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Cultural Imperialism and the Marketing of Native America

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INTRODUCTION

In 1992, mainstream Euro-America demonstrated the short, selective, and sanitized character of both the national memory and the official history that sustains it by celebrating an anniversary: the Columbus Quincentenary, the "discovery" of the "New World." The vast majority of activities generated by this event were festive and culturally self-congratulatory. Yet there were powerful subcurrents of protest, indigenous and otherwise, in wide evidence, contesting the sharply edited, profoundly revisionist nature of the commemoration. They drove home the moral and methodological implications of the fact that history is not only written from a particular standpoint, but that that standpoint has been of the colonizers, not the colonized.[1] The response of Native America was also a determined assertion of presence and continuity, pointedly captured by the defiant counter spilling over with t-shirts, posters and bumper stickers: "Still Here! Celebrating 49,500 years . . . before Columbus."

Partly as a result of these cultural dynamics, the writing of history has become more problematic within the general public's awareness. Some began openly to question longstanding practices, notably the racist dimensions of the continued stereotyping of Indian people by Hollywood, the media, and the sporting

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world.[2] Yet many deeply disturbing aspects of contemporary Western/indigenous cultural relations were left largely unexamined and unquestioned. One of these is a particularly virulent form of cultural imperialism—the marketing of Native America and, most tellingly, of native spirituality.

Consider, for example, that a leading figure of the New Age recently announced he intended to patent the sweat lodge ceremony since native people were no longer performing it correctly.[3] Could he receive intellectual property protection from the U.S. government for the sweat lodge ceremony, acquiring the right to prohibit native people from performing it? To sue them if they do so? Astoundingly, it is at least legally arguable that he could,[4] thereby placing himself in a position to limit the access of native peoples to their own cultural expressions.[5] Yet, were such to occur, it would be only an escalation (albeit a particularly egregious one) of a phenomenon already deeply entrenched in Western culture, the commodification of indigenous spirituality. The transformation of indigenous spiritual knowledge, objects, and rituals into commodities, and their commercial exploitation, constitute a concrete manifestation of the more general, and chronic, marketing of Native America.[6]

Cultural imperialism is one of a number of oppressive relations that may hold between dominant and subordinated cultures.[7] Whether or not it is conscious and intentional, it serves to extend the political power, secure the social control, and further the economic profit of the dominant culture. The commodification of indigenous spirituality is a paradigmatic instance of cultural imperialism. As such, it plays a politically vital diversionary role, serving to colonize and assimilate the knowledge and belief systems of indigenous cultures. Ultimately, it facilitates a type of cultural acquisition via conceptual assimilation: Euro-American culture seeks to establish itself in indigenous cultures by appropriating, mining, and redefining what is distinctive, constitutive of them. The mechanism for this is an oft-repeated pattern of cultural subordination that turns vitally on legal and popular views of ownership and property, as formulated within the dominant culture.

MARKETING NATIVE AMERICA

Whether peddled by white shamans, plastic medicine men and women, opportunistic academics, entrepreneurs, or enterprising

New Agers, Indian spirituality—like Indian lands before it—is rapidly being reduced to the status of a commodity, seized, and sold. Sacred ceremonies and ceremonial objects can be purchased at weekend medicine conferences or via mail order catalogs.[8] How-to books with veritable recipes for conducting traditional rituals are written and dispensed by trade publishers.[9] A succession of born-again medicine people[10] have—with greater or lesser subtlety—set themselves and their services up for hire, ready to sell their spiritual knowledge and power to anyone willing and able to meet their price.[11] And a literary cult of Indian identity appropriation known as white shamanism continues to be practiced.[12] Instead of contributing to the many native-run organizations devoted to enhancing the lives and prospects of Indian people, New Agers are regularly enticed into contributing to the continued expropriation and exploitation of native culture by purchasing an array of items marketed as means for enhancing their knowledge of Indian spirituality.

Recently, the National Congress of American Indians (an organization not exactly known for radicalism) issued a "declaration of war" against "non-Indian wannabes, hucksters, cultists, commercial profiteers and self-styled New Age shamans" who have been exploiting sacred knowledge and rituals.[13] Throughout Indian Country, eloquent, forceful critiques of these cultural developments have been mounted. Writers, intellectuals, activists, and spiritual leaders[14] have joined in identifying and resisting what has been described as "a new growth industry . . . known as 'American Indian Spiritualism'"[15] (henceforth AIS). The phenomena being protested are diverse and include literary, artistic, scholarly, and commercial products intended for consumption in the markets of popular culture as well as in those of the cultural elite.[16]

When the spiritual knowledge, rituals, and objects of historically subordinated cultures are transformed into commodities, economic and political power merge to produce cultural imperialism. A form of oppression exerted by a dominant society upon other cultures, and typically a source of economic profit, cultural imperialism secures and deepens the subordinated status of those cultures. In the case of indigenous cultures, it undermines their integrity and distinctiveness, assimilating them to the dominant culture by seizing and processing vital cultural resources, then remaking them in the image and marketplaces of the dominant culture. Such "taking of the essentials of cultural lifeways," Geary

Hobson observes, "is as imperialistic as those simpler forms of theft, such as the theft of homeland by treaty."[17]

It is a phenomenon that spans native North America, sparking the fierce resistance of indigenous people in Canada as well as the United States. Lenore Keeshig-Tobias, a Toronto-based Ojibwa poet and storyteller, is a founding member of the Committee to Re-establish the Trickster, an organization devoted to reclaiming the native voice in literature. The Canadian cultural industry, she protests,

> is stealing—unconsciously, perhaps, but with the same devastating results—native stories as surely as the missionaries stole our religion and the politicians stole our land and the residential schools stole our language. . . . (It) amount(s) to cultural theft, theft of voice.[18]

Wendy Rose makes it plain that the issue here is not that "only Indians can make valid observations on themselves" and their cultures; rather, it is "one of integrity and intent":

> We accept as given that whites have as much prerogative to write and speak about us and our cultures as we have to write and speak about them and theirs. The question is how this is done and . . . why it is done.[19]

Some forms of cultural imperialism are the product of academic privilege and opportunism. The "name of Truth or Scholarship"[20] may be invoked, the cause of scholarly progress, of advancing knowledge.[21] Ojibwa author Gerald Vizenor reproaches the "culture cultists (who) have hatched and possessed distorted images of tribal cultures."[22] Their obsession with the tribal past, he contends, "is not an innocent collection of arrowheads, not a crude map of public camp sites in sacred places, but rather a statement of academic power and control over tribal images."[23] Sometimes the 'cause' is one of ethical progress, of moral duty:

> Given the state of the world today, we all have not only the right but the obligation to pursue all forms of spiritual insight. . . . [I]t seems to me that I have as much right to pursue and articulate the belief systems of Native Americans as they do.[24]

On this reading, the colonization of indigenous knowledge and belief systems (and the attendant economic profit that their repack-

aging brings in the marketplaces of the dominant culture) is not only morally permissible, it is morally mandated.

