia, displacement from traditional lands and resources was intended, even if methodical extermination was not.

Many commentators have analysed the destructive effects of colonisation on Maori life.⁷³ The effects on Maori women were compounded by their being reduced to

⁷¹ See J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

⁷² M Goldsmith, "Maori Assertions of Indigeneity, Post-Colonial Traumatic Stress Disorder, and Holocaust Denial" in E Kolig and H Muckler (eds) *Politics of Indigeneity in the South Pacific* (Transaction Publishers, Hamburg, 2002) 85, 90.

⁷³ See for example A Mikaere, *The Balance Destroyed: The Consequences for Maori Women of the Colonisation of Tikanga Maori* (M Jur Thesis, University of Waikato, 1995) 142-3; N Te Awekotuku, *Mana Wahine Maori* (New Women's Press, Auckland, 1991)

the level of their European counterparts - in a patriarchal legal system that denoted women as the property of their fathers or husbands. Maori women lost their legal personality under the common law doctrine of coverture, and with it the ability they had in tikanga to own and manage property, and engage in contractual relationships.⁷⁴ In particular, the legal status and position of Maori women, their roles and responsibilities in collective histories and whakapapa were eroded by Christian sensibilities and Western laws. Christian notions of legitimate marriage and child bearing also affected rights of succession and social organisation ideologies.⁷⁵

Within the New Zealand context, the treatment of Maori women often left them last in line behind Pakeha men, Maori men, and Pakeha women. The colonisation experience was therefore *qualitatively* different for Maori women when compared with Maori men. As Maori legal academic Ani Mikaere argues, for Maori women, the impact of colonisation was that the balance between men and women proscribed in tikanga was destroyed. This was due to the imposition of new laws and values, but also because of the internalisation of these values by Maori men.⁷⁶ Within Maori society for example, the previously balanced gender roles on the marae was upset by the men of numerous iwi deciding that women could no longer speak in formal settings.⁷⁷

Despite racist policies and practices that prescribed different treatment for Maori compared with non-Maori, there did exist a patriarchal bonding across cultures that resulted in different experiences for Maori, based on gender. While Maori men were not deemed the equal of their Pakeha counter-parts, they were not subjected to the erosion of their roles and status in the same manner or to the same extent as Maori women. As Maori lawyer Annette Sykes has argued, this process effectively devalued Maori women and denied them their place in helping to determine the future of their whanau, hapu and iwi.⁷⁸

In day-to-day life, the social structure of Maori communities underwent significant transformation, with clear distinctions between the public and private domain, and the reconstructed nuclear family headed by the husband becoming the norm. The deconstruction of collectivism was most evident in laws aimed at individualising title to land, but also affected family ideologies.⁷⁹ The acceptance or imposition of the dichotomy of a private and public domain had significant implications for all women. According to Pakeha values, the natural place for women was in the private, domestic sphere, sheltered from the male public domain of politics, power and influence. For Maori women, who came from a society where whakapapa and mana were more influential in determining role and status than gender, this was a real diminishment of status.

The private and isolated nature of the nuclear household was in complete contrast to the open and collective nature of whanau and hapu living. This new dynamic may have contributed to a lack of protection for Maori women against domestic violence, which is not recorded as common in any historical records. Further, in this new normative scheme,

74 Above n64, 130-132.

75 Ibid.

76 Above n73.

77 See K Johnston, "Maori Women Confront Discrimination" *Indigenous Law Journal* 4 (2005) 21 at 31-33.

78 Annette Sykes' submission to the Waitangi Tribunal for the Mana Wahine Claim, cited in L Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (University of Otago press, Dunedin, 1999) 156.

79 Above n64, 133.

Maori women became increasingly vulnerable - economically reliant upon their husbands as sole breadwinners, and now sole caregivers of children under Christian values.⁸⁰

Within a century of the signing of the Treaty of Waitangi, Maori society had suffered irreparable damage. Most important in this process was the non-recognition of tino rangatiratanga or sovereignty over our own affairs, people and assets, despite the Crown assurances in the Tiriti o Waitangi.

The breakdown of the traditional legal system resulted in the disappearance of traditional familial structures, recognised leadership and physical wealth through land and resource holdings and the traditional economic base. These factors, initially the result of policies and practices aimed at land alienation, were compounded with the mass migration of Maori from rural to urban areas after World War Two. In 1945 75% of Maori lived in rural areas. By 1991 only 18% remained outside of the cities and urban settlements.⁸¹

Migration occurred for a multitude of factors – some Maori were forced off uneconomic land holdings, while others wanted to partake in modern urban society with all of its trappings. Regardless of the reasons, moving away from traditional tribal communities weakened Maori ties to traditional lands, support networks, and systems of social organisation. Urbanisation and the undermining of Maori social structures effectively led to widespread cultural alienation within two generations. As historian Bronwyn Labrum observes:⁸²

Urban opportunities were a double-edged sword as Maori attempted to adapt to the Pakeha urban lifestyle of permanent employment and a total cash economy and cultural pressures to leave certain customs and practices behind them. Newly available comparisons in urban setting accentuated the (unfavourable) differences between Maori and Pakeha to the Pakeha majority...With greater visibility came a greater perception of Maori as a problematic population.

