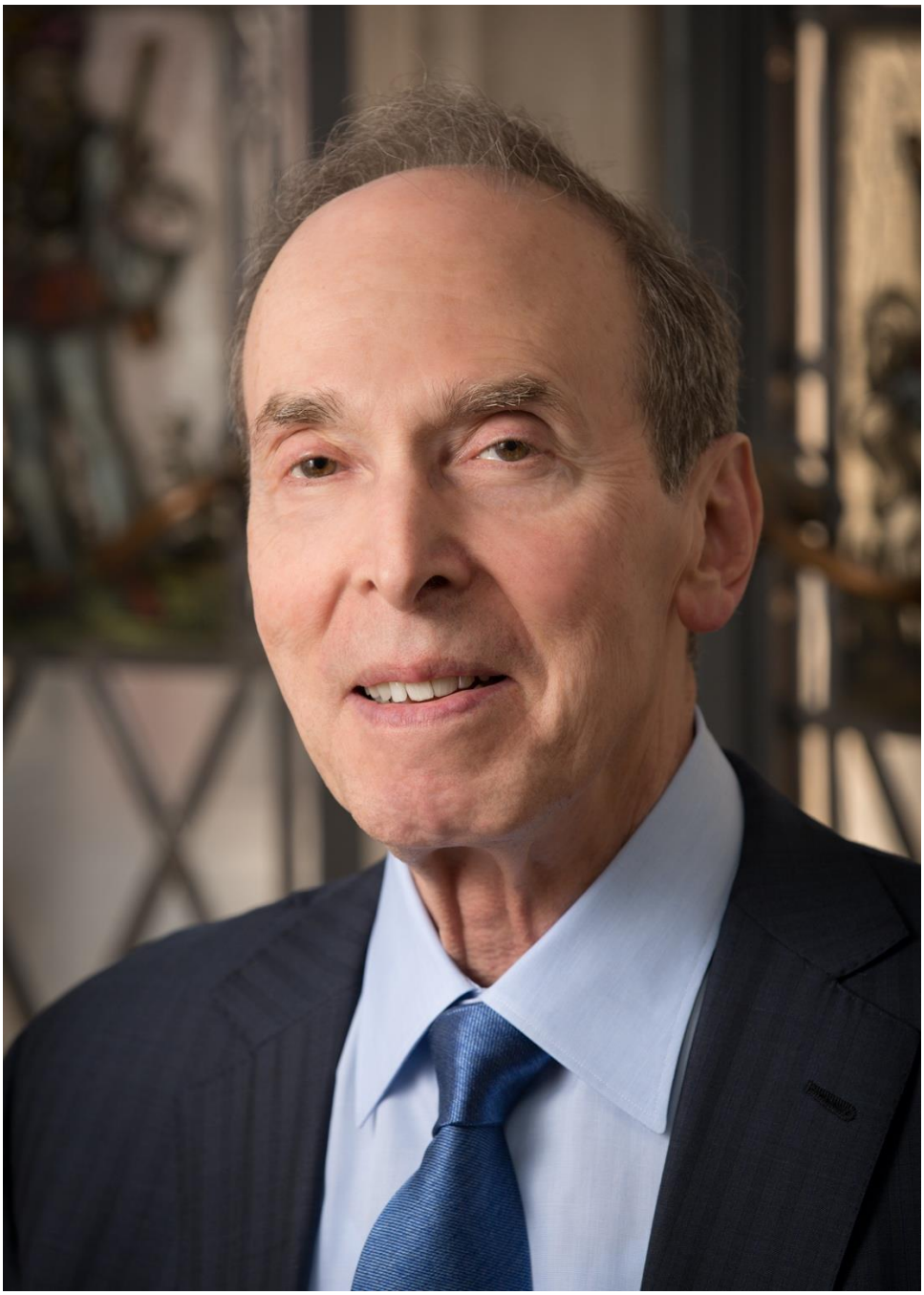

W. MICHAEL REISMAN

CELEBRATING MICHAEL REISMAN: THE INNER WORLDS OF OTHERS – A GUIDING LIGHT FOR INDIGENOUS RE-EMPOWERMENT

SIEGFRIED WIESSNER*

Michael Reisman is a beacon of light in the firmament of international law and jurisprudence. His retirement from his faculty position at the Yale Law School affords a welcome occasion to celebrate his work in the quest for a world public order of human dignity.[1] Michael is the cherished leader of the New Haven School of Jurisprudence, an intellectual movement designed to combine the prescriptive purposes of the law with the empirical insights of the sciences to achieve the goal of the flourishing of human beings, through access by all to the processes of shaping and sharing all things humans value.[2] It is the most comprehensive and creative, empowering theory about law and, indeed, its concepts and procedures are uniquely available for securing value-outcomes in situations of disintegrating public order and even the ultimate horror of normative *tohu bohu*. It is needed even more in this highly conflictual, often violent world.

