Indigeneity: The Politics and Ethics of a Concept

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A Dissertation Presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of Doctor of Philosophy

Woodrow Wilson Department of Politics

University of Virginia
May 2015

Abstract

Globally, indigenous groups have sought protections that are related to their indigenous, as distinct from simply minority, status. As recognition of a concept of indigenous rights has grown, some of these groups have received some of those protections. Efforts to reduce disparities between indigenous and non-indigenous populations through local, national and international fora have, however, achieved limited success. I suggest that one hindrance to success is a failure to address the role that conceptions of indigeneity play in shaping discourse that advances or minimizes indigenous rights.

In this dissertation I argue that political discourse around indigenous peoples in New Zealand and Australia limits recognition of, and redress for, past and present injustices. Moreover, I suggest that liberal accounts of historic injustice inadequately address indigenous grievances, as they fail to consider the ways that indigeneity, in and of itself, might affect entitlements. Insufficient consideration of how conceptions of indigeneity function, or the ethical demands they might generate, means that these accounts do not accurately identify *who* is affected by past injustices and therefore deserving of redress, or the ways in which these definitions shape the *kinds* of privileges and resources that should be extended to indigenous individuals or groups.

In response to this failure, I elucidate and advocate for a theory of 'nonidentity' thinking as a means of conceptualizing indigeneity. Nonidentity thinking challenges assumptions that individual or institutional portrayals of ideas or objects capture them in their entirety. It relies on constellations of concepts and historical processes to better understand what any particular concept might entail. Thinking in this way does not produce a definitive interpretation of any one concept; instead, it specifies a process to critically engage with discursive and legal norms to resist the hegemony of a set of ideas and practices. I argue that this approach might improve theories of historic injustice by attending more carefully to the ways that concepts of indigeneity are used to determine who receives recognition for unjust treatment and what that recognition entails. In addition, I suggest that nonidentity thinking is a promising resource through which to approach conceptions of indigeneity because it encourages reflection on the situated nature of indigenous claims and the relative weight given to indigenous or non-indigenous voices in any given context.

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Acknowledgements

This dissertation would not have been possible without the support of a large community of friends, mentors and family. In particular, I would like to thank my committee chair, Lawrie Balfour, for her insightful, constructive comments and constant encouragement. She has been incredibly generous with her time and support. I would like to thank my committee members—Jen Rubenstein, Denise Walsh and Colin Bird—who have also been immensely generous with their time and talents, offering exceptional support, critique and mentorship. I would also like to express my appreciation to Jeff Olick for his insightful comments at the January 2014 Political Theory colloquium and for giving his time to serve on my committee.

The Political Theory community at UVa has provided an outstanding intellectual home for the past five and a half years. In addition to my committee members, I'd like to thank Stephen K. White, George Klosko and my PT colleagues and friends: Molly Scudder, Callum Ingram, Colin Kielty, Greta Snyder, Regev Ben Jacob, Nadim Khoury, Evan Farr and Ryan Pevnick. Thanks also to the numerous people in Charlottesville who offered friendship and encouragement, including professors and students of the professional development seminar, Kate Sanger, Emily Sydnor, Emily Charnock, Kyle Lascurettes, Kathleen Doherty, Brandon Yoder and Charlotte McDaniel.

I am indebted to the scholars at Victoria University of Wellington, who initiated my passion for politics and welcomed me home for a productive six months of teaching and research in 2012. Particular thanks to Nigel Roberts, whose infectious enthusiasm for politics and dedicated support throughout my undergraduate and graduate career has fuelled my own passion and successes. Jon Johansson, Stephen Levine, Hilde Coffé, David Capie, Ben Thirkell-White,

Kate McMillan, Kate Schick, Maria Bargh, Domenica Gisella Calabrò and Jeff Sissons also deserve recognition and thanks.

Working away from Charlottesville has presented its own rewards and challenges, but special thanks to Justin, my ever-present source of online support; to Avi for wide-ranging conversations over long runs and for generously providing a collaborative working space; to Branwen for her enthusiasm, encouragement, and willingness to babysit; and to Steph, my family away from home.

The Timperleys and the McGahans have been a constant source of encouragement. I couldn't have done this without their support.

In particular, my parents, Susan and Stephen Timperley, and my husband, Mike, have been by my side every step of the way. It is to them that this dissertation is dedicated.

Introduction

1. Why conceptions of indigeneity?

Indigenous peoples worldwide experience higher average rates of poverty, malnutrition, landlessness and internal displacement, and have lower average levels of literacy and access to health services than other members of society.[1] While indigenous peoples make up approximately five percent of the global population, they account for about fifteen percent of the world's poor. In many countries, indigenous people have significantly lower life expectancy than their fellow citizens, are more likely to be engaged in exploitative activities such as sex work, and face marginalization and exclusion from mainstream society and from policy and decision-making.[2]

The concentration of poverty and loss of rights specific to indigenous peoples is a result of numerous factors, largely stemming from legacies of historical conquest and oppression. Efforts to reduce these disparities through local, national and international fora, including the 2007 United Nations Declaration on the Rights of Indigenous Peoples, have achieved limited successes. I suggest that one hindrance to success is a failure to address the role that conceptions of indigeneity play in shaping discourse that advances or minimizes indigenous rights.

Although there has been much discussion about definitions of indigeneity in anthropology, political science has not paid a great deal of attention to indigenous politics in general, let alone the concept itself.[3] Kevin Bruyneel argues that indigenous politics has been

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[1] International Fund for Agricultural Development, 'Statistics and Key Facts About Indigenous Peoples,' (February
[2] United Nations, 'Training Module on Indigenous Peoples' Issues,' *United Nations* (2010), http://www.un.org/esa/socdev/unpfii/documents/trainingmodule_en.pdf: 10-11 (accessed April 27, 2012).
[3] For this claim about political science, see Kevin Bruyneel, 'Social Science and the Study of Indigenous People's Politics: Contributions, Omissions, and Tensions,' in José Antonio Lucero, Dale Turner, and Donna Lee VanColt (eds.), *The Oxford Handbook of Indigenous Peoples Politics* (New York: Oxford University Press, 2014). Some of

marginalized in mainstream political science, in part because the discipline focuses on sovereignty as an exclusive characteristic of the state and in part because race and ethnicity studies does not adequately account for the unique political identity and politics of indigenous people.[4] This results not only in marginalization, but in misrepresentation of indigenous peoples and politics because "their identity and claims are often too easily positioned as analogous to other nondominant groups—such as immigrants and their descendants and African slaves and their descendants—in a manner that does not account for the distinctive history and, in particular, nation-based identities and claims for sovereignty that define much of indigenous politics."[5]

Despite this omission in the literature, Bruyneel does outline three areas in which political science has addressed indigenous politics to varying degrees: 1. the political history and governance of individual indigenous nations;[6] 2. relationships between indigenous peoples and dominant state or international institutions;[7] 3. theoretical work focusing on the dynamics of colonialism and settler politics in relation to indigenous people.[8] This final category of scholarship includes important work by Iris Marion Young, Will Kymlicka, J.G.A. Pocock,

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the key works of anthropology addressing definitions of indigeneity include, John R. Bowen, 'Should we have a universal concept of 'indigenous peoples' rights? Ethnicity and essentialism in the twenty-first century,' *Anthropology Today*, Vol. 16, No. 4 (2000): 12-16; Marcus Colchester, 'Response: Defining Oneself and Being Defined As, Indigenous,' *Anthropology Today*, Vol. 18, No. 3 (2002): 24; Justin Kenrick and Jerome Lewis, 'Indigenous Peoples' Rights and the Politics of the Term 'Indigenous',' *Anthropology Today*, Vol. 20, No. 2 (2004): 4-9. Francesca Merlan, 'Indigeneity: Global and Local,' *Current Anthropology*, Vol. 50, No. 3 (2009): 303-333; Ian McIntosh, 'Defining Oneself and Being Defined As, Indigenous,' *Anthropology Today*, Vol. 18, No. 3 (2002): 23-24.

[4] Bruyneel, 'Social Science and the Study of Indigenous People's Politics,' 1.

[5] Bruyneel, 'Social Science and the Study of Indigenous People's Politics,' 10.

[6] For example, David Wilkins' work on the Navajo Nation, see David Wilkins, *The Navajo Political Experience* (Lanham: Rowman & Littlefield, 2003).

[7] For example, Sheryl Lightfoot's work on the United Nations Declaration on the Rights of Indigenous Peoples and Courtney Jung's analysis of activism and exclusion (or selective inclusion) of indigenous peoples in Mexico, see Sheryl Lightfoot, 'Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada,' *Political Science*, Vol. 62, No.1 (2010): 84-104 and Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge: Cambridge University Press, 2008).

[8] For example, James Tully's work on Canadian constitutionalism vis-à-vis First Nations people and Carole Pateman's critique of the 'settler contract,' see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) and Carole Pateman, 'The Settler Contract,' in Carole Pateman and Charles Mills (eds.), *Contract and Domination* (Cambridge: Polity Press, 2007): 35-78.

Charles Taylor, James Tully, Paul Patton, Duncan Ivison and Glen Coulthard that has sought to investigate the ways that identity, recognition, minority rights, and state sovereignty have affected indigenous groups.[9] This work recognizes the urgency of such study not only because of its possible implications for scholarship in political science, but because of its significance in global politics. Kymlicka argues, for example, that addressing questions of sovereignty raised by indigenous groups is important given that "the problem of the 'nations within' is truly universal in scope, of enormous urgency and of staggering proportions… Ethno-cultural conflict has become the main source of political violence around the world… Put in this light, the problem of how states deal with 'nations within' is not a marginal issue: it is one of the key issues, perhaps even the central issue, for states in the twenty-first century."[10]

Together, these scholars make the case that indigenous politics should not be relegated to a niche area of study, but embraced by political science more generally to inform topics as diverse as sovereignty and the state, ethnicity and racial politics, and social justice.[11] Furthermore, this scholarship is important in domestic and global politics alike, given the critical role of indigenous peoples in constructing or destabilizing narratives about state legitimacy and

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[9] Iris Marion Young, 'Hybrid Democracy, Iroquois Federalism, and the Postcolonial Project,' in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press, 2000): 237-258; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1996); J.G.A. Pocock, 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori,' in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press, 2000): 25-35; Charles Taylor, 'The Politics of Recognition,' in Amy Gutman (ed.), *Multiculturalism and the Politics of Recognition: An Essay by Charles Taylor* (Princeton: Princeton University Press, 1992): 25-74; Tully, *Strange Multiplicity*; Paul Patton, 'Political Liberalism and Indigenous Rights,' in Sandra Tomsons and Lorraine Mayer (eds.), *Philosophy and Aboriginal Rights: Critical Dialogues* (Ontario: Oxford University Press, 2013): 151-160; Duncan Ivison, 'Historical Injustice,' in Jon Dryzek, Bonnie Honig, and Anne Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2008); Glen S. Coulthard, 'Subject of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada,' *Contemporary Political Theory*, Vol. 6, No. 4 (2007): 437-460.

[10] Will Kymlicka, 'American Multiculturalism and the 'Nations Within',' in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press, 2000): 223.

[11] For example, Bruyneel argues that taking into account the ways that the inclusion of indigenous people in studies of white supremacy might fundamentally alter studies of race and ethnicity in the United States by challenging traditional black-white binaries (Bruyneel, 'Social Sciences and the Study of Indigenous Peoples' Politics,' 13).

the flow-on effects of these narratives in political conflict. Some of this work is already in progress. For example, Margaret Kohn and Keally McBride excavate the meaning of political foundations in a number of postcolonial contexts including the way that indigenous relationships with the land work to disrupt neocolonial forms of economic development.[12] They suggest the link between liberal ideas and colonial practices may not be coincidental, but that liberalism helped legitimize colonial projects.[13] In considering the construction of identity and power in relation to postcolonialism, they draw on works such as Paul Gilroy's *The Black Atlantic*, Ann Stoler's *Carnal Knowledge*, Anne McClintock's *Imperial Leather*, and Lisa Weeden's *Ambiguities of Domination*, to investigate the ways that postcolonial discourses frame politics.[14]

In this dissertation I draw on these ideas, seeking to demonstrate how concepts of indigeneity are framed in New Zealand and Australia in such a way as to justify denying access to economic resources and territory. I argue that there has been insufficient attention to the development of concepts of indigeneity in the south Pacific, and that these concepts play a crucial role in justifying state policies towards indigenous peoples. I suggest that liberalism may be an insufficient lens through which to approach questions of historic injustice, given its complicity in processes of colonization. In particular, I argue that liberal accounts of historical injustice developed by political theorists obscure or fail to address important questions of justice, such as whether particular rights are granted by indigenous status. Given the dominance of accounts of global justice that favor liberal approaches to moral obligation, I argue that it is especially important to investigate the ways that concepts of indigeneity might influence these accounts.

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[12] Margaret Kohn and Keally McBride, *Political Theories of Decolonization: Postcolonialism and the Problems of Foundation* (New York: Oxford University Press, 2011): 98-118.
[13] Kohn and McBride, *Political Theories of Decolonization*, 13.
[14] Kohn and McBride, *Political Theories of Decolonization*, 8.

To make this argument, in addition to drawing on works of political science, I also engage with the emerging field of indigenous studies, which critically questions conventional epistemological and ontological assumptions, research methodologies, and histories specific to indigenous peoples.[15] This scholarship has developed a number of accounts of what it means to be indigenous, in particular how indigeneity relates to whiteness.[16] However, alongside this critique of whiteness has been an attendant concern that engaging in definitional debate about who counts as indigenous, and what indigeneity entails, may be more harmful than helpful.[17] Historically, many indigenous groups have been subject to definition by non-indigenous peoples through assessment of blood quantum, pseudo-scientific racial theories, and often regressive theories of cultural distinctiveness. These definitions have been employed by individuals and institutions to limit or deny indigenous access to resources or apologies.[18] For many indigenous scholars it is no accident that anthropology has the largest literature on definitions of indigeneity—anthropologists are often charged with having participated in oppressive practices against indigenous peoples.[19]

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[15] An excellent compilation of such work is Norman K. Denzin, Yvonna S. Lincoln and Linda Tuhiwai Smith (eds.), *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks: Sage Publications Inc., 2008).

[16] Rebecca Tsosie, 'The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness",' *Journal of Law & Policy*, Vol. 18 (2005): 55-98; Aileen Moreton-Robinson (ed.), *Whitening Race: Essays in Social and Cultural Criticism* (Canberra: Aboriginal Studies Press, 2004).

[17] My thanks to Maria Bargh for bringing this more assertively to my attention.

[18] There is a vast literature referencing these methods, but Kauanui details this with particular clarity in J. Kehaulani Kauanui, *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity* (Durham: Duke University Press, 2008).

[19] At the International Indigenous Development Research Conference in Auckland, New Zealand (June 27-30, 2012) and at the Native American and Indigenous Studies Annual Meeting in Saskatoon, Canada (June 13-15, 2013) this was a common theme raised across multiple panels and papers. Many non-indigenous contemporary anthropologists recognize these concerns and seek to address and alleviate them in their methodologies and work, for example see Paul Sillitoe (ed.), *Indigenous Studies and Engaged Anthropology: The Collaborative Moment* (Ashgate Publishing, forthcoming 2015). Similarly, a number of indigenous scholars in anthropology aim to disrupt oppressive practices of research and definition (see, for example, Kim Tallbear, *Native American DNA: Tribal Belonging and the False Promise of Genetic Science* (Minneapolis: University of Minnesota Press, 2013 and Jenny Reardon and Kim Tallbear, ''Your DNA is Our History': Genomics, Anthropology, and the Construction of Whiteness as Property,' *Current Anthropology*, Vol. 53, No. 12 (2012): 233-245).

Definitional discussions are therefore rightfully treated warily. At the same time, one justification for exploring more fully what is meant by indigeneity in the face of these concerns is a call from indigenous scholars to embrace the definitional debate in order to explore more fully the implications being indigenous might have on policy, actions, and culture. As Paul Whitinui puts it, "we need to unpack what indigeneity is—and act on it, act as it."[20] Similarly, Manahuia Barcham's post-structuralist response to reified notions of indigeneity does not reject the very act of defining indigeneity, but seeks to more critically scrutinize the language of being and non-being compared with the language of becoming.[21] This dissertation seeks to contribute to this conversation by focusing on the ways in which concepts of indigeneity shape political discourse to frame conversations about the reparations owed to indigenous peoples.

2. Chapter outline

This dissertation takes as its central concern how the language used around indigenous peoples might limit recognition of and redress for historic and present injustices. I suggest that despite liberal accounts of historic injustice often treating indigenous peoples as their primary subject, these accounts regularly fail to consider how aspects of indigeneity might alter their recommendations.

In Chapter One, I raise two questions: 1. what are the key features of universal conceptions of indigeneity? and 2. in what ways do these conceptions influence accounts of historical injustice? To answer these questions I look at prominent international definitions of

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[20] Paul Whitinui, quoted from a presentation entitled 'Indigenizing the Disciplines,' *International Indigenous Development Conference*, New Zealand (June 28, 2012).
[21] Manahuia Barcham, '(De)Constructing The Politics of Indigeneity,' in Duncan Ivison, Paul Patton and Will Sanders (ed.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2002): 138.

indigeneity provided by the ILO and the UN and discuss them alongside research on indigenous identity by anthropologists and political scientists. I discuss the two main kinds of definitions that exist—criterial and relational—and indicate the ways that these are used to police indigenous access to moral, cultural, and economic resources. In conclusion, I argue that although these definitions have significant influence on the status of indigenous individuals and groups, they are unsatisfactory in addressing the complexity of indigenous identity, resulting in unjust outcomes. As a result, there is a need for better theoretical tools to understand indigeneity.

In Chapter Two, I illustrate the complex and changing nature of claims around indigeneity in New Zealand in order to assess the ways that concepts of indigeneity are used to justify policies towards New Zealand's indigenous population, the Māori. I focus on New Zealand because though it is often regarded as a leading nation in its progressive stance towards its indigenous population, I argue that the political discourse around Māori claims limits the state's capacity to recognize and address issues of justice. Tracing three political developments in New Zealand's recent history, I highlight different understandings of conceptions of indigeneity within New Zealand and argue that these developments reveal three continuing sources of injustice in New Zealand that existing liberal approaches to indigeneity fail to address: 1. who should get compensation for historical injustices? 2. should indigenous status grant 'special' rights? 3. what is the best configuration of political representation for Māori? Finally, I consider two leading liberal accounts of justice—Jeremy Waldron's work on superseding historical injustice and Chandran Kukathas' work on reparations—and their response to these questions, arguing that both theories fail to provide adequate responses that more accurate notions of indigeneity require. They both overlook the question of who should get compensation for historical injustices on the basis of indigenous identity; Waldron ignores and Kukathas rejects

the idea that indigenous status should confer particular rights; and neither account requests nor offers guidance on the most appropriate configuration of political representation for indigenous people.

In Chapter Three, I turn to Australia to consider the ways in which judicial and legislative decisions have rested on flawed definitions of indigenous peoples, which has resulted in continued miscarriage of justice for Aboriginal Australians. Australia is a valuable comparison with New Zealand because it shares many similar characteristics—it is a settler nation with corresponding Anglo-colonial history, and indigenous peoples constitute a minority in the population. Aligning these significant factors allows me to probe more deeply the nuances of use of language around indigeneity in these two contexts.[22] I argue that the discourse around indigeneity in Australia's political-judicial system reveals five problems that operate across a range of cases: *the problem of evidence*, *the problem of articulation*, *the problem of authenticity*, *the problem of apparent self-interest*, and *the problem of legitimacy*. These problems indicate the extent to which injustices against indigenous Australians are perpetuated as a result of poorly constructed legal definitions of indigeneity. As a response, I explore two postcolonial theories of narrative formation—Ashis Nandy's 'ahistorical' reading of the past and Homi K. Bhabha's counter-narratives—suggesting them as alternative approaches to constructing the presiding narrative of indigeneity in Australia.

Given the failures in both New Zealand and Australia to account for the ways that these conceptions of indigeneity obscure issues of justice, in Chapter Four I elucidate and advocate for

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[22] As I note in the chapter, these similarities should not be granted too much weight in my analysis—there are many ways in which these countries have very different settler histories and these have been the subject of much research (for example see, Karen Fox, 'Globalising Indigeneity?,' *History Compass*, Vol. 10, No. 6 (2012): 427-428). However, as white settler nations they share at least some features that allow me to focus on more subtle differences than a comparison of countries with different colonial histories or where indigenous people constitute the majority of the population.

a theory of 'nonidentity' thinking as a means of conceptualizing indigeneity. Nonidentity thinking directs attention to the failures of categories to fully capture important elements of any given identity or object. Reflecting more deeply on the ways in which indigeneity is defined and how it might be used to justify controlling or restricting access to public goods, I suggest that nonidentity thinking encourages productive questioning of the status quo and allows for the generation of more nuanced conceptions of indigeneity that might result in more just outcomes for indigenous groups in New Zealand and Australia. In particular, I argue for the importance of 'thinking in constellations' to highlight the unique experience and history of different understandings of indigeneity. These definitions might also shape theories of justice that respond specifically to indigenous groups rather than treating indigenous peoples as their subject but failing to attend to the specific features and duties that might flow from indigeneity. To illustrate nonidentity theory in practice, I draw on one conception of indigeneity that could be characterized as 'nonidentity' thinking in a New Zealand context—a research approach called Kaupapa Māori.

3. A note on methodology

This project raises a number of methodological challenges that are important to address. My standing as a non-indigenous individual influences my orientation to this project, the kinds of conversations I can have with indigenous scholars and individuals, and the conclusions I reach.[23] As I note in Chapter Four, some indigenous scholars and activists in New Zealand argue

[23] Chandra Talpade Mohanty's seminal article 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' *Feminist Review*, No. 3 (1988): 61-88 addresses some of the complex questions arising from the relationship between identity and scholarship. Thomas McCarthy's *Race, Empire, and the Idea of Human Development* (New York: Cambridge University Press, 2009) also highlights the role philosophers have in reproducing hierarchical relations in their scholarship.

that research on indigenous politics is the province of indigenous scholars. They argue that the involvement of non-indigenous individuals may or does perpetuate oppressive practices. Others, however, argue that not only can non-indigenous scholars participate, they have an obligation to do so. In New Zealand, the Treaty of Waitangi signed in 1840 is often interpreted as the founding document establishing relationships between Māori (the indigenous population) and Pākehā (the settlers).[24] Largely because of the differences in translation, most contemporary legislation refers to the principles, rather than the specific provisions, of the Treaty. These principles include a commitment to partnership, requiring both parties (Māori and the Crown) to act in good faith. Scholars supporting the involvement of non-indigenous scholars in indigenous research in New Zealand point to the 'partnership principle' to argue that there is an obligation for Māori and Pākehā to work together.

I strongly appreciate the view that non-indigenous scholars may—in intentional and unintentional ways—contribute to the oppression of indigenous peoples. I also think that there is much to be gained from sincere dialogue and scholarship on indigenous politics by a variety of scholars from a range of disciplines and cultural backgrounds. Although there are some questions that should only be addressed by indigenous scholars, I would suggest that there is a place for non-indigenous scholars to participate. In writing this dissertation I have attempted to acknowledge my standing by engaging in conversations with indigenous scholars, being attentive to the literature in indigenous studies, and drawing these contributions into my work where possible.

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[24] The Treaty of Waitangi was signed between the Crown and around 500 Māori chiefs in 1840 to establish New Zealand as British territory, and extended rights to Māori as British citizens.

My theoretical contribution is also mindful of my status as non-indigenous, and I attempt not to presume or make claims for indigenous peoples. I propose ‘nonidentity’ thinking as a possible resource for thinking through conceptions of indigeneity in part as a response to concerns about who should speak for whom. I posit it as a *process* for determining what concepts of indigeneity might work in any particular context, not as a way of advocating for particular conceptions that I agree with. I also deliberately leave open the question of who gets to participate and what weight their contributions should carry. Determining the participants and their standing is an important part of the process of nonidentity thinking—presupposing equality between indigenous and non-indigenous voices may, for example, be just one more way in which liberal values set the frame in which indigenous groups are ‘permitted’ to operate.

Chapter 1: Global Conceptions of Indigeneity

In 1989, the first representative from any African nation, Moringe ole Parkipuny, spoke to the United Nations Working Group on Indigenous Populations, arguing that two minority groups in Tanzania—hunter-gatherers and pastoralists—"suffer from common problems which characterize the plight of indigenous peoples throughout the world… our cultures and way of life are viewed as outmoded, inimical to national pride and a hindrance to progress."[25] This speech was a watershed moment that dramatically altered the composition of the Working Group, initiating the inclusion of indigenous peoples from nations other than white settler colonies. It signaled a substantial change in long-accepted definitions of 'indigenous' in an international context and allowed for the involvement of numerous African groups in the international indigenous rights movement.[26] Following this speech, groups such as the Maasai in Tanzania pursued a rights recognition strategy based on identification as indigenous. Anthropologist Dorothy Hodgson notes that "despite the tremendous potential for political paralysis" African activists "creatively positioned themselves to take advantage of the opportunities for political agency and collective action provided by the indigenous rights movement."[27] Employing the rhetoric and tools of the UN Working Group enabled groups like the Maasai to obtain funding and support from a range of NGOs, demonstrating the constructive influence global discourses of indigeneity could have on local groups.[28]

In 2007, the homes and crops of a scheduled tribe (*adivasi*) in Jharkhard, India, were

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[25] Moringe ole Parkipuny, quoted in Dorothy F. Hodgson, *Being Maasai, Becoming Indigenous* (Indianapolis: Indiana University Press, 2011): 25-6.

[26] Though these groups were recognized by the international indigenous rights movement, most African nation-states were hostile to this development, arguing that "we are all indigenous in Africa," see Hodgson, *Being Maasai*, 26.

[27] Hodgson, *Being Maasai*, 61.

[28] Despite this apparent success, Hodgson also details the detrimental ways in which this development has affected members of Maasai, with some activists spending money on items such as international travel, houses, and clothing, rather than targeting education or health initiatives for community members, see Hodgson, *Being Maasai,* 1, 63-104.

being destroyed by elephants. The best solutions to this problem involved either killing the elephants or removing the forests that brought the elephants into their villages, however these solutions contravened the standard of ecological harmony required for their status as indigenous peoples.[29] Protecting their homes and crops would thus deprive them of benefits indigenous status accrues, such as access to reserved seats in parliament. The standard of 'ecological harmony' the *adivasi* were required to meet was derived from global discourses of indigeneity, indicating the ways that global definitions may have negative implications for indigenous peoples in specific localities. In outlining this case, anthropologist Alpa Shah warns against 'the dark side of indigeneity,' which she claims is obscured by the global successes of indigenous rights activism.[30] She goes on to ask two important definitional questions: not simply "who were the *adivasis*?" but "who wants to define them?"[31]

These two examples illustrate the ways in which global discourses of indigeneity have the potential to both positively and negatively affect local populations. This chapter raises two questions about these international developments: 1. what are the key features of universal conceptions of indigeneity? and 2. in what ways do these conceptions influence accounts of historical injustice? In Section 1, I answer the first question by exploring some of the ways in which indigeneity is defined at a global level by international institutions. In Sections 2 and 3, I examine the two most common types of definitions: criterial and relational. I argue that criterial definitions may unfairly limit who counts as a legitimate indigenous claimant, whereas relational definitions hold more promise for understanding indigeneity. In Section 4, I outline some of the ways that liberal accounts of historical injustice fail to respond adequately to conceptions of

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[29] Alpa Shah, 'The Dark Side of Indigeneity? Indigenous People, Rights and Development in India,' *History Compass*, Vol. 5, No. 6 (2007): 1806-1832.
[30] Shah, 'The Dark Side of Indigeneity,' 1825.
[31] Crispin Bates, cited in Shah, 'The Dark Side of Indigeneity,' 1821.

indigeneity, including the question of why—or whether—indigenous people uniquely deserve restitution for historical injustice. I conclude by arguing for the necessity of more nuanced exploration of the ways these conceptions operate in specific contexts, which I undertake in Chapters Two and Three.

1.1 What is indigeneity? Global definitions

The concept of 'indigeneity' has proven to be controversial for at least two reasons: first, there is little consensus on what it actually means to be indigenous, and second, indigeneity in itself might be a poorly conceived idea with no veritable foundation.[32] In part as a reaction to these concerns, indigeneity as a concept has been defined and re-defined by scholars, activists, politicians, and the popular press in recent years. Despite differing definitions of indigeneity, however, there is little disputing its presence in contemporary politics. As Bengt Karlsson notes, "anthropologists need to move beyond the sterile debate about whether the concept of indigenous peoples is relevant and take note of the fact that the concept is already out there."[33] In agreeing with Karlsson that indigeneity is already 'out there,' I argue that understanding how different conceptions of indigeneity influence the ways that states, individuals, and groups interact affects current liberal theoretical accounts of historical injustice. While determining what indigeneity might entail requires looking at local, national and international usage, my focus in this chapter is primarily on international conceptions of indigeneity, since recent developments on indigenous rights in global fora have significantly influenced the tenor of discourse about indigeneity in both

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[32] One good example of work challenging the broad international acceptance of the term is Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy,' *Lecture at Victoria University of Wellington Law School* (2002): 55-82.

[33] Bengt G. Karlsson, 'Anthropology and the 'Indigenous Slot': Claims to and Debates and Indigenous Peoples' Status in India,' *Critique of Anthropology*, Vol. 23, No. 4 (2003): 403-423.

international and domestic settings.

There are two widely used meanings of the word, one advanced by the International Labor Organization's (ILO) Convention 169 (developed in 1989) and one proposed by UN special rapporteur José Martínez-Cobo in 1986. The ILO distinguishes between 'tribal' and 'indigenous' peoples[34] and states that peoples in independent countries are indigenous:

> on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.… [Further] self-identification as indigenous or tribal shall be regarded as fundamental criterion for determining the groups to which the provisions of this Convention apply.[35]

In contrast, Martínez-Cobo's contemporaneous definition framed the international indigenous movement in terms of human rights.[36] This definition claims that:

> Indigenous communities, people, and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity,

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[34] International Labour Organization, 'Convention 169: Indigenous and Tribal Peoples Convention,' Geneva (June 27, 1989), Article 1, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169 (accessed 21 January, 2013). See also Jeffrey Sissons, *First Peoples: Indigenous Cultures and Their Futures* (London: Reaktion Books, 2005), 17. Rebecca Tsosie also notes the importance of the ILO Convention in shaping definitions of indigeneity in 'The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness",' *Journal of Law & Policy*, Vol. 18 (2005): 65.

[35] Sissons, *First Peoples*, 18.

[36] Secretariat of the United Nations Permanent Forum on Indigenous Issues, 'Introduction: State of the World's Indigenous Peoples,' *United Nations*, http://www.un.org/esa/socdev/unpfii/documents/SOWIP_introduction.pdf, (accessed February 21, 2013): 2.

> as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[37]

The ILO's definition does not grant indigenous peoples the right to self-determination, and explicitly rejects the assumption that legal rights should accompany the definition, despite the use of the word 'peoples'.[38] The language of descent is prominent, although there is no indication of how to assess who is descended from pre-colonial societies. The retention of 'some or all' customs and institutions is also important, but again there is little explanation of what measure will determine the extent to which these have been retained in a form distinct enough to warrant application of the label 'indigenous.' Self-identification as indigenous is critical, though the ILO's omits mentioning whether self-identification alone is acceptable for indigenous status or whether it also requires regulation by the community—in other words, is self-identification sufficient to be considered indigenous or does the community also need to acknowledge that individual as indigenous? Furthermore, by shifting to the terrain of 'culture,' there appears to be an attempt to depoliticize the question of who counts as indigenous. This move may circumvent conversations about historic injustice, as it ignores questions of responsibility and relationships of power.

Through claiming the inherent human rights of pre-colonial peoples, Martínez-Cobo's definition provides indigenous peoples with a legal status that the ILO definition rejects. However, like the ILO definition, colonization is an integral part of the definition. Similarly, the language that indigenous peoples should 'consider themselves distinct' from colonial systems or culture reflects the ILO's emphasis on retention of customs. This framing, however, makes the

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[37] José Martínez-Cobo, 'Study of the Problem of Discrimination against Indigenous Populations,' *United Nations Document E/CN.4/Sub.2/1986/7 and Addenda 1-4* (1986/7), http://www.un.org/esa/socdev/unpfii/en/second.html (accessed January 21, 2013).
[38] See Article 1, Point 3.

criterion easier to meet than the ILO's—it requires showing difference from colonial society but not adherence to particular customs or institutions. This is an important distinction (as becomes apparent in Chapters Two and Three) because expecting adherence to particular customs puts those customs under scrutiny and encourages questioning of the 'authenticity' of certain customs, which may result in the reification of static notions of culture. Another striking aspect of Martínez-Cobo's definition is the language of indigenous peoples being "determined to preserve, develop and transmit" their territories and identity, in order to achieve their "continued existence." This language clearly reflects the orientation of the authors—indigenous activists—by revealing the political activism underlying the definition. It also, however, suggests what Tim Rowse calls "a politics of vulnerability and survival" latent in these definitions seeking recognition of indigenous peoples.[39]

The Martínez-Cobo definition has one further detail worth mentioning: reference to indigenous peoples' ethnic identity. This is a disputed claim. Dean and Levi argue that indigeneity is a kind of ethnicity where, "an indigenous people *become* an ethnic group not simply by sharing such things as a group name (ethnonym), connection to a homeland, and beliefs in a common ancestry, culture, language, or religion, but only when such traits are consciously recognized as emblems of connectivity and are mobilized at least in part to develop a sense of political solidarity."[40] However, Kevin Bruyneel argues that indigenous politics is often not included in race and ethnicity studies because there are fundamental differences between indigenous and other identity politics, in particular their distinctive history of "nation-

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[39] Tim Rowse, 'Indigenous culture: the politics of vulnerability and survival,' in Tony Bennett and John Frow (eds.), *The Sage Handbook of Cultural Analysis* (Los Angeles: Sage, 2008): 406-407.
[40] Bartholomew Dean and Jerome M. Levi, *At Risk of Being Heard: Identity, Indigenous Rights, and Postcolonial States* (Michigan: The University of Michigan Press, 2003): 5.

based identities and claims for sovereignty that define much of indigenous politics."[41] Anthropologist Elizabeth Povinelli also argues that, "an indigenous identity would not be considered the same as an ethnic identity because traditional indigenous culture has a different relationship to nation time and space."[42] A. Dirk Moses agrees that indigenous peoples might reject race or ethnicity as a category of classification, however he suggests that they might also treat declarations of a 'non-racial' future with caution arguing instead for "Indigenous cultural difference" to avoid facing "the non-self-realization, indeed disappearance of their people."[43] The inclusion of ethnicity in the UN definition is therefore somewhat controversial—some indigenous groups may accept the classification, while others might reject it.[44]

The contrasting legal status of indigenous peoples in each of these definitions, and their reliance on self-definition, meant that subsequent attempts at delineating clear conceptions of indigeneity in the late twentieth century were areas of disagreement and confusion. It is important to note, however, that these definitions arose out of the international indigenous rights movements and were not imposed by the ILO or the UN.[45] My claim is not, therefore, that the formation of these definitions was itself exploitative—indeed, they were developed and advanced by indigenous activists over three decades[46]—but that the confusion around these

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[41] Bruyneel, 'Social Science and the Study of Indigenous People's Politics,' 10.
[42] Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2007): 48.
[43] A. Dirk Moses, 'Time, indigeneity, and peoplehood: the postcolony in Australia,' *Postcolonial Studies*, Vol. 13, No.1 (2010): 15.
[44] There is vast literature in comparative political science addressing what ethnic identity is and whether it matters, but this is not the focus of my study here. Discussion about the validity of 'ethnic' identities (for example, Kanchan Chandra's suggestion that ethnic identity as a concept might be substituted for descent-based identities or identities based on sticky or visible attributes in 'What is Ethnic Identity and Does It Matter?' *Annual Review of Political Science*, Vol. 9 (2006): 397-424) may be important for indigenous politics, but my interest here is in how these concepts are being used, not how to classify them for the purposes of determining their causal influence in politics.
[45] Nevertheless, the activists who contributed to the development of these definitions are a small—though influential—subset of the indigenous population and cannot necessarily be assumed to speak for all indigenous peoples.
[46] My thanks to Sheryl Lightfoot for bringing this to my attention.

terms leads to problematic applications in national and international legal, social and economic policies.[47]

In addition to these two definitions of indigeneity developed in the 1980s, in 2002, the newly created United Nations Permanent Forum on Indigenous Issues described indigenous peoples in this way:

> Indigenous peoples are the inheritors and practitioners of unique cultures and ways of relating to other people and to the environment. Indigenous peoples have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, the various groups of indigenous peoples around the world share common problems related to the protection of their rights as distinct peoples.[48]

This description is similar to Martínez-Cobo's in that it avoids providing a definition of indigeneity based on positive claims of classification, instead focusing on self-identification. Like the other two definitions it is strikingly apolitical in its focus on culture components of indigeneity. This serves at least three purposes: 1. it avoids engaging in complicated debates of classification; 2. it avoids the charge that through definition the United Nations is perpetuating oppressive practices towards native peoples through removing opportunities for autonomy and self-determination, and 3. it avoids offering a venue for adjudication and responsibility that the UN's member states would reject or contest. Crucially, the focus on culture rather than politics circumvents the necessity of dialogue about historic injustices—though this definition recognizes 'differences' between indigenous and non-indigenous societies, it offers no language to critically assess the relationship between the 'dominant' society and indigenous peoples.

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[47] See, for example, Sissons, *First Peoples,* 18.
[48] United Nations Permanent Forum on Indigenous Issues, 'History of indigenous peoples and the international system,' http://social.un.org/index/IndigenousPeoples/AboutUsMembers/History.aspx (accessed March 26, 2012).

Furthermore, because the UN definition is based on negative claims it fails to offer clarity on questions such as, "are there degrees of indigeneity[?]" and is there "a corresponding sliding scale of obligations and benefits"?[49] These questions, anthropologist Ian McIntosh argues, are fundamental to understanding what might be required for justice and reparations.[50] Merely describing an indigenous group as following different customs to non-indigenous peoples offers no critical purchase on whether rights or responsibilities attach either to the group themselves or in relation to each other.

Contrary to McIntosh, anthropologist and director of the Forest Peoples Programme, Marcus Colchester agrees with the spirit of the Forum's decision to retain a loose definition open to self-determination, arguing against "impos[ing] tidy categories" on the "realities" of indigeneity. To do so, he argues, is "not just misguided but positively dangerous."[51] Instead, Colchester advocates for a "flexible framework" that allows for indigenous peoples to respond to "real life issues."[52] While flexibility of these definitions of indigeneity may offer opportunities for indigenous autonomy, the elusiveness of specific understandings not only has effects on who may be considered indigenous in particular contexts, but also has the potential to sidestep conversations about historic injustice. Although Colchester might be right that insisting on particular definitions for indigenous communities is problematic, flexible definitions have their disadvantages. For example, certain conceptions might provide greater, not fewer, opportunities for indigenous advancement, meaning a reliance on definitions constructed around negative

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[49] Ian McIntosh, 'Defining Oneself and Being Defined As, Indigenous,' *Anthropology Today*, Vol. 18, No. 3 (2002): 23.
[50] See also his response to Francesca Merlan in 'Reconciliation: The Peoples Choice?', *Anthropology Today*, Vol. 17, No. 1 (2001): 21 with regard to the Council for Aboriginal Reconciliation in Australia.
[51] Marcus Colchester, 'Response: Defining Oneself and Being Defined As, Indigenous,' *Anthropology Today*, Vol. 18, No. 3 (2002): 24.
[52] Colchester, 'Response: Defining Oneself,' 24.

claims might reduce the opportunities available to indigenous groups. Similarly, ill-defined or elusive notions of indigeneity might be detrimental to rights claims.

