Cultural Property, Culture Theory and Museum Anthropology

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The present collection of papers and the AAA panel from which they are drawn show how a topic—Lockean theories of private property—that twenty years ago might have seemed remote from anthropologists' interests is today central to culture theory and anthropological practice. It is worth reviewing the course of this transformation from arcane specialization to central theoretical concern.

In the 1960s and 1970s, a symbolic culture theory was reborn (or at least reinvigorated) in American anthropology, emerging from the shadows to which Boasian concerns had been relegated by converts to British functionalism and by the postwar zeal for science. This symbols-and-meanings cultural anthropology, associated most closely with people like Clifford Geertz and David Schneider, led to the "deconstruction" of several anthropological mainstays (like "kinship"), but one thing it did not transcend was the notion of a culture as a bounded unit. Still, the emphasis on symbolic construction encouraged by this type of anthropology led fairly directly to the next moment in culture theory. That is, Geertz's concern with "thick description" and with culture-as-text was trumped by the work of James Clifford, George Marcus and Dick Cushman, Dennis Tedlock, and others, who turned attention to anthropology-as-texted. This "literary turn" forced anthropologists to confront the ways in which bounded cultures (or, more accurately, depictions of them) emerged out of an interactive, cross-cultural encounter—that between the ethnographer and the people portrayed in ethnographies. Cultures, then, came to be seen as open-ended, contingent, and emergent—processes in history rather than transhistorical products having more or less coherent identities.[1]

This opening up of the boundaries (or boundedness) of cultures was a theoretical move that dovetailed with the concerns of fieldworkers studying nationalism, ethnicity, and the politics of culture. Those topics became central in the 1980s, and for anthropologists at least, they led to a growing awareness of the ways in which the anthropological model of culture (as set out, paradigmatically, in Benedict's *Patterns of Culture*) had become both commonsensical and deeply politicized in the contemporary world order (based on the nation-state). That awareness, too, made anthropologists question the boundedness of cultures. First, studying nationalism and cultural politics taught researchers to focus on the very construction, by "the natives," of culture as a bounded unit. Second, the international discourse of cultural politics suggested that such constructions paradoxically transcend or violate the very boundaries they aim to establish, because cultural particularity is always created and packaged in ways directed to and dictated by the cultural-political order beyond the bounded group in question.

Research on the cultural politics of nationalism brought attention to the epistemological and political nature of the boundedness implied in commonsense culture theory. Those implications were drawn from Lockean theories of private property and, more generally, from what C. B. Macpherson had termed "possessive individualism." Following Louis Dumont, I have argued that in nationalist ideology (as in commonsense anthropological theory) groups (nations or cultures) were individuals writ large—entities whose identity was understood to be based on the possession of "cultural property," just as the individual in a free-market society is defined largely in terms of the property he or she owns. In sum, in the nationalist worldview, a nation is a group of people bounded and defined by the fact that they possess a common culture.[2]

Much of the most recent work in anthropological culture theory has started from a critique of the boundedness and possessive-individualistic assumptions of commonsense culture theory. But that recent work has had to contend with a difficult ethi-

cal and political problem. Globally, cultural "rights" have been formulated almost exclusively within the framework of Western assumptions about property and individualism. This has meant that groups struggling for "cultural survival" have had to formulate their protests in the language of that globally hegemonic system. At the same time, to the degree that institutions and actors central to that system have tried to respond responsibly to those struggling for survival, they have tended to do so by extending rights and/or by writing laws couched in the hegemonic language.

Here is the point in the debate that the present collection of papers addresses. Each of the authors asks, from somewhat different perspectives, about the adequacy of a remedial cultural politics that fails to transcend possessive individualism. Two sorts of questions emerge particularly clearly. First, in what ways do the language and conceptualization of cultural property make it impossible for peoples to protect cultural processes that cannot easily be treated as individuated and thing-like, that is, as private property? Second, are there alternative conceptions of property more useful to such peoples that we can draw on as we try to retheorize "culture"?

Rather than summarizing the four authors' responses to such questions, which readers can digest on their own, I conclude by relating the larger project to museum anthropology. Just as once arcane questions about possessive individualism can now be seen to impinge crucially on culture theory, so anthropology in the museum has moved from the margins of the larger discipline back to the center—and for some of the same reasons that make questions about cultural property timely. That is, anthropologists interested in retheorizing culture have come to see the museum as a central site of the institutionalization of commonsense, nationalistic culture theory. Museums, of course, are important owners of cultural properties, and they are also important agents in using cultural properties to represent cultural identities. More than most institutions, then, museums will be directly affected by changing laws bearing on, and changing ways of thinking about, property. In the everyday cultural politics of museums we will find on-the-ground answers to the abstract questions posed above. All of which means that museums will continue to be lively sites for the "production" of culture theory in the foreseeable future.

Notes

1. The standard references are Geertz 1973, Schneider 1968, Wagner 1975, the essays collected in Clifford 1988, Marcus and Cushman 1982, and Tedlock 1979. An important corrective to the masculinist bias of this body of work is now available in Behar and Gordon 1995.
2. Dumont 1970, Handler 1988, Macpherson 1962.

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Indigenous Peoples' Claims to Cultural Property: A Legal Perspective

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The clash between indigenous peoples and European colonial nations has largely concerned property rights. The medieval European "Doctrine of Discovery," which treated North America as "vacant land" and awarded superior title to the first European nations to lay claim to portions of the continent, was used to disenfranchise Indian nations of their full rights to title and ownership in their traditional lands (Williams 1990).[1] Similarly, European concepts of property have been used to prevent Indian nations from enforcing their rights to tangible and intangible cultural property.[2] This failure to recognize tribal rights has in many cases resulted in the permanent loss of important parts of tribal cultural and religious life, and has detrimentally impacted tribal social organization.

Despite this dismal history, indigenous peoples have begun to reclaim their cultural property. American Indian nations represent living cultures with strong ties to their traditional past. Contemporary efforts to protect tribal rights to cultural property are closely related to the emerging movement among Indian nations to define their sovereignty according to their own concepts and traditions. Indigenous peoples' struggle for self-determination encompasses the powerful normative concept of cultural integrity, and is centrally linked to their efforts to protect both tangible and intangible aspects of their cultural heritage (Anaya 1996).

In asserting their rights to cultural property, Indian people also speak of the need to halt what they perceive as "cultural appropriation": the "taking—from a culture that is not one's own—intellectual property, cultural expressions and artifacts, history and ways of knowledge" (Ziff and Rao 1997:1). This assertion seems closely associated with the notion that, as one UNESCO panel has declared, "cultural property is a basic element of a people's identity" (Ziff & Rao 1997:1). Thus, tribal efforts to reclaim cultural property often stem from a concept of "cultural harm" rather than purely "economic harm," and a desire to stem the tide of assimilation and cultural loss that has plagued tribal societies since contact.

This essay examines the legal dimensions of indigenous peoples' claims to cultural property. Law and anthropology often address issues of cultural property in different ways. Anthropologists seek to understand cultural property within the context of the indigenous cultures themselves, while lawyers attempt to translate concepts of indigenous property into the language of Euroamerican law. Indigenous peoples' claims to cultural property provide a compelling example of the need for new legal relationships to be articulated between Indian nations and Euroamerican society.

Cultural Resources and American Law

Although United States law extends to cover important societal interests in cultural and historic preservation, Native American concepts of cultural property are often at odds with the narrow focus of these statutes. American law has traditionally confined the concept of cultural resources to tangible representations of human activity and offered limited protection to such resources in order to meet certain social objectives. Tangible cultural resources include historic and prehistoric structures and artifacts, as well as cultural objects of importance to contemporary tribes, such as sacred objects and objects of cultural patrimony.

Federal historic and cultural preservation statutes such as the National Historic Preservation Act (NHPA) [16 U.S.C. Sec. 470 et seq.] and Archaeological Resources Protection Act (ARPA) [16 U.S.C. Sec. 470aa et seq.] are directed toward the protection of historic and prehistoric structures, ruins, monuments, and artifacts. NHPA and ARPA consider protection of human history to be a good that benefits all of society. NHPA specifically covers "traditional cultural properties," which include tangi-

ble historic properties associated with the cultural practices and beliefs of a living community (Parker and King 1990). However, NHPA does not give Native Americans an enforceable cause of action to protect traditional cultural properties against disturbance. Thus, the statute may still allow development or disturbance of such properties if appropriate documentation or mitigation measures are in place.

ARPA considers "archaeological resources on public lands and Indian lands" to be "an accessible and irreplaceable part of the Nation's heritage." Although Native American people have significant control over archaeological resources on tribal lands as an aspect of their property interest in those lands, their interests in off-reservation resources are only indirectly acknowledged through the statute's notice, consultation, and mitigation provisions.

Both NHPA and ARPA speak to documenting and preserving America's "collective" past, suggesting that all citizens have the right to access this past, either through written records or through actual preservation. Indeed, ARPA was specifically intended to prohibit the looting of historic and prehistoric sites and to preserve and protect those sites for scientific research. With regard to cultural resources located off the reservation, both statutes consider "ownership" of the past to rest with the American public. In many ways, Native American culture and history are treated as "common goods" that belong to society as a whole, rather than as a source of legal entitlements for native peoples.

