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Just Governance or Just War?: Native Artists, Cultural Production, and the Challenge of "Super-Diversity"

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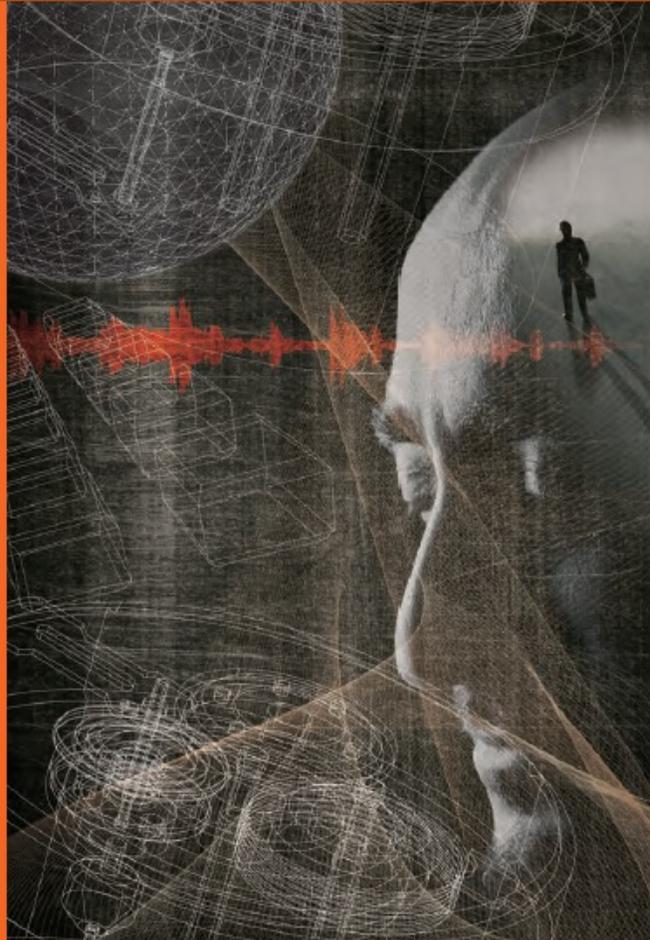
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JUST GOVERNANCE OR JUST WAR?: NATIVE ARTISTS,
CULTURAL PRODUCTION, AND THE CHALLENGE OF
“SUPER-DIVERSITY”

REBECCA TSOSIE[†]

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I. INTRODUCTION

If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.¹

You might ask what an ancient text, written by a Chinese philosopher over 2,500 years ago, could possibly have to do with the topic of my essay, which concerns the rights of Native American artists to their creative works and the rights of tribal governments to protect tribal cultural art forms, such as quill work, bead work, and basketry. Indigenous artists and tribal communities are actively engaged in a fight to protect their cultures and art forms from appropriation and misuse. As Walter Echo-Hawk observes, there has been little legal protection for the cultural rights of Indigenous peoples, and consequently, “indigenous heritage has been appropriated, pirated and misused.”² According to Echo-Hawk:

The theft of culture is part of the one-way transfer of property from indigenous to non-indigenous hands seen in colonies and settler states around the world—it includes not only the taking of land, natural resources, personal property, but even the heritage of indigenous peoples and their very identities, plucking them as clean as a Safeway chicken.³

Of course, many non-Indians fail to appreciate that Indigenous peoples hold a form of property right to aspects of their cultures,

¹ SUN TZU, THE ART OF WAR 18 (James Clavell ed. 1983).

² WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 198 (2013).

³ *Id.*

namely the right to exclude others from particular uses or condition such use by requiring a license (for example, for the commercial use of the tribal name).⁴ The U.S. laws regulating intellectual property rights (copyright, patent, trademark) provide a poor fit for the interests of Indigenous nations in protecting the intangible aspects of their cultural heritage.⁵ There have been limited victories by federally recognized American Indian and Alaska Native nations seeking to prevent consumer confusion about what an “Indian product” is for purposes of the federal Indian Arts and Crafts Act,⁶ which protects the right of American Indian and Alaska Native artists to market their art as an authentic Indian product.⁷ However, the appropriation of tribal art forms continues, as design guru Ralph Lauren and commercial marketers such as J.C. Penney have demonstrated by transforming the intricate silver and turquoise jewelry of Southwest Indian tribes into mass-market products for trendy fashionistas trying to “play Indian.”⁸ If appropriately labeled to avoid consumer confusion, the non-Indian design world will continue to capture the greatest share of commercial value of tribal art forms, and most consumers and producers will overlook the impact on tribal cultural identity.

Many, if not most, non-Indians fail to understand the significance of cultural identity to Indigenous peoples, nor do they

⁴ Angela R. Riley, *“Straight Stealing”: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 71-72 (2005) (describing the use of Native American cultural practices in the entertainment industry without any social response to the appropriation of Native American culture.)

⁵ *Id.*

⁶ See Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662.

⁷ See *id.*

⁸ See John Hartman, *Under Turquoise Skies – Ralph Lauren*, DURANGO SILVER (Mar. 6, 2011), <http://www.durangosilver.com/blog/tag/ralph-lauren-turquoise/>; See Megan Finnerty, *Stepping into a Cultural Conundrum*, THE ARIZONA REPUBLIC, Apr. 25, 2015, <http://www.azcentral.com/story/entertainment/arts/2015/04/25/appropriation-cultural-conundrum-native-american/26334281/>

understand the concept of cultural harm.⁹ Consequently, the battle over cultural appropriation continues as Dan Snyder, owner of the Washington team, proclaims that the “Redskins” logo and team name actually honors Indians, ignoring the protests of Native leaders and tribal members who assert that the mascot disparages and degrades them.¹⁰ The battle continues over sacred symbols as pop music giant Pharrell Williams and countless other celebrities wear garish “war bonnets”¹¹ in a caricature of the ceremonial headdress that is culturally authorized for use only by esteemed and worthy tribal leaders from the Indigenous nations of the Southern and Northern Plains. But is this really a desecration or is it a permissible act of artistic appropriation? If there is no legal right to stop these appropriations, why should it matter? Perhaps most vexing of all, it seems to outsiders that not “all Indians” agree on the terms of the debate. Team owner Dan Snyder pointed this out as he hosted his VIP guests, then-Navajo Nation President Ben Shelly and First Lady Martha Shelly, during a 2014 football game in Glendale, Arizona, all wearing hats with the infamous Washington Team logo.¹²

⁹ See Rebecca Tsosie, *Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm*, 35 J. L. MED. & ETHICS 396, 405–09 (2007) (articulating multiple examples of cultural harm against Indians by non-Indians due to their failure to recognize or understand the significance of cultural identity and the unique nature of Tribal claims).

¹⁰ *Daniel Snyder Defends Redskins*, ESPN (Aug. 6, 2014), http://espn.go.com/nfl/story/_/id/11313245/daniel-snyder-redskins-term-honor-respect. This essay refers to that entity as “the Washington Team” in the text that follows.

¹¹ See ELLE (July 2014) (UK edition) (picturing Williams on the cover in a headdress); Shan Li, *Victoria’s Secret Apologizes For Use of Native American Headdress*, LA TIMES (Nov. 13, 2012), <http://articles.latimes.com/2012/nov/13/business/la-fi-victorias-secret-native-american-20121113>.

¹² See Andrew Joseph, *Navajo Nation President Ben Shelly Sits in Box With Dan Snyder*, ARIZ. CENT. (Oct. 13, 2014, 10:39 AM), <http://www.azcentral.com/story/sports/heat-index/2014/10/13/navajo-nation-president-ben-shelly-sits-in-box-with-dan-snyder/17188935/>.

If one reads Sun Tzu's words carefully, it is abundantly clear that identity is of paramount importance in times of war, as in the context of a battle.¹³ One must know oneself and also one's enemy. Similarly, one must differentiate the rules of governance that hold a civil society together, from the principles that govern a war between enemies. Sun Tzu also wrote that "[h]umanity and justice are the principles" by which states must govern their affairs.¹⁴ In comparison, "opportunism and flexibility" govern armies as they go to war with the enemy, and these are "military rather than civic virtues."¹⁵ Are we in a time where just principles of governance will define the respective boundaries between Native rights and those who want to profit from Native culture? Or do the terms of the debate suggest that cultural production is yet another battleground between Native governments and the nation-states that now encompass them?

This essay is intended to facilitate a dialogue about who possesses the authority to use tribal designs, symbols and motifs within the contemporary sphere of cultural production.¹⁶ I will explore why U.S. copyright and trademark law often do not adequately protect the interests of Native artists or tribal governments, and why tribal governments should be concerned about the international dialogue concerning ownership of traditional cultural expression. This essay builds on Walter Echo-Hawk's argument that securing adequate legal protection for the cultural rights of Native artists and tribal governments is pivotal to the realization of their human rights within domestic society.¹⁷ Echo-Hawk's argument embodies a complex array of issues, and this essay maps those issues for future discussion and analysis. In my view, Echo-Hawk appropriately describes the protection of Indigenous cultural rights as the most important issue for the future

¹³ See TZU, *supra* note 1 and accompanying text.

¹⁴ *Id.* at 17.

¹⁵ *Id.*

¹⁶ Finnerty, *supra* note 8.

¹⁷ ECHO-HAWK, *supra* note 2 at 198.

because if the law cannot intervene to protect Indigenous peoples from cultural harm, the final phase of colonialism will proceed unabated. I use the term “colonialism” to describe the power dynamics of European settlement on the lands that ultimately became the United States.¹⁸ That dynamic alternately engaged policies of war and peace with Native peoples, but always employed the use of power and dominance to subordinate Native peoples and appropriate land, resources, and rights from them. This was done to build the empire of the British Crown and then to build the new nation that emerged as the United States.

Colonialism in the United States has proceeded through three phases. The first phase involved the destruction of Native peoples through outright military action from the date of European contact until the “Indian Wars” were deemed officially concluded in the United States at the close of the nineteenth century.¹⁹ The battleground was tangible and the cost of defeat was loss of life. There was no confusion over who was Indigenous and who was not. The conversation was about who was an ally and who was an enemy. During this first phase, the United States used its military power to subdue Indigenous Nations who were deemed to be the enemies of the United States, and the U.S. sought political alliances with Indigenous Nations who were willing to be its allies.²⁰ There are over 500 treaties between American Indian Nations and the United States government, dating from 1778 until 1871, when Congress ended making treaties with Indian nations.²¹ Each of those documents acknowledges the sovereignty of the

¹⁸ See CAROLE GOLDBERG, REBECCA TSOSIE, KEVIN WASHBURN & ELIZABETH WASHBURN, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 3 (6th ed. 2010) (describing Federal Indian law as “a doctrinal, historical vestige of the legal regime that tried to rationalize, legitimate, and regulate American colonialism over Indian tribes.”).

