ERRATA

p 24 para 4, 4th line: "nor" for "or"

p 33 para 2, 5th line: delete "us"

p 49 para 1, 14th line: insert comma after "point"

p 52 para 3, 4th line: delete "then"

p 60 para 2, 4th line: insert quotation mark after "happens"

p 62 para 1, 5th line: delete "therefore"

p 62 para 2, 1st line: "of" for "or"

p 66 para 2, 4th line: "reveal" for "reveals"

p 68 para 1, 1st line: "a" for "the"

p 240 para 1, 2nd line: "whinge" for "winge"

p 240 para 2, 8th line: "wreak" for "reek"

p 264 para 2, 12th line: "departure" for "department"

p 269 para 1, 2nd line: insert comma after "Australians"

p 281 para 2, 5th line: "of claiming it as" for "as claiming as"

p 318 9th line: "indigenous" for "indiegnous"

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Contested Titles: Postcolonialism, Representation and Indigeneity in Australia and Aotearoa New Zealand

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Contents

Statement

I declare that this thesis contains no material which has been accepted for the award of any other degree or diploma in any university, and that, to the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the text.

Stephen Pritchard

Synopsis

This thesis examines representations of Australian and New Zealand indigenous cultures, peoples and rights within legal, historical and anthropological discourses. By reference to a selection of 'case studies' that centre on questions of the legitimacy or authority of indigenous cultural practices or beliefs, it considers the underlying assumptions of certain notions of 'representation' and their implications for discussions about post-colonialism, indigeneity and cultural and identity politics. More specifically, the thesis draws on recent theoretical approaches to cultural politics, ethics and critical legal studies to examine the authority of non-indigenous representations of indigenous culture by reference to a range of debates centring on: the legitimacy and authenticity of contemporary Maori tattooing and the notion of indigenous cultural property; Aboriginal sacred-secrets, the Hindmarsh Island Affair and Reconciliation between indigenous and non-indigenous Australians; Maori activism, criminal law and the Treaty of Waitangi.

Acknowledgements

Chapter One

Introduction: Theory Out of Place

It is because proper names are already no longer proper names,
because their production is their obliteration, because the erasure
and imposition of the letter are originary, because they do not
supervene upon proper inscription . . .that the interdict was
possible, could come into play . . .

Jacques Derrida *Of Grammatology*

1. *A Philosophical Outline*

This thesis will examine the relationship between representations of indigeneity within legal, historical and anthropological discourses and issues of justice, ethics and authority, through a series of case studies or examples. More specifically, it considers the underlying assumptions of certain notions of 'representation' and their implications for discussions about postcolonialism, indigeneity and cultural and identity politics through debates centring on: the legitimacy and authenticity of contemporary Maori tattooing and the notion of indigenous cultural property; Aboriginal sacred-secrets, the Hindmarsh Island Affair and Reconciliation between indigenous and non-indigenous Australians; Maori activism, criminal law and the Treaty of Waitangi (*te Tiriti o Waitangi*).

The reason I have chosen to examine Australian and New Zealand contexts and the manner in which I approach them relates, for the most part, to my own circumstances. I

studied philosophy and literary studies in New Zealand. In the months before moving to Melbourne to begin my Ph.D. in comparative literature and cultural studies I decided against the philosophical thesis I had initially planned. Instead, I rewrote my thesis plan as a negotiation and mediation between the interests derived from my disciplinary training and the local social and political concerns that confronted me. The examples I chose derive from this attempt to make sense of local issues that challenged and engaged me. Thus, the peculiar juxtaposition of Kant and questions of Maori sovereignty, for example, can be attributed more to my own 'peculiar' personal situation than to a pre-conceived reading strategy. Nevertheless, as I hope to show, such 'strange' couplings can be fortuitous.

The collection of these diverse 'cases' under the rubric of certain themes or concepts is in no way intended to suggest that comparison between New Zealand and Australian contexts is simple, easy or even possible without a certain degree of violent generalisation. Nor should my preoccupation with 'European' philosophical or theoretical traditions or my reference to the proper names 'New Zealand', 'Australia', 'Maori' or 'Aborigine' be taken as uncritical or unproblematic. Rather, I begin with these difficult notions or terms in order to highlight how they circulate and function within a variety of discourses.

In this respect, I believe that my philosophical or theoretical 'preferences' are instructive, not only because of the insights they offer, but also due to their 'difficult' relationship to debates about colonialism, imperialism and the politics of representation and knowledge. It is easy to draw a line between the traditions of 'the West' and 'the non-West', but less easy to justify this demarcation. One could argue against thinkers like Marx, Hegel and Kant in the name of colonialism, positioning their texts within 'Western' tradition and tracing the relationship between the insights

they offer and the rationale of colonialism, imperialism and Eurocentricism. However, just as the polarisation of theoretical approaches into 'Western' and 'non-Western' positions can oversimplify what is in fact highly complex, so too can the apparent simplicity of the distinction 'Western' and 'non-Western' mask both a dangerous and uncritical valorisation of certain preconceived or 'accepted' positions and a complicity with the traditions such positions are defined against. Noting the subversive potential of 'readings' of 'Western' philosophical texts in such 'complicated' contexts, Gayatri Chakravorty Spivak observes that:

> our sense of critique is too thoroughly determined by Kant,
>
> Hegel and Marx for us to be able to reject them as "motivated
>
> imperialists" . . .a deconstructive politics of reading
>
> [however] would acknowledge the determination as well as
>
> the imperialism and see if the magisterial texts can now be
>
> our servants as the new magisterium itself in the name of the
>
> Other. (1999: 7)

Spivak names the re-orientation, re-positioning or re-reading of the texts of such thinkers in terms of the particular concerns and issues that confront us, "mistaken". (1999: 9) Such a "mistaken" reading strategy can be advantageous. To 'read' Kant, Marx or Hegel in places and contexts that seem quite 'distant' from the intended concerns of these philosophers, to force them into dialogue with issues and concerns not 'properly' their own or to 'use' their ideas for openly political purposes, enacts and enables an ethics and politics of reading. As Spivak notes of her own (mis)uses of Kant, "let us remember that "bungling" may be a synonym for intervention." (10)

I do not deny the importance of looking beyond 'Western' sources, but for the purposes of this thesis, where the question of the distinction between 'West' and 'non-West' is posed alongside and in conjunction with questions concerning authority, self-determination and the politics of representation, I prefer not to the take the distinction for granted.

My concern here is not indigenous culture *per se*; I do not attempt to provide a truthful or authoritative representation of indigenous culture, society or customs. Instead my focus is the discursive construction of 'indigeneity' and its operation in certain 'European' derived discourses, which, as I have already suggested, is also to admit that my concern is never simply a 'European' matter. Rather than reject 'the West' in the name of its Other, or take up a study of the 'non-West' in answer to imperialist discourses, I map out a series of negotiations 'between', not simply as an investigation into a series of relationships *between* 'West' and 'non-West", but equally a politics of relationality or of any attempt to provide the ground or terms of relation.

The metaphor of ground, as that which provides the foundation of any conceived relation ties the staging of identity and cultural representation to a particularly colonial geographic imaginary. For example, considering the 'distance' between Europe and "the New World" and the foundation of discourses on civility and savagery, Montaigne 'digresses': "It would seem that there are movements, some natural and some feverish, in these great bodies, as in our own." (1958: 107) Providing a metaphoric bridge between discourses on geology and tectonics and the conceptualisation of other cultures *in terms of the distance from Europe*, he suggests how such 'movements' make 'these bodies' tremble, revealing their points of contact with others and undermining their solidity. Utilising a similar range of metaphors, Jean-Luc Nancy observes:

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Many lines of rupture transverse *us* . . . philosophy segmented

from itself . . . which means, perhaps, discovering that it

never did have proper limits, that it never was, in a sense a

"property". (1991: 2)

These concerns translate into wider interests addressed in the chapters that follow.

The approach I have taken reflects a concern with both the question and the politics of

the relationship between singular or specific 'cases' or 'examples', the wider generality

they are taken to instantiate and the ground or foundation of this relation. I take terms

or concepts located firmly within the 'heart' of 'Western' thought, and by re-

positioning and re-thinking these terms in relation to contemporary debates about

indigeneity and indigenous property I attempt to enable "movements" like those

described by Montaigne. In this respect, my approach 'hinges' on a number of

philosophical terms ('judgement', 'experience', 'sense' and 'representation'), their

problematisation and its implications in a variety of contexts.

For Kant, judgement is the activity that defines critical philosophy as such;

judgement is the 'faculty' that bridges the abyss that separates the specificity of sensory

data from the terms of its comprehension or recognition: it determines "whether

something does or does not stand under a given rule (*casus datae legis*)." (1933: 177)

Kant distinguishes judgement from perception; he opposes both his rationalist

predecessors, for whom perceiving was a low-grade judging, and his empiricist

teachers, who were inclined to assimilate judging to perceiving. According to Kant,

judging and perceiving correspond to two distinct faculties: understanding and sense.

Though analytically differentiated, these faculties are not entirely independent. In order

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to 'experience', understand or conceive of anything one must possess certain concepts *a priori* or independently of experience, and yet these concepts are themselves opened within and tied to 'experience'. Kant writes:

> Objects are *given* to us by means of sensibility, and it alone yields us *intuitions*; they are *thought* through the understanding, and from the understanding arise *concepts* . . .[however] while the matter of all appearance is given to us *a posteriori* only, its form must lie ready for the sensations *a priori* in the mind, and so allow of being considered apart from all sensation. (1933: 65-66)

In Kant's moral philosophy we find a similar mediation between moral law, which springs from pure reason, and the maxims that arise in specific material contexts. In *The Critique of Pure Reason* Kant notes that the transcendental categories of understanding could not be applied *directly* to the raw data of sensory intuition. A category is formal and universal; a sensory manifold is material and individual. To explain this he described a process of schematisation whereby the purely abstract, existentially indeterminate categories could be applied to concrete individual sensory contents and enable us to know actual and possible objects of a phenomenal world. Likewise, in his works on moral philosophy, Kant argued that a process of typification is necessary; the abstract moral law of our pure reason had to be *typified* before it could be normatively applied to the material maxims of our actions. This mediation does not amount to the deduction of maxims from moral law nor the reduction or confinement of the sensory to the dictates of reason. According to a certain reading of Kant, the

'contraction' or 'unification' of the perceptual or sensory or the typification of moral law in thought leaves a space for the negotiation of reason and judgement in terms of the dictates of the "here, now" of experience.

This opening offers interesting critical opportunities, since 'experience' and 'judgement', both as concepts and forms of 'openness', according to David Wood, are conditions for "philosophy's productive intercourse with what lies outside of itself . . ." (1999: 109) In the difficult and uncertain conjuncture between what one conceives *a priori*, what one inherits socially or culturally and what one encounters "here and now", one finds the experience of 'experience', 'judgement' and 'philosophy' running up against their own limits. The (im)possibility of judgement or experience that does not reduce an encounter to an already known or conceived principle of determination or recognition problematises 'experience', 'judgement' and 'philosophy' in their simple and domesticated senses. This problematisation not only foregrounds their constitutive limits, but by extension, also the unposed question of what lies 'beyond'. Wood, following Derrida, characterises this 'experience' of the limit thus: "The interruption of experience, in the sense of both an interruption of experience and the interruption of experience." (114)

This interruption or 'opening' offers a 'chance', not only to be critical and reflect upon the conditions of possibility of experience or judgement, but also, by not allowing such a reflection to return judgement or experience to 'itself', this opening enables 'other' experiences, forms of thinking and being. This difficult aspect of 'experience', the experience of intolerable complexity or the intolerable complexity of experience, makes *just* judgement possible. In Thomas Keenan's words:

It is when we do not know exactly what we should do, when the effects and conditions of our actions can no longer be calculated, and when we have nowhere else to turn, not even back onto our "self", that we encounter something like responsibility. (1997: 2)

While 'theory' provides us with principles that tell us how to act or what something might be in a given situation, there are no rules to tell us that a 'situation' is an instance of a rule or law. The 'opportunity' one finds in the (dis)juncture of theory and 'experience', cognition and action is, for Derrida, what gives identity or culture a 'chance' in the future. Within a tradition, a specific political, cultural or historical closure, from a determinate position or perspective, the other gives us this 'chance'; a break or opening with a horizon of expectation, a risk or gamble and an opportunity or unexpected possibility. The boundaries between theory and practice, cognition, action or experience are revealed primarily in their transgression. My principle interest here is not so much with what cognition reveals of experience or experience of cognition, nor with what theory reveals of certain cases or cases of theory, but with what each reveal as unrevealed *as* the unrevealable that opens the field of possibility. As Derrida observes:

Experience obviously supposes a meeting, reception, perception, but perhaps in a stricter sense, it indicates the movement of transversing. And by transversing consequently a limit or a border. (1995b: 373)

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'Experience' not only raises questions about the sending and receiving, departure and destination it presupposes, but also about the conditions of their possibility and, beyond this, about what would be impossible. The question of the ground of judgement, or rather the lack of ground, thus opens a range of concerns relating to authority, legitimacy and conditions of possibility.

Read against the background of debates about colonial politics, one of the central concerns in this thesis is the relationships between the possibility of representing certain specificities, the possibility and politics of speaking about or of such individual instances, the manner in which such an inquiry makes us think or practice representation and the ethical or political possibilities these activities present. Rather than taking as 'given' sets of cases that can unproblematically be brought together under some national, cultural or diagnostic name, or, alternatively, denying the possibility of any such feat, I will draw from the relationship between 'examples' and more general 'unifying' concerns a sense of the ethical and political issues that underwrite any such representation, conceptualisation or narrativisation. A central interest, therefore, is in how all representations of identity and culture *in general* or indigeneity and indigenous cultures in particular, are ethical and political matters. Much of my concern with legal, historical and political discourses revolves around the way colonial discourses, by limiting their subjects to the terms of their field, pass over and foreclose such political or ethical questioning. As with the particular questions examined in this thesis, these interests should not be taken as a *merely* theoretical interest in certain examples of colonialism, since this examination is just as much a consideration of theoretical interests and 'investments' read through 'colonial' texts. In short, this investigation is more an interrogation of certain themes or concepts in

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'Western' thinking in terms of its articulation in 'the non-West', as it is an investigation into indigenous culture and its relation to 'theory'.

This introductory chapter is divided into three parts: in the first I will consider the question of the 'proper' place of theory by reference to a number of debates centring on recent postcolonial theory and the politics of representation so as to provide a theoretical backdrop for the chapters that follow; in the second I consider the problematic relationship between theory and practice in the context of colonialism and (post)colonial scholarship; in the third I shall describe the way these concerns feed into the issues concerning justice, community, proper-ness and property. Through these discussions, I will introduce and outline the main propositions put forward in the thesis concerning the relationship between the problematic of representation identified in recent postcolonial and post-structuralist theory, the 'before-ness', 'prior-ness' or 'properness' implied by notions of indigeneity, and their implications for debates about justice, reconciliation, authority and authenticity.

2. *Naming the Postcolonial*

2.1 The Contexts of Post-colonialism(s)

When Marcia Langton proposes a study of "representation of Aborigines in an iterative mode" (1993: 7) she suggests a way of understanding representation as normalising, constitutive and transformative. The term 'iterative', coined by Derrida, problematises the view that meaning is determined either by the context in which a word, sign or name appears or by any property of the word, name or sign. More precisely, 'iteration' refers to the way in which a word, name or sign 'communicates' its meaning through its repeatability and (mis)recognition as that word, name or sign, despite and by virtue of its repetition as something different. As Hubert Dreyfus and

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Charles Spinosa point out, iterability is "a [paradoxical] characteristic of *types* - namely they must be capable of being instantiated in a variety of contexts . . .[and yet] depend for their full determination on matters external to them." (1996: 742) Iteration describes the performativity of naming or representing, in the sense that such acts are constitutive of that which they name; it describes what Judith Butler has called "that aspect of discourse that has the capacity to produce what it names." (1994: 33) It is through repetition, or rather the incompleteness of identification which necessitates repetition, that the word, name or sign is able both to secure and to undermine, conserve or transform, the meaning of that which it names. Thus, in the context of current debates about Aboriginality or indigeneity, Langton uses the term 'iterative' to suggest both the ways that representations perform, create, maintain and articulate identities and the relations of power and authority implied by the recognition of such representations.

One might wonder, however, about the implications of evoking, citing or performing postcolonial or post-structuralist theory in different contexts from those in where the theories were initially formulated or developed. In the discussion of indigenous rights or identity in Australia, for example, 'theory' often appears universalising and Eurocentric, particularly insofar as it extends its critical gaze to indigenous contexts or subjects. Here, the reterritorialisation of signifiers of Aboriginality into the field of 'theory' can be interpreted as a move that establishes and consolidates the authority of Western discourses over objects and things non-Western. A central point of this criticism concerns postcolonial and post-structuralist theory's alleged preoccupation with the function and role of representation at the expense of historicised empirical research and despite its own cultural and political positionality. Patrick Wolfe has argued that the "cultural production formula" of post-colonial and

post-structuralist theory insidiously disempowers the position of Aboriginality by assimilating it and that "by adopting the self-righteous posture of not privileging literate discourse, it claims the deepest recesses of Aboriginal life for its unblinking gaze" (1992: 337). Langton, qualifying her own use of theory, has noted that "some intellectuals even demand that the Native . . .speak from the hyperluxury of the first world with the reflective thoughts of a well-paid, well-fed, detached scholar" (84). Nicholas Thomas has complained that:

> [c]olonial discourse has, too frequently, been evoked as a global and transhistorical logic of denigration, that has remained impervious to active marking or reformulation by the 'Other'; It is figured above all as a coherent imposition rather than a practically mediated relation. (1994: 3)

The importance of these critiques and the significance they attach both to knowledge of the local and the empirical and an awareness of positionality in studies of colonialism cannot be underestimated. And yet, many of those criticised as proponents of 'post-colonialism' or 'colonial discourse theory' seem acutely aware both of the problematic relationship between the general and the specific with regards to representation and of the need to register and recognise the specific and localised forms colonialism takes. Perhaps more importantly, scholars of 'post-colonialism' have cast critical attention on the 'conditions of possibility' of the presentation of 'the empirical', revealing much about the historically and culturally specific conditions under which terms of inquiry are assumed and the way inquiry operates within both particularised and more general relations of power. As Spivak has observed, while one must

endeavour to recognise the specificity of particular manifestations of *colonialism*, there can be no simple, unproblematic or uncontaminated reportage of facts or disclosure of position: "anyone dealing with a report or tale (the material of historiography or literary pedagogy) can and must occupy a certain "I"-slot in these dealings [and] . . .[t]here may be a hidden agenda in covering this rather obvious thing." (1988b: 243)

Spivak's observation is more than a mere reflexive gesture or an attempt to qualify and excuse a particular intellectual or academic practice; there is no 'happy' reconciliation between methodological or epistemological concern and the politics of 'practice'. In this sense, hers is an approach that is both radically committed to empirical inquiry and critically responsive to the ethical and political implications of such commitment. It both refuses the finality of 'this is it' notions of identity and questions the metaphysical investment this implies while simultaneously confirming and affirming the necessity of a sense of history and historicity, and an appreciation of the specifics, the cultural and political forces which work through and animate such inquiries and their general conditions of possibility.

Instead of simply opposing 'matters of fact' to matters of representation or taking representation as simple re-presentation of what *already* is, Spivak takes the problematic relationship between representation, representor and represented as a central concern. Rather than attempt to distinguish the singular attribution of a name, word or sign from the essential generality of the system in which they circulate, the very idea of an attribution, designation or identification is taken as an aporia between a particular 'identity' or 'thing' and its representation, where the term, like any name, already betrays the singularity of that which it names, and the 'sense' it is 'given' through its expression, explication or denotation. This problematic concerns the politics of representations in terms of its implications for what 'is' and what 'can be'

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and the 'place' of 'theory' itself. Through a reconsideration of debates centring on the work of Homi Bhabha and Spivak, I will argue that postcolonial theory's examination of the correspondence between types representation and ways of 'being' has enabled a consideration of representation and its implications in terms of agency, identifications and notions of rights, entitlements and what is 'properly' in 'its' place.

2.2 The Context(s) of Postcolonial Theory

There is nothing new about the study of colonialism *per se*. Indeed, studies of colonialism developed in tandem with colonialism itself in a wide range of disciplines and scholarly fields. The term 'post-colonialism' now denotes an extremely broad and heterogeneous set of practices and conditions. My focus here is primarily the form of discourse analysis initiated by Edward Said's *Orientalism* in 1978, as a sub-discipline within literary and cultural theory, and only occasionally with the apparent 'condition' or relation to colonialism implied by the prefix 'post' in 'post-colonialism'. Unlike Fanon, Césaire and Ngugi, Said shifted the study of colonialism towards its discursive operations by foregrounding the relationship between forms of representation and knowledge and the development and history of colonialism and imperialism. This has a number of significant implications for the ways colonialism can be conceptualised. As Robert J. C. Young observes:

> This meant that the kinds of concepts and representations
> used in literary texts, travel writings, memoirs and academic
> studies across a range of disciplines in the humanities and
> social sciences could be analysed as a means for
> understanding the diverse ideological practices of

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colonialism. . . it emphasised the ways in which seemingly impartial, objective academic disciplines had in fact colluded with, and indeed been instrumental in, the production of actual forms of colonial subjugation and administration. *Orientalism* provided powerful evidence of the complicity between politics and knowledge. (1995:159-160)

The innovative quality of Said's work derives from its focus on the intersections between the study of colonialism, literary studies and post-structuralism. Following Foucault's theorisation of the way a discursive field constitutes its object of knowledge, Said radicalised the study of colonialism, by arguing that 'Orientalist' texts "can create not only knowledge but also the very reality they appear to describe." (c1978: 94) Nearly everything in postcolonial theory has been a further development or extension of this treatment of colonial discourse, through the incorporation of different theories or the consideration of different colonial contexts.

One significant difference between Said's position and many of his successors hinges on the question of humanism. *Orientalism* deplores the ways in which 'Orientalism' tends to eliminate 'humanist values'. According to Said, any remedy for this tendency it would be achieved through the appeal to a general notion of 'human experience' and in terms of humanist values. Bhabha and Spivak, however, develop Said's insights through the consideration of different sets of colonial texts and contexts, through the re-contextualisation of psychoanalytic theory (Fanon, Freud, Lacan and Zizek), Marxism (Marx, Benjamin, Gramsci and Althusser), deconstruction (Derrida and de Man) and postmodernism (Jameson and Lyotard), and through a

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critique of humanism. This critical approach to humanism developed from a recognition that it was in many ways complicit with colonialism. As Young notes:

> The idea of the human which Said opposes to Western representation of the Orient is itself derived from the Western humanist tradition. It was produced from the very same culture that constructed not just anti-humanist Orientalism, but also, as Said himself points out, the racist ideology of [the] superiority of the 'White Man' ... (1990:131)

All of what Young points out about the problems associated with humanism may well be true both in theory *and* in practice, and yet, as Spivak and Bhabha note, we must surely admit that the category 'human' has been and still is one of the most pertinent and effective categories under which struggle is made or rights claimed. Nor could anti-humanism provide a category that could replace the term and still not face the very same problems identified in the critique of humanism. The very notion of the human is thoroughly problematic: there is no denying how it has been used or the problems it carries within it. But, the very force that enabled the category to impose itself so effectively, the implied sense of 'human' as beyond any particular culture, language, religion or nationality, makes possible a counter argument against attempts to appropriate the term or naturalise it as 'proper' to any particular form. In short, the term 'human' in its generality permits a critique of Eurocentricism *in the name of human rights*. Perhaps, one might suggest, as I believe Said would, that it may be precisely because of its problematic nature, this terrible past in which 'the human' served as justification for all sorts of injustices and in the interests of all sorts of

imperialisms, that the category can be re-claimed or appropriated, giving it a chance in the future.

The notion of 'human rights' has imposed and re-produced a certain concept of the subject of these rights, which as a general notion effaces difference. In the context of colonial New Zealand, for example, the affirmation of 'human rights' masked an imposition of a European derived notion of the subject, a subject entitled to various benefits only in so far as conformed and was subject to certain authorities. Despite the fact that this notion of the subject of human rights was imposed in a manner that was interwoven with colonial interests, the general notion has been appropriated and re-articulated against monoculturalism and Eurocentrism. I will discuss this further in the chapters that follow. It will suffice now to note that there is no fixed relationship between any articulation of 'human rights' and any particular content or form. 'Human rights' are not the property of any group *in particular* and any delineation implied by an assertion of these rights can be challenged *in their name*. The re-articulation of rights could be seen as the reproduction or re-articulation of a certain aspect of the status quo. We might ask, however, whether, in Keenan's words:

> These are new rights, new kinds of rights, long hidden within
> the discourse of "human rights", rights of different kinds of
> events and experiences which have now become available to
> us? (38)

In the field of postcolonial studies there have been a number of analogous debates concerning the relationship between colonialism and the terms and categories of modernity. Concerned at the uncritical acceptance of Western concepts and categories,

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numerous journals and books have noted the similarity between debate about humanisms and about post-colonialism's alleged relationship to postmodernism and post-structuralism. Considering some of these theoretical connections, Rice and Waugh have argued that: "[l]ike 'postmodernism', the term ['post-colonialism'] has come to refer both to the condition (here post-coloniality) and to discourses which theorize that condition." (1996: 291) Conversely, many judge the claim that post-colonialism might somehow be tied to the moment of postmodernity, in the sense of an *after* which is simultaneously 'post' colonialism *and* modernity, far too simplistic a conceptualisation of colonialism, underestimating the magnitude and pervasiveness of the effects of colonisation and inscribing the colonial with the temporal, historical or conceptual categories of the West. It could be argued that, although postmodernism and post-colonialism may each be related to a problematisation of European thought and identity, postmodernism can also be seen as a determined effort to retain, for Europe and European thought, the position of global centrality. Arguing this is in a collection of essays dedicated to this problematic relationship, Adams and Tiffin see postmodernism "as a Euro-American western hegemony, whose global appropriation of time-place inevitably proscribes certain cultures as 'backward' and marginal while co-opting to itself certain of the 'raw' materials." (1996: 291)

While it is worth noting here that the curious slippage from 'European' to 'Euro-American' is in some ways characteristic of the problematic way certain approaches are simplistically mapped out in terms of allegedly homogenous nations, this point will be pursued later. What I note here is that, while acknowledging the significance of these criticisms, others such as Bhabha and Gunew have suggested that postmodernism shares important similarities with certain strains of postcolonial theory when articulated as a particular problematic concerning a relation to 'the modern'. For

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Bhabha, post-colonialism is neither that which follows or supersedes the modern, but rather the anterior of the modern; 'postcolonial contramodernity' or the revision and renaming of "the postmodern from the position of the postcolonial."(1994: 175) Much as Foucault views the interrelationship between power, resistance, repression and productivity, so post-colonialism can be understood as inseparable from colonialism. As with the postmodern's relation to 'the modern', post-colonialism is thought, not as an effect of colonialism or that which supersedes or follows it, but rather as that which was there *from the beginning*, as colonialism's problematic, disruptive, contrapuntal limit. Signalling this relation in his own work, Bhabha argues that the power of the postcolonial translation of modernity rests in its:

> Its *performative, deformative* structure that does not simply
> revalue the contents of cultural traditional, or transpose
> values 'cross-culturally'. The cultural inheritance of slavery
> or colonialism is brought *before* modernity *not* to resolve its
> historic differences into a new totality, nor to forego its
> traditions. It is to introduce another locus of inscription and
> intervention, another hybrid, 'inappropriate' enunciative site,
> through that temporal split- or time lag- that I have opened up
> . . .for the signification of postcolonial agency. (241-242)

Despite such qualification, opposition to the use of post-structuralist theory has tended to suggest that its allegedly 'textualist' or 'idealist' inclinations occur at the expense of empirically-grounded materialist social inquiry. Indeed, some have suggested that postmodern and post-structuralist theory improperly impose a particular

conceptual frame on non-Western contexts or texts, and in so doing reduce their subjects to matters of 'mere representation' and other concerns 'proper' to Western philosophy (see, for example, Slemon and Tiffin eds., 1989). This charge suggests that postmodern and post-structuralist theory repeat the errors of the Enlightenment philosophy they so strongly oppose, proceeding as if their insights were universifiable, general and transcendental. Theory thus faces three charges: firstly, that there is a form of complicity or collusion between 'theory' and colonial interests; secondly, that the presumed relevance of post-structuralist theorisations of the subject, culture and meaning are treated as universifiable, and thirdly, and more generally that this 'retreat' from 'the empirical' relates to the tendency of theory to provide little in the way of 'practical' solutions or interventions. In other words, although theory is claimed to be radical its critics assert that *in practice* it is the opposite: concerned with the realm of representation and questioning the very bases of mobilisation and critique, under the guise of 'the subject' and 'objectivity', theory seems to work in the interests of the status quo.

For example, Aijaz Ahmad suggests that postcolonial theory has been the privileged activity of scholars far removed from the social and material realities that constitute the subject matter of such theorisations. The position of the postcolonial critic in the West, the absence of the day to day perils that face many of the subjects they 'theorise' affords a luxurious distance from which to problematise subjectivity and truth. Moreover, according to Ahmad, these theorisations reproduce the international division of labour within the academic sphere and are thus complicit with the movements and operations of global capitalism, by which Western profit is made through the extraction and refinement of the 'raw materials' of the "Third World". The "Third World" becomes an appropriable other in a self-consolidating, self-affirming

relation to the West(ern). The imposition of post-structuralist theorisations onto non-Western contexts gives priority to certain philosophical questions or concepts that preoccupy the 'Western mind' and, in so doing, both displaces and undermines the forms of identification and authority essential to anti-colonial struggle. Taking *Orientalism* as an example, Ahmad describes what he takes to be the highly problematic relationship between Said's failure to provide an alternative position to 'Orientalist' discourse and his privileging of Western texts and authors. This relationship, he argues, connects Said's description of the pervasiveness of colonial discourse and the silencing effect he associates with it to the central position he himself gives to English texts and authors. Ahmad observes:

> what is remarkable [about *Orientalism*] is that with the exception of Said's own voice, the only voices we encounter in the book are precisely those of the very Western canonicity which, Said complains, has always silenced the Orient. Who is silencing whom, who is refusing to permit a historicised encounter between the voice of the so-called 'Orientalist' and the many voices that 'Orientalism' is said so utterly to suppress, is a question that is very hard to determine as we read this book. It sometimes appears that one is transfixed by the power of the very voice that one debunks. (1992:172-173)

Bhabha and Spivak have also been criticised for the ways they privilege certain "Western" theoretical concerns with disadvantageous implications for anti-colonial struggle and the authority of non-Western cultures and identities. Here I provide a

caricature of such criticisms. Bhabha's emphasis on the doubleness in colonial enunciation, which ultimately undermines colonial authority, has been criticised for attributing such subversion to the colonial text and thus placing agency within the equivocal circulation of *colonial* constructs. Despite Spivak's observations concerning the subversive potential produced by the slippage between the colonial text and its iteration within the colonial context, she too has been accused of overstating the effectiveness of imperialism, leaving the colonised no ground from which to utter a word of resistance. For Nicholas Thomas, these apparent problems in Bhabha and Spivak are related to the uses of certain types of theory which he suggests undervalue the empirical and consequently gloss over the complex relations within colonial encounters, so that actual instances of struggle and agency remain undiscovered. Bhabha, for example, is criticised, through the figure of Derrida, for his appropriation of legislative metaphors and the notion of 'governmentality'. After quoting a fragment from Derrida regarding the way the voice of the subject "responds to some police, a force or order and law" (Derrida, 1979: 104), Thomas remarks:

> There are indeed necessary and fundamental questions about
> how representations are licensed, how particular ways of
> constructing subjects, their possible actions, the possible
> moral inflections of their actions, their historical roles and so
> on may be said to be legislated discursively, but . . .there are
> significant limits to the extent that one can expect operations
> to be visibly policed, or at least different kinds of policing. .
> .[and isn't] a certain degree of incoherence found in even
> conventional genres? If this is the case, if narratives are often

dis-organized either because of deliberate experimentation . .

.or because their objects of knowledge are contested or

imperfectly recognized, policing may be more conspicuous in

its effort than in its effect. (44)

Here, Thomas suggests that 'the rule of law' and the effectiveness of 'policing'

may in fact be over-estimated and that in practice they may have very little influence

over what happens. For Thomas, the remedy to this "overstatement of colonial

hegemony" is to be found in a more localised and historically grounded ethnography

that would "deal more adequately with the *presence* of "the colonized" in colonialism,

with the autonomy of their enunciations and strategies" (45). He illustrates this point

by reference to two photographs of staged savagery, one taken in 1894 and the other in

1975. The photograph from 1894, *The Vanquished*, shows a group of Fijians on their

way to a cannibal feast. It can easily be read as constructing the group in a manner that

conforms to and is shaped by European conceptions of the South Pacific 'native' thus

effacing any trace of non-European agency. But Thomas claims that:

[t]o see the picture this 'obvious' way . . .is to be complicit in

the result of the photographic process and to pass over the

fact that this enactment of cannibalism must have been the

outcome of some sort of deal or negotiation. Even if the

capacities of the European photographer and the Fijian actors

to shape the terms of the arrangement were unequal, the

Fijians were possessed of a kind of agency and willed

involvement that the photograph effaces. (36)

In the photograph from 1975, *Hudson Lagusu demonstrates use of the sacrificial altar*, Thomas finds even clearer evidence of agency. Father Lagusu, he observes:

> is not a generic Solomon Islander, a warrior type, but a man who is named, and marked as an Anglican priest, in the photograph caption; and as it happens Father Lagusu is also the author of an article describing the sacrifice he was playfully performing, not a voiceless subaltern. (63)

While the point Thomas is making seems clear, these examples are not as convincing as he suggests and reveal something of how he misreads Bhabha, Spivak and Derrida. For while any form of law or rule can be transgressed, ignored or resisted, transgression and resistance take law itself, be it colonial or otherwise, as their point of reference. In other words, there can be no determination of identity that does not also in some way *presuppose* some principle or rule of determination, verification or authentication. To return to the examples Thomas provides, this would not necessarily mean that no form of action or consciousness is present in the colonial rendering of the 'native', nor that such constructs cannot be effectively opposed or resisted. Rather, the point concerns the type of identification and agency in question here, which marks a particular national, ethnic or cultural entity within a particular text or context.

Derrida, Bhabha and Spivak do not, in fact, renounce the idea of cultural identity. However, they do go to some lengths to demonstrate how such identity, in so far as it is recognisable or comprehensible, is internally differentiated, that it is *not* identical with itself, not 'self-present' or 'autonomous'. As Derrida notes: "what is proper to a culture

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is not . . .identical to itself"; it must differ from itself, even be "different *with* itself" (1992c: 9). Following Saussure, these theorists argue that a sign attains its identity only by differing from other signs. But, beyond Saussure, bringing structural determination into question in terms of its conditions of possibility, or that which must always already be taken to be in order to think such determination, they consider not only 'given' 'presences' but also the 'presencing' of the present or the giving of the given. In terms of structural differences that elude totalisation and are open to history, which give a sign what value it has as a signifier, the distinction Thomas assumes between textual and 'extra-textual', or between the 'logic or law' of the text and the presences that animate and influence it and 'appear' as a trace of what preceded it, cannot be maintained since the evidence he finds must always-already be within signification.

In other words, any distinction Thomas might draw between discursive and extra-discursive must itself be discursive, just as any presence must be dependent upon determining factors which exceed and infect that presence. If identity is constituted through a system of differences, so too will 'its' agency be the result of its determination as 'such-and-such' vis-à-vis such a system. Even the interrogation of a system cannot take place without presupposing some position of authority, some rule of determination. Thus, the identity or agency of the non-Westerner within the colonial text is constitutive of the spaces made available within the text itself, in terms of the text and quite simply as a matter of 'textuality'; it does not 'exist' before the text, but only in terms of the text; it is thoroughly (con)textual. Father Lagusu, the speaking subject Thomas refers to as a clear example of agency, is a speaking subject, speaking as 'the native', only in so far as he is positioned as such within a particular discursive configuration, not purely, simply or autonomously as a non-Western subject speaking

without inhibitions, prohibitions or constraints. Any position of articulation within this context is possible only in so far as it is made available within that particular discourse.

In this sense, and as Althusser and Foucault noted, the position of the subject is "assigned". The paradox of this observation is captured by the word 'subject' itself, as at once an actor or agent, a free subjectivity that does things, but also the subjected and determined, as in "colonial subject". As Foucault shows, a subject comes into being through some form of 'subjectification', that is by virtue of the manner in which it is determined, positioned or assigned (See, in particular, Foucault, 1977). Thus, Lagusu's articulation of identity is made, not in terms that are *his own* but in the terms of *another*. In this sense his articulation as 'such-and-such' subject "responds to some police, a force or order and law", in so far as such forms of determination establish both the grounds of subjecthood and the possibility of 'response'.

Despite this emphasis in Bhabha, Spivak and Derrida on how identification is secured through a system of relations, they also argue for an affirmative relation to the Other, a relation which does not reduce the Other to its relation within such a system. Here we find simultaneously a concern with the specific cultural, historical or 'empirical', terms in which identification is made and their more general conditions of possibility, the division or difference between the two, and an opening which, after Levinas, may be taken as opening to the possibility of ethics or politics. The imperative here demands an openness to the other that cannot and should not be reduced to a self-consolidating relation. But, as Spivak observes, in any particular instance that relation must also be recognised as historically and culturally specific.

The 'native', therefore, cannot be taken merely as a 'sign' within a particular system or economy of meaning: it is not reducible to the meaning given within a particular system of identification; and yet, nor is it to be taken as a personification of

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something 'wholly other'. As Spivak points out, despite the need to affirm and endorse difference, irreducible alterity, subject positions and specific forms of identity, such as the subaltern woman, are positions within social space, with histories, with specific and particular characteristics and concerns: "I do not encounter the subaltern in decolonised space as absolute alterity . . . I . . . think of the flesh and blood gendered subaltern in those remote decolonised areas" (1993b: 153).

2.3 Representations: Speaking for/of

Considering the range and variety of ways in which we speak and respond to the face of another, Alphonso Lingis notes:

> [w]e speak in order to give the other her own voice. We speak in order that the other can speak for himself. Our speech breaks, stops, opens silences, and awaits the moment when it shall withdraw into silence. (1998: 136)

Speaking for the other, *giving* speech to the other as speech *of the other*, is not the other speaking since the act is not *of* the other but *for* the other; it stands in as their speaking and in doing so 'pastes over' the fact of their non-speech. As Mark Taylor observes, rather than being external to language, the site of non-speech precedes it: "[l]anguage, like Lacan's symbolic order, precedes those who speak it or those through whom it speaks. Inscription within the symbolic order or linguistic system entails a "primal" lack that leaves an irrecuperable remainder." (1993: 41) Language and meaning is constituted by *not saying* the trace. But, this silence both affects us and compels us to speech. Both the margin that unsettles the 'present' of speech, and the

uncanny past that returns as future affects and effects meaning as an interruption, avoidance or delay. By simultaneously bringing into question the relation of meaning to non-meaning, self to other, *I* to *we* - this site or opening issues the promise of ethics. As Derrida observes:

> From the moment I open my mouth, I have already promised; or rather, and sooner, the promise has seized the *I* that promises to speak to the other. . . .This promise is older than I am. Here is something that appears impossible, the theoreticians of speech acts would say: like every genuine performative, a promise must be made in the present, in the first person (in singular or plural). It must be made by one who is capable of saying *I* or *we*. (1989: 14)

When one writes or produces a history in which another is 'figured', their difference is confronting and challenging. Here the paradox of the *giving* of representation which can never fully account for what it is that opens or 'gives' the space of representation directs us to the question of the limit or margin of our knowledge. It finds dis-location here, in the attempt to think the location of the other. The 'appearance' of the other opens the question both of representation and of relation. Lingis writes:

> The other is other, not in exchanging places in the common world with me, but in putting demands from his or her own place on my occupancy of a place. He or she is other, not in

formulating different words from a common discourse, but in contesting what I say. We are not different instances of a universal ego-structure in a field I can survey from above; the field in which we exist is the space opened by our confrontation. (1994: 174)

We must note, however, that there is an important but difficult distinction between the general conditions for the possibility of representation, language or meaning and the conditions of representation in a specific colonial context. There is a danger here of moving too quickly and uncritically from a concern that is marked and shaped by specific historical and cultural forces and concerns of a more general nature, and yet, the problem of representation is never simply one explicable by reference to specific or localised factors.

Describing the subaltern as an unassimilable margin in an article addressing the work of the *Subaltern Studies* group, Spivak offers two ways in which the group may be read. She notes that: "even as 'consciousness' is . . . entertained as a self-proximate signified or ground, there is a force at work here which would contradict such metaphysics." (1985b: 338) The counterpoint suggestion Spivak finds would not take subalternity to be definable or assimilateable to the terms of 'the known', but instead note that "subaltern consciousness is subject to the cathexis of the élite, that it is never fully recoverable, that it is always askew from its received signifiers, indeed that it is effaced even as it is disclosed". (339) Instead of something that is made present within the text of history, Spivak suggests that the subaltern be taken as a "negative consciousness" which, unlike "the grounding positive view of consciousness, . . . [could] be generalised as the group's methodological presupposition." (339)

If one reads Spivak here through Levinas's point that the subject is subject only insofar as it is subjected within a world, just as the subject in turn transforms its world, then the subject's relation to the world and others could be thought equally to determine subject and 'world'. The subaltern *as* subject would be positioned within the 'world' inhabited through their 'in-the-world-ness'. Beyond this empirical or historical matter, however, the 'un-recoverability' of the subaltern woman prompts the question of that which is *beyond* recovery and available positions.

The line of questioning Spivak signals opens both subject and world to different 'becomings': the positing of the figure of the subaltern as a "negative consciousness" or 'supplement' marks both a point of lack and excess, not able to be fully disclosed, known or recovered, that 'opens' the field of inquiry, and in so doing transforms the inquiry itself. The marginal figure of the subaltern woman opens a field of questioning in the sense that *not saying the trace* makes possible the field, while the *trace* or margin opens that field to a question concerned with the possibility of the object and subject of the field. For Spivak, this general question is approached through the specific context of the *Subaltern Studies* group. But, as we shall see, such questioning cannot remain a matter of context or of a specific economy of meaning. Indeed, Spivak remarks that:

> The project there is to enter the space in such a way that the other in that space does not simply remain a self-consolidating other but another that is critic of my staged self. (1993b: 153)

This debate about the relationship between representation, identity and agency is crucial since it is central to the problematic ways in which forms of representation make possible certain forms of identification or agency. To oppose the suggestion that the 'I' of identity is something inner, unique or prior to the contexts in which in it 'appears', acts or performs, need not imply that the terms and bases of non-Western identification are invalid or illegitimate. I do not suggest that we uncritically accept a 'social construction' theory of identification or meaning. Any social or conceptual determination must already be underwritten by certain 'material' conditions and relations. The question of how meaning is constituted should not, therefore, end with a certain context of determination or production, but must also consider the conditions of possibility of that production. The process of legitimisation is itself thoroughly interwoven into issues concerning cultural politics and relations of power within (neo)colonialism. This is to suggest that representations are performative in significant ways, in the sense that they produce or bring into being what they represent. Such representations are, however, constrained by the discursive fields in which they appear, such that whatever identities are performed are only made possible to the extent that they are recognised as that which already is, and in this way 'appeal' to or cite forms of authority of authentication. The possible identifications for "Maori", for example, are limited by what will be accepted under this term or name. As in Althusser's description of the constitution of identity through interpellation, the turn in response to the law brings the subject into being and into the language of self-ascription: 'Here I am' (1972).

But, of course, as with interpellation, the 'voice' one responds to and recognises oneself through is not the voice of the self but of the law. Thus, what "Maori" *is* will be determined by practices, beliefs and forms of knowing and not by some necessary

connection between the name and a set of attributes. In this sense, the rethinking and problematisation of the relationship between representation and 'forms of being' suggests not only ways in which particular forms of oppression and discrimination can be linked to representation, but also paths for thinking about the creative potential of representation to bring into being different, hopefully less oppressive, forms of identification.

Similarly to Thomas, Benita Parry argues that Spivak's inability to detect the traces of native resistance is a consequence of her strategy of reading. Discussing Spivak's 'Can the Subaltern Speak?' and an essay on Jean Rhy's *Wide Sargasso Sea*, Parry criticises both for severely restricting "the space in which the colonised can be written back into history."(1995: 40) Commenting on Spivak's rendering of the character Christophine, Parry complains:

> Spivak sees her as marking the limits of the text's discourse,
> and not, as is here argued, disrupting it. What Spivak's
> strategy of reading necessarily blots out is Christophine's
> inscription as a native female, individual self who defies the
> demands of the discriminatory discourses impinging on her
> person . . . (40)

In much the same way that Thomas located "the *presence* of "the colonized" in colonialism", Parry claims that, within the lines of *Wide Sargasso Sea*, "Christophine's defiance is not enacted in a small and circumscribed space appropriated within the lines of dominant code, but is the stance from which she delivers a frontal assault

against antagonists" (40), thereby attributing to Christophine uncompromised non-Western positionality and agency.

But, as Spivak cautions, the presence of the self-representing non-Western subject relates less to the 'actual' fact of their existence or forms of expression than to their articulation within certain contexts, in the light of what she, following Lyotard, describes as "the "*différend*", the inaccessibility of, or untranslatability from, one mode of discourse to another."(1988a: 300) Spivak thus warns us that the invocation of the authentic Other often disguises the desire for a self-consolidating other, already reduced to the economy of the Eurocentric text through the reduction of difference to a difference 'in relation to' the already given ground of interpretation. Such an invocation, "might allow the complicity of the investigating subject . . .to disguise itself in transparency." (294)

Of importance here is Spivak's argument that the word 'representation' is better understood as having two interrelated senses: "as "speaking for", as in politics, and . . . as "re-presentation", as in art or philosophy." (275) She insists that we not conflate the two and yet still consider how "re-presentation", in the sense of depiction, definition or characterisation, can fix or delimit what counts as "representation", in the sense of a delegate or instantiation, as well as how "re-presentation" always-already implies a representor or a "speaking on behalf of". At the very least, this should prompt us to consider what and who is framing the non-Western as authentic or autonomous and so alerts us to the fact that, as Derrida observes, "the very project of attempting to fix the context of utterances [or identities] . . .cannot be apolitical or politically neutral. . .and [is] never a purely theoretical gesture." (1988: 132)

Spivak's point is not, therefore, the effectiveness of colonial authority. Rather, it concerns the possibility of the utterance and reception of difference within the texts of

colonialism, and of the academic or the revisionist historian or literary critic. As she plainly states: "[w]hat I was concerned about was that even when one uttered, one was constructed by a certain kind of psychobiography, so that the utterance itself . . .would have to be interpreted in the way in which we historically interpret anything." (1996: 291) Her complaint, then, is that 're-presentation' is often passed off as 'representation' which renders invisible the position of the intellectual who *gives* voice to the 'native'. Explaining why she prefers to think of the non-Western subject or voice as that which subversively occupies and disrupts the limit of the colonial text, rather than attempting to recover or restore it as a presence within the text, she comments, with reference to Derrida, that:

> [t]o render thought or the thinking subject transparent or invisible seems . . .to hide the relentless recognition of the Other by assimilation. It is in the interests of such assertions that Derrida does not invoke "letting the other(s) speak for himself" but rather invokes an "appeal" to or "call" to the "quite-other" (*tout-autre* as opposed to the self-consolidating other) . . . (1988a: 294)

This draws attention to the limits of representability, to what is beyond possibility in terms of any field of expectation or intelligibility. The question of representation goes beyond any relation between a self and an other to pose the question of the other beyond relationality. Rather than shift the debate to a form of theoretical idealism, this would instead pose the question of relation, position, modality or limit, thereby making critical intervention possible. Indeed, rather than accepting the terms as 'given' it

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makes two distinct and interrelated projects possible: one in terms of the given; the other the question of the giving of the given.

