JUSTICE, COLONIALISM, AND THE STATE

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ABSTRACT
Karl Martin Adam: Justice, Colonialism, and the State
(Under the direction of Luc Bovens)

My dissertation explores ways that engaging with the history of settler colonialism should matter to work in contemporary political philosophy. I begin by critiquing the state of the debate in the philosophy of immigration. The most popular arguments for open borders--the view that people should nearly always be able to live and travel wherever they wish-- are parallel to arguments historically made to justify settler colonialism. Unless seriously qualified, these arguments have the counterintuitive consequence that most historical settler colonialism was justified; they also have dire consequences for the rights of indigenous peoples today. However, most of the popular arguments for immigration restrictions also fail to account for the rights of indigenous peoples. How, then, can we understand the principled basis of those rights?

I offer my own justification of territorial rights and (some) border controls based on Neo-Roman republicanism. This is the view that the purpose of political institutions is to protect people from *domination*, where domination is understood as subjection to the arbitrary will of another. There is a growing literature on the question of what (if anything) is wrong with colonialism apart from obvious wrongs that are often perpetrated by colonizers such as physical violence, enslavement, and the displacement of colonized people from their homes. I argue that colonialism is a wrong even in the absence of violence etc. because it involves domination in the sense just mentioned. Furthermore, I argue that rights to control territory and impose (some)

restrictions on immigration are justified as a means of preventing domination by settlers.

Philip Pettit, the most influential neo-Roman republican, has argued that a state is necessary to secure non-domination. This would seem to imply that my justification of territorial rights as a means of preventing domination does not apply to non-state societies. In response to this objection, I draw on defenses of non-state forms of governance in American Indian/First Nations philosophy as well as the actual history of non-state societies to rebut Pettit's arguments: non-state societies can successfully protect their members from domination and have actually done so.

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CONTENTS

INTRODUCTION

Contemporary political philosophy in the western analytic tradition--the tradition in which I am trained and with which I am most familiar--is, I believe, objectionably narrow in at least three ways. First, one of the most common methodologies in analytic political philosophy is reflective equilibrium. We propose principles and consider their implications for different real world or imaginary cases and then modify both the principles and our judgments about particular cases in light of one another. But analytic political philosophers tend to test their principles against real world cases from only a very narrow band of human experience, namely politics in contemporary western countries. And even here they tend (though of course there are exceptions) to ignore certain aspects of politics in these countries such as the fact that the U.S., Canada, etc. are settler states within which many indigenous peoples claim sovereignty over ancestral or treaty granted lands. This makes analytic political philosophers systematically unaware of the implications of the arguments they make for people living in other times and places as well as for e.g. indigenous peoples in the countries they do generally consider as test cases in reflective equilibrium. This matters practically because these arguments can be used against the people the philosophers did not consider when making them. It also matters theoretically because for reflective equilibrium to work, it must not systematically ignore negative implications of principles in certain types of cases.

Second, and relatedly, analytic political philosophers have a tendency to theorize from the armchair about what things would be like in the absence of certain political institutions or under institutions of a certain form. This is sometimes unavoidable. After all, without actually

try to put institutional structures in practice we have no way to predict what their effects will be other than by reasoning from what we know about human nature and about other institutions. But analytic political philosophers also have a tendency to ignore the historical and anthropological record in favor of armchair theorizing when it would be possible to investigate how institutions have actually worked in practice. This is related to the first point, because it is the historical and anthropological record outside the contemporary west and certain selected parts of western history that is ignored both in reflective equilibrium and in considering what kinds of institutions are possible or practical. And, again, there are both practical and theoretical negative consequences. Unnecessary armchair theorizing has negative consequences in practice as this reenforces negative judgements of political institutions in other times and places, judgements which have been and currently are used to justify attempts to destroy those institutions. It also has negative consequences for theory in that we analytic political philosophers lose access to the imagination expanding potential of the wide range of ways humans have found of living together and accept many false beliefs about which institutions are possible and practical.

Third, analytic political philosophy is objectionably narrow in that it mostly does not engage with other traditions of political philosophy. Contemporary political philosophers in the Chinese, African, American Indian/First nations, Islamic, and other traditions regularly engage deeply and sympathetically with western thought--both analytic and continental--but, with some honorable exceptions, analytic political philosophers read and respond only to other analytic political philosophers and political theorists and sometimes western social scientists. Again, this has both practical and theoretical negative consequences. Practically, this contributes to the extent to which non-western traditions and those who work in them are not treated with respect in the western academy. Perhaps more importantly, it also contributes to the extent to which

justifications of things such as indigenous rights that draw on indigenous philosophies are not treated as legitimate. Theoretically, in so far as philosophy is a truth-seeking enterprise, this narrowness cuts us analytic philosophers off from the truths discovered in other traditions and from the opportunity to advance further by having our beliefs challenged by those traditions. This narrowness is also related to the first two. It means that analytic political philosophers do not engage with arguments from those who take other parts of history and other current experiences to be relevant to questions in political philosophy, and it means that we do not hear or engage with arguments in favor of those systems of institutions we ignore by the people who live under them or who are in an intellectual tradition originating with people who once lived under them.

On one level, the following dissertation consists of three papers intervening in three different debates that are nevertheless building on one another. Chapter 1 critiques the state of the debate in the philosophy of immigration by pointing out that arguments for open borders lead to the objectionable consequence that settler colonialism was and is morally justified while existing arguments for immigration restrictions do a poor job of accounting for the rights of indigenous peoples to restrict settlement on their lands. Chapter 2 addresses the recent debate over what is wrong with colonialism, and gives a republican answer to that question, which I use to provide a justification of (some) immigration restrictions. And chapter 3 addresses what appears to be a negative consequence of the argument of the previous two namely that my republican account can support territorial rights only for states and not for non-state societies like many indigenous peoples.

My dissertation is also, however, an illustration of the problem with the three ways that analytic political philosophy is overly narrow described above. The contemporary analytic

philosophy of immigration is concerned almost exclusively with the immigration policies of the contemporary U.S. and Europe, with a little attention spared for Canada and Australia. As I argue in Chapter 1, this leads to arguments both for and against open borders that have negative consequences for indigenous peoples--consequences that are ignored when these arguments are used in reflective equilibrium. Philip Pettit, the most influential advocate of the republicanism I draw on in my first two chapters, argues that securing non-domination, the goal of republican political philosophy, is possible only in a state. His argument is based, however, primarily on armchair reasoning about how people would behave in the absence of a state with limited empirical data. As I argue in Chapter 3, paying attention to the anthropological and historical record of actually existing non-state societies can help us see ways that humans have overcome the problems that may seem insurmountable from the armchair. Analytic political philosophers have also almost entirely ignored the work of American Indian/First Nations political philosophers. This has enabled the philosophy of immigration literature to largely ignore the issue of settler colonialism and indigenous rights, despite these being central topics in American Indian/First Nations philosophy. It has also allowed analytic political philosophy to ignore the defenses of non-state political institutions put forward by many indigenous philosophers, which I discuss in Chapter 3. Of course, these are merely examples in which, I believe, philosophy that is less narrow in these three ways is made better by being less narrow. I have not proven that avoiding these ways of being narrow is generally beneficial to philosophy, but I believe that it is and hope to inspire my fellow analytic political philosophers to produce work that is less narrow in these ways.

CHAPTER 1

Settler Colonialism and the Philosophy of Immigration

> Welcome to Settler Colonialism. The first rule of Settler Colonialism is: you do not talk about Settler Colonialism. -- Burkhart 2019, 3

> Demographically, the imperial world was a white man's world. Europeans were more or less free (wars and depressions permitting) to migrate where they wished, or could make a living. Imperial rulers promoted Afro-Asian migrations to develop their colonies, and discounted the claims of local communities to keep their land to themselves. -- Darwin 2008, 299

I. Introduction

"Miguel Sanchez could not earn enough to pay the bills in his hometown. He tried for several years to obtain a visa to come to the United States and was rejected every time. In 2000 he entered on foot with the help of a smuggler" (Carens 2013, 1). So begins Joseph Carens's recent book on immigration, which then goes on to describe the difficulties the pseudonymous Sanchez faces including, most importantly, the constant fear of deportation despite marrying a U.S. citizen, raising children, and contributing to U.S. society for over a decade (Carens 2013, 1-2). Like the hook into Carens's book, the philosophy of immigration literature that has developed since the 1980s focuses almost exclusively on people like Sanchez, poor migrants from poor countries seeking a better life in North America and Europe (for an important exception to this trend see Reed-Sandoval and Diaz Cepeda 2021). There are good reasons for this, after all, this is the kind of immigration that is a hot-button political issue in contemporary western political discourse, and philosophers, in so far as they wish to be useful to society, should have something to say about these political debates. It seems especially urgent now in the age of Donald Trump,

Boris Johnson, and other politicians peddling hatred of immigrants to speak up on behalf of Miguel Sanchez and those like him who are the victims of anti-immigrant government policies and who too often are the victims of hate crimes inspired by the public statements of Trump, Johnson, and their ilk.

Furthermore, contemporary immigration policies are manifestly unjust. Books could be (and have been) written on this subject, but I will only mention three ways in which contemporary border policies are unjust and I will confine my examples to the United States, though similar things are true of the border policies of most rich countries. First, in part due to the lobbying efforts of employers, the current system results in millions of unauthorized migrants living in the shadows and suffering exploitation since their employers can, and do, have them deported if they agitate for better working conditions or notify the authorities of such things as the violation of worker safety regulations, the failure to pay minimum wage, and even sexual harassment and assault (Bacon 2013, Chs. 1, 4-6; Sager 2020, 41; Walia 2013, 66-74). This is particularly intolerable from the perspective of the neo-Roman republican theory of immigration I shall defend in the next chapter, but it should be objectionable to anyone concerned with the basic human rights of migrants. Second, the United States has a policy, known as "prevention through deterrence," of focusing enforcement resources on areas of the border with few natural barriers and relying on the danger of death involved in crossing through the desert to deter border crossings in other areas. This policy has failed to reduce illegal immigration since it was instituted in 1994, but it has resulted in the deaths of thousands of migrants (Mendoza 2017, 96-8; Walia 2013, 43-4). Again, this policy is inconsistent with concern for the basic human rights of migrants. Finally, through the promotion of trade policies like NAFTA combined with the subsidization of U.S. products (especially agricultural products) the U.S. shares a significant

responsibility for creating the conditions of poverty that many migrants to the U.S. are attempting to leave (Bacon 2013, Chs. 1-3; Walia 2013, 41-52). This may well impose on the U.S. a duty of reparation to allow the victims of its policies to attempt to improve their lives by migrating to the United States if the U.S. refuses to compensate them in other ways. Even if it does not, however, as the great classical Chinese philosopher Mengzi observed, most people are not able to be virtuous and law abiding if they lack a decent, and reliable, standard of living because they will be too focused on survival to fulfill their social obligations and too tempted to cheat, steal, and otherwise break the law in order to achieve a better life. Therefore, if the government establishes institutions and laws in such a way that people do not have a decent and reliable standard of living, and then punishes them for breaking the law, it is like "setting a trap for the people" (Mengzi 1A7, 3A3). Similarly, if the U.S. causes Mexican farmers to lose their land because it gains permission to sell subsidized American corn in Mexico and then punishes migrants from these countries for violating American immigration law, it is setting a trap for the people.

The understandable focus on these sorts of injustices and the plight of migrants like Miguel Sanchez has, however, lead to an over-reaction in which defenders of so-called "open borders" argue that the trouble with the immigration policies of the U.S. and other rich countries is not due to the particularities of the history of the countries involved or due to inhumane enforcement practices but rather to the very attempt to restrict immigration itself. Since Joseph Carens's ground-breaking 1987 article, "Aliens and Citizens: The Case for Open Borders," three main families of arguments have been put forward to establish that people should generally be able to live in whatever country they like with only very minor restrictions--namely arguments from fairness, arguments from liberty, and arguments from utility. These arguments, I will show,

go too far since, unless they are seriously qualified, they justify much of the practice of settler colonialism. Indeed, this should be unsurprising since arguments of these three types, among others, were made by prominent defenders of settler colonialism from the 16th Century on. If we are committed, as I believe we should be, to some sort of reflective equilibrium, we should reject the sweeping claims of open borders advocates that border controls are unjust in general and assess immigration policies in a more fine-grained way. Doing this also requires going beyond the standard arguments given in the literature to justify some border controls since these arguments have trouble accounting for the rights of indigenous peoples. All this, in addition to being an intervention into the open borders debate in the philosophy of immigration, is also an illustration of the importance of considering the ways that philosophical arguments apply to times and places beyond contemporary Europe and North America.

The next section of this paper will describe in detail the three families of open borders arguments mentioned above, discuss their historical antecedents in defenses of settler colonialism, and show how the contemporary arguments for open borders lead to the conclusion that historical settler colonialism was morally justified unless they are hugely qualified. Then Section III will discuss popular arguments for the right of political communities to restrict immigration and show the trouble they have accounting for the rights of indigenous peoples. This sets the stage for my positive proposal in Chapter 2.

II. Arguments for Open Borders

In this section I discuss each of the three main families of open borders arguments. Historically, arguments in support of settler colonialism were made in each of these three families closely parallel to the contemporary open borders arguments. It would seem, then, that

advocates of the contemporary open borders arguments must endorse the conclusion that settler colonialism was and is justified unless they can find a relevant difference between their arguments for open borders and the arguments for settler colonialism showing that the open borders arguments somehow do not apply in settler colonial contexts or unless they identify a countervailing consideration that shows why indigenous peoples are justified in resisting settlement without justifying immigration controls more widely. For each of these families of arguments, I argue that the open borders arguments do not differ from the pro settler colonialism arguments in any way that would make them not apply in settler colonial contexts. Unfortunately, most of the influential advocates for open borders have not considered the impact of their position for the rights of indigenous peoples or have given lip service to indigenous rights without explaining why indigenous people have the right to control access to their lands despite the open borders arguments (see e.g. Carens 2013, 247).

