

Book Review

The Right To Be Different: Indigenous Peoples and the Quest for a Unified Theory

Multicultural Citizenship: A Liberal Theory of Minority Rights. By Will Kymlicka.* *Oxford & New York: Oxford University Press, 1995.* Pp. vii, 280. \$29.95.

Indigenous Peoples in International Law. By S. James Anaya.** *New York & Oxford: Oxford University Press, 1996.* Pp. 267. \$45.00.

Lawrence Rosen[†]

I. E PLURIBUS UNUM? THEORETICAL UNITY AND CULTURAL DIVERSITY

Americans genuinely seem perplexed by the issue of group rights. Ever since the Federalists' vision of the country prevailed over the view of those who saw the nation as congeries of communitarian entities, Americans have favored the ideal of unitarian nationhood without relinquishing their romance of community. A similar ambivalence is evident in the American tendency to cast issues predominantly in terms of individual rights rather than of collective rights, while still granting exceptions to those groups that seem to embody the ideals from which we imagine ourselves to have strayed.¹ Thus, we largely

* Research Director of the Canadian Centre for Philosophy and Public Policy in the Department of Philosophy, University of Ottawa.

** Professor of Law, University of Iowa.

† Professor of Anthropology, Princeton University; Adjunct Professor of Law, Columbia University Law School.

1. The classic statement on individualism and the American polity remains that of ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1989) (1835). See generally Lawrence Rosen, *Individualism, Community, and the Law: A Review Essay*, 55 U. CHI. L. REV. 571 (1988) (reviewing the issues raised by de Tocqueville, as addressed by more recent writers).

speak a language of uniformity—of one body of law affecting all persons in the same way—yet also acknowledge that religious communities like the Amish may be destroyed by state-enforced laws of general application.² We have long since moved away from a vision of America as a communitarian polity,³ yet we anguish over the effect that a zoning ordinance has on a local ethnic community⁴ or the damage that we do to immigrants when we fail to consider their backgrounds in criminal proceedings.⁵

The temptation, then, is to seek a unified theory that will speak to particular situations within a framework of common criteria. Such unifying theories have broad appeal in many domains of western culture, from religion to economics to law. The desire for a unifying political and moral theory is especially strong when indigenous peoples are concerned, since they have long been left to the mercy of quite different surrounding states. As a result, any unified theory must account for their particular circumstances.⁶

For the political philosopher Will Kymlicka, the unified frame proposed is that of the liberal state, a single political entity capable of attending to multiple cultures within its bounds by recognizing the need of individuals to forge their choices from within a distinctive cultural orientation.⁷ Provided that its citizens all share the larger goal of enabling choices that do not harm others' capacity for choice, the unity of the state as the guarantor of such

2. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (holding that Amish children who might have to perform acts contrary to their faith and the well-being of their religious community may not be required to attend public school beyond the eighth grade). See generally Donald B. Kraybill, *Negotiating with Caesar*, in *THE AMISH AND THE STATE 3* (Donald B. Kraybill ed., 1993) (describing how the Amish have used negotiation to maintain their distinctive practices).

3. See PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965) (analyzing the legal and religious ideas that prompted the American move away from communitarianism and toward a unified system of politics and law).

4. See, e.g., KATHLEEN M. MOORE, *AL-MUGHSTARIBUN: AMERICAN LAW AND THE TRANSFORMATION OF MUSLIM LIFE IN THE UNITED STATES 117-33* (1995).

5. On the so-called "cultural defense plea," see Malek-Mithra Sheybani, Comment, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 *LOY. L.A. INT'L & COMP. L.J.* 751 (1987).

6. The disastrous impact of conquest and colonialism on the health, social structure, and political organization of indigenous peoples has been amply documented. See, e.g., SVEN LINDQVIST, *EXTERMINATE ALL BRUTES* (1992) (analyzing the relationship between colonial conquest and the rise of racism in 20th-century Europe); RONALD WRIGHT, *STOLEN CONTINENTS: THE AMERICAS THROUGH INDIAN EYES SINCE 1492* (1992) (describing the effects of disease and depopulation that followed the conquest of the indigenous peoples of the Americas). The history and conditions of indigenous peoples are addressed in a number of recent works. See *ETHNICITY AND GROUP RIGHTS* (Ian Shapiro & Will Kymlicka eds., 1997); AUGIE FLERAS & JEAN LEONARD ELLIOTT, *'THE NATIONS WITHIN': ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND* (1992); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* (1990); DAVID MAYBURY-LEWIS, *INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE* (1997); *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995); *THE RIGHTS OF SUBORDINATED PEOPLES* (Oliver Mendelsohn & Upendra Baxi eds., 1994); *WE ARE HERE: POLITICS OF ABORIGINAL LAND TENURE* (Edwin N. Wilmsen ed., 1989). For the perspectives of a number of indigenous peoples, see generally *THE INDIGENOUS VOICE: VISIONS AND REALITIES* (Roger Moody ed., 1988), which incorporates indigenous accounts of the colonial experience and their views on current conditions; and *VOICES OF THE FIRST NATIONS* (Freda Ahenakew ed., 1995), which collects the views of native peoples of Canada.

7. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 82-84* (1995).

choice can be maintained.⁸ For S. James Anaya, a scholar of international law, unity implicitly lies in the formulation of transnational customs and conventions.⁹ Their overall principles will insure that national boundaries do not place undue burdens on the cultural or political life of those who resided in the state before it took its present political shape.¹⁰ Notwithstanding critical differences between these two orientations, both authors address many of the same questions: Is the nation, the cultural group, or humanity as a whole the proper unit to use in fashioning a comprehensive approach to indigenous peoples? Is a theory of "multicultural citizenship" or a separate theory of indigenous rights most likely to produce results consistent with the larger aim of ensuring individual choice or collective values? Indeed, can any unified theory adequately address the very different histories and structures of contemporary indigenous peoples?

Regardless of the shape such a quest for common ground takes in a post-colonial world, all such theories must take into account the ambivalence that citizens of many nations feel toward the indigenous peoples living within their borders.¹¹ Nowhere are these mixed feelings more striking than in the case of America's treatment of its own indigenous population. As the image of

8. *See id.* at 92-93.

9. *See* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996)

10. The movement toward decolonization in the years after World War II also incorporated the "blue water thesis," which established procedures for granting independence to overseas colonies but largely immunized states from decolonization procedures affecting their indigenous populations. Later developments, such as the International Labour Organisation conventions, *see infra* notes 87-92 and accompanying text, began to erode this exclusively statist position. *See ANAYA, supra* note 9, at 43-44

11. The term "indigenous" is used in many contexts and documents without precise definition. Kymlicka offers no specific definition, an approach which may call into question his attempt to handle the problems of all "minorities" within a single frame of analysis. Anaya says "the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others." ANAYA, *supra* note 9, at 3. Anaya also cites a much longer definition used by the UN Subcommission on Prevention of Discrimination and Protection of Minorities. *See id.* at 5 n 2. The definitional problem is, of course, vexing: If identity is left to groups or individuals themselves, as is the practice of the US census, more evolving self-definition may result, removing the power of identification from the conqueror. If clear parameters are set, such as degree of native parentage—the blood quantum measure used in much of federal Indian policy in the past—apparent precision may be acquired at the expense of self-identity and the power of native groups to set the criteria for their own membership. A case like that involving the Mashpee Indians, in which the question of tribal identity resulted in a finding that the Mashpee were a tribe at certain times but not at others, shows the difficulties attendant on defining a group by external criteria. *See Mashpee Tribe v. New Sudbury Corp.*, 592 F.2d 575 (1st Cir. 1979). Even overall terminology has changed. The terms Native American and American Indian now are used interchangeably by most of the native peoples of the United States (an inconsistency that will be followed here), even though individuals are careful to identify themselves in most cases by the name of their tribe. *Cf* MARIANNA TORGOVNIK, *PRIMITIVE PASSIONS* 135-36 (1997) (describing increased self-identification by Native Americans as Native Americans).

For purposes of the present discussion, it may therefore be best to work from the broad definitions used, implicitly and explicitly, by Kymlicka, Anaya, and various international accords. Thus, indigenous peoples may be regarded as the descendants of preinvasion groups who are eligible for membership in and continue to define themselves in terms of those groups and who continue, in whole or in part, to be governed by rules formulated by such groups. The specific issues of group attachment, conflicts of laws, and scope of political powers will vary with each situation, a consequence of indigenous peoples being at once partially self-governing and irretrievably embedded within a larger polity.

native peoples has changed from that of the noble savage to that of an indigenous yeomanry, from that of an unproductive nomad to that of a beleaguered dependent, from that of a worthy foe to that of a sporting mascot or ecological emblem, Americans have not shaken their ambivalence about Native Americans and America's treatment of them. When, for example, the members of the Five Civilized Tribes—notwithstanding their being clothed, Christianized, and literate—were compelled in the 1830s to remove to the West, large numbers of Americans signed petitions against their expulsion.¹² Yet white America's unwillingness to back this position with concerted action bespoke its mixed feelings regarding America's impact on the Native Americans and their land.¹³ American ambivalence also deeply suffused the decisions of Chief Justice John Marshall. In his opinions concerning the Cherokee,¹⁴ Marshall spoke of America's extravagant pretensions in laying claim to the lands of sovereign peoples and sought to assuage that ambivalence by creating reciprocal duties for the federal government arising from the Native Americans' anomalous status as "domestic dependent nations."¹⁵ Through every twist of policy and every turn of Supreme Court analysis, this ambivalence has marked America's relations with the original inhabitants of the land. It remains no less current in decisions today relating to whether a court should defer to a tribe's discriminatory precepts,¹⁶ deprive a tribe of the use of an endangered species in an ancient ritual,¹⁷ or accept oral traditions as valid in the determination of tribal identity.¹⁸

What is true in the national realm is increasingly true in the domain of international law and politics as well. The ambivalence toward group rights, heightened by decolonization and global awareness of local practices, forces a wide range of nations and cultures to address such issues as female circumcision,¹⁹ the capacity of individuals to further themselves despite the

12. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 243 (1962); see also ANTHONY F.C. WALLACE, *THE LONG, BITTER TRAIL: ANDREW JACKSON AND THE INDIANS* 67-68 (1993) (describing how Congress was "deluged by hundreds of petitions and memorials, solicited by religious groups and benevolent societies opposed to Indian removal").

13. See PRUCHA, *supra* note 12, at 240-44.

14. The Marshall trilogy consists of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

15. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

16. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-72 (1978) (holding that a federal court civil action against an Indian tribe for sex discrimination was barred by sovereign immunity).

17. See *United States v. Dion*, 476 U.S. 734, 746 (1986) (holding that an 1858 treaty with the Yankton Sioux did not immunize members of the tribe from prosecution for hunting bald eagles without permits when tribal members regularly used eagle feathers in rituals).

18. The validity and impact of oral testimony is particularly relevant in the process by which American Indian groups that were previously not recognized by the federal government may achieve government-to-government status under the terms of the informally designated "Federal Acknowledgment Project." Indeed, the limited weight given to oral testimony was specifically discussed when the regulations governing this process were issued. See *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, 59 Fed. Reg. 9280, 9289 (1994) (codified at 25 C.F.R. § 83.7(e) (1997)).