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[1] At his 70th birthday, the academic world, across many divisions of theories about law, united to honor Michael with a most impressive Festschrift: LOOKING TO THE FUTURE. ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner eds., 2011). For his monumental record in scholarship and practice, see ID. at xxviiliii.

[2] W. Michael Reisman, *Theory about Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935 (1999); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. 118 (1992); Harold Hongju Koh, *Michael Reisman, Dean of the New Haven School of International Law*, *in* LOOKING TO THE FUTURE, *supra* note 1, at 13; Siegfried Wiessner, *Michael Reisman, Human Dignity, and the Law*, *in* LOOKING TO THE FUTURE, *supra* note 1, at 21, 23.

I have another, more personal reason to celebrate: Michael has been my mentor, my collaborator, and my treasured friend over many years. He has been most generous and kind. In particular, he supported the creation of the academic flagship of St. Thomas University Benjamin L. Crump College of Law, its Graduate Program in Intercultural Human Rights,[3] a program I direct with Professor Roza Pati. I was, and am, blessed to be able to turn to him for his advice in structuring the program, developing its faculty, and setting its goals. The New Haven School of Jurisprudence is the animating force of the LL.M. and J.S.D Program in Intercultural Human Rights; of various seminars and courses at our law school; the Brill book series on Intercultural Human Rights; and the *Intercultural Human Rights Law Review*. In particular, this law review is committed to its members using the intellectual tools of the New Haven School in writing qualifying and published papers.

As there are continuing attempts to redefine the New Haven School,[4] it is important to restate its essence, which distinguishes it from other theories about law. A school of jurisprudence means a "community of scholars who identify as such, shared common ideas about social process, a common sense of mission about that social process, and a common methodology."[5] Michael, Andrew Willard and I restated those key principles in our 2007 essay on "The New Haven School: A Brief Introduction."[6] The New Haven School is more than a theory about international law; it is applicable to any legal system.[7] It sees law as a process of authoritative and controlling

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[3] *Cf.* Human Rights at St. Thomas University College of Law, https://www.stu.edu/law/human-rights/.

[4] *See, e.g.*, Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 599 (2007); Laura A. Dickinson, *Toward a 'New' New Haven School of International Law?*, 32 YALE J. INT'L L. 547 (2007).

[5] W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007).

[6] *Id.*

[7] W. Michael Reisman, *Theory About Law: The New Haven School of Jurisprudence, in* 1989/90 WISSENSCHAFTSKOLLEG JAHRBUCH 228 (F.R.G.); W. Michael Reisman, *Theory about Law: Jurisprudence for a Free Society*, *supra* note 2, at 935 ("Theory about law was the center of Myres McDougal's intellectual enterprise ... [and his] primary interest."); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT'L L. 96 (2001); Roza Pati,

decision.[8] This theory of legal process, as developed also at Harvard, may encompass, on the international plane, a transnational one that includes actors others than the nation-state.[9] But New Haven's concern is not merely to describe or to analyze. Its goal is not only to understand, but to shape the law,[10] i.e. move it in a direction that allows all human beings to live and to flourish, to pursue their chosen goals in life. It tries to solve problems, not simply to lament them, or

Trafficking in Persons and Transnational Organized Crime: A Policy-Oriented Perspective, *in* HANDBOOK ON HUMAN TRAFFICKING, PUBLIC HEALTH AND THE LAW 27 (Wilhelm Kirch et al. eds., 2014); Christian Lee Gonzalez-Rivera, *Neither "Genteel Hoax" Nor "Slot Machine": Constitutional Interpretation in Policy-Oriented Jurisprudence*, *in* HUMAN FLOURISHING: THE END OF LAW, *infra* note 13, at 175.

[8] It is a key insight of the New Haven School that law is a process of authoritative and controlling decision. For details, see Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); W. Michael Reisman, *International Law-Making: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981); Reisman et al., *supra* note 5.

