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Clarifying Cultural Property

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INTRODUCTION

Author Stephenie Meyer forever altered the cultural existence of Quileute Indians when she wrote them into her *Twilight* novels. Now a veritable global phenomenon complete with books, movies, and affiliated merchandise, the *Twilight* series depicts young, male members of the tribe as vampire-fighting werewolves who ferociously defend a peace and territorial treaty made with local bloodsuckers.[1] In reality, the Quileute Tribe consists of approximately 700 Indians, many of whom live on a remote reservation in the pacific Northwest, a tiny parcel of the once vast Quileute territory. Since *Twilight*'s unprecedented international success, the Quileute have been overwhelmed with fans and entrepreneurs, all grasping, quite literally in some cases, for their own piece of the Quileute.[2]

Meyer boasted on her own blog, in fact, that she took rocks from First Beach, which is located under the jurisdiction of the Quileute Nation, and placed them on her windowsill for inspiration when writing her novels.[3] And that was just the beginning. Dozens of tourists have followed in her path and removed rocks from First Beach for their own collections. MSN.com even entered a reservation cemetery to film the graves of deceased tribal elders, later publishing a macabre video montage set to music on the Internet. Busloads of tourists roll through the reservation daily, throwing the spotlight on a tribe that never sought the attention.

With the recent release of the third *Twilight* movie in the series, the commercialization of all things Quileute—from movies and books, to charm bracelets and earrings—has spawned a multimillion-dollar empire. Yet, little of this benefits the Quileute people, who remain impoverished and are currently devoting most of

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their scarce resources to a fight with the U.S. government over their ancestral lands.[4] At the same time, copyright, trademark, and other laws protect those who have commodified Quileute culture—giving everyone from Stephenie Meyer, Summit Entertainment, and a dozen online T-shirt sellers the legal "right" to profit from so-called Quileute creations.[5]

This is, in our view, a cultural property story. For the Quileute, as for most indigenous peoples in the world, culture is tied to their lands, resources, language, religion, sovereignty, and the Seventh Generation. Since the arrival of Europeans in North America, the Quileute have suffered severe losses of all of these resources, with the *Twilight* phenomenon representing only the most contemporary incarnation. Yet, like other indigenous peoples, the Quileute are not content to sit back while others commodify their cultural heritage. Instead, they are using legal tools to protect their cultural resources and navigate their participation in contemporary commerce.

In 2009, for example, the Quileute Nation complained to MSN.com that its video team had trespassed onto tribal land and caused "an enormous amount of pain and suffering to the Quileute Nation as a whole, but especially to the descendants of the Quileute chief" whose grave had been filmed.[6] MSN.com issued a public apology and took down the video,[7] and subsequent documentary crews have approached the Quileute Nation to negotiate the terms of filmmaking on the reservation, leading to insightful coverage of their tribal education and cultural history.[8] Recently, the tribe launched a *Twilight at Quileute* web site to provide information about the tribe and to sell tribal baskets, necklaces, canned salmon, and clothing.[9] As tribal Chair Anna Rose Counsell-Geyer explained, "Traveling across our great country and observing other native tribes commercially marketing their wares in a successful and respectful manner motivated us to explore the concept of promoting culturally appropriate authentic Quileute items online."[10]

While the playing field is hardly level between the Quileute and those who commodify their culture, the Quileute have begun to engage the outside world on their own terms. In these respects, the Quileute story also evokes some of the themes addressed in anthropologist Michael Brown's *Who Owns Native Culture?*, one of the first books to expose indigenous peoples' attempts to protect their cultural heritage. Our own article, "In Defense of Property" (IDP), detailed a theory of indigenous cultural property generally and also responded to what we saw as a critical view, expressed by Brown and others, of property law's role in indigenous cultural property claims. As a matter of property theory and practice, we argued that indigenous peoples have a legitimate interest in exercising a duty of care or "stewardship" over resources—intellectual, real, personal, and tribal properties—that express their collective identity or "peoplehood." Brown's current essay raises thoughtful and provocative questions regarding the intersection of sovereignty, property, and culture, and for this reason, we are especially grateful for the opportunity to discover common ground—while raising some points for further analysis and dialogue.

Moreover, a thoughtful discussion of these issues is quite timely. Even beyond the Quileute and other domestic matters, a burgeoning body of international human rights law is developing around the concept that many different components of indigenous peoples' cultural property are interrelated. Path-breaking cases from in the Inter-American human rights system, such as those involving the Sawhoyamaxa, Mayans, and the Western Shoshone, among others[11]—illustrate how claims for equality, human rights, access to culture, and rights to property cannot be disaggregated into separate pieces. Both the claimants and the tribunals go to great lengths to demonstrate how these claims are linked and interdependent.[12]

In the landmark case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[13] for example, the Awas Tingni, a small native community living on the Atlantic coast of Nicaragua, sued the Nicaraguan Government for granting a major logging concession to Awas Tingni territory without its consent. On one level the case was about the ways in which logging would interfere with the community's subsistence practices. But it was also broader and deeper than that. The very methods of rotating lands for agriculture and hunting boar were aspects of the culture that would be severely, if not completely, disrupted by the logging practices.[14] The contested lands were also the site of the community's burial grounds and other spiritual elements. In the absence of property rights, the Awas Tingni could not protect these aspects of their culture against destruction by state or corporate interests.

