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THE ASCENSION OF INDIGENOUS CULTURAL PROPERTY LAW

BY

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# THE ASCENSION OF INDIGENOUS CULTURAL PROPERTY LAW

Angela R. Riley\*

*Indigenous Peoples across the world are calling on nation-states to “decolonize” laws, structures, and institutions that negatively impact them. Though the claims are broad based, there is a growing global emphasis on issues pertaining to Indigenous Peoples’ cultural property and the harms of cultural appropriation, with calls for redress increasingly framed in the language of human rights. Over the last decade, Native people have actively fought to defend their cultural property. The Navajo Nation sued Urban Outfitters to stop the sale of “Navajo panties,” the Quileute Tribe sought to enjoin Nordstrom’s marketing of “Quileute Chokers,” and the descendants of Tasunke Witko battled to end production of “Crazy Horse Malt Liquor.” And today, Indigenous Peoples are fighting to preserve sacred ceremonies and religious practices at places like Standing Rock, Oak Flat, and Bear’s Ears. Though the claims range from “lands to brands,” these conflicts are connected by a common thread: they are all contemporary examples of Indigenous Peoples’ efforts to protect their cultural property.*

*As issues surrounding cultural property play out on the global stage, there is a parallel movement underway within Indigenous communities themselves. More than fifteen years ago, in 2005, I conducted a comprehensive study of tribal law to understand what American Indian tribes were doing to protect their own cultural property within tribal legal systems. Since my original study, the ground around issues of cultural preservation and appropriation has shifted dramatically. Transformative changes in human and Indigenous*

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\* Professor of Law, UCLA School of Law and Director, Native Nations Law and Policy Center. The author extends her deep appreciation to Dean Jennifer Mnookin for substantial research support for this project and to outstanding research assistants Rachel Sweetnam and Emily Kent, without whom this Article could not have been written. I am indebted to my colleagues, Rebecca Tsosie, Kristen Carpenter, and Trevor Reed, for being in conversation with me about the importance of tribal law in protecting Native culture and the work they have done to shape the field. Miigwetch to Sonia Katyal, who continuously inspires me, and to Sonia and Rachel Lim, my collaborators in undertaking future work in this field. Sincere thanks also go to the National Indian Law Library at the Native American Rights Fund, under the outstanding leadership of Library Director Anne Lucke and her team, Nora Hicken and Amanda Rios-Santiago, and also to the Native American Rights Fund, particularly Sue Noe, Anne Lucke, and Ashleigh Fixico, who supported this research in a myriad of ways. My deepest appreciation also to NARF, Sue, and the Indigenous Caucus of WIPO’s Intergovernmental Committee for inspiring this work and for inviting me to be a part of the project. Chi-miigwetch to Kristen Carpenter for her vision and grace in facilitating an agreement to bring the Maaso Kova home and for her thoughtful comments on this Article. The author thanks the *Michigan Law Review* for their outstanding editing of this piece.

rights—including the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples, among others—have reignited interest in Indigenous Peoples’ own laws. Inspired by a convergence of global events impacting cultural rights, in 2020 and 2021, I set out to update my survey results and analyze the tribal cultural preservation systems and tribal laws of all 574 federally recognized American Indian tribes and Alaskan Native Villages in the United States.

This Article reports those findings, situating the results in a human rights framework and leading to a core, central thesis: the data reveal a striking increase in the development of tribal cultural property laws, as Indian tribes seek to advance human and cultural rights in innovative and inspired ways. Indeed, in this Article, I contend we are witnessing a new jurisgenerative moment today in the cultural property arena, with tribal law already influencing decisionmakers at multiple ‘sites’—international, national, and subnational—in real time, with great potential for the future. To further demonstrate this phenomenon, I highlight the case study of the recent agreement to repatriate the Maaso Kova, a ceremonial deer head, from Sweden to the Yaqui peoples, and I also introduce several other examples where the seeds have been planted for the growth of the next jurisgenerative moment in Indigenous cultural property rights.