There are, interestingly, similarities between these insights and Bhabha's attempts to attribute a form of agency to the non-Western subject, while remaining critical of humanist notions of the sovereign subject. For him, the idea of an agency *in itself* or apart from a specific context remains thoroughly problematic. The idea of a resistant colonial agency outside of or independent of the text of colonialism results in a form of essentialism that must first presuppose an abstract subject without a context. Here, Bhabha follows Zizek's anti-descriptivist tendencies, in so far as he suggests that there is no agency or identity, pure and simple, in-itself, but only identity or agency given through a particular context, as "such-and-such", and that there is no necessary connection between a form of identity or agency and the descriptive features we attribute to it. This view holds that meaning and agency are not innate but situational and contextual, i.e. given through a system of meanings as a position with the system. As Ernesto Laclau notes:

> This guaranteeing of the object in all counterfactual
> situations, that is, through the change of all its descriptive
> features [i.e. temporal or contextual changes], is the
> *retroactive effect of naming itself*: it is the name itself, the
> signifier, which supports the identity of the object. (1989:
> xiii)

The result of this way of conceptualising identity and agency, according to Bhabha, is that the giving of the name, the attribution of a positionality within a discursive

system that constitutes the subject, positions the subject as "such-and-such" identity. In other words, the determination of the subject, of its identity, always exceeds the subject itself. This process of identification, Zizek notes, takes the form of a tautology: "[a] name refers to an object *because this object is called that*- this impersonal form ('it is called') announces the dimension of the 'big Other' beyond other [empirical] subjects." (93) As in Spivak's description of the reduction of difference (epistemic violence) that occurs when the non-Western other is 'given' representation within the Western text, so the inscribed identity of the 'native' within the text 'obliterates' what it names, in so far as it is given meaning and constituted in terms (by necessity) not its own. 'Own-ness' is, of course, both one of the stakes in naming and the site that opens the question of 'the before' which gives one's own-ness to oneself. Here, the mutually constitutive relationship between self and other provides Bhabha with a way of thinking a form of postcolonial agency:

> The individuation of the agent occurs in the moment of displacement. It is a pulsional incident, the split-second movement when the process of the subject's designation- its fixity- opens up beside it, uncannily *abseits*, a supplementary space of contingency. In this 'return' of the subject, thrown back across the distance of the signified, outside the sentence, the agent emerges as a form of retroactivity. . . It is not agency as itself (transcendent, transparent) or in itself (unitary, organic, autonomous). As a result of its own splitting in the time-lag of signification, the moment of the

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subject's individuation emerges as an effect of the
intersubjective- as the return of the subject as agent. (185)

Part of Thomas's and Parry's criticisms still remain unaddressed, however; they do more than simply charge Bhabha and Spivak with overestimating colonial hegemony, they also suggest that this 'error' is the result of post-structuralism's 'suspension of the referent', its retreat from the 'empirical' into the domain of 'pure textuality'. They are surely right to argue that certain theoretical arguments in postcolonial theory seem to suit particular political strategies and particular contexts, and, therefore, cannot be appropriate or useful in all cases. For example, the implications of the problematisation of the subject or of culture for diasporic and immigrant populations in England or North America differ significantly from those of indigenous populations in Australia or Aotearoa New Zealand.

For immigrant Indians in London and indigenous Aborigines in Australia identity is crucially linked to place. However, the respective implications of problematising this connection are so different as to call into question its appropriateness 'across the board'. For indigenous minority populations rights seem to be based on beliefs that might well be described as 'essentialist' and, similarly, discourses of equality often end up consolidating the interests of (majority) non-indigenous populations. The problems we find in relation to the homogenisation of national cultural differences are no less applicable to studies within nations and regions. It would seem that, where similarities and generalities can be assumed, this can be so only through a full appreciation of the specificities and differences of each case. In other words, and as Thomas makes clear, such theories must proceed *from examples.*

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Despite these reservations, such problems derive mainly from the way the work of Spivak, Bhabha and Said has been appropriated in other contexts by other scholars. As Young pointed out, much of the criticism directed at their work involves a form of category mistake: "the investigation of the discursive construction of colonialism does not seek to replace or exclude other forms of analysis" (1995: 163). Here, Said seems the most difficult to defend. But, despite his tendencies to describe 'Orientalism' at times as a kind of ahistorical seamless discursive entity, at others his concern seems more rigorously grounded in the study of national and regional, literary and scholarly particularities and specificities. Indeed, while in some important ways Spivak and Bhabha bring into question the very distinction between the general and the specific, macro and micro, global and local, theoretical and empirical, in others their work can be seen to arise from a theoretically aware 'close reading' of exactly these terms. Thus, Bhabha argues against general transnational studies that refuse and ignore differences:

> the 'simultaneous' global locations of . . .modernity should
> not lose sense of the conflictual, contradictory locutions of
> those cultural practices and products that follow the 'unequal
> development' of the tracks of international or multinational
> capital. Any transnational cultural study must 'translate', each
> time locally and specifically, what decentres and subverts this
> transnational globality . . . (241)

Similarly, likening the notion of 'grammatological knowledge' to empiricism, Spivak argues, through a passage from Derrida, that ""[d]econstruction" is not . . .a new word for "ideological demystification". Like "empirical investigation . . .tak[ing]

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shelter in the field of grammatological knowledge" obliges "operat[ing] through examples'." (292) Warning against the imposition of theoretical insights from one context to another, she insists that attention to the 'empirical' has been a central concern of hers:

> [t]he Indian case cannot be taken as representative of all countries, nations, cultures and the like that may be invoked as the Other of Europe as Self. This caution seems all the more necessary because, at the other end, studies in English, French and German eighteenth century are still repeatedly adduced as *representative* of the emergence of *the* ethical consensus - and studies of Emerson and Thoreau, and Henry Adams advanced as study of the American mind. (1985a: 132)

Given the importance of the question of the 'proper' place of theory and its application, this problem of 'position' warrants further consideration. It relates to Bhabha's and Spivak's more general interests regarding the application of names and identities as an assignment of position. Indeed, in relation to these scholars one of the more extraordinary aspects of the 'assignment' of place or positionality relates to how they themselves have been labelled as either "Third World" or "First World", depending on the context in which the 'assignment' is made, thus calling into question the distinctions between 'First World' and 'Third World', 'theory' and 'practice'. This question of their identity relates usefully to the assignment of place given in naming

and to the questions concerning the 'place' and 'properness' of practices such as theory.

Discussing the application of names to specific instances and the theorisation of the specific, Spivak describes what she holds to be an inevitable 'lack of fit' between the narrow and general uses of a term or name. 'Post-colonialism', as a name for some general phenomenon, cannot properly name the specific conditions of the localised encounters and contexts that fall under its name without reducing and obliterating the specificity of these instances. Similarly, in reference to Foucault's use of the term 'power', Spivak suggests that he cannot 'properly' maintain both its macro and micro senses. Like Derrida's notion of *différance*, 'power' attempts to name a particular relation or configuration that is irreducibly singular, but in its naming, in so far as it is able to name, its meaning necessarily exceeds that instance and refers to something more general. As Spivak observes:

> To use *this* name ['power'] to describe a generality inaccessible to intended description, is necessarily to work with the risk that the word "is wrested from its *proper* meaning," that it is being applied "to a thing which does not *properly* denote". . . (1993a: 29)

This space between the general and the specific, according to Spivak, marks the gap between the singular event, performance or instantiation of the name and its necessary occurrence within a history of language and meaning. The result is much like Bhabha's description of the retroactive emergence of the subject, a kind of interweaving of the general and the specific, the empirical and the ideal, in which each

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brings the other into crisis. Spivak calls this weight of (pre-existing) language 'the burden of paleonymy', whereby the name names only in so far as the specificity it marks out is designated solely in the terms of some generality, within a history or horizon of expectation: the name reduces that which it names to the 'value' ascribed to such a name within a particular system of signification. In this sense, she argues, the name 'power' is not only a name, but also a catachresis that indicates the point of crisis between the "two-sense divide" of the general and specific or the empirical and the transcendental, that marks the place of deconstruction. Here, once again, we revisit the problem described by Spivak and Bhabha with regards to the possibility of 'making present or vocal' the non-Western subject. As Derrida has pointed out:

> It is because the proper names are already no longer proper names, because their production is their obliteration . . .it is because the proper name has never been, as the unique appellation reserved for the presence of the unique being, anything but the myth of a transparent legibility present under obliteration . . .When within *consciousness,* the name *is called* proper, it is already classified and is obliterated in *being named.* It is already no more than a *so-called* name. (1976: 109)

3. *The Names Given: Tradition, Inheritance and the Theory/Practice Problematic*

3.1 Philosophy's Tradition

At a time when many seem to suggest that the so-called 'postcolonial' or 'postmodern' age we inhabit has brought with it the possibility of a radical re-configuration or alteration in the relations of power, production or meaning, we do well to remember the insights of one of the thinkers identified with this allegedly passing 'epoch', Marx. Noting the relationship between tradition and inheritance, on the one hand, and the possibility of revolutionary consciousness, on the other, he argued that:

> Men [sic] make their own history, but they do not make it just
> as they please; they do not make it under circumstances
> chosen by themselves, but under circumstances directly
> encountered, given and transmitted from the past. The
> tradition of all the dead generations weighs like a nightmare
> on the brain ot the living, And just when they seem engaged
> in revolutionising themselves and things, in creating
> something that has never existed, precisely in such periods of
> revolutionary crisis they anxiously conjure up the spirits of
> the past to their service and borrow from the them names,
> battle cries and costumes . . .(1934: 10)

Marx's point is relevant to the question of how postcolonial theory might offer something different from other forms of discourse 'under' colonialism. It raises the question, for example, of the relation between representation and re-presentation in terms of Western philosophy's relation to the non-West (the constitution of the colonial subject, the complicity of Western intellectual production with Western

intellectual interests) and what Althusser calls the relation between knowledge and "the system of real conditions which make it, if we dare use the phrase, a determinate *mode of production of knowledges*". (1970: 41) While recent theory, following a Kantian model of critical philosophy, attempts to distinguish itself from dogmatism by bringing into question its conditions of possibility, philosophy itself is defined as a practice in terms of relation to its inheritances and traditions. Simon Critchley observes: "the philosophic tradition is the tradition of de-traditionalisation" (1999: 124). The idea of transgression and critical redemption is thus written into the philosophical 'script'. The philosophic tradition, Critchley argues, *begins* with death, the death of Socrates:

> the significance of this . . .is that, with it, we can see how
> philosophy constitutes itself as a tradition, affects itself with
> narrative, memory and a chance of a future, by repeating the
> scene of radical *de-traditionisation*. (122)

By extending and repeating itself over time and space while demanding universal validity, philosophy at once passes over the question of its particular origin, since what it claims, it claims independently of the singular and specific context of utterance, as if what it said must be true independently of perspective or position, while simultaneously repeating the origin of those utterances as its founding principles. As Critchley notes by reference to Said: "such philosophical sentiments do not seem far from the core belief of imperialism" (128). The question for Critchley thus becomes: "if we provisionally admit that there is a racist or imperialist logic in philosophy . . .then could it ever be otherwise? . . .would it be conceivable for philosophy, or at least 'we European philosophers', to be in a position to repeat another origin"? (129) In

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other words, and this point is central to the thesis that follows, how might theory theorise colonial contexts and subjects without, by that very process, repeating and re-inscribing Western dominance and authority?

According to Husserl in *The Crisis of the European Sciences,* there are two senses of tradition, one inherited or handed down without question, the other invented through a critical engagement with what came before it. These correspond to what he calls *sedimented* and *reactivated* senses of tradition. As Critchley notes, sedimented tradition is a form of traditionalisation, "a process of settling or consolidation . . . [consisting] in the forgetfulness of the origin of the state of affairs" (129) while *reactivation* counters *sedimentation* with what Husserl calls "a teleological-historical reflection upon the origins of our critical scientific and philosophical situation." (1970: 3) Against the first sense of tradition, Husserl calls on his readers to reactivate the origin of the tradition from which the adventure sprang, and to do this precisely in order to awaken a sense of crisis and distress. In Critchley's words, this "demand for the reactivation of a sedimented tradition . . . is a necessary and unavoidable move . . . into philosophy and critique" (131).

Husserl demands from the 'present' a critical interrogation of the origin of philosophy which brings the present into question in terms of its 'presencing'. This parallels Derrida's thinking of tradition in terms of the problem of closure (1978), which according to Critchley constitutes a third sense of tradition, a *deconstructed* tradition. The problem of closure, as Derrida articulates it, concerns the injunction delivered by the duplicitous and ambiguous historical moment - 'now' - where our language, concepts and institutions show themselves to be part of a tradition that is in crisis, under question and exhausted, while, at the same time, seeking to break with and move beyond that tradition. This problem of closure thus describes the simultaneous

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and contradictory position from which one both refuses tradition and remains part of it. As Critchley observes: "[c]losure is the hinge that articulates the double movement between the philosophical tradition and its other(s)." (132) Interestingly, he identifies this not quite 'inside-outside' moment with the hybrid-exile figures of Said and Paul Gilroy, contrapuntal critics who pose a form of "critical-historical, genealogical or deconstructive reflection that would bring us to the recognition of the hybridity of culture and tradition." (134)

Similarly, but in response to Said's description of the pervasiveness of colonial discourse and his apparent over-simplification of the supposed coloniser/colonised binary, Bhabha has argued that a reading of the colonial text itself reveals instances of covert subversion and slippage. Between the lines of the colonial text Bhabha finds an opening for appropriation, mimicry and resistance. As Gunew notes:

> Bhabha concentrates on undoing the monological and unisonant authority of colonial discourse. Assuming as the basis of its power that it can fully define knowledge, it produces 'otherness' as stereotypes or the fixing of difference; and its implication in psychoanalytic economies of fantasy and desire is illustrated by the emphasis on that 'scopic' drive which reproduces the colonised as the object of the colonising gaze, 'the look'. (1994: 35)

Spivak too points to the ways in which the terms presented by the West are open to negotiation, co-option and appropriation:

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The political claims that are most urgent in decolonized space

are tacitly recognized as coded within the legacy of

imperialism: nationhood, constitutionality, citizenship,

democracy, socialism, even culturalism. In the historical

frame of exploration, colonisation, decolonisation, what is

being *effectively* reclaimed is a series of regulative political

concepts, whose supposedly authoritative narrative of

production was written elsewhere . . . They are thus being

reclaimed, indeed, claimed, as concept-metaphors for which

no *historically* adequate referent may be advanced from

postcolonial space. . . For the people who are making the

claims, the history of the Enlightenment episteme is "cited"

even on an individual level, as the script is cited for an actor's

interpretation. (1996: 48)

It is important to note here, as Spivak does, that the appropriation of 'the terms of the West' is never unproblematic nor without political danger. This concern is best brought out by considering the relationship between the categories often used to describe this process of negotiation and appropriation, the condition of 'in-between-ness' it suggests and the intellectual resistance equated with it. In most cases the figure or individual involved is described or characterised as nomadic or exilic able to 'shuttle' between cultures, languages and/or traditions. This characterisation remains questionable, however, at least when considered against the backdrop of the globalising, hegemonic forces that operate under 'late capitalism'. As Critchley argues:

Is the intellectual (described with the figures of nomad, exile

or agent of hybridity) really a source of resistance to late

capitalism, or do these figures rather suggest a troubling

complicity with that which the intellectual intends to oppose?

That is to say, might not hybridity, exile and nomadism better

describe the deterritorializing force and the speculative flows

of late capitalism . . .rather than constituting any resistance to

it? (139)

Such dangers are ever-present. The conditions of the possibility of political 'gain'
are simultaneously those of the possibility of 'loss'. In other words, the negotiation and
contestation of cultural boundaries, the appropriation of Western terms and the re-
articulation and reterritorialisation of 'things non-Western' are the conditions for the
possibility both of effective resistance and of the effective dissolution of resistance, a
counter-hegemonic claim in the interests of the 'non-West' and a claimed non-West in
the interests of Western hegemony.

3.2 Theory and the Name

These observations have interesting implications for the understanding of
representation and the name. As we have noted, the name is recognisable only insofar
as it functions as part of a general system of meaning that would precede and proceed
from that which is named. To receive a name, one must already occupy a position
within a culture, tradition or history and in a sense the name will both be determined by
and will predetermine this position. Taking this problematic of the name as a central
concern in the chapters that follow, I reflect on the function and allocation of the

proper name within certain legal, anthropological and political discourses and ask, within these contexts, what is given to a name in naming, in the sense of its history (paleonymy), the properties, rights and entitlements which derive from it (its value, form or content), and, in an obviously related way, the senses in which we might consider the *properness* or *improperness* of the name. Such consideration of the name will involve both a politics and a problematisation of representation in order to examine the attribution of adjectives and verbs, for example, to nouns and pronouns, the system in which names are 'given', the power relations implied and produced by such attribution and their implications in terms of possible identifications or claims to ownership or authority.

Consider, for example, the relationship between two sets of phenomena: on the one hand, claims concerning the authenticity of what some allege to be *ta moko*, or Maori tattooing, long after its death proclaimed by anthropologists, ethnologists and historians, and the articulation of notions of indigenous sacred-ness, law and authority within the realm of non-indigenous law and politics; on the other, the recent spate of fake and counterfeit 'Aboriginal' artists and writers, the appropriation of Maori cultural and intellectual property, claims concerning 'recently invented' or 'fabricated' sacred traditions and the unrepresentational representation of indigenous issues and beliefs within law and politics. These 'examples' reveal both the complexity of 'naming' and the stakes involved. One might also say, at least provisionally, that they also suggest some of the ways in which representations *do* things performatively; the way in which they effect and change bodies and, indeed, the way in which they both construct and make possible the very 'ground' on which so-called practical political moves are made possible.

The argument made here, then, is in part a response to objections to the uses of 'Western' theories in contexts not fully Western or European, in a manner taken to give some priority to theory over practice, or to the conceptual and abstract over the pragmatic and empirical. This is fraught. There is little one can do to justify 'theory' in general or in principle. Indeed, the use of post-structuralist theory within the context of issues of indigeneity of post-colonialism may often be improper or inappropriate. It could be argued that these 'theories' are far too general and 'foreign' to do justice to the specificities with which I engage in this study. However, in another sense, more particularly in relation to the 'naming' or 'location' described and exemplified by Spivak and Bhabha, this mirrors the very problems I have already alluded to, in so far as it already implies a notion of what is 'proper' or in 'its' place. For if the uncritical assumption that theory can 'find' its place anywhere is dangerous and arrogantly Eurocentric, it seems equally disabling to assume that the questions 'theory' has to offer have relevance only in the West and to Westerners. My point following Spivak, is that while one should be vigilant with respect to the positionality or location of 'theory', one must also acknowledge that this positionality is not fixed, but moveable. As a dialogue with and against the centrality of 'Western authority', 'theory' can and is (re)articulated from its margins.

This concern is highlighted by my interest in the suggestion that the reconceptualisation of identity as an effect of representation, that is, produced or generated, opens up possibilities of "agency" that are insidiously foreclosed by positions that take identity categories as foundational and fixed. This is not to say that such an approach is without problems. The procedure I follow is to begin by questioning the assumed purity of identity as well as theory and practice, and to question the discreteness and autonomy of 'their' right and proper contexts. Following

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Spinoza's famous question "What does the body do?", one might ask "What can be what?" and "To whom does this or that belong?" At certain levels theories, ideas and perspectives seem undeniably 'placed' in particular cultural and historical traditions. The privileging of such questions could indeed be as a 'Western' preoccupation made possible by the luxurious distance of the 'Western' academy from these traditions. In this respect, one must be wary about how particular concerns or "interests" can mask relations of power. This is, as Spivak shows, one of the great lessons of deconstruction (1996).

Colonialism would have been impossible without its complementary theories. As a consequence, we have good reason to be suspicious of those who claim that ideas or theories transgress boundaries. I do not take 'theory' to be neutral or innocent and will not deny its complicity with power or imperialism. I take note of Spivak's caution that, in such contexts, the traces of complicity can always be found.

However, at the same time we must note that 'theory' is not necessarily imperialist or either good or bad *a priori*, or, more precisely, that theory's imperialism can operate in a variety of ways, not always in the interests of 'the West'. This returns us to the questions posed earlier with regard to the reception of tradition. It is not as if the 'place' or 'effect' of any 'theoretical practice' could be determined independently of the particular context in which 'theory' is 'practised'. Indeed, one might suggest that the 'place' of 'theory' is itself a type of 'effect', beyond the determination of any singular 'point of origin' or dispatch, that the politics of 'theory' is as much a politics of 'reception' as it is of 'origins'. My interests concern the association of power with certain groups or individuals and certain forms of discourse, such that certain ways of thinking or behaving are taken to be 'proper' to a particular group or identity, as their *a priori*, by definition, such that, as a consequence, resistance and subversion is simply

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confined to spaces outside of that which it resists or subverts. How often do these sorts of statements take what is 'Western' or 'non-Western' to be fixed or essential? A cursory glance through historical studies of colonialism reveals how both universalisation and essentialism have been put in the service of colonising power.

Following Foucault, then, one might ask to what extent questions concerning 'who' have tended to eclipse those concerning 'how'? This is not intended to give primacy to anti-essentialism, 'the social' or 'structure', but instead argues for the implication or *trace* of the 'how' within the 'who' and vice versa. One cannot consider who speaks or acts within a particular context without prompting questions about how such speech or action is made possible, or from where it derives its power and authority. In other words, in a manner that demands the uneasy bringing together and problematisation of the empirical and the ideal, one must consider the place of identity as well as the identity of place. Lacan notes that: "the name is the time of the object." (Butler, 1997a: 29) But, as Judith Butler has added, it is also the time of the Other: "[o]ne is, as it were, brought into social location and time through being named. And one is dependent upon another for one's name, for the designation that is supposed to confer singularity." (1997a: 29) This is not to deny a beyond of the name or that the politics of 'the cultural' is reducible to a problematic of signification. What it does suggest, however, is that we must at least begin with the name in order to pose the question of the name or the 'before' of the name. One must take positions in order to raise the question of positionality.

If, as Foucault has suggested, subjects or identities are never fully formed or achieved, but are instead always in the process of becoming through such repetition, then the incompleteness of naming or identification suggests a way of thinking of a form of co-opting of power which would make the 'improper' 'proper' or, in a slightly

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different register, bring it into hegemony (Foucault, 1980). In so far as the process of naming or identifying an object, person or group amounts to the act of their constitution, then their descriptive features will be fundamentally unstable and open to counter-hegemonic re-articulation. As Butler argues: "[i]t is precisely the possibility of repetition which does not consolidate that dissociated unity, the subject, but which proliferates effects which undermine the force of normalization." (1997b: 93)

In this manner, she notes, "the term which not only names, but forms and frames the subject . . .mobilizes a reverse discourse against the very regime of normalization by which it was spawned." (1997b: 93) For example, the way representations of indigenous culture or people determine, to some extent, what can be considered indigenous can be thought in terms of the relationship between the demarcation of cultural boundaries and the possible identifications such boundaries allow. One can note, therefore, certain links between representation (in both senses) and notions of ownership, property and sovereignty. We can find obvious examples of this type 'potential' of 're-positionings' within re-visions of law and history where documents, statements or objects are taken to mean radically different things in different contexts or places.

4. *The Gift of Justice and Community*

4.1 Before the Name

'What's in a name?', the famous question from Shakespeare's *Romeo and Juliet* expresses a frustration and dismay at the fact of the name, at the burden of its history and inheritance. The question that follows asks what lies beyond name. Even if one says *yes* or *no* to the name, accepting it or refusing it, then as Derrida notes:

> [i]heritance . . .remains before us . . .To be . . .means to
> inherit. All questions on the subject of being or what is to be
> (or not to be) are questions of inheritance. . .That we *are* heirs
> does not mean that we *have* or that we *receive* this or that,
> some inheritance that enriches us one day with this or that,
> but that the *being* of what we are *is* first of all inheritance . .
> .(1994: 54)

This gives us an interesting way of approaching the politics of the name, identity, history and all that is 'proper' to them. It prompts us to think about what is or isn't given to a name, sign or identity within a particular cultural, historical and socio-political context *and* what remains beyond or before such determination. In the context of postcolonialism and cultural politics, this feeds into a discussion about the relationship between representation and its implications for what can 'be', about the discursive, social, conceptual and material conditions that give identity and meaning or that establish 'proper-ness', and thus the forms of identification possible within a particular context. But, as we have seen, this notion of inheritance and being or that which is beyond or before the name, pushes us to think more than such conditions, more than what can be done or what is possible - indeed, it asks us to contemplate 'the impossible'. This point is important, since it concerns the possibility of justice or ethics.

A particularly interesting aspect of the notion of indigeneity in the context of debates about ethics and justice relates to the fact of its 'first-ness', 'proper-ness' or 'in-place-ness' at home. In the context of law, and what we might call 'colonial

representation' generally, 'before' carries with it a remarkable paradox. In law, indigeneity, indigenous rights and authority have been recognised as 'before' 'the law', prior to its arrival and imposition, displaced, but only after the law's imposition, read through the law, in its terms, later. This notion of before evokes a politics of receptivity and, as with any question about positionality and tradition, a central concern is the question of what is able to be retained and what can be rejected. As I have suggested, there is an interesting parallel here to debates about moral and ethical theory insofar as the moral decision, read in terms of a Kantian notion of morality, involves both a singular and specific moment or situation and a decision or claim that aspires to the highest level of abstraction. As Jürgen Habermas argues:

> A categorical imperative that specifies that a maxim is just
> only if *all* could will that it should be adhered to by everyone
> in comparable situations . . .*Everyone* must be able to will
> that the maxims of our action should become universal law. .
> .what one "should" or "must" do has here the sense that to act
> thus is just and therefore a duty. (1993: 8)

It is interesting to note that the break Habermas describes between decisions or actions with an "egocentric character" and those that are moral or ethical centres on this notion of doing or acting as one *must* according to duty. Duty, of course, is not self-evident: it must be recognised or *received*. It is here that we find, most strikingly, the connection between the question of what is just and what is inheritance or reception of tradition. Following as much as opposing Kant, Derrida notes that, in order to be just, one must not merely act according to the dictates of tradition, law or duty.

According to Kant, to the intellectual concept that contains the rule or principle by which one can determine or act, "an act of judgement must be added whereby the practitioner distinguishes [what for Derrida is undistinguishable] whether or not something is an instance of the rule." (1974: 41) For Derrida, following Kant's own argument, such judgement would be an experience of 'the impossible', since in Kant's own words, to judge whether or not an instance conformed to a rule, to judge a rule or law, one must appeal to a law, rule or principle, "a head above a head" (Kant, 68), "a clear contradiction . . .[since] there would have to be a third, then, to decide." (71)

In short, Kant argues that in order to judge a law or tradition, one must first presuppose a law or tradition, which is paradoxical since there is no position beyond law or tradition, or response to duty that would be beyond duty. Whereas Kant is inclined to dismiss this possibility on the basis of its apparent self-contradiction, Derrida finds in this opening of what Kant describes as an infinite repetition of "a head above a head", the (im)possibility of breaking, the moment "here, now" that gives justice a 'chance'. As Derrida claims, and I shall argue, it is because of its impossibility that justice is possible; this experience of the impossible makes possible the judgement that is at once determined by law and yet judges law.

This has important implications for the way one can view the (im)possibility of justice or democracy. One aspect of this approach, however, derives from a critical interrogation of the terms of the 'present' or the 'given' in relation to 'presencing' or 'giving' of a given present. In all the examples I examine, these concerns about representation, identity and authority are recast in the context of legal debates. It is appropriate here, therefore, to briefly introduce and summarise some of the links I make between the gift, identity, authority, justice and law.

4.2 The Gift

Arguing for a connection between "the ever-present bases of law, to its real fundamentals and to the very heart of normal social life" (1954: 67) and 'primitive' forms of gift-exchange, Marcel Mauss makes the following recommendations:

> A wise precept has run right through human evolution, and
> we would be as well to adopt it as a principle of action. We
> should come out of ourselves and regard the duty of giving as
> liberty, for in it there lies no risk. A fine Maori proverb runs:
>
> > '*Kò maru kai atu*
> >
> > *Ko maru kai mai*
> >
> > *Ka ngohe ngohe.*'
>
> 'Give as much as you receive and all is for the best.' (69)

In this account of 'primitive' gift-exchange Mauss finds the creative origin through which peace, alliance and order emerge from a state of disorder, war and nature. Suggesting a parallel with Hobbes and Rousseau, Marshall Sahlins describes Mauss's findings thus:

> Here was a new version of a dialogue between chaos and
> covenant, transposed from the explication of political society
> to reconciliation of segmentary society. The *Essai sur le don*
> is a kind of social contract for the primitives. (1972: 169)

Gift economy, then, signalled both a 'progression' from a state of 'savagery' and yet also, as Mauss's romantic appeal suggests, a form of 'ideal' state which offered itself as a corrective model to modern European society. Like Hobbes and in some ways Rousseau, Mauss believed that the understructure of society is war and that peace can only be achieved through some form of 'contract' or 'bond' which transcends individuals and groups. However, Mauss's work differs from both in important ways. According to Mauss, unlike the 'social contract' or the 'State', gift-economy would organise society only in a segmentary sense, not in a corporate. As Sahlins notes:

> Reciprocity is a "between" relation. It does not dissolve the separate parties within a higher unity, but on the contrary, in correlating their opposition, perpetuates it. Neither does the gift specify a third party standing over and above the separate interests of those who contract. Most important it does not withdraw their force, for the gift affects only will and not right. Thus the condition of peace as understood by Mauss - and as in fact it exists in primitive societies - has to differ politically from that environment by the classic contract, which is always a structure of submission, and sometimes terror. Except for the honour accorded to generosity, the gift is no sacrifice of equality and never liberty. (Sahlins: 170)

As this description suggests, society based upon gift economy established relations between groups or individuals which do not imply an 'overcoming' of difference for some 'greater' unity, and thus appear to be of relevance to contemporary discussions

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about democracy, multiculturalism and the recognition of difference. Against notions of society that are blind to difference and require the cession of individual sovereignty, Mauss's suggestion that we should "come out of ourselves" and "regard the *duty* of giving as *liberty*" seems to suggest an 'openness' to difference and a relation to an*other* which, at the very least, begins to point in the direction of Kantian morality or, at best, a Levinasian or Derridean ethics. As John Frow has noted:

> One of the main functions of the theory of the gift has . . .been to provide an account of the altruism . . .of non-exploitable reciprocity as a basis of community. (1997: 104)

However, the particular value Mauss finds in 'primitive society' suggests ways in which this relation to *another* may not be as open as he at first implies. Positioned between 'the state of nature' and modern European society (as "good representatives of the neolithic stage of civilisation" (69)), 'primitive society' forms part of Europe's system of self-identification: standing both as a romantic alternative to the 'impoverished' and 'impure' West and as an image of its distant past, 'primitive gift-exchange' is reduced, ultimately, to its relation to the West. Indeed, this point is further amplified by the fact that Mauss's study and the critical interventions offered later by Lévi-Strauss, Firth, Johansen and Sahlins, all hinge on differing translations and interpretations of a particularly obscure passage in Maori. Aside from the differences between translations from Maori to English or French, the conceptual leap from the 'immediate' meaning of the text to the apparent recognition of the origin of European society and economy in general within the passage reveals how the identity of 'primitive society' is inscribed in the language of the West and its 'economy' of

identification. The 'openness' Mauss proscribes, appears to apply only within the *closure* of European thought, to act according to duty and within an economy.

As Derrida has pointed out, Mauss often seems to conflate 'gift', 'economy' and 'exchange', terms that are interconnected but discontinuous:

> The gift, *if there is any*, would no doubt be related to economy. One cannot treat the gift, this goes without saying, without treating this relation to economy, even to the money of economy. But is not the gift, if there is any, also that which interrupts economy? That which, in suspending economic calculation, no longer gives rise to exchange? That which opens the circle so as to defy reciprocity or symmetry, the common measure, and so as to turn aside the return in view of the no-return? . .It must not circulate, it must not be exchanged, it must not in any case be exhausted, as gift, by the process of exchange, by the movement of circulation of the circle in the form of return to the point of departure.
> (1992b: 7)

The point, then, is that as soon as the gift is given, the recognition of the gift as 'gift' annuls itself. To present the gift, *to make it present*, effaces the gift and reduces it to the terms of economy and exchange; for the gift to be gift it must appear without obligation, duty or reciprocity, whether repressed or not; it must be outside of economy, *aneconomic*.

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This may seem to have shifted the discussion away from the representation of difference, agency and identity. And yet, as Derrida points out, the problematic of the 'gift' can be seen to relate to a similar problematic relating to identity, justice and representation more generally. Taking another culture in the way Mauss does, effaces difference in so far as identity is reduced to the terms of *Mauss's* system of thought. The circulation of the term 'primitive', the value it is given, for example, occurs at the expense of that which makes those cultures unique and specific. In more general terms, this notion of the gift economy as social contract seems to go too far in so far as it fails to explain how the subjectivities that enter such an economy are constituted. In this respect, by conflating the giving of the gift to its presentation within economy, this theory of society conceals an essentialism of a subject immanent to itself, which speaks as a whole preceding the parts or as a part before its encounter with others.

These criticisms are serious, and yet, it is not as if the separation of gift and economy is possible. Still, as Derrida observes, this inseparability offers a lesson: this paradox reveals an aspect of a more general problem of presentation: "it so happens (but this "it so happens does not name the fortuitous) that the structure of this impossible *gift* is also that of Being . . . and of time." (27, 28) In Frow's words, the problem of the gift in the work of Derrida is simultaneously the attempt to:

> imagine the 'first' and impossible gift, to read the gift as a
> figure of Being or pure gratuitousness- is what makes
> possible a philosophical discourse, and indeed because
> philosophy is finally dependent . . .upon the denial of
> economy, of debt . . .and the difference of exchange. (1997:
> 108-109)

Thus, this problematic of the gift mirrors a similar problematic concerning the proper name and the 'just' representation of difference. Like the 'presentation' of the gift, the act of reducing identity to a proper name or the reduction of judgement to the terms of law, is an act of violence against what is proper, specific and singular to that which is named or judged. By classifying it and inscribing it in a system or economy of differences, the process of naming, the application of law, or the 'presentation' of the gift, 'obliterates' what is unique to that which is being named, judged or presented. As John Caputo notes:

> In deconstruction, justice has the structure of the gift; it follows, lets us say, not the "logic" or the "law" of the gift, but at least its movement or dynamic. Justice must move through, must "traverse" or "ex-perience" the "aporectics" of the gift, must experience the same paralysis and impasse. For the gift, too, like justice, is *the* impossible, something whose possibility is sustained by its impossibility. (1997: 140-141)

Against the background of debates about multi-culturalism and bi-culturalism, the point made here relates directly to the cases studied within this thesis in terms of the idea of 'just' representation and recognition; in recognition of the way the marking, naming and positioning of the tattoo (chapter 2&3), the secret (chapter 4&5) or non-Western systems of law (chapter 6&7) efface and reduce the singularity, specificity or difference of that which they designate. More precisely, one finds here that the system of authority by which the tattoo, 'sacred-secret' or non-Western law is recognised,

known or given representation, is undeniably tied to, if not continuous with, the mechanisms by which colonial power is administered and constituted. One cannot simply pose the question of what the tattoo, sacred-secret, or non-Western belief are without simultaneously raising questions about what authorities are appealed to determine such matters, and how such appeal therefore itself relates to an interweaving of relations of power, forms of knowing and ways of being; in short, the power/knowledge nexus that marks and thoroughly infiltrates such objects of contestation and debate. It is through the recognition of such relation, therefore, that one can begin to see the 'improperness' of 'the proper' and equally the possibility that those 'proper' forms of authority and law can be re-articulated by taking up the terms of authority in ways that can radically challenge and re-configure certain circuits of power.

4.3 Morality, Community and Ethics

For the most part, the debates that I investigate presuppose some ground or communication, debate or exchange. Consequently, the idea of the gift, as that which opens and exceeds economy, is useful for thinking the possibility of these grounds. I shall end this chapter by re-approaching the question of 'the given', the gift, possibility and justice, through a dialogue between the work of Habermas and Kant. I take this detour to draw attention to a connection between 'the possible' and the possibility of justice, ethics and democracy because this concern emerges throughout this thesis, motivates my continuing interrogation of the conditions of possibility, and reveals how such interrogation has significant implications for the way justice, ethics and democracy are conceived.

In the work of Habermas and Kant we find the possibility of morality based upon a notion of community or consensus: the goal of moral theory is to establish a basic principle that would hold true in all situations, in terms of which the validity of norms could be decided. For both, the notion of a 'moral' community underwrites this possibility. According to Kant:

> The union of many people for some common end which they
>
> all *have* is found in all social contracts. But their union as an
>
> end in itself- as an end that everyone *ought to have*, and thus
>
> as the first and unconditional duty in each external
>
> relationship . . .does not occur in a society unless it
>
> constitutes a community. The end, now, which in such an
>
> external relation is in itself a duty, and itself the supreme
>
> formal condition of all external relations . . . (1974: 57)

In order for there to be any form of morality, moral judgement or action one must assume a form of consensus or community. According to Habermas, however, the procedure by which this is established in the Kantian model is far too monological, since, in large part, it 'establishes' the foundation of morality through individual philosophical reflection. Kant assumes that the meaning of moral validity can be grasped from the position of a reflective individual. Against this, Habermasian discourse ethics is irreparably social, in Ciaran Cronin's words:

> Once consciousness and thought are seen to be structured by
>
> language, and hence essentially social accomplishments, the

deliberating subject must be relocated in the social space of

communication where meanings - and hence individual

identity which is structured by social meanings - are matters

for communal determination through public processes of

interpretation. (1993: xii)

In place of Kant's 'monological' model, Habermas proposes what he takes to be a

more 'dialogic' form of discourse ethics. Any assumed consensus would be open to

argumentation and contestation and in this way his model promises to be more

democratic and fair. Habermas notes that his notion of 'communicative action':

Depends on the use of language oriented to mutual

understanding. This use of language functions in such a way

that the participants either agree on the validity claimed for

their speech acts or identify points of disagreement, which

they conjointly take into consideration in the course of further

interaction. . .Any speech act therewith refers to the ideally

expanded audience of the unlimited interpretation community

. . .(1996: 18-19)

What such a model aspires or gestures to is, in Habermas's words, a situation where

individuals could communicate freely and without distortions that might impede their

argumentative search for truth or rightness. To this he adds that the ideal conditions can

never be fully realised, but that, despite this, an ideal speech situation is not an empty

ideal. Instead, the ideal becomes, in Cronin's words, the "normative presupposition that

Habermas exploits in developing his "quasi-transcendental" grounding of a basic moral principle." (xv) As Habermas explains:

> presuppositions assumed by participants in argumentation indeed open up a perspective allowing them to go beyond local practices of justification and to transcend the provinciality of their spatiotemporal contexts that are inescapable in action and experience. (1996: 322-333)

I agree with everything Habermas proposes, except the way he conceptualises the possibility of community and justice. He is right, I believe, to direct attention to the conditions under which a particular claim to legitimacy, validity or rightness is made and to ask how the meaning of moral validity is established or consensus 'assumed'. Moreover, his suggestion that an "ideal speech situation" could never be realised and that, in consequence, any assumed 'consensus' must be continually open to question, seems remarkably similar to Derrida (despite their considerable differences elsewhere). Indeed, noting a similar point of compatibility, Critchley has argued that Derrida's "messianic appeal to justice conceived as a relation to the irreducible singularity of the other might be combined with a broadly Kantian and procedural theory of justice, capable of testing the validity of moral-political claims." (158)

However, by assuming rational argumentation as the space or practice that would restore and maintain 'consensus' Habermas assumes that morality, ethics and justice can be reduced to what is possible within such a 'sphere'. As with the notion of gift economy articulated by Mauss, a central concern here is with what must already be assumed if consensus is to be possible. In the notion of an ideal speech situation, for

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example, Van Den Abbeele finds idealism, utopianism and "a myth of that immanence that would explain [its] . . . coming into being as but the unravelling or disclosing of what already is . . . (1991: xii)

As Wittgenstein (1972) insisted, argumentation is only possible when a common language game is assumed. Both Habermas and Derrida would, I believe, agree with this proposition, and yet, the differing conclusions they draw from this observation reveals a way Derrida can be seen to be more Kantian than Habermas. As Hamacher points out:

> The ideal of argumentation is an ideal of the symmetrical weighing of interests and of an economy of *do ut des*: precisely the economy of the trading of equivalents which Kant [and Derrida] had rejected on ethical grounds. (1997: 319)

For Derrida, questions of justice can never be reduced to matters determinable within any horizon of expectation, in terms of the conceivable, the intelligible or 'the possible'. Such reduction would violently submit the other to anticipatory horizons that confine the other to the same and the relation to the other to possible relations in terms of 'the given'. Where for Habermas, the minimal requirement for the _ sibility of justice is the possibility of a shared language, rational argumentation and communication, for Derrida it is the impossibility of founding justice on *any* principle or practice, such as communicative action or rational argumentation, that makes justice possible. In short, the impossibility of providing any ground for determining what is just, and the experience of this aporia, 'opens' the possibility of justice; the possibility

of justice, like the gift, is its impossibility, just as the opening of economy to difference, gift, the other, is simultaneously the possibility of assimilating, reducing and effacing difference, gift and other.

Chapter Two

Traces of Authority: Anthropology and the Maori Tattoo's 'Proper' Time

> *...Cut statistics on my face*
>
> *name, age, place of birth, race,*
>
> *village, tribe, canoe.*
>
> *Carve deeply, erase doubt*
>
> *As to who*
>
> *I am ...*
>
> Vernice Wineera Pere 'Walking on Water'

In defining the meaning of 'Maori' through the traditional, pre-contact past, anthropological studies have tended to measure the authenticity of contemporary practices in terms of their similarity to past practices. Transformation and change have tended to be characterised in terms of degradation, unauthenticity and Europeanisation, rather than cultural strategy, survival and growth. Here the apparent disagreements between what is stated in academic discourse and what is alleged of certain social practices, highlight issues relating to the naming or defining of 'the Maori': the complex relationship between the attribution of certain cultural practices to a particular group, the identity of this group, and the notions of authorship and authority implied by such designations. Against the backdrop of these issues and concerns, this chapter will examine the relationship between representation, knowledge and power through a

consideration of the intersections between anthropological representations of Maori tattooing or *ta moko* and theoretical accounts of cultural politics and the representation and recognition of difference. More specifically, in the context of what appears to be a discrepancy between anthropological and historical characterisations of *moko* and what some today claim to be a revival of *ta moko*, I will examine the representation of the 'time' of *moko* in the context of the articulation and definition of cultural identity and authority. My central concern in the next two chapters on the tattoo or *moko* and less directly in all the chapters that follow, relates to the assumed relationship between representation and its object, or more specifically, between representation, the represented and representative.

1 *Modernity, Anthropology and Representation*

In an essay on modernity, colonisation and writing, Simon During observed that: "[p]erhaps nothing has divided Western from non-Western societies more powerfully than the notion that the West is the natural, the elect home of modernity."(1989: 759) The linkage of 'modernity, colonisation and writing' is highly suggestive of the way the European colonial empires initiated a range of temporal-historical mappings that made anthropological writing possible. The link between the inscription of a relation between the West and the non-West, in terms of a temporal-historical distribution in space, and colonial writing and anthropological discourses, ties together modernity, anthropology and colonialism in a re-conceptualisation of historical time based on a relation to other histories or, more specifically, other spatially coexisting temporalities. As Peter Osbourne notes:

The condition for this transformation of the sense of the relationship of the present (and its immediate past) to the more distant past- from being a simple addition in a linear sequence of chronological time, to a qualitative transcendence of the past of an epochal type . . .was a reorientation towards the future. This reorientation could only take place once . . .the advance of the sciences and the growing consciousness of the 'New World' and its peoples had opened up new horizons of expectation. (1995: 11)

The marking out of supposed differences in spatial terms places 'writing', in the sense of a marking of already presupposed divisions, relations or oppositions, at the heart of the anthropological project, since it establishes a distinction between the site of representation and that which is represented. Anthropology inscribed and marked out (temporal) differences between its subject and object without being able to account for or 'place' the 'time' of the marking. As Osbourne points out: "[i]t was the function of anthropology to establish historical differences between different types of society within the present." (1995: 17) Here, he directs attention both to the empirical and the transcendental conditions of possibility of anthropology. The impossibility of fully separating both the trace of the authorial hand and those historical and cultural contingencies which weigh upon it from the object they outline threatens to undo the stability of the division or difference, be it temporal, spatial, conceptual or imaginative, that makes the practice of anthropology possible. The intertwining of the subject and object of knowledge threatens both the objectivity and the political and intellectual purity of the anthropological project. The 'object' detailed in such studies comes to be

seen as both formed and shaped by that which necessarily exceeds the scene of knowledge: neither completely internal nor external to the 'field', the framing strategies that mark out the object deny the separation of knower and known. The very structure of anthropological discourse requires that the object of study remain temporally or spatially distinct, stable and external to the subject. Moreover, as Jonathan Friedman points out:

> anthropology is [also] born out of the ideological representation of the centre/periphery/margins structure of our civilisation as an evolutionary relation between civilisation and its less developed forerunners, *a mistranslation of space into time*. (1994: 5)

Friedman's concern is with the way such differentiations between the subject and object of study typically 'seal off' or separate the object from the time of observation and writing, in short, from 'modernity', and, so consider the object only insofar as it is able to be 'frozen', 'taken out of time' (Thomas, 1996a), or detached from history. By presupposing the division or distance between the subject and object as 'given' or, conversely, by focusing upon structural relations these studies fail to consider history and structure adequately equally or simultaneously; that is, as diachronic relations and systems of social and cultural reproduction which are not reduced to relations within a particular structure, but which can some how make sense of the empirically 'given'.

This problematic has implications beyond questions of anthropological method and epistemology, since the association of the purity or authenticity of other cultures' practices, beliefs or objects on the basis of their distinctness and autonomy from

Western modernity has typically meant that authority and legitimacy are based upon these very cultural, temporal and conceptual divisions or differences. Consequently, the marks of colonisation or contact on the articulation of identities, or the development of beliefs and practices which assimilate or appropriate 'Western' materials or methods, are generally read in terms of degradation and the loss of authenticity and tradition. As Nicholas Thomas notes, this inability of traditional anthropology to integrate a sense of history into its central concerns is "reflected in the fact that studies of the 'social change' genre always associate change with European contacts or some colonial presence". (1996a: 11) Moreover, the fact that anthropological studies and reports now play a role in debates concerning the recognition and institutional legitimisation of indigenous rights and beliefs means that these studies are generally disabling and limiting (although in many ways necessary) insofar as they fail to provide for contemporary articulations of indigeneity.

