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# *You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights*

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Moral and political theorists like Will Kymlicka have attempted to frame moral justifications for Aboriginal rights in ways that fit with the principles of liberalism. By contrast, the Supreme Court of Canada has repeatedly invited consideration of "Aboriginal perspectives" in its case law on Aboriginal rights. How to approach Aboriginal rights issues is an immensely important question given the range of identifiable cultural gaps between Aboriginal and non-Aboriginal understandings of relevant matters. The author seeks to forward the enterprise of a theory of normative discourse for cross-cultural settings. He engages with and endeavours to build on Charles Taylor's account of "unforced consensus" on human rights issues in order to develop certain methodological claims concerning moral theorizing in a cross-cultural setting, attempting to draw some further distinctions to flesh out an approach to cross-cultural moral theory. The author goes on to argue that moral theorizing in the context of Aboriginal rights issues has failed to live up to appropriate methodological demands and that the conclusions of this paper have implications for a range of judicial and policy contexts.

Des théoriciens de l'éthique et de la Science Politique, tel Will Kymlicka, ont tenté de conceptualiser les justifications morales des droits des peuples autochtones, de manière à ce que ceux-ci soient en accord avec les principes du libéralisme. À l'opposé, la Cour Suprême du Canada, dans sa jurisprudence ayant traité aux droits des peuples autochtones, a, à plusieurs reprises, exigé d'accorder plus de considération au point de vue des autochtones. La façon d'aborder la question des droits de ces peuples est d'une importance capitale vu l'écart culturel notable qui sépare les autochtones et les non autochtones quant à la compréhension de ces questions significatives. L'auteur s'investit dans la formulation d'une théorie du discours normatif dans un cadre interculturel. L'auteur ancre son questionnement sur les écrits de Charles Taylor, concernant le «consensus naturel» sur la question des droits de l'homme, dans le but de développer et de bâtir certaines affirmations méthodologiques quant à la théorisation normative dans un contexte interculturel, s'efforçant ainsi de dresser plus de distinctions visant à étoffer une théorie de l'éthique interculturelle. L'auteur soutient que la théorisation normative, dans le contexte des droits des peuples autochtones, a échoué car celle n'a pas pu adéquatement répondre aux exigences méthodologiques et maintient que les conclusions émanant de l'article ont une portée de grande envergure autant dans des contextes juridiques que politiques.

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For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of [these rights] that such people can recognize and understand.

—Will Kymlicka<sup>1</sup>

*Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. ... The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*.

—Chief Justice Antonio Lamer<sup>2</sup>

## Introduction

Prominent non-Aboriginal political theorists who have argued for Aboriginal rights, notably Will Kymlicka, have sometimes suggested that effective advocacy of Aboriginal rights in courts and other decision-making bodies requires the excision of certain elements of Aboriginal thinkers' own conceptions of Aboriginal rights. Kymlicka's claim in the epigraph above has been described by one Aboriginal philosopher as a "brutal reality check" for Canada's Aboriginal peoples.<sup>3</sup> However, the Supreme Court of Canada has repeatedly purported to be open to "aboriginal perspectives" and has even mandated that these perspectives be considered.<sup>4</sup> Although Aboriginal perspectives will often arise from Aboriginal traditions or concepts accepted as fitting a legally pluralistic transsystemia,<sup>5</sup> the Court has

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<sup>1</sup> *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989) at 154 [Kymlicka, *Liberalism*].

<sup>2</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 19-20, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.] [emphasis in original].

<sup>3</sup> Dale Turner, "Perceiving the World Differently" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 57 at 60.

<sup>4</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 112, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.]; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 32, 199 D.L.R. (4th) 385 [*Mitchell*]; *Ross River Dena Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 at para. 64, 213 D.L.R. (4th) 193 [*Ross River*]. See also *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220 at paras. 129-30, 255 D.L.R. (4th) 1 [*Marshall*]. *Mitchell* and *Marshall* both refer to "the aboriginal perspective" in singular form, a usage that is questioned further below (*Mitchell*, *ibid.* at para. 32; *Marshall*, *ibid.* at para. 130).

<sup>5</sup> On transsystemia generally, as well as transsystemic education, see Julie Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'" (2001) 27 *Queen's L.J.* 237; Harry Arthurs, "Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme" (2005) 50 *McGill L.J.* 707; H. Patrick Glenn, "Do'in' the Transsystemic: Legal Systems

implicitly opened itself up to moral ideas from different world views. The Court arguably seems bolder, at least in theory, than many political theorists.<sup>6</sup> Witness, for example, statements like that of Chief Justice Lamer in the epigraph above, in which he expresses a readiness to see Aboriginal rights defined differently than traditional liberal rights.<sup>7</sup>

Although we are beginning to see the formation within Canadian law of a set of concepts related to Aboriginal rights,<sup>8</sup> the ultimate shape of these concepts has been and will remain highly influenced by political and moral theory. The relevant bodies of law on Aboriginal rights are so open textured that no judicial body could apply them and actually reach legal results without applying further legal and moral principles.<sup>9</sup> Section 35 of the *Constitution Act, 1982* “affirms existing rights” without explicit reference to sources for these “existing rights”.<sup>10</sup> Section 25 of the *Canadian Charter of Rights and Freedoms*,<sup>11</sup> requiring that *Charter* rights “not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada,”<sup>12</sup> presents complex interpretive puzzles that demand thorough theoretical analysis.<sup>13</sup> We could multiply the examples, and we would amplify the point that these are bodies of law demanding moral theory for their application. Courts have dealt with that fact by relying heavily on academic

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and Legal Traditions” (2005) 50 McGill L.J. 863; Richard Janda, “Toward Cosmopolitan Law” (2005) 50 McGill L.J. 967; Rosalie Jukier, “Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom” (2005) 50 McGill L.J. 789; Roderick A. Macdonald & Jason MacLean, “No Toilets in Park” (2005) 50 McGill L.J. 721.

<sup>6</sup> This conclusion would arise from the fact that the Court claims to open itself to Aboriginal world views whereas the theorists under discussion do not make such a claim. The conclusion is merely “in theory” to the extent that the Court fails to live out its promised openness.

<sup>7</sup> *Van der Peet*, *supra* note 2 at paras. 19-20.

<sup>8</sup> Thomas Isaac sees this area of law as developing within a reasonably consistent principled framework. See e.g. Thomas Isaac, *Aboriginal Title* (Saskatoon: Native Law Centre, 2006). Some authors, however, have alleged more inconsistency on the part of the Supreme Court. See e.g. Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask. L. Rev. 281. I argue in Part I, below that there are deeper reasons for instability in this area of the Court’s jurisprudence.

<sup>9</sup> On open-textured language, see H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Oxford University Press, 1998) at 128.

<sup>10</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>11</sup> Part I of the *Constitution Act, 1982*, *ibid.* [*Charter*].

<sup>12</sup> *Ibid.*

<sup>13</sup> On the current difficulty of understanding s. 25 without any sufficiently principled framework, see Jane M. Arbour, “The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003) 21 Sup. Ct. L. Rev. 3. For an excellent comment on a recent case interpreting s. 25, see Celeste Hutchinson, “Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*” (2007) 52 McGill L.J. 173.

moral theory literature in cases that require them to interpret section 35 of the *Constitution Act, 1982*.<sup>14</sup>

This reality raises the question of how moral theorizing should take place in a cross-cultural context. Does the nature of a cross-cultural context affect methodologies for undertaking moral theory analysis in ways that are similar to its impact on other matters like approaches to dispute resolution?<sup>15</sup> One initial response might be that moral theorizing, unlike matters dependent on actual types of cultural behaviour, is immune to cross-cultural factors except insofar as it might make cross-culturally objective statements about how disputes are to be settled in normatively acceptable ways. Those maintaining this traditional view might well see any suggestion to the contrary as the result of an insidious movement of the forces of multiculturalism into sacrosanct realms.<sup>16</sup>

In this essay, I draw on and engage with Charles Taylor's account of "unforced consensus" on human rights issues<sup>17</sup> to offer a different response, nevertheless steering clear of the relativism that traditionalists fear. Without making a claim that the substance of moral theory on matters like Aboriginal rights has any particular cultural content, I will argue that methodologies for moral theorizing can be affected by culture and that the failure to account for this reality has the potential to undermine the ability of theorists to arrive at the best normative accounts. In only this latter sense—that failure to consider the cultural dimensions of methodology may undermine the search for best answers—those normative accounts that fail to engage cross-culturally, in preferring particular culturally affected norms without adequate justification, may be suspect. They in turn fail to live up to the challenge of offering a moral theory that can assist areas of the law that must function cross-culturally.

Particular legal doctrines within the corpus of law relating to Canadian Aboriginal issues—even where less open textured—demand some sort of cross-

<sup>14</sup> As one measure, consider that Brian Slattery's articles have been cited more frequently in post-1982 constitutional jurisprudence than have Peter Hogg's articles. See Peter McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985–2004" (2004) 83 Can. Bar Rev. 633 at 653. That statistic, of course, is deceptive since it does not count citations to books. However, as another measure, consider that more than one quarter of the s. 35 cases to date invoke theoretical writings, most often by Brian Slattery or Kent McNeil, that usually at least purport to offer some normative claims.

<sup>15</sup> See generally Bell & Kahane, *supra* note 3.

<sup>16</sup> See e.g. Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity Press, 2000).

<sup>17</sup> "Conditions of an Unforced Consensus on Human Rights" in Joanne R. Bauer & Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999) 124 [Taylor, "Unforced Consensus"]. With one exception that does not even discuss the same issues (John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1), Taylor's "unforced consensus" account seems to have gone largely unnoticed in Canadian legal writing, at least in any explicit and sustained way.

cultural analysis.<sup>18</sup> We might name, among others, principles of interpretation that address the meeting of minds between different cultural groups in treaty formation and the like,<sup>19</sup> alterations to rules of evidence to accommodate Aboriginal oral history materials,<sup>20</sup> consultation requirements,<sup>21</sup> and, generally, the legal principles concerned with the concept of "reconciliation".<sup>22</sup> We could also point to Chief Justice Lamer's call for theories of Aboriginal rights that reconcile liberalism and the other moral frameworks needed to understand Aboriginal rights.<sup>23</sup> Again, the Supreme Court of Canada is seeking a mode of theorizing that political theorists have generally been reluctant to provide, though Mark Walters has recently dramatically transformed the face of Canadian legal theory with his powerful argument that a failure to show adequate respect for Aboriginal legal perspectives may undermine the conditions for the system's legality.<sup>24</sup> Although the topic of moral or political theory methodology might at first glance seem somewhat removed from the legal realm, it actually has vital implications both for law and for legal legitimacy.

