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Non-Positivist Legal Pluralism and Crises of Legitimacy in Settler-States

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In this article we develop an original, non-positivist conception of legal pluralism, which we then deploy to identify and evaluate a particular type of legitimacy crisis. Such crises occur when settler-states attempt unilaterally to resolve conflicts between their own legal orders and indigenous legal orders, and thus treat the relevant indigenous communities unjustly. By identifying each legal order in terms of its morally valuable instantiation of the rule of law, we emphasise their equal normative status; the legitimacy crises we identify are typified by failures to acknowledge and respect this equality on the part of settler-states. Using case studies drawn from the United States of America and Australia, this article not only advances the first non-positivist theory of legal pluralism, but also demonstrates the utility of non-positivism as an analytical tool within socio-legal jurisprudence.

Keywords: law and social theory; political philosophy; legal pluralism; non-positivism; indigenous justice; Oliphant v. Suquamish Indian Nation

INTRODUCTION

That the legacy of colonialism is one of moral disaster is perhaps nowhere more apparent than in the ongoing injustices faced by indigenous communities within settler-states. In this paper, we draw attention to one important dimension of this

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legacy: the legitimacy crises that arise whenever Western settler-state governments attempt unilaterally to resolve seeming conflicts between their own legal orders and those of indigenous communities subject to their overarching governance.[1] To present these crises as a distinct type of pressing institutional problem, and to enhance the precision with which they can be identified, we employ a 'non-positivist' conception of legal pluralism. Beyond its capacity to illuminate these institutional problems, this conception is original in three respects. First, it establishes a novel understanding of legal pluralism, which places the *absence of legitimacy* at the core of that contested concept. Second, since non-positivism traditionally either ignores or rejects the possibility of legal pluralism, our conception of the latter both challenges and extends that school of legal theory. Third, by demonstrating the importance of political morality when examining complex social phenomena, this (re)construction of legal pluralism inaugurates a distinctly non-positivist form of socio-legal jurisprudence.

1. Legitimacy Crises

The identification of context-specific 'legitimacy crises' both motivates and enables our approach: such crises are particular instances or events of situational injustice, in

[1] We use 'indigenous communities' instead of situation-specific terminology, such as, for example, First Nations (Canada) and Native Nations (US). Our intention is not to conflate the cultural, spiritual, social and political traditions of these communities but to emphasise commonalities in their existence within circumstances of illegitimate settler-state governance.

which 'unjustified governance' occurs.[2] Broadly construed, governance is the process through which a community organises their collective lives.[3] Governance requires justification when, in moral terms, it is *problematic*:[4] the imposition of social and political hierarchies, in combination with the use of collective social pressure as a means of coercion, is presumptively unjust (Green, forthcoming). This potential injustice is understood in terms of equality and autonomy: the elevation of *some* individuals (but not others) to positions of power presumptively violates equality (Buchanan 2004: 242-243), whilst coercion, understood as the exploitation of our capacity to reason by changing the options available to us (Nozick 1997: 15-44), presumptively violates *both* equality and autonomy. This dual violation occurs because coercion subjugates the will of one person to that of another, which undermines their equal status and, through manipulation, also causes changes in behaviour, thus compromising autonomous decision-making.

The moral importance of equality and autonomy thus sets a high threshold for

[2] Unlike Jürgen Habermas (1975), whose focus is upon *sociological* legitimacy, that is, the widespread *belief* that legitimacy pertains, our focus is rather on moral *reality*.

[3] Hannah Arendt (1970: 44; 1998: 201) explains this in terms of *power*, which 'corresponds to the human ability not just to act but to act in concert. Power is never the property of an individual; it belongs to a group'.

[4] 'Morality' here denotes the reasons that *should* govern our behaviour, determining what is right, wrong, permissible, impermissible, good, bad, and so on. Following Derek Parfit (2011: 31), we take such reasons to be objective considerations that *genuinely* count in favour of doing or not doing something. Moral justifications for any presumptively wrongful activity must establish sufficient reasons for doing that thing, notwithstanding its seemingly wrongful nature.

justification: governance must either *enhance* equality and autonomy, thereby 'dissolving' the presumptive violations mentioned above, or secure an outcome so morally imperative that the injustice represented by the violation of equality and autonomy is 'outweighed' (Rawls 2005: 3-4). Where such justifications are available, we can meaningfully speak of *legitimate* governance.[5] Wherever singular instances of governance *cannot* be justified, that specific governance is *illegitimate*. Where such illegitimacy is endemic, enduring, or undisclosed, there exists a *legitimacy crisis* of the sort that concerns us in this paper.

In contemporary states, legitimacy characteristically requires at least the maintenance of civil peace (Renzo 2011: 580), the protection of fundamental human rights (Rawls 1999: 78-80), appropriately representative government (Buchanan 2004: 249-259),[6] and adherence to the rule of law (Dworkin 1986: 208-215). We argue that the threshold for legitimacy is far higher in settler-states, particularly the CANZUS states from which we draw our case studies, due to their colonial legacies. [7]

[5] Following Christopher Morris (1998: 104-106), we distinguish legitimacy – the moral permissibility of governance – from the existence of a duty to obey (authority); see also A.I. Applbaum (2010), 'Legitimacy without the Duty to Obey' (2010) 38(3) *Philosophy & Public Affairs* 216). Not all philosophers make this distinction, however (Simmons 1999: 746; Dworkin 1986: 190-192).

[6] Whilst discussing the *authority* of law, Jeremy Waldron (1999a: 99-118) provides the most comprehensive argument for why democratic government partly 'dissolves' the presumptive violation of equality mentioned above.

[7] CANZUS includes Canada, Australia, New Zealand, and the United States. They are 'all affluent liberal democracies settled [through]…intensive British imperial expansion…and many of their current legal-constitutional commonalities derive from their shared inheritance of English common law' (Gover 2015: 356).

Contemporaneously, whenever such states attempt to govern indigenous communities, the presumptive injustice of their discrete actions is compounded by their responsibility to address the historic injustices of colonialism, which makes their governance of such communities much harder to justify.

2. *The Argument*

Our novel non-positivist conception of legal pluralism locates a discrete set of *settler-state* legitimacy crises, presents them as a unified phenomenon, and provides criteria for their accurate evaluation. These specific crises occur when agents of a hegemonic settler-state attempt unilaterally to resolve apparent conflicts between their own legal order and one or more indigenous legal orders, and, in so doing, undermine and disrespect the relevant indigenous communities. This approach requires a tripartite argument, with each aspect informing and supporting the others. First, our non-positivism establishes the respect due to indigenous legal orders *qua* legal orders by emphasising their morally valuable instantiation of the rule of law or 'legality'. By placing the law of indigenous communities on an equal footing with the legal orders of the settler-states within which they live, this approach strengthens indigenous sovereignty claims.[8] Second, by focusing on settler-state illegitimacy, we draw a

[8] We contend that all indigenous communities should enjoy thoroughgoing self-determination (see also Anaya 2004: 7-8); in the US it is '[p]erhaps the most basic principle of all Indian Law…that those powers

conceptual link between, on the one hand, legal pluralism, and, on the other, our non-positivist understanding of law. Since non-positivism holds legitimacy to be integral to the concept of law, we argue that the legitimacy crises we identify bolster the separateness of indigenous legal orders vis-à-vis 'incorporation' attempts by settler-states. Third, our non-positivist conception of legal pluralism, developed through the socio-legal analysis of three case studies drawn from two CANZUS settler-states, exposes the injustices perpetrated by governments that respond illegitimately to seeming conflicts between their own legal orders and those of indigenous communities.

Our argument proceeds over four Parts. Part One situates our approach relative to other theories of legal pluralism, highlighting points of synergy and divergence. Part Two elaborates a non-positivist account of what it takes for law to exist, emphasising the role that legitimacy and legality play in the identification of distinct legal orders. Focusing primarily upon the work of Ronald Dworkin, it also explains why legal pluralism has hitherto either been ignored or rejected by non-positivists. Our own conception of legal pluralism is developed in Part Three through a contextualised reading of the controversial 1978 United States' Supreme Court judgment in *Oliphant*

which are lawfully vested in an Indian tribe…[are] inherent powers of a limited sovereignty, which has never been extinguished' (Cohen 1942: 122).

v. Suquamish Indian Tribe.[9] Part Four uses two 'sacred site' case studies – Bears Lodge (Devils Tower) in Wyoming, USA and Uluru in central Australia – to demonstrate the explanatory power of this non-positivist approach to legal pluralism.

We argue that (non-positivist) legal pluralism pertains when two or more discrete governance traditions, each instantiating the moral value of legality, exist within the same space.[10] Our four criteria for the identification of this phenomenon are as follows.

First, there must be a provisionally identifiable group of people that two or more seemingly distinct sets of 'governance practices' each purport to govern.[11] Second, each set of governance practices must be capable of generating 'jural relations' that are presumptively morally binding (Hohfeld 1913: 29-59; Hart 1982: 183-186). Crucially, the binding nature of these jural relations must be partly explicable in terms of the *moral* value of legality. These first two steps establish the existence of more than one *prima facie* legal order, after which the genuine separateness of those orders must

[9] 435 U.S. 191 (1978).

