

MOUNT PELERIN SOCIETY CONFERENCE  
BACKGROUND PAPER FOR PANEL : RECONCILING THE TRADITIONAL WITH THE  
MODERN IN A LIBERAL SOCIETY.

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the case for individual freedom rests chiefly on the recognition of the inevitable ignorance of all of us concerning a great number of factors on which the achievement of our ends and welfare depends.... If there were omniscient men, if we only could know not only all that affects that attainment of our present wishes, but also the future wants and desires, there would be little case for liberty....<sup>1</sup>

There are more things in heaven and earth, Horatio,  
Than are dreamt of in our philosophy.<sup>2</sup>

*Abstract*

Any number of politicians, policy-makers and academics (whether indigenous or non-indigenous) have moralised about doing justice to indigenous peoples. This leads to the misrepresentation of indigenous peoples' political ambitions since it makes assumptions about the rights indigenous peoples might want; indeed it usually proceeds without reference to the views of indigenous peoples. Instead the focus should be upon how the state might convince indigenous peoples, after years of evidence to the contrary, that the state is the best institution to provide them with 'order, protection, safety, trust, and the conditions of cooperation' and this entitles it to their consent. This makes legitimacy the state's problem, and gives indigenous peoples, like any peoples or individuals, the right to voice and self-determination so that they might reconcile themselves and their traditions with the modern state.

*Introduction*

There are myriad ways in which an indigenous political theorist might think through the reconciliation of traditional indigeneity with the modern post-colonial worlds of settler nations such as Canada, Australia, and New Zealand. So I choose to start at the very beginning of politics, with the very first question to be answered: why the state? So suggest that the first question raised by the presence of indigenous peoples in a modern polity, is not about justice between indigenous and non-indigenous, but why

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<sup>1</sup> Friedrich A. von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 29.

<sup>2</sup> W Shakespeare, "The Complete Works. Ed. Stanley Wells and Gary Taylor", *Compact Edition (Oxford: Clarendon Press, 1988)*, Hamlet, Act 1 Scene 5, 699. This proem was the theme for the paper before the earthquake struck Christchurch, but seems all the more suitable now. I mention this also to note that the paper was completed without the aid of a university library.

indigenous peoples need be concerned with obeying the state in the first place. I make this argument against the political moralism of scholars and policy-makers who suggest a particular *a priori* set of ethics should shape a political system, so that it is 'just' for indigenous peoples. Such attempts imagine on behalf of indigenous peoples what rights and resources a *just* state would give those peoples. I suggest that indigenous peoples can very well (self)determine their own political goals and activities to achieve the rights they require from the modern state. The first step in reconciling the traditional and modern, then, would be to find out what goals and activities indigenous peoples actually have, rather than moralising about what they ought to be.<sup>3</sup> In other words, I want to make insist that reconciling the traditional and modern for indigenous peoples, as for other peoples, depends – as always – on individual self-determination or choice, and not the applied morality of a government.

To the members of the Mount Pelerin Society, the justification for allowing the individual to (self)determine their modes of political existence needs only a passing glance. After all, Hayek's insight that "no one can attain a point of Archimedean leverage on and distance from society such that any synoptic knowledge of it is available to him"<sup>4</sup> so that we should not attempt to moralise the political choices of other – indigenous or otherwise – individuals must be obvious to members of a society that was founded to promote such ideals. Hayek's contribution to political economy, amongst others such as Friedman and Popper, allows us to understand why reconciling the modern with the tradition can only be achieved individually, not by governments; that the human condition of the 'difficulty of knowing and the elusiveness of truth'<sup>5</sup> means that our individual wisdoms cannot be captured, by one thought, one idea, one institution, or by one idea of government. Hayek's insight seems oft forgot by those who write, think and make policy about, the political claims of indigenous people." When

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<sup>3</sup> I take this thought from the recent attacks on the dominant 'political moralism' of contemporary political theory, 'where [the theorising] is something like applied morality.' Bernard Williams, *In the Beginning Was the Deed*, ed. Geoffrey Hawthorn (Princeton; NJ: Princeton, 2005), 2. Critics of the moralising approach, such as Williams and A. John Simmons, have identified its method as based in the attempt to derive political legitimacy from an account of individual morality. This may help philosopher kings, but as early as Machiavelli, it became obvious that political legitimacy (as in stability) is about much else besides. A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 140-1; Williams, *In the Beginning*, 9. Both Williams and Raymond Geuss have advocated a return to a more realistic approach on the basis that political moralism creates ideal imaginings about politics which are no guide to political action e.g. 'the often noted absence in Rawls of any theory about how his ideal demands are to be implemented is not a tiny mole that serves as a beauty spot to set off the radiance of the rest of the face, but the epidermal sign of a lethal tumour.' Raymond Geuss, *Philosophy and Real Politics* (Princeton, NJ: Princeton University Press, 2008), 94.