[9] As developed at Harvard in the 1950s in Hart and Sacks' American Legal Process theory, expanded to international law in the 1960s by Chayes, Ehrlich, and Lowenfeld, and extended to transnational legal process by Koh. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1968); and Harold Hongju Koh, *Transnational Legal Process*, 75 NEBRASKA L. REV. 181 (1996). As stated earlier, these process theories are devoid of normative ambition; their implicit value is a belief in process as a value in itself. Siegfried Wiessner, *Introduction*, *in* GENERAL THEORY OF INTERNATIONAL LAW 1, 27 (Siegfried Wiessner ed., 2017). *See also* Harold Hongju Koh, Transnational Legal Process and the "New" New Haven School of International Law, Chapter 5 of *International Legal Theory*, published online by Cambridge University Press on 21 July 2022, https://www.cambridge.org/core/books/abs/international-legal-theory/transnational-legal-process-and-the-new-new-haven-school-of-international-law/A9859B44AAB0959B6252D32B4B5DBC34 ("This chapter reviews the Transnational Legal Process approach to international law, sometimes called the 'New' New Haven School of International Law.'"). It appears thus to be more appropriate to designate the "New New Haven School" as "Old Cambridge."

[10] W. MICHAEL REISMAN & AARON SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1986).

to give an account of a process without inventing strategies for their amelioration.

In contrast, Michael Reisman applies the comprehensive New Haven Approach: Continuing and expanding the path-breaking work of Myres McDougal and Harold Lasswell,[11] he is a realistic idealist, addressing problems of society through detailed analyses of pertinent facts and law with a view toward realizing a public order of human dignity,[12] in which all human beings can thrive and bring all their faculties to full bloom.[13] Law, then, is just a means to an end, serving human beings, not the other way around.[14] This perforce interdisciplinary approach calls for a thorough grounding in the facts of the particular problem under review, to determine the conflicting claims, the perspectives, identifications, and bases of power of the claimants, the authoritative and controlling past and predicted future decisions regarding those claims in light of their conditioning factors; and finally the appraisal of those decisions and the development of recommendations to resolve or at least ameliorate the problem.[15]

The problems Michael has identified and discussed run the gamut from the assessment of global crises to the minute analysis of looking, staring and glaring in a café. Beyond scholarly analysis, however, he is driven to contribute actively to a world public order of human dignity.[16] From his early article on the lawfulness of international concern regarding Rhodesia[17] to the call to maintain an

[11] For a summary of their theory about law, see HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

[12] Siegfried Wiessner, *Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman*, 34 YALE J. INT'L L. 525 (2009).

[13] *Cf.* his most recent book, edited with Roza Pati, entitled HUMAN FLOURISHING: THE END OF LAW. ESSAYS IN HONOR OF SIEGFRIED WIESSNER (W. Michael Reisman & Roza Pati eds., 2023).

[14] Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PAC. L. REV. 45, 51 (2010).

[15] *Id.* at 48 *et seq.*

[16] Introduction to LOOKING TO THE FUTURE, *supra* note 1, at xxi-xxiii.

[17] Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

absolute ban on torture,[18] to mention but a few of his compelling interventions, he abides by his moral compass to enhance human dignity in appropriate systems of public order.[19] What has, however, been less analyzed is his groundbreaking work regarding the enhancement of the legal status and rights of indigenous peoples. In effective ways, Michael prepared the soil on which the legal flowers of those rights could grow and blossom. This essay is designed to retrace the work he undertook in this field in the late 20th century (I) and see his efforts and calls to action come to fruition in the early 21st (II).

I

The plight of indigenous peoples is well known to Michael, as he addressed it in his foundational essay on the protection of indigenous rights in international adjudication.[20] Victims of colonization, they were "consigned to a kind of international legal shadow land."[21] Their dispossession, marginalization, exploitation and often physical extermination left them without rights; Indian tribes were no legal units under international law.[22] The process of decolonization, largely conducted after World War II under the auspices of the United Nations, "rarely encompassed indigenous peoples"; in the New World, it benefitted "mostly so-called Creole or local elites or local elites of European extraction."[23] The doctrine of *uti possidetis juris* divided their territories among the new elites,[24]