#### TABLE OF CONTENTS

INTRODUCTION.....	3
I. BACKGROUND.....	7
A. <i>Tribal Sovereignty: A Law of One’s Own</i> .....	7
B. <i>Mismatch</i> .....	10
C. <i>Why Tribal Cultural Property Law?</i> .....	18
1. Living Sovereignty.....	19
2. Magnifying Cultural Difference.....	20
3. External Application.....	22
II. RESEARCH FINDINGS.....	23
A. <i>Methodology</i> .....	23
B. <i>Overview: Comparative Findings and Identifying Trends</i> .....	27
1. Tribal Websites.....	29
2. Tribal Cultural Preservation Programs and Tribal Historic Preservation Officers.....	30
3. Tribal Cultural Property Laws.....	32
a. Cultural Preservation.....	34
b. Burial Sites, Funerary Objects, and Repatriation....	37
c. Sacred Sites and Ceremonial Places.....	42
d. Intangible Property.....	48
e. Data Sovereignty.....	56

III.	TRIBAL LAW INNOVATIONS AND THE NEXT JURISGENERATIVE MOMENT.....	61
	A. <i>Repatriation of the Yaqui Maaso Kova</i> .....	61
	B. <i>Jurisgenerative “Seeds” of Change</i> .....	65
	CONCLUSION.....	70

#### INTRODUCTION

Indigenous Peoples across the world are calling on nation-states to “decolonize” laws, structures, and institutions that negatively impact them. Just recently, the *New York Times* ran a featured story highlighting how Indigenous Peoples have appealed to courts and international institutions to aid in the goal of “reversing colonialism.”<sup>1</sup> Though the claims are broad based, there is a particular growing global emphasis on issues pertaining to Indigenous Peoples’ cultural property and the harms of cultural appropriation, with calls for redress increasingly framed in the language of human rights.<sup>2</sup>

In the United States, for example, Indigenous advocacy around cultural appropriation has led to the Washington football team’s decision to finally abandon its infamous R-skins team name<sup>3</sup> and has challenged marks seemingly indelibly ingrained in the American fabric, like the Jeep Cherokee<sup>4</sup> or the Indian maiden on Land O’ Lakes butter, which alternately reify negative stereotypes of Native peoples or attempt to erase Indigenous identity altogether.<sup>5</sup> For Indigenous Peoples, the demands for protection of Indigenous cultural property run deep and are directly linked to the dispossession of Indigenous lands, broken treaties, and Native genocide.<sup>6</sup>

Over the last decade, Native people have actively fought to defend their cultural property. The Navajo Nation sued Urban Outfitters to stop the sale

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1. Max Fisher, *Indigenous People Advance a Dramatic Goal: Reversing Colonialism*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/06/17/world/canada/indigenous-kamloops-graves.html> [perma.cc/86ZT-5W48].

2. See *id.* (discussing the United Nations Declaration on the Rights of Indigenous Peoples).

3. See Angela R. Riley & Sonia K. Katyal, Opinion, *Aunt Jemima Is Gone. Can We Finally End All Racist Branding?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/opinion/aunt-jemima-racist-branding.html> [perma.cc/C35J-YTKN].

4. Angela R. Riley, Sonia K. Katyal & Rachel Lim, Opinion, *The Jeep Cherokee Is Not a Tribute to Indians. Change the Name.*, WASH. POST (Mar. 7, 2021, 7:00 AM), <https://www.washingtonpost.com/opinions/2021/03/07/jeep-chokeee-name-change-native-americans/> [perma.cc/CW58-PLNW].

