

ADDENDUM TO

REFRAMING INDIGENOUS CULTURAL
ARTIFACTS DISPUTES:

AN INTELLECTUAL PROPERTY-BASED APPROACH

CORTELYOU C. KENNEY

Please note that by the time this issue went to print, Yale University agreed to return the collections known as the “lost treasure” of Machu Picchu to Peru. This article does not reflect this change of events.

REFRAMING INDIGENOUS CULTURAL ARTIFACTS DISPUTES: AN INTELLECTUAL PROPERTY-BASED APPROACH ♦

CORTELYOU C. KENNEY*

INTRODUCTION.....	503
I. THE BATTLEGROUND OF REPRESENTATION	508
A. The Rise of The Museum in an Age of Empire Building	508
B. Museums as Sites of Silence and Cultural Amnesia ..	511
II. REFRAMING THE ARTIFACTS DEBATE.....	514
A. Physical Property Regimes: The Failure to Address Questions of Knowledge and Representation	514
1. Inefficacy of Current Physical Property Regimes	516
2. Inadequate Cause of Action	517
3. Inadequate Remedies (Property Rules, Liability Rules, and Inalienability Rules)	519
B. The Trend Towards Indigenous Intellectual Property	520
1. Federal, State, and Tribal Laws and Regulations	521
2. International Regulations.....	525
C. Reframing Cultural Artifacts: Through the Lens of Intellectual Property	527
1. The Problem of Knowledge.....	528
2. The Problem of Representation.....	530
3. Artifacts Themselves As “Intellectual Property” ..	532
III. THE PERILS OF INTELLECTUAL PROPERTIZATION.....	534
A. Defining Indigeneity	535
B. Cultural Hybridity	538
C. Censorship.....	539

♦ Permission is hereby granted for noncommercial reproduction of this article in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

* J.D. University of California, Berkeley, School of Law (Boalt Hall); A.B. Dartmouth College. This paper is dedicated to the memory of Professor Philip Frickey, teacher, inspiration, and intellectual pioneer. The author would like to thank her father, James Kenney, for his incisive criticisms and support. She is also grateful to Angela Harris, Amy Kapczynski, Joseph Sax, Curtis Buckley, Christopher Heaney, and Daniel Berman. © 2011 Cortelyou C. Kenney.

D. The Master's Tools.....	540
IV. ESCAPING THE PARADOX.....	541
A. Intellectual Property and "Cultural Stewardship"	542
1. Strong Rights, Soft Remedies	545
2. Nonrivalry as the Basis for Consensus Building ..	547
B. The "Wrap Around" Effect in Cultural Artifacts	
Context	549
CONCLUSION	551

INTRODUCTION

Indigenous cultural artifacts are traditionally seen through the prism of physical property. Disputes over a spectrum of objects, from human remains to sacred objects, center around who has title and possession, when import and export can be prevented, and under what circumstances economic remuneration or repatriation are appropriate. Museums, academic researchers, countries of origin, and indigenous descendents fight bitterly over these questions, prompting heated public relations campaigns, government lobbying, and litigation.

A recent high-profile example of such skirmishes involves a storied collection of Incan remains, pottery and jewelry known as the "lost treasure" of Machu Picchu.¹ The pieces were unearthed by swashbuckler and Yale professor Hiram Bingham during his expeditions to Peru in 1912 and 1914-1915, carted to New Haven, and abandoned in university vaults for over half a century. After years of stalled negotiations, Peru filed suit in December 2008, seeking repatriation of the collections and monetary damages.²

Yet there are reasons to question whether the Yale-Peru standoff, and cultural artifacts disputes more generally, ought to be seen solely in physical-property terms. Peru also alleges breach of fiduciary duty, arguing Yale failed to adequately care for the collections by leaving thousands of mummy bundles in cardboard boxes and blocking access to studies and photographs of the

¹ This term was first invoked by Peru's former first lady, now a professor of anthropology at Stanford University, to describe the artifacts. Eliane Karp-Toledo, *The Lost Treasure of Machu Picchu*, N.Y. TIMES, Feb. 23, 2008, <http://www.nytimes.com/2008/02/23/opinion/23karp-toledo.html>. Descriptions of the collections vary depending on the commentator. For excellent general discussions of the controversy, see Arthur Lubow, *The Possessed*, N.Y. TIMES MAG., June 24, 2007, <http://www.nytimes.com/2007/06/24/magazine/24MachuPicchu-t.html>; Christopher Heaney, *Bonesmen: Did Yale Plunder Peru?*, NEW REPUBLIC, Oct. 23, 2006, at 14, available at http://academic.mu.edu/matthew/hist071/Hist071fall07/TNR_CHeaney_10-23-06.pdf [hereinafter *Bonesmen*]; CHRISTOPHER HEANEY, CRADLE OF GOLD: THE STORY OF HIRAM BINGHAM, A REAL-LIFE INDIANA JONES, AND THE SEARCH FOR MACHU PICCHU (2010).

² Republic of Peru v. Yale University, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008).

remainder.³ More important are the assertions that Peru is entitled not simply to Machu Picchu artifacts, but also to any “related materials”—including “reports, studies, and photographs related to those artifacts”—and that Yale falsely represented in a widely attended and highly lucrative public exhibition that the artifacts ‘belonged’ to the Peabody Museum.⁵

It is no accident that Peru’s suit coincides with the rise of global movements for indigenous rights. These movements have lobbied not only for self-determination through ownership of physical property—in particular, land reform—but, increasingly, of information.⁶ These ideas have gained so much currency in certain quarters that they have become axiomatic; to some, it is simply unthinkable that indigenous groups should not be able to control the manner in which they are discussed, portrayed, or thought of since many portrayals can have clearly discernable negative consequences.⁷

While stopping short of such a conclusion, this article argues that the informational perspective should be considered in the arena of indigenous artifacts disputes. Rather than demarcating battle lines solely along the physical contours of the collection at stake, we must also consider them in terms of the intellectual ‘real estate’ associated with contested objects. This is not because such a view is natural or inevitable, at least not any more so than

³ See Complaint, ¶¶ 41, 110-16 Republic of Peru v. Yale University, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008); Hugh Eakin, *Inca Show Pits Yale Against Peru*, N.Y. TIMES, Feb. 1, 2006, <http://www.nytimes.com/2006/02/01/arts/design/01mach.html>.

⁴ See Complaint, *supra* note 3, at ¶¶ 88-91; First Amended Complaint ¶ 144, Republic of Peru v. Yale University, 3:09-cv-01332-AWT (D. Conn. Oct. 16, 2009) (alleging that Yale “also holds research papers, studies, and reports about the artifacts, as well as illustrations and photographs made of the Artifacts”).

⁵ See Complaint, *supra* note 3, at ¶¶ 79-80.

⁶ See Kristen A. Carpenter, Sonia Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1025 (2009) (noting domestic and global movements grounded in the language of property to challenge the expropriation of indigenous “lands, medicines, ceremonies, artwork, and natural resources”). For an example of the current debate surrounding this topic, see MICHAEL BROWN, WHO OWNS NATIVE CULTURE? (2003) (arguing against fencing in of indigenous information and premising his approach on the scholarship of Lawrence Lessig); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007) (contending that cultural property laws stifle the development of culture including cultural “hybridity”); Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 883 (2008) (discussing the countervailing “backlash” of “access to knowledge” movements centered around the freeing, rather than fencing in, of intellectual property).

⁷ See, e.g., Suzanne D. Painter-Thorne, *Contested Objects: Contested Meanings: Native American Grave Protection Laws and Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261, 1265 (2002) (making this assumption in context of cultural artifacts disputes); Kelly Mauceri, *Of Fakes and Frauds: An Analysis of Native American Intangible Cultural Property Protection*, 5 GEO. J.L. & PUB. POL’Y 263, 264 (2007) (same for Native American storytelling); Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 201, 204 (2005) (advocating the application of the international human rights frame to indigenous property to “overcome the trauma of . . . conquest and colonization”).

physical property itself.⁸ Nor is it because such a policy would necessarily even the cultural playing field, as other proponents of expanding IP regimes to other areas' traditional knowledge have advocated.⁹ Instead, it is because acknowledging that artifacts disputes are often about who has the right to frame the cultural 'other' can illuminate undiscussed issues surrounding physical ownership.

This article fundamentally reframes the debate over cultural artifacts. I argue that artifacts are not only physical property, but also a species of intellectual property that can be regulated independently of physical status. The IP-based approach to indigenous artifacts asks not who has title to the objects, but how information generated by and related to such objects in the course of research, restoration, curation, display, and handling ought to be treated. In short, objects are not merely 'things' of incredible monetary and historic value, but also a network of ideas, images, and representations with enormous cultural and religious significance. These ideas "carry with them a constellation of responsibilities" extending beyond ownership.¹⁰

Because it is easier to share an idea than a thing, the IP-based approach offers a toehold into longstanding disputes that have proven intractable under the physical-property paradigm and its winner-take-all stakes. It also offers a more nuanced understanding of the history underlying these objects, which may facilitate dialogue through recognition of multidimensional rights and obligations. This more complex understanding of the stakes may enable both sides to find common ground that was previously overlooked.

The IP-based approach to indigenous cultural artifacts is

⁸ The notion of property has been questioned by many intellectual movements. For a postcolonial critique, see Elazar Barkan & Ronald Bush, *Introduction to CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 2* (2002) [hereinafter *CLAIMING THE STONES*]. Furthermore property and intellectual property are not static concepts, but have evolved radically over time. Kapczynski, *supra* note 6, at 847 (discussing socially constructed nature of property and intellectual property, the latter shaped by "framing" undertaken by a "diverse group of industries" from pharmaceuticals to record companies). Finally, there are good reasons to treat physical property and intellectual property not as analogs, but as distinct concepts that have very little to do with each other. See generally Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031 (2005).

⁹ See, e.g., Angela Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

¹⁰ George P. Nicholas & Kelly P. Bannister, *Copyrighting the Past? Emerging Intellectual Property Issues in Archaeology*, 45 CURRENT ANTHROPOLOGY 327, 340 (2004). This manner of 'viewing' artifacts has been foreshadowed by scholars in certain quarters, particularly on the domestic front. See, e.g., *id.*; Painter-Thorne, *supra* note 7; TONY BENNETT, *THE BIRTH OF THE MUSEUM* 9 (1995); Claire L. Lyons, *Objects and Identities: Claiming and Reclaiming the Past*, in *CLAIMING THE STONES*, *supra* note 8, at 116; David Addison Posey, *Selling Grandma: Commodification of the Sacred Through Intellectual Property Rights*, in *CLAIMING THE STONES*, *supra* note 8, at 201-23.

novel, but it is also a logical outgrowth of the trend towards so-called intangible cultural property. Over the past two decades, movements in indigenous rights and IP have dovetailed to produce a spate of new laws—international, foreign, domestic, as well as tribal—that regulate ‘traditional knowledge’ from songs and dances to healing ceremonies to seed genomes to textile patterns. These laws have provoked a heated debate in the academic community, generating criticism from the so-called copyleft and access-to-knowledge (a2k) scholars—who advocate freeing, not fencing in, information—and, in turn, prompting a counter-offensive from indigenous rights advocates who defend these laws and argue that ‘propertization’ of culture need not be censorious or unduly restrictive if ownership and possession are defined more broadly.

Part I begins by illustrating how cultural artifacts disputes have never solely been about ownership and possession, but also have often involved related questions of knowledge and representation. It shows that conquest dispossessed indigenous peoples of objects, and that representations and interpretations of these objects facilitated continuing violence and subjugation. It then turns to modern issues involving artifacts, illustrating how museums often exclude native voices and handle objects without acknowledging the immense religious and spiritual import they have. In particular, it examines modern practices related to the study and display of these objects, and the often tokenizing role accorded native voices in both arenas.

Part II traces the failures of existing physical-property based frameworks to adequately deal with these issues, focusing on the causes of action and remedies they provide. It then examines the nascent trend towards regulating intangible cultural property, a trend that typically manifests in the context of indigenous songs, dances, or stories, but that already is being used to control ‘related’ or ‘intellectual’ elements of physical artifacts such as dig notes, photographs, and exhibitions.

Part III addresses dangers posed by ‘propertization’ of these related or intellectual elements, including threats to freedom of expression and to cultural hybridity. It addresses the significant tensions with the so-called access-to-knowledge mobilization that in many other contexts has seen indigenous groups lobby for the ‘unfencing’ of information.

Part IV argues that in spite of these dangers, an integrated understanding of cultural artifacts that acknowledges both their physical as well as intellectual dimensions is normatively desirable. While intellectual property rights can, and perhaps should, be resisted in other contexts, they are, perhaps ironically, less

onerous when tethered to physical objects.

Before plunging in, a brief caveat is in order with regard to terminology. This article uses terms like ‘colonialism’ and ‘the Global South.’ These function as placeholders and are not intended to embrace meanings advanced by particular communities or individuals. Rather, these terms may be essentially contested, defying definition. This is especially true where words have been the subject of linguistic, if not actual, wars. Attempts to pin down who and what counts as ‘native’ are undermined by rapid societal shifts—biologically through intermarriage, geographically through diasporas and environmental change, and technologically with the introduction of consumerism and capitalist economies.¹¹ The term ‘cultural artifacts’ is also loaded because it is both broad and heterogeneous, and has been taken by some scholars to encompass things as diverse as “matchbook covers[,] baseball cards[,] fruit box labels[, or] perfume bottles.”¹²

Nevertheless, because communication requires some degree of shared understanding, this article employs working definitions of the concepts above. The phrase ‘indigenous peoples’ should be read in reference to existing laws in the jurisdictions discussed. ‘Tribes’ means native groups recognized at the federal or state level.¹³ ‘Cultural heritage’ is a broad category that includes both physical and intangible objects and arguably real property such as sacred sites.¹⁴ ‘Cultural artifacts’ is a specific subset of this category that, for purposes of this article, refers only to moveable physical property such as human remains or sacred objects that have “ethnographic, or historical value.”¹⁵ Heartland examples include the Machu Picchu collections at stake in the dispute with Yale. More modern day artifacts, including secular objects, might include textiles or works of art, depending on the vantage point of the group of people to which they pertain and the individuals studying them. Importantly, within these pages, the phrase ‘cultural artifact’ does *not* include intangible cultural property.

¹¹ See Alex Tallchief Skibine, *Exhibiting Culture: Museums and Indians: Culture Talk or War in Federal Indian Law?*, 45 TULSA L. REV. 89, 90 (2009) (arguing word choice in this context is not merely a question of semantics).

¹² See John Henry Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULTURAL PROP. 11 (2005).

¹³ Native Hawaiians are included in this definition as they are recognized by the state of Hawaii.

¹⁴ See BLACK’S LAW DICTIONARY 436 (9th ed. 2009) (contrasting the terms “cultural heritage” and “cultural property”).