19. See Note, *What's Culture Got To Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946-57 (1993) (detailing the customary and legal implications

conventions of their group, and the rights of individuals to leave the religions of their birth.²⁰ Numerous international conventions have been propounded,²¹ but the refusal on the part of the United States and other nations to sign many of these conventions²² is less a hypocritical stance toward the principle of such accords than a manifestation of the deeply equivocal responses such undertakings elicit.

Given the plenary power that most nations accord themselves to formulate wholesale solutions to their “native problems,” it is understandable that the quest for a unified theory of group rights should be as attractive a goal to political philosophers and international lawyers as it is tempting to politicians and activist courts. In the American context, for example, Congress has repeatedly used its plenary power to implement one “solution” after another to “the Indian problem”—from land tenure programs, to support for tribal constitutions, to the termination of tribal status—all in the belief that the anomalous status of semi-sovereign entities within national borders could be comprehensively resolved.²³ Courts, too, often have found the peculiar status of Indians best treated by applying the same standards to tribal members as to any other citizens in order to avoid having to deal with special circumstances on a case-by-case basis.²⁴

Realistically, however, what might any unified theory do for us? It may be argued that a universal theory would, without requiring every nation to solve the relationship of individual to group rights in the same fashion, encourage the formulation of a common set of terms and standards of evaluation with which to assess this relationship. Rather like a convertible currency, such a theory would be capable of transforming general precepts into localized coin. At the same time, a universal theory would, by its emphasis on shared terms of conversion, begin to articulate criteria for weighing human rights, individual rights, and group rights within a single frame of reference.

of female circumcision).

20. Article 18 of the Universal Declaration of Human Rights provides for the right of individuals to change their religion. *See* G.A. Res. 217, U.N. GAOR, 3d Sess., art. 18, at 71, 74, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. Saudi Arabia abstained from voting for the Declaration in part because it regards leaving Islam as an act of apostasy. *See* DAVID LITTLE ET AL., *HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC PERSPECTIVES ON RELIGIOUS LIBERTY* 33 (1988); ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS* 11 (2d ed. 1995).

21. *See* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, 21 I.L.M. 205 (1982); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 19 I.L.M. 33 (1980); International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1966); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360 (1966).

22. For a list of human rights conventions and signatory nations, see LOUIS HENKIN ET AL., *BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW: CASES AND MATERIALS* 143-208 (3d ed 1993)

23. *See* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 31-133 (1980).

24. *See, e.g.*, Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (discussing the changing comprehensive views of tribal membership in the jurisprudence of the Supreme Court)

Indeed, it can be argued that such a unified theory might eventually give rise to shared substantive results: Common practices might come to have the status of an international customary law of indigenous rights as a greater number of nations find it advantageous to their international reputations and connections to give effect to such customs.²⁵ Even if local solutions were always to remain preeminent, common approaches could hold out the prospect of more secure borders, less internal conflict, and greater international acceptance—provided, of course, that the range of commendable national solutions was at once limited and politically acceptable.

Why, then, does the formulation of such a unified theory remain so elusive? There are at least three major hurdles such a theory must overcome. The first concerns the theory's level of specificity. Imprecise language may well be as necessary for philosophical theories as for legislative proposals, but if the range of permissible content remains so great as to permit almost any practice, neither the theory nor its results will compel respect. Second, the theory must have a significant degree of transnational applicability. If it appears to be drawn from or for a particular region, the theory will begin life with a genealogy that may carry as much advantage in its home territory as it does stigma abroad. And third, the units upon which the theory is to be built must be comparable across the board and must be able to stand on intellectually and politically supportable ground notwithstanding distasteful local implications. The definition of "indigenous peoples," for example, must be clear enough that it will not vary widely from one circumstance to another. Similarly, a unit like "the nation" or "the community" must be drawn with sufficient precision such that not every collection of individuals would qualify for its protections; yet the unit must also constitute a rubric under which each local agglomeration could imagine placing itself. In the process, the question of whether the same units of analysis apply equally well to such diverse entities as ethnic groups, minorities, or indigenous peoples will require careful attention.²⁶

To engage seriously, therefore, the explicit and implicit unified approaches taken by Kymlicka and Anaya, respectively, is to raise both the question of the appropriateness to indigenous peoples of any unified approach and the diversity of concerns that apply to quite different indigenous groups. It is necessary to

25. Cf., e.g., THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989) (discussing the emergence and existence of international customary law). But cf. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849-70 (1997) (questioning whether international human rights lawsuits are binding under the U.S. Constitution).

26. Numerous other unified theories have, of course, been formulated within political and legal philosophy. Of particular interest is John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS* 41 (Stephen Shute & Susan Hurley eds., 1993), which argues that justice requires equal political opportunities, equal economic opportunities, and maximum benefit to the disadvantaged. For a critique of Rawls's position, see Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195 (1994).

tack back and forth between broad theory and specific cases as a check on the viability of the theory and the effects of theory on practice. Part II of this Review, then, considers Kymlicka's theory of the liberal state as a way of engaging the problems of indigenous peoples, like those of other minority groups, within a single framework of analysis. Part III evaluates Anaya's chosen framework of international rights conventions to see how that particular unifying approach deals with the distinctive situation of native populations. The final part of this Review returns to the overall advisability of relying on a unified approach given both the particularities of indigenous situations and some of the proposals and practices that have been developed outside the framework of a unified theory.

II. INDIGENOUS PEOPLES IN A MULTICULTURAL STATE

Although he does not refer to it as a unified theory, Will Kymlicka seeks a single, overarching theory that encompasses all minority groups, including conquered indigenous peoples. He finds in classic liberal political theory the basis for such an approach. In his version of liberalism, individuals must live within sociocultural groups in order to express and enact their political lives. States must afford such groups, whether they are constituted by immigrants or people native to the land, the opportunity to exist. If, however, any of these subnational groups fail to grant their own members that degree of personal choice that the state accords each person, then in the hierarchy of powers engendered by the liberal deference to the individual, subsidiary cultures must give way. Thus, to understand Kymlicka's unified approach, one must understand both the tenets and the limits of his version of the liberal state.

As the subtitle of Kymlicka's book indicates, his unified theory is intended to cover a wide variety of minority groups, not only indigenous peoples, and to do so from the perspective of the theory of liberalism articulated by such authors as John Stuart Mill, John Rawls, and Ronald Dworkin,²⁷ whose works are within the classic liberal tradition expressed centuries before by John Locke. Kymlicka notes that in the period since World War II adherents to this form of liberalism have emphasized broad-scale human rights, as embodied in such documents as the United Nations Universal Declaration of Human Rights.²⁸ With the exception of some affirmative action programs, however, even liberals have largely turned away from an emphasis on the collective rights of minorities.²⁹ While an emphasis on ethnic minorities in the first half of the century had seemed to contribute to the divisiveness that led to war,

27. See KYMLICKA, *supra* note 7, at 80-82.

28. See *id.* at 2-5 (citing Universal Declaration, *supra* note 20, at 71). The Universal Declaration was adopted with 48 states voting in favor, none against, and eight abstaining (including Saudi Arabia, the USSR, South Africa, and Yugoslavia). See HENKIN ET AL., *supra* note 22, at 143

29. See KYMLICKA, *supra* note 7, at 4.

failure to attend to these groups' claims in more recent years, says Kymlicka, has left "cultural minorities vulnerable to significant injustice,"³⁰ particularly with respect to the preservation of their cultures through language, education, and the exercise of some degree of communal power. Thus, human rights conventions, which "are quite vague, and often seem motivated more by the need to appease belligerent minorities than by any clear sense of what justice requires,"³¹ need to be supplemented by a more comprehensive theory of minority rights.³²

Toward this end, the author characterizes a state as multinational if it contains a number of groups whose strong distinctions of language and culture are rooted in originating nation-like entities, or as polyethnic if the state consists of groups that, notwithstanding their national origins, seek by their immigrant status to become part of the larger society.³³ Thus, countries like Australia, New Zealand, and some in Latin America, all of which have tried to merge their indigenous peoples into the polyethnic category and to claim immunity from international scrutiny, would be required to conceive of their native peoples as part of a multinational state. The result of this recategorization is crucial because under Kymlicka's general theory rights flow differently depending on the category that applies.³⁴ Since liberalism is not simply about individual rights but also is about the protection of freedom of conscience—which in most instances can be fulfilled only through group activities protected by an appropriate measure of self-governance—justice, says the author, requires some degree of "group-differentiated citizenship."³⁵ This ranges from an entitlement to the preservation of one's language and background, in the case of the units comprising a polyethnic state, to a fuller set of self-governing powers, for the units composing a multinational nation.³⁶ To specify how these rights should be assessed and apportioned, the author has to involve himself still more directly with the implications of his liberal theory.

For Kymlicka, liberalism implies the freedom to choose a plan for one's life, and to do so by rationally assessing the idea of the good in the face of new information or experiences.³⁷ Such choices can exist only within the context of group life. He therefore agrees with Ronald Dworkin that by debasing one's culture the range of desirable choice is itself debased.³⁸ A

30. *Id.* at 5.

31. *Id.* at 6.

32. *See id.*

33. *See id.* at 10-11, 17-19.

34. *See id.* at 26-33.

35. *Id.* at 47-48.

36. *See id.* at 45-46.

37. Kymlicka speaks of liberal tolerance as committed to that form of autonomy by which "individuals should be free to assess and potentially revise their existing ends." *Id.* at 158.

38. *See id.* at 83 (citing RONALD DWORKIN, *A MATTER OF PRINCIPLE* 230 (1985)). For a critical discussion of Kymlicka's ideas concerning the harm occasioned by the loss of one's culture, see John R. Danley, *Liberalism, Aboriginal Rights, and Cultural Minorities*, 20 *PHIL. & PUB. AFF.* 168, 179-80 (1991).

culture provides an ease of identity—what Avishai Margalit and Joseph Raz have called “boundaries of the imaginable”³⁹—which, though it could be surrendered at will, is rarely forsaken because of the difficulty any individual would have in starting from scratch to compose a range of available life plans.⁴⁰ But whereas communitarians see the highly localized as the level at which ends should be reinforced and choices made possible, Kymlicka posits the nation-state itself as the fundamental unit within which any kind of minority group can offer choices to its members.⁴¹

It is here that Kymlicka runs into the first of a number of stumbling blocks.⁴² Like any comprehensive approach, a theory of group rights based on a vision of the liberal state must address specific situations and differentiate, where appropriate, among the variants covered by a single formula. If, for example, minorities who emigrated to a new country and those already resident there are to be treated identically or according to a hierarchy of importance, the unifying theory must account for the merging or ranking of constituent entities. Neither in philosophy nor in physics is it plausible to offer a comprehensive approach that grants any particular element priority without a clear rationale for doing so; neither in politics nor in science may one discount inconvenient differences or merge entities to fit one’s formula.

In addition, one must be clear about the units of one’s analysis. If the chosen building block produces insights for one issue but not for others, its claims to comprehensive usefulness will be undermined. If the unit chosen is itself capable of being broken down into separate elements, one’s theory must account for the circumstances in which one or another level of inclusiveness is appropriate. And if, as in physics, psychology, or astronomy, one’s political theory is intended to show the natural or logical relation among domains not previously seen as linked, the new paradigm must show that such connections apply across a wide—indeed, all-encompassing—set of discrete cases. It is

39. Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 449 (1990)

40. See KYMLICKA, *supra* note 7, at 89-90 (discussing how cultural identities provide meaningful options to the members of a culture).