<sup>4</sup> John Gray, "Hayek on Liberty, Rights, and Justice", *Ethics*, vol. 92, no. 1 (1981), 82.

<sup>5</sup> M Kundera, *The Art of the Novel*, trans. Linda Asher (London: Faber and Faber, 1988), 18.

governing indigenous people, modern society reverts to more traditional and less democratic patterns of politics, where elites decide, without consultation, the policy that will apply. That is, could the Northern Territory Emergency Response legislative package possibly survive politically in application to any community but an indigenous one? Could the New Zealand Government's response to the Foreshore and Seabed survive politically if the rights in question were denied to any group other than the indigenous population?

### *Indigenous rights imagined*

Too often scholarly writing and thus practical policy-making<sup>6</sup> tells indigenous peoples in settler colonies how to reconcile the traditional and the modern, rather than allowing those indigenous individuals to choose the best way themselves. There is, 'a forgetting of being' that allows government to forget the vital lesson of which the market liberal resurgence of the 1980's reminded us: the state doesn't automatically know best. This is particularly apt where the state is dealing with a people who may (or may not) choose very different conceptions of the good life, including those individuals who have contact (or wish to make contact) with what they perceive to be traditional ways of life. This brings me to the poem with which I headed this paper, and which I think encapsulates Hayek's reason for his advocacy of freedom.<sup>7</sup>

'There are more things in heaven and earth, Horatio,  
Than are dreamt of in our philosophy.'<sup>8</sup>

I use that quote as a double edged sword to chop the political theory of indigeneity into little pieces. Swinging one way I provide evidence as to how easily and naturally moralising the politics of indigeneity (indigenous-state relations) leads to the

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<sup>6</sup> While in some areas of political theory or political studies there is little movement between academia and policy, in indigenous studies the cross-over is vast. The most obvious international example is James Anaya's status as both almost the most important legal scholar on international indigenous rights, and the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. Domestically, however, the state utilises indigenous academics, or academics writing on indigenous matters constantly. This at least allows indigenous voice to enter the government policy process. However where that voice is dictating what I, if I am to be truly indigenous, should eat, I do somewhat take against the practice: e.g. the conclusions of two respectable north American indigenous academics, that in order to 'reflect a shift to an Indigenous reality from the colonized places we inhabit today in our minds and in our souls' indigenous peoples are exhorted to "Decolonize your Diet – our people must regain the self-sufficient capacity to provide our own food, clothing, shelter and medicines." Taiaiake Alfred and Jeff Corntassel, "Being Indigenous: Resurgences against Contemporary Colonialism", *Government and Opposition*, vol. 40, no. 4 (2005), 612-13.

<sup>7</sup> I realise that my interpretation of Hayek at this point is a touch anachronistic, if I am understood as defending individualism for its own sake (which Hayek grew to repudiate), but the rest of the text will make clear that I am not. See P Légé, "Hayek's Readings of Mill", *Journal of the History of Economic Thought*, vol. 30, no. 02 (2008).

<sup>8</sup> Shakespeare, "The Complete Works", 699.

misrepresentation of indigenous peoples. Cutting the other way, I argue that government has a duty to assist those peoples in their self-determination, where I mean literally the ability of the individual to decide the political goals and actions that are appropriate to that individual.