[18] W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852 (2006).
[19] Introduction, *supra* note 1, at xxiv.
[20] W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350 (1995).
[21] *Id.*
[22] Cayuga Indians (Gr. Brit).) v. United States, 6 R.I.A.A. 173 (U.S.-Brit. Arb. Trib. 1926). Or, as John Westlake wrote in his influential treatise: "[O]f uncivilized natives international law takes no account." JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 136 (1894).
[23] Reisman, *supra* note 20, at 352.
[24] *Id*.

letting the colonial conquerors' rule them from their graves.[25] Declarations of their rights were at the time of Michael's writing being prepared at the universal and regional level. The "claims of indigenous peoples have implications," but "the process of actualization is slow, and the often 'soft' changes in one part of the international *corpus juris* are only slowly carried over into others. As a result, many anachronisms survive; some continue to be applied as law, perpetuating the injuries of a historical era now condemned and lamented."[26] "As a substantive matter," Michael wrote, "the court should not ignore indigenous rights and transfer title or confirm possession by a state as if the territories involved were vacant. To do this simply reenacts the tragedy of colonialism."[27] Reference here is to the doctrine of *terra nullius*, discarded by the International Court of Justice in the *Western Sahara Advisory Opinion*.[28] Other opinions of the Court devalued indigenous claims.[29]

His impatience with the pace of change is palpable:

> Modern computer software programs can make appropriate changes through an entire universe with a single keystroke. Would that the *corpus* of international law could be updated as quickly and efficiently. Changes in international law, alas, are registered much more slowly, deliberately and unevenly. Even though the international human rights program has recognized the need to protect indigenous peoples and certain critical indigenous rights have been established in a number of authoritative documents, adjustments taking account of those

[25] Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1150 (2008). *See also* Malcolm N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 BRIT. Y.B. INT'L L. 75, 119-25 (1997).
[26] Reisman, *supra* note 20, at 353.
[27] *Id.* at 359.
[28] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 39 (Oct. 16).
[29] *See, e.g.*, Land, Island and Maritime Frontier Dispute (El Sal. v. Hond., Nicar. intervening), 1992 I.C.J. 351 (Sept. 11); Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3).

> changes have not been carried over into other parts of international law. No automatic program can accomplish this. In every case in which an indigenous claim could have been lodged but for the standing impediment, the judges involved should raise the issue, so that the international *corpus juris* will advance, case by case, until the international legal system provides justice for all.[30]

Michael observed the plight of indigenous peoples most acutely as he was appointed member, in 1990, and later, in 1994, Chair of the Inter-American Human Rights Commission. In his Commission's visit to the country of Ecuador, in November 1994, as he kindly shared with me, he observed the spoliation of indigenous lands by the chemical residues from the extraction of oil: those lands looked like a moonscape, with no trace of life left. Indigenous women washed their clothes in a polluted river, which emitted a horrible stench. On the other hand, he met the headman of a tribe. He must have been his age. They could not communicate with each other; still, they looked into each other's eyes, and they instantly recognized each other's humanity.[31] This and other such visits, including those to

[30] Reisman, *supra* note 20, at 362.

[31] For the official report of this visit, see the Inter-American Commission's Report on the Situation of Human Rights in Ecuador, Chapter IX: Human Rights Issues of Special Relevance to the Indigenous Inhabitants of the Country, April 24, 1997, https://www.cidh.oas.org/countryrep/ecuadoreng/chaper9.htm#HUMAN%20RIGHTS%20ISSUES%20OF%20SPECIAL%20RELEVANCE%20TO%20THE%20INDIGENOUS%20INHABITANTS%20OF%20THE%20COUNTRY. "Oil exploitation activities have proceeded through traditional indigenous territory with little attention to the placement if facilities in relation to existing communities; production sites and waste pits have been placed immediately adjacent to some communities; roads have been built through traditional indigenous territory; seismic blast have ben detonated in areas of special importance such as hunting grounds; and areas regarded as sacred, such as certain lakes, have been trespassed. … [P]ursuant to the initial introduction of oil exploitation activities …, the last of the indigenous Tetetes were driven away, a circumstance believed to have hastened their extinction as a people." *Id*. For further detail, see Note, *Debt, Oil, and Indigenous Peoples: The Effect of the United States Development Policies in Ecuador's Amazon Basin*, 5 HARV. HUM. RTS J. 174 (1992). For deeper interdisciplinary analysis, see PATRICIA I. VAZQUEZ, OIL SPARKS IN THE AMAZON.