41. See *id.* at 93.

42. In an earlier study, Kymlicka had argued that cultural disadvantage is equivalent to material disadvantage, see WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 183-87, 193-95 (1989), and that a liberal state owes consideration to minorities for their cultural needs, as a context for choice, no less than to all its citizens for their material needs, see *id.* at 165-66. This left open, however, the issue of whether a community whose customs are contrary to those of the liberal concept of justice has a claim to such cultural consideration. The book under review is, in part, an answer to some of the criticisms raised about that earlier work. Kymlicka’s edited volume, THE RIGHTS OF MINORITY CULTURES, *supra* note 6, contains a series of essays, including one by Anaya. See S. James Anaya, *The Capacity of International Law To Advance Ethnic or Nationality Rights Claims*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 6, at 321. The essays address minority rights issues through particular regional and topical examples. Of special interest is the exchange between Kymlicka and Chandran Kukathas. Kukathas’s reprinted 1992 article, *Are There Any Cultural Rights?*, see Chandran Kukathas, *Are There Any Cultural Rights?*, in THE RIGHTS OF MINORITY CULTURES, *supra* note 6, at 228, which argues that liberalism should support individual but not group rights, was answered by Kymlicka in Will Kymlicka, *The Rights of Minority Cultures: Reply to Kukathas*, 20 POL. THEORY 140 (1992).

precisely on these criteria that Kymlicka's approach begins to encounter difficulties.

Kymlicka chooses the nation-state both as the irreducible unit for a culture (as the context for supplying possible choices) and as the building block for either multinational or polyethnic citizenship.⁴³ This decision precludes consideration of those other units within which people frequently find meaningful life rendered possible.⁴⁴ One cannot assume that it is only within the broader context of a state that the freedom of choice Kymlicka takes as axiomatic must be embedded.

Kymlicka's starting point, it is important to note, is almost always his native Canada, where he has served in both advisory and academic roles.⁴⁵ The question of Quebec thus forms his central example, and when he moves by extension to Puerto Rico or to the role of indigenous groups generally it is against the problem of Canadian unity that he posits his units of analysis and his preferred solutions.⁴⁶ It is thus never clear why people should not be free to choose the unit they think best expresses their freedoms—why, indeed, that is not among the freedoms even liberal theory should acknowledge—and why association needs to be placed within a larger nation to be either meaningful or viable.⁴⁷

The problem goes deeper inasmuch as Kymlicka and arguments he cites favorably envision culture as an admixture of elements—rather like a wardrobe, a collection of books, or a set of favored cuisines—that each person puts together for himself.⁴⁸ Were he instead to see culture as a set of categories by which experience is rendered meaningful and made to seem immanent and indeed even natural, by its connections and replications in diverse domains of life,⁴⁹ the presumption in favor of the state as the atom

43. In Kymlicka's lexicon, culture and nation are to be equated: "I am using 'a culture' as synonymous with 'a nation' or 'a people'—that is, as an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history." KYMLICKA, *supra* note 7, at 18.

44. Kymlicka's definition, for example, allows him to avoid raising "gay culture" or similar groupings to the level of entitlement his theory propounds. By equating culture and national borders, however, his schema fails to incorporate native groups that have been dispersed across jurisdictional frontiers, to whom Kymlicka's own criteria for a protectible culture should apply.

45. See Brian Barry, Book Review, 107 ETHICS 153, 153 (1996) (reviewing KYMLICKA, *supra* note 7). Kymlicka's fellow Canadian Charles Taylor also says: "It is not altogether an accident that this book was written by a Canadian." Charles Taylor, Book Review, 90 AM. POL. SCI. REV. 408, 408 (1996) (reviewing KYMLICKA, *supra* note 7).

46. See, e.g., KYMLICKA, *supra* note 7, at 79, 122, 142.

47. Brian Barry is especially critical of this emphasis in Kymlicka's book: "[W]hen it comes to a choice between individual autonomy and almost unconditional collective autonomy for national minorities, Kymlicka comes down unhesitatingly on the side of the latter. Nothing could show more clearly the subversion of Kymlicka's original liberal project by his subscription to the doctrines of romantic nationalism." Barry, *supra* note 45, at 154.

48. See KYMLICKA, *supra* note 7, at 101-03 (citing Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992)).

49. On the anthropological concept of culture, see CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

of choice would not withstand inspection. Some of the problems used by Kymlicka to exemplify his theory and some of his solutions would similarly be called into question.

Consider, for example, the problem posed by the illiberal society. Kymlicka says that while justice demands the freedom of choice within one's nation-like culture, this is only true if that culture itself allows change through choice among new experiences or information.⁵⁰ Thus, he suggests, a society that refuses to allow women to have the full range of choice allowed men is not entitled to the full measure of acceptance within a multicultural state since it fails the initial test of liberal freedom for all its members.⁵¹ It is here that a second stumbling block interposes itself, for Kymlicka, despite his occasional denials,⁵² also sees the individual as the fundamental unit operating within a nation-like entity to create his or her own choices.⁵³ Illiberal groupings fail to acknowledge individual rights. This is so whether the grouping is a tribe that does not allow the children of women who marry outsiders to inherit tribal positions or properties in the same way as men who marry outsider women,⁵⁴ or the Ottoman millet system, which allowed confessional autonomy over personal matters but granted no realistic escape for those who lacked full benefits within a recognized religious community.⁵⁵ But removing formal constraints is no guarantee that freedom is enhanced: It is a hard question whether one is ever entirely free to ignore the categories by which one's culture creates a sense of orderliness. And even if one does shift cultures, has one increased freedom or merely exchanged modes of constraint? Is a Native American who leaves his group more free than one who accepts the constraints of inclusion notwithstanding some reduction of choice?

Kymlicka is hardly unaware of such problematic issues, but he continually ducks the hard questions by suggesting that where irreconcilable differences exist some *modus vivendi* should be sought⁵⁶ or by axiomatically reasserting the freedom to revise one's choices,⁵⁷ without indicating how we are to know when such freedom is actually being exercised. Although he does not counsel direct intervention in an illiberal society, particularly if people are free to leave

50. See KYMLICKA, *supra* note 7, at 158, 165-72. Compare Kymlicka's argument with that of Daniel Philpott, who argues that the enhancement of democracy should be the purpose of recognizing self-determination in a group. See Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352, 375-76 (1995).

51. See KYMLICKA, *supra* note 7, at 39-42, 132-34

52. See *id.* at 46-47, 127, 129.

53. See *id.* at 92-93.

54. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), *Lovelace v. Canada*, U N GAOR Hum Rts. Comm., 36th Sess., Supp. No. 40, Annex 18, at 166, U N Doc A/4/36/40 (1977), *reprinted in* 2 HUM RTS. L.J. 158 (1981).

55. See KYMLICKA, *supra* note 7, at 156-58 (discussing the Ottoman millet system)

56. One approach the author suggests is that of granting such groups an exemption from national laws. See *id.* at 168.

57. See *id.* at 158 (discussing the importance of freedom to assess and revise one's ends as critical to liberalism).

or if their leaders have broad popular support,⁵⁸ neither these social characteristics nor his assertion that economic pressure is permissible to bring down an illiberal society⁵⁹ tells us why one form of force is allowed when another is not. Indeed, it becomes impossible to tell where the line is between a serious restriction like slavery and an arguably less serious one like exclusion by gender from certain rituals.⁶⁰ Kymlicka is ultimately forced to conclude that “[l]iberals need to think more deeply about how to promote the liberalization of societal cultures”⁶¹ without ever having come to grips with any other unit of existence or any other criterion for freedom than his own simplified, and rather incoherent, theory of rational choice within the nation-state.

Just as toleration, by this theory, means relative nonintervention except to encourage individual choice within cultural contexts, so too citizenship, by these lights, does not contradict polyethnic rights. This is true so long as identities can to some degree be shared, even if that means forgetting a certain amount of intergroup history. Kymlicka admits to being mystified at the process by which (as he quotes A.V. Dicey) “a very peculiar state of sentiment” arises to precipitate a shared identity.⁶² His mystification, however, may arise from the fact that, more often than not, shared identity develops out of highly illiberal processes—by distinguishing “us” from “them,” by castigating “them” as less than “us,” and by taking actions that commit oneself to such a view of others.⁶³ If Kymlicka is to fashion a truly unified theory of group rights he must ask, at the very least, whether the very “illiberal” tendencies he would wish to see destroyed do not, in fact, yield desirable ends in themselves. If that is so, just what criteria will stand up to universal inspection as “illiberal”?

Perhaps, one might argue, it is sufficient to guard both the merits of personal choice and resultant shared identity simply by protecting constitutional freedoms of religion, association, and the like. Here again the Canadian example is Kymlicka’s starting point—and in many respects his limiting point as well. For even though he does not want the language issue pushed back to the highly localized level, he still would support land claims for territorial groups—not as compensation, but “to sustain the viability of self-governing

58. *See id.* at 165-70.

59. *See id.* at 168-69 (distinguishing direct intervention from incentives to improve human rights such as offering membership in the European Community and the North American Free Trade Agreement).

60. *See id.* at 170 (arguing that the Amish, Mennonites, and Hasidic Jews present more complex cases for intervention).

61. *Id.* at 172.

62. *Id.* at 192 (quoting, without citation, the 19th-century English theorist A.V. Dicey’s discussion of multinational federations).

63. Rosabeth Moss Kanter, for example, demonstrates the positive correlation of utopian communities’ hostility to the outside world with their stability and longevity. *See* ROSABETH MOSS KANTER, COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE (1972).

minority communities.”⁶⁴ Without specifying which instances merit such support, Kymlicka offers no way to discriminate among the actual cases that arise.

Does, for example, teaching Ebonics (an alleged African-American language dialect)⁶⁵ as the first language in an elementary school qualify for state toleration? If, under Kymlicka’s theory, one answers in the negative because African Americans are not a nation-like culture and they seek integration into American society at large, one presumes what many African Americans themselves may not assert. If one argues in favor of self-government for native peoples without specifying the limits of sovereignty—in the sense, as the United States Supreme Court once characterized it, of the ability “to make their own laws and be ruled by them”⁶⁶—one’s theory remains altogether inapplicable to concrete situations. If one does not specify criteria for determining when “assimilation” is so complete as to eradicate cultural distinctiveness, one cannot determine which rights to accord various groups. And if all that can be offered, by Kymlicka’s own admission, is “a rather vague conclusion”⁶⁷ that setting aside some seats for representatives of native peoples in the national legislature is desirable,⁶⁸ a good deal of the force of one’s theories must of necessity be lost. To paraphrase the famous words of John Gardner, if we do not think any more concretely about how we construct our philosophy than how we construct our plumbing, we run the risk that neither will hold water.⁶⁹

It is for this reason that one regrets the absence of more developed examples in Kymlicka’s work.⁷⁰ Consider, for instance, the impact of the following cases for Kymlicka’s theory: In 1988, Ivan Kitok, a member of the Scandinavian native group known as the Sami, was denied the right to herd reindeer by the village to which he had formerly belonged.⁷¹ His exclusion was upheld by the Regeringsträtten (the highest administrative court in Sweden) under Swedish law, which grants considerable autonomy to the Sami on such matters.⁷² When Kitok appealed to the U.N. Human Rights Committee, alleging the violation of his right to enjoy his own culture, the Committee upheld the Swedish ruling, stating that the interests of the group

64. KYMLICKA, *supra* note 7, at 220 n.5.

65. See Peter Applebome, ‘Ebonics’ Omitted in Oakland Report on Teaching English, *N Y TIMES*, May 6, 1997, at 19.

66. *Williams v. Lee*, 358 U.S. 217, 220 (1958).

