# Traditional Knowledge Aff

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### Inherency

#### Current US involvement in treaties to protect traditional knowledge with IP law is not enforceable – domestic policy is needed

Rotzin 24

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The U.S. is well-known for being relatively conservative about entering multilateral treaties (it has still failed to ratify many human rights treaties, including Convention on the Elimination of all Forms of Discrimination Against Women204 and Convention on the Rights of the Child205) so, realistically, encouraging a country like the U.S. to ratify the CBD and then the Nagoya Protocol seems far-fetched. The U.S. has also been unenthusiastic about WIPO progression.206 The U.S. did not give support to WIPO at all until it was assured that WIPO was not going to be the “norm” for future treaty development.207 Regardless, there are steps that could be taken to enhance safety measures against biopiracy at a federal level with enhanced patent protections. These protections do not need to turn the patent world on its head but could simply involve enhanced scrutiny on the level of review for “prior art” and “novelty” when examining patents that involve traditional knowledge. Some commentators have also suggested that an explicit disclosure requirement should be incorporated into U.S. patent law to compel patent applicants to state if they use traditional knowledge.208 To aid in this, the USPTO could establish a U.S.-specific patent and/or copyright ClearingHouse for researchers and companies to use as a resource before applying. Encouraging an open discourse and ABS between Indigenous groups and corporations wanting to use the information, much like the Nagoya Protocol does, is another simple way that Indigenous groups could become more involved in the process and reap the benefits.

### Plan

#### The United States Federal Government should significantly strengthen its protection of intellectual property rights in copyrights, patents, and trademarks through the protection of traditional knowledge through restorative remediation

### Solvency

#### Protecting Traditional Knowledge (TK) with restorative justice is essential to better equity in IP law and fosters relationships that make modern applications of TK more effective

Reed 23

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As the above case study suggests, where Indigenous peoples seek redress for abuses of their cultural expressions by Institutions, restorative justice may provide some distinct advantages that may not be available through standard copyright litigation. However, some modifications may be necessary to fully unlock the remedial potential of restorative justice for Indigenous communities. First, restorative justice may be more responsive than copyright litigation to the actual harms Indigenous communities are facing with regard to their cultural expressions. With copyright, the availability and scope of remedies will generally turn on the factors discussed in Part II-considerations like the extent of economic or commercial loss caused by an infringement, whether the infringer is a nonprofit educational Institution, whether a commercial harm exists that cannot be remedied by monetary damages, how burdensome it might be on the infringer to stop their illicit use, and the public's interest in the proposed remedy. Few of these considerations point to the specific nature of the cultural abuse or ensure that the remedy will actually repair that abuse. Restorative justice, on the other hand, grounds its remedies entirely on the experiences of victims and their expectations for repair that emerge during the conferencing process. In an environment where both parties are on equal footing, the parties can generate interventions that are much more targeted and forward-seeking than merely transferring money from one party to another or permanently restricting one party from using a particular IP. For example, if an Indigenous community already has a restitutionary framework in place for abuses of IP, such as a formal apology, a forgiveness ceremony, or a mode of repayment, the Institution could agree to participate in that process or make that restitution."' Or, as with the Hopi Tribe example above, if an Indigenous community has expectations for how intellectual properties should be treated, those can be implemented going forward. Second, traditional copyright litigation does little to restore victims and infringers into a shared community. While some might argue that community reintegration is irrelevant to good IP policy, growing evidence suggests that public opinion over the ethical use of IP and racial inclusiveness and diversity are all critically important values in today's information economy."' Restorative justice provides a means by which an offending institution may in the future normalize relations with an Indigenous community and the general public upon fulfillment of a mutually agreed upon set of restitutionary steps. Relationship normalization may be important for both Indigenous communities and Institutions. Many Indigenous communities lack the resources or expertise to hold and manage the vast amounts of their IP currently held in Institutions' collections. They may have no other choice but to keep the community's cultural expressions in the custody of an offending Institution to ensure their preservation. An enforceable restorative justice agreement provides legal assurance that the Institution will manage the community's cultural expressions according to its laws, protocols, and standards of care. Institutions may also benefit from reintegration, as Indigenous collections likely have little or no public value without the expertise and knowledge Indigenous communities can provide. Institutions will undoubtedly make much more effective use of their collections by working in partnership with Indigenous communities to reestablish their sovereignty over their cultural expressions than by engaging in perpetual conflict with them. But while restorative justice might appear to be a panacea for remedying Institutional abuses of Indigenous cultural expressions, there are two important ways in which restorative justice will need to be tailored to the IP context before it can provide effective repair.

### Reparations

#### Indigenous names, creations, and knowledge are exploited by corporations, reform is needed for restitution

Perez 23

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Congress has taken steps to protect tangible aspects of tribal property.87 Passing legislation to protect historically important artifacts “established a fundamental principle of Native American ownership of their cultural property.”88 Even so, there remains no recourse for the appropriation of cultural aspects of tribes that are intangible. This has led some tribes to protect its intangible cultural property of significance from outsiders. 89 As both tangible and intangible elements of tribal culture are “essential to the survival of Indian Nations as distinctive cultural and political groups,” Congress must act by altering the current intellectual property schemes within the United States.90 The distinction between typical trademark protections and Native American tribes was challenged in Navajo Nation v. Urban Outfitters, Inc.91 In this decision, the Court determined that the Navajo Nation was not entitled to summary judgment because the NAVAJO mark was not famous, and therefore could not be diluted or tarnished.92 Despite the Navajo Nation possessing a trademark and spending over 3.8 million dollars annually to promote their marks in areas ranging from oil, gas, gaming, publishing, arts and crafts, and other areas of economic development, the Court determined that the mark was “niche” and therefore did not qualify for the added protection of a famous mark.93 The Navajo Nation, one of the largest tribes in the United States and producer of a well-known “Navajo blanket” style which the tribe claims generated seventeen million dollars per year as of 2014, 94 did not qualify for the protections granted to famous marks. Later within the Navajo Nation docket, the District Court granted the Navajo Nation’s motion for summary judgment and determined that the NAVAJO trademarks had not become generic, even noting that a “strict construction of trademark forfeiture is especially appropriate given the origin of the “Navajo” mark and the fiduciary duty the United States owes the Indian Tribes.”95 The Court noted that Urban Outfitters failed to show that the NAVAJO trademarks had become generic in the minds of consumers or that the Navajo Nation abandoned the marks. For those reasons, the tribe successfully had Urban Outfitters’ affirmative defenses and counterclaims of genericness, and abandonment, thrown out with prejudice.96 The parties would eventually agree to an undisclosed settlement.97 Though it was not a trial win for the tribe, the Navajo Nation case demonstrates that tribes can and should monitor and regulate third-party use of their names. It also reveals that courts are willing to evaluate the fiduciary role that the United States maintains with tribes when dealing with tribal intellectual property rights. Unfortunately for most tribes, many of their designs and creations have already entered the public domain, and there is no method to reclaim their rights after designs and creations enter that sphere. Additionally, many forms of “traditional cultural expression” in Native cultures are presented orally and fail to meet the requirement of being “fixed in a tangible medium” to obtain copyright protection.98 Although copyright law does offer alternatives to the traditional “author” through recognition of joint works, works made for hire, collective works, and the transfer of rights, 99 none of these current exceptions meet the needs of Native American tribes attempting to claim ownership of works created centuries ago. Thus, there is a tension between the traditional Western purpose of intellectual property law—exploiting the full commercial potential of a work for a particular author—and tribal creations, which are often the result of communal and intergenerational participation.100 There is a large gap in protection for tribes, who often hold no copyright and thus have no control over their traditional art or stories. This is especially problematic since “art plays a central role” in many indigenous communities.101 Moreover, “indigenous designs are being appropriated and used commercially throughout the world” to sell goods ranging from ‘Navajo style rugs’ to ‘Apache motorcycles’ to the ‘Jeep Cherokee,’ generating significant revenue for large multinational companies. Allowing tribes to reclaim their names through added trademark protections, along with salvaging rights in those copyrightable creations that are tribally generated, will help produce economic development for every tribe within the United States. Scholars have pointed out the unjust and inequitable way in which companies have seemingly wrapped the discovery doctrine102 into intellectual property law to exploit tribal knowledge.103 As expressed above, patents can be unbelievably valuable for companies, and to obtain them, many multinational enterprises are not afraid to identify and utilize traditional tribal knowledge. One such example would be the neem tree patent. In 1959, a German entomologist traveled to India and witnessed a swarm of locusts devour everything in their wake but for a lone tree. Since then, researchers have investigated the neem tree and found many useful properties.104 Long before researchers arrived, aboriginal groups in India used the tree for a variety of health and wellness benefits, including an antidote for malaria.105 One of the few problems with the plant was that the azadirachtin did not keep well, decaying quickly after being extracted from the plant.106 In the 1990s, American researchers traveled to India to study the neem tree and found an innovative way to alter the active ingredient to make it stable in storage and thus make it last longer.107 The researchers then went back to the United States and applied for a patent on the new strain, selling Patent No. 5,124,349 to W.R. Grace & Co., an agricultural chemical company in Florida.108 In 1995, a collection of agriculture, science, and trade groups, along with over one hundred thousand Indian farmers, petitioned the USPTO to cancel the neem tree patent.109 Although they demanded revocation of the patent on the grounds that it was not novel, they had no success, and the USPTO did not revoke the patent.110 As noted above, prior to passing the AIA in 2011, the United States did not recognize foreign knowledge or the use of an invention as a bar to patentability.111 Many Indians expressed frustration “at the fact that [multinational companies] seem to continually reap tremendous economic benefits from India, while the country as a whole remains very poor.”112 Yet another example can be seen through a patent obtained in 1986 on a strain of ayahuasca. For generations, healers, and religious leaders among the indigenous people of the Amazon used ayahuasca to treat sicknesses, contact spirits, and see into the future.113 An American researcher named Loren Miller traveled to the Amazon Rain Forest and filed a patent application for ayahuasca. After discovering Miller’s patent, many local Amazonians were furious, believing a foreigner was exploiting a plant that they had worshipped for hundreds of years. 114 The indigenous tribes of South America organized, opposing the patent along with other support groups.115 In this case, the tribes were successful, obtaining a rejection of Miller’s patent on November 3, 1999.116 While the ayahuasca patent was successfully rejected, multinational companies continue to exploit traditional knowledge for profit while intellectual property regimes do little to support indigenous peoples. Unfortunately for many tribes, “[t]he IP regime in the United States is primarily designed around a framework of ‘commercial exploitation of the works and knowledge … [and] the maintenance of their control.’”117 Several modifications to federal intellectual property law, or modifying the IACA, would provide greater economic and cultural protections for Native American artists, inventors, and their tribes. Congress could amend the definition of “Indian” to be more inclusive of non-member Native American artists. Tribes could utilize the Lanham Act to hold companies accountable for using their tribal names. Intellectual property law could adopt communal ownership as a possibility.118 Finally, Congress may mandate restitution from companies benefitting from indigenous knowledge, repaying the exploited communities.