Guatemala, Colombia, Haiti, and Peru, "strengthened his resolve to address the plight of the oppressed and the exploited. Whenever possible, he bravely and directly confronted the elites responsible for these actions."[32]

Of abiding and groundbreaking value was his work, with Commission member Patrick Robinson and Principal Specialist Dr. Osvaldo Kreimer, on the project of a regional declaration on the rights of indigenous peoples.[33] As Chair, Michael sent the first draft of the so-called "Inter-American Declaration on the Rights of Indigenous Peoples" for comments to governments, hundreds of indigenous organizations, experts and other interested entities.[34] Upon that feedback, the Commission approved what it called the "Proposed American Declaration on the Rights of Indigenous Peoples."[35] Even though the final version of the American Declaration on the Rights of Indigenous Peoples was only adopted some 20 years later,[36] Michael was not only present at the creation, he was one of the progenitors of this key instrument. The major structure and content of the ultimate product was set. It included, inter alia, indigenous peoples' collective rights to their land, internal self-government, and cultural heritage,[37]

LOCAL CONFLICTS, INDIGENOUS POPULATIONS, AND NATURAL RESOURCES (2014), http://library.oapen.org/handle/20.500.12657/30559.

[32] Introduction to LOOKING TO THE FUTURE, *supra* note 1, at xxii.

[33] Inter-American Commission on Human Rights, Historical Background of the Rights of Indigenous Peoples under the Inter-American System, https://www.cidh.org/Indigenas/chap.1.htm.

[34] Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights at its 1278th session held on September 18, 1995. OEA/Ser/L/V/II.90, Doc. 9 rev. 1, Sept. 21, 1995. For details, see Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271, 272-73 (1996).

[35] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 133rd session. OEA/Ser/L/II.95, Doc. 6, Feb. 26, 1997.

[36] American Declaration on the Rights of Indigenous Peoples, adopted at the third plenary session of the 46th Regular Session of the OAS General Assembly held on June 15, 2016. AG/RES.2888 (XLVI-O/16). *See* text at https://www.oas.org/en/sare/documents/DecAmIND.pdf.

[37] For detailed analysis, see Siegfried Wiessner, *The Proposed American Declaration on the Rights of Indigenous Peoples*, 6 INT'L J. CULT. PROPERTY 356 (1997).

leaving, however, as the later UN Document, the concept of an "indigenous people" undefined and up to the self-identification of the people concerned.

What was of even more global relevance was Michael's article on "International Law and the Inner Worlds of Others."[38] It provided the foundation for the groundedness in culture of the rights of indigenous peoples in general.

Michael starts with the insight that our species needs to create and ascribe meaning and value to the "immutable experiences of the human existence: the trauma of birth, the formation of gender or sexual identity, procreation, the death of loved ones, one's own death, indeed, the mystery of it all."[39] Each culture records these experiences in "codes of rectitude" that "serve as compasses for the individual as he or she navigates the vicissitudes of life." Such are the "inner worlds, the inner reality each person inhabits."[40] These realities, he states, are "expressed in sets of signs, symbols and practices of varying elaboration that, together, constitute comprehensive systems of rectitude for the culture concerned." They become key parts of a person's self. The international human rights system is concerned, not with a "homogenized uniformity of inner worlds," but with "protecting, for those who wish to maintain them, the integrity of the unique visions of these inner worlds, from appraisal and policing in terms of the cultural values of others."[41] These inner worlds are the "central, vital part of the individuality of each of us. This is, to borrow Holmes' wonderful phrase, 'where we live.' Respect for the other requires, above all, respect for the other's inner world."[42] The historical problem has been that certain cultures believed in their superiority, based on military or economic might, that "theirs was the only valid inner world." Their *mission civilisatrice* has "always been a euphemism for the eradication, brutally if necessary, of the inner worlds of indigenous peoples and the imposition, in their places, of

[38] W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25 (1996-97).
[39] *Id.*
[40] *Id.*
[41] *Id.* at 26.
[42] *Id.*

another supposedly superior and transcendent one."[43] In addition to the "agony of the victims," the "collective humanistic loss suffered in the destruction of the inner worlds of others is enormous."[44]

Policy-wise, he concludes:

> Understanding other cultures is as minimal a requirement as understanding another human being. At this moment, understanding is not enough. The cultures of indigenous peoples are endangered and some are in danger of disappearing. Efforts must be undertaken to reverse that and to allow those who wish to nurture and develop their own language and symbol systems to do so, Political and economic self-determination may be important, but it is the integrity of the inner worlds of peoples – their rectitude systems or their sense of spirituality – that is their distinctive humanity. Without an opportunity to determine, sustain and develop that integrity, their humanity – and ours – is denied.[45]

II

A key question relates to the impact of Michael's work: How are the themes explored by Michael continuing to shape the field? How are the questions he asked continuing to motivate scholarship?

