

Chicago-Kent College of Law

Scholarly Commons @ IIT Chicago-Kent College of Law

All Faculty Scholarship

Faculty Scholarship

February 2003

Defining Traditional Knowledge -- Lessons from Cultural Property

Sarah K. Harding

IIT Chicago-Kent College of Law, sharding@kentlaw.iit.edu

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Sarah K. Harding, *Defining Traditional Knowledge -- Lessons from Cultural Property*, 11 *Cardozo J. Int'l & Comp. L.* 511 (2003).

Available at: https://scholarship.kentlaw.iit.edu/fac_schol/267

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

DEFINING TRADITIONAL KNOWLEDGE – LESSONS FROM CULTURAL PROPERTY

*Sarah Harding**

My contributions to this symposium stem not from a knowledge of intellectual property or “traditional knowledge,” but rather from my thinking and writing on the repatriation and protection of the cultural property of indigenous people, particularly the cultural property of Native Americans. I should add that while many of the contributions to this symposium were prescriptive, the following comments are best described as cautionary and critical. I do not provide concrete suggestions for how to protect “traditional knowledge,” but there are some lessons to be learned from our experiences in the protection and repatriation of cultural property.

My primary focus is on the term “traditional.” In the cultural property context, the comparable term is “cultural.” What do we mean by these phrases and how do these terms influence our understanding of the culture and politics of indigenous peoples? In this very brief paper, I will discuss some of the assumptions embedded in our understanding of these words as reflected in the repatriation of Native American cultural property.

DEFINING CULTURAL PROPERTY

The label “cultural” as used in the context of the patrimony¹ or property of Native Americans reflects at least three assumptions. First, the property in question is owned by the culturally affiliated group, rather than any one individual within that group. The second assumption is that the object is authentic, meaning that it is unique, not a replica,² and that it has a clear connection to the

* Associate Professor of Law, Chicago-Kent College of Law. Research Fellow, Law Program, Research School of Social Sciences, Australian National University (2002-03). Many thanks to all the participants in the conference for their insightful comments, particularly Graeme Austin for his thoughtful critique.

¹ The term “cultural patrimony” appears in the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§3001-3013 (1994), discussed throughout this paper. The more commonly recognized term is “cultural property.” These terms will be used interchangeably throughout this paper.

² In at least one instance a Native American tribe has attempted to repatriate replicas along with the originals. See Ferguson, Anyon and Ladd, *Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems*, reprinted in REPATRIATION READER: WHO

cultural or religious practices of a particular group. Third, and perhaps this is merely an extension of the second point, that it is valued outside the market. In other words, that the object be considered something other than a fungible, alienable commodity by the repatriating group.

The Cape Fox Totem Pole that was recently repatriated from the Field Museum is a good example of Native American cultural property that conforms to these assumptions.³ The Cape Fox Pole is important to the Tlingit people, not because of its market value or its educational and aesthetic qualities but rather because it has some unique significance to the Tlingit people. Upon its return a member of the Cape Fox community commented, “[t]hese things contain our tribal history, tell us who we really are. These things will make our grandchildren proud of who they are.”⁴ Such statements make it clear that the Totem Pole is thought to be authentic, collectively owned and separate from the art/artifact market that so dominates Western modes of valuation. It is these characteristics that in this context generate the label “cultural” property.

While these three assumptions are only implicit in the term cultural property, they are made explicit in the definition of “cultural patrimony” found in the Native American Graves Protection and Repatriation Act (“NAGPRA”).⁵ The definition reads:

An object having *ongoing historical, traditional or cultural importance central to the Native American group or culture itself*, rather than property owned by an individual Native American, and which therefore *cannot be alienated*, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe . . . and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.⁶
(emphasis added)

The United Nations study on the protection of cultural heritage has a much broader definition because it includes both tangibles and intangibles under the heading of “heritage,” thus

OWNS AMERICAN INDIAN REMAINS 239, 256 (Devon Mihesuah ed., 2000) (discussing the attempt by the Zuni to repatriate “replicas” of their War Gods).

³ See William Mullen, *After 100 Years Totem Pole Comes Back Home*, CHICAGO TRIBUNE, July 22, 2001, at 1; William Mullen, *Lost Totem Is Back With Tlingit Indians*, CHICAGO TRIBUNE, July 24, 2001, at 11.