In one sense, this should not be surprising. Brian Slattery's classic account of Aboriginal rights as a body of legal doctrine

that defines the constitutional links between the Crown and aboriginal peoples and regulates the interplay between Canadian systems of law and government (based on English and French law) and native land rights, customary laws, and political institutions<sup>25</sup>

makes clear the degree to which Aboriginal rights law involves the interaction of different legal systems. As Nicholas Kasirer has recently reminded us, a legal system carries with it particular values, systems of thought, and intellectual traditions.<sup>26</sup> Any

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<sup>18</sup> A more general rationale is also possible. Judicial organs actually stand in need of a cross-cultural theory in disputes involving parties from different cultures because they need a theory that can explain to both sides of a dispute why one party has won and the other has lost (or some combination thereof on different issues). On some issues, this need is lessened where the law itself can stand as a cross-cultural theory for how disputes are to be resolved. But in disputes concerning Aboriginal rights, no such easy answer presents itself. Part of what is at stake is whose law should apply; in many Aboriginal rights contexts, the very issue is whether Canadian or Aboriginal sovereignty appropriately applies, so there must be recourse to some other form of explanation concerning what law applies.

<sup>19</sup> See e.g. *R. v. Simon*, [1985] 2 S.C.R. 387 at 404, 71 N.S.R. (2d) 15, 24 D.L.R. (4th) 390.

<sup>20</sup> See *Delgamuukw*, *supra* note 4 at para. 87. For a discussion of the practical application of the principles enunciated in *Delgamuukw*, see Dwight G. Newman, "Tsilhqot'in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2005) 43 Alta. L. Rev. 433.

<sup>21</sup> See e.g. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 10, 245 D.L.R. (4th) 33.

<sup>22</sup> See e.g. *Delgamuukw*, *supra* note 4 at para. 186.

<sup>23</sup> *Van der Peet*, *supra* note 2 at paras. 19-20.

<sup>24</sup> Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's L.J. 470.

<sup>25</sup> "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 732 [footnotes omitted].

<sup>26</sup> "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal Educ. 29 at 35-37.

understanding of Aboriginal rights in Canada inherently demands a specification of the interaction between different moral world views.

In Part I, I introduce a parallel between the questions of the appropriate interaction of different moral world views and recent Canadian case law on Aboriginal rights in order to underscore the salience of my project, showing how the case law manifests ongoing struggles about how to engage in meaningful cross-cultural theory. In Part II, I introduce Taylor's concept of an "unforced consensus" on human rights, arguing that it provides a generally helpful model for cross-cultural rights discourse. I will simultaneously seek to unpack certain elements of Taylor's account in order to present some of its more specific implications. In Part III, I attempt to show how "traditional" moral theorizing on collective rights issues, as exemplified in Kymlicka's prominent writings, has failed to live up to the methodological demands that emerge from Part II. In Part IV, I sketch out some new approaches to moral theorizing, tying them both to the case law introduced in Part I and to the political theory literature discussed in Part III.

I seek to explore, in a preliminary way, cross-cultural moral theorizing of Aboriginal rights that can inform and persuade Canadian courts and legislators while remaining true to Aboriginal conceptions of these rights. The term "moral theorizing", which I will often use, is not meant to cast the task narrowly, but refers simply to a theorizing on the right or the good. I argue in this article that the methodology used for theorizing about Aboriginal rights should change as a result of the cross-cultural context and that this conclusion also has implications for the Canadian judicial approach to Aboriginal rights. My account is intended as a preliminary form of a general theory of cross-cultural theorizing of Aboriginal rights, not to address specific problems but potentially connected to many, so some of the claims are framed at a certain level of abstraction. However, as I will now show, my account has direct practical implications for section 35 case law.

## I. Section 35 Case Law and Cross-Cultural Understandings

As I noted earlier, the Supreme Court has repeatedly mandated taking into account Aboriginal perspectives in developing section 35 and Aboriginal rights.<sup>27</sup> However, some of its most recent case law has shown a profound ambivalence toward this principle. In its 2005 decision in *R. v. Marshall*, the Court called for the assessment of Aboriginal rights in terms of how they "translate" into rights known to the Canadian legal system.<sup>28</sup> As Chief Justice McLachlin, writing for the majority, put it, "The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and

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<sup>27</sup> See *Delgamuukw*, *supra* note 4 at para. 112; *Mitchell*, *supra* note 4 at para. 32; *Ross River*, *supra* note 4 at para. 64; *Marshall*, *supra* note 4 at paras. 129-30.

<sup>28</sup> *Supra* note 4 at para. 48.

objectively as it can, into a modern legal right.”<sup>29</sup> Although this “translation” metaphor and test arise within a discussion that refers to both Aboriginal and European perspectives, they parallel Kymlicka’s advice that “it is important to find a justification of [Aboriginal rights] that [non-Aboriginal judges and politicians] can recognize and understand.”<sup>30</sup> The priority in terms of concept or justification becomes comprehensibility within the non-Aboriginal (and “modern”) context.

As I have argued elsewhere,<sup>31</sup> inconsistency with prior principle is unsurprising in the section 35 context: although the Court has clearly turned to political theory to flesh out section 35, we do not yet have comprehensive theoretical bases in place for the analysis of Aboriginal rights. Thus, the Court’s jurisprudence has varied dramatically with respect to different dimensions of its section 35 case law.<sup>32</sup> Based on this conceptualization of what has happened in the section 35 context,<sup>33</sup> there is no compelling reason to consider *Marshall* to be a stable point of future legal reference either, particularly given the degree to which it has rapidly come under trenchant academic critique.<sup>34</sup> Notably, in its 2006 decision in *R. v. Sappier*,<sup>35</sup> the Court implicitly moved away from elements of the majority analysis in *Van der Peet*—the leading case on the nature of Aboriginal rights—and toward the adoption of elements of the *Van der Peet* dissents.<sup>36</sup> In doing so, the Court cited academic critiques of the original majority judgment.<sup>37</sup>

This last example actually manifests in one further way the salience of attempting to grapple with cross-cultural theory in the section 35 context. One of the academic critiques to which the Court refers is Russell Lawrence Barsh and James Youngblood Henderson’s seminal case comment on *Van der Peet*.<sup>38</sup> One of Barsh and Henderson’s critiques of the *Van der Peet* test—which requires that a practice protected by an Aboriginal right be integral to an Aboriginal community’s distinctive culture<sup>39</sup>—is that

<sup>29</sup> *Ibid.*

<sup>30</sup> *Liberalism*, *supra* note 1 at 154.

<sup>31</sup> See generally Dwight G. Newman, “Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title” (2007) 44 *Alta. L. Rev.* 779 [Newman, “Prior Occupation”].

<sup>32</sup> See e.g. McNeil, *supra* note 8 (sketching a broad narrative of Aboriginal title). For an alternative view that the law discussed by McNeil has evolved in gradual and comprehensible steps, see Isaac, *supra* note 8.

<sup>33</sup> For my discussion of the competing narratives of s. 35 interpretation, see Newman, “Prior Occupation”, *supra* note 31.

<sup>34</sup> See e.g. Paul L.A.H. Chartrand, “*R. v. Marshall*; *R. v. Bernard*: The Return of the Native” (2006) 55 *U.N.B.L.J.* 135; McNeil, *supra* note 8; Walters, *supra* note 24 at 472, 501-502, 517.

<sup>35</sup> 2006 SCC 54, [2006] 2 S.C.R. 686, 309 N.B.R. (2d) 199, 74 D.L.R. (4th) 75 [*Sappier*].

<sup>36</sup> *Ibid.* at paras. 42-45, 49.

<sup>37</sup> *Ibid.* at paras. 42, 44.

<sup>38</sup> “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand”, Case Comment, (1997) 42 *McGill L.J.* 993.

<sup>39</sup> *Supra* note 2 at para. 46.

[w]e can find no precise equivalent of European concepts of “culture” in Mi’kmaq, for example. How we maintain contact with our traditions is *tan’elo’lieki-p*. How we perpetuate our consciousness is described as *tilnuo’li’k*. How we maintain our language is *tilnuita’sim*. Each of these terms connotes a process rather than a thing.<sup>40</sup>

The Court goes on to draw the conclusion—as awkward as it might arguably be for its *Van der Peet* test—that “[u]ltimately, the concept of culture is itself inherently cultural.”<sup>41</sup>

Even prior to this self-reflexive, seemingly self-questioning statement, the Court’s section 35 case law has shown an ongoing struggle with cross-cultural issues in the Aboriginal rights context. This conclusion is sufficient, of course, to make an attempt to grapple with cross-cultural theorizing relevant in the judicial context. One would err if one were to say that cultural dimensions of the concept of culture fundamentally render the project senseless. That one community conceptualizes justice differently than another community does not undermine the moral validity of specific claims. That it is wrong to torture (at least generally, if some readers think there are exceptions) may be conceptualized in different ways but nonetheless remains morally true. Accordingly, the task at hand is not to undertake some kind of deconstruction of the very essence of adjudicative discourse but to reason about cross-cultural theorizing and, in so doing, to contribute to yet better-reasoned judicial discourse.

Existing cross-cultural gaps in the context of Aboriginal rights are not, of course, found solely in the judicial context. Academic literature is replete with claims of the gaps between Aboriginal and non-Aboriginal world views—indeed, of the irreconcilability of certain elements of these world views.<sup>42</sup> Some of the differences may be more complex than sometimes presumed. To develop just one example slightly further, one common claim is that an Aboriginal conception of property is entirely irreconcilable with its Western equivalent.<sup>43</sup> One of the alleged dimensions of this irreconcilability is a polarized relation to property: Aboriginal people feel a connection to their property whereas non-Aboriginal people regard property only instrumentally.<sup>44</sup> Such polarized descriptions risk failing to recognize the richness of both conceptions. For example, many non-Aboriginal people would feel a deep-rooted sense of violation if they had something stolen, or if land that had belonged to a family for several generations were expropriated. That said, there is no doubt that a complex set of cultural differences exists between Aboriginal and non-Aboriginal world views.

<sup>40</sup> Barsh & Henderson, *supra* note 38 at 1002, n. 30.

<sup>41</sup> *Sappier*, *supra* note 35 at para. 44.

<sup>42</sup> See Walters, *supra* note 24 (citing numerous examples).

<sup>43</sup> See generally James (Sackj) Youngblood Henderson, Marjorie L. Benson & Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough, Ont.: Carswell, 2000) at 397-425.