(1) Let's start with the last issue he addressed: what policies are the rights of indigenous peoples based on? The battle lines are drawn between *culture* and *political and/or economic self-determination.*

Karen Engle, for example, would argue that the conception of indigenous rights as culture-based runs against an original framework of economic and political issues motivating the global movement of indigenous empowerment. Especially static, essentialized concepts of indigenous culture lead to the exclusion of many claimants, force

[43] *Id.* at 27.
[44] *Id.*
[45] *Id*. at 35.

others into unwanted cultural cohesion, and limit indigenous economic, political, and territorial self-government.[46] Beatriz Garcia and Lucas Lixinski agree and add that culture imposes a burden possibly limiting human rights for indigenous peoples, partly attributable to the lack of precision in defining the term "culture."[47] Will Kymlicka warns against the pursuit of exclusive special rights for indigenous peoples as, among other reasons, possibly undermining support for their cause, as there are other groups that are also in need of targeted rights, such as national minorities, the Roma, Dalits, immigrants, and others.[48]

The essentialism critique has to be taken seriously. It, however, misses the point in various ways. It is, in itself, reductionist of the empirical reality of human beings, caricaturing individuals as purely economic actors interested solely in power and wealth. Human life and human flourishing extend far beyond the econometric view of cost/benefit analysis and wealth maximization. Man (and woman) does not live by bread alone. A comprehensive view of human nature would comprehend that beyond power and wealth, human beings are motivated by a range of other goals: respect, well-being, affection, skills, enlightenment, and rectitude.[49] Individual human beings differ in their setting of priorities of aspiration, and the empirical description of such aspirations does not portend any hierarchy between them. There might be, indeed, there often are, mixed motives or aspirations. The law should allow access by all to the processes of shaping and

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[46] KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY (2009). *See also* Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141 (2011).

[47] Beatriz Garcia & Lucas Lixinski, *Beyond Culture: Reimagining the Adjudication of Indigenous Peoples' Rights in International Law*, 15 INTERCULTURAL HUM. RTS. L. REV. 127 (2020).

[48] Will Kymlicka, *Beyond the Indigenous/Minority Dichotomy?*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 83, at 207 (Stephen Allen & Alexandra Xanthaki eds., 2011).

[49] *Cf.* HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY (1950); Lasswell & McDougal, *Jurisprudence for a Free Society*, *supra* note 11, at 336 *et seq.*

sharing of all of these aspirations, i.e. things humans value. This is what an order of human dignity demands.[50]

Indigenous peoples may be, and often are, at the bottom of the social and economic ladder in virtually all societies they live in. That is why one of their claims is the quest for social and economic rights such as food, health care and shelter. This is, however, not their only, or most characteristic, claim. Their other claims have historically asked for preservation of their endangered culture, their language, their lands. This enters a realm not easily assessed or included by materialist *matrices*.

It is the realm of spirituality. As Michael explained, it is the reality of their inner worlds, their cosmovisions. It is a world often foreclosed to the modern mind and its overweening idea of progress. It may be characterized as made-up, unprovable, irreal. Still, it is a powerful force that motivates people across the globe in many places at least as powerfully as greed or the desire to remove vast material inequality. As the leader of the Indian Nations Union in the Amazon, Ailton Krenak has formulated:

> When the government took our land . . . they wanted to give us another place . . . But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where our God created us. . . . We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life. . . . [T]he only thing we have is the right to cry for our dignity and the need to live in our land.[51]

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[50] Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 127 (2011).

[51] World Commission on Environment and Development (WCED) Public Hearing, Sao Paulo (Oct. 28–29, 1985), quoted in WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) 4–19.

It is difficult to justify calling these professions of indigenous spirituality pretextual or strategic, or emanating from a false consciousness. There may be some indigenous persons who do live inauthentic lives, but so do members of other groups. Religion has been called the "opiate of the people," but the mystery of faith is a powerful reality common to many human beings around the globe. In a multicultural global community, indigenous peoples' value systems and world views, deeply spiritual, are at the center of their demands.