#### The plan solves - IP law is essential to preventing biopiracy, empirically works

Nwankwo & Kenny 21

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IP rights, including patents, copyrights, and trademarks, are designed to create enough legal protection to maximize incentives for engaging in creative and innovative processes, while also improving the flow of ideas. But it is hard to strike a balance between overprotective and relaxed IP systems: strict IP can reduce the economic impact of new ideas and drive up the costs of future innovation; under-protection can disincentivize current innovators. The challenge of balance and the use of standard IP approaches is particularly large with regard to traditional knowledge, which “cannot be fully or properly accounted for through the Western-oriented prism of patents, copyrights, trademarks and other formal IP outputs.” Patents in particular are designed to reward a corporate entity or individual with a temporary monopoly to use a recent innovation that passes standards for novelty. Traditional knowledge is often collaborative and incremental, relying on a community's insights and know-how often built up over generations. Traditional knowledge is managed as a collectively held, shared, and preserved resource in Indigenous communities worldwide. However, recent decades have seen an increased number of private sector companies exploiting traditional knowledge, often in ways that do not benefit the communities that have created and preserved the knowledge. This has been accomplished through the selective use of the idea of “public domain”—the notion that traditional knowledge does not merit IP protections because it is public, but that commercial innovations building on or benefiting from the same knowledge are proprietary and subject to IP protection. A particular issue is bioprospecting—the search for useful products derived from natural resources, including plants and animals that can be developed further for commercialization: A natural remedy for malaria. Bitter root (Quassia amara) is a small red-flowered tree native to Central and South America used for centuries by Indigenous groups to combat malaria. Without acknowledging the indigenous and local communities of French Guiana that helped France’s Institut de Recherche pour le Développement (IRD) isolate the active ingredient known for antimalaria activity, and without providing them with a means to access the potential malaria drug at an affordable price, the IRD patented the ingredient. After initially mounting a vigorous defense, IRD finally acquiesced, agreeing to share benefits of the patent with the impacted communities of French Guiana, including ensuring they can obtain the drug at an affordable price. Using plants to curb hunger. For centuries, the San people of Southern Africa used the hoodia plant as an appetite suppressant, particularly during hunting expeditions where little food was available for many days. In 1963, the Council for Scientific and Industrial Research (CSIR) patented the plant’s appetite-suppressing element (P57) without initially negotiating any agreement with the San. The South African San Council challenged the lack of compensation for their traditional knowledge, resulting in the CSIR and the Council entering into a memorandum of understanding in 2002 which laid out payments to be provided to the San on an ongoing basis. Though both of these examples eventually resulted in the communities which generated the traditional knowledge receiving benefits from the patenting, they had to go through lengthy legal and negotiation processes in part because of the ill-fitting nature of standard intellectual property regimes and traditional knowledge.

#### Remaking intellectual property law confronts the systematic devaluation of creations by people of color, challenging epistemic frameworks of coloniality

Vats 20

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While Mignolo sketches the importance of epistemic delinking from modernity, the specifics of his project are not always clear. Given the em-beddedness of the nation-state, including its management of normative citizenship, with (neo)coloniality certainly requires moving away from in-clusionary politics as a strategy for gaining full intellectual property citi-zenship. As Mignolo writes, “The emergence of ‘modern nation-states’ in Europe, means two things: that the state became the new central author-ity of imperial/colonial domination and that the ‘nation’ in Europe was mainly constituted of one ethnicity, articulated as ‘whiteness.’”30 White co-lonial nation-states became the arbiters of citizenship, in part through the creation of hierarchies through which they deemed themselves superior to (neo)colonial states and in part through the legal manipulation of the cat-egory itself.31 They also became arbiters of the legitimacy of knowledge, specifically who has and does not have the capacity to create. The project of remaking intellectual property law, then, must address the centrality of the state and the centrality of whiteness in the formation of intellectual property policy and its underlying ideologies and cultural forma-tions. This does not mean doing away with the nation-state or completely disempowering white people. Instead, it means confronting the role of the nation state in epistemic violence and its complicity in white supremacy. Decoloniality, as a tool of a larger, interdisciplinary Critical Race IP agenda, “creates space for a complex and multifaceted engagement with race and, (neo)coloniality that addresses the fundamental historical power dynamics that shaped laws of knowledge production.”32 For instance, decolonizing intellectual property law requires undoing the state’s oligopoly on defining and enforcing conceptions of infringement and the public domain. It also requires pushing back against the implicit whiteness in state and cultural conceptions of creativity, innovation, progress, and A2K. Both of these are necessary but not sufficient for intellectual property justice.Darrel Wanzer-Serrano writes: “Decoloniality is an alternative accent—one marked by pluriversal commitments, geo-historical attentiveness, and bio-graphical considerations.”33 In order to get to a place in the context of intellectual property law where that trio of goals is possible, anti-racist and anti-colonial activists must persuade lawmakers that knowledge production comes in a variety of forms, not of all of which comport with notions of Romantic authorship. This project is an ongoing one, though it is some-times impeded by commitments to incrementalism, inclusion, or capitalism. Approaching such issues from the vantage point of pluriversality, historicity, and contextual specificity forces engagement with intellectual property law’s tendency to mark some people as less than human and prefigure solutions through racial capitalist lenses. Important questions in building egalitarian copyright, patent, and trade-mark policies, then, include: “Whose labor is valuable? How is it valued? What systems underpin those definitions of labor? And how do we alter and remake the systems that undervalue the knowledge of people of color and maintain systems of white supremacy?”34 Storytelling, protecting tra-ditional knowledge, and A2K are important parts of the answers to those questions, as the three case studies in chapter 4 demonstrate. But they are necessary though not sufficient solutions to the circulation of racial scripts that this book traces.Derrick Bell argues that making visible the racial non-neutrality of law is a central part of the project of CRT. Similarly, unveiling the nexus between coloniality/modernity is a core part of the project of decolonial theory—and one that is helpful in reimagining copyright, patent, and trademark law. Making visible intellectual property law’s racial non-neutrality and invest-ments in (neo)colonial flows of power has been a core aim of this project. While scholars in a variety of disciplines have begun to work through the histories of intellectual property and race in particular instances, a great deal more work needs to be done in theorizing how copyrights, patents, and trademarks have played important roles in racial formation, how their racial scripts evolve and pervade public culture, in discursive and material ways, and how political economy is tied up with questions of race. Coming to grips with intellectual property law’s stubborn doctrinal and discursive resistance to creating narrative space for non-white creators and their full personhood renders legible those discourses that subtly but persistently normalize Enlightenment views of creatorship, infringement, and concomi-tantly race. In the United States and globally, the struggle over creating equitable intellectual property law is a struggle about the ways in which Americans imagine, feel, and commodify knowledge in intersectionally raced and (neo)colonial ways.

#### IP is intertwined with racial scripts of creativity, enforcing a devaluation of works by people of color

Vats 20

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This chapter examines how, historically and through formal exclusion, race, intellectual property law, and citizenship came to be consistently in-tertwined and racial scripts about the unimaginativeness, intelligence, lazi-ness, disloyalty, hypersexuality, and dangerousness of people of color became central to defining who was and was not American. Between the 1700s and the mid-1900s, creatorship and citizenship were coproduced, with both of them drawing from the broader “rhetorical culture”5 around race to articu-late their core principles. The citizen creator was the idealized maker, the Romantic creator who comported with the fetishization of imagination, human progress, and consumer desire. Even as the nation’s racial politics became more progressive, or at least less formally racist, intellectual property discourses and policies consistently returned to the rhetorical and struc-tural resources through which creatorship was cast as fundamentally white. Citizenship was explicitly juridically marked for “whites only” through a litany of governmental actions from Fugitive Slave Laws to the Chinese Exclusion Act. Each of these domestic moves signaled a desire to build an American nation in which only whites were citizens and national expan-sion, economic protectionism, and indigenous industry were federal priori-ties. The often protectionist sentiments that were embedded in discussions of intellectual property policy, for instance in disputes over protection of foreign copyrights,6 drew upon larger conversations about citizenship’s whiteness, sometimes consciously through the invocation of familiar racial scripts and sometimes unconsciously through the mobilization of racist sentiments. Overtly and inferentially racist claims in public culture shaped the nation’s understandings of who ought to be protected by intellectual property law and who ought to have access to the American Dream, which in turn shaped copyrights, patents, and trademarks.7 Charles Mills refers to the “first period of de jure white supremacy,”8which he characterizes as being marked by an explicit racial contract. Peri-odizing intellectual property’s racial commitments in a similar manner reveals how formal exclusions related to property and personhood were articulated and reinforced through contemporaneous articulations of citizenship—and therefore Americanness—to keep people of color from enjoying equality of protection of creative works, inventions, and identifying marks. I am less interested in demarcating specific changes in the period from the late 1700s to the mid-1900s with respect to race, citizenship, and intel-lectual property law than I am in establishing that despite the considerable racial democratization of creatorship that occurred from the 1830s onward, the “inner energy,” in Eva Illouz’s words,9 of intellectual property law and political economy remained white and continuously racially exclusionary. The production and articulation of the concepts of true imagination, human progress, and the consumer gaze during this period created legal doctrinal containers for racial scripts embedded in discourses of citizenship to haunt contemporary copyright, patent, and trademark law. Copyright discourse treated creativity as a raced endeavor through the continual invocation and bounding of the concept of imagination. Patent discourse treated innova-tion in the same way through its raced conceptions of human progress. And trademark discourse, which increased rapidly as the nation’s industrial economy grew, supported intellectual property law as racial project by pro-tecting racist images as product identifiers. Together, these practices marked whites as producers/consumers of intellectual property in a system of racial capitalism and people of color as objects of production/consumption. In this sense, intellectual property actively contributed to the white supremacist projects of slavery, settler colonialism, and imperial expansion—which critical race theorist Andrea Smith identifies as linked to anti-Blackness, anti-Indigeneity, and anti-Asi-anness, respectively—by allowing whites to own not only the physical labor of people of color but also their intellectual labor and likenesses.10 “White supremacy,” as I use the term here, refers to a system of structural power in which “whites overwhelmingly control power and resources” and “ideas of white superiority and entitlement are widespread.”11By the time the contemporary information economy had begun to emerge in the mid-1900s, copyrights, patents, and trademarks had estab-lished doctrinal standards that were intertwined with all three of the pillars 30Stanfor dUoof white supremacy and citizenship that Smith identifies. Racial scripts fa-cilitated legal doctrinal moves that reinforced white supremacy across racial groups. Further, these doctrinal standards were part of a larger system of “emotional capitalism,”12 with which public feelings around race, (neo)colonialism, citizenship, nation, and economy in intellectual property law were interwoven to produce (white) citizen creators. Copyright and patent law created a raced system of protection through triangulation with legal definitions of personhood and citizenship. While copyright and whiteness were legally linked through state restrictions on property ownership and citizenship well before the first federal copyright legislation,13 the Copyright Act of 1790 formalized those connections by explicitly affording copyright protection to any author in the United States “being a citizen or citizens thereof, or resident within.”14 Given that under the Three-Fifths Compromise, enslaved persons were not treated as whole people, they were not afforded the basic rights of citizens or even persons. The so-called Citizenship Clause in the Copyright Act of 1790—and sub-sequently the Copyright Act of 1836—ensured that predominantly whites were granted copyright protection, and even when people of color were able to secure such rights, it was only through successful negotiation of white gatekeeping.15 Because the Supreme Court’s infamous decision in Dred Scott v. Sandford (1857) was not overturned until 1868, with the passage of the Fourteenth Amendment, Black people continued to be denied basic citizenship rights long into the nineteenth century. Karla Mari McKanders uses the phrase “tiered personhood”16 to de-scribe the system in which the rights afforded to all individuals, regardless of citizenship status, are “bypassed . . . by defining certain groups as non-persons based on differences between dominant and subordinate groups.”17For instance, even when copyright law’s formal racial restrictions ended, the nation’s racist attitudes persisted. Jim Crow, which violently pushed back against the rights afforded by the Fourteenth Amendment, was only one manifestation of such tiered personhood and the systematic racial subor-dination that supported it.Formal citizenship requirements for copyright registration eventu-ally ended with the International Copyright Act of 1891, a statute that, in theory, extended copyright protection to all individuals in the United States.18 However, the International Copyright Act of 1891 neither ended the nation’s desire to associate American citizenship with whiteness nor pre-vented the de facto racial discrimination that followed from legal articula-tions of copyrightability. Lauren Berlant describes sentimental approaches to citizenship, which posit the citizen not as political subject but rather as “someone with attachments and intentions and pain capacities—for exam-ple, as a subject of feelings—who longs for what everybody is said to long for, a world that allows access to vague belonging, a sense of unanxious general social membership that ought to be protected by the institutions that bind power to ordinary life.” In Berlant’s reading, the formal legal language of citizenship, which schol-ars and lawyers often emphasize as the site of rights and entitlements, can be separated from its informal rhetorical and affective ones. Doing this shows how exclusion works through the association of some bodies with nation and citizenship and the exclusion of other bodies from those same categories. As Sara Ahmed puts it, shared feelings are what bring individuals together and “bind the imagined white subject and nation together.”20 Shared feelings among white men about how intellectual property law should work and who should benefit from its legal determinations were wrapped up with racial ide-als of citizenship and national identity, in a manner that coalesced to produce apparently race neutral legal decisions and economic policies. More specifically, the concept of true imagination operated as a vehicle for making raced judgments about the nature of creativity. Even when au-thors of color won their copyright cases, they were doing so through a doc-trinal lens implicated by citizenship that prefigured them as lacking creative capacity. The revelation that true imagination became a tool for excluding Black people from access to authorship is well established.21 The connection between that phrase and citizenship, however, is far less thought out.Copyright’s protectionist tendencies can be read as moves to police belonging, particularly through xenophobic attachment to whiteness. Yuengling v. Schile (1882), a copyright case that contemplated the bound-aries of domestic protections for foreign authors suing in U.S. courts, ar-ticulated the prevailing nationalist and protectionist aims of using copyright law to protect (white) domestic industry. The decision noted that “the prohibition against an extension of the copyright to alien authors was as broad as the section authorizing copyright in favor of resident authors,”22 reading the denial of copyright protection to foreign authors broadly and in a manner consistent with the sentiments of the young nation. In shoring up the nation’s protectionist posture in the area of copyright law, Yuengling also reaffirmed that intellectual property law could and should be motivated by a desire to unify white men in the nation against the racial and economic threats of immigrants, particularly of color.