A. Arguments from Fairness

Joseph Carens begins his argument for open borders by making an analogy between the privilege of citizens of rich countries and the privilege of the feudal nobility (2013, 226). Carens does not define what he means by "feudalism", but from what he says it appears that by "feudalism" he means a system in which there is a legally recognized division between those born nobles and those born commoners and in which nobles have much better life prospects than commoners (2013, 226, 228). He draws attention to two analogies between feudalism and contemporary border controls. The first of these is that being born into a rich country dramatically improves one's life prospects in the same way that being born into the feudal nobility did, though there are poor people in rich countries and rich people in poor countries just

as in feudal systems there are some poor nobles and some rich commoners. The second is that this privilege of birth is defended by laws that keep the citizens of poor countries out of rich countries and keep the commoners down. Feudalism, Carens believes his readers will agree, was unjust because it involved this sort of legal barrier to equal opportunity. He challenges the defenders of border controls to explain why the barrier to equal opportunity involved in a legal prohibition (backed by people with guns) of people from poor countries moving to rich countries is any less unjust (2013, 226, 228). Opening borders, Carens admits, might well not do much to ameliorate substantive global inequality since it takes resources to migrate, and even with open borders, migration would likely not be an option for the poorest of the poor. But opening careers to talents did not significantly improve the lot of most peasants, though it was still a moral advance over feudalism. Similarly, he argues that even if opening borders will not significantly improve the lives of most of the world's poor, doing so would make the world more just because they would at least have formal equality of opportunity (Carens 2013, 235).

Another argument Carens offers for open borders is based not on equality of opportunity but on his claim that "a commitment to equal moral worth entails some commitment to economic, social, and political equality" (2013, 228). One might think Carens would argue that borders must be opened because doing so would reduce the economic, social, and political inequality in the world by allowing at least some poor people to become less poor by emigrating to a rich country. As mentioned above, however, Carens admits that opening borders would only be moderately effective at reducing global inequality not least because the poorest people would not have the resources to emigrate even if borders were open. In addition, he accepts the criticism that there is something morally perverse about responding to poverty in poor countries by encouraging people to leave their homes instead of helping them to have a good life where

they live. Therefore, he agrees that what is needed to reduce global inequality is a host of other measures, which he describes as a transfer of wealth from rich to poor countries and a transformation of global institutions (Carens 2013, 233). Furthermore, he makes clear that he is not making a policy proposal to current states saying that they should open their borders. This is politically unachievable given the current political climate and raises significant issues of non-ideal theory that fall outside the scope of Carens's book, such as how one state should act given that the other rich states do not fulfill their obligations to open their borders (Carens 2013, 229-30). Rather, he is claiming that in a just world, borders would be open. The other measures to reduce global inequality he calls for, he believes, would make open borders politically possible, because they would result in a world without poor countries that vast numbers of people would want to immigrate from. As he puts it, "In principle, free movement is not in conflict with global justice but rather is part of what global justice requires" (Carens 2013, 234). So how does our commitment to economic, social, and political equality justify open borders? In part, the answer is the argument from equality of opportunity above, but in part the connection is that the argument for open borders removes excuses for inaction regarding global inequality. This is so because at least some poor people are poor because we use force to prevent them entering rich countries. Therefore, whatever one thinks of the arguments that purport to show that the economic policies and imperialism of the rich countries are responsible for global poverty, our unjust border controls make us responsible, and this grounds a duty to reduce global inequality by means other than opening borders (Carens 2013, 234-5).

Mathias Risse builds another fairness-based argument not strictly speaking for open borders but for a more limited conclusion, the right of people in over populated countries to move to less populated countries. When he introduces this argument, he has already argued that

the earth is owned in common by all people, and that what this amounts to is that each person has a human right to have their basic needs met where they live. In this argument he assumes that all people have their basic needs met to show that even if this is the case, there is a right to immigrate to less populated countries for people from more populated countries (Risse 2012, 153). He starts his discussion with a thought experiment in which the population of the United States has fallen to two persons, who have the technology to control the borders. These people, he thinks we will agree, must not restrict the entry of others who wish to enter the country in order to keep it all for themselves (Risse 2012, 253). He then explains that population density alone is not enough to tell if a country is overusing or under using its resources because the resources in different countries vary and are more or less useful to humans. Therefore, we need a measure of overuse or under use of resources. The best such measure, he argues, is whether the bundle of resources used by the average inhabitant of a country has a market value higher or lower than the bundle of resources used by the average human (Risse 2012, 154-6). This argument is based on the idea that no society should use a disproportionate amount of resources because doing so would be unfair, so it does not justify immigration into countries where the standard of living is higher because resources are used more efficiently (Risse 2012, 165). There are complications here involving resources becoming useful as a result of human labor, e.g., the Dutch dikes producing useful farmland (Risse 2012, 157-9), but a detailed discussion of Risse's handling of this issue is not necessary for the present paper.

An early argument of this type is put forward in Sir Thomas More's dialog, *Utopia*. In this dialog, the character Hythlodai explains that when Utopia becomes overpopulated, that is when its population exceeds the number the Utopians believe is ideal, they form colonies on the mainland. They do this by taking land from its original inhabitants and giving the original

inhabitants the choice between becoming members of the Utopian colony and living under Utopian laws on the one hand and being driven away or killed on the other. The Utopians provide two justifications for their taking of land. One is a utilitarian argument that I will discuss in Section C below. The other is based on the principle that when some people have more land than they need, it is just for those who do not have enough to take some of it. Furthermore, if those with more land resist, the law of nature justifies war against them (More 2014, 67). I do not intend, here, to enter the debate over the extent to which More endorses the institutions and arguments of his fictional Utopians. Whether or not More endorsed them, however, the actions and justifications of his fictional Utopians anticipated the practice and justification of real settler colonialism, which had not yet begun when the dialog was published in 1516.

Thomas Hobbes, too, provides a brief argument of this type. In a famous passage of Leviathan he writes, "The multitude of poor (and yet strong) people still increasing, they are to be transplanted into countries not sufficiently inhabited, where, nevertheless, they are not to exterminate those they find there, but constrain them to inhabit closer together, and not range a great deal of ground to snatch what they find, but to court each little plot with art and labour, to give them their sustenance in due season" (2.30.19). Again, we have here the idea that over population in one community justifies migration to another.

A more developed form of this argument was put forward by Emer de Vattel who argues that no nation is entitled to more than its fair share of the world's resources. In the past, it may have been permissible for people to be pastoralists or hunter-gatherers, but the world's population is now too high for all to live this way, so no people have the right to claim a larger portion of land than they need so that they can have a higher quality of life as nomads rather than laboring as farmers. Therefore, the conquest of the densely populated Meso-American and

Andean states by the Spanish was unjust, but conquest of American Indians who claimed large tracts of land they would not need if they were agriculturalists was, in Vattel's phrase, "most just" (1.8.81, 1.18.209). Vattel seems to take much of this back, however, when he argues later that one people cannot simply take the land of another even if that nation is not really using it because doing so would violate that nation's rights of property and would, by analogy, permit peasants to take over the properties of the lords (2.8.86-90). This is, I think, meant to apply only after the principle that a nation cannot take a disproportionate part of the earth's resources, which is the only way I see of interpreting Vattel to be consistent. In any case, the original argument Vattel makes should be compelling to contemporary proponents of fairness-based arguments for open borders.

I have called the arguments discussed in this section fairness based because they all rely on the claim that certain kinds of inequalities are unfair. I have not called them egalitarian, because some, e.g., More's argument, are better thought of as sufficientarian with a high sufficiency threshold. Risse's argument is fairly clearly a modification of those of More, Hobbes, and Vattel, but the connection to Carens's argument might be less apparent. Things have changed significantly in the last several centuries so that whereas Vattel started by appealing to the intuition that it was unfair for some people to have a good life as hunter-gatherers if the population was too high for everyone to do so and tried to counteract the obvious implication of his argument that feudalism was unjust, Carens has a much more thoroughgoing egalitarian position and starts with the injustice of feudalism and attempts to discredit border controls by association. Carens is, I think, appealing to the same sorts of intuitions about fairness as Vattel, More, and maybe even Hobbes though he is more consistent and uses them to construct broader more egalitarian principles.

It is difficult for advocates of the contemporary arguments for open borders discussed in this section to reject Vattel's conclusion that European settler colonialism in areas of relatively low population density, like North America, was just. If the mere exclusion of people from certain territories is analogous to feudalism, as Carens argues, then American Indian attempts to keep Europeans off their land are analogous to noble's clinging to their feudal privileges. Interestingly enough, the concept of the "noble savage" was originally coined by Marc Lescarbot when he observed that all American Indians were "noble" because they hunted, a privilege restricted to the nobility in Europe (Ellingson 2001, 21-4). Europeans in the 16th through 18th centuries were in many ways worse off than American Indians. They had poorer nutrition and worse quality of life due to their higher population densities (Bailyn 2012, 25-7; Richter 2003, 56-7). In addition to those fleeing religious persecution, many immigrants, though they were not the poorest of the poor, were dispossessed peasants and small farmers suffering the effects of enclosure (Kulicoff 2000, 7-8, 16-27, 39-41, 53-61, 165-7, 174-190). Attempts to keep Europeans off American Indian land, thus, functioned to keep the poor poor and preserve a status quo in which natural resources in some areas were under used while natural resources in other areas were overused. If these are wrong-making features of contemporary immigration restrictions, then they were wrong-making features of historical immigration restrictions as well.

B. Arguments from Freedom

Michael Huemer provides an argument that attempts to build up from shared intuitions about justifications for coercing an individual to the conclusion that we have the right to cross borders. He describes a case in which a man, Marvin, wants to walk to the market to buy food

and another man, Sam, prevents him from doing so. Sam's action, he thinks we will all agree, is unjust barring special circumstances such as Marvin having previously hired Sam to prevent him from going to the market. In this scenario, Huemer thinks that Marvin is analogous to an immigrant, the marketplace is analogous to the country they wish to emigrate to, and Sam is analogous to the government that tries to prevent them. This analogy shows, Huemer thinks, that immigration restrictions are prima facie rights violations and require a significant justification. He goes through the various reasons a government might want to keep immigrants out such as fear of economic competition, a desire to promote the interests of those to which it has special obligations, prioritizing the least well off, cultural preservation, etc. and argues that Sam could not legitimately prevent Marvin from going to the market for any of these reasons. Therefore, the government cannot prevent immigration for these sorts of reasons either (Huemer 2010, 431-50). Only truly catastrophic effects of immigration could justify immigration restrictions and he does not believe that the catastrophic effects he has in mind such as environmental devastation, the collapse of social programs, the collapse of liberal democracy, etc. are likely. This being said, he suggests only gradually opening the borders to ensure that they can be closed again if this sort of catastrophe threatens (Huemer 2010, 450-5).

In addition to the egalitarian arguments discussed above, Carens provides what he calls a cantilever argument for open borders. This argument begins with what he takes to be the shared assumption that there is a human right to freedom of movement within the state and attempts to extend this to a human right to freedom of movement across borders. The human right to freedom of movement within the state is recognized in various human rights documents including the UDHR, and, Carens believes, will be endorsed by liberals and democrats. This human right cantilevers to a human right to move across borders, he argues, because there is no

human interest protected by the human right to freedom of movement within the state that could not equally lead one to wish to move from one state to another. Therefore, he argues, whatever reasons there are for protecting the ability of people to move freely within the state are also reasons to protect their ability to move from one state to another. He then refutes five attempts, which I will not address here, to show that the analogy between movement within the state and movement from one state to another fails and concludes that he has shown that his cantilever argument succeeds (Carens 2013, 237-45).

In his "On the American Indians," Francisco de Vitoria provides a series of grounds that could have made the Spanish conquests in the new world just. The first of these is that it would have been just to conquer any American Indian community that prevented the Spanish from exercising their natural right to trade and live in these American Indian communities. Vitoria, in good neo-scholastic fashion, justifies this supposed natural right with a long list of different scriptural and historical authorities, with appeals to the consent of mankind, and, most importantly for my purposes, with two arguments appealing to the idea of freedom of movement. The first of these is that freedom is the default position, and a political community must provide a good reason to restrict it, but the only legitimate reason would be that the movement in question causes actual harm. The second is that either one of two conditions attain: either the Spanish are subjects of the American Indians, or they are not. If they are not, American Indian laws cannot infringe on the freedom of the Spanish to go where they wish, and if they are, then the American Indians cannot exclude them (3.1.1-2). From this Vitoria believes it follows that the Spanish have the right to trade and settle, again unless they cause actual harm (3.1.3). Finally, he argues that if there are things in a particular community that are not individually owned and may be appropriated by any member of the community, then foreigners can also

appropriate these things (3.1.4).

My, admittedly controversial, interpretation of Vitoria is that he believed the actual Spanish conquests in the Americas were unjust because these wars of conquest were not, in fact, an attempt to protect the rights of Spanish citizens to trade and settle. What is of interest here, however, is not whether he was an apologist for the Spanish crown but rather that he provided an argument that it is wrong to prevent foreigners from trading and living in one's community, which clearly implies that later American Indians when they faced settlers rather than conquering armies had no right to exclude those settlers from their lands. His argument was, indeed, used to justify precisely this by English colonial apologists (Fitzmaurice 2014, Ch. 3).

In his *The Rights of War and Peace*, Hugo Grotius develops this sort of argument further. He distinguishes between individual (and presumably family, partnership, etc.) ownership of land and national ownership of land, or as he also phrases it, jurisdiction. Individual ownership of land he argues, is based on first occupation and use, but a nation can claim ownership of unused land (2.2.4). Property rights, whether national or individual, however, come with the proviso that the property may be used by non-owners for non-harmful purposes. This is because people would not have agreed to the creation of individual or national property without this proviso since agreeing to the creation of property without this proviso would not be in anyone's interest prior to the establishment of property (2.2.11).

As an application of this, nations (and presumably individuals) must allow passage through their territory, though they may demand compensation for any damage done by those passing. This applies to not only trade goods but also to migrants and to armies engaged in just wars. Possible retaliation by the enemies of the army seeking passage is not a reason to deny passage and, furthermore, neither is fear that the army will conquer one's nation rather than

merely passing through because, "one Man's Right is not diminished by another Man's Fear..." (2.2.13). He then argues that victims of shipwrecks and similar occurrences must be allowed to stay for a short time in one's country and refugees must be allowed to stay permanently on the condition that they obey the laws (2.2.15-6). Finally, he argues that if there is land owned by a nation but not individually owned, it must be granted to foreigners upon request provided, once again, that they obey the laws. The only exception to this is land used for an important collective purpose, he gives the example of land owned by Rome and used to graze cattle for the army (2.2.17). Grotius does not explicitly say what if any remedy there is if a political community prevents settlement on unowned land, but he does defend the use of force to secure passage if one's passage through a nation's territory is denied (2.2.13). Therefore, it seems likely that he would also support force by would-be settlers. Grotius, again, does not specifically address this point, but it also seems clearly to follow that if foreigners must be allowed to enter a country and take unclaimed land, they must be allowed to purchase existing land especially given his claim that trade may not be restricted by the state (2.2.13).