Suggesting a connection between representational practices, systems of authority and colonisation, Eugene Hanson has pointed out that: "control over the depiction of Maori has been, and is being, used as an effective tool of colonisation." (1996: 25) And yet, an emphasis on the interweaving and entanglement of subject and object also proves problematic insofar as it undermines the grounds on which claims of authority, ownership and identity are based. Here, the consideration of the relationship between representation, its object and authority, and their conditions of possibility, should not be construed as a retreat from specific political or ethical issues of a particular instance, context or example. Rather, such an approach can effect a radical 'opening' that makes it possible to consider the terms of a given instance or example as ethical or political outside or beyond the designation or determination of the terms 'ethics' or 'politics' within the field in question. For example, as long as anthropology is

conceptualised in a manner that takes for granted the relation between its modes of description and that which is described, ethical and political questions are limited to those concerning the accuracy or realism of its representations. A consideration of the conditions of possibility of this practice, both historical or empirical and transcendental, problematises this relation of representation to its object, along with its terms of 'accuracy' or 'realism', in relation both to the historical forces that animate, shape and influence its operations and the conceptual pre-suppositions on which it is based. Indeed, for many critical anthropologists, these concerns mark one of the necessary departure points for their discipline. As Osbourne writes, the critique of the assumed temporal-historical division at the heart of the anthropological project:

> has . . . transformed the problem of representation from a narrowly epistemological one (relativism), into the more directly political form of a questioning of the social functions of the representational practices at stake; but it has not thereby solved it. (18)

2. 'Tattoos' of the Past

Although tattooing was practised in many parts of the world, early *moko* differed from other forms of tattooing because the skin of the tattooed subject was typically chiselled rather than punctured with needles. *Moko* were not simply designs on the skin but carvings. Indeed, the other name given to *moko* by Maori is *whakairo*, the term commonly given to woodcarving. The face and buttocks were the primary areas for the male tattoo; for women it was the lips and chin. *Moko* on the face was composed of groups of lines and spirals symmetrically placed on either side of the

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face. Two types of spiral were used- the *koru*, which has a 'clubbed' end, and the 'rolled up' spiral. Buttock and thigh tattoos generally consisted of large spirals, with the cheeks of the buttocks forming two mirror-image design fields. *Moko* pattern could be broadly separated into two types: that based on pigmented line and *puhoro*, based on darkening background that left an non-pigmented 'clear skin' pattern.

For pre-European Maori the *moko* was an expression of a uniform view of life. As Simmons notes, it was a "badge in that it was widely believed to designate membership of a particular group and individual's standing within that group. . .[It was a text that revealed the] tribe, . . .rank and [in the case of males] his masculinity". (1986: 23) Post-European tattooing grew out of an awareness of the Maori as a threatened minority group and the need to assert identity and authority. Simmons observes: "the popularity of [post-European] tattooing tended to increase when other features of Maori were revived (such as fighting in the 1860s and carving in the 1930s)." (23)

Moko (the tattoo) is a highly sacred thing, embodying not only the authority or *mana* of the tattooed subject, but also that of the *hapu* (sub-tribe or extended family), *iwi* (tribe) and their ancestors. *Moko* describes an individual's *whakapapa* or genealogy and life history, bringing together the past and the future, the spiritual and physical around the physiognomy of the body. *Ta moko* (the process) is equally sacred, the practice could only be performed by a suitably qualified and recognised individual, a *tohunga ta moko*. Nearly all aspects of the process were considered highly sacred and were subject to strict restrictions or *tapu*.

After European contact, bone and greenstone chisels were replaced with metal chisels. As Simmons notes, "the last chisel tattoos done in New Zealand date to before

1925". (19) Sometime around 1910 a new technique was developed using darning needles bound together, and from the 1950s onwards electric needle guns were used.

Debates about Maori tattooing have tended to either centre on their appropriateness (in 'civilised' times for example), their authenticity or legitimacy or their misuse and appropriation. While tattooing may not seem to be the most urgent or obvious object of debate with respect to Maori or indigenous cultural politics, it is a particularly engaging site of debate because of the way contemporary tattooing has been inflected by a broad range of identifications, some ethnic or racial, others gendered or classed. These are inseparable from the history of interactions between Maori and non-Maori or encounters between Europeans and non-Europeans in the Pacific generally, and from the way tattooing has been continually transformed and re-territorialised. In some respects, such transformations parallel the changing meaning of 'Maori': the particular ways 'Maori' was given meaning have, arguably, depended less upon any essential characteristics of the indigenous people of Aotearoa and more on their perceived differences from Europeans in terms of European norms and beliefs. If nineteenth-century Maori identity was, in Mason Durie's phrase, "a product of several forces: colonisation, Christian conversion, an emerging sense of Maori nationalism, and immigration with a rapid reversal of population dominance" (1998: 54), so the meaning of *moko* as a signifier of 'Maori' identity was to a considerable extent determined by its perceived relation to European beliefs. Indeed, later tattooing practices carried the indelible mark of European contact and influence.

The history of the transformations and re-territorialisation of these markings reads like a version of the history of colonialism and inter-cultural exchange. Europeans (re)encountered tattoos on 'natives' in the Pacific, often with the belief that this was a practice once found in Europe, which had been given up and forgotten as it had

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become more 'civilised'. Adventurers, sailors and traders were generally immensely impressed by Pacific tattooing, at times acquiring their own and returning to Europe, where they were received and interpreted within an entirely different context. Tattoos established perceived affinities or links between a range of otherwise diverse groups and individuals: most visible on the bodies of sailors, beachcombers and runaways, the tattoos were taken to reflect the 'primitive' nature both of 'the native' and of the newly tattooed Europeans, who were often outsiders, abnormal, anti-social and sometimes criminal. Recoded, transferred and transformed, tattooing then returned to the Pacific to 'take the place' of the now 'dead-and-gone' traditional practices. In the initial 'return', the tattoo carried various meanings given through re-contextualisation and blended with stories about exotic and savage lands and people. In the seventeenth and eighteenth century, captive natives, sailors and adventurers with tattoos became regular attractions at carnivals and circuses. This context of reception and performance shaped European conceptions of what the practice and object meant. As Mark Taylor notes:

> [t]his reintroduction of tattooing in the carnival context has had a lasting impact on the way in which it had been understood in Europe and America. In the absence of an adequate appreciation of social and cultural context, tattooing tends to be regarded an aberrant entertainment provided by aliens and freaks. (1997: 95)

In this process, the distinction between what is and is not 'European' is neither clear nor simple. Indeed, while at times tattooing appears to articulate the boundaries

of particular cultural or social groups, the sheer diversity of practices also seems to confound and undermine distinction. One could argue, for example, that the initial object or origin of this chain of transformations was, not so much the 'authentic' indigenous object, but rather a marking that activated the European imagination, designated by its relation to 'the European'. And yet, one must be careful not to ascribe all agency to the European, as if the changes which occurred could not at all be re-territorialised within Maori practices. Still, one could argue that, like the identity which the tattoo marked out, the notion of 'the authentic', 'pure' and uncontaminated tattoo only came into being with the creation of copies, that is, the inauthentic or counterfeit. In other words, the system of identification or verification that determines what is or is not authentic would only ever have come into being once the need to differentiate arose. Such a reconfiguration of practices or of the terms in which they are known need not amount to 'impurity', 'illegitimacy' or 'contamination'. From the beginning, then, the tattoo, or rather *moko* as tattoo, was taken as part of a system of identification inseparable from contact, influence and appropriation. Similarly, the terms in which the object or practice are articulated or defined cannot and could not be thought of as separable from the particular political concerns and investments established by colonisation and settlement. The 'value' of 'authenticity', for example, could not be thought of as distinct from the particular context in which it becomes endangered.

The development of the meaning of 'the tattoo' does not begin simply with European contact in the Pacific and proceed according to European uses: in a sense, both European and non-European were implicated in each other from contact; the stigmatisation of the tattoo in the West is inseparable from its 'origin' in the Pacific. And yet, the 'origin' of stigmatisation is in no way clearly non-Western, since from

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the beginning the terms of identification were thoroughly European. In other words, European identity types provided the conceptual topography or points of reference against which various relations were mapped; the vocabulary of European identity, and its concerns about its others (be they internal or external), provide the ground for, even anticipate, the identities, cultures and societies that were later 'discovered'. It is this self-consolidating relation, the reduction of difference to difference in relation to self, that positions *moko*, as 'tattoo', as something generalisable, reducible and transportable. Observing this relationship between colonisation, identification and the reception of the tattoo, Marc Blanchard argues that:

> There seems to be a link between the reception of tattooing in Europe and the ideology of colonisation. Not only because Western man does *not* customarily tattoo his body, but precisely because tattoos are the marker of the colonized other ... (1994: 290)

The way these observations effect the debate concerning the authenticity of recent practices should now be clear. The fact that there are possible relationships between the prominence of *moko*, both in European representations of 'traditional' pre-contact Maori, and in contemporary Maori assertions of sovereignty and authority, illustrates how *moko*, taken as distinctly Maori, has become both a particularly potent symbol of 'Maori-ness' and a complex site of contestation. This is not to suggest that such practices are any the less authentic or legitimate. As Thomas notes, contact and exchange need not be conceived of as an "all-or-nothing, one-shot event that transforms the world: it is a process." (1997: 11) Moreover, as he observes elsewhere,

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while "[e]xchange denotes replacement . . .[i]t's a useful idea not because it grasps a social relation, but because it fails to do so. The social processes of barter, gift-giving, and other forms of traffic nearly always amount to both less and more than the simple substitution of goods." (1996b: 145) Thus, instead of focusing on the exchange between Maori and non-Maori as if it were a simple matter of a loss of purity and authenticity, one might consider the process whereby identities and cultural boundaries are articulated creatively and dynamically.

Focusing on the inflection of the 'European' within the 'Maori' and vice versa, one is able to consider both a more dynamic notion of identity and the relationship between identity, representational practices, the social and political contexts in which they occur and the effects they produce. Rather than secure for the West the terms of identity, this approach, by reversing the relation between representation and 'reality' or 'actuality' such that representations are themselves taken to be (re)productive rather than merely reflective or mimetic, would ultimately inflect the terms of identity with a cultural politics of knowledge marked by colonialism. This would suggest, not that the 'traditions' in question are unauthentic, but rather in Jeffrey Sissons's words:

> that they, like all traditions, have genealogies in both Foucauldian and Maori senses. Foucauldian because their emergence reflects new forms of power/knowledge associated with colonial state formation; Maori because they are products of a multitude of alliances and oppositions between kin working against and within these new regimes of power. To study genealogies of tradition is, therefore, to emphasise continuity over discontinuity particularly in

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relation to reifications of tradition within colonial and post-

colonial society. (1998: 1)

As far as the identification of the authentic is concerned, one of the central problems is the way practically all studies take as their central objective a differentiation between the prejudice and bias of early writers and the evidence and documentation of 'authentic' pre-contact practices. In early European writing, *moko* figured prominently as a type of cultural marker that connected European notions of the noble savage or the primitive to traditional Maori society and also offered a way in which Maori might be considered in relation to other (tattooed or non-tattooed) people of the Pacific.

From first contact, European travellers took considerable interest in *moko*, describing it paradoxically as impressive and noble, but simultaneously barbaric and abhorrent. Cook and Banks took an immediate interest in *moko* and devoted considerable space in their journals to it. Indeed, the fact that both began their descriptions of Maori with an account of *moko* indicates the importance they attributed to it as an individuating feature (Cook, Vol.1: 278-279, Banks, Vol. 2: 13-14). Yet, while *moko* seemed to offer some basis for comparison with other 'primitive' peoples, it also served as a mark that distinguished Maori from Samoans and Tahitians etc., not only in terms of artistic variations within a larger 'field' or category of peoples, but also as an indication or clue to the 'nature', 'temperament' and 'level of civilization'. Banks, for example, noted that while the "art" was unique to Maori in form and technique and demonstrated, in its originality, how "the wild imaginations [of Maori] scorn to copy" (Vol. 2, 1962:13-14), as a form of "tattow", it placed them under the general name "South Sea Islanders" (13).

As suggested above, these descriptions often revealed a peculiar mix of emotions: fascination, admiration, fear and disgust. For example, Banks took this form of body decoration to be at once "most remarkable", an art of "Elegance and Justness", "finished with a masterly taste and execution", "noble", "honorable", but also "frightfull", "enormously ugly", fierce and 'barbaric' (13-14). In 1817, J. L. Nicholas, an early missionary, similarly characterised *ta moko* as impressive but ultimately, "a mode of disfiguring the face, . . .[a] barbaric process . . .which gives the countenances the most disgusting appearance, and makes it truly hideous to the eye of the European." (1986: 150)

Described in this way, *moko* functioned as a point of radical differentiation from the European observer and lent itself to a cultural mapping of Polynesia. The tattoo was seen as a type of outward manifestation of the 'savage's' mind, a 'debased' "Ancient Alphabet" (Tregear, 1890: 114), a barbaric and thus uncivilised marking of the body that, when contrasted with European culture and society, testified to the base physicality of the 'native's' expressions. *Moko*, as a marking of the 'traditional' Maori, situated Maori culture within an evolutionary continuum (Buckland, 1887) that furnished and justified the association between the colonisation of Aotearoa New Zealand and the inevitability of the disappearance of *moko*, as a necessary consequence of the 'civilising' effect of European contact and influence. It is as if the 'time' of *moko* was taken to be incompatible with that of the European. Describing the inevitable disappearance of 'the old ways' and the rapid transition "from savage to modern conditions", Felix M. Keesing remarked that: "[t]he Maori race has had to adapt itself inevitably to the new life which has steadily been superimposed upon the old- with no alternatives other than extinction." (1928: 9)

The early observers who lent intellectual weight to such characterisations included Darwin himself, the father of evolutionary thought, for whom the *moko* marked the difference between "nobility" and "savageness". Comparing 'the Tahitian' to 'the Maori', he claimed that, although both belong to the same "family of mankind . . .[t]he comparison tells heavily against the New Zealander . . .[because of the] manner in which tattooing is practised here [in New Zealand]." (1839: 305) Given this difference, Darwin concludes, now that the Maori have been brought into contact with Europeans, that tattooing "will probably very soon be disused." (305) This tendency to characterise *moko* as a thing of the past was remarkably common in nineteenth-century writing. As early as 1855, when *moko* was still relatively common, Rev. Richard Taylor, a prominent missionary, described it in the past tense. (Simmons: 1986) This might well reflect the way such practices were 'located' within the temporal-historical continuum, as in Buckland's paper to the Anthropological Institute in the late 1880s, which deals with the co-existence of earlier and later periods of 'human history'. At a time when tattoos were still being practised, she held that:

> Falling under the head of ornament, it seems probable that
> this painful mode of personal adornment was adapted at a
> very early period of human history . . .falling into desuetude
> with the advance of civilisation. (1887: 319)

Whatever the conceptual basis for this view, the disavowal of tattooing practices also reflected the degree to which missionaries and settlers opposed the practice, which some considered "the Devil's Art". (Thomson, 1859: 77) Tattooing was even considered incompatible with Christianity by William Yates, another missionary:

"tattooing has been forbidden; and it is understood that any person coming to live with us is no more to submit himself to such a debasing performance." (1935: 150) This is far more prescriptive than descriptive, as if giving up the practices of 'savagery' is sufficient to bring Maori into 'civility'.

Despite their clear religious, cultural and philosophical bias, such writings, drawings and paintings, along with preserved tattooed heads, figure prominently in almost all scholarly studies of *moko*. The problem with attempts to reconstruct 'authentic' pre-contact practice from such objects and texts is, as Leach notes that:

> Everything . . .we know about pre-contact Maori . . .culture is
> a reconstruction which is heavily dependent upon prior
> assumptions of European explorers who *expected* that the
> native inhabitants would be all more or less alike . .
> .[Consequently] Pacific Island ethnography . . .represents
> cultural history filtered and distorted through the use of
> European categories of thought. (1985: 221)

Once the Eurocentricism of such texts became clearly visible to scholars, the reconstructive project required an impossible separation between the true and objective and the biased or prejudiced.

Alfred Gell's *Wrapping in Images* is one of the most recent and comprehensive studies of tattooing in Polynesia, a practice he generally considers "dead-and-gone". (1993: 10) From a historical or anthropological perspective there seem to be very good reasons for characterising these practices in this way: the decline and disappearance of traditional tattooing throughout Polynesia has been well documented and is generally

explained by the negative and destructive influences of European contact and colonisation. This explanation seems uncontroversial: as the documentation clearly shows, the decline of tattooing practices was in many ways a result of the influence of European beliefs, for example, that Christianity was incompatible with them, and the displacement and destruction of the social and cultural structures and beliefs which had supported the art. And yet, tattoos are visible in Aotearoa in increasing numbers, tattoos which visually resemble the traditional tattoos and are also claimed as such. So we have two assertions, first that traditional indigenous tattooing came to an end by the end of the nineteenth century, second that in Aotearoa New Zealand today *ta moko* is alive again as a "facet to the renaissance of Maori tangata- the next step in the battle to reclaim a culture and re-assert a Maori identity." (*Pu Kaea*, 1997) The existence of contemporary indigenous tattoos calls into question the equation whereby the destructive effects of colonisation and European influence lead, almost ineluctably and inexorably, to the disappearance of *Maori* tattooing.

Against critics like Leach, Gell identifies what he calls a "purificatory process" (10). The way he tackles these problems is mirrored in his attempt to defend the use of the term 'Polynesia' to demarcate and name his field of study. In the case of the tattoo, as an object of knowledge, he argues that we must determine how it is described by Europeans, in order to exploit "the historical resonances which the encounter between us and them produced." (11) Through a comparative study of 'Polynesian' practices, he argues that he is able to construct a "plane of tattooing" across Polynesia, which makes it "possible to interpret the positioning of specific Polynesian societies within it." (295)

It is here, however, that Gell, like many scholars before him, understates the difficulty of disentangling the object of study from the disinterested gaze. The value

attributed to early sources attests to the belief that the texts closest to an uncontaminated pre-contact society are best able to provide a 'true' and 'clear' window into the authentic past. Texts, sketches and objects from early contact are generally considered of much greater value than later ethnography or historiography, because of the destructive and contaminating influence of the Europeans. As Gell articulates it, in order properly to 'secure' its object of study, reconstructive anthropology would, therefore, attempt to separate the resonances or traces of the authentic from the distorting effects of European interest and influence.

But, any distinction between the true and the imaginative must always already assume a distinction or marking out that would undermine this very project. Furthermore, this task is all the more problematic by virtue of the fact that the desire to know, then as now, always 'soils' the purity of that which it pursues. What drives this search? Who places such high price on the truly, authentic Other? Is this not the drive that led adventurers and explorers to the Pacific in the first place? As Thomas notes of this type of 'attraction' to the object, in reference to Samuel Johnson's journals, 'curiosity' is taken to mean "addicted to enquiry":

> While enquiry would usually seem a proper and essentially
> masculine activity, addiction, entailing abandonment or at
> least a partial surrender or self-government before an external
> agent or object, is certainly illegitimate and excessive.
> (1997b: 107)

This suggests that we should attempt to think the relation between the posited object and the particular value seen in it as one which cannot be adequately or properly elided.

The difficulty 'authentic' objects present, given both their significance for studies of *moko* and the desire and interest invested in them, foregrounds this problematic relationship between their apparent 'authenticity' and the particular value scholars saw in these objects, as 'curious' examples of 'primitiveness' and 'otherworldliness'. The preserved head here offers us a clear example of such paradoxical concern with knowledge, 'curiosity' and interest. The collectability of the preserved head seems linked to *moko*'s capacity to signify the object of curiosity and knowledge itself; its portability bespeaks a type of creative recontextualisation and objectification whereby the object is taken both as an example of 'Maori tattoo' and as a 'primitive' artefact or collectable.

3. *The Object of Authenticity*

To illustrate the problem more clearly in terms of the objectivity attributed to these objects, one need only consider the case of Major General Robley, an acknowledged authority on *moko*, author of one of the most influential studies on the subject, decorated soldier from the Maori Wars in the mid-nineteenth century, and also the owner of one of the largest collections of preserved tattooed heads. His *Moko or Maori Tattooing* is as much an exposé of his collection of heads and sketches as a study of Maori tradition. According to Robley, the value of the 'head' derived from the fact that the tattoo was characteristic of 'Maori-ness', a remnant of an apparently disappearing race. Hence, the horrible irony in Robley's lament that: "[t]he time is approaching when the history of moko will be written from the comments of previous

writers [such as himself] and from the dried specimens of moko-mokai in the collections [such as his own]." (1896: 183)

The point, of course, is that whatever value or beauty the Europeans saw in 'the Maori tattoo', its acquisition required the death of the former 'owner'. The collection of heads thus creates value not only in the sense of the accumulation of objects and the creation of a restricted economy, but also insofar as the collection and trade contributed to the disappearance, and thus rarity, of actual 'living examples'. Not only did the trade reduce the number of *moko*, by killing off tattooed individuals, it also considerably offended Maori and debased the practice of *ta moko* through lack of respect and the contravention of *tapu*.

The story becomes even more complex when we learn from Simmons that: "[i]n the early to mid-nineteenth century, tattoo is influenced by a curious standard of excellence- the tattoo on dried heads obtained to trade for muskets." (151) Collected heads were in many cases produced *for* sale, *with the European market in mind*. The 'purity' of these objects, therefore, carries with it the trace of European desire, the desire for purity. These 'specimens' were thus not quite so 'authentic' as they were often made out to be, or, perhaps more precisely, they were made to appear authentic and were thus produced to conform to a notion of authenticity which itself was not indigenous. As Simmons notes:

> [t]he heads of slaves who were tattooed for trade did not have
>
> true tattoos. Tattoo was a thing of mana, of tapu, therefore
>
> when an ariki's tattoo was placed on a slave he could not be
>
> given the true tattoo or he would have the mana and so could
>
> not be killed- he would be tapu. (140)

In short, the emergence of a trade in 'authentic' heads produces a circulation of 'counterfeited' heads, which demonstrates a form of Maori agency and intentionality not typically attributed either to the 'production' of heads for trade or to the changes in 'traditional' practices.

The detachment and circulation of these heads suggests some of the ways in which 'objects' are made mobile, made into signs or decipherable texts. Indeed, this practice is itself mirrored, perhaps even anticipated, by the typical approaches to *moko* in early texts, where the *moko* is taken as a design, a marking abstractable from its specific context, displayed and depicted as an image on mere body fragments in illustrations and named or characterised as 'head', 'specimen' etc even on living subjects. It was by such de-contextualising, de-humanising practice that individual *moko* became knowable as general forms of tattooing or primitive decoration and able to be mapped and interpreted more generally. In this way, the story of the circulation and coding of 'the head' serves as an analogy for many studies of Maori tattooing: the tradition taken as dead is reconstructed posthumously in an attempt to recover its meaning. The world of the Maori, or at least those parts which interested European scholars, are thus reconstructed around the tattooed face, the face of the 'savage', mapped over it and extended from it as if it were a fragment, letter or word of what the early colonial scholar Tregear called a debased and forgotten "Ancient Alphabet" (114).

Similar evidence of a desire to recover the authenticity of the past can be found in photographs from the late nineteenth century depicting 'traditional' Maori. As Robley notes, "[p]hotography came into use just in time for the recorder of *moko* . . .[and yet] [o]ne often notices that a photographer has inked in the lines, a magnifying glass shows us where he has failed to follow them accurately" (126-127). Like the

posthumous tattooing that sometimes occurred on the heads of slaves, marks were inscribed onto photographic negatives even when they were actually absent. Describing a photograph taken during the 1880s, for example, Virginia-Lee Webb observes:

> This photograph shows an unidentified Maori woman with *moko* or facial tattoos drawn or etched on the negative. Traditional facial tattooing had declined among Maori by the time the photograph was taken. When *moko* was absent, the photographers often drew it directly onto the glass plate. (1995: 179)

So invested, interested, indeed 'soiled', these photographs, like the interpretations of the 'heads', are full of loss, opaque and elusive. The 'marking' that gives rise to their meaningfulness and 'authenticity' in each case occurs 'in-between' the 'then' and 'now', the 'here' and 'there'; marking 'the authentic' not as that which is or was before contamination and loss, but as that which marks loss, a nostalgia and mourning for that which is absent or gone.

4. *The Permanence of the Line (Past/Future)*

My interest in the discrepancy between claims concerning the 'death' and 'return' of 'traditional' practices is not primarily concerned with the empirical falsity of the colonial archive, as if locating certain tattoos would resolve this issue, but with the way certain conceptualisations of culture make possible certain forms of identification. Thus, I am particularly concerned at the problematic relationship between what

scholars have tended to argue so convincingly and unwaveringly, on the one hand, and what one encounters, for example, on the bodies of real Maori, on the other. An important question, therefore, is whether these latter are *moko* and if not why not? This question has not been addressed in academic or institutional discourses: contemporary *moko* are at once frequently visible in popular culture imagery (see, for example, *Once Were Warriors*) and on the arms, legs, torsos and faces of Maori, and yet discursively absent from, if not antithetical to, academic descriptions of Maori cultural practice. These contemporary practices cannot be simply or easily be discounted as less authentic copies of some purer practice from the past. On the two sides of the problematic, the notion of authenticity derives from different or differing registers and is consequently located and recognised in a different manner and by reference to different criteria. Interestingly, when seen in relation to the other, both draw attention to the complexities concerning identification and recognition of cultural difference: recent practice reveals some of the ways in which anthropology has objectified and frozen a particular moment in culture, robbing it of its life; and yet to allow for the re-emergence of such practices, for their return or survival outside 'accepted' contexts, of their re-positioning or repetition, calls into question the stability of the essence on which they are grounded.

Setting aside the question of authenticity, for the moment, we should note that recent practices and claims pose no direct challenge to studies like Gell's since he ignores the present altogether. And yet, one must wonder about his preference for pre-contact practices and the reasons why he terminates his inquiry when he does. Moreover, the idea of *contemporary moko*, as a practice which transgresses accepted temporal, historic and cultural boundaries, emerges as a kind of spectre, an imaging that 'returns' and, in so doing, undermines the relationship of Gell's studies to the

contained-ness of the practices they take as their objects. The tattoos stand here like a ghost, a mark or image of an object, supposedly proper to another time, not quite or fully present, a trace or opening which undoes the seal between the time of the scholar and the past studied, a disruption, an emergence, which undermines the text. Like the alleged cultural differences which separated early scholars from their subjects and provided the foundations of anthropological study, the boundary that marks the authentic, traditional, pre-contact, and the line between the life and death of the tradition, provides more recent scholars with a way of disentangling their own time and culture from that which they study.

In Gell, the absence of contemporary *moko* appears all the more remarkable given his recognition that it would be futile "to pretend that it is possible to reconstruct Polynesian tattooing practices as if the encounter between European and Polynesian cultures had never taken place." (19) Even more remarkable in the politically and socially fraught context in which tattoos were recorded, is his claim that tattooing is "part of the "technology" for the creation of political subjects and . . .the reproduction of political relations." (9) Here, he goes so far as to quote Foucault to illustrate how the tattoo functions as a form of cultural and political inscription on the body. He claims that the body (presumably of the Polynesian) is caught up in political fields that "invest it, mark it, train it, torture it, force it to carry out tasks, to perform ceremonies, to emit signs." (3) Here, Gell's concern is with how tattoo functions as a 'technology of the body' within a particular social system, considered in terms of its internal relations. And yet, given the complex relations established by contact and settlement, the scene in which his primary texts were produced, one is left to speculate about the extent to which such technique would be inflected by these relations. How, one might ask, can one attempt to define a cultural practice as autonomous and internally defined

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when the presence of those observing the 'tradition' modifies and alters the practice and makes possible the signification of such markings as the markings of Maori, rather than simply the markings of a particular tribe. Gell may be interested in charting the demise of 'traditional' tattooing, its appropriation by sailors and its transformation in the West, but he fails to acknowledge the subsequent re-appropriation or development of tattooing by Maori *as a Maori practice*. As Gilbert Herdt notes in his review of *Wrapping Images*:

> No [Polynesian] agency . . .was attached to the changing role
> of the tattoo, according to Gell, a formation completes itself
> with the advent of the Europeans and the importation of
> purely foreign tattoos . . .such a view does not explain the
> cultural reality that is supposedly displaced or the new one
> that supposedly emerged with modernity. (1994: 395)

From the position of the scholar, a 'return' of the 'dead' must be taken as a copy, a phantom of what was living which would potentially bring into jeopardy the basis of cultural differentiation and knowledge for the anthropologist. Indeed, if one considers the task Gell sets himself with regard to the reconstruction of authentic pre-contact traditions, in relation both to the bounded-ness of culture such reconstruction requires, and to the obviously related task of disentangling the object of knowledge from the knowing subject, it becomes clear that these studies define 'the traditional' or authentic in ways that, not only foreclose the possibility of later re-articulation or revival, but also draw attention to the cultural locatedness of anthropology itself. As Johannes Fabian observes, the founding paradigms of anthropology:

established themselves as a discourse of distance, on

remoteness in space and time. Their scientific aim was to

explain, or account for, the culture history of mankind . . .or

the law-determined emergence of cultural variation . . .by

means of the comparative method whose primary datum was

the distribution or dispersal of culture traits in space. . .that

distance, spatio-temporal but also developmental, *was not the*

object of explanation; it was a necessary assumption, a

conceptual category involved in the constitution of the Other,

that is, the object of anthropology. (1991: 197)

The emphasis on the "deadness" of the tradition and the conspicuous absence of

recent practices seems to suggest a continuation of earlier tendencies to posit the

meaning of *moko* at some point prior to or independent of European contact or

influence. The 'pastness' of *moko*, its 'primitiveness' and subsequent differentiation

from European practices, conveniently produce the space between 'the European' and

its Other. It is a differentiation that distances the European anthropologist from the

tattooed native. As Fabian points out: "[c]ulture, inasmuch as it served as

anthropology's guiding concept, has always been an idea *post factum*, a notion

oriented toward the past (to "custom" and "tradition")". (193) Both the power that

enables knowledge and the knowledge that enables power, can here be translated into

relations inflected by and cast in terms of colonial politics. One can read the lack of

acknowledgement and recognition of contemporary indigeneity, or what Fabian calls

"coevalness, radical contemporaneity, which would have the consequence that we

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experience the primitive . . .as copresent, hence co-subjects, not objects" (198), as positioning 'native' authenticity at some point 'prior to' or 'other-timely' and, in this way, constituting the object of anthropological knowledge in terms of a temporal distance between the object and subject of such knowledge. This relation establishes anthropology's authority with respect to its object and also raises significant political issues, insofar as its characterisations delimit what can possibly count as 'authentically' or legitimately indigenous in present and future contexts. As Fabian notes: "[t]he posited authenticity of the past (savage, trivial, peasant) serves to denounce an inauthentic present (the uprooted, *évolués*, acculturated)". (1983: 11)

With the exception of Michael King's discussion and documentation of *wahine moko* or Maori female tattoo, the closest any of the most recent studies get to describing something from the last fifty years is Simmon's observation that:

> In recent times electric needles and the tattooing skills of
> European professionals have been employed. The fashion of
> self-tattooing with needles is practiced by many young
> people of Maori, Pacific Island and European descent to
> decorate hands, arms, legs and faces . . .(19)

He concludes that "[t]hese motifs are a popular form of art . . .more akin to those derived from the sailor's tattoo." As with earlier studies, the overwhelming emphasis is placed on loss. Indeed, in a recent debate documented by the television current affairs program *60 Minutes*, this distinction between 'the traditional' and contemporary 'tattooing' became one of the central areas of disagreement. The headmaster of a school in the East coast of the North Island of Aotearoa New Zealand

here questioned the authenticity of the 'tattoo' or *wahine moko* of one of his students. According to the headmaster, the question of authenticity ultimately hinged upon the presence or absence of recognised traditional customs and procedures. In this particular case, he claimed, the absence of traditional elements and the use of 'Pakeha' implements distinguish the student's 'tattoo' from a genuine *moko*: "you will never get a stainless steel *Pakeha* electric needle taking the place of the greenstone chisel, because what you are ending up with is a photocopy of a great masterpiece, and you don't want that." (*60 Minutes*, 1996)

Interestingly, the student and her supporters did not explicitly challenge this delineation between the traditional and the acculturated, Maori and non-Maori, but rather questioned the authority on which judgements were based. Clearly less troubled than the headmaster by the use of an electric tattoo gun, the student calmly suggested that the problems with her *moko* were "his problem", not so much about Maori practices as *Pakeha* interpretations of Maori practice. Thus, the headmaster misses the point, with his response that "regrettably I think I know a little more about their culture than they sometimes do." Here, the question of knowing is inseparable from the issue of authority and positionality, particularly in instances where the subtext appears to concern a Maori assertion of *tino rangatiratanga* or sovereignty.

Relating de Certeau's conceptualisation of space to cultural knowledge and identification, James Clifford argues that "space" is never ontologically given: "[i]t is discursively mapped and corporeally practiced. . .In this perspective, there is nothing given about a "field". It must be worked, turned into a discrete social space, by embodied practices of interactive travel." (1997: 54) Following this suggestion, one might argue that the 'place' of *moko* is never already given but must be constituted and negotiated through discourse and practice. This observation, need not rule out the

possibility that what is negotiated is the relationship between something that remains singular and specific and its constitution or articulation within a particular socio-historical field. In a sense, then, it might paradoxically bring together and undo those oppositions (Maori/non-Maori, primitive/modern, traditional/contemporary) which sustain the possibility of its articulation *as moko*. In some ways this resembles the state of identification described by During in the case of Makereti, a Maori woman who worked as a tourist guide at the beginning of this century, the author of a book on Maori genealogy, and an anthropologist who later expressed her belief in traditional Maori 'mythology'. During asks:

> As she moved from show business to anthropology, from native informant to believer in *tapu*, did Makereti live in traditional Maori time, pseudo-traditional Maori time, modern Maori time or occidental time? On what side of these differences? (1989: 767)

His answer, "[o]bviously on all- which is also means none" (767), highlights the impossibility that is the possibility of representing or identifying the 'time' of *moko* and 'Maori-ness'. We can neither hold Maori and European 'time' as separate and incommensurable nor as occupying the same space without reifying them in terms of some metaphysical ground or some space or time which encapsulates them and their relations to one another. The refusal either to efface the difference of the temporality of culture(s) or to hold them radically distinct allows one the possibility of thinking their 'difference' as simultaneously that which makes them impossible and possible; it problematises difference and identity and in doing so, opens the future to the

possibility of an articulation of the same as different. To recontextualise Lingis's description of the tattoo, one might hold that, while the tattoo seems on the one hand fundamentally personal, singular, corporeal and irreducible:

> These very same intensive points now become demands, appeals. For something, someone, absent. They become marks for-another [for the Other, another-self, the future], they form the gaping cavities of demand, want, desire, hunger. (1983: 38)

We might suggest that different notions of 'the traditional' have different values and uses for anthropologists, historians and Maori, especially in the context of debates concerning cultural politics, the repatriation and protection of indigenous cultural and intellectual property, and the recognition of indigenous beliefs and custom. However, we cannot assume universal or fixed positions here: clearly Maori, like anthropologists and historians, do not constitute some absolutely unified or homogeneous category; anthropologists, historians and Maori are in no way mutually exclusive categories and, most importantly, the 'fixing' of the term 'Maori' in terms of its inclusions and exclusions, in terms of what it can and can't signify, is perhaps the central issue here. In asking this question about the nature of the determination of identity, I do not wish to suggest that the external, structural determinants of identity are causally primary and thus take a stance against cultural essentialism.

My approach is not in fact theoretically anti-essentialist, since an emphasis on intercultural or discursive determinations of identity and meaning need not require that these forms of determination be taken as primary nor that all is reducible to such

determinations. Positions like essentialism and anti-essentialism cannot be characterised as good or bad apart from the specific situations in which they are evoked. Tactically, either approach to identity or meaning is potentially enabling in some contexts, while disabling in others. And yet, the emphasis on 'tactic' here is misleading insofar as it implies a kind of voluntarism where there may, in fact, be no choice. As Spivak (1993a) observes, while essentialism may be politically dangerous, anti-essentialism may well be impossible insofar as the assumption of 'essence' or 'fixity' provides the basis for the political. A more fruitful approach to this problematic, therefore, may begin by recognising it as an impasse and instead direct critical attention to the way a certain cluster of attributes are 'given' as 'something' within a specific context.

To foreground these issues in this context one not only adds a political edge to the discussion, insofar as it requires us to think of the limits of the discursive, in terms of cultural difference and the conditions of possibility for the meaningfulness of 'objects' like *moko*, but also prompts us to address questions concerning the ethical and political nature of such representations of other cultures, in a manner sensitive both to the contexts in which these occur and to issues relating to authority, positionality and power which may be derived from such contexts.

The risks involved in challenging representation are clear, particularly in cases where rights, property and authority are based on a notion of stability or fixity. However, to appropriate Butler's words for my own argument, one can still describe and prescribe a politics that would attempt to:

> compel the terms of modernity to embrace those they have
> traditionally excluded, and to know that such an embrace

cannot be easy. . .This is not a simple assimilation and accommodation of what has been excluded into existing terms, but, rather, the admission of a sense of difference and futurity into modernity that establishes for that time an unknown future . . . (1997: 161)

Chapter Three

Essence, Identity, Signature: Tattoos and Cultural Property

This chapter critically examines the notion of cultural property through a range of questions about the 'proper place' of the tattoo and, more specifically, the way these questions relate to a specific cultural-political field concerning the possibility, legitimacy and authenticity of contemporary Maori tattooing (*ta moko*). My interest here is not so much with a specific form of tattooing, but with the range of questions that emerge from the juxtaposition of recent debates concerning the definition and control of cultural property, distinctions made between 'traditional' *moko*, defined as pre-twentieth-century 'tattooing' or showing minimal European influence, and contemporary *moko*, defined as either late twentieth century 'tattooing' or tattooing using 'European' technology. Here, I argue, the relationship between questions of 'property' and what does or doesn't count as 'Maori' foregrounds issues concerning the 'properties' and 'proper-ness' of identity and culture and the authority on which such notions are based. Thus, while tattooing may not appear the most urgent or obvious object of debate with respect to Maori or indigenous politics or questions of cultural property, it is a particularly engaging site of debate both because of the way contemporary tattooing has been inflected by a broad range of identifications and because arguments about 'the tattoo' in a (neo)colonial context effectively foreground the relationship between the definition of cultural 'property' and the politics of representation.

As Michael Ryan has noted: "the concept of the subject in liberal social theory, the basis of all rights claims, is inseparable from the institution of property." (1989: 151)

To attribute something to someone, to grant or acknowledge some right is the basis of personhood. Ryan observes: "[b]y catachresis . . .rights come into being as the claim to ownership . . .[and yet] the catachresis is reversible; property . . .is constructed upon the metaphor of the person or subject." (151) The question this chapter addresses is thus: if the subject is tied to ('its') property and property to the subject and if, therefore, neither the subject nor property can stand logically or conceptually before the other, how might we think of the relationship between a proper name, such as 'Maori', and 'its' alleged object(s), such as *moko*, in a manner that does not subject both to Western notions of the subject and property? This point is not merely a matter of conceptual interest but also concerns practical issues concerning the definition and 'control' of cultural objects and knowledge: just as the reduction of *moko* to 'tattoo' submits that 'form' to a more general economy of meaning and exchange, so too does its positioning as property make it amenable to appropriation. As I have already suggested, however, this reduction or positioning also appears to be the condition of possibility for the protection of cultural property and 'culture'. The possibility of an *indigenous* tattoo not only foregrounds concerns relating to the problematic division between the singularity of the corporeal and cultural specificity of tattooing and the generality of any system of marks or signs, it links the (im)possibility of such a 'form' of marking to the property and future of culture, inter-cultural translation or exchange and legal and political recognition of cultural difference. In this chapter I shall critically examine the relationship between the (im)possibility of 'properly' representing 'the tattoo' and the idea of tattooing being both *of* and *for* culture and identity.

1. *Theorising 'The Tattoo'*

Early studies of tattooing drew on a range of perceived associations between the presence of tattoos, 'primitive society' and certain forms of cultural or social behavior deemed savage or barbaric. As Leonard Cassuto notes, in the nineteenth century "tattooing . . .was seen as a sign of atavism and a physical marker for the presence of cannibalism." (1996 :242) As the range and variety of tattooed bodies grew to include sailors, beachcombers, explorers and runaways these associations were complicated by the shifting contexts of their reception. Scholars of anthropology (cf. Buckland, 1887; Tregear, 1890), psychology (Scutt & Gotch, 1974; Hewitt, 1977) and criminology (Lombroso, 1968) interpreted tattooing in a manner that increasingly tied together allegedly savage and barbaric practices of 'non-Westerners' to forms of deviant, anti-social or criminal behavior exhibited by 'uncivilised' lower class Westerners.

While these associations were in part due to the socio-historical circumstances under which tattooing was 'discovered' and 'introduced' to 'the West', these discourses anticipated and made possible this alignment. As I have already suggested, the reception of these newly marked bodies, like the bodies observed on the shores of Tahiti, Samoa and New Zealand, was both shaped by their perceived relationship with the 'norms' of European civility and measured in terms of their conformity to pre-existent notions 'lesser developed' cultures and societies. Thus, despite its 'infiltration' of 'the West', the line the tattoo marked out remained a temporal-historical limit of European modernity. Encountered as a sign of the exotic 'New World', the tattoo was simultaneously received as something old (Tregear, 1890), forgotten or past. The writing of the tattooed body, therefore, was not solely a definition and description of a figure of marginality, but also the writing of its 'modern' civilised European counterpart. Indeed, the 'tribalism' and 'primitivism' attributed to non-Western peoples were not so much discovered in explorations of foreign lands as, in Klesse's

words, as found in "discursive assumptions, which emerged out of . . .internal contradictions and tensions of modernity." (33)

Studies of both traditional 'non-Western' and contemporary 'Western' tattooing have frequently described the tattoo as a cultural text that discloses much about individuals and the social or political order they find themselves in. For example, describing contemporary practices, Victoria Pitts notes that tattooing has been embraced by popular culture as a "technology of consumption, personal expression and youth insubordination" and bodies "sites of representation" (1998: 67, 74). Suggesting a similar notion of tattoo as a form of social or political technology that acts upon or effects the body, Alfred Gell insists that in 'traditional' Polynesian society the practice functioned:

> [a]s a technical means of modifying the body . . .[making] possible the realization of a particular type of 'subjection' . . .which in turn, allow[ed] . . .for the elaboration and perpetuation of social and political relationships of certain distinct kinds . . . (1993: 3)

Gell, like Pitts, describes the way the tattoo marks both the division and the link between bodies and culture. Read as either a sign of affiliation within a social order, or pathologised as an "infantile", "self-destructive" or "oppositional" manifestation of the interface between the individual and society, 'the tattoo' is taken in this way as a key to insights into identification and socialisation. It marks the body; it inscribes, constructs, and invests it within a variety of psychical, cultural and political fields. Pitts is concerned with contemporary 'Western' body modification, while Gell studies

'traditional' Polynesian tattooing. While the historical and cultural subject matter is different, both draw upon a general, abstractable notion of both the body, as a form or medium for representation, and tattooing, as a universalisable system of markings that operate across a broad range of contexts. Each particular practice is understood in terms of a more general economy or history of the body, cultural, historical or contextual difference is thus explained in terms of differing forms or technologies of the body.

In light of the discussion thus far in this and the previous chapter, where the question of the relationship between cultural specificity, representation and authority is central, it should now be clear how the assumption of 'the body' or 'the tattoo' is problematic. While the question of how the tattoo shapes the body or self is significant and important, by passing over the question of their possibility, this approach risks naturalising a certain form of body or bodily practice. Etched between the all too familiar couplings, nature/culture, subject/object, cause/effect, this marking is as much a blindspot as a point of illumination, as much a practice that complicates the division between 'inner', 'outer', 'effect', 'affect' or 'cause' as a marking that defines or classifies.

Taking Gell's concern with social and cultural reproduction as a starting point, we might instead argue that the tattoo reveals something about a site of production, not merely a process whereby individuals are 'individuated' or subjects 'subjected', but simultaneously the constitution of the subject in terms of culture, and of culture in terms of the subject, since the line the tattoo traces between the two cannot be reduced to either one. Following Grosz's suggestion that the body should neither be reduced to a psychical or lived interiority nor a sociopolitical exteriority, we might attempt to think the tattoo as a "kind of *hinge* or threshold . . .that produces interiority through the

inscription of the body's outer surface." (1995: 33) Insofar as it marks a distinction or point within a system of relations, the tattoo traces a precarious line between the corporeality or specificity of bodies and the generality of systems of meaning that give 'the body' or 'the tattoo' sense. In this respect, the tattoo gives us a metaphor for the problematic relationship between the sensible and the intelligible: not merely a line or inscription which ties together and individuates subject and culture, nor a marking or act that can be *known* in a manner that is not already subjected or reduced to some general economy, the tattoo might be thought of as a marking which precedes and exceeds the individual act, event, 'thing' or idiom insofar as it is meaningful, while not being reducible to a generalisable system of relations or terms insofar as it is a specific mark which is irreducibly singular.

This 'in-between-ness' could be read as yet another nail in the coffin of essentialist theories of identity or culture. Indeed, critiques of foundationalist theories of the body or the subject are often translated into an attack on social or cultural fixity, the prerequisite of any social or cultural identity politics. It is important to note, therefore, that the description of the 'tattoo' at the edge of 'the West' or 'the subject', at the point where it could be said to undo such notions, often coincides with and draws upon some of the more dubious aspects of theories of globalisation, capitalism or postmodernism.

In an essay on body modification and the (postmodern) self, for example, Paul Sweetman argues for a type of textualised and flattened out notion of the self and the body whereby "everything is 'quotable' and more or less divested of meaning" (1999: 54). In the same publication Bryan Turner describes the collapse of distinctions between 'non-Western' and 'Western' graphics. While 'tribal' or 'primitive' body art previously expressed and signified a certain cultural or geopolitical specificity, according to Turner, globalisation, consumerism and the circulation of images has

resulted in a situation where 'non-Western' graphics are little more than 'signs' able to be appropriated and "[t]raditional Maori or Japanese signs are [now] woven into global consumerism" (1999: 40). These descriptions make important points, and yet, one must note two immensely important political points they pass over: the distinction between Maori or Japanese culture as it is found in consumer culture and Maori and Japanese culture as it is practiced by Maori and Japanese; that such narration risks duplicating the homogenising movements attributed to globalisation by characterising globalisation and consumerism as a one-directional. It may be true, as Turner and Sweetman observe, that globalisation and consumerism has an enormous influence over cultural practices or that the distinction between authentic and inauthentic culture is problematic, however, as Klesse notes, it is also important to be "cautious and not generalize certain experiences which may be of particular relevance for certain groups within Western societies." (20)

While arguments that seek to demonstrate the portability or instability of certain cultural 'signs' or the contingent and citeable nature of identity are often put forward with the best of intentions, as an anti-essentialist critique of colonial racial categories or epistemologies, for example, in doing so they often close off questions concerning the conditions of possibility of such 'signs' and signification or the production, circulation or consumption of certain bodies, questions which also concern the possibility of anti-colonial critique. In short, any study of the meaning of 'the tattoo' should not only look to the specific conditions *of* its production, but also to it *as a form of production*, to borrow Appadurai's words, as an inscription that "embod[ies] locality as well as locate bodies . . ." (179)

2. *The Outline of the so-called Tattoo*

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The inverted commas that frame the word "tattooing" here indicate this difficult but, perhaps, necessary dependence upon a general term, which emerges at the moment we bring together a variety of different practices under the one heading 'tattoo'. This difficulty is itself aligned with and related to the relationship between the singular, specific and particular and a range of concepts or notions concerning a system or 'grammar' that necessarily transcend any particularity. The assumption of a *particular* 'marking' under some less specific genera, thus, raises significant questions about the grounds of identification. The point of this line of questioning is to illustrate the way debates, which have often been presented as matters of truth or knowledge, fail to consider how *such terms give identity*; it asks what opening or origin makes this type of truth possible.

These points extend beyond the question of the tattoo in the sense that the problematic they highlight concerns the possibility of signification generally. Rather than dissociate the singular attribution from the essential generality of 'the name', the very idea seems to suggest an aporia between a particular 'thing', where the term 'thing' already betrays the singularity of that which it names, and the 'sense' it is given through its expression, explication or denotation. Thus, the problem, as I have outlined it, concerns the structure of the 'mark': the relationship between the essential abstraction of every common noun or name and the particular or individual 'thing' named; and the attribution of a 'property', both in the sense of ownership and an attribute or quality, and authority with respect to such 'property'.