67. KYMLICKA, *supra* note 7, at 150.

68. See *id.* at 144-49.

69. Cf. JOHN GARDNER, *EXCELLENCE* 86 (1961) (“The society that scorns excellence in plumbing because it is a humble activity and tolerates shoddiness in philosophy because it is an exalted activity will have neither good plumbing nor good philosophy. Neither its pipes nor its theories will hold water.”)

70. Specific examples of the conflict between individual and group rights are analyzed in 1 ANTHONY D’AMATO, *INTERNATIONAL LAW AND POLITICAL REALITY* 309-85 (1995).

71. See *Kitok v. Sweden*, U.N. GAOR, Hum. Rts. Comm., 43d Sess., Supp No 40, Annex 7(G), at 221, U.N. Doc. A/43/40 (1988) (views adopted July 27, 1988).

72. See *id.* at 222.

could, in instances like the control of collective resources, sometimes outweigh the interests of an individual.⁷³ Kymlicka's rather weak response to the similar case of *Lovelace v. Canada*⁷⁴ is that the powerful should not be allowed to exploit the weak.⁷⁵ But this does not address the question of how a theory of individual rights as choice enhancement within a group culture should lead us to assess the group's need to maintain a coherent world view and form of organization. Similarly, consider the case of David Thomas, a Coast Salish Indian who was taken against his will to undergo an initiation ceremony experienced by all Salish men.⁷⁶ Kymlicka's theory fails to guide us to a decision as to whether Salish or Canadian culture should be supported in such a case—especially given the fact that Canadian culture itself can require service against one's will in the military.

Perhaps Kymlicka is right when he says that such issues cannot be resolved, only managed, and that reducing issues to individual rights alone may disrupt the formation of a viable polity.⁷⁷ Yet if the author did not find that principle to be applicable when a society was being "illiberal" to one of its own members, even this back-up position loses much of its persuasive force. The problem may, as we shall see, lie less in some of the universals to which Kymlicka commends our assent than in the very quest for a unified theory linking such disparate phenomena. Before addressing that prospect, however, we must consider one other major alternative approach, namely that of an international law of indigenous rights.

III. INTERNATIONAL LAW AS A UNIFYING FRAME

S. James Anaya's belief in the utility of international law for framing the discussion of indigenous rights is axiomatic to his study: He accepts without question international accords as *the*—or at least *an*—indispensable element in addressing and assuring whatever rights ought to be accorded conquered peoples. Anaya lays no explicit claim to the formulation of a unified theory of minority or indigenous rights. Nevertheless, his reliance on the fundamental precepts of international law and on its superiority in addressing these issues indicates his commitment to the principles of international law as such a

73. See *id.* at 229. See generally Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368 (1991) (describing the relationships between resource management, individual rights, and collective rights in indigenous communities).

74. U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc. A/36/40 (1977), reprinted in 2 HUM. RTS. L.J. 158 (1981).

75. See KYMLICKA, *supra* note 7, at 230 n.1. Compare Kymlicka's treatment of *Lovelace* to the brief review of it and *Kitok* in ANAYA, *supra* note 9, at 101. Anaya argues that *Kitok* demonstrates that group interests in cultural survival may take priority over individual rights. See *id.*

76. See *Thomas v. Norris* [1992] 2 C.N.L.R. 139 (B.C. Sup. Ct.); see also Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1343 (1993) (analyzing *Thomas* in terms of tribal sovereignty).

77. See KYMLICKA, *supra* note 7, at 193-94.

unifying framework. Unlike Kymlicka, he factors indigenous peoples out for separate consideration. His international law approach thus presumes: (1) that the discussion of indigenous rights and needs takes place most fruitfully across national frontiers; (2) that through such cross-national boundaries standards can develop that each state cannot, as history shows, be relied upon to achieve on its own; and (3) that once articulated, such rights, though far from self-executing, will gain force through accepted methods of international law practice. In this regard, he takes as given that international articulation of indigenous rights is a good thing in and of itself in much the same way that Kymlicka assumes the nation is the best unit within which even group-differentiated rights can be fashioned. To understand Anaya's unified approach, therefore, one must initially understand the antecedents of his form of international law discourse.⁷⁸

Anaya organizes his study into three distinct parts. First, he details the historical context of the modern human rights movement.⁷⁹ By doing so, he is able to show how western expansionism enfolded native peoples within an international law framework that rendered the state central and all competing claims for sovereignty not rising to the level of the state largely unworthy of full recognition. As contemporary international norms began to emerge after World War II, Anaya argues in the second part of his study, the concept of self-determination took center stage; with it followed an intense discussion about the content of such a concept and its range of application.⁸⁰ Anaya's focus in the third part of his study—the actual implementation of international norms⁸¹—flows directly from his earlier chapters. By reviewing various international accords within the context of negotiated international conventions, he is able to place the existing and proposed conventions affecting indigenous peoples in a broader context. Throughout, Anaya does not propound a specific theory of indigenous rights but instead situates himself firmly in the context of international law; his study partakes of, and adds to, the assumptions that drive much of international law discourse, particularly the emphasis on the state and the individual as the sole units for consideration.

Anaya strives to show that international law provides an especially appropriate, if implicit, framework in which to address the rights of indigenous peoples. Like the proponents of international conventions of human rights, he comes to the unifying appeal of international law through a particular history of ideas and political relations. As Anaya himself describes it, if the language

78. Anaya explored many of the issues addressed in the present book in his earlier work. See S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 131 (1993); S. James Anaya, *Native Land Claims in the United States: The Unatoned for Spirit of Place*, in *THE CAMBRIDGE LECTURES*, 1991, at 25 (Frank McArdle ed., 1993).

79. See ANAYA, *supra* note 9, at 9-71.

80. See ANAYA, *supra* note 9, at 75-125.

81. See ANAYA, *supra* note 9, at 129-82.

of much philosophical discourse about group rights is firmly embedded in the terms of eighteenth- and nineteenth-century liberal or communitarian thought, the language of international group rights is only now beginning to emerge from the concepts of international law born in that same age.⁸² Philosophy and law in the early modern era, he indicates, shared a bias in favor of the state as the essential unit of analysis.⁸³ Thus, in the formulation of the leading eighteenth-century theoretician of international law, Emmerich de Vattel, the dichotomy between individual and nation-state was posited as a natural fact.⁸⁴ Native peoples, with their overlapping territories and kin-based affiliations, qualified as neither. Notwithstanding some variations, Vattel's characterizations captured the terms of discussion. The conclusion that the law of nations existed between states, rather than above them, reinforced the qualification that states achieve their status only if recognized by other states. Well into the twentieth century, therefore, native tribes were said to have no status whatsoever in international law.⁸⁵

Anaya explains that in the period of decolonization after World War II international organizations paid increasing attention to the circumstances of the native peoples of the newly independent nations of the world.⁸⁶ Although the problems of native peoples were once regarded as the sole province of conquering nations, the development of some states out of former mandatory or trust territories under international law, coupled with an overall anti-racist climate, increased the visibility of native peoples to international agencies. Mutually recognizing states were no longer the only units of discussion in international fora: Human rights and group rights constituted an alternative discourse to which many agencies became increasingly attuned. As Anaya indicates, indigenous peoples first began to benefit from this shift when, in 1957, the International Labour Organisation (ILO) promulgated Convention No. 107.⁸⁷ Although the attention to natives was new, the underlying

82. See ANAYA, *supra* note 9, at 13-15.

83. See *id.*

84. See EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW* (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

85. See ANAYA, *supra* note 9, at 23. As Anaya summarizes the matter: "Early affirmations of indigenous peoples' rights succumbed to a state-centered Eurocentric system that could not accommodate indigenous peoples and their cultures as equals." *Id.* at 26. Thus, in Advisory Opinion No. 61, *Western Sahara*, 1975 I.C.J. 12 (Oct. 16), the fact that Spain had agreements with the chiefs of local tribes was taken to mean that the area was not *terra nullius*. In *Island of Palmas* (Neth. v. U.S.), 2 R.I.A.A. 829 (1928), however, the Netherlands was permitted to assert sovereignty by right of occupation notwithstanding the argument that the natives were as politically and socially organized as the natives in the Western Sahara. In each instance, the Eurocentric conception of state and polity governed the assessment of the case. See generally KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* (1989) (analyzing claims to native lands in the development of the British colonial empire). For the argument that the precepts governing western legal approaches to indigenous peoples derives from propositions established during the Medieval period, see ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 49-50 (1990).

86. See ANAYA, *supra* note 9, at 43-44.

87. See ANAYA, *supra* note 9, at 44 (discussing and citing Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent

philosophy was not: The Convention spoke in terms of members of indigenous "populations" rather than of "peoples" or "groups," and the overall tone was assimilationist.⁸⁸ It took until 1989 before a new version of the ILO Convention was to reflect changing perceptions through its elimination of an incorporative tone,⁸⁹ and its emphasis on the more independent sounding "peoples."⁹⁰ The ILO experience is important not only for coping with the loaded terminology of indigenous rights but also because, unlike other organizations, the ILO creates treaty obligations among ratifying states and affects the formation of those precepts of international customary law that compel recognition.⁹¹

The experience of the ILO thus becomes a test of Anaya's faith in international accords, of the movement from an assimilationist to an indigenous-rights perspective, and of the level of specificity any such international accord must achieve to be effective. But the ILO conventions still did not test the full extent to which native voices and concerns could affect the shape of these conventions. A stronger test for Anaya's international law approach relates to the concept of "self-determination" as addressed in more recent international conventions. Not unexpectedly, many nations have been adamant in wishing to avoid the imputation that native groups possess a right to a significant degree of self-governance or even secession.⁹² Thus, when the United Nations formed a working group in 1985 to formulate the Draft Declaration on the Rights of Indigenous Peoples, the stage was set for a substantial divergence of views. Many nations objected to the implication of separatism contained in the term self-determination, while most groups representing indigenous peoples insisted on the use of the term.⁹³ (Ironically, the United States has not objected to the term or many of its underlying implications, in part because American policy with respect to Native Americans since the 1970s has been repeatedly referred to as the "Self-Determination Policy.")⁹⁴ To understand some of the reasons the U.N.

Countries, June 26, 1957, 328 U.N.T.S. 247). Convention No. 107 was motivated by the ILO's concern about employment practices adversely affecting native peoples.

88. See ANAYA, *supra* note 9, at 45.

89. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382. Anaya calls this Convention "international law's most concrete manifestation of the growing responsiveness to indigenous peoples' demands." ANAYA, *supra* note 9, at 47

90. ANAYA, *supra* note 9, at 48.

91. See *id.* at 49-50.

92. The ILO Convention No. 169, for example, ducked the issue altogether. As the committee whose proceedings led to the Convention wrote: "[T]he use of the term 'peoples' in this Convention has no implications as regards the right to self-determination as understood in international law." ANAYA, *supra* note 9, at 49 (quoting Report of the Committee on Convention 107, International Labour Conference, Provisional Record 25, 76th Sess., at 25-27, para. 31 (1989)).