The Native American Graves Protection and Repatriation Act (NAGPRA) [25 U.S.C. Sec. 3001 et seq.], which governs excavation of cultural resources on public and Indian lands as well as the repatriation to Native Americans of cultural resources and human remains held by federally funded institutions, represents a departure from this norm. Like ARPA, NAGPRA protects tangible cultural resources—human remains, funerary objects, sacred objects, and objects of cultural patrimony. Unlike ARPA, however, NAGPRA's overriding goal is to repatriate essential cultural resources to Native American people, and thus, the statute's intent is to respect Native American beliefs and provide a legal means to enforce their claims.

Significantly, NAGPRA is the first statute to recognize tribal property interests in various cultural resources and the first statute to recognize a group entitlement to cultural property that stems from tribal law and tradition, yet is protected under federal law.[3] For example, the category of "cultural patrimony" under the statute includes cultural items that have ongoing historical, traditional, or cultural importance central to the tribe itself, such that they may not be alienated, appropriated, or conveyed by any individual tribal member. Thus, tribal law or custom is used to determine the legal question of alienability at the time that the item was transferred. NAGPRA also covers "sacred objects," which the statute defines as specific ceremonial objects needed by traditional Native American religious leaders for the *current* practice of traditional Native American religions by their present-day adherents. The criteria used to define "objects of cultural patrimony" and "sacred objects" suggest the vital role of indigenous beliefs (an "intangible" aspect of culture) in establishing what is ultimately considered a tangible cultural resource.

Notably, none of the federal cultural preservation statutes *specifically* protects intangible cultural resources, including the expressive aspects of culture, such as symbols, art, ceremonies, songs, and traditional knowledge. Collectively, indigenous intellectual property rights (IPR) have yet to receive legal protection under American law. This is primarily due to the wide divergence between concepts of property in Anglo-American society and in indigenous societies.

The Role of Property Law

Anglo-American property law is a system of rules that governs the legal relations between people with respect to certain items. Many people think of property law as an absolute system of rights (in the moral sense) and entitlements (in the legal sense); however, it is far more flexible than this. As Joseph Singer notes, "because property is socially and politically constructed, the scope of property rights changes over time as social conditions and relationships change. This is because the social meaning of a property right depends on its effects in the real world on human relationships" (Singer and Beerman 1993:228).

Thus, American property law is very much premised on the Anglo-American social and political system, and on notions of individual autonomy and personal security. American property law serves several paramount goals of society, such as

certainty of title, fairness, and economic efficiency. Indeed, economics plays a dominant role in American property law. There is a distinct relationship between ownership, profit, and utility in the Anglo-American property system, which extends to concepts of both tangible and intangible property (Yen 1994).

Significantly, Anglo-American property law places paramount value on the individual and this has given rise to the current system of private property rights. Over two centuries ago, William Blackstone tellingly defined the European view of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Ellickson et al. 1995:37-38).

In comparison, tribal property systems often revolve around principles of collective or communal ownership. These property systems focus on group, rather than individual, rights. In collective property systems, ownership is in the community, but an individual may acquire superior rights to or responsibilities for part of the collective property by, for example, being entrusted with the care and maintenance of the property. In communal property systems, individuals within the system have equal rights to the property and cannot acquire special rights to any part of the property vis-à-vis other community members (Bell 1992:461).

In either case, the property may not be alienable outside the group and may be subject to a very different set of expectations and responsibilities than those that typically arise under Anglo-American property law. For example, the Blackfeet people of northern Montana traditionally possessed medicine bundles and entrusted certain tribal members with their care. The bundles were circulated throughout the society and due to the strong spiritual forces contained within, the bundles were, in fact, considered to be "alive": "Once secured these revered, energizing powers exacted duties and obligations. They had to be guarded and protected, cared for daily like children; in fact, their owners are usually referred to as father and mother" (Farr 1993:9). Thus, although many Native American societies have traditionally recognized some degree of private property, the nature of the individual's possessory use is grounded in concepts of responsibility and obligation to the group (Byrne 1993:119).

Given these vastly different orientations to property, common law principles of Anglo-American property law often have little relation to indigenous peoples' values. This fact is perhaps most apparent when considering American intellectual property law and its relation to Native Americans.

Indigenous Peoples and Intellectual Property Rights

Anglo-American law recognizes various categories of property rights in original creations. The author of a creative work is considered to own the tangible chattel that embodies the work, such as a sculpture, painting, or written manuscript. This ownership right enables the author to prevent others from using or altering the work while it belongs to him. Once the work is sold, however, the new owner of the chattel is typically free to alter, destroy, or deface the work at will. With respect to property rights in the "creation," rather than the chattel that embodies the creation, the author generally retains only the limited rights to the work established by statute or judicial common law. Thus, for example, if the work is protected by copyright law, the author may be entitled for a limited time to preclude others from copying, publicly displaying, or publicly performing the work (see Leaffer 1989:203-60).

Anglo-American intellectual property law provides a poor fit for indigenous peoples' concerns about protecting intangible cultural resources, including traditional knowledge. As Article I of the United States Constitution recognizes, the statutory protections of copyright and patent law are intended to "promote the progress of science and the useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." Thus, the state awards a limited monopoly to certain individuals to provide economic incentives to create novel and useful works. The overriding presumption, however, is that knowledge and ideas are the "common property" of all members of society; individual rights to creations are the exception rather than the rule. As Justice Brandeis observed in *International News Service* v. *Associated Press*: "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use" [248 U.S. 215, 250 (1918)].

Many Indian nations seek to protect traditional cultural knowledge—for example about the use of herbs, plants, and other natural resources—from exploitation or misuse by non-members. However, as Tom Greaves has observed, there are several distinct conceptual problems with according copyright or patent protection to traditional knowledge (Greaves 1994:8). First, both copyrights and patents protect "new" knowledge (novel inventions, original expressions), rather than existing knowledge. Much of what Indian nations seek to protect would be considered "traditional knowledge," of long-standing importance to the group. Moreover, many would argue that oral tradition and knowledge that is not recorded cannot be protected under legal principles that require knowledge to be "fixed" in a tangible medium (the "chattel" that embodies the invention). An additional problem is posed by the fact that anthropologists have already documented and written about some areas of traditional knowledge that Native Americans would now like to protect. Thus, there may be an issue about whether the result of this research and documentation has been to place certain tribal ritual and traditional knowledge into the public domain.

Second, copyrights and patents confer property rights on individuals (or corporations, which are legal entities acting as individuals), rather than groups. A critical function of property law is to enable an individual to exclude others from unauthorized use of the property. Indigenous knowledge, however, is often part of the entire tribe's identity. By recognizing traditional knowledge as "property," the law would seek to establish which members of the group are entitled to hold rights to the knowledge, control its use, and exclude others from the knowledge.

Finally, copyrights and patents establish limited rather than perpetual protection of the invention or creation. American property law frowns on giving perpetual rights in intellectual property because monopoly is seen as socially destructive. American intellectual property law seeks to encourage productive behavior and progress. Limited monopolies are permissible because these reward productive behavior. Perpetual monopolies are not recommended because these discourage competition and hamper productive behavior. With respect to indigenous peoples' claims, however, these social goals are meaningless. Native Americans seek to protect their intangible cultural resources because of values and beliefs that stem from their own cultural traditions and often have nothing to do with furthering competition and the market system of America.

Admittedly, copyrights and patents are not the only tools available for the protection of intellectual property rights. The law of trademark and trade secrets provides additional protection, although like other types of Anglo-American intellectual property law, both doctrines hinge upon an assertion of commercial value. The law of trademarks and trade secrets focuses on preventing economic injury to producers and preventing consumers from being misled. An outgrowth of these policies is the Indian Arts and Crafts Act (25 U.S.C. Sec. 305-309), which was amended in 1990 to provide a broad range of civil and criminal penalties for selling goods misrepresented as being Indian-produced. The Act protects Indian tribes from "economic" harm, but not from "cultural" harm, e.g., "cultural appropriation." Thus, the Act does not appear to regulate products that are "Indian-inspired"—for example, non-Indian works that use a traditional symbol of a particular tribe—if there is no intention to mislead a consumer into thinking that the object is an "Indian product." Furthermore, although many Indian people protest such conduct, it is likely that a non-Indian artist's work would be protected under First Amendment guarantees of free expression.

Finally, certain legal principles that rest on combined tort/property law doctrines have been used to protect certain aspects of individual identity and creative labor from commercial appropriation. Under the "right of publicity," for example, a celebrity or public figure has the right to be free from appropriation of his or her name, image, or likeness (Newton 1997). The right of publicity is premised on economic theory and holds that every human being should have control over the commercial use of his or her identity (McCarthy 1986). In most jurisdictions, the right of publicity is treated as a property right in that it is descendible at death and may be enforced by one's heirs. The right of publicity could potentially be used by Native Americans to protect the identity of well-known individuals, whether contemporary or historic, from commercial exploitation. Indeed, this was part of the legal claim brought by the descendants of the Lakota leader Crazy Horse, who protested a beer manufacturer's use of his name to sell an alcoholic beverage (Newton 1997). As with so much of Anglo-American law,

however, the right of publicity protects individual rather than group identity, and thus will probably not be successful in tribal claims to preserve cultural integrity, unless there is some legal or moral basis to justify such an extension.