Whatever its form, cultural imperialism often plays a diversionary role that is politically advantageous, for it serves to extend—while effectively diverting attention from—the continued oppression of indigenous peoples. Acoma Pueblo writer Simon Ortiz underscores this aspect of the phenomenon. Condemning white shamanism as a "process of colonialism" and a "usurping (of) the indigenous power of the people," he charges that

> symbols are taken and are popularized, diverting attention from real issues about land and resources and Indian peoples' working hours. The real struggle is really what should be prominent, but no, it's much easier to talk about drums and feathers and ceremonies and those sorts of things. "Real Indians," but "real Indians" only in quotes, stereotypes, and "interesting exotica."... So it's a rip-off.[25]

Keeshig-Tobias refers to it as "escapist" and a "form of exorcism," enabling Canadians "to look to an ideal native living in never-never land" rather than confront "the horrible reality of native-Canadian relations."[26] The extent to which cultural imperialism turns on conceptual colonization, and what is ultimately at stake in this, has been succinctly captured by Oneida scholar Pam Colorado. She contends that the commodification of indigenous spirituality enables the dominant culture to supplant Indian people even in the area of their own spirituality. This moves beyond ensuring their physical subordination to securing absolute ideological/conceptual subordination. If this continues,

> non-Indians will have complete power to define what is and is not Indian, even for Indians.... When this happens, the last vestiges of real Indian society and Indian rights will disappear. Non-Indians will then "own" our heritage and ideas as thoroughly as they now claim to own our land and resources.[27]

Some practitioners of AIS are genuinely surprised when they are charged with arrogance, theft, hucksterism. They see themselves as respectfully "sharing" indigenous spirituality, even as they make a living on its commercialization, charging hefty fees to "share" their version of the pipe ceremony and the sweat lodge, and to sponsor New Agers through vision quests. Moreover, they

see nothing problematic in this behavior, castigating their critics as "advocates of censorship . . . trying to shackle artistic imagination"[28] or as "Indian fundamentalists" guilty of "reverse racism"[29] and of a selfish refusal to share traditional knowledge.[30] This last is to massively distort what is at issue and the source of indigenous concern. The Traditional Elders Circle, meeting at the Northern Cheyenne Nation, is very clear on the point:

> [T]he authority to carry . . . sacred objects is given by the people, and the purpose and procedure is specific to time and the needs of the people. . . . [P]rofit is not the motivation. . . . We concern ourselves only with those who use spiritual ceremonies with non-Indian people for profit. There are many things to be shared with the Four Colors of humanity in our common destiny as one with the Mother Earth. It is this sharing that must be considered with great care by the Elders and the medicine people who carry the Sacred Trusts.[31]

That those engaged in the buying and selling of products generated by the AIS industry fail to recognize their behavior as reprehensible suggests that the diversionary function of cultural imperialism is operative at the individual level as well, where it deflects critical self-reflection.[32] Hobson speaks of this as an "assumption . . . that one's 'interest' in an Indian culture makes it okay . . . to collect 'data' from Indian people."[33] Ward Churchill describes a comparable development. New Age practitioners of AIS, he maintains,

> have proven themselves willing to disregard the rights of American Indians to any modicum of cultural sanctity or psychological sanctuary. They . . . willingly and consistently disregard the protests and objections of their victims, speaking only of their own "right to know."[34]

He characterizes the process as one of self-deception. Their task is to simultaneously hang on to what has been stolen while

> separating themselves from the *way* in which it was stolen. It is a somewhat tricky psychological project of being able to "feel good about themselves". . . through legitimizing the maintenance of their own colonial privilege.[35]

Such posturing effectively hides or diverts individuals' attention from the nature and consequences of their behavior. It is, in

Renato Rosaldo's terms, grounded on a courting of nostalgia, wherein the agents of colonialism yearn for what they themselves have altered or transformed. "Imperialist nostalgia" has a paradoxical element to it:

> [S]omeone deliberately alters a form of life, and then regrets that things have not remained as they were prior to the intervention. At one remove, people destroy their environment, and then they worship nature. In any of its versions, imperialist nostalgia uses a pose of "innocent yearning" both to capture people's imaginations and to conceal its complicity with often brutal domination.[36]

This nostalgia is integral to the cultivation of self-deception. It is a "particularly appropriate emotion to invoke in attempting to establish one's innocence and at the same time talk about what one has destroyed."[37]

THE CULTURAL POLITICS OF OWNERSHIP

When confronted by their critics, those engaged in the marketing of Native America frequently do attempt to justify their behavior. From their reasoning and rhetoric we can elicit some distinctive features of this variant of cultural imperialism. What we will find is a rationale that has reverberated throughout the history of dominant/indigenous relations, one that starkly reveals how the cultural politics of ownership are played out in the context of oppression.

Consider Gary Snyder's response to indigenous protests. "Spirituality is not something that can be 'owned' like a car or a house," he asserts. It "belongs to all humanity equally."[38] Or Alberto Manguel's response to Keeshig-Tobias: "No one," he contends, "can 'steal' a story because stories don't belong to anyone. Stories belong to everyone. . . . No one . . . has the right to instruct a writer as to what stories to tell."[39] Yet those who write and copyright "native" stories, those white shamans who sell poetry that "romanticize(s) their 'power' as writers to inhabit (Indian) souls and consciousness"[40] and those culture capitalists who traffic in "Indian" rituals and sacred objects are all clearly making individual profit on what "no one" (allegedly) owns. Such responses are both diversionary and delusionary. They attempt to dictate the terms of the debate by focusing attention on

issues of freedom of speech and thought and deflecting it from the active commercial exploitation and the historical realities of power that condition current dominant/indigenous relations. In the words of Margo Thunderbird,

> They came for our land, for what grew or could be grown on it, for the resources in it, and for our clean air and pure water. They stole these things from us . . . and now . . . they've come for the very last of our possessions; now they want our pride, our history, our spiritual traditions. They want to rewrite and remake these things, to claim them for themselves.[41]

The colonists indeed displayed an array of motivations regarding their presence and conduct in America, and it is similar to that of the AIS practitioners currently vending Native Americana. The prospect of profits from speculation lured some to seize native lands; others, wanting to escape poverty and enhance their lives, regarded themselves as merely "sharing" underused lands; most found it convenient to believe that the indigenous inhabitants of this continent could have no legitimate claims to land.[42]

Analogous reasoning and rhetoric accompany numerous parallel tales of acquisition in contemporary Western/indigenous relations. By examining some of these, we can better elicit the specious justificatory appeals on which cultural imperialism relies to extend and legitimize such practice. Their cumulative weight suggests that cultural imperialism, in its late capitalist mode, requires a legitimating rationale, one that enables the dominant culture to mask the fundamentally oppressive nature of its treatment of subordinated cultures. This rationale is fashioned by invoking legal and popular views of ownership and property prevalent in Euro-American culture and conceptually imposing these on indigenous cultures. It may take one, and usually both, of two forms—an appeal to common property and an appeal to private property. In the first, the dominant culture enhances its political power, social control, and economic profit by declaring the (material, cultural, genetic) resources of indigenous cultures to be common property, freely available to everyone. Thus, whatever the dominant culture finds desirable in indigenous cultures is declared to be part of the "public domain." The second appeal accomplishes the same ends through opposing means, facilitating privatization and the transformation of valued indigenous resources into commodity form. These appeals lie at the heart of cultural imperialism. As we will see, they commonly

function in tandem, with the former preparing and paving the way for the latter. Three examples will be examined: (1) the copyrighting of traditional indigenous music; (2) the patenting of indigenous genetic resources; and (3) the patenting of human cell lines of indigenous people themselves. We will see how, through the development of the notion of intellectual property and the articulation of intellectual property laws, the established legal system extends and enforces the practice of cultural imperialism. First, however, to facilitate appreciation of where these examples fall on the continuum of expropriative strategies invoked by Euro-American culture, I offer a few remarks about some of their historical antecedents.

