

# Book Review

*Nigel Bankes\**

**Review of John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Centre for International Governance Innovation (CIGI), 2019). 236pp + a Preface (ix-xvi).**

This is the latest in a series of volumes or reports from the Centre for International Governance Innovation (CIGI)<sup>1</sup> dealing with Indigenous normative orders and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration).<sup>2</sup> This volume comprises a preface by three of the four editors (Larry Chartrand, Oonagh Fitzgerald and Risa Schwartz), an introduction by the fourth editor, John Borrows, and then an additional 23 chapters grouped in four parts. The four parts are: I) International Law Perspectives, II) Indigenous Law Perspectives, III) Domestic Law Perspectives, and IV) Concluding Thoughts. The cover of this volume is graced by the art of Christi Belcourt and Isaac Murdoch, and additional images by Ningiukulu Teevee, Kim Hunter, Ernest Swanson, and Anna Heffernan accompany each of the four parts of the volume; an image of a sweetgrass braid by Peter Pomart is featured on each of the individual chapter pages. The latter reflects both the title of the volume as well as an important theme. Of the 18 authors and editors (some authors have multiple contributions), 11 identify as

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1 John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, Ontario: Centre for International Governance Innovation Press, 2019). The other volumes are Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report (Waterloo, Ontario: Centre for International Governance Innovation Press, 2017); Centre for International Governance Innovation, *UNDRIP Implementation: More Reflections on the Braiding International Domestic and Indigenous Laws*, Special Report (Waterloo, Ontario: Centre for International Governance Innovation Press, 2018). I have not read these earlier reports but I note that some of the chapters in the current volume have titles that are identical to those in the 2018 volume. For information on CIGI see CIGI's website <<https://www.cigionline.org/>>.

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP].

Indigenous. The essays are all relatively short (between 6 and 16 pages), but they are weighty in terms of content.

The occasion for the volume is the ongoing debate in Canada over the implementation of the Declaration. Adopted by the United Nations General Assembly in 2007 by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), the Declaration consists of a substantial preamble and 46 articles. At a conceptual level, it is best to think of the Declaration as translating and applying general rules and principles of international human rights law (such as the right to self-determination, the right to equality and the right to be free of discrimination) to the particular situation of Indigenous peoples. The Declaration does not create new rights. Rather, it seeks to address the particular history of colonization experienced by Indigenous peoples.

As is well known (and as recorded above), Canada dissented from the adoption of the Declaration. It has since moved on from that position through several steps — beginning with a lukewarm endorsement of the Declaration as an aspirational document by the Harper Government in 2010. In 2016, then Minister Carolyn Bennett of the Trudeau Government announced at the UN Permanent Forum that Canada was now a “full supporter of the Declaration without qualification” and that the government intended “nothing less than to adopt and implement the declaration in accordance with the Canadian constitution.”<sup>3</sup> In the same speech, Minister Bennett indicated that “[b]y adopting and implementing the Declaration ... we are breathing new life into Section 35 [of the *Constitution Act, 1982*] and recognizing it now as a full box of rights for Indigenous peoples in Canada.”<sup>4</sup> The Trudeau government did not propose specific legislative measures to implement the Declaration but instead announced in November 2017 that it would support the adoption of Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*.<sup>5</sup> This was a private member’s bill introduced by NDP MP Romeo Saganash. With government support,

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3 Carolyn Bennett, Speech Delivered at the United Nations Permanent Forum on Indigenous Issues, New York (10 May 2016), online: *Indigenous and Northern Affairs Canada* <[www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html](http://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html)>.

4 *Ibid.*

5 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous People*, 1st Sess, 42<sup>nd</sup> Parl, 2016 (third reading in the House of Commons 30 May 2018, reported out of the Standing Senate Committee on Aboriginal Peoples, 11 June 2019).

the Bill passed the House of Commons May 30, 2018, and it then went on to the Senate. The Senate failed to adopt the Bill before Parliament dissolved on September 11, 2019.