Changes in patterns of employment, household structure and child raising saw the nuclear family supplant the whanau as the core social unit for many urban Maori.⁸³ These effects often increased the hardship for Maori women, isolated from traditional support and family.⁸⁴

One outcome of the impact of these historical factors is the high rate of socio-economic disadvantage Maori have experienced and continue to experience. The Native Schooling system churned out Maori who were reliant upon unskilled jobs, once they moved away from the rural agricultural sector.⁸⁵ This established a pattern where Maori did not seek tertiary education and the skilled occupations that come with further study. This was not a huge problem until economic downturns led to the downsizing of the

⁸⁰ Ibid, 134.

⁸¹ R Walker, *Ka Whawhai Tonu Matou* (Second Edition, Penguin Books, Auckland, 2004) 197.

⁸² B Labrum, "Developing 'The Essentials of Good Citizenship and Responsibilities' in Maori Women: Family Life, Social Change and the State in New Zealand, 1944-70" *Journal of Family History* [1994] 448.

⁸³ Ibid, 452; Above n81, 197-9.

⁸⁴ Above n70, 348-350.

⁸⁵ See J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

public service and employment in the industrial sector. Once these phenomena occurred, often the hardest hit demographic was unskilled Maori.

Maori continue to feature on the negative side of the ledger in almost all indicators involving health, wealth, education and employment. Connected with these indicators is a high dependency on the State and its agencies. The combination of this myriad of factors may partially explain the statistical gulf between Maori and non-Maori in criminal justice data in New Zealand. Commentator Mason Durie refers to the complex interaction between the historical identity factors and socio-economic profiles and offending as the result of “trapped lifestyles”.⁸⁶ He asserts that trapped lifestyles have three key characteristics:⁸⁷

[F]irst they involve risk; second they are likely to lead to marginalisation, poor health and offending; and third ... for many people there is no escape.

Lifestyle risk factors associated with offending and imprisonment include alcohol and gambling addictions, drug use, injury and domestic violence and abuse.⁸⁸ Maori are over-represented on every measure for these factors.⁸⁹ Sociologist Helene Connor agrees with Durie, and argues further that the loss of language and identity for Maori manifests itself in destructive behaviour such as substance abuse, violence and crime.⁹⁰

Low Maori participation in certain functions of society, such as the economy, education, and lawmaking, reinforces our marginalisation and maintains barriers in terms of access to justice. Maori passivity may be the result of insecure cultural identities and a lack of control over resources. One of the key difficulties for young, often second or third generation urban Maori, is their limited ability to participate in a Maori identity.

The mana and tapu of Maori people has been damaged by the process of colonisation that has destroyed the fabric of Maori society and the resources upon which it relied for survival. This process is in itself a hara in that it has trampled upon the collective wairua of Maori as a people. The trauma of colonisation has inflicted incalculable harm on Maori people. Maori lawyer and criminologist Moana Jackson has referred to colonisation as the “attack on the Maori soul”, while Maori politician Tariana Turia has similarly talked about the phenomenon of Post-Colonial Traumatic Stress Disorder, in which the effects of colonisation have been culturally integrated into the soul and psyche of Maori.⁹¹

This process has had particularly devastating consequences for Maori women – bereft of the support and resources of whanau and whenua, and the prescription laid out in tikanga and ancestral precedent for the balancing of the male and female principles.

⁸⁶ M Durie, *Nga Kahui Pou: Launching Maori Futures* (Huia Publishers, Wellington, 2003) 62.

⁸⁷ Ibid.

⁸⁸ Ibid, 65.

⁸⁹ Ibid, 65-66.

⁹⁰ DH Connor, “Reclamation of Cultural Identity for Maori Women” in A Jones, P Herda and T Suaali (eds) *Bittersweet Indigenous Women of the Pacific* (Otago University Press, Dunedin, 2000) 110.

⁹¹ M Jackson, “The Colonisation of Maori Philosophy” in G Oddie and R Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) 84, 86; M Goldsmith, “Maori Assertions of Indigeneity, Post-Colonial Traumatic Stress Disorder, and Holocaust Denial” in E Kolig and H Muckler (eds) *Politics of Indigeneity in the South Pacific* (Transaction Publishers, Hamburg, 2002) 85, 86-88.

Instead, the sexism of Pakeha culture presenting them as inferior and weak, and severely curtailing their life opportunities and public roles, combined with the racism of Pakeha culture means that Maori women are at the bottom of the heap in New Zealand society.

What Factors Set Maori Women up For Over-Criminalisation?