In finding for the Awas Tingni, the court wrote that they have the right to live on their own territory based, in part, on the "close ties of indigenous people with the land." These ties must be understood not merely as title claims but as the "fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival." For indigenous communities like the Awas Tingni, whose traditions include a communitarian conception of land ownership, the court explained that "relations to the land are not merely a matter of possession and production but a material and spiritual element" of their culture. The right to occupy and control the use of traditional community territory is necessary not only to protect the human rights of current tribal members but to "preserve their cultural legacy and transmit it to future generations."[15] Ultimately, the court ordered that Nicaragua demarcate the Awas Tingni lands, based on their customary use patterns, and to respect these lands as their legally protected property.

It is precisely because of the interrelated nature of such claims that an evaluation of the respective roles of property, culture, and sovereignty in indigenous peoples' cultural property cases is indispensable. Toward this end, Brown's provocative response to IDP pushes us to refine three points of analysis: first, whether or not indigenous peoples should, as both a descriptive and a normative matter, be afforded particularized treatment under cultural, real, and intellectual property law; second, to evaluate more precisely the operative principles behind our proposed systems of stewardship and governance; and third, to explore the implications of protecting—or commodifying—the cultural properties of indigenous peoples in

light of the public domain and the fluidity and hybridity that embodies our global culture. We respond to each in turn and appreciate the opportunity to delineate our ideas in greater detail.

1. SOVEREIGNTY AND PROPERTY

As a starting point, Brown offers a powerful objection to "sovereignty" and "property" as bases for indigenous peoples' cultural property claims, pointing out that as a practical matter tribal assertions of sovereignty or ownership over cultural resources will do little to "insulate a community from every outside influence" or "assert control over public discussion" of Indian culture and traditions by outsiders. At the outset, we wish to clarify that many of the indigenous property claims we discuss within our article stem not from attempts to control public discussion, but from a desire to restore indigenous cultural properties to a comparable baseline of protections that many other social groups or individual property owners already enjoy. Presumably, Brown would not contest this point. He does, however, express discomfort with claims based on indigenous peoples' status as such, questioning the workability of property claims based on the nuanced and complex aspects of indigenous identity. To the extent that this may be an issue of lawyers and anthropologists talking past one another, we are pleased to clarify some legal concepts.

As a matter of positive law, of course, indigenous groups have historically been treated as special subjects of concern in both American domestic and international human rights law. As the works of scholars like Will Kymlicka and S. James Anaya have detailed, their mistreatment has been vastly different in both degree and kind than that even of other colonized groups, justifying a particularized design and trajectory of legal entitlements.[16] In this sense, we would situate IDP within these mainstream, accepted legal approaches, both domestically and internationally, that seek to extend basic notions of equality and nondiscrimination to indigenous peoples.[17]

In the United States, Indian people and their lawyers often describe tribes' legal status through the language of sovereignty, a term that strikes a discordant note with Brown, who says that we, like most legal scholars, "fail to ponder sovereignty's inherent limits." Admittedly, sovereignty is a deeply contested term, which has inspired far more scrutiny and criticism than can be conveyed here.[18] But, quite simply, despite roots in the historical image of a European monarch's absolute power over his subjects, current international, domestic, and indigenous legal practice treats sovereignty as connoting a sphere of governing authority, exercised in relationship with other states, peoples, and citizens.[19] In the United States, there are three sovereigns—the federal, state, and tribal governments—whose concomitant presence and formal legal status give rise to a set of necessarily limited powers.[20]

Thus, we use the language of sovereignty, not because we (mis)understand it as unlimited and unchecked, but because it accurately communicates the political status of American Indian tribes in relation to other governments within the U.S. legal framework. Undoubtedly, there exists some degree of contradiction in American Indian tribes' status as "domestic dependent nations," given that it simultaneously characterizes Indian nations as both dependent and independent vis-à-vis the nation-state. As Indian law scholarship explains, however, these seemingly contradictory positions are reconciled in the U.S. context by understanding that tribes' "dependent" status obligates the federal government to act as a fiduciary or trustee to tribes, largely to protect and respect their independent status, in the form of nationhood and self-governance.[21] In the international context—including as contained the UN Declaration on the Rights of Indigenous Peoples[22]—this space of authority is described as a right of self-determination rather than sovereignty, but both terms underscore the call for indigenous peoples' rights to autonomy over their cultural resources.[23] Accordingly, we reiterate IDP's appreciation of non-U.S. indigenous as well as nonindigenous cultural property claims and emphasize that our work does not, either conceptually or practically, preclude the possibility that other peoples can—and, rightfully, should—pursue their own claims for protection of their cultural property.

Clarification of *property* is also necessary here, as we respectfully suggest that Brown persists in equating property with ownership[24]—a characterization that misses one of the central points of IDP (property interests are broader than ownership interests) and the significant body of property law, theory, and practice supporting that point. While U.S. contemporary property laws are influenced by the eighteenth-century Anglo-American ideal of owners' right to do whatever they want with their own land or other resources, this classic conception has been thoroughly debunked on both descriptive and normative grounds by legal scholars going back to the 1930s.[25] Today, a basic tenet of property law is that the proverbial bundle of rights can be *disaggregated* with title holders and nontitle holders having various rights and responsibilities to the property. Dozens of generic property law arrangements—landlord–tenant, copyright registrant–public, landowner–easement holder—illustrate the limited nature of property interests among participants in our system. Thus, we begin with the premise that all property rights are limited, to some extent, by competing interests, and that judgments about where to place the limits should reflect societal norms and values. So, from our perspective, assertions of cultural property rights will occasionally, but rarely, vest indigenous peoples with the absolute powers of control, exclusion, or alienation that Brown seems to fear.

