Title: Be honest, apologize, and give me my land back: how settler colonial states should reconcile with their indigenous peoples

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Ahe’ee
Abstract:

In order for a state to be legitimate vis-à-vis its citizens, those citizens must be reasonably able to, minimally, trust that it is both able and willing to create laws that are morally just. For liberal theories of legitimacy, generally speaking, just laws are laws that respect the individual rights of persons. The settler colonial states of Australia and the United States have throughout their history failed to respect the rights of indigenous peoples qua individuals. There exists, then, a large amount of evidence suggesting that it would be reasonable for those peoples to not trusting those states. And, in so far as it is reasonable for indigenous peoples of those states to not trust that their respective states are able and willing to create just laws for them, those states are illegitimate.

Given both the size, severity, and consistency of the wrongs committed against indigenous peoples by their respective settler colonial states it is not enough for those states to simply cease in their wrongdoing. The states in question must engage in a deliberate effort to generate the trust necessary for them to become legitimate. Political reconciliation, aimed at addressing the unique historical wrongs committed against indigenous peoples, can begin to generate that trust. However, political reconciliation alone will be insufficient. Given the substantial amount of evidence against the settler colonial states, we would be wrong in assuming a priori following reconciliation that they would be capable of making just laws for their respective indigenous citizens or willing to make such laws.

Moreover, reconciliation does not necessarily address the wrong of failing to respect indigenous sovereignty. In order for that wrong to be addressed, indigenous peoples must be able to collectively secede. By choosing not to secede following reconciliation, an indigenous people would signal that they do trust their settler colonial state to make just laws for them, and to that extent that it is legitimate.
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Introduction

The settler colonial states of Australia and the United States are illegitimate vis-à-vis their Indigenous citizens. The only way for them to become legitimate requires engaging in a process of political reconciliation with their indigenous citizens, and permitting secession by those citizens.

The research underlying this thesis was an attempt to grapple with the following question: why should indigenous peoples accept or even acknowledge moral obligations to the authority of states that have, throughout the entirety of their relationship, violently harmed them? My short answer to that question is: as things stand, they shouldn’t. That answer is not one that I have come to idly. It has come about through the course of my research into how to improve the conditions for indigenous peoples within the settler colonial states of Australia and the United States. And, ultimately, like most answers its usefulness comes in the form of the follow-up questions: what does it mean that those states are illegitimate? And, what would it take for those states become legitimate?

I began my research with the intention of finding ways to improve the situation of indigenous peoples within the settler colonial states of Australia and the US. Within both states outcomes for indigenous peoples are, on average, the worst among any demographic. Indigenous peoples, on average, suffer from rates of incarceration, youth suicide, drug abuse, domestic violence, alcoholism, unemployment, and so on. That bed is not one that indigenous peoples have made for themselves. Through extremely
violent and generally despicable actions, the states in question ought to shoulder much, if not all of the blame.

States or even individual governments screw over lots of peoples, though. Why should we care about the situation of indigenous peoples when much larger demographics are getting the shaft every day? In Australia, for example, a recent Senate Committee report, *Commonwealth Contribution to Former Forced Adoption Policies and Practices*¹, acknowledged the governments fault in forcibly removing children from single mothers between the late 1940s and early 1980s. During roughly the same time period in the US (1932-1972), the US Public Health Service conducted the following study: Tuskegee Study of Untreated Syphilis in the Negro Male. The study, as the name suggests, informed African-American males that they would be receiving treatment for syphilis, when, in fact, they were not being treated at all.² And today, through centuries of government endorsed racism and chauvinism, virtually all non-white or non-males in the US earn less than their white male counterparts for the same jobs with similar education and work histories. If the question above about the existence of moral obligations to the authority of those states is answered negatively on account of a pattern of wrongdoing, then it would seem that lots of peoples can answer similarly. In that case, what makes indigenous peoples worth talking about?

What we need from an answer to that question, clearly, is some feature that importantly distinguishes the claims that indigenous peoples have. There is a limited pool of resources for addressing the claims of wrongdoing against the state (including, but not limited to, public attention and public support). In so far as the everyday citizen is concerned, the claims that indigenous peoples have are no different than the claims that any other minority group has.

One way to make the distinction is by degree. For example, an indigenous person might say to a member of another minority group, “Yeah, what happened to you was terrible, but what happened to me was so much worse!” One worry with a distinction of harms by degree, though, is that it can be very difficult to weigh the harms. There are roughly 2.5 million Native American citizens in the US. These citizens are the descendants of victims (and sometimes the victims themselves) of

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forced relocation, forced child removal policies, land theft, and so on. Now, consider the case of African-Americans, who number about 38 million today, many of whom are the descendants of victims of slavery, forced segregation, and a host of other wrongs. In both cases, the actions of the state against their ancestors, recent relatives, and selves has dramatically affected their current place in society, but how should we weigh their claims against each other? Are the things that happened to Native Americans objectively worse than the things that have happened to African-Americans? How much should it matter that there are today more descendants from victimized African Americans than Native Americans? Or that there are currently more African American victims today? I don’t know. Ideally, states would address all of the claims from all of the people. The sad fact of the matter, though, is that these claims must inevitably compete in the political sphere; the public can only care so much about issues they see as racially motivated. That is not say that these groups should not nor that they do not work together—they should and they certainly do.

Perhaps, then, we should just lump their claims together? In both cases, some resolution is needed to address the historical injustices that both minority groups have suffered. At the very least, both groups have claims against being treated wrongly on the basis of their race. By lumping the claims together, though, we are denying that there is any distinguishing feature to the claims that indigenous peoples have. That is all well and good if their claims are not importantly distinguishable than the claims of other wronged minority groups within their state. However, that is not the case.

One way to distinguish claims of indigenous peoples is looking at what is sought by addressing injustices. For African Americans and other victimized minority groups, what is often sought is equality taken as equal opportunities and equal treatment compared to other citizens. For indigenous peoples, it is a return to sovereignty, or right to self-govern over their lands and people.

Indigenous Australians have never ceded sovereignty to the Commonwealth. Instead, the Commonwealth merely asserted its own sovereignty over them. In the US, treaties made between the US and Native American tribes did transfer some aspects of governance from tribes to the US. However, the ultimate claim of sovereignty by tribes was never ceded. That is what importantly distinguishes the claims that the indigenous peoples of Australia and the US have against their respective settler colonial states; equality is not enough, indigenous peoples ought to be respected as sovereigns.
Distinguishing the claims of indigenous peoples in this way can help us understand why previous attempts at addressing indigenous claims against the state have failed. In the United States, Congress passed the Indian Civil Rights Act (1968) guaranteeing Native Americans most of the same rights afforded to other citizens under the Bill of Rights. In Australia, there have been several attempts to address inequalities: the 1962 amendment to the Commonwealth Electoral Act federally enfranchising Indigenous Australians and 1967 constitutional referendum allowing them to be counted in the national census, the Bringing Them Home Report and the subsequent national apology by Prime Minister Kevin Rudd in response. These are important moments and should be celebrated as instances of progress made in addressing indigenous rights. None of them, however, address the claim of indigenous sovereignty; instead, they seek to incorporate indigenous peoples into the larger state.

To the credit of those states, however, some progress has been made in that area of indigenous sovereignty. In 1975 the US Congress passed the Indian Self-determination and Education Act, which gave tribes, among other things, greater control over how to redistribute funds from the government; and in 1992, the Australian High Court in Mabo v Queensland acknowledged the existence of Native Title as distinct and prior to the Commonwealth, paving the way for Indigenous Australians to reclaim and protect their traditional lands. Unfortunately, the US Congress, at the same time, drastically reduced federal funding for tribes by nearly half, a trend that has continued to day. The effect of which made it more difficult for tribes to take advantage of self-determination policies. And, in Australia, subsequent decisions made by the government regarding Native Title have made it difficult for Indigenous Australians to make effective use of the landmark decision.

Taking the distinction between sovereignty and equality seriously, a number of interesting questions arise for political philosophers. Namely the question of how settler colonial states can become legitimate over indigenous peoples? Many of the answers to why a state is legitimate can be nipped and tucked to fit various groups. When it comes to indigenous peoples in these settler colonial states, however, that doesn’t work so well. How do you claim moral obligations from a group that still retains sovereignty? What should we do, then, in these cases?

As the title of this thesis suggests, being honest, apologizing, and giving indigenous peoples their land back would go a long way towards resolving the issue of legitimacy. It would not go all of the way, though. For it to go all the way, I believe
indigenous sovereignty needs to be recognized; in other words, indigenous peoples ought to be able to secede and form fully sovereign states in order to be able to meaningfully consent and thereby confer legitimacy on the settler colonial state. None of that is to say that those states should cease in their attempts to improve the civil rights of indigenous citizens nor that they are off the hook for addressing the historical injustices they have committed. It is to say that what is needed is a process which attends to past injustices while also giving indigenous peoples a choice about their future. In other words, the settler colonial states ought to try and reconcile and the indigenous peoples ought to be able to decide whether they want to secede.

That answer, of course, is very extreme. It is unlikely to find practical support amongst most indigenous peoples, let alone the settler colonial states and their non-indigenous citizens. And, in general, it’s usually a bad strategy to jump to the most extreme course of action, which secession most certainly is. Are there options short of secession that would resolve the issue of legitimacy?

My first pass at the question of legitimacy involved looking into the role that deliberation can play in changing social norms. That research was guided by the assumption that non-indigenous citizens in those states held false and damaging norms regarding both indigenous peoples and indigenous cultures. I thought if the larger populations in those states recognized both that indigenous peoples are capable of being self-determining–just like everyone else–and that indigenous cultures are valuable for contemporary societies, that eventually less paternalistic, and harmful, policies would follow. And, after a while, those states would come to be legitimate for their indigenous citizens.3

The attitudes that individuals in these societies hold is important: reconciliation, as I will discuss in later chapters, will fail unless those attitudes change. And, regardless of any potential instrumental effects on policy, addressing bad norms is a good thing. That said, I doubt changing peoples’ attitudes would result in changing public policy.

People have problems of their own. As horrible as these governments have historically treated (and currently treat) their respective indigenous populations, they

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3 This is distinct from the take that Duncan Ivison, *Postcolonial Liberalism*, (Oxford: Oxford University Press, 2002) provides. He is primarily interested in whether deliberation over policies with policymakers could eventually lead to a legitimate state. I was interested in whether engaging in deliberation with citizens could lead to policy changes.
have a similar history of mistreating lots of people. Simply changing the attitudes most citizens have towards indigenous peoples and cultures would certainly elevate the discourse on indigenous issues, but that would not change the fact that those issues would have to compete with issues more salient to the general populations of those countries. And, given the relatively small size of indigenous populations within those states (roughly 2%), that competition isn’t really much of a competition. I abandoned this route, then, in favor of the strategy of lobbying politicians and making deliberate yet subtle changes to the law.4

Australia, more so than the US, has recently been enamored with ruthlessly paternalistic policies. In the last decade alone, the Australian government has launched a full-scale military intervention into the Northern Territory on the premise of eradicating high rates of child sexual assault and abuse through, among other mechanisms, removing children from their parent’s custody.5 A worthy cause if there ever was one, for sure. Unfortunately, studies conducted both prior to6 and after7 the intervention found that very little was effectively done to improve child welfare, and that the levels of sexual assault and abuse may have been drastically overblown.8

Also, in the last decade, Australia has declared a policy of “Closing the Gap” between Indigenous Australian and non-Indigenous Australian health and education outcomes. Australia identified seven areas in which the gap needed closing: life expectancy, child mortality, employment, reading and writing, school attendance, early education, and year 12 attainment.9 Some of these goals were to be met by 2013 and others not until 2030. As of 2017, only two of the goals is on track to be met (year 12 attainment and infant mortality rate).10

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4 In other words, I adopted Dale Turner’s strategy from, Dale Turner, This is not a peace pipe: toward a critical indigenous philosophy, (Toronto: University of Toronto Press, 2006).
6 Ibid. See, for example, Summary Point (29) regarding the compulsory acquisition of property held by Indigenous Australians.
8 Ampe Akelynernenane and Meke Mekarle, “Little Children are Sacred Report,” Northern Territory Board of Inquiry Into the Protection of Aboriginal Children from Sexual Abuse, Department of the Chief Minister, (2007).
In both cases, mentioned above, Australia has failed to act on, or even consider, recommendations on how to address these issues by indigenous leaders. That is a disturbing fact; and one that gives me pause to suggest the strategy of lobbying directly at politicians. The other potential candidate, winning legal battles, is similarly frustrating, as illustrated by the ultimate outcome of the McArthur River Mine’s proposal to expand to an open-cut mine. In *Lansen & Ors v NT Minister for Mines and Energy & Ors*, the Northern Territory Supreme Court heard arguments for and against expanding the McArthur River Mine to an open-cut mine. Those against argued that doing so violated the *Mining Management Act of 2001* because the proposal failed to address the potential environmental issues associated with the move to an open-cut mine. The Supreme Court agreed with that argument and decided to not authorize the change. Two days later, special legislation was introduced to the Northern Territory Parliament to make moot the Supreme Court’s ruling. That legislation was passed and the McArthur River Mine is now an open-cut mine.

Whether through parliament or through courts, or through public opinion, the prospects for making positive changes to Indigenous Australian policy seem dim. At this point, my research turned from utilizing the current mechanisms available to investigating the possibility of new mechanisms. I began examining alternative forms of democracy, such as lottocracies, to see if they could improve the amount of political influence indigenous peoples had within these states. Lottocracies, or democratic decision-making by lottery, fail because there are simply not enough indigenous peoples. In both Australia and the US, indigenous peoples make up around 2% of the overall population (and less than a majority within any individual state). It would, of course, be possible to have a weighted lottery, but once you start moving in that direction, the democratic justification of lotteries (opportunity for equal influence over political decisions) begins to vanish, and an already unlikely project is made all the more unlikely.

Another solution for resolving the deficit of political influence is something like what Australia had in the 1990’s. *The Australian and Torres Strait Islander Commission* (ATSIC) formed in 1990 was a committee of Indigenous Australian leaders.

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12 *Lansen & Ors v NT Minister for Mines and Energy & Ors*, Supreme Court of the Northern Territory, 28, (2007).
with near decisive say in the administration of government programs for Indigenous Australians and with substantial influence over the creation of those programs.

In 2005, ATSIC was abolished amid charges of corruption and negligence by its Chairman, Geoff Clark.\footnote{Megan Shaw, “Howard puts ATSIC to death,” \textit{The Age}, (16 April 2004), http://www.theage.com.au/articles/2004/04/15/1081998300704.html, retrieved 6 June 2017.} This outcome was in contrast to the 2003 review of ATICIS, in which the reviewers recommended a more devolved ATSIC.\footnote{Hannaford, John, Jackie Huggins, and Bob Collins. "In the hands of the regions–A new ATSIC." Report of the review of the Aboriginal and Torres Strait Islander Commission. Canberra, Commonwealth of Australia, (2003).} There were no solid grounds for abolishing ATSIC. Had ATSIC remained, albeit under different leadership and with procedures in place to prevent corruption, it would have been dismantled eventually. The reason being is that so long as the government had the capacity to abolish it, they would do so.

My pessimism here, I believe, is justified. The Australian government has a long history of taking away or outright destroying the nice things that Indigenous Australians have (or could have). Some recent events include removing any claims of justice from Australia’s reconciliation effort in the 1990’s\footnote{Andrew Gunstone, “The formal Australian reconciliation process: 1991-2000,” \textit{National Reconciliation Planning Workshop}, (2005).}, amendments made to the 
\textit{Native Title Act} in 1996 diminishing the bargaining power of Indigenous Australians over Native Title lands\footnote{Jeff Kildea, “Native Title: A Simple Guide for those who wish to understand Mabo, the \textit{Native Title Act}, Wik and the Ten Point Plan,” Human Rights Council of Australia, (1998).}, voting against the United Nations Declaration on the Rights of Indigenous Peoples (something the US also did) in 2007, and making changes to the law in order to circumvent a Supreme Court ruling as seen in the McArthur River Mine controversy above\footnote{Lansen \& Ors v NT Minister for Mines and Energy \& Ors, (2007).} to name a few. Most recently are changes made to the Community Development Project (CDP), which imposes more severe work-for-the-dole requirements–longer hours, less pay, and less days off per year–for Indigenous Australians in rural areas.\footnote{Indigenous peoples from the Ngaanyatjarraku Shire have filed a lawsuit against the Australian state on charges of racial discrimination, and will be making their case before a judge in July 2017.}

With the destructive tendencies of the Australian government in mind, I moved to consider whether protection of something like ATSIC through the constitution would be sufficient to protect it from political tampering or destruction. More explicitly, the idea was that if ATSIC were defined within and made part of the constitution, then, perhaps, its powers could exist, to a greater degree, independently from the government,
and thus not be subject to the normal political rigmarole. As it turned out, that is the solution that Indigenous Australians agreed upon recently at the National Constitutional Convention taking place at Uluru. Their statement, in part, reads:

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution. Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.²⁰

While the statement is certainly a huge step in the right direction, and much better than mere recognition as Australia’s First Peoples, it is far from ideal. The process by which the group would like the constitutional enshrinement to occur is through treaty-making, and that is worrisome.

As required by international law at the time, European settlers arriving on the eastern shores of the US, made treaties with the Indigenous tribes. The process of making treaties with tribes was continued by the American settlers. However, at some point or another, virtually every treaty made with Native Americans was unilaterally violated by the US. That isn’t to say though that those treaties are worthless today. Treaties today play a crucial legal role in disputes between tribes and the government as well as non-government agencies. The point of bringing up treaty violations is because it encourages us to ask why those treaties were violated. One vague but certainly true answer is because they granted too much power or too many resources to the tribes. When treaties were first made with tribes, they were done so out of necessity. Tribes at that time were still militarized enough or had large enough numbers to pose a threat to US expansion.

²⁰ *Uluru Statement from the Heart*, (2017).
That fact does not bode well for treaty-making in the Australia. The Australian government does not face strong enough pressure to make treaties of substance with Indigenous Australians. Given the examples I’ve cited above, there is no reason to believe that the Australian government would grant favorable treaties to Indigenous Australians. More likely, any treaties would serve as symbolic gestures. That British colonists did not deem it necessary to make treaties with Indigenous Australians is an upsetting and disgraceful feature of Australian history, and making symbolic treaties today will do little to change that. Furthermore, even if they did make treaties, why would they honor them? The US doesn’t honor its treaties with Native Americans and most citizens happily ignore that.

Thus, nearly twelve months into my twenty-two month thesis, I decided that political reconciliation with the option to secede would be the only way to secure the future well-being of indigenous peoples in these settler colonial states; as well as the only way in which indigenous peoples could come to have moral obligations to the political authority of those settler states. Taken together, those two statements—securing future well-being and legitimating these states through secession—is not paradoxical. My suggestion is not that indigenous peoples should secede; it is that those states ought to accept their right to do so and that indigenous peoples ought to be able to act on that right. Those states ought to engage in political reconciliation in order to, among other reasons, prove that they are committed to not being the types of monsters that will come in and take indigenous children away at night. Indigenous peoples today have more reason to mistrust their settler colonial states than to trust them. What reconciliation can provide is evidentiary reasons for trusting these states. However, given the mountain of evidence against these states, there is a limit on how much trust reconciliation can reasonably generate. Namely, it cannot generate sufficient trust such that indigenous peoples ought to accept moral obligations to that state. That is where secession can play a role in legitimating these states. Indigenous peoples ought to be able to decide for themselves which future looks better. Following reconciliation, they would have two stacks of evidence: the evidence of harm and the evidence for better future relations provided by the reconciliation effort. Under those conditions, a decision to not secede would be sufficient, I believe, for establishing the legitimacy of those states vis-à-vis their respective indigenous citizens. That is not to say that is the only reason for supporting secession; it is only saying that acknowledging indigenous secession provides a path for those settler colonial states becoming legitimate.
It would be exceedingly unfair to not subject my own prescription to the same pessimism that I’ve exposed the other alternatives to. If neither the settler colonial states nor their general citizens can be motivated to address the injustices committed against indigenous peoples, then why would they support a lengthy reconciliation process, let alone giving indigenous peoples the option to secede? We shouldn’t expect them to; they won’t. Instead, what I am going to argue is that given all that has transpired, political reconciliation including the option to secede is the best way forward (and perhaps the only way forward) for legitimating the settler colonial states vis-à-vis their respective indigenous citizens.

History has shown us that neither Australia nor the US should be trusted with the well-being or rights of their respective indigenous citizens. Barring reconciliation and the option to secede, I believe it would be exceedingly irrational for indigenous peoples to accept any arguments suggesting those states are legitimate. That issue of the legitimacy of those states and how reconciliation and the option to secede resolve it will be the topics of this thesis.

This thesis will proceed as follows: following this introduction, the first chapter will argue that contemporary liberal theories of legitimacy cannot justify the legitimacy of the settler colonial states over their respective indigenous citizens. In this chapter, I will bracket indigenous claims to sovereignty and instead focus on what grounds we might appeal to in order to legitimate the settler colonial states. I will review two general accounts of legitimacy: instrumentalist theories of legitimacy and consent theories of legitimacy. In typical cases, I believe that the satisfaction of either type of theory would be sufficient for legitimating the state. However, in the atypical case of indigenous peoples, neither type of theory can be satisfied given the history of the relationship between indigenous peoples and the settler colonial states. We should use history as a guide to future action; and the history of the relationship in question has been wrought with severe and widespread violence and harm. Because of that indigenous peoples should be reasonably wary of carrying a great deal of unjustified risk in virtue of being citizens of those states.

In the second chapter, I argue that settler colonial states have an obligation to pursue reconciliation with their indigenous citizens. Reconciliation, I argue, does not legitimate these states, but does help toward that aim by attending to the historical injustices which have led to these states being illegitimate, thus giving indigenous peoples evidence to trust that they will be treated justly going forward. The primary
philosophical literature on political reconciliation concerns reconciliation in post-conflict states or in transition states, neither of those pertains to the current situation. However, many of the features of those reconciliation efforts are desirable in the case of indigenous peoples. I will explore what, I think, are three critical features of those processes that will need to be employed in reconciliation processes between indigenous peoples and their settler colonial states: truth commissions, political apologies, and reparations. In addition, I will emphasize an additional proponent: voluntariness. I will also review an account of reconciliation which deals directly with the relationship at hand, and argue that it fails to fully resolve the issue of legitimacy.

Building off the previous two chapters, the third chapter argues that because reconciliation does not create legitimacy, whether it is successful or not entails that indigenous peoples still have a right to secede. The argument for a right to secede is distinct from the argument of illegitimacy, however. That a state is illegitimate vis-à-vis certain citizens, does not mean that those citizens have a claim to that state’s territory. Instead, under situations of harm, those citizens have a right to being aided in exiting that state, usually as refugees. Thus, in order to make the argument for secession I will consider the various claims to territory that indigenous peoples possess and how they can be weighed against the claims of the settler colonial states. Lastly, I will consider what the dominant theories of secession in the philosophical literature have to say on the topic. I will argue those theories are unfairly demanding for individuals seeking to secede from violent states, and that, all things considered, we ought to accept indigenous peoples in these settler colonial states as having a right to secede. That right is, of course, meaningless if it isn’t realistic, and in outlining why those theories of secession are overly demanding, I will explain what needs to happen for secession to be realistic.

