

and resources there that persons living elsewhere don't have (with regard to the same land and resources)?

44. Kingsbury (1998: 435).
45. Ivison, Patton, and Sanders (2000: 9). And Dianne Otto has said—in her (1995: 97), —that all this just reflects the tendency of liberalism 'to conflate broad human experience into rigid dichotomous stereotypes'. She goes on: 'To recognize multiplicities would free indigenous peoples from the current imperative to present themselves as a unified category. It would enable a construction of indigeneity that was diverse, multi-layered and shifting'.
46. Tully (2000: 47).
47. Oliver (1998: 223).
48. See Waldron (2004).

2

Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations

Rebecca Tsosie

2.1. INTRODUCTION

For Native peoples, the discussion about reparations is not an intellectual exercise. It is a discussion of how the past, present, and future are cojoined and interdependent, just as the contemporary descendants of those who lived through the 'Indian wars' of the past couple of centuries are inseparably linked to their ancestors. The 'past' encompasses our family, our people, our nations. It is the story of how we came to be who we are today. As John Borrows, a Canadian First Nations scholar suggests, tribal narratives and stories are also important repositories for understanding the principles and laws that guide Native peoples in their interactions with one another and with the European societies that 'settled' these lands.¹ Any discussion of contemporary Native/non-Native relations is thus incomplete without a reference to Native normative frameworks.

In keeping with that premise, this essay discusses the concept of 'reparations' as one that is simultaneously emotional and spiritual, political and social. The framework for understanding the role of 'reparations' for Native nations necessarily must be intercultural. It must account for the different historical experiences of Native nations with the Europeans that colonized these lands, and it must address Native epistemologies. There is no 'uniform' theory of reparations that fits all cultures, all nations, and all peoples. This essay explores the potential contours of a theory of reparations for Native peoples, while simultaneously acknowledging that the theory may and likely will differ, depending on the particular historical context and cultural framework that applies.

The project of this essay is thus quite different from that of the other contributors to this volume. Janna Thompson's chapter offers a theory of

reparative justice as it might apply to contemporary discussions about achieving justice for the Native peoples of Australia. Her chapter acknowledges the importance of historical context, but is highly dependent on prevailing moral theories of justice and desert among citizens in pluralistic societies. Jeremy Waldron's chapter is even more abstract, defining the concept of 'indigenous' as a method to assess whether rights claims are appropriate or justified at all. Both Waldron and Thompson appear to conceive of reparations under a 'tort model of reparations', as essentially being compensation for 'past wrongdoing', while still factoring in the equitable interests of contemporary citizens, both Native and non-Native. In comparison, this essay addresses what an intercultural framework for reparative justice might look like, and suggests that the starting and ending points might differ from group to group. In particular, Native peoples are asserting claims for recognition of cultural and political rights, as separate governments, which distinguishes their claims for reparations from those of any other group. This essay suggests that the concept of reparations should respond to the need to heal wounds that relate to past wrongdoing, as well as contemporary forms of injustice against Native peoples.

2.2. IDENTIFYING THE 'STARTING POINT'

To avoid abstraction and motivate this discussion, I start by examining one case study of a particular Native nation and its experience with the US government. The story of the Great Sioux Nation, which comprised several autonomous political bands of Lakota, Dakota, and Nakota peoples, and its battle against the United States is the subject of a great deal of popular American fiction. The most popular modern account exists in the 1990 box office hit, *Dances with Wolves*. This movie relates the romantic story of an American cavalryman who joins the Sioux Indians in their last fight for freedom before they succumb to 'conquest' by the United States. The Sioux Indians are noble, spiritual, and brave. The cavalrymen are corrupt, dirty, and mean. It is a sad story, because the tragic demise of the Sioux is inevitable, and no matter how hard the hero tries, there is nothing to be done. *Dances with Wolves* was a huge hit with the American public. It also did wonders for the South Dakota tourist economy. Suddenly, everyone wanted to visit the Black Hills (now under state, private and federal ownership) and see the glorious past of the Sioux Indians. Well, what about the present? The governor of South Dakota at the time, George Mickelson, got into the spirit of things and announced a 'Year of Reconciliation' between the state of South Dakota and the Sioux Indians. This, however, turned out to be largely a photo opportunity.² Some

Sioux Indians asked whether the government would give back any of their lands, particularly the sacred sites that they still use for religious purposes in the Black Hills. Some Sioux people wondered whether the government would issue an apology, say it was sorry for stealing their treaty-guaranteed lands, for murdering their patriot chiefs—men like Sitting Bull and Crazy Horse, or for turning their backs on the many solemn promises made in the treaty commissions. No apology ensued. No attempt was made to give land back. In fact, today, the Lakota people on the Pine Ridge Reservation live in the poorest county in the United States. They not only have the highest poverty rate in the United States, but among the highest rates of unemployment, alcoholism, domestic violence, suicide, and incarceration.

So, do the contemporary Sioux people 'deserve' reparations? We can argue about why, in the words of Janna Thompson, 'existing citizens of a political society owe reparation for injustices that they had no role in perpetrating'.³ Or we can discuss why contemporary Lakota individuals should have the right to make any 'claims in respect to wrongs done to their parents and ancestors'.⁴ At first glance, these seem to be perfectly useful intellectual inquiries that ought to concern diverse citizens of a pluralistic society. In fact, the US Supreme Court ventured part of the way down that path in its 1980 opinion in *United States v. Sioux Nation* which held that the 1877 statute that appropriated the Black Hills from the Lakota people was an unconstitutional taking of the treaty-guaranteed lands of the Sioux Nation, and that the United States was legally obligated under the Fifth Amendment to pay 'just compensation' to the contemporary descendants of the bands that were parties to the treaty.⁵ The United States subsequently discharged its 'debt' by paying the requisite amount of money into a trust account set aside for the Indian people. Was this an attempt at reparations for a past wrong? That all depends on what the starting point is for the discussion of reparations.