¹⁵ See Carpenter et al., *supra* note 6, at 1032 (cultural property traditionally includes “documents, works of art, tools, artifacts, buildings, and other entities . . . thought to merit special protection”).

Rather ‘intangible property,’ ‘cultural knowledge,’ or ‘traditional knowledge’ (‘TK’) refer to ephemeral resources such as medicinal knowledge and folklore derived from a particular community that is often closely guarded and passed down through the generations.¹⁶ Modern examples might include dances, television programs, or songs that pertain to particular communities. Regulation of intangible cultural artifacts is beyond the scope of this article, which focuses solely on the application of the IP frame to the tangible.

Finally, by ‘indigenous artifacts,’ this article does not mean disputed objects such as the Elgin, or Parthenon, Marbles, articles looted from the Iraqi national museum, or Chinese antiquities. Rather its meaning is restricted to history and culture of any of those tribes or peoples described above: namely those recognized by a pertinent government or supranational body such as the United Nations as ‘indigenous.’ It is the history of such peoples—and the unique legacy of violence spawned by colonialism and its study of them—that endows the intellectual property approach with such potency.

I. THE BATTLEGROUND OF REPRESENTATION

A. *The Rise of The Museum in an Age of Empire Building*

Not only the acquisition but also the study of cultural artifacts has long had an uncomfortably intimate relationship to the oppression of indigenous communities across the globe. Unlike the acquisition of cultural artifacts, the history of cultural knowledge and representation is not well-chronicled by legal scholars. During the age of empire building, governments constructed institutions such as the British Museum in London and the Louvre in Paris.¹⁷ These early fora served a dual purpose of inspiring nationalist pride and promoting the ‘taste’ of the bourgeois public.¹⁸

¹⁶ See United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, Oct. 17, 2003, <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (the category is “manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship”).

¹⁷ The Louvre Palace became a museum during the French Revolution to evince “political virtue” and show “the civic-mindedness of its leading citizens.” Carol Duncan, *Art Museums and the Ritual of Citizenship*, in EXHIBITING CULTURE: THE POETICS AND POLITICS OF MUSEUM DISPLAY 279 (Ivan Karp & Steven D. Lavine eds., 1991).

¹⁸ See BENNETT, *supra* note 10, at 109; Elazar Barkan, *Amending Historical Injustices: The Restitution of Cultural Property – An Overview*, in CLAIMING THE STONES, *supra* note 8, at 19; see also Timothy Webb, *Appropriating the Stones: The “Elgin Marbles” and English National Taste*, in CLAIMING THE STONES, *supra* note 8, at 72.

Artifacts from the ‘cradle of civilization,’ Egypt, Italy, and Greece, were shown as decontextualized *objects d’art*.¹⁹ In contrast, items from indigenous peoples were typically identified as a form of primitive crafts, or exhibited in anthropology and natural history galleries. These institutions were created to ‘study’ and ‘preserve’ the ‘savages’ from strange lands soon to become extinct.²⁰ Relying on now-discredited methodologies such as phrenology to examine human remains, scientists created taxonomies of ‘conquered’ peoples, which curators prominently displayed to illustrate their biological inferiority relative to sophisticated museum-goers.²¹

Exhibits functioned as cultural zoos or circuses, putting live indigenous peoples from Australia to Patagonia on display in the context of ethnographic objects, plant and animal specimens, and architectural facsimiles.²² Often these individuals were forced to go their daily activities: sleeping, nursing, crouching over fires, or miming other seemingly-typical activities such as hunting in the museum space. Although participants could sometimes act as docents and narrate the terms of their own display, the overall effect of these living exhibits was to convert indigenous captives into metonymical objects literally embodying their respective cultures.²³ The result was not only dehumanizing but also humiliating. Viewers jeered, mocked, and took pleasure in the animalistic and seemingly absurd lifestyles depicted, an attitude that reinforced their sense of comparative western ‘civility.’²⁴

Perhaps the most appalling example is the so-called Hottentot Venus, a sideshow performer named Saartjie Baartman who became the subject of public titillation.²⁵ Upon her death, her genitalia, skeleton, and brain were shown in Paris’ *Musée de*

¹⁹ See Webb, *supra* note 18, at 72; ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL ARTIFACTS 61 (2006).

²⁰ See VRDOLJAK, *supra* note 19, at 46-47 (noting the rise of cultural Darwinism in reference to study and display of cultural artifacts).

²¹ Developed by the German physician Franz Joseph Gall at the turn of the nineteenth century, phrenology purported to correlate cranial physiognomy with intelligence, character traits, and criminal propensity. See Barbara Kirshenblatt-Gimblett, *Objects of Ethnography*, in EXHIBITING CULTURES: THE POLITICS AND POETICS OF MUSEUM DISPLAY 398, 400 (Ivan Karp & Steven D. Lavine eds., 1991); John S. Haller, Jr., *Concepts of Race Inferiority*, J. MED. 40, 41 (1970); VRDOLJAK, *supra* note 19, at 56.

²² See Kirshenblatt-Gimblett, *supra* note 21, at 402-04; see also Curtis M. Hinsley, *The World as Marketplace: Commodification of the Exotic at the World’s Columbian Exposition, Chicago, 1893*, in EXHIBITING CULTURES: THE POLITICS AND POETICS OF MUSEUM DISPLAY *supra* note 21, at 345.

²³ See Kirshenblatt-Gimblett, *supra* note 21, at 407.

²⁴ *Id.* (quoting the account of Henry C. Shelley of the British Museum’s exhibition of Bushmen).

²⁵ See Bernth Lindfors, *Hottentot, Bushman, Kaffir: Taxonomic Tendencies in Nineteenth-Century Racial Iconography*, 5 NORDIC J. AFR. STUD. 1, 3 (1996). Interestingly, when abolitionists attempted to bring a case against her manager, she reportedly denied that she was enslaved, claiming instead that she was well paid and well treated. See *id.*

l'Homme until 1976.²⁶ Her enlarged labia and nymphae, achieved through beautification techniques common to the Hottentots, were commented upon by two of the most famous pathologists of the era, who deemed them “sufficiently well marked to distinguish these parts at once from those of any of the ordinary varieties of the human species.”²⁷ The genitals were seen as indicia of deviant sexuality that included lesbianism and copulation with apes.²⁸

Problematic representational techniques were not limited to Europe. Anthropologists and natural historians in the New World raced to preserve traces of native communities “vanish[ing] into history.”²⁹ Like their counterparts on the Continent, many of these early scientists conceptualized their mission as educational.³⁰ Their quest to accumulate knowledge, however, often accompanied the violent dispossession of the populations they studied, and, in turn, a willingness to portray them in exoticized and sometimes explicitly degrading terms. Scientists at the Smithsonian amassed vast quantities of human remains, relying on U.S. soldiers to remove the skulls of deceased Native Americans from “hospitals, battlefields[,] . . . graves, and burial scaffolds.”³¹ Much like racial taxonomies in Europe, their studies indicated that indigenous populations were lower on the evolutionary ladder than Anglo pioneers.³²

Prominent educational institutions also contributed to the darker aspects of ethnography and anthropology. UC Berkeley’s renowned Alfred Kroeber brought Ishi, the last living member of the Yahi nation, to live in a San Francisco institution affiliated with the Phoebe A. Hearst Museum for Anthropology.³³ Billed as “uncontaminated and uncivilized” and as a “stone age Indian,” Ishi attracted thousands of visitors as he demonstrated techniques for making arrowheads before he died of tuberculosis in 1915.³⁴ While he formed close connections with his captors/guardians,³⁵ Ishi himself was denied a voice in the manner in which he was

²⁶ See Chris McGreal, *Coming Home*, GUARDIAN, Feb. 21, 2002, <http://education.guardian.co.uk/museums/comment/0,11727,660396,00.html>.

²⁷ Sander L. Gilman, *Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine, and Literature*, 12 CRITICAL INQUIRY 204, 216 (1985).

²⁸ See *id.* at 213.

²⁹ Hinsley, *supra* note 22, at 347 (quoting Fredrick Ward Putnam, director and curator of the Peabody Museum at Harvard University).

³⁰ *Id.* at 363.

³¹ Painter-Thorne, *supra* note 7, at 1269.

³² See *id.*; Patty Gerstenblith, *Cultural Significance and the Kennewick Skeleton: Some Thoughts on the Resolution of Cultural Heritage Disputes*, in CLAIMING THE STONES, *supra* note 8, at 168.

³³ See ORIN STARN, ISHI’S BRAIN: IN SEARCH OF AMERICA’S LAST “WILD” INDIAN 24-30 (2004).

³⁴ *Id.* at 24.

³⁵ Ishi’s legal status remains unclear. Native Americans did not become eligible for U.S. citizenship until 1924 and Kroeber had to telegraph the Bureau of Indian Affairs to have Ishi released into his custody. See *id.* at 39.

portrayed. Most strikingly, his name was not his own, but a pseudonym coined by Kroeber after inquiries about who “is he?”³⁶ After his death and despite his wish to be cremated, Ishi’s brain was removed and clandestinely spirited to the Smithsonian where it would remain until an anthropologist uncovered it in the late 1990s.³⁷

B. *Museums as Sites of Silence and Cultural Amnesia*

Museums have come a long way from their colonial pasts. As indigenous peoples gained power through mass mobilization, control over social and financial resources, and access to educational spaces historically reserved for the societal elite, these spaces themselves underwent a process of transformation. Disciplines from art history to anthropology struggled to process critiques put forth by postcolonial thinkers such as Edward Said and Homi Bhabha and were pressured to alter questionable research and display policies.³⁸ Some museums now use information obtained from the study of artifacts to ‘restore’ Native culture actively stamped out by assimilationist government policies. For example, studies by Franz Boas—the ‘father’ of modern anthropology—have been used by native groups in British Columbia to reconstruct ceremonies that were banned.³⁹ As a result of these changes, the most blatantly racist or insensitive representational techniques common to the age of empire building are perhaps the exception rather than the rule in today’s multicultural museum environment. Nevertheless, much work remains to be done.

First, ‘blind’ acquisition—or acquisition without consultation with affected populations—of cultural artifacts continues at a high rate, particularly from resource-rich regions in the Global South. Given the immense poverty and the prospect of attracting tourists, there is a great incentive for indigenous individuals to promote expropriation of cultural artifacts.⁴⁰ Often, however, these individuals act in opposition to the express interests of the groups

³⁶ *Id.* at 40.

³⁷ See Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, 29 J. LAND RESOURCES & ENVTL. L. 91, 104-05 (2009) (recounting the Ishi story and subsequent intratribal battles over the brain’s repatriation).

³⁸ See MOIRA G. SIMPSON, MAKING REPRESENTATIONS: MUSEUMS IN THE POST-COLONIAL ERA 7-13 (1996) (discussing the “tremendous blossoming of cultural expression amongst indigenous peoples and other ethnic minority groups resulting from a growing awareness of the importance of cultural heritage and the desire for free expression and civil rights” and the impact this trend has had on museum display policies).

³⁹ Nicholas & Bannister, *supra* note 10, at 337.

⁴⁰ See David Matsuda, *The Ethics of Archaeology, Subsistence Digging, and Artifact Looting in Latin America: Point, Muted Counterpoint*, 7 INT’L J. CULTURAL PROP. 87 (1998); Nicholas & Bannister, *supra* note 10, at 329, 337-38 (observing that indigenous members participating in such trends are often accused of cultural “prostitution”).

to which they belong. Museums sometimes make little effort to determine who the true representatives are. Some museums do not have a general counsel or attorneys review acquisitions. Still others have explicitly sided against indigenous groups, supporting freedom of individual members to side against tribes in question.⁴¹ Moreover, because the Association of American Museums' ethical guidelines defend loans with a "hazy provenance" if the work is of "significant value," museums often fail to identify an explicit conflict of rights.⁴² The upshot is that many indigenous groups may never know a museum possesses objects, and thus are unable to request participation in the decisions related to acquisition, curation, research, and care.

Second, museums often care for artifacts under their control inadequately. While the primary justification among cultural "internationalists" for retaining title to or possession of objects is the research or educational value they provide,⁴³ this justification often rings hollow when actual practices are examined. Some institutions have carefully preserved objects or data related to their use, allowing indigenous groups to reconstruct lost rituals or kept artifacts in pristine condition when they might have been destroyed had they remained in their original location.⁴⁴ Nevertheless, other institutions have been extremely poor custodians. For example, Ishi's brain was stored in the Smithsonian for decades without anyone knowing; stunning Navajo shields remained in the possession of private individuals after discovery by the Park Service despite the need to store them in a climate-controlled environment.⁴⁵

Third, even when museums adequately care for objects, many deny indigenous groups access to objects or exclude them from research and display decisions. Communities have minimal "input into the meaning attached to the object studied" and are silenced by cultural outsiders who consider artifacts academic specimens, rather than living entities with religious, spiritual, or otherwise

⁴¹ See William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1035 (2001) (recounting an episode where the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia protested the Indian Arts and Crafts Act in the spirit of libertarianism and individual autonomy). The conflict between individual and group rights will be discussed in Parts III & IV, *infra*.

⁴² Hugh Eakin, *U.S. Museum Guidelines Defend Ties to Collectors*, N.Y. TIMES, Feb. 28, 2006, <http://www.nytimes.com/2006/02/28/travel/28iht-museums.html>.

⁴³ For a discussion of the difference between cultural "nationalists" and cultural "internationalists" and how these theories are reflected in different legal regimes, see *infra* note 57.

⁴⁴ Nicholas & Bannister, *supra* note 10, at 337.

⁴⁵ See Threedy, *supra* note 37, at 92, 102 n.85 (discussing Navajo shields unearthed in Wayne County, Utah).

nonacademic import to the groups in question.⁴⁶ For example, Yale touts the banner of collaboration, but throughout most of its negotiations with Peru, the University steadfastly refused to let Peruvian researchers access many of the collections in its vault.⁴⁷ And, even when groups in question are engaged, their opinions are often ignored or tokenized to justify previously formulated institutional policies. If it is possible to trace objects to multiple groups, museums will often use one group to ground the museum's decision, without ascertaining if this decision accords with the interests of the second group.⁴⁸

Finally, museum representations not only violate the wishes of indigenous societies, but do so while demonstrating significant historical amnesia. Many institutions omit any reference to or discussion of the manner in which their collections were obtained, and, as a consequence, whitewash histories of oppression and subordination out of their historical narratives. Strikingly absent from Yale's Peru displays is, for example, any mention of the dark history that lies behind acquisition. Yale's Peabody Museum opened its 2003 exhibit *Machu Picchu: Unveiling the Mystery of the Incas* with much fanfare, juxtaposing its collections of artifacts with "modern videos and computers to reimage life at the Inca's mountain estate."⁴⁹ The show contained a "handsome actor" who simulated the "discovery" of Machu Picchu, and "a mannequin of [Hiram] Bingham [as he] photograph[ed] an Indian excavating a grave."⁵⁰ The exhibit sparked an outcry in Peru. Mariana Mould de Pease, a leading anthropologist and commentator, charged

⁴⁶ Painter-Thorne, *supra* note 7, at 1270-71; see also Russell Barsh, *How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8 INT'L J. CULTURAL PROP. 14 (1999).