Both Vitoria and Grotius assume that in the state of nature, people would be free to move as they wished through the world. They then ask whether the creation of political communities meant that people no longer had this freedom and answer in the negative. Only private property gives individuals the right to prevent other individuals from settling on particular pieces of land, though it does not give individual property owners the right to prevent passage across their property. Huemer's argument is similar to this beginning with Sam and Marvin meeting in what might as well be the state of nature and concluding from the wrongfulness of Sam's obstruction of Marvin that the introduction of a state with a border between Marvin and the Market does not make it permissible for him to be obstructed. Carens's cantilever argument is even stronger than

those of Vitoria, Grotius, and Huemer. Rather than simply asserting that the restriction of human freedom involved in border controls requires justification and rejecting possible justifications as they do, Carens asserts that freedom of movement in particular is a human right.

Like those of Grotius and Vitoria, the arguments of Huemer and Carens put significant pressure on indigenous rights. If there is a human right to cross borders as Carens suggests or if preventing someone from crossing a border is wrongful coercion analogous to Sam preventing Marvin from reaching the market as Huemer suggests, then settlers had at least a right to move onto indigenous lands that were not privately owned.

C. Utilitarian Arguments

Oddly enough considering their importance in debates over global justice more generally, influential contemporary utilitarians like Peter Singer have not become prominent participants in the debate over open borders. Open borders proponents who are not utilitarians, however, bolster their other arguments with the claim that open borders would maximize utility because open borders maximize economic efficiency. The same reasons that justify free trade, they argue, also justify free movement of people to where the jobs are. Free movement of workers would ensure that skilled workers go where their skills can best be put to use and unskilled workers would work where cheap labor is most efficient maximizing production and minimizing production costs (Carens 1987, 263; Johnson 2007, 137-43; Legrain 2007, Chs. 3-4; Sager 2020, 32-3).

More, as I mentioned above, provides an early Utilitarian argument for settler colonialism. What is relevant for my purposes here is that the Utopians justify their settler colonialism in part by the fact that their methods of agriculture are more productive. Because of this, the land they colonize can support both the colonists and the original inhabitants at a higher

standard of living than the original inhabitants enjoyed prior to the founding of the colony. So when the Utopians give the natives of nearby lands the choice between living as members of a Utopian colony or being driven out, they are offering them the chance to have a higher standard of living (More 2014, 66-7).

A much more famous, and very influential argument, along the same lines was provided by John Locke in his *Second Treatise of Government*. This argument is embedded in a larger argument in which Locke attempts to show that individual appropriation of things owned in common can be justified. Locke has argued that individual appropriation is permissible only when "enough and as good" is left for others (5.33). He then points out that cultivated land produces significantly more than uncultivated land. Therefore, when someone appropriates land and cultivates it, they increase the amount of produce available to humanity. In Locke's example, cultivated land produces ten times as much as uncultivated land, so someone who appropriates and cultivates ten acres of land produces as much from those ten acres as was originally produced from 100 acres. This means, according to Locke, that the person has in effect given 90 acres to humanity since the yield of the remaining 90 acres is now in addition to the yield from the ten cultivated acres, which produce a yield of the same quantity as the original 100 acres (5.37). He then goes on to claim that American Indian land management practices are unproductive in this way compared to European methods of land use (5.41-3). Furthermore, American Indian lands can be appropriated by anyone who will appropriate and cultivate them because American Indian lands have not been claimed by individual American Indians and are, thus, still part of the global commons. Or as he puts it, "in the beginning all the World was America" (5.49). Thus, by implication, European settlers who appropriate and cultivate American Indian land are benefiting humanity.

There are significant problems with Locke's overall complex argument. For one thing, it is not clear that someone who cultivates ten acres and makes them produce as much as 100 uncultivated acres has left enough and as good for others even if they have increased global production. This is because the cultivator keeps the product of the ten cultivated acres and leaves only the product of the 90 acres free to be gathered by the rest of humanity. Humanity as a whole may have more product to use in this situation, but less of the product is available to everyone except the cultivator. Of course, the rest of humanity could trade for what is now owned by the cultivator, but in many cases having to exchange something else for this product leaves them with less than when they could simply gather and hunt on the land that has now been cultivated. Perhaps more importantly, Locke offers an inconsistent position in that he recognizes that one cannot simply appropriate part of the land set aside as a commons by law in European countries. This is because this land is common to a particular community not to humanity as a whole, and members of the community must follow the law (5.35). But American Indian communities also had societal agreements that land was common to a particular community (Greer 2018, Chs. 2, 7; Jennings 1975, 67, 71, 94). If the fact that England say has reserved some land in common means that people from other political communities cannot increase the resources available to humanity by appropriating and cultivating it, then it is quite dubious to claim that people can increase the resources available to humanity by appropriating and cultivating the land held in common by American Indian communities.

Abstracted from Locke's larger argumentative structure, however, his appeal to economic efficiency and to the increase in the standard of living it enables one to form a powerful argument if one is a utilitarian or regards utility as extremely important. Here, for instance, is Andrew Jackson making the economic efficiency argument by itself as a justification for settler

colonialism:

> Humanity has often wept over the fate of the aborigines of this country, and Philanthropy has been long busily employed in devising means to avert it, but its progress has never for a moment been arrested, and one by one have many powerful tribes disappeared from the earth. To follow to the tomb the last of his race and to tread on the graves of extinct nations excite melancholy reflections. But true philanthropy reconciles the mind to these vicissitudes as it does to the extinction of one generation to make room for another... Nor is there anything in this which, upon a comprehensive view of the general interests of the human race, is to be regretted. Philanthropy could not wish to see this continent restored to the condition in which it was found by our forefathers. What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of Liberty civilization, and religion? (qtd in Richter 2003, 235-6)

Now, there are many reasons to question whether open borders would in fact maximize utility. Like the benefits of "free trade," the benefits from free movement of workers might primarily go to the already wealthy, which given the diminishing marginal utility of wealth could mean that aggregate utility actually goes down. Then there are possible negative side effects of open borders. As David Miller argues, for instance, open borders could seriously harm global efforts to reduce population growth since countries have less of an interest in limiting population growth if people can easily move to a less populated country (Miller 2005, 201). More importantly for my purposes here, however, is the fact that the appeal to economic efficiency of the contemporary advocates for open borders is almost identical to the appeal to economic efficiency of Locke or Andrew Jackson. The only difference is that the contemporary version of the argument appeals to workers maximizing efficiency by moving to where the jobs are while the settler colonial variant appeals to farmers maximizing efficiency by moving to where the land is. If anything, the utilitarian argument for settler colonialism is stronger than the utilitarian argument for open borders--as I have suggested, there are many reasons to question whether open borders would in fact maximize utility, but at least aggregate utility was clearly maximized

when Europeans displaced American Indians and formed societies with much higher population densities.

III. Arguments for Border Controls

The arguments for open borders I have discussed above, as the advocates of open borders acknowledge, are only pro tanto and could, in theory, be outweighed by other considerations. The typical strategy of the advocates of open borders, therefore, is to provide these positive arguments and then knock down all the arguments for the conclusion that political communities have the right in a substantial number of cases to restrict immigration (Carens 1987; Carens 2013; Hidalgo 2019; Huemer 2010; Johnson 2007; Legrain 2007; Mendoza 2017; Sager 2020). Even if the attempts by the open borders advocates to refute these arguments for border controls fail, however, there is another problem with the common arguments for the conclusion that political communities have the right, in a substantial number of cases, to restrict immigration if they so choose (the position misleadingly called "closed borders" in the literature). These arguments all to a greater or lesser degree have trouble accounting for the rights of indigenous peoples to control access to and settlement on their lands. In the remainder of this section, I briefly show why four popular types of arguments for "closed borders" fail in this way.

A. The Argument from Associative Ownership

One argument that states have the right to restrict immigration, most notably put forward by Ryan Pevnick (2011), is based on the idea that communities have ownership rights over the institutions and other public goods they produce. Pevnick argues that just as a family may pass down a farm to their descendants or a congregation may pass down their church to future

members, citizens may choose (with some constraints) to whom to pass down control of the things they have created (Pevnick 2011, 36-40, 53-4). These goods include, "protection from internal and external threats, risk-protection schemes (such as public healthcare or pension programs), and programs facilitating the achievements of members (such as publicly supported higher education programs)" (Pevnick 2011, 53). Since sharing in these sorts of goods is the primary value of membership in a state, Pevnick argues, the citizens who are the creators of these goods and their heirs may exclude those who did not have a share in creating them (Pevnick 2011, 38-9, 53-4).

Pevnick then goes on to consider an objection to this view, namely that while it seems to work for public goods created by members, like social insurance, it does not seem to apply to access to territory (Pevnick 2011, 54-5). Pevnick's response is to argue that while there are exceptions, his example is migration to Israel, the reasons people have for migrating to receiving countries are typically based on the goods produced by the citizens. Even land derives its value from the political and economic institutions that enable it to be put to productive use (Pevnick 2011, 55-7). Thus, he writes, "In sum, the general line of argument that I have advocated is that as long as the value of entrance to the territory hinges on the goods that, as a result of the processes of social cooperation, become connected to that territory, it is a mistake to suggest that all have a right to access. Instead, because those goods only exist through the coordinated efforts of the citizenry, the political community has a legitimate claim to controlling the shape of access to them" (Pevnick 2011, 60).

The trouble with this argument is that it implies that countries like the U.S. have a greater right to restrict immigration than indigenous peoples who were and are the victims of settler colonialism. Immigrants to the U.S. wish to benefit from the various public goods provided by

the state from infrastructure to social welfare programs to the economic prosperity underwritten by the state. Paradigm cases of settler colonialism, on the other hand, involve settlers who genuinely primarily want land rather than access to public goods produced by indigenous communities. In these cases, it is also not that they want the land because they can use it to profit by engaging with the economy of the indigenous community in the way that someone who migrated to say the contemporary U.S. and began farming would then profit by selling to other U.S. residents and corporations. Rather, in paradigmatic cases of settler colonialism the settlers primarily support themselves and trade with their country of origin or the world market. Now, of course, Pevnick could support the rights of indigenous communities to exclude potential settlers, but to do so, he would have to appeal to reasons other than associative ownership. Thus, the argument from associative ownership, even if it succeeds, cannot be what is needed to qualify the arguments for open borders to avoid their problematic consequences for the rights of indigenous peoples.

B. The Argument from Freedom of Association

Another type of argument for the right to restrict immigration appeals to the widely recognized right of freedom of association. The most influential defender of this sort of argument is Christopher Wellman. Wellman points out that we generally value freedom of association in a number of areas of life from the freedom to marry who one wishes, to the freedom to join religious organizations, to the freedom to join various other private clubs and associations. Importantly, the freedom of association is also the freedom to not associate--to refuse proposals of marriage, choose not to join a religion, etc. We also, he argues, value freedom of association at the level of the state, and this is what explains the fact that it is wrong for one state to annex

another without its consent, the fact that consent is needed on both sides for states to enter organizations like the European Union or NAFTA, etc. Therefore, he argues, citizens have a pro tanto right to control, through their states, what current non-citizens (if any) will be admitted to the association. This is because as a citizen, I am brought into association with new immigrants even if I never interact with them directly both because they become co-directors of the policies of the state and because when they become fellow citizens, I gain special obligations towards them (Wellman 2008, 9-15).

The freedom of association argument does provide a defense of some important indigenous rights. For instance, settler states, like the U.S. and Canada, have imposed membership criteria on indigenous communities rather than allowing them to continue determining who their members are (Alfred 2009, 108-11; Coulthard 2014, 83-91; Simpson 2014, 13-6, 56-65). If the U.S. and Canadian governments truly respected freedom of association, they would no longer force indigenous communities to accept members based on alien criteria or exclude from membership, and the benefits of membership, individuals who are members based on indigenous criteria. Freedom of association does not, however, provide grounds for indigenous land rights. This is because, as I pointed out in my response to Pevnick in the previous subsection, paradigmatic cases of settler colonialism did not involve settlers wishing to join indigenous communities (i.e., to become associates of the indigenous people in question) but rather involved settlers attempting to gain access to indigenous lands.

Wellman attempts to respond to a related objection that he may have justified the right to restrict membership but has not justified the right to restrict access to territory by arguing that states are necessarily territorial and must have jurisdiction over everyone in a given territory to perform their central functions of securing the human rights of each member and resolving

disputes (Wellman 2011, 99-100). There are a number of problems with this argument even in its intended role of defending the right of states to restrict immigration. One might think, for instance, that people could immigrate to the territory claimed by a state and not be granted political rights (meaning they are not associating with the existing citizens in government). They would, of course, likely form other associations with the citizens from marriage to joining the same golf clubs, but these other associations would be voluntary. It has even greater problems accounting for the rights of indigenous peoples in non-state societies since by definition they are not organized into states which have the function Wellman identifies. Furthermore, freedom of association by itself even if it must exist in some territory does not provide a connection to any particular territory or amount of territory. It does not show that indigenous people have the right to prevent settlement because the settlers will, In Hobbes's phrase, "constrain them to inhabit closer together." Freedom of association is preserved when an indigenous people is forced onto a reservation on a part of their former lands, or arguably even after removal to another territory entirely, so long as the settlers do not become members of the indigenous community and the indigenous people can, if they choose, stay on their reservation, and not join associations with the settlers. We must, then, look to other grounds of the rights of indigenous peoples to restrict immigration to their territories.