Interestingly, many years later and despite severe economic challenges, the Sioux Indians continue to refuse to accept the award, which now stands at over US\$500 million with accrued interest. How could this be? Does this mean that the Sioux Indians are not in favor of reparations? Does this mean that Governor Mickelson's suggested 'reconciliation' between Native and non-Native 'citizens' in South Dakota is in fact impossible? Could it be that the Sioux people understand reparations and reconciliation much differently than the non-Indian politicians and citizens of South Dakota? Clearly, the starting and ending points are much different for the Sioux people than for the non-Indians in South Dakota. The non-Indians claim to want a reconciliation, by which they mean a final effort to 'put the past where it belongs'. The Supreme Court decision says this is only possible if the United States makes amends for its illegal appropriation of the Black Hills. In the American legal

system, money is an adequate means to compensate for loss of property. The loss of property is in the past. The compensation operates in the 'present' to redress past wrongs. However, for the Sioux people, the wrongdoing continues because the United States still maintains control over the lands that are seen as fundamental to Sioux political and cultural identity and because the United States continues to deny the several bands of the Sioux Nation their sovereign right to protect their land, and the natural and cultural resources comprised within those lands. The United States not only appropriated Sioux 'property', but actually tried to eliminate the Sioux people themselves. The Sioux people perceive the appropriation of the Black Hills as inseparably linked to the US government's genocidal military campaign against them, which culminated in the 1890 massacre at Wounded Knee. Moreover, they see the physical genocide of the nineteenth century as related to more contemporary efforts to extinguish Sioux political identity. In the words of Sioux attorney, Mario Gonzalez, 'the killings at Wounded Knee and the theft of the Black Hills are not separate, unrelated stories [but rather] our repeated efforts to liberate our homeland [constitute] a political matter directly related to this country's effort to destroy Lakota identity'.⁶

If we understand reconciliation as a process of 'healing' between groups who have experienced bitter and painful relations, and if we use the concept of reparations as a means to identify specific steps in that process, then we cannot be afraid to engage the full story of the Sioux Nation's encounters with the US government, including the Wounded Knee Massacre. The basic facts of the event are not disputed. In December of 1890, a Lakota leader, Big Foot, brought his band of sick and starving people to a military post and surrendered to the United States after an official government order authorized the US military to kill all Sioux Indians who were attempting to hunt and survive on their traditional lands and had not submitted themselves to the Indian agency. The US cavalry separated the men from the women and children and disarmed the men. After an unidentified shot was fired, the US cavalry began firing on the Indian men, who fled from the soldiers. The soldiers had surrounded the camp, however, and they began firing their Hotchkiss guns not only on the men, but on the women and children who were waiting in the camp. Individual soldiers pursued the Indians, butchering them as they ran. In the end, over 300 Sioux Indians were killed, two-thirds of them women and children.

Although the basic facts are not contested, the perspectives given in historical accounts vary widely. American history books generally refer to Wounded Knee as the 'last of the Indian wars'. The pervasive account is that the US cavalrymen overreacted to the 'unidentified shot' due to their fear of the Sioux people and their belief that the messianic Ghost Dance religion practiced

by Big Foot and his followers was a violent movement. The history books relate that the soldiers began firing indiscriminately on men, women, and children due to their overwhelming fear of the Sioux Indians. The Sioux people, in comparison, are adamant that this was a 'massacre' and not a 'battle'. Moreover, the survivor accounts hint at a much darker story. Alice Ghost Horse, a survivor of the massacre, told of what happened that day, as her father helped her mother, brothers, and sisters hide from the soldiers in a ravine. She tells how he was wounded, but left them to look for survivors and never came back. She says that she and the other survivors hid until nightfall, and that they heard shots ring out for hours until dusk fell. Then, they heard a wagon searching for the dead.⁷ Her story concludes: 'I have never touched a white man during my lifetime. I just could not trust any white men and never will because they killed my father and brother for no reason at all'.

Of course, Mario Gonzalez and other Lakota Nationalists would assert that the United States did in fact have a 'reason' to commit murder, and that reason was to conquer the Lakota people and appropriate their lands and resources. And yet, if the Sioux Nation's claim is distilled into an inquiry about compensation for 'property rights', how can we address the larger claim for reparative justice? Waldron's essay focuses on the rights that accrue from indigenous status, which primarily relate to land and title, and he suggests that the very assessment of 'injustice' is dependent on a careful look at the equities between Native and non-Native peoples in contemporary society. Thus, the entire question of whether 'historical titles' to land can persist may be relative to the needs and expectation interests of the non-Native peoples who by now have occupied and asserted title to the lands for a couple of centuries. This perspective, in fact, informs the US Supreme Court's holding in a recent case, *City of Sherrill v. Oneida Indian Nation*, that the 'Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part' over parcels of land that the tribe purchased in fee within the boundaries of its original treaty reservation, which had never been disestablished by the US government.⁸ Thompson's essay goes further, suggesting that ownership is not the only basis for Native claims, but that there are many other claims that might arise from 'past injustices', some of which may have persisted into the contemporary era. She suggests that many of these claims might be redressed by providing tangible opportunities (e.g. to employment or education) that could in fact 'equalize' the disparate experiences of Native and non-Native citizens. Finally, with respect to the category of claims that relate to cultural harm (e.g. forcible acculturation in government-sponsored boarding schools), Thompson suggests that, although some claimants might be justified in making reparative claims as 'heirs to a culture or the benefits of a community', this entitlement would necessarily end

when the 'cultural link with the past has been severed', and living members of the culture no longer are able or willing to value their aboriginal culture.⁹

Compare the accounts offered by contemporary Sioux scholars and claimants with the accounts given by Waldron and Thompson. For the Sioux people, the fight for land is coextensive with their fight to maintain a separate political and cultural identity. They perceive themselves as rights holders by virtue of their inherent existence as a separate people and it is not up to any foreign government, legal system, or moral system to define their 'rights' or entitlements to land and culture. For Waldron and Thompson, Native claims can be parceled out into claims for 'ownership', for 'equal opportunity' as citizens, or for 'cultural rights'. Within the moral universe of Western liberal thought, these claims are weighed and adjudicated for their 'contemporary' validity. The two frameworks are radically different and lead to very different accounts of what 'reparative justice' might look like in a contemporary era. With that in mind, this essay now turns to offer an intercultural framework to evaluate the multiple dimensions of Native claims for reparative justice.

2.3. NATIVE AMERICAN REPARATIONS: A HISTORICAL SURVEY

In a legal sense, reparations are only appropriate where one group has suffered some legally cognizable 'harm' at the hands of another. As the preceding section demonstrates, the Sioux Nation and the various bands of Lakota, Dakota, and Nakota people have experienced a variety of harms. These are representative of the harms suffered collectively by Native people in the United States, and are simultaneously legal and moral in nature.

First, there are what I will describe as 'political' harms that ensued in the conflicts between Native people and the United States. Some of these harms relate to the forced appropriation of treaty-guaranteed lands and resources. For example, the 1868 Fort Laramie Treaty between the United States and the Sioux Nation promised the Sioux people that they would live in peace, in perpetuity, on the 'Great Sioux Reservation', an area that encompassed most of what are now the states of Montana, North Dakota, South Dakota, Nebraska, and Wyoming. In direct violation of the treaty provisions and by force and fraud, the United States seized most of this land. Today, the Sioux people are divided into minute reservations, on lands that comprise a mere fraction of what they once held. In turn, much of the land on these small reservations was taken in the early 1900s and given to white settlers, to the states, and to the US government for use in reclamation projects, national parks, and national monuments. The Sioux Nation has thus lost valuable rights to lands and

associated resources (e.g. timber, minerals, and water) and has also suffered the moral and dignitary harms of treaty breach and subsequent treatment as a 'conquered nation'.