¹⁹ See *id.*, at 1–121 (recounting the history of Federal Indian law in great detail).

²⁰ *Id.* at 14–20.

²¹ *Id.* at 4; Helen Oliff, *Treaties Made, Treaties Broken*, NAT’L RELIEF CHARITIES BLOG (March 3, 2011), <http://blog.nrcprograms.org/treaties-made-treaties-broken/>.

Indian nations, as well as their rightful claims to their traditional lands and resources. Most of those treaties were subsequently breached,²² in whole or in part, due to the actions of the United States, as well as its failure to protect treaty-guaranteed lands from encroachment by settlers.²³ Today, that brutal past exists in monuments that mark the sites of the massacres at Wounded Knee, Sand Creek, and other places where Native peoples experienced genocide as they fought to protect their homelands and peoples. Of course, the past also lives on in the memory of their descendants.

The second phase of colonialism involved the appropriation of Native lands and cultural objects for use of Euro-American settlers in the guise of efforts to civilize Indians so that they could eventually be incorporated into society as American citizens. During this era, all Indians were treated alike, whether they had been friends or enemies of the United States during the prior interval. Federal civilization policy relied on the notion of a “wardship” under which the benevolent civilized government maintained virtually absolute control over the “savage” wards, who were deemed to lack the fundamental capacity to maintain rights to ownership of property or ability to contract for goods and services, as “civilized” peoples could. Until the late 1930s, the Indian Agent assigned to each reservation assumed direct control over tribal members on the reservation, and the Indian ward had no right to leave the reservation or enter the larger society, except with the approval of the Agent or his designees. The battleground became both tangible and intangible because control was exercised over the physical body and at the level of the mind to break down the freedom of Native peoples and their ability to maintain their historical and separate cultural and political identities. Federal law and policy converted the political relationship between Nations

²² Oliff, *supra* note 21.

²³ GOLDBERG ET AL., *supra* note 18 at 15–16.

into a hierarchical relationship between the dependent ward and the benevolent master as “trustee.”²⁴

During this second era of colonialism, the United States government used its political power to appropriate vast amounts of Native land and tangible tribal cultural heritage, including sacred objects, objects of cultural patrimony, and human remains.²⁵ At the same time, the U.S. government endeavored to erase tribal cultural identity through a mandatory civilization program that featured the federal boarding school policy; federally-supported efforts to convert Indians to Christianity; the federal allotment policy, which was designed to break down tribal landholdings and inculcate an individual ethic of property ownership, as well as other nineteenth and twentieth century equivalents. Policymakers touted the civilization program as being “beneficial” to Indians because it would prepare them for a future in which they might transcend the limitations of their status as wards and become U.S. citizens.²⁶ Initially, Congress selectively naturalized American Indians to citizenship if they demonstrated successful assimilation.²⁷ In 1924, Congress enacted the Indian Citizenship Act, which extended U.S. citizenship to all American Indians, but specified that they would retain their treaty rights and political rights under federal law, as members of federally recognized tribal governments.²⁸

Indigenous peoples survived the first two waves of colonialism and today, federally recognized tribal governments exist as

²⁴ Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. STATE L.J. 299, 317-332 (2002) (describing the relationship between historical policies and the use of native images by outsiders.).

²⁵ See generally Rebecca Tsosie, *Who Controls Native Cultural Heritage? “Art,” “Artifacts,” and the Right to Cultural Survival*, CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE (2009); see also Tsosie, *Reclaiming Native Stories*, *supra* note 24, at 317-332.

²⁶ See Tsosie, *Reclaiming Native Stories*, *supra* note 24 at 317-332.

²⁷ GOLDBERG ET AL., *supra* note 18, at 30.

²⁸ Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b) (2012)).

separate nations, with recognized legal rights of self-governance and the moral and political right to self-determination.²⁹ Tribal governments possess executive, legislative, and judicial powers, and they exercise jurisdiction over their lands and their members.³⁰ American Indian and Alaska Native peoples are members of their tribal Nations, as well as full citizens of the United States and the states where they reside. They are free to practice the religion of their choice, can attend public or private schools, and may reside on or off the reservation. Some would say that we are no longer in an era of colonialism because citizenship guarantees the same autonomy of choice that all members of U.S. civil society possess. However, I argue that we are currently in a third and perhaps final phase of colonialism, which is quite insidious because it operates at the level of consciousness. We all possess beliefs that are deeply programmed into our subconscious minds and these beliefs inform our actions and our beliefs about what is “possible.” As collectives and as individuals, who do we think that “we” are and who do we think that “they” are? Have “we” become “them”? Do we mirror who “they” think that “we” are? Clearly, identity matters. But who decides the rules? And as we address the issue of Indigenous cultural rights, do we operate by the principles of just governance in a civil society? Or do we operate by the principles of war?

These are complex questions and they merit sustained attention. This essay will frame the components of the debate as a way to expand the dialogue about the rights of Native artists and the role of Indigenous rights in “cultural production,” which is a process that involves many different dynamics, including social media, the entertainment industry, the art industry, the marketplace, the laws that govern the rights of “individuals” to their creations (intellectual property law), and the laws that govern the rights of tribal governments to their cultures (Federal Indian

²⁹ GOLDBERG ET AL., *supra* note 18 at 13–39, 111–12.

³⁰ See generally GOLDBERG ET AL., *supra* note 18, at 382–94 (discussing tribal governmental structures and functions in the modern era); 1–18 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.04 (Nell Jessup Newton ed., 2012).

law). In discussing “American” cultural production, I will build on an insight made by Kevin Gover, Director of the National Museum of the American Indian, at a recent lecture given at Arizona State University.³¹ Gover discussed an upcoming exhibit at the National Museum of the American Indian (NMAI) entitled “Americans,” noting that until the 1700s, the term was used exclusively to reference Indigenous peoples in the Americas. However, over time, the term “Americans” has become synonymous with the people of the United States. The United States was birthed from British colonies and presumably built upon a British cultural tradition. This is clearly illustrated by our categories of law and philosophy, which continue to inform the discussion about rights and what is a legal issue, versus a moral issue. However, the United States has constructed itself as a multicultural democracy through a mode of cultural production that draws heavily upon its “Indigenous” heritage. Does the cultural heritage of Indigenous peoples belong to the United States? Or is this appropriation of Indigenous cultural identity the final act of colonialism in a centuries-long struggle to claim victory over the Indigenous Nations of this land?

That question is of increasing importance since technology can enhance our capacity to generate creative expression, but it can also further confuse cultural identity. This essay highlights the contemporary policy issues and argues for Indigenous nations to develop their own governance systems for “traditional cultural expression,” which is the term used by nation-states to describe a default category of cultural heritage that contains anything that is not formally protected under existing intellectual property laws.³²

³¹ Kevin Gover, Dir., Nat’l Museum of the Am. Indian, Lecture at the Sandra Day O’Connor College of Law Indigenous Stereotypes in Sports Symposium (Jan. 30, 2015).

³² In 2013, the World Intellectual Property Organization (WIPO) sought comment on a draft Treaty dealing with the Protection of Traditional Cultural Expression. In that draft, Traditional Cultural Expression is defined as “any form of artistic and literary expression, tangible and/or intangible, or a combination thereof, . . . in which traditional culture and knowledge are

In addition, individual Native artists should be active participants in the dialogue about the relationship between art and cultural identity and what falls within the category of permissible cultural production, as a system of voluntary and appropriate cultural sharing and exchange. This must be contrasted with what falls within the category of cultural misappropriation, meaning the involuntary and exploitive transfer of value and benefit from the Indigenous group to the dominant producers and consumers of the global arts economy.³³ Currently, public policy is unable to differentiate the permissible use of Indigenous cultural expression from its misuse, and Indigenous peoples are the only ones who can speak to this.³⁴ I will argue that the rules of civil society should govern this debate in a spirit of just and respectful intercultural exchange between Indigenous peoples and the various national and global governance systems. However, if this is not possible, we should at least understand the rules of the war that we are engaged in, and we should acknowledge the battlegrounds that exist at the level of consciousness and in the material world that drives our economic system.

In the text that follows, I will sketch my ideas in a chronological form, so that the reader can understand the relationship of Indigenous cultural identity to the rights of cultural

embodied . . . [and] which is intergenerational, . . . including, but not limited to phonetic and verbal expressions, musical and sound expressions, expressions by action, tangible expressions, and adaptations of these expressions.” The notes to the text clarify that the category encompasses stories, epics, legends, poetry, narratives, songs, rituals, dance, plays, ceremonies, and games, as well as “material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture and sacred places.” Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/27/5 (Jan. 22, 2014) [hereinafter “Draft Articles”], available at

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_5.pdf.

³³ Finnerty, *supra* note 8 (distinguishing the two sets of cases).

³⁴ *Id.*

production in the modern era. Part II of the paper discusses the context for the debate by examining the historical and modern context of cultural imagery, as it has affected Native peoples. Part III discusses identity harms and the role of tribal governments in regulating the protection of Native culture under existing domestic law. Part IV of the paper focuses on the rights of Native artists to their creations and the principles that U.S. law invokes for determining rights claims. In Part V, the paper discusses the broader implications of these issues for Indigenous peoples, focusing on international human rights law as a tool to define Indigenous governance over cultural identity.

II. COLONIALISM, CULTURAL IMAGERY, AND NATIVE PEOPLES

As Professor Robert Williams notes in his brilliant critique of Western civilization, *Savage Anxieties*, Western European peoples have, for centuries, employed the cultural imagery of the “savage” to divest other peoples (including Indigenous peoples) of their rights and to reinvent their own governments and societies in the process.³⁵ Williams argues that “without the idea of the savage to understand what it is, what it was, and what it could be, Western civilization, as we know it, would never have been able to invent itself.”³⁶ In particular, Western philosophers and jurists relied on the notion of an “irreconcilable difference between civilization and savagery” to shape and direct the nature of the policies that would govern their interaction with these peoples.³⁷

Building on his prior work, Williams demonstrates how the cultural imagery of the “savage” justified the Doctrine of Discovery, under which Western European nations appropriated lands in the Americas for their “ownership” and control during the colonial era; the same cultural imagery was invoked to birth a new

³⁵ ROBERT A. WILLIAMS, JR., *Savage Anxieties: The Invention of Western Civilization 1* (2012).

