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#### The continual settler drive to secure its own health has resulted in a system of global biopiracy wherein western transnational corporations have targeted traditional medicine for their own profit. Biopiracy renders these indigenous knowledges and communities as only sites for extraction.

Bhattacharya 14 [Sayan Battacharya, Department of Environmental Studies at Rabindra Bharati University in Kolkata, India], “Bioprospecting, biopiracy and food security in India: The emerging sides of neoliberalism”, International Letters of Social and Humanistic Sciences, SciPress Ltd, pg. 49-54, 2014 //SLC PK

2. BIODIVERSITY, BIOPROSPECTING AND BIOPIRACY

Historically there has been prolific scientific interest in the lifestyles, knowledge, cultures, histories, and worldviews of indigenous peoples. Rural communities depend on traditional knowledge for food, health and agriculture. This traditional knowledge forms the basic cultural identity for them, contributing to social cohesiveness and thereby reducing vulnerability and poverty. 80 % of the world’s populations, mostly the ‘undeveloped’ regions, still rely on the indigenous medicinal knowledge of local plants for their medical needs.3 In India, around 70 % of the population directly depends on land-based occupations, forests, wetlands and marine habitats for ecological livelihoods and cultural sustenance.4

Over 7500 species of plants and several hundred animal species and also metals and minerals are utilized by the folk tradition in India. The custodians and carriers of these traditions are tribal as well as non-tribals, including house wives and welders, thousand of herbal healers, bone setter, vishvaidyas, birth attendants, potters, gold-smiths, black smiths, barbers and even wandering monks.

According to ASI, there are 4635 ethnic communities in India. In principle each of these communities could be having their own oral medical traditions that have been evolving across time and space.3 Traditional knowledge does not only include only the recorded knowledge of plants for medicinal use but also the oral knowledge that has been passed on from generations to generations. In India there have been a lot of cases where the indigenous knowledge has been tried to be taken away. Due to its easy access, it has been prone to piracy. According to UNDP Human Development Report 1999: “The South is the source of 90 per cent of the world’s biological wealth – India, for example, has 81,000 species of fauna and 47,000 of flora, including 15,000 plant varieties unique to the country – and yet industrial countries hold 97 per cent of all patents worldwide and are driving the rush to patent plant genetic resources.” 5

Today, the genomics revolution is fueling a new wave of scientific research in the form of bioprospecting, and it is impacting the lives of indigenous peoples around the world. Bioprospecting involves searching for, collecting, and deriving genetic materials from biodiversity samples that can be used in commercialized pharmaceutical, agricultural, industrial, or chemical processing end products.6

The megadiversity countries with 60-70 % of the world`s known biological diversity have significant stake for harnessing the potential of biotechnology and bioprospecting for achieving sustainable economic development.1 The Convention on Biological Diversity (CBD), the first international treaty provides opportunities to biodiversity rich countries to realize benefits arising out of the utilization of their bioresources. The CBD mentioned that national governments have authority to determine access to their genetic resources, and calls on governments to provide for conservation, sustainable use and equitable sharing of benefits from commercial use of those resources.

Between 4 and 40 million biological species are still unknown in the world. New species are being discovered even today. In the last few decades, biotechnology has developed and played a vital role in the development of the agricultural, pharmaceutical and medical industries. As the importance of the biotechnology industry increases, many useful biotechnological inventions can earn their inventors millions of dollars.

The real pirates are those developed countries, especially the US, who benefited and prospered from the plundering of natural resources from the developing and less developed countries without paying any royalty to the source countries at all. Between 25-50 % of current prescription pharmaceuticals come from plants, either directly or through modifications by biochemical methods, and the value of drugs to the U.S. pharmaceutical industry coming from plant species is estimated at over 30 billion USD per year.2 A multinational company or individual who wishes to develop a new product often makes use of the traditional knowledge of local people in deciding upon a plant, animal or other biological source to study.

After the successful production of commercially useful products from those organisms, the company applies for a patent in its own name on those products. In most cases, the inventor not even acknowledges in his patent application that his product was derived from information provided by a local community. Biopiracy therefore can be described as the unjustified extraction of the environmental heritage and traditional knowledge from various regions of the earth for economic exploitation and industrial monopolization.7

Daniel F. Robinson distinguished between three different categories of biopiracy:

“Patent-based biopiracy: The patenting of (often spurious) inventions based on biological resources and/or traditional knowledge that are extracted without adequate authorization and benefit-sharing from other (usually developing) countries, indigenous or local communities.

Non-patent biopiracy: Other intellectual property control (through plant-variety protection or deceptive trademarks) based on biological resources and/or traditional knowledge that have been extracted without adequate authorization and benefit-sharing from other (usually developing) countries, indigenous or local communities.

Misappropriation: The unauthorized extraction of biological resources and/or traditional knowledge from other (usually developing) countries, indigenous or local communities, without adequate benefit-sharing.” 8

2. 1. Global emergence of Biopiracy

A recent report of United Nations Development Programme (UNDP) mentioned that “if unpaid royalty payments were being made to developing countries and indigenous peoples for the plant varieties and local knowledge used by multinational food and drug companies, those providers would earn approximately 5.4 billion USD per year”.2 Examples of countries not receiving their full share of these royalties include Tibet, India, Sri Lanka, South Africa, Samoa, Madagascar, Ecuador, Mexico and the Philippines. Since the 1980s, individual inventors or corporations in some countries, such as the United States, Japan, and some European countries, successfully lobbied government to permit exclusive rights to certain biological materials they developed through patenting. They were given exclusive rights to plant and/or reproduce and market them and have the right to prohibit others from planting, reproducing and selling the material provided.

2. 2. Biopiracy in India: few examples

In the recent past, there have been several cases of biopiracy of traditional knowledge from India. First it was the patent on wound healing properties of haldi (turmeric).9 Curcuma longa, a type of turmeric, is an Indian herb that has been used as treatment for sprains, inflammatory conditions and wounds. The orange coloured root is native to the subcontinent and South East Asia, and for thousands of years has been a one of the major components of Ayurvedic medicine. In 1995, two US scientists from the University of Mississippi were granted US patent 5,401,504 on the use of turmeric. The scientists claimed that turmeric could heal wounds and claiming this to be novel. They have mentioned in their patent application that turmeric has long been used in India as a traditional medicine for treatment of various sprains and inflammatory conditions. But they claimed that there was no research on the use of turmeric as a healing agent for external wounds. The Indian government vigorously challenged the patent and provided numerous research papers predating the patent, proving that turmeric has long been used in India to heal wounds. As a result, the US Patent and Trademark office rejected all patent claims related to turmeric.10

The Neem tree case is another significant example of biopiracy of Indian medicinal plant. Azadirachtin is one of many active compounds present in bark, leaves, flowers and seeds of the Neem tree or Azadirachta indica. The remarkable properties of this compound have been utilized in India from ancient times in the form of extracts of various kinds produced by Indian farmers and small industrial firms in medicine and agriculture. Use of neem had been described in ancient Indian texts written over 2,000 years ago as an air purifier and effective medicine for almost all types of human and animal diseases because of its insect and pest repellant properties.9,10 A US timber importer studied the curing properties of neem and began importing neem seed to his company headquarter in Wisconsin since 1971. He successfully extracted a pesticidal agent from neem extract called Margosan-O. In 1985, the bio-pesticide derived from neem tree received clearance for the product from the US Environmental Protection Agency (EPA). The patent for the product was sold to the multinational chemical corporation, W.R. Grace after 3 years. Since then, many US and Japanese firms gained patents on formulae for stable neem-based solutions and emulsions and other products. The W.R.Grace approached several Indian manufacturers and industries to purchase their technology. The company ultimately managed to start a joint venture with a firm called P.J. Margo Pvt. Ltd to set up a plant in India. The plant processes up to 20 tonnes of seed a day and also established a network of neem seed suppliers in order to guarantee a constant supply of the seeds at a cheap price. In May 2000, a coalition of groups successfully overturned the patent held by the US company, WR Grace and the US Department of Agriculture over the Indian neem tree.10

Basmati is produced largely in Punjab, Western India and in Pakistan. Basmati rice has been one of the fastest growing export items from India in recent times. It is evident that Basmati has been grown for centuries in the subcontinent. After centuries of observation, experimentation and selection, the Indian farmers have developed numerous varieties of the rice to meet various ecological conditions, cooking needs and taste.9 On 2 September 1997, Texasbased RiceTec Inc. was granted patent number 5663484 for a new plant variety that is a cross between American long-grain rice and Basmati rice. RiceTec claimed that the new varieties have the same or better characteristics as the original Basmati rice and can be successfully grown in specified geographical areas in North America. The patent covers the genetic lines of the basmati and includes genes form the varieties developed by farmers. RiceTec has already been trading rice under brand names such as Kasmati, Texmati and Jasmati. RiceTec’s strain possesses the same qualities and characteristics of the Indian traditional varieties of Basmati. On the question of consumer deception, RiceTec clearly labels its product as ‘American type Basmati rice’.10 No case has been filed in the US so far by any interested party from the Indian subcontinent regarding this serious issue. By mid 2000, however, the Indian government decided to challenge some of the claims of the RiceTec patent. World’s largest importer of Basmati rice, Saudi Arabia and the UK, recognized that Basmati rice is unique to Northern India and Pakistan. Furthermore, the Agricultural and Processed Food Export Development Authority and Trade Mark Watch Agency of India have managed to win the Basmati patent case in at least 15 countries (including UK, Australia, France, Spain, Chile and the UAE). In the Basmati case, RiceTec’s action would really become a threat to the sales of Basmati rice from India, and could affect the economic conditions of the rice farmers in India.

