more than a basket of resources to be analyzed, parsed, and consumed—
with appropriate “remediation,” of course. For the Beaver, Brody shows, the land is a livelihood, a legacy, and a moral
community.

Having demonstrated how far apart the worlds of whites and Indians are in British Columbia, Brody might have concluded that
traditional environmental knowledge is simply too different, too
vitally linked to a community’s spiritual core, to figure usefully in
matters of public policy, a position that would have foreshadowed
critiques of TEK that emerged two decades after his book was pub-
lished. Instead, he argues the opposite. The survival of the Beaver
against overwhelming odds tells us that they know things to which
we should give serious consideration. They cannot, as Brody says,
“withdraw into some bizarre and insular domain of their own.” We
must listen to them, for their sake and for our own, even if a perfect
translation is impossible. There is a middle ground that, despite its
inability to embrace all the subtleties of aboriginal tradition, suggests
creative strategies for both using the land and protecting it for future
generations. This middle ground is only one of many things that
may be lost if TEK and other forms of indigenous knowledge are, in
the name of heritage protection, removed to new reservations of the
mind.28

8. Finding Justice in the Global Commons

In 2001 a university archivist faced an ethical dilemma concerning materials that had recently
come under her care. The collection consisted of interview tapes and
correspondence bequeathed to the archives by an anthropologist and
his Native American collaborator, who had worked together on a
study of an Indian tribe in the region served by her university. Now
tribal officials were asking that the collection be closed to the public
because it contained esoteric religious information that some mem-
bers of the tribe did not wish to see circulated. The archivist con-
sulted a range of experts interested in questions of cultural property.
She offered to talk with me about the case on the condition that her
institution not be identified until the issue was settled.

According to the university’s legal counsel, there are no flaws in
the deed of gift that transfers the collection to the archives. This
means that the university owns the physical documents and holds a
copyright to their contents. In accepting the gift the archives agreed
to honor the wishes of the donors, now both deceased, that the ma-
terial be made available to researchers. The tribe wishes to review re-
quests for use of the documents and to decide who will be given access to them, applying whatever criteria it deems appropriate. This would potentially violate the ethical guidelines of the archivist's professional guild, which stipulates that all patrons be treated equally. It would also break an impressive list of state and federal laws prohibiting discrimination on the basis of religion, gender, or ethnicity.

On the other side of the ledger is the archives' responsibility to the public. Members of the tribe are citizens of the state where the repository is located even though their federal reservation enjoys a high degree of political sovereignty. Tribe members attend the university as students. Others serve on the university's staff. In short, they are part of the public that the archives are obliged to serve, and their wishes must be acknowledged even if they cannot be granted in their entirety.

The archivist and her staff are searching for creative ways to respond to the tribe's concerns without flouting the donors' stated desires and the ethical standards of archival practice. The university has considered establishing a joint review board to develop ground rules for use of the collection. For instance, researchers might be allowed to listen to the interview tapes but not to quote them in print. The archives might also employ informal tactics for protecting tribal interests, perhaps by delaying preparation of finding aids that make the collection easier to use. For now, the documents and tapes remain sealed as negotiations continue. The staff is training members of the tribe in records-management practices that will be put to use in tribal offices. This relationship is helping to counter misunderstandings about archives and the constraints under which they operate, but neither party to the dispute is likely to be entirely satisfied when negotiations conclude.¹

The archives case illustrates a version of liberal pluralism that might be called "multiculturalism without illusions." This approach accepts that conflicts over values are inevitable when societies encompass groups that practice different ways of life. The optimistic view that a culturally diverse citizenry can hammer out a shared vision of the good society has become harder to sustain in the face of new forms of identity politics, rising immigration rates, and the collapse of the melting-pot model of assimilation that helped the United States absorb the last major wave of immigrants early in the twentieth century. This shift in attitudes toward cultural diversity has been effected through appeals to the idea of rights, both of individuals and of cultural communities. Such "rights talk," as it has been labeled by the legal scholar Mary Ann Glendon, has made politicians and citizens more sensitive to issues of social justice. Nevertheless, Glendon and others worry that its simplistic quality gives rise to forms of political discourse that undermine social peace. It is in the nature of rights to seek absolutes. Rights have a finality that silences debate and possibilities for negotiation. When one group's notion of a right prevails, the legitimacy of the solution remains in doubt. In complex, highly diverse societies, it is simply impossible to satisfy everyone's idea of what their rights are or should be, especially in the absence of an offsetting discourse focused on responsibilities.²

