INDIGENOUS PEOPLES: CAUGHT IN A PERPETUAL HUMAN RIGHTS PRISON

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"Recognized", I like that term. Makes me feel almost real.

– Thomas King, 2012[1]

I. INTRODUCTION

As a Canadian citizen I am entitled to all the rights and privileges such status provides me, without discrimination based on my Aboriginal ethnicity. Not only do I possess such individual rights, I also have the social and economic means to benefit meaningfully from that status, unlike many of my fellow Métis "Canadian" citizens.[2] Nothing for me to complain about? Ah, but there is. In fact I am offended precisely because I am a Canadian citizen. Let me briefly explain: Canadian citizenship was not something my people agreed to have; it was forced upon my Métis ancestors from the Wood Mountain-Willowbunch area of what is now present-day southern Saskatchewan.[3] They were an independent bison hunting people with their own governance structure, laws, and territorial sovereignty (shared in common with a kinship alliance known as the *Nehiyaw Pwat* confederacy).[4] Regrettably, things changed with the onslaught of Canadian military authority and power. The 1885 war that ended with the defeat of the Métis people at the battle of Batoche and the subsequent hanging of Métis leader Louis Riel for treason are later regarded as regrettable but inevitable moments in the progress of civilization.[5]

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[1] Thomas King, *The Inconvenient Indian* (Toronto: Anchor Canada, 2012) at 65.

[2] Aboriginal peoples are disproportionately among the poorest in Canada. A study conducted by Wilson and Macdonald in 2006 noted that "[t]here is a large disparity in employment incomes between Aboriginal and non-Aboriginal people in Canada. Based on the most recent data available, median incomes for Aboriginal peoples in 2006 still had not reached the $21,431 median income level non-Aboriginal Canadians achieved in 1996." See Daniel Wilson & David Macdonald, *The Income Gap Between Aboriginal Peoples and the Rest of Canada* (Ottawa: Centre for Policy Alternatives, 2010) at 8.

[3] The courts have not been consistent with determining the date of when the Crown asserted sovereignty and arguably thereby acquired sovereignty (although the idea of assertion as establishing sovereignty is a contentious issue in the literature). Dates have ranged from 1670 to 1870 in the case law for this area of the prairies. See Larry Chartrand, "Métis Aboriginal Title in Canada" in Kerry Wilkins, ed, *Advancing Aboriginal Claims* (Saskatoon: Purich Publishing, 2004) 151 at 165.

[4] Nicholas C P Vrooman, *"The whole Country was ... 'One Robe'": The Little Sheel Tribe's America* (Helena: Little Shell Tribe of Chippewa Indians of Montana and Drumlummon Institute, 2012) at 87.

[5] For an interesting account of colonization as an inevitable process of Indigenous displacement as seen through television drama, see Rebecca Johnson, "Living *Deadwood*: Imagination, Affect, and the Persistence of the Past" (2009) 42:4 Suffolk UL Rev 809.

Ever since we were unilaterally absorbed into the Canadian state machine we have been resisting Canadian colonization and fighting for recognition as a distinct sovereign people. By the force of settlement and the imposition of British/Canadian sovereignty, followed by the visible manifestation of effective governance control (along with its monopoly on legal violence) in our territory we called home, we became Canadian citizens. But we did not abandon our Métis culture and identity and yes, we continue to resist our political inclusion into a nation-state that is not one of our own choosing.[6] More problematic still is the fact that democratic philosophers such as Jurgen Habermas do not satisfactorily account for this injustice, but rather ignore it so as to avoid the inconsistency in the logic of the theory.

In this paper, I argue that the issue of forced citizenship inclusion cannot be satisfactorily resolved based on accepted liberal theories of nation and democracy such as those posed by Jurgen Habermas. This is so because the point of departure in liberal theory is based on an initial assumption that the composition of the original citizenship of a democracy like Canada is legitimate, or is at least taken as a given unable to be challenged within liberal theory without rupturing the constitutive principles upon which it is founded. It may seem unorthodox to focus a paper about Indigenous peoples' governance on the criticism of a theorist of democracy who never turned his mind to the issue of colonization and the unwilling absorption of Indigenous peoples into the sovereign sphere of a colonizing European nation state. It might also seem odd that I do not focus on writers such as Will Kymlicka or Michael Ignatieff who have more directly turned their minds to such questions. As explained in this essay, I focus on Habermas because Habermasian theory has been transplanted to America, and scholars within philosophical, legal, and political studies in Canada accept his work as a valuable resource when considering Canadian democracy. Moreover, liberal theorists like Habermas reinforce theorists like Kymlicka who are simply incapable of imagining a democracy like Canada as being forever unjust and illegitimate because of the forced presence of Indigenous peoples. Arguably liberalists like Kymlicka strive to ensure that the standards of deliberative democracy for which Habermas is representative are effectively and fairly applied to Indigenous peoples within the state, thereby ensuring that colonization no longer disadvantages them from within.

Yet, how can one advance a theory of democracy and transplant it in America – or in any colonizing context – without addressing the question of the rightful inclusion of Indigenous peoples? Interestingly, Michael James, whom I discuss more fully below, tries to do so by writing about the relationship between American Indian tribes in the United States and the United States government. Although he makes a good case, relying on Habermasian theory, for a strategy to ensure that the American tribes have a distinct democratic voice in American governance, he ultimately fails to address the question of the unjust inclusion of the American tribes under the sovereignty of the United States.

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[6] For a personal account of the paradox of socially and materially benefiting as a Canadian citizen while at the same time despising that same citizenship, see Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor's Journey" (2010) 50 SCLR (2d) 89.

I will argue that liberal theory does more harm than good to Indigenous interests. Yes, Habermas and James do provide a powerful argument for advancing a certain kind of active citizenship to ensure that democracy is legitimate and responsive to all those who belong including Indigenous peoples, but it flounders when applied to the question of how a distinct nation can be unilaterally absorbed under the sovereignty of another without consent. How does one reconcile the characterization of a democracy based on the *freedom of all* to participate equally in the governance of such a democracy when that very freedom to choose to be part of it in the first place was not *free* at all?