In an earlier day, imperial powers could appeal to three competing legal theories of territorial acquisition to justify their claims to sovereignty over new lands: occupation, conquest, and cession. The first of these, unlike the other two, required that the land be *terra nullius*, devoid of people. According to Blackstone,

> if an uninhabited country be discovered and planted by English subjects, all the English laws then in being . . . are immediately there in force.[43]

Declaring that the land belonged to no one set the stage for its conversion into private or individual property—a legally protected possession. But other legitimating rationales for the privatizing of property were needed, particularly to accommodate other types of property in addition to land. By declaring the intellectual and cultural properties of indigenous peoples to be in the public domain—that is, to belong to everyone—the stage is equally well set for their conversion into private property. These two rationales (terra nullius and public domain) clearly resemble each other. The notion of property belonging to no one is the functional equivalent of the notion of property belonging to everyone; they both serve as the terms of a conversion process that results in the privatization of property. However, while the concept of terra nullius enabled the privatizing only of lands, the notion that property in the public domain could come to be owned by individuals applies to other types of property as well, such as intellectual and cultural property. The latter conversion process is addressed below; it might thus be regarded as a legal theory of cultural acquisition, whereby Western intellectual property rights are invoked in the interests of

cultural imperialism in order to appropriate valued intangible indigenous resources.

The politics of property is the central historical dynamic mediating Euro-American/indigenous relations. Certainly one of the more obvious examples of this is the General Allotment Act of 1887, which served to privatize communally owned tribal lands. A more recent case is that of the struggle to protect Newe Segobia (Western Shoshone homelands) from further encroachment by the U.S. government. It is a struggle at least as old as the 1863 Treaty of Ruby Valley, in which the U.S. first acknowledged native title to the land. The Western Shoshone have steadfastly refused payment for the subsequent theft of a large portion of their land, rejecting the government's offer of $26 million in damages for land taken by "gradual encroachment." The eight-hundred-acre cattle ranch of Mary and Carrie Dann has been a focal point in this controversy.

In the early 1970s, the Dann sisters were told that their cattle were trespassing on "public range land" and that they must purchase federal grazing permits to run livestock on "public land." (The terms *public lands* and *public domain lands* designate lands that are subject to sale or other disposal under the general laws of the U.S. or the states.)[44] They have been locked in lawsuits ever since. Their home has been raided by federal agents, their livestock impounded, and their brother imprisoned. They were also recently awarded the "alternative Nobel Peace Prize" by the Stockholm-based Right Livelihood Foundation.[45] Says Carrie Dann, "The real issue is that the United States is attempting to claim control over sovereign Western Shoshone land and people. Our land has never been ceded or deeded to the U.S., so it's not possible for them just to take it and determine that our title to the land has been extinguished."[46]

But the politics of property has never been confined to land. Consider the struggle between Euro-American and indigenous cultures over the ownership of human remains. Since the U.S. claims title to all "cultural property" found on federal public lands, material items of indigenous cultures discovered on these lands belong to the U.S. government, provided that they are at least one hundred years of age.[47] This includes human skeletal materials, which find themselves—together with these other items—thereby transformed into the "archaeological resources" of the dominant culture.[48] Ultimate authority to regulate the disposition of such "resources" rests with the secretary of the

interior, according to the Archaeological Resources Protection Act of 1979.[49] Moreover, since the majority of states do not strictly regulate the excavation of native graves and sacred sites on state or private lands, private landowners have historically been at liberty to sell, destroy, or otherwise dispose of any material remains of indigenous cultures as they saw fit or profitable.[50]

Thus, whether it is legally permissible to dig up a grave, to display or sell the contents of it, will turn in part on whether that grave is in an Indian or non-Indian cemetery. This discriminatory treatment of skeletal remains has been noted by various critics. C. Dean Higginbotham has observed that "only the burial and religious sites of Native Americans are regularly subjected to archaeological excavation and study in the United States."[51] Walter Echo-Hawk concurs:

> If human remains and burial offerings of Native people are so easily desecrated and removed, wherever located, while the sanctity of the final resting place of other races is strictly protected, it is obvious that Native burial practices and associated beliefs were never considered during the development of American property law.[52]

Cultural imperialism, then, embraces a spectrum of expropriative strategies. At one end of this spectrum we find legal theories of acquisition that facilitate the dominant culture's ownership of indigenous land and of the material remains of indigenous peoples within the land. At the other end, we find theories of acquisition that rely on laws of intellectual property to legitimate the privatization of less tangible indigenous resources. We can turn now to three examples in which the legitimating rationale of public domain is invoked to provide moral and legal cover for the theft of indigenous cultural and genetic resources.

MUSICAL PIRACY AND LETTERS OF MARQUE

Like the rest of U.S. property law, music copyright is based on an individualized conception of ownership. Existing copyright law fails to acknowledge any rights of indigenous communities to their traditional music. Indeed, the United States is among the most reluctant of nations to "consider changes in the copyright law which would give broad rights to intellectual property for 'traditional' rather than individually created culture."[53] Tradi-

tional indigenous music is considered to be in the "public domain" and so not subject to copyright.[54] Anyone may borrow extensively from materials in the public domain. Moreover, entire works may be "borrowed" from the public domain and receive copyright protection provided the author or composer has contributed some "modicum of creative work"[55] and is able to meet the "originality" requirement. Originality has been interpreted minimally: A work has originality if it is "one man's alone."[56] Any "distinguishable variation" of a prior work "will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial."[57] The threshold for originality is particularly low in music: "[A] musical composition is original if it is 'the spontaneous, unsuggested result of the author's imagination.'"[58] It may be achieved by slight variations in the use of rhythm, harmony, accent, or tempo.

Thus, as Anthony Seeger protests, "the real issue is . . . the economic and cultural exploitation of one group by another group or individual." Under existing copyright law,

> there is nothing illegal about taking a piece of "traditional" music, modifying it slightly, performing it, and copyrighting it. When music is owned by indigenous people it is seen as "public domain." If it becomes popular in its "mainstream" form, though, it suddenly becomes "individual property." The song brings a steady income to the person who individualized it, not to the people from whose culture it is derived.[59]

While others are free to copy the original indigenous song with impunity, were someone to attempt to copy the "original" copy (now transformed into the legally protected individual property of a composer who has "borrowed" it from the indigenous "public domain"), he or she would be subject to prosecution for copyright infringement.[60] This includes any members of the indigenous community of the song's origin who cannot meet the requirements of "fair use."[61]

According to the Universal Declaration of Human Rights, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[62] Copyright, then, is recognized as a human right but only as an individual human right. Since copyright laws turn on identifying specific individuals who have produced the work to be copyrighted, they afford no protection to

the traditional music of indigenous communities. In response to this, a United Nations agency—the World Intellectual Property Rights Organization (WIPO)—proposed in 1984 a set of "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions." (In this context, the term *folklore* refers to traditions that transcend the lifespan of individuals. To receive protection, moreover, they need not be "reduced to material form.")[63] Recognizing that "no share of the returns from . . . exploitation is conceded to the communities who have developed and maintained" their traditions, the model provisions would treat as a punishable offense any unauthorized use or willful distortion of folkloric traditions that is "prejudicial to the cultural interests of the community concerned."[64] A review of the model provisions by a U.N. group of experts concluded that, despite a desperate need for protections of this nature, an international treaty would be premature, since there were no (1) workable mechanisms for resolving disputes or (2) appropriate sources for identifying the folkloric expressions to be protected. Accordingly, to date, no country has adopted these provisions; they remain proposals for member states. As Darrell Posey notes, acquiescence to such arguments is "akin to allowing people to steal property whenever the owner has failed to announce his or her possession."[65]

Current copyright laws not only fail to protect the intellectual property of indigenous communities but directly facilitate cultural imperialism by consigning traditional music to the public domain, then providing for its facile "conversion" to private property. In such circumstances, copyrights offer legal and intellectual cover for cultural theft. They give an aura of legitimacy to the privateering activities of individuals who, like Blackbeard and Henry Morgan, have been granted letters of marque and reprisal by the government "so that they could do whatever they wanted."[66] Two critics of the music copyright system have recently demonstrated an emerging pattern in this regard:

> [S]ongs from small countries are often picked up and exploited internationally, with the original collector or publisher claiming the copyright on the "first there, first claim" principle, and with the original *local* composers or "collectors" getting left out.[67]