Karela (bitter gourd), Jamun (blackberry), Gumar and Brinjal, for instance, are commonly known in India for their anti diabetic characteristics. Their usees are so common in India that there is no novelty involved while using them for curbing diabetes. A patent was, however, obtained in the U.S. by three NRIs for their utilization as a cure for diabetes.11

North East India is very rich in flora especially in cultivation of medicinal plants by the tribes. Resource-rich Nagaland is plagued by bio-piracy with rare medicinal herbs, orchids and other endangered species being smuggled out of the state. These plants are being borne off by pharmaceutical companies for commercial benefits. Ginseng, taxus baccata and cephallu taxus and paris cordifolia have medicinal properties and are often smuggled to Myanmar.12

Some cases have been highlighted with a success story, but there are also numerous stories of deprivation in the context of biopiracy. Corporate patents usually do not recognize or compensate the indigenous people who are the main conservators of those resources. Indigenous communities, over the centuries, have identified and classified plants native to their lands and found their beneficial characteristics. But, the tribes do not have access to legal information that would protect their plants and cultural knowledge nor do they have the finances to obtain them.9 The profit incentive companies often overexploit the beneficial plant resources for commercial use, which ultimately result in the loss of forests and genetic material, crisis of land, plants and cultural knowledge of the indigenous communities.

2. 3. Biopiracy and food security

The stealing of biological resources and indigenous knowledge would affect food security, livelihood of indigenous people, and consumers’ choice. More than 70 % of our food supply is dependent on a small number of edible plant resources, mainly wheat, maize, rice, and potato, which are fundamental to food security. Patenting of these plants varieties will definitely pose threat to the consumers. The patenting of biological technology will encourage monopoly control of plant material by Western transnational corporations. Farmers will become dependent of on corporations for their input in agriculture, i.e. seeds, fertilizers, pesticides and herbicides. It has particularly troubling implications for the developing world as the farmers cannot afford to buy seed each year and traditionally set aside a portion of their harvest to plant in the next growing season. Moreover, with the introduction of the genetically modified crops and high yielding varieties, the local crop varieties are being lost and outcompeted.13 The farmer’s rights to choose the desired crops have become difficult to implement. The technology can execute a devastating effect on the economy and food security of the farmers in developing world and can eventually destroy the locally adapted, inexpensive traditional crop varieties.14 The entire process will eventually lead to the monopolization of trade, which is ultimately against the principle of free trade fostered by the World Trade Organization (WTO).

India’s agriculture being rich in bio-diversity has been always been an easy prey for big corporations engaging in agribusiness for the purpose of bio-piracy.15 Monsanto, for instance, tried to spread genetically modified brinjals in India in the form of Bt Brinjals in spite of the fact that India itself is a source of over 2500 different unique varieties of brinjals.16 Monsanto’s attempt of taking over the market was opposed by the public forcing the government to ban it for an indefinite period of time.16 But Monsanto is still stealing native crops, including brinjals, and quietly working on GM varieties of them in test fields, which is a clear violation of India's Biological Diversity Act 2002 (BDA). The farmer variety has been used by Monsanto in its breeding programs without taking prior permission from Indian farmers and without entering into any kind of benefit sharing agreement with them. This is not just grossly unethical; it is in violation of international agreements like the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources (ITPGR) which recognize the rights of the farming community over the genetic wealth used in agriculture.17

#### IP protections are structurally opposed to indigenous medicines, causing continual cooption for modern pharmaceuticals.

Eiland 08 [Dr. Eiland received a doctorate in Oriental Archaeology from Oxford University and an LLM from the Munich Intellectual Property Law Center], “Patenting Traditional Medicine”, Nomos Verlagsgesellschaft mbH & Co. KG, pg. 7-10, 2008 //SLC PK

Traditional medicines (TM)1 can form the basis of modern pharmaceuticals. Depend- ing upon national laws, it is possible to protect TM with patents. For instance, a US patent can be issued that derived information or even genetic resources from the TM of another country. This has raised criticism from a number of different perspectives. Most notably there is a perceived conflict between traditional knowledge (TK) struc- tures and patent law. Some question if TM is even an intellectual property (IP) right. There are a number of proposals to protect TM using other forms of IP rights, such as geographical indications and trade secret law. These issues are far from settled, and can have strong political overtones. Before going further, however, TM will be con- sidered in the light of other IP rights.

TM has been a source for pharmaceuticals for a long time. Aspirin is a good example. The ancient Egyptians used willow leaves as an analgesic and anti-inflammatory drug. The Classical world was also familiar with the healing properties of this plant. Hippocrates (460 – 370 BC) recommended the use of extracted juice from the bark of the white willow to suppress pain and fever. It was only in 1828 that the extract of wil- low bark was purified. In 1859 the chemical structure was identified. The drug was mass produced shortly thereafter. Bayer registered the compound on 1 February 1899 under the name of Aspirin. The ‘a’ stood for acetyl, and the ‘spir’ for Spiraea ulmaria, the plant from which the drug had first been isolated. Today it is the most popular analgesic in the world, and new discoveries are ongoing.2 In the case of aspirin, the TK that helped researchers to find the active ingredient was thought at the time to be in the public domain. If aspirin were patented in recent decades, there would no doubt be litigation over who supplied the TK. Other examples of drugs derived from natural substances and that have been incorporated into mainstream medicine are morphine (1806), quinine (1823), atropine (1833) and digitalis.3 In 1982, it was estimated that about 50 % of all filled prescriptions in the US originated from drugs that were derived – one way or another – from natural substances. This generated US sales of about 20 billion.4 Another estimate found that 3/4 of the plants used in prescription drugs originally came to the attention of drug companies because of their use in TM.5 In 1995, the worldwide market value of TM derived pharmaceuticals was estimated to be $43 billon.6 While one could argue about the precise values, TM has significant pharmaceutical applications. Drug companies are interested in acquiring TM, both natural substances, as well as the knowledge about how to use them. In the past, such knowledge was regarded as free information. The assumption was that no one had a right to this information, especially because there usually needed to be a long process of development to make TM into a patentable drug. Modern conceptions of the issue leave little doubt that TM can be an IP right. Considering the large profits generated by modern drugs, there has been increasing pressure to pro- tect TM with patents. Several well-known cases of western companies patenting drugs based on TM has also raised concerns. Some advocates who don’t support the patent system but who do wish income to ‘trickle down’ to the communities who developed the TM suggest that an entirely new legal framework be established. Patents are appreciated by this group as unsuitable:

First, the invention is not dated, so that it is not possible to determine the critical date. As it would have been used for a long period of time, it would lack novelty. Also, the inventor is not determined, since it is knowledge that belongs to the who community. Patents are granted to individuals, or a small group of them, not to an undetermined group of people.7

The main question that emerges is feasibility. Are patents suitable for protecting TM and, if not, what are the alternatives?

The Controversy Bio-piracy is a term minted in the last decades to describe taking biological materials – including TM – and patenting them in the west.8 When this happens TK right holders allege a property right has been violated. The source of the information, as well as the material itself, is not acknowledged. No compensation is paid. When a patent is issued, it is not held by the inventor. The patent will prevent the holder of the TK from taking out a patent themselves. Despite the accusations, however, a patent is granted for an invention that may have little in common with TM as practiced by an indigenous community. Bio-piracy is a very political issue.

This highlights the so called north-south divide.9 The accusation is that wealthy nations in the north rely upon colonial era conceptions of property in order to gain access to TK, including TM, for free. TK is not usually protected using a system of written laws in southern countries. It may be controlled as collective property by trained practitioners (such as a Shaman).10 The fact that the legal systems may be different – they may be termed traditional legal systems – does not make them less valid. It does, however, make compliance difficult. This quickly leads into the issue of disclosing the origin of biological materials as a pre-requisite for patent protection. Indeed, without knowing the origin there can be no thought of benefit sharing.11 Yet from a ‘northern perspective’ these proposals could hamper research and lead to higher drug costs. On the other side, some have suggested that protection of medical knowledge, including drugs, with patents is fundamentally incorrect.12 While this subject captures media and public attention, the patent system is unlikely to be replaced any time soon.13 The real questions are how patents can be used to protect TM, and how patents based on the misappropriation of TM can be stopped. Some consideration will also be paid to other legal methods of protecting TM that have been proposed as alternatives to patents.

TM involves both the substance itself (assumed here to be botanical) as well as the practices used to prepare it for use. Both India and China14 have ancient medical traditions, but they use very different methods of protecting it. The TM of these two countries will be used as a lens to explore some of the issues involved in patenting. There are then two important divisions in the analysis. The first is the kind of protection provided in national legislation. The second issue is the kind of protection offered to TM of other countries in the west as well as in international agreements. America will receive special attention. Prior use or (unpublished) knowledge of an invention in a foreign country is no bar to obtaining a patent in America.15 This is clearly in order to encourage US business and industry, but according to critics, it has devastating effects on the TK of other nations.1

#### The move to biopiracy adds new energy and technology to the settler project of terra nullius, putting every part of the world into the project of dispossession.

Sharma & Campbell 99 [Sharma is a Ph.D. in Sociology from the University of Toronto and an Associate Professor of the Sociology Department at the University of Hawai’I at Manoa. Allison Campbell is an American Chemist known for work on biomineralization, biomimetics, biomaterials, and bioactive coatings for medical implants.] “Vandana Shiva on Sexual Economics, Biopiracy and Women's Ongoing Resistance to Colonialism”, Atlantis, Volume 23.2, Spring/Summer 1999 // SLC PK

Q. 1 Some feminists talk about globalization as a new phenomenon. You talk about it as a five hundred-year-old project of colonialism. You also recognize that this process has not been a static one and that major changes have taken place throughout the 1990s. In your view, what are some of the changes that signify to you that this decade represents a third wave of colonialism and how do you see it as part of, rather than distinct from, the larger colonial project?

The connection between the present globalization and the first wave of globalization which, in the Third World, was just called, "colonialism," are the ideas that Other people aren't people, their resources are up for grabs, it's an empty earth, it's terra nullius and that colonization is actually a liberation, because the colonizer, somehow, by bringing the colonized into the colonial relationship lifts them out of their "non-humanness." The whole notion of the "white man's burden" fits into colonization by first and necessarily defining people out of humanity and then defining them up into a humanity as defined by the colonizer.

Something very, very similar is going on now, which is why in the Third World when this period of globalization started, we didn't just talk of it as globalization. We talked of it as recolonization. It was experienced as that. It was identifiable as that - with a few breaks, with a few changes. The commonness is, of course, the fact that all the systems and structures that societies put together in the post-colonial phase, in all its imperfections, are being systematically disbanded. You suddenly see countries starting to look the way they did before independence. The same oil companies which were thrown out are back. The same domination is there. You can literally, physically, see it. You know Gandhi's entire mobilization was started by his being thrown out of a first class train compartment in South Africa. Suddenly in India, I experience the fact that there is a business class where white men travel and there is an economy class where the rest of us are. It wasn't that way a while ago. So you can see this recolonization physically also.