#### And, this coloniality of thought and permanent devaluation inspires a permanent state of exception, justifying all forms of ongoing violence

Maldonado-Torres 2008

Nelson Maldonado-Torres, associate professor of comparative literature at Rutgers, ‘8 [Against War: Views from the Underside of Modernity, p. 217-21]

Dussel, Quijano, and Wynter lead us to the understanding that what happened in the Americas was a transformation and naturalization of the non-ethics of war—which represented a sort of exception to the ethics that regulate normal conduct in Christian countries—into a more stable and long-standing reality of damnation, and that this epistemic and material shift occurred in the colony. Damnation, life in hell, is colonialism: a reality characterized by the naturalization of war by means of the naturalization of slavery, now justified in relation to the very constitution of people and no longer solely or principally to their faith or belief. That human beings become slaves when they are vanquished in a war translates in the Americas into the suspicion that the conquered people, and then non-European peoples in general, are constitutively inferior and that therefore they should assume a position of slavery and serfdom. Later on, this idea would be solidified with respect to the slavery of African peoples, achieving stability up to the present with the tragic reality of different forms of racism. Through this process, what looked like a "state of exception" in the colonies became the rule in the modern world. However, deviating from Giorgio Agarnben's diagnosis, one must say that the colony--long **before** the concentration camp and the **Nazi** politics of **extermination--served as the testing ground for the limits and possibilities of modernity,** thereby **revealing its darkest secrets**." **It is** race, **the coloniality of** power, and its concomitant **Eurocentrism** (and not only national socialisms or forms of fascism) **that allow the "state of exception" to continue** to define ordinary relations in this, our so-called postmodern world. Race emerges within a permanent state of exception where forms of behavior that are legitimate in war become a natural part of the ordinary way of life. In that world, an otherwise extraordinary affair becomes the norm and living in it requires extraordinary effort." In the racial/ colonial world, the "hell" of war becomes a condition that defines the reality of racialized selves, which Fanon referred to as the damnes de la terre (condemned of the earth). The damne (condemned) is a subject who exists in a permanent "hell," and as such, this figure serves as the main referent or liminal other that guarantees the continued affirmation of modernity as a paradigm of war. The hell of the condemned is not defined by the alienation of colonized productive forces, but rather signals the dispensability of racialized subjects, that is, the idea that the world would be fundamentally better without them. The racialized subject is ultimately a dispensable source of value, and exploitation is conceived in this context as due torture, and not solely as the extraction of surplus value. Moreover, it is this very same conception that gives rise to the particular erotic dynamics that characterize the relation between the master and its slaves or racialized workers. The condemned, in short, inhabit a context in which the confrontation with death and murder is ordinary. Their "hell" is not simply "other people," as Sartre would have put it-at least at one point - but rather racist perceptions that are responsible for the suspension of ethical behavior toward peoples at the bottom of the color line. Through racial conceptions that became central to the modern self, modernity and coloniality produced a permanent state of war that racialized and colonized subjects cannot evade or escape.

### BioD

#### Biodiversity is at risk of collapse in the US

Curry 23

Tierra Curry is the Endangered Speicies Codirector and Senior Scientist at the Center for Biological Dviersity. "50-Year Assessment Magnifies Urgent Need for Protection." Published by the Center for Biological Diversity on February 6, 2023. Available here: (https://biologicaldiversity.org/w/news/press-releases/new-analysis-40-of-us-wildlife-ecosystems-are-imperiled-2023-02-06/) - AP

WASHINGTON— A new report on the status of U.S. wildlife conservation reveals that 40% of animals, 34% of plants and 40% of ecosystems nationwide are at risk. Released today, the analysis — Biodiversity in Focus: United States Edition — was compiled by NatureServe, a nonprofit organization that assembles conservation data from a national network of scientists and organizations. “This grim assessment adds to the mountain of science showing that we’re creating an extinction crisis,” said Tierra Curry, a senior scientist at the Center for Biological Diversity. “It’s suicidal of us to pretend that business as usual is more important than safeguarding the natural world we all depend on.” The study is the most comprehensive to date on the status of U.S. ecosystems. It found that 51% of grasslands and 40% of forests and wetlands are at risk of range-wide collapse. Only 12% of U.S. lands are currently protected. “Grassland loss is the biggest U.S. environmental disaster that gets the least attention,” said Curry. “Conversion of grasslands to suburban sprawl and pesticide-intensive agriculture is a primary reason we’ve lost 3 billion birds and why we could lose monarch butterflies and vital pollinators.” Among animals, the evaluation found that freshwater species such as mollusks, crayfish and amphibians are the most threatened groups because of water pollution and dams. Insects like butterflies, bees and dragonflies are also highly imperiled, with 37% of U.S. bee species facing extinction. For plants, nearly half of cactus species are vulnerable, making them the most jeopardized plant group. Around 30% of ferns and orchids are at risk, as are 20% of tree species. “By taking nature for granted we’ve pushed natural systems to the brink of collapse,” said Curry. “We’ve been so neglectful for so long, but we can create a different world that doesn’t exploit nature and vulnerable human communities for never-ending sprawl and consumption.” Several policy proposals could provide solution to the biodiversity crisis. The Recovering America’s Wildlife Act, which will be re-introduced in Congress, would provide more than $1 billion to states, Tribes and agencies for species conservation. The Extinction Prevention Act would provide funding to the U.S. Fish and Wildlife Service to recover the most endangered groups of species. Biden’s America the Beautiful Initiative is facing a ticking clock on enacting protections for 30% of U.S. lands and waters.

#### Squo IP policy results in destruction of biodiversity

Farah & Prityi 23

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Nevertheless, the answer to the question essentially posed by Percy Schmeiser – where do Monsanto’s rights end and his rights begin – was not answered in Schmeiser’s favour. From the perspective of resilient food production, in Schmeiser’s opinion, it is rather questionable whether bioengineered food crops protected by patents have substantially improved yields and resulted in reduced use of pesticides and herbicides. It is quite undisputable that these bioengineered products have considerably increased the profits of corporations holding patent rights over them. However, it has been suggested that the track record since the introduction and boom of patents over plants demonstrates a loss of biodiversity, extended use of pesticides and herbicides, as well as lower crop yields.127 Corporations usually direct their efforts “on developing only a few seed varieties.”128 Practical implications of this approach – underpinned by the system of intellectual property rights - may result in a decrease of genetic diversity of crops and limited opportunities of “local population to enjoy the benefits of scientific progress and its applications.”129 It is also relevant to note that the increased yields associated with genetically improved crops have also a darker side, resulting – for instance, in South-East Asia – in the loss of traditional crop diversity.130

#### Protection of TK challenges unsustainable practices and maintains ecological diversity

Perez 23

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Another potential method of economic growth within Native American communities could be repatriating funds from companies that have attained the benefits of traditional knowledge. Again, the United States could find inspiration from overseas. In 2002, India passed the Biological Diversity Act (BDA) to protect its biological diversity by creating an equitable benefit-sharing scheme and establishing the National Biodiversity Authority, which implemented regulations and opposed intellectual property applications of foreign entities within India. 145 The BDA blocks patent applications for any invention based on research or information on India’s biological resources obtained without prior approval.146 India used the BDA to send out notices in 2015 to several companies seeking a share in the profits from products using their biological resources. 147 If the United States were to pass similar legislation instead of intending to prevent domestic companies from exploiting the traditional knowledge of either Native American tribes or indigenous peoples in developing nations, it could lead to a major decline in biopiracy.148 For those that continue the practice, the U.S. could instate heavy penalties and send any fines into a general pot that could be distributed to Native American tribes who have been impacted by the practice, whether it be recently or in the past. Additionally, tribes that demonstrate a company obtained and utilized their traditional knowledge to acquire a patent and profited from that monopoly could potentially be repaid a percentage of profits from those ill-gotten gains. With our current patent system, it is unlikely that any of the companies would be held accountable for continuing to practice biopiracy. However, attorneys for the Center for International Environmental Law, the organization that successfully challenged the ayahuasca patent, argued that disclosing prior art that consists of traditional knowledge (thereby making it unpatentable) promotes the progress of science in multiple ways.149 First, it “provides an incentive for continued use and maintenance of indigenous knowledge systems” by recognizing those who possess knowledge of local biological resources.150 Additionally, supporting traditional knowledge systems with positive incentives helps “maintain high levels of biodiversity in their regions over many centuries.”151 It is beneficial to recognize traditional knowledge when possible in order to maintain it and foster a more ecologically diverse planet, and it is equally important to allow indigenous people to benefit economically from that traditional knowledge. We could theoretically implement a dual-pronged biopiracy regime whereby those who do not disclose that their patent application was founded on traditional knowledge are subject to penalties, with restitution going to a general pot or those they have harmed where it is possible to identify a particular group. For those who disclose traditional knowledge as a basis for their prior art, we can provide a slight incentive by registering a new class of patent, lasting a shorter term than the typical twenty-year monopoly, and allowing indigenous peoples to liberally use the product.

#### Biodiversity loss worsens climate change, disease, and results in extinction cascades

Stanford Report 23

"Study finds human-driven mass extinction is eliminating entire branches of the tree of life." Published by the Stanford Report on September 18, 2023. Available here: (https://news.stanford.edu/stories/2023/09/human-driven-mass-extinction-eliminating-entire-genera) - AP