Some of these harms occurred as the US government, its officials, and its citizens confiscated the bodies of the Indians who died during this process of dispossession and refused to give them back. For example, in the late 1800s, the US Surgeon General issued an official order which required US cavalrymen to dismember Indian bodies recovered on the battlefield and send them to Washington, DC for 'scientific' analysis. This gruesome policy had many analogs at the local level, as frontier vigilantes and US soldiers murdered Indian people and plundered their bodies and campsites for regalia, weapons, and sacred objects which were kept as trophies in some cases, and turned over to museums and agency collections in other cases. Indian people suffered further harm from the public display of their ancestors' remains and sacred objects in museums and the open sale and trade of these remains and sacred objects at 'Wild West' conventions and trade shows. Native legal claims to repatriate their dead or their cultural objects were routinely denied until 1990, when Congress issued corrective legislation on the subject in the form of the Native American Graves Protection and Repatriation Act (NAGPRA).¹⁰ As of 1990, conservative estimates speculated that there were approximately 250,000 sets of Native American human remains in federal repositories and museums. We now know that this number was much higher, and today, only a fraction of those remains and sacred objects have been returned to Native communities.

Second, the Sioux, like all Native people, have suffered a variety of cultural harms. They were subjected to a forced campaign of civilization, which outlawed their religious ceremonies and cultural practices. Individuals were imprisoned and fined for engaging in their religious practices without any form of court hearing or trial. Native children were forcibly seized and removed to distant boarding schools, where they were forbidden to speak their language and were taught that Indian culture was 'primitive, heathen, and bad'. Their traditional governments were shut down, and the Indian Bureau set up alternative government structures (tribal councils) for them. They were displaced from their sacred lands and barred from engaging in their traditional economies and life ways. Instead, they were coerced into a forced dependency, which made their very survival contingent on appropriations of 'rations' from the US government, most of which were illegally pilfered by the Indian agents and sold at a profit to non-Indian settlers.

It is hard to describe the impact of these harms and their profound legacy for contemporary Native people. The intergenerational harm of these policies

continues to haunt Native people. In the words of Assistant Secretary for Indian Affairs, Kevin Gover:

The trauma of shame, fear, and anger has passed from one generation to the next, and manifests itself in the rampant alcoholism, drug abuse, and domestic violence that plague Indian country. Many of our people live lives of unrelenting tragedy as Indian families suffer the ruin of lives by alcoholism, suicides made of shame and despair, and violent death at the hands of one another.

What possible framework is available for redress of these harms? I will first discuss the general framework within legal theory for reparations, and then discuss the experience of Native peoples in the United States.

2.3.1. A Framework for Understanding Native American Reparations

The concept of reparation carries with it a multitude of meanings. Webster's dictionary defines reparation in alternative ways: first, as 'the act of making amends, offering expiation (atonement), or giving satisfaction for a wrong or injury;' and second, as 'compensation in money or materials payable by a defeated nation for damages to or expenditures sustained by another nation as a result of hostilities with the defeated nation.' These alternative definitions indicate that, broadly construed, the concept of reparation is applicable to relationships between individuals, groups, and nations. It is designed to restore what has wrongfully been taken and to atone for injury, whether material or moral in character. The concept of reparation is accepted by the United States and the international community. It is a concept that has value across cultures and time periods because all peoples recognize that certain acts are 'wrong' and that harms must be remedied.

In many ways, the concept of reparation is consistent with legal principles designed to redress harms for breach of contract or tort injuries. Unlike criminal actions, which are designed to punish individuals for wrongdoing, civil actions generally seek to restore the appropriate relationships between injured parties. Thus, for contractual injuries, we seek to place the injured party back into the position that he would have been in without the breach. The doctrine of restitution in contract cases, for example, calls for the breaching party to restore or give equivalent value for any loss, damage, or injury. Similarly, in tort cases, we offer victims compensatory relief for economic loss through actions for damages. Where the harmful conduct has caused an unjust enrichment, the law can impose a 'constructive trust' on the profits in favor of the victim.

According to Martha Minow, reparations embodies an ideal of 'restorative justice'.¹¹ Restorative justice aims to 'repair the injustice', to make up for it and

institute future changes to correct the injustice. Drawing on Minow's work, there are several different forms of reparative justice for historical wrongs. Reparations offers money or resources in symbolic redress of violations. 'Restitution' returns wrongfully appropriated property, artifacts, and human remains. 'Apology' offers verbal acknowledgment of responsibility for wrongdoing and affords victims the chance to forgive or refuse to forgive. Notably, reparative justice can entail both economic and symbolic acts: monetary payment, health and social services, restitution of property, public apologies, and memorials. There is a material component to this process and also an intangible, psychological component. At a minimum, it is important to emphasize the humanity of victim and offender, to repair social connections and instill a sense of peace rather than ongoing conflict. There is an emphasis on healing. For example, victims need to move beyond a sense of powerlessness, and may need to tell their own stories and have the public acknowledge this.

There are many problems in adopting a theory of reparation that does not acknowledge these dual components. For example, it would be wrong to suggest that once compensation is made, the events need not be discussed again. Nor is it appropriate to suggest that a monetary remedy can cure a nonmonetary harm. Furthermore, we need to evaluate cases within an intercultural context. If we apply the concept of reparation to intergroup relations, the normative frameworks that we use will be informed by different cultural values and by different perceptions that stem from our respective historical experiences. Although American people 'share' a history in some sense, our perception of that history differs depending on whether we are descended from Native people, African people brought here involuntarily as slaves, British colonists, or the many ethnic groups that voluntarily immigrated to the United States, but then found themselves categorized and stereotyped in particular ways because of their original ethnicity. Similarly, our contemporary experience in the social, political, and economic realms of American society can vary drastically depending on these same considerations. Thus, not surprisingly, many American citizens view the concept of reparation with a great deal of suspicion. 'What do THEY want now?', 'How much will this cost US?'. The response exemplifies the problem.

It is important to separate the question of *entitlement* to reparations from the question of what *measures* are necessary to achieve reparations. For example, within international law, reparations between nations entail both monetary compensation and satisfaction.¹² Damages are available for moral and material injury. 'Material injury' involves 'damage to persons or property'. Monetary compensation is the most common reparation form. A moral injury to a state is an 'injury to the dignity or sovereignty of a state', for example a violation or breach of a treaty. The remedy for this might be an award

of monetary damages, punitive sanctions issued against the wrongdoer, an apology to the victim, an acknowledgment of wrongdoing by the guilty party, or any other measures necessary to prevent the recurrence of the illegal act. In any case, the point of reparation is to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.¹³ With respect to Native Americans, the doctrine of reparation as it applies to nations forms an appropriate model because of their continuing status as separate sovereigns with distinctive cultures and continuing ties to their aboriginal territories. I want to acknowledge, however, that in some cases, individual Native Americans will have a claim for reparations based, for example, on discrete instances of abuse, such as occurred at many government-run boarding schools.

