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A WHITE AMERICAN FEMALE CIVIL RIGHTS ATTORNEY IN NEW ZEALAND: WHAT MAORI EXPERIENCE(S) TEACH ME ABOUT THE CAUSE

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> How a nation interacts with its indigenous peoples, and deals with injustices will ultimately become part of that country's . . . identity.[1]
>
> — Georgina Te Heuheu, Minister of Women's Affairs

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1. Richard Knight, *Maori Sales Label Touted,* N.Z. HERALD, June 22, 1999, at A16.

I. INTRODUCTION

As Americans, we commonly assume that the world takes lessons from us—or at least that the world fancies observing us as much as De Tocqueville did in the 19th century. I believe that the reverse works just as well, if not better, and that, indeed, it is our responsibility to learn from the experiences of other nations. In my case, observing the experience(s) of the Maori—the indigenous population of New Zealand—teaches me much about the civil, political, economic, social and cultural rights of indigenous populations and urban persons of color, as well as about the state of democracy in a neo-liberal, global economy. Without presuming to be like De Tocqueville in any way, I will share here what I have learned from a year-long stay in 1999 in hopes of reinvigorating our own post-civil rights movement—which at its heart is the struggle to construct a more just and equitable multiracial democracy.

I must preface my remarks, however, by admitting a few things. First, I am a civil rights attorney only in so far as is demanded of me at the Institute on Race & Poverty at the University of Minnesota Law School in the fight against racial and economic injustice. Therefore, when I refer to "the cause" I am speaking in a very broad sense about the equalization of opportunities for persons of color, not only in terms of civil rights, but also in terms of full participation in the democratic process. Second, I am far more informed about the plight of urban persons of color than I am about that of indigenous persons—especially in rural areas. However, the cumulative effects of institutional racism and concentrated poverty affect both populations, especially where the populations intersect, as is the case with urban Maori. And last, I am admitting ahead of time that I capture only as much of Maori experience(s) as I can as a visitor and as a Pakeha or "person of predominantly European descent."[2]

In the main part of the article, after an overview of race and identity in New Zealand, I will locate Maori experience(s) within two general contexts—namely in relation to the Treaty of Waitangi and in reaction to the recent neo-liberal economic reform.

2. H.W. WILLIAMS, A DICTIONARY OF THE MAORI LANGUAGE 252 (1975). All further translations will be drawn from this source. To pronounce Maori words, use the following sounds: a = ah, as in "pa"; e = ay, as in "day"; i = ee, as in "fee"; o = oh, as in "no"; and u = oo, as in "too." The "ng" sound resembles the "ng" sound in "tongue. The "wh" sound is commonly pronounced as "f." The "r" sound is rolled off the tongue, not formed in the throat.

Examining the Treaty—with its much-debated notion of *rangatiratanga* (self determination/sovereignty)—will require an exploration of political and civil rights. Examining the neo-liberal reform, in turn, will require a closer look at economic and social rights. In the second part of the article, I will attempt to discern several patterns that emerge with which to implicate our own cause.

II. MAORI EXPERIENCE(S) IN CONTEXT

A. *A Brief Overview of Race and Identity*

1. *Contemporary Inter- and Intra-racial Tensions*

> We cannot sleepwalk to the goal of a racially harmonious society.[3]
>
> — Dr. Rajen Prasad, Race Relations Conciliator, New Zealand

Guidebooks commonly promote New Zealand as "a country of racial harmony" with "a renewed interest in *Maoritanga* (Maori way of life)"[4] and a "high standard of living."[5] As would be expected, this depiction is incomplete. The relationships within the nation are far more complex and contentious and the standard of living far more racialized.

According to the 1996 census, New Zealand's 3.68 million population includes approximately 14% Maori, 10% Asian, 6% Pacific Islanders,[6] and 70% Pakeha.[7] As in the United States, however, the racial and ethnic makeup of the population will

3. Karen Burge, *Major Changes to Cultural Landscape by Mid-century,* N.Z. HERALD, March 22, 1999, at A3.

4. JANE KING, NEW ZEALAND HANDBOOK 13 (1990).

5. *Id.* at 16.

6. Pacific Islanders have been in New Zealand for more than 100 years, with migration increasing rapidly in the 1960s. *Id.* They currently make up almost 6% of the population and include Samoans, Tongans, Fijians, Cook Islanders, Tokelauans, and Niueans. *Id.* at 3. They are diverse in culture and language, but share common migration and assimilation history. *Id.* at 8. MINISTRY OF PACIFIC ISLAND AFFAIRS, NAVIGATING THE CURRENTS OF THE NEW MILLENNIUM: A SPECIAL REPORT 8 (1999) (discussing the changing familial and societal structures of Pacific peoples in New Zealand) [hereinafter SPECIAL REPORT].

7. MASON DURIE, TE MANA, TE KAWANATANGA: THE POLITICS OF MAORI SELF-DETERMINATION 86 (1998). Forty percent of Maori are under the age of 15. *Id.* Elderly Maori will increase from 3% in 1991 to 13% in 2031. *Id.* Elderly will likely be less familiar with customs and culture and unable to count on consistent *whanau* (family) support. *Id.*

change dramatically in the near future. By 2046, the proportion of Pakeha will drop to only half the population at around 2.5 million. Maori population will almost double and Asian and Pacific Islander more than triple.[8]

The relationship between Pakeha and Maori receives the lion's share of attention—largely due to the historic nature of colonizer and colonized. Whether this relationship is a positive one is contended. One Pakeha scholar, Peter Munz, believes that all is well in New Zealand because Maori are geographically mixed with Pakeha and not locked in reservations "with food and beer" like the "Red Indians", or trapped in homelands like the South Africans.[9] But Ella Henry, a Maori of Nga Puhi, argues that there is little evidence the two races are coming together. "What Pakeha fail to understand," says Henry, "is that they get on with Maori because Maori have made the effort . . . Pakeha cannot accept that the sacrifice made by Maori has robbed us of our personal identity and *mana* (honor). If the tension is not obvious it is because we have been trying so hard to be like them . . . ."[10]

Assimilation of Maori into Pakeha ways appears to be the norm.[11] As one Pakeha former Race Relations Conciliator admits, "the power of the numbers and the overwhelming weight of western culture combine to make for an irresistible one way flow of cultural traffic. . . . Consciously and unconsciously we have been folding the culture of the Maori into what we regarded as better for all."[12] Indeed, when the English settlers carved out their territories they displayed a "wonderfully cavalier disregard of the . . . local terrain" instead drawing "an orderly, linear, culturally straightjacketed response . . . antithetical to the endlessly curving, flowing line of Maori design."[13] Munz argues that assimilation is the "essence of human history" and cannot be prevented. He

8. Burge, *supra* note 3, at A3.

9. CAROL ARCHIE, MAORI SOVEREIGNTY: THE PAKEHA PERSPECTIVE 99 (1995).

10. HINEANI MELBOURNE, MAORI SOVEREIGNTY: THE MAORI PERSPECTIVE 22 (1995). Henry even believes that groundwork has been set for gang warfare and civil disturbance. *Id.*

11. CHRIS LAIDLAW, RIGHTS OF PASSAGE: BEYOND THE NEW ZEALAND IDENTITY CRISIS 160 (1999).

12. *Id.* at 159. One prominent Pakeha captures the essence of this subjugation when he claims, "[a]ll people may be of equal value; but, although we should respect the good in all cultures, we cannot say that Maori and European contributions to civilization are equal." DAVID ROUND, TRUTH OR TREATY: COMMON SENSE QUESTIONS ABOUT THE TREATY OF WAITANGI 79 (1998).

13. LAIDLAW, *supra* note 11, at 26.

claims that no ethnic identity lasts very long, including Maori.[14]

Economic subjugation of Maori accompanies this assimilative process. Maori (as well as the Pacific Islanders) experience among the lowest income levels; the highest rates of unemployment and single-parent families; the poorest health; the lowest educational enrollment and achievement; and the highest representation in subsidized housing, government-funded income support, and the criminal justice system.[15] As Waireti Walters, a health worker, puts it, "Here we are as Maori in our own country and we are still begging under the table to the white man. We always seem to be deprived or second class."[16]

Some Pakeha, lamenting the preferential treatment Maori sometimes receive to compensate for this subjugation, claim that Maori "simply can't hack it on a level playing field."[17] Many even complain of positive discrimination to the Race Relations Office. According to the 1999 Race Relations Conciliator, Dr. Rajen Prasad, the level of discomfort among non-Maori is increasing.[18] It appears that "biculturalism" for Pakeha is "no more than a limited indulgence; but for the Maori it is a matter of survival."[19]

Survival is particularly daunting for urban Maori. Prior to World War II, 90% of Maori lived in rural areas and predominantly within their *iwi* (tribal) domains. After an economic boom, labor demands increased in urban areas drawing Maori in.[20] Currently, 80% of Maori live in the main urban centers, with about 25% in Auckland alone.[21] As anthropologist Steven Webster notes,

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14. ARCHIE, *supra* note 9, at 94. Munz is Professor Emeritus of History at Victoria University. *Id.* at 93. Munz goes on to say, "[s]ome Maori think they came here ready-made in canoes. But they didn't." *Id.* at 96.

15. SPECIAL REPORT *supra* note 6, at 8.

16. MELBOURNE, *supra* note 10, at 57. Often Maori are not even welcome at the table, as was evident during my stay, for example, in Howick, a suburb of Auckland where Pakeha were trying to keep Maori out of the area and prevent them from establishing a *marae* (meeting house). *See* Scott Kara, *Marae Word a Canker in Garden of Memories*, N.Z. HERALD, Dec. 4-5, 1999, at A4.

17. Frank Haden, *It's An Unlevel Playing Field at the 2000 Maori Olympics*, SUN. STAR TIMES, Oct. 10, 1999, at C4.

18. Jenny Forsyth, *Changing Face of Race Complaints*, N.Z. HERALD, Oct. 27, 1999, at A13.

19. LAIDLAW, *supra* note 11, at 159.

20. Paul Meredith, Urban Maori as "New Citizens": The Quest for Recognition and Resources, Paper Presented to the Revisioning Citizenship in New Zealand Conference 2-3 (Feb. 22-24, 2000) *available at* Te Matahauariki Institute, http://www.lianz.waikato.ac.nz/.

21. DURIE, *supra* note 7, at 86. This would include areas of 30,000 or more such as Auckland and Hamilton. *Id.* Because of unemployment, however, there is

"[I]mmigrant 'others' are tolerated primarily because their labour is used to build industries . . . [or] they are not tolerated and must live. . . apart from the [Pakeha]."[22] He goes on to say that "the persistent myth that [Maori] are a 'rural' people only recently having 'drifted' to the cities entrenches their status as 'immigrants' in their own home."[23]

Because of increasing urban migration, the initial housing policy of "pepper-potting"—dispersing Maori families throughout urban centers—was superceded by that of allocating Maori to state-built homes in large housing estates.[24] The resulting racial polarization is particularly evident in Auckland, where affluent coastal and inner-city suburbs are dominated by aging Pakeha and less affluent areas by ethnic minorities and families with young children. Within ten years, only half of all Auckland residents will be Pakeha. Urban renewal strategies have neither stemmed this white flight nor provided the appropriate mix of housing options needed to avoid increased crime, health problems, and antisocial behavior in high-density, low-income areas.[25] As a result, a widening income gap and rising housing prices are producing a metropolitan community of "haves" and "have-nots."[26]

Urban Maori also have to contend with living apart from and in tension with rural *iwi* (tribes). At least 70% of all Maori live outside their tribal *rohe* (boundaries) and approximately one-third live without any tribal influence at all.[27] This urbanization process has led to cultural losses, disenfranchisement of urban Maori from their tribal land and origins, and socio-economic difficulties, especially without *whanau* (kin) to fall back on.[28] Although "*iwi*" traditionally meant "the people", its current "tribal" meaning has empowered rural *iwi* elders to further ghettoize urban Maori and

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a trend toward migration back to tribal areas such as the Northland. *Id.* Also, some 26,000 Maori are recorded living in Australia. *Id.*

22. STEVEN WEBSTER, PATRONS OF MAORI CULTURE: POWER, THEORY AND IDEOLOGY IN THE MAORI RENAISSANCE 11 (University of Otgao Press 1998)

23. *Id.*

24. Meredith, *supra* note 20, at 3.

25. Geoff Cumming & Scott Kara, *Planning Vital to Avoid Slums: High-Density Housing Can Have its Pitfalls,* N.Z. HERALD, Nov. 24, 1999, at A7.

26. Geoff Cumming, *Ethnic Melting Pot on the Way,* N.Z. HERALD, Aug. 18, 1999, at A8. "By 2021 the region will house 1.5 million people, 34% of New Zealand's population." *Id.*

27. Meredith, *supra* note 20, at 17-18. At the 1996 census, 25% of Maori either didn't know their *iwi* or chose not to affiliate with it. *Id.* at 18.

28. *Id.* at 4.

relinquish them to a lesser status, both within the Maori community as well as within the nation as a whole.[29] In fact, the "*iwi*" has become the "master narrative for constructing the identities and citizenship of Maori in the present."[30] As a result, a powerful urban Maori sensibility has emerged that strives to legitimize the realities of being Maori in the city and secure the right to be recognized.[31] Through a shared social and political commitment, urban Maori have created politically active voluntary associations, pursued litigation, and nurtured economic development.[32] In addition, they have recreated traditional Maori structures of *whanau, hapu* (subtribe) and *iwi* and replaced them with pan-tribal relationships and urban *marae* (meeting houses).[33] Unfortunately, these types of pan-tribal movements are not always well-received and are sometimes viewed as the means by which the "power-culture" further tyrannizes the minority.[34]

These inter- and intra-racial tensions are also located within a multicultural context. In addition to the significant number of Pacific Islanders, population patterns have been significantly altered by recent large-scale migrations, mainly from Asia.[35] Asks a New Zealand Herald editorial, "[I]s this country bicultural or multicultural? It is a question that ought to be answered by all New Zealanders. When all answer, there can be no mistaking the multicultural character of this country."[36] Despite the trauma associated with being colonized and the subsequent rights secured under the Treaty of Waitangi,[37] many New Zealanders argue that Maori "are not the only cultural minority in need of legal protection."[38] Yet, the former Minister of Maori Affairs, Tau Henare, resists being crowded out by "newly arriving people" and believes priority should be given to Maori issues.[39] It seems hard enough for the nation to figure out what biracialism means ("[c]an

29. *Id.* at 9.
30. *Id.*
31. *Id.* at 4.
32. *Id.* at 4-6.
33. *Id.*
34. MELBOURNE, *supra* note 10, at 156.
35. Dr. Rajen Prasad, *Annual Report of the Race Relations Conciliator for the Year Ending 30 June 1996*, *in* 2 HUM. RTS. L. & PRACT. 211, 215 (1997)[hereinafter *Annual Report*].
36. *We're New Zealanders,* N.Z. HERALD, June 24, 1999, at A16.
37. *See infra* Part II. B.
38. *We're New Zealanders, supra* note 36, at A16.
39. *Maori Culture 'Fighting to Survive,'* N.Z. HERALD, June 29, 1999, at A16.

it really be a fusion of Maori and Pakeha cultures, each a reflection of the other, or is that just a pipe-dream of political correctness?"[40]) much less multiracialism, despite its appeal. Some suggest that perhaps both are achievable.[41]

2. Maori Culture and Identity

> [T]he preconception of Maori culture as a whole way of life ideologically obscures both the present deterioration of Maori society and the colonial and recent history which has instead constituted Maori culture as a whole way of struggle. The beneficiaries of the cultural "Renaissance" may be more its opportunist patrons, Maori as well as Pakeha, than the majority of Maori themselves.[42]
>
> — Steven Webster, Visiting Anthropologist

Pakeha columnist Charmaine Pountney writes that most New Zealanders are comfortable with the idea of a multi-cultural society as long as it means a variety of "costumes, cuisines, or churches."[43] Without an exploration of different values and ethics, she argues, society will not be harmonious.[44] However, neither costumes and cuisines, nor values and ethics capture the systemic nature of the racial tensions and inequalities that persist New Zealand. Instead, argues Webster, Maori culture has the capacity to mask this systemic quality.

Maori culture is fighting to survive in New Zealand.[45] Through

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40. LAIDLAW, *supra* note 11, at 26.

41. *Id.* According to one report, "From a race relations perspective in the New Zealand context, it is inappropriate to see biculturalism and multiculturalism as polar opposites. The term biculturalism is appropriately used to describe the Treaty relations between Maori and the Crown, and from this relationship emerges a number of rights and responsibilities. Multiculturalism is therefore not a counter to biculturalism because it refers to quite a different image of a society and one that rests comfortably with the concept of biculturalism described above." *Annual Report*, *supra* note 35, at 215.

