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Book Review

BETWEEN CONSENTING PEOPLES: POLITICAL COMMUNITY AND THE MEANING OF CONSENT, edited by Jeremy Webber and Colin M. Macleod[1]

DWIGHT NEWMAN[2]

IN LATE 2010, THE SUPREME COURT OF CANADA split in the Aboriginal rights decision *Beckman v Little Salmon/Carmacks First Nation*.[3] Justice Deschamps wrote a separate concurring judgment partly to emphasize what she conceptualized as the importance of an Aboriginal community not being permitted to "renege unilaterally on its constitutional undertaking..." by claiming rights beyond those in its treaty relationship.[4] The decision capped a year that had included another divisive foray[5] by the Court into principles of Aboriginal treaty interpretation in the context of the James Bay and Northern Quebec Agreement[6] as well as the Court's ongoing push for reconciliation between Aboriginal and non-Aboriginal communities—a goal pursued by the Court in its interpretation of section 35 of the *Constitution Act, 1982*.[7]

In the context of such pronouncements in the Court's jurisprudence, the collection edited by Jeremy Webber and Colin Macleod, *Between Consenting Peoples:*

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1. (Vancouver: UBC Press, 2010) 269 pages.
2. Professor of Law, University of Saskatchewan.
3. [2010] 3 SCR 103 [*Beckman*].
4. *Ibid* at para 107.
5. *Quebec (AG) v Moses*, [2010] 1 SCR 557.
6. James Bay and Northern Quebec Agreement (1975), online: <http://www.gcc.ca/pdf/LEG000000006.pdf> [JBNQA].
7. Being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11. For the Court's encouragement of such reconciliation, see *e.g. Beckman*, *supra* note 3 at para 10 (explaining that "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35"); *Rio Tinto Alcan v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 38.

Political Community and the Meaning of Consent, is a welcome contribution to the discussion of a set of theoretical questions associated with consent in the context of relationships between Indigenous and non-Indigenous communities. The collection emerges from a 2004 workshop held by the University of Victoria's Consortium on Democratic Constitutionalism, but it remains a timely contribution to an issue in political theory that has very current practical implications.

Webber opens the book with an essay exploring several different concepts of consent from the viewpoint of various Western political theories, drawing from, for instance, versions of hypothetical, liberal, group-based, and more implicit forms of consent.[8] Webber insightfully showcases serious questions arising from some of these forms of consent. Notable are the sophisticated challenges he raises to the idea of group-based consent, which pose questions regarding which collectivities can consent to what and regarding who are the rightful representatives or members of particular communities.[9]

Some of these theoretical concerns have been realized as practical problems in Aboriginal rights cases. One example occurs in the context of identifying the community that holds a collective Aboriginal right, which in turn affects the determination of the group(s) to which government actors owe a duty to consult in particular circumstances.[10] These sorts of issues have led some political theorists—in a move they seem to consider very progressive—to effectively abandon the idea of Indigenous peoples having claims as groups due to the constructed nature of some of their group identities.[11] Webber rightly resists these impulses and at least supposes that it might be possible to develop principled answers to some of the questions. But to develop answers on even these questions of consent would take a sustained argument of some length,[12] and they represent just a subset of a longer list of questions about consent and political theory. As just the introductory essay of this collection is written solely with his own pen, Webber can hope only to open a conversation. The reader begins the book with hopes that

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8. Jeremy Webber, "The Meanings of Consent" in Webber & Macleod, *supra* note 1, 3.
9. *Ibid* at 15-16.
10. Dwight Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) 41 UBC L Rev 249.
11. Such is, to a degree, the tack of Courtney Jung. See Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge, UK: Cambridge University Press, 2008) at 282 (arguing that only Kymlicka-style group-differentiated rights may be possible because of the fundamentally constructed nature of groups).
12. Having engaged elsewhere in an argument on collective rights at some length, I claim to have tackled only some of them. See Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart, 2011).

the impressive set of authors whose works are featured in the collection will take up the challenge and engage with each other to arrive at some answers and defensible claims.