<sup>44</sup> See *ibid.*

The relevance of such differences to Canadian law is inescapable. Indeed, one of the areas of potential difference pertains precisely to what law is. The conception of law within Aboriginal world views, as various writers have detailed, differs significantly from that within non-Aboriginal world views.<sup>45</sup>

The question that returns like an echo is how, most appropriately, to face up to these cross-cultural divides in the context of Aboriginal rights claims. The Court's most recent "translation" test, discussed above, involves a sort of dalliance with something akin to Kymlicka's claim that Aboriginal rights will need to be phrased in ways that are comfortable to non-Aboriginal judges. Can we do any better?

## II. Cross-Cultural Dialogue and "Unforced Consensus"

A particularly rich counterpoint to the epigraph from Kymlicka and, implicitly, to judicial approaches that undertake only a one-way translation, is Charles Taylor's account of "unforced consensus" on human rights.<sup>46</sup> Taylor's account emerged from a larger theoretical movement concerned with intercivilizational dialogue and cross-cultural theorizing.<sup>47</sup> The challenges of cross-cultural theorizing are not unique to the

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<sup>45</sup> See generally James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan Native Law Centre, 2006) at 116-77; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 13-23; Walters, *supra* note 24 at 479-94 (particularly for his discussion of the "Great Law").

<sup>46</sup> See Taylor, "Unforced Consensus", *supra* note 17. For other salient accounts on similar matters in the Canadian context, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002). However, the points of engagement between Kymlicka and Taylor are so specific that I have considered it appropriate to focus on Taylor's account for present purposes. A larger project on cross-cultural theorizing could engage with the full spectrum of authors who have implicitly touched on the notion of unforced consensus.

<sup>47</sup> The United Nations General Assembly decided in 1998 that 2001 would be the United Nations Year of Dialogue Among Civilizations, thus putting the notion of intercivilizational dialogue and cross-cultural theorizing squarely on the world agenda. See generally Ken Tsutsumibayashi, "Fusion of Horizons or Confusion of Horizons?: Intercultural Dialogue and Its Risks" (2005) 11 *Global Governance* 103. In doing so, the UN responded to both the East Asian challenge to human rights and to an academic literature that had emerged either claiming a forthcoming clash of civilizations or urging the need for dialogue in the face of pluralism. See e.g. Samuel P. Huntington, "The Clash of Civilizations?" (1993) 72:3 *Foreign Affairs* 22 (foreseeing a clash of civilizations but also that reconciliation will require dialogue); Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996); John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999). A number of efforts at theorizing intercivilizational dialogue emerged through the 1990s. See e.g. Hans Küng & Karl-Josef Kuschel, eds., *A Global Ethic: The Declaration of the Parliament of the World's Religions* (London: SCM Press, 1993); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); Hans Küng, *Global Responsibility: In Search of a New World Ethic* (New York: Continuum, 1996);

Canadian context.<sup>48</sup> Indeed, John Rawls's later writings famously turn to related issues. His account of an "overlapping consensus" in *Political Liberalism*<sup>49</sup> bears some similarity to Taylor's concept<sup>50</sup> (a similarity to which I will return below), and his account in *The Law of Peoples* is similarly concerned with justice in the face of pluralism, now situated at the international level.<sup>51</sup> But Taylor's account offers particular insights for our purposes and, I will argue, has a particularly apt application to the issues at hand.

The hope for the "unforced consensus" conception, as Taylor presents it, is a "meeting of very different minds, worlds apart in their premises, uniting only in the immediate practical conclusions."<sup>52</sup> This meeting involves "[a]greement on norms, yes, but a profound sense of difference, of unfamiliarity, in the ideals, the notions of human excellence, the rhetorical tropes and reference points by which these norms become objects of deep commitment for us."<sup>53</sup> The background differences, Taylor argues, can themselves be a source of strength, offering the possibility of mutual learning and borrowing.<sup>54</sup> This learning and borrowing can be consistent with the unforced nature of the consensus sought, since Taylor embraces a rich understanding of the traditions between which there can be dialogue. Each tradition can draw on the "possibilities of reinterpretation and reappropriation that the tradition itself contains."<sup>55</sup>

Although Taylor only explicitly offered this account of "unforced consensus" in 1999, there is little doubt that it has a deeper grounding in his previous philosophical work. A telling indicator of this is that Ken Tsutsumibayashi was able to develop something much like Taylor's account of unforced consensus merely from Taylor's previous work on the politics of recognition, and without any explicit reference to Taylor's later "unforced consensus" project.<sup>56</sup> This grounding of unforced consensus in Taylor's previous work makes clear part of the justification for cross-cultural theory. As Tsutsumibayashi claims, Taylor's earlier argument on the politics of recognition<sup>57</sup> suggests that the politics of identity will develop into a more destructive

Hans Küng, *A Global Ethic for Global Politics and Economics* (Oxford: Oxford University Press, 1998); Richard Falk, *Predatory Globalization: A Critique* (Cambridge: Polity Press, 1999).

<sup>48</sup> The variety of sources in note 47 makes this clear.

<sup>49</sup> *Supra* note 47.

<sup>50</sup> Note that Taylor himself notes this similarity, treating Rawls's metaphor as a starting point ("Unforced Consensus", *supra* note 17 at 125).

<sup>51</sup> *Supra* note 47.

<sup>52</sup> "Unforced Consensus", *supra* note 17 at 143.

<sup>53</sup> *Ibid.* at 136.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 142.

<sup>56</sup> See Tsutsumibayashi, *supra* note 47.

<sup>57</sup> Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25.

force in the absence of a “fusion of horizons”<sup>58</sup> that shows a real respect for (in the sense of a genuine attempt to understand and engage with) the values of diverse groups; resentment will grow out of failure to recognize cultures that members themselves consider of abiding value.<sup>59</sup> In other words, the refusal to engage in a project of cross-cultural moral theorizing can be tantamount to a denial of the worth of particular cultures.<sup>60</sup>

Like much of the rich body of Taylor’s writing, one struggles to draw from his account entirely precise claims. But that is part of its power: his account can be both argumentative and evocative, eliciting a yet deeper conception of “unforced consensus”. Taylor’s account stands in contrast to Rawls’s “overlapping consensus” in that, while Rawls is fundamentally concerned with a moral consensus on those elements of the political order that would assure stability in the context of reasonable pluralism,<sup>61</sup> Taylor is potentially open to seeking consensus across a broader array of matters. In his notion of learning and borrowing from across cultures, Taylor also offers some more specific forms of engagement,<sup>62</sup> while Rawls tends to presume that an overlapping consensus can simply arise through an acceptance of the premises of political liberalism based on deeper premises from within each world view.<sup>63</sup>

Drawing from Taylor’s account, then, we might frame the challenge of cross-cultural rights theory as the pursuit of some agreement among those holding a variety of background world views that would enable them to live and flourish together.<sup>64</sup> Taylor acknowledges that there will be ongoing senses of unfamiliarity between those

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<sup>58</sup> Tsutsumibayashi, *supra* note 47 at 105 [emphasis omitted]. Taylor draws the concept from Hans Gadamer’s hermeneutics (Hans-Georg Gadamer, *Wahrheit und Methode* [Truth and Method] (Tübingen, F.R.G: Mohr, 1960)) but, as articulated by Tsutsumibayashi, “reformulate[s] [it] into a social scientific tool” (*ibid.* at 105).

<sup>59</sup> Tsutsumibayashi, *ibid.* at 105-109.

<sup>60</sup> Such denial can also be an assault on the lives of individual persons: consider honestly the implications of Taylor’s insight that “[t]he gender definitions of a culture are interwoven with, among other things, its love stories, both those people tell and those they live,” making the point that even something that has oppressive elements may still crucially frame identities in deep ways, and thus arguing at least for care in imposing demands for instant change (“Unforced Consensus”, *supra* note 17 at 139).

<sup>61</sup> Rawls, *Political Liberalism*, *supra* note 47 at 15, 22-29, 147-52.

<sup>62</sup> Taylor, “Unforced Consensus”, *supra* note 17 at 136.

<sup>63</sup> His “[s]teps to [o]verlapping [c]onsensus” presumes a willingness to enter into discussion of an overlapping consensus (*Political Liberalism*, *supra* note 47 at 164-68). Lucas Swaine has recently reinvigorated the study of some of these issues, discussing the genuine struggles of explaining the legitimacy of the governmental order to theocratic religious groups. See Lucas Swaine, “A Liberalism of Conscience” in Avigail Eisenberg & Jeff Spinner-Halev, eds., *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 41 at 47-55. See also Lucas Swaine, *A Liberalism of Conscience: Politics and Principle in a World of Religious Pluralism* (New York: Columbia University Press, 2006).

<sup>64</sup> There are, of course, theorists besides Rawls concerned with related matters. See e.g. Jeremy Waldron, “Special Ties and Natural Duties” (1993) 22 *Philosophy & Public Affairs* 3 at 14-15 (developing the Kantian requirement to establish just relations with one’s neighbours).

holding richly complex background world views.<sup>65</sup> But his claim is also that such individuals can usefully learn and borrow from one another if they are ready to go beyond preconceptions and simplicities.<sup>66</sup> Consider, for example, the increased use of restorative justice approaches within the judicial system. Such approaches, which involve victims, offenders, families, and the community, and that encourage healing and reconciliation, are not unique to Aboriginal cultures. However, some Canadian justice departments that have implemented them have cited the influence of Aboriginal world views in the development of such strategies.<sup>67</sup>

An objection might emerge that Taylor's recipe contains little but saccharine and that his account represents only well-intentioned but naive hopes for the reconciliation of differences that are beyond reconciliation. Three responses suggest themselves. First, Taylor's proposal may simply posit a necessary act of faith, the rejection of which becomes a self-fulfilling prophecy. In other words, it is simply necessary to assume that it is possible to reach cross-cultural consensus in order to have a chance of doing so. Second, Taylor's account not only hopes for cross-cultural consensus but provides an appropriate and moderate measure of what cross-cultural consensus would look like—it would remain complex, variegated, and rich with ongoing encounter. Third, as I will argue further below, Taylor's account can actually ground specific methodological principles for seeking cross-cultural consensus. Taylor's work seeks "conditions of an unforced consensus."<sup>68</sup> It thereby implicitly calls us to analyze the circumstances and conditions that can better promote the attainment of such a cross-cultural consensus, going beyond an assertion of hope to an articulation of the means of attaining these hopes.

That said, one needs to address a possible ambiguity in Taylor's project, that between seeking agreement merely on "practical conclusions"<sup>69</sup> and seeking at least some agreement at the propositional level supporting these conclusions.<sup>70</sup> Does Taylor seek agreement on underlying principles or on the practical conclusions that result from them? Arguably, Tsutsumibayashi's development of Taylor's project clarifies Taylor's desire for a "fusion of horizons" that would pay some regard to the propositional level, and Taylor himself seems to presume as much when he speaks of the potential borrowing processes that might occur between cultures in the course of dialogue.<sup>71</sup>

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<sup>65</sup> Taylor, "Unforced Consensus", *supra* note 17 at 136.