2. STEWARDSHIP AND GOVERNANCE

With some of our foundational terms and principles clarified, we turn to Brown's discussion of our stewardship model. He writes that our cultural property analysis

identifies "no limits to the proposed stewardship rights of indigenous peoples over cultural productions, knowledge, and biological inheritance that they insist are theirs alone."[26] In his view, we fail to address when, if ever, indigenous claims should be "subordinated to [the claims of] the global community?" Brown is not the only scholar to propound what we see as a *limiting principles* criticism of IDP. Expressing skepticism about whether one can become a steward without being so-designated by the owner, Kal Raustiala and Stephen Munzer further query:

> Assume . . . that an indigenous people can appoint itself steward over its own [traditional knowledge]. If there are competing claims of stewardship, it is not evident how the law should adjudicate among them. . . . Could Jewish people appoint themselves stewards of klezmer, or African Americans appoint themselves stewards of jazz?[27]

Like Brown, Raustiala and Munzer seem to worry that the "limitless" nature of indigenous claims to cultural property would be difficult to administer and threaten the legitimate interests of others in the same resource. In sacred sites litigation, courts have similarly wondered aloud if a tribe's opposition to development in a particular area might actually represent broader Indian attempts to regain "rather spacious tracts of public property."[28] Litigating parties, with some sympathy from the courts, have also expressed fears that Indians might make a religious claim to the Lincoln Memorial[29] or the color of government file cabinets.[30]

We hear in all of these critiques a plaintive cry for limits—theoretical, doctrinal, and practical—to indigenous peoples' cultural property claims. We make two preliminary responses to this concern. First, it is important to consider the operative legal context under which our stewardship claims are offered. Many areas of cultural property protection originate from baselines of zero legal protection for indigenous peoples' cultural resources.[31] Returning to the sacred sites cases, for example, under current U.S. Supreme Court precedent, the First Amendment has offered *no* protection for American Indian sacred sites located on federal public lands.[32] Consider also the Native American Graves Protection and Repatriation Act (NAGPRA), which, among other things, provides tribes with the opportunity to consult on projects that will disturb burial sites on federal and tribal lands. NAGPRA was enacted, not to afford indigenous peoples special rights to graves protection, but because Congress acknowledged that state cemetery protection laws had not historically applied to—or protected—Indian cemeteries.[33]

Concomitantly, we point out that to the extent that the law has evolved through statutory and administrative reforms, American Indians are still often afforded only a procedural right to participate in consultations about the treatment of their cultural property, but seldom possess any substantive right of access, title, maintenance, or representation. Consider, for example, (1) the National Collegiate Athletic Association (NCAA) program in which universities are encouraged to seek tribal consent and participation vis-à-vis controversial tribal mascot use;[34] (2) the National Historic Preservation Act's (NHPA's) requirement that public land use agencies consult, on a government-to-government basis, with Indian nations on

federal undertakings that may adversely affect sacred sites;[35] and (3) NAGPRA's provisions that federally funded museums must inventory their collections of indigenous human remains and associated funerary objects, and then notify and work with tribes to facilitate their repatriation.[36] These are all extremely modest legal rights that, in our view, do not scream for limits.

Second, we do agree that, in some instances, indigenous peoples' claims may need to accommodate others' interests in science, speech, or invention. This is fully consistent with our theoretical and doctrinal approach to property and sovereignty in which the legal system should acknowledge stakeholders with a legitimate claim to certain entitlements. However, to assert that indigenous groups might legitimately—pursuant to our theory—appoint themselves stewards of the Lincoln Memorial demonstrates both a factual and legal disconnect with the way stewardship works in indigenous communities. The duty to steward cultural resources originates in tribal customary law, which articulates the relationship between the people and the world around them.[37] In most instances, tribal customary law dates back to the tribe's very creation story, identifying certain resources as critical to the community and thereby necessitating human care. Because tribal law on cultural resources is ancient, predating the arrival of Anglo-American legal principles, its stewardship principles are not dependent on Anglo-American notions of property in which the owner usually has the power to designate someone else as the steward of his property. And yet, as we argued in IDP, we believe that Anglo-American property law is sufficiently flexible and capacious to encompass an indigenous stewardship model.[38]

Both contemporary cases and recent scholarship have begun to demonstrate how tribal law and custom place explicit limits on an indigenous community's rights and duties to cultural resources.[39] In *Navajo Nation v. United States Forest Service*, for example, several tribes sued under the Religious Freedom Restoration Act (RFRA) to stop the desecration of the San Francisco Peaks, a holy site where the Forest Service had approved the use of wastewater in snowmaking for a private ski resort. The en banc Ninth Circuit, relying on the Supreme Court's decision in *Lyng v. Northwest Cemetery Protective Association*,[40] rejected the tribes' arguments, in part because it could see no limits to the Indians' claims. Surely, in the majority's viewpoint, the government could not function if the Indians were free to designate any mountain on the public lands to be "sacred" and thus require federal accommodation under federal statutes. Dissenting Judge Fletcher pointed out the fallacy of this argument, noting:

> The majority's implication rests upon an inadequate review of the record . . . while there are many mountains within White Mountain Apache, Navajo, and Havasupai historic territory, only a few of these mountains are "holy" or particularly "sacred." . . . For the Navajo, there are . . . four holy mountains. They are the San Francisco Peaks, the Blanca Peak, Mt. Taylor, and the Hesperus Mountains.[41]

Then Judge Fletcher described in great detail the tribal custom associated with San Francisco Peaks, including the story of the Navajo deity Changing Woman,

who resided there at the time of creation, and the contemporary religious practices involving water and plants that would be desecrated by the proposed use of waste material. The Navajo creation story—and the legal and cultural responsibilities it sets forth—is told through a *specific* set of locations, events, and values.[42] Such customary law provides no basis for the Navajo people to claim themselves stewards of a limitless number of mountains or other resources across the southwest. Through this analysis, Judge Fletcher was able to discern a "substantial burden" on Navajo (and Hopi) religious practices that did not implicate the entire land holdings of the federal government.[43]

Judge Fletcher's opinion, albeit a dissenting one, thus provides a practical view of tribal customary law as providing discernible limits on Indian cultural property claims. It is one example that may respond to Brown's worry that IDP has "difficult[y]" in "getting from splendid abstraction to real-world complexity." That said, we agree that IDP is primarily a theoretical work. In articulating a theory of property based in conceptions of peoplehood and stewardship, we did not, for example, propose model legislation to modify or extend existing property rights (though we have made such suggestions elsewhere).[44] Given the scope of subject matters, geographies, and peoples we are talking about—everything from botanical claims in Peru to sports mascots in Illinois—it would be extremely difficult to propound a particularized set of formulations to determine where such limits should lie in every conceivable case.

The bridge, in our view, between theory and practice relies on engaging with a *governance* approach to cultural property disputes that does support real-world solutions, just as Judge Fletcher's dissent suggested.[45] Indeed, an empowered governance approach to cultural property disputes seems to be gaining currency across academic disciplines and around the world. Since we wrote IDP, for example, Arizona State University (ASU) entered into a settlement with the Havasupai Indian tribe to "remedy the wrong that was done" when an ASU geneticist, having obtained Havasupai blood samples for diabetes research, also used the samples in research on Havasupai mental health and tribal origins without the donors' consent.[46] The geneticist, to this day, maintains that she "was doing good science."[47] But many institutions and researchers understand that such studies, no matter how important from a scientific perspective, should only occur with meaningful indigenous consent. For example, the Canadian Institutes of Health Research has recently promulgated guidelines in which researchers working with aboriginal communities should obtain the community's consent, undertake research of benefit to the community, and translate resulting publications into the community's language.[48] This would seem to be a governance approach in which indigenous peoples are empowered to negotiate the terms of the scientific research that draws resources from their communities.

More generally, groups such as the United Nations World Intellectual Property Organization (WIPO) are working diligently to find ways both to protect indigenous peoples' intangible culture and to balance critical interests of creativity and

free speech.[49] These are formidable projects, indeed. As Rosemary Coombe has suggested, it may take more conversations like this one between scholars from divergent disciplines to address practical issues of cultural property governance.[50]

3. COMMODIFICATION AND ITS DISCONTENTS

In the third part of his response, Brown expresses a great deal of discomfort with the idea of commodification generally. Brown appears to be rightly concerned with the "direction of commodifying every aspect of human identity," as he poses the provocative question: "is it possible to define culture as property without commodifying it?"[51] In support of his critique, Brown discusses a book by John and Jean Comaroff, *Ethnicity, Inc.*, which decries the association of property with identity. "'Identity,' the Comaroffs declare (29), 'is increasingly claimed as *property* by its living heirs, who proceed to manage it by palpably corporate means: to brand it and sell it, even to anthropologists, in self-consciously consumable forms' [emphasis in original]."[52] This is admittedly a complicated observation, which Brown advances by suggesting that it is quite difficult to pursue the goals of propertization without some form of commodification.

At the outset, we note that Brown's concerns about commodification focus almost exclusively on *intangible* cultural property, a category that we concede is incredibly complex. Yet, we reiterate here that those claims compose only one (albeit important) aspect of achieving an overall understanding of the protection of cultural property. In our view, many of the most salient issues regarding cultural properties—including native peoples' efforts to protect sacred sites, hold on to their ancestral territory, and repatriate and rebury ancestors and funerary objects currently held *en masse* in museums—do not involve commodification.[53] Indeed, many of these claims concern nonfungible properties that, by definition and as a matter of tribal law, would fall within a protected sphere of inalienability.[54] Here, we think it is important to distinguish between the property law concepts of *title* (classically defined as evidence of one's ownership interest, including the right to alienate) and *custody* (connoting guardianship or a duty of care). While the issue of title certainly connects to Brown's skepticism regarding commodification, much of what we are concerned with regarding tangible property (funerary remains, sacred sites, etc.) involves the stewardship values inculcated by custody over inalienable goods that elide Brown's concerns about commodification. Indeed, since so much of our commentary gravitates toward the goal of custody rather than title, it is important to observe, at the outset, that protection of some cultural objects does not always lead to market-based solutions; in fact, quite the opposite.