Liberal theory contradicts itself at its very foundational roots and, as I argue below, is incapable of responding to the question of rightful inclusion in the first place. All that liberal theorists can do – especially those who turn their attention to the Aboriginal question – is to advocate for a kind of special order within the democracy which accords a distinct collective voice to Indigenous peoples as well as individual voices. How far this goes depends on the nuances of each theorist's attempt to reconcile the collective political claims of Indigenous peoples and the state. The harm of initial inclusion in the state without consent is ignored in favor of advocating for special rights unique to the group but which are defined *within* the very democracy to which they were forced to belong.

This failure to account for the initial morality of forming citizenship boundaries in liberal theory is perhaps why Bonnie Honig is so critical of Habermas. According to Honig, Habermas does not recognize the potential legitimacy of acute alienation from the existing constitutional structure nor the legitimacy of transcending the constitution towards an entirely new world order.[7] Notably, claims for Indigenous sovereignty are often viewed as threats to the very constitutional foundation of Canada and thus are arguably impossible to acknowledge under Habermasian theory.[8]

This is true even where the universalistic moral approach of Habermas is adapted to account for Indigenous groups within a conceptual framework that acknowledges cultural pluralism as posited by Michael James.[9] At best, as explained more fully below, James' theory criticizes unilateral plenary power over American Tribal authority, but the sovereignty of the Tribes remains inferior to that of the United States itself. Jacques Rancière's theory of dissensus, on the other hand, may

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[7] Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's 'Constitutional Democracy'" (2001) 29:6 Political Theory 792.

[8] For instance, Justice Binnie in *Mitchell v MNR*, [2001] 1 SCR 911, held that a Mohawk claim to trade freely between the United States border and Canada based on Mohawk sovereignty was not compatible with Canadian sovereignty. In coming to this decision Justice Binnie agreed with *United States v Wheeler*, 435 US 313 (1978), where the United States Supreme Court held that "[t]hese limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." (emphasis in original) (at para 166).

[9] Michael Rabinder James, "Tribal Sovereignty and the Intercultural Public Sphere" (1999) 25:5 Philosophy & Social Criticism 57.

have the flexibility to side-step this paradox or the vicious circle that insists on translating claims that attempt to transcend the existing constitutional structure into claims that "can be adjudicated positively or negatively within an existing economy of rights and liberties."[10] Ultimately I wonder whether Glen Coulthard's rejection of the need for any recognition by the State (or dialogue, for that matter) may be the only viable option, since Western theorists of democracy seem to be incapable of – or perhaps unwilling to – adequately respond to the claims of unjust inclusion within the state in the first place.[11]

This paper will first consider how Canadian courts have responded to Aboriginal claims under s. 35 of the *Constitution, 1982*.[12] I will try to show how Canadian courts have effectively "liberalized" Aboriginal rights claims so as to preclude any possible recognition of an independent political status equivalent to that maintained by Canadian sovereign authorities. I argue that the approach taken by the courts has been to treat Aboriginal claims as analogous to individual human rights claims thereby always subjecting them to the over-riding claims of the Canadian public good.

Interestingly, Habermasian theory does provide a basis for critiquing the current jurisprudence concerning Aboriginal rights. Habermasian theory, particularly as it is adopted to apply to Aboriginal peoples claims by James, does offer theoretical support for greater inclusion of Indigenous voices in a democracy like Canada. I will show how this is the case by examining two leading cases; *Cunningham* and *Tsilhqot'in.*[13] Initially relying on Habermas and James, I will provide a critique of these cases by outlining the negative impact the analysis adopted by the courts has had on Indigenous political autonomy claims as articulated by James. Accordingly, I will argue that a Habermasian analysis, as modified by James to address Aboriginal claims, would likely view the current norms and rules that define Aboriginal-Crown relations as morally flawed and fundamentally illegitimate. Ultimately, however, I will argue that James' adaptation of Habermasian theory does not go far enough. It remains incapable of addressing the question of "contested political association" because it cannot go beyond simply upholding internal democratic fairness.[14] Radical democrats, which emphasise a constant flux of contestation in democracy as opposed to striving for inclusive and equitable political participation, may provide a viable alternative basis for justifying

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[10] Bonnie Honig, *supra* note 9 at 800 referencing Jacques Rancière's critique of a "rights – centred constitutionalism on spontaneous political action." See Jacques Rancière, "Who is the Subject of the Rights of Man?" (2004) 103:2/3 S Atlantic Q 297.

[11] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[12] Section 35 (1) states that "Existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[13] *Alberta v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670; *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] 2 SCR 257.

[14] Andrew Schaap, "Aboriginal Sovereignty and the Democratic Paradox" in Adrian Little & Moya Loyd, eds, *The Politics of Radical Democracy* (Edinburgh: Edinburgh University Press, 2008) 52 at 52.

Aboriginal claims to sovereignty, but ultimately they too may be flawed to the extent that political recognition will likely not sufficiently transcend the European-Indigenous philosophical divide, nor be truly freeing. I will conclude by agreeing with Coulthard that the only viable option may be to reject all forms of dialogical interaction with the colonizing other and instead turn inward to harness the inner strength of our peoples.

II. CANADIAN JUDICIAL RESPONSE TO ABORIGINAL RIGHTS CLAIMS IN CANADA

In 1982, the Métis were defined as one of three categories of Aboriginal peoples whose existing Aboriginal and Treaty rights were recognized and affirmed in s. 35 of the *Constitution Act, 1982*.[15] There was much hope in 1982. It did not last. Little did we know that being "Aboriginal" meant a continuing inferior status and being subjected to the will of the state, even when we arduously proved our Aboriginal rights and Treaties do exist through accessing prohibitively expensive British/Canadian courts.[16] Section 35 did not amount to the emancipation of my people, but rather a clever deception of subjugation with benefits. The common law has become liberal democracy's loyal and steadfast tool in the project of absorption without consent.