First then, to demonstrate the misrepresentation of indigenous peoples political ambitions in the prevalent ideas of indigenous rights in the academy and government. The types of indigenous rights I wish to critique are those generated by an appeal to the injustice indigenous peoples have suffered, where that injustice is judged by *a priori* moral standards of a particular scholar or theory of ethics. An example of such political moralism is the view that given the enormous inequalities in power between indigenous and non-indigenous peoples, research on indigenous subjects must be done only by indigenous peoples. In order to take such a view, one would have to make assumptions about a number of other concepts, such as sovereignty, having a legal system capable of enforcing such rights (unless they are to be entirely utopic), and a state that wishes to do justice to indigenous peoples. Most importantly, one would think, such a claim should have evidence of the political desires of indigenous peoples themselves. Yet, even among indigenous scholars themselves, there is little to no evidence of any social science, or even anecdotes about the concrete political desires of individual indigenous peoples or communities. Instead, the views of indigenous peoples are deemed to be synonymous with the principles of the particular theory used to frame claims made on behalf of indigenous peoples.<sup>9</sup>

The paucity of indigenous views in the scholarly literature turns that literature from an attempt at doing justice, into an sanctimonious little pity party staged in the academy for any number of peoples who have no need of pity, and much need for freedom – particularly in some parts of Australia - from government interventions based on influential scholarly political philosophies. This seems particularly damaging since there are concrete problems serious enough without imagining more moralistic utopias: attempting to remove health disparities so that mortality was reduced would give Maori 10 years on average longer to live, and Indigenous Australians 20 years. Further the paucity of empirical study has real effects even on the institutions of law; the incoherent and incontinent pleading of the Declaration of the Rights of Indigenous Peoples is a

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<sup>9</sup> See for instance the seminal text in indigenous research; LT Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999). For a sensitive and deeply wise, but nevertheless devastating, dismissal of the political ambitions of Smith's book see S Hope, "Self-Determination and Cultural Difference", *Political Science*, vol. 58, no. 1 (2006).

massive failure, since the controversy surrounding its adoption suggests it has almost no chance of providing a basis for legally binding rights.<sup>10</sup>

*The misrepresentation of indigenous peoples in political theory*

For the purposes of illustrating the problems in the political theory on indigenous claims, given space constraints, I have chosen the arguments of two important and influential scholars; Jeremy Waldron and James Tully. These authors are chosen because they both accept that historical injustice was done, accept that it suggests rights of some kind ought to be allocated, but are at either end of the intellectual spectrum about the content of those rights. Waldron discards the import of historical injustice in favour of ensuring equality of citizens (indigenous or non-indigenous) while Tully's argument uses the historical injustice to generate self-determination rights of indigenous people. Typically, however, *they both get through their arguments without reference to a non-academic contemporary indigenous voice.*

It should be noted here, as I can get into trouble otherwise, that I do *whakapapa* (have an indigenous family history) although I hope to convey to the reader that my argument intends to judge political theory by its own standards, not by the terribly constricting standards of identity politics. Indeed, I think part of the problem here *is* identity politics, because it necessarily makes indigenous identity central to the politics indigenous people encounter. This is unhelpful since it is surely the political authorities and the actions of those authorities, not indigenous identities, that must prove their legitimacy to all members of a state, since it is the authorities that control the monopoly of force.

To return to the task at hand, I will first critique Jeremy Waldron's conclusion that indigenous peoples' entitlement to rights is no more than all other citizens, since the complexities of restoring the property rights renders those rights void. Waldron starts his inquiry in this area with an intention to discover how one should examine historical grievances with a view to doing 'justice to the legitimate grievances and claims of individuals in this context [of historic dispossession].'<sup>11</sup> If those individuals were alive, then there could be some direct restitution and compensation. His suggestion, since they

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<sup>10</sup> See the statements of Australia, Canada, New Zealand and the United States justifying their (initial) refusal to sign the Declaration. Of course, the declaration has great meaning and moral significance, but it many hoped that it would have substantive legal impact as well. United Nations, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President," in *General Assembly 61st Session. Plenary 107th & 108th Meetings (AM & PM), 13 September 2007* (New York: Department of Public Information, News and Media Division, 2007).

<sup>11</sup> Jeremy Waldron, "Redressing Historic Injustice", *University of Toronto Law Journal*, vol. 52, no. 1 (2002), 143.

are long dead, is that 'the best hope of reparation is to make some sort of adjustment in the present circumstances of those descended from the persons who suffered the injustice...'<sup>12</sup> Without examining quite why, he then assumes that reparations those descendants are claiming, should 'transform the present so that it matches as closely as possibly the way things would be now if the injustice had not occurred'.<sup>13</sup> After close philosophical investigation, Waldron decides that that the philosophical problems around such rectifications are too complicated. For instance, he argues it is impossible to sustain a link between the property and the victim if the property is altered, since justice would then be based on a 'best guess' at what rectification should be and that would be an odd foundation for property rights. Furthermore, removing those now occupying the land on the basis of illegal activity 100 years earlier would create another injustice. In his own idiom, changed circumstances mean that the need to rectify the historical injustice of indigenous people losing their property rights is 'superseded' by the 'contemporary needs, claims, and deserts' of society today.<sup>14</sup>