⁴⁷ Eventually, the University allowed Peruvian researchers to conduct an inventory, the results giving rise to further points of tension. See Paul Needham, *Discrepancy clouds count of Inca items: Peruvian officials report 10 times as many artifacts as Yale had announced in previous inventory*, YALE DAILY NEWS, Apr. 14, 2008, <http://www.yaledailynews.com/articles/view/24407>. Nevertheless, the Republic of Peru alleges that even this inventory process was flawed. See First Amended Complaint ¶¶ 151-53, Republic of Peru v. Yale University, 3:09-cv-01332-AWT (D. Conn. Oct. 16, 2009).

⁴⁸ Cf. Threedy, *supra* note 37, at 104-07 (discussing NAGPRA's exacerbation of intertribal conflict and museums preferential treatments of certain tribes); Shepard Krech III, *Museums, Voices, Representations*, 18 MUSEUM ANTHROPOLOGY 3, 3-8 (1994) (discussing formation of advisory committees designed to operate in good faith but that can "hegemonically co-opt independent people-minded people who might otherwise object to what museums do," the problem of vocal minorities, and the problem of constraints on museum adherence to committee suggestions based on funds and grants from more conservative sources). Of course, many museums do incorporate the voices of native groups. For example, Washington D.C.'s Museum of the American Indian makes a concerted effort to collaborate with Indian tribes in the United States. See Krech III, *supra* note 48, at 3-8.

⁴⁹ Christopher Heaney, *Hiram Bingham and the "Lost Treasures" of Machu Picchu: Popular Archaeology, Imagined Imperialism and National Press in the Yale Peruvian Expeditions* (Apr. 21 2003) (unpublished B.A. thesis, Yale University) (on file with author).

⁵⁰ *Id.*

that Dr. Richard Burger, co-curator of the exhibit and Yale's chief defender of Hiram Bingham, had consciously excised indigenous voices from his research. She stated that Dr. Burger had "made his livelihood with a very useful concept: 'Incas yes, Indians no'" and wanted "the archaeological Peru, ancient, of the glorious past," but was disinterested in "the Peru of the mestizo, criollo and all of the bloods of today."⁵¹ Although her rhetoric is perhaps inflated given that Dr. Burger's catalogue did include chapters by Peruvian anthropologists and historians,⁵² including a chapter on the modern-day Machu Picchu, it does indicate that the emotional status of artifact representation is a live issue, and one which strikes a chord when it comes to characterizing indigenous identity. Such problems are not limited to the Peabody. Many fine arts and anthropology museums display artifacts without providing any context whatsoever.⁵³

II. REFRAMING THE ARTIFACTS DEBATE

Just as the international artifacts story has centered on questions of acquisition, so too have legal issues focused almost entirely on questions of physical property. This Part examines the existing regimes governing artifacts and argues that they inadequately address the problems discussed in Part I.B.1 & 2. I then turn to an emerging body of law used to fill in the gaps: intellectual property. I argue that it is descriptively likely that disputes will increasingly be conceptualized through this IP lens.

A. *Physical Property Regimes: The Failure to Address Questions of Knowledge and Representation*

Artifacts are traditionally considered a species of "cultural property"—a category of "tangible resources bearing a distinct relationship to a particular cultural heritage or identity."⁵⁴ Under this framework, objects have a different legal status than fungible, hence easily monetized, objects.⁵⁵ (To think in economists' terms,

⁵¹ *Id.* (citing Mariana Mould de Pease as quoted in Francisco Estrada, *Los Tesoros de Machu Picchu deben regresar*, PERU.21, Mar. 4, 2003, at 9).

⁵² See *id.* (characterizing de Peases' rhetoric as an exaggerated, and potentially political, ploy designed to effectuate the return of the physical objects themselves).

⁵³ See Krech III, *supra* note 48, at 7 (discussing the National Gallery of Art's *Art of the North American Frontier* that presented "stunning . . . headdresses and pipes" that chronicled the acquisition of each object from non-Native owners but, with one exception, failed to include "historical photographs of Native people at the time the objects were used . . . [and] extended discussion in text of artifact meaning or use" and that when confronted with this fact, the curator responded "he was proud to see them there alongside other 'great art,' and that they were interpreted in the way they were because he believed it to be appropriate").

⁵⁴ Carpenter et al., *supra* note 6, at 1032.

⁵⁵ Some scholars—most notably Eric Posner—dispute the wisdom of this distinction, arguing that cultural property can, and ought, to be seen no differently than ordinary

they are not ‘widgets.’) Treaties such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects accord special protection during wartime, directing combatants to refrain from targeting them, and impose special penalties for illegally acquired items.⁵⁶ The guiding principle behind these regimes is that artifacts are unique.⁵⁷ They cannot be manufactured or replaced, and their loss would deprive the world of “scholarly information” produced by archeologists, anthropologists, ethnographers, historians, and scientists or prevent future aesthetic from being “appreciate[ed]” by “people who care about cultural property.”⁵⁸

Nevertheless, while physical property-based regimes are animated by a concern about information insofar as they distinguish cultural property from widgets—thus implicitly conceding the symbolic and emotional importance of objects—they do not capture or adequately address the issues outlined in Part I.B for at least three reasons. First, and perhaps most fundamentally, the remedies imposed by these regimes reflect the larger dichotomy between property rules and liability rules.⁵⁹ That is, they center upon repatriation of the physical objects or payment of monetary damages, and do not take into account the intangible dimensions of the objects that cannot be effectively monetized or owned. Second, even when remedies address some of the issues broached above, they do not solve the cases in which there may be no legal grounds for physical repatriation or reparation and for which there are intangible issues at stake.⁶⁰

property. See, e.g., Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213 (2007).

⁵⁶ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330.

⁵⁷ The three regimes, however, have fundamentally different points of emphasis. The Hague Convention reflects the “internationalist” belief that “everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives.” Merryman, *supra* note 12, at 11. The UNESCO and UNIDROIT Conventions embody the “nationalist” paradigm, implying “the attribution of national character to objects, independently of their locations or ownerships.” John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

⁵⁸ Posner, *supra* note 55, at 217.

⁵⁹ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁶⁰ Questions of rights and remedies are closely linked, and in this case, perhaps inextricably so. I address this intersection in Part IV of this paper, *infra*, arguing that expansion of substantive rights can be appropriate when coupled with weaker remedies.

Finally, laws governing control of physical property have proven patently ineffective at achieving their goals, as almost all cultural property scholars concede. This Part will address these three issues in turn.

1. Inefficacy of Current Physical Property Regimes

As a threshold matter, it should be noted that a physical property-based approach has proven remarkably ineffective at regulating cultural artifacts. With the possible exception of the Native American Graves Protection and Repatriation Act (NAGPRA)⁶¹ or New Zealand's Protected Objects Act,⁶² most laws have thus far failed to stem the overwhelming tide of objects from South to North or to effectuate repatriation of objects known to have been acquired under questionable circumstances.⁶³ An in depth discussion of the difficulties underlying regulation of the market for cultural artifacts is beyond the scope of this paper.⁶⁴ Nevertheless, there are at least three salient characteristics worth noting.

First, illegal possession of cultural artifacts is much harder to prove than possession *en se*. It is far more difficult to amass evidence that the country or group in question failed to consent to artifact export, that the museums or collectors had knowledge of this fact, or that foreign laws governing excavation were violated than to prove that a group has an object. Legal reforms that shift the emphasis from illegal possession to simple possession may be desirable from an indigenous rights perspective—much as NAGPRA takes this approach in the context of human remains and funerary objects—but would likely be ardently opposed by members of the museum enterprise.⁶⁵ Indeed, such a shift might

⁶¹ As even the most sanguine scholars concede, NAGPRA leaves much to be desired and does very little to alter the behavior of private museums and collectors since it only covers governmental institutions. See generally Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995).

⁶² See Piers Davies & Paul Myburgh, *The Protected Objects Act in New Zealand: Too Little, Too Late?*, 15 INT'L J. CULTURAL PROP. 321, 335 (2008) (noting the failures of law to adequately protect the Maori including neglecting the importance of intellectual property).

⁶³ Current estimates vary regionally, but tend to peg the value of objects flowing into the West in the vicinity of millions, if not billions, of dollars. See Part II, *supra*, for a fuller discussion.

⁶⁴ For a smattering of criticism, see Posner, *supra* note 55 (arguing import-export restrictions fuel a black market for antiquities); Gerstenblith, *supra* note 61, at 565 (pointing to “overlapping jurisdictions, inadequate funding and personnel [...] inefficient duplication of effort [...] [and] the perception that only those artifacts on public land may be protected”).

⁶⁵ See, e.g., Patty Gerstenblith, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 411 (2003) (recounting an episode where the Metropolitan Museum of Art knowingly acquired stolen artifacts from Turkey to the tune of \$1.2 million and bitterly fought court efforts at repatriation, arguing

empty the vaults and display cases of most history and anthropology museums in the United States, and have a significant impact on research institutions. In short, it is not pragmatic.

Second, and related, the demand for international artifacts remains high and is unlikely to diminish in the near future. The market for illicit antiquities—of which indigenous cultural objects are a significant subset—is the third most profitable black market in the world behind drugs and arms.⁶⁶ Many museums and private collectors fight requests for repatriation tooth and nail, given the revenue these artifacts generate and which they stand to lose if objects leave their collections.

Third, and most crucial, artifacts are not widgets; they are finite, and they tend to be seen by the indigenous groups from which they originate as well as by the researchers who devote their careers to understanding them as irreplaceable. Unsurprisingly, since only one side can possess or own a unique object at once, debates over physical control frequently prove acrimonious.⁶⁷ The next subsections will illustrate that emphasis on title obscures the underlying issue of cultural identity, and, in fact, it is much easier to regulate information than it is to regulate the possession of physical items themselves.

2. Inadequate Cause of Action

Physical property approaches to the cultural artifacts problem are inadequate to remedy many—if not most—of the problems raised by Part I.B. Professors Kristen Carpenter, Sonia Katyal, and Angela Riley argue persuasively in their recent article, *In Defense of Property*, that the loss of tangible property is “inextricably linked” to cultural identity.⁶⁸ Yet, a physical property-based approach tends to focus almost exclusively on the question of title. Domestic regulations have a similar character, focusing on smuggling goods across state boundaries.⁶⁹

the attachment of researchers to artifacts).

⁶⁶ See Janene Marie Podesta, *Saving Culture, But Passing the Buck: How the 1970 UNESCO Convention Undermines its Goals by Unduly Targeting Market Nations*, 16 CARDOZO J. INT'L & COMP. L. 457, 460 n.15 (2008); see also Nicolas & Bannister, *supra* note 10, at 335 (“The acquisition of antiquities, often by illegal or unethical means, is occurring at unprecedented rates to satisfy the growing interest of collectors and museums in historic or prehistoric items that are prized for their age, rarity, exoticness, or ‘Aboriginalness.’”).

⁶⁷ The AAM argues that a “hallmark of American culture is a profound appreciation for and desire to learn about and preserve the culture of other countries and civilizations that span the globe and recorded history.” Lyons, *supra* note 10, at 127.

⁶⁸ Carpenter et al., *supra* note 6, at 1040, 1060. Their proposal of focusing on fiduciary duties, stemming from corporate, environmental, and American Indian law, will be discussed in the final section, *infra*.

⁶⁹ For instance, laws such as the National Stolen Property Act, originally intended to prevent shipment of stolen automobiles across state lines, have been applied in the cultural artifacts context. See, e.g., Kelly Elizabeth Yasaitis, *National Ownership Laws as*

Indigenous interests in knowledge and representation are simply not covered by the dominant physical property regime. Indigenous groups cannot ensure humane and respectful portrayals of their cultures or appropriate treatment of sacred cultural objects or human remains (such as Saartjie Baartman's and Ishi's) or prevent cultural objects from being desecrated through alteration, distortion, or mutilation.

Second, indigenous groups lack the ability to control the flow of information and access to cultural artifacts—a so-called right of cultural privacy akin to trade secrets or the confidentiality accorded medical data.⁷⁰ Groups from whom information is obtained through research of artifacts have no say in whether and how this information is disseminated. For instance, groups cannot ensure that sacred objects are not displayed to the public at large, even if these objects were originally supposed to be shown only to select segments of the population.⁷¹ Indigenous groups also have no control over the publication of data obtained via anthropological and archeological research of artifact collections.⁷² They have no right to pre-approve release of anthropological publications surrounding sacred objects.⁷³

Third, indigenous groups cannot obtain access to and information about collections of artifacts from their respective cultures under a traditional property paradigm. If indigenous representatives want to examine, study, or obtain an inventory of objects possessed by museums and research institutions, they have no means to do so, short of voluntary compliance on the part of museums. Museums may also refuse to loan out objects, even when it is practically or financially possible for groups to conduct research locally. Indigenous groups are unable to use the objects in question—for example, in ceremonies or celebrations even if such use would pose no danger to the objects in question.

Finally, indigenous groups often have no voice in decisions regarding curation, display, research, restoration, and storage of cultural artifacts. Without consultation, museums may be uninformed about particular restrictions that should be placed on an artifact's use, or what representations might be seen as offensive to the groups in question. Indeed, museums often

Cultural Property Protection Policy: The Emerging Trend in United States v. Schultz, 12 INT'L J. CULTURAL PROP. 95, 96-97 (2005); see also Judith Church, *Evolving U.S. Case Law on Cultural Property Disputes*, 2 INT'L J. CULTURAL PROP. 47 (1993) (collecting cases).

⁷⁰ For a discussion of informed consent in the medical context and contract-based solutions, see *infra* note 117 and accompanying text.

⁷¹ See, e.g., Brown, *supra* note 6, at 24 (discussing dissemination of photographs against tribal wishes).

⁷² See Nicholas & Bannister, *supra* note 10, at 340 (proposing contractual remedies to solve this problem).

⁷³ *Id.*

determine which artifacts are sacred and which groups they belong to, absent indigenous consultation.