Their evidence includes various examples of the appropriation by American artists and record companies of the traditional music of

the Caribbean, where profits on a single calypso song can easily run in the millions without any of this flowing back to the peoples or countries of its origin. They document in detail the confusion and exploitation that results when "international copyright systems . . . come into conflict with traditional thinking":[68]

> [T]he identity of the actual composer becomes irrelevant in the traditional [calypsonian] system. This "positive" public domain attitude can of course be totally exploited by the legally wise when exposed to a system where the first registered copyright claimant is accepted as the legal owner. . . . It's not easy to merge the cultural norms of a society where music is regarded as a gift to the public with the legal norms of a society where individual ownership is the holiest pinnacle![69]

GENETIC IMPERIALISM AND THE "COMMON HERITAGE"

In what has been described as "the last great resource rush,"[70] commercial seed and drug industries are extracting, transforming, and commodifying the valuable genetic resources of indigenous peoples. This time around, it is not land or natural resources that imperialism has targeted but indigenous genetic wealth and pharmaceutical knowledge. Indigenous peoples inhabit the most genetically diverse areas of the world, and, once again,

> their areas, and their knowledge, are . . . being mined—for information. Unless indigenous rights to this material and knowledge are respected, this gene rush will leave indigenous people in the same hole as the other resource rushes.[71]

Corporate and academic scientists engaged in "gene-hunting" and "chemical prospecting" first mine indigenous medicinal and agricultural knowledge. They then identify and extract selected plant materials, process these in laboratories and finally through the legal system—ultimately transforming them into commodities and legally protected private property, for whose use indigenous people must pay. The key first step is to declare that these indigenous genetic resources belong to everyone. As the "common heritage of humankind . . . to be traded as a 'free good' among the community of nations,"[72] they are "not owned by any one people and are quite literally a part of our human heritage from

the past."[73] Thus, they are "looked upon as a public good for which no payment is necessary or appropriate."[74] One may then convert these free "public" goods into private property and a source of enormous economic profit.

A current example is the use by the Uru-eu-wau-wau Indians of Brazil of the bark of the Tike-Uba tree in a preparation that acts as an anticoagulant.[75] Reportedly, a large U.S.-based chemical company is attempting to patent these properties of the plant,[76] following a study by corporate scientists of sap and bark specimens provided to them by members of the Goiana Institute for Prehistory and Anthropology.[77] The Uru-eu-wau-wau, protesting this commercialization of their knowledge, are challenging that company's right to patent their traditional medicines.[78] However, as Janet McGowan notes,

> much like Columbus' voyage, when it comes to U.S. patent law, it isn't always a question of getting there first, but having the resources to control and protect your discovery. . . . U.S. patent law really protect(s) (and financially reward[s]) the discovery of the known.[79]

Despite the fact that some 80 percent of the world's population relies on traditional health care based on medicinal plants and that 74 percent of contemporary drugs have the same or related uses in Western medicine as they do in traditional medical systems, the pharmaceutical knowledge and medicinal skills of indigenous peoples are neither acknowledged nor rewarded. As one commentator observes,

> Traditional remedies . . . are products of human knowledge. To transform a plant into medicine, one has to know the correct species, its location, the proper time of collection . . . , the part to be used, how to prepare it . . . , the solvent to be used . . . , the way to prepare it . . . , and, finally, posology . . . curers have to diagnose and select the right medicine for the right patients.[80]

Yet, while indigenous pharmaceutical knowledge, like industrial knowledge, has been accumulated by trial-and-error, "it has been made public with no patent rights attached. . . . What are the ethics behind recording customary knowledge and making it publicly available without adequate compensation?"[81] Such questions are all the more pressing because, often, this knowledge is obtained

from specialists in the indigenous community only after the scientist "has established credibility within that society and a position of trust with the specialist."[82] Research in ethnopharmacology[83] cannot ignore the omnipresence of pharmaceutical corporations eager "to analyze, develop, and market plant products," to secure "exclusive rights to pertinent information" collected.[84] While some ethnopharmacologists have worked to develop products managed by indigenous communities, others have been accused of "stealing valuable plant materials and appropriating esoteric plant knowledge for financial profit and professional advancement."[85] Witting or not, this collusion of Western science, business, and legal systems is a potent extractive device:

> [C]ontemporary patent systems tend to disregard the creative intelligence of peoples and communities around the world. Thus the Western scientific and industrial establishment freely benefits from a steady flow of people nurtured genetic material and associated knowledge, and, at times, after only a superficial tinkering, reaps enormous economic profits through patents, without even token recognition, and much less economic reward to the rightful owners of such resources.[86]

Rural sociologist Jack Kloppenburg describes this phenomenon as "the commodification of the seed."[87] He notes that scientists from the advanced industrial nations have, for more than two centuries, appropriated plant genetic resources, yet,

> [d]espite their tremendous utility, such materials have been obtained free of charge as the "common heritage," and therefore common good, of humanity. On the other hand, the elite cultivars developed by the commercial seed industries . . . are accorded the status of private property. They are commodities obtainable by purchase.[88]

The process wholly discounts the tremendous investment of generations of indigenous labor that is involved in the cultivation of specific plant varieties for their medicinal and nutrient value.[89] It credits solely the "chop-shop" laboratory labor of corporate and academic scientists who "modify" what they have taken. Victoria Tauli-Corpus, representing indigenous peoples at a meeting of the U.N. Commission on Sustainable Development (CSD), underscores the exploitation and skewed reasoning that is at work:

> Without our knowing these seeds and medicinal plants were altered in laboratories and now we have to buy these because companies had them patented. . . . We are told that the companies have intellectual property rights over these genetic plant materials because they improved on them. This logic is beyond us. Why is it that we, indigenous peoples who have developed and preserved these plants over thousands of years, do not have the rights to them anymore because the laboratories altered them?[90]

THE "VAMPIRE PROJECT": PATENTING INDIGENOUS PEOPLE

There seems to be little that is indigenous that is not potentially intellectual property.[91] This includes indigenous people themselves or, more exactly, indigenous cell lines. The Human Genome Organization (HUGO) is currently engaged in an NIH-sponsored effort to map and sequence the human genome. This $3-billion project is supposed to be completed in fifteen years. Since the project does not consider population-level variation, a collateral study has been proposed—a "genetic survey of vanishing peoples"[92] known as the Human Genome Diversity Project (HGDP). It proposes to create thousands of cell lines from DNA collected from "rapidly disappearing indigenous populations."[93] Some 722 indigenous communities have been targeted for "collection."[94]

A recent article in *Science* presents the following rationale for such a study:

> Indigenous peoples are disappearing across the globe. . . . As they vanish, they are taking with them a wealth of information buried in their genes about human origins, evolution, and diversity. . . . [E]ach (population) offers "a window into the past". . . a unique glimpse into the gene pool of our ancestors. . . . Already, there are indications of the wealth of information harbored in the DNA of aboriginal peoples.[95]

Sir Walter Bodmer, HUGO's president, refers to the proposed survey (dubbed the "vampire project" by indigenous delegates to the United Nations) as "a cultural obligation of the genome project."[96] At an HGDP workshop on "Ethical and Human Rights Implications," it was suggested that sampling begin "with the

least politically risky groups. . . . If the Project does not proceed carefully and properly, it could spoil the last good opportunity to obtain some of this data."[97] What are "proper procedures?" Dr. Paul Weiss, an anthropologist, proposed the following strategy, according to the summary report:

> "Immortalization" can be a very sensitive term and should be avoided when talking about the intended creation of cell lines. (Someone suggested using "transformation," the standard European practice.) Whether to tell people what you intend to do, as a technical matter, is a difficult question.[98]