<sup>66</sup> *Ibid.*

<sup>67</sup> This is the case, for instance, with Saskatchewan's 1995 Restorative Justice Strategy. See e.g. Saskatchewan Justice, *Restorative Justice Strategy Interim Status Report—October 1997: Responding to Changes in the Traditional Criminal Justice System* (N.p.: Saskatchewan Justice, 1997).

<sup>68</sup> "Unforced Consensus", *supra* note 17 at 124.

<sup>69</sup> *Ibid.* at 143.

<sup>70</sup> *Ibid.* at 136.

<sup>71</sup> *Ibid.*

Although, to my knowledge, Taylor has never resolved this ambiguity, it is possible to unpack and engage his theory so as to better see the possible force present in both versions—whether agreement is to be sought primarily at the level of conclusions or underlying propositions. From the outset, it is worth distinguishing between two possible sources of moral conclusions reached by different cultures. First, different cultures might place different value on different objectives, or, putting it more simply, these cultures may have different values.<sup>72</sup> The modern acceptance of the idea of value incommensurability means that some value differences may in fact simply arise from different choices based on different commitments. In other words, not every intercultural value difference represents a moral error on the part of one of the cultures involved; some simply represent different choices between incommensurable options.<sup>73</sup> So, for instance, if Aboriginal traditions place more value on cultural connectedness and some Western traditions place more value on individuality, Aboriginal and non-Aboriginal cultures may arrive at different approaches to specific issues. But they would in the process of arriving at these different approaches simply act on different values that represent different dimensions of human potential.

Second, different cultures might reach different results simply through the application of different concepts.<sup>74</sup> Therefore, an Aboriginal community operating with a conception of law that emphasizes harmony and natural order rather than positivistic rights<sup>75</sup> may initially have different perceptions about the way in which a court should adjudicate a particular case.<sup>76</sup>

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<sup>72</sup> More specifically, cultures might have different societal goals or social forms structuring individual choice in circumstances where reason alone cannot provide a guide between those different societal goals or social forms. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 321-22. Incommensurability arises when there are no reasonable grounds for preferring one option over another or regarding them as equally worthy. See Timothy A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at 41-44.

<sup>73</sup> The full application of these concepts to the context at hand would be worth further analysis in a more extended project. Among other questions, one might ask to what degree Ruth Chang's criticisms of value incommensurability call for the re-evaluation of any of the standard claims in this regard. See Ruth Chang, *Making Comparisons Count* (New York: Routledge, 2002).

<sup>74</sup> There is an implicit suggestion to this effect running throughout much current writing on Canadian Aboriginal legal issues. It surfaces in both academic and judicial contexts. For an example of the former, see Henderson, Benson & Findlay, *supra* note 43 ("Only when reviewing courts have understood Aboriginal tenure from an Aboriginal perspective can they begin to determine the relationship of Aboriginal tenure to Crown tenure and the common law perspectives" at 399). For the latter, see *Delgamuukw*, *supra* note 4, LaForest J., concurring (a *sui generis* Aboriginal title interest cannot "be described with reference to traditional property law concepts" at para. 190). See generally Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24 *Oxford J. Legal Stud.* 1.

<sup>75</sup> See e.g. Taiiaki Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont.: Oxford University Press, 1999) at 101-102.

<sup>76</sup> Some would argue that this example involves not simply a conceptual difference but a value-based difference as well, at least in so far as the different concepts import values. Some concepts will

One can thus distinguish value-based differences from concept-based differences,<sup>77</sup> both of which might reasonably lead thinkers within one cultural framework to reach different conclusions on a particular matter. Distinguishing value-based differences and concept-based differences, however, begins to make clear that different sorts of differences might push differently toward aspirations of agreement at the levels of propositions and conclusions.

If value-based differences are genuinely incommensurable—that is, not resolvable in terms of some further underlying value or values<sup>78</sup>—then there would seem to be only qualified hope for agreement at the conclusory level. By stipulation, there can be no agreement at the propositional level because there is no further value with which to render commensurate the choices each culture has made.<sup>79</sup> The actual claim put by many, of course, would be that many value choices are actually commensurable in terms of some underlying value(s)—human dignity is often cited as a possibility<sup>80</sup>—and, if that is so, then there is the possibility of reasoning through what best expresses the underlying value(s). So, for instance, an agreement could emerge between Aboriginal and non-Aboriginal communities that human dignity is best respected by treating offenders in particular ways within the justice system.<sup>81</sup>

If one accepts the notion of genuine incommensurabilities, then matters become more complicated. Agreement on conclusions might not seem to be automatic, for

indeed import values. But there will nonetheless be a conceptual element at stake in the differences that emerge; that conceptual element requires independent analysis of the sort I am offering.

<sup>77</sup> The question of which difference is more at stake in the Aboriginal rights context in Canada has not been fully analyzed, and clearer understandings in this area are well worth further attention.

<sup>78</sup> See *supra* note 72. The term “incommensurable” has sometimes taken on other connotations. Perhaps as a result, authors like Alan Cairns have challenged claims about the alleged incommensurability of values between Aboriginal cultures and non-Aboriginal cultures. Cairns suggests that such claims are in tension with the interpenetration of cultures within Canada (Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 8). However, interpenetration of cultures is not inconsistent with the presence of some incommensurabilities of value; a lawyer and a novelist might grow up in the same social setting, even the same family, and share many values yet choose different goals in light of some incommensurable values. That said, Cairns is right to interrogate the extent of cultural differences with Canada’s Aboriginal peoples, and it might well be that there are many more commonalities than in the intercivilizational context (which itself will contain many more commonalities than often thought). To take just one example, it is surely mistaken to claim that only Aboriginal individuals’ personal identities and cultures are connected with the land. See generally Newman, “Prior Occupation”, *supra* note 31.

<sup>79</sup> On the concept of incommensurability, see *supra* note 71. See also Raz, *The Morality of Freedom*, *supra* note 72 at 327 (noting that the essence of incommensurability is that there is not some further value with which to commensurate two incommensurate options).

<sup>80</sup> See e.g. Hugo Adam Bedau, “The Eighth Amendment, Human Dignity, and the Death Penalty” in Michael J. Meyer & William A. Parent, eds., *The Constitution of Rights, Human Dignity and American Values* (Ithaca, N.Y.: Cornell University Press, 1992) 45 at 145–46. Bedau describes dignity as “the premier value underlying the last two centuries of moral and political thought,” which, if one believed it fully, would make it something that offers appropriate commensuration (*ibid.* at 145).

<sup>81</sup> See e.g. Saskatchewan Justice, *supra* note 67; text accompanying note 67.

those attaching different values to different characteristics of processes or end states might reasonably reach different conclusions on many matters. Within this branch of the analysis, Taylor's prospect of an "unforced consensus" either becomes an unsubstantiated assertion of an ongoing faith in liberalism managing to overcome such differences, or else rests on an ongoing set of circumstances that enable different genuinely incommensurable values to be chosen, which might well be possible, particularly if genuine incommensurabilities are limited in scope.<sup>82</sup> Conditions of nonconflict might be instrumental to the implementation of genuinely incommensurable choices. If human flourishing, for example, is an inescapable value but there are a range of incommensurable forms of human flourishing, it might nonetheless be the case that certain sorts of cross-cultural agreement are instrumental to the achievement of any of these incommensurable forms.<sup>83</sup> The absence of reasonable peace and stability may undermine all efforts at different forms of human flourishing. So, there remains the possibility of agreement on certain practical conclusions.

If differences arise from the presence of different concepts within different cultures, prospects for propositional agreement are, perhaps, more significant. Concepts per se describe but do not define reality. If a biologist operates with one concept of a rose, likely one that is well developed in terms of species differentiation, that biologist will notice different things about roses than the poet who operates with a different concept of a rose and who, in turn, notices other things about roses. Both will notice mainly true things, though occasionally they will simply not notice things or actually reach mistaken conclusions based on the limitations of their respective concepts. However, were they to operate with an awareness and understanding of one another's concepts, they would, by virtue of propositional agreement, be able to reach agreement on conclusions.

One could view the concepts at issue in cross-cultural moral differences as of a different kind, being not natural-kind concepts—those describing groupings of things that are natural and not artificial, with examples being chemical elements or biological species—but, for instance, "interpretive concept[s]".<sup>84</sup> However, to the extent that concepts of justice differ from concepts of roses, such a difference arises from the introduction of value differences, not because they are different kinds of concepts per se. Concept-based differences per se implicitly presume the possibility of reaching agreement on conclusions that are based on the further study of, as well as agreement at, the propositional level. This is because concepts are, in a sense, mental placeholders for elements of physical, moral, or other reality. Assuming that reality is subject to at least some objective claims—and one descends rapidly into

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<sup>82</sup> Cf. *supra* note 72 and accompanying text.

<sup>83</sup> See e.g. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 85-95 (developing a model with a set of basic human goods, all of which are equally fundamental and thus implicitly incommensurable).

<sup>84</sup> Dworkin, *supra* note 74 at 15.

senselessness on any other assumption—then even if subjective conceptual placeholders about reality were to differ, the underlying objective realities would be subject to ultimate agreement once one got past the lenses of different concepts.

Of course, the objection raised in respect of concept-based differences immediately makes clear the potential overlap of value-based and concept-based differences. Different cultures reach different practical conclusions based on a complex mix of concept-based differences, which are over time rendered ever more complex by cultural processes. Consider gender definitions, one of the complex and rich examples Taylor raises, albeit in a slightly different context, in his discussion of “unforced consensus”. Taylor writes, “The gender definitions of a culture are interwoven with, among other things, its love stories, both those people tell and those they live.”<sup>85</sup> Taylor’s point here is the sophisticated but oft-neglected one that even a cultural characteristic with oppressive elements may frame human identities in deep ways, suggesting the need for caution in imposing demands for instant change.<sup>86</sup> However, this example also appropriately manifests the deep-rooted historicity of cultural differences enmeshed in webs of cultural differences that are both value based and concept based. A culture’s traditional norms involving the selection of a marriage partner based on consultations with others, rather than solely on romantic love, may arise from a complex mix of elements. These might include different ways of pursuing the same value (such as the search for lasting life partnerships), different choices as between different values that may be incommensurable (such as between more community-oriented and more individually oriented conceptions of family), and different historically mediated cultural concepts (or empirical beliefs, or, even, empirical conditions, with the ways in which each culture perceives lasting life partnerships best enduring being crucially affected by the culture’s own historical experience about what makes for lasting life partnerships).

