**Indigenous People and the Legitimacy of Criminal Justice in Canada**

Indigenous people pose strong challenges to the legitimacy of the Canadian criminal justice system and the political system that supports it. These challenges are fundamental enough to undermine the validity of liberal democratic theories of legitimacy in Canada. How might Canadian liberal democrats respectfully respond? I begin by surveying Indigenous challenges to the legitimacy of Canadian law. I then switch into a theoretical register, examining the concept of legitimacy, the relation between law and political legitimacy, and liberal democratic conceptions of legitimacy. With the pieces in place, I look at how Indigenous challenges specifically undermine theory, making it impossible to both maintain hegemonic liberal democratic approaches to legitimacy and respond respectfully to Indigenous concerns. In the final section, I briefly sketch the outlines of how liberal democrats could enter respectfully on the path to a legitimate solution.

**Indigenous Challenges to the Legitimacy of Canadian Law**

Indigenous people have many justified complaints against the operation of criminal justice in Canada. Compared to other Canadians, Indigenous people are incarcerated at much higher rates and are more likely to be victims of crime, particularly violent crime. Indigenous people have also been subjected to racism and abuse by police. The widespread practice of “starlight tours,” in which Indigenous people were driven by police to the edge of town in winter and left to freeze to death is merely the most horrifying recent example. The justice system also has a long history of enforcing racist Indian Act policies, forcibly removing children from their parents to residential school, and criminalizing Indigenous political dissent. Currently, the inadequate response of the justice system to the epidemic of missing and murdered Indigenous women and girls has attracted public attention. In the panoply of specific complaints, it is sometimes possible to miss the general challenge posed to the legitimacy of Canadian criminal justice.

John Borrows diagnoses a “crisis of legitimacy about the rule of law in Aboriginal communities” because Indigenous people do not see themselves and their normative values reflected in the conduct of law. This harmonizes with the findings of the Royal Commission on Aboriginal Peoples (RCAP), which recognized the strong arguments made by Indigenous people to challenge the legitimacy of Canada’s exercise of power over them. RCAP asserted a principle that the “legitimacy of a system of justice rests on its being an expression of a society’s basic values, expressed in the rules that govern people’s rights and responsibilities and the way peace and order are maintained when disputes arise.” To this way of thinking, Indigenous peoples constitute distinct societies with different basic values from Canada as a whole. The justice system fails to reflect these values, and thus fails a basic test of legitimacy. The failure is particularly egregious because non-Indigenous values are forcibly imposed on Indigenous people. The Osnaburg/Windigo Tribal Council Justice Review Committee thus argued:

“The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness...It lacks legitimacy in their eyes. It is seen as a very repressive system and as an adjunct to ensuring the continuing dominance of Euro-Canadian society.”

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2Comack, Racialized Policing, 115–51.
5Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide, 77.
6quoted in ibid., 49.
Mary Ellen Turpel argued that Canadian legal institutions falsely claim “cultural authority” over Indigenous people, that is, the authority “to create law and legal language to resolve disputes involving other cultures.”⁷ She argues that Canadian courts lack the cultural authority to adjudicate conflicts among Indigenous people, and illegitimately apply culturally inappropriate individual rights analysis.⁸ In this, she is supported by Kristen Manley-Casimir, who argues that a lack of cultural understanding may even mean that judges are unable to cognize the wrongs suffered by Indigenous claimants.⁹ Because the creation of legal meaning always takes place within a particular culture, non-Indigenous judges are not even in a position to define the content of pre-existing Aboriginal rights under Canadian law (let alone to resolve disputes among Indigenous people).¹⁰ These theoretical concerns play out in the actual practices of justice in Indigenous communities. The provincial court in the Eskasoni Mi’kmaq Community in Nova Scotia, for instance, is criticized by Indigenous residents and even by non-Indigenous justice system officials. The crown prosecutor argues that its legitimacy is undermined because Indigenous people frequently sort out underlying problems before cases are heard, and reject the legitimacy of the dispositions (particularly jail) on offer in court.¹¹ Some Indigenous residents also argue that the combination of the adversarial system of justice with a lack of cultural understanding enables ill-intentioned people to manipulate the system to escape accountability.¹²

Within this general framework, Indigenous people question the legitimacy of many specific Canadian justice practices. At the level of specific practice, it is important to recognize the diversity of Indigenous cultures and avoid over-generalizations about Indigenous/non-Indigenous difference. Indigenous justice is often presented as non-punitive, putting it in stark contrast with Canadian retributive justice.¹³ Patricia Montue-Okanee and Turpel assert clearly, “Punishment is a concept which is not culturally relevant to aboriginal social experience.”¹⁴ While some Indigenous communities did practice remarkably non-punitive justice, others had punitive approaches including severe corporal punishment and execution.¹⁵ Prison, on the other hand, was unknown in pre-contact Indigenous societies and remains alien to many communities' sense of justice. Punishment outside of social life “is seen as counter-productive, creating further obstacles to the restoration of balance and harmony after an anti-social act.”¹⁶ Prison is often seen as worsening crime (through negative socialization and increasing recidivism after release).¹⁷ For Indigenous communities that see (criminal) acts as indicators of an underlying disharmony of relationships, the imposition of incarceration – an alien, counter-productive, and punitive justice practice – is seen as particularly illegitimate.¹⁸