In a strict philosophical sense Waldron's argument against counterfactual justice is correct; the existential rights of the dead must give way to those living.<sup>15</sup> But that is not my immediate concern. Rather I want to suggest that no state process of indigenous property rectification (in Australia, Canada or New Zealand) is attempting to negotiate anything like his sense of rectification, nor does Waldron provide any evidence that indigenous peoples feel themselves entitled to full rectification of their property rights. Yet Waldron by implication and analogy suggests that indigenous peoples' (and particularly Maori) claims rely on the counterfactual speculation necessary for full rectification of property rights. Since one cannot base property rights on counterfactual speculation, Waldron argues, indigenous historic injustice claims fail to provide contemporary rights.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid., 144.

<sup>14</sup> Jeremy Waldron, "Settlement, Return, and the Supersession Thesis", *Theoretical Inquiries in Law*, vol. 5, no. 2 (2004), 237-68; Waldron, "Redressing Historic Injustice", 135-60; Jeremy Waldron, "Historic Injustice: Its Remembrance and Supersession," in *Justice, Ethics, and New Zealand*, ed. Graham Oddie and Roy W. Perrett (Auckland: Oxford University Press, 1992), 139-70; Jeremy Waldron, "Superseding Historic Injustice", *Ethics*, vol. 103, no. 4 (1992), 4-28.

<sup>15</sup> Ibid., 240. The philosophical argument against attempting rectification based on counterfactuals is reasonably derivative. See Lawrence Davis, "Comments on Nozick's Entitlement Theory", *The Journal of Philosophy*, vol. 73, no. 21 (1976). and for a very clear examination of Waldron's argument see A. John Simmons, "Historical Rights and Fair Shares", *Law and Philosophy*, vol. 14, no. 2 (1995). This debate is more fully surveyed in Chapter Three 'Property in the contemporary political philosophy of justice' of Lindsey Te Ata o Tu MacDonald, "The Political Philosophy of Property Rights" (Ph D, University of Canterbury, 2009).

It is always hard to prove the negative, but I certainly have never seen an indigenous claim to full rectification, and have often been surprised by indigenous leaders, pulling their punches so to speak, in their claims.<sup>16</sup> It is a matter of descriptive fact that indigenous peoples, whose claims are local, specific and made in the language of Western political theory, do not make a claims for the rectification of all property they once owned. This realism on the part of indigenous peoples may need explanation by scholars, but Waldron's suggestion that they should abandon all historical injustice claims ever in the hope of distributive justice seems far-fetched. Indeed, Waldron's suggestion seems positively horrid given both the history of social policy practice toward indigenous peoples in settler societies, and those societies continuing inability to reconcile even basic health disparities between indigenous and non-indigenous peoples. Battling windmills, and taking many Sancho's with him, Waldron's supersession thesis speaks to an imaginary claim of an all too real people, who have been caricatured too much already.

At the other end of the spectrum of the political theory of indigenous rights are the arguments of James Tully. Tully argues forcefully for special and wide-ranging rights for indigenous peoples on the basis of historic injustice. He claims that 'the struggle for recognition as self-governing first nations is not only a struggle to right an injustice... it is also a struggle to reclaim their traditional lands to practise their customary forms of land use.'<sup>17</sup> Tully's thesis is that Locke's theories of government and property were used as part of a contestation over the status of Amerindian property rights and political status by litigants and polemicists to advance colonial claims, and that these same conceptions continue today to drive the perpetuation of the injustice today.<sup>18</sup> First, Locke gave

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<sup>16</sup> See for example, the pulling of the punch in E. T. Durie, "Waitangi: Justice and Reconciliation" (paper presented at the School of Aboriginal and Islander Administration, University of South Australia: "Second David Unaipon Lecture", Adelaide, 10 October 1991).. International or comparative surveys of indigenous claims include Roger C. A. Maaka and Augie Fleras, *The Politics of Indigeneity : Challenging the State in Canada and Aotearoa New Zealand* (Dunedin: University of Otago Press, 2005); Miguel Alfonso Martinez, "Discrimination against Indigenous Peoples: Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations," (United Nation Economic and Social Council: Commission on Human Rights, 1995); Ronald Niezen, *The Origins of Indigenism : Human Rights and the Politics of Identity* (Berkeley: University of California Press, 2003).. Information on indigenous peoples involved in ethnic conflict has been collected as part of the Minorities At Risk Dataset project at The Centre for International Development and Conflict Management at the University of Maryland (see <http://www.cidcm.umd.edu/mar/>).

