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Reflections on Culture and Cultural Rights

Intriguingly,” the editors of *Culture and Rights* observe, “in the 1980s, at the very moment in which anthropologists were engaged in an intense and wide-ranging critique especially of the more essentialist interpretations of the [culture] concept, to the point of querying its usefulness at all, they found themselves witnessing, often during fieldwork, the increasing prevalence of ‘culture’ as a rhetorical object—often in a highly essentialized form—in contemporary political talk.”¹ Just as “we” discover that culture is constructed, fluid, and ever inventive, “they” begin to articulate demands for rights in terms of a cultural identity asserted to be primordial and fixed.

This historical noncoincidence has been noticed by various parties and has been interpreted in various ways. According to David Scott, the so-called natives have every reason to suspect these newfangled antiessentialist ideas, indispensable though such ideas may seem to Western academic theorists, himself included: “For *whom* is culture partial, unbounded, heterogeneous, hybrid, and so on, the anthropologist or the native?”² The new concept of culture as hybrid, heterogeneous, and processual is

“merely the most recent way of conceiving and explaining otherness, of putting otherness in its place.” It suits “post–cold war North Atlantic liberalism,” for it offers a way of playing down “ideological conflicts.”³ As the voice of this “North Atlantic liberalism,” Scott quotes James Tully, who argues (in Scott’s paraphrase) that demands for “cultural survival and recognition” by groups like indigenous peoples make “a *cultural* claim on the domain of the political.” They are aspirations to “appropriate forms of self-government, . . . to govern themselves in ways they deem consonant with their traditions. From the point of view of these struggles, therefore, culture is not separable from politics but is, on the contrary, an ‘irreducible’ aspect of it . . . so far as these struggles are concerned, the institutions of modern constitutional society are unjust precisely to the extent that they do not enable the political embodiment of cultural traditions.”⁴ In pursuit of justice, then, Tully urges constitutional thinkers to give up on “the billiard-ball conception of cultures, nations, and societies” that makes any political embodiment of culture seem impossible. In response, Scott argues that the new hegemony of culture produced by the cultural turn, a hegemony he himself “can hardly not-inhabit,” has left in place “the moral and epistemological privilege of the West.” The West’s liberal political theory now demands a non-billiard-ball version of culture, Scott suggests, because non-Western peoples have recently been coming to the West in large numbers and “making material claims on its institutions and resources.” The new version of culture is a way of evading these demands.⁵

Anthropologists Rachel Sieder and Jessica Witchell offer a somewhat different reading. For them, hegemonic North Atlantic liberalism is again getting what it wants, but what it wants out of non-Western peoples—in this case, the indigenous of Guatemala—is, on the contrary, a billiard-ball essentialism. “Indigenous identities in Guatemala are effectively being narrated or codified through dominant legal discourses, specifically those of international human rights law and multiculturalism. This has resulted in the projection of an essentialized, idealized, and atemporal indigenous identity, the movement’s leaders often perceiving such essentializing as tactically necessary in order to secure collective rights for indigenous people.”⁶ Essentialism reflects the worldview not of the indigenous themselves but of the reductive, reifying tendencies of the law. “As indigenous struggles interact with dominant discourses, they appear to become more essentialist in response to the reductionist orientation of law. However, while the outcome of these interactions may be to present a seemingly atemporal,

fixed notion of collective identity in order to claim rights, this is precisely because of the strategic invocation of rights language rather than any pre-existing ontological ‘culture’” (206). Embracing a “fixed notion of collective identity” may or may not serve the genuine interests of indigenous peoples or minorities, they argue, but such a notion does serve the interests of human rights discourse and its representatives: “The increased participation of indigenous peoples also acts to legitimize the expansion and reproduction of the international institutions themselves and the legal discourses they produce” (207).