The adversarial nature of Canadian justice practices is also seen as undermining legitimacy. Although some Indigenous groups did have adversarial practices of justice, many place a primacy on the restoration of community harmony in a way that actively forbids adversarial behaviour.¹⁹ Anishinaabek culture, for instance, includes a strong ethic of non-contradiction.²⁰ This means that cross-examination of witnesses is not only culturally

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⁸Ibid., 41.
¹⁰Ibid., 153.
¹²Ibid., 192–93.
¹³for a table of dichotomies, see Sawatsky, “Self-Determination and the Criminal Justice System,” 92–93.
¹⁵Milward, Aboriginal Justice and the Charter, 21–23.
¹⁷Milward, Aboriginal Justice and the Charter, 12–14.
¹⁸Ibid., 16–17.
¹⁹Miller, “The Individual, the Collective, and Tribal Code,” 112; Milward, Aboriginal Justice and the Charter, 142–44.
inappropriate, but unethical.21 Ethics of non-confrontation are also accompanied by a strong duty of truth-speaking, which can come into conflict with the right to silence in Canadian jurisprudence.22 There can also be a strong emphasis on accepting responsibility that means Indigenous people may plead guilty even when they have valid legal defences.23 In fact, taking these principles together, it can be unethical to plead not guilty precisely because it forces others to violate the ethic of non-confrontation by accusing you at trial.24

The legitimacy of various sources of law is strongly contested. Indigenous legal traditions draw on plural sources of law, including customary law, sacred law, natural law, deliberative law, and positivistic law.25 The Canadian legal system rejects the legitimacy of some of these sources (e.g. sacred law), provides limited recognition to others (e.g. some but not all Indigenous customary law), and contests the meaning of others (e.g. Western natural law tradition is different from laws “regarded as literally being written on the earth” and legible from observing the natural world).26 Canadian criminal justice, by contrast, is based largely on positive law passed by the Canadian parliament (especially the Criminal Code) and an English-derived tradition of common law interpreted by the judiciary. The dual legitimations of law through judicial tradition and democratic authorization sit awkwardly together. Particularly challenged, though, is why they should legitimate the application of law in Canada. Given that Indigenous legal traditions pre-date Canadian law, Borrows argues that Canadian law needs to legitimate itself in light of them.27 To justify Canadian “Crown” authority, Mariana Valverde argues that Canadian judicial discourse switches between a rational-modern discourse and a neo-medieval discourse on the mystical foundations of sovereign authority, while denying the same epistemic eclecticism to Indigenous interlocutors.28

Indigenous challenges to the legitimacy of Canadian criminal justice thus operate at three levels. At the most specific level, Indigenous people challenge specific law, legal principles, and practices of justice. This includes questioning not only the right to silence, adversarial trials, and the use of incarceration, but also the requirement of impartial judges, the presumption of innocence, the right to counsel, the right against unreasonable search and seizure, the rules of evidence, and the prohibition on corporal punishment.29 At the second level, Indigenous people challenge the legitimacy of the criminal justice system as a whole, rejecting the cultural and legal authority of non-Indigenous justice over Indigenous people. On the third level, the legitimacy of the Canadian state as a whole is brought into question by challenging its assertion of power over Indigenous people. As Gordon Christie notes, the law does not view broader issues about the legitimacy of the state as within its competence, and leaves them to politics.30 Yet the challenge at the political level rebounds onto the legitimacy of the legal system, as the legitimacy of such a system is usually thought to be conferred upon it by a legitimate constitution and legitimate political institutions.31

The Concept of Legitimacy

Legitimacy is a fundamental concept for politics. At least since Hobbes, this has been explicit in political theory, and it is implicit in a great deal of empirical political science.32 The
basic, still-operative sociological definition of political legitimacy comes from Max Weber: a political order enjoys legitimacy to the extent that subjects consider it to be binding.\textsuperscript{33} Weber's initial analysis of legitimacy captures many important features. He identifies plural sources of legitimacy in tradition, “affectual attitudes”, rational belief in absolute value, and legality (through consent or recursive authority).\textsuperscript{34} Crucially, Weber acknowledge the imbrication of prudential and normative considerations in actual submissions to authority, a problem that continues to bedevil the study of legitimacy.\textsuperscript{35} Because Weber's concern with legitimacy was centrally a social-scientific classification of “imperative coordination” (command-obedience relations), Weber collapsed the distinction by reducing the sociological measure of legitimacy to actual compliance.\textsuperscript{36} This has left an unfortunate legacy in the operationalization of legitimacy in empirical social science.\textsuperscript{37} Silje Langvatn summarizes the Weberian sociological definition of political legitimacy as, “the de facto ability of a political regime to secure acceptance based on belief...as opposed to securing compliance based on coercion alone.”\textsuperscript{38}