The illusion of justice through appealing to the courts of the colonizer is not unique to Canada. In discussing the pursuit of justice by Aboriginal peoples in Australia, Andrew Schaap notes the dilemma of rights-pursuit using the colonizers' courts.

> The recourse to legal remedies that rights make available may contribute to the further dispossession of a group within a nation-state. This was spectacularly witnessed, for instance, by the claims brought by indigenous peoples to native title in Australia following the *Mabo* judgment, which effectively provided a legal means of extinguishing indigenous peoples' political claims to reparative justice by recourse to the facticity of sovereignty.[17]

In Canada, s. 35 of the *Constitution* has, since 1982, prevented the federal government from unilaterally extinguishing Aboriginal rights without consent. However, the courts have conceptualized them as akin to typical individual human

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[15] Section 35 (1) states that "[e]xisting aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."; *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 s 35.

[16] Canada insisted, and the courts agreed, that Aboriginal rights were only those that were "cognizable" by the British common law. For instance, the Supreme Court of Canada stated in *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 that "[t]he ultimate goal is to *translate* the pre-sovereignty aboriginal right to a modern common law right". Moreover, the status of Treaties were diminished to some unique form of domestic contract cognizable only to the British common law (*R v Sioui*, [1990] 1 SCR 1025).

[17] Andrew Schaap, *supra* note 16 at 69.

rights whose characterization has effectively denuded them of any independent political character. In other words, Canadian law has determined Aboriginal peoples to be rights-benefitting bodies, and ignores or denies that they are also rights-determining bodies. Consequently, Aboriginal rights are regarded as no different in kind from rights contained in the *Charter of Rights and Freedoms*, which guarantees such rights as individual freedom, security, and equality. As with all individual human rights, governments can limit the exercise of Aboriginal rights in the interest of the broader community. Section 1 of the *Charter* expressly provides governments with the power to impose such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[18] Although section 35 is outside of the *Charter* and therefore not subject to the limitation clause of section 1 of the *Charter*, the Supreme Court of Canada nonetheless read into section 35 an analogous limitation on the exercise of Aboriginal and Treaty rights, allowing governments to unilaterally impose limitations on such rights despite their placement outside of the *Charter*.[19]

In *Cunnigham*, the Supreme Court, based on a challenge to the membership provisions of the Métis Settlements Accord (MSA) and its implementation legislation, held that excluding status Indians from membership in the Peavine Métis settlement was an acceptable form of ethnic/racial discrimination because it met the criteria of an ameliorative program protected by s. 15(2) of the *Charter*.[20] Having acquired Indian status, the plaintiff in *Cunningham* complained that his exclusion from membership in the settlement because of his newly acquired Indian status amounted to discrimination contrary to s. 15 (1) of the *Charter*. The court held that s. 15(2) provides a good answer to the charge of discrimination because s. 15 (2) is concerned with promoting substantive equality for disadvantaged groups. The court held that those Métis who benefit from the MSA are part of an ameliorative program because the legislation at issue was part of a negotiated agreement between the government of Alberta and the Métis Settlements Federation to "establish a Métis land base to preserve and enhance Métis identity, culture and self-government, as distinct from Indian Identity, culture and modes of governance."[21]

What is particularly disconcerting about this case is that the court accepted the argument that a land claim and self-government agreement essentially amounted to a human right substantive equality initiative designed to reduce certain disadvantages collectively experienced by the Métis as a group. This

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[18] *Candadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[19] This position is famously noted in the oft-quoted statement in *R v Sparrow*, [1990] 1 SCR 1075 at 1103 where the Supreme Court of Canada stated, "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

[20] At issue was whether s 75 of the *Métis Settlements Act*, RSA 2000 c M-14 which excluded those members who obtained Indian status under the *Indian Act* was discriminatory based on the equality rights protection in s. 15 of the *Charter*. Peavine is one of 8 Métis settlements with land set aside collectively on behalf of the Métis communities in Alberta. The Accord and legislation also sets up a self-government regime and Appeals Tribunal for dealing with disputes arising on the settlements. It is broadly similar in nature to Indian reserves under the *Indian Act,* but less paternalistic. I was a beneficiary of this agreement and had membership in the Paddle Prairie Métis Settlement.

[21] *Cunningham*, *supra* note 15 at para 69.

characterization of the agreement and implementation legislation reduces Aboriginal nations to the status essentially of ethnic minorities who have no prior claim to sovereignty to the territory subjected to colonization. A political claim becomes translated into an individual human right substantive equality claim, which by definition is a program that is, theoretically at least, intended to be of temporary duration until such time as the disadvantage no longer exists and the specialized program is no longer justified. Does this mean that once there is no threat from Indian identity there is no longer any justification for this land base and self-government Métis specific "program"? The equality rights analysis employed by the court is problematic because it diminishes Aboriginal political autonomy claims to that of a state-endorsed affirmative action program.[22]

Unique to Aboriginal *Charter* challenges is the fact that there are two options for upholding the alleged discriminatory distinction that is the basis of a section 15(1) claim. These challenges can be explained away by relying on the principle of achieving substantive equality under section 15(2), or they can be explained away by relying on the principle that Aboriginal peoples possess interests contrary to those of the state, which cannot be challenged by individual reliance on the liberal values of the state by applying section 25 of the *Charter* instead.[23] The intent behind s. 25 was to shield Aboriginal specific rights from potential *Charter* challenge based on an argument that the specific Aboriginal right is discriminatory on the grounds of race or ethnicity. It is preferable to defend claims like that raised in *Cunningham* based on s. 25 instead of s. 15(2).

The reason for my preference of section 25 over section 15(2) stems from the invasive prevalence of contemporary liberal discourse which constantly threatens the inherent political status of Aboriginal peoples. By blindly applying a culturally Western liberal construct of individual rights, including the concept of substantive equality when Aboriginal interests are in potential conflict, risks overly conceptualizing Aboriginal peoples as simply another ethnic interest group or minority group wholly dependent on the intervention of Canadian governments to create and protect their interests. The inherent independent political status of Indigenous peoples, and their political/legal agency in the negotiation and definition of specific rights protections "with" Canadian governments, is accordingly devalued in the process. This threat, albeit more indirect than direct, will unnecessarily

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[22] It might be argued that this characterization of the claim was inevitable since the claim was brought under s 15 of the *Charter*. Section 25, however, was a viable alternative which would not have inappropriately brought a political power within the analytical framework of individual human rights. Lawyers and jurists need to appreciate the consequences of characterizing what are at core Indigenous political claims as human rights ameliorative programs of the state.