The passenger pigeon. The Tasmanian tiger. The Baiji, or Yangtze river dolphin. These rank among the best-known recent victims of what many scientists have declared the sixth mass extinction, as human actions are wiping out vertebrate animal species hundreds of times faster than they would otherwise disappear. Yet, an analysis from Stanford University and the National Autonomous University of Mexico, published in the Proceedings of the National Academy of Sciences, shows the crisis may run even deeper. Each of the three species above was also the last member of its genus, the higher category into which taxonomists sort species. And they aren't alone. Up to now, public and scientific interest has focused on extinctions of species. But in their new study, Gerardo Ceballos, senior researcher at the Institute of Ecology at the National Autonomous University of Mexico, and Paul Ehrlich, Bing Professor of Population Studies, Emeritus, in the Stanford School of Humanities and Sciences, have found that entire genera (the plural of "genus") are vanishing as well, in what they call a "mutilation of the tree of life." "In the long term, we're putting a big dent in the evolution of life on the planet," Ceballos said. "But also, in this century, what we're doing to the tree of life will cause a lot of suffering for humanity." "What we're losing are our only known living companions in the entire universe," said Ehrlich, who is also a senior fellow, emeritus, by courtesy, at the Stanford Woods Institute for the Environment. A 'biological annihilation' Information on species' conservation statuses from the International Union for the Conservation of Nature, Birdlife International, and other databases has improved in recent years, which allowed Ceballos and Ehrlich to assess extinction at the genus level. Drawing from those sources, the duo examined 5,400 genera of land-dwelling vertebrate animals, encompassing 34,600 species. A total of 73 genera of land-dwelling vertebrates, Ceballos and Ehrlich found, have gone extinct since 1500 AD. Birds suffered the heaviest losses with 44 genus extinctions, followed in order by mammals, amphibians, and reptiles. Based on the historic genus extinction rate among mammals—estimated for the authors by Anthony Barnosky, professor emeritus of integrative biology at UC Berkeley—the current rate of vertebrate genus extinction exceeds that of the last million years by 35 times. This means that, without human influence, Earth would likely have lost only two genera during that time. In five centuries, human actions have triggered a surge of genus extinctions that would otherwise have taken 18,000 years to accumulate—what the paper calls a "biological annihilation." "As scientists, we have to be careful not to be alarmist," Ceballos acknowledged—but the gravity of the findings in this case, he explained, called for more powerful language than usual. "We would be unethical not to explain the magnitude of the problem, since we and other scientists are alarmed." Next-level loss, next-level consequences On many levels, genus extinctions hit harder than species extinctions. When a species dies out, Ceballos explained, other species in its genus can often fill at least part of its role in the ecosystem. And because those species carry much of their extinct cousin's genetic material, they also retain much of its evolutionary potential. Pictured in terms of the tree of life, if a single "twig" (a species) falls off, nearby twigs can branch out relatively quickly, filling the gap much as the original twig would have. In this case, the diversity of species on the planet remains more or less stable. But when entire "branches" (genera) fall off, it leaves a huge hole in the canopy—a loss of biodiversity that can take tens of millions of years to "regrow" through the evolutionary process of speciation. Humanity cannot wait that long for its life-support systems to recover, Ceballos said, given how much the stability of our civilization hinges on the services Earth's biodiversity provides. Take the increasing prevalence of Lyme disease: white-footed mice, the primary carriers of the disease, used to compete with passenger pigeons for foods, like acorns. With the pigeons gone and predators like wolves and cougars on the decline, mouse populations have boomed—and with them, human cases of Lyme disease. This example involves the disappearance of just one genus. A mass extinction of genera could mean a proportional explosion of disasters for humanity. It also means a loss of knowledge. Ceballos and Ehrlich point to the gastric brooding frog, also the final member of an extinct genus. Females would swallow their own fertilized eggs and raise tadpoles in their stomachs, while "turning off" their stomach acid. These frogs might have provided a model for studying human diseases like acid reflux, which can raise the risk of esophageal cancer—but now they're gone. Loss of genera could also exacerbate the worsening climate crisis. "Climate disruption is accelerating extinction, and extinction is interacting with the climate, because the nature of the plants, animals, and microbes on the planet is one of the big determinants of what kind of climate we have," Ehrlich pointed out.

## Extensions

### Solvency

#### Strengthening the protection of Traditional Knowledge (TK) in IP law with restorative justice promotes accessibility and flexibility that is excluded in the squo

Reed 23

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While a complete exposition of restorative justice is beyond the scope of this article, this Subpart provides a brief sketch of the restorative justice concept and its applications to Indigenous peoples and to IP disputes. Restorative justice exists in a variety of forms and legal contexts, but generally involves "collectively identify[ing] and address[ing] harms, needs, and obligations [of the stakeholders of a criminal offense or civil dispute], in order to heal and put things as right as possible."192 Restorative justice frameworks surfaced in the American legal system in the form of victim-offender mediation (VOM) programs that provided alternatives to state-based, retributive forms of criminal justice. 193 One of the central innovations restorative justice provided was its focus on resolving not only the violation of law caused by an offender but also the consequences of the offense for the victim and the surrounding community. As restorative justice theorist Professor Carrie Menkel-Meadow explains, [w]hen a crime or serious bad act ... occurs, it affects the victims, offenders, interested bystanders (such as family members, employees, or citizens), and the larger community in which it is embedded ... create[ing] needs and responsibilities for the direct participants in the act, as well as for the larger society in which their act(s) occur.1' 94 Restorative justice seeks to bring together all those with stakes in the offense to "resolve collectively, through dialogue and mutual understanding, how to deal with the aftermath of the crime and its implications for the future."195 The restorative justice process typically begins with the parties to an offense entering a preparation phase which, in most cases, involves the offender assuming responsibility for their bad act and the victim voluntarily consenting to engage with the offender in the process of restitution-making, either through individual participation or by appointing a representative.196 Members of the community supporting the victim, the offender, or representing the community at large, may also agree to participate.197 By establishing shared goals and responsibilities toward one another as a prerequisite to participation, stakeholders place themselves in a position to embark on collective understanding of the impact of the wrong on each stakeholder, and development of a plan for restitution, repair, and reintegration. The second phase in most restorative justice processes is a conferencing period between the victim, the offender, and community stakeholders.198 While the techniques used for conferencing may vary by context and by the training of the mediator, conferencing generally includes mediated conversations that allow the parties to narrate the bad act from each person's point of view, to set forward the victim's and community's expectations for reparations from the offender, and to appreciate and understand why the wrong occurred, including its root causes.1 9 VOM, for example, is the paradigmatic form of restorative justice, particularly for minor criminal offenses like property-based crimes. VOM processes typically focus on "victim healing, offender accountability, and restoration of losses" 2 00-the bulk of which happens during this dialogic phase. As Professors Barbara Raye and Ann Warner Roberts explain, "the goals of the prototypical VOM were to create a 'safe place' for the victim and offender to discuss the crime and its aftermath."2 01 An important outcome of the conferencing phase is that it allows the offender to begin to formulate a plan to address the victim's expectations for redress, to heal the community, and to ultimately reintegrate the offender into normalized social relations within the community again.202 The third phase involves the victim either accepting or rejecting the offender's plan for restitution, and if the plan is accepted, fulfilling the plan's requirements. As Professors Mark S. Umbreit, Robert B. Coates, and Betty Vos reveal, almost all VOMs result in negotiated agreements outlining required reparations.2 03 These agreements may take the form of a formal contract between the parties, which "serves as a tangible symbol of conflict resolution and a focal point for accountability."2 04 Often, a supervising court may monitor implementation of the agreement to ensure the agreed-upon restitution is carried out.2 0' In cases where conferencing fails, does not produce a reparations plan, or the plan is rejected by the victim, the offender returns to the state-directed criminal justice process. Restorative justice plays an important role in criminal justice and civil dispute resolution in Indigenous communities around the world, and in some cases serves as the backbone of traditional Indigenous legal systems.2 06 But restorative justice has also been increasingly used to remedy large-scale abuses experienced by Indigenous peoples at the hands of settler nations and organizations. 207 For example, in 2007, Canada and Indigenous Survivors of its Indian Residential Schools embarked on an effort to provide redress through a Truth and Reconciliation Commission 20 (TRC) for injuries sustained during decades of what was ultimately deemed "cultural genocide" by the Commission.2 9 Through expression and documentation of their experiences, the Survivors helped generate a massive evidentiary archive that provided the basis for the TRC's final, non-binding report outlining recommendations to the Canadian government for restitution and repair.210 In their ninety-four "Calls to Action," the commissioners touched on nearly every aspect of Canadian-Indigenous relations including child welfare, education, language and culture, health, and the criminal justice system. The commissioners also called on Canada to fully implement the United Nations Declaration on the Rights of Indigenous Peoples into its laws at all levels.21 The remedies prescribed through this restorative justice effort have yet to be fully implemented, but they have resulted in some heartening changes in Canadian law and policy.21 While restorative justice has been employed to resolve internal and external offenses involving Indigenous peoples, restorative justice has thus far gained little traction in situations where IP interests have been violated-despite growing popularity of ADR in IP cases generally.2 3 Several courts presently allow or even require certain kinds of IP disputes to be diverted to ADR programs, particularly mediation programs, before the parties are permitted to commence litigation. Diversionary restorative justice programs could likewise be mandated when an Indigenous community's cultural expressions are involved and bring about significant benefits for the parties, for similar reasons. Restorative justice, like other forms of ADR, may provide several important advantages when compared to court-based adversarial litigation.215 These methods often allow parties to overcome jurisdictional limitations encountered in traditional courts, particularly where laws or policies governing IP rights differ between jurisdictions or where a court does not have personal jurisdiction over some of the parties to a dispute.2 1 They may also allow parties to select a mediator or arbitrator with specific expertise in the kinds of issues and contexts involved, rather than taking a chance on an assigned judge that may lack the background and training in Indigenous legal systems, worldviews, and modes of cultural expression.217 Additionally, restorative justice and other ADR methods give parties substantive flexibility, allowing non-legal, ethical, or political considerations to be raised during the proceedings or used as the basis of decision or source of remedy.21 And, due to the private nature of these proceedings, restorative justice and other ADR methods may allow a greater degree of confidentiality than a public court can provide, providing peace of mind to Indigenous participants.219 While restorative justice shares these benefits with other ADR methods, it has specific qualities that make it particularly attractive for repairing cultural abuses. For example, restorative justice emphasizes remediating harms caused to victims and communities by an offence, giving them a voice and a stake in the dispute resolution process. It also has, as a goal, the rehabilitation of offenders and achieving reintegration of victims and offenders into a shared community. These frameworks would be beneficial for many kinds of IP plaintiffs, but restorative justice would likely yield important advantages for Indigenous victims and Institutional offenders in cases of cultural and intellectual abuse. We have little empirical data on how restorative justice fares in remedying instances of cultural abuse. At a more general level, however, data do tend to show that restorative justice can be quite effective at increasing the satisfaction of both victims and offenders in the process of restitution-making when compared to the criminal justice system."' And, VOM conferencing coupled with an agreement detailing a restitution plan appears to increase offender compliance with requirements for reparations, and participants "across setting[s], cultures and types of offenses report the process and the agreement as fair to both sides."2 At the same time, restorative justice processes may leave some victims unsatisfied when key elements are not present. For example, commentators and Indigenous activists have raised pointed concerns with the structure of Canada's TRC process.222 Offenders were not required to accept responsibility for the crimes they committed as is typically the case in VOM,2 and Survivors were unable to directly engage in dialogue with those who actually abused or authorized abuse against them.22 4 Further, the Commission's mandate did not provide the opportunity for an agreement between the victims and offenders for restitution or reintegration going forward, only for recommendations to be made to the Canadian government.225 Thus, those adopting and implementing restorative justice processes for abuses of Indigenous cultural expressions would be well advised to give space to each step in the restorative justice process to maximize its capacity for healing and repair.

### Critical Framing

#### The aff uses capitalism against itself, eroding systems of domination through its iterative performance – this is especially key with intellectual property

Vats 20

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While the majority of this book has focused on the ways that racial scripts about the incapacity of people of color to create have pre-vented racial equality in creatorship, resistance to such narratives is abundant and productive. The racialization of creatorship/infringement is neither an uncontested development nor one-way enterprise. Rather, as with the meanings of intellectual properties themselves, people of color push back against categories of race, citizenship, national identity, and personhood by performatively critiquing and remaking Euro-American ways of knowing, valuing, and owning. The practices of individuals, groups, and institutions change the way that public culture thinks about creatorship/infringement and, as per the title of this book, the very color of creatorship. Debora Halbert writes, “The work of asserting alternatives to intellectual property is an interpretive battle. Intellectual property remains in the process of definition—there is a struggle to define the scope and meaning of the law.”1 Examining the particularities of the struggle is useful for bot7y9th imagining new ways of relating to intellectual property law and mapping new strategies for activism. The question of how resistance to intellectual property’s racial scripts works is an important one—and one upon which Lawrence Liang’s concept of porous legalities sheds light.2 Liang contends that (racial) capitalism pro-duces residual humans—including migrants, squatters, and pirates—whose labor value is rendered obsolete. In doing so, it creates space for seepages, “the action of many currents of fluid material leaching on to a stable struc-ture, entering and spreading through it by way of pores.”3 Seepages, by way of performative acts of resistance, erode (racial) capi-talism and “gradually disaggregate its solidity.”4 The romantic academic ideal of willful resistance from a conscious understanding of politics and culture is far less common than unintentional transgressions that produce anti-racist and anti-colonial effects. The latter acts, when extrapolated across urban spaces, “[create] new conditions in which structures become fragile and are rendered difficult to sustain.”5Liang uses the concept of seepages to theorize the porousness of law, which he argues are created through “a profound distrust of the usual nor-mative myths of the rule of law, such as rights, equality, access to justice, etc.”6 The concept of porous legalities provides a frame for understanding how alternative intellectual property worldmaking can take root in quotidian performances.7 Transgressive performances that create new “performative repertoires,”8 in Isaac West’s words, have the potential to exploit the gaps in the law in ways that produce new legalities. If (racial) capitalism and law can be eroded through the iterative per-formances of individuals, groups, and institutions, so too can the catego-ries of race, national identity, and citizenship through which capitalism and law operate. This chapter focuses on understanding how creators of color have contested racial scripts around creatorship/infringement, mobiliz-ing them in ways that undermine the racial scripts and racial feelings that animate them. Often, as Liang suggests, these strategies involve remaking capitalism or using it against itself and reorganizing public feelings in ra-cially radical configurations.