[10] We use 'space' rather than 'territory' since the latter is demarcated by domestic and international law.

[11] 'Governance practices' are 'social facts' about how communities organise their collective lives. They resemble what Emmanuel Melissaris (2009: 112) calls 'our *prima facie* sense of the law…as the shared belief of participants in a *nomos* in transforming the world normatively and in common'.

be confirmed.

Our third criterion requires some appropriately implicated individuals to believe that the relevant legal orders are incompatible with each other, insofar as they *apparently* generate conflicting jural relations.[12] Fourth, there must be no governance institution with *both* the capacity *and* the legitimacy to resolve this seeming conflict. These subsequent two steps are necessary because legality typically demands that a single set of common standards has primacy within any given space.

This approach, we contend, blends socio-legal studies' emphasis on particularity with analytic legal philosophy's conceptual precision in order to diagnose the legitimacy crises that often characterise legal pluralism within settler-states.

THE DEVELOPMENT OF LEGAL PLURALISM

The concept of legal pluralism is contested, not least due to it featuring within several disciplines often at odds with each other in terms of their starting premises, points of

[12] Our focus on legitimacy crises means that such conflicts need not be genuine: what matters is how the relevant settler-state institutions respond to the *perception* of conflict, given their special responsibilities *vis-à-vis* indigenous legal orders.

inquiry, methods of investigation, ultimate aims, and conclusions. Although we do not purport comprehensively to review this rich literature – plenty such studies exist (see, for example, Tamanaha 2008 and Michaels 2009) – it is important to situate our argument.[13] This Part will first acknowledge the concept's anthropological roots, noting its introduction as a *description* of the 'recalcitrant social reality' created by European colonisation (Griffiths 1986). Second, it will distinguish our conception from those approaches William Twining umbrella-terms 'social fact legal pluralism' (2010: 473, 486, 488 and 496ff), and which we consider fundamentally legally *positivist*.[14] Third, it will point to instances of synergy between our non-positivist conception and that of other critical, phenomenological, or ethnographical investigations.

1. Legal Pluralism's Anthropological Heritage

Given the CANZUS settler-state focus of this paper, the role played by colonialism in the development of the concept of legal pluralism merits attention. By provoking encounters between Western and non-Western legal orders, colonialism caused the circumstances that came to be described by legal anthropologists as 'weak' or 'classical'

[13] Since we only discuss legitimacy crises arising *within* settler-states, we do not engage with 'constitutional pluralism' (see, for instance, Walker 2002 and 2016) or 'global legal pluralism' (see Walker 2015; Berman 2012; Michaels 2009).

[14] For our understanding of legal positivism, see John Gardner's definition (2001: 199): 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits'.

legal pluralism (Griffiths 1986; Merry 1988: 872-874). Within the boundaries of colonial states – borders often newly and arbitrarily drawn with little attention to existing tribal territories or practices (Hendry 2019b) – non-state indigenous law was designated subordinate to 'official' state law imposed by colonising powers (Michaels 2009: 245). This non-state characterisation was influential: not only did denying indigenous legal orders the status of 'law' facilitate their marginalisation and suppression as 'mere' customary or traditional practices, but labelling such orders as unofficial also masked them from academic lawyerly attention. Our non-positivism is partly motivated by the importance of reversing this negative influence: by characterising indigenous legal orders, *qua* law, as worthy of respect, we emphasise their equal status *vis-à-vis* the legal orders of settler-states.

2. *Social Fact Legal Pluralism*

As Ralf Michaels observes (2009: 251), defining non-state law in opposition to state law 'raises the issue of how to distinguish non-state law from non-law'. Sally Engle Merry's famous questions are often quoted at this juncture: 'Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all these forms of ordering law?' (1988: 868). In attempting to answer, positivist legal theorists turned to the *concept* of law with a view to finding firm theoretical ground

on which to stand (see, for example, Griffiths 1986; Tamanaha 2009; de Sousa Santos 2002; Twining 2009); as Margaret Davies notes (2018: 39), 'the assumption that it is possible to find a conceptual distinction between things that are law and things that are not has…characterised…legal positivism'.

The fundamentally descriptive nature of such endeavours led Twining, as mentioned above, to dub these 'social fact legal pluralism' (2009).[15] Although Twining acknowledges that these projects provide 'little to no guidance on normative issues' (2009: 485), we go further, alleging that, insofar as conceptions of law are morally inert, they cannot adequately elucidate what *matters* about legal pluralism. Contrary to the premise adopted by social fact legal pluralists, we argue that the existence of law is not merely a matter of description but also turns on the presence of a *value*, that is to say, *legality*. Indeed, and while recent critical voices have moved debates beyond a social-fact focus, we contend that no other conception of legal pluralism adequately captures the respect that is due to law: something that is particularly important in the context of CANZUS settler-states, where that respect is routinely denied to indigenous law.

[15] When employing the term 'social fact', Twining seemingly intends something like Hartian *conventions* (Hart 1994: 254-259). By contrast, in this paper, we understand 'social facts' more broadly: as descriptively true propositions about how people have behaved, thought, believed, felt, and so on.

3. *Alternative Conceptions*

For our purposes, the most useful of these critical readings (Davies 2018: 33 and 114) are Emmanuel Melissaris' phenomenological account of 'ubiquitous law' (2009), Margaret Davies' critical legal pluralism (2005; 2017; 2018), and René Provost's ethnographic study of the 'rebel rule of law' (2018). Melissaris' core concern is whether or not law can be understood in dissociation from, first, the state, but also from those ideas of hierarchical authority that the state is often taken to entail. Drawing on Robert Cover's idea of *nomos*, Melissaris argues in favour of conceptualising law 'in terms of people's shared normative experiences, that is, by the way their normative commitments shape and are shaped by their experience of the world' (Melissaris 2009: 152). This elegant construction rightly, in our view, links the existence of law to the manner in which communities organise their collective lives. However, in seeing law wherever distinct governance practices pertain, this account is too inclusive. Whilst we would accept that such practices exist when communities '[transform] the world normatively and in common' (Melissaris 2009: 112), we would reserve 'legal order' for those practices that instantiate the moral value of legality, as will be outlined in the next Part.

Davies' pluralist approach to law, by contrast, is more of an 'ethos of pluralism' (2005) than a fixed theoretical position. Noting Melissaris' desire to identify a basic (thin) concept of law, she observes that, for him, legal content is 'still a matter of empirical investigation', which limits the capacity for general inferences to be drawn without risking essentialization (2017: 243 and 245). For Davies, critical legal pluralism is the pluralism *of pluralism*: not just a vein of legal pluralism but a variety of legal theory, an approach specifically intended 'to debunk the idea that there is either an objective or true version of legal pluralism' (Hendry 2019a: 171). This position is informed by Davies' 'unlimited' understanding of law (2018), which, although different from ours, mirrors our capacious understanding of *governance practices* (if not our narrower view of governance in the presumptively wrongful sense). Furthermore, whilst we also acknowledge that law creation can occur bottom-up, we are not committed to the notion that *all* law is generated in this manner: law for Davies *is* practice (2018, specifically on *materiality*; 2017: 254-255), whereas, for the non-positivist, law is *morally entailed by* practice.

Davies' ecumenical and bottom-up understanding of law would almost certainly encompass Provost's legally pluralist reading of 'rebel governance'. Provost's empirically-grounded account of the rebel administration of justice by the *Fuerzas*

Armadas Revolucionarias de Colombia (FARC) employs the insights of legal pluralism to characterise a 'rebel rule of law' (2018). This approach reflects our own insofar as we too identify legality where others often do not, that is to say, within indigenous communities. There are important differences, however: Provost sees 'insurgent jurisprudence…as legal pluralism incarnate' (2018: 232) and thus adopts legal pluralism as a starting premise and a lens through which to advance his argument. Our conception of legal pluralism, by contrast, is more robustly defined, whereas our account of legality is both more abstract and capacious than Provost's four desiderata for a rebel rule of law (2018: 267ff).

NON-POSITIVISM AND THE RULE OF LAW

We present a radically different approach from those discussed above, both to the nature of law and to the existence of discrete legal orders. Whilst we do not believe that law *must* be conceptualised in 'non-positivist' terms, we argue that doing so has particular explanatory power in relation to the settler-state legitimacy crises we consider below. To that end, this Part elaborates our non-positivist understanding of law and links it to our overarching concern with legitimacy.

Non-positivism is commonly defined in opposition to the legal positivist notion that 'the existence of law is one thing; its merit or demerit another' (Austin 1954: 184-185). Developed by Ronald Dworkin, this approach claims – contra positivism – that the existence of a legal order is not *purely* a matter of social fact but also one of political morality: law exists wherever the moral value of legality is instantiated by community governance practices (Dworkin 2006: 168-186). This, we argue, establishes two requirements for the existence of non-positivist legal orders. First, the relevant governance practices must be capable of generating 'jural relations' that are presumptively morally binding. Second, the moral potency of those jural relations must be partly explicable in terms of *the value of legality*.