93. See ANAYA, *supra* note 9, at 49.

94. The term (as well as the clearest articulation of this approach) is utilized in RICHARD NIXON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 3 (1970), reprinted in DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 253 (3d ed. 1993). More recently, the U.S. Congress acknowledged "the deprivation of the rights of

Working Group has not succeeded yet in forwarding a draft for approval, and indeed to test how good the international law framework propounded by Anaya is in incorporating indigenous perspectives, it is worthwhile to review some of the outstanding issues and differences of opinion that can be used to supplement Anaya's account.

The central problem in international accords affecting native groups, as we shall see, concerns the extent to which they assure some degree of self-rule. Settling on the terminology to address this issue in highly divergent situations has been a major stumbling block. Similarly, the question of inclusion within the rubric of "indigenous" has posed its own problems: Should some form of political or social association be a defining feature, or should heritage, self-definition, or national law hold sway? At what stage may a group or individual have so merged with the larger society or polity that it may be said effectively to have relinquished its former affiliation? And when differences of approach or interpretation arise, will some pan-national forum be called upon to decide the matter—and, if so, by what criteria—or should matters be left to the parties to negotiate, notwithstanding substantial differences in bargaining power? Views on these and related issues vary immensely.

If we compare the current version of the Declaration with earlier drafts and with revisions proposed by the National Aboriginal Islander Legal Services Secretariat (NAILSS),⁹⁵ one of the many indigenous nongovernmental organizations (NGOs) given consultative status in the proceedings, some very sharp differences are apparent. An early draft of the Declaration spoke of the concern that oppressed native peoples should be empowered "to voice their grievances and to organize themselves in order to bring an end to all forms of discrimination and oppression which they face."⁹⁶ NAILSS wanted the declaration to speak of the conditions of deprivation and disintegration "which

Native Americans to self-determination" in its apology for "the suppression of the inherent sovereignty of the Native American people" by "the illegal overthrow of the Kingdom of Hawaii on January 17, 1893." S.J. Res. 19, 103d Cong. § 1 (1993). Self-determination legislation, such as the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1994), has permitted Indian tribes to plan and administer programs funded by the federal government. Part of the irony of the American policy is captured by David Maybury-Lewis, who has noted the fact that the colonists labeled the natives of the New World Indians, only to try to abolish the term later. See MAYBURY-LEWIS, *supra* note 6, at 7-12.

95. See Statement by the National Aboriginal and Islander Legal Services Secretariat (Chippendale) [hereinafter NAILSS Statement] (on file with the *Yale Law Journal*). Anaya does not refer to the NAILSS statement or to those of similar groups in his text. For a set of responses by other NGOs to an early draft declaration, see Jason W. Clay, *Organizing To Survive*, CULTURAL SURVIVAL Q., Winter 1984, at 2; and Roger Jones, *Legal Strategies for Cultural Survival and Human Rights*, CULTURAL SURVIVAL Q., Spring 1986, at 69. See also the discussions by indigenous and governmental representatives in UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.6 (1982); and UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, DISCRIMINATION AGAINST INDIGENOUS PEOPLES: REPORT OF THE WORKING GROUP ON INDIGENOUS POPULATIONS ON ITS SEVENTH SESSION, U.N. Doc. E/CN.4/Sub.2/1989/36 (1989) [hereinafter 1989 REPORT].

96. 1989 REPORT, *supra* note 95, at 31.

in turn may legitimately lead to rebellion against all forms of oppression."⁹⁷ The present draft of the Declaration speaks instead of indigenous peoples' "right to development in accordance with their own needs and interests."⁹⁸ Similarly, an earlier draft spoke of "the need for minimum standards taking account of the diverse realities of indigenous peoples in all parts of the world."⁹⁹ NAILSS would have substituted "comprehensive" for "minimum" standards.¹⁰⁰ By comparison, the current draft simply speaks of the United Nations' having "an important and continuing role to play in promoting and protecting the rights of indigenous peoples."¹⁰¹ Indigenous NGOs did succeed in changing the 1988 draft language barring "propaganda derogating their dignity and diversity";¹⁰² the current draft refers instead to "[a]ny form of propaganda directed against them."¹⁰³

NAILSS, however, pressed for "recognition of and protection for [indigenous peoples'] own self-defined land-tenure systems."¹⁰⁴ Whether the current reference in Article 26 to "the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources"¹⁰⁵ will carry the same implications for protecting indigenous concepts of land tenure remains to be seen. Although the current draft repeatedly speaks of the right to self-determination—particularly in its clear assertion in Article 3 that "[i]ndigenous peoples have the right of self-determination"¹⁰⁶—the matter is far from being acceptable to many member states. Indeed, indigenous representatives walked out of the October 22, 1996, meeting of the Working Group to protest an agenda that, after twelve years of haggling, would have reopened discussion of every one of the draft provisions.¹⁰⁷ Representatives of native groups reportedly were trying to determine if Article 3 has any real chance of passage or whether its denial by many states will undermine the entire thrust of the document.¹⁰⁸

97. NAILSS Statement, *supra* note 95, at 1 (footnote omitted)

98. U.N. DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, AS AGREED UPON BY THE MEMBERS OF THE WORKING GROUP ON INDIGENOUS POPULATIONS AT ITS ELEVENTH SESSION (1993) [hereinafter 1993 DRAFT DECLARATION], reprinted in CULTURAL SURVIVAL Q. Spring 1994, at 65 The 1988 draft did incorporate in its preamble the phrase "which in turn may lead to rebellion against all forms of oppression," but very pointedly left out the word "legitimately" from any reference to conditions leading to rebellion, as proposed by various NGOs. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, DISCRIMINATION AGAINST INDIGENOUS POPULATIONS REPORT OF THE WORKING GROUP ON INDIGENOUS POPULATIONS ON ITS SIXTH SESSION 32, U.N. Doc E/CN.4/Sub.2/1988/24 (1988) [hereinafter 1988 DRAFT DECLARATION]

99. 1988 DRAFT DECLARATION, *supra* note 98, at 32

100. NAILSS Statement, *supra* note 95, at 2 (footnote omitted)

101. 1993 DRAFT DECLARATION, *supra* note 98, at 65

102. 1988 DRAFT DECLARATION, *supra* note 98, at 33

103. 1993 DRAFT DECLARATION, *supra* note 98, at 66.

104. NAILSS Statement, *supra* note 95, at 4 (footnote omitted)

105. 1993 DRAFT DECLARATION, *supra* note 98, at 67

106. *Id.* at 66.

107. See *Draft Declaration on the Rights of Indigenous Peoples Update*, CULTURAL SURVIVAL Q. Winter 1997, at 5.

108. See *id.*

Anaya's approach to self-determination parallels the intent and the incompleteness of documents like the Draft Declaration. He sees "the plain meaning" of the term "peoples," not as support for the proliferation of mutually exclusive entities, but as bespeaking a global context of increasingly interconnected and interdependent spheres of power.¹⁰⁹ Secessionism is trumped by the propulsion toward such interconnectedness, which he equates even with the real meaning of freedom.¹¹⁰ But this is surely a very different notion from that held by many indigenous groups. Many of these groups want true self-governance to the exclusion of any other polity; many do not want citizenship imposed upon them by states within which they happen to live;¹¹¹ and many hold the belief that land is not convertible into money,¹¹² a belief that may be utterly incompatible with the economies of the surrounding state. Anaya is more sensitive than Kymlicka to the range of ways in which the relations among indigenous and state governments may be organized, negotiated, and revised,¹¹³ but he does share with Kymlicka the assumption that it is through law, more than through politics, that all such relationships should be cast.

Similarly, Anaya sees the implementation of self-determination supported by the extension of the concept of international customary law into the realm of indigenous rights. Thus, a notion like cultural integrity, which appears in Article 6 of the Draft Declaration,¹¹⁴ has been applied by international fora to cases that involve state interference with access to and management of native resources.¹¹⁵ But more difficult cases involving women¹¹⁶ and

109. See ANAYA, *supra* note 9, at 80-82.

110. See *id.* at 79. Anaya writes:

The values of freedom and equality implicit in the concept of self-determination have meaning for the multiple and overlapping spheres of human association and political ordering that characterize humanity. Properly understood, the principle of self-determination, commensurate with the values it incorporates, benefits groups—that is, "peoples" in the ordinary sense of the term—throughout the spectrum of humanity's complex web of interrelationships and loyalties, and not just peoples defined by existing or perceived sovereign boundaries.

Id.

111. See 2 THE INDIGENOUS VOICE 1-174 (Roger Moody ed., 1988) (containing numerous statements by indigenous groups on their desire for autonomy and self-governance).

112. See 1 *id.* at 355-410 (containing native peoples' statements concerning the inalienability of native lands).

113. Cf. 2 *id.* at 129-40 (detailing negotiations involving Australian aborigines and Maoris with the governments of Australia and New Zealand, respectively).

114. See 1993 DRAFT DECLARATION, *supra* note 98, at 66.

115. See ANAYA, *supra* note 9, at 100-01 (citing cases). Article 27 of the International Covenant on Civil and Political Rights, 6 I.L.M. 368, 368 (1967), also speaks of the right of minorities "to enjoy [their] own culture," though it does not use the term "integrity." Anaya details other international documents that refer to cultural integrity. See ANAYA, *supra* note 9, at 98-104.

116. The present Draft Declaration on the Rights of Indigenous Peoples, unlike earlier versions, makes no special mention of women's rights. References to other U.N. conventions in the Declaration do not resolve the question whether traditions of gender discrimination within an indigenous community will take precedence over national or international guarantees couched in terms of individual or human rights. The question of women's rights is one of the stumbling blocks to wide acceptance of human rights standards. The broader conflict of cultural values and international norms has created difficulties in formulating international standards. For example, there was considerable disagreement over these issues at the World

children¹¹⁷ in indigenous societies will cast a very different light on the idea of “cultural integrity” and the relation of collective rights under indigenous rights agreements to individual rights as understood by human rights conventions.

Indeed, Anaya’s account can be read to suggest that it is perhaps more in the realm of material issues than in deep-seated cultural difference that international conventions can serve indigenous peoples most effectively. Protection of the intellectual property of native peoples—their designs, medicinal discoveries, and genetic resources—is potentially amenable to international accords¹¹⁸ and has already found its way into some of the policies and practices of the World Bank and private investment.¹¹⁹ Particularly troublesome are the conflicts that arise when native peoples and the state disagree on the exploitation of resources in their territories. These may range from the state’s perceived “need” to extract minerals or energy from a native territory¹²⁰ to the state’s desire to bar the killing of endangered

Conference on Human Rights, held in June 1993, in Vienna, and at the preparatory meeting resulting in the Bangkok Declaration of the Ministers and Representatives of Asian States. See *The Bangkok Declaration*, in HUMAN RIGHTS AND CHINESE VALUES 205, 216-19 (Michael C. Davis ed., 1995) (advocating the accommodation of national and regional particularities and varying historical, cultural, and religious backgrounds in the process of international norm-setting); Michael Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES, *supra*, at 3 (noting the Asian governments’ position that the concept of “universal standards” for the protection of human rights is “undesirable, if not impossible”); James Ledbetter, *Rights to Remain Silent: Why Did the World Conference on Human Rights Fail? And Does the Clinton Administration Care?*, VILLAGE VOICE, July 13, 1993, at 33 (discussing the failure of the World Conference on Human Rights); Elaine Sciolino, *U.S. Rejects Notion That Human Rights Vary with Culture*, N.Y. TIMES, June 15, 1993, at A1 (labeling as “intense” the struggle between western countries committed to universal human rights and countries that oppose the “imposition of Western values”).