Similarly, the late Vine Deloria, Jr., revered leader of the U.S. indigenous revival, stated that indigenous sovereignty "consist[s] more of a continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty."[52] "Sovereignty," explains another great Native American leader, Kirke Kickingbird, "cannot be separated from people or their culture."[53]

This *differentia specifica* of indigenous peoples, the collective spiritual relationship to their land, is what separates them also from other groups generally, and diffusely, denominated "minorities," and what has created the need for a special legal regime transcending the general human rights rules on the universal and regional planes. There have been eclectic interpretations of human rights conventions that protect certain minority traditions, as in the jurisprudence of the European Court of Human Rights regarding the Roma, and there have been specific treaties, albeit not widely ratified, that protect indigenous peoples, such as ILO Convention No. 169.[54] The most comprehensive effort to safeguard indigenous peoples' cultures has, however, been made with the United Nations Declaration on the Rights of Indigenous Peoples of September 13, 2007,[55] which was

[52] Vine Deloria, *Self-Determination and the Concept of Sovereignty*, *in* NATIVE AMERICAN SOVEREIGNTY 118, 121 (John R. Wunder ed., 1996).
[53] KIRKE KICKINGBIRD ET AL., INDIAN SOVEREIGNTY 2 (1977).
[54] ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.
[55] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *adopted* Sept. 13, 2007. As to its legal effect, see S. James Anaya &

passed in the General Assembly by 143 states against only 4 states opposing. As stated in its preamble, the world community recognized "the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures, and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources."

The threat to the survival of their culture is what has motivated the claims listed above. It underlies indigenous peoples' demands to live on their traditional lands, to continue their inherited ways of life, to self-government. Cultural preservation and flourishing are thus at the root of the claims as recognized by the states; this goal, not primarily political or economic objectives, inspires the positive law guarantees. In this broad sense, all the rights of indigenous peoples are cultural rights, and any interpretation of these rights, whether in UNDRIP or other instruments and prescriptions recognizing rights of indigenous peoples, ought to keep this *telos* in mind.[56]

As to Kymlicka's point, that indigenous peoples should not be granted special rights when other groups, especially minorities, do not enjoy them, I would respond that the success of the indigenous peoples' movement should be taken as encouragement for other groups with special needs to pursue a similar path of international legal empowerment, rather than a reason to lament a -- not yet -- successful outcome in their case.[57]

(2) The second abiding theme pursued by Michael transcends scholarship as part of his *vita contemplativa*. It is a result of the efforts of his other side, his vigorously pursued *vita activa*,[58] included in his call for action to formulate and implement indigenous peoples' rights. It was an enormous success to have the OAS General Assembly ultimately adopt his grand project of an *American Declaration on the*

Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/.

[56] Wiessner, *supra* note 50, at 129.

[57] Siegfried Wiessner, *Culture and the Rights of Indigenous Peoples*, *in* THE CULTURAL DIMENSION OF HUMAN RIGHTS 117, 125 (Ana Filipa Vrdoljak ed., 2013).

[58] Introduction, *supra* note 1, at xv.

Rights of Indigenous Peoples (ADRIP) on June 15, 2016.[59] Like its big brother, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of September 13, 2007, it proclaims the trifecta of rights to self-determination, culture and land.[60] Self-determination, as in UNDRIP, is limited to autonomy in local and internal affairs,[61] allowing for their own indigenous law and institutions.[62] The assimilation of indigenous peoples and the destruction of their cultures is rejected,[63] and their right to cultural identity and integrity affirmed.[64] They have the right to maintain and strengthen their distinctive spiritual, cultural and material relationship with their lands, territories and resources,[65] as well as the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;[66] finally they have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.[67] Consensus was not achieved on the requirement for consultations to obtain the free, prior and informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.[68] Like the UNDRIP, the holders of these rights are not defined; instead, self-identification is the fundamental criterion for determining to whom this Declaration

[59] American Declaration (ADRIP), *supra* note 36.
[60] Siegfried Wiessner, *Indigenous Self-Determination, Culture and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples*, *in* INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION, ch. 1, at 31 (Elvira Pulitano ed., 2012).
[61] ADRIP, art. XXI(1).
[62] ADRIP, art. XXII.
[63] ADRIP, art. X.
[64] ADRIP, art. XIII.
[65] ADRIP, art. XXV(1).
[66] ADRIP, art. XXV(2).
[67] ADRIP, art. XXV(3).
[68] ADRIP, art. XXIII(2). Colombia would not agree to a possible veto power of the respective indigenous people.