Section 3 of the Bill would have enacted that the Declaration is “hereby affirmed as a universal international human rights instrument with application in Canadian law.”<sup>6</sup> Sections 4-6 were more process-oriented. Section 4 instructed the Government of Canada, in consultation and cooperation with Indigenous peoples, to “take all measures necessary to ensure that the laws of Canada are consistent with” the Declaration.<sup>7</sup> Section 5 instructed the Government of Canada, again in consultation and cooperation with Indigenous Peoples, to develop and implement a national action plan “to achieve the objectives” of the Declaration.<sup>8</sup> Finally, section 6 required the Minister to submit a report to the House and the Senate on the implementation of the government’s obligations under sections 4 and 5 for each of the next 20 years, and specifically to report on the “measures” referred to in section 4 and the action plan referred to in section 5.<sup>9</sup>

The Preface to the volume sets out much of this background and describes the origins of CIGI’s engagement with the issue. It also introduces the concept or image of braiding sweetgrass as follows:

The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous peoples’ own laws allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship encompassing these different legal traditions might mean.<sup>10</sup>

The Preface also explains that the book focuses less on the legal character of the Declaration and more on “the normative content of its principles”. Borrow’s introduction provides a summary of the individual chapters.

It is always a challenge in a book review of an edited volume to do justice to a disparate set of essays and to deal even-handedly with the many different

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6 *Ibid*, s 3.

7 *Ibid*, s 4.

8 *Ibid*, s 5.

9 *Ibid*, s 6. I have set out my views on Bill C-262 here Nigel Bankes, “Implementing UNDRIP: some reflections on Bill C-262” (27 November 2018), online (blog): *ABlawg* <[ablawg.ca/wp-content/uploads/2018/11/Blog\\_NB\\_Bill\\_C-262\\_Legislative\\_Implementation\\_of\\_UNDRIP\\_November2018.pdf](http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf)>.

10 Preface in Borrow et al, *supra* note 1 at xiii.

contributions. In what follows, I have elected to provide a listing of the different chapters or ‘parts’ so that the reader has at least some sense of the coverage offered in the four different parts of the volume. I then identify and discuss what seem to me to be some of most significant themes that emerge.

Part I of the volume, “International Law Perspectives”, is comprised of six essays: Sa’ke’j Henderson, “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation-States”<sup>11</sup>; Sheryl Lightfoot, “Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples”<sup>12</sup>; John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges”<sup>13</sup>; Joshua Nichols “‘We have never been domestic’: State Legitimacy and the Indigenous Question”<sup>14</sup>; Gordon Christie, “Legal Orders, Canadian Law and UNDRIP”<sup>15</sup> and Brenda Gunn, “Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples”<sup>16</sup>. While some of these essays certainly discuss the international legal aspects of the Declaration, others are much more focused on domestic and indeed Indigenous legal orders. This is particularly true, for example, of Christie’s essay as its title might imply.

Part II, “Indigenous Law Perspectives”, also comprises six essays: Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult”<sup>17</sup>; Larry Chartrand, “Mapping the Meaning of Reconciliation in Canada: Implications for Métis-Canada Memoranda of Understanding”<sup>18</sup>; Lorena Sekwan Fontaine, “Our Languages Are Sacred: Indigenous Language Rights in Canada”<sup>19</sup>; Aimée Craft, “Navigating Our

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11 James (Sa’ke’j) Youngblood Henderson, “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation-States” in Borrows et al, *supra* note 1 at 13 - 19.

12 Sheryl Lightfoot, “Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples” in Borrows et al, *supra* note 1 at 21-28.

13 John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges” in Borrows et al, *supra* note 1 at 29 -36.

14 Joshua Nichols, “‘We have never been domestic’: State Legitimacy and the Indigenous Question” in Borrows et al, *supra* note 1 at 39 - 44..

15 Gordon Christie, “Legal Orders, Canadian Law and UNDRIP” in Borrows et al, *supra* note 1 at 47 - 53..

16 Brenda Gunn, “Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples” in Borrows et al, *supra* note 1 at 55 - 61.

17 Sarah Morales, “Braiding the incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Borrows et al, *supra* note 1 at 63 - 81.