Bernard Williams gives us another approach to defining political legitimacy. He begins from the Hobbesian “first political question” of securing sufficient safety and order to provide the conditions of cooperation.\textsuperscript{39} While Hobbes thought the conditions for solving the first problem sufficiently demanding to determine the rest of political arrangements, Williams demurs; multiple arrangements can solve the first political question, but not all will be legitimate. He posits a “basic legitimation demand” that emerges whenever the power to rightfully coerce is claimed. The demand is for a justification to be offered to each subject over whom such power is claimed. The concept of legitimacy provides only a weak standard; any state that meets this basic demand is legitimate regardless of its other political virtues or defects.\textsuperscript{40} This allows Williams to argue that legitimacy is not an independent moral standard prior to politics, but is instead “inherent in there being such a thing as politics.”\textsuperscript{41} A situation of naked coercion is not political, but is the problem all political relations (in answering the first political question) seek to solve. He presents as axiomatic that the power of coercion cannot justify its own use.\textsuperscript{42} The upshot is that demanding and offering justifications of coercive power is definitive of political relations. It also means that the weakness of the standard of legitimacy is deceptive; it is weak because it is merely a shell for people's actually beliefs about legitimacy. As various justifications come to be questioned and rejected, the strength of the legitimacy standard in particular historical situations is ratched up; states must meet ever more stringent standards of legitimacy in response to their subject's demands, because they cannot fall back on the exercise of coercion to justify itself.

Legitimacy also came to hold great importance in the late thought of John Rawls. Rawls sought a general concept of legitimacy that could go beyond the Weberian social-scientific understanding of actual obedience and provide a normative standard for appropriate acceptance of authority.\textsuperscript{43} Yet he does not talk of moral legitimacy, but instead is in accord with Williams about the distinctly political nature of the legitimacy standard.\textsuperscript{44} Political legitimacy is a composite quality, connected to moral justifiability (i.e. justice), legality, adherence to

\begin{itemize}
  \item \textsuperscript{33}Weber, \textit{The Theory of Social and Economic Organization}, 125.
  \item \textsuperscript{34}Ibid., 130.
  \item \textsuperscript{35}Ibid., 124, 326.
  \item \textsuperscript{36}Ibid., 326–27; Williams, “Reasons to Obey: ‘Multiple Modernities’ and Constructions of Political Legitimacy,” 35.
  \item \textsuperscript{37}Williams, Chan, and Shin, “Political Legitimacy in East Asia: Bridging Normative and Empirical Analysis,” 4.
  \item \textsuperscript{38}Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 133.
  \item \textsuperscript{39}Williams, \textit{In the Beginning Was the Deed}, 3.
  \item \textsuperscript{40}Ibid., 4.
  \item \textsuperscript{41}Ibid., 5.
  \item \textsuperscript{42}Ibid., 5–6.
  \item \textsuperscript{43}Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 134.
  \item \textsuperscript{44}Ibid., 135.
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recognized procedures, and right pedigree.\textsuperscript{45} Legitimacy is institutional, in that it is about correct processes for the creation of laws and the pedigree of political authorities.\textsuperscript{46} The central notion is that of legitimate political authority: legitimacy creates political authority in the first place, by creating a \textit{prima facie} political-moral obligation on citizens to obey.\textsuperscript{47} Within a political order, legitimacy has a nested structure: the constitution legitimates political institutions, which can in turn legitimate particular laws.\textsuperscript{48} Rawls argues that while legitimacy is essentially connected to justice, it is a weaker standard requiring thresholds of sufficient procedural and outcome justice.\textsuperscript{49} Thus, legitimacy is partially content-independent. Gross injustice negates legitimacy, but a law could be just and still illegitimate (if it produces just outcomes but was illegitimately adopted) or legitimate and unjust (so long as it is over the sufficiency threshold).\textsuperscript{50} These features of legitimacy enable political stability under conditions of increasing value pluralism, including the pluralism of political values that animated the later Rawls. To synthesize the terminology and concerns of Rawls, Williams, and Weber: an overlapping consensus that a given constitution satisfies the basic legitimation demand can provide for a stable political order despite substantive disagreement on conceptions of justice or particular laws.

\textbf{Law and Political Legitimacy}

Law stands in a complex relation to political legitimacy. Law is not strictly a necessary condition of political legitimacy. Political regimes can be legitimated without recourse to law, as in Weber's examples of the accepted arbitrary authority of a traditional chief or the charismatic authority of a prophet.\textsuperscript{51} Yet there is broad agreement that law is a functional necessity in large-scale pluralistic societies.\textsuperscript{52} Thus, under most conditions, the question of legitimacy arises with respect to a political order regulated by law. Under such conditions, law and political authorities stand in a dynamic equilibrium with regard to legitimacy; each draws legitimacy from and conveys legitimacy on the other.

The requirements of legal legitimacy are deeply contested in legal theory. From the standpoint of political theory, however, for a law to be legitimate it must be authorized by the appropriate political authority (which much itself be legitimate). This is true for the direct authorization of statute law and for common law, in which tradition is given effective authorization by surviving ongoing judicial interpretation and legislative silence. Rawls' model of nested legitimacy clearly states the principle: the legitimacy of particular laws derives from their authorization by legitimate political institutions. For legal positivists, appropriate authorization is both a necessary and sufficient condition for the legitimacy of law. Some other theorists impose additional conditions on law. For instance, Lon Fuller argues that the principles of legality (he identifies eight) provide an internal morality of law that must be met in order for law to be law at all.\textsuperscript{53} As law is a precondition for good or even legitimate law, meeting the test of legality would then be another necessary condition of legitimate law.\textsuperscript{54} Rawls' formulation of the concept of legitimacy goes even further, incorporating as it does the test of sufficient justice that would render grossly unjust law – however authorized – illegitimate. For Fuller, this "external morality" of law is not the concern of judges,\textsuperscript{55} but it is fair for us to say that it is a requirement of the political (if not legal) legitimacy of law.