For present purposes, it is sufficient to conclude that some of the unforced consensus Taylor seeks would be at the level of practical conclusions and some at the underlying propositional level. Moreover, absent a definitive faith in liberal discourse overcoming all value incommensurability, some unforced consensus might not occur at all. If one does not have that definitive faith in the power of liberal discourse,<sup>87</sup> failures to attain cross-cultural agreement can arise from various sources, including inefficiencies that might attach to the “negotiation process” (that is, the mode one adopts for seeking cross-cultural agreement)<sup>88</sup> and actual value incommensurabilities where different actors choose not to alter their commitments.

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<sup>85</sup> “Unforced Consensus”, *supra* note 17 at 139.

<sup>86</sup> See also Dwight G. Newman, “Theorizing Collective Indigenous Rights” (2007) 31 *Am. Indian L. Rev.* 273 at 283, n. 58 [Newman, “Indigenous Rights”].

<sup>87</sup> On the acts of faith behind liberalism, see generally Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2005).

<sup>88</sup> Many of the dynamics of negotiation theory potentially apply. For an account closely geared toward analyzing efficiencies and inefficiencies in negotiation processes, see generally Howard

The degree to which such cross-cultural consensus can emerge may be problematic. That said, Taylor offers a powerful argument for the necessity of at least some degree of cross-cultural moral theorizing. After all, some theorists classed as liberal theorists of multiculturalism have suggested their readiness to challenge the very worth of particular cultures.<sup>89</sup> Taylor's argumentation, by contrast, provides a compelling counterpoint to attitudes that threaten to reawaken disrespect for minority cultures. His argument explicitly points to a presumption of value: if different cultural and religious traditions have emerged and served humanity well over the centuries, the logical presumption is that there is something of value in these traditions that has enabled them to respond to human needs.<sup>90</sup> To say that is not to embrace everything within every tradition. Indeed, Taylor expects traditions to make use of internal "possibilities of reinterpretation and reappropriation,"<sup>91</sup> that is to say, ways of internally reinterpreting a tradition so as to remove elements that have oppressive consequences while also adhering to what is of value in the tradition.<sup>92</sup>

Drawing on the spirit of Taylor's approach, one can conceive the approach as grounding a more specific sort of methodology of cross-cultural consensus building. The methodology would first involve distinguishing between conceptually based and value-based elements of disagreements. Conceptually based disagreements would call for translation processes that interpret the concepts of one culture for another in the hope of explaining the claims of the first. It might also be possible to develop intermediate concepts that are between two cultures and similarly find underlying agreement. So, for instance, it might be possible to find agreement between Aboriginal conceptions of the relationship between humans and specific territories, on one hand, and Western concepts of "ownership", on the other, by disaggregating a bundle of property rights to render a set of Aboriginal rights to engage in certain activities within a territory consistent with an ongoing ownership interest by some individual or institution.<sup>93</sup>

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Raiiffa, John Richardson & David Metcalfe, *Negotiation Analysis: The Science and Art of Collaborative Decision Making* (Cambridge: Belknap Press of Harvard University Press, 2002).

<sup>89</sup> See e.g. Rawls, *Political Liberalism*, *supra* note 47 at lvi-lvii (arguably excluding the genuine meaning of certain religious positions, something John Finnis has challenged in work that remains, to my knowledge, thus far unpublished); Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) [Raz, *Ethics in the Public Domain*] ("it has to be admitted that liberal multiculturalism is not opposed in principle to the assimilation of one cultural group by others" at 182); Susan Moller Okin, "Feminism and Multiculturalism: Some Tensions" (1998) 108 *Ethics* 661 at 680 (stating without much explanation that it might be better that some cultures "become extinct"). Later, she has tried to temper this language and perceived misinterpretations (Susan Moller Okin, "Multiculturalism and Feminism: No Simple Question, No Simple Answers" in Eisenberg & Spinner-Halev, *supra* note 63, 67 at 69-70.)

<sup>90</sup> "Unforced Consensus", *supra* note 17 at 139, 143-44. See also Michael Oakeshott, "Rationalism in Politics" in *Rationalism in Politics and Other Essays* (London: Methuen, 1962) 1; Raz, *Ethics in the Public Domain*, *ibid.* at 179-80, 204-205.

<sup>91</sup> "Unforced Consensus", *ibid.* at 142.

<sup>92</sup> See also Newman, "Indigenous Rights", *supra* note 86.

<sup>93</sup> See Newman, "Prior Occupation", *supra* note 31.

In the case of value-based disagreements, one would attempt to carefully understand the values of the other culture and seek ways of reconciling these values with one's own, if possible. In some cases, it might be possible to find a deeper value that offers an easier resolution. So, if both Aboriginal and non-Aboriginal conceptions of the judicial system's role are rooted in the well-being of the community, they might be able to agree on appropriate approaches to the use of penal sanctions.<sup>94</sup> In some cases, it might be possible to understand the value of the other culture and then to find a reconciliation. For example, if Aboriginal communities conceive of their relation to their children in terms of kinship, it might be possible to find ways of modifying the best-interests-of-the-child standard so as to recognize an independent Aboriginal child welfare system that is acceptable in both cultural contexts.<sup>95</sup> In some cases, it might be possible to understand another culture's values but not to bridge the differences, leaving the cultures in question with the sole option of agreeing to disagree. So, a Western secular state might recognize certain indigenous peoples within it as having jurisdiction to promote the traditional spiritual values of their communities even while pursuing a state that is neutral vis-à-vis religion.<sup>96</sup>

There is no denying that there might be genuinely incommensurable differences. But a spirit of engagement that is concerned with seeking the above kinds of cross-cultural reconciliations has far more potential than one might initially think. Taylor's approach commends a methodology that seeks to engage with other cultural communities in a quest for common ground.

### III. Kymlicka, Collective Rights, and Aboriginal Conceptions

Will Kymlicka has created an entire school of thought in liberal multiculturalism and its variants,<sup>97</sup> but his writing was initially concerned with showing how a liberal theory could properly recognize special rights for Aboriginal groups.<sup>98</sup> Kymlicka has made monumental contributions by showing that it is possible to defend collective legal rights held by Aboriginal communities that are based on traditional liberal

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<sup>94</sup> See e.g. Saskatchewan Justice, *supra* note 67; text accompanying note 67.

<sup>95</sup> See generally Cindy L. Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences" (2006) 39 U.B.C. L. Rev. 63 (implicitly calling for Aboriginal customary adoption adapted in light of considerations not traditionally recognized in Aboriginal customary adoption practices but not undermining their fundamental values either).

<sup>96</sup> See e.g. Dwight Newman, "Putting Kymlicka in Perspective: Canadian Diversity and Collective Rights" in Stephen Tierney, ed., *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice* (London: Ashgate, 2007) 59 [Newman, "Kymlicka in Perspective"] (discussing such examples in emerging self-government agreements).

<sup>97</sup> Kymlicka himself perhaps best describes this school of thought (Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002) at 338-43 [Kymlicka, *Contemporary Political Philosophy*]).

<sup>98</sup> It has been enormously influential in showing how cultural rights can fit within liberal theory and has had an influence on debates in the Aboriginal rights area in particular. See e.g. Cairns, *supra* note 78 at 175.

values concerned with the equality of individuals. Put briefly, Kymlicka argues that if Aboriginal communities face particular challenges in maintaining the cultural contexts they provide for their individual members, then collective legal rights may be justifiable for those Aboriginal communities in order to protect individuals' equal access to cultural identities.<sup>99</sup> Thus, Kymlicka is ready to argue, for example, in favour of limits on the voting rights of non-Aboriginal Canadians who move into Aboriginal territories.<sup>100</sup>

Such a position, however, is distinct from any claim that communities per se have moral claims to equality. In responding to an argument by Taylor that communities per se have moral claims to equality, Kymlicka writes that such a concept is "incoherent". Kymlicka rejects any moral status for communities themselves. As he states, "Groups have no moral claim to well-being independently of their members—groups just aren't the right sort of beings to have moral status."<sup>101</sup>

Kymlicka, then, is ready to defend collective legal rights (claims or justified entitlements based on the correct interpretation of a legal system's rules and principles) but not collective moral rights (claims or justified entitlements that are valid independently of any legal system).<sup>102</sup> One could initially interpret his theoretical account as an example of cross-cultural theorizing. After all, it finds agreement with the claims of Aboriginal peoples for certain Aboriginal rights, albeit grounding them within a liberal framework.

However, a further exploration of why Kymlicka takes the approach he does in defence of Aboriginal communities problematizes this initial conception. In one sense, Kymlicka rejects collective moral rights on an ontological premise—that groups are not the sort of entities to hold rights.<sup>103</sup> In a deeper sense, Kymlicka actually operates on a preliminary presumption against any approach not compatible with liberalism, a presumption reflecting the strategic aims of *realpolitik*. In an attempt to explain why the approaches of many Aboriginal theorists have been misguided insofar as they have deployed theories departing in various ways from standard liberalism, Kymlicka writes that nonliberal arguments "are not very strong *politically*, for they do not confront liberal fears about minority rights."<sup>104</sup> Kymlicka, as illustrated by the epigraph of this essay, is actually concerned with what would convince those who hold power: "[I]t is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and

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<sup>99</sup> *Liberalism*, *supra* note 1 at 182-205.

<sup>100</sup> *Ibid.* at 150-52.

<sup>101</sup> *Ibid.* at 241-42.

<sup>102</sup> Compare Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) at 408-24. Buchanan argues that "[t]o assert that indigenous collectivities, or any collectivities, are the possessors of moral rights is not only implausible; it is also entirely *unnecessary* from the standpoint of devising institutions for protecting the interests of indigenous peoples" (*ibid.* at 415 [emphasis in original]).

<sup>103</sup> See note 101 and accompanying text.

<sup>104</sup> Kymlicka, *Liberalism*, *supra* note 1 at 153 [emphasis added].

so it is important to find a justification of [these rights] that such people can recognize and understand.”<sup>105</sup>

Such an approach effectively silences the beliefs Aboriginal peoples themselves hold about Aboriginal rights. One might consider, for example, the language of the *Draft United Nations Declaration on the Rights of Indigenous Peoples*,<sup>106</sup> indigenous peoples having been substantially represented in its development. Most of the rights in that instrument are held by “indigenous peoples”, with only some attributed to “indigenous individuals”, and a number of rights are explicitly identified as collective (either in addition to or in place of being individually held).<sup>107</sup> Although these are set out as manifesto rights (which might be thought more legal than moral in form), the cumulation of collective rights must eventually be taken as indicative of the proposition that communities per se can hold moral rights, the very claim that Kymlicka rejected.