Further complicating this debate is the concern that attempts at definition may be a method of subtly controlling or oppressing indigenous peoples. Manahuia Barcham writes that "the creation of a voice for 'authentic' indigenous claims… has also led to the coterminous silencing of the 'inauthentic'" and that reified notions of indigeneity are harmful to those who do not fall within prescribed bounds.[53] In New Zealand, for example, discussions about indigenous reparations are conducted between the Crown (government) and Maori *iwi* (tribes). While this process of reparations is often regarded as progressive (though it is by no means without its critics), from the outset the process defines Maori in relation to their *iwi*, meaning that a large percentage of Maori who have lost contact with their tribe—often as a result of colonial intervention—are not beneficiaries of these policies. The exclusion of what has come to be known as 'urban Maori' in the formal reparations process is an issue that is rarely discussed in mainstream politics, but is often a subject of concern amongst indigenous activists within New Zealand.[54] As Barcham cautions, the process of determining who constitutes an 'authentic' indigenous voice may disenfranchise peoples with a legitimate claim to redress.[55]

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[53] Manahuia Barcham, '(De)Constructing The Politics of Indigeneity,' in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2002): 138.

[54] For example, the major fisheries settlement reached in 1992 in which $150 million worth of commercial fisheries assets and twenty percent of future fishing quota allocations were set aside for *iwi* extinguished the rights of all Māori not associated with these *iwi* to commercial fishing (Manahuia Barcham, 'The challenge of urban Maori: reconciling conceptions of indigeneity and social change,' *Asia Pacific Viewpoint*, Vol. 39, No. 3, 1998: 308-9). See also Steven Webster, 'Māori Retribalization and Treaty Rights to the New Zealand Fisheries,' *The Contemporary Pacific*, Vol. 14, No. 2, 2002: 341-376.

[55] Barcham cites Roger Maaka's statistic that "more than 80 per cent of Maori live in urban areas and for many of these individuals the tribe is no longer the sole focal point of their Maori identity" to make this point (Barcham, 'The challenge of urban Maori,' 304). Tahu Kukutai makes a similar argument in 'Māori Demography in Aotearoa New Zealand: Fifty Years On,' *New Zealand Population Review*, Vol. 37, 2011: 45-64.

Internationally, some indigenous groups, such as the Ecuadorian contingent at the 2001 UN Permanent Forum on Indigenous Issues, have also pressed back against the use of the term 'indigenous,' arguing that it is an outdated way of presenting otherness. Instead, the Ecuadorian delegation advocated using specific tribal names instead of a singular, universal categorization of indigeneity.[56]

On the basis of these debates about what it means to be indigenous, there seem to be two main options: the promotion of clear, unequivocal statements of what is meant by indigeneity or recognition of a range of meanings, self-determined by different groups in their local contexts. Clear definitions may furnish some rights to some people, but have the potential to predetermine conversations about who counts as indigenous and what kinds of rights they might have. Diverse definitions may generate autonomy and self-determination for indigenous communities, but have the potential to impede efforts to theorize the historical phenomenon of settler-colonialism or create politics that respond to its effects. They may also reduce the possibility of collective action and power through deemphasizing shared histories, identities, and characteristics of indigenous peoples. While these identities might not be the only basis for collective action—coalition politics at a national level might be an alternative strategy to gain political power, especially given that nation-states still have more power than the UN—they currently play a crucial role in the international indigenous rights movement.

To circumvent this dilemma, anthropologist Francesca Merlan made a recent and widely supported claim[57] that indigeneity "…like many other social categories, is a contingent,

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[56] Ian McIntosh, 'UN Permanent Forum on Indigenous Issues,' *Anthropology Today*, Vol. 27, No. 6 (2001): 23, see also Sissons, *First Peoples*, 17.

[57] As noted by prominent anthropologist Charles R. Hale in response to Merlan's article, see: Charles R. Hale, 'Comments' in Francesca Merlan, 'Indigeneity: Global and Local,' *Current Anthropology*, Vol. 50, No 3 (2009): 322.

interactive, and historical product."[58] Unlike Colchester, who worries that definitions will produce static conceptions that will be detrimental to indigenous peoples and their capacity for self-determination, Merlan—who is concerned with indigeneity in an international context—argues that because it has no *a priori* meaning, the concept of indigeneity changes with international norms.[59] Even so, she suggests that certain features can be identified that have developed as a result of internationalization of the concept of indigeneity. She claims that international understandings of indigeneity were stimulated by political elites in a small number of liberal democratic nations—primarily the Anglo-American settler colonies and Scandinavian nations—and that these nations treat indigeneity as a malleable, socially constructed idea broadly in accordance with international norms.[60]

Unlike McIntosh and Colchester, Merlan is not making a normative claim; however, her descriptive approach offers a useful starting point for engaging with the various definitions that are being used in governing bodies such as the UN and anthropological works interested in indigenous issues. Starting with how the term is currently being used internationally allows for clearer understanding about the real world understandings of this term, what the stakes are for these uses, and a good position from which to make normative claims about what conceptions of indigeneity might be most promising for addressing historical injustice against indigenous populations.

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[58] Francesca Merlan, 'Indigeneity: Global and Local,' *Current Anthropology*, Vol. 50, No 3 (2009): 319.
[59] This raises important questions about who shapes these international norms—for example, is it member states of the UN or indigenous activists or some other institutional actors?
[60] Sheryl Lightfoot goes further to argue that the 'Anglosphere' (Australia, Canada, New Zealand and the United States) 'selectively endorsed' the United Nations Declaration on the Rights of Indigenous Peoples only after they had "[written] down the norms themselves so that they aligned with existing domestic policy and institutions," see Sheryl R. Lightfoot, 'Selective endorsement without intent to implement: indigenous rights and the Anglosphere,' *The International Journal of Human Rights*, Vol. 16, No. 1, 2012: 111.

To assess international definitions, I borrow Merlan's loose distinction between 'criterial' and 'relational' definitions of indigeneity.[61] Criterial definitions propose some set of criteria or characteristics, the fulfillment of which allows for 'indigenous' identification. Relational definitions do not focus on intrinsic characteristics of indigenous people or groups, but instead look at the relationship between indigenous groups and their 'other'[62] by way of identifying indigeneity. While some of the definitions I explore include both criterial and relational elements, for the most part, one or the other aspect is prevalent.

1.2 Criterial definitions

Most criterial definitions contain one or more of the follow elements:

i. historical background of a precolonial society disrupted by (European) settlers,[63]

ii. being the first inhabitants of a territory,[64]

iii. some sort of human-environment or spiritual relationship with the land,[65]

iv. related to point (ii), but not requiring it, *belonging* to a place or locality.[66]

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[61] Merlan, 'Indigeneity: Global and Local,' 305.
[62] In most cases, this refers to the non-indigenous peoples who also inhabit the territory, whether colonizers or more recent immigrants.
[63] For example, Jeffrey Sissons, *First Peoples*, 13-15; Martínez-Cobo, 1986, cited in Merlan, 'Indigeneity: Global and Local,' 305; Kevin Bruyneel, 'Social Science and the Study of Indigenous People's Politics: Contributions, Omissions, and Tensions,' in José Antonio Lucero, Dale Turner, and Donna Lee VanColt (eds.), *The Oxford Handbook of Indigenous Peoples Politics* (New York: Oxford University Press, 2014).
[64] For example, Colchester, 'Response: Defining Oneself,' 2002; and as related in Shah, 'The Dark Side of Indigeneity?, 1806-1832.
[65] For example, Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003): 143-190; this is also central in Shah's 2007 critique of global definitions of indigeneity and in the definition provided by the United Nations Permanent Forum on Indigenous Issues as detailed above.
[66] For example, Karin Lehmann, 'To Define or Not To Define—The Definitional Debate Revisited,' *American Indian Law Review*, Vol. 31, No. 2 (2006): 514-515; James Clifford, 'Indigenous Articulations,' *The Contemporary Pacific*, Vol. 13, No. 2 (2001): 481-482. Patrick Thornberry also suggests an additional criterion: that indigenous peoples form "distinctive societies," though this is a cultural claim and confers no special status. It also seems that fulfilling any or all of the above criteria might result in such a claim, therefore I have not included it as a separate

A criterial approach to defining indigeneity has been popular because it appears to provide a clear standard by which to assess whether any individual or group should be considered indigenous. The danger of a criterial approach, however, is that it also functions as a policing mechanism that can be used by states, institutions or individuals to limit who can access resources or rights available to indigenous peoples. I argue that each of these criteria are flawed, and that the attempt to design universal criteria that describes all indigenous groups may unfairly restrict who counts as legitimate indigenous claimants.

Criterion (i) provokes at least two critiques. First, it privileges the Anglo-American settler nation and Scandinavian accounts of indigeneity, which are predicated on colonial disruption.[67] For groups that consider themselves indigenous, yet do not have such histories, this criterion reduces their claim to indigenous status and the benefits that status might accrue. The Peoples Republic of China, for example, claims that the category indigeneity does not apply to any of its peoples.[68] However, it is apparent that conceptions of indigeneity are being applied to groups within their borders and used for political traction, as in the highly publicized case of Tibetans in China.[69] The colonial history criterion is also problematic for indigenous groups in Jeremy

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criterion (Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002): 39).

[67] Some scholars and activists have even claimed that the term 'indigenous' should be reserved only for peoples in the Americas and Australasia, given the differences in demographic history, see John R. Bowen, 'Should we have a universal concept of 'indigenous peoples' rights'? Ethnicity and essentialism in the twenty-first century,' *Anthropology Today*, Vol. 16, No. 4 (2000): 13.

[68] This is based on the Chinese government's official position that the Han majority is an indigenous people with roots in the Wei River valley, see: Dru C. Gladney, 'The Question of Minority Identity and Indigeneity in Post-Colonial China,' *Cultural Survival Quarterly*, Vol. 21, No. 3 (1997): 50.

[69] There are also a number of minority groups living within China (official government records state that there are 56 minority groups in China) who might be considered indigenous but are unable to claim indigenous status. This may be because of the Chinese government's response to them (see Emily Yeh, 'Tibetan Indigeneity: Translations, Resemblances, and Up-take,' in Marisol de la Cadena and Orin Starn (eds.), *Indigenous Experience Today* (New York: Berg, 2007): 69-97; and Dru C. Gladney, 'Relational Alterity: Constructing Dungan (Hui), and Uygur, and Kazakh identities across China, Central Asia, and Turkey,' *History and Anthropology*, Vol. 9, No. 4 (1996): 445-477). It may also be that international definitions of indigeneity do not give them an external source of support in seeking recognition as indigenous.

Waldron's view, because the colonial argument—or 'prior occupancy,' in his terms—is premised on a conservative principle valuing stable, flourishing societies. The conservative principle underlying this claim makes it paradoxical to upset the current status quo of settler nations in order to seek redress for past historical injustices against an indigenous population.[70]

While Waldron's argument does not require one to dismiss invasion as a condition for indigeneity, it does raise important questions about what that condition implies for reparations and redress of historical injustice. The implication of his response is that upholding a conservative principle of the status quo should trump the demands colonization and oppression places on societies whose indigenous populations were irreparably altered by these interventions. The literature on this question of whether or not contemporary residents can or should be held responsible for past injustices is too vast to be adequately examined here; however, Duncan Ivison makes a strong counter-argument that current residents should be held somewhat responsible for the actions of their societies' ancestors, in part because in many cases these residents have benefitted and continue to benefit from past injustices.[71] This argument weakens Waldron's assumption that we should seek to maintain our political commitment to conservatism rather than seeking to address valid concerns about historical injustice.[72]

Criterion (ii)—being first inhabitants of a territory—is also problematic, as it places a significant burden of proof on those claiming to be first occupants. Moreover, historical inquiry in most cases is not able to provide the necessary evidence for first occupancy of a people.[73] Some critics also argue that indigenous peoples' claims are weakened by evidence that they were

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[70] Jeremy Waldron, 'Redressing Historic Injustice,' *University of Toronto Law Journal*, Vol. 52, No. 1 (2002): 56.
[71] Duncan Ivison, 'Historical Injustice,' in Jon Dryzek, Bonnie Honig, and Anne Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2008): 507-528.
[72] This argument also neutralizes concerns about collective responsibility, another hurdle liberal theorists face in addressing historical injustice.
[73] Waldron, 'Redressing Historical Injustice,' 75-7.

engaged in their own wars and injustices prior to European arrival.[74] Even in those cases where first occupancy can be proved, territorial precedence may have a dispossessory effect. Elizabeth Povinelli offers an illustrative account of just such an effect in her discussion of the Kenbi land claim in the Northern Territory, Australia, in which many of the initial indigenous claimants died during the course of the legal case. As a consequence, the claim for their descendants was weakened, especially because the descendants lived outside the claim area.[75] In other words, as for criterion (i), locating notions of indigeneity in claims of originariness (criterion ii), fails both in terms of the *validity* or *proof* of the claim, and in the *consequences* of such a claim.

Criterion (iii) points to some sort of human-environment or spiritual relationship with the land as a basis for indigeneity. This relationship is foregrounded in such expectations as those faced by the *adivasi* in Madhya Pradesh outlined at the beginning of the chapter. This criterion not only intends to explain what indigeneity means, but also contains normative guidelines about what indigenous people require for justice. The assumption that indigenous peoples have an urgent, spiritual connection with the land means that to dispossess them of land or to engage in degradation of environmental features (such as forests, rivers, or ecological systems) is committing an injustice more damaging than 'merely' taking away an economic resource. The introduction of spirituality brings a moral dimension to this connection with land that serves as a trump card for calls for retributive justice. Establishing such a claim not only requires accepting that indigenous peoples have particular spiritual awareness and connection with the earth, but that this brings with it certain privileges.

While definitions of indigeneity based on relationships with ancestral territories might offer positive outcomes for indigenous peoples in terms of granting collective rights or access to

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[74] Waldron, 'Redressing Historical Injustice,' 77.
[75] Povinelli, *The Cunning of Recognition*, 211-217.

land, some may be harmful. Shah's example of the *adivasi* reveals the tragic consequences of holding indigenous people accountable to an international standard of indigeneity, including such tropes as the perception that indigenous people represent standards of ecological purity. She notes, "[t]his imagery says far more about a generic stereotype that is currently the vogue in the international public sphere than it does about the diversity and complexity of indigenous people's relationship with their environment."[76]

This criterion is also problematic because it assumes that all indigenous peoples have this sort of connection with their lands, when some groups may not—for example, the Griqua (a groups of mixed origin descendants of European men and Hottentot or Khoi-San women) have indigenous status at the UN, despite not claiming spiritual links to the land.[77] This criterion is also problematic because it says little about the status of indigenous peoples who were forcibly removed from their ancestral lands and consequentially lost their relationships with the land or environment. Relying on this criterion means that the negative effects of colonization are imposed twice on indigenous groups—first in the removal of land, and second in removal of indigenous identity by defining indigeneity in terms of particular kinds of relationship with the land.

Criterion (iv) requires a *sense of belonging* to the territory, a more fully sensory and involved experience than simply living on it. It partially reflects what Rebecca Tsosie calls "the normative framework" of indigenous group that is reflected, for example, in the spiritual

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[76] Shah, 'The Dark Side of Indigeneity,' 1824.

[77] Though the Griqua have gained recognition in the UN as indiegnous, another group that emerged from the same colony—the Rehoboth Basters—was not granted the same recognition, though they continue to attend indigenous meetings at the UN. Dahl contends that one reason for this rejection is the Basters' relationships with the British colonizers and support for racist policies (Jens Dahl, *The Indigenous Space and Marginalized Peoples in the United Nations* (New York: Palgrave MacMillan, 2012): 199-200). Recognition of the Griqua, however, suggests that at least some indigenous peoples see their claim as legitimate, despite not fulfilling the demands of criterion (iii).

connection the Sioux have with the land.[78] This criterion makes the dispossessory effects from (ii) less likely, and explains why it tends to be used in the United Nations as a more expansive criterion from which to determine indigeneity (insofar as the UN determines indigeneity) than the simple habitation of a particular territory, which can be problematic when indigenous peoples were forcibly removed from their original locations.[79] In this respect, criterion (iv) fits closely with the UN's call for self-determination, which plays a large role in dictating to what extent an individual feels connected to the land. That said, this criterion cannot be sufficient alone to determine indigeneity. Many individuals feel a strong sense of belonging in their personal homes, yet they would likely not claim to be 'indigenous' to the land on which their home rests. To rest a claim to indigeneity on self-identified belonging to a territory could make for problematic pronouncements, some of which are evidenced in the rise of nationalistic political parties in Britain and continental Europe.[80]

These problems with 'criterial' definitions of indigeneity do not necessarily mean that they have no place in conversations about indigeneity, but they do suggest that requests for redress or reparations resting on these claims are unreliable, at best. Moreover, criterial definitions leave indigenous peoples vulnerable to Merata Mita's concern that: "We have a history of people putting Maori under a microscope in the same way a scientist looks at an insect.

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[78] Rebecca Tsosie, 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations,' in Jon Miller and Rahul Kumar (eds.), *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press, 2007): 43-68.

[79] Andrea Muehlebach, 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism,' *Identities: Global Studies in Culture and Power*, Vol.10, No. 2 (2003): 265.

[80] Examples of this include the British National Party's emergence as a champion of indigenous Britons' rights. While I am not suggesting that there might not be genuine grounds for such claims, my intuition is that this use of indigeneity—and certainly the political rhetoric that flows from it—seriously underestimates the complexities of such this term, thus allowing for abuse. Adam Kuper explores this question of indigeneity in more detail in 'The Return of the Native,' *Current Anthropology*, Vol. 44, No. 3 (2003): 389-402.

The ones doing the looking are giving themselves the power to define."[81] Creating a list of criteria that all indigenous peoples should meet to be considered indigenous means that those designing the list have power to police who is considered indigenous, which raises serious concerns about who is creating the definitions and their aims in doing so. Additionally, by creating universally applicable criteria, there is little sensitivity to local context, history or culture, which may result in invalidating the claims of those who consider themselves indigenous, but fail to meet these general guidelines.

Although still containing the power to define, relational definitions respond to Mita's concern that indigenous peoples are being treated like insects insofar as they do not require indigenous individuals or communities to 'measure up' to some absolute standard. Relational definitions of indigeneity also remove one of the major drawbacks of criterial definitions of indigeneity—that these criteria are too static and inflexible to adequately encapsulate the complexities of indigenous identity.

1.3 Relational definitions

Relational definitions do not neatly separate out into distinct criteria as above, instead they focus on relationships between indigenous groups and the society in which they reside. Two different accounts of relational definitions dominate the literature. The first defines the indigenous group in relation to—and opposition with—the state. For example, David Maybury-Lewis argues that, "indigenous peoples are defined as much by their relations with the state as by any intrinsic characteristics they may possess."[82] Rodolfo Stavenhagen agrees, asserting that

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[81] As quoted in Linda Tuhiwai Smith, *Decolonizing Methodologies* (London: Zed Books, 1999): 58.
[82] David Maybury-Lewis, quoted in Merlan, 'Indigeneity: Global and Local,' 305.

"indigenousness, independently of biological or cultural continuity, frequently is the outcome of governmental policies imposed from above and from the outside."[83] In both these definitions, indigeneity is predicated on a particular relationship of the indigenous group with the state.

In contrast, Marisol de la Cadena and Orin Starn argue that indigeneity is generated from social formations, but these are not solely, or even necessarily, those designed by the state.[84] Similarly, in advocating for clear definitions of indigeneity, McIntosh postulates that "[t]he existence of an indigenous group implies the existence of the opposite, the non-indigenous or exogenous – an even more problematic category."[85] His definition is relational in the sense that it posits indigenous groups against an 'other,' which he suggests may in itself be difficult to define. Further, in this relational conception of indigeneity, he acknowledges that there may be "degrees of indigeneity – a sliding scale of peoples between the two extremes of native and strange."[86]

Justin Kenrick and Jerome Lewis emphasize the dispossessory effects of these relationships with the 'other,' arguing that "[a] relational understanding of [indigeneity] focuses on the fundamental issues of power and dispossession that those calling themselves indigenous are concerned to address, and on the enduring social, economic and religious practices that constitute their relationships with land, resources and other peoples."[87] In their account, indigeneity is not solely predicated on the 'other,' although these relationships of power form a central component of indigenous rights claims. This can be seen in the UN definition, which privileges self-determination and in so doing points to the centrality of power-relations in understanding indigeneity. Likewise, Kenrick and Lewis' relational conception of indigeneity

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[83] Rodolfo Stavenhagen, quoted in Merlan, 'Indigeneity: Global and Local,' 305.
[84] Marisol de la Cadena and Orin Starn, 'Introduction,' in Marisol de la Cadena and Orin Starn (eds.), *Indigenous Experience Today* (New York: Berg, 2007): 1-30.
[85] McIntosh, 'Defining Oneself,' 23.
[86] McIntosh, 'Defining Oneself,' 23.
[87] Justin Kenrick and Jerome Lewis, 'Indigenous Peoples' Rights and the Politics f the Term Indigenous,' *Anthropology Today*, Vol. 20, No. 2 (2004): 9.

seems to look at power imbalance not simply as an effect of indigenous-colonial relationship, but as feature of such relationships.

While bringing attention to the power dynamics that they claim are integral to indigenous identity, their account leaves important questions about the ways definitions of indigeneity might change if power relations were neutralized or reversed. In other words, if indigenous people were not systematically marginalized and exploited, would indigeneity as a concept still exist? This question is pressing, not only because it raises the possibility that making gains for indigenous peoples might in itself eradicate the notion of indigeneity, but also because it raises the possibility of claims from groups like the British National Party in Britain, which argues that 'indigenous' Britons are being negatively affected by immigration from other countries.[88]

The implications of embracing these relational definitions are significant. While I argue that defining indigeneity as a relationship between indigenous groups and the state is too narrow and fails to appreciate the broad range of social processes and actors that shape understandings of indigeneity, it is also problematic to simply state that indigeneity is "what we decide it is" as a product of group interactions in any given moment. While being a member of a group is an important feature regularly attributed to indigeneity[89] allowing groups to define themselves and others may have troubling consequences.[90]

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[88] For example, Nick Griffin, leader of the British National Party says: "Native British are now treated like second-class citizens in our own country, whilst asylum-seekers and immigrants are pushed to the front of the queue for housing, jobs and benefits." Nick Griffin, 'Introduction,' *British National Party website*, www.bnp.org.uk/introduction (accessed October 12, 2012).

[89] This point is made multiple times in this UN training document. United Nations, 'Training Module on Indigenous Peoples' Issues,' *United Nations* (2010), http://www.un.org/esa/socdev/unpfii/documents/trainingmodule_en.pdf: 11 (accessed April 27, 2012).

[90] Collective rights are depicted as a central aspect of the indigenous cause in UN documents detailing indigenous development. Collective rights are controversial, yet the UN Permanent Forum on Indigenous Issues embraces them as essential to indigenous development and uses them as justification for why "indigenous issues" are different from development or human rights' issues, see: United Nations, 'Training Module on Indigenous Peoples' Issues,' *United Nations* (2010), http://www.un.org/esa/socdev/unpfii/documents/trainingmodule_en.pdf: 11 (accessed April 27, 2012). The question of whether being a member of a group should be considered an independent criterion of

While the UN description should not be considered the only authority on global conceptions of indigeneity, their international membership and influence makes them a touchstone for such understandings. Returning to the description offered by the UN Permanent Forum on Indigenous Issues, the significance of relationships of power as identified by Kenrick and Lewis can be seen in recognition of the 'common problems' of indigenous peoples, which are implicitly identified as unique to indigenous groups:

> Indigenous peoples are the inheritors and practitioners of unique cultures and ways of relating to other people and to the environment. Indigenous peoples have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, the various groups of indigenous peoples around the world *share common problems* related to the protection of their rights as distinct peoples.[91]

This definition points to at least two kinds of relationships. First, the relationship between indigenous groups. Since indigenous groups share certain challenges, they are drawn together in aspiring towards particular political goals, namely protection of their indigenous rights. Second, the relationship between two kinds of 'peoples'—indigenous peoples, who have "distinct" "social, cultural, economic and political" features, and (implicitly) non-indigenous peoples, who are members of the "dominant societies" in which both groups reside. This definition, however, offers little guidance as to whether the relationships among indigenous groups and between indigenous and non-indigenous groups are *defining features* of indigeneity, or whether they are simply *effects* of indigeneity. This is complicated by the UN's inclusion of criterial features, seen

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indigeneity is one I chose to leave out of criterial definition, in part because I would argue that it may be a necessary but not sufficient feature of indigeneity.

[91] United Nations Permanent Forum on Indigenous Issues, 'History of indigenous peoples and the international system,' http://social.un.org/index/IndigenousPeoples/AboutUsMembers/History.aspx (my emphasis), accessed March 26, 2012.

in the references to the "distinct" characteristics of indigenous peoples, and in their "unique cultures and ways of relating" to the people and the world around them.

Merlan argues that the UN definition of indigeneity presents indigeneity as neither intrinsic nor relational.[92] As a result, the concept can be used in many ways by different actors within the international system and in local contexts. Her more specific argument—that indigeneity is the historical product of a liberal democratic environment—captures this contingency, showing that particular historical and social forces have shaped the ways individuals and institutions understand and utilize the term indigenous. However, if it is the case that global conceptions of indigeneity can be considered a product of decisions made by individuals and institutions, there are two aspects that must be scrutinized further: first, in any given moment what does indigeneity look like? Second, what are the implications of any specific definition?

For now, I want to put the first question aside, since this the subject of Chapters Two and Three.[93] The second question lends itself to different kinds of answers. One is explanatory and based on empirical evidence—tracing global conceptions of indigeneity to political outcomes can reveal the ways that these conceptions have real political effects. Another is theoretical, tracing the ways in which the definitions outlined above affect accounts of historical injustice in notable ways. Below, I consider how liberal accounts of historical injustice have overlooked the influence of particular conceptions of indigeneity, thus weakening their validity.

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[92] Merlan, 'Indigeneity: Global and Local,' 305.
[93] In Chapter Two I analyze policy documents, national periodicals, broadcast news media and interviews with Maori leaders to explore the ways that indigeneity was and is being used in a New Zealand context. In Chapter Three I analyze court documents, legislation and national news media to explore ways that indigeneity is being defined with regards to land rights in Australia.

1.4 Historical injustice and indigeneity

It is clear that international definitions of indigeneity are having wide-ranging effects on indigenous identity and practices. The importance of these definitions is confirmed not only by recent developments within the UN formally acknowledging the presence and rights of indigenous populations worldwide,[94] but by critical research exploring the powerful effects of definitions and labels on group identity, power relations within and between groups, and the subsequent effects of these on local, national, and international policies and politics.[95]

Responses to international definitions of indigeneity—such as those of the Maasai in Tanzania and the *adivasi* in India—raise two key questions, both of which have important consequences for accounts of historical injustice. First, *who* has access to resources or rights reserved for indigenous peoples? While defining oneself or being defined as indigenous may have negative implications, increasingly it may offer certain privileges in terms of rights, resources, and access to economic and symbolic reparations.

Second, how might the way that indigeneity is defined shape the *kinds* of privileges and resources available to indigenous peoples? Many programs supporting indigenous people focus on promoting a range of policies including: redefining development policies that are culturally appropriate, developing monitoring mechanisms to improve accountability of policies, and promoting non-discrimination and inclusion of indigenous peoples in local, national, and

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[94] This is exemplified in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007.
[95] The literature on this general assumption is extensive, but three particularly noteworthy examples are: Charles Taylor, 'The Politics of Recognition,' in Amy Gutman (ed.), *Multiculturalism and the Politics of Recognition: An Essay by Charles Taylor* (Princeton: Princeton University Press, 1992): 25-74; Iris Marion Young, 'Equality of Whom? Social Groups and Judgments of Injustice,' *Journal of Political Philosophy*. Vol. 9, No. 1 (2001): 1-18; and Will Kymlicka, *Multicultural Citizenship*, (Oxford: Oxford University Press, 1996). For examples where definitions of indigeneity in particular have had a powerful impact on political outcomes, see: Shah, 'The Dark Side of Indigeneity?': 1806-1832; and Michaela Pelican, 'Complexities of indigeneity and autochthony: An African example,' *American Ethnologist*, Vol. 36, No. 1 (2008): 52-65.

international laws, policies and projects.[96] Certain conceptions of indigeneity may be influencing some of these policies, thus affecting the kinds of programs institutions like the UN choose to support. For example, linking indigeneity to spiritual understandings of the land may require particular kinds of reparations not frequently considered in liberal, Western frameworks, which tend to privilege property rights over non-tangible resources or opportunities.

This definitional question is especially important in the face of liberal political theory's traditional emphasis on property rights and agency as a starting point for considering claims of historical injustice. An important account offered by Jeremy Waldron posits that present circumstances affect claims of injustice, and these are not taken into account by the widely-referenced theory of justice in rectification that Nozick outlines.[97] He asserts that attempting to construct counterfactual history in order to assess the ways that time has changed outcomes is impossible and that as a result present circumstances must be considered in determining what is considered an unjust incursion.[98]

While I agree with him that contemporary circumstances do alter judgments on appropriate approaches to rectification of past injustices against indigenous populations, I disagree with his focus on the transfer of property as a means analyze and address historic injustices. I argue that his approach fails to adequately consider how injustice is perpetuated beyond mere resource distribution, manifesting itself in the relationships groups and individuals develop towards each other. The global conceptions of indigeneity surveyed above require

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[96] United Nations Forum on Indigenous Issues, 'Second Decade of the World's Indigenous People,' *United Nations Forum on Indigenous Issues* (December 22, 2004), http://social.un.org/index/IndigenousPeoples/SecondDecade.aspx (accessed April 26, 2012).
[97] Jeremy Waldron, Superseding Historic Injustice,' *Ethics*, Vol. 103, No. 1 (1992): 4-28; Waldron, 'Redressing Historical Injustice'; Jeremy Waldron, 'Settlement, Return, and the Supersession Thesis,' *Theoretical Inquiries in Law*, Vol. 5, No. 2 (2004): 237-268.
[98] Waldron, 'Superseding Historic Injustice,' 9-10; Waldron, 'Settlement, Return, and the Supersession Thesis,' 241-2.

sensitivity to what it means to be indigenous, not simply an assessment of present circumstances. Kenrick and Lewis' definition comes closest to Waldron's view, insofar as their focus on power relations leaves the notion vulnerable to questions about what happens when power relationships change—in other words, when the present circumstances alter. Kenrick and Lewis's definition does not, however, allow the focus of political redress to become one of material resource appropriation and reallocation. Instead, by making power dynamics central to their account, they recognize indigeneity as an important means of expressing and legitimizing particular identities.

Waldron's engagement with questions of indigeneity demonstrates further the problem with this focus on economic resources. He argues that notions of indigeneity rely on claims of either 'first occupancy' or 'prior occupancy.' As I outline above, he suggests that the burden of proof for those claiming to be the first occupants of a territory is high, and that historical inquiry in most cases is not able to provide the necessary evidence for first occupancy of a people.[99] Prior occupancy, he argues, appears to be a more promising avenue of inquiry, in which indigenous populations claim that their habitation of a territory before colonial settlers gives them certain privileges. He cautions, however, that prior occupancy is premised on a conservative principle valuing stable, flourishing societies, in which case it is paradoxical to upset the current status quo of settler nations in order to seek redress for past historical injustices against an indigenous population.

These arguments, and his accounts of addressing historical injustice that flow from them fail, to acknowledge the social value placed on conceptions of indigeneity. Charles Taylor, Iris Marion Young, and others claim that recognition of identity of any kind (not indigeneity specifically) is essential for individuals to flourish. Taylor argues that recognition is "a vital

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[99] Waldron, 'Redressing Historical Injustice,' 75-7.

human need" and that "nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[100] Young emphasizes that justice is not primarily concerned with resource allocation, but with recognition of an individual's standing in relation to others. Notably, she argues that groups constitute individuals—that is, the characterization of the liberal subject as ontologically prior to the social is fundamentally flawed.[101] Following these accounts, I claim that indigeneity is important because of the political and social functions it serves in any particular context and time. While Waldron argues that indigeneity cannot be upheld because scrutiny of the concept leads us to realize that indigenous groups cannot prove first occupancy, and the conservative principle behind prior occupancy can be applied to contemporary, colonized societies, I argue that this emphasis on criteria fails to appreciate the ways in which indigeneity is in part a relational concept in which interactions between indigenous and non-indigenous groups confer some of the status of indigeneity. Exploring this dimension of indigeneity calls for much more extensive redress for past injustices than that for which Waldron advocates.

Offering an alternative account of historical justice, Chandran Kukathas' work on reparations for past grievances emphasizes agency in questions of historical redress. Though he proposes symbolic redress as a means of restoring relationships in contemporary societies, he explicitly argues that this redress should not be seen as an attempt to address the transgressions against people in the past. Like Waldron, he argues that links must be established between perpetrators and victims in order to assign responsibility for past injustices. He stresses, however,

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[100] Taylor, 'The Politics of Recognition,' 25-26.
[101] Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990): 44-5.

that this is likely to be a difficult, and in some cases impossible, task.[102] This requirement that original perpetrators and victims must be tied to current claimants fails to appreciate the ways in which conceptions of indigeneity are a vehicle for identity that call for responses beyond economic compensation. While Kukathas' approach is more sensitive to relational conceptions of indigeneity in its consideration of the relationship between the perpetrators and victims of injustice, it fails to fully explore dimensions of power in these relationships. Kukathas is concerned that blame is attributed to individuals who were not alive at the time injustices were committed, even though differences in political power, economic resources, and respect between these groups clearly extends beyond the original perpetrators and victims to their descendants.

Duncan Ivison suggests that these differences in power, resources, and esteem require a different kind of assessment of the relationship between advantaged and disadvantaged groups. He calls this approach the 'benefits argument,' which claims that any wellbeing resulting from historical injustices creates responsibilities for those who have benefitted from the injustice.[103] On this reading, a group that is systematically worse off than others in society as a result of historical injustice should be offered compensation. Ivison, however, highlights a number of problems with this intuition, amongst which is that the driving force behind this claim is not a backward-looking claim for reparations, but a forward-looking claim of distributive justice or the desire for 'reconciliation' of a divided society.[104] In this, his conclusion resembles Kukathas'—in the interest of addressing rifts in contemporary society, responsible parties should offer some kind of compensation—however, the benefits argument differs in that this is an ethical burden on descendants, not simply one of pragmatism or convenience.

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[102] Chandran Kukathas, 'Responsibility for Past Injustice: How to Shift the Burden,' *Political Philosophy and Economics*, Vol. 2, No. 2: 165.
[103] Ivison, 'Historical Injustice,' 507-528.
[104] Ivison, 'Historical Injustice,' 517.

I follow Ivison in thinking that indigenous claims to redress historic injustice should not rely on such arguments, which emphasize distributive justice of an implicitly economic nature, rather than a more expansive consideration of power relations. When used by and for indigenous groups, the benefits argument obscures the important role indigeneity itself plays in providing a particular kind of legitimacy to claims for justice. If addressing the benefits argument is the primary concern of a government, that government would be justified in ignoring indigeneity and instead seeking economic redistributive measures targeted at the less well off in general, rather than focusing on a specific group.[105] Alternatively, if the most efficient means to produce more equitable social and economic arrangements would be to focus on particular groups in society who fall disproportionately into lower socio-economic groups, policies could be designed that take into account particular group characteristics, though these need not distinguish between indigenous and non-indigenous groups.

On two levels, then, the benefits argument fails: practically and normatively. Although the benefits argument might be one that some governments or individuals would like to make,[106] in practice this is not how many national governments are responding to indigenous claims for rectification of historical injustice. In New Zealand, for example, the government has set aside specific seats for Māori in parliament, created a Ministry of Māori Affairs, provided scholarships for Māori students, and acknowledged the right for Māori to lodge historical grievances with a specially created Office of Treaty Settlements (Te Tari Whakatau Take e pa ana ki te Tiriti o Waitangi). In contrast, few non-indigenous minority groups in New Zealand have been the

[105] This assumes that inequality in society is considered problematic. For governments unconcerned with inequality, no action at all would be required.

[106] In New Zealand this seems to be the basis for many of the policies enacted with the purpose of moving towards more equal distribution of resources, education, and land for Māori. However, there have been critiques of policies focused specifically on Māori, such as former member of parliament and leader of the opposition, Don Brash's speech in 2004 asking for an end to Māori 'special privileges.' For the speech, see: Don Brash, 'Orewa Speech', *National Party website*, http://www.national.org.nz/article.aspx?articleid=1614 (accessed April 27, 2012).

subject of such extensive legislative activity, despite experiencing systematic discrimination by the New Zealand government.

For example, Chinese immigrants who came to New Zealand in the mid-1800s to dig for gold were required to pay a head tax of £10 (later increased to £100 in the late-1800s) in order to enter the country, and were only permitted entry along with a certain tonnage of cargo.[107] Although an official apology and a small sum of compensation was offered in 2002 by Prime Minister Helen Clark, there has been little sustained national attention on the discrimination of Chinese New Zealanders resulting from governmental policies of the late nineteenth and early twentieth centuries. In contrast, there has been significant and persistent attention on the experiences of New Zealand Māori. Although this attention is partially rooted in the justification offered by the 'benefits argument'—as a percentage of the population Māori are worse off than their Pākehā[108] counterparts[109]—the focus on Māori has also been on the basis of their indigeneity.

Normatively, the benefits argument fails because of its pragmatic forward-looking emphasis on overcoming contemporary social discord, rather than an ethical demand to consider the legitimacy stemming from indigenous claims *per se*. Jeff Spinner-Halev offers one possibility for considering the importance of past injustices, not just for their effects on contemporary politics, but as a way of understanding why some injustices endure. His theory suggests that the past should be considered insofar as it allows for greater understanding of how

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[107] Manying Ip and David Pang, 'New Zealand Chinese Identity: Sojourners, Model Minority and Multiple Identities,' James H. Liu, Tim McCreanor, Tracey McIntosh and Teresia Teaiwa (eds.), *New Zealand Identities: Departures and Destinations* (Wellington: Victoria University Press, 2005): 177.

[108] Technically, the term Pākehā refers to original colonial settlers in New Zealand of British or Irish descent. In contemporary politics the term has been broadened to mean people of European descent.

[109] The European/Pākehā median annual income was $25,400 in 2006 compared with $20,900 for Māori, see Statistics New Zealand, 'Personal income by ethnic group,' *2006 New Zealand Census of Population and Dwellings,* 2006, http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/incomes/personal-income-by-ethnic-group.aspx, accessed July 10, 2.014

these injustices were carried out and that "acknowledging the harm will not change the physical living conditions of the group, but it will sustain group members' dignity."[110] In other words, respect becomes a central feature of such an approach—an idea that resonates with indigenous communities desire for self-determination.

This question of dignity and self-determination is rarely addressed in any meaningful way in, for example, New Zealand national dialogue. There has been little sustained attention as to why indigeneity confers particular rights above and beyond those demanded by the benefits argument. While economic and structural factors play a crucial role in affecting the status of indigenous peoples in contemporary society, I argue that particular conceptions of indigeneity may have influenced and continue to influence political and social outcomes for indigenous peoples. Though institutions and individuals are important mechanisms by which power is exercised, discourse has the power to shape identities and the privileges that attach to them.[111] This dissertation does not seek to privilege concepts over the influence of structural forces and individual agency, but it does intend to show that certain definitions of indigeneity might provide indigenous groups with more powerful claims to historical redress.

Understanding indigeneity as an evolving concept utilized by both colonizers and the colonized for political influence will in itself challenge the conclusions offered by scholars such as Waldron and Kukathas. While some accounts of historical injustice do attempt to make relationship bonds a central feature of claims for redress, they focus on relationships between individuals or groups without considering the particular features of those individuals or

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[110] Jeff Spinner-Halev, 'From Historical to Enduring Justice,' *Political Theory*, Vol. 35, No, 5 (2007): 579.
[111] An excellent example of this is Joan Scott's work on the meaning attached to wearing the veil in France, *The Politics of the Veil* (Princeton: Princeton University Press, 2007).

groups.[112] As outlined above, both in the UN definition and in criterial and relational definitions, particular characteristics of indigeneity need to be identified that demonstrate why issues of indigenous injustice require different kinds of address than those involving other marginalized groups in society.

In the next chapter, I provide a genealogy of the concept in a New Zealand context in order to follow its manufacture and development in the national conscience. I argue that political discourse around indigenous peoples in New Zealand limits recognition of and redress for injustices, and that liberal accounts of historical injustice inadequately address indigenous grievances, as they fail to consider the ways that indigeneity in and of itself might affect entitlements.