There is a sense in which these concerns can only be 'improperly' translated into those relating to *ta moko*. Both tattooing and *ta moko* are socially and culturally specific practices and, therefore, should not be thought of as a form of marking 'prior to' or 'before' culture and identity or as a marking out or 'writing' that would give the

possibility of any particular marking of the body. And yet, insofar as part of the problem we face here is the recognition of what is 'before' the general term or the system by which a specific 'practice' is recognised as having a certain form, this problematic certainly opens out to such questions.

Similarly, the introduction of the term 'property' may seem problematic, insofar as it imposes a particular concept or category upon something not 'properly' understood in this manner. However, thinking the conceptualisation of 'markings' in terms of the 'properness' of property can be useful insofar as it inflects our discussion with a broad range of indigenous concerns, which establish a relationship between the dispossession, displacement and destruction of indigenous peoples and their cultures and the representations which provided the justificatory foundation for such acts, in short, the violent reduction and translation of indigenous beliefs and interests into European-derived categories or concepts. Moreover, the etymological and conceptual connection between questions concerning the possession or owning of property, property as quality, nature or disposition and the notion of 'properness', describes how the determination of a thing, such as a tattoo, identity or culture, might be understood in the context of discussions about identity and cultural politics, especially in the shadow of debates about essentialism. 'Given' 'properties', on the one hand, presuppose, as a condition of their possibility, a system of recognition or attribution, while on the other, something essential, in-itself, originary or 'proper'.

The question I pose here concerns the way a certain cluster of attributes is *given* as *belonging together*: how is it that someone or something can 'belong' to a culture? Putting aside, for the moment, the issue of how the definition of culture and identity become the chief stakes in this question, one cannot and should not assume that what counts as belonging in one culture corresponds to belonging in another. The question

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of who a 'tattoo' belongs to, or of the 'proper' place of a particular 'marking', is thus in no way a straight forward matter, since the very basis of 'who' may well presuppose such a marking. Here the alternative runs between the view that the 'tattoo' is the expression of a particular position, a distinctiveness that belongs to a particular person or persons, and that it necessarily exceeds a particular instance, belonging equally, in a sense, to determinations beyond a single site. The opposition foregrounds a problematic relation between a specific form of marking, *ta moko*, and what appears to be its general conditions of possibility, the possibility of its legitimate use and the possibility of its misuse or appropriation.

As I have shown, where tattoos have marked out cultural boundaries, as they do with distinctions between Western and non-Western practices or 'objects', these concerns feed into debates about essentialist and anti-essentialist conceptualizations of identity: the link between the 'thing', be it subject or object, and its properties can be taken as either contingent or necessary. The mark, here the tattoo, stands for a sort of difference that can either be thought of *in relation to another*, as that which is constituted through language, community, society or culture, or as that which is *different in itself*, as a distinctive and essential mark. Familiarity with these debates gives good reason for caution, since the positions designated 'essentialist' and 'anti-essentialist' are often cast so as to correspond to alleged differences between 'Western' and 'non-Western' interests and beliefs.

And yet, there is reason to suspect that things are far more complicated and complex than this reading suggests. While the corrective is in many ways necessary and important, the problem need not present itself as a choice between essentialism and anti-essentialism or 'the West' and 'the-non-West'. It may be that this difficulty associated with the assertion that some form of 'marking' or 'practice' is proper to

some group is an effect the form of its articulation within European-derived socio-legal discourses. This difficulty has significant pragmatic implications. Consider, for example, two concerns related to indigenous cultural practices. On the one hand, against the strict and limiting confines imposed upon the category 'indigenous' by 'preservationists', 'traditionalists' and conservative scholars of anthropology and history, some assert the need to recognize the legitimacy and creativity of indigenous expressions, practices and beliefs, as re-positioned, re-articulated or re-formulated *within* the contemporary. Against those that consider *ta moko* a thing of the past, for example, *moko* artist (*tohunga ta moko*) Rangi Skipper argues that "the ink he buries in skin symbolises the resurrection of both a unique art form and aspirations for Maori sovereignty. . .excavated from the past and redesigned for today." (Watkin, 1997: 36) Rather than view *moko* as a form or practice 'proper' to traditional Maori culture, Skipper suggests that it can redefined or re-positioned in a manner that has relevance for Maori today, as an "important step in coming to terms *with what it means to be Maori*." (Watkin, 36)

As Bill McKay argues, the association of 'Maori-ness' with the past and with that which is to be distinguished and defined against *all things non-Maori* fails to reflect Maori beliefs or interests:

> Pakeha [European/New Zealander derived] definitions polarised debate, trapping Maori into western constructs involving notions of authenticity such as the absence of change in "traditional" cultures. . .[this framework has] allowed no place for risk and response to changing circumstances. (1996: 24)

Proponents of this position tend to argue for a conception of culture that is permeable, transformative, dynamic and creative. Indeed, such a conception of culture seems essential if it is to be relevant and meaningful with the current context. Moreover, as Peter Shand has noted, notions of Maori art based upon normative definitions of the 'traditional' or the 'authentic' run the "risk of introducing a prescriptive element into Maori art." (1998: 38) This observation has led to considerable criticism of legal and legislative approaches to indigenous property. Cecilia O'Brien, for example, has cautioned that "[o]ne must be certain that heritage legislation does not exclude 'the use by indigenous people of items which in their view are part of their life." (1997: 71)

On the other hand, there is a need to protect indigenous cultural and intellectual property from improper use and appropriation. This requires a notion of culture as definable, manageable and policeable. The problem is that the legal and legislative mechanisms in place for the protection of indigenous property generally require and assume a fixed, already given and accepted notion of what *is* or has been, thus privileging the past over 'the contemporary', or 'the modern', and placing authority with institutional bodies that are neither indigenous nor even under the direction of indigenous people, concepts or beliefs. Here, the central concern for either position relates to the identification of what *is* indigenous, but one argues for the necessity of transgression, growth and incorporation, while the other seeks to prohibit and protect against the 'traffic' between cultures. Thus, while these concerns are undoubtedly related, with respect to their concern about indigenous empowerment and self-determination, they appear to move in opposite directions with respect to the way culture or identity is defined in a variety of contexts.

On the one hand we have a position that seems to allow for the possibility of dynamic change and growth and yet is unable, at least formally, to distinguish between indigenous and non-indigenous in 'border-line cases', between Europeanised-indigenous objects and indigenised-European objects. On the other, we have a position that provides the basis for clear definition of what is or isn't 'indigenous', but in doing so severely restricts and limits the scope and territory of indigeneity and disadvantages indigenous peoples within 'non-traditional' contexts, in the present. This opposition not only parallels the more theoretical opposition outlined above, between essentialism and anti-essentialism, insofar as in one instance culture seems to be defined as autonomous and self-defining, in the other, as structured within a system of relations, but also highlights the impossibility of deciding between these opposed terms, revealing what Spivak has called "the unavoidable usefulness of something that is very dangerous." (1994: 156)

3. *Crossing the Line*

I noted in the previous chapter that, despite the attempts of anthropological and historical studies to delimit and define the object or practice of 'Maori tattooing' or *ta moko*, the practices themselves often seem to defy clear and unproblematic categorisation and classification. In many cases boundaries were constructed according to preconceived notions of 'Maori-ness' or 'primitiveness' with little if any attention to the complexity of the practices themselves. As Rangihiroa Panoho argues: "[t]here is a whole under-exposed history of innovative and aggressive Maori adoptions of Pakeha forms, design, technology and materials, particularly from the nineteenth century." (1992: 124) Some explanation for this tendency may be found in the fact that, since cultural identities are defined in terms of their differences, 'the traditional' tended to be defined as that which appeared unmarked by European influence and contact. And yet,

because definitions are cast in these terms, 'traditional' practices are always already marked by their opposites, or by the system in which they are 'positioned'. This is, of course, not an argument against the primacy of 'the indigenous' within such a determination and in no way disputes their legitimacy or connection to practices and beliefs existing prior to or independently of European contact or influences. As was the case in the previous chapter, my concern here is not to reveal the 'true' nature of such beliefs or practices, but with the articulation and circulation of the 'authentic' or 'the Maori' "within the true", as Foucault might say, in contexts that are not entirely Maori, never purely a matter of 'internal relations', not simply indigenous, but rather a matter between what is and what is not a definition that, by necessity involves another. (see Durie, 1998)

It is useful to retrace some of the points made in chapter 2. As to cultural boundaries, it is particularly interesting to note how *ta moko* was identified as 'Maori' within colonial representations, a term that functioned as both a name and an adjective. At times it denoted and marked out a distinctive racial or cultural category or group of people, while at others it named a particular mode or style, a way of living or behaving, within a particular context. It may be because of this double-sense of the term 'Maori', along with the conceptualisation of 'Maori' in terms of an evolutionary continuum, that it became possible for practices such as *ta moko* to articulate identity performatively rather than merely express or reflect it. Thus, while Maori 'became' increasingly 'Europeanised', wearing European clothes, using European tools, implements and weapons and adopting European laws and beliefs, there was, to a certain extent, a 'Maorisation' of things European. This was not restricted to the re-territorialisation of objects: so-called *moko* found its way onto the bodies of those once

deemed 'European', runaway sailors, beachcombers, traders and adventurers, who 'became' native.

Despite the tendencies of early scholars to emphasize the distinctiveness of Maori culture and, more particularly, *moko*, the line that divided 'the European' from 'the Maori' could be crossed in both directions. Consider, for example, the cases of Barnet Burns and Fredric Manning. Burns, a 'once English' trader, was captured by a group of Maori and tattooed because they believed that such marking would create an unbreakable, sacred link between himself and the tribe: "it was . . . to make sure I stop along with them, bring them trade, fight for them, and in every way make myself their friend." (1844: 9) As a result of this 'initiation', his appearance and the manner in which he lived for the remainder of his time in New Zealand, his narrative is told, not from the position of a once captive Englishman, but from that of "a New Zealand Chief". Similarly, Fredric Manning, an early European settler who had 'taken' to the Maori way of life, published his account of early New Zealand society and settlement in *Old New Zealand* anonymously as "by a Pakeha Maori". (*Old New Zealand*, 1964)

While these claims cannot be taken as unproblematic insofar as they reflect European notions about the nature of culture and identification, they tie together the notion of transgression and cultural appropriation in a manner that makes it difficult to calculate loss or gain in any clear or simple way. Considering the case of such tattooed 'Europeans', Thomas observes:

> tattooing transposed to a white man's face became diagnostic
> of the condition of the so-called Pakeha Maori, or white
> Maori, the resident castaway or indigenised settler, who
> personified the flotsam and jetsam of the colonial Pacific.

These are awkward terms for an awkward condition, a condition understood by various obscure nineteenth-century beachcombers, and most recently by the character Baines in the film *The Piano*, as marked by both cultural loss and gain. Or, if cultural markings aren't quite or aren't just a set of owned and disowned things, perhaps they present neither gain nor loss. (1995: 93)

Here, then, between the rhetoric of loss and gain we find the difficulty of understanding the dynamics of identification, appropriation and dispossession throughout colonisation and settlement. If one accepts that European contact significantly changed the meanings of things 'Maori', how is it possible to define *moko* as something identifiably Maori, as property able to be protected, without defining it in a way that articulates 'Maori-ness' against 'European-ness', and as a result significantly reduces and closes off possible identifications and articulations of 'Maori-ness', amongst contemporary Maori, some of whom know little about 'pre-contact' culture? Phrased differently, how might one simultaneously acknowledge the destruction and loss caused by colonisation, affirm a relation with the past, with tradition, but also affirm creative, legitimate gains within the present when the 'authentic' and 'legitimate' is so often firmly positioned as 'past', a 'before' to much of what defines the terms of both 'today' and the future?

Consider, for example, During's description of 'contact':

Postcolonial identity politics tends towards paradox and irresolution because, with the coming of Europeans, the

narratives, signifiers and practices available to articulate the needs and wants of the colonised are at once inscribed within Eurocentric modernity. Thus, the moment of arrival opens out in a scene of forgetting and misrecognition. *Crucial signifiers of precolonial Maori language soon began to lose their meaning, because they depended for their sense upon practices that were disrupted by European settlement.* There is now no consensus as to what certain words 'mean'. (1989: 764)

The significance of the distinction between the pre-colonial and the colonial is in some respects obviously justified here; there can be no denying that contact would have changed things considerably or that colonialism was very destructive in many respects. And yet, one must question the way During's description characterises contact so overwhelmingly in terms of Maori loss and European gain. It may be true that European contact significantly altered the meaning of all things Maori, as the shift in the meaning of the word 'Maori' itself demonstrates: meaning 'normal' before contact, from the time Europeans arrived it began to function as a term for the indigenous population or *tangata whenua* as distinct from others (see Durie, 1998). However, there seems good reason to doubt both the instantaneous-ness of any change in meaning, and the relation of loss and gain During implies, as if 'signifiers' began to "lose their meaning" before a blow was struck, before negotiation or communication, before property was taken, before any physical or material imposition, as if the mere appearance of the Europeans was sufficient to bring about the beginning of the end, as

if European modernity unfolded like a homogenising blanket which smothered and radically reconfigured the axes of identification and meaning.

The effect of construing the relation between European and Maori thus is to subsume all Maori actions and beliefs after contact within the tide of Europeanisation, as if there could be no identity, no agency, from then on which was not already Europeanised. As Thomas has noted, this tendency to view colonisation as a one-way process, with Europeans as the active agents who bring the indigenous, the passive victims, into modernity, marginalises those who:

> Must negotiate identities in urban contexts, with non-traditional social relations, institutions, jobs and . . .is [therefore] inappropriate in so far as it is strongly associated with the past, rather than the contemporary circumstances within which they, like everyone else, have to operate. (1994: 196)

Such a view seems to place far too great an emphasis on a division derived from 'contact', between the (pure) precolonial and the (impure) colonial. As Thomas notes, while the idea that identities are articulated relationally "must be true as a universal proposition":

> It is evidently not true that indigenous peoples, or any others,
> need constantly to express their identities in relation to
> colonizers rather than each other, or in relation to other

indigenous peoples or nonindigenous peoples other than the colonizers. (1997b: 13)

In a sense, During's position favours a 'Rousseauean' nostalgia, a mournful preoccupation with loss over an affirmative assertion of life, incorporation and growth; a preference for a determination of identity which is never locatable and always deferred rather than a positivity which finds its difference, initially at least in itself. As Panoho has argued in the context of debates about change in indigenous art: "Te ao Maori- the Maori world- has always been in a state of flux; the boundaries between Maori and Pakeha art and culture have always been transmutable." (1992: 124) With reference to Gisbourne chief Raharuhi Rukupo's innovative style and use of steel chisels, in the carving of the meeting house Te Hau ki Tauranga in 1842, and the appropriation of Catholic symbols within meeting houses under the supervision and influence of Te Kooti in the 1870s and 1880s, Panaho notes that:

> Te Kooti's late nineteenth-century meeting houses, like
> Rukupo's reflect a strong sense of Maori identity and reveal
> an openness to aspects of Western culture which helped make
> sense of a changing world. These houses were built in a time
> when the Pakeha believed the Maori to be a dying race. But
> in contrast to this pessimism, Rongopai (Waituhi, 1887) and
> Tokanganui o Noho (Te Kuiti, 1873) meeting houses . .
> .abound with innovative appropriations and present a Maori
> culture alive and bubbling with creative energy. (125)

It is useful here to reconsider the prevalence of the sort of incommensurable opposition between the 'primitive' or 'the native' and 'the modern' or 'the civilised', implied by During, in terms of the way 'the authentic' functions. While it may be granted that the pre-modern and the modern are often taken as mutually constitutive and thus ultimately problematic rather than 'given', nevertheless, one must wonder about the implications of this distinction insofar as it often translates into a distinction or opposition between the indigenous and the non-indigenous, marking a kind of incongruity between performances of indigeneity and the contemporary and therefore placing severe limitations on the possibilities of expression, performance or the re-positioning of the indigenous in the contemporary context.

4. *Cultural 'Invention' and the 'Invention' of Culture*

Even an approach which would treat Maori culture as a construction articulated against European culture would perhaps fail to recognise the structures of authority that validate its own 'take' on the truth of culture and the metaphysical presumptions this entails. The critique of essences or the stability of cultural identity is no less metaphysical than its uncritical acceptance and, at least from an analytical perspective, locating the source of the determination of culture or identity within the realm of 'the cultural' or 'the social' is as problematic as biological or racial theories. In 1989, Alan Hanson, an American anthropologist, proposed that "[t]he invention of Maori culture has been going on for more than a century, taking at least two distinct forms in that time". (1989: 890) Hanson's point is that 'traditional culture' is an invention constructed for contemporary purposes "which proposes a stable heritage handed on from the past." (890) The point is not the simple recognition of the fact that traditions, like all cultural forms must re-articulate and re-contextualise themselves, but that "the

Maori tradition that Maoritanga invents is one that *contrasts* with Pakeha culture, and particularly with those elements of Pakeha culture that are least attractive." (894)

In the context of cultural politics in Aotearoa New Zealand, this thesis was translated into the charge that Maori culture was inauthentic and Maori claims often fabricated to suit their own needs. While pointing out the obvious fact that culture is invented, Hanson grossly over-emphasizes the freedom of such invention, articulating his argument in a manner that reduces Maori culture to an oppositional articulation to the Pakeha. The privileging of that which is articulated through such a relation is itself highlighted by the curious fashion in which he frames his debate historically. If all culture is invention, one might ask, why does he limit the date of invention to the last one hundred years? Assuming he could not accept the notion of pre-contact authenticity, the only answer would seem to be that Maori 'came into being' with European contact and settlement. While this may be true as a general proposition, since Maori-ness as it is known today only became possible once the settlers had created the conditions of pan-tribal identification, to assume that the entire content of such identification is a mirror image of European society and culture ultimately places the determination of Maori identity with European contact, settlement and colonisation. This notion of Maori culture as reactive conflates external and internal relations of identity, difference-to-another and difference-in-itself, and in so doing reduces all cultural difference to a 'plane of similarity' or an already assumed ground of identity.

There is no simple or safe approach here. The affirmation of identity and culture as positive, as self-defining or self-differentiating, risks uncritically accepting the terms in which identity or culture are given through a conflation of re-presentation and representation, while the characterization of colonisation in terms of a kind of trafficking or exchange between cultures means that matters of ownership, authenticity

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and authority become difficult to determine. Hybridisation may seem to open up and undermine particular identities, when it reveals their 'purity' to be fictional. But as Laclau observes: "if the particularity asserts itself as mere particularity, in a purely differential relation with other particularities, it is sanctioning the *status quo* in the relation of power between the groups." (1996: 27)

In the context of copyright or cultural and intellectual property law, both positions seem problematic, though for obviously different reasons (cf. *Maori and TradeMarks*, 1997). The notion of a shared, entangled trajectory of culture makes it virtually impossible to establish ownership, let alone protect property, while the notion of culture as clearly definable and policeable seems biased toward 'accepted' definitions and categories, 'what has been' rather than 'what is' or 'what could be'. Moreover, as many have noted, legal definitions tended to characterise 'property' in a manner that failed to recognise Maori beliefs, practices and concerns, especially so far as cultural property is concerned. Here we find again what might be called a politics of translation, within the context of law, a matter of the problematic relationship between an apparently indigenous 'object' and its translation into European-derived legal terms. As Shand has pointed out: "the acts and common law reflect the normative positions of Euro-centric intellectual property law, which is to say they are focused on individual rights and interests." (1998: 17)

The demise of traditional Maori tattooing practices in the middle of the nineteenth century occurs simultaneously with its 'revival' amongst Europeans. Taken initially as a marking that defined cultural boundaries, the tattoo was 'taken', first literally on the bodies and body parts of natives, and then, later, transposed on the bodies of Europeans themselves. In the first instance, the tattoo was received as an item of curiosity and anthropological interest, in the second as a marking of opposition to

'civilised' modernity. This suggests, initially at least, two sets of connections: one between the opposition to tattooing by Europeans and its later appropriation; the other between all that Europeans had invested in the tattoo as a sign and its later value and potency as a sign of Maori revival and sovereignty.

Here, two observations can be made. The recent revival of 'primitive' tattooing in North America, Europe and elsewhere demonstrates how the tattoo continues to be 'taken' as a sign or expression of primitivism *par excellence*. The term given to this, 'modern primitives', suggests that the assumed division between 'the modern' and the 'primitive' forms the primary axis of identification. As Peter Lentini points out:

> the term 'modern primitives' refers to individuals who, in the midst of rapid industrial and technological change and the insecurities of modernity (such as unemployment, spatial dislocation, urbanisation and its subsequent alienation), challenge western philosophy's notions of faith in scientific, rational and profit-driven progress . . . (1999: 47)

Thus, if European modernity is positioned as 'good', then manifestations of its opposite 'primitivism' are taken as 'bad'. If European modernity is taken to be 'bad', then its opposite is taken to be 'good'. The key point here is that the tattoo, or more precisely certain 'forms' of tattoo, are appropriated and reduced to an assumed relation to 'the West'. In this way, the tattoo gains power as a sign of opposition to Eurocentricism and modernity through its initial signification as that which opposed 'European Civilisation'. Indeed, this reveals some of the complexity of distinguishing between early and later 'uses' of *moko*, insofar as contemporary *moko* seems very

much inflected by this sense of its oppositional power. The capacity of *moko* to stand as an assertion of Maori sovereignty and authority seems to be a form or mark of identification that is, to use a Derridean phrase, already 'counter-signed' by 'European modernity'.

The scene of exchange, of the transference of the tattoo and the alteration of the meaning it implies, of its translation, redefinition or re-positioning within another context, in terms of another law and different configurations of power, describes how interpretation, knowledge, use and appropriation are here intertwined. Thinking of the different and yet interrelated economies of meaning and value, how could one doubt that the appropriation of *moko* is itself premised upon the failure and/or impossibility of reading it in its specificity, as attached to a part of a *particular* body? Doesn't the functioning of *moko* as signature suggest that the motif is necessarily separable from the individual or collective to the extent that it can stand in their absence? If abstraction here enables appropriation it also seems to enable signification generally. Indeed, one might argue that the possibility of recognition, communication and signification seems tied to the possibility, indeed, necessity, of forgery, appropriation and mis-recognition. In more precise terms, this problem ties together the question of what can be 'Maori' and what it can 'represent' or 're-present'. Representations determine both what can count as an instance of that which is re-presented and consolidate relations of power and authority by assuming the position of representor through such an act.

It is important to note here that, despite the distinctiveness of *moko*, or the recognition that its marks were taken to be irreducibly singular by Maori, it is such an abstraction of the *moko* as mere design or marking, as tattoo-in-general, the mark of 'the primitive' or 'Maori-ness', that enables its removal from specific bodies, just as

the aestheticisation of *moko* provided the grounds for its contemplation as something apart from the body, in disregard of the bond that tied together body and marking as signature and signatory. In other words, the assumed interchangeability of positions, 'bodies' or 'properties' can itself be seen as an imperialist move that makes appropriation possible.

Kant provided a philosophical expression of this approach, holding that the appreciation of the true and free beauty of such 'designs' was only possible once distanced from its context, relieved of the burden of 'means' and taken as an end in itself. As he observes: "[a] figure might be beautiful with all the flourishes and light but regular lines, as is done by the New Zealanders with their tattooing, were we dealing with anything but the figure of the human being." (1911: 73) This abstraction, re-contextualisation or appropriation occurred on a remarkable scale. While anthropologists like A. W. Buckland and Edward Tregear described *moko* as "ornamentation", "personal adornment" (Buckland, 1887: 319) or a debased form of graphics (Tregear, 1890), the extensive and wide circulation of images of *moko* brought with it a broad range of appropriations. As Thomas notes, in reference to appropriation of *kowhaiwhai* and *koru* 'patterns' from an engraving of a Maori man with *moko*: "[t]he involuted 'spirals' and 'scroll[s]' figure in the engraving . . . is probably the single most extensively reproduced image from the entire visual archive of eighteenth-century exploration". (1995: 93)

These appropriations are based on the denial or effacement of difference along with the corresponding assumption of some universal ground of contemplation, meaning and abstraction. It would seem that copyright, intellectual and cultural property law is also blind to such differences: just as the appropriation fails to consider the authority invested in the binding of *moko* to body, so too current law recognises the

object or practice only insofar as it is recognised by the law, in terms of its universifiable principles, and further, refuses to acknowledge the authority which would prohibit appropriation or misuse in *Maori* terms (c.f. *Maori and TradeMarks*).

5. *Representations of Moko*

Representations both determine what can count as an instance of that which is represented and consolidate relations of power and authority by assuming the position of representor. In the context of Aotearoa New Zealand, for example, it might be useful to think of the re-articulation, development or influence of Maori culture in a variety of non-traditional places, contexts or media, and the questions that might always be asked: whether this thing, act or person actually is 'Maori' and whether they are truly representative. We might think of the question of the representation of Maori that arose around debates about a proposed 'fiscal envelope' to settle Maori grievances with the Crown. In this particular case, the question of *who could represent Maori* was a hotly contested matter amongst both Maori and non-Maori. We might think also of the signatures of Maori on deeds and treaties such as *Te tiriti o Waitangi* or the Treaty of Waitangi, and the variety of things these signatures are taken to mean or authorize. Indeed, the analogy made between *moko* and signature has some historical basis, as Michael King observes:

> Many nineteenth-century chiefs chose to sign documents
> such as land deeds and the Treaty of Waitangi with their
> moko in preference to a signature so as to increase the tapu of
> the document. (1978: 14)

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The signature is also a useful metaphor for the further consideration of the relationships between protection, delimitation, development and circulation with respect to cultural boundaries, identities and property. In fact, the term signature can mean either a mark or sign that stands for something or someone in their absence and, as in science and forensics, a distinctive identifying marking or characteristic. In the first sense, then, it can be something which derives from some structure or system and is non-essential, while in the second it is 'the essential' aspect of identity. These two meanings offer paths into either side of the essentialism/anti-essentialism debate. When one sees tattoos or *moko* in a context that is not 'traditional', for example, the answer to the question 'whose signature is this?' could refer either to contextual, social or cultural determinants or to 'proper' and stable 'essences', such as blood, race, ethnicity etc.

It may be the case that tattoos of this nature, as markings that define or assert a particular form of identity or culture, tend to be most prominent at the *borders* of culture, as a kind of marking or articulation ultimately shaped and motivated by inter-cultural politics. This sort of 'in-between-ness' also be symptomatic of a type of splitting and intertwining of the Maori/non-Maori divide whereby either side of such oppositions constitute themselves in relation to the other, such that the tattooed line, as the limit, is ultimately undone, an incision 'in-between' through which the other and the self bleed together. Lacan observes, that, apart from its apparent erotic function, "[t]he tattoo . . .has the function of being for the Other, of situating the subject in it, marking his [sic] place in the field of the group's relations, between each individual and all the others." (1979: 206) Moreover, as Grosz has noted:

[p]aradoxically, the signature is the possibility of the infinite

repetition of what is unique and irreplaceable. "The drama

that activates and constructs every signature is this insistent,

unwearying, potentially infinitive repetition of something that

remains, everytime, irreplaceable." (Derrida) the signature is

not self-contained and given, cannot be a presence-to-itself,

for it always requires a counter-signature, a reception, an

other to sign for it. (1995: 13-14)

Once one considers both the possibility and impossibility of reversing the

relationship between representation and reality, both the creative potential in

representation, the way in which it performatively brings into being that which it

represents, and its dependence upon some recognition, some system or code by which

it can be recognized as that which must already be, then one begins to see how

representation both opens possibilities and closes them down, how it secures and

destabilizes authority. In this context, we must ask what it is that authorises such a

signing. Here we strike a paradox: representation may be constitutive, in the sense that

it can performatively constitute that which it re-presents and in so doing effectively

determine the range of possible identifications, and yet such representation of a

particular identity, object or practice must always be recognised as that identity, object

or practice, must be re-cognised as a re-presentation, thus implying something always-

already before, something which is repeated and repeatable. One would not want to

assume that the structure of the signature and way it is recognised, legitimated or

authorised is the same in Maori and non-Maori contexts. But again, perhaps the way

this admission sits uneasily with my general thesis concerning the notion of *a* Maori or

non-Maori context offers some further possibilities, such as the articulation of Maori law, of *mana* [authority, power or prestige], *tapu* [the holy, sacred or prohibited], *tikanga* [procedure, custom or method], as law. For it is surely European law, articulated as universal law, which justified and maintained the dispossession and displacement of Maori authority in Aotearoa.

Perhaps the most pervasive model through which the development and relationship of Western and non-Western tattooing is conceptualised, is that of economy and exchange. Here, particular signs, like tattoos, circulate within a particular system, signifying certain social and cultural relations, beliefs and interests. The meaning of such a sign, as 'marking-in-general', would be determined by its function or value within a given system, while its operation within a cross-cultural or inter-cultural situation would be understood in terms of the ways such signs are re-signified. In other words, we would come to understand a particular 'sign' in terms of its use within a system, structure or economy. Against the exchangist model, Deleuze and Guattari offer a reading of society and bodily inscription in terms of the 'primitive socius':

> We see no reason . . .for accepting the postulate that underlies
>
> exchangist notions of society; society is not first of all a
>
> milieu for exchange where the essential would be to circulate
>
> or to cause to circulate, but rather a socius of inscription
>
> where the essential thing is to mark or be marked. There is
>
> circulation only if inscription requires or permits it. (1983:
>
> 1430

The significance of this point for my discussion of *moko* is two-fold. Firstly, rather than assume that such markings are readily translatable or subsumable within some larger category, like 'tattoo', 'graphics' or 'writing', that they are separable from the bodies on which they are inscribed, Deleuze and Guattari suggest that such inscriptions mark an attachment to the earth and to others, not in terms of exchange, but as an assemblage or coupling. 'Primitive' signs would thus be 'embedded' in situations, not fully separable from bodies, specific planes, rituals, gestures and beliefs, yet not entirely fixed in their relationship to one another. The inscription, then, encodes and marks the individual within a system and in doing so determines the terms of economy. Simple appropriation, therefore, would take the thing- the mark- only in terms of its denotational value, while failing to observe its multiple connotations and efficacious power, its embeddedness.

Secondly, and in a related way, the translation of such marking into the more general terms of signification would be, in a sense, a violent reduction or imposition that assumes such terms at the expense of the singularity of the mark. The reduction of 'the tattoo' to its 'appearance' or in terms of its recognisability within a system or economy of meaning would, of course, receive the marking as something other than 'itself'. If one thinks of the tattoo as a form of production, as something that 'gives' 'properties' to a subject, or even the subject itself, then, to use the words of Pitts, one could say tattooing "*matters* . . .[in the sense that] material situation[s] . . .[are] altered as a result of bodily representations."(74)

The point might be, then, that any assumed ground which would make *moko* translatable and transferable would represent difference at its own expense. To recognise it is to re-cognise it as that which it is not, to take it and re-territorialise it in a manner which necessarily effaces the specific relations which gave it meaning or

'belonging' within indigenous culture. To see *moko* it terms of the exchangist model of loss and gain might already, therefore, assume a type of general inscription of value or meaning- to take the marking as something which falls under a genus that unites Western and non-Western graphics. The problem, therefore, is that the assumption of some ground of exchange, translation or circulation involves a violent reduction or effacement of the singularity of a particular idiom, marking or act. However, such reduction, such separation and abstraction of the mark from the context in which it is 'embedded', seems to be what makes the mark recognisable *as a mark of 'such and such'* and thus function as a signifier. In other words, the general terms of economy and exchange that reduces difference to difference within the system of economy makes 'meaning' possible. As Derrida has argued with the case of 'writing':

> The possibility of repeating and thus of identifying the marks
> is implicit in every code, making it into a network [*une grille*]
> that is communicable, transmittable, decipherable, iterable for
> a third [not just for sender and receiver], and hence for every
> possible user in general. To be what it is, all writing must,
> therefore, be capable of functioning in the radical absence of
> every empirically determined receiver in general. . .the
> possibility of the "death" of the receiver inscribed in the
> structure of the mark [...] (1988: 8)

In order to function as an identifiable mark, it must be repeatable in the absence of sender or receiver. And yet, it is the trace of this irreducible singularity, the mark of the excluded difference, that opens the structure of exchange, signification and meaning to

the line of ethical and political questioning I am interested in here. The assumed generality, which founds the possibility of exchange and circulation, masks and effaces the specific historical and empirical conditions under which a particular event or mark is given within the terms of the system. For example, formally or structurally there may be no way to differentiate between different manifestations of 'Maori-ness' within the contemporary context. 'Proper' use would seem to *depend* on 'improper' use. An important point here is that the ambiguous category of the 'newly traditional' can be used to describe a whole range of objects and identities, from the Europeanisation of things Maori to the 'Maori-isation' of things European. As During notes:

> Here what is 'new' in the 'newly traditional' is a struggle
> against injustice and loss that continue into the postcultural
> era where inequities in employment, health and education
> continue to be linked to racial difference. (769)

By situating the notion of authenticity within the socio-historical context of colonialism, During provides us with some way of differentiating between European appropriations of 'the Maori' and Maori appropriations of 'the European' and for arguing that the relationship between Maori to Pakeha and Pakeha to Maori need not be taken to be mutually translatable, symmetrical or reciprocal. He continues: "to place them together under terms like the 'newly traditional' is to pass over what distinguishes them." (770) And yet, such difference could only ever be expressed in terms that exceed the specific instances concerned; it would always be a difference *in relation to another*. This impossibility of representing the difference that counts marks the possibility of ethics or justice: the recognition that representation is always

inadequate to this task makes possible a relation to another person, group, language or system of law which is ethical.

This finds an interesting parallel in recent thought in the field of cultural and intellectual property rights, where Maori claims are typically expressed in terms of European-derived concepts. The challenge in such thinking arises, not from an attempt to find provision within the existing structures and concepts of law for indigenous rights, but from an exposition of the law's narrow Eurocentric base. The translation of the relationship of things Maori into Eurocentric notions of property thus becomes 'part and parcel' of the denigration and destruction of Maori cultural practices. Indeed, Shand goes on to argue that "a loss of cultural sovereignty, whether through an inability to practice, the influx of imitations or through the adoption of formal modes of expression by outsiders, is akin to an act of epistemic violence." (42) The point of this observation is to underline the possibility that the relations Maori have to cultural practices, objects and systems of belief may not be able to be characterised in the terms available to European-derived law. In this way, the singularity or corporeality of 'the tattoo' can be linked to the question of cultural specificity, the recognition of difference and the possibility of 'property' beyond simple 'property'.

This question of the possibility of this impossibility (further elaborated in chapters 4 & 5) hinges on the 'between-ness' of the tattoo. Revealing and outlining boundaries as it crosses and transgresses, the tattoo might be considered radically 'before', in the sense Derrida (1991) gives to the term 'before' in 'before the law' as 'prior to' as well as 'in front of' a past and future beyond any present, a marking out that which makes possible any relation or ground of 'between' or 'inter'. In this manner, the (im)possibility of this translation across or between cultures would not only make culture representable or any form of inter-cultural relation, the possibility of culture,

property or identity might also turn out to depend on the repeatability of such a 'marking'. This insight might mean recognising, as much as this is possible, both that *ta moko* is a form of property that must be defined in European-derived socio-legal terms in order to be protected or recognised, but that it could never be 'properly' understood or contained by these terms and that the basis of the 'proper-ness' of such 'property' could never be, but *must* be, 'taken' as 'given'.

Chapter Four

Between Fact and Fiction: Hindmarsh Island and the Truth About Secrets

The term 'business' is often used to name a broad and diverse range of Australian Aboriginal sacred, ritual, or customary practices and beliefs. As Diane Bell observed:

> In seeking to make plain to whites the importance of their law, Aborigines draw upon an extended work metaphor. The law is termed "business" and is made up of "women's business" and "men's business" . . . Ritual activity is glossed as "work" and the participants as "workers" and "owners." (1998: 531)

'Women's business' denotes 'traditional' practices or beliefs or, in Bell's words, "the complex of gendered behaviours" (530) understood to be either typical or exclusive to that group or considered the 'province' of women. What this term denotes from region to region varies greatly. Thus, exactly what such a term might mean in any specific context is by no means clear and could only be determined in relation to its context-specific uses. Indeed, recent studies have revealed the ways in which specific forms of 'women's business' have been overlooked or 'mis-recognised,' often by male anthropologists preoccupied with certain forms of 'men's business' or 'models' of Aboriginal society. Preconceptions about what counted as 'legitimate business,' as

well as problems relating to gender or cultural exclusivity, may well prevent so-called experts from recognising 'business.'

As a matter relating to a question of knowledge of another culture this has obvious epistemological implications. Feminist anthropology, for example, has done much to demonstrate how knowledge of traditional Aboriginal society has been shaped by the gendered preconceptions of male anthropologists (in general, see Bell). Insofar as such knowledge has implications for the legal, political and social recognition of certain Aboriginal traditions and beliefs, this matter has significant political and ethical implications.

Where Aboriginal customs and beliefs depend on non-Aboriginal recognition, as is the case with the current system set up for the registration and protection of sacred 'property' and land, these issues tie together matters of 'representation,' understood both in the sense of a speaking on behalf of and a form of depiction or characterisation, and matters of political and legal right and entitlement. The risks of representation are clear since the 'figuration' of Aboriginal cultures and peoples within the so-called authoritative discourses like anthropology and law not only makes recognition of such cultures and beliefs possible but is also instrumental to such power-knowledge and a condition of possibility for continued colonial dominance.

1. *Background*

The Royal Commission *Report of the Hindmarsh Island Bridge* (1995) investigated allegations concerning the 'fabrication' of certain 'sacred/secret' gender-restricted traditions or beliefs (which came to be known as 'women's business') belonging to the Ngarrindjeri, an Aboriginal tribe or language group from the lower Murray area in South Australia. This secret 'women's business' was claimed to be associated with

Hindmarsh Island, a small, sparsely populated river-bound island at the mouth of the Murray river some 90 kilometers South-east of Adelaide on the southern coast of South Australia. The claim had formed the basis for an application under the Commonwealth *Heritage Act* to prevent the construction of a bridge from the small coastal town of Goolwa to the island. Thus, the allegation of fabrication brought the application into question and, in June 1995, the South Australian government appointed Iris Stevens royal commissioner to investigate the matter.

Since then, a considerable amount has been written on the subject of the Hindmarsh Island Bridge 'Affair'. It has been the subject of at least three books, numerous journal, magazine and newspaper articles, a Royal Commission inquiry, two Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* (1984) section 10 reports, a legislature review and a recently-passed Commonwealth Act. Unless the threat of defamation and damage curbs further reportage and commentary, the scope and volume of this literature looks set to increase substantially. The legal and political battles centring on the 'Affair' continue to take bizarre twists and turns, leading *Sydney Morning Herald* writer Debra Jopson to characterise it as "[o]ne of Australia's most extraordinary webs of litigation" (1999: 14).

Even before the commissioner handed down her conclusion in support of the charge of 'fabrication', a Federal Court had quashed the Commonwealth *Heritage Act* protection order made by the then Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner. Tickner had elected not to view the contents of sealed envelopes that formed the central part of the 'women's business' claim, since these were considered sacred and secret and were to be viewed only by authorised women. To overcome this obstacle he had nominated a female staff member to act on his behalf, assess the claim, and report to him. While Tickner was applauded by some for

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his sensitivity, others, including Justice O'Loughlin of the Federal Court, deemed his actions unacceptable. According to O'Loughlin, if the Aboriginal claimants wished to obtain protection under the *Heritage Act* "they must be prepared to reveal sufficient about their sites to bring themselves within its umbrella." (*Chapman v Minister*, 1994: 126) As far as O'Loughlin was concerned, there was no question that disclosure was necessary to make an application under the Act: "it is essential that the minister have full details of the claims so that he might appropriately consider their efficacy"; the Aboriginal claimants must weigh "up whether the importance of that they attached to the site is so great as to justify disclosing their secrets to the minister." (127)

From the establishment of the commission, it became clear that the 'Affair' had wide-reaching implications, not only for issues relating to the recognition of Aboriginal beliefs and customs, but also for the relationship between politico-legal institutions and issues relating to gender politics, feminism, political correctness, minority rights and media representation of Aborigines. Indeed, the commissioner's conclusion that "the whole claim of 'women's business' from its very inception was a fabrication" (298) fuelled the widespread suspicion that the commission had been set up in response to political objections, concerning the operation of legislation such as the *Heritage Act* and the *Native Title Act* (1993), from developers and property owners. Thus, the "Affair' was not only linked to the future of Aboriginal rights and recognition in law and legislature, but also took on political significance as an instance where the government and the courts could set the direction for future claims.

If the *Heritage Act* protection order and the minister's refusal to view the contents of the 'sealed envelopes' were taken by some as emblematic of the Labour government's 'indulgence' of 'minority interests', later responses from the media can be seen to 'signal' the changes that brought the 'landslide' victory of the Coalition

government and a corresponding change in direction, perhaps even reversal, of legislative and legal approaches to Aboriginal rights. By the end of 1996 the Hindmarsh Bridge Bill, which proposed to relieve the Federal Minister for Aboriginal and Torres Strait Islanders Affairs of all obligations to investigate the Hindmarsh claim, directly linked the future of the 'Affair' to the future of native title and, more particularly, the Federal government's *Native Title Amendment Act* (1998). In a strange and somewhat perverse reversal, many who had supported the 'women's business' claim and opposed the bridge now face hefty defamation and damages charges issued by the developers. Company owners, Wendy and Tom Chapman, have sought up to $47 million in damages for what they saw as a "conspiracy to ignore their rights"(Jacobs and Gelder, 1998: 126). As Jacobs and Gelder note, the position of the developers came to be seen as emblematic of a "new social category: 'dispossessed middle Australians'" (126) evoking the marginality of the 'white Australian'.

The commission's conclusion that the 'women's business' claim had been fabricated was reached despite the fact that the 'proponent' women refused to testify or provide evidence and regardless that no one who gave evidence before the commission had any knowledge of what was contained in the 'sealed envelopes', with the exception of Dr Deane Fergie, the anthropologist who helped the women lodge their claim, but who had refused to discuss the content of the secrets. One of the central problems the commission had to address, then, was the way to establish the 'truth' about an alleged tradition which by its very nature, was secretive and restricted.

How could the falsity of a secret be established when its protection might require that it be masked in lies? There could be no clear way of establishing whether the absence of evidence for the existence of this tradition testified to its falsity or to its continued and effective practice. If the 'women's business' claim was legitimate, so

the argument goes, then Ngarrindjeri law would prohibit disclosure. The absence of the 'proponent' women from the hearings supports this reading, but also meant that discussion at commission hearings was limited to secondary sources, either those who did not believe or had not heard of the tradition. To get around this problem, the commission, on the one hand, attempted to establish grounds for inferences about the content of the 'sealed envelopes' and, on the other, argued that it was not concerned with actual content, but with why and when this tradition had arisen. In the commission's *Report*, these two parallel arguments are developed in such a way that they become inseparable.

2. *The Truth About the Commission*

In her conclusion, the commissioner argues that: "[i]f the 'women's business' existed . . .then it would not have been kept totally secret . . ."(298) Where traditional Aboriginal society would tend to judge the truthfulness or legitimacy of the one who speaks on the basis of who it is that speaks, in terms of tribal or family hierarchy, the commissioner demanded that truthfulness be dependent upon the secret itself. As Diane Bell observes:

> The respect system [amongst the Ngarrindjeri] sets out the
> proper way of behaving; it specifies who may know what,
> when, and in what detail. The code is strictly followed,
> constantly reinforced, and it is not possible to engage in
> conversation of any depth or meaning if one does not abide
> by the rules. They are simple. *The elders know. Don't ask.*
> *Don't answer back or challenge. Wait to be told. . . .When*

one is told by an elder, one doesn't question the authority, or

the rationality . . .The justification is the authority of the

elder".(1998: 62)

The concern expressed by the commissioner was not merely a matter of the possibility or plausibility of a 'totally secret secret', but also, and perhaps primarily, of the possibility of recognising that which is secret, the unsaid. This is where the contrast between Aboriginal and non-Aboriginal knowledge is most clear. For the commissioner, the tradition can only be recognised as legitimate if its secrecy can somehow be revealed or exposed to the commission. This requirement, a symbolic demonstration of the power and authority of the commission, as arbiter, judge and 'truth commission', demands that recognition be achieved in its own terms. The pursuit of truth in this legal and political context is far more revealing of the problematic way Aboriginal claims are addressed than of any truth about fabrication. Between those who supported and those who opposed the commission's *Report*, the central point of disagreement was whether or not 'truth' could be established by the commission, given that the claim was only given representation in terms of negative attributes: that which does not exist, is not known or heard of, and that which must not be spoken.

This point about how 'women's business' was represented in the *Report* highlights my main interests in this and the next chapter: the commission's approach to the issue of the sacredness and secrecy of the alleged tradition; the way Aboriginal beliefs and customs were represented by this inquiry; and how the relationship between the authoritativeness and conclusiveness of the commission's findings and the organisation and evaluation of evidence can be read against more general issues concerning

(post)colonial politics and the representation and recognition of difference. Read against the backdrop of a history of exclusions and mis-recognitions of Aboriginal societies, customary practices and laws, this absence offers a powerful image of how the authority and conclusiveness of 'the law' are founded upon representational practices that 'silence', exclude and appropriate Aboriginal voices. Like the fiction of *terra nullius*, the narrative of "the truth" of the fabrication disguises both the 'constructed-ness' of the finding and the extent to which it is premised upon the exclusion and hierarchical ordering of different and competing narratives. Indeed, a juxtaposition of the commission's concerns with disclosure, exposition and the pursuit of truth against the silence of the secret and the absence of the 'proponent' women, not only accentuates the differences between (non-Aboriginal) Australian legal practices and Aboriginal cultural practices, but also powerfully demonstrates the extent to which Aboriginal beliefs and practices are not recognised in their own terms but, rather, are given representation through the terms of 'the law' or 'the commission'. In other words, this case highlights the way silence is constitutive of the singular, totalising voice of the law, its authoritativeness and its conclusiveness.

Obviously, the commission's conclusion could not be reached until all 'relevant' factors had been assessed and evaluated. In fact, this process of differentiation and evaluation is fundamental to the conclusiveness of the findings, in so far as it allows various pieces of evidence to be weighed in relation to each other so that a 'picture' of the truth can be assembled. The assemblage of 'truth' here warrants consideration, since it draws attention to the relationship between the manner in which 'truth' is demonstrated and 'the truth' itself. In the narrative offered within the *Report*, truth must be uncovered and distinguished from lies. And yet, this narrative of uncovering, of laying bare, cannot find the truth without simultaneously finding that which is not

true: the two must come together. Derrida observes of the cipher of secrets that one requires a deciphering which, "to make the thing appear uncovered (*aperikalytôs*), must first find it hidden."(1989: 18) In short, there is no laying bare of the truth that does not depend on a (literary or conceptual) convention of (un)covering:

> In attempting to distinguish science from fiction, one finally
>
> will resort to the criterion of truth. And in asking oneself
>
> "What is truth?" one will come back very quickly, beyond the
>
> waystations of adequation or of *homoisis*, to the notion of
>
> unveiling, of revelation, of laying bare what is, such as it is,
>
> in its Being. Who will allege then that the *Clothes* do not put
>
> the truth itself onstage? that is, as the possibility of the true as
>
> a denuding? (Derrida, 1987b: 419)

The way differentiations are made in the commission's *Report*, and in supporting publications like Chris Kenny's *"It would be nice if there was some Women's Business"* or Ron Brunton's *The False Culture Syndrome: The Howard Government and the Commonwealth Hindmarsh Inquiry*, is suggestive of the assumptions on which their conclusions are based. One of the main distinctions drawn between the evidence for and against fabrication was based on the characterisation of particular individuals or testimonies in terms of their possible political motivation. Kenny's book, for example, offers an in-depth account of his version of the issues and events surrounding the inquiry. But, because of his own 'interested' involvement in the 'affair' he is able to offer far more than a simple description or recapitulation. Kenny was not only a key witness, but was also 'personally' involved in the 'emergence' of practically all the

"dissident" arguments against the 'women's business' claim: he may have 'persuaded' Ngarrindjeri man, Doug Milera, to offer a 'confession' about the alleged fabrication; on a video tape played at the commission hearing he was heard telling the 'dissident' women how to challenge the claim (Mead, 1995). Very little is made of such matters while substantial space is set aside for speculation about the political motivations behind the anti-bridge campaign. Kenny's 'experience', at the level of its narrativisation and presentation, is little more than a rhetorical construction: a fashioning of the self that reveals the self to be little more than fashioning, a presentation of truth which is an artifice of the artifice-less, in Montaigne's words, a portrayal or the honest self "simple, natural . . .complete and in all my nakedness." (1958: 23)

3. *Truth, Invention and Fabrication*

Like the commission report, the force of Kenny's argument seems premised upon an exclusion of other narratives, such as those that suggest possible collusion between certain state and federal politicians, Kenny himself and the 'dissident' women who spoke against the claim. The basis of such an exclusion or evaluation can never itself be brought into question since it provides the ground on which judgement itself is based. On such an assumed ground, the selectiveness of Kenny's argument is paralleled by its narrative style, which often blurs the distinction between what he experienced, what he was told and what is mere speculation. Kenny thus provides a powerful example of the way the authoritativeness of first person narration may rest on mere literary convention, rhetorical clothing that stages the unclothing of truth.