The fourth chapter of this thesis will discuss the relationship between secession and legitimacy. Following the claim from the first chapter that it would grossly unjust for settler colonial states to claim moral obligations from indigenous peoples, I will argue that given successful reconciliation and the realistic capacity to secede, a choice to not secede is analogous to giving the express consent to the settler colonial state, thereby legitimating it.

Lastly, in the conclusion of this thesis, I will summarize the main points of the thesis, and suggest some general takeaways from the thesis.
A couple of notes before beginning, indigenous readers may find my strategy in this thesis disappointing. There are at least two reasons for this (though probably more): first, I utilize a near exclusive liberal moral framework to make my arguments; and second, by appealing to secession, I am acknowledging, to some extent, that the settler colonial states have recognizable and valid claims to the territories they possess.

I recognize the issue with using a primarily liberal framework for arguing: it risks devaluing indigenous moral frameworks. Despite that, my reason for moving forward with the liberal framework is to provide the broadest base for my arguments. There are hundreds of different indigenous peoples, each with their own valid and nuanced conception of what is good and bad, right and wrong. In my experiences, though, I have not found indigenous moral frameworks to be anti-liberal or even non-liberal. Instead, I have found many of them to place a great deal of importance on the individual, in some cases much more so than any contemporary western society. More often than not, though, the moral importance of individual persons is tempered by the moral importance of non-persons. That there are sources of moral value that are not persons ought to be taken more seriously, and I believe that indigenous leaders and academics, much better suited than myself, will continue to make progress in that area. That said, my arguments are limited to the liberal framework because those arguments are ones that everyone, regardless of their moral framework, must be able to provide a response to. Ultimately, though, the main reason for utilizing a liberal framework is because the dominate moral framework within settler colonial states is liberalism, and those are the people that need convincing.

In response to the second disappointment, concerning my use of secession, my only defense is that securing sovereignty over traditional lands or even securing proper reconciliation will require the support of the settler colonial states. As such, the process will be highly political and highly legal. As unfounded as their claims to territory might be, it would be a non-starter to not take those claims seriously.

Lastly, much of this thesis is focused on the situation in Australia, although the structure of the arguments work just as well in the US. The reason that I’ve focused on Australia is that I’m writing this thesis in Australia, and, as such, have been fortunate to meet with many Indigenous Australian leaders and to hear their unfiltered opinions
about the state of things. I have also been fortunate enough to be invited into several rural communities to see first hand the “torment of [their] powerlessness.”

Another reason, though, that I’ve focused on Australia is that it has more potential for positive change than the US. Much of this probably has to do with its smaller population size. While Australia is a diverse place, it is nowhere near as diverse as the US. And issues raised by Indigenous Australians are much more likely to appear on the nightly news or in the headlines than similar issues in the US. Reconciliation, I believe, will fail unless the larger population buys-in; and in Australia, much more so than the US, getting that buy-in might be possible

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21 Uluru Statement from the Heart, (2017), italics in original.
Chapter 1: Settler colonial states are not legitimate states

It is taken for granted that the settler colonial states of Australia and the United States are legitimate vis-à-vis their respective indigenous citizens. While it is of course true that those states treat them as citizens\(^1\) it is not clear their respective indigenous citizens should have moral obligations to them as such. And, in fact, in this chapter, I will argue that the respective indigenous citizens do not possess moral obligations as such. There are two reasons for this: first, the Indigenous peoples of Australia and of the United States have never ceded their right to be fully sovereign states. What has happened is that the settler colonial states have diminished or outright destroyed their capacity to be sovereign states. And it simply does not follow from that that those settler colonial states should be able to assume legitimacy. Graciously, though, we might grant that in spite of the wrongful dismantling of indigenous states it would be possible for the settler colonial states to claim legitimacy. In order for that to be possible, the settler colonial states would, at minimum, need to satisfy the requirements of legitimacy. This brings me to the second reason for why indigenous peoples lack moral obligations to these states: the settler colonial states do not meet the requirements for satisfying even the most basic liberal theories of legitimacy vis-à-vis their respective

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\(^1\) In Australia citizenship was effectively granted by the 1967 constitutional referendum, which made it possible for the Australian government to make laws for Indigenous Australians and to also count them in the national census. And, in the United States, Congress passed the Indian Citizenship Act in 1924 which granted citizenship to all Native Americans born within the US.
indigenous citizens. In this chapter, I will focus on the second reason and show and why it is the case.

In the second section of this chapter, I will provide an overview of what legitimacy is and how it can be achieved. In the third section, I will evaluate whether the settler colonial states can claim legitimacy through the provision of instrumental benefits of their citizenship. In the fourth section of this chapter, I will consider whether consent theories can do the job. The short answer is that it depends on what type of consent is achieved and how it comes about. Ultimately, though, as things currently stand, we ought to reject consent based accounts as establishing the legitimacy of these states, as well. In the fifth section, I will conclude. The upshot of my conclusion is not that these states can never be legitimate vis-à-vis their indigenous citizens, but that, among other things, meaningful political reconciliation needs to happen first. I will elaborate on the details of political reconciliation in the next chapter.

Before beginning, I want to clarify two things: some unfamiliar terminology (perhaps) and the scope of my arguments. A settler colonial state is not the same as a colonized state nor is it referring to a postcolonial state. Colonization is the imposition of laws and norms by an outside state, and it has one of two potential conclusions: the first is decolonization, or the removal of those outside laws and norms; and the second is the complete assimilation or amalgamation of the original inhabitants into the colonizers society, or the outright destruction of the original inhabitants’ societies. If it is the latter type of outcome, then the colonizers will then proceed to settle or make their home in the colonized land with nearly all meaningful traces of the original habitants gone. Settler colonial states are those in which colonization has been incomplete but settlement has proceeded anyways. Because of this, colonial practices continue in the form of policies of termination, assimilation, or just plain old paternalism.

Secondly, throughout this chapter, and the thesis as a whole, I will be referring to indigenous peoples. And, unless otherwise specified, I mean that as both or either Indigenous Australians or Native Americans. Now, the concept that I am interested in, legitimacy, is a political concept, and its satisfaction will be scrutinized by appeal to the wrongful actions of the settler colonial states. Perhaps for that reason, the most obvious category of indigenous peoples for whom my thesis is relevant are those who have

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residence in either rural areas or tribal land, because they are the ones who have been most affected by colonial style policies and actions.

What about the so-called *Urban Indians*, though? Nearly half of all indigenous peoples in either Australia or the US live in urban areas. When Australia enforces racially discriminatory laws for Indigenous Australians in rural areas, does that have an important effect on an Indigenous Australian who has made her home in Canberra for the past 40 years? Or when the Environmental Protection Agency authorizes the disposal of dangerous toxic waste into the water supply of the Navajo Nation, should a Navajo who grew up in Tucson, AZ (Tohono O’odham land) claim to be affected?

I think the answer to those questions is yes. The general tendency of action taken by the settler colonial states has not only been detrimental to the well-being of rural indigenous peoples (many of whom have families that live in urban areas), but also to indigenous culture as a whole. And indigenous peoples, like all other peoples, have a claim to exercise their culture. Destroying traditional lands and harming those in rural areas—often the best sources of traditional language and culture—are affronts on the ability of indigenous peoples to practice their culture. Furthermore, those types of actions, like many others brought about by these settler colonial states, have not been specific to one group of indigenous people or another. These settler colonial states have acted indiscriminately in wronging their respective indigenous populations. For that, all indigenous peoples within those states, regardless of clan, tribal affiliation, or place of residence should view their culture (and, more basically, their well-being) at risk under those states. Therefore, when I claim that the settler colonial states are illegitimate vis-à-vis indigenous peoples within their territories, my assertion is one that any indigenous person in those states should be able to lay claim to.

2. Legitimacy

When a state is legitimate, its citizens possess a content-independent moral obligation to generally obey its directives—its laws, rulings, policies, etc. It is important to stress the content-independent nature of legitimacy here. For example, I might have reasons (even moral reasons) to obey the regime of a bloodthirsty dictatorial tyrant either because his directives, in some instance, match with what I ought to morally do; or because obeying his directives would be the most prudent course of action I could take. However, we would not want to say that that tyrant’s dictatorial regime is legitimate vis-à-vis me or anyone else. My reasons for obeying his directives have
everything to do with the expected outcomes associated with obeying his directives and nothing to do with the quality of his authority (which, being a bloodthirsty dictatorial tyrant, is poor).

Ideally, a fully legitimate state generates content-independent moral obligations to be obeyed without question. And, conversely, a completely illegitimate state cannot make any claims to content-independent moral obligations on behalf of its citizens. It is unlikely that any state can meet the ideal of being fully legitimate. All states certainly act wrongly and make poor decisions from time to time. That, however, is not say that all states are illegitimate. States which approximate the requirements of legitimacy can claim to be legitimate with respect to how well they approximate those requirements.

The requirements of legitimacy vary from theory to theory. My focus in this chapter is on liberal theories of legitimacy. The requirements of liberal theories of legitimacy can be stated generally in one of two ways: a state is legitimate vis-à-vis a group of citizens if and only if (1) it has provided its citizens with sufficient reasons to trust its ability and willingness to make just laws; or (2), its citizens have consented to its authority on agreement that it will make just laws for them. The first way in which a state can be legitimate can be satisfied simply by the state creating just laws and establishing itself as the type of authority that makes just laws. The second requires something more: that its citizens consent to its authority to impose laws on them in exchange for its creating just laws for them. It follows from these requirements that a state which absolutely fails to create just laws would fail in providing reasons for its citizens to trust it, and to that end, would be illegitimate; and, also, that a state which absolutely fails to create just laws would fail to keep its compact with its citizens, thereby morally voiding the consent it had been given, and making it illegitimate.

Liberal theories of legitimacy must place a great deal of emphasis on the state proving itself trustworthy of making just laws for its citizens. The way in which I wish to characterize trustworthiness in this thesis is in terms of risk of future wrongs. Why should risk matter? In general, I follow the assertion that citizens of a state have claims against the state increasing their risk to harmful or violent outcomes. Given the substantial history and the breadth of egregious wrongdoing, indigenous peoples are subject to an unjustly high amount of risk in virtue of being indigenous peoples under the authority of the settler colonial states. In so far as they are subjected to this risk

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through the directives of those states, it would irrational for them to accept that they have content-independent reasons for obeying the directives of the state.

How does a state prove itself trustworthy? The most obvious way is through establishing a record of making just laws. If citizens can look back on the history of their state and see that it usually makes just laws for its citizens, they have evidence to trust that their state will continue to make just laws. Of course, that evidence in itself may be insufficient for proving a state to be trustworthy. A state could have a mostly superb history of making just laws, but also randomly select several citizens to be sacrificed to the fire once every generation. In that case, its citizens would have evidence to not trust that state—at least in so far as randomly selecting citizens to be sacrificed is not a morally just directive.

No state has a perfect record of making or issuing just directives. Most states have committed actions which can be pointed to as morally disturbing. That can create a difficult situation: how should those incidents be weighed against the morally good directives of the state? For example, should we allow for a singular period of government sponsored genocide in a state’s past to outweigh the trust built through decades of universal suffrage and robust civil rights protections since?

I believe not. One way to make these comparisons, I think, is to ask the question: does the recent history of the state show a commitment towards just lawmaking? A state which has committed wrongs in the past can learn from its mistakes and prove itself to be the type of state trustworthy of making just laws, even *vis-à-vis* its victims.

One reason to believe the above claim is true is that if we deny it, then we leave open the possibility that no state today is legitimate and also the possibility that no state today can become legitimate. That would be a poor result, I think. Claiming that a morally disturbing history is insurmountable would not provide the state with as much, or perhaps any, motivation for learning from and correcting its past. What though does a state need to do to prove itself?

Can states who have committed wrongs against its citizens and fail or refuse to learn from those actions still prove themselves trustworthy? Logically the answer is yes. A million years of consistently making just laws without blemish should count for something. However, in actual practice the likelihood of such a situation emerging is vanishingly small. For example, consider the wrongs committed by the Australian
government during the *Stolen Generation*, namely forcibly removing Indigenous Australian children from their families. Forcibly removing children from their home is something that was recognized by the Australian government as wrong, but positive steps were not taken to prove a commitment against that happening again. And during the *Northern Territory Intervention Act*, nearly 30 years later, it happened again.

Even in instances where the general relationship has improved over time, there is reason to expect those past wrongs to resurface. For one salient example, the US has historically violated all of its treaties with Native American tribes; and, to this day, continues to violate many of those treaties despite both legal and moral obligations created by those treaties (and recognized by the US). Even with the continuing wrong of violating treaties, the US also provides tribes and their citizens with many benefits. And, while the US seems to have not learned from its wrongdoing of treaty violating, it is certainly the case that its relationship with tribes, and the outcomes tribes face as a result of US authority, has improved over time. That would suggest that while the US has certainly acted wrongly against tribes and continues to act wrongly against tribes that it is trending in a positive direction. Simply trending in the direction of making just laws, however, is insufficient for legitimacy. That trend needs to show a commitment to making just laws and in so far as unjust laws are still being made, then despite progress in other areas, no such trend exists.

More generally, we might think there is simply an important distinction between merely ceasing one’s wrongful actions and addressing one’s wrongful actions. One common way to pump that intuition is by appeal to our interest in apologies. It is not enough for us that wrongs simply cease, we want wrongdoers to apologize. And one plausible reason for why is that an apology indicates an acknowledgment of the wrong done and a commitment to not committing those types of wrongs again. Among other things, an apology can provide us with evidence to trust that the wrongdoer will not commit that wrong, or similar wrongs, again.

Obviously, states can’t just address their wrongs with an apology. The wrongs committed by states are much more severe, in most cases, than the wrongs individuals can commit interpersonally. That said, states can take action to address their past wrongs; and in doing so they can provide evidence to their victims that they are committed to not committing those wrongs, or similar wrongs, again.
This brings me to the issue with liberal theories of legitimacy that I will be discussing in the sections below: they do not require states to address historical wrongs; and in so far as they fail to do that, victims have reason to believe that future injustices, though not necessarily the same injustices, will occur. That is not to say that past wrongs shouldn’t be addressed for their own sake, they should. What it is to say, is that in so far as past wrongs go unaddressed, the victims of those actions will always have evidence against their state being trustworthy and thus the state will always have evidence against its claims of legitimacy vis-à-vis those victims.

3. Instrumentalist accounts of legitimacy

Instrumentalist accounts of legitimacy posit that a state is legitimate if it can be trusted to provide certain beneficial goods or outcomes to or for its citizens. Under that general description, we can find a number of theories.

Joseph Raz, for one, argues that a state is legitimate if it offers directives that individuals have reason to follow, independent of the authority being the source of those directives. As he puts it, “authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”\(^4\) The directives of the state, for Raz, do not always need to be based on reasons that individuals would have independently, though. It just needs to be the case that on average acting in-line with the state’s directives would be consistent with what one would have had reason to do had the state not been there. That said, what gives us reason to obligate ourselves to the state is not merely that its directives are consistent with what we believe we have reason to do, but because it is better at securing those outcomes than we would be on our own. For example, we might believe we have duty of charity to others. The process of finding those in need of our charity and then acting on the duty can be costly and act as impediments to the realization of that duty. Through its abilities of taxation and redistribution, the state can minimize the costs associated with each individual attempting to discharge her duties to be charitable.

Another contemporary philosopher who adopts this type of view is Allen Buchanan. Buchanan claims that a state is legitimate if it reasonably protects the basic human rights of its citizens, where the standard for those rights is determined by their

current understanding within international legal moral theory.\textsuperscript{5} States who do a good job at protecting these rights are, on this account, more legitimate than those who do a poor job. The view is attractive because it focuses only on protection of basic rights—rights to property, non-domination, freedom of consciousness, etc.—which all individuals require to live a decent life.

Those are just a small sample of instrumentalist theories of legitimacy. The intuition behind all of them is easy enough—regardless of other reasons individuals might have, they have reason to be obligated to states which, on average, meet certain requirements for securing goods or outcomes to or for them. Assuming the settler colonial states were able to meet the requirements of some instrumentalist theory, would it then be the case that indigenous peoples within them would have a moral reason to obey the authorities of those states?

3.2 Instrumental to our demise

First, I want to reiterate once again that as things currently stand, it would be a terrible lie to suggest that the settler colonial states have sufficiently met even the most minimalistic requirements for securing legitimacy through the provision of goods or outcomes to or for indigenous peoples. These states have endorsed or directly committed acts of slavery, relocation, genocide, theft of land, theft of children, and so on against the indigenous peoples of their territories. It would, in fact, be more reasonable to say that these states have been instrumental to the demise of indigenous peoples.

In the US, treaties were made and systematically broken. And in Australia, the early colonizers declared the land \textit{terra nullius} or nobody’s land. This was because the colonizers did not recognize the land rights of the Aboriginal inhabitants as valid. In both states, this led to the unjustified colonization of indigenous peoples and the settling of their lands. As a result, many indigenous peoples were relocated to places that were often far from their traditional land and were often located in remote, inhospitable areas.

In the late 1800s, both the US and the largely autonomous Australian colonies begun the process of assimilating indigenous children into the mainstream culture. This process primarily took the form of forcibly or coercively removing indigenous children from home and placing them into boarding schools. These policies were enacted

through more the more generally affable policy of “compulsory schooling for children.” However, given that many indigenous children were living in remote areas, Australia opted to remove them and place them in areas where schooling was accessible; and the US opted to fund religious boarding schools on or around reservations. In Australia, this practice continued until the 1960s and is known as The Stolen Generation; and in the US, this practice continued into the 1970s. In addition to being separated from their families, children in these schools were often physically assaulted and mistreated for any expression of their indigenous culture. And today both the US and Australian governments dramatically underfund health and education services for their respective indigenous populations, and continue to subject them to coercive and unjust laws, such as the Northern Territory Intervention mentioned in the Introduction, or the continued violation of Native American lands and treaty agreements, through permitting the North Dakota Pipeline, dumping toxic waste into a tribe’s water supply, and so on.

From those three distinctive periods of interaction, the initial periods of interaction and some of the more recent, it should be clear that when it comes to indigenous peoples the settler colonial states have a terrible history of producing unjust laws.

3.3 Buchanan’s instrumentalist theory

What would it require for Buchanan’s account to be met? And what would meeting its requirements mean? Conceivably, I think, it would require both Australia and the United States to ratify the United Nations Declaration on the Rights of Indigenous Peoples7 (DRIP). This is because Buchanan calls for the list of human rights protections to come from international moral legal theory, which is precisely where DRIP came from. And, if the settler colonial states did ratify DRIP, then it would certainly count as evidence of them being more trustworthy.

Thus far, Australia and the US have only signed off on DRIP.8 The difference between signing or endorsing DRIP and ratifying it is that ratifying it binds the state to make the contents of the international agreement part of its national law. The move to ratify would make sense here for two reasons: first, because DRIP is a document that

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6 The most famous of the US schools was the Carlisle Indian School, whose headmaster’s famous motto was “Kill the Indian, save the man.”


8 Of interesting note is that only four countries—Australia, Canada, New Zealand, and the United States—voted against the document.
was developed by indigenous peoples from all over the world, it is a document that reflects the interests, to some extent, of indigenous peoples; and second, because Buchanan’s account of which rights states ought to protect comes from those rights currently recognized at the international level.

What value would ratifying DRIP have? Given that the value of treaties in making sure agreements are kept is suspect, its value would primarily come in the form of signaling to indigenous peoples that the states are working to make things better. Even so, assuming that its benefits would be more than symbolic what would those benefits be?

Rather than going through each article, some of the important takeaways are that discrimination against indigenous peoples qua indigenous peoples would be made illegal; the rights to self-determination and cultural revitalization would be recognized; and consent from the relevant indigenous peoples would be required for any attempt by the state to relocate them.

If the settler colonial states met these demands to the satisfaction of their indigenous citizens would their authority be legitimate? I think not. It would count as a reason for thinking that those states are the types of states that are able and willing to make just laws for their indigenous citizens. However, that evidence would still be outweighed by the overwhelming mountain of historical evidence against the state. There is nothing in DRIP that requires a state to explicitly address its past wrongs. That matters. The DRIP, with some exception, is very forward looking—its list of rights serve as a guide for how states ought to treat their indigenous citizens; it is not a guide for addressing the past. These states need to address their troubled past as a necessity for showing they are in fact committed to not being the type of state they have been in the past. Simply binding themselves to a legal document is insufficient, especially given their proclivity for violating such documents.

3.4 Raz’s account

Before considering Raz’s account, I want to acknowledge some of the issues that have been taken with his account. The most vexing issue people have is that in large diverse societies, who benefits and how they benefit will be unclear, and without a state being able to show individuals that they will in fact benefit it will be unable to provide a reason for its legitimacy. And if individuals have to reason over the state’s directives to determine whether they are aligned with their own reasons, then that would defeat the
benefits of efficiency that the state would provide. For my purposes, I believe we can bracket these worries. I will also, for the sake of argument, assume that whatever reasons indigenous peoples would have for following directives are reasons that individuals from a Western culture would also have. Ultimately, I am interested in whether the historical facts of the matter should bear on the legitimacy of a state that does satisfy Raz’s requirements for indigenous peoples.

Imagine, for a moment, that a new government came into power in Australia and reinstated the Australian and Torres Strait Islander Commission (ATSIC), re-amended the Native Title Act restoring the right of indigenous peoples to veto mining projects on their traditional lands; changed the direction of the Community Development Program (CDP) so that its focus were once again on local development, instead of assimilating indigenous peoples into urban cities; extended and increased the funding on the Aboriginal Ranger Program; rallied the Australia people to recognize the Aboriginal and Torres Strait Islanders as the first people of this land; created treaty agreements with the many different indigenous peoples within Australia; ratified DRIP; etc. Essentially, imagine if the directives of the Australian government were directives that secured outcomes that had nearly unanimous support from the indigenous peoples of Australia. In that case, would there be sufficient evidence to think that the state’s authority were legitimate?

To some extent this has already been proposed. Will Kymlicka and Chandras Kukathas both seem to have in mind a millet style of rule where each individual minority group is able to govern by their own rules, while still remaining under the general authority of the settler states. The term millet comes from the Arabic word, millah, meaning “nation.” Its most famous usage was a system of governance was as a description for the system of governance once used by the Ottoman Empire, through which different religious groups could live under the Empire while still being governed by their own laws. As a description of the actual system of governance employed by the Ottoman Empire, the concept is stretched. However, as a concept, it does have attractive features especially for minorities whose religious conceptions or conceptions of justice conflict with the laws of the state in which they live.

In the current settings, the US currently comes closest to meeting this ideal, allowing for tribes to utilize traditional forms of governance, including norms, for making decisions. The only restriction being that the tribe’s actions not conflict with Federal law. For example, the Navajo Nation Supreme Court and the elected officials
of the Nation are required to provide justifications for their decisions grounded in traditional Navajo law. This, in effect, means that the tribe is able to give reasons to its citizens for its laws based on reasons that those citizens as Navajo can accept. Studies done on other tribes by the Harvard Project for Indigenous Economic Development have shown that tribes who utilize this ability enjoy greater democratic participation and law abidance from their citizens.