18 Larry Chartrand, “Mapping the Meaning of Reconciliation in Canada: Implications for Métis-Canada Memoranda of Understanding on Reconciliation Negotiations” in Borrows et al, *supra* note 1 at 83 - 91.

19 Lorena Sekwan Fontaine, “Our Languages Are sacred: Indigenous Language Rights in Canada” in Borrows et al, *supra* note 1 at 93 - 100.

Ongoing Sacred Legal Relationship with *Nibi* (Water)”<sup>20</sup>; Cheryl Knockwood, “Rebuilding Relationships and Nations: A Mi’kmaw Perspective of the Path to Reconciliation,”<sup>21</sup> and Sarah Morales (in a second contribution) “Canary in a Coal Mine: Indigenous Women and Extractive Industries in Canada”<sup>22</sup>.

Part III, “Domestic Law Perspectives”, begins with a second contribution from Brenda Gunn entitled “Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law”<sup>23</sup>. This is followed by Joshua Nichols (again, a second contribution), “UNDRIP and the Move to the Nation-to-Nation Relationship”<sup>24</sup>, Jeffrey Hewitt, “Options for Implementing UNDRIP without Creating Another Empty Box”<sup>25</sup>, Robert Hamilton, “Asserted vs Established Rights and the Promise of UNDRIP”<sup>26</sup>, Ryan Beaton “Article 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35”<sup>27</sup>, Kerry Wilkins, “Strategizing UNDRIP Implementation: Some Fundamentals”<sup>28</sup> and Hannah Askew, “UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders”<sup>29</sup>.

Part IV, “Concluding Thoughts,” comprises four essays, all second or even third contributions to the volume from their authors: Gordon Christie, “Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges”<sup>30</sup>; Joshua Nichols and Robert Hamilton, “Conflicts or Complementarity with Domestic Systems? UNDRIP, Aboriginal Law

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20 Aimée Craft, “Navigating Our Ongoing Sacred Legal Relationship with *Nibi* (Water)” in Borrows et al, *supra* note 1 at 101 - 110.

21 Cheryl Knockwood, “Rebuilding Relationships and Nations: A Mi’kmaw Perspective of the Path to Reconciliation” in Borrows et al, *supra* note 1 at 111- 118.

22 Sarah Morales, “Canary in a Coal Mine: Indigenous Women and Extractive Industries in Canada” in Borrows et al, *supra* note 1 at 119 - 131.

23 Brenda Gunn, “Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law” in Borrows et al, *supra* note 1 at 135 - 144..

24 Joshua Nichols, “UNDRIP and the Move to the Nation-to-Nation Relationship” in Borrows et al, *supra* note 1 at 145 - 151.

25 Jeffrey Hewitt, “Options for Implementing UNDRIP without Creating Another Empty Box” in Borrows et al, *supra* note 1 at 153 - 157.

26 Robert Hamilton, “Asserted vs Established Rights and the Promise of UNDRIP” in Borrows et al, *supra* note 1 at 159 - 165.

27 Ryan Beaton, “Article 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35” in Borrows et al, *supra* note 1 at 167 - 175.

28 Kerry Wilkins, “Strategizing UNDRIP Implementation: Some Fundamentals” in Borrows et al, *supra* note 1 at 177 - 187.

29 Hannah Askew, “UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders” in Borrows et al, *supra* note 1 at 189 - 196.

30 Gordon Christie, “Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges” in Borrows et al, *supra* note 1 at 199- 206.

and the Future of International Norms in Canada”<sup>31</sup>; Cheryl Knockwood, “UNDRIP as a Catalyst for Aboriginal and Treaty Rights Implementation and Reconciliation”<sup>32</sup> and Sa’ke’j Henderson, “The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems”<sup>33</sup>.

This is a very rich collection of essays from a diverse range of authors and I strongly recommend it. The volume deserves to be read by both practitioners and academics and especially by those who have any responsibility — and perhaps that is all of us — for implementing the Declaration in Canada. I now turn to some of the important themes that emerged from my reading of these essays.