There are a myriad of interconnecting factors to explain the over-criminalisation of Maori women in New Zealand. Some of these factors might be attributed to “structural intersectionality”, which is the term used by Kimberle Crenshaw to explain the interplay of ethnicity and gender in relation to the position and experiences of minority women in the community. For example, the burdens of gender and class oppression might be visible in terms of Maori women’s poverty, lack of job skills and child and family responsibilities. These factors are then compounded by the racism of policies and practices relating to employment, health and housing.⁹²

In the previous section I argued that the process of colonisation had a devastating impact upon Maori communities, and on Maori women in particular. The loss of legal and political status for Maori women resulted in a loss of lands and resources that did not occur in the same fashion for Maori men.

In this section I will set out data relating to the contemporary position of Maori women. In my view many of these factors are heavily influenced by the historical processes I have described previously – that is, that the stripping of economic power, legal standing and the provision of racist gendered education continues to affect modern Maori women. The data will show that Maori women fare worse than both Maori men and non-Maori women on all key social indicators linked to criminalisation and victimisation. Many of these indicators are, I would argue, linked with ethnicity (that is, with being Maori), while the effect of gender results in Maori women committing crimes that are both numerically fewer and less serious than those committed by Maori men. The specific effects of gender on criminal offending and treatment in the criminal justice system are addressed in the next section.

In my view, a schooling system that tagged Maori women for domestic servitude and unskilled labour established a continuing cycle of underachievement and poverty.⁹³ The position of Maori women today is testament to this combination of socio-economic and historical factors. Maori women are therefore often not only alienated from Maori society, but also from society as a whole. They are marginalised from Maori culture by their lack of reo and tikanga. They are outside of mainstream society due to their poverty, lack of education and invisibility in the public domain.

While the gaps between Maori and non-Maori have closed considerably over the past 40 years, Maori women continue to feature at the lower end of all indicators of socio-economic deprivation in New Zealand. They are over-represented in their exposure to most of the multiple risk factors associated with criminal activity - such as poverty, income and employment disparities, mental and community health problems, family violence, and lack of community support/facilities.

⁹² K Crenshaw, “Women of Color at the Center: Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 Stan. L. Rev. 1241, 1250.

⁹³ J Simon and L Tuhiwai Smith (eds) *A Civilising Mission? Perceptions and Representations of the New Zealand Native Schools System* (Auckland University Press, Auckland, 2001).

The adoption of Pakeha values, the process of modernisation, and the effects of Native Schooling all contributed to the high rate of socio-economic disadvantage suffered by Maori. However, as already noted, Maori women tend to fare even worse than Maori men in social indicators, in that they have lower incomes, poorer health and are more likely to have the sole charge of dependent children. For example, data in the 2006 Census shows that New Zealanders overall have a median income of \$24,400 per annum, while for Maori, the median is \$20,900.⁹⁴ A gendered breakdown shows that the median income for men is \$31,500, compared with \$19,100 for women.⁹⁵ A breakdown by gender and ethnicity shows that the median income for Maori men is \$25,900 compared with \$17,800 for Maori women.⁹⁶ In this instance therefore, there is both a gap between Maori and non-Maori, and a gap between genders, and Maori women fare worse than BOTH the median Maori and the median woman. The household and personal incomes of Maori women are lower, with 50% of all Maori women aged over 15 receiving a government welfare benefit in 1996, compared with 20% of non-Maori women. The 2001 Census found that Maori women were over-represented in the very lowest income bracket and under-represented in the very highest.⁹⁷ Forty one percent of all Maori children live in households earning less than \$20,000 per annum. Half of all Maori women aged over 15 are reliant on a government benefit as their major source of income, with an unemployment rate of 19% compared with 7% for non-Maori women.⁹⁸ These are clear examples of the effects of intersectionality in action.

Only 30% of Maori own their own homes, compared with 59% of Pakeha. Nearly 40% of Maori leave school with no formal qualifications, with slightly more Maori men than Maori women in this category (43.5% of men, 36.7% of women).⁹⁹ In the 1996 Census, 16% of Maori women reported they did not have a telephone, and 19% did not have a car.¹⁰⁰ These factors, combined with the geographical spread of Maori women – who are more likely to live in rural areas than non-Maori, means that accessing social and legal services can be prohibitive.¹⁰¹

The 1996 New Zealand Health Survey and the 1997 National Nutrition Survey confirm persisting health inequalities between Maori and non-Maori New Zealanders, largely linked to socio-economic deprivation.¹⁰² The surveys specifically identified poor housing, low levels of education, poor diet, alcohol consumption and smoking as health-affecting behaviours. As a result of Maori being over-represented in each of these indicators, there are corresponding outcomes in terms of lower life expectancy, high blood pressure, iron deficiency, rates of injury and hospitalisation, rates of affliction of diabetes, heart and liver disease and asthma.¹⁰³ In comparison to non-Maori women, the life expectancy of Maori women remains lower (73 compared with 79 years). Other

⁹⁴ Statistics New Zealand, *Quickstats National Highlights 2006 Census*, (Statistics New Zealand, Wellington, 2007).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Statistics New Zealand, *Census of Population and Dwellings 2001* (Statistics New Zealand, Wellington, 2002). The median income for Maori women was \$13,200, compared with \$15,100 for European women and an overall median income for all women of \$14,500. The median income for all men in the same period was \$24,900.