Nevertheless, here and elsewhere Brown expresses his deep concern over the "crisis of the public domain" and, from his perspective, our failure to resolve this issue of real concern.[55] Here, we sympathize with Brown's desire to preserve the public domain, but we part ways with Brown's suggestion that protecting intangible as-

pects of indigenous culture is at odds with this goal. Three arguments may be made to respond to Brown's quite understandable concerns, however. First, many ethnicities of all races, colors, nationalities, and tribal and nontribal affiliations commodify different aspects of their identities by selling cultural objects, propertizing aspects of their culture, or holding cultural events, either to develop cultural awareness or monetary gain.[56] Many nonethnic groups do the same—universities, sports teams, labor unions, political movements, and the like.[57] Brown's expression of concern, we respectfully suggest, fails to adequately capture precisely why indigenous groups should be singled out for more critical attention than any other ethnic or nonethnic group that may pursue the same goals of commodifying aspects of their cultural identity.

Consider, for example, Brown's point that the protection of Navajo rug designs is impractical. The issue, for Brown, it seems, is not that there cannot be intellectual property protection in rug designs, but that indigenous peoples have somehow missed—and are trying to perhaps overstate—their rights to commodify. If, for example, the Navajo had trademarked symbols and used them in commerce, under the federal Lanham Act they could continue to be used in perpetuity, presumably without opposition by Brown and his counterparts, even though this, too, would shrink the public domain. To this end, Brown offers the solution of copyrighting Navajo rug designs for infringement (plus a fair trade solution to prevent misappropriation), and we heartily applaud this as a potential solution, though we note that this, too, fails to resolve Brown's concerns regarding the public domain.

Second, if indigenous groups and tribes are somehow less able to commodify elements of their cultures—whether it be traditional knowledge, artifacts, or other types of fungible goods—then it paves the way for what we believe is already taking place: a significant scale of appropriation without remuneration or attribution.[58] (One only need to look at our introduction to this essay to see a poignant example). To be sure, Brown is sensitive to these concerns, a point that intersects precisely with his suggestion of increased enforcement of intellectual property interests, complemented by a fair trade regime that protects native interests. At the same time, however, Brown suggests that his ultimate goal is to expand the public domain, making information more "free." Yet, we respectfully observe that many of his illustrations refer to indigenous intangible cultural property that *is* currently commodified—rarely by or for the benefit of the native peoples that may have participated, willingly or unwillingly, in its creation. Brown's examples—such as Native American mascots (protected by federal trademark law to the monetary benefit of the universities who use them) and traditional ethnobotanical knowledge (protected by patent law to the benefit of the patent holder, typically corporations or research universities)—do not currently exist in the public domain, free for the taking. They are ardently protected by intellectual property rights holders and backed by American courts.[59] In short, if indigenous peoples cannot commodify their culture, some other nonindigenous entrepreneur will surely take

their place, risking not only the quality of the goods that may be produced but also potentially diluting the goods' association with tribal origins, and concomitantly denying indigenous peoples the opportunity to participate in the profits.

Third, and finally, it is important to separate out discomforts that surround commodification (with which we share some of Brown's hesitation) from Brown's other arguments concerning identity. He contends, using the example of Indian gaming, that cultural commodification can also add to the formation and reification of political differences based on identity-based categories, pointing out stories of individuals facing disenfranchisement from their tribal communities as a result of new membership restrictions. While we agree that such instances might be problematic, we think it is important to note that the problem of membership reclassifications is not necessarily brought about by protecting cultural property.[60] Though capitalism and commodity certainly may bring about undesirable results at times, the contention that commodification leads to membership disputes is misguided; rather, while commodification may influence such identity classifications in some instances, it certainly should not shoulder the blame exclusively.

CONCLUSION

In closing, we agree with Brown that culture is messy, unpredictable, and suffused with contradictions. Ultimately, even as we decidedly advance a theory for the protection of indigenous peoples' cultural property, we do, in fact, share a great deal of common ground with Brown and some of our other critics. We absolutely agree, for example, that cultural property claims—like all property claims—must have limits, and we appreciate the opportunity to identify indigenous customary law as one meaningful source of such limits, in addition to some that already exist within the law. But in our view, enabling the law to continue to work so clearly for the benefit of those with power—and so clearly against those without—calls for a reorientation of indigenous proprietary interests that integrates notions of fairness, equality, and distributive justice.

In closing, contrary to Brown's fear that cultural property protections serve as a way to justify cultural purity, the deification of tradition, or societal isolation,[61] we wish to note that, like Brown, we too believe in cultural hybridity, fluidity, and evolution. In fact, we see these values reflected in many cultural property programs, particularly those like NAGPRA and NHPA that emphasize consultation between indigenous peoples and other stakeholders, thereby facilitating discussions and cooperative solutions between groups that might not otherwise interact at all. Yet, we reiterate here that, at times, the law—with its emphasis on rules and state-sponsored enforcement—does not always offer an appropriate solution to these conflicts, and exploring questions of ethical protocols, alternative dispute resolution, or "best practices" might be more salient.[62] We see great hope in the work of WIPO, as well as international tribunals and some domestic courts that

have been struggling with these issues for years. Even though some resolutions of cultural property disputes are indisputably imperfect, we think it is possible, and necessary, to account for and accommodate society's competing interests, even when those interests complicate and disrupt existing hierarchies.[63]

Finally, we emphasize that IDP was written as an invitation to dialogue. It is a conversation, not a conclusion. We fully recognize the complexity of the issues we address and hope that this response—like IDP—facilitates a deeper conversation about the ways in which law and politics shape the lives and potential for meaningful cultural survival of the world's indigenous peoples.