The novelty of this colonialism, the break with the old project of globalization, is that it is creating new colonies. It is still creating colonies, but it is creating new colonies. I often call these new colonies the life within living systems: the interior spaces of women, animals and plants. It is presented as a "brave new breakthrough" into a genetic world. For instance, in a circular announcing a meeting organized by the department of Industry Canada with Monsanto (one of the world's largest bio-technology corporations) this last June, they used the word "genetic commerce." Now, it is not the case that they haven't traded in biological products before. The entire coffee trade, tea trade and sugar industry was a trade in these products.

I remember reading somewhere that by the end of the violence of the creation of the sugar industry, which had become an addiction in Europe, there were some "fair traders" saying "don't eat West Indian beet sugar, because this many kilograms of sugar is equal to so many lives, because that's how many slaves had to be killed." And they'd eat East Indian sugar because it comes from farms run by people themselves. There's a wonderful historian who has called this the "big Colombian Exchange." The Colombian Exchange, according to him, was the process where valuable, biological wealth was being taken from the colonies, particularly the Americas and from the Native Americans. Corn is a primary example. I mean look at anything that is today, not just the staple in consumption, but is the basis of Empires: Levers, Lipton, look at any of them. These empires are related to a genetic commerce of another era. So there's nothing very new about it.

But now, new tools are being used to go into the spaces within. These inner spaces are then declared as private property. By having the ability to move parts of organisms around, they, the creators and owners of these new tools, are then claiming that they have created whole systems of life. They are, then, claiming new property. Like they claimed property in land and in so doing dispossessed the original inhabitants, they are now creating property in life. And this is the real breakthrough. There are new technological tools for colonization. There are new notions of property in areas that the last colonialism couldn't reach. Combined with all this, of course, is the even further construction of fictions that white men have created to get power away from people's understanding of their world. These fictions are used to detach themselves, to de-personify their agenda by making it more abstract.

Q.2. Over the last five hundred years, there has been a profound ontological shift in notions of values, wealth and power that has deeply affected women, nature and the "Third World." In each case, white males of the ruling class have defined themselves as creator, knower and benefactor. In your work, you have talked about how their role as exploiters has been naturalized by conceptually emptying women of their creative capacities, emptying nature of its regenerative capacities and emptying the people of the "Third World" of their capacity to self-organize and denying their prior ties to their land. You talk about this latest wave of globalization as representing a further, equally profound, cosmological shift. What is this shift and how is it affecting the daily lived experiences of women?

The present shift is redefining living systems, particularly women, plants, animals, microbes and their regenerative capacities, as empty of any regeneration. That capacity to regenerate is then relocated in the engineering mind, in the engineering man where it is treated as a product of that mind, which is outside of the actual regeneration process. As a result of that emptying out of the regenerative and creative capacity of plants, animals and women, you get this notion of creation as something you do to systems from the outside. This is a repeat of the way it was first constructed within Christianity where a male God created creation from the outside. This was/is very different from most other cosmologies where creation creates herse\f - and it is always as a "herself." Yet, now they don't even need a God in male image. Now, it is the males of this planet who are basically saying they are the creators. For instance, they "created" Dolly.

You can see this in their representation of what they are doing. You can see how they are trying to shift people's minds by saying the Creator is the scientist and owner (in this case Ian Wilburt), and Dolly is what he created. Yet, all Wilburt did was take two cells and put an electric shock through them. That is all he did. Dolly did the rest herself. But, of course, in the way it is commonly represented, Dolly is not her own creation. However, she is a tremendous miracle of self-organization. That fact that Dolly took an alien cell and organized herself into a wool sheep is a miracle, a miracle which the 276 "sisters of Dolly," as I call them, who were mutants, could not do because there was a rejection. But they too were still self-organizing. Even if it wasn't a self-organizing that matched the agenda of pharmaceutical companies. Now, this notion of creation is literally redefining what we are. It is a very profound ontological shift, because it is making us bundles of genes, rather than complex systems in highly intensive interaction with ourselves and with the rest of the world.

#### Thus, we affirm – the member nations of the World Trade Organization ought to end the use of intellectual property protections by non-Indigenous groups for medicines derived from indigenous knowledge.

To clarify, these are the 159 countries that are currently member states

#### IPR is an active threat to traditional medicine which treats natives as an expense rather than a priority. Prefer indigenous scholarship—conversations over IPR on traditional knowledge have excluded native voices.

IPCB et al. 06 [The IPCB is organized to assist indigenous peoples in the protection of their genetic resources, indigenous knowledge, cultural and human rights from the negative effects of biotechnology. Llamado de la Tierra is comprised of indigenous peoples throughout the world who are experienced in cultural and intellectual property policies and laws in the context of the indigenous struggle for de-colonisation and self-determination. The International Indian Treaty Council serves as an advocate for the human rights of Indigenous Peoples locally, nationally, and internationally.] “Joint Statement of the Indigenous Peoples Council on Biocolonialism (IPCB), Call of the Earth/Llamado de la Tierra (COE), & International Indian Treaty Council (IITC)”, International IP Policy News, 6-12-06, <https://www.ip-watch.org/2006/12/06/inside-views-indigenous-groups-tell-wipo-dont-patent-our-traditional-knowledge/> //SLC PK

Mr. Chairman, we have some general comments regarding document 10/5 on traditional knowledge. As we noted yesterday, TCEs cannot exist without TK, therefore, the comments we gave yesterday regarding TCE’s also apply to this agenda item. And in particular, we would like to reiterate that we qualify our comments on this document by the following understanding: our provision of comments on the Draft Objectives and Principles does not imply any ascension to the process or document as a whole. To be clear, it is entirely premature for our organizations to indicate a preference for a legally binding instrument based on this draft document.

Until the substantive provisions are entirely illuminated, it would be irresponsible of us to make such a commitment. Unfortunately, the Committee’s work to-date has been developed without the broad-based participation of Indigenous peoples. Until this process has much broader participation by Indigenous peoples, it would be inappropriate to endorse any standard-setting or legally binding instrument that would impact on all Indigenous peoples all around the world.

TK is a topic of utmost concern to Indigenous peoples because traditional knowledge, and more specifically, Indigenous knowledge, is all encompassing in that it represents the collective cultural heritage of our Peoples. IK is the foundation of Indigenous cultures, and therefore, any policy-related or standard-setting discussion about the protection of our knowledge poses significant implications to the lives and livelihoods of Indigenous peoples and are of critical concern.

Before discussing how the Committee can propose to protect TK, it is necessary to understand the different meanings of protection. Protection, from an intellectual property law perspective, means that the owner of a patent, a copyright, a trademark or some other IP has a legal right to exclude others from using or reproducing it. The IP forms of protection for intellectual creations and innovations are time limited, individualistic, monopolistic and exist for economic benefit.

By contrast, when most Indigenous peoples speak of protecting Indigenous knowledge, we mean it in a much broader sense that includes safeguarding its continued existence and development and protecting the whole social, economic, cultural and spiritual context of that knowledge. Indigenous peoples are seeking mechanisms that protect the holistic, inalienable, collective, and perpetual nature of Indigenous knowledge systems for purposes far more expansive than profit motives.

Any attempt to develop IPR-based mechanisms to “protect” IK actually poses much more threat to our knowledge, as a whole, than it can ever claim to prevent. Rather than protect, the imposition of IPRs over IK actually would serve to facilitate the alienation, misappropriation, and commercialization of IK.

Furthermore, dividing IK into artificial categories, rather than safeguarding its holistic and dynamic nature, poses a serious threat to its continued existence and development. It must be clear that any attempt to recast IK in IP terms fundamentally changes the nature of the IK from that of belonging to the cultural heritage of Indigenous peoples, to being private property in western law. Policy Objectives

With regard to the Policy Objectives, we have some general comments.

Regarding section (iii), in order to “meet the actual needs of holders of TK,” our rights must not only be respected, but more importantly these rights must be recognized.

Regarding section (vii), when referring to the specific intellectual traditions of Indigenous peoples, the term Indigenous knowledge (IK) should be utilized. IK is holistic in nature, and cannot be separated into distinct categories. IK is intrinsic to specific Indigenous peoples, and is fundamental to sustaining this distinct knowledge for future generations. As such, IK does not exist for the benefit of others but rather the Peoples to whom the knowledge belongs. Protection of Indigenous peoples’ rights over their knowledge should be a priority, rather than trying to balance the interests of users of IK at the expense of compromising the rights of IK holders.

Regarding section (xi), free prior informed consent of the affected Indigenous peoples must be ensured. Existing and developing national and international regimes governing access to genetic resources have not consistently recognized our right to FPIC, therefore, we expect the Committee not just be consistent with the other regimes, but to uphold the highest degree of recognition of our right to FPIC.

Regarding section (xiv), the list of means to preclude the grant of improper IP rights does not meet the needs and aspirations of Indigenous peoples. Disclosure of source and origin in a patent application and providing evidence of PIC and benefit sharing for the country of origin is insufficient. In fact, we believe patent applications that include or are based on IK should be specifically excluded from patentability. In IP terms, we’re sure you understand that these patent claims would fail to meet the test of innovation, novelty or inventiveness. But more importantly for Indigenous peoples, such patent claims should be denied because IK is in the Indigenous domain; that is, it is already under the jurisdiction of Indigenous legal systems, which protect the IK in perpetuity as the inherent and inalienable cultural property of Indigenous peoples. General Guiding Principles

IK belongs to the originators of such knowledge, as do the genetic resources originating from their territories. IK systems can best be protected by ensuring the right of self-determination of Indigenous peoples, including the right to territory and permanent sovereignty over natural resources. We are concerned about comments by some States that wish to strike any reference to the rights of Indigenous peoples in the Committee documents. We note with particular concern Canada’s intervention today that the language of the document should be changed to reflect only “IP rights.” The rights we are seeking here are far beyond IP rights; We seek recognition of our human rights to our self-determination, cultural heritage, and right of free, prior informed consent. Indeed, it is precisely these rights that provide the legal framework for the protection of Indigenous peoples’ TK, TCEs and genetic resources. Substantive Provisions

Some topics clearly fall within the purview of intellectual property, namely copyrights, patents and trademarks among others. IK is not one of them. Therefore, any comments on the substantive provisions would be premature. Conclusion

True protection of IK, responsive to the needs and aspirations of Indigenous peoples, is fundamentally based upon the recognition of the rights of Indigenous peoples, as established in international human rights laws. Given the mandate of WIPO to promote IPRs, and the fact that IPRs cannot adequately protect IK, perhaps this discussion should best be carried out in the human rights arena.