C. The Argument from Cultural Preservation

Yet another argument for restricting immigration relies on the idea that this is necessary for people to preserve their cultures. The most influential advocate of this sort of view in the philosophy of immigration is David Miller (2005; 2016), but I shall focus on the version of the

argument provided by Will Kymlicka because Kymlicka, unlike Miller, explicitly focuses on defending the rights of indigenous peoples with this argument. According to Kymlicka, legal institutions designed to protect cultures are required by a proper understanding of equality. This is because the ability to live in one's culture is an important good, and this good is unequally distributed since some people face barriers to the preservation of their culture that others do not. In particular Kymlicka focuses on the use of one's language in public life and such public policies as whether public holidays and the work week permit one's religious observance. The right to restrict immigration, for Kymlicka, flows from the need not to be outvoted on issues of language policy etc., and it is important not to be outvoted on these issues because this is the only way to reliably preserve one's culture (Kymlicka 1996, 108-13, 124-6).

Kymlicka, like Wellman, has gotten something importantly right. It is important for cultural groups not to be systematically outvoted on issues important to them, and, indeed, I will put this at the center of my positive proposal in the next chapter. There is, however, also something deeply problematic about his view, namely the reliance on cultural difference. As a number of proponents of indigenous rights, both indigenous and non-indigenous have pointed out, this sort of cultural preservation basis of indigenous rights makes indigenous rights vulnerable to cultural change and liable to disappear if indigenous people (voluntarily or not) begin speaking the languages of the settler state, convert to world religions, etc. (Bessire 2014, Ch. 8; Engle 2010; Nichols 2020 187-8). Indeed, in some of his later work, Kymlicka himself notes this objection and the ways that states, such as Brazil, have attempted in practice to deny rights to indigenous people for supposedly not being "real" Indians due to assimilation into majority culture (Kymlicka 2001, 141, 148). Kymlicka acknowledges that for strategic reasons it may be best to emphasize an alternative justification of indigenous rights, like historical property

claims based on first occupancy, but then doubles down on his argument by pointing out the weakness of historical property claim arguments vis-a-vis egalitarian arguments for redistribution (2001, 148). But this is not a successful response to the problem. Kymlicka's critique of historical property claim arguments may well be a good one, in fact I believe it is, but that would show that his own cultural protection proposal is the best justification of indigenous rights only if cultural protection and historical property claims were the only two plausible defenses of indigenous rights. And, whatever the weakness of alternatives, Kymlicka has done nothing to mitigate the counterintuitive consequences of his own view.

D. The Argument from Self-Determination

The final argument for immigration restrictions I shall discuss is based on self-determination. In one sense leaving self-determination arguments for last is misleading since both Pevnick and Wellman also put their arguments in terms of self-determination. But what Pevnick means by "self-determination" is just the ability of a political community to restrict immigration and control membership, not the sense of self-determination I will be discussing in this subsection, and Wellman focuses on freedom of association, though he also claims this is an aspect of self-determination rather than something separate since a community cannot be self-determining without freedom of association. Here, though, I will focus on arguments based directly on the idea that it is important for political communities to be self-determining. David Miller, again, makes influential arguments of this type (Miller 2016), but I shall focus on the self-determination based argument found in Margaret Moore's 2015 book (in the next chapter I will also discuss a related argument Moore makes in a later paper for the wrong of the taking of territory) because unlike Miller and most of the philosophy of immigration literature, Moore

considers indigenous peoples land claims as a central case in her book. Moore argues that to be self-determining, a people must have the ability to restrict immigrations for two sorts of reasons. First, the future composition of the community is both directly and indirectly a matter for the self (the community) to determine. This is because the community may directly have preferences over the people who will make it up in the future, and because various other priorities, from land use planning to planning for the types of skills required in the population require being able to control who becomes a member of the community to implement. Second, in some circumstances, a people cannot be self-determining without controlling immigration since otherwise newcomers can wrest control from the original inhabitants and come to dominate them (Moore 2015, 195-203).

Moore, like Kymlicka and Wellman, has hit on important truths about the reasons for restricting immigration. Indeed, my own proposal in the next chapter runs on similar lines as her second self-determination-based reason for restricting immigration, though I appeal to the danger of domination directly rather than through the risk that it poses to self-determination. But the idea of self-determination that she, like the rest of the philosophy of immigration literature, uses is deeply problematic for indigenous peoples. This is because Moore et al. understand self-determination in the sense of positive liberty. Moore argues that to be self-determining, a political community must be a corporate agent that can make collective decisions in a centralized way. This is what it means, she argues, for the community, the self, to determine things, namely the conditions of life of the members. She recognizes that some communities lack the political institutions to be self-determining in this sense, but her only remedy to this is a duty of international society to help communities construct the institutions necessary for self-determination (Moore 2015, 47-54). But, of course, many indigenous peoples historically did not

have means of collective decision making at the level of the whole people, and some do not today though other indigenous peoples have been forced to develop such institutions by settler societies. Thus, there is a dilemma for Moore's account. Either non-state indigenous societies that lack centralized decision-making procedures do not have the self-determination based right to control immigration onto their lands at all because they are not self-determining, or if they do have such a right, it is only because of their potential to develop centralized decision-making procedures. The former horn of the dilemma makes this type of argument quite bad at providing justification of indigenous rights to control access to land, and even the second horn of the dilemma is deeply problematic since many indigenous communities have chosen not to develop these institutions and this would make developing a type of institution contrary to their political traditions a requirement of their rights to control their territory.

IV. Conclusion

This chapter has shown that both popular arguments for open borders and popular arguments for closed borders have objectionable implications for the rights of indigenous peoples. The popular arguments for open borders seem to provide as good a justification for the rights of would-be settlers on indigenous lands as they do for the rights of would-be immigrants to the U.S. or the EU. Furthermore, this is not a coincidence since similar arguments were in fact developed historically to justify the actions of settlers. The popular arguments for closed borders, even if they escape the challenges offered by open borders advocates, all fail to justify the land claims of some significant group of indigenous peoples. In the next chapter, I attempt to provide an account of the right to restrict immigration based on an account of the central wrong of colonialism that can successfully account for the rights of indigenous peoples and is attractive in

itself. Whatever the success of that continuation of this project, however, my hope is that in this chapter, I have illustrated the importance of considering the implications of arguments in the philosophy of immigration for the rights of indigenous peoples.

CHAPTER 2
What (Else) Is Wrong with Settler Colonialism?

> We state the following as the means by which cessions of land are usually obtained of the Indians. The whites encroach and settle upon their territory. They increase greatly in number in a short time, and representations are soon made to the government, concerning the value of the land and the necessity of buying it. Commissioners are sent, large presents are made to the chiefs, (formerly whisky was copiously distributed,) and their ears are filled with the glory and power of the whites. Such representations are not, however, needed to convince them either of the ability or the will of the United States to oppress them, and they usually sell, what they think would otherwise be taken by force. -- The North American Review, qtd in Banner 2005, 227

I. Introduction:

At first glance, the answer to the question I have chosen as the title of this chapter may seem obvious. Settler colonialism, like colonialism in general, typically involves things that all right-thinking people realize are (at least prima facie) wrong such as the killing of innocent people and people being driven from their homes.

Violence and displacement are certainly wrongs that are often perpetrated as part of settler colonialism. But settler colonialism is not always violent. For instance, sometimes the colonized realize that violent resistance is futile, and the colonizers are able to get what they want without violence. It also does not necessarily involve people being driven from their homes. For instance, sometimes the colonizers allow the colonized to remain in their homes but take most of the agricultural land, pastures, and/or hunting grounds.

In addition, and perhaps more importantly, in many cases the colonizers did not begin by using violence and displacement against the colonized. Rather, in many cases, these were responses to, often violent, attempts by the colonized to prevent settlement. Thus, it matters a

great deal whether the colonized had a right to resist settlement prior to the use of violence and displacement by settlers. If the colonized did not have a right to resist settlement prior to the use of violence and expulsion by the colonizers, the retaliatory violence and expulsion practiced by colonizers was, at worst, going too far in the just cause of making the world safe for settlers. If, on the other hand, much resistance to settlement was justified, measures taken to defend settlers added to the initial wrong of settlement.

Lea Ypi (2013) answers the question of what is wrong with colonialism by arguing that colonialism, even colonialism in the absence of significant violence, is wrong because it involves an objectionable relationship among people. She contrasts her account with accounts of the wrong of colonialism based on the idea that the colonizers violate the rights of the colonized to their territory. For Ypi, the wrong of colonialism is not the wrongful taking of territory but the wrongful imposition of an unequal and non-reciprocal political association on a political community by a group of outsiders.

In response to Ypi, Margaret Moore (2019) has argued that there are multiple wrongs associated with colonialism. One of these, which she associates with Ypi's account, is domination. Another independent wrong, however, is the taking of territory.

Ypi is correct, I shall argue, that what is wrong with colonialism even when it does not involve violence and expulsion is a certain kind of relationship between the colonizer and the colonized. In particular, this relationship can be cashed out in republican terms as domination, namely the subjection of the colonized to the arbitrary will of the colonizers. I shall argue that preventing domination, when properly understood, is precisely the purpose of territorial rights. Therefore, violating territorial rights is wrongful because of the importance of preventing domination. This means that I will show that the taking of territory is wrong, pace Ypi. And I

will show, pace Moore, that we do not need to appeal to grounds independent of domination to see what is wrong with the taking of territory.

Indigenous scholars have typically claimed that indigenous peoples have the right to control access to their land and to membership in their communities because these are aspects of sovereignty (see e.g. Barcham 2000; Coulthard 2014; Deloria and Lytle 1984; Simpson 2014; Simpson 2017; Trask 1999; Turner 2006; Wilkins 1997; and, though he would not use the word "sovereignty," Alfred 2009; 2015). If these advocates of indigenous rights succeed in showing that indigenous communities are sovereign, this is an effective response to those who agree that the rights to control access to territory and membership are aspects of sovereignty but attempt to deny these rights to indigenous communities. However, as I discussed in depth in the previous chapter, advocates of open borders have developed powerful arguments against the idea that sovereign political communities have the right to control access to territory except in very limited circumstances. Therefore, advocates of the rights of indigenous peoples to control territory need an account of why certain political communities have this right in a much broader range of circumstances than those provided by the advocates of open borders. Unfortunately, as I argued in the previous chapter, the popular arguments in the literature attempting to justify the exclusion of potential immigrants in some circumstances have serious trouble accounting for the rights of indigenous peoples to control territory. It is another goal of this paper to bring my discussion of the distinctive wrong of colonialism to bear on the philosophy of immigration as a way of countering the alleged near universal scope of the arguments for open borders discussed in the previous chapter.

The next section of this chapter will lay out my positive account of domination as the

distinctive wrong of colonialism and defend territorial rights as a social technology to prevent domination. Section III will situate my view between those of Ypi and Moore and show that I have succeeded in expanding Ypi's view in a way that is not ad hoc and also incorporates the wrong of the taking of territory identified by Moore. And the remaining two substantive sections will address objections.

II. The Republican Argument for Territorial Rights

In what follows, I will be drawing on neo-Roman republican political theory, which takes domination, in the sense of being subject to the arbitrary will of another, as the primary evil which political institutions exist to prevent (Pettit 2012, Chapter 1). I wish to be ecumenical regarding why domination in this sense is objectionable. Card carrying republicans, like Philip Pettit, hold that being dominated in this sense makes one unfree. This is typically supported by arguing that to be free it is insufficient not to be interfered with in acting as one wishes. Rather, one must not be subjected to someone who can arbitrarily constrain one, e.g., a husband in a patriarchal society, a master in a slave-holding society, etc., even if the person to whom one is subjected chooses not to exercise their power (Pettit 2012, 7-8).

One might equally, however, foreground inequality in what is objectionable in domination. Elizabeth Anderson, one of the foremost advocates of relational equality argues that "[f]rom a relational point of view, social inequality and lack of freedom are one and the same" and goes on to make clear that the freedom she has in mind is freedom in the republican sense of freedom from domination (Anderson 2010, 103). This is because being dominated in the republican sense is, by definition, being lower in a hierarchy of some sort.

It is my view that domination in this sense is the distinctive wrong suffered by colonized

peoples even in the absence of such other wrongs as violence against the colonized. In Section III, I will show how this claim follows naturally from and improves on Ypi's account of the wrong of colonialism and also how it provides a unified account of the wrongs of colonialism described by Margaret Moore.

Some critics of the idea of republican freedom have argued that what matters to whether one is free is not whether one is subject to the arbitrary will of another but whether one is likely to be interfered with (Carter 2008; Kramer 2008). Such critics will likely disagree with me that domination is the distinctive wrong of colonialism. Even they, however, have instrumental reason to oppose domination and support social technologies that attempt to secure non-domination. Non-domination as Pettit argues is a "gateway good" in the sense that securing non-domination requires securing many other things that matter (Pettit 2012, 3). Particularly important in a colonial context, if a political community is dominated, the dominators can, depending on the amount of power they have, impose the other wrongs commonly associated with colonialism. For instance, Ypi says of colonialism that, "[b]urning native settlements, torturing innocents, slaughtering children, enslaving entire populations, exploiting the soil and natural resources available to them, and discriminating on grounds of ethnicity and race are only some of the most familiar horrors associated with it" (Ypi 2013, 262). If one people (A) can inflict these sorts of horrors on another people (B) with relative impunity, then B is dominated by A. This is because whether or not B suffers these horrors depends on the whim of A. Therefore, ensuring that B is not dominated means ensuring that A cannot impose these or other horrors on B with impunity. This means that as Locke argues in the *Second Treatise of Government*, it is legitimate to resist someone trying to get me in their power because I have no way of knowing what they will do to me once I am in their power (3.17). This sort of critic of republican freedom,

then, should agree with what I say in the remainder of this section regarding the importance of territorial rights as a social technology to prevent domination, despite the fact that they value non-domination only instrumentally. At least they should agree unless there is good reason to think that the dominating colonizers are so benevolent that they will not in fact perpetrate the familiar horrors associated with colonialism that domination enables.

Now having argued for the importance of securing non-domination of peoples, I will argue that a concern with preventing domination grounds territorial rights. Settler colonialism often takes place by means of ordinary people, often merely seeking a better life, settling in the territory of another group and later taking power. I will begin by describing some examples of this phenomenon and then draw some conclusions from them.