ENDNOTES

1. Meyer, *Twilight*, 124.
2. Angela R. Riley, "Sucking the Quileute Dry," *New York Times*, February 7, 2010.
3. Meyer, *Twilight—Forks*.
4. For information on the current land dispute between the Quileute and the U.S. National Park Service, see Jessica Kowal, "In a Bid for Higher Ground, a Low-Lying Indian Tribe Raises the Stakes," *New York Times*, http://www.nytimes.com/2006/07/30/us/30beach.html; Rachel La Corte; "Quileutes block beach access in push for more tribal land," *Seattle Times*, 24 November 2006, ⟨http://seattletimes.nwsource.com/html/localnews/2003445301_dispute24m.html⟩. For historical information on the Quileute land claim and treaty history with the United States, see *Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930), *cert. denied*, 283 U.S. 820 (1931) (holding that river bed and tidelands at mouth of Quileute river are not part of reservation land); *U.S. v. State of Washington*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999) (upholding Quileute and other tribes' rights to harvest shellfish in tidelands); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, (1859); University of Washington, *History of Treaty-Making*.
5. Sellers of "Quileute" items range from independent entrepreneurs like the Twi-Space Fan Shop to major retailers like Nordstrom.com. Interestingly, when we last visited Norstrom.com, its "Quileute" products were still showing but listed as "currently unavailable." See, for example, *The Twilight Saga, New Moon for BP*: "Quileute" Hoody, "Quileute Tattoo" Tee, and "Quileute Tattoo" Earrings.
6. Paige Dickerson, "Quileute to Receive Apology for MSN.com's 'Twilight' Video," *Peninsula Daily News*, January 10, 2010, ⟨http://www.peninsuladailynews.com/article/20100111/news/301119997⟩.
7. MSN Entertainment, *Apology*.
8. Babette Herrmann, "Quileute Tribe Embraces 'Twilight' Buzz," *Indian Country Today* (Canastota, NY), November 11, 2009. For video of an elder sharing the Quileute creation story with filmmakers, see *Spotlight—Quileute Nation*. The tribe has posted its laws, applicable to all within its sovereign territorial boundaries, alerting visitors that entry into burial grounds and ceremonies is prohibited. Quileute Nation, *Indian Country Etiquette*.
9. Quileute Nation, *Twilight at Quileute*. The store's tagline is "Be authentic!"
10. "Quileute Tribe Starts Twilight-Inspired Items Online," *Peninsula Daily News*, ⟨http://www.peninsuladailynews.com/article/20100331/news/303319988⟩ accessed 8 July 2010.
11. *Sawhoyamaxa Indigenous Community of the Enxet People v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C), No. 146 (Mar. 29, 2006) (holding that by failing to protect ancestral land, Paraguay had deprived Community of not only right to property but rights to cultural, spiritual and economic integrity); *Maya indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004) (holding that Belize had violated Community's rights to equality before the law, equal protection and nondiscrimination by failing to establish legal mechanisms necessary to protect communal property right of the Maya people); *Mary and Carrie Dann v. United States*, Final Report, Case 11.140, Inter-Am. Comm'n H.R., Report No.

75/02, OEA/Ser.L/V/II.17, doc. 1, rev. 1 (2002) (holding that the U.S. had violated plaintiffs' and other Western Shoshone members' rights to equal treatment under the law by "extinguishing" title to Western Shoshone lands without the participation and adequate representation of tribal members).

12. See for example, *Sawhoyamaxa v. Paraguay*, para. 118 (Considerations of the Court) (The culture of indigenous communities "reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources. . . ."); Also see, *Dann v. United States*, 60 (Position of the petitioners) ("As the Western Shoshone culture is dependent upon the land and the natural resources upon it, the Petitioners argue that the State's actions are directly threatening the Danns' enjoyment of Western Shoshone culture.")

13. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (Ser. C), No. 79 (Aug. 31, 2001) (holding that land claims based on traditional occupation and spiritual importance were protected under right to property provisions of Inter-American Convention on Human Rights).

14. See Vuotto, "One Year After Breakthrough Court Order."

15. *Awas Tingni Community v. Nicaragua*, para. 149. According to S. James Anaya, Special Rapporteur for the UN, this was the first case in which "an international tribunal with legally binding authority found a government in violation of the collective land rights of an indigenous group." S. James Anaya, "Nicaragua's titling of communal lands marks major step for indigenous rights," *Indian Country Today*, 5 January 2009, http://www.indiancountrytoday.com/opinion/36996734.html. See also OAS, "IACHR Hails Titling."

16. Anaya, *Indigenous Peoples;* Kymlicka, *Minority Cultures*. See also United Nations, *Declaration*, Preamble paras. 6 ("indigenous peoples have suffered from historic injustices"); *Yanomami v. Brazil*, Case 7615, Inter-Am Comm'n H.R., Resolution No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, (1985) (citing Inter-Am. Comm'n H.R. Resolution, *Special Protection for Indigenous Populations. Action to combat racism and racial discrimination* [1972]) ("for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states"); *Tortrino v. Argentina*, Case 11.597, Inter-Am. Comm'n H.R., Report No. 7/98, OEA/Ser.L./V/II.98, doc. 7 rev. ¶ 15 (1997).