Similar problems attach to the Anglo-American "misappropriation doctrine," which was constructed by the courts to protect certain interests that are not protected by intellectual property statutes or common law doctrine but which are seen as socially productive and thus worthy of some protection. For example, in the case of *International News Service* v. *Associated Press*, the Supreme Court offered limited protection to a news agency in its distribution of "hot" news stories and thus precluded competitors from appropriating the news bulletins and distributing them as their own, until the commercial value of the news had passed. Significantly, however, the misappropriation doctrine is not premised on fairness or moral right; it facilitates the economic goal of protecting valuable creations whose continued production may be in jeopardy if others are given free reign to appropriate the property.

In summary, Anglo-American doctrines of property law and intellectual property law can offer only limited protection for the concerns of indigenous peoples. Moreover, there is a fundamental dissonance between the social goals that Anglo-American property law seeks to protect and those that are of importance to indigenous peoples. This dissonance seemingly will prevail until Anglo-American property law can expand to recognize the claims of indigenous peoples on an equal basis.[4]

Toward a New Vision of Indigenous Property Rights

Due to the vastly different theories of "property" and "ownership" that stem from Anglo-American tradition and Native American tradition, Native Americans continue to face difficulty in gaining legal protection for their tangible and intangible cultural resources. NAGPRA provides a significant first step in recognizing indigenous peoples' claims to cultural property and extending federal power to protect some of those claims. It is possible that future legislation could recognize tribal customary law regarding tangible and intangible cultural property as entitled to protection under federal law. However, extensions in the existing law are not likely to occur absent a demonstration of some compelling legal or moral basis for doing so. This raises a critical issue: are tribal concepts of cultural property cognizable in moral terms?

Interestingly, modern American intellectual property law stems from dual theoretical traditions. The first focuses on economic incentives for creative works, and the second focuses on the "moral rights" of an author to property in the fruits of her labor (Yen 1994:163-64). Under the latter theory, copyright exists because a failure to protect an author's property rights in her creations would be an abridgement of a fundamental "human right" (Yen 1994: 171). Although the economic theory has dominated American intellectual property law, largely due to the American aversion to monopoly and its stifling influence on the market, the "moral rights" theory has influenced the development of intellectual property law in other countries. The Universal Declaration of Human Rights, for example, states that: "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Chapman 1994:212).

Of course, this recognition of moral rights within property law is framed in individualistic terms. Thus, it seems initially unclear whether we could extend such moral theories to include the group's right to cultural integrity. Such a right is, however, recognized in the Draft Declaration on the Rights of Indigenous Peoples, which contains several articles that expressly acknowledge the rights of indigenous peoples to their cultural and intellectual property (Suagee 1994). For example, according to Article 29:

> Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts (Suagee 1994:199).

The Draft Declaration is important because it recognizes the entitlement of indigenous peoples to full enjoyment of all human rights, including the preservation of cultural identity. Rights to cultural property, both tangible and intangible, are viewed as essential aspects of cultural identity.

Indeed, some scholars argue for an extension of Western individualism in intellectual property law, drawing on the moral rights tradition, to cover group claims to cultural and intellectual property. For example, as Professor Margaret Radin has argued, a "personhood" theory of property justifies special rules for treatment of property based upon the relationship of persons to objects, and is designed to facilitate "self-identification" and "human flourishing" (Radin 1982, 1993). As one commentator points out, this theory could be extended to cover group claims to cultural property, on the theory that the goal of proper "group development" would justify special rules for group claims to cultural property (Moustakas 1989).

Other scholars, such as Rosemary Coombe, appear to disagree that indigenous peoples' claims to cultural integrity could ever be recognized within western categories of property, such as "intellectual property, cultural property and real property" (Coombe 1993). As Professor Coombe points out, such categories "divide peoples and things according to the same colonizing discourses of possessive individualism that historically disentitled and disenfranchised Native peoples in North America" (Coombe 1993:249). Coombe builds a postmodern critique of intellectual property law that questions both the validity of the law as applied to indigenous peoples and the validity of the law in general. According to Coombe, intellectual property laws "stifle dialogic practices—preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community and difference" (Coombe 1991:1855).

Under the postmodern critique, a legal solution to the concerns of indigenous peoples may be undesirable as well as impractical. Indeed, Coombe appears to advocate an ethic for respecting cultural integrity, rather than a legal solution (Coombe 1997). She advocates the "central importance of shared cultural symbols in defining us and the realities we recognize," which seems to militate in favor of overcoming the strictures imposed by intellectual property law in favor of a free exchange of ideas and creative expression (Coombe 1991:1880). On the other hand, it is questionable whether this approach could successfully be used to combat cultural appropriation.

Coombe correctly observes that reducing Native American cultural beliefs to a "copyright license" reduces the "social relationships between Native storytellers to one of contract and the alienation of market exchange relationships," rather than recognizing the unique social relationships among Native peoples, based largely upon "traditions of respect" rather than "values of exchange" (Coombe 1993:284; Coombe 1997:92). However, the more troublesome issues remain: how can we promote respect for Native American cultural beliefs within an Anglo-American property system? Do we need to frame the issue in terms of property rights? In terms of human rights? Should we even frame the issue in terms of "rights"? Should we instead search for a moral "common ground" that can protect diverse interests? Unfortunately, the answers to these questions are far from clear. However, these and other questions provide a framework for the ongoing dialogue on protection of indigenous peoples' rights to cultural resources.

Notes

1. In *Johnson* v. *McIntosh* [21 U.S. (8 Wheat) 543 (1823)], Chief Justice John Marshall incorporated the Doctrine of Discovery into American law by holding that European discovery had divested the Indian nations of full rights to alienate their lands. Thus, the European nation held the "fee" while the Indian nations retained only the more limited "right of occupancy."
2. By "tangible" cultural property, I mean objects such as masks, ceremonial articles, and other material objects closely associated with a cultural practice or tradition. By "intangible" cultural property, I mean songs, ceremonies, stories, and certain other types of expressive activity and cultural knowledge. This latter category in some ways resembles the Anglo-American notion of "intellectual property," but is not coextensive with that concept. Others have drawn a distinction between "material culture" and "esoteric knowledge" (e.g., Nason 1997).
3. Accordingly, the criminal sanctions authorized by NAGPRA prohibit the sale or purchase of Native American cultural items that were illegally acquired within the meaning of NAGPRA. *See* 18 U.S.C. Section 1170(b). These sanctions broaden NAGPRA's scope to cover the conduct of private individuals.
4. Although the issue is beyond the limited scope of this paper, I would like to acknowledge that various proposals have been advanced to accomplish the goal of reconciling indigenous peoples' claims within Anglo-American property law. John Moustakas argues for a new system of law that would provide mandatory protection for certain types of cultural property through a regime of strict inalienability (Moustakas 1989). Stephen Brush suggests an alternative approach to defining property rights, drawing upon the concept of "Farmers' Rights," which was developed to create an "international fund for conservation of crop genetic resources" (Brush 1994: 138). And David Stephenson looks to computer software licensing agreements as a

potentially fruitful model for indigenous peoples to adopt as a means for legally protecting their right to just compensation for the acquisition and use of their intellectual products (Stephenson 1994: 182).

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The Power of Possessions: The Case Against Property

Peter H. Welsh

The concept of *cultural property*[1] has become thoroughly embedded in modern museum discourse. It is fundamental in the dialogue between museums and peoples whose cultures are represented in public spaces and who assert cultural affiliation with museum collection materials. This paper argues that *cultural property* embodies serious contradictions that may prove detrimental to furthering the relationships between museums and represented communities. The problem with *cultural property* is that (1) it is based on an idea of culture that is inconsistent with modern understandings of the concept, and (2) it reflects an idea of ownership that is at odds with the practices of many of the groups seeking to re-establish control over physical things.

In the past decade, as anthropologists have focused on the role of objects in the dynamic process of exchange, with its concomitant tensions and contradictions, the ways that objects acquire meaning and value as they move among contexts of possession has taken on greater significance. *Cultural property* implies a permanence to ownership that studies of exchange call into question. This paper will consider how the concept of cultural property can subvert, rather than support, the efforts of groups seeking the restoration of control over significant objects.

Museum professionals have developed a heightened awareness of the multiplying constraints on the control of the materials in museum collections. *Cultural property* has become an encompassing concept for referring to the broad range of materials for which issues of control have been most acute (Messenger 1989; Palmer 1989; Thurstan 1986). The term was originally used to describe items removed from their place of origin in time of war or other armed struggle. After World War I and, especially, after World War II, efforts were made to return artworks and historically significant objects to nations from which they had been taken. Under the auspices of the United Nations two major Conventions shaped the understanding of *cultural property*. In particular, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property associated the term with an extremely broad range of materials.

Also treated as cultural property are items over which national governments have asserted claims—such as archaeological specimens that have been unlawfully excavated, looted, or smuggled outside of the country (Greenfield 1989). In this usage, cultural property is anything that would be subject to claims of repatriation, whether the objects have been removed from the country of origin or not.

Most recently, *cultural property*—especially, discussions about cultural property repatriation—has become central in the relations between museums and the peoples with whom the objects housed in galleries and collections are associated (Teague et al. 1997). In the United States, these relationships have been given a formal structure by legislation such as the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act, and the American Indian Religious Freedom Act. The legal recognition that culturally affiliated groups could exert control over their cultural property has found further expression in recent efforts by some Native American communities to limit the use of historic photographs and documents by academic researchers, treating the materials as intellectual property (Hopi Tribe 1994; Morell 1994; Nason 1997).