Treaty after treaty was signed between British colonial governments and later the U.S. on the one hand and American Indian nations on the other guaranteeing that the Indians could keep certain lands. Repeatedly, the British and American governments were unable or unwilling to keep white settlers off Indian lands, and repeatedly British and American governments came to the aid of squatters on Indian lands if Indians used violence to remove them. When Indians were not able to remove squatters from their lands, they were after a time, pressured to sign new treaties signing away rights to the land that had been squatted upon. In addition, Indians soon began to understand this pattern. They often realized that offers to sell land could not be resisted in the long term since colonists would squat on the land even if they did not sell, which enabled the British and U.S. governments to buy lands in advance of white settlement from Indians hoping to at least get something for their land. As a result, many Indians were forced to move farther and farther westward. Furthermore, American Indians, both those who were uprooted and moved west and those who remained in their ancestral lands and were demographically swamped

by white settlers, were subsumed into the United States as members of oppressed minorities subject to the political decisions of white courts and legislatures and the Bureau of Indian Affairs (Banner 2005, Chs. 2-7; Greer 2018, 382-6, 405-15; Kulicoff 2000, 99-106, 138-44; Merrell 2009, Chs. 5-6; Perdue and Green, Chs. 2-4; Richter 2003, 171-3, 184-7, 192-216, 222-235; Shannon 2008, Ch. 6).

This sort of settler colonialism was not only a danger to non-state societies like those of most American Indians. In the 1810s, American squatters began settling in what at the time was part of the Spanish colony of New Spain and now is East Texas. Mexico, including Texas, became independent from Spain in 1821 and began allowing legitimate immigration into Texas in 1825 both to develop the economy and, perhaps more importantly, to serve as a buffer against the Comanches, who controlled a vast empire on the Southern Plains and habitually raided first Spanish and later Mexican settlements. By 1830, however, Anglos outnumbered Tejanos (hispanic inhabitants of Texas) in Texas, and there had already been a short-lived rebellion by one group of Anglos, joined by some American Indians, and significant friction over issues from slavery to taxes. The Mexican government tried to enforce a ban on immigration from the U.S. while encouraging internal migration to Texas as well as immigration from Europe, but this policy was dismantled shortly thereafter. By 1836, when Texas became independent from Mexico, Tejanos were outnumbered by Anglos in Texas ten to one. Most Tejanos joined the Anglo led revolution, but after Texas became a Republic and later was annexed by the U.S., Anglo distrust and violence forced many Tejanos to flee to Mexico (Campbell 2012, Chs. 4-7; Reséndez 2004, 17-25, Ch. 5; Torget 2015, Chs. 1-4).

In these cases, the settlers certainly committed wrongs beyond violating territorial rights. They used violence against the colonized, imposed oppressive systems of government on the

colonized, and drove the colonized from the lands where they had built their lives. Presumably, it is uncontroversial that the colonized could morally resist these wrongs at the time, say, at which violence was being perpetrated by the colonizers. But resistance at that stage is often a losing proposition. Once a settler population is powerful enough to dominate the colonized (either because of sheer numbers or because of such factors as more wealth, superior military technology, etc.), there is little the colonized can effectively do to stop them. What, then, can a political community do to protect its members from future domination by settlers? The obvious answer is claim a territory and restrict immigration into that territory. Perhaps there are other social technologies that could accomplish this, but the one that actual human societies have developed is the bounded territory.

Territorially located political communities, if they are to ensure non-domination, must exercise enough control over the related issues of membership and who comes onto their land to prevent two possible situations. One of these is the newcomers coming to outnumber the original inhabitants whether in a political community as a whole or merely in a particular area, e.g., Mexican Texas, and dominating the original inhabitants. This domination might be violent, but it might also be legal and take place through the forms of majoritarian democracy if the immigrants relegate the original inhabitants to what Pettit calls a "sticky minority," i.e., a group that systematically loses votes on a certain range of issues (Pettit 2012, 212; Pettit 2014, 124-5). The other is the newcomers coming to dominate the original inhabitants because even though they are a minority, they have greater power due to wealth, superior technology, political connections to other powerful countries or to a federal or national government, etc. As my reference to connections to federal and national governments suggests, I have been using the phrase "political communities" rather than "states" because I think these reasons apply to any political community

including members of federal states, e.g., Quebec, and to indigenous communities partly incorporated into settler states.

Importantly, at issue here is the power of settlers not their intentions. As mentioned above, many settlers, at least originally, did not want to dominate the indigenous people. They merely wanted land or other opportunities for themselves. Many, no doubt sincerely, pledged to live peaceably. But the intentions of the first generation do not bind the second, and once domination exists, it both tempts the dominating group to use their power and colors all the interactions between the two groups since everyone knows that the dominating group can choose to use their power at any time. So, the control over territory, to prevent domination, must grant the right not only to exclude those with professed hostile intentions but also those would-be settlers who, perhaps sincerely, pledge to live in harmony with the original inhabitants if they would create one or both of the two situations of domination discussed in the previous paragraph.

Note that I have not argued that political communities may exclude anyone and everyone they wish. Rather, I have argued that exclusion is justified when it prevents domination. But there is an epistemic problem of how to determine whether potential settlers pose a serious risk of coming to dominate the original inhabitants (or whether their descendants pose such a risk). As I argued above, this risk increases with the number of would-be immigrants and with their power (because of their connections to other states, their wealth, their technology, etc.). But there remains the problem of who assesses this risk. Perhaps the world would be better off if some international body could make these decisions, though the record of international institutions such as the WTO and the IMF is not encouraging. But in the current state of the world, there is no alternative to allowing political communities to make these decisions for themselves. This does not mean, however, that any decision a political community makes is justified. On the

contrary, if a political community excludes potential immigrants who they cannot reasonably believe pose a threat of domination, the political community acts wrongly. This is analogous to other areas in which for lack of alternative, states have the legal authority to set their own policies regarding how to address potential risks, but some of the actions they may take are unjustified given what it is reasonable to believe about the risk. For instance, the FDA must determine whether new medicines are safe enough to sell in the U.S., and they have the capability to make decisions that are unjustified by the available evidence resulting in deaths that could have been prevented by medicines they wrongly did not approve, or deaths caused by dangerous medicines they wrongly approved.

Another important conclusion follows from my argument. The more populous a political community is, and the more stable a political community's government is, the weaker is the republican justification for restricting immigration into the territory as a whole, or, perhaps more accurately, the more numerous or powerful immigrants have to be to pose a threat. By this criterion, the United States has less justification to restrict immigration than nearly any other country (and perhaps less than any other country given that the only two other countries with higher populations, China and India, have much higher population densities). Though, as mentioned above, it is possible that my argument justifies restrictions on internal migration within large and stable countries, e.g., even tens of millions of immigrants pose no threat to China as a whole, but the people of Tibet or Xinjiang may well have a moral right to control immigration from the rest of China. Also, by this criterion, modern day indigenous peoples have very strong justification for keeping others off their land and restricting membership of their communities. This is because most indigenous peoples have relatively small populations and because most of those who want access to indigenous lands come from the larger settler states in

which the indigenous communities are embedded and from which the indigenous people often already suffer some level of domination.

III. Alternative Views on the Wrong(s) of Colonialism

The view I have defended above is, I believe, attractive in itself. That being said, the true merits of any view become clear only when it is compared with the important alternatives. And, in fact, my republican account of the distinctive wrong of colonialism and of territorial rights combines the virtues of two recent accounts of the wrongfulness of colonialism while avoiding the vices of each.

Leah Ypi (2013), provides perhaps the most influential recent answer to the question of what is wrong with colonialism. Ypi begins by attempting to refute those who think colonialism is primarily wrong because it involves the violation of territorial rights. She addresses a plethora of such arguments, and I do not have the space to summarize each of them and her critiques here (Ypi 2013, 163-72). Suffice it to say, that I find Ypi's criticisms of the views she discusses convincing, and I will assume here that they succeed. That being said, in my view, nothing she says rules out the defense of territorial rights Moore (2019) gives in response to her article, which I shall discuss shortly, nor do her critiques of arguments for territorial rights work against my own argument for them given above. Indeed, I shall argue momentarily that territorial rights follow from Ypi's own account of the wrong of colonialism.

Ypi's positive account of the wrong of colonialism is that colonialism involves creating a political association that denies some of its members equal and reciprocal terms of association (Ypi 2013, 158, 163, 178). There are two aspects of equal and reciprocal terms of association according to Ypi. First, equality and reciprocity must characterize the process by which two

groups of people who come in contact with one another form a political association. And second, the terms of political cooperation they establish for their association must themselves treat all the parties equally and reciprocally. Colonialism always violates the first condition since it is imposed on one group by another, and it usually violates the second as well (Ypi 2013, 178).

Ypi says very little about what equality and reciprocity amount to. She says that they rule out force or threats of force as well as situations in which one party to negotiations is economically dependent on the other. They also rule out trickery, such as treaties written in two languages in which the content agreed to by those signing in one language is different from the content agreed to by those signing in the other (Ypi 2013, 179, 181-182). All these conditions are, of course, instances of domination in the republican sense of subjection to the arbitrary will of another. I thus agree with Ypi that the wrong of colonialism is relational though I prefer to put it in terms of domination by one group of another than of flaws in their association. It is unclear how much of a difference this makes. On one reading of Ypi, her account is narrower than mine since one group can dominate another without forming a government or alliance or other kind of political association with them. On the other hand, Ypi says that she remains neutral on how thick or thin a political association must be (Ypi 2013, 176). So perhaps on the very thin end, any kind of interaction counts as an association for Ypi, which would bring our accounts closer together. This possibility is strengthened by her claim to be able to account for the wrong of neo-colonialism involving formally independent countries, her example is France Afrique (Ypi 2013, 188).

Ypi sees one of the virtues of her account as that she provides a unified explanation of the wrong of different forms of colonialism. These include settler colonialism, in which settlers take control of the land and largely expel the original inhabitants; commercial colonialism, in which

the colonizers seize control of the government to extract resources with very little settlement; and civilizing colonialism, in which the colonizers take control allegedly to civilize the colonized (Ypi 2013, 161). She also sees it as a virtue that on her account colonialism is part of a family of related wrongs such as the oppression of domestic minorities and oppressive alliances. These are all, Ypi claims, ways in which terms of association can fail to be reciprocal and equal with colonialism being the member of this family in which the member of the association that is not treated equally and reciprocally is a territorially located political community (Ypi 2013, 163). My account, being either extensionally equal to or broader than Ypi's, has these same virtues. All these are forms of domination, and I am happy to agree with Ypi that colonialism is the domination of territorially located political communities.

Margaret Moore, 2019, makes two related critiques of Ypi, one of which I whole-heartedly agree with and the other I disagree with. The criticism of Ypi that I do endorse is based on the fact that Ypi claims that there is a duty to associate. When two political communities encounter one another, she writes, they have an obligation to create a political association to adjudicate their claims against one another including claims to the land on which each group lives (Ypi 2013, 176). Ypi does not actually say why she believes this duty exists, but based on other things she says, my best reconstruction of her argument is that since she thinks she has shown that there are no territorial rights that have not been created by a political institution, when two groups encounter each other and both want the same resources, they must form an association that treats both groups equally and reciprocally to address each group's needs and wants regarding, among other things, land. Moore rightly asks of this purported moral duty to accept offers to form an equal and reciprocal political association, "Why isn't it legitimate for indigenous people simply to ask to be left alone, to claim that they want to be self-governing

over their own lives, in their own community, on their own territory, just as they were before? Why does the mere arrival, uninvited, of some other group put them under a moral obligation to enter into a political association with them" (Moore 2019, 104)?

Moore and I agree in rejecting Ypi's duty to associate. I have argued above that a concern with domination grounds the right for indigenous communities, and other political communities who are at risk of domination by would-be settlers, to choose to be left alone rather than to form an association with those who wish to settle on their land. Pace Ypi, I believe this also follows from her account. Ypi's equal and reciprocal terms of association may or may not be narrower than non-domination in the republican sense by being limited to an association, but at least groups negotiating terms of association do not do so equally when one is subject to the arbitrary will of another nor is an association equal when it makes one group subject to the arbitrary will of another. So, my argument that territorial rights are justified to secure non-domination is also an argument that territorial rights are justified to prevent the creation of associations that are not equal and reciprocal.

Moore wishes to establish the right of indigenous people to choose to be left alone, however, by providing a justification of territorial rights that she claims is independent of domination. She argues, and this is the critique of Ypi with which I disagree, that there are two primary kinds of wrong associated with colonialism and that Ypi's attempt to find the distinctive wrong of colonialism is misguided. These two types of wrong are what Moore calls "domination," which she understands narrowly as formal political rule, and settlement on territory by colonists who disrupt the way of life of the indigenous people (Moore 2019, 89, 106).

Pace Moore, however, I believe both domination in her sense of wrongful political rule

and the taking of territory are instances of domination in the broad republican sense. I take it as given that domination in Moore's narrow sense is an instance of domination in the wide republican sense. To see why the taking of territory is also an instance of domination in the republican sense, we must examine what Moore thinks is wrong with the taking of territory. Moore argues convincingly that individual people have occupancy rights to the territory around which they build their lives. This, she argues, is due to the moral force of legitimate expectations (Moore 2019, 92-95 and see also her more fleshed out account in Moore 2015, Ch. 3). But so far, there is no right to exclude settlers who will not exclude the indigenous people and are willing to share the land. So, Moore argues, again convincingly, that when land use patterns conflict, for instance when the indigenous people are hunter-gatherers and the settlers are farmers or miners, the right of the indigenous people to continue their way of life gives them a claim to exclude settlers who would start farming or mining or otherwise prevent them from continuing to use the land as they traditionally had (Moore 2019, 95-98). This is, however, a clear case of domination in the republican sense. The settlers come in and force the indigenous people to radically transform their way of life. But my republican defense of territorial rights is much broader. It shows why political communities have the right to exclude would-be settlers even where there is no land use conflict--justifying, for instance, the Mexican attempt to restrict Anglo migration to Texas. My account also does not make an artificial separation between different forms of domination in the republican sense as Moore does. Surely what matters for Moore is the fact that the indigenous people are forced to radically transform their way of life, an effect of being subject to the arbitrary will of the colonizers, but this is common to many kinds of colonialism--not merely settler colonialism involving land use conflicts. For instance, what Ypi calls commercial colonialism, colonialism based on political rule to facilitate resource extraction

without significant settlement, often involves colonized populations being forced to radically transform their lives by the colonizers by being forced to work in the mines or on plantations. Similarly, what Ypi calls civilizing colonialism often involved the destruction of indigenous religions and family structures and enforced new patterns of labor. In one kind of case, the colonizers imposed these changes indirectly and perhaps unintentionally through the taking of territory and in the other they imposed the changes directly through coercion. But there is a deeper similarity of the indigenous people being subject to the effects of the actions of the colonizers which force them to change their way of life.