Jane Cowan, one of the editors of *Culture and Rights*, proposes in her contribution to that volume a third view that overlaps with both of these. Like Sieder and Witchell rather than Scott, Cowan holds that “the view of a minority as a ‘natural’ ethnic unit prevails as common sense within international human rights discourse” (168).⁷ For Cowan it is this discourse, rather than postmodern or constructionist anthropology, that truly represents the hegemonic West. Showing how a Macedonian minority identity has in fact been constructed in contemporary Greece, Cowan too sees a dangerous complicity between human rights discourse and subnational collectivities modeling themselves on, and thus destabilizing, the nation-state. Like Scott, she stresses the continuity with an earlier imperial history: “The alliance between this [the Macedonian minority rights] movement and the international human rights community looks just like another version of an old Balkan story in which the cunning client cultivates the powerful and morally righteous foreign patron and persuades him to meddle in local affairs that he does not understand” (169).

Unlike the others, however, Cowan assigns an explicit and positive role to at least one section of “the international human rights community”: those observers, like herself, who refuse to naturalize “an archipelago of a world composed of discrete, bounded islands of culture” (153). She can do so because she sees the members of the minority as themselves ambivalent about entering into such a view. What if, she asks, the process of constructing a Macedonian minority happens among people who “identify themselves today as ‘Greeks’” (154)? In part because of a history of Greek intolerance for minorities, but not entirely for this reason, many of those who call themselves *dopii* or Macedonians “appear disinclined to choose once and for all, to be *either* Greek or Macedonian, a member of the majority or a member of the minority. Rather, such a person lives a life in which being *dopia* or Macedonian is salient at some moments, but not at others; she usually

thinks of herself as ‘Greek’ yet sometimes speaks of ‘the Greeks’ as if the category did not include herself” (171).⁸ Given the “ambiguity of a minority rights discourse” which “must *deny* ambiguity and *fix* difference,” yet does so in defense of a cultural identity “whose denial brings both suffering and indignation,” Cowan concludes as follows: “I find the only tenable position for the engaged scholar to be a paradoxical one: to support the demands for recognition of the Macedonian minority, but as a category *chosen* rather than *imposed* (whether explicitly or *de facto*); yet at the same time, to problematize, rather than celebrate, its project, and to query its emancipatory aura, examining the exclusions and cultural disenfranchisements it creates from within. I feel obliged to stress the profound ambiguities and potential dangers of mechanisms which entrench and harden such identities, and which, even when meant to contest claims of national homogeneity, lock us ever more tightly into precisely the same national logic of purity, authenticity, and fixity” (171).

In our view, Cowan has it more or less right—not right in some universal or atemporal way, but right enough in today’s context. As Cowan suggests, too much is at stake in minority and indigenous assertions of their cultural identity, at stake materially as well as spiritually, for the academic critic to begrudge due recognition on the grounds of some sort of theoretical incorrectness. Such judgment could be charged with succumbing to its own faulty logic of “purity, authenticity, and fixity.” On the other hand, like Cowan we too believe that the state is not always the bad guy in the human rights story, that the indigenous or minority group claiming its rights is not always the good guy, and that claims to cultural rights cannot be properly understood or defended therefore without nuanced and nimble attention both to internationally established human rights norms and to the particularities of time and place. One way in which we would like to extend Cowan’s argument is with reference to these particularities: by specifying the moment in the development of human rights discourse in which demands for cultural rights are currently being formulated. In this way taking sides around these rights can perhaps come to seem less like facing a universal philosophical dilemma (as Cowan makes it seem) and more like making a reasoned, situated political choice. By gesturing at what is happening today in the United Nations system under the heading of cultural rights, we would also like to suggest that the two branches of “Western” or “international” discourse that Cowan quietly and questionably separates off from each other—a reifying discourse of international law and

a de-reifying discourse of anthropology—are not as far apart as she seems to assume, but share some of the same commitments and capacities to produce and defend a nonessentialized version of culture. There is more suppleness in the law than she allows, and suppleness of just the sort she seems to want. And we would suggest, in dialogue with David Scott, that the turn to culture in the new or constructionist sense is not simply a way of avoiding “ideological conflict” and direct political confrontation. It is also a way of making what Scott calls “material claims,” and a way that seems more likely to win international assent than some of the other tactics currently in play.