Like the commission, Kenny makes up for his lack of knowledge concerning 'the secret', and thus the basis of the claim made by the 'proponents', by threading together

a variety of narratives, so as to overcome this 'lack' by reconstituting and incorporating it. Not surprisingly, both texts place considerable value on speculative evidence about overheard discussions, private meetings and a whole variety of alleged political associations. This privileging of certain forms of evidence is apparent in Kenny's argument for the fallibility of the 'oral' and 'hearsay' evidence given by supporters of the 'proponents', such as Betty Fisher, in contrast to the authority of the 'expert' testimony given by anthropologists, Philip Clarke and Philip Jones. It reappears, in inverse form, in his dismissal of the testimonies given by anthropologists Steve Hemming and Deane Fergie, on the grounds that their opinions may be shaped by their political beliefs, while 'hearsay' evidence by others is accepted uncritically. In this manner, Kenny is able to colour his descriptions morally to such an extent that the 'truthfulness' of evidence seems based on character references. The word of the Chapmans, styled by Kenny as a well-intentioned, hard-working couple, is taken against the word of the 'politically motivated' anti-bridge campaigners, just as the word of the 'honest', church going 'dissidents' is taken against the word of the 'conspiring' 'proponents'.

Kenny misses the point, then, when he criticises Christine Nicholls because she had not "sought out the proper nouns instead of guessing about the adjectives" (1996b: 47). In the opposition between 'political interest' and knowledge, or morality and truth, particularly in relation to anthropological knowledge, his focus on the proper nouns ('Aborigines', 'traditions', 'developers', 'greenies', etc) fails to consider how these are given meaning and 'truth-value' by the way they are positioned, indeed clothed, by adjectives. The attribution of adjectives ('good', 'bad', 'true', 'false', etc) to particular 'proper nouns' is anything but objective.

Similarly, the privileging of certain testimonies or forms of evidence reveals implicit assumptions, not only about the relationship between anthropology, history and individual testimonies, but also about the construction of Aboriginal culture generally. The distinction between the 'newly invented' and the authentic, for example, suggests that Aboriginal culture is a fixed static object, the majority of knowledge of which is now held in museums and understood by anthropologists. This distinction was reflected in the line of questioning pursued by the counsel for the 'dissidents'. Rather than take the word of members of the Aboriginal community as to the legitimacy of their claims, the counsel chose to question an anthropologist about the possibility that such a tradition had been 'invented':

Q. . . .you are saying that that [tradition] is something that has- that the formulation has occurred by way of a process of invention of tradition.

A. Yes, that's a convenient way of describing it.

[. . .]

Q. If it is an invention of tradition, does that mean that something which was not there previously has appeared in the tradition.

A. That's right. And it implies a- sort of a more radical change. I mean, we accept that it is the nature of culture to change all the time, but, in the case of invention of tradition more p⋮icularly the examples talked about there are talking about fairly major changes. (Royal Commission transcript, 1995: 3711-3713)

Privileging historical and anthropological accounts of Aboriginal culture and history, Kenny claims that: "the Ngarrindjeri no longer possess much of their own cultural history. The greatest repository of that knowledge, physically and intellectually is the museum on North Terrace, Adelaide."(1995: 101) Brunton extends this line of argument to conclude that anthropological material by itself was sufficient to settle the case: "the publicly available anthropological material was sufficient to demonstrate that 'women's business' was almost certainly *a recent invention.*" (1996: 8) Brunton here illustrates the way academic sources were interpreted by both the commission and Kenny in relation to the accusation of fabrication. One of the central arguments in the commission's finding is based on the absence of sacred-secret 'women's business' in Roland and Catherine Berndt's *The World that Was.* According to Brunton, this supports the allegation of fabrication, since the Berndts' book, "[t]he most authoritative account of . . .Ngarrindjeri culture" (3), contains the index entry "secret-sacred issues, absence of".

The argument has considerable importance for to the way cultural practices, such as 'women's business', have been conceptualised. Firstly, it seems to suggest that traditions or customs can only be recognised to the extent that they are recorded by anthropologists. Thus, we find the suggestion that the 'traditional' is that which is recorded by anthropology or held in a museum. This follows from the 'measure of truthfulness' or authenticity based upon a distinction between the 'traditional' and the 'invented', where the former is truthful, the latter fabricated and inauthentic. Secondly, the title of the Berndt's book, *A World that Was*, is suggestive of mainstream anthropology's primary objectives: the documentation of traditional customs and practices as distinguished from those which have been transformed or altered as a

consequence of colonisation or, indeed, the presence of anthropologists. As Jane Jacobs notes, "the emphasis on reconstruction of a positive world [in anthropology] has meant many important processes of change and adaptation of traditional knowledge and customary practices were for many years virtually ignored." (1989: 79) This focus on "the traditional" meant that anthropology tended to ignore the ways traditions and custom are transformed to meet the contexts in which they are performed.

Described thus, the commission inquiry appears less a dialogue between non-Aboriginal discourses (ie. law, anthropology and history) and Aboriginal subjects, more what Trinh T. Minh-ha calls 'gossip': "[a] conversation of "us" with "us" about "them" [which] is a conversation in which "them" is silenced." (1989: 67) This draws attention to the way many 'official' discourses about 'other' (non-Western) cultures speak on behalf of the 'native' as their interpreter, scribe and expert. Indeed, even when 'natives' are given the space to speak for themselves, this is always framed by the text of the Western expert, quoted, already interpreted and deciphered, always the object rather than subject of inquiry. In such cases, the 'native' is *given* speech, in an act of ventriloquism, through citation, whereby the experts speak and in doing so secure and reproduce their source of authority and knowledge.

As with gossip, the more personal or confidential the information is, the more valuable it will be to the expert. Hence, the citation of anthropological authorities who, according to Kenny, know more about Ngarrindjeri than the Ngarrindjeri; hence the extensive biographical accounts of the 'proponent' women, the intense interest in the details discussed in private meetings, the speculation about secret plans and collusion between disparate groups of anti-bridge campaigners, "conservative retirees, radical greenies, small business people, unionists . . ." (1996: 54). According to Trinh, the

'nativist' expert "who seeks to perforate meaning by forcing entry into the Other's personal realm undertakes the desperate task of filling in all the fissures that would reveal the emptiness of knowledge." (68) The citation of 'experts' and 'witnesses' provided the commission with a way of "filling the fissures" thereby enabling it to speak with what Trinh calls "the apathetic tone of the voice of knowledge". (68) This, she notes, "is how gossip manages to mingle with science".

Obviously, the conclusiveness of the commission's 'findings' is linked fundamentally to its authority. As I have already suggested, the establishment of "truth" or "falsity" is dependent upon and constituted through the hierarchical organisation of evidence I outlined above. Further to this requirement, however, the argument must assume that disputing parties, in order to be 'in dispute', 'agree' upon some common terms or principles. To be considered and judged, these positions must be translatable into the terms of the commission. As Foucault pointed out, the establishment and definition of the terms and rules of 'expressibility', along with the organisation and categorisation of discourses, is a characteristic of the definition and demarcation of any given institutional or disciplinary 'field' of knowledge. (1972) Authority and 'truthfulness', rather than being what the field properly responds to, are themselves effects *of this field*.

This point not only connects the demonstration of 'truth' to particular forms and practices of representation, in relation to the delimitation between representation and the unrepresentable, it also suggests the way representational practices both presuppose and constitute legal-judicial authority. We can take, from this observation concerning the relationship between the limits of representation, truth and authority, two points. Firstly, if Aboriginal claims are only recognisable within a legal context to the extent that they are translatable into the terms of 'the law', the problem is not merely one

concerning representation, i.e. partial or non-representative representation, but also concerning the relationship between representability and authority. Secondly, this point is not simply about how the law operates, but rather, it illustrates the way 'the law' constitutes and founds itself in relation to others *by establishing or founding a relation between others*. For example, the question of how 'the law' represents or recognises Ngarrindjeri beliefs and customs can be read against the historical backdrop in which the foundation of the authority of law in Australia is premised upon both an exclusion of the *difference* of Aboriginal society and culture and a corresponding mis-recognition and re-inscription of 'the Aboriginal' into the European sphere of recognition, meaning and calculation. Named and positioned within the system of European thinking, the authoritativeness of 'the law' is 'justified' by a certain notion of European superiority and advancement *in relation* to 'the Aboriginal'. Hence, the authority of 'the law', its very foundation, is constituted through an act of exclusion and repression: the assumed universality of 'the law' extends it over all instances at the expense of their difference, its singular authority univocal because it permits no dissenting or differing voices. As Mark Taylor notes: "As the domain of the calculable, law defines the sphere in which moral agents interrelate through general values, norms and principles that are shared by a given group." (1993: 86) He adds that the assumed "universality of the structure of exchange makes theoretical and practical calculation comprehensible." (86)

This suggests a relationship between the 'unrepresentable' and the certainty which the 'principle of exchange' makes possible. By naming Aboriginality, the law reduces it to the calculable, the knowable and manageable. As Levinas observes, the reduction of an other to the terms of law improperly forecloses the question of who names, the scene of naming and the possibility of just relations between the Self and Other: "it does not invoke these beings but only names them, thus accomplishing a violence and

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a negation. . .Partial negation, which is violence, denies the independence of a being: it belongs to me." (9)

4. *The Desire to Know*

The politics of naming, in this context, evokes a colonial scenography that reveals the irony of the naming of 'the Aboriginal' insofar as it names that which is before (colonialism etc) from a position after its denial, exclusion or repression. The later recognition of Aboriginal society, culture and rights recalls a scene of colonial naming that overwrites and effaces indigenous laws, languages and cultures by reducing them to the terms already accepted by Anglo-Australian law. Despite the much cited positive implications of the *Mabo* case, for example, Tehan notes that it arguably "had a negative impact . . .since it demonstrated that the common law is unable to recognise interests in land which are different to, or not derived from, its own concepts of property and which do not meet the stringent test for the survival of native title."(1996: 268) Thus, the law recognises Aboriginality only after the authoritativeness and legitimacy of Aboriginal law is passed over, denied and displaced. Making a similar observation of Kant's description of the human and the notion of the subject, Spivak notes:

> I have indeed thought of who will have come after the subject, if we set to work, in the name of who came before, so to speak. Here the simple answer . . .[is] the Aboriginal [and yet] . . .[p]aradoxically, Kant bestowed upon them an absurd national identity [*Neuholländer*]".(1999: 27n32)

I will make more of this notion of 'the before' in later chapters; here it will suffice to note of the irony that, as with the representation of Aboriginality within the law, the identity Kant places before the subject, the Aboriginal, occupies the bizarre, before-after position suggested by the name '*Neuholländer*'.

As Freud noted, the content of a repressed image or idea can make its way into consciousness only if it is first negated. The negation of what is not translatable into the terms of the Self, restores and maintains the mastery of the Self by naming what is negated in its own terms: "To negate something is, at bottom, to say: 'This is something which I should prefer to repress.' A negative judgement is the intellectual substitute for repression; its 'no' is the hall-mark of repression, a certificate of origin". (1995: 667) The naming of 'the Aboriginal', the inscription of Aboriginality within law and the refusal to accept the idea of an undisclosable secret, are connected in so far as the initial denial or disavowal of difference makes possible a recovery of difference in the terms of the Self or the law. This recuperation recovers difference, but in such a way as to re-cover the irrecuperable. In the Hindmarsh case, as with Freud's subject, this recuperation is never fully or completely achieved or completed; even after recuperation, there remains a trace of the unrecoverable and unrepresentable. It is thus tempting to make use of Freud here, as Jacobs and Gelder do, to diagnose both the compulsion to represent and settle the truth and the unsettling and 'uncanny' effects of the unrepresentable.

The conclusiveness of the commission's argument is thus based on a representation of 'the secret', in the sense that the commission *must* represent the secret in order to consider it, incorporate, know or master it. Thus, the commission differentiates what is of true 'value' to the case, those discourses against which reliable and truthful discourses may be measured, and simultaneously fails to acknowledge what the terms

of such differentiation exclude or efface. For the commission, there can be no recognition of difference that cannot be represented:

> [f]acts must be proved to the reasonable satisfaction of the Commissioner. . .The Commission could only come to its findings on the basis of the evidence before it. . .'Evidence' meant [only] evidence given in the witness box with the sanction of an oath and subject to examination. (1995: 7)

This rigorous notion of 'evidence' and 'truth' posed serious problems for those who wished to have their sacred knowledge recognised but were unprepared to disclose that knowledge to achieve this. And yet, the commissioner declares with full confidence that the commission's conclusion was justified on "the basis of the evidence before it."(7) Indeed, Kenny provides an insight into how the commissioner was able to come to this conclusion, given the significant gaps and absences in the inquiry: "the Commissioner . . .was able to draw inferences from the refusal of many to testify." (230-231) Similarly, Nicholas Iles, counsel for the 'dissident' women, suggested that:

> the decision of the proponent women to boycott the Commission was a calculated one, taken on legal advice . . . [and] was a matter which Commissioner Stevens was entitled to take into account in assessing the *bona fides* of their claims and the veracity and utility of any evidence which they might have, but did not give . . . (1996: 12)

The notion that the commission was competent to consider and assess the veracity of evidence never brought before it is simply extraordinary, and yet, it does highlight the difficulty of the task it undertook. As the counsels in the inquiry noted, it remains to be seen how an alleged sacred-secret could be shown *not* to exist. The counsel for the 'dissident' women pointed out that:

> Unless you know what the secret women's business is- either the generality of it or the specifics of it- you will have no way in which you can test the criticisms that are made in respect of the generality to see if they are correct and, if so, what weigh you give them. (*transcript*, 28)

The strategy the commission decided upon, in the face of this difficulty, was to inquire instead into the circumstances under which the alleged sacred-secret 'emerged'.

Here, the commission's capacity to make sense of the absence of the 'proponent' women appears essential to its ability to come to a 'conclusive' decision. The problem, therefore, can be seen to be both a matter of what might not or *could not* be said in the commission's hearings and of the way it determined what it will hear, what it will allow into consideration, what value evidence shall be granted and how these determining factors enable the commission to re-present the 'truth'. As I have suggested, the problem is roughly analogous to the mis-recognition of Aboriginal society and culture that formed the basis of the *terra nullius* thesis, which legitimised Aboriginal displacement and dispossession. The authoritativeness of *terra nullius* was premised on particular representations of Aborigines, which positioned them in opposition to, and thus inscribed in the terms of, European standards and norms:

constructed in terms of alleged absence, Aborigines were seen to lack civilisation, organised society or government.

As Russell Goldflam has noted, Aborigines are today still constructed in this manner:

> that same system continues to construct Aborigines' language rights on the (unspoken) assumption of '*vox nullius*' . . .By effectively depriving Aboriginal people of a voice, institutionalised organs of state coercion, of which the legal system is a prime example, simultaneously claims for their own discourses a position of privilege . . . (1995: 38-39)

5. *Hearing the Truth*

In this way, the structure of the 'hearing' can be understood, not solely as an apparatus for listening to testimonies or evidence, but also, and perhaps primarily, as a mechanism for organising, interpreting and translating; for distinguishing the heard from the unheard, and thus establishing the conditions for 'hearing' itself. Greg Mead's *A Royal Omission: A critical summary of the evidence given to the Hindmarsh Island Bridge Royal Commission with an alternative Report* is useful for illustrating this point, in so far as it presents an argument structured around fragments of transcript and reaches a totally different conclusion. By describing the way the commission 'heard' evidence, Mead also offers insights into the particular strategies used by the commission to reach its conclusions. His text includes, in fact privileges, the types of voice the commission trivialises and excludes, such as the testimonies of Steve

Hemming, Deane Fergie and Betty Fisher, which all of provide arguments for the existence of sacred-secret 'women's business'.

But, of course, the problem of translation, interpretation and recognition is quite separate from the issue of who the commission decides to favour. The 'hearing', rather than offering a neutral space for all to speak freely, already restricts what can be heard within its confines to that which is spoken in its terms. This relates to a point made by Spivak about what speaking in this type of context might be. The significant issue with regards to recognition and representation, she argues, is not who can say something, but rather who listens: "speaking and hearing complete the speech act." (1996: 292) Speech-act theory suggests, via Derrida, that a verbal or visual sign is recognisable only to the extent that it conforms to or follows pre-established rules or conventions. To be heard in court, for example, you must follow its rules; you must speak in terms it recognises. In this way, 'the law' is able to re-establish its authority in new contexts and situations through repetition or citation. This again suggests how the structure and intention of the commission hearing repeats the 'violence' of exclusion and differentiation which constituted the foundation of the law. Clearly, this has imperialist implications in so far as Aboriginal claims can only be recognised in the terms of law, through translation or *by proxy*. Thus, legal representation, in the sense both of depiction and of an acting on behalf of, is always expressed within the closure of legal discourse, as what Spivak calls an "irreducible vis-à-vis" the Eurocentric dominant. (1996: 164)

As I have suggested, it is possible to read the commission's assertions that it will not recognise what is not brought before it and that, therefore, 'the secret' must be spoken in order to be assessed, as an expression of concern with regards to its authority. The question of authority in this case hinges on the commission's capacity

to incorporate and consider both sides of the argument. Tying together the acts of writing (and speaking), appropriation and mastery, de Certeau argues that the 'mark' (the 'trace' or 'voice') of the Other threatens the unity and authority of the discourse or text. This point may be useful for thinking about how it was necessary for the commission to speak on the 'proponent' women's behalf in order to neutralise the challenge they represent. According to de Certeau, it is the 'mark', 'smudge' or trace of alterity which signals the limit of the discourse and thus evokes a sense of the unrepresented: the 'mark' thus signals "[t]he instability of the limits set: the frontier yields to something foreign." (1984: 154) Describing Robinson Crusoe's discovery of footprints on the beach, he suggests that it is the threat of the unknown, the unknowable, irreducible Other or absence, of which the footprint marks the trace that causes Crusoe such concern and anxiety.

As with the suggestion of the unspeakable or unrepresentable, the footprint is threatening because it marks the limit of Crusoe's world/text/ discourse. It is that which cannot be incorporated. Thus, just as Crusoe recovers "the power of mastery when he has the opportunity to see . . .when the absent other shows himself" (154), so too the authority of the law or the commission, and the conclusiveness of its arguments, can only be established when the secret is said, known and, therefore, able to be incorporated. Even if it is taken to be withheld, the secret is inscribed within the realm of the discloseable or the speakable and would incorporate and account for it and thus deny the secret its secrecy. There is, then, an important difference between the secret 'as-it-appears' or is spoken about and 'the secret'. As Derrida observes: "[t]he secret is not the secret of representation that one keeps in one's head and which one chooses not to tell, it is rather coextensive with the experience of singularity. The secret is irreducible to the public realm- although I do not call it private" (1996: 80).

Indeed, in the case itself we find some evidence of this problem of naming the secret. Bell, for example, prefers the phrase "restricted knowledge" to 'secret' since 'secrecy' as it is commonly understood mischaracterises the tradition in question:

> If one is operating within a system of restricted knowledge and is bound by the "respect system, the issue of so-called "secrecy" takes on a different hue. It is linked to the authority of the elders and to the protection of what is sacred; it is far from the taunt of "I have a secret." (1998: 373)

It is, then, the ability to name, define and speak that otherness which allows it to be appropriated in a manner that simultaneously maintains authority. As de Certeau notes: "[n]aming is not here the "painting" of reality any more than it is elsewhere; it is a performative act organising what it enunciates. It does what it says, and constitutes [what it] . . .declares." (155)

In a related way, certain aspects of the inquiry demonstrate the paradoxical nature of the commission's objective concerning the demonstration of truth and the secrecy of the tradition in question. In the cross-examination of amateur historian Betty Fisher, Michael Abbott, counsel for the 'dissident' women, suggested that she had proven that she did not really possess any knowledge of sacred-secret traditions, because she allowed sections of her notebook to be filmed for evidence, which would have been prohibited were the contents 'truly' sacred. Thus, Abbott suggests that non-disclosure testifies to authenticity. However, when it was explained that only non-sacred, non-secretive parts were filmed he called for Fisher's evidence to be "disregarded as untested", on the grounds that she "refused to produce the notebooks for scrutiny."

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(Mead, 13) Thus, the sacred-secret could only be recognised as legitimate if it were made available for inspection, which according to Abbot would 'prove' that it was not 'truly' sacred.

This paradox is further demonstrated in other arguments used in the Commission's *Report,* particularly in relation to the evidence from anthropologists and the "dissident" women. For example, although the Commissioner acknowledges that sacred-secret knowledge is restrictive by its very nature, she goes on to argue that "[i]f the 'women's business' existed and if it came from the sources nominated by Doreen Kartinyeri [the 'central' "proponent" women] then it *could not* have been kept totally secret [i.e. from anthropologists and the "dissident" women]. . ." (298) Despite the perfectly reasonable arguments put to the Commission by Steve Hemming, Deane Fergie and others, as to why anthropologists and "dissident" women may have been excluded from the secret business, the Commissioner suggests that, if the secret is true, it would have been disclosed or *partly known.*

This contradiction marks the gap between the Commission's object of inquiry, the secret 'women's business', and the contents of the secret envelopes sent to the Minister, which formed the basis of his *Heritage Act* declaration, i.e. the secret itself. The problem, as Deane Fergie pointed out, is that, in its terms of reference the Commission determined that 'women's business' referred to "the . . . business contained in the sealed envelopes. . .[and] the secret envelopes were not before the royal commission." (1996: 14-15) This is why the Commissioner sought to reconstruct their contents, *fabricate* them, by reference to other sources, who had also not viewed them and could only speculate. So the Commissioner argues that "there has been a body of evidence out of which it has been possible to infer their contents." (298)

But even Abbott, acting on behalf of the "dissident" women, recognised the problem with this, when he argued early in the Commission hearings that, unless the contents of the envelopes were available for scrutiny, "[i]t would, in our submission, entirely frustrate the Commission. . .because unless you know what the secret women's business is- either the generality of it or the specifics of it- you will have no way in which you can test the criticisms that are made. . ." (Fergie, 24) The ridiculousness of the assumption that inference could be drawn from testimonies by people who had no knowledge of the 'women's business' or of the secret envelopes is powerfully demonstrated by Fergie, who notes that the evidence which would make inference possible included an "exhibit identified as a 'bundle of press reports', a letter to the editor of the *Advertiser*,. . .videos of television interviews with Doreen Kartinyeri [and]. . .two pages of Hansard, one referring to comments in the South Australian House of Parliament by Liberal MP Peter Lewis on what he thought the contents of the envelopes were and a response to those comments two days later." (Fergie: 18) On the matter of the contents of the envelopes, Peter Lewis, speaking on the floor of the South Australian Parliament, is taken to be as reliable a source of information as the primary author of the contents, Doreen Kartinyeri.

This illustrates the extent to which the Commission failed to consider the implications of its conduct in not recognising the sacredness of the alleged secret. Surrendering sacred-secret information to such a body, even where confidentiality is promised, involves considerable risk for the Aboriginal community. The envelopes sent to Robert Tickner ended up, through some error, at the office of the (then) shadow environment Minister, Ian McLachlan, an outspoken opponent of the 'women's business' claim. Disregarding the label "Confidential- to be read by women only", his staff opened the envelopes and photocopied the contents. While McLachlan was forced

to resign and the photocopies destroyed, the Court later overturned Tickner's ban on the grounds that he had not properly considered the claim. Moreover, in the *Broome Crocodile Farm Case* the Full Court concluded that:

> the dictates of natural justice, or procedural fairness, required that certain information which had been received by a "s10 reporter" [or a person reporting on a section 10 breech of the *Heritage Act*] and which was potentially adverse to the interests of other parties. . .be given, in some form, to the interested parties so that they may have an opportunity to answer the information. (Davis, 1996: 127)

In other words, the Court suggested that the contents of a *Heritage Act* claim must be made available to 'interested parties'. Strict confidentiality, therefore, could not be guaranteed. All this clearly offers some justification for concerns relating to the protection of sacred-secret information. Indeed, as Jacobs has pointed out, concern about disclosure may in fact relate to the sudden 'emergence' of claims:

> Recording Aboriginal land-based knowledge, cultural or sacred sites as such knowledge has come to be known, establishes the preconditions for a power/knowledge nexus which rests not with Aborigines but with those state agencies that build 'complete' and spatially fixed reconstructions of this knowledge. In various ways, Aboriginal groups have attempted to negotiate a balance between the present

pragmatic necessity of disclosure, the need to register sites so that they are afforded legal protection, and the necessity of secrecy, the need- both traditional and strategic- to keep their land-based claims to themselves. (1996: 113)

The way the Commission insisted that the sacred secret be proven, relate to its own authority in ways I have suggested. If we reflect upon the unspeakability of the secret and the Commission's attempts to make the secret known, we can ask: "what is not heard in the Commission hearing or, by extension, within the legal context?" Clearly, the Commission will not recognise the suggestion that *it* cannot establish the truth, that it has no authority over Aboriginal cultural beliefs and that its assumed authoritativeness and universality is premised upon a denial of difference, different cultural systems, different laws. The secret effectively exposes what the commission cannot consider, what is beyond consideration and for all intents and purposes beyond its 'jurisdiction': the question of its foundation to judge legitimately. In this way, the underlying concern in the case, the reason why the Commission felt it must reach a judgement, relates to what the sacred-secret claim represents, i.e. the unknown, the unspeakable, the unrepresentable demanding recognition. This seems to be the issue Nicholas Iles is most concerned about, when he argues for the conclusiveness of the Commission's findings: "where are we to draw the line? In making such exceptions- however attractive in isolated instances- *you cannot but put at peril the rule of law* by which rights and obligations of individuals are determined." (my emphasis, 1995:12)

Chapter Five

Making Up for the Silence: Sacred-Secrets, Justice and Reconciliation

> Inasmuch as qualitative heterogeneity eludes the grasp of reason,
> absolute difference is unspeakable. . . This not-speaking . .
> .inevitably offends reason. Since reason constitutes itself in and
> through the exclusion of the incomprehensible, it needs the not,
> which it cannot undo. In other words, reason is bound to and by
> that which it cannot bear. It includes what it excludes in a
> nondialectical relation of expropriation that subverts every
> dialectical appropriation.
>
> Mark C. Taylor *Nots*

Building on the discussion of the Hindmarsh Island Bridge 'Affair' from the previous chapter, I want now to consider the relationship between the way the commission attempts to overcome these silences, or the lack of clear positive evidence, the question of the authoritativeness and conclusiveness of its findings and the way the sacred/secret has been dealt with in such contexts. I will then proceed to a broader philosophical discussion of the relationship between the idea of the 'secret', the problematic of representation as identified within recent post-colonial theory, and the types of lesson the Hindmarsh case might offer to an understanding of justice 'between' cultures. This concern for a specific type or form of relation 'between'

foregrounds the problematic outlined in chapter 2, which demonstrates how justice based on an already assumed ground or relation reduces and diminishes the possibility of a just relation to the other, a relation that would not be determined in advance and would not, therefore, submit that relation to pre-conceived, 'given' relations.

Through a consideration of this difficult tension between the possibility of justice, or the just relation to an*other*, and the impossibility of a relation without the assumption of positions or without the requirements of law, I will also briefly examine the contribution made both to debates about postcolonialism in Australia and to the Hindmarsh 'Affair' by Jacobs and Gelder's *Uncanny Australia*. My primary interest here is the relationship between representation or re-presentability and justice, ethics and reconciliation. While the uncanny-ness of Australia may describe a type of undoing or de-familiarisation of the familiar, the self or the 'homely', and while the other that engages, troubles or unsettles the self in Jacobs and Gelder's narrative may not simply or merely be another in relation to the self, tracked or charted in this problematic *of the self*, in their treatment of the 'unrepresentable' or the 'untranslatable' and their characterisation of the 'sacred' as uncanny they appear to reduce the relation to the other to a relation with the self, within an economy of the self and 'the same'. At that moment of instability and uncertainty which the uncanny describes the suggestion that the sacred secret is nothing but its performance comes close to duplicating the violence of the commission.

The connection between the 'Affair', justice and reconciliation is relatively straightforward: the commission's *Report* and inquiry prompted questions about the representation of Aboriginal beliefs in legal and political contexts and about the relationship between Aboriginal and non-Aboriginal systems of law and authority. From the beginning of 1995, many were quick to point out how the outcome of this

inquiry could have implications for assessing Aboriginal Native Title and Heritage Act claims. In the *Sydney Morning Herald*, Jopson noted that the issue of secrecy not only raised legal questions but also questions of national significance "like how two different systems of law- Aboriginal and non-Aboriginal- can exist side by side".(1995: 9) More recently, the point has been amplified by Bell:

> Over and above the legal-politico maneuvers is the critical
> issue of the quality of justice dispensed through the courts
> and legislature. The question this raises could shape the
> agenda for a society with civic commitment that is reflective,
> that is not held hostage to competing interests, that sees
> through the anti-intellectualism of populist leaders, looks
> beyond the rhetoric of rights to the quality of justice enjoyed
> by minorities and women, and that refuses to allow the rights
> of the vulnerable to be sacrificed so that the status quo not be
> disturbed. (1998: 603)

1. *Mapping the Sacred*

Discussing recent Aboriginal claims concerning the sacredness of the country, Jacobs and Gelder note that, despite the widespread belief of many that Aboriginal sacredness is an archaic residue of the primitive past, it actually figures "much more largely, and incessantly, in this country these days." (1998: 1) As they point out: "[f]ar from being left behind as a relic or as a residue, it may even be able to determine aspects of Australia's future; far from being out of place in Australia, it sometimes seems (to an increasing number of commentators) to be *all over the place.*" (1998:1)

The articulation and inscription of the 'modern' nation itself 'solicits' 'Aboriginality', even as it seeks to overwrite and efface it. The return of the 'sacred' 'unsettles' the cartography of the nation founded on 'settlement' and problematises the designation of 'the Aboriginal' as that which is both before and is superseded by modernity, just as it undoes the 'proper-ness' of 'property'. As recent attempts by the Coalition government and One Nation have shown, the more strongly and strenuously the nation is defined and the more clearly it seeks to contain its 'others', the more it 'issues up' destabilising forces within its own boundaries and limits. Borrowing from Freud, Gelder and Jacobs name this (re)emergence of the Aboriginal sacred within the bounds of nation 'the uncanny'. Just as the *Mabo* decision and Native Title legislation have radically altered the imagined geography of the Australian nation, they argue, so too claims concerning the sacredness of certain sites throughout Australia have had a de-familiarising or 'uncanny' effect on notions of nation and identity.

By considering 'sacredness' at the level of discourse, Gelder and Jacobs attempt to move beyond the suggestion that representation of 'the sacred' is necessarily exploitative or in the interests of non-Aboriginals. While recognising the dangers inherent in any invocation of 'the sacred' in legal, political and anthropological discourses 'sacredness' is also shown to have a destabilising, 'uncanny' effect upon these very discourses, making possible a whole range of reterritorialisations of 'the Aboriginal'. A further novelty of the notion of 'uncanny' in this context derives from the way it evokes a notion of doubling, which addresses and describes both the emergence of the unfamiliar within the familiar (the other within the self) and the incessant, indeed pathological, 'need' to represent this 'unfamiliar' in order to overcome and master its traumatic effects. This offers some explanation for the conservative and nationalist responses to Aboriginal claims, calls for certainty and

stability with regard to the nation and it relationship with (its) others[1]. This use of 'the uncanny' describes a necessary doubling 'effect', where the self 'solicits' its other and vice versa; a solicitation where the secret is incessantly spoken, the authentic always-already counterfeited and where the totalising geographies offered by conservatives issue up the ghosts they sought to efface.

Thus, any attempt to answer the question of who owns Australia once and for all, or of who or what is Australian, creates the context where multiple articulations of ownership and identity are likely, just as the acquisition and development of land by non-Aboriginal business creates a situation in which conflicting claims emerge, which might otherwise have remained silent. As Anthony Moran notes, these questions concerning nation, citizenship and ownership are 'unsettling', in so far as responses tend to reveal and expose both an "attachment to the myth or idea by members of a political community . . .and [a] represent[ation of] a form of kinship and unity in the face of . . .allies and enemies."(1998: 103)

The origin of the notion of nation, its authenticity and purity, is dependent upon that which is other than itself, in short, other nations and other nationalities. Such representations or assertions must posit a relation to another on which the possibility of nation stands. Aboriginality is positioned 'before' 'the nation' and is articulated against it, and yet, by representing it as temporally or historically 'before', "Aboriginality" can be appropriated as the before of a particular identity, collectivity or community, as a relation to its past, heritage or tradition. From the position of 'conservatives', for example, this 'before' is ultimately reduced to a difference within 'the nation'. Here it is important to note the distinction, difficult as it is to maintain, between the 'before' I have just outlined, within history, knowledge or temporality and a 'before' that never appears to us as such, except in the form of non-appearance as a

trace at the margins of the historical, intelligible or phenomenal. This later 'before', beyond historical or conceptual incorporation, which could be described as 'the impossible' and which, in so far as it is presented or appears, does so not as itself, problematises any assumed relationality or ground from which the before might be fixed or located.

The 'properness' of self/home/nation must be represented, repeatable and marked out. Their representation therefore 'doubles', 'articulates' or re-presents identity in order to be recognised, and yet, in this doubling, the thing that 'gives' identity, i.e. difference from another, undoes it; the 'gift' of difference exceeds the terms of the 'economy' of identification, the condition of 'the properness' of identity is already ·beyond the control of economy, the condition for properness/improperness must already be given 'before' nation. The possibility of the 'my-own-ness', which the claim of 'proper' and 'true' nationality or citizenship demands, comes from elsewhere, from the limit of nation, both within and without, from before and after nation, from the stranger or the other, but as an appropriable 'outside' at once inside that makes 'own-ness' and nation possible. The irony, then, is that the place of this difference is, on the one hand, *at the origin, in the beginning,* 'indigenous' since there could be no 'nation' without such difference, and, on the other, afterwards, 'settled' and within. 'Recognition' of 'the Aboriginal' paradoxically comes after 'the non-Aboriginal' and yet must be before it. As Zizek observes, the fight for nation is:

> *a defense of something which comes to be only through being experienced as lost or endangered.* The nationalist ideology endeavors to elude this vicious circle by constructing a myth of Origins- of an epoch preceding oppression and

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exploitation when the Nation was *already there* . . .-the past

is trans-coded as Nation that already existed and to which we

are supposed to return through a liberation struggle. (1991:

213-214)

2. *Reconciliation and the Truth*

In relation to these issues about nation, identity and recognition, one of the most

interesting aspects of the Hindmarsh 'Affair' concerns the way some commentators

frame the discussion of reconciliation within discourses of nation, so that

reconciliation is seen to be based upon a balance of interests, certainty, openness and

fairness. "Reconciliation" between Aboriginal and non-Aboriginal Australians is thus

frequently characterised as an 'overcoming' of differences which could unite the two

groups as one under the heading of nation. When the then opposition leader, John

Howard, held that the acceptance of the 'women's business' claim was "harming the

process of reconciliation" (1995: 2), or when Ron Brunton argued that "reconciliation

starts with the truth"(1998: 2), each suggested that 'the claim' damaged the possibility

of reconciliation because it improperly privileged the interests of one 'minority' group

over others. Moreover, 'the claim' is here also taken to be damaging because it was

'ill-founded' and 'false'. For such a claim to be acceptable, it was held, it must be in

the interests of 'the nation' and, furthermore, it must be 'true'. If claims made after

Mabo and *Wik* were 'unsettling', because, as Prime Minister Howard suggests, "the

pendulum had swung too far towards Aborigines" (1997: 9), then the solution required

that Aboriginality and Aboriginal sacredness be defined, registered, contained *and*

proved. In short, 'the Affair' apparently demonstrated just how 'out-of-hand' the claim

process had become, both because it put 'minority interests' ahead of 'national

interests' and because it was open to abuse, deception and corruption. These concerns 'signalled' the need for change. Such change, it was held, would 'reconcile' differences and unite indigenous and non-indigenous Australians as 'one nation'. As Moran observes, Howard's notion of reconciliation is the:

> fantasy of final and total justice [which] threatens to eliminate any distinction between settler and indigenous. Through such justice settlers might complete their project of fusing nation with soil, but at the expense of the indigenous. (109)

The idea that justice begins with truth is problematic for a number of reasons. Nietzsche challenged the way epistemology and ethics converged in the notion of 'goodness' and 'the just', a convergence of truth with morality which takes truth as given and morality merely as a matter of a good or bad relation to or re-presentation of the 'true'. While acknowledging the dangers of recognising and affirming 'untruth', he argued against taking the 'good' to be 'the true' and attempted to think 'beyond good and evil':

> To recognize untruth as a condition of life: that, to be sure, means to resist customary value-sentiments in a dangerous fashion; and a philosophy which ventures to do so places itself, by that act alone, beyond good and evil. (1973: 36)

One of Nietzsche's main concerns here is that the association of the 'good' with 'truth' forecloses the question of the possibility of truth/falsity in a particular context and, in so doing, reduces ethical relations to the order in which truth is given. It fails to ask, for example, about the cultural conditions under which 'the truth' of some matter would become possible or representable. Following Derrida, one might suggest that, if 'truth' is given in its representation rather than as that which is re-presented, then the constitution of 'the true' might in fact foreclose the possibility of a just relation to another, since it subjects and reduces such a relation to the order of truth.[2] Ethics, Derrida points out, is 'before' knowledge. As Cohen notes, "[e]thics would not be a legitimate or illegitimate epistemological power or weakness . . .but the responsibility of the knower prior to, and the condition of, knowing." (1986: 2) Justice or reconciliation as a form of justice would, therefore, be an attempt to think of an impossible relation to another which was not already determined by knowledge and which was not already inscribed by 'the true'. While we must not take this 'before truth' to be a nostalgic or uncritical acceptance of the 'aboriginal' as 'before', since 'the aboriginal', as 'already or 'properly' 'in-its-place', is problematised by and haunted by the 'non-aboriginal' and vice-versa, in this attempt to think beyond the known, I shall argue, the question of 'the sacred-secret' is instructive.

3. *Ethics and the Violence of the Truth*

In this characterisation of the relationship between truth and ethics there is a tension between the notion of truth as it appears to be articulated by Nietzsche or Foucault, on the one hand, and Derrida, on the other. This tension is helpful because it highlights some of the difficulties with Jacobs and Gelder's description of the Hindmarsh case and the relationship between the sacred and its 'presentation'. In his

review of Foucault's *History of Madness*, Derrida notes that one can't simply describe truth as an imposed order, as a culturally or historically i. cateable form or system, and thereby outline a kind of 'ethics' of truth or 'the true'. It is not as if one could describe the imposition of a system or order of 'the truth' of one culture upon another, without evoking and calling upon a sense of truth that would necessarily go beyond and make possible such description already capturing this description within 'its' order. The silence of madness, Derrida observes, could not be a determined locateable silence, framed or locked away by a certain historical or cultural form of reason, a silence that one could not *possibly* articulate:

> Not a determined silence, imposed at one given moment rather than any other, but a silence essentially linked to an act of force and a prohibition which open history and speech. *In general*. Within the dimension of historicity in general, which is to be confused neither with some ahistorical eternity, nor with an empirically determined moment or the history of facts, silence plays the irreducible role of that which bears and haunts language, outside and against which alone language can emerge . . . (1978: 54)

Beyond the particular historically locateable violence that one could describe, then, there is a violence that would make such history itself possible. Thus, it can never be simply a matter of this or that group imposing a certain notion of truth or reason upon another, but rather that truth and reason must be presupposed in order to think both this imposition and a determinable group. We are, as it were, always already drawn into the

fold of this 'order', into this relationship, beyond conceptualisation, to a silence that necessarily exceeds any localised or regional exposition or inquiry. Which is to say, with Derrida, that:

> [i]f the transcendental "violence" to which we allude is tied to phenomenality itself, and to the possibility of language, it then would be [already] embedded in the root of meaning and logos . . . (125)

For this reason there can be no just relation to an*other*, no recognition without the 'presentation' of the other within this closure. These forms of relation to the other as other are 'impossible': "*Other than* must be o*ther than* myself. Henceforth, it is no longer absolved of a relation to an ego. Therefore, it is no longer infinitely, absolutely other. It is no longer what it is" (126); there can be no revolution against reason or truth, no positing of a position outside or beyond that is not already operating "only within reason, [with] . . . the limited scope of what is called, precisely in the language of the department of *internal affairs*, a disturbance." (36)

This observation brings us to the point Jacobs and Gelder seem to make, namely that, in situations like the Hindmarsh case, what we are dealing with is the translation of 'the sacred' into the prevailing dominant terms of recognition. Here they note the usefulness of Lyotard's notion of the *differend*, but argue that it is ultimately problematic since it suggests a kind of incommensurability, "where one could never hope to comprehend the other's point of view even as they may very well live together in the same place." (18) In short, they conclude that the suggestion that Aboriginal sacredness and 'modernity' are incommensurable "withdraws [the sacred] . . .from

modernity" (18). Against this, they suggest that Aboriginal sacredness in 'postcolonial' Australia "is produced and reproduced through a process of dialogue. [where t]here is always someone to speak to and always someone to speak back." (19)

The problem with this is that, by resisting and opposing the idea of the impossibility of translating 'the sacred', Jacobs and Gelder seem to reduce sacredness to its presentation within 'the possible', 'the demonstrable' and 'the visible'. This would not in itself have been so bad. After all, the other as other is indeed unworkable without an accompanying sense of the trace or some presentation. However, their rejection of this notion of the untranslatable leads them in a different direction, toward troubling assertions that flatten and limit both 'the sacred' and 'the secret' - such as "[s]ecrecy is always a matter of demonstration or performance" (25) - and so efface the question of the difference between 'presentation' and 'performance' and the unpresentable or unperformable, where sacredness is not taken to be in a dialogic relation to modernity, "in a position of negotiation" (22), but rather modernity is taken to "reshape sacredness in turn" (22).

While I would not and could not disagree over whether modernity effects 'the sacred', or over what relation it bears to its 'performance' or 'demonstration', it remains important to ask whether 'the sacred' or 'the secret' could or should be reduced to its apparent appearance, 'effects' or relation to the self, nation or modernity, for example, to 'the uncanny' or the 'uncanny effect'. The apparent impossibility of navigating or characterising the divide they note between the 'so-called' sacred and 'the sacred' should not mean that we must only speak of a discourse of sacredness, as they sometimes seem to acknowledge. When Jacobs and Gelder state that "[f]or non-Aboriginal Australians, Aboriginal claims on property and objects can make what is familiar seem unfamiliar- what is 'ours' is also 'theirs': our home is unhomely" (92),

they seem to be at once diagnosing a condition and a 'presentation' of 'the sacred' that could hardly be reduced to a discursive 'Aboriginality', while simultaneously making use of and assuming the 'positions' and relations apparently in question. One might be tempted to ask what and whose condition is being signified as 'uncanny', were it not that 'what' and 'who' are already part of the stakes implicated in this concern for the 'proper-ness' of place.

Rather than oppose the possibility of 'the impossible', the *differend*, one might note how it enables one to pose a line of questioning toward this relation between the impossibility of the other to appear as other and appearance in terms of 'the possible'. The difference between the 'so-called' or apparent 'sacred', as it is performed or demonstrated, and the sacred as the unperformable would reveal an enabling paradox: the necessary violence, or in Derrida's words, the:

> necessity of speaking of the other as other, or to the other as
>
> other, on the basis of its appearing-for-me-as-what-it-is: the
>
> other . . . as the necessity from which no discourse can
>
> escape, from its earliest origin- these necessities are violence
>
> itself . . .[which] is at the same time nonviolence, since it
>
> opens the relation to the other. (Derrida, 1978: 128-129)

4. *The Uncanny*

It is precisely at the moment, where 'own-ness' is unsettled, where one can no longer unproblematically refer to the 'our' or 'their' of belonging of property, that Jacobs and Gelder's failure to consider an open-ness of the (im)possibility of an other beyond the plane of intelligibility or identification submits the other to the order of the

given, 'the possible', or visible. There are two critical points that demonstrate this concern. The first relates to Freud's essay itself, the second to the relationship between reconciliation and the motif of the ghost or the haunting used by Jacobs and Gelder. For Freud, E. T. A. Hoffmann's story, 'The Sandman', was useful because it provided the occasion for an exploration of the effects of "something which is secretly familiar, which has undergone repression and then returns from it" (Jay, 1998: 157).