Native peoples in the United States continue to suffer from a profound legacy of historical injustice that has political, legal, social, economic, moral, and spiritual dimensions. These are integrated in such a way that the concept of reparations, for Native people, must simultaneously address the dispossession of their lands, natural resources, ancestral remains, and cultural property, as well as the suppression of their political autonomy and their cultures. To reduce these components into a claim for monetary compensation is ludicrous. The measures used to redress these harms will require a significant restructuring of America's basic institutions, including its political and legal institutions. The concept of reparations has been used within Critical Race Theory (CRT) to advocate arguments for structural changes in society, on the theory that our existing institutions (political, educational, etc.) are fundamentally unequal because they were created to maintain the dominance of the racial elite who founded this country. I accept the truth of that statement in the context of discussions about the nature of injustice, and so part of my argument for Native peoples proceeds along similar lines to the arguments of CRT scholars: that we need to make structural changes to our basic institutions in order to ensure justice. What those changes should be, of course, will depend on the nature of the injustice. I am arguing for a theory that evaluates the experience of each group (e.g. African Americans, Native Americans) independently.¹⁴ Thus, for Native Americans, reparations may well be (in the words of Mari Matsuda), a 'legal concept that has transformative power'.¹⁵

2.3.1.1. *The Experience of American Indian Nations With Reparations*

American Indian claims for reparations, to date, have been largely within the context of land claims litigation and claims for repatriation of ancestral human remains and sacred objects.

Land Claims

In the case of land claims, reparation for the loss of American Indian lands and resources has depended on a *compensable breach* of a treaty right or right conferred by statute, as well as the willingness of federal courts to substantiate the breach with a damages award. So, for example, in *County of Oneida v. Oneida Indian Nation*, the Court found that the 1790 and 1793 Trade and Intercourse Acts, which forbade the purchase of lands from Indian tribes without the consent of the United States, invalidated the state of New York's 1795 purchase of Oneida land.¹⁶ This decision clouded the title to thousands of acres of land in New York, currently occupied by non-Indians. Although the Oneidas prevailed in their legal claim, the case is still being litigated to determine the remedy for this wrongful act.

The main vehicle to redress violations of American Indian land rights was the Indian Claims Commission Act (ICCA) of 1946.¹⁷ Until the ICCA was passed, individual tribes had to petition Congress to enact a special statute in order to adjudicate their claims against the government. Not surprisingly, very few tribal claims had actually been eligible for adjudication prior to 1946. The ICCA outlined five categories of claims that would be justiciable before the Commission, including claims in law or equity arising under 'the Constitution, laws, or treaties of the United States', tort claims, equitable causes of action (such as fraudulent conduct by government officials), takings of tribal lands without compensation, and 'claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity'. The Act, as it was interpreted and litigated, offered monetary compensation to Indian nations for the wrongful appropriation of their lands, and for other violations of tribal rights guaranteed by treaty or statute.

The Lakota brought an action for the breach of the 1868 Treaty and the taking of their sacred Black Hills in the 1920s under a special Congressional statute. After nearly twenty years, the Claims Court held that this was merely a 'moral' claim that had no legally cognizable basis for redress. After the ICCA was passed, the Lakota again got Congressional permission to reopen the case under that statute's standard for legal redress. This time they prevailed, but were merely awarded monetary damages for the taking of the land and associated resources.¹⁸ Because the Lakota sought repatriation of the lands, rather than monetary compensation, they were not satisfied with the reparations process under the ICCA.

The ICCA also failed to redress other moral and dignitary wrongs. Tribes that pursued claims that arguably fell into the 'fair and honorable dealings' category were sadly disappointed with the Claims Commission's narrow interpretation of that provision. For example, the Ft. Sill Apache Tribe's claim for redress of injuries suffered during their twenty-seven year imprisonment was

held not to be compensable under the fair and honorable dealings clause of the ICCA.

Thus, the ICCA is an example of the government's tendency to view Native American reparations as a monetary settlement of property claims rather than a means to account for moral or dignitary harms. The harms to Native American sovereignty and culture have been addressed through legislation dealing with repatriation, language rights, self-government (e.g. the Indian Reorganization Act, and the Indian Self-Determination Act), and the Indian Child Welfare Act. These pieces of legislation affirm the status of Indian nations as 'domestic dependent nations' under the federal trusteeship. Thus, the federal government may 'restore' and 'protect' aspects of Native sovereignty that were wrongfully impaired, such as the right to hold cultural property and the right to determine guardianship rights to Native children.

Repatriation Claims

Along with their land base, Native Americans suffered loss of significant cultural resources, including sacred objects and objects of cultural patrimony, which were removed by artifact collectors and anthropologists. In addition, Native American human remains were also collected by federal agencies and museums for scientific study. In addition to the plundering that took place under the Surgeon General's order and the activities of frontier vigilantes, Native American gravesites on state and federal lands were plundered by archaeologists and amateur 'artifact collectors' to recover human remains and funerary objects. In the 1900s, the US government passed legislation providing that Native American remains on federal land were 'federal property'. This constrained the activities of the amateur collectors to some extent, but provided federally licensed archaeologists with a legal right to dig up Native American remains and take them to museums for scientific study.

These practices continued largely unabated until the enactment of the NAGPRA in 1990.¹⁹ Native American Graves Protection and Repatriation Act is one of the only federal statutes to ever provide enforceable protections for Native American cultures. Native American Graves Protection and Repatriation Act is an important piece of legislation, enacted pursuant to the federal government's trust responsibility to Indian people, which protects the unique cultural rights of these groups. Thus, NAGPRA's provisions must be interpreted consistently with the federal government's duty to protect Indian tribes from actions undertaken by the dominant society which seek to destroy Native cultures and peoples. This duty of protection was a solemn pledge that the federal government made to Indian people when it entered treaties with them. Many tribal leaders counseled against ceding any lands, in part because they feared that they would lose any ability to protect their ancestors' remains.

They were assured by federal negotiators that the white people sought only to settle the lands and not to harm the Indian people. Native American Graves Protection and Repatriation Act thus reflects a moral as well as legal duty to safeguard Native cultures.

Native American Graves Protection and Repatriation Act protects the rights of Native American people, including American Indian tribes, Native Alaskan groups, and Native Hawaiians, to four categories of cultural items: human remains, associated and unassociated funerary objects, objects of cultural patrimony, and sacred objects. While 'human remains' and 'funerary objects' have their usual meanings, 'objects of cultural patrimony' and 'sacred objects' have statutory definitions which largely rely on Native American tradition and law to define the nature of the object and the standards for rights of possession, disposition, and alienation of these objects. Native American Graves Protection and Repatriation Act is fairly unique among federal statutes because of its explicit reference to cultural knowledge and the role of tribal law in establishing concepts of ownership and 'cultural affiliation'.

