Decolonising Legal Research:
Developing Legal Theory to Articulate
Māori and Non-Māori Legal Research Paradigms Equitably

A Thesis

Submitted in Fulfilment

of the Requirements for the Degree

of

Doctor of Philosophy in Law

at

The University of Waikato

by

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THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2026

Abstract

Māori and non-Māori legal research paradigms in Aotearoa New Zealand are separated by a considerable theoretical knowledge gap. Māori knowledge systems are generally not well known in a non-Māori context. In order to bridge this theoretical knowledge gap jurisprudential studies need to address this gap from Māori and non-Māori perspectives. Doing so enables the development of decolonised legal research paradigms which allow for the sharing of knowledge from positions of respect. In this work, a new theoretical interpretation of legal research paradigms in our jurisprudence is presented, relying on an interdisciplinary approach to support these interpretive strategies.

Beginning with the understanding that knowledge is empowering for both Māori and non-Māori, I foreground the epistemological character of decolonising legal research that supports Linda Tuhiwai Smith's call for research to be conceived differently and highlight the need for an integrated recognition of *kaupapa Māori* in the development of legal theory in Aotearoa New Zealand. Reimagining our laws as something more than 'sovereignty' is the first step in narrowing the current theoretical knowledge gap. I translate the broader language of colonialism into the more specific vocabulary of the criminal justice system, in order to make more visible the manner in which Eurocentrism permeates decolonising legal research and stifles the potential future social development of Māori.

Since Linda Tuhiwai Smith's call to decolonise research, significant progress has been made with regard to the inclusion of principles of *tikanga Māori* to guide legal research that includes Māori. However, transforming principles of *tikanga Māori* into our jurisprudential landscape is a complex task. It is increasingly recognised that understanding the key principles of *tikanga Māori* is not always sufficient and that a greater theoretical understanding of decolonising legal principles is needed. I will analyse theoretical features of research epistemologies with the goal of grasping the complex array of historically-specific practices through which particular dimensions of our socio-legal experience are produced.

Finally, I will explore how an interdisciplinary approach enables us to link forms of subjectivity to forms of objectivity in a distinctively "cultural" way, by working *through* difference rather than against it, and by acknowledging as meaningful each law's characteristic discursive formation.

This work is written as an intervention in Eurocentrism, aimed at providing a fresh interpretation of decolonising legal research. On this level, the most important argumentative thread is the one that demonstrates how Eurocentrism can be read as a colonising tool, which deploys positions that marginalise Indigenous knowledge. By unpacking Eurocentrism's complex meaning it is possible to refashion Eurocentrism to include the notions of "partnerships", that value subjective experience over objective, and that, in reality, include "Indigenous cultural" qualities.

This style of decolonising jurisprudence pushes strenuously for a legal paradigm shift towards a culturally safe space for all legal scholars, not just Māori; a shift that could encourage our legal theory to converge in a more holistic way. The most important argumentative threads are those centred on the inclusion of Indigenous arguments, and the emergent character of decolonising legal research categories such as *whanaungatanga* or relational accountability. This type of innovative legal interpretation offers the possibility for a new theoretical era for decolonising legal research.

Acknowledgements

For Nadir.
Without you, I never would
have gone there.

What, then, consoles us
in this human society full of calamities,
but the unfeigned faith and mutual love
of true and good friends?

-Augustine, City of God, AD 426

Special thanks to Dr Valmaine Toki and Gay Morgan, my supervisors,
for all their support and patience.

Many thanks to the University of Waikato Research Doctorate Scholarship Committee
whose funding enabled me to complete this project.

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Chapter 1. Introduction

I once heard the survivors
Of a colony of ants
That had been partially
Obliterated by a cow's foot
Seriously debating
The intentions of the gods
Towards their civilization

Don Marquis, 1927[1]

I am a Pākehā[2] researcher exploring Māori and non-Māori theories of law. I have no *whakapapa*[3] to speak of, merely a belief that as researchers there are "innovative" ways of conducting legal research. This thesis sets out to describe theories of law and how they influence both Māori and non-Māori legal research paradigms. It is my hope that my continuing journey of learning in this area of law will allow me to incorporate the knowledge of many Indigenous and non-Indigenous scholars far more experienced in this area than myself.

The views I present here have developed from my perspective as a Pākehā observing an Indigenous worldview. However, I am conscious that Māori scholars have begun to assert themselves and are no longer allowing others to speak for them. They are beginning to articulate their own theoretical paradigms and to demand that research conducted in their communities follows *kaupapa Māori* and respects the Māori worldview; by Māori, for Māori.

Research is implicated in the production of Western knowledge, in the nature of academic work, in the production of theories that have dehumanized Māori and in practices that have continued to privilege Western ways of knowing, while denying the validity for Māori of Māori knowledge, language and culture.[4] One of the hopes of this study is to convince research communities of the need for a greater *kaupapa Māori* approach to research. *Kaupapa Māori* research has become a way of structuring assumptions, values, concepts, orientations and

[1] Don Marquis *Archy and Mehitabel* (Dolphin Books, Doubleday, New York, 1927) at 50.
[2] The term Pākehā is contested. For the purpose of this thesis it refers to New Zealanders who are non-Māori.
[3] R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, 2012) at 491: *Whakapapa* - to trace one's ancestry back to a particular point of connection; the systematic recitation or presentation of a genealogy.
[4] Linda Tuhiwai Smith *Decolonising Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 185.

priorities in research.[5] It allows us to engage in a dialogue about setting new directions for the priorities, policies, and practices of research for, by and with Māori.[6] But can a non-Māori researcher carry out *kaupapa Māori* research?

Linda Tuhiwai Smith entertains the idea as long as the researcher is not on his/her own and only if they were positioning themselves as a non-Indigenous person.[7] Kathy Irwin describes *kaupapa Māori* as research that is 'culturally safe' and involves 'mentorship' while satisfying the rigor of research, and that it is undertaken by a Māori researcher, not a researcher who happens to be Māori.[8] Russel Bishop frames *kaupapa Māori* in relation to the obligations contained in the Treaty of Waitangi which creates opportunities for the involvement of non-Indigenous researchers as Treaty partners, in support of Māori research. Bishop also claims that some non-Indigenous researchers, who have a genuine desire to support the cause of Māori, ought to be included, because they can be useful allies and colleagues in research.[9]

Bishop, Irwin and Smith have all argued that being Māori, identifying as Māori and as a Māori researcher, are critical elements of *kaupapa Māori* research.[10] Thus, *kaupapa Māori* research, as currently framed, would argue that being Māori is an essential criterion for carrying out *kaupapa Māori* research.[11] However, feminist research for example, maintains its focus on issues of gender (not just of women), but has moved away from the idea that only women can carry out feminist research to one that is less essentialist.[12]

In a similar vein, exercising restraint and not becoming too involved in identity politics because of the potential these politics have for paralysing development,[13] seems to suggest that those who are non-Māori should not be precluded from participating in research that has a *kaupapa Māori* orientation.[14] Culturally appropriate mentorship and supervision has been a way of approaching and organising this research so that myself, as a non-Indigenous researcher, could

[5] M Olssen "Producing the Truth about People" in J Morse and T Linzey (eds) *Growing Up, The Politics of Human Learning* (Paul Longman, Auckland, 1991) at 158.
[6] Tuhiwai Smith, above n 4, at 185.
[7] At 186.
[8] Kathy Irwin "Māori Research Methods and Practices" (1994) Sites 28 (Autumn) at 27.
[9] Russel Bishop "Initiating Empowering Research" (1994) 29 New Zealand Journal of Educational Studies 1 at 175.
[10] Tuhiwai Smith, above n 4, at 188.
[11] At 189.
[12] At 189.
[13] At 188.
[14] At 188.

participate.

I offer this thesis not as an expert in the field of Indigenous legal theory but as a non-Māori student on a learning journey. In effect, I am about to explain my research journey, my story. "Stories go in circles. They don't go in straight lines. It helps if you listen in circles because there are stories inside and between stories, and finding your way through them is as easy and as hard as finding your way home. Part of finding is getting lost, and when you are lost you start to open up and listen."[15] I did not always understand the Māori concepts I discovered on my research journey, some aspects of my journey I found morally challenging, other aspects I can only describe as 'enlightenment;' but always I found myself in a position of learning.

It is my intention to present the following thesis in such a way as to honour and build relationships with the ideas that it represents; and to act, always, with the greatest respect for Māori. It will be for the reader to decide if I have achieved this aim. Maybe all I can hope to achieve as a Pākehā, is to raise an awareness to the possibility of conducting "innovative" legal research in Aotearoa New Zealand that honours and protects our Indigenous peoples.

What I have learnt so far is that understanding the Māori worldview is all about understanding relationships. All the ideas postulated in this thesis rely on the formation of relationships. "An idea cannot be taken out of this relational context and still maintain its shape."[16] I have been faced with the problem of trying to define and describe Indigenous concepts and ideas when I personally have no relational context to Māori as a Pākehā. These challenges are ongoing but undeterred, I continue my learning journey.

Much has been written about how Eurocentric research has helped in the colonisation and oppression of Indigenous peoples.[17] Building on these works, this thesis sets out to test

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[15] T Tafoya "Finding Harmony: Balancing Traditional Values with Western Science in Therapy" (1995) Canadian Journal of Native Education 21 (Supplement) at 12.

[16] Shaun Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 8.

[17] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012); E Marchetti and D Bargallie "Evaluating Indigenous-Focused Criminal Court Processes: Why Using Indigenous-Centric Methodologies is Important for the Attainment of Access to Justice" (2017) 15 Yearbook of New Zealand Jurisprudence: Special Issue - Indigenous Access to Justice at 1; L Rigney "Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles" (1999) 14 Journal of Native American Studies (Fall) 2 at 116; L Rigney "Indigenous Australian Views on Knowledge Production and Indigenist Research" <https://ncis.anu.edu.au/_lib/doc/Rigney_Goduka.pdf>.

whether, with a greater theoretical understanding of legal research paradigms, traditional and dominant Western research paradigms can evolve and become more equitably focused. It may be that with a greater understanding of Indigenous and non-Indigenous legal theory in relation to research methodologies, that decolonising legal researchers can learn more about what it means to be Māori and how *kaupapa Māori* and 'culture' could or should influence our contemporary legal system.

It is more than two decades since Linda Tuhiwai Smith explored the intersections of colonialism and research methodologies.[18] However, the development of decolonised legal theory to support Smith's work has been almost absent during this period. No major sociolegal change will occur for Māori, nor will our legal systems improve if we do not address the need for some kind of legal theoretical development. Many basic questions of the relationship of law to social change and to Indigenous cultural development are completely neglected if not reflected in a solid decolonised theoretical foundation.

Decolonising our laws is a recognised field of legal scholarship but its usual strategy of development has not led it to touch on questions in any theoretically systematic way. Few academics who have been interested in decolonising law and its development, have classified themselves as theorists in the traditional sense of the law. Their questions largely come from outside of the field of theoretical law encompassing a more practical application; this is not to negate their contribution as they belong to a new field of study only now in the process of emerging from the shackles of colonialism. This emerging field of legal study which aims to explore general connections between law, Indigenous culture and rights to self-determination so far lacks a name and a shape for its shared theoretical space. Its literature is well intentioned but foundational at its best. Work by specific academics, both Māori and non-Māori, are all relevant to broader questions of Indigenous culture and its place within a contemporary legal context, but these studies remain, mostly, without a solid theoretical component.[19]

[18] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (1st ed, University of Otago Press, Dunedin, 1999).
[19] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 196.

There are of course enormous obstacles that stand in the way of developing decolonising legal theory that is truly equitable. Crossing boundaries between cultures is challenging and extremely difficult. A decolonising theorist must be versed in history, law, economics, sociology and culture to master the task of theory development. Patient work between parties is needed, guided by some agreed principles. No decolonising theory is possible without some agreed concepts or propositions. The point of these concepts and propositions is to eradicate half-formed notions and assumptions that hinder much needed progress. Some sort of legal theory seems to be at work in the Navajo Courts in the United States and the Islamic law courts of Morocco, that we can learn from. This thesis does not claim real progress toward a shared theory of law and development. It tries merely to clarify a few foundational concepts that might strengthen our initial theory building.

For myself personally, the idea of decolonised law implies a group of people subject to governance by law equally. It is not easy to decide what absolute minimum would constitute an equitable legal system, but I hope we have agreement that *tikanga Māori* is a distinct and legitimate system of laws. Classification of our legal system into one that is decolonised assumes that our legal system has a definite character; all members of the legal system share certain basic legal traits. These traits or characteristics compliment each other, they remain persistent over time, and permeate our legal institutions in such a way as to give our legal system a unique and definitive character; one that recognises our Indigenous peoples as equals and *tikanga Māori* as a legitimate legal entity.

The decolonising character of our legal system would in turn single out certain basic or core features. The core features are then used to assign a body of law to our decolonised system. This thesis will argue '*aroha*' as a core feature. However, '*aroha*' was not singled out because it is known to be important to the way law actually operates in modern times. It is singled out because it tells us things about our nation and society; it offers a causal connection between Māori and non-Māori that could contribute to legal change that is therapeutic as opposed to adversarial in nature.

As decolonising scholars we have reason to be sceptical of the common law system in Aotearoa New Zealand. Nonetheless, I am reluctant to draw a sharp line between what is conventionally called English law and that which is considered decolonised law which is something quite

complex and quite different. All I am saying, at what is the beginning of decolonising theory development, is that the conventional concept of the legal system, based on the common law and statute, is not a helpful tool of research and theory development, unless the purpose of our current laws includes an understanding of the cultural relationship between law and society. Currently, the conventional concept of law does not do an adequate job of describing how the legal system works (or does not work) for Māori, who are the greatest users of our criminal justice system. The traits the current system singles out have not been tested culturally for their impact on Māori specifically.

Distinguishing between two definitions of legal systems – one introduced by our colonisers, historic and orthodox, and one based on decolonising ideals that stresses the importance of Indigenous culture – helps bring clarity to our discussions about persistent Eurocentricisms in law and our society. It may be useful and economic to construct an orthodox legal system that is insulated from Indigenous culture because if it is not culturally specific it can then be adapted to fit any phase of social development. However, if we reduce our legal values to essentials, such as *aroha,* these values would remain timeless for all of society. *Tikanga* could be adapted to the modern world without fundamental change. Afterall, the common law has persisted since the reign of Edward I to Charles III, absorbing and responding to social change until the present day. If the common law can accommodate this type of social change, it is not then, self-contained, it could adapt and become culturally very specific, even unique. Afterall, the English common law has evolved from some form of cultural influence through the centuries; culture being an effective mechanism for legal change.

Māori consider learning to be a lifelong process, and *kaupapa Māori* is an Indigenous paradigm that is important to how Māori view the animate and inanimate world around them throughout their whole lives. In conducting this research it is hoped to gather a greater theoretical understanding which enables a more respectful relationship with the concepts of *kaupapa Māori* and assists in developing ways of including this paradigm into the juristic landscape of Aotearoa New Zealand more equitably. When thinking about merging theory and epistemologies in legal research and creating hybrid legal cultures it is important to consider what might be imagined. What theories could be imagined in relation to the existing Indigenous legal system, *tikanga Māori,* and the domestic laws created through colonisation? An objective of this study is to create a discussion around an equitable and progressive theoretical discourse when conducting legal research affecting Māori and non-Māori.

Generally speaking, this thesis would make statements about how legal theory supports an investigation into our legal research epistemologies. Some sort of hypothesis would be postulated, along with a process for testing the hypothesis and then hopefully new and dynamic theory would emerge. This framework appears simple enough to apply to questions about epistemologies and methodologies. The roots of Western legal theory can be traced back to Plato and Aristotle. The origins of Indigenous legal theory appear less well defined from my limited Pākehā perspective. Nonetheless, is a testable hypothesis the best way to understand the origins of legal theory of Māori and non-Māori? Conducting theoretical work using a methodological framework based around a research hypothesis amounts to descriptive theory development more akin to the physical sciences; it is also legal theorising embedded in the colonising tradition.

In an attempt to avoid the trappings of colonising traditions, this research is more concerned with developing theories of law that are prescriptive in nature and that aspire to idealized systems of equitable social justice. Certainly, I envisage a plurality of legal theories where Māori and non-Māori theories exist in synergy. Akin to the dominant research paradigms (positivism, feminism, realism etc.) there are also a plethora of Indigenous legal theories. Gordon Christie finds that Indigenous communities will naturally contain degrees of diversity of opinion and perspective, just as we see within non-Indigenous communities.[20]

The first hurdle in the search for a potential shared theoretical space as legal researchers is whether there is a need for descriptive or prescriptive theorising about epistemologies; prescriptive legal theory, in this sense, would describe how legal researchers focus on how law should or ought to be used, and descriptive legal theory, on the other hand, focuses on describing the law as it is used, not saying how it should be used.

Non-Māori legal researchers exploring dominant legal systems tend to focus on objective experiences: for example, they employ doctrinal research techniques, and use empirical data to support their research. Equally, those Māori legal researchers exploring dominant legal systems using prescriptive techniques on a more abstract level, may use for example, qualitative methodologies such as grounded theory to explore the experiences, of say, incarcerated Māori women within a patriarchal prison system.

[20] Above.

While this type of sociological research avoids an obvious scientific or 'objective' construct, grounded theory remains an intellectual construct of the dominant research paradigm. This type of colonially conditioned and informed theorising clearly identifies 'gaps' that need to be filled by Indigenous theories about the nature of law. Just as non-Māori legal researchers will explore the objective experiences their communities have constructed since their arrival in Aotearoa New Zealand from 1840, likewise, Māori legal researchers will have understandings about the nature of laws affecting them since the first law of Aotearoa brought across the Pacific oceans by Kupe, Toi and others to our shores, that might prove insightful to non-Māori researchers.

"Looking at the world via different cultural and experiential groundings, Indigenous peoples will not only be able to articulate how their own systems are structured and understood, but also to cast new light on dominant legal orders."[21] But how do the two systems meaningfully interact? How do we measure equitably, legitimate connections between the epistemologies of two normative legal systems? Indigenous legal theorising now becomes essential if we are to develop what Christie describes as 'oppositional understandings' of the nature of research epistemologies and how we undertake a study of them.[22]

Legal theory requires the development of new methodologies that will better measure and reflect the impact, for example, of the criminal justice system on Māori. Legal theory which integrates differing paradigms, disciplines and cultural views is essential if the holistic development of a criminal justice system that assists Māori is to gain momentum. The rationale for developing a shared theoretical space has never been stronger. This rational will guide the focus of this thesis which rests with the positive effects of maintaining, transmitting and clarifying *kaupapa Māori* as credible legal entity through the development of legal theory that articulates Māori and non-Māori legal research paradigms equitably.

As I commence this thesis I anticipate concerns from academics accustomed to Western style legal methods and research presentations. Legal research is all about answering questions. Equally, legal research is about unquestioned answers; questions that are difficult, challenging and infinitely complex. It is my hope that readers of this thesis will begin to question some of their own beliefs about the way legal research should be conducted and presented, so that they

[21] Above.
[22] Above.

can recognise the significance of developing alternative theoretical understandings as a solution to answering challenging legal questions.

Chapter 2. Decolonising Legal Research

"Only the law of the Pākehā custom is recognized in New Zealand…The Māori who seeks justice and redress under Pākehā law must rely on the blunt instrument of that very same law which is embedded upon the mechanisms designed for his legal control."

Rev. Māori Marsden[1]

2.1 Māori Scholarship and Ways of Knowing

If Māori are to be freed from the need to constantly justify their research and knowledge systems from a dominant Pākehā perspective, it becomes necessary to articulate exactly what this Māori paradigm entails.[2] Within Māori scholarship, the philosophical perspective that informs most Māori research is *kaupapa Māori.*[3] Tuakana Nepe argues that *kaupapa Māori*[4] is derived from very different epistemological and metaphysical foundations and it is these that give *kaupapa Māori* its distinctiveness from Western philosophies.[5] The concept of *kaupapa Māori* implies a way of framing and structuring how Māori think about ideas and practices,[6] it is a conceptualisation of Māori knowledge.[7]

Kaupapa Māori research, therefore, seeks to understand Māori forms of knowledge in Māori terms and within the wider framework of Māori values and attitudes, Māori language, and Māori ways of living in the world.[8] Linda Tuhiwai Smith describes *kaupapa Māori* as a fledgling approach, occurring within the relatively smaller community of Māori researchers; this in turn exists within a minority culture that continues to be represented within antagonistic colonial discourses. It is a counter-hegemonic approach to Western forms of research and, as such, currently exists on the margins.[9]

Describing *kaupapa Māori* as a research paradigm invites comparisons with Western science,

[1] Māori Marsden *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Edited by Te Ahukaramū, The Estate of Māori Marsden, Masterton, 2003) at 101.
[2] Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 12.
[3] S Elers "Refuting Denzin's Claims: Grounded Theory and Indigenous Research" (2016) 15 Grounded Theory Review 2 at 111.
[4] *Kaupapa Māori* is defined as a Māori approach, Māori topic, Māori customary practice, Māori institution, Māori agenda, Māori principles, Māori ideology, a philosophical doctrine, incorporating the knowledge, skills, attitudes and values of Māori society <http://Māoridictionary.co.nz/search>.

which is exactly what *kaupapa Māori* is resisting.[10] *Kaupapa Māori* sets out a field of study that enables a process of selection to occur, and defines what needs to be studied and what questions ought to be asked.[11] It also builds on existing values and knowledge. Tuhiwai Smith describes *kaupapa Māori* research as a social project: it weaves in and out of Māori cultural beliefs and values, Western ways of knowing, Māori histories and experiences under colonialism, Western forms of education, Māori aspirations and social-economic needs, and Western economics and global politics.[12]

To date, Indigenous peoples have adapted some of the theory developed in the social sciences, especially health related sciences,[13] feminist theory and relational psychology[14] to assist in developing Indigenous research tools. Much of the ideology underlying these areas is similar to an Indigenous worldview in that it challenges the cultural outlook of mainstream society.[15] Grounded theory[16] for example, as a research methodology has been widely used by Indigenous researchers. While Indigenous researchers may look to grounded theory for methodological support, this support is not for external validation but rather as a complementary framework that recognises the unique features of *kaupapa Māori.*

As *kaupapa Māori* grows and evolves as a legal entity, we need to go beyond the tendency to compare it with mainstream legal practice, in order to develop legal theory, practice and methods that are uniquely Māori. This addresses one of the major complaints that Māori have about research in general – that researchers come from outside the community to "study"

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[5] Tuakana Nepe *E Hao Nei e Tenei Reanga: Te Toi Huarewa Tipuna: Kaupapa Māori, an Educational Intervention System* (MA Thesis, University of Auckland, Auckland, 1991) at 15.
[6] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 190.
[7] Nepe, above n 5, at 15.
[8] Tuhiwai Smith, above n 6, at 190.
[9] At 191.
[10] At 191.
[11] At 193.
[12] At 193.
[13] A Miller, P Massey, J Judd, J Kelly, D Durrhein, A Clough, R Speare, S Saggers "Using a Participatory Action Research Framework to Listen to Aboriginal and Torres Strait Islander People in Australia about Pandemic Influenza" (2015) Rural and Remote Health 15 <http://www.rrh.org.au>.
[14] J Taylor, C Gilligan and A Sullivan *Between Voice and Silence: Women and Girls, Race and Relationship* (Harvard University Press, Cambridge, 1995).
[15] Shaun Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 16.
[16] B Glaser and A Strauss *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, Chicago, 1967).

Indigenous problems.[17] There are numerous problems when employing dominant Western-style scientific approaches to Indigenous research, perhaps the most obvious being that the researcher, no matter how objective they claim their methods and themselves to be, do bring with them their own set of Eurocentric biases. "In addition, this approach focuses on problems, and often imposes outside solutions, rather than appreciating and expanding upon the resources available within Indigenous communities."[18]

The development of *kaupapa Māori* as a recognised legal research paradigm is of great importance to Māori because it allows the development of *kaupapa Māori* theory and methods of practice. For example, in the field of criminal law, Māori will be the ones who decide what is *tika*[19] *or he,*[20] or if that distinction even needs to exist. Indigenous research paradigms supported by strong theoretical arguments will encourage an enhanced appreciation of a Māori worldview that allows Māori to look forward to a more culturally appropriate future that distances itself from historical traumas of the past.[21] Furthermore, the development of *kaupapa Māori* as a recognised legal research paradigm is also important for non-Māori as it will assist in the understanding of *kaupapa Māori* and its associated culture and values. Students of law, and indeed many other disciplines, should have the choice of studying *kaupapa Māori* initiatives that are researched and supported by strong theoretical positions while also "allowing for critical examination of its shortcomings."[22]

There is a general consensus that Māori present a different set of needs and necessitate a different approach in the fields of education, health, criminology and psychology.[23] Unfortunately, successive governments have continually tried to impose their own views on economic rationalism, political allegiance and policy direction upon Māori. Governments expect economic viability and impose dominant societal standards which in turn render the many layers of human services discriminatory for Māori with initiatives for Māori often

[17] Tuhiwai Smith, above n 6.
[18] Wilson, above n 15, at 16.
[19] Definition of 'tika' (verb) to be correct, true, upright, right, just, fair, accurate, appropriate, lawful, proper, valid < http://Māoridictionary.co.nz/keywordword/tika>.
[20] Definition of 'he' (verb) to be wrong, mistaken, incorrect <http://Māoridictionary.co.nz/keyword/he>.
[21] Linda Hasan-Stein and Valmaine Toki "Reflections from the Roundtable: Access to Justice – How do we heal historical trauma?" (2017) Yearbook of New Zealand Jurisprudence: Special Issue - Indigenous Access to Justice 15 at 183.
[22] Wilson, above n 15, at 19.
[23] See Valmaine Toki "Tikanga Māori and Therapeutic Jurisprudence" in V Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 212.

proving ineffectual.[24] Government recommendations also have either not been implemented or have been "watered down."[25]

Māori programmes designed by "expert" Pākehā service providers are numerous. A common theme to all these programmes is the use of social, historical and economic factors to explain the differences between Māori and non-Māori which manipulate recommendations that are intended to adapt Māori "problems" to the Pākehā way of doing things. These programmes proceed with the assumption that if economic and environmental conditions were the same for Indigenous and non-Indigenous people, Indigenous people could "pull themselves up" to the standards of the dominant society.[26] The other thing that all of these programmes hold in common is that without fail, the conditions and issues that are being studied get worse, rather than improving, after the research has been done.[27]

There is scant research that recognises that Māori think and behave in a manner that is unique to themselves. This generates a need to examine how *kaupapa Māori* as an Indigenous research paradigm can lead to a better understanding of and provision for the needs of Māori. Appreciating the cultural differences Māori have can lead to research methods that are more fully integrated with the Māori worldview.

The theoretical framework that underlies this study assumes that Māori have the right to self-determination.[28] Consistent with the right of self-determination is the ability to access justice in accordance with Māori custom and traditional value systems.[29] Māori, like many Indigenous peoples, are over represented in all social statistics. Securing procedural fairness and substantive justice is, therefore, vital when considering access to justice for Māori. Developing decolonizing legal theory to articulate Māori and non-Māori legal research paradigms equitably is one way of achieving this goal.

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[24] N Jones *Revealed: Major Police Strategy to Cut Māori Crime Statistics Falling Short* (New Zealand Hearld, 23 August, 2016) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11699010>.
[25] C Trevett *Andrew Little Waters Down Māori Governance Comments* (New Zealand Hearld, 10 February, 2015) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11399473>.
[26] Wilson, above n 15, at 20.
[27] J Atkinson *Trauma Trails, Recreating Song Lines* (Spinfex, North Melbourne, 2002) at 208.
[28] United Nations Declaration on the Rights of Indigenous Peoples, art 3.
[29] United Nations Declaration on the Rights of Indigenous Peoples, art 4 and 5; see V Toki "Constitutional Frameworks: the United Nations Declaration on the Rights of Indigenous Peoples" in V Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 135; Sentencing Act 2002, s 27.

2.2 Eurocentric Research Practices and the Effects on Indigenous Peoples

2.2.1 Research Paradigm Dichotomies

Eurocentrism refers to a body of knowledge that has been used to interpret the histories and cultures of non-European societies according to the European experience.[30] In preparing the context for articulating how Eurocentrism continues to permeate our best efforts to decolonise research, it is necessary to build a greater understanding of how legal research is currently conducted by Māori and non-Māori. First, it becomes immediately apparent that although an Indigenous research paradigm has existed for millennia, it is only in recent years that research discourse has entertained the idea of such a paradigm in mainstream legal academic scholarship.[31]

Generally, a research paradigm is the set of common beliefs, values, assumptions and agreements that a community of researchers has about how problems should be understood and addressed.[32] In effect, it is the philosophical intent or motivation for undertaking a study[33] and it guides the researcher's actions. Paradigms are thus broad principles that provide a framework for research.[34] However, Wilson warns us that "as paradigms deal with beliefs and assumptions about reality, they are based upon theory and are thus intrinsically value laden."[35]

Paradigms can be characterised through their ontology (what is real?), epistemology (how do I know what is real?), methodology (how do I find out more about this reality?), and axiology (what is it ethical to do in order to gain this knowledge, and what will this knowledge be used for?).[36] Understanding the paradigm underpinning a research project is crucial and researchers need to be clear about what paradigm informs and guides their research approach.[37]

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[30] A Mills, G Durepos and E Wiebe *Encyclopedia of Case Study Research: Education* (Sage Publications, Thousand Oaks, CA, 2010) 2 at 1.
[31] Hasan-Stein, above n 2, at 20.
[32] T Kuhn *The Structure of Scientific Revolution* (University of Chicago Press, Chicago, 1962).
[33] N Mackenzie and S Knipe "Research Dilemmas: Paradigms, Methods and Methodology" (2006) 16 Issues in Educational Research 2 at 195.
[34] Wilson, above n 15, at 33.
[35] Above.
[36] Above.
[37] E Guba and Y Lincoln "Competing Paradigms in Qualitative Research" in N Denzin and Y Lincoln (eds) *Handbook of Qualitative Research* (Sage, Thousand Oaks, CA, 1994) at 116.

Guba and Lincoln describe four dominant research paradigms - positivism, post-positivism, critical theory and constructivism,[38] developed over time from Western philosophical thinking of the nature of 'reality' and 'truth'.[39] A common thread of thinking that runs through all four paradigms is that knowledge is seen as being *individual* in nature.[40] However, Wilson maintains this is vastly different from the Indigenous paradigm, where knowledge is seen as belonging to the *cosmos* of which we are a part and where researchers are only the interpreters of this knowledge.[41] The researcher is, in Wilson's opinion, only the interpreter of knowledge and Indigenous research is the ceremony of maintaining accountability to relationships.[42] This distinction in the ownership of knowledge is one major difference between the dominant and Indigenous research paradigms.[43]

It is possible, therefore, that in using one research paradigm over another, a researcher may choose to interpret a paradigm in relation to a particular perspective.[44] For example, a study of the relevance of gender in society may employ a paradigm that encompasses a feminist perspective. This creates a risk of "data not telling us a story," but instead it is a potentially biased researcher that manipulates "data to craft a story that comports with…their understanding of the world."[45] Walter and Andersen stress that racialised presumptions are veiled in Indigenous statistics in Australia and that those who rule the dominant position in the realm that controls, commissions, analyses, and interprets Indigenous data is occupied by a group who constitutively share the social, racial, and economic position of a middle class Euro-Australian.[46] Tuhiwai Smith explains that:

> The term "research" is inextricably linked to European imperialism and colonialism. The word itself, "research", is possibly one to the dirtiest words in the Indigenous world's vocabulary. When mentioned in many Indigenous contexts, it stirs up silence, it conjures up bad memories, it raises a smile that is knowing and distrustful.[47]

Tuhiwai Smith contends that research methodologies need to be decolonised to be of use to Indigenous peoples. However, such an ideology is not without its own perils. If Māori conduct research within a restricted research paradigm, such as a *kaupapa Māori* paradigm, they risk confining themselves to an Indigenous-only research domain. Problems of marginalisation and segregation from the broader scholarly world could result. While isolation in an Indigenous world of academia may feel comfortable and possibly secure, it leaves the Indigenous scholar ill equipped to challenge and engage with Western dominant scholars as peers.

2.2.2 The Power of Eurocentric Statistics

A possible solution to the isolation an Indigenous academic may feel is the inclusion of empirical data, for example, into the Indigenous research framework which would increase the research methodology options available to Māori. However, statistics are powerful forces. The researchers who create statistics leave their mark on them – not just because people are biased in overt or conscious ways, but also because social, cultural, economic, and political perspectives infuse the research data even when we think we are "just counting people."[48] The social, cultural, and economic phenomena that are chosen for inclusion, and also those which are excluded, prove a reflection of the nation-state's changing social, cultural, and economic priorities and norms.[49]

Population statistics have a powerful influence over government and social service in New Zealand. These statistics become the lens through which the government engages with Māori. They become the framework for the creation and implementation of social policy for Māori and increasingly statistics frame how we view Māori in our society. "As we invest ourselves in our communities in their categories, we increasingly use statistics to help us tell *ourselves* who we are."[50]

Feminist scholars, have attempted to demonstrate how contemporaneous male-dominated statistical research tended to cut out women's voices from the statistical "truths" they created,[51] with many of the categories used to collect data reflecting male understandings.[52] For example,

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[38] Above.
[39] E Marchetti and D Bargallie "Evaluating Indigenous-Focused Criminal Court Processes: Why Using Indigenous-Centric Methodologies is Important for the Attainment of Access to Justice" (2017) Yearbook of New Zealand Jurisprudence: Special Edition Indigenous Access to Justice 15 at 12.
[40] Wilson, above n 15, at 38.
[41] At 38.
[42] At 97.
[43] At 38.
[44] Hasan-Stein, above n 2, at 31.
[45] E Bonilla-Silva and T Zuberi "Towards a Definition of White Logic and White Methods" in T Zuberi and E Bonilla-Silva (eds) *White Logic, White Methods: Racism and Methodology* (Rowman and Littlefield Publishers, Lanham, 2008) at 7.
[46] M Walter and C Andersen *Indigenous Statistics: A Quantitative Methodology* (Routledge, London, 2016) at 34.
[47] Tuhiwai Smith, above n 6, at 7.
[48] Walter and Andersen, above n 46, at 7.
[49] At 7.
[50] At 8.
[51] At 11.
[52] S Ortner "Is Female to Male as Nature is to Culture?" in M Rosaldo and L Pamphere (eds) *Women, Culture and Society* (Stanford University Press, Stanford, CA, 1974) at 67.

the absence of data related to incarcerated Māori women is 'itself symptomatic of a failure to understand the manner in which the justice system affects Māori women.'[53] Many of the statistics used in the analysis of the criminal justice system in New Zealand relate to Māori generally. The statistics used have been selected to represent the main factors involved in determining the relative position of Māori. These statistics are in the nature of broad indicators rather than exact measures of that position.[54] However, Māori women's experience is significantly different from that of men. Without accurate data it is impossible to focus on disparities between Māori and non-Māori, or male and female, at a particular point in time for example, nor look into past trends.[55]

Furthermore, the failure to collect adequate data on the outcomes for Māori women who experience incarceration 'continues to perpetuate the Crown's attitude of no value in Māori women.'[56] Tuhiwai Smith describes how Indigenous peoples have been historically oppressed by Western research knowledge through (mis)representation, (mis)interpretations and (mis)appropriations that have perpetuated ongoing racism and colonialism.[57] Hence, there needs to be a more specific evaluation of the experiences of Māori women in prison, evaluation that is 'grounded in a real sense of, and sensitivity towards what it means to be an Indigenous person,'[58] if we are to achieve a reduction in Māori women's imprisonment rates in New Zealand. The number of Māori women offenders is comparatively small compared to men but the impact is not and upon analysis it is obvious that within the current criminal justice system it is not appropriate to simply replicate the provisions for men and hope it will work for women. History shows that unless there is a specific focus on Māori women they will continue to be disadvantaged as a minority within a male-oriented prison system.[59]

[53] New Zealand Law Commission *The Experiences of Māori Women* (New Zealand Law Commission, Wellington, 1999) Report 53 at [162].
[54] At [163].
[55] Linda Hasan-Stein "The Butterfly Effect: Can the Simple Act of Breastfeeding Improve the Long-term Outcomes for Māori Women who Experience the Criminal Justice System and their Whānau? (2017) Yearbook of New Zealand Jurisprudence: Special Issue Indigenous Access to Justice 15 at 138.
[56] D Henare "Carrying the Burden of Arguing the Treaty" in W Ihimaera (ed) *Vision Aotearoa: Kaupapa New Zealand* (Bridget William Books, Wellington, 1994) at 126.
[57] Tuhiwai Smith, above n 6, at 37.
[58] At 39.
[59] Hasan-Stein, above n 55, at 131.

This would suggest that statistics do not just describe reality - they create it. In doing so they not only influence how the phenomena they describe are understood, they also shape their accepted explanations.[60] This results in the collection, analysis and interpretation of data about Māori women that reflects the dominant cultural framework of New Zealand, but not necessarily the reality for Māori women. The statistical depiction describes the social complexity of incarcerated Māori generally, but not Māori women specifically. This leaves the dominant culture selectively illuminating the "truth" about the Indigenous communities they study, while deliberately diminishing the statistical summaries of Indigenous groups they consider insignificant. Indigenous peoples in first world nations are well aware that there is little to support a claim that settler scientific research paradigms – like those found in statistical research – operate in the interests of Indigenous peoples.[61]

Foucault argued that statistics represented a central technology through which social relations were rendered "governable."[62] Statistics were thought central to the practice of liberalism, which we broadly conceive as including a concern with limiting the exercise of formal state power while developing the capacities of liberty among the power's citizens.[63] For Māori, in the hands of the state with little knowledge about the peoples their statistics analyse, "these reports have produced very narrow but largely accepted lenses through which most people think about and "understand" Indigenous peoples today.[64] The dominant Pākehā majority and the primary producers and users of Māori statistics, shape the methodological practices of New Zealand. "Indigenous policy actors and others become increasingly invested in statistical categories, the categories become naturalized by nearly all who make use of them."[65] Thus engendered research practices become the norm, as in the words of Bourdieu, "it's just the way things are."[66] "It is in this manner that dominant methodologies emerge from the dominant cultural framework of the society of their instigators and users."[67] This leaves Māori with statistical methodologies that largely fail to provide a means for Māori to portray themselves socially.

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[60] Walter and Andersen, above n 46, at 9.
[61] At 131.
[62] Michel Foucault *Security, Territory, Population: Lectures at the Collegè de France: Lecture 1* (ed Michel Senellart, translated by Graham Burchell, Palgrave Macmillan, Basingstoke, 2007) at 11-13.
[63] At 13.
[64] At 14.
[65] At 15.
[66] Pierre Bordieu *Distinction: A Social Critique of the Judgment of Taste* (Routledge, London, 1984) at 471.
[67] Above n 46, at 15.

Tuhiwai Smith described research as a "dirty word" in Indigenous communities mainly attributed to statistical research and a much larger critique of scientific method,[68] with elders describing being measured and prodded and endless streams of anthropologists,[69] more interested in their utility as unique specimens than as human beings.[70] "We have a history of people putting Māori under a microscope in the same way a scientist looks at an insect. The ones doing the looking are giving themselves the power to define."[71] Thus, statistical analysis and Indigenous knowledge find themselves in a position of unease and mistrust, anxious about how to move forward together. "Perceived ties between damaging research practices and quantitative methods are seen to align with the coloniser settler obsession of calculating and quantifying."[72]

Another reason for mistrust of empirical data analysis is the fact that the "field remains a largely Indigenous-free zone."[73] This is not to suggest a deliberate exclusion of Indigenous people or researchers, however, this lack of an established Indigenous presence, combined with the specific and technical language used and the statistical basis of quantitative analysis create an atmosphere around the practice that is alien to many Indigenous researchers.[74] Walter explains:

> But attempting to compete using non-quantitative techniques misses the essential point that statistical information will be collected, analysed, and disseminated by our respective nation-states and by our respective colonizing settler researchers with or without our involvement. If Indigenous researchers do not undertake quantitative research in areas of pressing concern for Indigenous people, we can be very sure that others will. And it will be their questions that get posed, their interpretations of the analysis that influence, and their prioritizations that drive research and policy.[75]

Statistical results will almost always count for more than qualitatively obtained evidence. Data is power and effective in influencing the influential.[76] The fact that these results can be "proved" in statistical terms means that they are taken seriously in a way that qualitative findings are not.[77] Hence, Māori researchers and academics must become literate in statistical analysis if they are to level the power relationships embedded in statistical information that accords its legitimacy when qualitative research is unable.

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[68] Tuhiwai Smith, above n 6, at 37.
[69] M Mallet *My Past, Their Future: Stories from Cape Barren Island* (Blubber Head Press, Sandy Bay, Australia, 2002) at 50.
[70] M Walter "Using the Power of the Data within Indigenous Research Practice" (2005) Australian Aboriginal Studies 2 at 27.
[71] M Mita "Mereta Mita on…" (New Zealand Listener, 14 October 1989) at 30.

2.2.3 Scientific Eurocentrism

As a result of colonialism, Indigenous researchers often find themselves in the position of having to explain how an Indigenous perspective is different from Western style scholarship but nonetheless valid. Perhaps the call for validation arises over the question of differences between how we define science and art. Carlos Cordero describes the difference by stating that within the Western knowledge system there is:

> A separation of those areas called science from those called art and religion. The Indigenous knowledge base on the other hand, integrates those areas of knowledge so that science is both religious and aesthetic. We find then, an emphasis in the Western tradition of approaching knowledge through the use of intellect. For Indigenous people, knowledge is also approached through the senses and intuition.[78]

Indigenous knowledge is also unique to a given culture, its locality and society. It is acquired by local peoples through their daily experience.[79]

The Western idea that knowledge is approached through the intellect leads to the belief that research must be objective rather than subjective, that personal emotions and motives must be removed if the research "results" are to be valid. In contrast, Indigenous knowledges are understood as the "common sense" ideas and cultural knowledges of local peoples concerning the everyday realities of living. This definition refers to the epistemic saliency of cultural traditions, values, belief systems and world views that, in any Indigenous society, are imparted to the younger generation by community elders. It also refers to world views that are products of a profoundly direct experience of nature and its relationship with the social world. Hampton explains:

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[72] Walter and Andersen, above n 46, at 133.
[73] Above.
[74] Above.
[75] Walter, above n 70, at 27.
[76] Walter and Andersen, above n 46, at 134.
[77] Above.
[78] C Cordero "A Working and Evolving Definition of Culture" 21 Canadian Journal of Native Education at 30.
[79] G Sefa Dei, B Hall and D Rosenberg "Situating Indigenous Knowledges: Definitions and Boundaries" in G Sefa Dei, B Hall and D Rosenberg (eds) *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto Press, Toronto, 2000) at 19.

> One thing I want to say about research is that there is a motive. I believe the reason is emotional because we feel. We feel because we are hungry, cold, afraid, brave, loving, or hateful. We do what we do for reasons, emotional reasons. That is the engine that drives us. That is the gift of the Creator of Life. Life feels…Feeling is connected to our intellect and we ignore, hide from, disguise, and suppress that feeling at our peril and at the peril of those around us. Emotionless, passionless, abstract, intellectual research is a goddam lie, it does not exist. It is a lie to ourselves and a lie to other people. Humans - feeling, living, breathing thinking humans - do research. When we try to cut ourselves off at the neck and pretend an objectivity that does not exist in the human world, we become dangerous, to ourselves first, and then to the people around us.[80]

Objective research claims to describe a true and correct reality, which is independent of those involved in the research process. Subjective research is generally concerned with the study of experiences from the perspective of an individual, and emphasises the importance of personal perspectives and interpretations. Although this is a somewhat simplified view of the way in which research could be approached, it highlights an important distinction to consider as a researcher. Thinking about research in objective or subjective terms will determine the development of research questions, the type of data collected, the methods of data collection and analysis adopted and the conclusions drawn.

With the notion of objectivity in research comes the idea of separating before one can unite or of looking for the smallest individual component before seeing "the big picture."[81] This leaves the Western paradigm considering individual components rather than looking at the total person and the complexity of the connections and relationships that allow an individual to function.[82]

One major difference between the dominant paradigms and an Indigenous paradigm is that dominant paradigms build on the fundamental belief that knowledge is an individual entity: the researcher is an individual in search of knowledge, knowledge is something that is gained, and therefore, knowledge may be owned by an individual.[83] A *kaupapa Māori* paradigm comes from the fundamental belief that knowledge is *relational*; knowledge is shared with all of creation; the cosmos. It goes beyond the idea of individual knowledge to the concept of *relational* knowledge; *whakawhānaungatanga.* You are answerable to all your relations when

[80] E Hampton "Memory Comes Before Knowledge: Research May Improve if Researchers Remember their Motives" (1995) Supplement, Canadian Journal of Native Education 21 at 46.
[81] Wilson, above n 15, at 56.
[82] T Tafoya "Finding Harmony: Balancing Traditional Values with Western Science in Therapy" (1995) Canadian Journal of Native Education 21 (Supplement) at 27.
[83] P Steinhauer "Thoughts on an Indigenous Research Methodology" (2002) 26 Canadian Journal of Native Education 2 at 177.

you are doing research.[84] Graveline illustrates the concept as "that which the trees exhale, I inhale. That which I exhale, the tree inhales."[85]

In law school we inhale the adversarial dialogue of our lecturers and are taught to compete for the best legal outcomes. "Students are challenged to find fault (within prescribed parameters), to find the missing link or the weak link in work done by others…there must be a winner and a loser."[86] These adversarial notions alienate many Indigenous scholars.

Descartes (1596-1650), the French philosopher, mathematician, and scientist is considered the father of modern Western philosophy. His philosophies still permeate the contemporary legal studies that are taught worldwide.[87] Contrastingly, the foundation of Indigenous research lies within the reality of the lived Indigenous experience. Indigenous researchers ground their research knowingly in the lives of real persons as individuals and social beings, not on the world of ideas.[88] Weber-Pillwax explains:

> Any theories developed or proposed are based upon and supported by Indigenous forms of epistemology.[89] We as Indigenous scholars who wish to participate in the creation of knowledge within our own ways of being must begin with an active and scholarly recognition of who our philosophers and prophets are in our own communities. These are still the keepers and the teachers of our epistemologies.[90]

Descartes a key figure in the scientific revolution formulated analytical geometry and the idea of applying mathematical method to philosophy.[91] He concluded science would prove to be the pursuit of true wisdom.[92] Descartes also held that all truths were linked with one another so that finding a fundamental truth and proceeding with logic would open the way to all science.[93]

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[84] Above.
[85] J Graveline *Circle Works: Transforming Eurocentric Consciousness* (Fernwood Publishing, Halifax, NS, 1998) at 57.
[86] Wilson, above n 15, at 57.
[87] Jack Maden "I think therefore I am: Decartes' Cogito Ergo Sum Explained" (October 2023) <https://philosophybreak.com/articles/i-think-therefore-i-am-descartes-cogito-ergo-sum-explained/>.
[88] C Weber-Pillwax "Identity Formation and Consciousness with Reference to Northern Alberta Cree and Metis Indigenous Peoples" (Unpublished Doctoral Dissertation, University of Alberta, Edmonton, 2003) at 49.
[89] Epistemology: the theory of knowledge, especially with regard to its methods, validity, and scope, and the distinction between justified belief and opinion <https://en.oxforddictionaries.com/definition/epistemology>.
[90] Weber-Pillwax, above n 88, at 49.
[91] René Descartes *Discourse Method: Part IV (1637)* (Translated by J Cottingham, Cambridge University Press, Cambridge, 1985) at 36.
[92] W Durant and A Durant *The Story of Civilization: Part VII The Age of Reason Begins* (Simon Schuster, New York, 1961) at 637.
[93] G Durandin "Les Principes de la Philosophie: Introduction et Notes" (1970) Librairie Philosophique Paris J Vrin at 50.

Descartes represents reason and objectivity and science, and these three ideas have also been used as tools of "truth" that have helped heal and helped kill.[94] This notion that empirical evidence is more robust than cultural knowledge continues to permeate Western thought which in turn alienates many Indigenous scholars. "It is the notion of the superiority of empirical knowledge that leads to the idea that written text supersedes oral tradition."[95] "For Indigenous scholars, empirical knowledge is still crucial, yet it is not their only way of knowing the world around them.[96] For example, law is also embedded in stories. Like common law cases, stories could communicate appropriate and inappropriate behavior. Stories could also record punishments, or chronicle when mercy or justice was extended or retracted.[97] Wilson explains it is the voice of our ancestors that tells us when it is right and when it is not. Clearly, Indigenous research cannot undermine the integrity of Indigenous persons or communities because it is grounded in that integrity.[98] It is the knowing and respectful reinforcement that all things are related and connected.[99] Weber-Pillwax describes how:

> The languages and cultures of Indigenous peoples are living processes. Research and creation of knowledge are continuous functions for the thinkers and scholars of every Indigenous group, and it is through the activation of this principle that Indigenous university scholarship is conducted. Indigenous scholarship reflects inherited Indigenous ontologies and epistemologies and it is the responsibility of Indigenous researchers associated with a university to maintain and continuously renew the connections with our ancestors and our communities through embodiment, adherence and practice of these.[100]

2.2.4 International Eurocentric Influences and the Importance of Local Context

Policy development to reduce crime, including Māori offending, has typically prioritised international evidence, usually from the USA, Canada or the United Kingdom.[101] This evidence and research does not incorporate the Māori world view and fails to translate to Māori settings evidenced by the steadily increasing levels of Māori offending and imprisonment.[102] In the

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[94] M Meyer "Acultural Assumptions of Empiricism: A Native Hawaiian Critique" (2001) 25 Canadian Journal of Native Education 2 at 189.
[95] Wilson, above n 15, at 58.
[96] Above.
[97] K Green "Transforming Our Nuuyum : Contemporary Indigenous Leadership and Governance: Stories told by Glasttowk Askq and Bakk Jus Moojillth, Ray and Mary Green" (2014) 12 Indigenous Law Journal 3 at 3.
[98] Weber-Pillwax, above n 88, at 49.
[99] Wilson, above n 15, at 61.
[100] Weber-Pillwax, above n 88, at 49.
[101] Addressing the Drivers of Crime for Māori – Te Puni Kokiri <https://www.tpk.govt.nz/documents/download/174/tpk-addressdriverscrime-2011.pdf>.
[102] P Gluckman "Towards Better Use of Evidence in Policy Formation: A Discussion Paper" (Office of the Prime Minister's Science Advisory Committee, Wellington, 2011); E Durie "A Study of Māori Offending" (Address to the New Zealand Parole Board Conference, Wellington, 2007); Te Puni Kōkiri *Report on Wānanga: Māori Designed, Developed, Delivered Initiatives in the Justice Sector* (Te Puni Kökiri, Wellington, 2010).

New Zealand context, preferential investment in international evidence-based programmes has inhibited the development of good empirical evidence about what works for Māori with limited impact on outcomes for Māori from this investment approach.[103] Experiences from other Western style jurisdictions may inspire and inform but they are rarely transposed into an Indigenous setting without loss of efficacy,[104] with a 50 per cent drop off in efficacy between demonstration sites, where the designer and researchers are leading implementation, and the same programme delivered in other settings in some cases.[105]

Contrastingly, there is emerging interest in the important influence of local context on implementation success.[106] While there has been intermittent support for locally designed, developed and delivered programmes in New Zealand, these are often regarded as experimental and somehow of lesser quality than large scale imported programmes, and therefore not funded to the point that evaluation can be rigorously undertaken. For Māori, this history has been expensive and mainly unsuccessful in addressing complex issues such as offending.[107]

A range of responses is required to reach different *whānau* experiencing the criminal justice system and to problem solve with different *iwi* and *hapū*. Many Māori in the criminal justice system come from *whānau* in what Professor Sir Mason Durie has termed "trapped lifestyles".[108] Involving people from these *whānau* in designing and evaluating criminal justice interventions offers an alternative approach in the search for solutions that break the cycle of disengagement, deprivation, exclusion and offending. These culturally appropriate responses are consistent with ideas emerging from international literature of the importance of local

[103] Gluckman, above, at 109.
[104] At 110.
[105] M Lipsey and F Cullen "The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews" (2007) 3 Annual Review of Law & Social Science at 535.
[106] E Cox et al *Rebalancing Local Economies: Widening Economic Opportunities for People in Deprived Communities* (Ippr North, Joseph Rowntree Foundation, The Northern Way, 2010); A Matheson, K Dew, J Cumming "Complexity, Evaluation and the Effectiveness of Community-Based Interventions to Reduce Health Inequalities" (2009) 20 Health Promot J Austr 3 at 221; R McCausland and A Vivian "Why do some Aboriginal Communities have lower crime rates than others? A pilot study" (2010) 43 Aust and New Zealand J Criminology 2 at 301.
[107] Gluckman, above n 102.
[108] M Durie "Imprisonment, Trapped Lifestyles and Strategies for Freedom" in Ngā Kāhui Pou *Launching Māori Futures* (Huia Publishers, Wellington, 2003) at 5.

context[109] and the need to decolonise research.[110]

Decolonising research "recognises and works within the belief that non-Western knowledge forms are excluded from or marginalised in normative research paradigms, and therefore non-Western/Indigenous voices and epistemologies are silenced and subjects lack agency within such representations."[111] Researchers need to refuse normality and utilise principles, paradigms, methodologies and methods that incorporate Indigenous standpoints and perspectives providing a better fit for research with or involving Indigenous peoples.[112]

However, Putt describes how research can be broadly divided into that which is investigator-driven and that which is policy-driven[113] which often leads to "inconsistencies in the ways that researchers present their theoretical and methodological choices within the reporting of their research projects, particularly in evaluation reports."[114] For example, "data does not speak for itself nor does our data emerge in a vacuum. Who we are influences the questions we ask, the responses we get, and in turn the scholarship we produce"[115] which is then re-used by other researchers, scholars[116] and eventually, governments.

The needs of Māori experiencing the criminal justice system are often complex and poorly understood. As previously explained, quantitative data analysis, in particular, tends to reproduce racialised identities[117] instead of individualised factors that may or may not show signs of statistical significance.[118] As a consequence, information is lost or never sought,

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[109] J Greene "Implementation Evaluation: A Future Direction in Project Evaluation" (1978) 6 J Crim Justice Volume 2 at 167; A Cissner and D Farole *Avoiding Failures of Implementation: Lessons from Process Evaluations* (Centre for Court Innovations, US Department of Justice, 2009) <www.courtinnovation.org>; Te Puni Kōkiri *Report on Wānanga: Māori Designed, Developed, Delivered Initiatives in the Justice Sector* (Te Puni Kokiri, Wellington, 2010).

[110] B Swadener and K Mutua "Decolonising Performances: Deconstructing the Global Postcolonial" in N Denzin, Y Lincoln and L Tuhiwai Smith (eds) *Handbook of Critical and Indigenous Methodologies* (Sage Publications, Thousand Oaks, 2008) at 33.

[111] Above.

[112] T Zuberi and E Bonilla-Silva (eds) *White Logic, White Methods: Racism and Methodology* (Rowman and Littlefield Publishers, Lanham, 2008) at 174.

[113] J Putt "Conducting Research with Indigenous People and Communities" (2013) *Brief 15 Indigenous Justice Clearinghouse* 1 at 1.

[114] Marchetti and Bargallie, above n 39, at 11.

[115] C Gallagher "The End of Racism as the New Doxa" in T Zuberi and E Bonilla Silva (eds) *White Logic, White Methods: Racism and Methodology* (Rowman and Littlefield Publishers, Lanham, 2008) at 174.

[116] Marchetti and Bargallie, above n 39, at 11.

[117] At 9.

[118] C Cunneen and S Rowe "Changing Narratives: Colonised Peoples, Criminology and Social Work" (2014) 3 International Journal for Crime, Justice and Social Democracy 1 at 49.

knowledge is reproduced from a Western paradigm, and policies are recreated from the hegemonic standpoint. Criminal justice and legal policies that impact on an Indigenous person's access to justice, such as the availability of culturally specific and appropriate legal representation can be inappropriately constructed and implemented because they are inadequately informed.[119]

2.3 Defining Decolonising Legal Research

> To remember this history is not for the sake
> of keeping alive the memories of old tyrannies,
> but to recognize present tyranny,
> for these patterns are in us still.
> It would be strange if they were not.
> It is these patterns that I believe we should study,
> become conscious of,
> and recognize as they emerge in us
> and in the societies we live in.
>
> *Doris Lessing*[120]

It is more than two decades since Linda Tuhiwai Smith asked us to conceive research differently. Tuhiwai Smith's *Decolonising Methodologies*[121] is a cautionary tale from an Indigenous perspective, and one that highlights the need for an integrated recognition of Māori custom in the development of legal research in New Zealand. Since Tuhiwai Smith's call to decolonise research significant progress has been made with regard to the inclusion of principles of *tikanga Māori* to guide legal research that includes Māori. Nonetheless, transforming principles of *tikanga Māori* into our jurisprudential landscape is a complex task. It is increasingly recognised that understanding the key principles of *tikanga Māori* is not always sufficient and that a greater theoretical understanding of decolonising legal principles is needed.

However, before a greater theoretical understanding can be developed it is important to define exactly what decolonising research means from an Indigenous and non-Indigenous perspective. Prior states that decolonising research decentres the focus from the aims of the non-Indigenous

[119] Marchetti and Bargallie, above n 39, at 9.
[120] Doris Lessing *Prisons We Choose to Live Inside* (House of Anansi Press Incorporated, Toronto, 1986) at 30.
[121] Tuhiwai Smith, above n 6.

researcher to the agenda of the Indigenous people[122] through the adoption of Indigenous perspectives, knowledge and methodologies.[123] Decolonisation allows Indigenous people to make sense of their own reality instead of having non-Indigenous researchers defining it.[124] As a result, Māori scholars have begun to assert themselves and are no longer allowing others to speak for them. They are beginning to articulate their own research paradigms and to demand that research conducted in their communities follows *kaupapa Māori* and respects the Māori worldview; by Māori, for Māori.[125]

One of the hopes of decolonising research according to Tuhiwai Smith[126] is to convince research communities of the need for a greater *kaupapa Māori* approach to research. *Kaupapa Māori* research has become a way of structuring assumptions, values, concepts, orientations and priorities in research.[127] It allows us to engage in a dialogue about setting new directions for the priorities, policies, and practices of research for, by and with Māori.[128] However, some might consider that decolonizing research necessitates to exclude non-Indigenous researchers altogether.[129]

As previously mentioned, Linda Tuhiwai Smith entertains the idea of non-Māori researchers carrying out *kaupapa Māori* research as long as the researcher is not on his/her own and only if they were positioning themselves as a non-Indigenous person.[130] Perhaps the key is in "linking community-driven agendas to appropriate and responsive research;"[131] research agendas that are "sympathetic, respectful, and ethical from an Indigenous perspective"[132] (See Appendix 1.2).

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[122] Deborah Prior "Decolonising Research: A Shift Toward Reconciliation" (2007) Nursing Inquiry 14 at 165.
[123] Shaun Wilson "What is an Indigenous research methodology?" (2001) Canadian Journal of Native Education 25 at 175.
[124] Kathy Absolon and Cam Willett "Putting Ourselves Forward: Location in Aboriginal Research" in Leslie Brown and Susan Strega (eds) *Research as Resistance: Critical, Indigenous and Anti-Oppressive Approaches* (Canadian Scholars' Press, Toronto, 2005) at 120.
[125] Hasan-Stein, above n 2, at 5.
[126] Tuhiwai Smith, above n 6, at 185.
[127] M Olssen "Producing the Truth about People" in J Morse and T Linzey (eds) *Growing Up, The Politics of Human Learning* (Paul Longman, Auckland, 1991).
[128] Tuhiwai Smith, above n 6, at 185.
[129] Hugo Asselin and Suzy Basile "Concrete Ways to Decolonize Research" (2018) 17 ACME: An International Journal of Critical Geographies 3 at 644.
[130] Tuhiwai Smith, above n 6, at 186.
[131] Paul Hodge and John Lester "Indigenous Research: Whose Priority? Journeys and Possibilities of Cross-Cultural Research in Geography" (2006) Geographical Research 44 at 49.
[132] Renee Pualani Louis "Can you hear us now? Voices from the margin: Using Indigenous methodologies in geographic research" (2007) Geographical Research 45 at 134.

Bishop, Irwin and Smith have all argued that being Māori, identifying as Māori and as a Māori researcher, are critical elements of *kaupapa Māori* research.[133] Thus, *kaupapa Māori* researchers, as currently framed, would argue that being Māori is an essential criterion for carrying out *kaupapa Māori* research.[134] However, feminist research for example, maintains its focus on issues of gender (not just of women), but has moved away from the idea that only women can carry out feminist research to one that is less essentialist.[135] Louis warns that creating methodologies that only apply to Indigenous researchers provides fodder for more essentialist arguments.[136] Exercising restraint and not becoming too involved in identity politics because of the potential these politics have for paralysing development,[137] seems to suggest that those who are non-Māori should not be precluded from participating in research that has a *kaupapa Māori* orientation.[138]

Thus, with a "two eyed seeing framework",[139] it is suggested that Indigenous and non-Indigenous researchers can be appreciated as allies with complementary worldviews.[140] Hence, culturally appropriate mentorship and supervision has been a way of approaching and organising research so that a non-Indigenous researcher could be involved.[141] However, for non-Indigenous researchers, Irlbacher-Fox states that "being an ally is not a self or permanent designation. Rather, it is context-specific, and is initiated and conferred by Indigenous

[133] Tuhiwai Smith, above n 6; Kathy Irwin "Māori Research Methods and Practices" (1994) Sites 28 (Autumn) at 27; Russel Bishop "Initiating Empowering Research" (1994) 29 New Zealand Journal of Educational Studies 1 at 175.
[134] Tuhiwai Smith, above n 6, at 189.
[135] At 189.
[136] Renee Pualani Louis "Can you hear us now? Voices from the margin: Using Indigenous methodologies in geographic research" (2007) Geographical Research 45 at 120.
[137] Tuhiwai Smith, above n 6, at 188.
[138] Above.
[139] Debbie Martin "Two-eyed seeing: A framework for understanding Indigenous and non-Indigenous approaches to Indigenous health research" (2012) Canadian Journal of Nursing Research 44 at 20.
[140] Nado Aveling "Don't talk about what you don't know': On (not) conducting research with/in Indigenous contexts (2013) Critical Studies in Education 54 at 203; Russel Bishop "Initiating Empowering Research" (1994) 29 New Zealand Journal of Educational Studies 1 at 175; Paul Sylvestre, Heather Castleden, Debbie Martin and Mary McNally "Thank you very much...You can leave our community now: Geographies of responsibility, relational ethics, acts of refusal, and the conflicting requirements of academic localities in Indigenous research (2018) 17 ACME: An International Journal for Critical Geographies 3 at 750; Andrea Vásquez-Fernández, Reem Hajjar, María Shuñaqui Sangama, Raúl Sebastián Lizardo and Miriam Pérez Pinedo "Co-creating and decolonizing a methodology using indigenist approaches: Alliance with the Asheninka and Yine-Yami peoples of the Peruvian Amazon" (2018) 17 ACME: An International Journal for Critical Geographies 3 at 720.
[141] See Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 6 for example of supervision and mentorship during LLM studies of *Kaupapa Māori* by non-Indigenous researcher.

peoples."[142] Rix et al explain that research must be conducted in a way that fully captures and honors the voices and perspectives of Indigenous peoples but, more importantly, emanates from an Indigenous ontological and epistemological basis.[143]

Nonetheless, there is a real threat that even research that emanates from an Indigenous ontologically and epistemologically grounded initiative will remain tainted with Eurocentric prejudice. This is exemplified in the Te Kooti Rangatahi Courts.[144] The objective of these courts is to reduce reoffending by Māori youth and to provide the best possible rehabilitative response, by encouraging strong cultural links and meaningful involvement of *whānau, hapū* and *iwi* in the youth justice process.[145] Te Kooti Rangatahi or Rangatahi Courts along with *kuia, kaumātua* and local marae communities, allow Māori youth who appear before them an opportunity to learn who they are and where they are from, and to participate in Māori protocols and customs which in turn assists to reconnect them with their identity. There is always an emphasis on holding a young person accountable for their offending behaviour while at the same time addressing their risks and needs.[146] The sitting of the court is held at a *marae* (traditional Māori meeting house), and observes *marae kawa* (ceremonial rituals), as part of the ceremony and processes of the court.[147]

However, it is the provisions of the District Courts Act, that allows a sitting of the Youth Court to be held within a *marae* environment.[148] Te Kooti Rangatahi functions with the same powers and responsibilities as a mainstream Youth Court, discharging the young person once they have completed their Family Group Conference (FGC) Plan or making a more formal order if they do not.[149] Since the first Te Kooti Rangatahi sat at Te Poho-o-Rāwiri marae, in Gisborne, on

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[142] Stephanie Irlbacher-Fox "Traditional Knowledge, Co-existence and Co- resistance" (2014) Decolonization: Indigeneity, Education & Society 3 at 151.
[143] Elizabeth Rix, Shawn Wilson, Norm Sheehan and Nicole Tujague "Indigenist and Decolonizing Research Methodology" in Pranee Liamputtong (ed) *Handbook of Research Methods in Health Social Sciences* (Springer, Singapore, 2018) at 7.
[144] For many years experienced youth justice professionals expressed concern regarding the successive generations of Māori defendants that are processed through the Youth Court to the District Court and then onto prison. It was agreed that a new approach was required to meet the needs of youth experiencing the criminal justice system. Following extensive consultation between youth court stakeholders and local iwi and their leaders, the idea of a youth court sitting at a marae became a reality.
[145] H Taumaunu "Rangatahi Courts of Aotearoa New Zealand" (November, 2014) Māori Law Review. In 2017 Judge Taumaunu was awarded the prestigious Veillard-Cybulski Award recognising innovative work with children in difficulty and Te Kooti Rangatahi.
[146] Children, Young Persons and their Families Act 1989, s 208(fa).
[147] Taumaunu, above n 145.
[148] Section 4(4) of the District Courts Act 1947 provides that "a Judge may hold or direct the holding of a particular sitting of a court at any place he deems convenient."
[149] Taumaunu, above n 145.

30 May 2008, these courts have applied law in an orthodox manner but also incorporated *te reo Māori* (Māori language), and *tikanga Māori* (Māori protocol).[150]

Yellowknife Dene scholar Glen Coulthard firmly describes such an approach as a "recognition-based model of liberal pluralism that seeks to 'reconcile' Indigenous assertions of nationhood with settler-state sovereignty…via some form of renewed legal and political relationship."[151] Coulthard would also argue that Te Kooti Rangatahi Courts "instead of ushering in an era of peaceful coexistence grounded on the ideal of reciprocity or mutual recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend."[152]

Already we have a sense of the Eurocentricism that persists in the Marae Courts despite the well intentioned incorporation of *te reo Māori* (Māori language), and *tikanga Māori* (Māori protocol). This persistence then permeates the paradigms used by researchers to conduct evaluations of Indigenous initiatives. For example, in 2012, an independent consultancy nominated by the Ministry of Justice prepared an evaluation of five of the then, ten, Te Kooti Rangatahi Courts.[153] The evaluation report made observations of 'good practice' and 'positive outcomes' for rangatahi and victims using qualitative methodologies borrowed from Western research paradigms.

Lavallée describes the important lessons learned from working from an Indigenous research framework within legal academia and how the "rules of academia and of research do not always allow an Indigenous research framework to flourish."[154] Although qualitative research principles were undoubtedly helpful in guiding the evaluation of Te Kooti Rangatahi, they were also problematic.[155]

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[150] Above.
[151] Glen Sean Coulthard *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, Minneapolis, 2014) at 3.
[152] Above.
[153] Ministry of Justice "Evaluation of the Early Outcomes of Ngā Kooti Rangatahi" (Ministry of Justice, Wellington, 19 December 2012).
[154] L Lavallée "Practical application of an indigenous research framework and two qualitative indigenous research methods: Sharing circles and Anishnaabe symbol-based reflection" (2009) 8 International Journal of Qualitative Methods 1 at 36.
[155] Similar findings to Lavallée were described by the author in Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019).

Indigenous research is decolonising research.[156] As such, it is important that Indigenous ways of knowing resist being categorised under Western concepts, including qualitative inquiry.[157] The application of a *kaupapa Māori* research framework to this evaluation instead of a Western application of qualitative methods, would have offered a theoretical contribution that searches for a different way of knowing; one that endeavours to decolonise legal academia.

Which leads to the question of whether outcome evaluations of Indigenous sentencing courts, and Te Kooti Rangatahi youth courts in particular, are being conducted in a way that captures the full effect of the courts. How are we actually measuring the courts success; through the eyes of Māori or non-Māori? How then do we escape the research boundaries designated and recognised by the State? The United Nations Declaration on the Rights of Indigenous Peoples states that as researchers we have a responsibility to renew knowledge and practices that support Indigenous ontological and epistemological understandings of self-determination.[158] This can only be achieved by convincing research communities of the need for a greater *kaupapa Māori* approach to research.

Marchetti and Bargallie have identified that paradigms and theories can influence the conduct and findings of research and that understanding the significance of choosing an appropriate research methodology is important for planning how to undertake evaluation that is with or involves Indigenous peoples.[159] They argue that it is not sufficient to simply cast a critical lens on laws, policies or procedures in order to ensure access to criminal justice, but that further analysis needs to be undertaken of the manner in which research and evaluations of laws and processes are conducted.[160] Marchetti and Bargallie claim that without this type of evaluation, evidence of whether access to justice is indeed available, cannot be adequately or sufficiently collected and the continued over-representation of Indigenous peoples in custody will never be able to be fully addressed.[161]

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[156] Tuhiwai Smith, above n 6.
[157] Lavallée, above n 154, at 36.
[158] United Nations Declaration on the Rights of Indigenous Peoples, art 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] Marchetti and Bargallie, above n 39, at 2.
[160] At 5.
[161] Above.

Marchetti and Bargallie state:

> That it is insufficient to simply critique the ways in which laws are applied and administered without giving due regard to how such critiques are formulated and how the impact of laws and criminal justice processes are researched and evaluated. That is, there needs to be more thought given to not only determining whether systemic or institutional racism exists within a certain criminal justice process, but how it manifests in terms of the methodological considerations that are used to analyse the impact of a criminal justice intervention.[162]

Western methods of evaluation predominantly focus on measures and criteria that are difficult to apply within a non-mainstream setting because they do not reflect Indigenous cultural values and aspirations for the programmes being studied.[163] These methodological problems and how they impact on ensuing findings need to be considered and addressed if we are to gain a better understanding of how Eurocentrism can be removed from decolonising research practices.