Complementary to Glendon's skepticism about current versions of rights talk is the pragmatic "value pluralism" advanced by the British political philosopher John Gray. Gray holds that the search for consensus values is fruitless in pluralist democracies, which can sustain themselves only through compromise and the eternal quest for a modus vivendi. That does not mean that all compromises are morally acceptable. Value pluralism allows for the protection of basic human rights and, conversely, for recognition that certain forms of behavior are genuinely wrong. With the exception of a small set of core protections, however, everything is subject to negotiated solutions that Gray insists are "usually perceived to be more legitimate than le-
gal procedures which end in the promulgation of unconditional rights." The major advantage of political solutions is that they are never final: they can change to reflect changing sentiments and shifting local realities.3

In the 1990s New York City wrestled with a conflict illustrative of value pluralism. During Lunar New Year celebrations, New York's Chinese community has long punctuated its public processions with fireworks. In the traditional Chinese view of things, fireworks are an essential element of the ritual. Whether the purpose of the explosions is to rid the world of evil spirits or to awaken the dragon who brings spring rains (interpretations vary), the ritual is incomplete and flawed without pyrotechnics. But fireworks are prohibited in New York for reasons of public safety. After several years of talks, the city and the Chinese community reached a compromise. A professional pyrotechnics company, supervised by the New York Fire Department, detonated safe fireworks that simulated the sound and the flash of the illegal variety. Naysayers grumbled, but the annual festival took place with reasonably satisfying explosions. Through pragmatic compromise, the conditions of a successful ritual were met.4

In the continuing encounter between the archives and the Indian tribe, both parties navigate uncharted waters, without benefit of laws or formal rules that mandate censorship or repatriation of culturally sensitive information. The advent of the Native American Graves Protection and Repatriation Act (NAGPRA) has brought these questions to broader public attention. Yet NAGPRA does not deal with information as such, however much some Native American leaders would like it to do so. Instead, what has moved the archives to enter into extended negotiations with the tribe is a combination of professionalism—a commitment to serve the institution's multiple publics as faithfully as possible—and simple decency. Skeptics will dismiss the case as anomalous, a unique situation reflecting the intervention of an enlightened archivist or the good will of the parties involved. My interviews with cultural resource managers in the United States and Australia suggest that in fact this situation is more the rule than the exception today.

Negotiations provide openings for unique, culturally appropriate solutions that can subtly alter dominant cultural ideas of ownership (or, for that matter, of religion, or art, or social relationships). One sees this in action at Devils Tower National Monument. The June moratorium on ascents of the tower is precisely the kind of awkward half-measure deplored by advocates of indigenous rights. If Devils Tower is sacred to American Indians, isn't it sacred all the time? What about the two hundred or so people who climb in June in defiance of the moratorium? Yet a visit to the place left me with a feeling that something positive was happening there. The park's improvised and quintessentially political solution is not a legal end point. It is a beginning. Native American leaders have developed sound working relationships with park officials. Visitors to the monument are absorbing educational messages about its religious importance to the region's Indians. These changes were nudge forward by federal laws and presidential executive orders. Nevertheless, the outcome reflects the convergence of multiple interests advanced by groups that cover the spectrum of civil society in the American West: tribal governments, indigenous-rights organizations, climbing associations, lobbyists for expedition outfitters and the local tourism industry, right-wing legal foundations, and a range of religious denominations.

Zia Pueblo's drive to reassert control over its sun symbol is a variation on the same theme. The tribe has used an instrument of the state, trademark law, to assert control over a powerful symbol. Zia's licensing agreement with Southwest Airlines uses another tool: the desire of commercial firms to project a positive public image. Both
strategies, as well as the tribe's formal petition to the state of New Mexico, serve to remind the general public that Zia religious symbols are not to be triffled with. To be sure, efforts to control use of powerful cultural symbols raise knotty questions of free speech. Yet to the extent that they inspire a public conversation about fundamental values, they serve a vital purpose. They create the possibility, as Clifford Geertz puts it, "of quite literally, and quite thoroughly, changing our minds." This outcome would be less likely if the federal government were to issue an edict declaring all Native American symbols off-limits for reproduction on the grounds that they are a form of cultural property.5