Our approach reflects Jeremy Waldron's claim that 'to describe an exercise of power as an instance of lawmaking or law application is already to dignify it with a certain character' (2008: 12). It entails that, wherever there is law, there is something of value that must be respected. As argued in later Parts, the legitimacy crises we analyse are unified as a set by settler-state abrogation of this respect.

1. The Components of Law

According to non-positivism, law comprises three things:[16] social facts about a given community's governance practices; the moral reasons that justify the 'impact' those practices *should* have upon how that community ought to behave; and the 'jural relations' that articulate this moral impact (Greenberg 2014: 1310-1323).

Our definitions of 'social facts' and 'moral reasons' are provided above; the relationship between these two elements, understood in terms of their 'moral impact', is best explained by an example. In the CANZUS settler-states we examine it is typically believed that appropriately adopted legislative texts effect legal change; such texts, it might be said, *impact* what law requires. For non-positivists, this must be explicable in moral terms: insofar as new legislation changes the law, there will be moral reasons that justify why, and to what extent, this change occurs. Furthermore, insofar as legislation affects how the community it governs *genuinely ought to behave*, the nature and extent of this impact will be determined by those same reasons: typically cited reasons include the respect due to democratic decision-making, the coordinative value of publically ascertainable rules, and so on (Waldron 1999b). Thus, to the extent that residents of Canada have duties to pay income tax, this will be partly explicable in

[16] According to Dworkin, there are arguably four: 1) governance practices; 2) moral reasons; 3) general 'principles' of law arising from a combination of 1 and 2; and the jural relations that those principles entail in particular cases (see Dworkin 1997: 14-45 and 81-130).

terms of its 1985 Income Tax Act (R.S.C., c.1 (5th Supp.)), which, for several moral reasons, *should* contour the scope and detail of the obligations in question.[17] Legislation is manifestly not unique in this regard: customary practices (Postema 2007), judicial rulings (Dworkin 1986: 276-312), executive proclamations (Levinson 2007), and constitutional documents (Dworkin 1997) all may alter the concrete normative implications of non-positivist law.

Such implications can be most clearly articulated in terms of the 'jural relations' they establish. As originally conceived by Wesley Newcombe Hohfeld, four types of such relation exist. Each comprises a couplet of basic legal concepts that entail each other's existence: rights correlative to duties; liberties to no-rights; powers to liabilities; immunities to disabilities (Hohfeld 1913: 30). Within this framework, rights entail the existence of duties *owed to the right-holder*, whilst liberties imply freedom from duty. Similarly, the existence of a power (for instance, to sue) means that some person or group will be liable to that power, whilst immunity protects legal subjects from potential liability. We adopt Hohfeld's framework with one exception: as observed by H.L.A. Hart, it is possible to conceive of duties *owed to no-one in particular* (Hart 1982: 185). Such duties, which lack a correlative right, might include, for example, our duties

[17] We assume that individuals are morally required to participate in sufficiently just taxation schemes (see generally Klosko 2004).

to protect historical monuments or to preserve our natural environment.

By tracing the moral salience of governance practices down to the concrete jural relations they entail, our approach presents law as irreducibly moral: where it obligates us, it does so morally; where it leaves us free to act, this too it justifies in moral terms. Importantly, however, the jural relations that non-positivist law generates are only *presumptively* binding, and may be overridden by weightier, non-legal, moral considerations (Dworkin 1986: 214 and 2006: 206; Greenberg 2014: 1306). This qualification – that law neither exhausts nor preempts *all* political morality – has an important implication: our conception of legal pluralism requires only that legal orders are understood to be moral *in character*, and not, as good sense and experience often repudiate, that all law is perfectly just.

2. Legality

The previous section established the basic components of non-positivist law, provisionally defining such law in terms of the 'moral impact' that governance practices can have upon the ways in which a given community ought to behave. However, as observed by Mark Greenberg, governance can impact our 'moral profile' in many *non-legal* ways (2014: 1321-1323): for example, illegitimate governance can

generate duties to resist, alter, or abandon our governance practices through *unlawful* means (Delmas 2018). Clearly, more is needed to distinguish non-positivist law from the remainder of political morality. We argue that this can be done by appealing to the moral value of legality: legal orders exist where their constitutive governance practices generate jural relations that are presumptively binding in part by virtue of *that* value.

Legality has both horizontal and vertical elements. Horizontally, it represents what Gerald Postema refers to as 'a *mode of association*' between members of the same community (Postema 2014: 24). By living within communities governed in accordance with a common set of standards, individuals are treated as the equals of those they live alongside (Dworkin 1986: 200 and 213-214). This 'equal concern and respect' (Dworkin 1977: 180-183 and 272-278) may not be particularly 'thick' – for instance, contemporary legal orders rarely achieve socio-economic equality – but it necessarily requires that, within communities, 'there be no "thumb on the scale" for certain individuals we favor' (Waldron 2017: 49). When individuals violate the common standards of their community without appropriate justification, their actions *implicitly disrespect* and, in extreme cases, even *actively undermine* the equal status that legality aims to protect (Postema 2014: 37-38). By contrast, when, through compliance, individuals demonstrate 'faithfulness…to each other with respect to some common

governing norms' (Postema 2014: 25), they respect each other *as* equals, transforming their common life into what Dworkin describes as 'true' community (1986: 201). The distinctive value of living within such communities distinguishes the normative implications of law from other ways in which governance can impact our 'moral profile'. It also informs their normative weight: when characterised by legality, governance practices can generate jural relations that are presumptively binding *because of* the instantiation of equality that this represents. Finally, and most importantly for our purposes, the value of living within a community of equals establishes law as worthy of respect *from the outside*: wherever a legal order exists, those not subject to it must *also* respect it as an intrinsically valuable achievement of a community other than their own.

The vertical dimension of legality, which concerns law's contribution to *legitimate* governance, proceeds from these egalitarian foundations. As canvassed above, governance is morally problematic whenever it violates equality and autonomy. This problem is partly 'dissolved', however, when governance is subject to legality.[18] Since hierarchies and coercion can *themselves* embody the value of equality when they are imposed in accordance with common standards, this partly negates their presumptive

[18] Whilst arguably *necessary* for legitimacy, legality is not *sufficient* (Morris 1998: 104).

violation of that ideal (Dworkin 1986: 213-214). Furthermore, insofar as common standards help to avoid coordination problems (Kant 1996: 27-29, 92-94 and 97-98) and are sufficiently easy to identify by those subject to governance (Fuller 1964: 33-94), they can also enhance individual autonomy, and consequently also partly negate any presumptive violation of that value. Crucially for our conception of legal pluralism, this argument entails that legality – and therefore the existence of non-positivist law – is *necessarily* connected to the importance of forestalling *illegitimate* governance (Dworkin 1986: 93).

This connection between legality and legitimacy has sometimes provoked a mistaken assumption that non-positivism necessarily denies the existence of non-state law (Twining 2009: 502-503; Letsas 2012: 81 and 97-102). We suggest that non-positivists may inadvertently have encouraged this mistake by placing too much emphasis upon legality's vertical dimension when it comes to the identification of discrete legal orders. Two observations are important here. First, although states arguably embody the most visible social and political hierarchies, and utilise particularly widespread coercion, this does not entail that *only* states exhibit these morally problematic aspects of governance.[19] In the following Part, we observe that the Suquamish tribe, who, we

[19] Typically, non-positivists do not *deny* the connection between non-state governance and the possibility of non-state law, so much as *ignore* it (see, for example: Dworkin 1986: 93, 115-275 and 350-

claim, constitute a non-state legal order, have governance practices that require similar justification. Second, and more importantly in our view, whilst its connection to legitimacy is important, legality concerns more than the mitigation of morally problematic governance. As argued above, governance practices broadly construed can have a distinctly legal 'moral impact' insofar as they generate jural relations to which legality lends normative weight. For us, law exists wherever this horizontal dimension of legality is present, such that discrete legal orders can arise wherever a community governs itself in accordance with common standards. What is more, the achievement that this represents explains why such orders are worthy of respect. The next Part explains how two or more legal orders can exist in the same space, which we characterise in terms of non-positivist legal pluralism.

INTRODUCING NON-POSITIVIST LEGAL PLURALISM

Having indicated how our conception of legal pluralism differs from competing accounts, and having established our theoretical framework, our definition of non-positivist legal pluralism should be restated. Such pluralism pertains where two or more governance traditions, each instantiating the moral value of legality, exist in the

354; Greenberg 2014: 1339; N. Stavropoulos 2009: 350-354).

same space. Unlike social fact legal pluralism, which by its own admission is morally inert, this approach presents law as necessarily worthy of respect. Rather than understanding legal pluralism in purely descriptive terms, we see it as intrinsically morally demanding: individuals acting within such circumstances must demonstrate appropriate respect to each legal order involved. Unfortunately, this obligation is frequently violated by the governments of settler-states, as this Part will show.