If the key characteristic of the millet view is that it allows for individuals to be ruled by directives they have, then the millet view would fail to justify the federal laws. The reasons provided at the federal level would not be the reasons of the minority, at least not entirely. At best, the federal level could justify itself through permitting one to live under her minority groups laws. There is nothing in that justification, then, to explain why it is that the state should have that power to begin with. Even so, would something like that provide enough instrumental benefits to prove the state as trustworthy?

No. Given everything else that has occurred there is not sufficient evidence to show that the next government would not revert on important issues. Take for example, the recent controversy surrounding the Dakota Access Pipeline. Under the Obama administration, construction of the pipeline was halted; under the Trump administration, it was streamlined. If past behavior is evidence of future behavior, then we have a tremendous mountain of evidence suggesting that policy reversion would occur.

In virtue of their actions, settler colonial states would need to do more than make a few changes in order to be recognized as trustworthy; they would need to prove that they are the types of states committed to securing beneficial goods or outcomes for their indigenous citizens. That process would undoubtedly take a long time, and during that time indigenous peoples would continue to reasonably regard themselves as being at risk of future harm by the state.

4. This was not consensual and that matters

The strategy for showing why consent theories of legitimacy fail is somewhat similar to the strategy of showing why instrumentalist theories fail. In regards to instrumentalist theories, as things stand, the instrumental benefits of citizenship in the settler colonial states is insufficient for meeting the demands of the theories. However, even under ideal conditions, the settler colonial states would not be able provide sufficient evidence proving themselves trustworthy in making just laws for their
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respective indigenous citizens. Part of the reason why is that those theories do not necessarily require past injustices to be corrected. For those theories considered, a state is justified in so far as it adequately protects an accepted understanding of basic human rights or gives its citizens reasons to comply that those citizens already have. In so far as those theories remain focused on what immediate changes it needs to make or on what it needs to do in the future, they will be insufficient in establishing that those states are able and willing to not be the monsters they have been in the past.

Consent is probably most intuitive way to show that a state's authority is legitimate. Consent, by itself, though, is not normatively interesting. For consent to do the work of legitimating a state, it needs be spelled out a bit more. Typically, these conditions are that consent be given voluntarily and that the individual giving it is reasonably informed about she is consenting to. That, however, is not the entirety of the story for consent. When individuals consent to the state, they are consenting to a type of agreement between them and the state. Both sides are agreeing to certain things. Individuals are agreeing to being under the authority of the states; and the states are agreeing to take on the responsibility of providing certain benefits for those individuals. There are different accounts of how these conditions can be met, but those general conditions are sufficient for understanding when we should take consent seriously.

I will begin by considering whether the conditions for express consent are met. I will then turn to tacit consent, whereby individuals do not need to directly express their consent but rather give it indirectly, typically through compliance or positive engagement with the state. I will argue that in the first case satisfaction of the conditions have not been met and in the second that given other facts about the situation that we cannot treat it as expressing anything normatively interesting. Lastly, I will consider another strain of consent, hypothetical consent, whereby the claim is that consent would be given if the individual were properly situated.

4.1 Express Consent

In its most forceful form actual consent requires that the state receive the voluntary, express, and informed consent of each of its citizens on each of its laws in order for it to be legitimate. Aside from this being virtually impossible to accomplish, there are few outside of the philosophical anarchists that would endorse it. A less

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10 Ibid.
forceful version requires only that free (voluntary) and informed individuals give consent to being governed by a state, as opposed to having to give consent to each of its laws. As Harry Beran puts it, “Consent consists in acceptance of membership in a state by each person who is under political obligation.” And while few would hold that requirement as necessary for legitimacy, for the same reasons as the more forceful form, it is plausible to think that something like that where achieved would certainly signify that individuals are acknowledging and accepting the moral authority of the state.

Within the context at hand, the closest approximation of that requirement was made possible by two distinctive political decisions made in Australia during the 1960s. The first was the 1962 amendment to the *Commonwealth Electoral Act* which gave Indigenous Australians the right to voluntarily enroll and vote in federal elections.12 This amendment not only made it possible for Indigenous peoples to participate as equals in the election process but also made doing so voluntary.13 The second is the 1967 constitutional referendum which, in passing, formally included Indigenous Australians as Australian citizens in the national census and allowed the Australian government to make laws separately for them. Taken together, these landmark events in Australian history made it possible for its Indigenous peoples to take part in deciding whether to become members of the Australian state. In other words, it provided an opportunity for them to formally give their consent to the Australian state. First by giving them the right to vote and second by giving them the opportunity to use that right to influence whether they should be counted as citizens.

The first problem with treating these successive decisions as constituting express consent is that the 1967 referendum itself was a farce. The referenda were voted on by all of Australia, of which Indigenous peoples make up roughly 2% of the total population and much less than a majority in any state. And so, even if every Indigenous person in Australia voted against citizenship, it would have passed anyways.14

Instead, then, of looking at the two decision as constituting consent, we might just look at the 1962 amendment. We might say, for example, that by choosing to enroll

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11 Harry Beran, “In defense of the the consent theory of obligation,” *Ethics*, 87 (1977), pp. 260-271 at p. 262. In the quote above, a “person” who can consent is no longer a “political minor” and is a naturalized citizen of that state.

12 And in 1965 that right was fully extended to state and local elections as well.

13 For non-Indigenous Australians voting is compulsory. It is also compulsory for Indigenous Australians who enrol to vote.

14 This was the most successful referendum in the history of Australia, with nearly 91% of the vote being in favour of including Indigenous peoples as citizens in the constitution.
and to vote in elections Indigenous peoples are consenting to, and thus legitimating, the state’s moral authority. It is impossible, of course, to glean the reasons for why individuals would choose to participate in the electoral process, and so for the sake of argument I will assume that by voting individuals were expressing their consent to the settler colonial state’s authority over them. Ultimately, that intention does not matter, though, because the choice to consent did not matter; it was not a real choice. And even if it were a real choice, it would have been made under coercive circumstances.

The first way in which the choice was not real is that the choice they were making did not matter, and for that reason should not count as a choice. The structure of a choice requires that different options lead to different outcomes. The choice to consent was not a choice because whether they consented or not, the Australian government was going to impose its authority on them. That is, the different options available led to the same outcome. In regards to the imposition of Australian authority, there was no difference between an Indigenous Australian who consented to that authority and one who did not.

The second way in which the choice was not real is that it was made under wrongfully coercive circumstances. Namely, the right to vote was given while the Australian government was still engaged in forcibly removing children from their homes and relocating them to provide them with a Western education. Which itself was taking place on the heels of many other acts of cultural genocide, including also dispossession and forced relocation. Given the extent of the violence these peoples had already faced, and the fact that they possessed little if any direct influence in preventing further harm, it is reasonable to believe that the choice between consenting or not was really a choice between assimilation or the outright extinction of their culture. As such, that choice would have been highly coerced because it was made under immoral circumstances. For example, imagine that a madman has trapped you in a puzzle room and the only way out requires you to cut off your hand; and that not cutting off your hand will result in your eventual death in the puzzle room. And, that once out of that room, you will be subjected to a similar room. By cutting off your hand, and moving to the next room, you are not consenting to the madman’s capturing you nor to being exposed to the truly horrific choice of losing a hand or dying; instead, you are playing his game in the hopes that eventually your situation will improve. That the madman

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15 This is, of course, known as *The Stolen Generation*.
16 Or imagine a scene from the Saw movie series.
should use the wrongfully coercive situation to extract your consent does nothing to make the situation morally permissible. Similarly, if the government says, “Consent or not,” and not consenting means that an incompetent or downright immoral state will continue to have sole discretion over your well-being, then the fact that you are consenting should not count as creating moral obligations to whatever directives the state issues next; instead, you are playing their game in hopes that one day your situation will improve. We should view the choice to enroll and to vote, if it can even be called a choice, as coercive, and thus as not a valid act of expressing consent.

In general, the problem with express consent is that the choice to consent was never actually available. And even if it was, it was only available under coercive circumstances. Switching to the US, the state never sought anything resembling initial consent. Congress simply declared that Native Americans were citizens in 1924, though the right to vote was not permitted in all states until 1948. We should, I think, reject any story which claims that indigenous peoples have given their express consent to the moral authority of these states.

4.2 Tacit Consent

The second version of actual consent is tacit consent. Its satisfaction requires only that individuals choose to remain within the state. For example, in both Australia and the US individuals are free to emigrate. Thus, any individual who chooses to remain in either of those states is indirectly choosing or consenting to being under the moral authority of that state. This view is attractive because it does not require individual state governments to seek the consent of each new individual. It merely requires that state’s make it reasonably achievable for its citizens to emigrate. And given the large number of respectable liberal democratic states in the world, individuals choosing to emigrate can do so without fear that their basic rights will be diminished in any important way.

Emigrating, for much of the world’s population, is an insurmountable financial obstacle. For many indigenous peoples, whose communities often suffer from high rates of poverty, that is surely the case. In addition, indigenous peoples have different claims to land. Namely that their identity is fundamentally tied to their traditional lands. Making it easy for them to emigrate by providing compensation for the monetary costs of doing so does not necessarily make emigration an option. And, if that is the
case, then we should not take their remaining on or near their traditional lands as them tacitly consenting to the state.

Nonetheless, merely staying in a state is only one version of tacit consent. Another version of tacit consent argues that when individuals not only remain in the state but also engage with it beneficially that they are consenting to its moral authority. Indigenous peoples could remain in the states without necessarily engaging directly with the state through the benefits it makes possible—employment opportunities, education programs, and so on.

There are, of course, any number of reasons for why an individual would remain and actively participate in a state which they found illegitimate. Individuals might simply be trying to make the best of a bad situation. In that case, their staying does nothing to justify the bad situation. For instance, if a kidnapper offers his victim the choice between a Coke and a Pepsi and she chooses Coke, the kidnapping does not become magically become justified.

In any case, participation in civil society appears much lower for indigenous peoples than for the general population. Unemployment rates for Indigenous Australians in major cities are nearly three times higher than the rest of the population. In the US, unemployment has recently been almost twice as high for Native Americans compared to the rest of the population.

It looks as if any version of consent where actual consent is given by individuals is going to be off the table for serving as the story of why the settler colonial states are legitimate vis-à-vis their indigenous citizens. The main reasons why having to do with the historical fact that expressive consent, where attempted, was meaningless; and that claiming tacit consent through informal participation ignores important aspects of Indigenous culture, including the strong ties that indigenous peoples have to their traditional land; and because participation in society does not tell us anything morally relevant about the legitimacy of a state. I will now turn to hypothetical consent to see what support for legitimating the state it can provide.

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4.3 Hypothetical consent through public reason

Two problems with consent so far have been that it was either coercive (in the case of express consent) or that it assumed too much (in the case of tacit consent). Theories of hypothetical consent overcome these worries by specifying certain conditions which must be satisfied for consent and thus for legitimacy. While the details of the conditions vary from one version to another, they all share a common description and a common underlying ideal. Descriptively, theories of hypothetical consent all claim something like this: a state is legitimate if a reasonable individual would consent to the moral obligations demanded by the state in question. The ideal is simply that a state’s authority ought to be justifiable to all of its citizens in order for it to be legitimate.

One of the most famous contemporary accounts of hypothetical consent is John Rawls’ public reason theory of legitimacy. He argues that a state is legitimate if the basic structure of its government (its institutions, organizational structure, and processes i.e. its constitution) are based on a liberal conception of justice, because reasonable citizens would, upon reflection, recognize that the only way a stable society can exist is if it is based on a liberal conception of justice.

For Rawls, reasonable citizens are those that are normatively idealized to the extent that they realize their own epistemic limitations and are willing to act in accordance with that knowledge. These citizens accept the burdens of judgment, the idea that we should expect and accept the fact of intractable yet reasonable disagreement over a wide array of issues ranging from the empirical to the abstract; and also the fact of reasonable pluralism, the idea that those disagreements will exist within a society of free and equal individuals. Because of the limitations imposed by the burdens of judgment and reasonable pluralism, the best a society could hope to do is be neutral amongst competing comprehensive doctrines (hereafter, doctrines), or beliefs about what is good and bad or right and wrong, and work toward an overlapping consensus, a unanimous agreement, over how we should go about establishing the constitutional essentials of a society.

In order for a society to be neutral over competing doctrines and reach an overlapping consensus, Rawls believes that reasonable citizens would offer reasons to

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19 Other things can be inserted for reasonable, but the general point is that citizens are idealized to accept certain conditions as legitimate, where the conditions are, for a lack of better word, reasonable.
20 John Rawls, Political liberalism. (Columbia: Columbia University Press, 2005), pp. 54-56
each other in terms “addressed to citizens as citizens.”21 By addressing “citizens as citizens,” Rawls means that those individuals should try, as best as they can, to offer reasons from their own doctrines, which they believe free and equal people with different doctrines, could accept. Citizens would be willing to do this for two reasons. First, because doing so helps further along the goal of generating a stable society given their epistemic limitations; and second, because they have an assurance, based on the unanimous acceptance of those limitations by all, that others will engage with them similarly. As Rawls puts it, citizens are “ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so.”22 Given that citizens are so motivated, and have assurances that the fair terms of cooperation will be met, a state which instantiated these idealizations would, according to Rawls, be legitimate.

If such a state exists, it would be reasonable for citizens to accept that state as legitimate as reasons coming from the state justifying its various coercive actions would be reasons that citizens could accept as just liberal reasons. We know, however, that the states in question have not taken seriously the doctrines of indigenous peoples. Those states have explicitly sought to undermine and destroy the cultures of their indigenous citizens for generations. And while that is certainly of the upmost importance, it is a separate issue than what the Rawlsian is concerned with. The hypothetical nature of the Rawlsian story of legitimacy is concerned primarily with what a state needs to do to be hypothetically justifiable to all, not necessarily with what it has done. Thus, in order for the state to be legitimate over its indigenous citizens it just needs to be able to provide reasons for them to consent to it from the same conception of justice it uses to legitimate itself to its other members.

There are a number of issues that have be raised against Rawls’ theory, I want to focus on two. First, the requirement that the abstract agreement which the Rawlsian “overlapping consensus” aims at is not an empty set. It is an exclusively liberal conception of justice. A number of critics have argued that point against Rawls’ theory over the years. I will review some of those points below and, for the sake of argument, conclude that it is not necessarily a concern for the theory. The second issue is the idealization away from the past injustices of the state and the failure to provide any

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22 Rawls, (2005), p. 49
guidance for how a justifiable state could emerge given those injustices. In particular, Rawls’ ignorance of those past injustices makes it unclear as to why indigenous peoples should expect to be treated under the fair terms of cooperation.

4.3.2 Justifying a liberal conception of justice, fair terms of cooperation and stability

Indigenous academics such as Dale Turner23 and Taiaiake Alfred24 have argued that indigenous peoples do not endorse purely liberal conceptions of justice. For them liberal conceptions of justice all share the same basic normative structure: only the interests of individual persons, as opposed to groups of individuals or non-person entities, are morally relevant. Where this can differ in the case of some indigenous conceptions of justice is when things such as land, animals, and spirits are possessors of rights or have claims alongside individual persons.25 Thus, for some indigenous conceptions of justice, the moral obligations demanded by the state must also include a space for the rights and interests of non-person entities.

If it is true that liberal conceptions of justice are inherently disrespectful toward non-person entities *qua* rights holders, then it would not be clear how the two moral frameworks–liberal and indigenous–could be made compatible. As things stand, however, it is not clear that liberal conceptions are inherently disrespectful toward those other conceptions. Individuals in a liberal society are afforded a vast amount of liberty to pursue their own ends. While others within those societies may not agree with their practices, so long as those practices are not causing wrongful harm to them or others, they have no normative claim against those practices. And it would be absurd to claim that the practices of indigenous peoples expose wrongful harm onto their members or to others. Thus, while the Rawlsian liberal conception of justice does not endorse the rights of non-persons, it does not necessarily prevent others from engaging in practices which do, and for that reason it cannot be said that it is entirely disrespectful toward those non-liberal conceptions.

The problem with using the Rawlsian version of hypothetical consent is not that its content is discriminatory against certain outcomes, it is with its inability to deal with historical injustices. While this is not necessarily a problem with the theory, as that was

23 Dale Turner, *This is not a peace pipe: towards a critical indigenous philosophy*. (Toronto: Toronto University Press, 2006).
25 That is that they have moral worth unrelated to utility we derive from them.
never its end, it is a problem with using it to legitimate settler colonial states. One way in which these historical wrongs affect the theory is by eroding the unanimous belief by members of society that the fair terms of cooperation are assured. Given the wrongs which have consistently taken place, it is reasonable for indigenous peoples to mistrust that the state’s institutions are adequate for providing incentives for individuals to take their interests seriously, and thus for the state to take their interests seriously. If indigenous peoples cannot be properly assured that their claims will be taken equally, then how can it be claimed that they should accept the state as legitimate?

Without directly addressing the problems mistrust caused by patterned and widespread historical injustices, the Rawlsian might appeal to the desirability of a stable liberal society in order to show that the state is legitimate. Namely, he might appeal to the fact that individuals would have an incentive to not prevent or discourage indigenous peoples from engaging with their culture, which, in turn, would provide an assurance that the more particular interests of those peoples would be respected. The incentive which would motivate cooperation is that the failure to cooperate fairly would lead to disobedience by indigenous peoples toward the state, which would, in turn, cause instability.

I doubt that would be a strong enough for motivating the fair terms of cooperation where it is not already the norm. That is because indigenous peoples make up a very small percentage of the population in either Australia or the US, and so would find it difficult to gain traction for their causes in these societies. And in addition to the small number of Indigenous peoples, there is also a large diversity of indigenous peoples with distinctive claims, over 500 different indigenous groups within the US and as many within Australia. And lastly, even if all of those groups came together they would likely lack the financial resources to effectively lobby their views as indigenous peoples. As in either settler colonial state, indigenous citizens are, on average, the poorest. In other words, it is doubtful that the stability of either liberal state could be upended by disobedience from its indigenous members. And therefore, the desirability of stability is unlikely going to be enough to motivate non-indigenous citizens to engage in fair terms of cooperation with indigenous citizens.26

The Rawlsian, however, might take that appeal to stability a different way. He could claim that despite the lack of assurances over their particular interests being

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26 This is especially true considering that governments in which these citizens inhabit have consistently failed to do so.
protected that indigenous peoples would still be assured that their basic liberal rights are secured. Everyone must give something up in order to participate in a society of peoples with reasonably plural views and limitations over the quality of judgments regarding those views, and there is agreement over basic principles of justice which secure a basic set of liberal rights for all individuals. And so long as the state can ensure conditions through which that arrangement can be maintained, individuals should view that state as legitimate.

The desideratum of stability only makes sense given that we are trying to construct a society given the burdens of judgment, reasonable pluralism, and, I believe, a strong interest in living together. Absent that last condition our impetus to solve the problems of the burdens of judgment and reasonable disagreement disappear. If stability is what we are after, then it would be best reached through constructing a society that is homogenous over more than abstract principles; it would be homogenous over those and also as many particulars as possible, so much so that would not have to worry about any disagreement. Thus, if stability is the end, then indigenous peoples would hypothetically be better off in their own communities. What motivates individuals to live together then is not just stability but “stability” plus “the value of living in a diverse society.”

Assuming there is something valuable about living with those whom we have deep disagreements with, that value is only necessarily manifest when individuals are treated equally. For example, a slave living in a first world democratic country is still a slave. In other words, the value in living together in a wealthy society is not enough to legitimate the state under which we all live unless both the institutions of that state as well as its members interact with all members under the fair terms of cooperation. Thus, we have returned to the problem of the fair terms of cooperation. The Rawlsian story of hypothetical consent, it seems, does not have the resources to assure indigenous peoples that the fair terms of cooperation will be satisfied. And because it is unable to do that, it cannot overcome the mistrust that indigenous peoples are justified in holding toward their respective settler colonial states.

As in the case of actual consent, it is not necessarily the case that hypothetical consent is useless in legitimating these settler colonial states for their indigenous populations. The problem is that there is a prior process of resolving past injustices that needs to be done to allow these theories to be applied.
Conclusion

In this chapter, I have tried show how liberal theories of legitimacy fail in regards to their application to the indigenous peoples within the settler colonial states. The primary issue for those theories of legitimacy discussed here is how they address the historical relationships between indigenous peoples and their settler states. Historically, the relationships include forced relocation, genocide, treaty-breaking, forced assimilation, and so on. If any of those theories is to work in generating legitimacy for these states, then those horrible injustices need to be addressed. Until they are addressed, the settler colonial states will not be able to lay any claims to legitimacy vis-à-vis their indigenous citizens. The reason for this, I argued, is that history is the best guide we have for future actions; and what that guide looks like in these settler colonial states is future substantial harms committed against their indigenous peoples. The first step, then, in becoming legitimate will require states to prove to their indigenous citizens that they can be trusted to make just laws for them.

In the next section, I will discuss the concept of reconciliation and the important role that it plays in providing evidence that a state is both able and willing to make just laws for its citizens.
Chapter 2: Political reconciliation between settler colonial states and indigenous peoples

No government policy toward Indians can be fully effective unless there is a relationship of trust and confidence between the Federal government and the Indian people. Such a relationship cannot be completed overnight; it is inevitably the product of a long series of words and actions. But we can contribute significantly to such a relationship by responding to just grievances which are especially important to the Indian people.

- President Richard M. Nixon, 1970

In the previous chapter, I diagnosed one issue with the relationship between the settler states of Australia and the US and their indigenous citizens: that those states are illegitimate vis-à-vis their respective indigenous citizens. Their illegitimacy stems, minimally, from a relationship of systemic and patterned violence and harm, including the theft of land, forced relocation, ethnic genocide, forced acculturation, as well as many other wrongs. Because of that history, indigenous citizens of those states have significant evidence to against trusting these states to make just laws for them.

In this chapter, I will outline what first steps the settler colonial states must take in order to prove themselves as trustworthy for their indigenous citizens. However, regardless of what the state does to prove itself as trustworthy of making just laws for its indigenous peoples, the evidence against it will likely always stack higher. Therefore, by working to prove itself as trustworthy the settler colonial states do not make themselves legitimate; instead, what they do is present evidence for indigenous peoples to accept them as such.

This chapter will proceed as follows: following the introduction, the second section will clarify the relationship between reconciliation and a state’s authority, understood as authority that can reasonably be trusted to make just laws for the groups thus reconciled. The third section will address the question of what reconciliation does

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2 One does not simply undo centuries of gross abuse.
to the claims that victims have against their wrongdoers. The fourth section will distinguish political reconciliation in the case of indigenous peoples and their settler colonial states from political reconciliation typically found in the literature. The fifth section will put forth what I think are necessary components to the reconciliation process: truth commissions, apologies, and reparations. The sixth section will argue what the requirements for participation are in the process, both for indigenous peoples and for the settler colonial states. The seventh section will consider an account of reconciliation aimed at the question of legitimacy for settler colonial states vis-à-vis their indigenous citizens. Finally, I will conclude.