Not surprisingly, native rights activists such as Jeanette Armstrong of Canada's En'owkin Center describe the ethics committee as "a P.R. operation for the project."[99]

Indigenous opposition has been extensive and emphatic. After heated debate with Stanford law professor Henry Greely, chair of the HGDP ethics subcommittee, the 1993 Annual Assembly of the World Council of Indigenous Peoples unanimously resolved to "categorically reject and condemn the HGDP as it applies to our rights, lives, and dignity."[100] In January 1994, John Liddle, director of the Central Australian Aboriginal Congress, protested,

> If the Vampire Project goes ahead and patents are put on genetic material from Aboriginal people, this would be legalized theft. Over the last 200 years, non-Aboriginal people have taken our land, language, culture and health—even our children. Now they want to take the genetic material which makes us Aboriginal people as well.[101]

And at the June 1993 session of the CSD, indigenous representatives described the HGDP as "very alarming": "[W]e are calling for a stop to the Human Genome Diversity Project which is basically an appropriation of our lives and being as indigenous peoples."[102] Project opponents

> believe we are endangered. . . . After being subjected to ethnocide and genocide for 500 years (which is why we are endangered), the alternative is for our DNA to be collected and stored. This is just a more sophisticated version of how the remains of our ancestors are collected and stored in museums and scientific institutions.
>
> Why don't they address the causes of our being endangered instead of spending $20 million for five years to collect

> and store us in cold laboratories. If this money will be used instead to provide us with basic social services and promote our rights as indigenous peoples, then our biodiversity will be protected.[103]

They also raised concerns about patenting and commercial exploitation: "How soon will it be before they apply for IPRs to these genes and sell them for a profit?"[104]

The legitimacy of these concerns is without question. Indeed, the U.S. Centers for Disease Control and Prevention (CDC) had *already,* in November 1991, applied for a patent to a cell line created from a Guaymi woman. They did so because of its commercial promise and since "the government encourages scientists to patent anything of interest."[105] However, lack of commercial interest, together with pressure from indigenous organizations and their supporters, prompted the CDC to abandon its application in 1993.[106] The Canadian-based Rural Advancement Foundation International (RAFI) was responsible for discovering the patent application and sounding the alarm regarding it, noting that it "represented the sort of profiteering from the biological inheritance of indigenous people that could become commonplace as a result of the proposed Human Genome Diversity Project."[107]

CONCLUSION

The justificatory rhetoric embedded in these examples is essentially the same as that invoked by those we encountered at the outset of this essay who are actively engaged in the marketing of indigenous spirituality. In all of these cases, appeals to common property, private property, and usually both in succession constitute the legitimating rationale of cultural imperialism. It enables the dominant culture to secure political and social control as well as to profit economically from the cultural and genetic resources of indigenous cultures. Just as the concept of terra nullius once provided legal and moral cover for the imperial powers' treatment of indigenous peoples, the concept of public domain plays a comparable role in late capitalism.

As we have seen, far from being mutually exclusive, these appeals function together to facilitate a conversion, or privatization, process. When intellectual property laws of the dominant culture

are imposed on indigenous peoples, the first appeal to common property or the public domain lays the legal groundwork for the private ownership secured by the second. What "flows out . . . as the 'common heritage of mankind' . . . returns as a commodity."[108] This is a particularly effective strategy for acquiring desired but intangible indigenous resources—medicinal and spiritual knowledge, ceremonies, artistic expressions. Ownership of such intangibles may in turn (as in the case of genetic information) lead to control of, and denial of indigenous access to, tangible resources. This is not only "legal theft" of indigenous resources; it is legally sanctioned and facilitated theft. As Vandana Shiva comments, "[C]ommunities have invested . . . centuries of care, respect, and knowledge" in developing these resources, yet

> today, this material and knowledge heritage is being stolen under the garb of IPRs (intellectual property rights). IPRs are a sophisticated name for modern piracy.[109]

The payoff of imperialistic cultural practice is substantial. There is considerable economic profit to be reaped from the commodification and marketing of indigenous cultural resources. It is also politically invaluable. As the established legal system extends and enforces the practice of cultural imperialism, it brings with it its own legitimating rationale. This, simply put, is a way of speaking about and thinking about what is going on—a rhetoric and a reasoning that plays a politically diversionary role as, at the individual level, it nurtures self-deception.[110] Ultimately, the two appeals explored here constitute a logic of domination—a structure of fallacious reasoning that seeks to justify subordination. The dominant conceptual framework is held to have certain features that indigenous frameworks lack and that render it superior. Such alleged superiority, it is assumed, justifies the assimilation of those frameworks and cultures to it.[111]

This logic of domination figures vitally in the marketing of Native America. If strategies of resistance to it are to be effective, they must be situated within the broader social context that informs it. The extension of the commodity form to new areas is one of the principal historical processes associated with the political economy of capitalism. It provides a way of reproducing the social relations needed if capital is to survive and grow in a particular sector.[112] The development of the notion of intellectual property and the articulation of intellectual property laws is a

significant moment in the self-expansion of capital, another instance of "the relentless extension of market assumptions into areas where the market has not ruled."[113] We are, as Christopher Lind protests, "forced to genuflect before the great god market in yet one more area of . . . life."[114] It is also a significant move in the dynamics of power that structure dominant/indigenous relations, in the growth of cultural imperialism. It wrests away from indigenous peoples the power to control their cultural, spiritual, and genetic resources. As Kloppenburg notes, "business interests in the developed nations have worked very hard over the past ten years to put in place a legal framework that ensures that genetically engineered materials . . . can be owned."[115]

Let us be clear about what is being critiqued. It is not the concepts of public domain or common heritage, nor even that of private property per se. It is a particular set of social and power relations—specifically, the dynamic of oppression and domination mediating Western and indigenous cultures that sustains the practice of cultural imperialism. As outlined here, that practice is one wherein elements of the dominant culture's conceptual framework—notably, its concepts of ownership and property—are thrust upon indigenous cultures and enforced by the power of the state. These concepts tend to dictate the terms of the struggle, to reinforce current relations of power, and to sustain existing inequities between dominant and indigenous cultures. Resistance to this is pronounced, adamant, and growing. While indigenous representatives to the Commission on Sustainable Development acknowledged that many of the cultural and genetic resources of indigenous cultures can be shared with the rest of the world, they were resolute that

> we will be the ones who will determine how these will be shared based on our own conditions and our own terms. We cannot buy the arguments that we have to play within the field of existing patent and copyright laws to be able to protect our resources and knowledge. . . . Is there a way of preserving and promoting biodiversity and indigenous peoples' knowledge and technology without necessarily being pushed into the field of intellectual property rights? We are still seeking for the answers to this.[116]

The task is as daunting as it is vital. Morton Horwitz has documented how, during the post-Revolutionary War period, merchant and entrepreneurial groups rose to political and eco-

nomic power, forging an alliance with the legal profession to advance their own interests through a transformation of the legal system. By the mid-nineteenth century, they had succeeded in reshaping the legal system to their own advantage and at the expense of other less powerful groups in society.[117] A comparable phenomenon appears to be currently in process at the international level. Through coercive instruments such as the GATT, the U.S. and other leading industrial nations have succeeded in furthering their interests at the expense of indigenous peoples and developing nations by strengthening Western intellectual property systems worldwide. All of this demonstrates the degree to which law, as various critical legal theorists have insisted,[118] is a form of politics. The politics of property and ownership that we have seen played out in the various examples above is ample testimony to the fact that, when it comes to dominant/indigenous relations, law has never been separate from politics. Whether as appeals to terra nullius or to the public domain, legal theories of acquisition have, since contact, provided the legitimating rationale for territorial and cultural imperialism and for the privatization of indigenous land and resources. A first step in undermining this process (although it is no more than that) may be to set to rest the fractured fairy tale of a neutral, apolitical legal system.