42. WEBSTER, *supra* note 22, at 19.

43. Charmaine Pountney, *Racial Harmony: We Need Different Rooms in a Common House,* N.Z. HERALD, July 5, 1999, at A13.

44. *Id.* Charmaine proposes a national code of ethics, or statement of values that "would say what we want, as well as what we don't accept. It would state what we are trying to be, rather than what we are, and it would include no penalties. It would be in clear, simple language and in every language used in our community. Discussing and trying to agree on a national code of ethics could provide a useful focus for redirecting much of the negativity which infects our national life at present." *Id.*

45. *Maori Culture 'Fighting to Survive,'* N.Z. HERALD, June 29, 1999, at A16.

great effort, however, the Maori language has managed to survive as one of the primary weapons utilized in this fight. Maori seek to nurture it just as the nation seeks to nurture the *kiwi*.[46]

> Maori is the foundation language of New Zealand, the ancestral language of the *tangata whenua* (people of the land) and one of the *taonga* (rights, property, anything highly prized). . . . Maori culture is part of the heritage of New Zealand, with the language at the heart of the culture. To Maori, the language is *taonga tuku iho* (a gift handed down by their ancestors) and key to all things Maori.[47]

Their language, however, was almost lost. Between 1913 and 1953 the number of Maori school children who could speak Maori decreased from 90% to 26%. By 1998, only 8% of all Maori adults were fluent in it. Their number is now increasing, however.[48] In addition, thousands of Maori children are enrolled in Maori language schools,[49] and the Maori Language Commission is looking for ways to encourage the learning of Maori.[50] Since 1992, 24,000 Pakeha children have also begun to learn Maori at school, [51] and certain Maori words are used regularly by non-Maori and in print. The Maori Language Act of 1987,[52] which made Maori an official language, conveys the right to speak it in all legal proceedings, regardless of the ability to understand or communicate in English or any other language.[53] Despite these strides, the language is retained at the margins by those New Zealanders who feel

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46. Frankie Letford, *Nurture Maori Language,* N.Z. HERALD, July 19, 1999, at A12. The *kiwi* is a nocturnal bird, unique to New Zealand. New Zealanders have come to be called "Kiwis" because of this. Neither is to be confused with the kiwifruit.

47. Richard Knight, *Survival is Becoming a Race Against Time,* N.Z. HERALD, June 1, 1999, at A15.

48. *Id.*

49. Richard Knight, *New Vigour in Teaching Maori to People Gaining Second Language,* N.Z. HERALD, July 26, 1999, at A11. *Kohanga reo* are preschools with Maori language as the main teaching language; and *kura kaupapa* are elementary and intermediate schools that teach traditional Maori values and conduct all lessons in Maori. *Id.* *Whare wananga* are tertiary educational institutions with an emphasis on Maori language, but covering all ranges of subjects. *Id.*

50. *Id.* The Government is utilizing both visual and oral techniques. *Id.*

51. Rawiri Taonui, *Two Peoples, One Nation and Room for Optimism,* N.Z. HERALD, Feb. 5, 1999, at A13.

52. Maori Language Act, 1987 (N.Z.).

53. Willie Jackson, *Racism Behind Fury Over Anthem Sung in Maori,* N.Z. HERALD, Oct. 15, 1999, at A15.

contempt toward it.[54]

Other aspects of Maori culture that are highly visible to non-Maori—such as the *haka* (chant),[55] or historical displays at tourist sites—may be doing more to threaten the integrity of the culture than to preserve it and often fail to ameliorate the socio-economic conditions of Maori.[56] For example, a recent movement to draw tourists to the markets, *marae*, and cultural performances of South Auckland, may do little to remedy the systemic nature of the renowned concentrated poverty embedded there.[57]

Stephen Webster argues that the popular stereotype of Maori cultural identity actually subverts and obscures their struggle by protecting sources of power and avoiding real social change.[58] This stereotype includes such characteristics as:

> [*k*]*in* [*whanau*] and community solidarity; respected and authoritative elders; public ceremonial and ritual symbolism in *hui at marae* (gatherings at kin-based meeting places including meeting-houses decorated with symbolic carvings, weavings, and paintings); generosity and sharing of resources; Maori language as mother tongue; harmony with the natural world; and profound spirituality centered in notions of *tapu* ('taboo'), *mana* ('prestige'), and *wairua* ('spirit').[59]

Webster argues further that these characteristics often function in an essentialist way. They are assumed to be "grounded primordially in tradition" and to describe "the whole way of life of contemporary Maori society, regardless of its struggles in a quite different daily political economic reality."[60] Unfortunately, argues Webster, the cultural renaissance that has brought these characters to the attention of the nation has done little to change the

54. *Id.*

55. The *haka* is often performed before important sports matches by team members for inspiration.

56. Richard Knight, *Authenticity Haunts Maori,* N.Z. HERALD, June 7, 1999, at A15. A survey of Te Arawa leaders from the popular tourist city Rotarua, suggested that some guides lied and that the exploitation of Maori culture degraded it. *Id.* But local operators say "history, scenery and authenticity all play an important role" and local elders help maintain the balance between success and staying true. *Id.*

57. Nick Perry, *Bright Lights of Otara to Beckon Tourist Dollars*, N.Z. HERALD, July 21, 1999, at A1. The devastation of South Auckland was featured in the 1994 film, *Once Were Warriors*.

58. WEBSTER, *supra* note 22, at 21.

59. *Id.* at 29.

60. *Id.*

established structures and has left the majority of Maori largely unaffected.[61] "There is ironic truth in the phrase, 'I'm a born-again Maori'," notes Webster, in that any change likely to come about from this cultural momentum is likely to be "individual, psychological, or spiritual."[62]

The other side of Maori culture is more real:

> [T]he insistent assertion of ignorance of Maori culture . . . black wool singlets, gumboots, and acrid sweat of forestry, shearing, and slaughterhouse gangs; two street maintenance workers leaning on shovels and watching a third dig around a water main; young unemployed eyes gazing expressionlessly from under a baggy stocking cap; battered women nevertheless staunch in standing up for their men; chain-smoking unto death; defiantly sprawling graffiti asserting that 'Maoridom is boredom'; street-kid 'homies' sleeping in derelict buildings; the shapeless threat of a motorcycle gang in the park; Black Power living in the midst of a 'traditional' Maori community; a Maori *haka* or war dance done not by a rugby team, but by the inmates of a *gaol*; the laconic denial by an inmate tattooist that Maori motifs might be in need of the expert advice of Maori elders; every TV screen tuned in to a Maori motif flown on the spinnaker of the Bank of New Zealand yacht in the America's Cup race; a jagged scar where a piece is torn from the sacrosanct carving in the Maori meeting-house of a university most Maori can never hope to enter.[63]

Paul Meredith of Waikato University agrees with Webster that the nation must abandon its romantic notions of "the authentic 'Maori'" or "the innocent essential 'Maori' subject."[64] Drawing upon Stuart Hall's work with "black" as a category, Meredith rejects fixed, transcendental racial categories. Instead he favors an understanding of "Maori" as a politically and culturally constructed category that can account for a complex plurality of "Maori" subjects.[65]

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61. *Id.* at 33.
62. *Id.* at 39.
63. *Id.* at 49.
64. Paul Meredith, Seeing the "Maori Subject": Some Discussion Points, Paper Presented at the 10th Annual General Meeting of The "Maori" Law Society 3 (1998). Meredith is of Ngati Kaputui and Pakeha origins. [transcript of speech available with author].
65. Meredith, *supra* note 64, at 3 (citing STUART HALL, DAVID MORLEY & KUAN-

According to Meredith, prior to the arrival of Pakehas, the word maori meant "normal" or "usual". There was no one dominant Maori identity. Instead, community members were defined by *whanau*, *iwi*, and the surrounding terrain.[66] Only when the *tangata whenua* (people of the land) contrasted so starkly with Pakeha did a common ethnicity emerge. Early missionaries pushed this new Maori identity through conversion and sought an end to tribal distinctions. This colonization process, along with later urbanization and immigration, has lead some Maori to adopt a pan-Maori identity.[67] However, argues Meredith, to be Maori is to be more than one essential thing, it is to have a gender, class, political orientation, religious preference, sexual orientation, etc. . . . [68] To essentialize Maoriness is to facilitate the ongoing colonial project of acculturation, pragmatism, and expedience.[69]

Fostering an anti-essentialist understanding of Maori in New Zealand requires an examination of the two most embracing structural contexts in which their experience(s) unfold: the Treaty of Waitangi and the recent neo-liberal economic reform.

B. Te Tiriti o Waitangi—The Treaty of Waitangi

1. Historical Foundations of the Treaty

> [The] Maori protest has kept the treaty alive more than any other single factor. It has challenged the long-standing assumption that the treaty forged 'one people' and that New Zealand was a special experiment in relationships between a European and an indigenous people. . . . In many respects New Zealand, in spite of the treaty, has been merely a variation in the pattern of colonial domination of indigenous races.[70]
>
> — Claudia Orange, Historian

According to legend, Polynesians first arrived in this South Pacific group of islands in the 10th century naming it Aotearoa, "land of the Long White Cloud," although archaeological evidence

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HSING CHEN, STUART HALL: CRITICAL DIALOGUES IN CULTURAL STUDIES (1996).

66. *Id.*

67. *Id.* at 4.

68. *Id.* at 5.

69. *Id.* at 8-9. For this reason, references to the experience(s) of Maori are made in the optional plural form throughout this article.

70. CLAUDIA ORANGE, THE TREATY OF WAITANGI 5 (1987).

suggests settlements existing as far back as 700 B.C.[71] The early Maori social system was based on kinship, chiefly leadership, and a shared language and belief system based on mana and tapu. After Captain Cook's three exploratory voyages, British frontiers of trade and Christianity turned toward Aotearoa. Beginning in 1800, naval and commercial vessels exploited resources regularly. By the mid-1830s semi-permanent trader-settlers established themselves along the coast, increasing to over 2000 permanent settlers by 1839.[72]

Initial Maori-Pakeha contact proved mutually advantageous. Maori traded their services and provisions for European trade goods, and Europeans proceeded to extract the natural products of the land. Once subsistence farmers and food-gatherers, Maori began cultivating crops for trade and learning to read and write in Maori. Some became Christian or integrated it into Maori *ritenga* (custom). Change was more rapid along the coast of the North Island, while the inland and South Island remained largely unaffected until the 1830s.[73] By then an increasing number of redcoats, settler militia, and *kupapa* auxiliaries (Maori collaborators) were confiscating Maori lands and undermining their *iwi* organizations. When Maori tried to acquire the skills needed to conform, they found themselves trapped in a legal jungle that made it difficult to develop, but easy to sell, their lands.[74]

Consequently, Maori appealed to the British Crown for protection.[75] As historian Claudia Orange argues, "All parties who expressed an interest in New Zealand . . . shared the conviction that British intervention was both necessary and desirable. Opinion differed only on the extent . . . and the role that the Maori people should play. It was now a question of whose interests were to come first . . . ."[76] In 1835, at the urging of concerned missionaries, thirty-four *rangatira* (chiefs) signed a Declaration of Sovereignty, asking the British Crown to be a parent and protector of their independent infant state. Ironically, the Crown viewed this

71. KING, *supra* note 4, at 9.
72. ORANGE, *supra* note 70, at 6.
73. *Id.* at 7.
74. ALAN WARD, AN UNSETTLED HISTORY 4 (1999).
75. ORANGE, *supra* note 70, at 11-12. They first appealed in 1830 after "The *Elizabeth* Affair" when an English captain conspired with the Ngati Toa of Kapiti to raid the Ngai Tahu of The South Island, and then again in 1831 when rumors circulated that a French warship intended to annex Aotearoa. *Id.*
76. *Id.* at 26.

document as the means by which to make the Aotearoa a dependency and later a Protectorate, prompting it to consider negotiating a treaty that would secure the right to pass laws.[77] Although it was rare for colonizers to negotiate rights with the indigenous populations, the Maori were more militarily and economically organized than other populations Britain encountered.[78]

In 1840, the Treaty of Waitangi was drafted by the British and presented to the Maori in a manner calculated to secure their agreement. The transfer of power to the Crown was downplayed and Maori suspicions lulled by the assurance of a degree of *rangatiratanga* (sovereignty) and the extension of law, order, protection, and other rights.[79] There were actually two treaties—one in English and one in Maori (with its subsequent English translation). Because of this, the exact meaning of the Treaty was uncertain. As Orange describes it:

> Confusion surrounded the treaty from the first. The treaty in English ceded to Britain the sovereignty of New Zealand and gave the Crown an exclusive right of pre-emption of such lands as the Maori people wished to sell. In return, the Maori were guaranteed full rights of ownership of their lands, forests, fisheries and other prized possessions [*taonga*]. The treaty also promised them the rights and privileges of British subjects, together with assurances of Crown protection. Only thirty-nine chiefs signed this treaty in the English language, however. Most signed a treaty in the Maori language. The text failed to convey the meaning of the English version, and the treaty negotiations did not clarify the difference. Each party to the treaty was left with expectations about the power they would exercise.[80]

To the British, the Treaty cleared away a legal impediment to assertion of British sovereignty, answered contemporary humanitarian interests to 'protect' native races, and secured Maori co-operation as a basis for peaceful European settlement.[81] It also

77. *Id.* at 21; Sir Douglas Graham, *Declaration of Sovereignty was Superseded By Treaty,* N.Z. HERALD, Feb. 22, 1999, at A13.

78. KEN S. COATES & P.G. MCHUGH, LIVING RELATIONSHIPS, KOKIRI NGATAHI: THE TREATY OF WAITANGI IN THE NEW MILLENNIUM 30 (1998).

79. ORANGE, *supra* note 70, at 32-33.

80. *Id.* at 1.

81. *Id.* at 2.

served to curtail French expansion in the Pacific, and regulate privately owned, opportunistic land settlement companies.[82]

Although there was no single Maori understanding of the Treaty, Rawiri Taonui, lecturer in history at the University of Auckland, argues that it was viewed as an "honourable pact between themselves and the new arrivals."[83] Despite this understanding, an outbreak of fighting in the 1850s over land, authority, and *rangatiratanga* required Britain to secure sovereignty on the battlefield and in the colonial parliament, where they had gained it in name only. Despite these tensions, a major *hui* (meeting) of *rangatira* was held near Auckland in the 1860s to clarify the Treaty's clauses and serve as a Maori 'ratification.' Again, because the Crown presented the Treaty in its most benevolent light, Maori leaders came away viewing it as a primarily protective, religious-like covenant that left their *mana* intact.[84]

By the 1860s, however, Britain was systematically suppressing the Maori. A new translation of the Treaty clarified the official meaning: Maori had signed away sovereignty of the country in 1840 and there was neither a cause for separate governmental institutions, nor a basis for alleging the abridgment of any enumerated rights.[85] The newly formed settler government, which now had substantial control, "assumed full responsibility over and subjugated the Maori, perpetrated a series of unjust wars, confiscated and/or forced Maori to sell vast tracts of land, and passed immoral legislation."[86] As a result, the Maori were deprived of the most basic rights.[87]

Nonetheless, Maori still believed Treaty promises were going to be honored, directing hundreds of petitions to the government and protesting to England.[88] These petitions, along with early protests over land in the 1880s, forced the government to publicly

82. Taonui, *supra* note 51, at A13.

83. *Id.* However, the reality of colonization and suppression belied this impression. For example, after the Treaty, Maori were detained without trial and banned from speaking their language in schools.

84. ORANGE, *supra* note 70, at 4.

85. *Id.* at 3.

86. Taonui, *supra* note 51, at A13. Lands were first taken through confiscations pursuant to the New Zealand Settlements Act, 1863 (N.Z.), then through the Native Land Court under the Native Land Act, 1865 (N.Z.). Seas and waterways were also taken through legislation such as the Oyster Fisheries Act, 1867 (N.Z.).

87. *Id.*

88. ORANGE, *supra* note 70, at 4.

dismiss the Treaty. Some representatives even claimed that Captain Cook's discovery was the actual basis for the assertion of sovereignty.[89] By 1900, the economic, cultural and political suppression of the Maori was substantially complete[90] and by 1930 less than 6% of original lands remained in their hands, most of it impossible to farm.[91] This loss of land led to a loss of *rangatiratanga*—"the capacity for self-determination which can only come with control over resources."[92] The Treaty would not receive official prominence again until the centenary approached in 1940 and Pakeha were seeking symbols to express their budding nationhood.[93]

One of the first symbols to emerge was the Treaty House, the site of the original Treaty signing in the Northland. When the house was gifted to the nation in 1934, it quickly revived the Treaty as an icon of the nation's identity. The Treaty was subsequently promoted, alongside what Taonui describes as the "fiction of racial harmony in New Zealand," while "the real history of injustice was laid aside."[94]

But Maori continued to petition the Government and the British Crown for relief.[95] And in the 1970s, when a recession further marginalized and urbanized Maori, the educated Maori elite began to organize to reject assimilation and minority status and to secure "first occupants" rights under the Treaty. Protests and direct action began to dominate Maori-Pakeha relations. Land occupations were particularly successful, the most renowned of which was of Bastion Point, one of the few remaining areas held by Maori in Auckland.[96] Pakeha were taken by surprise. They believed

89. ORANGE, *supra* note 70, at 3-4. William Fox, a veteran colonial politician, wrote a lengthy exposition claiming the Treaty was an invalid basis for the assertion of sovereignty. *Id.* at 3.