Part I of the book turns explicitly to the possibility of conceptions of consent arising from Indigenous traditions. In the second essay, Val Napoleon examines the Gitksan resolution of a 1945 intra-clan dispute and very briefly compares some elements of the legal approach present in that dispute to features of legal reasoning identified by Gerald Postema in the early English common law. Napoleon uses this specific example to highlight the richness of reasoning within Indigenous legal traditions and to call attention to the promise these traditions hold with regard to the interaction of Indigenous peoples and Western legal systems.[13]

Next, Janna Promislow analyzes historical encounters between Hudson's Bay Company employees and primarily Cree traders at York Factory from 1682 to 1763. She uses the pursuit of consensual relations in these interactions to argue for the role of Indigenous agency. Promislow also notes the failure to achieve non-coerced meetings of the minds in forming treaties, and she argues consequently for attention to injustices that may have been embedded in allegedly consensual treaty norms.[14]

The fourth piece is a contribution by Tim Rowse, subtitled "Some Australian Stories," and is composed of several vignettes from Australian history. These stories provide the foundation for arguments grounded in the work of Michel Foucault and James Tully that conclude with words reflecting simple uncertainty about the meaning of consent.[15] The cumulative result is that part I of the book opens the scope of material affecting readers' thinking, though it offers only a limited set of claims.

Part II of the book includes rich pieces by leading theorists Margaret Moore, David Dyzenhaus, and Duncan Ivison as well as a thoughtful piece by the up-and-coming Andrée Boisselle. Unfortunately, none engages explicitly with any of the others. However, a careful reading reveals some interrelations. In her essay,[16] Moore poses important challenges to standard theories that posit that political legitimation is attained through consent. She then develops a strong argument that unjust usurpation of pre-existing governance structures violates some principles that would be secure as requirements for legitimacy and that would thereby lead

13. Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Webber & Macleod, *supra* note 1, 45.
14. Janna Promislow, "'Thou Wilt Not Die of Hunger ... for I Bring Thee Merchandise': Consent, Intersocietal Normativity, and the Exchange of Food at York Factory 1682-1763" in *ibid*, 77.
15. Tim Rowse, "The Complexity of the Object of Consent: Some Australian Stories" in Webber & Macleod, *supra* note 1, 115.
16. Margaret Moore, "Indigenous Peoples and Political Legitimacy" in Webber & Macleod, *supra* note 1, 143.

to modern obligations to redeem the relations with Indigenous peoples. While challenging Jeremy Waldron's claim that the restitution of past harms to Indigenous communities may have been wholly superseded by changed circumstances,[17] Moore recognizes that subsequent historical developments will both complicate and limit any attempt to restore the past.[18] However, she argues that forward-looking redemptive action can nonetheless follow, thereby making constitutional enforcement of minority rights an important part of forward-looking legitimacy and essential in light of the state's inability to claim authority through a clear record of providing justice when it has failed to do so.[19]

It is here that one can link Moore's argument to Dyzenhaus's. Like Moore, Dyzenhaus's piece explicitly discusses political legitimation. Dyzenhaus, following a sophisticated comparison of the accounts of authority in Joseph Raz and Thomas Hobbes, argues that the establishment of the rule of law has self-legitimating consequences and that a claim to just authority arises from the state's non-arbitrary establishment of legal order.[20] The absence of direct dialogue between Moore and Dyzenhaus here is unfortunate in light of the question that logically arises as to whether the requirements each author develops for legitimacy are substitutive or complementary.