In order to get a quick fix on the actual state of human rights discourse, consider Colin Samson’s statement in his contribution to the *Culture and Rights* volume that the Innu of Canada “have not been decolonized.” Neither, Samson goes on, have other tribal and indigenous peoples. If the relations of such peoples with the states in which they reside can only be described as “colonial” (227), as Samson argues, the only solution would seem to be to allow them to exercise at long last the right to self-determination.⁹

This is a compelling indictment of undeniable injustice. In the name of the right to self-determination, cultural identity in the old billiard-ball sense is mobilized here in order to make just the sort of “material claims” that Scott fears will not be put forward by culture in the new and revised sense. Indeed, these claims seem to include all the material perquisites of national sovereignty. But that is just the problem. Whether such claims are just or not in some abstract or absolute sense, how much chance do they have of being recognized at this point in history? And what would happen if they were?

The history of the right to self-determination is relevant here. Self-determination was not mentioned in the Universal Declaration of Human Rights of 1948. Many of the drafters of the 1948 document had been colonial powers, and it is no surprise that they were not eager to recognize such a right. Self-determination was first recognized as a right in the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights of 1966; it is the common article 1 of both these instruments. By 1966, of course, decolonization was in the process of adding to the roster of states an ever-increasing number of former colonies, and self-determination could therefore get a much better hearing. After the end of the Cold War, there was of course another wave of declarations of national independence. But what is happening in the name

of self-determination at present? The answer is: not much. With two specific exceptions, Palestine and Western Sahara, self-determination is largely understood internationally as a right that has already been granted to all legitimate claimants, namely the former colonies.¹⁰ Unless one understands self-determination to mean 1) the right of a nation-state to be free from foreign occupation or 2) the right to be governed by a genuinely representative government as a result of free and fair elections—in both cases, rights pertaining to peoples who already enjoy territorial sovereignty—the consensus is in effect that there is no such right. Groups like Human Rights Watch and Amnesty International will not touch issues of self-determination in, say, Tibet, Kashmir, or Chechnya.

The grounds for this consensus are not legal. There is no strictly legal reason why the right to self-determination could not also be taken to apply to groups within existing states, and sometimes overlapping more than one, which were never granted external sovereignty, that is, statehood. International law itself does not specify the size or nature of the group that constitutes a people and is thus the proper bearer of the right to self-determination. But if taken to apply to all groups claiming to be peoples *within* states, it would of course subvert the very existence and sovereignty of the states themselves. In this sense it is an incoherent right. And it is likely to remain so. From the point of view of existing states, however recent and arbitrary their own establishment, it is no wonder there has been so much resistance to the idea of defining terms like *people*, *indigenous*, or *minority*—though, it should be added, there has also been at least some willingness on the part of states to deal with the relevant problems in the absence of any strict definition. To define “peoples” would seem to entail extending to them the right of self-determination and a possible claim to sovereignty. In practical terms, this would mean, in Samson’s words, questioning “the legitimacy of the states themselves” (226). The likely result would be sanctioning unilateral secession. There is a strong case to be made that this would be a mistake from a political, economic, and even a human rights perspective. There is of course no guarantee that a new state entity would be more respectful of human rights, and there is reason to believe that the creation of many such entities would in fact result in a massive increase in human rights violations. (It is this case that is missing from Cowan’s invocation of the “old Balkan story”: how new contenders for statehood not only use the power of righteous foreign patrons, but—this is what Cowan omits—use it against others who either already enjoy statehood or

are also contending for it, and whose counterclaims are left out.) Existing states achieved self-determination only because self-determination was denied to other claimants within and across their present borders. In order for all peoples to achieve self-determination, there would have to be an agreement as to who is and who isn't a people. But the only means of producing such an agreement, capable of arresting the infinite regress to ever-smaller groups, would seem to be violence on an almost unimaginable scale. For how else could the map of the world be redrawn so that the claims of these peoples were no longer overlapping and therefore no longer rivalrous? One does not have to be a strong defender of existing states to conclude that reopening these questions around the world would be a recipe for massive and multiple catastrophe. And this threat strikes just as surely at the former colonies from which the language of anticolonialism is borrowed.