5. Riley & Katyal, *supra* note 3.

6. Benjamin Madley, *Reexamining the American Genocide Debate: Meaning, Historiography, and New Methods*, 120 AM. HIST. REV. 98, 98–99 (2015).

of “Navajo panties,”<sup>7</sup> the Quileute Tribe sought to enjoin Nordstrom’s marketing of “Quileute Chokers,”<sup>8</sup> and the descendants of Tasunke Witko battled to end production of “Crazy Horse Malt Liquor.”<sup>9</sup> And today, Indigenous Peoples are fighting to preserve sacred ceremonies and religious practices at places like Standing Rock, Oak Flat, and Bear’s Ears.<sup>10</sup> Though the claims range from “lands to brands,”<sup>11</sup> these conflicts are connected by a common thread: they are all contemporary examples of Indigenous Peoples’ efforts to protect their cultural property.<sup>12</sup> And this advocacy is not limited to the United States, as Indigenous Peoples across the globe assert their rights and push back against the mass appropriation and commodification of Indigenous culture.<sup>13</sup>

As issues surrounding cultural property and cultural appropriation play out on the global stage, there is a parallel movement underway within Indigenous communities themselves. More than fifteen years ago, I set out to conduct a comprehensive study and report on what American Indian tribes within the lower forty-eight states were doing to protect their own cultural and intellectual property within tribal legal systems.<sup>14</sup> Since my previous findings on this subject were published in 2005, there have been seismic shifts in

7. Alysa Landry, *Navajo Nation and Urban Outfitters Reach Agreement on Appropriation*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/navajo-nation-and-urban-outfitters-reach-agreement-on-appropriation> [perma.cc/AEE3-CR8G].

8. *Cuff ‘Em! Quileute Tribe Sues over Quileute-Branded ‘Twilight’ Merch*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/cuff-em-quileute-tribe-sues-over-quileute-branded-twilight-merch> [perma.cc/7ACE-BPZD].

9. Frank Pommersheim, *The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42 (2012).

10. Kristen A. Carpenter & Angela R. Riley, *Standing Tall*, SLATE (Sept. 13, 2016, 1:30 PM), <https://slate.com/news-and-politics/2016/09/why-the-sioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html> [perma.cc/K6FM-J3EZ]; Joshua Partlow, *Tribes Want Immediate Action to Reverse Trump’s Cut to Bears Ears National Monument*, WASH. POST (Sept. 28, 2021, 6:51 PM), <https://www.washingtonpost.com/climate-environment/2021/09/28/bears-ears-monument-tribes-biden> [perma.cc/SPJ8-6G7G]; Dana Hedgpeth, *This Land Is Sacred to the Apache, and They Are Fighting to Save It*, WASH. POST (Apr. 12, 2021, 7:00 AM), <https://www.washingtonpost.com/history/2021/04/12/oak-flat-apache-sacred-land> [perma.cc/LH7Z-FGTF].

11. Professor Sonia K. Katyal coined this phrase. Interview with Sonia K. Katyal, Haas Distinguished Chair, Assoc. Dean for Faculty Dev. & Rsch., and Co-Director of the Berkeley Ctr. for L. & Tech., Univ. of Cal. Berkeley Sch. of L. (July 2020).

12. For a complete definition and discussion of “cultural property,” see *infra* Section II.B.3.

13. See, e.g., *Yumbulul v Reserve Bank of Australia* [1991] FCA 332 (25 July 1991) (Austl.) (considering a claim by an Australian Aboriginal artist regarding a bank’s use of his Morning Star Pole design on a \$10 note, with the artist asserting his claims under the tribal law of the Galpu clan).

14. Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005) [hereinafter Riley, *Straight Stealing*]. Leading Indian law scholars have been writing about tribal law for almost a century. See, e.g., K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941); RENNARD STRICKLAND, *FIRE AND THE*

Indigenous rights and an increased awareness of the devastating consequences of colonization on Indigenous Peoples. Moreover, in 2007, the U.N. General Assembly overwhelmingly adopted the U.N. Declaration on the Rights of Indigenous Peoples (the Declaration), and in 2010 the United States finally reversed its initial opposition and expressed its support for the Declaration.<sup>15</sup> In addition to these remarkable changes, as my coauthor Kristen Carpenter and I have written elsewhere, the world has since witnessed a “jurisgenerative moment” in Indigenous and human rights.<sup>16</sup> We described that phenomenon as typified by a dynamic system of “multiple site”<sup>17</sup> engagement, and we demonstrated how Indigenous rights developing at tribal, national, and international levels have produced a complex interplay of laws that have greatly expanded protections for Indigenous Peoples.