117. A number of problems arise with reference to children, who are mentioned at various places in the present Draft Declaration and who are the subject of the widely ratified Convention on the Rights of the Child, 28 I.L.M. 1448 (1989). See Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD I (Philip Alston ed., 1994) (examining the Convention’s standard of “best interest of the child” as an example of the clash of cultures and universal human rights standards); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV INT’L L J 449 (1996) (criticizing standards that emphasize children’s autonomy rather than emphasizing the state’s responsibility to children).

118. See generally VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLES AND INTELLECTUAL PROPERTY RIGHTS (Stephen B. Brush & Doreen Stabinsky eds., 1996) [hereinafter VALUING LOCAL KNOWLEDGE] (considering such topics as indigenous rights to copyright artistic designs and the safeguarding of religious practices from commercialization by outsiders). On the issue of genetic resources, see generally Stephen B. Brush, *Whose Knowledge, Whose Genes, Whose Rights?*, in VALUING LOCAL KNOWLEDGE, *supra*, at 1, which contemplates the compensation of indigenous people for the sharing of their culture, knowledge, and biological resources; and Jonathan Friedlaender, *Genes, People, and Property*, CULTURAL SURVIVAL Q., Summer 1996, at 22, which introduces a collection of essays on indigenous peoples’ rights to genetic information.

119. Cf. *Operational Directive 4.20: Indigenous Peoples*, in TRADITIONAL KNOWLEDGE AND SUSTAINABLE DEVELOPMENT 52, 53-54 (Shelton H. Davis & Katrina Ebbe eds., 1995) (discussing protection of land rights). The general relation of indigenous peoples to their environment is taken up in Agenda 21, U.N. Conference on Env’t & Dev., U.N. Doc. A/CONF.151/26, 31 I.L.M. 814 (1992).

120. See 1 THE INDIGENOUS VOICE, *supra* note 111, at 159-86 (analyzing the role of multinational corporations and native reactions to their mining operations); ALVIN M. JOSEPHY, JR., NOW THAT THE BUFFALO’S GONE 151-263 (1982) (describing private and governmental attacks on American Indian water,

species for native religious rituals.¹²¹ Indeed, as one moves into the realm of cultural differences—whether the question is one of access to sacred sites,¹²² determining who may have a voice in speaking for an indigenous group,¹²³ or varying styles of criminal punishment¹²⁴—fundamental values may once again come into irreconcilable conflict.

There have been, of course, a number of proposals for, and some development of, international fora for the resolution of disputes involving native peoples. Support exists for a permanent forum that would operate under United Nations auspices,¹²⁵ but the composition of such a panel and the relative priority of native versus human rights and international customary law standards remain to be addressed. Without overarching tribunals indigenous peoples may remain subject to national policies and laws. With such tribunals they may gain outside enforcement powers or simply lose out to the procedures or criteria imposed by nations that wish to continue treating their native peoples as an internal political matter.

In the end, it may seem churlish to suggest that international law is an imperfect vehicle for the support of indigenous peoples' rights. After all, does it not represent a clear attempt to help them? Are we not responding to their expressed concerns when their representatives participate in the drafting of conventions? And is the public discussion of such matters not a major contributor to sensitizing—or at least embarrassing—recalcitrant governments? Even if international law cannot “solve” the problems of native peoples, one could argue that it helps to achieve a number of other desirable ends. When categories emerge in international discussion—whether it be those of “women,” “children,” or “native peoples”—the members of a category acquire a presence,

fishing, and mineral resources); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992) (arguing that reform is needed to heal the breach between Indian and non-Indian communities caused by laws allowing resource exploitation in the American West).

121. On the relation of treaty rights to endangered species legislation in the United States, see *United States v. Dion*, 476 U.S. 734 (1986).

122. See Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691 (1993).

123. The issue of group identity arises in the American context as part of the Federal Acknowledgment Project, see *supra* note 18, which allows previously unrecognized Indian tribes to enter into government-to-government relations with the United States. See 25 C.F.R. § 83.7(a) (1997). See generally Rachael Paschal, Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209 (1991) (discussing the requirements and difficulties for tribes in gaining recognition).

124. A tribal judge was criticized recently for punishing teenage tribal members found guilty of a mugging by banishing them to a small island rather than sending them to jail, as state law would have recommended. See *Critics Contend Tribal Justice Was Easy on Young Muggers*, N.Y. TIMES, Sept. 11, 1995, at B12.

125. See ANAYA, *supra* note 9, at 152. As Anaya notes:

The 1993 World Conference on Human Rights, in its Vienna Declaration and Programme of Action, called for a “permanent forum” for indigenous peoples within the United Nations system, and the U.N. General Assembly responded by requesting the Commission on Human Rights and its subsidiary bodies to give “priority consideration” to the permanent forum idea.

Id. (footnotes omitted).

even if they have yet to obtain decisive power. Indeed, when such individuals or groups begin to see their own situation in terms of "rights," "integrity," or "inviolability," they and their interlocutors may be launched on a new discourse of great consequence.

Yet the very struggle for the terms of the discussion may, when played out within the format of international conventions, mask the very weakness of those affected. As the alternative draft proposal discussed above and the walk-out of native representatives from the recent meeting of the Working Group indicate, if the terms of such conventions remain too vague, if the criteria continue to be drawn from the political cultures of former colonial powers, if native groups do not have a vote on the drafted accords, and if the people affected cannot see themselves in the language of the document, their alternative vision may once again be submerged by those who profess to mean them well. It is far from a rhetorical question to ask why a simple declaration of self-determination for indigenous peoples by the international community is not sufficient—and why most nation-states prefer a document of innumerable articles susceptible to rather different readings.

IV. UNITY AND DIVERSITY REVISITED

The work of Kymlicka and Anaya underscores the allure and the pitfalls of relying on a unified theory for addressing the concerns of indigenous peoples. Kymlicka's unified approach fails to acknowledge the significant distinction of native rights from those of minorities or ethnic groups by relying on the nation as the indissoluble unit of political existence and on cultural groups as existing solely for the development of the individual.¹²⁶ Anaya's international law emphasis runs the same risk when it too accepts the nation as the unit of analysis and places indigenous peoples in terms of that unit. Thus, while such theories do separate indigenous from other group rights, they inevitably blur the distinction with their sheer propulsion toward one theory

126. The high watermark of this emphasis on the nation in recent years was undoubtedly the Gulf War, when President Bush refused to consider breaking up Iraq into Kurdish, Shiite, and Sunni portions because doing so would set a precedent for the dissolution of nation-states more widely. See George Bush, *The Liberation of Kuwait Has Begun* (Jan. 16, 1991), in *THE GULF WAR READER* 311-14 (Micah L. Sifry & Christopher Cerf eds., 1991); see also BBC WORLD SERV., *GULF CRISIS CHRONOLOGY* 204 (1991) (noting President Bush's statement that "the U S does not seek the destruction or destabilisation of Iraq"). The exception that proves this rule is clearly the former Yugoslavia, where only after the de facto dissolution of the nation were western powers willing to sign on to the existence of separate entities—and then only because they feared that the spread of ethnic divisiveness might threaten nearby nations like Greece. See LORING M. DANFORTH, *THE MACEDONIAN CONFLICT* (1995) (describing the role of Macedonian identity across the frontiers of Greece, Yugoslavia, and the Balkans); MAYBURY-LEWIS, *supra* note 6, at 107-18 (summarizing the status of ethnic polities in the former Yugoslavia); Ivo John Lederer, *Bosnia: Precedents of Peace*, WASH. POST, Dec. 17, 1995, at C7 (analyzing the Dayton Accords and the division of the former Yugoslavia). It is also worth recalling that the concept of the nation-state itself imagined that minorities would be merged into the polity as a whole. See Dankwart A. Rustow, *Nation*, in 11 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 7, 8 (David L. Sills ed., 1968)

covering all situations. The result is either to move, as Kymlicka does, to a level of generality that makes specifics difficult to address, or, as Anaya does, to leave out enforcement for nonstate solutions whenever the power of the state against an internal group is irreconcilably posed. In both instances it is not so much that misdirection occurs through a clearly fallacious theory as that a more refined sense of other bases of knowledge and a genuine repertoire of alternatives are set aside in the face of a one-size-fits-all orientation. It may be possible, however, to construct a more elaborate or supplemental framework for conceptualizing indigenous rights, emphasizing procedural approaches suggested by the ethnographic knowledge of other cultures or elaborating formats used to negotiate solutions to very particular disputes.

Such an elaborated set of alternative or supplementary propositions would have two distinct advantages over a unitary approach: (1) It would permit us to take a critical stance towards the established foundations of our theories and to entertain new foundational concepts; and (2) it would give us a more extended range of approaches with which to consider the particularities of variant situations—to fashion, as it were, more tailored solutions than is possible when one size must apply to every shape. Thus, international law precepts may be exceedingly valuable for sensitizing powers to a common language of obligation, but the appreciation of alternative legal forms may represent a useful supplement to the inclusion of indigenous jurisprudence in the family of laws entitled to comity. While individual choice may form one basis for striking at group tyranny, the realization that choices are often structured by group inclusion and cannot be forsaken except at great social and psychological cost may help to validate the practices groups apply to those who continue to be associated with them.

It is relatively easy, of course, to criticize Anaya and Kymlicka for their proposals' lack of specificity, the vagueness of their terms, and the lack of coherence among their competing rights formulations. But this criticism would, to a considerable extent, be misplaced: One hardly needs to foresee all possible occurrences or resolve all outstanding matters at once before the path of a given approach can be commended. More important at this stage is the establishment of some of the terms of the discussion itself. In particular, some decision must be made about the distinctiveness of indigenous rights and the role of history in separating indigenous rights from any others; about the extent to which indigenous perspectives will really be brought to bear on the discussions; and about the broader concepts of cultural change that existing powers employ in their visions of native peoples in the modern world. As we seek alternatives or additions to the classic foundations of liberal theory and international law, we may wish to begin with some of the findings of modern historical and social analysis.

History matters enormously to a consideration of native peoples' rights. Kymlicka would support historic agreements with tribes that are not illiberal

in order to build trust within a context of equality-based, group-differentiated, self-governing entities.¹²⁷ Anaya, who is never quite direct about the role of history, implies that precolonial affiliations should not take precedence over the desires of contemporary populations.¹²⁸ Neither author attends to the distinctive history and changing policies upon which indigenous peoples have been forced to rely and from which they cannot be extricated. It is not simply a matter of historic injustice to say that local history cannot be ignored.¹²⁹ Rather, historic relations with indigenous peoples are unlike those involving any others. Westerners' temptations to ignore history in the name of universal justice or imagined predictability eventually will come up against unavoidable historic particularities.¹³⁰ Useful analogies can certainly be constructed from outside domains for application to indigenous rights, but principles and procedures that fail to attend to history or cultural difference will only perpetuate forced assimilation in the name of a higher law or philosophy.