[23] Section 25 reads as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
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> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

influence society's overall understanding of the rightful place of Aboriginal peoples as self-governing entities in Canadian confederation by mischaracterizing the basis of their rights as being equivalent to those required by other Canadian groups (such as visible minorities) in need of substantive equality to offset historical disadvantage. Such an approach tends to minimize or ignore an equally important basis of Aboriginal entitlement to recognition and protection of Aboriginal-specific interests as being grounded in the overall reparation of their status as independent polities. The legitimate reparation of Aboriginal cultures, institutions and structures of authority is unique to the Aboriginal-colonial experience and sets Aboriginal peoples qualitatively apart from other "disadvantaged groups".[24]

The concern from an Aboriginal perspective is that, given the prominence of the current mainstream philosophical views on human rights, Aboriginal culture may be unduly and unfairly trumped. Section 25 exists, in part, to guard against this tendency of attrition due to the overwhelming influences of non-Aboriginal society and culture.[25] It is in this context that section 25 of the *Charter* exists. It exists because Aboriginal peoples have rights that may be threatened by the "ideological baggage of paternalism, assumptions of superiority, and liberal belief in the progress of 'mankind' as an organic and undifferentiated whole".[26]

The Canadian state assumes it is an authority fashioned after the British Constitution, which regards itself as the only valid source for the creation, definition and management of legal rights. Thus, in order to ensure that collective Aboriginal interests, including political and authoritative interests, are not unduly restricted or negated, a mechanism must exist to re-order the normal expectation given to the prominence of individual rights. Section 25 has the potential to re-order this expectation by stating that Aboriginal collective rights are not to be compromised by the cultural and philosophical interests of the non-Indigenous community.

Aboriginal rights and interests are far more profound than being a means to achieve substantive equality within Canada. They may be ameliorative, in the sense of being consistent with the objectives of substantive equality, but they possess qualities that transcend the limitations placed on "ameliorative" programs. Accordingly, section 15(2) and its concern for substantive equality is simply incompatible with protecting Aboriginal political interests, or the right to self-determination as peoples, or the right to sovereignty as a nation. Continued reliance on s. 15(2) threatens the relevance of political emancipation of Aboriginal peoples by making the internal domestic human rights approach *the norm* when addressing collective political claims.

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[24] This paragraph and the preceding paragraph are adapted from Larry Chartrand, "The Aboriginal Sentencing Provision of the Criminal Code as a Protected 'Other Right' under Section 25 of the Charter" (2012) 57 SCLR (2d) 389 at 392–393, 399–400.

[25] Bruce Wildsmith, *Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 20–22.

[26] M E Turel/Akwi-Kwe, "Further Travails of Canada's Human Rights Record: The Marshall Case" in Robynne Neugebauer, *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars Press, 2000) at 334.

Cunningham provides a useful example of how jurists translate political claims into internal human rights claims. Likewise, the recent *Tsilhqot'in* decision does so in the context of limiting the rights recognized as Aboriginal rights in a manner consistent with limiting individual human rights claims.

In *Tsilhqot'in*, the court was more explicit than in *Sparrow* in adopting the legal framework developed in *Oakes*, which outlines what a government must show to establish that an infringement of a protected *Charter* right was justified under s. 1 of the *Charter*.[27] In *Oakes,* Justice Dickson developed a two-part test for determining when a government action that infringes a *Charter* right can be justified. The test is as follows:

1. There must be a pressing and substantial government objective;
2. The means to achieve the government objective must be proportional to the harm caused;
    a. The means must be rationally connected to the objective;
    b. There must be minimal impairment of rights;
    c. There must be proportionality between the infringement and objective.[28]

In *Tsilhqot'in*, the Supreme Court applied these same criteria to Aboriginal rights claims based on s. 35 of the *Constitution Act, 1982*. Although somewhat modified, the test in *Tsilhqot'in* closely mirrors the *Oakes* test:

1. There must be a substantial and compelling objective of the government.
2. Incursion must be consistent with Crown's fiduciary duty (i.e. proportional).
    a. Necessary to achieve a government purpose (rational connection)
    b. Minimal impairment and no further to achieve objective
    c. The government benefits must not be outweighed by adverse effects on the Aboriginal interest.[29]

As can be seen in the comparison of the two legal tests, it is difficult to see any significant difference between these two approaches to limiting both the individual human right to free speech and the Aboriginal right to sovereignty (or self-government). This approach to justifying government infringement of Aboriginal and Treaty rights is problematic because it arguably reduces collective political claims and translates them to be analogous to individual human rights

[27] *R v Oakes*, [1986] 1 SCR 103.

[28] Ibid.

[29] *Tsilhqot'in*, *supra* note 15 at para 87. In the justification context, the fiduciary duty refers to the onus on the Crown to satisfy the justification criteria for infringement of a constitutionally protected Aboriginal right. This characterization of the fiduciary duty is distinct from the fiduciary duty that is applied to cases where the Crown is acting on behalf of a band in the selling of reserve lands or managing reserve land on behalf of a band as was the case in *Wewaykum Indian Band v Canada,* 2002 SCC 79, [2002] 4 SCR 245.

assertions that can be limited where necessary for the overall public good. In commenting on the impact of the case, John Borrows was very critical. He stated:

> It requires a discriminatory denigration of Indigenous peoples' laws and life-ways to hold that Indigenous title and governance is subject to non-Indigenous paramount interests as a by-product of European sovereign assertions. This is what the Supreme Court of Canada has done in the *Tsilhqot'in* decision. Despite the many positive aspects of the case in the *Tsilhqot'in* decision, Aboriginal title is still a "burden on the underlying title asserted by the Crown at sovereignty" (at [75]). Terra nullius, though modified by this case, is very much alive and well in Canada. …
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> [T]he Supreme Court demonstrated a terra nullius approach to Aboriginal rights in the *Tsilhqo'tin* case when it failed to give attention to *Tsilhqot'in* jurisdiction over the land flowing from their ancient occupation. Instead the Supreme Court allowed provincial laws of general application to govern *Tsilhqot'in* lands (at [101]). It said a legal vacuum would exist in Canadian law if provincial law did not apply to Aboriginal lands (at [147]).[30]

This conclusion that without the application of Canadian jurisdiction there would be a legal vacuum is not surprising since Aboriginal rights are classified and treated like human rights belonging to individual citizens and it would be absurd to think of citizens as possessing their own "sovereignty" or inherent jurisdiction to govern.