The most obvious and most explicit theme is that of braiding. It provides a powerful image but it is also strongly connected with ideas of pluralism which in turn are connected to the need to abandon unilateralism if we are to successfully decolonize our settler space. The authors remind us that the unilateralism of the settler state takes many forms. Even the normative weight of the Declaration in Canadian law turns on the State insofar as UNDRIP “will be enforceable against the Crown in Canada only if, and only when, the Crown and/or relevant legislative bodies agree... to be bound by it.”<sup>34</sup> Similarly, Hamilton emphasizes that we “should reject a unilateral determination of asserted and established rights” and replace it with negotiated resolutions since, “(w)hen multiple forms of legal authority are functioning in the same space pluralism requires that authority be negotiated through dialogue.”<sup>35</sup> Hewitt similarly argues that we must revisit the unilateralism of the *Sparrow*<sup>36</sup> infringement test which serves to set the terms on which Canada engages with Indigenous peoples “exclusively on Canada’s terms, favouring itself.” Beaton’s position is similar, and in their concluding essay, Nichols and Hamilton sug-

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31 Joshua Nichols & Robert Hamilton, “Conflicts or Complementarity with Domestic Systems? UNDRIP, Aboriginal Law and the Future of International Norms in Canada” in Borrows et al, *supra* note 1 at 2017 - 214.

32 Cheryl Knockwood, “UNDRIP as a Catalyst for Aboriginal and Treaty Rights Implementation and Reconciliation” in Borrows et al, *supra* note 1 at 215 - 221.

33 James (Sa’ke’j) Youngblood Henderson, “The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems” in Borrows et al, *supra* note 1 at 223 - 228.

34 Wilkins, *supra* note 28 at 178. This perhaps goes too far as does Hewitt’s statement at 153 to the effect that “UNDRIP is an international declaration and therefore non-binding on Canadian courts.” The better view is that those provisions of the Declaration that represent customary international law (or come over time to represent customary international law) become part of the common law without the need for statutory incorporation (as recognized in the Preface at xiii). Hewitt, *supra* note 25 at 153.

35 Hamilton, *supra* note 26 at 163-164.

36 Hewitt, *supra* note 25 at 156; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

gest that “the single most important step in giving life to the legal pluralism envisioned in UNDRIP is to ensure that contested claims between the parties are subject to negotiation.”<sup>37</sup>

As a concrete and positive example of how we might move forward in a pluralist world, several authors mention the experience of the Haida Nation. The Haida have been able to negotiate several agreements with both the province of British Columbia and Canada with respect to Haida Gwaii and the surrounding marine areas based upon ideas of co-jurisdiction in which each party maintains its own view of the legal basis for its authority.<sup>38</sup> Another way forward according to Nichols and Hamilton is to re-interpret section 35 as jurisdictional in nature rather than reflecting “a sovereign-to-subjects model of contingent rights.”<sup>39</sup>

Another important theme is that of the relationship between the duty to consult and accommodate doctrine of Canada’s section 35 jurisprudence (combined with the justifiable infringement doctrine for an infringement of an established right) and the free, prior informed consent language of the Declaration. This was a significant issue for many parliamentarians in both Houses during the Committee debates on Bill C-262. While the tension between these two approaches is referenced by a number of the authors, Beaton’s treatment of the issue is particularly illuminating. Beaton points out that the Declaration contains its own justifiable infringement test in Article 46(2)<sup>40</sup> and that this opens the door to a possible argument that Article 46(2) could be read as endorsing the existing jurisprudence of the Supreme Court of Canada. Beaton rejects that argument principally because the unilateral structure of the current Canadian test is inconsistent with the overall structure of Declaration and in particular Article 27.<sup>41</sup> This leads Beaton to propose that the Crown

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37 Nichols & Hamilton, *supra* note 31 at 213.

38 See Christie, *supra* note 15 at 49; see also Chartrand, *supra* note 18 at 89; see also Hamilton, *supra* note 26 at 164.