⁹⁸ Ministry of Women's Affairs, *Maori Women: Mapping Inequalities and Pointing Ways Forward* (Wellington, 2001).

⁹⁹ Statistics New Zealand, *Census 2006 Quickstats About Maori*, (Statistics New Zealand, Wellington, 2007).

¹⁰⁰ Te Puni Kokiri and the Ministry of Women's Affairs, *Maori Women in Focus* (Te Puni Kōkiri, Wellington, 1999)

¹⁰¹ Law Commission Report 53, *Justice: The Experiences of Maori Women* (Law Commission, Wellington, 1999) 47.

¹⁰² Te Puni Kokiri, "Tikanga Oranga Hauora" (2000) 4 Whakapakari 2.

¹⁰³ *Ibid.*, 2-5.

research also demonstrates that Maori women were more likely than non-Maori women to have alcohol and substance abuse problems.¹⁰⁴ Maori women are three times more likely to be hazardous drinkers than non-Maori women.¹⁰⁵

Interestingly, despite the proclaimed links between deprivation and life expectancy, where low Maori life expectancy tends to correlate to living in deprived areas (56% of Maori live in high deprivation areas, compared with 24% of non-Maori), there is still a big gap overall between Maori and non-Maori. Pakeha living in the *most* deprived areas still live significantly longer than Maori living in the *least* deprived areas.¹⁰⁶ This demonstrates that there remain some entrenched disparities between Maori and non-Maori across the socio-economic spectrum.

Research also establishes a link between deprivation and victimisation. The 2006 New Zealand Crime and Safety Survey explored the experience of crime victimisation of 5416 randomly selected New Zealanders. Overall, the bulk of crime and repeat victimisation was likely to be experienced by people who were young, Maori, solo parents, reliant on social welfare benefits, and those living in rental accommodation.¹⁰⁷ In other words, the risk of victimisation is concentrated amongst those who are less socially and economically placed. Maori women are overrepresented in each of these categories of variables, resulting in rates of victimisation that place them ahead of *all* other demographic groups, including both Maori men and non-Maori women. Aside from an increased risk of victimisation, the survey also reported an uneven distribution of the total number of victimisations. Sixty percent of those surveyed reported no victimisations at all for 2005, but 6% of respondents reported five or more for the same period.¹⁰⁸ This echoes research that asserts that past victimisation is the best predictor of future victimisation.¹⁰⁹

Maori women face four times the risk of the average woman of being subject to confrontational offences committed by their partners, and are twice as likely as the average person to be victimised by others.¹¹⁰ There was no difference reported in the proportion of men and women who had experienced offences committed by their partners, but women experienced more offences than men did.¹¹¹ Therefore, gender is less of a significant factor in the prevalence of victimisation than ethnicity, but is important with regards to the recurrence of violence. Ethnicity is significant for both measures, so being Maori is related to both the prevalence *and* incidence of victimisation – whether it happens, and how often it happens. Maori women then suffer intersectional oppression on both counts.

Older data from the National Collective of Women's Refuges supports the conclusions of the New Zealand Crime and Safety Survey. For example, in the ten

¹⁰⁴ C Page, An Evaluation of the Pilot (NSAD) Alcohol and Drug Treatment Unit at Arohata Women's Prison: A Report Commissioned by the Department of Corrections (Department of Corrections, Wellington, 1999).

¹⁰⁵ Above n102, 2, 5.

¹⁰⁶ Te Puni Kokiri, "Tikanga Oranga Hauora" (2000) 4 Whakapakari 2-5.

¹⁰⁷ Ministry of Justice, New Zealand Crime and Safety Survey 2006, Executive Summary. These conclusions echo those in A Morris and J Reilly, The 2001 New Zealand National Survey of Crime Victims (Ministry of Justice, Wellington, 2003) chap 2.5.

¹⁰⁸ *Ibid.*

¹⁰⁹ K Pease, Repeat Victimisation: Taking Stock (Home Office, London, 1998).

¹¹⁰ Ministry of Justice, New Zealand Crime and Safety Survey 2006, Tables 3.7, 3.8, 3.9.

¹¹¹ *Ibid.*, Chapter 3.3.

months to April 1997, 45.2% of their 5,783 new clients were Maori. Maori men were the abusers in 40.5% of these cases.¹¹²

One could speculate that the high rate of victimisation of Maori women might occur more readily in a society defined by the nuclear household – and that Maori men would traditionally have been reigned in by the open nature of the whanau and the lack of a public/private divide in Maori society. However, even casting such theories aside, there is little doubt that the contemporary experience of domestic and family violence for Maori women renders them less visible and more vulnerable than they would have been in a functioning traditional Maori social system.