In the Canadian context, the courts in how they interpret s. 35 and ignore s. 25 are engaged in a kind of double talk; they articulate reconciliation between peoples (Crown and Indigenous peoples), but they conceptualize the rights of Indigenous peoples as akin to individual Charter/human rights which can then be unilaterally infringed upon by the State, thereby diminishing the equal peoplehood status of Indigenous peoples. Although courts and governments will distinguish Aboriginal peoples from other minority groups in Canada and justify this distinction based on the fact that Aboriginal peoples were here first, this rhetoric becomes hollow when applications to manifest this difference are guided through an analysis equivalent to what one would expect in a liberal adjudication of minority rights claims.

So prevalent is this thinking that journalists, lawyers and even judges often mistakenly assume that s. 35 is located in the *Charter of Rights and Freedoms*.[31] Their language betrays their assumptions. To test this conclusion, I conducted a Google search of the term "s. 35 of the Charter" which effectively demonstrated how prevalent the assumption was. Journalists often made the mistake, but a good

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[30] John Borrows, "Aboriginal Title in *Tsilhqot'in Nation v. British Columbia* [2014] SCC 44", (2014) Maori L Rev, online: <www.maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqotin-v-british-columbia-2014-scc-44/>.

[31] As noted above it is important that section 35 is located inside the *Constitution Act, 1982*, but is not included in the section of the *Constitution* where the *Charter* is found, which sets out individual human rights protections as worthy of constitutional protection against State action.

number of legal commentaries, many of which are written by legal scholars, were equally guilty as well.[32] Perhaps more disconcerting was the fact that many judges in their actual written judgments also made the mistake. When I conducted a legal database search of the same phrase "s. 35 of the Charter", no less than 45 cases were listed, including one judgement by the Supreme Court of Canada itself.[33]

When analyzing Aboriginal claims through the minority rights lens, the objective of autonomous political emancipation becomes lost in translation with the overwhelming need for liberals to promote inclusive justice. The "political history of the last two centuries is marked by the struggles to extend the recognition of citizenship to excluded groups from poor men to women to various minorities and non-nationals."[34] It is true that Indigenous individuals, to the extent they are integrated into Canadian society and exist apart from their political communities, do need and benefit from struggles that make Canadian citizenship meaningful by relying on human rights protections and substantive equality guarantees. But, at the same time, Indigenous peoples are also struggling for exclusion – the opposite of the human rights program as generally conceived.

III. ABORIGINAL RIGHTS CLAIMS AND HABERMASIAN/JAMES THEORY

In this section, I wish to explore the benefits of applying Habermas' theory of democratic legitimacy to the problem of categorizing Aboriginal claims as some sort of human right claim and thereby subjecting such rights claims to unilateral infringement and legislative action by non-Aboriginal governments. I recognize that Western theorists such as Habermas, for example, have provided a useful framework for understanding why certain rights are valuable in defining the moral functioning of a liberal democracy like Canada. In particular, Michael James' application of Habermasian theory is illustrative of how Aboriginal peoples' claims to sovereignty and greater self-government can be advanced by drawing on "Habermas' conceptions of discourse and the public sphere to construct a universalist, discursive theory of democratic cultural pluralism."[35]

James conceptualizes the Indigenous nations located within the boundary of the United States as cultural groups within a network of cultures. He then relies on Habermasian theory to develop a conception of an intercultural public sphere and argues that such a sphere has the potential to both recognize Indigenous sovereignty

[32] There were 28 documents listed that contained the phrase.

[33] Quicklaw is a widely used commercial legal database primarily used by lawyers for researching cases. A few of the references were in relation to s 35 of the French Language Charter of Quebec. The majority, however, were in reference to s 35 of the Constitution and were clearly mistakes that were not picked up by the judge or legal personnel before being officially reported.

[34] Costas Douzinas, *Human Rights as Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007) at 41.

[35] James, *supra* note 11 at 59.

and at the same time stay true to discursive democracy.[36] James identifies three broad elements of the intercultural public sphere:

- The public sphere accommodates substantial cultural diversity where norms may embody diverse cultural substance, provided the formal criteria for the legitimate creation of a norm satisfies discursive conditions of fairness.

- Legitimate norm formation must allow for flexibility in creating context-sensitive policies aimed at accommodating marginalized groups and encourage the widest possible spectrum of conversation by resolutely avoiding thematic constraints and must address false universality if need be by providing guaranteed representation to marginalized groups within discursive forums of norm formation and must ensure that power imbalances are minimized.