Aboriginal theorists writing on indigenous rights have also advocated this view. For example, Mary Ellen Turpel wrote in a prominent article: “Although indigenous people are individually affected by the denial of collective human rights, the source of their suffering is generally inseparable from the oppression experienced by the people as a group.”<sup>108</sup> She argues that the failure of the Canadian legal system to develop collective rights responding genuinely to the circumstances and claims of Aboriginal peoples is a conceptual failure.<sup>109</sup> Such statements suggest strong beliefs in the

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<sup>105</sup> *Ibid.* at 154.

<sup>106</sup> Annex to Commission on Human Rights, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, UN Doc. E/CN.4/1995/2 & E/CN.4/Sub.2/1994/56 (October 1994) [mimeo].

<sup>107</sup> *Ibid.*, Preamble. See especially arts. 6 (a collective right to live as distinct peoples), 7 (collective and individual rights against ethnocide and cultural genocide), 8 (collective and individual rights to develop identities), 32 (collective right to determine own citizenship), 34 (collective right “to determine the responsibilities of individuals to their communities”). See also the Chairman’s final text in Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995—on its Eleventh Session*, UN Doc. E/CN.4/2006/79 (March 2006) [mimeo.] (“indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples” at 19, PP18bis). The final text affirms rights of “indigenous peoples” as distinct from “indigenous individuals” in many articles, though the word “collective” is removed from arts. 32 and 34 (*ibid.* at 65, 66). On disputes about the inclusion of collective rights in this legal instrument, see generally Newman, “Indigenous Rights”, *supra* note 86.

<sup>108</sup> “Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition” (1992) 25 *Cornell Int’l L.J.* 579 at 584 [Turpel, “Legal Developments”].

<sup>109</sup> Mary Ellen Turpel, “Aboriginal Peoples and the Canadian *Charter*: Interpretative Monopolies, Cultural Differences” [1989-1990] *Can. Hum. Rts. Y.B.* 3 at 23 [Turpel, “Interpretative Monopolies”].

existence of collective moral rights, something Kymlicka's ontological premises exclude from the outset.<sup>110</sup>

Although space limitations preclude a full development of the point here, it is not philosophically incoherent (or at least not possible to claim such incoherence without a fuller development of the claim that goes well beyond what Kymlicka provides) to argue for collective moral rights, even by beginning from central premises of Western philosophical traditions. Analyses of collective rights have been underdeveloped,<sup>111</sup> and they are sufficiently complex to warrant fuller treatment elsewhere, but I have argued at length that the existence of collective moral rights is, on a deeper analysis, logically demanded by standard accounts of rights within Western traditions.<sup>112</sup>

In making this argument, I obviously advance a controversial claim, one that some might challenge as antithetical to Western traditions and as ultimately exaggerating the difficulty of cross-cultural moral theorizing by those from Western traditions. If that is the case, the challenges for cross-cultural moral theorizing on Aboriginal rights are even more difficult than I believe them to be. But in the absence of definitive arguments to that effect, there is no reason to refuse an engagement with perspectives that initially differ from traditional Western theory merely in the hopes of achieving cross-cultural moral theorizing. Moreover, the need for cross-cultural moral theorizing would remain after any such refusal and would simply constitute a more challenging enterprise.

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<sup>110</sup> The ontological-type argument that groups are not the sort of entities to have moral standing is, in a very real sense, Kymlicka's main argument against the existence of collective moral rights. See text accompanying note 100. One of his arguments against discussing "collective rights" is that the term does not get at what is at issue. See Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995). Another is the strategic-type argument that liberal judges will be more receptive to arguments founded on individual equality claims. See Kymlicka, *Liberalism*, *supra* note 1. But neither of these is actually an argument against the existence of collective moral rights so much as a comment on what some people find interesting to discuss. I challenge his ontological premises at length elsewhere, arguing that because some communities have moral standing to the extent that we can recognize collective moral responsibilities in some instances, we can also recognize collective moral rights in some instances. See e.g. Newman, "Indigenous Rights", *supra* note 86; Dwight G Newman, *Community and Collective Rights* (D.Phil. Thesis, Oxford University Faculty of Law, 2005) [unpublished] at 39-79 [Newman, *Community*]. For an argument that could pose a different challenge to Kymlicka's ontological premises, see Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 *Queen's L.J.* 259 at 269. Fox-Decent suggests that the ultimate unit of value within the law is the legal person (which can include not only natural persons but also unions, corporations, communities, and indigenous peoples), and that the rule of law responds to the claims of legal persons. Although Fox-Decent does not develop the argument precisely this way, one could argue that the fact that these claims can have moral standing implies *ipso facto* that the rule of law may mean that certain collective moral rights exist.

<sup>111</sup> See Linda Cardinal, "Collective Rights in Canada: A Critical and Bibliographical Study" (2001) 12 *N.J.C.L.* 165 ("There are still no comprehensive studies of the anthropological, historical, legal, philosophical or social and political foundations of collective rights" at 166).

<sup>112</sup> See Dwight G Newman, "Collective Interests and Collective Rights" (2004) 49 *Am. J. Juris.* 127; Newman, *Community*, *supra* note 110.

Kymlicka's claim concerning appropriate political strategy might seem to some like an inoffensively pragmatic suggestion aimed at the successful advancement of Aboriginal claims, and one might even try to frame it as guidance for successful cross-cultural moral dialogue in which, in Taylor's words, we achieve a "meeting of very different minds, worlds apart in their premises, uniting only in the immediate practical conclusions."<sup>113</sup> But Kymlicka's strategic suggestion is ultimately at odds with the broader urging of Taylor's theory of cross-cultural dialogue to seek mutual understanding, since Kymlicka's strategic demand in effect requires Aboriginal communities to explain themselves in Western (literal and figurative) language.

Moreover, the real problem is that different propositional content on this issue ultimately means a difference with regard to practical conclusions. As I have developed at greater length elsewhere,<sup>114</sup> Kymlicka's argument that there can legitimately be certain collective legal rights (though he never likes the term and prefers simply to speak about group-differentiated rights),<sup>115</sup> but only if they are based directly on the advancement of individual moral autonomy,<sup>116</sup> has practical implications for various issues. In particular, it tends to lead rapidly to Kymlicka's well-known distinction between "external protections" and "internal restrictions", which holds that group-differentiated rights may ground protections against outsiders but not policies restricting insiders.<sup>117</sup> The presumable result is to recommend against, for example, regimes that permit Aboriginal groups to take steps to protect cultures or religions that may have somewhat restrictive effects on their own membership.<sup>118</sup> This is the case even when preservation of Aboriginal culture and spirituality would be to the great benefit of the membership. Kymlicka's approach, then, seemingly recommends against some of the provisions developed in contemporary Aboriginal self-government agreements in Canada. For example, a recent self-government agreement involving the Tlicho nation empowers a Tlicho government to enact laws in relation to the "protection of spiritual and cultural beliefs and practices of [Tlicho] Citizens and [the] protection and promotion of the [Tlicho] language and of the culture of the [Tlicho] First Nation,"<sup>119</sup> conjoined with provisions that suggest some ability to limit members' rights as they would otherwise have been interpreted under

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<sup>113</sup> "Unforced Consensus", *supra* note 17 at 143.

<sup>114</sup> See especially Newman, "Kymlicka in Perspective", *supra* note 96.

<sup>115</sup> See e.g. Kymlicka, *Multicultural Citizenship*, *supra* note 110 at 35.

<sup>116</sup> See Kymlicka, *Liberalism*, *supra* note 1 at 165-73.

<sup>117</sup> *Multicultural Citizenship*, *supra* note 110 at 35.

<sup>118</sup> See Kymlicka, *Liberalism*, *supra* note 1 at 196-98 (launching his now-classic attack on the practices of certain Pueblo groups that sought to defend their traditional spirituality); Newman, "Kymlicka in Perspective", *supra* note 96. For another interesting recent critique of Kymlicka on these points, see Andrew M. Robinson, "Cultural Rights and Internal Minorities: Of Pueblos and Protestants" (2003) 36 *Canadian Journal of Political Science* 107.

<sup>119</sup> *Land Claims and Self-Government Agreement Among the [Tlicho] First Nation as Represented by the Dogrib Treaty 11 Council and the Government of the Northwest Territories and the Government of Canada*, 4 September 2002, art. 7.4.4(a), online: Indian and Northern Affairs Canada <[http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr\\_e.pdf](http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr_e.pdf)> [*Tlicho Agreement*].

the *Canadian Charter of Rights and Freedoms*.<sup>120</sup> Kymlicka's approach seems to run up against conclusions arising within other frameworks.

The implication is that the propositional content of the argument here may not be simply irrelevant background. Some cross-cultural moral theorizing on certain Aboriginal rights issues will only be viable and will only promote the aims of cross-cultural theory if it employs a richer notion of cross-cultural theorizing, one that looks to the propositional content of the theorizing and is thus willing to pay attention to Aboriginal world views and propositional claims concerning matters like collective moral rights.

A meaningful cross-cultural moral theory project engaging Aboriginal rights needs to engage seriously with Aboriginal perspectives. It is thus vital to deal with Aboriginal theorists on their own terms, in a manner that fully engages with their positions and views. It is equally important to refrain from using the alterity of their perspectives as a basis for rejecting their work.<sup>121</sup> Although my present task is one of discussing methodology rather than actually undertaking the above engagement, it is possible to draw briefly on the writings of Darlene Johnston and Mary Ellen Turpel on Aboriginal rights as collective rights to illustrate how academic practice needs to open itself up to, and engage with, such writings. However, other Aboriginal theorists' views also point to a challenge going beyond a simple engagement with Aboriginal perspectives on collective rights.

As a preliminary note, one should realize of course that the aim is not the retrieval of "an (authentic) Aboriginal conception," thereby forcing rich thought and complex traditions into one simple (perhaps even historically frozen) form. Even some Aboriginal theorists themselves have come at times close to making this error. For example, Darlene M. Johnston's 1989 essay, "Native Rights as Collective Rights: A Question of Group Self-Preservation,"<sup>122</sup> unfortunately spoke in broad-brush terms: "Native people view their relationship with the land as central to their collective identity and well-being. Within the native world view, people and land and culture are indissolubly linked."<sup>123</sup> One cannot, however, meaningfully seek *the* "native world view". Even in 1989, Johnston's writing unfortunately suggested that she was not fully ready to recognize complex dialogues within Aboriginal thought itself. Hopefully, this shortcoming can be attributed to merely semantic error, as she also explicitly acknowledged the variety of Aboriginal communities.<sup>124</sup>

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<sup>120</sup> See Newman, "Kymlicka in Perspective", *supra* note 96.