⁴ Mullen, *After 100 Years Totem Pole Comes Back Home*, *supra* note 3, at 1.

⁵ 25 U.S.C. §§ 3001-3013 (1994).

⁶ 25 U.S.C. § 3001(3)(D)(1994).

making it more useful in the context of this symposium. It too stresses at least the first two elements discussed above.

The heritage of indigenous peoples has a *collective character* and is comprised of all objects, sites and knowledge including languages, *the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people* or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage.⁷ (emphasis added)

Both of these definitions put “collective” ownership and non-market significance up front but authenticity is equally important. The references to “ongoing . . . importance” and “from generation to generation” indicate the centrality of reaching back in time, connecting the present to an irrefutably authentic past. Even new creations, according to the definition in the Daes report, must have some association with the past to qualify as cultural heritage. The NAGPRA definition goes one step further in its assumption that “alienability” is incompatible with authenticity. An object that is alienable cannot, according to the definition, have the sort of significance that is worthy of the label “cultural.” In this sense “cultural” signifies something not only separate from, but indeed unsullied by, market notions of value.

These are not new ideas. In many ways they simply reflect our assumption of otherness in indigenous people. The notions of authenticity, collectivity and inalienability, here associated with Native American society, are quite distinct from the dominant assumptions underlying capitalist, market-driven societies. As anthropologist Michael Harkin observes: “it has been a characteristic intellectual habit of Western civilization to assume that peoples outside it represent marvellous inversions of their own social and cultural norms.”⁸ In addition to reflecting our expectations of an authentic “other” in indigenous people, cultural property laws also reflect our desire to know and observe their traditions. So, for example, in order to repatriate or protect cultural property under

⁷ ERICA-IRENE DAES, FINAL REPORT ON THE PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES, ¶ 12, U.N. Doc. E/CN.4/Sub.2/26 (1995).

⁸ Michael Harkin, *Privacy, Ownership and the Repatriation of Cultural Properties: An Ethnographic Perspective from the Northwest Coast* 3 (2001) (on file with author).

NAGPRA or the National Heritage Act,⁹ Native American communities must convince a museum or relevant federal official of the significance of the object or site in question. If information is withheld, even if the reason itself is culturally or religiously based, the chances of success are minimized.¹⁰ Protection, therefore, comes at the price of openness.

Given these assumptions, it should come as no surprise that one of the most discussed and highly regarded repatriation stories relates to the Zuni War Gods. The repatriation of the Zuni War Gods is considered a success story because they are so incontrovertibly authentic, and because the Pueblo of Zuni, contrary to tradition, shared so much knowledge and information in the process of seeking their return. Indeed, it is often observed that the successful return of the War Gods turned on this openness.¹¹

Thus the “cultural” or “traditional” items of indigenous people are presumed to be significant to and owned by the group as a whole, authentic, unique (or exotic) and inalienable, and all these features must be transparent if the items are to be preferred or repatriated. But a close examination of the various Native American responses to NAGPRA reveals a slightly more complicated picture.

⁹ 16 U.S.C. § 470(f) (2000).

¹⁰ Secrecy has become a significant issue under both NAGPRA and the National Historic Preservation Act, resulting in the passage of regulations and guidelines to alert government officials to the sensitive nature of some cultural knowledge or information. *See, e.g., NATIONAL PARK SERVICE, Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NATIONAL REGISTER BULLETIN, 38, (1990) (“It may not always – or even often – be possible to arrange for information to be sought in precisely the way those being consulted might prefer, but when it is not, the interviewer should clearly understand that to some extent he or she is asking those interviewed to violate their cultural norms. The interviewer should try to keep such violations to a minimum.”)

¹¹ *See* Adele Merenstein, *The Zuni Quest for Repatriation of the War Gods: An Alternative Basis for Claim*, 17 AM. INDIAN L.REV. 589, 591-92 (1992) (the eventual repatriation of the Zuni War Gods was achieved “only [through] the power of persuasion.”); William Merrill, Edmund Ladd and T.J. Ferguson, *The Return of the Ahayu:da: Lessons for Repatriation from Zuni Pueblo and the Smithsonian Institution*, 34 (5) CURRENT ANTHROPOLOGY 523 (1993) (describing in detail the negotiations leading up to repatriation of the War Gods from the Smithsonian). The Pueblo of Jemez also has an extremely successful repatriation program that depends on openness and a “very good rapport” with the museum world. *See* AMERICAN INDIAN RITUAL OBJECT REPATRIATION FOUNDATION NEWS AND NOTES, Vol. 2, No. 2 (1995-96). This view also appears in section 2 of the Pueblo of Jemez Repatriation Policy which can be found at the Pueblo of Jemez Department of Resource Protection NAGPRA/Cultural Preservation Resource Page at <http://www.nmia.com/~quasho/nagpra.htm>.