The accurate identification of non-positivist legal pluralism requires four distinct steps. First, a provisionally identifiable group of people must be purportedly governed by two or more seemingly distinct sets of governance practices. Second, each set must be capable of generating jural relations that are presumptively morally binding for reasons of legality. Third, the relevant individuals must believe that these governance practices are incompatible with each other, insofar as they ostensibly ground conflicting jural relations. Fourth, and most importantly, there must be no governance institution with *both* the capacity *and* the legitimacy to resolve this apparent conflict.

The first two steps establish the existence of more than one *prima facie* non-positivist legal order, whilst the second two are necessary to confirm their genuine separateness. As argued in the previous Part, legality concerns the value of living under *one* common

set of standards: in ordinary circumstances, that value favours a single legal order governing a given space. As a matter of principle, therefore, establishing a plurality requires evidence of legality being *better* served by maintaining the genuine separateness of the *prima facie* legal orders in question. Steps three and four accomplish this by asking whether any unilateral attempts at 'incorporation' would be legitimate: as we demonstrate in Section 4, the conceptual connection between legality and legitimacy entails that illegitimate attempts at incorporating one order into another cannot have legal or moral effect. As noted above, our identification of non-positivist legal pluralism is designed to elucidate specific settler-state legitimacy crises and to present them as a distinct type of pressing institutional problem. In this Part we use the 1978 US Supreme Court case of *Oliphant v. Suquamish Indian Tribe* to elaborate that conception.

In *Oliphant* the Court declared that tribal governments lack the power to prosecute non-Indians who commit crimes in Indian Country.[20] By reversing the ruling of the US Federal Court of Appeals for the Ninth Circuit, which held that 'the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed' (*Mark*

[20] Indian Country, as defined by federal statute at 18 U.S.C. § 1151 (2012), includes all reservations, dependent Indian communities, and Indian allotments to which title has not been extinguished.

David Oliphant v. Edward Schlie, Chief of Police of the City of Bremerton),[21] the Supreme Court, we argue, compounded the illegitimacy of the United States of America (US) *vis-à-vis* its indigenous communities. Our contextualised reading of this controversial case places particular emphasis upon the social and institutional reality of Suquamish governance in 1978, and on the impact the Supreme Court decision had upon indigenous communities.

1. *Two* Prima Facie *Legal Orders*

Contrary to the discredited doctrines of discovery and terra nullius, the territory of what is now the US was originally home to numerous legal orders, supervening upon various governance practices (Borrows 2002: 117): '[t]ribal governments, like all other governments, have always possessed methods for settling disputes and dealing with those who violate community norms' (Hendry & Tatum 2018: 105). Unlike 'the formal court system of the Europeans', these methods often included mediation by tribal elders (Koehn 1997: 708-709), and even today 'the importance of customary law in…tribal courts cannot be understated' (Fletcher 2007: 60-61). We argue that this divergence from the Western legal paradigm does not preclude the fundamentally legal nature of these practices; in this respect, our understanding of law shares the

[21] Quoted in the 9th circuit case *Mark David Oliphant v. Edward Schlie, Chief of Police of the City of Bremerton*, Defendant, 544 F.2d 1007 (9th Cir. 1976), 1009.

expansive ethos of the critical legal pluralists discussed in Part 1.

For contemporary states, legality demands quite particular governance practices (such as the promulgation of legal *texts*) (Fuller 1964 :49-51). However, a non-positivist understanding of that value does *not* entail that law exists *only* where such practices do (Dworkin 2006: 184); like any other moral value, the requirements of legality are sensitive to context (Williams 1985: 65-68). While certain institutions are often considered co-extant with law (Waldron 2008: 19-35), we contend that this state-centralism is myopic. For example, and by contrast to many indigenous communities, modern states typically have expansive populations and routinely engage in *coercive* governance. It is features like these, and not legality in the abstract, that generate the requirements of form most often associated with *state* legal orders: while large populations necessitate that those common standards integral to *horizontal* legality take an impersonal and publicly ascertainable form; similarly, the *vertical* dimension of legality is only engaged when 'problematic' governance is present.

Turning to our case study of *Oliphant*, locating legality in the governance practices of the Suquamish is comparatively straightforward on both the horizontal and vertical dimensions of that value. Taking their name from the traditional Lushootseed phrase

for ‘people of the clear salt water’, the Suquamish and their ancestors inhabited the Central Puget Sound Region (in present-day Washington) for thousands of years. A federally recognised tribe, the Suquamish now live on the Port Madison Indian Reserve: as a party to the 1855 Treaty of Point Elliott (Treaty with the Dwamish, Suquamish, etc, 22 January 1885, Point Elliott, 12 Stat. 927) the sovereign Suquamish government relinquished title to their extant lands for acknowledgement and protection of their fishing and hunting rights, healthcare, education, and the reservation at Port Madison (ibid). The tribe are currently governed according to their own Suquamish Tribal Code (Suquamish Tribal Council Resolutions: 88-048, July 11, 1988; 91-106, October 28, 1991), which codified the 1973 Law & Order Code, the Youth Code, and various other Tribal Council-published resolutions and ordinances (ibid, Preface). In 1978, when *Oliphant* was decided, the Suquamish possessed a Tribal Council, courts, police, and other institutions established by their constitution and bylaws (adopted 23 May 1965), through which they governed their collective lives (Ruby & Brown 1992: 228). Furthermore, although not lacking its own controversy (Ball 1987: 123-124), the 1968 Indian Civil Rights Act (ICRA) required all ‘Indian tribes’ to implement many of the guarantees provided in the US Bill of Rights (25 U.S.C. §§ 1301-1304).

We contend that these practices and institutions were patently sufficient to ground

standards of governance that established the Suquamish tribe as a community of equals, thus satisfying the horizontal dimension of legality. This means that it was, and is, deserving of respect as such. Parallels can thus be drawn between the Suquamish legal order and that of the US,[22] such that if we accept the legality of the latter, doubting the status of the former seems unmotivated. This also extends to legality's vertical dimension. For Dworkin, the governance practices of the US 'commit [it]…to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern' (Dworkin 1997: 7-8). If true of the US, this surely also holds for the Suquamish: for example, Oliphant himself was formally charged before the Provisional Court of the Suquamish Indian Tribe, incarcerated by order of that court, then released on his own recognizance. This process has all the hallmarks of legally regulated governmental coercion. As such, we argue that the Suquamish Indian Tribe was and is a non-positivist legal order, capable of generating jural relations that have normative weight for reasons of legality. In the next section we consider the conflict identified in *Oliphant* between one such relation – the claimed power of the Suquamish tribal authorities to prosecute non-Indians – and its incompatible

[22] On the shift to 'Western-style constitutional tribal government in 1934' and the move away from traditional procedures, see Barsh & Henderson (1979: 636) and Hendry & Tatum (2018: 104-110) 'The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark' (1979) 63 *Minnesota Law Rev.* 609, at 636;

counterpart, generated by the US legal order, namely Oliphant's alleged immunity from prosecution, as enforced by the Supreme Court.

2. *The Seeming Conflict of Jural Relations*

Mark Oliphant, a non-Indian living on the Suquamish's Port Madison Indian Reservation during the summer of 1973, there attended a tribal celebration where he assaulted a tribal police officer and resisted arrest. After his arrest and charge by tribal police, Oliphant faced prosecution before the Provisional Court of the Suquamish Indian Tribe, which claimed authority to try non-Indians under the tribe's Law and Order Code (1973 ch. 1, art. ID, § 3) 'by reason of their retained national sovereignty' (*Oliphant* at 196). Arguing that the Suquamish lacked jurisdiction over him as a non-Indian, Oliphant sought habeas corpus relief under ICRA (25 U.S.C.§§ 1301-1304 (ICRA, 1968), § 1303). The question presented to the Supreme Court was whether the Suquamish genuinely retained inherent criminal authority to prosecute non-Indians. In a controversial and deleterious opinion, Justice Rehnquist reversed the appellate court's finding, rejected decades of precedent, and diminished the efficacy of tribal criminal jurisdiction with lasting effect.

Understanding the scale of *Oliphant'*s impact requires three points of

contextualisation. First, it is not unusual for non-Indians to be resident in Indian Country; indeed, at the time of the case the 2928 non-Indian residents of Port Madison Indian Reservation outnumbered the fifty Suquamish residents by a ratio of almost sixty to one (*Oliphant* at 193 (n. 1)).[23] This situation can be attributed to the assimilationist allotment policy followed by the federal government, whereby the 1887 General Allotment (Dawes) Act (ch. 119, 24 Stat. 388)[24] led to significant percentages of tribal land passing out of Indian hands; the Rehnquist Court even noted that the 'substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior' (*Oliphant* at 193 (n.1)). Second, in its 'wholesale creation of a limiting theory of tribal jurisdiction', the Court was evidently concerned about 'the specter [sic] of fifty reservation tribal members exercising criminal authority over nearly three thousand non-Indian reservation residents' (Duthu 1994: 376). Its discomfort about the subjection of non-Indians to tribal law is clear, notably in its reliance on its 1883 decision in *Ex Parte Crow Dog* to argue that such a step would effectively judge non-Indians 'by a standard made by others and not for them [and try] them, not by their peers, nor by the customs of their people, nor the law of their land, but by a…different

[23] US Census data from 2010 shows that, even that recently, Indians and Alaskan Natives only comprised 626 of the Port Madison Reservation's 7640-strong population: <https://www.ofm.wa.gov/sites/default/files/public/legacy/pop/census2010/sf1/data/tribal/wa_2010_sf1_tribal_28000US55715.pdf>.