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[112] One excellent example of an account of historical injustice that considers the role of relationships in claims of descendants for reparations is Janna Thompson, 'Historical Injustice and Reparation: Justifying Claims for Descendants,' *Ethics*, Vol. 112, No. 1 (2001): 114-135. However, the bonds she details are generic—they could equally apply to indigenous and non-indigenous groups—and therefore her theory fails to point to why, specifically, indigenous people might have greater claims. Also considering the obligations contemporary generations have to the dead—focusing on relationships between living and dead—is Tim Mulgan, 'The Place of the Dead in Liberal Political Philosophy,' *The Journal of Political Philosophy*, Vol. 7, No. 1 (1999): 52-70. Unlike Thompson, Mulgan's account does suggest that there are distinctions between indigenous and non-indigenous peoples and their understanding of the dead, although his argument is intended primarily to raise questions for liberalism rather than to impart a new understanding of the dead that might signal a particular feature of indigeneity that might have useful implications for accounts of historical injustice.

Chapter 2: Changing Conceptions of Indigeneity in New Zealand—Implications for Justice

In 1992 the New Zealand government agreed to one of the largest Treaty settlements, granting Māori shares in commercial fishing companies, $18 million in cash and twenty percent of future quota allocations.[113] This settlement was one of the first to address historic injustices against Māori and was widely hailed as a promising sign of New Zealand's progressive policies towards indigenous New Zealanders.[114] The language of the settlement, however, belies some of this promise. In the course of negotiations, references to 'Māori' were replaced with references to '*iwi*' (tribes), with the final settlement being allocated only to specific *iwi*, not to Māori in general. This change in language meant that a large number of Māori—especially those who lived in cities without tribal affiliations—were effectively written out of the claim, although few media, government, or academic sources commented on this at the time.

This example demonstrates how different conceptions of indigeneity might affect the recognition and resources offered to particular indigenous individuals and groups in New Zealand. Despite national recognition of injustices committed against indigenous New Zealanders—as evidenced by support for the Treaty settlements process—many Māori continue to face systemic political, cultural and theoretical obstacles to justice. These obstacles are frequently invoked in national media through issues as diverse as the specifics of Treaty settlement claims, educational opportunities for Māori students, high levels of Māori

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[113] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, December 14, 1992, http://www.legislation.govt.nz/act/public/1992/0121/latest/DLM281433.html, accessed April 2, 2014.

[114] That said, Paul Moon notes that there was a small minority in the Māori community who thought "the whole Deal was a violation of the Treaty of Waitangi and the traditional Maori world view (*te ao Maori*), and was "selling the Maori short" of what was rightfully one of their largest, and potentially most lucrative possessions as well as violating the spiritual elements of the resources in question." (Paul Moon, 'The Creation of the "Sealord Deal",' *The Journal of the Polynesian Society*, Vol. 107, No. 2 (1998): 145).

unemployment, and cultural clashes between Māori and Pākehā individuals and institutions.[115] Responses to these obstacles take many forms, including reparations in the form of Treaty settlements, protest marches (*hikoi*), and commentary in the popular press.

Much political theory literature on Māori and indigenous groups addresses these concerns through a lens of historical injustice, attempting to justify or criticize these cases in light of historical claims.[116] These accounts often focus on indigenous communities as targets of unjust treatment, yet they do not specifically address whether being indigenous, in and of itself, might require particular kinds of redress. These arguments are intended to be broadly applicable to any group that has suffered unjust treatment—for example, African Americans and Native Americans alike—yet this general assessment overlooks important ways that indigenous groups might deserve quite different responses on the basis of their identity beyond the specific treatment they experienced at the hands of the state.

Some attempts have been made to understand what the abstract term 'indigeneity' implies for these claims of historical rectification; however, there is little work exploring how changing conceptions of indigeneity in particular contexts have been used to uphold or deny claims to justice.[117] Such a task is crucial, for at least two reasons. First, assessing the political

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[115] For example: Christine McKay, 'Dannevirke: Passions run high in debate over reserves,' *Hawke's Bay Today*, March 31, 2014, http://www.nzherald.co.nz/hawkes-bay-today/lifestyle/news/article.cfm?c_id=1503456&objectid=11229573, accessed April 6, 2014; Merania Karauria, 'Minister faces angry protest by Uenuku,' *Wanganui Chronicle*, March 29, 2014, http://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11228433, accessed April 6, 2014; Simon Collins, 'Closing the gaps: The great ethnic job divide,' *The New Zealand Herald*, March 17, 2014, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11220647, accessed April 6, 2014; Jonathan Milne, 'Minister in pre-election 'race' attack,' *The New Zealand Herald*, April 6, 2014, http://www.nzherald.co.nz/maori/news/article.cfm?c_id=252&objectid=11233058, accessed April 6, 2014.

[116] For example, W.C. Bradford, 'Beyond Reparations: An American Indian Theory of Justice,' *bypress Legal Series*, Paper 170, 2004; Jeremy Waldron, 'Superseding Historic Injustice,' *Ethics*, Vol. 103, No. 1, 1992: 4-28.

[117] For examples of work assessing the term 'indigeneity,' see Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy,' *Lecture at Victoria University of Wellington Law School* (2002): 55-82; Rebecca Tsosie, 'The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness",' *Journal of Law and Policy*, Vol. 18

implications of understandings of indigeneity requires a detailed account of how terms are being used in context—abstract notions of indigeneity do not capture the complexity of legal, political, or social responses to identity claims on the ground. Second, exploring the generation and specific usage of these terms allows for evaluation of the validity of current political theories addressing injustice for indigenous communities that are based on abstract (rather than context-based) notions of indigeneity.

This chapter seeks to provide an understanding of the ways conceptions of indigeneity in contemporary New Zealand have been invoked by policy makers and indigenous peoples to justify political and social policies towards Māori. I focus on New Zealand because it is often regarded as a leading nation in its progressive stance towards its indigenous population and issues of indigenous injustice are a central part of national discourse. I argue, however, that the political discourse around Māori claims limits the government's capacity to recognize and address issues of justice. I suggest that despite New Zealand's progressive approach with regard to reparations and apologies, it continues to perpetuate injustices by excluding some legitimate indigenous claimants from the settlement process and failing to adequately address questions of what might be owed to Māori on the basis of their indigeneity. Critically assessing these failures in New Zealand is important given its leading role in international discourse on indigenous rights.

In Section 1, I outline the historical background to contemporary race relations in New Zealand, highlighting the central role of the Treaty of Waitangi in framing the nation's political identity as bicultural rather than multicultural. Section 2 provides a genealogy of the concept of indigeneity as it relates to three key political themes in New Zealand from the late twentieth century to the present day. The first is the Treaty Settlements process, where I argue that

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(2005): 55-98; Francesca Merlan, 'Indigeneity: Global and Local,' *Current Anthropology*, Vol. 50, No. 3 (2009): 303-333.

historical redress has resulted not just in attempts to address contractual obligations, but has also supported notions of Māori as rights-bearing indigenous peoples. At the same time, it has also clearly delineated who counts as Māori for the purposes of rectification, and thus circumscribed the rights of certain Māori individuals and groups. The second is dialogue and legislation around political representation, in particular disagreements over the value and legitimacy of race-based compared with needs-based policies. National debate over such policies has been heated throughout the early twenty-first century, and indicates vastly differing notions of indigeneity and the legitimacy it confers. The third is the way that the global indigenous rights movement has affected language and policy in New Zealand, and I focus on two different, though connected, developments: 1. the growing trend among Māori scholars and activists to connect definitions of indigeneity in New Zealand to global definitions, and the potential effect of this on identity formation and political outcomes, and 2. the ways in which international institutions have influenced assessments of domestic justice in New Zealand by applying differing definitions of indigeneity in successive reports, resulting in inconsistent conclusions as to who should receive reparations meted out by the New Zealand government for historical injustices.

I argue that this genealogy reveals three continuing sources of injustice in New Zealand that existing liberal approaches to indigeneity fail to adequately address: 1. Who should get compensation for historical injustices? 2. Should indigenous status grant 'special' rights? 3. What is the best configuration of political representation for Māori? In Section 3, I consider two leading liberal accounts of justice—Jeremy Waldron's work on superseding historical injustice and Chandran Kukathas' work on reparations[118]—and their response to these questions, arguing

[118] I have chosen these two particular accounts of addressing historical injustice not only because Waldron and Kukathas are prominent liberal interlocuters responding to questions of historical injustice and reparations, but

that both theories fail to provide adequate responses that more considered notions of indigeneity require. I contend that Waldron's focus on the transfer of property as the means to understand and respond to historic injustice is at odds with how indigeneity is invoked in New Zealand. Similarly, Kukathas' emphasis on agency as the means by which to determine the rightful recipients of reparations does not account for the complexities surrounding understandings of indigeneity that deviate from traditional tribal groupings. As a result, their accounts fail to adequately respond to the three sources of injustice I identified in Section 2: they both overlook more nuanced assessments of who should get compensation for historical injustices on the basis of indigenous identity; Waldron ignores and Kukathas rejects the idea that indigenous status should confer particular rights; neither account asks or offers guidance on what configuration of political representation is most appropriate for indigenous people. Section 4 concludes by indicating the ways in which conceptions of indigeneity might or should evolve in a New Zealand context.

2.1 The Treaty of Waitangi and race relations in New Zealand

Issues of indigenous injustice form a central part of national discourse in New Zealand. This discourse often centers on the relationship between the white majority—Pākehā—and the indigenous minority—Māori. However, the unambiguously multicultural composition of New Zealand raises questions about why the relationship between Pākehā and Māori is privileged over other inter-group relationships. According to the 2013 New Zealand census, ethnic groups were represented as follows: 74% 'European,'14.9% Māori, 11.8% 'Asian,' 7.4% Pacific

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because they represent a wider group of liberal accounts that focus on who should receive reparations and what form those reparations should take.

peoples, and 2.9% 'Other.'[119] These figures alone suggest that New Zealand might be classified more easily as multicultural rather than bicultural. Further, individuals who do not identify as European often experience higher levels of racial discrimination than those who do, and are more likely to report feeling marginalized in society. Individuals who identified as Asian reported higher levels of racial discrimination than any other ethnic group, with Māori and Pacific peoples also reporting higher levels of racial discrimination than Europeans.[120] Median annual income measures are significantly lower for those who identify as Māori, Asian or Pacific peoples than for Europeans.[121] The 2012 New Zealand General Social Survey also indicates that Europeans reported higher levels of satisfaction and wellbeing than other ethnic groups on a range of questions.[122]

These are only crude measures of experience and require more sustained analysis than I have provided here, but they do indicate disparities—in some cases significant—between groups. On the basis of these findings, it is important to question why indigenous claims are prioritized in national dialogue about justice in New Zealand. Why might indigeneity uniquely justify restitution when other marginalized groups in society do not receive similarly sustained consideration?[123] I suggest that New Zealand's understandings of indigeneity and its relationship

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[119] Statistics New Zealand, '2013 Census: Cultural Diversity,' *2013 New Zealand Census of Population and Dwellings*, March 5, 2013, http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-national-highlights/cultural-diversity.aspx, accessed April 2, 2014.
[120] Statistics New Zealand, 'Working together: Racial discrimination in New Zealand,' *New Zealand General Social Survey*, 2012, http://www.stats.govt.nz/browse_for_stats/people_and_communities/asian-peoples/racial-discrimination-in-nz.aspx, accessed July 10, 2014.
[121] Statistics New Zealand, 'Personal income by ethnic group,' *2006 New Zealand Census of Population and Dwellings,* 2006, http://www.stats.govt.nz/Census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/incomes/personal-income-by-ethnic-group.aspx, accessed July 10, 2014.
[122] Statistics New Zealand, 'New Zealand General Social Survey: 2012,' http://www.stats.govt.nz/browse_for_stats/people_and_communities/Households/nzgss_HOTP2012/Commentary.aspx, accessed July 10, 2014.
[123] As noted in Chapter One, there are also cases of historical injustice against specific identity groups in New Zealand that, though they have received some attention (for example, the economic discrimination faced by Chinese immigrants in the mid-1800s, which was formally acknowledged by the Prime Minister in 2002 with an official

with justice stem from the Treaty of Waitangi and its crucial role in shaping New Zealand's predominantly bicultural political identities.

The Treaty of Waitangi (te Tiriti o Waitangi) is widely considered the founding document of New Zealand.[124] It was signed between the British Crown and over five hundred Māori chiefs in 1840, establishing New Zealand as a British territory and extending rights to Māori as British citizens. The Treaty is controversial in part because two versions were produced—one written in Māori and the other in English—each differing in meaning. The main difference between the two is the understanding of where authority rests. In the Māori version, authority is divided into two: *kawanatanga* or governorship, which was ceded to the British, and *rangatiratanga* or customary authority of the chiefs, which was to be retained by Māori. The English version assumes all sovereignty is ceded to the British.[125] Since its signing, many Māori have referred to the Treaty when outlining violations against their rights and the conditions they agreed to in yielding the territory to the British; however, until the creation of the Office of Treaty Settlements in 1975 no governmental or legal body upheld these complaints.

Reliance on the Treaty as the founding document is not without other problems. Besides the issue of translation, it is problematic to rely on a document that ignores injustices against Māori that occurred before the signing of the Treaty and that pays no attention to Māori who

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apology and small sums of compensation), have not received the same sustained scrutiny as the relationship between Māori and Pākehā.

[124] The seminal work on the centrality of the Treaty of Waitangi to New Zealand's legal, political, cultural and historical framework is Claudia Orange's *The Treaty of Waitangi* (Auckland: Allen and Unwin Ltd, 1987). Most scholarly, legal and political texts concur with this view, see, for example, Paul McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991).

[125] Giselle Byrnes, 'Jackals of the Crown? Historians and the Treaty Claims Process in New Zealand,' *The Public Historian*, Vol. 20, No. 2 (1998): 11. Largely because of the differences in translation, most contemporary legislation refers to the principles, rather than the specific provisions, of the Treaty. These principles include a commitment to *partnership*—requiring both parties (Māori and the Crown) to act in good faith—*active protection*—requiring protection of Māori interests by the Government—and *redress*—requiring the Government to redress and provide compensation for breaches of the Treaty (see James Anaya, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Preliminary Note on the Mission to New Zealand,' *United Nations Human Rights Council,* A/HRC/15/37/Add.9, 2010: 5-6).

were not signatories to the Treaty, despite also being subject to colonization. Some scholars have even questioned whether Māori signatories were able to transfer authority to the Crown—J.G.A. Pocock points to the Prendergast judgment, which argues that the Treaty lacks binding force in law because indigenous signatories lacked sovereign statehood and therefore could not transfer sovereignty to the British.[126] Later in this chapter I indicate ways in which the definitions of Māori specifically as Treaty partners are exclusionary and may fail to provide justice for deserving recipients. These concerns aside, it is important to acknowledge that the Treaty has been used effectively to mete out justice through the Treaty settlements process. Given the lack of progress in the decades prior to the establishment of the Tribunal, this is no small matter. For this reason alone, there has been overwhelming public support for recognition of the Treaty as New Zealand's founding document.

New Zealand political discourse significantly altered course with the creation of the Office of Treaty Settlements (Te Tari Whakatau Take e pa ana ki te Tiriti o Waitangi) in 1975. The decades prior to its establishment were characterized by vocal protest movements against the government, seeking a formal avenue through which Māori could lodge grievances with the government over failures to uphold conditions of the Treaty of Waitangi. Three protests in particular contributed to the sense that the status quo was fragile, all focused on land rights. The first was Dame Whina Cooper's 1975 land march on Parliament from Te Hapua in the north. The 79-year old Māori elder led approximately 5000 people on a march down the length of the North Island to protest Māori land loss and to present a Memorial of Rights to Prime Minister Bill Rowling signed by 200 Māori elders. She also delivered a petition with over 60,000 signatures

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[126] J.G.A. Pocock, 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Māori,' in Duncan Ivison, Paul Patton, and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press, 2002): 28.

asking for tribal land to be entrusted to in Māori in perpetuity and for the repeal of statutes that could alienate Māori land.[127] Cooper argued that connection with the land was so crucial to Māori identity that the historical removal and continued use of ancestral lands by non-Māori was destroying Māori culture and identity.[128]

The second major protest was the 506-day occupation of Bastion Point (Takaparawhā) from 1977-78, which was a response to the acquisition of Māori land during the late 1800s. The government planned to build high-income housing on the land, despite it earlier being declared 'absolutely inalienable' by the Native Land Court.[129] Through negotiations and a claim lodged with the newly created Waitangi Tribunal, Bastion Point was eventually returned to the tribe Ngāti Whātua in 1987, but only after sustained public pressure.[130]

The third protest extended throughout the 1970s, focusing on ownership of the Raglan (Whāingaroa) golf course. During the Second World War the government had taken Māori tribal land to use as a military airfield, but after the war part of the land was not returned to its original Māori owners and instead turned into a public golf course. This action was considered particularly injurious, as the land contained sacred Māori burial sites, in addition to a marae (tribal meeting house) and homes, which were leveled for the golf course.[131] An occupation in 1978 led by prominent Māori activist Eva Rickard gained widespread publicity, and the land was

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[127] Basil Keane, 'Ngā rōpū tautohetohe – Māori protest movements,' *Te Ara: The Encyclopedia of New Zealand*, http://www.teara.govt.nz/en/nga-ropu-tautohetohe-maori-protest-movements, last updated April 1, 2014, accessed July 11, 2014.
[128] Radhika Mohanram, 'The Construction of Place: Maori Feminism and Nationalism in Aotearoa/New Zealand,' *NWSA Journal*, Vol. 8, No. 1 (1996): 58.
[129] Keane, 'Ngā rōpū tautohetohe – Māori protest movements,' http://www.teara.govt.nz/en/nga-ropu-tautohetohe-maori-protest-movements.
[130] Aroha Harris, *HIKOI: Forty Years of Māori Protest* (Wellington: Huia Press, 2004): 86.
[131] Harris, *HIKOI*, 60.

eventually returned to Māori in 1983.[132] Partially in response to the increasing range, prominence, and support for these protests, the Waitangi Tribunal was created to offer formal acknowledgment of the harm caused by these failures to uphold the principles of the Treaty. The Tribunal also opened the door to conversations about the rights and responsibilities of Māori and Pākehā to one another. It was not until 1985, however, that the Treaty of Waitangi Amendment Act extended the scope of the Tribunal to investigate historical claims dating back to 1840.

The formation of the Tribunal not only formally legitimized discourse around indigenous rights in New Zealand, but also paved the way for more extensive conversations about Māori identity and representation. These questions of representation were not limited to interactions within the Treaty settlement process, but more widely affected the political landscape. Discussion ranged from whether Māori should have their own political party to whether they should have veto rights over national legislation or self-determination within the New Zealand nation-state.[133] Problematically, the answers to these questions depended on who asked the question, and of whom. Not only were the goals of representation diverse, and in many cases divergent, but the issue of who represents whom in these discussions was, and remains, controversial.[134]

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[132] Harris, *HIKOI*, 62; Keane, 'Ngā rōpū tautohetohe – Māori protest movements,' http://www.teara.govt.nz/en/nga-ropu-tautohetohe-maori-protest-movements.

[133] One of the most prominent conversations about self-determination or veto rights for Māori occurred when the National Māori Congress resolved in 1995 to move towards a Māori nation, if not a Māori nation-state. Whilst the New Zealand government has proven itself open to Māori self-management (particularly the Fourth Labour Government (1984-1990), under a program of devolution) it has not ever endorsed calls for a self-governed Māori nation within the New Zealand nation-state (Mason Durie, 'The State of the Maori Nation,' in Raymond Miller (ed.), *New Zealand Government and Politics* (Auckland: Oxford University Press, 2003): 497). On the formation of a Māori Party, see: Radio New Zealand Newswire, 'New Maori Party will win all the Maori seats,' *Radio New Zealand*, May 6, 2004, http://maoriparty.org/panui/new-maori-party-will-win-all-the-maori-seats-2004/, accessed April 3, 2014.

[134] Ann Sullivan, 'Maori Affairs and Public Policy,' in Raymond Miller (ed.), *New Zealand Government and Politics* (Auckland: Oxford University Press, 2003): 510.

In 1995, the United Nations General Assembly declared the start of the "International Decade of the World's Indigenous People."[135] This move directed global attention to indigenous issues, although the declaration of a second "International Decade of the World's Indigenous Peoples"[136] in 2005 suggests that the goals of the first decade were under-supported or not wide-ranging enough. The second decade brought about the creation of a formal United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This proposal was adopted in 2007, with eleven countries abstaining from the vote and four countries voting against it. Those four countries comprised the traditional "white settler dominions"[137]—Australia, Canada, New Zealand, and the United States. Subsequently all four have ratified the declaration[138], and a variety of reasons have been offered for their reluctance to support the original declaration. The New Zealand government, for example, argued simultaneously that the requirements of the declaration were too demanding with respect to property and legal powers, and that the Waitangi Tribunal was already providing the appropriate means for Māori redress.[139] Although there are numerous contributing factors for the New Zealand government's adoption of the declaration in 2010, national media were quick to attribute the change in policy to growing criticism from groups both inside and outside the country.[140]

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[135] United Nations, 'International Decade of the World's Indigenous People,' Resolution 48/163, http://www.un-documents.net/a48r163.htm, accessed January 31, 2012.
[136] United Nations, 'International Decade of the World's Indigenous People,' Resolution 59/174, http://www.un-documents.net/a59r174.htm, accessed January 31, 2012.
[137] Roger Maaka and Augie Fleras, 'Engaging with Indigeneity: *Tino Rangatiratanga* in Aotearoa,' in Duncan Ivison, Paul Patton, and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press, 2002): 89-109.
[138] Australia on April 3, 2009, New Zealand on April 19, 2010, Canada on November 12, 2010, the United States on December 16, 2010.
[139] Fairfax New Zealand News, 'NZ Indigenous Rights Stance 'Shameful' – Māori Party,' *Stuff*, September 14, 2007, http://www.stuff.co.nz/archived-stuff-sections/archived-national-sections/korero/45362, accessed February 1, 2012.
[140] See Tracy Watkins, 'NZ Does a U-Turn On Rights Charter,' *Stuff*, April 20, 2012, http://www.stuff.co.nz/national/politics/3599153/NZ-does-U-turn-on-rights-charter, accessed February 1, 2012.

These changes in New Zealand politics and policies towards Māori groups and individuals provokes an important question: how are conceptions of indigeneity used to legitimize or undermine certain claims of rectification for past and current injustices? To explore this question, I trace how concepts of indigeneity have developed and been invoked by policy makers and indigenous peoples in contemporary New Zealand in order to better understand who is defining indigeneity and the ways in which it has changed over time. By mapping how different understandings of indigeneity have been used to justify New Zealand's political and social policies toward Māori, and how in turn these understandings have been shaped by certain political developments, I hope to show how these changes narrow the boundaries of who is considered a legitimate recipient of state resources or reparations on the basis of their indigenous status. Though this chapter cannot exhaustively assess the usage and affect of all conceptions of indigeneity throughout this period, the three themes—Treaty Settlements, political representation, and international influences on domestic politics—serve as prominent issues of national importance that have significantly contributed to New Zealand's evolving understanding of race relations and indigenous politics.

2.2 Indigeneity in New Zealand: Treaty settlements, political participation, international influences

2.2.1 Treaty fisheries settlements

Since the mid-1970s the New Zealand nation-state has made efforts to redress historical injustice through both formal apologies and settlements. This process has been subject to much discussion in society—academic, political, and private—and continues to be an important part of the national dialogue. The Office of Treaty Settlements outlines what a settlement entails:

> A Treaty settlement is an agreement between the Crown and a Maori claimant group to settle all of that claimant group's historical claims against the Crown. Claimant groups are usually iwi or large hapu (tribes and sub-tribes) that have a longstanding historical and cultural association with a particular area. Some very specific claims may result in agreements with smaller groups.[141]

Because the Treaty of Waitangi was an agreement between the Crown and Māori chiefs, one widely held assumption that has generally been upheld by the Office of Treaty Settlements is that settlements involve *iwi* (tribes), *hapū* (subtribes), or *whānau* (extended family), as it is these people and groupings who were represented by signatories to the Treaty. The description above does leave room for "some very specific claims," though in practice these have been minimal.

The assumption that Māori would be represented by tribes was not granted at the outset of the settlement process in 1975, however. Elizabeth Rata, an academic working on tribal Māori politics, argues that between 1984 and 1992 discourse increasingly referred to '*iwi'* rather than 'Māori,' in large settlements related to fisheries.[142] In the 1989 Māori Fisheries Act, for example, '*iwi*' were the named recipients of Treaty settlements, not 'Māori' (despite the name of the Act).[143] One of the most important settlements to date—the Treaty of Waitangi (Fishery Claims) Settlement Act 1992—in which *iwi* were given $150 million worth of commercial fishing assets and twenty percent of future quota allocations, also invalidated future claims or agreements over commercial fishing resources.[144] The terminology of *iwi* used in this act is therefore highly significant, as the settlement meant not only that solely those who were affiliated with *iwi* were eligible for these funds, but also that no future claim could be lodged by other groups or

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[141] Office of Treaty Settlements, 'What is a Treaty Settlement?' http://www.ots.govt.nz/, accessed April 6, 2014
[142] Elizabeth Rata, 'Discursive strategies of the Maori tribal elite,' *Critique of Anthropology*, Vol. 31, No. 4 (2011): 372.
[143] Māori Fisheries Act 1989, December 20, 1989, http://legislation.knowledge-basket.co.nz/gpacts/public/text/1989/an/159.html, accessed April 2, 2014.
[144] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, December 14, 1992, http://www.legislation.govt.nz/act/public/1992/0121/latest/DLM281433.html, accessed April 2, 2014.

individuals. In other words, any Māori not associated with these *iwi* had no legitimate claim on commercial fishing in New Zealand at the time or into the future. By defining this settlement as one for *iwi*, rather than for Māori in general, large numbers of non-tribally affiliated Māori received no settlement and, crucially, have no future recourse to compensation or apology.

Non-*iwi* groups took this decision to the Court of Appeal, who ruled that the 1992 Fisheries Act should benefit all Māori, including those not affiliated with an *iwi* (in particular, urban Māori, who constitute a large percentage of the Māori population[145]). However, this decision was overturned by the Privy Council in 1997 on the grounds that the Court of Appeal was not mandated to make this decision. The case was then sent back to the High Court, where the presiding judge ruled that the wording of the Māori Fisheries Act 1989 indicated that all assets could only be distributed to *iwi*. The judge also ruled that only 'traditional' Māori tribes (those who signed the Treaty) qualified as *iwi*.[146]

These developments demonstrate the significance of conceptions of indigeneity in this context. In particular, they show that definitions of Māori—whether as part of an *iwi*, *hapū*, *whānau*, or non-affiliated with a tribe—have clear implications for addressing historical and present-day injustice. The decisions made by the government and the courts to read the Treaty as a contract between Māori tribes and the Crown, rather than between the Crown and Māori as a people, left non-affiliated Māori with little recourse for justice within the formal Treaty

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[145] Estimates in 2006 indicate that 85% of Māori are 'urban'—i.e. live in towns and cities (Paul Meredith, 'Urban Māori,' *Te Ara: The Encyclopedia of New Zealand*, http://www.teara.govt.nz/en/urban-maori, updated December 4, 2012, accessed May 21, 2014). Some 'urban' Māori still identify with *iwi*, *hapū*, or *whānau*, but there are some who do not and either have no affiliation with Māori groups, or have joined urban Māori organizations such as Te Whānau o Waipareira Trust of West Auckland or the National Urban Māori Authority (formed in 2003). These organizations, however, have no specific right to reparations under the Treaty Settlement process, though there have been some efforts by the government to devolve some welfare responsibilities to these urban trusts.

[146] Manuhuia Barcham, 'The challenge of urban Maori: reconciling conceptions of indigeneity and social change,' *Asia Pacific Viewpoint*, Vol. 39, No. 3 (1998): 309. See also Rata, 'Discursive strategies of the Maori tribal elite,' 360. What constitutes an *iwi* is also the subject of much discussion, see Steven Webster, 'Do Maori know what a hapuu is?' *Journal of Royal Anthropological Institute*, Vol. 17, No.3 (2011): 622-627.

settlement process, despite the open wording of the Treaty Settlements Office which seems to suggest that "some specific claims" might be eligible. In other words, the language change from Māori to *iwi* in the early 1990s narrowed the frame for future settlements, creating a discourse that set expectations for reparations to be limited to Māori associated with *iwi*, *hapū*, or *whānau*. Furthermore, some of the decisions—such as the 1992 Treaty of Waitangi (Fishery Claims) Settlement Act—specifically and permanently foreclosed the possibility of revisiting past injustices in future claims. As a result, the exclusiveness of definitions used by the courts and the Treaty process not only has the potential to leave past injustices unaddressed for some claimants, but might extend these injustices into the present through continuing to ignore groups or individuals with rightful claims but no official recourse to address them.

Since the fisheries decisions, there has been much discussion about the appropriateness of relying on *iwi* as the basic unit of negotiation with the Crown. Some academics, such as Rata, argue that this process of '*iwi*-isation' has been a strategy adopted by the tribal elite in order to control resources and power. She suggests that "Indigeneity not only creates the homogenous collective represented by the elite, but the concept is a relational one, excluding all those who are not indigenous" and that this homogenization allows tribal leaders to dominate the financial and political benefits of the settlement process.[147] Roger Maaka, on the other hand, sees these definitions as flowing from the government: "the freezing of tribes at the signing of a treaty with a European power is concomitant with the colonization process and the influence of state legislation on Maori society."[148] In his view, it has been to the benefit of the government to restrict who counts as a negotiation partner in line with the principles of the Treaty, although he

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[147] Rata, 'Discursive strategies of the Maori tribal elite,' 368.
[148] Roger Maaka, 'The new tribe: conflicts and continuities in the social organisation of urban Maori,' *The Contemporary Pacfici*, Vol. 6, No. 2 (1994): 314.

does not make clear whether this has been a deliberate government policy or an unintentional outcome of power dispersed through the process of colonization.

Manuhuia Barcham indicates that both of these forces are at play, arguing that that the freezing of Māori social structure is a combination of the aims of colonial modern government and support from indigenous elites.[149] Barcham's analysis seems most accurate, insofar as the government laid the groundwork for *iwi* to become the representatives of Māori in the 1989 Fisheries Act, yet this was done in consultation with tribal leaders. Similarly, the case taken up by non-*iwi* against the tribal definitions of the 1992 settlement highlights the active support of *iwi* leaders for the original settlement. For example, Tipene O'Regan, a prominent Māori scholar and activist wrote to the Treaty Tribunal at the time of the settlement, arguing that *iwi* believed that only those who had signed the Treaty should be eligible for settlements.[150] In his argument he made both a moral and a practical claim. In moral terms that, "It follows as a matter of simple logic that the return of wrongfully alienated fisheries assets should be to the original owners… the closest contemporary expression of that ownership – Iwi."[151] In other words, *iwi* are the appropriate recipients of settlements, since they are the most clearly traceable original owners of the fisheries assets. In practical terms, allowing settlements to be distributed to *hapū* would mean that too many groups would be seeking reparations—he estimated 1000 *hapū* in existence at the

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[149] Barcham, 'The challenge of urban Maori,' 306. Frantz Fanon also articulates the insidious nature of colonialism in its ability to coopt native elites in *The Wretched of the Earth*. Though Barcham does not suggest that indigenous elites in New Zealand are acting out of false consciousness, his formulation does share similarities with Fanon's anticolonial theory. See also Cathy Cohen on the politics of intentional deviance, given individuals' limited agency and choices (Cathy J. Cohen, 'Deviance as Resistance: A New Research Agenda for the Study of Black Politics,' *Du Bois Review*, Vol. 1, No. 1 (2004): 27-45).

[150] Tipene O'Regan, in Barcham, 'The challenge of urban Maori,' 308. This view is also upheld by a number of other prominent Māori scholars and activists. For example, Maria Bargh argues that "those who signed te Tiriti signed on behalf of whanau, hapu, and iwi or on behalf of themselves as part of these social units" and therefore constitute the official Treaty partner to the Crown (Maria Bargh, 'Changing the Game Plan: The Foreshore and Seabed Act and constitutional change,' *Kotuitui: New Zealand Journal of Social Sciences*, Vol. 1, No. 1 (2010): 21).

[151] Tipene O'Regan, quoted in 'Te Whanau o Waipareira Report,' *Waitangi Tribunal*, Wellington, 1998.

time of the settlement (and also suggested that more might emerge if the fisheries settlement was opened to *hapū*), which would result in meager settlements of "economically non-viable packages," not to mention it being "an administrative nightmare."[152] While O'Regan was making a claim specifically about the importance of settlements directed at *iwi* rather than *hapū* (not about settlements for tribal groups rather than for non-tribally affiliated individuals), presumably he would have employed the same arguments to support the case for tribes over individuals: that *iwi* were the traceable original owners, and that it would be an administrative burden and economic failure to distribute to groups outside *iwi*.

Similarly, the Māori Party, established in 2004 explicitly to represent Māori interests in Parliament, also upholds this traditional tribal structure in their stated principles: **"**We want a government that values accountability and serving the people; we want a public service that understands the aspirations of *whānau, hapū, and iwi*."[153] In their policy documents, including their most recent manifesto written in 2011, references to the Treaty of Waitangi and settlements consistently focus on the relationship between *iwi/hapū* and the Crown, rather than between the Crown and Māori in general.[154]

Despite the successes of *iwi, hapū and whānau* in the courts and national legislation, and in their widespread acceptance in political rhetoric as the rightful partners in the Treaty process, the validity of this tribal approach has been questioned. Prominent Māori scholar and activist Ranganui Walker argued in 1989 that historically *iwi*, *hapū* and *whānau* could not be seen as

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[152] Tipene O'Regan, quoted in 'Te Whanau o Waipareira Report,' *Waitangi Tribunal*, Wellington, 1998.
[153] Māori Party, 'Our Policies: Kāwanatanga,' http://maoriparty.org/?page_id=7583, accessed April 4, 2014 (my emphasis).
[154] Māori Party, 'Our Whānau: Our Future,' October 28, 2011, http://maoriparty.org/our-policies/, accessed April 4, 2014.

completely distinct groups, and that large structural differences existed across regions.[155] This historical ambiguity shores up advocates for less rigid understandings of Māori groupings than those based on tribes identified in 1840. John Tamihere, former politician and now journalist, supports this ethos, saying "the Treaty must follow the people – we did not stop developing in 1840. You've got to flow with the people."[156] In this statement Tamihere is making an important moral and political point about the failure of a concept of justice that depends on freezing indigenous life at a particular moment in time. Both he and Walker question the validity of an approach that demands indigenous groups be assessed at a single moment in time—the signing of the Treaty—when society has clearly changed in the intervening years and generations.

Similarly, Barcham suggests that, "The continual reference by government and the courts to perceptions of Maori society of today as a replica of Maori society of 1840, fails to take in to consideration the evolution of Maori society."[157] He points to the celebration of evolution in Māori mythology to demonstrate that changing notions of Māori identity and society are fundamental to Māori culture.[158] These views indicate that contemporary understandings of tribal identities in New Zealand are inaccurate because the processes of colonization significantly

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[155] Ranganui Walker, 'Maori identity,' in D. Novita and B Wilmott (eds.), *Culture and Identity in New Zealand* (Wellington: GP Books, 1989).
[156] John Tamihere, quoted in Barcham, 'The challenge of urban Maori,' 308.
[157] Barcham, 'The challenge of urban Maori,' 306.
[158] Barcham, 'The challenge of urban Maori,' 306. Though Barcham argues this point by pointing specifically to Māori mythology, many other scholars have made the same argument about indigenous cultures elsewhere—that it is unreasonable to assess a culture based on the original point of contact with settlers, given the changes wrought by the passage of time (and, especially, the changes wrought by colonialism). For example, Margaret Kohn and Keally McBride, *Political Theories of Decolonization: Postcolonialism and the Problems of Foundation* (New York: Oxford University Press, 2009): 8-9; Catherine Lu, 'Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress,' *The Journal of Political Philosophy*, Vol. 19, No. 3 (2011): 261-281; Lea Ypi, Robert E. Goodin and Christian Barry, 'Associative Duties, Global Justice, and the Colonies,' *Philosophy & Public Affairs*, Vol. 37, No. 2 (2009): 103-135. Some scholars also highlight the unfair expectation that indigenous groups remain culturally static in order to 'prove' their indigenous status, while settler society does not have to justify evolving cultural or social standards. For clear examples of this double standard, see Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

changed Māori groupings through both formal and informal policies, such as the suppression of Māori language and culture in schools and the stigmatization of Māori in society and work, which in turn contributed to urbanization and movement away from ancestral lands.[159] In addition, contemporary tribal identities may be problematic because their emphasis on groupings represented by signatories to the 1840 Treaty is antithetical to the ethos of evolution embedded in Tikanga Māori.[160]

These concerns suggest that, despite the now well-established Treaty settlement process and its determination of who counts as the Māori 'partner,' it is important to scrutinize state-sanctioned definitions of *iwi*, *hapū*, or *whānau* to explore whether these groupings are a fair representation of the indigenous people of New Zealand. If critics are correct that these definitions inadequately account for all those who should be considered Māori and eligible for apologies and reparations, then the settlements process is not only failing to fully address historical injustices, but may be perpetuating new injustices.

2.2.2 Political representation: needs-based v. race-based policies

In 1996 the introduction of a new Mixed Member Proportional (MMP) electoral system transformed New Zealand politics from a first-past-the-post to proportional representation system, ushering in a range of new political parties and introducing an era of coalition politics.[161] Prior to the introduction of MMP, four electoral seats were reserved for electors of Māori descent

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[159] This urbanization was extremely rapid: in 1926 84% of Māori were living in rural, tribal settlements. By 1986 almost 80% were living in urban settings (Paul Meredith, 'Urban Māori,' *Te Ara: The Encyclopedia of New Zealand*, http://www.teara.govt.nz/en/urban-maori, last updated December 4, 2012, accessed May 19, 2014).

[160] Tikanga Māori can be translated in many ways, but often refers to Māori culture, protocols, ethics, or ways of doing things.

[161] Under the first-past-the-post electoral system, New Zealand's political landscape was dominated by two political parties: the National Party and the Labour Party. Since the first MMP election in 1996, there have been between six to eight parties represented in each Parliament (1996-present). Additionally, since 1996 no one political party has attained more than 50% of the vote, thus requiring coalition governments.

who chose to be enrolled in Māori (rather than general) seats.[162] The Royal Commission on the Electoral System recommended that the Māori seats be abolished with the introduction of MMP, as Māori should achieve proportional representation through the mechanism of list seats.[163] A number of Māori organizations argued for the retention of the Māori seats, in part because they hoped for increased representation in Parliament, but also on the grounds that as *tangata whenua*—'people of the land'[164]—they had a right to special representation.[165] In particular, arguments on the basis of first occupancy were lodged that intended to reflect their special status in New Zealand as indigenous peoples, not simply as a significant minority group. In other words, on the basis of their indigeneity, Māori had a right to representation separate from the general population. Extensive deliberation in Parliament and the Electoral Law Reform Select Committee resulted in these requests being upheld, and the number of seats was increased from four to seven as a result of new guidelines tying the number of electorates to population. Since the 1996 election, Māori representation in Parliament has been roughly proportional to the number of Māori in the population as a result of both the new electoral system and the increased number of reserved Māori seats.[166]

Tariana Turia and Pita Sharples, co-leaders of the Māori Party, have suggested that there should also be consideration given to a Māori Australian electorate—Te Ao Moemoea—for the

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[162] These reserved seats were established in 1867. Electoral Commission, 'Māori Representation,' http://www.elections.org.nz/voting-system/maori-representation, last updated October 3, 2013, accessed March 21, 2014. Māori seats can be contested by any candidate regardless of their identity, however electors in the Māori seats must self-identify as Māori.

[163] Electoral Commission, 'The Māori Seats Under MMP,' http://www.elections.org.nz/māori-and-vote/māori-seats-under-mmp, last updated February 15, 2013, accessed March 21, 2014.