applies.[69] This is problematic as explained in another article,[70] especially when these rights are to be considered part of hard, not "soft" international law.[71]

(3) Finally, a personal note: Michael's leading work in the field inspired me to do extensive research on the extraordinary indigenous renascence that occurred in the last decades of the 20th century. This re-empowerment, after centuries of suffering decline, had led to significant changes in the law and practices of states that had substantial indigenous populations. These changes included the recognition of indigenous peoples' rights to preserve their distinct identity and dignity and to govern their own affairs—be they tribal sovereigns in the United States, the Sami in Lapland, the *resguardos* in Colombia, or Canada's Nunavut. Indigenous people achieved this dramatic victory through several means: a peace treaty in Guatemala, constitutional and statutory changes in countries such as Brazil, modifications of the common law in Australia, the law of Taiwan and Malaysia, as well as landmark judgments in Botswana, South Africa, and Kenya, to mention but a few instances of state practice. Rights to land are key to indigenous peoples' cultural survival, and they have been recognized as collective entitlements under the jurisprudence of the Inter-American Court of Human Rights. Indigenous culture, language, and tradition, to the extent they have survived, are increasingly inculcated and celebrated. Treaties of the distant past are being honored and agreements are fast becoming the preferred mode of interaction between indigenous communities and the descendants of the former conquering elites. This now very widespread state practice and *opinio juris* regarding the legal treatment of indigenous peoples allowed me to draw the following conclusion in 1999:

> First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways

[69] ADRIP, art. I(2).

[70] Siegfried Wiessner, *Indigenous Peoples: The Battle over Definition, in* REFLECTIONS ON INTERNATIONAL LAW. STUDIES IN HONOUR OF LINDY MELMAN 4 (Tim McCormack ed., 2023).

[71] Siegfried Wiessner, *Joining Control to Authority: The Hardened "Indigenous Norm,"* 25 YALE J. INT'L L. 301 (2000).

> of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations.[72]

In 2008, my good friend James Anaya was elevated to the position of UN Special Rapporteur on the Rights of Indigenous Peoples, and he asked me to chair the International Law Association's Committee on the Rights of Indigenous Peoples. With the help of dedicated Rapporteur Federico Lenzerini and a devoted group of 30 experts from around the world, and a painstaking review of state practice and *opinio juris*, we arrived at ILA Resolution No. 5/2012 on the Rights of Indigenous Peoples. It confirmed the indigenous peoples' communal rights to autonomy, cultural heritage and their traditional lands under pertinent treaty and customary international law. It was adopted without any opposition by the ILA Plenary Assembly in Sofia, Bulgaria on August 30, 2012.[73]

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[72] Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective*, 12 HARV. HUM. RTS. J. 57, 127 (1999).

[73] Rights of Indigenous Peoples, Resolution No. 5/2012 on the Rights of Indigenous Peoples, 75th Biennial Meeting of the International Law Association (ILA), Sofia, adopted August 30, 2012, https://www.ila-hq.org/en_GB/documents/ conference-resolution-english-sofia-2012-4. For its genesis, see Siegfried Wiessner, *The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012, in* DER STAAT IM RECHT. FESTSCHRIFT FÜR ECKART KLEIN ZUM 70. GEBURTSTAG 1357 (M. Breuer et al. eds., 2013), and Federico Lenzerini, *ILA Resolution No. 5/2012 and the Rights of Indigenous Peoples, in* HUMAN FLOURISHING: THE END OF LAW, *supra* note 5, at 708. As to its legal effect, see Timo Koivurova, Federico Lenzerini & Siegfried Wiessner, *The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples, in* INTERNATIONAL ACTORS AND THE FORMATION OF LAWS 89, 101 (Katja Karjalainen et al. eds., 2022).

Conclusion

Michael Reisman is not only a global leader in the quest for a public order of human dignity worldwide. He is also a hero, mostly unsung, in the formation of the novel regime of collective rights of indigenous peoples, as he has laid the psychosocial groundwork for the policies underpinning the law: the need to respect the humanity of peoples whose inner worlds, or cosmovisions, are radically different from ours. Understanding them and allowing them to flourish in their culture on their traditional lands is a mandate the New Haven School is well equipped to develop and support.