While the etymological consideration of the term "*Unheimliche*" offers a number of exciting possibilities relating to the status of originality and the unsettling of the present, according to Freud, the "something" that returns is identified with castration anxiety. Following Schelling, he characterises this uncanny as "the name for everything that ought to have remained hidden and secret and has become visible." (Jay, 157-158) Thus, on the one hand this describes the 'appearance' or 'becoming visible' of something previously hidden, secret or invisible, and on the other, the effect of this 'appearance'. The distinction between the hidden and the secret and its 'becoming visible' or 'presentation', therefore, seems crucial. For if the uncanny is to work productively within the context of Aboriginal reconciliation, the politics of nation and social justice, then it must surely do so as a "domain" or "concept" that opens the limit of any system or economy of identification or intelligibility. Such productive use occurs, according to Cixous, in so far as "the *Unheimliche* presents itself, first of all, only on the fringe of something else" (1976: 528) and not as the disclosure, effect or agitation of a secret that is nothing other than the fear of castration (or loss of home) and it accompanying yearning for one-ness. As Jay warns, at its deepest level this effect the uncanny produces is "the desire . . .for reunion with the mother's body." (158)

To be sure, the summoning of the ghosts of the past, the marginal or the repressed does offer an opportunity, in so far as it disrupts and unsettles the apparent 'in-place-ness' or stability of the present. However, as I shall argue in later chapters, such an invocation would also be the condition for the possibility of exorcism, forgetting, incorporation or a therapeutic 'work of mourning'. The reconciliation that follows from the uncanny would thus be far from unproblematic, as a recognition of the fictive or imaginative aspect of any 'presence' or 'presentation' within the present, a conjuring that seeks to undo narcisstic fantasies of the restoration of a true home, but at the risk, perhaps necessity, of losing what is repeated or 'returned' by the uncanny. As Mehlman has noted, "what is *unheimliche* about the *unheimliche* is that *anything* can be *unheimliche*." (Jay, 162) By reducing the sacred to the uncanny one may risk losing those very differences evoked or appealed to. As Jay argues:

> It may . . .not be enough to say that hegemonic attempts at
>
> closure necessarily call up their spectral others and thus can
>
> never be total, when those others are themselves no less- and
>
> may be no more- problematic versions of the same desire for
>
> wholeness. (162)

It may be for this reason, Jay argues, that Derrida ultimately argues for ultimate undecidability between the "*Unheimliche*" the *Heimliche*, an undecidability registered at the level of etymology since, while in one sense the word "*Heimliche*' implies " a desire for a womblike state of ontological security prior to symbolic castration" (162), in another it simply means "having an actual place in the world you can call your own." (162) In her review of Jacobs and Gelder's book, Julie Stevens notes that the

undoing and unsettlement of boundaries and distinctions noted by the authors not only undermines the basis for conservative attacks on Aboriginal rights but also for Aboriginal rights themselves. In this way, the puzzling lack of a clear politics, coupled with a resistance to apparently fixed essences or stable positions, could as easily align the book with conservative thinking as with progressive analysis. Although I have some reservations about her argument, I tend to agree with Stevens observation that:

> intellectual interventions that appear completely to ditch discourses of oppression – in the name of challenging narratives of victimhood – run the risk of erasing the victimisation of Indigenous people . . .[ironically placing their work] much closer to John Howard's rejection of 'black armband history' . . .than I'm sure they would like to be. (1999: 104)

5. *Figuring Silence*

Both the royal commissioner's conclusion that the claim was 'fabricated' and the Federal Court's decision that sacredness must be demonstrated to its satisfaction raised, rather than put to rest, concerns about miscarriage of justice. With regard to the relationship between certainty, exclusion and reconciliation outlined above, it is worth recalling the royal commissioner's conclusion:

> Having regard to the *whole* of the evidence, including the history of events, the anthropological evidence and the evidence of the dissident women, I conclude that the whole

claim of 'women's business' from its inception was a fabrication. (1995: 298)

Quite aside from the fact that a number of anthropologists had convincingly argued for the claim's plausibility, there could be no clear way of establishing whether the evidence for the existence of sacred-secret tradition testified to its 'recent invention' or to its effective maintenance and protection. There could be no way of being sure, beyond all doubt, that the 'truth' such evidence presented did not conceal it own secret, a secret of its untruthfulness, deception or falsity. As Bell observes: "[o]ne reading of the silences has been to equate 'I don't know' or 'She didn't say' with ignorance. But . . .[certain] silences . . .cannot be read as ignorance . . .There are silences and there are lacunae. We need care attributing significance." (1998: 403)

As Bell suggests, it is tempting to read the inquiry and surrounding debates in terms of the broader political environment. For example, the way these power relations maintain and consolidate the authority and legitimacy of certain particular knowledges and institutions, corresponds to more general moves at the level of national and state politics to reduce Aboriginal and minority rights. More precisely, there seems to be a connection between the privileging of the allegedly disinterested, culturally neutral, objective anthropological text over critical and reflexive anthropology or oral accounts from the indigenous peoples themselves, and the conservative thrust behind the attack on feminist anthropology, Aboriginal rights and beliefs and what the commission names as 'anti-development' groups. The point here is, not merely a matter of interested or politically-biased inquiry, but of the relations of power inherent in the construction of truth itself. Howe, for example, has noted the power relations entailed in the 'recognition' of Aboriginal beliefs, customs and rights and the assertion of legal

'truth', arguing that, by its reinscription of historical 'truths', the Court in fact established a new set of rules about indigenous people's relationship to land, property and notions of 'truthfulness': "the translating of conditional historical truths into legal truths has a performative function- it is to induce effects of truth." (quoted in Tehan, 1996: 279) The other side of the 'truth' remains virtually unquestioned in official or institutional contexts. Deane Fergie observed in mid-1995:

> Only one people's credibility is being questioned: 'Who's asking about the credibility of the developers or the politicians? Nobody? I feel thoroughly ashamed with the way my people have been so eager to believe a story about fabrication- a story which doesn't stand up to any scrutiny of the chronology of events.(quoted by Collis, 1995: 15)

Despite the necessity to generalise here, we should be sensitive to the dangers of reading the case as an instance or example of a generalisable subject that could be appropriated without an understanding and appreciation of its irreducible particularities. We must be careful to note that all is not quite as it seems, we must resist the temptation to diagnose the situation, to speculate about motivates, secret plans and dishonesty. This is not just a matter of epistemology: as I shall show, there are ethical reasons for resisting the temptation to prescribe some 'truth' to the situation. Here, of course, one might well ask: 'what right do we have to add to or speak about this thoroughly complex and sensitive situation, given the risk that such a commentary might risk duplicating the violence of the commission's inquiry into matters that were none of its 'business'? And yet, not speaking may well constitute a

far worse violence. There is, as I have argued, no nonviolent approach. From *this* position, there is no safe, innocent, disinterested place from which to intervene. Justified entry into the debate cannot be given in advance, nor assumed nor granted. Justice here emerges as a question of the just application of law, just consideration and recognition, just representation, translation or transformation of what might, by its very nature, be untranslatable and untransportable. The experience of justice is possible here only if 'experience' is not taken in the traditional, phenomenological sense, as perception of that which presents itself, but rather as that which 'runs up' against the limits of the (un)presentable. In short, we necessarily confront a risk in naming, articulating and characterising the un-nameable: naming the 'truth' we may fail to see that 'truth' hides a secret.

Here, then, as much as in any inquiry, we should be cautious about the way things are named, in so far as the giving of the name, like 'sacred-secret' or 'women's business', effects a substitution that risks reducing the things named to those names; taking the unknown as familiar by inscribing and fixing it within our own economy; assuming authority over it by demanding to be the authority that recognises it. Taking 'the law', 'truth' and 'the name' as 'given' passes over and effaces their 'given-ness'; the fact that they are first 'given', and 'given' in a sense that cannot be reduced to 'truth' or 'name'. As Taylor has noted: "the law is always one or another version of the *law of exchange* . . .a closed structure in which mutually recognizable opposites circulate." (1993: 86)

While law requires that all things before it be reduced to terms recognisable to it and capable of integration into its economy, as an incorporate-able 'before' justice requires that we affirm and admit the difference and incalculability of that which is brought before it. There is an unrelenting tension here between the necessity of law, of

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principles of determination and calculation and the possibility of justice. There can be no justice without law, and yet justice cannot be reduced to law. Since we are looking here at 'indigenous' 'rights' or 'beliefs', 'before' must be read both as temporal or historical as suggesting being 'in the presence of' or 'subject to', but also, perhaps impossibly, 'beyond' such determinations. Justice, then, would necessarily exceed the bounds of law and calculation; it would acknowledge, as much as possible, the injustice of the reduction of difference to the terms of the law, economy, or knowledge. Rather than recognise another as Other, then, the judgement of law, where the subject of law is reduced to a subject of law, is mere economic rationalism. As Derrida points out, a justice that could be calculated and thus reduced to the terms of law "is not justice [at all but] . . .social security, economics." (1997: 19) And yet, for justice to be done, as it 'is', one *must* name, calculate and judge.

The notion of the secret in its generality can be seen as a problematic which provides us with a useful way of approaching the relationship between representation, the unspeakable or un-representable and the possibility of justice. The alleged secret defies the complete and total presentation demanded by the law, it cannot be fully incorporated, it creates a type of opening, an incalculability, which requires faith, trust and an acknowledgment of other authorities. As the gift is to economy, so the secret 'opens' 'truth' to its conditions of (im)possibility. In this way, the commission's attempts to supplement the silence of the (sacred)secret, and to reduce it to the terms of law, is illustrative of the way law often 'produces', indeed, 'fabricates', its conclusive 'truth', through an unjust closure or reduction of law to law.

The possibility that the sacred-secret may be un-representable should not be taken to mean that it is either irretrievable or unrecoverable. Setting aside the problems I noted with the relationship between 'the sacred' and 'the uncanny', it is helpful to note

that, while restricting their discussion of the Aboriginal sacred to discourse, Jacobs and Gelder neither consider the discursive and the sacred to be unconnected, nor reduce sacredness to the discursive, but instead see "discourses as an *effect* of the Aboriginal sacred". (1998: xi) They thus affirm a notion of the irreducibility and untranslatability of 'the sacred' to discourse, while simultaneously recognising that "sacredness can function as much more than just a 'mute' residue; indeed, its political effects can be far-reaching, luxurious and decidedly unsettling." (20) In other words, though 'sacredness' is approached through a variety of discourses, it signals an aporetic point within 'the discursive'. As a number of their cases appear to testify, the sacred or spiritual aspects of other cultures, while often appearing attractive and intriguing, also represent and demonstrate, in their 'foreignness' and by virtue of their attractiveness, the limits of rational apprehension and exhaustive representation. For example, although some anthropology presents itself as the 'science' of non-Western society and culture, its attempts to understand and explain non-Western religion clearly exhibit a tendency to project its desires and anxieties upon non-European subjects and, at the same time, to demonstrate the affective capacities of 'the sacred'.

While the re-emergence of the 'sacred-secret' may demonstrate how the "sacred site [can] . . .travel under modern circumstances" (Gelder and Jacobs, 127), this emergence always endangers that which it announces. The 'appearance' of 'the sacred' in non-'traditional' contexts is never purely or simply liberating or empowering. Indeed, as we have seen, such 'appearance' is at once the condition of possibility of empowerment and of dis-empowerment. As numerous commentators on Aboriginal land and heritage claims have noted, the whole issue of the naming, registration and recognition of sacred sites is thoroughly problematic: concerns about the disclosure of secrets and the protection of sites, for example, require that these sites and sacred

traditions be exposed to a whole variety of threats in order to be protected under non-Aboriginal law and legislature. As Justice O'Loughlin pointed out, by way of a quotation of precedent in *Chapman v Tickner* (1995):

> While the Authority understandably treats as confidential information gathered by it relating to sites, the time must necessarily come when information will have to be disclosed in order to establish the existence of a sacred site, whether it be for the purpose of a prosecution or as a step towards declaration under the Act. (126)

The problem is that, once revealed and named, the 'sacred-secret' is open to appropriation and mis-recognition. The 'giving' of meaning in this context can always produce undesired effects, just as (mis)signification can produce unintended 'meanings'. Consider the incident where the confidential envelopes containing information about the 'women's business' ended up with the shadow Minister. As Jacobs and Gelder note:

> We can pause here to wonder once more about the ability of the sacred site to [be] . . .channelled through (amongst other things) the unpredictable pathways of the Australian postal service. It is not just that there is no telling how and where one's sacred secrets may be received; it is also that there is no telling what form those sacred secrets might take. A site can even become a (purloined) letter. (127-128)

This requirement to disclose sensitive information in order to have it recognised, aside from contravening indigenous law, also shifts power into the hands of non-Aboriginal institutions, opening sacred sites or knowledge to improper circulation, ridicule and abuse. Indeed, cases have been recorded where Aboriginal claimants have themselves argued for fabrication, when it became clear that sacred-secret material was exposed or vulnerable (Jacobs, 1989). The assumed fabrication of the 'sacred-secret' 'women's business' in the Hindmarsh case and the continuing refusal to respect the alleged secret by the royal commission only further demonstrate and reinforce the dangers of disclosure.

The paradox, then, is that the secret must be circulated and named in order to prevent its disclosure and to protect it from circulation or violation. The secret is constituted as 'secret' by saying and thinking it as secret, so that it is both divulged, as that which is *said* to be prohibited, restricted or protected, and negated, as that which *cannot be said*, and thus divided against itself. As Jacobs and Gelder note:

> Secrecy is always a matter of demonstration or performance.
> So in the case of the Aboriginal sacred, a dialogic relation is
> constructed between secrecy and publicity: they relate to each
> other through a process of soliciting [...] This is a feature of
> the sacred-in-the-midst-of-modernity, which has secrecy and
> publicity compromise each other in order to produce the
> processes through which they continue to be identified as
> autonomous and intact. After all, secrets cannot be secrets
> until they are spoken about as such. (25)

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It is in this relationship between what can and cannot be said that the difference between Aboriginal and non-Aboriginal knowledge seems most clear. Western thought has tended to conceptualise information as ideally open and public. In traditional Aboriginal society, knowledge is often taken as restricted and private, since disclosure is believed to bring loss and harm to its owners. Exposition or disclosure of Aboriginal knowledge may have the effect of diminishing or destroying aspects of the 'heritage' or 'property' that disclosure seeks to protect. As Tehan points out: "[t]he strict application of the rules and procedures of the dominant system therefore may operate to prevent protection of heritage even where legislation is specifically expressed to exist for the purpose of such protection."(297) Part of the problem seems to derive from the fact that indigenous law is itself given very little authority within the legal system. As Hancock notes, while "the protection of Aboriginal culture may be predicated on the existence of Aboriginal law, the significance of this law is being reduced to mere evidentiary status." (1996: 19) Indeed, the only restrictions the commissioner seemed to recognise, with respect to the 'sacred-secret' nature of the object under inquiry, were those concerning the Commonwealth *Heritage* and *Racial Discrimination Acts*.[3] The commission assumed that, as long as the proceedings did not contravene either Act, then there could be no reason why individuals should not come forward and provide evidence. As Tehan observes:

> The fundamental assumption underlying this approach [and
> the approach of Anglo-Australian law in general] is that
> indigenous heritage claims based on relationships to land are
> capable of, and must be subject to, transparent evaluation and

assessment according to criteria imposed by the dominant

legal system. (296)

As we have seen, the commission attempted to supplement the lack of evidence by interpreting the refusal to testify. And yet, one must ask: given that no-one before the commission, except Deane Fergie, either had viewed the contents of the secret envelopes, which formed the basis of the *Heritage Act* claim, or knew to what 'sacred-secret' 'women's business' actually referred then, how could it judge the truthfulness of the claim? How could such negativity cast the slightest shadow of positivity? Here, the performance of secrecy, which enacts a double inscription (one 'public', one 'private'), means that there can be no way of knowing the difference between manifestation and non-manifestation. The alleged secret, whether existent or not, cannot be read through some form of symptomatology, because there can be no way of knowing how one level of signs corresponded to another, when by their very nature they are designed to elude interpretation.

The refusal to speak here, despite the fact that a refusal must, in a sense, 'speak' in order to register *as* refusal, is a negation that cannot be fully recovered and recuperated. Instead of being a negativity that can be synthesized or incorporated within representation, the unknowability of the secret marks an impasse or the limit (within/without, before/after) of representation itself. As Taylor notes, this negativity can only be recovered in so far as to "recover is to re-cover the irrecuperable." (39) The secret may well have to be presented and spoken publicly in order to be recognised, but it could never be reduced to this presentation or name, since this would, at least potentially, name and present the unnameable and unpresentable. Even an admission of fabrication by one supposedly privy to the secret's content in fact

guarantees nothing. Admission, performed publicly, seems to expose its guarded centre, but, like a Chinese box, reveals, or at least opens the possibility of, still other interiors. As it is spoken, the secret reveals what is still withheld, envelopes itself, an opening that is forever closing, hiding, withholding, a closing announcement that forever opens in its silence, naming and speaking the withheld and unspoken.

In a sense, the structure of the relation of the secret to truth is like that of law to justice or the gift to economy. As Caputo observes, the secret and justice have the structure of the gift:

> let us say, not the "logic" or the "law" of the gift, but at least
> its movement or dynamic. Justice must move through, must
> 'traverse' or 'ex-perience' the 'aporectics' of the gift, must
> experience the same paralysis and impasse. For the gift, too,
> like justice [and the secret], is *the* im-possible, something
> whose possibility is sustained by its impossibility.(140-141)

6. *The Unsayable and the Unsaid*

We might, then, acknowledge a certain similarity between the unsayable, as that which exceeds the limits of speech, knowledge or presentation and yet makes these possible, and the unspoken, the secret which will not and must not be spoken or disclosed. In both cases, the invocation of the limit of presentation and representation disrupts and undermines the fantasy of a position of all-knowing truth. This knowledge requires total transparency of all matters 'before' the commission, it demands that nothing remains unsure and that no absence or silence be left unaccounted for. Thus it would be wrong and unjust to attempt to reduce the secret to the terms of law or to

demand that it be so demonstrated to be recognised as legitimate. And yet, somewhat paradoxically, the possibility of recognition within law requires that the secret be *said*, or at least named. To recall a point made by Gelder and Jacobs: "secrets cannot be secrets until they are spoken about". (25) And yet, we must add to this the need to maintain an impossible distinction between the secret-as-it-appears or the secret-as-effect and the secret-itself. Similarly, we find a justice depending upon an impossibility: the difference between the just and unjust would depend on that between merely legal judgement and judgement which simultaneously judged law and opened it to the (im)possibility of such judgement. In short, it would accept the impossibility of true representation of what was 'before' it, the impossibility of (re)presenting the secret. Here it is worth noting the anxiety in a series of questions about the possibility of accepting the 'women's business' claim asked by Iles, counsel for the 'dissident' women. Pausing from consideration of the truth or falsity of the claim, he asked:

> But where do we draw the line? In making such exceptions-
> however attractive in isolated instances- you cannot but put at
> peril the rule of law by which rights and obligations of
> individuals are determined. (1995: 12)

Perhaps the secret that troubles the commission and its counsels so is not a Ngarrindjeri secret. Indeed, in the light of Iles's anxiety I am tempted to ask: what secret *is it* that he, like the commission, refuses to hear? From where do their demands, requirements and objectives derive?' Upon what is *its* authority based? How closed the commission seems to its own silent concealment: enveloped within its every pause, behind every statement, we find what it refuses to hear, the question of its own

legitimacy, the foundation of its authority. Only once its right to take names, use them, fix them and judge them has been taken for granted can its authority be assumed. This right requires that its authority already be established, demonstrated, 'given'. But, of course, such questioning remains virtually unspeakable within the context of legal debates; indeed, its repression and effacement is a requirement of their possibility.

While it may be true that the idea of making claims based upon sacred-secret business raises considerable anxiety about the possibility of 'fabricated' or false claims, or the 'de-centring' of power and authority away from the 'law' and into the 'hands' of 'minority groups', the answer cannot be to address the matter with the bad faith in which the commission proceeded. Might not justice require trust or open-ness to another, which would exceed calculation, economy, obligation or reciprocity? If the demand that recognition be based upon demonstration to the commission is unjust, in so far as it reduces all difference to positions prescribed by economy, then might not the answer be to act, not from duty or in terms of economy, but out of an obligation without determination. The promise of justice, like the gift without return which disrupts economy, breaks with economy and, as Derrida notes, "give[s] economy its chance."(1992b: 30)

Justice would then be an openness to that which is outside the circle of economy or law, it would affirm the incalculability of what is calculated, the unnameability of what is named. It would not reduce the relationship to the other or difference to *a relation* or terms already conceived. Here, the idea of affirming the secrecy of the secret, its unknowability, provides a suggestion as to how *inter*-cultural justice might appear. To affirm the secret as secret, without giving in to it, submitting oneself to it or deciding upon its truth or falsity, the law might allow itself to open up to another, to make possible a 'play' between 'laws'. To appropriate the words of Caputo:

For as long as it is kept alive, as long as it is well known that there is a secret which some have and others do not, then it has the power to divide esoteric knowledge, insiders and outsiders, and thus create a . . .politics of assigning places . . .of speaking from an authorized site, distributing speakers across a hierarchized space. As long as secrets and gifts are well known and acknowledged, there is power [in secrets]: authorities to acknowledge, debts to be paid. (1998: 34)

Justice would therefore be an opening to that which is 'before', simultaneously a recognition that one must name and calculate and the (im)possibility of doing so.

Endnotes

[1] . An excellent example of this anxiety with regards to the definition of nation can be found in the Australian Mining Council's 1993 advertising campaign against Native Title legislation, where a map of Australia was shown representing land-use. This map drew attention to land under control or subject to claim by Aborigines. The advert asked readers to look at the place where they lived: "Take a good look at this map. Does this look anything like the one we studied at school?" (cited in Gelder and Jacobs, 141).

[2] . One should note here that Derrida's position is not that of a relativist. As he himself plainly states: "the value of truth (and all those values associated with it) is never contested or destroyed in my writings, but is only reinscribed in more powerful, larger, more stratified contexts" (1989: 146) Thus Derrida's point is far more significant that an observation that truth is 'constructed', as Barry Allen points out, "for truth-value (and associated values like reference, translation, relevance, implication, objectivity etc.) to "be determinate" in any case, depends on nothing that is indifferent to the asymmetrical relationships of power that work to settle texts in contexts.""(1993: 24)

[3] . While there have been significant moves made within legal practice to recognise Aboriginal sacred-secret traditions, the point here remains the same: in such instances, regardless of the concessions made or the progress achieved, such moves must also be read as changes which re-confirm and re-consolidate the authority of Anglo-Australian law over matters relating to Aboriginal culture and society. In short, although they recognise the sacred-secret to some degree, the bottom line is that they still will only recognise that which can be demonstrated to the satisfaction of the court.

Chapter Six

Law, Order and Bi-culturalism

"Justice is an experience of the impossible."

Jacques Derrida, 'Force of Law'

"Justice for Maori can never be done. It never will be done."

Andrew Sharp, *Justice and the Maori*

1. *The Violence Problem*

In 1987 the New Zealand government commissioned a report, the 'Roper Report' as it became known, which examined violence in a broad range of contexts. Although many commended the report, it was widely noted that very few submissions were received from the Maori community. Many critics suggested that the failure to consult Maori on such issues reflected the more general social and political inequalities which give rise to the social conditions that create violence in the first place. Titewhai Harawira, for example, argued that any report which considered the relationship between Maori and violence should consider the social and cultural context in which such violence occurs (Rosier, 'Tackling Violence' 19). In other words, it must take into account the uneven distribution of power and wealth within society and the 'violence' that establishes, maintains and is produced by such relations; it must look beyond matters of 'law', 'order' and 'criminality' to consider the historically and culturally specific conditions under which violence is produced. Thus, Harawira's

concern was not merely with what was in the report, but with what its approach toward violence passes over and leaves unaddressed: systematised, institutionalised racism implicit in the legal and criminal justice system. She argues:

> The major part of the Maori submissions that were made in Tamaki were about the violence of racism, and how in fact that has been perpetuated on Maoris for 150 years. When you talk about violence let's talk about the history of the violence of racism: how it has completely stripped our people of their land, their language, of our heritage. So that today we are the highest unemployed, the worst housed, and our health figures are the worst. (cited in Rosier, 1987: 19)

Here Harawira foregrounds the relationship between the exclusion of Maori perspectives on violence and the violence itself. Moreover, she argues that this exclusion is itself a form of violence, inseparable from the 'criminal' violence involving Maori. For Harawira, the problem with the Roper Report was that it failed to consider the relationship between Maori violence, violence against Maori, and issues of sovereignty and authority. As she makes clear:

> Unless any report or government commission reflects a shift of power to empower the powerless, then we're wasting people's time, we're wasting the paperwork . . .because all that really ends up doing is providing a framework to protect the status quo. (19)

One way in which to extend this point would be to note how the designation of the term 'violence' or 'criminality' operates normatively. The naming of the criminal does not merely describe or articulate what 'is', but rather names only insofar as the basis for this designation, both the difference between the criminal and the non-criminal and the position from which they are judged to be so, is presupposed and taken for granted. The name does not simply name what already is, but, operating within a particular socio-political and historical horizon, produces what it names in naming, constituting and consolidating objects in ways inflected by colonialist interest and desire. The naming of 'the criminal' cannot be separated from the authority to name: in the colonial context the rhetoric of law provides the armature of colonial sovereign authority, filled out and strengthened by military force and other more insidious forms of imperialism.

Here naming, thinking and conceptualising apparently *give* the materials to the coloniser. Naming, according to this line of thinking, is thus an act of imperialism *par excellence*: history books and maps are full of European names that wrote over and effaced the indigenous names before them. The argument Harawira makes draws attention to the violence of this scene, calling into question the authority assumed by the European system that displaced Maori ones, tracing the material, social and cultural effects of this displacement within a contemporary context.

This line of argument takes as given the two sides of this struggle, or perhaps, these two sides *given in struggle*: one indigenous the other colonising; one system or order imposing itself on the other. Injustice would thus be an *unjust* imposition on or subjugation of another. This challenges representations of matters of criminality and justice based on narrow and uncritical notions of 'crime', 'violence', justice and law.

Against monoculturalism, it argues for respect with regards to difference: bi-culturalism, multi-culturalism, not one culture or system of beliefs and authority, but more than one, many.

Yet, beyond these matters of colonial, racial, institutional or criminal violence, there are further preliminary questions that must be addressed. Aside from specific instances of 'violence', or rather as the condition for thinking their possibility, one might note what Derrida has called a 'first' or 'founding' violence: 'before' racial differences or particular relations, battling nations, communities or tribes; 'before' the imposition of ideologies, subjugation or domination; a quasi-transcendental violence that *gives* the possibility of relations, an economy of acts or principles of judgement. This move *could* appear politically dubious if it were taken as simultaneously a move away from the specific context named and toward a kind of Eurocentric philosophical imposition.

But the relationship between a specific description of violence, alleged injustice, colonial imposition, domination, law and justice is exactly what is at stake in this inquiry. The violence of an imperialist or colonising imposition on another, like the violence within the domain of law, already conceives of the relation to the other within an economy of law and calculability. The question of justice, which already includes the question of the question - its force, authority and place within a tradition - would therefore require an attempt to think the condition of possibility of such relations, of relationality and that which is beyond relation. "Otherwise", Derrida notes, justice "rests on the good conscience of having done one's duty, it loses the chance of the future, of the promise or the appeal" (1994: 28).

Instead of starting with a violent imposition on or subjugation of a group by another, one should begin, he argues, with a problematisation of the opposition between law, convention or the institution on the one hand, and nature on the other:

> with all that they condition; for example . . . between positive
> law and natural law . . .the paradoxes of values like those of
> the proper and of property in all their registers, of the subject,
> and so of the responsible subject, of the subject of law . . .
> (1991: 8)

No doubt there is considerable danger implicit in the imposition of any 'culturalism' as the basis or ground for negotiation between cultures, insofar as that which would ultimately determine what is possible remains unthought and unquestioned. No conceptualisation of law or right could be culturally neutral. As Andrew Sharp argues: "Their context is culturally specific" (1990: 283). But, one cannot simply maintain a notion of language (of culture or law) and justice as culturally relative, since these notions or concepts are neither proper to any culture or group nor able to be contained by them: language and justice, if taken as possible, must exceed them. As Sharp notes: "justice . . .requires that something binds the rivals." (41)

It is through thinking of the relationship between given acts or systems of interpretation, matters of proper-ness or place, and the violence that gives relation, place or value, that one can begin to approach the question of violence, law and colonisation against these background questions concerning the possibility of justice or ethics. As Derrida (1978) has shown, political violence latches onto this primary violence; cultural violence comes 'after', and not 'before', the dividing, differentiating

power that marks out and opens its possibility. To limit an investigation of justice and colonial violence to the struggle between two given cultural groups, or indeed the giving of these cultural groups through struggle, risks reducing the other (in whose name we demand justice) to terms within the sphere of calculation, law and economy. Rather than a mere evaluation of what is possible and what can be done, the pursuit of justice must also attend to the question of 'the possible'.

2. *The Politics of the Given Terms*

During the last ten years there have been a number of politically motivated challenges to the authority of parliament and the justice system with respect to Maori issues. In many cases these were not restricted to institutionally 'accepted' channels of debate or criticism. Their central point was often the rejection of and opposition to the terms set by Pakeha status quo, a sentiment captured in Donna Awatere's argument that 'revolutionary' action is always bound to be deemed illegal or 'unacceptable' by the prevailing order:

> No Maori should sacrifice their taha Maori [the Maori
>
> perspective] for "respectability" in this white society. Sir
>
> Apirana Ngata, a Cabinet Minister, *had* respectability. . .And
>
> always will have it. Any Maori can be "respectable" as long
>
> as they are willing to pass as white. (1984: 54)

The 'Haka Party' incident at Auckland University in 1979, Mike Smith's attack on the tree on One Tree Hill in 1994, the Moutoa Gardens occupation, the many acts of defiance at Waitangi Day 'celebrations', Bastion Point, and the anti-Springbok Tour

demonstrations all illustrate the way grievances with 'the system' have often taken the form of 'illegal' action. Moreover, insofar as these have been subjects of legal action they are illustrative of how the legal system responded to assertions of Maori authority or sovereignty. In other words, they bring into question not only local issues concerning matters of ownership or authority over particular sites or contexts, but also the authority and legitimacy of the institutions that pass judgement.

Commenting on the significance of 'Maori radicalism' and the Eurocentric bias it revealed within the justice system, Sharp has argued that law in Aotearoa remains Pakeha or British-derived:

> Given 'Maori', given 'Pakeha', and given the irreducible
> ethnic difference between, this is true. However much the law
> and politicians may have renounced the language of race and
> culture in their proceedings, it is true. However much they
> thought the state and its activities to be culturally neutral, it is
> true. However, many Maori individually were satisfied with
> the regime and worked with it, it is true. . .All this is true, as
> it were, as a matter of definition – except that, to take the
> equally permissible view, Pakeha consciousness would not
> think of the system they imposed as one of brute power and
> hegemony, but rather of justified legal authority of a superior
> civilisation . . . (282-283)

Here he makes a number of important observations concerning the relationship between law, colonialism and notions of liberal democracy, arguing that the claim that the law is universal and impartial or based upon the interests of the majority masks the way it has consolidated and maintained Pakeha hegemony. As Harawira observes, by shifting the focus of criticism from the question of the legitimacy of the law's foundation (or the relation between the law and others) to issues concerning legality (relations within the law) the justice system has been able to incorporate and assimilate all challenges to the status quo.

Moreover, Sharp's point has two further implications: that the legal institutional renunciation of the languages of race and culture need not signal the end of racism or cultural prejudice; and that inter-cultural justice and law may well be impossible. Indeed, the claim to have surpassed racial or cultural issues might be more dangerous than openly admitting such influence, since the first claim ultimately closes off and blocks the position from which to criticise legal institutions and practices, while still allowing the possibility of racism 'renamed'. One can never assume that a decision or ruling does justice to both Maori and Pakeha. The reterritorialisation of one culture's concepts or rules into the other must always risk the possibility, perhaps necessity, that it will be reduced to the terms of one.

However, if justice is Sharp's concern, then one can question his restriction of its possibility or impossibility to an economy of the given. He suggests that "this is true" as a matter of definition misconstrues the relationship between law, authority and power and the possibility or impossibility of justice. He seems to suggest that 'the law' can *only* be *Pakeha* law, and, in doing so, fails to observe the specific, contingent, historical relations, which have enabled the law to serve and express the interests and beliefs of Pakeha. The suggestion that 'the law' should not be taken to be solely

Pakeha need not suggest that Maori law could or should be assimilated into 'the law'. Instead, my interest here is not only with how it functions, but also how it might function differently. Law does not stand outside history or power, it is radically unstable and, despite the fact that it was installed by the British in accordance with their beliefs and protocol, there can be no final and complete determination of law, such that it must always serve the interests of a particular group or carry a specific, enduring intention. For between each articulation of the law, there exists a radical instability where the law, in each new context, with each new citation repeated as something different from what it was, is never fully determined.

This approach implies a broader notion of the power of law than mere possession or acquisition. As Foucault insisted, power should not be thought simply or primarily as something possessed, taken, owned or centralised within a particular body or institution. Instead, he proposed that we "base our analysis of power on the study of techniques and tactics of domination." (1980: 102) In other words, political or legal power is not:

> a phenomenon of one individuals's consolidated and homogenous domination over others, or that of one group or class over others . . .[but should instead] be analysed as something which circulates . . . [and] only functions in the form of . . .a net-like chain. (98)

This observation has the following implications for the interpretation of law in Aotearoa: firstly, it problematises the model of Maori and Pakeha laws as standing in simple opposition to each other, one good and the other bad, and the corresponding

(Hobbesian) idea that they are, therefore, mutually exclusive (i.e. there can only be one sovereign power); secondly, it widens the scope of inquiry to include a whole variety of practices, systems or relations and discourses, which make possible this particular operation of power, in the name of the law.

However, while it is important to note the ways in which power both constitutes and is constituted within and through specific historical or cultural sets of relations, power and force must also be seen to be pre-figured by a form a differentiation, division or marking beyond or at the limit of these relations, this context or historical-cultural closure, being at once the historical and historicity. We must not, therefore, think merely of law, discourse or a particular set of relations imposed on others, without risking an uncritical acceptance of the terms, positions or values produced by such an object. The insistence on the priority of acts understood purely within an historical closure, as meaningful in-themselves or as meaning-giving, is a form of secondary violence or a refusal of the other as other that forecloses the possibility of ethics or justice through its attempts to master an originary violence, the violence of classification and inscription.

It is in relation to such instability that I will consider the relationship between legal responses to Maori radicalism and the way the law has continually sought to re-establish and re-affirm its authority through an articulation of criminality. Here, my primary concern is the relationship between representations of the link between Maori and violence and the possibility of notions of justice, equality and recognition against the background of debates about the Treaty of Waitangi/ *te Tiriti o Waitangi*. What I hope to demonstrate is that 'radicalism' is in many ways connected to violence. Rather than advocate violence, or appeal to the benefits of law and order, I shall suggest that

certain acts open up a space from which we can reconsider the relationship between law and justice, bi-culturalism and just recognition.

3. *Maori, Law and Colonialism: An Overview*

In Aotearoa, debates about the recognition of indigenous rights have typically centred around conflicting readings of the Treaty of Waitangi/ *te Tiriti o Waitangi*, which is generally considered the founding document of both the nation and its system of law, on the basis of an agreement between the indigenous Maori and the British Crown. This 'agreement' formed the basis of the Crown's legal and political authority over 'the nation' and provided the dominant model for the conceptualisation of Maori-Pakeha relations as bi-cultural. From the legal point of view, or at least that which predominates in New Zealand, once the treaty was signed no laws were recognized other than those founded in positive law, common law or legislation. In other words, the apparent cession of Maori sovereignty implied by the treaty not only consolidated the Crown's sovereign authority, but also meant that only laws recognized by the Crown would have any (official) authority. As Paul McHugh points out:

> If 'natural law', 'international law' or 'Treaty rights' have any legal status in New Zealand law, it is because there is some permissive common law or statutory 'rule of recognition'. (1991: 376)

From this perspective, indigenous rights do not and cannot exist outside or beyond Crown law or legislation.

This view has been challenged in a number of ways. Firstly, it has been argued that the unity or consensus implied by the signing of the Treaty/ *te Tiriti* is, at the very least, questionable. Peter Cleave, for example, remarked that: "[a]s a point of reference for inter-ethnic politics . . .the Treaty of Waitangi has an instability at its most fundamental level". (1989: 45) Indeed, the unity of 'the Treaty' itself is significantly undermined by the fact that it existed in more than one version and, most importantly, that a version in Maori seemed to differ significantly from the officially recognised English text. In the recognised English version, Maori transferred complete sovereignty to the Queen of England (under Article 1) in exchange for the "Rights and Privileges of British Subjects" (under Article 3), while in the Maori version the chiefs of New Zealand were guaranteed *te tino rangatiratanga*, or full and unfettered authority over their lands, habitations, and *ratou taonga katoa*, or all things highly prized. Moreover, the authority of the English version is greatly diminished in the eyes of Maori by the fact that 500 chiefs signed *te Tiriti o Waitangi*, the Maori version, only 37 the English.

Secondly, it has been argued that the Maori version itself guarantees the authority of Maori law. As Moana Jackson points out:

> the retention of Rangatiratanga in Article 2 and the protection
> of te ritenga Maori in Article 4 clearly encompass the right of
> Maori to monitor the conduct of their own through
> appropriate legal processes. Rangatiratanga means more than
> control over the natural resources; it means legal and political
> authority over those people who are the beneficiaries of the
> natural resources. In essence, rangatiratanga necessarily

includes the power to make law and exercise authority through Maori legal institutions. (1989: 38)

The Crown's authority in Aotearoa is premised upon the exclusion of these differences within 'the Treaty'. The Maori text, *te Tiriti*, is recognised only insofar as it mirrors the English text, so that the illusion of consensus or agreement is constructed solely in terms set out in 'the Treaty'. The constitution of 'the nation' under one system of law can then be seen to be based upon the exclusion or repression of difference at the point of its constitution. Indeed, as I shall argue, the legitimacy of 'the law' in Aotearoa, its authority to rule over all people within the nation, is marked by the exclusion of (Maori/Pakeha) difference and by the unequal relations established at its institution. It is as if, by conceiving of the nation as a unified body, difference with respect to law or difference within the body can only be seen as dis-unity or chaos. Indeed, the primary theoretical source for most notions of sovereignty, Hobbes's *Leviathan*, links the performative power of the compact or contract, on which the nation-state is based, to God's creative pronouncements and in this way describes the creation of a singular, unified sovereign state or body as a civilised order formed from the chaos of nature:

> by Art is created the great LEVIATHAN called
> COMMONWEALTH, or STATE, (in Latine CIVITAS),
> which is but an Artificiall Man; though of greater stature and
> strength than the Naturall, for whose protection and defense it
> was intended . . .the *Pacts* and *Covenants*, by which the parts
> of this Body Politique were first made, set together, and

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united resemble that *fiat*, or the *let us make man*, pronounced

by God in the Creation. (1968: 81-82)

The constitution of the body of the nation in this manner conceives of it as an ordering of parts founded on a contract or compact. But what gives this pronouncement authority? Indeed, what is this authority? In Hobbes's case it is the authority of reason which, like the divine being to which he compares it, brings the body into conformity with what *should be*. But, of course, here reason is articulated against its opposite *within* economy, just as the body is given order and form only once its outline is discerned and articulated. What remains unthought, indeed unthinkable in terms of this unity, is that which gives economy, distinction and thus the body itself. In this manner, the definition of the body is always haunted by an initial marking out, a writing or division that makes it possible. The narration of the body must therefore conceal and efface its relation with its other in order to maintain its unity. Difference not reducible to difference within this unity protests and attacks 'the system', returning as an originary trauma. This trauma can never be reconciled or known in its representation. As Caruth observes, the representation does not awaken the self to the reality of trauma or bring it within sight, but consists in "handing over the seeing it does not and cannot contain to another [and another future]." (1996: 111) Representation returns to economy what is in fact unassimilable.

If this were merely a story about the illegitimacy of origins, one could discount this argument with the claim that the law today is different from the law then, that its legitimacy no longer rests on some original agreement or contract, but on democracy and the capacity to represent all equally and impartially. This, in fact, is the view taken by McHugh, who argues that the legal system is continually transformed by an

ongoing commentary or re-evaluation of the system, which seeks to confront and expose prejudice. Against the claim that 'the law' is 'Pakeha', he argues that:

> it is important to realise that the evolving and dynamic common law on Treaty issues more often than not gives legal effect to historical record and is founded, ultimately, upon a generating concept of fairness. (1991: 382)

For McHugh, the space between 'the law' and its interpretation makes change possible. He defends the current system by arguing that it already offers a mechanism of change: as prejudice is exposed, so the law is modified and changed. Arguing against "radical writers on the Treaty of Waitangi" and "Critical Legal Scholars", he suggests that a clear distinction needs to be made between the processes of definition and translation with respect to questions of Maori rights. For McHugh, Maori must define their rights and lawyers must translate them into law so as to see whether or not they can be recognised legally. Historical method here helps to remedy prejudice or discrimination. He characterises the legal system as an:

> interpretative community reshaping text . . . by confrontation of prejudice. This prejudice, like the text, is shaped by the reader's place in history, which disposes him or her to prejudge meaning . . .Historicity governs the way in which this confrontation of the reader and the text is resolved but confrontation itself ensures change. (1992: 105)

The difference between the law as text and the context in which it is interpreted may well make change possible, but it need not make the law any more just. Indeed, the process McHugh describes provides a mechanism by which the law can incorporate or neutralise potential challenge. As Foucault noted, commentary is itself an effective way of maintaining or 'policing' a system, since in many ways it re-produces and repeats the inequalities established at its inauguration. The function of commentary, for those who wish to uphold or conserve law, is to reduce all factors to the law by reconciling differences to the original, authoritative text. Foucault observes that: "commentary's only role is to say *finally*, what has silently been articulated *deep down*. . .Commentary averts the chance element of discourse by giving it its due." (1972: 221) Commentary is thus the mastery of the text through the neutralisation of difference.

The significance of this problem is revealed in the method McHugh describes whereby Maori might define their (claimed) rights and lawyers translate those rights into law. In any such case, the final task remains in the hands of legal authorities: Maori rights are defined, but only so as to be reduced to the terms recognised within the law. For McHugh, then, the legitimacy and authority of the law are never brought into question directly. Changes occur because provision is found within the law, not because the law is shown to be inadequate or unjust. As Cornell notes, this myth of the full readability of law ultimately conserves the law "as a self-legitimating machine by returning legal interpretation to the supposed origin that repeats itself as a self-enclosed hermeneutic circle." (1993: 80-81) The problem, in other words, is that all questions concerning the just operation of law are reduced to issues of legality.

The law is thus able to brush aside criticism that its operations are discriminatory by denying the relevance of the terms of criticism, for example, the relationship between

the operation of law and Eurocentric bias. Moreover, by continually deferring to the law for decision, one not only rules out the possibility of judging the law itself and thus doing justice, but also reduces the element of ethical or political responsibility within judgement. This again re-emphasises the point made earlier by Harawira that, unless one addresses the way law consolidates and maintains relations of dominance and subordination, the sort of confrontation McHugh describes is likely to achieve little more than the protection of the status quo.

To apply this approach more directly to Aotearoa, we would need to argue that the initial relationship between the British and Maori has been translated, through time, and through the process of legal interpretation, into the legal system currently in place. This shift from the assumption of power by the British and the institution of British law, to 'the law' of the nation and its various systems and operations, thus carries with it, manifests and reproduces the unequal relations of this founding. Put simply, the British established their own authority last century by denying Maori authority. The operation of law not only derives from this authority, but also, through repetition, re-affirms and re-establishes it. As Kelsey notes: "for Maori . . .Pakeha law . . .sought to dispossess Maori of their resources, suppress Maori resistance, repress Maori culture and spirituality and denigrate Maori values from 1840 to the present day." (1990: 212)

Since 1840, when the Treaty was signed, British-derived law has continually deprived Maori of their traditional beliefs, customs and property. This provides striking confirmation of Said's suggestion that colonialism is not simply a matter of physical or military force, but of discourses which make possible its physical, military, territorial control: "dealing with it by making statements about it, authorizing views on it, describing it, teaching it, settling it, ruling over it . . ." (1978: 3) In short, the law has made colonialism 'possible': in the interests of 'order and fairness', it has been written

and interpreted in a manner which expanded and maintained the power and authority of the Crown, whilst continually disadvantaging Maori.

Quite apart from individual cases that discriminate against individual Maori, New Zealand law and legislation was and is discriminatory. In 1841 the Land Claims Ordinance stated that lands not actually occupied or used by the Maori belonged to the Crown, which clearly contradicted Article 2 of the Treaty. In 1844 Governor Fitzroy dropped the pre-emption clause in Article 2 of the Treaty and allowed private sales to take place. In 1846 Governor Grey abolished the Protectorate Department, which had responsibility for protecting Maori rights, and gave the New Zealand Company the exclusive right of pre-emption. The *Constitution Act* (1852) which established Provincial Government, granted the franchise to males over 21 with individual title to property of a certain value. Very few Maori males were thus qualified. The *Native Lands Act* (1862) individualised Maori land titles in order to obtain more land for the British; the *New Zealand Settlement Act* (1863) paved the way for land confiscations of over three million acres following the land wars of the 1860s; the *Suppression of Rebellion Act* (1863) removed the right to trial before imprisonment for Maori, so as to punish tribes for rebelling against the Crown; the *Maori Prisoners Act* (1880) allowed the indefinite imprisonment of Maori without trial; the *Tohunga Suppression Act* (1905) prohibited so-called superstitious beliefs; the *Native Health Act* (1909) forbade adoption in accordance with Maori custom, suppressed the notion of an extended family or *whanau*, and prohibited Maori mothers from breastfeeding their children. Between 1840 and 1975 the extent of Maori land dropped from 66, 400, 000 acres to 3, 000, 000 acres.

A cursory glance at the statistics gives further evidence of such inequalities. According to the *1991 New Zealand Census*, Maori made up 9.7% (323,493) of the

total population of Aotearoa, while European New Zealanders made up 79.5% (2,658,738) (*1991 Census, National Summary* 17). Yet, despite their relative size, in 1990 Maori were convicted of more homicides and assaults than any other group and made up well over half the prison population. Maori were not only more likely to commit crime and be convicted, but also to receive a heavier sentence than a European with a similar conviction. (*Department of Justice Statistics 1989-1990* 87,133,149) The blame for such figures must rest, at least in part or indirectly, with the legal system itself and its relationship to the general social conditions of Maori within New Zealand society. A brief examination of the statistics relating to living conditions, education and income reveals very clear patterns of social inequality. The 1991 census shows that most Maori over the age of 15 have no school qualifications (162,903) and less than 20% (52,479) had School Certificate in one or more subjects (*1991 Census, NZ Maori Population and Dwellings* 23). The largest income bracket by far was between $5,001-$10,000 per annum, with over half of the Maori population earning less than $15,000 per annum. (21)

4. *Sovereignty and the Rule of Law*

In response to a question concerning the possibility of recognising some form of Maori law or authority on the basis of the Treaty, the then Prime Minister of New Zealand and former Minister of Justice, Geoffrey Palmer, insisted that the supremacy of Pakeha law was non-negotiable:

> The argument made . . .to me that under the Treaty Maori
>
> people retained the right to monitor and control the conduct
>
> of Maori people through systems of Maori law. I regard that

claim as ill-founded. This is clearly a claim which cannot be met under existing New Zealand law. Not only is it contrary to the principle that all New Zealanders are equal under the law, it strikes at the heart of the rule of law in a democratic system. Such an approach cannot be tolerated. (Kelsey, 213)

Because its justice claims to be *blind* to race, ethnicity, class and gender, because it bases it authority on claims to be ahistorical, apolitical, unbiased and non-discriminatory, the law does not and cannot operate in an openly or obviously racist manner. Nevertheless, it defines itself against and through the exclusion of Maori authority and law. This point relates to what I see as a correspondence between a number of distinct but related concerns with the practice of law between: various representations or notions of criminality and violence and their perceived manifestation in Aotearoa; beliefs about the disposition of particular groups to behave in a criminal or violent manner; and the way the legal system has responded to assertions of Maori authority or law. My concern is with the relationship between criminal violence, the violence of 'the system', the ways in which the court has responded to acts of Maori sovereignty, the way the law (re)defines itself through the definition of the unlawful, and the possible connections between the naming of the criminal and the perceived criminality of 'the Maori'.

The suggestion here is that, behind the guise of the stock phrase 'all equal before the law, one law for all', there lies very considerable inequality. The demand 'one law for all' has effectively meant that for Maori equality exists *only* in law. It seems clear that such terms establish relations that are actually unequal. For example, 'equality' in the sense used within law is defined through what is taken to be held in common rather

than in terms that respect and acknowledge difference. This blindness to particularities, to both the specific individuals that come before it and the conditions that make its operations possible, derives from the belief that justice must appeal to something beyond the specificities of each case, to some generalisable principle or rule. Justice, we are told, requires consistency and regularity.

And yet, justice also requires us to consider each case individually, on its own terms. Doing justice might mean that one should consider, on a case by case basis, the possibility that law itself may be discriminatory or unjust. It may very well be *unjust*, therefore, to proclaim equal access to justice, to privileges and rights, in terms of some disembodied, abstract or universal human or civil principle. These rights, and the laws formulated to ensure them, neutralise the particular and differential relations between Maori and Pakeha, reducing them solely to the terms recognised by the law. So the demand for *indigenous* rights will either be understood merely in terms recognised by 'the law' or be construed as a radical challenge to the limits of law, to a legitimacy based on just and equal consideration. Such demands call for the recognition of rights which are *indigenous*, that is, derived from another law 'before', and thereby reveal how the authority of 'the law' has been established through the exclusion of 'other' laws. They *position* the law historically and culturally and so attempt to make visible that which the law has continually excluded and repressed: the 'outside' of law that is already its inside, the 'other' law, the law's other and the violence of its inscription and concealment.