Thank you for your indulgence.

#### The battle for self-determination does not end with the 1AC, but you should refuse the seductive call to abandon the specific struggles against IP when faced with clear and attainable goals posed by activists

Whyte 16

(Kyle Powys – Potawatomi, Timnick Chair of the Humanities in the Department of Philosophy @ Michigan State University, "Indigenous Peoples, Climate Change Loss and Damage, and the Responsibility of Settler States", "Indigenous Environmental Movements and the Function of Governance Institutions." (2016): 563-580], JKS)

I understand indigenous peoples to encompass the roughly 370 million persons whose communities governed themselves before a period of invasion, colonization or settlement and who live within territories where nations, such as New Zealand or Canada, are more widely recognized internationally as sovereigns. Groups identifying as indigenous typically exercise political and cultural self-determination through their own laws, rights, and governing capacities—often having to navigate ongoing forms of colonialism, such as settler colonialism, colonial legacies, and numerous legal, political, bureaucratic, and social barriers imposed by nations, international organizations, subnational and municipal governments, corporations, and groups of private citizens (Anaya 2004; Cadena and Starn 2007; Larson et al. 2008; Niezen 2003; Sanders 1977). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) articulates political and cultural self-determination as indigenous peoples’ being able to “freely determine their political status . . . and economic, social and cultural development” (article 3), exercise “autonomy or self-government” (article 4), and “strengthen their distinct political, legal, economic, social and cultural institutions . . .” (article 5) (United Nations General Assembly 2007). These articles express indigenous renditions of self-determination and cultural integrity in international human rights law. A significant part of indigenous political and cultural self-determination involves the operation of indigenous environmental governance institutions, which refer to systems ranging from customs to social orderings to decision-making processes that coordinate the achievement of environmental outcomes such as clean air and water, sustainable crop yields, and upkeep of culturally meaningful places. UNDRIP also enshrines such institutions by protecting “traditional subsistence economies” (article 20), “traditional plants, animals and minerals” (article 24), and “spiritual relationships with . . . traditionally owned or otherwise occupied and used lands, territories, waters, and coastal seas and other resources” (article 25) (United Nations General Assembly 2007). These institutions are often seen as the practical embodiments of indigenous cosmologies expressing webs of mutual responsibilities shared across human and non-human beings, entities, and collectives. As major architects of environmental movements, indigenous environmentalists advance important arguments about what the function, or purpose, of environmental governance institutions should be. Different from functions discussed by people of other nations and heritages—like creating trading markets that incentivize pollution abatement or synthesizing diverse scientific sources for climate change planning—many indigenous environmentalists argue that institutions should be structured to function as conveners, or orchestrators, of relationships that connect diverse parties (from humans to forests) as relatives with reciprocal responsibilities to one another. To make this case, I will provide an overview in the following section of indigenous environmentalism and the theory of institutions. Then, in the third section, I will identify a set of themes about the function of institutions in the communications of indigenous environmentalists. In the fourth section, I will analyze these themes as a framework of indigenous conceptions of the function of institutions. In the fifth section, I will describe in more detail two cases of how indigenous environmentalists have structured institutions that function in this way. I will conclude with some remarks on why indigenous institutional frameworks are important dimensions of political and cultural self-determination and should be at the table in academic and policy spheres. Indigenous Environmentalists and Institutions As a citizen of an indigenous nation, activist, and scholar, I have participated in and am aware of diverse indigenous environmental movements. The collective actions of these movements include declarations, public performances, direct actions, reformation of law and policy, court victories, and grassroots institution building. Numerous indigenous-led organizations spark these actions, such as networks, clubs, coalitions, nongovernmental organizations, governmental agencies and committees, intergovernmental or multiparty organizations, and research centers. Moreover, diverse persons in wide-ranging walks of life and professions are involved, including elders and youth, people of all genders, indigenous knowledge keepers and scientists, employees of indigenous governments, and indigenous activists/advocates, among many others. While certain literatures on indigenous environmentalism tend to focus on the appropriation of romantic or false conceptions of indigenous peoples’ cultures as rhetorical tools (Churchill and Jaimes 992; Harkin and Lewis 2007; van Ginkel 2004), I emphasize instead how indigenous peoples have taken on substantial intellectual and organizational leadership. Indigenous environmental movements have achieved too many outcomes to document here. For example, international activists shaped the environmental dimensions of UNDRIP, such as articles 23 to 25 (United Nations General Assembly 2007), and succeeded in ensuring the United Nations Framework Convention on Climate Change (UNFCCC) would include an International Indigenous Peoples’ Forum on Climate Change and support the Indigenous Peoples Biocultural Climate Change Assessment (2014). Indigenous environmentalists have pressed scientists to recognize indigenous peoples in assessment reports such as the Intergovernmental Panel on Climate Change reports, Arctic Climate Change Assessment, and US National Climate Assessment (Maldonado et al. 2013; McLean et al. 2011; Bennett et al. 2014; Smith and Sharp 2012). Idle No More, the Midwest Treaty Network, and the Indigenous Environmental Network have solidified both greater awareness of and concerted actions on significant environmental issues such as pollution, mining and extraction, deforestation, and removal (Idle No More Berry and Camacho 1998; Clark 2002; Gedicks 1993; Goldtooth 1995; Grinde and Johansen 1995, 2014; Igoe 2004; LaDuke 1999; Schlosberg and Carruthers 2010). Māori organizing, including the Waitaingi Tribunal and its report on the river claim, spurred New Zealand’s government to recognize the legal voice and rights of the Whanganui River (Te Aho 2010). Indigenous organizing in Ecuador motivated the government to recognize legal rights of tropical forests, islands, rivers, and air in its new constitution (Postel 2012; Pachamama Alliance 2008). Court victories, such as the Saramaka People v. Suriname in the Inter-American Court in 2009, or the Voigt decision in the Great Lakes region in 1983 by the US Court of Appeals, have served to protect, in certain respects, indigenous ways of life (Carlson and Coulter 2012). Western Shoshone grandmothers, Mary and Carrie Dann engaged in legal and direct actions at the US federal and international levels to resist gold mining and land seizure, achieving victories such as a 2006 review of their case by the United Nations Committee on the Elimination of Racial Discrimination, which decided against the United States (Fishel 2006, 2007). Indigenous peoples have repurposed (indigenized) non-indigenous legal and policy mechanisms by creating conservation easements (Middleton 2011), tribal national parks in the United States (Carroll 2014) and protected conservation zones (Corntassel 2008). In all these collective actions, indigenous environmentalists actively criticize, reform, envision, create, and participate in many environmental governance institutions. Specifically, environmental governance institutions refer to any systems of customs, norms, conventions, social orderings, and decision-making processes that function to coordinate various aspects of a society toward achieving certain environmental outcomes, such as pollution abatement or biodiversity conservation (Borrows 2002; Napoleon 2013; Richardson 2008; Shockley 2012). Institutions range from massive state actors such as the US Environmental Protection Agency (EPA) or Michigan Department of Environmental Quality, to networks such as Idle No More or the Coalition Against Tarsands, to civil society organizations such as the Sierra Club, to widely practiced cultural norms in some societies such as frugality or respect for non-human life. Theoretical debate in many academic, public, and private sectors occurs over what functions institutions should serve. I understand an institution’s function to refer to the purpose it should be structured to accomplish for achieving targeted outcomes such as safe air quality or forest conservation. The structure is made up of the specific ways in which customs, norms, conventions, social orderings, or decision-making processes are designed, articulated, and arranged strategically to carry out the function.

#### Debate’s fixation on extinction narratives centers a notion of universal humanity that allows for dehumanization and erasure of native relationality to nature.

Mitchell 17 ““Decolonizing against extinction part II: Extinction is not a metaphor – it is literally genocide” Audra Mitchell [settler currently living and working on the Ancestral and Treaty lands of the Attawandaron (Neutral), Haudenosaunee (Six Nations of the Grand River) and Anishinaabe (Mississaugas of the New Credit) peoples. Prof. Mitchell holds the Canada Research Chair in Global Political Ecology at the Balsillie School of International Affairs], September 27, 2017, https://worldlyir.wordpress.com/2017/09/27/decolonizing-against-extinction-part-ii-extinction-is-not-a-metaphor-it-is-literally-genocide/ SM

Extinction is not a metaphor…

Extinction has become an emblem of Western, and white-dominated, fears about ‘the end of the(ir) world’. This scientific term is saturated with emotional potency, stretched and contorted to embody almost any nightmare, from climate change to asteroid strikes. In academic and public contexts alike, it is regularly interchanged with other terms and concepts – for instance, ‘species death’, global warming or ecological collapse. Diffused into sublime scales – mass extinctions measured in millions of (Gregorian calendar) years, a planet totalized by the threat of nuclear destruction – ‘extinction’ has become an empty superlative, one that that gestures to an abstract form of unthinkability. It teases Western subjects with images of generalized demise that might, if it gets bad enough, even threaten us, or the figure of ‘humanity’ that we enshrine as a universal. This figure of ‘humanity’, derived from Western European enlightenment ideals, emphasizes individual, autonomous actors who are fully integrated into the global market system; who are responsible citizens of nation-states; who conform to Western ideas of health and well-being; who partake of ‘culture’; who participate in democratic state-based politics; who refrain from physical violence; and who manage their ‘resources’ responsibly (Mitchell 2014).