The progressively wider application of *cultural property*, from the international to the intellectual, can be seen as a logical progression. However, with each step away from the contexts in which the concept was originally recognized and applied (war booty), more contradictions have become apparent. The major contradictions are embedded in the very

words that are used. *Cultural property* depends on a concept of culture that suggests fixed traditions linking the past with the present. This bounded vision of cultures is profoundly different from the contemporary view that any particular culture is a permeable, "fuzzy" set of values and beliefs in a dynamic relationship with other cultures. Even more problematic is the "property" component of the term. The history of property theory in the West dominates our understanding of *cultural property*. However, in the context of claims made by groups whose views on the rights and responsibilities of people with regard to objects may be significantly different, the meaning of *property* may not be the same. Thus, the fixing into law of Euroamerican property concepts has the potential to extend the influence of Euroamerican values in the guise of supporting a return to traditionalism.[2] This paper discusses the inadequacies and pitfalls of the concept of *cultural property* in light of its history.

Property Rights

Two basic elements come into play when considering the question of property and possessions. The first is the empirical relationship between people and the material world. The second is the moral question of human rights in relation to labor and resources. Western philosophy often seems uneasy with the close connection and attachment people develop with things. Whether it is the Platonic ideal of the purity of thought versus the base foundation of experience, or the Old Testament proscription against the creation of idols, we see an effort to disconnect the material world from the ideal world. From this perspective, the embodiment of value in the material world that stimulates aesthetic, religious, or political fervency seems both misguided and invalid. However, insights provided by an anthropological perspective show that possessing material things has a fundamental role in establishing relationships among people and groups. Studies into processes of consumption (Douglas and Isherwood 1986; McCracken 1988; Miller 1987, 1995) and exchange (Appadurai 1986; Thomas 1991; Weiner 1985, 1992) have advanced our understanding of the ways that value is constructed in relation to the possibility for items to be incorporated into—or removed from—systems of exchange.

Since Locke (1978), thinking about the relationship of people to material has focused on the establishment and maintenance of rights to exclusive use. Locke based his understanding of the source of property rights in the human body. The ultimate source of rights to exclusive use resided in each person's physical being. Locke saw a direct and logical extension of those rights to the results of productive labor. Each person could claim that which he or she had made, both material items and transformations of the land. Thus, a person could claim property rights over a field that was tilled, a forest that was felled, or a flock that was followed. Such an approach to property favors the individual over the group. As the Enlightenment gave rise to the rights of individuals to claim rights over property, these rights could be shown to have a natural source. If people could claim the products of their own labor, then ripple-like, these rights continue further to support the accumulation of goods that can become the morally acceptable basis for capitalism.

Marx, in *Das Capital*, offers an alternative to capitalist views of property rights (see Marx 1978)—but he begins from the same starting point as Locke. Marx also holds that the ultimate source of property rights begins with control over self, but Marx stresses the fundamental difference between rights over material things and the things themselves. From Marx's point of view, property rights over things are never separable from the labor that produced them, and the value of those rights is measured in terms of the labor invested in them. When value appears to reside in things independent of the labor required to produce them, people lose control of production and become vulnerable to exploitation. The consequence, from a Marxist perspective, is that people come to measure the value of their lives in terms of what they have, rather than in terms of what they produce. This possessive individualism (Macpherson 1978a) leads to situations in which competition for goods is the impetus for labor. The idea of property rights becomes conflated with property as things.

Property rights in the Western sense, whether viewed from a capitalist or Marxist perspective, are focused on individuals and on origins. They provide a means by which individuals can claim and hold against others that which they have "earned." Property rights anchor the owner to those things that come from labor, and their value is measured in terms of the effort that was expended to gain those rights. Property rights are individually focused—whether the individual in question is a single person or a corporate body such as a clan, a tribe,

a community, or a museum. The individual can lay claim to title over property and can show that no other individual has equal or greater rights.

Becoming Cultural Property

Cultural property—whether it manifests itself as traditional cultural property (TCP), in the language of the National Historic Preservation Act; as World Heritage, in the language of UNESCO; or as sacred ceremonial objects, in the language of NAGPRA—is a definable category. At present, designating materials as cultural property is the primary means available to a group seeking to keep materials from circulating in the marketplace as commodities. Fixed as it is within a framework that sees cultures as having definable limits, identifiable traits, and idealized pasts, *cultural property* itself has taken on the qualities of an objectifiable entity. Based on evidence and argument it becomes possible, in principle, to make a determination about whether something does or does not qualify to be considered as "*cultural property*." The outcome of such a judgement has implications akin to naming a biological population an "endangered species": if the materials in question make the cut, a set of special laws and ethics come into play. Otherwise they become fair game for being assigned a market value.

Some take a view of *cultural property* that treats it as a limited and closed universe made up exclusively of those items "so heavily charged with cultural or national significance that their removal from their culture of origin left that culture shorn of one of its dimensions, and diminished in the eyes of its own creators" (Browning 1986: 805). If it is possible, then, to distinguish those things that qualify as cultural property from those that do not, it seems that there could be a time when all of the globe's cultural property has been identified. Defining culture as a closed system of essential elements authenticated by history—the "essentialist" view (Gable and Handler 1996; Handler and Linnekin 1984; Pannell 1994)—does not easily accommodate the emergence of new cultural property.

The essentialist model of cultures in anthropology has given way to an approach that emphasizes a dynamic relationship with the past in which creative and adaptive reinvention is expected—the "constructivist" view. From this perspective, Umberto Eco's encounters with Disneyland and Forest Lawn during his "travels in hyperreality" begin to constitute a postmodern guidebook to heritage sites (Eco 1986). The constructivist picture of *cultural property* places it in the context of the shifting significance of tradition (Handler 1985, 1991): places and things take on new meanings and importance through time. And like the Vietnam War Memorial in Washington, D.C., places without history can enter a society's consciousness quickly and thoroughly; despite their newness, their loss would leave a void that would be difficult to fill.

Constructed traditions and objectified veneration, as at Colonial Williamsburg (Gable and Handler 1996; Gable et al. 1992) or in East Africa (Bruner and Kirshenblatt-Gimblett 1994), can be shown to serve the purposes of the groups who are in a position to exploit them. Multiple interpretations of sites or objects can result in a form of "heritage dissonance" (Tunbridge and Ashworth 1996) in which the past and its presentation becomes contested territory.

Universal and Affiliated Cultural Property

The effort to develop universal concepts of *cultural property*, as evidenced in World Heritage Sites and international treaties, is an example of the application of the tension between constructivist and essentialist positions regarding cultural property. Universal cultural property is universal in theory only. The benefits that come from the preservation of universal cultural property fall mainly to affluent and powerful nations and groups that have the luxury of setting certain things aside and viewing them from sufficient distance to appreciate comparison.

Still more troubling, as *cultural property* is examined, is the constructivist view of what I call affiliated cultural property (Welsh, in press) in which the attachment to material is framed in relation to a specific cultural tradition. A constructivist perspective on affiliated cultural property has the potential to diminish the validity of claims made by groups seeking to recover significant materials by deconstructing assertions of tradition and heritage (Briggs 1996, Hobsbawm and Ranger 1983). Thus, the interests of the elite can be served just as effectively using a constructivist approach as from the essentialist position. Being in a position to pronounce—on good academic footing—that cultural property claims are a historic illusion frustrates the ability of groups to make cultural property claims.

The observation of the constructed nature of *cultural property* applies equally, of course, to the

claims museums make for retaining their collections. But museums can supplant the moral argument with utilitarian ones that leave them in a doubly powerful position; they have (or have access to) the resources to preserve the objects (an argument that has been used for keeping the Parthenon Marbles in the British Museum), and they have a mission to use objects to benefit the public in educational programs and displays.

Museums have come to serve the important role of transforming commodities into cultural property. Items that enter museum collections achieve noncommodity status by default.[3] Accessioning and cataloging carries a commitment to resist market enticements for disposing of items that have been accepted because they further the institution's purpose.

All museum collections are buffered from the market and their commodity status is limited, but certain things are more potent than others. In museum parlance, cultural property is usually reserved for things whose loss would be felt most profoundly. For instance, as chief curator of The Heard Museum during the time when NAGPRA was being debated, I repeatedly assured the collections committee of the board of trustees that the number of items in the museum that would be impacted by the impending legislation was very small in comparison to the entire collection. Indeed, NAGPRA was written to exclude all but a very few categories of materials.

Property Rights in Culture

Cultural property is property in the Western sense, and questions of title predominate. When treated in this way, resolving cultural property claims becomes a complex title search. Once the appropriate "title holder" is identified, that individual (corporate or singular) can exert a claim. Like other disputes, many cultural property cases have emphasized the question of whether or not rights were properly conveyed from a known "owner" to the current possessor.