The mandate of NAGPRA to repatriate Native American human remains and cultural objects back to Native people is considered a form of reparations. Arguably, the right to bury the remains of one's ancestors and protect the sanctity of ancestral burial sites are basic 'human rights' that most American citizens have always enjoyed. Thus, perhaps NAGPRA merely ensures that Native peoples are treated 'equally' to non-Native peoples. However, NAGPRA is intended to remedy the significant cultural harm caused by the historical appropriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony from Native peoples. In that sense, the statute is a form of reparative justice. Indeed, with the exception of NAGPRA, there has been little effort to address the cultural harm caused by past and present government policies that have harmed Native cultures, including harms to religion, land, and resources.

2.4. NATIVE AMERICAN REPARATIONS: A PROSPECTIVE ANALYSIS

In an article on treaty rights that was published a few of years ago, I drew on work by Eric Yamamoto and Mari Matsuda to assert that intercultural justice will ultimately depend on the willingness of various cultural groups to recognize group injustices, both past and present, and attempt to define a strategy to heal, to reconcile, and to reaffirm the rights of distinctive groups within American society.²⁰

My discussion with respect to intercultural justice depends on two foundational points. I start with the premise that the concept of reparation is critical to achieve 'intercultural justice' between contemporary groups in American society. However, because of the very different historical positions of the respective groups that comprise 'American society', the specific measures used will vary. Thus, my second premise is that the concept of reparation must be flexible and account for the different historical experiences of particular groups.

2.4.1. Defining Intercultural Justice

Professor Eric Yamamoto has written a comprehensive account of interracial justice that provides a good foundation for the idea of intercultural justice.²¹ According to Yamamoto, 'interracial justice entails hard acknowledgment of the historical and contemporary ways in which racial groups harm one another, along with affirmative efforts to redress justice grievances and rearticulate and restructure present-day relations.'²² Interracial justice is fundamental in healing broken relationships between different groups and in establishing 'right relationships' between those groups.²³ Yamamoto suggests that interracial justice involves four components of 'combined inquiry and action': (a) recognition of group harms and grievances, (b) accepting group responsibility for healing the wounds, (c) reconstructing intergroup relations through particular acts (e.g. forgiveness, apology), and (d) reparations, which involves making material changes (social, economic, and political) to rebuild the structure of the relationship in a tangible way (not 'just talk').²⁴

Yamamoto's model is centered on race relations rather than cultural relations. Race and culture share an important intersection, however, which Yamamoto acknowledges, and which makes the model of interracial justice constructive to defining intercultural justice.²⁵ As Albert Memmi observed, aspects of cultural difference, both real and imagined, are used by dominant racial groups to single out racial minorities as 'the other' and justify unequal, exclusionary, and even violent treatment of those groups.²⁶ Moreover, cultural imperialism by the dominant group depends on suppression and/or assimilation of minority cultures. The resultant cultural loss has devastating consequences for members of the minority cultures, who 'experience a loss of identity' that often results in psychological trauma and social dysfunction (e.g. substance abuse, incarceration, and domestic violence).²⁷

2.4.2. Acknowledging the Past

William Chapman writes: 'the past is at its best when it takes us to places that counsel and instruct, that show us who we are by showing us where we have been, that remind us of our connections to *what happened here*'.²⁸ Indian people and Euro-American people share a history of their encounter, and, for better or worse, they share the legacy of that encounter. Indian nations suffered huge losses, whether measured in lives, lands, or other resources. However, they also maintained lands and cultural identities that support their claims to sovereignty and self-determination today.

The history that has characterized the relations between American Indians and the United States has been one of tremendous violence, treachery—and yes, pure 'evil'. The genocide that took place on this continent is of staggering dimension. According to James Sterba, as of 1890, when the Indian wars concluded with the massacre at Wounded Knee, 98 percent of the Native population that existed during pre-Columbian times had been killed.²⁹ Up to ninety-four million Indians lost their lives during the conquest of the Americas (as compared to sixty million Africans during slavery, and six million Jews during the Holocaust).³⁰

Of course, it is not the sheer magnitude of the genocide that characterizes the evil of conquest for American Indian nations; it is their subsequent treatment by the dominant society. Building on Laurence Mordekhai Thomas's work in *Vessels of Evil: American Slavery and the Holocaust*, Sterba examines the continuing evil wrought by the dominant society's justification of the conquest and dispossession of Native peoples through stereotyping. Thomas differentiated the evils of American slavery from the Holocaust through the concept of 'natal alienation' which Sterba asserts is also a feature of Indian-White relations. Natal alienation is the forcible destruction of the minority group's cultural context by the dominant society: 'There is natal alienation in the lives of an ethnic group when the social practices of the society into which they were born forcibly prevents most of them from fully participating in, and thus having a secure knowledge of their historical-cultural traditions.'³¹ Sterba claims that the lack of equal respect and opportunity is what has barred the flourishing of these groups.³²

Sterba's argument suggests that if Blacks, Indians, and other racial minorities are given equal respect and opportunity as citizens, then the wrongs that have been done to them through cultural destruction can be overcome. To some extent, Janna Thompson's essay shares the same conclusion. Many Native people would disagree with this assessment, at least with respect to Native peoples. For example, Haunani-Kay Trask asserts that it is the fact of this cultural destruction which is responsible for the 'psychological

dependency' that continues to traumatize Native peoples: 'generations become addicted to the worst cultural habits of the colonial society which increases both ignorance of and alienation from, the Native culture.'³³ The increasing alienation of Native people from their traditional cultures cripples them in the dominant society and in their aboriginal societies.

Indeed, the poverty rate among American Indians, the low life expectancy, high suicide rate, and high rates of alcohol-caused mortality indicate that 'American Indians suffer from extreme social and economic injustice.'³⁴ Trask notes a similar set of social ills among Native Hawaiian people, and attributes this to the 'continuing impact of Western imperialism.'³⁵ Whether couched in terms of injustice or 'imperialism' the end question is the same: how do the different groups that comprise 'American' society come to terms with the evils of the past and attempt to overcome the continuing consequences of that past in an effort to achieve intercultural justice?

2.5. HEALING THE FUTURE: NOTIONS OF RECONCILIATION AND JUSTICE

In any process of group reconciliation it is necessary to first acknowledge the complex and pervasive nature of the harm, both as a legal and as a moral matter. It is then necessary to construct a vision for the future that can encompass notions of intercultural 'justice' within a framework for healing and reconciliation. Building on Yamamoto's account of interracial justice, it appears that there are two essential requirements for effective reconciliation.³⁶ First, the groups must reconstruct their relationship through acts, such as apology, that indicate acknowledgment of wrongdoing and a commitment to 'make things right'. Second, true reconciliation entails a commitment to make tangible amends which will facilitate the material economic, social, and political changes necessary to achieve justice.