Oddly, exposure to the fear of extinction contributes to the formation and bolstering of contemporary Western subjects. Contemplating the sublime destruction of ‘humanity’ offers the thrill of abjection: the perverse pleasure derived from exposure to something by which one is revolted. Claire Colebrook detects this thrill-seeking impulse in the profusion of Western blockbuster films and TV shows that imagine and envision the destruction of earth, or at least of ‘humanity’. It also throbs through a flurry of recent best-selling books – both fiction and speculative non-fiction (see Oreskes and Conway 2014; Newitz 2013; Weisman 2008). In a forthcoming intervention, Noah Theriault and I (2018) argue that these imaginaries are a form of porn that normalizes the profound violences driving extinction, while cocooning its viewers in the secure space of the voyeur. Certainly, there are many Western scientists, conservationists and policy-makers who are genuinely committed to stopping the extinction of others, perhaps out of fear for their own futures. Yet extinction is not quite real for Western, and especially white, subjects; it is a fantasy of negation that evokes thrill, melancholy, anger and existential purpose. It is a metaphor that expresses the destructive desires of these beings, and the negativity against which we define our subjectivity.

But extinction is not a metaphor: it is a very real expression of violence that systematically destroys particular beings, worlds, life forms and the relations that enable them to flourish. These are real, unique beings, worlds and relations – as well as somebody’s family, Ancestors, siblings, future generations – who are violently destroyed. Extinction can only be used unironically as a metaphor by people who have never been threatened with it, told it is their inevitable fate, or lost their relatives and Ancestors to it – and who assume that they probably never will.

This argument is directly inspired by the call to arms issued in 2012 by Eve Tuck and Wayne K. Yang and more recently by Cutcha Risling-Baldy. The first, seminal piece demonstrates how settler cultures use the violence of metaphorical abstraction to excuse themselves from the real work of decolonization: ensuring that land and power is in Indigenous hands. Risling-Baldy’s brilliant follow-up extends this logic to explain how First People like Coyote have been reduced to metaphors through settler appropriation. In both cases, engagement with Indigenous peoples and their relations masks moves to innocence: acts that make it appear as if settlers are engaging in decolonization, while in fact we are consolidating the power structures that privilege us.

In this series, want to show how Western, and white-dominated, discourses on ‘extinction’ appear to address the systematic destruction of peoples and other beings while enacting moves to innocence that mask their culpability and perpetuate structures of violence. As I argued in Part I of this series, extinction is an expression of colonial violence. As such, it needs to be addressed through direct decolonization, including the dismantling of settler colonial structures of violence, and the resurgence of Indigenous worlds. Following Tuck, Yang and Risling-Baldy’s lead, I want to show how and why the violences that drive extinction have come to be invisible within mainstream discourses. Salient amongst these is the practice of genocide against Indigenous peoples other than humans.

…it is literally genocide.

What Western science calls ‘extinction’ is not an unfortunate, unintended consequence of desirable ‘human’ activities. It is an embodiment of particular patterns of structural violence that disproportionately affect specific racialized groups. In some cases, ‘extinction’ is directly, deliberately and systematically inflicted in order to create space for aggressors, including settler states. For this reason, it has rightly been framed as an aspect or tool of colonial genocides against Indigenous human peoples. Indeed, many theorists have shown that the ‘extirpation’ of life forms (their total removal from a particular place) is an instrument for enacting genocide upon Indigenous humans (see Mazis 2008; Laduke 1999; Stannard 1994). Specifically, the removal of key sources of food, clothing and other basic materials makes survival on the land impossible for the people targeted.

Nehiyaw thinker Tasha Hubbard (2014) makes a qualitatively distinct argument. She points out that the Buffalo are First People, the elder brothers of the Nehiyaw people (and other Indigenous nations – see Benton-Banai 2010). Starting in the mid-1800s, the tens of millions of buffalo that ranged across Turtle Island were nearly eliminated through strategic patterns of killing carried out by settler-state-sponsored military and commercial forces. Their killing was linked to governmental imperatives to clear and territorially annex the Great Plains by removing its Indigenous peoples. As Hubbard points out, methods of destroying buffalo herds included large-scale killing, but also the disruption of their social structures, the destruction of the ecosystems on which they rely, and the removal of calves. These acts involve each of the components of the definition of genocide enshrined in the UN Genocide Convention:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

From Hubbard’s viewpoint, rooted in Nehiyaw philosophy and ethical-legal principles, the systematic destruction of the buffalo is not like genocide, nor is it exclusively a tool for carrying out genocide against human peoples. It is genocide in its own right: an attempt to destroy a particular First People and the possibilities of its continuity. In other words, the deliberate and systematic attempt to eliminate the buffalo, enacted by settler states, simultaneously enacted genocide against Indigenous peoples and their nonhuman relatives.

Genocides of Indigenous peoples (human and otherwise) continue apace in contemporary settler states, transformed into multiple manifestations. For instance, they are integral to ‘biosecurity’ strategies designed to police the biological boundaries of these states and their citizens. Laced with racializing and xenophobic rhetoric (Subramaniam 2001), strategies such as culling or planned eradications are intended to remove ‘invasive’ or ‘foreign’ life forms in order to protect ‘Native’ ones. Many of the ‘invasive’ life forms targeted for destruction were transported to unfamiliar lands through colonial patterns of settlement and global trade flows.

However, this logic of elimination (Wolfe 2006) is often perverted, turned against Indigenous\* beings whose flourishing impedes the expansion or consolidation of the colonial state. For instance, Deborah Bird Rose (2011 a, 2011 b) shows how this form of violence is continually waged against flying foxes, who are framed by the settler state as “pest[s] whose extinction is [deliberately] sought”. This act of elimination involves explicit genocidal ideation, or the imagination of the destruction of a people. Rose characterizes it as a “matter of imagining a world without [dingoes or flying foxes], then setting out to create it” (Rose 2011a). The Australian settler state has used multiple tactics to induce terror and preclude flourishing amongst flying foxes, from the emission of high-pitched electronic signals to smearing trees with python excrement (Rose 2011b). Indeed, in 2014, I lived near to the roosting site of a group of flying foxes in Turrbal and Jagera Country (suburban Brisbane to settlers). Such nesting places are called ‘colonies’ , reflecting a Western scientific rhetoric that frames Indigenous peoples as ‘invaders’ of the settler state. The trees that housed the nesting site backed onto a municipal facility, whose fence had been covered with barbed wire, in which many of the bats snared their wings and starved to death. This ‘security’ measure – designed to protect the facilities relied upon by urban settlers from the intrusion of flying foxes – is a powerful weapon for precluding ongoing flourishing of Indigenous other-than-human peoples. I learned from neighbours that this ‘colony’ had previously been ‘moved’ from several other sites around the city, suffering significant declines in population each time. Indeed, despite reported declines of 95% in flying fox communities in Queensland and neighbouring New South Wales, the Queensland settler state legalized the shooting of the bats in 2012 by fruitgrowers.

Of course, in some cases, the elimination of life forms is not as targeted or intentional – it may take the form of land-based extractive violence, the creep of ocean acidification, the decimation of rainforests by climate change. Proponents of a Eurocentric definition of genocide could argue that these events lack intention. Indeed, within international law, intention to commit genocide is a necessary criteria for conviction. However, theorists of critical genocide studies have long argued that this definition is inadequate: it brackets out a great many of the acts, logics and structures that produce the destruction of unique peoples. According to Tony Barta, definitions of genocide that focus on ‘purposeful annihilation’, and in particular on physical killing, have “devalu[ed] all other concepts of less planned destruction, even if the effects are the same” (Barta 2000, 238). For this reason, he shifts the focus from ‘genocidal intention’ to ‘genocidal outcome’ – that is, from the abstract assignation of genocidal agency to the felt and embodied effects of eliminative violence. It is the focus on intent, he contends, that allows white Australians to imagine that their relationship with Aboriginal people is non-genocidal despite overwhelming evidence of systematic and deliberate racialized destruction over several centuries. In contrast, an approach based on ‘genocidal outcomes’ makes it possible to account for complex causality and weak intentionality – that is, for myriad acts mediated by subtle, normalized structures that, together, work to eliminate a people. I want to argue that the same logic applies to nonhuman peoples: the destruction of a life form, its relations with other beings and its possible futures is a genocidal outcome, whether or not intention can be identified.

Similarly, Christopher Powell (2007) argues that, since a ‘genos’ is a

“network of practical social relations, destruction of a genos means the forcible breaking down of those relationships…these effects could be produced without a coherent intent to destroy. They could result from sporadic and uncoordinated actions whose underlying connection is the production of a new society in which there is simply no room for the genos in question to exist. They might even result from well-meaning attempts to do good” (Powell 2007, 538)

As I have argued elsewhere, extinction is defined by the breaking of relations and the systematic destruction of the conditions of plurality that nurture co-flourishing worlds. Whether inflicted out as a deliberate act of extirpation, or as the convergent effect of eliminative logics expressed over centuries and enormous spatial scales, extinction is the destruction of relations and the heterogenous societies they nurture.

Understood in this way, ‘extinction’ is not a metaphor for genocide or other forms of large-scale violence: it is a distinct manifestation of genocide. Masking the genocidal logics that drive extinction involves several moves to innocence (Tuck and Yang 2012). Treating extinction as something short of genocide entrenches Eurocentric understandings of personhood that are limited to homo sapiens, which is itself an act of violence against these peoples. Ironically, the entrenchment of this dichotomy also enables the logic of ‘dehumanization’, in which human communities are likened to reviled nonhumans (for instance, cockroaches) in order to motivate violence against them. As I have argued elsewhere (Mitchell 2014), the logic of generalised ‘dehumanisation’ is uniquely effective in Western frameworks in which the lack of ethical status for beings other than humans removes obstacles to their mass destruction. Within worlds in which human and nonhuman persons are linked through complex systems of law, treaties, protocols and long-standing relations, this claim is illogical. Within Western settler states, however, it functions as a means of justifying ongoing violence against Indigenous peoples and their relations.

In addition, by framing extinction as a problem for a universal figure of ‘humanity’ (more on this to follow…) mainstream discourses of extinction obscure its profound entwinement with race and racializing structures. These examples make it clear that eliminative violence is targeted on specific groups of people and their other-than-human relations, as defined by the aggressors. Indeed, patterns of genocidal violence extend racializing categories, hierarchies and eliminative impulses to other-than-human peoples. Just as approaching gender violence separately from race effaces their intersection, understanding extinction as distinct from race is deeply misleading. This is not only because racialized people are more likely to suffer from the effects of ‘extinction’ and other forms of environmental racism (which they are). It is also because the eliminative violence that drives extinction extend and enact race beyond the category of homo sapiens by defining particular groups against white settler norms and as threats to the settler society. To approach extinction separately from issues of race is, therefore, to miss one of its most defining features.