3. Inadequate Remedies (Property Rules, Liability Rules, and Inalienability Rules)

The inefficacy of current remedies in disputes over cultural property—of which cultural artifacts are a subset—has been discussed at length by Carpenter, Katyal, and Riley in their article, *In Defense of Property*.⁷⁴ I do not attempt to rehearse it here, except to touch on areas in which it relates to museum disputes over indigenous artifacts in particular. To the extent remedies for managing cultural property disputes are flawed, that should not necessarily push us to look at the rights themselves in a different manner. We might instead adopt a different legal regime that opts for alternative dispute resolution or community mediation to resolve artifacts disputes. The thesis of this article is not necessarily incompatible with such a solution. But adopting the frame of intellectual property better lends itself to these alternative remedial schemes as discussed at greater length in Part IV.A.

Traditionally laws governing physical property have been defined along three axes: property rules, liability rules, and inalienability rules. Property rules, perhaps the most powerful conception of ownership, are monopolistic: title confers the ability to exclude others and to control the uses to which property is put, including “transfer, production, [and] conservation.”⁷⁵ Because of the powerful nature of this form of relief, as well as its dignitary appeal, it has been extremely popular among indigenous groups seeking to effectuate return not only of artifacts, but also of lands appropriated by conquistadores and subsequent governments.⁷⁶ Nevertheless, this form of relief is also the most controversial because it necessarily involves dispossessing those who have current title, many of whom had no role in the original acquisition process and who arguably have a reliance interest in the land or objects at stake. One need only look to NAGPRA to see how museums bitterly fight against compliance given the drastic nature of the remedy and the reputational, emotional, and economic stake they have in retaining possession.

Liability rules, in contrast, are rights to economic remuneration. In the international artifacts context, liability rules can, of course, provide satisfaction for some indigenous

⁷⁴ Carpenter et al., *supra* note 6, at 1038-46.

⁷⁵ *Id.* at 1080.

⁷⁶ *Cf.* Carpenter et al., *supra* note 6, at 1051-52 (discussing sacred sites and attachment to land).

communities. If cultural artifacts are not conceived of in dignitary terms but are primarily about economic profits, then both museums and communities in dire economic straights ought to be satisfied by profit-sharing arrangements. The *quid pro quo* is lessened liability and enhanced public image for museums and increased stability for indigenous communities. However, the refusal of many indigenous communities to accept money in lieu of object return indicates limitations. Particularly for sacred objects and human remains in communities with a strong sense of connection to their ancestors and future generations, economic solutions may be not only inadequate, but insulting. Hence the refusal of the Sioux nation to accept damages for the United States government's taking of the Black Hills of South Dakota and Peru's refusal to accept money for Machu Picchu objects.⁷⁷

Finally, inalienability rules are restrictions on transfers of title. For example, living individuals are not allowed to alienate certain vital organs (such as a heart), though in some jurisdictions donation of certain body parts (blood, kidneys) is allowed. In the cultural artifacts context, inalienability rules have been implemented by numerous source countries—usually through laws that claim artifacts as cultural ‘patrimony’ and prevent export and expropriation.⁷⁸ These laws have been partially successful at curbing the number of artifacts on the legal market. However, they do not effectuate return of objects alienated before their passage, and do not affect the manner in which museums and collectors handle pieces under their control. Further, because they are national in nature and do not allow dialogue with particular groups, these laws risk depriving communities who want to share their heritage with the world of the ability to do so.

B. *The Trend Towards Indigenous Intellectual Property*

Although a physical property paradigm is predominantly used to manage cultural artifacts disputes, a movement has mounted towards regulation of ‘traditional knowledge’ and ‘intangible heritage.’ Indigenous groups not only seek repatriation, remuneration, and alienability restrictions of moveable property such as human remains and sacred objects. They also seek to control the fate of things such as songs, dances, or ceremonies,

⁷⁷ For a discussion of the Sioux Nation's refusal to accept money for the Black Hills see generally EDWARD LAZARUS, *BLACK HILLS, WHITE JUSTICE* (1999).

⁷⁸ In the Peru-Yale context, Peru points to a decree it claims banned the export of cultural artifacts at the time Bingham spirited the pieces back to New Haven. See First Amended Complaint ¶19-21, *Republic of Peru v. Yale University*, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008).

which do not necessarily have a physical component but are primarily ‘intellectual.’ In Part II.B, I examine the larger trend toward intellectual property and indigenous rights. In Part II.C, I argue that, as a descriptive matter, representations and information “related to” artifacts such as human remains and sacred objects are unlikely to remain exempt from this movement.

To be clear, laws regulating ‘intangible heritage’ or indigenous ‘intellectual property’ often do not resemble traditional patent, copyright, trademark, or trade secret laws but are often *sui generis* with an IP flavor: namely, they seek to fence in information from the public domain and to control the uses to which it can be put. In response to aggressive intellectual property frameworks championed by U.S. corporations in the pharmaceutical, agricultural, and entertainment industries in particular, tribes and foreign governments have found ways to control knowledge of their own in creative and dynamic ways.⁷⁹

1. Federal, State, and Tribal Laws and Regulations

The move towards IP in the field of indigenous rights is, in fact, nothing new. The Native American Graves Protection and Repatriation Act (NAGPRA) is generally perceived of as a scheme aimed to stem the flow of new acquisitions and to effectuate the physical repatriation of cultural artifacts. Yet, it functions largely as an exception to the physical-property based regimes discussed in Parts II A & B and implicitly and even explicitly recognizes the intellectual dimensions of these objects. Indeed, one commentator has referred to it as a “strangely woven quilt of contemporary intellectual property law and tribal cultural property law.”⁸⁰ This characterization is borne out in at least three discrete manners.

First, Section 3002 of NAGPRA requires museums to notify and consult affected groups regarding excavations under certain circumstances.⁸¹ This section has been narrowly interpreted,⁸² yet it gives tribes a stake in how objects are extracted and studied by controlling the flow of archeological information entering the public domain. The interaction with another piece of federal legislation—the National Historic Preservation Act (NHPA)—is

⁷⁹ See generally Michael Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT’L J. CULTURAL PROP. 40 (2005).

⁸⁰ David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 104 (2001).

⁸¹ 25 U.S.C. § 3002 (1990).

⁸² Angela Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49, 66-79 (2002) (collecting cases limiting what constitutes federal lands).

telling.⁸³ In 1992, two years after the passage of NAGPRA, Congress authorized the creation of Tribal Historic Preservation Offices to encourage native resource management.⁸⁴ The result has been an increase in the number of tribal archeologists, which has also prompted novel archeological methodologies that accord with native spiritual beliefs.⁸⁵

Second, NAGPRA requires museums to conduct inventories of objects in collections to determine their affiliation with native communities.⁸⁶ Museums often conduct scientific studies such as carbon-dating or DNA testing to determine affiliation. But NAGPRA also gives weight to indigenous knowledge such as oral histories to determine first whether the object is affiliated with a particular group and second what function it serves for the group in question.⁸⁷ In *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, for example, an indigenous group "sought the return of a ki i la au, or carved wooden image, which it designated as a sacred object" but which the City of Providence claimed was "merely utilitarian."⁸⁸ Ultimately, the NAGPRA committee deferred to the tribe's characterization and counseled the City to return the artifact.⁸⁹

Inventories are primarily intended to facilitate artifact return. Nevertheless, the inventory process also involves questions of knowledge. A tribe, for instance, may correct or supplement a museum's understanding of the objects in question, providing additional information on sacred significance or burial contexts.⁹⁰

⁸³ 16 U.S.C. 470 *et seq.* (1966).

⁸⁴ 16 U.S.C. §§ 470-71 (1992).

⁸⁵ See Joe E. Watkins, *Beyond the Margin: American Indians, First Nations, and Archaeology in North America*, 68 AM. ANTIQUITY 273, 276-78 (2003). Of course, Watkins' conclusion could be an example of confusing correlation with causation. The law might have been passed in response to increased interest in native archeology, or dovetailed with the increased number of native archeologists. However, it seems likely that the law has had some—albeit potentially indeterminate—impact.

⁸⁶ 25 U.S.C. §§ 3003-3004 (1990).

⁸⁷ See Debora L. Threedy, *supra* note 37, at 108.

NAGPRA . . . lists oral tradition as a relevant category of evidence. In fact, the Act lists oral tradition along with 'scientific' evidence, such as linguistic, historical, archaeological, and genetic evidence, with no indication that one type of evidence is worth more weight than any other. The Act thus incorporates as evidence the stories that indigenous peoples tell one another outside of the courtroom. The Act, by doing this, alters a basic rule of evidence in the adversarial system of justice.

Id.

⁸⁸ Painter-Thorne, *supra* note 7, at 1285 (citing *City of Providence v. Hui Malama I Na Kupuna O Hawai'i Nei*, 62 Fed. Reg. 23794, 23795 (May 1, 1997) (Native American Graves Protection and Repatriation Review Committee advisory findings and recommendations)).

⁸⁹ *Id.*; see also Isaac Moriwake, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261 (1998).

⁹⁰ See Painter-Thorne, *supra* note 7, at 1287-90; Gerstenblith, *supra* note 65, at 452 ("[M]useum professionals now consult with Native American tribes in the handling, care and disposition of a range of Native American sacred and cultural objects. This

For example, when asked to compile an inventory of objects for tribes in Alaska, UC Berkeley's Phoebe A. Hearst Museum of Anthropology changed labeling after being told that many of the records were not accurate.⁹¹ And while tensions between the Hearst and many tribes remain high, consultation has prompted joint exhibitions, such as the one on Ishi at the California Indian Museum and Cultural Center co-sponsored by the National Indian Justice Center, as well as increased transparency in decision-making.

Finally, NAGPRA contemplates the possibility of competing intertribal claims to cultural artifacts and encourages extrajudicial dispute resolution to incorporate as many voices as possible.⁹² As such, it acknowledges that multiple entities may have a stake in human remains and attempts to balance interests in representing and studying culture as a fluid entity. Although such a process is fraught with difficulties when tribes have radically different attitudes towards curation or repatriation—with some favoring reburial of the objects, others desirous of museum display to educate the public about their history, and others intent on using them in ceremonies—it holds out the potential for a far more nuanced appreciation of artifacts and how they ought to be understood. The legislation concludes that resort to court may be necessary to determine the fate of disputed artifacts. But along the way it forces museums to critically evaluate objects in their collection, to conduct investigations into provenance, to collect testimony from various groups, and ultimately, to have a deeper and more accurate understanding of culture.

Other federal statutes governing Indian 'products,' such as the Indian Arts and Crafts Act ("IACA"), are more clearly linked to traditional concepts of intellectual property.⁹³ The IACA, as amended in 1990, functions as a trademark and consumer protection law and requires works designated as Indian-made to "actually fit this description."⁹⁴ The law sounds in many of the dignitary interests discussed in Part I.B—in particular the right of tribes to control the manner in which they are represented—as well as substantial economic interests. As mentioned, the market for cultural artifacts is booming. While it is unclear what overlap, if any, exists with Indian arts and crafts, commentators estimate

consultation was originally mandated by NAGPRA but now often goes beyond these dictates. This process enriches the understanding that museum professionals can gain about these objects and thus makes them better educators of the public.").

⁹¹ See *Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Phoebe Hearst Museum of Anthropology, University of California-Berkeley*, Berkeley, CA, 66 Fed. Reg. 16495-01 (Nat'l Park Serv. Mar. 26, 2001).

⁹² See generally Threedy, *supra* note 37.

⁹³ Mauceri, *supra* note 7, at 283.

⁹⁴ Carpenter et al., *supra* note 6, at 1104.

that “counterfeit Indian products were responsible for an annual loss ranging from forty to eighty million dollars per year” with most counterfeits being produced abroad.⁹⁵

The IACA has been criticized in some quarters for “ahistorical fetishizing” of Indian culture and “ignor[ing] the extent to which the IACA’s arbiter of genuineness—Indian tribes—is a creation of federal Indian law and policy.”⁹⁶ The validity of these criticisms will be discussed in Parts III and IV. Nevertheless, it undoubtedly influences institutional buying behavior of new cultural artifacts and the relationship between tribes and museums, increases consultation and investigation into provenance issues, and promotes accuracy of the historical record.⁹⁷ For example, after it was initially passed, an Oklahoma museum closed afraid that its “collections might not pass muster under the new law” because it “had never inquired whether each artist whose work was displayed was formally recognized by a tribe.”⁹⁸ Upon “receiving assurances from the Indian Arts & Crafts Board” that the IACA only “deal[t] with commercial offers and transactions” and “those merely displaying or possessing an item without intent to sell it are unaffected,” the museum reopened.⁹⁹ The net effect of the law may be to diminish instances where museums purport to represent specific indigenous groups without their permission, though it has obvious negative side effects, including the diminishment of freedom of expression which will be discussed in Part III.

States and localities have also passed statutes to protect indigenous intellectual property that can be deemed applicable to the cultural artifacts context. For example, Arizona, California, and Nebraska have recently passed legislation mirroring and expanding protections afforded indigenous groups granted by the federal NAGPRA.¹⁰⁰ California’s statute, for example, includes tribes not officially recognized by the federal government and also has heightened documentation, consultation, and transparency requirements.¹⁰¹ These laws are nascent, but they are likely to accelerate over time in areas where tribes have political influence,

⁹⁵ *Id.* n.369 (quoting Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 339 (2002)); Hapiuk, *supra* note 41, at 1017-18 nn.33-35 (2001) (noting that “[f]ederal customs regulations now specifically require imported Native American-style jewelry and arts and crafts (e.g., pottery, rugs, kachina dolls, baskets, beadworks) to be indelibly marked with the country of origin”).

⁹⁶ Hapiuk, *supra* note 41, at 1045.

⁹⁷ *See id.* at 1020 n.52.

⁹⁸ *Id.* at 1011.

⁹⁹ *Id.* n.8.

¹⁰⁰ *See* John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POL’Y J. 349, 429 n.364 (2004) (collecting statutes).

¹⁰¹ CAL. ALS CODE § 818 (2001); CAL. AB CODE § 978 (2001).

and as professional organizations (such as the International Council of Museums (“ICOM”), the Society for American Archeology (“SAA”), and the American Anthropological Association (“AAA”)) pass ethical codes dealing with research, curation, and displays that mandate increased consultation with affected indigenous communities, giving communities veto power in certain situations (such as the excavation of human remains).¹⁰²

Finally, indigenous communities are passing their own laws that put pressure on and provide legitimacy for national courts to adopt similar stances.¹⁰³ For example, the Hopi claim an interest in “all published or unpublished field data relating to the Hopi, including notes, drawings, and photographs, particularly those dealing with religious matters.”¹⁰⁴ Similarly, the Apache have demanded “exclusive decision-making power and control over Apache ‘cultural property’ . . . defined as ‘all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts’ relating to the Apache, including any representation of Apache culture offered by Apache or non-Apache people.”¹⁰⁵ Indigenous laws are the frontlines of intellectual property in terms of innovation and departure from existing legal frameworks, but they draw on existing mechanisms such as copyright to demand benefits, sharing arrangements such as joint-copyright over research which would convert them into legal co-authors of the materials produced, or trademark to protect the creation of new artifacts akin to the IACA.¹⁰⁶

2. International Regulations

U.S. law is rapidly evolving in the area of intellectual property as it relates to the museum enterprise. Internationally, however, a movement has crystallized around the concept of ‘traditional knowledge,’ loosely defined as the individual and collective cultural practices of indigenous communities. This body of law often deals with a different set of problems such as bioprospecting of indigenous genetic materials for pharmacological and agricultural research or misappropriation of intangible heritage such as music and folklore that can be easily taken by outsiders

¹⁰² See Cohan, *supra* note 100, at 430-31. *But see id.* at 436-37 (noting divergence among codes and lack of clarity that gives researchers room to wiggle out).