The importance of history is intimately connected to a second issue, namely consideration of the fundamentally different perspectives that many native peoples hold in comparison to their neighbors. To the native of the Americas for whom the concept of owning land is as unthinkable as owning the air around one's head is to the average American,¹³¹ or to the Aborigine for whom throwing a spear at another may hold important cultural or religious significance,¹³² a covenant's promise to protect his people against "ethnocide"¹³³ may sound like yet another invitation for an outside forum to set the terms of acceptable practices within the natives' own culture. With little to insure that it is their understanding of the terms of a prior agreement that will be given effect,¹³⁴ and with the experience of one recent case

127. See KYMLICKA, *supra* note 7, at 116-20.

128. See ANAYA, *supra* note 9, at 84.

129. As Richard Falk has said in this context: "[W]e cannot approach the challenge of the relationship with indigenous people as long as it remains an abstraction that can be lumped with other categories of injustice. Instead it has a specific history or series of histories, that is bound up with our modernizing, developing civilization." Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17, 21 (James Crawford ed., 1988).

130. There has, for example, been enormous variation in the terms of treaties, political policies, and interracial relations affecting indigenous peoples. While general principles may serve as an overarching context for cross-national relationships involving native peoples, approaches to such problems as economic development of native resources must speak to local histories and local concerns. As Frank Pommersheim, referring to economic programs in the United States, has said. "Each side [state and tribe] has to see, or at least explore, the potential for identifying *local* common ground on which to make a stand." FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 161 (1995).

131. For native attitudes concerning the inalienability of land, see 2 *THE INDIGENOUS VOICE*, *supra* note 111, at 355-411.

132. See Regina v. Muddarubba, in *CRIMINAL LAW* 692 (Richard C. Donnelly et al. eds., 1962) (printing an originally unpublished 1956 Australian opinion concerning an Aborigine who speared a native woman who called him by a term referring to his genitals).

133. *E.g.*, 1993 DRAFT DECLARATION, *supra* note 98, at 66 ("Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide.")

134. The presumptions exemplified by the U.S. Supreme Court's approach to the interpretation of treaties with Indians—that "ambiguous expressions must be resolved in favor of the Indian parties

interpreting existing human rights conventions suggesting that collective religious beliefs may be subject to the interpretations of nonbelievers,¹³⁵ much careful thought will have to be given to how the distinctiveness of indigenous cultures will fare in the international environment. For all the professions of concern for the preservation of native cultures, the language of a unified theory of liberal rights and the language of international customary law and global linkage cannot but lead many indigenous peoples to fear that their distinctiveness will be subject to a new form of well-meaning assault.

Such a concern for retention of real differences leads to an additional concern about international accords. As westerners think about indigenous peoples, they may, with the best of intentions, tend to freeze such groups at a particular moment in time or to create a climate in which certain "natural" processes will not be disrupted by outside influences.¹³⁶ References to the insupportable destruction of indigenous peoples abound in the preambles to national and international legislation.¹³⁷ So, too, there have been frequent references to "development" and "progress" in documents concerning indigenous peoples.¹³⁸ Perpetuation of such western conceptualizations can easily serve as a new vocabulary of demonization. If Donald Trump disparages Native Americans who run gambling casinos by saying that since they are dressed in suits, rather than feathers, they do not look like Native Americans to him, he clearly implies that the "special status" Native Americans have under U.S. law constitutes an insupportable privilege. Neither the terms nor the

concerned, [that] Indian treaties must be interpreted as the Indians themselves would have understood them, and [that] Indian treaties must be liberally construed in favor of the Indians," Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617 (1975) (footnotes omitted)—are concepts that neither the international covenants nor Kymlicka has considered. Compare the example of the Treaty of Waitangi of 1840, in which the question arises whether, by use of the word *kawanatanga*, the Maori intended, as they now assert, to give to the whites only the powers of a "protectorate" or to cede to the whites all of their "sovereignty," the term by which *kawanatanga* was translated into the English version of the treaty. See J.G.A. POCKOCK, *LAW, SOVEREIGNTY AND HISTORY IN A DIVIDED CULTURE: THE CASE OF NEW ZEALAND AND THE TREATY OF WAITANGI* (1991).

135. See *Khan v. Begum* [1985] 3 S.C.R. 844 (India). *Khan* is discussed in Anika Rahman, Note, *Religious Rights Versus Women's Rights in India: A Test Case for International Human Rights Law*, 28 COLUM. J. TRANSNAT'L L. 473, 477-79 (1990).

136. Anaya refers to a study of Native Hawaiian culture as arguing in favor of "the natural evolution of Hawaiian culture cushioned from the onslaught of outside influences that have thus far had devastating effects." ANAYA, *supra* note 9, at 110. The uncritical endorsement of ideas like the "natural evolution" of a culture can, like earlier scientific and colonial doctrines, continue to create a climate of assumptions capable of justifying policies quite harmful to native peoples.

137. See, e.g., International Indigenous Peoples Protection Act of 1989, H.R. 879, 101st Cong. § 2.

138. The preamble to the 1988 draft of the Universal Declaration on Indigenous Rights used the following phrase: "[c]onsidering that all peoples and human groups have contributed to the progress of civilizations and cultures which constitute the common heritage of humankind . . ." 1988 DRAFT DECLARATION, *supra* note 98, at 32 (emphasis omitted). The reference to "progress" was subsequently removed. See 1993 DRAFT DECLARATION, *supra* note 98. Nevertheless, the seemingly laudatory use of this term, like the continuing reference to the "right to development in accordance with their own needs and interests," 1993 DRAFT DECLARATION, *supra* note 98, at 65, has a double-edged quality to it: It assumes that "progress" or "development" is the norm, whereas native peoples may believe neither concept represents their conception of the world.

mentality of our philosophy or law, however, should allow non-natives to play the role of "cultural game warden." The risk is that, for whatever motivating reasons, the entire discourse of philosophy and international law as it relates to indigenous peoples could replicate much of history by failing to acknowledge these most fundamental problems of attitude and perception on the part of non-native peoples. It is here that some of the findings of modern social science may be of assistance.

Social science research has, on occasion, contributed markedly to policy approaches. Within the field of anthropology, for example, comparative studies have clearly demonstrated that there is no correlation between race and intelligence, complexity of social forms, or subtlety of cultural constructs.¹³⁹ When the separate but equal doctrine of *Plessy v. Ferguson*¹⁴⁰ was being challenged, such findings were indispensable to undercutting the claims of "scientific racism."¹⁴¹ While findings about the nature of cultural patterns may not lead ineluctably to specific policy conclusions, they may, at the very least, point to some implications for society as a whole of applying one or another particular public policy. Consider, in this context, the implications for indigenous peoples' rights of what we know about human rationality, the role of history in nonliterate societies, and the social organization of other cultures.

For some time there has been a concern in anthropology about whether people in different cultures reason in fundamentally different ways.¹⁴² If different languages and systems of cultural symbols express or encode experience through categorically different modes of reasoning, translation among cultures and the quest for certain universals may face an almost insuperable barrier. The clear weight of evidence, however, is to the contrary. Notwithstanding quite different subjects and resultant patterns, there is no reason to believe that people differ in their fundamental capacity for rational thought.¹⁴³ Indeed, the issue is no longer whether others are as rational but rather hinges upon two more subtle points: (1) that given a common base to human rational thought, translation among cultures is indeed possible,

139. For examples of these studies, see ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH THE FALLACY OF RACE* (Oxford Univ. Press 1974) (1942), and ASHLEY MONTAGU, *STATEMENT ON RACE* (Oxford Univ. Press 1972) (1951).

140. 163 U.S. 537 (1896).

141. See RICHARD KLUGER, *SIMPLE JUSTICE* 264-66 (1976), see also 2 ROBERT REDFIELD, *THE SOCIAL USES OF SOCIAL SCIENCE* 187-88 (Margaret Park Redfield ed., 1963) (explaining the author's role as an expert witness in *Sweatt v. Painter*, 339 U.S. 629 (1950), a predecessor of *Brown v. Board of Education*, 347 U.S. 483 (1954)); Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 *AM ANTHROPOLOGIST* 555, 557-62 (1977) (detailing the testimony of anthropologists in cases associated with *Brown*).

142. See THOMAS NAGEL, *THE LAST WORD* (1997) (emphasizing the universal validity of reasoning), *RATIONALITY* (Bryan R. Wilson ed., 1979); MARSHALL SAHLINS, *HOW "NATIVES" THINK* 157-66 (1995); Richard A. Shweder, *Anthropology's Romantic Rebellion Against the Enlightenment, or There's More to Thinking than Reason and Evidence*, in *CULTURE THEORY* 27 (Richard A. Shweder & Robert A. Levine eds., 1987).

143. See sources cited *supra* note 142.

notwithstanding the different resonances each language carries; and (2) that alternative systems of thought may serve to enrich one another as encounters increase and changing circumstances pose new problems. If, for example, one traces a chain of causality at all points to human agency, as many cultures do, one's view of ecological responsibility may be quite different than if one assumes that physical processes can lead "accidentally" to physical results. Similarly, another culture's giving prominence to techniques for assessing character over ways of assessing "facts" may challenge us to rethink our own culture and law's bases for interpersonal perception and the treatment of cultural minorities.

This form of the rationality argument thus provides some justification for allowing the courts of indigenous peoples to develop, provided those councils articulate the reasons for their decisions.¹⁴⁴ Just as the Administrative Procedure Act¹⁴⁵ revolutionized administrative law by requiring bureaucrats to give reasons for their actions¹⁴⁶—reasons that could then be subject to inspection—so, too, by recognizing the commonly based rationality of indigenous decisionmakers and affording them the opportunity to explain their judgments, native approaches could be included within the growing body of international custom and human rights discourse. Whether in appellate review by an international forum or simply by incorporation in collections of the opinions of native tribunals, indigenous law would be accorded the opportunity to present itself as no less rational than the judgments of other cultures.

Thus, an indigenous group may rationally calculate that the orderliness of the universe on its view may be irreparably harmed by dividing power between secular and sacred figures. Westerners may view this division of power as enhancing individual choice; from the indigenous perspective, however, the division actually limits choice, by precluding that unitary world through which the full range of human possibilities is alone rendered practicable. Whether it is accusations of witchcraft, which are made of almost everyone at some time and carry neither criminal penalty nor personal stigma but serve to level status differences and redistribute wealth to the injured,¹⁴⁷ or an incest boundary that encourages group alliances at the expense of choices permitted under state statutes,¹⁴⁸ the practices of native peoples are not without rational foundations. To see such beliefs and practices as no less capable of

144. For a recent argument in favor of expanding the role of tribal courts in the Native American context, see POMMERSHEIM, *supra* note 130, at 57-59, 66-79.

145. 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1994 & Supp. 1997).

146. See U.S.C. §§ 553(c), 555(e), 557(c).

147. See E.E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE 63-83 (1937); ROBIN FOX, *Pueblo Baseball: A New Use for Old Witchcraft*, in ENCOUNTER WITH ANTHROPOLOGY 182 (1968).