On this point, I see constitutional protections for certain minority rights as partly helping to ensure the rule of law, thereby linking the two authors' arguments. However, in the next essay of the book, Ivison offers a more rights-skeptical argument, raising as a concern the "uneven" empowerment that arises from rights as conceived within the normative systems that have included them.[21] Ivison conceives of rights "naturalistically"—that is, as social practices emerging from empirical forces—and as historically embedded, not only accruing to agents but actually constituting them.[22] Although he has expounded more on rights within such a framework in his other writings,[23] the effect in the present context is to

17. *Ibid* at 162. Moore cites the first iteration of Waldron's argument. See Jeremy Waldron, "Superseding Historic Injustice" (1992) 103 Ethics 4. Waldron has subsequently reiterated it in other works, including specifically in regard to the Canadian context. See Jeremy Waldron, "Redressing Historic Injustice" (2002) 52 UTLJ 135. Typically, theorists do not endeavour to provide any answer. In my current research I am developing a fuller answer to this issue.
18. Moore, *supra* note 16 at 152.
19. *Ibid* at 153-58.
20. David Dyzenhaus, "Consent, Legitimacy, and the Foundation of Political and Legal Authority" in Webber & Macleod, *supra* note 1, 163 at 184.
21. Duncan Ivison, "Consent or Contestation?" in *ibid*, 188 at 197.
22. *Ibid* at 198-202.
23. See especially Duncan Ivison, *Postcolonial Liberalism* (Cambridge, UK: Cambridge University Press, 2002).

undermine the role of rights as any sort of lead normative concept, putting in question the claims that would have emerged from the Moore-Dyzenhaus line of argument in prior essays.

Although Boisselle does not explicitly engage with Ivison in her piece, she carries forward Ivison's problematization of the relationship between rights and agents. She does so with her critique of Jeremy Waldron's procedural account of the authority of the law (and particularly legislation) and its presumed binaries of consent and disagreement. Boisselle uses this argument as a background to seeing legality, agency, and culture as more deeply intertwined with one another than in Waldron's account.[24] Boisselle might have gone on to unpack these interconnections in a variety of ways—and her future work will be something to watch closely—but she is, of course, presently limited to the length of an essay.

James Tully's concluding essay,[25] which occupies its own part of the book, implicitly draws on part I insofar as he refers to some of the rich complexities of treaty-making. However, particularly in light of the reader's high expectations for the work of such a notable theorist, Tully ultimately seems to lose the subtler thought of part II in discussions of relatively undifferentiated notions of hegemony, which Tully considers to be a central concern. This concern seems to override any reason to engage in the more precise distinctions to which part II began to lead.

Were there to have been some fuller engagement between the Moore-Dyzenhaus line and the Ivison-Boisselle line—either in the collection itself or even in the conclusion—the collection would perhaps have had the potential to make a deep and lasting contribution to the project of understanding some of the implications of the consent required for political action in relation to Aboriginal communities. But the nature of an edited collection rather than a monograph is that the different authors can leave their pieces as brief arguments on smaller points and so may not contribute as much as they could have. The editors of this collection have brought together a set of top-notch thinkers who could have done more. It is unfortunate that, while trapped in the limits of the edited collection form, they do not engage in more dialogue to draw on its possible advantages.

There are various possible aspirations for political theory and its ability to offer normative prescriptions for relationships between Indigenous and non-Indigenous communities. If I were to express reservations that the collection's theorists had not developed a set of universal normative principles, I would hasten

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24. Andrée Boisselle, "Beyond Consent and Disagreement: Why Law's Authority Is Not Just about Will" in Webber & Macleod, *supra* note 1, 207.
25. James Tully, "Consent, Hegemony, and Dissent in Treaty Negotiations" in Webber & Macleod, *supra* note 1, 233.

to add that doing so is not the only task of theorists. But it is a possible one. In the context of claims established on consent, it is a task that could contribute in a very meaningful way to the courts' engagement with issues like historical and modern treaty interpretation or, more generally, the concept of reconciliation. It is, unfortunately, not one with which this collection fully grapples.

That said, the collection remains an important contribution. It should be read widely because it considers some of the most challenging questions of moral and political theory faced by Canada and other states engaged with similar issues of Indigenous rights. The collection's discussion is rich with possibilities and ideas that will serve as groundwork for further theoretically sophisticated discussions about consent, political theory, and the relationships between Indigenous and non-Indigenous communities. It is to be profoundly hoped that these or other authors take the discussion farther in the future.