39 Nichols & Hamilton, *supra* note 31 at 212, 214.

40 Article 46(2) provides that:

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

41 Article 27 provides that:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those

needs to work collaboratively with Indigenous peoples to establish a process or body with Crown and Indigenous representatives that could resolve cases of disagreement between section 35 rights holders and the Crown in cases where a proposed project or activity “could infringe or adversely impact section 35 rights.” Furthermore, the onus would be on the Crown to make its case to such a body “before the Crown is allowed to pursue that action”.<sup>42</sup> This is an important idea that deserves further exploration.

Another subject (if not a theme) that several authors discuss is the nature of Canada’s commitment to implementing the Declaration. Borrows notes that this is a “solemn commitment” which attracts the honour of the Crown and from which there can be no backsliding.<sup>43</sup> Knockwood emphasizes the focus on implementation: “(w)e do not need more broken promises — we need action”.<sup>44</sup> Other authors carefully examine the terms of Canada’s latest endorsement of the Declaration and in particular the references to implementing the Declaration “in accordance with the Constitution” and breathing life into “Section 35.” For some, this a red flag. Chartrand, for example, drawing on an illuminating table comparing key elements of the Declaration with the jurisprudence of the Supreme Court of Canada on the same issue, suggests that not much could be achieved if we were to implement the Declaration in accordance with the Constitution.<sup>45</sup>

It follows from such a concern that the relationship between the Constitution and the Declaration should be inverted and that the Declaration should be used to re-interpret the Constitution and key decisions of the Supreme Court of Canada. For example, both Borrows<sup>46</sup> and Gunn<sup>47</sup> make the case that implementing the Declaration will require the Supreme Court to revisit the distinction that it made in *Van der Peet*<sup>48</sup> and *Pamajewon*<sup>49</sup> between pre-contact and post-contact cultural practices and the narrow definition of constitutionally protected rights that emerged from those two decisions. In its place, the Court should accord greater weight to Indigenous normative orders

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which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

42 Beaton, *supra* note 27 at 172.

43 Borrows, *supra* note 13 at 32.

44 Knockwood, *supra* note 21 at 117.

45 Chartrand, *supra* note 18 at 87.

46 Borrows, *supra* note 13 at 30-31.

47 Gunn, *supra* note 23 at 136-138.

48 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]

49 *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204 [*Pamajewon*].



and recognize “that Indigenous peoples’ rights are based in Indigenous peoples’ own legal traditions”.<sup>50</sup>

The emphasis on Indigenous legal traditions has certain implications for all of us. For example, Craft emphasizes the importance of revitalizing Indigenous languages as part of revitalizing Indigenous laws in recognition of the reality that “[a]ny non-Indigenous language articulation or Western mechanism of law making will compromise Anishnaabe *inaakonigewin* (law)”.<sup>51</sup> Fundamental to that law are ideas of collective well-being (*mino-biimaadiiziiwin*) and relationality (*inendiwin*).<sup>52</sup> Fontaine also emphasizes the importance of language rights and the need for Canada to fully acknowledge the right of Indigenous people to transmit their languages and laws from generation to generation and to provide the necessary funding to support those languages.<sup>53</sup> It also has important implications for those of us who are not steeped in one or more Indigenous legal traditions. While Indigenous people must take the lead on many key issues associated with implementation of the Declaration, as Wilkins reminds us (the Who, Where and How questions<sup>54</sup>), if the task that we face is to braid international, domestic, and Indigenous law then we who lack capacity in Indigenous law may, as Askew suggests,<sup>55</sup> have a “Duty to Learn” Indigenous law. Legal academics may have a particular responsibility to ponder the implications of this question for the law school curriculum.

This book is well presented and carefully edited, and the artwork adds a rich dimension. An index would have made the volume yet more useful. I also think that the editors could have done more to pull together the themes of the volume, perhaps through an opening or closing integrative essay or through short concluding chapters for each of the four main parts of the volume. As it is, each chapter stands on its own. But these are quibbles. In sum, this is an important volume of essays on an important issue and it deserves (and perhaps needs) to reach a wide audience.

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50 Gunn, *supra* note 23 at 138.

51 Craft, *supra* note 20 at 104.

52 *Ibid* at 110.

53 Fontaine, *supra* note 19 at 99.

54 Wilkins, *supra* note 28 at 180-185.

55 Askew, *supra* note 29 at 190.