<sup>17</sup> James Tully, *An Approach to Political Philosophy : Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 138.

<sup>18</sup> James Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground," in *Property Rights*, ed. Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul (Cambridge: Cambridge University Press, 1994), 153-80; Tully, *An Approach to Political Philosophy*. Extensions of this research can be found in Barbara Arneil, *John Locke and America : The Defence of English Colonialism* (Oxford: Clarendon Press, 1996); Vicki Hsueh, "Cultivating and Challenging the Common: Lockean Property, Indigenous Traditionalisms, and the Problem of Exclusion", *Contemporary Political Theory*, vol. 5 (2006), 193-214. In this section I have started with the original articles in which Tully discussed Locke and the colonisation of what is now know as

sophisticated expression to the idea that excluded Amerindian government did not qualify as a 'legitimate form of political society.' Second, Locke's property theory justified the claim that Amerindian 'customary land use' is 'not a legitimate type of property.'<sup>19</sup> This seems straightforward, even if one could remark that Locke's target for the *Two Treatises* was not the Permanent Forum for Indigenous Peoples at the UN, but the peculiar circumstances of English monarchical succession in seventeenth century.<sup>20</sup> Yet, Tully goes further and makes that claim that these are matters of injustice to be rectified today, and that the rectification means the reassertion of the particular rights of indigenous self-determination (self governance) that were removed by colonial governments.

Reviewing similar claims about Australian history, an Australian scholar has noted that 'the critical charge comes from the counterfactual claim that a great deal of suffering would have been avoided if only the colonists had acted more adroitly.'<sup>21</sup> Indeed, Tully does seem to suggest a great deal of wickedness would have been avoided (and would be avoided in the future) had the colonists followed the moral guidance that 'can be theoretically *reconstructed* and defended' from the 'classic enunciation of the Aboriginal and common-law system' provided by the 'Royal Proclamation, and Chief Justice Marshall's interpretation of it' in the 1820s and 30s.<sup>22</sup> Put more bluntly, Tully argues that if the colonists had our moral colour and guidance (since as he notes, the

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North America, rather than his later summary of those arguments in James Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity, The John Robert Seeley Lectures* (Cambridge ; New York: Cambridge University Press, 1995), see especially 70-78. He concludes the relevant section of that later book by claiming that 'Locke's account covers over the real history of the interaction of European imperialism and Aboriginal resistance. The invasion of America, usurpation of Aboriginal nations, theft of the continent, imposition of European economic and political systems...' Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*, 78. While his words hardly do justice to the events, amongst other issues one could raise as a political theorist, one might be tempted to ask how could Locke know about these awful events? The rhetorical charge is more pressing than one might guess at first glance; it is a metaphor that invokes holocaust deniers. Beyond the rhetoric there is a more important and scholarly question to pursue about the representation of indigenous peoples and politics in Tully's text: are we really meant to assume that the inability of indigenous political authorities to protect their peoples' property is a historical fact usefully thought about through the lenses of 21<sup>st</sup> century constitutionalism? Surely the point is to consider what constitutionalism best meets the needs of today, given such historical injustice. It is an especially strange claim for Tully to make since his constructivist interpretation of Locke discards historic entitlement to property rights on the basis that Locke cannot have been as absurd as to think that people with no property would accept a government that protects those with property. Thus, Tully knows that historical arguments (since he jettisons them in his interpretation of Locke), are fertile ground for conflict, not constitutionalism.

<sup>19</sup> Tully, *An Approach to Political Philosophy*, 139.

<sup>20</sup> Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground.," Tully, 1993 #303}

<sup>21</sup> Paul Muldoon, "Thinking Responsibility Differently: Reconciliation and the Tragedy of Colonization", *Journal of Intercultural Studies*, vol. 26, no. 3 (2005), 244. Muldoon cites as a source for this idea Tim Rouse, "Historians and the Humanitarian Critique of Australia's Colonisation", *The Australian Journal of Anthropology*, vol. 14, no. 2 (2003), 253-58.