Daigle encourages researchers "to think how their work and everyday practices – scholarly or otherwise – actively dismantle colonial structures and relations of power, while building (re)newed ones that are accountable to the Indigenous political and legal authorities."[164] And Cree scholar Willie Ermine insists that research should be done within an ethical space at the convergence of Indigenous and non-Indigenous worldviews.[165]

However, as we strive to construct this ethical space, Māori must be weary of the hidden dangers of accepting non-Indigenous language and legal paradigms to express their understandings of the law and Indigenous peoples relationship to it. Perhaps one way of making sure legal research is conducted within an equitable ethical space is to collaboratively construct our decolonised research paradigms. Legal researchers could create research paradigms that are "grounded in intercultural collaboration, where control is shared by Indigenous and non-Indigenous research partners and where the co-created knowledge is continuously validated."[166] This co-created knowledge then frames the obligations contained in the Treaty of Waitangi creating opportunities for legal researchers as Treaty partners to develop

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[162] At 7.
[163] C Cunneen and S Rowe "Changing Narratives: Colonised Peoples, Criminology and Social Work" (2014) 3 International Journal for Crime, Justice and Social Democracy 1 at 49.
[164] Michelle Daigle "Awawanenitakik: The Spatial Politics of Recognition and Relational Geographies of Indigenous Self-Determination" (2016) Canadian Geographer 60 at 266.
[165] Willie Ermine "The Ethical Space of Engagement" (2007) Indigenous Law Journal 6 at 193.
[166] Andrea Vásquez-Fernández, Reem Hajjar, María Shuñaqui Sangama, Raúl Sebastián Lizardo and Miriam Pérez Pinedo "Co-creating and decolonizing a methodology using indigenist approaches: Alliance with the Asheninka and Yine-Yami peoples of the Peruvian Amazon" (2018) 17 ACME: An International Journal for Critical Geographies 3 at 720.

decolonising research practices. While it is imperative to establish a dialogue around how to decolonise legal research as partners, Māori remain committed to maintaining their traditions through language and culture. This leaves Māori "reconciling difficult relationships with others who benefit from the persistence of colonial research and practices."[167]

Decolonisation encapsulates two sets of ideas; Indigenous and non-Indigenous. There are, nonetheless, considerable challenges to these ideas about decolonisation that represent new challenges for Māori. Discussions about decolonising legal research are discussions about reimagining the law outside of colonialism. However, is there not a risk that 'fashionable' decolonisation has merely 'become a strategy for reinscribing or reauthorizing the privileges of non-Indigenous academics because the field of 'post-colonial' discourse has been defined in ways which can still leave out Indigenous peoples, our ways of knowing and our current concerns?'[168]

Clearly there are two sets of ideas on how we define decolonising research. The dilemma posed by two such approaches is that whilst we may reject or dismiss one over the other, these ideas remain and little is offered in the way of an alternative. We live with these ideas simultaneously and in a state of constant collision. This leaves Māori struggling to make sense of their culture within a modern colonial state while the dominant Western ideologies struggle to decide what is best for all.

It is evident that the first law of Aotearoa exists today. It is alive and interacting, but mingles untidily with our modern juristic landscape. Nonetheless, *tikanga Māori* is a coherent dimension of New Zealand law. It is the glue that holds disparate areas of present day laws together, regardless of whether you are Māori or non-Māori. The essential principles of *tikanga, whānaungatanga, kaitiakitanga* and *manaakitanga* speak to aspects permeating all our laws whether it is decisions of the Family Court, Environment Court, Criminal Court or our human rights documents.[169] *Tikanga Māori* as a body of law can be mapped and its effect on New Zealand law can be measured using *kaupapa Māori* research methodologies. Its

[167] Deborah McGregor "From 'decolonized' to reconciliation research in Canada: Drawing from Indigenous research paradigms" (2018) 17 ACME: An International Journal for Critical Geographies 3 at 828.
[168] Tuhiwai Smith, above n 6, at 25.
[169] Joe Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (Harkness Henry Lecture, 2013) 21 WLR at 32.

principles can be drawn into mainstream decision-making and expressed in a cultural context and many examples of this approach already exist in legislation.[170]

However, the history of legal research involving Māori signals a problematic relationship between the government and Māori. A consistent theme of research has been analysis by non-Māori with minimal or no input from Māori, resulting in government authorities with no real local perspective, dictating how Māori should be conducting themselves. This type of research has characteristically disempowered Māori communities, perpetuated stereotypes that reinforced colonially motivated racism, while bringing no measurable benefits to Māori communities struggling to access justice.

In response to what many see as Western academic oppression of Māori communities in the name of justice, Indigenous researchers are increasingly calling for research to be decolonised.[171] Decolonising research places Indigenous voices and epistemologies at the centre of the research process when conducting research with Indigenous communities[172] while also challenging the generically held belief that Western research methods and ways of knowing are the only objective truth. Holding Western academia as the "truth" marginalises the principles of *tikanga Māori* and Māori knowledge by denigrating them as folklore or myth.[173] In Tuhiwai Smith's opinion the decolonising researcher should centre Indigenous values and follow Indigenous protocols. This does not mean researchers should reject all Western methods and theories, as they may be adapted if deemed appropriate and beneficial by the local community.[174]

As a greater number of legal academics and researchers become interested in decolonising

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[170] Above.
[171] L Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2005) at 85; S Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 39; P Cochran, C Marshall and C Garcia-Downing "Indigenous ways of knowing: Implications for participatory research and community" (2008) Am J Public Health 98 at 22; N Denzin, Y Lincoln and L Tuhiwai Smith (eds) *Handbook of Critical and Indigenous Methodologies* (Sage, Thousand Oaks, CA, 2008); L Lavalee "Practical application of an Indigenous research framework and two qualitative Indigenous research methods: sharing circles and Anishnaabe symbol-based reflection" (2009) Int J Qual Methods 8 at 21.
[172] Tuhiwai Smith, above n 6, at 85; A Miller et al "Using a participatory action research framework to listen to Aboriginal and Torres Strait Islander People in Australia about pandemic influenza" (2015) Rural and Remote Health 15; B Swadener and K Mutua "Decolonizing Performances: Deconstructing the global postcolonial" in N Denzin, Y Lincoln and L Tuhiwai Smith (eds) *Handbook of Critical and Indigenous Methodologies* (Sage, Thousand Oaks, CA, 2008) at 31.
[173] Tuhiwai Smith, above n 6, at 85.
[174] V Simonds and S Christopher "Adapting Western Research Methods to Indigenous Ways of Knowing" (2013) 103 Am J Public Health 12 at 2194.

approaches to research, more understanding is needed so that truthful partnerships can develop that equally share the researcher and the researched voice at all stages of the research process. There is sparse literature to be found on the inherent tensions and lessons learned from projects that include differing epistemological methodologies and decolonising approaches. What is needed is a foundation to guide future work on the intersection of Indigenous and Western knowledge production.

Decolonising research is a learning process and an orientation to research that is constantly evolving with no real rule book. It requires respect while paying careful attention to the research process and being prepared to acknowledge when Western methodologies are not appropriate. A major challenge is how to render Indigenous methodologies palatable to a Westminster based legal system. Developing a positivistic, lineal research design that ensures a robust research process is an easy trap for the non-Māori legal researcher; one where a pre-conditioned response provides nothing more than evidence-based data which ultimately amounts to persistent colonising behaviour. Clearly, there are considerable challenges to any exploration of how to develop and incorporate a *kaupapa Māori* research paradigm that would assist in changing the current disparities in the justice system for Māori.

Decolonising legal research is necessary given the existing social inequities that Māori continue to experience in the justice system. A decolonising perspective is significant because it focuses on Indigenous-settler relationships and seeks to interrogate the powerful social relationships that marginalise Indigenous peoples.[175] However, paradigmatically speaking, a decolonising perspective and Indigenous epistemologies emerge from very different paradigms.[176] If we take a moment to consider the relational assumptions that underpin *whānaungatanga* we unearth further epistemological tensions within the differing research paradigms. Stewart states that from an Indigenous research perspective the relational is viewed as an aspect of methodology whereas within Western constructs the relational is viewed as bias, and thus outside methodology.[177] This suggests a pliable nature within Indigenous methodologies categorical units of ontology, epistemology, methodology; a certain flexibility to accommodate a worldview outside of Western tradition. While certain Western research

[175] F Nicoll "Are you calling me a racist?" Teaching critical whiteness theory in Indigenous sovereignty (2004) 3 Borderlands 2.
[176] M Kovach *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press, Ontario, 2010) at 42.
[177] S Stewart "One Indigenous academic's evolution: A personal narrative of Native health research and competing ways of knowing" (2009) 4 First Peoples Child and Family Review 1 at 57.

paradigms frown upon the relational because of its potential to bias research, Indigenous methodologies embrace relational assumptions as central to their core epistemologies. [178] These tensions are difficult to navigate, and even harder to appease when searching for common ground as researchers. Nonetheless, the complexities of a *kaupapa Māori* research paradigm may not be fully understood or regarded as legitimate but there is plenty of evidence to support its existence.

Decolonising research requires constant reflective attention and action, and there is an absence of published guidance for this process.[179] There is a need for continued exploration of how to engage *kaupapa Māori* methodologies alone or in conjunction with appropriate Western methodologies when conducting research with Māori. Currently, the body of *kaupapa Māori* research in law is limited, and often not perceived as valid or legitimate.

To change inequities in the criminal justice system with the aim of reducing incarcerations rates for Māori, researchers have to recognise the need to build trusting partnerships with Māori communities, that includes decolonising research that balances appropriately both Indigenous and Western frameworks and methodologies.[180]

In conclusion, how do we gauge the effect Tuhiwai Smith's cautionary tale has had on the law and its interface between Māori and wider research communities? A starting point could be the platform Tuhiwai Smith's book provides upon which two differing epistemological foundations could engage in a conversation about their differences and mutual interests. Decolonising research "recognises and works within the belief that non-Western knowledge forms are excluded from or marginalised in normative research paradigms, and therefore non-Western/Indigenous voices and epistemologies are silenced and subjects lack agency within such representations."[181] Linda Tuhiwai Smith describes how Indigenous peoples have been historically oppressed by Western research knowledge through "mis-presentations, mis-interpretations and mis-appropriations" that have perpetuated ongoing racism and

[178] Kovach, above n 176, at 42.
[179] Simonds and Christopher, above n 174, at 2185.
[180] K Walters, A Stately and T Evans-Campbell "Indigenist collaborative research efforts in Native American communities" in A Stiffman (ed) *The Field Research Survival Guide* (Oxford University Press, New York, 2009) at 146; L Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2005) at 85; L Rigney "Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles" (1999) 14 Journal of Native American Studies (Fall) 2 at 116.
[181] Swadener and Mutua, above n 172, at 33.

colonialism.[182] Researchers need to refuse normality and utilise principles, paradigms, methodologies and methods that incorporate Indigenous standpoints and perspectives providing a better fit for research with or involving Indigenous peoples.[183]

2.4 Conceiving Legal Research Differently

Colonialism frames the way in which Māori experience the law. Our prison statistics are proof of this.[184] Colonialism also frames the way in which legal research is conducted. "Research is one of the ways in which the underlying code of imperialism and colonialism is both regulated and realized. It is regulated through the formal rules of individual scholarly disciplines and scientific paradigms, and the institutions that support them (including the State)."[185] In contrast, decolonising legal research is research that engages with our colonial past and encourages us to question the underlying assumptions, motivations and values which inform our legal research practices; it is research that has the potential to change the way Māori currently experience the law.

The Expert Mechanism on the Rights of Indigenous Peoples' study of access to justice for the United Nations General Assembly in 2013 held that States needed to consult and cooperate with Indigenous peoples to develop appropriate methodologies to obtain comprehensive data.[186] This is because existing "research is implicated in the production of Western knowledge, in the nature of academic work, in the production of theories that have dehumanized Māori and in practices that have continued to privilege Western ways of knowing, while denying the validity for Māori of Māori knowledge, language and culture."[187]

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[182] Tuhiwai Smith, above n 6, at 37.
[183] E Bonilla-Silva and T Zuberi "Towards a Definition of White Logic and White Methods" in T Zuberi and E Bonilla-Silva (eds) *White Logic, White Methods: Racism and Methodology* (Rowman and Littlefield Publishers, Lanham, 2008) at 174.
[184] In New Zealand, the rate of imprisonment for Māori is 660 per 100,000 whereas for New Zealand Pākehā the rate is less than 95 per 100,000. Furthermore, the proportion of offenders starting a prison sentence who are Māori increased from 47 per cent to 56 per cent between 1983 and 2013. Department of Corrections *Trends in the Offender Population* 2013 (Department of Corrections, Wellington, 2013) <http://corrections.govt.nz>.
[185] Tuhiwai Smith, above n 6, at 8.
[186] United Nations Human Rights Council: Expert Mechanism on the Rights of Indigenous Peoples "Study on Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: 6th Session" (Office of the High Commissioner, 8-12th July 2013), Annex, art 12, at 23 <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session6/A-HRC-EMRIP-2013-2_en.pdf>.
[187] Tuhiwai Smith, above n 6, at 185.

In response to this continued Western privilege "Indigenous scholars are in the process of shaping, redefining and explaining their positions."[188] They are defining the research, outlining the ethical protocols and explaining the culturally congruent methodologies that can be used at the behest of their communities.[189] Indigenous people are at a stage where they want research and research design to contribute to their self-determination and liberation struggles, as it is defined and controlled by their communities.[190] Indigenous peoples think and interpret the world and its realities in differing ways to non-Indigenous peoples because of their experience, histories, culture and values.[191] However, as Indigenous voices are increasingly being heard and Indigenous scholars are now using Indigenous knowledge in their research, Indigenous research methodologies will in turn become common practice. As the legal academic landscape in New Zealand changes, the need for legal research that includes Indigenous research paradigms becomes mandatory.

Currently, most of the existing research on Indigenous peoples is contaminated by Eurocentric prejudice.[192] There is an abundance of research conducted *on* Māori – as opposed to that conducted *by* or *with* Māori – that focuses on negative aspects of life, as identified by non-Māori researchers. In many of their conclusions, the studies identify "problems" that are in need of further study. The research agenda is set by non-Māori with a focus on the "problem" rather than a way forward; an agenda that tends to be adversarial rather than holistic in focus.[193] One of the consequences of such an approach to studies *on* Māori, even if the research was well intended, has been the proliferation of negative stereotypes about Māori.[194] Another significant problem with non-Māori researching Māori is that there is always a comparison made between the culture of Māori and non-Māori. "The language, tone, and focus of research reflects this comparison, with the inevitable consequences of rating one over the other."[195] The

[188] Wilson, above n 15, at 54.
[189] Above.
[190] L Rigney *Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies: A Guide to Indigenist Research Methodology and its Principles* (Paper presented at the Chacmool Conference, University of Calgary, Calgary, 1997) at 3.
[191] At 8; Wilson, above n 15, at 55.
[192] M Battiste and J Youngblood Henderson (2000) *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publications Ltd, Saskatoon, 2000) at 132.
[193] Hasan-Stein, above n 2, at 20.
[194] R Walker "The Role of the Press in Defining Pākehā Perceptions of the Māori" in P Spoonley and W Hirsh (eds) *Between the Lines: Racism and the New Zealand Media* (Heinemann Reed, Auckland, 1990) at 37; R Walker "Māori and the Media" in R Walker (ed) *Nga Pepa a Ranginui: The Walker Papers* (Penguin Books, Auckland, 1996) at 142; R Walker "Māori News is Bad News" in J McGregor and M Comrie (eds) *What's News: Reclaiming Journalism in New Zealand* (Dunmore, Palmerstone North, 2002).
[195] Wilson, above n 15, at 17.

dominant view of knowledge is upheld.[196]

It becomes important, therefore, to define decolonising legal research within the historical and cultural context of contemporary New Zealand and then examine its potential for development and implementation within our current legal dynamics. However, in order to develop decolonising legal research methodologies, one needs a better understanding of the methodology of legal scholarship within the domestic legal system of New Zealand. Also, within the context of the current debate of the status of Māori culture within legal scholarship, the question arises as to what kind of discipline legal scholarship should be in New Zealand and which methodologies are most appropriate for culturally informed legal research. Here, we are faced with the diverging traditions of Māori and non-Māori legal scholarship and the underlying theories of 'legal science' in the course of Western legal history and theories of 'cosmology' found in the traditions of *tikanga Māori.*

Mark Van Hoecke describes legal scholarship as torn between grasping as much as possible the expanding reality of law and its context, on the one hand, and reducing this complex whole to manageable proportions, on the other.[197] However, in the latter case, a purely internal analysis of the New Zealand legal system, isolated from any cultural and societal context, is an option that risks perpetuating colonising legal research practices. This is most notable in legal doctrine where "law is largely cut loose from its context, and societal problems are exclusively worded as 'legal' problems, that should be 'solved' without taking into account anything that is not 'law'."[198] In effect, "'legal reality' is confined to legislation and case law,"[199] divorcing itself from the 'legal reality' of Māori. Legal solutions to Māori 'problems' are solved with sparse connection to the societal reality of Māori.

Doctrinal research "is concerned with the formulation of legal 'doctrines' through an analysis of legal rules".[200] The researcher's aim is to describe part of a body of law and how it applies.[201]

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[196] Hasan-Stein, above n 2, at 20.
[197] Mark Van Hoecke 'Preface' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at vii.
[198] Above.
[199] Above.
[200] Paul Chynoweth "Legal Research" in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, London, 2008) at 29.
[201] Mary-Rose Russell *Legal Research in New Zealand* (LexisNexis, Wellington, 2016) at 8.

Doctrinal research is the dominant legal research method,[202] and some elements of doctrinal analysis will be found in all but the most radical forms of legal research.[203] However, doctrinal research is also a legal researcher's 'comfort zone'.[204] It is stoically formulaic[205] and open to criticism.[206] The thrust of the legal realist movement in the early 1920's encouraged distrust of the judicial technique of seeming to deduce legal conclusions from so-called rules of law. Realists believed that judges neither do nor should decide cases formalistically. Despite many outdated aspects of legal realism, the realists were successful in refuting "formalist" or "mechanical" notions of law and legal reasoning.[207] After all, the law is greater than merely advising clients, representing and judging litigants and enacting statutes.[208] Legal research is also designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.[209]

In attempting to define and measure research, the researcher's philosophical stance frequently determined the research questions, progress and possible outcomes of academic research.[210] Within the dominant paradigm, the legal system itself functions as a theoretical framework that selects facts and highlights them as legally relevant ones.[211] In response, Westerman encourages research that studies law from an independent theoretical framework, which consists of concepts, categories and criteria that are not primarily borrowed from the legal system itself and that include 'historical studies, socio-legal research, philosophy, political

[202] Doctrinal Research - 'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments' Dennis Pearce, Enid Campbell and Don Harding (Pearce Committee) *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) cited in Terry Hutchinson *Researching and Writing in Law* (3rd ed, Reuters Thomson, Sydney, 2010) at 7.
[203] Paul Chynoweth, above n 200, at 31.
[204] Russell, above n 201, at 8.
[205] Above.
[206] The Arthurs Report: Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) cited in Terry Hutchinson *Researching and Writing in Law* (3rd ed, Thomson Reuters, Sydney, 2010) at 8.
[207] Brian Leiter "American Legal Realism" in William Edmundson and Martin Golding (eds) *The Blackwell Guide to Philosophy in Law and Legal Theory* (Blackwell Publishing, Malden, MA, 2005) at 53.
[208] The Arthurs Report, above n 206.
[209] Above.
[210] At 107.
[211] Pauline Westerman "Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law" in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 87.

theory and economy.[212] Westerman confirms the importance of building on doctrinal research conclusions by using sociological or other 'outsider' perspectives.[213] Cotterrell has also argued that true legal scholarship must entail a sociological understanding of law.[214]

Martha Minow, Dean of Harvard Law School, in outlining the types of intellectual contribution resulting from legal scholarship, refers to 'doctrinal restatement,' describing jurisprudence and the philosophy of law as developing or elaborating a theory that tries to explain how areas of law fit together, it engages with alternative theories and demonstrates the contribution this theory makes to the resolution of a doctrinal or practical problem, it also advances a normative framework for the future.[215]

Minow encourages us to explore the possibility of conceiving legal research differently. But how would this futuristic normative framework work? What methods would it use? Where does 'Indigenous culture' fit within this paradigm? Should we even try to develop 'law in context', while still emphasizing internal perspectives on law? And where does 'pluralism' fit within this framework? Or is integrating culture and sociology into law too complex a task?

Van Hoecke says it would be very difficult, if not impossible, to demarcate a common epistemological framework, within which common methodologies could be worked out for quite diverging research purposes.[216] Perhaps Van Hoecke is correct, in that Māori and non-Māori research epistemologies are so diverse from each other that it will prove too difficult to develop the complex research skills necessary to conceive legal research differently. However, failure to conceive legal research differently results in law that "aims to order society and influence human behaviour",[217] an approach that largely alienates the lived experience of

[212] At 94.
[213] Terry Hutchinson and Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research" (2012) Deakin L Rev 17 at 115.
[214] Roger Cotterrell "Why Must Legal Ideas be Interpreted Sociologically?" (1998) 25(2) Journal of Law and Society at 171.
[215] Martha Minow "Archetypal Legal Scholarship – A Field Guide" in AALS Workshop for New Law Teachers (AALS, 2006) 34-5 <http://www.aals.org/documents/2006nlt/nltworkbookO6. pdf>.
[216] Mark Van Hoecke 'Preface' in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at ix.
[217] Julie De Coninck "Behavioural Economics and Legal Research" in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 257.

Māori.[218]

In reaction to this, many Indigenous scholars have attempted to broaden our legal doctrines asking for them to be conceived differently, asking for them to be conceived with a 'cultural' element.[219] How would such a broad cultural discipline look? Which methodologies would we use? How would we educate researchers to carry out such research? And what identity would this discipline take? Perhaps the main conclusion to be drawn from these questions is that several approaches to legal research are possible, as long as a pluralist[220] approach is upheld that acknowledges the current inter-generational transfer of social inequalities for Māori.

On the other hand, should we even try to conceive legal research differently as Māori and non-Māori researchers? Or should we pragmatically aim at adjusting our legal doctrines to reflect 'law in context', while maintaining a traditional perspective on our laws? These questions are fraught with complexities. Furthermore, Indigenous research paradigms are a relatively new phenomena within traditional Western legal academic institutions. However, pressures are slowly building for a more deliberate, formalised inclusion of Māori culture in the New Zealand constitution.[221] There is a requirement for legal researchers to identify and be accountable for developing a shared epistemological position between Māori and Western research paradigms.

Searching for these epistemological connections encourages us to examine our role as researchers and calls for a more comprehensive narrative on what it means to evaluate our laws equitably. With the growing number of culturally appropriate legal initiatives introduced, such

[218] See Russell Bishop "Kaupapa Maori Research: An Indigenous Approach to Creating Knowledge" in Neville Robertson (ed) *Maori and Psychology: Research and Practice* (Māori and Psychology Research Unit, Waikato University, Hamilton, 1999).
[219] See Russell Bishop "Freeing Ourselves from Neo-Colonial Domination in Research: A Kaupapa Māori Approach to Creating Knowledge" in Norman Denzin and Yvonna Lincoln (eds) *Sage Handbook of Qualitative Research* (3rd ed, Sage, London, 2005); Shaun Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008); Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012); and Valmaine Toki "Tikanga Māori and Therapeutic Jurisprudence" in Valmaine Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 212.
[220] M Hooker *Legal Pluralism – An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press, Oxford, 1975) at 2. Hooker describes legal pluralism as "the existence of multiple systems of legal obligation…within the confines of the state."
[221] Above n 219.

as court processes,[222] and the continuing development of Indigenous-focused jurisprudence and legal doctrine,[223] researchers involved in Indigenous research projects face multiple challenges as they seek to develop their own epistemological and ontological research paradigms in conjunction with Western influenced research paradigms and academic institutions. Without underestimating the epistemological implications of doing so,[224] researchers could use this approach to pragmatically synchronise a diversity of research processes within one study.[225]

Aiming to conceive legal research differently in the hope of discovering normative decolonised research practices is a multi-layered task. In this study I will use a critical realist's lens to examine methods in comparative law that could pave a road to developing decolonising legal research methodologies based on legal theory with a strong cultural focus. Geoffrey Samuel argues that developing methods in comparative law could be an avenue for developing the methodology of domestic legal doctrine.[226] The purpose behind a comparative law approach to legal research for example, would be the reliance on the act of comparison to clarify the relationship between Western research and Indigenous ways of knowing so that more equitable theories, practices and relationships could be developed from their interrelation.

The intention of comparing Indigenous and non-Indigenous epistemologies, then, 'is to both decolonise the areas of collaboration between Indigenous and Western modes of…research, and rewrite and re-right, the boundaries between these ways of knowing.'[227] There are opportunities for contradictory and even mutually exclusive elements to meet and fashion dynamic relationships in an attempt to address the structural tensions that exist between them.[228] As long as the knowledge that is traded across this boundary does not happen between equals, the legacy of colonialism continues.[229]

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[222] For example, Te Kooti Rangatahi Marae Based Youth Courts, see Ministry of Justice *Rangatahi Court: Evaluation of the Early Outcomes of Te Kooti Rangatahi* (Ministry of Justice, Wellington, 2012); and Te Kooti Matariki Adult Offender Court, in Kaikohe, Northland.
[223] For example, cases heard before the Waitangi Tribunal, the Māori Land Court and Te Kooti Rangatahi Marae Based Youth Courts.
[224] Alan Bryman "Paradigm Peace and the Implications for Quality" (2006) 9 International Journal of Social Research Methodology at 111.
[225] Louis Botha "Mixing Methods as a Process Towards Indigenous Methodologies" (2011) 14 Int J Soc Res Methodol at 313.
[226] Geoffrey Samuel "Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?" in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 257.
[227] Linda Tuhiwai Smith "On Tricky Ground: Researching the Native in the Age of Uncertainty" in Norman Denzin and Yvonna Lincoln (eds) *Sage Handbook of Qualitative Research* (3rd ed, Sage, London, 2005) at 85.
[228] Above.
[229] Above n 225, at 323.

Chapter 3. Defining Māori and Non-Māori Legal Theory

Sir Apirana Ngata identifies the importance of both Māori and Pākehā knowledge systems innovatively drawing both worlds together within a holistic framework when he states: *Ko ngā tohunga hei hao i taua waenganui nā, ko te rōpū i wakatapuria tahitia i roto i te mātauranga Pākehā, i te mātauranga Māori: Blending traditional Māori expertise with Western education.*[1] Western knowledge systems and theories of knowledge have existed for millenia. Theories and knowledge systems are not new concepts for Māori either. Leonie Pihama explains:

> As Indigenous people, theory is something that our tūpuna have always done: we've explained things; we've tried to frame things; and we've tried to analyse and interpret things – for generations, for thousands of years – so the whole notion of theory is not a new thing. In the early nineties when we started talking about *kaupapa Māori* theory, it was grounded in that idea that our people have always been engaged in knowledge, knowledge expression, articulation, interpretation, and analysis. We're a navigational culture so we had to be able to theorise the world, and how we would get here, in really complex ways.[2]

Western jurisprudence, or legal theory, broadly speaking is the theoretical study of law. It seeks to explain the nature of law and provide an understanding of the role of law in society. In a similar vein *kaupapa Māori* theory grows out of a need to articulate Indigenous theories about the world. There are hundreds of different types of theory, both Western and Māori. Just as Western critical theory encompasses many different types of theory, for example, Marxism, postmodernism and feminism, similarly *kaupapa Māori* is not a single theory. Individual *hapū* and *iwi* have their own way of understanding *kaupapa Māori.* Colonialism disrupted those understandings and the development of *kaupapa Māori* theory. In terms of absorbing the impact of colonisation and imperial influences *kaupapa Māori* now seeks to realign itself by returning to traditional knowledge systems in order to transform the colonised reality of contemporary Aotearoa New Zealand.

Understanding our contemporary legal system and how it affects New Zealand society may be assisted through an understanding of legal theory. However, attempting to develop an

[1] Apirana Ngata cited in Te Ahukaramū Charles Royal "Mātauranga Māori: An Introduction - A 'Think Piece' Report (Ministry of Education, Wellington, 2019).

[2] Leonie Pihama "A Conversation About Kaupapa Māori Theory and Research" *Kei Tua o Te Pae Hui Proceedings: The Challenges of Kaupapa Māori Research in the 21st Century* (New Zealand Council for Educational Research, Wellington, 2011) at 49.

understanding through the visions of popular Western theorists such as Hart, Foucault, Austin, and Bentham, for example, soon becomes limiting and constrains our ideas about New Zealand society within colonising paradigms. These theorists were not New Zealanders, they were not Māori, they did not understand our local context. They did not understand our culture or our politics. They theorised about different contexts and were supported by academia alien to our biculturalism. If we seek to understand our own particular jurisprudence through theoretical analysis, whose theories do we use?

The use of *kaupapa Māori* theories may seem obvious, but we have to be cautious not to replicate models of liberal pluralism which assimilate *kaupapa Māori* theories within our existing colonial narratives. The denial of Māori knowledge and theorising has been an integral part of the colonising agenda.[3] Hence the inherent right to *kaupapa Māori* and to self-determination as a collective expression should not be subsumed within the discourse of pluralism. When theorising it is imperative to understand that *kaupapa Māori* is a way of life that cannot simply be assimilated within a dominant system; it insists on solidarity in accordance with the Māori worldview.

For many Māori who have actively sought theoretical explanations for their experiences, *kaupapa Māori* theory provides a culturally defined theoretical space,[4] a theoretical space "defined and controlled by Māori."[5] As such, *kaupapa Māori* theory is based upon and informed by *mātauranga Māori* that provides a cultural template, a philosophy that asserts that the theoretical framework being employed is culturally defined and determined.[6] *Mātauranga Māori* is a distinct Māori epistemology and way of knowing; it is a Māori intellectual tradition.[7] Te Ahukaramu Charles Royal defines *mātauranga Māori* as theory and *whakapapa* as research methodology.[8] *Whakapapa* is regarded as an analytical tool that has been employed by our people as a means to understand our world and relationships.[9] In such a framework it appears

[3] Leonie Pihama "Kaupapa Māori Theory: Asserting Indigenous Theories of Change" in J Barker (ed) *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-determination* (University of Nebraska Press, Lincoln, NE, 2005) at 191.
[4] Pihama, above n 2, at 5.
[5] At 5.
[6] At 5.
[7] R Wiri *The Prophecies of the Great Canyon of Toi: A History of Te Whäiti-nui-a-Toi in the Western Urewera Mountains of New Zealand.* (Unpublished Doctoral Thesis, University of Auckland, Auckland, 1998) at 25.
[8] Te Ahukaramu Charles Royal *Te ao märama: A research paradigm in Te Pümanawa Hauora* (Proceedings of Te Oru Rangahau, Mäori Research and Development Conference, School of Mäori Studies, Massey University, Palmerston North, 1998) at 83.
[9] Pihama, above n 2, at 7.

that *whakapapa* is both vehicle and expression of *mātauranga Māori*.[10] The assertion through *whakapapa* of the origins of *mātauranga Māori* returns us to Papatūānuku and Ranginui.[11] In Te Reo, when *ki* is spoken before *mua, ki mua* can be translated as meaning 'in front of' or 'before' or 'ahead'. Without the particle *ki, mua* relates to the past meaning 'the former' or 'the time before'. The past and the future are linked linguistically. The future remains influenced by the past. Māori use history to define their future. Tuakana Nepe describes *kaupapa Māori* as a body of knowledge accumulated by the experiences of the Māori people through history from the origins of Papatūānuku and Ranginui. It is knowledge that is distinctive to Māori society and has its origins in the metaphysical.[12]

Rangiātea is the first known Whare Wānanga (Higher house of learning) located in Te Toi-o-ngā-Rangi (the upper level of the spiritual realm), the home of Io-Matua-Kore (the creator).[13] Knowledge has always had a central place within Māori society and the complexities of knowledge and knowledge transmission are recognised in the structures of the Whare Wānanga.[14] The teachings of Maori Marsden from his understandings of *kaupapa Maori* and the three baskets of knowledge – Te Kete Tuauri, Te Kete Aronui and Te Kete Tuaātea[15] assist in illustrating the importance of the Whare Wānanga:

> Teaching 1.
>
> Why do the kahikatea trees grow together? The spirit of Tane teaches us that the roots of the kahikatea trees are somewhat shallow, they do not grow deeply into the ground. A student of Tane asked himself why this should be so. Then he had an illumination. He understood why the kahikatea trees grow together. This is the only tree that grows in this way. He recalled what was said at Te Whare Wānanga (at the House of Learning). He understood…that at stormy times, when the wind blows, if the kahikatea tree should grow on its own, then it will fall over because of the shallowness of the roots. However, as they stand together, the roots have become interwoven with one another. When the wind blows and a tree should lean over, then it is held in place by the roots of another tree. This was the illumination that came to him. Further, if a person should stand on his/her own, then he/she will fall, according to the model of standing together.[16]

[10] At 7.
[11] Royal, above n 8, at 83.
[12] Tuakana Nepe *E hao nei e tënei reanga: Te Toi Huarewa Tipuna, Kaupapa Mäori, An Educational Intervention*. (Unpublished Masters Thesis, University of Auckland, Auckland, 1991) at 4.
[13] At 4.
[14] Pihama, above n 2, at 6.
[15] Māori Marsden *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Edited by Te Ahukaramū) (The Estate of Māori Marsden, Masterton, 2003) at 79.
[16] At 79.

> Teaching 2.
> Knowledge (mātauranga) is different from knowing (mohio). When illumination of the spirit arrives, then one truly knows, according to your ancestors. When the illumination of the spirit arrives in the mind of the person that is when understanding occurs – for knowledge belongs to the head and knowing belongs to the heart. When a person understands both in the mind and in the spirit, then it is said that that person truly 'knows' (mohio).[17]

In the recent Taskforce Report, Smith and Jones identified three key outcomes that should characterise the future state of the University of Waikato. One of those outcomes was that:

> *All staff and students enjoy enhanced academic experiences and results from the weaving of mātauranga Māori through existing teaching and research approaches.*[18]

The theory of *mātauranga Māori* presents a view concerning the paradigm of traditional Māori culture.[19] Whilst this theory seeks its inspiration in the past, its orientation is toward the creation of a philosophy of knowledge, appropriate for contemporary and future needs and aspirations.[20] As evidenced in the Taskforce Report, *mātauranga Māori* theory is integral in supporting the structural reorientation of academic institutions of Aotearoa New Zealand.

However, any further discussion of 'theory' needs to be approached with caution. The appending of the term 'theory' to *kaupapa Māori* or *mātauranga Māori* is potentially contentious. The term 'theory' immediately invites the researcher to imagine concepts based within European philosophical traditions. Theory, like research, has rarely been *Māori* friendly.[21] It often provides a platform for the continued oppression of Māori. Theories of racial inferiority, deficiencies and cultural disadvantage have been central in the denial of Māori people access to our land, language and culture.[22] This leaves Māori engaging with theory as a site of struggle.[23] As a tool, theory can be oppressive and it can be transformative depending on whose hands the tool is in.

While it is important to engage and develop decolonising theory, Barbara Christian states, it must be grounded in experiences and practice, without which theory becomes prescriptive and

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[17] At 79.
[18] Linda Tuhiwai Smith and Alister Jones (eds) *Report of the Taskforce* (University of Waikato, Hamilton, 2021) at 2.
[19] Royal, above n 8, at 78.
[20] At 78.
[21] Pihama, above n 2, at 7.
[22] L Mead *Ngä aho o te käkahu mätauranga: The multiple layers of struggle by Mäori in education* (Unpublished Doctoral Thesis, Education Department University of Auckland, Auckland, 1996).
[23] Graham Smith *The Development of Kaupapa Māori Theory and Praxis* (Unpublished Doctoral Thesis, School of Education, University of Auckland, Auckland, 1997) at 445.

elitist.[24] Perhaps the most important feature of any decolonising theory that is developed is its accessibility. While decolonising legal theory should be transformative, it is pointless if it is inaccessible. "If theory is inaccessible because of the language chosen by academics then the potential for that theory to transform the lived realities of oppressed groups becomes limited."[25]

But what if we take a truly simplistic approach to defining theory? What if we define theory, for example, simply as *a set of principles on which the practice of an activity is based*? The language is neutral and perhaps even generalisable, it perhaps even describes *kaupapa Māori* without inviting notions of oppression or disadvantage. Abbott and Wallace noted that, given all people engage in acts of thinking and having ideas, we are all theorists.[26] We are all theorists, Māori and non-Māori, *with a set of principles on which the practice of an activity is based*. Through the application of a simplistic definition of theory we have discovered some equal ground as theorists.

Abbott and Wallace can assist us further. They identified that social science theories are expected to be, "open-ended, open to new evidence, capable of modification and improvement, and clear about the way its concepts are formed."[27] These are expectations of theory that support a decolonising framework. These expectations do not take away from the possibility of multiple theories. Given the diversity of worldviews, of cultural ways of seeing, understanding and therefore explaining the world, it is expected that a range of theories may exist simultaneously for any given event or to explain experiences.[28]

Yet despite multiple theories, we are still able to remain grounded in our simplistic views of theory as Coxon, Marshall and Massey note that theories may be viewed fundamentally as collections of general principles that provide explanations for events and experiences.[29] The theory we speak of still applies to us all, but it is its 'fundamental' qualities that implies theory that is 'accessable' to us all. It is important that any decolonising legal theory that we develop is devoid of elitism, otherwise it renders itself inaccessible to Māori, and possibly other cultural groups. Leonie Pihama finds that "to write in ways that deny access to the majority of Māori

[24] Barbara Christian "The Race for Theory" in C Moraga and G Anzuldua (eds) *This Bridge Called My Back* (Kitchen Table Women of Colour Press, New York, 1990) at 335-345.
[25] Pihama, above n 2, at 8.
[26] P Abbott and C Wallace *Introduction to Sociology: Feminist Perspectives* (Routledge, London, 1997) at 2.
[27] At 25.
[28] Pihama, above n 2, at 8.
[29] E Coxon, J Marshall and L Massey (eds) *The Politics of Learning and Teaching in Aotearoa/New Zealand.* (Dunmore Press, Palmerston North, 1994) at 1.

people is in my opinion bringing closure rather that ensuring ongoing debate and evolution." Similarly, if legal theory is inaccessible because of the language or the epistemologies employed by academics then the potential for that theory to decolonise legal research becomes stifled. Leonie Pihama explains:

> Māori academics often speak of being caught in the bind between our communities and the academy. Māori thesis students often voice the position that their thesis must be able to be read by their whānau and the wider Māori community, if it cannot then its potential for offering information and knowledge is, in their minds, diminished. This can create a dilemma for Māori students in that the expectations of the university, and what constitutes a thesis and theory, can differ significantly from the expectations of the Māori student and their priority audience.[30]

Similar dilemmas also exists in universities for non-Māori law students who find themselves ill equipped 'theoretically' during their legal education. Academic institutions could reassess how legal research methods and theory are taught so that students are equipped with the skills required to identify how cultural values and assumptions determine how methods and theories are selected, and the need to appreciate and respect the legitimate place of non-Western methods and theories.[31] Students must also be able to practice negotiating the bridge between alternative methods and theories in real-world partnership settings and to rethink their own assumptions that are often taken for granted.[32]

Attempts to define theory are saturated with complexity[33] for both Māori and non-Māori. While meeting the expectations of the university can create dilemmas for Māori students, equally understanding the complexities of *kaupapa Māori* can be monumentally challenging for the non-Māori student. Thus, in the search for ways to emancipate *kaupapa Māori* from the constraints of Western theoretical frameworks, while bridging knowledge barriers with non-Māori, it was a conscious intension of this thesis to commence defining theory in simplistic terms in an attempt to be deliberately inclusive of both Māori and non-Māori in my theory building.

Harsha Walia describes decolonisation as the process whereby we create the conditions in

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[30] Pihama, above n 2, at 8.
[31] P Goodson *Theory in Health Promotion Research and Practice: Thinking Outside the Box* (Jones and Bartlett, Sudbury, MA, 2010) at 150.
[32] L Botha "Mixing methods as a process towards Indigenous methodologies" (2011) Int J Soc Res Methodol 14 at 313.
[33] T Ward "Definitions of Theory in Sociology" in R Denisoff, O Callahan and M Levine (eds) *Theories and Paradigms in Contemporary Sociology* (F E Peacock Publishers, Itasca, IL, 1974) at 39.

which we want to live and the social relations we wish to have.[34] Decolonisation has an intellectual dimension too, because it involves understanding how colonisation might have shaped ways of thinking.[35] Leonie Pihama argues that the process of decolonising theory is a crucial element of a *kaupapa Māori* theoretical approach.[36] The imposition of Western theoretical frameworks that deny Māori knowledge, culture and society in order to maintain the dominance of Western theoretical imperialism over Indigenous theories is not disputed. Nonetheless, the responsibility of developing analyses that can both engage the underpinning assumptions of a range of theoretical approaches and providing critique that is key to identifying whose interests are served and how power relationships are being constructed lies with both Māori and non-Māori.

While valid criticism can be made of opinions of early judges, writers and ethnologists who have left an enduring mark, in more recent times Durie CJ of the Māori Land Court, describes how "we have seen some outstanding research and argument…some of the best material on which the Tribunal has relied has come from Pākehā…"[37] The need for decolonising legal theory is paramount. The Taskforce Report of the University of Waikato supports this.[38] However, decolonising legal theory steeped only in *kaupapa Māori* will prove fruitless if Māori speak of 'spiritual matters' that non-Māori dismiss as metaphysical and therefore not real. What is needed is decolonising legal theory that interprets the meaning of law in Western terms as well. Traditional and academic legal theory should not exist in conflict, "they in fact depend on each other."[39] In managing this interface between Māori and non-Māori legal theory, the issue for Māori is not simply an issue of how to right wrongs but how to find balance. What is required is a united approach to the development of decolonising legal theory. However, this is only possible with support for the traditional values of Māori within empowering communities. Reconciliation of our conflicting legal theories within a shared theoretical space is only possible if those within that shared space are truly sensitive to the needs and autonomy of Māori.

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[34] Harsha Walia "Decolonising Together" Briarpatch Magazine 1 January 2012 <briarpatchmagazine.com/articles/view/decolonizing-together>.
[35] Max Harris *The New Zealand Project* (Bridget Williams Books, Wellington, 2017) at 83.
[36] Pihama, above n 2, at 9.
[37] E Durie *Ethics and Values in Māori Research* (Proceedings of Te Oru Rangahau Maori Research and Development Conference, School of Maori Studies, Massey University, 7-9 July 1998) at 66.
[38] Smith and Jones, above n 18, at 2.
[39] Durie, above n 37, at 67.

There are and always will be many different theoretical perspectives on law in Aotearoa New Zealand. There is no correct way of constructing legal theory around our contemporary society, but if theorists are to understand the past and how we arrived in the present, then attempts must be made to construct decolonising legal theory that is better informed by the Māori worldview than theories that have come before. Developing and defining decolonising legal theory is equally the responsibility of Māori and non-Maori.

Chapter 4. Research Design – Comparing Theories of Law

4.1 Theoretical Research and Choice of Methodology

A broad aim of this study is to establish a shared theoretical space and to suggest practical ways in which legal researchers can work more effectively together on issues of law affecting both Māori and non-Māori in New Zealand. A more specific aim of this study is to combine mythological and legal elements of natural law in a series of stories that connect and show commonality between Māori and non-Māori research epistemologies.

There is no single methodology to guide this project. However, the goal is to "document and interpret as fully as possible the totality of whatever is being studied, from the peoples point of view or frame of reference".[1] As an aim of this study is to search for ways in which to decolonise existing legal research paradigms, a qualitative research methodology is considered suitable, as the goal of qualitative research is the development of concepts which help us to understand social phenomena in natural (rather than experimental) settings, giving due emphasis to the meanings, experiences, and views of all the participants.[2]

Although exploratory, this study also aims to move beyond a descriptive account, towards a more theoretical understanding of the tensions between different research epistemologies. For this reason also, a qualitative approach would seem appropriate as most qualitative studies are directed towards developing or verifying theory.[3] Pearce et al describe theoretical research as research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.[4] Thus, this research aims to develop general theoretical analyses related to our modern legal frameworks while ensuring that those analyses remain closely tied

[1] Nigel Fielding "Ethnography" in Nigel Gilbert (ed) *Researching Social Life* (Sage Publications Ltd, London, 1993) at 154.
[2] Nicholas Mays and Catherine Pope *Qualitative Research in Health Care* (BMJ Publishing Group, London,1996) at 1.
[3] Steven Taylor and Robert Bogdan *Introduction to Qualitative Research Methods: The Search for Meanings* (Wiley, London, 1984).
[4] Dennis Pearce, Enid Campbell and Don Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission: A Summary* (AGPS, Canberra, 1987) at 6.

to the specific mythical and historical accounts of Māori and non-Māori peoples.

This qualitative study will be conducted using three main research methods. These methods include *an integrated literature review, external legal history* and *comparative law*. Often there is a case for using more than one method in a qualitative study.[5] Using several methods allows access to different levels of knowledge and combining methods can help to build a wider picture. This research will take a mixed method approach to the collection of information, in recognition that the study of legal theory and research epistemologies can be complex and very often requires a range of research approaches in order to elicit appropriate material.

4.2 An Integrated Literature Review and New Perspectives

An integrated literature review informs every chapter of this thesis. "The integrative literature review is a distinctive form of research that generates new knowledge about a topic by reviewing, critiquing, and synthesizing representative literature on a topic in an integrated way such that new frameworks and perspective on the topic are generated."[6] An integrated literature review is useful when reviewing new emerging topics, such as culturally focused decolonising methodologies in legal research, that are generating a growing body of academia that may include contradictions or discrepancies which are not currently being addressed in the literature. Thus, this integrated literature review hopes to provide a fresh, but considered perspective on the topic of decolonising legal research methodologies that makes a substantive contribution to new knowledge.

An integrated literature review is the broadest type of research review method allowing for the simultaneous inclusion of data from theoretical as well as empirical literature.[7] In addition, integrative reviews incorporate a wide range of purposes: to define concepts, to review theories, to review evidence, and to analyse methodological issues of a particular topic.[8] The

[5] J Morton-Williams "Making Qualitative Research Work: Aspects of Administration" in R Walker (ed) *Applied Qualitative Research* (Gower Publishing Company, London, 1985) at 27.
[6] Richard Torraco "Writing Integrative Reviews of the Literature: Methods and Purposes" (2016) 7 Human Resource Development Review 3 at 62.
[7] Robin Whittemore and Kathleen Khafl "The Integrative Review: Updated Methodology" (2005) 52 Journal of Advanced Nursing 5 at 547.
[8] M Broome "Integrative Literature Reviews for the Development of Concepts" in B Rodgers and K Knafl (eds) *Concept Development in Nursing* (2nd ed, W B Saunders Co, Philadelphia, 1993) at 231.

varied sources of data sampling of an integrated literature review in conjunction with a strong research framework has the potential to result in a comprehensive portrayal of complex concepts, theories, and legal problems related to Maori and non-Maori legal research paradigms. A thematic analysis will be applied to the research materials to elicit the common themes and concepts that answer the central research question regarding a shared theoretical space for Māori and non-Māori legal researchers. The data extracted will be synthesised and reported in a narrative form. Synthesis is a creative process that integrates existing ideas with contemporary ideas to develop new perspectives on a topic despite the fact that the review summarises previous research.

Most integrative literature reviews address two general kinds of topics—mature topics or new, emerging topics.[9] Regardless of whether the literature review addresses a mature or emerging topic, readers expect to see the knowledge from the literature synthesized into a model or conceptual framework that offers a new perspective on the topic.[10] As discussing a shared theoretical space as Māori and non-Māori legal researchers is a relatively new topic, a literature review encourages a conceptualisation of the topic that advocates new models or frameworks rather than the reconceptualisation of existing dominant paradigm models. There is an expectation that the theory development in this study will challenge and extend existing knowledge, not simply rewrite it. As decolonising research is an emerging topic there is potential benefit from a holistic conceptualization and synthesis of the literature.

The critical analysis of the literature for this thesis involves carefully examining the main themes and arguments presented in the literature through a critical lens. The critique that follows in the discussion will identify the strengths of the literature as well as any deficiencies, omissions, inaccuracies, and other problematic aspects of the literature.[11] This critical analysis will involve deconstructing pieces of literature on the topic of legal theory into basic elements. This includes searching the literature on the origins of knowledge of Māori and non-Māori in New Zealand, the social or environmental context of this knowledge both past and present, and how we apply this knowledge in our legal practice. Attentive analysis will allow the researcher to expose knowledge that has previously been taken for granted or obscured by years of intervening colonial research. This will enable the researcher to conceptually reconstruct the

[9] Richard Torraco, n 6, at 409.
[10] At 356.
[11] At 420.

research topic for a more transparent and contemporary understanding of the subject.

4.3 External Legal History as Law in Context

External legal history is law in context;[12] it recognises that law constitutes society and society constitutes law.[13] Furthermore, law is not static. It responds to societal, economic, political, religious, intellectual and environmental influences. Correspondingly, any investigation of the foundations of legal research epistemologies, for example, demands recourse to historical resources. The 'how' and 'why' of epistemologies is likely to be found in the norms, values, customs and tradition of the time of their creation, and this will be achieved through the examination of historical documents, oral traditions and stories.

This choice of method is obviously suitable for an enquiry into the origins of legal theory. It is hoped that understanding the past may provide insight into the current tensions between differing theories of law. Linda Tuhiwai Smith described research as a "dirty word" in Indigenous communities,[14] with elders describing being measured and prodded and endless streams of anthropologists[15] more interested in their utility as unique specimens than as human beings.[16] "We have a history of people putting Māori under a microscope in the same way a scientist looks at an insect. The ones doing the looking are giving themselves the power to define."[17] As a result, Indigenous and non-Indigenous researchers find themselves in a position of unease and mistrust, anxious about how to move forward together. Therefore, searching in the past may be instructive in illuminating different approaches to legal research. Afterall, "Progress…depends on retentiveness…Those who cannot remember the past are condemned to repeat it."[18]

The main challenge of this method arises from the sources themselves; myths and stories.

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[12] Mary-Rose Russell *Legal Research in New Zealand* (LexisNexis, Wellington, 2016) at 13.
[13] Catherine Fisk and Robert Gordon "Forward: Law as…Theory and Method in Legal History" (2011) 1 UC Irvine Law Review 525.
[14] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 1.
[15] Molly Mallet *My Past, Their Future: Stories from Cape Barren Island* (Blubber Head Press, Sandy Bay, Australia, 2002) at 50.
[16] Maggie Walter "Using the Power of the Data within Indigenous Research Practice" (2005) Australian Aboriginal Studies 2 at 27.
[17] Merata Mita "Merata Mita on…" (New Zealand Listener, 14 October 1989) at 30.
[18] George Santayana *Reasons in Common Sense* (Dover Publications, New York, 1980) at ch 12.

Because the research depends on data from the past, issues arise around the authenticity and validity of the evidence itself, as well as the credibility of the writer or author of the records being relied upon.[19] The researcher may also be faced with a paucity of data as many oral traditions remains unrecorded in written form. Accessing relevant, credible and accurate data may be problematic.[20] Undertaking this type of research is labour intensive, bias in interpreting ancient source materials from a contemporary standpoint may also be problematic, and there is always the risk of anachronism.

Undertaking this research requires persistence, not just in finding and retrieving historical data, but also in contextualising it authentically. However, central to this thesis "is the recognition that the law is perpetually in a state of flux; not simply in that its rules are repeatedly being changed but that the intellectual structures linking together those rules are always themselves provisional.[21]

Our legal history shows that Western legal individualism and Māori collectivism are legal orders incessantly searching for a point of equilibrium where the individual interest and the collective interest are no longer in conflict with each other. As legal researchers increasingly embrace alternatives to adversarial processes for trying to resolve conflict, the very concept of what many theorists have regarded as law is beginning to prove outdated. As legal comparatists searching for more equitable laws, we are searching outside the standard legal theories because of the danger Eurocentricism poses to our search. It may be that as legal comparatists we might be better served by not starting out with a concept of law but rather ideas that are grounded in our legal history. When we consider *kaupapa Māori* historically, its principles may not fall within the ambit of modern legal theory. However, why shouldn't a theory fashioned in the past determine what counts as law today? Surely, laws from the past that include *kaupapa Māori* theory can be used to test the boundaries of our contemporary legal frameworks. Creating a dialogue between the legal theory of Māori and non-Māori offers many different viewpoints for legal comparatists to work with, and the more viewpoints we engage with, the more inclusive and equitable the dialogue will become. Samuel states "there is no single dominating legal theory – at least when viewed over time – and this in itself means that contemporary legal knowledge is not as stable as one might think. There is no single

[19] Russell, above n 12, at 14.
[20] Above.
[21] David Ibbetson "What is Legal History a History of?" in Andrew Lewis and Michael Lobban (eds) *Law and History* (Oxford University Press, Oxford, 2004) 33 at 40.

dominating theory because beneath the debates there are fundamental epistemological tensions in play…"[22] There are tensions between common law and *tikanga Māori,* between individualism and collectivism, between formalism and realism, between authority and therapeutic jurisprudence, and arguably many more tensions. "Once law is viewed in this way – that is through a range of what might be called epistemological tensions – there is surely an opening for a dialogue"[23] between the theories of law of Māori and non-Māori.

4.4 Comparative Law as Legal Sociology

Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against another situation.[24] It could be argued therefore, that comparing is a fundamental principle of legal research.[25] However, comparative law deals with other legal systems,[26] it denotes a method of study and research and not a distinct branch or department of the law.[27] In other words, there is no *comparative law* only the comparative study and knowledge of it.[28]

Due to the interdisciplinary nature of comparative law,[29] comparison is an instrument of research which is both flexible and capable of extension to any kind of problem which may be under investigation.[30] The fundamental characteristic of comparative law, viewed as a method, lies in the fact that it is applicable to any form of legal research; the method is equally at the services of the legal historian and sociologist as well as to the lawyer.[31]

The strength of comparative law as legal sociology is that it attempts to explain the interaction

[22] Geoffrey Samuel "What is (or perhaps should be) the relationship between legal history and legal theory?" (2018) 6 Comparative Legal History 1 at 103.
[23] Above.
[24] Maurice Adams "Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law" in Mark Van Hoecke *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 229.
[25] See V V Palmer "From Lerotholi to Lando: Some Examples of Comparative Law Methodology" (2005) 53 American Journal of Comparative Law at 262.
[26] Mathias Reimann "Comparative Law and Neighbouring Disciplines" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) at 13.
[27] HC Gutteridge *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd ed, Cambridge University Press, Cambridge, 1949) at 1.
[28] Reimann, above n 26, at 14.
[29] See Geoffrey Samuel *An Introduction to Comparative Legal Theory and Method* (Hart, Oxford, 2014) at 23.
[30] Gutteridge, above n 27, at 26.
[31] At 10.

between law and society, including culture. It looks beyond a single legal system, and in doing so "it expands the database and thus the testing grounds or hypotheses, and it introduces additional variables that can be used to control results".[32] If this study, using comparative law, seeks to understand the similarities and differences between Māori and Western legal theory, a sociological perspective will add crucial descriptive depth and enormous explanatory potential.[33] Such a perspective shows that law is only one among many mechanisms of social control, so that one society may invoke law where another relies on customary norms.[34]

Comparative law analyses different types of law, and in this case, different types of legal theory. This means that natural laws may be compared with domestic laws, if this approach is appropriate for the research question,[35] and such a comparison could be highly informative.[36] Comparative law must look beyond the traditional (Westphalian) system of coexisting nation states, and come to grips with much more complex and fluid relationships between a multiplicity of overlapping and intersecting legal orders.[37] This study sets out to explore the potential for a shared theoretical space as legal researchers; to identify overlapping principles of legal theory which could underpin the development of decolonising legal research in a shared jurisdiction. Comparative law, when conducted effectively, should thus be an instructive model for all legal analysis.[38] Ultimately, comparatists translate…so that those who are within the comparatists culture of origin may gain access to the worlds of those who are not.[39]

4.5 Comparative Law's Commitment to Theory and Interdisciplinarity

Otto Kahn-Freund stated that comparative law 'is not a topic, but a method'.[40] Thirty years later Pierre Legrand strongly disagreed with this statement, but he also argued for two other characteristics that he considered to be central to comparative legal studies, namely that there

[32] Reimann, above n 26, at 25.
[33] At 26.
[34] At 26.
[35] At 18.
[36] Mathias Reimann "Beyond National Systems: A Comparative Law for the International Age" (2001) 75 Tulane Law Review 1103.
[37] Reimann, above n 26, at 20.
[38] Vivian Grosswald Curran "Cultural Immersion, Difference and Categories in US Comparative Law" (Winter 1998) 46 American Journal of Comparative Law 1 at 91.
[39] At 92.
[40] Otto Kahn-Freund "Comparative Law as an Academic Subject" (1966) 82 Law Quarterly Review 40 at 41.

should be a commitment to theory and a commitment to interdisciplinarity.[41] It is through comparative legal studies that legal researchers are able to present a different perspective in respect to how the discipline of law affects Indigenous peoples. As this thesis will hopefully reveal, the study of epistemologies in legal research is greater than a study of the 'objects of science' to be reasoned by methods such as induction, deduction, analysis, synthesis, analogy and so on; "it is equally a matter of schemes of intelligibility and paradigm orientations."[42] And these schemes and paradigms are just as much issues of methodology as are reasoning techniques.[43] As we search for ways in which to decolonise legal research, comparative legal studies brings not only a different type of perspective to the study of law and culture in New Zealand, but it also advances the idea that differing legal epistemologies should be influencing how we think about legal theory and not just the theories of the dominant research paradigm.

Yves Chevrel says the key notion of comparative law is the idea of 'the foreign' or the 'other'.[44] Having decided to conduct comparative law, the researcher must then consider the paradigm dichotomy, that between a 'natural' and a 'cultural' approach. Samuel describes the 'nature' paradigm as one that starts out from the assumption that the social sciences are no different than the natural sciences.[45] A 'naturalist' is one that considers social phenomena as being an extension of natural phenomena and not giving rise to a specific explanation.[46]

In contrast, and the paradigm that will be followed in this study, the cultural paradigm "in one in which it is the cultural norms and values of the group or society which, through the medium of socialisation, inculcation defines the meaning of behaviour or, according to some, the practices".[47] The cultural paradigm is, in other words, one in which the phenomenon being considered is regarded as being the product uniquely of its cultural context.[48]

Samuel said there is no denying that the movement within comparative law has been progressively towards a cultural approach.[49] Cotterrell remarks that "indeed, it has been taken

[41] Pierre Legrand "How to Compare Now" (1996) 16 Legal Studies at 232.
[42] Geoffrey Samuel "Comparative Law and its Methodology" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, London, 2013) at 101.
[43] Above.
[44] Yves Chevrel *La Littérature Comparée* (5th ed, Press Universitaires de France, Paris, 2006) at 5.
[45] Samuel, above n 42, at 101.
[46] J-M Berthelot "Programmes, Paradigmes, Disciplines: Pluralité et Unité des Sciences Sociales" in J-M Berthelot (ed) *Epistémologie des Sciences Sociales* (Presses Universitaires de France, Paris, 2001) at 498.
[47] J-M Berthelot "Les Sciences du Social" in J-M Berthelot (ed) *Epistémologie des Sciences Sociales* (Presses Universitaires de France, Paris, 2001) at 247.
[48] Samuel, above n 42, at 102.
[49] At 102.

up by some comparatists as a tool to try to reorient the entire field of comparative legal studies,"[50] and concludes that culture therefore "appears fundamental – a kind of lens through which all aspects of law must be perceived, or a gateway of understanding through which every comparatist must pass so as to have any genuine access to the meaning of foreign law,"[51] in this case – *kaupapa Māori.*

In 1949, H C Gutteridge used the phrase 'Comparative Jurisprudence' as an expression of the belief that the main purpose of the comparative method of study is to aid the historian or the analytical jurist in tracing the origin and development of concepts common to all systems of law.[52] However, Legrand stressed that comparative law must be understood within its particular legal culture itself situated within the wider culture of the relevant society. *Extra culturam nihil datur.*[53] He insists that comparative legal studies is dedicated to understanding the 'other'.[54] Legrand states that:

> The essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture. The aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law in the way it does. The comparatist must, therefore, focus on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure.[55]

The researcher is seeking to understand what Legrand describes as the legal *mentalité* within which *kaupapa Māori* theory is situated. It is the epistemological substratum which best epitomises … the legal *mentalité* (the collective mental programme), or the interiorised legal culture, within a given legal culture.[56] It is not the intention of the researcher to treat *kaupapa Māori* as an 'object' that can be transplanted from one legal system to another. To do so would confine analysis to universal concepts at risk of lacking depth of understanding and perpetuating colonising practices. Instead a hermeneutical approach will be taken by the researcher where the cultural meaning of *kaupapa Māori* must be deciphered by the comparatist, because Legrand says the interpretation is a reading which wants to give an

[50] R Cotterrell "Comparative Law and Legal Culture" in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 710.
[51] At 711.
[52] Gutteridge, above n 27, at 2.
[53] Pierre Legrand *Le Droit Comparé* (3rd ed, Presses Universitaires de France, Paris, 2009) at 84.
[54] At 74.
[55] Pierre Legrand "European Legal Systems are Not Converging" (1996) 45 International and Comparative Law Quarterly 52 at 60.
[56] Above.

account not only of the directly visible aspects of legal phenomena but also their sense.[57] And this sense is to be obtained only by deconstructing the law 'object' (principles of *kaupapa Māori)* as an object in itself and reconstructing it in an interdisciplinary context which will reveal its cultural complexity.[58] Simply looking for a shared theoretical space as legal researchers from say a traditional 'black-letter' framework is not an option for this study as many of the methodological and epistemological issues and tensions underpinning the decolonising legal research are located within the societal contexts of Māori and non-Māori.

4.6 Comparative law itself is rooted *dans la difference*

The search for a shared theoretical space as legal researchers invites us to entertain the idea of universalism of legal theories. The Aristotelian tradition of general jurisprudence aims to identify universal principles of natural law, and the Christians developed the idea of a universal divine law. These principles can be identified by way of rational reasoning or by way of showing a universal organic evolution of the law.[59] The question about a universal law is an obvious point of interest for comparative lawyers.[60] However, there are problems with 'universalisation'. The recognition of differences between facts or objects to be compared is often neglected or omitted in favour of a too hasty focussing on what appears *similar* and, by extension, *universal*.[61] Zweigert and Kötz are most insistent on the importance of this presumption of similarity in comparative law.[62] Legrand, on the other hand, argues the complete opposite, claiming that comparison involves quite the opposite presumption – a presumption of difference – because it is about identifying diversity in law. Comparative law itself is rooted *dans la difference.*[63] Legrande argues that processes of comparison that are no longer bound to commensuration. He argues in favour of "incommensurability" as the radical absence of common ground between different orders of legal knowledge. "What there is across laws, and all there is, is an abyss - an untranslatable abyss. For me, comparison is thus the site

[57] Legrand, above n 53, at 16.
[58] At 46.
[59] Mathias Siems *Comparative Law* (Cambridge University Press, Cambridge, 2014) at 28.
[60] At 29.
[61] Ute Heidmann "Epistémologie et Pratique de la Comparaison Différentielle" in M Burger and C Calme (eds) *Comparer Les Comparatismes: Perspectives Sur L'histoire et Les Sciences des Religions* (Edidit, Arehè, 2006) at 144.
[62] K Zweigert and H Kötz *An Introduction to Comparative Law* (3rd ed, Oxford University Press, Oxford, 1988, trans T Weir) at 40.
[63] Legrand, above n 53, at 101.

of a problem rather than a solution."[64]

Despite the complexities of comparative law that have been outlined above, this is not to say that the epistemological origins of legal knowledge of Māori and non-Māori cannot be examined and analysed as an object in itself. Samuel explains that the methodological starting point is the causal scheme of intelligibility.[65] At this point differences and similarities will begin to emerge. There are positive and negative aspects to this type of comparative analysis. The positive aspect is that the researcher attempts to place the object of comparison – let us say, the origins of legal knowledge in mythology – within the cultural context that goes some way in revealing the relationships that make up the cultural context being compared. A negative aspects of comparative analysis is the creation of 'universal' myths.

The challenges of conducting a comparative study at this point appear daunting. How is the researcher to proceed with this methodological dichotomy? Does she advance a presumption of *similarity* or *difference?* Does she presume that the legal principles found in *kaupapa Māori* and Western legal theory are similar in their functions or does she presume difference? Discouragingly, these questions raise a further methodological dichotomy for the researcher to contemplate; that between genealogical and analogical comparison. A genealogical comparison is a matter of explaining similarities between … systems in terms of *real* historical connections: any resemblance is interpreted as the sign of a genealogical connection.[66] An analogical comparison, and the methodology that will be followed in this study, is one which puts the emphasis on a similarity of form and structure between two objects or elements not descending from a common ancestor.[67] Thus, the object of comparing Māori cosmology and Western scientific thought having been in no direct contact with each other either cosmologically or in time, is not the creation of real objects of comparison, instead, the researcher is comparing the relationships (*whanaungatanga)* between the objects and not the objects themselves. Bublox confirms that:

> In analogical comparison to compare A and B is not then about presenting similarities as intrinsic properties resulting from a common source or differences as the sign of an irreducible

[64] Pierre Legrand "Econocentrism" (2009) 59 University of Toronto Law Journal 2 at 215 .
[65] Samuel, above n 42, at 108.
[66] Y Bubloz "Augustine et Porphyre Sure Le Salut: Pour une comparaison analogique et non apologétique du Christianisme et du Néoplatonisme" in M Burger and C Calme (eds) *Comparer Les Comparatismes: Perspectives Sur L'histoire et Les Sciences Des Religions* (Edidit, Arehè, 2006) at 115.
[67] Samuel, above n 42, at 106.

> singularity; to compare A and B is to establish some ideal relations between one phenomenon and another in the hope of improving the respective intelligibility of each of them.[68]

One is comparing relations and aspects and not the things themselves.[69]

In light of the distinction between genealogical and analogical comparison the comparatist will be required to research the origins of knowledge of Western legal theory in comparison with the origins of knowledge of Māori. Are there connections between these two types of knowledge? And if so, how compatible are these connections in reality? Care must be taken when conducting comparative research because, even if a clear analogical connection can be established, the 'relationships' of comparison cannot be assumed to be similar relationships in the context of either system. If the comparatist simply transplants aspects of legal 'knowledge' from one jurisdiction to another this creates further methodological and epistemological problems. Are such transplants of 'knowledge' even possible? Can the comparatist take aspects of Māori legal culture and connect it to a Western legal culture in such a way that it retains the essential characteristics of *kaupapa Māori* theory*;* or once connected does *kaupapa Māori* become something different?

These initial tentative steps towards establishing a shared theoretical space as legal researchers soon creates further complex questions for several reasons. It is complex because the comparatist is taking *kaupapa Māori,* a theory of law that has formed within one social system unique to Māori, and attempting to connect it to a completely different social and theoretical legal system, namely Western jurisprudence. Accordingly the comparatist can ask whether *kaupapa Māori* should be seen as a specific identity belonging to a specific legal culture or whether it should be seen as a universal example of participation in a shared legal process.

There are endless examples of transfers from one legal system to another.[70] Different societies borrow and export a variety of legal concepts.[71] However, even if it is accepted that there have been legal transplants from one system to another throughout history, Pierre Legrand questions

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[68] Bubloz, above n 66, at 117.
[69] Jonathan Smith *Drudgery Divine: On the Comparison of Early Christianities and the Religions of Late Antiquity* (University of Chicago Press, Chicago, 1994) at 36.
[70] Samuel, above n 42, at 106.
[71] Michele Graziadei "Comparative Law as the Study of Transplants and Receptions" in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 466.

whether transplants are appropriate. He states:

> No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the *rule* itself.[72]

Legrand's ideas support an Indigenous cultural paradigm where divorcing cultural principles from a particular legal culture is unthinkable. Michele Graziadei, on the other hand asserts that the transfer of laws from one community to another may not be impossible.[73] For Graziadei it is a question of how we view culture. He finds culture is the outcome of mishmash, borrowings, mixtures that have occurred, though at different rates, ever since the beginning of time.[74]

Impossible or not, the transplant issue is a sensitive and controversial one. The very different cultural origins of *kaupapa Māori* and Western style legal jurisdictions enveloped by a history of colonialism mean that the comparatist must remain alert to the cultural context in which Māori and non-Māori legal researchers currently work today. Western legal research paradigms have undoubtedly had a considerable impact on the development of substantive law in New Zealand. The same, however, cannot be said for Indigenous research paradigms which have been continually been denied legitimacy in the New Zealand legal landscape.

4.7 Hermeneutics and Causal Schemes of Intelligibility

There is the potential for a non-Māori researcher to paint a simplistic view of aspects of *kaupapa Māori* theory using comparative law as a means of promoting her own legal agenda rather than as a vehicle for the discovery of new knowledge about law itself. "One major danger therefore that is to be found in comparative legal studies is that of superficiality in the sense that the researcher undertakes neither a proper analysis nor strives to engender a real understanding of the other. … Methodology in comparative law cannot therefore be divorced from methodology in the social sciences in general.[75] At this point the research question

[72] Pierre Legrand "The Impossibility of 'Legal Transplants'" (1997) 4 Maastricht Journal of European and Comparative Law at 120.
[73] Graziadei, above n 71, at 468.
[74] At 469.
[75] Samuel, above n 42, at 110.

becomes critical as it largely determines the type of methodology to be adopted. Following on from this, the methodology will define the strategies through which a legal reality will be constructed by a specific data collection. Closely linked to the research question and methodology is the issue of schemes of intelligibility. How can the researcher legitimately construct a *tertium comparationis*[76] where similarities and differences in the origins of legal knowledge are discussed, noting in particular the elements that have given rise to points of convergence and divergence? This type understanding will require recourse to a scheme of intelligibility known as hermeneutics.[77] The hermeneutic method focuses on the legal texts which define, describe and prescribe the function of the law. A hermeneutical method is one where a phenomenon (A) is regarded as a signifier of a deeper phenomenon (B), the signified. This type of method is associated with deep textual analysis, "although there is no reason why a hermeneutical scheme need be confined to a text."[78] To use an example from this study, the researcher will examine the principles of *tikanga* (phenomenon A) in terms of what *tikanga* reveals about *relationships/whanaungatanga* (phenomenon B). Is *tikanga* merely a set of principles to guide behaviour or does it represent something deeper; is it an expression of the ultimate source of law making?

Causal scheme of intelligibility contribute to the methodological complexity of this sociolegal study. The complexity is intensified when one scheme is used in combination with another, as in this study; hermeneutics with causal analysis (A is caused by B caused in turn by C). It is hoped by combining different types of schemes that different types of legal knowledge will be revealed. These epistemological complexities are well documented in the social sciences. However, of fundamental importance for a study involving Indigenous peoples is the researchers level of engagement with the schemes of intelligibility, and the paradigm orientation in which the researcher's study is situated. These considerations are all integral to the question of how to compare Māori and non-Māori legal theory in New Zealand. In addition the non-Māori researcher cannot assume that Māori share the same view of what amounts to law and legal knowledge. When discussing Maori legal traditions it is important to note that no Māori word or phrase accurately conveys either law or custom. The closest Māori equivalent to these concepts is *tikanga*. *Tikanga* derives from the adjective *tika* meaning right (or correct) and just (or fair) and encompasses both ways of doing things and the underlying values and

[76] Above.
[77] J-M Berthelot *L'intelligence du Social* (Presses Universitaires de France, 1990) at 62.
[78] Samuel, above n 42, at 111.

principles.[79] The point to be stressed is that the comparatist will not impose a uniform understanding of the law under the guise of *tertium comparationis,* but instead will heed the advice of Legrand and research difference as well as similarity.

4.8 The Development of Decolonising Legal Theory

An ethical problem that exists only with qualitative data is that at the beginning of the research, the researcher has no idea of the detailed objectives, although general aims are held, as in the case of this study. The nature of this type of research is flexibility and its use of unexpected ideas that arise during data collection and analysis. The ultimate confession of a student of jurisprudence is not being confident that the products of theorising may have any significance other than as 'play things,'[80] that improving our understanding of how to decolonise legal research is 'simply indulging in a particular intellectual pastime.'[81] However, I sincerely hope that my theory building can be a coherent product of my thinking, and that it can make a contribution towards a more legitimate and effective environment for Māori and non-Māori legal researchers to work together.