The complex process in NAGPRA for establishing or contesting "cultural affiliation" or "right of possession" is fundamentally about title. The complexities of unequal power relations that governed so many of the settings in which transfers of Native American cultural property took place—colonialism, military conquest, reservations—make it difficult to argue that all parties were on equal footing when someone decided to sell a medicine bundle, for example. The possibility of coercion in such settings has often seemed overwhelming (Ridington 1993). The range of responses to evidence of unequal power in property transfers—from England's staunch refusal to return the Parthenon Marbles to Denmark's eventual return of the Icelandic Manuscripts (Greenfield 1989)—does not diminish the fact that control of cultural property rests on the satisfactory establishment of property rights. In this context, the question is no longer whether or not it is appropriate for the Euroamerican notion of property rights to be applied universally to cultural property, but simply deciding to whom the rights belong.

Notably, cultural property cases in the United States concerning human remains, and those in which there is documentation of ownership by a corporate body of more than one person, have been resolved rapidly, if not without rancor. The conceptual struggle over the rights to control Native American human remains was finally determined by two basic issues—fairness and property. As it became clear that Native American human remains had been consistently treated differently than the remains of people of European descent, the accusation of unfair treatment could not be disputed convincingly. Most influential, though, was the application of the concept of property rights to human remains. Walter Echo-Hawk's memorable phrase that "none of these Indian people donated their bodies to science" resonated directly with the Euroamerican notion that the most potent property rights stem from a person's inviolate right over his or her own body.[4] Although some on the academic side sought[5] to present data that indicated a very broad range of attitudes and behaviors by Native American people concerning the appropriate treatment and disposal of human bodies after death, Euroamericans seeking to claim rights to control human remains were ultimately answerable to the interpretation of moral rights expressed by Locke.

While the debate about Native American human remains reflects the importance of personal control over property, other material is more influenced by the necessity for there to be clear title to support a transfer of property rights. Museums have returned objects to tribes because the museum's governing body was convinced that the individual from whom the object was acquired did not have the right to dispose of it. Under this logic, ob-

jects for which a descent group or a local group held joint responsibility (or ownership) could not be acquired with clear title. Museums have been properly reluctant to hold on to things over which they do not have good title.

Inalienability

The kinds of things that are treated under the property principle in cultural property cases might be more appropriately handled in some other way. An alternative to the view of property rights that justifies them in terms of their source, or origin, is found in work that considers value not in terms of production, but in terms of the cultural processes by which value is re-negotiated at the time of exchange. This approach gives equal emphasis to the process of production and to use. Focusing on the movement of objects, historical and contemporary, creates a picture of control that is not as neatly anchored in original rights as one that emphasizes property as the outcome of production. It has the advantage, though, of giving special attention to the values and meanings that shape the possession and exchange of objects.

The most significant alternative to the *cultural property* paradigm is embodied in Annette Weiner's concept of *inalienable possessions* (Weiner 1985, 1992). She introduced this concept as a way to reveal forms of exchange other than reciprocity. Inalienable possessions are passed from one generation to the next outside of the value system that governs exchange. Their value is drawn from what Weiner terms a cosmological authentication, which sets certain items outside the sphere of commodities by virtue of lineage, history, or connection with a spiritual domain. Given their transferability, material objects and land are most frequently encountered as inalienable possessions, though texts and other intangible entities occasionally serve. Examples range from grand symbols of nationhood—the crown jewels—to personal treasures such as heirlooms. The value of inalienable possessions is revealed by the effort expended to prevent their loss.

Above all, Weiner points out, inalienable possessions highlight the paradox of keeping-while-giving that fuels the system of exchange. Models based on reciprocity suggest the outcome of exchange is equality: I give you something with the expectation that you will respond with something of equal or greater value. In contrast, a view of exchange that focuses on the presence of inalienable possessions accentuates difference rather than equality: I give you something in order to preserve that which I value highest. Inequality in exchange recognizes the presence of the unequal distribution of inalienable possessions.

The idea of inalienable possessions is useful for understanding *cultural property* in ways that Weiner predicts, as well as in some others that she does not. Weiner pays particular attention to the notion of inalienablilty. She seeks to demonstrate how inalienability as an ideal state impacts social inequality and nostalgia. Those with power over that which cannot be given control far more than material. Power over things which can never be reproduced, gives control of reproduction. Appadurai (1986) highlighted how value is reproduced in the act of exchange by using commodities to reveal the ways relationships are created in exchange events. Weiner focuses attention on those entities that are consciously kept out of the commodity stream. She argues that their existence in a special category of non-commodity warrants special attention. They acquire a special capacity to stem the tides of entropy—to anchor the past in the present—to offer a resolution to the universal paradox of reproduction and decay

Inalienable possessions are often described as sacred, or treasured, or immovable. Sandra Pannell, for instance, recently interpreted Australian *tjurunga* in terms of inalienable possessions (Pannell 1994). She holds that *tjurunga* are one physical manifestation of a "consubstantial" (Munn 1984) relationship between objects, beings, people, and places that is understood and translated as the Dreaming. As "material manifestations of cosmology" (Pannell 1994: 30) *tjurunga* authenticate the connections among the different entities. The transformations that connect the elements of the system are phenomenological in which "local cosmologies and cultural epistemologies are immanent in the everyday rather than emergent from it" (ibid.).

There are several good reasons for considering inalienable possessions as alternative to *cultural property,* reasons that go beyond introducing one more terminological device. For instance, *cultural property* is defined by qualities inherent in objects such as origin and ownership. *Cultural property* has a fundamental linkage to the idea of bounded and objectified cultures. Inalienable possessions, on the other hand derive their meaning from the discourse

of paradox associated with exchange. The cosmological authentication that sets inalienable possessions apart from other things is clearly and necessarily part of the constructed nature of these special entities, but it is not necessarily tied to "cultures" as the community in which the authenticity has force. Instead of treating culture as a superindividual, inalienable possessions are always associated with groups—whether families, communities, or societies—and highlight the need to protect against loss. *Cultural property* only awkwardly fits when, say, a community of scholars seeks to hold a collection of ancient Native American materials for continued study. This same collection is more comfortably viewed as an inalienable possession cosmologically authenticated by the potential to increase human knowledge and whose loss to science is not measurable in economic terms. The concept of inalienable possessions establishes a fairer way to compare competing claims for control.

The most important difference between *cultural property* and inalienable possessions has to do with the distinction between property and possessions. Property rights extend from the individual in opposition to the group. They are concerned with establishing and maintaining rights that exclude others from free use of the material in question. This expansionist orientation and acquisitive nature sets property apart from possessions. Understanding the reasons for attachment to possessions has less to do with understanding the source of rights than with understanding the consequences of loss. In the context of NAGPRA, for instance, shifting our perspective from property to possessions does several things: rather than highlighting "cultural affiliation" and "right of possession" it emphasizes how loss of access to objects would impact any affected group; it centers attention on groups; and it recognizes that possessions are always implicated in systems of exchange.

The concept of cultural property is a potent one and one that would seem to have the potential for communities to reclaim materials from which they have become alienated. However, with its links to Euroamerican concepts of property, it brings unintended consequences. In this paper I have suggested that the concept of inalienable possessions provides a more inclusive and potentially more effective avenue for arriving at resolution of cultural property disputes.

Notes

1. In order to distinguish the several usages of the concept of cultural property, the words will be italicized when used conceptually, and they will be presented in regular text when the reference is to objects.
2. The requirement to show that sacred objects and objects of cultural patrimony (as well as Traditional Cultural Property) acquired their cultural significance in a traditional context prior to the present time forces meaning into a fixed "traditional" past.
3. And sometimes to a fault. When each nail and flake of a historic artifact is afforded the air-conditioned care of museum storerooms, we could be said to have entered the world of non-commodity fetishism.
4. Kopytoff (1986), however raises, important questions about this assumption with regard to the commodification of human organs.
5. And continue to seek, for that matter (see Clark 1996).

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Beyond the Museum: The Politics of Representation in Asserting Rights to Cultural Property

Tressa Berman

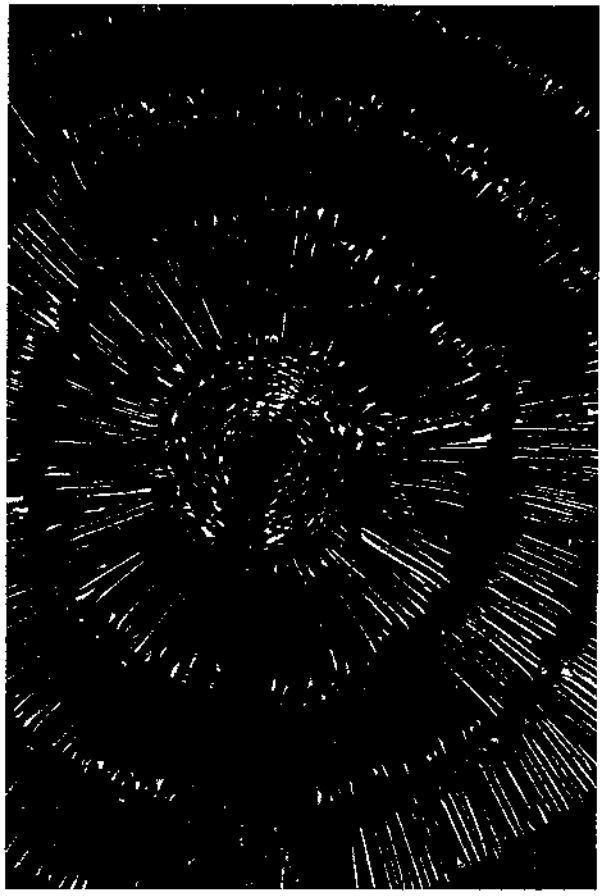
The introduction to a collection of articles on the ethics of collecting cultural property (Messinger 1989) asks, "Whose culture? Whose property?" Performance artist and cultural critic Coco Fusco in her self-described "passionately irreverent" essay on the cultural politics of identity poses these questions: Who are we? Whose values? Whose museums and whose aesthetics? (Fusco 1995). These questions link cultural identity to claims of cultural property—especially in the contests over representation and ownership in current museum debates (Clifford 1986). Museum objects themselves have come to symbolize the cumulative historical effects of cultural appropriation, and have therefore become crucial to assertions of cultural identity in debates over cultural and intellectual property.