90. Taonui, *supra* note 51.

91. WARD, *supra* note 74, at 4.

92. *Id.* at 6.

93. ORANGE, *supra* note 70, at 3-4; Taonui, *supra* note 51, at A13.

94. Taonui, *supra* note 51, at A13.

95. *Id.*

96. Rawiri Taonui, *Bastion Point Evictions: Only Now is the Real Story Told,* N.Z. HERALD, June 29, 1999, at A13. The government had been (mis)using this area and one other Maori holdout, Okahu Bay, for positioning guns (it was thought the Russians might invade in the 1850s) and later for such projects as sewage lines—although Maori homes remained unconnected. Maori were refused building permits and then labeled backward and blamed for the destitution. Their homes and a *marae* were even burned in the 1950s to prepare for the Queen's visit. When the government planned to subdivide Bastion Point, the Nagati Whatua people

that Maori already enjoyed equal rights and that New Zealand was different from other countries such as America or South Africa.[97]

As a result of these protests, the Treaty of Waitangi Act of 1975[98] created the Waitangi Tribunal to hear Maori claims of Treaty breaches.[99] Along with amendments such as the Treaty of Waitangi Amendment Act of 1985,[100] which allows for historical claims going back to 1840, this legislation provides Maori due process for seeking reparations and restoring *rangatiratanga*.[101] As might be expected, however, the Crown[102] controls all major Treaty organizations such as the Tribunal and the Office of Treaty Settlements. The Tribunal, which has the most Maori input, is also the least powerful and chronically lacks adequate funding. It can make findings about the validity of claims and recommend compensation, but only subsequent Crown or court opinions can render these findings binding.[103] Approximately half of the Tribunal's recommendations have been ignored by the government and some have yielded negative outcomes, which Maori have contested.[104]

As of 1999, the New Zealand Crown had paid $600 million[105] in compensation to Maori[106] and there were approximately 790 claims still remaining before the Tribunal.[107] Some argue that all historical claims can be settled within a couple of decades, but that the Tribunal will always be needed for the resolution of current

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rose up and occupied the land. In the late 1980s, a $3 million settlement was reached. The Ngati Whatua now have land elsewhere and lucrative development projects. *Id.*

97. WARD, *supra* note 74, at 22.

98. Treaty of Waitangi Act, 1975 (N.Z.).

99. Taonui, *supra* note 51, at A13; WARD, *supra* note 74, at 7.

100. Treaty of Waitangi Amendment Act 1985 (N.Z.).

101. WARD, *supra* note 74, at 25. Other amendments extended due process in relation to State-owned Enterprise land and Crown forestry land.

102. "Crown" will hereinafter be used in reference to the New Zealand government.

103. Rawiri Taonui, *Treaty Negotiations: Act with Patience,* N.Z. HERALD, Oct. 7, 1999, at A17. The Tribunal has some power to compulsorily return state-owned enterprise lands and crown forests but has only threatened to use this power once. *Id.*

104. Paul Spoonley, *A Long Way to Go Before All Maori Issues Are Settled*, N.Z. HERALD, Dec. 3, 1999, at A15. Much Maori controversy is between rural *iwi* and urban Maori or between *iwi* and *hapu* (subtribes).

105. All references to dollar amounts refer to the New Zealand dollar.

106. Taonui, *supra* note 51, at A13.

107. Spoonley, *supra* note 104, at A15.

issues.[108] Others, like Richard Pribble, leader of the political party, ACT, have called for the abolishment of the Tribunal and the final settlement of all claims within the next decade.[109]

2. Current Treaty Claims

> I say to Maoridom: 'Mandate your people and get on to negotiate. Get out of the courts and into the [negotiating] room so we can negotiate these things with ministers and make progress.'[110]
>
> — Jenny Shipley, National Party Prime Minister, 1999

Current Treaty claims assume many forms and illustrate the limitations of the claims process.[111]

a. Land Claims

Land claims are the most common. For example, the *Muriwhenua* (Far North) Land Claim, one of the first to be lodged, has yet to be settled. The difficulty lies in uniting five *iwi* and 30 separate claims in one settlement.[112] Bitter inter-*iwi* disputes over who has the mandate to represent them in negotiations, and how settlement and compensation distribution processes will be handled have caused lengthy delays.[113] A recently formed joint negotiating team has faltered,[114] and the Director of the Tribunal has called for an independent, well-resourced, culturally appropriate body to deal with treaty claim settlement disputes.[115]

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108. WARD, *supra* note 74, at 167.

109. Spoonley, *supra* note 104, at A15. *See also Courage is Priority for Treaty Pact*, SUNDAY STAR TIMES, Oct. 3, 1999, at A10.

110. John Armstrong, *Shipley Urges Treaty Action*, N.Z. HERALD, Nov. 1, 1999, at A5.

111. This is not to suggest that all settlements are disappointing. The Ngai Tahu have been particularly successful in balancing economic development with bettering the welfare of the *iwi* and its members. Even though they accepted a settlement at a fraction of their loss, they have been able to buy Crown assets and develop subsidiary investments, particularly tourism. Improvements include a stronger economic base, increased job opportunities, housing development, and scholarships and grants for tertiary education. The government controlled Trust Board has even been replaced with a regionally-elected organization. Richard Knight, *Tribe Eyes Court Over Land Loss,* N.Z. HERALD, May 11, 1999, at A5.

112. Jan Corbett and James Gardiner, *Tribal Infighting Stalls Claim*, N.Z. HERALD, Aug. 23-24, 1999, at A15.

113. Tony Gee, *Move on Our Claim Before Election: Iwi*, N.Z. HERALD, Sep. 11, 1999, at A10.

114. *Minister Accused of Divide-and-Rule Ploy*, N.Z. HERALD, Oct. 5, 1999, at A8.

115. Richard Knight, *Tribal Infighting Spurs Disputes Service Plan,* N.Z. HERALD,

More recently, the Crown settled a land claim with a *Turangi hapu* (subtribe) for the taking of land under compulsory order in 1964 to support a power scheme.[116] The Tribunal found that the Crown took more land than it said it would and broke its promise to lease it back.[117] In addition to $5 million compensation in cash and properties, the Crown also deeded the Turangitukua House, a site of cultural significance, to the *hapu*.[118] However, management and control of some of the reserves remain with the area district council rather than with Maori, who accuse the Crown of not trusting them to manage their own land.[119]

Land claims settlements have also been troubled by the perceived importance of the disputed land to the "nation as a whole"—*writ* Pakeha. Claims that Maori *rangatira* (chiefs) were deceived into signing away part of the capital city, Wellington, could result in nearly $10 billion compensation.[120] The mythologically significant Whanganui River[121] has also been subject to a claim.[122] In 1999, after nearly 120 years of advocacy, the Tribunal recommended the river be vested with the Atihaunui people and the Whanganui River Maori Trust Board be given management power over uses of the waterway.[123] Critics are worried about the precedent, however. As one MP (member of parliament) puts it, "everything, including air, water and sunlight together with the ownership of all native plants and animals in New

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Feb. 10, 1999, at A12.

116. *Treaty Deal Will Return to Haunt Government Say MPs*, N.Z. HERALD, Oct. 7, 1999, at A12. Some even think that the land should be handed back to descendants of the original owners. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Maori May be Entitled to Wellington,* N.Z. HERALD, April 1, 1999, at A6. This claim was recently reinforced by historical evidence discovered from a New Zealand Company land purchase officer.

121. Rawiri Taonui, *Sacred River Much More than Just a Waterway,* N.Z. HERALD, July 5, 1999, at A13. In mythology, the Whanganui River valley is the rift left by Maunga (Mount) Taranaki when he fled to the west after losing a battle with Maunga Tongariro over the love of Maunga Pihanga. *Id.* Water flowing from a wound in Tongariro's side formed the river. *Id.* The river is a living entity of the Atihaunui. *Id.* It is their ancestor, their kin-relation and the living embodiment of all that they are. *Id.*

122. *Id.* The Atihaunui people lost 1.3 million acres and water flow when the river was diverted into a power scheme. *Id.*

123. Eugene Bingham, *Tour Operators Display Grasp of 'Spirituality,'* N.Z. HERALD, June 28, 1999, at A3.

Zealand is now up for grabs."[124]

b. Fishing Rights Claims

Indeed, recent claims are not limited to land. Several thousand Maori from the Far North planned to file a claim in 1999 when the government threatened to remove the moratorium on permits for commercial harvesting of seaweed.[125] More importantly, many claims have been lodged to secure fisheries rights after British colonization destroyed what was an extensive Maori fishing industry.[126]

The Treaty of Waitangi Fisheries Commission was established in 1992 as part of the Sealord deal, "in which Maori relinquished commercial fishing rights in return for quota, cash and shares in the fishing company."[127] The Commission is responsible for sharing out Maori fishing assets which it has successfully increased from an initial $190 million to $600 million. Although it tries to ensure that all Maori benefit from the assets and has even set up a help-line to assist people in learning which tribe they belong to,[128] the Commission has faced court action ten times because of its procedure for allocating fishing rights to different Maori groups.[129] Because only mandated *iwi* organizations have the right to deal with the Commission, litigation to identify who actually possesses

124. Audrey Young, *Precedent a Worry, Says Act MP*, N.Z. HERALD, June 28, 1999, at A3. For example, the foreshore, seabed and water of the Hauraki Gulf around Auckland are subject to a complaint asking for a 50% management role in a proposed marine park. Richard Knight, *Maori Demand More Say on Marine Park*, N.Z. HERALD, July 15, 1999, at A18.

125. Richard Knight, *Maori Lodge Seaweed Plea*, N.Z. HERALD, Sept. 2, 1999, at A18. Seaweed is a traditional food and medicine source for Maori.

126. Alison Horwood, *Onus on Maori to Care for Fisheries: O'Regan*, N.Z. HERALD, Oct. 13, 1999, at A13.

127. Treaty of Waitangi (Fisheries Claim) Settlement Act, 1992 (N.Z.); Richard Knight, *Fisheries Anger Brings Threat of More Litigation*, N.Z. HERALD, July 24-25, 1999, at A5.

128. Whaimutu Dewes, *Time for Fishing Assets to Go to Traditional Maori Tribes*, N.Z. HERALD, Oct. 22, 1999, at A13. The Commission works out of two premises: the collective nature of the property requires allocation through *iwis*; and all Maori must benefit from the settlement. *Id. Iwis*, in return, must act for benefit of all their members. *Id.* Whether assets should be distributed on the basis of population or as property rights to tribes with a fishing tradition is still contested. The Tribunal, however, has confirmed Ngai Tahu's rights to claim the fisheries off their coast because their *rohe* (boundary) takes in the majority of the South Island. MELBOURNE, *supra* note 10, at 156.

129. Richard Knight, *Constant Litigation Leaves Fish Body to Flounder in Legal Net*, N.Z. HERALD, April 13, 1999, at A11.

this mandate continues. The result is confusion between Maori and non-Maori and problems not only for fishery assets, but for the claims process as a whole.[130] Matters are further complicated by urban Maori authorities who have demanded they be taken into account. Their quest to be designated as an *iwi* with rights to the distribution of assets has largely failed in the courts.[131] In response, the Minister of Maori Affairs in mid-1999, Tau Henere, called for the reconstitution of the Commission to include urban Maori representatives, which traditional *iwi* opposed.[132]

c. Other Claims

Other Treaty claims include demanding the continuation of the Maori news service on national radio,[133] achieving greater Maori control of the New Zealand Film Commission,[134] and participating in radio wave auctions—all three of which focus on issues of access to resources to advance the Maori language and culture. In the case of radio waves, in 1999, the Tribunal found that the Crown had failed to consult Maori about the sale of the nation's airwaves as required under the Treaty.[135] It called for damages and for Maori participation in any future auction of radio waves, whether for data, radio, or television.[136] The Tribunal's recommendations sparked heated debate. Neither Maori nor Pakeha knew of the electromagnetic spectrum in 1840, so was the Tribunal "stretching its credibility" when it found the Crown guilty of an "'aggravated breach' of the Treaty?"[137] Was it overstepping its scope of operation by offering Maori "a free ride" for any asset they could think of?[138]

130. *Id.*

131. *Id.* In 1999, urban Maori asked Justice Paterson in the High Court at Auckland to decide what constituted an *iwi*. His decision was that urban authorities had no claim on assets. The Appeals Court rejected their case against allocating fishing assets through tribes (*iwis*). Dewes, *supra* note 128.

132. Knight, *supra* note 127.

133. Richard Knight, *End of Maori Radio News Attacked as Treaty Breach,* N.Z. HERALD, July 9, 1999, at A14. Three daily news bulletins were stopped in early July 1999. *Id.*

134. Louisa Cleave, *Maori Seek Bigger Role in Film Commission,* N.Z. HERALD, Feb. 15, 1999, at A4. Maori film-makers have lodged a claim with the Waitangi Tribunal for greater control over the Commission and its $12 million annual budget which is the main source of funding for the film industry. *Id.*

135. Keith Newman & Keith Perry, *Maori Victory in Radio Battle,* N.Z. HERALD, July 1, 1999, at A1.

136. *Id.*

137. *Bizarre Treaty Judgment,* N.Z. HERALD, July 2, 1999, at A10.

138. Reuben Chapple, *Radio Spectrum Belongs to Whole Country, Not a Race*, N.Z.

Or was the Tribunal correct in interpreting the Treaty to require a sharing of "the then known resources and, by implication, those resources that would subsequently become available?"[139] At the heart of this debate was whether the Treaty was meant "to fossilize the status quo" or to function as a "living instrument to be applied in light of developing circumstances."[140] In the end, the Government rejected the Tribunal's recommendations and resumed plans to auction the radiowaves.[141]

Alan Ward, a contract historian with the Waitangi Tribunal, suggests that to overcome the limitations of the Treaty claims process the Crown should strengthen and racially balance the Tribunal; develop national reparation guidelines and models for research; and provide incentives for claimant groups to aggregate their claims and work together.[142] These suggestions, however, leave without remedy the lack of attention paid to *rangatiratanga* or sovereignty.

3. The Treaty and Rangatiratanga

> [T]wo pegs have been set in the ground.[143]
>
> — Wira Gardiner, Former Executive Director of the Ministry of Maori Development
>
> We should be cautious with straightforward sovereignty claims of either the Crown or Maori . . . . The challenge is to accept a bit of both . . . [but] can there be a blending of two cultures if one of them tells the other how to do it?[144]
>
> — Klaus Bosselman, law lecturer, University of Auckland

HERALD, July 19, 1999, at A13.

139. Rawiri Taonui, *Airwaves: Maori Entitled to 'Fair, Equitable' Share,* N.Z. HERALD, July 12, 1999, at A13. Critics even feared claims would now be made on everything "from genetic engineering discoveries to oil and gas reserves." Andrew Laxon & Keith Perry, *Government Cool on Airwaves Decision: Access to Knowledge the Issue*, N.Z. HERALD, July 2, 1999, at A3.

140. Ron Taylor, *Does Finding Mean a New Edition of Treaty,* N.Z. HERALD, July 3-4, 1999, at A19; Tanoui, *supra* note 139, at A13.

141. Angela Gregory, *Boilover with Maori Brews Over Radio Spectrum Sale,* N.Z. HERALD, Oct. 21, 1999, at A2. Elders of the largest Maori tribe protested and planned to appeal to the courts and to the Privy Council in Britain. *Id.*

142. WARD, *supra* note 74, at 176-78.

143. MELBOURNE, *supra* note 10, at 82.

144. Klaus Bosselmann, *Two Cultures Will Become One Only on Equal Terms,* N.Z. HERALD, March. 1, 1999, at A13.

a. Article II Rights

In Article II of the Maori version of the Treaty of Waitangi, the Queen gives Maori "*tino rangatiratanga*" or "full sovereignty" over their lands, villages and *taonga* (precious possessions). In the English version, however, the Queen gives them merely "undisturbed possession." Understanding what exactly was given and what bearing it should have today is critical to national discourse and identity.

At an undiscerning level, the two versions of the Treaty are pitted against each other. Many Maori argue that the Treaty created a partnership to govern the country and that Maori did not cede *rangatiratanga* in 1840.[145] Many Pakeha, on the other hand, argue that reference to the Treaty as a partnership is misleading. As Sir Douglas Graham, the minister in charge of Treaty negotiations states:

> Once the Treaty had been confirmed, sovereignty as it is commonly understood, passed from Maori to Britain. If Maori are still sovereign, . . . then Maori have effectively terminated the treaty and have no rights under it. They cannot have it both ways . . . . [The Treaty] certainly did not create a partnership to govern the country . . . . That function passed to the Crown.[146]

Graham asks what Maori sovereignty would actually look like if conceded. Would it give Maori the right to pass laws binding on all New Zealanders or just on Maoris? Would all Maori be subject somehow to Maori-generated laws but no others? Would Maori living in Auckland be subject to laws that are different to those applying to the non-Maori living next door? Obviously Graham believes sovereignty wouldn't work: "New Zealand is quite different to Canada [and the United States], where Indians enjoy limited self-government on reservations. Here Maori do not lie on reservations—they are fully integrated."[147] Once the claims process is complete, Graham concludes, Maori will have the chance "to join the rest of us" and "work towards a united, peaceful country rather

145. Lynette Waymouth, *No Ceding of Sovereignty,* N.Z. HERALD, Feb. 26, 1999, at A13. Waymouth argues that a series of articles and editorials in *Te Wananga,* a Maori newspaper from 1874-1878 support this position. *Id.* Also, the Maori Council has had plans to lobby APEC countries to recognize Maori sovereignty. Graham, *supra* note 77.