There are varying degrees of complexity within this research ranging from practical problem-solving to analysis and commentary of the law. It is hoped that there will be 'innovative theory building',[82] starting with simple ideas that strengthen into the 'necessary building blocks for the more sophisticated ones'.[83] This study calls for a mixed method approach and each of the three methods to be used will benefit from the other. There can be no 'innovative theory building' without *an integrated review of the literature. Comparative law* often needs a historical dimension in order to fully understand the laws, processes and institutions it considers.[84] For example, contemporary similarities and differences in legal theory "are fully intelligible only against the background of their historical development."[85] Equally, *historical*

[79] See Law Commission *Maori Custom and Values in New Zealand Law* (NZLC PP9, 2001) at 15.
[80] Roger Brownsword "Maps, Methodologies, and Critiques: Confessions of a Contract Lawyer" in Mark Van Hoecke *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 152.
[81] Above.
[82] Mark Van Hoecke *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at vi.
[83] Above.
[84] Reimann, above n 26, at 22.
[85] J Dawson *The Oracles of the Law* (University of Michigan Press, Michigan, 1968) at ix.

research needs a comparative dimension in order to show which phenomena or developments were peculiar to a place or region and which were broadly common.[86] Each discipline has often made the 'common mistake' of ignoring the other – and promptly run into easily avoidable errors.[87] Fortunately,…most of the good comparative work has been historically informed, just as much top-notch historical work has been comparative.[88] Blending *an integrated literature review*, *external historical research* and *comparative law* will create huge benefits in that these three methods can form kindred disciplines profiting from each other's perspective in the pursuit of 'innovative theory building' that assists in decolonising our legal research in the future.

[86] Reimann, above n 26, at 23.
[87] Jim Gordley "Comparative Law and Legal History" in Mathias Reimann and Reinhard Zimmermann (eds) The Oxford Handbook of Comparative Law (Oxford University Press, Oxford, 2006) at 763.
[88] Reimann, above n 26, at 23.

Chapter 5. Anticipating Criticism of the Chosen Methodology

5.1 Limitations of the Research Methodology

In discussing the findings of this study a number of limitations must be taken into consideration. Firstly, it must be recognised that the study was conducted within a qualitative research paradigm and thus incorporates the strengths and weaknesses of this methodology.

It is acknowledged that the information is gathered from a small sample of specifically written texts. However, as noted earlier, adoption of this methodology involved an attempt to explore specific written materials in depth. At this exploratory stage this approach was felt to be more appropriate than researching a larger written text sample on predetermined categories.

Also, it is acknowledged that in qualitative research the analysis of the data depends on the interpretations by the researcher and is therefore open to alternative interpretations. This limitation is recognised and whilst the researcher reported the findings to her supervisors and other interested parties involved in the study and received favourable responses to her interpretations, nevertheless, it is possible that other researchers may identify further ideas not discussed in this study.

Discussions of criteria for judging qualitative research from a Western perspective, are generally limited to questions about specific aspects of methodology such as reliability, validity and generality.[1] These classical criteria rest on the norm of objectivity in which an important methodological goal is to limit wherever possible the effects of researcher bias, since bias is defined as a deviation from some empirical fact.[2] Qualitative research which adopts the humanistic paradigm challenges the dualistic distinction between the researched and researcher, arguing that because the personal is always present in research, the criteria for judging the quality of research cannot be reduced to tactics for eradicating observer bias.[3] Qualitative researchers have therefore argued that the application of these classical canons to the evaluation of generative qualitative research runs the risk of undermining the benefits that

[1] K Henwood and N Pidgeon "Qualitative Research and Psychological Theorising" (1992) British Journal of Psychology 83 at 97.
[2] Above.
[3] Above.

a qualitative methodology can provide.[4]

5.2 The Problem of Validity and Reliability

One of the main problems of qualitative research is that it is often judged by the standards for quantitative results, which is inappropriate as the aims and intentions of both vary greatly. Issues of validity and reliability are fundamentally different in qualitative research and centre on whether the research represents reality and truth.[5]

5.2.1 Validity

Qualitative methods such as those used in this study are committed to describing the researcher's interpretation of social reality. This has led to questions being raised regarding whether qualitative researchers really can provide accounts from the perspective of those whom they study and how we can evaluate the validity of their interpretations of those perspectives. One particular criticism regarding the issue of interpretation is that only snippets of data are included in reports of qualitative studies, and little is known about the representativeness or generality of these fragments. The readers of such reports are unable to formulate their own hunches about the perspective of the people who have been studied and how adequately the researcher has interpreted people's behaviour in the light of the explication of their systems of meaning.[6]

An approach to this situation and the one that was adopted in this study, is the use of a method that clearly documents what is done, and why it is done, at all phases in the research process. This exercise provides a means of tracking the progress of (and stimulating) creative thought.[7] This will allow readers to formulate their own hunches about the perspectives on the theories of law that have been presented and how adequately the researcher has interpreted these perspectives.

The term validity refers to how well the finding of the study reflect the phenomena under

[4] Above.
[5] P Field and J Morse *The Application of Qualitative Approaches* (Chapman and Hall, London, 1985) at 50.
[6] A Bryman *Quantity and Quality in Social Research* (Routledge, London, 1988) at 77.
[7] Henwood and Pidgeon, above n 1, at 97.

consideration and how accurately the data has been interpreted.[8] Therefore evidence from the data will be presented to support the conclusions reached. This will take the form of descriptions or quotations. Thus the validity, accuracy and completeness can be checked. In fact, the main reason for introducing a method of triangulation (an integrated literature review, external legal history and comparative law) to the study was principally to check the validity of the findings.

To totally eliminate bias from any study is impossible, irrespective of the methodology used.[9] Thus, a model is judged, not on whether it is, in some sense, ultimately valid,[10] but on whether "the results of an enquiry fit, make sense and are true to the understanding of ordinary actors in the everyday world."[11]

5.2.2 Reliability

The question of reliability is complex. Researchers produce reliable research when they use an accurate research instrument. In qualitative research this means completeness and precision of data. Reliability and replicability are linked. However, qualitative studies cannot easily be replicated as data depends on personal accounts.[12] Perhaps *attestability* is a more appropriate term to use when discussing the reliability of qualitative research, as it refers to the degree in which the researcher makes the methods explicit and uncovers biases or reactive effects. Researchers should be aware of their own and participants reactions and make them explicit.[13]

Replication of this study may not produce identical results as no two researchers are the same. Differing backgrounds, experience and interaction with materials, may effect the results of an identically performed study. Comparative law as a method of study can be explained as one way of attempting an understanding of legal research paradigms. Its strength lies not in whether it could be reproduced by others, but that it attempts to make sense of legal theory and demonstrates what it is trying to explain.

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[8] Field and Morse, above n 5; D Polit and B Hungler *Nursing Research: Principles and Methods* (7th ed, J B Lippincott Company, London, 2004).
[9] Field and Morse, above n 5.
[10] N Pidgeon, B Turner and D Blockley "The use of grounded theory for conceptual analysis in knowledge elicitation" (1991) 35 International Journal of Man-Machine Studies at 151.
[11] G Psathas *Phenomenological Sociology: Issues and Applications* (Wiley, New York, 1973).
[12] Field and Morse, above n 5.
[13] P Brink "Issues of Reliability and Validity" in J Morse (ed) *Qualitative Nursing Research* (Sage, Newbury Park, 1991).

5.3 The Problem of Generalisation

One of the limitations often raised in connection with qualitative research is the small data samples in the study and the fact that research sampling decisions are not made on statistical grounds, which leads to doubt over the generalisability of the study. However, generalisability to populations is not one of the aims of this study. The aim is on generalisability of data to theoretical propositions rather than to populations.[14] Thus, the intention is not to produce a sample that is typical of all research epistemologies. The critical issue is whether *kaupapa Māori* theory shares any phenomena associated with Western legal theory. Hence, Henwood and Pigeon suggest that researchers should talk in terms of *transferability,* rather than *generalisability,* of findings.[15]

5.4 Reporting the Results

The aim of this study was to allow concepts to emerge from the data generating working hypotheses rather than immutable empirical facts.[16] While traditional research methods can produce an accumulation of information, they can simultaneously fail to provide effective insights into human experience.[17] The concern here is not for the identification of reliable and objective 'facts', but of subjective experiences.

The concepts that emerge from the data will be reported without reference to numbers or percentages. This is due to the fact that there is no predefined criteria for determining the frequency with which a theme must recur before it is deemed to be of sufficient significance to merit citation. The findings will be presented in terms of impression gained, rather than as firm conclusions. The results will therefore be structured according to the aims of the study. Each research aim will be addressed by presenting the themes and concepts that emerged relating to it.

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[14] Bryman, above n 6.
[15] Henwood and Pidgeon, above n 1, at 97.
[16] Above.
[17] P Nicholson "Counselling Women with Postnatal Depression: Implications from Recent Qualitative Research" (1989) 2 Counselling Psychology Quarterly 2 at 123.

5.5 Problems with Comparing Language

Gutteridge claims that so long as the subject-matter lends itself to comparison its nature and extent may be left to the discretion of the investigator.[18] Nonetheless, there are concerns with this study regarding the difficulty in approaching laws from different linguistic and cultural backgrounds,[19] and the fact that comparison must not be indiscriminate if it is to yield valuable results.[20] Legrand says since the law can exist only in a language that it is impossible to create a legal universal object.[21] Which leads the researcher to question to what extent the English language and Te Reo classify objects in different ways? Legrand assists in answering this question when he states that:

> Different languages, because they confront [reality] in different ways, thus offer different accounts of reality. No language can pretend to exhaust reality; no language offers a standpoint from which reality would be wholly visible. Rather, each language represents a choice which conditions the answers to be given by reality. Although they all address reality, language can never be reduced to a single description of it.[22]

Legrand gives an example of the extent to which different languages classify objects in different ways. He explains:

> Imagine, for example, a spherical, bouncy object. An anglophone will call it 'ball.' A francophone will call it 'balle' *but only if it is small.* Otherwise, she will refer to it as a 'ballon.' In other words, there is one spherical, bouncy object and two renditions of it through two languages ('ball' and 'balle'). The descriptions vary to the extent that the word 'balle' connotes the idea of smallness in the way the English 'ball' does not. The illustration shows that the complexity of reality will not always be fully captured by a single language: the notion of size is not rendered by the English 'ball.'[23]

The Māori Language Commission chief executive, Ngahiwi Apanui, gives an example in Te Reo:

> Many of us know "*whakarongo*", as in to listen. But "*rongo*" doesn't just mean to listen. It's the word used for all the senses, other than sight. What you hear, touch ... but it also means smell, and feel. *Rongo au te wairua*, I felt the spirit." The encompassing word for sensory experience is distinguished by context: If you're talking about some steaming *kai* (food), it's going to be smell. But of course, you can't smell something without tasting it. Obviously, it doesn't mean

[18] Above.
[19] Above.
[20] At 73.
[21] Pierre Legrand *Le Droit Comparé* (3rd ed, Presses Universitaires de France, 2009) at 102.
[22] Pierre Legrand "Against a European Civil Code" (1997) 60 Modern Law Review at 56.
[23] Above.

you listened to the food, otherwise you'd probably be on some kind of drug.[24]

This Te Reo illustration shows that the complexity of a sensory reality for Māori will not always be fully captured by the English language translation. The researcher needs a language through which to describe her research findings but if these languages hold different meanings there is a danger of creating false connections as legal researchers. The researcher must remain mindful of Legrand's comment that the complexity of reality will not always be fully captured by a single language.[25]

5.6 The Problem of Researcher Bias and Subjectivity

Qualitative research is often criticised for lacking scientific rigor. Research that relies exclusively on observation by a single researcher is limited by definition to the perceptions and introspection of the investigator…[26] and so influencing the data collection. Similarly, it is argued that the researcher's own background will radically affect his/her understanding and interpretation of the data.[27] Thus, qualitative interpretations have been criticised as merely subjective accounts.

However, the issue of subjectivity affects both qualitative and quantitative research, since all methods rely on subjective interpretation, and research activity inevitably shapes and constitutes the object of inquiry.[28] The researcher's role cannot exclude activities of searching for and allocating meaning to the events under scrutiny and of shaping an investigation according to the ultimate objectives of the research.[29] Researcher bias is therefore unavoidable.[30] In recognising this problem this study will attempt to adopt what Reason termed 'critical subjectivity'.[31] This is a quality of awareness in which "we do not suppress our primary

[24] Thomas Manch "The words in Te Reo Māori that English doesn't have" *Stuff* (New Zealand, 12 September 2018) <https://www.stuff.co.nz/national/106816674/the-words-in-te-reo-maori-that-english-doesnt-have>.
[25] Legrand, above n 22, at 56.
[26] N Mays and C Pope *Qualitative Research in Health Care* (BMJ Publishing Group, London, 1996) at 1.
[27] D Goods and F Watts "Qualitative Research" in G Parry and F Watts (eds) *Behavioural and Mental Health Research: A Handbook of Skills and Methods* (LEA, London, 1989) at 211.
[28] Henwood and Pidgeon, above n 1, at 97.
[29] Pidgeon, Turner and Blockley, above n 10, at 151.
[30] S Jones "Depth Interviewing" in C Seale (ed) *Researching Society and Culture* (Thousand Oaks, Sage Publications, CA, 2003) at 257.
[31] Peter Reason "Introduction" in Peter Reason (ed) *Human Inquiry in Action: Developments in New Paradigm Research* (Sage, London, 1988) at 1.

subjective experience; nor do we allow ourselves to be overwhelmed and swept along by it; rather we raise it to consciousness and use it as part of the inquiry process."[32]

Another central issue also worth acknowledging is these particular research findings were gathered by a non-Māori researcher examining a *kaupapa Māori* perspective. It is important to appreciate that while non-Māori and Māori strive to work in partnership with each other, their understandings are derived from very contrasting epistemological foundations. As a non-Indigenous researcher, I needed to understand and work with the differences between Western research paradigms and Indigenous ways of knowing. To do this, I acknowledged the power relationships that exist in all research and strived to develop culturally safe research practices that adhered to the national ethical principles developed for working with Māori,[33] which included self-reflection, adaptation and respect. This acknowledgement of the power relationship between researchers that exists is important because as Christie explains:

> The legal theorist always comes to the task of theorising with a political or ideological agenda. In theorising, the theorist would be advancing these underlying schema, either promoting the maintenance and strengthening of a certain form of political structure (what we tend to see in what is called 'doctrinal' analysis in mainstream legal study), or pushing for varying degrees of legal reform…The act of legal theorising is itself potentially implicated in the production of law,…the idea that the legal theorist comes to the task of theorising with presumptions and conceptual understandings that go into the categorisation of legal phenomena, which then feed into how an understanding of the law emerges."[34]

Given the complexities of legal theory, it would be naïve to imagine that finding a shared theoretical space as legal researchers would be a straightforward process. Much of what has been written about legal research methodologies is tightly connected to theorising about the law. A particular theoretical understanding or presumption of a researcher could impact notably on the legal research methodologies they develop with non-Indigenous theorists often deploying their theories to oppress and dispossess Indigenous peoples.[35]

Given the colonising nature of legal research and legal theorising to date, it is incumbent on

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[32] Above.

[33] SPEaR Good Practice Guidelines (Ministry of Justice, Wellington, 2008) s 4.1 <http://www.spear.govt.nz/good-practice-guidelines-june-2008>.

[34] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 207.

[35] See J Henderson "Post-Colonial Indigenous Legal Consciousness" (2002) 1 Indigenous Law Journal at 1; Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012).

both Māori and non-Māori academics to articulate visions of legal research that reflect equitable foundations of understanding; understandings that "reveal how dominant legal theory plays this role, and illustrate how Indigenous understandings of the law might sit in contrast to these oppressive regimes."[36] There is the potential with a comparative legal method that the comparatist may analyse foreign legal systems from their own perspective i.e. the researcher's own jurisdiction.[37] This approach is not without criticism as comparative research should avoid the imposition of the researcher's own preconceptions on other legal systems.[38]

One approach to negating these criticisms could be for the comparatist to adopt an interior point of view, with the consequence that the comparatist should try to present the legal materials in the same manner as a lawyer from the foreign legal system in question.[39] However, the approach favoured by this study will be to adopt a neutral stance with no system being viewed from the inside. Instead, all legal material under study will be viewed from an outside perspective.[40]

There are two other approaches to the comparative method: *functionalism* and *balancing*. Amongst *functionalists* there is wide agreement that a socio-economic problem should be the starting point of a comparative analysis.[41] From a *functionalist's* perspective, the socio-economic problem of this proposed study would be the tensions that arise between differing legal research epistemologies. However, the approach that will be taken in this study which will enable the researcher to adopt a more neutral stance in relation to studying two jurisdictions is the model of *balancing* which sees the differences between legal systems as "the product of different balances between conflicting considerations, be they principles or policies, rights, powers, or whatever".[42] The purpose of *balancing* is to expose the ideological context of differing legal structures.[43] The act of *balancing* also aligns itself with a fundamental tenant of Māori society. The ultimate goal of *tikanga Māori* is balance, balance within the individual

[36] Christie, above n 34, at 210.
[37] Mathias Siems *Comparative Law* (Cambridge University Press, Cambridge, 2014) at 16.
[38] Konrad Zweigert and Hein Kötz *An Introduction to Comparative Law* (3rd ed, Clarendon, Oxford, 1998) at 35.
[39] Siems, above n 37, at 17.
[40] Mathias Reimann "Comparative Law and Neighbouring Disciplines" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) at 21.
[41] Siems, above n 37, at 26.
[42] Duncan Kennedy "Political Ideology and Comparative Law" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) at 35.
[43] At 46.

and balance within the community.[44]

In this study, the *conflicting* considerations would be the various competing and overlapping epistemological principles of Māori and Western research paradigms. The *balancing* of these epistemologies with each other, would allow the researcher to not only recognise differences but also similarities to assist in the search for a shared theoretical space as legal researchers. This type of ideological analysis acts as a starting point for theory building.

It is important as a non-Māori researcher from the epistemological standpoint of the dominant research paradigm not to approach or appraise *kaupapa Māori* theory from a dominant Western standpoint. In Cooper's exploration of how we organise knowledge as researchers he finds that the researcher either takes a neutral perspective on how literature is reviewed and discussed, or the researcher espouses a position or point of view that may influence the review and discussion of the literature.[45]

An approach that was taken in this study to enable the researcher to adopt a more neutral stance in relation to studying two jurisdictions, one of whom is the dominant Western paradigm, is to look for what Ehrmann[46] describes as the 'functional equivalents of legal terms and concepts in various cultures'. Hence, in contrast to thinking in terms of Western concepts of 'law and order' and 'legal method', the researcher will loosely frame the search for answers around Hoebel's 'four law jobs' questions:[47]

Are these four jobs being performed?

1. Social control
2. Conflict resolution
3. Adaptation and social change
4. Norm enforcement

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[44] H Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 31.
[45] Harris Cooper "Organizing Knowledge Synthesis: A Taxonomy of Literature Reviews" (1988) Knowledge in Society (Spring) at 104.
[46] Henry Ehrmann *Comparative Legal Cultures* (Prentice-Hall, New Jersey, 1976) at 11.
[47] E Adamson Hoebel *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, NY, 1954) at 10, adapted by Peter de Cruz *Comparative Law in a Changing World* (3rd ed, Routledge Cavendish, London, 2008) at 230.

This type of approach allows for a more inclusive approach to analysis that accepts concepts outside Western ideals of law and legal systems.

As a non-Indigenous researcher I am conscious of Linda Smith's discomfort with post-colonial and post-modern thought, finding it faddish and merely the latest non-Indigenous theories to move into the role of oppression and domination.[48] She invites Indigenous peoples to be ever cognisant of the act of writing, constantly aware of who they might be writing for, and continually thinking of their work in a political context.[49] These sage words of advice apply equally to the non-Indigenous researcher. While Indigenous peoples have been, in many ways, oppressed by theory,[50] this is because this theorising has constructed frameworks of interpretation that marginalize them.[51]

However, there are aspects of Western legal theories and research paradigms that may speak to the Indigenous researcher. For example, while *kaupapa Māori* appears to be the dominant philosophical perspective amongst Māori researchers, a cursory search of the repository databases of New Zealand's eight universities shows that grounded theory is frequently used by Māori researchers in order to make sense of their data.[52] All decolonising researchers need to be vigilant and engaged in a process of continually questioning the theoretical frameworks they are using to answer questions about the law.

Creating connections as legal researchers is challenging work. Not only is there an abundance of complex Western legal theory to make sense of, but while searching for better ways of researching together, the researcher must also navigate the less palatable aspects of colonising theoretical frameworks. Christie noted "how quickly matters around the activity of legal theorising get complex and murky."[53]

It is difficult to dispute the possibility that all legal theory might be infected by the perspective of the theorist.[54] Nonetheless, when researchers make use of insights from each others worlds

[48] Tuhiwai Smith, above n 35, at 36.
[49] Above.
[50] At 38.
[51] Christie, above n 34.
[52] S Elers "Refuting Denzin's Claims: Grounded Theory and Indigenous Research" (2016) 15 Grounded Theory Review 2 at 111.
[53] Christie, above n 34, at 215.
[54] At 219.

it is possible to reveal the 'truth' in the nature of the conflicts within which each world finds themselves entangled. Searching for a shared theoretical space as legal researchers offers opportunities to hear the excluded voices of Māori. Articulating alternative research frameworks "chips away at this process of exclusion" that Monture-Angus has identified where the control over discourse and language is most serious: in the realm of theorising.[55] A way forward could be at a point of cultural and theoretical interaction, where Māori and non-Māori legal researchers meet at the same level of meaning and understanding. Monture-Agnus notes that in the realm of jurisprudence the key point of cultural contact happens at the level of legal theorising, where Indigenous voices must go into a process of negotiation around the nature and meaning of the very legal terms that would go into a new realm of just jurisprudence.[56]

While this idea of searching for a shared theoretical space as legal researchers requires exploration, it is fraught with challenges, mainly around the question of appropriation of Western research paradigms that have evolved over centuries from very contrasting epistemological, religious, political and cultural perspectives than Māori. Clearly it could be dangerous to attempt to cast the aspiration of *tikanga* and *kaupapa Māori* within a Western legal framework, as doing so runs directly into a heated and ongoing debate over the nature of self-determination for Māori. But if this study expresses Indigenous understandings in a way that incorporates non-Māori concepts, there is a hope of creating a discourse that employs legal theory that recognises the collective interests of both Māori and non-Māori. "It is a matter of appreciating the nature and scope of dangers that exist, and with caution to act accordingly."[57]

The intent of this chapter is to say something about the nature of our relationships as legal researchers and how theorising can support the development of those relationships. However, theoretical work also holds many dangers for Māori communities. "It is indisputable that much of the 'heavy work' of colonialism has been carried out by the law, and indeed by the construction of the dominant system on a foundation of racist and colonial theoretical presumptions and positions."[58] It is important, therefore, to understand the manner in which dominant theoretical perspectives have colonised and oppressed Māori theoretical perspectives. We need "to expose and understand the invisible biases against Indigenous

[55] Patricia Monture-Angus *Journeying Forward: Dreaming First Nations' Independence* (Fenwood Publishing, 1999) at 55.
[56] Above.
[57] Christie, above n 34, at 230.
[58] At 231.

peoples underlying and inherent in law."[59] What is needed now is the construction of legal research practices that articulate the theoretical perspectives of both Māori and non-Māori.

[59] Tracey Lindberg "Critical Indigenous Legal Theory" (PhD Thesis, University of Ottawa, Canada, 2007) at 324.

Chapter 6. Fitting Together Disparate Theories of Law[1]

6.1 Comparing Differing Perspectives

In the search for a shared theoretical space as legal researchers it is not the intention to compare all the parametres of modern legal theory in relation to *kaupapa Māori* theory, but to introduce ideas and concepts about our current laws from different theoretical perspectives. To assist with this challenge, the following chapters will address three distinct Western theories of jurisprudence, or schools of thought, in relation to *kaupapa Māori* theory:

1. Ancient natural law theory which considers all people have inherent rights, conferred not by act of legislation but by God, nature or reason.[2]
2. Analytic jurisprudence which rejects natural law instead encouraging the use of a neutral point of view and descriptive language when referring to aspects of legal systems[3] and includes "legal positivism", and "legal realism."
3. Normative jurisprudence which is concerned with "evaluative" theories of law aimed at criticism and reform.[4]

Before offering a comparative perspective on Māori and non-Māori theories of law it is useful to consider some of the tensions that may arise in doing so. There are many risks in comparing Western legal theory to *kaupapa Māori* theory, the most obvious being that the Western theories become the frame of reference for discourse that undermines the worldview of Māori. On the other hand, an extreme culturalist position would not permit the comparison of legal theory from differing worldviews.

Historically, the schools of thought that are about to be discussed have played major roles in

[1] Throughout this chapter reference to forms of "liberalism" is in a general manner that refers to a society with a representative government, a dominant "marketplace" ideology tempered by governmental regulation, a focus on individual merit over community well-being, and protection of private property rather than collective ownership. However, in recognition that a single word can have many perspectives it is important to note that from the Indigenous perspective of Māori Marsden "liberalism" is "the morass into which we have plunged recently in New Zealand is simply another name for confusion as to what our convictions really are. Mind and heart are at war with one another, and not as commonly asserted reason and faith. Our reason beclouded by extraordinary/blind/unreasoning faith in its reasoning power (cf. Logical Positivism), spawns sets of fantastic life-destroying ideas." Māori Marsden *The Woven Universe: Selected Writings of Rev. Māori Marsden* (edited by Te Ahukaramū, The Estate of Māori Marsden, Masterton, 2003) at 94.
[2] Hans Kelsen *General Theory of Law And State* (Translated by Anders Wedberg, The Lawbook Exchange, New Jersey, 2007) at 392.
[3] H L A Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review at 593.
[4] Robin West *Normative Jurisprudence: An Introduction* (Cambridge University Press, New York 2011).

the colonisation and marginalisation of Māori culture. It is not a simple matter of mapping one theory onto another and agreeing on shared elements. Doing so creates "the existence of numerous other hidden implications in the adoption of a theoretical framework… which may lead to numerous implications not as immediately obvious…"[5] However, while there are hidden dangers in attempting to develop any kind of decolonising theorising, the key to successful theorising lies in turning the dangers into advantages for both Māori and non-Māori researchers. Kidman said it was now common for Indigenous and non-Indigenous communities to work together to solve "the really big problems of our time;"[6] striving together to build theoretical frameworks that provide better explanations for our current legal systems.[7]

The following chapter discusses customary and common law, positivism, critical legal theory, strategic essentialism and legal realism in an attempt to fit together disparate theories of law. I will explore the role of these theories in our seemingly endemic persistence to colonise legal research via theories of law and legal research paradigms within Western academic frameworks. While comparing theoretical positions acts as a starting point for further discussions on how to decolonise legal research, I will deliberately locate the discussion within a critique of Western theory as a true but flawed body of knowledge. I will also question the complicity of Indigenous studies that use Western knowledge, mindful that "when knowledge or theory tries to understand the Other, then the alterity of the Other vanishes as it becomes part of the same."[8] Thus, I set out to construct decolonising theories of law that resists universalism, instead choosing to tread in these diverse and diverging theoretical landscapes with a shared sense of purpose by questioning which theories of law, Māori and non-Māori, can we retrieve from the ashes of colonialism to ignite scholarship within decolonised frameworks. I will attempt to answer this question by offering an account of the demise of three major jurisprudential traditions in Western legal theory – natural law, positivism and critical legal studies, which results in and is motivated by a call for the recognition of distinctly

[5] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 214.
[6] Henry Dubby "Scientists rubbish Auckland University professors' letter claiming Māori knowledge is not science" *New Zealand Hearld* (New Zealand, 28 Jul, 2021) <https://www.nzherald.co.nz/nz/scientists-rubbish-auckland-university-professors-letter-claiming-maori-knowledge-is-not-science>.
[7] Pete McKenzie "Explosion of ideas: How Māori concepts are being incorporated into New Zealand law" *The Guardian Newspaper* (United Kingdom, 17 October 2021) <https://www.theguardian.com/world/2021/oct/17/explosion-of-ideas-how-maori-concepts-are-being incorporated-into-new-zealand-law?>.
[8] Madan Sarup *Identity, Culture, and the Postmodern World* (Edinburgh University Press, Edinburgh, 1996) at 68.

normative jurisprudence. Constructing decolonising legal theory that is normative could contribute to the development of culturally appropriate legal reform.

6.2 Common Law, Customary Law and *Tikanga Māori*

Prior to signing the Treaty of Waitangi in 1840, law and order operated within the legal system of Aotearoa through *tikanga Māori* with Māori world views, values and customary laws and institutions prevailing.[9] *Tikanga Māori* is correctly referred to as the first law of Aotearoa New Zealand.[10] The Māori legal system originates from Te Ao Māori and embraces the creation stories that determine our relationships to each other, the environment and the spiritual world. This is akin to the natural law theory; law is nature.[11] Bentham, Austin, Kelsen, Weber, Hart and Raz all published stern repudiations of what they understood to be the theory of natural law,[12] but Lon Fuller broadly asserted that natural law theorists hold that law is derived from natural principles such as divine will and the natural world.[13] Also akin to natural law theory is the assertion that *tikanga Māori* "draws no disjunction between law and morality."[14]

Prior to colonisation, *tikanga Māori* was an effective legal, political and social system based on values. Māori adhered to principles or values rather than rules.[15] In order to understand the values of *tikanga* "it is necessary to look back to the first law of New Zealand brought across the Pacific oceans by Kupe, Toi and others to the shores of Aotearoa."[16] The Waitangi Tribunal in 2011 described the system of values and custom that Kupe brought with him as follows:

> Its defining principle, and its life blood, was kinship – the value through which the Hawaikians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its

[9] Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 WLR at 74.
[10] Annie Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in M Belgrave, M Kawharu and D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 330.
[11] Valmaine Toki "*Tikanga Māori* – A Constitutional Right? A Case Study" (2014) 40 Commonwealth Law Bulletin 1 at 36.
[12] John Finnis *Natural Law and Natural Rights* (2nd ed, Oxford University Press, Oxford, 2011) at 18.
[13] See Lon Fuller *The Morality of Law* (Yale University Press, New Haven, CT 1969) at 96-102.
[14] Toki, above n 11, at 37.
[15] Hirini Mead *Tikanga Maori Living by Maori Values* (Huia, Wellington 2003) at 8.
[16] Mikaere, above n 10, at 330.

> own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in *te ao Māori* as *whānaungatanga*) they also emphasised human responsibility to nurture and care for it (known in *te ao Māori* as *kaitiakitanga*).[17]

The system of law that emerged from the adaption to the land of the original settlers of *Aotearoa* became known as *tikanga Māori: tika* meaning correct, right or just.[18] As always in *tikanga Māori,* the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics, but rather a *koru*, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.[19]

The common law doctrine of Aboriginal rights and the partnership provisions and inclusion of *taonga katoa* within the Treaty of Waitangi affirm that first law, Māori customary law, was not only to be officially recognised within the legal system of Aotearoa New Zealand, but to be preserved and protected by the Imperial, Colonial and subsequent Governments of Aotearoa New Zealand.[20] The Treaty ought to have encouraged the integration and reconciliation of Māori customary and English common law. However, in reality, upon colonisation, the continuum of *tikanga* was interrupted. Māori cultural definitions and ontological assumptions that shaped their notions of criminality and social order were replaced by those of the colonising power. This resulted in a changing world for Māori.[21] However, changes in *tikanga* as a result of contact with colonisers does not undermine Māori law. Māori law remains in force. Metge points out that contact with other cultures produces outward change but very rarely produces a change in the fundamental value system which belongs to the contacted culture.[22] John Borrows describes the changing world of Indigenous peoples in the following way:[23]

> First Nations legal traditions were the first laws of our countries and were not extinguished through discovery, occupation, prescription, or conquest, they could be viewed as retaining their force. Furthermore, when treaties are made they can be seen as creating an intersocietal

[17] Waitangi Tribunal Report *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.
[18] Mikaere, above n 10, at 330.
[19] M Henare *Te tangata, te taonga, te hau: Māori Concepts of Property* (Property and the Constitution Conference, New Zealand Institute of Public Law, Victoria University of Wellington, 18 July 1998) at 6.
[20] Joseph, above n 9, at 77.
[21] Toki, above n 11, at 33.
[22] Joan Metge *New Growth From Old: The Whänau in the Modern World* (Victoria University Press, Wellington, 1995).
[23] John Borrows *Canada's Indigenous Constitution* (University of Toronto Press, Toronto 2010) at 21.

> framework in which first laws intermingle with Imperial laws to foster peace and order across communities.

Borrows sentiments were eloquently reflected by Canadian Supreme Court Justice McLachlin in her dissenting judgment in Van der Peet:[24]

> The history of the interface of Europeans and the common law with aboriginal peoples is a long one... Yet running through this history, from early beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs of the aboriginal peoples who occupied the land prior to European settlement.

There is considerable debate about what should be in the list of generally applicable core values the holders of the first law brought, adapted and still hold.[25] Recognising that ultimately it is only Māori who can decide what their values are and how each value applies in a particular context, m*ana, tapu, utu, kaitiakitanga* and *whānaungatanga* are a few recognised by the Law Commission.[26] Of these, *whānaungatanga* is the glue that held, and still holds, the system together; the idea that makes the whole system make sense – including *legal* sense.[27] So *whānaungatanga* might be said to be the fundamental law of the maintenance of properly tended relationships.[28]

Similar to common law, a function of *tikanga* is the maintenance of collective values in order for communities to live in peace and to attain stability.[29] Another similarity is the importance of precedent. The nature of *tikanga* depends on reference to traditional use and practice. This is also the foundation of common law.[30] Over centuries the common law has evolved through the courts in response to the changing needs of society. Hand in hand with the evolution of the common law in the New Zealand courts has been the struggle by Māori to convert customary rights into common law rights.

In *Re The Lundon and Whitaker Claims Act* 1871[31] the Court of Appeal asserted that "the Crown was bound, both by the common law of England and by its solemn engagements (the

[24] *R v Van der Peet* [1996] 2 SCR 507 at [263].
[25] J Williams "Harkness Henry Lecture - Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 WLR at 3.
[26] Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [124].
[27] Williams, above n 25, at 4.
[28] Above.
[29] Joseph, above n 9.
[30] Toki, above n 11, at 38.
[31] *Re The Lundon and Whitaker Claims Act* (1871) 2 NZ (CA) 41.

Treaty of Waitangi), to a full recognition of native proprietary right." The Court stated that "whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it."[32] This was the strongest judicial recognition of Māori Aboriginal or customary title at the time.[33] However, only a handful of years later in the 1877 case of *Wi Parata v The Bishop of Wellington,*[34] the Chief Justice Sir James Prendergast ruled that the Courts lacked the ability to consider claims based on aboriginal or native title. The Treaty of Waitangi was 'worthless' because it had been signed 'between a civilised nation and a group of savages' who were not capable of signing a treaty. Since the Treaty had not been incorporated into domestic law, it was a 'simple nullity'.[35] This decision would undermine the credibility of *tikanga Māori* as a legal system and it would serve to negate *kaupapa Māori* as a legitimate course of jurisprudence. It would also influence decision-making on matters of law affecting both Māori and non-Māori for decades to come.

Māori rights under the Treaty of Waitangi and many of their values, customary laws and institutions were marginalised and lay legally dormant following *Wi Parata* until the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal almost 100 years later.[36] The Waitangi Tribunal re-established *tikanga Māori* as the first law of Aotearoa New Zealand. While the current law of Aotearoa New Zealand has its foundation in the English common law, inherited from colonisation and the resulting Commonwealth membership, its *local context* and *history* makes it differ from other British common law jurisdictions. Elias CJ confirms this position in the case of *Attorney-General v Ngati Apa,* when she states "but from the beginning of the common law of New Zealand as applied in the Courts, differed from the common law of England because it reflected local circumstances."[37] Elias CJ also stated that:

> Any prerogative of the Crown as to property in the foreshore or seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Māori custom and usage recognising property in the foreshore and seabed lands displaces any English Crown Prerogative and is effective as a matter of New Zealand law unless such property interests have been lawfully extinguished. The existence and extent of any such property interest is determined by application of tikanga.[38]

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[32] Above.
[33] Joseph, above n 9, at 80.
[34] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.
[35] New Zealand History Nga Korero A Ipurangi O Aotearoa "Chief Justice declares treaty 'worthless' and a 'simple nullity" (Ministry for Culture and Heritage, Wellington, 2020) <https://nzhistory.govt.nz/the-chief-justice-declares-that-the-treaty-of-waitangi-is-worthless-and-a-simple-nullity>.
[36] Joseph, above n 9, at 81.
[37] *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA) at [17].
[38] At [49].

Parliament also recognises the importance of *local context* and *history* through legislation. The Oaths and Declarations Act 1957, s18 of the Judicial Oath states:

> I swear that I will well and truly serve Her Majesty, Her heirs and successors, according to law, in the office of; and I will do right to all manner of people after the *laws and usages* of New Zealand without fear or favour, affection or ill will. So help me God

This oath requires a Judge to consider all New Zealand citizens equally while applying the laws and usages of New Zealand without fear or favour, this includes Māori customary laws; the first law of Aotearoa. The Supreme Court Act 2003, s3 which states:

> The purpose of this Act is-
> (a) to establish within New Zealand a new court of final appeal comprising New Zealand Judges-
> (i) to recognise that New Zealand is an independent nation with its own *history and traditions;* and
> (ii) to enable important legal matters, including legal matters relating to the *Treaty of Waitangi, to* be resolved with an understanding of New Zealand conditions, *history, and traditions; and*
> (iii) to improve access to justice …

Both the Oaths and Declarations Act 1957 and the Supreme Court Act 2003 confirm the history and customary traditions of Māori through the common law.

In 2003, *Ngati Apa v Attorney-General*[39] overruled the injustice of *In Re the Ninety-Mile Beach*[40] and *Wi Parata*,[41] declaring that Māori could bring claims to the foreshore in the Māori Land Court. Tipping J joined with the majority of the Court in overturning *In Re the Ninety-Mile Beach*, and with the whole of the court, in declaring that there was no barrier stopping the Māori Land Court from investigating Māori customary rights in the foreshore and seabed. Tipping J restates the problem with the reasoning in *In Re the Ninety-Mile Beach* that "Māori customary title was, as I have already discussed, not a matter of grace and favour but of common law. Having become part of the common law of New Zealand, it could not be ignored by the Crown unless and until Parliament had clearly extinguished it, and then only subject to whatever might have been put in its place."[42]

[39] *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA).
[40] *In Re the Ninety Mile Beach* [1963] NZLR 461 (CA).
[41] *Wi Parata v Bishop of Wellin*gton (1877) 3 NZ Jur (NS) (SC) 72.
[42] Tipping J *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 at [207]-[208].

The Court also indicated that customary aboriginal title interests (non-territorial) might also remain around the coastline. Unfortunately, the Foreshore and Seabed Act 2004[43] extinguished those rights before either the Māori Land Court could hear a claim to territorial customary title or the High Court could hear a claim to non-territorial customary rights via the common law. That legislation has been condemned by the Committee on the Elimination of Racial Discrimination.[44] The 2004 Act was repealed and replaced with the Marine and Coastal Area (Takutai Moana) Act 2011.

Despite the recognition in common law of the rights of Māori in *Ngati Apa*,[45] it proves to be a lost opportunity for Māori and it is almost a decade before the Court of Appeal considers questions of common law and *tikanga* again in the case of *Takamore v Clarke.*[46] The justices noted that in order to recognise Māori custom as part of the common law of New Zealand, the custom must be long-standing; must have continued without interruption since its origin; must be reasonable; must be certain in its terms; and must not have been displaced by Parliament through clear statutory wording.[47] It was held that the custom failed on 'reasonableness' and therefore did not meet the test of recognition. The most significant issue reflected in the Court of Appeal's decision in *Takamore* is the unlikely recognition of Māori custom by the common law in future cases because of the high thresholds for recognition set in this joint judgment.

However, on appeal to the Supreme Court, the justices adopted a 'modern approach',[48] noting that *tikanga* was a relevant consideration and a 'value'[49] to be weighed. Although this does not soften Glazebrook and Wild JJ's judgments, it did reinforce the need to develop the common law, so far as is reasonably possible, consistently with the Treaty of Waitangi. An opportunity has been created for *tikanga* to inform the common law; and an opportunity for "articulating how Indigenous understandings and conceptualisations underpin theoretical perspectives...[50]

[43] The Foreshore and Seabed Act 2004 is a former Act of the Parliament of New Zealand fuelling the New Zealand foreshore and seabed controversy. It overruled the 2003 decision of the Court of Appeal in *Ngati Apa v Attorney-General.* It was replaced by the Marine and Coastal Area (Takutai Moana) Act in 2011.
[44] Committee on the Elimination of Racial Discrimination Sixty-sixth session 21 February – 11 March 2005 Decision 1 (66) New Zealand Foreshore and Seabed Act 2004. The Committee found "the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Māori, in particular in its extinguishment of the possibility of establishing Māori customary title over the foreshore and seabed…"
[45] *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA).
[46] *Takamore v Clarke* [2011] NZCA.
[47] Above.
[48] *Takamore v Clarke* [2012] NZSC 116 at [164].
[49] At [94].
[50] Christie, above n 5, at 231.

6.3 The Synergy between *Tikanga Māori* and Positivism

Positivism in legal theory, better known as formulated by Bentham's disciple John Austin than in Bentham's own original and more complex formulation, has long dominated speculative English thinking about the general nature of law.[51] Austin argued that laws are commands of the sovereign; backed by sanctions and issued by a supreme authority.[52] Empiricism provided the theoretical basis for such developments with HLA Hart advancing positivism theories that suggested there is not any necessary relation between law and morality.[53] Although Hart is often referenced saying laws should reflect a minimum content of natural law for a legal system to function effectively, necessitating the inclusion of certain moral principles, such as protection from violence and respect for property rights.[54] Hart also describes legal systems constructed of both primary rules of obligation and secondary rules that enable the recognition, change and adjudication of those primary rules.[55] This leads me to suspect that legal positivism fails to give morality the credence a decolonising theorist requires. A theory that insists on 'rules' seems to contribute little to our understanding of law as a social construct that makes our lives 'good'. Positivists, while striving to maintain the rule like character of our laws seem less concerned with maintaining the integrity of those laws.

It seems probable that moral and political considerations will make up any decolonising theory that we construct together. Finnis said the reasons we have for establishing, maintaining or reforming law include moral reasons,[56] and these reasons may well shape our shared decolonising theory. But Finnis also accepted that the existence and content of law can be identified without recourse to moral argument, and that "human law is artefact and artifice; and not a conclusion from moral premises."[57] These comments make it difficult to see how the decolonising legal theory that we develop can accommodate any of

[51] HLA Hart "The New Challenge to Legal Positivism (1979)" (2016) 36 Oxford Journal of Legal Studies 3 at 459.
[52] John Austin *The Province of Jurisprudence Determined (1832): Lecture 1* (reprinted, Cambridge University Press, Cambridge, 1995) at 13.
[53] HLA Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harvard Law Review 593 at 601.
[54] HLA Hart *The Concept of Law* (3nd ed, Oxford University Press, Oxford, 2012) at 193-200).
[55] HLA Hart *The Concept of Law* (2nd ed, Oxford University Press, Oxford, 1997) at 79-99.
[56] Finnis, above n 12, at 266-273.
[57] John Finnis "The Truth in Legal Positivism" in Robert George *The Anatomy of Laws: Essays on Legal Positivism* (Oxford Scholarship On Line, 1996) at 205.

the truths of legal positivism. Legal positivism and Austin's[58] ideas of law as the command of a sovereign stand in direct opposition to theories of natural law and *tikanga Māori* with particular disagreement surrounding natural law and *tikanga's* claim that a connection between law and morality is essential.

Lon Fuller thinks that it is not sufficient for a legal system to be based on customary practice, since law could not guide behaviour without also exhibiting to some degree of "the rule of law".[59] If we consider law as a matter of fact, then how do we explain the duty to obey. Fuller asks how "an amoral datum called law could have the peculiar quality of creating an obligation to obey it."[60] This social fact of "obeying" creates obligations to perform, together with sound arguments for "moral" inclusions in the decolonising theory that we develop.

Hart identifies legal positivism with "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[61] Coleman was also in denial about the necessity for a connection between law and morality. "They must be in some sense 'separable' even if not in fact separate."[62] However, there are many necessary "connections" between law and morality in *tikanga.* If legal positivism rejects any interdependence between law and morality it is difficult to see how positivism can be useful to our decolonised theory building.

*T*oki, however, is able to identify a half way point. She is able to find a synergy and suggests "if we are to make any tentative analogy, we could say that *tikanga Māori* lies *between* natural law and positivism. Laws are derived from cosmology and *te ao Māori*, or nature; they establish a standard or legal precedent but are also subject to change."[63]

If we consider Hart's theory on legal positivism and his rule of recognition, according to Hart:

> ...to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can simply say that the statement that a

[58] HLA Hart (ed) Introduction to John Austin: The Province of Jurisprudence Determined (Weidenfeld & Nicholson, London, 1954) at vii–xxi.
[59] Lon Fuller "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harvard Law Review 4 at 630–672.
[60] At 656.
[61] HLA Hart *The Concept of Law* (3rd ed, Clarendon Press, Oxford, 2012) at 185.
[62] Jules Coleman "Negative and Positive Positivism" (1982) 11 *The Journal of Legal Studies* 1 at 139.
[63] Toki, above n 11, at 37.

particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.[64]

In Hart's view, the rule of recognition arises out of a convention among officials where they accept the rule's criteria as standards that impose duties and confer powers on officials, and resolves doubts and disagreements within the community.[65] Stephens found that despite the inadequacy of Hart's notion of the primitive system, his idea of the union of primary and secondary rules can be a useful tool of analysis of non-Western cultures. Māori society offers possibilities for such legal analysis.[66] Accordingly, *tikanga Māori*, a value-based doctrine, provides criteria against which other values are assessed, in line with Hart's rule of recognition.[67] Values intrinsic to *tikanga Māori* are *whanaungatanga, mana, tapu, utu, kaitiakitanga, mauri, wairua* and *aroha*. The aim of these values is to bring balance to the individual as well as the community. For example, the regulators *tapu* and *mana* assist to restore any imbalance through the process of *utu*, or reciprocity.[68]

Hart's rule of change allows legal systems to introduce a new primary rule and to adapt rules already in use,[69] aligning with the fluidity of *tikanga* and its ability to change and adapt to new sociological perspectives. *Tikanga Māori* grants the decision-maker the ability to adapt values, providing *tikanga* is maintained.[70] Māori custom is not rigid, able instead to adapt to the changing requirements of the community, giving effect to a "practical jurisprudence."[71] This "practical jurisprudence" and the ability of Māori communities to change customary practices was recognised by the courts in the case of *Hineiti Rirerire v Public Trustee of New Zealand* in 1919 when the court noted that Māori custom did not follow the English notion that custom must, in order to be called custom, have been in place since "time immemorial".

> It may well be that this is a sound view of the law, and that [Māori] as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the customs of such a race is not to be put on a level with the custom of an English borough...which must stand as it has always stood, seeing that there is no quasi-

[64] Hart, above n 54, at 79.
[65] Scott Shapiro "What is the Rule of Recognition (And Does it Exist)? in Matthew Adler and Kenneth Himma (eds) *The Rule of Recognition and the US Constitution* (Oxford University Press, Yale Law School, 2009) Public Law Working Paper No 184.
[66] Mamari Stephens "Māori Law and Hart: A Brief Analysis" (2001) Victoria University of Wellington Law Review at 855.
[67] Toki, above n 11, at 37.
[68] At 36.
[69] Hart, above n 54.
[70] Stephens, above n 65, at 859.
[71] New Zealand Law Commission, above n 26, at 5.

> legislative internal authority which can modify it.[72]

Hart also has rules of adjudication that allow resolution of any breaches of the rules. The rules of adjudication empower individuals to make authoritative determinations of whether, on a particular occasion, a primary rule has been broken;[73] identify the individuals who are to adjudicate; and define the procedure to be followed.[74] In accordance with *tikanga* individuals responsible for maintaining the values of a particular *iwi* were *tohunga.* Māori Marsden describes *tohunga* as "a chosen one" or "appointed one".[75] Their function was to mediate between the gods and the tribe to ensure the welfare of the tribe.[76] Sir Apirana Ngata also noted:

> He was not only chief of the clan, but he supplied its law and government. The law that governed the tribe practically emanated from the priest, from the *tohunga*....The law which meant life and death which dealt with everything pertaining to their cultivations, everything pertaining to their industries, everything pertaining to their moral life, and everything pertaining to their religious life emanated from *tohunga*. His word was law.[77]

Māori Marsden describes how:

> Normally the decision to *rāhui* an area was the prerogative of the *tohunga*…He was an expert in reading the signs that pointed to the depletion of resources in different areas of the tribal territory. He would consult with the chief (Rangatira) and/or tribal elders and a firm decision and course of action was approved.[78]

As identified by Toki, these similarities between *tikanga Māori* and positivism, although tenuous, provide synergy.[79] Borrows supports this tenuous synergy with the following comment:[80]

> At its origin, a custom is a rule of conduct [...] The custom is transmuted into positive law when it is adopted by the courts of justice [...] but before it is adopted by the courts and clothed in legal sanction it is merely a rule of positive morality, a rule generally observed by the citizens [...]

Nonetheless, despite these synergies, in the search for a shared theoretical space, it is difficult

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[72] *Hineiti Rirerire v Public Trustee of New Zealand* [1919] UKPC 71.
[73] Hart, above n 54, at 94.
[74] At 96.
[75] Māori Marsden, above n 1, at 14.
[76] At 15.
[77] Sir Apirana Ngata (19 July 1907) 139 *NZPD* 518.
[78] Māori Marsden, above n 1, at 70.
[79] Toki, above n 11, at 37.
[80] Borrows, above n 23, at 12.

to identify positivist perspectives that are truly meaningful for the decolonising researcher. In fact, it is almost tempting to reject the legal positivists internal perspective of the law that according to Hart was the 'properly' legal perspective.[81] Internally viewed in Hart's sense the legal system will always appear as a fundamentally legitimate way of regulating society.[82] However, Joseph Raz warned that the legal researcher is expected to respect the democratic mandate of the legislator and to move forward with caution.[83] This type of legal perspective would confine the researcher to the 'rules' of the dominant legal paradigm and risk perpetuating the cycle of colonising legal research.

In *The Cheyenne Way,* Llewellyn believed that merely relying on a formal rule-centred analysis of society was incomplete at best and that there was a need to understand how law operated within a social and cultural context, before one could expect to reform the law.[84] No useful legal theorising can be done in a vacuum, artificially disconnected from its cultural context. Justice expressed in principles and rules devoid of context is incomplete. "Every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust."[85]

A further rejection of Hart's positivism seems justified, as Hart would probably have called Māori customary law a primitive or "pre-legal" system according to the criteria in *The Concept of Law.*[86] Mamari Stephens in her brief analysis of Māori law and H.L.A. Hart[87] finds "Hart's theoretical construct of the primitive system does not reflect actual Māori processes and it is difficult to imagine a culture that would reflect that construct. Therefore, its usefulness as an explanation of Māori processes is questionable." Stephens finds that the "primitive system" remains a theoretical construct in *The Concept of Law* as a foil to the real star: Hart's legal system.[88] A system that continues to be a dominant influence on New Zealand jurisprudence legitimising the use of Western legal theory to analyse the Māori worldview.

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[81] Hart, above n 54, at 88.
[82] Panu Minkkinen "Critical Legal Method as Attitude" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, London, 2013) at 119.
[83] Joseph Raz *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press, Oxford, 2009) at 196.
[84] Karl N Llewellyn and E Adamson Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, Oklahoma, 1941) at 20.
[85] Harry Jones "Law and Morality in the Perspective of Legal Realism" (1961) 61 Columbia Law Review 5 at 801.
[86] Stephens, above n 65, at 853.
[87] Above.
[88] Above.

As an alternative, adopting an external perspective, that is, an approach that is not 'properly' legal in Hart's sense, could emancipate the researcher from her obligations towards the law.[89] This would allow the researcher to examine Indigenous culture and perspectives in relation to democratic ideals that are not extracted from the constitutional law itself. There is a strong temptation to reject Hart and his positivist's enthusiasm for internal perspectives of law in favour of more culturally focused legal theorising.

Many scholars have devoted their careers to discounting Indigenous knowledge.[90] However, pitting ourselves against one another, does little to advance theoretical legal knowledge and develop decolonising practices. Much of *kaupapa Māori* was generated using theory that has been codified according to a Māori world view. And while Māori do not need synergy with Western schools of thought to authenticate their knowledge systems, it is important to foster understanding and for Māori and non-Māori to work together to find a shared theoretical space. Respect for *kaupapa Māori* theory as a distinctive and valuable knowledge system that complements our existing understandings creates an environment where theorists are learning from each other. "There is no argument to be had on whether this is good or necessary. It is both."[91]

If we think like Georg Hegel who saw law as part of the rational unfolding of freedom and ethical life[92] with every existing legal system expressing deliberate governance in a world otherwise dominated by chance,[93] and that Hobbes is right, any order is better than chaos[94] and in some circumstances order may be achievable only through positive law,[95] fairly soon we have to entertain ideas that "good" laws will result in "evil" laws and discuss the age old issues of "power." Thus, to exclude the dependency relationship of law and morality seems to close the door to many interesting possibilities for decolonising theorists to balance good and

[89] Minkkinen, above n 81, at 147.
[90] See Kendall Clements et al "In Defence of Science" *New Zealand Listener* (New Zealand, July 2021) <https://twitter.com/JoannaKidman/status/1418876703938465792>.
[91] The New Zealand Association of Scientists "Mātauranga and Science" (27 July 2021) < https://scientists.org.nz/news/10776879>.
[92] Georg Hegel *Elements of the Philosophy of Right* (Nicolaus Verlag, Berlin, 1821) at 3.
[93] Leslie Green and Thomas Adams "Legal Positivism" in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition) <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>.
[94] Thomas Hobbes (1651) *Leviathan: Chapter 13* (ed C B Macpherson, Penguin Classics, London, 1968) at 185.
[95] Above at n 92.

evil more equitably. But, if it is possible that moral value *derives* from the existence of law[96] that expresses deliberate governance in a world dominated by the spirit of a community comfortable with its own self-consciousness, then unfortunately positivism remains fallible to the decolonising theorist. A quest for the decolonising theorist, therefore, appears to be the establishment of deliberate connections between law and morality because they are innocuous on the ground that they care more about human nature than they do about the nature of law; decolonising theorists care about people.

Kelsen's idea that "the function of the science of law is not the evaluation of its subject, but its value-free description" is troublesome.[97] As a result, the need to establish connections between law and morality appears both necessary and highly significant if we are to create any sort of alliance with *kaupapa Māori* theory. But the positivists insistence that the existence and content of law depends on social facts, not on the law's merits contributes to an understanding of the nature of law that is of little use to the decolonising theorist. The idea that legal positivism insists on the separability of law and morality is colonially repressive. Positivist visions are clouded by the need to theorise about rules. But law is *not* best when it excels in legality; law must also be just.[98] And Raz reminds us that law not only occupies itself with *moral matters* but also makes *moral claims* over us.[99] Which leaves us wrapping ourselves up in issues of law and morality until we arrive at a situation where the law is regulating similar issues with analogous moral and legal techniques.

This situation would suggest that morals must figure in any theoretical argument about its legitimacy and in any decolonising theory development. Perhaps another way to approach the challenge of whether to connect or separate issues of law and morality is to think in terms of how we govern. Kelsen finds that both natural law and positive law have in common a universal form of governance, namely *obligation*;[100] the condition of being morally or legally bound to do something. Obligation exists when there is a choice to do what is morally good and what is morally unacceptable.[101] In the Māori world, *tikanga Māori* would set about balancing these

[96] Joseph Raz *Practical Reason and Norms* (2nd ed, Oxford University Press, Oxford, 1990) at 165.
[97] Hans Kelsen *Reine Rechtslehre* (Deuticke, Vienna, 1960) translated by Max Knight *Pure Theory of Law* (University of California Press, Berkeley, CA, 1967) at 68.
[98] Above n 92.
[99] Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, Oxford, 1994) at 210.
[100] Hans Kelsen *"*Zeitschrift für offentliches Recht – The Idea of Natural Law" (1928) reprinted in Ota Weinburger (ed) *Essays in Legal and Moral Philosophy* (translated by Peter Heath, Reidel, Dordrecht, 1973) at 34.
[101] Ralph Ross *Obligation* (Ann Arbor, The University of Michigan Press, Michigan, 1970) at 50.

obligations using such regulators as *tapu* and *mana* to assist in restoring any imbalance through the process of *utu*, or reciprocity,[102] until a state of *ora* is reached. Where positivism and other Western schools of thought seem to continually struggle with its place within law, *tikanga Māori* has always resided comfortably with issues of morality.

6.4 Critical Legal Studies: A Passionate Response to a Brutish Life

The origins of Critical Legal Studies (CLS) can be traced to the first conference on Critical Legal Studies at the University of Wisconsin at Madison in 1977, where a group of legal scholars, practitioners, teachers, and students, dissatisfied with the Law and Society Association's empirico-behaviourist focus, met to discuss the formation of a new association.[103] Similar to the objectives of decolonising legal theory, critical legal theory "helps to identify what's been privileged and what's been suppressed. It tries to reveal the backstage devices – the empirical assumption, the contestable visions of society, the beliefs about directions of historical change – that mainstream legal discourse uses to close off the dark side of the status quo and embed progressive alternatives to the status quo."[104] In contrast to the sterility of mainstream empiricism and legal doctrine, CLS provided a critique of law that was capable of both understanding and reforming the legal system as well as the society to which it belongs.[105]

It is reasonably straightforward to trace the initial schools of CLS critique. Gordon and Goodrich both trace the CLS critique to Western Marxism and structuralism;[106] Hunt traced the CLS critique to Marxism and subjectivist interpretivist sociology;[107] and Standen traced CLS to the Frankfurt School's critique of positivism.[108] Later CLS is harder to define with an

[102] Toki, above n 11, at 36.
[103] Jason Whitehead "From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Re-examination of Frankfurt School Critical Theory" (1999) 26 Florida State University Law Review 701 at 705.
[104] Robert Gordon "Some Critical Theories of Law and Their Critics" in David Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed, Basic Books, New York, 1998) at 653.
[105] Allan Hutchinson (ed) *Introduction to Critical Legal Studies* (Rowman & Littlefield Publishers, New Jersey,1989) at 3.
[106] Gordon, above n 103, at 646-50; Peter Goodrich et al *Introduction to Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent* (Routledge, London, 1994) at 9-12.
[107] Alan Hunt *Explorations in Law and Society: Toward a Constitutive Theory of Law* (Routledge, London,1993) at 159-60.
[108] Jeffrey Standen "Critical Legal Studies as an Anti-Positivist Phenomenon" (1986) 72 Virginia Law Review 983 at 992-96.

almost "anything goes" approach. CLS scholarship appears to consist of an amalgamation of Marxists, Frankfurt School theorists, neo-realists, left Weberians, pragmatists, existentialists, structuralists, post-structuralists, deconstructionalists, feminists, socialists, phenomenological, and Hegelian.[109] The movement almost defies any form of confinement.

Nevertheless, CLS is composed of at least two distinct theoretical schools: the critical modern school and the postmodern school.[110] Whitehead described how the now dated critical modern school explores legal indeterminacy and ideology in order to illustrate the failure of the liberal form of economy and society drawing its theoretical support from Marxism, Freudianism, and the Frankfurt School.[111] The postmodern school, on the other hand, drawing its support from Foucault and Derrida, explores the idea that no objectively correct legal or political results are possible,[112] with Hutchinson and Monahan claiming that the outcomes of law have no inherent logic and that legal doctrines are a conflict between opposing and disconnected world views.[113] By dividing CLS into "critical modern" and "postmodern" movements, I describe generalised ideas rather than explicit positions taken up by particular CLS theorists. While many theorists clearly fall on either side of the divide between movements, I believe creating this distinction is useful and necessary. It will become apparent as I continue with this discussion that while the "critical modern" strand of CLS is still alive, its heyday has clearly passed,[114] which is unfortunate as it offered threads to grasp for the decolonising theorist. Contrastingly, and adding further to the decolonising theorists misfortune, I can find little of use in the "postmodern" strand of CLS which has been in vogue since at least the mid-1980s and is clearly on the rise.[115]

The Anglo-American critical legal studies movement came to maturity in the late 1970's, motivated, in part, from a sense of dissatisfaction with the state of doctrinal legal scholarship.[116] It is possible that the CLS movement was never a proper 'movement', instead amounting to

[109] James Boyle *Introduction to Critical Legal Studies* (New York University Press, New York, 1992) at xiii; Gunter Frankenberg "Down By Law: Irony, Seriousness and Reason" (1989) 83 North Western University Law Review at 383.
[110] Whitehead, above n 102, at 707.
[111] At 708.
[112] At 708.
[113] Allan Hutchinson and Patrick Monahan "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford Law Review at 223-26.
[114] Whitehead, above n 102, at 708.
[115] At 708.
[116] West, above n 4, at 107.

nothing more substantial than a group of left-of-centre North American law schools promoting various non-doctrinal approaches influenced by Marxism, feminism and deconstructionism; that were often incompatible with each other.[117] Kennedy and Klare stated that:

> CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches. Quite the contrary, there is sharp division within the CLS movement on such matters. CLS has sought to encourage the widest possible range of approaches and debate within a broad framework of a commitment to democratic and egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society.[118]

Yet despite the lack of agreement, there is substance in the CLS movement to inspire the decolonising theorist, notably the utopian work of Roberto Unger and Peter Gabel who argued passionately for better ways to organise our social worlds.[119] Unger described human nature as plastic and therefore malleable so that we can reform and lift our expectation of each other and ourselves. Gabel argued for the creation of a shared life that is more trusting, more communal, less hostile, less suspicious, and more welcoming toward strangers and intimates both, as well as a less alienated way of working with the natural world to create a shared and hospitable social home.[120] History as well as moral imagination reveals other possibilities to us, and law can yield other outcomes.[121] Unger and Gabel, like the decolonising theorist, understand that our world is not necessarily as it should be, that outcomes could have been different, and that it is within ourselves to create a significantly improved shared life for both Māori and non-Māori.

For Unger, our natures can yield any shape our imaginations can hypothesise;[122] our nature is a function of our moral imagination, not the other way round. As much as I admire Unger, it is important to point out that Unger claims to be exploring the passions of real, embodied people, but the excessive abstractness of some passages [from *Passion: An Essay on Personality*]

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[117] Minkkinen , above n 81, at 148.
[118] Duncan Kennedy and Karl Klare "A Bibliography of Critical Legal Studies" (1984) 94 Yale Law Journal at 461.
[119] Roberto Unger *Passion: An Essay on Personality* (The Free Press, New York, 1984); Peter Gabel "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Texas Law Review 8 at 1563.
[120] Gabel, above n 118, at 1566-7.
[121] West, n 4, at 113.
[122] Unger, above n 118, at viii.

reflects his failure to come to grips with the implications of sexual difference for passionate experience and politics, or with the significance of the passions of specifically womanly, notably maternal, experiences.[123]

For Gabel, we need not imagine a different nature, we need only reacquaint ourselves with our true desires, and hence our true selves: our natures are in fact at odds with the paranoid delusions of liberal legalism.[124] Gabel and Unger provide the decolonising theorist with ideas about how to remove the constraints imposed on individuals by unjust laws, enabling them to develop a sense of self-determination and to give full and free expression to their cultural knowledge. For Unger, in particular, individuals bequeathed with dignity, self-respect and equal opportunity are the highest hope of humankind. Collectively, a society of such people could make up a new form of decolonised democracy in which all social decisions would be regarded as moral and political ones.

Out of Unger's critique of formalism and objectivism and his search for alternative institutional forms for basic social institutions, particularly the market and democracy, arose the practice of the "deviationist doctrine."[125] The deviationist doctrine represents an attempt to marry doctrine with empirical social theory and ideological conflict.[126] The doctrine refuses to accept what is unjust in established forms of society.[127] The doctrine aims to highlight how biased and power-informed legal materials have gained a concrete resemblance of necessity that they are not entitled too.[128] The deviationist doctrine is helpful because it would encourage the decolonising legal theorist to transform society by taking a principle from *tikanga Māori,* for example, and extending it into an area from which it had previously been excluded.[129] This would allow the decolonising theorist to draw upon a rich collective history of experience and knowledge of *kaupapa Māori* that has helped to articulate *whakapapa* in the past, and can now be adapted to the new sociological perspectives of a shared theoretical space.[130]

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[123] Carole Pateman "Passion: An Essay on Personality – A Book Review" (1986) 96 Ethics 2 at 422.
[124] Gabel, above n 118, at 1566.
[125] Roberto *Unger The Critical Legal Studies Movement: Another Times, A Greater Task* (Verso, New York, 2015) at 96.
[126] Above.
[127] At 103.
[128] At 99.
[129] Above.
[130] At 100.

Unger also wanted new rights that would protect the interests of all members of society and ensure their ability to participate fully in the political, economic, and moral life of their society, similar to the rights enacted in our New Zealand Bill of Rights Act 1990. Ungers' rights would include rather radically, destabilization rights,[131] that is, the right to disentrench accumulations of power that serve to inhibit and disempower members of society.[132] He also proposes to change the social institutions of contract and property to bring them more in line with principles of solidarity and community.[133] These principles of solidarity and community, although they are not underscored with the relational ties of *whakapapa,* could find synergy with the *tikanga* principle of *whanaungatanga* and collective land ownership that defines the Māori world view. Gabel and Unger also show a moral case for legal reform which aligns with natural law and *tikanga's* claim that a connection between law and morality is essential. Unger intended his moral indictment of liberal legalism and his jurisprudential commitment to the practice of the "deviationist doctrine"[134] to alter social structures towards progressive and just legal reform.

By the mid-1090's, it had become commonplace to bemoan (or celebrate) the death of the CLS movement,[135] but for the decolonising theorist, the alternatives to liberal legalism put forward by utopian CLS theorists such as Gaber and Unger, offer substantial arguments that are worth revisiting. However, postmodern critical legal studies, or the neo-crits, that follow the CLS movement do not prove to be as fruitful, and offer little in the search for a shared theoretical space. This, according to West is due to the disappearance of the moral brief that once defined the CLS movement.[136] She claims that the neo-crits have gone to such lengths to disown moral commitments, and any willingness to express them; they have turned aggressively against even remotely utopian or moral arguments for change.[137] The result is a movement increasingly focused solely on the machinations of power, as reflected in law, that eschews moral critique.[138] As a result, the neo-crits alienate the decolonising theorist because they choose to endorse Foucault's "broad claim regarding the omnipresence of power is what eventually emasculated the moral critique."[139] "Everything we see and everything we know, Foucault famously argued, from the most ordinary to the most extraordinary categories of thought and speech, we see and

[131] At 119-124.
[132] At 127-143.
[133] At 143-178.
[134] At 96.
[135] West, above n 4, at 115.
[136] At 174.
[137] At 118.
[138] Above.
[139] At 165.

know because of the power of someone or some group that has so defined our categories of thought, knowledge, and speech, such that we know what we know, see what we see, and think what we think."[140]

If Foucault is correct about power, then "the realist and critical claim that both law and our knowledge of it are the product of contingent exercises of power." Whether they be sovereign power, social power, cultural power, or individual power, it corresponds that all knowledge "is a product of various constellations of power, then obviously all that we know about law is likewise."[141]

If all that we know about the law "is a function of power,"[142] "knowledge, then masks power and, more specifically, masks its origins in power. Power is both everywhere and most often hidden."[143] For example, Māori Mardsen unmasked the hidden power structures within our Resource Management Act (RMA) back in 1992, a year after the Act was passed.

The Resource Management Act, 1991, s7 Other matters states:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> kaitiakitanga:
>
> (aa) the ethic of stewardship:

In response to the section 7 of the RMA, Māori Marsden defines *kaitiakitanga* as:

> The term '*tiaki'* whilst its basic meaning is 'to guard' has other closely related meanings depending upon the context. *Tiaki* may therefore also mean, to keep, to preserve, to conserve, to foster, to protect, to shelter, to keep watch over.
>
> The prefix '*kai'* with a verb denotes the agent of the act. A *'kaitiaki'* is a guardian, keeper, preserver, conservator, foster-parent, protector. The suffix *'tanga'* added to the noun means guardianship, preservation, conservation, fostering, protecting, sheltering.[144]

Māori Marsden considered the reference to *'kaitiakitanga'* as specific.[145] "It applies to

[140] Michel Foucault *The Order of Things* (2nd ed, Routledge, London, 2001) at xvi-ix.
[141] West, above n 4, at 165.
[142] Foucault, above n 139.
[143] West, above n 4, at 164.
[144] Māori Marsden *Kaitiakitanga: A Definitive Introduction to the Holistic World View of the Māori* (Ministry for the Environment, Wellington, 1992) at 15.
[145] At 1.

traditional Māori 'guardianship' over such resources as native forests and *kaimoana."* However, in achieving the purpose of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard not only to *kaitiakitanga* but also the "ethic of stewardship."[146] The inclusion of an "ethic of stewardship" offers an opportunity for ambiguity to seep into the intention of the Act.

Māori Marsden stated:

> Stewardship is not an appropriate definition since the original English meaning of stewardship is "to guard someone else's property," apart from having overtones of a master-servant relationship. Ownership of property in the pre-contact period was a foreign concept. The closest idea to ownership was that of the private use of a limited number of personal things such as garments, weapons, combs.
>
> Apart from this all other use of land, water, forests, fisheries, was a communal and/or tribal right. All natural resources, all life was birthed from Mother earth. Thus the resources of the earth did not belong to man but rather, man belonged to the earth. Man as well as animal, bird, fish, could harvest the bounty of mother earth's resources but they did not own them. Man had but 'user rights'.[147]

The ambiguity of the RMA, s7, and the subtle inclusion of the "ethic of stewardship" provides for the Western disjunct between our material world and the spiritual, between secular and sacred. "This disconnection is linked to the capitalistic mode of production and expropriates and commodifies the land, its resources and people."[148] This piece of legislation is "a function of power,"[149] that then overrides the spiritual and human considerations, along with communal land and tribal rights of Māori.

While an account of power is a central component of any credible conception of Western law, law's coerciveness threatens any possibility of creating a shared theoretical space with the Māori world view. While what is offered here is a rather reductive view of law as power, nonetheless, it raises issues of how to approach the uncomfortable coexistence of power and *mana.* While Western legal theory struggles with issues of power, the same issues in relation to power do not exist in *tikanga Māori.* The theorist will, therefore, struggle in the search for a shared theoretical space because both Māori and non-Māori are equal protagonists, however, power and *mana* hold different meanings while their discourses are inextricably linked.

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[146] The Resource Management Act 1991, s7(aa).
[147] Māori Marsden, above n 143, at 15.
[148] At 16.
[149] Foucault, above n 139.

Building on the work of Māori Marsden and those that have followed him, it becomes a role of decolonising theory to establish where power is hidden in Western jurisprudence and unmask it. If we agree that developing and defining decolonising legal theory is equally the responsibility of Māori and non-Maori, and that achieving equality in a shared theoretical space is our goal, then assertions that *kaupapa Māori* theory is grounded in critical theory[150] merely immobilises the possibility of moving forward with decolonising theory development. While *kaupapa Māori* is clearly not 'grounded' in critical theory (it is undisputed that the theoretical foundation of *kaupapa Māori* emanates from *Papatūānuku,* and not from imported Western theories), Pihama asserts that the key elements of critical theory as a theory that challenges dominant systems of power may also be seen within *Kaupapa Māori* theory.[151] Is this apparent synergy between critical theory and *kaupapa Māori* useful in terms of advancing decolonising theory?

Critical and decolonising scholarship are both "premised on a sympathetic regard for the suffering of people in the world – and a felt moral imperative to respond to it."[152] It is scholarship that questions how law effects people, in particular Indigenous peoples. It is scholarship that is not particularly interested in "the interplay of principles, interpretations, interpretive presuppositions, interpretive strategies, and so on. It is not about making our textual-legal premises and principles the best they can be, or about the interplay between competing textual interpretations."[153] It is not at all 'doctrinal'. It is about people, and understanding 'historical trauma', and the harm sustained through colonisation, and the ways in which the law legitimates and masks our understandings of what it means to be Māori.