The contemporary demographic context for Maori women illustrates that they are a uniquely positioned subset of the general New Zealand population. The combination of their ethnicity, gender, and socio-economic positioning affects, amongst other things, their employment prospects, housing choices, and health outcomes. In relation to the criminal justice system, these factors filter Maori women *into* the system, ultimately influencing rates of criminal offending. For example, as a result of economic deprivation, Maori women come into regular contact with associated social services, such as social welfare, housing and health agencies. This type of contact and surveillance may increase the likelihood of being subject to criminal proceedings, not necessarily because of increased criminality, but because relevant authorities exchange information about clientele and any offending is more likely to be discovered than offending committed by persons in the general community.

Once filtered into the criminal justice system, as offenders or victims, the particular characteristics of many Maori women affect their access to justice, in terms of affordability of counsel, access to services because of childcare, communication and transport difficulties, and perceived cultural and class barriers between clients and justice officials or service providers.¹¹³

The effect of this combination of factors is that Maori women are less likely than other demographic groups to report crime, access social services or justice sector agencies, or fully participate in or access initiatives that should cater to their needs. These practical barriers are coupled with perceptions that services do not take account of the life experiences of Maori women.

The Effect of Gender

Although as noted in the previous section, Maori women fare worse than Maori men in almost all social indicators, many of which are demonstrably linked with criminal offending, they do not offend in anywhere near the same numbers as Maori men do. This reflects the role of gender – that in all jurisdictions women do not offend as much as men. In this section I will explore some of the theories that seek to explain why women conform more to social norms, resulting in gender disparity in offending statistics.

Feminist perspectives as to the causes of female offending did not take off until the late 1960s - early 1970s. At that time, criminologist Carol Smart noted some of the ironies of the approach to women's criminality – on the one hand there was not much interest in the subject of female criminality, and on the other there were stubborn

¹¹² Law Commission Report 53, *Justice and Maori Women* (Law Commission, Wellington, 1999), 47.

¹¹³ *Ibid*, 32 – 37.

attitudes towards the stereotyped female offender that prevented new ideas in their treatment from developing.¹¹⁴ Smart argued that the low profile of women's offending was a result of it not being viewed as a major social problem.¹¹⁵ Frances Heidensohn and Marie Andree Bertrand made similar claims, that women were relatively invisible in criminological theory, and when they were mentioned, their offending was invariably discussed in a sexualised manner, rather than applying any rationalised analysis.¹¹⁶ Psychologist Phyllis Chesler picked up on Smart's thesis, by contending that the treatment of women in the criminal justice system is influenced by society's expectations of gender appropriate behaviour. Different reactions to the same behaviour may cause a male to be jailed, and a woman to be committed to a mental institution.¹¹⁷

Early theorists in feminist criminology sought to address two main issues – the “gender ratio” problem and the “generalisability” problem.¹¹⁸ The gender ratio problem asks why women are less likely than men to commit crime and the generalisability problem addresses the difficulties in adding women to theories of male criminality and its associated research. These issues converge in that the former means that the latter does not adequately explain female offending.

One of the strands of feminist criminology that emerged during the 1970s promoted the “liberation thesis” – that is, that as women were liberated from the home, and generally moved from the private domestic sphere into the public sphere of work, power and politics, rates of offending would rise in tandem, to match those of men. For example, Freda Adler claimed that the gender ratio problem was a result of lack of opportunity for women to offend, and that as women forced their way into the corporate world, they would also force their way into white collar crime.¹¹⁹ This did not prove to be the case, so that emancipation may have brought more freedom to women, but there was no empirical evidence to prove a change in the pattern or rates of female offending.¹²⁰ Furthermore, the theory did not apply to or take account of the experiences of working class women, who had always been in the public sphere of employment – and who still engaged in far less crime than their male counterparts. Critics also argued that Adler's female criminal was essentially masculine – meaning that her theory merely placed biological females into traditional mainstream “male” explanations of crime.¹²¹

Although feminist and critical scholarship investigating women and the criminal justice system began to emerge in the 1970s, it was really in the 1980s that a significant interest in academic study and empirical research in this area began to occur.¹²² The

¹¹⁴ C Smart, *Women, Crime and Criminology* (Routledge & Kegan Paul, London, 1977) Chapter 5.

¹¹⁵ *Ibid.*

¹¹⁶ F Heidensohn, “Gender and Crime” in M Macguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* (Oxford University Press, Oxford, 1994) 997, 1012.

¹¹⁷ P Chesler, *Women and Madness* (Four Walls Eight Windows, Chicago, 1972).

¹¹⁸ K Daly and M Chesney-Lind, “Feminism and Criminology” *Justice Quarterly* 5/4, 498, 508.

¹¹⁹ F Adler, *Sisters in Crime* (McGraw-Hill, New York, 1975) 3

¹²⁰ M Chesney-Lind and L Pasko, *The Female Offender: Girls, Women and Crime* (Sage Publications, Thousand Oaks, 2004).