2.5.1. Reconstruction

The process of reconciliation is largely framed by the government's approach to acknowledging historical injustice. Building on the post-slavery reconstruction process, Robert Meister suggests that there are two different approaches to 'posttraumatic reconciliation.'³⁷ One approach asks all Americans to acknowledge the pain and suffering that the United States has inflicted on *others*. This approach represents a constitutional politics of *representation*, which implies that preexisting identities are fixed and require recognition.³⁸ Under a politics

of representation, it is vital for the nation to recognize the separate identities of the victims and to meet their claims to redress past and present injustice. The perpetrators (or their descendants) are required to *acknowledge* wrongdoing as a way to start healing the wounds of the past. Under this model, 'truth' about the past is essential, and national politics and histories must be opened to include the voices of those who have been excluded.

In the context of American slavery, Meister contrasts the 'Lincolnian' approach, which is to ask all Americans 'to identify *themselves* as victims who survived the experience of slavery and the Civil War.'³⁹ This approach exemplifies a 'constitutional politics based on *reidentification*', which implies a national rebirth based on a new collective identity that bridges the gap between 'self' and 'other.'⁴⁰ The goal of a politics of reidentification is not necessarily to set things right for the victims, but to help the entire nation recover from its 'toxic guilt' which is ultimately destructive to the common goal of national citizenship. The 'Union' is the survivor in this model, and victims and perpetrators are asked to mutually identify with one another as 'survivors' of past events, and to acknowledge the equal moral footing that they now share. Under the Lincolnian view, 'Americans' are the survivors, and there is no need for any particular group to 'survive'. In fact, a politics of reidentification discourages an emphasis on group differences, which are seen as contrary to the spirit of reconciliation that should guide the present condition of all Americans. Not surprisingly, any notion of group apology is likely to be inconsistent with this notion of the 'common' identity of victims and perpetrators as survivors of a less than glorious past.

A politics of reidentification may be suitable for groups that are committed to equal citizenship and opportunity, and for whom reconciliation implies an end to past policies that disadvantaged them from equal citizenship. However, it is not suitable for groups such as Native peoples, who seek continuing recognition of their *separate* political and cultural identities, as well as social and economic justice within contemporary society. The treaties between the United States and Indian nations exemplify the commitment to tribalism and group-based separatism that Indian nations look to today in their efforts to gain recognition for their rights to self-determination. Thus, it is possible, as some Aboriginal people in Australia have asserted, that group-based claims for self-determination are in fact inconsistent with the national governments' efforts to achieve reconciliation, to the extent that such efforts are based on a 'politics of reidentification' which intend to unify the constituent members of a multicultural society around a unitary ideal of citizenship.⁴¹ Importantly, however, Native rights to self-determination are not independent of their claims for redress for historical injustice. On the contrary, one of the great harms of colonialism has been the denial of the inherent right of

self-determination for Native peoples. Thus, the concept of reparations for Native peoples MUST include recognition of their right to self-determination. This is not some vague agreement to allow tribes to govern themselves within the colonial bureaucracy, but an actual commitment to honor the types of bilateral treaty relationships that *nations* enjoy, as well as the right to maintain their distinctive tribal cultures (through, e.g. the protection of sacred sites and ancestral human remains under standards that are suited to Native claimants).

In any case, to be effective as a means to achieve intercultural justice, a 'politics of representation' must involve an *intercultural* dialog on the normative foundations necessary to achieve healing and justice between groups. The next section of this chapter examines the use of apology as a tool to start that process of intercultural dialog.

2.5.2. Apology as a Means of Intercultural Dialog

There are only two instances in which the United States or its representatives have attempted to apologize for past wrongs toward Native Americans. The first occurred in 1993, when the US Congress issued a resolution apologizing to the Native Hawaiian people for the 1893 overthrow of the Hawaiian Kingdom by a band of insurgents backed by the US military and asking for the process of reconciliation to commence. The second occurred in September 2000, when Kevin Gover, a Pawnee Indian and the Assistant Secretary for Indian Affairs, apologized to Native people for the past wrongs committed by the Bureau of Indian Affairs (BIA) and for the continuing harm suffered by contemporary Native communities as a result of these wrongs. Because the latter apology is most relevant to the harms I have described above for the Lakota people, I focus on this apology.

Assistant Secretary Gover made his remarks on the occasion of the 175th Anniversary of the BIA, which he characterized not as a 'celebration', but as a 'time for reflection and contemplation, a time for sorrowful truths to be spoken, a time for contrition'. He started the apology by reciting several historical harms that BIA policy and actions perpetrated on Native peoples. Most importantly, he acknowledged that the original mission of the Office of Indian Affairs, which started out in the Department of War and was then moved to the Interior Department after most of the Indian wars had been concluded, was to pave the way for the United States to appropriate lands from tribal ownership for the benefit of US citizens. This, in turn, was accomplished by 'ethnic cleansing' intentional physical harm 'on a scale so ghastly that it cannot be dismissed as merely the inevitable consequence of the clash of competing ways of life':

the deliberate spread of disease, the decimation of the mighty bison herds, the use of poison alcohol to destroy mind and body, and the cowardly killing of women and children in massacres such as those at Sand Creek, the banks of the Washita River, and Wounded Knee.

Assistant Secretary Gover then listed the BIA's subsequent efforts to 'annihilate Indian cultures' and destroy Indian economies by inculcating a forced dependency on the United States and the BIA. Gover concluded that 'poverty, ignorance, and disease have been the product of this agency's work'.

Until this speech, it was unheard of for a US government official to talk about US Indian policy as ethnic cleansing. After all, the 'official version' of the United States dispossession of Native nations generally hinges on the justification that because of the 'savage' character of the tribes, they were unable to 'hold property rights' on the same level as civilized people, and thus were 'necessarily' conquered by a more civilized nation.

When Assistant Secretary Gover's apology acknowledged the truth of United States/Indian relations, as Indian people have experienced that history and as they continue to experience it, he started an intercultural dialog about acknowledging the past in order to heal the future. Assistant Secretary Gover stressed that by accepting the historical legacy of the BIA as one of 'racism and inhumanity' the Agency must also accept 'the moral responsibility of putting things right'. Admittedly, this apology came from a federal agency and not from the US government. Yet the apology is historically significant because it represents the first official attempt ever to acknowledge moral responsibility for past wrongs against American Indian people committed by the United States and its agents. The apology thus served several important purposes.