[24] Codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (2006)).

race, according to the law of a social state of which they have an imperfect conception' (*Oliphant* at 210-211, quoting *Ex Parte Crow Dog*[25]). This, it should be noted, is in spite of Congress having already taken steps, in the form of ICRA, to guarantee in tribal courts the rights of all defendants, Indian and non-Indian alike (Barsh & Henderson 1979: 635). Third, *Oliphant* created, to the detriment of public safety, an enormous prosecutorial lacuna within tribal criminal law enforcement. Considering the population asymmetry noted above, this is particularly salient, although no accident: the Rehnquist Court's awareness of 'the prevalence of non-Indian crime on today's reservations' is even noted in the opinion (*Oliphant* at 212). Further to this issue, *Oliphant* generates significant jurisdictional uncertainty within Indian Country while, at the same time, compelling tribes to rely upon federal law enforcement and thus to be dependent upon 'another sovereign's law-enforcement interests' (Resnick 1995: 124).

We argue that the above facts suggest two incompatible legal claims, each denoting a reciprocally incompatible jural relation. The Suquamish claim alleged a territorially demarcated power to prosecute crimes within the Port Madison Reservation, to which

[25] *Ex Parte Crow Dog,* 109 U.S. at 571, which held that federal courts lack criminal jurisdiction over Indians in Indian Country

both Indians and non-Indians would have been liable.[26] The irreconcilable claim of the Rehnquist Court, which purportedly downgraded Suquamish jurisdiction to *in personam* only, alleged for non-Indians an immunity from tribal prosecution, which would have disabled the tribal court from trying the case. For us, this is paradigmatic of clashes between *prima facie* distinct non-positivist legal orders. Employing the language of conflicting jural relations – which articulate law's most concrete normative implications – enables greater precision in the identification of such clashes. This, in turn, facilitates the diagnosis of the legitimacy crises we examine: when such crises arise, they arise in specific circumstances, never in the abstract. It is the wrongful actions of individuals in positions of power that cause the harm, and our fine-grain approach helps to illuminate this reality.

3. The Legitimacy Crisis

As noted in our introduction, governance is morally problematic insofar as it violates equality and autonomy: the possibility for illegitimacy arises wherever it employs social and political hierarchies or coercion. We further observed that the importance of those two values sets the threshold for legitimate (that is, justified) governance

[26] We suggest that, on a non-positivist understanding of law, this claim was legally sound. The importance of public safety within the Reservation justified the tribal courts' power to prosecute non-Indians, whilst the language of the 1973 Law & Order code provided the necessary social facts. This position was bolstered, we contend, by the illegitimacy of Rehnquist Court's contrary ruling.

quite high: whilst the maintenance of civil peace and the protection of basic human rights might justify whatever coercion and hierarchies are necessary for those ends, contemporary governance characteristically extends far beyond such activity, regulating many more aspects of our lives (Green: forthcoming). The legitimacy of these practices requires more: the means and ends of governance must *in general* either morally 'dissolve', or morally 'outweigh', their violation of equality and autonomy. In the case of contemporary states, this will usually require at least appropriately representative government and adherence to the rule of law (Buchanan 2004; Dworkin 1986: 11). We contend that this legitimacy threshold is even higher for settler-states, where ongoing legacies of colonialism often, sometimes intractably, undermine the justifiability of state governance *vis-à-vis* indigenous communities.

This argument begins with the historic injustice of colonialism and its violation of equality and autonomy. It is not our intention here to address 'the full horror of the atrocities committed' (de las Casas 1992: 43) under colonialism, but rather to emphasise its *distinct* wrongfulness, namely, 'the establishment of a form of association that fails to offer equal and reciprocal terms of interaction to all its members' (Ypi 2013: 178). By forcing and manipulating indigenous communities into subordinate positions, European settlers disrespected and undermined the equal

status and autonomy of each individual within those communities (Ypi 2013: 179-181). Crucially, this weakened the legitimacy of CANZUS settler-states at their genesis because these aspects of their creation violated *exactly those values* that must be instantiated for presumptively wrongful governance to become legitimate. This, we argue, is not just a matter of history: the injustice of colonialism endures insofar as it is compounded, or insufficiently ameliorated, by settler-states that propagate the violation of indigenous equality and autonomy.

When a moral wrong is committed the onus is upon the wrongdoer either to reverse the unjust state of affairs or to do the next best thing by providing compensation (Aristotle 2002: 1130b30-1131b20). Neither eventuality erases the original wrong but taking appropriate action can prevent it from becoming compounded. The enhanced legitimacy threshold in settler-states reflects the importance of responding to considerations of this kind. Legitimate governance within such states requires more than *general* justification through representative government and the rule of law: it also requires *specific* justification in relation to the contemporary implications of its unjust past. In this respect, any failure to eliminate the ongoing injustices that colonial governance 'wrongfully promoted' (Lyons 2013: 106) represents a legitimacy crisis.

Judgments like *Oliphant* both ignore and compound this problem. Rather than ameliorating the unjust state of affairs perpetuated by ongoing US attempts to subordinate indigenous communities, the Rehnquist Court attempted a 'disingenuous' (Duthu 1994: 373) and 'performative' (Ball 1987: 37) doubling down on that oppression.[27] The concurrent illegitimacy of the Court has two dimensions: the first concerns its embeddedness within the US legal order, whilst the second ensues from the substance of its decision. On the first point, intervention by any court with jurisdiction grounded *solely* in the US legal order would have been inherently problematic. Such 'courts of the colonizer' (Barsh & Henderson 1996-97: 1002) are presumptively illegitimate because demonstrating 'proper respect for tribal self-determination requires that *tribal courts* be accorded primacy in resolving any potential conflict between the tribal and [the] federal' (Duthu 1994: 396, our emphasis).

The violations of autonomy and equality perpetrated by colonialism included the undermining of indigenous self-determination. Insofar as indigenous self-governance promotes individual autonomy, colonial disruption of those governance practices violated that value. Furthermore, that disruption also violated equality through its

[27] This supports Peter d'Errico's allegation that 'Federal Indian Law is the continuation of colonialism' (2009: 110-111).

asymmetry: indigenous self-governance was undermined by settlers who, hypocritically (Wallace 2010: 309; Fritz 2019: 309), proclaimed their own inviolable rights to political independence (Jefferson et al 1776). For contemporary settler-states, this creates a remedial duty to facilitate self-determination for indigenous communities, which is downstream from their more general obligation to eliminate the ongoing injustices of colonial governance. Crucially, this facilitation, we argue, must include presumptive non-interference in the administration of justice, and this because of the latter's centrality to effective self-governance.[28] In *Oliphant*, therefore, the involvement of the US courts was in itself *pro tanto* illegitimate.

The second dimension of the Supreme Court's illegitimacy concerns the substance of its decision: as argued by Dworkin, the legitimacy of an institution always turns, at least in part, upon what it *does* (1986: 214-224). In this respect *Oliphant* is straightforward: Rehnquist's opinion displays three distinct violations of legality. First, as mentioned above, the judgment causes a prosecutorial lacuna, which not only undermines public safety, but also, *contra* equality, generates a normative asymmetry between Indians and non-Indians, as only the former were recognised as being subject to tribal law. Second, by *exclusively* upholding the immunity of non-Indians from

[28] This duty of non-interference *might* be limited but, we suggest, only in extreme circumstances, such as when necessary for the maintenance of civil peace and the protection of fundamental rights.

'unwarranted intrusions on their personal liberty' (*Oliphant* at 210), Rehnquist 'never addresses why non-Indians' liberty interests are privileged over those of Indians' (Duthu 1994: 377; Barsh & Henderson 1979: 635). Third, as well as overtly departing from accepted principles (Hendry & Tatum 2018: 97), the Court's reasoning demonstrated 'an unusual propensity for the selective use of history, assuming conclusions, and even according greater weight to defeated bills than enacted law' (Barsh & Henderson 1979: 617). The importance of this also extends to the integrity of the US legal order: to quote Peter Maxfield, '[Rehnquist] drew false inferences, misrepresented or distorted case holdings and other legal authorities, and generally argued based on unsubstantiated statements…Would our system, so resilient yet so fragile, survive this practice on a widespread scale?' (1993: 443).