The Critical Theory of the Frankfurt School envisioned what Max Horkheimer and Theodor Adorno called a truly human society that would foster the freedom and meet the needs of all

[150] A Eketone "Theoretical underpinnings of Kaupapa Māori directed practice" (2008) Mai Review 1; Graham Smith *The development of Kaupapa Māori theory and praxis* (Unpublished Doctoral Thesis, School of Education, University of Auckland, Auckland, 1997); R Wiri *The prophecies of the great canyon of Toi: A history of Te Whäiti-nui-a-Toi in the western Urewera mountains of New Zealand* (Unpublished Doctoral Thesis, University of Auckland, Auckland, 2001).

[151] Leonie Pihama *Tihei mauri ora, honouring our voices, Mana wahine as a Kaupapa Mäori theoretical framework* (Unpublished Doctoral Thesis, The University of Auckland, Auckland, 2001); Leonie Pihama *He kaupapa körero: Mäori health researchers and provider views on the impact of Kaupapa Māori* (Report to the Health Research Council for the Höhua Tutengaehe Postdoctoral Fellowship, Auckland, 2010).

[152] West, above n 4, at 175.

[153] Above.

members of society.[154] Edward Said, however, insists that despite its insights into domination in modern society, the Frankfurt School Critical Theory "is stunningly silent on racist theory, anti-imperialist resistance, and oppositional practice in the empire.[155] Lucius Outlaw describes the early Frankfurt School theorists, in particular Horkheimer and Adorno, as "not known initially so much for theorizing about racial problems…as for [their] insightful critique of social domination generally."[156] Horkheimer and Adorno developed a rudimentary framework for a critical theory of racism and colonialism but failed to engage adequately with colonial racism and anti-colonial resistance.[157] The critical theorists' account of racism was Eurocentric and too narrowly focused on anti-Semitism.[158] They rightly intimated that understanding racism is necessary for an adequate critical theory of modern capitalist society; yet their focus on anti-Semitism was insufficient for this task.[159]

One function of making these theoretical parallels "has been to recognize and valorize Indigenous peoples as victims of violent oppression at the hands of European colonizers and their regimes."[160] However, the social, cultural, and psychological contexts of the Holocaust…and that of post-colonial Indigenous "survivance"[161] differ in many striking ways.[162] Without doubt, many Indigenous populations were victims of intentional killing through conflict[163] and some groups, like Newfoundland's Beothuk First Nation, were entirely eliminated through low-intensity conflict and starvation.[164] However, defining *kaupapa Māori* around the Holocaust "emphasises individual and actual events allowing for clear and succinct diagnostic utility, yet it fails to account for long-term chronic and complex individual and collective trauma."[165] While the Holocaust was a time-limited series of events covering about

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[154] Max Horkheimer and Theodor Adorno *Dialectic of Enlightenment: Philosophical Fragments* (Edmund Jephcott (translator), Stanford University Press, Stanford, 1947) at xiv.
[155] Edward Said *Culture and Imperialism* (Vintage Books, New York, 1994) at 278.
[156] Lucius Outlaw *Critical Social Theory in the Interests of Black Folks* (Rowman & Littlefield, Lanham, MD, 2005) at 93.
[157] Said, above n 154, at 278.
[158] Bruce Baun "Decolonising Critical Theory" (2015) 22 Constellations: An International Journal of Critical and Democratic Theory 3 at 420.
[159] Above.
[160] L Kirmayer, J Gone and J Moses "Rethinking Historical Trauma" (2014) 51 Transcultural Psychiatry 3 at 303.
[161] G Vizenor *Manifest Manners: Narratives on Postindian Survivance* (University of Nebraska Press, Lincoln, 1999).
[162] Kirmayer, Gone and Moses, above n 159, at 299.
[163] J Belich *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland University Press, Auckland, 1987); see also the Cape Grimm massacre in 1828 and the Black War 1828 – 1832 genocide that occurred in Tasmania, Australia, decimating the Indigenous population.
[164] Kirmayer, Gone and Moses, above n 159, at 306.
[165] R Wirihana and C Smith "Historical trauma, healing and well-being in Māori communities" (2014) 3 MAI Journal 3 at 198.

a decade, the events that constitute historical trauma for Indigenous peoples in the United States, Canada, Australia and New Zealand lasted hundreds of years and still exists today.[166]

Furthermore, theoretical comparisons between the Holocaust and Māori do not allow for racist experiences due to assimilative colonial practices. Jews who survived the Holocaust were able to return to unbroken religious and cultural traditions.[167] Indigenous peoples, on the other hand, had their livelihoods decimated by cultural suppression,[168] land alienation[169] and forced removal of children.[170] These theoretical comparisons suggest that the persistent suffering of Indigenous peoples 'reflects not so much past trauma as ongoing structural violence.'[171] Paul Gilroy says, to accomplish "a world free of racial hierarchies…we will need to reconstruct the history of 'race' in modernity."[172] Many contemporary theorists have to turn away from the Frankfurt School in favour of alternative approaches to critical theory. It is time for critical theory to modernise itself; it needs to be decolonised.

West describes the disappearance of the moral belief that once defined the critical legal studies movement as a retreat from the idea that legal scholarship should have any moral point or that the scholar should have a moral point of view. According to CLS scholars Kennedy and Klare, critical legal studies was "concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society."[173] Initially CLS was almost sentimental in its approach. "It was premised on a sympathetic regard for the suffering of people in the world – and a felt moral imperative to respond to it."[174] West describes CLS

[166] Kirmayer, Gone and Moses, above n 159, at 305.
[167] At 305.
[168] The Tohunga Suppression Act, 1907.
[169] R Boast "Te tango whenua – Māori land alienation" (2015) Te Ara - the Encyclopedia of New Zealand at 4 <http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation>.
[170] Human Rights and Equal Opportunity Commission *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, Sydney, 1997) at 651; C Wesley-Esquimaux and M Smolewski, *Historic Trauma and Aboriginal Health* (Aboriginal Health Foundation, Ottawa, 2004) at 4; J Miller *Shingwauk's vision: A history of Native residential schools* (University of Toronto Press, Toronto, 1996). It is also noted that programs seldom address the 'unique needs of Aboriginal and Torres Strait Islander peoples including the forcible removal as a child and intergenerational trauma.' See Submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment 'Aboriginal and Torres Strait Islander Perspectives on the recurrent and indefinite detention of people with cognitive and psychiatric impairment' (First Peoples Disability Justice Consortium April 2016) at 58.
[171] Kirmayer, Gone and Moses, above n 159, at 301.
[172] Paul Gilroy *Postcolonial Melancholia* (Columbia University Press, New York, 2005) at 30.
[173] Kennedy and Klare, above n 117, at 461.
[174] West, above n 4, at 175.

as impassioned and emotional[175] which suggests a movement with humanistic and caring qualities, that aligns itself with the *tikanga* principles of *kaitiakitanga* and *whanaungatanga*. However, and rather bluntly, "there is no room for a sympathetic response to the suffering of others in a Foucauldian world."[176]

"Critical Legal Studies, always on the defensive against charges of emotionalism, lack of rigor, and anti-intellectualism could not sustain its moral project against the internal challenge to it posed by the rise of Foucauldian theory,"[177] with the neo-critical legal theory movement turning "aggressively against even remotely utopian or moral arguments for change…increasingly focusing solely on machinations of power, as reflected in law."[178] This endorsement of Foucault by the neo-critical movement leaves critical theory 'exposing the dynamics of power',[179] while its moral brief becomes redundant. This leaves CLS devoid of the humanistic qualities decolonising theory requires. The CLS movement appears to be dead and the moral brief against liberal legalism appears to have died with it. Our legal landscape appears impoverished without Unger's optimism and passion for human nature, his refusal to believe human beings are inherently brutish in the Hobbesian sense, his faith in the power of responsive and humane legal and social institutions to fashion a new kind of jurisprudence. I miss the emotional aspects of CLS that current legal theory lacks. An absence of a human dimension leaves nothing for the decolonising theorist to grab hold of, it leaves no synergy with the moral framework of the Māori world view.

6.5 Filtering Critical Indigenous Studies Through a Decolonised Lens

Critical Indigenous studies as a mode of analysis can offer accounts of the contemporary world of Indigenous peoples that centre…ways of knowing and theorising.[180] Moreton-Robinson describes critical Indigenous studies as "a relationship: complicated, disorienting, delightful."[181] As an interdisciplinary field, Indigenous studies draws from and contributes to

[175] Above.
[176] Above.
[177] At 176.
[178] At 118.
[179] At 165.
[180] Aileen Moreton-Robinson "Introduction: Critical Indigenous Theory" (2009) 15 Cultural Studies Review 2 at 11.
[181] Aileen Moreton-Robinson *Critical Indigenous Studies: Engagements in First World Locations* (University of Arizona Press, Tucson, 2016) at 31.

a diverse array of theoretical and methodological perspectives, but ultimately seeks to disrupt accepted colonial binaries...[182] If the purpose of critical Indigenous studies is not limited to learning about Indigenous people, cultures and histories, but also includes an appreciation of how knowledge about Indigenous peoples is created, then Critical Indigenous theory may assist in informing researchers seeking new ways to unmask the deceptive aspects of colonial power.

In the search for more equitable practices as legal researchers, it is important to explore whether Māori and non-Māori inhabit a legal space in which they share essential theoretical understandings of the law. Is there a body of theorising that emanates from and is focused on shared epistemological origins? Answering this question is challenging as there is currently a lack of legal theoretical discourse centred on Indigenous peoples to support this thesis,[183] and furthermore, there is as yet no distinct and vibrant body of scholarship identifiable as Indigenous Legal Theory (ILT).[184] Clearly, Māori and non-Māori have their own particular perspectives from which to critique the law, however, there is also no distinct body of scholarship on the shared aspects of legal theory of Māori and non-Māori.

Critical Indigenous theory seeks to overcome the ideology that legal relevance is integral to colonial (or state) legal determinism by drawing on a raft of legal theories including legal realism, critical legal studies, radical feminism, and most significantly critical race theory to expose and understand the invisible biases against Indigenous peoples underlying and inherent in law.[185] The Canadian Indigenous scholar, Gordon Christie said this is achieved firstly by revealing ways in which the dominant system has functioned to trap Indigenous aspirations within webs of theory and principle,[186] and secondly, by building Indigenous theoretical perspectives.[187]

Critical Indigenous legal perspectives are inextricably linked to the right of self-determination.[188] The State passes itself off as exhibiting a willingness to engage with Māori

[182] M Nakata, V Nakata, S Keech & R Bolt "Decolonial Goals and Pedagogies for Indigenous Studies" (2012) 1 *Decolonization: Indigeneity, Education & Society* 1 at 120–140.
[183] Christie, above n 5, at 196.
[184] At 195.
[185] Tracey Lindberg "Critical Indigenous Legal Theory" (PhD Dissertation, University of Ottawa, Canada, 2007) at 324.
[186] Christie, above n 5, at 231.
[187] Above.
[188] Valmaine Toki "Understanding a Critical Indigenous Law Perspective to Intellectual Property" (2017) IPQ 4 at 371.

and in acts that recognise biculturalism and the partnership envisaged by the Treaty.[189] However, this willingness is conducted within a non-Indigenous legal framework that believes itself to be a framework appropriate to manage Māori issues.[190] A belief Ani Mikaere describes as an "apparently unshakable Pākehā belief in the inherent superiority of British law" and the "blind assumption of the Crown's right to sovereignty".[191] This short sightedness extends to colonial systems of knowledge production which operate from positions of *epistemic blindness* that make invisible alternate ways of knowing and being. Epistemological assumptions of a particular knowledge system provide a framework that describes what types of knowledge can be obtained along with criteria that distinguishes 'true' from 'false' understanding.[192] There is some form of *epistemic blindness* in most accounts of our laws because of the Crown's belief in its right to sovereignty.[193] This belief facilitates mechanisms used by colonisers to mask racism and colonialism. When ways of knowing become hegemonic, *epistemic blindness* inevitably leads to forms of *epistemic erasure* that negate or subjugate alternate knowledges through discursive processes that construct them as 'traditional', 'superstition', or 'ethnoscience.'[194]

After centuries of colonial domination that vanquished Māori knowledge, in the last few decades the Crown appears to have recognized the potential for Māori knowledge to address legal problems such as criminal justice for example.[195] However, Western legal theory and Indigenous knowledge represent profoundly different paradigms that are difficult to amalgamate. There is the added complication of Western scholarship being the norm for assessing Indigenous knowledge. We could start by addressing this problem by creating a decolonising agenda which would begin by addressing the historical exclusion of *tikanga Māori* in our theoretical knowledge production. While an understanding of *tikanga Māori* is crucial for theory development there is a danger of "essentializing" knowledge by privileging the voice of Māori. A collaborative investigation of legal theory in the local context is therefore

[189] Jessica Lai "What is an Indigenous right to intellectual property?" (2017) IPQ 78 at 90.
[190] Above.
[191] Annie Mikaere *Colonising Myth Māori Realities He Rukuruku Whakaaro* (Huia Publishing, Wellington, 2011) at145.
[192] G Burrell and G Morgan *Sociological Paradigms and Organisational Analysis: Elements of the Sociology of Corporate Life* (Routledge, London, 1979) at 1.
[193] Mikaere, above n 190, at145.
[194] A Sharma "Decolonizing International Relations: Confronting Erasures Through Indigenous Knowledge systems" (2021) International Studies 58 at 25-40.
[195] Valmaine Toki "A New Vision" in Valmaine Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 249.

critical. Such reflexivity will question both the imposition of Eurocentric assumptions upon Māori as well as the 'authenticity' of concepts claimed to be *tikanga*.

If only it were that simple. The Māori world view involves relational ontologies where everything living and non-living are interconnected through *whakapapa* and the cosmos. In reality this perspective is incommensurable with Western ontologies that see the world as being constructed of cause and effect relationships and objective facts. While there is a need for alternative epistemologies and ontologies to broaden our theoretical understandings, I do not think we can effectively provide the shared theoretical space for decolonising dialogue between different epistemological traditions with a well-meaning intention to incorporate multiple contexts.

Firstly, it could lead to other forms of colonial control unless we dissolve the power of the sovereign that determines what is being included and who is doing the including. Importantly, a decolonising perspective should not incorporate multiple contexts into some utopian world. Rather than attempt to subject the Māori world view to a theoretical space made up of Western rules, perhaps we can create a "decolonising perspective that asks us to imagine a 'pluriverse' – "a world in which many worlds coexist and where everything is connected to everything else."[196] This is an important step in transitioning theories of law from "objective" accounts to principles of law constructed around the idea of "relationships" and Critical Indigenous studies can assist us with this transition.

It is indisputable that much of the heavy work of colonialism has been carried out by the law, and indeed by the construction of the dominant system on a foundation of racist and colonial theoretical presumptions and positions.[197] This leads to the conclusion that the only substantive issue for Indigenous Critical Legal theory appears to be a question of how to release Indigenous issues captured within Western legal frameworks. Here in Aoetaroa New Zealand, Toki suggests a two stage analysis for Māori: first, that Māori seek "tino rangatiratanga" or Māori self-determination, a goal often difficult to achieve within Western legal constructs; and secondly, that widespread systemic change is required to both account for the harmful effects

[196] Subhabrata Bobby Banerjee "Decolonizing Management Theory: A Critical Perspective" (August 2021) Journal of Management Studies at 11.
[197] Christie, above n 5, at 231.

of the colonial process and truly honour the terms of the Te Tiriti o Waitangi.[198] Māori desire control, not a benevolent state acting in their best interests.[199] Toki further claims that understanding Critical Indigenous theory is pivotal to achieving this.[200]

6.6 Spivak and Strategic Essentialism

The desire to decolonise is almost utopian in its aims. A utopia that never manages to free itself from the shackles of its colonisers. As we search for methods of decolonisation based on decolonised legal theory, we are at risk of creating a panacea for solutions to colonialism that perhaps are not justified. Linda Tuhiwai Smith describes decolonisation as a "movement that has developed a shared international language or discourse which enables Indigenous activist to talk to each other across their cultural differences."[201] "It is true, however, that what "decolonisation" looks like to Indigenous scholars is widely variable."[202] How effective can the movement to decolonise be with such variance, and can it be effective if it excludes the colonisers? Inevitably decolonising discussions take place within scholarly environments founded by colonisers who have been influenced by the European Enlightenment and the scientific revolution.[203]

Gayatri Chakravorty Spivak is less optimistic about the utopian aims of decolonising theory. Spivak tells a story of nations following formulas since the Industrial Revolution: colonialism, imperialism, neo-colonialism and lately, transnationality which describes the principal of acting at a geographical scale larger than that of states. Transnational policies and programmes are practised by organisations such as the United Nations and the European Union, and seek to submerge national policies and programmes within these larger entities. Aihwa Ong describes transnationality as "the condition of cultural interconnectedness and mobility across space".[204]

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[198] Kiri Toki "In Defence of Fiduciary Duties: Why Fiduciary Duties Are a Step Forward, Not Sideways, for Maori" (Harvard University, Massachusetts, 2016).
[199] Toki, above n 187, at 370.
[200] Above.
[201] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (Otago University Press, Dunedin, 1999) at 110.
[202] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 85.
[203] Bernard Cohen "Scientific Revolution and Creativity in the Enlightenment" (1982) 7 Eighteenth-Century Life 2 at 41.
[204] Aihwa Ong *Flexible Citizenship: The Cultural Logics of Transnationality* (Duke University Press, London, 1999) at 4.

Spivak remarks that transnationality has severely damaged the possibilities of social redistribution in developing nations.

> We might say that transnationality is shrinking the possibility of an operative civil society in developing nations. In the shift from imperialism to neo-colonialism in the middle of this century, the most urgent task that increasingly backfired was the very establishment of a civil society. We call this the failure of decolonization. And in transnationality, possibilities of redressing this failure are being destroyed. I do not think it is incorrect to say that much of the new diaspora is determined by the increasing failure of a civil society in developing nations."[205]

Despite Spivak being considered one of the most influential postcolonial intellectuals, Dhondy described reading Spivak's prose as akin to being put through the tortuous wringer.[206] I too wrestle with most of Spivak's work, and despite even after a third re-read of her work I am usually left wondering if what I struggled with could not have been said in a simpler way. Nonetheless, despite the difficulty in interpreting Spivak's prose,[207] she did coin the term "strategic essentialism" in the 1980's, a major concept in postcolonial theory, which refers to a sort of temporary solidarity for the purpose of social action. For example, women's groups have many different agendas that make it difficult to arrive at consensus on feminist issues; "strategic essentialism" allows for disparate groups to accept temporarily an "essentialist" position that enables them to act cohesively.

Although any sort of "essentialism" is highly problematic for the knowledge it creates about the "other", there is sometimes a political and social need for what Spivak calls "strategic essentialism"[208] which might be useful to the development of decolonising theory. Spivak uses this term to refer to the strategy that various Indigenous groups might use to present themselves cohesively. According to Spivak, this temporary essentialisation could help create solidarity, a sense of belonging and identity for Indigenous groups trying to establish decolonising practices despite strong social differences existing within themselves. Thus, "strategic essentialism" is about the need to accept temporarily, an "essentialist" position in order to be able to act.[209]

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[205] Gayatri Chakravorty Spivak "Diasporas Old and New: Women in the Transnational World" in Peter Pericles Trifonas (ed) *Revolutionary Pedagogies: Cultural Politics, Instituting Education, and the Discourse of Theory* (Routledge, New York, 2000) at 6.
[206] Farrukh Dhondy "Death Sentences: A Critique of Postcolonial Reason: Toward a History of the Vanishing Present by Gayatri Chakravorty" (New Statesmen, London, 9 August 1999).
[207] Above.
[208] Gayatri Chakravorty Spivak *Subaltern Studies: Deconstructing Historiography* (Routledge, New York, 2006).
[209] Nasrullah Mambrol "Strategic Essentialism" (9 April 2016) Literary Theory and Criticism at 1.

Essentialism is the view that objects have a set of attributes that are necessary to their identity.[210] Classical Greek philosophers saw essence as the necessary characteristics of a thing (those it cannot lose without ceasing to be itself), as opposed to its accidental or possible characteristics (those it happens to have but could abandon without losing its identity as that thing);[211] non-essentialism being the belief that for any entity, there are no specific characteristics which entities of that kind must possess in order to be considered that specific entity.

Essentialism has been challenging from its inception. Plato, in the Parmenides dialogue, depicts Socrates questioning the idea of essentialism.[212] The role and importance of essentialism in biology is still a matter of debate.[213] A cursory glance to South Africa reveals essentialist social theories that contributed to inhumane political formations in the past.[214] Closer to home, we only need to consider health service provisions in New Zealand to identify how essentialism could lead to a reified view of cultural identities—for example, assuming that the increased incidence of diabetes and heart disease amongst Māori compared to non-Māori is due to racial difference rather than social causes, could lead to fallacious conclusions and potentially unequal medical treatment and life expectancies. In general, believing that culture and ethnicity are essential characteristics of people which define who they are, can have serious consequences. Essentialist…thinking lies at the core of many discriminatory and extremist ideologies.[215]

Correspondingly, there are a number of critiques of "strategic essentialism", including Spivak herself, who see the concept evolving into a means for promoting essentialism rather than as a means of analysis.[216] The concept has morphed into a theory rather than remaining a technique or strategy for understanding the complexity and fluidity of subject/object positions, of identity

[210] Richard Cartwright "Some Remarks on Essentialism" (1968) 65 *Journal of Philosophy* 20 at 615.
[211] Jonatan Kurzwelly, Nigel Rapport and Andrew Spiegel (2020) "Encountering, Explaining and Refuting Essentialism" (2020) 43 Anthropology Southern Africa 2 at 66.
[212] Samuel Rickless "Plato's Parmenides" in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Stanford University, California, Spring 2020) <https://plato.stanford.edu/archives/spr2020/entries/plato-parmenides/>.
[213] David Hull "Essentialism in Taxonomy: Four Decades Later" in Volker Wisseman (ed) *Annals of the History and Philosophy of Biology* (Universitätsverlag Göttingen, 2006) at 4.
[214] Kurzwelly, Rapport and Spiegel, above n 207, at 65.
[215] J Kurzwelly, H Fernana and M Ngum "The Allure of Essentialism and Extremist Ideologies" (2020) 43 Anthropology Southern Africa 2 at 116.
[216] George Ritzer, Michael Ryan, John Wiley & Sons (eds) *The Concise Encyclopedia of Sociology* (Wiley-Blackwell, New Jersey, 2011) at 619.

and power.[217] Spivak's understanding of the term was first introduced in the context of cultural negotiations, never as an anthropological category.[218] Spivak has since repudiated the term, dissatisfied with the manner in which the term has been deployed in nationalist enterprises to promote (non-strategic) essentialism.[219] Essentialism manifests itself in a diversity of forms and is used in multiple ways. Yet it is always potentially dangerous — even when it is mobilised strategically and in apparently worthy forms for purposes of overcoming oppressive structures.[220] Given that essentialism always carries a latency to be used for pernicious ends,[221] this thesis will discuss decolonising approaches that might lead to the development of theoretical spaces in ways that neither encourage nor rely on any form of essentialist thinking.

A rejection of Spivak's "strategic essentialism" risks perpetuating the ongoing corroboration with colonial theories of law. It is not the intention to continue to wreak havoc on Māori epistemologies. The devastation and inhumanity experienced by Indigenous peoples must stop. However, oscillating between self-determination and colonial control is self-defeating and unsustainable. It is usual for *kaupapa Māori* studies to be conducted within Western style universities. This implies an interdependence on both Māori and non-Māori theories of knowledge; an interdependence tainted by questions of morality for the coloniser, and feelings of resentment for the Indigenous person. Brendan Hokowhitu describes the current preoccupation of Indigenous theorists with the idea of "decolonisation" as having developed a schizophrenic envisioning of an authentic Indigenous self located in a precolonial past and, thus, divorced from the materiality of the present.[222] This appears to suggest that "decolonisation" is founded on ontological ideals concerning existence and identity; ontology being a typically Western theoretical construct. Decolonising theorists then, are searching for and trying to uncover the origins of identity; trying to understand what is essential to being an Indigenous person, which "necessitates the removal of every mask to ultimately disclose an original identity,"[223] all within a Western paradigm.

Given the significance of essentialism to the decolonising movement and the desire for self-

[217] Above.
[218] Susan Abraham "Strategic Essentialism in Nationalist Discourses: Sketching a Feminist Agenda in the Study of Religion" (2009) 25 Journal of Feminist Studies in Religion 1 at 156.
[219] Gayatri Chakravorty Spivak *Other Asias* (Blackwell Publishing, Malden, MA, 2008) at 260.
[220] Kurzwelly, Rapport and Spiegel, above n 210, at 66.
[221] Above.
[222] Hokowhitu, above n 201, at 89.
[223] Michel Foucault "Nietzche, Genealogy, History" in P Rabinow *The Foucault Reader* (Pantheon Books, New York, 1984) at 79.

determination by Indigenous peoples, it is unsurprising that Indigenous academics continue to frame their resistance on essentialist theories in terms of utopian desires related to identity. However, an…essentialist deployment of culture, race, tribe, nation and cosmos *inevitably* entails demarcation, denial, division and exclusion, a world divided into true believers and belongers on the one hand and outsiders on the other.[224] Jackson describes any kind of identity thinking is insidious[225] because "like all reification, it elides the line that separates words and worlds, language and life." Reducing the world to simplistic, generalised category oppositions admits neither synthesis nor resolution, and is self-perpetuating, vast areas of human experience becoming suppressed or abolished.[226] Our response must be to create a theoretical space where researchers are self-assured and work together beyond the reach of the long arm of colonialism. Our response must be to pursue a pragmatist critique of "theory" and "culture." The reality of academia is the tension and interplay *between* individual academics and *amongst* multiplicities of theories of law. We must not ordinarily accord Western legal theory an indeterminate role. Contradictoriness and the perpetual flux of theoretical experience remains our challenge as legal researchers and supports the need to collaborate together in a shared theoretical space.

It is impossible as a non-Māori scholar to decolonise legal theory in ways that do not conform to Western paradigms. Essentialist arguments are not available to me, I am not Māori. But an essentialist would argue that the key to the success of any decolonising project would be the unravelling of any interwoven epistemological knowledge and the reweaving of that knowledge free of guilt and compromise. However, no matter how tempting it is to reweave this knowledge, there remains a risk of surrounding ourselves as researchers in a decolonised utopia that nonetheless enables the continuation of colonial discourses that we are seeking to oppose.

[224] Kurzwelly, Rapport and Spiegel, above n 210, at 77.
[225] M Jackson *The Politics of Storytelling: Violence, Transgression and Intersubjectivity* (Museum Tusculanum Press, Copenhagen, 2002) at 115.
[226] Kurzwelly, Rapport and Spiegel, above n 210, at 77.

Chapter 7. Old and New Schools of Thought

7.1 Who is speaking for who? Turning the gaze upon ourselves

In this chapter, I argue that part of decolonising research involves investigating ideas about identity, engaging with self-criticism of both Māori and non-Māori, and identifying who is speaking for who, including turning the gaze upon ourselves and our research communities to identify alternative forms of knowledge that have been silenced by Western thought. Decolonisation is more than the tokenism of recognition, rights and reconciliation. The academia produced by the "myth" of universal knowledge should not filter out alternative ways of being that perhaps include moral thought and spirituality.

If we limit ourselves to discussions of self-determination for Māori that in turn enable counter discourses centred around egalitarianism and reverse racism, which in turn perpetuate the cycle of further oppression of Indigenous communities, we terminate the cycle with "Indigenous rights that are registered "undemocratic" in that they are framed as encroaching on the common rights of all and thus on "natural law" (i.e. "the order of things").[1] Utopian ideas of decolonisation and self-determination become products of "postcoloniality and an expected outcome easily recast against Indigenous peoples."[2] But what if we identified shared aspects of natural law that resisted counterdiscourse arguments. The following chapters outline how decolonising studies can invest in the production of shared ontologies through reimagined subjectivities as opposed to objectivities. What if we take Indigenous knowledge that is unintelligible to Western rationalism and reinsert it into our knowledge taxonomies so that the "incomprehensible" and "irrational" becomes an approach to law that is important to the advancement of our shared knowledge?

West argues that the legal "good" is absent in our contemporary jurisprudence[3] which amounts to "an unwarranted dereliction of duty" as academics which is "shameful".[4] She also claims

[1] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 91.
[2] At 92.
[3] Robin West *Normative Jurisprudence: An Introduction* (Cambridge University Press, New York 2011) at 11.
[4] At 203.

that the three contemporary approaches to law - natural law, positivism and critical legal studies, are all intellectual descendants of legal realism, "which diverged in unfortunate ways from its legacy."[5] Identifying legal realism as a common anchor of all three contemporary schools of thought asks us to re-examine the realist legacy in the hope of developing normative jurisprudence that denounces colonising legal theories. Reconstructing legal realism for the 21st century that includes a sociological aspect, provides the most secure foundation for the development of distinctive decolonising legal theory within a shared jurisprudential framework.

7.2 The Value of Realism for Decolonising Legal Theory

A rebirth and revival of realism that resurrects the moral strands of what was once a vital if dated intellectual movement could offer a portal for the decolonising theorist. A portal through which we can visualise the value of a realist philosophical perspective, specifically 'critical realism' as a theory to guide legal researchers searching for ways to decolonise legal theory. Joseph Maxwell's explanation of critical realism helps define the distinction between ontology and epistemology around which this discussion will be focused:

> Critical realism combines a realist ontology (the belief that there is a real world that exists independently of our beliefs and constructions) with a constructivist epistemology (the belief that our *knowledge* of this world is inevitably our own construction, created from a specific vantage point, and that there is one possibility of our achieving a purely "objective" account that is independent of all particular perspectives). All knowledge is thus "theory-laden," but this does not contradict the existence of a real world to which this knowledge refers.[6]

It is hoped that taking a realist philosophical perspective and applying this to a number of theoretical and methodological issues in legal research can provide a strong justification for decolonising legal theory, and significantly contribute to and reshape some of our existing legal theories and practices. It is not the intention to argue that 'critical realism' is the correct theoretical approach for this study, as "the constructivist epistemology of critical realism implies that no position or theory can claim to be a complete, accurate representation of any

[5] Hanoch Dagan "Normative Jurisprudence and Legal Realism" (Tel Aviv University Law School, Tel Aviv, 2012) 169 at 3.
[6] Joseph Maxwell *A Realist Approach for Qualitative Research* (Sage Publications, London, 2012) at vii.

phenomenon, including research itself, and that we should view every theory from both the "believing" and "doubting" perspective,"[7] "looking both for what insights and advantages it provides and for where its blind spots and distortions are."[8] However, it is anticipated that realism could provide new and productive ideas for legal researchers that stimulates us to think about the way we study and the methods we use, that are insightful and contribute to a paradigm shift that encourages greater equality within our current legal research environment.

After a cursory review of the literature, there appears to be no agreed definition of 'realism' but many different versions. In this study the term 'critical realism' will be used in a very broad sense as "a distinctive feature of all forms of realism is that they deny that we can have any "objective" or certain knowledge of the world, and accept the possibility of alternative valid accounts of any phenomenon. All theories about the world are seen as grounded in a particular perspective and worldview, and all knowledge is partial, incomplete, and fallible."[9] Our knowledge of the real world is inevitably interpretive and provisional rather than straightforwardly representational.[10]

Maxwell finds that critical realists thus retain an ontological realism (there is a real world that exists independently of our perceptions, theories, and constructions) while accepting a form of epistemological constructivism and relativism (our understanding of this world is inevitably a construction from our own perspectives and standpoint). This type of theory agrees that there is no possibility of attaining a single, 'correct' understanding of the world,…and that any position is independent of any particular viewpoint.[11]

Perhaps non-Māori legal researchers are epistemological constructivists and relativists in the sense that they believe that both the ontological world and the worlds of ideology, values and morals contribute to the construction of legal knowledge. And for the Māori legal researcher, adopting a critical realists approach may be a welcomed alternative to positivism. Positivists argue that theoretical terms and concepts were simply logical constructions based on, and

[7] Peter Elbow "Kinship and Social Organization" in Raymond De Mallie (ed) *Handbook of North American Indians: Volume 13: Plains* (Smithsonian Institution, Washington DC, 1984) at 974.
[8] Joseph Maxwell "Review of Jean Anyon, Theory and Educational Research: Toward Critical Social Explanation" (2010) Education Review (Online Journal) <http://edrev.asu.edu>.
[9] Maxwell, above n 6, at 5.
[10] E Frazer and N Lacey *The Politics of Community: A Feminist Critique of the Liberal-Communitariam Debate* (Harvester Wheatsheaf, New York, 1993) at 182.
[11] Maxwell, above n 6, at 5.

defined by, observational data, "fictions" that were useful in making predictions but which had no claim to any "reality."[12] Realism offers an opportunity to step away from the cold facts of a science orientated paradigm.

In contrast to positivism, Maxwell[13] finds that most critical realists hold that mental states and attributes (including meaning and intentions), although not directly observable, are part of the real world, a position denied by both logical positivism and constructivism. For Māori, mental and physical entities are equally real, although they are conceptualized by means of different concepts and frameworks found in cosmology and the Māori world view.

The attraction of realism for the decolonising theorist is its "compatibility with the idea that there are different valid perspectives on reality."[14] Critical realism has important implications for the development and conduct of decolonising legal theory. While there is considerable criticism of critical realism,[15] a realist perspective can provide innovative ways of approaching decolonising legal research. It is not that critical realism is the correct jurisprudential perspective for a decolonising agenda, only that it provides a theoretical perspective for the construction of a discussion about the development of decolonising legal theory.

One of the attractions of critical realism for the decolonising researcher is its compatibility with the idea that difference is fundamental,[16] its scepticism towards "general laws"[17] and its commitment to the existence of a real, though not an "objectively" knowable, world.[18] Perhaps critical realism and decolonising theory are mutually supporting, particularly with respect to ideas about the inclusion of "culture" in our legal frameworks. Critical realism could be an important theoretical tool for the development and implementation of decolonising research methodologies. Although there is a substantial amount of research that assumes Indigenous

[12] At 8.
[13] Above.
[14] At 9.
[15] Norman Denzin and Yvonna Lincoln "Introduction: The Discipline and Practice of Qualitative Research" in Norman Denzin and Yvonna Lincoln (eds) Sage Handbook of Qualitative Research (3rd ed, Sage, Thousand Oaks, CA, 2005) at 13; J Smith and D Deemer "The Problem of Criteria in the Age of Relativism" in Norman Denzin and Yvonna Lincoln (eds) Sage Handbook of Qualitative Research (2rd ed, Sage, Thousand Oaks, CA, 2000) at 877-896; Yvonna Lincoln and Egon Guba "Paradigmatic Controversies, Contradictions, and Emerging Confluences" in Norman Denzin and Yvonna Lincoln (eds) Sage Handbook of Qualitative Research (2rd ed, Sage, Thousand Oaks, CA, 2000) at 175-176.
[16] Maxwell, above n 6, at 9.
[17] D Little *Microfoundations, Method and Causation* (Transaction, New Brunswick, 1998) at 197.
[18] Maxwell, above 6, at 10.

focused methodologies, there is relatively little explanation of the theoretical approaches taken to research on Indigenous peoples.[19] And while none of the views expressed here regarding Māori and non-Māori culture are new, both cultures could be strengthened, and significantly reframed by a critical realist perspective.

Realists like to recruit the social sciences into law's service.[20] It assists the realist in tackling the age-old jurisprudential dilemma of the role of moral ideas in the functioning of law in society. It derives from the realist insistence that a jurists' obligation of responsible decision making pervades 'the whole of law in life' making the use of 'moral insights' critical to law.[21] Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation. Every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust.[22] The realists tendency to resort to interdisciplinary insights and evidence supports Oliver Wendell Holmes' argument that the law does not amount to a matter of just "doing the sums rights."[23] The decolonising theory to be drawn from legal realism is that the moral dimension of law is to be sought not in rules and principles of positivism, but in the process of responsible decision making which should pervade the whole of law as a social construct. The moral insights suggested by the realist analysis provide possible parallels in the literature of Western theology but also in *kaupapa Māori* and Māori cosmology.

The analogy of theology and cosmology to law suggests that legal realism, with its emphasis on the tensions that exist in law between the demands of the prescriptive rule-formulation and the appeal of interdisciplinary insights, is not the irrational philosophy that it may seem to its critics. Positivists may suspect that these ideas bring rather illicitly theological themes into the legal realm in some form of disguise that panics the scientific community.[24] However, both positivists and Critical Legal Theory argue from partial sectors of experience, whereas theological themes aim at a more comprehensive understanding of Māori and non-Māori life

[19] Tracey Lindberg "Critical Indigenous Legal Theory" (PhD Dissertation, University of Ottawa, Canada, 2007) at 324.
[20] Neil Duxbury *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995) at 80; Dagan, above n 5, at 13.
[21] Harry Jones "Law and Morality in the Perspective of Legal Realism" (1961) 61 Columbia Law Review at 801.
[22] Paul Tillich *Love, Power and Justice: Ontological Analyses and Ethical Applications* (Oxford University Press, 1954) at 15.
[23] Oliver Wendell Holmes 'The Path of the Law' in *Collected Legal Papers* (Harcourt, Brace & Co, New York, 1920) at 184.
[24] Ben Leahy "Auckland University professor resigns from acting dean role over letter claiming Māori knowledge isn't science" (New Zealand Herald, 28 July 2021) < https://www.nzherald.co.nz/nz/auckland-university-professor-resigns-from-acting-dean-role-over-letter-claiming-maori-knowledge-isnt-science>.

experience not limited to scientific or empirical assumptions.

The collapse of legal formalism may be an aspiration of the decolonising theorist who believes "the duty of weighing considerations of social advantage becomes inevitable" due to their rejection "of the notion that social progress can be judged only in terms of…scientific expertise."[25] Science can only "throw light upon the real meaning of legal rules by tracing their effect throughout the social order',[26] and as Llewellyn concluded, judges should use the information gathered on the law in action and its impact in society, as well as technical data of fact and expert opinion, in order to supplement, rather than supplant, the normative aspect of their judgment.[27] In Llewellyn's words:

> Its essence is the supplementation of legal authority on the one hand, and of ordinary common sense on the other, with such technical data of fact and expert opinion as are available, or can in the time at hand be made available, to inform a judgment. In legislation, in advocates' work, and in work of courts, in counselling, above all in administration, this comes to the fore. It is a vital style-factor; it changes the whole relation of a legal craftsman to his work and to his society. Instead of being *the* expert, by mere command of his own craft in command of all crafts, he becomes *one* expert, in immediate command only of his own craft - otherwise a co-worker.[28]

Or as Dagan stated more simply "…for the realists the ideal lawyer combines the technical expertise of the social sciences with the practical wisdom of the legal craft."[29] In other words, the lawyer is only one expert in a team of experts allowing a multidimensional and more inclusive approach to law.

The thrust of the legal realist movement in the early 1920's encouraged distrust of the judicial technique of seeming to deduce legal conclusions from so-called rules of law. Realists believed that judges neither do nor should decide cases formalistically. Despite many outdated aspects of legal realism, the realists were successful in refuting "formalist" or "mechanical" notions of law and legal reasoning.[30] However, it needs to be acknowledged that the realist of the 1920's "lacked the technical sophistication of economics we now have."[31]

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[25] Dagan, above n 5, at 7.
[26] Felix Cohen "Modern Ethics and the Law" (1934) 4 Brooklyn Law Review 33 at 45.
[27] Dagan, above n 5, at 8.
[28] Karl Llewellyn "On the Good, the True, the Beautiful in Law - Prologue" (1942) The University of Chicago Law Review at 244.
[29] Dagan, above n 5, at 9.
[30] Brian Leiter "American Legal Realism" in William Edmundson and Martin Golding (eds) *The Blackwell Guide to Philosophy in Law and Legal Theory* (Blackwell Publishing, Malden, MA, 2005) at 53.
[31] Dagan, above n 5, at 8.

Nonetheless, the decolonising theorist should not reject realism due to its out dated aspects, but instead embrace the humanist and reformist foundation of the realist movement and in doing so develop an appropriate way for responsibly integrating cultural and cosmological insights into legal discourse. And for no greater reason than because legal realism perceives human values as "pluralistic and multiple, dynamic and changing".[32] Realism encourages the decolonising researcher to combine "the technical expertise of the social sciences with the practical wisdom of the legal craft…alongside…distinctive institutional, procedural, and discursive characteristics of the various law making venues."[33] Realism offers the potential for developing a shared theoretical space.

The law is never only just about individual and group interests or political power. Nonetheless, the legal realist insists…that an account of power must play a central role in any credible conception of law…[34] Decolonising legal theory is more than just demonstrating how to survive in law's coercive environment. If decolonising scholars are to borrow ideals from the realists they must acknowledge that legal realists have neither solved the problems of morality in law nor conclusively demonstrated how morality can survive in law's coercive environment. "But because the consequences of severing law from moral reasoning are just as grave as those of conflating law with morality,"[35] the decolonising researcher's theories of law must accommodate the uncomfortable relationship between morality and power while remaining vigilant to the potentially devastating consequences of this unhappy marriage.

Kaupapa Māori theory relies on cosmology and traditional systems of thought about how the universe works. In contrast, Western law is "separated from metaphysical speculation and is expected to follow as closely as possible the scientific method."[36] From a Western perspective *kaupapa Māori* seems too burdened in cosmological premises to be of any use to scientific and objectively constructed Western legal thought. To realise decolonising legal theory new tools of research are required, this includes reaching outside of scientific thought in order to develop equitable laws in a shared legal space.

Let us for a moment reach outside our scientific thoughts on positivism, and draw into a shared

[32] Hessel Yntema "Jurisprudence on Parade" (1941) 39 Michigan Law Review 1154 at 1169.
[33] Dagan, above n 5, at 9.
[34] Above.
[35] At 10.
[36] Owen Anderson *The Natural Moral Law: The Good After Modernity* (Cambridge University Press, New York, 2012) at 2.

theoretical space ideas about *kaupapa Māori* theory and realism. If we consider *kaupapa Māori* theory is a theoretical framework that is organically Māori,[37] the idea that *kaupapa Māori* is 'organic' is relative to human nature. "This concept of human nature is basic to the study of natural law."[38] It is impossible to disconnect legal theory from beliefs about what is real. In this sense, all legal theories are "natural law" in that they all claim to best accord with human nature and reality.[39] *Kaupapa Māori* as a legal philosophy derives law from the nature of being human. Legal positivism maintains that laws are made by humans and legal realism is a theory that all law derives from prevailing social interests and public policy. All three theories of law are essentially doing the same thing; being human.

When non-Māori make strong statements against *kaupapa Māori* theory, such as in the case of those who say that knowledge derived from cosmology is not 'real,' we are reduced to theories of what is 'real,' of how human nature fits into this reality, and subsequently what is 'right' (*tika*) for human nature. For both Māori and non-Māori, theories of law, therefore, come down to questions about what is 'real,' what does it mean to be human, and what is 'right' (*tika*).

This means that it must be theoretically possible to contextualise *kaupapa Māori* within a framework of beliefs about what is 'right', human nature, and what is 'real.' To talk about *kaupapa Māori* that does not do this will be articulating conceptions of law that sit outside mainstream theoretical speculations. This may account for why *kaupapa Māori* has historically evoked opposing political philosophies, and can be, and has been used to support persistent colonising theories of law; theories of racial inferiority, deficiencies and cultural disadvantage which have then been used as a means of denying Māori access to their land, language and culture.[40]

Clearly this is unacceptable theorising and it becomes necessary to defend *kaupapa Māori* through decolonising practices. However, it is not credible to simply defend *kaupapa Māori* as a legitimate legal entity for a modern country like Aotearoa New Zealand. Instead, it becomes

[37] J Mane "Kaupapa Māori: A Community Approach" (2009) 3 MAI Review 1; L Pihama *Tungia te ururua, kia tupu whakaritorito te tupu o te harakeke: A Critical Analysis of Parents as First Teachers* (Unpublished Masters Thesis, University of Auckland, Auckland, 1993); G Smith *The Development of Kaupapa Māori Theory and Praxis* (Unpublished Doctoral Thesis, School of Education, University of Auckland, Auckland, 1997).
[38] Anderson, above n 36, at 38.
[39] At 203.
[40] L Mead *Ngā aho o te kākahu mātauranga: The multiple layers of struggle by Māori in education* (Unpublished Doctoral Thesis, Education Department, University of Auckland, Auckland, 1996).

necessary to defend *kaupapa Māori* within specific theoretical frameworks. And this situation arises simply because modern Aotearoa New Zealand failed to provide a lasting foundation for *kaupapa Māori* that confirmed a shared constitutional life.

As we study the relationship between *kaupapa Māori* and Western legal constructs, can a theory of law be constructed that does not rely on the idea of science? Can law be determined without resorting to empiricism? Epistemologically, currently Western law is expressed in positivistic terms that argue that only facts about the world known through data count as knowledge. Limiting all explanation to an empirical explanation ignores the gaps in our legal knowledge that cannot be filled through empirical research. Therefore, limiting explanations about our laws to empiricism does not advance our laws and is not helpful in assisting our pursuit of knowledge. It does however, offer a source of scepticism about difficult questions, "questions that must be answered in order to understand all the implications of empirical research."[41] Decolonising research shows that we must look elsewhere to a metaphysical foundation to support our laws. Perhaps a realist's critique of our laws would allow us to move beyond empiricism and fill the gaps in our decolonising knowledge with ideas that have been shaped by the inclusion of cultural and metaphysical examinations of our laws.

Realism also allows us to take issues of morality head on, leaning more closely towards the natural law position than a positivist one. Realism sits more comfortably with ideas that create chaos and recognise difference. "If the realist analysis is right, the day to day work of judges, law officers, and practicing lawyers involves processes far less orderly and far more intricate than the application of positive law generalizations to fact-situations falling more or less neatly within them."[42] Positive law appears to be all about commands; commands of the sovereign in particular. The chance to make alternative choices of law, for example, to apply the principles of *tikanga Māori*, "cannot but be influenced by the decision maker's *ought to be."*[43] Legal realism, with its emphasis on the inevitability of moral considerations coupled with discretion in the law, sides with the tradition of natural law, and against Austin and his positivists, on the issue of separating the law from questions of what the law is and what the law ought to be.

The law ought to be fair but it is not. Currently, formal legal doctrine does not take us closer

[41] Anderson, above n 36, at 170.
[42] Jones, above n 21, at 808.
[43] Above.

towards an understanding of the importance of 'cultural' in our decision making. Yes, "do good and avoid evil," but whose "good" and whose "evil"? How do decision-makers within Western frameworks determine what is the good and evil from the excluded cultural perspective of Māori. Yes, we can act within reason, but a just decision requires both a jurisprudence that perceives the good or *tika* of a situation and has been perceived from a sound shared theoretical intellect.

When we consider how judges judge, how prosecutors use their discretion, and how lawyers create their arguments, we need moral theory in the natural law tradition that directly addresses the points of strain in the current relationships between Māori and non-Māori, at which moral insights would be most useful. This becomes a point where the realist perspective can become very useful to decolonising theory. Choice and responsible decision making are central elements for realists.[44]

Important contemporary schools of thought branch out from legal realism and attempt to conceptualise power and science and tradition and modernity in different guises. I am guilty of "cherry picking" aspects of natural law, positivism and Critical Legal Studies to fit my decolonising agenda. I also use realism selectively to put a "moral" spin on my arguments, to construct fair and equitable visions of law that are currently unavailable. I do this intentionally in order to work out a decolonised theory of law that cultivates a distinctly shared theoretical experience. This task of "cherry picking" legal theory implies that the contest between schools of thought must be settled by comparing their usefulness for generating potential new ideas about how to decolonise legal theory.

Part of the attraction for realism in the search for a shared theoretical space is that it likes to juggle tensions; historically, tensions between power and science, and science and tradition, and tradition and modernity.[45] Post-realists are guilty of fragmenting legal arguments to suit their agendas and these agendas have dismantled the most distinctive features of legal realism: "it's difficult accommodation of power *and* reason, science *and* craft, and tradition *and* progress."[46]

[44] Jones, above n 21.
[45] See Hanoch Dagan *Realism Renewed: Essays on American Legal Realism and Private Law Theory* (Oxford University Press, New York, 2013) at 15.
[46] Dagan, above n 5, at 11.

It is not the intention to compare natural law, positivism, critical traditions and realism in order to identify legal theory that fits a decolonising agenda. The purpose of these theoretical reconstructions is to work out our own theory of law so that is cultivates a distinctively decolonised legal scholarship that symbolises what it means to be a citizen of Aotearoa New Zealand. This task of generating decolonising theory for the non-Indigenous theorist rests in comparing Western schools of thought for their usefulness for generating potential decolonising legal theory. Reimagining a realists conception of law into arguments about for example, power and *mana, aroha, ora* and balance, woven back and forth between tradition and modernity is the key to translating existing legal theory into distinctively decolonised legal theory. Developing a realists theoretical perspective allows legal scholars to expand its understanding of a wide range of legal avenues through which laws are created, applied and evaluated. Where the realists' focus is on the dynamics between power, science, tradition and modernity, these concepts assist the decolonising theorist in reimagining realists conception of law into arguments about power and *mana, aroha, ora* and balance. Realists also assist us by drawing in insights from other disciplines such as *tikanga Māori*. They create opportunities for a paradigm shift.

I am asking legal realism to shed light on our colonial institutions in general, and more specifically, I am asking legal realism to address the task of reform and formulation of our laws; I am asking legal realism to decolonise our laws. As a realist, I am deliberately searching for theoretical insights from the application of other disciplines' theories and methodologies to my research questions. This synergising of legal theory is not just the result of my own methodological invention instead "it is premised upon and justified by the legal realist conviction that in order to generate useful accounts of legal phenomena legal theorists must engage with the irreducible complexity of law and thus need to adopt a principled antipurist position."[47] The realists position strengthens decolonising theory because as researchers we have a responsibility to critique our laws as well as contribute towards their development and "one cannot discharge these obligations from any single perspective on law."[48]

The legacy of legal realism implies that synthesis of a variety of ideas must be a distinctive feature of any decolonising legal theory that we develop as researchers working together equitably. It is important that legal theory should include sociological and historical analyses

[47] Dagan, above n 5, at 13.
[48] Above.

of the law as well as comparison of different laws because these analyses can explain the evolution of colonialism and also open up our legal imaginations to alternative frameworks for constructing our laws. Adopting a realist theoretical perspective that utilises a sociohistorical analyses and a comparative law approach will provide a foundation for the consideration and inclusion of the competing agenda of *tikanga Māori* and provide portals for its possible adoption into our current legal frameworks in a more substantive manner than currently exists.

In the spirit of legal realism, I am not overly concerned with conventional ideas about the law nor Western legal traditions. I am interested in law as sociology as this appears to provide the most fertile material for a critique of the inequality that currently exists in our laws. Loyal to the realist's legacy, I will examine competing legal ideals both critically and constructively, and not be fearful of reaching conclusions that require extreme transformations of the law in order for our laws to become equitable. Indeed, as Dagan explained, "legal theory in the legal realist tradition is not limited to the happy middle; genuine insight often comes from what some perceive as extremes." Although such insights might require us to think outside our "scientific" mindset, it should nonetheless give rise to a dynamic and equitable shared theoretical space as legal researchers.

As I already mentioned, legal realism offers us a conception of law that permits the cohabitation of power and *mana, aroha, ora* and balance, woven back and forth between tradition and modernity. This conception offers a foundation for the development of decolonising legal theory while retaining our attention to the colonising influences that exist. It also allows for the synthesis of other relevant insights from other disciplinary perspectives on our laws. Thus, reimagining legal realism could make a vital contribution to the development of decolonising legal theory in the future.

7.3 Old School Realism and New Schools of Thought

A weakness of present day legal academia is its neglect of the production of decolonising legal scholarship. How we produce such scholarship is not easily answered. The task of producing decolonising scholarship is more than just adding insights drawn from other schools of thought, or disciplines such as the humanities or social sciences. The point of decolonising scholarship is not to promote a political or moral agenda. "The point is to add to our fund of knowledge

about the law and history, not to lend the weight of history to a political or moral agenda."[49] The goal should be genuine scholarship about the law and law's culture, not simply more legal arguments about law's content."[50] Decolonising scholarship should be about the study of law that includes other disciplines: an amalgam of cultural studies, realism, and postmodern inquiry for starters. Further additions could include economics, history, oral tradition and cosmology. "The foundational shift is away from making arguments about what the law is or should be from within the discipline of law itself and toward arguments about the nature of law and legal culture, from a nonlegal but disciplined vantage."[51]

From the distance I have travelled so far on my legal theory journey, I have experienced decolonising scholarship as being accountable for evaluating how law achieves and fails to achieve justice for Māori and non-Māori. It offers constructive criticism of law from a credible legal theoretical perspective and encourages debate about how the law contributes towards improving quality of life for individuals and social groups.

It is important to develop a decolonising perspective from which meaningful criticism of law can be conducted and achieving these objectives would offer the possibility of developing a distinctive decolonising legal voice. Legal scholarship has no shortage of arguments defining decolonising research and addressing issues of legal reform. However, without a theoretical perspective, legal scholars will have no distinct decolonising theoretical voice.

Developing a distinctive decolonising legal theory can in turn provide equally distinctive decolonising research tools with which to undertake constructive criticism of existing laws, their inadequacies and associated pathologies. Decolonising scholars are particularly well positioned to diagnose the pathologies created by inequities of law or even the absence of laws, due to their unique decolonising legal knowledge of law's potential value, its history of achievements and failures and its promises.

In this chapter I have tried to show what threads of theory might be useful to the decolonising theorist attempting to weave together new theory out of old. It is important to avoid repeating the same errors as old theorists. There is a quote attributed to the Dalai Lama that says "learn

[49] West, above n 3, at 180.
[50] At 190.
[51] Above.

the rules so you know how to break them properly." The decolonising theorist should be "capable of the moral and politically essential work of diagnosing the pathologies that follow from law's absence."[52] Equally, the law we have might be in need of reform, but likewise the law we do not have, and should have, needs articulation.[53]

In the context of New Zealand jurisprudence, generally, discussions about 'sovereignty' in modern times does not include *tino rangatiratanga*. The Western legal imagination largely ignores the existence of Indigenous sovereignty within our legal frameworks, yet this is surely what our democracy should demand of itself. Developing a shared theoretical space means we should be able to think beyond familiar theories and examine the complexities of our social world in new and unfamiliar ways.

Applying differing perspective to ideas about legal theory has produced unfamiliar questions about the future of legal research in Aotearoa New Zealand. Attempting to fit together disparate theories of law offers analytical insights at a national level, making the New Zealand experience central to international developments in the field of decolonising legal research. This may require New Zealand jurisprudence to be more creative if it is to develop a shared theoretical space that does not obscure fundamental problems with contemporary understandings of legal theory in Western countries where Indigenous sovereignty continues to exist.

Whatever else the decolonising theorist knows or does not know after piecing together disparate theories of law, she does know something of land confiscation, oppression, subordination, intergenerational trauma, created by the absence of *tikanga Māori,* and the stifling conformity that is present due to the over intrusive presence of the sovereign. We have every reason to expect the decolonising theorist to give a voice to these concerns. Sensitivity to law's peril and promise is the content of their expertise.[54] Failure of decolonising theory to articulate where the law over reaches or denies hope, is a missed opportunity.

Developing decolonising research supported by analysis of our current jurisprudential schools of thought offers the legal researcher portals to a shared theoretical space between Māori and

[52] West, above n 3, at 201.
[53] Above.
[54] West, above n 3, at 203.

non-Māori. An analysis of differing schools of thought plots their development and divergence from initial ideas about realism while also offering a sharp critique of their failures which is invaluable when considering reform; reform that can be significantly reimagined by a more cultural and holistic understanding of the ideas emanating from the original schools of legal realism rather than an unquestioning acceptance of the formalistic jurisprudence radiating from newer schools of thought that followed.

Dagan argues that legal realism is an important ancestor of all three contemporary schools of thought offering a subtle conception of law as a set of institutions distinguished by the irreducible cohabitation of power and reason, science and craft, and tradition and progress;[55] a cohabitation that also appears to describe the current Māori and non-Māori legal relationship. This conception, "which is torn apart by the realists' hiers,"[56] provides a foundation on which to initiate and build decolonising theories of law. Drawing on Foucault's work on sovereignty and rights, Moreton-Robinson argues that patriarchal white sovereignty as a regime of power deploys a discourse of pathology as a means to discipline Indigenous people into becoming 'good citizens', through constructing a state of exception that enables its own pathological behaviour.[57] Legal realism provides a foundation for developing decolonising legal theory that has reflected on the sustained pathological behaviour of our current coercive normative legal institutions and the relentless effort to synthesize Māori thought into Western ideals. Reimagining legal realism may hold the key to fitting together disparate theories of law.

A possible benefit of critiquing old schools of thought is to better understand how Western tradition imposes itself on the development of decolonising legal theory. Understanding Western legal tradition will not, perhaps, be able to immediately determine what a decolonising legal perspective is or ought to be, but it will hopefully be able to point to possible ways of departing from an orthodoxy that dominates legal research and, at the same time, to also reduce the risk of *tikanga Māori* being marginalised by persistent colonial attitudes. "The critical legal researcher will always run the risk of being either 'defined in' or 'defined out', of being either absorbed and neutralised by her political adversaries or excluded into a meaningless and

[55] Dagan, above n 5, at 15.
[56] At 15.
[57] Aileen Moreton-Robinson "Introduction: Critical Indigenous Theory" (2009) 15 Cultural Studies Review 2 at 12.

ineffectual existence outside of what is regarded as valuable academic work."[58] But a decolonising approach that is able to address Western legal tradition on equal terms will hopefully also identify avenues for theoretical departures from mainstream ideas that are more culturally inclusive.

Nevertheless, calls for legal reform are consistently referenced to tradition; Western tradition, a tradition that persistently resists the inclusion of the Māori tradition. Our first task then becomes a question of how do we overcome the invasive aspects of Western legal tradition? And, then a second task is how exactly do we incorporate Māori tradition?

In order to answer the first question about how the legal theorist can overcome Western tradition it becomes necessary to understand that it is Western tradition that is resisting the necessary change. "Even if the need for another approach may well be recognised, tradition presents itself as an impediment, and it will want to have its say before the overenthusiastic critic causes any serious damage…How can critical legal research overcome tradition? is articulated in the tension between the demands of the future and the obligations to yesteryear."[59]

Decolonising legal research wants to change the law. The need for change and the possible obstacles to change have been identified, and now the decolonising researcher needs to find out how the required changes can be implemented. Minkkinen claims that law can be changed by researching it in a critical way.[60] But by understanding tradition the decolonising researcher becomes trapped by an obligation to correct previous mistakes created by colonialism in order to move forward from a place Māori and non-Māori no longer wish to reside together. Does this mean uprooting ourselves completely and introducing radical reform or do we take a Joseph Raz approach, one where "the legal researcher is expected to respect the democratic mandate of the legislator and to move forward with caution."[61]

Kelsen's pure theory of law and Hart's legal positivism that followed establish legal traditions

[58] Thomas Mathiesen *Law, Society and Political Action: Towards a Strategy under Late Capitalism* (Academic Press, London, 1980) at 224–26.
[59] Panu Minkkinen "Critical Legal Method as Attitude" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, London, 2013) at 151.
[60] At 151.
[61] Joseph Raz *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press, Oxford, 2009) at 196.

that legal researchers are expected to follow. Kelsen concluded that 'tradition' or a legal norm is often understood as a set of obliging rules that regulate the work of the researcher and direct it towards something that is itself seldom seriously questioned.[62] "It is the doctrinal or 'black letter' default position from which other approaches in legal research are regarded as deviations and departures."[63] Broadly speaking, we are expected to apply legal method to our research problems. But there are alternative understandings of tradition, such as those found in *kaupapa Māori* which would enable decolonising researchers to depart from colonising traditions without having to look back to its past for theoretical reassurance.

Hopefully considering old schools of thought has been justified. There may very well be other critical perspectives, like Marxism or feminism, that I should have considered. But the main exercise in considering old schools of thought was to engage with Western tradition in order to avoid what Minkkinen described as the risk of unwittingly carrying tradition with her resulting in her blindly swapping one normative tradition for another.[64]

Considering different legal traditions allowed me to question existing prejudice and then put my own prejudice into question; it allowed me to see a wider theoretical landscape. I do not want to create decolonising theory that is limited for all the same reasons as traditional theories, but instead, create decolonising theory that is continuously questioning and being questioned. So, when attempting to answer the question of how decolonising research can change law it became necessary to consider law as a tradition. But decolonising theory requires that tradition is not understood in a normative way. Legal positivism obliges the legal researcher to follow prescribed legal rules. There is little room to question the rules. On the other hand, decolonising research offers the researcher the opportunity to ask new questions in different ways. What is it that holds Māori and non-Māori together? What epistemological markers can we detect? As we move beyond the confines of positivism and hegemonic constructions of power, beyond cultural resurgence at the peripheries of colonial ideals to a point where all researchers are questioning discourses of power which have come to define our legal frameworks, who has authority to speak?

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[62] Hans Kelsen *Pure Theory of Law* (2nd ed, translated by M Knight, University of California Press, Berkeley, CA, 1967) at 45.
[63] Minkkinen, above n 59, at 152.
[64] At 169.

When we consider what it means to share a theoretical legal space as researchers, there is a desire to frame questions of identity beyond the incongruity of what it means to be a dispossessed people and those Māori who seek *tino rangatiratanga*, and colonisers and a State offering restitution. Decolonising research allows us the opportunity to unpack the disparate theories of law. It asks us to question the logic of ethnic identity and the risks associated with the compulsion to converge theories of law.

Ronald Dworkin argues that when interpreting rules, judges should consider the context and, if necessary, appeal to broader principles as "law's empire is defined by attitude, not territory, power, or process… It is an interpretive, self-reflective attitude addressed to the political structure as a whole."[65] HLA Hart also discussed areas of indeterminacy in law, where judges may exercise discretion as "in every legal system there will be, as we have seen, some cases where the rule is silent…the law is fundamentally incomplete: it has what I shall call a 'penumbra of uncertainty'…the judge has a discretion."[66] Hart appears to be suggesting that judges may draw on moral and other considerations. Correspondingly, decolonising theories need to arrive at a point beyond legal positivism and formalistic ideas about the law, beyond hegemonic constructions of power, beyond neo-colonial ideas about how Māori should behave in modern times, beyond cultural assertions at the peripheries of colonial frameworks, to a point where both Māori and non-Māori are questioning discourses of power within disparate areas of the law which have come to define New Zealand society.

Western theories of law are understood as the expressions of those who make the law; the sovereign. However, *kaupapa Māori* theory does not correspond with Austin's idea of law as the command of a sovereign. Does a legal theory need to align with the command of a sovereign in order to be validated? Toki explains that *tikanga*, as a discrete system of law focuses on communities and societies based around smaller social-political groupings and economies. The smaller size of the group anticipated consensual enforcement of laws, rather than enforcement by objective courts and juries. Upon a stalemate in consensual negotiations, *rangatira*, leaders with *mana*, would exercise their influence to make a decision.[67]

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[65] Ronald Dworkin *Law's Empire* (Harvard University Press, Massachusetts, 1986) at 410.
[66] HLA Hart *The Concept of Law* (3rd ed, Clarendon Press, Oxford, 2012) at 128.
[67] Valmaine Toki "*Tikanga Māori* – A Constitutional Right? A Case Study" (2014) 40 Commonwealth Law Bulletin 1 at 37.

If we are to make any tentative theoretical analogies between Western ideals and the Māori worldview, we need to set aside the sovereign, and consider basing our speculations on *kaupapa Māori* theory that synergises with natural law theory, positivism, critical legal theory and realism because all laws are derived from nature; they establish a standard or set a legal precedent; and they are all subject to change.

Chapter 8. Theoretical Struggles in Law

Give sorrow words; the grief that does not speak knits up
the o'er wrought heart and bids it break.

William Shakespeare, *Macbeth*

8.1 Denying Western Theories – Liberating Kaupapa Māori Theory

As legal researchers we are researching legal situations as a means of gathering a greater understanding of a particular subject. "Research adds to, is generated from, creates or broadens our theoretical understandings."[1] However, as New Zealand society becomes increasing diverse and culturally complex we encounter situations that Deleuze describes as "situations which we no longer know how to react to, in spaces which we no longer know how to describe.[2]

As researchers we are faced with the challenge of creating a legal language and corresponding theory to describe these spaces. Thinking with theory can assist in the development of ways in which to decolonizing legal research methodologies. The challenge to researchers is to use legal theory in order to understand the data of our research as more than "representational", theory that "helps us to avoid being seduced by the desire to create a coherent and interesting narrative that is bound by themes and patterns."[3] The challenge is the pursuit of "innovative theory building" that decolonises our current legal frameworks.

"Indigenous peoples have been, in many ways, oppressed by theory…theories that have not looked sympathetically or ethically at Indigenous peoples."[4] Most theorising about Indigenous peoples has historically taken an anthropological approach. To date there has only been a

[1] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 39.
[2] Gilles Deleuze *Cinema II* (Translated by Hugh Tomlinson and Robert Galeta, University of Minnesota Press, Minneapolis, 1989) at xi.
[3] Alecia Jackson and Lisa Mazzei *Thinking with Theory in Qualitative Research* (Routledge, London, 2012) at viii.
[4] Tuhiwai Smith, above n 1, at 39.

modest contribution to theoretical development by Indigenous scholars.[5] However, legal theory is important for Indigenous peoples as it helps them to make sense of their cultural reality in a modernist world. Linda Smith describes the importance of theory for Māori in the following way:

> It enables us to make assumptions and predictions about the world in which we live. It contains within it a method or methods for selecting and arranging, for prioritizing and legitimating what we see and do. Theory enables us to deal with contradictions and uncertainties. Perhaps more significantly, it gives us space to plan, to strategize, to take greater control over our resistances. The language of a theory can also be used as a way of organizing and determining action. It helps us to interpret what is being told to us, and to predict the consequence of what is being promised. Theory can also protect us because it contains within it a way of putting reality into perspective. If it is a good theory it also allows for new ideas and ways of looking at things to be incorporated constantly, without the need to search constantly for new theories.[6]

The problem posed by Smith's theoretical ideology is that at some point it will encounter theoretical opposition. For Smith "this means struggling to make sense of our own world while also attempting to transform what counts as important in the world of the powerful."[7]

The next step in the pursuit of "innovative theory building" then becomes a question of how to decolonise legal theory. How do we prevent Eurocentricisms permeating our methodologies and the theories that inform them? Does the decolonisation of legal theory mean a total dismissal of Western theory and knowledge? Or is it about collaborating our concerns and worldviews and creating a shared theoretical perspective? While employing the principles of *tikanga Māori* and *kaupapa Māori* theory are essential tools in our research, it is not just an understanding of the tools of research that is fundamental. Of perhaps even greater importance are "the conceptual tools, the ones which make us feel uncomfortable, which we avoid, for which we have no easy response."[8]

As we move to engage with decolonising our research practices as a formalised process rather than just an ideology, the challenge lies in thinking about relationships, rather than individuals. Recognising the need to decolonise our research is the easy part. Creating the processes of decolonisation requires much more acumen. Decolonising legal research is a process of making and unmaking, arranging, organizing and fitting together disparate areas of law. It is also about

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[5] See Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 196.
[6] Tuhiwai Smith, above n 1, at 40.
[7] Above.
[8] At 41.

asking not only how we are connected as legal researchers but also asking what new jurisdictions are created by these connections.

Kaupapa Māori theory is a theoretical framework that is organically Māori.[9] There is a general agreeance that *kaupapa Māori* theory traces its origins back to Papatūānuku.[10] However, Pihama claims that as a theoretical framework *kaupapa Māori* theory is still developing.[11] This implies that new knowledge is being generated. The idea that *kaupapa Māori* theory is still evolving is an important aspect to consider. Graham Hingangaroa Smith asserts the right for Māori to be Māori on their own terms and to draw from their past to provide understandings and explanations of the world.[12] Clearly the political agenda of the State sits uncomfortably alongside the cultural aspirations of Māori. However, *kaupapa Māori* theory, having derived from organic Māori origins, provides an already existing theoretical process to address the struggles with the State and the inherent power relationships within those struggles.

Kaupapa Māori theory is not constructed in the adversarial and individualistic fashion that is characteristic of Western theories. It does not acknowledge the existence of superior knowledge or consciously deny the rights of Pākehā to their philosophical traditions, culture or language. Its only assertion is "of the right for Māori to be Māori on our own terms and to draw from our own base to provide understandings and explanations of the world."[13]

A key concept of *kaupapa Māori* is *whānaungatanga. Whānaungatanga* is all about relationships and shared experiences. Knowledge is gained from these relationships but is owned by the cosmos. The knowledge is not new, it has always been there in the cosmos. What is new, is the relationship. Perhaps then, the idea of *kaupapa Māori* theory evolving is insubstantial. *Kaupapa Māori* theory has no need to evolve. As *kaupapa Māori* theory moves through history it simply creates a new set of relationships to apply to the existing knowledge.

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[9] J Mane "Kaupapa Māori: A Community Approach" (2009) 3 MAI Review 1; Leone Pihama *Tungia te ururua, kia tupu whakaritorito te tupu o te harakeke: A Critical Analysis of Parents as First Teachers* (Unpublished Masters Thesis, University of Auckland, Auckland, 1993); G Smith *The Development of Kaupapa Māori Theory and Praxis* (Unpublished Doctoral Thesis, School of Education, University of Auckland, Auckland, 1997).

[10] Te Ara: The Encylcopedia of New Zealand <https://teara.govt.nz/en/papatuanuku-the-land>. In Māori tradition, Papatūānuku is the land. She is a mother earth figure who gives birth to all things, including people. Trees, birds and people are born from the land, which then nourishes them. Some traditions say that the land first emerged from under water. In the Māori creation story, Papatūānuku had many children with Ranginui, the sky father. Their children pushed them apart to let the light in. The children had more children, including birds, fish, winds and water. They became the ancestors of everything in the world today.

[11] Leonie Pihama "Kaupapa Māori Theory: Transforming Theory in Aotearoa" (2010) 9 He PuKenga Kārero Raumati (Summer) 2 at 10.

[12] Smith, above n 9.

[13] Pihama, above n 11, at 11.

Ideas about new theories already belonged to the cosmos, to all the relations that it has formed, not to contemporary researchers claiming new theoretical ideas as their own.

Gaining theoretical knowledge as researchers and our relationships with that knowledge is something that we as researchers are accountable to. And therefore, it becomes culturally inappropriate to create new knowledge or to use knowledge out of context; in effect, what is needed is an understanding of the relationships that go into forming *kaupapa Māori* theory, or indeed any legal theory*;* as researchers we are building a relationship with an existing Indigenous or non-Indigenous idea or knowledge. This is evidenced in the intergenerational relationships that forms between Māori peoples, their sacred knowledge and places called *whakapapa.* Elders, *kuia* and *kaumātua,* have built up a relationship over generations with the sacred knowledge that they are entitled to. Knowledge is relational, experienced, and expressed in sensuous terms, in stories, and critical personal narratives that locate the person in moral relations with others.[14] To strip Māori knowledge of its relationships would amount to use of knowledge without accountability.

Clearly ideas about legal theory do not belong solely to Pākehā. Bell Hook talks about "the race for theory" and the ways in which new theory is being constructed. Hook explains that while it is important to engage and develop theory, it must be grounded in experiences and practice, without which any theory development becomes prescriptive and elitist.[15]

Graham Hingangaroa Smith asserts that theory is a central problem in the development of liberatory processes which can transform the lives of subordinated groups.[16] Smith's "liberatory theory" speaks from a political position that understands the injustice and oppression experienced by Māori. Without such a political position the need for liberatory theory would be redundant. The recognition of the need for theory to be liberatory, and that this recognition is located in an understanding of oppression, of pain, of struggle, and could possibly be transformative is not disputed.[17] However, is it the responsibility of *kaupapa Māori* to evolve into a liberatory theory for Māori? Or is it the responsibility of Pākehā to change the Eurocentric orientation of Western scholarship?