¹⁰³ See Riley, *supra* note 9, at 105-07 (collecting laws).

¹⁰⁴ Nicholas & Bannister, *supra* note 10, at 339.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Note that the Bill of Rights does not apply within Indian Country. See *Talton v. Mayes*, 163 U.S. 376 (1896). Nevertheless, it has been extended by statute in the form of the Indian Civil Rights Act, including a version of the First Amendment (albeit one that omits an Establishment Clause). Thus, freedom of expression issues are very much alive.

without the community's consent.¹⁰⁷

Unlike U.S. statutes that focus on repatriation of physical objects and create information-sharing regimes for management of knowledge acquired through the study of these artifacts, most of these laws directly focus on the knowledge itself. Some foreign jurisdictions, usually those with a relatively strong history of indigenous rights, have attempted to repatriate indigenous knowledge by applying intellectual property laws straight up. Courts in Canada and Australia, for example, have found copyright infringement of paintings and textiles on the grounds that unauthorized reproduction might endanger spiritual relationships with the land or violate trade secrets by the unauthorized spread of sacred information such as photographs of secret ceremonies.¹⁰⁸ Canada has also allowed "defensive" registration of trademarks to sacred symbols or sites such as petroglyphs, to protect them from being copied or reproduced.¹⁰⁹ Because it is possible to patent genetic materials in many of these jurisdictions including the United States, Canada, and many European countries, it might also be possible for indigenous scientists to patent information obtained through the analysis of human remains, thus temporarily fencing off that material from the public domain. Alternatively, indigenous peoples might waive the right to fight patents of information obtained from scientific research in exchange for remuneration or some other benefit, an arrangement that would echo Iceland's agreement to provide DeCODE with licenses to all genes discovered in exchange for free access to any medicines derived from this research.¹¹⁰

Other countries have modified existing IP regimes or have created *sui generis* schemes to deal with specific indigenous peoples. Perhaps most boldly, New Zealand has amended its trademarks laws to protect indigenous designs, requiring the government to veto any application for marks whose use or registration would offend a significant portion of the community, legislation that has the practical effect of preventing trademarks incorporating Maori sacred designs.¹¹¹ Other countries including

¹⁰⁷ See Posey, *supra* note 10 (discussing this set of problems).

¹⁰⁸ See Brown, *supra* note 6, at 43-54 (discussing *Bulun Bulun, Milpururru v. R & T Textiles Pty. Ltd.*, 86 F.C.R. 244 (1998)).

¹⁰⁹ See Nicolas & Banister, *supra* note 10, at 341.

¹¹⁰ *Id.* n.33.

¹¹¹ See Irma De Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT'L L.J. 337, 337-50 (2005); An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371 (July 28, 1997) (Phil.); Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American*

Panama, Nigeria, Tunisia, and the Philippines have passed 'copyright-like' laws allowing, *inter alia*, collective ownership of sacred indigenous objects, fee distribution to communities whose folklore serves as a source for creative works, and the criminalization of "intentional distortion" and misuses of folklore.¹¹²

Third, questions of indigenous rights and traditional knowledge have caught the attention of the United Nations, the World Intellectual Property Organization, and the Organization of American States. For instance, the widely-debated UNESCO treaty on intangible heritage explicitly includes "representations" and "cultural spaces," and is aimed at "integrat[ing]" the physical and the intangible and managing the 'grey area' between the two, including local input into resource management.¹¹³ The Protocol of San Salvador addresses similar issues, though the document concentrates on concerns of just compensation and access to knowledge more so than its counterparts.¹¹⁴ Finally, and perhaps most significantly, traditional knowledge was singled out for potential WTO regulation under the TRIPS agreement during the Doha round, suggesting the possibility of more aggressive enforcement (e.g. fines and retaliatory trade measures, rather than the purely normative force derived from proclamations by other international institutions).¹¹⁵

C. *Reframing Cultural Artifacts: Through the Lens of Intellectual Property*

How might intellectual property laws discussed in Part II.B affect cultural artifacts? As the previous two Sections demonstrate, disputes over human remains to sacred objects are typically regulated via a physical property-based framework that focuses on title and possession. Nevertheless, a wave towards controlling intangible aspects of culture is forming. This Section will illustrate that the wave might well spill over into museum policies dealing with artifact research and representation, with ramifications for the physical uses to which these artifacts are put. They also may

Cultures?, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 43 (2004).

¹¹² Kremers, *supra* note 111, at 43-44.

¹¹³ JANET BLAKE, COMMENTARY ON THE 2003 UNESCO CONVENTION ON THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE, xii, 1, 5 (2006).

¹¹⁴ See Hadjioannou, *supra* note 7, at 213; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" art. 14, Nov. 17, 1988, O.A.S.T.S. No. 69, available at <http://www.oas.org/juridico/english/treaties/a-52.html>.

¹¹⁵ See BLAKE, *supra* note 113, at 9-10. Nonetheless, the Doha round was widely viewed as a disaster. Efforts to modify TRIPS have been abandoned out of fears that amendments would result in further concessions from developing nations, and talks have shifted back to WIPO, a forum that provides technical assistance and affords a potentially more receptive atmosphere for such concerns.

affect how objects themselves are conceptualized—a theme that will be more thoroughly developed in Part II.C.3.

Of course, because of the abstract, nascent, and widely variable nature of laws discussed in Part II.B, it is extremely difficult to predict how they will play out in practice. Nevertheless, anthropology and ethnography are also being regulated by some countries and there is already evidence that museums are considering their collections along these dimensions, if only because, like Yale's Peabody, they are forced to do so as a result of litigation. The primary questions, then, are what scope and shape these regulations will have, and how museums and indigenous groups ought to respond to trends that also implicate disputes over the physical fate of the artifacts. This Section will briefly suggest some of the range of possible outcomes, using the Peru-Yale dispute to show that in the wake of the indigenous intellectual property movements, artifacts "carry with them a constellation of responsibilities" including "onerous cultural and spiritual obligations."¹¹⁶

1. The Problem of Knowledge

Perhaps the primary effect regulations of intangible cultural heritage could have in the arena of cultural artifacts is how collections are researched. If indigenous peoples are granted a property right in the knowledge derived from human remains or sacred objects, communities could gain a powerful say in what methodology is used to study collections, what data is published, how information is disseminated, and even whether research may be conducted in the first place. Nicholas and Bannister discuss the implementation of "peer review" by indigenous groups of archeological publications, the creation of "joint copyright" laws, and control over data and analysis of data derived from campsites, burial grounds, ceremonial sites, etc.¹¹⁷ While most of the changes mentioned by Nicholas and Bannister are contractual—hence forward-looking—similar approaches could easily be applied to management of collections acquired centuries ago. The passage of NAGPRA and the recent spate of state, tribal, and international laws mandating indigenous input into cultural property management all suggest a strong trend in this direction.

¹¹⁶ Nicholas & Bannister, *supra* note 10, at 340.

¹¹⁷ *Id.* A recent case of the Havasupai Indians, who live in the Grand Canyon is illustrative. A scientist from Arizona State University had obtained the consent of the tribe to conduct research on diabetes. However, one of her students used blood samples to investigate other illnesses such as schizophrenia. The University eventually reached a \$700,000 settlement with the tribe. See Amy Harmon, *Indian Tribe Wins Fight to Limit Research of Its DNA*, N.Y. TIMES, Apr. 21, 2010, <http://www.nytimes.com/2010/04/22/us/22dna.html>.

These laws might radically alter the research process, but they need not do so. Assume that Peru, or indigenous peoples living in the Andean highlands, had intellectual property rights over the Machu Picchu collections. What might this mean in practical terms? At a minimum, Peruvians would have a say in the process of inventorying the collections—including how such objects are classified and possibly how they are counted.

Second, further studies by Yale's anthropology department could require input from Peruvian or indigenous scholars who might have veto power over the types and extent of research conducted.¹¹⁸ For example, any testing conducted on fragments of human remains and pottery shards would have to comport with standards of respect imposed by the Peruvian government, serve specific scientific goals drafted in tandem with the government, or accord with certain methodological approaches. This would also likely require artifacts to be kept in good condition; after all, leaving them in cardboard boxes for nearly a century hardly respects the dead or meets the definition of research the University purported to be conducting. While this requirement is probably more contentious than inventorying, it need not engender too much opposition. Indeed, Yale's original memorandum of understanding with Peru provided for a joint museum in Cuzco where collaborative research projects would be undertaken and the original catalogue for the traveling exhibition included essays by Peruvian scholars.¹¹⁹ Further, it is already considered 'best practice' among many anthropologists and archeologists to obtain the informed consent of the communities they work with if the modern ancestors have religious or cultural interests in artifacts studied.¹²⁰ This is particularly true when knowledge is considered sacred or dangerous—as many indigenous communities believe information held within human remains to be.¹²¹

Another, still more aggressive, formulation of intellectual property rights might allow Peruvians to claim ownership over

¹¹⁸ One question raised by the spate of new laws is: who would have the right to control information? Would it be governments or indigenous groups themselves? The answer depends, of course, on the particular laws in question. There may, however, be conflicts of interest between governments and indigenous groups, as the history of colonization painfully demonstrates. Yet, as demonstrated by the wave of indigenous leaders who have been elected in Latin America to their countries' highest office, this trend may be changing. For an interesting mediation on some of these issues outside of the indigenous rights context, see Joseph P. Fishman, *Locating the International Interest in Intrastate Cultural Property Disputes*, 35 YALE J. INT'L L. 347 (2010) (discussing intranational, rather than international, cultural property disputes).

¹¹⁹ *Yale Seeks Collaborative Relationship with Peru*, YALE OFFICE OF PUBLIC AFFAIRS AND COMMUNICATIONS, Dec. 9, 2008, <http://opa.yale.edu/news/article.aspx?id=1997>.

¹²⁰ See Nicholas & Bannister, *supra* note 10, at 342.

¹²¹ See Posey, *supra* note 10, at 201.

studies conducted by Hiram Bingham following the lead of countries such as the Philippines or tribes such as the Hopi. Indeed, such an argument is included in Peru's December 2008 complaint, which seeks the return of all materials "related" to the objects—presumably including photographs, dig notes, and replicas of the original artifacts.¹²² Such "related" materials might be considered 'derivative' works since the original dispossession of property enabled their creation and but for the digging by the likes of Hiram Bingham, they would never have been produced in the first place. If the Republic gets its way, the research process will likely be halted or Peru will be able to demand remuneration for Yale to keep the fruits of its labor. This would be controversial among American academics, yet it is a proposition supported by many researchers abroad. As Nicholas and Bannister point out, it is commonplace in British Columbia for groups to exercise veto power over what information makes it on to the pages of scientific journals by licensing the use of information subject to certain conditions.¹²³

Finally, at the outermost bounds, Peru might be able to assert a right to anything produced using information remotely derived from the artifacts. How far this right might extend is uncertain. However, using the example of New Zealand's or the Apache's laws, perhaps anything from articles and pictures in *National Geographic* to Bingham's autobiography to studies analyzing Yale's data conducted by Japanese scientists could be regulated. Still further, anything relying on these sources might be controlled—perhaps through claw-back rights equivalent to copyright—since it is a but for cause for the original acquisition and perhaps should never have been released in the first place.

2. The Problem of Representation

The second effect regulations of intangible cultural heritage could have is on representation. If the indigenous equivalent of a French *droit moral*, or moral right, develops, it would likely alter museum display policies and publications.¹²⁴ At a minimum, this would mean blatantly racist policies discussed in Part I.A—where indigenous remains were used to illustrate the genetic inferiority of these groups—would be prohibited. In the Yale-Peru context, the university's anthropology museum, the Peabody, would likely

¹²² See Complaint, ¶¶ 41, 110-16, Republic of Peru v. Yale University, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008).

¹²³ See generally Nicholas & Bannister, *supra* note 10.

¹²⁴ See Sarah Ann Smith, Note, *The New York Artists' Authorship Rights Act Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984) (discussing increased protections afforded artists under a moral rights scheme).

not have been able to refer to indigenous groups as “prehistoric men” that ranked barely above fossils and were displayed in “habitat cases” as it did in the early twentieth century.¹²⁵ The most recent depiction of indigenous laborers in Yale’s traveling exhibition—discussed in Part I.B—might also violate this standard if it were sufficiently offensive.

Second, under the same laws, museums and universities might be required to create ‘accurate’ representations of the culture of origin. For example, Yale would be required to correctly label the pottery shards or ceramics it displayed—not claiming they came from one site or were created by one community in the Amazon when, in fact, they were from another. Similarly, Yale could not glorify Bingham’s heroic exploits and careful anthropological techniques without revealing the darker history behind their provenance. Such an accuracy requirement would likely necessitate consultation with affected groups. After all, it would be very hard to know the geographic origin of an artifact that was improperly labeled in the first place without reaching out to the communities in question. In the Yale-Peru context, this would obligate the University’s anthropology department to collaborate with their South American counterparts in ascertaining the history behind each piece and possibly including Peruvian narratives along with the display. Like restrictions on research, an ‘accuracy’ requirement might also ‘wrap around’ to the uses of the physical property; after all, if a collection is kept in disarray, or broken into fragments an incomplete or partial image of the ‘artifact’ will be displayed.

Third, it might also be considered an ‘intentional distortion’ to create decontextualized artifacts displays—for example treating Incan vases as *objects d’art* without mentioning their origin or history. Although the Peabody goes out of its way to include information about Machu Picchu, other museums do not necessarily do so. For instance, ancient cultural artifacts have been displayed in the National Gallery as if they were pieces of modern art—although they were not explicitly labeled as such their proximity to other contemporary pieces implied as much. Such a requirement parallels that of the IACA, which requires proper attribution to tribal groups and requires tribal members to get approval from their leaders prior to representing that arts and crafts as originating from the group in question. If museums were held to this standard in the artifacts context, it might also prevent acquisition from indigenous individuals without prior approval of

¹²⁵ See, e.g., MILDRED C. B. PORTER, BEHAVIOR OF THE AVERAGE VISITOR IN THE PEABODY MUSEUM OF NATURAL HISTORY AT YALE UNIVERSITY 2, 6 (1938).

their tribe and would likely require pieces to be marked as relating to the tribe, rather than the individual. Thus, if a museum wanted to mount an exhibition of art through the ages, it could not merely label an artifact as having been created by a particular individual (if known), but would need to state the individual belonged to a particular group of Incans.