Extinction is not a metaphor – in many cases, it is quite literally genocide enacted against Indigenous peoples and their other-than-human relations. To treat it as a metaphor is to obscure and participate in the structures of violence that drive it. From this perspective, in addition to active decolonisation efforts, and the resurgence of Indigenous peoples, addressing extinction also requires attacking the genocidal, racializing, eliminative logics that are diffused throughout settler (and other) states. It also requires honouring the unique relations, worlds and peoples that are targeted by these discourses and practices.

#### Settler colonialism is deeply engrained in Western culture and reflects in the universalist logic of non-naturalistic ethics – their philosophy gets appropriated to justify extermination of Indigenous peoples because of its cultural starting point.

John **Hinkinson** – Editor at Arena, an Australian maganzine. “Why Settler Colonialism?” Arena. 20**12**. https://arena.org.au/why-settler-colonialism/ JJN

Settler colonialism as a practice is a subset of colonial history, one where the colonial relationship converts into a very specific cultural practice. It is where the ‘settler culture’ seeks a permanent place in the colonial setting and, as such, enters an unrelenting cultural logic of misrecognition and blindness towards the cultural other, issuing in acts of objective cruelty and cultural destruction. Because this relationship is based in cultures, which are prior to the individual (while simultaneously forming the individual), it is a relationship that is especially difficult to put aside. Empirically speaking, there are many such examples in history, many arising in the period of Western Empire associated with modernity and expansionism in the New World. Settler colonialism as a field illuminates the history of these myriad examples while bridging into accounts of contemporary expressions of the settler phenomenon, from the continued cultural suppression arising out of nineteenth-century Empire (in Africa, the Americas, Australia and New Zealand, for example) to twentieth-century expressions in Palestine. If settler colonialism is to develop as a field of critical study it needs to include but go far beyond empirical accounts simply framed by an ethic of cultural justice. To do this it is necessary to develop a theory and account of how settler colonialism as a practice is based culturally. And this will require a broader frame of reference than the specific localities of settler-colonial practice, a broader frame that shows how this phenomenon is an effect of power based in attitudes to other cultures more generally. For it is arguable that the settler-colonial attitude derives from a widespread cultural politics set within a larger frame, one which the world today assumes, rather than reflexively knows or seeks to reform. This is to speak of a continuing imperialist attitude expressed in a view of other cultures that has little respect for those cultures’ core assumptions. There are crude expressions of this lack of cultural empathy, but there are also ‘high’ expressions, such as those embodied in the universalist philosophy of the West. For high universalism, the emancipatory principle is argued to be beyond all specific cultures and, as such, superior to all of them. Recent US adventures in the Middle East come to mind, where the invocation of ‘freedom’ has become a sign of disrespect for the complex cultures of the region. Imposed ‘freedom’ has devastating effects. Common to these expressions is a deep cultural blindness associated with modernity that is unable to view other cultures empathically or engage them in informed, reciprocal cultural interchange. Rather, knowledge of such cultures has predominantly developed instrumentally as a means to domination. These relations of cultural power at a more general level both generate the settler colonial relationship and reflexively feed off its effects. As John Gray remarks in his Black Mass, the Enlightenment is responsible for many racist policies, especially towards colonized peoples. Enlightenment philosophers have a special responsibility, as is seen in the case of Locke: John Locke was a Christian committed to the idea that humans are created equal, but he devoted a good deal of intellectual energy to justifying the seizure of the lands of indigenous people in America.(8) Other philosophers, including Kant, are mired in much the same logic. The goal of equality within a universal civilization was the prospect, but this could only be achieved by the peoples of the colonies ‘giving up their own ways of life and adopting European ways’.(9) If they did not willingly give up their ways of life, extermination, an idea that was widespread, might be entertained. This was not merely a Nazi policy. When H. G. Wells asked himself about the fate of ‘swarms of black and yellow and brown people who do not come into the needs of efficiency’, he replied: ‘Well, the world is not a charitable institution, and I take it they will have to go’.(10) John Gray goes on: Nazi policies of extermination … drew on powerful currents in the Enlightenment and used as models policies in operation in many countries, including the world’s leading liberal democracy. Programmes aiming to sterilize the unfit were under way in the United States. Hitler admired these programmes and also admired America’s genocidal treatment of indigenous peoples: he ‘often praised to his inner circle the efficiency of America’s extermination — by starvation and uneven combat — of the “Red Savages” who could not be tamed by captivity’.(11) If there is any doubt about the crucial role of settler colonialism in the power effects of the West one should turn to the recent book by Timothy Snyder, Bloodlands.(12) Here the author confirms that the various plans constructed by Hitler and the Nazi regime for the mass starvation of the Slavs and the Final Solution of the Jews of Eastern Europe were based on settler-colonial assumptions, in particular as expressed in the example of the United States and the conquest of the Native American peoples. Hitler’s plan (the Generalplan Ost) to colonize the Ukraine breadbasket was one that sought to turn back the clock of industrialization in the Soviet Union, deliberately starve unwanted millions of people, introduce German settlers up to the Urals, enslave Slavs where they were deemed to be essential for economic production and push the Jews of Eastern Europe beyond the Urals into Asia. While the plan was quickly frustrated in its detail by the resistance of the Soviets, Hitler’s plan is nevertheless illustrative of crucial background assumptions and elaborations of notions of ‘development’. For Hitler, Colonization would make of Germany a continental empire fit to rival the United States, another hardy frontier state based upon exterminatory colonialism and slave labor. The East was the Nazi Manifest Destiny. In Hitler’s view, ‘in the East a similar process will repeat itself for a second time as in the conquest of America’. As Hitler imagined the future, Germany would deal with the Slavs much as the North Americans had dealt with the Indians. The Volga River in Russia, he once proclaimed, will be Germany’s Mississippi.(13) As suggestive as this material may be, the point is not that of equating the United States with the Nazis. Rather it is to make the more important ethical point about Western powers and Western culture: they are interwoven with practices that take settler colonialism for granted, practices that arguably define the underside of modernity.

#### In settler research spaces we have a responsibility and role of the ballot to center indigenous knowledge, and to contribute to unsettling the academy—our work connects different discussions of indigeneity and decolonization to the rest of the globe.

Sium et al 12 (Aman Sium, Chandni Desai, Eric Ritskes, Ontario Institute for Studies in Education, University of Toronto, Sium identifies as being Tigrinya, indigenous, African, and Eritrean, Ritskes is Zhaganash, Towards the ‘tangible unknown’: Decolonization and the Indigenous future, Decolonization: Indigeneity, Education & Society ¶ Vol. 1, No. 1, 2012, pp. I-XIII, JKS)

Decolonization does not exist without a framework that centers and privileges Indigenous life, community, and epistemology. In that regards, it becomes vitally important, despite our goals of understanding and promoting a global Indigenous undertaking, to center and recognize the local settler colonial contexts on which we, as authors, are situated. As we write this, we are on unceded Haudenosaunee and Mississauga land. We do not state this to signal a particular understanding of the complexity of issues, resistance and life that this statement entails, nor in belief of an (perceived and imposed) alliance with Anishinaabeg peoples. Too often talk of ¶ solidarity and alliance gets co-opted in these ways, as ‘magic words’ to state and dispense with complexity, not understanding why they are said or what responsibility and action they might entail. We state these words as a contestation of colonial logic that, as Andrea Smith (2006) notes, “holds that Indigenous people must disappear. In fact, they must always be disappearing, in order to allow non-Indigenous peoples rightful claim over the land” (p. 68). The history of settler colonialism is one of displacement and replacement and we are each implicated in this. We state these words in recognition of the Anishinaabeg peoples’ continued right to this land, to sovereignty, and indeed, their right to exist beyond the often fetishized historical memory of settler colonialism. We do not need to state this to make it true, it simply is. ¶ It is important to recognize this particular history of colonialism, and subsequent (temporary) interruption of sovereignty, because it affects each of us. There is no escaping complicity within a settler colonial state, especially for those of us who have settled here, though complicity looks different for each of us. Complicity cannot be collapsed into simple and neat categories without historicizing the political legacy of colonialism and the way in which it manifested and continues to manifest itself both here and across the globe. It is important to consider the process and logics of colonial modernity and white supremacy, the way in which Europeans defined and classified people – as human and non-human – and then used this as a basis to conquer land and subjugate populations through enslaving, indenturing in labour, genociding and warring (Wynter, 2003, Smith, 2006). It is crucial to consider the particularities of forced movement and involuntary migrations of various diasporas and their distinction from (European) settlers that colonized and settled various lands for the purpose of capitalist expansion rooted in notions and the epistemology of “possessive individualism” (Mohanram, 1999). ¶ That being said, for those who have settled here, we have a history of interruption to recognize and rectify; as Waziyatawin (in this issue) notes, Indigenous peoples recognized, from the beginning, how Western thought and presence displaced and endangered Indigenous ways of knowing and relationships to the earth, as well as the earth itself. We have a responsibility to honor the Indigenous ‘laws of the land’ and to restore right relationships. Often the call for sustainability and ecological responsibility is framed from a settler vantage point, in belief that “this land is your land, this land is my land” so we must take care of it. For those of us who are not Indigenous to Turtle Island, we must recognize our particular responsibility to this land and its stewards. All of this is interwoven into this work and our beginning point. ¶ As such, the starting point of decolonization is not a rejection of colonialism. Rather than replace the dominant with the marginalized, or as Fanon (1968) puts it, make it so “the last shall be first and the first last” (p. 37), the decolonizing project seeks to reimagine and rearticulate power, change, and knowledge through a multiplicity of epistimologies, ontologies and axiologies. Decolonization cannot take place without contestation. It must necessarily push back against the colonial relations of power that threaten Indigenous ways of being. Alfred (2009b) and others have suggested that decolonization can only be “achieved through the resurgence of an Indigenous consciousness *channeled into contention with colonialism*” (p. 48; emphasis ¶ added). Indigenous knowledges are the starting point for resurgence and decolonization, are the medium through which we engage in the present, and are the possibility of an Indigenous future. Without this power base, decolonization becomes a domesticated industry of ideas. Decolonization is not always about the co-existence of knowledges, nor knowledge synthesis, which inevitably centers colonial logic. Whiteness does not ‘play well with others’ but, rather, fragments and marginalizes - so it must be asked: Co-existence at what cost and for whose benefit? Decolonization necessarily unsettles. In the face of the beast of colonialism, thirsty for the blood of Indigeneity and drunk on conquest, assimilation is submission and decolonization calls on those who will “beat the beast into submission and teach it to behave” (Alfred, 2009a, p. 37).