At stake in cultural property claims is not only the potential loss of cultural objects from the people who "need" them,[1] but also the objectification of their makers under the political and legal banners of representation and restitution. Following Shohat (1995), I use the term "representation" to describe a type of *political enactment,* in the sense that the indirect rule of the U.S. federal government over tribal governments is active in cultural property claims as an assertion of political power. For example, in the proportional rule of tribal politics, tribal councils that adopted the 1934 Indian Reorganization Act make public decisions that cannot always account for divergent views among tribal members.[2]

In restitution claims, the "burden of proof" lies with Native Americans to prove their "legitimacy" as qualifying community members when staking claims to cultural property from holding institutions. For instance, American Indians must sometimes produce genealogical evidence of their historical relationship to objects, and this evidence must frequently be corroborated by U.S. government documents (e.g., federal tribal enrollment records).

This paper puts forth three categories of rights for understanding the application of intellectual property rights and other juridical mechanisms in cultural property claims: production rights, use rights, and proprietary rights. In order for these "rights," to be recognized, they must first be understood within cultural frameworks. For example, rights to production may first be governed by cultural codes of conduct (what I will discuss as "cultural copyrights"), especially where use rights carry ritual knowledge and responsibilities (viz. Pinnel and Evans 1994). The law can be useful in protecting knowledge that is wrongly appropriated *outside* of the cultural group, but it may have limited ability to enforce intra-cultural claims. Once objects enter the market, proprietary rights are asserted, such as in cultural property and repatriation claims. In this discussion, "cultural property" refers to material cultural artifacts and the ideas and rights that govern their production, use, and ownership.

U.S. property law—a uniform set of texts based on rules of "authority" and "precedence" stemming from English common law—favors evidence that reflects historical constructions of possessive individualism (see Handler 1991; Torres and Milun 1990). Drawing on Lockean principles of the "natural rights" inherent in private property, Handler has discussed some of the problems caused by this philosophical bias in understanding claims to cultural properties (cf. MacPherson 1962). From this underlying principle of individual ownership, property law requires that individuals acting as unitary entities (such as a "Tribe") demonstrate their links to objects. This framework forces a kind of "collective individualism"—even if it is a *mis*-represented identity. That is, we should recognize the distor-



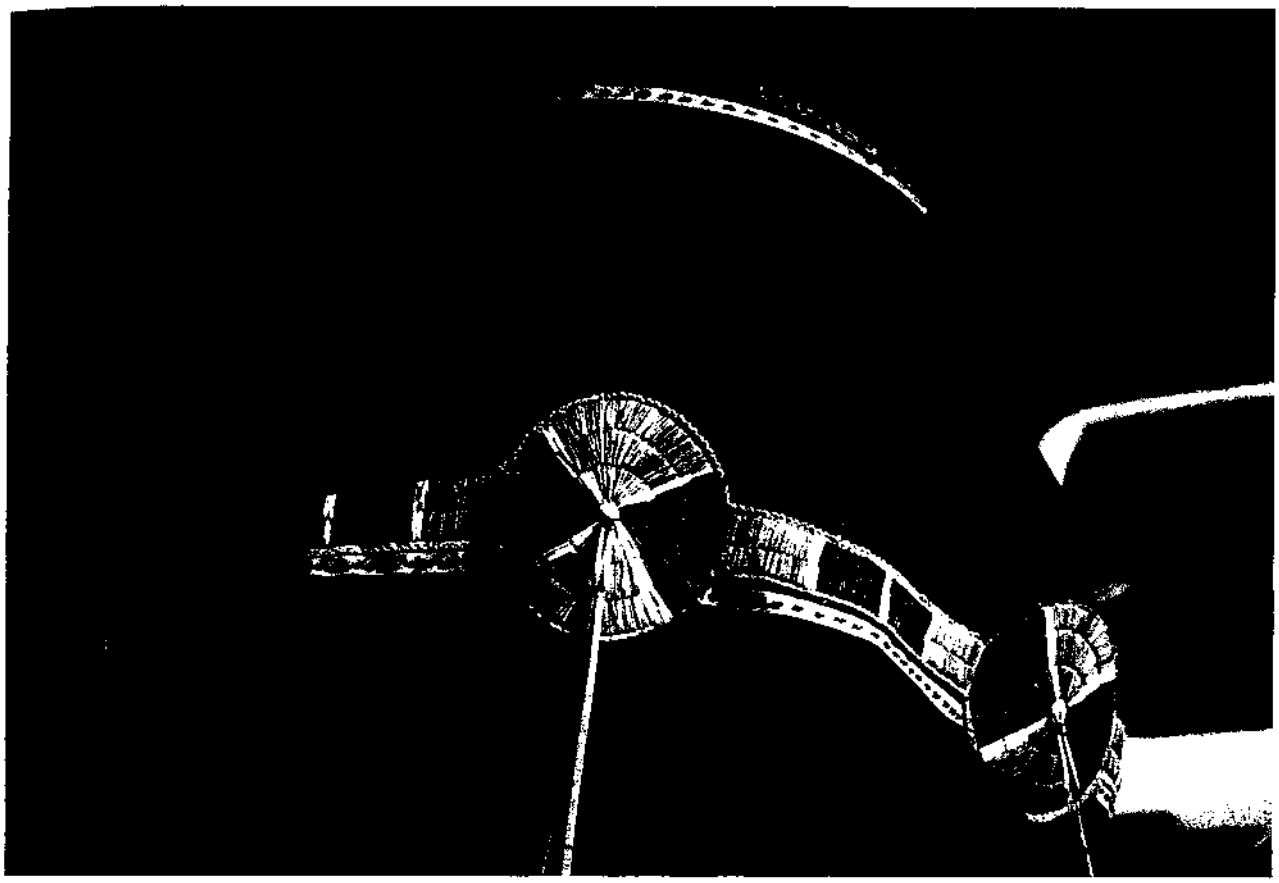
1. Close-up of a quilled Hidatsa ornament. H.W. Case Collection, University of Colorado Museum.

tions that are possible when individuals stand in for nations. In cultural property cases involving American Indians, conflicts erupt at the community level when "collective individuals" assert a unitary right to claim an object on behalf of the entire community. For example, in a recent case that came before the NAGPRA Review Committee, lineal descendants of the Kiowa Chief Satanta filed a claim on behalf of the "Chief Satanta Descendants" or (CSD). Their legal claim was countered by the officially elected tribal council, members of which also claim descent from Satanta (Carras, forthcoming).[3]

Examples of contested claims are only now beginning to emerge in the aftermath of the 1990 Native American Graves Protection and Repatriation Act and the 1989 National Museum of American Indian Act that guides repatriation policy for the Smithsonian Institution. In many cases, protracted negotiations between museums and tribal representatives have preceded written (legal) claims. Furthermore, it is not usually possible to observe or document community-based decision-making. Sometimes dissent has been ignored or overridden in order to expedite the appearance of consensus, especially where institutional deadlines guide the process of negotiation.

In some contested cases, the need for a unitary voice in making cultural property claims exacerbates already existing factional tensions within some communities. Contemporary procedures of tribal governmental representation (based on Euro-American principles of proportional government) sometimes result in silencing some family and community interests. In this context, kinship becomes a critical feature, not just for reckoning lineal affiliation to museum objects, but for understanding the processes of decision-making at the community level in cultural property claims. For instance, the fact that two groups of claimants can demonstrate a lineal kinship relationship to a particular object (such as in the case of Satanta's Shield) highlights the complex ways in which kinship relations intertwine with political positions and cultural identity.