[164] This rough translation 'people of the land' could be considered a domestic term similar in meaning to 'indigenous.'

[165] Alexandra Xanthanki and Dominic O'Sullivan, 'Indigenous Participation in Elective Bodies: The Maori in New Zealand,' *International Journal on Minority and Group Rights*, Vol. 16, No. 2 (2009): 191-2.

[166] This runs counter to the expectation of the Royal Commission that proportionality would be established without reserved seats.

115-125,000 Māori living in Australia. They suggest that such an electorate should exist as Māori are moving to Australia "because of the pull of higher wages and a better chance to get work; or even worse, being pushed across because of negative experiences in Aotearoa [New Zealand] from 'perceived prejudice'."[167] On this view, residency within the country is not the means by which Māori citizens establish their right to vote—being indigenous to the country is sufficient, no matter where a person resides.[168]

Neither Turia nor Sharples have provided more details justifying their argument, and this proposal has not gained widespread support, but their rationale provides insight into the kind of relationship they envision Māori having with New Zealand—both with regard to the people and the land. The reasons they provide speak to the advantages of wages in Australia, but also to racism within New Zealand—in Sharples' words, "No wonder our young are escaping to the land of dreaming. Cos sometimes it must seem like a living nightmare back home."[169] It is difficult to establish the accuracy of their assessment that racism is one of the key reasons for Māori migration to Australia (there has also been significant non-Māori migration across the Tasman, often linked to higher wages and better work opportunities); however it is striking that there have not been calls for all New Zealanders residing overseas to have the ability to vote or overseas electorates established.[170] Although Turia and Sharples do not offer other reasons for

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[167] Tariana Turia and Pita Sharples, 'Maori Party finds the Eighth Maori Electorate: Te Ao Moemoea,' September 29, 2007, http://maoriparty.org/panui/maori-party-finds-the-eighth-maori-electorate-te-ao-moemoea/, accessed April 2, 2014.

[168] The Department of Internal Affairs has also considered whether people with Māori ancestry who are not citizens or permanent residents should be granted New Zealand citizenship, see Holly Waldron, 'Overseas-Born Māori and New Zealand Citizenship,' *Institute of Policy Studies* (Wellington, 2011).

[169] Sharples, 'Maori Party find the Eighth Maori Electorate,' 2007, http://maoriparty.org/panui/maori-party-finds-the-eighth-maori-electorate-te-ao-moemoea/.

[170] There are sufficiently large numbers of New Zealand citizens residing in Australia (about 600,000) and the United Kingdom (about 60,000) to make such calls plausible, at least in terms of population (Statistics New Zealand, 'At Least 1 Million New Zealanders Live Overseas,' http://www.stats.govt.nz/browse_for_stats/population/mythbusters/1million-kiwis-live-overseas.aspx, last updated June 22, 2012, accessed May 27, 2014).

holding this view, it is also possible that, given the history of removal of Māori from ancestral lands, they would argue that the specific ties Māori have to the land as indigenous peoples make them deserving of political representation even when living abroad.

Electoral boundaries have been redrawn following the 2013 census, resulting in one additional general electorate seat in Auckland. The public has been invited to respond to the new boundaries, and their objections were published in the *New Zealand Gazette* and taken up for consideration by the independent body charged with proposing and reviewing the electorate boundaries. Two objections were lodged that specifically requested abolishment of the Māori seats: B Jacobson "Recommends the discontinuance of the Māori electorates since the introduction of MMP has ensured the representation of all ethnic or minority groups are better served and there is no advantage in maintaining a separate Māori roll."[171] One other objection was listed as "similar to above."[172]

The views of these two citizens (who presumably represent at least some others who did not lodge official complaints) are consistent with the arguments of a number of academics, public figures and politicians who suggest that race-based policies, such as separate Māori electorates, provide unfair special treatment to Māori. For example, in 2004, leader of the opposition Don Brash gained a significant bump in the polls when he made a now infamous speech in which he stated:

> In this country, it should not matter what colour you are, or what your ethnic origin might be. It should not matter whether you have migrated to this country and only recently become a citizen, or whether your ancestors arrived two, five,

[171] New Zealand Gazette, 'Objections to Proposed Boundaries of Electoral Districts of New Zealand,' Wellington, January 14, 2014: 111.
[172] These objections can be set in the context of 409 objections and 164 counter-objections, see comments from Bernard Kendall, Chair of the Representation Commission, in 'New Electorate Boundaries Finalised,' *Scoop*, April 17, 2014, http://www.scoop.co.nz/stories/PO1404/S00284/new-electorate-boundaries-finalised.htm, accessed April 24.

> 10 or 20 generations ago. [W]e must build a modern, prosperous, democratic nation based on one rule for all. We cannot allow the loose threads of 19th century law and custom to unravel our attempts at nation-building in the 21st century.[173]

Similarly, Rata argues that:

> …the condition for democracy is everywhere the end of tribalism with its birth-ascribed inequality and exclusive kin membership. The incompatibility goes deep into the very structure of politics. Tribalism is based on principles of inequality. Democracy is based on equality. Kin status is what matters in the tribe; citizenship is the democratic status. Tribalism is exclusive. To belong you must have ancestors who were themselves born into the system. Democracy by contrast includes people from all backgrounds. The matter of who is included and who is excluded touches all areas of New Zealand life.[174]

Former politician and public intellectual Muriel Newman also argues that "Distinguishing citizens on the basis of their ancestry is—by its very nature—fundamentally abhorrent to free people whose institutions are founded on the doctrine of equality."[175]

These views all suggest that special rights or privileges for Māori are detrimental to principles of equality and democracy. In some cases, advocates of these views suggest that the real concern should be for those who are the bottom of the socio-economic milieu, regardless of race. In other words, they contend that, for those concerned with social justice, needs-based, not race-based, policies should be supported.[176]

In contrast, advocates of Māori seats or other particular rights for Māori, argue that race-based policies uphold important values. First, they argue on moral grounds that the Treaty of

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[173] Don Brash, 'Nationhood,' Speech given at Orewa Rotary Club, reprinted in *The New Zealand Herald*, January 24, 2004, http://www.nzherald.co.nz/treaty-of-waitangi/news/article.cfm?c_id=350&objectid=3545950, accessed April 2, 2014.
[174] Elizabeth Rata, 'Tribalism, Democracy Incompatible,' *The New Zealand Herald*, January 29, 2013, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10861949, accessed April 2, 2014.
[175] Muriel Newman, 'Equal Rights an Election Issue,' *New Zealand Centre for Political Research*, March 16, 2014, http://www.nzcpr.com/equal-rights-an-election-issue/, accessed April 2, 2014.
[176] As I mentioned in Chapter One, inclusion of race or ethnicity in definitions of indigeneity is contentious.

Waitangi establishes a special relationship with Māori that requires granting certain privileges. For example, in discussing the evolution of policy creating Māori wards in local government bodies, political scientist Janine Hayward uses Kymlicka's 'community of interest' principle to argue that, "the Crown has a duty to Māori voters as a 'community of interest' in local politics, as well as a duty to increase the number of Māori elected to local government."[177] She also suggests that the partnership principle of the Treaty of Waitangi "established Māori as a community of interest in New Zealand with rights over and above those rights enjoyed by British subjects (or New Zealand citizens in a contemporary context)."[178] This justification not only draws on the Treaty as a legal contract to be upheld, but also on the assumption that Māori have particular rights not available to non-Māori on the basis of their indigeneity.

In addition to moral arguments for race-based policies, there have also been pragmatic arguments for singling out Māori for special treatment. Mason Durie, prominent academic and activist, suggests that, "[A needs-based] approach is inconsistent with the evidence and tends to assume that ethnicity is a function of economic need rather than a determinant of lifestyle, culture and social organisation."[179] Similarly Tahu Kukutai notes that ethnicity accounts for differences in wellbeing, health and education independent of socio-economic class.[180] Given this finding, she posits that a needs-based approach is inadequate to address certain health or educational outcomes that are linked specifically to ethnicity. Her demographic analysis also indicates that there are sub-groups within ethnic identification that correspond to socio-economic status. Those who identified as Māori solely through ancestry tended to be among the least

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[177] Janine Hayward, 'Mandatory Māori wards in local government: Active Crown protection of Māori Treaty rights,' *Political Science*, Vol. 62, No. 2 (2011): 189.
[178] Hayward, 'Mandatory Māori wards in local government,' 197-8.
[179] Mason Durie, 'Race and Ethnicity in Public Policy: Does it Work?' *Social Policy Journal of New Zealand*, Vol. 24 (2005): 9.
[180] Tahu Kukutai, 'Māori Demography in Aotearoa New Zealand: Fifty Years On,' *New Zealand Population Review* Vol. 37 (2011): 50.

disadvantaged, whereas those who identified as Māori through ancestry, tribe, language, and ethnicity tended to be the most disadvantaged.[181] Amongst those who identified as Māori, there was evidence of ethnic and socio-economic segmentation based on the extent to which an individual identified with particular Māori features such as whether an individual knows her ancestry genealogy, if her contacts are mainly Māori, whether she has a financial interest in Māori land, or if she is registered on the Māori electoral roll.[182] In other words, those with more connections to Māoridom were, according to Kukutai, more likely to be disadvantaged across a range of socio-economic indicators than those with fewer connections.

Kukutai's findings draw attention to the ways that historical disadvantage that has manifested in Māori—especially those who identify strongly as Māori—in the form of socio-economic disadvantage in contemporary society. This argument does not rely on the concept of indigeneity conferring special rights, although Kukutai does suggest that her research points to the fact that "Māori want to be explicitly and meaningfully recognised as rights-bearing indigenous peoples, rather than one of many ethnic minority populations with special needs."[183] Her focus on the empirical relationship between identifying as indigenous and experiencing disadvantage suggests that 'race-based' rather than 'needs-based' policies might be best employed to address these inequalities. Exploring more carefully this relationship might result in the formation of more sensitive policies. Mason Durie's research on indigenous health upholds a similar conclusion—that sensitivity to indigeneity as a practical rather than moral matter might yield better health outcomes. Durie argues that being sensitive to specific indigenous health

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[181] Kukutai, 'Māori Demography in Aotearoa New Zealand,' 50-4.
[182] Kukutai is clear that categorical reification is problematic, and argues that the features she identifies—for example, an individual knowing their sub-tribe name, knowing three generations of ancestry genealogy, financial interest in Māori land, contacts mainly Māori etc.—are not tied to any socially meaningful distinction, but are simply a heuristic device to conceptualize Māori identity in a more nuanced way than a simple Māori/Pākehā distinction.
[183] Kukutai, 'Māori Demography in Aotearoa New Zealand,' 57.

protocols (such as handling bodily fluid samples in line with Māori conventions, or categorizing and collecting data with reference to Māori-specific measures) will result in more equitable health outcomes than merely forging ahead with interventions that are identity-blind.[184]

Taken together, these two pieces of research suggest that taking indigeneity into account in designing public policy is important not only or simply because indigeneity might confer special rights, but because being indigenous results in specific needs that cannot be addressed in terms of need alone. Health outcomes in Māori communities, for example, are not necessarily going to improve simply by focusing attention on communities with poor health outcomes—they will be successful only if they also recognize that indigeneity requires special kinds of assessment, diagnosis, and treatment.

Haywood's response, however, does explicitly draw on an ethical argument that Māori have special rights and privileges "above and beyond" those of British subjects (and modern New Zealand citizens), based on the community of interest established through the signing of the Treaty. She strongly supports the legal requirements of the Treaty yielding certain sovereign rights and resources to Māori, but also argues that through the creation of a community of interest, Māori deserve particular rights not available to other New Zealand citizens. This is not a practical argument, but a moral one that identifies indigeneity as providing special status. These two justifications—practical and moral—indicate a need for at least some race-based policies in New Zealand. Such views also indicate that more nuanced definitions of indigeneity might assist in developing focused policies that better reflect these observations.

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[184] Mason Durie, 'Understanding health and illness: research at the interface between science and indigenous knowledge,' *International Journal of Epidemiology*, Vol. 35, No. 5 (2004).

2.2.3 International references and influences

Alongside domestic developments in recent decades, international attention has been directed towards indigenous politics and rights through institutions such as the United Nations. In this section I explore not only the ways in which New Zealand scholars, activists, and leaders have drawn on the global indigenous rights movement in shaping their response to domestic politics, but also how international organizations such as the UN have influenced the language around indigenous politics within New Zealand.

Developments in international human rights discourse were largely shaped by domestic groups seeking representation and acknowledgement within the broader international sphere, and were boosted by links that national indigenous activists made with other national groups. Connections established through civil society groups resulted in the creation of the UN Working Group on Indigenous Populations set up by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1982. The working group invited indigenous peoples from around the world to participate, even though they were not representatives of state governments, thus creating a new venue for collaboration and sharing of experiences among indigenous groups.[185] The subsequent creation of the Permanent Forum on Indigenous Issues in 2000, commitment to a second International Decade of the World's Indigenous People from 2005-2015, and support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 have all brought attention to indigenous affairs, and provided formal and informal fora for conversations between indigenous groups. While these conversations are still largely relegated to indigenous elites, the inclusion of non-state representatives presented

[185] Mason Durie, *Nga Kahui Pou: Launching Māori Futures* (Wellington: Huia Press, 2003): 277.

important opportunities for indigenous voices not formally tied to state politics or interests to speak with each other and to an international audience.

At the same time that indigenous issues were gaining attention in the UN, Māori scholars, politicians and activists were starting to link understandings of what it means to be Māori to international definitions of indigeneity. In 1982, Sir Ranganui Walker—a well-regarded Māori scholar and writer—wrote in a prominent national magazine that "Indigenous people the world over share a common spiritual, philosophical and cultural base in their mythology, tribalism and relationship to the earth-mother."[186] In drawing out the commonalities between indigenous groups across the world, Walker presumably hoped that by indicating the ways in which Māori are connected to a larger group of indigenous peoples, they would be able to draw on successes of indigenous rights movements overseas and be less easily dismissed in a domestic context. In so doing, he was also making a categorical statement about what it means to be indigenous: a shared understanding of the importance of mythology and relationship with the earth, based in tribal relationships. Although he did not provide specific comparisons with other indigenous groups to show these commonalities, embedded within this statement is a sense that there is something global about the kinds of relationships indigenous communities have with each other, with the land, and with their cultural heritage. Within the broader context of the article, he also implicitly indicates that these commonalities make indigenous groups distinct from other groups, and therefore deserving of particular treatment and consideration.

Walker's statement not only coincided with international developments in indigenous politics, but also served as a precursor to significant domestic settlements. Such policies included the aforementioned Treaty of Waitangi (Fishery Claims) Settlement Act 1992, which recognized

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[186] Ranganui Walker, 'Capitalism v. Tribalism,' *New Zealand Listener*, July 24, 1982: 16.

a Māori territorial right to the sea and its produce, and the Resource Management Act 1991, that allowed Māori some authority over traditionally owned land and waterways (though they were not granted ownership over these territories). These agreements draw on some of the key features outlined in Walker's definition, in particular the special relationship that indigenous people (not just Māori) hold with the land. While there were numerous forces contributing to these political developments, the emergence of language connecting Māori claims with an international identity and political movement at a time when domestic claims were starting to gain legitimacy is significant. It points to the influence of international discourse on indigenous rights, not just as a source of pressure on New Zealand's national government to live up to its self-ascribed progressive image in global affairs, but also in facilitating further development of a discourse of rights for domestic indigenous activists.

Beyond similar experiences with the land, links that have been drawn between other indigenous groups and Māori include specific kinds of knowledge that are not represented in the traditional western canon. For example, Linda Tuhiwai Smith, a highly regarded Māori academic and activist wrote in 2004 that, "what Maori people have, as with other indigenous people, is a distinct knowledge tradition which lies outside western views of knowledge."[187] Mason Durie also claims that, "Maori worldviews, like those of many indigenous people, are based on values and experiences that have evolved over centuries."[188] Though Māori knowledge and worldviews may be specific to Māori, there is an assumption that the tenor and content of these views is both significantly different to Western worldviews and sufficiently similar to that of other indigenous peoples across the world that they help to constitute indigeneity more broadly. This alternative

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[187] Linda Tuhiwai Smith, quoted in Elizabeth Rata, 'Kaupapa Maori research,' Unpublished paper, *University of Auckland* (2004): 10 (my emphasis).
[188] Durie, *Nga Kahui Pou*, 13.

approach to knowledge and, more specifically, to research practices is a key feature of Māori claims that are not just local, but international in their vision. For example, Ngā Pae O Te Māramatanga—the primary center for Māori research excellence supported by New Zealand's Tertiary Education Commission—explicitly outlines its focus in terms of benefit not only to Māori, but to local and global communities:

> Our vision is to unleash the creative potential of Māori peoples to bring about positive change and transformation in the world. Our mission is to conduct research relevant to Māori communities – research which leads to transformation and positive change. … The outcomes and benefits of this research are communicated and facilitated *locally, nationally and internationally*.[189]

This commitment to international connections between indigenous groups is relatively new. As Mason Durie notes in 2003, "There has been a greater sense of determination, the adoption of new strategies, and the emergence of a sense of family between indigenous peoples in various parts of the world."[190] Connections between indigenous groups—though they may have their basis in, for example, similar ecological worldviews[191]—have been developed as communication between indigenous groups has been made possible through institutions such as the UN, the opportunities of global communications technologies, and an increasing awareness of the possibilities of coalition politics. Māori groups have actively sought global outreach,

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[189] Ngā Pae O Te Māramatanga, 'Strategic Direction,' http://www.maramatanga.co.nz/about/vision-mission, accessed May 15, 2014 (my emphasis).
[190] Durie, *Nga Kahui Pou*, 271.
[191] Mason Durie, for example, claims this vigorously: "neither colonization nor socio-economic disadvantage is considered to be the most defining element of indigeneity. Instead, *most indigenous peoples believe the fundamental starting point is a strong sense of unity with the environment*" (Durie, 'Understanding health and illness,' 1138, my emphasis) and "*The defining characteristic of indigenous peoples is* therefore not necessarily premised on colonization or sovereignty or a prior claim to settlement, but on *a longstanding relationship with land, forests, waterways, oceans, and the air.* In this sense, indigeneity can be conceptualized as a state of fusion between indigenous peoples and their accustomed environments" (Durie, 'Understanding health and illness,' 1139, my emphasis).

indicated in claims that "the hallmark of Māori in the future" will be "partnerships with the Crown (i.e. the New Zealand Government), with the private sector, between Iwi (i.e. tribes), with overseas commercial interests, *and with indigenous peoples across the globe*."[192]

As explored in Chapter One, there are a number of ways in which international understandings of indigeneity have altered the ways that local indigenous groups perceive and conduct themselves. The statements above make clear some of the international connections that New Zealand scholars, activists and academics have drawn on to assist in supporting and legitimizing domestic policies that returned land or ceremonial authority to Māori groups. The increased use of language specifically connecting understandings of what it means to be Māori to international definitions of indigeneity from the late 1970s coincides with—and perhaps bolstered—more active policy measures aimed at recognizing New Zealand's historical injustices towards Māori.

Beyond the expansion of domestic understandings of Māori indigeneity, international observers have also increasingly reported on indigenous affairs in the country. The United Nations has sent two special missions to New Zealand, one in 2006 and one in 2010, both of which drew attention to the key successes of, and challenges to, domestic indigenous development. The purpose of these missions was to provide an objective assessment of New Zealand's treatment of its indigenous population, with the intention of pressuring the government to pursue just policies towards Māori. As UN Special Rapporteur James Anaya notes, "Governments usually want to appear to the world as being in compliance with their international obligations, in order to avoid public condemnation or more serious consequences for violating those obligations. Motivated *to appear* in compliance with their international

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[192] Mason Durie, 'Pae Mana: Waitangi and the evolving state. The Paerangi Lectures: Maori Horizons 2020 and Beyond,' *Massey University Te Mata O Te Tau Lecture Series*, July 14, 2009: 12 (my emphasis).

obligations when under the scrutiny of international bodies, states are more likely *to actually be* in compliance."[193]

The 2006 report listed in its recommendations that "*Iwi* and *hapu* should be considered as likely units for strengthening the customary self-governance of Maori, in conjunction with local and regional councils and the functional bodies created to manage treaty settlements and other arrangements involving relations between Maori and the Crown."[194] Elsewhere in the report, Special Rapporteur Rodolfo Stavenhagen refers consistently to *iwi*, *hapū*, and *whānau* as units by which settlements should be agreed or inequalities addressed—he does not consider individuals or groupings outside these traditional units.

The 2010 report also upholds these communities as vehicles through which problems should be resolved, in particular with regard to Treaty settlements. However, it also explicitly notes tensions with this approach. For example, it quotes Ruawaipu, Ngāti Uepohatu and Te Aitanga-a-Hauiti tribes as reporting that there was a "serious likelihood that redress for [their] grievances will be given to others, and their claims will be disposed of without being heard or adjudicated when legislation is introduced to implement the settlement" because they were not recognized by the Crown as *iwi* represented in the Treaty.[195] As a result of this and similar examples, Special Rapporteur James Anaya notes that "Māori groups have also reported that the Government's settlement policy redefines existing culturally based traditional hapū and iwi structures and traditional leadership structures, which in some instances had caused conflict or

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[193] S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004): 219 (his emphasis).
[194] Rudolfo Stavenhagen, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples: Mission to New Zealand,' *United Nations Commission on Human Rights*, E/CN.4/2006/78/Add.3, 2006: 20.
[195] James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples: The situation of Māori People in New Zealand,' *United Nations Human Rights Council*, A/HRC/18/XX/Add.Y, 2011: 13.

division among Māori groups."[196] Similarly, he calls for urban Māori to be recognized and attended to, especially in policies related to social or economic disadvantage.[197]

The differences between the 2006 and 2010 reports on the question of tribal definitions are striking, though there has been little or no attention dedicated to them in public or scholarly discussion. The 2006 report essentially upholds the status quo, suggesting that the government should continue to develop policies that benefit the tribal groupings agreed upon in the legal cases of the 1980s and 1990s. The 2010 report, on the other hand, challenges the status quo by questioning whether the groupings relied on by the government are inclusive enough to mete out more comprehensive justice to Māori.

There are a number of plausible reasons for such differences. One is that the 2006 report was less widely publicized within the country and therefore consultation tended to be with politically established groups, especially those already in negotiations with the Office of Treaty Settlements. By 2010, more groups outside the establishment may have been aware of the 2006 report and taken efforts to speak with the special rapporteur (such as Ruawaipu, Ngāti Uepohatu and Te Aitanga-a-Hauiti *iwi*, whose solicitor sent a letter to Anaya reporting their case). It is also possible that the 2006 report focused more on *iwi*, *hapū* and *whānau* because much of the report was focused on a controversial piece of legislation passed in 2004 that received much criticism both domestically and internationally for taking away special rights of Māori to the seabed and foreshore without due process.[198] Given the urgency of this matter, it is possible that the Special

[196] Anaya, 'Report of the Special Rapporteur,' 13.
[197] Anaya, 'Report of the Special Rapporteur,' 24.
[198] The Foreshore and Seabed Act 2004.

Rapporteur's attention was focused more on addressing this case of egregious miscarriage of justice than on subtler concerns about the treatment of non-*iwi* affiliated Māori.[199]

The differences between these two reports indicates not just that international observers may not be altogether consistent in their assessments (there was no difference in the government's reliance on tribal groupings to allocate Treaty settlements between 2006 and 2010, suggesting that these reports—for all their benefits—should be assessed with some healthy skepticism), but also the great complexity of the issues and a need for their continued assessment. The differences between the 2006 and 2010 UN reports clearly demonstrate the effect understandings of indigeneity might have on policy, especially with regard to tribal affiliation as a pre-requisite to representation in Treaty settlements.

2.3 Normative implications of complex and changing definitions of indigeneity

The intention of this chapter has been to contribute to current political theorizing on indigenous rights by closely analyzing the ways that conceptions of indigeneity have influenced discourse about indigenous political advancement in contemporary New Zealand politics. Exploring three areas of indigenous politics—the Treaty settlement process, political representation, and global references and interventions—draws attention to ways that the state has relied on incomplete conceptions of indigeneity, which has not only contributed to failures to address historic injustices, but continued injustices against some Māori. These injustices take at least three forms: 1. failure to include all rightful claimants in the settlements process, 2. failure

[199] The legislation was later repealed and replaced by more acceptable (though still contentious) legislation in the form of the Marine and Coastal Area (Takutai Moana) Act 2011.

to recognize 'special' rights attached to indigenous status, and 3. failure to fully account for the ways indigenous status might affect political representation.

Further work needs to be done tracing the ways that conceptions of indigeneity are used in New Zealand before drawing strong conclusions, but my preliminary research challenges theories that rely on property rights and individual perpetrators and victims as a starting point for considering claims of historical injustice. In particular, it suggests that many liberal political theory approaches to historical rectification are limited in their response to indigenous justice. Below, I discuss these three problems with reference to two prominent liberal accounts of historic injustice proposed by Jeremy Waldron and Chandran Kukathas. I argue that their accounts are compromised because they do not recognize the ways that differences in definitions of indigeneity alter state responses to questions of compensation, rights, and representation. Because their arguments are broadly applicable to *any* oppressed group against whom injustices have been committed (despite their specific acknowledgment of indigenous peoples as subjects of injustice), they ignore the ways that indigeneity itself might require particular kinds of redress, such as those demonstrated by Kukutai and Barcham.

Waldron's work has been influential in the literature on historical injustice and reparations, in particular his 'Supersession Thesis,' which states that present circumstances have a significant effect on claims of injustice, despite not being taken into account by the Nozickean view of justice in rectification.[200] Waldron argues that most defenders of historic rectification rely in some part on Nozick's theory of historical entitlement, therefore Nozick's failure to recognize the ways in which entitlements might fade over time poses a serious problem for

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[200] Waldron, 'Superseding Historic Injustice'; Waldron, 'Indigeneity? First Peoples and Last Occupancy'; 'Jeremy Waldron, 'Settlement, Return, and the Supersession Thesis,' *Theoretical Inquiries in Law*, Vol. 5, No. 2, (2004): 237-68.

theories of historic justice. Exploring the ways that counterfactual history might provide a method of recognizing the passage of time, he concludes that any reliance on constructing a counterfactual history faces significant problems of analysis, not least that individual choices will affect outcomes in unpredictable ways.[201] In order to move beyond this problem, he proposes that circumstances must make a difference to what counts as unjust incursion.[202] Specifically, he argues that "the persistence of that deprivation [of resources] for a long period of time, in the course of which circumstances change drastically, may result in an altogether different situation, S_2, which is no longer unjust—relative to contemporary needs, claims and deserts—and in which no one, including the descendants of P [indigenous people], are deprived of resources to which they are legally or morally entitled."[203]

Kukathas' work has also been prominent in accounts of historical rectification. He emphasizes agency in questions of historical redress, concluding that symbolic compensation may be desirable "[i]n order to repair, not the wrongs done to people in the past, but the fabric of a society that has been torn by serious injustices in its history."[204] He argues, however, that bearing responsibility for past injustice is only appropriate if clear lines of responsibility can be drawn between perpetrators and victims, which proves difficult, if not impossible.[205] His emphasis is therefore on determining whether a clear line between perpetrators and victims exists from generation to generation in order to mete out reparations.

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[201] Waldron, 'Superseding Historic Injustice,' 9-10.
[202] Waldron, 'Settlement, Return, and the Supersession Thesis,' 241-2.
[203] Waldron, 'Settlement, Return, and the Superssession Thesis,' 240.
[204] Chandron Kukathas, 'Who? Whom? Reparations and the Problem of Agency,' *Journal of Social Philosophy*, Vol. 37, No. 3 (2006): 340.
[205] Chandran Kukathas, 'Responsibility for Past Injustice: How to Shift the Burden,' *Political Philosophy and Economics*, Vol. 2, No. 2 (2003): 165.

2.3.1 Who should get compensation for historical injustices?

The first question emerging from my research on conceptions of indigeneity in New Zealand is *who should get compensation for historical injustices?* For example, should only those associated with the *iwi* whose representatives signed the Treaty be included in the settlements process, or should all Māori regardless their tribal affiliation (or those who have no tribal affiliation) also be considered? In New Zealand there seems to be a sense that indigeneity is not simply about drawing a clear line between first or prior occupants and their descendants in order to mete out compensatory justice. Although some conceptions of indigeneity are based on *iwi*, *hapū* and *whānau* who can trace connections to original signatories of the Treaty,[206] there appears to be a growing number of voices that suggest this is too narrow an approach.[207] Given the success of the '*iwi*-ization' movement, it is clear why tribal leaders may have embraced this approach for political reasons: it provided a clear and meaningful group of recipients deserving of historical redress. It is also clear why the government supported this movement: *iwi* represented manageable (and restricted) units through which to administer settlements. As the Treaty process has gained legitimacy and international bodies such as the UN have started paying attention to Treaty settlements and New Zealand's indigenous relations, however, there seems to be increasing interest in discussing broader definitions of Māori that are more inclusive of urban or non-tribally affiliated Māori.

Waldron argues that only those who can show they continue to live in unjust circumstances should receive compensation. His Supersession Thesis, though it identifies indigenous peoples as its subject, does not take into account specific features of indigenous

[206] For example, Tipene O'Regan and Maria Bargh both suggest that the signatories of the Treaty are the rightful Treaty partners in contemporary New Zealand.
[207] For example, Tahu Kukutai and Roger Maaka both consider the ways that urban Māori are an important, underrepresented demographic in the Treaty settlements process.

relationships that might have a bearing on who deserves compensation. It offers no guidance on how to adjudicate between the claims of *iwi* and those of individual Māori in, for example, the Treaty settlements process. Instead, he argues that the crucial question in compensation is whether a current injustice is being perpetuated against an individual or group, rather than whether it occurred in the past. Although he notes that there is often some overlap in current and past injustices, according to his theory those cases where current and past injustices do not coincide is an indication that any entitlement stemming from the past injustice has faded. This is problematic not simply because it leaves unanswered questions about what counts as a present injustice—for example, is the fact that non-indigenous people own more land in New Zealand than indigenous people an unjust situation?—but because it accepts that those who were arguably most affected by colonization (such as urban Māori who have been more fully assimilated into settler culture) are those who are have least entitlement to rectification of past wrongs.

By arguing that entitlements may fade with time, Waldron fails to take seriously the negative effects of colonization on claimants. He suggests that attempting to provide a counterfactual history premised on an absence of colonization is an impossible task, since it is impossible to know how individual actions would affect history. As such, he argues that the focus on addressing current injustices should be accompanied by "an honest and committed resolve to do justice for the future."[208] However, this approach lessens acknowledgement of the ways that history has significantly altered the relationship between the signatories of the Treaty and the groups they represented. Furthermore, it understates the extent to which urban Māori have been subjects of a particular kind of injustice—being removed from their communities as a

[208] Waldron, 'Superseding historic injustice,' 27.

result of colonization. Though Waldron's theory does acknowledge that if Māori are still facing unjust circumstances they have a right to compensation, it doesn't account for the possibility that there are Māori who may appear by contemporary standards to have their "needs, claims and deserts" fulfilled, even though they are deserving of acknowledgement for past injustices that separated them from their communities.

In contrast, Tamihere and Barcham recognize the passage of time in their accounts of indigeneity. They both argue that focusing on Māori groupings at the point of signing the Treaty does a disservice to how Māori have evolved in the intervening years. This evolution should allow for recognition of non-traditional groups, in particular urban Māori. These individuals are most likely to be unable to identify their ancestry, despite having experienced the effects of historical injustices and continuing to face discrimination in contemporary society on the basis of their identification as Māori. Although Waldron's theory may grant these Māori reparations if they can prove they continue to face unjust circumstances, it takes no action on recognizing their lost heritage.

One aspect of Waldron's Supersession Thesis that does appear to cohere with the definitions advanced by some of the indigenous scholars and activists above, is his recognition that land forms a central part of many claims for rectification. Durie provides a representative example of this view, arguing that "The defining characteristic of indigenous peoples is therefore not necessarily premised on colonization or sovereignty or a prior claim to settlement, but on a longstanding relationship with land, forests, waterways, oceans, and the air. In this sense, indigeneity can be conceptualized as a state of fusion between indigenous peoples and their accustomed environments."[209] Waldron might argue that analyzing historical rectification in

[209] Durie, 'Understanding health and illness,' 1139.

terms of property rights is entirely consistent with this definition of indigeneity. However, his notion of property as a resource to be owned and transferred fails to acknowledge the complexity of indigenous relationships with the land. He outright dismisses the Lockean notion that there is an intimate relation between a person and a resource (as a result of the labor that has been applied to it) arguing that it is an 'incoherent' idea. He suggests that this would make the land inalienable: "how could they [property rights] be transferred, through sale or gift, from one person to another—without offense to the personality of the original acquirer?"[210]

This refutation of the inalienability of land contradicts the ways that Treaty claims in New Zealand are often framed as requests for custodianship rather than ownership of the land.[211] Indeed, the harms afflicted by alienation of land are often not couched in terms of loss of resources, but as loss of identity (as in the 1975 Land March) or spiritual harm in the confiscation of burial sites and ancestral ties to the land (as in the Raglan Golf Course dispute). In other words, Waldron's rejection of the idea of land as inalienable runs counter to Māori understandings of their relationships with the land. The Supersession Thesis may be correct that present circumstances alter assessments of historical injustice, but its narrow focus on a particular kind of property acquisition and transfer means that it insufficiently acknowledges how indigenous understandings of the land might affect accounts of what counts as justice and to whom reparations might be owed. Treating land as an interchangeable commodity diminishes the importance of particular territories for particular groups, and it doesn't provide a way of distinguishing between the claims of *iwi* and those of individual Māori.

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[210] Waldron, 'Superseding historic injustice,' 17.
[211] The exercise of customary custodianship is *kaitiakitanga*, see Ruth Panelli and Gail Tipa, 'Placing Well-Being: A Maori Case Study of Cultural and Environmental Specificity,' EcoHealth, Vol. 4 (2007): 455. For more on this relationship, see Merata Kawharu, 'Ancestral Landscapes and World Heritage from a Māori Viewpoint,' *Journal of the Polynesian Society*, Vol. 118, No.4 (2009): 328 and 333; Linda Te Aho, 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua,' *Waikato Law Review*, Vol. 14 (2006): 116.

Kukathas' account differs from Waldron's in that he focuses on the necessity—and the difficulty—of demonstrating a traceable connection between the ancestors of perpetrators and victims in order to determine who owes reparation to whom. The effect of this response is similar to Waldron's in that it unjustifiably makes those who were arguably least negatively affected by the forces of colonization more likely to have stronger claims (since they are more likely to be able to trace their ancestral roots through *iwi*, *hapū* or *whānau*). His theory also shifts the burden of proof to the victims, requiring them to prove their connection to signatories of the Treaty or to tribes, while non-indigenous members of society do not face the same requirement (despite benefiting from past injustices). Though many of the original *iwi*, *hapū* and *whānau* who signed the Treaty of Waitangi still exist, countless individuals who were formerly members of these groups are no longer affiliated because social, political, and/or economic forces introduced by colonization encouraged or required them to leave their ancestral homes and families. Kukathas directs us to question the fairness in allowing these individuals to claim rectification as they are unable to identify their kin groups. However, this only compounds the injustice. Not only did colonization result in unjust acquisition of land and loss of identity and culture for Māori (among other injustices), but future generations are being held accountable for such losses.

Kukathas' focus on identifying perpetrators and victims is replicated in, for example, Tipene O'Regan's comment in the 1998 Waitangi Tribunal report that, "It follows as a matter of simple logic that the return of wrongfully alienated fisheries assets should be to the original owners" and that "the closest contemporary expression of that ownership" is *iwi*.[212] In fact, the Treaty settlements process in general seems to follow Kukathas' logic—that the descendants of signatories to the Treaty are those deserving of redress. However, O'Regan (and the Treaty

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[212] Tipene O'Regan, quoted in 'Te Whanau o Waipareira Report,' *Waitangi Tribunal*, Wellington, 1998.

settlements process more broadly) does little to prove the connection between past victims and their contemporary descendants, which Kukathas requires for compensation. Furthermore, as Walker notes, the very basis of 'traditional' groupings is questionable—the idea of distinct and clearly identifiable *iwi, hapū,* and *whānau* existing prior to signing the Treaty is dubious—meaning that tracing ancestry back to these groups may itself be misguided. Finally, it is questionable whether signing the Treaty—an imported construction (or imposition)—should be a prerequisite for historical redress, since Māori who did not sign the Treaty were also victims of colonization.

Despite descent from the signatories of the Treaty being an assumed condition for reparations in New Zealand, proof of descent has not formed a significant part of the Treaty settlement process. However, for Māori to receive reparations under Kukathas' theory, they would have to move towards a system more like that in Australia, where proof of descent forms a crucial part of land claims.[213] I return to this issue in more detail in Chapter Three, but the requirement for claimants to prove their connection to ancestors is unfairly burdensome (especially given the double standard existing in Australia, where non-indigenous individuals are not required to provide evidence of their ancestry to support their property rights). Attempting to focus on tracing direct ancestral connections with victims (or with perpetrators) obscures these important questions of rectification, including the extent to which agency understood in terms of lineal descent is really the crucial issue.

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[213] For example, the Aboriginal Land Rights (Northern Territory) Act 1976 requires evidence of lineal descent (not spiritual—or socially recognized—descent), in addition to a number of other requirements (such as unbroken connection with the land and evidence of continued cultural practices), to rule in favor of Aboriginal claimants.

2.3.2 Should indigenous status grant 'special' rights?

The second question raised in considering the evolution of conceptions of indigeneity in New Zealand is *should indigenous status grant particular rights not available to the general population?* For example, should distributive policies 1. be directed generally at those with the most need in society, 2. specifically target indigenous individuals to address inequalities of income, health and education, or 3. take into consideration issues arising from indigenous status itself? In New Zealand, politicians and academics have argued against special treatment for indigenous groups on the basis that it undermines democratic ideals of equality, while arguments in support of special rights have been grounded in both pragmatic concerns—that Māori experience disadvantage specifically on the basis of their indigeneity (not simply as one of many minority groups)—and moral ones—that the signing of the Treaty of Waitangi established the basis for Māori to have special rights as a community of interest. In other words, justifications range from support for 1. need-based approaches that pay no attention to indigeneity, 2. need-based approaches that recognize indigeneity as a crucial causal or intervening variable, and 3. approaches that focus only on indigeneity, not on need. Though the government has acted to grant some special rights, the reasoning for such policies appears to be somewhat *ad hoc* and more consideration is necessary to distinguish between these rights: are different rationales operating to grant special entitlements to Māori on the basis on income, health and education, or indigenous status?

Waldron does not identify how indigenous peoples entitlements might differ from non-indigenous rights. Instead he focuses primarily on the ways that the passage of time might have altered the requirements of justice: if "contemporary needs, claims and deserts" are fulfilled and

no one is "deprived of resources to which they are legally or morally entitled"[214] then the matter of compensation is settled. Questions of who signed the Treaty or what constitutes an entitled recipient on the basis of their tribal affiliation or ethnicity are unimportant to his theory.

Crucially, this means that his account does not consider the ways in which Māori continue to be affected by historical injustices on the basis of their identity, not just on the basis of lost resources. Moreover, despite his focus on property rights, he ignores significant aspects of Māori relationships with the land, specifically the ways that the land contributes to identity or spiritual well-being. Although I agree with him that contemporary circumstances may alter judgments on appropriate approaches to rectification of past injustices against indigenous populations, his focus on the transfer of property as a means to understand, analyze, and address historic injustices does not take into account how concepts of indigeneity are used in New Zealand. This means that his theory focuses on resource distribution rather than in the relationships groups and individuals develop towards each other.