Finally, at the outermost boundary, intellectual property rights affecting representation might track IP notions of misappropriation—where museums might not be able to display artifacts at all without permission of groups in question. This approach maps on to some of the more radical tacks taken by the Canadian Supreme Court, which issued claw-back notices in the context of sacred designs.¹²⁶ As with exhibition of the designs, public display would be using the appearance of the artifacts for prohibited purposes. In the Peru-Yale dispute, the Republic could demand that Yale not show any replicas, photographs, or perhaps even depictions (such as sketches) of the artifacts. Further, even though it might not be able to demand return of the artifacts, the concept of misappropriation would certainly limit the uses to which artifacts were put. These uses might be specific (as in, groups might be able to insist on certain types of display) or they might be general (prohibiting public display altogether). The concept of misappropriation might also enable tribes to drive the display process.

3. Artifacts Themselves As “Intellectual Property”

Issues of knowledge (e.g. how artifacts are studied) and representation (e.g. how artifacts are displayed) illuminate a larger, and largely unexplored point: artifacts themselves are ‘intellectual property’ and as such not only subject to physical-property based regimes but also intangible heritage regimes. This may simply be to state a truism: artifacts are a subspecies of cultural property, which is of course finite and unique. To say that cultural artifacts have ‘penumbras’—e.g. they incarnate or contain certain information or values—may be no different than to say any kind of property stands for and contains information. A wedding ring, for instance, may stand for values (marriage) and contain information (the wearer is married). This might be John Merryman’s point when he says that “cultural property” might include things as diverse as “matchbook covers[,] baseball cards[,] fruit box labels[, or] perfume bottles.”¹²⁷

Yet, the emerging intangible cultural property laws seem to

¹²⁶ See Brown, *supra* note 6, at 43-54 (discussing *Bulun Bulun, Milpurrurru v. R & T Textiles Pty. Ltd.*, 86 F.C.R. 244 (1998)).

¹²⁷ Merryman, *supra* note 12, at 11.

single out indigenous property—property that must necessarily have some spiritual or cultural import to a historically disadvantaged and dispossessed group. These laws generally do not apply to such mundane, however emotionally significant, items as wedding rings or perfume bottles. NAGPRA, for example, is very clearly limited to a discrete category of indigenous objects: human remains, associated and unassociated funerary objects, sacred objects, and “objects of cultural patrimony,” defined as having ongoing importance central to the culture.¹²⁸ Interestingly, intellectual property laws have already been applied not only to representation and research, but, as in the case of the Canadian Supreme Court’s textile decision, to the physical things themselves.¹²⁹ NAGPRA is a hybrid law, and can be seen as regulating both ‘physical’ and ‘intellectual’ components of objects, though it primarily regulates information as a means to control title rather than as end in and of itself.

What does it mean in concrete terms for physical property to be subject to intangible property regulations? Are artifacts entirely intellectual objects: Does their intellectual ‘aura’ or ‘penumbra’ completely encompass or overlap the physical thing itself? Can the intangible elements of a thing be detached or stripped away if, for example, it no longer is of ongoing importance to descendants of those who created it or their community? Or, are the intellectual elements permanently ingrained in a thing, assuming it once had spiritual or cultural significance? If no one exists to honor the dead, at some point are they not simply bones? If a skeleton decays, at what point is it no longer human remains but part of the soil? And if cultural artifacts can lose their intellectual dimension, when does this occur? Finally, if it is possible to regulate the intellectual without the physical, might laws be tailored *only* to deal with the intellectual components? These are the sixty-four thousand dollar questions.

Of course, given the inchoate state of indigenous intellectual property, it is hard to know for sure. But if an object itself is deemed to have intellectual significance—in that it contains information and embodies culture—perhaps it may be a starting point to regulate these components as discrete from the objects as physical entities. Further, treating objects as intellectual property allows recognition of the hybrid nature of objects and their differential import and meaning. For instance, Yale obviously thinks about the Machu Picchu collections in a certain way (as

¹²⁸ 25 U.S.C. §§ 3001-3013.

¹²⁹ See Brown, *supra* note 6, at 43-54 (discussing *Bulun Bulun, Milpurrurru v. R & T Textiles Pty. Ltd.*, 86 F.C.R. 244 (1998)).

academic specimens) whereas Peru clearly sees them through another lens (as having patrimonial importance). Still other groups (such as indigenous highlanders) might see the objects in another way (perhaps focusing on their spiritual value) whereas other indigenous descendents (such as lowlanders) might see them as having little significance.

If an object can have different meanings as determined by its relationship to various individuals and groups, some of which are perhaps unexpressed because of ignorance or persecution, then which meaning trumps? Again, it will depend on how intellectual property laws are applied, but it seems at least theoretically possible to create tiers of priority based on the importance of the object and its nexus to the communities in question, and, to the extent possible, to reconcile and combine seemingly conflicting meanings. At a certain point, it may also be necessary to accept tensions about what objects mean, as long as certain baselines are met (e.g. museums acknowledge the spiritual import of objects to indigenous groups and these groups in turn acknowledge the scientific value these objects may have to museums). This baseline could then be a jumping off point for further discussions regarding research and representation as well as uses—uses that might not recognize any of the meanings ascribed to the objects. Yale, for instance, might recognize that human remains are sacred and thus should not be publicly exhibited (assuming the indigenous communities in question believe this), while Peru might agree that the same remains contain information about the disease record and that, perhaps from a sacred perspective, gleaning this information from respectful examination may even serve the continuing evolving norms of the communities in question.

III. THE PERILS OF INTELLECTUAL PROPERTIZATION

Whether or not intellectual property protections will apply to physical artifacts—converting them from pure bundles to bundles of intellectual rights—and whether or not these protections are normatively desirable are two independent inquiries. This Part will examine the implications of the trend towards the intangible rights. In many respects it represents a positive development by evening the playing field.¹³⁰ And, as a simple matter of justice, these laws have great appeal.

Nevertheless, there are many dangers involved in an IP approach. Thinkers such as Michael Brown, Naomi Mezey, Madhavi Sunder, Russell Barsh and others problematize it from

¹³⁰ See, e.g., Riley, *supra* note 9.

various angles in the context of songs and ceremonies,¹³¹ arguing that severe difficulties arise in defining who and what qualifies as ‘native,’ applying western legal standards to concepts that are of a spiritual nature, and, perhaps most importantly, in the hybridity that results when cultures overlap.¹³² The last concern also contains buried issues of free speech, a principle deeply enshrined in U.S. constitutional law.

This Part addresses these concerns and suggests that they are quite real, particularly in an era of globalization with rapid demographic fluctuations and social change. Intellectual property rights have also been used to oppress native groups because the concept of property, let alone intellectual property, is foreign to many indigenous communities. Contrary to prevailing wisdom, however, I do not argue against an IP framework, at least when tethered to concrete physical objects. Rather, in the intersection of the physical and intellectual, many of these concerns are ameliorated.

A. *Defining Indigeneity*

Perhaps foremost is the question of what it means to be indigenous. After all, these laws do not protect every culture equally: they single out groups for preferential treatment in a fashion analogous to affirmative action or hate speech codes.¹³³ Scholars argue that it is impossible to come up with a coherent or principled definition of indigenous groups. No matter what heuristic is used, be it genetic testing or tribal sovereignty, connection to land, or some combination of the above,¹³⁴ there will be exclusions exacerbated by diversity and increasingly rapid demographic shifts.¹³⁵ These factors are compounded by the legal incentive structure put in place. Privileging certain ‘in groups’ is arguably ‘preservationist,’ depriving those who are different of the right to assert their own identity.¹³⁶ This is no small concern in an era of increasing interconnectedness, where groups often come into conflict with members desiring to alter traditional ways of life.

¹³¹ But see Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1334-35 (2004) (arguing that “leaving information and ideas in the public domain . . . turns a blind eye to the fact that for centuries the public domain has been a source for exploiting the labor and bodies of the disempowered—namely people of color, the poor, women, and people from the global South”).

¹³² See generally Mezey, *supra* note 6; Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69 (2000).

¹³³ See Mezey, *supra* note 6, at 2005. For an interesting critique of hate speech codes which has unexplored implications for the area of indigenous rights, see Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499 (1996).

¹³⁴ The literature on self-determination is vast, and I do not attempt to survey it here.

¹³⁵ See Mezey, *supra* note 6, at 2005-06.

¹³⁶ *Id.* at 2013.

While definitional quandaries may plague intellectual property rights or indigenous rights as a broader field, they are particularly salient in the context of artifacts disputes. First, deciding which groups merit protection for the creation of contemporary tapestries is much easier than deciding who should own objects made thousands of years ago. For instance, the “cultural patrimony of Peru consists of the remains of more than four thousand years of strikingly different cultures, spread throughout the country . . . [and] [m]ost of the ancient cultural property of Peru is . . . not associated with living indigenous cultures or languages.”¹³⁷ Determining what tribe made which artifact, especially when the archeological record itself is ambiguous, is far from an easy task. Such problems have already arisen in the context of NAGPRA where indigenous groups have issued competing claims to the same object, as Deborah Threedy illustrates in her article tracing a dispute over three bison-hide shields discovered in Utah.¹³⁸ They can be even more thorny when it comes to deciding what pieces of evidence to rely on in parsing the claims. Indeed, it is possible, and even likely, that both groups may have valid claims if the community split apart, or that the artifacts ‘belong’ to none of the competing claimants.¹³⁹

The temporal disconnect is magnified in the context of representations, which are debatably second-order cultural objects. Are the photographs taken by Hiram Bingham depictions of Andean culture at the time of his expedition? Of Incan society thousands of years ago? What about dig notes? Other archival documents chronicling the explorer’s encounters with indigenous peoples of the era? And what about the modern interpretations of these documents, for instance liner notes at an exhibit, a catalogue of objects, or a historical treatise? While indigenous conceptions of time and authorship are undoubtedly different from western understandings,¹⁴⁰ attempting to pinpoint the precise moment of creation in any evidentiary framework would be a difficult task. It might be possible to find the moment of

¹³⁷ Clemency Coggins, *Latin America, Native America, and the Politics of Culture*, in CLAIMING THE STONES, *supra* note 8, at 111. Incan remains near Machu Picchu are likely tethered to living societies.

¹³⁸ See Threedy, *supra* note 37.

¹³⁹ See, e.g., *Bonnichsen v. United States*, 367 F.3d 864, 876 n.17 (9th Cir. 2004) (holding that none of the three Indian groups who claimed Kennewick Man as an ancestor could support their claim because radiocarbon dating proved the bones were over eight thousand years old and thus could not be called Native American despite the Secretary of the Interior’s argument that for NAGPRA purposes remains could be designed as Native American even if they were “100,000 or 150,000 years, close to the dawn of *homo sapiens*”); see also Threedy, *supra* note 37, at 116 (“Not all stories can be told. What if a tribe is forbidden to talk about the evidence necessary to document their claim?”).

¹⁴⁰ See Nicolas & Bannister, *supra* note 10, at 331.

creation legally irrelevant by positing that any information of present value to any native group ought to be considered their intellectual property. However, this may run into substantial overbreadth issues, including freedom of expression and academic integrity. This question is considered more fully in the subsection that follows.

Finally, even to the extent that images can be connected with cultures, internal disagreement over the methods and content of the representations are very possibly a greater impediment in this context than in traditional ownership disputes. A problem involving physical property is limited to the basic remedial options outlined in Part II.A.3—property rules, liability rules, and inalienability rules. While groups may be torn between these options, especially when income levels vary widely,¹⁴¹ the remedial options are at least confined to a relatively finite universe. In contrast, the spectrum of solutions in the intellectual property context is far wider, producing paradoxes of choice and making it very difficult to regulate efficiently. Some groups may want input on shaping museum policies and may vary as to the extent of the contribution, some may want to censor the offending items altogether, others may simply want access to this data for their own research purposes, and still others may not care to assert any claim of connection whatsoever. This difficulty is of course amplified by demographic and social changes, which make tribal governments likely to change position frequently, undermining museum reliance on the positions of indigenous groups and making frequent consultations a legal necessity. These changes also bind future generations of affected groups to the decisions made by present day representatives, decisions that to some may seem no different from selling Manhattan for twenty-four dollars. Finally, for multiple claimants the problem may be even greater—especially when they have radically different ideas as to how to care for an artifact. What happens when the Navajo want to use their shields in renewal ceremonies (which will cause them to wear down over time) but the Ute want them carefully stored in a humidity-controlled environment for preservation for future generations? What happens when one of the Oneida tribes want to widely publish information so as to educate the public and make them more sympathetic to their long and hard efforts to reclaim land, while another group wants to keep this information locked away because dissemination would violate their spiritual code?

¹⁴¹ See generally Matsuda, *supra* note 40 (discussing the economic incentives for 'selling out' culture).

B. *Cultural Hybridity*

Closely linked to the question of who counts as native is the issue of hybridity. Much as the thought of owning knowledge troubles those who believe that ‘information wants to be free,’ protecting indigenous heritage through IP rights disquiets scholars who see culture as “dynamic in its appropriations, hybridizations, and contaminations” and who ask what happens when cultural encounters “transform . . . contested property.”¹⁴² Thus, a tattoo or other body mark seen as sacred and inviolable in some portions of the world can be resignified in others through widespread use in the fashion industry and elsewhere. To this extent, and to the extent that we as a society seek to promote creativity and borrowing, categorizing the tattoo as the property of the Maori might have a significant chilling effect on artists of every stripe—body artists, visual artists, or clothing designers—as well as on ordinary individuals.¹⁴³ Or, for instance, in the context of the music industry, should we as a society prevent the use of Native American garbs by rappers such as OutKast in their music videos?¹⁴⁴ What about children’s stories and folklore?¹⁴⁵ Westerners who practice Eastern religions? Sports mascots? The Indiana Jones franchise?

Aside from the logistical nightmare this might entail, at least some of these activities seem like intuitively legitimate behavior. Perhaps we should examine whether the groups responsible for the underlying source of inspiration are willing to permit such activities. Perhaps the remainder—the easy cases as it were—can and should be regulated. But where would we draw the line as to how much culture or cultural contribution is enough? Where does one culture or creator end and another begin? And what about shifts over time and geography?