- The promotion of mutual learning and mutual criticism among cultural groups.[37]

James' theory is valuable because it challenges the failure of the state to apply Habermasian morality to Indigenous claims discourse. For example, the unilateral imposition of legislation on Tribal authorities would be contrary to a Habermasian-inspired intercultural public sphere. Specifically, James argues that the plenary power that the United States Congress currently possesses and exercises to legislate and interfere in Tribal sovereignty is contrary to an impartial, universalistic discourse of legitimate democratic norm-formation. He states that

> […] a theory of the intercultural public sphere would refocus attention upon Congressional plenary power, criticizing not simply its failure to accord formal equality to minority nations … but also its contradiction of fair discursive conditions for the creation of legitimate norms.[38]

It is valuable that Habermasian theory as developed by James condemns unilateral normative action without participatory discourse by American tribal authorities leading to a consensus based on equal participation of all concerned. Such a critique also has value in Canada given the existence of a similar plenary power granted to the federal government under s. 91(24) of the *British North America Act, 1867* (now part of the *Constitution Act, 1982*) to legislate in relation to "Indians."[39] It also provides a valuable basis for criticising the affirmed principle stated in *Tsilhqot'in* that the federal or provincial governments have the power to unilaterally legislate against the consent of the Aboriginal nation, provided the *Oakes*-like justification test is met. Relying on James' Habermasian adaptation, one could argue

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[36] *Ibid* at 77.

[37] *Ibid* at 75–76.

[38] *Ibid* at 78–79.

[39] Constitution Act, 1982 s 35, supra note 17.

that Canada's exercise of unilateral power without consent is illegitimate and contrary to the principles of democracy itself. "Plenary power, with its unilateral capacities for state action without tribal consent, clearly contradicts the discursive understanding of intercultural legitimation."[40] I am cautiously optimistic that the new Prime Minister of Canada, Justin Trudeau, has taken this critique seriously as he has recently affirmed that a nation-to-nation relationship will be followed and that the unilateral imposition of legislation that affects Aboriginal peoples will no longer be accepted without input.[41]

IV. THE PROBLEM OF ORIGINAL INCLUSION

Habermas provides a very compelling theory of legitimate democracy and, in my opinion, such a theory is quite satisfying in a largely ahistorical conceptual world to describe the workings of a liberal democracy and what it takes to ensure its ongoing legitimacy, were it not for the messy presence of Indigenous peoples who had prior political and legal orders of their own before they were unilaterally absorbed – but not erased – by British imperialism.

Unfortunately, Habermasian theory does not adequately address the context of nation-states built on a history of colonialism; Habermasian theory is unable to explain how the imposed colonial layer can be justified in a context where a distinct people indigenous to the territory can be made to become part of something not of their own choosing. It is insufficient in my mind to argue that the injustice of colonization can be addressed by active, internal, robust political participation, or if necessary, in acts of civil disobedience.

Yet, more profound than this is the fact that such frameworks not only do not offer much substance for promoting Indigenous political emancipation, they actually reinforce opposition to Indigenous struggles for political autonomy. They do this by diverting attention away from the sovereignty issue and instead to a framework that is only relevant to internal state social dynamics (which incidentally are more conceptually comfortable with individual rights claims as opposed to collective political claims) and which has no traction for contestations of statehood itself. As Andrew Schaap, avidly points out, Habermas provides an imperfect answer, particularly in the context of colonized Indigenous peoples, as to how the "we" (i.e. those who are citizens and authors of discursively legitimated law) came to include Indigenous peoples. Schaap argues that Habermas' "view of law as a

[40] James, *supra* note 11 at 79.

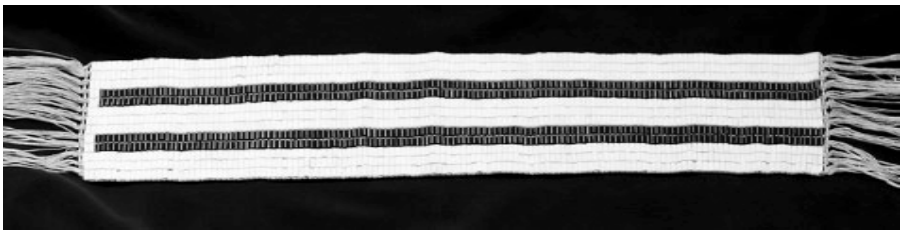
[41] See speech by Justin Trudeau at the Assembly of First Nations Meeting (8 December 2015). Online: <aptn.ca/news/2015/12/08/watch-prime-minister-trudeaus-address-to-the-afns-special-chiefs-assembly-here/>. I could not help but notice, however, that when he did the customary acknowledgement of the Algonquin, Trudeau thanked them for being "caretakers" of the land instead of the usual acknowledgment of recognizing that the territory on which Ottawa exists is unsurrendered Algonquin land, or the less common acknowledgement of the unsurendered sovereignty of the Algonquin nation.

medium for democratic expression places undue constraints on political deliberation because it represents social conflict as already internal to the political community."[42]

To what extent, then, is the medium of law able to faithfully represent a claim that contests the 'we' on which its legitimacy depends? Or, to put it another way, to what extent are radical claims co-opted in being represented as rights-claims to be adjudicated by reference to the authorising 'we' that is contested in the first place?[43]

Consequently, because self-determination for Habermas can only be exercised within the law, "this rules out in advance the possibility of any kind of radical action, understood in terms of an act of constituent power."[44] Therefore, as Schaap points out, Habermas simply presumes community as a legal fact even though he knows that the community may have come about by "historical chance and the actual course of events, normally, by the arbitrary outcome of wars or civil wars."[45]

Habermas' starting point that all citizens are and start off from a base of shared standards is a problematic one.[46] Indeed, he reinforces this notion by referencing the symbolism that all of society is "in the same boat" and relying on the same constitutional foundations to keep this symbolic boat intact.[47] Contrast this image with the well-known image of the Two-Row Wampum belt that was expected to be the normative basis of Mohawk–European relations.



[42] Schaap, *supra* note 16 at 68.

[43] *Ibid* at 68–69.

[44] *Ibid* at 66.

[45] *Ibid* at 67, quoting Habermas (2001: 116)

[46] Jurgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" (2001) 29:6 Political Theory 766 at 775.

[47] *Ibid* at 775. Interestingly, Justice Binnie in *Mitchell*, *supra* note 10, rewrote this history by characterizing the Two-Row wampum as Aboriginal and Canadian being in a shared boat. At paras 129–130 he stated that "[t]he modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners… On this view, to return to the nautical metaphor of the "two-row" wampum, "merged" sovereignty is envisaged as a single vessel (or ship of state) composed of the historic elements of wood, iron and canvas."