4. *Confirming Non-Positivist Legal Pluralism*

This arrant illegitimacy animates our finding of non-positivist legal pluralism in *Oliphant*, which, in turn, bolsters the very *separateness* of the Suquamish legal order. In this respect, we fundamentally oppose, and seek to undermine, Rehnquist's 'performative utterance' (Ball 1987: 37) that indigenous legal orders have been 'incorporated' into that of the US (*Oliphant* at 209). Section 1 contended that the Suquamish engage in distinct governance practices that instantiate legality, whilst

Section 2 noted the conflict between their claimed power to prosecute non-Indians and the incompatible immunity that Rehnquist's judgment supposedly identified. These steps correspond to our first three criteria for the identification of non-positivist legal pluralism, and thus present the situation in *Oliphant* as one of apparent conflict between two *prima facie* distinct legal orders. What remains to be justified is that these legal orders are *in fact* distinct and that, whatever its intention (Ball 1987: 37-43), the Supreme Court did not succeed in 'incorporating' the Suquamish legal order into that of the US.

According to non-positivism, law supervenes upon governance practices that instantiate legality; if those practices change in some material way, the content of the law may also change (Greenberg 2006: 230-240). This suggests one way that the agents of one legal order might seek to 'incorporate' another, namely by dismantling their target through the elimination of its underlying governance practices. Of course, this would not so much *incorporate* the other order as cause its *destruction*. In settler-states such destruction was often attended by injustice of the worst kind: the murder, forced assimilation, forced relocation, and enslavement of indigenous communities, amounting to genocide.[29]

[29] See, for example, the findings of physical, biological and cultural genocide in: The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future Summary of the*

The incorporation Rehnquist seemingly contemplated is different: his language implies that the US absorbed the relevant indigenous legal orders *by operation of law* once the territory of the US had expanded to include them (*Oliphant* at 209). We argue that, assuming a non-positivist understanding of law, and given the legitimacy crises typified in the previous section, Rehnquist's inference is conceptually impossible. As argued in Part 2, legality has strong conceptual connections to legitimacy, in that promoting justified governance forms part of the 'most abstract and fundamental point' of governing in accordance with common standards (Dworkin 1986: 93). Consequently, *illegitimacy* runs contrary to law's moral foundations, which, on a non-positivist understanding, constitute its very existence. One crucial implication of this is that no wholly illegitimate actions can take legal effect, even if they purport to, for instance, by emulating legal form. To hold otherwise would imply that such actions could *instantiate* legality whilst *simultaneously abrogating* one of its most important moral foundations. This, we claim, is conceptually incoherent: the irreducibly moral nature of non-positivist law prevents it from countenancing that paradox (Dworkin 2011: 104-122).

Final Report of the Truth and Reconciliation Commission of Canada (2015) <http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf>.

For this reason, Rehnquist's allegations of 'incorporation' lack any basis in law or morality. The existence of a *prima facie* distinct Suquamish legal order, and the remedial duty of the US to facilitate Suquamish self-determination, together entail that no attempt at thoroughgoing incorporation through law could have been legitimate, and therefore effective, prior to 1978. Furthermore, to the extent that *Oliphant* itself represented an illegitimate attempt at incorporation, it cannot have had legal or moral effect. The legitimacy crisis this case embodies does not entail an *absence* of legal connections between the US and Suquamish legal orders: the tribe's status as a sovereign dependent nation necessitates at least *some* US law operating within the Port Madison Reservation (Duthu 1994: 396-397). However, it does support the separateness of the Suquamish legal order, and thus reinforces the tribe's inherent sovereignty.

Crucially, these implications epitomise the type of legitimacy crises that our conception of legal pluralism helps to elucidate. Forestalled by US intervention, the Suquamish tribal authorities were prevented from addressing the seeming conflict of jural relations raised in *Oliphant*. Conversely, no US institution, least of all the Supreme Court, possessed sufficient legitimacy to do the same. This left their two legal orders in uncomfortable and asymmetric parallel: historic injustice and considerations of

legality precluded incorporation, the seeming conflict between them went without legitimate resolution, and the hegemonic institutions of the settler-state failed to acknowledge that, *qua* legal orders, both merited the same basic respect.

SACRED SITES IN NATIONAL PARKS: BEARS LODGE AND ULURU

Our extended focus in the preceding Part has been on *Oliphant*, our paradigmatic case. This Part employs two additional case studies to demonstrate further the explanatory and evaluative power of our conception. These studies – Bears Lodge/Devils Tower National Monument (Wyoming, US) and Uluru/Ayer's Rock (Northern Territory, Australia) – exemplify conflicts that have arisen concerning sites held sacred by indigenous communities. As Yuval Jobani and Nahshon Perez observe, '[d]isputes over access, legitimate and permissible conduct, site management, and even the proper name of such sites reflect how thoroughly the understandings and meanings attributed to such sites differ' (2018: 255). We articulate these conflicts in terms of incompatible legal claims from *prima facie* distinct legal orders, claims which signify reciprocally incompatible jural relations, and analyse attendant legitimacy crises in terms of non-positivist legal pluralism.

1. Bears Lodge

Bears Lodge,[30] the geological formation that has come to be known as Devils Tower, is in Wyoming's Black Hills, on the 'overlapping traditional territories of many Indian tribes of the Plains' (Burton & Ruppert 1999: 206). A US National Monument since 1906 and managed by the National Park Service (NPS) since 1916, this formation features significantly in the belief systems and land-based religions of Plains Indian tribes, over twenty of which claim a cultural affiliation with the site and still perform traditional ceremonies and rituals there (Tatum & Shaw 2014: 62).[31] Indeed, it was on the grounds of this religious primacy that the relevant tribes initially favoured an outright ban on climbing Devils Tower, for which it had long since been considered a premier location: over forty years of recreational climbing have seen the rock desecrated and defaced by hundreds of metal bolts and pitons (ibid: 61). In mediating this clash between indigenous communities and climbing groups, the NPS in 1992 involved key stakeholders in a working group, with the aim of creating a climbing management plan. Following three years of consultation, the final version (FCMP) was issued in 1995 and detailed, among other things, a one-month voluntary climbing

[30] We use the name Bears Lodge, a translation from a Lakota name for the formation, *Mato Tipila*, although acknowledge that different Plains Indian tribes use alternative names. See <https://www.nps.gov/deto/learn/historyculture/aboutthename.htm>.

[31] For similar reasons to those given for the Suquamish legal order, we argue that at least the Arapahoe, Cheyenne, Crow, Kiowa, Lakota, and Shoshone tribes instantiate legality within their governance practices.

closure during June, recognised as an especially sacred time for the tribes. The free choice to refrain from climbing would thus be a 'personal decision' expressing 'respect for Indian people and their traditions' (Burton & Ruppert 1999: 217).

Climbers, under the auspices of the Bear [sic] Lodge Multiple Use Association (BLMUA), challenged this situation in the Wyoming District Court (*Bear Lodge Multiple Use Association v. Babbitt* 1998),[32] alleging that this voluntary 'ban' violated the Establishment Clause of the First Amendment to the US Constitution (*ibid* at 1451). Whilst the Court held that a *mandatory* ban would have 'depriv[ed] individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship', voluntary closure did not (*ibid* at 1455-1456). This amounted to recognition of *a liberty to climb* on behalf of BLMUA, which was not explicitly rejected by the Tenth Circuit on appeal.[33] Conversely, and notwithstanding the compromises struck by the working group, the legal orders of the relevant indigenous communities originally recognised what was, in effect, an *erga omnes* duty *not to climb*.[34] These reciprocally incompatible claims about jural relations embody a clash between multiple legal orders comparable to the one present in *Oliphant*.

[32] *Bear Lodge Multiple Use Association v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).
[33] *Bear Lodge Multiple Use Assoc. v. Babbitt*, 175 F.3d 814 (10th Cir. 1999). This appeal was dismissed due to the climbers' lack of standing.
[34] For example, tribal representatives 'repeatedly equated climbing the Tower to climbing St. Peter's Cathedral in Rome' (Burton & Ruppert 1999: 214).

2. Uluṟu

Parallels can be drawn between Bears Lodge and Uluṟu, which is situated on Aṉangu lands in Australia's 'Red Centre' and within the Uluṟu-Kata Tjuṯa National Park. Considering Uluṟu inseparable from Tjukurpa, their traditional law,[35] the Aṉangu Aboriginal people hold the 348m-high sandstone formation to be both an intensely sacred site and a link to 'creation ancestors'.[36] While the NPS working group led to compromises over climbing on Bears Lodge, notably in the form of the voluntary moratorium during June, the stated preference of the Aṉangu people has always been for a complete ban on the recreational climbing of Uluṟu. By characterising it as 'a sacred place restricted by law' (Wilson 2017), the Aṉangu people in effect assert an *erga omnes* duty *not to climb*; as Aṉangu traditional landowner and Board Member Tony Tjamiwa explains, climbing 'is not a proper part of this place' (2012: 109).