146. Graham, *supra* note 77, at A13.

147. *Id.*

than promote separatism and division."[148]

At a more discerning level, Wayne Rumbles of the University of Waikato School of Law criticizes the claims process for functioning as a "mask" that excuses the white public "from taking responsibility for its own racism and colonialism"[149] and for perpetuating the old relationship of colonizer and colonized. The Crown determines who will come to the table, what is to be negotiated, and how. This protects the construction of a unitary sovereignty and displaces claims for *rangatiratanga* under Article II. Rumbles argues that this type of postcolonial practice and discourse in white settler countries is dangerous. It embraces diversity without addressing the institutional and constitutional basis of the colonial societies, which in turn re-inscribes the colonization process. "Maori are expected to settle for less than 2% of the value of their claims, to agree to extinguish all historical grievances . . . and then state that the settlement is fair, full and final. . . . The Treaty Settlement process is not fair and reasonable, and the Crown is acting to maintain its privileged position. . . ."[150]

This masking process works in the following way. First, it removes *rangatiratanga* from the negotiating table altogether. As, Jim Bolger, the 1995 Prime Minister of New Zealand bluntly stated, "We can not negotiate the division of sovereignty between various groups of New Zealanders. That is not possible and won't happen."[151] Next, the masking process removes ethnicity from the table, removing the "Maoriness from Maori, both textually . . . and institutionally."[152] For example, the word "Maori" is found only once in the Direct Negotiation Booklet where the phrase "claimant group" is preferred. More importantly the Crown remains in control of the process, while at the same time backgrounding the unequal power relationship. The entire process serves an assimilative purpose and allows for the denial of "Otherness," claims Rumbles.[153]

The "corporatization of the *iwi*" as Rumbles describes it, has a

148. *Id.*
149. Wayne Rumbles, Treaty of Waitangi Settlement Process: New Relationship or New Mask, Paper Presented at The Compr(om)ising Post/Colonialism Conference 3 (Feb. 10-13, 1999) *available at* Te Matahauariki Institute, http://www.lianz.waikato.ac.nz/.
150. *Id.* at 13.
151. *Id.* at 9.
152. *Id.* at 10.
153. *Id.* at 9-10.

similar assimilative effect. Structuring the management of settlements through corporate organizations "allows Pakeha to see Maori in terms of their own culture without having to accommodate counter-hegemonic tribal power structures."[154] It also causes difficulty among Maori powerbrokers and those seeking *rangatiratanga*:

> As has been shown in fisheries settlements among American Indians, the structure of the settlement itself creates class differences which fit the indigenous people more closely into the capitalist structure of the society . . . [and] neutralizes the ethnic solidarity which forced the settlement. . . . [T]he new share of wealth will go to 'tribes' which are, in effect, capitalist corporations run by a managerial Maori elite.[155]

Building upon this division, the masking process also fosters a "Good Maori-Bad Maori" dichotomy. Those who settle, claims Rumbles, are admired as reasonable, sensible, realistic, reconstituted, postcolonial, post-settlement and capitalist. This helps Pakeha see Maori in terms of their own culture. On the other hand, those who don't settle are seen as unreasonable and unrealistic. This dichotomy eventually becomes internalized and seen as natural—hiding the reality of the imbalance in negotiations.[156]

To unmask the Treaty settlement discourse and practice, Graham recommends several measures: viewing the claims process as an interim measure to help recreate an economic base for Maori rather than a full and final solution; exposing the fiction of a unitary Crown sovereignty; and placing the discussion of Maori *rangatiratanga* squarely on the negotiating table ". . . in a fair and equitable manner and not circumscribed by an unwillingness to deconstruct [the nation's] colonial infrastructure and power relationships, which are based on a fiction of unitary sovereignty."[157]

b. Indigenous Rights

This movement away from unitary notions of sovereignty is also reflected in international discourse supporting indigenous rights. In the last fifty years, international pressures have mounted

154. *Id.* at 11.
155. WEBSTER, *supra* note 22, at 38.
156. Rumbles, *supra* note 149, at 11-13.
157. *Id.* at 14.

to resolve the grievances of indigenous peoples dispossessed of their land and culture by paternalistic settler populations.[158] Almost all demand sovereignty. As stated in the U.N. Draft Declaration on the Rights of Indigenous People 1994, Article 3, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[159]

Klaus Bosselmann, law lecturer at the University of Auckland, argues that Maori *rangatiratanga* has a sound legal basis under this emerging post-colonial international law. State sovereignty is no longer absolute but must be considered along with self-determination and human rights. "Accordingly, a concept of 'joint government' based on the Treaty as a 'partnership' and *rangatiratanga* as the exercise of self-government is 'a distinct legal option.'"[160] Bosselmann describes a relationship that allows for both territorial sovereignty of the Crown and joint government of Pakeha and Maori. He argues that a second chamber in parliament and a Maori legal system would be legitimate and would not threaten the nation's sovereignty. An equitably negotiated written constitution, however, would offer the opportunity to settle the debate.[161]

Legal scholars Ken S. Coates and P.G. McHugh also endorse this relational approach to indigenous rights for two main reasons. First, they fear that a claims-based relationship between government and tribe produce only interim results rather than an

158. COATES & MCHUGH, *supra* note 78, at 20. Progress has been made by the Small Peoples of the North in Yakutia (central Siberia in Russia), the First Nations of the Yukon, and the Inuvialiut of the Mackenzie River basin. *Id.* at 21. The Universal Declaration on Human Rights of 1948, G.A. Res. 217A, U.N. GAOR, 3d. Sess., at 71, U.N. Doc. A/810 (1948), provided a vital international forum for indigenous rights. 1993 was declared International Year of the Worlds' Indigenous People; many support groups subsequently emerged (World Council of Indigenous People; Survival International, Centre for World Indigenous Studies); in 1982 the Working Group on Indigenous Populations was established and released the Draft Declaration on Rights of Indigenous Peoples, 34 I.L.M. 541, 548 (1995), affirming and extending the rights of indigenous peoples. Self-determination is central. It requires protection from genocide; guarantees cultural and intellectual property rights; and requires existing treaties to be honored. It is heatedly debated. If ratified by the U.S., New Zealand or Canada, it would lead to internal legal challenges, increased non-indigenous anxiety, and political conflict. COATES & MCHUGH, *supra* note 78, at 21-39.

159. 34 I.L.M. 541, 548 (1995). This right is also referred to in various human rights conventions and other international agreements.

160. *Id.*

161. Bosselmann, *supra* note 144.

ongoing framework for that very relationship. The resolution of one claim simply provides the basis for another.[162] Second, they fear that because indigenous rights are western constructs that fail to reflect the cultures and belief systems of indigenous people (e.g., individual land ownership vs. communal connections with physical surroundings), they must be superseded by a post-structuralist approach in which identity arises and relations are managed.[163]

A post-structuralist approach, argues McHugh, avoids the appropriation of the dominant culture that results from pitting the rights of the state against those of the tribe.[164] "It emphasizes a process and voice as well as continuity and negotiability of identity and relations rather than illusory and rigid notions of closure and exit."[165] As a result, a post-structuralist approach leads to a cooperative cultural coexistence void of the politics of domination.[166] Interestingly, McHugh sees the United States as an emergent model of this approach, displaying growing emphasis at a federal level upon native consent and cooperation—a "bottom-up" rather than "top-down" approach.[167] McHugh argues that any agreement—even to talk—is an exercise of sovereignty.[168]

From a distance (McHugh is now teaching at Cambridge) it looks like New Zealand is moving toward a "relational" approach through the Treaty claims process. McHugh states that "what

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162. P.G. McHugh, *Aboriginal Identity and Relations in North America and Australia, in* LIVING RELATIONSHIPS: KOKIRI NGATHI: THE TREATY OF WAITANGI IN THE NEW MILLENIUM, 107, 119 (1998). For example, the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §1606(2000), granted indigenous peoples of Alaska title to over 40 million acres of land and $1 billion (U.S. dollars) in return for the extinguishment of aboriginal title in the state. It was hailed at first, but is now severely criticized by natives. There was a virtual absence of implementation mechanisms and a failure to address fundamental questions of state-native relations. New claims are now resurfacing. *Id.* at 117.

163. *Id.* at 111; Ken S. Coates, *Introduction New Zealand and Maori-Pakeha Relations in a Global Context, in* LIVING RELATIONSHIPS: KOKIRI NGATHI: THE TREATY OF WAITANGI IN THE NEW MILLENIUM, 19, 31 (1998).

164. McHugh, *supra* note 162, at 111.

165. *Id.* at 170.

166. *Id.*

167. *Id.* at 171. For example, In 1994 President Clinton set out principals for federal dealings with Native Americans. William J. Clinton, *Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22, 951 (April 29, 1994). They focus on more effective day-to-day working relationships and respect for rights of self-government due the sovereign tribal governments. *Id.*

168. McHugh, *supra*, note 162, at 171 (quoting P.S. Deloria & R. Laurence, *Negotiating Tribal-State "Full-Faith and Credit" Agreements: The Topology of Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 390-91 (1994).

perhaps is missing, however, is an acceptance that these initiatives, grounded in Maori participation and consent, are an expression of *rangatiratanga*."[169] Rather, there is a misperception that *rangatiratanga* leads to competitive and adversarial relationship with the Anglo-settler state.[170] This misperception, argues McHugh, is fostered by the dominance of the claims process, the publicity given to separatist extremists, and to some extent, by the nature of Maori political discourse itself.[171] While the claims process must continue, McHugh calls for a "parallel/supplementary political environment beyond it" that substitutes the rhetoric of finality and closure with an explicit more unified, coherent position on *rangatiratanga*, issued—perhaps in statement form—after collaboration with Maori.[172] Such a position could stress the participative character rather than the separatist one.[173] The Crown could formally recognize the "internal" sovereignty of Maori tribes subject to plenary power of Parliament.[174] Inter-*iwi* matters could be left for Maori resolution, giving the *iwis* political and constitutional status.[175] This might, however, result in the entrenchment of an *iwi*-based form of Maori representation in the political process, which would have to be expanded to include urban Maori.[176]

In a response to McHugh, Roger Maaka prefers to avoid describing the relationship between Government and Maori in terms of competing theories.[177] It is better to see the present reality of Treaty settlements as "an opportunity to re-conceptualize the relationship . . . to explore ways and means of creating a new genuinely post-colonial relationship . . . based on the acceptance that Maori are a sovereign people because they were the original occupants, never having relinquished their independence by explicit agreement."[178] This understanding of a relationship built on "interlocking sovereignties" rather than competing ones, concludes Maaka, "would require a major mind-shift by a number

169. *Id.* at 172.
170. *Id.*
171. *Id.*
172. *Id.* at 173.
173. *Id.*
174. *Id.* at 173-74.
175. *Id.* at 174.
176. *Id.*
177. Roger Maaka, *A Relationship, not a Problem, in* LIVING RELATIONSIPS: KOKIRI NGATHI: THE TREATY OF WAITANGI IN THE NEW MILLENIUM, 201, 204 (1998).
178. *Id.*

of both Maori and Pakeha . . . ."[179]

4. The Treaty and the Political Process

> My heartfelt thanks to the last term of Parliament for introducing MMP. This has given a forgotten people of this nation—made forgettable by the whirlwind of endless reform—a voice in this House, a voice that will never again be silenced.[180]
>
> — Alamein Kopu, Alliance List MP

As both Bosselman and McHugh suggest, Maori participation in the political process is a means of achieving both *rangatiratanga* and the necessary mind-shift Maaka describes. Prior to 1993, the electoral system was "first-past-the-post" (FPP), whereby candidates with the most votes in an election were elected to parliament.[181] According to research economist Brian Easton, this "winner-takes-all" (WTA) process resulted in "a virtual dictatorship" once the majority party chose the prime minister.[182] Only the outcome of the next election or the very unlikely possibility of the prime minister being overthrown could shift the balance of power.[183] Under this system, argues Easton, New Zealand was governed by a ruling elite that was almost exclusively Pakeha, male, middle-aged or older, and British-oriented.[184] Similar to the United States, two parties existed that reflected the two ends of the same spectrum, and vigorously contested its center.[185] As such, the political process failed to reflect the society, which was younger, of color, poorer and over half female.[186]

Seeds of change were planted in the 1970s when the pastoral, export-driven economy diversified, the country became more U.S.-oriented, and women and Maori were selectively introduced into governance.[187] Despite dissatisfaction with the two traditional parties, says Easton, "the institutional arrangements were more

179. *Id.*
180. Anthony Hubbard, *Kopu's 15 Minutes Over*, SUNDAY STAR-TIMES, Nov. 28, 1999, at A7.
181. BRIAN EASTON, THE WHIMPERING OF THE STATE: POLICY AFTER MMP 13 (AUCKLAND U. PRESS 1999).
182. *Id.*
183. *Id.*
184. *Id.* at 28.
185. *Id.*
186. *Id.*
187. *Id.* at 29.

difficult to change, because they were at the foundation of the elite's power."[188]

The electoral reform of 1993 introduced a mixed-member-proportional (MMP) electoral regime, virtually eliminating the "winner-takes-all" process.[189] It is now extremely unlikely, notes Easton, that any single party will have an absolute majority and therefore unilaterally appoint a prime minister and cabinet with which to impose polices on parliament.[190] Instead, a multi-party or non-majority-party government will emerge.[191] In theory, with increased parliamentary supervision, policy will be of higher quality and evolve more slowly. Policy will also incorporate real elements of party differences, involve more public consultation, and better reflect the electorate's desires. Groups which have tended to be excluded from the policy process will have greater influence and public sector spending will increase.[192]

Prior to the reform, Maori were assured four seats in parliament as set out in the Maori Representation Act of 1867,[193] one of the few constitutional guarantees extended to Maori.[194] With the introduction of MMP, there was concern Maori MPs could lose their existing seats unless steps were taken. Ultimately, Maori seats were retained, to be based on the number of Maori who register on a separate Maori roll in preference to the general roll.[195]

As such, under MMP, each voter has two votes: an electoral district (or constituency) vote and a party-list vote. Maori seats apply only to electoral district votes. Those on the Maori roll vote for a representative of a Maori electoral district (a Maori seat), while voters on general roll vote for a representative of general electoral district (general seat). For the party-list vote, the rolls are

188. *Id.*
189. Electoral Act, 1993 (N.Z.).
190. EASTON, *supra* note 181, at 15.
191. *Id.*
192. *Id.* at 123.
193. Maori Representation Act, 1867 (N.Z.).
194. Although not explicitly found in the Treaty of Waitangi, Maori representation has been recognized as entirely consistent with it. NGATATA LOVE, *The Treaty of Waitangi*, *in* THE CONSTITUTIONAL IMPLICATIONS OF MMP 42, 43 (Alan Simpson ed., 1998).
195. EASTON, *supra* note 181, at 36. The "Maori Option" allows Maori to choose between enrolling on the general roll or the Maori roll. The "Maori Option case" was decided in 1994 by the Waitangi Tribunal, which accepted Treaty relevance in a statute that makes no explicit reference to the Treaty. DENESE L. HENARE, *Commentary*, *in* THE CONSTITUTIONAL IMPLICATIONS OF MMP 49, 56 (Alan Simpson ed., 1998).

effectively combined, all list votes are totaled and party-list seats allocated to parties that competed for the list vote. Lists are made up by parties, which place their candidate for prime minister at the top.[196]

The impact of MMP on Maori is still being determined. In the 1993 election, four of the ninety-nine constituency seats went to Maori, in 1996, five of sixty-five and in 1999, six of sixty-seven.[197] Together, the Maori seats constitute the Maori Affairs Select Committee, which has been likened to the U.S. Congress' Black Caucus.[198] According to Ngatata Love, MMP has proved to be a shot in the arm for Maori who are now participating in much greater numbers in mainstream politics. The frustrating feeling that enrolling was a pointless exercise (despite a statutory obligation) has diminished.[199] MMP has also increased the incentives for mainstream parties to put Maori high up on their party-lists. Real oppositional political parties are now seen by more Maori as means by which to affect sought after changes under the Treaty and to challenge the recent neo-liberal economic reform.[200] The more seats are contested, argues Love, the more discussion about Maori rights will occur.[201]