2. Reconciliation, what are we even talking about?

Before beginning, I want to clarify what the concept at play is. The category of reconciliation that I am interested in here treats reconciliation as (1) a set of processes for restoring or improving a relationship damaged by the wrongdoing of at least one of the parties; and (2), as the outcome in which individuals can move forward with their relationship. It is being employed here as a process by which the settler colonial states can best prove their authority trustworthy to their indigenous citizens; and it is a necessary (though not sufficient) condition for both sides to move forward together with their relationship.

What is the relationship between reconciliation and authority, though? Very simply, the answer has to do with improving trust. The best way for a state to show its authority is just is to show that it has a record of being able and willing to produce and enforce just laws for its citizens. If a state has a record of doing that, then its citizens have a strong reason to trust that those things will continue to be done. However, when a state’s record indicates that it is committed to making unjust laws for its citizens, those citizens have strong reasons to trust that those unjust laws will continue. By engaging in reconciliation, a state is attempting to improve the relationship of trust with its citizens.

What does successful reconciliation entail, then? Only that the state has done, within the scope of what is reasonable, what it can do to prove itself as both able and willing to make just laws for its citizens. That is, it has done what it can to give those wronged citizens reasons to trust it by showing it is committed to not being the type of state it has historically been and that it is committed to being a state worthy of their trust. It is important to make it clear, however, that reconciliation does not create any obligations to the state’s authority. Reconciliation certainly provides evidentiary
reasons for individuals to obligate themselves to that authority. But, given the impetus for reconciliation in the first place, barring a process of reconciliation which spanned several generations, it should not be taken as sufficient evidence to obligate oneself to the state nor for the state to assume that such obligations exist. And, even in instances where reconciliation were prolonged over multiple generations, indigenous peoples would still be owed a story as to why they should continue to be subject to the high risk of further wrongdoing while that process continued.

That answer might strike some as misguided. It places the emphasis of reconciliation on the process of improving the state’s status as an authority and not on its responsibility to the victims _qua_ victims; in other words, it appears to paint the story as being concerned with its status, rather than a story of making amends to its victims. As far as an interest in status is what drives reconciliation, and not justice for the victims, the process might be perceived as misguided. Stephen Winter presents a similar concern regarding state apologies, “A state does not apologise in order to improve its civic identity. A state apologises because it owes it to survivors.”³ Moreover, when we put it the other way around, we are “[G]etting the normative structure backwards.”⁴ Thus, when reconciling, if the state is reconciling because it wants to justify its authority first and not because it owes the process to its victims, then we have probably gotten something wrong.

To some extent, I think the worry is correct in suggesting that focusing on the status of the state as opposed to the victims is objectionable. That said, as far as both sides care about improving the relationship, attempting to improve its status is the best positive course of action the state can take. I will leave the question of what happens when at least one of the sides does not want reconciliation for the final section of this chapter.

3. What does reconciliation do?

In regards to reconciliation, there is another very important question worth discussing: how does successful reconciliation change the claims of wrongdoing the victims have brought forth? Put slightly differently, how ought we to consider the claims of those who have been wronged, following successful reconciliation? For example, it’s been argued that when a wrongdoer apologizes to her victim that her

⁴ Ibid.
The apology is sufficient for forgiveness and causally leads to forgiveness, where forgiveness is taken as the foreswearing of resentful attitudes towards the wrongdoer. Therefore, the victim’s claim to justifiable resentment towards the wrongdoer evaporates in virtue of receiving an apology from her wrongdoer. Does something resembling that sort of relationship exist for reconciliation? That is to ask, what happens to a victim’s claims when she reconciles with her wrongdoer?

There are three potential answers that I want to consider: the view that successful reconciliation requires that the victims (and society) “move on” from the wrongdoing; that all legal claims against the state have been exhausted; or that it requires forgiveness of the wrongdoer (and hence the foreswearing of resentment). I intend to show that reconciliation should not entail any of these features, beginning with the claim that victims ought to move on. Instead, I believe reconciliation only provides evidentiary reasons for wronged individuals to trust that the future relationship will be just. It should not require individuals to “move on,” it should not, unless directly addressed, affect the claims that individuals might bring against the state through the courts, and it should not require that individuals forgive the state.

3.2 Move on, mate!

Moving on, as I am using it here, means something like pretending as if nothing bad happened. As the story might go, it would be shameful to look upon the past and potentially harmful as it would bring up old wounds. Once the wrongdoer, the state in this instance, has taken all the necessary steps to reconcile, the victims ought to simply pretend as if nothing happened and move on. This is most attractive in situations where forgiveness would be impossible and the ruminating on the past would be counterproductive to future relationships or simply to the victims themselves. This was offered as a reason for why reparations ought not to be paid to victims of the Stolen Generation in Australia. In the process of determining what reparations victims were owed those victims would be required to recount their story, which would impose great hardship upon them.

That sentiment, that individuals ought to move on, is noticeable amongst the general population in both Australia and the US. In fact, its prevalence is one of the leading reasons for why there was such a fervent debate amongst Indigenous Australians on whether to seek a referendum on constitutional recognition or to seek treaties. Obviously, in theory, those two goals are not mutually exclusive. However,
individuals who seek treaty-making express concern that, like the 1967 referendum, Australian citizens would vote yes on recognition and then see the issue of Indigenous rights as fully resolved. And once the public adopts that stance, indigenous peoples should, as they say, “Move on, mate!”

The view that victims ought to move on following reconciliation is wrong. In most cases of systemic state violence, the victims come to identify themselves through their victimization and non-victim members through the wrongdoing. Improving the relationship between states, victims, and non-victims requires, in part, creating a new identity that all can move forward with. In order to do that successfully, though, individuals cannot forget what has happened. The past must play a crucial role in defining the moral community. Furthermore, this view can become quite dangerous, I believe. Telling victims that they ought to move on from what has transpired following successful reconciliation assumes that all of the wrongs done to them can be sufficiently dealt with through some form of institutionalized justice. That should strike everyone as clearly wrong. For, a perhaps more intuitive example as to why that is clearly wrong, imagine telling a victim of rape that she should move on simply because her rapist was in prison. Victims need to be able to share their narratives; it is an important aspect in the process of healing. Given the trauma of what has transpired, we ought to encourage, not discourage them from sharing their stories. More to the point of this thesis, however, is that failing to address wrongs and simply telling people to move on does nothing to provide evidence that those wrongs will not reappear in the future.

3.3 No more legal claims

The second claim, that reconciliation requires individuals to drop their claims of justice against the state because those claims have been satisfied is more interesting. It prescribes that once reconciliation has been achieved that the victims no longer have claims against the state, and that bringing up the past and attempting to use it against the state would be unfair. This claim is similar to the one I expressed above, except it involves only legal claims. It would certainly not preclude victims from speaking out and sharing their stories and could even include venues and support for victims to share

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their stories, including memorials and National Sorry Days.\(^6\) It only assumes that whatever institutional justice needed meting out has been mete out, and that claiming for more justice on top of that would be unfair. To take a simple, but roughly analogous example, if I accidently spill your beer on the ground, apologize and immediately get you a new one, under most circumstances, it would be unfair for you to demand that I keep getting you beers throughout the night. That, I think, is the intuition behind the idea that once reconciliation is completed, that individuals ought to cease in making claims of justice against the state.

Even in instances where what is being reconciled covers a large swathe of historical wrongs it is very unlikely that reconciliation will be able to address all of the wrongs that have occurred. It is also unlikely that reconciliation, as a tangible state process with a beginning and end, will get it right the first time. More likely, following reconciliation, both sides would need to be in positions to continue to work together to address the issues unresolved and root out those issues undiscovered the first time around. That is to say, even when reconciliation addresses certain injustices, it will likely not do so in a manner sufficient with discharging justice. More work will need to be done following reconciliation to do that.

3.4 Forgiveness

Lastly, some hold that reconciliation is synonymous with forgiveness.\(^7\) Forgiveness is distinct from both moving on and ceasing in making justice claims in that it pertains directly to the attitudes held by the victims. In doing so, forgiveness necessarily excludes the notion that victims ought to move on, while at the same time not necessarily making any claims regarding institutional justice.\(^8\) Forgiveness, within the philosophical literature, is canonically taken as the forswearing of attitudes of resentment toward the wrongdoer by the victim.\(^9\) There are two ways in which we can conceive of that idea: the first is as an entirely subjective process; and second, as being validated only when the wrongdoer makes sufficient amends. The former is called

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\(^6\) Australia really has a National Sorry Day for people to apologize to victims of the Stolen Generation. I’m not making that up. https://www.reconciliation.org.au/news/national-sorry-day-an-important-part-of-healing/. I reckon it’s similar to take your child to work day, but instead you find an indigenous person and say sorry to them.


forgiving, while the latter is called forgiveness. I am concerned with forgiveness. The idea here is that victims ought to forswear any negative attitudes toward the state (in relation to its wrongdoing) following reconciliation.

The problem with this interpretation is that it is too demanding. Forgiveness, the forswearing of attitudes of resentment, is not something we can demand from others. A rapist cannot apologize and then demand that the victim should forgive him. Similarly, a state cannot reconcile and then demand that its victims forgive it.

Yet another reason for thinking forgiveness is too strong as an aim of reconciliation is that there may be some acts that individuals are justified in being unwilling or unable to forgive. In those cases, the best a wrongdoer can do is attempt to persuade the victim that the wrongdoing will cease and that he is sorry for his past actions. Requiring forgiveness makes reconciliation too demanding. If not forgiveness, not abandoning legal claims, and not moving on, then what changes in the victims' claims such that reconciliation is possible?

3.5 Trust

Ultimately, the best a settler colonial state can do is provide evidence that its indigenous citizens could trust it going forward. To have reconciliation play any other role would be wrong or outright inappropriate. Putting it lightly, these settler colonial states have made a complete mess of things. Their indigenous citizens have every reason to expect that they will continue to make a complete mess of things. Those states need to provide evidence to their indigenous citizens that they will not, in fact, continue to make a complete mess of things. That evidence can be provided through a process committed to improving its relationship, which can only be achieved by working directly with indigenous communities to learn what wrongs have occurred and how best to address them.

4. Conceptions of political reconciliation

Much of the conceptual literature on political reconciliation has to do with transitional justice. In the transitional context, political reconciliation is a process for dealing with the past in order to allow all parties to transition into a new (usually

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11 See, for example, the recent philosophical treatment of the subject by Colleen Murphy, *A moral theory of political reconciliation*, (New York: Cambridge University Press, 2010).
democratic) state. In these instances, the wrongdoer is not the new state (obviously) but individual members of a previous state. For that reason, there is no question of the new state needing to prove its citizens can trust it, beyond ensuring that those previous atrocities “Never [happen] Again.” In other words, the new state does not need to address what the old state did in the same way; it only needs to make sure those wrongs don’t get repeated.

There is also the more general type of reconciliation, post-conflict reconciliation. That literature is focused primarily on the actions of particular regimes, for example the truth and reconciliation commission which took place in Chile focused on the actions of Pinochet’s regime. It did not involve the authority of the Chilean state, only issues surrounding that particular regime.

Aside from being focused on the actions of individuals, another shared hallmark of reconciliation in the transitional context or the post-conflict context is that the wrongdoers will not necessarily remain in power. That is, of course, not the case in the settler colonial states. The wrongdoers, taken primarily as the state, will remain in power following reconciliation. The systemic pattern of wrongdoing, against which the claims of illegitimacy emerge, belongs to the states, and not to any individual government. That does not mean that individual governments or individual officials should not be blamed, only that their wrongdoing is insufficient for making the claim of illegitimacy in the way that I have done so in this thesis.

One final point, reconciliation processes—though not necessarily their outcomes—have enjoyed near unanimous support by the citizens of states in transitional or post-conflict settings. That assumption is not one that can be made here.

Given these differences, how should we conceive of political reconciliation between indigenous peoples and their settler colonial states? Yes and no. It should still be conceived of, generally, as a process for improving a relationship following wrongdoing, and it will still contain the structure of reconciliation processes as they’ve occurred all over the world (something I will discuss next). Some of the differences will include how the processes of reconciliation are satisfied in a non-interpersonal relationship and how support for the process can be gained and sustained. Perhaps the most salient difference, though, will come in making sure the process is voluntary for

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13 The slogan of South Africa’s TRC
indigenous peoples. The states in question are guilty of a patterned history of wrongdoing and violence against their indigenous citizens. It would be just as absurd to require indigenous peoples to engage in reconciliation with those states as it would be to require the victim of some severe wrongdoing to engage in reconciliation with her wrongdoer.

5. Pieces of reconciliation: be honest, apologize, and give us our land back

In this section, I am going to discuss three necessary features for political reconciliation: truth telling, apology, and reparations. None of these features are without controversy. Getting the truth from those who know they have done terrible things is not easy. In the case of the TRC amnesty was baited as an incentive for individuals to tell the truth, and there was dissent among victims as to whether that was fair. And apologies are appropriate for individuals, not for abstract entities, right? So, how should we conceive of a political apology between the state and individuals? Finally, reparations between indigenous peoples and settler colonial states is going to have to involve the transfer of lands. For some individuals, that is a no-no. I will discuss these features in turn, highlighting their necessity and how they have been criticized. I do not mean for these features to be exhaustive, and will, in the section following this, discuss additional features that have been proposed as necessary to the process of political reconciliation between indigenous peoples and the settler colonial states.

5.2 Let’s get real here

The general aim of truth telling is getting the facts of the matter straight, however damming those facts might be. In countries like South Africa\textsuperscript{14}, Chile\textsuperscript{15}, and Guatemala\textsuperscript{16} truth commissions have been established to piece together the facts through use of, among other things, victim testimony, public records, and the testimony of the perpetrators of the crimes.

Virtually no one in the literature argues that truth telling is unimportant to the success of reconciliation. Among other things truth commissions are helpful in

\textsuperscript{16} Memory of Silence, Guatemala, (1999).
improving are: the self-worth of victims\textsuperscript{17}, creating a more unified moral community\textsuperscript{18}, and generating support for the lengthy reconciliation process. Truth commissions take seriously the testimonies of victims, and for some of those victims, it is the first time they will have been asked to share their story with others; and for many, it will be the first time that anyone has taken their stories seriously. For the victims who decide to share their stories, this process can help restore their sense of self-worth, whereas previously they may have kept their stories pent up as a source of self-shame. It can also help the rest of society understand and empathize with their claims, which is especially important when officials have denied or attempted to mitigate the severity of wrongdoing that has occurred. The importance of empathy here is twofold: first, it can help integrate the victims into the moral community; and second, within settler colonial states, a long process of reconciliation will need public support, and the best way to achieve that is to begin with a truth commission so that the public can see and hear the atrocities and thus better understand the need for reconciliation.

In terms of the role it plays alongside the other processes of reconciliation, perhaps, the most important benefit to truth commissions is the establishment of the facts through rigorous and careful research. These facts will play an important role in understanding how it is that the rest of the process of reconciliation will proceed. Without knowing the facts of what has transpired, apologies and reparations are less likely to hit their marks, and thus less likely to be viewed as successful.

Truth commissions are not without controversy, however. The primary criticism from individuals involved in the process is that the means by which truth commissions gain testimony from the wrongdoers, the potential for amnesty from legal and civil prosecution. In South Africa, where perpetrators of genocide testified to murdering innocent peoples, the idea that some of them would be able to walk free (and did) was startling to the moral community, especially to the victims who felt their claims to justice had been devalued. Other criticisms include claims that victim testimony does not necessarily provide any type of catharsis for the victim; that truth commission push victims to forgive; that truth commissions are too restricted to


\textsuperscript{18} Colleen Murphy, 2010; Ernesto Verdeja, *Unchopping a tree: reconciliation in the aftermath of political violence*, (Philadelphia: Temple, 2009).
producing a single narrative of events and thus leave many truths in the dark\textsuperscript{19}; and that the value of truth commissions is suspect barring action taken on the information uncovered\textsuperscript{20}.

Some of the criticisms levied above do not concern the concept of political reconciliation but rather instantiations of it. For example, there is nothing conceptually connecting testimony from either victims or perpetrators (or the truth for that matter) to an obligation to forgive. Forgiveness, in so far as it is a necessary prerequisite to reconciliation, only behaves as such when Christianity, or some other religious virtue, is injected into the process of reconciliation\textsuperscript{21}. That is not to say that there is no relationship between the truth and forgiveness. It is more than plausible to think that truth and forgiveness are necessarily connected – forgiveness can’t come about unless you know what you’re forgiving.

What about the focus of truth commissions on producing one version of the truth? As a matter of practical necessity, I think one version of the truth is necessary for gaining as much widespread buy-in into the process. However, to do that, truth commissions should not limit the perspectives to those of victims and perpetrators but to also the perspective of those other members of society who have their own understanding of events. This is especially important in settler colonial states where the dominant understanding of events seems to still resemble that of white saviors rescuing savages from some harsh, brutish, uncivilized state of being.

The general public is far too sensitive to accept that their way of seeing the world is false, and so simply presenting the truth as being only that which comes from the victims and repentant perpetrators will not be persuasive, regardless of its validity\textsuperscript{22}. In the end, that big picture narrative will require some simplifying and will almost certainly have to pay attention to the beliefs held by the general public. These concessions are out of a matter of practical necessity for conveying a digestible narrative to the public that can gain widespread support.

\textsuperscript{20} Brandon Hamber, Transforming societies after political violence, truth, reconciliation, and mental health, (Dordrecht: Springer, 2009).
\textsuperscript{21} Tutu, 1999.
\textsuperscript{22} For a recent example in Australia, look no further than the public furor caused by claims that Australia was invaded, not settled, by the British.
What about the other criticisms? Does it matter if testimony fails as a type of catharsis for victims? Not necessarily. The truth commissions need the testimony of victims in order to understand what has happened. And most victims would, I believe, like for their stories to be known to the public, and as such would participate in some form (not necessarily through public testimony, but also through written testimony or through having others tell their stories for them). Whether the process of sharing their stories is beneficial (or even harmful) for the victims, they should be given the opportunity. If victims want to share their stories and the commission takes proper steps to ensure the victims know and have access to proper mental health resources, then the victims ought to be able to make that choice for themselves.

It is certainly true that many truth commissions have been ineffective in leading to substantive changes in the society. For example, the conclusion of the Truth and Justice Commission in Mauritius in 2011, which dealt with the island nation’s history of slavery, yielded over 300 recommendations on how to address the facts unearthed.23 However, since delivering those recommendations to government committees nearly no investigations have occurred into how or whether to implement them, leaving many to believe that the government has no intention of ever doing so.

What this failure to act on or even consider recommendations points to, I believe, is a further need to get the public involved in the process. At the end of the day, when the public has an interest in a particular matter, politicians will have to respond to that interest. That said, politicians (and other interest groups) will certainly try to sway public opinion, and often times they will do so by attempting to undermine the validity of those with whom they disagree. It is in those instances that truth commissions in are likely to struggle. Truth commissions will need the full support of government if they are to be successful, but in the age of “alternative facts,” it is unlikely that that support will be readily available.

The typical way in which the truth has been coaxed from public officials in truth commissions is through amnesty from legal or civil persecution. But what force does amnesty offer when reconciliation is with the state and not particular individuals? Or when individuals can simply deny the claims of the commission as leftist? The answer is that amnesty is not something that will be of interest in political reconciliation cases between settler colonial states and indigenous peoples. Instead, what will be of interest

23 Truth and Justice Commission, Mauritius, (2011)
is the process by which the truth commission operates. Out of a matter of practical necessity, the truth in these instances will get politicized. In some cases, the truth will get unrecognizably transformed through over-politicizing. It will then take the form of some watered down version that fails to address many of the wrongs or outright dismissal wrongs. That is not to say that a watered down truth is worthless—it’s certainly preferable to pretending as if nothing bad had occurred at all; and it might be politically expedient to make some concessions to the truth in order to get the larger narrative out there.

If reconciliation is to occur within settler colonial states, the questions of how to proceed with establishing a truth commission and how to ensure its recommendations enjoy enough endorsement to lead to positive changes will need to be addressed. It is my opinion that the best way to proceed would be to provide a publicly accessible, transparent, and openly deliberative truth commission with the resources to frequently update the public and make known their deliberations, such that any major criticism can be engaged with. What truths get watered down and what an acceptable narrative looks like for indigenous peoples, though, will ultimately be something that indigenous groups will need to decide.24

5.3 Apologies, what are they good for?

Reconciliation simpliciter is a process of improving or restoring a relationship damaged by the moral wrongdoing of one or more parties. One of the necessary aspects of reconciliation is an apology by the wrongdoer. Apologizing, in general, is considered a moral requirement for wrongdoers. The general justification given for this requirement stems from the value of respect. An apology conveys to the victim that the wrongdoer does respect her as a moral agent, despite his wrongful actions.

Apologies have a wide range of conditions. What conditions an apology has depend on the theorist and what they see apologies as doing. For some, the fact that apologies are paradigmatically interpersonal does not present a roadblock for political apologies (apologies by states); for others, it provides a substantial roadblock for understanding political apologies. For those who argue that no roadblocks exists claim

24 For a recent example of this, look to the meeting of Indigenous Australian leaders at Uluru, where they made the decision to stop pandering to the constitutional recognition movement in favour of pushing treaty-making. This was a rejection of the narrative that Indigenous Australians ought to be included in the constitution in favour of the narrative that Australia wronged its Indigenous peoples by not making treaties with them and has an obligation to make treaties with them today.
that the difference is superficial because, at the end of the day, political apologies must still adhere to the same set of conditions that interpersonal apologies do. On the other hand, those who believe roadblocks do exist claim that there is a deep difference: namely, in how interpersonal apologies relate to forgiveness. In what follows, I am going to consider two very different accounts of political apologies, one that argues that political apologies are entirely distinct from interpersonal apologies. The other argues that interpersonal apologies can apply directly to states. Ultimately, I conclude that there is no real difference in terms of outcomes. If that conclusion is true, then regardless of where we place political apologies on the spectrum between (and including) those views, we have reason to think that states are situated to apologize. As such, we should not reject their inclusion in process of political reconciliation between settler colonial states and indigenous peoples. Before getting to those accounts, I want to discuss what apologies do and why they are desirable for reconciliation.

Why should we think that apologies are necessary for reconciliation? The general aim of an apology, I believe, is to convey respect for the victim. This conveyance of respect, however, is of a particular type. For example, abstaining from harming others out of a belief that doing so is wrong can implicitly convey a sense of respect for others as individuals possessing some sort of value. Other examples, might include saying “Please” and “Thank you” to strangers. The type of respect that I am concerned with emerges when one has explicitly disrespected another and that the victim of that disrespect has reason to believe that the actor in question believes the victim to be unworthy of the respect owed to him as an individual with moral value. For example, calling someone by a member of a particular racial group by a racial slur associated with that group is, among other things, disrespectful in this sense as it attributes lesser value to an individual based on a morally arbitrary feature of that person. What an apology does, very simply, in that situation, is signal to the victim that the wrongdoer recognizes and communicates to the victim that it was wrong of them to issue that slur. In other words, it conveys to the victim that they are deserving of the same respect owed to all others; and, thus, that the wrongs committed against them were, at least to that extent, wrong.