In particular, his theory is not attentive to the fact that conceptions of indigeneity are employed not just as a response to material resource appropriation and reallocation, but as a means of expressing and legitimizing particular identities.[215] This can be seen especially clearly in Kukutai's work on Māori identity, which examines the links between socio-economic outcomes and Māori identity.[216] Exploring these dimensions of indigeneity might lead to much more extensive redress than that for which Waldron advocates, because it acknowledges the

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[214] Waldron, 'Settlement, Return, and the Supersession Thesis,' 240.
[215] A range of theorists acknowledge this dimension, for example: Charles Taylor, 'The Politics of Recognition,' in Amy Gutman (ed.), *Multiculturalism and the Politics of Recognition: An Essay by Charles Taylor* (Princeton: Princeton University Press, 1992): 25-74; Duncan Ivison, 'Historical Injustice,' in Jon Dryzek, Bonnie Honig and Anne Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2006): 507-528; Iris Marion Young, 'Equality of Whom? Social Groups and Judgments of Injustice,' *Journal of Political Philosophy*, Vol. 9, No. 1 (2001): 1-18.
[216] Kukutai, 'Māori demography in Aotearoa New Zealand.'

specific influences indigeneity might have on what counts as a just outcome. His focus on poverty, for example, as one possible contemporary expression of past injustice, assumes some sort of objective standard of poverty that may not accurately characterize certain indigenous customs or lifestyles or the appropriate responses to them.[217] Similarly, by focusing primarily on contemporary property rights and resources, the Supersession Thesis ignores the ways that indigenous identity informs questions of political representation or affects quality of life through, for example, health care and outcomes.

Kukathas also glosses over rights that indigenous status might entail, stating that compensation is only necessary to mend "the fabric of a society that has been torn by serious injustices in its history." In other words, his focus is not on responding to historical wrongs *per se*, but on repairing contemporary relationships in society, which means that indigeneity and the special status it might grant is of little consequence. This is problematic, because it fails to take into account the ways that indigenous identity affects individual's responses to land or society, such as those outlined above.

2.3.3 What is the best configuration of political representation for Māori?

The third question raised by understandings of indigeneity in New Zealand is *what is the best configuration of political representation for Māori that is consistent with justice overall?* For example, should there be special representation set aside for Māori—such as Māori electorates—and should all Māori have the opportunity to be represented in New Zealand politics regardless their physical location (for instance, an electorate for Māori in Australia)? In scholarship and public discourse there have been clearly articulated concerns about the

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[217] Waldron, 'Superseding historic injustice,' 27.

definitions that are used to decide who has the right to represent particular groups, and whether Māori deserve reserved seats in national or local government in order to fulfil the obligations society has to them as indigenous peoples or as Treaty partners. These concerns have not only focused on the ethical dimensions of such definitions, such as whether Māori constitute a community of interest, but also their clear social and political implications, such as the outcomes of policies based on need or those based on indigenous communities specifically. Neither Waldron nor Kukathas ask what configuration of political representation is the most appropriate for indigenous people, therefore their theories are unable to offer guidance on how to address this issue.

Issues of representation are at the heart of indigenous politics, so this deficiency seriously compromises their theories. As I detail in Chapter Four, the question of who speaks for whom is a central concern of Māori (and other indigenous) scholars. It is a critical question that informs not just who gets reparations and what they should look like, but who gets to determine the answers to these questions. It also affects conversations about one key question in indigenous politics—sources of sovereignty. Though questions about Māori sovereignty have surfaced from time to time in New Zealand's political discourse, the idea of 'nations within a nation' has never been seriously considered by the government. This stands in stark contrast to the approach towards indigenous communities by other settler nations such as the United States, where the government has granted certain tribes status as sovereign nations.

It is also an important question to consider given the wide range of opinions on indigeneity and the status it grants. These differences do not neatly attach to Māori and Pākehā identities, but differ within Māori and non-Māori groups and within groups of similar social and economic status. As a result, it is important to consider the ways that conceptions of indigeneity

are used and crafted by individuals and how this affects responses to current and past injustices, whether through the allocation of reserved seats for Māori or the possibility of sovereign Māori nations within New Zealand.

2.4 Conclusion

Alternative understandings of indigeneity, such as those promoted by Barcham or Kukutai, may enable more comprehensive responses to historical grievances. In particular, they may allow for acknowledgment of Māori who are no longer affiliated with the *iwi*, *hapū*, or *whānau* in the Treaty Settlements process, and they may acknowledge that indigenous status requires targeted economic or social policies on the basis of either moral or pragmatic grounds.[218] At present, there are myriad concepts of indigeneity being used in contemporary New Zealand to advance or deny access to apologies and reparations. Just as there is no universal view among non-Māori about what it means to be indigenous in New Zealand or the relative rights or policies that should accompany these understandings, there is also no consensus amongst Māori about their identity and the rights it might grant. There is also not clear agreement between individuals of the same position or status within society, as indicated by the range of views held among politicians, academics, activists, journalists, and citizens.

Accommodations are being sought through the formal Treaty settlements and through public policy that fluctuates between needs-based and race-based justifications. These political decisions are rooted in varied and—in some cases—incompatible definitions not only of what it means to be indigenous in New Zealand, but what indigeneity might grant more generally in

[218] In Chapter Four I suggest a process through which to approach defining indigeneity. However, this process cannot predetermine the content of definitions of indigeneity in any particular context, therefore it is impossible to state unequivocally what indigeneity should look like in New Zealand, or the specific rights and responsibilities that might flow from it.

terms of rights or privileges. Greater deliberation on this interaction between concepts of indigeneity and claims for justice is necessary for more just outcomes in New Zealand, especially for those Māori who are not currently recognized in Treaty settlements, political representation, or public policy.

Given the largely settled nature of the political response to indigenous claims in New Zealand in the form of the Treaty settlements process, I argue that there is even more urgency to critically assess the terms being used to define recipients of governmental compensation. The focus on *iwi*, *hapū*, and *whānau* as Treaty partners may in large part come from a genuine desire by both Māori and Pākehā to appropriately respond to historical and present-day injustices against Māori, but it overlooks clear evidence that indicates there may be other individuals or groups who also have fair claims to apologies or reparations. My preliminary research suggests that definitions of indigeneity in New Zealand should be amended to take into consideration individual Māori not affiliated with tribes. Though it is possible that New Zealanders agree that only tribally-affiliated Māori should be considered indigenous or receive reparations, this conclusion should be made on the basis of sincere and critical dialogue rather than unreflective acceptance of the status quo.

In Chapter Three, I consider the ways in which definitions of indigeneity have been used to justify who receives reparations or acknowledgement of historic injustices in Australia. There are important similarities between New Zealand and Australia, such as their shared white settler history and the minority status of their indigenous populations, that make this comparison useful for exploring some of the nuances of concepts of indigeneity and their uses in national discourse. There are also some key differences between the two states, such as the rhetoric of biculturalism in New Zealand contrasted with Australia's language of multiculturalism, that indicate ways that

these discourses around indigeneity might be used to generate different responses to past and present injustices.

Chapter 3: Policing the Boundaries of Indigeneity in Australian Land Claims

> To the Australian courts… the Yorta Yorta peoples were not sufficiently Aboriginal to get one square meter of what was left over after the whites had taken all that they wanted."[219]

In 2002 the High Court of Australia ruled that members of the Yorta Yorta community were not entitled to native title over land and waters in northern Victoria and southern New South Wales.[220] The decision hinged on whether the Yorta Yorta had maintained continuous interests in the territory and had continued to observe traditional laws and customs on that land. In order to meet the demands outlined in the Native Title Act (1993), the Yorta Yorta people were essentially asked to prove that they had maintained their indigenous status. The High Court's 5-2 decision against conferring native title on the claimants reflected their opinion that "the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe these laws and customs."[221] This ruling was widely read as a determination that that judges did not consider the Yorta Yorta claimants to be indigenous enough to possess native title in the territory.[222] It also meant that the Yorta Yorta had no legally recognized rights to territory

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[219] Noel Pearson, 'The High Court's Abandonment of 'The Time Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta,' *Sir Ninian Stephen Annual Lecture at University of Newcastle Faculty of Law*, March 17, 2003: 2.

[220] High Court of Australia, 'Members of the Yorta Yorta Aboriginal Community v. Victoria.' [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356, available from http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/58.html, accessed July 10, 2014.

[221] Aileen Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision,' *borderlands ejournal*, Vol. 3, No. 2 (2004): para 2.

[222] For example, see Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty'; Pearson, 'The High Court's Abandonment of 'The Time Honours Methodology of Common Law'; Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002); Ben Silverstein, 'The Rule of Native Title: A View of *Mabo* in the British Empire,' *Griffith Law Review*, Vol. 16, No.1 (2007): 55-82; Bruce Buchan, 'Withstanding the Tide of History: The *Yorta Yorta* Case and Indigenous Sovereignty,' *borderlands ejournal*, Vol. 1, No. 2 (2002); David Ritter, 'The Judgement of the World: The Yorta Yorta Case and the 'Tide of History,' *Australian Historical Studies*. Vol. 35, No. 123 (2004): 106-121.

in the area and no further avenue for redress within the legal system, since the High Court ruling could not be appealed.

The centrality of definitions of indigeneity in this court case highlight the high stakes in such definitions. As I demonstrated in Chapter Two, institutional definitions of Māori in New Zealand have been used to justify marginalizing some Māori in historical reparations and apologies. In this chapter, I turn to another context—Australia—to examine how different understandings of indigeneity have been used to justify who receives reparations or acknowledgement of historic injustices. In Section 1 I explain why Australia is a useful and important case to consider, both in comparison with New Zealand and with respect to its practices of defining Aboriginal Australians. I also provide an outline of some key legislative and judicial responses to indigenous Australians since the 1970s. In Section 2 I identify and analyze five problems generated by these responses: *the problem of evidence*, *the problem of articulation*, *the problem of authenticity*, *the problem of character*, and *the problem of legitimacy*. These problems indicate the extent to which injustices against indigenous Australians are perpetuated through a discourse based on poorly constructed legal definitions. In Section 3 I explore two postcolonial theories of narrative formation—Ashis Nandy's 'ahistorical' reading of the past and Homi K. Bhabha's counter-narratives—as alternative approaches to constructing the presiding narrative in Australia. I suggest that critically questioning state narratives in Australian legal and judicial decision-making might result in more just outcomes for Aboriginal Australians.

3.1 Indigenous politics in Australia

As an English settler colony, Australia shares a number of features with New Zealand. One of the most important is that the indigenous population is a minority in the nation. This

differs from other forms of colonial rule in which indigenous inhabitants outnumbered the settlers, resulting in very different strategies of dissent. As a minority population, Aboriginal Australians have been unable to employ strategies that require a majority or large numbers of people to be effective, such as electing representatives to pass favorable legislation or non-resistance protest movements. As A. Dirk Moses notes, because of their minority status "one of the few strategies available to Aboriginal intellectuals [in Australia] is making moral claims to survival and, perhaps, some autonomy."[223] This has meant that indigenous groups and individuals seeking justice in the white settler colonies such as Australia and New Zealand have tended to gravitate towards legal and moral instruments in order to make demands of the state. While there is value to making comparisons across diverse cases, in this dissertation I focus on Australia and New Zealand because I want to offer a more fine-grained analysis that considers ways in which similarly settled societies might correspond or differ in their approaches to defining indigeneity.

Despite sharing an English settler history, there are important differences between the countries worth acknowledging, though an extensive analysis is not possible (or necessary) in the context of this chapter. One of the most important is that Australia is a federal system, meaning approaches to indigenous inhabitants often differ from state to state. Aboriginal Australians also constitute a significantly smaller percentage of the population (2.5%) than Māori in New Zealand (14.9%).[224] These differences are partially a result of different treatment and policies enacted

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[223] A. Dirk Moses, 'Time, indigeneity, and peoplehood: the postcolony in Australia,' *Postcolonial Studies*, Vol. 13, No.1 (2010): 15.

[224] The most recent Australian census (2011) shows 548,368 people identified as Aboriginal or Torres Strait Islander out of a total population of 21,507,717 (Australian Bureau of Statistics, '2011 Census Statistics,' www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat, accessed October 24, 2014). The most recent New Zealand census (2013) shows 598,602 people identified as Māori out of a total population of 4,242,048 (Statistics New Zealand, '2013 Census ethnic group profiles: Māori,' www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/ethnic-profiles.aspx, accessed October 24, 2014).

against Aboriginal Australians and Māori by their respective colonizers, and partially as a result of greater number of settlers moving to Australia than to New Zealand.[225]

Finally, references to indigenous inhabitants in Australia are largely made in the context of a broader rhetoric of multiculturalism, whereas in New Zealand the language of biculturalism is dominant. This results in significant differences in the two nations' approaches to their indigenous inhabitants. The language of multiculturalism may be detrimental to Aboriginal Australians because it strengthens the rhetoric of equal rights in response to requests for 'special rights' for indigenous groups. In New Zealand, this discourse of equal rights was employed by the leader of the opposition in 2004 when he called for 'one rule for all' and suggested that special privileges for Māori were undermining the country's commitment to democracy; however, this speech was widely condemned in national media.[226] In Australia, although some politicians have attempted to use Australia's identification as multicultural to advance policy favorable to Aboriginal Australians, the language of multiculturalism tends to elevate equal rights over particular rights. For example, when former Prime Minister Paul Keating argued: "Isn't it reasonable to say that if we can build a prosperous and remarkably harmonious multicultural society in Australia, surely we can find just solutions to the problems which beset the first Australians—the people to whom the most injustice has been done"[227] this rhetoric set Aboriginal Australians alongside other minority groups in Australia, ignoring the possibility of

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[225] For more on the reasons for differences in settler policies towards Aboriginal Australians compared with Māori, see Karen Fox, 'Globalising Indigeneity?,' *History Compass*, Vol. 10, No. 6 (2012): 427-428 and David Mercer, 'Aboriginal self-determination and indigenous land title in post-*Mabo* Australia,' *Political Geography*, Vol. 16, No. 3 (1997): 190.

[226] For example, see Jon Johansson, 'Orewa and the Rhetoric of Illusion,' *Political Science*, Vol. 56, No. 2 (2004): 111-129.

[227] Paul Keating, 'Redfern Speech (Year for the World's Indigenous People),' delivered in Redfern Park, December 10, 1992, available from https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf, accessed July 10, 2014.

distinctive status. In contrast, the bicultural discourse in New Zealand sets Māori apart as a group entitled to special recognition and treatment.

This chapter focuses on judicial and legislative acts related to Aboriginal land claims in Australia. I focus on these acts in part because settlements over land and resources are often some of the most contentious disputes in English settler colonies like Australia and New Zealand. Although there are disputes over cultural knowledge and practices, it is the transfer of property or other economic resources that are often sources of greatest contention in these nations. Part of the reason is that as liberal states they are committed to some level of toleration of difference, which means that acknowledging (certain) cultural rights often aligns with their ideological commitments.[228] As liberal nations based on Lockean notions of property, however, expectations about the distribution of land and economic resources often conflict with indigenous notions of and relationships with the land. My focus on land rights in this chapter does not mean that property is the only method of meting out justice[229], but instead intends to use these conflicts between Western and indigenous notions of property to illuminate the ways that definitions of indigeneity are being employed and the high stakes of this discourse. In particular, I argue that these definitions show current accounts of historic injustice are inadequate, as they focus too narrowly on property as a commodity and lack appreciation of indigenous relationships with land, which in turn affects both who should be considered indigenous and what kinds of reparations they might be owed.

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[228] This is not to say that cultural clashes have not resulted in serious disputes within Australia or the other white settler nations. For an example of an intractable clash of Western and indigenous values, see Povinelli, *The Cunning of Recognition,* 167-169. As I note in Section 3, toleration itself has its limits and may be a source of oppression.

[229] See my critique of Jeremy Waldron in Chapter Two in which I argue that his reliance on Western conceptions of property rights to address historical injustices against indigenous peoples is problematic.

Because Australia has a federal system, legislation affecting indigenous Australians often differs from state to state. For example, Australia's 1901 Constitution allowed states to pass legislation excluding Aboriginal Australians from voting, which most states did until 1962 when Aboriginal Australians were granted the right to vote in federal, Northern Territory and Southern Australia elections. It was not until 1965 that they were granted the vote in Queensland.[230] In this chapter I consider the ways definitions of indigeneity in two landmark pieces of legislation—one state-based (the Aboriginal Land Rights (Northern Territory) Act 1976) and the other national (the Native Title Act 1993)—were used to justify rulings on land claims of Aboriginal Australians.

I also examine two prominent court decisions: *Eddie Mabo v. The State of Queensland* (1992) and *Members of the Yorta Yorta Aboriginal Community v. The State of Victoria* (2002) to show how the legislative discourse around indigeneity was used in court rulings. The *Mabo* ruling is widely regarded as having overturned the doctrine of *terra nullius* (land belonging to no one) that colonists used to justify their settlement of Australia. The *Yorta Yorta* decision is controversial because it ruled that the Yorta Yorta community's loss of 'traditional' culture invalidated their claim to native title. Though the language used in these pieces of legislation and court cases do not represent all conceptions of indigeneity operating in Australia's legal and political discourse, they are wide-ranging in their influence and archetypal of some of the key ways indigeneity has been defined in Australia.

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[230] Pat Stretton, 'Indigenous Australians and the vote,' *Australian Electoral Commission*, http://www.aec.gov.au/indigenous/indigenous-vote.htm, last updated January 14, 2013, accessed June 26, 2014.

3.1.1 The Aboriginal Land Rights (Northern Territory) Act 1976

The Aboriginal Land Rights (Northern Territory) Act 1976 (LRA) was the first piece of legislation that provided the basis for Aboriginal Australians to claim rights to 'Traditional Aboriginal Land.' The legislation describes the peoples eligible for such consideration in this way:

> ***Aboriginal*** means a person who is a member of the Aboriginal race of Australia.[231]
>
> ***Aboriginal tradition*** means the body of traditions, observance, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.[232]
>
> ***Traditional Aboriginal owners***, in relation to land, means a local descent group of Aboriginals who:
>
> have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> are entitled by Aboriginal tradition to forage as of right over that land.[233]

The LRA definition focuses on 'local descent group,' which requires evidence of lineal descent. Proof of lineal descent is based on what Elizabeth Povinelli called "an academically mediated model of indigenous social organization" developed—and presented to the courts—by anthropologists.[234] The model focuses on blood lines, and maintains that Aboriginal Australians can only belong to one territory and one descent group.[235] As such, it fails to recognize spiritual

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[231] Aboriginal Land Rights (Northern Territory) Act 1976, No. 191, 1976 as amended, Canberra: Office of Parliamentary Counsel, 1 (italics and bold in original), available from http://www.comlaw.gov.au/Details/C2013C00556, accessed July 10, 2014.
[232] Aboriginal Land Rights (Northern Territory) Act 1976, 1 (italics and bold in original).
[233] Aboriginal Land Rights (Northern Territory) Act 1976, 7-8 (italics and bold in original).
[234] Povinelli, *The Cunning of Recognition*, 209.
[235] Povinelli, *The Cunning of Recognition*, 208.

or socially recognized descent that may be based, for example, on shared experiences of ritual and death or relationships with the land.

In the 1981 Finniss River report the first land commissioner John Toohey argued that, rather than relying on the anthropological model of group identification, group membership should be based "on a principle of descent deemed relevant by the claimants."[236] As a result, in one case—the 1985 Nicholson River (Waanyi/Garawa) Land claim—a limited form of spiritual descent was recognized based on ritual responsibility and descent "from the same mythic ancestors as the other members of these groups."[237] It was used for just two individuals, however, and Povinelli argues that it merely "supplemented human descent as the primary mechanism of group construction—it did not determine it."[238]

Spiritual descent continued to be applied inconsistently in the ruling of cases, with the land commissioner refusing to acknowledge it as the central basis of group membership in the 1987 Ti Tree report. Even though there has been some movement towards a broader understanding of what consitututes Aboriginal identity in land claims, the assumption of lineal descent underpins this development. In other words, identification on the basis of, for example, spiritual ties to the land or to other group members, still serves as a supplementary attachment rather than forming the basis of identity claims. Inconsistent rulings on who meets the criterion of 'local descent group' contributes to the problems raised by this definition. Furthermore, even acknowledging a slightly more expansive understanding of Aboriginal identity in later claims, early land claims have not been re-litigated and were decided on the basis of the highly

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[236] Quoted in Povinelli, *The Cunning of Recognition*, 210.
[237] Povinelli, *The Cunning of Recognition*, 209. See also Report by the Aboriginal Land Commissioner, Justice Kearney to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory, 'Nicholson River (Waanyi/Garawa) Land Claim,' Canberra: Australian Government Publishing Services (1985): 13.
[238] Povinelli, *The Cunning of Recognition*, 209.

restrictive lineal descent model. The result is that—as with, for example, the fishery settlements in New Zealand in the 1990s—there may be individuals with just claims to land who were excluded as claimants in original submissions and have yet to find justice.

In addition to the requirement to prove attachment to a group through descent, Aboriginal individuals or groups also have to meet other requirements in order to lodge a claim based on the Land Rights Act. As detailed in the legislation's definition above, they must prove "common spiritual affiliations to a site on the land... that place the group under a primary spiritual responsibility for that site and for the land."[239] Placing the burden of proof on the claimants by requiring them to demonstrate their spiritual links to the land generates further problems, which I discuss in more detail in Section 2.

3.1.2 Eddie Mabo v. The State of Queensland

In 1992 the principles of the Land Rights Act were tested in a court case in Queensland—*Eddie Mabo v. The State of Queensland*—where Eddie Mabo sought native title to land in the Murray Islands for the Meriam people.[240] The landmark judgment passed down by the court is widely viewed as overturning the doctrine of *terra nullius* at the point of Australia's settlement.[241] It confirmed that native title survived the extension of British sovereignty, but only in situations where Aboriginal and Torres Strait Islander peoples had maintained an uninterrupted connection with the land throughout the period of European settlement. Additionally, title existed only where it had not been extinguished by "valid legislation" created

[239] Aboriginal Land Rights (Northern Territory) Act 1976, 8.
[240] High Court of Australia, 'Mabo and others v. Queensland (No. 2) ("Mabo case"),' [1992] HCA 23; 175 CLR 1; F.C. 92/014, available from http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html, accessed July 10, 2014.
[241] For a rejection of this characterization of Mabo, see David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis,' *Sydney Law Review*, Vol. 18, No. 5 (1996): 5-33.

by the Commonwealth, territory, state or other governments, and where rights to native title could be demonstrated by reference to traditional customs and laws of the people concerned.[242]

The *Mabo* decision has generated a diverse range of interpretations from criticism of its effects on the unity of the Australian nation to arguments that it promotes unity through reconciliation between indigenous and non-indigenous Australians.[243] Regardless the actual effects of the judgment, *Mabo* was widely perceived as a radical transformation of the moral basis of the Australian nation through offering formal recognition of Aboriginal peoples as the first inhabitants of the land. In a speech celebrating the Year for the Indigenous Peoples in 1992, Prime Minister Paul Keating stated that, "We need these practical building blocks of change. The Mabo Judgement should be seen as one of these. By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, Mabo establishes a fundamental truth and lays the basis for judgement for all."[244] The *Mabo* decision was so influential that the following year Keating's government passed the Native Title Act in order to enshrine the key principles of the *Mabo* decision in law for the entire nation.

3.1.3 The Native Title Act 1993

The Native Title Act 1993[245] is similar to the Land Rights Act but differs in at least three important respects. First, it is national legislation that applies across all six states, whereas the Land Rights Act applies only within the Northern Territory. Second, the Native Title Act

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[242] High Court of Australia, 'Mabo and others v. Queensland (No. 2) ("Mabo case")'.
[243] For more detail on these differing interpretations see Silverstein, 'The Rule of Native Title,' 55-56; Elizabeth Povinelli, 'Reading Ruptures, Rupturing Readings: Mabo and the Cultural Politics of Activism.' *Social Analysis*. Vol. 41, No. 2 (1997): 20; Paul Patton, 'Mabo and Australian Society: Towards a Postmodern Republic, *The Australian Jounral of Anthropology,* Vol. 6, No. 3 (1995): 83-84; Mercer, 'Aboriginal self-determination and indigenous land title in post-*Mabo* Australia,' 200.
[244] Keating, 'Redfern Speech (Year for the World's Indigenous People).'
[245] Native Title Act 1993, No. 110, 1993 as amended, Canberra: Office of Parliamentary Counsel, available from http://www.comlaw.gov.au/Details/C2014C00631, accessed July 10, 2014.

included interests at sea in addition to land, in recognition of different conceptions of territory for Aboriginal Australians.[246] Third, the way in which judgments are heard and settlements reached differs. Judgments for the Land Rights Act are prepared by the Aboriginal Land Commissioner and settlements determined in conjunction with one of the four Aboriginal Land Councils in the Northern Territory. In contrast, claims lodged under the Native Title Act first go to mediation before the Native Title Tribunal and if mediation fails the matter is settled by litigation in the Federal Court.[247] Cases that go to litigation have different rules for evidence than normal trials, such as more liberal approaches to hearsay, although Peter Gray—a former Federal Court judge—suggests that these rules of evidence are problematic because they "are potentially more restrictive of any attempt to create new exceptions."[248]

One of the most controversial sections of The Native Title Act is 223(1), which defines 'native title' and 'native title rights and interests' as:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> the rights and interests are recognised by the common law of Australia.[249]

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[246] Mercer, 'Aboriginal self-determination and indigenous land title in post-*Mabo* Australia,' 205-206.
[247] Paul Patton, 'Sovereignty, Law and Difference in Australia After the Mabo Case.' *Alternatives*. Vol. 21, No. 2 (1996): 152; David Ritter, 'The Judgement of the World: The Yorta Yorta Case and 'The Tide of History',' 106-107.
[248] Instead, he suggests that the courts should recognize oral traditions as their own category of evidence rather than simply amending the application of hearsay rules to include them (Peter R.A. Gray, 'Do the Walls Have Ears? Indigenous Title and Courts in Australia,' *International Journal of Legal Information,* Vol. 28, No. 2 (2000): 201).
[249] Native Title Act 1993, No. 110, 1993.

This language requires Aboriginal claimants to show that they observe traditional customs and laws, and that they have a connection with the land or waters where they are seeking native title. These features became a source of contention in a prominent court case, *Members of the Yorta Yorta Aboriginal Community v. the State of Victoria*[250] that reached the High Court in 2002. The claimants consisted primarily of urban Aborigines and was prepared by a consultant anthropologist who noted that in the nearly 155 years since Europeans first came to the area there had been "massive alterations in technical, environmental and economic circumstance."[251] The claimants acknowledged from the outset that there had been many changes in their community as a result of European settlement (and policies of absorption, segregation and integration) but that they still held native interest and title in the land. As I show in Section 2, this resulted in a number of issues with respect to the kinds of evidence that were privileged in determining the claimants' connection with the land and the very legitimacy of the legislation in its assumption that those who are least affected by colonization have the strongest claims to native title.

Despite the importance of the Land Rights Act, *Mabo* and the Native Title Act in recognizing native title, they all rely on definitions of Aboriginality that were used in court to deny justice for some claimants, either because the claimants were not deemed to be Aboriginal enough to be granted native title, or the range of claims was limited by their ability to 'prove' their connection with the lands they sought custodianship over. In the next section I outline five ways in which Australian law places unjustified burden of proof on Aboriginal claimants and fails to acknowledge or address the ways that indigenous status might be undermined in a legal system based on Anglo-European legal values.

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[250] High Court of Australia, 'Members of the Yorta Yorta Aboriginal Community v. the State of Victoria.'
[251] High Court of Australia, 'Members of the Yorta Yorta Aboriginal Community v. the State of Victoria.'

3.2 Key problems with definitions of indigeneity in Australian law

3.2.1 The problem of evidence

The *problem of evidence* is that indigenous groups and individuals may be unable to frame their links to the land and each other in terms that the legal system recognizes. The evidence presented by Aboriginal individuals may not meet standards of proof required by the Australian legal system, as demonstrated in an exchange outlined by Povinelli in a case brought by the Belyuen under the Land Rights Act. An Aboriginal woman—Christine Fejo King—attempts to explain to the Belyuen's lawyer (Tony Young) where some sacred sites are and how they should be treated:

> **Christine King:** I was told but I can't tell you on a map. I don't know the names. But I was told that if I went there, I would feel that it was wrong.
>
> **Mr. Young:** I see. So, do you believe that if you went to one of these dangerous places, you might be in danger, or other people might be in danger?
>
> **Christine King:** You don't—you go there, and the back of your hair, neck on the back of your hair stands up. It's—, you know.[252]

On cross-examination King's daughter, Jessica, explained her relationship with the sea eagle:

> I have a special relationship with a creature in this country. It is a bird. And it is my guardian and I follow it because it'll take me to safe places. And wherever I go it will guard me… And I also found that I can talk to the bird like I'm talking to you now. And I can understand what he says to me back. And if I concentrate I can hear everything he says in detail.[253]

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[252] Quoted in Povinelli, *The Cunning of Recognition*, 250.
[253] Quoted in Povinelli, *The Cunning of Recognition*, 252.

In appealing to presentiment and feeling rather than to 'empirical' facts, both Jessica's and Christine's testimony challenged the usual forms of evidence accepted by Australia's courts. Responses to Jessica's testimony included the government's lawyer mimicking her, requesting more information about her abilities and highlighting their implausiblity. Some audience members openly commented as Jessica spoke that her testimony sounded like "New Ageism" and "crystal culture."[254] Likewise, Christine's testimony generated ridicule from some members of the audience including snorts of laughter.[255]

These kinds of responses have at least two effects. The first is that they diminish the sense of Aboriginal claimants that they are being taken seriously and potentially affects their willingness to participate in such processes. The second is that these responses may also affect judgments. In the King case, it is unclear whether the final settlement was affected by the dismissive responses to the two women's testimony; however, there is clear evidence in similar trials that such evidence was taken less seriously than other forms of evidence provided by witnesses. For example, in the Yorta Yorta case Justice Callinan acknowledges the limitations of the Yorta Yorta members' testimony:

> The appellants suffered two particular disadvantages to which regard had to be made: loss of traditional knowledge and practice because of dislocation and past exploitation; and, by reason of the lack of a written language and the absence therefore of any indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows is at risk of being influenced and distorted in transmission through the generations, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest. Anthropologists' reports, which also relied to a

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[254] Povinelli, *The Cunning of Recognition*, 252.

[255] This dissertation has not addressed how intersectionality might affect indigenous claims, though indigeneity is certainly not the only factor affecting indigenous individuals experiences and claims. In this situation, for example, it is hard to know the extent to which gender also played a role in the dismissive responses towards Christine and Jessica King, though it was likely a contributing factor.

> large extent on transmitted materials were liable to suffer from similar defects as well, in this case, as his Honour held, as some lack of objectivity ordinarily to be expected of experts. A further complication was that some witnesses on behalf of the appellants, understandably resentful of past dispossession, made emotional outbursts and failed to give evidence which could be of assistance to the Court."[256]

In this statement, though Callinan recognizes that colonization has negatively affected the Yorta Yorta community (a problem I return to later in the chapter), he also draws attention to two ways in which their evidence does not hold up to the court's scrutiny.

First, the court assumes that oral testimony is less reliable than written testimony, which means that because the Yorta Yorta does not possess a written language, they are disadvantaged from the outset. Justice Olney even suggests at one point that though some of the senior witnesses had an 'impressive' and 'accurate' knowledge of their traditions:

> The cogency of such evidence does not necessarily depend on the credibility of the individual witnesses but must be assessed in the whole context of the case, including, where it exists, evidence derived from historical records and the recorded observations of people who witnessed activities and events about which the claimant group know only what has been passed down to them by their forebears.[257]

The emphasis on 'recorded' evidence not only overlooks the value of critical oral evidence supplied by Yorta Yorta claimants, but disproportionately elevates written records. Despite their concerns about the reliability of oral evidence, Callinan, Olney and the other judges appeared to have few reservations about accepting the evidence of nineteenth century anthropologist Edward Curr, despite his status as an amateur ethnographer operating under a different and much

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[256] Justice Callinan, 'Members of the Yorta Yorta Aboriginal Community v. Victoria.'
[257] Quoted in Bruce Buchan, 'Withstanding the Tide of History: The *Yorta Yorta* Case and Indigenous Sovereignty,' para 8.

criticized set of anthropological norms.[258] In this apparent acceptance of written testimony and an emphasis on the flaws of oral testimony, the judges tilted the scales of evidence strongly against the Yorta Yorta claimants. Similarly, in the Mabo case, Eddie Mabo suggested that he could show his knowledge of song to the Court:

> I remember when Tapi Salee was a baby as well and he used to sing songs—songs that were relating to that particular Malo and Bomai cult as well, and that's also stuck in my mind, and I can sing them for you if you want me to.[259]

His offer was declined, however, because it might "be difficult to put them [the songs] on the transcript."[260] For this spurious reason, Mabo's evidence was literally written out of the court record.

Second, in drawing attention to the "emotional outbursts" of the claimants, Callinan suggests they became less credible in the eyes of the court. Much as Jessica and Christine's testimony was ridiculed for appealing to non-tangible knowledge, the emotional response of some witnesses for the Yorta Yorta community weakened their case, in part because it upheld the distinction between 'subjective' (seen as unreliable) and 'objective' (seen as reliable) responses that the judges were using to assess the claim. These examples of failure to listen to claimants or invalidation of their testimony are directly linked to their indigenous status—the content and forms of their evidence were deemed of dubious validity, despite being rooted in their cultural norms.

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[258] Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 17. See also Rod Hagen, 'Ethnographic information and anthropological interpretations in a native title claim: the Yorta Yorta experience.' *Aboriginal History*. Vol. 25 (2001): 216.
[259] Grace Koch, 'We have the song, so we have the land: song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims,' *Aiatsis Research Discussion Paper*, No. 3 (2013): 16. Mabo's statement comes from *Mabo v. Queensland* (1986), though remains relevant to the 1992 appeal, since that case used much of the same evidence.
[260] Koch, 'We have the song, so we have the land,' 16.

3.2.2 The problem of authenticity

In addition to problems with what evidence is taken seriously by the court, claimants also face problems meeting the standard of evidence required to 'prove' their Aboriginality. These standards are often difficult, if not impossible, to meet. I call this *the problem of authenticity*. *Mabo* does not define what it means to be Aboriginal in precise terms, other than to say: "Aboriginal people, maintaining their identity and customs, are entitled to enjoy their native title."[261] In *Mabo*, to be Aboriginal and have claim to land therefore requires maintaining 'identity and customs.' The verification of this standard, however, was left to lawyers and anthropologists, who based their claims on prior law (such as the descent-based language in the Land Rights Act) and anthropological models of Aboriginality designed by academics. Povinelli suggests that "most practicing land claim lawyers and anthropologists know the law imposes conditions on the performance of local culture and that these conditions are based on abstracted anthropological models that do not fit any particular Aboriginal group, culture, or practice perfectly,"[262] yet despite such acknowledgement, these models were applied in both the *Mabo* judgment and in later cases tried under the Native Title Act.

Numerous academics concur that, despite the *Mabo* judgment's acknowledgement of native title to land, native title was only available to those few who were able to fulfil a strict definition of 'Aboriginiality'.[263] This definition identified Aboriginals as possessing "a pristine essence," which Patrick Wolfe argues was "a quality of such radical historical instability that its

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[261] High Court of Australia, 'Mabo and others v. Queensland (No. 2) ("Mabo case").'
[262] Povinelli, *The Cunning of Recognition*, 267.
[263] Ben Silverstein, 'The Rule of Native Title,' 56; Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era,' *Social Analysis*, No. 36 (1994): 123-124; Peter H. Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005), 126.

primary effect is to provide a formula for disqualification."[264] In other words, although *Mabo* upset the ideological foundation of settler colonization (and the Native Title Act extended this ruling to the nation), the benefits of this change were limited to as few subjects as possible. The standards of authenticity required to lodge claims limited both the range and number of valid claims. Claimants were required to show continuous connection with the land and the maintenance of 'identity and customs,' even though these standards were difficult to meet or prove and usually required external observers (such as anthropologists) to make assessments of any given claimant's adherence to these customs.

While this standard of authenticity was also present in Land Rights Act claims to some extent, it is foregrounded in the *Mabo* judgment in part because of the incongruence between the radical promise of the decision and the subsequent rulings based on its precedent. Although the judgment appeared to pave the way for a new era of progressive judicial decision-making with regard to Aboriginal Australian claims, it simultaneously severely restricted who could be considered an Aboriginal claimant. In a move indicative of the tenor of public discourse, even Aboriginal groups were keen to assuage the fears of non-indigenous Australians that *Mabo* would dramatically alter the rights afforded indigenous Australians. The Aboriginal and Torres Strait Islanders Commission took out a half page advertisement in a national newspaper stating that, "The High Court has done no more than to assert the legal rights of the indigenous peoples of Australia in the light of the common law, the same rights enjoyed by non-indigenous Australians."[265] The decision to create this advertisement suggests that the Commission was worried that media responses to the ruling might alarm non-indigenous Australians by suggesting that Aboriginal Australians were now entitled to special treatment under the law.

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[264] Wolfe, 'Nation and MiscegeNation,' 124.
[265] Patton, 'Mabo and Australian Society,' 85.

Later, when the Liberal government attempted to restrict native title rights through legislation in 1997, the opposition leader (Kim Beazley) and two former Prime Ministers (Paul Keating of the Labour Party and Malcolm Fraser of the Liberal Party) publicly rejected this move by appealing not only to moral reasons such as the economic and social struggles of Aboriginals and the shame of historical oppression, but also to pragmatic ones—that native title would not significantly change composition of land ownership in the nation. In fact, Beazley made a point of highlighting the restrictive nature of these claims: "Native title will only ever be able to be claimed by a small minority of Aboriginal and Torres Strait Islander Australians—those who can evidence some form of ongoing association with the land in question."[266] The restrictive definition of Aboriginal claimants helped to ensure that this has been the case.

The harm of applying these standards of authenticity is not just that it might be difficult for Aboriginal claimants to meet them, but that they cause the victims to blame themselves for failing. The claimants come to consider their inability to 'prove' their Aboriginality a failure of cultural identity that Povinelli suggests is often seen as a personal rather than a structural one: "Aboriginal persons I work with often turn their critical faculty on themselves or become trapped between unanswerable questions: 'Were my traditions taken from me?' or 'Did I, my parents, and my children abandon them?'"[267] These questions insidiously serve to undermine indigenous people's sense of identity and their understanding of what might be owed to them as a result.

3.2.3 The problem of character

Another way in which problems with evidence manifest in the *Mabo* decision and Native Title Act works in conjunction with the standard of authenticity imposed on Aboriginal

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[266] Kim Beazley, 'Address to the Nation by the Leader of the Opposition, Kim Beazley,' *The Age*, Melbourne, December 2, 1997.
[267] Povinelli, *The Cunning of Recognition*, 54.

claimants. I call this *the problem of character*, in which evidence provided by the claimants is viewed with skepticism because it *too closely* adheres to the standard of authenticity required by the courts, thus casting aspersions on the intentions or character of the claimants.

In contrast to decisions reached under the Land Rights Act, in which some land commissioners have acknowledged that Aboriginal traditions may change over time, the Australian High Court ruled that "the governing descent principle in operation in a particular group" cannot be "changed by them [claimants] at whim so as to fit the circumstances of a land claim."[268] In other words, the claim cannot be seen to be strategic. This requirement is burdensome because it expects compliance—Aboriginal Australians must fulfill the criteria required by the state to identify as legitimate claimants in native title cases—yet it simultaneously punishes them for being too compliant.

For example, in a claim regarding coastal lands in the Northern Territory, the southern Wagaitj moved their initiation practices away from southern territories and toward a waterhole at stake in their claim.[269] This change in behavior seems self-serving—it appears that in response to the requirements of the law the Wagaitj altered the location of their traditions—but it is not clear that these practices might not have moved in response to cultural, ecological or other pressures regardless of their claim. In this case the Wagaitj were not only being held to an unfair expectation that they freeze their traditions in time—they should only hold their initiation practices in the southern territories—but in deviating from that expectation they were challenged not just on the 'authenticity' of their claim, but also on their character. The relocation of their

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[268] Povinelli, *The Cunning of Recognition*, 227.
[269] Elizabeth Joan Ganter and Martyn Paxton, *Kenbi Land Claim: Report on Traditional Ownership* (Northern Territory: Department of Lands and Housing, 1990).

initiation practices was seen as too convenient for their claim, and they were therefore cast as manipulative and attempting to 'cheat the system.'