Today, the ground around issues of cultural rights and cultural appropriation is shifting yet again. In recent years, tribes have employed a combination of tribal,<sup>18</sup> federal,<sup>19</sup> and international laws<sup>20</sup> in attempts to protect their cultural property through both litigation and diplomacy. Not surprisingly, much has been written about the scope and potential of federal and international laws to address these issues, while the tribal law chapter of this jurisgenerative

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SPIRITS (1975). In the last several decades, there have been in-depth examinations of tribal law on topics of great import to tribes. See, e.g., Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 159 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) (religious freedom); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997) (tribal court jurisprudence); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003) (individual rights); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761 (2000) (Hopi common law). There is now also a tribal law casebook as well. MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020). My own work has extensively explored tribal law. See e.g., Riley, *Straight Stealing*, *supra* (cultural property); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012) (firearm regulation); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016) (criminal VAWA prosecutions).

15. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP], [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf) [perma.cc/D6MQ-9MWK]; *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS (2022), <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [perma.cc/CK53-BZS5].

16. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014).

17. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1670 (2006).

18. See *In re Estate of Tasunke Witko v. G. Heileman Brewing Co.*, 23 Indian L. Rptr. 6104 (Rosebud Sioux Sup. Ct. 1996) (case involving rights of publicity of “Crazy Horse” under Lakota law).

19. *Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098 (D.N.M. 2016).

20. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733 (Fr.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110 (Fr.).

story has remained obscured in the background. But it is a story that demands to be told. This Article seeks to do just that.

In the summer of 2020, I embarked on a new project. Expanding dramatically—in both breadth and depth—on my 2005 work, I researched and analyzed the tribal cultural preservation systems and codes of all 574 federally recognized American Indian tribes and Alaskan Native Villages in the United States.<sup>21</sup> My research findings lead me to a core, central thesis: the data reveal a striking increase in the development of tribal cultural property laws, as Indian tribes seek to advance human and cultural rights in innovative and inspired ways. And my work goes a step further, demonstrating through a case study of the repatriation of the Maaso Kova, a ceremonial deer head from Sweden to the Yaqui peoples, that we are witnessing a new jurisgenerative moment today in the cultural property arena, with tribal law working in conjunction with laws at multiple sites—international, national, and subnational—to influence external decisionmakers in real time.

This Article makes an additional, key contribution to the Indigenous rights literature, as it affirms the enormous significance of the development of tribal cultural property law, even where tribes have limited jurisdiction over what happens beyond reservation borders.<sup>22</sup> In contrast to international and federal laws, tribal law promotes tribal sovereignty and Indigenous self-determination, as articulated in the Declaration, is uniquely situated to capture and reflect Indigenous cultures and lifeways, and can and *does* shape outcomes in ongoing cultural property disputes. For all these reasons, understanding tribal cultural property law and the significance it holds in Indigenous communities is essential to truly grasp the threat posed to tribal cultural survival and to ensure continued Indigenous existence.

This Article proceeds as follows. Part I briefly explains the metes and bounds of tribal sovereignty and the scope of Native Nations' authority to enact and enforce tribal law within their territories and over their members. Going further, Part I describes the considerable mismatch between U.S. law and Indigenous Peoples' cultural property and explains why tribal law in this area is so essential. Then, building off my original, in-depth research of the tribal codes of the 574 tribes and villages in the United States, Part II describes and

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21. My previous project excluded Alaskan Native Villages. This project does not discuss Native Hawaiians because they are uniquely situated within the political contours of the United States and do not have federal recognition as an Indian tribe. This is not to say, however, that Native Hawaiians do not exercise their "cultural sovereignty" to advance their language, lands, resources, and culture, despite this status. See Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing "Indigenous Data Sovereignty,"* 80 MONT. L. REV. 229, 266 (2019).

22. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 868 (2016); Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 97–99 (2007) (detailing how federal policy drove tribal law underground and how tribes are now revitalizing those laws).



analyzes the findings and offers a comparative analysis regarding changes over the last fifteen years. To drill down on the results, it expands beyond the earlier research, organizing and analyzing tribal cultural property law in five categories: (1) cultural preservation; (2) burial sites, funerary objects, and repatriation; (3) sacred sites and ceremonial places; (4) intangible property; and (5) data sovereignty,<sup>23</sup> and also captures counts of when the tribal codes cite to several relevant federal statutes.<sup>24</sup> Finally, Part III presents a case study of the recent agreement to repatriate the Maaso Kova and also introduces several other examples in tribal, national, and international “sites” where the seeds have been planted for the growth of the next jurisgenerative moment in Indigenous cultural property rights.

## I. BACKGROUND

To provide context for understanding the research results, this Part sets forth some key—and well-settled—background principles. First, Section I.A explains the nature of tribal sovereignty and what it means for tribes to exercise their rights of self-determination to make their own laws and be governed by them. Section I.B documents the ways in which Western law fails to protect Indigenous Peoples’ cultural property and why—particularly in the United States—Indigenous Peoples’ cultural property is so unique. Section I.C briefly details why tribal law in this area is critical to protect Indigenous Peoples’ rights and to cultural survival itself.

### A. Tribal Sovereignty: A Law of One’s Own

At the first point of contact with Europeans, there were hundreds of Indigenous groups in what is now the United States, representing enormous diversity in terms of organization, culture, and language. They were governed according to their own law, tribal law. These tribes were recognized by the United States as sovereign and not subject to the authority of the states.<sup>25</sup> Thus, with some limited exceptions,<sup>26</sup> tribes are largely governed by federal

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23. As a technical matter, all the codes reported by this research fall within the first category: (1) cultural preservation. In this sense, it is a cumulative category comprised of all the cultural property laws. However, in the analysis breakdown, *infra* Part II, this category is presented both collectively and separately in order to give space to discuss “general” cultural preservation codes that did not otherwise fall within subcategories (2)–(5).

24. As discussed more fully in Part II, I sought specifically to find where tribal laws referenced the Indian Arts and Crafts Act, the Native American Graves Protection and Repatriation Act, the Copyright Act, the Lanham Act, and federal patent law.

25. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”), *overruled on other grounds by Nevada v. Hicks*, 533 U.S. 353 (2001).

26. See, e.g., Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) (withdrawing federal criminal jurisdiction from Indian country in

and tribal law. Moreover, tribes were not party to the U.S. Constitution, nor are they constrained by the Bill of Rights.<sup>27</sup> Thus, tribes historically had and maintain today a limited sovereignty within the borders of the United States.<sup>28</sup>

Because of tribes' sovereign status, the United States negotiated hundreds of treaties with Indian nations—as nations—to procure their lands, oftentimes in return for peace, protection, and the guarantee that tribes would be able to continue to live apart from the dominant society in a “measured separatism.”<sup>29</sup> Ultimately, the United States broke many (if not all) the treaties made with Indian nations, and Congress ended treaty making with tribes in 1871.<sup>30</sup> Nevertheless, treaties established a baseline of sacred compacts that largely defined the relationship between the United States and the Indian nations.<sup>31</sup>

Though the pendulum of federal Indian policy has swung wildly from empowerment to assimilation and back again over the last two centuries, tribes have consistently been treated as sovereign nations by the United States, albeit subject to the plenary authority of Congress and with some significant limitations imposed by the Supreme Court.<sup>32</sup> This means, for example, that a core tenet of federal Indian law has been a respect for tribes' inherent authority to define their own tribal laws and be governed by them.<sup>33</sup>

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select states, extending state criminal jurisdiction over the same territory, and granting select civil adjudicatory jurisdiction over cases arising in Indian Country).