In summary, my account of the wrong of colonialism is at its core closely related to Ypi's. However, I reject her duty to associate. In fact, I argue, a concern with domination or with ensuring that associations are equal and reciprocal itself grounds territorial rights. Here I part company with Moore by arguing that though she has shown a way in which settlement can be wrongful, this is an instance of domination, properly understood. Thus, both the taking of territory and domination in Moore's sense of political rule are forms of the singular distinctive wrong of colonialism.

IV. Objections

In this section I address two potential objections to my view in particular. The next section, section V, also addresses an important objection by Laura Valentini to Ypi, that I must respond to since Valentini attacks features of Ypi's account that mine shares.

A. The Efficacy Objection

One potential objection to the account I have given is that in the cases I described in

Section II, both American Indian nations and the Mexican government did try to enforce territorial rights, but this failed to prevent domination. What makes attempting to control immigration permissible given the costs this imposes--e.g., on potential immigrants who are turned away--given that it also seems ineffective? Or put another way, this seems from the cases I have given like a fairly ineffective--and thus bad--social technology.

One response to this is that the appearance of ineffectiveness is partly a result of selection bias--I intentionally chose examples in which settlers came to dominate the colonized. It is difficult to find examples of societies effectively staving off domination by enforcing territorial boundaries since this requires being able to establish the counterfactual claim that had they not imposed immigration controls the settler population would have risen to the point at which settlers dominated the original inhabitants. This being said, there are cases of communities being able to control access to their land base and then being dominated only when they could no longer do so. For instance, in New England, Europeans visited, traded, and engaged in deep sea fishing for a century without settling, during which time the local American Indians did not suffer the sort of domination by Europeans that would come later (though the Europeans were prone to slave raiding). It was only after European introduced disease decimated the population of the Wampanoag that they allowed the establishment of the English Colony at Plymouth and famously kept the English alive through the winter in order to use their alliance with the gun-armed English to maintain their independence from their Indian neighbors, who had not been affected by the plague. This led, within just over half a century, to English rule over most of New England with the American Indians being relegated to an oppressed class if not sold into slavery in the Caribbean (Brooks 2018, 3-4; Greer 2018, 82-5, Ch. 6, 259-64; Jennings 1975, Chs. 11-18; Kulicoff 2000, 95-9; Lepore 1999, Chs. 3-6; Maine 2001, Ch. 2; Mann 2011, Ch. 2; Richter

2003, 90-107). This is a case in which we can be fairly sure that keeping the Europeans out prevented domination, since they came to dominate the New England Indians shortly after they were no longer excluded.

Another deeper response is that territorial rights are analogous to other rights of defending a community that are often, though far from always, ineffective such as the right to collective self-defense against invasions. It may sometimes be too costly to exercise the right of collective self-defense especially when there is little chance of success. Similarly, it may sometimes be too costly to try to restrict immigration (e.g., in many cases where the only way for an Indian nation to remove squatters would have been to enter a hopeless war with the United States government). But these facts do not undermine the right of collective self-defense when it is likely to be successful, and they do not undermine the right to control immigration when it is likely that this can be done successfully.

It also seriously affects the moral evaluation of inter-community agreements. For instance, as mentioned above, it makes a significant difference to our view of the moral force of treaties whether we think that the Indian Nation that signed a treaty had the right to restrict immigration in principle even though they did not have an effective way of exercising that right. If we deny this, they had no such right but were extorting concessions in exchange for no longer resisting settlement, which they were morally obligated to allow even without any concessions in return.

B. The So What Objection

Another potential objection challenges the relevance of this argument for potential settlers. Granted that I have shown that political communities have the right to restrict

immigration to their territory if they can, why does this create a duty for potential settlers or other political communities? If a settler can lead a better life by crossing a border illegally and settling on the land of an indigenous community, say, why shouldn't they do so if they have no intention of harming the original inhabitants? After all, one settler more or less will hardly make a difference to the situation of the original inhabitants. Or put another way, I may have shown that communities have a liberty right to restrict immigration to prevent domination, but does this translate to a claim right against individuals who would not, by themselves, bring about domination not to evade those immigration restrictions?

First of all, there is an obligation to comply with prohibitions of conduct that are designed to protect others from harm (including domination). This extends to prohibitions of conduct that merely puts others at risk of harm. For instance, it might not be wrong in itself to accumulate vast amounts of wealth. But if a society decides to prevent domination of the poor by limiting the amount of wealth anyone can possess, it is wrong not to comply with whatever tax scheme and other regulations are designed to limit accumulation of wealth. Similarly, when laws restricting immigration are a reasonable way of a community reacting to the risk of domination, there is a pro tanto moral reason to obey them.

Now, what I have said above does not entirely respond to the objection since those cases involved individuals who each posed a risk of directly causing harm themselves, and domination of settlers requires groups, or as I put it above, one settler more or less doesn't make a difference. But, of course, every settler reasoning and acting based on that principle would make a difference. I do not have anything especially new to say about these sorts of collective action problems, which are important in areas from justifying voting to attempts to combat global warming. But we do, and should, generally recognize an obligation to follow laws and other

norms that exist to solve these sorts of collective action problems. Perhaps there is no moral requirement not to over-fish if all the other fishers refrain from over-fishing, but if there is a law specifying catch size, then there is an obligation for all fishers to obey that law even if a few of them could disobey without unduly reducing fish populations. Similarly, even though one settler over the amount permitted might not create a settler population that dominates the original inhabitants, there is an obligation for all potential settlers to refrain from violating immigration restrictions (unless the grounds for those restrictions are over-ridden by some of the open borders arguments discussed in the previous chapter or by something like the right of necessity in the case of refugees.

V. Escaping Valentini's False Dilemma

Since my account of the wrong of colonialism agrees with Ypi that there is something wrong with colonialism as such and that this is a certain kind of unequal relationship between the colonizers and the colonized, I must also respond to an important objection to Ypi by Laura Valentini, who argues that there is nothing necessarily wrong with colonialism. Valentini criticizes Ypi's account for being ambiguous as to whether what is being subjugated is a political collective understood as an aggregate of all the members of the collective or a political collective understood as a corporate agent. On both possible disambiguations, she argues, the account fails to show that this kind of subjugation is wrong (2015, 316).

The aggregate interpretation does not pick out a genuine wrong, Valentini argues, because individuals do not typically consent to governments, even democratic and non-colonial ones. So, if the procedural wrong of colonialism is that the colonial relationship is imposed against the will of individual colonized persons, this is true as well of many existing just states.

The argument goes through several more epicycles responding to Ypi's attempts to preempt this objection, but I take this to be the core of the argument (Valentini 2015, 316-23).

The collective interpretation, Valentini argues, is problematic because of unjust collectives. If it is individuals that ultimately matter morally, then there cannot be a categorical prohibition of violating the consent of a collective. This is because the individuals that make up the collective might wish to be taken over if it is oppressive and the will of the collective (as a corporate agent represented by the government) should not count against this. Ypi responds by saying that the fact that a collective violates the consent of its members does not license violating their consent further by incorporating them into a different collective. Valentini thinks this amounts to returning to the aggregate interpretation however (2015, 323-6).

Now, there are some serious issues with Valentini's arguments against each horn of the dilemma. For one thing, Ypi makes clear that she is not discussing the ethics of humanitarian intervention or the question of whether one wrong, living under an oppressive government, is better or worse than another, being colonized by a different government (2013, 161). Perhaps colonialism is sometimes the lesser evil, but that does not make it not an evil.

My republican account, however, allows us to escape Valentini's dilemma entirely. The relevant way to think about domination of groups for republicans is that I am dominated if I and people like me are subject to the arbitrary will of another. Philip Pettit expresses this in terms of the "tough luck test." I and people like me are not dominated by the government in so far as when a decision goes against my interests, as will inevitably happen from time to time, I can reasonably and truly believe that this is just tough luck--the waste treatment facility had to be located somewhere, and the process that picked my back yard was not driven by disregard for the interests of my neighbors and me. This involves the idea that all members of the community

have equal control of government policy (Pettit 2014, 142-4).

In colonial contexts, of course, the colonizers fail the "tough luck test." By definition, it is not the case that the colonized have equal control over decisions, and their interests are almost always not treated equally. This, of course, is not to deny that there are historical examples of people preferring domination by an external colonial power to domination by the internal elite. But, again, neither Ypi nor I are trying to deny that suffering colonialism might sometimes be the lesser evil. We are trying to explain why it is an evil.

Thus, there is a way to pick out domination of a group that does not require the actual consent of each citizen for legitimate government. Whether the state is set up with sufficient safeguards to prevent me from being dominated does not depend on whether I consent to living under the state (for a detailed specification of the kinds of checks and balances required to make a state non-dominating, see Pettit 2012, Chs. 3-5). This means that the account developed here escapes the problem Valentini sees on the first horn of her dilemma. On the other hand, the account I have provided is still robustly individualist in that it appeals to the domination of individuals as members of groups rather than to the domination of corporate agents. This means that the account avoids the problem Valentini sees on the second horn of her dilemma.

VI. Conclusion

In this paper, I have accepted part of Lea Ypi's account of what makes colonialism wrong even in the absence of its common effects such as violence. In particular, I have accepted the idea that the wrong of colonialism has to do with a relationship between people. I have argued that the relevant relationship is domination in the republican sense of subjection to the arbitrary will of another. This, I have argued, pace Ypi, grounds a robust sense of territorial rights for

political communities since borders are an important social technology to prevent the establishment of domination. Border controls, in certain contexts, prevent the entry of people who, even if they are well intentioned at the beginning, may come to have undue power over the original inhabitants. I have shown how my account incorporates the wrong of the taking of territory, which Margaret Moore sees as separate from domination. This is because the thing that Moore herself sees as particularly harmful about the taking of territory is the disruption of the lives of those living on it, and this sort of disruption is, I have argued, a downstream effect of domination. Finally, I have, hopefully, refuted some objections to my account.

CHAPTER 3

Republicanism Without the State
A Response to Philip Pettit

> Today we have police, prosecutors, jails, and written laws and procedures. I am convinced that our Anglo-based system of law enforcement is no more effective than the ways we traditionally handled law enforcement problems. Our present system certainly requires more money, more facilities, more resources, and more manpower. But we have this system now, and it works as well as those of our brother and sister jurisdictions. My point is that the Anglo world has said to tribes, 'Be like us. Have the same laws and institutions we have. When you have these things, perhaps we will leave you alone.' Yet what the Anglo world has offered, at least as far as Navajos are concerned, is either something we already had or something that works no better than what we had. -- The Honorable Tom Tso, former Chief Justice of the Supreme Court of the Navajo Nation (2005, 36)

I. Introduction

What would happen if the state collapsed or otherwise disappeared tomorrow? Many dystopian works of science fiction explore this possibility, which is generally pretty bleak. No more law enforcement to deter others from killing us or taking our possessions, no more welfare state social safety net to support those who need it, no more regulators controlling pollution or product safety (if there would even still be products), no more public works such as road maintenance, etc. It is intuitive for those of us who live in states to assume that the things we would lose if we lost the state are things that peoples who never created states must also lack, and philosophers have often reasoned in this way. To take the most famous example, Hobbes argues in *Leviathan* that we can know that he is right that in the absence of a government with the power to keep us all in awe life would be "solitary, poor, nasty, brutish and short" because even with such a government we do not trust our fellow citizens--as evidenced by the fact that

we do things like lock our doors when we leave our houses (1.13.8-10). Further, he appeals to actual cases of collapse of government, namely civil wars, for evidence of what life in the state of nature must be like (1.13.11).

Hobbes's view of the state of nature is, of course, famously extreme, but many other philosophers have agreed with the general idea that the state is necessary to protect us from one another. Notably, Philip Pettit, the most prominent advocate of Neo-Roman republicanism, has argued that any reasonable conception of social justice requires the existence of a state (2012, 132-3). In this chapter, I shall argue that Pettit is mistaken, however. Whatever is actual is possible, and non-state societies have developed methods of overcoming the barriers Pettit identifies to establishing social justice in ways that, if not perfect, are at least comparable to those employed by actually existing states.

I focus on Pettit for two reasons. First, his conception of social justice is quite demanding. If I can show that non-state societies can overcome the barriers Pettit sees to social justice, which he defines as the condition in which no member of society is dominated by others, it will follow that I have shown that non-state societies can achieve fewer demanding ideals like Hobbes's goal of avoiding a war of all against all. Second, I have drawn significantly on Pettit's work in the earlier chapters of this dissertation. But if he is correct that securing non-domination requires a state, various problematic consequences for the rights of non-state societies may follow. I have argued, for instance, that the cause of securing non-domination grounds territorial rights, including the territorial rights of non-state societies. But if non-state societies are incapable of securing non-domination to their members, there is at least a prima facie argument that states who incorporate the members of non-state societies are acting for their own good by bringing them for the first time into the possibility of living free of domination. And, in fact,

precisely such arguments have historically been made by the advocates of assimilation to justify abolishing indigenous forms of government, taking indigenous lands, and incorporating the former members of indigenous non-state societies as individual citizens of settler states (for critiques of Pettit along these lines see e.g., Markell 2008 and Nichols 2014).

II. Is the State Necessary for Social Justice?

Social scientists disagree about the definition of a "state," and some even go so far as to advocate abandoning the concept of the state as a distinct kind of political order (see e.g., Graeber and Wengrow 2021, Ch. 10). I shall not here take sides on the best social scientific definition of a state, or indeed on whether we would do better to abandon this category. Rather, I will follow Pettit's understanding of what a "state" is and argue that the kind of institution he refers to by that name is not necessary for social justice.