<sup>22</sup> Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground," 173.



morality he recommends is a reconstruction of past court decisions) they would have not treated indigenous peoples so badly. On the basis of the recent legal historiographical work, there is much that could be said about Tully's reconstruction of North American law. Not least, as McHugh puts it, that 'Men, not law, caused the suffering of aboriginal peoples.'<sup>23</sup> But the point I wish to highlight, is that in seeking guidance as to indigenous political aspirations, Tully has turned not to contemporary aboriginal voices, but to historic legal judgements in American courts.

On the basis of his reading of the court judgements he has surveyed Tully argues that if Aboriginal peoples were accepted by the judges as,

self-governing nations with ownership of their territories; then it follows from the central theory of the *Two Treatises* itself that they have the right to defend themselves and their property, with force if necessary.<sup>24</sup>

On first reading, this seems a reasonable proposition. It is, after all, the assumption upon which is founded the non-interference doctrine of the modern international state system. Yet, if political theory is to take seriously the agency of indigenous peoples, such that they are seen both historically and today as self-governing, sovereign nations as Tully suggests, his frame is woefully inadequate to the task of justifying both the claim of historical injustice, and the claim that rights of self-government should be restored.<sup>25</sup>

Using his close textual analysis of colonist rhetoric Locke, Tully can explicate the political actions of some colonial political actors. Yet he only glances at indigenous actions, neither explaining them, nor assigning them any weight. Indeed, upon reflection the violence done to the agency of indigenous peoples in Tully's text is quite extraordinary. It is as if we are supposed to imagine that the colonial empire simply subjugated all indigenous people everywhere, with no trouble, and without any interaction? Lyndsay Head discussing similar presentist histories in New Zealand

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<sup>23</sup> Commenting on the shift from fluidity of common law to a positivistic approach in law McHugh notes 'abject fate of aboriginal peoples would have occurred irrespective of the change in the method and language of legal practice and thought... unleashed economic growth in two mighty empires, British and American, and its unquenchable thirst for land justified laws explained by a motley, fluid and far from coherent or consistent cobble of intellectualizing... Men, not law, caused the suffering of aboriginal peoples.' P. G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 31-32.

<sup>24</sup> Tully, *An Approach to Political Philosophy*, 175.

<sup>25</sup> For while the frame demonstrates Locke's use in justifying some colonial actions, it does not explain why the principles that Tully finds in the Royal Proclamation and the Marshall jurisprudence were not followed, since both Marshall and the Royal Proclamation, as he wants to show, owe something to the consent based ideas of Locke. This is notwithstanding the violence Tully does to idea of indigenous peoples as agents in their own right: while he gives them much normative sovereignty, he merely nods via the 'great peace' to their actual intentions and agency in a complex history of 300 years.

suggests that the view that during colonial times indigenous peoples merely acted in traditional terms ‘silences Maori history at the point at which it in fact began to speak with a new voice.’<sup>26</sup> To put it more directly: Tully suggests that aboriginal society was sovereign, with its own system of property rights. Under a Lockean theory of consent, the failure of that indigenous government to protect that system of property rights meant that the government had failed, and its people were without legitimate governance. That is, the very moralising theory Tully thinks can justify indigenous self-government, actually suggests that indigenous political authorities lost their legitimacy, because they failed to protect their subjects property rights against others’ arbitrary takings.

A failure of indigenous government is clearly not what Tully had in mind in making his argument about indigenous sovereignty, but that is where his argument leads. His argument is led there because his moralising about indigenous peoples takes little to no account of their actual history, historical statements or political claims today: not broad based statements about indigenous rights, such as in the United Nations declaration, but about what self-determination might mean to individuals who are indigenous.

*A response to the misrepresentations of political theory*

What is the response to such misrepresentations? It would be easy at this point to jump to fashionable politics of recognition.<sup>27</sup> Yet, for contemporary problems, at least in the places with which I am familiar, recognition is the start, not the end of racism. And while I might whakapapa, I would like to presume that my indigenous identity is unimportant to my individual citizenship, and my right to self-determine.