¹²¹ D Christina and P Carlen, *Criminal Women* (Polity Press, Cambridge, 1985).

¹²² See for example, N Rafter, *Partial Justice: Women, Prison and Social Control* (2nd ed, Transaction, New Brunswick, 1990); A Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* (Routledge, London, 1990); A Adelberg and C Currie (eds) *In Conflict With the Law: Women and the Canadian Justice System* (Press Gang, Vancouver, 1993); M Chesney-Lind, “Rethinking Women's Imprisonment: A Critical Examination of Trends in Female Incarceration” in B R Price and N J Sokoloff (eds) *The Criminal Justice System and Women: Offenders, Victims and Workers* (2nd ed, McGraw-Hill, New York, 1995); M Shaw, “Is There a Feminist Future For Women's Prisons?” in R Matthews and P Francis (eds) *Prisons 2000: An International Perspective on the Current*

timing of this expansion of the academic discipline coincides with the rapid increase in the numbers of imprisoned women.¹²³

Loucks and Zamble noted in 1999 that:¹²⁴

Until the past decade, research concerning the origins and continuance of criminal behaviour in females has been virtually absent from social science literature, so that the development of theories of female offending has occurred in an empirical vacuum.

The development of feminist criminology, and equality theory and jurisprudence paralleled the movements in wider feminist scholarship, which shifted from the early premise that the experience of women cut across all other variables. Researchers began to question this “essentialist” doctrine – that “one size fits all”, and to consider the impact and influence of other factors such as class, sexuality, religion, and most notably, race.

Attached to the move against essentialism, was the promotion of subjective narrative, as researchers began to postulate that women’s criminality was inseparable from the response of the justice system to them. For example, Pat Carlen spearheaded a major strand of criticism levelled at some of the early feminist criminologists – that their theories were ignorant of the political realities of the lives of women.¹²⁵ Rather than start with grand theory about the assumed experiences of *all* women, it was argued that we should look to empirical studies of *particular* women and listen to what they have to say about themselves. A significant feature of this wave of feminist theory therefore, was to move from the essentialising top-down model of theory, to researching at the ground level, by interacting with specific women.

One of the seminal pieces of research in the renaissance of women and criminal justice studies was a prominent study by Carlen in the 1980s, in which she adapted the “Strain” and “Control” theories of criminology to explain female criminal offending. The Control Theory is based on the assumption that people conform to the law while they feel it is materially and psychologically worth their while to do so. The subjective decision to conform might include consideration of the likelihood of being apprehended, potential penalties upon conviction and whether you have anything to lose by offending. Carlen’s argues that, from her analysis of interviews conducted with offending women, they felt neither compelled nor induced to be law abiding. Often their material circumstances were such that they were unable to stay out of trouble with the law.¹²⁶

As a result of interviewing a group of female offenders with significant criminal histories, Carlen identified three key areas that feminist criminologies had thus far failed to explain. These were the fact that female offenders tended to be of the lower classes,

State and Future of Imprisonment (St Martin’s, London, 1996); M A Bertrand, “Incarceration as a Gendering Strategy” *Canadian Journal of Law and Society* (1999) 14; H Hannah-Moffat and M Shaw (eds) *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Fernwood, Halifax, 2000)

¹²³ This also coincided with the entry of significant numbers of women into the realms of academic and policy making.

¹²⁴ A Loucks and E Zamble, “Predictors of Recidivism in Serious Female Offenders” (1999) *Corrections Today*, February, 26-28.

¹²⁵ P Carlen, “Criminal Women and Criminal Justice: The Limits to and Potential of, Feminist and Left Realist Perspectives” in R Matthews and J Young, *Issues in Realist Criminology* (Sage Publishing, London, 1992) 184

¹²⁶ P Carlen, “Out of Care, Into Custody” in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keynes, 1987) 126, 129-130.

that minority ethnic groups were over-represented as female offenders, and that these groups comprised the majority of women in prison.¹²⁷

Carlen asserted that, unlike men, women had two sites of social control. The major place of social control for men is the workplace, whereas for working women, both the workplace and the home are material and ideological sites of social control. She stated:¹²⁸

[W]omen who break the law have, like all other Western women, been born into material and ideological conditions structured by two major sets of relationships: the class relationships of a capitalist mode of production and the gender relationships of a patriarchal system of social reproduction. Additionally, black women (and black men) in Britain will have had both their life-chances and their experiences of the criminal justice and penal systems, shaped by racism.

Working class women are therefore expected to aspire to and achieve both a class and a gender ideal, of “respectable working-class motherhood”, placing them in a double bind.¹²⁹ The theory therefore, is that women do not offend in the same numbers as men because they are doubly controlled by expectations placed upon them in the domestic sphere as well as in the workplace.