\textsuperscript{45}Ibid.
\textsuperscript{46}Ibid., 134.
\textsuperscript{47}Ibid., 135–36.
\textsuperscript{48}Ibid., 134.
\textsuperscript{49}Ibid.
\textsuperscript{50}Ibid., 135.
\textsuperscript{52}Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 137.
\textsuperscript{53}Fuller, The Morality of Law.
\textsuperscript{54}Ibid., 155–56.
\textsuperscript{55}Ibid., 131–32.
On the other side of the equilibrium, many theorists take some degree of legality to contribute to the legitimacy of the very political institutions that authorize legitimate law. In his famous typology, Weber suggests that rational-legal forms of authority supersede traditional or charismatic authority in modern conditions. Rawls also connects legitimacy to legality, although he has comparatively little to say on the subject. To the extent that a conception of legitimacy is procedural, that is, concerned with the appropriate process for the creation of authoritative commands, and the correct procedures are given by law, adherence to law will contribute to political legitimacy. Perhaps more importantly, violation of standing procedural laws will negate legitimacy within a given political order (this is how a law can be just but illegitimate). If Habermas and Rawls are right that law is functionally necessary for coordination in current conditions, then to the extent we accept the validity of Fuller's claims about the internal morality of law, the principles of legality will themselves shape conditions of legitimacy for law and political authority alike.

Legitimacy Now and Around Here

This discussion of law and legitimacy has introduced the idea that the social condition faced by a given political order may narrow down the range of possible responses to the basic legitimation demand. Legitimacy through personal authority may be more tenable in small-scale societies, in which people know one another directly, than it is in large-scale societies that require some form of law for successful coordination. In a society facing an existential threat, governments may be able to legitimately demand much more of subjects than in more fortunately situated societies. Williams suggests that critique can further narrow the range of viable legitimations, as people come to reject forms of authority that were once acceptable. It becomes relevant to ask: given our historical situation, what can be legitimate to us? In Williams' terms, what are the conditions of political legitimacy “now and around here”?

In contemporary Western political theory, the liberal democratic response to the basic legitimation demand is hegemonic. Williams argues that, because the Enlightenment has made rival legitimations seem false and ideological, only a liberal solution is possible now and around here. He even gives us a crude formula: Legitimacy + Modernity = Liberalism. It is vital to note the explicit historicity of Williams' account: the liberal state, insofar as it has foundations, is founded in its ability to satisfy the basic legitimation demand now and around here. Yet the liberal state is based on the same historical process that makes it the only legitimate answer. The liberal situation is historically particular, not universal. Williams indicates that there are a range of possible legitimate liberal regimes, but that all raise the standards of legitimacy by demanding greater protection of a broader range of individual interests. Such regimes will take sophisticated steps to ensure that answers to the first political question do not become part of the problem, through recognizing free speech and the panoply of other political rights that help us avoid escaping pole-cats and foxes to be devoured by lions. They will also protect a wider range of basic interests of citizens, reject rationalizations of disadvantage in terms of race and gender, and reject self-legitimating hierarchical structures that generate disadvantage. Currently, at least some minimum requirement of participatory democracy is demanded as part of legitimacy, but the relative importance of this is contested and cannot be settled by

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56 Williams, “Reasons to Obey: ‘Multiple Modernities’ and Constructions of Political Legitimacy,” 37.
57 Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 137.
58 Williams, In the Beginning Was the Deed, 14.
59 ibid., 8.
60 ibid.
61 ibid., 9.
62 ibid., 8–9.
63 ibid., 9, 7.
64 ibid., 7; Locke, Locke, 328.
65 Williams, In the Beginning Was the Deed, 7.
transcendental argument.\textsuperscript{66}