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[14] M Meyer *Ho'oulu: Our Time of Becoming: Hawaiian Epistemology and Early Writings* (Ai Pohaku Press Native Books, Honolulu, 2003).
[15] Bell Hooks *Teaching to Transgress* (Routledge, London, 1994) at 70.
[16] Smith, above n 9, at 131.
[17] Hooks, above n 15, at 70.

Graham Smith suggests that theory is a definite site of struggle between Māori and non-Māori, but that the struggle for a theoretical space to describe the Māori worldview is a worthwhile struggle. Pihama describes this struggle in terms of a contested theoretical space.[18] With the assistance of "liberatory theory" Māori are challenging the dominance of Western theories. This type of "liberatory theory" could be perceived as threatening to those who advocate the dominance of Western theories.

Pihama defines "liberatory theory" as "also about Māori constituting theory within our own terms." And Sheilagh Walker argues that Māori academics engage in theory because of their engagement in the struggle for *kaupapa Māori.* This appears to suggest that an understanding of theory somehow assists in legitimising *kaupapa Māori*. This seems reasonable as we require an understanding of theory in order to put something into practice. In Walker's terms, however, "our struggle becomes our theory"[19] would appear to suggest that *kaupapa Māori* somehow has to evolve into a liberatory theory to overcome the oppression of colonialism.

Walker also suggests that *kaupapa Māori* theory is not defined within Western philosophical traditions but through a *kaupapa Māori* praxis,[20] However, if *kaupapa Māori* is not a theory in the Western sense (that is, it does not subsume itself within Western epistemologies that privilege dominant conceptualisation and worldviews over others), then it raises issues with regard to the origin of the tools used to develop these liberatory endeavours.

In attempting to address the problem of the Western dominant conceptualisations of law, when seeking to develop liberatory theories, is there not a risk that in their attempt to change the orientation of Western scholarship, attempting to validate *kaupapa Māori* requires constant reflection on the tools that Māori choose to achieve this? Is there not a risk that in seeking to understand the theories of the dominant partner, there is a constant risk of liberatory theories becoming tainted with Eurocentricisms?

A fundamental premise on which *kaupapa Māori* theory is argued is that in order to understand, explain and respond to issues for Māori, there must be a theoretical foundation that has been built from *Papatūānuku,* not from the building blocks of imported theories. However in order to change the orientation of Western scholarship it becomes necessary to understand it, which

[18] Pihama, above n 11, at 9.
[19] Sheilagh Walker *Kia tau te rangimarie: Kaupapa Māori theory as a resistance against the construction of Māori as the 'Other'* (Unpublished Masters Thesis, University of Auckland, Auckland, 1996) at 119.
[20] Above.

includes an understanding of theory. There is no disputing that legal theory in Western terms deserves to be resisted by Māori. But while one serves to validate *kaupapa Māori* theory in Indigenous terms, would it be short sighted to deny that there are theories of Western origin that could prove useful in the search for a shared theoretical space as researchers?

Kaupapa Māori theory provides Māori with a continued tradition of thinking, explaining and understanding the Māori world since creation that is not influenced by colonising forces. It can also be argued that *kaupapa Māori* theory is an evolving theoretical framework based on the experiences of collective Māori movements;[21] movements that have been engaged in a struggle within academic institutions for the recognition, validation and affirmation of *kaupapa Māori* as a theoretical framework. While it can be argued that the organic nature of *kaupapa Māori* allows for a range of theoretical expressions to support those struggles, it is the struggle with the practical application of *kaupapa Māori* in a colonised space that stifles the development of liberatory theory that could free both Māori and non-Māori from its Eurocentric shackles.

8.2 The Character of Decolonising Legal Theory

One feature of decolonising legal scholarship that the existing literature establishes beyond dispute is a lack of consensus on what exactly decolonising scholarship is. Legal scholars, both Māori and non-Māori, are doing very different research both in terms of the methodologies they use and the goals they seek to accomplish the task. Consequently, describing the character of decolonising legal scholarship risks ignoring important distinctions that in turn render it an ideological but redundant discipline.

Richard Posner described "legal theory" as the study of law from the outside using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system.[22] This definition conveniently sums up Western legal thought in a nut shell. However, adding the adjective "decolonising" to the idiom "legal theory" as defined by Posner, creates a very different character of legal theory. Meir Dan-Cohen describes "legal theory" as a rough synonym of jurisprudence or general jurisprudence and it concerns questions regarding the

[21] Pihama, above n 11, at 12.
[22] Richard Posner "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100 Harvard Law Review 761 at 779.

nature of law, the meaning of its normativity, its general structure and sources and so on.[23]

In contrast, "decolonising legal theory," appears at odds with Posner's definition concerned with substantive, normative legal problem solving; instead seeking self assuredly to regulate the nature of human relationships through the application of *kaupapa Māori* theory. This differs quite dramatically from Posner's more traditional genre of legal scholarship which is concerned predominantly with doctrinal analysis, judicial decision making and the conduct of individual legal practitioners; instead focusing on relationships, negotiating boundaries and working to create and hold safe space with corresponding behaviours;[24] *kaupapa Māori* theory has a social purpose.

Here lies the potential for disagreement regarding the character of what amounts to "legal theory" whether it be decolonising or not. Decolonising legal theory ventures so far as to hint at a decline in Western law's autonomy, "a decline associated with law's increasing dependency on various other disciplines.[25] For Posner the law is autonomous because it depends upon specific legal materials like judicial opinions, statutes, and rules.[26] Posner is content for the law to lose its autonomy because the practice of law should also include the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system to include non-legal materials.[27] He is advocating law's revision. Like Posner, legal realists also believed that legal practice could be improved through the incorporation of non-legal insights.[28]

Tying law to social and cultural discourse is not a new idea. Rudolf von Jhering entertains these ideas as early as 1877 in his text *Law as a Means to an End*.[29] And Oliver Wendell Holmes in 1920, then takes Jherings' ideas of tying law to social purposes and develops them further.[30] When contemplating possible character traits that might define decolonising legal theory, Oliver Wendell Holmes' ideas provide a useful starting point. He finds that legal reasoning

[23] Meir Dan-Cohen "Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience" (1992) 63 University of Colorado Law Review at 570.
[24] Taina Pohatu "Āta: Growing Respectful Relationships" (2013) Journal of Psychotherapy Aotearoa New Zealand 17(1) at 13-26.
[25] Dan-Cohen, above n 23, at 570-1.
[26] Posner, above n 22, at 771.
[27] At 779.
[28] Zipporah Batshaw Wiseman "The Limits of Vision: Karl Llewellyn and the Merchant Rules" (1987) 100 Harvard Law Review 465 at 493.
[29] Rudolf Von Jhering *Law as a Means to an End* (1877) (Translated by Isaac Husik, The Law Book Exchange Limited, New Jersey, 1999) at 325.
[30] Oliver Wendell Holmes *The Path of the Law* (1897) 10 Harvard Law Review 457 at 1.

should be concerned with providing reasons that refer to the "social ends of law"; to "considerations of social advantage."[31] Those responsible for making and developing the law "should have those ends articulately in their minds."[32]

Holmes helps us extract ourselves from the shackles of colonial discourse by suggesting we need to study "the ends sought to be attained and the reasons for desiring them,"[33] opening the doors to law as an interdisciplinary profession. Holmes in 1920, invites us to contemplate that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[34] Both statistics and economics now frame present day legal policy initiatives. But a century later, our future man has become a politically correct "person", and furthermore, a person of culture with a social history.

Around the same period, Roscoe Pound called for "'team-work' between jurisprudence and the other social sciences."[35] Pound insisted that jurists must take account of the "social facts" and "the actual social effects of legal institutions and legal doctrines."[36] Felix Cohen described law as "a study of the consequences…in terms of human motivation and social structure".[37] It involves "concrete human values" and tests "the effects of law upon human desires and feelings."[38]

It was Oliver Wendell Holmes who said "it is on the question of what shall amount to a justification, and more especially on the *nature of the considerations* which really determine or ought to determine the answer to that question, that judicial reasoning seems…often to be inadequate.[39] Tying law to social and cultural discourse offers decolonising legal theory the opportunity to confront the practice of precedent which has cast a shadow over how Māori

[31] Above.
[32] Oliver Wendell Holmes *Law in Science and Science in Law* (Address Before the New York State Bar Association, 17 January 1899).
< http://www.minnesotalegalhistoryproject.org/assets/Holmes-%20Law%20In%20Science-K.pdf>.
[33] Wendell Holmes, above n 30, at 1.
[34] Above.
[35] Roscoe Pound "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 Harvard Law Review at 510.
[36] At 513.
[37] Felix Cohen "Transcendental Nonsense and the Functional Approach" in Lucy Kramer (ed) *The Legal Conscience: Selected Papers of Felix S Cohen* (Yale University Press, New Haven, 1960) at 56.
[38] Felix Cohen "Modern Ethics and the Law" in Lucy Kramer (ed) *The Legal Conscience: Selected Papers of Felix S Cohen* (Yale University Press, New Haven, 1960) at 31.
[39] *Vegelahn v Guntner* 167 Mass 92, 105-06, 44 NE 1077 at 1080 (1896) (dissenting opinion)(emphasis added).

experience the law since the beginning of colonisation. Karl Llewellyn believed that the law is little more than putty in the hands of judges who are able to shape the outcome of cases based on their personal values or policy choices.[40]

Posner, who is generally viewed as a moral sceptic,[41] offers some interesting insights into doctrinal law. Once criticised for stating "I see absolutely no value to a judge of spending decades, years, months, weeks, days, hours, minutes, or seconds studying the Constitution, the history its of enactment, its amendments, and its implementation."[42] He went on to say "I pay very little attention to legal rules, statutes, constitutional provisions… A case is just a dispute. The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute? The next thing…is to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favour of that sensible resolution. And the answer is that's actually rarely the case. When you have a Supreme Court case or something similar, they're often extremely easy to get around."[43]

Our caselaw is scattered with examples of decisions that have weighed heavy on Māori. Edward Robinson described the practice of precedent as "the principle that the concurrence of a judge with his predecessors is a direct test of the validity of his decision." It allows for "a habit of mind in which a stupidity may be perpetuated on the grounds that it is well-established."[44] This "conservative logic"[45] has perpetuated inequality within our current legal system. The only way of "attaining an improved set of values as to what courts ought to do is by developing decolonising legal theory which "thoroughly discredits many of the things courts have been thought to do."[46]

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[40] Karl Llewellyn *The Bramble Bush* (Columbia University Press, New York, 1930) at 3.
[41] Richard Posner "The Problematics of Moral and Legal Theory" (1998) 111 Harvard Law Review 7 at 1642.
[42] Richard Posner "Supreme Court Breakfast Table: Law School Professors Need More Practical Experience: Entry 9: The Academy is out of its Depth" (Slate, 24 June, 2016) < https://slate.com/news-and-politics/2016/06/law-school-professors-need-more-practical-experience.html>; Nina Totenberg "Federal Judge Richard Posner: The GOP Has Made Me Less Conservative" (NPR, 5 July, 2012) <https://www.npr.org/sections/itsallpolitics/2012/07/05/156319272/federal-judge-richard-posner-the-gop-has-made-me-less-conservative>.
[43] Adam Liptak "Exit Interview with Richard Posner, Judicial Provocateur" (New York Times, 11 September 2027) <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.
[44] Edward Robinson "Law - An Unscientific Science" (1934) 44 Yale Law Journal 235 at 256.
[45] At 264.
[46] Above.

Robinson was keen for legal scholars to become "genuine social engineers; for such engineering to be successful, legal scholarship should apply social scientific methods for the practical solution of sociolegal problems."[47] It seems that decolonising theory can draw from Robinson's legacy by borrowing from the methodology of another discipline (eg. *kaupapa Māori*) to explain the limitations of legal doctrine and call for its reform. Rather radically, Dagan and Kreitner, suggest that this could occur "with no reference, explicit or implicit, to the concept of law or to the possible constraints of law's constitutive characteristics."[48]

George Priest claimed that law school curricula will always follow the most persuasive explanations of the law and that the best writing about the legal system *is* interdisciplinary.[49] Priest's perspective shapes legal scholarship as being specialised according to separate social science disciplines which would result in law schools that are structured as "a set of miniature graduate departments in the various disciplines."[50] Priest does not imply that legal doctrine should be neglected but is open minded enough to suggest that interdisciplinary research includes methodologies of other disciplines.[51] He too rather radically claimed that it is difficult to justify "why law is a subject worthy of study at all," and even went as far as denying even the utility in "extensive knowledge of the intricacies of legal doctrine and legal argument."[52]

Priest's perspectives align themselves with decolonising ideas and Indigenous thoughts about how we define law. In *Te Reo* there is no direct translation for the word "law". In searching for a translation that aligns with Western ideas about law, *tikanga*, a Māori concept that incorporates practices and values from *mātauranga Māori* or Māori knowledge[53] seems the most appropriate translation. However, *tikanga,* when translated into the English language elicits a wide range of meanings that encompass a customary system of values and practices that have developed over time and are deeply embedded in the social context.[54] Māori scholar Hirini Moko Mead views *tikanga* from several perspectives that include the control of interpersonal relationships, codes of conduct and moral judgments about what is the right/*tika*

[47] At 236.
[48] Hanoch Dagan and Roy Kreitner "The Character of Legal Theory" (2011) 96 Cornell Law Review at 675.
[49] George Priest "Social Science Theory and Legal Education: The Law School as University" (1983) 33 Journal of Legal Education 437 at 440.
[50] At 441.
[51] George Priest "The Growth of Interdisciplinary Research and the Industrial Structure of Legal Ideas: A Reply to Judge Edwards" (1993) 91 Michigan Law Review at 1936.
[52] Priest, above n 49, at 438.
[53] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Press, Wellington, 2003) at 11.
[54] Tikanga <https://maoridictionary.co.nz/search?keywords=tikanga>.

way of doing something.[55] None of these translations mentions the word "law" directly. Defining *tikanga* seems to be more connected to discussions about individual and group behaviours. Llewellyn insisted that studying law as a liberal art, by combining "technique, the intellectual side, the spiritual, the true, the beautiful, the good" - is the best practical training since it accords students "vision, range, depth, balance, and rich humanity,"[56] which are all key for developing effective decolonising theory. The law student of the future will be equally out-of-place without an education of increasingly greater sophistication in social science theory.[57] The Hon. Sir Joe Williams, Justice of the Supreme Court, said "it's extraordinarily difficult to be an effective lawyer these days if you don't have some grounding in the basics of tikanga."[58] He went on to add that "Interestingly, I think where we're getting to is that *tikanga* appears to be civilising the more barbaric aspects of the individualisation of the Enlightenment…the challenge is to integrate, to synthesise, to weave, the best of both of these two systems into something that is bigger and better than each individually".[59]

8.3 The Study of Power and Reason Through Realism

The act of *balancing* aligns itself with a fundamental tenant of Māori society. The ultimate goal of *tikanga Māori* is balance, balance within the individual and balance within the community.[60] Dagan and Kreitner describe Western legal theory, on the other hand, as typically structured…around…interrogating the law as a set of coercive normative institutions."[61] Perhaps they are correct. Afterall, Austin too, emphasised law's coercive dimension;[62] Kant argues for a distinctive moral principle, which restricts all coercive power to the subjugation

[55] Mead, above n 53, at 11.
[56] Karl Llewellyn "The Study of Law as a Liberal Art" in Karl Llewellyn *Jurisprudence: Realism in Theory and Practice* (The University of Chicago Press, Chicago, 1962) at 394.
[57] Priest, above n 49, at 441.
[58] Joel Maxwell "Justice Joe Williams on Te Reo Māori and Synthesising Aotearoa Law" (Stuff, 18 September 2020) < https://www.stuff.co.nz/national/122794406/justice-joe-williams-on-te-reo-mori-and-synthesising-aotearoa-law>.
[59] Above.
[60] Mead, above n 53, at 31.
[61] Dagan and Kreitner, above n 48, at 681.
[62] John Austin *The Province of Jurisprudence Determined* (1932) (Hackett Publishing Company, Indianapolis, 1998) at 9-33.

of reason;[63] and some Marxist theories maintain that law's reason serves power.[64] Ideas about "power" infiltrate all aspects of Western legal thought, but are largely absent from *kaupapa Māori* theory.

I like to wear a realist's cap because I believe legal realism makes for good legal theory and can assist us to decolonise our legal academia. But I also respect the fact that Māori may not share my thoughts on realism. Clearly our jurisprudence would be impoverished and limited in scope if we all thought like legal realists. While I consider legal realism provides a foundation to balance the challenges of reason and power, and this act of *balancing* aligns itself to the fundamental tenant of Māori society, it is possible that *kaupapa Māori* may provide a completely different interpretation on this *balancing* relationship between reason and power.

Setting aside issues around interpretation for a moment, the realist's conception of law helps here as it offers a framework for articulating the idea that, while power and reason are essential components of Western law, it can concurrently appreciate the difficulties of their cohabitation with *kaupapa Māori* theory. Realists offer decolonising jurisprudence the opportunity to go "beyond adjudication to consider the numerous other arenas that are replete with law-making, law-applying, law-interpreting, and law-developing functions.[65]

Theoretical arguments that are overly simplistic and reductive will not be convincing, because attempting to chop up the complex task of theory making into sizeable chunks in an attempt to make the complex issue of legal theory more easily digestible will not ultimately be persuasive. But understanding the complete phenomenon of how to decolonise legal research requires a reductive account as tentative steps are always advisable in the initial stages of theory building. Ultimately, perhaps the only requirement of legal theory is that it proves useful and is hopefully "true." An added bonus might be that it provokes us to think and consider alternatives to the current status quo. "As should be clear by now, the very terms of reference for what would make a legal theory good or valuable are quite up for grabs."[66] I use legal realism in this thesis as an example of what legal theory might have to offer a shared theoretical space in

[63] Arthur Ripstein *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, Cambridge, MA, 2009) at 4-29.
[64] Evgeny Bronislavovich Pashukanis *The General Theory of Law and Marxism (1924)* (translated by Barbara Einhorn, Transaction Publishers, London, 2002) at 63.
[65] Neil Komesar "Imperfect Alternatives: Choosing Institutions in Law" (1994) Economics and Public Policy at 3-13.
[66] Dagan and Kreitner, above n 48, at 682.

decolonising scholarship. I use realism to broadly navigate the coerciveness of colonialism and the resulting state monopolisation of power, but more specifically to highlight the hidden dimensions of law's power within our academic institutions. It is in this merging of colonial attitudes with notions of Western legal theory that allows universities to obscure law's coerciveness. These attitudes provide the moral permission for theory-making that has dehumanised Māori. "These practices have been categorised by [Indigenous] scholars as examples of epistemic violence on a people's entire sense of knowing and being."[67]

Our reluctance to challenge the blurring of law's coerciveness by existing legal theory is troubling. However, realists take on the challenges created by the concealment of law's coerciveness. The realist's discussion includes not only issues of power and interest, "they insist that law is also a forum of reason and that modes of legal reasoning often function as constraints on the choices of legal decision makers."[68] This is good news for decolonising theorists as "law is not only about interest or power politics; it is *also* an exercise in giving reasons."[69]

For decolonising theory to be effective it needs to become truly inventive to overcome the constraints of legal decision makers. "Reasons are appeals to a host of values in an attempt to justify law's coercion."[70] These reasons could include Indigenous values. For example, *mana ōrite* is a cultural metaphor which calls for us to view the *mana* of others as being *ōrite,* that is, alike, similar, identical or equal to our own. Such positioning, within relationships of interdependence, brings reciprocal responsibilities to maintain and grow the *mana* of the other.[71]

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[67] Linda Tuhiwai Smith and Alister Jones "Report of the Taskforce" (University of Waikato Council, Hamilton, April 2021) at 13. In 2020 the University of Waikato, Hamilton, New Zealand, was the subject of a number of claims about racism. While the specific complaints of racism were found to be unwarranted, the report of Hon Hekia Parata and Sir Harawira Gardiner highlighted that as a university founded in settlement history and adhering to Western university traditions and cultures, there was structural, systemic and casual discrimination at the University of Waikato. In October 2020, a Taskforce led by two senior members of staff was formed to develop a plan to address the issues raised in the Parata Gardiner Report. Following consultation with students and staff, the Taskforce presented their report to Council at its meeting on 30 March 2021and it was unanimously accepted. This report presents to the University of Waikato Council an indicative work programme developed by the Taskforce to address systemic and casual racism, strengthen the place of Te Tiriti o Waitangi/The Treaty of Waitangi and demonstrate a valuing of *mātauranga Māori*, as part of achieving continued excellence as a global university.

[68] Dagan and Kreitner, above n 48, at 683.

[69] Above.

[70] Above.

[71] Tuhiwai Smith and Jones, Report of the Taskforce, above n 67, at 19.

"Reasons may be articulated at varying levels of abstraction"[72]…from the general propositions such as to recognise the value and validity of *mātauranga Māori,* down to the inclusions of arguments that are contextually tailored to build and protect genuine relationships between universities and *tangata whenua* for example. "Reasons also range from wholly substantive to the technical."[73] A good substantive reason is a reason that derives its justificatory force from a moral, economic, political, institutional, or other social consideration.[74] There are three main types of substantive reasons: goal reasons, rightness reasons, and institutional reasons.[75] A goal reason derives its force from the fact that, at the time it is given, the decision it supports can be predicted to have effects that serve a good social goal. The goal may or may not have been previously recognised in the law. A right reason draws its force from the way in which the decision accords with a sociomoral norm of rightness. An institutional reason is a goal reason that is "tied" to a specific institutional role or process.[76]

Recognising this range of reasoned argument offers scope for decolonising theory. Decolonising legal theory must aspire to expose the limitations of existing legal reasoning. Realism takes on the "responsibility of legal theory to offer possibilities of critique of status quo power arrangements and the option of marshalling the law for morally required social change."[77]

Because reasoning about law affects the distribution of social power which results in adverse consequences for Māori in particular, a role of decolonising theory is to be suspicious of the reasons given by law makers. Legal doctrine could be described simplistically as an "endless process of testing and re-testing as part of an interminable quest for more just societies."[78] At this stage, decolonising schools of thought can question the legitimacy of resorting to considerations of principle as opposed to policy.

Here there is an opportunity for decolonising legal theorists to incorporate an alternative perspective in their analysis; a *kaupapa Māori* theoretical perspective. This perspective would create an alternative to the "jurisprudential tunnel vision that sees the legal universe through

[72] Dagan and Kreitner, above n 48, at 683.
[73] At 683.
[74] Robert Summers "Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification" (Cornell Law Faculty Publications, New York, 1978) Paper 1194 at 716.
[75] Above.
[76] At 722.
[77] Dagan and Kreitner, above n 48, at 684.
[78] Above.

judicial eyes."[79] Instead of an adjudication-centered perspective, decolonising legal theory could expand the theoretical view to include, literally, alternative universes through which law is created, applied, or otherwise becomes effective. Some of these decolonising institutions might include marae courts, *Te Reo* language, and other forms of Māori social norms such as *tikanga Māori,* symbolic of "balancing" rather than the current "power" frameworks that define Western law.

8.4 A Bridge Across Opposing Theoretical Positions – Developing a Common Language

A shared theoretical space as legal researchers should seek to explain, justify, or reform our colonial jurisprudence. To achieve these goals as a non-Māori, I resort to insights from other discourses about law and the social sciences. For myself personally, legal theory is not just a discussion of methodologies, epistemologies and coercive normative institutions; it is also an appreciation that the nature of law does not need to be adversarial; it can amount to a set of rules that requires balancing. To balance these rules, legal theorists look to sociohistorical analyses of the law as well as to comparative law because they can offer contextual accounts that help explain the sources and the evolution of colonialism. By undermining the dominant paradigms claim of necessity, theorists can put forward alternative legal possibilities and provide justifications for the possible ramifications of their adoption.

It is possible that decolonising legal theorists will push themselves right outside the comfort zone of the average theorist to reach a theoretical space that is nothing short of a radical transformation of our laws; because it is a radical transformation of the law that may be required for decolonising theory to be legitimate. "Indeed, legal theory is not limited to the happy middle; genuine insight often comes from what some perceive as extremes."[80]

Conceiving a shared theoretical space combines theory from the interfacing disciplines of Western schools of thought and *kaupapa Māori* theory. Although constructing this space sounds ambitious (which it is), this effort remains mandatory insofar as we have a duty as legal researchers to explain, justify, and reform our existing laws. Nonetheless, there are very murky

[79] Above.
[80] Dagan and Kreitner, above n 48, at 686.

waters to be navigated. Western legal theory exudes a self-confidence that masks an inner torment; that of the shame of colonialism. These contradictory dispositions highlight the necessity for good legal theory to not simply accept the inequality of our laws in overt resignation but instead to seeks out and interact with *kaupapa Māori* theory with equal self-confidence. Decolonising legal theory, like Western schools of thought, needs to be self-confident.

The self-confidence that is generated from any decolonising legal theory that we develop is as a result of internalising the complexity of our laws and a belief that only an engagement with these complexities on equal terms can generate useful theoretical paradigms. If what typifies our laws is indeed the "balancing of our relationships" rather than the institutional cohabitation of power and reason, and this core feature of law necessitates an evolution of law where any one-dimensional Western style account of law and its specific legal doctrine or practice is, by definition, inadequate, then this conviction would lead the decolonising legal theorists to a pluralistic, principled anti-purist position; this conviction would indeed demonstrate "a mature openness to other disciplines that demonstrates a welcome self-confidence."[81]

Legal theorists have a responsibility to improve the lives of Māori and ameliorate the inequality they currently experience within the legal system. They have a duty to explain, justify, and reform the law, and "one cannot discharge these obligations from any single perspective on law."[82] Nonetheless decolonising legal theory must not lose itself to its own ideas of self-determination. It must also maintain a practical application. If decolonising theory puts less emphasis on law's coerciveness and adversarial qualities it risks alienation from the brute realities of our current criminal justice system. By distancing itself to some extent from legal doctrine and from the jurists' internal point of view, decolonising legal theory may be insufficiently attuned to the realities of law; it may relegate itself to mere notions of decolonising romanticism.

One of the core convictions underlying decolonising legal theory requires the legal theorists to navigate questions about how to achieve equality within our laws. It implies that legal theory will generally rely on fair judgments as to the optimal degree of cultural inclusion into the practice of law and as to the optimal mix of *kaupapa Māori* perspectives that should be called

[81] Christopher McCrudden "Legal Research and the Social Sciences" (2006) 122 Law Quarterly Review 632 at 645.
[82] Joseph William Singer "Normative Methods for Lawyers" (2009) 56 UCLA Law Review at 910.

on for its analysis. While there is no valid reason to discourage the inclusion of *kaupapa Māori* into our theoretical perspectives, there can be good reason for hesitancy. *Kaupapa Māori* theory not only provides our shared theoretical space with an essential contribution; it also serves as a potential source of theoretical criticism and resistance. The criticisms may be varied and originate from diametrically opposed paradigms. However, a role of decolonising legal theory is to serve as a bridge across opposing theoretical positions. In this sense, decolonising legal theory may help to ameliorate the disjunction between Western schools of thought and *kaupapa Māori* theory. This "bridging" role may seem an insurmountable task for the decolonising theorists. But the attitudes of all legal discourses serve as a check on the core convictions of a decolonising theorist; accommodating the perspectives of differing discourses allows the decolonising theorist to craft theoretical frameworks that rely on an equitable understanding of law as a set of shared values; as a set of shared values that need to be balanced.

After a fairly unsystematic gathering of evidence I have discovered a certain discomfort about the status of decolonising legal theory. There are two recurring alternatives; adopt a pluralist philosophy or relinquish scientific pretentions and delve more deeply into essentialist arguments. Either alternative appears flawed in some way. Decolonising legal theory, distinctive in its search for equality, should be understood as an alternative legal theory. It is a version of legal theory that generates a language with which the decolonising theorist can advance more nuanced arguments than are currently available; a language that allows for a deepening of inquiry into the effects of colonialism. "Depth and nuance are [also] avenues for innovation, for new ways of seeing, or for overcoming the kinds of roadblocks to thinking that often arise from stale polarization from arguments that have reified into "positions."[83] Decolonising theory will enable us to be more convincing theorists, it offers fresh experiences to a stale jurisprudence, and any sort of governance whether it is pluralistic or based on *tino rangatiratanga* is more respected when all participants are better informed.

Hegemonic discourse currently marginalises the voice of Māori. Western schools of thought hold secure positions in our academic institutions and have a significant influence on legal theory development. But a characteristic of decolonising theory should be about creating a common language of theory within a shared theoretical space rather than silencing disputes between theoretical discourses; it should be about triggering respectful debate. Polarising

[83] Dagan and Kreitner, above n 48, at 690.

disputes rather than dividing theorists should become the focus of discussion. This would bring the marginalised voices of Māori to the table allowing for the inclusion of alternative theoretical perspectives. This also provides an opportunity for legal scholars to be proficient in all schools of thought affecting our jurisprudence. *Kaupapa Māori* theory should be part of the tool kit of any legal academic and in fact, any legal practitioner. In other words, legal academics should have a background in legal theory that is drawn from a shared theoretical space.[84]

Reflecting on the character of decolonising legal theory brings me back to the purpose of this thesis and to the question of how to create a shared theoretical space as legal researchers. I have been trying to figure out what decolonising legal theory is and what it could be. I am appealing to the character of this theory to reveal itself. On the one hand, there is a descriptive project of characterizing existing and future decolonising legal theory. But on the other hand, I am also trying to figure out who else gets to participate in the character building of this theory; who are the participants in this legal drama? And how can they reveal themselves?

I have waded my way through the divergent currents of Positivism, Critical Legal Studies, Doctrinalism, Critical Indigenous Studies, Realism and essentialist arguments and discovered that law as a professional discipline is at risk of dissipating any sort of coherence as to who the law is actually serving. Thirty years ago Meir Dan-Cohen argued that legal scholarship required a fundamental theoretical reorientation.[85] But as the currents of various discourses toss me around, I find myself in a boat with John Henry Schlegel who noted that successful legal scholarship was based on whether it will be useful to an appellate judge within a Western legal framework.[86] Schlegel also remarks on the "monotonous and depressing"[87] fact that new ideas about legal scholarship only gather validation if they can be assimilated to the Western legal tradition of rule interpretation. Thirty years later Indigenous peoples are still wading against the currents of various discourses within Western frameworks hoping the tide will turn. As Schlegel rather exasperatedly concluded, “we never seem to get anywhere.”[88] He argues for a reorientated form of legal scholarship that is freed from "the silly notion of law as rule"[89] and

[84] See Joel Maxwell “Justice Joe Williams on Te Reo Māori and Synthesising Aotearoa Law” (Stuff, 18 September 2020) < https://www.stuff.co.nz/national/122794406/justice-joe-williams-on-te-reo-mori-and-synthesising-aotearoa-law>.
[85] Dan-Cohen, above n 23, at 569.
[86] John Henry Schlegel “A Certain Narcissism; A Slight Unseemliness” (1992) 63 University of Colorado Law Review at 613.
[87] At 611.
[88] At 611.
[89] At 608.

includes non-doctrinal scholarship into the "many things other than legal rules [that] interact to produce results."[90]

In his day, Schlegel devastated contemporary understandings of the practice of law, but left nothing standing in their place.[91] Are decolonising scholars opening themselves up to the same criticism? Decolonising scholars are calling for change and improvements in our legal practice, but are we paralysed like traditional legal scholarship never seeming to get anywhere? Post describes this self-defeating tension of Schlegel's position as an increasingly common characteristic of bright, innovative legal scholarship.[92] How do bright, innovative declonising scholars avoid the same tensions as Schlegel?

Systemic and casual racism currently exists in legal academia.[93] In a challenge to this position traditional legal scholarship is being confronted by the emergence of a new form of scholarship – decolonising scholarship. Slowly, but assuredly, decolonising scholarship is undermining any internal consensus as to the purposes and function of Western legal discourse. The causes of this internal institutional crisis as was seen at the University of Waikato for example,[94] are no doubt extensive and complex. One important cause, however, is almost certainly the challenge of *mātauranga Māori* to this internal perspective and the recognition of its value to the traditional position of legal academia.

The law has traditionally understood its authority as founded in the rule of law,[95] which has embodied the values of universality and impersonality.[96] Lon Fuller argued that law is "the enterprise of subjecting human conduct to the governance of rules."[97] Fuller thought that this enterprise created its own "internal morality" deeply interested in such things as the generality, clarity, and consistency of rules.[98] But as we have come to see *kaupapa Māori* is a culturally specific form of legal discourse that is becoming increasingly recognised. And as we have come to embrace all that Māori culture has to offer, increasingly Western legal authority and

[90] At 610.
[91] Robert Post "Legal Scholarship and the Practice of Law" (1992) University of Colorado Law Review 63 at 622.
[92] Above.
[93] See Linda Tuhiwai Smith and Alister Jones "Report of the Taskforce" (University of Waikato Council, Hamilton, April 2021), above n 67, at 13.
[94] Above.
[95] Post, above n 91, at 27-28.
[96] At 624.
[97] Lon Fuller *The Morality of Law* (Revised edition, Yale University Press, New Haven, 1969) at 33-38.
[98] Above.

the rule of law have grown correspondingly problematic.

Dan-Cohen reminds us that the judge's decision is coercive; it will be "backed up by the state's force."[99] These authoritative traditional aspirations for universality and impersonality are becoming less and less relevant, because their meaning can be attributed to the dominant paradigms necessity for control of the law. It remains unclear what impersonal, universal, or authoritative ground the dominant paradigm can continue to assume in our evolving decolonised legal landscape.

The search for this shared theoretical space represents a formidable task. We could abandon the search, or just continue to side-step issues of legal authority, or we could shift our orientation to external perspectives with a cultural focus. But let us not be guilty of increasingly undermining the foundations of Western thought if we cannot bring ourselves to abandon all ties. As we flirt with ideas about decolonising legal scholarship we must also own the crisis of identity that goes with such an aspiration. And we must own this new identity together.

[99] Dan-Cohen, above n 23, at 585.

Chapter 9. Thinking with Theory

9.1 Thinking with Theory in Decolonising Legal Research

It appears that while our current legal system promises formal equality for all its citizens it actually yields substantive inequality for Māori. It promises liberty while providing limited options for Māori within a Eurocentrically constrained hierarchy. Our legal system "holds up a false mirror of who we are."[1] We desire more meaningful connections with each other not because we are infinitely bound by the partnership principles contained in the Treaty of Waitangi but because of who we are as humans and our desire for better lives with less violence and greater happiness and as Gabel put it, "more love."[2] Decolonising our laws offers us the possibility, from which our current laws have alienated us – to reimagine our laws equitably, and create communities where Māori are less isolated and marginalised.

The decolonised alternative to our current legal system rests on a moral case for legal reform. It is a moral belief, as opposed to its jurisprudential agenda that drives the decolonising theorist. Decolonising theory had no ambition whatsoever, other than to demonstrate the irrationality of the current legal system through moral arguments. However, in order to create a shared theoretical space as legal researchers, it becomes necessary to engage with Western jurisprudential claims. In order to share this space, the moral and jurisprudential claims must be mutually supporting.

Furthermore, any form of moral critique must be more than mere utopian writings. The moral critique and jurisprudential writing must move toward a common end together. The reform of sociolegal structures through decolonising writing and practice must lean in a more progressive and more just direction. Decolonising legal theory can demonstrate the possibility of radical legal reform; its moral dimension and corresponding critique show its necessity. It is these basic arguments – the desire for alternative and more just social orderings, the moral and

[1] Peter Gabel "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves " (1984) 62 Texas Law Review 8 at 1566-1573.
[2] Peter Gabel "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982) 11.3 NYU Review of Social Change at 374; Peter Gabel "Critical Legal Studies as a Spiritual Practice" (2008) Pepperdine Law Review 36 at 515-530.

political arguments against the current legal system, that define decolonising theory. It is that theory with both a moral argument and a jurisprudential argument, joined together that is the subject of this chapter. As the chapters progress, I also want to present a somewhat novel account – at least different from the standard accounts most often given in the literature on legal theory – of why *aroha* or love, is worth including in any discussion of sociolegal theory.

9.2 Establishing Basic Building Blocks of Decolonising Theory: What, How and Why

During my thesis I have tried to find a simple way to navigate and understand the complexities of decolonising legal theory. Perhaps this is a naïve approach. But finding the necessary ingredients to make up a theoretical contribution that omits a Eurocentric approach necessitates a back to basics approach. There is an abundance of excellent legal theory that typically involves terms and concepts that are difficult for the decolonising legal researcher to incorporate into their practice. My experience has been that the available legal theory and research paradigms are more likely to alienate Indigenous researchers, than they are to clarify and give meaning to their Indigenous ideas.[3]

This thesis is a rudimentary attempt to create decolonising legal theory. The long term goal is to create a new type of theory that both Māori and non-Māori can share collaboratively. In the meantime, I deliberately propose several simple concepts for discussing a decolonising theory development process. My motivation for such a simplistic approach is to ease the difficulties in communicating ideas about the complex subject of legal theory that may have previously alienated certain research groups.

Dubin held that for a theory to be complete it must contain three essential elements: what, how and why.[4] Let me think out loud about how these three essential elements might assist in the development of decolonising theory.

[3] Tess McClure "New Zealand hopes to banish jargon with plain language law" *The Guardian Newspaper* (United Kingdom, 22 Sep 2022) <https://www.theguardian.com/world/2022/sep/22/new-zealand-hopes-to-banish-jargon-with-plain-language-law>.
[4] R Dubin *Theory Development* (Free Press, New York, 1978) at 26.

Firstly, what? What factors are necessary to explain decolonising legal theory? Have all relevant factors been included to eliminate bias and Eurocentricisms? Have all irrelevant factors been excluded because they are of no value and do not increase our understanding? As I map out my conceptual landscape of theoretical ideas, I am conscious of including too many factors and losing my 'simplistic' approach, while trying to remain sensitive to issues of 'representation' and 'comprehensiveness'.

Secondly, how? Having identified a set of factors that I consider necessary to explain theory, it is important to ask 'how' are they related? This idea about relatedness is important for two reasons. On a practical level, this involves drawing arrows between boxes and overlapping circles within vein diagrams on my white board. This step orders my thoughts and delineates patterns visually.

Another approach is a question of 'how' they are related in terms of *whakapapa*. Already at this basic conceptually level there is a window of opportunity to incorporate *tikanga Māori* into our theory building.

Together the What and How elements constitute a foundation to support our theory. The more complex the set of relationships under consideration, the more useful it is to graphically depict them.[5] While my white board focuses my thinking and can assist with teaching others, not all theorizing must be visual. Theory development could equally be achieved through the oral tradition and storytelling as a means of balancing issues of 'representation' and 'comprehensiveness'.

Our third essential element is Why. What are the underlying sociolegal dynamics that justify the selection of factors and their relationships? This rationale constitutes the theory's assumptions that theoretical glue is required to hold a shared theoretical space together. This is akin to the concept of *whanaungatanga.*

A further 'Why' question to be addressed is 'Why' should legal researchers consider this theoretical paradigm credible? A realist response would be that this theory is an accurate

[5] David Whetten "What Constitutes a Theoretical Contribution?" (1989) 14 Academy of Management Review 4 at 491.

portrayal of true life with inclusive views of human nature, organisations, societal processes that includes culture. This provides the basis for judging the equitableness of the proposed theory.

A legal theorist must convince others that their propositions are comprehensible as well as equitable if they hope to have an impact on decolonising legal research. The mission of decolonising theory development is to challenge and extend existing knowledge, not simply replay the same tune on different instruments. It becomes necessary, therefore, to push forward the boundaries of our knowledge by providing compelling justifications for hybrid legal views. "This requires explaining the Whys underlying the…Whats and Hows."[6]

The 'Why' and its underlying sociolegal dynamics has important implications for the link between decolonising theory development and legal research practice. Combining the Hows and the Whats produces answers to a certain extent. Technically, the Hows and the Whats can be theorised without understanding the Whys underlying the theoretical paradigms. However, this tends to lead to shallow empirically driven assumptions that are often bias laiden, rather than more comprehensive theoretically dominated discussions. As a field of study, when we have insufficient understanding of why our sociolegal dynamics exist, then our discourse tends to perpetuate the Eurocentricisms it has been guilty of in the past. "To avoid vacuous discussions, propositions should be well grounded in the Whys, as well as the Hows and the Whats."[7]

Whetten summarised 'What and How' as descriptive accounts of the factors of our research, but only the 'Why' provides explanations of our factors.[8] Thus, 'What and How' provide a framework for interpreting our sociolegal paradigms. But it is the legal theory that explains these paradigms. For decolonising legal theory to become an established norm in research, we must ensure that we includes a sound explanations for 'why' we should expect researchers to share this theoretical space. Together these three elements 'what', 'how' and 'why' provide description and explanation forming the basic building blocks of decolonising theory development.

[6] Above.
[7] Above.
[8] Above.

Generalisability is not an aim of this decolonising theory development. Context, specific to Māori, is to be respected due to the unique nature of Māori culture. Striving to be generalisable would place limitations on the quality of theory to be generated. Therefore, the specifically Indigenous context of Aotearoa will deliberately restrict the boundaries of generalizability, and as such restrict the range of the theory. Focusing explicitly within the contextual limits of Aotearoa is a deliberate effort to understand the sociolegal phenomenon that are unique and familiar. In this respect, sensitivity to context will supercede generalisability in importance as a hallmark of decolonising legal theory is law in context, with a focus on the lived experience. Gergen claimed that according to the contextualist perspective, meaning is derived from context.[9] That is, we understand what is going on by appreciating where and when it is happening.[10] Culture is embedded within society and must be understood within its specific context.

It is not the intention in this thesis to generate new theory from scratch. Instead, the idea is to share theories from both paradigms with the idea of amalgamating these theories that already exists. "Although, in principle, it is possible to make an important theoretical contribution by simply adding or subtracting factors (Whats) from an existing model,"[11] this process does not guarantee the elimination of Eurocentricisms that currently exist in our theoretical models. The additions or deletions of existing theory will not necessarily address the issues of hidden biases, for example, in our current models, nor may it substantially alter the lived experience of Māori.

One way to demonstrate the value of a how sharing theory between Māori and non-Māori will positively change our sociolegal landscape is to identify how this change affects the accepted relationships between Māori and non-Māori (Hows). Just as a list of factors and their relationships does not necessarily constitute a theory, similarly the sharing of factors from an existing list should not be assumed to qualify as a theoretical contribution. It is the relationships/*whanaungatanga*, not lists, that validate the theory. "…houses are made of stone.... But a pile of stones is not a house".[12] Decolonising theoretical insights come from demonstrating how the sharing of our paradigms significantly alters our understanding of our sociolegal landscape; it offers an opportunity to reorganise our causal maps.

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[9] K Gergen *Toward Transformation in Social Knowledge* (Springer-Verlag, New York, 1982).
[10] Whetten, above n 5, at 492.
[11] Above.
[12] J H Poincare *La Science et L'hypothese* (Flammarion, Paris, 1905) Chapter 9.

Decolonising theory proposes important changes to orthodox theory's What and How. In the process of developing this theory, scholars are confronted with an inconsistency between their lived experience and their internal wisdom; their *mana*. Although ideas about decolonising theory are frequently discounted by mainstream theorists on the basis of their outmoded thinking even in orthodox terms, relationships or *whanaungatanga* are major elements for the basic building blocks of decolonising theory development.

While relationships or the 'Why's' enrich decolonising theory, they are also the most difficult aspect of theory development. It involves borrowing perspectives from other paradigms dissimilar to our own, which encourages us to alter our metaphors for life and step outside our own innateness. In turn we must then challenge the underlying rationales supporting our own theories. This may be a profound challenge to our views of ourselves and others within our communities. Such reflection, however, is what is necessary for the reconceptualization of our dated colonial theories of law.

9.3 An Interdisciplinary Hermeneutical Approach to Decolonising Theory Development

I have previously mentioned that external legal history is law in context;[13] it recognises that law constitutes society and society constitutes law.[14] Nearly any claim we make as lawyers, as well as every distinction we draw, will implicitly or explicitly be set against another situation.[15] It could be argued therefore, that comparing is a fundamental principle of legal research.[16] The strength of comparative law as legal sociology is that it attempts to explain the interaction between the law and society, including culture. Such a perspective shows that law is only one among many mechanisms of social control, so that one society may invoke law where another

[13] Mary-Rose Russell *Legal Research in New Zealand* (LexisNexis, Wellington, 2016) at 13.
[14] Catherine Fisk and Robert Gordon "Forward: Law as…Theory and Method in Legal History" (2011) 1 UC Irvine Law Review at 525.
[15] Maurice Adams "Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law" in Mark Van Hoecke *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 229.
[16] See V V Palmer "From Lerotholi to Lando: Some Examples of Comparative Law Methodology" (2005) 53 American Journal of Comparative Law at 26.

relies on customary norms.[17] This leads me to ask if the law as a discipline has anything to contribute to decolonising research in general or is decolonising research entirely dependent upon methodological and epistemological insights developed outside of the law in the social sciences. Geoffrey Samuel asked if comparatists needed to be fluent in interdisciplinary approaches before they can properly call themselves a comparative lawyer?[18] If this is the case, does a comparatist need to be fluent in interdisciplinary approaches in order to make a contribution to decolonising legal theory development?

Legrand advocates complex cultural and interdisciplinary comparison.[19] A common characteristic in legal scholarship, particularly those researchers using traditional doctrinal methodologies that characterise legal scholarship, is that it operates within the dominant legal research paradigm. This paradigm is one where the primary scheme of intelligibility is hermeneutics operating in respect of a text (legislation, court judgment) whose authority is never put into question.[20] Comparatists operating within this paradigm become preoccupied with common denominators…This in turn tends to result in claims of convergence and harmonisation. In other words comparative law orientates itself towards a presumption of similarity rather than difference.[21] This is problematic for a study searching for epistemological connections because this search for connections in the form of 'shared theory' risks the *universalisation* of cultural facts to what Heidmann describes as an abstract construction.[22]

There is a belief that the primary role of the academic lawyer is to produce doctrinal work.[23] However, this limits the work to a positivists commentary and the associated restrictions of this type of methodological approach.[24] This approach views law uniquely from its interior[25] within which the aim is to analyse and to explain in a coherent and logical manner a legal text or court decision and, continuing in this same methodological mode, to guide the reader

[17] At 26.
[18] Geoffrey Samuel "Does One Need an Understanding of Methodology in Law Before One Can Understand Methodology in Comparative Law?" in Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 177.
[19] Bénédicte Fauvarque-Cosson "Development of Comparative Law in France" in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 61.
[20] Samuel, above n 18, at 179.
[21] At 180.
[22] Ute Heidmann "Epistémologie et Pratique de la Comparaison Différentielle" in M Burger and C Calme (eds) *Comparer Les Comparatismes: Perspectives Sur L'histoire et Les Sciences des Religions* (Edidit, Arehè, 2006) at 143.
[23] Fauvarque-Cosson, above n 19, at 61.
[24] P Jestaz and C Jamin *La Doctrine* (Dalloz, Paris, 2004) at 171.
[25] At 172.

towards future outcomes with respect to the positive law under consideration.[26]

Thus, the legal researcher undertaking doctrinal research engages "in a hermeneutical exercise that has as its object a legal text."[27] The interpretative exercise of doctrinal research will engage conceptions and ideologies that the researcher has about culture specifically and social reality generally and these in turn will inform the researcher's textual commentary.[28] However, there are real epistemological dangers for Māori when this type of doctrinal method is extended into the area of comparative studies. As Heidmann points out 'the epistemological truism that one tends to neglect when one remains inside a homogenous and unique disciplinary field of investigation, that is the fact that all the theories, all the notions and focal points of analysis and all the identities are object constructions.[29] In other words, the epistemological truism of *tikanga Māori* is lost in the interior positivistic view of the dominant research paradigm.

Roscoe Pound, a former dean of Harvard Law school described how:

> It has been felt for sometime that the entire separation of jurisprudence from the other social sciences, the leaving of it to itself on the one hand and the conviction of its self-sufficiency on the other hand, was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view but was in large part to be charged with the backwardness of law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal thought and popular thought on matters of social reform. Not a little of the world-wide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of "team-work" between jurisprudence and the other social sciences.[30]

If law is to reflect 'reality' for Māori, then legal researchers need to be encouraged to enter into the world of interdisciplinary work, otherwise they will never be equipped to avoid the epistemological difficulties noted by Heidmann and Pound. Or put another way, legal research will have little or no epistemological value beyond continuing to contribute to the dominant colonising research paradigm. There is a danger here that doctrinal law undertaken by legal researchers working from a non-interdisciplinary environment, will be methodologically discriminatory. There are many different meanings to doctrinal research and if this method is to be used with any sense of intellectual culturalism that acknowledges Māori knowledge, these

[26] At 231.
[27] Samuel, above n 18, at 181.
[28] Jestaz and Jamin, above n 24, at 241.
[29] Heidmann, above n 22, at 146.
[30] Roscoe Pound "The Scope and Purpose of Sociological Jurisprudence" (1912) 25 Harvard Law Review at 510.

different methods must be properly appreciated, requiring the legal researcher to include an interdisciplinary dimension to their studies. If as legal researchers we are unwilling to take interdisciplinary work seriously, it is difficult to envisage how legal research can evolve from the colonising textual analysis and scientific reductionism that it currently is. What is needed in a better understanding by researchers of legal theory and methodology that includes a cultural dimension.

In order to appreciate how this interdisciplinary dimension to comparative law might provide insights to the development of decolonising methodologies in legal scholarship, it is important to understand that there 'appears to be a lack of emphasis on methodology and epistemology not just in traditional legal scholarship but equally in legal education.'[31] The situation is further compounded by what appears to be 'as yet not distinct and vibrant body of scholarship identifiable as Indigenous Legal Theory (ILT).[32] Riles claims that scholarship needs to be theoretically informed,[33] but 'compounding the lack of legal-theoretic discourse centred on Indigenous peoples (and by Indigenous scholars) is the lack of any sustained investigation into background questions around the place of legal theory in relation to Indigenous people.[34]

Christie asks whether Indigenous peoples might not only have particular perspectives from which to critique the law, but also particular theoretical perspectives concerning the law.[35] In order to develop decolonising research practices 'the question of whether Indigenous peoples inhabit a conceptual space from which emerge particular, distinct and essential theoretical understandings of the law'[36] needs to be answered. There should be a body of theoretical knowledge focused on *tikanga.* But how do we answer this question when since the nineteenth century knowledge has been dominated by positivism.

Berthelot noted that the gains that flowed from this positivist model were considerable. It

[31] Samuel, above n 18, at 188.
[32] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in B Richardson, S Imai and K McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at195.
[33] A Riles "Comparative Law and Socio-Legal Studies" in Mathias Reimann and Reinhard Zimmermann *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 801.
[34] Christie, above n 32, at 195.
[35] Above.
[36] Above.

incited rigour, based not on religion or philosophical speculation but on empirical reality.[37] Berthelot would reflect on this phenomenon in terms of a unified scientific model of the type that is dominant in the natural sciences, the scheme of intelligibility that comes into play is that of causality. What caused this phenomenon and what are the physical laws that have given rise to its presence?[38] This causal scheme in its turn brings into play a particular kind of reasoning, that of deduction. Once one knows the physical laws, these laws are brought into relation with the particular circumstances, and the explanation follows as a conclusion.

However, this approach fails to explain that the physical story is not the whole story. In *tikanga Māori* there is more than just the physical aspect of the story. There is also an intention to signify something that requires a different scheme of understanding to reveal its sense or signification. The Māori believe that all things have a spirit as well as a physical body; even the earth has a spirit, and so do the animals, birds, and fish; mankind also has a spirit…The spiritual and physical bodies were joined together as one by the *mauri*; the *manawa ora* (or life-giving essence which is imbued at birth) gives warmth and energy to the body so that it is able to grow and develop to maturity.[39]

Ancestors are important anchor points in the social system for Māori.[40] Anne Salmond describes how:

> Ancestral power for both men and women came to rest within the body in the mauri, the immaterial abiding-place for the mana of the atua (powerful ancestor); and the mauri protected the hau, an individuals's characteristic vitality or breath of life, just as the wairua or immaterial self protected its physical basis the body (tinana). In fact all things in the phenomenal world had a tinana, a wairua, a mauri and a hau, for in Māori cosmological theory the same fundamental forces gave form and energy to all matter, and tipu or cosmic generative power already contained the potentiality for all forms of life.[41]

Berthelot points out the dichotomy of an epistemological approach that asserts that social facts are different from the facts of the physical world.[42] Māori culture's influence on the scheme

[37] J M Berthelot "Epistémologie des Sciences Humaines" in S Mesure and P Savidan (eds) *Le Dictionnaire des Sciences Humaines* (Presses Universitaires de France, Paris, 2006) at 378.
[38] At 380.
[39] Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Melbourne, 2008) at 152.
[40] Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003).
[41] Anne Salmond *Knowledge is a Blessing on Your Mind: Selected Writings 1980-2020* (Auckland University Press, Auckland, 2023) at 82.
[42] Berthelot, above n 37, at 380.

of intelligibility is specific, interpretative and based upon an understanding of Indigenous knowledge. This gives rise to the dichotomy between explanation and understanding,[43] or within the German social science tradition, between the sciences of nature and the sciences of the spirit (Geisteswissenschaften);[44] or within *kaupapa Māori,* the science of *mauri* and of *wairua.*

Another paradigm orientation that must be appreciated when investigating schemes of intelligibility is the dichotomy between a naturalist and a culturist approach.[45] If we consider Māori culture as a social phenomena and a continuation of natural phenomena, is it then subject to the same investigating schemes of intelligibility? Naturalistic paradigms tend to orientate the researcher towards a casual scheme.[46] In contrast, the culturalist paradigm, will regard social patterns and practices as signifiers, or manifestations, of a deeper cultural phenomenon and will therefore seek to understand them in terms of what they signify. Here the hermeneutical scheme will be central[47] with an emphasis on social facts as signs of a deeper cultural understanding.

The result is that knowledge turns out to be far more complex than the unitary model of positivism would suggest.[48] At this point the opposition between Western and Indigenous explanations and comprehension of knowledge has not lead to the identification of epistemological connections as legal researchers, instead it indicates clearly distinct epistemological regimes; as Berthelot observed, it has given rise to epistemological pluralism.[49]

Should the casual scheme of natural science dominate while the hermeneutical approach of the social sciences is relegated to the category of 'possibly relevant'? These are complex and controversial questions. The two approaches appear intent on invalidating the other, an approach that does little to support the search for a shared theoretical space as legal researchers.

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[43] R A Makkreel "Expliquer et Comprendre" in S Mesure and P Savidan *Le Dictionnaire des Sciences Humaines* (Press Universitaires de France, Paris, 2006) at 441.
[44] S Mesure et al "1833-1911" in S Mesure and P Savidan *Le Dictionnaire des Sciences Humaines* (Press Universitaires de France, Paris, 2006) at 277.
[45] Samuel, above n 18, at 191.
[46] J-M Berthelot "Programmes, Paradigmes, Disciplines: Pluralité et Unité des Sciences Sociales" in J-M Berthelot (ed) *Epistémologie des Sciences Sociales* (Presses Universitaires de France, 2001) at 484.
[47] Samuel, above n 18, at 191.
[48] At 189.
[49] Berthelot, above n 37, at 380.

The initial conclusion appears to be that no single epistemological approach can govern Māori and non-Māori legal researchers. Thinking in terms of epistemological pluralism, immediately creates a dichotomy between the holistic nature of *tikanga Māori* and the individualistic and adversarial approach of Western legal systems. It is undisputed that these two schemes involve two different paradigm orientations. How should the researcher compare these contrasting epistemologies authentically? In effect 'social reality cannot be reduced to a single equation'.[50] Also the level at which we observe reality can change the type of observation recorded. Consequently, when one is comparing say the legal response to a criminal act, the response involves two different paradigm orientations, firstly at a macro (organizational) level and secondly, at a micro (individual) level. A policy maker will not see the individual Māori who are incarcerated but they do exist; equally the lawyer representing his client will not have made the laws affecting his client but the laws are there nonetheless.

It is this macro/micro dichotomy that unhinges empirical data. One can predict the number of people that will enter the prison system each year on average and one can also predict that the majority will be Māori. However, one cannot predict which individual Māori will enter the prison system. At a macro level one could safely predict poverty was a contributing factor to high rates of incarceration of Māori, however, only a professional working at a micro level with individual families could understand the precise reasons why an individual's actions would result in incarceration.

9.4 Conducting Comparative Law

With a weight of legal theory on our shoulders, how exactly do we carry out decolonising comparative law in the mist of such complex and controversial questions? Vigour states that to compare is, in the first instance, to bring out some differences and some common points according to a criterion that should be defined at the outset and which orientates the view of the researcher.[51] With this in mind, I decided my first criterion for conducting decolonising comparative law as a comparatist, is the need to be free of an authoritative orientation. Another consideration for myself as the researcher is which specific units to compare. John Stuart Mill

[50] D Desjeux *Les Sciences Sociales* (Presses Universitaires de France, Paris, 2004) at 116.
[51] C Vigour *La Comparaison dans les Sciences Sociales* (La Découverte, Paris, 2005) at 7.

makes a distinction between diverse cases and very similar cases.[52] Similar cases, according to Mill, are most useful when the researcher seeks to identify common themes or a shared variable, or as in this study, 'a shared theoretical space' as legal researchers.[53] Clutching Stuart Mills' advice, and that of Samuel Butler who said that "though analogy is often misleading, it is the least misleading thing we have,"[54] I chose 'love' and 'aroha' as specific units for comparative purposes as while there are similarities in their meaning there is also much that does not translate directly.

A second consideration when choosing specific units to compare is the potential for the comparatist to analyse foreign legal systems from their own perspective i.e. the researcher's own jurisdiction.[55] This approach is not without criticism as comparative research should avoid the imposition of the researcher's own preconceptions on other legal systems.[56] One approach to negating these criticisms could be for the comparatist to adopt an interior point of view, with the consequence that the comparatist should try to present the legal materials in the same manner as a lawyer from the foreign legal system in question.[57] However, I feel without *whakapapa* and any sense of Indigenous 'innateness', that this approach would be inappropriate. The approach favoured by this study will be to adopt a neutral stance with no system being viewed from the inside. Instead, all legal material under study will be viewed from an outside perspective.[58]

Two further, and major approaches to comparing law are *functionalism* and *balancing*. The functional method dominates comparative law.[59] This is a methodology that puts the emphasis not on an analysis of an institution itself, for example, but on the functions of that institution. Berthelot explains the functional scheme as one where one phenomenon X is analysed from the position of its function in a given system.[60] Afterall, the basic methodological principle of all comparative law is that in law the only things which are comparable are those which fulfil

[52] John Stuart Mill "Of the Four Methods of Experimental Inquiry"(1843) quoted in Alan Sica (ed) *Comparative Methods in the Social Sciences* (Sage, London, 2006) at 105.
[53] Above.
[54] Samuel Butler *The Notebooks of Samuel Butler* (ed Festing Jones, A C Fifield, London, 1912) at 298.
[55] Mathias Siems *Comparative Law* (Cambridge University Press, Cambridge, 2014) at 16.
[56] Konrad Zweigert and Hein Kötz *An Introduction to Comparative Law* (3rd ed, Clarendon, Oxford, 1998) at 35.
[57] Siems, above n 55, at 17.
[58] Mathias Reimann "Comparative Law and Neighbouring Disciplines" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) at 21.
[59] Samuel, above n 18, at 178.
[60] Berthelot, above n 46, at 484.

the same function.[61] Amongst *functionalists* there is wide agreement that a socio-economic problem should be the starting point of a comparative analysis.[62] From a *functionalist's* perspective, the socio-economic problem of this proposed study would be the tensions that arise between differing legal epistemologies.

However, the approach that will be taken in this study which will enable the researcher to adopt a more neutral stance in relation to studying two jurisdictions is the model of *balancing* which sees the differences between legal systems as "the product of different balances between conflicting considerations, be they principles or policies, rights, powers, or whatever".[63] The purpose of *balancing* is to expose the ideological context of differing legal structures.[64] In this study, the *conflicting* considerations would be the various competing and overlapping epistemological principles of Māori and Western legal theoretical paradigms. The *balancing* of these epistemologies with each other, would allow the researcher to not only recognise differences but also similarities to assist in the search for a 'shared theoretical space' as legal researchers. This type of ideological analysis acts as a starting point for theory building.

9.5 The Lost Era of Traditional Views

The modern story of critical research in law is often compressed into a Critical Legal Studies (CLS) movement that supposedly reflects what contemporary 'critiquing' is all about;[65] a move away from traditional views to "the creation of a more just society."[66] However, it is an understanding of traditional views that interests the researcher because these views represent traditions that the researcher is trying to return to in her quest for answers. Researching traditional Western views may not initially be able to provide obvious critical legal perspectives and connections with the traditions of *tikanga Māori,* but it will hopefully be able to direct the researcher to avenues that depart from the colonising legal research principles that

[61] Zweigert and Kötz, above n 56, at 34.
[62] Siems, above n 55, at 26.
[63] Duncan Kennedy "Political Ideology and Comparative Law" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, Cambridge, 2012) at 35.
[64] At 46.
[65] Panu Minkkinen "Critical Legal Method as Attitude" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (2nd ed, Routledge, London, 2017) at 148.
[66] Duncan Kennedy and Karl Klare "A Bibliography of Critical Legal Studies" (1984) 94 Yale Law Journal at 461.

currently exist.

De Cruz advises that in order to make meaningful comparisons it is important to select systems that are at a similar stage in their legal (and often their political, economic and social) evolution, so that there is a baseline of similarity.[67] Cognisant of this advice, surely there can be no better starting point than at the beginning; this study has looked at aspects of the origins of knowledge of both the Māori and non-Māori. However, this could also prove to be a foolish tactic as evidenced by past scholars. Sir Henry Maine made analogies and assumptions about Roman law in 1861 that were later proved to be incorrect.[68] In the next century, Pringsheim[69] in 1933 argued that:

> A natural relationship exists at an early stage between all primitive legal systems: each system during its youth seems to pass through a similar process before the peculiarities of the nation are imposed upon its juridical order.

It seems prudent to heed the warning of Watson at this point, who warned against advocating what De Cruz[70] describes as the 'general pattern of development' because:

> Although it is perfectly natural and conceivable that different peoples did, at various times, have the same basic responses to a situation, it is simply not possible to move from this commonplace observation to the formulation of a theory of general legal development applicable to all or many unrelated societies.[71]

Hence, if this study is to generate theory related to epistemological connections between Māori and non-Māori it is important not to "obscure the discovery of the actual development of the legal system being studied."[72]

In the search for decolonising legal theory in the lost era of traditional views, it is difficult to circumvent the influence of Immanuel Kant (1724-1804) and the neo-Kantians that followed him. Kant wanted to establish a scientifically valid way of investigating social and cultural phenomena such as law so that the resulting humanities and social sciences would not have to

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[67] Peter de Cruz *Comparative Law in a Changing World* (3rd ed, Routledge Cavendish, London, 2008) at 228.
[68] Above.
[69] F Pringsheim [1933] 5 CLJ 347.
[70] De Cruz, above n 67, at 228.
[71] Alan Watson *Legal Transplants,* (Scottish Academic Press, Edinburgh, 1974) at 21.
[72] De Cruz, above n 67, at 229.

pale in comparison to their natural science counterparts.[73] Kelsen's (1881-1973) 'pure theory of law' objectifies law claiming it to be a science by searching for the "what and how law is, not how it ought to be."[74] Despite Kelsen's progressive views, those of a socialist with an understanding of feminist issues, his concern with the scientific status of law does not lend itself to the development of decolonising legal theory. Kelsen's 'pure theory of law' "serves as a model of the way in which the orthodoxy of the positivistic tradition in law in general regulates the production of legal knowledge."[75]

Kelsen encourages researchers to follow a certain positivistic method to avoid constructing arguments deemed 'unscientific.' However, it is precisely the 'unscientific' nature of law that I wish to explore. In contrast to Kelsen's 'pure theory of law' it is the pursuit of an understanding of the law grounded in verifiable social facts and Dworkin's (1931-2013) 'liberal values'[76] that prove a greater driver of this study. I am anxious to avoid theories of law that claim to be 'pure' as this implies 'superiority' and that other theories of law may be less 'pure,' inferior or not legitimate. However, it was important to engage with the 'pure theory of law' and unpack the manner in which the tradition of legal positivism exercises its normative hold over the production of legal knowledge as this exposed a framework for the continued production of colonising legal knowledge.

Kelsen's 'pure theory of law' stands in contrast to Gadamer's (1900-2002) model of philosophical hermeneutics which considers the relationships between the past and the present. Gadamer grounded his philosophies in Platonic-Aristotelian, as well as Heideggerian thinking,[77] and claimed that legal hermeneutics is able to point out what the real procedure of the human science is.[78] It is this linking of the past and present that Gadamer understands as tradition.[79]

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[73] Immanuel Kant *The Conflict of the Faculties* (1798) Part 11 (translated by Mary Gregor, Cambridge University Press, Cambridge, 1992) at 43-45.
[74] Hans Kelsen *Pure Theory of Law* (Translated by M Knight, University of California Press, Berkeley, CA, 1967).
[75] Minkkinen, above n 65, at 129.
[76] Ronald Dworkin "Foundations of Liberal Equality" in Grethc Peterson (ed) *The Tanner Lecture on Human Values* (1990) 11 at 1 < https://www.cambridge.org/core/journals/legal-theory/article/abs/dworkin-on-the-foundations-of-liberal-equality/A0AA3D089A8867AADCC4D674E0B01126>.
[77] Jeff Malpas "Hans-Georg Gadamer" in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2018) URL <https://plato.stanford.edu/archives/fall2018/entries/gadamer/>.
[78] Hans-Georg Gadamer *Truth and Method* (1960) (Translated by J Weinsheimer and D Marshall, Continuum, London, 2004) at 292.
[79] Minkkinen, above n 65, at 133.

> Thus what is established by [history] seems to be a language of facts, but which questions these facts answer and which facts would begin to speak if other questions were asked are hermeneutical questions.[80]

Could this 'humanist' approach of hermeneutics assist in the search for a shared theoretical space between Māori and non-Māori legal research epistemologies? Indigenous approaches to law and hermeneutics both reject the methodological ideals of modern science that underpin the concept of knowledge. This is opposite to Kelsen's 'pure theory of law' which constructs legal propositions and concepts by adhering to a scientifically sound methodology.[81] Indigenous approaches to law and hermeneutics focus on non-patriarchal relationships as opposed to positivist's individualistic approach based on patriarchy. And perhaps most importantly Indigenous approaches to law and hermeneutics both include the recognition of the historical, cultural and social situatedness of legal researchers as opposed to the 'objective' ideal of conventional research approaches, recognition that also includes the differing voices of 'others', rather than 'purifying' legal research from such variations as the positivists would. Armed with a hermeneutic approach, decolonising theoretical reasoning would not take a prudent positivist approach that normative law demands, instead the decolonising theorist would refrain from the enclosure of the internalist's world, and as expressed by Gadamer, allow 'others' to speak.

If we approach the question of how Māori and non-Māori can be better researchers together through tradition, then revisiting the old laws of Māori and non-Māori requires that tradition is not understood in a normative way. The normative tradition of legal positivism in general, and Kelsen's 'pure theory of law' in particular, both oblige the legal researcher to follow prescribed conceptual, epistemological or methodological rules.[82] Empirical legal research, for example, must be conducted in particular ways, and the penalty for doing otherwise is a negative peer review of the results. As such these rules do not allow for the development of 'other' ways of doing legal research. On the other hand, a legal critique in the hermeneutic tradition allows the 'other' to grow organically with the research question, the answers to which lead to new questions that then continually include the 'other', inviting diversity into a broader legal

[80] Hans-Georg Gadamer *Philosophical Hermeneutics* (University of California, Berkeley, 1976) at 11.
[81] Minkkinen, above n 65, at 134.
[82] At 135.

landscape.

Thinking about how decolonising legal research might emerge from our current legal frameworks requires us to think about 'theory' in the context of legal study and to contemplate what sorts of decolonising theories could be imagined in relation to both Indigenous legal systems and domestic laws in Aotearoa New Zealand. Whatever the value of such emerging theories, the history of law can be seen as a struggle between various schemes and methods of analysis;[83] a struggle that is still going on today.[84]

Last century, the basic methodological principle of all comparative law was that of functionalism.[85] However, in this new century Pierre Legrand resists the idea of functionalism and proposes instead, the 'deconstructive hermeneutical' approach; often labelled as the cultural method in comparative legal studies. His emphasis is on the cultural and mentality context in which law operates.[86] He insists that similar rules that may get transplanted from one system into another, may have quite different cultural and mentality significance in the new system from the significance they had in the old system.[87] Legrand indicates how methodology in comparative law is inherently both epistemological and theory-orientated,[88] and contributes positively to the development of decolonising research methodologies.

Ronald Dworkin asserted that law is in essence an interpretative (hermeneutical) exercise, he also asserted there is often a right answer to every legal problem.[89] Examining legal research epistemologies from the position of a decolonising epistemologist is challenging for many reasons. The internal (doctrinal) and external (cultural and social view) dichotomy throws up all manner of complex theoretical questions that there appears to be no right answer to despite Dworkin's assertions. Facts studied in the social sciences cannot be so easily transformed into simple objects capable of being modelled into abstract schemes, allowing themselves logically and mathematically to be manipulated to produce reliable knowledge[90] or answers. Aspects of

[83] Mark Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, Oregon, 2011) at 197.
[84] Samuel, above n 18, at 197.
[85] Zweigert and Kötz, above n 61, at 34.
[86] Pierre Legrand *Le Droit Comparé* (3rd ed, Presses Universitaires de France, 2009) at 47.
[87] Above.
[88] Pierre Legrand "La Comparaison des Droits Expliquée à Mes Étudiants" in Pierre Legrand (ed) *Comparer les Droits, Resolument* (Presses Universitaires de France, Paris, 2009) at 216.
[89] Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977) at 279.
[90] G Granger *La Science et les Sciences* (2nd ed, Presses Universitaires de France, Paris, 1995) at 85.

Indigenous culture are too complex to model in a way that is accurate and representative. The problem is how to conceptualise cultural facts without resorting to colonising methodologies, "because the difficulty with the social sciences is that the models employed can only very partially represent a phenomenon."[91]

However, the law is supposed to make sense of social and cultural facts. "And not just in a way that allows the law to be applied but also in a way that permits the solutions to legal problems to be predicted."[92] There are as many approaches to answering legal questions as there are schools of jurisprudence. And while positivism might remain the dominant model, natural law theory, realism, Indigenous legal theory, are other approaches that support the development of decolonising research methodologies. The dominant legal theorists are interested in epistemological foundations of law in the form of rules and norms and they theorise legitimate sources of these rules and norms "premised on the assumption that the ontological foundation of law is a body of rules."[93] The dominant research paradigms impose on legal scholarship by attempting "to reveal an intelligible order or meaning in the law," and in doing so, reduces "the large and possibly confusing mass of legal information to a relatively tight and coherent theory which is thought to lie behind it or justify it."[94] These types of paradigms reject interdisciplinarity in comparative legal studies. Fauvarque-Cosson went so far as to assert that when "Legrand advocates complex cultural and interdisciplinary comparison his approach renders the discipline so complicated that it may well discourage and deter scholars from becoming involved in the first place."[95] However, concerningly, this type of scholarship, particularly doctrinal scholarship, operates within the dominant research paradigm.[96] This paradigm is one where the primary scheme of intelligibility is hermeneutics operating in respect of a text (legislation, court judgment) whose authority is never put into question.[97] The researcher applies inductive and deductive techniques…with the result that comparative law becomes associated with one form or another of scientific reductionism.