In an article titled "Borderzones" Gerald MacMaster reminds us that "[Native] identity continues to be contentious....Contests over the representations of personal and collective identity and the categories through which identity is filtered... must recognize that we live in highly contestable spaces, spaces that continually collide and mix" (1995:87-88). MacMaster goes on to cite recent amendments to the 1934 American Indian Arts and Crafts Board Act to highlight the highly legalized and bureaucratized ways in which American Indian identity becomes an allowable commodity in the framework of artistic production. Likewise, American Indian federal recognition cases before U.S. courts stand to remind us that "the recognition of cultural identity...requires that we ask how group membership ought to be taken into account" (*Mashpee Tribe* v. *Town of Mashpee* 1979; see also *Montoya* v. *United States* 180 U.S. 261, 266 [1901]). What these cases point to are the ways in which identity is codified in the law. Moreover, personal and collective identities of tribal membership necessarily take on the possessive qualities of individualism in property law. In legal contexts, the question of "Who gets to speak for whom?" is not only an inquiry into representation and ownership,

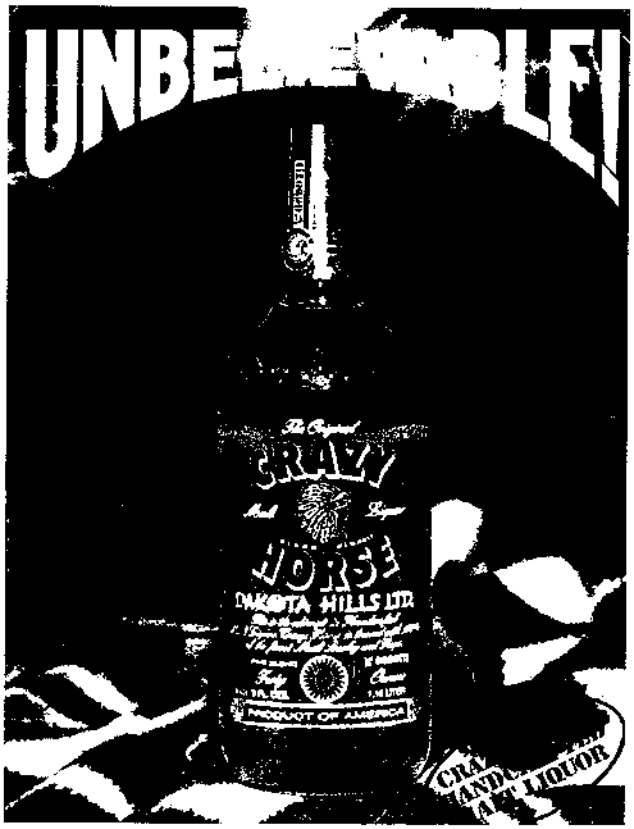


2. Quilled dance shawl. Fort Berthold Reservation, North Dakota. Photo: Tressa Berman.

it also begs questions about cultural identity and political power.

Case law can set precedents for testing the efficacy of intellectual property rights and cultural property laws; however, indigenous rules governing the production and "ownership" of American Indian cultural objects often do not follow legal principles. Instead, objects are subject to community-based sanctions. In local cultural contexts, indigenous knowledge bears upon cultural property claims by conferring collectively recognized "precedents" and "evidence." Indigenous knowledge is not merely a parallel to case law, especially when it is evaluated within unequal structures that continue to inform Indian-White relations (cf. Coombe 1993; Torres and Milan 1990). We see this when collective claims are reduced to a collective identity (e.g., "The Sioux") that can legally assert a claim to cultural property, and when the legitimacy of counter-claims to cultural objects is called into question by the institutions that hold them in trust and by title.

In order to sort out potentially competing interests in cultural property claims, I outline a series of "rights" that expose contradictions when cultural property laws are applied to indigenous systems of knowledge. Drawing on case law and ethnography, I illustrate some practical problems that can arise between Native communities and museums and their administrators. In this discussion, "cultural property" refers to material cultural artifacts and the ideas and rights that govern their production, use, and ownership. Western law, from this perspective, serves as a type of heuristic device through which economic, political, and cultural justice can be interpreted. Moreover, indigenous kinship arrangements regulate competing claims to cultural property—both between indigenous groups and bureaucracies (such as museums), and among competing community interests for control over cultural knowledge and cultural property.[4] In order to sort out legal and extra-legal regulators, I suggest three categories of overlapping rights related to artistic



3. Crazy Horse Malt Liquor advertising poster. Ferolito, Vultaggio and Sons, and Hornell Brewing Company.

production and cultural property claims: rights to production, use rights, and proprietary rights.

Rights to Production

In order to protect creative ideas and the inventions that spring from them, U.S. property law offers provisions for patents, trademarks, and copyrights. Currently, in both national and international arenas, Native and non-Native lawyers, activists, artists and anthropologists are focusing attention on the applicability of intellectual property rights (IPR) as a means for creating legal standing in cultural property claims (viz. Suagee 1994). Based on categories that bracket infringement rights (e.g., Industrial Property and Copyright), the World Intellectual Property Organization (WIPO) devised "Model Provisions for the National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (as cited in Posey 1991). The model provisions recognize *expressions* and *productions* to protect "folk traditions" that are recognized "collectively," thus removing the necessity of an individual creator or artist as required by copyright law (Posey 1991:31).

While WIPO, UNESC, and the United Nations' non-governmental organizations work to hammer out international documents, great difficulty remains in ratifying agreements that can be applied cross-culturally and internationally. Some advocates of IPR question the relevance of Euro-American laws to indigenous codes of secrecy, ritual obligations and ceremonial transfers of knowledge and power (Brush and Stabinsky 1995, Greaves 1994). In this light, indigenous "rights to production" may lie so much outside of the law, that customary law and social sanctions remain the only binding forces of protection and control of indigenous knowledge. Indigenous knowledge in this sense refers to cultural and ceremonial rights that accompany production of objects and that carry specific protocols for their artistic execution.

For example, Pinnel and Evans (1994) report that Cochiti Pueblo drum makers of Northern New Mexico contested the production of drums by an individual claiming to be of Cochiti heritage but having no cultural or kinship link to the community. The individual produced the drums without a culturally sanctioned right that required, among other forms of initiation, apprenticeship into traditional techniques of production, which he did not use. Furthermore, the individual in question was marketing his "Cochiti" drums at a profit that steered sales away from the Pueblo by under-cutting their prices. In this case, as the authors mention, New Mexico law prohibits the marketing of unauthentic "Indian" art under current statute, but can do nothing about the infringement of what they call "cultural copyright" (ibid., p.47). In the former instance, the 1988 New Mexico Arts and Crafts Protection Act (since amended) protects Native artists from outside infringement and helps to secure an economic base that is integral to New Mexico's tourist economy by legally authenticating (and sometimes overseeing) the production and sale of "American Indian" art.

During my work in North Dakota among Mandans and Hidatsas, women's quillworking societies allowed women to participate in shared ritual knowledge that included the technical craft of porcupine quilling (fig.1). Prior to colonization, age-graded societies involved kin relations that fostered

the persistence of ceremonial forms of production. While age-graded societies no longer function as they did in the nineteenth century, quillwork motifs continue to belong to individual women who dream of a particular design. Techniques continue to be passed on through kin-based structures of learning and ritual "payments" (Berman 1989). Hidatsa women accrue prestige for their quilling skill, and in former times kept records of their accomplishments through "quilling counts." As an illustration of this, an elder Hidatsa quillworker (now deceased) told me in ranked order all of the quilled items she had produced in her lifetime (fig. 2).

Because I was an adopted "clan child" of this woman's clan, she agreed to instruct me in the art of quilling — despite the fact that she was in her late seventies and nearly blind. Our sessions turned less on technical proficiency than on accuracy in ritual performance and payment for the rights of production. Here, a type of "cultural copyright" governed the procedures for the acquisition of cultural knowledge, but it was, most importantly, my fictive kinship relationship to one I called "grandmother" that entitled me to make the request. In this example, as well as the Cochiti drum case, "rights of production" are closely linked to "rites of passage" that determine not only life-cycle readiness, but social incorporation and relational reciprocity. The idea of "payment" to acquire the rights to production has only recently been construed in monetary terms, but as I argue elsewhere, it does not carry the same kind of value as a market transaction (Berman 1996; cf. Taussig 1980).

The concept of *rights to production* over cultural property in the above cases is closely linked—through kinship membership—to collective assertions of and control over cultural identity. Cultural knowledge, embedded in the production of ceremonial objects, is given meaning not by outside evaluators, but by internally constructed values that reproduce cultural identity.

Constructions of cultural identity link cultural property claims to intellectual property rights for the very reason that this arena may be the last level of appropriation extracted from indigenous peoples.[5]

Use Rights

The next level of analysis relates cultural objects to their context and circulation in what I take as a form of "use rights." Again, New Mexico provides a case in point, where the people of Zia Pueblo

4. "Dance of the Goose Society" from A. Bowers, *Mandan Social Organization,* 1950.

sued the state of New Mexico for appropriating the Zia sun sign as the symbol for the New Mexico state flag. According to Zia tribal member Peter Pino, the Zia Pueblo recently won a court settlement that established legal precedent and is now investigating the viability of filing a claim against private businesses that use the Zia symbol. A cursory survey of the Albuquerque phone book yielded ninety-six variations of the sun symbol used by private companies (Pino 1995).

Another current case of appropriation of Native symbols for commercial use is the suit filed by the descendants of the Lakota Chief Tasunke Witko (Crazy Horse) against the manufacturers of Crazy Horse Malt Liquor (Gough 1995, Herrera 1994; fig. 3).[6] The lawsuit involves descendants of Crazy Horse who oppose using his name to market malt liquor. The individual Seth Big Crow was named as the family representative in legal and public records. Kinship clearly lies at the heart of the complaint and served to strengthen claims of tribal customary law (see also Newton 1997). In short, by establishing lineal and direct descendance to the Lakota individual known as Crazy Horse, family members of the Rosebud Sioux Tribe work with tribal attorneys to create legal standing on issues of copyright infringement in the use of the Crazy Horse name by claiming "inheritable rights to the publicity value inherent therein." The issue with respect to use rights is clearly related to an identity authenticated by lineal descendance.