### AT: State Bad

#### Simultaneous use of institutional and individual resistance is necessary for decolonial opposition to IP, every act of resistance opens paths to pluriversality

Vats 20

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Returning to Best’s analysis of the relationship between the fugitive and embodiment—specifically that Fugitive Slave Laws gave rise to a two-body problem that allowed whites to treat Black people as “living prop-erty”—creates a bridge to a new and productive rereading of fugitivity, a concept that can be occupied to create a radical approach to intellectual property politics. Fred Moten, before defining the same term, asks, “How do we think the possibility and the law of outlawed, impossible things?”41He responds to that inquiry by writing on fugitivity as a resistive concept, practice, and mode of being:This fugitive movement is stolen life, and its relation is reducible nei-ther to simple interdiction nor bare transgression. What can be at-tained in this zone of unattainability . . . is some sense of the fugitive law of movement of black social life ungovernable, that demands a para-ontological of the supposed connection between explanation and resistance.42Harney and Moten’s conception of fugitivity describes a “stolen life,”43 in which anti-racist and anti-colonialist scholars and activists “do not come to pay their debts, to repair what has been broken, to fix what has come undone.”44 Harney and Moten continue:We cannot be satisfied with the recognition and acknowledgement gen-erated by the very system that denies (a) that anything was ever broken and (b) that we deserved to be the broken part; so we refuse to ask for recognition and instead we want to take apart, dismantle, tear down the structure that, right now, limits our ability to find each other, to see beyond it and to access the places that we know lie outside its walls . . . once we have torn shit down, we will inevitably see more and see differently and feel a new sense of wanting and being and becoming.45 The intellectual property fugitive, a figure I have sketched out through the examples in the previous chapter, engages law with the knowledge that intellectual property law can never be effectively reformed, even if it periodically benefits people of color, because it is too deeply intertwined with racism and racial capitalism to be redeemable. Moreover, the intellec-tual property fugitive performs radical resistance to copyright, patent, and trademark regimes that are mired in national identity, citizenship, and racial capitalism through consistent acts that “tear down the structure.” The goal of the intellectual property fugitive is not only a series of policy proposals to tinker with intellectual property law but a hegemonic commitment to constant critique, particularly storytelling that rescripts racial formations, remakes racial feelings, and creates possibilities for more spacious concep-tions of belonging, in knowledge and human cultures.Mat Callahan, in an article titled “Why Intellectual Property? Why Now?” writes:Under these conditions, capitalist interests view IP not merely as an opportunity to seek profit, but more fundamentally as the underpin-ning of a global regime, especially the trade treaties and international agreements that dictate the flow of all goods and services be they ma-terial or intellectual. Indeed, the threat many movements pose . . . is not primarily one of piracy or “theft” of the intellectual property of one corporation or another; rather, the threat is to the foundation of private property and the ownership of ideas as a conceptual framework for law or governance of any kind. In other words, within any and every conflict revolving around IP are the core principles of capitalism: possessive individualism, private appropriation of public wealth—es-pecially natural resources—and the despoiling or destruction of the commons. Thus, what makes IP a vital battlefront for our time is that the stakes are capitalist enslavement or human liberation.46 Though Callahan focuses on the issue of economics, he does not discuss the issue of race, which also underpins contemporary systems of intellectual property law. Specifically, race and economics are intertwined in ways that guarantee the valuation of particular kinds of ideas with particular kinds of owners. Reimagining creatorship, infringement, citizenship, nation, and personhood in intellectual property law requires answering fundamental and pressing questions about race and capitalism. Those questions will become increasingly important in coming years, as intellectual property becomes an even more central space for the negotiation of economics, politics, and humanness. For Harney and Moten, fugitivity as concept is adversarial to-ward state-based policy reforms as the ultimate mechanisms for producing equality. White supremacy guarantees failure as well as ontological collu-sion with a racist system invested in destroying people of color. Given that intellectual properties are legally constructed through domestic and inter-national institutional action, the knee-jerk response is to intervene legally. Unlike Harney and Moten, I do not conclude with the notion that in-dividuals can never ask for inclusion or recognition within the state. Rather, I understand fugitivity, particularly when read alongside decoloniality, as metaphorical shorthand for the need for constant vigilance about the under-lying racial investments of the state and publics as well as an epistemologi-cal break with the seductive forces of law, even when they seem appealing. Letting go of the illusion that, as Bell counsels, law can bring radical change and embracing, instead, that legal gains are frequently rolled back partially or completely, leaves space for committing to continuing anti-racist and an-ticolonial struggle. The legal and performative aspects of engaging in that struggle, which come in a variety of individual and institutional forms, are the path to treating people of color not as objects decoupled from their creativity and innovation, but as whole persons with dignity, humanity, and the capacity to occupy the category of creatorship in all its pluriversal forms.

#### Empirically works – the Yoga Wars required institutional and individual resistance

Vats 20

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As the example of Prince demonstrates, individual resistance can have con-siderable structural implications, particularly in terms of the organization of institutions. The Yoga Wars, the ongoing struggle between India and the developed world over the ownership, commodification, and practice of yoga, have for the last two decades been important sites for individual and institutional (neo)colonialism and decolonization of intellectual prop-erty rights. The use of the word “piracy” to describe other than the Global South’s use of knowledge produced and protected in the Global North confronts the racial scripts that undergird contemporary understandings of (white) expertise and the “discovery” and “purification” of knowledge. Read vis-à-vis the examples provided here, flipping the script of piracy re-fuses to accept the notion that people of color can produce only the raw materials that are then transformed into “real” and protectable knowledge.44One of the first printed uses of the term “yoga piracy,” in a 2005 Wash-ington Times article, set the terms of the conflict between India and the West over yoga. Vinod K. Gupta, head of an Indian task force on traditional knowledge and intellectual property, used “yoga piracy” to describe the predominantly Western propertization and monetization of yoga, both of which he criticized. “These [asanas] were developed in India long ago and no one can claim them as their own,” he argued.45 In this context, alterna-tive narratives of intellectual property infringement emerged as discursive mechanisms for inverting the racial scripts of Asians as lazy thieves who lack the intellectual capacity or work ethic to produce knowledge. The struggle to claim yoga manifested in two primary ways: the use of decolonial vernacular by lay Indians and Indian Americans to remake the very language of intel-lectual property and the creation of a digital database by the Indian gov-ernment to protect against intellectual property rights claims in knowledge that had already been “discovered” by people of color. These two resistive moves served to decolonize and dewesternize global patent law by making Euro-American biases visible and producing new institutional structures and knowledge categories that confront them.Reframing ownership through decolonial vernacularVernacular rhetoric—“the rhetoric of the oppressed”46—offers a counterpoint to the rhetoric of those in power, including around discourses of race and citi-zenship. Significantly, even though it is the non-expert language of everyday life, vernacular rhetoric can trickle up to influence the language of those in power, changing the very words, concepts, and institutional structures that experts use to describe and manage areas of public concern.47 For instance, vernacular discourses around yoga piracy helped Indian publics to inadvertently produce new approaches to categorizing and managing traditional knowledge, thus pushing against rhetorics of expertise that justified excluding people of color from circuits of knowledge production and knowledge ownership.48 In effect, rhetorics of piratical theft of yoga produced new, radical, and accessible vocabularies for discussing intellectual properties that, in turn, influenced government policymakers. The use of language in the context of yoga piracy operated as “decolonial vernacular,” a practice through which quotidian uses of legal language contest (neo)colonial regimes of knowl-edge production.49 One of the earliest and most famous rhetorical rescript-ings of the infringement narrative came in Vandana Shiva’s articulation of the term “biopiracy” in 1997. Shiva, who was responding to the rise of bioprospecting, sought to critique “the exploitation of biological resources and traditional knowledge without the consent of local people or authori-ties, and without adequate compensation.”50 She observes: “At the heart of Columbus’ ‘discovery’ was the treatment of piracy as the natural right of colonizer . . . Patents are still the means to protect this piracy of the wealth of non-Western peoples as a right of Western powers.”51 The lan-guage of biopiracy, then, rewrites the racial scripts that Western discourses of infringement perpetuate, specifically pushing back against the relations of power that they implicate. Taking a cue from Shiva’s successful struggles to invalidate patents for turmeric and neem oil in wound healing, those who contested yoga piracy named the problematic power relations through which yoga is consistently colonized and commodified.

### AT: Relegate to Tribal Authority CP

#### No solvency - Tribal courts are restrained from prosecuting non-Indigenous people

Kaste 24

Martin Kaste is a correspondent on NPR's National Desk covering law enforcement and privacy. "Tribal courts can't prosecute non-Native drug suspects. Tribes say it's a problem." Published by NPR on February 20, 2024. Available here: (https://www.npr.org/2024/02/20/1232366074/fentanyl-tribes-prosecute-drug-cases-non-indian-suspects) - AP

Tribal leaders testified about an insufficient response by state and federal law enforcement to the drug traffickers who bring fentanyl onto reservations. Azure said his tribe was moving ahead with its own "tribal drug task force." But tribal law enforcement is limited in what it can do. Because of the landmark 1978 Supreme Court ruling Oliphant v. Suquamish Indian Tribe, tribal courts are not allowed to prosecute non-American Indians for most crimes — including drug trafficking. That distinction between Native and non-Native is an ever-present factor for tribal police on reservation land. Tulalip Tribal Court Chief Judge Meredith Drent takes a seat below the court's official seal, which depicts four salmon encircling the scales of justice. The Tulalip Tribes in Washington state, for instance, has a police department with a specialized team of narcotics detectives, who try to identify and interrupt the flow of fentanyl into their small reservation located between Interstate 5 and Puget Sound, north of Everett. When they detain or arrest someone on suspicion of drug crimes, a key question is "Are you tribal-enrolled?"

#### Perm: Do the plan to enforce the CP. Tribal courts request federal courts to enforce rulings against non-tribal citizens

AP News 19

The Associated Press is an American not-for-profit news agency headquartered in New York City. "9th Circuit: Federal court can enforce tribal court rulings." Published on August 15, 2019. Available here: (https://apnews.com/general-news-858970418a0f490691e6a68731e9f8bb) - AP

BOISE, Idaho (AP) -- The 9th U.S. Circuit Court of Appeals says Native American tribal courts can ask the federal courts to enforce rulings against non-tribal citizens. The ruling handed down last week reversed an opinion from U.S. District Judge B. Lynn Winmill, who said federal courts didn't have jurisdiction to enforce a ruling from the Coeur d'Alene Tribal Court against non-tribal citizens, Boise State Public Radio reported. The appellate court disagreed. "The doors to the federal courthouse are open to tribal courts and tribes who seek to have their judgments recognized in federal court," Dylan Hedden-Nicely, the director of University of Idaho College of Law's Native American Law program, said of the 9th Circuit's ruling. The question arose in a case between the Coeur d'Alene Tribe and a couple who live on the reservation but who aren't tribal citizens. Steve and Deanne Hawks built a boat garage on the St. Joe's River. But the Coeur d'Alene Tribe said the St. Joe's River is tribal property, and tribal officials told the couple they needed a permit for the structure. According to court documents, the Hawks never responded, and in 2016 the Coeur d’Alene Tribe sued in tribal court. The tribal court fined the Hawks nearly $4,000 and said the garage could be dismantled. That’s when the Coeur d’Alene Tribe went to the U.S. District Court in Idaho to ask a federal judge to enforce the tribal court ruling. The Hawks, meanwhile, contended the federal court didn’t have jurisdiction in the matter. The Hawks and the Coeur d’Alene Tribe have since reached an out-of-court settlement on the boat garage issue, and the 9th U.S. Circuit court’s ruling was narrowly focused on the jurisdictional question. “The Hawks are glad to have this matter behind them and appreciate the Tribe’s cooperation in resolving it,” said Norman Semanko, an attorney representing the Hawks family. Ernie Stensgar, chairman of the Coeur d’Alene Tribal Council, praised the ruling in a prepared statement. “This a victory not just for the Coeur d’Alene Tribe, but it also provides important precedent for all tribes within the 9th Circuit region that our tribal courts’ judgments against non-members can be recognized and enforced at the federal level,” Stensgar said.