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NOTES

1. This was nicely demonstrated by the quietly reflective and rhetorically effective query that the Mennonite community employed to raise the popular conscience: "500 Years Ago the Americans Discovered Columbus on Their Shores. How Do You Think They Felt about It?"

2. The work of the American Indian Anti-defamation Council and of activist scholars such as Ward Churchill in *Fantasies of the Master Race*, ed. M. Annette Jaimes (Monroe, ME: Common Courage Press, 1992) and *Indians Are Us?* (Monroe, ME: Common Courage Press, 1994) has been instrumental in this regard.

3. This was related by Robert Antone in "Education as a Vehicle for Values and Sovereignty," an address given at the Third International Native American Studies conference at Lake Superior State University in October 1991.

4. However, the more probable route would be a copyright, not a patent. See 17 U.S.C. 106 (Exclusive Rights in Copyrighted Works). This would involve reducing the ceremony to some tangible expression, then claiming authorship of it. The broad construal of the salient legal terms, especially *writings (Goldstein v. California,* 412 U.S. 546 [19731), suggests this is feasible. However, given constitutionally protected religious freedom, any suit for copyright infringement would likely be dismissed out of hand.

5. See 17 U.S.C. 110 (Exemptions of Certain Performances and Displays); see also *Robert Stigwood Group Ltd. v. O'Reilly,* 530 F.2d 1096 (2d. Cir. 1976).

6. The sale of "authentic" Indian images and "genuine handmade" trinkets reaches far into the history of Euro-American/indigenous relations.

7. Various radical theorists and social critics have alluded to cultural imperialism, although few characterize it at length. My discussion differs somewhat from that of Iris Young (in "Five Faces of Oppression," *Rethinking Power,* ed. Thomas Wartenberg [Albany, NY: SUNY Press, 1992]). I agree with her that it is one of several forms of oppression, but I emphasize its impact on the cultures rather than the individuals subjected to it. I move freely in this paper between references to indigenous cultures generally and native North American cultures more specifically, since the practice of cultural imperialism under consideration is similarly imposed upon them. However, closer analyses of how specific historical, political, cultural, and socioeconomic circumstances condition and modify such practice are needed.

8. The crassness of this commodification is stunning, as a perusal of the Berkeley, California-based Gaia Bookstore and Catalog Company readily reveals. Their 1991 catalog, for example, offers a series of oracular Medicine Cards and Sacred Path Cards (with titles such as "Medicine Bowl," "Give-Away Ceremony," and "Dreamtime") that promise "the Discovery of Self Through Native Teachings." Such spirituality, noted Osage scholar George Tinker observes, is "centered on the self, a sort of Western individualism run amok" (in David Johnston, "Spiritual Seekers Borrow Indian Ways," *New York Times,* 27 December 1993, section A), whereas Indian spirituality focuses on the larger community, the tribe, and never on the individual.

9. Two illustrative examples are John Redtail Freesoul's *Breath of the Invisible: The Way of the Pipe* (Wheaton, IL: Theosophical Pub. House, 1986) and Ed McGaa's *Mother Earth Spirituality* (San Francisco: Harper Books, 1990).

10. Among these are Sun Bear, Wallace Black Elk, Grace Spotted Eagle, Brook Medicine Eagle, Osheana Fast Wolf, Cyfus McDonald, Dyhani Ywahoo, Rolling Thunder, and "Beautiful Painted Arrow." See Churchill's *Indians Are Us?* for a powerful critique of these and other spiritual hucksters.

11. Consider, for example, a recent flyer advertising the 1994 Rochester workshops of Brook Medicine Eagle, who is pictured in feathers, bone, leather, and braids. The text describes her as an "American native Earthkeeper" whose book *Buffalo Woman Comes Singing* (New York: Ballantine, 1991) offers "ancient

truths concerning how to live . . . in harmony with All Our Relations." She is currently offering a $150 workshop on "shamanic empowerment" to "awaken the higher level of functioning possible for two-leggeds."

12. For more extensive discussion, see Leslie Silko, "An Old-Time Indian Attack Conducted in Two Parts: Part One: Imitation 'Indian' Poems; Part Two: Gary Snyder's *Turtle Island*," in *The Remembered Earth: An Anthology of Contemporary Native American Literature*, ed. Geary Hobson (Albuquerque: University of New Mexico Press, 1979); Wendy Rose, "Just What's All This Fuss about White Shamanism Anyway?" in *Coyote Was Here*, ed. Bo Scholer (Aarhus, Denmark: University of Aarhus Press, 1984); and Churchill's *Fantasies of the Master Race*.

13. Johnston, "Spiritual Seekers Borrow Indian Ways," 1.

14. These include Leslie Silko, Vine Deloria, Wendy Rose, Oren Lyons, Geary Hobson, Joy Harjo, Gerald Vizenor, Ward Churchill, Russell Means, AIM, the Circle of Elders of the Indigenous Nations of North America, and many others.

15. Churchill, *Fantasies of the Master Race*, 215.

16. Christopher Lind, "The Idea of Capitalism or the Capitalism of Ideas? A Moral Critique of the Copyright Act," *Intellectual Property Journal* 7 (December 1991). Lind misunderstands the nature of this protest and of the "claim being made by aboriginal artists and writers of colour . . . that whites are 'stealing' their stories"(p. 69). He insists that "(w)hat is being stolen is not the story itself but the market for the story . . . or the possibility of being able to exploit the commercial potential" (ibid.) of the story. Indigenous critiques are directed against the very fact of commercialization, against the extension of the market mechanism to these cultural materials by the dominant society. The claim being made is that this continues and extends a long history of oppression, that it constitutes theft of culture, of voice, of power.

17. Hobson, *The Remembered Earth*, 101.

18. Laura Keeshig-Tobias, "Stop Stealing Native Stories," *Toronto Globe and Mail*, 26 January 1990, section A.

19. Wendy Rose, "The Great Pretenders," in *The State of Native America*, ed. M. Annette Jaimes (Boston, MA: South End Press, 1992), 415–16.

20. Hobson, *The Remembered Earth*, 101.

21. Cultural imperialism is often at its apex in the academy. As a result of the stubborn influence of positivism, knowledge claims within the dominant (academic) culture continue to be regarded as value-free. An instructive example of this is Wilcomb Washburn's "Distinguishing History from Moral Philosophy and Public Advocacy" (in *The American Indian and the Problem of History*, ed. Calvin Martin [New York: Oxford University Press, 1987]). A past president of the American Society for Ethnohistory, Washburn is particularly upset about "the process of using history to promote nonhistorical causes." He reacts with consternation to the recent call for historians to "form alliances with non-scholarly groups organized for action to solve specified societal problems," which he associates with "leftist academics" and "Indian activists" (p. 95).

Washburn offers himself as an example of a historian committed to what one is tempted to call a Great White Truth, a Truth properly cleansed of all values:

> [A]ll my efforts are guided by, and subject to, the limitations of historical truth. . . . There is no place in the scholarly profession of history for such distorting lenses. History to me means a commitment to truth . . . however contradictory it may be to our . . . acquired convictions about how the world should be. (p. 97)

He assumes that his work, like his conception of truth, is unburdened by such distorting lenses and remains both value-free and politically neutral. Yet note that this work includes his "recent experiences in writing Indian history, which involve combat with radical theorists on the ideological front"; his letters to the *Dartmouth Review* in support of the use of the Indian as a symbol; his efforts abroad to "justify United States policy . . . to spike assertions of genocide . . . to disprove the assertion that . . . multinational corporations control the United States Government and seek to exploit the resources of all native peoples against their will" (p. 94). All this, we are to suppose, is "value-free." And he goes on to claim that some will recognize his "lifelong and quixotic pursuit of the reality of the Indian as 'noble'" (p. 97).