According to Carlen, most working class women conform to the class and gender deals because normative femininity and heterosexuality are celebrated and promoted in places such as the mass media. Working class women who have a good work ethic are materially rewarded for the fruits of their labours, and those with a commitment to domesticity may also have a supportive male partner to seal the deal.¹³⁰ Regulated women will likely be mothers operating within the structure of a nuclear family, supervised by the machinations of the welfare state – through welfare professionals – such as doctors and social workers.¹³¹

Carlen argues that, in her sample population, offending women are those for whom the ideology of the nuclear family has broken down, thus leaving them “gender unregulated.” She asserts that girls in welfare care, single women living alone and other “women without men” fit within this category of gender unregulated women.¹³² Female offenders are therefore women without family, sociability, femininity and adulthood.¹³³ Such women are different from the majority of female criminals, who, despite occasional offending, do not make a career out of it, and still maintain commitment to the family ideal. Those women are still viewed as “gender compliant”, meaning that they place value in, and strive to achieve, the gender ideal promoted by wider society and its institutions.

Carlen goes on to show, from her studies of offenders, that even gender unregulated women buy into consumerism, as they believe this is the only hope of moving forward in their lives. She claims that the women she studied were restrained

¹²⁷ Ibid.

¹²⁸ Ibid, Introduction.

¹²⁹ P Carlen, *Women, Crime and Poverty* (Open University Press, Milton Keynes, 1988) 12-14.

¹³⁰ P Carlen and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keynes, 1987) 3.

¹³¹ Ibid, 3-4.

¹³² Ibid, 13.

¹³³ Ibid, 119.

from achieving material success by legitimate means due to their class status, so adopted illegitimate means instead.¹³⁴

[C]ertain combinations of gender and class factors are also strategic in determining the extent to which some women will 'see through' the controlling occlusions of the 'gender deal' and consequently decide to go it alone - even if it means in order to 'have what everybody else takes for granted' they have to break the law.

Further, Carlen states that when gender unregulated women come into contact with the criminal justice system they are often stropky and impolite, thus further defying accepted models of femininity.¹³⁵ In other words, the fact they are gender unregulated filters them into the justice system, and once there, they are judged according to norms of femininity they do not value or comply with. Once this happens, the women come face to face with justice system officials and fail to meet appropriate constructions of femininity including a predilection for "vulnerability, dependency and emotionality".¹³⁶ This of course worsens the situation, and the attitude of unregulated women and their social characteristics are then predictors of the type and length of sentences imposed on them. It is now broadly known that women commit a very small share of crime, and this has significant implications and consequences for women who do offend.

Once in the system, young women are further marginalised from society, and thus move further and further away from the possibility of ever making either the class or gender ideal. At this stage, with little likelihood of overcoming economic deprivation, any perceived ideological attachment to notions of family and legitimate success all but evaporate. This leaves imprisoned women with nothing to lose, thus fuelling a cycle of law-breaking.

One of the ironies of Carlen's theory is that women who conform to accepted and expected notions of femininity are often better treated by the criminal justice system than those who do not, regardless of the seriousness of their offending. Carlen and earlier theorists, such as Otto Pollack, postulate that gender compliant women are dealt with in a chivalrous manner by the predominantly white middle class male establishment. Women offenders are therefore not dealt with on a par with equivalent male offenders, but are assessed according to the extent of their gender regulation.¹³⁷ So, serious offenders who are deemed to be good conforming wives and mothers may be dealt with compassionately and funnelled out of the system. On the other hand, less serious offenders who do not conform to good female stereotypes are more harshly treated. Worrall states that:¹³⁸

¹³⁴ Ibid, 9-10.

¹³⁵ Ibid, 9-10.

¹³⁶ Above n1, 305.

¹³⁷ See for example the study conducted by Dr Samantha Jeffries, "Gender Differentiation in Criminal Court Outcomes" available at crime.co.nz (accessed 17 June 2007). Dr Jeffries analysed sentencing and remand outcomes for 388 offenders from the Christchurch District and High Court, and argues that men and women were sentenced according to their gender roles. Responsibility for children was a primary consideration for judges sentencing women, while employment factors were key to sentencing male offenders.

¹³⁸ P Carlen and A Worrall, *Analysing Women's Imprisonment* (Willan Publishing, United Kingdom, 2004) 123.

The female lawbreaker is routinely offered the opportunity to neutralise the effects of her lawbreaking activity by implicitly entering into a contract whereby she permits her life to be represented in terms of its domestic, sexual and pathological dimensions. The effect of this 'gender contract' is to strip her lawbreaking of its social, economic and ideological dimensions in order to minimise its punitive consequences.

The common thread in modern research involving women and penology is the conclusion that the position of women in the justice and penal systems reflects their place in society as a whole. Further, the control of women as criminals is merely an extension of the control of women in general. The history of female deviance is defined by women who failed to fulfil their socially designated roles as good wives and mothers. Female criminals were immoral "fallen women", such as prostitutes and petty thieves who 'are punished for breaching not only the criminal law but also sex role expectations.'¹³⁹ The result of such attitudes is that the female offender will be dealt with according to the extent to which her crime deviates from these stereotypical norms of acceptable female conduct, a process that is not applied equally to her male counterparts.