"Lineal descendance" emerges as a criterion in cultural property claims, and it is defined as an authenticating variable in the language of NAGPRA [Sec. 10-2, (14)]. In other words, claims made to objects (or human remains) held by museums must be put forth by (or on behalf of) an identifiable individual. In my comments on NAGPRA regulations in the 1993 Federal Register[7], I identified some problems with definitions that too narrowly defined kinship affiliations in genealogical terms, and took issue with the reification of "traditional kinship systems" as the language of the law reads. Instead, I suggested attention to specific and *dynamic* kinship systems. Kinship reckoning, like other cultural traditions changes through time. The question of "traditional" is begged by the need to construct new ceremonies for previously unprecedented events, such as reburial and repatriation itself. The "authenticity" of these ceremonies is sometimes questioned by both museum professionals and community members without a full accounting or recognition of the innovative quality of culture and its diverse identities.

Stereotypes of American Indians persist in both the appropriation of Native imagery and symbols (Jojola 1994) and in bureaucratic formulations of representations of "Indianness." Romantic images of American Indians framed in an ethnographic present on the one hand, or vilified images of militant activists on the other, continue to shape legal and political discourse and the selective representation of tribal members by policy officials. The issue of "who gets to speak for whom" in the halls of political power is complicated by uneven and subjective selection processes. At the community level, tensions between tribal governments and their constituents have long been an artifact of federal Indian policy. Yet, NAGPRA stipulates that tribally appointed government spokespeople are the only individuals charged with the power of official representation in cultural property claims.

The issue of representation in the context of "use rights" presents a conundrum by which tribal sovereignty at the level of government-to-government relations sometimes conflicts with the use rights of objects caretaken by medicine people. In some cases, only certain people have the culturally sanctioned power to transfer use rights and make claims on cultural objects because of their responsibilities endowed by the collectivity and their privileged knowledge about the appropriate context and care of the objects in question. As Philip Minthorn, a Sahpatin (Cayuse) research archaeologist and artist, has pointed out, indigenous claims to cultural artifacts housed in museums are inherently counter-hegemonic in that they pit indigenous use rights against the proprietary interests of holding institutions (Minthorn 1994). The Euro-American notion of "possessive individualism" that would have individuals demonstrate their unilateral links to objects becomes the model against which a type of "collective individualism" is forced to assert itself. This is the case when museums recognize only government appointed officials as the arbiters in cultural property claims.

Proprietary Rights

The establishment of "use rights" enables claimants to assert "proprietary rights" on legal bases that challenge, as repatriation policy now allows, the legal "ownership " of objects acquired by museums without legal title (e.g., through theft or illegitimate removal from sacred contexts). However, many cases turn on the legality of bequests, whereby Native peoples, often at the peak of dispossession and despair, "sold" their objects to collectors in much the same way that pawn became a medium of exchange in the early reservation period. In addition, some objects that were collectively held were given to anthropologists by individuals who had only partial rights to confer. For example, the Mandan Goose Women's Society Headband, collected by Frances Densmore at the turn of the century and gifted to the Smithsonian's National Museum of Natural History, was "owned" collectively by women who shared rights in Mandan corn bundles (Bowers 1950; fig. 4). These rights were matrilineally inherited, such that each successive generation was apportioned among a wider network of kin. The Goose Women's Society no longer functions as it did in the late nineteenth century, but descendants of bundle owners are known in the community as possessing "portions" of bundles and concomitant bundle rights. For argument's sake, let's imagine that one group of Mandans came together to make a claim on the Goose Women's Society Headband, while another (family) group who also had members with bundle rights contested the claim. Whose proprietary rights get priority?

The problem of unitary claims is compounded by legal prescriptions that define a tribal representative as one who is appointed by the tribal govern-

ment. Some scholars (Biolsi 1994, Lanowski 1994) argue for a reform in tribal charter governments to more evenly reflect the proportional representation of old-time consensus-oriented tribal governments. This could potentially give greater voice to families (again, the heart of kin-based communities) whose claims are silenced by current procedures of representation. As Minthorn states in relation to indigenous claims of tribal bundles on museum collections,

> Native communities are now required to divulge sacred and esoteric forms of knowledge in order to substantiate their claim or to insure the appropriate disposition of such objects...without the guarantee of the protection of that knowledge (1994:11).

As Peter Welsh's article (this issue) suggests, one way to reconcile these dilemmas may be to apply the concept of "inalienable possession" to objects deemed inextricable from their possessors/caretakers, such as the case of the Kiowa Chief Satanta's Sun Shield described earlier. As Annette Weiner has shown, "inalienable possessions do not just control the dimension of giving [or taking], but their historicities retain for the future, memories, either fabricated or not, of the past" (Weiner 1992:7). This point reflects the notion that "alienability," when construed as a dimension of market exchange, is not universally possible with respect to the separation of specific objects from their social lives—that is, the social relations that govern production, use, and ownership (see also Appadurai 1986).

By incorporating extra-legal dimensions to IPR, those now claiming "use rights" would be enabled to assert "proprietary rights" on legal bases that challenge, as repatriation policy now allows for, the legal ownership of objects deeded to museums on spurious grounds (i.e., removal from sacred contexts). In other words, there may yet be ways to reconcile legal mechanisms with customary sanctions. Legal mechanisms, must be framed within larger protections of cultural knowledge and the right to self-determination as tribal members sift through stacks of NAGPRA inventories and work in their communities to amass new forms of "evidence" against the burden of proof that prevails upon them to legitimize their identities when staking claims to the objects of their cultural histories.

Cultural Rights as Legal Rights

The task for museums in identifying specific rights may lie beyond the museum itself. As repatriation research reveals, museum records are often woefully incomplete, inadequate for rendering judgements in cultural property claims. Ethnographic and oral historical evidence must be not only considered, but actively sought. An ethnographic approach that works with the research agenda of tribes may help to uncover cultural meanings that determine these rights without violating rights of privacy and reducing cultural knowledge to a matter of public record. Definitional difficulties arise in proprietary claims by begging the definition of "property." In Euro-American law, property claims are enmeshed within philosophical assumptions about individualism and private property—ideas that conceptually conflict with indigenous claims to cultural objects. Furthermore, Euro-American ideas about ownership link individuals to cultural objects through a type of "collective individualism" that sometimes complicates the issue of representation in cultural property claims.

The issue of cultural patrimony forces a reconsideration of "the collectivity" from a myriad of standpoints, especially where kinship regulates claims to cultural property. Selective representation of tribal officials may not adequately address competing interests within communities. As the law now stands, proprietary group rights take precedence over rights to production and use. When possible, an understanding of these categories allows for greater input to the decision-making process. For example, the maker of an object may have a different intention than one who makes a proprietary claim. As Harding (1997) has recently argued, the legal doctrine of customary right addresses the joint involvement of many, which serves to increase ("use" and "proprietary") value. Currently, NAGPRA and related legislation serve to limit tribal involvement through legal representation alone. Intellectual property rights, as a mechanism for legalizing collective rights to production, use, and claims to cultural objects must be framed within larger protections of cultural knowledge and the right to self-determination as collective and fundamental human rights.[8] This article suggests that cultural property cases may be evaluated in a com-

plementary way to the sets of rights that now govern case law in intellectual property claims. By gathering new kinds of "evidence," the scope of the law itself becomes more broadly construed to include the multiplicity of voices required for a fair hearing in cultural property cases.

Acknowledgement

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Notes

1. NAGPRA stipulates the return of ceremonial objects "which are needed by for traditional Native American religions by their present day adherents (25 U.S.C. sec.#3001(3) (c)).
2. For an extensive discussion of the Indian Reorganization Act and its effects on tribal autonomy, see Deloria and Lyttle 1984.
3. In another case, the descendants of the Cheyenne warrior Dull Knife attempted to file an injunction against the return of Cheyenne burial remains to the Northern Cheyenne reservation in Montana in a dispute between lineal claimants (Summary report filed by the Repatriation Office, National Museum of Natural History). See also Yellowman 1995.
4. For a description of how kinship regulates claims to cultural property, see Yellowman 1995.
5. See the special issue of *Cultural Survival Quarterly*, Summer 1996, Volume 20, Issue 2. The issue of cultural identity is intimately linked with indigenous peoples' adverse reactions to the Human Genome Diversity Project, as the authors discuss from various standpoints. See also Ziff and Rao 1997 for collected essays that address diverse domains of appropriation.
6. Civil Complaint, Rosebud Sioux Tribal Court, IN THE MATTER OF THE ESTATE OF TASUNKE WITKO, a.k.a. CRAZY HORSE, Seth H. Big Crow, Sr., as Administrator of said Estate, and as a member and representative of the class of heirs of said Estate, Plaintiffs, v. The G. Heileman Brewing Co., La Crosse, Wisconsin, and Baltimore, Maryland; The G. Heileman Brewing Co., d/b/a Hornell Brewing Co. of Baltimore, Maryland, and Messrs. John Ferolito and Don Vultaggio, of Brooklyn, New York, individually, and d/b/a Ferolito, Don Vultaggio and Sons, of Brooklyn New York, Defendants.
7. May 28, 1993, 43 CFR Proposed Rule on implementing the Native American Graves Protection and Repatriation Act. Federal Register, Washington, D.C.
8. This theme is affirmed in Daes 1993.

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