22. Gerald Vizenor, "Socioacupuncture: Mythic Reversals and the Striptease in Four Scenes," in Martin, *The American Indian and the Problem of History*, 183.

23. Ibid.

24. Gary Snyder, as cited in Churchill, *Fantasies of the Master Race*, 192.

25. Simon Ortiz in an interview in *Winged Words: American Indian Writers Speak*, Laura Coltelli (Lincoln, NE: University of Nebraska Press, 1990), 111–12.

26. Keeshig-Tobias, "Stop Stealing Native Stories," 7.

27. Pam Colorado, as cited in Churchill, *Fantasies of the Master Race*, 101.

28. Keeshig-Tobias, "Stop Stealing Native Stories," 7.

29. Johnston, "Spiritual Seekers Borrow Indian Ways," 15.

30. See, for example, Ed McGaa's comments in Johnston, "Spiritual Seekers Borrow Indian Ways," 15. Wendy Rose also addresses herself to rebutting this point, noting that white shamanism has touched upon something very real and that its critics are not set on hoarding or on purposively withholding spiritual knowledge:

> An entire population is crying out for help, for alternatives to the spiritual barrenness they experience. . . . They know . . . that . . . part of the answers to the questions producing their agony may be found within the codes of knowledge belonging to the native peoples of this land. Despite what they have done . . . it would be far less than Indian of us were we not to endeavor to help them. Such are our Ways, and have always been our Ways. (Rose, p. 418)

31. Cited in Churchill, *Fantasies of the Master Race*, 223–24.

32. I refer to this facet of cultural imperialism elsewhere as a "no-fault" assumption—the belief that the literary, artistic, scholarly, and commercial products of AIS are neither epistemologically nor ethically suspect or at fault, that they are legitimate and morally unproblematic vehicles of spiritual knowledge and power. (See Laurie Anne Whitt, "Indigenous Peoples and the Cultural Politics of Knowledge," in *Issues in American Indian Cultural Identity*, ed. Michael Green [New York: Peter Lang Press, 1995]). There I also address the commodification of indigenous spirituality and develop some of the epistemological issues raised by it at greater length. In particular, I focus on some central features of the dominant knowledge system that facilitate the "no-fault" assumption, features that permit and facilitate the marketing of Native America more generally.)

33. Hobson, *The Remembered Earth*, 101.

34. Churchill, *Fantasies of the Master Race*, 210.

35. Ibid.

36. Renato Rosaldo, *Culture and Truth* (Boston: Beacon Press, 1993), 70.

37. Ibid.

38. Gary Snyder, as cited in Churchill, *Fantasies of the Master Race*, 192.

39. Alberto Manguel, "Equal Rights to Stories," *Toronto Globe and Mail*, 3 February 1990, Section D.

40. Leslie Silko, as cited in Michael Castro, *Interpreting the Indian* (Albuquerque: University of New Mexico Press, 1983), 161.

41. Churchill, *Indians Are Us?* 216.

42. David Lyons, "The Balance of Injustice and the War for Independence," *Monthly Review* 45 (1945): 20.

43. Gerry Simpson, "*Maybo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence," *Melbourne University Law Review* 19 (1993): 199.

44. *Northern Pac. Ry. Co. v. Hirzel*, 161 P. 854, 859 (Idaho 1916).

45. The Dann sisters were honored for "their courage and perseverance in asserting the right of Indigenous peoples to their land" (Valerie Taliman, "Dann Sisters Win International Award for Commitment to Native Rights," *News from Indian Country* 7:20 [1993]: 1.

46. Taliman, "Dann Sisters Win International Award," 5. More detailed consideration of this case can be found in Glenn Morris, "The Battle for Newe Segobia: The Western Shoshone Land Rights Struggle," in *Critical Issues in Native North America*, vol. 2, ed. Ward Churchill (Copenhagen: International Working Group for Indigenous Affairs [IWGIA], 1990).

47. Speaking of the Antiquities Act of 1906, Walter Echo-Hawk notes that "the underlying assumption . . . is that all 'cultural resources' located on federal land 'belong' to the United States, and can be excavated only for the benefit of public museums. There are no provisions for Native ownership or disposition." (Walter Echo-Hawk, "Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources," *Review of Law and Social Change* 14 [1986]: 449. See this article for a discussion of the American Indian Religious Freedom Act and its implications for ownership of

native resources.) The Antiquities Act has never been formally repealed, although it has been superseded by the Archaeological Resources Protection Act of 1979.

48. The term *cultural property* is generally considered to include "objects of artistic, archaeological, ethnological, or historical interest" (John Merryman, "Two Ways of Thinking about Cultural Property," *The American Journal of International Law* 80:4 [1986]: 831). An "archaeological resource" refers to any material remains of past human life and activities that have been determined to be of "archaeological interest." See 16 *United States Code,* section 470bb(1).

49. 16 *United States Code,* section 470(dd). However, this act, unlike the earlier Antiquities Act, does require that Indian tribes be notified of any excavation permit that might cause harm to the cultural sites. See 16 *United States Code,* section 470cc(c).

50. Indeed, according to a recent article on a Colorado development known as "Indian Camp Ranch," prospective homeowners

> can now purchase land where more than 200 Anasazi sites have been identified.... Those who buy property... will also be allowed to excavate sites on their land.... Artifacts recovered will become the property of a museum to be built in the area. Homeowners will be allowed to display recovered artifacts in their residences, provided they are turned over to the museum upon their death. (*Archaeology,* [March/April 1995], 14)

According to the state archaeologist of Colorado, such land-use plans are legal.

51. C. Dean Higginbotham, "Native Americans versus Archaeologists: The Legal Issues," *American Indian Law Review* 10 (1982): 99–100.

52. Echo-Hawk,"Museum Rights vs. Indian Rights," 448.

53. Anthony Seeger, "Singing Other Peoples' Songs," *Cultural Survival Quarterly* 15:3 (Summer 1991): 39.

54. Moreover, since the 1976 Copyright Act extends copyright protection for the lifetime of the author plus fifty years, only "recent" compositions qualify for copyright protection. See 17 *United States Code,* section 302 (a).

55. *Amsterdam v. Triangle Publications, Inc.,* 189 F.2d. 104, 294 (3d Cir. 1951).

56. *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239 (1903).

57. M.B. Nimmer, as cited in Maureen Baker, "La(w)—A Note to Follow So: Have We Forgotten the Federal Rules of Evidence in Music Plagiarism Cases?" *Southern California Law Review* 65 (1992): 1590.

58. *Hirsch v. Paramount Pictures,* 17 F. Supp. 816, 817 (S.D. Cal. 1937).

59. Seeger, "Singing Other Peoples' Songs," 38.

60. See *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239 (1903).

61. 17 *United States Code,* section 107 (amended 1992).

62. U.S. Constitution, Article 27 (2).

63. Darrell Posey, "Effecting International Change," *Cultural Survival Quarterly* 15:3 (Summer 1991): 31.

64. Ibid.

65. Ibid.

66. Jack Kloppenburg, "Conservationists or Corsairs?" *Seedling* (June/July 1992), 14.

67. Roger Wallis and Krister Malm, *Big Sounds from Small People* (New York: Pendragon Press, 1984), 190–91.

68. Ibid., 199.

69. Ibid., 199, 188.

70. Jason Clay, "Editorial: Genes, Genius, and Genocide," *Cultural Survival Quarterly* 14:4 (1990): 1.

71. Ibid.

72. Norman Myers, *A Wealth of Wild Species* (Boulder, CO: Westview Press, 1983), 24.

73. Garrison Wilkes, "Current Status of Crop Germplasm," *Critical Reviews in Plant Sciences* 1:2 (1983): 156.

74. Jack Kloppenburg and Daniel Kleinman, "Seed Wars: Common Heritage, Private Property, and Political Strategy," *Socialist Review* 95 (September/October 1987): 8.