³⁶ *Id.*

³⁷ *Id.*

nation, the United States, and to justify its claims for land acquisition during the nineteenth and early twentieth centuries.³⁸ Today, Williams claims, this dynamic reprises in stereotypes of Native peoples and legal justifications for policies that would otherwise reflect an illegitimate form of racism under contemporary law.³⁹ Native stereotypes continue while the overt caricatures of Black, Latino, and Asian peoples have disappeared from the contemporary marketplace.⁴⁰ Thus, in the twenty-first century, the Western world's "most advanced nation-states continue to perpetuate the stereotypes and clichéd images of human savagery that were first invented by the ancient Greeks to justify their ongoing violations of the most basic human rights of cultural survival belonging to indigenous tribal peoples."⁴¹

Williams identifies these doctrines as the most dangerous threat to the continuing survival of the world's indigenous peoples because it normalizes the hierarchical and exploitive relationship created by colonialism.⁴² As Williams and Echo-Hawk point out, the failure to recognize adequate legal rights to tribal cultural

³⁸ See *id.* at 224–25. The Doctrine of Discovery was first applied under international law to vacant lands in order to validate the ownership of the first Nation to discover such lands. However, it was then extended during the era of European colonialism to validate the claims of civilized Christian nations to colonize areas inhabited by uncivilized and non-Christian peoples (heathens and infidels in India and the Middle East, as well as Native peoples throughout the Americas). Chief Justice John Marshall imported the Doctrine of Discovery into Federal Indian law in the famous case of *Johnson v. McIntosh*, which held that Great Britain and its successor, the United States, retained the fee interest in the lands that they discovered and settled, except for the "right of occupancy" (aboriginal title), which allowed Native people to remain in possession of their lands until their title of occupancy was extinguished by the European sovereign by purchase or conquest. See 21 U.S. 543 (1823). The Doctrine of Discovery thus established a hierarchy of authority that subordinated Indigenous governance systems.

³⁹ WILLIAMS, *supra* note 35, at 225.

⁴⁰ See Marty Westerman, *Death of the Frito Bandito*, AM. DEMOGRAPHICS Mar. 1989, at 28.

⁴¹ *Id.* at 9.

⁴² *Id.*

protection constitutes a compelling human rights problem in this country. This battle is intangible, and therefore it remains unseen and unacknowledged by most citizens in contemporary society, even by some of those who are Indigenous. The battle involves identity, power, and the right to claim the essence of an Indigenous people as belonging to the European-derived nations that claim rights through discovery. This mode of engagement served the European nations as they appropriated Native lands, through the concept of the “public domain,” and it continues to serve descendants of European nations today as they appropriate Native identities.⁴³

There is clearly an element of racism at work, given the cultural imagery of the savage. However, Federal Indian law neatly sidesteps the issue of racism by affirming that federally-recognized American Indian and Alaska Native governments are political, rather than racial, groups, and that their rights are governed by the unique rules of Federal Indian law, as opposed to the rules that govern equality of citizenship for members of racial minorities. With limited exceptions, contemporary U.S. civil rights law disclaims the need to treat citizens differently based upon their status as members of “racial or ethnic minority groups.”⁴⁴ Today, all laws that create race-based classifications, whether beneficial (i.e., affirmative action) or harmful, are evaluated under strict scrutiny for purposes of the equal protection clause.⁴⁵ In comparison, the United States routinely passes special legislation

⁴³ See statement by Professor James Anaya, Special Rapporteur on the rights of Indigenous peoples, twenty-third session of the World Intellectual Property Organization, Intergovernmental Commission, Feb. 4, 2013, at 3 (comparing notion of the public domain with the Terra Nullius doctrine) [hereinafter Professor Anaya statement].

⁴⁴ See, e.g., 42 U.S.C. §§ 300u-6, 2000e-16 (2012) (government employment is free from discrimination on the basis of “race, color, religion, sex, or national origin”).

⁴⁵ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that all racial classifications authorized by any governmental actor must be analyzed by the reviewing court under strict scrutiny).

to secure the political rights of the Native Nations that are in a trust relationship with the United States.⁴⁶ These laws are treated very deferentially, applying only the minimal level of review to determine whether they are rationally related to the government's trust responsibility.⁴⁷

Today, tribal attorneys build on the Federal Indian law framework to argue for Indigenous cultural rights under the guidance of the political right to self-determination. As Professor James Anaya points out, the norm of self-determination encompasses a right to cultural integrity for Indigenous peoples.⁴⁸ The self-determination argument works well with tangible resources such as land and cultural patrimony. It is less successful as applied to intangible resources because the relationship of Native culture to self-determination is much more nuanced and complex. This is due to the historical legacy of cultural imagery that was employed to divest Indigenous peoples of their rights to land and cultural identity, as well as the modern trend to normalize "cultural borrowing" as a means to contemporary cultural production.⁴⁹ After 500 years of contact, the line between European and Indigenous culture is blurred and any attempt to fence out an intrusion or appropriation meets resistance unless it falls within a classic case of copyright or trademark violation.

Furthermore, in the case of stereotyping, it is not always obvious that the political status of tribal governments can insulate them from the multiple harms that stereotyping causes to tribal

⁴⁶ Title 25 of the U.S. Code is devoted to the rights of tribal governments. *See* 25 U.S.C. §§ 1–44 (2012).

⁴⁷ *See, e.g.,* *Morton v. Mancari*, 417 U.S. 535, 555 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

⁴⁸ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 111 (2d ed. 2004).

⁴⁹ *See* Christine Hoff Kraemer, *Cultural Borrowing/Cultural Appropriation: A Relationship Model For Respectful Borrowing*, 2 *THORN MAG.* 36 (2009).

identity, and individually to tribal members.⁵⁰ Indeed, as philosopher Miranda Fricker points out, our basic social interactions tend to have profound impacts upon particular groups, and epistemic injustice can arise when individuals are harmed in their ability to convey knowledge to others or to make sense of their own experience.⁵¹ In such cases, the “politics of epistemic practice” determine how social power operates to produce injustice in everyday social practices. A group can be harmed in its ability to participate equally in creating a given social experience, including defining what constitutes art.⁵² Is art the individual creation of an artist? Does it comprise the tribe’s own form of culturally authorized cultural production; through songs, designs, ceremonies, symbols, and the like? According to Fricker, when a group is excluded from exerting power within an institution, such as legislative or judicial bodies, which controls the terms of their own experience, injustice arises.⁵³ Similarly, when individuals who object to the dominant system are targeted as militants or not representative of the group itself, they suffer a further injustice that impairs their ability to convey valid or relevant information because they have been labeled as unreliable or not meriting credibility. Indigenous peoples have been affected by epistemic injustice in many categories of public policy and these dynamics exist in the current debates over Native control over culture and art.⁵⁴

The next section will discuss the impact of stereotyping as a form of identity harm, arguing that certain forms of cultural

⁵⁰ E.g., CNN Wire Staff, *Native Americans Object to Linking Geronimo to bin Laden*, CNN (May 6, 2011, 5:55 AM), <http://www.cnn.com/2011/US/05/05/bin.laden.geronimo/index.html>.

⁵¹ See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 1* (2007).

⁵² *Id.* at 153–54.

⁵³ *Id.*

⁵⁴ See generally Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 (2012).

production are employed to negate the ability of tribal governments to control intangible aspects of cultural heritage.

III. NATIONAL IDENTITY, TRIBAL IDENTITY, AND IDENTITY HARM

The law is a social institution that broadly involves power relations between the national government and its citizens, and between the United States and Native Nations. In the former case, the government and its citizens share a political identity within civil society, although pluralistic democracies must manage diverse cultural identities. Modern pluralistic democracies, such as the United States, tend to do this under the project of “multiculturalism,” which Professor Steven Vertovec describes as a diversity management strategy that promotes “tolerance and respect for collective identities” associated with specific cultural groups.⁵⁵ This requires an overall understanding of the dominant identity of the national government, as well as the careful management of racial and ethnic minorities to ensure that they enjoy equal citizenship, meaning equal access to political and civil rights. Notably, under this model, religion and other forms of cultural differences are tolerated and accommodated to the extent possible, consistent with other national objectives.⁵⁶ However, there is no right to culture within the United States, and therefore, attributes of minority cultures, such as language and other cultural practices, are not affirmatively protected or preserved, unless they are part of the national culture, such as designated historic sites.⁵⁷

The question of what belongs within the dominant cultural identity of the national government, and what belongs within the minority group’s cultural identity, may be clear in Great Britain and other European countries. However, it is a difficult question in

⁵⁵ See Steven Vertovec, *Super-Diversity and Its Implications*, 30 *ETHNIC & RACIAL STUD.* 1024, 1027, 1047 (2007).

⁵⁶ *Id.* at 1027.

⁵⁷ See Tsosie, Reclaiming Native Stories, *supra* note 24 at 332-46 (identifying the arguments for and against legal protection for a “right to culture”).

settler nations, such as the United States, Canada, and New Zealand, at least in relation to Indigenous peoples. In the quest for a separate national identity, the United States, like many other settler countries, appropriated Indigenous land and cultural imagery as a way to establish its own identity separately from its British forebears. This is clearly demonstrated by the role of the museum in settler states, such as Canada, the United States, New Zealand, and Australia, which focused on “creating a common identity for the new nation, pluralistic in nature, descended from Europe, but located on new lands separated from Europe.”⁵⁸ Throughout its history, the United States has appropriated Indigenous names and symbols to build federal power, including use of Native images and identities on U.S. currency, and military operations and equipment (e.g. the Apache helicopter, “Operation Geronimo”).⁵⁹ Similarly, the United States has built a national creation mythology around the encounter of Europeans with Indians (e.g. Pocahontas and John Rolfe, Sacajawea and Lewis and Clark).⁶⁰ Even if the images portray Native people positively, they are invoked to build the country’s national identity.

Conversely, the negative stereotypes of the Indian as a “savage” that Professor Williams discusses were used to justify federal paternalism to take Indian land, children, religions, and cultural objects for the “good of the Indians” in the nineteenth century.⁶¹ Although modern policymakers disclaim any continuing intent to invoke cultural racism, stereotypes about Native peoples persists in American culture, politics, and sports, thus perpetuating the historical consciousness about Native identity within

⁵⁸ Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 U. TULSA L. REV. 3, 6 (2000).

⁵⁹ ‘Geronimo’: Native Americans Blast Bin Laden Code Name, NBCNEWS.COM, http://www.nbcnews.com/id/42897871/ns/world_news-death_of_bin_laden/t/geronimo-native-americans-blast-bin-laden-code-name/#.VVMiWkaGNqw (last updated May 4, 2011).

⁶⁰ Gover, *supra* note 31.

⁶¹ See Rebecca Tsosie, *Cultural Challenges to Biotechnology*, *supra* note 9 at 403.

contemporary society. It is important to note that this national consciousness undermines the ability of Indigenous peoples to participate as equals in the construction of their contemporary identities, labeling such exercises as mere efforts to establish what is politically correct. In this world, the “good” Indian still passively relies on the non-Indian benefactor to create value for tribal existence, as demonstrated by Dan Snyder’s attempt to gain the support of nationally recognized tribal leaders and organizations for the Washington Team’s mascot. The “bad” Indians who demonstrate and voice opposition are dismissed as troublemakers and malcontents, as were the nineteenth century Indigenous patriot leaders, such as Sitting Bull, Crazy Horse, and Geronimo. The end result is that the United States government maintains the power to use Native identities for its purposes without being accountable for the harms to Native peoples. In fact, the use of cultural imagery is often protected as freedom of expression for purposes of the U.S. Constitution.⁶²

Clearly, American Indian and Alaska Native peoples have been affected by stereotypes throughout history. For purposes of this essay, it is necessary to examine who controls the image of the “Indian” in contemporary society. Are cultural images and identities considered property, in the sense that they can be owned and commercialized? Or are these images merely ideas that are beyond government regulation and are available for appropriation by others?