<sup>121</sup> Kymlicka verges on doing so. See e.g. *Liberalism*, *supra* note 1 at 153.

<sup>122</sup> 2 Can. J. L. & Jur. 19.

<sup>123</sup> *Ibid.* at 32.

<sup>124</sup> *Ibid.* at 31-32. There are arguably parallels in, for example, Chinese philosophy, in which some earlier Chinese philosophers "sought to determine the essence of Western philosophy and the essence of Chinese philosophy," or at least sounded as if they were constructing such generalizations, in order to promote at least the beginnings of dialogue (Nicholas Bunnin, "Introduction" in Chung-Ying Cheng & Nicholas Bunnin, eds., *Contemporary Chinese Philosophy* (Malden, Mass.: Blackwell, 2002) 1 at

The views of some Aboriginal theorists, like those of Johnston and Turpel, are reasonably accessible to people from non-Aboriginal traditions. Both have Western legal educations and are skilled at speaking to Western institutions from within, as it were. Johnston specifically orients much of her argument in “Native Rights as Collective Rights” around the writings of non-Aboriginal theorists while also trying to incorporate Aboriginal perspectives on rights. In this manner, she herself engages in a sort of fusion of horizons.<sup>125</sup> Turpel has partly pursued her argument in the familiar framework of the jurisprudence of the United Nations Human Rights Committee<sup>126</sup> and has written about Aboriginal rights in the context of section 35 of the *Constitution Act, 1982* as co-author with non-Aboriginal constitutionalist Peter Hogg.<sup>127</sup>

Some authors, like John Borrows, have developed their arguments in less Western forms by, for example, drawing the attention of the non-Aboriginal legal community to the legal content of Aboriginal fables—though it is worth noting that Borrows has still written in a reasonably familiar legal form.<sup>128</sup> One of the challenges of cross-cultural moral theorizing, of course, is to communicate ideas in a form that can persuade those initially or potentially opposed to them without sacrificing the very content of these ideas. An additional complexity thus attaches to the practice of cross-cultural moral theorizing, one that can be called *dialogic form-substance tensions*. Seeking a fusion of horizons brings this challenge to the fore. I do not claim to have easy answers to these challenges. Seizing upon those theorists whose views are initially most accessible because they are communicated in forms that incorporate elements of one’s own cultural tradition may have its advantages, especially where these theorists have successfully communicated the theory at stake. But there are dangers to this approach, as it may result in dialoguing with diluted versions and/or elitist interpretations of the tradition. If one succumbs to either of these dangers (and I make no claim that they necessarily do here), some of the very objects of cross-cultural moral theorizing may be lost.

This first challenge shares something important in common with the next, which is concerned with the methodology of engagement in cross-cultural moral theorizing. Kymlicka, as I noted earlier, has developed a sophisticated and extensive body of theory. Yet, having identified the importance of Johnston’s contribution on collective

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2). As with that phenomenon, we treat Aboriginal theorizing most seriously if we are ready today to “distinguish between what is valuable and what should be disregarded in the works considered,” being ready to leave as part of history cruder attempts at characterizing *the* interpretation of any complex tradition (*ibid.*).

<sup>125</sup> *Supra* note 122 (engaging with writings that include those of François Chevrette, Julius Grey, Owen Fiss, Michael McDonald, Frances Svensson, Ronald Garet, and Robert Cover).

<sup>126</sup> “Legal Developments”, *supra* note 108.

<sup>127</sup> Peter W. Hogg & Mary Ellen Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74 Can. Bar Rev. 187 at 210ff.

<sup>128</sup> “The Trickster: Integral to a Distinctive Culture” (1997) 8 Const. Forum Const. 27.

rights sufficiently to include it in a collection of essays he edited,<sup>129</sup> Kymlicka nonetheless fails to engage with the content of her views. He either includes them in a (repeated) footnote as an example of a communitarian theory,<sup>130</sup> thereby attaching a label to Johnston's views, or rejects them as examples of views that fail to attend to Kymlicka's favoured distinction between external protections and internal restrictions.<sup>131</sup> Both approaches, of course, manifest what is in some respects considered solid academic practice, manifesting an ability to draw and apply distinctions in an argumentative manner that seeks to prove the superiority of one's position over that of rival academics. But cross-cultural moral theorizing demands something more: it requires a careful engagement with the views of Aboriginal theorists even when it is tempting to dismiss them in accordance with prevailing academic practice.

Johnston's piece, on closer reading, is not specifically "communitarian"; it is rather an engagement with the writings of a number of theorists that attempts to show ways "to ground collective claims in a rights-based theory"<sup>132</sup> and then argue that Aboriginal communities can make rights claims as collectivities. Johnston does discuss communitarian theories in the early pages of her article, but merely ends up drawing more general insights concerning common goods and goes on to use a number of other theoretical perspectives that are not inherently communitarian. She proceeds eventually to develop important implications of an attitude attendant to collective rights in terms of possession and enjoyment of traditional lands. In the process, she offers views on the relationship of individuals and collectivities, which Kymlicka glosses as "rais[ing] familiar questions about the priority (moral, ontological, formative) of the individual and the community, and hence about the relative priority of individual rights and collective rights,"<sup>133</sup> before returning to his conceptual refusal to consider collective rights. In general terms, cross-cultural theorizing may well need a careful reading of what is unfamiliar rather than an attempt to characterize the unfamiliar as familiar and easily ignored.

In terms of the methodology developed at the end of Part II, Kymlicka's discussion fails to engage in a cross-cultural dialogue with Johnston. Kymlicka reads her concepts into a pre-existing framework rather than seeking intermediate concepts that may make their positions reconcilable or seeking values that they may share. He

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<sup>129</sup> See Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" in Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 179 [Johnston, "Native Rights"].

<sup>130</sup> For repetitions of this same footnote, see Kymlicka, *Multicultural Citizenship*, *supra* note 110 at 207, n. 20; Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) at 19, n. 4; Kymlicka, *Contemporary Political Philosophy*, *supra* note 97 at 373, n. 10.

<sup>131</sup> See Will Kymlicka, "Introduction" in Kymlicka, ed., *The Rights of Minority Cultures*, *supra* note 129, 1 at 14.

<sup>132</sup> Johnston, "Native Rights", *supra* note 129 at 19.

<sup>133</sup> "Introduction", *supra* note 131 at 14.

acts in accordance with standard academic practice but in the process misses opportunities for shared learning with Johnston.

Turpel presents some Aboriginal perspectives concerning collective rights in her discussion of the jurisprudence of the United Nations Human Rights Committee,<sup>134</sup> having previously expressed some of these perspectives in a less detailed way in the course of discussing why Aboriginal communities might seek self-government outside the *Charter*.<sup>135</sup> In a later piece co-authored with Peter Hogg,<sup>136</sup> she advances an interpretation of the highly contested<sup>137</sup> section 25 of the *Charter*, which requires that *Charter* rights “not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada.”<sup>138</sup>

Turpel claims first (and somewhat surprisingly) that section 25 was developed without any contemplation of its use in relation to Aboriginal self-government, but that it gives reason to interpret the legal rights of Aboriginal governments in light of Aboriginal traditions, thereby justifying some deference to Aboriginal conceptions of rights (which would ideally be set out in Aboriginal charters).<sup>139</sup> Turpel’s arguments, then, carry forward some Aboriginal conceptions of rights. They also identify other specific points of legal interaction on which there needs to be cross-cultural moral theorizing. Something like section 25 of the *Charter* can form a specific focus for a circle of discussion. That said, there are dangers, evident in Turpel’s own approach to the question, in choosing such a focus. To the extent that one might interpret section 25 in terms of framers’ intent (to which Turpel first referred), one would risk surrendering cross-cultural moral theorizing to the power dynamics at play at a particular historical moment of constitution-drafting—or, more specifically, to the way in which that historical moment has since been cast in dominant narratives. To the extent that one might interpret section 25 only with reference to traditional legal modalities, one risks entrenching the power dynamics of current historical legacies. Cross-cultural moral theorizing demands an active moral re-engagement in the shared search for understanding.<sup>140</sup>

Cross-cultural moral theorizing will also be a dynamic process, one with potentially shifting objectives. Transition toward engagement with Aboriginal

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<sup>134</sup> “Legal Developments”, *supra* note 108.

<sup>135</sup> “Interpretative Monopolies”, *supra* note 109 at 29-41.

<sup>136</sup> Hogg & Turpel, *supra* note 127.

<sup>137</sup> For a helpful recent summary of some of this contestation and uncertainty, see Arbour, *supra* note 13.

<sup>138</sup> *Supra* note 11.

<sup>139</sup> Hogg & Turpel, *supra* note 127 at 214-16.

<sup>140</sup> This claim has parallels to but does not coincide precisely with claims that the constitution should be viewed as a “living tree” (*Edwards v. Canada (A.G.)*, [1930] A.C. 124 at 136, [1930] 1 D.L.R. 98 (P.C.)). One cannot exclude the possibility that constitutional “watertight compartments” (*Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 at 355) might be precisely what may best respond to cross-cultural issues, depending very much on precise factual circumstances.

understandings of certain rights as collective rights may be just a beginning. Gordon Christie has recently advanced the argument that translating Aboriginal rights into group rights or rights of group autonomy represents only an initial step, for danger remains so long as one is interpreting Aboriginal rights in terms definable in Western traditions, and that the real challenge lies in being open to fuller Aboriginal self-definition of Aboriginal rights.<sup>141</sup> Sákéj Henderson's writings might illuminate, as well, the more general challenge of undertaking dialogue in the limited forms of languages that embody particular world views within the languages themselves.<sup>142</sup> A project of cross-cultural moral theorizing is like group quilt making in the pursuit of a progressive unfolding of yet undiscovered cloth—and all the more valuable for these complex dynamics.

#### IV. Implications

Faith in a project of cross-cultural moral theorizing has a variety of specific implications. As I argued in Part II, it suggests a certain methodology of engagement. This engagement makes demands at a number of levels, including the nature of academic engagement, the presence of Aboriginal individuals in academia or on the courts, and in specific legal contexts like that of the Court's recent "translation test".<sup>143</sup>

I argued in the last section that the mode of academic engagement with Aboriginal theorists may need to adapt in subtle ways to avoid the automatic dismissal of claims arising from Aboriginal world views. This may initially seem like a minimalist sort of conclusion, reflecting only the commonsensical aspect of critical race arguments in the United States that those working on minority rights issues should actually read minority scholars.<sup>144</sup> That demand, of course, is already one that goes beyond the level of triviality. Richard Delgado's famed study of how engagement with minority scholars began as a sort of pretence—with some scholars engaging in such manoeuvres by reading only the first few pages of pieces by minority scholars, something Delgado revealed through their citations—can serve as a reminder of the notion's more substantial implications.<sup>145</sup>

At a broader level within academia, there are reasons to encourage the entry of Aboriginal theorists into debates in sufficient number to engage with Western thought while recognizing the rich potential for diverse interpretation and reinterpretation of both Western and Aboriginal thought.<sup>146</sup> Dale Turner has gone some distance toward this goal, surprisingly within an account accepting Kymlicka's *realpolitik*. Turner

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<sup>141</sup> Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous L.J.* 67.