First, the apology issued a corrective history to evaluate past conduct. American history books and law books are replete with the justificatory approach to past bad acts toward Native Americans. For years, history books instructed American school children that the savagery of Indian people was responsible for their demise in the face of 'civilization'. This understanding, in turn, has been used by Supreme Court justices and policymakers to justify the denial of Native rights. In *Tee-Hit-Ton v. United States*, for example, the savage nature of the Tee-Hit-Ton Indians, as a group of itinerant 'hunter-gatherers' excuses the United States from any contemporary Constitutional obligation to pay just compensation for the taking of their traditional lands.⁴² In a different context, Chief Justice Rehnquist's dissent in *United States v. Sioux Nation* relies on the same rationale to excuse the obligation to pay the Lakota for the taking of treaty-guaranteed lands. Relying on the *Oxford History of the American People*, Rehnquist alludes to the savage nature of the Lakota people, who 'lived only for the day, recognized no rights of property, robbed or killed

anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching'.⁴³ Rehnquist's conclusion is telling:

That there was tragedy, deception, barbarity, and virtually every vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now encompasses more than three million square miles and 50 states cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: 'Judge not, that ye be not judged'.⁴⁴

The impact of this history and its popular understanding on Native peoples is profound. Not only does the United States fail to acknowledge the vast and complex nature of the harm that it has wrought on Native peoples, but it appears to place the blame for this harm squarely on Native people themselves. The message to Native people is simple: 'If only you had been more like us, things might have been different for you'.⁴⁵

Second, and building on this historical foundation, Assistant Secretary Gover's apology locates responsibility where it belongs: on the original wrongdoers and those in privity with them. Gover acknowledges that 'the BIA employees of today did not commit these wrongs', but they must 'acknowledge that the institution we serve did'. All employees of the BIA 'accept this inheritance, this legacy of racism and inhumanity. And by accepting this legacy, we accept also the responsibility of putting things right'. In this sense, Assistant Secretary Gover's approach builds on what Peter French and others call 'collective responsibility'. Some scholars locate collective responsibility for past wrongs under a 'benefits theory'. Peter French, however, makes a compelling case for collective responsibility among contemporary governments, groups, and institutions for past wrongs based on the idea of collective ownership of 'public memory'.⁴⁶ 'Public memory casts the past into our present', French argues, 'and well it should because it is our past or what we are jointly committed as a group to being our past. We, as a collective, are the continuation of the projects of our collective's past'. Public memory is the repository of our collective identity, and to the extent that officials, governments, and institutions manage it publicly, it represents our commitment to a collective past for our contemporary group. Thus, Assistant Secretary Gover's remarks are particularly important because they recast the collective memory of the United States and American citizens as a way to acknowledge collective responsibility for past wrongs.⁴⁷

In that respect, the third important function of Assistant Secretary Gover's apology is to differentiate the impacts of the harms and show the continuing nature of the historical wrongdoing. So, Gover's apology speaks not only to the

historical physical harm (e.g. ethnic cleansing) perpetrated on Native peoples, but also the economic harm (destruction of traditional food sources and economies, forced dependency), and the cultural harm (prohibiting Native language and religion). All of these harms resulted from tangible and overt laws and policies of the United States.⁴⁸ However, the result of these harms is far more complex: a constellation of emotional and spiritual trauma that extends from generation to generation within Native communities. For example, Assistant Secretary Gover refers to the tragic legacy of the BIA boarding schools and asserts that 'the BIA committed these acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually'.

Assistant Secretary Gover affirmatively states that 'These wrongs must be acknowledged if the healing is to begin'. And in that sense, the single most important purpose of the apology was to set the process for healing in motion.

2.5.3. Reconciliation and Reparations

According to Matsuda, the idea of reparations builds on the Constitutional norm of liberty and 'recognizes the personhood of victims'.⁴⁹ Lack of legal redress for racist acts continues the injury perpetrated by the initial wrongdoing by signifying 'the political nonpersonhood of victims'.⁵⁰ The grant of reparations, on the other hand, declares: 'You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you'.⁵¹

Although many citizens view the concept of reparations as coextensive with *monetary* compensation, the idea of reparations is much more complex and has social, economic, and political dimensions. In fact, some groups would dispute that monetary damages could ever be a satisfactory replacement for the loss of certain tangible resources. For example, the Lakota seek the return of the Black Hills and refuse to take compensation in the form of damages. The idea of reparations clearly must involve recognition of Native peoples' rights to enjoy their distinctive cultural and political identity. Thus, many Native American claimants argue for recognition of their rights to practice their religion at certain sacred sites and for their political right to 'self-determination'. Finally, the concept of reparations may depend as much on process as on substance for its effectiveness at achieving true reconciliation. As Matsuda notes, the 'very process of determining the validity of claims will force collective examination of the historical record. The discovery and acknowledgment of past wrongs will educate us and help us to avoid repeating the same errors'.⁵² In that respect, Assistant Secretary Gover's apology engaged the forward-thinking

questions of what it might mean to 'heal' Native communities and what the BIA's moral responsibility might be in this process. The apology itself intended to commence this process in at least three different respects. First, it is intended to set a moral boundary against which to measure future behavior:

Never again will this agency stand silent when hate and violence are committed against Indians. Never again will we allow policy to proceed from the assumption that Indians possess less human genius than other races. Never again will we be complicit in the theft of Indian property. Never again will we appoint false leaders who serve purposes other than those of the tribes. Never again will we allow unflattering and stereotypical images of Indian people to deface the halls of government or lead the American people to shallow and ignorant beliefs about Indians. Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

Second, the apology is intended to inspire a policy template to deal with legal and political redress for past wrongs, which are often reflected by the current needs of Native communities. It is clear from Gover's remarks that the harms are much too complex and serious for a 'quick fix'. Perhaps Native economies can be bolstered by gaming policies. Perhaps Native governments can be supported by the self-determination and self-governance statutes and policies. But the process of healing for Native communities will require a much more nuanced version of federal policy dedicated to a moral, as well as legal, commitment to the notion of self-determination. What does it mean to facilitate 'tribal self-determination' if the tribal government is still under the control of the federal government and its larger agenda to American citizens? How can a 'tribal community' be a vibrant repository for self-determination if a significant portion of Native adults are incarcerated and in poverty, and if a significant portion of Native families are torn apart by substance abuse and domestic violence? These are the paradoxes of contemporary Indian policy that Gover acknowledges, and with which the process of healing must engage.

Finally, Assistant Secretary Gover's apology is intended, on a spiritual level, to set in motion the process of redirecting blame, healing spiritual trauma, and promoting a larger sense of collective responsibility on the part of the US government and its citizens. Importantly, the apology *alone* cannot actually do any of those things. Rather, it is intended to start that process in motion and begin a dialog about what must be done to heal the past. As Gover says, 'we desperately wish that we could change this history, but of course we cannot'. The most that can be done is to 'accept the moral responsibility for putting things right'.

2.6. CONCLUSION

The intellectual puzzle about reparations and reconciliation is really quite simple: We cannot heal the future if we cannot honestly acknowledge the truth of the past. This requires the reformulation of public memory, from an exercise of justification to an admission of past wrongdoing and an acknowledgment of current inequities.

It is important to think about the process of healing from historical trauma as both a *cultural* and an *intercultural* process. For example, Senator Daniel Akaka from Hawaii linked the Congressional apology to Native Hawaiian people, which focused on reconciliation with the Hawaiian cultural concept of 'ho'oponopono', which means 'to make things right' and is a technique used to resolve interpersonal conflicts.⁵³ Senator Akaka observed that:

The process of reconciliation is a process of healing, which should not be viewed as one particular issue or a narrowly defined process. It should be viewed as a multitude of positive steps between Native Hawaiians and the federal government to improve the understanding between each party, to improve the social and economic conditions of Native Hawaiians, and to resolve long standing matters of political status and land claims.