There are, of course, other views on what an apology does. Some claim that an apology attempts to “make amends” for wrongful action; and other, more controversially claim, that an apology seeks to gain forgiveness. On the view that an apology is aimed at “making amends,” I think it is reasonable to suspect that what those
authors have in mind is a type of conveyance of respect. If amends meant something less morally loaded, such as only monetary compensation, then the apology in that sense is more akin to “paying off” or “buying off” the victims, which declares nothing in regards to the moral wrongness of the action.

In a very convoluted way, it could be stated that apologies seeking forgiveness are also related to conveying respect. It is a reciprocal conveyance of respect: the apologizer in apologizing is conveying respect for the victim in light of her wrongdoing; and the victim is recognizing the apologizer as deserving of forgiveness out of a sense of love for humanity. Marguarite La Caze has argued that forgiveness is an imperfect duty based upon love for others.25 One interpretation of that is that it is virtuous to have a general sentiment of love for humanity, which, I believe, can be spelled out under some interpretation of respect. In that case, though, the duty would be perfect, not imperfect. On the other hand, if we interpret La Caze’s claim as a deeper sense of love, then it would be far too demanding.

A more plausible idea, I think, to conceive of forgiveness is as social construct not grounded in any moral principles or virtues. Instead, we forgive because we find doing so useful for social life,26 and apologies, in addition to being owed, provide evidence that forgiving could lead to productive future relations. That is not to say that some forgiveness is not better than others. As I suggested above, there is something more desirable about forgiveness assisted in coming about by an apology as opposed to merely forgiving by changing one’s attitude or heart. That is because forgiveness, as opposed to forgiving, is less likely to relapse given that it has the additional support of an apology; whereas, forgiving has only the support of love or some other potentially fleeting attitude.

That, I believe, is also the extent of the relationship between apology and forgiveness. That of course is not without controversy. As Joseph Beatty wrote in the 1970s, “[T]here seem to be both transitive and intransitive dimensions to forgiveness. The very appeal to the other to forgive one, which presupposes that one can influence the other to forgive, suggests that there is a very real transitive aspect to forgiveness.”27 On the other hand, that appeal (an apology) makes the victim feel guilty, which makes

the forgiveness given non-voluntary and therefore not really forgiveness, thus making the relationship between apology and forgiveness intransitive. In so far as we are concerned with the relationship between apology and forgiveness, his analysis provides us with the conclusion that forgiveness must come about unilaterally or else it is not forgiveness. In other words, if a wrongdoer apologizes prior to forgiveness being given to her, then forgiveness can no longer be given. This conclusion is contrary to our intuitions on forgiveness which suggest that an apology can help to bring about forgiveness. It also has the odd result of apologies being antithetical to conveying respect for the victim as they would seek instead to coerce the victim.

At the end of the day, apologies convey respect for the victim and provide the victim with evidence that future beneficial relations might be possible. This is desirable in reconciliation processes where the victims have suffered discriminatory and inhumane violence at the hands of their states. Apologies in reconciliation cases are important for the same reason that they are important in everyday instances: they aid the victim in reclaiming or establishing her sense of self-respect. In cases of reconciliation, however, they also serve an additional function: apologies given by representatives of the state establish culpability for the events. That is important for future legal proceedings between indigenous peoples and settler states.

5.4 What makes an apology?

When we reflect on what we might consider to be a valid apology, it is reasonable to suspect that it could be achieved by a mere look. For example, consider a child who has realized a grievous error in her judgment led to her act wrongly. Having this realization the child looks to her parents, utterly devastated by having exercised such poor judgment. Her parents can read the guilt on the child’s face and knows that the child knows what she has done is wrong and has learned her lesson. The parent might also intuit a number of other things from the look of her child which signal that the child is truly apologetic for her actions. It would, of course, be a slap in the face of victims if the leader of a wrongfully acting state offered a “devastated” look as an apology for genocide or wrongfully and through the use of force taking one’s children. Does that mean that what we accept as interpersonal apologies should not be accepted as political apologies? Not necessarily. I believe that what is important about our interpersonal apologies is precisely what is of importance for our political apologies:

28 Ibid. at p. 247.
conveying a sense of respect for those we have wronged. Where the two types of apology differ is in what the normative conditions for their satisfaction requires.

First, the state is not the close friend of its citizens nor is it their parent. The relationship is at best distant and abstract, albeit immensely important. Therefore, we cannot intuit at a glance the apologetic nature of the state. The state has only two ways of communicating to its citizens, through the speech acts (including written) of its representatives and through its laws. Given the wily political nature of states, as well as the conditions that most philosophers require for apologies, the value of speech acts is insufficient for apologizing. That is to not to say that the speech act of an apology is unnecessary, though. It is only to say that the words must be backed up by legislative action.

5.4.2 Griswold on apology

I will start with Charles Griswold’s account of apology, and then discuss his views in relation to political apologies. It is important to note that Griswold, following Wittgenstein, views apologies as a sibling to the cluster of concepts under the heading of forgiveness. As Griswold claims, “What else is an apology if not a request for forgiveness?” His conditions for being deserving of forgiveness i.e. for giving an apology are as follows:

1. acknowledge that she was the responsible agent
2. repudiate her deeds (by acknowledging their wrongness) and herself as their author
3. express regret to the injured at having caused this particular injury to her
4. commit to becoming the sort of person who does not inflict injury; and show this commitment through deeds as well as words
5. show that she understands, from the injured person’s perspective, the damage done by the injury (this requires Smithean “sympathy”)
6. offer a narrative accounting for how she came to do wrong, how that wrongdoing does not express the totality of her person, and how she is becoming worthy of approbation.29

Griswold is in the camp that believes that apologies provide both evidentiary reasons to forgive as well as a virtuous reason to forgive. According to Griswold only the first four conditions can be met by political apologies. The first condition can be met by proxy, the state in giving an apology is acknowledging responsibility for the wrongdoing; the second is met by the speech act or other performative act signaling apology; the third is also met by proxy, as apologies must contain remorse or regret at having caused the action. An apology that did not contain those types of attitudes would not be an apology, it would be more like a justification for one’s actions. The fourth can be met by backing the apology up with substantive policy changes, memorials, reparations, etc.

Griswold argues, though, that the fifth and sixth conditions cannot be met by the state. The fifth condition cannot be met because the state as an abstract entity, or non-person, does not possess moral sentiments and as such is unable to show that it understands the full extent of the damage done by the wrongdoing. Griswold’s claim is that the moral sentiments are necessary because they signal that the apologizer is worthy of being forgiven. To be worthy of forgiveness, the apologizer must fully recognize and appreciate the full moral wrongness of her actions. If an apologizer could not do that, it is not clear that the apologizer would be apologizing for the wrongdoing or apologizing for getting caught.30

The sixth condition cannot be met because the state is unable to create a narrative of interpersonal harm. Instead, the narrative that the state offers will be much more complex given its political nature; it will be public not personal. The public nature of the state’s narrative, says Griswold, lends itself more towards seeking a “public record” than seeking to show itself “worthy of approbation.” Whereby “public record” Griswold has in mind something like the report made by a truth commission sans any recommendations.

Because the state does not fully meet the conditions necessary for being able to apologize it is not something that can apologize, at least not in the interpersonal sense, according to Griswold. Instead, what the state can do, and what it should do, he says, is issue what he refers to as “political apologies.” Political apologies are similar to normal

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30 It is also not clear that the apologizer would be apologizing for the actual wrong committed, as opposed to what it (the state) in its limited capacity, views as the wrong committed. This hearkens back to the relationship between the truth and forgiveness stated above: you simply cannot forgive if you don’t know what you’re forgiveness is for; and similarly, you simply cannot apologize if you don’t know what you’re apologizing for.
apologies in form, but lack moral sentiments and interpersonal narratives. The first
implication of this is that political apologies are not deserving of forgiveness. Just as it
would be inappropriate to forgive the rock that smashes into your windshield, it would
be inappropriate to forgive the state that wrongfully took your land. Instead of
forgiving, he argues that victims ought only to accept that they were given a political
apology.

The second implication is that when a state commits a wrong it commits it
against an entire moral community and not necessarily against any particular individual.
Hence, the public nature of political apologies. Because of that, political apologies are
not given only to the primary victims, they are apologies given to the moral community.
That is to say, when the apologizer goes to meet the second condition – repudiating the
wrongs – that there is nothing to distinguish the wrong she did to the primary, or direct,
victim from the wrong a practically unaffected fellow citizen suffered. And, in fact, it is
the wrong as it is felt by the moral community, not the primary victim, that is
repudiated. Therefore, an apology for wrongly taking one’s land is not addressed to that
individual or group of individuals who had their land wrongfully taken; instead it is
addressed to all as an unfortunate occurrence of a rights violation. This has the effect of
downgrading the first four requirements of the apology. Because it is addressed to the
moral community, Griswold’s political apologies are unlikely to serve any useful
purpose for victims nor are they likely to aid the reconciliation process in general.

In so far as apologies do seek forgiveness and are necessary for forgiveness to be
virtuous, I think Griswold is correct in his assertion that states *qua* abstract entities
cannot satisfy his fifth condition. There are two things that are likely to follow from
striking that requirement for states. First, what Griswold claims, it would not be
virtuous to forgive the state; second, that the state may have difficulty in meeting the
demands of the fourth condition – showing itself as committed changing its ways. That
difficulty in meeting the fourth condition, however, is merely in the quality of the
apology; it does not affect the fact that an apology had still been given; it would only
affect how thorough it is and thus how it is received and subsequently accepted or
denied.

As far as the narrative structure of the state’s apology being primarily between
the state and the broader moral community, I think Griswold is clearly incorrect. The
upshot of his claim was that political apologies are better suited for creating a public
record, not for promoting forgiveness. Even if we accept that there is no normative
relationship between political apologies and forgiveness, it is not clear why political apologies should be aimed first and foremost at the moral community, and not at the direct victims. Griswold’s argument that political narratives are bound up in more complex normative structures – namely the relationship between the state and moral community – as opposed to person to person sounds plausible at first, but there is no reason to think that the state would need to give such a narrative in order to apologize for what it had done to any specific individual or group of individual; and even if such a narrative was needed to satisfy the moral demands of being a state that demand does not exclude or conflict with a demand to apologize to the primary victims as well.

If I am correct and the state can possess multiple narrative structures, then we can accept that the state possesses a unique structure which requires it to apologize for its actions to the broader moral community, while not denying that it also required to apologize separately for its actions to its victims. This would require multiple apologies but there is no reason for why the state should not be required to issue multiple apologies if it has committed distinct wrongdoings at distinct levels.

In summary of this view, I think it is reasonable to state that even if political apologies are distinct from interpersonal apologies, in that they are not aimed at forgiveness, that they can still be effective by meeting the first four conditions that Griswold holds for the paradigmatic interpersonal apology. And in doing so, it is possible for them to achieve all of the typical functions that we would desire of an apology as a political trust-building exercise.

5.4.3 Minimalist apologies

On the other side of the spectrum we have views which permit that political apologies are nothing more than direct applications of interpersonal apologies, just given in a different context. Stephen Winter argues that apologies possess three features: the verdictive, attributive, and participatory features. The verdictive feature is nothing more than giving a clear account of the wrongs and why they were wrong; the attributive feature is the act of accepting blameworthiness for the wrongful action; and the participatory feature merely requires that the agents accepting responsibility or being apologized to have standing to perform those functions.31

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31 Winter, 2015.
Where political apologies differ from normal person-to-person apologies is largely in the participatory feature. Who has the standing to apologize and what is their relation to the victim? A plausible answer is that the elected leaders of those states *qua* representatives of those institutions have standing to apologize on behalf of those states. For example, when Kevin Rudd apologized for the Stolen Generation he was not apologizing for his role in the wrongdoing, he couldn’t have done that. Could he have apologized on behalf of all Australians? Also unlikely. Doing so would entail that citizens who opposed the forced removal of children and even those children themselves were in some sense responsible for the actions of the government. Instead, he argues that political apologies are given on behalf of the institutions which require legitimacy. Wrongdoing by the state, says Winter, calls the authority of those institutions into question and gives reasons for citizens to not obligate themselves to them. In so far as an individual in the capacity and moral standing of Rudd (Prime Minister and not perpetrator) provides an apology, that apology should be considered as on behalf of the state. Interpreting the participatory feature of an apology in this way does nothing to bar the other features from being realized. Rudd could clearly satisfy the verdictive conditions by providing an account of the wrongdoing as well as judgments for why they were wrong; and the act of apologizing on behalf of the state tacitly accepts that the state’s actions were blameworthy.

5.3.4 Victims and the standing to be apologized to

Even if we accept that representatives apologizing on behalf of the state is both desirable and appropriate, there is still the question of whether current generations deserve apologies for historical wrongs done to their deceased relatives. The typical way of asking this question is to ask when is it appropriate to apologize to those who were not victims. I think that question, however, would be inappropriate here. The reason being is that we know current generations of indigenous citizens have wrongly suffered from the historical wrongdoing of the settler colonial states; in addition, we also know that current government actions also produce wrongs against indigenous peoples.

5.4 This land is your land (maybe), and this land is my land

Reparations, or compensation for stolen, damaged, or lost property, is going to have to involve land if reconciliation is going to be something indigenous peoples will participate in. Any discussion of reconciliation without the transfer of land is a non-
starter. This claim has been made most forcefully by political scientists at the University of Victoria. One paper in particular, “Who's Sorry Now? Government Apologies, Truth Commissions, and indigenous Self-Determination in Australia, Canada, Guatemala, and Peru” by Jeffery Corntassel and Cindy Holder⁴² offer a nice summary of the position through the following parable:

There were two friends, Peter and John. One day Peter steals John’s bicycle.

Then, after a period of some months, he goes up to John with outstretched hand and says ‘Let’s talk about reconciliation.’

John says, ‘No, let’s talk about my bicycle.’

‘Forget about the bicycle for now,’ says Peter. ‘Let’s talk about reconciliation.’

‘No,’ says John. ‘We cannot talk about reconciliation until you return my bicycle.’³³

The point of the story is obvious enough. Of the many injustices committed against indigenous peoples again and again has been the stealing of their land by these settler colonial states. Virtually none of the land acquired by treaty can be said to have been acquired fairly, as the terms of treaties between the US and its indigenous peoples have been unilaterally violated by the US; and many treaties in the US featured indigenous signatories that were either grossly misled as to what they were signing, lacked the authority to sign a treaty, or both. 

Without reparations taking the form of lands being returned, any attempt at reconciliation is likely to be perceived as insincere, and, as the story above articulates, insulting. Land, however, is not the only form reparations must take. Changes to federal policy allowing for even greater autonomy for indigenous peoples will also need to occur – what good is land if you’re not able to do anything with it?

Bashir Bashir argues that policy-making, in so far as it requires deliberation, should not be included within the scope of reconciliation. He says, “deliberation and reconciliation fulfil different yet crucial tasks. Deliberation is universal, distributive, and prospective in its orientation and reconciliation is historical, reparative, and

³³ Ibid. at p. 467.
I think that is wrong. Reconciliation, in so far as it promotes the prospect of better relationships must look to the future. And, on the topic of policy, is must include discussions about the distribution of goods and resources within the society. The case could certainly be made that deliberation in regards to social norms within the society is outside the scope of political reconciliation as that is something that occurs between individuals and involves the changing of attitudes and beliefs.

What ultimately makes reparations important, and necessary, is that it can involve the transfer of lands and resources for developing institutions of self-governance and independent economies on that land. Regardless of how successful the other aspects of reconciliation are, the process would be a massive failure if the settler colonial states failed to provide measures for increased self-governance and land rights for its indigenous peoples.

One feature which distinguishes these aspects of political reconciliation is that they are all actions which can only be completed through the assistance of the state government. Truth commissions will fail if politicians are denying the validity of their outcomes as leftish nonsense; political apologies can only be given by representatives of the state; and reparations can only be made through government action. That feature is why attempts at reconciliation in Australia have largely failed. Starting as a government initiative in the 1990s, Reconciliation Australia very quickly found itself under the same political rigmarole as any other political initiative. Its initial attempts at defining reconciliation were to create a justice and reconciliation process to address the Stolen Generation, however, the government decided that using justice in relation to the process would be unhelpful and removed it. That is not to say that the reconciliation process was a complete wash. The Bringing Them Home Report, which came out of a part of reconciliation in 1997 yielded an accurate account of what had transpired and that led, eventually, to the aforementioned apology by Prime Minister Rudd in 2007. However, the recommendations of that commission were dismissed by the federal government the time. Instead of making reparations in the form of monetary payments to the victims, the government decided instead to create a fund to be used for reuniting families, Link Up, while dismissing individual compensation as not being “the most appropriate way of dealing with family separation.” In addition, the process of deciding compensation could not be done in “a practical and equitable manner,” and any tribunal

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attempting to discern compensation would “not avoid the trauma of revisiting past events.” Ultimately, it took until 2016 and the actions of state governments, not the federal government, to compensate victims of the Stolen Generation.

Deliberative truth commissions, political apologies, and reparations do not encompass the necessary procedural components of the political reconciliation process between indigenous peoples and their respective settler colonial states. However, they do cover conditions that virtually every proponent of reconciliation can get behind, albeit not necessarily in the way that I have suggested they be implemented.

In order for successful reconciliation to be successful between indigenous peoples and the settler colonial states, reconciliation must be collaborative. While the components above must be present, the form that they take must be determined in partnership between indigenous peoples and these states. If only for pragmatic purposes, it cannot be indigenous peoples simply making a list of demands that the states ought to meet entirely. Furthermore, it is not conceptually required as a matter of trust-building that states should have to meet such a list of demands. States through engaging in the process in good faith—in taking seriously the claims of their indigenous citizens, working with them, going through the different components of reconciliation, and so on—can provide solid evidence that they ought to be trusted. That said, as a matter of practicality, certain demands will have to be met by the settler colonial states in order for the trust accrued through good faith reconciliation to be decent enough to build sufficient confidence for indigenous peoples to be able to reasonably trust that those states will not commit the sort of wrongs they’ve been guilty of again.

6. Participation and reconciliation

There is one last little bit that I want to explore in the process of reconciliation. What obligations do either side have to participate? And what do those obligations entail? In addition to its procedural requirements, reconciliation also contain an important participatory requirement. This is entailed by, the existence of the procedural requirements—you can’t have deliberative truth commissions if no one participates, for example. However, the way in which I want to distinguish this requirement is in terms of obligations that parties have to participate in the overall process. In virtue of the claims of legitimacy either taken or assumed by the settler colonial states, I believe they

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have an obligation to engage in the process of reconciliation. On the other hand, in virtue of those states not being legitimate, participating in the process ought to be entirely voluntary for indigenous peoples. While both of these claims seem intuitively obvious, their respective entailments are worth exploring. Starting with the participatory obligations of the state, I will touch on these topics now.

States have a duty to their citizens to create just laws. Under typical circumstances, liberal constitutional democracies are able to accomplish that goal through simply being decent liberal constitutional democracies. However, when those states behave violently and maliciously against their citizens, they have a duty to either rectify the situation or to abandon their claims when rectification is either impossible or unsuccessful. However, that is not to say that choosing to abandon one’s claims of authority is the same as getting off the hook for wrongdoing. For example, if the US abandoned any claim to governing its indigenous citizens that decision would do nothing to discharge its other moral duties owed to those peoples. In short, the claim is simply that while state’s have as duties to their citizens, it possesses a more general duty to make amends to those whom it has wronged.

On the other hand, reconciliation for indigenous peoples in these states must be voluntary. For it to be anything other than voluntary would presuppose that they owed it to the settler colonial states to participate. As no such claim exists, it is not clear what could obligate them to participate the process. That is especially true given the circumstances surrounding the relationship. The systemic and egregious acts of wrongdoing of the states are such that these states could not provide reasonable assurances that participating in reconciliation would ensure a better future for their respective indigenous citizens. That is not to say that indigenous peoples would be disinterested in participating in the process.36 Only that there is no obligation for them to do so. What does it mean for the process to be voluntary for indigenous peoples, though?

There are two parts of the process of reconciliation in which voluntariness is going to be important. First, in consenting to the process of reconciliation itself; and, second, is in being able to exit the process. I will first discuss what needs to happen for

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36 Although, to be fair, absent any coercion, it is not clear why indigenous peoples would want to reconcile. As one person working on indigenous rights in Australia often tells me, “Reconciliation is a White man’s thing. We don’t want that crap.”
indigenous peoples to be able to consent to the process, and then discuss what needs to be the case for them to be able to exit that process.

In so far as reconciliation is aimed at improving relationships in light of wrongdoing, making it non-voluntary would force the victims of wrongdoing to work toward improving their relationship with the wrongdoer. This is similar, I believe, to requiring victims to forgive their perpetrators; it creates an additional wrong done to the victim. To require that victims engage in reconciliation, would be to force them to continue to engage with their wrongdoers and thus to continue to expose them to the risk of wrongdoing by that wrongdoer.

If that is true, then what does a choice to “not reconcile” need to mean? The choice to “not reconcile” must be functionally equivalent to the claim that “the state is illegitimate.” Because reconciliation is aimed at providing evidence to trust an untrustworthy state, “not reconciliation” must entail that indigenous peoples are unwilling or unable to trust the state in light of its past actions or in light of its failure to reconcile in good faith i.e. by not being honest, apologizing, giving land back, etc. And where being trustworthy of making just laws is a necessary condition for the legitimacy of states, untrustworthy states are not legitimate.

In that case, indigenous peoples ought to be able to exit the state. This outcome is similar but distinct from the outcome of successful reconciliation. Following successful reconciliation, the settler colonial states would still be illegitimate—reconciliation provides evidence in favour of trusting the state, it cannot outweigh generations upon generations of distrust built through severe wrongdoing. However, in the case of successful reconciliation legitimacy would not be off the table. Whereas a case where reconciliation fails or indigenous peoples do not want to reconcile, legitimacy would be off the table. In the next chapter, I will justify the right of indigenous peoples to exit as interpreted as a right to secede; and, then, in the chapter following that, show how a decision to “not secede” following successful reconciliation legitimates the state vis-à-vis its indigenous citizens.

Assuming indigenous peoples want to reconcile, what obligations do they have, then? Once they have agreed to participate, they do have an obligation to see it through. That obligation is not absolute, of course. It could be that the settler colonial states fail to reconcile in good faith, for example. If that were to occur, indigenous peoples would be justified in ending the process. What, though, would need to occur for indigenous
peoples to end the process prematurely? Likewise, should the settler colonial states possess a symmetric power to end the process? The answer to that second question has to be yes in order to avoid the possibility of indigenous peoples making unfair demands. What justifies either party ending the process early?

We might think that there are a number of disagreements between indigenous peoples and the settler colonial states which would justify either party abandoning the process. In general, I think there are two sets of potential conflicts that might cause concern. The first one is disagreement over the legal status of non-persons as rights bearers. I briefly touched on this in the previous chapter, but will elaborate on it further here. The second has to do with land. Settler colonial states fear proposals which would lead to increasing the lands owned by indigenous peoples as well as increasing protections that indigenous peoples have in regard to those lands. It is important to note that these types of disagreements, if they are to pose a real concern to reconciliation, require that the groups be unwilling to budge.