Until recently this prohibition was more hopeful than actual: requests to respect their law and culture are displayed on signs near Uluṟu and on the park's website.[37] As of 26 October 2019, however, the climb will close permanently (Department of

[35] <https://parksaustralia.gov.au/uluru/discover/highlights/uluru/>.
[36] <https://parksaustralia.gov.au/uluru/discover/culture/>.
[37] <https://parksaustralia.gov.au/uluru/discover/culture/uluru-climb/>.

Environment and Energy, 2017). Arguably this has come about through greater Anangu involvement in the park's management: compared to Bears Lodge, where the Indian contribution was limited to participation in the NPS working group, the Anangu share management of the national park with the Australian Government, comprising two-thirds of its Management Board. This change in policy gives primacy to Anangu Tjukurpa: while the Australian legal order previously accepted the existence of *a liberty to climb*, it now acknowledges – on this point at least – the importance of non-interference with the Anangu legal order. This change serves to differentiate Uluru from Bears Lodge: prior to the Board's decision the conflicts of jural relations were identical in form.

3. Non-Positivist Legal Pluralism

As this comparison implies, Bears Lodge and Uluru now possess sharply contrasting moral profiles: the unchallenged ruling of the Wyoming District Court symbolically perpetuates the alleged liberty to climb Bears Lodge, whilst the new policy of the Uluru-Kata Tjuta National Park mirrors the concrete normative implications of Anangu Tjukurpa. The latter situation is superior in terms of legitimacy. Not only does the substance of the new Australian policy appropriately respond to that settler-state's unjust colonial legacy, but two thirds of the relevant decision-making body comprised

Anangu representatives. The substance of the US position, by contrast, reinforces the hegemony of its own legal order; moreover, as a forum, the Wyoming District Court was no less a 'court of the colonizer' – no less presumptively illegitimate – than the Supreme Court in *Oliphant*.

These differences generate distinct consequences in terms of non-positivist legal pluralism. Whilst the Wyoming Court's decision typifies the legitimacy crises that often attend such pluralism, the new Australian policy will arguably *defease* the crisis that currently surrounds Uluru. For reasons similar to those canvassed in Section 4 of the previous Part, the illegitimacy of US courts *vis-à-vis* the indigenous communities connected to Bears Lodge both evinces problematic disrespect for their legal orders and, simultaneously, confirms the separateness of those orders. Furthermore, since the Wyoming Court held that a mandatory ban would constitute 'improper…coercion' (*Bear Lodge Multiple Use Association* at 1455), it seems unlikely that any legitimate indigenous institution *could* impose one, even if they wanted to.[38] This leaves the relevant legal orders in an uncomfortable and asymmetric parallel similar to that identified in *Oliphant*.

[38] The record of the work group suggests that the relevant communities no longer desire one (Burton & Ruppert 1999: 216).

Conversely, insofar as the Management Board of Uluṟu-Kata Tjuṯa is legitimate in issuing its climbing ban, any problematic asymmetry will soon lapse, along with the attendant legitimacy crisis. This does not imply that Aṉangu Tjukurpa will somehow become 'incorporated' into the Australian legal order: non-positivist legal pluralism still pertains because the ban effectively defers to the requirements of Tjukurpa, which, at least in substance, becomes the only legal order to govern the climbing of Uluṟu. Such issue-based deferral takes seriously that settler-state's duty to facilitate Aṉangu self-determination, which reflects the respect due to Tjukurpa as an independent legal order. The ban's resolution of the conflict through its acknowledgement of the Aṉangu legal order defuses exactly the kind of legitimacy crisis that our non-positivist conception of legal pluralism has been developed to identify.

CONCLUSION

Non-positivist legal pluralism pertains when, within the same space, two or more governance traditions each instantiate the moral value of legality. Identifying such pluralism necessitates that four criteria be satisfied. First, two or more seemingly distinct sets of governance practices must purport to govern the same group of people. Second, each such set must be capable of generating jural relations that are

presumptively morally binding for reasons of legality. Third, appropriately implicated individuals must believe that, because conflicting jural relations seemingly arise from these governance practices, such practices are incompatible. Fourth, there must be no governance institution with *both* the capacity *and* the legitimacy to resolve this apparent conflict.

Unlike social fact legal pluralists, who understand the existence of multiple legal orders in purely descriptive terms, this takes the existence of legal pluralism within contemporary settler-states to be partly contingent upon controversial questions of political morality. Our turn towards a distinctively non-positivist socio-legal jurisprudence has two instrumental motivations. First, by demarcating indigenous communities in terms of non-positivist law, we emphasise their importance as intrinsically valuable legal orders: insofar as they instantiate the horizontal dimension of legality, these communities should be respected as communities of equals. Second, by focusing on the concrete circumstances in which such respect has *not* been afforded, we provide a framework for the identification of a discrete set of legitimacy crises. The precision of this framework is enhanced both by the attention we pay to specific social and institutional contexts, and by our drilling-down to the atomistic level of conflicting jural relations.

Our approach was developed and exemplified through the socio-legal analysis of three case studies from two CANZUS settler-states, all of which typify the kind of legitimacy crisis that arises when indigenous legal orders are not shown the respect they merit *qua* law. Our selection of examples has thus been deliberately narrow in order to demonstrate the moral importance and distinctiveness of such crises; nonetheless we maintain that the above framework has utility across all CANZUS settler-states. Wherever there is a seeming conflict between the legal orders of such states and those of indigenous communities, legitimacy crises are liable to arise and should, we contend, be analysed in non-positivist terms. For instance, notwithstanding the innovative nature of the 2014 Ruruku Whakatupua Te Mana o te Iwi o Whanganui, enacted into the law of Aotearoa/New Zealand by the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, potential for conflict remains: while s14 of the Act recognises the personhood of the Whanganui River system (Te Awa Tupua), s16a guarantees protection for preexisting property interests *in the river*. This is because s14 effectively provides a statutory basis for Māori tikanga (law),[39] while s16a upholds New Zealand common law rights.

[39] See *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua*, Wai 262, Waitangi Tribunal Report 2011, volume 2, p.750.

Any resultant legitimacy crisis *could*, perhaps, be analysed by committed legal positivists. Nothing about our conception of legitimacy, our contentions about the presumptive illegitimacy of settler-state institutions, or our moral critiques of cases such as *Oliphant* necessitates a non-positivist understanding of law. Nevertheless, our approach has advantages that positivism cannot replicate. Conceptualising legal pluralism *solely* in terms of social fact portrays the parallel existence of multiple legal orders as something without any necessary moral implications. This leaves open the question of whether indigenous legal orders should be treated with respect by settler-states. Conversely, non-positivism explicates why such orders are valuable *wherever* they exist and so entails that respect will *always* be due. What is more, non-positivism explains the *equal* value, *qua* law, of indigenous and state legal orders in a manner that legal positivism – insofar as it is morally inert – cannot. As such, not only does non-positivism more directly address the moral complexity of legal pluralism as it exists in CANZUS settler-states but it also better elucidates the centrality of law to many indigenous sovereignty claims and ongoing struggles for adequate self-determination.

Bibliography

Anaya S J (2004) *Indigenous Peoples in International Law* (2nd edition). Oxford: Oxford University Press.

Applbaum, A I (2010) 'Legitimacy without the Duty to Obey'. *Philosophy & Public Affairs* **38(3)** 216-239.

Arendt H (1970) *On Violence*. Boston: Houghton Mifflin Harcourt.

Arendt H (1998) *The Human Condition* (2nd edition). Chicago: University of Chicago Press.

Aristotle (2002) *Nichomachean Ethics* (transl. Sarah Broadie and Christopher Rowe). Oxford: Oxford University Press.

Austin, J (1954) *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence.*

Ball M S (1987) 'Constitution, Court, Indian Tribes'. *American Bar Foundation Research Journal* **12(1)** 1-140.

Barsh R L & Henderson J Y (1979) 'The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark'. *Minnesota Law Review* **63** 609-640.

Barsh R L & Henderson J Y (1996-1997) 'The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand'. *McGill Law Journal* **42** 993-1009.

Berman, P S (2012) *Global Legal Pluralism*. Cambridge: Cambridge University Press.

Borrows J (2002) *Recovering Canada: The Resurgence of Indigenous Law.* Toronto: Toronto University Press.

Buchanan A (2004) *Justice, Legitimacy, and Self-Determination.* Oxford: Oxford University Press.

Burton L & Ruppert D (1999) 'Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Land'. *Cornell Journal of Law and Public Policy* **8(2)** 201-247.

Cohen F (1942) *Handbook of Federal Indian Law*. Washington, D.C.: Government Printing Office.

Davies M (2005) 'The Ethos of Legal Pluralism'. *Sydney Law Review* **27(1)** 87-108

Davies M (2017) 'Plural Pluralities of Law' in Nicole Roughan and Andrew Halpin (eds) *In Pursuit of Pluralist Jurisprudence*. Cambridge: Cambridge University Press, 239-260

Davies M (2018) *Law Unlimited.* Abingdon, Oxon: Routledge Glasshouse.