Since the 1980s, a Draft Declaration on the Rights of Indigenous Peoples has been in preparation by United Nations bodies.¹¹ At its current stage, in a working group of the Commission on Human Rights, it is widely considered to be at an impasse. For the project of extending the right of self-determination to indigenous peoples—which is only part of the Draft Declaration, but an important part—is generally perceived to entail exactly the consequences that Samson welcomes: questioning the legitimacy of the states in which those peoples reside. These states include some of those former colonies that fought for and benefited from the right to self-determination when it was first introduced in the decade of the 1960s and after. Former colonies are in no hurry to see themselves delegitimated and dismembered—a goal that many would associate with U.S.-backed globalization as well as U.S.-backed human rights language, though the United States and its allies seem equally afraid of the effects of self-determination. There is no internationally acknowledged right to unilateral secession, nor is one likely to emerge. Indeed, the resistance to the Draft Declaration by today's numerous states is uncannily reminiscent of the original skepticism with regard to group rights by a much smaller number of states in 1948.

And yet the present consequences of ancestral and continuing injustice against indigenous peoples and minorities are pervasive and preemptory. The rights and interests of these groups desperately need defending. What then is to be done?

Our proposal is to explore what has been done, and what can yet be done, in the name of cultural rights. Based on careful study of how cultural rights have been dealt with by international instruments and the practice

of UN human rights treaty bodies, we would propose that cultural rights offer an alternative and too often underutilized foundation for defending and extending group rights, and in particular a ground for possible resolution of conflicts over indigenous rights that cannot be resolved in terms of self-determination.¹² That is, through cultural rights indigenous peoples can achieve a good portion of the goals they want out of the right to self-determination, but without posing the same threat to existing states. Here what has already been achieved for the cultural rights of minorities, which have not articulated their claims in terms of self-determination, can perhaps lead the way.¹³ Cultural rights have this potential precisely because, as David Scott suggests, the concept of culture on which they are based is not simply or exclusively the old billiard-ball concept whose implied goal seems to be nothing less than full political sovereignty—and yet, because it pulls back from this exacting demand, it also does, *pace* Scott, allow “material claims” to be made. Cultural rights are of profound political significance both because they have to do with identity and because they are a means of attaining economic and political objectives that cannot be attained more directly.

Like *self-determination*, the term *cultural rights* goes unmentioned in the Universal Declaration of Human Rights of 1948. Its absence and the decades of neglect that followed can be attributed to various factors: a desire to avoid the lurking dangers of cultural relativism, a perception of culture as on the one hand too vague and fluid a concept to serve as the basis for rights, and on the other a luxury that could wait until more urgent matters are attended to. Most important again, however, was the association between cultural rights and an array of group identities that, if accorded rights, seemed to threaten the integrity of existing borders. In 1948, before the era of decolonization was well underway, the relevant borders were those of empires as well as nation-states, and opposition to group rights on the part of the United States and the European colonial powers was continuous with their resistance to the struggle of colonies for self-determination. Some of what have since come to be called cultural rights—for example, the right to speak one’s own language or to practice land-based religions or to protect traditional knowledge—literally make no sense for indigenous peoples or minorities unless they are understood also as group rights. These rights-to-be appear in the Universal Declaration only in the form of an individual right, Article 27’s right to “participate” in the cultural life of “the”

community.¹⁴ There is no recognition of group rights or of rights pertaining to a minority culture as distinct from that of the majority.¹⁵