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[91] Above.
[92] Samuel, above n 18, at 206.
[93] W Twining and D Miers *How To Do Things With Rules* (5th ed, Butterworths, London, 2010).
[94] S Hedley "The Shock of the Old: Interpretivism in Obligations" in C Ricketts and R Grantheam (eds) *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, Oxford, 2008) at 206.
[95] Fauvarque-Cosson, above n 19, at 61.
[96] Geoffrey Samuel "Is Law Really a Social Science? A View from Comparative Law" (2008) 67 Cambridge Law Journal at 288.
[97] Samuel, above n 18, at 179.

9.6 Colonising Aspects of Scientific Reductionism

Scientific reductionism, can perhaps be described as a colonising approach to legal research. It acts as an epistemological strategy that puts into operation concepts and methods designed to unify an area of knowledge that has had to be fragmented and diversified in order to understand its objects.[98] Comparatists operating within this paradigm become preoccupied with common denominators; and, as the object of legal research are only texts, the common denominators are often nothing more than assertions drawn from other (textual) assertions.[99] This is turn results in 'one nation' ideologies, and assertions that 'one size fits all'; 'in other words comparative law orientates itself towards a presumption of similarity rather than difference.'[100]

Hedley notes that dominant paradigm researchers tend to look inward, returning to traditional theories and methodologies spurning modern legal developments.[101] Samuel describes a certain kind of refuge within the dominant research paradigm.[102] The problem with this type of paradigm exclusivity is that is narrows the depth of understanding of the researcher in relation to the colonising implications of such methods and epistemologies. What is needed is serious analysis and reflection on schemes of intelligibility from outside the discipline of law. If dominant research paradigms 'are to be the tools of comparative law, it will result in nothing more than superficial scientific reductionism.'[103] Superficial scientific reductionism will assimilate the lived experiences of Māori into the common denominator problems of mainstream society. The colonising aspects of legal research will endure. However, an interdisciplinary approach may well reveal decolonising approaches to legal research that make interesting contributions to epistemological understandings in general.

As a result, I am eager to move on from the confines of comparative law employing a positivistic approach; that is learning the rules of another legal system within the methodological context of a simplistic functionalism,[104] and instead locating this study squarely within a cultural context. The very nature of this move is interdisciplinary, inviting

[98] J M Besnier "Les Theories de la Connaissance" (Presses Universitaires de France, Paris, 2005) at 102.
[99] Samuel, above n 18, at 179.
[100] Above.
[101] Hedley, above n 94, at 221.
[102] Samuel, above n 18, at 207.
[103] Above.
[104] Geoffrey Samuel "Comparative Law and its Methodology" in Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (Routledge, London, 2013) at 114.

with it the challenges of methodological and epistemological complexity. To overcome these challenges I will organise the methodological problems and debates about dichotomies within a framework that will remain sensitive to and respectful of the methods used to obtain knowledge. I will constantly question what is meant by comparison as a reminder of the fundamental dichotomies that have proved problematic in this type of research in the past, such as the ones between nature and culture, between a presumption of similarity and a presumption of difference, between a functional approach and its alternatives, and between Indigenous paradigm orientations and Western ones.

Samuel also invites the researcher to question what is meant by 'law' in the context of 'comparative law.'[105] With any comparative study of Indigenous peoples there is a great danger of perpetuating legal colonialism. It cannot be assumed that the 'other' shares the same epistemological views as the researcher, and so in approaching the question of 'law' Legrand's presumption of difference[106] will resonate throughout this study. Furthermore, the question of what exactly will be the object of comparison and the theory implications involved in this study centre on whether the study focuses on rules, norms, institutions, values etc. In the context of this study the object of comparison will be 'knowledge'.

However, merely focusing on 'knowledge' as an issue of 'law' is insufficient in itself as the object in question is tied to the question of comparison. I could focus on 'knowledge' in terms of its causal relations with legal process, or something different again. Whichever focus is taken, the nature of theoretical debates surrounding 'knowledge' in the two systems of comparison in this study will reveal different concerns which is turn will reveal differences in the nature of that legal knowledge. The type of 'knowledge' that emerges from this comparative study will be equally dependant upon the methodology chosen and the schemes of intelligibility adopted. This plurality of methods and schemes is inherent in sociolegal research and thus invites epistemological controversy. However, it is hoped that an articulately designed methodology and scheme will inform this study.

There is consensus now that scholarship…needs to be both theoretically informed and empirically grounded – and that different mixes of these two elements should be encouraged

[105] Above.
[106] Legrand, above n 86, at 101.

and appreciated.[107] This sociological focus to legal studies could in turn engender a more equitable dialogue between Indigenous and non-Indigenous scholars. Clearly, comparative law can make a contribution to the development of Indigenous theory and methodologies, but the comparatist cannot do credible research if located simply within the 'internal', and dominant research paradigm orientation. What can be achieved by comparing two different systems of law, if the comparatist is employing research methods designed within the dominant research paradigm? The very idea that comparative law can be interdisciplinary implies that this interdisciplinarity can be a two-way process. Indigenous legal scholarship can make its own contribution to the development of legal research epistemologies through an interdisciplinary approach. However, like most things associated with legal theory, comparison is not straightforward.

[107] Riles, above n 33, at 801.

Chapter 10. Expanding Legal Theoretical Boundaries Beyond Grounded Theory

10.1 Rationalising Māori Knowledge in Western Terms

A civilization that proves incapable of solving the problems it creates is a decadent civilization.
A civilization that chooses to close its eyes to its most crucial problems is a stricken civilization.
A civilization that uses its principles for trickery and deceit is a dying civilization.

Aimé Césaire[1]

Māori value, and always have valued knowledge.[2] It is possible to argue that Māori traditionally operated in ways not dissimilar to (Western) researchers…, albeit subject to their own methodologies, philosophies and world view.[3] It is appropriate, therefore, that when considering how to share a theoretical space as researchers, that kaupapa Māori theory is given equal theoretical legitimacy as non-Māori paradigms and is acknowledged as central to the development of a knowledgeable legal society.

The New Zealand Bill of Rights Act 1990, s27(1) Right to Justice states that "every person has the right to the observance of the principles of natural justice…" While the term 'natural justice' generally is referring to "duty to act fairly", clearly any human rights instrument that rules against bias and guarantees a right to a fair hearing must identify and address Māori knowledge, primarily in recognition of our Indigenous history, but also as a consequence of the partnership created between the Crown and *tangata whenua* under the Treaty of Waitangi. "The special relationship between *tangata whenua* and the Crown acknowledges the right of a distinct Māori position based on the Māori world view of knowledge as *taonga*."[4] Clearly the inclusion of Māori knowledge through *kaupapa Māori* theory has the potential to support the development of legal research paradigms which better meet the needs and expectations of Māori. Traditionally, orthodox research paradigm development would come from an evidence

[1] Aimé Césaire *Discourse on Colonialism* (Translated by Joan Pinkham, Monthly Review Press, New York, 1972) at 9.
[2] Chris Cunningham "A Framework for Addressing Māori Knowledge in Research, Science and Technology (2nd ed, A Keynote Address to Te Oru Rangahau Māori Research and Development Conference, 7-9 July 1998, Massey University) at 387.
[3] Above.
[4] At 395.

based source; hopefully, an evidence base that is rigorously obtained, while remaining culturally and equitably informed, which both Māori and non-Māori can have confidence in.

It is unfortunate that traditional knowledge based on *kaupapa Māori* theory is often described as from a legal system outside of our mainstream system. This is unfortunate because *kaupapa Māori* is the first law of Aotearoa New Zealand, and should not be judged as from 'outside' but rather as emanating from an existing system. "Māori knowledge should be acknowledged as at least of equivalent status."[5] Furthermore, banishing Māori knowledge by limiting it to ideas based in tradition considered primitive is to rationalise Māori knowledge in Western terms that are clearly ignorant.

Māori theoretical perspectives may sit uncomfortably within a purely mainstream view, and priorities for Māori law reform may not always coincide with mainstream priorities. Nevertheless, there is an expectation that a shared theoretical space should be a homogeneous one. Clearly there will be a range of Māori theory to compliment our shared jurisprudence. And any proposed theories of law will recognise a diversity of approaches to legal research, and also "diverse Māori realities."[6]

I too, like many academics, am guilty of rationalising Māori knowledge in Western terms. Many legal academics have tried to identify aspects of Māori knowledge and codify this knowledge using methods, such as grounded theory for example, which is a common research tool in mainstream sociolegal research. While *kaupapa Māori* appears to be the dominant philosophical perspective amongst Māori researchers, a cursory search of the repository databases of New Zealand's eight universities shows that grounded theory is frequently used by Māori researchers in order to make sense of their data.[7] However, the tools of grounded theory often divorce the relationships fundamental to *kaupapa Māori* theory in the search for themes found in the grounded theory coding process.

Back in 2008 in Gisborne, His Hon Judge Taumaunu piloted and presided over the first marae-based youth court, Te Kooti Rangatahi. Since then, fourteen additional Rangatahi Courts have

[5] At 388.
[6] M Durie "Ngā Matatini Māori: Diverse Māori Realities" (A Paper Prepared for the Ministry of Health, Massey University, Palmerston North, 1995).
[7] S Elers "Refuting Denzin's Claims: Grounded Theory and Indigenous Research" (2016) 15 Grounded Theory Review 2 at 111.

been established throughout New Zealand. The objective of these courts is to reduce reoffending by Māori youth and to provide the best possible rehabilitative response, by encouraging strong cultural links and meaningful involvement of *whānau, hapū* and *iwi* in the youth justice process. Te Kooti Rangatahi or Rangatahi Courts along with *kuia, kaumātua* and local marae communities, allow Māori youth who appear before them an opportunity to learn who they are and where they are from, and to participate in Māori protocols and customs which in turn assists to reconnect them with their identity. The establishment and development of Te Kooti Rangatahi was fully supported and encouraged by the Principal Youth Court Judge Andrew Becroft, the then Chief District Court Judge, the late Chief Judge Russell Johnson, and now the current Chief District Court Judge Jan-Marie Doogue.

During my Master of Law (LLM) studies I undertook an evaluation of this Indigenous criminal justice initiative, the Te Kooti Rangitahi marae youth courts, which included interviewing marae court judges. The study involved searching for the most suitable method for gathering, analysing, and applying data from Western and Indigenous sources. Wilson noted that methods may be borrowed from other paradigms as long as they fit the ontology, epistemology, and axiology of the Indigenous paradigm.[8] However, Wilson also claims that applying a Western methodology in an Indigenous context may be incompatible because the underlying epistemology of Western methods and theories is not Indigenous.[9] And indeed, this is what I experienced when trying to apply grounded theory in a *kaupapa Māori* context. Rather naively, I assumed that certain methodologies would be adaptable when there was analogy between the paradigms. However, my research experience showed that grounded theory was too alien and ultimately not conducive in assisting my attempts at conducting decolonising research. Grounded theory as a method did not allow me a vigilance that ensured that the research process truly respected the principles of *tikanga Māori* and *whānaungatanga,* as I will explain.

I decided to use grounded theory in my LLM studies, not because Indigenous theory was not a legitimate option, but I was biased toward finding an appropriate Western theory and assumed that only a Western theory would be admissible. In hindsight, I accept that the decision to use grounded theory was perpetuating colonialism.[10] I was trained in qualitative content analysis

[8] Shaun Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 39.
[9] Above.
[10] Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 112.

as a researcher and mistakenly assumed that a grounded theory method would be translatable and transportable within a marae court setting where the study was based. Despite having previously used grounded theory as a method for data analysis, I struggled to successfully relate Western theories to Māori communities and the marae-based courts. Although I managed to apply them to a certain degree, the applications were theoretical but lacking in practicality. While I was committed to attempting decolonising research and believed that a grounded theory approach was achievable, ultimately I was unable to implement decolonising research in practice. After a difficult period of analysis, it became clear that Western theory and methods were not always appropriate and remained colonising approaches.[11]

I encountered three general problems with grounded theory data analysis. Firstly, the breaking apart of data into themes was awkward and ultimately did not fit the *holistic* elements of a Māori worldview. This type of grounded theory analysis amounts to breaking data down into small pieces to examine it. Wilson warns that if we are saying that an Indigenous methodology is all about relationships, then in breaking things down into their smallest pieces, you are in fact destroying all the relationships around it.[12] Much of the data from the interview transcripts in my study consisted of stories recounted by the marae court judges that were interviewed. Breaking apart stories changes the relationship between the storyteller and the receiver of the story and loses the relationship of the pieces of the story to each other.[13] Another consequence of breaking apart the judge's interview transcript into themes required by the grounded theory method is that the relationships among the judge's narrative are lost. When a story is told, it is the whole story that is taken in and learned from. It is not possible to receive a theme or quote from a story and learn in the same way.[14]

A second problem occurred when applying thematic analysis to interview and observational data from my study, and then relating the core themes to each other independent of the complete transcript data. Correlating abstracted themes is compatible with Western methods but, can be almost hostile from an Indigenous perspective because it severs the relationship between learner and storyteller.[15] Simonds and Christopher found that the context and much of the true meaning of the story is lost when examining themes in relationship to each other independent

[11] Above.
[12] At 119.
[13] V Simonds and S Christopher "Adapting Western Research Methods to Indigenous Ways of Knowing" (2013) 103 Am J Public Health 12 at 2192.
[14] Above.
[15] Above.

from the transcripts.[16] For example, despite every judge being asked the same question, each individual judge recounted a different story in response to the questions I asked. To combine a piece of one judge's story with another judge's story through thematic analysis is, therefore, disrespectful to the *mana* of the judge and his or her stories.

Thirdly, is the problem of extracting core themes with the grounded theory method. This is not an Indigenous method and it did not fit with a *kaupapa Māori* understanding of data. Throughout the study cultural protocols were followed but grounded theory, complete with boxes and arrows used to understand, explain and predict behaviours and themes, with an implicit cultural bias toward a linear or individualist orientation, did not merge well with a *kaupapa Māori* research paradigm. Western science has evolved from a strong positivist tradition, including grounded theory. Positivism adheres to the view that only "factual" knowledge gained through observation is trustworthy, limiting my role as a researcher to data collection and interpretation that is carried out in an objective way. Theories such as this assume a positivist research paradigm, which aims to develop universal truths that can be used to predict and control behaviours. In the literature on Indigenous research paradigms, predicting and controlling behaviours is not a priority.[17] Problems arose when I tried to push a linear positivist theory onto a *kaupapa Māori* research paradigm and found it did not fit the situation or context, and ultimately hindered the data analysis process.

As part of the analytical process of grounded theory that I used for this study, I picked themes out of interviews and observations and discussed each theme in turn using quotes and data notes to back up my analysis. I was familiar with this process having used it successfully to investigate the performance of procedures by midwives in labour wards as part of a Master of Science thesis. In stark contrast to writing about obstetric procedures, I found myself writing about some of the many relationships that make up *tikanga Māori.* And that is when my experience in grounded theory began to unravel. Grounded theory worked well within a clinical environment, but in this project, my writing did not always retain the context of the interview and observational data. The essence of the data was often lost when it was removed from its narrative and environmental context. According to Tafoya it is not possible to know both the context and definition of an idea at the same time.[18] The closer you get to defining or explaining

[16] Above.
[17] Above.
[18] T Tafoya "Finding Harmony: Balancing Traditional Values with Western Science in Therapy" (1995) Canadian Journal of Native Education 21 (Supplement) at 7.

an idea, the more it loses its context.[19] I endeavored to express my ideas showing the appropriate levels of respect, reciprocity and responsibility for the relational accountability that attaches to an Indigenous research paradigm. In essence, grounded theory needed to remain based in a community context; it needed to remain 'relational.' The problem that presented itself was that as I coded my data, I discovered that *tikanga Māori* was not easily taken apart. Furthermore, the concepts of *tikanga* lost their meaning when broken down into abstract forms.

Whānaungatanga is all about relationships and shared experiences. Knowledge is gained from these relationships and is owned by the cosmos. The knowledge is not new, it has always been there in the cosmos. What is new, is the relationship. Therefore, the whole idea of discovering themes through grounded theory analysis from a collection of coded data is insubstantial. By using grounded theory I was not discovering new ideas about *tikanga Māori*, I was instead creating a new set of relationships. The ideas or themes identified by the study already belonged to the cosmos, to all the relations that it has formed, not to me as an individual researcher compartmentalising and coding themes and claiming the ideas that it generated as my own.

As the study progressed and I gained a greater understanding of *kaupapa Māori,* I began to appreciate that gaining knowledge and my relationship with that knowledge was something that I was accountable to. And therefore, it became culturally inappropriate to break data down into concepts in accordance with a grounded theory method. In effect, it was culturally inappropriate to use the knowledge out of its context; out of the special relationships that go into forming *tikanga Māori.* You have to build a relationship with an Indigenous idea or knowledge, not break it down.

There is an intergenerational relationship that forms between Māori peoples, their sacred knowledge and places called *whakapapa.* Elders, *kuia and kaumatua,* have built up a relationship over generations with the sacred knowledge that they are entitled to. Knowledge is relational, experienced, and expressed in sensuous terms, in stories, and critical personal narratives that locate the person in moral relations with others.[20] To strip Māori knowledge of its relationships is to use the knowledge without accountability.

[19] Wilson, above n 8, at 99.
[20] M Meyer *Ho'oulu: Our Time of Becoming: Hawaiian Epistemology and Early Writings* (Ai Pohaku Press Native Books, Honolulu, 2003).

Issues around accountability and confidentiality also proved challenging when considering research methodologies from differing epistemological standpoints. When using a Western research paradigm, generally, ethical approval is granted with the understanding that identities of the participants will be kept confidential. Contrastingly, from an Indigenous perspective, it is important to acknowledge the elder or where you are acquiring the information from in order to honour the relationships that they share with the knowledge they are imparting. The elder does not own the knowledge, but it is important to name their relationship with the knowledge, and acknowledge that as the researcher you are not claiming the knowledge either, but instead respecting the *whakapapa* of the knowledge while maintaining accountability to the elder. Thus, from a Western research paradigm, ethically, confidentiality is paramount. However, from a *kaupapa Māori* perspective, it is almost unethical to do so. To acknowledge an elder, confirms they have the *mana* to pass on the knowledge. In a sense you are validating your research by authenticating your data and its source.[21]

The knowledge of *kuia* and *kaumatua* comes from an entire life of learning, culminating in an intuitive knowledge of the Māori world based on personal relationships. Non-Indigenous researchers may spend many years in tertiary education acquiring research skills. Thus, a commitment to research requires a lifetime of practice and training with many researchers spending an entire lifetime attempting to analyse and understand a single topic thoroughly. *Kuia* and *kaumatua* hold different levels of knowledge and share this knowledge dependant on the thinking and readiness of the student. Much of the sacred knowledge of elders can be complex and requires a lifetime of learning and analysis by a student. This commitment to the lifelong learning of an Indigenous researcher creates difficulties when confined to a university academic agenda. Reproducing all the Indigenous ideas and relationships that make up a *kaupapa Māori* research paradigm risk being poorly represented or underdeveloped due to the time and word limit constraints of a written thesis. Indeed, a *kuia* or *kaumatua* may be insulted by the specific focus or lack of relatedness of a question in relation to their lifetime of learning. It is therefore difficult to articulate and substantiate in a word limit confined written text, the *kuia* and *kaumatua's* commitment to lifelong learning about *tikanga Māori*.[22]

[21] Hasan-Stein, above n 10, at 116.
[22] Above.

However, one method through which authenticity or credibility may be ensured is through continuous feedback with all the research participants.[23] In my study, the research findings were submitted in a written report form to the judges that were interviewed inviting comments on the findings presented to them. This allowed each judge in the research relationship to check the accuracy of the analysis and findings and it also created an opportunity for judges to elaborate on the ideas presented in the report and to learn from the other participants. Relationships in research are built not only between researcher and individual participants but also among the participants themselves and the ideas that are being discussed.[24] This allows for the collaborative analysis of the research. The researchers and the judges were accountable to each other through a shared analysis of the research data. Once we get away from the idea that knowledge is individually owned, collaboration in the interpretation of knowledge becomes not only feasible but also desired or necessary.[25] The knowledge is part of the relationships between us and cannot be owned.[26]

Collaborative analysis whether in Western or Indigenous research methodologies ensures that any possible distortion from one point of view is corrected so that things are measured accurately, or seen as they actually are.[27] However, in analysis through an Indigenous paradigm, accuracy does not play as big a part in describing the phenomenon that is being studied, what is more important is describing the set of relationships that make up the phenomenon.[28]

While conducting my study I was attempting to meet the criteria by which grounded theory research is judged, such as validity and reliability, so that this research may accurately be described as "fact." After all, the aim of grounded theory is to move from a set of unstructured materials to a collection of theoretical outcomes.[29] Analysis from a grounded theory perspective breaks data down to examine it. However, as I broke data down into its smallest pieces I was conscious of the fact that *tikanga Māori* includes all of these relationships that I was forcing apart expecting them to speak for themselves. To break any piece of the topic away

[23] Wilson, above n 8, at 121.
[24] Above.
[25] Above.
[26] Above.
[27] At 122.
[28] Above.
[29] N Pidgeon, B Turner and D Blockley "The use of grounded theory for conceptual analysis in knowledge elicitation" (1991) 35 International Journal of Man-Machine Studies at 151.

from the rest will destroy the relationships that the piece holds with the rest of the topic.[30] In effect I was destroying all of the inter-related principles of *tikanga Māori.* I was dissolving *tikanga's* holistic nature. I concluded that grounded theory risks evaporating the integrity of *tikanga Māori.* Instead, what was needed was an Indigenous style of analysis that encompassed all of *tikanga's* principles and relationships as a whole rather than breaking them down.

10.2 Intuitive Logic and Indigenous Data Analysis

Wilson urges the use of a more intuitive logic, rather than a linear logic, to analyse Indigenous research, because you cannot just break everything down into small parts and use linear logic to bring them back together as a whole.[31] You have to use an intuitive logic, where you are looking at the whole thing at once and coming up with your answers through analysis that way, so it's mostly innate within us explains Wilson.[32] An "innate" quality or ability is one that you are born with, not one you have learned, which raises questions about the non-Indigenous researcher's ability to be 'innate' when analysing Indigenous concepts.

During my study I found myself standing on Tuhiwai Smith's "tricky ground".[33] It was tricky because it was ''complicated, and changeable, and it was tricky also because it can play tricks on research and on the researcher.''[34] Grounded theory's ground, and the spaces it encompasses, are always constructed, never bedrock solid, always nuanced, and potentially dangerous.[35] I discovered that "lurking around the corners are countervailing conservative forces that seek to disrupt any agenda of social justice that may form on such tricky ground.''[36] Grounded theory, I believed, as does Smith[37] was "a positivist research paradigm that, like life in general, should be simple."[38] However, grounded theory was proving far from simple despite Denzin's claims that grounded theory using Indigenous epistemologies and methodologies

[30] Wilson, above 8, at 120.
[31] At 119.
[32] At 119.
[33] L Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2005) at 85.
[34] Above.
[35] N Denzin "Grounded and Indigenous Theories and the Politics of Pragmatism" (May 2010) 80 Sociological Inquiry 2 at 300.
[36] Tuhiwai Smith, above n 33, at 85.
[37] Above.
[38] Above.

could be a decolonising tool for Indigenous and non-Indigenous scholars alike.[39]

The problem is that grounded theory places emphasis on how to develop theory through qualitative analysis of codes, memos, sequences, theoretical sampling, comparative analysis, and diagrams.[40] However, it became apparent when using grounded theory in my study that there was the need for a greater connection between grounded theory and the social structure of Indigenous research paradigms that encouraged justice and equality. Grounded theory is arguably the most influential model of theory construction used by qualitative researchers in the social sciences today.[41] With grounded theory there are no testable hypotheses, no links to an existing theory, and anybody can be a theorist.[42] Thus, grounded theory is not set in stone, there are multiple versions: positivist, post-positivist, constructivist, objectivist, post-modern, situational, and computer-assisted.[43]

What grounded theory does provide is a set of steps and procedures any researcher can follow in the construction of a theory fitted to a particular problem[44] with emphasis on the importance of generalizability, comparisons between cases, and the systematic relating of concepts grounded in data.[45] Therefore, grounded theory, with its commitment to critical, open-ended inquiry could be a decolonizing tool for Indigenous and non-Indigenous scholars alike[46] as was attempted in my study. However, in proposing a research collaboration between grounded theory and a *kaupapa Māori* methodology, it would be misleading not to acknowledge and address the considerable difficulties that were experienced applying two research approaches with differing epistemological foundations to one project.[47]

Increasingly legal research has included Māori methods, such as *hui, waiata* and *karakia* and been conducted in *te reo Māori* which supports the call for a shared theoretical space to validate these combined methodologies. While modern life provides new challenges for Māori knowledge and philosophy, with the support of a shared theoretical space, Māori knowledge

[39] Denzin, above n 35, at 298.
[40] A Strauss *Qualitative Analysis for Social Scientists* (Cambridge University Press, Cambridge, 1987) at iii.
[41] K Charmaz ‘‘Grounded Theory in the 21st century: A Qualitative Method for Advancing Social Justice Research’’ in N Denzin and Y Lincoln (eds) *Handbook of Qualitative Research* (3rd ed, Sage, Thousand Oaks, CA, 2005) at 507.
[42] Denzin, above n 35, at 296.
[43] Charmaz, above n 41; A Clarke *Situational Analysis: Grounded Theory after the Postmodern Turn* (Sage, Thousand Oaks, CA, 2005).
[44] Denzin, above n 35, at 297.
[45] At 298.
[46] Above.
[47] Hasan-Stein, n 10, at 119.

has significant potential to contribute to a dynamic and contemporary legal system.

Cunningham found that research "can only contribute to a Māori knowledge base when a Maori analysis is enabled – Māori data can only be converted to Māori knowledge through a Māori analysis."[48] This would imply that a Māori analysis places Māori experience at the centre of the theoretical base. Cunningham states that a Māori analysis does not disregard the technological advances of this and last century but rather uses them within a Māori philosophical framework for the ultimate goal of Māori development.[49] But any form of technological advancement has a theoretical component, which suggests that theories of knowledge can be shared whether technical or legal.

Neither form of legal theory, Māori or non-Māori, is necessarily superior to the other, but they can produce very different interpretations of the law as they are based on different epistemological values with arguably some shared aspects. The cultural orientation of the researcher then becomes important as the subjective data collection of a Māori researcher will yield a particular set of results with its own set of biases, while a non-Māori researcher will yield results with differing biases. Their subjective analysis of the same data has the potential to yield substantively different results. But if we shared a theoretical standpoint then the biases and differences could surely be reduced.

If we take statistical data, for example, to elucidate data about populations in Aotearoa New Zealand, a Western paradigm analysis will generally construct ethnic groups: Māori, Asian, Pacific Islander etc. Analyses of Māori by ethnic group are fraught with difficulty[50] generally attributed to poor data collection and integrity, and partly to do with varying views on the concept of ethnicity.[51] 'Māori' is in fact a term which covers a culturally heterogeneous group and Māori statistics merely offer some average experience with the fine detail lost.[52] On the other hand, "research by Māori, for Māori and with Māori,"[53] "has greater potential to meet the

[48] Cunningham, above n 2, at 393.
[49] Above.
[50] R Kilgour and V Keefe *Kia Piki Te Ora: The Collection of Māori Health Statistics* (Department of Health, Wellington, 1992); E Pomare, V Keefe-Ormsby, C Ormsby, N Pearce, P Reid, B Robson, N Wātene-Haydon *Hauora Māori Standards of Health III – A Study of the Years 1970-1991* (Te Rōpu Rangahau Hauora a Eru Pomare, Wellington School of Medicine, 1995).
[51] Cunningham, above n 2, at 393.
[52] Above.
[53] Linda Tuhiwai Smith *Towards Kaupapa Māori Research* (Paper presented at the Matawhanui Conference, Māori University Teachers Conference, Massey University, 1995).

needs and expectations of those who have been the subject of the analysis, in this instance due to the preservation of the 'fine detail'.[54]

This means that data will need to be collected in a responsive way. Legal researchers may focus on research techniques that employ Māori methods such as *hui,* with mainstream methods such as questionnaires. Contemporary analytical tools such as empirical data collection may be used in conjunction with Māori analytical tools such as *hui* so that dual accountability will result; legal researchers will be aiming to meet the expectations of funders and reviewers from mainstream academic institutions *and* the expectations of Māori.

One of the positive characteristics of this types of dual accountability is that researchers will need to develop a 'balanced' shared position on a single issue. Both Māori and non-Māori knowledge can be produced through this type of dual accountability research approach. Despite these decolonising efforts, the Māori knowledge produced through this type of research will unfortunately be measured against Western legal paradigms and methodologies through the peer reviewed journal publication process. Unfortunately the academic and the legal community are not immune to discrimination, and the academic publication process is an area which deserves examination. It is widely acknowledged…that academic manuscripts originating from institutions in non-Western, emerging economies…are often scrutinised more rigorously by…journals based in the West than submissions originating from prestigious institutions in Western countries.[55]

The potential for *kaupapa Māori* theory and analysis to support a shared knowledge future is enormous. The ideas that I present here allow for the consideration of similarities as well as differences between theoretical approaches and for locating legal researchers, methods and epistemologies within a shared framework. The existence of *kaupapa Māori* theory is undisputed. Redress of lost knowledge and protection of *taonga* under the Treaty of Waitangi is more challenging. Creating a shared theoretical space becomes a contemporaneous struggle.

I am conscious that a more extreme view would consider the 'fine detail' that I have previously referred to is in fact "knowledge that is unintelligible to the Western academy, that refuses

[54] Cunningham, above n 2, at 393.
[55] M Niriella, A De Silva, H De Silva, et al "Is there racism in academic medical publishing?" (2021) BMJ Evidence-Based Medicine 6 at 26.

Western classification via its lexicon and taxonomic cataloguing."[56] I am complicit in attempting to combine knowledge as a means of shifting paradigms. Not everyone will agree this is the correct approach to tackling issues of inequality in our laws. There is the ever present need to remain mindful "that when knowledge or theory tries to understand the Other, then the alterity of the Other vanishes as it becomes part of the same".[57]

Brendan Hokowhitu would find my ideas monstrous, "a hyperbolic device to force attention to the peril unintelligible knowledge poses to the universalization project of the Western academy that continues today: the monster that lurks in the metaphysical landscapes coded as "resources," epistemologies coded as "myth", cultures coded as "traditions," and peoples coded as "Other".[58] It is true that ideas about how to create decolonising legal theory vary widely and I share Gayatri Spivak's views on "the failure of decolonization" which highlights the fact that decolonising theory to date has not been terribly successful.[59] As long as our aim is to 'share theories' there will always be the risk that we will "simultaneously enmesh ourselves further by corroborating the colonisers' methods…"[60], along with the fact that academia 'happens' within the physical space of universities founded on ideals from the European Enlightenment.

Drawing on Foucault's work on sovereignty and rights, Aileen Moreton-Robinson argues that patriarchal white sovereignty as a regime of power deploys a discourse of pathology as a means to discipline Indigenous people into becoming 'good citizens', through constructing a state of exception that enables its own pathological behaviour.[61] So the struggle evolves in terms of how Māori can authenticate their knowledge within the walls of Western academic institutions which seems a dubious starting point because while "under the watchful gaze of the colonizers, controlling, manipulating, morphing with the definitive purpose of social cohesion"[62] Māori knowledge remains at risk.

I myself have previously relied on utopian ideals to advance my decolonising arguments.[63] And

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[56] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 84.
[57] Madan Sarup *Identity, Culture, and the Postmodern World* (Edinburgh University Press, Edinburgh, 1996) at 68.
[58] Hokowhitu, above n 56, at 84.
[59] Gayatri Chakravorty Spivak "Diasporas Old and New: Women in the Transnational World" (1996) 10 Textual Practice 2 at 249.
[60] Hokowhitu, above n 56, at 85.
[61] Aileen Moreton-Robinson "Introduction: Critical Indigenous Theory" (2009) 15 Cultural Studies Review 2 at 12.
[62] Hokowhitu, above n 56, at 88.
[63] See Chapter 6.4 Critical Legal Studies: A Passionate Response to a Brutish Life

Hokowhitu describes how the Marx-based works of Antonio Gramsci and Paul Freire were heavily influential to the development of *kaupapa Māori* (Māori epistemology) theory in the 1980's and 90's.[64] But why are these influences really necessary? *Kaupapa Māori* theory was already in existence. If there is no new theory just a change in our relationships with existing theory, are we not looking to Gramsci and Freire out of a growing frustration due to our inability to describe *kaupapa Māori* in Western terms? Surely Marxism did not heavily influence the development of *kaupapa Māori*? *Kaupapa Māori* was already in existence, it did not need Marxism to validate itself. What is needed are the tools within Western academic institutions to understand *kaupapa Māori* theory. Or as Michel Foucault described it, that which "necessitates the removal of every mask to ultimately disclose an original identity."[65]

My fixation with developing decolonising theory from a shared space is developing a distinctly tail chasing identity. Why does *kaupapa Māori* need influences to develop as a theory? Foucault argued for a "belief in the lofty origin" that conceived the moment of birth as the moment of "greatest perfection."[66] My insistence to ground ourselves in decolonising utopianism within the walls of Western academic institutions, is perhaps only enabling the continuation of colonial discourses which we are supposed to be rejecting. These tensions reverberate continuously around issues of how to authentically present legal theory that is equitable and retains distinctive rights for Māori.

The oppressive process of colonisation has initiated these utopian ideals. Surely there must be some hope of producing decolonising legal theory "by raising the spectre of knowledge unintelligible to Western rationalism…and to reinsert those orderings…blurred beyond comprehension."[67]

As we search for answers in traditional forms of Indigenous culture, Hokowhitu explains that "when contemporary is reframed in terms of the renaissance of classical practices lost due to colonization, and where this supposed cultural renaissance is underpinned by an inherent resistance to the dominant colonial ideology, then an ontological blunder occurs that divorces what it means to be Indigenous from the *present,* where Indigenous people lose their existential

[64] Hokowhitu, above n 56, at 89.
[65] Michel Foucault "Nietzsche, Genealogy, History" in P Rabinow (ed) *The Foucault Reader* (Pantheon Books, New York, 1984) at 79.
[66] Above.
[67] Hokowhitu, above n 56, at 93.

self, the immediacy of just being, of living, of doing.[68] However, philosophically speaking, Plato holds that knowledge is innate, so that learning is the development of ideas buried deep in the soul. In several of Plato's dialogues, Socrates presents the view that each soul existed before birth with the 'Form of Good'[69] and a perfect knowledge of ideas. Thus, when an idea is "learned" it is actually just "recalled".[70] Plato identifies how the Form of the Good provides the knowledge with which to understand difficult concepts such as justice.[71] He offers a 'bridge' rather than the finality of 'divorce' as a means of traversing from traditions through to modernity.

The *Platonic doctrine of recollection* or anamnesis, is the idea that all humans possess innate knowledge perhaps acquired before birth and that learning consists of rediscovering that knowledge from within.[72] This doctrine implies that nothing is ever learned, it is simply recalled or remembered. While Plato's Form of the Good is often criticized as too general,[73] it fits nicely with my 'basic building blocks' approach and ideas that Māori hold in relation to innate being. I have touched on ideas about 'no new knowledge' previously. In the process of attaining self-determination for Indigenous peoples, strategic essentialism dominates progress guided by traditional values. These values are framed as 'premodern' by colonising attitudes, which leaves Māori "reinventing themselves as cogent (i.e. recognizable) citizens of modern colonialism.[74] Therefore, I question whether 'sharing a theoretical space' is in fact the very framework that makes decolonising scholarship comprehensible to Māori and non-Māori epistemologies. It allows us to search in the past. Such a framework could be supported by Hegel's ideas about Absolute Knowing from the *Phenomenology of Spirit* which suggests that colonized cultures already knew "absolutely;" knowing that was absolute; that which is the "unified, comprehensible whole" of reality.[75]

Unfortunately the allegorical side product of such certainty was the construction of "Other"

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[68] At 91.
[69] C D C Reeve *Blindness and Reorientation: Problems in Plato's Republic* (1st ed, Oxford University Press, Oxford, 2013) at 165-166.
[70] J L Ackrill "Anamnēsis in the Phaedo" in E Lee and A Mourelatos (eds) Exegesis and Argument: Studies in Greek Philosophy Presented to Gregory Vlastos, Phronesis: A Journal for Ancient Philosophy Supplementary Volume (Van Gorcum, Open Library, 1973) at 177-95.
[71] C D C Reeve *Plato Republic* (2nd ed, Hackett Publishing Company, Indianapolis, 1992) at 238-243.
[72] Jacob Klein *A Commentary on Plato's Meno* (University of *Chicago* Press, Chicago, 1989) at 103–173.
[73] Reeve, above n 69, at 165-166.
[74] Hokowhitu, above n 56, at 91.
[75] Georg Hegel *Phenomenology of Spirit* (Translated by A V Miller, Claredon Press, Oxford, 1977) at 479.

cultures as immoral, monstrous, and mythical.[76] Throughout colonization, Indigenous peoples faced an invader whose epistemological understanding of the world, or endemic discursive psychosis, resembled delusion of grandeur;[77] an unfortunate unidimensional consequence of Enlightened rationalism. The violent synthesis of one culture into another typically involved encompassing and reconfiguring the incomprehensible into comprehensible forms, the classification of Indigenous forms of knowing into Western ontological catalogues, and/or the simple denial that many practices even existed.[78] The fact that Indigenous epistemologies can challenge "Enlightened" knowledge allows us an opportunity to investigate theoretical concepts beyond the colonisers gaze. While it is important to engage in self-criticism of theory that has been 'normalised' into our consciousness, this goes hand in hand with giving a voice to what can be described as radical notions of decolonisation; but notions that "simply cannot be housed by the tokenism of recognition, rights, and reconciliation."[79]

Brendan Hokowhitu describes how the "…unknowable metaphysical epistemologies of Indigenous peoples were the principal threat to the colonial/Enlightenment project because they simply defied the Western order of things, and thus these epistemologies were branded and discarded as fanciful, childlike myths of a pre-civilized Self that had yet to come up to speed with the rational European mind.[80] But I have argued for the inclusion of 'myth' as a source of legitimate knowledge. Decolonising theory is all the richer for its inclusion. To date the only 'myth' I have discovered that is of no value to my quest, is the 'myth' of universal knowledge; universal knowledge that defeats Māori knowledge, knowledge that fills our prisons with our Indigenous peoples, and allows them to feature in our demographic statistics for all the wrong reasons. Let us not allow myths and metaphysics to haunt our shared spaces, let them inhabit these spaces with a real sense of purpose.

[76] Hokowhitu, above n 56, at 93.
[77] Above.
[78] At 94.
[79] At 100.
[80] At 96.

Chapter 11. Shifting Legal Paradigms

Knowledge is a blessing on your mind,
it makes everything clear and
guides you to do things in the right way

Eruera Stirling[1]

11.1 How do we shift a legal research paradigm?

For this struggle to decolonise our legal research to succeed what is needed is a legal paradigm shift. It is a responsibility of Pākehā to facilitate this shift in our legal paradigms as we are responsible for the inequitable paradigms that currently exist. But how do we shift a legal paradigm? While I acknowledge the absolute risk that we will "simultaneously enmesh ourselves further by corroborating the colonisers' methods"[2], I dare to suggest that perhaps we can look to science for inspiration and the work of Thomas Kuhn as a starting point for assistance in shifting our legal paradigms.

A legal paradigm shift, based on the concept identified by the American physicist and philosopher Thomas Kuhn,[3] would involve a fundamental change in the basic concepts and practices of law as a professional discipline. Although Kuhn restricted the use of the term 'paradigm shift' to the natural sciences, the concept of a legal paradigm shift is also possible if we think creatively. Paradigm shifts arise when the dominant paradigm under which normal science, or in this case law, operates is rendered incompatible with new phenomena, facilitating the adoption of a new theory or paradigm.[4]

Firstly, let us consider that as a whole a "paradigm" designates what the members of our legal community have in common, that is to say, the framework of values shared by our legal

[1] Eruera Stirling *The teachings of a Māori Elder* (Oxford University Press, Auckland, 1981).
[2] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 85.
3 Thomas Kuhn *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, 1962) at 54.
4 Above.

community. Then, in a second sense, if we consider a paradigm is a single element of a whole, say for example, legal doctrine, which stands for the explicit rules and thus defines our traditions and practice, then Kuhn's scientific ideas could be useful to the decolonising theorist.

Kuhn used paradigms to investigate what he calls "normal science", the science that can decide if a certain problem is scientific or not. While "normal science" can mean science guided by a coherent system of rules derived from a paradigm, paradigms can guide the science also in the absence of rules.[5] The idea that rules are not necessarily required to make a paradigm fits comfortably with ideas about 'the balancing of relationships' rather than 'the regulation of rules' as concepts to define our legal paradigms.

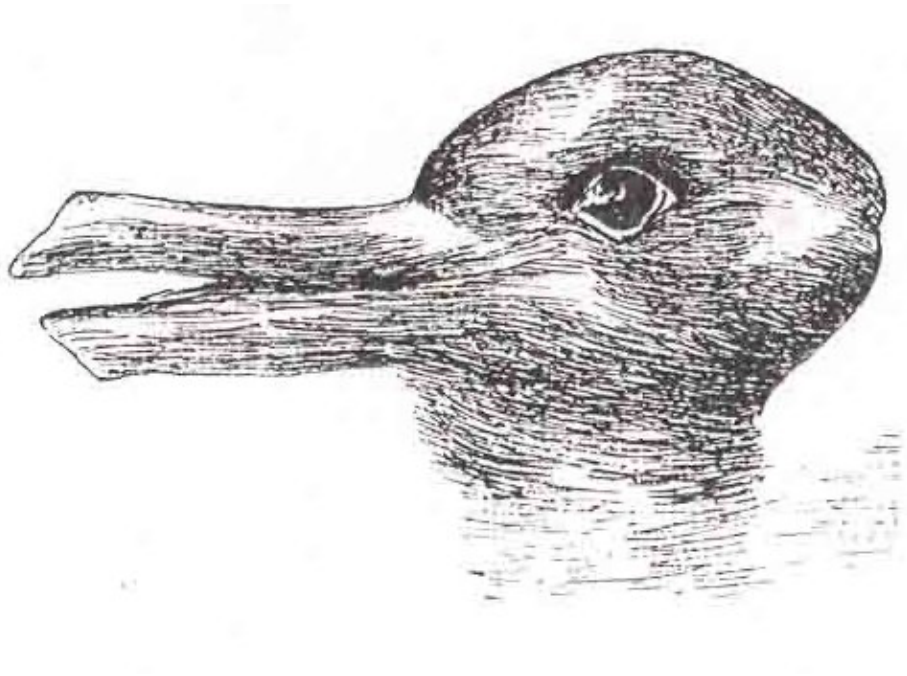

Figure 1. The duck-rabbit optical illusion by Ludwig Wittgenstein

Kuhn used the duck-rabbit optical illusion (Fig. 1) made famous by Ludwig Wittgenstein posthumously in 1953,[6] to demonstrate the way in which a paradigm shift could cause one to see the same information in an entirely different way. Decolonising theory asks us to do exactly that; see our current laws in a different way.

[5] Giorgio Agamben "What is a Paradigm?" (European Graduate School Video Lectures, 2015) <https://www.youtube.com/watch?v=G9Wxn1L9Er0>.
[6] Ludwig Wittgenstein *Philosophical Investigations* (Blackwell Publishing, Oxford, 1953) at 194.

In his 1962 book the *Structure of Scientific Revolutions*, Kuhn explains the development of paradigm shifts in science in four stages.[7] As we search for the basic building blocks on which to build our shared legal theory perhaps Kuhn's ideas about shifting scientific paradigms in four stages can help us. If we loosely base our ideas about how to move theoretical boundaries around his four stages it is possible to develop ideas about how we might actually move legal boundaries and engage with law in an entirely different way.

In the first stage of a paradigm shift, a dominant legal paradigm is active. This paradigm is characterised by a set of Western legal theories and ideas that define what is possible and rational to do from a Pākehā perspective. There is a clear set of tools, for example, those found in legal doctrine, with which to approach a particular problem. This paradigm is useful in that it provides both the scope and tools with which to conduct legal research. Kuhn stresses that, rather than being monolithic, the paradigms that define 'normal science', or in our case 'mainstream law' can be particular to different people. Whereas a chemist and a physicist might operate with different paradigms of what a helium atom is,[8] so might an Indigenous and non-Indigenous academic operate with different paradigms when discussing ideas about justice. However, under normal science, scientists may encounter anomalies that cannot be explained by the dominant paradigm, and similarly so in a legal sense. Although describing *kaupapa Māori* theory as an anomaly is perhaps not a good fit, I use this language in an analogous manner that encourages us to think differently about ideas outside of our current paradigms.

In the second stage of a paradigm shift, when significant anomalies have accrued against a dominant paradigm, the scientific community is thrown into a state of crisis. To address the crisis, in what Kuhn calls "extraordinary research", scientists extend the boundaries of 'normal science' in an exploratory fashion.[9] Without the structures of the dominant paradigm to depend on, legal academics engaging in 'extraordinary research' can produce new theories to explain the anomalies. Kuhn describes this stage as "the proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals".[10]

[7] Kuhn, above n 3, at 54.
[8] At 50.
[9] At 87.
[10] At 91.

In stage three, Kuhn describes this stage as a time when a new paradigm is formed, a paradigm which gains its own new followers. This stage entails both resistance to the new paradigm, and reasons for adopting it. What eventuates is a new generation of legal academics who have grown up familiar with the new paradigm.

And finally, in stage four of our paradigm shift, a legal revolution is created; a new paradigm is adopted as the dominant one and textbooks are rewritten and a constitution is created that allows us to move on from our colonial past.

Kuhn states that when a scientific paradigm is replaced by a new one, albeit through a complex social process, the new one is *always better*, not just different.[11] Perhaps different and better paradigms would also be possible in a legal sense with the development of a shared theoretical space. Moving legal boundaries and engaging with differing paradigms opens portals to see the same knowledge in an entirely different way.

If we consider a series of exchanges and entanglements, convergences, and collisions involving ancestral Maori, Western, and modernist ideas in relation to legal theory in New Zealand, Maori and non-Maori have often engaged in confrontational debate. However, if the State, ancestral Maori and modernist legal framings are juxtaposed, despite being incommensurable in certain respects, drawing upon divergent forms of order, participants in the process could weave together a concerted approach toward the development of decolonising legal theory; this interweaving avoids the need for a "universal theory of everything" in which only one reality is possible and only one set of assumptions about the world can prevail.

Weaving distinct, even incommensurable theories together into decolonising legal frameworks, may have unorthodox outcomes, but they may also prove enlightening as heard in the chant of Eruera Stirling:[12]

[11] At 199.
[12] Stirling, above n 1.

Whakarongo! Whakarongo! Whakarongo!	Listen! Listen! Listen!
Ki te tangi a te manu e karanga nei	To the cry of the bird calling
Tui, tui, tuituiā!	Bind, join, be one!
Tuia i runga, tuia i raro,	Bind above, bind below
Tuia i roto, tuia i waho,	Bind within, bind without
Tuia i te here tangata	Tie the knot of humankind
Ka rongo te pō, ka rongo te pō	The night hears, the night hears
Tuia i te kawai tangata i heke mai	Bind the lines of people coming down
I Hawaiki nui, i Hawaiki roa,	From great Hawaiki, from long Hawaiki
I Hawaiki pāmamao	From Hawaiki far away
I hono ki te wairua, ki te whai ao	Bind to the spirit, to the day light
Ki te Ao Mārama!	To the World of Light!

11.2 Shifting Legal Research Paradigms with the Help of Customary Law

Te rongonuio te taniko kei roto i te whiriwhiri noa māu tonu tōna ātaahua
The beauty of taniko, the embroidered border of a fine woven cloak,
is that there is more than one pattern.

Why study the legal theory of two cultures? Only through the analysis of both legal cultures can we "recognize what is accidental rather than necessary, what is permanent rather than changeable in legal norms and legal agencies, and what characterizes the beliefs underlying both."[13] Westminster style legal norms assume their theoretical foundations and dominance as valid without too much in the way of self reflection. In contrast, if we consider *tikanga Māori* which embodies theories of law that use mythical beliefs to produce different legal results, we are then able to distinguish and respect these alternative places with legal rules and norms or other techniques of social control as legitimate. Ranginui Walker described how "in a culture that lives and grows, there need be nothing outmoded or discredited about mythology. Properly understood, Māori mythology and traditions provide myth-messages to which the Māori people can and will respond today. All that is needed is that these myth-messages be more clearly signposted."[14]

When I struggle to find the relevance of myth to the stoic dominance of our Western legal traditions, I am reassured by the words of Ranginui Walker because they provide an insightful

[13] Henry Ehrmann *Comparative Legal Cultures* (Prentice-Hall, Englewood Cliffs, New Jersey, 1976) at 9.
[14] Ranginui Walker "The Relevance of Māori Myth and Tradition" in Michael King (ed) *Te Ao Hurihuri: Aspects of Māoritanga* (Reed Publishing Group, Auckland, 1992) at 170.

perspective on a complex understanding:

> One way of looking at mythology is to read it as the mirror-image of a culture. Myths reflect the philosophy, ideals and norms of the people who adhere to them as legitimating charters. Sometimes a myth is the outward projection of an ideal against which human performance can be measured and perfected. Alternatively, a myth might provide a reflection of current social practice, in which case it has an instructional and validating function.[15]

Myths like the rules of traditional behaviour possess the same dynamism that allows them to vary with the real or perceived needs of the society. Ranginui Walker describes how:

> Although the moral truths which are the myth-messages are relatively stable, points of detail may be altered to suit local circumstance…Māori myth and traditions are logically arranged and related systems that fulfilled explanatory, integrating, validating, historic and socialisation functions for the people who owned them. Although possessing supra-normal powers in an age of miracles, the heroes of myths and traditions behave basically in human ways. They love, hate, fight and die just as their living counterparts do. Embedded in the stories are themes and myth-messages that provide precedents, models and social prescriptions for human behaviour. In some cases the myth-messages are so close to the existing reality of human behaviour that it is difficult to resolve whether myth is the prototype or the mirror image of reality.[16]

This comparison of legal cultures that includes mythology produces self reflection that leads to a more comprehensive legal understanding not limited to views of a single system of law.

Anne Salmond describes how:

> Far from being a static, steady-state 'traditional' society, then, Māori life was dynamic and rapidly changing. In the four hundred and fifty years or so before European arrival, Māori invented a new language, cosmology and art forms, fashioned new kinds of watercraft and buildings, and mastered new fibre, stone and agricultural technologies. Sometimes they made mistakes, setting fires that ran out of control and exploiting some local species to the point of extinction, including the moa, a giant flightless bird and their best source of protein. Nevertheless, the rate of successful innovation was impressive. Different ways of life, products and ideas emerged in different parts of the country.[17]

The Reverend Taylor as early as 1855 described how according to Māori philosophies, the world began with a surge of energy, followed by knowledge, thought, memory and desire. It was not until *hau ora* and *hau tipu*, the winds of life and growth, blew through the Void that Ranginui and Papatūānuku, the Sky and Earth, emerged, followed by stars, plants, animals and

[15] At 170-171.
[16] At 182.
[17] Anne Salmond *Knowledge is a Blessing on Your Mind: Selected Writings 1980-2020* (Auckland University Press, Auckland, 2023) at 495.

people.[18]

In this relational universe of *whakapapa*, the Māori world emerged from *utu,* reciprocal exchanges between *hapu* and *iwi*. In this way, relations between the ancestors who emerged from Rangi and Papa alternate between gift giving and union, and quarrelling and exclusion.[19] *Hau*, the wind of life, thus emerges at the very beginning of the cosmos, animating exchanges of all kinds in the *whakapapa* networks.[20] Tamati Ranapiri, a respected elder, described *hau* in 1907 as:

> As for the *hau*, it isn't the wind that blows, not at all. Let me explain it to you carefully. Now, you have a treasured item (*taonga*) that you give to me, without the two of us putting a price on it, and I give it to someone else. Perhaps after a long while, this person remembers that he has this *taonga*, and that he should give me a return gift, and he does so.
>
> This is the *hau* of the *taonga* that was previously given to me. I must pass on that treasure to you. It would not be right for me to keep it for myself. Whether it is a very good *taonga* or a bad one, I must give to you, because that treasure is the *hau* of your *taonga*, and if I hold on to it for myself, I will die. This is the *hau.* That's enough.[21]

Ranapiri goes onto to explain if a person fails to uphold their obligations in such exchanges, their own life force is threatened. As gifts or insults pass back and forth, impelled by the power of the *hau,* patterns of relations are forged and transmuted, for better or for worse.[22]

But Salmond considers that *hau* goes far beyond the exchange of gifts. It also animates and transforms those who exchange them. In greeting each other, people press noses and breathe, mingling their *hau* (wind of life) together. People speak of themselves as *ahau* (myself), and when *rangatira* or chiefs speak of an ancestor in the first person, it is because they are the *kanohi ora* (living face) of that ancestor, and if they speak of their kin groups in the same way, it is because they share ancestral *hau* together.[23]

Tikanga Māori is compelling because it demonstrates that binding rules that govern conduct existed before the arrival of Westminster style laws in Aotearoa. "Although law cannot develop

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[18] Reverend R Taylor *Te Ika a Mau or New Zealand and its Inhabitants* (Wertheim & Macintosh, London, 1855).
[19] Anne Salmond "Tears of Rangi Water, Power, and People in New Zealand" (Winter, 2014) 4 Journal of Ethnographic Theory 3 < https://doi.org/10.14318/hau4.3.017>.
[20] Above.
[21] Elsdon Best "Letter from Tamati Ranapiri to Peehi, MS Papers 1187–127" (Alexander Turnbull Library, Wellington, 23 November 1907) at 2.
[22] Salmond, above n 19.
[23] Above.

without the existence of a community, the community does not need to have the characteristics of a state to give itself legal rules."[24] If the boundaries around what can be legal are not fixed, perhaps these boundaries can be moved.

11.3 The Center of Gravity of Legal Development Lies in Society Itself

The German sociologist Max Weber found that "law, convention, and usage belong to the same continuum with imperceptible transitions leading from one to the other…It is entirely a question of terminology and convenience at which point of the continuum one shall assume the existence of the subjective conception of a "legal obligation."[25] Ehrmann describes how "…it is wrong to define the forces of law in terms of a central authority, of courts and constables."[26] Such forces do not currently meet the needs of Māori. As long as such authorities are lacking Māori will seek legal satisfaction by other means. Therefore, in accordance with our changing society, and in order to meet the needs of Māori, our laws will gradually become more diverse and more inclusive. Oliver Wendell Holmes stated "law, being a practical thing must found itself on actual forces."[27] This implies that "self determination" in line with the rights to *tino rangatiratanga* contained within the Treaty of Waitangi and the changing cultural landscape and demands of our community are inseparable from our societal institutions. "The center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.[28]

To judge a legal system by the text of its statutory enactments and by the rules governing court procedures would give a distorted picture of the results it produces in life.[29] For example, Māori comprise 15 per cent of the New Zealand population, but they are over three times more likely to be apprehended for a criminal offence than non-Māori,[30] and Māori are over five times more likely to be prosecuted than non-Māori.[31] Moreover, far fewer Māori offenders are diverted,

[24] Ehrmann, above n 13, at 2.
[25] Max Weber quoted in Richard Abel "A Comparative Theory of Dispute Institutions in Society" (1974) Law and Society Review 8 at 221-22.
[26] Ehrmann, above n 13, at 3.
[27] Oliver Wendell Holmes *The Common Law* (Harvard University Press, Cambridge, Mass, 1881) at 213.
[28] At 213.
[29] Henry Ehrmann *Comparative Legal Cultures* (Prentice-Hall, Englewood Cliffs, New Jersey, 1976) at 4.
[30] Pat Doone *Hei Whakarurutanga Mo Te Ao* (Crime Prevention Unit, Wellington, 2000) at ch 4.
[31] Ministry of Justice *Responses to Offending by Māori and Pacific Peoples* (Ministry of Justice, Wellington, 1999) <www.justice.govt.nz>.

warned or cautioned[32] supporting Moana Jackson's claim that the criminal justice system is institutionally racist toward Māori.[33]

The United Nations Working Group on Arbitrary Detention noted that Māori are over-represented in the prison population and warned that incarceration that is the outcome of bias "constitutes arbitrary detention in violation of international law."[34] The hiatus between legal ideals and reality for Māori is crippling. Under colonial rule, the hiatus has been largely accepted with reluctant passivity since the signing of the Treaty. But Selznick says the moment might come, when the law by the very expectations it has raised mobilizes enough energies to provide a vehicle for actual rather than merely promised change.[35]

Clearly legal reform for Māori is pressing and the English social reformer, who heavily influenced the French revolution, Jeremy Bentham, was all for legal reforms that responded quickly to social need and the restructuring of society.[36] Reluctant to throw caution to the wind, Savigny who was writing around the same period as Bentham, condemned the sweeping legal reforms that the French Revolution had introduced and that were threatening to invade Europe. Savigny's ideas are useful for the decolonizing theorist. In his opinion only fully developed customs could form the basis of legal change.[37] Since customs grow out of the habits and beliefs of concrete people, rather than expressing those of an abstract humanity, legal mutations could only be national, never universal.[38] These ideas respects the unique nature of *tikanga* and the importance of local context to its sustainability. Writing earlier than Savigny was another Frenchman, Montesquieu, who also expressed doubts about the suitability of one nation's legal system for another. He concluded that since laws must integrate with the social and cultural conditions of a country, they would never be valid outside of the country in which they had been developed.[39]

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[32] Valmaine Toki "Tikanga Māori and Therapeutic Jurisprudence" in Valmaine Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 20.
[33] Moana Jackson *The Māori and the Criminal Justice System – He Whaipaanga Hou: A New Perspective: Part 2* (Department of Justice, Wellington, 1988).
[34] United Nations General Assembly *Report of the Working Group on Arbitrary Detention: Mission to New Zealand* (30th Session, Agenda Item 3, Human Rights Council, Geneva, July 2015).
[35] Philip Selznick "Law: The Sociology of Law" in *International Encyclopedia of the Social Sciences* (Macmillan, New York, 1968) at 57l.
[36] Wolfgang Friedmann *Legal Theory* (5th ed, Columbia University Press, New York, 1967) at 312-20.
[37] At 209-13.
[38] Henry Ehrmann *Comparative Legal Cultures* (Prentice-Hall, Englewood Cliffs, New Jersey, 1976) at 5.
[39] Charles Louis de Secondat Montesquieu *The Spirit of the Laws* (1753) (translated by Thomas Nugent, Hafner, New York,1949) Book 1 at 6-7 and Book XIX at 307-15.

Anselm Feuerback thought otherwise:

> "The richest source of all discoveries in every empirical science is comparison and combination. Only by manifold contrasts the contrary becomes completely clear; only by the observation of similarities and differences and the reasons for both may the peculiarity and inner nature of each thing be thoroughly established. Just as from the comparison of languages the philosophy of language, the science of linguistics itself, is produced; so from comparison of the laws and legal customs of nations of all times and places, both the most nearly related and the most remote, is produced universal jurisprudence, the pure science of laws, which alone can infuse real and vigorous life into the specific legal science of any particular country."[40]

However, for any decolonising theorist there are pitfalls and risks attempting to engage *tikanga Māori* with Western theory to find universal themes. It is easy to be mislead by similarity in language and sociolegal concepts. Ehrmann suggests that what we need to study instead are the 'functional equivalents' in differing cultures.[41] Therefore if we start with a legal problem of social significance then the next step would be to examine the legal rules by which their offences would be resolved from one legal system to the other.

There is an immediate urge to 'classify' laws and assimilate legal concepts into universal habits of law. Classification of laws instantly hampers the decolonizing theorist. Individual legal systems defy mutually exclusive categorization. For example, in modern Aotearoa New Zealand, the Western style legal system relies on statute but it is not entirely codified. Nor do Māori rely totally on an unwritten oral tradition. Equally, answers to legal problems are not found exclusively in court decisions whether mainstream courts or marae based courts. Perhaps the phenomenon emerging from decolonizing legal theory is that the developing theory is hybrid in nature and defies classification; that the emerging hybrid jurisprudence of Aotearoa New Zealand might nonetheless be valid and dynamic as demonstrated elsewhere in legal systems such as private law of Israel which contains elements of Talmudic, Islamic, Roman-Catholic, canon, and Ottoman law,[42] or in large sectors of the Arab world, where a career on the bench as *qadis*, are often those who come from traditional religious backgrounds and represent sectors of the society that see themselves as the guardians of a high tradition,"[43] and then there are those of the Navajo peoples in the United States who successfully mix Navajo

[40] Anselm Feuerback quoted in Harold Berman "The Comparison of Soviet and American Law" (1959) Indiana Law Journal 34 at 560.
[41] Ehrmann, above n 13, at 11.
[42] At 12.
[43] Lawrence Rosen *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge University Press, Cambridge, 1989) at 65.

law with laws of the state.

The Navajo, who identify as Dine (the People) in their own Athabascan language, have experienced similar struggles to Māori.[44] Early contact resulted in war, slave and livestock raiding, trading and treaty making.[45] The wars between 1863 and 1868 were particularly destructive producing large scale suffering for the Navajo.[46]

The attempted assimilation process, in 1865, by the United States government failed.[47] Admitting defeat a treaty was signed with the Navajo Nation. The 1868 Navajo Treaty reaffirms and guarantees to the Dine their rights as a sovereign nation.[48] Contrary to popular non-Indian belief, these treaties did not provide any rights to Indian nations. These treaties only recognised the pre-existing sovereign status of Indian nations and contain certain promises the United States made in exchange for Indian Nations forfeiting substantial land rights.[49]

Despite the suffering, trauma and tragedy experienced[50] the core values retained by the Navajo became the foundation for law and procedure employed by the modern Navajo Nation government, particularly the Navajo Nation Court System.[51] From its creation in 1923, the Navajo have operated a democratic government, without a formal written constitution,[52] comprising of three branches: Legislative (Navajo Nation Council), Executive (President and Vice-President), and Judicial (Navajo Nation Court System).[53] The President of the Navajo Nation appoints each judge and then the Navajo Nation Council confirms the President's

[44] The Navajo Nation extends over north eastern Arizona, south eastern Utah, and north western New Mexico, nearly 27,000 square miles, with 298,197 individuals identifying as Navajo in the United States; see Census Bureau *Census 2000: Special Tabulation* (Washington DC, 2004); see also J Correll *Through White Men's Eyes: A Contribution to Navajo History* (Navajo Foreign Publishing Company, Arizona, 1976) for early history between 1541 – 1846.
[45] F Reeve *Navajo Foreign Affairs 1795-1846* (Navajo Community Press, Arizona, 1983).
[46] G Bailey and R Glenn Bailey *A History of the Navajos: The Reservation Years* (School of American Research Press, Santa Fe) at 9; see also R Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009) at 2.
[47] R Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009) at 5.
[48] At 6.
[49] At 6.
[50] At 7.
[51] At 8. In 1923 requests by oil companies for exploration leases for the Four Corners area of Navajo country, arguably, is perceived as the catalyst for the creation of the Navajo Tribal Council. The first meeting on July 7, 1923 resulted in the signing of oil and gas leases on behalf of the Navajo Nation for lands, delineated in the 1868 Navajo Treaty.
[52] R Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009) at 16.
[53] At 16.

appointee with a unanimous vote.[54] Similar to the Judges of Te Kooti Rangatahi, Navajo judges must speak the Navajo language fluently and understand Navajo culture and traditions as they are used in litigation in the Navajo courts. Nineteen judges serve the Navajo Nation of approximately 300,000 Navajo compared with only eight marae court judges serving approximately 600,000 Māori.

Navajo judges employ Navajo common law to resolve legal issues. Navajo court decisions containing these norms, values, customs and traditions are published in the *Navajo Reporter* and readily available to legal practitioners, judges, researchers, and the public.[55] The Navajo Council codified Dine Fundamental Laws in 2002. This is utilised by the Navajo courts and departments of the Navajo Nation to resolve issues and formulate policy.[56]

Ehrmann claimed, wrongly in my opinion, that "in some countries a deliberate selection of norms imported from another family of legal cultures has been used to bolster Indigenous institutions which otherwise would have become obsolete."[57] It is unlikely that an Indigenous institution would support such a statement; a hybrid institution might consider the comment; but more than likely this type of comment would be stated by a non-Indigenous institution in order to position themselves favourably. Such comments demonstrate the subtleties of colonialism and Eurocentric practices that should be avoided. *Tikanga* is a vibrant and effective legal system in its own right that risks being rendered obsolete due to colonising practices rather than inadequacy as a legal system. As decolonizing theorists we must resist the temptation to categorise if to do so invites portals for ongoing colonialism. These and other reservations concerning the construction of hybrid decolonising theory must be kept in mind so that the theory we create is equitable in its application.

"Sources of law are the materials out of which legal rules are fashioned once distinctively legal obligations have emerged in society.[58] If we were to truly honour the obligations held in the Treaty of Waitangi, customs based on mythological traditions as well decisions by judicial bodies, written and unwritten rules held in oral traditions and other sources about the law could supplement these materials. In combination, these sources are common to both Māori and non-

[54] At 18.
[55] At xxi.
[56] At xxi.
[57] Ehrmann, above n 13, at 12.
[58] Above.

Māori. However, what is required is a paradigm shift in terms of relative importance given to these sources by differing legal bodies. "Throughout history each of these sources has had its ideological defenders who were inclined to see the virtues of wisdom and justice restricted to those sources that seemed to serve best their own interests and values.[59]

If we agree that all societies have some form of law to guide them since their creation, then it is possible to approach the study of customary law from the perspective of a legal anthropologist; that is to study law within our society. Robert Joseph describes how laws are nothing more than societal rules which have to be practically sanctioned in the here-and-now.[60] Legal anthropology sets itself the task of understanding these rules of societal behaviour, which must be designed to deter illegal behaviour while in turn being capable of enforcing the social interests of society which results in the rules becoming part of the customary laws of our society.

Fitzgerald stated in *Salmond on Jurisprudence:*

> It was long the received theory of English law that whatever was not the product of legislation had its sources in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded…Even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance.[61]

Ehrmann describes custom as not only the oldest but also an ubiquitous source of law: it prescribes behaviour that through continued observance has become "customary" and it announces sanctions for deviant behaviour.[62] He states further that what distinguishes mere habits from customary law is the coercive force that is gathered behind the latter.[63] This is certainly true of English common law which is theoretically based on a fiction perpetuated by popular faith rather than academia. A variation of this ubiquitous source of law that Ehrmann describes is the popular mythical culture that forms the customary practices of *tikanga Māori*. Māori rely on custom to create their legal rules, but the difference lies in the manner in which law is created through custom; *tikanga* does not so much "announce sanctions for deviant

[59] At 21.
[60] Robert Joseph "Re-Creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Waikato Law Review 74 at 84.
[61] P Fitzgerald *Salmond on Jurisprudence* (12 ed, Sweet & Maxwell, London, 1966) at 189-190.
[62] Ehrmann, above n 13, at 21.
[63] Above.

behaviour", rather it seeks to "balance relationships" through customary practices.

Joan Metge concluded that another difference between Western law and Māori customary law is the origins of their legal sources and in the contrast between oral and written communication. Metge explains:

> Tikanga arises out of on-going community debate and practice and are communicated orally; as a result they are adapted to changing circumstances easily, quickly and without most people being consciously aware of the shift. Western laws are formulated and codified by a formal law-making body and are published in print; their amendment, while possible, is a complex and lengthy process. As a result laws often lag behind community opinion and practice; at times, however, they can be ahead and formative of it.[64]

Custom then has historically been a basis of law for all people. And most anthropologists nowadays accept that all human societies have law, whether or not they have formal laws and law courts.[65] Except in times of exceptional crisis, all human societies pursue as key aims the maintenance of order, the reinforcement of accepted values and the punishment of breaches. Large-scale, complex state societies are codified into a system of courts and Judges and small-scale societies with simpler political structures use means which are mainly informal, implicit and serve other purposes as well.[66]

Professor Dame Anne Salmond said in her evidence to the Waitangi Tribunal:

> It should be stressed that in 1840 in Northland, Māori were operating in a world governed by *whakapapa* (genealogical connections). Ancestors intervened in everyday affairs, *mana* was understood as proceeding from the ancestor-gods and *tapu* was the sign of their presence in the human world. Life was kept in balance by the principle of *utu* (reciprocal exchanges), which operated in relations between individuals, groups and ancestors.[67]

Her point was that when the settlers arrived in *Muriwhenua* in the 1830s the land was not empty of law. Kupe's law held sway. The point made repeatedly by the Waitangi Tribunal was that the first law did not evaporate when settlers arrived.[68]

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[64] Joan Metge, 'Commentary on Judge Durie's Custom Law' (Unpublished Custom Law Guidelines Project Paper, Wellington, 1997) at 5.
[65] Joseph, above n 60, at 83.
[66] Metge, above n 64, at 2.
[67] Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23.
[68] Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (Harkness Henry Lecture, 2013) 21 WLR at 7.

However, Joan Metge warned those that want "to come to grips with Māori custom law, it is necessary to recognise that Māori concepts hardly ever correspond exactly with those Western concepts which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation - the direct reference - is substantially the same, the connotations are significantly different."[69] Hence those qualified to articulate the values and practices inherent in tikanga Māori are Māori schooled in *tikanga Māori* through a life experience of *tikanga*, especially respected *kaumatua* (elders).[70]

Nonetheless, the overriding theme of Māori and English customary practices is that *tikanga* lost out to the coercive nature of the English common law. Only when *tikanga* and the English common law are fused, and in the process, transformed into a hybrid entity will *tikanga* remain functional and thereby avoid annihilation. This could be achieved by shifting theoretical paradigms that allow the inclusion of *tikanga* in adjudication or by its incorporation into our legislation for example.

The English merged their local custom into common custom and after a time the common law and customary law were used synonymously and precedent was developed. Similar to *tikanga Māori* and decisions made by the *toanga*, "judge-made law was given the appearance of being intimately tied to the people's habits, their wisdom, and their consent."[71] If *tikanga* was routinely included in judge-made law, the Judge's obligation not to depart from precedent in the gradual building of a hybrid common law would protect Māori from arbitrary colonial powers. The judiciary would gradually form a shield for Māori protecting them from Eurocentric laws and law makers and discriminating statute.

Voltaire exclaimed "You want good laws? Burn yours and make new ones." Chief Justice Coke, acted with less French abandonment, and called statutes "raging tyrants," defeating Bentham's attempts at large-scale codification.[72] The French revolution and its codifers did little to quell the English enthusiasm for their "common-law way of life." Sometimes the slow and steady plod of precedent development is preferable to a revolution. Despite the shattered

[69] Metge, above n 64, at 3.
[70] Joseph, above n 60, at 92.
[71] Ehrmann, above n 13, at 22.
[72] At 23.

social conditions of Māori, if our precedents included *tikanga* then the constant reference to the past would align with principles contained in *whakapapa* and Māori traditions. It is important to defend the common law as a source of law for Māori as historically drastic reform to legislation has often resulted in statues that have frozen colonial ideals to the detriment of Māori.

The New Zealand foreshore and seabed controversy is a relatively recent example of this type of drastic legislative reform. It concerns the ownership of the country's foreshore and seabed, with several *iwi* claiming that Māori have a rightful claim to title based on historical possession and the obligation by the Crown under the Treaty of Waitangi. On 18 November 2004, Parliament passed the Foreshore and Seabed Act 2004 which deems the title to be held by the Crown. Moana Jackson, in a hui within Ngāti Kahungunu, voiced three main grounds of opposition: (1) The Act was a confiscation of *iwi* and *hapu* rights to the foreshore and seabed because it removed title and vested it in the Crown on behalf of 'all New Zealanders'; (2) The act was discriminatory because it required *iwi* and *hapu* to allow access over areas of foreshore they had an interest in but did not place the same responsibility on Pakeha. It created a basic inequality of obligation; (3) The Act was also discriminatory because it denied Māori access to the Courts to seek clarification of rights. It created a basic inequality of legal opportunity. The act was later repealed and replaced by the Marine and Coastal Area (Takutai Moana) Act 2011.