6.2 Non-persons as rights bearers

On the first of those worries, there is recent evidence suggesting that contemporary liberal states may not be inimical to the rights of non-human entities. As a recent court decision in New Zealand has declared, the river, Te Awa Tupua, “will have its own legal identity with all the corresponding rights, duties and liabilities of a legal person.”37 Shortly thereafter, a similar decision was made by Uttarakhand High Court in India stating that both “[T]he Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna.”38

These decisions are the first of their kind anywhere in the world and illustrate progress in recognizing non-persons as rights bearers within contemporary liberal systems of government. While the reasons behind these decisions are unique to the countries in which they were made, I do believe some optimism can be drawn from them if only in regards to a willingness for individuals on both sides to work together to

38 Salim v. State of Uttarkhand, the High Court of Uttarakhand at Nainital, (2014).
make laws which reflect the diversity of beliefs within these societies. What remains to be seen, though, is what the upshot of these decisions will be in terms of protecting these areas. I granted in the first chapter that indigenous conceptions of rights – including rights to non-human entities – could be captured within a liberal framework. The primary reason being that, in terms of outcomes, there may not appear to be a significant difference between having a robust set of protections for an important land area – such as a river or forest – grounded in human rights interests (in culture, for example) to that land having the same set of protections grounded in non-human rights interests but represented by individuals. If there is in fact no difference in outcome, then the most severe objection settler colonial states would have would be in terms of upsetting foundational legal norms of their societies. On the other hand, it is very likely that permitting indigenous conceptions of justice to play a role in shaping the legal norms they live under would provide strong positive evidence for indigenous peoples to reconcile.

I do not think that the question of how states should weigh that sort of decision is only political, though. Certainly, it will depend upon their constituencies. But, I believe, it is a point that indigenous peoples could press as a normative requirement for the settler colonial states. The reason being is that indigenous peoples could plausibly claim that violations to their traditional lands as well as their claims to that land have been justified by the settler colonial states through the denial of indigenous moral frameworks. For example, the declaration of *terra nullius* in Australia, later overturned in *Mabo v Queensland*, was made out of the false belief that Indigenous Australians had no system of law or governance related to land ownership. That of course was false. Given that injustices committed against indigenous peoples have sometimes stemmed from the exclusion of indigenous moral frameworks, the best way to address those injustices is through acknowledging the validity of indigenous moral frameworks for (at least) legal purposes. If the settler states were unwilling to budge on acknowledging or in at least engaging in serious deliberations on the topic, then indigenous peoples would be justified in exiting the process prematurely.

6.3 DRIP and fear mongering

As discussed in the previous chapter, the settler colonial states in question have yet to ratify the United Nations *Declaration on the Rights of Indigenous Peoples* (DRIP). Their reasons for doing so have primarily had to do with fears that doing so would limit their authority over their territories. Australia, despite being assured in no
equivocal terms by an article in DRIP, feared that DRIP would support secessionist claims by Indigenous Australians; and the US expressed fear that DRIP would require reversion of private property to Native Americans.

Considering the second fear, as the first has been adequately debunked by the words contained with DRIP, it is not as damming as these states make it out to be. Assuming that reversion of private property would occur, there is nothing to suggest that it would need to occur immediately. For example, a non-indigenous family could continue to own the land until the death of their oldest child or grandchild before ownership would revert back; or, the settler colonial states could use their powers of eminent domain to reclaim the property at a fair price; or the states could make changes to federal law which would permit indigenous peoples to issue land titles to non-indigenous citizens, thus allowing those families to repurchase the land from an indigenous government. There are an endless number of way in which those fears can be addressed.

Is there a general way to characterize over what issues ending the process is justified? I believe justifications for ending the process are related to issues concerning the authority of the state. It is limited to these issues because the indigenous peoples would not be justified in making claims above or beyond what is necessary to address the historical injustices they have faced. That is not to say, though, that the state should limits its reconciliation efforts to only addressing those injustices. These states, if they ultimately want to become legitimate, need to prove to their indigenous citizens that they are fully committed to being a just state for their indigenous peoples. I now want to turn to an influential account of reconciliation within the literature and see how it measures up.

7. Deliberative modus vivendi

Duncan Ivison proposes, what he terms as, a “deliberative modus vivendi” between indigenous peoples and their settler states. The deliberative aspect requires that settler states enter into good faith deliberation with their indigenous citizens over how to best incorporate their views into the norms of the state. The fact that this process would take place as a modus vivendi simply means that these deliberations would be ongoing. Ivison is aware that one-off deliberations are not likely to create the

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39 Ivison is concerned with First Nations peoples and Native Americans.
drastic changes necessary for indigenous people to “feel at home” as citizens of these states. In fact, it may even be harmful to have drastic changes from the get-go as you would then risk alienating other members of society. By allowing for these deliberations to be ongoing, they can constantly be updated according to the best available evidence on what works. For Ivison, it is not necessarily the emergence of drastic changes to the laws or norms of the state which allow indigenous peoples to “feel at home” within these states. Instead, it is that they have the opportunity to shape the norms of the state which accomplishes that. This view is desirable in that it provides the answer to how the settler colonial states could eventually become legitimate.

As Ivison puts it, reconciliation is something that is occurring all throughout this process. In effect, he argues, that by the state participating in good faith in these deliberations they are providing evidence of not just their status as justified political authorities but also for why it would not be risky for indigenous peoples to accept them as legitimate.

Ivison’s view is attractive if indigenous people have a choice as to whether they will participate in the process. As I discussed above, not being able to make that choice would presuppose the legitimacy of the state and thus defeat the primary purpose of reconciliation. I do not mean to say that a non-voluntary process of reconciliation would necessarily fail to provide benefits to the indigenous peoples. Truth commissions, apologies, reparations, policy changes, and a stream of other important benefits might follow from a non-voluntary process of reconciliation. Those are important benefits and it would be a great thing if they came about. However, in so far as we care about legitimacy, we should not be satisfied with those benefits as their appearance, as well as continuance, is contingent upon the political will of states who have systematically violated nearly every agreement they have ever made with their indigenous citizens.

Nonetheless, it could be argued that Ivison’s deliberative modus vivendi is a good second-best strategy. If states are unwilling to acknowledge and support indigenous rights to secede and no viable secession strategies exist, then it would, perhaps, be in the best interests of indigenous peoples to work with the state to reshape its norms and laws so that they might someday be able to feel at home within it. That said, the costs of having to wait around to feel at home within these states is likely to be very high–cultural assimilation, for example, is not stopping anytime soon. On the
other hand, secession probably isn’t happening anytime soon. It may turn out that Ivison’s view is not the second-best but rather the best route. Determining its priority might depend on the costs associated with each option.

Conclusion

While there exists a substantial amount of literature regarding political reconciliation processes, much of that literature is focused on transitional states and interpersonal reconciliation. In the literature that does focus on reconciliation between a state and its citizens, many important questions have been left unanswered. What I have attempted to do in this chapter is to start to answer some of those questions, such as what role truth commissions, what role political apologies will play, and what obligations each party has to participate in the process.

The key issue facing political reconciliation within the Australia and the US is public support. In many instances of political reconciliation following severe conflicts or during the transitioning to a new state, a majority of those populations want to reconcile, and even a larger majority recognize why it reconciling would be desirable. Within the settler colonial states, however, most citizens simply do not care; and those that do care, do not see reconciliation as something that needs to address the authority of their states. Indigenous peoples will have to make some concessions on what the process of political reconciliation entails if they are going to get that public support. That said, there is a limit to what they should accept, namely those limits described above. To complicate matters even more, in the next chapter, I will continue to address that topic of what reconciliation requires arguing that indigenous peoples ought to be able to secede as a result of the settler colonial state’s illegitimacy. That assertion holds true regardless of whether the only components of reconciliation have been satisfied.
Chapter 3: Justifying indigenous secession

In this chapter, I will justify the right of indigenous peoples to secede. The right of indigenous peoples to secede, and their reasonable ability to do so, are necessary conditions for the legitimacy of the settler colonial states. Secession, I believe, should be conceived of as separate from the process of reconciliation. Political reconciliation, discussed in the previous chapter, focuses on building the foundations for indigenous peoples to be able to reasonably trust their respective states; and, given its political nature, it is grounded in the obligation states have to create and reasonably maintain a system of just laws for its citizens. Secession, though it also helps to achieve the end of building trust, is justified differently. Precisely what that justification is will be the topic of this chapter.

The chapter before this one argued that political reconciliation is necessary to build trust into the relationship between indigenous peoples and their settler colonial states. Successful reconciliation provides evidence to indigenous peoples that those states are committed to making just laws for them. The process of reconciliation, for indigenous peoples, I claimed, is entirely voluntary. They are under no morally defensible obligation to engage in reconciliation nor are they obligated to remain under the authority of a state who has so grievously wronged them throughout its entire history, even following successful reconciliation. What these claims entail is that indigenous peoples ought to have the option to exit the authority of the state. And what
I will argue in this chapter is that their option to exit ought to be conceived of as a right to secede.

This chapter will proceed as follows: the first section is this introduction. In the second section, I will distinguish the right to exit, conceived as a right to refugee status, and the right to secede. In the third section, I will argue that while illegitimacy under the circumstances described entails a right to individually exit, for indigenous peoples within these states it entails a right to collectively secede. In the fourth section, I will consider what popular theories of secession within the liberal framework have had to say about secession. Lastly, I will conclude.

2.1 The right to exit

One important upshot of the previous chapter is that following a successful process of reconciliation, the settler colonial state would still be illegitimate; reconciliation only helps to build trust, it cannot make it so that one should trust. What follows from that? In circumstances similar to the ones described throughout this thesis, we would think it right that we should assist those individuals in exiting the state through refugee programs or through amnesty programs. However, due to circumstances of this situation, I think we should support the idea that the right to exit for individual indigenous peoples, ought to entail a right to collectively secede from their respective settler colonial states.

In the next part of this section, I will distinguish the right to exit, conceived of as either becoming a refugee or as voluntarily emigrating from collectively seceding. Following that, in the next part, I will argue for why we ought to interpret this right to exit as a right to collectively secede in circumstances involving indigenous peoples within the settler colonial states of Australia and the US.

2.2 Relocation, emigration and secession, similarities and a huge difference

To exit, or emigrate, is to voluntarily leave one’s country or state of residence in order to settle in another state. When one is forced to exit due to wrongful persecution by their state or risk of wrongful persecution by their state, they often do so by becoming refugees or by seeking asylum. Secession, on the other hand, is similar in only some senses to these forms of exit. It does involve permanently settling in a different state. However, it very importantly (and differently) requires the state from which one is exiting to relinquish some of its territory so that those exiting can form a new state or reform a previous state. There is, of course, some grey area between
forming a new state and reforming an old one. Scotland’s 2014 referendum on secession, if successful, would have restored exclusive rule over Scotland’s territory to the Scottish people, but it would not have reformed the most recent independent Scottish state, the Kingdom of Scotland, whose parliament, in tandem with the parliament of the Kingdom of England, passed an Act of Union to form the Kingdom of Great Britain in 1707.¹

If things are as bad as I’ve claimed they are for the future of indigenous peoples within the settler colonial states, then why not just leave? Sure, indigenous peoples have ties to their communities making voluntary emigration a difficult decision, but surely, one might think, the option should at least be considered? Perhaps, you might think emigration is infeasible due to financial constraints. But what about becoming refugees? Again, given the projected future of indigenous peoples under the settler colonial states is dismal, there may be a case that indigenous peoples could make to become refugees.

The international standard for defining a refugee, the Convention Relating to the Status of Refugees, reads as follows: a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.² Following that definition, in order to become a refugee one must be at risk of persecution for those same reasons above by the country of his or her nationality. As of 2013, the convention has enjoyed widespread ratification with over 140 countries having ratified it and several others observing its practices.

Given the requirements of becoming a refugee and the support available in the international community for refugees, becoming a refugee looks like a less extreme solution to the issue of indigenous peoples qua indigenous peoples being wronged and facing a reasonable future of continued wrongs at the hands of the settler colonial states. Becoming a refugee, then, does seem like a valid legal remedy. And given the requirements for becoming a refugee, the shoe certainly seems to fit. That said, becoming a refugee (or voluntarily emigrating) is not the right course of action for indigenous peoples nor is it even a valid one.

¹ Acts of Union, 1707
2.3 Secession, not emigration

As far as I can tell, no one has made that suggestion that indigenous peoples in the US or Australia should emigrate, either voluntarily or as refugees. That isn’t to say that it hasn’t happened nor that it isn’t a solution worth exploring. If the settler colonial states were to reinstate policies permitting citizens to murder indigenous peoples without any real fear of legal punishment, then those indigenous peoples should very quickly flee those states through any means necessary.3

But why would becoming a refugee be so bad? The answer lies in the terms I’ve been using, “indigenous,” “Settler,” “Colonial,” and so on. Indigenous peoples are, for lack of better term, indigenous to the lands upon which the settler colonial states have settled and colonized. The Diné, for example, are indigenous to what we consider the Southwest United States, not, for instance, Norway. Their culture, their beliefs, their histories, traditions, identities are connected to the Southwest. The same sort of story goes for all of the indigenous peoples within these settler colonial states. If those things did not matter (or mattered much less), then indigenous peoples likely would have pursued refugee status quite aggressively. Instead, they have fought and resisted against the extreme violence (including, at times, their attempted extinction) committed by these states.

This is what makes secession the best way to interpret indigenous exit. Secession, unlike emigration, is all about taking land from the existing state. Although it involves similar features to the act of emigrating, it is all about territory. Secession, by definition, involves the transfer of a state’s territory. On the other hand, refugees or emigrants take with them very little if any personal property when they relocate to a new state. Moreover, a second reason to think of secession differently is that it is a right of collectives, not individuals as is the case of the right individuals have to voluntarily emigrate and the right to become a refugee or seek asylum.

Given these features of secession, any theory or account of secession is going to have to answer the following questions: first, why a collective has the right to take territory from an existing state; and, in addition, why that collective has a claim to self-govern over that territory.

3 For some tribes, emigrating across borders might be reasonable. The traditional lands of the Pasqua Yaqui tribe, for example, extend across the US and into Mexico making immigration to Mexico not entirely unreasonable.
3. Justifying secession, claims to land

Despite any claims indigenous peoples have against their respective settler colonial states, it would be reasonable to think that secession is all-things-considered unjustified. One reason for thinking so is that there is no connection between the ability and willingness of states to make just laws and claims for that state to give up its territories. And so, without further arguments, we might think that regardless of how terrible the state, the only courses of action would be voluntary emigration or emigration with the support of the international community. That said, further arguments can be offered in support of indigenous peoples right to take, or take back, territory from their respective settler colonial states.

There are three arguments, I believe, that can be offered in support of the indigenous claim to the territories held by the settler colonial states: the first has already been suggested above, their traditional lands are an essential feature of their identities. I will develop the idea further below and consider some criticisms of it. That idea, I believe, works best when considered alongside the second argument, the general well-being of indigenous peoples. The last argument is a legal one. It places its emphasis in two places: first, on the existence of treaties and Supreme Court decisions, which acknowledge the validity of claims to the territory of the settler states by their indigenous citizens; and second, on the fact that no tribe in either Australia or the US has ever ceded sovereignty over the entirety of its land.

Virtually any discourse on claims to land within the liberal framework has to begin with John Locke’s assertions on the limits of property ownership and its acquisition. The limits, according to Locke, are: first, that one cannot acquire more than what she can make productive use of; and second, that one must leave as much and as good for others. On the topic of acquisition, one can acquire property through mixing her labor with it or through paying other individuals to mix their labor with it for her, and so on. Locke’s assertions are not just interesting for liberal purveyors of thought, though. They were used to justify the terra nullius (nobody’s land) claim regarding the land that is now Australia. British colonists claimed that Aboriginal peoples had not made productive use of the land and therefore had not mixed their labor
As such, the land belonged to nobody and, as such, the Crown did not require its vassals to make treaties with its inhabitants.

There is a great deal of debate over how to interpret Locke’s justification for these assertions. On one interpretation he justifies these assertions from the following claims: (1) the world belongs to all, and thus no one can claim all of what belongs to all, nor can one be justified in claiming more than his or her fair share; and (2) similar to how God has dominion over us in having been our creator, we have dominion (to a lesser extent) over the things that we produce with our labor.

In terms of Locke’s justifications about the limits of property ownership and its acquisition, it’s not obvious that we should be attempting to make sense of it when understanding what these things mean under present moral and legal circumstances. That is not to say it’s impossible to tell a comprehensive story about how the US or Australia’s claims are unjust on Lockean grounds. It is just to say that drawing concrete conclusions from it in today’s world might be more trouble than it’s worth. Regardless of how unjust the colonization and settling of indigenous lands has been, it has happened and it has largely been accepted. Furthermore, its acceptance has led to the formation of intricate laws and social norms. Due to that intricacy, perhaps more than anything, it’s not clear how Locke’s justification for ownership, by itself, could make sense of competing claims in today’s world.

For that reason, I will stick with more contemporary and nuanced arguments, such as the arguments concerning the importance of culture and well-being, as well as arguments based on the law. These arguments, I believe, taken together, bolster indigenous claims to territory against competing claims.

That said, it might be a bit unfair to use those as the criteria for whose claim to land is stronger. For example, let’s accept for now that territory held by the US is essential to indigenous culture; that tribes would be better caretakers of that land than the US; and, that by virtue of treaties, some of that territory should still belong to Native American tribes. Even then, there might still be reasons against reversion of that territory to tribes. One consideration against it is the harm that such a transfer might have on the capacity of the US to perform its necessary functions. Yet another consideration against it, is what Jeremy Waldron calls the *supersession thesis*, or the

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4 Because the colonists did not believe the Aboriginal peoples could ever make productive use of the land, it did not make sense to worry about leaving enough and as good for them, as they would never be in a position to own it.
idea that claims of justice emerging from historically wrong acts can be mitigated due to present circumstances. I will look at those considerations and others in the sections which follow.

3.2 A cultured approach to secession

The first line of argument for grounding an indigenous right to secede as a condition of being able to voluntarily exit the process of reconciliation is that it is necessary for the continuance of their culture. Over the years, Will Kymlicka has introduced two influential arguments justifying the importance of culture. In *Liberalism, Community, and Culture* he argued, along Rawlsian lines, that culture is important as a *primary good*, or as a good essential for individuals to be able to pursue their conception of a good life. Culture is essential for what it means to be an individuals because it is essential for the exercise of individual autonomy. This is because it provides individuals with a “context for choice.” Which is to say that it assists individuals in making sense of the choices they are confronted with. Without having contexts, choice-options would appear similar to the decision-maker, thus making decision-making from their perspective as having a fixed outcome and therefore meaningless.

While that claim is certainly true, it does not tell us why any culture in particular is valuable. That is, if culture is important in virtue of providing a context for choice, then any old culture should do. In *Multicultural Citizenship*, Kymlicka expanded on his previous claim. Arguing that culture provides individuals with a way to identify themselves as moral agents. Following the work of Charles Taylor on the relationship between respect and culture, Kymlicka argued that there is a causal connection between self-respect for oneself as a moral agent and how one’s own culture is respected. This second justification was needed to help make sense of why not just any culture could do.

How do we get from culture to secession, though? I think in nearly any case, one’s culture takes its roots from some territory or has elements in some territory. That said, it does not only come from territory. For example, Texans in the United States take pride in being Texans (people who identify Texas being home). However, they

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might also identify in important ways as being Cowboys fans; gun owners; Christians and so on. Sure land matters but its importance to one’s identity can vary from person to person.

Unlike most peoples, though, indigenous peoples often claim that their culture is inextricably tied to their traditional lands. That is not to say that their identities do not consist of other components, such as being Cowboys fans, gun owners, Christians, etc., but that when it comes to identifying themselves and relating to the world their identity as a territorially rooted indigenous person matters.

Even if we accept that an indigenous persons’ identity is strongly tied to their traditional lands that is a long way from the idea of reverting sovereignty over that land to them. Conceptually, it is not clear that practicing one’s culture over a given territory requires ownership of that territory. For example, Muslims are able to make pilgrimages to Mecca – and are even required to do so once in their lifetime by their religion, Islam. In theory, individuals who visit and who practice Islam do not need to own the Mecca in order to enjoy the benefits of it.

Of course, one could claim that it is Muslims who own the land upon which the Mecca sits and so visiting practitioners qua Muslim’s do own it. Should that matter, though? So long as Muslims had adequate access to the holy site and the site were properly maintained, they would not have a claim that their culture was being wrongly interfered with or prohibited. The keys to the Church of the Holy Sepulchre are in the safekeeping of a Muslim family, and have been for hundreds of years, and that has not prevented or hindered Christians from worshiping at the holy site.8

That seems to be the idea behind the agreement between tribes in the US and the US government. The US government holds the land patents to the land (and thus has sovereignty over it) but tribes are able to own, legislate, and use their reserved lands in line with their traditional culture to the extent that their laws and usage do not conflict with US federal laws. Thus, access to many important sites is readily available and it is within the rights of tribes to maintain the well-being of those sites.

Unfortunately, actions taken by the US have shown neither a commitment to respecting tribes access to sacred sites nor towards ensuring those sacred sites are

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adequately protected. For example, beginning in 2005, a series of court decisions determined that the use of reclaimed sewage to expand the ski resort in Arizona’s San Francisco Peaks was permissible as it did not violate tribal religious rights despite those Peaks being recognized as an important sacred site to 13 tribes in the region\(^9\), and being a part of the traditional Hopi land.

3.3 Negative effects on well-being

By permitting the use of reclaimed sewage water on the San Francisco Peaks, the courts placed the water supply of the Hopi tribe at substantial risk. Something that is not just morally questionable but also legally questionable. It is legally questionable because the courts in those instances above explicitly ignored the precedent set by *Winters v. United States*\(^{10}\), which requires the government to not diminish a tribe’s access to its water supply, which by reducing their potable water supply they are doing. Other recent examples of violating that decision include the Environmental Protection Agencies approving the dumping of toxic waste into the water supply for the Navajo Nation, and the construction and operation of the Dakota Access Pipeline near the water supply for the Dakota Sioux tribe.

It is reasonable to think that if the US government is willing to jeopardize a tribe’s access to safe drinking water, despite protests from the tribes and standing Supreme Court decisions, that it would also be willing to jeopardize a tribe’s ability to make use of its lands for the purposes of practicing its culture. That is what makes the question of “Who should own the land?” important; and if we consider only the connections between culture and autonomy and between natural resources and survivability, then the answer to that question ought to, at least in some cases, be the indigenous peoples. Those are not the only relevant criteria to land ownership, though.

Land doesn’t just provide feel-good psychological benefits, though. It has more tangible and readily visible benefits for indigenous peoples, as well. There are many cases of indigenous peoples becoming ill as a result of being separated from their traditional land, where separation is caused by distance or by the destruction of their traditional land.\(^{11}\) This claim is distinctive from the decision-making benefits of culture. Our cultures shape our lives and help us make sense of our decisions; whereas this claim of

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\(^9\) For the Diné, it is called *Dook’o’osliid* and is one of the four sacred mountains.