Again like the right to self-determination, cultural rights were officially acknowledged as a term for the first time in 1966. Thanks to decolonization, it would seem, the moment had finally come both for self-determination and for cultural rights. Yet cultural rights did not rise in tandem with self-determination. Indeed, there is a real question as to how far cultural rights have risen at all. By comparison with civil and political rights and even with economic and social rights, cultural rights have received very little attention either from the UN human rights bodies or from public opinion. After 1966, as Cold War battles raged between civil and political rights and economic and social rights, cultural rights continued to be neglected. The first steps occurred only after the end of the Cold War, when the North/South divide made culture central to the contention over human rights.

Two impulses have propelled this relatively sudden and recent interest. On the one hand, culture and cultural rights have been put on the table by representatives of countries of the Global South like Cuba and Iran. In a gesture consistent with those countries' previous positions, differences of national culture, which they describe as rights, are mobilized so as to oppose the concept of universality of human rights. Instead of setting culture *against* rights, however, the Iranian initiative Dialogue Among Civilizations tried out the innovative proposition that culture could be seen as itself a right: a right possessed by nation-states, and thus a right that could in effect subvert other rights.¹⁶ (The end result, however, in large measure supported the universality of human rights.) A 2002 Cuban initiative on cultural rights, arguing that national cultures must be protected against globalization, was originally formulated so as to present cultural rights as rights *belonging to the nation-state*.¹⁷ On the other hand, interest in cultural rights has also emerged out of movements on behalf of indigenous peoples and minorities, groups understood to be *subnational* or *transnational*, in other words not congruent with presently existing states.

In short, these two vectors of interest in cultural rights contradict each other. As with the right of self-determination, they collide over the proper *scale* or *object* to which the category should be applied—that is, over what entity should be the proper bearer of cultural rights. One assigns cultural rights to nation-states, seeking thereby to protect small states from larger and more powerful ones. The other assigns cultural rights to indigenous

peoples and minorities, seeking to defend them against the states—against small as well as large states—within which they are located.

Since it is not possible for states to be bearers of human rights—something for which there is currently no basis in international law—there is no dilemma here, legally speaking. But politically speaking, both of these motives for interest in cultural rights are obviously worthy of serious consideration; both impulses, however contradictory, will have to be taken into account by anyone seeking to extend respect for human rights into more of a rights-abusing world. And one might argue indeed that here, as elsewhere, the opposition between law and politics cannot be sustained. For the politics of scale enters into the law not just by means of a refusal to get a given law on the books (as with the Draft Declaration), but also by refusals or studied indeterminacies of definition within the law, whether the definition of the proper bearer of rights or for that matter the definition of culture. Marc Manganaro, in *Culture, 1922: The Emergence of a Concept*, suggests that for the humanities “it is precisely the multifariousness of the concept, its capacity for ambiguity, slippage, and transfer, that makes” culture “institutionally productive” (2).¹⁸ On the other hand, Margaret Wilson observes in *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* that “giving definition to cultural rights is necessary for legal enforceability” (13).¹⁹ In fact, the ability to work without definition, which we associate more readily with the humanities than with the law, belongs to the legal process more broadly conceived, and indeed is sometimes a successful legal strategy for dealing with historical contradiction. International human rights norms are dynamic and develop slowly through treaties, international custom, and jurisprudence. The law has not defined culture, and yet norms of cultural rights have been developing.

If culture is not a billiard ball with a well-defined border, if a culture can overlap with, permeate, and be permeated by other cultures, then the demand for cultural recognition cannot be expressed as a demand for sovereignty. Asking for cultural rights can involve asking for less than self-determination, which includes territorial sovereignty. And *cultural autonomy*, a concept developed by Max Van der Stoep, former High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE), asks for considerably less than so-called territorial autonomy.²⁰ Yet it is arguable that national minorities have achieved more recognition for their rights at the international level than indigenous peoples

have, and this in large part because they have not spoken in the name of self-determination. These achievements include a European treaty and an international declaration. Both specify cultural rights. On the other hand, many of the gains that the indigenous have made at the normative level were possible because, there being no UN declaration or treaty on indigenous people in force and ILO Convention No. 169 on Indigenous and Tribal Peoples being of limited scope and ratified by few states, the Human Rights Committee has made clever and creative interpretation of the minority-related article 27 of the International Covenant on Civil and Political Rights in order to call attention to the rights of the indigenous and to decide on specific complaints.