In my view, Carlen therefore correctly appreciated that an analysis defined purely by gender is too simplistic - that we need to take account of other variables, such as class, to gain a better insight into offending patterns and treatment of offenders in the criminal justice system. There is much in her arguments that translates to the experiences of Maori women in New Zealand. This is particularly so given the socio-economic positioning of Maori women, as set out in the previous section. Julia Tolmie makes this point, in arguing that, vis-à-vis non-Maori women, Maori women's positioning 'provides a possible insight as to why Maori women do not get the same lenient treatment in the criminal justice system.'¹⁴⁰ This then is what intersectional theorists such as Krenshaw and Harris are referring to when documenting the way in which 'race can modify the effects of gender for women of colour'.¹⁴¹

The lethal combination of race, gender, socio-economic deprivation and the gendered experience of cultural breakdown as a result of the process of colonisation, result in Maori women collectively and individually being 'gender unregulated' according to Carlen's theory.¹⁴² Further, the constructs of tikanga Maori as described in the previous section, illustrate that Western notions of gender and femininity are not philosophies or practices that Maori women subscribe or aspire to.¹⁴³

What Carlen's theory cannot account for is the relevance of indigeneity and the Treaty relationship between the Crown and Maori in the New Zealand context. Whilst she is cognisant of the effects of racism as a possible factor to consider in assessing the

¹³⁹ A Morris, "Sex and Sentencing" [1988] Crim.L.R. 163.

¹⁴⁰ Above n1, 306.

¹⁴¹ A Harris, "Race and Essentialism in Feminist Theory" (1990) 42 Stanford L Rev 581; K Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) 43 Stanford Law Review 1241.

¹⁴² Above n1, 306.

¹⁴³ A Mikaere, "Maori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato Law Review 125; C Te Kawehau Hoskins, "In the Interests of Maori Women? Discourses of Reclamation" (1997) 13 Women's Studies Journal 25; K Quince "Maori and the Criminal Justice System" in J Tolmie and W Brookbanks (eds) *Criminal Justice in New Zealand*, (Lexis Nexis, Wellington, 2007).

experiences of minority working class women, the fact of being indigenous adds a further dimension to the power and relationship dynamics at play in assessing the construction, application and reaction of the criminal justice system to such defendants. For example, although the available collated data does not lend itself to such a comparison, I would expect that when comparing working class Maori women to working class non-Maori women, there would still be a gap in offending statistics. In other words, even accounting for other sites of oppression, such as gender, class and being an ethnic minority, there is still an over-representation of Maori women compared with non-Maori women. We have seen that this is the case with health statistics in the previous section. I believe the added dimension of being a colonised people, as opposed to one of a number of ethnic minorities discriminated against in a variety of other ways, has a significant effect on the long-term psyche of Maori. The racism perpetuated against us has occurred on our own territories, not as transplanted minorities, whether as a result of voluntary or forced migration.

Conclusion

In this article I have set out the historical and contemporary experiences of Maori women that over-expose them to the risk factors related to social harms, resulting in them being “filtered in” to the criminal justice system. The effects of colonisation by Pakeha eroded the status and diminished the roles of Maori women in our whanau, hapu and iwi. While some of the experiences of colonisation were common to Maori men and women as *Maori*, many circumstances and outcomes were either directed at or impacted upon Maori women because of our gender. These seemingly historical happenstances so greatly affected the social, cultural and political organisation of Maori society, that they continue to resonate in our contemporary lives. The effect of the qualitative differences in the experience of colonisation for Maori women, compared with Maori men, is that as a demographic group, these structural inequalities set Maori women up for over-representation in the criminal justice system.

We know that Maori women are more likely than non-Maori women to be convicted and imprisoned for criminal offending, but we cannot clearly state why that is the case. The statistics clearly show that they are not “filtered out” in the way that the majority of non-Maori women are at this stage. Feminist theorists such as Pat Carlen assert that non-gender regulated women do not receive the benefit of “chivalrous” decisions that would result in their exit from the system, and I argue that this could apply to Maori women.

I have not assessed the treatment Maori women receive in their journey through the criminal justice system following offending and apprehension. There may be logical reasons for increased rates of imprisonment, including higher numbers of previous convictions compared with non-Maori female offenders, or an inability to pay fiscal penalties – thereby reducing a sentencing judge’s options. However, there remains scope for a much larger empirical project assessing the *responses* of the criminal justice system to Maori women as offenders. This could include survey and analysis of use of discretion and decision-making by law enforcement officers, Crown prosecutors and judges.

What is essential in this next stage of analysis is the isolation of data relating to Maori women, given their unique positioning. An intersectional strategy aims to remedy

the mischief of minority women who experience multiple discriminations falling through the cracks of a narrow focus on either racism or misogyny. We cannot hope to address the causes of social harm if we do not contextualise the experiences of the specific peoples involved in offending.