If recognition, and political moralism are not suitable for the production of indigenous rights, what then? As I suggested at the outset, I think the answer is to ask about the very purpose of politics for indigenous peoples. The great minimal state theorist of the twentieth century, Robert Nozick, suggested that answering this question for all peoples, ‘involves showing ... [the state] to be prudentially rational, morally acceptable or both’.<sup>28</sup> In Bernard Williams’ writing, Nozick’s question is ‘the “first” political question’ of providing ‘order, protection, safety, trust, and the conditions of

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<sup>26</sup> Lyndsay Head, "The Pursuit of Modernity in Maori Society," in *Histories, Power and Loss : Uses of the Past : A New Zealand Commentary*, ed. Andrew Sharp and Paul G. McHugh (Wellington, N.Z.: Bridget Williams Books, 2001), 102.

<sup>27</sup> See Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1994); James Tully, "Public Philosophy in a New Key. Volume 1, Democracy and Civic Freedom," (Cambridge: Cambridge University Press, 2008); Tully, *Strange Multiplicity : Constitutionalism in an Age of Diversity*.

<sup>28</sup> Simmons, *Justification and Legitimacy*, 123.

cooperation'.<sup>29</sup> Only once the state can be justified to individuals on this basis, as Williams' pointed out, can other political questions be raised, such as what should be the moral colour - the particular morality - of a state. Justifying political authority in this sense provides compelling reasons why it is better for citizens to live within the protection of a political authority than to live in an anarchical society. This places some emphasis on the authority not to create problems for its citizens that outweigh their fears of anarchy, so it must continually justify its coercive power. On this view all one needs to ask is whether the modern state answers, or is capable of answering, that first political question for indigenous peoples; is the acquiescing to state morally rational, and prudential for indigenous peoples? Or in Williams' terms does the state provide indigenous peoples with order, protection, safety, trust, and the conditions of cooperation. Before directly asking that question of indigenous peoples themselves, it is pointless to act as philosopher kings and moralise about how our society should treat indigenous peoples: they are quite capable of moralising themselves. Instead, we should note the saurian truth of Hamlet's comment to Horatio, and recognise that it is not the task of political theory to characterise the cultures of indigenous peoples.<sup>30</sup>

*Allowing the subject to determine their own politics*

Political theory, and thus government policy, should not try to encompass a culture, let alone the multiple cultures of indigenous people. Instead, it is the indigenous peoples who encompass their culture and their internal politics, and the best that a state might do is suggest why its institutions answer the political aspirations of indigenous peoples. This would of course involve asking what those aspirations might be. Kirsty Gover, one of the few scholars who has done empirical work<sup>31</sup> in this area – analysing over 700 indigenous constitutions to see how indigenous people actually constitute themselves and their governance entities outside of the rhetorical demands of claims-making – sees the creation of indigenous peoples' institutions within the state as the hardest of all problems for the government to solve. States tend to insist on a defined indigenous institution, but the state's insistence on that product creates such massive

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<sup>29</sup> Williams, *In the Beginning*, 3.

<sup>30</sup> As some scholars recognised years ago: C Kukathas, "Liberalism and Multiculturalism: The Politics of Indifference", *Political Theory*, vol. 26, no. 5 (1998); C Kukathas, "Are There Any Cultural Rights?", *Political Theory*, vol. 20, no. 1 (1992).

<sup>31</sup> Of course many scholars use indigenous court claims to be empirical work. Given the distortions necessary for claims by indigenous peoples to enter the courts, this seems rather like journalists claiming to have sources while using press releases as the basis for their work.

distortionary incentives, that the very people the government is attempting to assist to achieve autonomy, lose their self-determination over their group boundaries.<sup>32</sup>

*Conclusion: reconciliation through the provision of a legitimate state.*

Given the difficulty of the states' relationships with indigenous peoples, one might be tempted to suggest that the government should get out of the business altogether of indigenous affairs. Although this would not necessarily be counterproductive for indigenous peoples since they would be left unmoralised, the state itself would continue to question its own legitimacy; at least in this market-liberal moment. For the legitimacy of the modern settler state is tied uniquely and precisely to the existence and status of indigenous peoples. If a state is justified by its defence of property rights, then its legitimacy depends upon the upholding of property rights. Indigenous claims for ancient property rights on this understanding are not of fundamental concern because they raise the question of 'is your society fair?', they are fundamental challenges for the modern state because they raise the question for indigenous groups of 'why should we obey?'