As these cases show, the dynamism and flexibility of civil society can play a key role in the rebalancing of relations between indigenous peoples and nation-states. This shift is evident in worldwide efforts to right historic wrongs through the restitution of lands, the payment of reparations, and the modification of legal systems to open new political spaces for formerly subordinate groups. Few believe that money or land alone can undo a history of genocide. Formal restitution has profound limitations, and sometimes it may be little more than window dressing for states in search of new legitimacy. But by acknowledging the injuries of the past, restitution helps to lay the groundwork for new and better ways of living together.6

If a central goal of the indigenous-rights movement is to move the global community toward cultural-protection policies that are both effective and ethically sound, it is vital to make a distinction between matters of economic justice and the broader goal of protecting "cultural integrity"—an emerging code word for respectful treatment of indigenous symbols, religious practices, and knowledge. The Total Heritage Protection approach rejects this distinction, calling it ethnocentric and a violation of the right of a people to define the world as they see fit. For better or for worse, however, intellectual property laws are organized around financial incentives. The doctrine of moral (or authors') rights represents a feeble nod in the direction of non-economic concerns, but it is limited in scope, problematic from a free-speech perspective, and almost completely absent from the legal system of the United States, the single largest actor on the world's commercial stage. Some experts worry that both intellectual property law and indigenous cultures might be harmed by efforts to turn copyright into an instrument for protecting cultural integrity. One has only to recall the case of H. R. Voth's photographs to see how risky it would be to redefine them legally as the intellectual property of the Hopi. The precedent would create pressures to extend the term of all copyrights even further, a prospect appealing to the world's largest media corporations. A law that automatically conferred ownership of historical photographs to their subjects, or their subjects' descendants, would inhibit the work of historians and documentary filmmakers in harmful ways. These might be acceptable hazards if they genuinely protected Hopi religion, but there is little reason to think that Voth's photographs of Hopi rituals would cease to be available to anyone seriously interested in examining them.7

A market-based framework provides considerable room for reforming and broadening intellectual property law to accommodate the unique features of creativity in traditional societies. The Bulan Bulan decision in Australia shows that the special relationship between indigenous artists and their communities, at least where religious images are concerned, merits distinctive treatment. In the United States, trademark regulations make it increasingly difficult for companies to use Native American names and symbols as identifiers for commercial products in the absence of formal licensing agreements with pertinent tribes. Patents, especially in the biotech-
nology arena, remain the most problematic element of the system. Opposition to overly liberal treatment of patent applications is growing even in business circles, suggesting that infringement of indigenous interests in plant products is at least partly a systemic problem that should be treated as such. In 2002 the business magazine Forbes published an article alleging that the U.S. Patent and Trademark Office’s lax standards had turned the patent into a “blunt instrument for establishing an innovative stranglehold.” When a publication that calls itself “The Capitalist Tool” begins to denounce the oppressiveness of current intellectual property practices, one may infer that the system’s swing in the direction of ever greater restrictive-ness may be coming to an end.

Critics of the world intellectual property system are most persuasive when they question current understandings of the public domain. At present the public domain encompasses all folkloric knowledge as well as formerly proprietary knowledge whose protection has lapsed. Elements of this communal resource can be privatized, albeit temporarily, through copyrights and patents provided that an applicant meets the state’s standard of originality. In the case of copyright, standards of originality are low, but so are the protections that copyright affords. Most of the economic injustice associated with the imitation of indigenous music and art arises not because the appropriator “takes something away” from someone else, for copyrights stand little chance of directly blocking the activity of a native performer or artist. The inequity lies instead with the appropriators’ social capital, which leaves them better positioned than their indigenous counterparts to reap financial reward. This is manifestly unfair, but it is symptomatic of broader social realities, not of a failure of intellectual property law as such. Patents are another matter, because in principle patents confer monopolistic control. Under close scrutiny, most publicized cases of biopiracy fail to qualify as outright theft, and few have realized profits in the marketplace. Still, there are enough instances of questionable “invention” that the system cries out for reforms that would recognize the proprietary interests of local communities in public-domain information. These interests rarely qualify as absolute, but they surely merit a place at the table when profits are distributed.