This concern that indigenous people are unfairly exploiting the 'honest' attempts of post-colonial societies to right the wrongs of the past is widespread. In New Zealand, it is so common that it has its own name: 'the grievance industry.'[270] Māori are accused of being disingenuous about the real reasons behind their Treaty claims: if an *iwi* or *hapū* states a spiritual connection with a territory and requests economic compensation as part of the settlement, suspicions are cast on the motives of that *iwi* or *hapū.* These criticisms are regularly leveled at claims involving economic or land and resource reparations, implying that there is a conflict between 'authentic' indigenous values and economic interests.[271] Māori are therefore held to an untenable standard: to be considered indigenous they are required to uphold static cultural expectations, and any orientation towards contemporary societal values (such as an interest in economic compensation for past wrongs) is viewed with skepticism as a transgression of indigenous values or—worse—as a convenient excuse to defraud the state. As with the Wagaitj case, this challenges not only the 'authenticity' of their culture, but also casts aspersions on their character—Māori are depicted as greedy and self-serving rather than as having genuine claims.

Similarly, in Tanzania, the Maasai have been altering their beliefs to fulfill expectations set by corporations, local government and international organizations, which allows them access certain status and resources.[272] This orientation towards the discourse of indigeneity promoted by groups such as the UN Permanent Forum on Indigenous Issues makes sense as a political

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[270] For example, see Elizabeth Rata, 'Discursive strategies of the Maori tribal elite.' *Critique of Anthropology*. Vol. 31, No. 4 (2011): 368.
[271] For a representative example of this view, see the article and comments: David Farrar, 'Treaty Settlements,' *Kiwiblog,* December 6, 2012, http://www.kiwiblog.co.nz/2012/12/treaty_settlements.html, accessed November 14, 2014.
[272] Dorothy L Hodgson, *Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World* (Bloomington: Indiana University Press, 2011).

strategy, yet is cast as an opportunistic move by the Maasai to gain more than their 'fair share' of resources. As with the Wagaitj and the Māori, this condemnation holds the Maasai to an impossible standard of cultural purity, while also portraying them as self-interested. The problem here is not only that there is an underlying requirement that indigenous communities be seen as 'authentically' indigenous, which often results in the reification of culture, but that changes to any tradition which coincide favorably with legislation are met with skepticism about the character of the claimants.

3.2.4 The problem of articulation

Another problem related to evidence is the *problem of articulation.* In some cases, information that would 'prove' a spiritual link is sacred and cannot be shared without trangressing the group's ethics. Examples of this are difficult to detail, given the understandable reluctance or refusal of indigenous peoples to discuss such information. This problem differs from the problem of evidence insofar as there may be evidence that would be accepted as valid in a court, but the claimants refuse to share this evidence because of its sensitive nature.

One example of such a case is the Hindmarsh Island controversy, in which a group of Ngarrindjeri women attempted to prevent a bridge being constructed between Goolwa and Hindmarsh Island in South Australia, saying that it interfered with women's sacred sites. In making this request, they appealed to the Aboriginal Heritage Act (1988), which "provide[s] for the protection and preservation of the Aboriginal heritage."[273] The federal minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, evaluated the claim in 1994 and determined that there should be a twenty-five year building ban on the bridge. Following an

[273] Aboriginal Heritage Act (1988), South Australia, available from http://www.legislation.sa.gov.au/LZ/C/A/ABORIGINAL%20HERITAGE%20ACT%201988.aspx, accessed August 5, 2014.

appeal by the developers, however, Tickner's decision was overturned by the federal court. Media reports at the time indicated that the Ngarrindjeri women had made up stories about the sacred nature of these sites,[274] and a subsequent Royal Commission report suggested that the women's claims were fabricated.[275] This report was based on evidence provided by early anthropologists who did not mention the presence of sacred sites in the area.[276]

Arguments for and against the Ngarrindjeri women's claim focused on the absence of historical documentation of such sites.[277] Those supporting the women argued that if the sites were sacred the women could not talk about them with others. Furthermore, Peter Gray—a former Federal Court judge—notes that "Aboriginal people often will only yield to pressure to reveal crucial information at a late stage in the proceedings, when all attempts to withhold the information have failed. The delay in releasing the information may then give rise to suspicion on the part of non-Aboriginal participants that what is being revealed is recent invention."[278] In contrast, those arguing against the women's claim suggested that the sites did not exist at all, drawing on statements made by Ngarrindjeri elders (some of which were later retracted).[279] In

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[274] James F. Weiner, 'Religion, Belief and Action: The Case of Ngarrindjeri "Women's Business" on Hindmarsh Island, South Australia, 1994-1996,' in Adolfo de Oliveira (ed.), *Decolonising Indigenous Rights* (New York: Routledge, 2009), 81. In fact, as alluded to in Weiner's title, the case came to be known as "Secret Women's Business," see Ken Gelder and Jane M Jacobs, 'Promiscuous Sacred Sites: Reflections on Secrecy and Scepticism in the Hindmarsh Island Affair,' *Australian Humanities Review*, 1997.

[275] Hindmarsh Island Bridge Royal Commission, 'Transcript of Processings,' State of South Australia, July 19, 1995, available from http://digital.library.adelaide.edu.au/dspace/bitstream/2440/5127/1/P_1.pdf, accessed October 18, 2014.

[276] "The considerable anthropological data and literature from, amongst others, Meyer, Taplin, Tindale and, in particular, Ronald and Kathryn Berndts (sic) reveals a wealth of detail of private matters of sexuality, initiation and birthing to do with both men and women of the Ngarrindjeri people. This data purports to reach back to a time earlier than the European invasion. This data reveals no secret sacred women's business associated with Hindmarsh Island and its environs." (Hindmarsh Island Bridge Royal Commission, 'Transcript of Processings,' 115).

[277] As with Christine and Jessica King's testimony in the Belyuen claim, the extent to which disbelief about the sacred sites was linked to the claimants being women, not just Aboriginal, is difficult to assess, though the media's designation of the claim as 'women's business' and 'the Hindmarsh affair' seems condescending.

[278] Gray, 'Do the Walls Have Ears?', 192.

[279] Jennifer Clarke, 'Chronology of the Kumarangk/Hindmarsh Island Affair,' *Aboriginal Law Bulletin*, 1996.

1997 the conservative Howard Government passed legislation—the Hindmarsh Island Bridge Act (1997)—that allowed for the bridge's construction, and the bridge was completed in 2001.

Similar situations arise in indigenous communities elsewhere, such as the Sicangu Lakota Oyate (Rosebud Sioux Tribe) in South Dakota, where presentions at the Rosebud Sioux Supreme Court may include ritual dances that can only be witnessed by members of the tribe.[280] While such cases are not necessarily problematic—for example, the Rosebud Sioux Tribe Supreme Court has been able to recognize these rituals in their proceedings—the unavoidable exclusivity of sacred information makes this evidence ill-suited to examination in an Anglo-European judical framework that tends to regard information as universal and public. Gray offers a detailed analysis of the ways that the Anglo-Australian legal system fails to account for differences in Aboriginal understandings of rights to information, noting that in Aboriginal communities "because information is inseparable from its author in oral cultures, authorship takes on a privileged status, and a complex system of information constraints operates."[281]

In Aboriginal communities knowledge is often highly regulated and there is fragmentation of information across a community, meaning that some members of a community might not be aware of certain kinds of knowledge. This might be one reason that some Ngarrindjeri elders initially stated that they were not aware of sacred sites at Hindmarsh even while others claimed to know of their existence. Compounding the problem, because of their sensitive nature it is difficult to determine how many cases like this exist, given that individuals or groups are unlikely to draw attention to them precisely because it is unacceptable to speak about such matters publicly.

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[280] For more information, see David L. Weiden, 'Judging in a Tribal Voice: An Analysis of the Decisions of the Rosebud Sioux Tribe Supreme Court,' unpublished APSA paper, 2013.
[281] Gray, 'Do the Walls Have Ears?', 190.

3.2.5 The problem of legitimacy

Underlying many of the problems detailed above is the *problem of legitimacy.* Aboriginal Australians are required to justify their claims to land under conditions imposed by a system of law brought by the settlers. The burden of proof to show a rightful claim is placed entirely on indigenous groups and individuals, and that proof must comply with procedures and standards determined by the Anglo-Australian system of law. Despite its radical premise, *Mabo* (and the Native Title Act), still assume that it is within the Australian legal system's jurisdiction to decide on matters of native title and they set the terms and boundaries for such claims. As Brennan notes, "*Mabo* expressly reiterated the inviolate nature of Australian sovereignty and the legality of the white-Australian nation state."[282]

In an attempt to allow for more authentic and representative adjudication of land claims in response to the Land Rights Act, four Aboriginal land councils were created—the Central Land Council, the Northern Land Council, the Tiwi Land Council, and the Anindilyakwa Land Council. They have statutory authority under the Land Rights Act 1976 and additional responsibilities under the Native Title Act 1993. They are managed by Aboriginal Australians who are elected by members of local Aboriginal communities[283] and self-identify as "important bodies as they give Aboriginal peoples a voice on issues affecting their lands, seas and communities."[284] The land councils (under the auspices of the Land Rights Act) have been

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[282] Frank Brennan, *One Land, One Nation: Mabo—towards 2001* (St. Lucia: University of Queensland Press, 1995), 32. See also Patton in 'Mabo and Australian Society,' 87 and Povinelli, 'Reading Ruptures, Rupturing Readings,' 20.
[283] The process differs slightly for each land council, but in general the councils are elected by Aboriginal community members who live within the constituency. The Chair and other executive positions are elected by the council members. This means that Aboriginal representatives both self-identify as Aboriginal and are, presumably, elected on the basis of their credibility as such.
[284] Northern Land Council, 'What we do,' http://www.nlc.org.au/articles/cat/what-we-do/, accessed October 22, 2014.

successful in transferring property back to Aboriginal Australians—just under fifty percent of the Northern Territory (385,000 square kilometers) is now Aboriginal land.[285]

The councils, however, are still subject to the requirements of the Lands Rights Act, legislation created outside of Aboriginal groups by a legislative body comprised primarily of non-Aboriginal Australians. As Peter Russell notes, working within the existing framework of the dominant society "reduces their [Aboriginal Australians'] moral capacity to challenge the legitimacy of the settler state."[286] He concludes that "in the resort to the white man's courts... a measure of justice... is about all Indigenous peoples can expect."[287] Patrick Wolfe concurs: "None of this means that the retaining of native title, where this occurs, cannot represent a significant Aboriginal gain. It does, however, mean that acknowledging native title constitutes a state strategy for containing Aboriginal resistance."[288]

This problem underlies all claims in Australia, since they are all mediated through the Australian legal and political system, even in cases where Aboriginal councils recognizing Aboriginal law are involved in the process. Povinelli's work highlights the tensions between these two systems of law and points out that resolution of these tensions always falls in favor of the settler society—though Australian law "might demand 'real acknowledgement of traditional law and real observance of traditional customs' as the basis for a successful native title claim, *real* customary being must be free of any sense of a repugnant that would 'shatter the skeletal structure' of state law; that is, provoke an affective relation to a cultural or social otherwise, an

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[285] Central Land Council, 'Land won back,' *Central Land Council*, http://www.clc.org.au/articles/cat/land-won-back/, accessed October 12, 2014.
[286] Russell, *Recognizing Aboriginal Title*, 196.
[287] Russell, *Recognizing Aboriginal Title*, 381.
[288] Wolfe, 'Nation and MiscegeNation,' 129-130.

experience of fundamental alterity."[289] Theories of liberalism often grapple with this very problem—what does it mean to tolerate or allow alternative kinds of being when those activities may run counter to liberal notions of the good?[290]

In Australia adhering to liberal principles results in two problems. First, the rituals and laws of some Aboriginal groups directly challenge liberal values. When this occurs, the legal system privileges non-indigenous values over Aboriginal values, thus reducing claims of tolerance to mere lip service.[291] Second, Aboriginal laws and customs may not be intelligible in a liberal framework. One of the major issues with being subject to settler laws is that they fail to recognize Aboriginal understandings of the land. Most courts have interpreted the Native Title Act as requiring claimants to prove a *physical* connection with the land, based on western notions of property ownership that assume entitlement to land requires occupation in the form of title deeds, residences, or fences.[292] Moreton-Robinson argues instead that, "Indigenous people are the human manifestations of the land and creator beings, they carry title to the land through and on their bodies. Thus the physicality of Indigenous people is testimony to the existence of particular tracts of country… This is why the connection to land is never broken and why no other Indigenous group claimed or could claim Yorta Yorta country."[293] The *Mabo* and *Yorta Yorta* cases both demonstrate the dominance of Anglo-European conceptions of land, whereby the primary question being asked is who has control over certain tracts of land, rather than questions that reflect the relationship between people and the land. As Stewart Motha notes, the

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[289] Povinelli, *The Cunning of Recognition*, 12.
[290] See, for example, John Locke, 'An Essay on Toleration (1667),' *Political Essays* (New York: Cambridge University Press, 2006); Michael Walzer, *On Toleration* (New Haven: Yale University Press, 1997); Susan Moller Okin, *Justice, Gender, and the Family* (USA: Basic Books, 1989).
[291] For example, Povinelli details the state's response to and censure of Aboriginal sex rites in the Northern Territory, *The Cunning of Recognition*, 111-152.
[292] Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 17.
[293] Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 12.

Mabo decision "is a continuation of colonial rule whereby the original inhabitants are forced to accept the invader's law and *its* translation of their relationship to the land."[294]

In addition to failing to fully acknowledge Aboriginal law and traditions, reliance on the settler system of laws also diminishes or outright ignores the effects of colonization. Claimants are forced to prove a continuous connection with the land, even though it is the very act of colonization that—often forcibly—removed them from these lands. The *Yorta Yorta* case is the clearest example of this, since its claimants were primarily urban Aboriginal Australians. Judge Olney, one of the Federal Court Judges, found that:

> the facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional lands in accordance with their traditional laws and any real observance of their traditional customs.[295]

'The tide of history'—or the effects of colonization—are deemed by Olney to have eroded the rights the Yorta Yorta people had over their lands. Put another way, because the processes of colonization significantly affected the Yorta Yorta, they no longer have a strong claim to native title. The paradox introduced by the law is that less colonial intervention makes for more successful claims, or as Wolfe puts it: "this formula entails a ratification—even a redoubling—of the history of oppression, since it provides that *the more you have lost, the less you stand to gain.*"[296] In addition to reducing the range and number of land claims, this policy

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[294] Stewart Motha, '*Mabo*: Encountering the Epistemic Limit of the Recognition of 'Difference',' *Griffith Law Review*, Vol. 7, No. 1 (1998): 80 (italics in original).
[295] Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 2.
[296] Wolfe, 'Nation and MiscegeNation,' 125-126 (italics in original). See also Silverstein, 'The Rule of Native Title,' 56-57; Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 2; and Deborah Bird Rose, 'Histories and Rituals: Land Claims in the Territory,' in Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia* (Sydney: Allen & Unwin, 1996), 35. This problem can also be seen in New Zealand—

also functions ideologically to shore up the legitimacy of the liberal state by moving responsibility for maintaining Aboriginal traditions to the claimants. Pointing to the fact that some traditions have survived—for example, those acknowledged by the courts in *Mabo*—the state can claim that those traditions that did not survive were weak, and therefore not deserving of redress.[297]

The problem of legitimacy directly intersects with all of the problems above, in particular questions about evidential proof of indigeneity, because it points to the way that legislative and judicial decisions based in an Anglo-European tradition have decided the ground rules on which land claims can be made. Although there are gestures towards incorporating Aboriginal law and traditions in the language of the laws, there is little attempt to radically reconsider the Lockean notions of property that underlie the basis of the Australian state and its laws.

3.3 Changing the narrative on indigeneity claims in Australia

The five problems I identified all point to the legal and judicial apparatus of the state assuming "the epistemological privilege of defining who indigenous people are and that to which [they] are entitled."[298] This assumption stems from a state narrative that upholds the value of liberalism (brought to Australia by European settlers) where neutrality towards its subjects is at the heart of the system. As such, the law applies to all equally and is intended to ensure that all Australians receive fair treatment in legal or political proceedings. Built into this system, however, are a series of normative commitments that privilege European historical accounts of the settling of Australia and the duties that flow from this. *Mabo* fundamentally altered one

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Māori retaining connections to iwi, hāpu or whānau have stronger claims to Treaty settlements than urban Māori who have lost connection with their tribes.

[297] Povinelli, *The Cunning of Recognition*, 54-5.

[298] Moreton-Robinson, 'The possessive logic of patriarchal white sovereignty,' para 12.

aspect of that narrative by declaring that Australia was not *terra nullius* when settlers first arrived. Despite the radical promise of this decision, however, it did not fundamentally change the legal-judicial apparatus of the state and its response to indigenous land claims.

In this section I consider postcolonial theories of narrative as a possible resource for addressing the problems resulting from indigenous identification in Australia. In particular, I focus on Ashis Nandy and Homi K. Bhabha's accounts, which critically examine dominant narratives within states. I argue that their accounts would require the legal-political system in Australia to more critically consider not only its own position in shaping concepts of indigeneity, but to genuinely engage with Aboriginal Australians and their histories.

This approach has potential to be a dangerous undertaking. Historical interpretations have the potential to yield negative outcomes for indigenous populations in particular, given that the dominant groups in society often write the most widely accepted narratives. The concerns that Aboriginal Australians raised with Povinelli highlights this issue: in thinking about whether they have retained 'enough' Aboriginal traditions to be considered Aboriginal claimants in native title cases, they often turn the question of responsibility onto themselves asking if they failed to withstand the forces of colonization. Even more insidiously, the settlers can justify their incursion by pointing to instances where Aboriginal traditions have remained strong—the longevity of some traditions proves that weak traditions were abandoned, while the stronger (and presumably more valuable) ones continued. On this view, the discourse of progress—inherent to the Enlightenment thinking—offers the white settler nation an opportunity to see contemporary society as reflecting the strength of good values over bad.[299] Aboriginal laws that are

[299] Thomas McCarthy analyzes this relationship between Western conceptions of human development and the expansion of empire in *Race, Empire, and the Idea of Human Development* (New York: Cambridge University Press, 2009).

acknowledged in the political-judicial system fit within the framework of the liberal nation, and those that do not are discarded, fitting into a narrative of progress of the nation as a whole.

Given the problems with this discourse of progress, it may seem imprudent to look to historical context in order to better understand conceptions of indigeneity. However, not all historical approaches need employ the same logic. For example, Nandy outlines an approach to historical interpretation that rejects a linear, progress-oriented view of the past. As a counter-balance to these kinds of histories, Nandy suggests 'ahistorical' readings of the past. He recognizes that this takes many different forms and limits his analysis to drawing out what he considers to be two defining features.

The first is what he calls "the principle of principled forgetfulness," which acknowledges the temporality of history, seeing the present as intrinsically linked to the past.[300] This kind of history privileges myths as the "predominant mode of organizing experiences of the past," which results in "a refusal to separate the remembered past from its ethical meaning in the present."[301] Rather than seeing 'facts' as the organizing principle for explaining the past, these accounts assume myths are the vectors of societies' moral principles. As I detail later, this feature of an 'ahistorical' approach is beneficial in an Australian context, where mythology plays a crucial role in Aboriginal understandings of place, time, and society.

The second feature, which is strongly related to the mythology of the ahistorical, is that constructing the past should not rely on strict categories of past and present.[302] This approach details a temporality that allows the boundaries between the two to blur, which offers space for morality of other times to make an imprint in contemporary behavior. Nandy indicates that linear,

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[300] Ashis Nandy, 'History's Forgotten Doubles,' *History and Theory*, Vol. 34, No. 2 (1995): 47.
[301] Nandy, 'History's Forgotten Doubles,' 47.
[302] Nandy, 'History's Forgotten Doubles,' 50.

Western historical consciousness attempts to provide a clear narrative that cannot help but bring about conflict, as there will always be individuals who seek to take control of the details of the past. His critique of linear historical method is useful as it opens a space in democratic dialogue for critical engagement with the past and the present, looking to the future.

Bhabha builds on this idea of troubling traditional relationships between participants and history by offering a compelling interpretation of the stories told by groups. In his work he shares with Nandy the desire for plurality in the narratives of nations. For Bhabha, counter-narratives work against the dominance of the monolithic nation by subverting its imposition of a stereotype on them. He argues that, "Counter-narratives of the nation that continually evoke and erase its totalizing boundaries—both actual and conceptual—disturb those ideological manoeuvres through which 'imagined communities' are given essentialist identities."[303] For him, the counter-narrative disturbs the homogeneity of the national discourse, allowing rise of plural identities. These identities can only address history through the act of narration, in which "The subject is graspable only in the passage between telling/told, between 'here' and 'somewhere else', and in this double scene the very condition of cultural knowledge is the alienation of the subject."[304] The dominant discourse places pressures on alternative meanings but, rather than simply seeing a single dominance that oppresses others, Bhabha recognizes that there is potential within the oppressed not only to react to that dominance—thus conforming to a binary—but to change the very scope of the narrative. In his words: "From the place of 'meanwhile', where cultural homogeneity and democratic anonymity articulate the national community, there

[303] Homi K. Bhabha, *The Location of Culture* (New York: Routledge, 2010): 213.
[304] Bhabha, *The Location of Culture*, 215.

emerges a more instantaneous and subaltern voice of the people, minority discourses that speak betwixt and between times and places."[305]

Using this approach to think historically about Australia generates a range of responses, including a possible rejection of the legitimacy of the very notion of 'Australia' as multicultural white settler nation. For example, Frank Brennan suggests that, "contemporary Aborigines whose ancestors were denied the vote at the referendum approving the Constitution might assert their sovereignty by actions other than acquiescence, thereby calling into question the legitimacy of the Constitution."[306] Though his critique questions the status quo, it still accepts the value of Anglo legal norms by linking the fact that Aboriginal Australians were not offered the vote to the legitimacy of the Constitution. A more radical exegesis might instead ask why requiring a vote itself might be an inappropriate imposition of values. Similarly, although it is laudable that the judicial system now hears cases of native title resulting in some successful land claims, the laws and procedures are premised on settler values and are unable to do full justice to Aboriginal entitlements. The Native Title Act sets restrictions on what land can be considered in native title cases by only allowing claims on land that has not been alienated (in other words, it does not disturbing titles accumulated since colonization) and in some cases allowing for the co-existence of native title in Crown title.[307] Questioning the dominant narrative might result in questioning the validity of confining native title settlements only to land that was not acquired in the intervening years of European settlement.

Attending more closely to the ways that history characterizes conceptions of indigeneity in Australia might also yield more expansive notions of individual and group relationships with

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[305] Bhabha, *The Location of Culture*, 227.
[306] Brennan, *One Land, One Nation*, 128.
[307] Pearson, 'The High Court's Abandonment of 'The Time Honoured Methodology of the Common Law,' 2. Notably, where these is conflict between the two titles, Crown title takes precedence.

land. This might reduce the over-reliance on physical presence as a means to prove connection to the land, and allow for acknowledgement of indigenous understandings of land and self. A more nuanced appreciation of historical context bears promise as a method of more comprehensively incorporating Aboriginal traditions and law into national political and legal discourse. For example, 'the dreaming' is a central feature of Aboriginal culture and identity. The dreamings refer both to stories of creation and to the interaction between the present, natural world and a supernatural world.[308] Knowledge of the dreamings is shared through songs, stories and ceremonies, many of which connect the people with the land. Because of this connection, "The dreamings are integral to the land tenure system of Aboriginal people. They attach to land in a way that results in the identification of the two; people are land and land is people. In contrast with the commodity view of rights to land, an Aboriginal person's land rights are not capable of being bought and sold, because the self cannot be traded."[309]

Given the centrality of the dreamings to indigenous status, a sincere commitment to a more expansive historically situated evaluation of its meaning and place in political and legal discourse would likely yield very different responses to the five problems identified above. Being more responsive to the dreamings through, for example, being attentive to Nandy's request for mythology of the ahistorical or Bhabha's counter-narratives, might allow for new conceptions of morality and indigeneity to emerge in contemporary Australian politics.

Acknowledgement of the dreamings would likely alter what counts as evidence in a court or land council proceeding. Songs, ceremonies, and oral testimony could be included in proceedings rather than dismissed, as in the case of Eddie Mabo's offer to sing songs as part of

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[308] Gray, 'Do the Walls Have Ears?', 188; Lynne Hume, 'The Dreaming in Contemporary Aboriginal Australia,' in Graham Harvey (ed.), *Indigenous Religions: A Companion* (New York: Cassell, 2000): 126-127.
[309] Gray, 'Do the Walls Have Ears?', 188.

his testimony. The significance of these kinds of evidence might also be reconsidered, both by deliberating more critically on the status of written records (often prepared by amateur ethnographers from the nineteenth or early twentieth century) and by reflecting on the value of songs, stories or ceremonies as evidence. It might also respond to the problem of articulation by altering approaches to sacred knowledge through acknowledging the nature of these claims and finding ways to better address this restricted information. Avoiding drawing on history as a linear progressive narrative also has the potential to alter perceptions of who should be considered Aboriginal, and how those claims are tested, by challenging the notion that the traditions that withstood 'the tide of history' are more valid or authentic than traditions that have changed in response to colonization.

Nandy and Bhabha's postcolonial responses to state narratives are a useful resource for challenging the Australian state's narrative about its settlement and the relative value of its customs and principles. The problems identified in Australia are not, however, rooted only in inadequate or inappropriate historical interpretations. Though genuine acknowledgement of the dreamings might significantly reshape the legal landscape, this acknowledgement alone is not sufficient to address the problems faced by Aboriginal Australians in their land claims. It does not focus attention on the ways that certain concepts are shaping discourse around indigenous rights. For example, at its heart, the problem of authenticity results from deficient conceptions of indigeneity: Aboriginal Australians are being asked to conform to externally generated and unrealistic expectations of what it means to be indigenous in order to lodge and successfully defend land claims. Nandy and Bhabha's theories might go some way towards challenging reliance on early anthropologists' accounts of indigenous claims through re-assessing the state's narrative of what constitutes an 'authentic' indigenous claimant. However, though their theories

might alter what counts as historical proof, they do not necessarily question the requirement for some form of authenticity.

In particular, the language of descent needs critical evaluation. It is not enough to just question the narrative around the founding of Australia and to introduce space for inclusion of the dreamings in legal and political discourse—attention needs to be directed at the ways that concepts of indigeneity are shaping discourse in Australia, not just the context in which they operate. For instance, the expectation that claimants show continuous connection with the land and maintenance of 'identity and customs' requires scrutiny, as does the role of external observers such as anthropologists and the state in evaluating these claims. Though a critical questioning of state narrative might assist in challenging some of the land claims decisions, it does not require questioning the language around what constitutes an 'authentic' indigenous person. Similarly, the problem of character can best be addressed by considering the ways that concepts of indigeneity are being used to frame decisions. The pervading sense that there is a contradiction between 'authentic' indigenous culture or traditions and economic reparations is a conceptual problem as much as a narrative one.

3.4 Conclusion

Australian legislative approaches to land claims have failed to produce just outcomes for indigenous Australians. They shift the burden of proof onto indigenous groups and members, apply unrealistic and in some cases contradictory standards for this proof, do little more than pay lip service to Aboriginal laws and traditions, and in some cases result in indigenous individuals questioning their own identification as indigenous and their responsibility for failing to withstand the forces of colonization. Addressing these issues would dramatically alter the legislative and

discursive norms of the state and change the status of Aboriginal Australians—not just in the eyes of the state, but in their own self-appraisal.

One possible way to achieve this is more critical assessment of the role of state narratives in shaping discourse around indigeneity. An 'ahistorical' interpretation of the past might allow for recognition of the crucial role of dreamings in Aboriginal Australian law, customs, and history and reduce overreliance on damaging settler narratives of indigeneity. However, though this approach might encourage inclusion of the dreamings in legal and political discourse, it does not evaluate the meanings attached to concepts. This is crucial for addressing some of the problems identified in Australia. For example, to determine what measures—if any—should be used to establish if a claimant is indigenous requires questioning the very concept of descent and its relationship with indigeneity, not just a critical evaluation of the narratives that led to the descent-based language of the Land Rights Act.

Considering the central role particular definitions of indigeneity play in addressing claims of historical injustice, in Chapter Four I elucidate and advocate for a theory of 'nonidentity' thinking as a means of better conceptualizing indigeneity. Reflecting more deeply on the ways in which indigeneity is defined and how these definitions might be used to control or restrict access to public goods, I suggest that nonidentity thinking encourages productive questioning of the status quo and allows for more nuanced conceptions of indigeneity that might result in more just outcomes for indigenous groups in New Zealand and Australia. A nonidentity approach to defining indigeneity would likely not resolve all the problems I have identified, but it is a promising process by which to navigate some of the nuances of defining indigeneity in relation to the political-judicial framework. It is likely to result in more inclusive practices, such as genuine acknowledgment of Aboriginal traditions and law and inclusion of different forms of

evidence. This approach might also result in further dismantling of the myth of the ‘civilizing’ influence of settlers and critical questioning of the legitimacy of the legal framework.

Chapter 4: Constellations of Indigeneity

The political theory literature on historical injustice often addresses questions of what is owed to indigenous peoples, however there is limited direct engagement with how—specifically—being indigenous might influence particular rights or duties.[310] Focusing on the ways that indigeneity is defined and used might influence accounts of historical injustice, many of which assume that indigeneity is a legitimate, important feature of rights claims without fully exploring what indigeneity might entail.[311] This is problematic, because defining indigeneity has at least two important consequences. First, it affects *who* has access to resources or rights reserved for indigenous peoples. While defining oneself or being defined as indigenous may have negative implications, such as those detailed in Chapters Two and Three, increasingly it may offer certain privileges in terms of rights, resources, and access to economic and symbolic reparations. Second, it shapes the *kinds* of privileges and resources available to indigenous peoples, including promoting non-discrimination and inclusion of indigenous peoples in local, national, and international laws, policies and projects, redefining development policies that are culturally appropriate, and developing monitoring mechanisms to improve accountability of policies.[312]

Similarly, more nuanced accounts of historical injustice—ones that are sensitive to how

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[310] One notable exception is Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy,' *Lecture at Victoria University of Wellington Law* School (2002): 55-82.

[311] Examples of such works include Chandran Kukathas, 'Responsibility for Past Injustice: How to Shift the Burden,' *Political Philosophy and Economics*, Vol. 2, No. 2 (2003): 165-190; Chandran Kukathas, 'Who? Whom? Reparations and the Problem of Agency,' *Journal of Social Philosophy*, Vol. 37, No. 3 (2006): 330-341; Janna Thompson, 'Historical Injustice and Reparation: Justifying Claims of Descendants,' *Ethics*, Vol. 122, No. 1 (2001): 114-135. To some extent, work such as W. C. Bradford's, 'Beyond Reparations: An American Indian Theory of Justice,' *bypress Legal Series*, Paper 170 (2004) does address more specifically what kind of redress is due to indigenous groups, but this is premised on American Indian's specific interests and grievances, not on an understanding of indigeneity *per se*.

[312] For example, see the United Nations Forum on Indigenous Issues, 'Second Decade of the World's Indigenous People,' *United Nations Forum on Indigenous Issues* (December 22, 2004), http://social.un.org/index/IndigenousPeoples/SecondDecade.aspx (accessed April 26, 2012).

particular conceptions of indigeneity might influence what is understood as just outcomes—have the potential to strengthen contemporary accounts of what is required for justice in indigenous communities. For example, the recent Federal Court case known as *Daniels v. Canada*, in which non-status Indians sought recognition from the government as 'Indians' under section 91(24) of the Constitution Act, 1867, might have resulted in a different ruling if more expansive understandings of indigeneity had been used, including better appreciation of the particular experience and history of non-status Indians and Métis.[313]

Defining what indigeneity entails, however, has proven to be controversial. Although indigeneity is generally upheld as an important identity grouping in liberal democracies,[314] its presence in international and local politics is still contested and there is little consensus on what it means to be indigenous.[315] In this chapter, I turn to Theodor Adorno's discussion of 'nonidentity' thinking, which points to characteristics of ideas or objects that cannot be subsumed under universal ideas or concepts. Nonidentity thinking seeks to avoid relying on single, all-encompassing concepts to understand the political and social world. Instead it focuses attention on the sites where human understanding encounters limits and at the ways in which constellations of concepts might illuminate discrepancies in world-views. These constellations,

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[313] The plaintiffs in this case sought three declarations from the Federal Court of Canada: 1. that Métis and non-status Indians should be recognized as Indians by the Constitution Act, 1867, 2. that the Queen owes a fiduciary duty to Métis and non-status Indians as Aboriginal peoples, 3. that Métis and non-status Indians have a right to be consulted and negotiated with by the federal government on a collective basis. The court upheld the first declaration, but rejected the second and third. The Canadian government subsequently appealed the decision. For the ruling, see Federal Court of Canada, *Daniels v. Canada*, Docket T-2172-99, January 8, 2013, Citation 2013 FC 6, http://decisions.fct-cf.gc.ca/en/2013/2013fc6/2013fc6.pdf (accessed August 8, 2013).

[314] See Duncan Ivison, Paul Patton and Will Sanders, 'Introduction,' in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press, 2002): 1-24 and Francesca Merlan, 'Indigeneity: Global and Local,' *Current Anthropology*, Vol. 50, No. 3 (2009): 303-333.

[315] Notions of indigeneity are controversial not only because of differences in how the concept is defined, but because some scholars have challenged the very notion of indigeneity, claiming that it is a poorly conceived idea with no veritable foundation (for example, see Jeremy Waldron, 'Indigeneity? First Peoples and Last Occupancy,' 55-82). In this chapter I assume that indigeneity does exist and do not address critics who argue that indigeneity is a flawed or failed concept.

understood not simply as ranges of concepts, but also collections of historical processes, mark both the physical and the temporal characteristics of an idea or object. Thinking in constellations not only reveals a more comprehensive appreciation of ideas or objects through more nuanced description or explanation, but also provides insights by bringing attention to the negative space that constellations of concepts cannot exhaustively describe.

I argue that this idea of constellations is fertile ground from which to explore the power and limits of conceptions of indigeneity. I suggest drawing on Adorno's theory of the nonidentical to push back against totalizing definitions of indigeneity by highlighting the particular experience and history of different indigenous groups. Recognizing the nonidentical nature of indigeneity enables critical engagement with constellations of concepts that attend to the distinctive aspects of indigeneity in a particular moment and location. It also opens space to critically reflect on these aspects and ask what might be obscured by their use. This allows for nuanced assessments about the nature of indigeneity and questioning of essentialized identities and knowledge.

This chapter is divided into four sections. First, I consider ways in which conceptions of indigeneity have been limiting in New Zealand and Australia. In Section 2, I suggest that reflecting on indigeneity using a lens of 'nonidentity' thinking might avoid these limitations, by pushing back against universal, reified notions of indigeneity and allowing for particularized self-definition by specific communities. To illustrate this argument, in Section 3, I draw on one conception of indigeneity that could be characterized as 'nonidentity' thinking in a New Zealand context—a research approach called Kaupapa Māori. Finally, having outlined why nonidentity might be promising for theorizing indigeneity, in Section 4, I suggest that characterizing indigeneity in nonidentical terms may present some challenges. While there are some limitations

to applying Adorno's theory to indigenous politics, I argue that nonidentity should not be dismissed as a promising resource for conceptualizing indigeneity. It has potential to respond to some of the key problems with current definitions of indigeneity; notably, that universal definitions may not best represent what it means to be indigenous, and that unreflective acceptance of current definitions may fail to produce just outcomes.

4.1 Limitations of conceptions of indigeneity in New Zealand and Australia

In Chapters Two and Three I examined the ways that conceptions of indigeneity in New Zealand and Australia have been used in political and legal dialogue to justify *who* should receive settlements, state resources, or land claims and to determine the *content* of these reparations. I argued that my research on New Zealand reveals three continuing sources of injustice in New Zealand that existing liberal approaches to indigeneity fail to adequately address:

1. Who should get compensation for historical injustices?
2. Should indigenous status grant 'special' rights?
3. What is the best configuration of political representation for Māori?

In Australia, I argued that conceptions of indigeneity used in land claims cases contributed to five sources of injustice:

1. the problem of evidence (indigenous groups and individuals are unable to frame their links to land and each other in terms that the legal system recognizes)
2. the problem of authenticity (claimants are unable to meet the standard of evidence required to 'prove' their Aboriginality)

3. the problem of character (evidence provided by claimants is viewed with skepticism because it too closely adheres to the standard of authenticity required by the courts)
4. the problem of articulation (information that would 'prove' a spiritual link is sacred and cannot be shared without transgressing the group's ethics)
5. the problem of legitimacy (Aboriginal Australians are required to justify their claims to land under conditions imposed by a system of law brought by the settlers).

Some of the problems between the two contexts overlap. For example, the discourse around who should get compensation in New Zealand has relied on language of *iwi*, *hapū* and *whānau*, contributing to the disenfranchisement of non-tribally affiliated Māori from Treaty settlements, such as in the Fisheries settlements of the 1990s. Similarly, Aboriginal Australians have been subject to a discourse that questions their authenticity as Aboriginal and provides the justification for court rulings that deny claims to ancestral territory (such as *Members of the Yorta Yorta Community v. Victoria*).

The problem of legitimacy is also evident in both contexts—discourse around indigenous peoples are based in laws and systems brought by settlers, despite limited acknowledgement of Aboriginal or Māori laws and customs. The contours of the legal system influence the kinds of evidence that can be used to claim indigenous status and set the boundaries for who should be considered indigenous and what kinds of redress are available to them. In both New Zealand and Australia, questions about the founding have influenced discourse about who should receive redress for historic injustices. In New Zealand, this discourse centers on the Treaty of Waitangi, taking this contract between Māori chiefs and the British Crown as the starting point for addressing injustices. This approach privileges tribally affiliated Māori over non-tribally affiliated Māori and ignores injustices that occurred before the signing of the Treaty. In Australia,

despite the significance of the *Mabo* ruling that Australia was not *terra nullius* at the point of settlement, settler laws and customs continue to take precedence over Aboriginal ones.

In Chapter Two I considered two leading liberal accounts of justice—Waldron's supersession thesis and Kukathas' work on reparations—and argued that their accounts fail to adequately respond to the three sources of injustice I identified in New Zealand. Neither account offers a nuanced assessment of who should get compensation for historical injustices on the basis of specific indigenous identities; Waldron ignores and Kukathas rejects the idea that indigenous status should confer particular rights; and neither account asks nor offers guidance on what configuration of political representation is most appropriate for indigenous people.

In Chapter Three I suggested that one possible response to the issues in Australia is to be more critical of the role of state narratives in shaping discourse around indigeneity. Being more attentive to 'ahistorical' readings of the past through recognizing the crucial role of dreamings in Aboriginal Australian law, customs, and history might reduce the overreliance on damaging settler narratives of indigeneity. Though this approach holds some promise for countering state narratives, it is not targeted at disrupting harmful conceptions of indigeneity. It might allow for inclusion of the dreamings and more critical questioning of national history, but it does not focus directly on the meanings attached to concepts. For example, determining what measures—if any—should be used to establish if a claimant is indigenous is not just a matter of critically evaluating what events led to the descent-based language of the Land Rights Act, but involves questioning the very concept of descent and its relationship with indigeneity.

Likewise, this approach is not sufficient to respond to some of the problems identified in New Zealand. Though it would likely result in some changes to national discourse, such as more critical questioning of reliance on the Treaty of Waitangi as the basis of claims for justice, it

offers no guidance for assessing the rationale for resource distribution in New Zealand, such as whether through policies should be directed at needs alone, needs with indigeneity as a causal or intervening variable, or simply on the basis of indigenous status. For this task, an analysis of the ways events have shaped contemporary judgments is insufficient to identify or respond to the problem. Instead a sensitive and critical evaluation of the terms used to identify and discuss Māori is necessary.

4.2 A non-identical approach to conceptions of indigeneity

Given the central role of definitions of indigeneity in the rhetoric about historical injustice in both Australia and New Zealand, I suggest a theory of 'nonidentity' thinking as a means of evaluating and conceptualizing indigeneity in order to address some of the injustices detailed above. First, I briefly outline what nonidentity entails before explaining why I think it has potential for thinking about indigeneity. In particular, I focus on an indigenous research approach—Kaupapa Māori—as one example of a nonidentical understanding of indigeneity.