\(^{10}\) *Winters v. United States*, 207 U.S. 564, (1908).

well-being is much more basic in the sense that its effects relate primarily to our most basic sense of physical well-being: access to safe drinking water.

Taken in conjunction, indigenous peoples could make a case that their claims to certain territories are stronger than that of either the government or other groups, since their claims are necessarily connected to their individual autonomy and well-being. That, however, is not to say that ownership ought to be reverted back to the indigenous owners solely on those grounds.

At best, it might appear that an argument from culture and well-being supports granting greater land rights, short of reversion, to indigenous peoples. And, in fact, the primary proponent of this view, Will Kymlicka does not take it as supporting a case for secession. Instead, he argues for a nation within a nation model in which indigenous peoples have greater autonomy over their affairs while remaining under the jurisdiction of their respective settler states.

3.4 The law already recognizes that sovereignty once existed and the arguments for extinguishing it are poor

The last claim lies within what has already been established within the courts of the states in question. In the famous Mabo v Queensland case, the High Court of Australia acknowledged the existence of Aboriginal land title as existing previously – and independently – from Australian law; and in the United States, where hundreds of treaties have been made with the indigenous peoples, the US Constitution recognizes many tribal reservations as lands held in trust by the state governments for the tribes. And US Indian policy does regard its relationships with Native Americans tribes as relationships of sovereign to sovereign, despite the fact that tribes are treated more like states within the federal system.

In addition, no tribe can be said to have formally ceded sovereignty in either the US or AU. The closest known instance of a tribe ceding its sovereignty occurred in 1999 between the Nisga’a people and the Canadian government. It is important to note, however, that unlike the legal status of indigenous rights in the US and AU, the Canadian Supreme Court ruled in 1990 that Aboriginal rights which existed at the time of the 1982 Constitution Act are the only rights protected by Canadian law and are protected only as a matter of and in virtue of common law. In other words, Aboriginal rights came into existence only with that act and exist only as Canadian common law. This feature of Canadian law has led many to protest the Nisga’a’s decision as coerced
on grounds that they were offered more strongly entrenched rights if they ceded their sovereignty. In any case, despite the tenuous nature of indigenous peoples’ rights in AU and the US, there is at least some precedent for the acknowledgment of their right to land currently held by the state, which is independent of the claims of those states. That their claims are independent, however, does mean that there will be some competition between them. More often than not these competing claims go against the indigenous group. In the case of the Australia, *Wik v Queensland*, determined, among other things, just that: when there is a dispute between Native Title and Crown Title, the Crown wins.

This distinctive set of land rights might also grant unique protection against eminent domain clauses. Both AU and the US possess “takings” clauses, or the right of eminent domain, in their constitutions which justify the acquisition of privately held property by the state if it is for public use purposes and if the state provides just compensation for that property. Non-indigenous citizens of these states were born into those constitutional laws and their practices of trading and acquiring property have evolved with full knowledge of those laws. Because indigenous rights to land exist as separate and prior to the laws of these states, it is not immediately obvious that their property should be subject to the same laws, especially given that their rights to property were established before those constitutions took effect. However, until that clause is evoked against a recognized piece of land held by an indigenous people, there is no sure way of saying how the courts would rule. In *Johnson v. M’Intoch*, Chief Justice Marshall did not deny the wrongness of taking Indian land. However, that comment came as obiter in regard to whether such takings violated international law, which did not form part of the binding Opinion in the case.

Whether any of these three lines of argument are sufficient on their own is unclear. The legal route is tenuous at best as they would ultimately rely on highly politicized courts, in the case of the US, or on courts lacking decisive power, in the case of AU. Arguments from culture or well-being might be persuasive, but the empirical results suggesting the important link between land and the physical and psychological status of indigenous peoples is still in its infancy. This is in large part due to the diverse conditions of indigenous territories and cultures, as well as the diverse facts surrounding colonization and settlement of individual tribes. Taken together, however, I think these arguments generate a *pro tanto* case for indigenous territorial secession.
In summary, what I have argued in this section is that there are reasons for considering the collective right of indigenous peoples to secede. Those reasons I have offered, though, are not the only relevant considerations.

4. Secession and its justifications

In this section, I will review what some of the popular liberal theories of secession have to say about its justification. By the lights of any of these theories, secession would not be justified for indigenous peoples. Rather than weigh the value of indigenous peoples’ right to secede as a requirement of political reconciliation, though, I will instead challenge the requirements held by those popular theories of secession. In the section following, I will consider Jeremy Waldron’s popular supersession thesis as well as his argument claiming indigenous peoples are unfit, in today’s world, for governing.

4.2 Primary rights theories and remedial rights only theories of secession

The first type of theory I will discuss is commonly referred to as a primary rights theory of secession. It posits that our right to secede does not come about due to the circumstances of the situation, but stems instead from our basic right to be self-determining. The second type of theory is called a remedial rights only theory of secession. These theories claim that secession is only justified when it is a measure of last resort for remedying rights violations.

Primary rights theorists of secession include Harry Beran as well as John Altman and Christopher Wellman. Beran’s theory argues that groups must be able to secede in order for the authority of state’s to be legitimate. He claims that, “liberal political philosophy requires that secession be permitted if it effectively desired by a territorially concentrated group within a state and is morally and practically possible.”¹² Generally speaking, he believes secession is morally possible when the seceding state does not harm the capacity of the rump state’s citizens to be self-determining; and it is practically possible when the seceding state is able to secure the basic rights of its own citizens. Though an exhaustive list of what may justify secession is not something he aims to provide, he does provide a list of what may make secession unjustifiable: (1) the group seceding is not large enough to form a state, (2) it does not permit secession within its ranks, (3) it exploits or oppresses minorities within it, (4) it surrounds the

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rump state, (6) its territory does occupies essential territory of the rump state, and (6) its territory does possesses a disproportionate amount of local resources. He justifies the claims that individuals have to secession, as opposed to just emigration, by assuming that all individuals have, “a moral right to a fair share of habitable territory of the earth and that a group of people who have traditionally occupied a territory have a moral right to continue to occupy it.”

Altman and Wellman offer a similar account of what justifies secession. For them, groups are justified in seceding for essentially the same reason, group self-determination. The limits that Altman and Wellman place on secession are “that the [rump] state must be able to continue to perform its requisite functions.” In addition, the seceding group must be able to perform the requisite political functions. What those functions are is not entirely clear. Altman and Wellman tie those functions to the state’s capacity and willingness to secure an environment which allows individuals to have, “a decent human life in modern society.”

These theories of secession have been criticized for being too permissive. They seemingly take the value of territorial integrity, so important to international law, and throw it to the wind. On the other hand, remedial rights only theories place a much larger emphasis on territorial integrity.

Remedial rights only theorists argue that the right to secede can only come about due to the circumstances of the situation. Namely, that there be some systemic individual rights violations suffered by the group wishing to secede, and that seceding would remedy those violations. Allen Buchanan is probably the most well-known proponent of this view. It has, however, been around for quite a while. It was proposed by Johannes Althusius as a justified response to tyranny. Buchanan believes that we ought to institutionalize secession, rather than simply permit groups to secede.

The chief reason for believing that the institutional question is the more urgent one is that secession crises tend to have international consequences that call for international responses. If these international responses are to be consistent and morally progressive, they must build upon and contribute to the development of more effective

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13 Ibid. pp. 30-31
14 Ibid. p. 24
16 Ibid. at p. 1.
17 Beran, (1984), at p. 22.
and morally defensible international institutions, including the most formal of these, the international legal system.\textsuperscript{18}

Buchanan’s claim, I should note, is in relation to unilateral secession. That is, when one a group wants to secede and the rump state either does not permit it or goes out of its way to prevent it. Those sorts of cases will inevitably require assistance from the international community. However, due to the costliness of intervention, it is only justifiable when the secession is based on systemic rights based abuses.

What sorts of abuses count? Buchanan does not give a laundry list of what we ought to take as violations that justify secession, but he does suggest that that list should be determined by the international institutions through contemporary moral and legal theorizing. That said, he does make it clear that one-off rights violations are insufficient for secession, as every state violates the rights of its citizens from time to time; nor should we wait until acts of genocide or the threat of genocide to say that secession is justified.\textsuperscript{19}

Another restriction Buchanan places is that the new state must be superior to the rump state in protecting the basic rights of its citizens. That is, the new state’s ability to protect the rights of its citizens must be as good as the rump state and be better at protecting the relevant rights (those which justified secession). The international community can play a role in assisting in secession as well as in assisting the new states in achieving that goal.

Those are the two types of theories of secession most commonly found in the literature, primary rights theories and remedial rights theories. On its face, it would appear as if indigenous peoples would satisfy the requirements for secession according to either. As I will show in the next section, however, they do not satisfy the requirements; and thus, according to these theories, indigenous secession is unjustified.

\subsection*{4.3 The case against indigenous secession}

On its face, it looks like indigenous peoples will satisfy the most basic primary rights theory and the most basic remedial rights only theory. Indigenous peoples are certainly territorially and culturally concentrated groups, and they are groups who have faced systemic rights based violations (including genocide) at the hands of the settler


colonial states. Given those two facts, the case for secession should be straightforward. The case, however, is not straightforward, there are still the following issues: whether indigenous peoples could form states that are able to perform the requisite political functions; whether indigenous secession would negatively affect the rump state’s capacity to perform its requisite political functions; and whether the international community would support secession from within either Australia or the United States.

The first two issues emerge mainly from the claims of primary rights theorists, who require that for secession to be justified the seceding group be able and willing to sufficiently perform the requisite political functions, and that the indigenous secession not harm that same capacity of the rump state.

Would indigenous states be able to secede today and form states that meet the requirements prescribed by Altman and Wellman? Not in most instances. The question of economic viability must be addressed. If there is a “hard” question to the issue of indigenous secessionist movements, most would consider it to be economic viability. If an indigenous people has neither the resources nor the capital to create the necessary rights-protecting institutions and to adequately maintain those institutions, then their willingness to do so doesn’t mean much of anything. And, as it stands, there is no reason to think that most tribes could be economically viable right now. Large amounts of tax revenue are needed to provide health care, schools, government building and employers, etc. The cost per citizen of some of those goods would be even higher in indigenous communities, and not just because the smaller scale. Indigenous communities would be a substantial deficit when it comes to health-related issues, with indigenous peoples in the United States having much shortest average life expectancies and the highest rates of diabetes of any group, as well as the highest rates of drug abuse and alcoholism. Australia is no better in those regards. And those figures are not going to change overnight. And so, an indigenous nation-state should expect to inherit a substantial financial burden in the health sector due to the status of their population as well as the inadequate funding that indigenous healthcare receives.

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Similar deficits exist in education and law enforcement, as well. In addition, most tribes are likely to suffer from a lack of institutional know-how, as they have not had recent experience in governing and certainly not in governing within the type of framework that Beran or Altman and Wellman have in mind. There are also a number of opportunity costs in relation to trade, namely friendly foreign trade agreements established by the settler colonial states’ respective positions in the global economic order.

The only potential avenue of response to those concerns would be for reparations to include a substantial amount of resource rich lands. Water, coal, nuclear, solar, and wind energies have the potential to be big business for tribes in the US. In fact, tribes in the US have been able to settlements regarding the disregard of their water rights by the government. In those cases, however, what is being ruled on is the violations of the terms of use according to treaty agreements. Whether those treaties would be ripped up by secession is an interesting question; assuming that something like that would be possible, would the US permit for its access to valuable resources to be subject to a treaty that it cannot unilaterally enforce through its own court system? If the current administration is anything to go by, the answer is a resounding no.

But would an indigenous secession, in which resource rich lands were reclaimed, pose a threat to the capacity of settler colonial states to perform their requisite political functions? Potentially. According to a 2007 report, the United Nations Chairperson on the Permanent Indigenous Peoples Forum, Ms. Tauli-Corpuz claimed that a majority of the world’s remaining natural resources are found on indigenous territories. If that claim holds true for indigenous peoples in Australia and the United States, and if it is also true that indigenous secessionists would secure full ownership of those territories and resources when seceding, then the claim could be made that the capacity of those settler states to perform the requisite political functions would be diminished. According to the primary rights theorists, that could be a sufficient reason to deny indigenous secession, as removing those resources from ownership of the settler colonial states would certainly have a negative effect on the rump states.

24 Ibid.
It is not far-fetched to think that a deal could be worked out to soften the blow of indigenous peoples reclaiming full ownership of their land. In general, it is just very unlikely that indigenous secession would, in practice, harm the settler states. The most likely secessionist scenario is that indigenous secessionists would be unable to secure full ownership over resource rich lands. However, in terms of theory, should the fact that reacquisition could greatly diminish the capacity of these states to perform the requisite political functions count as sufficient reason to prevent certain territories from being reacquired? Here, the claim is interesting. It is not necessarily questioning what claims to the land the state has over that land. Rather, it is what claims do non-indigenous citizens of that state have for their state to govern that territory? And relatedly, what claims do indigenous peoples have that their state should govern that territory? What makes these interesting questions is that it side-steps the question of what to do when a state is illegitimate and asks instead how we should weigh competing claims of individuals.

As far as this thesis is concerned, the state, not its citizens, are the primary authors of the wrongdoings against indigenous peoples. That is not to say citizens should be completely absolved of responsibility. It is to say, though, that legitimacy is a property of states, not citizens. It is outside the scope of this thesis to question the status and history of social relations between indigenous and non-indigenous individuals within these states. Even if we accept that these states have exploited the land and that it is because of that that its citizens have been able to enjoy a modern quality of life, it isn’t clear that citizens ought to be held responsible or necessarily blameworthy for that. In that case, if Altman and Wellman want to comment on the status of indigenous secession, they need to tell a story about how we should weigh these competing claims. As it stands, their theory is indeterminate over that matter and thus incomplete. One potential answer is that most of the benefits from these resources have, over a long period of time, gone to non-indigenous citizens to the great neglect of indigenous citizens within these states, and therefore, as a matter of reparations, indigenous peoples ought to be awarded some measure of resource rights to their lands. That said, it is unlikely that any indigenous secession would lead to the reclamation of all or even most of a tribes traditional land, provided that land held valuable natural resources.

Even if indigenous peoples were able to secure sufficient resources for an economy able to perform the requisite political functions, most would lack the
institutional know-how necessary for actually performing those functions in a sufficient manner, and according to Jeremy Waldron, some would even shirk such a duty.26

Waldron claims that indigenous peoples prefer and are dogmatic over familial forms of governance and other non-liberal traditional forms of governance.27

Traditional forms of governance are indefensible for rule over societies such as Australia and the United States because contemporary citizens require much more complex institutions, he claims. The traditional governance practices of indigenous peoples would not adequately emulate that role that these states currently play, and because of that they have no claim to governing over territory. As he puts it:

[S]overeignty, state, and law should be seen as less like a family firm, more like a fire brigade – a functional necessity, not a cultural patrimony. We set up and fund a fire brigade to respond to the kinds of conflagrations we expect under modern conditions; we choose it on the basis of matching capacity to circumstances. We don’t choose it on the basis of heritage – the traditional red fire engine, the ancestral jobs for firefighters grandfathered in from long ago. If its services are made available to all, it doesn’t matter whose fire brigade it is, or whose traditions [it] matches, or who set it up or how; what matters is that we have it and it works.28

And, he says, even if it were the case that indigenous peoples were willing to form adequate governments, an explanation for why citizens should have to wait for those governments to become effective is lacking.29 Without that explanation, we should not permit good-intentioned indigenous self-governance. Taken together, Waldron’s argument is much more than an argument against what he calls indigenous “sovereignty” over territory – which is the exclusive and right to impose laws over a given territory – but also over forms of limited sovereignty, the likes of which already exist for Native American tribes.

Does his argument work? Briefly the claims are as follows: starting with the background requirement that a state be practically appropriate (or be able and willing to perform the necessary political functions), the first claim is that indigenous peoples

27 Ibid. at p. 18
28 Ibid. at p. 24, italics in original.
29 Ibid. at p. 18
would not be likely to form an appropriate state; and second, that even if they could, it
would take too long and would not be superior to current states.

There is substantial evidence showing that the moral, social, and political norms
of all societies, regardless of race, evolve over time through interactions with other
societies, increases in size, or the development of new ideas. At best, Waldron’s first
argument, then, denies that indigenous societies are incapable of evolving over time. It
is not clear where he draws that claim from, given that instances in which tribes have
been permitted and able to self-govern have shown a remarkable capacity of tribes to
utilize contemporary social, political, and moral norms alongside their traditional ones.

What about Waldon’s second claim? Bracketing his explicit racism, he says it
would take tribes too long to develop the norms and institutions necessary for
contemporary governance, he claims. And citizens would require justification for
having to endure during that wait. If the concern is something like, Sydney, New South
Wales and all of its property is going to get reverted back to its traditional owners, then
we should be worried. However, the reason for why we should be worried is not
because it is getting reverted back to its traditional owners, but because any massive
overhaul of government officials is always risky. That said, if the concern is simply
time to develop, then the solution is simple: provide indigenous communities with the
support needed to develop the norms necessary for governing contemporary, urban
environments prior to turning it over to them.

All in all, Waldron’s claims are perplexing. Indigenous peoples can self-govern,
and they can do it well. One piece of evidence often pointed in favor of indigenous self-
governance are the beneficial outcomes coming from the Indian Self-Determination and
Education Assistance Act. According to the researchers at the University of Arizona’s
Native Nations Institute as well Harvard’s Indigenous Economic Development Project,
that piece of legislation has been the most successful piece of policy ever enacted by the
US government in terms of improving the well-being of Native Americans because it
allowed them to shape, within the laws of the constitution, the social and political norms
which governed their reservations.  

There is a more general worry that someone could press in the ballpark of
Waldron’s argument. That indigenous peoples should not be subjected to an indigenous

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30 Stephen Cornell and Joseph P. Kalt. “Reloading the dice: improving the chances for economic
development on American Indian reservations,” Malcolm Wiener Center for Social Policy, John F.
nation-state which they found to be illegitimate. In response to this, I want to say two things. First, barring some significant rights violations committed by the newly minted indigenous nation-state, the claims of illegitimacy via risk would be different. Citizens would be at risk of their state, perhaps, not being able to provide a bundle of goods and services on par with what they may have had under the settler colonial states, for example. But the risk imposed on them would not be risk of future violence or other types of harm. Second, there is no reason to think that a treaty agreement between an indigenous nation-state and the settler colonial states establishing free movement across the borders, thus allowing indigenous peoples living on indigenous territories to continue to work and take part in the communities of the settler colonial states. Like many issues discussed already, there are practically and readily available solutions.

The most likely solution is that tribes would not be granted sovereignty over places like Sydney. Instead, what land they would receive would likely be land already established as a reservation or undeveloped land held by the rump state for public use.

Even then, though, those lands can have valuable resources that the rump state would be unlikely to let go. Without those resources could secession still be justified for indigenous peoples? That is, is resource independence through territorially owned lands the only path to justified secession? What about international assistance? Indigenous peoples would certainly have a better chance of getting non-resource rich lands back from the state. Given that, couldn’t they then just appeal to international assistance for developing? Maybe.

First, the question of whether the international community would endorse indigenous secession and the question of whether the international community would provide assistance to a newly reformed indigenous nation-state are clearly separate questions. If secession requires the endorsement of the international community to be justified, as Buchanan seems to think, it is difficult to imagine it ever getting that justification. Aside from the settler colonial states I am concerned with many other non-settler colonial states have indigenous populations who can make similar claims to being systemically wronged and being coerced into continuing to live under substantial risk of future wrongs. And though the experiences of the Sami people in the Scandinavian region or Canada’s First Nations peoples are certainly different they are close enough that supporting secession in the US or Australia might be taken as a, “Why not us?” cry in their respective countries. In addition to the gross historical injustices they have suffered at the hands of their states, they continue to deal with
diminished rights to land and culture and suffer from outcomes much worse than their non-indigenous countrymen. Moreover, indigenous peoples across the world can make similar claims. For that reason, it is reasonable to think that no state has an interest in permitting secession within their own territory by their indigenous peoples and so no state would move to ever acknowledge secession for indigenous peoples as a morally justifiable outcome within international law.\textsuperscript{31}

What about the question of assistance? It certainly seems plausible that the international community would support a newly formed indigenous nation-state, as they could simply claim that the secessionist movement which led to its formation was \textit{sui generis}. That is the stance the United States took when considering Kosovo’s independence, with then Secretary of State, Condoleezza Rice, issuing the following statement: [W]e’ve been very clear that Kosovo is \textit{sui generis} and that that is because of the special circumstances out of which the breakup of Yugoslavia came. The special circumstances of the aggression of the Milosevic forces against Kosovars, particularly Albanian Kosovars, and it’s a special circumstance.\textsuperscript{32}

Whether the claim that an indigenous secession from the US or Australia could be labelled as \textit{sui generis} remains to be seen. Assuming though that indigenous secession would be impossible as a unilateral exercise, it is easy to imagine that the US or Australia would label it as such. If, however, indigenous peoples tried to unilaterally secede, it would be unlikely that they would do so with the approval of the international community, whether because doing so would give rise to sentiments amongst other indigenous peoples or because of the risk of upsetting relations with either Australia or the US. And for those reasons, it is not hard to imagine the international community failing to provide the necessary assistance for indigenous peoples to create and maintain the institutions necessary for performing the requisite political functions.

According to the two most popular theories of secession, indigenous peoples would not be justified in unilaterally seceding. The primary reason being is that they would be unable to secure sufficient resources for establishing and maintaining the institutions necessary for performing the requisite political functions. There are two reasons for this: first, the settler colonial states are not likely to permit secession if it

\textsuperscript{31} That is not to say that no state would permit secession; it is well within the rights of a state to permit its citizens to secede. Just look to the recent referendum on secession by Scotland from the United Kingdom for an example.

means indigenous peoples are going to gain exclusive control over the valuable resources within their reserves; and second, indigenous peoples should not expect assistance from the international community after unilaterally seceding.

4.4 Bugger those requirements

Should indigenous peoples have to abide by those requirements? Perhaps it would be the case that most indigenous states would have poor economies and would very much be developing states. Why should that matter in regards to their claims to secede?

For the theories of secession above, harm played a large role in justifying secession. For the primary rights theorists, secession should not harm the rump states capacity to perform its requisite political functions, including the securing of the basic rights of its citizens; and for the remedial rights only theorists, systemic wrongdoing or harm is what justifies a group’s right to secede. This is important because it follows from the logic of those theories that such harm cannot continue or exist in the new state. On my analysis of why secession is justified, I claim that the long stream of wrongs committed against indigenous peoples by these states undermines any claim to justified authority the settler colonial states can make and also gives indigenous peoples strong reason to deny the legitimacy of those states. What restrictions, then, would my claims place on a new state?