17. We admittedly cabin the claims asserted in IDP by focusing more specifically on American Indian tribes. But not, as Brown claims, because we are "out of step with current thinking about the complexity of indigenous identities," but rather to achieve specificity in our subject and, correspondingly, precision in our arguments. Brown, "Culture, Property, and Peoplehood," this issue, p. 575. We read this criticism as rooted in a definitional argument against notions of *indigeneity* altogether, which is beyond the purview of both IDP and this response but has been the subject of a variety of commentaries. See, for example, Waldron, "Indigeneity"; Tsosie, "The New Challenge."

18. A recent collaboration between anthropologist Gelya Frank and legal scholar Carole Goldberg provides a particularly nuanced description of American Indian sovereignty in theory, doctrine, and practice. See Frank and Goldberg, *Defying the Odds*, 3–14.

19. See, for example, Rawls, *Law of Peoples*, 23, 27. Cf. Anaya, *Indigenous Peoples*.

20. O'Connor, "Lessons," 1.

21. See, for example, Cohen, *Handbook*, 169.

22. United Nations, *Declaration*, preamble. paras. 16, 17, articles 3, 4.

23. For a discussion of the character and scope of the concept of "self-determination," see Anaya, *Indigenous Peoples*, 98ff. For a discussion of self-determination and indigenous peoples' rights in contemporary international law, see Anaya, *Indigenous Peoples*, 110ff.

24. Brown's tendency use of the terms "ownership" and "stewardship" interchangeably, as in his analysis of sports mascots, causes him to overstate our analysis. Brown, "Culture, Property, and Peoplehood," this issue, p. 571. A point of clarification: We did not call for tribes to become "owners" of mascots. Instead, we approvingly described the NCAA guidelines that encourage teams to engage tribes in discussions about their use of Indian mascots and to negotiate mutually acceptable outcomes in these instances. This, in our view, is "stewardship"—exercising a duty of care over property, even in the absence of title to that property. See NCAA, *NCAA Executive Committee Issues Guidelines*.

25. See Carpenter, "Property Rights," 1085–91; Riley, "Indian Remains," 83–84.

26. Brown, "Culture, Property, and Peoplehood," this issue, p. 572.

27. Raustiala and Munzer, "The Uneasy Case," 66. This quote is taken from a longer passage in which the authors suggest that stewardship must be an attribute of ownership, a relationship in which "it hardly seems that someone who does not own the property could appoint herself or another as steward over the property" (65–66).

28. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 452–53 (1988) (noting that plaintiffs' religious beliefs, specifically requirement of "unobstructed view" and "undisturbed naturalness" when in prayer seats could form broad basis of future land claim cases).

29. See *Badoni v. Higginson*, 455 F.Supp. 641, 645 (D. Utah 1977) (comparing native plaintiffs' claim based on historical and ongoing religious practice to hypothetical land claim by a visitor to the Lincoln Memorial who might also claim a "profound religious experience").

30. See *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) (plaintiff "may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.").

31. See *Wana the Bear v. Community Construction Inc.*, 128 Cal. App. 3d 536, (Cal. Ct. App. 1982) (upholding ruling that Indian burial site is not a cemetery entitled to protection under the California cemetery law).

32. See *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451–53 (1988) (government action that would "virtually destroy" Indian sacred site not prohibited by the First Amendment).

33. See *Native American Graves Protection and Repatriation Act*, *U. S. Code* 25 (2006), §§ 3001–3013. See also Trope and Echo-Hawk, "Native American Graves Protection and Repatriation Act: Background and Legislative History."

34. See NCAA, *NCAA Executive Committee Issues Guidelines*.

35. *National Historic Preservation Act, U.S. Code* 16 (2006), §§ 470 et seq.

36. *Native American Graves Protection and Repatriation Act*, *U.S. Code* 25 (2007) 3003, §§ 5(a) (inventory of human remains and funerary objects), 5(d) (notification of tribes), and 7(a) (repatriation of identified remains).

37. For an example of tribal customary law and its provisions for the stewardship of cultural resources, see Bowers and Carpenter, "*Lyng v. Northwest*" (on stewardship duties in Yurok tribal law).

38. See Carpenter, Katyal, and Riley, "In Defense of Property," 1028–29, 1088–90, 1124.

39. Anthropologist and legal scholar Justin Richland has recently authored a series of articles considering the limits of Hopi traditional knowledge as they relate to questions of jurisdiction and sovereignty. See, for example, Richland, "Hopi Sovereignty," 89–112; Richland, "Hopi Tradition."

40. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

41. *Navajo Nation v. United States Forest Service*, 535 F.3d. 1058, 1098 (2009) (Fletcher, J. dissenting).

42. While not cited in the Navajo Nation opinion, Navajo legislation also enumerates by name the "sacred mountains," which "must be respected, honored, and protected" by the Diné who "were designated as the steward for these relatives." *General Provisions, Navajo Nation Code* Title 1 (1995), Sec. 205 (B)–(D).

43. *Navajo Nation v. U.S.*, 1100–1107.