Rawls presents one of the most influential models of liberal political legitimacy in contemporary political theory. In fact, Silje Langvatn reconstructs three accounts of legitimacy in Rawls. In \textit{Theory of Justice}, she argues, legitimacy was a matter of being sufficiently close to the ideal of justice as fairness.\textsuperscript{67} Realizing that this did not do sufficient justice to pluralism, in \textit{Political Liberalism} Rawls presented his “liberal principle of legitimacy”: “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”\textsuperscript{68} While this account is the most familiar and perhaps thus most influential, I wish to devote more attention to the third formulation, which Langvatn presents as a “reasonable reconstruction” of Rawls from his latest works.\textsuperscript{69} In his late works, Rawls based political legitimacy directly on the criterion of reciprocity.\textsuperscript{70} Here, Rawls operated with an expansive idea of reasonable pluralism that includes not only a pluralism of comprehensive doctrines, but also a plural political conceptions of justice.\textsuperscript{71} In the face of such pluralism, Rawls once again scaled back his ambitions for consensus. No longer do we aim for an overlapping consensus on justice, or even on a single most reasonable political conception of justice. Instead, Rawls merely aimed for an overlapping consensus that the political conceptions of justice operative in the constitution are in fact reasonable.\textsuperscript{72} This leads Rawls to focus on the reasons people give to justify political power on fundamental issues. If the reasons people give support a political conception of political justice compatible with their most considered convictions of justice, their comprehensive doctrine, and are such that other citizens could accept as politically reasonable, then losing minorities can accept decisions as legitimate and binding.\textsuperscript{73} A legitimate constitution will be shaped by public reason over time, and will be able to confer legitimacy on ordinary laws and decisions.\textsuperscript{74} With this formulation, Rawls wants to be able to make do with only minimal assumptions about the ideas political reasonable citizens will implicitly accept from their “public political culture”: democracy or popular sovereignty, constitutionalism, citizens as free and equal, and society as a fair system of cooperation.\textsuperscript{75} The extensive liberal-democratic nature of these assumptions clearly shows the local and historically specific nature of the public political culture; this too is firmly an account of legitimacy now and around here.

Rawls’ late focus on public reason brought his account of legitimacy closer to Habermas’ pre-existing philosophical reconstruction of the legitimacy of legal order in Western democratic societies. Through his theory of communicative action, Habermas argues that free and unfettered communication can substitute for the metaphysical grounds of political legitimacy destroyed by the enlightenment’s disenchantment of the world.\textsuperscript{76} I cannot do justice to the complexity of Habermas’ theory here, but it is worth sketching a brief outline. Communicative reason is speech oriented to mutual understanding, and embedded in the structure of languages are certain basic validity claims (truth, truthfulness, and rightness).\textsuperscript{77} As Melissa Williams puts it, “Communicative Action, then, as grounded in the mutual agreement of equal subjects, provides a

\begin{itemize}
\item 66ibid., 15–16.
\item 67Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 138.
\item 68Rawls, \textit{Political Liberalism}, 137.
\item 69Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 132.
\item 70ibid., 140.
\item 71ibid., 141.
\item 72ibid., 143–44.
\item 73ibid., 142–43.
\item 74ibid., 145.
\item 75ibid., 143.
\item 76Williams, “Reasons to Obey: ‘Multiple Modernities’ and Constructions of Political Legitimacy,” 38–39.
\item 77ibid., 38.
\end{itemize}
non-coercive foundation for the coordination of social relations.” Habermas conceives of a public sphere with formal and informal components. In the diffuse and multi-centered informal public sphere, unfettered communication enables the formation of public opinion over time. In the formal public sphere, political institutions formalize public opinion as public will in law. The components of the public sphere are mutually constituting, with freedom of deliberation secured through basic rights that are themselves subject to critical evaluation and change over time. This too is a historically specific process, requiring a supportive political culture or a rationalized lifeworld that can meet rational political will-formation half-way.

Both Habermas and Rawls see themselves as resolving tensions and overcoming the shortcomings of existing theories of legitimacy. In this, they converge on a form of deliberative democracy as a synthesis of liberal and civic republican traditions. Roughly speaking, the liberal tradition is seen to focus on respect for rights, particularly negative rights, as the main source of governmental legitimacy, while the civic republican tradition places a greater emphasis on popular sovereignty, active participation, and shared speech. Habermas rejects the primacy of one over the other, arguing that deliberative democracy can present private autonomy (liberal) and public autonomy (civic republican) as co-original. The rights that underpin participation in the deliberative process of collective self-legislation are given content over time by that very process of shared deliberation. In the theories of both Rawls and Habermas, a major component of political deliberation is the continual raising and answering of the basic legitimation demand. That is to say, in a Habermasian public sphere, citizens continually demand and receive justifications for exercises of political power. Under the Rawlsian conception of public reason, any challenges to political power that can be couched in publicly reasonable terms must be given answers that are themselves publicly reasonable. The depth and breadth of challenges to the legitimacy of rule in modern, pluralistic societies dictates that only a system that can continually answer challenges to its legitimacy can provide a stable answer to the basic legitimation demand.

Given the ever-present temptation to universalism in liberal democratic thought, it is vital to openly acknowledge the parochialism of liberal democratic conceptions of legitimacy. The concept of legitimacy has much broader currency than these conceptions. This is becoming increasingly clear as political thought catches up to globalization; with the emergence of the global village, democracy is no longer the only legitimacy game in town. East Asia, for instance, is exceptional when it comes to legitimacy, having confounded the universalizing expectations of modernization theory. At any given level of economic development, citizens in East Asia express less attachment to democracy and the rule of law and greater support for authoritarian forms of rule. Governments enjoy a “legitimacy premium”, that is, people support governments at higher levels than you would expect from their judgements of state performance. This so-called exceptionalism is only terribly puzzling if we insist on viewing it through the lens of Western standards of legitimacy. Empirical and normative study have found other legitimacy standards operating in East Asia. Singapore, for instance, explicitly grounds political authority in a principle of meritocracy over and against democracy. The Confucian-based concept of minben legitimacy also appears to be widespread. Minben, meaning roughly “the people as root”, is taken to mean that political power should be guided by the well-being of the people, rather