Consider some further examples of this sort of effort. In 1994 the Human Rights Committee adopted a General Comment on article 27 of the International Covenant on Civil and Political Rights. Article 27 provides that “in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The committee underlines that the enjoyment of these rights “does not prejudice the sovereignty and territorial integrity of a state party. At the same time, one or other aspect of the rights of individuals protected under that article—for example, to enjoy a particular culture—may consist in a way of life that is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.”²¹ This article, which the committee even interpreted to cover the cultural rights of noncitizens, migrant workers, and visitors, has already been used to stop the granting of leases for oil and gas exploration and timber development on indigenous land in Canada and to defend Maori fishing rights in New Zealand as well as Sami practicing reindeer husbandry in Finland, which were threatened by logging interests.²² These cultural rights have an immediate material payoff. Interestingly, they also incorporate what can be called a politics of scale.²³ In the Finnish case, the Human Rights Committee managed, for better or worse, to specify scale as a zone of indeterminacy. Accumulations and their limits matter: “A certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of rights under Article 27.” Included in the decision was also a warning to the State party to bear

in mind that “though different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of the Sami people to enjoy their own culture.”

Material claims are often pressed in the name of a right to a cultural heritage. Against the opposition of many member states, indigenous peoples are claiming protection for their tangible and intangible cultural heritage and traditional knowledge—for example, the assertion of intellectual property rights to dances, songs, stories, and so on. Under this heading the indigenous peoples are claiming intellectual property rights over knowledge of any kind that concerns them, knowledge that over the decades has been commercially exploited and occasionally even patented by the private sector.²⁴ Depending on how one approaches the issue, there could be a threat that international human rights discourse would indeed help reify cultural identity, just as Cowan and Sieder and Witchell charge, colluding in the creation of billiard balls out of more fluid and amorphous processes. Yet there are also many indigenous representatives who refuse a self-reification by which their culture could become merely something to preserve, not a power of fresh creation. Moreover, it is not merely the new anthropology that rejects the “freezing” of cultural process as heritage; international law, too, hesitates to reify that which seems resistant to reification.²⁵ Since cultures are in perpetual movement through time, it asks, What are the limits of state intervention in favor of a culture? Should the state “stop the clock”? Is the state, for example, legally obliged to commit resources so as to save a dying language or culture when the participants in that culture are changing their attitude toward tradition? Should the state, say, promote folklore at schools when society is indifferent to it?

Culture’s perpetual movement in time can also be seen in the discourse of human rights itself. Looking at the case law of the Human Rights Committee, one sees that limitations to individual cultural rights may be considered only in a moment of danger to the survival and welfare of a minority or indigenous people. We say “moment” because, according to general principles of human rights law, such limitations must be temporary and can be justified only for as long as the danger to the group’s survival or welfare exists. Of course the latter is a matter of judgment and the practice of international bodies is not eloquent or fully consistent on this subject, but the acknowledgment of temporality is clear. As it is when human rights law demands so-called positive obligations, or what Americans term affirmative action. Such measures are explicitly intended to be restricted to a limited

time of need, a time adequate to deal with the results of long and systematic discrimination. This limitation is the best guarantee that these measures will not produce the sort of reified identities discussed, for example, by Wendy Brown.²⁶