4.2.1 What is nonidentity?

Adorno's use of the word 'identity' is potentially confusing, since he does not employ it as political scientists often do—in order to classify groups with shared characteristics or to tell stories of peoplehood. For Adorno, identity thinking is *classificatory*—it is used to conceptualize how some objects or ideas are similar to others. For example, if I think of a cat, I am drawn to those things about it that make it similar to other cats, such as its whiskers, ears, and paws. Identity thinking therefore presents an object in representational terms and does little to examine the particulars of said object. While identity thinking might be useful as a cognitive shortcut, Adorno argues that it is problematic to rely on it. In focusing on the ways in which one object is

similar to another, the ways in which any particular object is unique are obscured. In other words, thinking of a cat as a creature with whiskers, ears and paws overlooks its unique characteristics such as its squint or its personality.

The problem is that this kind of conceptual thinking enables the domination of those things that appear to have been mastered conceptually.[316] It is a kind of intellectual hubris, for it allows individuals or institutions to think that their portrayal of ideas or objects captures the entirety of those things. As a consequence, they think that it is within their intellectual capacity to fully comprehend the world around them. In doing so, they reduce things to what they understand of them, and the particularities of the idea or object are lost within the overarching categorical framework that has been created. The result is that they experience what Adorno considers a 'withered' form of contemporary life.[317] Rather than experiences with objects or ideas being meaningful and engaging, individuals or institutions are drawn to unreflectively accept that objects and others are simply representative of certain categories or ways of thinking. Accepting the norms of identity thinking makes individuals or groups vulnerable to a latent oppression that is embedded within identity thinking.

Adorno's refutation of identity thinking is most clearly developed in *Negative Dialectics*, in which he adopts many terms for what he thinks is the alternative to identity thinking, including: the nonconceptual, the conceptless, the heterogenous, the irreducible, the qualitative, the alien, the open, the undistorted, and the unidentical.[318] I focus on the term *nonidentity* to convey Adorno's argument that it is important to look beyond similarities and instead look to the

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[316] Alison Stone, 'Adorno and Logic,' in Deborah Cook (ed.), *Theodor Adorno: Key Concepts* (Stocksfield: Acumen Publishing Limited, 2008): 55.
[317] Brian O'Conner, *Adorno's Negative Dialectic: Philosophy and the Possibility of Critical Rationality* (Cambridge: The MIT Press, 2004): 46.
[318] These terms are listed by Anke Thyen, cited in Brian O'Conner, *Adorno's Negative Dialectic*, 49.

particularities of an object or idea. Rather than focusing on identifying objects or ideas by classifying them according to similarities with other such objects or ideas, thinking in nonidentical ways encourages paying attention to those characteristics that cannot be subsumed under the universal. As Adorno suggests, "A matter of urgency to the concept would be what it fails to cover, what its abstractionist mechanism eliminates, what is not already a case of the concept."[319]

Adorno's concept of nonidentity is difficult to characterize, as defining nonidentity requires performing the very activity he is critiquing—attempting to describe a positive concept through reference to other concepts. As he states at the outset in *Negative Dialectics*, "To think is to identify."[320] As such, the condition of nonidentity is "an antagonistic system in itself—antagonistic in reality, not just in its conveyance to the knowing subject that rediscovers itself therein."[321] In this statement Adorno insists that he is not providing a general concept or definition of nonidentity or singular individuality. Accordingly, Alison Stone suggests that Adorno's nonidentity be viewed as a *limit-concept*, which indicates the place where understanding of objects or ideas encounters limits rather than offering positive information about them.[322] For example, to know where the limits are, a range of concepts might be employed to understand what something is—a cat, for instance, might include: white, furry, blue eyes, friendly. Nonidentical thinking then requires thinking more critically about what these concepts fail to explain about the cat in order to more accurately grasp what it is. In Adorno's

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[319] Theodor Adorno, *Negative Dialectics* (London: Routledge, 2000): 8.
[320] Adorno, *Negative Dialectics*, 5.
[321] Adorno, *Negative Dialectics*, 10.
[322] Stone, 'Adorno and Logic,' 56.

words, "In that sense, the nonidentical would be the thing's own identity against its identifications."[323]

This conception of nonidentity seems to focus on understanding objects rather than on understanding people's identities, but Adorno indicates that such a distinction is flawed.[324] In *Dialectic of Enlightenment*, Adorno and Horkheimer challenge the Enlightenment's privileging of instrumental reason that encourages individuals to think of themselves as superior to the natural world. In so doing, Enlightenment thinking creates a split between subject and object that subordinates matter to mind, and in so doing alienates individuals from their "human sensuality and affectedness."[325] In other words, the Enlightenment idea of the unitary self—with the capacity to dominate nature—detrimentally directs individuals to distinguish between the thinking subject and matter.[326] In contrast, Adorno understands the self as "decentered and multiple,"[327] and rejects the dichotomy of object and subject. Through this rejection of a unitary self, Adorno's nonidentity thinking can therefore be understood as applying not only to the classification of objects, but to the understanding of identities.

Elaborating on how to recognize the nonidentical, Adorno suggests setting concepts in constellation, for this "illuminates the specific side of the object, the side which to a classifying procedure is either a matter of indifference or a burden."[328] In attempting to understand a particular object, any one concept is limited in what it can convey about that object. Adorno

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[323] Adorno, *Negative Dialectics*, 161.
[324] Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment*, trans. John Cumming (New York: Continuum Publishing Company, 1991): 275-6.
[325] Fred Dallmayr, 'The Underside of Modernity: Adorno, Heidegger, and Dussel,' *Constellations*, Vol. 11, No. 1 (2004), 105.
[326] Dallmayr, 'The Underside of Modernity,' 104.
[327] Edwina Barvosa, *Wealth of Selves: Multiple Identities, Mestiza Consciousness and the Subject of Politics* (College Station: Texas A&M University Press, 2008), 5. As Barvosa notes, he does not, however, theorize how these different elements might be organized within the self, see 5-6.
[328] Adorno, *Negative Dialectics*, 162.

argues that looking to constellations of concepts—a range of different concepts that depict certain facets of a particular object or idea—will provide a more accurate understanding of that object or idea than one concept alone. For example, to describe a cat, concepts such as furry, small, and friendly are brought together to get a better sense of what a cat is. Adorno does not suggest, however, that simply bringing together a range of concepts will provide a richer, more accurate, sense of an object or idea. While this might lead to greater understanding of an idea, he thinks that understanding will remain confined by pre-existing ideas and structures that have the potential for domination. To avoid this, Adorno advocates attempting to identify the aspects of an object that are *not* described by a constellation of concepts. Resisting definition by concepts challenges conditions that attempt to define and control individuals and societies.

Constellations have one further characteristic that Adorno draws on to develop a more comprehensive sense of nonidentity thinking. For him, constellations are not simply sets of concepts, but also a series of historical processes, that "can only be delivered by a knowledge mindful of the object in its relation to other objects… Cognition of the object in its constellation is cognition in the process stored in the object."[329] Constellations therefore mark not only the physical, but also the temporal characteristics of an object. While a description of a cat might include commenting on her long whiskers, pointed ears, and blue eyes, I might also note the events she has participated in or encountered in her life—getting scared by a car, sitting in the sun on the porch, or exploring the botanic gardens. While these constellations of historical events can never fully grasp an object, they move towards understanding the particularity of that object.

In short, focusing on the moment of nonidentical experience may help to avoid a 'withered' engagement with the world and encourages individuals, groups, and societies to

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[329] Adorno, *Negative Dialectics*, 163.

embrace feeling, emotion and suffering in ways that enrich their lived experiences. It serves as a reminder that no matter the complexity of a concept, its universalizing nature may reduce or prevent emancipation because it obscures important facets of any particular idea or object. Adorno argues that attempting to reveal the particularity of concepts is essential for humans' conscious, critical and autonomous response to the world.

4.2.2 How might nonidentity be useful for thinking about indigeneity?

The dual sense of these constellations—conceptual and historical—makes nonidentity thinking particularly appealing as a method for approaching questions of indigeneity. Indigeneity is often defined either in criterial terms—such as being first inhabitants of a territory, or having a particular relationship with the land—or relational terms—such as the power dynamics between colonializers and indigenous communities or between indigenous groups and the state. Thinking in constellations would encourage engaging with both criterial and relational definitions of indigeneity to critically explore the distinctive aspects of indigeneity in a particular moment and location.

This contrasts with approaching indigeneity from the perspective of identity thinking, which Adorno claims is intimately related to, and expressive of, the relations of domination and exploitation that define global capitalism.[330] Identity thinking not only captures the oppressive nature of capitalism, but is indicative of the relationships of domination and exploitation imposed on indigenous communities by colonial powers. The malevolence Adorno detects in identity thinking bears strong resemblance to Māori scholar Linda Tuhiwai Smith's critique of Western approaches to knowledge and thinking, which she argues perpetuate the domination of

[330] Bradley Macdonald, 'Theodor Adorno, Alterglobalization, and Non-identity Politics,' *New Political Science*, Vol. 34, No. 3 (2012): 328.

indigenous communities through forcing indigenous groups to conform to standards of research that were—and continue to be—oppressive.[331] Adorno's abhorrence of conformity, as seen in his critique of the culture industry, points to his theory as a promising resource for thinking about the ways in which indigenous groups may be disempowered by 'identity thinking'—that is, by classificatory thinking.

His theory urges more careful consideration of whether indigeneity should be characterized in ways that are not determined by an external regime of power. This mindfulness of the dangers of identity politics can be seen in Wendy Brown's argument that certain emancipatory aims of identity politics are subverted by their 'wounded attachments.'[332] Brown argues that identity politics is shaped by Nietzschean *ressentiment*—rather than creating an identity internally, groups tend to create an identity in opposition to the group that has exploited or dominated them in the past. In doing so, each identity-based group is buying in the hegemonic values and beliefs of history and the present culture. According to Brown, this is adding insult to injury—worse, it is adding injury to injury—insofar as it is further wounding an already wounded history. While Adorno theorizes identity more broadly than Brown, there are key similarities between the two approaches—namely, that identity is dangerous because it disguises the uniqueness of objects, people, or concepts. Brown's theory not only reinforces Adorno's concern that identity thinking is oppressive, but highlights the insidious nature of that oppression by showing its deceptive appearance of emancipation. Similarly, Adorno argues that identity thinking cloaks itself in the language of liberation, but reinforces oppressive norms and actions. His commitment to nonidentity thinking stems from his hope that it helps "to retain a sense of its specificity as an intellectual act, separate from the political practices of the current period, that

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[331] Linda Tuhiwai Smith, *Decolonizing Methodologies* (London: Zed Books, 1999).
[332] Wendy Brown, 'Wounded Attachments,' *Political Theory*, Vol. 21, No. 3 (1993): 390-410.

can also allow it to attend better to the realization of a future world in which domination and human suffering are no longer defining features."[333]

For this reason, I propose drawing on Adorno's suggestion of 'thinking in constellations' in order to highlight the unique experience and history of different conceptions of indigeneity. Rather than focusing solely on identifying specific features of indigeneity, I suggest looking to the constellations of concepts that evoke indigeneity in order to reconsider the possibilities of indigenous rights and politics. This encourages avoiding totalizing definitions of indigeneity—such as those experienced by the *adivasi* in India—or exclusionary definitions—such as those experienced by urban Māori in New Zealand—and moves towards more recognition of the unique experience, history and culture of indigenous peoples.

This approach recommends questioning international descriptions of indigeneity such as those provided by the United Nations Permanent Forum on Indigenous Peoples. Although the Forum deliberately avoids providing or using any formal definition of indigeneity (instead focusing on self-identification), it is clearly advocating for some sort of understanding of indigeneity that allows for the kinds of strategic alliances that would enable aboriginal groups to promote policies based on general agreement around the concept of indigenous peoples. My suggestion is that this international notion of indigeneity—however loosely defined—should be troubled by thinking more carefully about the particular space, history, and experience of the peoples it is attempting to represent, even though this might disrupt some international indigenous alliances.

For example, in the case of the *adivasi* in India, embracing notions of ecological harmony might fit with an international view on what it means to be indigenous, but this imposes a

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[333] Macdonald, 'Theodor Adorno, Alterglobalization, and Non-identity Politics,' 329.

definition on the *adivasi* that does not withstand changes in the environment or the group's values. Drawing on Adorno's theory of nonidentity allows for the construction of a much more nuanced picture of what it means to be indigenous in that specific location and time in history, without requiring the community to conform to a static, pre-conceived, non-indigenous notion of environmental spirituality. In particular, this requires paying attention to the ways in which criterial definitions, such as a community's connection with the land, might change in relation to their current context.

4.3 Kaupapa Māori as non-identical indigeneity

One example of a way in which nonidentity thinking might be applied to cases of indigenous identity is seen in the Kaupapa Māori[334] research approach developed by indigenous scholars and activists in New Zealand. Explaining the genesis of Kaupapa Māori, Linda Tuhiwai Smith—an early and prominent advocate for the approach—argues that: "The word itself, 'research', is probably one of the dirtiest words in the indigenous world's vocabulary. When mentioned in many indigenous contexts, it stirs up silence, it conjures up bad memories, it raises a smile that is knowing and distrustful."[335] Identifying the ways that Western research has damaged and oppressed Māori people, Tuhiwai Smith advocates for an approach that "bring[s] to the centre and privilege[es] indigenous values, attitudes and practices rather than disguising them

[334] It is difficult to define Kaupapa Maori briefly, and the following paragraphs are intended to flesh out in more details the variety of meanings of Kaupapa Maori, but the literal meaning of Kaupapa is: proposal, subject, matter for discussion, theme (see http://www.maoridictionary.co.nz/word/2439). Māori refers to the indigenous peoples of New Zealand.
[335] Tuhiwai Smith, *Decolonizing Methodologies*, 1.

within Westernized labels such as 'collaborative research'."[336] The resulting approach is known as 'Kaupapa Māori', 'Kaupapa Māori research' or 'Māori-centered research'.

The Kaupapa Māori approach differs from traditional Western research methodologies and corresponds to Adorno's call for nonidentity in at least two ways. First, its very name denies an appeal to universality, instead drawing specifically on the terminology of 'Māori' or *tangata whenua*[337] rather than that of 'indigeneity' more broadly. The word 'Māori' is itself an indigenous term that was used prior to European settlement, but in current usage it evokes a colonial history in which Māori —the indigenous population—are contrasted with 'Pākehā'[338]—the non-indigenous settler population.[339] The importance of this naming of research as specifically and uniquely Māori rejects a generalized discourse that assumes oppression has universal characteristics. By focusing on the particularity of Māori experiences, customs and perceptions, Kaupapa Māori displays a nonidentical approach to knowledge, research, and definition that allows for more nuanced and accurate understandings of what it means to be indigenous in New Zealand.

Kaupapa Māori also parallels Adorno's call for nonidentity thinking by demonstrating how constellations of concepts might be employed to create a dynamic understanding of indigeneity. It is not a based on a set of prescriptive principles that aim to transcend cultural and historical boundaries, but rather it is embedded in local context, time and communities. Thus, the second way in which Kaupapa Māori differs from conventional Western research methodologies

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[336] Tuhiwai Smith, *Decolonizing Methodologies*, 125.
[337] *Tangata whenua* is roughly translated as 'people of the land.'
[338] Pākehā is a controversial term, as it originally referred only to the first white settlers in New Zealand and their descendants, but is now more broadly used to refer to non-indigenous white people in New Zealand. Because of the negative connotations originally associated with term, some white New Zealanders now prefer the classification 'European' or 'New Zealander,' claiming that it is incorrect to label them Pākehā if they are not descended from the original settlers. In my usage here, I am reverting to the terminology of 'Pākehā' given that I intend to draw upon associations with colonial history.
[339] Tuhiwai Smith, *Decolonizing Methodologies*, 6.

is in its practice. While Kaupapa Māori research acknowledges that guidelines required by formal university ethics committees may be important as background conditions for Kaupapa Māori, these universal guidelines do not comprehensively outline ethical conduct within Māori communities. In particular, the Western focus on confidentiality and individual consent fails to recognize certain cultural features that may be specific to particular populations.[340] For example, the Institutional Review Board (IRB) guidelines at the University of Virginia maintain that respect for persons involves "protecting the autonomy of all people and treating them with courtesy and respect and allowing for informed consent."[341] While this might be a laudable objective, the focus on individual autonomy fails to adequately address the ethical obligations for communally-located knowledge and consent. For example, it does not appreciate that many indigenous groups do not see knowledge as a public or shareable commodity, but as sacred and a source of identity. As such, these universal 'objective' ethical guidelines are not only a poor guide to conducting certain kinds of research, but they may perpetuate oppressive research practices that indigenous groups have faced.

Kaupapa Māori therefore asks researchers to extend their research ethics beyond such 'universal' principles. Unlike conventional Western research methods, the Kaupapa Māori approach does not prescribe one set of ethical guidelines for researchers to follow. Instead there is a dynamic set of guidelines for engagement with Māori populations that are consistently being

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[340] Two examples of university ethics committees with such foci are the federally mandated Institutional Review Board (IRB) in the United States (see, for example, the IRB protocol details at the University of Virginia: http://www.virginia.edu/vpr/irb/) and the university ethics committees in New Zealand (see, for example, Martin Tolich, 'Pākehā "Paralysis": Cultural Safety for Those Researching the General Population of Aotearoa,' *Social Policy Journal of New Zealand*, Is. 19 (2002): 164-178). One notable exception to this 'Western' model is the Canadian Government's ethics committee—the Panel on Research Ethics (PRE)—which requires indigenous community consent along with individual consent (see http://pre.ethics.gc.ca/eng/policy-politique/interpretations/research-recherche/).

[341] University of Virginia Institutional Review Board of Social and Behavioral and Sciences, 'IRB: A Brief History,' http://www.virginia.edu/vpr/irb/sbs/about_history.html (accessed March 15, 2013).

amended to ensure they reflect local community traditions or expectations. One example of such guidelines for Kaupapa Māori research is:

> Aroha ki te tangata (a respect for people)
> Kanohi kitea (the seen face, that is present yourself to people face to face)
> Titiro, whakarongo … korero (look, listen … speak)
> Manaaki ki te tangata (share and host people, be generous)
> Kia tupato (be cautious)
> Kaua e takahia te mana o te tangata (do not trample over the mana[342] of people)
> Kaua e mahaki (don't flaunt your knowledge).[343]

These guidelines are discussed, debated, and altered depending on the context in which they will be employed, following one of the principle tenets of Kaupapa Māori that "writers do not tell you *how to do* Kaupapa Maori research."[344]

Therefore, while the IRB approach is intended to broadly protect populations being studied, their universal approach to ethics consent means that they fail to fully acknowledge some of the key principles for acting ethically in particular contexts with specific populations. The same is true of New Zealand university ethics committees—their focus on impartial, universal ethical tenets are deficient for research in a Māori context. These ethics committees could be characterized as a form of identity thinking—they encourage unreflective acceptance that confidentiality and individual consent are the important tenets of ethical research, rather than exploring the ways in which those assumptions might fail to recognize other ethical commitments to particular communities and thus work as oppressive forces.

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[342] Mana is roughly translated as spiritual power/prestige/authority.
[343] These guidelines are acknowledged by the New Zealand Ministry of Social Development as critical practices for Maori Research, see Kataraina Pipi et al., 'A Research Ethic for Studying Māori and Iwi Provider Success,' *Social Policy Journal Document*, Is. 23 (2004): 144.
[344] Shayne Walker, Anaru Eketone and Anita Gibbs, 'An Exploration of Kaupapa Maori Research, Principles, Processes and Applications,' *International Journal of Social Research Methodology*, Vol. 9, No. 4 (2006): 335 (italics in original).

In contrast, Kaupapa Māori attempts to address these shortcomings by repositioning researchers "in such a way as to no longer need to seek to give voices to others, to empower others, to emancipate others, to refer to others as subjugated voices, but rather to listen to and participate with those traditionally 'othered' as constructors of meanings of their own experience and agents of knowledge."[345] The Kaupapa Māori approach is emancipatory not because it deliberately sets out to liberate Māori from their colonial history, but because its attentiveness to the 'othering' process of Western styled research. It addresses the failure of Western researchers to understand that "…it has been taken for granted that indigenous peoples are the 'natural objects' of research. It is difficult to convey to the non-indigenous world how deeply this perception of research is held by indigenous peoples."[346] As such, even when complying with university ethics requirements, researchers who hope to study indigenous issues may be implicated in such oppressive practices.[347]

Challenging this universal approach, Kaupapa Māori asserts itself as an activist methodology that is "used as both a form of resistance and a methodological strategy, wherein research is conceived, developed, and carried out by Maori, and the end outcome is to benefit Maori."[348] Kaupapa Māori does not claim to be objective or universal in its implementation. It is described as transformational, as a methodology of resistance, as an intervention strategy and, perhaps most significantly, as dynamic.[349] These attributes—rejection of universal values, a

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[345] Russell Bishop, 'Freeing Ourselves from Neocolonial Domination in Research: A Kaupapa Maori Approach to Creating Knowledge,' *Cultural Studies and Education*, Vol. 11, No. 2 (1998): 207.
[346] Tuhiwai Smith, *Decolonizing Methodologies*, 18.
[347] Rachael Fabish, 'The Impact of Tā Te Māori Rangahau / Methodologies of Māori Research on My Work,' *Te Kāhui Kura Māori*, Vol. 1, No. 2 (2012), http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid00_2Kahu-t1-g1-t3.html (accessed January 30, 2013).
[348] Walker, Eketone and Gibbs, 'An Exploration of Kaupapa Maori Research, Principles, Processes and Applications,' 331.
[349] See Kaupapa Maori, 'Definitions,' http://kaupapamaori.com/theory/6/ (accessed January 30, 2013).

focus on a particular time, context, and culture, and approaching research through thinking in constellations—are mirrored in Adorno's call for nonidentity thinking.

Despite Kaupapa Māori's strengths as a useful illustration of what nonidentity thinking might look like in indigenous politics, there are some ways in which it is not a perfect exemplar of such thinking. While Adorno criticizes privileging the universal over the particular, it is unclear to what extent he would be accepting of an approach that in some cases explicitly denies non-Māori involvement. In some descriptions, Kaupapa Māori requires that research is conducted solely by and for Māori: "It is the process by which the Māori mind receives, internalises, differentiates, and formulates ideas and knowledge exclusively through te reo Māori. Kaupapa Māori is esoteric and tuturu Māori. It is knowledge that validates a Māori world view and *is not only Māori owned but also Māori controlled*"[350], it is "an attempt to 'retrieve some space' to plan, organise, conduct, analyse and give back culturally responsive research primarily *by Māori, and for Māori,*"[351] and it is "*research by Māori for Māori with Māori*."[352] While it could be argued that this is one manifestation of particularity—recognizing that individuals are not all the same and that some have greater legitimacy or right to talk on some matters than others—it is troublingly exclusionary.

This concern is further complicated by the fact that some activists and scholars define Kaupapa Māori as an enterprise that actively *requires* non-Maori involvement under the

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[350] Tuakana Nepe, 'Te Toi Huarewa Tipuna: Kaupapa Maori, An Educational Intervention System,' *Unpublished MA Thesis,* Auckland, NZ: University of Auckland (1991) (my italics).
[351] J.B.J Lee, 'Ngā Tohutohu: A Purākau Approach to Maori Teacher Narratives,' in *Informing Our Practice, Special Volume: Selections from the 2002 TEANZ Conference*, Deborah Fraser and Roger Openshaw eds. (Palmerston North: Kanuka Grove Press, 2003) (my italics).
[352] Huia Tomlins Jahnke and Julia Taiapa, 'Māori Research,' in Carl Davidson and Martin Tolich (eds.), *Social Science Research in New Zealand: Many Paths to Understanding* (Longman: Auckland, 1999): 45 (my italics).

conditions of the Treaty of Waitangi.[353] For example, Martin Tolich and Russell Bishop argue that non-indigenous New Zealanders should not be excluded from Kaupapa Māori research because they not only have a right but an obligation to be involved on the basis of the partnership principle of the Treaty of Waitangi.[354] This understanding of Kaupapa Māori, in which non-indigenous researchers are obligated to participate, reduces the concern that particularity emanating in part from the identity of the researcher might be exclusionary or inappropriate.

Even if there is disagreement about the extent to which non-indigenous researchers can or should be involved in Kaupapa Māori, I argue that the problem of particularity based on identity is somewhat mitigated by the contingency of these definitions. As a result of the oppressive experiences and effects of Western research for Māori in New Zealand, most scholars and activists have deliberately avoided offering intransigent defining principles for Kaupapa Māori. As Leonie Pihama states, "Kaupapa Māori theory is evolving, multiple and organic."[355] As such, the problem of whether the particularity of participants creates as many or more problems than it resolves, relies to some extent on whether the definition includes or excludes non-indigenous individuals. This is clearly a somewhat unsatisfactory resolution to the question of whether this kind of particularity in Kaupapa Māori has positive or negative effects; however, it does highlight one benefit of nonidentity thinking, that particularity might induce contingency that requires constant assessment of the relative advantages and disadvantages of particular definitions, as I detail below.

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[353] The Treaty of Waitangi was signed between the Crown and around 500 Māori chiefs in 1840 to establish New Zealand as British territory, and extended rights to Māori as British citizens. The Treaty is controversial because two copies were produced—a Māori version and an English version—with each differing in meaning. In 1975, a tribunal was created to offer formal acknowledgement of and reparations for the harm caused by failure to meet the obligations outlined in the Treaty.

[354] Russell Bishop, 'Initiating Empowering Research?' *New Zealand Journal of Educational Studies*, Vol. 29, No. 1 (1994): 175; Tolich, 'Pākehā "Paralysis."

[355] Leonie Pihama, 'Tehei Mauri Ora, Honouring Our Voices: Mana Wahine As Kaupapa, Māori Theoretical Framework,' *Unpublished PhD Thesis*, Auckland, New Zealand: The University of Auckland (2001): 113.

Although Kaupapa Māori is a research approach rather than a political policy or practice *per se*, I argue that it is a close approximation of what nonidentity thinking might look like in a more overtly political context. A regular criticism of Adorno's work is that he provides few resources for concrete, positive action. Outlining the ways that Kaupapa Māori reflect a nonidentical approach to an indigenous problem may not comprehensively show how such an approach might be used in the halls of government or in producing policy, but it does gesture towards ways that such an ethos might significantly alter the status quo.

4.4 Challenges to nonidentity thinking

Having outlined its potential for thinking about indigeneity, I want to recognize three challenges raised by embracing nonidentity. These challenges are not serious enough to undermine the value of considering nonidentity as a path towards more fruitful engagement with questions of indigeneity and the myriad problems facing indigenous peoples. However, by raising these concerns, I acknowledge that this approach is not the ultimate or final resolution for defining indigeneity. It is, rather, an important starting point for more nuanced conversations about how to approach such questions.

One concern with this approach is that it might be seen as distorting Adorno's commitment to championing self-conscious, critical reflection of autonomous individuals. While this commitment may sound compelling for indigenous communities seeking self-determination, his individualistic approach may not provide space for *community* self-determination, which is often an important feature of indigenous discourse and development. Adorno's abhorrence of the universal at the cost of the particular suggests that it is not possible to simply extend Adorno's

ideas of critical self-reflection to communities without undermining one of his key critiques of the culture industry: that it encourages conformist behavior and thought.

In Kaupapa Māori, for instance, despite the lack of specificity about guiding principles for research, there are some scholars and activists who are relatively prescriptive about who can conduct such research and what it might entail. For example, Russell Bishop explains that "Kaupapa Māori research is collectivistic and is oriented toward benefiting all the research participants and their collectively determined agendas, defining and acknowledging Māori aspirations for research, while developing and implementing Māori theoretical and methodological preference and practices for research."[356] This 'collectivistic' approach defined by 'Māori' is problematic insofar as it is unclear who determines what the collective wants and who counts as Māori. There are a number of possible responses to such questions that are beyond the scope of this chapter[357], but defining indigenous research methods through collective decision-making is clearly antithetical to Adorno's theory. While Adorno's individualistic approach does not necessarily prevent his ideas being used to define indigeneity, further theorizing is required to address whether it might be possible to reconcile his aversion to conformity with group rights and collective action.

The second challenge is that moving away from totalizing definitions of indigeneity—such as those Shah identified in India—raises the opposite problem: how can any kind of workable definition be created if the particular must be taken into consideration for each group, location, and moment in time? Does the differentiation required by thinking in constellations

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[356] Russell Bishop, 'Freeing Ourselves from Neo-Colonial Domination in Research: A Kaupapa Māori Approach to Creating Knowledge,' in Norman K. Denzin and Yvonna S. Lincoln (eds.), *The Sage Handbook of Qualitative Research* (Thousand Oaks: Sage Publications, 2005): 114.

[357] There is some scholarly work considering the democratic deliberation and decision-making processes that Maori *iwi* (tribes) commit themselves to. These processes support respectful and equal treatment of all community participants, although they still tend to favor the voices of hereditary leaders and elders over other community members, for example see Sissons, *First Peoples*.

mean that definitions will be too unwieldy to use in any practical sense? Psychologists have studied people's use of concepts, and show that humans classify and generalize for a reason: if we did not, there would be too much information for us to recognize and respond to.[358] Focusing on the singularity of each definition of indigeneity might mean getting overwhelmed in details and failing to be able to act on a broader picture. Being unable to settle on an action means that this kind of approach might also be unsuited to democratic decision-making due to difficulties in agreeing on actions related to complex definitions.

One tentative response to this is to turn more broadly to Adorno's negative dialectics as a tool for moderating critical reflection on definitions. While Adorno follows Hegel's dialectic to some extent, he is clear that his dialectic will not result in a final 'conclusion.'[359] Instead, Adorno seeks an open-ended questioning "that does not presuppose the identity of being and thought" and embraces identity in its "unreconciled state."[360] This kind of questioning does not prohibit the possibility of reaching provisional conclusions about objects and ideas, instead it serves as a reminder of the inability for concepts to fully and coherently render the world. It also encourages attentiveness to the particularity of things. Provisional agreement can lead to recommendations for and acceptance of a compromise, not just as a result of bitter agreement to find a workable solution to the challenges facing indigenous peoples, but based on recognition that there are multiple plausible interpretations of concepts of indigeneity that might yield entirely different, but still valid, conclusions. Further, discussion about different interpretations might allow for

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[358] For example, see Takashi Yamauchi and Arthur B. Markman, 'Category Learning by Inference and Classification,' *Journal of Memory and Language*, Vol. 39 (1998): 124-148 and Takashi Yamauchi and Arthur B. Markman, 'Inference Using Categories,' *Journal of Experimental Psychology*, Vol. 26, No. 3 (2000): 776-795.
[359] This is a simplistic summary of Hegel's theory, but I use it to emphasize Adorno's rejection of some final conclusion. He says: "We are concerned here with a philosophical project that does not presuppose the identity of being and thought, nor does it culminate in that identity. Instead, it will attempt to articulate the very opposite, namely the divergence of concept and thing, subject and object, and their unreconciled state." Theodor Adorno, 'Lecture 1: The Concept of Contradiction,' *Lectures on Negative Dialectics* (Cambridge: Polity Press, 2010): 6.
[360] Adorno, 'Lecture 1,' 6.

clarification of the inadequacies of one interpretation over another. While nonidentity thinking encourages complexity that might stymie quick or easy action, it also encourages discussion that might improve the quality of eventual decisions. In practical terms, there are still obstacles to creating workable definition of indigeneity—for example, what fora or methods are most likely to yield the most democratic or just results?—but approaching conclusions from nonidentity thinking as provisional in nature is a promising avenue to explore.

Kaupapa Māori demonstrates both the complexities of such an approach and its potential rewards. On one hand, definitions of Kaupapa Māori are contingent on local settings, experiences, and the scholars and activists who are involved in such communities or research. As such, there is ample opportunity to challenge or revise definitions to suit a particular moment, place, or group. On the other hand, these contingencies may at times slow down deliberation and decision-making or even result in trenchant disagreement.

One final problem with nonidentity thinking is that conclusions cannot be easily generalized from one community to another, thus successes in one area might not be transferrable to others and the potential for coalition politics might be compromised. Against this view, Pihama argues that Kaupapa Māori is not only particular in character, contending that "Kaupapa Māori theory is simultaneously local and international. Local, in that it is necessarily defined by Māori for Māori, drawing on fundamental Māori values, experiences and worldviews. International, in that there are many connections that can be made through a process of sharing Indigenous Peoples theories."[361] In other words, despite Kaupapa Māori being specifically

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[361] Pihama, 'Tehei Mauri Ora, Honouring Our Voices,' 102. Julie Cruikshank makes a similar claim about Yukon Athabascan and Tlingit speaking peoples in the Yukon Territory, suggesting that "local knowledges" could respond to and alter global conceptual narratives, see *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Lincoln: University of Nebraska Press, 1998). While not explored fully here, this argument also raises the possibility of some similarities or connections across indigenous groups.

directed at Māori in New Zealand, there might be aspects of it that can and should be shared with other indigenous peoples globally to help generate new responses to indigenous problems.

Though in general Adorno's call for attentiveness to particularity should not be simply understood as a 'local' rather than an 'international' approach, in this context, there are similarities between the two as described by Pihama. Drawing on specifically Māori experiences and values allows Kaupapa Māori to interpret events in the context of Māori culture with reference to a violent colonial history and oppressive policies and practices that have continued through contemporary society. This might—and should—include assessment not only of the kinds of practices that indigenous groups might get involved in (such as Kaupapa Māori), but also who has the right to be involved in such practices. More broadly, indigenous groups worldwide might take lessons from such an approach and its effects. Nevertheless, the potential for general conclusions to be drawn from specific contexts and conditions is significantly compromised in nonidentity politics.

Despite these challenges, there is much to recommend Adorno's theory of nonidentity for indigenous politics, especially given that defining indigeneity is an important task for indigenous politics. Failing to understand what indigeneity entails means that accounts of historical injustice are likely to misidentify who should be included in policies of acknowledgment or restitution and what kinds of resources or rights should be available to indigenous peoples. Even when indigeneity is defined, however, this can lead to problems, as seen in the example of the *adivasi* in India. Embracing Adorno's concept of the nonidentical is a promising way to move beyond totalizing definitions of indigeneity and towards the possibility for more flexible and just policy-making on indigenous issues through more nuanced assessments about the nature of indigeneity.

Conclusion

Kevin Bruyneel argues that political science has overlooked indigenous politics to the detriment of not only indigenous groups but the discipline in general. My dissertation responds to this criticism by drawing scholarship in anthropology and indigenous studies into conversation with that of mainstream political theory in order to contribute to conversations around an enduring question in political theory: what is owed to groups who have suffered past injustices?

Māori and Aboriginal Australians have sought protections that are related to their indigenous, as distinct from simply minority, status. As recognition of a concept of indigenous rights has grown, some of these individuals and groups have received some acknowledgement and redress for past injustices. In this dissertation, however, I argued that political discourse around indigenous peoples in New Zealand and Australia limits recognition and rectification of historic and contemporary injustices. Without understanding how conceptions of indigeneity function or the ethical demands they might generate, these injustices will persist. In particular, I suggest that liberal accounts of historical injustice inadequately address indigenous grievances, as they fail to consider the ways that indigeneity in and of itself might affect entitlements.

In my analysis of discourse around indigeneity in New Zealand and Australia, I showed the ways in which current conceptions of indigeneity obscure or deny indigenous calls for justice. In international affairs, domestic rhetoric, and academic studies, New Zealand is often held up as an exemplar of progressive policy towards its indigenous peoples. I argue, however, that it continues to perpetuate injustices against some indigenous individuals in part because political discourse takes as a settled question the identity of the recipients of Treaty settlements. The language of *iwi*, *hapū* and *whānau* that has been in use since the early 1990s in Treaty settlement proceedings has allowed the state to justify ignoring non-tribally affiliated individuals from the

claims process. My argument is not that this language caused the government to ignore non-affiliated Māori from claims—it is possible, perhaps even likely, that this would have been the case regardless the terminology used—but that the language has been used to justify the marginalization of Māori who are not affiliated with *iwi*, *hapū* and *whānau*. Because these individuals might have just claims against the state, their marginalization is a failure of justice.

Neither does New Zealand's discourse around indigeneity critically engage what other duties might flow from these concepts, including justifications for distributive policies or arrangements of Māori political representation. For example, Māori living overseas might have rights to representation in New Zealand as *tangata whenua* (people of the land) that they are not currently afforded. These conclusions challenge the response of the state to questions of historic injustice, but they also challenge the conclusions of important liberal theories of historic injustice, such as those of Jeremy Waldron and Chandran Kukathas. Both these scholars' accounts fail to take into account how indigenous identity might alter who is owed compensation for past and current injustices, the ways that indigeneity might affect the kinds of redress required, and what configuration of political representation best meets the entitlements of indigenous peoples. As a result, I argue that we need better theoretical resources for addressing these problems of injustice.

In my analysis of Australian legislation and court cases relating to land claims, I identified five ways in which the language used around indigeneity is damaging to indigenous Australians' identity and calls for justice. I suggested that the normative framework around legal claims in Australia privileges liberal values, which may clash with or obscure Aboriginal Australian values. For example, the bias towards written evidence in court elevates settler accounts of history and culture over indigenous accounts that are shared orally and often in the form of storytelling or myth. Similarly, there is a presumption in the legal system that knowledge

is a commodity that can be publicly shared, while many Aboriginal Australian groups treat knowledge as sacred. This understanding of knowledge as sacred can result in fragmentation of information across a community and an unwillingness to share certain knowledge with outsiders (especially in a courtroom setting), thus compromising Aboriginal claims in legal settings.

One challenge to the dominance of liberal values in these settings is the work of postcolonial scholars, Ashis Nandy and Homi K. Bhabha, who seek to disrupt established narratives by giving voice to subaltern histories. Nandy suggests an 'ahistorical' reading of the past, in which myths rather than 'facts' are the central organizing feature for explaining the past. Both he and Bhabha also challenge linear conceptions of history, allowing the morality of other times to influence contemporary judgments.

These accounts go some way towards addressing some of the problems in Australia, but their focus is on the ways in which discourses around history privilege certain groups in society. Critically assessing the role of history in shaping discourse is an important component of addressing historic injustices, but the problems identified in Australia and New Zealand require a theory that focuses more directly on the meanings attached to specific concepts. For example, assessing the rationale for resource distribution in New Zealand—whether on the basis of needs, needs with indigeneity as a causal or intervening variable, or on the basis of indigenous status alone—requires more than an analysis of the ways events have shaped contemporary judgments. It requires a sensitive and critical evaluation of the terms used to identify and discuss Māori.

Nonidentity thinking might be a promising resource through which to achieve this. It challenges conceptual thinking that assumes an individual's or institution's portrayal of ideas or objects captures them in their entirety. While conceptual thinking is often a necessary mechanism for paring down the complex and competing information humans are exposed to in

their everyday lives, relying on it as an approach to all experiences and knowledge results in distorted and sometimes harmful understandings of ideas or objects. Nonidentity thinking requires critical engagement not only with the particulars of a concept, but also engagement with the space around it—what is not present is often as important as what is. Drawing on constellations of concepts and historical processes to more accurately understand what any particular concept might entail provides a process by which to critically engage with discursive and legal norms to resist the hegemony of a set of ideas and practices.

Nonidentity thinking presents some challenges, such as the lack of generalizable conclusions from one community to another. On the one hand, this is a strength of the approach, as it prevents ideas being unreflectively applied in different contexts. For instance, despite New Zealand and Australia sharing some basic similarities—they are both white, settler nations in which indigenous people form a minority of the population—there are significant differences between their histories, their political cultures, and their responses to their indigenous populations. Nonidentity thinking allows for nuanced exploration of the way that concepts of indigeneity operate in these specific contexts, taking into account these differences. Although Kaupapa Māori might be a promising resource in New Zealand for exploring conceptions of indigeneity, applying that approach in Australia could be just one more imposition of another value system on Aboriginal Australians. On the other hand, because this specificity means that responses in one community cannot be assumed for another, successes in one area may not be transferable to others. This inability to directly translate ideas across contexts might compromise the ability of the global indigenous rights movement to employ rhetoric that relies on shared features of indigeneity. It may even compromise their ability for coalition politics, given that nonidentity thinking emphasizes difference.