A further example was highlighted by Wayne Rumbles back in 2011.[73] Rumbles explained how a deliberate focus on Māori offending meant that reported offending statistics increased, setting up a cycle of focusing on the "Māori" criminal problem, which increased reporting of Māori crime, thus justifying the need for further official intervention, with the deeper concern being linked to the new dominion's focus on state control and law and order. This cycle set up a self-fulfilling prophecy, which still is manifest today. The Sentencing and Parole Reform Act 2010 amended the Sentencing Act 2002 and introduced into New Zealand the "three strikes" sentencing regime. The three strikes sentencing regime was introduced to protect the public, deter offenders, and improve public confidence in the criminal justice system.[74] The reality however, is that "given that there is some systematic bias discernible around Māori in the

[73] Wayne Rumbles "Three Strikes" Sentencing: Another Blow for Māori " (2011) 19 WLR 2 at 111.
[74] Law and Order Committee "Sentencing and Parole Reform Bill" (2010) at 1.

criminal justice system, any habitual offender-sentencing regime will disproportionately impact on Māori, feeding a cycle of increasing Māori incarceration.[75]

Erhmann said "only the courts, they will argue, can bring facts into focus; their role in sifting and transforming interstitially unsuitable rules promises more satisfactory results."[76] He also understood the law as being meleable, describing how "traditional behaviour secretes rules for future behaviour: yet the rules may vary with the real or perceived needs of the society.[77] Mulgan found that "all law, Pakeha as well as Māori, arises out of social norms and the need to enforce these norms within society. The ultimate source of Pākehā law is not the courts or statutes but the social values reflected by Parliament in statutes and by Judges in their decisions."[78]

11.4 Brewing in the Caldron of the Courts

Benjamin Cardozo, Justice of the Supreme Court of the United States, when considering the issue of judicial discretion, asked the following questions:

> To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into the strange compound which is brewed in the caldron of the courts, all these ingredients enter in varying proportions.[79]

While a wide range of factors go into the exercise of judicial decision making, it is likely that the qualities that are distinctive and characteristic of the dominant legal paradigm will snake their way through to the final decision unless there is a paradigm shift. In bringing about this paradigm shift it becomes less important to determine how regular systems of law function and more important to probe and interpret unchartered judicial landscapes. Specifically, the solution to the paradigm shift may be achievable by considering judicial discretion as a cultural

[75] Rumbles, above n 73, at 108.
[76] Ehrmann, above n 13, at 23.
[77] At 8.
[78] R Mulgan "Commentary on Chief Judge Durie's Custom Law Paper from the Perspective of a Pakeha Political Scientist" (Unpublished Paper, Law Commission, Wellington, 1997) at 2.
[79] Benjamin Cardozo *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921).

phenomenon.[80] We can try to understand the nature of judicial discretion in relational terms by using initiatives such as the marae based courts as a port of entry. If we argue that a better understanding of judicial decision making can be gained by analysing its cultural characteristics, it may be from a *tikanga Māori* perspective that the features of the new emerging paradigm can be constructed more clearly.

There are many theoretical approaches to law, most of them unattractive for various reasons. Our current criminal justice system speaks to this. While I am eager to demonstrate theories of law that are equitable, and holistic in nature, I am not eager to illustrate law as a 'soft touch' dispute resolution process. What appears more useful is to view law as part of a framework that includes concepts that extend across many different areas of social life and not just confined to the shelves of books in the law library. My quest becomes a search for the theories of law contained within the relationships of everyday life. This is not of course to discount the connections that exist between law and economics and politics for example. It is to say that these connections too, make up the relationships of everyday life. It is to say that in an attempt to understand the full range of social influences that shape peoples' lives, it is necessary to understand the ways which best account for social behaviour.

Felix Frankfurter, also a Justice of the Supreme Court of the United States, who succeeded Benjamin Cardozo, remarked that law should form an autonomous system rather than a cultural system, and that the creation of a logically consistent body of legal doctrine and precedents is the proper aim of law. However, Lawrence Rosen, who was examining the cultural presuppositions of decision making by the Islamic *qadi,* or judge, in Morocco, argued that judicial decision making is a cultural phenomenon and that judicial discretion is shaped by its surrounding cultural context.[81] Despite what could be construed as a threat to rule of law, Rosen went as far to say that the social background and class interest of judges shaped the actual content of the judgments reached.[82] "It is true in Morocco, as in much of the Arab world, that those who seek a career on the bench, particularly as *qadis*, often come from traditional religious backgrounds and represent sectors of the society that see themselves as the guardians

[80] See: Judge Frances Eivers – Tangata Whenua Judge *Administering justice through a cultural lens* <https://www.districtcourts.govt.nz/about-the-courts/judges-at-work/administering-justice-through-a-cultural-lens/ >.
[81] Rosen, above n 43, at 3.
[82] At 65.

of a high tradition."[83] While Rosen is describing the practice of *qadi* in the context of Islamic law and Moroccan social and cultural life, he defends the *qadi,* who has long been taken by Western commentators as the archetype of legal figure able to exercise vast discretion.[84] But Rosen is also concerned with a boarder theoretical issue: the relationship between the study of law and that of culture. In his opinion, historically, law and culture have been two separate subjects of study.[85] Lawyers for example, "often approach the patterns of social and cultural life either as intrinsically interesting but not directly germane to the course of actual legal decision making or in need of being kept distinct from law in order to establish or deny that the law may be reduced to explanation drawn exclusively in terms of economic, political, or psychological factors."[86] Rosen's work supports our paradigm shift, as he explores law as a set of relationships that constitute a social life. He explains:

> By tracking back and forth across law and social law, by viewing both domains through a common frame of theory and practice, we can give serious consideration, in a way that may be applicable to a wide variety of societies, to the proposition that it is indeed possible to formulate a study of law as culture and culture as integral to law.[87]

For many Western thinkers, Islamic law conjures images of medieval penalties of biblical proportions. When in fact, " for the one out of eight people on the planet who live subject to a legal system touched by Islamic precepts the role and importance of the law are inseparable from its connections to a wide range of social and cultural practices."[88] Māori live by similar connections. Justice Eivers, for example, describes how in her role as a *tāngata whenua* judge, she instinctively carries a cultural lens with her. It gives her a unique insight into both worlds.[89] Durie described Western legal paradigms as being rules-based and literate while *tikanga* is governed by values to which the community generally subscribed in a non-literate and performative manner.[90] While Western law tends to make a clear separation between morality and the law, the Māori legal system sees values, practices and rules as being very much interrelated.[91]

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[83] Above.
[84] At 3.
[85] At xiv.
[86] At xiii.
[87] At xiv.
[88] At xv.
[89] Eivers, above n 80.
[90] E Durie "Maori Custom Law" (Unpublished Paper, Law Commission, Wellington, 1994) at 3.
[91] Joseph, above n 60, at 82.

However, Western laws are also values-based, the values concerned being interpreted by the law makers.[92] By focusing our inquiry on how a Judge exercises his/her discretion in a culturally orientated manner, or by explaining how causal links gain legitimacy in our theory making for being culturally inclusive, it will be possible to suggest ways in which law and culture constitute a unified theoretical perspective that carries implications for dominant and Indigenous legal paradigms combined. This approach emphases law as a cultural system, a system that culturally constructs the order of the wider society.

Tikanga Māori is a societal system which is characterised as more context specific and pragmatic in organisation than Western systems of justice. The aim of *tikanga Māori* is to restore and balance relationships between parties to a position from which they may resume the on-going process of navigating their social reality together amicably. Lawrence Rosen found a similar position amongst Moroccan peoples. Rosen demonstrates in his anthropological studies how the person is conceived not as an abstract, rights-bearing entity as in the West, but instead is a production of his/her relationships with others that have developed over his/her lifetime.[93]

Rosen urges us to analyse law as part of our culture. He challenges the rigid procedural rules and strict court room decorum or etiquette that are entrenched in Western legal cultures, instead encouraging the adoption of more natural processes of dispute resolution.[94] Similar to the principles found in *whakapapa,* in Morocco, close attention is paid to social origins, connections and identity and these concepts influence a *qadi's* (judge) judicial interrogation and discretion.[95] Rosen rejects the explicit representation of ourselves as autonomous from, rather than continuous with, our culture and the culture of others. He encourages us to probe assertions that reasoning should be value-neutral or culture free.[96] The Islamic legal system, like *tikanga,* embodies law as part of culture where the concepts of knowledge and natural law are fundamental.

While the systems of law found in the Western world are largely alien to the extrajudicial world, in the Islamic courts of Morocco, and the Marae Courts in Aotearoa New Zealand, the

[92] Metge, above n 64, at 5.
[93] Rosen, above n 43, at 24.
[94] Joseph, above n 60, at 4.
[95] Rosen, above n 43, at 24.
[96] Above.

law being executed reflects the culture of its people. Rosen attributes this to the goals of law in Islamic society, which is not to hold the state as supreme or to develop an exacting body of legal doctrine, but to restore relationships and then facilitate the resolution of disputes independently of rigid precedent.[97]

Rosen analyses cultural meanings in a legal sense to demonstrate consistent principles drawn from everyday life. The *qadi* works within the context of Moroccan culture and this context influences the logic and coherence of the *qadi's* judicial discretion.

A core cultural value of Māori is to establish a connection or kinship — *whanaungatanga*.[98] A *tāngata whenua* judge is connected to the land through their *tūpuna*, or ancestors, landmarks, waterways, language, oral traditions and histories handed down from earlier generations — *ngā taonga tuku iho*. The analysis of legal systems, like the analysis of social systems, requires a judge to understand the categories of meaning by which they themselves comprehend their cultural experience and how they orient themselves toward the facts of a case. This idea of culturally influenced judicial discretion can contribute to the debate on the nature of legal decision making from the perspective that such an approach may be helpful in influencing the mainstream court proceedings from a decolonised standpoint.

Samuel Butler said "though analogy is often misleading, it is the least misleading thing we have."[99] And it does well to serve as a means of explicating fundamental legal terms that expose underlying modes of thinking between different cultures that share similar values. For example, the Islamic concept of *haqq* which means "right," "duty," "truth," and "reality,"[100] is in essence, mirrored in the *tikanga* principle of *utu,* and the Navajo principle of *nalyeeh,* representing the idea that all relationships contain obligations and that every act leads to a reciprocal obligation. "But although every act implies an obligation owed or a duty confirmed it is critical to note that the actual terms of such an obligation are themselves subject to constant negotiation and manipulation."[101] This implies an element of "truth" telling is required. In the case of Māori, knowledge of a person's *whakapapa* and *mana* communicates how that person is likely to act in a certain situation. To assess the "truth" of a situation, the reliability of

[97] At 5.
[98] Eivers, above n 80.
[99] Samuel Butler "Music, Picture and Books: Thought and Word, Notebooks 2" (Dutton, New York, 1917) at 93.
[100] Rosen, above n 43, at 13.
[101] Above.

witnesses or the truth of the statements of parties, a *tāngata whenua* judge must know the person's *whanaungatanga*.

In support of this notion of truth telling and predicting how someone might act, Rosen suggests that in Morocco people are known by the contexts which describe their existence:

> …the circumstances of their social origins, the qualities of learning or craft they possess, the range of situations through which facets of their interrelations and qualities have been arrayed and appraised. When, therefore, the *qadi* asks people about their backgrounds or circumstances he is trying to get a sense of who, by this society's criteria of identity, they are – what they have done or known or been surrounded by – for such information suggests to him, as to practitioners of everyday social intercourse, how another is accustomed to acting in various circumstances.[102]

In the Moroccan courts, the *qadi's* initial questions relate to the social identity of the parties. This is similar to the marae courts who always commence a hearing with a *pepeha* which establishes the identity and heritage of the parties. These actions reflect the cultural understanding that an individual's identity is constructed through a network of relationships and obligations to others; his/her *whakapapa* reveals his/her social fabric.

Similar to the roles of *hapu* and *iwi,* the Moroccan tribe, family, village, and quarter form an outer structure that provides the material that will cohere in the person, but not force any particular course upon him or her.[103] It is not the aim of *tikanga* and Moroccan law to invoke state power nor create a consistent body of legal doctrine. The aim of the *qadi* and the *tāngata whenua* judge is to return individuals to a position of being able to negotiate their relationships without reference to precedent; without predetermining what the outcome of negotiations should be.[104]

While employing the principles of *tikanga Māori*, the goal of Te Kooti Rangatahi and Te Kooti Matariki Courts is to restore disputants to harmony with each other and their communities.[105]

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[102] At 25.
[103] At 15.
[104] At 17.
[105] Te Kooti Matariki: Similar to the experience of youth justice professionals in the Te Kooti Rangatahi Marae Courts, stakeholders of the Kaikohe District Court, in Northland, also expressed concern regarding the successive generations of Māori defendants processed through the District Court and then onto prison; a system that limited the involvement of *whānau, hapū*, and *iwi* in the court process and the use of *te reo Māori* at court. In 2010, the late Chief District Court Judge Russell Johnson took steps to initiate a specialist court in Kaikohe, with an aim of increasing the use of section 27 of the Sentencing Act 2002 that allows the court to hear the offender's personal circumstances and cultural background.

They do this by talking things out (*korero).* Māori have traditionally used *korero* to gain consensus on decision making to solve community problems and establish goals. These components are integral to *tikanga Māori* governance. Traditional *kaumātua* and *kuia* were highly knowledgeable and skilled in *tikanga* customs which they used to earn the trust of *whānau.* Thus, the elders authority came from their wisdom and spirituality, and the trust *whānau* had for them. These traditional dispute resolution processes, *korero* and consensus to find solutions, are also the values that guide the marae-based courts.

Traditionally it is one of the primary tasks of a *qadi* to certify that a given individual did indeed possess the qualities of reliability so that his statements in court would possess a quality of truth about them.[106] Intriguingly, like the marae elders, the *qadi* draws on a combination of character and fact in the search of truth from a witness. "When a person regarded as reliable by the court bears witness to a statement it is by the integration of his stature and his word that actions in the world may be transformed into facts that are at once judicially workable and culturally recognisable."[107]

Furthermore, oral knowledge and tradition fixed in social interactions and context has greater legitimacy in the *qadi's* court than written testimony.[108] Using oral knowledge allows the *qadi* to rely on local knowledge and reputation while pulling customary practices into the decision making process.[109] Rosen found "where in the West we have increasingly de-emphasised the personal attributes and background of litigants and defendants and sought to refine our legal and technical evaluation of physical evidence, Islamic courts continue to stress the person rather than the single event and thus feel more comfortable with oral than with material testimony."[110]

11.5 The Power of Narrative

Narratives are central to human existence.[111] *Tikanga Māori* emphasises the importance of the

[106] Rosen, above n 43, at 23.
[107] Above.
[108] Above.
[109] At 26.
[110] At 28.
[111] L Presser and S Sandberg "Introduction: What is the story?" in L Presser and S Sandberg (eds) *Narrative Criminology: Understanding Stories of Crime* (New York University Press, New York, 2015) at 1.

oral tradition as a way in which Māori teach and learn. Māori have traditionally used stories to explain their communities and to cultivate deeper levels of understanding that facilitate *whānaungatanga* amongst *whānau, iwi* and *hapū.* Through the use of stories and narrative as a non-authoritarian approach, Indigenous peoples have developed an oral tradition that guides and when necessary modifies an individual's behaviour in a supportive manner.[112]

Narratives that inform insight have been part of Indigenous oral traditions for millennia and are an integral part of how Indigenous peoples perceive their world.[113] Yet, dominant society's empirically based research has privileged literacy and numeracy over oral traditions, thus invalidating the most basic way to make sense of the Indigenous lifeworld.[114] Within positivist strains of social science, life stories are reduced to the status of the anecdotal, adding colour or personal interest but unreliable as a basis for generalization.[115] For example, the *mana* of a *whānau* would have historically been enough to secure an agreement between parties. There was no need for a written contract. However, we no longer make deals based on a conversation, instead what is required is a written legal contract. New Zealand's colonial history corroborates with written contracts used to confiscate land and resources. This corroboration signals a point at which Māori stopped relying on their culturally intuitive ways of knowing and communicating with one another. Young and Saver found that once we lose our ability to construct narrative, we lose ourselves.[116]

Narrative aligns with an Indigenous worldview that honours orality as a means of transmitting knowledge and upholds the relational which is necessary to maintain a collectivist tradition.[117] It is a relational process that is accompanied by particular protocol consistent with tribal

[112] A Poonwassie and A Charter "An Aboriginal Worldview of Helping: Empowering Approaches" (2001) Can J Couns 35 at 63.
[113] E Duran and J Firehammer "Story Sciencing and Analysing the Silent Narrative Between Words: Counseling Research form an Indigenous Perspective" in R Goodman and P Gorski (eds) *Decolonising "Multicultural" Counseling through Social Justice* (2015) International and Cultural Psychology at 91.
[114] Above.
[115] M Maynes, J Pierce and B Laslett *Telling Stories: The use of personal narratives in the social sciences and history* (Cornell Press, Ithaca, 2008) at 5.
[116] K Young and J Saver "The Neurology of Narrative Substance" (2001) Annals of Internal Medicine 30 (1 and 2) at 72.
[117] M Kovach "Story as Indigenous Methodology" in M Kovach *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press, Ontario, 2000) at 94.

knowledge.[118] It is also a culturally organic means to gather knowledge within research.[119]

Without realising it, most of us shape our decisions and actions based on the cultural narratives or stories that surround us.[120] Despite Māori having suffered persistent annihilation of their culture, language, and land, stories have prevailed through oral tradition. These stories allow Māori to reconnect and reshape what it means to be Māori and the values of *tikanga Māori*. The power and value of narrative lies in its capacity to reach deeper levels of cultural understanding that Western scientific inquiry is less effective at detecting and interpreting.

Using narrative as a data source created an entirely contrasting research experience during my LLM studies, not only for myself but for the participants also. Despite having a set of interview questions, judges and elders told me stories. These stories required me to give up the control that I had anticipated with my fixed interview format, and instead it encouraged me to equally share in the research process through the telling and hearing of the participant's stories.[121] These narratives authenticated the human experiences of the offenders and offered greater insight into their personal journeys as Māori experiencing the marae-based courts.[122]

Researchers must consider the layers of belief systems embedded within stories as a framework for data analysis.[123] It is also worth noting that within Aboriginal understanding "the story" is a live entity and has a spirit. Therefore, a person is not telling the story per se; instead, the story is telling itself and, in this way, the story takes on a quality that brings life into the process.[124] Thus, the narrative contained in interviews and observations from my studies provides a different layer of insightful analysis in the context of other factors such as culture and community, rather than presenting orthodox thematic analysis in isolation.[125]

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[118] J Thompson "Hede kehe'hotzi'kahidi: My Journey to a Tahlatan Research Paradigm" (2008) 31 Canadian Journal of Native Education 1 at 24; M Kovach *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press, Ontario, 2000).
[119] R Thomas "Honouring the oral traditions of my ancestors through storytelling" in L Brown and S Strega (eds) *Research as Resistance – Critical, Indigenous and Anti-Oppressive Approaches* (Canadian Scholars Press, Toronto, 2005) at 237; R Bishop "Collaborative Storytelling: Meeting Indigenous People's Desires for Self-Determination" (Paper presented at the World Indigenous People's Conference, Albuquerque, New Mexico, June 1999) at 15.
[120] Duran and Firehammer, above n 113, at 91.
[121] G Devereux *From Anxiety to Method in Behavioural Sciences* (Mouton, The Hague, 1967).
[122] Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 130.
[123] Duran and Firehammer, above n 113, at 93.
[124] Above.
[125] Above.

As I navigate my way through the challenges of legal academia, my search has always been for a more therapeutic and holistic form of law. I have discovered an inseparable relationship between narrative and knowing and how this inter-relationship affects Indigenous research paradigms. Narrative evokes the holistic quality of *kaupapa Māori* methodologies. There is an underlying assumption that oral tradition is of pre-literate tribal groups that no longer have the same application in a literate and technological world.[126] However, oral tradition offers a portal to the holistic epistemology of Māori; it acts as an effective tool for teaching Indigenous knowledge. But is it possible to capture the lessons of oral tradition in Western academia? Perhaps not, because holistic knowledge is lost when stories are not delivered orally.[127]

As Vizenor points out "so much is lost in translation – the communal context of performance, gesture, intonation – even the best translations are scriptural reductions of the rich oral nuance."[128] Oral traditions create the relational glue that hold the *kaupapa Māori* concept of *whānaungatanga* together. In searching for ways to collect data that measured the success of the marae courts, it became evident that narrative revealed the true purpose of the study. The holistic and relational nature of *kaupapa Māori* research means making room in the methodology for *life.* Cover elaborates, "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning...Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which to live."[129]

However considering the use of Indigenous narrative in legal studies creates an interesting dichotomy. When learning through stories, it is often the relationship to the storyteller and knowledge of their past experience that helps the receiver relate to, take in, and learn from the story. Taking away the name of the storyteller takes away the life experience of the storyteller, which is broader than the story that is shared.

Indigenous researchers have emphasised the importance of context and relationship to

[126] M Kovach *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press, Ontario, 2010) at 96.
[127] G Vizenor and W Stevenson *Decolonising Tribal Histories* (University of California, Berkeley, 2000) at 19.
[128] Above.
[129] R Cover (1983) "The Supreme Court 1982: Nomos and Narrative" (1983) 97 Harvard Law Review 1 at 4.

Indigenous methods.[130] As Wilson explains, the credibility of the storyteller is solidified by knowing who is talking and where they are talking and that it can be considered unethical in tribal communities to share stories without naming the storyteller.[131] Contrastingly, in my previous studies involving marae court judges, the Judicial Research Committees' research protocols required that the judges remained anonymous, thus removing them from their life and community context. This is standard practice for interviewing from a Western perspective and is seen as protecting the rights of participants.[132]

Furthermore, for Indigenous peoples, knowledge is sacred and access to it must be earned. In contrast to the Western perspective that knowledge should be open to anyone, Native peoples often believe that researchers do not inherently have a right to "discover" knowledge in Indigenous communities.[133]

Research jargon such as *validity, reliability* and *generalisation* are terms persistently used to authenticate legal research. As long as these terms are defined by an epistemology that is non-Māori the research process will perpetuate ongoing colonialism.[134] Relying on empirical methodologies, ethical standards, and procedures that are not based in the lived experience of the communities being studied can be a great detriment to acquiring knowledge that is actually beneficial to the community.[135] Māori may have done research and evolved as communities for millennia through the use of oral traditions, but as researchers from a Western or non-Māori perspective, we struggle to see oral tradition as a valid research method. Instead, we insist hegemonically that Indigenous methodologies should be validated by Western research paradigms. This colonial mindset is so commonplace that often non-Indigenous researchers are oblivious to the fact that their research may be undermining or even causing harm to Māori.[136]

Te Kooti Rangatahi is a Māori lead legal initiative with culture as its central focus. When evaluating any Indigenous lead initiative, any data generated needs to be analysed through

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[130] S Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 39.
[131] Above.
[132] V Simonds and S Christopher "Adapting Western Research Methods to Indigenous Ways of Knowing" (2013) 103 Am J Public Health 12 at 7.
[133] S Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 8.
[134] Hasan-Stein, above n 122, at 131.
[135] Duran and Firehammer, above n 113, at 85.
[136] Hasan-Stein, above n 122, at 132.

processes recognised and valued by that particular Indigenous group.[137] There is also a call for exploring, valuing, and using Indigenous knowledge and methods on an equal footing with Western knowledge and methods, and for integrating Indigenous and Western methods when appropriate.[138] Openly engaging with the tensions that arise from attempting to integrate two differing epistemological foundations will hopefully encourage legal academics to conduct research with Māori using a *kaupapa Māori* research paradigm that is respected and utilised in its own right.[139]

As legal research becomes more culturally centred, we need to move away from the use of monocultural Western research paradigms that reinforce a process of knowledge production that privileges mainstream voices while devaluing those from marginalised groups.[140] Further exploration of narrative and storytelling as a research method is therefore required.[141]

[137] G Mohatt, K Hazel, J Allen, M Stachelrodt, C Hensel, R Fath "Unheard Alaska: Culturally anchored participatory action research on sobriety with Alaska Natives" (2004) Am J Community Psychol 33 at 263; M Dutta-Bergman "The unheard voices of Santalis: Communicating about health from the margins of India" (2004) 14 Commun Theory at 237.
[138] V Simonds and S Christopher "Adapting Western Research Methods to Indigenous Ways of Knowing" (2013) 103 Am J Public Health 12 at 10.
[139] L Botha "Mixing methods as a process towards Indigenous methodologies" (2011) Int J Soc Res Methodol 14 at 313; A Jones and K Jenkins "Working the indigene-colonizer hyphen" in N Denzin, Y Lincoln and L Tuhiwai Smith (eds) *Handbook of Critical and Indigenous Methodologies* (Sage, Thousand Oaks, CA, 2008) at 471.
[140] A Blodgett, R Schinke, B Smith, D Peltier and C Pheasant "Indigenous Words: Exploring vignettes as narrative strategy for presenting the research voices of Aboriginal community members" (2011) Qual Inq 17 at 522.
[141] Hasan-Stein, above n 122, at 132.

Chapter 12. Finding the Truth in Our Legal Relationships

12.1 Articulating the Truth

As I near the end of my search for arguments to support decolonised theories of law from a shared perspective, a persistent goal of the Western legal theorist appears to be the articulation of true statements of law. Christie noted that in some way or other all theories about the law rest on deeper visions about the notion of 'truth'.[1] West said the aim is not to criticize the law, to suggest what the law should be, or to suggest how to make the law more just. The aim is to restate the law accurately – the goal is truth, not justice, but true statements *of* law…[2]

Christie went on to say that a particular theoretical model is 'true' when it accurately portrays the subject matter under analysis, and that for positivists law is that which is positively appropriately asserted by either legislatures or courts.[3] Returning to West, she claims that if law is a learned profession properly housed in universities, then in some way the object of legal scholarship…should be law, and the goal of such scholarship should be truth. University-housed legal scholars, then, should aim, in their scholarship, to say something true about the law that is their subject.[4]

But are true statements really necessary? Langdell thinks truth is necessary. He states that the subject of legal scholarship is law, and the goal of it should be true statements "of law." Legal propositions themselves have value, and the goal of the legal scholar should be to utter true statements of law, particularly in areas in which the law is unclear.[5]

However, from a different stand point some might see the appropriate metric or measurement tool is not truth at all, but rather simply a matter of the degree to which 'facts' in context capture the reality of the participants and how we balance those facts within that context.

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[1] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 215.
[2] Robin West *Normative Jurisprudence: An Introduction* (Cambridge University Press, New York, 2011) at 184.
[3] Christie, above n 1, at 215.
[4] West, above n 2, at 183.
[5] Thomas Grey "Langdell's Orthodoxy" 45 (1983) University of Pittsburgh Law Review 1 at 1–54.

If we consider a paradigm shift as a way to facilitate the creation of decolonising legal theory, should the goal of this newly created decolonising theory be the search for 'truth', or put another way, is the objective of decolonising study to find the truth of the matter? In common-law systems pursuit of the truth very quickly complicates matters. The major premises of arguments that might yield legal truths with respect to particular questions can be the sources of injustice for Māori.

Perhaps 'truth' can be found in statute or codes or pulled from the evidence of past cases as precedent. Precedent, for example, allows the legal scholar to engage in forms of reasoning. That reasoning, however, may be distinctly colonial. Very few past cases in New Zealand include principles of *tikanga Māori,* or in fact, any cultural reference specific to Māori. The lawyer or judge may articulate some moral or political form of reasoning, nevertheless, the previous cases themselves (absent of any reference to Indigenous culture), contain the legal rules, and the lawyer's work, is to unearth them and uphold them if they are useful to the case. The lawyer is aiming to state or restate the law accurately. The goal then is to achieve true statements of law. Claims of justice or of morality that are culturally specific to Māori are secondary to this goal.

I have encountered throughout this thesis endless obstacles to the creation of decolonising theory. There is no clear path for the decolonising theorist to take. Decolonising theory is legal theory that is immensely complex and stacked with competing agendas. What in essence am I searching for? True statements of law or facts that reflect their context? These are two quite different goals. And while I am trying to capture these 'facts' and 'truths' am I subconsciously applying my own Pakeha filters and interpretive strategies to the task of theory building?

It is important that I reflect on this point as how I analyse issues of 'truth' and 'fact' can easily become tarnished by my own social and cultural background. I am making use of both Māori and non-Māori legal theories in this work, and part of this process of theory building is to constantly remind myself that this work speaks to the theoretical understandings of both communities.

12.2 Developing Distinctly Moral Arguments

Returning to the overall goal of Western jurisprudence resting on arguments that unearth true statements of law, not the better understanding of cultural principles, we find that the cultural morality that makes up *tikanga Māori,* and that might form an explicit or implicit premise of a legal argument, is largely absent. The scope of such reasoning from a decolonising perspective is therefore limited and the corresponding gaps in the law become real and overwhelming for Māori. Formal legal reasoning remains formal, not discretionary; it is distinctly legal, not moral; and reasoning is generally not culturally specific to Indigenous peoples. It is akin to the physical sciences and the natural world where facts are collected to articulate the truth about phenomena.

An absence of a moral critique appears terminal for decolonising theory development. It seems appropriate, therefore, to return to the work of Dworkin at this point, as his principle belief was that the law should be grounded in moral integrity. He understood that the moral idea that the state should act on principle insured that each member of the community was treated as an equal.[6] Dworkin appealed for legal reasoning that incorporated a moral principle: moral principles drawn from past caselaw precedent that aligned with the state law that governed the resolution of particular legal questions.[7] The neo-formalists were also answering legal questions within legal frameworks, but unlike the old, they explicitly appealed to moral principles while doing so.[8] If moral principles were argued within existing legal frameworks then could they succeed as legal principles? Dworkin would say yes. Moral principles are the bridge between legal and moral norms or the connection between the law that is and the law that ought to be.[9] They had the value of moral principle and the positive standing of positive law.[10] Moral norms meet the demands of decolonising theory in that legal questions can be resolved by reference to existing law – and the moral ambitions of a more culturally hybrid form of law – that it be principled and in line with an evolving equitable morality that could itself embrace far more than the covertly Eurocentric principles currently embedded in the common law.

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[6] Marcus Williamson "Professor Ronald Dworkin: Legal Philosopher Acclaimed as the Finest of His Generation" *Independent Newspaper* (United Kingdom, 15 February 2012) Obituaries.
[7] Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge, MA, 1986) at 176–274.
[8] West, n 2, at 188.
[9] Above.
[10] Above.

Decolonising scholarship encourages judges to interpret moral principles found in *tikanga Māori* and align them with existing laws. Afterall, Dworkin urged judges to make law the best it could be.[11] As scholarship, however, decolonising theory has limitations within current Western frameworks. The Western theorist's aim is true statements of law, and not necessarily statements about law.[12] If we include Dworkin's ideas in our theory development then moral principles would influence our existing legal institutions, including our past precedent. But whose moral principles? While we have established that *tikanga Māori* is a morally principle based paradigm, the inclusion of moral based perspectives is not without risk for Māori because the law in effect becomes saturated with the pursuit of the truth according to certain actor's moral principles that are not necessarily derived from Māori sources.

The result is law that makes moral claims that are soaked in the colonial compromises from which they emerge. They are not even, potentially, the actor's own moral beliefs; they are the moral principles that emerge from the scholar's reading of prior cases. These morals then nudge the law in a direction already foreshadowed by colonialism. They become at worst, an attempt at the moral justification for existing law developing into precisely the body of law decried by the decolonising scholar: a body of scholarship claiming moral authority for legal commands that lacks an Indigenous cultural perspective.

These legal commands are then given a truth value, and then debated, despite the fact they may lack Indigenous 'morals'. Our laws then quite consciously can foreclose recourse to any moral principles by which law could arguably be judged that are truly outside the scope of existing legal authority such as *tikanga Māori*. The moral principles by which legal authority could be arguably developed, are then internalized into our existing colonial law and values. These moral principles that are not necessarily Indigenous based morals, are, then, the basis of our laws: defined by orthodox limits whose limits in turn are set by existing colonial law. Inclusion of orthodox moral based perspectives, not only fails to generate genuine decolonising critiques of law, it also denies the possibility of including the Māori worldview of moral authority.

This issue of 'whose' morals leaves decolonising legal scholarship vulnerable. Decolonising

[11] Ronald Dworkin "Natural Law Revisited" (1982) 34 University of Florida Law Review 2 at 165–88.
[12] West, above n 2, at 188.

legal scholarship is not descendant of any orthodox legal paradigm and unashamedly so. Why should *tikanga* have to stand up to the scrutiny of Hart, Foucault, Marx, or any positivist for that matter? The moral based principles of *tikanga Māori* invoked are not dependent on orthodox law. Rather, they are drawn from outside of our current laws not emanating from within them. These morals are then used to illuminate our current law's true nature, by forming the basis on which law is truly criticized and reformed and then mould its future development in a way that is aligned with *tikanga's* traditional roots. In a sense decolonising scholarship is fundamentally conservative and democratic in that all it is asking is that law be true to itself.

Perhaps the only way for decolonising scholarship to succeed is to drop all claims of 'truth'. The decolonising scholar's goal should not be to make any claims about what the law should be, or, what the law is. Rather, the decolonising legal scholar's goal should be to make true claims about law, not true claims of law. And those claims can be made from an Indigenous cultural perspective. This would encourage the development of a field of "legal studies" – comparable to "feminist studies" or "environmental studies" – in which law is the object of study, and the goal is true statements about how Indigenous culture frames or does not frame our laws, rather than the traditional understanding of "doctrinal legal scholarship," in which the legal scholar employs the same form of argument as the lawyer or the judge: true statements of law constrained by dominant legal paradigms. It is impossible to create the basic building blocks for decolonising theory if decolonising scholars are embedded in the very legal practice that should be the object of their inquiry.

If the goal of orthodox jurisprudence is truth, and the object is law, the goal of the legal scholar likewise is the articulation of true statements of law. Some legal scholars may argue that decolonising legal scholarship grounded in principles of *tikanga Māori* in a legal sense is not scholarship at all because it does not aim to make true claims about law. Truth is not an ambition of *tikanga,* but 'balancing relationships' is.

Legal argument, as performed by lawyers and judges, always contains a 'truth' dimension. Decolonising legal scholars, however, should evade 'truth', because they should evade legal argumentation; the goal should be decolonising scholarship about law and how to include Indigenous culture, not simply more legal arguments about law's existing content. What fills the gaps in our laws for both Māori and non-Māori is some form of study of law that recognises *tikanga Māori* and the importance of balancing relationships as opposed to searching for ideas

about truth. 'Balance' is not only a principle of *tikanga Māori;* it could also characterise a complex hybrid legal process within Aotearoa New Zealand.

A paradigm shift would then be away from making 'truth' arguments about the law from within the discipline of law itself and toward arguments about the nature of law and Indigenous culture, from a 'balanced' and disciplined vantage point. Decolonising theory urges an abandonment of "legal doctrine" because the forms of legal theory the legal scholar inherits and mimics from the judge are insipid in the struggle against colonialism. Legal scholarship constrained by legal doctrine is often unduly conservative and limited. The legal scholarship that is still undertaken by most legal academics seeks to make the case for some statements of law, rather than statements about law that do so in a way that incorporates Indigenous culture and principles of *tikanga Māori.*

Oliver Wendell Holmes stated that legal questions cannot be answered solely by recourse to premises drawn from earlier cases.[13] Doctrinal scholarship aims to state what the law is, and achieves this by incorporating constrained orthodox premises, themselves drawn from Western legal principles, the point of which is to better reflect the truth about the law. Those premises must be legal, rather than just moral premises. They must appeal to the dominant Western legal ideals. They do not aim for moral truth; they aim instead for acceptance by the dominant paradigm.

The goal of decolonising legal scholarship, however, may be to employ forms of argument borrowed from the judiciary. This is because it engages with sources of law that it should be studying. But decolonising scholarship should be about understanding the law rather than attempting to be the law, if it is to create legal theory that supports the development of more equitable laws.

Our laws can and should be challenged, and it is possible to achieve this by using the moral premises contained within *tikanga Māori* to complete legal arguments when the current law has gaps that exist because older colonially influenced areas of law continue to persist. Traditional legal scholarship will become tepid and inconsequential when it engages with decolonised legal theory, as it ought. This type of theory will allow incremental steps in the

[13] Oliver Wendell Holmes "The Path of the Law*"* (1897) Harvard Law Review 10 at 457–78, 465, 467.

development of equitable laws. When engaged in by scholars, decolonising scholarship should be about law rather than of law, this would leave room for a serious Indigenous cultural analysis of law. It would leave room for an expansive array of analyses including historical inquiry, language analysis, *Ti Tiriti o Waitangi* analysis and much more. It would create opportunities to move on from our colonial past.

What, then, are the costs of ignoring the need for the development of decolonising theory? The costs are revealed by the jurisprudential gaps in our legal frameworks. What we need are academic institutions that focus on making the law accountable for how it achieves or fails to achieve justice for Māori. This is in part because we have neglected the development of legal systems that include and are based on *tikanga Māori* traditions, but it is also because *tikanga Māori* is not a compulsory subject for law students in most academic institutions in New Zealand.

If we consider for a moment what is at the heart of Indigenous peoples' claims to self-determination – a need to protect and promote a way of life[14] – our legal focus is forced to shift from a classical political stance to one that includes a cultural element, which is inextricably linked to Māori peoples' spirituality and their land.[15] This shift in focus is analogous to the legal theoretical paradigm shift that I am advocating. While decolonising legal theory is challenging us to think of theory in terms of physical, spiritual, mental, belonging to a place, and the "truth" of our relationships, it becomes almost certain that such a holistic positioning calls for a paradigm shift away from the token insertion of Indigenous knowledge into our academic institutions that we currently allow.

What is at stake if we share a theoretical space as academics? What are the risks for both Māori and non-Māori? Spivak would argue that the knowledge produced from a shared space will resemble a "re-orientalized" Indigenous epistemology that becomes synthesized within Western forms of knowing.[16] Or perhaps we are guilty of encouraging an Indigenous renaissance only to disguise these efforts with sovereign ideologies, which in turn masks the

[14] L Graham and S Wiessner "Indigenous Sovereignty, Culture, and International Human Rights Law" (2011) 110 South Atlantic Quarterly 2 at 413.
[15] Linda Hasan-Stein "The Butterfly Effect: Can the Simple Act of Breastfeeding Improve the Long- term Outcomes for Māori Women who Experience the Criminal Justice System and their Whānau? (2017) Yearbook of New Zealand Jurisprudence: Special Issue Indigenous Access to Justice 15 at 140.
[16] Gayatri Chakravorty Spivak "Diasporas Old and New: Women in the Transnational World" (1996) 10 Textual Practice 2 at 249.

uneasy relationship between Western rationalism and the metaphysical landscape of Māori. "A metaphysical presence that no colonial taxonomy can dishevel"[17] unless we embrace a legal theoretical paradigm shift. Embedded in the challenges of a paradigm shift should be the aspirations of decolonising legal theory. If we take on the challenge of a paradigm shift then we can begin to deconstruct the discourses of Western knowledge with the radical intent of sharing knowledge beyond the boundaries of colonialism.

The dominant legal culture in Aotearoa New Zealand relies on legal constructs that do not exist in Indigenous legal systems; contracts, estates, rights and powers. They can also be predominately incapable of expression in those language systems which form the basis of such legal cultures.[18] Any attempt to analyse *tikanga Māori* in terms of categories of modern Western law can result in distortion attributable to differences between English and Te Reo. While our dominant legal constructs are based on classical Roman, modern civil and common law cultures, *tikanga Māori* takes its meaning from sensed experience based on beliefs, values and mythology as opposed to abstract theory. *Tikanga Māori* is based on natural justice with a notable absence of abstract concepts. This is characteristic of cultures that have an absence of written language which is necessary to elaborate concepts into theory.[19] The principles of *tikanga Māori* are based on social considerations where parties to disputes do not seek adversarial declarations of right or wrong but rather they seek restitution and balancing of their social relationships.

12.3 New Actors Among Old Parts

It's up to you to break the old circuits
Hélène Cixous - Le Rire de la Méduse[20]

Emirbayer advised caution when considering Indigenous ontologies. He explained that the value of Indigenous studies is not necessarily in its transformative decolonial potential but offers instead a focus devoid of colonial categorisation that adopts "dynamic, unfolding

[17] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 95.
[18] Lawrence Friedman "Legal Culture and Social Development" (1969) Law & Society Review 4 at 29-44.
[19] Max Gluckman "Natural Justice in Africa" in Csaba Varga (ed) *Comparative Legal Cultures* (Dartmouth Publishing Company, Aldershot, 1992) at 25-44.
[20] Hélène Cixous "Le Rire de la Méduse" (1976) 1 Journal of Women in Culture and Society 4 at 39.

relations" that describe more truthfully the contexts in which relational transactions occur.[21] Individual persons, whether strategic or norm following, are inseparable from the trans-actional contexts within which they are embedded.[22]

Karl Marx argued that "society does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand."[23] He further states in *Capital* that "capital is not a thing, but a social relation between persons which is mediated through things".[24] Georg Simmel described "society is the supra-singular structure which is nonetheless not abstract.[25]

Legal analysis, and indeed empirical analysis, are both skilled in the art of detaching people from their individual contexts; analysing them apart or distanced from their relations within contexts. However, Margaret Somers and Gloria Gibson identified that "while a social identity or categorical approach presumes internally stable concepts, such that under normal conditions entities within that category will act predictably, the [relational, transactional] approach embeds the actor within relationships and stories that shift over time and space and thus precludes categorical stability in action…The classification of an actor *divorced* from analytic relationality is neither ontologically intelligible nor meaningful."[26]

This argument calls into question attempts by legal researchers to control variables within empirical data while ignoring the ontological and epistemological characteristics of Indigenous peoples embedded within actual cultural contexts. Even as statistical models grow ever more complicated, even alert to the "interaction effects" among variables, these problems, rooted as they are in fundamental assumptions, fail to go away.[27] "Nothing that ever occurs in the social world occurs 'net of other variables.' All social facts are located in contexts. So why bother to pretend that they aren't?"[28]

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[21] Mustafa Emirbayer "Manifesto for a Relational Sociology" (1997) 103 American Journal of Sociology 2 at 281.
[22] At 287.
[23] Karl Marx *The Marx-Engels Reader* (2nd ed, Norton, New York, 1978) at 247.
[24] Karl Marx *Capital Volume 1* (Translated by Ben Fowkes, Vintage Books, New York, 1977) at 932.
[25] Georg Simmel *On Individuality and Social Forms* (University of Chicago Press, Chicago, 1971) at 69.
[26] Margaret Somers and Gloria Gibson "Reclaiming the Epistemological 'Other': Narrative and the Social Constitution of Identity" in Craig Calhoun (ed) *Social Theory and the Politics of Identity* (Blackwell, Oxford, 1994) at 65-69.
[27] Emirbayer, above n 21, at 289.
[28] Andrew Abbott "Of Time and Space: The Contemporary Relevance of the Chicago School" (Sorokin Lecture, Southern Sociological Society, 1992b) at 6.

What is distinct about the relational contexts is that it sees relations between individuals as dynamic in nature; as evolving and ongoing processes rather than as static concepts among inert objects. As a result we have conceived a legal system with actors that have no ability to traverse inert obstacles. They ford the legal system with difficulty and for many, with a sense of hopelessness. But a legal system that embraces analysis of the law in terms of 'relationality' produces "new actors, new entities, new relations among old parts".[29]

These new actors create images of complex joint activities between Māori and non-Māori that need to be navigated if we are to succeed in the idea of a paradigm shift that embraces relationality. To soften the approach to the complexities of joint activities between Māori and non-Māori, in *Social Organization,* Charles Horton Cooley uses the analogy of "joint music-making" to convey similar imagery.[30] Norbert Elias describes "fluid figurations" and "the changing pattern created by the actors working together…the totality of their dealings in their relationships with each other."[31] One might be speaking here of *negotiations* or *conversations; hui* or *powhiri*. The underlying objective would be shared between Māori and non-Māori; that being the primacy of contextuality and relationality in sociolegal analysis.

It is undisputed that the viewpoint of two historical rivals rarely concludes with agreement on any one school of thought or theory. What is of greater interest, is exactly how these contradictory approaches to the law traverse each other, with the hope that in time a decolonising theorist would move back and forth implicitly and without judgment between several different points of view. It was Justice Rothstein of the Supreme Court of Canada who noted that "the goal of aboriginal…jurisprudence should not be to separate Canadians into two camps with two competing interests but rather to unite them with the shared goal of a just and peaceful and safe society…[32] In a similar vein, Professor Dame Anne Salmond recommends a more balanced approach in an attempt to grapple with the following questions: "What is it to be human, what do we have in common and what divides us?"[33] Human understanding and

[29] Andrew Abbott "Things of Boundaries" (1996) Social Research 62 at 863.
[30] Charles Horton Cooley *Social Organization: A Study of the Larger Mind* (Charles Scribner's Sons, New York, 1962) Chapter 3.
[31] Norbert Elias *What Is Sociology?* (Translated by Stephen Mennell and Grace Morrissey, Columbia University Press, New York, 1978) at 130.
[32] *R v Ipeelee* 2012 SCC 13 [2012] 1 SCR 433.
[33] Anne Salmond *Between Worlds: Early Exchanges between Māori and Europeans, 1773-1815* (Penguin Books, Auckland, 1997) at 513.

reciprocal exchange is required.[34] Anne Salmond notes that:

> …in New Zealand, at least, collaboration between Māori and Western knowledge seems possible. It may lead, eventually, to studies of cross-cultural encounters that do justice to the ancestors on both sides.[35]

Professor John Borrows notes that the thesis of his work "Canadas Indigenous Constitutions"[36] is that Indigenous laws can be recognised and affirmed in a Canadian legal context, and can also be justified through Western legal argument". He notes that:

> …Indigenous peoples law has been scattered by the prevailing order. It was believed to be insubstantial in comparison with the developing common law and constitutional structures…perhaps the most promising development for the maintenance and extension of Indigenous stories comes at those moments when Indigenous law's elements mingle with the land and those of the non-Indigenous jurisprudential order.[37]

The implications of a 'relational' approach to decolonising theory making are far-reaching. To begin with, if we take three significant concepts in sociolegal analysis—power, justice, and love—they are themselves open to extensive reformulation in terms of Indigenous thinking. Take the concept of *power,* which is typically seen in Western terms as a possession, "as something to be "seized" or "held.""[38] However, in Indigenous hands, it transforms from an abstract concept into the substance of a relationship. At its core are Elias' ideas of "fluid figurations," which coalesce with the principles of *whanaungatanga* that allow changing figurations that fluctuate with an equilibrium that balances power structures that have historically been oppressive. "This kind of fluctuating balance of power is a structural characteristic of the flow of every figuration."[39] The principles of *tikanga Māori* define power in similarly relational terms, as a balancing of the positions that Māori occupy within *hapu* and *iwi.* Far from being an attribute or possession of actors, power in Indigenous terms dissipates within figurations of relationships of a cultural and sociolegal nature.

The idea of *equality* can also be recast in relational terms that synergise with decolonising theory. "Typically, equality (like inequality) is defined essentialistically as a matter of

[34] Valmaine Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 254.
[35] Salmond, above n 33, at 513.
[36] John Borrows *Drawing Out Law* (University of Toronto Press, Toronto, 2010) at xiv.
[37] At 69.
[38] Emirbayer, above n 21, at 291.
[39] Elias, above 31, at 131.

individual variations in the possession of "human capital" or other goods."[40] The predominant causes of inequality in our current legal system are due to the orientations and actions of actors within the dominant paradigms, rather than the interconnected relationships among different actors of opposing views. Inequality comes largely from the solutions that the dominant paradigm actors improvise in response to societal problems—responses centred around power and control.

If the idea of balancing relationships can also be reconceptualized from a decolonising perspective, a vital principle of that perspective would be that it "breathes life" into inert ideas of individuals or groups that otherwise would remain abstract. Māori see relationships as inseparable from their context, especially from the problematic features of those contexts.

Although in popular imagination the term *utu* is linked closely to notions of vengeance, it also has quite neutral or even benign connotations of reciprocity in many contexts. As a result we see the engagement by actors of different sociolegal structures transforming those structures in interactive response to the problems enabled by the principles of *utu* and the idea of balancing relationships. Viewed internally, *utu* involves different ways of interacting with the sociolegal world, although even here, just as consciousness is always consciousness *of* someone, so too is *utu* always "*utu* toward someone," by means of which actors can enter into relationships with other people. These internal aspects of *utu*…note the link between *utu* and *mana.*[41] While *mana* is a key philosophical concept combining notions of psychic and spiritual force and vitality, recognised authority, influence and prestige, it also encompasses the power and the ability to control people and events or even rectify an undesirable state of affairs.[42]

Viewed externally, *utu* entails concrete transactions within relational contexts often described in oral traditions akin to an ongoing conversation. *Utu* becomes symbolic of a process by which actors become immersed in a lived experience that engages with others for the entirety of the actor's life; *utu* is relationship dependant and context embedded and signifies modes of response to problems hinged together through broad expanses of time as well as space.

[40] Emirbayer, above n 21, at 292.
[41] Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, University of Waikato, 2012) at 456.
[42] At 143.

The relational point of view allows for the reconceptualization of distinct, *sui generis* levels of decolonising inquiry that truly reflects *whanaungatanga*. At the most generic level, New Zealand society can be interpreted as an autonomous legal system institutionalised within a sovereign state. The institutional boundaries of the state have historically overlapped unevenly with Māori populations, their land, cultural identities, and collective commitments, nonetheless interactions have occurred across these boundaries. Michael Mann describes how:

> Societies have never been sufficiently institutionalized to prevent interstitial emergence. Human beings do not create unitary societies but a diversity of intersecting networks of social interaction. The most important of these networks form relatively stably…But underneath, human beings are tunnelling ahead to achieve their goals, forming new networks, extending old ones, and emerging most clearly into our view with rival configurations.[43]

This does not invalidate the sovereign state but instead implies a matrix of diverse relationships that approach with caution the assumption of primacy of state. This has implications for theoretical inquiry as a relational approach to law opens up many new and holistic directions for decolonising research. Relational approaches to the sociolegal study of *Indigenous culture* are not yet well developed. But they should include some basic assumptions, beginning with the notion that legal studies that include Indigenous culture entail, not individual "attitudes" or "values," but rather groups of communicating relationships within contexts.

Decolonising research methodologies would therefore include analysis of the meaning and structure of these relationships. Such decolonising methodologies would be relational because they encourage us to move away from the analysis of individuals concepts towards concepts embedded in complex *relational* networks and collective ideals. "The meaning of one concept can be deciphered only in terms of its 'place' in relation to the other concepts in its web. What appear to be autonomous categories defined by their attributes are reconceived more accurately as historically shifting sets of relationships that are contingently stabilized."[44]

Perhaps we can define decolonising research as a continuing process of relational interpretation. Words and actions derive their meaning only when located within a context whether abstract or spiritual, and they only make legal sense within the ongoing flow of

[43] Michael Mann *The Sources of Social Power Volume 1: A History of Power from the Beginning to AD 1760* (Cambridge University Press, Cambridge, 1986) at 16.
[44] Margaret Somers "What's Political or Cultural about Political Culture and the Public Sphere? Toward an Historical Sociology of Concept Formation" (1995) *Sociological Theory* 136.

relational connections. The idea of relationality then offers both a position from which to understand Indigenous difference and density, and the "temporal and epistemological complexity of our relationships" with settler colonial societies.[45]

The potential of a relational mode of decolonising legal inquiry is considerable. Theoretically it offers a compelling alternative to the current 'individual' focused perspectives of dominant paradigms. New approaches that include an Indigenous culturally focused inquiry highlight its potential and it is the ongoing efforts of decolonising researchers who will reconstruct the major theoretical concepts we currently work with that will further attest to this. There is also the potential for academics from a wide variety of other disciplinary backgrounds and traditions to converge upon this relational frame of reference so that this paradigm shift that I am seeking, rather than existing on a fragmented level, resembles a more holistic, inclusive entity.

Many challenges lie ahead. Decolonising theorists have several tasks. One is to explore in greater depth the effects of Indigenous culture and collective relationships on our sociolegal frameworks, importing into our legal paradigms many of the same theoretical insights already contained within the principles of *tikanga Māori,* but also exploiting new innovative approaches to law reform such as marae based courts and s27 initiatives so that they become accepted mainstream approaches.

Our second task is to ensure as we move to a more culturally focused theoretical framework with decolonising researchers striving resolutely to maintain theoretical consistency in our theory-building. We are not aiming for the acceptance of hybrid theories of law, instead it is the longevity of culturally focused relationships based on *whanaugnatanga* we seek to support within our shift in theoretical legal paradigms.

And finally, decolonising theorists must begin to synthesise alternative ways in which fundamental issues of law have been theorised from within the dominant legal tradition in the past. Decolonising debates will be lifted to a much higher plane—and theory-building facilitated—once all legal theorists begin to see differences, for example, between Foucault's

[45] C Andersen "Critical Indigenous Studies: From Difference to Density" (2009) 15 Cultural Studies Review 2 at 82.

"power" and Tillich's "love"[46] and *tikanga's aroha* as opposing ways of considering the same issues. Only then will decolonising theorists be able fully to grasp the possibilities of a paradigm shift; only then will they finally arrive at the point of theoretical clarity that truly reflects an Indigenous perspective.

The concepts contained within decolonising ideals, once adopted, allow the theorist to open doors to previously inconceivable ways of thinking. Centring decolonising studies around relationality provides portals for the critique of liberal individualism while highlighting the importance of collective ideals. In its simplest definition, relationality describes the state of living in recognition of interconnectedness with people, land and other entities.[47] Aboriginal relational ontology describes how:

> All things are recognised and respected for their place in the overall system. Whilst they are differentiated, these relations are not oppositional, nor binaric, but are inclusive and accepting of diversity. These relations serve to define and unite, not to oppose or alienate.[48]

The challenge for decolonising legal theory is the predominance of dominating paradigms that exclude Māori. Current legal research paradigms are instruments of settler colonialism. Decolonising legal theory of the future must be based on a form of collective legal theory. It would make sense that those theories would need to be based on Māori values because *tikanga Māori* is the first law of Aotearoa.

It makes sense then, that the theories we move forward with would be inclusive of Māori values. In his doctorate studies Hemopereki Hōani Simon studied *haka, moteatea* (traditional chants), and *waiata-ā-ringa* (action songs) to build a political philosophy and theory from a Māori viewpoint. He says Aotearoa New Zealand is becoming more accepting of *te reo Māori* and *te ao Māori*, and at some point there will be a realisation that Aotearoa New Zealand needs to come up with its own set of values. He believes these should be based on five core Māori values *whanaungatanga* (centrality of relationships), *manaakitanga* (looking after people), *mana, tapu/noa* (respect for the spiritual character of things) and *utu* (balance and

[46] See Chapter 13: Aroha and a Willingness to Engage Creatively.
[47] Nikki Moodie "Learning About Knowledge: Threshold Concepts for Indigenous Studies in Education" (2019) The Australian Educational Researcher 46 at 742.
[48] K Martin "Ways of Knowing, Being and Doing: A Theoretical Framework and Methods for Indigenous and Indigenist Research" (2003) 27 Journal of Australian Studies 76 at 203–214.

reciprocity).[49]

Underlining these core values, *aroha, tika* and *pono* could also influence our decision-making so that decisions are made with compassion and a real sense of 'truth;' because any new theory we create needs to represent authentically the true sociolegal reality of Māori. Creating a shared theoretical space based on Māori and non-Māori constitutional values can form the foundations of a society where everyone in Aotearoa New Zealand can move towards a future based on truthfulness.

[49] Laurilee McMichael "Taupō's Hemopereki Simon first Māori scholar to be awarded Mills College fellowship" *The New Zealand Hearld* (New Zealand, 2 September 2021) <https://www.nzherald.co.nz/rotorua-daily-post/news/taupos-hemopereki-simon-first-maori-scholar-to-be-awarded-mills-college-fellowship/X2CGDMZ37L4SA4GNMIYZGHI4Y4/>.

Chapter 13. Aroha and a Willingness to Engage Creatively

13.1 Remaining Mindful

Mindful of how I filter and interpret my theoretical ideas, in the following chapter I will explore the interconnection between ideas about 'truth' and how we might respond to these ideas with a deeper philosophical understanding that the role of *aroha* can play in our commitment to equitable justice.

Returning to the complex realities of navigating legal theory and my search for more therapeutic and holistic forms of decolonised law, another inseparable relationship I have discovered is that of *aroha* and justice and how this inter-relationship affects Indigenous research paradigms. *Aroha* values such as respect, kindness, co-operation, friendliness, and the vocabulary of *whānaungatanga* imbue the marae court process creating a horizontal system of justice that adheres to the traditional *tikanga* notions of equality. This is contrary to vertical systems of justice observed in Westminster style court houses that employ hierarchies of power and authority fashioned on force and coercion. All participants have an equal voice in the marae-based court with an opportunity for everyone to be heard.

If a future approach to Indigenous issues in Aotearoa New Zealand is to be based on the concepts of *tika* and *pono* as mentioned, then the need to discover a common ground between *hapū* and *iwi* and the rest of the nation will become imperative. Every person will need to approach these ideas with an open mind and a willingness to engage in an informed manner. This would need to be a transparent approach and not one based on absolute power but the idea that we are striving for social justice as equals.

It is difficult to imagine a partnership or new ways of thinking about shared legal theory when one of the partners has historically and detrimentally always been the oppressor. I am in no position to align Māori concepts with my Pākehā notions of legal equality so I must search for answers to my legal questions within Western frameworks because that is my background. But how do I step out of the shoes of the oppressor and walk a different road to find my answers?

It is heartening to find Western theorists even up to a century ago attempting to navigate difficult questions about how to make our laws more equitable, perhaps not for Indigenous peoples specifically, but for all peoples generally regardless of social class, race or ethnic background. Perhaps ideas about more equitable theoretical spaces as legal researchers have always been there, we just have not indulged in the creativity required to implement them.

I have outlined how shifting boundaries of knowledge is necessary if we are to invest in the development of a shared theoretical space. I have also speculated about the possibility of creating a paradigm shift by redefining knowledge considered unintelligible to Western rationalism by reinserting knowledge in a form that is dynamic and equitable for both Maori and non-Maori. The idea of shifting paradigms is assisted by the act of comparison. The act of comparison requires the selection of at least two theories of law, for example, *kaupapa Māori* and principles of natural law taken from the ancient Greeks. The selection of two theories of law is deliberate as Gutteridge warns that unless there are good reasons to the contrary, prudence demands that the number of systems placed under comparison should be limited.[1] The multiplication of laws to be examined obviously increases the difficulties which may be encountered in any form of comparative research.[2]

A consideration in this study was which specific theories to compare. John Stuart Mill makes a distinction between diverse cases and very similar cases.[3] *Kaupapa Māori* and principles of natural law represent much that is similar. Similar cases, according to Mill, are most useful when the researcher seeks to identify common themes or a shared variable, or as in this study, 'a shared theoretical space' as legal researchers.[4] But what if we narrow our comparison more specifically. Let us consider for a moment the Western concept of 'love' and the *tikanga* principle of '*aroha*' as possible comparisons. *Aroha* is the basis for all things Māori. In Indigenous cultural domains relationality means that one experiences the self as part of others and that others are part of the self; this is learnt through reciprocity, obligation, shared

[1] H C Gutteridge *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd ed, Cambridge University Press, Cambridge, 1949) at 74.
[2] Above.
[3] John Stuart Mill "Of the Four Methods of Experimental Inquiry"(1843) quoted in Alan Sica (ed) *Comparative Methods in the Social Sciences* (Sage, London, 2006) at 105.
[4] Above.

experiences, coexistence, cooperation and social memory.[5] The *tikanga* principle of *aroha* encompasses the importance of living together in generous, loving kindness, mutual helpfulness and reciprocity/*utu*.

Gluckman evidenced similar findings in his study of African peoples. His evidence suggests that African law demonstrates that all men, because they live in society, have theory of rules of justice which they believe arise from reason itself, suggesting that Africans may well have formulated a theory of natural justice coming from human kindness itself similar to the principles found in *aroha.*[6] And Professor Paul Tillich, one of the most outstanding and influential religious thinkers of his generation, found that he could not work constructively in theology, philosophy, or ethics without encountering at every step the concepts of 'love', power, and justice.[7]

Love in its many guises is therefore central to all human existence. Precolonial *Māori* notions of love are underpinned by *manaakitanga*, which guides the nurturing of relationships and looking after and treating others with care, compassion, and empathy to uphold individual's *mana* and that of the *whānau.*[8] *Aroha* is an essential part of *manaakitanga* and is an expected dimension of *whanaungatanga*.[9] *Aroha* extends beyond its simple everyday translation of "love."[10] *Aroha* is a complex interweaving of multiple concepts and values and something difficult to comprehend when viewed from a Western worldview.[11] *Aroha* encompasses behaviours that are demonstrated as genuine respect, compassion, empathy, generosity, humility, and affection. *Aroha* is interrelated with *tika* (correct and right) and *pono* (true and honest). Together, *tika* and *pono* frame *aroha* and are grounded in reciprocity, the responsibility and obligations to others, and not only exist within current relationships but also continue if a relationship ends.[12]

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[5] Aileen Moreton-Robinson *Talkin' Up to the White Women: Indigenous Women and Feminism* (University of Queensland Press, St Lucia, 2000) at 16.
[6] Max Gluckman "Natural Justice in Africa" in Csaba Varga (ed) *Comparative Legal Cultures* (Dartmouth Publishing Company, Aldershot, 1992) at 25-44.
[7] Paul Tillich *Love, Power and Justice* (Oxford University Press, New York, 1960) at 1.
[8] Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Oxford, 1994).
[9] H Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 29.
[10] Denise Wilson, Alayne Mikahere-Hall, Debra Jackson, Karina Cootes, and Juanita Sherwood "Aroha and Manaakitanga— That's What It Is About: Indigenous Women, "Love," and Interpersonal Violence" (2021) 36 Journal of Interpersonal Violence 19-20 at 9813.
[11] At 9814.
[12] Wilson et al, above n 10, at 9814.

Aroha was a strong motivating principle in pre-European Māori society.[13] Durie identified seven fundamental principles or values that underpin Māori law as *whanaungatanga, mana, manaakitanga, mana tupuna, wairua, utu* and *aroha*.[14] A key accompanying value to the principle of reciprocity inherent in the term *utu,* for example, is *aroha*.[15]

Love/*aroha*, regardless of whether you are Māori or non-Māori, is universally significant. Therefore, no analysis of decolonising theory can avoid referring to love/*aroha*. Without such a reference, any theory development would be incomplete. Love/*aroha* plays an outstanding role in what it means to be human. It frames a person's cognitive encounter with the world, including the sociolegal world. Searching epistemologically for the meaning of love/*aroha* requires us to not only to define our individual construct of love/*aroha* but also love's structural relationship to each other as Māori and non-Māori. If we could achieve the task of defining love/*aroha* in a legal sense, we would be able to develop a basic description of any shared relationship if it existed. While it is unusual to attempt to describe love/*aroha* in legal sense, to do so could mean the unusual would in turn become natural and a familiar concept within our jurisprudence.

13.2 Defining Aroha in a Legal Sense

Epistemologically, I am searching for the fundamental meaning of love and *aroha* and their relationship with Western ideas of power and justice. I am also searching for their relationship to Indigenous ideas. If I am able to achieve this task, it would be possible to judge the many ways in which problems currently exist from a position of a mutual relationship. To use love in a legal sense is not to diminish its emotional power; its feelings of warmth, passion, happiness and fulfilment. But confining love to terms of affections is limiting. Love could take on a more intellectual meaning for example if we consider it in terms of God or Gods. Tillich described God as elevating love out of the emotional into the ontological realm.[16]

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[13] Joan Metge *Comments provided to the Law Commission on our draft paper "Māori Custom and Values in New Zealand Law"* (Law Commission, Wellington, 16 February 2001) at 7.
[14] E T Durie *Custom Law* (Unpublished Confidential Draft Paper for the Law Commission, January 1994) at 4.
[15] See Dame Joan Metge's discussion of the concepts of aroha and manaaki in *New Growth From Old: The Whānau in the Modern World* (Victoria University Press, Wellington, 1995) at 80–81.
[16] Tillich, above n 7, at 4.

However, before we intellectualise ideas about love, it is important to acknowledge that comparing is problematic. The ambiguities in the meaning of Māori and non-Māori concepts have confusing consequences and produce escalating problems as soon as the comparison is contemplated. When love and power are contrasted from a Western perspective "love is identified with a resignation of power and power with a denial of love."[17]

In contrast, *mana ōrite* views the *mana* of others as being *ōrite,* that is, alike, similar, identical or equal to our own. Such positioning, within relationships of interdependence, brings reciprocal responsibilities to maintain and grow the *mana* of the other.[18] There is a distinct absence of power, which removes the need for *aroha* to resign itself to power, or indeed, for the *mana* of someone to be denied love or *aroha.* There is no need to contrast "powerless love" or "loveless power".

The problem that is created, however, is how to remove the distrust from decolonising theory that proposes theoretical models where power is removed and love is more than an a mere emotional quality. The risk of such a proposal leads to rejection or indifference by orthodox thinkers. But as the aim is to start a decolonising conversation with very basic building blocks then the first steps must be to raise the awareness of the elements of love or *aroha* within structures of power and how the element of power without *aroha* surrenders Māori into some form of submission. It is only with a decolonising analysis of *aroha* and power that we will raise this awareness.

The problems which characterise the comparison of *aroha* in its relation to power, characterise equally any discussion of *aroha* in relation to justice for Māori. Orthodox jurisprudence does not usually compare *aroha* with justice, although love and power are often compared. For if the question of equity in our laws is asked and concepts of *aroha* and power are seen in light of this question, perhaps a shared meaning can become visible through the acknowledgment that the problems with decolonising theory which result from the confrontation of love and power are impossible to solve as long as power is approached with distrust and love is reduced to its emotional qualities.

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[17] At 11.
[18] Linda Tuhiwai Smith and Alister Jones (eds) *Report of the Taskforce* (University of Waikato, Hamilton, 2021) at 19.

This also leads to the separation of politics from culture. Such a division leads to the rejection of or indifference to the legal potential of *tikanga Māori.* I am suggesting for decolonising theory to be successful we must be aware of the concept of love in structures of power and how concepts of power without love becomes ineffective as a means of regulating society. It is through a comparative and decolonising analysis of love and power that we can produce this awareness.

Tillich described how the problems which characterise the discussion of love in its relation to power, characterise equally the discussion of love in its relation to justice. But it is commonly accepted that love adds something to justice that justice cannot do by itself.[19] The distribution of justice within the family law courts, for example, would be vacuous without the inclusion of love. Therapeutic jurisprudence also focuses on the impact of law on emotional life and psychological well-being,[20] and is asserted as being a relational based construct.[21]

Relationality is a central tenet to Māori.[22] An examination of the role of a *rangatira* in the Rangatahi Courts, for example, reveals that for a *rangatira* to demonstrate the *mana* needed to strengthen the cohesiveness of a group, the *rangatira* must demonstrate three principles of *whanaungatanga/*relatedness. The first was *aroha/*love, an emotional response instigated by kindness to others. The second was *atawhai/*foster, the obligation to protect the well being of their people. The third was *manaaki/*blessing, the ability to look after those temporarily in your care. A parallel exists here between the *rangatira* and a judge in the therapeutic jurisprudence forum.[23]

In the Pākehā criminal justice system, however, Toki describes how principles such as *aroha* and *atawhai* have been replaced by rules of statutory law. It is acknowledged that actors withing the criminal justice system, including social workers and probation officers, may exhibit *aroha* and *atawhai.* However, the constitutional importance of appointments to the

[19] Tillich, above n 7, at 13.
[20] Bruce Winick and David Wexler (eds) *Judging in a Therapeutic Key – Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, North Carolina, 2003) at 7.
[21] Warren Brookbanks "Therapeutic Jurisprudence: Conceiving an Ethical Framework" (2001) 8 Journal of Law and Medicine 3 at 328.
[22] Valmaine Toki *Indigenous Peoples and the Law: Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Oxon, 2018) at 217.
[23] At 40.

judiciary is to settle disputes between citizens and the state, and in doing so, to clarify and declare the law of New Zealand,[24] rather than to provide *aroha and atawhai* for the parties.[25]

Therapeutic jurisprudence provides an umbrella under which power and *aroha*/love can shelter comfortably together. While the role of a judge is to settle disputes between citizens and the state, and in doing so, to clarify and declare the law of New Zealand, with a similar end goal, the aim for the *rangatira* is to secure an outcome that is achieved by consensus and guided by principles of *tikanga Māori,*[26] which includes *aroha.* In this way the well-being and balance of the group could be restored to enable the successful functioning of the community.[27]

Ultimately *aroha* or love must satisfy ideas about justice in order to be relevant in a legal sense. And whatever decolonised justice we create must be included in a shared theoretical space that we jointly agree on. Is it unreasonable to expect agreement on ideas about justice that are made in unity with *aroha* as a principle of *tikanga* in order to avoid the injustices that have previously passed?

Currently justice is expressed in principles and laws which ideally are made in context; they reflect a lived experience. Tillich stated that every decision which is based on the abstract formulation of justice alone is essentially and inescapably unjust.[28] He went on to say that justice can only be reached if both the demand of the universal law and the demand of the particular situation are accepted and made effective for the concrete situation.[29]

Māori Marsden shared similar ideas to Tillich with regard to abstract thought. The route to *Māoritanga* through abstract interpretation claimed Marsden, is a dead end. "The way can only lie through a passionate, subjective approach."[30] Māori Marsden was brought up within Māori culture, and absorbed the values and attitudes of Māori. His approach to Māori things was

[24] Crown Law *Judicial Protocol* (Crown Law Office, Wellington, 2014) <http://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf>.
[25] Toki, above n 22, at 40.
[26] Waitangi Tribunal Report *Te Paparahi o te Raki* (Waitangi Tribunal Report, Wellington, November 2014) Wai 1040 at 20.
[27] Toki, above n 22, at 40.
[28] Tillich, above n 7, at 15.
[29] Above.
[30] Māori Marsden *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Edited by Te Ahukaramū) (The Estate of Māori Marsden, Masterton, 2003) at 2.

largely subjective.[31] The charge of lacking objectivity did not concern him. He found the so-called objectivity some insist on as simply a form of arid abstractions, a model or a map. "It is not the same thing as the taste of reality."[32] Furthermore, he states:

> I like to use a descriptive method to explore the features of consciousness found in Māori cultural experiences…While I will also do a formal analysis of some of the basic concepts out of which these attitudes arise, it is important to remember that Māoritanga is a thing of the heart rather than the head. For that reason analysis is necessary only to make explicit what the Māori understands implicitly in his daily living, feeling, acting and deciding.[33]

It is *aroha*/love which creates participation in law in context. Without *aroha*/love equitable justice is impossible. Tillich said justice is just because of the love which is implicit in it.[34]

13.3 Defending the Use of Aroha in a Legal Sense

I am mindful that to openly express or even use the word 'love' in a legal sense invites dangers. I am also mindful that Māori who make up a large proportion of our criminal justice system need to have warmth and love shown to them, especially by professionals who carry the authority for what shall happen to them, in their hands. It is not an insignificant responsibility, and it requires a more subjective approach to theory development than relying solely on a justice system based on a power model.