80Langvatn, “Legitimate, but Unjust; Just, but Illegitimate Rawls on Political Legitimacy,” 141–42; Williams, “Reasons to Obey: ‘Multiple Modernities’ and Constructions of Political Legitimacy,” 40.
81Williams, “Reasons to Obey: ‘Multiple Modernities’ and Constructions of Political Legitimacy,” 42.
82Ibid.
83Ibid., 30.
84Ibid., 29.
85Ibid., 30.
than the interests of their rulers, and is clearly operative alongside individual rights and the rule of law as a standard of legitimacy in Hong Kong. Faced with such current, competing conceptions of legitimacy, liberal democratic theory can and does abandon universalist pretensions in a retreat to conscious parochialism, including Bernard Williams’ “now and around here” and Rawls’ “public political culture.” Whether absenting oneself from the global conversation about legitimacy is advisable, the move is not even available to liberal democrats confronting challenges from Indigenous people, who are after all very much now and around here protest their exclusion from public political culture.

**Indigenous Challenges to Theory**

For liberal democrats in Canada (and elsewhere, especially Australia, New Zealand, and the United States), Indigenous challenges to legitimacy are uniquely inescapable. Because Indigenous people are both local and current, their claims cannot be avoided by any retreat of the “now and around here” form – not that it stops people from trying. The locality of Indigenous people is hardest to deny; the very term indicates the priority of Indigenous claims to “around here.” It is more common to try to present Indigenous cultures as atavistic, and to minimize rights claims by freezing them in the past. This is the approach of Canadian courts in recognizing Aboriginal rights, by limiting them to pre-contact practices. We have already seen that the experience of East Asia questions the presumption of a single path to modernity. The Indigenous challenge is of another order; Indigenous people assert, here and now, some of the very principles of legitimacy Western modernity tried to define itself against and thought to have superseded. Thus, we see from Indigenous people assertions of the validity of sacred law, self-justifying traditional hierarchies, or the personal authority of outstanding individuals. It is difficult for liberal democrats who tell a story about the rationalization of society or the progressive disenchantment of the world to understand these claims as anything but a throwback, but it is necessary to do if we are to take seriously the challenges posed by Indigenous people.

Some of the most acute challenges to the practice of Canadian justice do not pose a challenge for liberal democratic theories of legitimacy. In fact, those theories support the claims Indigenous people make against the state. One of the few basic features Williams identifies of all viable liberal theories of legitimacy is to forbid justifications of disadvantage based on race. Such theories then provide theoretical resources in support of Indigenous critiques of racism embedded in the criminal justice system. Rawls' requirement of sufficient justice, meanwhile, provides a theoretical justification for a legitimacy critique based on concrete injustices. The more blatantly abusive practices, such as Starlight Tours, are clear instances of the sort of gross injustice that invalidates legitimacy independent of procedural justice. Similarly, the systematic underrepresentation of Indigenous people on juries in Ontario could be considered to put the system below the threshold of sufficient procedural justice. Most notably, any liberal democratic theory of legitimacy that requires a justification for the use of power be offered to those over whom the power is claimed provides an avenue for Indigenous people to press their claim that the criminal justice system was imposed on them without such justification.

Unfortunately, liberal theories of public justification are a double-edged sword for Indigenous thought. As Matthew Tomm argues, they can help defend Indigenous people against unreasonable exercises of state power, but they also provide the normative justification for the

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87Ibid.
90Williams, *In the Beginning Was the Deed*, 7.
91Iacobucci, *First Nations Representation on Ontario Juries*. 
exclusion of Indigenous viewpoints. The Rawlsian conception of public reason can provide a powerful tool to protect Indigenous people from abuses of state power, by demanding that all power is justified to them. Prima facie, it would seem that a broad conception of public reason would condemn the “conceptual hegemony” of liberal concepts of justice in Canada and give a reasonable account of its harms in silencing Indigenous people and failing to provide reasons that resonate for them. Unfortunately, the specific content of Rawlsian formulations of public reason use the concept of “reasonable” to exclude many types of reasons, including many of those advanced by Indigenous people. By presenting a particular, Anglo-European conception of reason as definitive, such that only reasons grounded in that tradition count, the liberal tradition usurps decision-making power and subordinates Indigenous conceptions of justice.

If this were merely a matter of liberalism asserting the primacy of culturally-specific forms of reasoning and arguing, it could perhaps be corrected by more inclusive forms of deliberation. However, it is the very requirement of public reasons that prevents Indigenous people from deliberating on their own terms and in their own voice by offering reasons that are grounded in their particular worldview (and which others cannot accept). This is not merely a pitfall for a Rawlsian formulation. Williams explicitly argues that legitimacy’s requirement of offering a justification to each subject does not mean that it requires universal acceptance of those justifications. After all, there will always be “anarchists, or utterly unreasonable people, or bandits, or merely enemies” who will reject such a justification. It is not clear where in that list Williams would place “self-governing nations with independent legal traditions”, but over time liberal Canada has cast Indigenous people trying to practice their culture variously as all four. At the moment, though, most of the work of exclusion is done by the idea that Indigenous demands are unreasonable. In fact, the practice of public reason in Canada sometimes performs this exclusionary function at the expense of its inclusive function, as when the court denies Indigenous claimants the same epistemic flexibility in forms of rationality it relies upon for its own authority.