Despite these challenges, I argue that nonidentity thinking serves as a promising resource for exploring claims of indigeneity. Though I have focused on New Zealand and Australia in this project, a more extensive evaluation of the ways in which indigeneity operates in white, settler nations would include Canada and the United States. Notably, the Canadian and United States governments have differed from Australia and New Zealand in their response to indigenous sovereignty. To varying degrees, both have granted indigenous peoples the status of 'nations within a nation,' which presents different opportunities and challenges for responding to historic injustices. Operating as sovereign nations likely affects the discourse around concepts of indigeneity and the justifications that stem from these conceptions.

In Canada, for example, the Supreme Court passed a judgment in *Delgamuukw v. British Columbia 1997* that recognized "full property ownership," yet placed a caveat that land could not be used in non-traditional ways that would "destroy" the "special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture."[362] Though *Delgamuukw* has been depicted as a progressive decision that established oral tradition as equal to written testimony in a court setting[363], placing restrictions on 'acceptable' activities on the land raises questions about indigenous autonomy, identity, and relationship with the state. Nonidentity thinking would encourage critical evaluation of this decision.

Nonidentity thinking might also be considered as a resource for indigenous peoples outside the Anglosphere, given its attentiveness to historical circumstances and the particularities of discourse in any specific context. At the outset of my dissertation I raised concerns about

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[362] Supreme Court of Canada, *Delgamuukw v. British Columbia*, 1997, 3 S.C.R. 1010: 1015, https://scc-csc.lexum.com/scc-csc/scc-csc/en/1569/1/document.do, accessed July 26, 2014.
[363] Peter Russell, 'High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence,' *Saskatchewan Law Review*, Vol. 61 (1998): 247-276.

universal definitions of indigeneity, suggesting that they have the ability to foreclose certain conversations or reparations. Nonidentity thinking explicitly aims to promote critical questioning of such definitions, but it is possible that in so doing it could be a source of restriction itself. If all definitions are open to discussion, states or individuals could take advantage of this contingency as a means to promote conceptions beneficial to themselves. This is certainly a danger in the white-settler nations, but may be more (or less) so in other contexts. For this reason, detailed analysis of the ways that conceptions of indigeneity function in countries outside the Anglosphere are necessary to ascertain whether nonidentity thinking would be an appropriate or effective tool outside the white, settler states.

Because nonidentity thinking is a dialogical *process* through which to critically consider the ways that indigeneity is used and understood, it is impossible to specify the precise ways that conceptions of indigeneity might be affected by employing a nonidentical approach. This contingency can be a strength, especially given the nature of indigenous politics and scholarship. Nonidentity thinking requires attending to the ways that constellations of concepts work to magnify or diminish particular ideas or historical events. To effectively identify and assess a range of constellations, nonidentity thinking also encourages reflection on the important question of who gets to speak for whom. The suppression of certain voices, whether inside or outside political movements, is a problem that extends beyond indigenous politics[364] but has particular pertinence in this area given the silencing of indigenous voices through processes of colonization.

Another of the strengths of a nonidentity approach is its attention to historical context in critically examining concepts. On a general level, this allows for conceptions of indigeneity to be different in New Zealand than in Australia. It also offers a way of acknowledging and possibly

[364] See, for example, Cathy Cohen, 'Deviance As Resistance: A New Research Agenda for the Study of Black Politics.' *Du Bois Review*. Vol. 1, No. 1 (2004): 27-45.

navigating some of the differences among groups, such as the differences between Māori over whether non-tribally affiliated Māori should be included in the Waitangi Treaty settlements process, or internal disagreements between Belyuen and Larrakia groups in the Kenbi land claim in Australia.[365] Critical evaluation of these claims also encourages attentiveness to intersectionality claims, such as the ways that aboriginal women might experience indigeneity differently than aboriginal men.

These strengths make nonidentity thinking a promising resource for indigenous politics, even though the potential to draw universal conclusions applicable to all indigenous peoples is compromised. The failure to understand what indigeneity entails means that accounts of historic injustice have misidentified who should be included in policies of acknowledgment or restitution and what kinds of resources or rights should be made available to them. Nonidentity thinking encourages critical analysis of the terms used to determine who gets treated as indigenous and the benefits (or limitations) that attach to this status. It also requires recognition of the situated nature of these concepts and more careful consideration of who is constructing them. Using a nonidentical approach to reflect on claims of indigeneity should result in more accurate understandings of the term and its entitlements, which might result in more productive discourse around indigenous rights and politics.

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[365] Povinelli, *The Cunning of Recognition*, 216.

Bibliography

Aboriginal Heritage Act (1988). South Australia. Available from http://www.legislation.sa.gov.au/LZ/C/A/ABORIGINAL%20HERITAGE%20ACT%201988.aspx. Accessed August 5, 2014.

Aboriginal Land Rights (Northern Territory) Act 1976, No. 191. 1976 (Canberra: Office of Parliamentary Counsel). Available from http://www.comlaw.gov.au/Details/C2013C00556. Accessed July 10, 2014.

Adorno, Theodor. 2000. Negative Dialectics (London: Routledge).

Adorno, Theodor. 2010. *Lectures on Negative Dialectics* (Cambridge: Polity Press).

Anaya, S. James. 2004. *Indigenous Peoples in International Law* (New York: Oxford University Press).

Anaya, James. 2010. 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Preliminary Note on the Mission to New Zealand.' *United Nations Human Rights Council.* A/HRC/15/37/Add.9.

Anaya, James. 2011. 'Report of the Special Rapporteur on the Rights of Indigenous Peoples: The situation of Māori People in New Zealand.' *United Nations Human Rights Council*. A/HRC/18/XX/Add.Y.

Anderson, Benedict. 1983. *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso).

Balfour, Lawrie. 2005. 'Reparations After Identity Politics.' *Political Theory*. Vol. 33, No. 6: 786-811.

Barcham, Manuhuia. 1998. 'The challenge of urban Maori: reconciling conceptions of indigeneity and social change.' *Asia Pacific Viewpoint*. Vol. 39, No. 3: 303-314.

Barcham, Manuhuia. 2002. '(De)Constructing the Politics of Indigeneity.' Duncan Ivison, Paul Patton, and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press): 137-151.

Bargh, Maria. 2006. 'The Foreshore and Seabed: What now for Maori and the Government?' *MacMillan Brown Working Paper Series*. No. 15: 1-12.

Bargh, Maria. 2010. 'Changing the game plan: The Foreshore and Seabed Act and constitutional change.' *Kotuitui: New Zealand Journal of Social Sciences*. Vol. 1, No. 1: 13-24.

Barvosa, Edwina. 2008. *Wealth of Selves: Multiple Identities, Mestiza Consciousness and the Subject of Politics* (College Station: Texas A&M University Press).

Bhabha, Homi K. 2010. *The Location of Culture* (New York: Routledge).

Bishop, Russell. 1994. 'Initiating Empowering Research?' *New Zealand Journal of Educational Studies*. Vol. 29, No. 1: 175-188.

Bishop, Russell. 1998. 'Freeing Ourselves from Neocolonial Domination in Research: A Kaupapa Maori Approach to Creating Knowledge.' *Cultural Studies and Education*. Vol. 11, No. 2: 1-30.

Bowen, John R. 2000. 'Should we have a universal concept of 'indigenous peoples' rights? Ethnicity and essentialism in the twenty-first century.' *Anthropology Today*. Vol. 16, No. 4: 12-16.

Bradford, W.C. 2004. 'Beyond Reparations: An American Indian Theory of Justice.' *bypress Legal Series*. Paper 170.

Brash, Don. 2004. 'Nationhood'. http://www.donbrash.com/orewa-2004-nationhood/. Accessed March 21, 2010.

Brennan, Frank. 1995. *One Land, One Nation: Mabo—towards 2001* (St. Lucia: University of Queensland Press).

Brown, Wendy. 1993. 'Wounded Attachments.' *Political Theory*. Vol. 21, No. 3: 390-410.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press).

Bruyneel, Kevin. 2000. 'Politics on the Boundaries: The Post-Colonial Politics of Indigenous People.' *Indigenous Nations Studies Journal*. Vol. 1, No. 2: 73-94.

Bruyneel, Kevin. 2014. 'Social Science and the Study of Indigenous People's Politics: Contributions, Omissions, and Tensions.' José Antonio Lucero, Dale Turner, and Donna Lee VanColt (eds.), *The Oxford Handbook of Indigenous Peoples Politics* (New York: Oxford University Press).

Buchan, Bruce. 2002. 'Withstanding the Tide of History: The *Yorta Yorta* Case and Indigenous Sovereignty.' *borderlands ejournal*. Vol. 1, No. 2.

Butler, Judith. 1990. *Gender Trouble, Feminist Theory, and Psychoanalytic Discourse* (New York: Routledge).

Byrnes, Giselle. 1998. 'Jackals of the Crown? Historians and the Treaty Claims Process in New Zealand.' *The Public Historian*. Vol. 20, No. 2: 9-23.

Carens, Joseph H. 2004. 'A Contextual Approach to Political Theory.' *Ethical Theory and Moral Practice*. Vol. 7, No. 2: 117-132.

Chandra, Kanchan. 2006. 'What is Ethnic Identity and Does It Matter?' *Annual Review of Political Science*. Vol. 9 (2006): 397-424.

Cohen, Cathy J. 2004. 'Deviance As Resistance: A New Research Agenda for the Study of Black Politics.' *Du Bois Review*. Vol. 1, No. 1: 27-45.

Colchester, Marcus. 2002. 'Response: Defining Oneself and Being Defined As, Indigenous.' *Anthropology Today*. Vol. 18, No. 3: 24.

Clarke, Jennifer. 1996. 'Chronology of the Kumarangk/Hindmarsh Island Affair.' *Aboriginal Law Bulletin*.

Clifford, James. 2001. 'Indigenous Articulations.' *The Contemporary Pacific*. Vol. 13, No. 2: 467-490.

Coulthard, Glen S. 2007. 'Subject of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada.' *Contemporary Political Theory*. Vol. 6, No. 4: 437-460.

Cruikshank, Julie. 1998. *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Lincoln: University of Nebraska Press).

Dahl, Jens. 2012. *The Indigenous Space and Marginalized Peoples in the United Nations* (New York: Palgrave MacMillan).

Dallmayr, Fred. 2004. 'The Underside of Modernity: Adorno, Heidegger, and Dussel.' *Constellations*. Vol. 11, No. 1: 102-120.

Dean, Bartholomew and Jerome M. Levi. 2003. *At Risk of Being Heard: Identity, Indigenous Rights, and Postcolonial States* (Michigan: The University of Michigan Press).

de la Cadena, Marisol and Orin Starn. 2007. 'Introduction.' Marisol de la Cadena and Orin Starn (eds.), *Indigenous Experience Today* (New York: Berg).

de Oliveira, Adolfo. 2009. *Decolonising Indigenous Rights* (New York: Routledge).

Denzin, Norman K., Yvonna S. Lincoln and Linda Tuhiwai Smith (eds.). 2008. *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks: Sage Publications Inc.)

Department of Internal Affairs, New Zealand. 2014. 'Objections to Proposed Boundaries of Electoral Districts of New Zealand, Pursuant to Section 28 of the Electoral Act 1993.' *New Zealand Gazette.* No. 3: 67-111.

Dominy, Michele D. 1996. 'Maori Sovereignty: A Feminist Invention of Tradition.' Jocelyn Linnekin and Lin Pyen (eds.), *Cultural Identity and Ethnicity in the Pacific* (USA: University of Hawai'i Press): 237-256.

Durie, Mason. 2003. *Nga Kahui Pou: Launching Māori Futures* (Wellington: Huia Press).

Durie, Mason. 2003. 'Mana Māori Motuhake: The State of the Māori Nation.' Raymond Miller (ed.), *New Zealand Government and Politics* (Auckland: Oxford University Press): 488-502.

Durie, Mason. 2004. 'Public Sector Reform, Indigeneity, and the Goals of Māori Development.' *Commonwealth Advanced Seminar*. Wellington, NZ: 1-18.

Durie, Mason. 2004. 'Understanding health and illness: research at the interface between science and indigenous knowledge.' *International Journal of Epidemiology*. Vol. 33, No. 5: 1138-1143.

Durie, Mason. 2005. 'Race and Ethnicity in Public Policy: Does It Work?' *Social Policy Journal of New Zealand*. Vol. 24: 1-11.

Durie, Mason. 2009. 'Pae Mana: Waitangi and the evolving state. The Paerangi Lectures: Maori Horizons 2020 and Beyond.' *Massey University Te Mata O Te Tau Lecture Series*. July 14.

Fabish, Rachael. 2012. 'The Impact of Tā Te Māori Rangahau / Methodologies of Māori Research on My Work.' *Te Kāhui Kura Māori*. Vol. 1, No. 2. http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid00_2Kahu-t1-g1-t3.html. Accessed January 30, 2013.

Fanon, Frantz. 2004. *The Wretched of the Earth* (New York: Grove Press).

Federal Court of Canada. *Daniels v. Canada*. Docket T-2172-99. January 8, 2013. Citation 2013 FC 6. http://decisions.fct-cf.gc.ca/en/2013/2013fc6/2013fc6.pdf. Accessed August 8, 2013.

Fox, Karen. 2012. 'Globalising Indigeneity?' *History Compass*. Vol. 10, No. 6: 423-439.

Fraser, Nancy. 1995. 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age.' *New Left Review*, 212: 68-93.

Ganter, Elizabeth Joan and Martyn Paxton. 1990. *Kenbi Land Claim: Report on Traditional Ownership* (Northern Territory: Department of Lands and Housing).

Gelder, Ken and Jane M. Jacobs. 1997. 'Promiscuous Sacred Sites: Reflections on Secrecy and Scepticism in the Hindmarsh Island Affair.' *Australian Humanities Review*.

Gladney, Dru C. 1996. 'Relational Alterity: Constructing Dungan (Hui), and Uygur, and Kazakh identities across China, Central Asia, and Turkey.' *History and Anthropology*. Vol. 9, No. 4: 445-477.

Gladney, Dru C. 1997. 'The Question of Minority Identity and Indigeneity in Post-Colonial China.' *Cultural Survival Quarterly*. Vol. 21, No. 3.

Gover, Kirsty and Natalie Baird. 2002. 'Identifying the Māori Treaty Partner.' *The University of Toronto Law Journal*. Vol. 52, No. 1: 39-68.

Gray, Peter R.A. 2000. 'Do the Walls Have Ears? Indigenous Title and Courts in Australia.' *International Journal of Legal Information.* Vol. 28, No. 2: 185-212.

Hagen, Rod. 2001. 'Ethnographic information and anthropological interpretations in a native title claim: the Yorta Yorta experience.' *Aboriginal History*. Vol. 25: 216-227.

Harris, Aroha. 2004. *HIKOI: Forty Years of Māori Protest* (Wellington: Huia Press).

Hayward, Janine. 2011. 'Mandatory Māori wards in local government: Active Crown protection of Māori Treaty rights.' *Political Science*. Vol. 62, No. 2: 186-204.

Hazareesingh, Sudhir and Karma Nabulsi. 2008. 'Using archival sources to theorize about politics.' David Leopold and Marc Stears (eds.), *Political Theory: Methods and Approaches* (Oxford: Oxford University Press): 150-170.

High Court of Australia. 1992. 'Mabo and others v. Queensland (No. 2) ("Mabo case").' [1992] HCA 23; 175 CLR 1; F.C. 92/014. Available from http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html. Accessed July 10, 2014

High Court of Australia. 2002. 'Members of the Yorta Yorta Aboriginal Community v. Victoria.' [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356. Available from http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2002/58.html. Accessed July 10, 2014.

Hill, Richard S. and Brigitte Bonisch-Brednich. 2007. 'Politicizing the Past: Indigenous Scholarship and Crown- Māori Reparations Processes in New Zealand.' *Social and Legal Studies*. Vol. 16, No. 2: 163-181.

Hindmarsh Island Bridge Royal Commission. 1995. 'Transcript of Processings.' State of South Australia. July 19, 1995. Available from http://digital.library.adelaide.edu.au/dspace/bitstream/2440/5127/1/P_1.pdf. Accessed October 18, 2014.

Hodgson, Dorothy L. 2011. *Being Maasai, Becoming Indigenous* (Indianapolis: Indiana University Press).

Horkheimer, Max and Theodor W. Adorno. 1991. *Dialectic of Enlightenment*, trans. John Cumming (New York: Continuum Publishing Company).

Human Rights Commission. 2010. 'Tūi Tūi Tuituiā: Race Relations in 2009.' *Aotearoa New Zealand*.

Hume, Lynne. 2000. 'The Dreaming in Contemporary Aboriginal Australia.' Graham Harvey (ed.), *Indigenous Religions: A Companion* (New York: Cassell): 125-138.

International Labour Organization. 1989. 'Convention 169: Indigenous and Tribal Peoples Convention.' Geneva (June 27), Article 1. http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169. Accessed January 21, 2013.

Ip, Manying and David Pang. 2005. 'New Zealand Chinese Identity: Sojourners, Model Minority and Multiple Identities.' James H. Liu, Tim McCreanor, Tracey McIntosh and Teresia Teaiwa (eds.), *New Zealand Identities: Departures and Destinations* (Wellington: Victoria University Press): 174-190.

Ivison, Duncan, Paul Patton and Will Sanders. 2002. 'Introduction.' Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press): 1-24.

Ivison, Duncan. 2006. 'Historical Injustice.' Jon Dryzek, Bonnie Honig, and Anne Phillips (eds.), *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press): 507-528.

Jahnke, Huia Tomlins and Julia Taiapa. 1999. 'Māori Research.' In *Social Science Research in New Zealand: Many Paths to Understanding,* Carl Davidson and Martin Tolich, eds. (Longman: Auckland): 39-50.

Johansson, Jon. 2004. 'Orewa and the Rhetoric of Illusion.' *Political Science*. Vol. 56, No. 2: 111-129.

Jung, Courtney. 2008. *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (New York: Cambridge University Press).

Karlsson, Bengt G. 2003. 'Anthropology and the 'Indigenous Slot': Claims to and Debates and Indigenous Peoples' Status in India.' *Critique of Anthropology*. Vol. 23, No. 4: 403-423.

Kauanui, J. Kehaulani. 2008. *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity* (Durham: Duke University Press).

Kawharu, Merata. 2009. 'Ancestral Landscapes and World Heritage from a Māori Viewpoint.' *Journal of the Polynesian Society*. Vol. 118, No.4: 317-338.

Keating, Paul. 1992. 'Redfern Speech (Year for the World's Indigenous People).' Delivered in Redfern Park, December 10, 1992. Available from https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf. Accessed July 10, 2014.

Kenrick, Justin and Jerome Lewis. 2004. 'Indigenous Peoples' Rights and the Politics of the Term 'Indigenous',' *Anthropology Today*, Vol. 20, No. 2: 4-9.

Kohn, Margaret and Keally McBride. 2011. *Political Theories of Decolonization: Postcolonialism and the Problems of Foundation* (New York: Oxford University Press).

Koch, Grace. 2013. 'We have the song, so we have the land: song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims.' *Aiatsis Research Discussion Paper*, No. 33: 4-43.

Kukathas, Chandran. 2003. 'Responsibility for Past Injustice: How to Shift the Burden.' *Political Philosophy and Economics*. Vol. 2, No. 2: 165-190.

Kukathas, Chandran. 2006. 'Who? Whom? Reparations and the Problem of Agency.' *Journal of Social Philosophy*. Vol. 37, No. 3: 330-341.

Kukathas, Chandran. 2007. *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press).

Kukutai, Tahu. 2011. 'Māori Demography in Aotearoa New Zealand: Fifty Years On.' *New Zealand Population Review*. Vol. 37: 45-64.

Kuper, Adam. 2003. 'The Return of the Native.' *Current Anthropology*. Vol. 44, No. 3: 389-402.

Kymlicka, Will. 1996. *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press).

Kymlicka, Will. 2000. 'American Multiculturalism and the 'Nations Within'.' Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press): 216-236.

Lambert, Michael C. 1993. 'From Citizenship to Negritude: "Making a Difference" in Elite Ideologies of Colonized Francophone West Africa.' *Comparative Studies in Society and History*. Vol. 35, No. 2: 239-262.

Lee, J.B.J. 2003. 'Ngā Tohutohu: A Purākau Approach to Maori Teacher Narratives.' In *Informing Our Practice, Special Volume: Selections from the 2002 TEANZ Conference*. Deborah Fraser and Roger Openshaw eds. (Palmerston North: Kanuka Grove Press).

Lehmann, Karin. 2006. 'To Define or Not To Define—The Definitional Debate Revisited.' *American Indian Law Review*. Vol. 31, No. 2: 509-529.

Lightfoot, Sheryl R. 2010. 'Emerging international indigenous rights norms and 'over-compliance' in New Zealand and Canada.' *Political Science*. Vol. 62, No. 1: 84-104.

Lightfoot, Sheryl R. 2012. 'Selective endorsement without intent to implement: indigenous rights and the Anglosphere.' *The International Journal of Human Rights*. Vol. 16. No. 1: 100-122.

Locke, John. 2006. 'An Essay on Toleration (1667).' *Political Essays* (New York: Cambridge University Press).

Lu, Catherine. 2011. 'Colonialiam as Structural Injustice: Historical Responsibility and Contemporary Redress.' *The Journal of Political Philosophy*. Vol. 19, No. 3: 261-281.

Maaka, Roger. 1994. 'The New Tribe: Conflicts and Continuities in the Social Organization of Urban Māori.' *The Contemporary Pacific*. Vol. 6, No. 2: 311-336.

Maaka, Roger and Augie Fleras. 2002. 'Engaging with Indigeneity: *Tino Rangatiratanga* in Aotearoa.' Duncan Ivison, Paul Patton, and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press): 89-109.

Macdonald, Bradley. 2012. 'Theodor Adorno, Alterglobalization, and Non-identity Politics.' *New Political Science*. Vol. 34, No. 3: 321-337.

Māori Fisheries Act 1989. December 20, 1989. http://legislation.knowledge-basket.co.nz/gpacts/public/text/1989/an/159.html. Accessed April 2, 2014.

Martínez-Cobo, José. 1986/7. 'Study of the Problem of Discrimination against Indigenous Populations.' *United Nations Document E/CN.4/Sub.2/1986/7 and Addenda 1-4*. http://www.un.org/esa/socdev/unpfii/en/second.html. Accessed January 21, 2013.

McCarthy, Thomas. 2009. *Race, Empire, and the Idea of Human Development* (New York: Cambridge University Press).

McClintock, Anne. 1995. *Imperial Leather: Race, Gender, and Sexuality in the Colonial Context* (Abingdon: Routledge, Inc.).

McCormack, Fiona. 2011. 'Levels of Indigeneity: the Maori and Neoliberalism.' *Journal of the Royal Anthropological Institute*. Vol. 17: 281-300.

McHugh, Paul. 1991. *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press).

McIntosh, Ian. 2001. ''Reconciliation: The Peoples Choice?', *Anthropology Today*, Vol. 17, No. 1: 21-22.

McIntosh, Ian. 2001. 'UN Permanent Forum on Indigenous Issues.' *Anthropology Today*. Vol. 27, No. 6: 22-23.

McIntosh, Ian. 2002. 'Defining Oneself and Being Defined As, Indigenous.' *Anthropology Today*. Vol. 18, No. 3: 23-24.

Mercer, David. 1997. 'Aboriginal self-determination and indigenous land title in post-*Mabo* Australia.' *Political Geography*. Vol. 16, No. 3: 189-212.

Merlan, Francesca. 2009. 'Indigeneity: Global and Local.' *Current Anthropology*. Vol. 50, No. 3: 303-333.

Mohanram, Radhika. 1996. 'The Construction of Place: Maori Feminism and Nationalism in Aotearoa/New Zealand.' *NWSA Journal*. Vol. 8, No. 1: 50-69.

Mohanty, Chandra Talpade. 1988. 'Under Western Eyes: Feminist Scholarship and Colonial Discourses.' *Feminist Review*. No. 30: 61-88.

Moon, Paul. 1998. 'The Creation of the "Sealord Deal".' *The Journal of the Polynesian Society*. Vol. 107, No. 2: 145-174.

Moreton-Robinson, Aileen. 2004. 'The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision.' *borderlands ejournal*. Vol. 3, No. 2.

Moreton-Robinson, Aileen (ed.). 2004. *Whitening Race: Essays in Social and Cultural Criticism* (Canberra: Aboriginal Studies Press).

Moreton-Robinson, Aileen. 2006. 'Towards a new research agenda? Foucault, Whiteness and Indigenous sovereignty.' *Journal of Sociology*. Vol. 42. No. 4: 383-395.

Moses, A. Dirk. 2010. 'Time, indigeneity, and peoplehood: the postcolony in Australia.' *Postcolonial Studies*. Vol. 13, No.1: 9-32.

Motha, Stewart. 1998. '*Mabo*: Encountering the Epistemic Limit of the Recognition of 'Difference'.' *Griffith Law Review*. Vol. 7, No. 1: 79-96.

Muehlebach, Andrea. 2003. 'What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism.' *Identities: Global Studies in Culture and Power*. Vol.10, No. 2: 241-268.

Mulgan, Tim. 1999. 'The Place of the Dead in Liberal Political Philosophy.' *The Journal of Political Philosophy*. Vol. 7, No. 1: 52-70.

Nandy, Ashis. 1995. 'History's Forgotten Doubles.' *History and Theory*, Vol. 34, No. 2: 44-66.

Native Title Act 1993. No. 110. 1993. Canberra: Office of Parliamentary Counsel. Available from http://www.comlaw.gov.au/Details/C2014C00631. Accessed July 10, 2014.

Nepe, Tuakana. 1991. 'Te Toi Huarewa Tipuna: Kaupapa Maori, An Educational Intervention System.' *Unpublished MA Thesis (*Auckland: University of Auckland).

Niezen, Robert. 2003. *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press).

O'Conner, Brian. 2004. *Adorno's Negative Dialectic: Philosophy and the Possibility of Critical Rationality* (Cambridge: The MIT Press).

Office of Treaty Settlements (Te Tari Whakatau Take e pa ana ki te Tiriti o Waitangi), http://www.ots.govt.nz/. Accessed April 6, 2014.

Okin, Susan Moller. 1989. *Justice, Gender, and the Family* (USA: Basic Books).

Orange, Claudia. 1987. *The Treaty of Waitangi* (Auckland: Allen and Unwin Ltd.).

Panelli, Ruth and Gail Tipa. 2007. 'Placing Well-Being: A Maori Case Study of Cultural and Environmental Specificity.' *EcoHealth*. Vol. 4: 445-460.

Pateman, Carole. 2007. 'The Settler Contract.' Carole Pateman and Charles Mills (eds.), *Contract and Domination* (Cambridge: Polity Press): 35-78.

Patton, Paul. 1995. 'Mabo and Australian Society: Towards a Postmodern Republic.' *The Australian Journal of Anthropology*. Vol. 6, No. 3: 83-94.

Patton, Paul. 1996. 'Sovereignty, Law and Difference in Australia After the Mabo Case.' *Alternatives*. Vol. 21, No. 2: 149-170.

Patton, Paul. 2013. 'Political Liberalism and Indigenous Rights.' Sandra Tomsons and Lorraine Mayer (eds.), *Philosophy and Aboriginal Rights: Critical Dialogues* (Ontario: Oxford University Press): 151-160.

Pearson, Noel. 2003. 'The High Court's Abandonment of 'The Time Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta.' *Sir Ninian Stephen Annual Lecture at University of Newcastle Faculty of Law*: 1-10.

Pelican, Michaela. 2008. 'Complexities of indigeneity and autochthony: An African example.' *American Ethnologist*. Vol. 36, No. 1: 52-65.

Pether, Penny. 1998. 'Principles of Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation.' *Law, Text, Culture.* Vol. 4, No. 1: 115-145.

Phillips, Anne. 2003. 'Recognition and the Struggle for Political Voice'. Barbara Hobson (ed.), *Recognition Struggles and Spcial Movements: Contested Identities, Agency and Power* (Cambridge: Cambridge University Press): 263-273.

Pihama, Leonie. 2001. 'Tehei Mauri Ora, Honouring Our Voices: Mana Wahine As Kaupapa, Māori Theoretical Framework.' *Unpublished PhD Thesis* (Auckland: The University of Auckland).

Pipi, Kataraina et al. 2004. 'A Research Ethic for Studying Māori and Iwi Provider Success.' *Social Policy Journal Document*. Is. 23: 141-153.

Pocock, J.G.A. 2002. 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Māori.' Duncan Ivison, Paul Patton, and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press): 25-35.

Pool, Ian. 1991. *Te Iwi Maori: A New Zealand Population. Past, Present and Projected* (Auckland: Auckland University Press).

Povinelli, Elizabeth. 1997. 'Reading Ruptures, Rupturing Readings: Mabo and the Cultural Politics of Activism.' *Social Analysis*. Vol. 41, No. 2: 20-28.

Povinelli, Elizabeth. 2002. *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press).

Rata, Elizabeth. 2011. 'Discursive strategies of the Maori tribal elite.' *Critique of Anthropology*. Vol. 31, No. 4: 359-380.

Reardon, Jenny and Kim Tallbear. 2012. ''Your DNA is Our History': Genomics, Anthropology, and the Construction of Whiteness as Property.' *Current Anthropology*. Vol. 53, No. 12: 233-245.

Report by the Aboriginal Land Commissioner, Justice Kearney to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory. 1985. 'Nicholson River (Waanyi/Garawa) Land Claim.' (Canberra: Australian Government Publishing Services).

Ritter, David. 1996. 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis.' *Sydney Law Review*. Vol. 18, No. 5: 5-33.

Ritter, David. 2004. 'The Judgement of the World: The Yorta Yorta Case and the 'Tide of History.' *Australian Historical Studies*. Vol. 35, No. 123: 106-121.

Roach, David and Andrea Egan. 2008. 'The Equivocal Definition of Indigeneity and Ambivalent Government Policy toward Self-Determination in New Zealand's Health and Foreign Policy Apparatus.' *Junctures: The Journal for Thematic Dialogue*: 25-41.

Rose, Deborah Bird. 1996. 'Histories and Rituals: Land Claims in the Territory.' Bain Attwood (ed.), *In the Age of Mabo: History, Aborigines and Australia* (Sydney: Allen & Unwin): 35-53.

Rowse, Tim. 2008. 'Indigenous culture: the politics of vulnerability and survival.' Tony Bennett and John Frow (eds), *The Sage Handbook of Cultural Analysis* (Los Angeles: Sage): 406-426.

Russell, Peter. 1998. 'High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence.' *Saskatchewan Law Review*. Vol. 61: 247-276

Russell, Peter H. 2005. *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press).

Scott, Joan. 2007. *The Politics of the Veil* (Princeton: Princeton University Press).

Scott, Shirley V. '*Terra Nullius* and the *Mabo* Judgement of the Australian High Court: A Case Study of the Operation of Legalist Reasoning as a Mechanism of Political-Legal Change.' *Australian Journal of Politics & History*. Vol. 42, No. 3: 385-401.

Secretariat of the United Nations Permanent Forum on Indigenous Issues. 'Introduction: State of the World's Indigenous Peoples.' *United Nations*. http://www.un.org/esa/socdev/unpfii/documents/SOWIP_introduction.pdf. Accessed February 21, 2013: 2.

Shah, Alpa. 2007. 'The Dark Side of Indigeneity?: Indigenous People, Rights and Development in India.' *History Compass*. Vol. 5, No. 6: 1806-1832.

Sillitoe, Paul (ed.). Forthcoming 2015. *Indigenous Studies and Engaged Anthropology: The Collaborative Moment* (Ashgate Publishing).

Silverstein, Ben. 2007. 'The Rule of Native Title: A View of *Mabo* in the British Empire.' *Griffith Law Review*. Vol. 16, No. 1: 55-82.

Sissons, Jeffrey. 2005. *First Peoples: Indigenous Cultures and Their Futures* (London: Reaktion Books).

Smith, Linda Tuhiwai. 1999. *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books).

Smith, Rogers M. 2003. *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press).

Spinner-Halev, Jeff. 2007. 'From Historical to Enduring Injustice.' *Political Theory*. Vol. 35, No. 5: 574-597.

Stasiulis, Daiva and Nira Yuval-Davis. 1995. *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (Thousand Oaks: Sage).

Statistics New Zealand. 2013. '2013 Census: Cultural Diversity.' *2013 New Zealand Census of Population and Dwellings*. March 5. http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-national-highlights/cultural-diversity.aspx. Accessed January 21, 2014.

Stavenhagen, Rodolfo. 2006. 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples: Mission to New Zealand.' *United Nations Commission on Human Rights*. E/CN.4/2006/78/Add.3.

Stoler, Ann Laura. 2002. *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press).

Stone, Alison. 2008. 'Adorno and Logic.' In *Theodor Adorno: Key Concepts*, ed. Deborah Cook (Stocksfield: Acumen Publishing Limited).

Sullivan, Ann. 2003. 'Māori Affairs and Public Policy.' Raymond Miller (ed.), *New Zealand Government and Politics* (Auckland: Oxford University Press): 503-513.

Tallbear, Kim. 2013. *Native American DNA: Tribal Belonging and the False Promise of Genetic Science* (Minneapolis: University of Minnesota Press).

Taylor, Charles. 1992. 'The Politics of Recognition.' Amy Gutman (ed.), *Multiculturalism and the Politics of Recognition: An Essay by Charles Taylor* (Princeton: Princeton University Press): 25-74.

Te Aho, Linda. 2006. 'Contemporary Issues in Māori Law and Society: Mana Motuhake, Mana Whenua.' *Waikato Law Review*. Vol. 14: 102-119.

Thompson, Janna. 2001. 'Historical Injustice and Reparation: Justifying Claims of Descendants.' *Ethics*. Vol. 122, No. 1: 114-135.

Thornberry, Patrick. 2002. *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press).

Tolich, Martin. 2002. 'Pākehā "Paralysis": Cultural Safety for Those Researching the General Population of Aotearoa.' *Social Policy Journal of New Zealand*. Is. 19: 164-178.

Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. December 14, 1992. http://www.legislation.govt.nz/act/public/1992/0121/latest/DLM281433.html. Accessed April 2, 2014.

Tsosie, Rebecca. 2005. 'The New Challenge to Native Identity: An Essay on "Indigeneity" and "Whiteness"." *Journal of Law and Policy*. Vol. 18: 55-98.

Tsosie, Rebecca. 2007. 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations.' Jon Miller and Rahul Kumar (eds.), *Reparations: Interdisciplinary Inquiries* (Oxford: Oxford University Press): 43-67.

Tully, James. 2000. 'A Just Relationship Between Aboriginal and Non-Aboriginal Peoples of Canada.' Curtis Cook and Juan D. Lindau (eds.), *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal: McGill-Queen's University Press): 39-71.

United Nations Permanent Forum on Indigenous Issues. 'History of Indigenous Peoples and the International System.' *United Nations.* http://social.un.org/index/IndigenousPeoples/AboutUsMembers/History.aspx. Accessed March 26, 2012.

United Nations Permanent Forum on Indigenous Peoples. 'Data and Indicators.' *United Nations*. http://social.un.org/index/IndigenousPeoples/CrossThematicIssues/DataandIndicators.aspx. Accessed April 27, 2012.

United Nations Forum on Indigenous Issues. 2004. 'Second Decade of the World's Indigenous People.' *United Nations Forum on Indigenous Issues* (December 22). http://social.un.org/index/IndigenousPeoples/SecondDecade.aspx. Accessed April 26, 2012.

United Nations. 2010. 'Training Module on Indigenous Peoples' Issues.' *United Nations*. http://www.un.org/esa/socdev/unpfii/documents/trainingmodule_en.pdf: 10-11. Accessed April 27, 2012.

Waldron, Holly. 2011. 'Overseas-Born Māori and New Zealand Citizenship.' *Institute of Policy Studies*. Wellington.

Waldron, Jeremy. 1992. 'Superseding Historic Injustice.' *Ethics*. Vol. 103, No. 1: 4-28.

Waldron, Jeremy. 2002. 'Indigeneity? First Peoples and Last Occupancy.' *Lecture at Victoria University of Wellington Law School*: 55-82.

Waldron, Jeremy. 2002. 'Redressing Historic Injustice.' *University of Toronto Law Journal*. Vol. 52, No. 1: 135-160.

Waldron, Jeremy. 2004. 'Settlement, Return, and the Supersession Thesis.' *Theoretical Inquiries in Law*. Vol. 5, No. 2: 237-268.

Walker, Ranganui. 1982. 'Capitalism v. Tribalism.' *New Zealand Listener*. July 24.

Walker, Ranganui. 1989. 'Maori identity.' D. Novitz and B Wilmott (eds.), *Culture and Identity in New Zealand* (Wellington: GP Books).

Walker, Shayne, Anaru Eketone and Anita Gibbs. 2006. 'An Exploration of Kaupapa Maori Research, Principles, Processes and Applications.' *International Journal of Social Research Methodology*. Vol. 9, No. 4: 331-344.

Walzer, Michael. 1997. *On Toleration* (New Haven: Yale University Press).

Webster, Steven. 2002. 'Māori Retribalization and Treaty Rights to the New Zealand Fisheries.' *The Contemporary Pacific*. Vol. 14, No. 2: 341-376.

Webster, Steven. 2011. 'Do Maori know what a *hapuu* is?' *Journal of the Royal Anthropological Institute.* Vol. 17, No. 3: 622-627.

Weeden, Lisa. 2002. 'Conceptualizing Culture: Possibilities for Political Science.' *American Political Science Review.* Vol. 96, No. 4: 713-728.

Weeden, Lisa. 1999. *Ambiguities of Domination: Politics, Rhetoric, and Symbols in Contemporary Syria* (Chicago: University of Chicago Press).

Weiden, David L. 2013. 'Judging in a Tribal Voice: An Analysis of the Decisions of the Rosebud Sioux Tribe Supreme Court.' Unpublished APSA paper.

Weiner, James F. 2009. 'Religion, Belief and Action: The Case of Ngarrindjeri "Women's Business" on Hindmarsh Island, South Australia, 1994-1996.' Adolfo de Oliveira (ed.), *Decolonising Indigenous Rights* (New York: Routledge).

Wheen, Nicola R. and Janine Hayward. 2012. *Treaty of Waitangi Settlements* (Wellington: Bridget Williams Books Limited).

Wilkins, David. 2003. *The Navajo Political Experience* (Lanham: Rowman & Littlefield).

Wolf, Susan. 1987. 'Sanity and the Metaphysics of Responsibility'. Ferninand Schoeman (ed.), *Responsibility, Character and the Emotions* (Cambridge: Cambridge University Press): 46-62.

Wolfe, Patrick. 1994. 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era.' *Social Analysis*. No. 36: 93-152.

Xanthanki, Alexandra and Dominic O'Sullivan. 2009. 'Indigenous Participation in Elective Bodies: The Maori in New Zealand.' *International Journal on Minority and Group Rights*. Vol. 16, No. 2:181-208.

Yamauchi, Takashi and Arthur B. Markman. 1998. 'Category Learning by Inference and Classification.' *Journal of Memory and Language*. Vol. 39: 124-148.

Yamauchi, Takashi and Arthur B. Markman. 2000. 'Inference Using Categories,' *Journal of Experimental Psychology*. Vol. 26, No. 3: 776-795.

Yeh, Emily. 2007. 'Tibetan Indigeneity: Translations, Resemblances, and Up-take.' Marisol de la Cadena and Orin Starn (eds.), *Indigenous Experience Today* (New York: Berg): 69-97.

Young, Iris Marion. 1990. *Justice and the Politics of Difference* (Princeton: Princeton University Press).

Young, Iris Marion. 2000. 'Hybrid Democracy, Iroquois Federalism, and the Postcolonial Project.' Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press): 237-258.

Young, Iris Marion. 2001. 'Equality of Whom? Social Groups and Judgments of Injustice.' *Journal of Political Philosophy*. Vol. 9, No. 1: 1-18.

Ypi, Lea, Robert E. Goodin and Christian Barry. 2009. 'Associative Duties, Global Justice, and the Colonies.' *Philosophy & Public Affairs*. Vol. 37, No. 2: 103-135.