David Scott speaks of culture as expressing “the double aspiration of people to be free and to be rooted, without compromising either to universalism or to nativism” (96). We have been suggesting that in its attention to cultural rights, the UN human rights system, like contemporary constructionist anthropology, has been striving at least intermittently to realize this double aspiration, to combine rootedness with freedom. As everyone knows, freedom is risky. In addition to the risks Scott mentions, understanding culture to mean creativity as well as heritage carries with it the risk of assimilation to a more powerful majority culture. That is one of the risks even when cultural rights play a much-needed role in the peace process, in Guatemala or elsewhere. But there are political difficulties in any appeal to cultural rights. The point to stress in conclusion is the opportunities, which match and, we believe, outweigh these difficulties. If the Kosovars had been both allowed to teach the Albanian language in school and university and had been given the resources to do so, we might not have had to debate whether NATO’s “humanitarian intervention” was just another example of Western imperialism. Cultural rights like the right to education and the right to cultural participation have a real-world political strength. They make “material claims,” and claims that have a reasonable chance of being satisfied. They stake out a zone in which it is possible for some quantity of power to change hands. They merit something better than cynicism, whether directed at the new anthropological view of culture or at international human rights discourse.

Notes

- 1 Introduction to Jane K. Cowan, Marie-Bénédicte Dembour, and Richard A. Wilson, eds., *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001), 1–26; quotation from 3.
- 2 David Scott, “Culture in Political Theory,” *Political Theory* 31.1 (February 2003): 92–115; quotation from 101. Scott assumes that liberalism—the detachment from one’s beliefs—is stronger in the United States than in our opinion it is (110).
- 3 Scott, “Culture in Political Theory,” 106, 107. See, however, Susan Hegeman’s brilliant critique of the anticulture position in *Patterns for America: Modernism and the Concept of Culture* (Princeton: Princeton University Press, 1999). Discussing the argument in favor of banishing the culture concept, as presented for example by Virginia Dominguez and

- Johannes Fabian, Hegeman shows that to banish the word because of the impure Eurocentric baggage of “unfortunate premises and presuppositions” it carries is to remain within the worst of those premises and presuppositions: “Terminological scrupulousness would entail an intensification of our ‘cultural’ discourse, not its banishment” (201).
- 4 See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). Scott is summarizing pages 5–6 of Tully’s argument.
 - 5 Tully, *Strange Multiplicity*, 10; Scott, “Culture in Political Theory,” 93, 94.
 - 6 Rachel Sieder and Jessica Witchell, “Advancing Indigenous Claims through the Law: Reflections on the Guatemalan Peace Process,” in Cowan, Dembour, and Wilson, *Culture and Rights*, 201–25; quotation from 205. “The term ‘indigenous’ is itself conceptually based around the relation of the original population to that of their colonizers. The construction of an indigenous identity can in one sense be understood as a reaction to the historical projection of the Indian as the ‘other,’ subjected to policies of assimilation or eradication. The distinctive criteria for indigenous populations are therefore primordialism and cultural difference (Saugestad 1993); in order to gain the right to self-determination, indigenous movements evoke the language of historical continuity, on which they stake their claim to collective identity” (205).
 - 7 Jane K. Cowan, “Ambiguities of an Emancipatory Discourse: The Making of a Macedonian Minority in Greece,” in Cowan, Dembour, and Wilson, *Culture and Rights*, 152–76.
 - 8 The indigenous of Siberia and the pygmies of Central Africa want to be called indigenous. Many Latin Americans do not. Presumably one reason is a different relation to their states.
 - 9 Colin Samson, “Rights as the Reward for Simulated Cultural Sameness: The Innu in the Canadian Colonial Context,” in Cowan, Dembour, and Wilson, *Culture and Rights*, 226–48.
 - 10 What remains of the right to self-determination when one subtracts the situation of the former colonies is 1) the right of a nation-state to be free from foreign occupation and 2) the right to be governed by a genuinely representative government as a result of free and fair elections.
 - 11 UN document E/CN.4/Sub. 2/1994/2/Add. 1.
 - 12 Elsa Stamatopoulou, “Cultural Politics or Cultural Rights? UN Human Rights Responses,” a paper prepared for the Office of the UN High Commissioner for Human Rights in 2002. A book-length version is forthcoming from Martinus Nijhoff Publishers. The present essay draws on the results of this study. The views expressed in this essay do not necessarily represent those of the United Nations.
 - 13 As mentioned earlier in this essay, the right to self-determination appears in the Draft Declaration on the Rights of Indigenous Peoples. It does not appear in the already adopted United Nations Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992.
 - 14 Through the development of internal human rights instruments and their interpretation in the last fifty years, five human rights have come to be understood as cultural rights: the right to education, the right to participate in cultural life, the right to enjoy the benefits of scientific progress and its applications, the right to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the person is the author, and freedom for scientific research and creative