Still, I will note provisionally here, all of this may well be impossible. The law may speak with a singular voice, but this voice is already not fully its own. As Derrida observes: "One cannot speak of a language [one's own or another's] except in that language." (1998: 22) One may acknowledge the imperative to listen for and open to

the law's other, the other law, and yet its reception, articulation or recognition would never remain entirely other to the law. One can only calculate, think or judge in terms of what is known and what is convention and law. However, as Derrida has observed, justice would require an openness to that which is not predictable within this closure.

An obvious place to find the evidence of the incorporation and inscription of others within the law, is in the language of law and the naming of the criminal and the unlawful. This is the place where one finds both the unmistakable marks of a particular historical, political and social inscription upon seemingly objective categories, and simultaneously a series of conceptual categories that exceed any such socio-historical or political moment. The definition or naming of a particular group as more violent produces particular relations between the 'lawful' or 'normal' and the 'unlawful' and 'abnormal' within law. Law is produced through such differentiation: there can be no law without a corresponding notion of what would count as the contravention of law.

Such an ascription must always be understood in terms of the position from which it is announced or given. The position from which actions or individuals are judged to be violent or otherwise, for example, is not neutral or ahistorical but is, rather, the product of cultural and historical factors. The space which makes judgement possible, both discursively and materially, is itself produced by specific interests, preferences and biases, by forces beyond judgement or reflection. As Williams (1976) has pointed out, the term 'violence' does not simply name something in-itself, since the naming already assumes a principle of judgement: a distinction between the legitimate and illegitimate, between authorised and unauthorised force and thus a system of relations of authority. And yet, judgement and authority have no 'proper' place. No group, persons or institutions have law as their own unconditionally or properly.

Judgement assumes as much as it constitutes authority, veracity, legitimacy and power. In other words, violence can be defined as physical assault or more generally as the use of physical force or threatening and unruly behaviour only insofar as it is distinguishable from uses of authorised force. Interestingly, then, the difference between the violence of a criminal and the force used by officers of the law can never be fully determined prior to judgement, since their very distinction seems to rely on the judgement itself. As Williams notes, we speak of "the violence of a 'terrorist' but not, except by its opponents, of an army, where 'force' is preferred and most operations of war and preparation for war are described as 'defence'; or the similar partisan range of 'putting under restraint' or 'restoring order', and police 'violence'." (1976: 329)

This observation suggests, at the very least, that any judgement of law can be brought into question from the position of the one judged, in terms of a position not considered by the judgement. History and law have always been written from the perspective of the victors. One could argue, then, that behind the distinction between the protection of 'law and order' and the violence which threatens it, there always exists at least one opposing position, from which it can be viewed in reverse, or better, displaced, a perspective that observes the violence of the law and seeks to open the law to another. As I shall later argue, it is this (im)possibility of thinking the law's outside within its violent order, which opens the possibility of judging the law and *doing* justice.

Taken singularly, law is predicated on the exclusion of all other perspectives; it hears others only in its own terms and thus only once its authority has been accepted. This authority, its 'force', is based on the effacement or concealment both of its own cultural and historical specificity and of the exclusions which mark its foundation. As Foucault notes, the law's authority depends on an appeal to something transcendent,

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something mystical, the 'will of the people', 'principles of order and civilisation', 'democracy' or 'the word of God.' He observes that:

> If it were self-evident and in the heart, the law would no longer be the law, but a sweet interiority of consciousness. If , on the other hand, it were present in a text, if it were possible to decipher it between the lines of a book, if it were in a register that could be committed, then it would be possible to follow or disobey it. Where then would its power reside, by what force or prestige would it command respect? In fact the presence of the law is in its concealment. (1998: 157)

In other words, the mystical quality of the law means that it cannot be fixed, located, addressed directly or mastered; the law is able to be dissociated from any act or decision by being distinguishable from all 'improper' or 'unlawful' uses of law. Its assumed position as ultimate and final adjudicator neutralises all challenges by demanding that they be made in terms of the law. And yet, it is this ability to dissociate, to break with past law, to invent and re-found it that offers the possibility of justice. Herein lies the paradox for the pursuit of indigenous rights within the legal context: as recognised within the current system, they are not, strictly speaking, *indigenous rights*; rather, they are rights developed, defined and recognised within a European-derived tradition. Just as the meaning of *te Tiriti o Waitangi* is reduced to that of the Treaty, so the interpretation of indigenous rights as rights recognised by law reduces any possible challenge to the law to a legal challenge.

5. 'The Word of Law' and the Language of the Other

In an attempt to respond critically to the implications of this one-sided, mono-linguistic and mono-cultural view of justice, Jackson describes the imposition of 'the word of law' in Aotearoa as:

> a new word introduced into our land- a word born of a Christian God, a capitalist ethic, a common law, an imperial domain, an individuated manifest destiny . . .[a word which] demanded, and still requires, that Maori no longer source their right to do anything in the rules of their own law. Rather they have to have their rights defined by Pakeha; they seek permission from an alien word to do those things which their philosophy had permitted for centuries.(1992: 2,5)

I want to highlight the way the violence of such an importation or imposition of the law is paralleled by a form of representational violence which provides the rhetorical or justificatory 'force' behind this imposition. This is particularly evident in the way European 'civilisation' and 'society' has traditionally defined itself in opposition to the 'savage' or the 'native'. Jackson's observations concerning the construction or 'founding' of law at a linguistic level ('the word') are suggestive of the links between the performative power assumed by the law and the historical and cultural setting in which such performatives occur. In other words, the sovereign power of 'the law', its ability to name and thus constitute its categories (the criminal, the unlawful etc), is marked by the repression or disavowal of different laws (Maori law, *tikanga, tapu,*

mana etc) and their expression in their own language. As we have seen with the issue of the translation of 'the Treaty', the control of meaning is closely linked to the effacement of differences between cultures and languages. As Derrida observes:

> in the past and in the present, one founding violence of the law or the imposition of state law has consisted in imposing a language on national or ethnic minorities regrouped by the state. (1991: 21)

Indeed, the problem in cases such as 'the Treaty', where there are two different systems of law expressed in their own languages, relates to the more general problems associated with translation. The translation of one law or linguistic system into the terms of another is not merely a substitution of words or meanings but, rather, it presupposes a system of rules or principles (a law) which makes substitution possible. Such substitutions never perfectly carry meaning across, but instead recreate or rewrite it. Translation is itself a colonising process, reducing or submitting one language to another. For this reason the monolingualism of the law undermines its claim to hear all equally and fairly. While it may be true that there can be no decision, and therefore no law, without some common ground or 'shared language', the assumed neutrality of such (legal) translation disguises the way translation reconciles the differences between languages through totalisation. According to Derrida, the possibility of justice depends on the recognition of that which has been unjustly repressed, refused or excluded, a task which is ultimately impossible, he concedes, since such recognition can never be finally or definitively achieved:

To address oneself to another in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigour, it is not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law of an implicit third) but even excluded by justice as law (*droit*), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms. (1991: 17)

Derrida's point is that, against the universality of language, we recognise the particularity of the other's language, so that, in an attempt to do justice when we speak to the other, we must address the other in the other's language. Just application of the law, for Derrida, would not only be application of law, but would also require doing justice to such particularity, to attempt the impossible, to understand the language of the other, preserving its idioms, as the language of the other. Justice requires the possibility of this impossibility, the translation of the untranslatable. As Derrida notes:

It is unjust to judge someone who does not understand the language in which law is inscribed or the judgement pronounced, etc . . .This injustice supposes that the other, the victim of language's injustice, is capable of language *in general*, is man as a speaking animal, in the sense that we, men, give this world language. Moreover, there was a time,

not long ago and not yet over, in which "we, men" meant "

we adult white Europeans . . .(18)

And yet, simply to rule out the possibility of translation, on the grounds that

translation would work in the interests of *a certain form of law*, Western colonial law

for example, is to accept uncritically that a law or language can be owned, proper or

property. Language and law may each be unthinkable in any form not culturally and

historically determined. However, they cannot simply be reduced to such

determination since, in a sense, there can be no culture or history, nor subjects of

culture or history without, as their condition of possibility, law and language. They

exceed any such determination; they are both before and after. Moreover, discussing

the relationship between language and colonialism, Derrida suggests that language and

law always exceed the grasp and control of the coloniser (master). He argues that:

> contrary to what one is often most tempted to believe, the
>
> master . . . does not possess exclusively, and *naturally*, what
>
> he calls his language, because, whatever he wants or does, he
>
> cannot maintain any relations of property or identity that are
>
> natural, national, congenital, or ontological, with it, because
>
> he can give substance to and articulate [*dire*] this appropriate
>
> only in the course of an unnatural process of politico-
>
> phantasmic constructions, because language is not his natural
>
> possession, he can, thanks to that very fact, pretend
>
> historically, through the rape of colonial usurpation, which

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means always essentially colonial, to appropriate it in order

to impose it as "his own." (1998: 23)

The violence of the violent imposition of the coloniser rests, not simply with the imposition of law, but in an imposition of laws written by Europeans as 'the Law' as justice. Any principle, precedent or judgement can always be brought into question, judged or evaluated by reference to some other superior or greater law. The imposition of a particular determination of "law as justice", Western law as law *in general,* and presented, imposed and administered as such, is violent insofar as it forecloses the possibility of asking whether this *form* of law is just. And yet, the question of justice always arises and returns. Apart from any particular form of law or any claim concerning language, and putting aside the impossibility of translating the other's language into what one might call one's own, this language, like law, already exceeds and precedes any individual, group or nation.

Under the name of justice, the language of the law, as the language of justice, cannot be owned by a particular group. Like Lacan's notion of the symbolic order, this language precedes those who speak it or those through whom it speaks. Inscription within the symbolic order or linguistic system entails a "primal" lack which leaves an irrecuperable remainder. The impossibility of speaking to the other in the language of the other, or of reconciling, 'once and for all', particular determinate forms of law and justice, itself opens the possibility of justice. Rather than simply accept as given 'your' or 'mine', 'their' or 'our' language, and the institution of law as the violent reduction of many languages into one, one must also question the very basis of the 'their-ness' or 'our-ness' of language, the 'one-ness' of law. This would neither disarm nor disable an attempt to critique a system of law or locate it within a particular socio-political or

historical field, but instead make this exercise possible. "In a sense", Derrida notes, "nothing is untranslatable; but *in another sense,* everything is untranslatable; translation is another name for the impossible." (1998: 57) Rather than signal a failing, this impossibility opens the plane of possibility. As Derrida insists:

> Does this impossibility signal a failing? Perhaps we should say the contrary. Perhaps we would, in truth, be put to another kind of test by the apparent negativity of this lacuna, this hiatus between ethics . . , on the one hand, and, on the other, law and politics. If there is no lack here, would not such a hiatus in effect require us to think law and politics otherwise? Would we not in fact open- like the hiatus- both the mouth of possibility of another speech, of a decision and responsibility . . , where decisions must be made and responsibility, as we say, *taken*, without the assurance of an ontological foundation? (1999: 20-21)

6. *The Place of 'Violence'*

With this point in mind and in an attempt to redirect these issues toward the specific concerns of this chapter, it becomes important to recall the two ways we have seen language and law intersect. The first related to the treaty, the Treaty/ *te Tiriti*, around which most discussions about the legitimacy of Maori authority or law are based, which we have seen is a text split in two. As Cleave has argued: "As a point of reference for inter-ethnic politics . . .the Treaty of Waitangi has an instability at its most fundamental level." (1989: 45) Although many claim that 'the Treaty' is the

foundation of New Zealand society and the legitimate basis for its system of laws, it is, nonetheless, a foundation without foundation, which establishes and re-establishes itself, both at the level of language and practice, by excluding its irreconcilable and yet essential partner *te Tiriti o Waitangi*. The second relates to language use within the law. Here my primary concern is with how the naming of 'the criminal', and thus the definition of law itself, tend to reflect the beliefs and assumptions of the culture which produces these laws.

A useful place to begin an inquiry into the relationship between the authority of law and the naming of the 'other' is Montaigne's *Essays*, which consider, in their entries on cannibals and experience, the extent to which notions of 'universal judgement' are based on rhetorical constructions or fabrications. In response to the writings of travellers to the "New World", he argued that in morality and law "we call barbarous anything that is contrary to our habits." (1958: 108-109) Montaigne not only alerts us to the dubious nature of the shift from localised to universal knowledge and authority, by suggesting that it is largely rhetorical, but also places this movement in the context of colonialism and the way the various tropes of colonialism (barbarism/civilised etc) have become central to our moral and legal vocabulary. Against the backdrop of the rapid expansion of the European empires into the Pacific and the Americas, Montaigne describes the correspondence between the expansion of the law from the local (European) to the universal (humanity) and the expansion of the 'I' of the travelling author to the 'we' or 'us' of humanity.

Indeed, read against the scene of colonial expansion and the transformation of the world in the name of progress and civilisation, this will to power highlights the intertwining of representational and material forms of colonisation. In other words, morality and law transform the world according to what is initially an imaginative

topography, a here and a there, an us and them, the civilised and the savage. In each instance, European 'civilisation' (the familiar) is assumed to be the universal standard for morality and law, non-European cultures thereby deemed 'uncivilised' (different), unlawful and immoral. By describing the use of such language, by drawing attention to its specific historical and cultural positioning, Montaigne shakes the foundations of law. Indeed, by separating the word savage from any specific object, by showing how it has greater function as an adjective than a noun, he jolts the entire topographic order of the language of 'civility' and law. As de Certeau explains:

> The statements are only "stories" related to their particular places of utterance. In short, they signify not the reality of which they speak, but the reality from which they depart, and which they disguise, the place of their enunciation [*élocution*]. (1986: 71)

Montaigne draws our attention, then, to the fact that systems of law and morality are inseparable from the contexts in which they were articulated and which gave them their conceptual and material form. Since such matters have been performed in a manner undeniably coloured by colonialism for at least the last 400 years, it is not surprising that many of the relations established through colonisation are enforced, justified and complemented by relations within the law. Thus, the naming of the criminal at the moment where it also names the 'native' reveals how the law, in its differentiation between the lawful and the unlawful, seems to carry the traces of the empirical and historical circumstances in which it is uttered, a residue of racial and cultural differentiation and discrimination.

The authority of the law, according to Montaigne, rests both on the might that installs and maintains it and on the mystification of this basis of its founding. As he observes: "laws maintain their credit, not because they are just but because they are laws. This is the mystical basis of their authority; they have no other." (353) This observation makes two significant points: firstly, it distinguishes between the law and justice, a distinction that creates the space for a critique of law in the name of justice; and secondly, it connects the authority of the law to physical and material domination, in short, 'might makes right'. Indeed, while one could say that the universalisation of the law is solidified through the expansion of power and the control of territories and resources (jurisdiction), it is also through the acquisition of such resources that the law establishes authority.

In a sense, the law has no authority until it has a physical or material base from which to enforce itself. In this way, jurisdiction corresponds to the areas of military or state control and governance, force and might. Of course, force must never be taken purely *as might*: the terms of law are on occasion forceful enough to give power to 'the weak'. "Enforceability" therefore refers as much if not more so to what would be conceptually or logically possible, or in Foucault's terminology 'in the true', as to physical or military muscle. The fusion of what is possible in either sense links the rhetorical force of the law to the physical force that enforces it. As Derrida observes, the law, in order to be law, must be enforceable:

> Applicability, "enforceability", is not an exterior or
> secondary possibility that may or may not be added as a
> supplement to law . . .The word "enforceability" reminds us
> that there is no such thing as the law (*droit*) that doesn't

imply in itself, *a priori*, in the analytical structure of its concept, the possibility of being "enforced", applied by force. (1991: 5-6)

An example can be found in the way the authority of various European-derived institutions in Aotearoa depends upon a corresponding physical or military authority. During the first half of the last century, for example, nothing gave Europeans authority over Maori. Since Maori were far superior militarily and since they had their own laws and customs independent of anything European, European law had little authority. Indeed, where Maori chose to follow European law, it was only when it suited them. Authority came later with the Bibles, guns and soldiers. As McHugh concedes:

> Defacto such [Maori] authority was exercised by the chiefs after British sovereignty and until the Crown was *practically* able to exercise what it claimed as matter of law. The benchmark in the process was the New Zealand Wars. A declaration of sovereignty- mere legal ceremony- could hardly of itself have changed the *de facto* government of the tribes (whatever English lawyers might have thought *de jure*). (1991: 46)

7. 'Culturalisms' and Justice

The claim that 'justice' is both imposed and culturally relative is a central thesis in Sharp's *Justice and the Maori*, still perhaps the most thorough consideration to date of bi-culturalism and the relationship between Maori, law and justice in Aotearoa.

Sharp's thesis is thus in opposition to much that I have argued. For him, Maori chose the 'rhetoric of justice' because justice had force for them; *from their perspective*, he argues, a claim to justice makes sense. The distinction between justice and discourses on justice thus collapses, leaving only a negotiation or struggle between culturally determined positions. The place of the sovereign state is then as adjudicator in such negotiations.

Sharp thus not only conflates law and justice, arguing that "justice is a virtue either of transactions . . .or of distributions" (41), but also uncritically accepts the fiction of sovereignty and the violence it masks. And yet, in his characterisations of law and justice, choice and demand, contradictions emerge which suggest that his argument is but a step from mine. For example, according to Sharp, justice is culturally and contextually specific, and yet "justice also requires that something binds the rivals" (41). He claims that Maori *choose* justice, adopt its rhetoric and make use of it "to express difference, separate interests and rights" (41); and yet, somewhat paradoxically, "[i]t is also chosen because justice demands . . .that its dictates be acted upon" (41). He argues that, while law and justice are merely artificial constructions made by certain groups to express certain interests, "[r]eal and reasonable reparation [or, for Sharp, real justice]- as opposed to socially conventional and historically determined reparation- actually defies the human condition." (283) Here, then, we find both a justice that is chosen and one that makes demands, both relative to a group and exceeding it, human and inhuman.

When Sharp insists that "[j]ustice for Maori can never be done" (285), he describes both the 'impossible' position Maori find themselves in with respect to their claims in Aotearoa and the fact that any discourse on justice must ultimately be culturally relative and thus untranslatable. Still, he notes, it must be translated. When Derrida

says "[j]ustice is the experience of the impossible" (1991: 16) he is suggesting that there is no justice without the impossible experience of its apo ia. Justice, impossible as it is, must be done. Rather than that which will not be done, it opens the economy of law, decision and calculation to that which gives justice, the impossible. Justice then could not be an imposition of law, although it implies this, and could not be reduced to revenge, paybacks, payoffs or the settling of the debts of the past. In short, justice would require a commitment to be just always and unconditionally.

Chapter Seven

Between Justice and Law in Aotearoa New Zealand: Two Case Studies

Describing the possibility of a just judgement, Derrida observes:

> To be just, the decision of a judge . . .must not only follow a
> rule of law or a general law but must also assume it, approve
> it, confirm its value, by a reinstituting act of interpretation, as
> if ultimately nothing previously existed of the law, as if the
> judge himself invented the law in every case. (1991: 23)

The law, in order to be just, must have consistency and be generalisable, and yet justice cannot be defined or determined by ontologico-normative principles, rules or faculties. As Ian MacKenzie notes: "[j]ustice, if it is to live up to its own demands, must be justice in general, and the generality at issue must not be curtailed or bounded by present concerns of any sort" (1999: 74). But, the judgement of particular cases cannot be determined simply by reference to laws or principles. As Kant noted, "a rule . . .demands guidance from judgement", since in each individual case "judgement will be a faculty of . . .distinguishing whether something does or does not stand under a given rule." (1929: 177) Judgement, according to Kant, cannot be predetermined by principles of reason or rules of law: "though understanding is capable of being instructed, and of being equipped with rules, judgement is a particular talent which can be practised only" (177). Justice too

similarly requires an attentiveness to the specific 'cases' that must be judged, it requires one to consider, as much as possible, the singularity of the other.

In the context of colonialism this line of investigation draws our attention to the way certain 'traditions' within law and politics have elided and effaced the differences between law and justice, between particular forms of law and justice *in general*, and the implications for this in terms of the 'rights' of indigenous peoples. Through a reading of particular instantiations of law as justice one can trace the complicity of law with colonialism within the imperialising incorporation and inscription of others into the language of law and the naming of the criminal and the unlawful. Here, we not only uncover proof of the law's monolingualism and monoculturalism, but also the marks of this particular historical, political and social inscription on seemingly objective categories. For example, as I have argued in the previous chapter, the definition or naming of a particular group as more violent produces particular relations between the 'lawful' or 'normal' and the 'unlawful' and 'abnormal' within law. Law is produced through such differentiation, since there can be no law without a corresponding notion of what would count as the contravention of law. Produced within a specific cultural, socio-political and historical horizon, such differentiation simultaneously produces the other as criminal, uncivil and disorderly.

It is not merely that law carries with it an unavoidable trace of the contexts in which it was applied, enacted or practised; the colonial other was not merely encoded within an economy of law, in many ways, the violent of the other, its incorporation within the jurisdiction of law, is fundamental to the law's operations. The correspondence between the lawful and unlawful, the barbaric and the civil, developed and shaped by colonial

expansion, 'discovery' and 'expedition', is at a certain level coloured by colonial conceptions of the non-Western others they encountered, settled with, fought and 'civilised'. Law reflects the historical, material and political conditions of its establishment, despite its aspirations to universality and objectivity, its expressions are those of a specific cultural and historical perspective. In this sense, any figuration of the 'unlawfulness' must also me understood in terms of its cultural and historical location. Yet, beyond any particular encoding or formulation of the law or *its* others, the violent reduction of the other forms part of its general conditions of possibility. It is important here to observe that there is not necessary link between the manner in which the law's other has been figured or named in any specific context and the fact, as a condition of its possibility, the law can only be insofar as it (re)produces the image of its structural opposite, the unlawful. In this chapter I consider the relationship between these two forms of violence through an examination of legal representations of Maori and violence, and by reference to Maori activism, the (im)possibility of non-violence in general.

Taken singularly, 'the law' is predicated on the assimilation or incorporation of all other perspectives; it hears others only in its own terms and thus only once its authority has been accepted. This authority, its 'force', is based both on the effacement or concealment of its own cultural and historical specificity and on the exclusions that mark its foundation, and, perhaps more significantly, what is beyond or before it. The representation and recognition of indigenous culture in legal contexts is, in this way, limited to the terms of the law and these have often been articulated along the lines of cultural and racial difference. Setting aside the clear relationship between crime and the dispossessive and destructive effects of colonialism on indigenous populations, one might

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wonder about the relationship between statistical evidence, which places indigenous groups in a disproportionate relationship to a whole variety of criminal activities, and the way the articulation of criminality within the law often resonates with the tropes of colonialism. In what ways is the demand for law and order made against the image of the 'uncivilised' violent other? In what way might such a notion of violence passover and presuppose another more fundamental general violence? In this chapter I will consider the relationship between legal representations of violence, activism and the possibility of justice through a number of case studies. I will consider the extent to which the law in Aotearoa New Zealand is culturally or racially biased. If there can be no talk of justice, law or order that does not evoke the ghosts of colonialism, then no 'legal' act escapes this- whether against the law, within the law or despite the law. Against this problematic I shall examine the possibility of an anti-colonial activism that appeals to justice *beyond* law.

1. *Violence and Racism: The "Haka Party" Case*

In a survey of media reportage of crime in Aotearoa New Zealand, Spoonley discovered that:

> Even allowing for the over-representation of [Maori and Pacific Islanders] . . .in criminal behaviour . . .newspapers are three times more likely to use labels such as Maori or Pacific Islander rather than Pakeha or European when describing cases of violent and sexual offending. (1988: 35)

The use of such markers of identity in reports of criminal offences is both based upon and re-affirms prevalent assumptions and associations between ethnic groups and criminal behaviour. Indeed, Spoonley goes on to note that: "[i]naccurate or exaggerated reportage can also be seen in the way that certain activities (e.g. gang membership, rape, overstaying) tend to be associated with Maori/Pacific Island groups." (35) The point is further supported by a submission to the Press Council in 1986, which noted that, in an unpublished survey of 210 newspaper reports, only non-Pakeha [or non-European descended New Zealanders] were racially identified, and that minority labels were most often used in items about disorder, crime and violence. (Spoonley) While criminals are normally identified in terms of their defining characteristics, the emphasis on ethnicity only in instances involving non-Europeans, not only reflects and contributes to racial stereo-typing, but also suggests that 'white-ness' is the assumed social 'norm' from which only deviations need be noted. The significance of the fact that when Maori are named they are so frequently named as criminal should not be underestimated. The way the criminal is named, in this context, establishes through repetition an association between the name and the context in which it appears. As Butler points out:

> This is not simply a history of how they are used, in what
>
> contexts, and for what purposes; it is the way such histories
>
> are installed and arrested in and by the name. The name has,
>
> thus, a *historicity*, what might be understood as the history
>
> which has become internal to a name, has come to constitute
>
> the contemporary meaning of the name; the sedimentation of

its usages as they become part of the very name, a sedimentation, a repetition that congeals . . .(1997a: 36)

Such exaggeration in the media not only provides evidence of an association between Maori and crime, but also (re)produces this association. As Spoonley concludes: "the options available [to readers are] . . .reduced by the way the media combine symbols to direct the audience toward [this] . . .specific conclusion." (31)

A particularly interesting example of such reportage, which relates to the discussion in the previous chapter about the representation of Maori within the law, can be found in the case of *Dalton v Police* (1979), often known as 'the Haka Party Case'. The incident in question centred on a disrespectful and obscene version of a haka performed by engineering students at Auckland University. The haka is a traditional Maori war dance, which is considered a sacred performance that embodies and "symbolises the strength and power of the tribe." (Hazlehurst, 1988: 4). As Jackson points out: "[i]f the haka is done properly, with respect, there is no abuse. If it is mocked, if it is made obscene, then there is an abuse. Under Maori law, that sort of abuse was a crime." (1991: 39) Recounting the words of *kaumatua* Dick Stirling, Ranganui Walker notes that "in former times anyone who performed the haka in a slovenly manner was chastised . . .[and anyone] who performed someone else's haka in an insulting manner could be killed." (1990: 224) The engineering students at Auckland University had engaged in a 'mock haka' each year since 1954 as part of their post-graduation celebrations. Often drunk, they attired themselves in grass skirts, painted themselves in obscenities and performed a 'haka', in

which the words from Te Rauparaha's famous haka '*Ka Mate*' were replaced by oaths, racist slogans and obscene gestures. One particular version was reported as follows:

> Ka Mate! Ka Mate! (stamping feet and slapping thighs)
>
> Hori! Hori! [Hori is derogatory term for Maori] (left hand
>
> patting the head, right hand simulating masturbation)
>
> I got the pox from (repeat actions above)
>
> Hori! Hori!
>
> (Human Rights Commission, 1979: 5)

From the first performance numerous individuals and groups had registered complaints. Despite objections made by the Vice-Chancellor, the Students Association, the University Maori Club, the Auckland District Maori Council and many students, the engineers performed the haka year after year. It was claimed that, by the late 1970s, the full force of the offence had affected the morale of Maori students and that the wider Maori community was aware of how shamed and upset their students had become (Walker). Frustrated at the failure of attempts to stop the performance, an *ad hoc* group of Maori and Pacific Islanders decided to confront the students practising their 'haka' and to demand they cancel their performance. The two groups met, they argued and a fight broke out. Later, it was alleged, a number of the defendants were physically assaulted by police and forced to sign pre-written confessional statements.

The media response to the incident quickly confirmed the racist tendencies outlined by Spoonley. The first newspaper headline on the front page of the *Auckland Star* read:

'Gang Rampage at Varsity. Students at Haka Party Bashed'. The Maori and Pacific Islanders, most of them also students, were described as a 'gang', despite the fact that, as the article itself admits, they "were not wearing any identifying "patches" . . ."(1979: 1) This 'gang', the article noted, called themselves 'He Taua' which, according to the reporter, translated as 'war party'. The article described a 'violent attack' on innocent students and the injuries they incurred, but failed to provide any background to the incident.

Similarly, an editorial in the *New Zealand Herald*, headlined 'No Place for Violence', argued that the 'haka' was not intended to offend and that offence had not been taken in the past. The editor insisted that the university was a place for liberalism and tolerance and that the attack must have been planned, probably by 'Maori radicals', and was therefore not a spontaneous act, but deliberate. Theories began circulating about the possible identities of these 'radicals'. The overwhelming conclusion in the media, with respect to the arrested 'haka party attackers', was that the law must be upheld if 'civil' society in New Zealanders were to remain secure.

'He Taua' appeared before the court facing a total of 88 charges (although many were dismissed), the two most serious being assault and inciting riot. Ben Dalton and Hone Harawira chose to defend themselves on the grounds that the engineering students had committed a crime or *hara* against Maori law. At no stage did they deny they had been involved in a fight with the engineers. However, they argued they had acted in response to the actions of the engineering students. In short, Dalton and Harawira claimed that the engineering students and not He Taua had incited violence. Judge Blackwood refused to recognise this defence, maintaining that an appeal to Maori law could not be accepted as

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legally valid. Although he agreed that the engineering students' activities could not be justified in a 'multicultural society', he ruled that:

> However offended these defendants may have felt, that does not entitle them to take the law into their own hands, which is exactly what they chose to do. They chose to operate as a lynch law, a concept unacceptable to our law, and I believe, is unacceptable in any *civilised* society. *We are one people*, of differing religious beliefs, cultural heritages and racial backgrounds. We are governed by *one law. Every civilised society* has rules by which it lives, and makes those rules of necessity so that society may survive; *without those rules the law of the jungle would operate . . .*Expressed simply, the rule of the law is that every citizen of this country, irrespective of his colour, creed, sex or status, is *equal before the law, but is equally subject to that law.* There cannot be one set of laws, for example, for one ethnic group and another set of law[s] for others. *If the rule of law is not upheld we have anarchy.* If we have anarchy then *civilised society will perish.*(Sharp, 1990: 199-200)

As Blackwood made clear, the threat to law, order and 'civilised society' is related not simply to the 'violent nature' of the defendants' actions, but also to the fact that they

appealed to *another* law. The rule of law, Blackwood argues, rules out the possibility of other laws: law, order and civilisation are equated with the repression of differences or an overcoming or sublimation of particular individual interests and desires for the benefit of 'the nation', 'society' and 'civilisation'. Unity and order are understood in terms of a single common ground to which all individuals must submit. 'The law' is thus positioned as a system based upon universal reason and common good, as distinct from the particular, parochial beliefs of the defendants. Since 'the law' provides the basis for order, unity and the possibility of equality, the assertion of Maori law is construed as a chaotic and anarchistic threat to 'civilisation'.

According to Judge Blackwood, for the subject before the law, equality means equality "irrespective of his[!] colour, creed, sex or status" (200). This is equality despite difference, an equality that refuses to recognise the particular individual(s) before the court, except as a 'particular' under a general rule. In other words, the Judge cannot and will not take into consideration any offence committed under another law, or against any system of belief other than the law and in terms of the law. Consequently, the defendants had no legally recognisable defence for their actions. However, while as a defence the appeal to Maori customs carries no weight, it does, in the Judge's eyes, make their 'attack' a more serious challenge to law. Following another law amounts to a refusal of the authority of the law and so suggests a 'dis-order' within the order, anarchy or a return to "the law of the jungle" within the state. Despite the alleged universality of law, the language used to articulate this point is inflected by its historical and cultural positionality. It seems impossible, for example, to imagine phrases such as "the law of the jungle" being opposed to "civilisation" in this context without invoking the colonial 'staging' of law.

Such words, so heavily laden with Eurocentricism, position Maori-ness and 'dis-order' outside or beyond the frame of civilised order.

It is worth making a point of comparison here to demonstrate the similarity and differences between Australian and New Zealand contexts. Like the New Zealand legal system, Australian law has recognised indigenous law to some extent. In particular, in *Mabo v Queensland* (No.2) (1992) the High Court recognised native title and in the process overturned the notion that Australia was ever *terra nullius*, a notion that provided legal support to the belief that, despite the obvious presence of indigenous populations with systems of law and culture, "Australia in 1788 [w]as uninhabited by a sovereign or sovereigns or by people with institutions or laws."(Crawford et al, 1997: 125) However, as with the New Zealand legal system, recognition of indigenous law or customs has been both limited to recognition in the terms of 'the law' and often accompanied by a degree of anxiety about the relationship between the assertion of indigenous law and authority and the threat of disorder and violence. Just as the recognition of native title in *Mabo* (No. 2) was interpreted by many as "a challenge to the legitimacy of Australia"(Morgan, 216), so too was the assertion of indigenous customary law and tribal authority in cases such as *Coe v Commonwealth* (1979) and *Walker v New South Wales* (1994) treated as a challenge to the authority and legitimacy of law and order. In *Walker v New South Wales*, for example, Mason CJ of the High Court asserted that:

> The legislature of New South Wales has power to make laws
> for peace, welfare and good government . . .in all cases
> whatsoever. The proposition that those laws could not apply to

particular inhabitants or particular conduct . . . *must be rejected*. (McRae, 1994: 160)

In each instance difference is tolerated only insofar as it is compatible with the status quo. While the incorporation of cultural differences may appear to demonstrate the equality of 'the law', ultimately such an incorporation passes over the question of the legitimacy of the foundation of such authority and enacts, in Ghassan Hage's words, "[its] capacity to manage . . .diversity."(1998: 119) In this sense, it demonstrates how legal judgement has failed to differentiate between acts of 'violence' according to law, the violence of law and its complicity with colonial violence.

2. *Law and Human Rights*

Sensing the urgency with which they needed to address the situation that emerged in the wake of the 'Haka Party' dispute, the Human Rights Commission collected examples of 'Pakeha ideology' and of the opposing Maori views and published a preliminary report, *Racial Harmony in New Zealand- A Statement of Issues*. The report was the result of a call for public submissions by the Human Rights Conciliator, who had asked respondents to philosophise about issues relating to the 'Haka Party' incident and He Taua's taking of justice into their own hands. The study was divided into seven headings ('All New Zealanders', 'Different Treatment', 'Intolerance/Tolerance', 'New Zealand as a Multi-cultural Society', 'Racism', 'Bi-culturalism, land, cultural identity and language' and 'Law/Rights') and the report organised into two categories, 'View One', "based on the central theme that New Zealand is a mono-cultural society- that we are all New

Zealanders",(1) and "View A", which "places emphasis on the view that New Zealand is a society of diverse cultural groups."(1) Opposition to the 'Haka Party attackers' from "View One" emerged with great clarity. Respondents described the 'Haka Party attack' as an "organised act of thuggery, almost a conspiracy of violence"(3), a "foolish unwarranted action by some misguided youths . . . a means of deciding an argument for primitive savages."(3)

In the section on 'Different Treatment' they argued that special provision for Maori was 'racist' and that "to make matters blatant" would allow Maori to enjoy "civilised culture while enjoying special treatment for their own culture. Heathen practices of which 'tapu' and 'tangis' are examples bring inconvenience to the whole community"(8). Echoing many ideas from the judgement, these respondents suggested that equality and democracy could only be achieved if Maori thought of themselves, primarily, as New Zealanders. Justice and equality therefore required the disavowal of difference; the assertion of Maori custom, law or identity was seen, from this position, as separatist and racist. Consequently, Maori themselves were blamed for racial tensions, because they had insisted on racial difference: "what causes intolerance between races is the emphasis on the fact of race. If Maori and Pakeha accept each other as New Zealanders equal in every way, with colour and language as interesting but incidental differences, the racial angle by colour is diffused"(10); or expressed more crudely: "Maoris [sic] must be made to understand that good things in white man's culture cannot be got without sacrifices. If they want white man's standard of living they must join the rat race on the white man's terms."(13) Against the claim that Maori did not enjoy the same benefits in law, health, education and welfare, many responded that the problem lay with Maori themselves. In

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other words, the opportunities were there, but because of the alleged laziness of Maori or their tendency to 'winge', these were not taken.

3. *The Place of Maori Violence*

This type of association between 'Maori-ness' and a place or time outside of or prior to 'modern civilised society' echoes the way 'He Taua' was translated by the media as 'war party' or 'gang' and so taken as a threat to society, law and order. Apart from this translation offered by the media, the word 'taua' has a number of meanings. As Walker points out: "*taua ngaki mate* was . . .[an] expedition to avenge a murder or death . . .[and] a *taua muru* . . .[sought to] exact compensation for lesser misdemeanours than homicide."(1979: 64) While the media chose the particular translation that suited their reading of the incident, Walker argues that the function of *taua* was neither to reek havoc nor to create disorder, but to restore order *according to Maori law*. Rather than signalling the return of a 'primitive tradition', then, it can be read as an attempt to establish equality through an assertion of Maori right.

The media translation of the term should not be understood as an isolated instance, but needs to be read in relation to the various other means by which He Taua were positioned by the media and law. The translation of 'He Taua' as 'war party', the emphasis on the 'violence' of their attack and on the 'innocence' of the Pakeha students, the suggested connection between He Taua and gangs and 'radical' groups, all repeat, in different but related ways, assumptions, fears and anxieties about the violent inclinations of urban Maori. Indeed, it is only in relation to these views that one can explain why responses from the media, the legal institution and the public rapidly moved from the individual

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'facts' of the incident to a general condemnation of assertions of Maori authority as somehow returning to a type of pre-colonial 'violence', 'barbarity' or 'disorder'. The incident itself was interpreted, not as an attempt to protect a tradition or cultural treasure, but as an attack on liberal notions of freedom, democracy and civilised society.

This view provides some explanation for the court's decision. Indeed, as Walker notes, Blackwood's response demonstrates the way 'British justice' and Pakeha notions of law and order have always treated with contempt assertions of Maori cultural and political integrity. In short, the Judge recognised the radical threat implicit within the assertion of a system of rights or law independent of European-derived law, and it is to this perceived threat that he and the media principally respond. As Walker points out:

> Gang rampage at Varsity . . .no headline could have evoked a more emotive response from the general public. The patch wearing gang member is the nightmare incarnation of the Pakeha New Zealander's worst fears . . .the Coloniser knows too well the potential of violence to achieve social transformation. It was by violence that tribal society was destroyed in the first instance and the nation brought into being. It is for this reason that the state has a monopoly on violence, because it is the means by which control and national security are maintained.(1990: 222)

Walker demonstrates how media reportage of 'the incident' reproduces a type of colonial imaginary that has continually dwelt on the perceived opposition between the civilised world of the European and the dangerous and savage nature of Maori. The ease with which both media and public moved from an isolated case to an association between Maori-ness in general and violence and dis-order shows how the meaning of 'Maori' is given, not by the object named, but by the history of the name and the intertextual relations this history has established. Past descriptions and depictions and their contexts provide a series of images or associations that give meaning to the name, or what Butler would call 'sedimentation' (1997a). Violent acts by Maori are explained, not in terms of the violence to which they respond, but by some*thing* 'Maori'. In short, such acts are attributed to the name without consideration of the way the system 'positions' the name in relation to these attributes.

4. *Representations of Violence: Mair v Wanganui District Council*

Such representations of Maori make it seem as if 'the savage', never *fully* civilised or repressed, has returned to threaten the order and unity of late twentieth century Aotearoa. It is as if, in a manner reminiscent of Hobbes's *Leviathan*, civilisation displaces and overcomes an original state of nature or disorder. Violence isn't merely a threat to order, but the return of an original (indigenous) (dis)order. The narrative of the European bringing civilisation to the Pacific is never far away and consequently marks the rhetoric of law and justice culturally and historically. The way the media reports played up the 'savagery' of the 'gang-members' and the 'innocence' of the engineering students, thus repeats the early colonial fascination and fear of Maori, expressed typically through their

reported propensities for war, cruelty and barbarism. The Maori gang member, therefore, stands as the symbol of the return of tribalism and the threat it poses to the 'civilised order' exemplified by the University.

Another revealing instance of the way 'the law' has typically taken the assertion of Maori law and custom as a threat is *Mair v Wanganui District Court* (1996). While not concerning any straightforward examples of violence, this case involved an act the presiding Judge chose to interpret as an attack on the authority of the law. Moreover, this particular case foregrounds the manner in which the Court, both as a physical and symbolic space, is a spatial and architectural embodiment of the relations of domination. The incident occurred on 31 October 1995, when Ken Mair, a well-known Maori activist, was in court assisting a friend, who was the defendant on an assault charge. Mair indicated to the judge that he would like to undertake a *karakia*, or traditional Maori prayer before court proceedings were underway. To this Judge Adeane responded: "it is not appropriate in my view for a Judge to be present in these particular circumstances during a karakia."(*Mair v Wanganui District Court*, 1996: 558) The problem with what Mair proposed was not the saying of a karakia itself, but the attempt to "have a karakia, within [the Judge's] . . .presence."(558)

According to Adeane, allowing such an utterance in the court and in the presence of a Judge would challenge the authority of the law, in so far as it gave license to a different form or type of authority within its own space. Put simply, there was no place for Maori custom in Pakeha law. Accordingly, and without any reference to the fact that prayer is allowed in English, or that defendants swear on the Christian Bible or that the law is itself derived from *British* law, the Judge made the following observation: " [c]ourts are secular

institutions and have to deal with litigants of various race and creeds, and to emphasise one particular culture creates its own imbalances."(564) In other words, the assumed impartiality of the law would be brought into danger if it recognised and allowed a *karakia*.

In response to Adeane's initial refusal, Mair argued that "part of the karakia is for everybody to be included at the beginning and it would seem a bit odd to us that one of the main players with respect to yourself, would be missing. Therefore, we would [ask] that we have a karakia in your presence."(558) Adeane again refused Mair's request because he felt it inappropriate to have a *karakia* in his presence. The Judge then left the room for five minutes in order to give Mair time to conduct the *karakia* in his absence. When the Judge returned he began the proceedings but was interrupted by Mair: "[w]ith respect Sir my intention is to say the karakia. This is consistent with my culture. It is consistent with the Treaty of Waitangi."(559) The interchange proceeded as follows:

> *Judge Adeane*: Mr Mair, I have provided you with an opportunity of doing that within the last five minutes.
>
> *Mr Mair*: The opportunity Sir was not a real opportunity. In regard to the karakia everyone should be present that is involved within the proceedings. Therefore I shall proceed with the karakia in my own language.
>
> *Judge Adeane*: If you do so Mr Mair, it is likely that you will be held in contempt of Court and held to be so by me.
>
> *Mr Mair*: Sir, it is no wish for me to be held in contempt of

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Court but it is my wish to be consistent with my culture and
the Treaty of Waitangi. . .I shall now start a karakia [starts
singing].

Judge Adeane: Mr Mair you are in contempt of my ruling. . .I
now hold you in contempt and direct that you be stood down
in custody pending further order.(559)

The following day, when Mair appeared before Adeane, he again sought to have the
karakia said and again the Judge refused. Mair insisted that he had done no wrong and that
what he did was fundamental to himself as a Maori. Moreover, he claimed he would not
get much justice "today or within the system" and that he "was not a criminal and that his
tipuna [ancestors and elders] would expect him to uphold his tikanga [rules, customs and
law] and ensure it is done properly."(560)

If the Judge's reaction to Mair's requests seemed excessive, the sentence handed down
was equally so. Mair was not only held in custody overnight, but sentenced to serve a
further 21 days in prison. According to the legal report, the severity of this sentence
corresponded to the danger of the perceived threat. From the beginning, Judge Adeane
made it clear that he did not like the idea of formally recognising the *karakia*. Indeed,
evidence of a perceived threat was later demonstrated when Adeane explained that he had
interpreted Mair's repeated requests as "a warning" to him. The legal report similarly
reflects this concern about the recognition of Maori custom and the threat represented by
Mair's actions to the authority of the Judge. According to the report: "it was a calculated
challenge to the authority of the Court"(557) and the severity of the sentence was thereby

justified because of "[c]oncern at the way some cases had been heard . . .[and consequently] the community and the wide public interest in the protection of the administration of justice had to be made plain across the land."(565)

The Judge's ruling was thus not merely a response to Mair's utterance, but a reaction to what he saw as "a warning", a threat or challenge to which the law had to respond. Given the timing and location of the incident, in the Wanganui District Court in October 1995, few would have been unaware of Mair's participation in the Moutoa Gardens occupation earlier that year in that very town. Given the frequent media portrayal of Mair as a 'Maori radical', who continually and strenuously campaigned against the Crown on matters of Maori sovereignty, many may indeed have doubted his respect for the law. Nevertheless, Mair did not openly challenge it: in Court, he followed the directions of the Judge in every respect *except* where it contravened Maori law, *tikanga* or custom. Mair's actions in Court were consistent with *his* culture and *his* laws: this was the real threat. He did not merely break with or refuse to follow procedure, but instead chose to act according to Maori law. The Judge's ruling, in response, reveals and exposes the violence of the law.

5. *The Order of Violence*

As we saw in chapter 5, despite the claim that the law hears all equally, the 'hearing' is only made possible through the ordering or privileging of voices: speech must conform to recognised procedures in order to be 'heard'; speech is thus submitted to the authority of the law in order to be recognised. This should not be taken to mean that Judge Adeane is free while Ken Mair is constrained. The relation of power is itself made possible by the way in which space and discourse are ordered. To see how the space functions we must

also note, with Foucault, that the judge does not simply possess power, but operates within a system of power: "an effect of power, and, at the same time, or precisely to the extent to which it is an effect, it is the element of its articulation."(Foucault, 1980: 98) Put differently, power situates and positions the Judge just as much as the defendant. That the Judge is empowered to do things Mair is not, is a result of the position rather than the one positioned. In this sense, power is not merely power to speak and demand silence, but also to compel speech, to listen and read silences, and to judge. And yet, as we know from the notion of precedent, such operations are always constrained.