A state, for Pettit, is an agent or agency that functions as a legal person. It pursues goals through a variety of actions and policies and, he thinks most importantly, is conversable, i.e., presents itself to its citizens, organizations, other states, etc. as an agent with which one can do business (Pettit 2012, 133). The point of having such an agent, for Pettit, is to ensure social justice, i.e. that the members of society relate to one another as equals without domination (Pettit 2012, 77, 132-3). To achieve this goal, Pettit argues, the state must be able to coercively enforce its decisions and have a monopoly of legitimate coercive force (Pettit 2012, 133-4). In this paper I contrast "states," entities with the characteristics Pettit identifies, with non-state societies, societies that lack a centralized corporate agent with which one can do business or that have such an agent but in which the centralized agent does not claim that it can legitimately coerce members of the society.

Why does Pettit think a corporate and coercive state of this kind is necessary to establish social justice? In short:

> because only an agency of that kind would be capable of discharging the many varied and demanding tasks involved: maintaining the developmental, institutional and material infrastructure that justice requires; establishing and adjusting the laws required to identify substantive and coherent basic liberties; ensuring that those liberties are resourced on the basis of any needed conventions and subsidies; and protecting people against the invasion of those liberties, whether in particular relationships or on a more general front. The tasks involved here are so complex, interconnected and dynamic that no abstract apparatus of rules could plausibly ensure their fulfilment. Pettit 2012, 133.

This being said, Pettit does feel the attraction of a possible non-state form of political organization. As he points out, if it were possible to achieve social justice, i.e., non-domination with respect to other members of society, without a state, the risk of being dominated by the state itself could be avoided (Pettit 2012, 134). So, he asks whether he has been too quick to assume that a system of norms could not emerge in favorable conditions that protected all members of society from domination without a state to establish or enforce them (Pettit 2012, 134). Pettit, of course, says no, or to be more precise, he says that "there is little hope that [such a regime] could operate effectively in the absence of a state" (Pettit 2012, 135). Note the strength of the claim Pettit is making here. He is not merely saying that it would almost certainly be a disaster to abolish the U.S. government along with state and local governments in the hope that republican norms would emerge (which, lest it need be said, is a claim I would wholeheartedly endorse). He is arguing against the hope that such a system of norms could emerge in favorable conditions and function effectively. Or as he puts it, if the state did not exist, "[w]ould the cause of republican justice--or indeed the cause of any plausible view of social justice--still require us to invent it? I argue that it would" (Pettit 2012, 132-3).

Unfortunately, Pettit does not consider the history of actual societies that have existed without states as he defines them. All the arguments he gives against the possibility of social

justice in non-state societies are based on how he believes such societies would function a priori supported only with extrapolations from the behavior of people living in states.

Pettit expands on his brief statement of reasons for the necessity of the state quoted above by giving three separate arguments to show that important aspects of non-domination cannot be secured without the state. In particular he argues that: 1. without a state a society will likely not identify an appropriate set of basic liberties; 2. without a state a society will likely not be able to counteract the concentration of wealth and will leave the poor without the resources needed to exercise their basic liberties; and 3. without a state, members of some social groups will likely not be protected from domination by the powerful (Pettit 2012, 135). I will discuss each of these three arguments in depth below and show how non-state societies have solved each of these problems. First, however, I would like to note a gap in Pettit's reasoning. Each of these arguments is stated as a reason to believe that a society governed by norms that secure non-domination without a state is "unlikely." But then Pettit concludes that, "the cause of social justice requires the corporate agency of a coercive state and that no apolitical order could serve in that role" (Pettit 2012, 136). Perhaps the second part of this claim could be salvaged by a sufficiently creative interpretation of what an "apolitical order" would be--it seems natural to me as someone with a background in anthropology to say that there is no such thing as an apolitical order, for instance. But to be dialectically relevant, the claim must be referring to the kind of order of norms without a state that Pettit is arguing against.

Pettit's stronger conclusion is easily refuted. Whatever is actual is possible. I will show in this chapter that some societies have actually done a reasonably good job of overcoming the barriers to social justice that Pettit posits. Therefore, it is possible for societies to do a reasonably good job of overcoming these barriers without a state.

It is much more difficult to refute the weaker claims that Pettit's three arguments (discussed below) have as stated conclusions, namely that it is "unlikely" for non-state societies to be able to secure aspects of social justice. This, however, may be beside the point. Even if we were to show that non-state societies have rarely come close to establishing social justice, this is also true of states. So, showing how actual non-state societies have overcome the a priori barriers to establishing social justice Pettit identifies weakens the claim that if the state did not exist, we would have to invent it to establish social justice. Members of non-state societies that fall short of social justice could work to change their societies' norms to make them more just rather than inventing (or joining) the state.

Of course, changing norms that give some people power over others is difficult and likely to be met with resistance. So is changing the policy of actual states, however, controlled as it so often is by the rich and other socially powerful groups. It might be true that for a particular society a state is the easiest or most effective way to move towards social justice, but if there is a robust alternative, then there is a stronger claim to respect the choice of communities to try to stay outside the control of the state that has claimed their land (for communities seeking to do this, see e.g., Scott 2009).

In the next sub-section, I will briefly discuss the work of some indigenous political philosophers who have argued for the desirability and feasibility of non-coercive and non-centralized governance. Then in Subsections B through D I will respond separately to each of Pettit's three a priori arguments against the plausibility of social justice in non-state societies.

A. The Indigenous Philosophy of Non-State Governance

The Mohawk political theorist Taiaiake Alfred encapsulated an important strand of

American Indian/First Nations political philosophy when he wrote that, "Traditional indigenous nationhood stands in sharp contrast to the dominant understanding of "the state": There is no absolute authority, no coercive enforcement of decisions, no hierarchy, and no separate ruling entity" (Alfred 2009, 80). As we have seen, this is also, minus the point about hierarchy, an almost exact inversion of the kind of political system advocated by Pettit. It is also somewhat of an over-generalization since even leaving out of consideration the states in Meso-America and the Andes, there were historically indigenous nations organized as chiefdoms with hierarchy, some level of coercive authority, and a separate ruling entity in the sense that one small group of people ruled over others, e.g., the Powhatan Confederation (Rountree 2005, Ch. 2), The Kwakwaka'wakw (Wolf 1999, Ch. 3), etc. That being said, the type of political organization Alfred describes was historically quite common, and many indigenous scholars defend such non-coercive decentralized forms of governance today. Indian Tribes in the U.S. and First Nations in Canada have been required by the U.S. and Canadian governments to establish western style governments, but these entities have also to some extent retained or reintroduced non-coercive, decentralized forms of governance in some areas, e.g., the Navajo Nation's courts' practice of referring cases out of the western style tribal courts to peacemaking with the consent of the parties (Nielsen and Zion 2005; Austin 2009).

So why do Alfred and others endorse this sort of governance without a state as, at least in some situations, superior to state forms of governance? Alfred appeals to two values to ground this sort of governance: individual autonomy and equality. He contrasts the European model of governance, in which people surrender their right of autonomy to a sovereign, which, at least in a democracy, imposes the will of the majority by force with the indigenous model, in which each person chooses how to act for themselves, and no one is placed in power over others. In the latter

model, collective action is a result of people consciously choosing to act together, and leadership involves persuasion rather than force (Alfred 2009, 49-50). Many other indigenous scholars also endorse the ideal of non-coercion as a requirement of respect for the equality of persons (e.g., Austin 2009, 91-3, 101-4; Cordova 2007, 25-9; Simpson 2011, Ch. 7; Yazzie 2005). Navajo judge and legal scholar Robert Yazzie goes so far as to observe that there is a Navajo proverb to beware of powerful beings and that judges, and presumably other agents of the state, qualify as powerful beings. Calling on such beings against another person, he writes, was traditionally considered witchcraft, and condemned accordingly (Yazzie 2005, 46). This is, of course, deeply consonant with the republican ideal of all people sharing the status of free persons and being able to interact with one another on terms of equality since this is an ideal not only of governance but also of interpersonal relations generally. Both the Michi Saagiig Nishnaabeg scholar Leanne Betasamosake Simpson and the Jicarilla Apache philosopher Viola Cordova, for instance, focus on applying the general ideal of non-coercion to parenting (Cordova 2007, 25-9; Simpson 2011, Ch. 7).

There are, of course, obvious practical challenges with this sort of model, and I will address many of them when I come to Pettit's three a priori arguments for the state. Here, however, I must address a more theoretical concern, namely whether these political systems are really non-coercive. Alfred notes that traditionally if there were irreconcilable differences, a member would leave the group (Alfred 2009, 50). Similarly, Deloria and Lytle observe that the primary traditional sanction of last resort was expulsion from the group, which typically did not need to be enforced because the individual in conflict with the rest of the group would usually simply leave (Deloria and Lytle 1984, 201). It certainly seems that the ultimate threat of being expelled from one's community and family if one does not behave appropriately is coercive.

However, even if traditional non-state forms of governance do not completely escape coercion, there is a significant difference in degree. Citizens of a state, such as the U.S., are subject to the state's law, and the ordinary way to deal with infractions of that law is for an agent of the state, a judge or jury, to impose some sort of punishment. The coercive punishment applied in response to the most extreme of offences advocated by Alfred and others while it should not be ignored is a last resort to be used when ordinary methods of consensus-based conflict resolution fails and thus affects a much smaller segment of people's lives.

B. Non-State Societies Can Identify Appropriate Basic Liberties

Pettit's first argument against the plausibility of social justice in non-state societies is that norms that are not put into place by a state are unlikely to specify an appropriate set of basic liberties that are co-exercisable and co-satisfiable. This is apparently because of differences (presumably in the sense of disagreements) between people and the need for conventional rules including rules for modifying the rules (Pettit 2012, 135).

Understanding Pettit's argument here requires some explication of his theory of basic liberties. For Pettit, the state should ensure that its citizens have the maximum range of basic liberties that are co-exercisable and co-satisfiable. Co-exercisable choices are those that everyone can make at the same time. This constraint rules out basic liberties that would be physically impossible for everyone to exercise like the freedom to use any natural resources one wants and calls for the institution of something like a property scheme to regulate the use of resources. It also prohibits basic liberties that are contingently impossible because of scarce resources like the basic liberty for everyone to take up a very expensive hobby (Pettit 2012, 94-97). Choices are co-satisfiable when they promote the individual and collective satisfaction of everyone in society.

By this Pettit means that the choices must not be such that if many people exercise them many people will be deprived of benefiting from the choices. There are three categories of choices that are ruled out as basic liberties. Choices that harm others; choices that give some people too much power over others, and choices that are counterproductive, e.g., everyone could speak at the same time, but this would defeat the purpose of anyone speaking (Pettit 2012, 98-101). Now there are different ways of trying to maximize the entrenched types of choices by creating institutions (such as property rules, driving regulations, etc.) and subsidies to make more choices co-exercisable and co-satisfiable. Which set of rules and institutions a society adopts is largely a matter of convention, though some sets are better than others (Pettit 2012, 104-6). So far, there does not seem to be a problem for non-state societies. Non-state societies, of course, have established and do establish rules governing things like the use of natural resources, rules for speaking in meetings, etc. to enable their members to have a wide range of choices. What I take it Pettit thinks that they cannot do is meet his next criterion. This is that since there is no definitive list of basic liberties, there must be procedures for changing the rules either as circumstances change or merely to improve the system (Pettit 2012, 106).

As I understand Pettit, the problem for non-state societies here is supposed to be that changing the norms as circumstances change or new conflicts develop requires a corporate agent that can make decisions for the society and then impose them on that society. Fortune might result in a set of good norms for the moment, but the norms are unlikely to change to fit new circumstances by chance, so planning and centralized decision making are needed to change them. Of course, many societies that social scientists ordinarily identify as non-state societies, e.g. as chiefdoms or even tribes--do have such a centralized corporate body with a monopoly of legitimate force, but such societies would seem to meet Pettit's definition of a state. Many other

non-state societies, however, do not have such a centralized corporate agent with coercive authority, and it is these societies I seek to defend.

So, can non-state societies (using Pettit's definition of a state) have ways of improving their norms? Yes, in at least two ways. First, non-state societies, like societies in general, typically have ways of resolving conflicts. The Navajo, for instance, traditionally resolved conflicts by bringing the parties to a conflict together along with other people affected, e.g. the clans of the parties, to a meeting facilitated by a naat'áanii or peacemaker. The goal of such a meeting both traditionally and in the reinstituted version of the practice that currently exists as a supplement or alternative to the Navajo Nation judicial system is to reach a consensus on how to move forward. In fact, as Yazzie explains, Navajo justice is forward looking and based on solving problems and repairing relationships rather than backward looking and focused on punishing people for breaking the law (Yazzie 2005, 46-52). This sort of system can and does adapt to changing circumstances by finding solutions to new problems or, possibly, improved solutions to old problems. Indeed, an important part of the peacemaking process is the so-called "lecture," a misleading English term for the naat'áanii's recounting of the history of similar disputes and how they were resolved (Zion 2005, 95). This way of changing norms should not be a surprise to a U.S. audience since we also have a common law system in which solutions to new problems or old problems with changed circumstances must be found by our method of resolving disputes, the courts, and the way problems are solved over time creates the context for solving future problems.

The above method, however, might be thought to be limited since it only arises from particular disputes and relies on a slow process of precedent shaping first the norms of dispute resolution and second the norms governing everyday life. So, can people change norms

intentionally and broadly without the state? Yes, they can. People living in states do this regularly. Social movements often do advocate for state action, but that state action often, if not typically, is a result of politicians and judges catching up with changes in social norms, e.g. the LGBTQ+ rights movement made significant progress in changing social norms prior to and likely resulting in the series of Supreme Court cases striking down various kinds of anti-LGBTQ+ discrimination in the law.

Let us take, however, a case of collective action to change the norms of a non-state society. Several centuries before European contact, the five nations that later formed the Iroquois Confederacy were independent and hostile to one another and lived in a near constant state of war as documented both by the oral tradition and by archeological evidence. Then, these five nations, each of them decentralized and lacking in coercive authority, made peace, adopted a set of customary laws including elaborate rituals and a council with members of all five nations that functioned primarily to keep the peace by persuasion since it also had no coercive authority. If we believe the oral tradition, this was a result of two leaders, Deganawidah, a supernatural being who taught the rituals to cope with mourning, and Hiawatha, a human who had been driven mad by grief. They built a consensus in favor of the new Great Law of Peace village by village and nation by nation until the confederacy was formed. Whether this is exactly how it happened or not, the archeological evidence shows that sometime in the late 15th century the five nations went from fighting one another to extensively trading (Fenton 2010, Ch. 8; Richter 1992, Ch. 2; Shannon 2008, 24-6). So here we have a case of significant and rapid change in norms including the introduction of new institutions in the absence of centralized coercive authority.