# Neg Stuff

## Squo Solves

#### Consultations between the USPTO & Indigenous tribes happening in the status quo

Kinsella 24

Mackenzie Kinsella is a legal fellow at Seagen, and a J.D. candidate at the University of Washington School of Law. "A Seat at the Table: USPTO’s Tribal Consultations Open Conversations Surrounding Indigenous Knowledge Rights." Published by the Washington Journal of Law, Technology & Arts. Published on February 4, 2024. Available here: (https://wjlta.com/2024/02/04/a-seat-at-the-table-usptos-tribal-consultations-open-conversations-surrounding-indigenous-knowledge-rights/#:~:text=Native%20American%20intellectual%20property%20(IP,resources%2C%20and%20traditional%20cultural%20expressions.) - AP

Native American intellectual property (IP) has a history of being used without the permission and authorization from Indigenous communities. Indigenous IP encompasses traditional knowledge, genetic resources, and traditional cultural expressions. Traditional knowledge can include skills and practices concerning biodiversity, agriculture or health. Genetic resources could, for example, comprise of plants, seeds and medicine formulas. Traditional cultural expressions can involve folklore, symbols, designs, music, and performance. There is a complex and challenging relationship between IP systems and protection of Indigenous knowledge. Certain mechanisms for IP protection create gaps and barriers for Indigenous innovators. Often formal IP protections require the identification of specific individual creators and inventors, however, this “ownership” requirement stands in contrast with Indigenous conceptions of “ownership.” Additionally, Indigenous knowledge may not meet “originality” or “novelty” requirements under current IP standards. These gaps and barriers for Indigenous knowledge protection create opportunities for Indigenous knowledge to be used without consent from Tribes. Some examples of Indigenous IP being used without any tribal permission include, Stephanie Meyer’s use of the Quileute tribe’s origin story, which misappropriates and misrepresents Quileute traditions. Another example of misuse of Indigenous IP is Allergan’s use of the Saint Regis Mohawk tribe’s formula to make an eye drop drug, and transferring ownership of all of the Allergen’s eye drop patent back to the Tribe in order to attempt to attain sovereign immunity against specific legal challenges. These examples illustrate the difficulty and complexity that surrounds how Native Americans can protect their cultural properties. Current IP systems are not providing protection for Indigenous IP. However, the US Patent and Trademark Office (“USPTO”) is currently seeking input from Tribal Nations input regarding Indigenous IP. US Patent and Trademark Office Seeking Comments from Tribes On October 24, 2023, the USPTO published two notices requesting input from Tribal Nations regarding protection of Indigenous IP. The USPTO intends to hold formal tribal consultations, which are two way government-to-government dialogues between Tribes and Federal agencies where Federal proposals are discussed. These tribal consultations are the first tribal consultations that the USPTO has held with Tribes. The USPTO’s proposed tribal consultations are to address any concerns regarding how the current IP system protects genetic resources and traditional knowledge that Tribes have. The consultations will be discussed with the World Intellectual Property Organization (WIPO), which is an organization that focuses on intellectual property world-wide and has been focused on protecting resources for Indigenous People. The WIPO Intergovernmental Committee’s negations could potentially lead to specific countries acceding to a treaty and creating legal instruments to protect genetic resources, traditional knowledge, and traditional cultural expression. These formal consultations have been applauded by the Native American Rights Fund (NARF) and the National Congress for American Indians (NCAI), the latter express how these consultations are necessary to move the United States federal government forward towards respecting Tribal Nations as the holders and guardians of these specific aspects of their cultures. The First Notice by the USPTO offers 19 questions for Tribes and their representatives to provide their input on the IP protection of genetic resources and traditional knowledge. The First Notice comment period ended Monday January 22, 2024. The Second Notice by the USPTO involves hosting formal tribal consultations in January 2024. The USPTO alongside the WIPO, and other federal agencies will be focused on providing the USPTO insight into how Tribes foresee how the USPTO should make changes, and assist in defining what terms and phrases should be used. What Do These Formal Consultations Mean for Tribes? Previously, the USPTO has had a position of aligning with corporations and allowing access to Indigenous Intellectual Property at the expense of Indigenous communities. Now, the formal consultations, which will include federally recognized Tribal Nations, state-recognized Tribal Nations, and Native Hawaiians and their representatives, signal a shift in the USPTO’s previous position to one that recognizes the importance of protecting Indigenous People’s right to their intellectual and cultural property. The USPTO is interested in working with the WIPO to identify some soft laws regarding Indigenous knowledge. Some examples of this include publishing joint recommendations, best practices, and toolkits, which could be beneficial to Tribal Nations. However, Tribal organizations, like the Native American Rights Fund, have expressed that Indigenous peoples are concerned in how to ensure that these consultations are meaningful and produce an actual impact in the United States. In conclusion, these consultations provide hope for Indigenous communities to have the opportunity to express their concerns surrounding Indigenous knowledge. Furthermore, the ability to have a seat at this table, with the USPTO, signals a positive step towards ensuring the rights and heritage of Indigenous Peoples are safeguarded in the realm of IP.

## No Solvency

#### Benefit sharing fails to protect TK, corporations side-step indigenous groups and agreements are fraught with conflict

Wynberg 23

Rachel Wynberg Rachel P. Wynberg is a South African biodiversity researcher and natural scientist who is a professor at the department of Environmental and Geography Sciences at the University of Cape Town. "Biopiracy: Crying wolf or a lever for equity and conservation?" Published by Research Policy, Vol. 52, no. 2. Published in March 2023. Available here: (https://www.sciencedirect.com/science/article/pii/S0048733322001950) - AP

Biopiracy, first coined as a term in the early 1990s, describes the way that corporations or researchers (usually from the global North) misappropriate the genetic resources and traditional knowledge of countries and Indigenous peoples and local communities (usually from the global South) without their consent, and, typically, patent this information to enable knowledge to be enclosed and further commodified for the purpose of profit ( Hamilton, 2006 ; Dutfield, 2009 ; Robinson, 2010 ). Over the past 30 years, however, the concept has become something of a broad church, synonymous with unseemly corporate profits, perceived inequities in the division of benefits arising from biodiversity-based commercialization, and the use of biological resources and associated knowledge without consent ( Dutfield, 2009 ; Robinson, 2010 ). In its widest sense, biopiracy has taken place for more than 2000 years, through unauthorized plant collections that served to build colonial empires and facilitate the financial prosperity and scientific advancement of Europe and North America, in part responsible for today's economic inequalities between nations ( Crosby, 1972 ; Kloppenburg, 1988 ). However, the rapid increase in awareness and the growth of social movements proclaiming the environmental and cultural rights of Indigenous peoples and local communities ( Posey and Dutfield, 1996 ; Lightfoot, 2016 ), has placed biopiracy in the spotlight over the past three decades, aligning also with the emergence of global intellectual property rules in the 1990s through the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) of the World Trade Organization. The TRIPS agreement encompassed a global intellectual property rights system for healthcare, food and agriculture and ushered in a new era of privatizing knowledge. In this neoliberal context of “hyperownership” ( Safirin, 2004 ), companies made increasing claims for monopoly control over innovations linked to biodiversity and traditional knowledge, linked to an intensification in patent activity ( Dutfield, 2000 ; Drahos, 2003 ; Oldham et al., 2013 ). International policies set in place a market-driven framework for biodiversity use, conservation, and social justice, characterized by the notion of “selling nature to save it” ( McAfee, 1999 ). Benefit sharing, first articulated as a legal expression by the Convention on Biological Diversity (CBD) in 1992, emerged as a central approach to address biopiracy, and coincided with escalating global concern about biodiversity loss, and changes in science and technology that were opening commercial opportunities for the use of biodiversity in lucrative pharmaceutical, biotechnology, agricultural, personal care, and food industries ( ten Kate and Laird, 1999 ). In what Gollin (1993) describes as the “Grand Bargain”, where access to biodiversity and associated traditional knowledge of the global South was traded for benefits from the technologically rich industrialized North, the CBD and its 2010 Nagoya Protocol, set in place a new regime to regulate bioprospecting and trade in genetic resources and traditional knowledge. “Users” wishing to access genetic resources, had to provide “fair and equitable benefits” to the country providing these resources. For these benefits to be obtained, a “provider” country had to facilitate access to genetic resources to users, typically companies or researchers from the global North (hence “access and benefit sharing”, ABS) ( CBD, 1992 ; Nagoya Protocol, 2010 ). This decidedly transactional approach relied on bilateral contracts and benefit-sharing agreements, which were used to negotiate agreements with the “provider” of genetic resources and/or traditional knowledge, which could be a state, an individual, or an Indigenous or local community. Users were now required to get permission from providers before collecting resources and knowledge (“prior informed consent”), mutually agree on the terms of exchange, and share benefits fairly. Benefit sharing was interpreted widely to go beyond the sharing of revenue to mean the “fair and equitable” division and allocation of both monetary and non-monetary benefits but without specifying how these subjective and almost unmeasurable objectives could be assessed. Monetary benefits were expected to reflect the market value of products commercialized based on genetic resources and biodiversity. Non-monetary benefits were anticipated to include a range of options, including stronger research collaborations and technology transfer between the global North and South, support for conservation, and capacity and skills development. The intention was to bring greater social, environmental, and economic justice to the commercial use of biodiversity, and to contribute towards strengthened rights of Indigenous and local communities and reduced inequalities ( Reid et al., 1993 ). Those advocating for market-based approaches to conservation theorized that the inclusion of conservation benefits in ABS agreements could also help to stem the loss of biodiversity by providing funding for conservation initiatives and biodiversity research ( Costanza et al., 1997 ). While initially concerned with traditional knowledge and the rights of developing countries over their genetic resources, in the 30 years since adoption of the CBD the world has witnessed dramatic technological changes, with increasing use of biotechnology, synthetic biology and associated commercial applications. Due to a heavy reliance of these technologies on genetic sequence data and information, new forms of “digital biopiracy” ( Hammond, 2017 ; Bond and Scott, 2020 ) have emerged, typically disassociated from the physical material itself and traditional knowledge holders with no clear sites for consent or benefit sharing ( Ruiz Muller, 2015 ; Kupferschmidt, 2018 ; Laird et al., 2020 ). Hammond (2020) , for example, lists a range of medicinal and food plants in Genbank, the US genetic sequence database, many drawn on traditional knowledge, with the information openly accessible to database users. Similarly, the way in which genetic sequence data (referred to as digital sequence information, or DSI in policy arenas) is accessed, managed and curated, means that a range of initiatives may side-step benefit-sharing requirements and undermine the rights of Indigenous peoples and local communities ( Bond and Scott, 2020 ; Smyth et al., 2020 ). Divseek, for example, a project that aims to sequence the genomes of a wide range of crops and wild relatives, has been censured for “facilitating wide-spread biopiracy by providing access to digital sequences of the world's crop biodiversity without provisions for benefit-sharing” ( www.synbiowatch.org/captain-hook-awards-2016/ , accessed 14 August 2022). This exponential use of DSI has coincided with the biodiversity emergency, raising questions about the role of DSI both as a tool to support biodiversity conservation through deepened knowledge and new applications, and as a conservation funding mechanism ( Laird and Wynberg, 2018 ). In parallel, and to align CBD requirements for prior informed consent and benefit sharing with patent rules, a protracted negotiation process has been underway within the World Intellectual Property Organization (WIPO) to require the obligatory disclosure in patent applications of genetic resources and associated traditional knowledge ( Robinson et al., 2017 ). This changing institutional, scientific, political, and technological landscape takes place amidst growing concerns about the calcification of the ABS framework, and its contribution towards ethical research and commercialization ( Laird et al., 2020 ). With 196 states members of the CBD and 138 party to its Nagoya Protocol, 1 hundreds of laws and policies are now in place globally to give effect to these international norms. A central requirement is for benefit-sharing agreements to be in place before permits are issued, leading to a range of negotiated agreements over the past 30 years between different actors including governments, research institutions, companies, and communities (e.g., Berlin and Berlin, 2004 ; Greene, 2004 ; Gamez, 2007 ; Laird and Wynberg, 2008 ; Robinson, 2010 ; UNDP, 2018 ; Chinsembu and Chinsembu, 2020 ). While the intention is to use these mechanisms to leverage greater social and economic justice, to induce conservation and sustainable use, and to strengthen the rights of Indigenous and local communities, emerging evidence suggests otherwise. Critics note that ABS agreements reached are typically conflict-ridden, hollow, or obsolete ( Berlin and Berlin, 2004 ; Morris, 2016 ; Dutfield and Suthersanen, 2019 ).