Stepping outside the indigenous-rights debate, one finds progressive legal thinkers arguing passionately for more freedom to borrow, blend, and ultimately create new artistic and technological forms. These same voices lament enclosure of the intellectual commons by corporations whose predatory approach to copyright and patent law makes it increasingly difficult to innovate. Such arguments tend to assume the existence of an undifferentiated public domain. From the indigenous-rights perspective, the public domain is the problem, not the solution, because it defines traditional knowledge as a freely available resource. Harmonizing the two positions will not be easy. Advocates of the indigenous “we own our culture” perspective find themselves in the odd position of criticizing corporate capitalism while at the same time espousing capitalism’s commodifying logic and even pushing it to new extremes. This position fragments what should be broad public opposition to the ways that the Microsots and Mercks and Disneys and AOL Time Warners of the world manipulate the intellectual property system to their advantage.

A possible exit from this cul-de-sac is outlined in the Bellagio Declaration, issued after an interdisciplinary conference sponsored by the Rockefeller Foundation in 1993. The Bellagio Declaration proposes reducing the scope of intellectual property rights in already established arenas (copyright, patent, trademark) while creating new protections for traditional arts and technologies. At the same time, the document affirms the signatories’ commitment to continued health of a public domain “from which all people, from all nations,
Who Owns Native Culture?

are free to draw." Like most statements on this subject, however, it is vague about the details of the "neighboring rights" that would protect the content of indigenous cultures. As we have seen, when actually enacted as law these new rights tend to create as many problems as they solve. This helps to explain why advocates of Total Heritage Protection routinely endorse the idea of neighboring rights but rarely commit draft legislation to paper. 10

Since Belloagio, a number of legal thinkers have called for a radical downsizing of global intellectual property rights. Lawrence Lessig, an outspoken critic of current copyright practices, proposes reducing copyright to five-year terms renewable to a maximum of seventy-five years, considerably less than today's standard of life plus seventy years. Lessig also suggests that the U.S. Patent and Trademark Office be required to undertake empirical studies to determine whether existing patent laws encourage or stifle innovation. Others argue that if the goal of intellectual property law is to serve the public good we should adjust the terms of biotechnology patents according to the social need for the product or process. Thus drugs for the treatment of male-pattern baldness might be eligible for short patent terms, whereas a malaria vaccine would be awarded a longer term, reflecting the product's greater value to society and the difficulty of recovering development costs from the vaccine's low-income target population. The longer term, of course, would be contingent on the patient holder's willingness to make the vaccine widely available at low cost. 11

The disposition of genetic resources may present the most difficult challenge to the world's intellectual property system, especially where food crops are concerned. Research and innovation are vitally necessary if the food supply is to grow with the planet's burgeoning population. The privatization of crop research and its control by a handful of corporations have aroused hostility in many countries, creating obstacles to continued progress. In the best of worlds, states would declare research on major food crops to be a public good free of intellectual property encumbrances, but that seems an unlikely scenario at present.

The legal scholar Carol Rose has suggested helpful new ways of thinking about genetic resources and other natural products. In an analysis of changes in legal understandings of property in the face of new technologies, Rose identifies a hybrid property form that she calls "limited common property" (LCP). LCP is neither completely public nor completely private. It typically takes the form of community resources that insiders are allowed to use but from which outsiders are excluded. Insiders enjoy a degree of latitude in their exploitation of LCP, but ties of social solidarity and economic reciprocity constrain abuses from within. The problem, according to Rose, is that LCPs are often invisible to outsiders whose notions of property assume overtly private forms of ownership. 12

An obvious way to treat natural products and public-domain folk knowledge would be to implement a version of compulsory licensing. Compulsory licensing arose in response to technological innovations such as player pianos, jukeboxes, and commercial radio. If radio stations were required to obtain prior permission before broadcasting each song, the transaction costs would be overwhelming, and programming would grind to a halt. Compulsory licensing allows for use of copyrighted material without permission; at the same time, it requires commercial users to pay reasonable fees to copyright holders. It is a "liability rule" rather than a "property rule." The system strives to balance the rights of copyright holders against society's need for the circulation of art and information. It also accepts that a copyright system is workable only if transaction costs are low. 13

A licensing system for natural products would acknowledge that local populations, especially indigenous ones, have legitimate propri-
Who Owns Native Culture?

copyright interests in the flora and fauna of their region. In other words, these resources, and local knowledge about them, qualify as limited common property. At the same time, a group's interests in natural products can rarely be judged exclusive, for the simple reason that knowledge about flora and fauna is unlikely to be limited to a single community or ethnic group, except perhaps in the unusual case of island environments.