A. Stereotyping and Identity Harm

Stereotyping is a primary source of prejudice in which a biased attitude can manifest in legally prohibited behavior, such as discrimination, but is not, itself, actionable.⁶³ For this reason, the case against stereotyping is best made by identifying its function.

⁶² Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 347-49 (2002).

⁶³ Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591 (2011) (discussing how stereotyping becomes actionable as discrimination).

Miranda Fricker describes stereotypes as “widely held associations between a given social group and one or more attributes.”⁶⁴ Fricker asserts that stereotyping is one of the primary ways in which members of a society make “credibility judgments” about other members, to include them, privilege them, or exclude them from a given social practice.⁶⁵ In this way, stereotyping is linked to other forms of injustice and can serve as a means of invoking identity power.

Identity power is of particular importance because many social interactions depend upon the participants’ mutual understanding of their social power.⁶⁶ Feminist scholars, for example, point out that men can use their male identity to influence a woman, perhaps by patronizing or intimidating her.⁶⁷ These subtle forms of domination, sometimes framed as “microaggressions,” are not actionable under the law as gender discrimination, and yet, they may have a very harmful impact upon women’s rights to equality under the law.⁶⁸ Similarly, tribal governments should care deeply about forms of cultural imagery that are used to portray Native peoples, because those stereotypes link up to a variety of harms,

⁶⁴ FRICKER, *supra* note 51, at 30.

⁶⁵ *Id.*

⁶⁶ *Id.* at 14 (“Whenever there is an operation of power that depends in some significant degree upon...shared imaginative conceptions of social identity, then *identity power* is at work.”)

⁶⁷ Tsosie, *Indigenous Peoples and Epistemic Injustice*, *supra* note 54, at 1154 (citing *id.* at 17).

⁶⁸ Robin Lukes & Joann Bangs, *A Critical Analysis of Anti-Discrimination Law and Microaggressions in Academia*, 24 RES. HIGHER EDUC. J. 1, 3 (2014) (“By their very nature, many microaggressions are not legally prohibited, because they are ‘everyday verbal, nonverbal, and environmental slights, snubs, or insults.’” (quoting DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* 7 (John Wiley & Sons, Inc. 2010)), available at <http://www.aabri.com/manuscripts/141824.pdf>); see Derald Wing Sue, *Microaggressions: More than Just Race*, *MICROAGGRESSIONS IN EVERYDAY LIFE* (Nov. 17, 2010), <https://www.psychologytoday.com/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race>.

including economic exploitation, or, in the case of Native women, interpersonal violence.⁶⁹

As Professor Anita Bernstein demonstrates in her article *What's Wrong With Stereotyping?*, contemporary stereotyping represents a struggle between liberty and equality.⁷⁰ Those who maintain that they have a constitutionally protected right to engage in symbolic speech, such as the use of mascots and other forms of negative cultural imagery about other groups, are asserting a degree of liberty that has adverse consequences for other groups, such as racial minorities and women. Stereotyping adversely affects those groups by constraining their opportunities, but the law does not acknowledge this harm. Instead, proponents of liberty often point out that all groups stereotype each other (Republicans and Democrats, Yankees and Southerners, Texans and New Yorkers, French and English, Catholics and Protestants) because all groups have a “type” (a set of characteristics and mannerisms) which is invoked, often humorously (e.g. the “redneck”) to poke fun at one’s own group or others. In other words, this is just what people do. What is the harm?

Bernstein responds by noting that if groups operate on an equal basis of power in their social interactions, stereotyping is not harmful and it quite frequently *is* humorous.⁷¹ However, she points out that there are several stereotypes that we should care about because they affect vulnerable groups and perpetuate harm by painting the vulnerable group as stupid, crazy, irrational, violent, predatory, brutish, or subhuman.⁷² In these cases, there is a historical pattern to the use of stereotypes that identify traits associated with the group that (1) denigrates the group, (2) substantiates the dominant consciousness that the trait is actually

⁶⁹ Shan Li, *supra* note 11 (cultural imagery sexualizes native women and promotes sexual violence).

⁷⁰ See Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655 (2013).

⁷¹ *Id.* at 664.

⁷² *Id.* at 665.

true, and therefore (3) justifies a negative assertion of social power to control the group.⁷³ This dynamic was also invoked by the Framers of the Constitution to justify the assertion that African peoples, who were imported into the United States to serve as slaves, should be counted as three fifths of a person⁷⁴ while white persons were counted as full persons. This diminished status was justified by the view, expressed most overtly in the infamous *Dred Scott* case, that Africans, as a race, possessed a set of inferior traits that made enslavement the best destiny for them.⁷⁵ Justice Taney wrote that Africans had, for more than a century, been “regarded as beings of an inferior order, and altogether unfit to associate with the white race.”⁷⁶ He found that they had been regarded as having “no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit.”⁷⁷

Even after the passage of the Fourteenth Amendment, this form of dehumanizing imagery justified the social subordination of African American people under the distorted logic of *Plessy v. Ferguson*, which described racism as a social problem, rather than a legal problem, thereby justifying official government policies of segregation as a permissible form of social management.⁷⁸ The separate-but-equal doctrine established by *Plessy*⁷⁹ was ultimately overruled in the realm of K-12 public school education by the 1954

⁷³ *Id.* at 720.

⁷⁴ U.S. CONST., art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV.

⁷⁵ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), superseded by constitutional amendment, U.S. CONST. amend. XIV.

⁷⁶ *Id.* at 407.

⁷⁷ *Id.*

⁷⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896) overruled by *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

⁷⁹ *Id.* at 551, 561 (upholding Louisiana law segregating public transportation by restricting railway carriages for “white” and “colored” citizens on the theory that “separate but equal accommodations” regulate social norms and are therefore consistent with the Fourteenth Amendment’s call for political equality).

Supreme Court case of *Brown v. Board of Education*,⁸⁰ followed by the more comprehensive reforms of the Civil Rights Act of 1964⁸¹ and subsequent civil rights legislation. However, racial equality remains elusive in the United States. Today, our society espouses “formal equality,” meaning that we resist most overt racial classifications. Yet, implicit racial biases are deeply embedded, and today the negative assertion of power can manifest as prejudice, which is generally not actionable because it is a private state of mind, or as discrimination, which is actionable if it violates a civil rights statute, for example, a landlord’s refusal to rent property based on the tenant’s racial status.

Within contemporary society, the overt racism of the past has evolved into covert racism, a shadow form of disparate treatment that remains unseen by many members of society.⁸² These negative assertions of power can be masked as “neutral” policies (e.g., sentencing laws that have disparate impacts upon racial groups), and can also undergird racial profiling and disparate use of force to subdue African American “suspects,” most recently demonstrated by the recent events in Ferguson, Missouri.⁸³ Months after the fatal shooting of Michael Brown, an eighteen-year-old black man, by

⁸⁰ *Brown*, 347 U.S. 483 (1954) *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (holding that racially segregated public schools are “inherently unequal” because they deny equal educational opportunity to children and impede their development as citizens in a democratic society).

⁸¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁸² See William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 1–2 (2015).

⁸³ James B. Comey, Dir., Fed. Bureau Investigation, Address at Georgetown University (Feb. 12, 2015) (presenting on the role of implicit bias in criminal justice system), *available at* <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>; see also Kevin Johnson & Yamiche Alcindor, *DOJ: Ferguson PD Engaged In Racially Biased Policing*, USA TODAY (Mar. 3, 2015), <http://www.usatoday.com/story/news/2015/03/03/ferguson-justice-report/24320987/>.

Officer Darren Wilson, a white law enforcement officer, the U.S. Department of Justice released a report demonstrating that the Ferguson Police Department engaged in “a broad pattern of racially biased enforcement . . . including the use of unreasonable force against African American suspects.”⁸⁴ Specifically, the report documents that 88% of the cases involving use of force in Ferguson concerned African American suspects.⁸⁵ The statistics may speak for themselves, but they also align with a history of cultural imagery depicting African American males as violent and given to criminal behavior, which has consistently resulted in a violation of the human rights and civil rights of African American people.

B. Native American Mascots and Identity Harm

Similarly, the use of cultural imagery as a mechanism to subordinate the rights of Native American peoples has been operative throughout history. Professor Williams’ work highlights the impact of the construction of Indigenous peoples as “savages.”⁸⁶ The contemporary use of Indian images as sports mascots illustrates the continuing nature of the problem. The use of these images originated at a time in American history when overt racism and bigotry was the norm in American society.⁸⁷ However, today these images are worth millions of dollars as a property interest in the hands of sports franchises such as the Washington Team, the Kansas City Chiefs, the Cleveland Indians, the Atlanta Braves, and the Chicago Blackhawks.⁸⁸ Because the use of Native American cultural imagery has been normalized within American society, generations of Americans have grown up with their own

⁸⁴ Johnson & Alcindor, *supra* note 83.

⁸⁵ *Id.*

⁸⁶ WILLIAMS, *supra* note 35, at 1.

⁸⁷ See NAT’L CONGRESS OF AM. INDIANS, ENDING THE LEGACY OF RACISM IN SPORTS AND THE ERA OF HARMFUL “INDIAN” SPORTS MASCOTS 2 (October 2013) [hereinafter NCAI REPORT], available at

http://www.ncai.org/resources/ncaipublications/Ending_the_Legacy_of_Racism.pdf.

⁸⁸ *Id.*

ideas about what they ought to be able to do, which includes the use of Indian mascots, even though they would no longer be willing to use overt cultural imagery to mock African Americans, Latinos, or Asians.⁸⁹ Although two-thirds of Indian sports images and mascots have been eliminated from use during the past thirty-five years, following a course of activism by Native peoples and support by the U.S. Commission on Civil Rights, as well as a host of other professional organizations and associations, there are still over 1,000 Indian sports images in active use, and the Washington Team continues to litigate its right to trademark the “Redskins” team name and image.⁹⁰

What accounts for the disparity between the treatment of these other groups and Native Americans? African Americans, Latinos, and Asians constitute much larger groups within U.S. society, wielding significant economic and political clout, while Native Americans continue to represent less than 2% of the U.S. population.⁹¹ But, the fact that the team owners continue to profit from the use of Native American images as sports mascots means that it is palatable to most Americans to consider these images to be the property of non-Native people. Native images have economic value to American society, demonstrating that the third phase of colonialism is actively in progress. In addition, the use of these images aligns with the intuition of Americans that cultural imagery is a form of constitutionally protected expression (symbolic speech)⁹² that merits protection as a liberty interest. And

⁸⁹ The “Frito Bandito” and “Little Black Sambo,” for example, disappeared from commercial use during the 1970s. *Frito Bandito*, WIKIPEDIA, http://en.wikipedia.org/wiki/Frito_Bandito (last visited Apr. 7, 2015); Marty, Westerman, *Death of the Frito Bandito*, AMERICAN DEMOGRAPHICS (Mar. 1989); Marjorie Rosenthal, *Banned From American Bookshelves: The Story Of Little Black Sambo*, LONG ISLAND BOOK COLLECTORS (Aug. 11, 2013), <http://longislandbookcollectors.com/2013/%EF%BB%BFbanned-from-american-bookshelves-the-story-of-little-black-sambo>.