The point is more explicit the other way around. Modern liberal governments and societies tend to believe that; people own themselves and their labour, and that a Government's rule is to set property rules, administer the rule of law, and allow spontaneous orders (or markets) to luxuriate in the freedom that they deserve as a result of their functionality. Amongst other principles to which this ideology must adhere, one is the idea, noted earlier as Locke's creation, that the reason for government is that it protects an individual's property rights against arbitrary taking.<sup>33</sup> Or to put it more formally – if a citizen's property rights are not protected, the citizen is no longer under a political obligation, but instead stateless, ungoverned and unprotected. A state or political authority that is unable to protect its citizens property rights is illegitimate. As Locke taught us, our consent to governance is our safeguard against tyranny, and for such safeguards, based as they are on political equality – the equality of political citizenship – we are prepared to sacrifice economic equality. The twentieth century

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<sup>32</sup> See, for example the disputes over the Fisheries Settlement in New Zealand. Kirsty Gover, *Tribal Constitutionalism: States, tribes and Membership Governance* (Forthcoming, 2010, Oxford University Press). Some of the arguments of the book are presented in K Gover, "Comparative Tribal Constitutionalism: Membership Governance in Australia, Canada, New Zealand, and the United States", *Law & Social Inquiry*, vol. 35, no. 3 (2010).

<sup>33</sup> Which is why such an ideology is antagonistic to the welfare state, since taxation (most famously in Nozick's version of this libertarianism) is arbitrary taking. Cf. Robert Nozick, *Anarchy, State, and Utopia* (Oxford: B. Blackwell, 1974); Jeffrey Paul, *Reading Nozick: Essays on Anarchy, State, and Utopia, Philosophy and Society* (Totowa, N.J.: Rowman & Littlefield, 1981).

proved awfully and tragically (as Hayek had prophesised in the *Road to Serfdom*) that this liberal paradox was correct: equal political rights (to freedom) mean we cannot enforce economic equality. This should be remembered by those who moralise the politics of indigeneity, in the hope of doing justice to indigenous peoples.<sup>34</sup>

This bears repeating, to believe in the classical liberal idea of the state necessitates resolving indigenous property, because otherwise, there is no reason for indigenous peoples to consent to the modern state, since up to this point, the state has not protected indigenous property rights. Without the consent of indigenous peoples, without that legitimacy, without a sure foundation on its property claims, there is every reason for indigenous individuals to consider the market-liberal state a raider, a conquistador, and to assume that the state will continue to dictate to its non-consenting citizens how they will be governed; forcing, if you like, them to be free, with all the moral horror that such a phrase can suggest.

#### *Reconciliation through indigenous self-determination*

The settler states of Australia, of New Zealand, of the US or Canada, have a sizable population who have no necessary reason to consent to being governed, and from whom the state must seek that consent before they can possibly be legitimate states. Thus the difficulty of reconciling the traditional and the modern, for indigenous government relations, is not based upon differences in culture or worldview or even history, but differences in political obligation. On the upside of this ferocious problem there is an obvious path to reconciliation, at least at the levels I have already addressed. The settler state needs to put in place institutions which are able to answer concerns of indigenous peoples by ensuring equality before the law, and self-determination of indigenous institutions (which, in fact, is all the reconciliation we should ever expect from anybody in politics). It will be difficult for the state to ameliorate indigenous concerns over their political status given the historical and ongoing racialised treatment of indigenous peoples honoured more in the breach that drove the processes of dispossession and exclusion from the polity. But at least now we are clear that legitimacy

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<sup>34</sup> Istvan Hont, *Jealousy of Trade : International Competition and the Nation State in Historical Perspective* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005), 92. For Hont, Locke set the stage for Smith's 'paradox of commercial society; that economic inequality was a paradox because it drove a wedge between the traditional egalitarian intuitions of Western moral thought and the guiding assumptions of modern political economy. The success of commercial society was counterintuitive to those who expected that political and economic equality must somehow proceed hand in hand. The new idiom suggested, instead, that legal and political equality could coexist with economic inequality without causing endemic instability in modern Western state. "Liberalism", as this new political form came to be called... could even be defined by the coexistence of political and legal equality and significant inequality in the very same polity.' Hont, *Jealousy of Trade*, 92.

is the state's problem, and indigenous peoples, like any peoples, or individuals, have the right to voice and self-determination in order that, traditional or not, they might reconcile themselves with the modern state.

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