## Restorative Justice Answers

#### Requiring restorative approaches removes agency from those harmed

Gavrielides 18

Theo Gavrielides is a legal philosopher and a restorative justice expert and the Founder and Director of the Restorative Justice for All (RJ4All). "Victims and offenders’ perceptions and experiences of restorative justice The evidence from London, UK." pp. 122-123. Published in the Routledge International Handbook of Restorative Justice in 2019. Available here: (https://www.taylorfrancis.com/books/edit/10.4324/9781315613512/routledge-international-handbook-restorative-justice-theo-gavrielides) - AP

Again, there was a strong theme that in order to increase awareness, information needs to come from people/organisations who have a trusting relationship with local communities, as people will be more likely to listen and take the information on board if it comes from someone they know. This information needs to be easy to find. Many interviewees reported looking for information online for significant periods of time and still not finding what they need. The complexity of language and the terminology that is being used for offering restorative justice was also criticised. Some victims also pointed out that it is important to strike the right balance by not making them feel patronised by the dumbing down of the language, but at the same time not expecting them to be legal experts. Translation was also brought up by our victims, some of whom did not have English as their first language. Attached to this was the issue of cultural competency and being able to sympathise and understand their respective cultures without assumptions. Furthermore, some victims felt that they were being approached by practitioners as commodities through a “sales pitch”. They often felt pressured to opt for restorative justice and that the benefits were highlighted more than the risks. Victims suggested that when being approached, it should just be about answering their questions and explaining how restorative justice directly relates to their specific circumstances. Several interviewees also said that it would be good to explain how restorative justice is different to the police and court system and that it would be good to hear about real examples/cases of positive outcomes and what other victims have got out of it. The reasons our interviewed victims opted for, or would have opted for, restorative justice included their desire to: feel empowered and have their voice heard; ask questions of the offender about the crime; get the offender to understand the impact of the crime so that they might not do it again. The interviewees also reported dissatisfaction with, or distrust of, criminal justice processes and agencies as reasons they would be interested in participating in restorative justice. Feelings of dissatisfaction stemmed from not feeling like they had been given a chance to be heard, not having the chance to hear anything from the offender, or needing something else in order to heal and move on. Feelings of distrust stemmed from previous negative experiences with statutory services resulting in people not wanting to invite such services further into their lives, as well as people being wary of the public nature of CJS processes. Hence they would prefer an alternative process to address the crime and its impact. For example, one interviewee who identified as being from a BAME background and being “queer”, disabled, suffering from mental illness and having previously experienced significant periods of homelessness, said that: Independence, anonymity and confidentiality will make community services a more attractive option for people wanting to access restorative justice. For marginalised people, it be would be better to have restorative justice delivered via a system which has not put you where you are. People won’t trust it otherwise – especially people with bad experiences of statutory services. I know lots of other marginalised people who would never go near police or mental health services and risk further contact with the system. In regards to circumstances which might lead them to not want to participate in restorative justice, the majority said that they would feel that way if they did not have enough information about the process or they were pressured. We also discussed with our interviewed victims their experiences with restorative justice services as well as any other services they had engaged with (e.g. police, victims support services), and those factors most important in regards to satisfaction and having their needs met. Our participants agreed that restorative justice services should be tailored and personalised to their individual and specific circumstances if they are to be victimled. They did not want to feel that they are just another “number” in the system. This also included appropriate service delivery to children (e.g. one interviewee reported dissatisfaction with her nine-year-old son being given the same information and advice from a victim support service about coping and recovering that she received as an adult and that it was completely inappropriate and confusing to him). Victims also pointed out the significance of setting appropriate expectations and meeting them. Service providers not following through on what they said they would do or providing incorrect information was a common reason for dissatisfaction. For example, one interviewee said about their experience: It was like they didn’t care at all. They sent individual letters to each family member including my young children that had all our names spelled wrong. My son needed support. Furthermore, victims agreed that having a single point of contact is critical to building trust and confidence and that not having to repeat information is important for their satisfaction and confidence in restorative justice. They also said that patience in service delivery is key to satisfaction levels, as it makes them feel less anxious. Our interviewees also noted the significance of being kept updated regularly, even in regards to small matters or just checking in (even when there are not any specific developments). Having consistency in how and when this is done, as well as by whom, is also important for reassuring victims and building trust and confidence. High levels of frustration were reported when victims had to chase service providers for updates and information.

#### Restorative justice advocates increasingly ignore Indigenous critiques in seek of empowering the restorative justice industry – recreating hierarchical colonial systems

Tauri 18

Juan Tauri is an Indigenous criminologist from Aotearoa (New Zealand). A graduate from the University of Cambridge, he is a critical commentator on criminal justice matters of importance to First Nations, including state responses, policy making, and media representation of crime and Indigenous communities. "Restorative justice as a colonial project in the disempowerment of Indigenous peoples." Published in the Routledge Handbook of Restorative Justice in 2018. Available here: (https://www.taylorfrancis.com/books/edit/10.4324/9781315613512/routledge-international-handbook-restorative-justice-theo-gavrielides) - AP

Indigenous peoples’ experience of the restorative justice (RJ) industry has been marked by a number of strategic decisions and practices that have made the relationship uncomfortable for both parties. One particularly problematic set of behaviours is the partiality shown by some members of the industry for utilising elements of Indigenous life-worlds in the manufacture and marketing of RJ products. The strategic deployment of Indigenous cultural practices, along with a willingness to standardise practice to align justice practice and outcomes with those of the public service, has seen the movement increasingly accepted within the folds of the criminal justice system. However, the industry’s failure to deliver on many of its promises, most especially as a source of jurisdictional empowerment for Indigenous peoples, means that it is increasingly viewed as a colonial project within the settler colonial state’s attempts to manage Indigenous peoples. This chapter offers an Indigenous critique of the settler colonial state’s current reliance on the importation and dissemination of restorative justice programmes, including conferencing forums and sentencing circles, as preferred responses to the related intractable problems of Indigenous over-representation in the criminal justice system and Indigenous resistance to settler colonial governance. We argue that recent Indigenous experience of the globalised RJ industry diminishes the efficacy of exaggerated claims made by RJ advocates about the transformative properties of RJ products and their ability to satisfy the demands of Indigenous peoples for jurisdictional self-determination. The stated aim of the Handbook is, in part, to provide ‘a comprehensive and authoritative review of research in new and contested areas’, whilst bringing ‘much needed attention to grey areas of practice’. This modest offering endeavours to meet these aims by enhancing our understanding of the impact the RJ industry has on Indigenous peoples based on the experiences of Indigenous peoples themselves. This is important given that Indigenous peoples are a criminal justice ‘client group’ whose views have thus far been severely neglected, and even ignored, by many RJ researchers, advocates and practitioners. At first glance, one might say that the Indigenous critique of RJ offered here is nothing ‘new’. This is a fair point when we consider that the first published critiques informed by Indigenous perspectives began appearing in the mid-1990s (see Blagg, 1997; Cunneen, 1997; Lee, 1997; Tauri, 1998). To date there has been a demonstrable lack of response to this body of work from RJ advocates. However, of late this largely conceptual and theoretical critique has been supported by Indigenous-led empirical research that reveals the disempowering impact RJ practices are having on Indigenous individuals and communities (see Moyle, 2013, 2014; Moyle and Tauri, 2016). This development means that the Indigenous-informed critique can no longer be ignored. We demand a meaningful response from the RJ industry, especially to our challenge that its members move past the mystification and romanticisation of its policies, programmes and practice, and demonstrate the value to us as a meaningful response to our social justice needs. This challenge is particularly important given that we have our own processes for dealing with social harm, and evidence that the globalisation of RJ has impacted the ability of some Indigenes to implement their own processes (see Tauri, 2014).

#### Settler use of restorative justice exaggerates and coopts Indigenous perspectives and dismisses Indigenous voices

Tauri 18

Juan Tauri is an Indigenous criminologist from Aotearoa (New Zealand). A graduate from the University of Cambridge, he is a critical commentator on criminal justice matters of importance to First Nations, including state responses, policy making, and media representation of crime and Indigenous communities. "Restorative justice as a colonial project in the disempowerment of Indigenous peoples." Published in the Routledge Handbook of Restorative Justice in 2018. Available here: (https://www.taylorfrancis.com/books/edit/10.4324/9781315613512/routledge-international-handbook-restorative-justice-theo-gavrielides) – AP

**\*Text Edited to Define Acronyms\***

In previous work, we have critiqued the exaggerated claims of the RJ industry in relation to its supposedly ‘Indigenous-derived’ policies and products (see Tauri, 2014). Over the past 15 years, the industry’s continued mystification of the [Family Group Councelling] FGC forum has been heavily critiqued by critical Indigenous and non-Indigenous scholars alike, including Blagg (1997) and Cunneen (1997) in the Australian context; Lee (1997), Rudin (2005) and Victor (2007) presenting Indigenous Canadian perspectives and Love (2002), Moyle (2013, 2014;) Moyle and Tauri (2016) and Tauri (1998, 2004, 2014, 2016) from a critical Māori perspective. Much of the work of these scholars has collectively exposed a number of significant issues with the RJ industry, including that much of the empirical research on Indigenous satisfaction is exaggerated, largely based on glorified customer satisfaction surveys (most particularly in New Zealand; for examples of this approach see Maxwell and Morris, 1993 and Maxwell et al., 2004) and closed-ended interview methods that restrict Indigenous participants’ from openly critiquing state-sanctioned forums (see Tauri, 2011). Furthermore, their work also demonstrates that reported Indigenous experiences of RJ programmes often do not match the glowing reports of meaningful cultural appropriateness or their ability to meet Indigenous aspirations for self-determination, often reported in academic literature and the pronouncements or RJ advocates (for detailed discussion of the exaggerated claims of ‘cultural sensitivity’ and juridical empowerment for Māori in the New Zealand context, see Love, 2002; Moyle, 2013, 2014; Tauri, 1998, 2004; and also Walker, 1996) A related issue is that much of the government-sponsored research highlights the co-optive and indigenised character of the FGC process (see Tauri, 2011) which all too often results in the marginalisation of whānau (family) members, cultural practices and ‘cultural experts’ (for example, in the New Zealand context regarding FGC practice, compare Maxwell and Morris, 1993 and Tauri, 1998 and Maxwell et al., 2004 and Tauri, 2004). Lastly, it has been argued that both the FGC process and the legislation that introduced it were influenced by the settler colonial states’ need to be seen to be doing something constructive in the face of a perceived rise in juvenile offending, particularly amongst Māori youth, and ongoing criticism by Māori of the Eurocentric bias of the formal system (Richard, 2007; Tauri, 1998; see discussion later on the role of RJ as a contemporary colonial project).