Representing cultural artifacts perhaps presents even trickier questions. While objects such as ceramics, implements, and even human remains originate from a particular society, their meaning

¹⁴² Mezey, *supra* note 6, at 2005. This concern is vastly more applicable to creative enterprises than it is to scientific ones. Some might protest the patenting of indigenous medicinal practices because such a practice might prevent treatment, locally or globally (e.g. Indonesia’s failure to share data about the Avian Flu virus), but such claims are less likely to be rooted in the notion that others have invented the contested medicine and more aptly phrased in terms of the public good. *See id.*

¹⁴³ *See generally* Stephen Prichard, *Essence, Identity, Signature: Tattoos and Cultural Property*, 10 SOC. SEMIOTICS 331 (2000); Peter Shaund, *Scenes from the Colonial Catwalk: Intellectual Property Rights and Fashion*, 3 CULTURAL ANALYSIS 47 (2002).

¹⁴⁴ *See* Riley, *supra* note 9.

¹⁴⁵ *See* Betsy Hearne, *Swapping Tales and Stealing Stories: The Ethics and Aesthetics of Folklore in Children’s Literature*, LITERARY TRENDS, http://findarticles.com/p/articles/mi_m1387/is_3_47/ai_54836350 (last visited Oct. 9, 2010).

is far from static. Subsequent indigenous generations may use them in different manners, especially if the time increment prior to 'discovery' is centuries or millennia. They are also subject to environmental changes in the soil, the atmosphere, or human settlement. Furthermore, as Mezey argues is the case for trademarks, they are substantially influenced by the meaning attached to them though other cultures. Thus, to the extent that the second-order representations, as opposed to the physical objects, are regulated, these laws run the risk of excluding subsequent contributions.

To think again in Mezey's terms, we might take the prototype of Hiram Bingham and the thousands of hours he poured into piecing together the artifacts to create an archeological record. Under an IP framework, his efforts, despite their original synthesis of data, might be considered the creation of another culture. Indeed, the contribution of individuals such as Bingham and other museum professionals are likely substantially greater than the example Mezey takes as the centerpiece of her article: the Indian mascot of Northwestern University.¹⁴⁶

C. *Censorship*

Linked to the issue of cultural hybridity are the incentive structures created by IP laws. While traditionalists argue that intellectual property rights increase the quality of expression, everyone can agree that it decreases the quantity of expression, engaging in 'rent transfers' from society at large to a concentrated group of individuals. At its worst, this can result in a substantial 'chilling effect,' discouraging individuals who have legitimate rights to produce.

Issues of censorship would certainly be relevant if intellectual property protections extended to the realm of indigenous artifacts. If indigenous groups were able to exclude others from access to information, might this not dramatically decrease our knowledge? Indeed, this question seems almost tautological: the whole idea behind these rights is to allow indigenous communities to hide away sacred objects and protect them from the prying eyes and ears of individuals who are not allowed to experience them. Thus, assuming even a very small number of indigenous groups attempt to enforce these rights, the quantity of knowledge in the public domain will necessarily be diminished.

Such an experience is indeed borne out by the applications of already-existing laws; as noted above, the traffic in indigenous

¹⁴⁶ See Mezey, *supra* note 6.

arts and crafts decreased in the wake of the IACA with at least one museum temporarily closing due to ‘compliance’ concerns.¹⁴⁷ Similarly, individual indigenous artists are restricted by the IACA, which forces them to seek preclearance from their tribe before billing themselves and their products as Indian.¹⁴⁸ Some individuals do not receive clearance, and thus may find it harder to market their works, and, in turn, to continue to produce.¹⁴⁹

Focusing more specifically on the question of knowledge produced as a result of research on artifacts collections, we might ask whether a significant reduction in output is likely to occur. Answering such an inquiry would require extensive empirical data, but we can look to other contexts to get a rough idea. In Israel, for example, “archeology and related research have been severely limited by objections of ultra-Orthodox Jewish groups over the sanctity of human remains . . . effectively halt[ing] most physical anthropology, and it extends to remains not affiliated with the modern Israeli population, including early human remains.”¹⁵⁰ Given how contentious cultural representations remain and how difficult it is to achieve consensus on seemingly innocuous issues such as whether to carbon date or DNA test human remains, it is very possible that IP regimes could produce a similar result.

D. *The Master’s Tools*

The last argument made in opposition to ‘propiertization’ of traditional knowledge or other intangible indigenous heritage is that such a maneuver would only be a new, and more virulent, form of colonialism that would whitewash historic oppression of these groups. Resistance to IP protections is perhaps strongest among indigenous leaders educated in the West, who argue that western epistemological—and by extension legal—systems are themselves a form of violence enacted through segregating and compartmentalizing emotion from intellect, land from life, past from present, and present from future.¹⁵¹ Current frameworks force indigenous knowledge into an artificial and unnatural rubric. More to the point, even if the categories themselves could be matched abstractly to indigenous knowledge, legal forums requiring the forms of evidence predominate in most countries are likely to violate native traditions (e.g. secrecy) by requiring

¹⁴⁷ The museum, of course, may have been simply staging a protest and exaggerating the effects of the law to make a point. It is hard to know given the facts available, but does not seem entirely implausible given the heated opposition to the law (and presumable effects on museum gift-shop sales). Hapiuk, *supra* note 41, at 1011.

¹⁴⁸ Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (1990).

¹⁴⁹ Hapiuk, *supra* note 41, at 1011.

¹⁵⁰ Nicholas & Bannister, *supra* note 10, at 331.

¹⁵¹ See Barsh, *supra* note 46, at 26.

disclosure to some number of individuals.¹⁵²

Of course, it is unclear how this argument applies to artifacts and representations of these objects. As Russell Barsh points out, these are deeply connected to land.¹⁵³ Others point to the perverse idea of “commodifying” items such as human remains, since these are rooted in the past and have a seemingly sacred significance, unlike bioprospecting of genetic information of living individuals who can give informed consent.¹⁵⁴

IV. ESCAPING THE PARADOX

The problems associated with an IP-based framework appear daunting. Is it logical, then, to suggest abandoning or supplementing a physical-property based approach to cultural artifacts, when it risks far fewer negative side-effects than its intangible counterpart? Wouldn't this take us 'out of the frying pan and into the fire'? In this Part, I answer 'yes' and 'no.' First, IP frameworks are uniquely suited to less potent remedial regimes such as the stewardship model advanced by Carpenter, Katyal, and Riley because it is easier to share an idea than a thing.¹⁵⁵ Indeed it may even be easier to care for, and about, an idea than a thing, suggesting that consensus on issues surrounding representation, research and shared meaning is more likely to form. Second, because the ideas related to cultural artifacts are confined by a universe of physical things and are directly tethered to these things, regulating them would be much less onerous than laws governing information *en se*. As such, cultural artifacts may actually prove less paradoxical than they appear and certainly less paradoxical than free-floating representations of indigenous groups that permeate popular culture.

Of course, no matter how IP rights are implemented, some tensions will remain. Given the emotional investment in and

¹⁵² This debate is, of course, far more complex than summarized by this article. See generally, Riley, *supra* note 9 (chronicling the experience of tribal court systems in grappling with indigenous knowledge and discussing the potential influence these courts have upon dominate courts).

¹⁵³ See Barsh, *supra* note 46.

¹⁵⁴ Of course, one might problematize the notion of consent. Some indigenous groups, for instance, prohibit autopsies of their members (a prohibition that some courts have ruled can be abrogated by states conducting criminal investigations). But could tribes limit the ability of members to give their own blood or to have invasive medical procedures conducted while alive? And what if individuals in question were to write a will commanding the donation of their bodies to science? NAGPRA resolves this dilemma by prioritizing the rights of lineal descendants, suggesting an acknowledgement of the tensions between individual and group decision-making in this context. See 25 U.S.C. § 3002 (1990). Of course, this tension could well be amplified in the context of information derived from cultural artifacts where conceivably many different descendants might claim a stake (at some point mirroring the parsing out of tiny plots of land in the post-allotment era).

¹⁵⁵ Carpenter et al., *supra* note 6.

deeply ingrained notions of cultural identity, the sheer number of groups affected by decisions related to cultural artifacts, and the dedication to the pursuit of knowledge by anthropologists, archeologists, and museum officials, disputes are likely to crop up over any number of issues. Similarly, promoting an IP-based approach would undoubtedly produce inefficiencies and high transition costs. Consulting with each and every group over each and every detail related to research seems daunting from a practical perspective and, in the end, may not produce agreements but only make disagreements more intractable. Further, it may also produce a significant free rider problem if indigenous groups know they can extract rents from museums and research institutions by holding out rather than negotiating in good faith, a problem that may produce a spill over effect against other groups interacting with these players.

Nevertheless, remaining aware of these effects as well as the potential pitfalls enumerated in Part III can help avoid them. Given both general and specific trends towards IP rights at the domestic and international levels, it would behoove all parties to work together to produce an optimal regulatory framework or to reach mutually amicable extralegal solutions. While an enforceable international framework may be out of reach, the economic consequences of ‘patchwork quilt’ multijurisdictional regulations are also severe. Further, while setting up any kind of consultative framework will undoubtedly have tremendous start-up costs, in the long run such a system may eventually reduce frictions and produce more responsible and insightful research as parties become repeat players, develop better understandings of the other, and learn to identify shared interests. We can already get a sense, from anecdotes of success in which consultation was a deeply ingrained part of the research process, that respect for indigenous interests promotes a sense of trust and enhances the quality of the knowledge that is publically shared.

Ultimately the devil is in the details of how any indigenous IP regime is designed and implemented. The aim of this Article is not to propose any specific mechanism, but to open a space for groups to explore these issues in context, keeping in mind the specter of poorly designed schemes and the ill effects these might have on all parties in the equation. I leave it to others to suggest or design doctrinal solutions to these problems.

A. *Intellectual Property and “Cultural Stewardship”*

Intellectual property has typically been conceived along the same remedial lines as physical property. A patent is an exclusionary right—the right to fence someone else out from

making your product unless you decide to license it. Thus, if I patent the genetic materials of my ancestors, I can prevent you from using these materials to make a drug. Similarly, copyright confers the ability to seek injunctive relief against any party who “‘trespasses’ against your creative works; so, for example, if a movie too closely mirrored the Indiana Jones franchise, Paramount Pictures would have the right to hold up release of its rival. Most opponents of indigenous intellectual property regimes seem to fear exclusionary rights will also apply to intangible cultural heritage.¹⁵⁶ Naomi Mezey, for example, is worried what the consequences of censoring Northwestern University’s Indian mascot.¹⁵⁷ And, indeed, these fears are borne out by some of the laws discussed in Part II.B, including New Zealand’s, Canada’s, and the Hopi’s.

Yet, there is no intrinsic reason why intellectual property ought to be conceived in these terms. Physical property is, at least in some cases, necessarily rivalrous. If I take a bite out of an apple, there is one chunk less for someone else. If I rent out my house, there are only so many rooms to go around. And, in the cultural artifacts context, there is generally only one item to be had. While it may be possible to make replicas, researchers and indigenous groups alike would be quick to label artifacts ‘unique’ because they contain valuable information or because they are sacred and represent ancestral spirits. Because they are not widgets, they are also not easily shared. It is theoretically possible to loan them out on a rotating basis at least in terms of possession, it tends to be all or nothing. A collection might be divided, and an artifact split into pieces, but, much like Solomon’s baby, this is considered destructive by both sides.

Information, on the other hand, is nonrivalrous. It is theoretically possible for parties to possess it simultaneously without it diminishing the enjoyment of others. If I have information about the diseases that felled my ancestors whose remains lie on display in the Peabody, I can share this information with researchers looking to design a cure for similar modern ailments. I can also share photographs and dig notes associated with artifact excavation with native researchers without impairing my study of these “related” items. Of course, sharing may prove more difficult in the cultural privacy context. If an indigenous group actively opposes anthropological and archeological research and objects to any proposed studies, it is unlikely the parties will be able to reach any mutually beneficial arrangement and sharing

¹⁵⁶ See, e.g., Mezey, *supra* note 6.

¹⁵⁷ *Id.*

will diminish the enjoyment of one and possibly both groups. However, this problem is likely to crop up in a finite number of disputes involving the intellectual aspects of cultural artifacts. On the whole, thinking about the ideas contained by and related to museum collections is likely to create a wider range of possible solutions to any given problem related to research and representation than using a physical property-based approach.

It is here that the notion of stewardship can shape our understanding of intellectual property regimes. In their article, *In Defense of Property*, Carpenter, Katyal, and Riley argue it is possible to conceive of physical property disputes not simply as implicating exclusionary rights or absolute control over an object, but also encompassing a “duty of care” as in the sense of fiduciary duties.¹⁵⁸ From this vantage point, titleholders may still owe obligations to third parties who are the equivalent of trust beneficiaries, including the obligation to act in the ‘best interests’ of these groups or individuals.

Fiduciary duties are, in fact, a staple of federal Indian law.¹⁵⁹ Tribes can sue the federal government for property mismanagement and these skirmishes can involve the uses to which property is put. For example, in the recent *Navajo Nation* case, thirteen southwestern tribes argued the Forest Service’s issuance of permits to a ski resort to make artificial snow violated the government’s fiduciary duty to protect the San Francisco Peaks, a native sacred site.¹⁶⁰ In issuing the permit, the tribes argued, the federal government ignored their right to free exercise of religion.¹⁶¹ While the tribes ultimately lost—just as native groups have lost in nearly every other lawsuit concerning limiting government management of Native American sacred sites—their arguments suggest a burgeoning paradigm that moves beyond the ‘all or nothing’ outlook of physical-property regimes.

The idea of stewardship has also been deployed in the cultural artifacts context. Angela Riley has separately argued that NAGPRA creates just such a trust obligation and that in construing the statute, courts and federal agencies must take into account the interests of the tribal claimant.¹⁶² Further, as “notice” legislation, it

¹⁵⁸ Carpenter et al., *supra* note 6.

¹⁵⁹ Significant differences between private and public trust doctrines complicate this analogy and attempted importation of standards from corporate law. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Actions Affecting Tribal Lands and Resources*, 1995 UTAH L REV. 109, 115-16 (1995).

¹⁶⁰ *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

¹⁶¹ *Id.*

¹⁶² See Riley, *supra* note 82 (contending the “trust doctrine would necessarily be implicated where a federal agency was responsible for facilitating, supervising, and authorizing the project that resulted in the excavation of Indian human remains”) see also Cohan, *supra* note 100 (making a similar claim).

is not merely enough for the government to abstractly consider what is in the “best interest” of any given tribe. Museums must also defer to tribal understandings of “best interest.” This argument is similar to the one Peru deployed in its complaint against Yale. Peru argued the University had breached its fiduciary duty both because it neglected the artifacts in cardboard boxes for nearly a century and because it told the government it had returned all objects taken from Bingham’s dig sites.¹⁶³ Had it acted in the “best interests” of the Peruvian people, it would have taken better care of the artifacts and it would have been forthcoming about their fate in the University’s collections.