44. See Riley, "Recovering Collectivity"; Carpenter, "Property Rights"; Katyal, "Trademark Intersectionality."

45. Carpenter, Katyal, and Riley, "In Defense of Property," 1022.

46. Amy Harmon, "Indian Tribe Wins Fight to Limit Research of its DNA," *New York Times*, 21 April 2010, ⟨http://www.nytimes.com/2010/04/22/us/22dna.html⟩.

47. Harmon, "Indian Tribe."

48. See Jennifer Couzin-Frankel, "Researchers to Return Blood Samples to the Yanomamö," *Science* (4 June 2010): 1218.

49. See, for example, WIPO, *Creative Heritage Project*; Vézina, *Traditional Cultures*; UNESCO, *Convention*; UN Convention on Biological Diversity, *Text of the Convention*.

50. Coombe, "Expanding Purview," 394.

51. A similar critique appears in Busse, "Epilogue," 364–65, claiming that IDP does not address the "dimension of property that interests many . . . anthropologists: social identity and social relations per se and in particular relations between persons (or peoples) with respect to things." Along with Brown's critique that we fail to provide sufficient "evidence" for the relationship between land, culture, and people, we may have to address Busse's "law and culture" point in subsequent works.

52. Brown, "Culture, Property, and Peoplehood," this issue, p. 575.

53. Brown mentions repatriation only once, where he addresses the repatriation of "human remains of great antiquity" on which he ultimately takes no identifiable position. Brown, "Culture, Property, and Peoplehood," this issue, p. 572.

54. In IDP, we discuss in greater detail the concepts of nonfungibility and inalienability under tribal customary law. See Carpenter, Katyal, and Riley, "In Defense of Property," 1048–50, 1085–87 (discussing sources including *Chilkat Indian Village v. Johnson*, 20 Indian L. Rep. 617 ["Whale house artifacts" are "clan trust . . . property" which cannot be alienated outside of the tribal community]).

55. Brown, "Culture, Property, and Peoplehood," this issue, p. 570.

56. See, for example, *Irish & St. Patrick's Day Shirts* (justirishstuff.com), *Oktoberfest Party Decorations* (OktoberfestHaus.com), and *Cinco de Mayo Party Supply* (cincodemayoparty.com).

57. See, for example, University of Colorado Book Store. *CU Apparel*; Los Angeles Lakers, *Lakersstore.com*; IWW, *Bay Area Labor Fest*; Tea Party Patriots, *Events*.

58. See Chander and Sunder, "The Romance of the Public Domain."

59. For examples of cases in which teams have defended and courts have upheld the use of Native American mascots, see *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96 (D.D.C.2003) (upholding the Washington Pro-Football team's trademark on the name "Washington Redskins" and its use of Native American imagery in logos and merchandise); *Illinois Native American Bar Association (INABA) v. Univ. of Illinois*, 368 Ill.App.3d 321, 305 Ill. Dec. 655, 856 N.E.2d 460 (1st Dist. 2006) (rejecting a civil rights challenge to University of Illinois' use of Indian "Chief Illiniwek" mascot); Cf. U.S. Commission on Civil Rights, *Commission Statement*. For examples of intellectual property derived from traditional ethnobotanical knowledge protected by U.S. patents, see, Sarreal, Eugenio S., et al. 1997. *Basmati Rice Lines and Grains*. U.S. Patent 5,663,484, filed 8 July 1994 and issued 2 September 1997 (patenting a rice strain derived from Basmati rice traditionally grown in India); Larson, Robert O. 1985. *Stable Anti-Pest Neem Seed Extract*. U.S. Patent 4,556,562, filed 19 March 1984 and issued 3 December 1985 (patenting method of extracting pesticide from seeds of the neem tree based on traditional practice among Indian and African farmers). For further discussion of controversy surrounding these patents and the patenting of ethnobotanical knowledge generally, see Schuler, "Biopiracy."

60. Membership issues, which are, in our view, largely detached from cultural property considerations, are some of the most complex and controversial questions facing Indian nations today. See, for example, *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996); *U.S. v. Cruz*, 554 F.3d 840, (9th Cir. 2009); *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04–09, 19 (Okla. Trib. Mar. 7 2006), available at http://www.cherokee.org/docs/news/Freedman-Decision.pdf.

61. Brown, "Culture, Property, and Peoplehood," this issue.

62. See Anderson, "Discursive Disorder."

63. See *Milpurrurru v. Indofurn* (1994) 54 FCR 240, 280 (Federal Court of Australia) (copyright infringement damages awarded to Native plaintiff reflecting "cultural" harm resulting defendants' reproducing sacred imagery on woolen carpets for sale, signaling possible expansion of damages regime beyond strictly economic harm); *Bulun Bulun v. R&T Textiles Proprietary Ltd*. (1998) 86 F.C.R. 244, 247 (Austl.) (protecting indigenous artwork through copyright principles); *Yumbulul v. Reserve Bank of Austl*. (1991) 21 I.P.R. 481, 24 ("the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.") (Federal Court of Australia) (rejecting an Australian Aboriginal artist's challenge to a bank's reproduction on a $10 note of one of his designs of the Morning Star Pole, but noting that because the plaintiff had created his design subject to the traditional norms of custodial management and not those of copyright ownership, "a serious misapprehension" may have occurred).

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