Despite these gains, Easton and others are more cautious. Popular expectations of MMP may have been inflated, providing only an illusion of political choice.[202] In fact, the moderating effects of coalitions may mean that major policy changes are unlikely.[203] Maori enrollment is still low,[204] young voters lack direction,[205] and confidence in Maori MPs is patchy.[206] Ill-

196. Henare, *supra* note 195, at 50-51.
197. EASTON, *supra* note 181, at 36.
198. LOVE, *supra* note 194, at 47.
199. *Id.* at 46.
200. *See infra* Part I.C. The Mana Motuake party broke away from Labour citing the party's inability to grapple with the issues raised by Maori within its ranks (self-determination). It remains electorally insignificant, however. JANE KELSEY, THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT? 305 (AUCKLAND U. PRESS 1997). Other Maori parties include: Mana Maori, Mana Wahine, and Maori Pacific.
201. LOVE, *supra* note 194, at 47.
202. KELSEY, *supra* note 200, at 316.
203. *Id.* at 316-17.
204. *Enrollment Apathy 'Reflects Maori Disillusion*,' N.Z. HERALD, Sept. 9, 1999 at A10. A month before the 1999 election, 135,313 people had enrolled in the 6 Maori seats, 6,616 lower than the previous election. *Id.*
205. Theresa Garner, *Young Voters 'Ripe for the Picking,'* N.Z. HERALD, Nov. 24, 1999, at A10. Researchers from the New Zealand Study of Values found young

considered party lists produce incompetent MPs and result in party-hopping and instability.[207] A dramatic rejection of Maori parties and a return to the Labour party in the 1999 election may have been due to a lack of resources and voters, as well as a lack of faith in stand-alone parties.[208]

During the same election, the Labour party aggressively courted the Maori vote.[209] It promised to strengthen the Ministry of Maori Development, close the gap between Maori and other New Zealanders in jobs, housing, and education, and create an international profile for Maori culture through a Maori tourism body.[210] The focus of Maori within the party was to "improve the Maori economy and close the gap."[211] As a result, in the November election, all five Maori MPs from the NZ First party were replaced by six Labour MPs including the urban Maori champion, John Tamihere[212]—with his "for Maori, by Maori" slogan.[213]

Taonui has urged Maori, however, to reconsider their loyalty to the Labour party because it has "delivered little."[214] The non-

adults floating around, with no clear-cut ideological positions. "They are lost within an individualist, isolationist kind of culture, and are at the whim of whatever forces come to bear on them," says study director Alan Webster. *Id.*

206. Richard Knight, *Politicians' Antics Seen as Turnoff for Maori Voters*, N.Z. HERALD, July 13, 1999, at A5. The "Tight Five" MPs in Parliament in 1996—all in the NZ First party—became known as the "loosies" and lost power. Audrey Young, *MMP a Winning Formula for Maori*, N.Z. HERALD, Nov. 18, 1999, at A18.

207. Hubbard, *supra* note 180.

208. Rawiri Taonui, *Maori Voters Should Revise Allegiances*, N.Z. HERALD, Sept. 2, 1999, at A15.

209. *Labour Pitches For Maori Vote*, N.Z. HERALD, Oct. 18, 1999, at A5.

210. *Id.* Specifically the Labour Party promised to: help young Maori gain qualifications through a "modern apprenticeship programme"; develop *papakainga—marae*-based housing; support self-build schemes; hire more teachers in Maori language and all core curricula; and stage a *hui* (meeting) for Maori educators and community leaders to develop long-term plan. It also promised to hold the Fisheries Commission accountable to both Crown and Maori and develop a "fair allocation model." *Id.* Other parties made promises to Maori as well: National: forward-looking; a hand-up vs. hand-outs; NZFirst: loyalty; Maori Pacific: leverage; no deadline on Treaty settlement; Alliance: policies with vision; Mana Maori Movement: an independent voice; ACT: to close the gap; Greens: more funding for the Tribunal; United: budget cap of $200 million/year on treaty settlements; Christian Heritage: increased Tribunal funding. Young, *supra* note 206, at A18.

211. Richard Knight, *Maori Expect Labour to Deliver*, N.Z. HERALD, Nov. 29, 1999, at A7.

212. Donna Chisholm, *Maori Voters Flock Back to Labour*, SUN. STAR TIMES, Nov. 28, 1999, at A3.

213. Knight, *supra* note 211.

214. Tanoui, *supra* note 208, at A15.

Maori majority will always dictate Maori policy, argues Taonui.[215] Maori could consider instead creating a pan-party Maori caucus or strategically using the electorate and party votes to produce pro-Maori, not pro-Party results.[216] Alternatively, two parallel parliamentary houses with provisions to prevent either dictating to the other could be formed. Although non-Maori would reject this type of reform, Taonui argues it would be legitimate under the Treaty.[217]

MMP delivers "more Maori into Parliament," Taonui admits, but, it has not delivered the promised "Maori miracle in politics."[218] Or as Easton observes, "It would be easy to argue that MMP restores (or strengthens) democracy in New Zealand. . . . But this is not enough. To have an effective democracy . . . requires . . . a re-establishment of some notion of equity in public policy . . . ."[219]

5. The Treaty and "Civil Rights"

The equity that Easton calls for is often associated with "civil rights"—at least in the United States. This is not really the case with the Maori struggle. Most often, Treaty and international "human rights" discourses dominate. This may be due to the nature of New Zealand's foundational documents. New Zealand is one of only three democratic countries in the world without a written constitution.[220] Rather, a collection of statutory law, judge-made law, international law, and the Treaty of Waitangi constitute the nation and dictate rights talk.[221] There is no judicial review of legislation[222] and the final court of appeal remains the Privy Council in Britain—although New Zealand might eventually establish its own court of final appeal. This would inevitably affect Maori who have always looked to the Queen as their Treaty partner.[223] A break from Britain, the establishment of an independent republic, and the drafting of a constitution would also have serious implications. Aspects of Maori lore such as *marae*

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. EASTON, *supra* note 181, at 123.
220. Steven Price, *Law is on Shaky Foundations,* N.Z. HERALD, Sept. 3, 1999, at A12.
221. *Id.*
222. *Id.*
223. *Privy Council 'Too Far Away,'* N.Z. HERALD, April 9, 1999, at A8.

justice and collective ownership of land are already recognized by the legal system,[224] but the New Zealand Law Commission believes that the nation's law would be stronger if more value were placed on Maori *tikanga* (customs). The law could then be better tailored to ensure the rights of the Maori.[225]

The main existing anti-discrimination statues include the Bill of Rights Act of 1990[226] and the Human Rights Act of 1993.[227] The former statute secures civil and political rights such as freedom of thought, expression, and association;[228] freedom from cruel treatment and unreasonable search and seizure;[229] and freedom from discrimination on the ground of "colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief."[230] The latter statute attempts to enforce international covenants and conventions,[231] although it does not resemble them substantively. Rather than prohibiting discrimination generally, it merely prohibits specific acts in areas such as employment,[232] public accommodations, [233] and housing[234]—and with many exceptions as well.[235]

The complexities of defending Maori rights within this context and along side the Treaty settlement process can be best illustrated by examining two specific issues: affirmative action in higher education and the rights of *wahine* Maori (women).

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224. *Maori Customs 'Need Equal Status,'* N.Z. HERALD, Oct. 13, 1999, at A8.

225. Angela Gregory, *Mixing Cultures to Settle Disputes,* N.Z. HERALD, March 30, 2001, at A5.

226. Bill of Rights Act, 1990 (N.Z.).

227. Human Rights Act, 1993 (N.Z.). This Act replaced the Race Relations Act, 1971 (N.Z.) and the Human Rights Commission Act, 1977 (N.Z.). *See generally*, Jerome Elkind, *Anti-Discrimination Law in New Zealand*, 1 HUM. RTS. L. & PRACT. 230 (1996) (outlining the prospects and problems of the Human Rights Act of 1993 and related legislation).

228. Bill of Rights Act, §§ 13, 14, 17, (1990) (N.Z.).

229. *Id.* §§ 9, 21.

230. *Id.* §19.

231. Elkind, *supra* note 227, at 231. These include: The International Covenant on Civil and Political Rights, 999 UN Treaty Service 171, 6 ILM 368 (1967); (entered into force for New Zealand March 28, 1979); The International Covenant on Economic, Social and Cultural Rights, 993 UN Treaty Service 3, 6 ILM 360 (1967); (entered into force for New Zealand March 28, 1979); and The Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. CCPR/C/10Add. 6, ¶34 et seq.

232. Human Rights Act, § 22, (1993) (N.Z.).

233. *Id.* §42.

234. *Id.* §53.

235. *Id.* § 44(4). For example, an exception against discrimination in public accommodations is provided for "clubs." *Id.*

a. Affirmative Action in Higher Education

> If it broadens participation in a profession, a little social engineering can do no harm.[236]
>
> — New Zealand Herald

The fluid nature of New Zealand's foundational documents might work to the advantage of Maori in the case of affirmative action, which, unlike in the United States, goes largely unchallenged in court. This is explicitly due to the Bill of Rights Act which excludes from discrimination "measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of . . . race . . .";[237] as well as to the Human Rights Act which permits "measures to ensure equality."[238] Both of these Acts are derived from international human rights law[239] and legitimize remedial efforts to equalize opportunities for those persons against whom discrimination is unlawful. Under them, three elements are required in undertaking an affirmative action plan: that the plan is done in good faith; that the plan assists or advances persons of a particular race; and that persons need (and want) assistance or advancement to achieve an equal place with other members of society.[240]

Because of their explicit endorsement, affirmative action in higher education exists in several forms in New Zealand,[241] from quotas found in the law and medical schools[242] to targeted

236. *A Little Social Medicine*, N.Z. HERALD, March 11, 1999, at A14.

237. Bill of Rights Act, §19(2), 1990 (N.Z.).

238. Human Rights Act, §73, 1993 (N.Z.).

239. *See* The Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CCPR/C/10Add. 6, ¶34 et seq.

240. Frances Joychild, *Affirmative Action—"Measures to Ensure Equality,"* 1 HUM. RTS. L. & PRACT. 218, 223 (1996) (citing Amaltal Fishing Co. v. Nelson Polytechnic, Unreported, 29/1/96, Complaints Review Tribunal, Wellington (Decision 1/96, CRT 3/94) (finding that Nelson Polytechnic failed to show that its quota systems for fishing cadet courses were specifically needed by Maori and Pacific Islanders and could not rely on Government policy or mere statistical inequalities for such a showing)).

241. Shane Cave, *Affirmative Action in Access to Education and Employment in New Zealand*, 3 HUM. RTS. L. & PRACT. 15, 17 (1997). Cave points out that affirmative action also received governmental support under the welfare system prior to the neo-liberal economic reform in the mid-80s. *Id.*

242. For example, out of 270 places for 1999 admission, the University of Auckland Law School held open 32 places for Maori and 13 places for Pacific Islanders all of whom needed a minimum average of C+ and were to be interviewed by Maori and Pacific Islander panels respectively. Statistics originally available at http://mark.law.auckland.ac.nz/1998/prospectus.html, but as of

education programs most often found in polytechnics.[243]

For example, Auckland's medical school, concerned for years with a lack of students of color, established an affirmative action plan in 1998 to attract and retain them.[244] Maori and Pacific Island students are accepted under a special admissions process, with slightly lower school grades allowed.[245] Personal qualities such as maturity and empathy now count as well.[246] For Maori and Pacific Island health care students that need extra preparation, the medical school also launched a bridging course called Vision 2020.[247] Once formal studies begin, however, students face the same courses, examinations and standards.[248]

In 1999, a record number of Maori and Pacific Island students were accepted to the medical school—26 of 104 students at the University of Auckland. This was double that of 1997, despite a new fee structure raising costs.[249]

Professor Colin Mantell, the head of Maori and Pacific Island Health at the University of Auckland argues in favor of the program:

> Tertiary institutes need to change their vision to one where Maori and Pacific Islander students will succeed, and ensure that opportunities and support are firmly established. There may be an initial educational deficit and the challenge is to strike that out as promptly as possible.[250]

Mantell also has asked society to "make the same shift in

August 14, 2001 this website was not available.

243. Cave, *supra* note 241, at 15. Ethnically targeted education programs are typically provided by the Government's Education Training Support Agency (ETSA).

244. Andrew Young, *Ethnic Mix Just What the Doctor Ordered,* N.Z. HERALD, March 10, 1999, at A7.

245. *Id.* The School used to accept only the top 150 applicants—i.e., those averaging about 82% over five bursary subjects. Special admissions students are still bright A bursary students. (Students sit for bursary exams in five or six subjects during 7th form—the equivalent of 12th grade. Their top five marks are totaled up with 500 being the top possible score.)

246. *A Little Social Medicine,* N.Z. HERALD, March 11, 1999, at A14.

247. Young, *supra* note 244 at A7. Forty students were enrolled in 1999 and would decide which health field to train in at the end of the year from nursing to physiotherapy to medicine.

248. Colin Mantell, *Maori, Pacific Health Professionals Needed,* N.Z. HERALD, March 10, 1999, at A15. The bridging program also offers a certificate in health science. *Id.*

249. Young, *supra* note 244 at A7.

250. MANTELL, *supra* note 248.

attitude to provide opportunities for Maori and Pacific Islanders" so that they can be part of the health care team.[251] He argues that no apologies need to be made for relaxing barriers.[252] The program is welcome because it will improve services to and address the particular health problems within Maori and Pacific Island communities. It will also increase representation of those minorities within the profession. Moreover, the program does not drop standards when it opens up the admissions process.

However, some New Zealanders are critical of the special admissions program, especially as market forces are applied to tertiary institutions. Significant numbers of the special admission students are from lower socio-economic backgrounds. Rates of non-completion by Maori and Pacific Island students at the early stages are as high as 50%. Bridging programs are often underfunded and not compulsory. The students often lack the requisite academic skills, do not make up this deficit in the time demanded by university methods of assessment, and suffer undue financial pressure. Maori complain that because Pakeha control the universities they "do not yet adequately address the problems these students face."[253] They are given heavy loads, expected to pass and not advised well enough. With rising university fees, Maori and Pacific Island students can least afford to fail. Yet, special admissions programs have yielded results.[254] Undoubtedly, the debate will continue.

b. Rights of Maori Women

> What affinity can we share with white women if they refuse to acknowledge and take responsibility for their colonialism?[255]
>
> — L. Whiu

The Government is under several obligations toward *wahine* Maori. While it has been relatively meticulous in complying with its reporting obligations under the U.N. Convention on the

251. *Id.*
252. *Id.*
253. Rawiri Taonui, *Time to Set Standards for Tertiary Education*, N.Z. HERALD, May 4, 1999, at A13. There are now eight institutions in the north in which Maori can attain bachelor degrees in Maori studies whereas ten years ago there were only two. In five years there will probably be four more. *Id.*
254. *Id.*
255. L. Whiu, *A Maori Woman's Experience of Feminist Legal Education in Aotearoa*, 2 WAIKATO L. REV. 161, 164 (1994).

Elimination of All Forms of Discrimination Against Women (CEDAW),[256] the Crown must still address the need for greater pay equity, adequate childcare facilities, adequate valuation on unpaid work, and an end to domestic violence.[257] In the area of domestic violence, Maori women in particular complain that not enough is being done—especially among their own people. Merepeka Raukawa-Tait, head of the women's refuge movement, claims that senior Maori leaders are spending too much time on tribal economic issues and enhancing their business portfolios while thousands of Maori women and children seek protection from violent partners.[258]

The Crown also has specific obligations toward Maori women under the U.N. Draft Declaration of the Rights of Indigenous Peoples[259] and under the Treaty of Waitangi.[260] Although *wahine* have traditionally been active participants in the formal leadership structure of Maori society,[261] the colonization process reshaped the foundational myths and restructured the extended family, leaving women dependent and marginalized both nationally and within Maoridom.[262] As Aroha Mead notes,

> [the] sexism which has occurred in Maori society originates more from colonisation than heritage, and it is

256. Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, 19 I.L.M. 33, 33.

257. Mai Chen, *Better Enforcing the Women's Rights Convention, in* HUMAN RIGHTS—HOW ARE THEY BEST PROTECTED 13, 17 (Paul Hunt ed. 1998). Even though the Equal Pay Act, 1972 (N.Z.) was passed nearly 30 years ago, the gender pay gap persists. The average weekly income for full-time female wage-salary jobs was 76% of that of men. Statistics show that in their early 20s, women's median wages are already only 87% of men's and they keep getting worse. Sandra Coney, *Real Action Needed on Gender Gap*, N.Z. HERALD, Nov. 21, 1999, at C4.

258. Andrew Stone, *Women's Refuge Head Slams Maori Leaders,* N.Z. HERALD, July 5, 1999, at A5. Maori tradition, *mana*, colonization and unemployment are also no excuse for domestic violence, argues another Maori woman, Kelly Bennett. "The traditional way is all rubbish. We were born into the European way. We didn't even know the old Maori ways. I'm ashamed and disgusted with my people." Carroll Du Chateau, *Welfare Worker Ashamed of Aggressive Maori Men,* N.Z. HERALD, Aug. 26, 1999, at A3.