While stewardship is a powerful concept, it has limited use in the realm of physical property. A tribe might be able to sue a museum for polluting mummy bundles with toxic waste, and it might even be able to limit the conditions of storage and handling under this framework. At the outermost boundaries, affected groups might assert exclusive control over the uses of cultural artifacts themselves; thus, if a tribe wanted to prevent a woman from handling a given artifact, under a stewardship framework the tribe ought to prevail over scientists or museum officials who do not want to spend resources crafting special care policies for each object or hiring more personnel. A tribe might also prevail if it wished to use the artifact in a sacred ceremony and use does not damage the object. Fiduciary duties thus address many of the rights and remedies discussed in Part I.B.

1. Strong Rights, Soft Remedies

However, by tying fiduciary duties or duties of care to physical objects themselves, the *types* of care owed are limited. It may be possible to concede a mummy bundle should be treated carefully, but this does not extend to the information or representations connected to objects or the meaning of those objects. A duty of care limited to the purely physical dimension of cultural artifacts would not prevent a museum from creating a display that whitewashed or omitted the history of their acquisition, nor would it mandate consultation with affected groups over how such history ought to be narrated since such descriptions are not actually part of the objects themselves. A duty of care would very likely be inapplicable to Yale’s traveling exhibition containing replicas of indigenous laborers, to the composition of the accompanying catalogue, or to Hiram Bingham’s dig notes for the same reason. Further, a duty of care is generally conceived of as

¹⁶³ See Complaint, ¶¶ 41, 110-16, Republic of Peru v. Yale University, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008).

unidirectional—typically the government or private parties owe it to beneficiaries, and no duty by the beneficiaries is owed to the government or private parties.

When paired with an intellectual property approach, the concept of stewardship takes on a new resonance. It becomes possible not merely to adequately care for a thing, but to care for and perhaps about an idea related to or contained by that thing. Cultural artifacts would thus be understood in a relativistic or contextual fashion; they are not just objects, but objects with history—objects that tell history. Human remains are not just bones; they are fragments of a life, and of a society; they come from a specific moment in time, and from a specific space. They have also evolved over time, acquiring new meanings from the places and times in which they have traveled. From this end, a “duty of care” through an IP framework could also change the directionality of the relationship—it is not merely museums and universities who are the custodians, and who owe care to indigenous groups, but perhaps also native groups who owe a duty of care to the ideas that have, over time, been added to the objects through research. In this sense, it is possible to conceive of intellectual property as extending rights to both parties, much as co-authorship does in the context of copyrighted works.

Intellectual property rights are in some sense “strong rights”—they go *beyond* the rights envisioned by the property based frameworks discussed in Part II.A.2 and even *beyond* the notion of fiduciary duties common in the museum context. The fact that they are “strong,” however, does not imply a corresponding increase in the strength of remedies. In fact, the strength of remedies might be inversely correlated with the strength of the right. For example, if we conceive of intellectual property duties governing the research process, it might be appropriate to mandate that indigenous inventories of collections must be allowed, and even that these inventories ought to displace the manner in which museums have counted or described collections since in many cases indigenous groups may well have a better understanding of what objects are or were. However, if indigenous groups assert a right to dictate what studies can be conducted on artifacts in the first place or to control exactly what uses the results are put to, perhaps it should be paired with a softer remedy like good faith consultation. The sheer number of rights conveyed by an intellectual property approach means that the remedies can be finely calibrated to match the dilemma in question and can be animated by an underlying concept of mutual obligation and respect. From this vantage point, both Peru and Yale might have intellectual property rights as against each other

and may be bound together to reach agreements, though of course the strength of each party's right may not be identical.

2. Nonrivalry as the Basis for Consensus Building

Perhaps more important, because ideas, representation, and information are nonrivalrous—because two or more parties can have different understanding of an object without diminishing the understanding of the other party—they provide an excellent starting point for consensus building. Although the parties may disagree on many, if not most, aspects of what artifacts mean—including how they ought to be researched, represented, and handled—parties can likely find some points of shared meaning or some baseline for how artifacts will be researched and represented. For example, although the parties may differ over whether Hiram Bingham was a hero or a racist, they can probably agree that exhibits should avoid offensive representations of indigenous people; for example, the image of Hiram Bingham directing what could easily have been interpreted indigenous slave labor could easily have been removed without affecting the efficacy of the exhibit. Similarly, it might have been possible to discuss the darker side of the artifacts' acquisition in conjunction with the storied history of the Incan empire, or to add a segment about the lives of current indigenous highlanders without compromising the integrity of the exhibition and even without engendering too much fuss from the curators.

Further, in the research process, NAGPRA has shown that it is possible to create richer, and more nuanced, understandings of what objects were through the process of consultation, as knowledge from both parties is added to the records. The fact that parties might not have previously reached an agreement on any of these issues does not necessarily mean that the issues are contentious; it simply may speak to a lack of communication between the two or failure to discuss less controversial issues first. But if IP laws require taking into account each perspective on these basic points, the incentive to participate in good faith increases, as does mutual understanding. Consensus is also more likely to build when layers of meaning are added, rather than subtracted. It is easier to get scientists to understand that artifacts have a spiritual value than to give up their belief in the importance of science. Similarly, it is easier for native groups to admit that objects have some scientific value than to jettison their position that objects have spiritual importance. Thus, the key to consensus building is to find places where both perspectives and understandings of objects can be admitted because, all too often in debates over repatriation, only one set of meanings is

acknowledged.

Once basic points of agreement are formed, these also serve as a jumping off point for further dialogue surrounding more controversial issues. For example, even though anthropologists may want to conduct a certain study on the collection of artifacts or use a specific methodology to conduct the proposed study, if indigenous groups disagree but propose an alternate means of studying the objects that comports with their baseline values, researchers are likely to have a higher quality of data produced. As is the case in British Colombia, many academics feel that routine consultation with indigenous groups enhances trust as well as improves their understanding of the underlying culture, in turn informing the research they conduct¹⁶⁴. Consultation can foster collaborative research efforts with native anthropologists and archeologists that may ultimately change the way indigenous groups view artifacts. Precisely because meaning is dynamic, discussions with scientists may prompt tribal leaders to decide to change their perspective of the objects in question and to conclude that studies do indeed serve spiritual values. Alternatively, scientists may realize that studying every artifact from a particular region is unnecessary to address the research questions they have in mind, and thus only undertake studies of remains that cannot be traced to any group.

Once consensus is reached on these low or mid-level questions, it is also possible to work outwards, addressing, in the research context, the content of publications, and in the representational context whether objects should be displayed at all. Finally, parties may even be able to reach agreements on questions of title and ownership that remain so intractable when dealt with through a physical property based framework. NAGPRA consultations revealed, for example, that after gaining assurances they would be able to use objects in sacred ceremonies, and that museums would refrain from handling them in violation of basic spiritual precepts, many tribes were quite content to leave museums in possession of artifact collections.¹⁶⁵ Part of reaching this conclusion may have been the educational function of artifact displays conducted in consultation with the relevant indigenous groups; many elders felt collaboration would serve native values if it could change public perceptions of their communities and they had a voice in the process. Contrariwise, after NAGPRA negotiations some museums have voluntarily returned cultural artifacts that likely would not have fallen within the law's

¹⁶⁴ See Nicolas & Bannister, *supra* note 10, at 342 (discussing the potential for collaboration with communities).

¹⁶⁵ Carpenter et al., *supra* note 6, at 1092-93.

coverage.¹⁶⁶ . Assuming intellectual property laws are correctly designed, it may result in benefits to all parties involved. A dialogic process—and one that generates extralegal solutions—is thus likely to address many of the concerns in Part III, from cultural hybridity, to censorship, and even to ‘using the master’s tools to disassemble the master’s house.’ Indeed, consultation might even promote many of these values by increasing the quality, and in some cases quantity, of cultural encounters.

Finally, it is worth acknowledging the difficulties inherent in consultation and consensus-building. There are folkloric reports of museums attempting to consult with relevant communities—only to have their researchers stranded on icy tundras after the nomadic group in question moved for the season. Nevertheless, these hurdles are not insurmountable, even when it comes to involving groups from the Global South. Indeed, there are a variety of concrete steps curators can take in the digital age, including contacting their counterparts at peer institutions in countries of interest via phone or email, consulting U.S. experts familiar with the communities in question, reaching out to consulates and other governmental agencies likely to have resources at their disposal, getting the advice or supervision from ICOM, or, perhaps most simply, leaving out a comment book for visitors to record their experiences of the museum space, thereby providing for an interactive model. Indigenous leaders who are particularly invested in the manner that their societies are depicted internationally often have a large enough stake to visit the institutions in question, as has been the case with both the Peabody and the Hearst. While non-rivalry certainly does not guarantee consensus, the range of options on the table, and the subtle alterations, and hybridizations of meaning that can be produced through dialogue provide substantially more hope than “all or nothing” physical property approaches.

B. *The “Wrap Around” Effect in Cultural Artifacts Context*

Another important principle that addresses many of the concerns in Part III is that laws regulating the intangible, or intellectual, dimensions of cultural artifacts are confined by the physical dimension of the objects. This distinguishes cultural artifacts from many other forms of intangible heritage, such as songs, dances, ceremonies, and, perhaps most importantly popular representations of native culture, and serves a limiting

¹⁶⁶ See, e.g., Kim Alderman, *Repatriation of Aboriginal Remains and Artifacts in Canada*, CULTURAL PROPERTY AND ARCHEOLOGY LAW BLOG, Sept. 13, 2010, <http://culturalpropertylaw.wordpress.com/category/nagpra/> (discussing voluntary return of Canadian masks).

principle against some of dangers in using intellectual property laws to regulate these other contexts.

First, while culture is hybrid and the meanings attached to artifacts evolve over time as different groups come into contact with them, the objects themselves are essentially stable. Although bones and sacred objects decay—especially if not stored in climate-controlled settings—they are qualitatively different from songs, dances, ceremonies, and popular depictions of native cultures whose composition, let alone meaning, can radically change over time. The importance of ‘tethering’ cannot be overstated; it dramatically shrinks the breadth of information and representations affected by non-indigenous cultures. For example, the Machu Picchu collections were only accessible to a small number of people—primarily Yale’s anthropology department and National Geographic as well as the indigenous peoples living in the area—limiting the amount of data generated by others. In contrast, songs, dances, and ceremonies have the potential to spread virally; for example, if a member of an indigenous community who possesses knowledge of songs, ceremonies, or dances moves to a different community, he or she can pass on this information to another individual, who can pass it on again until it becomes widely known and thus practically impossible to regulate through a “stewardship” model where parties bear mutual responsibility towards each other. Of course, some studies or depictions of cultural artifacts—such as Ishi’s photo in the Hearst—may also fall into this viral category, which is one of the primary reasons to oppose its regulation. But, in general, information and representations of physical things are generally held within museum vaults or researcher’s offices.

Using physical objects as a limiting principle also increases the stake individuals have in relationship to them. Yale, for example, has a very strong interest in the Machu Picchu collections, and, given the length of time it has studied and possessed them, a higher “duty of care” with regard to intellectual dimensions of the object seems appropriate. This is particularly true given the financial and legal savvy of universities and museums, which have directly profited from their possession of cultural artifacts and whose speech is less vulnerable to censorship as a result. In contrast, it would not be reasonable to require members of the general public who do not have a significant relationship to the artifacts, but who casually or even accidentally come into contact with them in a museum setting, perhaps creating information by talking to others about their experience or impressions, taking notes, drawing sketches, or even incorporating them into a longer creative work to act with the

same degree of care. Additionally, many of these encounters can be prevented *ex ante* assuming museum officials act in accord with tribal wishes. Perhaps it might be reasonable to require anthropologists who study music or dance to exercise the same duty of care in their research, but it would again be difficult to justify requiring the public at large to exercise such caution—particularly given how songs and dances (though perhaps not ceremonies) are intended to be disseminated unlike buried or closely guarded objects. To the extent that certain information such as the contents of a sacred ceremony becomes public against the wishes of an indigenous group through the unscrupulous tactics of researchers, it might also be possible to require the intermediary to limit the dissemination of information to the extent possible, or to pay damages to the group. However, given that anthropologists often did not gain access to indigenous ceremonies unless they earned the trust of the community, these scenarios ought to be the exception rather than the rule.

Finally, the history of cultural artifacts—the violent process by which they were acquired, the degrading and humiliating forms of research and representation discussed in Part I.A—may separate them from intangible cultural heritage items such as songs, dances, and popular representations. While of course parodies of indigenous songs and dances can prove highly offensive they are not necessarily accompanied by the same overtones. In the cultural artifacts context, studies of objects directly facilitated the dehumanization, displacement, and subordination of entire populations.

CONCLUSION

Ultimately, regulation of indigenous cultural artifacts—particularly using an IP approach—depends on the notion that indigenous groups are special or different. After all, it seems highly unlikely that we might extend such protections to other cultures, even those that also have a history of oppression. Would it not be just as intellectually sound, for example, to control research conducted of individuals abducted via the slave trade? What about Christians, Mormons, or Orthodox Jews who reject study of sacred objects in their religious traditions? Why shouldn't their wishes be respected as well? Such an argument is advanced by none other than Michael Brown, whose extensive contacts with American Indian communities gives him credibility on the subject.¹⁶⁷ Perhaps the most logical response is not that it is

¹⁶⁷ See generally Michael Brown, *Comments*, 45 CURRENT ANTHROPOLOGY 327 (2004) (responding to Nicolas & Bannister).

possible to historically differentiate indigenous peoples from religious minorities—though it is—but that such differentiation is necessary because of the mounting trend towards protecting indigenous rights, and particularly indigenous intellectual property rights, on a global scale. The likelihood that such regulations will affect archeology and cultural artifacts disputes within the next generation seems quite high as states and tribes pass laws modeling NAGPRA and as nations in the Global South pass vigorous laws to protect heritage they perceive as stolen.

Given the tide towards intellectual property, criticisms such as Brown's and Mezey's may be to some extent a moot point. It may be more productive for all parties to recognize that indigenous groups—and the governments who represent them—perceive an intellectual property interest in cultural artifacts. Given the flexible toolkit of remedies that is uniquely suited to the intellectual as opposed to the physical realm, because information is nonrivalrous and the duty of care can be bidirectional, repeat institutional players, including indigenous groups and museums, can develop points of consensus and trust if forced into contact with each other.

Thus, the oncoming wave of indigenous intellectual property regulations should give us serious pause—pause about the potential harms of overregulation—but also pause about the generation of knowledge and representation itself. Knowledge can be a weapon, a means of domination, and a form of colonialism, but it can also enrich the public perception of indigenous peoples and of the museum enterprise. By carefully sharing knowledge and developing it within certain boundaries or baselines, many of these dangers can be ameliorated.