At present, misguided application of sovereignty rhetoric stands in the way of implementing licensing systems that would benefit indigenous peoples. The position of the Rural Advancement Foundation International (RAFI) in the dispute over the ICBG-Maya project illustrates the problem. In its “Ten Points on Piracy,” RAFI recognizes that many neighboring indigenous societies may utilize the same plant species. RAFI concludes that “agreement must be reached with each community before bioprospectors can consider that they have permission to proceed.” This requirement would do little more than spread the tragedy of the anticommons, identified in Chapter 4 as a problem of the biotechnology industry, to indigenous societies. The likelihood that anyone could negotiate a viable agreement amid so many conflicting claims is prohibitively low. In its sheer impracticality, RAFI’s position fails to confront a key feature of all property regimes: their cost. As Carol Rose observes, “It costs something to define rights, to monitor trespasses, and to expel intruders.” Because natural products and knowledge about them are rarely localized, it is easy for potential exploiters to seek out alternative sources that entail lower costs. This is especially true for crop plants, since the agrotechnology industry benefits from more than a century of systematic collection of specimens and their relocation to facilities in the developed north.

Rather than setting impossibly high standards for prior informed consent, it would be preferable for national governments—or better still, for consortia of states sharing major biogeographic regions such as the Amazon—to impose easily explained licensing fees whose proceeds would be distributed to all recognized indigenous groups, on the assumption that over time short-term inequities would balance out. Payment of these fees, which should include a percentage of royalties on commercially successful products, would authorize companies to negotiate research agreements and know-how licenses with local groups. At the local level, the sovereignty principle would apply: communities would be free to collaborate, or decline to collaborate, with individual projects as they saw fit.

A law with this general form has been proposed in Peru, and similar legislation is under consideration elsewhere. Given the track record of many governments, one has to be skeptical about their willingness to redistribute fees to indigenous communities as promised. If administered efficiently and fairly, however, such a plan would strike a balance between the proprietary rights of local communities and the pragmatics of technological innovation by industry. Putting it into place would not imply conflict with aggressive American interpretations of patent law—such as the patenting of biological life-forms—that many countries find objectionable. It would merely set minimal conditions for undertaking commercial research within a biogeographic region.

Other effective strategies might be imagined along these lines. Some would require adaptation to specific types of material. What works for crop genetic resources is probably not the best approach for protecting proprietary interests in indigenous music or ceramics. But viable solutions will be hard to implement as long as the intellectual property regime is expected to control the movement of knowledge and modes of expression identified with indigenous commu-
nities. However flawed it may be in its current form, the world’s intellectual property system is designed to encourage rather than constrain the circulation of ideas.16

The goal of maintaining cultural integrity, inseparable from questions of collective privacy and a desire for dignity in the face of unwanted interest by outsiders, will be far more difficult to achieve through legislative means. By its nature, law strives for uniformity and precision. But in matters of getting along, as the sociologist Alan Wolfe has pointed out, precision is rarely desirable: “Just as diplomats try to find ambiguous wordings in treaties so that all sides can claim to be winners, commonsense morality suggests solutions to difficult moral dilemmas that allow as many people as possible to retain their self-respect.” The ambiguity required to foster social peace, Wolfe argues, is found in civil society, not in the state or the marketplace.17

Pivotal elements of civil society include professional associations, which influence occupational networks through codes of ethics and best-practice standards; religious denominations and the moral guidance they offer congregants; educational institutions, which provide forums for exploring multiple perspectives on values; advocacy groups that push for one agenda or another; service organizations concerned about living conditions in underprivileged sectors of society; labor unions, charged with protecting the interests of their members; and writers and documentary filmmakers, who strive to take their audience into the social realities of different communities. Addressing questions of cultural property through the diverse institutions of civil society is a slow, demanding process that cannot solve all social problems. Yet this approach offers distinct advantages over Total Heritage Protection strategies focused narrowly on law and mechanisms of state power. It exploits existing links between indigenous people and national societies: churches (a powerful force in Latin America, where native peoples are joining evangelical congregations in growing numbers), fraternal organizations of military veterans, labor unions, nongovernmental organizations (NGOs)—the list is long. It lays the foundation for solutions that fit local conditions. It minimizes expensive litigation and takes advantage of forms of voluntarism that draw communities together. It avoids codification and the perils of formal laws about culture. It encourages culturally appropriate remedies without instituting a system of group rights that would, to quote Mary Ann Glendon, “tend to pit group against individual, one group against another, and group against state.”18