activity. The least developed of these rights, and the one used to accommodate contemporary cultural claims, is the right to participate in cultural life. The study mentioned in note 12 is an analysis of this right. Article 27 of the Universal Declaration reads: “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Intellectual property rights have developed into a distinct area of national and international trade law rather than human rights law. It is the advocacy of indigenous peoples that is bringing traditional knowledge and heritage protection back to the arena of human rights while the debate under trade law continues.

- 15 This article was the only one in the Universal Declaration in which the question of whether to include group rights was even debated.
- 16 During the debates at the UN General Assembly, many statements of developing and developed countries alike saw guarantees for cultural pluralism within the context of the overall human rights regime, despite different degrees of emphasis. See UN documents A/56/PV.40, A/56/PV.41, A/56/PV.42, A/56/PV.43. In introducing the item in 1998, Iran spoke of the “necessity and significance of dialogue and the objection of force, the promotion of understanding in the cultural, economic and political fields, and the strengthening of the foundations of liberty, justice and human rights” (UN document A/53/PV.8). For the 2001 UN General Assembly resolution “Global Agenda for Dialogue among Civilizations,” see UN document A/RES/56/6.
- 17 The final text adopted by the Commission on Human Rights was considerably modified. See UN document E/2002/23, resolution 2002/26 of April 22, 2002.
- 18 Marc Manganaro, *Culture, 1922: The Emergence of a Concept* (Princeton: Princeton University Press, 2002).
- 19 Margaret Wilson and Paul Hunt, eds., *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Wellington, NZ: Huia, 2000), 13.
- 20 See Walter A. Kemp, ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (Boston: Kluwer Law International, 2001).
- 21 General Comment No. 23, UN document CCPR/C/21/Rev. 1/Add. 5.
- 22 For the Canadian Cree case, see UN document A/45/40, Annex 9(A) (1990). For the New Zealand case, see UN document A/56/40, Volume I, Annex X, A (Communication No. 1547/1993). For the Finnish Sami case, see UN document CCPR/C/52/D/511/1992, Case No. 511/1992.
- 23 The real question for a politics of scale is of course whether the different scales can be kept apart from one another.
- 24 For one view of this intellectual property movement, see Michael F. Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2003).
- 25 The sources of international law are international treaties; international custom, that is, state practice over a long period of time with the conviction that such practice constitutes law; and the jurisprudence of international tribunals. Sources of so-called soft law are also sought in resolutions and declarations of intergovernmental organizations, especially the United Nations General Assembly and other organs and the opinions and recommendations of international human rights bodies such as the Human Rights Committee.

Intellectual property law is voluminous and constantly augmenting, while increasingly addressed in the context of international trade regimes, for example at the World Trade Organization.

- 26 See Wendy Brown, "Suffering Rights as Paradoxes," *Constellations* 7.2 (2000): 230–41. Though cultural rights like the right to education in one's own language may seem "soft" to the nonexpert eye, they require an important investment in resources. And once translated into (always scarce) resources, they make visible the zero-sum relation between the rights of this group and the rights of that group, a clash of rights that belies the official position that rights are "interdependent and indivisible."