Delmas C (2018) *A Duty to Resist: When Disobedience Should be Uncivil.* Oxford: Oxford University Press.

d'Errico P (2009) 'American Indian Sovereignty: Now You See It, Now You Don't' in Adolfo de Oliveira (ed.) *Decolonising Indigenous Rights*. New York: Routledge, chapter 5.

de las Casas B (1992) *A Short Account of the Destruction of the Indies*. London: Penguin Random House.

de Sousa Santos B (2002) *Toward A New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition). Cambridge: Cambridge University Press.

Duthu N B (1994) 'Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country'. *American Indian Law Review* **19(2)** 353-402.

Dworkin R (1977) *Taking Rights Seriously*. Cambridge, Mass: Harvard University Press.

Dworkin R (1986) *Law's Empire*. Cambridge, Mass: Harvard University Press.

Dworkin R (1997) *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, Mass: Harvard University Press.

Dworkin R (2006) *Justice in Robes.* Cambridge, Mass: Harvard University Press.

Dworkin R (2011) *Justice for Hedgehogs*. Cambridge, Mass: Harvard University Press.

Fletcher M L M (2007) 'Rethinking Customary Law in Tribal Court Jurisprudence'. *Michigan Journal of Race and Law* **13** 57-97.

Fritz K G (2019) 'Hypocrisy, Inconsistency, and the Moral Standing of the State'. *Criminal Law and Philosophy* **13(2)** 309-327.

Fuller L L (1964) *The Morality of Law*. New Haven: Yale University Press.

Gardner J (2001) 'Legal Positivism: Five and ½ Myths'. American Journal of Jurisprudence **46(1)** 199-277.

Gover K (2015) 'Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous People'. *European Journal of International Law* **26(2)** 345-373.

Green A (forthcoming) *A Moral Explanation of Emerging Statehood: Political Community and International Law*.

Greenberg M (2006) 'How Facts Make Law' in S. Hershovitz (ed) *Exploring Law's Empire: the Jurisprudence of Ronald Dworkin.* Oxford: Oxford University Press, chapter 10.

Greenberg M (2014) 'The Moral Impact Theory of Law'. The Yale Law Journal **123(5)** 1288-1342.

Griffiths J (1986) 'What is Legal Pluralism?'. *Journal of Legal Pluralism & Unofficial Law* **24** 1-55.

Habermas J (1975) *Legitimation Crisis* (tr. T. McCarthy). London: Penguin Random House.

Hart, H L A (1982) *Essays on Bentham.* Oxford: Oxford University Press.

Hart, H L A (1994) *The Concept of Law* (2nd edition). Oxford: Oxford University Press.

Hendry J & Tatum M L (2018) 'Justice for Native Nations: Insights from Legal Pluralism'. *Arizona Law Review* **60** 91-113.

Hendry J (2019a) 'Review of Margaret Davies' Law Unlimited'. *Journal of Law & Society* **46(1)** 169-173.

Hendry J (2019b) 'A Legal Pluralist Approach to the Bakassi Peninsula Case' in Damian Gonzalez-Salzberg and Loveday Hodson (eds) *Research Methods for International Human Rights Law: Beyond the Traditional Paradigm*. Abingdon, Oxon: Routledge, 123-145.

Hohfeld W N (1913) 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'. *The Yale Law Journal* **23(1)** 16-59.

Jefferson T et al (1776) 'Declaration of Independence'.

Jobani Y & Perez N (2018) 'Governing the Sacred: A Critical Typology of Models of Political Toleration in Contested Sacred Sites'. *Oxford Journal of Law and Religion* **7** 250-273.

Kant I (1996) *The Metaphysics of Morals*, Mary Gregor (ed). Cambridge: Cambridge University Press.

Klosko G (2004) *The Principle of Fairness and Political Obligation.* London: Rowman & Littlefield Publishers.

Koehn M L (1997) 'Civil Jurisdiction: The Boundaries between Federal and Tribal Courts'. *Arizona State Law Journal* **29** 705-768.

Letsas G (2012) 'Harmonic Law' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law.* Oxford: Oxford University Press, 77-108.

Levinson S (2007) 'Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery' in Arthur Ripstein (ed) *Ronald Dworkin*. Cambridge: Cambridge University Press, 136-168.

Lyons D (2013) *Confronting Injustice: Moral History and Political Theory.* Oxford: Oxford University Press.

Maxfield P C (1993) 'Oliphant v. Suquamish Tribe: The Whole Is Greater Than the Sum of the Parts'. *Journal of Contemporary Law* **19(2)** 391-443.

Melissaris E (2009) *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*. Abingdon, Oxon: Routledge.

Merry S E (1988) 'Legal Pluralism'. Law & Society Review **22** 869-896.

Michaels, R (2009) 'Global Legal Pluralism'. *Annual Review of Law and Social Science* **5** 243-262.

Morris C (1998) *An Essay on the Modern State.* Cambridge: Cambridge University Press.

Nozick R (1997) *Socratic Puzzles.* Cambridge, Mass: Harvard University Press.

Parfit D (2011) *On What Matters: Volume One.* Oxford: Oxford University Press.

Postema G J (2007) 'Custom in international law: a normative practice account' in Amanda Perreau-Saussine and James Bernard Murphy (eds) *The Nature of Customary Law*. Cambridge: Cambridge University Press, 279-306.

Postema, G J (2014) 'Fidelity in Law's Commonwealth' in Lisa M. Austin and Dennis Klimchuck (eds) *Private Law and the Rule of Law*. Oxford: Oxford University Press, 17-40.

Provost R (2018) 'FARC Justice: Rebel Rule of Law'. *UC Irvine Law Review* **8** 227-274.

Rawls J (1999) *The Law of Peoples.* Cambridge, Mass: Harvard University Press.

Rawls J (2005) *Political Liberalism* (expanded edition). New York: Columbia University Press.

Renzo M (2011) 'State Legitimacy and Self-Defence'. *Law and Philosophy* **30(5)** 575-601.

Resnik J (1995) 'Multiple sovereignties: Indian Tribes, States, and the Federal Government'. *Judicature* **79(3)** 118-125.

Ruby R H & Brown J A (1992) *A Guide to the Indian Tribes of the Pacific Northwest* (revised edition). Norman, OK: University of Oklahoma Press.

Simmons A J (1999) 'Justification and Legitimacy'. *Ethics* **109** 739-771.

Stavropoulos N (2009) 'The Relevance of Coercion: Some Preliminaries'. *Ratio Juris* **22(3)** 339-358.

Te Aho L (2014) 'Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River'. *Māori Law Review* 1-9.

Tamanaha B Z (2008) 'Understanding Legal Pluralism: Past to Present, Local to Global'. *Sydney Law Review* **30** 375-411.

Tatum M L & Shaw J K (2014) *Law, Culture & Environment.* Durham, NC: Carolina Academic Press.

Tjamiwa T (2012) Uluṟu–Kata Tjuṯa National Park *Knowledge Handbook.* Director of National Parks: Australian Government.

Twining W (2010) 'Normative and Legal Pluralism: A Global Perspective'. *Duke Journal of Comparative and International Law* **20** 473-517.

Waldron J (1999a) *Law and Disagreement.* Oxford: Oxford University Press.

Waldron J (1999b) *The Dignity of Legislation.* Cambridge: Cambridge University Press.

Waldron J (2008) 'The Concept and the Rule of Law' *Georgia Law Review* **43(1)** 1-61.

Waldron J (2017) *One Another's Equals: the Basis of Human Equality*. Cambridge, Mass: Belknap Press.

Walker N (2002) 'The Idea of Constitutional Pluralism'. *Modern Law Review* **65(3)** 317-359.

Walker N (2015) *Intimations of Global Law*. Oxford: Oxford University Press.

Walker N (2016) 'Constitutional Pluralism Revisited'. *European Law Journal* **22(3)** 333-355.

Wallace R J (2010) 'Hypocrisy, Moral Address, and Equal Standing of Persons'. *Philosophy & Public Affairs* **38(4)** 307-341.

Williams B (1985) *Ethics and the Limits of Philosophy*. Abingdon, Oxon: Routledge.

Wilson S (2017) *Uluṟu climb closure – Words from the Chair*, 7a_i, on behalf of the Board of Management <https://parksaustralia.gov.au/uluru/pub/uktnp-climb-closure-words-from-chair-nov-2017.pdf>.

Ypi L (2013) 'What's Wrong with Colonialism'. *Philosophy & Public Affairs* **41(2)** 158-191.

Case list

Bear Lodge Multiple Use Association v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

Bear Lodge Multiple Use Association v. Babbitt, 175 F.3d 814 (10th Cir. 1999)

Mark David Oliphant v. Edward Schlie, Chief of Police of the City of Bremerton, Defendant, 544 F.2d 1007 (9th Cir. 1976), 1009.

Oliphant v. Suquamish Indian Tribe 435 U.S. 191 (1978).

Additional

Department of Environment and Energy (Australia), 2017 (November 1) ‘'Uluru climb to close', Media Release <https://www.environment.gov.au/mediarelease/uluru-climb-close>.