75. Kloppenburg, "No Hunting!" *Z Magazine* (September 1990), 106.

76. Clay, "Editorial: Genes, Genius, and Genocide," 1.

77. John Jacobs et al., "Characterization of the Anticoagulant Activities from a Brazilian Arrow Poison," *Journal of Thrombosis and Haemostasis* 63:1 (1991): 34.

78. Andrew Gray, "The Impact of Biodiversity Conservation on Indigenous Peoples," in *Biodiversity: Social and Ecological Perspectives*, ed. Vandana Shiva (Atlantic Highlands, NJ: Zed Books, 1991), 67.

79. Janet McGowan, "Who Is the Inventor?" *Cultural Survival Quarterly* 15:1 (Summer 1991): 20.

80. Elaine Elisabetsky, "Folklore, Tradition, or Know-How?" *Cultural Survival Quarterly* 15:1 (Summer 1991): 10.

81. A.B. Cunningham, "Indigenous Knowledge and Biodiversity," *Cultural Survival Quarterly* 15:1 (Summer 1991): 4.

82. Brian Boom, "Ethics in Ethnopharmacology," in *Ethnobiology: Implications and Applications*, ed. Darrell A. Posey et al. (Belém, Brazil: Proceedings of the First International Congress of Ethnobiology, 1990), 150–51.

83. Defined from the perspective of the dominant science, ethnopharmacology is the "scientific study of the medicinal uses of plants and animals by human groups other than the dominant Western society" (Boom, "Ethics in Ethnopharmacology," 148).

84. Boom, "Ethics in Ethnopharmacology," 149.

85. Ibid.

86. GRAIN (Genetic Resources Action International), "GATT, the Convention and IPRS," *Econet*, in the conference "Biodiversity" (28 June 1994).

87. Kloppenburg, *First the Seed: The Political Economy of Plant Biotechnology, 1492–2000* (Cambridge, England: Cambridge University Press, 1988), 11.

88. Kloppenburg and Kleinman, "Seed Wars," 24.

89. This was acknowledged by Illinois congressman John Porter who, in 1990, introduced a resolution to discontinue the ongoing GATT negotiations

regarding the extension of intellectual property rights to genetic and biological resources. The difficulty with the U.S. proposal on trade-related aspects of intellectual property rights, Porter charged, is that

> it fails to consider the value of biological and genetic material and processes in developing nations, as well as the invaluable and historic contributions of local people in the use of that material.
>
> Since these people typically do not have access to representation to ensure that their interests are protected in the GATT process, we have an obligation to recognize their rights. (John Porter, "A Resolution Affecting the GATT Negotiations on Intellectual Property Rights for Genetic and Biological Resources," *Congressional Record*, 101st Cong., 2d sess., vol. 136, no. 94 [20 July 1990], E 2425)

90. Victoria Tauli-Corpus, "We Are Part of Biodiversity, Respect Our Rights," *Third World Resurgence* 36 (1993): 25.

91. Or, for that matter, little at all. U.S. patents protect "anything under the sun made by man." New life forms have been patented (*Diamond v. Chakrabarty*, 447 U.S. 303 [1980]). And the right to patent and commercially exploit human cells, even over the protests of that individual, has been recognized (*Moore v. Regents of the University of California*, 793 P.2d 479 [Cal.1990], cert. denied 111 S.Ct. 1388 [1991]).

92. Leslie Roberts, "A Genetic Survey of Vanishing Peoples," *Science* 252 (1991): 1614.

93. Ibid.

94. A valuable overview of these and related developments can be found in the following RAFI (Rural Advancement Foundation International) *Communiqués:* "Patents, Indigenous Peoples, and Human Genetic Diversity," May 1993; "The Patenting of Human Genetic Material," January/February 1994; and "'Gene Boutiques' Stake Claim to Human Genome," May/June 1994.

95. Roberts, "A Genetic Survey of Vanishing Peoples," 1614, 1617.

96. Ibid., 1615. Perhaps he refers to it thus for reasons of expediency, since, "for reasons of expediency, the human genome being mapped and sequenced (by HUGO) is essentially a Caucasian one" (Roberts, "A Genetic Survey of Vanishing Peoples," 1614).

97. Henry Greely, "Summary of Planning Workshop 3(B): Ethical and Human Rights Implications" (Bethesda, MD: Human Genome Diversity Project Organizing Committee, 1993), 22–23.

98. Paul Weiss, as cited in Greely, "Summary of Planning Workshop 3(B)," 6.

99. Beth Burrows, "Life, Liberty and the Pursuit of Patents," *The Boycott Quarterly* 2:1 (1994): 33.

100. Ibid. HGDP was unanimously denounced at the December 1993 meeting of the World Council of Indigenous Peoples:

> The assumption that indigenous people will disappear and their cells will continue helping science for decades is very abhorrent to us.... We're not

> opposed to progress. For centuries indigenous people have contributed to science and medicine, contributions that are not recognized. What upsets us is the behavior of colonization. (Rodrigo Contreras, as cited in Patricia Kahn, "Genetic Diversity Project Tries Again," *Science* 266 [November 1994]: 721)

101. John Liddle, as cited in Burrows, "Life, Liberty and the Pursuit of Patents," 33–34.

102. Tauli-Corpus, "We Are Part of Biodiversity," 26.

103. Ibid., 25–26.

104. Ibid., 26. For a copy of the "Declaration of Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project," signed on 19 February 1995 by numerous indigenous organizations, see *Indigenous Woman* 2:2: 32–33.

105. Christopher Anderson, ". . . While CDC Drops Indian Tissue Claim," *Science* 262 (1993): 831.

106. There are other reported cases as well. According to Miges Baumann, of Swissaid, two more patent applications by the U.S. government of indigenous cell lines (from Papua New Guinea and the Solomon Islands) exist. See Burrows, "Life, Liberty and the Pursuit of Patents," 33.

107. Anderson, ". . . While CDC Drops Indian Tissue Claim," 831.

108. Kloppenburg and Kleinman, "Seed Wars," 25.

109. Vandana Shiva, as cited in Beth Burrows, "How Do You Spell Patent? P-I-R-A-C-Y," *The Boycott Quarterly* 1:3 (1994): 6, 5.

110. Intellectual property policies are justified in the Constitution on utilitarian grounds as a means "to promote the progress of science and useful arts" (U.S. Constitution, art. 1, sec. 8, cl. 8). Yet the lack of evidential support for the claim that patents and copyrights have indeed effectively promoted these ends has been noted (see Gerald Dworkin, "Commentary: Legal and Ethical Issues," *Science, Technology, & Human Values* 12:1 [1987]). In its place, one is generally offered appeals to "faith" that they are doing so; for example, "Faith in the private sector's ability to produce beneficial innovations is strong at the moment" (Pamela Samuelson, "Innovation and Competition: Conflicts over Intellectual Property Rights in New Technologies," *Science, Technology & Human Values* 12:1 [1987]).

111. For a characterization of oppressive conceptual frameworks and discussion of the logic of domination, see Karen Warren, "A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues," in *The Ethics of Collecting Cultural Property*, ed. Phyllis Messenger (Albuquerque: University of New Mexico Press, 1989).

112. See Kloppenburg, *First the Seed*, and Kloppenburg and Kleinman, "Seed Wars."

113. Lind, "The Idea of Capitalism or the Capitalism of Ideas?" 70.

114. Ibid.

115. Kloppenburg, "No Hunting!" 106.

116. Tauli-Corpus, "We Are Part of Biodiversity," 26.

117. Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).

118. See Joseph William Singer, "Legal Realism," *California Law Review* 76 (1988).