In addition, Christina Bicchieri's (2017 work on norm change, though she does not make this point herself, supports the ability of people in non-state societies to change their norms in

beneficial directions. Bicchieri points out that state action through the law is often a relatively poor way of changing behavior. Laws can lead to behavioral change when they help people coordinate, Bicchieri's example is changing traffic law from requiring driving on one side of the road to requiring driving on the other side of the road, but laws mandating behavior that is socially disapproved or forbidding behavior that is socially approved are very difficult to enforce since law enforcement officials, juries, and ordinary people who must report violations are hesitant to enforce them (Bicchieri 2017, 144-7).

The two strategies Bicchieri sees as most promising for changing norms (and thus behavior) are both available to non-state societies. The first involves media campaigns and so called "edutainment." These can be especially effective when they are popular and lead to discussion. This sort of discussion can both change people's minds and make people aware that their beliefs about what others approve and disapprove are mistaken (Bicchieri 2017, 147-53). Now depending on the level of technology available, members of non-state society can produce media campaigns including edutainment in the ways Bicchieri discusses. But even without television or radio, stories are a traditionally important form of education, especially moral education, in many non-state societies (see e.g., Basso 2004; Simpson 2011, Chs. 3, 7). Such stories are often told for a reason, e.g., to indirectly criticize certain behavior, and can create the kind of community wide discussions Bicchieri sees as important in norm change. This kind of norm change due to the oral spread of narratives is even historically documented, e.g., in the case of various pan-Indian movements (Dowd 1992; Ostler 2004, Chs. 11-2).

Bicchieri's second strategy is deliberation. When people are brought to discuss in small diverse groups with facilitation to overcome power differentials, she argues, they can come to change their minds especially about more weakly held beliefs, e.g., what behavior is actually

necessary to instantiate a value they hold (Bicchieri 2017, 156-62). These sorts of small-scale group deliberation sessions are also available to non-state societies. Indeed, this brings us back to the kind of traditional dispute resolution discussed above. But if Bicchieri is right, this kind of group deliberative dispute resolution can help change norms not only by setting new precedents but also by changing the minds of the participants.

C. Non-State Societies Can Resource Basic Liberties

Pettit's second argument is that a state is necessary to ensure the resourcing of basic liberties for the poor. This is because, he claims, only a state can counteract the concentration of wealth. To support this, he quotes Francis Fukuyama's assertion that "As by an iron law, the rich tend to get richer, in the absence of state intervention." Therefore, it is "extremely unlikely" that mere norms could provide for redistribution in order to resource the basic liberties for all (Pettit 2012, 135).

Now first of all, Pettit's attempt to ground his argument in empirical research (the one citation of Fukuyama) is very misleading. The actual sentence in Fukuyama on the page cited by Pettit is, "The iron law of the large estate or latifundia--the rich tend to get richer, in the absence of state intervention--applied in Latin America much as in other agrarian societies like China and Turkey" (Fukuyama 2011, 368). Note that all the societies mentioned by Fukuyama here are states and that Fukuyama is not addressing the question of non-state societies.

Furthermore, Fukuyama is less committed to the necessity of state action even in state level societies than Pettit makes him out to be. Pettit has quoted Fukuyama's second description of his iron law of latifundia. Fukuyama's first statement of this purported law is, "There is something like an iron law of latifundia in agrarian societies that says that the rich will grow

richer until they are stopped--either by the state, by peasant rebellions, or by states acting out of fear of peasant rebellions" (Fukuyama 2011, 141). So, Fukuyama explicitly limits his "iron law" to agrarian societies and also explicitly notes that wealth can be redistributed either by the state or by peasants acting independently.

Also, the processes Fukuyama discusses by which the rich get richer in agrarian states work through the state. His original statement of the "iron law of latifundia" comes in a discussion of the growth of large estates in Han Dynasty China which grew as their owners parlayed wealth into political power and secured exemptions for themselves from state taxes and then bought up the lands of small farmers who could not pay taxes and feed themselves in bad crop years (Fukuyama 2011, 141). The later formulation of this law partially quoted by Pettit takes place in the context of the growth of large estates in Latin America. These estates grew because certain Spaniards were granted the legal right to the forced labor of the indigenous people by the Spanish crown and used the income generated from this to buy land, so this is another case of the rich getting richer directly through state action (Fukuyama 2011, 368).

So, what can be gathered from Fukuyama's claims is that in agrarian states, large landowners use their wealth to influence the state and become larger land owners unless the state acts not to be influenced in this way or unless the peasants rise up to stop them or both. Hardly an endorsement of the claim that non-state societies will necessarily suffer from concentrations in wealth that undermine social justice as Pettit claims.

Secondly, whether wealth accumulates and the kind of power that comes from accumulated wealth depends on the norms a society has regarding property. Take the Iroquois, for instance. As is and was true of many other non-state societies, the traditional Iroquois conception of property included the idea that property that was not being used could be claimed

by those who needed it. Relatedly, there was a strong norm requiring sharing things like food with those who did not have enough. Furthermore, political influence came from giving property away not hoarding it, so influential men typically actually possessed the least amount of property in a village since they had given it away (Richter 1992, 21-2). Even this system might seem objectionable from a republican point of view since those who were able to acquire wealth parlayed it into political influence but note that this political influence was not influence over what laws everyone in society was forced to obey, as is the case in say the contemporary U.S. or the societies with Fukuyama's latifundia. Rather, the very non-state nature of society meant that the rich could not parlay their wealth into arbitrary power over others.

Pettit considers the objection to his argument for public insurance against poverty and misfortune that it might perhaps be more efficient for people to rely on private charity. In response he rightly points out that this would create a relationship of domination especially when people needed help over a period of time that could be withdrawn at the whim of the benefactor (Pettit 2012, 125-6). But then he qualifies this with, "Or at least that will be so in the event, surely quite likely, that benefactors are not pressurised to provide their services or there are not so many benefactors lined up to provide help that the needy depend on the goodwill of none in particular" (Pettit 2012, 126). In part the Iroquois system is public--in so far as the norms of property permit those in need to simply take unused property, they merely cut out the middle man of the government taxing and redistributing. But in so far as this sort of system does rely on gifts from the rich to those in need, it involves both the rich being pressurized--through the expectation that those with will share with those without--and the creation of a system of many "benefactors" so that no one depends on one of them in particular since everyone aspiring to political influence was strongly motivated to show themselves to be generous. Of course the

system was not perfect. Doubtless the rich abused their influence to some extent. But the question is a comparative one between this and other actual non-state societies and actual states regarding how well they have contained the baleful influence of the rich. And if one wishes to put an idealized state run on more republican principles than actual states in one side of the comparison rather than actual states, one must also put an idealized non-state society with norms shaped by republican leaders and citizens on the other.

D. Non-State Societies Can Provide Protection for All

Pettit's third argument is that norms are unlikely to provide protection from outright domination to everyone. This is because "Communal norms may assume any of a variety of objectionable profiles, as they reflect divisions within society and impose patterns that are highly injurious to those on the weaker side of gender or religious or ethnic or other divides." This claim is supported only by a reference to John Stuart Mill's opposition to what he called "The Despotism of Custom." Therefore, although a system based on norms without a state will not make people vulnerable to domination by the state itself, it will "almost certainly fail to protect the members of certain groups against the most rampant domination on the part of others" (Pettit 2012, 135).

It is undoubtedly true that many communal norms are oppressive and support various hierarchies, though Mill, employee of the British East India Company and advocate for despotic rule over the "uncivilized" that he was, is hardly an authority on this issue. But what follows from this? One could say the same about laws enforced by the state. If the fact that state laws may impose patterns injurious to those on the weaker side of various social divisions is not an argument against the state or state laws, why is the fact that communal customs may do this an

argument against communal customs? Perhaps the idea is that state laws can be changed if enlightened rulers somehow come to power in an oppressive state or if those on the weaker side of various social divides gain enough power to affect state policy, but as we have seen in subsection B, people in non-state societies too can change the norms under which they live. And, as in a state, for this to occur requires either those in positions of social privilege choosing to work to make the norms more equitable, or subordinated people gaining enough power to affect the norms, or some combination of both. Or put another way, if the favorable conditions for establishing good norms include a society with relatively small power differentials, we can reasonably hope for relatively decent norms. If we are imagining a society with large differences in social power among groups, its norms will likely require significant change, but the same is true of a state with significant power differentials.

There is, however, an important related worry I must address. Pettit argues, rightly in my view, that one of the things required for social justice is insulation, namely that people be protected from others who may wish to harm them by such means as violence, fraud, and theft. He specifies, however, that this insulation should take the form of criminalization. This involves threatening punishment for certain acts seen as wrongful and contrasts with rewarding people for not committing crime on the one hand and simply imposing a cost for committing it on the other. These other possible ways of imposing costs to deter people harming one another are insufficient, Pettit argues, because they do not communicate social disapproval and it is the social disapproval rather than the threatened punishment that makes most people fail to see most crimes as live options (Pettit 2012, 117-9).

This, it might seem, causes a problem for the idea that societies lacking in coercive authority can establish social justice. After all, no coercive authority means no authority issuing

punishments. Note, however, that it is social norms of condemnation not the actual punishment imposed by the state that Pettit himself thinks do most of the work in deterring crime and insulating potential victims. Combined with consensus based dispute resolution procedures likely to result in some cost imposed on the perpetrator associated with making reparation, such norms of condemnation are a creditable method of insulation available to societies without states.

III. Conclusion

In this chapter I have argued pace Pettit that social justice as the ability of all members of a society to relate to one another without domination is possible without a state. In particular, I have argued that non-state societies do have means of changing the norms under which they live to meet changing circumstances. I have argued that non-state societies have the ability to prevent domination by the rich. And I have argued that non-state societies need not leave some people oppressed and unprotected by the law any more than states.

This is important for at least three reasons. First because of the implications of statism for our historical judgements about the interactions between states and non-state societies. If it were true that the cause of social justice requires a state, it would be a good thing all else equal that the members of non-state societies were incorporated into states whether by creating their own new states or by joining preexisting states. We generally think, however, (and in my view rightly so) that colonialism practiced against non-state societies was and is not a good thing. Second, because of how we should think about current non-state societies living on lands claimed by one or another state but not meaningfully incorporated into that state. If it were true that the cause of social justice requires a state, then all else equal we should hope that these societies will be incorporated into the states that claim their land or break away to form new states as soon as

possible. If my arguments in this chapter are correct, however, we should consider other options and give up our knee jerk support for state building. And finally, because of how we should think about proposals by indigenous scholars to as much as possible reestablish non-coercive, decentralized, non-hierarchical forms of government. If it were true that the cause of social justice requires a state, we should hope that these attempts are not implemented, at least regarding any of the functions of the state needed to establish social justice. I do not know whether such proposals should be adopted, but if my arguments in this chapter are successful, these proposals should be considered on a case-by-case basis rather than being ruled out from the beginning because of the necessity of the state.

CONCLUSION

This dissertation began with a critique of the state of the debate in the philosophy of immigration. Popular open borders arguments, I contend, lead to the conclusion that settler colonialism is morally justified, and the major proponents of the open borders position do not seem to realize this or try to qualify their arguments to show why they do not apply in settler colonial contexts or why they are outweighed by other considerations in these contexts. Popular closed borders arguments, on the other hand, also do a poor job of accounting for indigenous land rights. Some of them are made without taking the rights of indigenous peoples into account, and actually seem to show that rich states like the U.S. and Canada have reason to restrict immigration while indigenous peoples do not. Others, like some versions of the arguments from cultural preservation and self-determination, are made with indigenous peoples in mind, but still leave certain indigenous communities without rights to control access to territory (due to language loss and assimilation in the case of cultural preservation arguments and due to the lack of a centralized political authority in the case of positive self-determination arguments).

In Chapter 2, I attempted to provide a justification of rights to control access to territory that avoids these problems. This justification grew out of a position in the debate over what the distinctive wrong of colonialism is. I argue that domination in the republican sense of subjection to the arbitrary will of another is the distinctive wrong of colonialism (by which I mean that this wrong is present in all forms of colonialism not that it distinguishes colonialism from other kinds of wrong). This view, I argued, incorporates the insights of two influential views of the wrong of colonialism, those offered by Leah Ypi and Margaret Moore, while avoiding the weaknesses of

each of these accounts. And, I argued, territorial rights (including the right to control access to territory) are a political institution justified by their usefulness in preventing domination.

Finally, in Chapter 3, I addressed an important issue with my republican defense of territorial rights, namely that influential republican theorists, like Philip Pettit, have argued that a state is necessary to secure non-domination, and this calls into question my attempt to base the rights of those indigenous peoples without states on institutions designed to secure non-domination. In response I argued that Pettit is mistaken. The state is not necessary for social justice. This is because the things Pettit believes non-state societies cannot do, have been done by non-state societies.

My goal goes beyond contributing to the debates over border controls, the distinctive wrong of colonialism, and the necessity of the state. It also goes beyond drawing positions in these three areas together into a single argument regarding indigenous land rights. I wish to exemplify the philosophical significance of paying attention to a wider slice of the human experience than is typical in analytic political philosophy. The debates in the philosophy of immigration look very different when we think about them while keeping in mind the history of settler colonialism than when we think about them only through the lens of contemporary European and North American immigration policy as is typical. Similarly, it is helpful to consider actual non-state societies when philosophizing over what a society without a state would be like. Finally, and perhaps most importantly, analytic political philosophy is made far poorer when we ignore the voices from other philosophical traditions. Dealing with the history of settler colonialism is central to contemporary indigenous philosophy, and we analytic political philosophers are able to carry on simply not considering the implications of our arguments for colonized people only because we largely ignore the work of indigenous political philosophers.

Similarly, much indigenous philosophy involves analysing indigenous forms of political organization and assessing the extent to which they can or should be adopted in the modern world. Analytic political philosophers can argue from the armchair that such forms of political organization cannot be just while citing no one defending them only because we mostly do not read the work of indigenous philosophers or engage them as equals. I hope that this work will inspire some of my fellow analytic philosophers to engage with the work of philosophers in other traditions and to investigate more deeply the relevance of human life in times and places they have not considered to the arguments they make.

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