CULTURE, INNOVATION, AND SOVEREIGNTY

NAGPRA has been in force for a little more than a decade and the types of things that have been repatriated under its provisions generally conform to the assumptions discussed above. Most of the items repatriated under the “cultural patrimony” provisions are indeed items that seem both authentic and uniquely associated with a specific tribal culture or religion. The Cape Fox Totem Pole and the Zuni War Gods discussed above are perfect examples. But there are other items that have been repatriated that *appear* oddly inauthentic, or at least not uniquely Native American.

For example, the Pueblo of Zuni repatriated a collection of Christian art works taken from a missionary church located in their community. Zuni representatives made it clear that these items have less cultural significance to them than many items that they refuse or hesitate to repatriate. More “traditional” items, aside from their War Gods, present internal cultural and religious issues, in particular questions about who will be responsible for such items. The Christian art works, on the other hand, were easy to repatriate because they did not implicate significant cultural or religious concerns and yet their return was clearly warranted by the fact they were improperly removed from a collectively owned church.¹²

More recently, two British flags and two British peace medals were repatriated to the Minnesota Chippewa tribe.¹³ They were described as being “passed on as a hereditary assignment, which provided for one individual of prominent status recognized as the ‘first chief’ or ‘principal chief’ of his own clan.” These items are quite clearly central to the history of the tribe and thus their repatriation is unproblematic. And yet as objects whose origins lie outside of the tribe (as with the Christian art works) they seem oddly incompatible with the assumptions discussed above.

Aside from specific items, at least one individual has expressed a sentiment about repatriation that is likely common among Native Americans: “Our dream is to pull a U-Haul up and take back as much as we can.”¹⁴ This comment reveals less of an interest in any specific authentic cultural connection and more of a

¹² See Ferguson, Anyon and Ladd, *supra* note 2 at 256.

¹³ 65 Fed. Reg. 57,208 – 57, 209 (2000).

¹⁴ David Whitney, *Old Photographs Were Key to Return*, at <http://www.tlingit-haida.org/what'shap/objects.html> (July 19, 2000).

focus on sheer entitlement.¹⁵ In other words, what seems most important here is not the unique nature of the property in question but rather the opportunity to reacquire as much as possible.

Local decisions about the placement and treatment of repatriated objects can also reflect serious cultural innovations rather than a “traditional” approach. Michael Harkin notes that the masks and ceremonial objects of the Kwakiutl, items associated with the potlatch ritual, were not communal but intensely personal, having been created for, and owned by, specific individuals. The repatriation of these ceremonial objects has been supported and encouraged by younger members of the tribe “who wish to construct an idealized vision of native culture as a communitarian utopia.”¹⁶ This development has involved the creation and establishment of museums or “cultural institutions” to display the objects. And yet older members of the community are often opposed to this shared understanding and significance, not to mention public display, of these intensely personal objects. In this particular cultural context, Harkin concludes “the acceptance of repatriated objects as *cultural property*, that is constituting part of an inalienable, communal heritage, is a radical innovation.”¹⁷

The point of all this is not to criticize how Native American communities have used NAGPRA but, to the contrary, to cast doubt on our assumptions or expectations about what is culturally or traditionally Native American. We expect what is cultural or traditional to remain faithful to some image of authentic tribal life. That image, however, may not necessarily accord with current Native American expectations, as is the case with Christian art works. It may not even accord with “traditional” expectations, as in the case of the Kwakiutl masks.

There is an irony here. On the one hand, the colonizing project was one of transformation, and while we presume that the attitudes of colonization are behind us, we still expect some degree of assimilation from indigenous peoples living in Western societies.