⁹⁰ NCAI REPORT, *supra* note 87, at 6, 10–15.

⁹¹ *Id.* at 5.

⁹² Examples of protected symbolic speech can be found in *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning), *United States v. Eichman*, 496 U.S. 310 (1990)

finally, the use of Native American cultural imagery is not cast as racism, but as a way to “honor” the Native American people. In other words, Americans have created themselves, through the use of Native American cultural imagery, a continuation of the dynamic that Williams describes in relation to the mythology of the “savage” as means to construct Western civilization.

Within the third phase of colonialism, the commercial value of “Indian identity” belongs to non-Indians. This is being litigated right now in federal court, following a recent ruling by the U.S. Patent and Trademark Office Trademark Trial and Appeal Board in *Blackhorse v. Pro-Football, Inc.*, which cancelled six active trademark registrations for the “Redskins” on the grounds that this symbol disparages Native American people within the meaning of the federal Trademark laws.⁹³ This ruling is currently being challenged by the Washington Team in a federal district court lawsuit that seeks to protect the right of the team to profit from the name.⁹⁴ If the Native American petitioners prevail, the use of the term “Redskins” will lack Trademark protection, meaning that Pro-Football, Inc. will have no federally protected property interest in the team name. This ruling, of course, does not affect the ability of individuals or corporations to use the term in other ways that would be offensive to Native American people.

For example, several years ago, the Hornell Brewing Company used the name of a revered nineteenth century Lakota leader,

(flag burning), and *United States v. O'Brien*, 391 U.S. 367 (1968) (burning a draft card), among others.

⁹³ *Blackhorse v. Pro-Football Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014); see also Zoe Tillman, *Judge Rules Redskins Trademark Case Can Move Forward*, LEGALTIMES (Nov. 25, 2014 12:09 P.M.),

<http://www.nationallawjournal.com/legaltimes/id=1202677398589/Judge-Rules-Redskins-Trademark-Defense-Can-Move-Forward?slreturn=20150228133911> (discussing ruling of U.S. District Court Judge Gerald Bruce Lee which denied motion of Native American petitioners to dismiss the appeal, finding that Pro-Football has a significant economic interest in the Trademarks which justifies appeal).

⁹⁴ Tillman, *supra* note 93.

Crazy Horse, to market a Malt Liquor product: “Crazy Horse Malt Liquor.”⁹⁵ At the request of outraged tribal leaders, Congress held hearings on the matter and concluded that the name should be cancelled because the company was intentionally marketing the product to Native youth and creating further social problems for these impoverished communities with high rates of alcoholism, traffic related fatalities, and youth suicides.⁹⁶ The federal court disagreed, holding that the company’s use of the name was constitutionally protected commercial speech, and that the government had impermissibly acted by banning the speech.⁹⁷ When the descendants of Crazy Horse attempted to sue Hornell Brewing Company in tribal court for a cultural tort, based upon defamation of their ancestor’s spirit and the family by unauthorized use of the leader’s name to market liquor, the federal courts held that the tribal court lacked jurisdiction over the Hornell Brewing Company, which was not doing business on the reservation.⁹⁸

The above cases demonstrate that harms to a name or cultural identity are not actionable unless they can be tied to a specific violation of existing law. So, for example, tribal governments have a legal right to regulate the use of their tribal name through trademark law. As an aspect of their authority, they can license use of the tribal name to third parties (as the Seminoles have done) or they can prosecute unauthorized uses of the tribal name, as the Navajo Nation did with Urban Outfitters.⁹⁹ Contemporary Native

⁹⁵ Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION 195, 201 (Bruce Ziff & Patima V. Rao eds. 1997).

⁹⁶ 102 CONG. REC. S13, 420 (daily ed. Sept. 14, 1992).

⁹⁷ Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1228 (E.D.N.Y. 1993).

⁹⁸ Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1093 (9th Cir. 1998).

⁹⁹ The Seminole Tribe of Florida has authorized Florida State University to retain the “Seminoles” Team name. See Robert Andrew Powell, *Florida State Can Keep its Seminoles*, THE NEW YORK TIMES (Aug. 24, 2005), http://www.nytimes.com/2005/08/24/sports/24mascot.html?pagewanted=all&_r=0. The Navajo Nation successfully challenged the use of

artists and tribal governments can invoke the provisions of the Indian Arts and Crafts Act to prevent non-Indians from falsely marketing their goods as “Indian made” or the product of a specific Indian tribe.¹⁰⁰ Both actions constitute a form of deceptive advertising that causes consumer harm.¹⁰¹ Tribal governments do not generally retain the exclusive right to produce particular art forms, such as rugs or baskets, even if there are distinctive design qualities to these traditional arts. So long as the producer of an item is, in fact, “Indian” for purposes of the Indian Arts and Crafts Act, he or she has the right to freely produce “Indian” art. Conversely, so long as a producer of an item correctly labels his or her art as “inspired by Native American designs,” he or she may freely appropriate Indigenous art forms. Individual Native American artists generally have the same rights as any artist to obtain protection for their own unique creations under the U.S. copyright laws,¹⁰² and they have the additional right under the

the term “Navajo” on Urban Outfitters clothing designs. *Navajo Nation v. Urban Outfitters, Inc.*, 935 F.Supp.2d 1147 (D.N.M. 2013); *see also* Caroline Jamet, *Urban Outfitters Sued for Trademark Infringement by Navajo Nation*, INTELL. PROP. BRIEF: AM. U. WASH. C. L. (June 18, 2012), <http://www.ipbrief.net/2012/06/18/urban-outfitters-sued-for-trademark-infringement-by-navajo-nation/>.

¹⁰⁰ Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305–305e (2012).

¹⁰¹ False advertising is defined as “[t]he tortious and sometimes criminal act of distributing an advertisement that is untrue, deceptive, or misleading; esp. under the Lanham Act, an advertising statement that tends to mislead consumers about the characteristics, quality, or geographic origin of one’s own or someone else’s goods, services, or commercial activity.” BLACK’S LAW DICTIONARY 719 (10th ed. 2014).

¹⁰² *See* 17 U.S.C. § 102(a) (2012) (listing copyrightable subject matter). *See also* The Visual Artists Rights Act of 1990, 17 U.S.C. § 106(a) (expanding rights of orators of visual art to include the rights of “attribution” and “integrity.”); *see* Tsosie, Who Controls Native Cultural Heritage, *supra* note 25 at 3-5 (discussing conceptual problems within the law that regulates protection of Indigenous cultural heritage due to the inability of the law to adequately distinguish “objects of art” from “cultural objects”); *see also* Dr. Jane Anderson, “Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use,” (May 5-7, 2005) at p. 9 (quoting Australian Indigenous leader Mick Dodson, who stated that “our laws and customs do not

Indian Arts and Crafts Act to label their cultural productions as an “Indian product.”¹⁰³ However, as the next section demonstrates, individual artists and tribal governments generally lack the right to control the use of traditional cultural expression beyond these specific legal categories.¹⁰⁴

IV. CULTURAL PRODUCTION AND THE RIGHTS OF NATIVE ARTISTS

There is a profound conceptual problem at the heart of debates about art as a means of cultural production, which is, that “art” is a category defined by Western views about the relationship of persons to objects, and the categories of legal protection that are available to artists are aligned with that conception.¹⁰⁵ Western philosophy and law worked in tandem to construct the categories of “art” and “artifacts” to differentiate the rights of Western authors who create works of “art” from those of non-Western cultures who produce “artifacts.” Today, individual Native artists are actively engaged in cultural production, and there are also significant repositories of tribal art and art forms in the archives of museums and libraries throughout the nation and the world. Indigenous art forms are intergenerational expressions of culture. However, because of the continuing conceptual problems that relate to the categories of “art” and “artifacts,” as well as what merits protection under U.S. copyright or trademark law, there is significant confusion about what rights, if any, exist in these tangible and intangible expressions of culture.¹⁰⁶

fit easily into the pre-existing categories of the Western system. The legal system does not even know precisely what it is in our societies that is in need of protection. *The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem.*”) (emphasis added by Anderson).

¹⁰³ 25 U.S.C. §§ 305–305e.

¹⁰⁴ See Tsosie, Who Controls Native Cultural Heritage, *supra* note 25.

¹⁰⁵ *Id.*

¹⁰⁶ See Olivia J. Greer, *Using Intellectual Property Laws to Protect Indigenous Cultural Property*, 22 NYSBA 27 (discussing the inability of U.S. intellectual property law to “prevent the unauthorized exploitation of tangible and intangible

A. The Historic Framing of Art as Cultural Production

In contemporary America, “art” is perceived as a commodity in the hands of consumers, and creators have limited rights to their original expression, which are defined by copyright law.¹⁰⁷ Our domestic legal system regulates the economic aspects of art as an enterprise by offering a limited incentive to creators to produce original art for the market. However, ideas are freely exchanged and therefore a robust public domain is perceived as necessary to serve the public interest in innovation and free expression. Traditional Indigenous art forms are largely seen as part of the public domain because they are ancient “tribal” cultures and there are many “creators” who share this tradition, rather than one individual “artist.” In addition, many outsiders see tribal designs as “generic” because they are disassociated from their original cultural context and the meaning of the symbols is not understood by contemporary consumers.¹⁰⁸ In other words, the entire conception of “art” is defined by the relationship of the viewer/consumer to the object, which has been created by the artist. This set of relationships is embedded within the Western philosophy of aesthetics.¹⁰⁹

indigenous cultural property”); Anderson, Access and Control of Indigenous Knowledge in Libraries and Archives, *supra* note 102 at 33 (concluding that the failure of existing law to protect Indigenous cultural knowledge and art forms is promoting the institutional development and use of “protocols” which can “prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement”); Kimberly Christen, *Opening Archives: Respectful Repatriation*, 74 AM. ARCHIVIST 185 (2011) (discussing a “collaborative archival project aimed at digitally repatriating and reciprocally curating cultural heritage materials of the Plateau tribes in the Pacific Northwest”).