Within the tradition of 'ho'oponopono', the healing process is both emotional and spiritual and is premised on the idea that the perpetrator and the person wronged are bound together in a relationship of negative entanglement called 'hiihia'. The healing process must 'untangle' these negative emotions to facilitate a mutual understanding of the 'emotional truth' of what happened, a sincere appreciation of the effects of the bad behavior, a confession of the wrongdoing and seeking of forgiveness by the perpetrator, the act of granting forgiveness and, ultimately, the 'release' of all negative emotions. The final phase of 'kala', which means to 'release, untie, free each other completely'—follows the phase of forgiveness. Thus, the idea of 'kala' is importantly distinct from that of 'forgiveness'. The actual phrase, 'Ke kala aku nei 'au ia 'oe a pela noho 'I 'au e kala ia mai ai' means 'I unbind you from the fault, and thus may I also be unbound by it'. As Manu Meyer observes, 'kala seeks to strip the incident of its pain-causing attributes'.⁵⁴

In issuing the Joint Resolution, the US government took an important first step by acknowledging its complicity in the illegal overthrow of the Hawaiian monarchy and its regret for the resultant hardships that occurred for the Native people. However, although the Joint Resolution expresses regret for the deprivation of Native Hawaiian rights to self-determination, and specifically acknowledges their attachment to their 'ancestral territory' and 'their cultural identity', it does not express support for Native peoples' contemporary rights

to self-determination or their legal rights to land or cultural resources. Thus, the pain cannot heal because the Native people still suffer from their dispossession from their lands and their distinctive cultural and political rights.⁵⁵ For Native Hawaiians, as for other Native people, the idea of intercultural reconciliation involves both the values essential to reconstruction (e.g. the notions of apology and forgiveness) and the need for tangible reparations as a way to make things right.

Native governments have demonstrated their tenacity and determination to exist in perpetuity. Through many treaties and laws that exemplify the 'trust doctrine', the US government has committed itself to protect Native governments, to respect their rights as separate peoples, and to work cooperatively to solve contemporary problems. Given this reality, engaging the process of intragroup and intergroup healing is not even an 'option' for the United States and the Indian nations. It is a requirement to achieve intercultural justice in the future.

NOTES

1. Borrows (2002).
2. See Gonzalez and Cook-Lynn (2001: 91) (quoting Lakota scholar Vine Deloria, Jr as stating that the Year of Reconciliation was simply 'twelve months of symbolic maneuvering for publicity and renewal of political images').
3. Thompson at p. 69.
4. *Ibid.*
5. *United States v. Sioux Nation*, 448 U.S. 371 (1980).
6. See Gonzalez and Cook-Lynn (2001: 82).
7. *Ibid.* at 15–21.
8. *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478, 1483 (2005).
9. Thompson at p. 69.
10. 25 U.S.C. §§3001–3013.
11. Minow (1998: 91–117).
12. Chock (1995: 495).
13. *Ibid.* at 495 (citing Chorzow Factory case from Permanent Court of International Justice).
14. Tsosie (2005).
15. Matsuda (1987).
16. 470 U.S. 226 (1985).
17. 25 U.S.C. §70–70v.
18. *United States v. Sioux Nation*, 448 U.S. 371 (1980).
19. 25 U.S.C. §§3001–3013.
20. See Tsosie (2000).
21. Yamamoto (2000).

22. *Ibid.* at 9–10.
23. *Ibid.* at 10.
24. *Ibid.*
25. *Ibid.* at 90–7.
26. *Ibid.* at 95–6.
27. *Ibid.* at 94–5.
28. Keith Basso, *Wisdom Sits in Places*, 4 (citing William Chapman), *Preserving the Past* 46 (1979) (emphasis in original).
29. Sterba (1996).
30. *Ibid.*
31. Sterba (1996: 437).
32. Sterba (1996: 438–9).
33. Trask (1994: 260).
34. Sterba (1996: 439).
35. Trask (1994).
36. My argument builds on Yamamoto's discussion of 'reconstruction' and reparation, in his account of interracial justice. See Yamamoto (2000: 190–209).
37. Meister (1998).
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*
41. Some indigenous Australians argue that the Australian government's program for reconciliation is essentially an effort to incorporate Native people into the larger polity and thus may actually impede a movement toward 'real self-determination', which should entail development of a sovereign Aboriginal nation and promote tangible political and economic rights for the Native people. See Cunnen and Libesman (1995).
42. *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955).
43. *United States v. Sioux Nation*, 448 U.S. 371 (1980). The majority of the Court held that the treaty-guaranteed nature of these lands did require the United States to pay just compensation to the Lakota for the taking of these lands.
44. *Ibid.*
45. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).
46. French (2003).
47. French's account is importantly different from Thompson's argument that 'people acquire historical obligations by being members of an intergenerational society that committed wrongs against another such society'.
48. For example, the 19th cent. Code of Federal Regulations expressly criminalized the practice of Native religions and customs.
49. Matsuda, *supra* note 17 at 74.
50. *Ibid.*
51. *Ibid.*

52. Ibid.
 53. See Meyer (1995).
 54. Ibid. at 35.
 55. See generally MacKenzie (1991). Mackenzie offers one of the most comprehensive treatments of the unique legal position of Native Hawaiian people. The persistent refusal of the courts to recognize the religious rights of the Native Hawaiian people is documented at pages 229–41.

3

Coming to Terms with the Past in Australia

Janna Thompson

Reparative justice, as it is traditionally understood, requires that the perpetrators of injustice return what they have taken from their victims and/or compensate them for harm done, with the objective of returning them, so far as possible, to the situation that existed before the injustice was done. Aristotle, for example, thought of reparation as a matter of righting the moral balance by ensuring that perpetrators would not profit from ill-gotten gains and that victims would recoup their losses.¹ My brief is to describe and discuss issues of reparative justice in respect to injustices done to Aborigines and their communities during the course of Australian history. But this job cannot be done without a critical examination of the traditional idea of reparation. Public debates in Australia about justice for Aborigines have made it clear that demands for reparation are difficult to justify or fulfill when there are disagreements about who (if anyone) now counts as a perpetrator or a victim or what justice requires when a return to an ante-injustice state of affairs is neither possible nor morally desirable.

I will discuss three issues which pose difficulties for an account of reparative justice in cases of historical injustices. First, the problem of explaining why existing citizens of a political society owe reparation for injustices that they had no role in perpetrating. Second, the problem of determining what counts as just reparation and how this should be determined; and third, the difficulty of explaining how individuals can make claims in respect to wrongs done to their parents or ancestors. In the course of my discussion of these issues, I will propose an alternative interpretation of reparative justice and its requirements.

3.1. A HISTORY OF INJUSTICES

Few people doubt that serious injustices were done to Aborigines and their communities during the course of European settlement of Australia. In some