However, perhaps rather than defending the use of 'love', what is needed is a more nuanced understanding of the concept of *aroha*. *Tikanga* encompasses customs, ethics, values, culture and principles for living daily life.[35] Smith encourages us to have *aroha kit e tangata* (a respect for people) when conducting research that includes Māori.[36] Within *tikanga, aroha* has a multi-layered meaning and is not only an expression of love but also the enacting of care, concern, respect and compassion for others.[37] The expression of *aroha* creates an innate positive effect

[31] Above.
[32] Above.
[33] Above.
[34] Tillich, above n 7, at 15.
[35] Mead, above n 9.
[36] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (Otago University Press, Dunedin, 1999).
[37] Barlow, above n 8.

on others that adds to their experience and meaning in everyday life.[38]

In terms of decolonising legal theory an integrated approach that is *tika* (correct in our thinking and knowing), *pono* (having integrity with what we know) and *aroha* (acting out of love)[39] appears essential. In practice, *aroha* is more than just knowing a concept or feeling an abstract emotion, *aroha* has a doing component that is related to the '*ha*' (to breathe, to taste) and the '*aro*' (to pay attention, take notice).[40] *Aroha* as a *takepu* (applied principle)[41] is an intrinsic part of how we 'become the theory,' as it affects the way we behave with…people.

Young et al describe how they incorporate *aroha* within the child protection system. *Aroha* is at the heart of their co-construction as they take notice of one another, while listening, learning and growing. This creates a *whakawatea* (to clear a pathway or make way) so that they can work together honestly and deeply. They take these 'warmths' and love as guides to practice with the young people and their families in the child protection system;[42] guides to practice that could be incorporated into our criminal justice system for example.

If we look to other jurisdictions we can find multi-layered expressions similar to *aroha* adopted into statutory law, for example, in Navajo law. In the case of *Re Mental Health Services of Bizardi,* the Navajo Supreme Court found the goal of traditional dispute resolution is to restore the parties and their families to *hozho* (harmony) using a similar process of 'talking things out' and the remedy of *nalyeeh* (restitution).[43] *Nalyeeh* translates as restitution, reparation or compensation for an injury or wrong done to a person.[44] The Navajo Tribal Council has adopted the restitution provision, *nalyeeh,* into Navajo statutory law.[45] During the sentencing phase, the Navajo court uses *nalyeeh,* which allows for apology, forgiveness, and restitution, to require a defendant to compensate any party harmed by wrongful conduct.[46] This can be applied in a

[38] Above.
[39] H Tate "Towards Some Foundations of Maori Theology" (PhD Thesis, Melbourne College of Divinity, Kew Vic, Australia, 2010).
[40] Susan Young, Margaret McKenzie, Cecilie Omre, Liv Schjelderup and Shayne Walker "'Warm Eyes', 'Warm Breath', 'Heart Warmth': Using Aroha (Love) and Warmth to Reconceptualise and Work towards Best Interests in Child Protection" (2020) 9 Social Sciences (Basel) 4 at 55.
[41] Taina Whakaatere Pohatu "Ata: Growing Respectful Relationships" (2004) He Pukenga Korero 8 at 1–8.
[42] Young et al, above n 40, at 55.
[43] *Re Mental Health Services of Bizardi* (2004) Navajo Supreme Court 8 Navajo Reporter 593.
[44] R Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009) at 79.
[45] At 23.
[46] J Boyden and W Miller *Report of Survey of Law and Order Conditions on the Navajo Indian Reservations* (United States Bureau of Indian Affairs Report, 23 March 1942) Interviews at 17.

criminal context. For example, when four defendants pleaded guilty to cattle rustling, each defendant was ordered to give the owner of the two cows they had stolen, ten head of sheep, to satisfy the restitution part of their sentence.[47]

The ultimate goal of traditional and modern *tikanga Māori* is returning disputants to harmony with each other, their *whānau, iwi and hapū.* Life is in a state of balance when people are in harmonious relationships with each other and with their surroundings. Maintaining balance in relationships is a deeply embedded Māori value.[48] *Utu* holds many meanings for Māori. Values placed upon *utu* include compensation, revenge or reciprocity. The concept of *utu* is found in all aspects of life from warfare[49] to economic transactions.[50] It is often referred to as the principle of reciprocity, with Metge[51] regarding its main purpose as maintaining relationships. *Utu* is a response to a *take* (a concern) and once the *take* is admitted the aim is to reach a state of *ea* (settlement), which might be translated as 'restoring balance' and thereby maintaining *whānaungatanga.*[52] Te Kooti Rangatahi and Te Kooti Matariki offer a pathway and a response by which *utu* is put into practice.[53]

The Navajo use the traditional principle of *nalyeeh* as a mechanism to restore disputants to *hozho* (harmony). Similar to *tikanga Māori*, *nalyeeh* translates roughly as restitution, reparation or compensation for an injury or wrong done to a person.[54] *Utu* is the end product of a process that uses apology, forgiveness, and *korero* (talking things out) to correct a wrong.[55] During discussions in Te Kooti Rangatahi, an agreement is reached on the amount of restitution that will restore an injured party to *utu.* Under *tikanga Māori*, restitution is usually paid to the victim and the victim's *whānau, hapū* and *iwi,* because the injury affects not only the victim, but also the victim's *whānau* through *whakapapa.* The principle of *utu* compliments Te Kooti Rangatahi and criminal litigation involving youth and the non-adversarial marae court process.

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[47] *Navajo Tribe v Jim Warito, Art Sandoval, Richard Antoni and John Largo,* Case No 18 (Navajo Court of Indian Offences, Crownpoint, New Mexico, 6 March 1942).
[48] Mead, above n 9, at 31.
[49] Above.
[50] Above.
[51] Above.
[52] Valmaine Toki "Lessons from the Navajo Tribal Courts: Tikanga Māori as common law?" (2018) 28 NZULR 2.
[53] Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 94.
[54] Austin, above n 44, at 79.
[55] Toki, above n 52, at 2.

Similarly, the *nalyeeh* principle works well with the Navajo jurisprudence model in the context of civil and criminal litigation in the Navajo Nation Courts and the non-adversarial Navajo peacemaking process.[56] In the case of *Allstate Indemnity Co v Blackgoat*[57] the Navajo Supreme Court explained the concept of *nalyeeh* and its function of restoring disputants to *hozho:*

> *Nalyeeh* is a unique Navajo doctrine based on the effects of injury. As the means by which Navajos customarily compensate injuries, Navajo Nation Courts use *nalyeeh* to assess the adequacy of damages in tort claims…*Nalyeeh* includes the responsibility to respectfully talk out disputes. While a "flexible concept of distributive justice" depending on the circumstances of the injury and the positions of the parties, a central purpose of *nalyeeh* is to restore harmony between the parties by adequately compensating the injured person or persons. Therefore, the amount of compensation arising out of that process "should be enough so that there are no hard feelings." Based on these principles, *nalyeeh* incorporates what might be expressed in Anglo terms as a procedural requirement and a substantive result.

We can extend *aroha* as a *takepu* (applied principle)[58] to become an intrinsic part of how we conduct ourselves within the courts, for example, in relation to *evidence.* Hampering the principles of *nalyeeh* and *utu* and the restoration of positive relations between parties is the withholding of evidence that might mitigate the other party's damages for example, or even plain dishonesty from either party, or the simple act of lying before the court. These are all actions that impede the central purpose of *nalyeeh* and *utu.* These actions can leave the affected party harbouring *kino nga piropiro* (bad feelings) in the quest for restitution.

In the case of *Casaus v Dine College,* the Navajo Nation Supreme Court discussed the issue of a litigant withholding evidence that might mitigate the opposing party's damages. The court used the *nalyeeh* principle to hold that a party has a duty to disclose evidence in her possession that might mitigate the other party's damages.[59] The court states firmly that it will not undermine the comprehensive resolution of a dispute between parties by permitting one side to withhold relevant evidence.[60] A party who withholds evidence violates that traditional principle called *na binaheezlaago bee t'aa lahji' algha deet a;*[61] to westernise the phrase "A comprehensive agreement made after consideration of all relevant matters".[62] In other words, a party cannot withhold matters that might be essential to an agreement as a way of gaining an

[56] Above.
[57] *Allstate Indemnity Co v Blackgoat* 8 Navajo Reporter 627 (Navajo Supreme Court 2005) PG 226 FTNOTE 75.
[58] Whakaatere Pohatu, above n 41, at 1–8.
[59] *Casaus v Dine College* No SC-CV-48-05 (Navajo Supreme Court, March 8, 2007) slip op at 7.
[60] Above.
[61] Above.
[62] Austin, above n 44, at 81.

advantage.

This principle works with the *nalyeeh* principle to ensure that an injured party is adequately compensated and made whole after full disclosure and consideration of all relevant evidence.[63] Making relationships "whole" again is analogous to similar principles found in *tikanga Māori.* The seeking of balance or equilibrium can be regarded as the end goal of the employment of *utu.*[64] *Na binaheezlaago bee t'aa lahji* and *utu* both require "honesty," that is, the relevant court processes must be transparent and without secrecy for everyone that has an interest.

In terms of decolonising legal theory development, *matarika* (honesty) becomes synonymous with an integrated approach that is *tika* (correct in our thinking and knowing), *pono* (having integrity with what we know) and *aroha* (acting out of love).[65] In practice, *aroha* is more than just a feeling, *aroha* has a practical component that is related to our conduct as individuals and within a group.

Te Kooti Rangatahi ensures *matarika* (honesty) in their processes. First, and perhaps most importantly, is that those appearing before Indigenous courts are more likely to respect and engage positively with the process and respect the involvement of their elders and the recognition of their culture. For many Māori youth, appearing in the mainstream court system can be a foreign, disconnected process that the youth easily dismisses.

Te Kooti Rangatahi on the other hand, places the young offenders in an environment where they feel at ease and can reconnect with their identity. For many critics this is seen as a soft option, but while the setting is different, the same legal rules apply. Requiring young people to stand up on their *marae*, in front of their *whānau*, *kuia* and *kaumatua*, and account for their offending, is a powerful and transformative experience. And according to a *tāngata whenua* judge "youth don't tell lies on the *marae*. They are much more likely to tell lies in the main court, because they are one removed from it, because they don't have to be responsible for actually answering."[66]

[63] Above.
[64] M Stephens and R Powell (2017) "Law in Aotearoa New Zealand" in E McDonald et al *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing Limited, Oxford, 2017) at 17.
[65] Tate, above n 39.
[66] Hasan-Stein, above n 53, at 96.

Understanding theories of law in relation to culture, is not just about examining moments of conflict but also by studying moments of judging. Considering the concepts of *haqq, utu and nalyeeh* in light of "truth" telling encourages us to reimagine judicial discretion as a reflection of cultural principles that relate directly to our relationships encountered in our social world, and not just elements of adjudication that must be eliminated. There is a growth of alternative dispute resolution processes in Aotearoa New Zealand[67] that emphasise negotiated settlements devised by the disputing parties themselves. Such initiatives offer a portal for the introduction of culturally based decolonised legal theory and principles based on *aroha*.

13.4 Balancing Theories of Aroha with Ontological Help

The weight of problems in constructing decolonising theory and the emotive character of love creates difficulties when confronting issues of equality within our laws. More often than not these theoretical discussions confuse rather than enlighten. Nonetheless, the struggle to create decolonising theory must begin with questions that ask who creates the theory of law in which decolonising justice is supposed to be expressed? Currently, the law is an imposed system – that of the colonial power. It is based upon the customary law of the United Kingdom and adapted according to the changing value systems, always in favour of the dominant majority.[68] Only the law of the Pākehā custom is recognised, despite the fact that the system and its application – jury peer system – emerged out of the struggles of the common people against the monarchy for social and political justice. So the Māori must be ruled by Pakeha folk-lore

[67] Te Whare Whakapiki Wairua, the Alcohol and Other Drug Treatment (AODT) Court, was established in November 2012 as a pilot across two District Court sites: Auckland and Waitākere. The Court aims to break the cycle of offending by treating the causes of that offending. It provides an alternative to imprisonment for people whose offending is being driven by alcohol and/or drug substance use disorders. Sentencing is deferred while participants work through the programme, which includes regular court appearances to check on progress. The AODT Court has adapted international best practice principles appropriate for Aotearoa New Zealand. For example, the programme includes the integration of Māori cultural practices into Court processes, cultural advice and peer support. This approach has been shown to be transformative and achieve better outcomes for those taking part <https://www.justice.govt.nz/courts/criminal/specialist-courts/alcohol-and-other-drug-treatment-court/>; The New Beginnings Court Te Kooti o Timatanga Hou is aimed at homeless people in Auckland. The Special Circumstances Court is aimed at homeless people in Wellington. If you get accepted into one of these courts, you can get help to address issues in your life that contribute to your offending. This is a voluntary court. People going through it can choose to withdraw and be returned to the normal court system at any time < https://www.justice.govt.nz/courts/criminal/specialist-courts/>.

[68] Marsden, above n 30, at 101.

and folk-law.[69]

Marxist theory of the State asserts that the laws of the State are tools which give social control to a ruling group.[70] Power, Foucault declared is all that should be of interest.[71] Unless the State somehow disintegrates and is replaced by a neutral administration without power, it is difficult to see how decolonising theory based on *tikanga* can succeed. "The justice of the ruling class is injustice…"[72] And as long as there is no alternative justice, the laws of the ruling class will prevail. If we accept the Marxist analysis and reduce justice completely to a function of power we will always be ruled by Pakeha folk-law.

So, how do you legislate for values based on love and myths and ideas about compassion? How do you legislate for spiritual values? This was a question posed by the Government to the Royal Commission on Social Policy as long ago as 1987.[73] In 1988 the report of the Royal Commission on Social Policy was published. This massive five-book opus included an extremely wide range of issues within its definition of social policy. The report was controversial and highly criticised at the time and has continued to arouse criticism since. [74] Nonetheless, the Commission can be seen attempting to broaden the scope of what could be considered as social policy with a more inclusive consultative dimension to ideas of how the process of social policy might take place. Many of its proposals did become policy and/or law, while many of its ideas continue to inform contemporary debate and discourse on social policy.[75] It might well have sown the seeds for decolonising theorists through its positive and continuing impact on our society despite what its detractors may believe.

If we create decolonised laws derived from principles of natural law, these laws will not express what is, but rather demand what it should be. Irrespective of power, decolonised laws will demand and expect obedience in a non-adversarial manner. Māori Marsden described how to operate in *aroha* reaped the rewards of social approval, honour, esteem and whilst this was a motivating factor, equally important was the sense of obligation which could entail sacrifice

[69] Above.
[70] Tillich, above n 7, at 16.
[71] Lawrence Kritzman and Michel Foucault (eds) Politics, Philosophy, Culture Interviews and Other Writings, 1977-1984 (Routledge, London, 1990) at 104.
[72] Tillich, above n 7, at 16.
[73] Marsden, above n 30, at 106.
[74] Jo Barnes and Paul Harris "Still Kicking? The Royal Commission on Social Policy, 20 Years On" (2011) Social Policy Journal Of New Zealand Te Puna Whakaaro 17 at 70.
[75] Above.

even unto death upon the part of a member:[76]

> By this means we hope that we all might fulfil the ideals of the general teaching of the great tradition of philosophy that, "If we live as we ought, we shall know things as they are, and that if we see things as they are, our vision will help us to live as we ought.

In Māori culture, *ngākau* is referred to as both the heart and the mind.[77] *Ngākau* translates to *na'au* in the Hawaiian language, and Manulani Aluli Meyer describes how "intelligence is found in the core of our body system – in our viscera, the *nau'au*[78]...without heart we don't have sense."[79]

If Māori must be ruled by Pakeha folk-lore and folk-law[80] as Marsden claimed and the Government is asking question about how to legislate for spiritual values[81] all the problems of aligning love and power in a shared theoretical space are driving us to search in the origins of our knowledge for answers. Searching mythologically for ways in which to balance concepts such as love and power might prove fruitful.

If we look to ontology for support in our search for a shared space theoretically, ontology assists us by asking questions about what is means 'to be'. 'To be' in essence means something that is present to someone at every moment; it describes their being. It is never hypothetical or conjectural. It is always descriptive. It describes someone's existence in reality. We can use ontology, therefore, to find out what the basic structures of being are and if as Māori and non-Māori we share any of those structures.

Tillich who confronts problems in ontological terms, describes love, power, and justice, metaphysically speaking, as old as being itself.[82] He says:

> They precede everything that is, and they cannot be derived from anything that is. They have ontological dignity. And before having received ontological dignity they had mythological meaning. They were gods before they became rational qualities of being. The substance of their

[76] Marsden, above n 30, at 42.
[77] Brendan Hokowhitu "Monster: Post-Indigenous Studies" in Aileen Moreton-Robinson (ed) *Critical Indigenous Studies: Engagements in First World Locations* (The University of Arizona Press, Tucson, 2016) at 99.
[78] Manulani Aluli Meyer "Our Own Liberation: Reflections on Hawaiian Epistemology" (2001) 13 Contemporary Pacific 1 at 141.
[79] At 143.
[80] Marsden, above n 30, at 101.
[81] At 106.
[82] Tillich, above n 7, at 21.

> mythological meaning is reflected in their ontological significance.[83]

For Plato, justice was not a special virtue, but the uniting form of the individual and the social body.[84] This could resonate with principles contained in *whanaungatanga* for Māori as *whanaungatanga* reflects relationships between physical, metaphysical and human connections. And in Aristotle too, we find a man driven by his heart, who described the doctrine of universal erōs which drives everything towards the highest form, the pure actuality which moves the world not as a cause (kinoumenon) but as the object of love (erōmenon).[85] Augustine and all his followers too, showed the primacy of love in relation to power and justice.[86]

Immediately I am conscious of looming problems with this ontological approach. Māori Marsden stated that "only an approach which sets out to explore and describe the main features of the consciousness in the experience of Māori offers any hope of expressing an understanding of Māoritanga.[87] "The reality we experience subjectively is incapable of rational synthesis. This is why so many Māori react against the seemingly facile approach of foreign anthropologists to their attitudes, mores and values, and the affective state of mind which produce them."[88] Māori Marsden went on to say:

> I believe only a Māori from within the culture can do this adequately. Abstract rational thought and empirical methods cannot grasp the concrete act of existing which is fragmentary, paradoxical and incomplete. The only way lies through a passionate, inward subjective approach.…The grasp of a culture proceeds not from superficial intellectualism but from an approach best articulated in poetry. Poetic imagery reveals to the Māori a depth of understanding in men which is absent from the empirical approach of the social anthropologist…
>
> Just like learning is a life long experience for Māori…the integration of an individual into full membership of society takes place over a long period of time. Not in formal schooling, but in his living situation…Remembering that the cultural milieu is rooted both in the temporal world and the transcendent world, this brings a person into intimate relationship with the gods and his universe.[89]

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[83] Above.
[84] Plato *The Republic* (translated by C Reeve, Cambridge University Press, Cambridge, 2004) at 115.
[85] Aristotle *Metaphysics: Book XII: Chapter 7* (translated by W Ross, Oxford University Press, Oxford, 1924) at 249.
[86] Augustine *The City of God: Book XIX: Chapter 14* (translated by R Dyson, Cambridge University Press, Cambridge, 1998) at 939.
[87] Marsden, above n 30, at 22.
[88] Above.
[89] At 23.

Tillich said the all the problems concerning the relation of love to power and justice, individually as well as socially, become insoluble if love is basically understood as emotion in a Western sense.[90] Love viewed from a Western perspective would be rendered a sentimental construct in relation to power and justice and ultimately irrelevant to Māori, and therefore unable to change inequitable laws or the challenge of orthodox power structures. An immediate stumbling block in the creation of decolonising theory would be to consider love or *aroha* as being fundamentally emotional in character. Equally an analysis of love without emotional considerations would be vacuous. Most of the pitfalls in creating decolonising theory would be, as Marsden points out, due to a misunderstanding of the Māori ontological character of *aroha.* On the other hand if love or *aroha* is understood as a shared ontological perspective, then perhaps a basic unity of love and *aroha* can be revealed.

Decolonising theory is not a new category of theory that can remove itself from ancient ontological inquiries. Without looking back to the ontological origins of being we will not be able to find answers to difficult questions. *Aroha* is central to Māori existence.[91] This is an ontological expression of love, it describes the nature of love for Māori. "They say that being is not actual without the love which drives everything that is towards everything else that is."[92]

Tillich claimed that whenever the ontological foundation of justice was removed, and a positivistic interpretation of the law was tried, no criteria against arbitrary tyranny or utilitarian relativism were left.[93] In the fight of Socrates with the Sophists this was the decisive point.[94] Many of the Sophistic educators were characterized as deceitful because they were more concerned with making a profit from teaching persuasive trickery than of producing quality orators that would promote Athenian democracy.[95]

This is the same fight that Māori experience today, with Eurocentrics claiming to teach qualities they perhaps do not themselves possess, namely truth, happiness and justice. Tillich

[90] Tillich, above n 7, at 24.
[91] Barlow, above n 8.
[92] Tillich, above n 7, at 25.
[93] Tillich, above n 7, at 55.
[94] At 56.
[95] George Kennedy *Classical Rhetoric and Its Christian and Secular Tradition from Ancient to Modern Times* (2nd ed, The University of North Carolina Press, North Carolina, 1999) Chapter 3.

claimed that this fight can only be won by a new foundation of natural law and justice.[96] Just as balancing relationships defines *tikanga,* according to Plato, justice was the uniting function in the individual man and in the social group.[97] An individual's obedience to social justice defines how his/her relationships will be ultimately balanced. And within this framework of social justice, every law will be implied equally.

The law is equal for all those who are equal. In Plato's *Republic,* ideas about justice and equality excluded slaves. Christianity removed the shackles from slaves by viewing everyone as equals before God, in theory. In reality, however, feudal times saw justice administered according to a well delignated social standing. "The principle of equality was restricted to the equals within the same ontological degree inside and outside the human society."[98]

The principle of equality if applied democratically should apply to every citizen of New Zealand. It is suggested that the New Zealand Bill of Rights could guarantee and facilitate this.[99] However, in the process of apply laws innumerable variants in equality appear; differences in individual experience and differences in social opportunities. These differences occur due to colonising influences in the manner in which justice is distributed. These differences prevent us from achieving an equalitarian society. But if these differences are a direct result of functional aspects of our jurisprudence rather than ontological in origin then surely these inequalities are not static; there exists the potential to change them.

I have tried to argue that ontologically we need to give *tikanga* value. But this analogy, taken from moral arguments, is only partly adequate. There is no real separation between reality and mythology ontologically when considering the origins of knowledge. One cannot consider the ontological origins of *aroha*/love in relation to power and justice without engaging with moral arguments, and one cannot consider moral arguments without referring constantly to the ontological origins of knowledge.

In searching for the roots of our moral imperative and how we measure its validity, the sources of its contents, the forces of its realisation, Tillich states that the answer to each of these

[96] Tillich, above n 7, at 56.
[97] At 55.
[98] Tillich, above n 7, at 59.
[99] New Zealand Bill of Rights Act, 1990.

questions is directly or indirectly dependent on a doctrine of being; an analysis of man's being and universal being.[100] There is no answer to creating a shared theoretical space without assertions about the nature of being for Māori. The most valid attempt to make a shared theoretical space based on ontological thought is through an analysis of the philosophy of values from ancient times. There is little to be gained from the interpretation of nature and societies shaped by modern science and materialistic ontologies that are alien to Māori culture.

This leaves us asking questions about how we give theoretical validity to elements of law on which differing ideas about human dignity and the meaning of existence depend. How do we create a doctrine of shared values? Values that are practical as well as theoretical for both Māori and non-Māori. Modern science is guilty of aligning itself with kindred disciplines such as biology, psychology and sociology and stoically refusing to absorb 'other' values because they are scientifically justified in doing so. These scientific values "are expressions of existence unable to judge existence from a place beyond it."[101] It is difficult to create this theoretical space if we think in terms of scientific necessity to explain all our unanswered questions.

But even if we free ourselves from the confines of scientific thought for the sake of *tikanga* values, the question remains: How can a value originating from beyond our current existence have any influence today? How can values derived from Māori mythology demand a sense of obligation for Pakeha who have no ontological relationship to the value in question? These questions are impossible to answer if we only think in terms of scientific Eurocentricisms.

Which, exasperatingly, leaves me pondering if it is even possible to find shared values. Perhaps the only answer is to find alternative values. Exhausted, I return to the beginning of my thoughts, and as a starting point consider whether we could approach this search pragmatically. Legal pragmatism views law as produced by specific social contexts with judicial consequences, and approaches human experiences objectively. The pragmatist Tillich warns:

> "…establishes rules describing the pragmatically most adequate behaviour. But one asks immediately: Adequate to what? Every situation is ambiguous in its ethical aspect and admits different answers to the question of adequacy.[102]

[100] Tillich, above n 7, at 72.
[101] At 74.
[102] At 75.

Let us consider for example the work of Posner. Richard Allen Posner, is an American jurist and law and economics scholar who served as a federal appellate judge on the U.S. Court of Appeals for 36 years. He said in a statement announcing his retirement, "I am proud to have promoted a pragmatic approach to judging during my time on the Court, and to have had the opportunity to apply my view that judicial opinions should be easy to understand and that judges should focus on the right and wrong in every case".[103]

While judicial opinions should be "easy to understand," on the other hand, Tillich's warning makes me sceptical of Posner's pragmatic approach to judicial decision-making. Posner encourages political and legal decision-makers to be guided by everyday pragmatism rather than abstract moral considerations.[104] He links ideas about pragmatic governments wrapped up in democracy that would reject more creative and self-determining views of Indigenous legal scholars for example. "Posner's version of pragmatism is both too narrow and too broad…A theory that incorporates everything ultimately proves nothing."[105] It is easy to envisage how Eurocentric judicial decision-making could persist under Posner eye.

Frustratingly, every theoretical proposition I investigate appears ambiguous in its intentions creating different answers depending on how the question is disguised, which is unfortunate for the decolonising theorist who searches truth and transparency. Defeated, I resign myself to the fact that a pragmatic approach seems inadequate.

As I admit to rapidly running out of theoretical ideas to answer my decolonising questions, I consider jumping in at the deep end and embracing Indigenous ideas with a moral approach based in mythology. How murky could these moral arguments become?

As a starting point I will consider two possibilities for interpretation. The first I will call divine law, the other I will call natural law. The first understands moral commandments, the principles of *tikanga,* as expressions of a divine will of the gods, it is sovereign and without challenge. It

[103] Patricia Manson "Richard Posner Announces Retirement" (Chicago Daily Law Bulletin, 2017) <https://www.chicagolawbulletin.com/archives/2017/09/01/retirement-9-1-17>.
[104] Richard Prosner *Law, Pragmatism, and Democracy* (Harvard University Press, Massachusetts, 2005) Chapters 1-2.
[105] Ilya Somin "Thoughts on Judge Richard Posner's Legal Pragmatism" (The Washington Post, 2 September 2017) < https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/02/thoughts-on-judge-richard-posners-legal-pragmatism/>.

must be obeyed as it is prescribed in the principles of *tikanga.* But why should anyone non-Māori obey the commandments of gods other than their own? Perhaps a way around this dilemma of how we understand the law is framing it around arguments to do with nature. If we assert that the law given by a god is in fact essentially from nature, put to us as law; natural law, then natural law, regardless of whether you are Māori or non-Māori represents our true being from which we have become estranged in modern life.

Every principle of *tikanga* appears to be an expression of a person's essential relationship to his/her self, to his/her *whanau*, *hapu* and *iwi* and to the universe. For Māori, this alone makes it obligatory, it commands obedience, and its denial will result in loss of *mana*. This results in unconditional obedience based on a moral imperative, regardless of how questionable this type of 'obedience' is for Pakeha.

It seems that Māori can transcend him/herself in all aspects of life with the knowledge contained within *tikanga*. He/she can use everything within *tikanga* for his purposes. He/she is limited only by his/her own *mana*. These limits can be reduced infinitely by loss of *mana* through disobedience. Nobody can say when *mana* is completely lost. But I imagine there is a definite limit to the amount that can be lost and at which point one destroys oneself.

Māori can refuse to engage with the intrinsic justice contained within *tikanga*, he/she can disregard the demands *tikanga* makes of him/her. He/she can remove or use *tikanga* as a form of justice. But resisting *tikanga* ultimately results in injustice against oneself; *mana* has been endangered. As a cultural phenomenon *tikanga* provides for human experience, it embodies laws and their obedience, traditions, and individual conscience. Māori who follow the principles of *tikanga* and is guided by his/her conscience, is likely to possess the *mana* necessary for successful personal and group relationships.

I have tried in vain to derive rules for obedience from shared theoretical principles. Defining obedience to *tikanga* through 'commandments' lacks the nuanced understanding reserved only for those with *whakapapa*. The question that remains then is: are there other ways to discover shared theories of law? A seemingly incontestable answer is: the cultural process of *tikanga* creates laws; *tikanga* provides a unique human experience, embodied in myth, tradition, authority of elders as well as the individual's own conscience. He/she who follows *tikanga* and decides under the guidance of his/her *mana* has a solid foundation for equitable justice.

Māori are never without a treasury of moral wisdom to draw on to sustain their communities, which in theoretical terminology, is based on mythical revelation. None the less, these mythically derived laws have lasted as structures of justice until today. In an ideal world, most of the daily encounters between Māori and others would be determined by these sources of justice. Tradition, authority and individual *mana* all play an important part in the balancing of social order. They are interdependent. They are all established sources of justice. The *mana* of an individual has been shaped by the processes in which the traditions of *tikanga* and its associated authority have been internalised by individuals and become rules of justice which make obedience mandatory. The principles of *tikanga* create an interplay between law and individual conduct. Is it possible to transcend this interplay between the general principles of tikanga and the mana of an individual to arrive at a point where this interplay can include 'others'? Perhaps the classical theory of natural law can assist us; the belief that it is possible to discover relationships which are universal and therefore valid.

While I have previously identified that defining obedience to *tikanga* through 'commandments' risks attempting to describe and define *tikanga* through a Eurocentric lens, I cautiously consider reflecting on my own Ten Commandments for assistance. Tillich said the Ten Commandments are considered by classical theology as statements of the natural law and so are their interpretations in the Sermon on the Mount.[106] He describes the commandments as principles that when used for concrete decisions they become indefinite, changing and relative.[107] This holds true for the principles of *tikanga* which also have the ability to adapt to the times.

It is too great a burden to expect natural law to provide all the answers to questions of how to share a theoretical space within broad discussions about justice? Certainly discussions in this thesis on the principles of justice are indeed richer when we develop a depth of understanding that includes principles of *aroha* and not merely orthodox discussions about justice and its relationship with traditional views on power. This is because justice based on power structures cannot fulfil the quest for equality in our laws, but the inclusion of *aroha* can.

Aroha shows what is just where adversarial justice cannot. To create shared theoretical spaces

[106] Tillich, above n 7, at 81.
[107] At 83.

that do not include concepts of *aroha* is to avoid the obligations required of decolonising research. The idea of *aroha* transcending justice is more than an emotional construct. *Aroha* gives justice that which is missing. *Aroha* demands equitable justice. If justice demands *aroha* then it also demands that justice gets creative. "For the creative element in justice is love."[108]

Love or *aroha,* no matter which guise it takes, as an attempt to understand a relationship with another person or persons, and indeed our relationship with the planet. It is more than mere emotionalism, rather it encourages respectful relationships between parties. It seeks to understand misguided motives and challenging behaviour. It uses legal principles founded on emotion to discover what it means to be human and how we care for our environment. Through *aroha* we can develop a deeper more legitimate understanding of the sociolegal dynamics presented to us. Tillich describes how "listening love is the first step to justice in person-to-person encounters."[109] This can also extend to our interactions with nature, and our injustice towards the planet.

For Māori, *aroha* is a sacred power that emanates from the gods and encompasses concepts of 'love', 'sympathy' and 'charity'.[110] *Aroha* in a person is often described as an all-encompassing quality of goodness, expressed by love for people, land, birds and animals, fish and all living things.[111] In Navajo society, *k'e* reinforces the kinship system through values that include respect, kindness, co-operation, friendliness, reciprocal relations, and love.[112] For both Māori and Navajo, language and traditions reinforce the values that each group expresses through love.[113] For Navajo, *k'e* frames the Navajo view of the universe as a web of universal relations.[114] The values that emanate from *aroha* and *k'e* prescribe custom and etiquette that both Māori and Navajo follow when interacting with all facets of life.[115] These ancient constructs are fundamental to the Navajo conception of an orderly universe functioning according to irreversible principles.[116] This is also similar for Māori.[117]

[108] Above.
[109] Tillich, above n 7.
[110] Barlow, above n 8, at 8.
[111] Above.
[112] Austin, above n 44, at 84.
[113] Toki, above n 52.
[114] Austin, above n 44, at 85.
[115] Toki, above n 52.
[116] Austin, above n 62, at 85.
[117] Toki, above n 52.

Whānaungatanga defines and secures concepts of identity, rights, obligations and reciprocity amongst *whānau. Aroha* is an emotional concept that is an almost instinctual way of reacting in relationships. The concept of *aroha* prescribes acceptable behaviour conducive to maintaining harmonious relationships amongst *whānau, hapū* and *iwi.* To act outside the boundaries of *aroha* is to risk bringing shame on one's *whānau.*[118] For Navajo, a person whose behaviour contravenes the rules of *k'e* assumes the risk of being marked with the maxim "he or she acts as if he or she has no relatives." The maxim describes a wrongdoer and reflects the traditional method of shaming that maintains community order and kinship unity.[119]

Whānaungatanga is indispensable to Māori because *whānau* provide for the physical, emotional and spiritual well-being of individuals. Relying on *whānau* for the sustenance of *aroha* is a tradition that has always been available to Māori.[120] Equally the important *k'e* values including the treasured values of sharing and giving can scarcely be exaggerated.[121] According to *kuia* and *kaumātua* love is not skin deep like the tattooed face of a chieftain, but swells up continually from the depths of one's heart.[122]

For *kaumātua* and *kuia* the principle of *aroha* is the basis for the giving, sharing, and support amongst *whānau.* The *kuia* and *kaumātua* of the *marae* courts express *aroha* through their acts of genuine care and concern towards the youth that stand before them, regardless of the youth's crime or circumstances. These are acts of *aroha* that add quality and meaning to the youth's life.[123] This *aroha* creates an alternative environment for young offenders. By removing them from the adversarial environment of the mainstream court and replacing it with a *marae* court setting where, with the support of *whānau,* and *kuia* and *kaumātua*, they are able to take ownership of their offending. Te Kooti Rangatahi marae court, for example, can bring forward the voices of the vulnerable and marginalized to be heard by all those connected to the court process; for all of those involved to learn from. Ideally, offenders will speak for themselves. If they are unable to they will be supported with the *aroha* of the elders until they are able to do so for themselves.[124]

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[118] Above.
[119] Austin, above n 44, at 87.
[120] Toki, above n 52.
[121] C Kluckhohm and D Leighton *The Navajo* (Harvard University Press, Cambridge, 1974) at 100.
[122] Barlow, above n 8, at 8.
[123]Toki, above n 52.
[124] Above.

Furthermore, the judges of Te Kooti Rangatahi marae courts understand and respect the important role of the elders, *kuia* and *kaumātua*. Without the support, *aroha,* and guiding words to the *rangatahi*, from the *kuia* and *kaumātua,* the courts would not be effective. The *aroha* of *kuia* and *kaumātua* also influences the role of the judges, with one judge stating that he owed his level of professional cultural competence to the *kuia* and *kaumātua* of his court due to their expertise in *Te Ao Māori.*[125]

These examples of the role of *kuia* and *kaumātua* taken from the marae courts support arguments for creative theory building that turns upside down our adversarial ideas about justice and contemplates justice in terms of 'giving', or in tikanga terms, *utu.* This idea of giving turns on the right of everyone we encounter to require something of us. Giving is an expression of justice bound up in theories based on love. Justice underpinned by notions of love also embraces ideas about justice that is forgiving. An excellent illustration of this is seen in the doctrine of Paul the apostle and Luther "to accept as just him who is unjust".

Salvation was the chief concern of Paul. He was anxious for the betterment of himself and his people in the presence of his God. He had inherited a scheme by which salvation was thought to be made possible – a scheme partly moral, partly forensic and legal, sometimes wholly forensic and legal but never since the days of the great prophets, predominantly moral.[126]

The teaching about salvation current in Paul's day, may be summarised as follows: God gave a law, the requirement of which man must keep, if he expected to be accounted righteous or justified by God's forensic decree. The law was glorified and made the channel through which divine benefits could flow; and the works of the law, in whatever way they were interpreted, were the full measure of man's part in the attainment of salvation.[127] Tillich describes forgiveness as the only way to reunite those who are estranged by guilt.[128] Without reconciliation the ability to heal relationships is absent from our laws. "Forgiving love is capable of restoring balance and repairing relationships."[129]

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[125] Hasan-Stein, above n 53, at 92.
[126] Charles Ritchey "Luther and Paul: Their Experiences and Doctrines of Salvation" in *The Biblical World*, Volume 50, No 4 (The University of Chicago Press, Chicago, 1917) at 227.
[127] Above.
[128] Tillich, above 7, at 86.
[129] Above.

Justice Joe Williams when speaking of Te Reo Māori and synthesising Aotearoa law commented that "interestingly, I think where we're getting to is that *tikanga* appears to be civilising the more barbaric aspects of the individualisation of the Enlightenment…the challenge is to integrate, to synthesise, to weave, the best of both of these two systems into something that is bigger and better than each individually".[130]

[130] Joel Maxwell "Justice Joe Williams on Te Reo Māori and Synthesising Aotearoa Law" (Stuff, 18 September 2020) < https://www.stuff.co.nz/national/122794406/justice-joe-williams-on-te-reo-mori-and-synthesising-aotearoa-law>.

Chapter 14. A New Theoretical Era for Decolonising Legal Scholarship

Beyond right and wrong there is a field, I'll meet you there.

Rumi, the Sufi, the poet

I have asked what actually constitutes decolonising legal theory and examined its potential merits. It was not my intention to create totally new theories, instead preferring to modify and extend existing theories in culturally appropriate ways. The proposed paradigm shifts can be calibrated in terms of partnerships. These partnerships tend to reflect a level of theorizing that relates to the principles contained in the Treaty of Waitangi.

Hopefully this thesis goes beyond making token statements about the value of decolonising theory development. The solutions proposed for remedying alleged Eurocentricisms in current legal theories are aimed at changing the way legal scholars think, in general. The purpose of decolonising legal theory should be to alter legal research practice, not simply create discussion in ways that are of little consequence.

It would be a mistake to characterise *tikanga Māori* as poorly developed because of its lack of doctrinal refinement. On the contrary, *tikanga Māori* is not undeveloped because of such a lack, a strong oral tradition renders it as consistent and logical as any doctrinal system of law. The difference in paradigms is that *tikanga Māori* is composed of principles that allow people to return to a state of balance through the negotiation of their own arrangements. It seeks consistency with natural law assumptions about humanity, not through the application of principles of the state's creation. *Tikanga Māori* is a system of morally based adjudication that finds its validation not in the perfecting of legal doctrine but in the balancing of everyday life, and assessed in this way, it is sophisticated and successful.

Tikanga Māori remains stoically pragmatic and true to its local context. It does not seek to endlessly refine a precedent, or codify its principles. Instead it applies principles to situations and evaluates the outcomes. There is validation of truth telling through *whakapapa* and *whanaungatanga,* with attention to consequences of actions rather than antecedents. *Tikanga*

Māori is not a system that governs, rather a framework that seeks to balance outcomes.

There is a logic and coherence to *tikanga,* and reasonableness and consistency are qualities of a *tāngata whenua* judge. The *tāngata whenua* judge decides cases according to the customary practice of the *iwi* and *hapu* for whom he/she works. He/she inquires after *whakapapa*; he/she considers plaintiffs, defendants, witnesses and victims in terms of relationships within their communities; he/she relies heavily on oral testimony in preference to written. His/her overriding concern is to balance relationships defined in local terms. Colonisers assumed they were introducing a more advanced form of law when they arrived in Aotearoa. While *tikanga* is a different form of law from the colonisers, it cannot be assumed that some laws are more advanced than others.

It is important to defend *tikanga* from its detractors and critics by offering a new approach, one in which we shift the theoretical paradigm so that it reconnects legal institutions with social life inclusive of culture because unless our legal systems are intimately connected with, rather than separate from our social and cultural lives, we will never bridge the gap between theoretical ideals; we will never provide a richer cultural interpretation of the law, we will never diminish existing power structures, or repair historical grievances.

This study is more theoretically focused than practical in application resulting in many of the arguments being couched in broad assertions. It insists that legal theory must be shared within the context of a wider culture that includes Māori. But this idea of a shared theoretical space could be pushed even further. While the cultural framing of the marae courts and the role of the *tāngata whenua* judge is elucidated with clarity, the role of institutional legal frameworks remains clouded. How do we educate law students? What is the impact of state supervision over marae courts? Should the massive overpopulation of Māori in our prisons reshape our current criminal justice system? The unanswered questions are endless. The comparison of Māori and non-Māori theories of law raises numerous problems, not least the question of whether it is even appropriate to contrast Māori and mainstream criminal jurisprudence in the search for shared theoretical spaces.

There are issues related to the influence of concepts such as *whakapapa* and *whanaungatanga* where intent, social background, past actions, and other social influences of the accused are often significant. These issues clash with mainstream jurisprudence who condemn these practices as unfair. Previous convictions are not typically allowed in evidence in mainstream

courts. There is the additional problem of the changing relationship between Māori and urban Māori who have drifted to the city and distanced themselves from their marae and active participation in Māori culture. This changing relationship raises question about the ability to implement local practices. Does an obligation to adopt *tikanga* in light of an urban drift diminish this ability? Is it now less legitimate and practical to refer to local practices? It could be argued that if *tikanga* was widely used then there would be the application of common cultural assumptions to specific events that would then become legally known and accepted. Due to the fluid nature of *tikanga,* it is able to preserve some flexibility that enables the adaption of general principles to local situations.

Any attempt at creating shared legal theorising can open jurisprudential discourse in Aotearoa New Zealand to avenues that lead forward with the promise of an equitable experience of justice for both Māori and non-Māori.[1] This thesis has looked sequentially at several major traditions in jurisprudence – common law, legal positivism, essentialism and critical legal studies – that have in the past provided philosophical foundations for Eurocentric scholarship in Aotearoa New Zealand. These legal traditions encourage a distinctly empirical analysis that lacks moral criticism and reform. Decolonising jurisprudence unashamedly benefits from a moral component. It criticises positive law specifically and suggests reforms for it on the basis of *tikanga Māori* principles that include moral values and Indigenous ideals.

These major movements in legal philosophy that I have discussed appear to have little to offer the decolonising theorist: contemporary natural lawyers rarely discuss what justice requires of law culturally from an Indigenous perspective; legal positivists have abandoned law on a moral basis, and critical scholars have distanced themselves from their once distinctive moral stand against liberal legalism.

Legal scholarship in Aotearoa New Zealand since the signing of the Treaty of Waitangi, has constantly leaned against Indigenous argument. Moral based arguments are often explicitly disparaged, particularly by right wing thinkers who advocate "one law for all." These arguments, so the complaints go, are "moralistic," inappropriately political, or pure advocacy, rather than empirically insightful of some broader sociolegal context. The philosophical movement in jurisprudential traditions I have described clearly reflects a contemporary

[1] Gordon Christie "Indigenous Legal Theory: Some Initial Considerations" in Benjamin Richardson, Shin Imai and Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oregon, 2009) at 230.

movement that covertly allows for ongoing Eurocentricism in legal scholarship generally. In response, decolonising jurisprudence pushes strenuously for a legal paradigm shift towards a culturally safe space for all legal scholars, not just Māori.

I have looked for an intersection between Indigenous and Western theory and its roots in the history of legal scholarship, and its human costs. These are movements that travel mostly in parallel to each other appearing to barely intersect. In response to the human cost for Māori specifically, I suggest a theoretical paradigm shift; a shift that could encourage our movements to converge in a more holistic way.

The decolonising legal scholarship I propose deliberately targets contemporary legal scholarship on moral grounds. It reflects on existing laws in an innovative way; on the givenness of the way things are; and the web of beliefs in which the legal scholar is firmly embedded. Decolonising literature generally has no impact on actual law reform in Aotearoa New Zealand. It is largely inconsequential. Any suggestion made in decolonising legal scholarship for a shift of legal paradigms remains at the margins of our jurisprudence and simply serves to highlight the rootedness of Eurocentricism in our laws with no real impact in a legal sense.

Decolonising scholarship will not mature as a discipline in Aotearoa New Zealand until legal scholars abandon our unhealthy fixation with empirical data and legal doctrine. Legal scholarship should divert its preoccupation with the way things ought to be, legally speaking, and focus instead on a better understanding of the way things are, for Māori in particular, who are the greatest participants in our criminal justice system.

We have little understanding of Indigenous criminality. We do not understand why our legal world is largely devoid of Indigenous culture, and we have no sense of how culturally legal changes could occur or why. We sense that our colonial history has something to do with it all, but we have no real understanding of the theory required to initiate legal change that would result in equitable laws. One reason for our ignorance, is that we lack a sustained, disciplined understanding of *tikanga Māori*. Legal scholarship, then, could usefully seek and develop deep understandings of orthodox laws that include Indigenous culture: its principles and practices. However, it cannot possibly achieve such an understanding if colonial attitudes are allowed to persist.

Within this context, then, decolonising theorists are coming to define their scholarly mission in terms drawn from other disciplines other than legal doctrine, with orthodox law serving as the object of those disciplines but not its defining characteristic. The idea of decolonised legal scholarship makes good sense, it is no longer radical in approach or unworthy of attention. Nor is it politically intentional; merely historical, philosophical, sociological, and economic scholarship that is influenced by the moral views contained within *tikanga Māori.*

Oliver Wendell Holmes opined "I hate justice."[2] Perhaps as colonisers we have colluded with Wendell Holmes. We have in effect shied away from any sustained analysis of the concept of Indigenous justice because talk of justice for Māori is emotive, challenging, or just too difficult. Perhaps, we have not, as a consequence, even investigated what we ourselves as decolonising theorists mean when we claim that our legal frameworks are unjust and Eurocentric? Do we even agree on what decolonising justice is? Do we even understand our theoretical positions when we become impassioned in our appeals for justice for Māori?

Justice commands of us that we abide by certain ideals.[3] However, if we lack a shared theoretical space we cannot undertake a study of justice for either Māori or non-Māori because there is no guide to direct our analysis or critique of our unjust laws. We have not to date, developed theories of decolonised justice that might guide us as Māori and non-Māori working together, on what appeals for equitable justice for all might entail. This is a gaping deficit in our jurisprudence. We cannot criticise our Eurocentric laws on the basis of appeals to justice if we have no theoretical basis for those appeals, nor any theoretical arguments to support what decolonising justice requires or entails.

Law may have been complicit in our current dilemmas, but there is no question that law in some form, whether conventional or not, will be essential to their resolution.[4] Decolonising legal scholars are faced with the challenge of diagnosing the pathologies that follow from law's absence of Indigenous culture. The legal theory we have is in need of reform, but likewise the decolonising theory we lack, needs articulation.

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[2] Letter from Oliver Wendell Holmes to Harold Laski (4 March 1920) in *The Holmes-Laski Letters (1916-1935)* (Mark DeWolfe Howe (ed), Harvard University Press, Massachusetts, 1953).
[3] Robin West *Normative Jurisprudence: An Introduction* (Cambridge University Press, New York, 2011) at 192.
[4] At 200.

The decolonising theorist has a particular understanding of social dynamics: they are attuned to social problems caused either by inadequate or the overzealous legal responses. They understand the devastation of assimilation of Māori to Western ways and the human costs of too little legal protection accorded to Māori culture and language. Decolonising theorists know too the pitfalls of toothless international law in the fight for self-determination; or simply the lack of appreciation of long-term effects of perpetually increasing incarceration rates of Māori. Decolonising theorists know intimately all of these facts and could know much more of the ways in which colonising law creates or perpetuates inequality for Māori with further in depth study facilitated by a more nuanced shared legal theory.

This study discussed the methodological considerations that can occur when applying theoretical approaches with differing epistemological foundations to a predominantly orthodox legal setting. By bringing together diverse ways of knowing in a shared legal landscape and a local context, it was possible to engage with the tensions of differing research paradigms and stimulate the development of new ways of doing legal research. The potential to generate a modern equitable jurisprudence in Aotearoa New Zealand from the tensions arising out of the diverse actors, perspectives, values and interests inherent in differing research paradigms offers hope to those who experience discrimination within our current legal system.

Employing an interdisciplinary approach to answering research questions seeks not so much to converge differing values and customs but rather encourage understanding through the association of the different epistemological lenses, perspectives, and standpoints of Māori and non-Māori. Indigenous research, acknowledges the interconnectedness of physical, mental, emotional, and spiritual aspects of individuals with all living things and with the earth, the star world, and the universe.[5] Its methodology…conforms to Indigenous ethical protocols that shape the methods according to local cultural imperatives.[6] Long-term occupancy of a certain place is also imperative.[7] Indigenous knowledges also seek to actively address colonial and postcolonial intrusions[8] as they try to re-establish the experiences and ways of knowing that

[5] L Lavallée "Practical application of an indigenous research framework and two qualitative indigenous research methods: Sharing circles and Anishnaabe symbol-based reflection" (2009) 8 International Journal of Qualitative Methods 1 at 23.
[6] J Porsanger "An Essay about Indigenous Methodology" (2004) Nordlit 15 at 105.
[7] G Dei, B Hall and D Rosenberg *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (University of Toronto, London, 2000) at 6.
[8] Above.

have been silenced by dominant Western knowledge communities.[9]

Personally, I was unable to become proficient at working with qualitative data as 'stories' and I am still exploring these methods as a non-Māori. However, I am convinced that better scholarship and research will ultimately be achieved through developing, recognising, and using *kaupapa Māori* methodologies, and merging Indigenous and Western methods when appropriate.

While the theoretical tensions of this study may not have been resolved, there is little doubt that research that involves the integration of Western legal theory and *kaupapa Māori* theory has become more common in recent years. Sharing a theoretical space is a research strategy which deliberately combines elements of Western research paradigms with a *kaupapa Māori* paradigm in the hope of ameliorating epistemological approaches and research cultures.

Without underestimating the epistemological implications of sharing theory, decolonising theorists could use this approach to pragmatically synchronise a diversity of legal theory. Nonetheless, there are dangers in mixing legal theory from different epistemologies as the process creates, and analytically exploits a particular societal relationship to create new or hybrid theory. The purpose behind such a sharing of theory would be to draw on the interaction of these theoretical arguments to clarify the relationship between Western legal paradigms and Indigenous ways of knowing so that hybrid theories and practices free from colonialisms can be developed. The intention of sharing theory, then, is to decolonise the areas of legal collaboration between Māori and non-Māori.

While this study employed *kaupapa Māori* philosophies to explain ideas, superficially, it may have been guilty of just passing itself off as having an Indigenous focus. What passes for Indigenous research tends to be methods of data collection and analysis conducted and represented by Westernised researchers according to modified, but ultimately hegemonic modern Western knowledge traditions.[10] Rather than Indigenous scholarship being pursued through Indigenous methodologies in higher education institutions, it is still Western

[9] L Botha "Mixing methods as a process towards Indigenous methodologies" (2011) Int J Soc Res Methodol 14 at 314.
[10] At 315.

methodologies which are perpetuated.[11]

This study considered the philosophies and practices born of Indigenous people's scholarship. Despite this, the Western legal theory used in this study was not able to absorb and apply the ontologically, epistemologically and axiologically appropriate theory of Indigenous research in a manner that truly respected the principles of *tikanga Māori*. The differing epistemological challenges proved too great. While the Western theory used in this study tried to actively 'appropriate, appreciate and accommodate'[12] the principles of *kaupapa Māori* theory, what appears to be needed is a new set of theories and philosophies generated by the critical and deliberate efforts of decolonising theorists, along with the scholarly support for the potential for *kaupapa Māori* theory to overlap with Western legal theory in a mutually beneficial way. This new set of theories requires an interdisciplinary approach that enables us to link forms of subjectivity to forms of objectivity in a distinctively "cultural" way, achieved by working *through* difference rather than against it, and by acknowledging as meaningful each law's characteristic discursive formation.

Indigenous theory which goes beyond that of conventional Western theory, continues to strengthen and find its own direction. There are uniquely Indigenous ways of producing and holding knowledge, such as through oral tradition,[13] traditional relationships,[14] local practices[15] and sacred inquiry.[16] Given opportunities for the re-establishment of intuitive ways of knowing and intergenerational relationships, where axiology is the driver of the research that includes a spiritual dimension,[17] it may be possible to produce creative and socially responsible legal theory with specifically Indigenous qualities.

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[11] D Morgan "Appropriation, Appreciation, Accommodation: Indigenous Wisdoms and Knowledges in Higher Education" (2003) International Review of Education 49 at 45.
[12] Above.
[13] Y Belanger "Epistemological distinctiveness and the use of 'guide history' methodology for writing native stories" (2001) 2 Indigenous Nations Studies Journal 2 at 15; M Kovach "Story as Indigenous Methodology" in M Kovach *Indigenous Methodologies: Characteristics, Conversations and Contexts* (University of Toronto Press, Ontario, 2010).
[14] S Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008); R Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009).
[15] Lavalee, above n 4, at 21; Austin, above n 13.
[16] P Reason "Reflections on sacred experience and sacred science" (1993) 2 Journal of Management Inquiry 3 at 273; Wilson, above n 13, at 39; Austin, above n 13, at 84-87.
[17] E Guba and S Lincoln "Paradigmatic controversies, contradictions, and emerging confluences" in N Denzin and Y Lincoln (eds) *Sage Handbook of Qualitative Research* (3rd ed, Sage, London, 2005) at 200.

I was always conscious that it is on Tuhiwai Smith's 'tricky ground'[18] that I position myself as non-Māori hoping to contribute to decolonising theory development. It was a position that required constant examination and re-examination of my own standpoint as a Pākehā. However, given the deliberate juxtaposition of conventional legal theories and Indigenous ones, Botha suggests that the purpose of teasing out fresh perspectives and re-evaluating accepted ones seems to offer fruitful opportunities for boundary breaking practices and theorising that could be especially appropriate for research by and for Indigenous communities.[19]

The potential for innovative hybrid legal theory that brings together Western and traditional methods harmoniously, lives in the ability of the decolonising theorist to bridge the gap between recorded data, let us call it *empirical data,* and the highly subjective unrecorded emotional data of lived experiences. Having identified considerable weaknesses through mixing theories of different epistemological origins, this study may ultimately, have only succeeded in providing "a platform from which to build ethically appropriate ways of relating to others in the context of Indigenous research."[20]

Building *kaupapa Māori* principles into main stream legal practice and research is essential if we are to meaningfully address the shameful incarceration statistics for Māori. It is these small negotiated shifts of adaptable practices that can incrementally change perspectives so that templates for new theories and values can be built up from them.[21] What is needed is further research that takes elements of different theoretical paradigms and successfully blends them creating research communities where Māori and non-Māori share a more common ground.

There are opportunities for contradictory and even mutually exclusive elements to meet and fashion dynamic relationships in an attempt to address the structural tensions that exist between them.[22] Ultimately what should be generated, though, is legal theory that has a life of its own – one that is free to initiate, benefit from, represent, and is a legitimate account of knowledge

[18] Linda Tuhiwai Smith "On tricky ground: Researching the native in the age of uncertainty" in N Denzin and Y Lincoln (eds) *Sage Handbook of Qualitative Research* (3rd ed, Sage, London, 2005) at 85.
[19] Botha, above n 8, at 320.
[20] Above.
[21] At 322.
[22] Above.

production involving Indigenous peoples.[23] As long as the knowledge that is traded across this boundary does not happen between equals, that is, Western researchers and Indigenous researchers, the legacy of colonialism continues.[24]

Not to use the insights that the study of a shared legal theoretical space might yield for the scope of law in Aotearoa New Zealand feels like an act of self-sabotage. Surely our laws need more than just improvements at the margins of our society? Surely we have the right to question whether our laws are good enough? We need to acknowledge our lack of understanding of our obligations as citizens toward our Indigenous peoples. Any configuration of legal theory that emerges from a shared space might be partly complicitous in the difficulties of contemporary democracy but not to use insights gleaned from our understanding of a shared theoretical space amounts to nothing less than a lost opportunity.

The challenge for Aotearoa New Zealand as a society is having the courage to allow Māori to rediscover and reassert *tikanga Māori* within their own whanau; the challenge is adopting an understanding of where Māori stand in accordance with the Māori world view; a standpoint that has no affinity with the ancient common law tradition which has been imposed upon them, but instead a tradition of *tikanga* that as New Zealanders we have every reason to uphold and respect.

With very broad brushstrokes I have painted a somewhat rudimentary sketch of legal theory that is undoubtedly a great deal more complex, controversial, and contextual in reality. Nevertheless, this rudimentary picture can at least stimulate and initiate thoughts on finding a more effective response to a much larger and complex issue. Given the opportunity that court initiatives such as Te Kooti Rangatahi[25] and Te Kooti Matariki[26] provide, our Māori communities could create an independent legal entity from which they can organise their communities in a socially just manner according to the principles of *tikanga Māori*. As non-Māori researchers we can assist these efforts by critically examining our own responsibilities in hampering or enabling this process.

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[23] R Bishop "Freeing ourselves from neo-colonial domination in research: A Kaupapa Māori approach to creating knowledge" in N Denzin and Y Lincoln (eds) *Sage Handbook of Qualitative Research* (3rd ed, Sage, London, 2005) at 109.
[24] Botha, above n 8, at 323.
[25] Te Kooti Rangatahi Marae Based Youth Courts, see Ministry of Justice *Rangatahi Court: Evaluation of the Early Outcomes of Te Kooti Rangatahi* (Ministry of Justice, Wellington, 2012).
[26] Te Kooti Matariki Adult Offender Court, in Kaikohe, Northland.

The search for this 'shared space' encourages an ongoing process of strategic thinking across diverse sectors, groups and communities within Aotearoa New Zealand, guiding the development of a new set of priorities for the Government's investment in legal research that affects Māori. Any shared theoretical space that results from this search must identify and address Māori issues, primarily in recognition of the unique history, knowledge and learning of Māori, but also as a consequence of the partnership created under *Te Tiriti*, the Treaty of Waitangi, between the Crown and *tangata whenua.*

I hope that this thesis has provided a fresh interpretation of decolonising legal research with the most important argumentative thread being one that demonstrates how Eurocentrism can be read as a colonising tool, which deploys positions that marginalise Indigenous knowledge, and in the process of unpacking Eurocentrism's complex meaning it is possible to refashion our Eurocentric origins to include the notions of "partnerships", that value subjective experience over objective, and that, in reality, include "Indigenous cultural" qualities.

This thesis operates as an intervention into decolonising legal theory, aimed at leveraging the analysis of Linda Tuhiwhai Smith's[27] work to suggest new ways to think equitably about Eurocentrism and possibilities for its transformation, the relationship between sociolegal forms of subjectivity and objectivity, and how to capture the complex and multifaceted character of 'Indigenous culture' within our theoretical legal knowledge. On this level, the most important argumentative threads are those centred on the inclusion of Indigenous arguments, and the emergent character of "decolonising legal research" categories such as *whanaungatanga* or relational accountability. This type of innovative legal interpretation offers the possibility for a new theoretical era for decolonising legal research.

Ka pū te ruha, ka hao te rangatahi
Set aside the old net, let the new net go fishing

[27] Linda Tuhiwai Smith *Decolonising Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012).

Chapter 15. A Few Final Thoughts

During this thesis I have asked the reader to consider new directions in relation to the discipline of law and the study of theory as a device for the production of knowledge that is truthful and considers *aroha* to be the ultimate principle of justice. I have explored the role that *aroha* might play in the deconstruction of essentialist ideas about the law with the assumption "that essentialist thinking lies at the core of many reductive, discriminatory and extremist ideologies."[1]

The intention of this thesis has been to examine whether it is even possible to share a theoretical space as Māori and non-Māori legal researchers. The purpose of developing a shared theoretical space as decolonising researchers is not only to learn about *tikanga Māori,* but to appreciate how knowledge about Māori is produced, ensuring an orientation to legal knowledge production that removes the mask of colonial power. I hope we can agree that this type of theorising is essential, while remaining cautiously aware of the dangers that this type of theorising holds for Indigenous peoples.

At some point we will have to develop tools so that our shared theory development can have a practical application. So long as these tools are developed within the context of our communities and the voices of all our relationships are heard, only then can we safely implement laws by and for Māori and non-Māori equitably.

Equitable justice goes hand in hand with mutual forgiveness. Mutual forgiveness by Māori and non-Māori is the fulfilment of decolonising justice. But mutual forgiveness is decolonising justice only if it is based on ideas about caring for each other. Care that is justified by love. Yes, uniting love with justice risks the creation of laws that oscillate between legalism and sentimentality. But risking ourselves in order to create decolonising justice enables a paradigm shift that embraces a world without the dynamics of power and the tragedy of life that accompanies it.

Many problems connected with decolonising justice have not been mentioned at all, others

[1] See J Kurzwelly, H Fernana, M Ngum, "The Allure of Essentialism and Extremist Ideologies" (2020) 43 Anthropology Southern Africa 2 at 107-118.

have been touched on only briefly or rather inadequately. However, I hope that the preceding discussion has proved one thing: that the problems of decolonising justice demand our attention so they are not lost to the cynicism with which they have been treated in the past. We cannot solve any of the inequities currently experienced by Māori if we do not see them in light of mutual forgiveness and love.

Linda Tuiwhai Smith describes the re-writing and re-righting of the Indigenous position in history as an important part of decolonising research.[2] This research project was a journey of discovery, with my initial reluctance to adopting different approaches turning to one of appreciation for the need for change. The most important lesson learned from my experience of working with Indigenous theory within legal academia was how the "rules of academia and of research do not always allow an Indigenous research framework to flourish."[3]

Although orthodox theory was helpful in guiding the research process, it was also problematic. This was most apparent in the comparative phase as I was constantly guilty of fragmenting *tikanga Māori* and in essence destroying its *mana.* It was necessary to take a "collective" approach if I was to maintain a *kaupapa Māori* focus. Nevertheless, orthodox theory was useful in organising the themes to collectively describe the data findings from my Pākehā perspective. However, Indigenous research is decolonising research,[4] and as such, it is important that Indigenous ways of knowing resist being categorised under Western concepts, including qualitative inquiry.[5] It is important to offer a theoretical contribution that searches for a different way of knowing, one that endeavours to decolonise legal academia. I hope that this thesis has contributed to that search.

[2] L Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012).
[3] L Lavallée "Practical application of an indigenous research framework and two qualitative indigenous research methods: Sharing circles and Anishnaabe symbol-based reflection" (2009) 8 International Journal of Qualitative Methods 1 at 36.
[4] Tuhiwai Smith, above n 2.
[5] Lavallée, above n 3, at 36.

Glossary

ahau	I, myself
Aotearoa	New Zealand
aroha	empathy, fellow feeling, love
aroha kit e tangata	a respect for people
atawhai	foster
atua	powerful ancestor, god, anything strange and extraordinary
hapū	subtribe
hau	wind (breath) of life
hau ora	wind (breath) of life; life force
hau tupu	wind (breath) of growth
hē	wrong
hui	ceremonial gathering
io-matua-kore	the creator
iwi	tribe
kaimoana	seafood
kaitiaki	caretaker, guardian, protector
kaitiakitanga	guardianship
karakia	prayer, incantation
kaumātua	elder
kaupapa	cause, purpose
kaupapa Māori	Māori customary practice
kōrero	discourse, talk
koru	fold, loop, coil; creation, new life, growth, strength, peace
kuia	older woman, female elder
mana	power, authority, prestige, ancestral efficacy
manaaki	care for, welcome
manaakitanga	hospitality, generosity of spirit; care for others
manawa ora	life force
marae	ceremonial centre, including meeting house, courtyard
mātauranga	knowledge, wisdom
mate	illness, death, existential danger
mauri	life force
mohio	knowing
moteatea	traditional chants
Muriwhenua	‘this is the end of the land’
ngākau	heart and mind
ngā kōrero tuku iho	talk handed down; oral history
ngā taonga tuku iho	earlier generations
noa	free from ancestral restriction
ora	life; health, prosperity, well-being
ōrite	being similar, being equal
Pākehā	New Zealand European
Papatūānuku	Mother Earth
pono	truth, true, faithful
rahui	ceremonial restriction; form of tapu restricting access to a resource
rangatira	chiefly person

rangatiratanga	chieftainship; right to exercise authority, independence
rangiātea	first known Whare Wānanga (higher house of learning)
Ranginui	Sky Father
take	concern
tāngata	people
tāngata whenua	local people (lit. ‘people of the land’)
taonga	treasure, prized article
taonga katoa	‘all their treasured things’
tapu	sacred, presence of ancestor god; ancestral power
te ao Māori	Māori ‘world’ or ways of living
te reo	Māori language
te toi-o-ngā-rangi	the upper level of the spiritual realm,
tiaki	to guard
tika	just, fair, right, correct; straight; appropriate, fitting, proper, according to precedent
tikanga	tradition, custom; protocol
tikanga Māori	ancestral ways of thinking and acting
tino rangatiratanga	absolute chieftanship
Ti Tiriti o Waitangi	Treaty of Waitangi
tinana	body
tipu	cosmic generative power
tohunga	specialist; priestly expert
tūpuna	ancestors
utu	equal return, reciprocal exchange
waiata	song
waiata-ā-ringa	action songs
wairua	spirit, immaterial being
whakapapa	lineage
whānau	family
whanaungatanga	relatedness, centrality of relationships
whakawatea	to clear a pathway, make way
whenua	land; placenta

Appendices

Appendix 1 The Research Process

1.1 Stages of the Research Process

The stages of the research process adapted from Polit and Hungler[1] are shown in Figure 2. The following chapter discusses the research process and ethical issues raised in relation to this study.

1.1.1 Identifying the Research Area

It was while working as a research assistant to Dr Toki, Associate Professor in Law, Te Piringa - Faculty of Law - University of Waikato, that I developed an interest in legal research methodologies. Having completed a MSc using a Western qualitative methodology, and a LLM using a *kaupapa Māori* methodology, I became interested in exploring further the differing epistemological foundations of these two contrasting research paradigms in the hope of establishing a shared theoretical space as Māori and non-Māori legal researchers. After developing research ideas during the research proposal phase of the study, a thorough literature review was undertaken to ensure feasibility of the project.

1.1.2 Literature Review

A computerised literature search was undertaken with additional information obtained from books and journals. The function of the literature review was to scope the potential for establishing a shared theoretical space as legal researchers when applying research approaches with differing epistemological foundations.

1.1.3 Research Proposal

A research proposal provided the structural framework for the main study.

[1] Denise Polit and Bernadette Hungler *Nursing Research: Principles and Methods* (7th ed, Lippincott, Williams and Wilkins, London, 2004) at 47.

Figure 2. The Stages of the Research Process

1.2 Ethical and Regulatory Obligations

1.2.1 Ethical Approval

The candidate was not required to make an application for verified approval to the Ethics Committee at the University of Waikato in accordance with Section 6(4) of the Ethical Conduct in Human Research and Related Activities Regulations as the jurisprudential approach to this research did not involve collecting data about or from individual people or organisations.

However, the candidate is mindful of an ethical problem that exists only with qualitative data collection. At the beginning of the research, the researcher has no idea of the detailed objectives, although general aims are held, as in the case of this study. The nature of this type of research is flexibility and its use of unexpected ideas that arise during data collection and analysis. Accordingly, the candidate will at all times adopt the New Zealand Social Policy and Evaluation Research (SPEaR) Committee Good Practice Guidelines (2008) on research and evaluation involving both Māori and non- Māori.[2]

1.2.2 Research About Māori

In keeping with the general philosophy of *kaupapa Māori,* one of the goals of this research is to make a positive contribution to academia, remembering that historically Māori have not always seen the positive benefits of research.[3] This goal also includes focusing on the cultural ground rules, what Evelyn Steinhauer describes as the three R's: Respect, Reciprocity and Relationality. Steinhauer explains:

> Respect is more than just saying please and thank you, and reciprocity is more than giving a gift. According to Cree Elders, showing respect is a basic law of life. Respect regulates how we treat Mother Earth, the plants, the animals, and our brothers and sisters of all races…Respect means you listen intently to others' ideas, that you do not insist that your idea prevails. By

[2] SPEaR Good Practice Guidelines (Ministry of Justice, Wellington, 2008) s 5.4 <http://www.spear.govt.nz/good-practice-guidelines-june-2008>.

[3] See M Battiste and J Youngblood Henderson (2000) *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publications Ltd, Saskatoon, 2000) at 132; Linda Hasan-Stein *The Tensions Between Differing Epistemologies in Legal Research* (Unpublished LLM Thesis, University of Waikato, 2019) at 20; R Walker "The Role of the Press in Defining Pākehā Perceptions of the Māori" in P Spoonley and W Hirsh (eds) *Between the Lines: Racism and the New Zealand Media* (Heinemann Reed, Auckland, 1990) at 37; R Walker "Māori and the Media" in R Walker (ed) *Nga Pepa a Ranginui: The Walker Papers* (Penguin Books, Auckland, 1996) at 142; R Walker "Māori News is Bad News" in J McGregor and M Comrie (eds) *What's News: Reclaiming Journalism in New Zealand* (Dunmore, Palmerstone North, 2002); Shaun Wilson *Research is Ceremony: Indigenous Research Methods* (Fernwood Publishing, Winnipeg, Manitoba, 2008) at 17.

> listening intently, you show honour, consider the wellbeing of others, and treat others with kindness and courtesy.[4]

By incorporating these principles into the research, the researcher hopes to honour the worldview of Māori with ethical responsibility and sensitivity. Weber-Pillwax believes the foundation of Indigenous research lies within the reality of the lived Indigenous experience. Indigenous researchers ground their research knowingly in the lives of real persons as individuals and social beings, not on the world of ideas.[5] Wilson confirms this notion by stating that if Indigenous ways of knowing had to be narrowed through one particular lens, then surely that lens would be relationality. All things are related and therefore relevant.[6]

Mindful of Tuhiwai Smith's comments that research is probably one of the dirtiest words in the Indigenous world vocabulary, stirring up silence, conjuring up bad memories and raising a smile that is knowing and distrustful,[7] the aim is that this "research is *with* and *for* people rather than *on* people."[8] As this study will include analysis of knowledge that Māori hold sacred, it was hoped that this research will be more than just a collection of data. In essence, this research will strive to uphold 'relational accountability.'[9]

The researcher is cognizant of the enormous privilege she has been granted to conduct research that includes Indigenous peoples. Paramount to this privilege, it is the researcher's intention to honour respect, truth-telling, doing good and not harming, remembering at all times that the purpose of the research is a belief that *kaupapa Māori* has the potential to lead us to a more enlightened way of thinking about and understanding the Māori and non-Māori relationship as legal researchers.

1.3 Statement of Roles and Resources

Chief Supervisor Dr Valmaine Toki, Associate Professor and second supervisor Gay Morgan,

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[4] E Steinhauer *Restoring Balance: Moving Full Circle from Trauma to Celebration* (Blue Quills First Nations College, Hobema, AB, 2001).
[5] Cora Weber-Pillwax *Identity Formation and Consciousness with Reference to Northern Alberta Cree and Metis Indigenous Peoples* (Unpublished Doctoral Dissertation, University of Alberta, Edmonton, 2003) at 49.
[6] Wilson, above n 3, at 58.
[7] Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Otago University Press, Dunedin, 2012) at 1.
[8] Peter Reason "Introduction" in Peter Reason (ed) *Human Inquiry in Action: Developments in New Paradigm Research* (Sage, London, 1988) at 1.
[9] Wilson, above n 3, at 97.

Senior Lecturer, from Te Piringa - Faculty of Law - University of Waikato supervised the candidate.

Following consideration of the research proposal by *Te Mata Kairangi* School of Graduate Research a University of Waikato Doctoral Scholarship was awarded to assist with the undertaking of this study.

The candidate accessed resources available from the University of Waikato library and online databases via computer.

1.4 Diary

The researcher kept a field diary of the research process to detail events, personal reactions to events, and changes in her views over time. This was completed at the end of each day during the course of the study. It represents the personal side of academic research, including reactions to informants and the feelings sensed from others, and the data collection in general. Frequently this formed the basis of tentative theories and the evolution of ideas for discussion.

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