¹⁰⁷ 17 U.S.C. § 106 (2012).

¹⁰⁸ See Rebecca Tsosie, Who Controls Native Cultural Heritage, *supra* note 25 at 5-7 (discussing Native and Western cultural views about “art” and “artifacts”).

¹⁰⁹ See Stephen Davies, *Aesthetic Judgments, Artworks and Functional Beauty*, 56 PHIL. Q. 224-41 (2006) (explaining the historic construction of aesthetics and the ways in which non-Western cultures were excluded from the framework

Within the philosophy of aesthetics that constructed the category of art, the individual artist is understood to create a work (painting, novel, sculpture, musical arrangement) that evokes a specific response from the viewer. According to Western philosophers, “aesthetic judgment” in the observer is premised on an attitude of “disinterested contemplation,” in which the viewer focuses on the item’s intrinsic, non-relational, and immediately perceptible properties.¹¹⁰ Thus, the Western concept of art encompasses objects and things that are susceptible of aesthetic appreciation and the more sophisticated and original the work is, the more it is protected by the law as an original work. Original authorship is the key to earning rights within the Western copyright system. The artist is rewarded with certain rights to incentivize his or her creation, and after a specific duration of time, the work will fall into the public domain to serve as inspiration for other artists.¹¹¹

Of course, the philosophy of aesthetics represents a distinctively Western experience. Under the philosophy of aesthetics, tribal art is generally placed within the category of “artifacts,” which is a vast repository of “primitive” and “non-Western” cultural expression. “Artifacts” are not considered “art” *even if* they contain elements that inspire aesthetic appreciation. This is why so much “tribal art” ended up in museums of natural history in the nineteenth century, rather than art museums.¹¹² Western aesthetics also excluded from the cultural category of art “phenomena” that lack significant aspects of “human design” and appeared to largely reflect “objects of nature” (arrangements of shells on a string, for example). To the Western “observer,” tribal cultural expression generally falls into the category of “artifacts”

governing art and the rights of creators); *see generally* STEPHEN DAVIES, *THE ARTFUL SPECIES: AESTHETICS, ART, AND EVOLUTION* (2012) (discussing the possibility of how aesthetics may be partly determined by human biology).

¹¹⁰ *See* Stephen Davies, *Non-Western Art and Art’s Definition*, *THEORIES OF ART TODAY* 199, 201–02 (Noël Carroll ed., 2000).

¹¹¹ 17 U.S.C. §§ 302–03 (2012) (stating the duration of a copyright in a work).

¹¹² *See* Tsosie, *Native Nations and Museums*, *supra* note 58, at 7.

or “phenomena.” The creator(s) are not considered to have rights of authorship, and therefore tribal designs and symbols are freely appropriated by others as merely “design” elements.¹¹³

Because modern art collectors often trade in “primitive art,” the art market must regulate what is the cultural patrimony of nations (for example, Mexico claims a national right to pre-Columbian art), as well as the private property of museums, which are constantly embattled by theft of original works and fraudulent reproductions. Native American cultural patrimony is regulated by statutes such as the Archaeological Resources Protection Act, which protects archaeological resources that are 100 years of age or older on federal and tribal lands,¹¹⁴ and the Native American Graves Protection and Repatriation Act, which criminalizes trafficking of tribal cultural patrimony and sacred objects.¹¹⁵ However, there is no domestic law regulating the intangible category of tribal cultural expression. There are countless images on the internet that reflect Native American people, including individuals in photographs; and tribal symbols, songs, designs, and art forms.¹¹⁶ The question is how to regulate the use of these images. Who owns tribal images and identities in the modern era?

¹¹³ See generally Kathy M’Closkey, *Up for Grabs: Assessing the Consequences of Sustained Appropriations of Navajo Weavers’ Patterns*, in NO DEAL!: INDIGENOUS ARTS AND THE POLITICS OF POSSESSION 128, 129–132 (Tressa Berman ed., 2012) (discussing how the Navajos’ rug market was flooded by cheap “knock-off” rugs because the Navajos could not protect their weaving patterns under U.S. law).

¹¹⁴ Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa–470mm (2012).

¹¹⁵ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2012).

¹¹⁶ See Kimberly Christen, Opening Archives *supra* note 106 at 193 (noting that “Digital technologies and the Internet have combined to produce both the possibility of greater indigenous access to collections, as well as a new set of tensions for communities” who seek to enforce cultural protocols for dealing with circulation of those materials).

B. Indigenous Perspectives on Art as Cultural Production

The late Elouise Cobell, a Blackfeet woman who was an acclaimed tribal leader, activist, and entrepreneur, said, “Art is the greatest asset Indian people have in our communities, yet it is the most underdeveloped.”¹¹⁷ A recent study on the economic value of art to Native communities found that “an estimated 30% of all Native peoples are practicing or potential artists and most live below the poverty line.”¹¹⁸ The same study examined the situation of emerging Native artists and found that they reported an annual household income of less than \$10,000.¹¹⁹ Native artists living on reservations are largely working through home-based enterprises for a cash income.¹²⁰ They often live hundreds or even thousands of miles from the urban art markets. They may lack access to electronic markets¹²¹ and they may instead rely upon non-Native gallery owners and agents to market their work to collectors. Clearly, as a group, Native artists lack direct access to a significant portion of the market¹²² Because of their disadvantaged status, they are also likely to lack the resources to obtain legal advice on how to use existing intellectual property law to protect their rights as individual artists. In that sense, Native artists are “underserved” by the contemporary legal structure.

As Ms. Cobell noted, however, cultural expression has always been of vital importance to Native peoples.¹²³ Language and art are

¹¹⁷ ARTSPACE, KATHLEEN PICKERING SHERMAN, FIRST PEOPLES FUND, LEVERAGING INVS. IN CREATIVITY, NW AREA FOUND., ESTABLISHING A CREATIVE ECONOMY: ART AS AN ECONOMIC ENGINE IN NATIVE COMMUNITIES 9 (Marianna Shay, 2013), *available* at <https://www.firstpeoplesfund.org/assets/uploads/documents/document-market-study.pdf>.

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.* at 17.

¹²⁰ *See id.* at 8–9.

¹²¹ *See id.* at 11–12.

¹²² *See id.*

¹²³ *See id.* at 1.

linked to tribal, cultural, and spiritual identity.¹²⁴ And Native art reflects the expression of living cultures, which are linked intergenerationally to their ancestors and the generations yet to be born.¹²⁵ Because Native art forms often embody traditional practices, including notions of stewardship and appropriate transmission of knowledge, it is incumbent upon Native communities to have the power to regulate cultural art forms. This is the genesis of movements to establish a “cultural trademark” to identify authentic Indigenous art and protect against misappropriation. For example, the Office of Hawaiian Affairs funded a Native Hawaiian Cultural Trademark study, which culminated in a 2007 report recommending the use of a cultural trademark program to protect the authenticity of Native Hawaiian art and the cultural transmission of knowledge that Native Hawaiian arts embody.¹²⁶ The Report documented the many issues that arise with any form of cultural certification, but recommended a process that would be consistent with Native Hawaiian practices of cultural transmission of knowledge and the genealogy of Native Hawaiian peoples.¹²⁷

The Maori “Toi Iho” Cultural Trademark program in Aotearoa (New Zealand) is cited by the authors of this report as a model.¹²⁸ The Maori “Toi Iho” Certification Trademark was created by a statute passed by the New Zealand parliament “to assist Maori to retain control over their cultural heritage and maintain the integrity of their art culture in an increasingly commercialized world.”¹²⁹ The legislation specified that the Certification Mark would be administered through the Arts Council of New Zealand in

¹²⁴ *Id.* at 5.

¹²⁵ *Id.*

¹²⁶ See HO’OIPO KALAENA’AUAO PA, HALE KU’AI STUDY GRP., NATIVE HAWAIIAN CULTURAL TRADEMARK STUDY: FINDINGS AND RECOMMENDATIONS 38–40 (2007), available at <http://hawaiiantrademarkstudy.com/Media/TrademarkStudyReport.pdf>.

¹²⁷ *Id.*

¹²⁸ *Id.* at 37–43.

¹²⁹ *Id.* at 37.

consultation with a parallel Maori arts agency, Te Waka Toi Cultural Arts Board.”¹³⁰ The Maori Arts Board is pivotal to the implementation of the program, and the actual Certification Mark is premised on the “Iho,” which is the essence of creation and the origin of Maori knowledge and tradition, representing the core of Maori arts.¹³¹ From this core symbol, emanate the “whakapapa” or genealogy lines of past, present and future generations, and there are colored spires in the design, which represent the creativity, innovation, and the dynamism of Maori artists.¹³²

Through the use of the Maori cultural trademark, the Maori people have assumed governing authority over their culture and its expression in authentic Maori art that is genealogically and culturally tied to Aotearoa.¹³³ This includes the traditional art forms of Maori people, which have a rich tradition of transmission of knowledge. But, it also includes the modern creations and innovations of contemporary Maori artists, who are engaged in a process of cultural production that reflects modern cultural identity. This is a very powerful example of what could happen for Native artists in the United States as a means to exert governance authority over Native American cultural production.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 39.

¹³³ *Id.* at 39. *But see* Jessica C. Lai, *Maori Culture in the Modern World: Its Creation, Appropriation, and Trade* 24 (Int’l Commc’ns & Art Law Lucerne, Working Paper No. 02, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961482 (“On its inception, toi iho was considered to be a world-leading initiative, often cited as a model to be used by other Indigenous peoples. However, the current National Government has decided to cease investment, management, licensing and promotion of toi iho. Creative New England stated that market research showed that it had not achieved increased sales of Maori art by licensed artists or retailers.”); LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CTR., NEW ZEALAND: MAORI CULTURE AND INTELLECTUAL PROPERTY LAW (2010), *available at* <http://www.loc.gov/law/help/nz-maori-culture/nz-maori-culture-and-intellectual-property-law.pdf>.

In the United States, inequities extend beyond the level of the individual artist to the level of the Indigenous group as a collective. Many American Indian and Alaska Native Nations continue to possess cultural methods of regulating tribal art forms. However, with a few exceptions, the idea of a “cultural trademark” for specific Indigenous nations has not received sustained attention. In the United States, the Indian Arts and Crafts Act is the only law that protects tribal governments and artisans from overt attempts by non-Indians to falsely market their goods as “Indian-made.”¹³⁴ However, the federal law is designed to avoid consumer confusion and not to substantiate tribal claims to cultural identity.¹³⁵ There are 566 federally recognized tribal governments in the United States, representing many distinctive cultures and language groups.¹³⁶ But the cultural distinctiveness of American Indian and Alaska Native Nations is often not seen. Rather, symbols such as the “dream catcher” become part of a generic Indian identity, which is widely appropriated by others. As of 2015, there is no domestic law in the United States regulating the appropriation of intangible tribal cultural heritage. Rather, the discussion of what rights Indigenous peoples have to their “traditional cultural expressions” is largely taking place in the international arena through the agencies of the United Nations and the World Intellectual Property Organization.¹³⁷

The nation-states possess governing authority within those structures and the dominant system of international trade depends upon a robust public domain to serve the commercial interests of

¹³⁴ See 25 U.S.C. § 305a (2012); see also Kelly Mauceri, Note, *Of Fakes and Frauds: An Analysis of National American Intangible Cultural Property Protection*, 5 GEO. J. L. & PUB. POL’Y 263, 268 (2007).