259. Draft United Nations Declaration on the Rights of Indigenous Peoples, Aug. 26, 1994, 34 I.L.M. 541, 548.

260. MELBOURNE, *supra* note 10, at 72.

261. *Id.* at 72. In keeping with the Maori worldview that acknowledged balance and interrelationship, both men and women were essential parts in the collective whole, including the sharing of power. *See generally,* R. KAHUKIWA & P. WAHINE TOA GRACE, WOMEN OF MAORI MYTH (1984).

262. Linda Smith, *MaoriWomen: Discourse, Projects and Mana Wahine, in* WOMEN AND EDUCATION IN AOTEAROA 34 (S. Middleton & A. Jones eds., 1992).

> a problem as common in international indigenous societies as is alienation of lands and resources. Maori leadership has got to work this through and de-programme all that does not rightfully belong within our Iwi histories. Maori women, as we all know, are the backbone of Maori society. . . . It is unfair, soul destroying and a tragic waste of much needed skill, energy and commitment, to continue to deny Maori women their rightful place in *Iwi*/Maori decision-making.[263]

The resulting inequality manifests itself today in exclusion of Maori women from meaningful roles in the Treaty settlement process. The Maori Women's Welfare League, for example, recently lodged a claim with the Waitangi Tribunal against the Crown for failing to protect the rights of Maori women in the Fisheries case.[264] Dame Georgina Kirby of Ngati Kahungunu and former National President of the Maori Women's Welfare League sums up the claim in this way:

> We say they are giving away the mana of Maori women. We talk about the partnership role of the Treaty and yet the government denies us a part in that partnership. When the Crown sets up agencies and mechanisms they don't consult with Maori women and they never have. They do not consider Maori women for decision-making positions. It happened when the Fisheries Commission was established.[265]

The invisibility of Maori women is particularly evident in the court proceedings themselves, argues Linda Tuhiwai Smith of the International Research Institute for Maori and Indigenous Education. A case like this, says Smith, "is generally about philosophical issues where there's a lot at stake politically, mana-wise, resource-wise; all those things added up . . . silence women's voices in the formal sense . . . .[I]t's the whole process."[266]

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263. Aroha Mead, Maori Leadership, Address to the Hui Whakapumau: Maori Development Conference (Aug. 1994).

264. *See supra* Part I.B.2.b.

265. MELBOURNE, *supra* note 10, at 73.

266. *Kei Whea Nga Wahine: A Conversation with Linda Tuhiwai Smith & Kuni Jenkins*, *in* 3 FISHERIES & COMMODIFYING IWI: ECONOMICS, POLITICS & COLONISATION 13 (1998).

6. Treaty Fallout

We must not lose our nerve now.[267]

— Sir Douglas Graham, Treaty Negotiations Minister

Before leaving the Treaty context, it is helpful to step back and see how it is viewed in its contemporary application. In October 1999, the New Zealand Study of Values found a significant rise in hostility toward the Treaty. Those who wanted it "abolished" increased from a quarter to a third, and those who supported it fell from a third to a quarter.[268] While there is no one set reaction, several prototypes emerge.

As expected, there are those Pakeha who are unabashed in their desire to put an end to the Treaty process. David Round, Professor of Law at University of Canterbury is most representative:

> A blight lies on our country. It destroys conversations and friendships, sours all political discourse . . . encourages divisiveness, bitterness and hatred. One side labels the other reactionaries and racists; the other replies with the labels of weaklings, dupes and fools. It is the Treaty . . . ."[269]

Other Pakeha take a more assimilative approach, such as social critic Walter Christie:

> Race separatism was not the aim of the Treaty of Waitangi. It is far from desirable now. From the outset the native New Zealanders adapted well to the modern world. They continued doing so for some time until diverted. . . . Common sense should prevail. We are one people, one society, one family where differences should enrich not divide."[270]

While still others, like Paul Spoonley, adopt a more benevolent, paternalistic tone:

> Restitution needs to continue because legitimate claims . . . should be recognized. But it may be time to invest energy and resources into other areas. Grievance could be replaced by development, and a number of Maori organisations are well down this road. There is a need to transfer negative welfare benefit spending into

267. Audrey Young, *Waitangi 'Nerve' Must Endure: Treaty Minister*, N.Z. HERALD, Oct. 8, 1999, at A5.

268. *Courage is Priority for Treaty Pact*, SUN. STAR TIMES, Oct. 3, 1999, at A10.

269. ROUND, *supra* note 12, at 25.

270. WALTER CHRISTIE, A RACE APART 233 (1998).

> more positive policies built around improving the skills of Maori, and making sure that they participate in economic growth and prosperity.[271]

Maori also express concern with the Treaty settlement process. Some believe they need to rely on themselves rather than the Treaty, [272] while others simply have no faith in the process at all. Cherryl Waerea-i-te-rangi Smith has transformed a Mohawk piece on ways to scalp an Indian into "Twenty-one Ways to Take Away Treaty Rights" which include: make the Maori a non-person (convince them their ancestors were savages, that they are violent, or make them wards of the state); convince Maori to be patient; make Maori believe that things are being done for their own good; insist that Maori "go through the proper channels"; set up a pretend court with no powers; play one *iwi* off another; and talk about what's good for everyone.[273]

New Zealanders who have not lost faith, also express a range of responses. There are those who are equally adamant about the need to maintain the Treaty process:

> Pakeha critics of the Treaty argue that parliamentary democracy and the rule of law are . . . sufficient for [peaceful co-existence]. Maori will reply that this is simply a recipe for the tyranny of the majority . . . The history of New Zealand land law would serve to prove them right . . . New Zealand is fortunate to have a founding statement of principles . . . by which the relations of Maori and Pakeha can be mediated . . . .[274]

And there are those, such as Taonui, that claim not enough is being done:

> There is a paradox when some New Zealanders, while attesting a sense of justice and protesting affordability return, cloaked in apologies, less than 2% of the lands unjustly taken from Maori, continue to enjoy the benefits they derive from the 98% they retain.[275]

Yet Taonui and others also express encouragement:

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271. Spoonley, *supra* note 104.

272. Angela Gregory, *Maori Must Have Own Economy, Says Leader*, N.Z. HERALD, July 30, 1999, at A14.

273. Cherryl Waerea-i-te-rangi Smith, *Twenty-one Ways to Take Away Treaty Rights*, *in* 1 THE FISCAL ENVELOPE: ECONOMICS, POLITICS & COLONISATION 30-32 (1995).

274. WARD, *supra* note 74, at 2.

275. Taonui, *supra* note 139.

> The treaty is an ongoing relationship . . . . It is nearly 160 years since the treaty was signed. We are not 15 years into that process of investigating losses, making reparations and, most importantly, determining how we can share the future. We need maturity, courage and patience in order to persevere.[276]

While some express hope:

> The treaty is, of course, a legal contract. But it is also a statement of hope, a symbol of partnership, a commitment made by representatives of two different peoples to try to work together . . . [to] become one nation. Like South Africa's 'Truth and Reconciliation Commission,' the . . . . Tribunal is a forum within which wounds from our past can be healed and new partnerships forged . . . this will occur only if we . . . look honestly at personal prejudices, cultural differences and structural racism, as well as individual grievances. . . .

And some even joy. "In ten years we'll look back and ask ourselves why we didn't . . . unleash all this energy before . . . ."[277]

In the end, the reality of the Treaty process is what is made of it. Unfortunately, the Treaty is not the only context in which Maori must contend for justice.

C. Neo-Liberal Economic Reform

1. The Reform

> The evidence was clear that, with the onset of structural adjustment, the colonial legacy of poverty, dispossession and alienation that had operated since 1840 had taken another, equally pernicious, form.[278]
>
> — Jane Kelsey, Associate Professor of Law, University of Auckland.

In 1984, heralded by Sir Roger Douglas, the traditionally social democratic Labour party unilaterally and cavalierly undertook the "New Zealand Experiment"—a pure neo-liberal economic reform. The National government continued "Rogernomics" with even

276. Taonui, *supra* note 103.
277. MELBOURNE, *supra* note 10, at 89.
278. KELSEY, *supra* note 200, at 285.

greater fervor after 1990.[279] By 1999, the fundamentals of the reform were entrenched: market liberalization and free trade, limited government, a narrow monetarist policy, a deregulated labor market, and fiscal restraint.[280] The reform continued, notwithstanding economic and social consequences[281] and a prevailing view among New Zealanders that the theory behind it was morally and ethically bankrupt.[282] Writes Kelsey, "There was no room for putting altruism ahead of self-interest, compassion ahead of efficiency, or mutual obligations and collective identity ahead of individual benefit. Nor was there any doubt about the intrinsic superiority of the market-place."[283]

As a result, the economic character of the country changed radically. In the private sector, the successive Governments removed subsidies, ceased regulating the number of competitors, set about dismantling import protection, and exposed sheltered industries to global markets. In the public sector, they transformed post and electricity into state-owned enterprises, trimmed railways for sale, and lifted the freeze from prices, wages, interest rates and dividends. The financial sector was deregulated and the dollar floated, farm subsidies wiped out, and public debts exposed.[284] Increasing foreign control required Maori resources to be sold off[285] while expanding Asian immigrant policies left largely poorer and unemployed Maori even more marginalized.[286]

The reform affected all other areas of New Zealand life as well. In education, the Governments transferred administrative responsibility to local school boards and, in order to reduce government funding, forced tertiary institutions to respond to the market—delivering private benefits to fee-paying students.[287] More profoundly, education was defined as a private good.[288] As a result, an elite student body emerged, under heavy pressure to recoup costs of education, repay loans, and pursue careers rather than

279. *Id.* at 1.
280. *Id.* at 2.
281. *Id.* at 11.
282. *Id.* at 271.
283. *Id.* at 335.
284. John Roughan, *Our First Steps into a Brave New World,* N.Z. HERALD, July 14, 1999, at A14. In particular the debts of Think Big, a huge public investment that gambled on 1970s oil prices, were exposed. *Id.*
285. KELSEY, *supra* note 200, at 342.
286. *Id.* at 340.
287. *Id.* at 4.
288. *Id.* at 328.

vocations. Intellectual interests became luxuries. Market forces served women, Maori and Pacific Island students the least and hit them the hardest.[289]

The Governments also cut back state expenditures "as the universal welfare state gave way to a limited safety net founded on the 'fundamental principles' of fairness, self-reliance, efficiency, greater personal choices, realism, and change management."[290] Michael Joseph Savage's vision of the "welfare of the people" as the nation's "first and constant consideration," which had placed the economy at the service of social justice since the 1930s, was superceded by a vision of the marketplace.[291] Targeted assistance was easier to sell to the electorate than a universal welfare system, despite the required threshold testing, monitoring, and compliance checking. As former Prime Minister Jim Bolger put it, "I am waiting for someone to provide moral justification, much less economic justification, to tax people on modest incomes so as to pay benefits to individuals or families who don't need them."[292]

Consequently, the extent and amount of entitlement to welfare benefits were pared back—even as those persons forced to depend on them grew.[293] Subsidized state housing was raised to full market value with supplements available for tenants in public and private rental accommodation or for homebuyers with strict eligibility. Institutions for mentally ill, elderly, and young closed in the name of community care, and churches and charities were expected to cover government's withdrawal from social and income

289. *Id.* at 329.

290. *Id.* at 272.

291. "The goal of New Zealand's social security system, according to the Royal Commission on Social Security in 1972 was to ensure within limitations . . . that everyone is able to enjoy a standard of living much like that of the rest of the community, and thus is able to feel a sense of *participation in and belonging to* the community." *Id.* at 271 (quoting Report of the Royal Commission of Inquiry, *New Zealand Today*, Vol. 1 (April 1988)). Standards for a fair society also included: dignity and self-determination; genuine opportunity for all people, of whatever age, race, gender, social and economic position or abilities, to develop their own potential; fair distribution of wealth and resource including access to the resources; and acceptance of identity and cultures of different peoples. *Id.* at 271-72 (citing Report of the Royal Commission on Social Policy, *New Zealand Today*, Vol. 1 (April 1988)).

292. JONATHAN BOSTON & SUSAN ST. JOHN, *Targeting versus Universality: Social Assistance for All or Just for the Poor?*, *in* REDESIGNING THE WELFARE STATE IN NEW ZEALAND: PROBLEMS, POLICIES, PROSPECTS 93, 93 (1999).

293. KELSEY, *supra* note 200, at 4.

support.[294] Charity was compatible with the neo-liberal ethos, enabling the rich to choose how much benevolence to bestow, and on whom.[295]

Kelsey also argues that an innate moralism and gender bias pervaded these attacks on the welfare state. The Crown moved to force "responsibility" back onto the family, attempted to normalize monocultural, nuclear and patriarchal family, and displayed indifference to widespread evidence of domestic violence.[296] It also adopted a new vocabulary that dehumanized the process.[297] As a result,

> [b]y 1995, after a decade of radical structural change, New Zealand had become a highly unstable and polarized society . . . What were once basic priorities—collective responsibility, redistribution of resources and power, social stability, democratic participation and the belief that human beings were entitled to live and work in security and dignity—seemed to have been left far behind.[298]

Nonetheless, the "New Zealand Experiment" was internationally "praised for getting the fundamentals right."[299] But did it, and at what cost?

2. The Socio-economic Effects of the Reform

> It is no coincidence that the biggest increases in income inequalities have occurred in economies such as those of America, Britain and New Zealand, where free-market economic policies have been pursued most zealously.[300]
>
> — *The Economist,* 1994.

The purpose of the neo-liberal economic reform was to increase growth and reduce poverty, neither of which occurred. Prior to 1984, New Zealand's real gross domestic product was very

294. *Id.* at 5.
295. *Id.* at 291.
296. *Id.* at 332.
297. *Id.* at 335. For example, "shedding workers" for lay-offs; "flexible wage rates" for cutting wages; "broadening the tax base" for shifting burden from rich to poor; and "incentives" for cutting benefits to force people into very low-paying jobs. *Id.*
298. *Id.* at 350.
299. Paul Dalziel, *Fifteen Years on and Economic Goals Remain Out of Reach,* N.Z. HERALD, July 14, 1999, at A15.
300. KELSEY, *supra* note 200, at 271, *citing For Richer, For Poorer,* THE ECONOMIST, Nov. 5, 1994 at 19.

close to that of Australia with annual growth rates of 2.7% and 2.9% respectively. Between 1984 and 1992, New Zealand's real output remained virtually static while Australia's continued to grow at 3% a year. After 1992, the annual growth rate recovered to 3.3%, yet still remained almost a full percentage point below that of Australia at 4.2%. So while its economy showed some signs of recovering, New Zealand slipped behind Australia, with an output gap of $215 billion from 1984 to 1998.[301]

At the same time, poverty levels grew dramatically, especially after social welfare cuts in 1991. Ten percent of the population increased their share of total income at the expense of the rest of the country's population, while the cut in the standard of living of the bottom 10% was 8.7%.[302] The number estimated to be living below the poverty line rose by at least 35% between 1989 and 1992; and by 1993 one in six persons was living in poverty.[303] "The issue of income distribution [had] simply been ignored," comments Kelsey.[304]

Unfortunately, "Maori were the most marginal of the marginalized. Having been systematically stripped of the resources that guaranteed their economic, cultural and spiritual well-being, Maori were reduced to an underclass in their own land."[305] By late 1993, census figures indicated that in the ten years prior, the proportion of Maori in the poorest 20% of the national population had almost tripled, while the proportion of Pakeha among the poor had actually decreased by about one fourth.[306] A dual society was emerging and Maori were becoming an underclass with no "vested interest in democracy . . . ."[307]

This income gap was compounded by past social policies and other pressures generated from a lack of attention to the culturally specific needs of the Maori.[308] As predominantly unskilled labor, Maori depended heavily on state employment. In the 1950s and 60s many *iwis* transferred resources in trust to the Crown in return for jobs, expecting them to be returned. The increased

301. Dalziel, *supra* note 299, at A15.
302. *Id.*
303. KELSEY, *supra* note 200, at 10.
304. *Id.* at 243.
305. *Id.* at 283.
306. WEBSTER, *supra* note 22, at 42.
307. KELSEY, *supra* note 200, at 296 (quoting Ian Shirley, Social Development in New Zealand, Address at the Social Development Seminar (Aug. 5, 1999)).
308. *Id.* at 273.

corporatization and privatization under the economic reform allowed the Government to sell these resources, setting Maori adrift and rendering them even more dependent on the state. Many Maori were also mainstreamed into urban workshops for the unskilled—lower paid employment in industries that had since been massively downsized.[309] For this reason, unemployment and benefit cuts hit Maori disproportionately hard.[310] By March 1992, the unemployment rate for Maori, who comprised 8% of the labor force, had reached 25.8% compared with an 8.1% rate for Pakeha.[311]

Families in poverty also faced charges for health care and education, which were previously free.[312] Devolution led to new forms of dependency on immediate families and voluntary agencies, which—although sold as a means to "empower the community"—were never properly funded.[313] The burden was merely shifted from the state to primarily *wahine* "volunteers."[314] The public symbol of this charity became the rise of the foodbank, which experienced an astounding 1,117% increase between 1991 and 1993, serving disproportionate numbers of Maori and Pacific Islanders.[315]

The "short-sighted, cost-cutting mentality" of economic reform also compromised Maori educational opportunities.[316] The established link between socio-economic status, race, and achievement[317] was exacerbated by the increased inability of schools in high poverty, non-Pakeha areas to provide for the needs of their students. In 1994, "one in five secondary students was at risk of failing school because of poverty, severe behavioral problems, truancy, or abuse."[318] Maori students and those in poor schools

309. LAIDLAW, *supra* note 11, at 161.
310. KELSEY, *supra* note 200, at 285.
311. *Id.* at 262. The rate for Pacific Islanders was 28.8%. *Id.*
312. *Id.* at 289.
313. *Id.* at 291.
314. *Id.* at 292.
315. *Id.*
316. *Id.* at 290.
317. *NZ School Report: Could Try Harder*, N.Z. HERALD, Sept. 16, 1999, at A15 [hereinafter *School Report*]. A 1999 report showed that a quarter of students at low-decile (poor area) schools did not sit for School Certificate (two steps below bursary, which is required for university entrance), compared with 4% at high-decile schools. *Id.* "Of the lower-decile students who did sit, most got D or E grades. *Id.* Boards of trustees in poorer areas tended to have less management experience and educational standards were lower." *Id.*
318. KELSEY, *supra* note 200, at 290.

were even more likely to fail.[319] Teachers in predominantly Maori schools were under rising stress,[320] as the gap between wealthy and poorer schools continued to grow.[321] The market model was racially and economically polarizing education rather than creating diversity. Teenagers from middle-class families in poor areas were abandoning their local schools for those in wealthier areas. Over half the low-decile (poor) secondary schools lost more than 10% of their students after 1992.[322]

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319. *School Report*, *supra* note 317, at A15.