It would certainly mean that an indigenous state would be wrong if it continued the unjust practices of the settler colonial states: forced assimilation, unjustified land takings, and racially discriminatory policies, among other things. But my claims have nothing to do with the efficacy of the governments provisions of basic goods and services, but instead with their abilities and willingness to create just laws for indigenous peoples. What the theories discussed above seem to be concerned about is the functionality of government in performing basic welfare functions for its citizens or in not violating the basic rights of citizens. An indigenous state may struggle out of the gate and perform poorly in its provision of goods and services for its citizens, but that is not to say that it would actively seek to harm its citizens. And, perhaps, most indigenous peoples would be happy to make the trade-off of the post-office being a little further away in order to secure their own state, free of the risks associated with being under the settler colonial states.
This view is primarily motivated by an intuition that there is something absurd about claiming that a group of people subject to substantial wrongdoing should not be able to pursue secession as a form of relief simply because they lack the resources or assistance in forming contemporary institutions of governance. This strikes me as especially absurd when we use that against people whose primary reason for not having those resources is because those resources were violently taken from them.

What requirements, then, ought to be applied to indigenous secessionist claims? I agree here with Burke Hendrix. He argues that Native Americans have a right to secede from the US, and that those tribes ought to be able to hold a double referendum on the topic of secession. His claim to secession is justified by the lack of authority the settler colonial states have over the territory which traditionally belonged to indigenous peoples. His requirement of a double referendum by indigenous peoples is clever. Seceding is a messy business and so a group looking to secede ought to be careful when making that decision. However careful they should be, though, the decision ought to be theirs; and nowhere is that truer than when they are forced to live under oppressive regimes.

5. Conclusion

In this chapter, I argued that unlike other circumstances which involve state wrongdoing, indigenous peoples ought to able to pursue secession. However unlikely it might be for indigenous peoples to get all of their land back, gaining full sovereignty over their current recognized land titles would, I think, still be progress. Contemporary liberal theories of secession, for the most part, require unjust standards for groups seeking to secede from state’s who have subjugated them to violence and rampant acts of dispossession, and to that extent do not block indigenous claims to secede.

Assuming secession is something the settler colonial states would support, what makes it a realistic option? I think the answer to that question is simply that indigenous peoples be given the choice to secede. Yes, early indigenous nation-states might struggle to find their footing, as any new state does, but it is certainly the right of indigenous peoples to have their own states. That said, I will discuss in more detail what the choice to secede ought to look like.

34 Imagine how differently Britain’s referendum on exiting the European Union could have been had they had a double referendum.
This conclusion, I think, raises a number of interesting questions. Of most importance, I think, is outlining how the jump from reconciliation to legitimacy can work. I will argue in the next chapter that, following successful reconciliation, an indigenous group’s choice to “not secede” should be taken as their consent to the state thereby legitimating the settler colonial state.
In this chapter, I argue that when both secession is a realistic alternative and when reconciliation has been successful, a decision to “not secede” is sufficient for establishing the consent of an indigenous people to the reconciled state. I understand the form of consent conferred by a decision to “not secede” to be explicit, which I take to be the surest (and best) form of acceptance of a state’s legitimacy vis-à-vis the consenting group.

To summarize where we stand, here is a brief review of the previous chapters. In the first chapter, I argued that the settler colonial states of Australia and the United States were illegitimate vis-à-vis their indigenous citizens. The reason being, that the history of the relationship between these states and their indigenous citizens shows a record of the states being unable or unwilling to create just laws for those citizens. As a result, indigenous citizens of those states do not have any reason to trust, going forward, that those states will create just laws for them. The second chapter argued that through political reconciliation, the settler colonial states could seek to make itself more trustworthy for their indigenous citizens. However, in light of the record of unjust laws and general wrongdoing, reconciliation would not make it the case that it would be reasonable for indigenous peoples to trust the offending states. And, in the third chapter, I argued that indigenous peoples ought to be able to secede from the offending states.

In this chapter, I will argue that the choice to secede can serve as a mechanism for a state being accepted as, and hence becoming, a legitimate source of obligation. This chapter will be brief and has only five sections: the first section is this introduction. The second will explore what it is that is so special about consent. The
third will argue for the analogy between consent and not seceding. The fourth will examine objections to consent based theories of legitimacy. And lastly, the fifth will show how the objections to consent theories can be overcome under the circumstances at hand in this thesis.

Before beginning, I want to specify the scope of my assertion. In the first chapter, I stated that my assertion of settler colonial state illegitimacy was one that any indigenous person within those states should be able personally to lay claim to. Is secession similar? Can any indigenous person just up and secede? No. Secession ought to be taken as a group right; no single individual can claim sovereignty over territory. What shape that group takes—whether as individual groups or confederacies including many groups—is something for indigenous peoples to decide for themselves. And as to how they should make the decision, I do think that Burke Hendrix’s suggestion of a double referendum on secession would be smart. However, how tribes ultimately make that decision, should again, be entirely up to them. It is certainly their right to make that decision; and there is no reason to believe them incapable of making that decision.1

2. Consent, what’s so special?

In the first chapter, I briefly touched on theories of consent, and how they relate to political obligation. Traditionally, the gold standard for consent theories is express consent given voluntarily and with adequate information concerning its consequences. While some today do acknowledge that that form of consent is the ideal form (or at least a suitable form) of accepting and hence grounding one’s obligations to the state, virtually no one thinks that option to be possible in the real world. The reason for their pessimism typically comes down to it being impossible to gain the consent of citizens, either because of the sheer number of citizens is too large or because the requirements for consent to be voluntary are not achievable. As such, most contemporary political philosophers rely upon forms of acquiring obligation that do not require express

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1 Indigenous self-determination, or self-governing, has never truly existed under the Australian government and so it is difficult to show one way or the other that they would be capable of making such a decision under current circumstances. That said, by any liberal account, the burden is on showing individuals or groups incapable of self-governing, not the other way around. Furthermore, there is evidence that Indigenous Australian leaders have longed worked together towards common goals. The most recent example is the joint statement released from a meeting of Indigenous Australian leaders from across the country, the Uluru Statement from the Heart, which enjoyed near unanimous support. In the US, centuries of evidence exists showing how tribes have worked together, both before and after colonization. Much of the recent evidence can be found in the annals of the Harvard Project for Indigenous Economic Development.
consent. I will start by presenting what it is that makes express consent (hereafter: consent) so special and then move on to address some of the most popular criticisms against it.

What makes consent so special, anyways? The classical answer to that question starts with the assumption that individual autonomy is the primary source of moral value; and proceeds to argue that in so far as obligations to the state limit an individual’s autonomy, those obligations require justification. The ideal form of justification is when those obligations to the state reflect one’s autonomous will; and the best way to assure that is the case is for individuals to express it as their will. Consent to the state is nothing more than the expression of one’s will in favor of obligations towards it. For proponents of this view, the state cannot claim obligations towards it from its non-consenting citizens and, to that extent, cannot be legitimate.

I partially share the conclusion of the classical consent theorists. However, I do not see (express) consent to the state as always being a necessity. It should only be necessary for legitimacy when there is a reasonable doubt that a state is unable or unwilling to make just laws for its citizens. In those cases, then, I share the conclusion of the classical consent theorists: without the consent of those citizens, the state cannot claim legitimacy. The reason being is that under normal circumstances where that doubt does not reasonably exist, I believe the state can be legitimate without consent being necessary. It can do this, for example, through creating just laws and outcomes for its citizens. In the next section, I will defend the analogy between consent and not seceding. Following that, I will review some of the common criticism levied against consent theories and then show how they can mostly be relegated to minor concerns in the particular cases being discussed.

3. The analogy between not seceding and consenting

How do we know that a decision to “not secede” from a state is the same as expressing consent and hence legitimating that state? It is conceptually possible for a decision to “not secede” from a state to not bestow any legitimacy to that state. For example, group could choose to “not secede” from its current state, while continuing to deny that it possesses any moral obligations to that state. In the case of indigenous peoples, such an alternative might be attractive given the dearth of resources currently available to them for forming a state. They might, for example, see themselves as, “Damned if we do and damned if we don’t.” In which case, sticking to the “status quo,”
or continuing to be subject to the laws of an illegitimate state, could be the best course of action. 2 Better the devil you know than the devil you don’t.

While the above alternative is possible, it is only possible if we allow unjust outcomes in the choice-set. This thesis is concerned with how to get just outcomes for indigenous peoples. If we exclude from the choice-set unjust alternatives—which the status quo certainly is—then we are left with two precise alternatives in the choice-set: “secession” (justified in the previous chapter) or “not secession” where “not secession” should be read as: the settler colonial state has presented enough evidence to a group for that group to trust its ability and willingness to create just laws for them.

In order for the choice to “not secede” to be analogous to expressing consent, the choice-set that it is contained within must contain distinct and viable alternatives; it must be voluntary for the relevant chooser (in this case, an indigenous tribe, nation, community, group, clan, etc.) to decide which alternative to choose; and the relevant chooser must be informed (to some extent) about the consequences of the choice.

In so far as the alternatives “to secede” and “not secede” entail what their common usage suggests, and indigenous people are permitted to make the decision between those alternatives, and where choosing either alternative leads to its realization, the choice-set does contain distinct and viable alternatives, and is voluntary.

If indigenous peoples are able to make a choice between secession and that choice is voluntary (on their own terms) and informed (the alternatives are explained and the risks associated with each decision are made available for public knowledge), then there is no reason why we should not regard that decision as the same as consent.

Before moving on to criticisms of consent, it might be helpful to buttress the argument that not seceding can be equivalent to virtually expressing consent with an example: the recent Scottish referendum on secession. The Scottish decision not to secede both morally and legally reaffirmed them as citizens of the United Kingdom of Great Britain. The circumstances of the situation required that a decision not to secede entailed remaining morally and legally obligated to the UK. Under the circumstances of the vote, for a decision to not secede to mean anything else would have required an additional vote.

2 We might interpret this as: the state is illegitimate, pending the fulfilment of future promises. In that case, though, it wouldn’t make sense to hold a vote on secession. The vote would simply be postponed until further notice.
The Scottish vote for secession came down to a “yes” or “no” question phrased as, “Should Scotland be an independent country.” It required only a simple majority either way and allowed citizens of the Commonwealth of at least 16 years of age to vote. Nearly 85% of eligible voters participated making it the highest turnout for a referendum in Commonwealth history since the inception of universal suffrage. Ultimately, the choice to remain a part of the UK was made with roughly 55% of voters choosing to remain.

4. Criticisms against consent

Consent no longer finds favor with most political theorists, especially in its explicit form. Here I want to examine two types of criticisms most frequently levied against consent as an ideal mechanism for the state’s acquisition of obligations. Those criticisms are the numbers and institutions problem and the voluntariness problem.

The first criticism is a numbers and institutions problem. There are too many people and they are spread too wide, therefore, it would be impossible for the state to go to each individual and receive his or her consent. Solutions to this worry have been proposed over the years. One is that upon coming of a certain age that individuals would be given the opportunity to consent. That fails because that would still leave all those who were eighteen years of age or older at the time of that proposal’s enactment as needing to be tracked down. To give this problem some meat, consider these demographic numbers from the United States: according to the US Census Bureau, the total population of the US in 2015 was 321,418,820. Of that, 22.9% or roughly 73,604,909 were under the age of eighteen. That leaves nearly 250 million individuals who would be unaccounted for.

Assuming, though, that the state could provide a mechanism for acquiring consent from all of its citizens, perhaps through a tick-box on tax forms, the second type of criticism still lingers: it probably wouldn’t be voluntary.

There are a couple of ways that we might express the voluntariness objection. First, there is the objection that the decision to morally obligate oneself to the authority

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5 Of course, this would also not reach everyone. However, no policy (or moral theory, for that matter) can work perfectly for those whom it is designed in every instance.
of the state is itself morally problematic, so much so that any instance of it would likely be wrongfully coercive; and second, that due to the circumstances of life that individuals cannot simply choose otherwise and for that reason the decision cannot be voluntary. I will discuss the first objection to voluntariness first.

On the face of it, the decision to consent—and thereby obligate oneself to the state’s authority—seems simple enough. If you consent, then you accept having moral obligations to generally respect and abide by the laws and punishments of the state. And if you choose not to consent, then you are rejecting that you have moral obligations to the state. You might still have reasons to obey the state, fear of legal punishment or social ostracizing for example, but there is no contract between you and the state such that you have an obligation to its authority.

One reason this difference matters is that individuals who believe they have moral obligations to do something will view those obligations as strong reasons in favor of doing that thing. For example, if an individual believes that law A comes from a legitimate state, then she is more likely to not violate A even if she knows that she will not be punished (legally or socially) for violating it; even if violating it would make her better off; and even if she simply disagrees with it. One way of thinking of legitimacy is that it establishes what Brennan, et al. refer to as a legal norm or the idea that obeying the law is just the done thing in that society, regardless of circumstances or other beliefs (with some reasonable exceptions, such as religious exemptions) regarding any particular law. In this case, it is the done thing because everyone knows that everyone else has consented to it and everyone knows that everyone knows that. Another way of thinking of it is to understand it as H.L.A. Hart did as providing content-independent reasons for obeying the law. In either case, the descriptive effect is roughly the same: despite what I would like to do or think would be better, I have a moral duty to generally obey the directives of a legitimate state.

Why though would the above claim about the relationship between consenting to moral obligations and the generation of reasons in favor of obeying a state’s directives be problematic? The criticism comes from the claim that moral obligations to the state should not be able to override obligations to one’s individual autonomy. A less forceful version of the claim is that such obligations are permissible if they do not override our

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6 Provided that state is also justified in possessing the authority to create rules and impose punishments.
obligations to our individual autonomy. Robert Paul Wolff suggested as much when he proposed instant direct democracy over (relevant) political decisions as a solution to the problem between moral obligations to the state and individual autonomy.\(^8\) Instant direct democracy over political decisions, however, is quite impossible he thought. Furthermore, it would likely only address the philosophical anarchist’s worry if those votes reached a consensus. Therefore, given that such a process would be impossible, the state, he believed, is never justified in claiming obligations from its citizens.

The other objection to consent theories as being coercive comes from David Hume. Hume’s objection is to the voluntariness of tacit consent, though it works well against any form of consent. The idea is that we cannot take one’s staying within the state, participating in the state’s activities, relying upon its services, etc. as a sign of her giving consent when she could not have done otherwise. And, because it is virtually impossible for most individuals to do otherwise, then it is also the case that it is virtually impossible for most individuals to have tacitly consented. That criticism does not just bite against theories of tacit consent. It also affects explicit consent. The claim is simple: even if states were able to seek out and gain consent for their authority from each citizen, that consent would not count as morally relevant if those citizens could not have chosen otherwise.

In practice, some might be concerned that indigenous secession is not a viable alternative given the financial circumstances that tribes currently face. It is very likely that most indigenous groups seeking to secede would be unable to provide the same or even remotely similar expenditures on welfare that they currently receive from their settler states. What most critics (and even supporters) of secession argue follows from this is that individuals within an indigenous state would be worse off, and thus that seceding would be irrational.\(^9\) And what is easy to glean from this is that given how potentially disastrous the conditions of an indigenous nation state would be, that choosing between it and the settler colonial state is no contest. In other words, it is simply not a viable option to choose an indigenous nation state.

5. How indigenous peoples can overcome these objections and consent can matter

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\(^9\) That, at least, has been the prevailing criticism I’ve received when presenting the idea of indigenous secession at multiple locations.
If these objections to consent theory hold, then we should not pursue consent as a mechanism for indigenous peoples to express acceptance of moral obligations to their settler colonial states. The most important objection, here, I believe is the numbers and institutions objection, that it would be impossible to ask each indigenous person from each tribe whether they would like to secede or not. My response to the Wolff objection is simply to say that philosophical anarchism is an inappropriate way to think of one’s relationship with the state, and that is especially the case for many indigenous peoples who proudly identify themselves, in part, through their relationship to their collectives. The Humean objection is overcome if the conditions for secession being realistic are met. Can those conditions be met, though?

I think so. What most of those critics fail to recognize is the historical wrongdoing that those individuals have suffered at the hands of the current state and the projected harm they should reasonably prospect from that. And so, while the standard of well-being according to common Western metrics will surely decline following secession, the risk of the drastic, egregious, and feckless harm they would be subject to will also decline. Whether that trade-off is acceptable is something that indigenous peoples should be able to decide. And so long as that decision is one they can make, we can say that their decision is both viable and voluntary. That said, it still seems ridiculous to think that the choice could go any way but in favor of the settler colonial states. Note, however, that there is nothing in what I have said which requires a vote to take place right now. If indigenous peoples want to wait and see whether reconciliation will lead to more just outcomes, then it is entirely within the scope of their right to hold off on having a vote. The process, I would imagine, would have to work in similar fashion to how the Indian Self-Determination and Education Act is supposed to work. Under that act, Native American tribes should be able to assume control over the management and administration of their federal programs and do so when they feel themselves ready to assume control. Similarly, tribes should be able to choose when to hold a vote on secession when they feel themselves ready to make that decision. And I do not believe that readiness should not be determined strictly by an indigenous group’s current financial situation, if only because the likelihood that an indigenous state would be able to avail itself to international aid for development. It just needs to be the case that indigenous groups can make that decision when they are comfortable making it.

It is important to note, though, that this does not run the other way; that is, while indigenous peoples would not need to prove themselves financially capable of running a
state in order for their choice to “not secede” to count as legitimating a settler colonial state, the settler colonial states do need to reconcile in order for the choice of indigenous peoples to “not secede” to count as legitimating. The reason here is simple: reconciliation provides evidence that the settler colonial states are able and willing to make just laws for their respective indigenous citizens. Without that evidence, consent to the state would not be binding, as it would entail indigenous peoples subjecting themselves to an unjust situation.10

That leaves the numbers and institutions objection. Indigenous peoples in both Australia and the US are spread out over large areas of land and can be found in some of the most remote parts of those states as well as in the most populated cities. More so perhaps than any other group of people within these states, it would be incredibly difficult to track down each indigenous person, explain the contours of the situation and then gather his or her vote. But is the consent of each individual required for a vote on secession? No. And this is perhaps where consent and a vote to “not secede” come apart most clearly. Consenting to a state is an individual action, whereas the decision to secede or not is a collective action.

Does the fact that consent and secession come apart here matter, though? I don’t believe so. Consent from each individual is always going to be a fool’s errand. It is an ideal that most any political philosopher, short of the anarchistic ones, would relax. That said, out of concern for the rights of individuals as well as out of practical necessity, indigenous peoples ought to make the decision as deliberative and democratic as possible. That said, in regards to the questions of how to gather votes and as to whether a simple majority, super majority, or some other arrangement is necessary for a vote to secede (or to revert back), we should leave the individual tribes to decide how that decision is to be made. That is not to say that settler colonial states should not support the process nor that they should not help in making the process fair, only that the ultimate decision of how things are going to be decided ought to be determined by the tribes themselves.

Given the entirety of the relationship between indigenous peoples and their respective settler colonial states, we should project indigenous peoples to continue to be wronged at the hands of settler colonial states. Therefore, another consideration in

10 For a similar claim, Joanne Lau argues that we are not morally bound to a majority decision which would subject us to treatment that consistent with our status as free and equal individuals. Joanne Lau, “Voting in bad faith,” Res Publica, 20, (2014), pp. 5-14.
favor of leaving the decision in the hands of indigenous peoples is because we have solid evidence to believe that the settler colonial states would not include the interests of indigenous peoples when making the decision or would act directly against indigenous peoples’ interests. No doubt many readers will find my suggestion that individual tribes or indigenous groups dictate the rules for a vote on secession troubling. Much of that doubt, I believe, comes from reservations about indigenous culture, commonly portrayed in settler colonial states as savage, inferior, and largely unethical.\textsuperscript{11} Those portrayals present a false image of what societies built upon the precepts of indigenous cultures once were and what they can once again be.

6. Conclusion

In this chapter, I argued how it is that a choice to not secede is analogous to expressing consent for the state. It required that the choice to be secede be made under conditions in which it was an actual choice, it was voluntary, and individuals were informed about the choice they were making. I also considered popular objections to the use of consent theories of legitimacy and either dismissed them or showed how they could be greatly diminished under the circumstances of indigenous referenda on secession.

Should indigenous peoples really secede, though? Is getting the state to engage in reconciliation efforts to sufficiently improve its trustworthiness? Whether any individual tribe or indigenous people should secede is a question for that tribe or that people to answer. And so the answer the second question must be no, reconciliation is not necessarily enough. That said, reconciliation in the way that I have described is, I think, still desirable; and if indigenous peoples in either state were able to get something like that, then it would certainly be a step in the right direction.

Conclusion

In this thesis, I have made my first attempt to answer the question of why indigenous peoples in Australian and the United States should accept or acknowledge the existence of moral obligations to their settler colonial states. The answer I’ve written in this thesis, or at least tried to, is that they shouldn’t—at least, not unless those settler colonial states undertake some serious atonement in the form of political reconciliation, and not unless indigenous peoples are able to make that decision for themselves by having a realistic choice to secede. I justified that answer by appealing to the high risk of future state harm for indigenous peoples by those states. Given the long and consistent history of systemic and egregious acts of violence and harm committed against indigenous peoples by these settler colonial states, I claimed that it would be irrational to not expect that behavior to continue. That said, I also argued that political reconciliation, if done properly, can provide evidentiary reasons for indigenous peoples to trust that the state will not, in the future, continue to be so destructive towards them. However, I also claimed that given the substantial amount of violence and harm wrought against indigenous peoples by those states, it is very unlikely that any amount of evidence would be sufficient to make the claim that indigenous peoples should trust their settler colonial states. Instead, the best those settler colonial states could hope for is to build enough trust into the relationship so that indigenous peoples decide to willingly accept obligations to them by choosing to not secede from them.
In attempting to answer the question of legitimacy, I have largely ignored an important and tangential issue, that of social attitudes towards indigenous people within these states. Attitudes towards indigenous peoples within these settler states are far from decent. The predominant, though not exclusive, attitudes amongst non-indigenous supporters of indigenous peoples tend to be those of either sympathy or pity. While those attitudes can be supportive, they are often unquestioning and are tied up with a romanticized image of indigenous peoples. On the other hand, among those who would adamantly deny that indigenous peoples possess any special claims against the state or worse, that indigenous peoples are inherently lazy, alcoholics, criminals, etc., the attitudes are very negative and often very aggressive, and frequently tied to a Westernized image of savage Indians or Black fellas. In the middle, and by far the most prevalent, are those who don’t really possess any attitudes on the topic, because they have busy lives of their own and the topic does not affect them in any noticeable way.

Addressing the pity parties, the white nationalistic parties, and the apathetic bunch will be necessary if political reconciliation is to be successful. Without the support of the larger populations of the settler colonial states, indigenous peoples stand no chance of securing the type of reconciliation they are owed.

On the other hand, addressing those attitudes is more than just instrumentally beneficial to the project of political reconciliation. While I do think the issue of authority is the bigger issue, addressing and changing the attitudes that non-indigenous peoples have about their indigenous countrymen is important on its own. Even if reconciliation were successful and indigenous peoples opted to accept moral obligations to the settler colonial states, the outcomes indigenous peoples would face would still be diminished if society then went back to treating indigenous peoples as second class citizens. We should seek to change those attitudes not just for a moment in order to get reconciliation done, but for the future so that, should indigenous peoples choose to remain citizens of their respective settler colonial states, they can have status as social equals within those states.
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