The operation of legal discourse is made possible both by its exclusions and by its internal ordering and classification, which in the context of the courtroom translates into actual spatial relations. Foucault describes the capacity to exercise power in such a space in terms of the way bodies are distributed. On one level the room itself reflects this ordering: the judge oversees and directs proceedings from an elevated seat; the areas within the court room are clearly divided and demarcated; acknowledged speech is only possible within certain spaces and only with the approval of the judge. As Foucault observes:

> Disciplinary space tends to be divided into as many sections as
>
> there are bodies or elements to be distributed . . .Its aim was to
>
> establish presences and absences, to know where and how to
>
> locate individuals, to set up useful communication, to interrupt
>
> others, to be able at each moment to supervise the conduct of
>
> each individual, to access it, to judge it, to calculate its

qualities or merit. It was a procedure, therefore, aimed at knowing, mattering and using. Discipline organises an analytical space.(Foucault, 1977: 143)

This establishment of 'presences and absences', understood as the activation of space through the creation of differences (ordering and classification) that make 'hearing' possible, might best be analysed in terms of the definition of what can be presented or said and what must, according to the law, remain unsaid. As we saw in chapters 4 and 5, it is important here to distinguish between absences that have in some sense to be accounted for within law, such as omissions, pauses or withheld information that is nevertheless within a sphere of discloseability, and a silence or absence beyond a simply negative accountable relation to the spoken or heard. In this way, the 'grammar' of space both mirrors and complements legal discourse, making the operation of law possible through exclusion, ordering and classification, while its possibility remains dependent upon its concealment and erasure of the trace of that which would render such discourse impossible: the unrepresentable, un-utterable or unspeakable. While not signifying some space outside the bounds of the court, one could then read Mair's efforts to say the *karakia* as an attempt both to speak 'out of place' and thus disrupt the 'order' of the Court, and to expose this order as merely an order and thus reveal what cannot be revealed with court. As Butler points out:

The operation of foreclosure is tacitly referenced in those instances in which we ask: what must remain unspeakable for

contemporary regimes of discourse to continue to exercise their power? How is the "subject" before the law produced through the exclusion of other possible sites of enunciation within the law? To the extent that such a constitutive exclusion provides the condition of possibility for any act of speech, it follows that "uncensoring the text is necessarily incomplete" . . .Understood as foreclosure, censorship produces discursive regimes through the production of the unspeakable. (1997a: 139)

As with the 'Haka Party' case, it is not simply the figure of 'the Maori' that threatens the law, but rather that which both is and is not contained by the order, the marginal or repressed within the order itself, a trace 'beyond' order and disorder. Like Walker's description of the radical potential of violence or Mair's attempts to say the *karakia*, the threat of that which is not 'simply disorderly', or easily reducible to an economy of law and order 'exposes' or opens a space between law and justice and offers some explanation for the way the law responds to such acts. For, as the judges themselves make clear, the threat here is not so much the crime as the notion of a crime organised or motivated by another law *beyond* 'the law' and thus criminality. This threat is a crime that is, at once, against the law and within its realm while *against* the law from a position beyond, an act *before the law* in the name of justice. If, as Foucault observes, "[t]he role of political power . . .is perpetually to reinscribe [disequilibrium] . . .through a form of unspoken warfare; to reinscribe it in social institutions, in economic inequalities, in language, in the bodies themselves" (1980: 90), then such acts can be read as a form of insurgency aimed

at (re)establishing another order. Indeed, in Foucault's terminology, by evoking their unjust exclusion against a similarly unjust history or by gesturing to a space beyond or before law, such acts can be considered both archaeological, in so far as they seek to expose how they have been inscribed and subjected within the hierarchical order or power and genealogical, in so far as they seek to struggle against unitary and totalising discourses through the "reactivation of local knowledges".(85)

6. A Critical Digression: Traditions and the Idea of Justice beyond Law

But, as I have already suggested, the very idea of an act against the law, which is at the same time beyond law, is self-contradictory. There can be no act that does not presuppose the law or some principle of determination. Indeed, describing the relationship between the social contract and constitutional law, Kant argued that opposition to the law was not only contradictory, since it assumed a position of decision beyond the arbitration or legislation of law, "a head above a head- which is self-contradictory" (1974: 68), but also:

> the most punishable crime in a community. For it shatters the
> community's foundations. And the ban is *absolute*, so
> unconditional that even though the supreme power or its
> agent, the head of state, may have broken the original
> contract, even though in the subject's eyes he may have
> forfeited the right to legislate by empowering the government
> to rule tyrannically by sheer violence, even then the subject is
> allowed no resistance, no violent counteraction. The reason is

that once a civil constitution exists, a people no longer have

the right to judge how that constitution ought to be

administered. (67-68)

The most obvious response to this position is that it seems to foreclose the possibility

of any change beyond mere reform. In order to be just and democratic, it might be argued,

that law must reflect the interests of 'the people' or 'the community' and not some

supreme legislator. While the Kantian may respond that any such ground for 'reflection'

must first presuppose an original or foundational contract or pact, it does not follow that

this foundation or ground should remain separate from or beyond the influence of 'the

people'. The debate as I present it here represents what David M. Rasmussen has

described as the two most significant approaches to the ethical dilemmas of modernity and

moral philosophy, the one Kantian the other Hegelian, which have in one way of another

"provide[d] the forum for the vigorous, heated . . .contemporary debate in ethics" (1990:

56) that includes in its fold Habermas, Honneth, Rorty, Derrida, Lyotard and Foucault.

The two sides of this debate usefully describe the opposing positions I have tried to work

between; the tension between the problems associated with the abstraction and

dissociation from specific forms of life demanded by Kantian notions of law and morality,

on the one hand, and, in Rasmussen's words, "the recognition [made by Kantians against

Hegelians] that a principle beyond specific reference to a particular culture is necessary in

order to avoid the pitfalls implicit in the allegiance to a particular culture or tradition."

(57)

Habermas's contribution to the debate emerged from observing the dangerous potential in the Hegelian solution shaped by National Socialism, where an ethic based upon a specific form of life, expressing a particular national or cultural interest or tradition could, and did, legitimate acts that appear undeniably unethical. Habermas's solution, discourse or communicative ethics, thus attempts to find a way to develop an ethic linked to the specific forms of life or culture in which ethical situations emerge and yet avoid the destructive or distorting effects of a specific cultural viewpoint or tradition. Faced with a particular ethical problem, and in a manner not so dissimilar from Derrida or Kant, he borrows from Peirce the idea of an ideal community of speech to consider the transcendental conditions for the possibility of agreement on normative claims, independent of any material or historical determination. As Rasmussen observes:

> If Peirce provides the communal idealization necessary for
> the construction of a discourse ethic, one can return to Kant
> to provide the basis for its central motif, namely, the
> procedure of universalization. Here, Habermas attempts to
> reconstruct the conditions of the categorical imperative at the
> level of speech as a way of grounding the very limited claims
> of moral theory. At its heart, moral theory articulates the
> discursive procedures implicit in processes of
> universalization which characterize argumentation. (60)

Normative validity is determined by the acceptance of the principle of 'universalisation', which implies a procedure whereby norms are able to be contested and

are accepted only once they are understood by all without coercion. Norms are thus valid when they are determined by a rational consensus. Such normative principles are, according to Habermas, open to empirical falsification, and thus not a form of abstraction completely insensitive to particularities, but are simultaneously able to be characterised as a formal ethic, and thus not moored to a particular cultural or historical perspective or tradition.

This seems in conflict with what I have proposed, inasmuch as Habermas's discourse ethic provides a procedural justification for truth and validity claims which imply that if one speaks of something as being valid, then one assumes a certain background consensus presupposing comprehensibility, truth, correctness or appropriateness, truthfulness or authenticity. This presupposition is precisely what I have continually directed my attention toward in order to describe a certain 'before' that is always already over, but that must be engaged with if one is truly to engage in ethics. In short, this already assumed consensus is what I have argued to be the condition of possibility of ethics (as Habermas claims), but also of its impossibility.

Habermas argues that such a consensus presupposes an ideal speech situation that in turn presupposes a kind of symmetry and reciprocity. Rather than simply presuppose such symmetry or reciprocity as the necessary conditions of ethics, however, I have argued that this presupposition becomes the impossible object of ethical inquiry. For Derrida, symmetry and reciprocity are precisely what one cannot assume. One could never know or assume that the law is just or that positions are equal within a given context without, because of that presupposition, foreclosing the question of positionality, legality or 'the given' and thus of justice and ethics beyond such determinations. The possibility of justice

arises from an asymmetrical obligation that can *never* be met; it is because responsibility for the other is infinite that decision is always *undecideable*.[1]

Thus, while it may not be possible to act in a manner that is simultaneously against the law and not inscribed within its logic, it could be argued that it is this impossibility that would make justice possible. Identifying the revolutionary nature of acts similar to those described by Walker or performed by Mair, Foucault notes the radical potential of 'violence', for counter-hegemonic ends describing it as the "a return of [subjugated] knowledge"(81) which *haunts* the system. Indeed, history would seem to suggest that Maori sovereignty and authority will not be restored through peaceful measures. As Walker notes, it was by violence that Pakeha law established itself at the expense of Maori and, he seems to suggest, it will be by violence that Maori will regain authority. Both Walker and Mair argue that struggle itself has positive effects for Maoridom, in so far as it provides a way of re-asserting and reclaiming a sense of identity and cultural worth lost during colonisation. In other words, these acts are consciousness-raising, they create possibilities and open a space not conceivable within the order of the law. Here we find interesting parallels with Sartre's description of Fanon's anti-colonial project as outlining both a similar process of self-realisation through violent struggle against the coloniser and a similar coloniser's condemnation of such activities:

> no gentleness can efface the marks of violence; only violence
> itself can destroy them. The native cures himself of colonial
> neurosis by thrusting out the settler by a force of arms . . .Far
> removed from his war, we consider it as a triumph of

barbarism; but of its own volition it achieves, slowly but

surely, the emancipation of the rebel, for bit by bit it destroys

in him and around him the colonial gloom. (1967: 18)

But, of course, the forceful installation of Maori law would be no guarantee of justice

were it to achieve authority only by displacing or excluding Pakeha law. Justice would not

be a return to the order before colonisation (as if this were possible). It would not be the

fulfilment of a dialectic, reconciliation or utopian revolution. In so far as the very meaning

of Maori implies the notion of non-Maori, the return of a former order would only be at

the expense of those it refused to acknowledge. Indeed, such an order could itself be

defined only negatively against the order it supposedly renounces. As Laclau notes: "[i]f

we simply *invert* the relation of oppression, the other (the former oppressor) is maintained

as what is now oppressed and repressed, but this inversion of the *contents* leaves the form

of oppression unchanged." (1996: 31) In other words, if Maori law were to be the system,

this would not, *a priori*, be any less oppressive.

The particular aspect of these cases that concerns me is not the assertion of a superior

law or system. Rather, what I find interesting is the way what may now be conceived as

violence to the system, as disorder, may later come to be seen as the restoration of order or

the institution of another system. The violence of the system, of its exclusions and

imposed order, produces this opposition. The more forcefully the law responds, the more

likely it is to be opposed. The radicality of the intervention posed by the 'Haka Party'

attackers can be seen most clearly, then, in their refusal to accept the divisions of the law

itself; not in their claim to be innocent or guilty under the law, but, in the appeal to another

law. By arguing that they were acting according to Maori law, by claiming that they spoke from a position outside the law, the defendants were able to call into question the relationship between the violence of the 'mock haka', the 'attack' by the 'Haka Party raiders' and the allegedly violent assault of the defendants by the police. In short, they attempted to shift discussion from relations within the law to relations between laws. The defendants questioned the legitimacy of the Court to decide such matters. Ben Dalton, for example, argued that:

> The law had been developed under European culture to accommodate Pakeha morals, mores and standards. A Maori in court was at a disadvantage because he had to justify his attitudes, his way of life and his reactions to a court bound by a system that did not recognise his rights to have different cultural beliefs, morals and ideas to the majority culture."
> (Hazlehurst, 28)

The matter brought into question, then, is the right of Pakeha to judge Maori and the legitimacy of 'the law' in relating to Maori. Such challenge reveals violence at two inter-related levels: firstly, representation in the sense of "acting on behalf of" in so far as the law fails to represent Maori interests and beliefs or to provide a space into which Maori can enter as equals *and* on their own terms; secondly, re-presentation in the sense of depiction and definition, in so far as the law (re)produces definitions, characterisations and

depictions which place and fix the position of Maori in a way that is disadvantageous and disabling.

7. *Activism and Violence Against 'the Order'*

Thus, the aim of anti-colonial 'violence' need not merely be to overthrow the settler, but to displace the system of oppression itself; it is, as Sartre notes, "to kill two birds with one stone, to destroy the oppressor and the man he oppresses at the same time: there remain a dead man and a free man."(19) Through such appeals to another order ('before'), these 'violent' acts threaten the present system, by the way in which they make visible the repressions or exclusions which give 'the law' authority. Through recourse to past and present injustice, they attempt to draw attention to the relationship between the authority of the law and the repression or exclusion of difference. For the law loses it legitimacy if is seen to be exercised or applied excessively or unfairly. By saying what the law requires to be forgotten, radicalism makes it possible that the law be made to appear unjust, illegitimate and unfair. It is in this way that the figure of the past returns to haunt the law, returning not as the savage, but as the innocent, the oppressed and the persecuted. The law, in order to be law, must always conceal this figure by repressing it as the body of the criminal, as violence or the antithesis of order. And yet, in its efforts to do so, especially when confronted or challenged, it must be careful not to respond excessively or violently. As Derrida points out:

> In . . .a founding or institution, the properly *performative* act
>
> must produce (proclaim) what in the form of a *constative* act

it merely claims, declares, assures it is describing. The simulation or fiction then consists in bringing to daylight, *in giving birth to*, that which one claims to reflect so as to take note of it, as though it were a matter of recording what *will have been there*, the unity of the nation, the founding of the state, while one is in the act of producing that event. But when legitimacy, indeed, legality, becomes permanently installed, it recovers its originating violence, and is forgotten only under certain conditions . . .[In certain historical cases, however], certain "conventions" were not respected, the violence too great, *visibly too great* . . .the disproportion of wealth *too* flagrant. From then on this violence remains at once excessive and powerless, insufficient in its result, lost in its own contradiction. It cannot manage to have itself forgotten. (1987a: 18)

Such a threat to the law can be seen as the threat to reveal it for what it is, to expose the violence that maintains it, and thus to open a space for critique. By attempting to set up parallels between the violence of the cultural offence, their own attack on the engineering students, and their assault by police officers, He Taua offer us an opportunity to consider the relationship between these 'crimes' and the positions from which they are judged. Indeed, the discussions that emerged from the "Haka Party Case" appear to have provided a similar opportunity to expose the injustice of law and, by extension, the illegitimacy of

the Pakeha state. The media condemnation of the 'attack' provided only one side of the picture, but the considerable support for the 'attackers' suggested the other. The case made available an opportunity to voice more general concerns about the state's relationship with Maori: support for the 'attackers' from the Auckland and New Zealand Maori Councils, the Maori Women's Welfare league and numerous prominent Maori made clear that the case could not be taken as a matter of simple legality. An attack by Walker on the media summed up the sentiment:

> How can we accept the failure of our newspapers to elicit the facts outlined here? How can we reconcile fairness with the biased, sensational treatment of the affair and the scapegoating of Maori Leaders who dared to suggest there was an alternative viewpoint? Pakeha New Zealanders awake from your slumber before we are stranded on the rock of racism! (1979: 65)

As Walker noted, the He Taua attack on the engineers' haka party effectively exposed "the raw nerve of racism in New Zealand society, which for so long had been concealed by the ideology of Maori and Pakeha as one people living in harmony." (1990: 225) This description also came with a warning: "the Maori is not intimated by power, just as the fighters of a warrior race were not intimidated by the big guns at Orakau or Gate Pa. . . justice cannot be denied by repression . . . the struggle will go on forever." (219)

Perhaps more powerfully than any physical attack, the act of exposing the law, of challenging it in the name of justice, makes it possible for the law to be seen as a reflection of a particular cultural interest and hence as co-opt-able, takeable and able to be made to serve another end, that of the other in the name of justice. The important difference between this use of law and the way the law has operated in the current system would be the belief that judgement is never final or universal, but always partial, positioned and incomplete. In other words, and as I have argued many times in the previous chapters, justice would never be in the present, but only ever in the future, never done but always to be done.

Endnotes

[1]. Of course, as I suggest in chapter 1, it is not entirely necessary to read Habermas against Derrida in this way. As Critchley points out:

> despite Habermas's moral cognitivism and his insistence upon the symmetrical nature
> of intersubjectivity, it is clear at the very least that there is work to be done here and
> that possibly Habermas and Derrida share more with each other than they both share
> with Rorty, especially when it comes to political matters. (107)

Chapter Eight

Conclusion: Representation, Memory and a Chance for Justice in the Future

In this chapter I readdress a number of the central concerns from the previous chapters. I shall offer few simple conclusions, however, and I what I shall offer may appear vague and ambiguous in places. But, while I am hoping that what has been presented in previous chapters will provide it with the grounding or points of reference that give it 'sense', as I have argued, there is always a gulf between any representation of any case, an individual example concerning 'justice', the object of memory or 'community' and the objects signified, a gulf that would always already assume something beyond exposition, description or characterization, a relation that makes possible agreement or disagreement between representation and represented. This does not itself justify the absence of detail or specificity within this chapter. Instead it gestures toward that (non)space of indeterminacy, that opening of a horizon of expectation, intelligibility or possibility that previous chapters have sought to highlight and put to use.

The ambiguity of this chapter is thus intentional. Retreating and moving back from the specific individual cases to consider broader concerns, I hope that this tension between specific localised concerns and a certain lack of specificity can enable me to demonstrate or produce a tension between the types of argument I have offered and the determination of their 'proper' subjects. Throughout the thesis I have been particularly interested in the way certain terms operate; how terms or proper names, often presupposed or taken as the

departure point in discussions about cultural politics or justice, terms like 'us' and 'we' or 'they' and 'them', are given, determined, circulated and encoded. My interest here has been largely with reconceptualising this relationship between certain names, the subject-positions they appear to designate and questions about justice, democracy and ethics, such that these questions are seen to emerge 'before' such positions or identities; before, as we have seen, meaning radically 'prior to', as a question concerned with the giving of positionality and the determination of a related field of possibilities and 'before' meaning a later or after that opens the 'possible' in terms of determinable positions to a future "here, now".

By attempting to highlight the indeterminacy opened between and beyond the descriptive and performative deployment of these terms, particularly where such 'names' are used in conjunction with claims, promises or hopes for justice, where the possibility the future offers gives the chance to reflect upon the determination of the terms and what they imply, by focusing on the space or moment that links the past and the future, *here and now*, I hope to dwell on the 'chance' reflection gives us. When I speak of these remarkable interpellations 'us', 'we', 'self' and 'other', therefore, I do so knowing that these terms are constrained, coerced, forced and imposed; how they operate within a field of possibilities; how they make a politics or ethics possible; how they bring with them obligations and responsibilities. But I also do so knowing, as much as this is possible, how the reception of these dispatches can never be completely determined in advance, how when I utter the terms 'us', 'we' or 'them', we could never be sure who these terms might include, how they open with the question of the future as they do with the past, how this

undecidability signals an opening to a beyond, a chance for justice to come and a just community.

1. *'Chances'*

On Saturday 6th November 1999 a Constitutional Referendum was held to determine whether or not Australia would become a republic before the Centenary of Federation on 1 January 2001. Advertisements in the media stressed that the referendum offered Australians the opportunity both to reflect upon Australia's past and help determine its future. Coupled with the sense of a new beginning, of the closing of the old and the opening of the new with the passing of the millenium, many argued that this moment was unique. One of the more prominent debates concerning the possibility of a constitutional change focused on the relationship between European-Australians and Australian indigenous peoples and cultures. Despite the uniqueness of this moment, of course, there have been many others: the past 30-40 years has provided many opportunities from which past and prevailing notions of the relationship between nation, citizenship and Aboriginal cultures could have been, and sometimes were, significantly challenged. These 'chances' seem dependent on many factors and, while for some the responsibility may seem to rest elsewhere, with ancestors, politicians, political systems or available resources, in a certain sense responsibility *must* be taken.

Read against the background of government-funded reports and commissions on Aboriginal Deaths in Custody and 'Criminal Justice', the 'Stolen Generations', Health and 'Reconciliation', and the 'uncovered' histories of violence, dispossession and displacement described by revisionist historians such as Henry Reynolds, the opportunity,

the appeal or demand for response, responsiveness and responsibility has long been present, and has never been limited to a concern with republicanism or monarchism, or any other political form. *For some time now* (some) Australians have begun individually and collectively to acknowledge a past different from the one taught at school: 'we' know about massacres, officially and unofficially sanctioned extermination and assimilation policies, the removal, separation and destruction of families, kin-groups and communities, and the destruction of a way of living.

At some time, for some past *for others* in some time to come, *when* individuals and collectivities have recognised and acknowledged what they must, *when* 'they' recognise this as an ethical and political imperative, as an 'I' or 'we' must, *when* 'they' see what 'they' must and yet cannot recognise, what for them is beyond recognition and the imperative, *then* the 'chance' such news brings will open the possibility of justice. This possibility of imagining what may not be possible *yet*, or re-imagining and re-membering what is unrecoverable, offers 'us' a project for the future. Against the distinctions drawn by the Howard government between the present and the past *Bringing Them Home*, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, according to Frow: "imagines . . intrication of historical times . . .[as] *resonance*, the passage of a succession of overlapping sound waves outward in echoing repetition from a point of department. "The actions of the past", it proposes, "resonate in the present and will continue to do so in the future"." (1998: 3)

Here we have a politics of testimony and listening, acceptance, reception and responsiveness. There is a demand to hear, acknowledge and respond to what has been, is and will be, as impossible as this because of its fundamental unintelligibility. We could

never adequately put names to these experiences, though we must name them; we could not know them, though we must try; no act or response could ever adequately answer or settle them, though we must act and respond. Ethical response here would not be to act simply according to duty, obligation or calculation. This should never amount to the mere settling of debts. Here my argument connects, not only with issues of law, but also of judgement and receptivity more generally. Such a response cannot function as transaction, or as the simple application of law. As Derrida argues:

> If I were content to apply a just rule, without a spirit of justice and without inventing the rule and the example for each case, I might be protected by law (*droit*), my action corresponding to objective law, but I would not be just. (1991: 17)

Frow notes of the politics of apology, the gift of apology, that if it is reduced to economic terms, calculated and measured, it would be no gift at all: "[i]n the case of a bad apology, it is 'as if the words themselves were simulating money.'"(4) To be sure, an ethics prior to calculation cannot be thought. Yet, the impossibility of this allows us to think the unthinkable. As Edith Wyschograd observes, there is an indispensable complement to the imperative as received or thought within law:

> the will of the other. . .The other's demand is a command in that it impacts upon my rule for proposed action as thus

affects what I will do. . .it is the sheer pressure of alterity, of

a will not my own, that impels me to form my maxims by

responding to this . . .[other] will that obliges me. . .This

calling into question [by the other] cannot be a datum of

consciousness . . .Alterity can only weigh in a sheer demand,

"a summons to answer, [not merely] as an obligation or a

duty about which it would have to come to a decision; it is in

its very position wholly a responsibility." (1998: 48)

To assume the other within 'the thinkable', 'the do-able' or 'the possible', would in

Levinas's words, be to violently submit the other to anticipatory horizons that confine the

other within the same, and so alter and compromise the alterity of the other (1991). Every

determinable telos is still "present", has already been anticipated within the horizon of

what presently prevails, of what is merely "possible". But, as Caputo points out, this

notion of the wholly other, the other as other is "unthinkable, impossible,

unutterable."(1998: 20) Does this impossibility then name a failing or describe the futility

of such lines of inquiry? On the contrary, Caputo argues, it is here that "Levinas calls us

toward this unthinkable-impossible-unutterable beyond" (20). Perhaps, as Derrida adds,

we would in truth be put to another kind of test by the apparent negativity of this lacuna:

by this hiatus between ethics . . , on the one hand, and, on the

other, law or politics. If there is no lack here, would not such

a hiatus in effect require us to think law and politics

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otherwise? Would it not in fact open- like a hiatus- both the

mouth and the possibility of another speech, of a decision and

a responsibility . . .(1999: 20-21)

The 'chance' of the encounter or the event offers an opportunity for some 'I' or 'we' to

act, and the possibilities this chance opens for acting are also the chance for an I or we

preceding, *giving* an opportunity beyond determination for an 'I' or 'we' to come. There

is, then, a certain becoming opened up by this appeal, a challenge to nation, citizen and

subject that provides an opportunity to rewrite these categories, positions, designations or

destinations.

Leaving aside the matter of the referendum or the millenium, I will take from these this

notion of a concern with the past and the relationship between 'us' and 'others', the

opportunity to judge and the chance for and of reflection, translatability, representation,

justice and memory.

2. *History, Names*

When many scholars speak of *the* history of 'New Zealand' or 'Australia' they ascribe

a form of unity or stability to their object of study, *as if* there is such a thing, *as if* it were

possible. Historical inquiry would thereby be a matter of determining what is and is not

significant with respect to such an invocation, what would and would not be *proper* to that

named object, *as if* such an object existed. Insofar as each aspect attributed to the

historical, political or legal object 'Australia' or 'New Zealand' is essentially determined

through the attribution of a variety of properties and attributes to these names, that

stability would rest upon whatever it was that established this relation, not merely the

ability to link together what is linked in naming, but also the properness or legitimacy of that linkage. To ask how this relationship between signifiers and signifieds is determined would thus not only bring to the fore the question of the conditions under which such an attribution came to be, but *of* the possibility of attribution itself, the economy of meaning, the *properness* of economy. For in a simple investigation into the name of these names, or in the name of others, passing over the question of the *properness* of the name or the basis of its legitimacy would risk reducing that which is called under the name to its designation within that *particular* economy or system.

This would, of course, not rule out the respectfulness that one ought to attribute to the name of another or the acceptance of another authority with respect to the name. But, as I have argued, there can be no such respect nor politics of the name without the question of what is beyond both determination and name.

Speaking thus I risk confusion. I should, of course, give some substance to my subject, provide some grounding and speak in context. What I am arguing for here is not a retreat from the specificity of the name, of the empirical, or history, fact or truth. But, speaking concretely, assuming a context and a set of given meanings risks going too far, too quickly. Without sufficient time, instead of adequately outlining the scenario, naming the characters and describing a crime, I have cultivated a struggle between the various cases I considered and the question of how their presuppositions effect and determinate the problem in question.

In each of the cases I outlined, where the 'meaning' of the term indigenous has been contested, negotiated or debated: the 'Hindmarsh Affair', the interpretation of *ta moko* or the Treaty of Waitangi/ *te Tiriti of Waitangi*, the legal response to Maori activism or the

various legal, historical or political interpretations of past relations between indigenous and non-indigenous Australians all demonstrate this tension in differing ways. In each case the stake in such contestation, negotiation or debate is real and clear: the risk in the giving of names, what they are taken to imply, who gives, who is given rights, entitlements, property and 'properness', is obviously great. Here the treatment of representation as mere re-presentation of what already is passes over the critical matter of how representation determines and consolidates our sense of what is. Each example, in a slightly different way, both leads us to a politics a reception, tradition and inheritance and forces us to consider the very ground of the name, its legitimacy and authority and, simultaneously, the authority of this authority. In short, the investigation into the name, which opens into a consideration of the historical, material and cultural conditions of naming, is at once a moment for critical reflection and political intervention.

4. *The (Impossible) Break*

Discussing the (im)possibility of breaking from the closure of Western metaphysics, Althusser suggests that:

> Not the repetition but the non-repetition of this space is the
> way out of this circle: the sole theoretically sound flight –
> which is precisely not a *flight*, which is always committed to
> what it is fleeing from, but the radical foundation of a new
> space, a new problematic which allows the real *problem* to be

posed, the problem misrecognized in the recognition structure

in which it is ideologically posed. (1970: 53)

A new space could not be forged *outside* the language of Western metaphysics, since that outside would already be determined by that language. Instead, as Althusser notes, one must think of the break from this closure in terms of a repetition that would be a non-repetition, a flight that would not be a flight - in short, the performative iteration of the difference as the same, within the same. The problem, Althusser observes, is that the problem philosophy addresses has been "formulated on the basis of its 'answer' . . .the formulation of the *problem* is merely the theoretical expression of the conditions which allow a *solution* already produced" (52). The possibility of producing a knowledge concerned with what is other than the closure of knowledge, insofar as that knowledge would be the effect of the problematic that structures it, would have to be open to, and able to be transformed by, that which it is not: non-knowledge, non-philosophy, 'the not' or trace of the other. What is possible would then be determined by that which is 'before' it, 'before', as I have argued, both in the sense of radically prior to and in front of or beholden to, 'the problematic', the question or the call. This indicates the relevance of affect, a 'before' that 'moves' or 'touches' 'us', insofar the becoming of a subject is taken to be affected by this before and yet able to affect this relation to this before. Drawing together the problem of the unknown or unknowable that affects and unsettles the 'ground' of self, Derrida observes:

A secret always *makes* you tremble . . .On the other hand,
trembling, at least as a signal or symptom, is something that
has already taken place, as in the case of an earthquake
[*tremblement de terre*] or when one trembles all over. . .
Where does this supplementary seal come from? One doesn't
know *why one trembles*. This limit to knowledge no longer
only relates to the cause or unknown event, the unseen or
unknown that makes us tremble. (1995a: 53, 55)

Here, despite the abstract and highly theoretical nature of the point, the connection
between this line of questioning and 'practical' politics or ethics becomes clear. Reposed
as the question of the unrepresentable Other, one can note that, insofar as the
problem(atic) already determines what can *be* (known, said, or enacted), the problem -
which translates into the 'call' of the other - would transform field, object, or closure. This
relates generality to the questioning of the 'given' form of a consciousness, community or
polity and the possibility of it becoming otherwise. By thinking the giving of the given or
the 'presencing' of the present one is able to move from a questioning or acting in terms
given within a specific economy, modality or closure to *the* question *of* economy,
modality or closure *in general*. In Marx, as with Heidegger and Derrida, this move is
precisely what would make 'revolutionary' thought or consciousness possible, where the
question of the relation between a specific form of thinking and a particular 'world' and its
material conditions is posed. In Marx and Engels's *The German Ideology*, for example,
the connection is between "German philosophy and German reality, the relation of their

own criticisms to their material surroundings" (1989: 41). Marx's notion of the mode of production, we must remember, is neither simply a form of physical existence nor simply that which produces individuals or is produced by them:

> This mode of production must not be considered simply as being the production of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite *mode of life* on their part. As individuals express their life, so they are. What they are, therefore, coincides with their production, both with *what* they produce and with *how* they produce.(42)

Within a specific mode of production individuals cannot recognise their particular historical and material conditions of possibility without posing the question of what is 'before' or beyond 'world' or 'the given'. Despite the more problematic aspects of Marx's formulation of this form of recognition, where he even goes so far as to characterise the self-realisation of man in terms of the unity between thought and being, for example, this description of the relationship between critical project, alienation and reification is particularly useful. According to Marx, the alienation of labour is exemplified, first, in the relation of the worker to the product of his or her labour and, second, in the relation of the worker to his or her own activity. The workers in capitalist society produce commodities and, in terms of this mode of production, produce themselves. The commodities are

produced by independent entrepreneurs for purposes of profitable sale. The worker labours for the capitalist, to whom they surrender the product of their labour. As Marcuse explains:

> Capital is power to dispose over the products of labor. The more the worker produces, the greater the power of capital becomes and the smaller the worker's own means for appropriating his [sic] products. Labor thus becomes the victim of a power it has itself created. (1955: 276)

In this manner, the object the labourer produces is encountered as an *alien entity*, a force independent of its producer, and thus the worker alienated from his or her product is at the same time alienated from him or herself. As Marcuse notes: "[t]he process of alienation affects all strata of society, distorting even the 'natural' functions of man [sic]. . .The system of capitalism relates men to each other through the commodities they exchange." (278-279) Through reification, capitalist society makes all relations between individuals take the form of objective relations between things.

This reduction of all things to *mere* things, to the value ascribed to them within capitalist exchange, relates usefully to what I have said about the designation of the name (value) within a particular system (or economy) of meaning. The critical point made in both cases is to see beyond the given terms, to consider the conditions under which meaning or value is given, in short the giving of the given. As Althusser argues, Marx forces us to abandon "the mirror myths of immediate vision and reading, and conceive

knowledge as production." (1970: 24) What political economy does not see, Althusser argues, is not some pre-existing object able to be but not seen, "but an object which it produced itself in its operation of knowledge and which did not pre-exist it." (24) Here, then, the problem knowledge must engage with is that of the conditions under which knowledge is possible, not mere epistemology or matters of what can be known, but the possibility of knowledge itself.

Making clearer the connection between Marx's critique and the questioning of the economy of meaning or representation in relation to the gift, Althusser suggests that, with the exception of Marx, past philosophers had not been able to provide an adequate critique of capitalism, because they had failed to understand how thought within this system is conditioned by it: "in general a philosopher *thinks in it rather than thinking of it*, and his [sic] 'order of reasons' does not coincide with the 'order of reasons' of his philosophy." (1979: 69) If one puts aside the problems with Marx's critique of this system, particularly those concerning the notion that behind or beyond alienation or false consciousness there exist assumed real conditions and individuals that are only covered over or masked by ideology, then we might go so far as to suggest that we find here the core of a critical project not entirely different from Derrida's. As I have already suggested, what Marx's examination of the relationship between the mode of production, consciousness and revolution directs us toward is the need to look beyond the apparently everyday or common sense terms of 'reality', beyond the terms as they are given within capitalism to a space beyond but, *conceived within*. As Barbara Johnson notes:

Marx's critique of political economy is not an improvement in it but a demonstration that the theory which starts with the commodity as the basic unit of economy is blind to what *produces* the commodity- namely labor. Every theory starts somewhere; every critique exposes what that starting point conceals, and thereby displaces all the ideas that follow from it. The critique does not ask "what does this statement *mean*?" but "where is it being made from? What does it presuppose? Are it presuppositions compatible with, independent of, and anterior to the statement that seems to follow from them, or do they already follow from it, contradict it . . .? (1981: xv)

This observation provides an interesting point of connection between this form of critical project and the possibility of postcolonial resistance, particularly in relation to debates about the (im)possibility of taking a position against colonial discourse without re-inscribing or reproducing colonial relations or power of conceptual categories. As far the possibility of resistance or revolution is concerned, Johnson suggests that revolution implies the formulation of a new problematic in terms of the old. As Laclau observes, this explains why in the work of Marx:

the anachronistic language of revolutions . . .is inevitable: the old revolution is present in the new one, not in its

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particularity but in its universal function of being *a* revolution, as an incarnation of the revolutionary principle as such. And the Marxian aspiration of a revolutionary language that only expresses the present, in which the 'content' overcomes 'phraseology', is pure impossibility. (1996: 72)

In short, one thinks only from within a tradition, in terms of a given set of historical and cultural conditions. *Critical thought* is possible, therefore, only if one conceives of one's relation to these conditions as one of critical reception. In this way, critical receptivity would seem to depend upon the possibility of that impossible space of critique within the closure of tradition itself. Here, in the apparent impossibility of revolutionary language, we find the possibility of justice and democracy in what Derrida calls the logic of spectrality: "an idea of justice- which we distinguish from law or right and even human rights – and an idea of democracy – which we distinguish today from it current concept and from its determined predicates today." (1994: 59) Within any such closure the haunting figure of spectrality, what he terms "a paradoxical incorporation . . .[a] Thing that is not a thing, . . . that is invisible between its apparitions" (6), reveals the paradoxical nature of any incarnation or instantiation of 'the name'. There can be no original or first instantiation of the proper, without already invoking both the 'sense' of that which is brought into being before its being and some other form of authority which could recognise this originary form. Any such posited figure, entity or thing must always already rely on this doubling, whereby what is originary and proper would require both a conceptual image of itself before itself and a relation to another, the improper or non-

originary, in order to be recognisable. The originary cannot claim conceptual, logical or temporal priority since its sense requires this relation to another, because, in order to be recogniseable, it must already be *in* relation. Thus, the 'sense' of the name presupposes both a generality beyond any particular instantiation or mortal limit and an embodiment or representation of that generality: between body and spirit, the logic of the spectre opens any determinate economy to its more general conditions of possibility, while marking that opening to 'beyond experience' with the traces of the empirico-historical horizon in which it occurs, since that opening is always already folded within experience. 'Between' the particular and the general, according to Laclau, we discover a 'spectral' relationship that can be characterised as hegemonic:

> one in which a certain body presents itself as an incarnation
> of a certain spirit: a certain body tries to present its particular
> features as the expression of something transcending its own
> particularity. . . the very fact that other bodies compete to be
> the incarnating ones, that they are alternative forms of the
> materialization of the same 'spirit', suggests a kind of
> autonomization of the latter which cannot be explained solely
> by the pure logic of spectrality. (1996: 71)

I will return to this narrative of ghosts and spectres. Here, however, it serves to draw together what I have noted of Althusser's notion of the problematic and Derrida's notion of the possibility of justice or a just relation to the other: how what Althusser would call

the question of the question or the problematic can be seen to effect an opening of structure, closure or economy that leads to what Derrida terms the structure of a messianic eschatology. This finds in both deconstruction and Marxism that which *could* affect being, as impossible as this is, making being 'other-wise'. The preservation of that question or opening, rather than its foreclosure as the reduction of the other to a self-consolidating other (or economy of the Same), enables one to think the question of how problematic determines 'being'. Instead of answering or re-presenting the problem one should attempt to *address* the problem, injunction or encounter- seeing the formulation of the question or the impossible experience of the aporia as that which would activate a form of becoming.

The point, then, would be to think the impossibility of bringing the unrepresentable into speech or language, while simultaneously attempting to think this impossibility as an opening to (or more problematically, for) the 'non-speaking' other. Any movement, act or utterance that would 'break' from the closure of 'speech' or 'thought' would, in its recognition, bring that movement, act or utterance back within its closure. Yet, as Althusser suggests, mis-recognising the same transforms the same. Opening to difference outside of the economy of the closure might allow difference to affect, break or interrupt economy. Situated on the 'margin' of 'Western thought', the problem articulated by Spivak, Derrida and Levinas of an unknowable, non-speaking other can effect and affect a becoming of 'the West' to its other and the other to 'the West'.

This, I believe, describes and prescribes the tension within my current project. There is, in historical, political and legal studies, both a need to say what must be said, to attend to concerns and to attend to them in to their singularity and a need to remain open to an encounter with the unanticipated, an obligation to receive, respect and respond. Indeed, as

I noted in the introduction, scholars of 'post-colonial' theory have not only engaged in rigorous historiographic studies, but also cast critical attention upon the 'conditions of possibility' of the presentation of 'the empirical', thereby revealing much about both the historically and culturally specific conditions under which the terms of inquiry are assumed and the way such inquiry operates within both particularised and more general relations of power.

4. *Ghosts and the Terms of the Past/Future*

In *Uncanny Australia* Jacobs and Gelder make use of the relationship between a politics of the present and the intervention of the ghosts of the past. This has an obvious relation to their own interest in 'the uncanny' and the 'unsettling' return of things repressed or forgotten. However, the notion of the ghost also has an interesting relationship to the problematic of representation I have outlined. Asking about the familiarity of Australia with its ghosts, Jacobs and Gelder connect the 'uncanny' relationship between a certain point of dispatch, or referent and a reception with the process of reconciliation. The site of hauntings and ghost stories, while appearing empty or uninhabited, they argue: "are always more than what they appear to be . . .[t]hese are 'excessive' things". (31) Even more perceptively, they add that ghosts cannot function in "a climate of sameness, in a country which fantasises about itself as 'one nation' or which imagines a utopian future of 'reconciliation' in which . . .all the ghosts have been laid to rest." (42)

Reconciliation should not, therefore, be taken to be the neutralisation of differences just as forgiveness and justice with respect to past wrongs should not amount to a form of

remembering in order to 'settle up' and move on. Any attempt to settle or put to rest the ghosts of the past recalls them only in order to exorcise or forget them. As Zizek notes:

> The point is *not* to remember the past trauma as exactly as possible: such "documentation" is a priori false, it transforms the trauma into a neutral, objective fact, whereas the essence of trauma is precisely that it is too horrible to be remembered, to be integrated into our symbolic universe. (1991: 272)

The fact that the traumatic unsettling effects of these various spectres cannot be remembered makes possible reconciliation as an act of justice and forgiveness. Moreover, any attempt to fix or determine a given set of relations or identity would contain this (im)possibility as the fixity itself conjures up a space or force of opposition. As Keenan has argued:

> [t]he identity of an ideological field is made possible by a signifier [such as 'Aboriginal'] – the *point de caption* – that stops the sliding of the proto-ideological signifiers and fixes their meaning . . .But if this name holds the field together . . .it is only at the cost of opening "a discontinuity in reality" . . .because it refers to nothing but its own totalization – and hence of opening the possibility of its own undoing. (1997: 182)

5. *Justice*

This problematic can be rephrased to better fit the specific discussion with which we have been engaged: how might a certain 'we' engage with the past, how might we respond in an adequate way to what confronts us 'here, now', given that this past could never be re-presented, known or recognised, given that there never could be a 'proper' or final and full reconciliation or settlement, given the differences between 'me', 'you' and 'them', before 'us' and 'others'? If in the words of Andrew Sharp, law is not indigenous 'by definition', if 'our' language betrays 'our' interests in justice, how could 'we' have a just relation between the indigenous and non-indigenous that was at the same time legal, or from 'our' point of view 'proper'?

Marking a specific instance of the possibility of appropriating the imported terms of law and right, appropriating what never was, in actuality, 'proper' to the coloniser, Derrida describes Nelson Mandela's struggle against apartheid in the name of human rights. The possibility of justice, its power, in this instance derives from the impossibility of claiming justice as part of some particular form of law, as claiming as one's own. Mandela admires the law, this 'foreign' law, because his admiration and reflection allows him on occasion to turn it against those who claim to be its guardians, so as to reveal what has never yet been seen. He admires it because the question of what is before this *particular* form of law, which presents itself as a form that legitimately and justly represents South Africa, what is not represented, indeed unrepresentable within this form, could nevertheless always be asked, given the right circumstances. Because it is impossible to say and know that a particular act, decision or judgement is just, justice is possible. Because, in order to

be just and democratic, any particular law or judgement must be open to interrogation and questioning, since the claim could always be made elsewhere, Mandela finds the 'seed' of democracy and justice within the terms of justice and judgement. The virtuality of this 'seed' would tie together the project of what lay before any particular actualisation and the promise of what is to come. This virtuality of that which is to come need not, however, imply a future exterior, distant or removed, since, *insofar as it is virtual*, this future would be a future 'here, now', to come but also both here and coming. According to Derrida, the subjects of resistance attempt:

> to speak the other's language without renouncing their own. And in order to effect this translation, their common reference henceforth makes an appeal to a language that cannot be found, a language at once very old, older than Europe, but for the reason to be invented once more. (1986: 333)

The claim that there can be no entirely new language or resistance, therefore, is not a cloaked acceptance of the status quo. Instead, it pushes us to work hard with what we have, to sift and search for the new in the old and the old in the new. As Ranganui Walker notes of attempts by Maori to find space for their specific interests in terms not their own, in the language of European-derived law and politics, anti-colonial struggle may be best achieved through and appropriation of these terms, an appropriation that 'takes' what never really belonged to European law or politics. In the words of Foucault Walker finds

the expression of this possibility of inflecting and re-orientating the terms of 'the West' in the interest of Maori sovereignty:

> The assertion of tino rangatiratanga [Maori self-determination or sovereignty] has been predicated on what Foucault identifies as 'local criticism . . .a return to knowledge, an autonomous non-centralised kind of theoretical production . . .an insurrection of subjugated knowledges' . . .Although the concept of tino rangatiratanga is a colonial construct inserted into the Treaty of Waitangi to manipulate the chiefs into signing, it is *now* a major principle of post-colonial discourse. (1999: 116-117)

The impossibility of any actualisation of the project of justice and reconciliation that transforms historiographic, legal and political projects such that justice and reconciliation becomes possible. As Meagan Morris argues, it is the attempt to remember things differently, in the light of recent revelations about things such as the Stolen Generations, that makes possible a transformative politics of memory: a memory that gives 'us' our chance at justice in the future. Justice requires a trust and open-ness to another exceeding calculation, economy, obligation or reciprocity. This promise of justice, like the gift without return which disrupts economy, must break with economy in order to "give[s] economy its chance."(1992: 30)

In certain situations, at certain moments, it seems that what and who will count or matter will differ. Those relations give rise to certain questions, to the matter of two or many, to a matter of counting, evaluating or noting a certain set of relations or culture, nation or polity, a bi-culturalism or multiculturalism, for example. Faced with facts about both past and present, as well as their implications for the future, 'we' are confronted with the task of taking stock and adequately responding to past and present wrong doings. But, of course, the difficulty these moments give 'us' also call into question the grounds for counting and the grounds from which one would say what or who counted. As Gatens and Lloyd note:

> Which memories and narratives are endorsed by legal recognition, historians or the general public, matters to the ability of individuals and groups to imagine themselves as possessing a past, a present and a future, that is, as possessing an identity. (1999: 138)

According to Hamacher, there must be more than one culture and there *must* be more than many. But, as he adds, while "[t]his imperative must count, and must count many, but it cannot do so unless it exposes the countable cultures, in and beyond counting, to what cannot be counted." (298) Here Hamacher poses the question that reveals the problem with any calculus of equality or right: "Who counts, who pays? And further: Is it still possible, here and now, simply to count?" (299) This question unsettles any basis on

which one might calculate the rights or privileges of any 'minority' or 'majority'; it disrupts any equation that would attempt to represent and balance interests or needs:

> Equality immediately brings with it, within a system of quantitative-representative democracy, the question of the quanta and amounts to be represented, and of how they will be represented. To take the question further: can minorities and majorities be adequately represented? How is "representation" possible in general? What, once again, counts, what is counted- and what is counting? (309)

Justice and reconciliation could never simply be an attempt to return things to their 'proper' places, it cannot rely on what is simply 'present' or 'given'. Just recognition of indigeneity, be it in the form of a sacred-secret tradition, 'properties', practices or customs, must proceed from the fact that one should not assume that indigeneity is reducible to its 'present' or 'given' forms. With respect to the recognition of the past and a responsibility for the future, this would require an openness to that which is beyond any past present or 'living' present, as Derrida insists: "within that which disjoins the living present, before the ghosts of those who are not yet born or who are already dead." (1994: xix)

As Gatens and Lloyd insist: "[n]o amount of redistribution of goods, compensatory financial arrangements, or even return of land will cancel or alleviate the past and present effects of the European imaginry on indigenous peoples." (146) This, however, is not an

argue against redistribution, compensation, or the return of land, they add, "[r]ather, these measures, though necessary, are far from sufficent." (146)

The point, then, is not to oppose any such calculation. Clearly, inequality exists and redistribution may well be the best and most immediate process to elevate this problem. Indeed, as Nancy Fraser observes, the distinction between economic injustice and cultural injustice is analytical:

> In practice, the two are intertwined. Ev·· the most material economic institutions have a constitutive, irreducible cultural dimension; they are shot through with significations and norms. Conversely, even the most discursive cultural practices have a constitutive, irreducible political-economic dimension . . .(1997: 15)

To speak of two cultures, 'bi-culturalism', and many, 'multiculturalism', as we do in Australia and Aotearoa New Zealand, must already be to move too far in certain respects, in so far as it already takes as given the basis of counting; in so far as it takes the basis of the 'who' for granted and *then asks what would be just, fair or ethical*. And yet, these cultures *must* count and must be counted; one *must* count, name and decide "here and now". As impossible as it is, the question of justice must come before the 'who', even while it is bound to come later. Justice cannot be reduced or limited to counting, to numbers or enumeration or distribution; to an 'I' or 'we', 'them' or 'they' already counted in advance, counted on and given value, before the question; yet it *must* count. In short, all

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of this is to say that there can be no politics or law that dos not presuppose certain names, positions or relations, a system for evaluating and counting, and no justice without politics and law, and yet, no justice without the question or opening to what is before or beyond system, name or relation.

If we think of the languages of justice, identity and property, then, as Derrida has noted, this observation could be translated as follows: "that in any case we speak only one language – and that we do not *own* it." (1998: 40) This points to the irreducibly political aspect of all languages, to the languages of all cultures and nations and to cultures and nations themselves. How could one count or name cultures, as if such an act were natural, simple or innocent? Indeed, Derrida concludes:

> All culture is originally colonial. In order to recall that, let us not simply rely on etymology. Every culture institutes itself through the unilateral imposition of some "politics" of language. Mastery begins, as we know, through the power of naming, of imposing and legitimating appellations. (39)

This observation forces us to consider the political and conceptual complexity of any invocation or appeal to the 'properties' or 'proper-ness' of culture or identity. This point is as enabling as disabling, an identification or claim *for* or *of* culture and identity is possible *because* this relationship between object and subject cannot be indefinitely fixed or secured. The opening toward the unknown or unrecognisable culture(s) provides such a destabilisation and, consequently, marks both a moment of anxiety and insecurity and a

chance of seeing the other not as an already homogenised other, but an other in its singularity. This is not merely a chance *of* the other, but *for* both the other *and* self. In order to give recognition of both self and other a chance, Hamacher argues:

> It must open up the possibility of recognition under "current"
> . . .conditions, but it must also keep open to the possibility of
> a recognition not limited by such conditions, and of a
> transformation of recognition . . .of the idealization of the
> given. (323)

Proper recognition would therefore always remain something to be done. The aporia of representation, recognition and identification I have described is the opening to this 'to come', its movement and future.

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