320. Bronwyn Sell, *Job Puts Load on Maori Teachers,* N.Z. HERALD, July 12, 1999, at A16. A report completed for the Ministry of Education showed that Maori secondary teachers are under stress, juggling teaching with looking after Maori students and promoting Maori language. *Id.* Maori teachers work an average of 60 hours a week and one in five considered leaving, "citing stress, lack of support and feeling undervalued." *Id.*

321. Wayne Bainbridge, *Poor Schools Could Lead to Permanent Underclass*, N.Z. HERALD, July 28, 1999, at A15. Equity payments to poorer school have failed. *Id.* They were originally intended for economically disadvantaged areas (decile 1-4) to try to balance the advantages of schools, but funding is now extended to up to decile 9 schools. *Id.*

322. Bronwyn Sell, *Cultural Shift Hurting Poorer Schools,* N.Z. HERALD, Sept. 16, 1999, at A12. These statistics come from a Ministry of Education report on the class of 1998. Only 5% of secondary schools in wealthy areas had a similar loss while half of them had grown more than 10%. *Id.* To remedy these shortcomings, educational experts are calling for compensatory literacy intervention; homework centers; parent education; and mentors. Wayne Bainbridge, *Schools Alone Can't Solve Maori Underachievement,* N.Z. HERALD, Nov.17, 1999, at A19; One-stop-schools providing food, healthcare, social welfare services have also been recommended. Catherine Masters, *Call for One-Stop Schools: Feed-and-Succour Scheme Advocated,* N.Z. HERALD, Oct. 5, 1999, at A4. Others are calling for more culturally specific structural reforms such as correct pronunciation of Maori names; family-friendly meetings and programs; more Maori teachers and board members; Maori language; art and music around the school; bilingual and immersion classes; and high expectations. Only then will the system shift from treating Maori as a small ethnic minority for whom a little provision must be made to true partners. Charmaine Pountney, *Too Many Barriers to Maori Learning*, N.Z. HERALD, July 26, 1999, at A13. Still others call for a strengthening of the separate Maori schools that already exist so as to escape a failed Western model of education. *Maori See Youngsters Being Schooled for Failure,* N.Z. HERALD, June 25, 1999, at A9. Currently, 96% of Maori children go to mainstream schools. *Id.* In a 1999 report, the Maori Education Commission, set up in 1997 to reduce the gap between Maori and non-Maori education, called for a separately funded Maori education entity rather than continuing with initiatives that patch on to mainstream curriculums. Currently, the education system is tightly legislated and takes a Western approach that focuses on treating a "deficiency" in the child. Critics feel that a separate system is not the answer. Richard Knight, *Henare Supports Urgent Boost to Maori Education*, N.Z. HERALD, June 25, 1999, at A3. Nationwide, there are 770 *kohanga reo* (preschools) and 50 total-immersion Maori language *kura kaupapa* (primary and intermediate schools. Taonui, *supra* note 51 at A13. More must be done, however, to meet the need for stable, two-parent, fully employed families with the economic

Moreover, between 1994-1997, the number of secondary students from poor schools going on to university dropped by 23%, while the number from wealthy areas increased 25%.[323] A University of Auckland study showed the link between the economic status of the community from which a school draws its students, and the likelihood students will go on to tertiary education. According to Professor Dame Anne Salmond, "The gap is widening at a frightening rate."[324] Unless the trend is reversed, New Zealand will be unable to produce the skilled population for the knowledge-based economy upon which the reform is dependent. In fact, New Zealand is already behind other developed countries in the percentage of persons with university qualifications.[325]

Studies also show that student loan debt created by applying market forces to education disproportionately affected those from poorer backgrounds. With fewer graduating, and those that do graduating with lower-level qualifications, poorer students now leave with less earning power and greater debt. Comments Rawiri Taonui, "We run the danger of creating a class of unqualified and heavily indebted former students. Rather than breaking down old barriers, we are creating new ones."[326]

Housing conditions were also negatively affected by the reform. High market rents for urban state housing—although a false economy—contributed to overcrowding and the spread of infectious diseases, which are expensive to treat.[327] In 1999, almost 75% of people living in crowded homes were Maori or Pacific Islander.[328] The market rents that low-income persons were forced to pay for substandard housing, showed the Government's lack of

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resources to provide good health care, books, and language experiences. Wayne Bainbridge, *Schools Alone Can't Solve Maori Underachievement,* N.Z. HERALD, Nov. 17, 1999, at A19.

323. Theresa Garner, *Fewer Poor, More Rich Going on to University*, N.Z. HERALD, Sept. 18-19, 1999, at A4. There have been overall gains in Maori tertiary enrollments and graduates, however. For example, the number of graduates rose from 400 to nearly 1,600 from 1990 to 1996. Rawiri Taonui, *Poor Students Borrow More*, N.Z. HERALD, Nov. 25, 1999, at A21.

324. Garner, *supra* note 323.

325. *Id.*

326. Taonui, *supra* note 323.

327. Martin Johnston, *State Housing Rents "Bad for Health"*, N.Z. HERALD, July 28, 1999, at A20.

328. Paul Yandall, *Accusations Fly Over Housing Woes*, N.Z. HERALD, Sept. 4-5, 1999, at A10.

concern for the urban poor. As one Labour party MP describing South Auckland put it, "What they've done is abandoned the poor here. They've abandoned them and are now ghettoizing them."[329] Substandard rural housing—sometimes in the form of overcrowded caravans, garages, and even cars—also contributed to serious health threats. The Northland, for example, had the second highest rate of meningococcal meningitis in the nation in 1999, and some of the highest infection rates for other third world diseases such as tuberculosis, rheumatic fever and hepatitis A.[330]

Health problems deepened among Maori in other ways as well: lower life expectancies,[331] lower immunization rates, poorer nutrition, and higher incidences of preventable injury, hospitalization,[332] and child death.[333] Troubling social conditions also resulted in higher rates of suicide,[334] family breakdowns,[335] domestic violence,[336] and child abuse.[337] An economy of drugs and crime prospered[338] and violent crime skyrocketed,[339] especially

329. *Little Change in Shoddy Flats,* N.Z. HERALD, Sept. 4-5, 1999, at A10.

330. Ken Lewis, *Housing Shame for Poor Rural Families,* N.Z. HERALD, Oct. 14, 1999, at A8.

331. *Maori Rate Cuts Life Expectancy,* N.Z. HERALD, July 13, 1999, at A10. According to 1996 data, Maori lived eight to nine years less than non-Maori. *Id.*

332. *Children Dying on Our Doorstep,* N.Z. HERALD, Oct. 16-17, 1999, at A5. "Nearly half of children in South Auckland live in areas considered among the most deprived in New Zealand." *Id.*

333. Danya Levy, *Child Death Toll Disgraces Nation,* N.Z. HERALD, June 8, 1999, at A11. "New Zealand's rate of 34 deaths per 100,000 people, is the highest of all the countries in the study." *Id.* Lower-income families are at higher risk. *Id.*

334. Martin Johnston, *Suicide Up to Levels of 1930s Bad Years,* N.Z. HERALD, Sept. 8, 1999, at A3. "One New Zealander commits suicide every 16 hours on average about 540 a year." *Id.* Male suicides rose 119% between 1974 and 1994, mostly in the 15 to 24 age range and among the unemployed. *Id.* Twelve and one-half percent were Maori, 81% of whom were male. *Id.*

335. Deborah Diaz, *Where Families Fail,* N.Z. HERALD, July 17-18, 1999, at A6.

336. Andrew Stone and Jan Corbett, *One Woman in Five Hit at Home*, N.Z. HERALD, Aug. 24, 1999, at A1. One in three Maori report being victims of physical domestic violence. "At 32.3% the rate is more than twice that reported by Pacific Islanders or Pakeha." *Id.*

337. KELSEY, *supra* note 200, at 293.

338. *Id.* at 294. Said one New Zealander, "In a country once renowned for a low crime-rate, where doors were never locked, children could walk alone to school and roam freely through parks and where old people could rely on neighbors for help rather than having to bar the doors and windows against them, something fundamental has changed." Jan Corbett et al., *A People at War with Themselves,* N.Z. HERALD, Aug. 21-22, 1999, at A15.

339. Corbett et al., *supra* note 338, at A15. "According to figures from the British Home Office, New Zealand is now the most violent country in the developed world, leaving aside South Africa." *Id.* There were 1,121 violent crimes

among young Maori and Pacific Island males.[340] Despite this, the Crown continued to cut back on legal aid.[341]

Kelsey quotes a feature story in England's newspaper *Independent* to capture the full effect:

> [t]here is the feeling that something irreplaceable has already been lost. For 40 years, New Zealand tried to build a civil society in which all its people were free from fear or want. That project has now lapsed. In its place is only a vague exhortation for individuals to go and get rich.[342]

It is no wonder that there has been sustained Maori resistance to the economic reform. Devolution actually strengthened the revival of the *iwi* base and the emergence of urban Maori activists, resulting in increased demands for *rangatiratanga*.[343] It became evident however, that " . . . lasting settlements would not be achieved by negotiating with an elite of Maori entrepreneurs and imposing market economic models on Maori economic development."[344] Nor would it be achieved by Crown demands for a "self-reliance and self-responsibility that could only be obtained on Pakeha terms . . . by assimilation . . . ."[345]

3. The Alternatives to the Reform

> The critical question in New Zealand was whether those Pakeha who now found themselves victims of the neo-liberal regime would continue to side with the state and international capital against Maori, or whether enough would change sides and seek out a complementary vision and strategy for the future.[346]
>
> — Jane Kelsey

Despite the entrenched nature of the neo-liberal economic

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per 100,000 compared with 861 for Australia and 610 for U.S. Most were assaults. *Id.*

340. Jan Corbett, *Why Do Maori Go Wrong?,* N.Z. HERALD, Aug. 25, 1999, at A13. Although only 15% of population, Maori men account for 35% of the arrests for violence. *Id.* This was down from 45% in 1995. *Id.* Pacific Islanders make up almost 5% of population and 15% of violent offences. *Id.*

341. Naomi Larkin, *Lawyers Angry at Legal Aid Cuts,* N.Z. HERALD, Oct. 5, 1999, at A1.

342. KELSEY, *supra* note 200, at 8.

343. *Id.* at 319.

344. *Id.* at 320.

345. LAIDLAW, *supra* note 11, at 161.

346. KELSEY, *supra* note 200, at 347.

reforms, Kelsey and others believe there are alternatives. Opinion polls taken during the 1990s indicate that the majority of New Zealanders support greater public expenditure in areas such as education and health care in place of tax cuts.[347] Because economic policy "should reflect the values people want to live by," argues Kelly, it should incorporate concepts like cooperation, loyalty and reciprocity.[348] She proposes a "gentler combination of liberalization with managed mixed economy, welfare state, and corporatist labor policy." She also urges the adoption of a community economic model that values family, household and volunteer work and that allows people "to genuinely participate in the economic decision that affect their lives."[349]

Rob Cooper, in a paper prepared for the Maori Council of Churches, describes true Maori economic development in similar terms. Rejecting individualism and self-interest, he calls for an integrated and harmonious balance of socio-economic factors that advance Maori life according to their own values of reciprocity, enduring collective responsibility, and a binding spiritual relationship with each other and with nature. He desires restoration of Maori lands and access to the benefits of Western knowledge and technology for adaptation according to Maori ways.[350] Manuka Henare, Senior Lecturer in Maori Business Development agrees, emphasizing a Maori worldview that includes ethics of *te ao marama* (wholeness); *mauri* (vitalism); *hua* (obligatory reciprocity in relationships and economics), *whanau* (extended family), *tika* (justice), *kotahitanga* (solidarity); *kaitiakitanga* (guardianship of creation), and *wairuatanga* (spirituality).[351] From these ethics, argues Henare, an economy of affection could emerge.[352]

To assure their economic survival, the Crown has urged Maori to develop visionary business leadership, resourcefulness and

347. *A Farewell to Welfare,* N.Z. HERALD, March 27-28, 1999, at J5. St. John and Boston argue that denying people adequate income support in face of overwhelming economic and social trends "is unjust and inefficient. As a matter of urgency, social welfare benefits must be restored to a level that removes the need for food-banks and other charities to meet . . . basic living standards." BOSTON & ST. JOHN, *supra* note 292, at 316.

348. KELSEY, *supra* note 200, at 358-59.

349. *Id.* at 363.

350. *Id.* at 364.

351. Manuka Henare, *Sustainable Social Policy*, *in* REDESIGNING THE WELFARE STATE IN NEW ZEALAND: PROBLEMS, POLICIES, PROSPECTS 39, 40 (1999).

352. *Id.*

cooperation—perhaps by recognizing the skills of younger, educated Maori.[353] Other strategies have emerged from economic summits and national *hui* (meetings) such as establishing a separate Maori economy and treasury.[354] This approach, however, would leave Pakeha privilege untouched and fail to unite the nation.

III. PATTERNS AND IMPLICATIONS

Tutira mai nga iwi,	Stand forth, people,
Tatou, tatou e,	Let us unite;
Tutira mai nga iwi,	Come forth, people
Tatou, tatou e.	Let us be one.
Whaia te maramatanga,	Seek for enlightenment,
Me te aroha,	And for love,
E nga iwi,	All people,
Kia tapa tahi,	Work together,
Kai kotahi ra,	Unite together,
Tatou, tatou e.	Let us be one.[355]

Several organizing patterns emerge as I reflect on Maori experience(s) and apply them to our nation: the need for us to adopt a de-essentialized and relational approach to building our own multiracial democracy, and the need for us to take action—structural action—to actually build this democracy.

A. *De-essentializing*

Webster reminds us that an essentialized approach to achieving equality will fail. Just as many New Zealanders—Maori and non-Maori alike—envelope themselves in an illusory celebration of the Maori way of life, many Americans stand behind what we are convinced is a diverse, yet color-blind society. By featuring our nation's racial and ethnic diversity and by claiming to have eliminated any personal animus towards communities of color, we have, in effect, essentialized our own civil rights

353. Richard Knight, *Maori "Lack Visionary Leaders"*, N.Z. HERALD, May 18, 1999, at A6.

354. Gregory, *supra* note 272. This separatist suggestion came from the Tai Tokerau Economic Development Summit in Waitangi on July 29, 1999. *Id.*

355. HIWI TAUROA & PAT TAUROA, TE MARAE: A GUIDE TO CUSTOMS & PROTOCOL 71 (1986).

movement, rendering it incapable of fostering a collective struggle for structural change. Although we have, like the New Zealanders, undergone a conversion of sorts since the 1960s, it has developed into a narcissistic one that masks the ways in which our society continues to perpetuate inequality—the ways in which our society is anything but color-blind. As Leonard Steinhorn and Barbara Diggs-Brown argue, "our professed attitudes, symbols, and public expressions masquerade as integrated when our lives clearly are not." [356] Coupled with poverty-entrenching neo-liberal economic reforms of our own, we have lost our direction. Jerome Scott and Walda Katz-Fishman describe our situation and what it will take to fight our way out of it in the following way:

> The enduring reality of race coupled with the deepening polarization of wealth and poverty[357] suggests that the civil rights reforms . . . did not transform the fundamental economic and political structures of American society . . . . The reactionary polices of neo-liberalism have come home with the 1996 law eliminating welfare "as we knew it";[358] reversal of the civil rights gains of the reform era; the mushrooming prison-industrial complex; anti-immigrant legislation; and attacks on job security, public education and public housing, health care and the environment . . . All of this makes possible a new politics of equality that challenges the hierarchies of capitalist domination comprehensively . . . Such a politics challenges not only racism (and sexism), but the system of global capitalism in which they are embedded and which makes the condition of poverty for the many a condition for the creation of wealth for a few.[359]

Diversity and color-blindness are not the only notions we essentialize in the United States. Returning a moment to

356. Leonard Steinhorn & Barbara Diggs-Brown, *By the Color of Our Skin: The Illusion of Integration and the Reality of Race*, POVERTY & RACE, Nov.-Dec. 1999, at 1,3. John O. Calmore argues further that even this masquerade is fading, as "whites become more comfortable with the segregated status quo." *Viable Integration Must Reject the Ideology of "Assimilationism"*, POVERTY & RACE, Nov.-Dec. 1999, at 7.