A major challenge posed directly to liberal democratic theories of legitimacy is the assertion by Indigenous people of the validity of non-public reason, or arguments from particularity. This constitutes a denial that public justification is required for all uses of political power. The very concept of Indigeneity invokes the meaningfulness of particularity, identifying the connection of a particular people to particular land. Many Indigenous arguments proceed from that particularity, asserting the validity of their law only for them on their territory. Some Indigenous advocates strategically bow to the necessity of the “hegemonic constraint” that requires conforming to the “moral lexicon and justificatory practices of the dominant culture in order to successfully assert their rights and interests.” Those who refuse to play by the liberal rules of the game are frequently excluded. Even when exceptions to normal rules are made, as when Canadian courts admitted oral history as evidence in Delgamuukw, the courts filter out Indigenous subjective normativity to hear only “objective” descriptive claims.

While Indigenous people may not claim that their reasons are the right reasons (or even normative at all) for others, many do make strong claims about the sufficiency of non-public

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93 Ibid., 300.
94 Ibid., 294, 301.
95 Ibid., 295, 302.
96 Ibid., 294.
97 Williams, In the Beginning Was the Deed, 135–36; discussed in Hall, “Bernard Williams and the Basic Legitimation Demand,” 472–73.
100 Ibid., 294.
reasons to govern their lives. Two Kanien'kehá:ka women, Osennontion and Skonaganleh:rá, for instance, claim to be “absolutely different” and that the thinking of others cannot be applied to what they say. They declare a disinterest in Western rationality, asserting that a belief in their creation story means they do not need other explanations. Gordon Christie provides support, arguing that “Emerging from a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live are visions of ways of life which are considered completely adequate to the task at hand.”

To liberalize such a society, in the sense of opening it up to rational critique to provide members with a “context of choice” is inappropriate and threatening, given that Indigenous societies have a way of life “known to be good.” These claims read to me as a strong assertion of a right for Indigenous people to govern themselves according to their own particular principles. This is not merely a claim of self-determination in terms of liberal autonomy, but the stronger claim that the no justification of internal matters is owed to outsiders, and that such a justification, if offered in authentic terms, would not make sense to them anyway. A denial of the necessity of external justification also seems to be at play in Glen Coulthard's rejection of the politics of reconciliation in favour of the self-assertion of Indigenous people as Indigenous. If justification is only owed internally, the imposition of external forms of criminal justice are necessarily illegitimate. Thus, the only people with authority to resolve conflicts in Indigenous communities would be internally respected individuals – an external, non-aboriginal judge “is simply an outsider without authority.”

Liberal democratic theories of legitimacy largely take the society in which political power must be legitimated as a given. Although the boundaries of a particular political community may themselves be subject to a requirement for justification, theorists allow themselves fairly substantive presumptions about historically existing society. The Indigenous challenges to legitimacy canvassed so far directly challenge these starting assumptions. They argue that they do not even implicitly share the values of Rawls' liberal democratic public political culture, challenging constitutionalism, the priority of free and equal individuals, and popular sovereignty. We have also seen that Indigenous people challenge Habermas' rationalization of the lifeworld by rejecting the authority of Western religion to challenge their beliefs or knowledge structures. In resisting their erasure from public political culture, Indigenous people challenge the boundaries, necessity, and legitimacy of the historically existing political community that is Canada. While some Indigenous people are content to claim Canadian citizenship, others (notably many Haudenosaunee) reject the idea that they are subjects of Canadian governments at all, going so far as refusing to allow Canadian law enforcement to access their territory and issuing their own passports for international travel. More generally, inasserting the legitimacy of their particular legal traditions and justice practices, Indigenous people challenge the necessity (and hence legitimacy) of a unified Canadian approach to criminal justice. Finally, we have seen that Indigenous people challenge the legitimacy of Canada as a political community at all, given its unjustified assertion of Crown sovereignty and failure to legitimate itself in terms of pre-existing Indigenous legal traditions.

Towards a Respectful Liberal Response

Canadian liberal democrats are unlikely to be able to accept all the claims raised by Indigenous people, but we can and should do better than dismissing them out of hand as

103 Ibid.
105 Ibid., 91–94.
106 Coulthard, Red Skin, White Masks, 154.
108 Turpel, “Aboriginal Peoples and the Canadian Charter.”
unreasonable. In shaping the principles of justification and deciding what sort of reasons will count, we need to retreat from specific, liberal-democratic conceptions of legitimacy and rely instead on the more capacious formulations of the general concept of legitimacy. The reality of Indigenous people and their worldviews falsifies the modernization narrative. This applies equally to Williams' crude formula (legitimacy + modernity = liberalism) and to more sophisticated accounts of the rationalization and disenchantment of society. For some reason, many liberals find it hard to let go of modernization theory. Habermas provides a cautionary example. Sometime after history failed to end, Francis Fukayama put to Habermas that East Asian religious ideas about the value of nonhuman nature might help counterbalance Western-rational environmental destructiveness. Habermas responded that however admirable the moral content of such ideas, we need to avoid a “dubious spiritual reenchantment of nature” and that East Asian societies needed to follow Western modernity in the transition to postmetaphysical thinking, “albeit in their own way.”