Underestimation of the power of civil society is inevitable once sovereignty thinking is allowed to push aside other ways of crafting solutions to social conflicts. If indigenous societies are “nations,” then all negotiations should take place with the state. In subtler ways, advocates of indigenous sovereignty find it threatening to acknowledge that native peoples, at least in the economically developed settler democracies, are deeply embedded in the broader civil society. Such an admission seems to undermine the separateness upon which cultural-rights claims are based. Instead, multiple social entanglements should be recognized as offering opportunities for communication and mutual comprehension. Used effectively, these viral links strengthen public understanding of indigenous self-determination and improve its prospects for realization.

Civil society also provides an opening for cultural claims based on social practice, as distinct from assertions of belief. One of the thorniest questions concerning native rights is how to accommodate emerging (or reemerging) groups that assert an indigenous identity. At present they are obliged to demonstrate clear continuity with
forms of civic engagement. In parts of the developing world, a recognizable civil society may be almost completely absent. Neither general lawlessness nor totalitarian order offers promising ground for the protection of cultural integrity, and in these situations indigenous communities focus, as they must, on collective self-defense of the most elemental kind. One happy effect of globalization is that civil society now has an international face. Today few countries are so disorderly or so hermetic that foreign NGOs are not working there. As we saw in Chapter 4, the limited accountability of NGOs may encourage mischievous and divisive tactics. In general, however, the presence of international organizations makes even the most oppressive government vulnerable to external scrutiny in ways that were unknown a few decades ago.

The matter of human rights and their precarious standing in many places raises the question of power. The forces arrayed against indigenous peoples in their struggle for control of cultural resources are undeniably strong. The market capitalization of some of the corporations pushing for more restrictive intellectual property laws exceeds the gross domestic product of entire nations. The close relation between financial power and intellectual property is evident in the periodic legislative rescues of Mickey Mouse: whenever the Walt Disney Company’s copyright on the familiar rodent is about to expire, it gets renewed by the U.S. Congress. But power takes many forms. It would be a mistake to underestimate the moral weight of aboriginal claims, which have far more influence in the world than one might expect of a population that, depending on who does the counting, represents somewhere between 4 and 8 percent of humanity. The current political situation in Latin America reveals the growing importance of indigenous peoples as agents of progressive social change. Despite the region’s history of military rule and indifference to human rights, indigenous groups have fundamentally re-
Who Owns Native Culture?

shaped national politics in Ecuador, Peru, and Bolivia. Less sweeping but still significant impacts have been felt in Mexico, Brazil, Venezuela, Colombia, Nicaragua, and Panama. In the Amazon, small but determined indigenous groups have sent international oil companies packing. Even more powerful indigenous movements have arisen in New Zealand and Australia, where Aboriginal-rights issues are now near the top of national agendas.

The symbolic power of indigenousness can be a mixed blessing. It sparks in outsiders a romantic interest that sometimes threatens the way of life they so greatly admire. But it also provides a global network of sympathizers who quickly rally to the cause in times of crisis. For corporations that worry about their public image, the power to shape opinion is never to be taken lightly. In October 2001 Maori leaders announced a settlement with the Danish toy company Lego over the firm’s unauthorized use of Maori names to identify figures in a new game. Lego reportedly agreed to desist from the use of Polynesian names in other products, and it pledged to “develop a code of conduct for cultural expressions of traditional knowledge.”

In their struggle for dignity and self-determination, indigenous peoples fight an uphill battle, but the slope is not as steep as it might be if economic power were the only relevant factor. The reality of a power imbalance underscores the importance of forging strong and durable alliances between the native-rights movement and groups that are defending the integrity of the public domain. Both have a vested interest in protecting the world’s cultural commons and in achieving a fairer balance of rights and responsibilities.

Civil-society strategies that spurn legislative solutions in favor of negotiated ones run counter to an influential strain of judicial thought that sees law as the most effective instrument for shaping attitudes and social norms. Proponents of this view hold that negotiation takes place, as the expression goes, “in the shadow of the law.”

Finding Justice in the Global Commons

Without laws that define rights and mark limits, parties have little incentive to negotiate. Legal scholars like to point out that, in liberal democracies, laws work as much through networks of information as by overt practices of enforcement. We follow the law because we are socialized to do so. Hence the importance of law that creates social incentives for proper behavior.