It is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel." [48]

The Habermasian approach, given the context of a liberal democracy and the liberal theories of rights relied upon in such a context, implicitly assumes that Aboriginal peoples have accepted their inclusion in the social polity of Canadian society and have thus implicitly agreed to be governed, and have indeed chosen to be governed, by the democratic apparatus of liberal Canadian democracy.[49] Given the history of Aboriginal colonization, these assumptions are simply perverse.

Even James' admirable attempt to reconcile Indigenous sovereignty claims with Habermasian theory fails because of Habermas' inability to address the legitimacy of including groups who do not wish to be included in the grand scheme of democratic state-building in the image of European culture and values. James too takes the community of which the American Tribes are a part, as a legal fact. Commendable is James' critique, using Habermasian theory, of Congresses' plenary power, but he is nonetheless silent on the question of unilaterally imposed underlying American sovereignty.[50]

I would argue that what James is attempting to do is equate Tribal sovereignty with a distinct form of collective group citizenship that does not presuppose symmetrical or uniform application. It is like allowing individual Americans to negotiate with the state as to how they will interact in a very decentralized norm-development process. Each citizen is then allowed, in this asymmetrical universe, to negotiate a set of rights unique and specific to that citizen and to acquire as close to a fully sovereign autonomous status as possible (everything is on the table), short of dismantling the state itself. This is, in my opinion, essentially the nature of the intercultural plural political sphere demanded by James. Nations as cultural groups are being conceptualized as individuals but with the added ability to individually negotiate citizenship status. This is made practically possible simply because there are a manageable number of definite Tribal groups and consequently there are no difficulties with governance efficiency, and no need to establish uniform administrative legal norms for effective public management.

In effect, James' form of collective American Tribal citizenship makes Tribes as free peoples disappear, but this result is cleverly disguised as part of a critical intercultural democratic discourse. The messy problem of the Indigenous full sovereignty question or their non-consensual inclusion as citizens of the United States disappears along with the "disappearance of [I]ndigenous peoples as free peoples with the right to their territories and governments."[51] At best, James'

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[48] James Wilson, *The Earth Shall Weep: A History of Native America*, (New York: Grove Press / Atlantic Incorporated, 2000) at 115–116.
[49] Schaap, *supra* note 16 at 69.
[50] James, *supra* note 11 at 59.
[51] Schaap, *supra* note 16 at 56.

argument creates a state of perpetual sovereignty negotiation not unlike the idea of being in a state of "shared sovereignty." In this shared state, the terms of co-existence are always theoretically open to challenge and change based on Habermasian conditions of fair discursive communication and, as James insists, of ensuring that problems of false universality and power imbalances are expressly accounted for and addressed.[52] It is one thing to argue for a coherent theory that explains the importance of certain conceptualizations of human rights to "political participation," for example, as fundamental to a just liberal democracy, but it is a different matter when a distinct people is unjustly forced to become a part of that liberal democracy in the first place. Indeed such understandings of human rights do more damage than benefit to Indigenous peoples' "rights".

The problem with the theorists discussed above is that they reinforce judicial conceptions of Indigenous rights as being akin to human rights. Much of the narrative in such writings focuses on how to ensure that everyone is equal and free to participate politically in society. Because of this perception, no attention is paid to whether some "citizens" ought to have been included as citizens in the first place. The contest is shifted away from being seen as one between competing autonomous political entities (which is a political question) to one of ensuring full and equal political rights of all "citizens" – Aboriginal peoples included – by eliminating barriers to such participation through human rights concepts.

Even at the International level, the UN *Declaration on the Rights of Indigenous Peoples*, which recognizes Indigenous self-determination as a unique form of collective human right that nation states must respect, does not allow a challenge to the political association or the terms of belonging within existing states. Self-determination is qualified for Aboriginal peoples and is expressly restricted to the domestic sphere of existing states. Indigenous peoplehood rights under the *Declaration*, as is the case with all human rights noted by Douzinas, are that states have "unanimously agreed that these rights could not be used to pierce the shield of national sovereignty."[53] Article 46 of the United Nations Declaration explicitly limits the exercise of Indigenous rights implementation in ways that cannot be "construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[54] This conspiracy against Indigenous emancipation is rendered complete at the international level.

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[52] James, s*upra* note 11 at 66–76.

[53] Douzinas, *supra* note 31 at 24.

[54] *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295 art 46.1 Online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

V. ALTERNATIVE OPTIONS: RADICAL DEMOCRACY OR COULTHARD'S REJECTION?

Schaap contrasts radical democratic theorists such Chantal Mouffe and Sheldon Wolin with Habermas because of their critical stances towards the identification of democracy with constitutionalism.[55] The paradoxical nature of democracy for which they advocate potentially allows for assertions of democratic will to overcome the barriers presented by the rule of law. Yet, Schaap is not so sure that Mouffe or others in the radical democratic vein would allow conflict to take a form that "would destroy the political association" of the constituent group concretely manifest in the real-world present.[56]

Interestingly, the Supreme Court of Canada may have found a way out of this dilemma. One could argue that in Canada, the court has recognized Canadian democracy as being compatible with radical democratic theories, and has even reconciled the problem of constituent disassociation. In the Québec secession reference case, "radical political speech and action"[57] that aims to fundamentally alter the terms of political association is made possible within the structure of the Canadian constitution.[58] Habermasian co-originality gives way to the purely political when the majority of a population in a given cultural and territorially defined place, votes in favour of separation from Canada. At this point, the matter becomes one of true political debate concerning how separation will take place, and on what terms. The court has only a monitoring role to ensure fair debate and cannot impose any substantive legal principle that would affect the outcome.[59]

Would an Indigenous people in Canada likewise be able, under the same principles articulated in the Quebec secession case, secede from Canada if a majority of the Mohawk nation, for example, clearly and unambiguously expressed in a democratic referendum a wish to secede from Canada?