¹³⁵ Mauceri, *supra* note 134.

¹³⁶ INDIAN ENTITIES RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS, 80 Fed. Reg. 1942 (Jan. 14, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-01-14/pdf/2015-00509.pdf>.

¹³⁷ Draft Articles, *supra* note 32.

consumers and producers in a global economy.¹³⁸ Today, intangible cultural heritage is increasingly stored in electronic databases.¹³⁹ These archives of “traditional cultural expressions” currently lack clear definition of ownership. Does ownership go to the person or persons who created the database or archive? Does it go to the individuals who produced the recorded expression? Does it go to the Indigenous communities these individuals belong to? Or are these archives part of the “common heritage of all mankind,” an open-access resource and creative commons from which others may liberally borrow for their own purposes?

The policy discussion about cultural production will benefit from careful thinking and planning. Indigenous nations should develop their own governance for traditional cultural expression and should be actively involved in the dialogue about the relationship between art and cultural identity.

V. THE ROLE OF INTERNATIONAL LAW IN REGULATING INDIGENOUS CULTURAL EXPRESSION

As this essay has demonstrated, the protection of Indigenous cultural heritage in the United States is limited and largely depends upon the existence of a federal law, such as NAGPRA or the Indian Arts and Crafts Act, which validates specific rights of Indigenous peoples, although the underlying right is often

¹³⁸ See generally INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (CHRISTOPHER B. GRABER, KAROLINA KUPRECHT, & JESSICA C. LAI eds., 2012). See also Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Note by the Secretariat: Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expression/Expressions of Folklore*, WIPO/GTRKF/IC/17 (Nov. 24, 2010) [hereinafter Intergovernmental Committee on IP] (“Maintaining a rich and robust public domain is commonly put forward as an important public policy goal.”).

¹³⁹ See Anderson, *supra* note 102, and Christen, *supra* note 106, and accompanying text.

grounded upon Indigenous customary law.¹⁴⁰ To some extent, Indigenous customary law may be incorporated into specific federal laws. For example, under NAGPRA, the very definition of categories, such as “sacred objects” and “objects of cultural patrimony” depends upon the cultural construction given to a particular item by the Native American group under its traditional law.¹⁴¹ The federal laws protecting Indigenous cultural heritage are exceptional in relation to the general statutory and Constitutional laws of the United States, and the fact that they exist at all is directly related to the advocacy of Native leaders for redress of egregious historical conduct by the United States toward Indigenous peoples.¹⁴²

Traditional cultural expression is not currently regulated by U.S. domestic law, and international organizations have struggled to define the term in a meaningful way, as illustrated by the 2013 effort of WIPO to create a draft treaty on the governance of traditional cultural expression.¹⁴³ If the term is defined broadly as an expansive “cultural commons” which is not protected by existing intellectual property law, then the presumption will be that the nation-states control the overarching governance of Indigenous cultural expression and have the power to include these groups within certain “exceptional” forms of domestic statutory protection (such as the Indian Arts and Crafts Act), or exclude them from protection, enabling the appropriation of Native cultural expression at will by innovative Westerners. In his role as the U.N. Special

¹⁴⁰ See *infra* note 142 and accompanying text.

¹⁴¹ See 25 USC section 3001 (3) (C) (defining “sacred objects” with reference to traditional Native American religious practices) and (D) (defining “cultural patrimony” with reference to the value accorded under Native American cultural traditions).

¹⁴² See Senator Daniel K. Inouye, “Repatriation: Forging New Relationships,” 24 Ariz. St. L. J. 1-3 (1992) (describing the “dark picture of mistreatment” of Native American people and their deceased relatives that led to the enactment of NAGPRA).

¹⁴³ See WIPO treaty, *supra* note 32; Intergovernmental Committee on IP, *supra* note 32.

Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya counseled against such an approach, recommending instead that nation-states should recognize Indigenous peoples' rights to traditional knowledge and other aspects of their cultural heritage in alignment with the standards of international human rights law.¹⁴⁴

In the text that follows, I will sketch out the existing approach of international law to traditional cultural expression and compare the approach that might be generated under the international human rights law relevant to Indigenous peoples. The choice of approaches will likely be informed by the contemporary dialogue on cultural production and international trade, and I will draw on that dialogue in my discussion, acknowledging that there is no global consensus on the outer boundaries of this dynamic.

A. Traditional Cultural Expression

The effort to create an equitable set of policies for the governance of traditional cultural expression has been ongoing for several decades. In 1989, UNESCO defined "traditional cultural expression" as:

The totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community insofar as they reflect its culture and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.¹⁴⁵

¹⁴⁴ See Anaya, *supra* note 48 at 7.

¹⁴⁵ 1 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORG., Records of the General Conference, 25th Session 239 (1989), *available at* <http://unesdoc.unesco.org/images/0008/000846/084696e.pdf#page=242>.

In 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions with the stated objective of encouraging an intercultural dialogue that would promote respectful interchange among diverse cultural groups.¹⁴⁶ The 2005 Convention noted the link between culture and development as a common interest of global nations and called for an ethic of “partnership” among the nation-states, indicating that this would best serve their collective interest in promoting productive international trade. Significantly, this Convention upholds the sovereignty of the nation-states to implement the measures that they deem necessary to foster the diversity of cultural expressions within their territorial boundaries. Nation-states are encouraged to be sensitive to the special needs and circumstances of particular groups and cultures, while promoting an overall ethic of productive collaboration around the use of traditional cultural expression.

In the hands of the communities of origin, traditional cultural expression is a mechanism to transmit culture across multiple generations and to ensure the cultural survival of these cultural communities. Therefore, some commentators argue for a strong theory of group rights to traditional cultural expression, equivalent to standard categories of intellectual property rights, but situated in cultural communities rather than particular individuals.¹⁴⁷ However, traditional cultural expression is often contained in the databases and archives of museums and libraries, and there are no

¹⁴⁶ See Rebecca Tsosie, *International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property*, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (CHRISTOPHER B. GRABER, KAROLINA KUPRECHT, & JESSICA C. LAI eds., 2012) 233-34 and footnote 37 (discussing 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. 2440 UNTS 311 (adopted on 20 October 2005, entered into force 18 March 2007).

¹⁴⁷ See, e.g., Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000).

uniform policies on governance of these resources.¹⁴⁸ Libraries and museums play an important role in preserving and providing access to cultural heritage throughout the world, and some commentators argue against validating cultural rights in the communities of origin on the theory that libraries, archives, and museums have a duty to safeguard this knowledge as the “common heritage of all mankind.”¹⁴⁹ Under this view, the purpose of the institution is to catalogue and distribute information about global cultures and to build repositories of this knowledge, which is potentially valuable for many purposes.¹⁵⁰

It is clear that the communities of origin have legitimate concerns about facilitating public access to parts of their culture and the associated harms that can result from misappropriation and misuse of their cultures. These harms are even more likely to occur given technological advances, which enable libraries to collect, store, preserve, and digitize cultural works, and then transmit those digital representations broadly through the Internet where they can be downloaded and even modified without any authorization from the community of origin. As commentators note, some institutions are dealing with these issues on a case-by-case basis, developing institutional protocols and best practices to involve Indigenous peoples in collaborative management of repositories and archives of cultural heritage.¹⁵¹ For example, Kimberly Christen described three principles that were vital to a collaborative endeavor involving several Indigenous nations from the Plateau region of the

¹⁴⁸ Anderson, *supra* note 102 at 4 (noting that “in most cases, Indigenous people are not the legal copyright owners of the material,” which means that they cannot control how the material is used and accessed, and further noting that much of what they seek to protect “is already in the public domain”).

¹⁴⁹ See, e.g., Amy Hackney Blackwell & Christopher William Blackwell, *Hijacking Shared Heritage: Cultural Artifacts and Intellectual Property Rights*, 13 CHI. KENT. J. INTELL. PROP. 137, 143 (2013) (arguing for open sharing of data from any object or resource that does not fall under the protection of intellectual property rights laws).

¹⁵⁰ *Id.*

¹⁵¹ See Anderson and Christen, *supra* notes 102 and 106 and accompanying text.

Pacific Northwest.¹⁵² The first principle involved developing an inclusive approach to institutional holdings that comprised Native perspectives on the resources. The second principle was to respect and act on both Native American and Western approaches to “caring for archival collections.”¹⁵³ The third principle was to “consult with culturally affiliated community representatives to identify those materials that are culturally sensitive and develop procedures for access to and use of those materials.”¹⁵⁴

Similarly, experts within the fashion industry are counseling designers to work with Indigenous artists and communities to ensure respectful collaboration and avoid exploitive forms of cultural appropriation.¹⁵⁵ This effort also involves a set of best practices, including involving Native peoples at the outset of “ideation and design processes,” welcoming their “influence and control” throughout the production and marketing process, and offering “financial or resource-based compensation.”¹⁵⁶ In addition, cultural outsiders are encouraged to respect the views of Indigenous governments, such as the Hopi Tribe, which oppose the commercial use of Hopi culture by any outside entity based on their belief that cultural knowledge is sacred and that “only certain people can have access to certain kinds of information.”¹⁵⁷

At this point, these standards and best practices are considered voluntary and optional in many cases, precisely because the Indigenous artist or tribal government may not have a recognized legal right under existing law. The expansion of technology and global markets offers an additional challenge, as does the reconfiguration of contemporary cultures due to the transnational migration of peoples and cultures.

¹⁵² Christen, *supra* note 106 at 195-96.

¹⁵³ *Id.* at 195.

¹⁵⁴ *Id.* at 196.

¹⁵⁵ See Finnerty, *supra* note 8.at 2F.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 3F (discussing comments of Leigh Kuwanwisiwma, who leads the Hopi Tribal Cultural Preservation Office).