<sup>142</sup> James [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 *Alta. L. Rev.* 46 at 59-63.

<sup>143</sup> See *supra* notes 28-30 and accompanying text.

<sup>144</sup> See generally Richard Delgado, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature", Comment, (1984) 132 *U. Pa. L. Rev.* 561.

<sup>145</sup> *Ibid.*

<sup>146</sup> See Taylor, "Unforced Consensus", *supra* note 17 at 142.

argues that “[i]f Aboriginal peoples are going to continue to assert that they possess unique forms of rights, sovereignty, and nationhood that the state must recognize as legitimate they will have to convince the dominant culture of the legitimacy of those assertions.”<sup>147</sup> The acceptance of Kymlicka’s *realpolitik* is explicit: “As long as Kymlicka’s constraint requires indigenous peoples to explain themselves within the discourses of the dominant culture, there will be a need for specially educated indigenous people to generate the required explanations.”<sup>148</sup> The latter point should actually be extended—it applies in both the second-best context in which Turner implicitly develops it and in the first-best context that Taylor’s cross-cultural theorizing implicitly seeks. Even without “Kymlicka’s constraint”, there is a need for an expanded Aboriginal intellectual community—with obvious potential for enlarging the understanding of what fits within intellectual discourse<sup>149</sup>—to engage in the kind of cross-cultural theorizing that should take place as a continuing project.<sup>150</sup>

Turner’s work points to the need for Aboriginal philosophers to engage in the challenging intellectual enterprise entailed by cross-cultural theorizing.<sup>151</sup> He also, at least implicitly, seeks to identify some of the particular projects Aboriginal philosophers need to undertake: elaboration of indigenous philosophy, engagement by indigenous intellectuals with Western European philosophy on its own terms, and engagement by indigenous philosophers with the Western European history of ideas.<sup>152</sup> What his work speaks to only subtextually is how to encourage the development of a critical mass of Aboriginal theorists undertaking these sorts of projects. One might, of course, simply try to assume away the issue in various ways: by assuming that this critical mass is already developing because of the presence of some prominent Aboriginal intellectuals in Canadian academia, by presuming that the macrolevel expansion of Aboriginal post-secondary education will likely lead to such a development, or by imposing the challenge solely on Aboriginal communities themselves. But there are both macro- and microlevel educational policy questions implicit in these needs. Significant educational policy work ought to be undertaken to determine ways of assisting Aboriginal communities and Aboriginal individuals in

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<sup>147</sup> Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 73 [Turner, *This Is Not a Peace Pipe*].

<sup>148</sup> *Ibid.*

<sup>149</sup> As Turner eloquently puts it, “The fact that our ways of understanding the world are not worthy of equal participation in a dialogue over the meaning and content of *our* rights is itself a form of inequality” (*ibid.* at 26). For his discussion of how some Aboriginal intellectuals have enlarged the intellectual endeavour, see e.g. *ibid.* at 27.

<sup>150</sup> For some interesting discussion of necessary changes in academia, see generally Devon Abbott Mihesuah & Angela Cavender, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln, Neb.: University of Nebraska Press, 2004). See also Turner, *ibid.* For an insightful recent analysis of Aboriginal rights and federalism, see Jean Leclair, “Federal Constitutionalism and Aboriginal Difference” (2006) 31 *Queen’s L.J.* 521.

<sup>151</sup> *Ibid.* at 103.

<sup>152</sup> *Ibid.* at 9, 88ff.

reaching a critical mass of Aboriginal theorists with the experiences and education necessary to participate powerfully in cross-cultural theorizing.

Some of this work can, indeed, take place in microlevel contexts. There is a particular role for institutions of legal education, where Aboriginal persons are finally becoming a growing presence. Legal education has the ever-present potential of preparing individuals not just to become practitioners of law—valuable though that is, and particularly so when acting in defence of oppressed communities—but also doers and thinkers of justice. Cross-cultural theorizing makes particular demands on the legal academy that will significantly affect the thinking of many leaders, both non-Aboriginal and Aboriginal. To incorporate cross-cultural theorizing into scholarly research agendas and thereby increase the capacity for cross-cultural theorizing, law schools can open dialogical spaces by engaging in projects of legal transsystemia<sup>153</sup> or, even more specifically, by developing programs for the study of indigenous legal traditions.<sup>154</sup> At a more specific level, of course, there is also the potential for courses that specifically address theoretical dimensions of Aboriginal rights.<sup>155</sup>

We can turn to a different context for which the methodology of cross-cultural engagement may have implications. In recent debates on judicial appointments to the Supreme Court of Canada, the presence of an Aboriginal justice on the Court has been perceived in many circles as an increasing imperative.<sup>156</sup> In 1996, the Royal Commission on Aboriginal Peoples recommended that “the Supreme Court of Canada should include at least one Aboriginal member” and that “a requirement that one of the justices be Aboriginal should be the subject of a constitutional amendment.”<sup>157</sup> A paper published by the Indigenous Bar Association in 2004 also urged the creation of an Aboriginal seat on the Supreme Court, arguing for this in terms of legal pluralism

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<sup>153</sup> See *supra* note 5.

<sup>154</sup> The suggestion is implicit in John Borrows' writing. See e.g. John Borrows, “Creating an Indigenous Legal Community” (2005) 50 McGill L.J. 153.

<sup>155</sup> To my knowledge, the University of Saskatchewan College of Law is the only law faculty in Canada with a course specifically on moral or political theory and Aboriginal rights, and this is only a special topics offering, not yet regularized within the curriculum. This uniqueness persists despite the presence of individuals on a number of faculties to whose research interests such a course would presumably be relevant.

<sup>156</sup> This is in keeping with the growing awareness of the central role of the Supreme Court in guiding reconciliation between Canada and its Aboriginal peoples. Aboriginal representation on the Supreme Court of Canada is arguably a natural extension of what Ian Peach wisely captured as a shift in concern surrounding the appointment process from a focus on federalism to one on the *Charter* and resulting judicial activism. See Ian Peach, *Legitimacy on Trial: A Process for Appointing Justices to the Supreme Court of Canada* (Regina: Saskatchewan Institute of Public Policy, 2005) at 2-3. We also see an emerging discussion on the importance of representation. See e.g. Isabel Grant & Lynn Smith, “Gender Representation in the Canadian Judiciary” in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) 57.

<sup>157</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 5 (Ottawa: Supply and Services Canada, 1996) at 129.

and the representation of indigenous legal traditions on the Court.<sup>158</sup> The Canadian Bar Association, though not comfortable with advocating specifically for an Aboriginal seat on the Court, has recently urged that “the Minister of Justice give particular focus to the appointment of Aboriginal judges to appellate courts including the Supreme Court of Canada.”<sup>159</sup>

If part of the task the Supreme Court must undertake is to engage in cross-cultural theorizing, there are some additional arguments in favour of Aboriginal representation on the Supreme Court. That said, Aboriginal representation may not be the only way in which the Court can successfully foster the kind of dialogue required, and I do not presume here to offer a determinate view on the much more complex question of judicial appointment. The Court might also benefit from the presence of non-Aboriginal judges attuned meaningfully to Aboriginal world views, or from attempts to further engage with Aboriginal world views.<sup>160</sup>

Finally—though one could draw out other implications as well, and the point of this article is to present a general theory with many different possible applications rather than to argue so much for these specific implications—the Court must contemplate its jurisprudence carefully in terms of how it promotes or discourages cross-cultural dialogue on Aboriginal rights. The recent approach in *Marshall* is that “[t]he Court’s task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.”<sup>161</sup> This approach superficially takes account of Aboriginal perspectives. But the Court could design a specific multi-faceted mode of engagement along the lines of the methodology I argued for in Part II. In so doing, the Court could begin to depart from the view that Aboriginal perspectives have an alterity that must be translated into “modern” discourse whereas non-Aboriginal perspectives need no translation. The perpetuation of such attitudes makes a doubtful contribution to the fostering of cross-cultural dialogue.

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<sup>158</sup> James C. Hopkins & Albert C. Peeling, “Aboriginal Judicial Appointments to the Supreme Court of Canada” (Paper prepared for the Indigenous Bar Association, 6 April 2004), online: Indigenous Bar Association <<http://www.indigenousbar.ca/pdf/Aboriginal%20Appointment%20to%20the%20Supreme%20Court%20Final.pdf>>. A similar argument appears in S. Ian Bushnell, “The Appointment of Judges to the Supreme Court of Canada: Past, Present, and Future” in Canadian Association of Law Teachers Special Committee on the Appointment of Judges, *Judicial Selection in Canada: Discussion Papers and Reports* (North York, Ont.: Canadian Association of Law Teachers, 1987) 1 at 21-25.

<sup>159</sup> Canadian Bar Association, *Federal Judicial Appointment Process* (Ottawa: Canadian Bar Association, October 2005) at 10, online: Canadian Bar Association <<http://www.cba.org/cba/submissions/pdf/05-43-eng.pdf>>.

<sup>160</sup> These might include a variety of possible approaches, ranging from hiring law clerks with substantial exposure to Aboriginal world views, to employing permanent staff who bring perspectives on Aboriginal world views, to undertaking specific engagement exercises with Aboriginal communities.

<sup>161</sup> *Supra* note 4 at para. 48.

We have, in this article, seen only some gestures toward a broader theory of cross-cultural theorizing. Its practice in the Aboriginal rights context can fit within a broader discipline of cross-cultural theorizing that is the subject of growing study and the methodology of which I have tried, in some slight ways, to further. But cross-cultural theorizing in the Aboriginal rights context will take place ultimately only through very careful engagement, informed by deeper principles of cross-cultural theorizing, with complex and challenging issues, and carried out by Aboriginal and non-Aboriginal scholars, thinkers, and peoples. Successful cross-cultural theorizing will take place best in the sort of conditions that we can all work further toward developing in forms both more tangible and yet more unfolding. We have both promises to keep and miles to go before we sleep, dreams to tell and dreams to live.

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