The case studies presented in this book strongly suggest that in the United States and Australia, and quite possibly in Canada and New Zealand as well, laws and public policies have already created a formidable legal overhang, in the shadow of which groups are successfully negotiating workable solutions to disputes about sensitive cultural information and access to sacred sites. In the United States, for instance, NAGPRA has given American Indians considerable clout with museums in matters lying beyond the law’s limited scope. More than anything, NAGPRA promoted the creation of new institutional arrangements—joint-use committees, review panels, and repatriation offices—that have redefined relationships between museums and indigenous communities. Consultation has become an element of everyday practice in museums and archives whose holdings include American Indian materials. Discussions inevitably move beyond artifacts and human remains to other matters. Existing laws and policies, in other words, have changed attitudes toward the management of sensitive cultural information despite the absence of laws making such change obligatory. The considerable progress already achieved without anything approximating Total Heritage Protection calls to mind the remark of a French diplomat to Madeleine Albright, then the U.S. secretary of state, while discussing an aspect of European bureaucracy: “It will work in practice, yes. But will it work in theory?”

There is doubtless a place for sharply focused legislation that confers limited rights in cultural information and community symbols,
especially to groups that can show how misuse of such resources by others would cause genuine harm. The problem is that advocates of Total Heritage Protection are edging toward insistence that all representations of native cultures merit legal regulation. I can think of few contemporary rights claims that are at once so vast, so vague, and so frankly separatist in intent.

This raises a central question conspicuous for its absence in debate about the future of native cultural property: To what extent should Aboriginal Australians, Native Americans, Maoris, and other indigenous peoples be considered part of a global commons? There is general agreement that native communities everywhere have been victimized since the Age of Exploration. Most commentators accept that indigenous peoples should be free to maintain distinct, vibrant societies that enjoy a reasonable standard of prosperity. A key element of native self-determination is the power to decide what sort of research takes place in indigenous communities, and under what terms. Beyond these basic tenets, however, vistas remain clouded. Should the public domain be something to which native peoples contribute as full participants? Or does sovereignty imply that they are opting out of the public domain as currently understood? If they are opting out—to my mind, a discouraging prospect—how can they do so without severely impairing the ability of social groups to talk to and about one another, a basic requirement for peaceful relations?

The hybrid nature of indigenous cultural life today argues against rigorous separation of indigenous knowledge from the public domain of global society. Native people increasingly depend on non-native languages to communicate even in the intimacy of their homes. Language barriers, which have helped to shield indigenous traditions from outside scrutiny and influence, are eroding nearly everywhere. Meanwhile, indigenous citizens move steadily into the everyday life of nation-states. One struggles to imagine a system of laws that could reverse the cultural mixing now taking place. It is even harder to understand why native leaders would want to put national governments in charge of efforts to defend the purity of their heritage. The long history of state paternalism offers too few successes, and too many disasters, to make this an attractive prospect.

To recognize the hybrid character of indigenous cultures is not to suggest that their assimilation is inevitable, nor is it to endorse the assimilationist policies of the past. Despite five centuries of relentless pressure, many core elements of native cultures retain their vitality. Some may be undergoing a renaissance. Indigenous societies include a growing number of intellectuals and political leaders equipped to move with agility from one social world to another—from meetings of village elders to corporate boardrooms, from the sweat lodge to the conference podium. It is their right, as well as their responsibility, to defend the dignity of their communities in public forums. Settler democracies must be held accountable for failure to honor their obligations to indigenous citizens. Formal law has a useful role to play in this process of cultural reconstruction, but we must also remain mindful of law's limitations and hazards.

A vivid memory of my college years is of a public dance that I attended at Hopi—probably in the village of Songoopavi, although the details have faded with time. It was the summer of 1970, and I was visiting Hopi during a weekend off from my job as a summer school teacher on the Navajo reservation. During the event, the austere, deliberate movements of the dancers alternated with the antics of clowns usually called Mudheads because of their clay-colored masks. Mudheads, like other Pueblo clowns, play a complex role in rituals. They intensify the presence of the sacred by epitomiz-
Who Owns Native Culture?

ing, sometimes to an alarming degree, characteristics of the profane. They parody behaviors of other categories of people—Indians, Hispanics, and Anglos—to illustrate, usually with devastating humor, why Pueblo culture is superior. In the early 1970s Pueblo clowns were especially fascinated by hippies, those strangely hirsute Anglos who assumed they had a natural affinity with their native brothers and sisters.