148. See DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT (1968) (explaining that cousin marriage, even where permissible by law, may be discouraged in the American kinship system).

communication and rational appraisal is to take a very significant step toward the recognition and respect necessary for mutual understanding and negotiation.

Similarly, we now know that the image of native communities as "peoples without a history" is quite false. Even where social structures, like the rules of chess, may not have undergone frequent alteration, we know that the arrangements, the styles, the moves vary in any culture.¹⁴⁹ The implication for indigenous rights may be, as we have seen, that no national or international policy should seek to fix native cultures at a given moment or in a given form. Policies based on the preservation of "timeless peoples" in timeless states should be opposed for their fallacious assumptions about the history of such groups. Oral history may then be accorded appropriate weight in establishing the identity or claims of native peoples. As a result, the question of when assimilation has erased indigenous identity may be addressed with greater sophistication if one sees that the adjustments made to the contact situation, embodied in oral history, often involve giving indigenous meaning to outside cultural forms. Such adaptation is necessary for a group to continue the social relations formerly expressed in a native ritual. Similarly, prohibitions against "ethnocide" may need to distinguish carefully between government programs aimed at the eradication of languages or customs and those that seek to freeze native cultures in a form acceptable to the interests of government or business. The appropriation by non-natives of the imagined ecological superiority of native peoples is not only historically misleading, but also may serve to justify policies that force natives to choose between specific types of economic development and maintaining their legal protections as native peoples. If anthropologists are correct in having shown that societies always have structural forms, does that not also suggest that native groups should be permitted to develop their own approaches to the contact situation? Denying that native peoples have histories robs them of their past; denying their past robs them of a future of their own creation.

It is also possible to fashion alternative procedures for the relation of indigenous peoples to the surrounding state without resorting to a unified philosophy or international convention, alternatives mentioned but not fully explored, by both Kymlicka and Anaya. For example, a number of Native American tribes have entered into agreements with states for the purposes of determining jurisdiction or regulatory controls.¹⁵⁰ Some of these compacts,

149. See, e.g., *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* (Nicholas B. Dirks et al. eds., 1993) (demonstrating that historical "texts" need to include sources beyond the documentary); *RENATO ROSALDO, ILONGOT HEADHUNTING, 1883-1974 A STUDY IN SOCIETY AND HISTORY* (1980) (showing how the history of a nonliterate group is undergoing constant change, as represented in oral sources); *ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982) (demonstrating that, when the voice of "the people without history" is properly considered, their contribution to changing world history alters one's view of that history)

150. Some of these compacts involve transnational agreements, as in the case of fishing agreements entered into among tribes, states, the U.S. government, and the government of Canada. See GETCHES ET

as they are called in the United States, involve cross-deputization of tribal and state police officers,¹⁵¹ while others concern the joint exploitation of limited resources, such as fish or game that cross borders.¹⁵² Other compacts could address outstanding matters of civil jurisdiction, conflicts of laws, or enforcement of one another's judgments. Compacts have the obvious advantage of all agreements: Through free entry, parties are more likely to adhere to their terms, to exchange ideas through the negotiation process, and to go beyond the formal terms as mutual interests are expressed and mutual flexibility appreciated. An agreement to allow the "hot-pursuit" of a drunken driver across a border, for example, may increase overall law enforcement in sparsely settled areas as well as encourage the flexible use of social sanctions that hold different meanings in different cultures. More broadly, by creating a special category in international law for such compacts and coupling them with the enforcement powers of an appropriate forum, one could encourage both negotiation and the recognition of each party's state-like qualities in certain contexts.

Similarly, the concept of "contractual sovereignty"¹⁵³ could serve as a substitute or supplement to any renewal of treaty negotiations.¹⁵⁴ Just as nation-states like Sikkim, Monaco, and the Vatican have agreements by which their defense or foreign policy is contractually assigned to another state,¹⁵⁵ so, too, encouragement could be given through international agencies to the apportionment of some sovereign powers among indigenous groups and surrounding states. Such a concept would simultaneously recognize sovereign powers previously unacknowledged and help formulate a recognized repertoire of possibilities through which the process of negotiation might be more fairly balanced. International oversight of agreements involving developers who contract with indigenous groups for the latter's intellectual property also could operate through recognized special-purpose categories and fora: Royalties for native medicinal plants or folk designs used in western decorations and clothing could be based on concepts of contractual sovereignty rather than the copyright laws of a particular nation. For nations concerned about security and the cross-border activities of indigenous groups, contractual sovereignty also

AL., *supra* note 94, at 858. Other compacts clarify the tax status of a tribe within a state, thus enabling a tribe to issue bonds. See Leon E. Wynter, *Business and Race*, WALL ST. J., Apr. 2, 1997, at B1. Perhaps most significantly, the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (1994), specifies that a tribal-state pact will serve as the basis for regulatory control of particular classes of casino games. For additional examples of tribal-state agreements, see CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 218 n.156 (1987).

151. Cf. POMMERSHEIM, *supra* note 130, at 79-90, 153-61 (emphasizing issues of state-tribal comity and negotiated sovereignty accords).

152. See GETCHES ET AL., *supra* note 94, at 858-60.

153. "Contractual sovereignty" is the apportionment of some sovereignty to indigenous groups through a contractual arrangement with the states in which they reside.

154. See VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* 161-86 (First Univ. of Tex. Press 1985) (1974).

155. See *id.* at 176-78.

could form the basis for negotiating free movements by natives, on the one hand, and control of incursions by inhabitants of bordering states, on the other. Issues of indigenous intellectual property could be shaped by forms of agreement developed by consultation among representatives of indigenous and state governments. The formulation of an array of recognizable accords could preserve the particularity of each situation while generating international support for legitimizing various types of agreements. Such an approach also may encourage the insertion of indigenous concepts into the developing realm of international customary law.

There even may be instances in some countries where indigenous peoples could organize as different types of entities for different purposes—as a religion, a registered voluntary association, or a profession—each type of activity linking them to the special protection accorded similarly situated entities, without costing them the option of being identified in other ways in still different contexts. Thus, protection for sacred sites could be linked to similar protection accorded other religions under national law, while jurisdictional powers could remain completely separate; alternatively, some aspects of membership and property rights could be governed by the laws of association. The advantage would be as much attitudinal as political: The right of indigenous peoples to distinct identities should not be at risk when they appear to “assimilate” with respect to particular issues. Such a realization would go a long way toward undercutting the tendency in any unified theory to eradicate difference once distinction in any domain is altered.

If indigenous peoples are not to have a full measure of independence, the question arises whether their special situation nevertheless argues for separate representation in local or national legislative bodies. Indeed, there may be circumstances in which an individual wishes to opt out of his or her political status as a “native” without losing all benefits accorded individuals who choose to be subject to native jurisdiction. International conventions or international customary law may need to speak to these issues. The special representation granted Maori in the New Zealand legislature,¹⁵⁶ for example, may constitute a model to be supported by international custom, particularly when, as in the Maori situation, natives constitute a significant proportion of the national population. In such a case, alliances formed with non-natives to help achieve their goals may, in turn, result in greater attention to native needs. In other situations, the publicity value of native representatives speaking with full immunity from the floor of the legislature may bring their situation to the attention of the public at large. State guarantees for individuals who wish to leave their groups may also require international guarantees if an individual subject to cultural discrimination by her group is to have a realistic alternative status available. Increased guarantees for a specific right of consent to matters

156. See KYMLICKA, *supra* note 7, at 147-49

affecting jurisdiction, particularly in civil matters and misdemeanors, would go a long way toward creating government-to-government cooperation among indigenous groups and their surrounding nations.

Such measures have the advantage lost by comprehensive approaches, whether of liberal theory or international law alone, which cannot respond to the quite widely varied situations and histories of native peoples. Seen as a repertoire rather than as exemplifications of a unitary approach, the array of options suggested can be fashioned to the circumstances in ways that avert the hurdles placed before unified theories: Specificity can emerge from broad propositions grounded in local agreements; cross-national criteria can develop that relate to processes; and units of analysis—person, tribe, peoples—can become more substantive based on the distinctive local histories of native/non-native relations. The result will be a synoptic view of indigenous rights, a view of instances out of which arises a sense of themes and variations by which the distinctiveness of indigenous lives—for so long occluded by philosophies and policies that perpetuate national interests in the name of general laws—will retain their own shape and voice.

The acceptability of alternatives, whether as an array of recognizable possibilities at the international level or as options for the reformulation of national policies, ultimately depends on the answer to one simple question: How much difference are non-native peoples and governments prepared to accept? I put the matter this way, emphasizing the non-natives, because without the concurrence of those non-native peoples who hold most power little may be expected to change. One may not be able to legislate a change of attitude, but as the terms of the discussion are changed, whether by capturing the philosophical underpinnings or through the articulation of international accords,¹⁵⁷ it becomes possible to see that, ironically, a diverse set of mechanisms offers the best hope for the development of a coherent approach to indigenous rights. The ambivalence felt toward native peoples in many nations affords an opportunity to move away from singular “solutions” to “the native problem” and toward the unity of diverse approaches.

The starting point comes in the reimagining of indigenous peoples and the consequent reconfiguration of our policies. Such representations have arisen at times out of westerners’ own ideals—as when Iroquois chiefs in the eighteenth century were portrayed in toga-like robes and convened like a republican senate for their own governance,¹⁵⁸ or, more recently, when a Native American was pictured in an ecology poster as so perfectly in tune with

157. The Draft Declaration on the Rights of Indigenous Peoples makes such a change in the terms of discussion when it emphasizes indigenous peoples’ “right to be different” in speaking in its opening of “the right of all peoples to be different, to consider themselves different, and to be respected as such.” 1993 DRAFT DECLARATION, *supra* note 98, at 65.

158. See JOSEPH LAFFITAU, *MOEURS DES SAVAGES AMERIQUAINS* (1724) (photograph, reprint on file with the *Yale Law Journal*).

the land that a tear could roll down his cheek at the prospect of continuing ecological harm.¹⁵⁹ Even when others portray native peoples in a positive light, the tendency may remain to ignore their "differentness" in the name of a common identity. If non-natives can resist the urge to stereotype natives or to render them identical to themselves we may be able to avoid the application of philosophical or legal paradigms that assume justice and difference to be incompatible. Only by the true acceptance of genuine difference will those who benefit from the existing distribution of power begin to see the full array of possibilities that are available to us all. Only by embracing inescapable difference, rather than seeking to disguise it under well-intentioned generalities, may a unified theory of policy or law, such as those sought by Kymlicka and Anaya, contribute to the overall goal (to borrow a phrase) of making every nation "safe for diversity."¹⁶⁰

159. See ROBERT F. BERKHOFER, JR., *THE WHITE MAN'S INDIAN* Plate 11 (1978) On the changing image of the American Indian, see also *DRESSING IN FEATHERS. THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE* (S. Elizabeth Bird ed., 1996), and ROY HARVEY PEARCE, *SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND* (1988) Cf Michael J Ybarra, *A Monument Caught in the Middle*, N.Y. TIMES, May 7, 1996, at A14 (describing a dispute over a statue in San Francisco representing conquered Indians) On the use of Native Americans in advertising specifically, see Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995).

160. David M. Shribman, *From Our Past: A Way to Glory*, BOSTON GLOBE, July 4, 1997, at A3