357. *See generally,* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) for a description of how race and poverty intersect in our construction of the American ghetto.

358. *See* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 U.S.C. 607 (Supp.III 1997).

359. Jerome Scott & Walda Katz-Fishman, *The Politics of Equality*, POVERTY & RACE, Nov.-Dec. 1999, at 5,6.

Meredith's discussion of the Maori subject, we can recall the danger involved in reducing identity to essential racial categories—"Maori", "Pakeha", "black", "Hispanic", "Native American", "white" etc. Regardless of the fact that no one subject is unitary, static, or ahistorical, and that race is socially constructed, we use these categories in an essentialist way to carry on our discourse and do our politics. Rather than liberating, race winds up further masking issues of economic inequality and powerlessness.[360] In the process, Meredith warns, we "ghettoize" our subject's potentialities and possibilities and back ourselves into a political corner where a plurality of subjects would suit us better.[361] A recent *New York Times* editorial captures the fallacy of essentializing Native Americans this way:

> It is hard to imagine more potent symbols of the American West than Native Americans and bison, so much so that it is almost always easier to see the history and the myths they evoke than it is to see the present-day reality. Native Americans are not, in fact, repopulating the Great Plains as a whole. In the Plains states, with few exceptions, Native American numbers are growing almost exclusively on the reservations, which are still plagued with deep poverty, social fragmentation and chronic illness of a kind more commonly seen among the urban poor.[362]

We also tend to essentialize black-white tensions just as New Zealand does Maori-Pakeha ones. In doing so, we ignore "the profoundly different relationships" other communities of color have with the current majority and with blacks.[363] This binary framework weakens solidarity, deprives one group of the benefits of the others' experiences, and fosters over-identification with whites.[364] While New Zealand must address bi- and multi-

360. LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 309 (1998).

361. MEREDITH, *supra* note 64.

362. *Unsettled Plains*, N.Y. TIMES, June 3, 2001, § 4 at 16.

363. Steinhorn & Diggs-Brown, *supra* note 356, at 5.

364. Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House,* 75 N.Y.U. L. REV. 283, 295-96 (2000); *see also* Carrie Lynn H. Okizaki, *"What are You:" Hapa-Girl and Multiracial Identity*, 71 U. COL. L. REV. 463, 480-482 (2000); Deborah Ramirez, *Forging a Latino Identity*, 9 LA RAZA L. J. 61, 63 (1996); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities,* 9 LA RAZA L. J. 1, 15(1996); Robert S. Chang, *Facing History, Facing Ourselves: Eric Yamamoto and the Quest for Justice,* 5 MICH. J. RACE & L. 111, 129 (1999)(reviewing ERIC YAMAMOTO, INTERRACIAL

culturalism, we must determine the extent to which the black-white paradigm remains useful in a multiracial society. If we continue to essentialize race we hinder our ability to acknowledge that all groups have been racialized in unique ways.[365] Rather, our employment of racial categories must be more multiple, intersectional, recombinational, tentative and fluid.[366]

In other words, we need to de-esssentialize our racial notions. This can be done, argues Meredith, by developing a critical consciousness. With such a consciousness we can challenge our own romantic—or not so romantic—notions of the nation's many racial and ethnic subjects. We can also then place the experiences of communities of color in their proper contexts as historically evolving, relational, changing in meaning, and "to be interpreted in terms of time and place"—as I have attempted to do with Maori experiences here.[367] Once we examine how race is socially constructed and how we share so many other selves in common, the racial "Other" can become part of us and we part of them. The idea, notes Peter Edelman, is to focus "more on what people have in common than on what differentiates them"—to unify rather than divide.[368] Developing this consciousness can also keep us humble, says Meredith, as we realize that our position is no more unique than that of others.[369]

De-essentializing the way we think of the racial "Other" can have monumental implications for the way we think, talk and do politics. It can help us unmask our nation's grave racial and

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JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1998)).

365. ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 154 (1998). As one Native American scholar put it: "To the Indian people it has seemed quite unfair that churches and government agencies concentrated their efforts primarily on the blacks. By defining the problem as one of race and making race refer solely to blacks, Indians were systematically excluded from consideration." VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 168 (1969).

366. *See* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1949 (1999) (citing EDWARD W. SOJA, THIRDSPACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES 22-23 (1996) for a discussion of how cause lawyers should consider a critical strategy of "thirding-as-Othering" in an attempt "to open up our spatial imaginaries to ways of thinking and acting politically that respond to all binarisms, to any attempt to confine thought and political action to only two alternatives, by interjecting an-Other set of choices").

367. Calmore, *supra* note 366, at 1928 (citing Michael B. Katz, *The Urban "Underclass" as a Metaphor of Social Transformation, in* THE "UNDERCLASS" DEBATE: VIEWS FROM HISTORY 3, 23 (1993)).

368. PETER EDELMAN, SEARCHING FOR AMERICA'S HEART 179 (2001).

369. Meredith, *supra* note 64, at 14.

economic inequalities and disturb its powerful assimilative processes—processes that designate everything white (and male) as normal, unmarked, and innocent. Our failure to racially integrate our schools, for example, is largely reflective of our inability or unwillingness to eliminate the structures within them—and within the larger community—that perpetuate segregation, concentrate poverty and assimilate all students into an essential whiteness. Our recent welfare reforms do the same things—they ignore the systemic barriers facing persons of color trying to get off the rolls and they moralize the racial "Other" into a monocultural lifestyle. These dehumanizing experiences are common to the Maori as well.

Learning to de-essentialize can also foster *rangatiratanga*. In our case, we need to think not only in terms of Native American sovereignty, but in terms of self-determination for all classes, races and ethnicities. Recognizing our multiplicity can help us achieve what Maori and non-Maori might find themselves achieving someday as well: overlapping sovereignties, rather then hegemony. This will require voting reforms like those in New Zealand that move beyond our "first-past-the post" and "winner-takes-all" system (which in every aspect is driven by essentialism),[370] and that curb discriminatory ballot initiatives and referenda.[371] This will also require the de-essentializing of the debate over the meaning of our own foundational documents and civil rights legislation. Just as the Treaty of Waitanga is in the process of "becoming" to all citizens, so must our Constitution, especially in the context of achieving substantive equality. As Meredith puts it, traditions must not remain fixed and ahistorical, but must justify and re-invent themselves in face of a multiplicity of identities.[372]

By de-essentializing, we can also avoid the either-or, dualistic approach to our discourse and politics that so often results in the triumph of the yell and the victory of the powerful. None of our views, none of our policies can be as "black" or "white" as we make them out to be. As Meredith argues, "We need an understanding of [every] debate that is more open ended and sophisticated, that emphasizes the ambiguities of the relations, the uncertainty of

370. *See generally,* GUINIER, *supra* note 360, at 156 (advocating cumulative voting in the United States, which allows "any self-defined minority group to vote strategically to gain representation.").

371. *See* Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CALIF. L. REV. 129 (2001).

372. Meredith, *supra* note 64, at 14.

tradition and the multiplicity of identities . . . ." [373] The tensions between our various racial, sexual and economic selves—just like the tensions between urban and *iwi* Maori, male Moari and Maori *wahine*—need renegotiating in a multi-dimensional, strategic fashion that serves the needs of all citizens as well as acknowledges persistent structural inequalities.

This means avoiding a singularly claims-based, litigative approach to furthering the cause, which Coates and McHugh argue has not suited Maori well. Such an approach provides only an illusory sense of closure. Take, for example, affirmative action in higher education in the United States. In our effort to retain racial diversity as a legitimate goal in admissions policies, rather than confine ourselves to responding to litigation (which in every aspect is also driven by essentialism) we can attempt a discourse that opens us up to the "Other" involved. Such a discourse can help us discover what it is we share in common that we want to achieve and how it is we can go about achieving it. If we can see less of a monopoly of "merit" on one side or the other, and focus instead on the "student" and the "citizen who desires to contribute as an educated professional" that we find in each other, we may be able to reach agreement on how to act more inclusively and effectively. We may also be able to overcome the color-blind mentality that underpins recent anti-affirmative action rulings. This would further enable us to uncover and deconstruct unitary white privilege and to rediscover the multiple significance of race that has, as Rumbles describes it in the case of "Maoriness", been removed from the table. Then, perhaps, remedial bridging—like the courses being offered at the University of Auckland medical school—and "bridging" in the larger relational sense can proceed.

B. Engaging in Relational Politics

Which brings us to the second organizing pattern: our need to engage in relational politics as a productive source of social transformation—"where neither self nor other, we nor them, take precedence." [374] As is obvious from what was just stated, to speak about de-essentializing is to speak about relationship.

> Each of us is constituted by the Other; we cannot deliberate or decide without implicating Otherness. We

373. Meredith, *supra* note 64, at 20.
374. Meredith, *supra* note 64, at 15.

> are 'Maori' in relation to those who are 'non-Maori', we are 'urban Maori' in relation to those who are 'tribal Maori', we are 'Maori men' in relation to those who are 'Maori women' and so forth. To dismiss the other is to dismiss the self.[375]

A relational approach, says Meredith, will demand that we negotiate, collaborate, compromise, and sacrifice. Forming "relationships of citizenship" is what he calls it. Creating a "beloved community" is what Martin Luther King, Jr., called it.[376] As the founder of the new Madison Society for Law and Policy, Professor Peter J. Rubin, argues, we need to reemphasize legal values such as compassion, equality and respect for human dignity, values that "have largely been read out of American law through the ascendancy of various strands of legal thought over the last 20 years."[377] Senator Paul Wellstone also argues that we need to "make a place for all Americans at the decision-making table," especially those that face major economic and social challenges.[378]

From what I observed, the interactions that are the least relational in post-economic reform New Zealand are not those between Maori and Pakeha, or between urban and *iwi* Maori, but between the Crown and all citizens. Compassion, mutual obligations, and collective identity, observed Kelsey, are now missing. This then "trickles down" to the interactions between citizens themselves, pitting those with opportunity against those without—even on an international level. A recent letter to the editor in the *St. Paul Pioneer Press* captures this anti-relational approach to economic policy, democracy building, and citizenship in the United States quite tersely:

> The primary role of government in [our] free democratic republic . . . is to create an environment that gives the individual equality of opportunity to succeed in life. With

375. *Id.* at 15.

376. *Facing the Challenge of a New Age*, *in* MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 22 (James M. Washington, ed. Harper San Francisco 1982) (1957).

377. Crystal Nix Hines, *Young Liberal Law Group Is Expanding*, N.Y. TIMES, June 1, 2001, at A17. The Society hopes to become the competitor to the highly influential and conservative Federalist Society. Its first chapter, organized in 1999 at Georgetown Law School, has 125-150 members and chapters will open the Fall of 2001 at a dozen law schools including Harvard, Columbia, University of Southern California, University of North Carolina, George Washington University and New York University.

378. PAUL WELLSTONE, THE CONSCIENCE OF A LIBERAL 206 (2001).

> this freedom comes the individual responsibility to take the necessary steps to make the opportunity a reality. If a person does not take advantage of a free public education, gets a criminal record, develops no job skills . . . this is not the fault of the taxpayers . . . The question then arises is this: should the contributing citizen pay the bill for those whose own failures led to whatever problems they might have? In other words should we trade in freedom of opportunity and the chance of individual success for the welfare state? I would hold that overtaxing the winners to build a welfare state for the losers is much more irresponsible than returning to the productive taxpayer a portion of his/her earnings.[379]

Are we all "essentially" winners or losers, as this writer suggests? Is there no room for finding commonality? And within this commonality, compassion? Must we persist in employing hyper-individualized rights talk without reference to mutual obligations and responsibilities?[380] Can we find no room for reconciliation and redemption?

C. Taking Structural Action

Because such a view is so exacerbating to the cause, it might help now to turn to the last organizing pattern that emerges: taking action to affect structural change. The most powerful symbol of this pattern—and it is meant to inspire—is the urban Maori. Generally speaking, Maori (as multiple-selves, of course) inspire action because they embrace a "whole way of struggle" rather than just a "whole way of life." Urban Maori, in particular, inspire action because

> by refusing accommodation within existing institutions and hegemonic arrangements, they [seek] to expand the boundaries of belonging and in effect have emerged as 'new citizens' . . . [and] as political subjects, in what Cornel West . . . terms a process of "new self-perception, in which persons no longer view themselves as objects of history, but rather as subjects of history, willing to put their own selves and bodies to reconstruct a new nation." Urban Maori, like so many other social movements, have

379. Miland Lathrop, *Government's True Role*, ST. PAUL PIONEER. PRESS, May 21, 2001, at 9A.

380. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

> . . . thus imagined and set out to shape their vision of Maori society, as they create space to live it, claim rights and entitlements for it, and through their own daily life practices construct and perform it . . . . [They] have offered a potential for reordering, restructuring and renewal. . . .[381]

As the global economy becomes more and more diversified, we will find ourselves like the urban Maori, without *whanau* or *iwi* or homeland, struggling to find new forms of community. Martin Luther King Jr. put it this way: "[o]ur world is geographically one. Now we are faced with the challenge of making it spiritually one."[382] In order to affect this transformation, we will need to resist being essentialized, avoid essentializng others and retain each other's dignity. We will also need to reorder, restructure, and renew the economic order, the racial order and all other colonizing, dehumanizing frontiers. This will require coalition building and direct action. It will also require the courage that Maori exhibit to put our whole selves into the struggle.

We can draw further inspiration from the structural changes that in 1992 went into creating an equal partnership between Maori and non-Maori members of the Anglican Church in New Zealand. After a multicultural commission researched the Treaty of Waitangi and reported back to the synod, the Church rewrote its constitution, recognizing the Treaty partnership originally envisaged in 1840. The rights of Maori and Pakeha to control their affairs were ensured in context of an ongoing relationship with the other ecclesiastical partners. The new Church now has three cultural streams known as Tikanga: the Pakeha Church, the Maori Church (Te Pihopatanga o Aotearoa) and the diocese of Polynesia, all with implicit obligations to each other.[383] Writes Anglican theologian Jenny Te Paa of the changes:

> The new structure has made Pakeha aware of their Treaty obligations and more open to examining issues of historical injustice . . . . For Maori it is like being set free! . . . . We rejoice in our ability to control events . . . . I am not aware of any other organization where the constitution and rules governing an institution have been changed in this way . . . [b]ecause the prospect of

381. Meredith, *supra* note 64, at 14.
382. Facing the Challenge of a New Age, *in* KING, JR., *supra* note 376, at 19.
383. MELBOURNE, *supra* note 10, at 169.

> changing existing arrangements is too untenable . . . . [This] model is being widely perceived as having enormous potential for other institutional settings. It's being talked about as a model for government.[384]

Structural changes within our nation—like those undertaken by the Anglican Church in New Zealand—are imperative. Many of our laws and institutions, although not explicitly racist, disempower persons and communities of color by perpetuating discriminatory conditions.[385] Entire systems produce policies and repeated patterns of behavior that undermine our ability to create a multiracial democracy.[386] We must ferret out these racist laws, institutions, policies, and practices and transform them. Maori values such as wholeness, mutual obligation, stewardship and spirituality can help us achieve this transformation.

As we wrestle with our own growing racial diversity and division, our own living history of colonization and injustice, and our own amoral, market-driven, global economy, we should embrace Maori experience(s) and allow them to inform and empower our cause.

384. MELBOURNE, *supra* note 10, at 170-71.

385. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* CRITICAL RACE THEORY, 449, 449-50 (1995).

386. Take, for example, law enforcement. Tactics endorsed in the "war on drugs," such as pretextual stops, have become "paths" followed by the organizational actors. While law enforcement agents deny that they are racist in targeting persons of color in traffic stops, racial profiling occurs nonetheless and is a manifestation of institutional racism.