¹⁵ And it should be added here that even more “authentic” items, such as the Cape Fox totem pole, are considered important items even when no one is left to interpret their original cultural meaning. See Mullen, *After 100 Years Totem Pole Comes Back Home*, *supra* note 3. (“The carved animal figures on the pole, which has stood in front of an empty clan house belonging to Thonas Johnson, bear stories, both real and legendary, about the origins of the Johnson clan, whose descendants still live there. Tragically, nobody is left who knows how to translate their full meaning.”)

¹⁶ Harkin, *supra* note 8, at 5.

¹⁷ *Id.*

On the other hand, the result of that expected transformation may at times come across as, in the words of Harkin, a “grotesque mockery,”¹⁸ causing us to desire and reimpose images of something that we imagine to be traditional. The “we” here, as the Kwakiutl example shows, is not necessarily limited to Western or non-indigenous societies.

It should come as no surprise that in the context of cultural property what turns out to be “cultural” is not just a product of some imagined authentic and distant cultural experience, but in addition what the current members of any given group of indigenous people construct and represent to be their cultural claims. These claims are inevitably the product of a history of colonization¹⁹ and the influence of mainstream Western society, in addition to local tradition. The objects that Native American communities classify as traditional or cultural are constantly in the process of reinvention or indeed may even be the product of a process of cultural reinvention, especially when they become the focus of intense competing cultural claims.

If, as argued above, the terms “traditional” and “cultural” are complex concepts that reflect constantly changing attitudes, then politics must also play a role in defining cultural property. Indeed, cultural objects and traditional knowledge are important focal points for assertions about the manipulation and representation of cultural identity. The struggle for control over “cultural” and “traditional” material is, in this sense, truly an expression of sovereignty, and to view it as primarily a “cultural” or esoteric issue is a mistake.

If we consider claims to cultural material, whether knowledge or objects, as important expressions of sovereignty as well as culture, then NAGPRA has been relatively successful. While the defi-

¹⁸ Michael Harkin, *From Totems to Derrida: Postmodernism and Northwest Coast Ethnology*, in 46.4 *THE AMERICAN SOCIETY FOR ETHNOHISTORY*, 817, 823 (1999).

¹⁹ A good example of an item of cultural patrimony that has taken on importance because of the impact of colonization is the Tlingit Beaver. This carved beaver was attached to the prow of a canoe that served as the sole means of survival for the Tlingit residents of the village of Hoochenoo after the village was destroyed by a U.S. naval ship. The beaver prow eventually disappeared and then reappeared in the collection of George Emmons and was sold to the American Museum of Natural History. See Stephen Kinzer, *Museums and Tribes: A Tricky Truce*, N.Y. *TIMES*, Dec. 24, 2000, at 37, for a discussion of this repatriation and the importance of the beaver prow as a symbol of survival. For a more complete story see http://www.alaska.net/~pepper/Beaver_Prow.html. The official repatriation notice also recounts the story, 64 Fed. Reg. 37, 567 (*date*).

inition of “cultural patrimony” is, as already stated, a product of our expectation of authenticity, it also gives Native Americans significant freedom to construct their own claims, thus providing space for some of the repatriations discussed above.²⁰ In short, any document whose intention is to protect the cultural and traditional practices and property of indigenous people should be less concerned with choosing concepts, categories and interpretive rules, and more concerned with creating space for collective and cultural agency.

Protecting traditional knowledge presents issues and concerns that go beyond what is at stake in cultural property. Furthermore, traditional knowledge probably is valued in more complex ways, both instrumental and intrinsic. While these differences are significant, the similarities between these categories are also important. What I have tried to argue in this brief paper is that we should be cautious about expecting too much from a definition or classification of anything that we label traditional or cultural. And further that such definition will need to be flexible to accommodate modern, hybrid and necessarily political conceptions of the cultural and traditional aspects of the lives of indigenous people.

²⁰ *But see* JAMES D. NASON, *NATIVE AMERICAN INTELLECTUAL PROPERTY RIGHTS: ISSUES IN THE CONTROL OF ESOTERIC KNOWLEDGE*, 237, 244 (Bruce Ziff and Pratima Rao eds., 1997) (commenting that the cultural affiliation process “presents a deeply paradoxical dimension to NAGPRA insofar as it asks tribes to fix identity in scientific western terms but also allows for a process of establishing cultural identity based on tribal oral traditional and non-Western notions of evidence.”).