The harms of cultural misappropriation are accentuated in the contemporary era by politics of “super-diversity,” which Steven Vertovec describes as a mechanism, which shapes national identity in the wake of new forms of immigration and transnationalism.¹⁵⁸ As applied to cultural production, super-diversity suggests that “culture” and “cultural difference” (diversity) will be used to construct, maintain, transform, or undermine national identities given the diverse forms of human migration and social organization that characterize the modern world.¹⁵⁹ Vertovec claims that “immigrant cultures are routinely posed as threats to national culture,” and therefore issues surrounding migration “stimulate, manifest, and reproduce cultural politics.”¹⁶⁰ Within this matrix, policymakers manipulate “popular notions of national versus alien culture” by invoking a notion of “difference” premised upon “particular images, narratives, and symbols of national culture.”¹⁶¹

As American identity is transformed through the politics of super-diversity, cultural production will increasingly be used to sustain a particular national identity. Where will Indigenous identity fit within this new politics? It is unclear how the politics of super-diversity will affect cultural production. It is possible that tribal cultures could be inadvertently associated with foreign cultures for purposes of exclusionary laws designed to uphold the dominant culture, such as the recent effort of legislators in Oklahoma to ban state courts from invoking any “alien” or “foreign law,” with a specific reference to Sharia law,¹⁶² but

158 Steven Vertovec, *The Cultural Politics of Nation and Migration*, 40 ANN. REV. ANTHROPOLOGY 241 (2011).

159 *Id.*

160 *Id.* at 242.

161 *Id.* at 242; *see also Griffith v. Caney Valley Pub. Sch.*, 2015 U.S. Dist. LEXIS 66059 (N.D. Okla. May 20, 2015).

162 H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010), *available at* <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf>; *see also Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (affirming issuance of a

clearly implicating tribal law systems as well. It is also possible that the national governments will further accentuate the construction of an “American” culture that draws heavily upon its “Indigenous” past, as a way to encompass Native cultures within the dominant narrative, in contrast to the “immigrant” cultures of Asians and Latinos. Significantly, the media has a prominent role in developing “national narratives” and in the construction of imagined (national and transnational) communities.¹⁶³ This is an additional reason why media images employing Native stereotypes have such a profound influence on the construction of identity.

I would argue that the project of super-diversity should include attention to the political movement of Indigenous self-determination, which rejects multiculturalism in favor of what Professor Duane Champagne terms “multinationalism,” that is the construction of a new consensual political order in which indigenous peoples are included as sovereign governments and treated with equal respect.¹⁶⁴ Within this matrix, it is imperative that Indigenous peoples have the ability to control their cultural identity. The right of self-determination depends upon the ability of a people to define themselves autonomously as separate cultural groups with distinctive ties to territory, distinctive forms of social organization (clans/kinship groups), separate languages, and the ability to govern themselves under their own laws and institutions. Indigenous political identity will always depend, to some extent, upon the group’s ability to use its core cultural identity to designate itself as separate from the nation-state and other groups. This means that cultural production must be consistent with indigenous norms about what is appropriately shared, and what

preliminary injunction of the state constitutional amendment as there was a likelihood of success that the provision would be unconstitutional).

¹⁶³ Isabelle Rigoni, *Intersectionality and Mediated Cultural Production in a Globalized Post-Colonial World*, 35 *ETHNIC AND RACIAL STUD.* 834, 835 (2012).

¹⁶⁴ Duane Champagne, *Rethinking Native Relations with Contemporary Nation States*, in *INDIGENOUS PEOPLES AND THE MODERN NATION STATE* 3–23 (Duane Champagne et al., eds. 2009).

must be retained within the group (or even, more narrowly, for example by certain clans or societies within the group).

This mode of governance may be a challenge for future generations, given the prevalence of many forms of shared cultural expression. So, for example, young Native artists have begun to explore synergies with hip-hop culture and rap music, as well as skateboard culture.¹⁶⁵ Professor David Martinez explores the work of Doug Miles, an Apache artist and creator of Apache Skateboards, who observes that skateboarding absorbs all nationalities and cultures, but also encourages Native artists to “take back the discourse on their work and redirect the discussion away from the mythical pristine lens of the past toward how Indigenous artists actually see themselves.”¹⁶⁶ Native identity is fluid and changing, but also stable and enduring. Native artists and tribal governments are engaged in cultural production, just as the dominant society is. However, it is necessary to see what their respective goals and purposes are, and also understand where the conflicts are located.

B. The Human Rights Approach to Indigenous Governance of Cultural Heritage.

As Professor James Anaya has explained, there are several composite norms embedded within the concept of Indigenous self-determination, including the norm of cultural integrity.¹⁶⁷ In my prior work, I have argued that the human rights approach should be used to reshape the domestic and international law governing intangible cultural heritage as it pertains to Indigenous peoples.¹⁶⁸ The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) offers the most comprehensive treatment of the norm of

¹⁶⁵ See David Martinez, *From Off the Rez to Off the Hook! Douglas Miles and Apache Skateboards*, 37 AM. INDIAN Q. 370, 370 (2013).

¹⁶⁶ *Id.* at 373.

¹⁶⁷ See Tsosie, *International Trade in Indigenous Cultural Heritage*, *supra* note 146 at 225.

¹⁶⁸ *See Id.*

cultural integrity in its many provisions, and Article 31 specifically articulates the right of Indigenous peoples to protect their cultural heritage:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicine, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.¹⁶⁹

As Article 31 recognizes, most Indigenous peoples do not separate the tangible and intangible components of their cultural heritage. Indigenous knowledge gives meaning to cultural symbols and songs, and that meaning must be articulated and governed by Indigenous peoples. Any other outcome would perpetuate the forms of “epistemic injustice” that have characterized the process of colonization.

In my view, the right of tribal governments to protect their intangible cultural heritage constitutes the core of their inherent sovereignty as Indigenous nations. This “cultural” form of sovereignty cannot be limited by the same artificial construction of “sovereignty” that informs the characterization of federally-

¹⁶⁹ Declaration on the Rights of Indigenous Peoples, art. 31, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

recognized Indian tribes as “domestic dependent governments.” This construction emerged out of the Doctrine of Discovery that was used to justify European claims to land and sovereignty during the colonial era. It cannot now serve as the basis to appropriate the core of Indigenous culture as belonging to the United States or any other contemporary nation-state which purports to act on behalf of the Indigenous peoples that were subsumed within its borders. Rather, as Professor Anaya observes “the same basic arguments that have resulted in the rejection of the *terra nullius* doctrine also speak for a reformation of the public domain, as it applies to indigenous knowledge.”¹⁷⁰ Under this logic, Native people have always been the custodians of their traditional knowledge and traditional cultural expressions. They never ceded their governance rights and there is no justifiable basis to find that the nation-state somehow assumed the right to appropriate these aspects of Indigenous identity.

Thus, the only challenge for contemporary policymakers is to recognize how existing jurisdictional limitations constrain the ability of Indigenous governments to protect their intangible cultural heritage from being misappropriated for commercial gain or other uses. Tribal governments currently have the power to enact laws to govern their members and their resources, but they may be hampered in their ability to apply this law outside reservation boundaries to non-members of the tribe. This is the area where federal law could prove useful, if there is an appropriate set of consultations between the United States and Indigenous nations, and if there is a way to achieve a political consensus about the terms of such protection, which will necessarily require modifications of the domestic law.

At the international level, the nation-states that participate in WIPO are differentiating the categories of “traditional knowledge,” “traditional cultural expressions,” and “genetic resources” for potential action through a multilateral treaty process. The United

¹⁷⁰ Professor Anaya statement, *supra* note 43 at 5.

States is participating in this effort even though it has not conducted a formal consultation on this topic with the elected leaders of the 566 Federally-recognized Indian tribes, which reprises the dynamic of colonial governance. The political leaders of the nation-states view Indigenous traditional knowledge and genetic resources as vital to the appropriate development of natural resources in an era of climate change.¹⁷¹ For example, the study of Indigenous seed stocks and farming practices may promote the development of drought-resistant crops by biotech companies seeking to patent new products and enable the commercial transfer of adaptive technologies to countries likely to suffer from warming trends and drought in the years to come.¹⁷² Expanding innovation in science and technology is the driving force behind the current effort to reach global consensus on the use of traditional knowledge and genetic resources.

In comparison, the use of traditional cultural expressions is often allocated less importance due to the view that this is related to “art,” rather than “science and technology.” Indigenous governments should pay close attention to this effort by the nation-states to create new categories and hierarchies that replicate the same Western cultural assumptions that were used to divest Indigenous nations of their lands and cultural resources. Will “traditional cultural expressions” be considered a resource like property (or intellectual property)? Or are they merely ideas, free for appropriation by cultural outsiders? The public benefit argument has always been employed by the colonial nations and their descendants to justify appropriation from Native peoples. This argument continues to be made in the contemporary era in the context of a robust public domain.

¹⁷¹ See Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L AND POL’Y J. 188, 250 (2009) (discussing role of Indigenous knowledge in sustainability planning).

Indigenous peoples must take back the power to define the terms of the debate within their own cultural frameworks and argue for a form of governance that respects and protects the core of Indigenous culture. This process must begin internally, within each Indigenous group, because only tribal law can adequately reflect the categories and interests at stake. Professor Angela Riley and Professor Kristen Carpenter describe the process of using traditional norms and practices to generate new frameworks of tribal law in their article “Indigenous Peoples and the Jurisgenerative Moment in Human Rights.”¹⁷³ Building on their insights, I would argue that tribal law on the protection of traditional knowledge and cultural expression can be used to generate a dialogue with the United States and potentially national legislation that adequately protects the interests of tribal governments. With participation from Indigenous governments, the United States would be able to engage in a discussion with other nation-states about the terms of a multinational convention or treaty that would protect Indigenous rights. Without such collaboration, the United States will likely take actions that will further impair Indigenous rights. Through an intercultural process of dialogue and collaboration among Indigenous peoples and the nation-states that encompass them, it may be possible to generate new categories of law that can overcome the mythology of discovery and effectively protect the rights of indigenous peoples.

V. CONCLUSION

The fundamental challenge for the future is to develop equitable governance structures that facilitate respect and responsibility for the important values and interests at stake. There are likely various potential models of governance, depending upon the nature of the community. A “one size fits all” approach to protecting the rights of an Indigenous community to traditional cultural expression may not be feasible because these communities

¹⁷³ Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 175 (2014).

are not equally situated. For many Indigenous peoples, traditional cultural expression is imbued with sacred value and this must be acknowledged and respected.¹⁷⁴ Within the United States, the federal government should engage a consultation with tribal governments to assess the possibility of issuing statutory protection for tribal “cultural trademarks” as a first step toward protecting traditional cultural expression. For American Indian, Alaska Native, and Native Hawaiian peoples within the United States, the overall issue of governance must be addressed through international, domestic, and tribal structures of law and policy. The principles of “humanity and justice” should inform the contemporary dialogue on cultural production, and tribal governments should have an equal voice in creating a workable structure for governance of traditional cultural expression.

¹⁷⁴ See Finnerty, *supra* note 8 (quoting the Director of the Hopi Tribal Preservation Office who stated that the Hopi have chosen not to trademark their designs because they are sacred and must be protected in perpetuity).