By some bizarre alchemy, the empirical failure of a descriptive story about progressive disenchantment turns it into a normative imperative. Liberal democrats cannot use historical facticity to rule out competing legitimacies. Theories of public reason have a tendency to do this by building liberal-democratic assumptions into their models of appropriate discourse. Other models remain on the table, and we must find a mode of dialogue that can make space for other ways of knowing and arguing.

Some observers look at the gulf between Indigenous and liberal democratic legitimations of justice and suggest more separation, in the form of independent Indigenous justice systems. Complete separation is not a viable option in practice nor does it present a theoretical solution to the legitimacy problem. Practically, the lives of Indigenous and non-Indigenous people in Canada are far too intertwined to be dealt with by entirely separate systems; criminal issues will inevitably arise between Indigenous and non-Indigenous people, or for each in the jurisdiction of the other. From the perspective of liberal democratic Canada, there is also a serious principled objection to separation. The respect owed by Canadians to Indigenous people is dual: we must respect Indigenous people as Indigenous (that is, respect their Indigenous worldviews and lifeways) and respect Indigenous people as equal co-citizens. These two forms of respect can find themselves in tension in the design of justice systems. Some sort of two-track solution will be necessary to address legitimacy challenges in criminal justice, involving greater space for Indigenous justice systems and reform of the Canadian justice system.

As a precondition for a respectful dialogue, there needs to be some way of identifying who needs to be brought together in conversation. The basic principle of legitimacy suggests that justification is owed to all those over whom authority is claimed, but this is a prior question: among whom should claims of authority even be raised? Put another way, why is any given issue something that must be decided together, rather than apart? Melissa Williams offers a possible guiding principle with the concept of “communities of shared fate.” This captures the fact that human beings are bound together in ethically significant relationships by forces not of our own making. Whether we do find ourselves in a community of shared fate in any given situation or with regard to any given problem must be an open question in respectful dialogue, but the concept provides a helpful guiding principle in mapping the boundaries of dialogic inclusion.

“We are all in the same boat, like it or not, so let us talk” is a more respectful starting point than, “I claim authority over you, here are my justifications.”

What sort of liberalism is an appropriate starting place for respectful intercultural dialogue? I submit that Judith Shklar’s “liberalism of fear” is uniquely suited to the task. This theory of liberalism begins by putting cruelty first, that is, by agreeing that cruelty and the fear it

111 Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide, 177.
112 Williams, “Citizenship as Agency within Communities of Shared Fate,” 43.
inspires are the worst evil, rather than by offering a highest good. It is “entirely nonutopian,” in contrast with a Lockean liberalism of natural rights or a Millian liberalism of personal development, both of which have served to justify historical practices of colonialism. The focus on historically conscious damage control is particularly apt in the Canadian situation, where developmental liberalism has been responsible for tremendous cruelty in the name of personal and social progress. A society guided by the liberalism of fear would not have been so keen on the assimilation of Indigenous people and could not have imposed the horror of residential schools (with the attendant cruelty of dividing families and the many cruelties visited on children). A liberalism of fear is also appropriate in being a political doctrine rather than a philosophy of life. In the Canadian context, there is deep disagreement between liberals and Indigenous people about natural rights, justice, and what constitutes a good life. As we have seen above, even Rawls' political liberalism and Habermas' deliberative democracy take some degree of consensus on these matters as assumptions. The liberalism of fear, on the other hand, divides political life into basic units of weak and powerful and aims for freedom from abuses of power. Crucially, the test for cruelty is to ask the least powerful – as I read it, in their place and time and in their terms. In our context, the great criticism of the liberalism of fear – that “not enough follows from it” – is a strength. The problem is precisely that too much follows from theories of liberal democratic legitimacy to make space for respectful dialogue with Indigenous people.

If liberals are to retreat to the minimalist liberalism of fear and a general concept of legitimacy, how can dialogue be structured? Must we abandon the strictures of deliberative democracy? It is certainly necessary to abandon the exclusive function of theories of public reason and engage Indigenous people and their reasons on their own terms. The only dialogue that can be legitimate for previously excluded people is a real, direct dialogue between people, the terms of which will necessarily be worked out politically rather than philosophically. Nevertheless, liberal democrats could turn to Arendtian judgment theory for guidance on how to enter such dialogue. Such theory is oriented toward reflective judgment, that is judgment that does not proceed by subsuming particulars under a general rule but instead operates on particulars as particulars. This is particularly useful when compared to public reason's dismissal of arguments from particularity. Rather than insisting on the offering of public reasons, we should instead try to take the actual viewpoints of others into account and achieve an "enlarged mentality" from which we can judge. It is only a humble liberalism of fear, engaged in a real process of perspective taking with concrete Indigenous others that can hope to move criminal justice toward a legitimate footing in Canada.

113Shklar, “The Liberalism of Fear,” 29; Shklar, Ordinary Vices, 8–9.
115Ibid., 21.
116Ibid., 27.
117Ibid., 35.
118Williams, In the Beginning Was the Deed, 56.
119Arendt, Lectures on Kant’s Political Philosophy, 83.
120Ibid., 42–44.
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