#### Prioritize burden of proof over burden of refutation – starting disad risk close to 0 because of implicit assumptions models predictions more accurately and opens debate to discussions of systemic racialized violence

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So let me offer another possibility: the problem isn’t the topic, but modern policy debate. The unrealistic scenarios, exclusive focus on policy scholarship, inability to engage systemic impacts and philosophical questions. And so long as these problems characterize modern policy debate, teams will feel compelled to avoid it. It might be tempting to assign the blame to “USFG should.” But these are bugs, not features of plan-focused, USFG-based, active voice topics. These bugs result from practices and norms that were initially and independently reasonable, but ultimately and collectively problematic. I also believe that these norms can and should be contested. I believe it would be possible for me to have a realistic, accessible, and inclusive discussion about the merits of a federal policy with, say, Amber Kelsie. Or put differently, I’m not sure I agree with Jonah that changing the topic is the only way to avoid being “a bunch of white folks talking about nuke war.”

The fact that policy debate is wildly out of touch—the fact that we are “a bunch of white folks talking about nuclear war”—is a damning indictment of nearly every coach in this activity. It’s a serious indictment of the successful policy debate coaches, who have been content to continue a pedagogically unsound game, so long as they keep winning. It’s a serious indictment of policy debate’s discontents who chose to disengage.

That’s not to say there hasn’t been any effort to challenge modern policy debate on its own terms—just that they’ve mainly come from the middle of the bracket and weren’t very successful, focusing on morality arguments and various “predictions bad” claims to outweigh.

Judges were receptive to the sentiment that disads were unrealistic, but negative claims to specificity always triumphed over generic epistemological questions or arguments about why “predictions fail.” The affirmative rarely introduced substantive responses to the disadvantage, rarely read impact defense. All considered, the negative generally won a significant risk that the plan resulted in nuclear war. Once that was true, it was basically impossible to win that some moral obligation outweighed the (dare I say?) obligation to avoid a meaningful risk of extinction.

There were other problems. Many of the small affirmatives were unstrategic—teams rarely had solvency deficits to generic counterplans. It was already basically impossible to win that some morality argument outweighed extinction; it was totally untenable to win that a moral obligation outweighed a meaningful risk of extinction; it made even less sense if the counterplan solved most of the morality argument. The combined effect was devastating: As these debates are currently argued and judged, I suspect that the negative would win my ballot more than 95 percent of the time in a debate between two teams of equal ability.

But even if a “soft left” team did better—especially by making solvency deficits and responding to the specifics of the disadvantage—I still think they would struggle. They could compete at the highest levels, but, in most debates, judges would still assess a small, but meaningful risk of a large scale conflict, including nuclear war and extinction. The risk would be small, but the “magnitude” of the impact would often be enough to outweigh a higher probability, smaller impact. Or put differently: policy debate still wouldn’t be replicating a real world policy assessment, teams reading small affirmatives would still be at a real disadvantage with respect to reality. .

Why? Oddly, this is the unreasonable result of a reasonable part of debate: the burden of refutation or rejoinder, the responsibility of debaters to “beat” arguments. If I introduce an argument, it starts out at 100 percent—you then have to disprove it. That sounds like a pretty good idea in principle, right? Well, I think so too. But it’s really tough to refute something down to “zero” percent—a team would need to completely and totally refute an argument. That’s obviously tough to do, especially since the other team is usually going to have some decent arguments and pretty good cards defending each component of their disadvantage—even the ridiculous parts. So one of the most fundamental assumptions about debate all but ensures a meaningful risk of nearly any argument—even extremely low-probability, high magnitude impacts, sufficient to outweigh systemic impacts.

There’s another even more subtle element of debate practice at play. Traditionally, the 2AC might introduce 8 or 9 cards against a disadvantage, like “non-unique, no-link, no-impact,” and then go for one and two. Yet in reality, disadvantages are underpinned by dozens or perhaps hundreds of discrete assumptions, each of which could be contested. By the end of the 2AR, only a handful are under scrutiny; the majority of the disadvantage is conceded, and it’s tough to bring the one or two scrutinized components down to “zero.”

And then there’s a bad understanding of probability. If the affirmative questions four or five elements of the disadvantage, but the negative was still “clearly ahead” on all five elements, most judges would assess that the negative was “clearly ahead” on the disadvantage. In reality, the risk of the disadvantage has been reduced considerably. If there was, say, an 80 percent chance that immigration reform would pass, an 80 percent chance that political capital was key, an 80 percent chance that the plan drained a sufficient amount of capital, an 80 percent chance that immigration reform was necessary to prevent another recession, and an 80 percent chance that another recession would cause a nuclear war (lol), then there’s a 32 percent chance that the disadvantage caused nuclear war.

I think these issues can be overcome. First, I think teams can deal with the “burden of refutation” by focusing on the “burden of proof,” which allows a team to mitigate an argument before directly contradicting its content.

Here’s how I’d look at it: modern policy debate has assumed that arguments start out at “100 percent” until directly refuted. But few, if any, arguments are supported by evidence consistent with “100 percent.” Most cards don’t make definitive claims. Even when they do, they’re not supported by definitive evidence—and any reasonable person should assume there’s at least some uncertainty on matters other than few true facts, like 2+2=4.

Take Georgetown’s immigration uniqueness evidence from Harvard. It says there “may be a window” for immigration. So, based on the negative’s evidence, what are the odds that immigration reform will pass? Far less than 50 percent, if you ask me. That’s not always true for every card in the 1NC, but sometimes it’s even worse—like the impact card, which is usually a long string of “coulds.” If you apply this very basic level of analysis to each element of a disadvantage, and correctly explain math (.4\*.4\*.4\*.4\*.4=.01024), the risk of the disadvantage starts at a very low level, even before the affirmative offers a direct response.

Debaters should also argue that the negative hasn’t introduced any evidence at all to defend a long list of unmentioned elements in the “internal link chain.” The absence of evidence to defend the argument that, say, “recession causes depression,” may not eliminate the disadvantage, but it does raise uncertainty—and it doesn’t take too many additional sources of uncertainty to reduce the probability of the disadvantage to effectively zero—sort of the static, background noise of prediction.

Now, I do think it would be nice if a good debate team would actually do the work—talk about what the cards say, talk about the unmentioned steps—but I think debaters can make these observations at a meta-level (your evidence isn’t certain, lots of undefended elements) and successfully reduce the risk of a nuclear war or extinction to something indistinguishable from zero. It would not be a factor in my decision.

Based on my conversations with other policy judges, it may be possible to pull it off with even less work. They might be willing to summarily disregard “absurd” arguments, like politics disadvantages, on the grounds that it’s patently unrealistic, that we know the typical burden of rejoinder yields unrealistic scenarios, and that judges should assess debates in ways that produce realistic assessments. I don’t think this is too different from elements of Jonah Feldman’s old philosophy, where he basically said “when I assessed 40 percent last year, it’s 10 percent now.”

Honestly, I was surprised that the few judges I talked to were so amenable to this argument. For me, just saying “it’s absurd, and you know it” wouldn’t be enough against an argument in which the other team invested considerable time. The more developed argument about accurate risk assessment would be more convincing, but I still think it would be vulnerable to a typical defense of the burden of rejoinder.

To be blunt: I want debaters to learn why a disadvantage is absurd, not just make assertions that conform to their preexisting notions of what’s realistic and what’s not. And perhaps more importantly for this discussion, I could not coach a team to rely exclusively on this argument—I’m not convinced that enough judges are willing to discount a disadvantage on “it’s absurd.” Nonetheless, I think this is a useful “frame” that should preface a following, more robust explanation of why the risk of the disadvantage is basically zero—even before a substantive response is offered.

There are other, broad genres of argument that can contest the substance of the negative’s argument. There are serious methodological indictments of the various forms of knowledge production, from journalistic reporting to think tanks to quantitative social science. Many of our most strongly worded cards come from people giving opinions, for which they offer very little data or evidence. And even when “qualified” people are giving predictions, there’s a great case to be extremely skeptical without real evidence backing it up. The world is a complicated place, predictions are hard, and most people are wrong. And again, this is before contesting the substance of the negative’s argument(!)—if deemed necessary.

So, in my view, the low probability scenario is waiting to be eliminated from debate, basically as soon as a capable team tries to do it

That would open to the door to all of the arguments, previously excluded, de facto, by the prevalence of nuclear war impacts. It’s been tough to talk about racism or gender violence, since modest measures to mitigate these impacts have a difficult time outweighing a nuclear war. It’s been tough to discuss ethical policy making, since it’s hard to argue that any commitment to philosophical or ethical purity should apply in the face of an existential risk. It’s been tough to introduce unconventional forms of evidence, since they can’t really address the probability of nuclear war.

#### Ideal theory is a form of abstraction away from the material violence of settler colonialism – their view from nowhere is not only useless but actively props up settlerism.