On this day, a Mudhead working the large dance plaza moved to a spot just below where I sat watching from a rooftop. Fixing me with an unsettling stare, he shouted in English, “Hey, Jesus! Jesus Christ! Come down for the Last Supper!” Although I probably failed to qualify as a hippie, I had the requisite facial hair, and his comments sparked raucous laughter from the mix of Navajo adolescents and Hopis around me. I laughed, too, although less comfortably than my companions. A few minutes later the Mudhead returned and shouted angrily, “Jesus, come down for the Last Supper, goddammit!” It was clear that he expected me to climb down. People made way amid general laughter. His fellow clowns set up a table in the middle of the plaza. Other visitors were called out: a middle-aged Anglo man, a Navajo youth, and a Hopi elder. We were seated at the table and given food—fried trout, as I recall, and the delicious corn bread called piki. To my great relief, the Mudheads turned their attention elsewhere, performing little skits that mocked themselves as much as others. We ate quickly and returned to our places on the rooftops. In what I later learned was typical of Hopi rules of reciprocity, the clowns had fed us to forestall hard feelings about their jokes at our expense. A goal of the ritual is to renew life, in part by bringing people together in happiness. Provoking ill will, even from outsiders, endangers the event’s sacred purpose.

Pueblo public rituals include elaborate forms of cross-cultural imitation. Clowns may dress as missionaries, Girl Scouts, anthropologists, or tourists, burlesquing the behavior of these strange outsiders in elaborately staged presentations. Other Indian tribes are not spared attention. Probably the most flamboyant example is the Comanche Dance, performed in several villages in northern New Mexico, in which groups of dancers abandon the strict dress code of Pueblo ritual in favor of gaudy interpretations of Plains Indian powwow garb. Jill Sweet, an anthropologist who studied the dances of Tewa-speaking Pueblo communities, describes something called the Navajo Dance. As many as forty men and women don Navajo-style hats, jewelry, and sunglasses. Toward the end of the dance, they pass around a jug and begin to act like drunks. When Sweet observed the dance, “the Tewa audience laughed uproariously at these antics because they consider such behavior typical of Navajos but not of themselves.” Sweet interprets this humorously disparaging performance (which in today’s litigious climate probably qualifies as group libel) as a symbolic effort to work through Tewa ambivalence toward the Navajo, who are both trading partners (and sometimes spouses or lovers) and traditional antagonists. “By mimicking the Navajos,” she says, Tewa people “ritualize and defuse years of interaction, including some dangerous confrontations.”

These examples of intercultural play highlight the complexity and moral ambiguity of the kinds of borrowing and imitation dourly summarized by a term like “cultural appropriation.” Members of different societies need to talk about one another if they hope to get along. The fluid dance of imitation and contrast, reticence and disclosure is an essential part of social life in pluralist societies. It is suppressed only with difficulty and at some cost in creative freedom. To make this observation is not to defend commercial exploitation or gross insensitivity. Nor is it to claim that movement of cultural elements between the politically weak and the politically strong is equivalent to exchanges among equals. I wish simply to point out the
risks of taking too rigid a view of cultural ownership, especially when technological and social changes are making cultural boundaries ever harder to identify.

Advocates of Total Heritage Protection fail to offer a comprehensive vision of what the world will look like after they have imposed the institutions of surveillance, border protection, and cultural purification that some call for. They talk of respect, cultural survival, and economic justice for indigenous communities. These are admirable goals. All of us should work to advance them. Nevertheless, history suggests that the legal regulation of culture is at best a fruitless enterprise and at worst an invitation to new forms of manipulation by the powerful. As a Turkish proverb says, "A weapon is an enemy even to its owner."

If I am critical of those who seem eager to defend a world of discrete, perfectly bounded cultures that never existed, it is because I am so impressed by the hope and pragmatism of indigenous elders, museum curators, archivists, and cultural-resource managers who are negotiating their way to more balanced relationships. They, far more than the activists and academic theorists who set the terms of debate about cultural ownership, understand that progress will be built on small victories, innovative local solutions, and frequent compromise. They recognize, too, that a world ruled solely by proprietary passions is not a world in which most of us want to live.