## Biodiversity Answers

#### Uniqueness: US is currently solving for BioD

Department of State 22

“Highlighting U.S. Efforts to Combat the Biodiversity Crisis” Published by US Department of State on December 15, 2022. Available here: (https://www.state.gov/highlighting-u-s-efforts-to-combat-the-biodiversity-crisis/#:~:text=and%20Conserving%20Nature-,Conserving%20at%20least%2030%20percent%20of%20U.S.%20Lands%20and%20Waters,climate%20and%20biodiversity%20crises%20as) - OC

The United States is committed to halting and reversing the loss of biodiversity globally. The global decline of nature represents an existential threat to livelihoods, food systems, and health. As countries meet in Montreal, Canada, at the 15th Conference of the Parties (COP15) to the Convention on Biological Diversity (CBD), the United States reiterates its support for an ambitious and transformative Global Biodiversity Framework that enables biodiversity to thrive – and with it all life and livelihoods. The United States is engaged globally and at home to support efforts to conserve, protect, connect, and restore nature, leading to healthy ecosystems, healthy people, and healthy economies. The United States has committed significant financial investment towards the first national conservation goal of conserving at least 30 percent of U.S. lands and waters by 2030, including the America the Beautiful Challenge – a $1 billion public-private partnership that offers a one-stop shop to support ecosystem restoration projects that invest in watershed restoration, resilience, equitable access to nature, workforce development, corridors and connectivity, and collaborative conservation, consistent with the America the Beautiful initiative. This initiative is a decade-long challenge to pursue a locally led and voluntary nationwide effort to conserve, connect, and restore the lands, waters, and wildlife upon which we all depend. Taking an all-of-government approach, the U.S. Fish and Wildlife Service, U.S. Forest Service, National Oceanic and Atmospheric Administration, and Department of Transportation are coordinating on a $2 billion partnership for fish passage and culvert removal to promote the healthy functioning of our streams, rivers and aquatic ecosystems. Internationally, the U.S. Agency for International Development (USAID) supports the conservation of wildlife and critical ecosystems in over 60 countries. In 2021, USAID invested $319.5 million to conserve biodiversity, reduce wildlife trafficking and other nature crimes, and support the resilience of vulnerable and marginalized communities who depend on biodiversity and healthy ecosystems for food, jobs, and security. USAID’s biodiversity conservation activities support objectives within USAID’s new Climate Strategy, including reducing greenhouse gas emissions and increasing carbon storage by improving forest conservation and management, conserving coral reefs and mangroves, and driving innovative technologies.

## CP

### Text

#### The United States Federal Government should relegate issues of traditional knowledge in domestic intellectual property rights to tribal authority

### Solvency

#### Tribal law is a more effective mechanism for protecting TK

Smolinksi 23

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As the previous two sections demonstrate, the current, mainstream IP protection regimes are insufficient to adequately protect the uniqueness, vastness, and complexity of Indigenous traditional ecological knowledge. Accordingly, there undoubtedly is a need for sui generis legal regimes designed to protect Indigenous intellectual property rights that fall outside of the standard patent, trademark, copyright, and trade secret doctrines.50 Importantly, despite the otherwise valid criticisms about their potential unenforceability on outsiders, these intellectual and cultural protection regimes must be driven by tribal laws.51 After all, tribes “are in the best position to determine whether and/or how to reveal culturally sensitive information.”52 Importantly, not only would this “allow [I]ndigenous peoples . . . to finally control the integrity, disposition, and appropriation of their sacred knowledge,”53 but also to “exercis[e] their inherent authority to define tribal laws and be governed by them.”54 If properly implemented, such tribal laws could be incorporated into the Anglo-American jurisprudence, which would not only afford “weight and legitimacy to [these] tribal law[s],” but also “provide[] an opportunity to infuse the dominant legal system with [I]ndigenous conceptions of justice,” specifically in the context of the protection of Indigenous intellectual property. 55 The next part of the Article provides a survey of selected historical and contemporary IP protection mechanisms utilized by American Indian tribes.

#### Tribal law enables tailored approaches to infringements on traditional knowledge

Smolinksi 23

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Importantly, the Tribes provided for specific remedies against a “[r]esearcher or other person or entity” acting in violation of the Code, which includes a “ban[ishment of] the researcher(s) from any future research at CRIT, [and the] assess[ment of] civil penalties of up to five hundred dollars ($500) per violation.”92 However, the Tribes seem to have firmly framed the possible violations in the context of the three mainstream intellectual property protection legal regimes discussed above: copyrights, trademarks, and patents.93 By far the most relevant to the scope of this work document discovered in this research was the Cultural Resource Protection Act of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation.94 Not only does the Act specify the requirements that must be satisfied before any “publication, commercialization, or release of [] research findings” related to the Tribe may happen,95 but it also provides a very comprehensive definition of what is considered Indigenous intellectual property. According to the Act, such property “means the [I]ndigenous cultural information, knowledge, uses, and practices unique to the Tribe’s ways of life maintained and established over protected lands and aboriginal areas.”96 The Act also explains that such knowledge is “based upon observation, habitation, and experience, and is often a communal right held by the Tribe, but in some instances by individuals.”97 Finally, the Act lists some specific types of such property, including “[k]nowledge of remembered histories and traditions”; “[d]etails of cultural landscapes and particularly sites of cultural significance”; “[k]nowledge of current use, previous use, and/or potential use of plant and animal species, soils, minerals, objects”; “[k]nowledge of preparation, processing, or storage of useful species”; “[k]nowledge of individual species (planting methods, care for, selection criteria, etc.)”; “[k]nowledge of ecosystem conservation”; “[b]iogenetic resources that originate (or originated) on [I]ndigenous lands and territories”; and even “[t]issues, cells, biogenetic molecules including DNA, RNA, and proteins, and all other substances originating in the bodies of Tribal members, in addition to genetic and other information derived there from.”98 Clearly, many of these enumerated categories are directly related to traditional ecological knowledge and natural sciences. Importantly, the Act vests the Tribe’s Preservation Board and the Tribal Court with the ability to enforce the Act and to impose penalties for any violations thereof, including civil fines of up to $5,000 per violation.99

#### Tribal law is more effective at accounting for each tribes particular beliefs and knowledge

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Clearly, not all Native American tribes are alike. Although perhaps not as pronounced presently as it was before European contact, mostly as a result of colonization, forced assimilation, but also due to Pan-Indianism, the diversity among Native American tribes still exists.120 Especially now, in an era of Indigenous language revitalization, and other efforts directed at restoring specific tribal traditions and cultures, the question arises: can a “common ground” model code be successful? In other words, are the rules proposed to protect tribal intellectual property flexible enough for tribes to bend them to their particular needs? Admittedly, tribal laws reflect each tribe’s particular “economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways.”121 On the other hand, as mentioned earlier, for various reasons, many tribal courts are now looking to intertribal laws to supplement their own. This could be at least partly explained simply by the convenience of seeking “inspiration” in a judicial system that has gone through a similar recent history, from the Courts of Indian Offenses to the modern assertions of self-determination and tribal sovereignty, but as the review of the traditional stories conducted in this research reveals, there is actually much commonality between the various American Indian tribes. Indeed, the virtues of humility, perseverance, respect, honor, love, sacrifice, truth, compassion, bravery, fortitude, generosity, and wisdom, are not unique to the Lakota peoples, and the “seventh generation” perspective has not only been practiced by the Lenni Lenape (Delaware) Indians. In fact, all of these beliefs and values appear to be uniformly shared by most, if not all, Native American tribes. Accordingly, a model tribal code that takes such universal values into consideration, but at the same time allowing a certain degree of flexibility, should have a chance of being effective. Native American tribes also vary in terms of their economic resources and financial needs. With this in mind, the proposed model code has been designed to afford the greatest level of customization with respect to, for example, the monetary fines imposed for infringement, or the types of intellectual property covered by the code, which each tribe may modify as needed. Importantly, according to the Tribal Court Clearinghouse, a project of the Tribal Law and Policy Institute, several tribal model codes have already been proposed, and successfully adopted by different tribes, over the recent years.122 These model codes include a Model Tribal Sex Offender Registration Code, a Model Indian Juvenile Code, and a sample Tribal Judicial Code. Accordingly, there is no reason to believe that the Model Indigenous Intellectual Property Protection Tribal Code proposed in this Article would be thwarted as a result of the cultural and/or economic diversity among Indian tribes.

### Net Benefit

#### The aff’s protection of TK works within the US’s limited conception of Indigeneity – leaving many without protection

Fernando 13

Dinisha L. Fernando, J.D. Candidate, Benjamin N. Cardozo School of Law, 2014; B.A., University of Rochester, 2010. "Intellectual Propety and the Protection of Indigenous Culture in the United States and New Zealand: An Effective Solution for Indigenous Communities?" Published in the Cardozo Public Law, Policy, and Ethics Journal, vol. 12(1). Published in Fall 2023. Availalbe here: (heinonline.org/HOL/Page?handle=hein.journals/cardplp12&id=165&collection=journals&index=) - AP

As New Zealand and the United States seek to find ways to incorporate the protection of Indigenous cultural objects and traditions into their legal frameworks, intellectual property seems the most fitting solution to tackling ownership issues. Cortelyou Kenney describes intellectual property as "a toehold into longstanding disputes that have proven intractable under the physical-property paradigm and its winner-take-all stakes" that also "offers a more nuanced understanding of the history underlying these objects, which may facilitate a dialogue through recognition of multidimensional rights and obligations."2 2 5 Furthermore, as evidenced by New Zealand's Trade Marks Act 2002 and NAGPRA, the intellectual property framework applied is not always rigid and often bends to accommodate indigenous perspectives. Kenney describes these regulations as "sui generis226 with an IP flavor" because their goal is to "fence in information from the public domain and control the uses to which it can be put," and "tribes and foreign governments have found ways to control the knowledge of their own in creative and dynamic ways."227 While these developments have made proponents optimistic their limited success has highlighted the shortcomings of the New Zealand and United States laws. First, there is a problem of limited scope: the laws do not protect all aspects of culture and tradition that indigenous people consider their property. While this may be partially due to the confines of Western intellectual property concepts, there are two other possible causes: (i) governments have not tapped into all aspects of intellectual property law; and (ii) governments have not incorporated enough sui generis accommodations into their regulations. For instance, New Zealand has only incorporated concrete deference to the Maori in their trademark laws. However, trademark is only one category of intellectual property22 8 and thus the Maori can only claim harm for a spe cific use of its cultural property. Unfortunately, many popular uses of their symbols do not fall under the purview of trademark and so they continue to face harm. The Maori do not demand a third party bar against all uses of their property; the Maori want informed consent and respect for their symbols and traditions. It is possible that this issue may be addressed by more creative lawmaking that incorporates more sui generis principles. The United States narrows its laws by subject matter and thus, at the moment, only tangible arts and crafts as well as sacred and funerary objects are offered protection. These are very limited categories. Second, it is questionable whether harms that have been addressed by these regulations are effectively prevented. The Treaty of Waitangi Act and the resulting Tribunal are illustrative of inefficient administration of relief. The Tribunal took ten years to respond to the Wai 262 Cultural Agreement with an advisory opinion that the government may disregard if it chooses. This lack of power and speed can be disheartening to indigenous groups that spend time and resources in hopes of promoting change through these legal means. United States regulations confine Native Americans to a very limited group, leaving many community members who embrace their indigenous culture without protection. Furthermore, lack of effectiveness and efficiency in the legal arena has led groups such as the Zia Pueblo to seek redress through other means. Few Native American tribes utilize the protections offered to them by NAGPRA.

### AT: Perm

#### Western intellectual property rights are incompatible with Indigenous cultural expression

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The incompatibility between traditional, Indigenous cultural values and the Western cultural/intellectual property protection mechanisms is multi-dimensional. First, traditional knowledge is typically transmitted through “songs, proverbs, stories, folklore, community laws, common or collective property and invention, practices, and rituals.”44 Given that physical recordings, in any form, of such practices or rituals are often entirely prohibited in Native American communities, meeting the hard copy fixation requirement of the Western IP protection regimes is virtually impossible.45 Second, while Western approaches “incentivize creation for a market economy,” and see intellectual property mainly as a means for an individual or a company to accumulate wealth, in the “communitarian, gift-based culture” of many Native American tribes, such property is considered a common good, to be shared in by all of the members of the community. 46 John (Fire) Lame Deer vividly explained this incompatibility by stating that while “[f]or a white man each blade of grass or spring has a price tag on it,” Indians generally refuse to live in the “Green Frog Skin World,” green frog skin meaning the U.S. dollar. 47 Accordingly, in the context of intellectual property protections, rather than achieving commercialization, the goal of many Indigenous communities is to “preserve the integrity of the knowledge and to keep it safe from appropriation, destruction, deformation, and extinction.”48 Obviously, the mainstream Western IP protection mechanisms fall short of this goal. Copyright law, designed to protect the expression of certain ideas, is of little use in protecting the knowledge itself. Trademarks, although arguably potentially useful for protecting genuine, Native-made handicrafts, are similarly of little help in sheltering traditional knowledge. Patents, due to their strict novelty requirements and short protection timeframes, similarly are ill-suited to protect the generations-old Indigenous knowledge. Finally, trade secret protections, although on the surface quite appealing (assuming that an argument could be made that only a few tribal members possess the relevant knowledge), in practice turn out to be quite powerless, especially against reverse-engineering; a technique which large companies certainly have at their disposal.49