Nichols 13 Nichols, R. (2013). Indigeneity and the Settler Contract today. Philosophy & Social Criticism, 39(2), 165–186. doi:10.1177/0191453712470359 SM

Throughout the 20th century, of course, these ‘high theories’ of human development have come under considerable attack. Although anti-imperial leaders and thinkers from those subject to European colonization had always offered trenchant critiques of the European discourse of progress, and counter-narratives were always available from within European thought, it was not until the 20th century that this counter-discourse began to take hold within Europe itself in any significant way. For instance, one of the first demands of the former colonies in the United Nations was to insist on the removal of references from UN documents to members in terms of ‘civilized’ versus ‘uncivilized’. The reason they gave was that this discourse was a prevailing justification for western imperialism in both its colonial and neo-colonial forms and, by the end of the two world wars – themselves major blows to European pretensions to be the standard of civilization – thousands of people in the West were reading these criticisms and taking them more seriously. And so, combined with various other factors (including the rise of Anglo-American analytic philosophy generally), the historical-anthropology language has largely been displaced by other modes of philosophical reflection – namely, more ‘ideal’ theory. As we also all know, in the early 1970s a particular variant of this formal or ideal theory came to predominate in the western academy. The publication of John Rawls’ A Theory of Justice (1971) and Robert Nozick’s Anarchy, State and Utopia (1974) revived and reactivated the intellectual tradition of social contract theory.3 Political 166 Philosophy and Social Criticism 39(2) Downloaded from psc.sagepub.com at NORTH CAROLINA STATE UNIV on March 18, 2015 philosophers after Rawls and Nozick have been generally reluctant to engage in the grand, complex historical and anthropological narratives that characterized the work of, for instance, Hegel and Marx. Instead, they argued that guiding principles for the organization of a just society (and a just relationship between societies) can be generated by abstracting away from the specific historical and cultural conditions of the present. By imagining oneself in (to use Rawls’ parlance) an ‘original position’, behind a ‘veil of ignorance’ (i.e. without knowledge of one’s race, gender, culture, social location, etc.), it is possible to determine what first principles would be generally acceptable to all (regardless of the above qualifiers). The notion of an original ‘contract’ between such individuals is thus used as a device of representation to generate a normative theory which can then be used to critically examine actually existing practices. This tradition and mode of philosophical reflection have come to replace the 19th-century historical-anthropological discourse as the prevailing manner in which philosophers and political theorists in the western academy (but especially in Anglo-American countries) analyse the possibility of a just relationship to non-western societies. The purpose of this article is to reflect not only upon the limitations, but more importantly upon the political function of this approach, particularly when it is deployed as a resource for reflection on the political struggles and normative claims of the indigenous peoples in the settler-colonial societies of the Anglo-American world (e.g. Australia, Canada, New Zealand, the United States). In so doing, I hope to present a small slice of a much larger project comprising a genealogy of what I will refer to here asthe ‘Settler Contract’.4 In usingthe term ‘Settler Contract’ I am deliberately playing off of previous work by philosophers and political theorists who have been concerned to show the historical function and development of social contract theory in relation to specific axes of oppression and domination. Two of the most important contributions to this literature are Carole Pateman’s The Sexual Contract and CharlesMills’TheRacialContract.In Pateman’s 1988 work, she rereadthe canon of western social contract theory in an attempt to demonstrate that the presumptively neutral and ideal accounts of the origins of civil society as presented in the works of, for instance, Hobbes, Locke and Rousseau, were in fact always (implicitly or explicitly) sexual-patriarchal narratives that legitimized the subordination of women. In 1995, Charles Mills deliberately borrowed from Pateman in his project of unmasking the racial (or, more precisely, whitesupremacist) nature of the contract. There, Mills defined the ‘Racial Contract’ as ... that set of formal or informal agreements or meta-agreements ... between the members of one subset of humans, henceforth designated by (shifting) ‘racial’ (phenotypical/genealogical/cultural) criteria C1, C2, C3 ... as ‘white,’ and coextensive (making due allowance for gender differentiation) with the class of full persons, to categorize the remaining subset of humans as ‘nonwhite’ and of a different and inferior moral status, subpersons, so that they have a subordinate civil standing in the white or white-ruled polities the whites either already inhabit or establish or in transactions as aligns with these polities, and the moral and juridical rules normally regulating the behaviour of whites in their dealings with one another either do not apply at all in dealings with nonwhites or apply only in a qualified form.5 Although they have not necessarily used the specific term of art ‘Settler Contract’, for some time now various thinkers have attempted to contribute to an expansion on these Nichols 167 Downloaded from psc.sagepub.com at NORTH CAROLINA STATE UNIV on March 18, 2015 themes by demonstrating the ways in which social contract theory has served as a primary justificatory device for the establishment of another axis of oppression and domination: an expropriation and usurpation contract whereby the constitution of the ideal civil society is premised upon the extermination of indigenous peoples and/or the displacement of them from their lands. I will use the term ‘Settler Contract’ to refer to the strategic use of the fiction of a society as the product of a ‘contract’ between its founding members when it is employed in these historical moments to displace the question of that society’s actual formation in acts of conquest, genocide and land appropriation.6 The Settler Contract’s reactivation is used not to deny the content of specific indigenous peoples’ claims, but rather to shift the register of argumentation to a highly abstract and counter-factual level, relieving the burden of proof from colonial states. In such a case, the original contract between white colonial settlers thus ‘simultaneously presupposes, extinguishes, and replaces a state of nature. A settled colony simultaneously presupposes and extinguishes a terra nullius.’ 7 The Settler Contract then refers to the dual legitimating function of the philosophical and historical-narrative device of the ‘original contract’ as the origins of societal order: first, by presupposing no previous indigenous societies and second, by legitimizing the violence required to turn this fiction into reality. Although the Settler Contract has obvious similarities and points of overlap with the Racial Contract, and is constituted in gendered and sexualized practices, it is analysable as a distinct axis since it pertains more to issues related to land appropriation and the subordination of previously sovereign polities and societies. My specific contribution here is twofold. First, I am interested in expanding the scope of these critical genealogies to include the mode of argumentation or style of reasoning endemic to social contract theory. In order to explain what I mean by this it is helpful to look to a point of difference between Pateman and Mills. Although Charles Mills sees the actual historical instantiation of contract theory as implicated in white supremacy, he nevertheless argues that the form or model of reasoning it represents can be ‘modified and used for emancipatory purposes’.8 Mills argues that the language of an ideal contract that constitutes society ‘serves a useful heuristic purpose – it’s a way of dramatizing the original social contract idea of humans choosing the principles that would regulate a just society’.9 This is why Mills described his work as a contribution to that long struggle to ‘close the gap between the ideal of the social contract and the reality of the Racial Contract’.10 Carole Pateman, on the other hand, has argued that the theoretical device of an appeal to the ‘ideal’ contract is itself inherently problematic. This is because Pateman, unlike Mills, sees contract theory as requiring the ‘fiction’ of property in the person. This theoretical presupposition is, according to Pateman, necessarily enabling of domination and oppression. She writes: Property in the person cannot be contracted out in the absence of the owner. If the worker’s services (property) are to be ‘employed’ in the manner required by the employer, the worker has to go with them. The property is useful to the employer only if the worker acts as the employer demands and, therefore, entry into the contract means that the work becomes a subordinate. The consequence of voluntary entry into a contract is not freedom but superiority and subordination.11 168 Philosophy and Social Criticism 39(2) Downloaded from psc.sagepub.com at NORTH CAROLINA STATE UNIV on March 18, 2015 Although Pateman’s more radical and comprehensive critique of social contract theory is instructive here, my contribution is different still. While I agree in general with Pateman’s assessment of the inherently problematic nature of contract theory, my aim is to bring to light another facet of this, one specifically related to colonization. As I will discuss in more length below, I am concerned to show how the appeal to an ‘ideal’ original contract, even as a heuristic device for the generating of ‘first principles’, serves to displace questions of the historical instantiation of actual political societies and domains of sovereignty and, as such, has served and continues to serve the function of justifying ongoing occupation of settler societies in indigenous territory. To do this, I draw upon a Foucaultian distinction between historico-political vs philosophico-juridical discourses of sovereignty and right as a means of complementing and augmenting previous work on the Settler Contract. Furthermore, I argue that the philosophico-juridical discourse of the Settler Contract has its origins – both in historical time and as an event repeated in contemporaneous time – at the moment in which the weight of the past cannot be borne. Contract theory can therefore be studied not merely in terms of the content of its claims (i.e. true or false depictions of indigenous peoples), but in terms of its strategic function in relieving the burden of the historical inheritance of conquest. When read in light of this function, I argue, contract theory emerges as an inherently problematic framework for the adjudication of indigenous claims and, moreover, for the establishment of a non-colonial relationship between indigenous peoples and settler-colonial societies. This also means, however, that unlike Pateman and Mills, I am less interested in the specific content of, for instance, the racist and demeaning depictions of indigenous peoples as pre-political ‘savages’ in the works of contract theorists since it is my claim that even independent of any specifically negative portrayal of indigenous peoples within such work, social contract theory is still a vehicle for the displacement of such peoples, conceptually and in actual historical fact. In fact, I want to argue, it is in those places where contract theory is at its most abstract (purportedly neutral and non-evaluative) that it often functions most effectively as a strategy of settler-colonial domination. The second contribution to this discussion I would like to make is to demonstrate how this form of theory continues to function today with respect to the claims of indigenous peoples. Thus, I am also less concerned here with the historical figures of Hobbes, Locke, Rousseau and Kant than Pateman or Mills, and more interested in those contemporary thinkers who explicitly work in this tradition – philosophers such as John Rawls, Robert Nozick and, the focus of this article, Jeremy Waldron. A few caveats before I proceed. First, it is not my claim that contemporary thinkers such as Rawls, Nozick, or Waldron necessarily intend to facilitate the logic of the Settler Contract (though I do not rule out this possibility either). I am not primarily interested in what specific authors intend to do with their arguments, but rather with how a specific rhetorical structure or style of argumentation shapes the discursive space such that certain outcomes appear as the logical or necessary conclusion to an argument when, in fact, the debate has been skewed in this direction by the point of departure itself. Second, I acknowledge that my selection of authors is non-comprehensive. I have chosen here to focus on Jeremy Waldron’s recent application of the social contract tradition to the claims of indigenous peoples. This is in part because (as I said at the outset) this particular article is merely one small slice of a much larger genealogy. But it is also in Nichols 169 Downloaded from psc.sagepub.com at NORTH CAROLINA STATE UNIV on March 18, 2015 part because Waldron represents a kind of ‘exemplary figure’ here. One of the difficulties in examining contemporary analytic contract philosophy as it relates to indigenous claims is that, overwhelmingly, philosophers working within this tradition do not consider such questions at all. Jeremy Waldron is a major exception to this rule. Since Waldron explicitly locates his work within the tradition descending from Hobbes and Locke, through Kant to Rawls and Nozick, and because Waldron’s influential and prominent role as legal scholar enmeshes his work closely with the juridical apparatus that actually adjudicates indigenous claims in Anglo-settler societies, and finally, because Waldron (a New Zealander of European descent) takes up the question of ‘indigeneity’ so directly and seriously, it seems appropriate to take him as an exemplar of the attempt to reformulate some modified version of analytic contract theory in relation to indigenous peoples.