I suspect that such a claim to secession would be translated and re-funnelled into a claim to be adjudicated "within the existing economy of rights and liberties." For Aboriginal peoples, constitutionalism would trump democracy, but not so for the Québécois. Unlike the characterization given to Aboriginal peoples, I suspect that the Québec populace would not be seen as a cultural group or minority whose rights would be internalized and transformed into a form of collective citizen; whose autonomy can be justifiably limited by the State. The claim for Québec's sovereignty would not, I suspect, be seen as some "absurd proposition" in the same

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[55] Schaap, *supra* note 16 at 52 and 68 respectively.

[56] *Ibid* at 70–71.

[57] *Ibid* at 52.

[58] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

[59] *Ibid* at paras 93, 101.

way that a claim by the Mohawks would be seen by some as an "absurd proposition."[60]

The Court itself seems to imply as much when it classified Aboriginal peoples in the Québec Secession case as being entitled to benefit from the "minority protections" of the *Constitution*, as distinct from a political community with the ability to express a will to separate like Québec:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act,* 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35 … recognized not only the ancient occupation of land by [A]boriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[61]

Perhaps Jacques Ranicere's theory of dissensus offers greater flexibility in recognizing and justifying Aboriginal peoples' assertions of sovereign independence because it is not foreclosed from questioning the political association matrix of existing nation states. Arguably, Aboriginal peoples know they have the rights that they do not have. And through acts of dissensus they are able to construct them as against the denial of "rights they suffer."[62] In the expression of such rights, they have the potential of being the rights of others and so are more than mere assertions of desire but are rather qualitatively transformed into rights language, and rightfully so. But then, is this dissensus doomed to a state of perpetual resistance? To overcome this dilemma, others must inherit the Aboriginal peoples' right to sovereignty justice on their behalf through a kind of humanitarian intervention that is ultimately guided by a "sheer ethical conflict"[63] that necessarily must transcend all principles of international law, all distinctions of what justice is, and all manner of how law is exploited. It is, as Rancière puts it, the battleground between Good and Evil.[64]

Speaking of evil, many Aboriginal peoples regard the actions of colonial governments over the history of contact as theft: theft of land, theft of culture, and theft of governance authority; indeed, theft of humanity. Why, then, negotiate or consult (engage in discursive politics) with a thief in return for what was wrongfully taken? Arguably, talk of reconciliation and politics in this context is essentially

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[60] Schaap, *surpa* note 16 at 66.

[61] *Ibid* at para 82.

[62] Rancière, *supra* note 12 at 305–306.

[63] *Ibid*.

[64] *Ibid* at 309.

extortion. The fact that the thief is willing to talk (even if it does so in a remorseful and honourable manner where the process is fair) does not amount to justice.[65] On the contrary, the thief is holding justice hostage. So the position of the thief is that it will release "justice," but on *its terms only*, because this thief is no ordinary thief—this thief now has all the power; it has a monopoly on violence (e.g. the police and the jail system). I suppose that in such a case, it is something to be thankful for, that the thief is now somewhat remorseful and apologetic regarding what it did in the past, and that it is now prepared to talk, and perhaps to even return some beads and trinkets. Because after all, even the thief's own middlemen (e.g. the courts) do not think it is right for its crime boss to keep the whole lot.

But can Aboriginal peoples continue to afford to wait for Good to defeat Evil? It seems that Indigenous peoples in Canada are caught in a liberal human rights nightmare with no means of escape.

VI. CONCLUSION

In drawing on Fanon's insights, Glen Coulthard states in *Red Skin, White Masks* that recognition "by the other is not posited as a source of freedom and dignity for the colonized, but rather as the field of power through which colonial relations are produced and maintained."[66] According to Coulthard, in the context of real world domination, the politics of recognition ultimately serve the interests of colonial power. Given the significance of "internalized colonialism" and the colonizers' misrepresentation of Aboriginal peoples as minorities, as well as the fact that recognition in colonial contexts is recognition on the terms as decided by the dominant power, Aboriginal peoples must in order to maintain human dignity "turn away" from the colonial state and instead find in their own "decolonial praxis" as "the source of their liberation."[67]

Indigenous peoples are not in a position to effectively engage with the colonial "other" until such time as they have achieved internal cultural integrity and confidence of their position, untainted by offerings of partial emancipation which is all that can be imagined by the liberal politics of difference. Aboriginal peoples must turn their backs away from the "other" and retrench in what is left of their own sources of knowledge, theory, culture and language to then emerge in a position of

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[65] Oftentimes the thief is not willing to talk at all, but must be dragged to the thief's own presiding court by Aboriginal claimants in search of justice.

[66] Coulthard, *supra* note 13 at 17.

[67] *Ibid* at 48. An alternative to Coulthard's all-or-nothing approach is expressed by Leanne Simpson where she states that Indigenous leaders working towards recognition and reconciliation with the state may do some good in reducing the harmful impact of colonization, but that the focus should be on "[o]ur liberatory and inherent theories of resurgence." In other words, the focus should be on being Indigenous in a regenerative way and not fall in the "web of colonial traps for settler political recognition and to gleefully accept white paper liberalism designed to redistribute resources and rights, placating the guilt of settler Canadians and neutralizing Indigenous resistance." See Leanne Simpson, *Dancing on Our Turtles Back: Stories of Nishnaabeg Re-creation, Resurgence, and New Emergence* (Winnipeg: ARP Books, 2011) at 24.

strength where they may then insist on their position without recourse to processes of diminishment as found in the processes of recognition or negotiation. This critique arguably requires the rejection of a theoretically fresh and unconstrained internal democratic space employing "reconciliatory" dialogue that presumes nothing (where all themes are on the table for negotiation) as advocated by James, and even a rejection of an openly manifest expression of dissensus according to Rancière. Indigenous liberation cannot be found within the confines of the other's camp no matter how accepting and welcoming that camp may be, nor can it be found in the right to constant struggle even to the point of transforming the camp to be *like* home. It will not be home. Two camps can no doubt join forces and be the richer for it. But we must begin from our own camp—we must go home first and then choose *willingly* to join.

Strange times we live in, where the only path to justice seems to be a retreat from human rights.