27. See *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the U.S. Constitution does not apply to the grand jury indictment of an Indian defendant in Indian country); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act does not provide for a cause of action to federal court outside of a petition for habeas).

28. See *Worcester*, 31 U.S. 515 (holding that laws of the state of Georgia do not apply in Indian country). *But see Nevada v. Hicks*, 533 U.S. 353 (2001) (recognizing that state sovereignty extends into reservation borders for some purposes).

29. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 14 (1987).

30. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71); see also WILKINSON, *supra* note 29, at 19 (“Congress’s decision in 1871 to bring treaty making with tribes to an end signaled a downgrading in the political status of tribes.”).

31. Robert A. Williams, Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 995–96 (1996).

32. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding congressional plenary authority regarding Indian affairs); *Montana v. United States*, 450 U.S. 544 (1981) (holding that tribes only have inherent sovereign civil regulatory jurisdiction over nonmembers on fee land within the reservation within limited circumstances); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that Indian tribes do not have inherent criminal jurisdiction over non-Indians for crimes committed in Indian country); cf. *United States v. Cooley*, 141 S. Ct. 1638 (2021) (holding that tribal police officers can conduct a temporary stop and search of a non-Indian criminal suspect under the second “*Montana* exception”); Violence Against Women Reauthorization Act of 2013 § 904, 25 U.S.C. § 1304 (affirming inherent tribal criminal jurisdiction over all defendants who commit certain acts of domestic or dating violence within reservation borders).

33. *Williams v. Lee*, 358 U.S. 217 (1959) (upholding the rights of reservation Indians to make their own laws and be governed by them).

As a result of this unique history,<sup>34</sup> day-to-day life in Indian country is largely governed by tribal law, and the development and maintenance of tribal legal systems is a central feature of Native governance.<sup>35</sup> Much of this governance takes forms that are familiar to those seen in the U.S. system and may include governmental institutions characterized by, for example, a separation of powers—including an executive, legislative, and judicial branch.<sup>36</sup> But, in practice, there is an enormous range of governmental structures within tribal nations. Such systems may deviate, even dramatically, from those found within the state and federal systems and may be built around village systems, theocracies, or clan relations, among many others.<sup>37</sup>

Thus, tribal law, which is each tribe's own law, is any law that is enacted by an Indian tribe, either formally or informally, whether oral or written.<sup>38</sup> Tribal law is often developed from a wide variety of sources and can manifest in various forms. Many tribes draw from tribal custom and tradition—or tribal customary law—in establishing at least some of their tribal laws.<sup>39</sup> Tribal customary law has a particular resonance with Native communities because it is generally reflective of internal customs, traditions, and lifeways with varying degrees of influence from exogenous systems.<sup>40</sup> Its legitimacy is established and maintained by repetition and longevity, and it is often monitored and enforced by respected elders, religious leaders, and community experts.<sup>41</sup> One of the advantages of tribal customary law is that it may be particularly well-suited to capture Indigenous values and lifeways in a way that Western law cannot.<sup>42</sup>

But tribes can and do go beyond tribal customary law in writing and enacting contemporary laws. Like all sovereigns, tribes are part of an interrelated

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34. See generally *United States v. Kagama*, 118 U.S. 375 (1886) (identifying Indian nations' sovereignty as "anomalous" in character).

35. See Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

36. See, e.g., CITIZEN POTAWATOMI NATION CONST. arts. 5, 6, 11 [perma.cc/2Y2K-ZRPH].

37. See Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1039 (1990).

38. See, e.g., Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 274 (2002); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 249 (1994).

39. See Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 320 (2008) (discussing some of the challenges of using tribal custom in tribal lawmaking).

40. Cf. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978).

41. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 453 (2000) ("It is the community-wide belief that a norm is legally required that provides customary law with authority and legitimacy.").

42. It may be difficult for some tribes to ascertain tribal custom and tradition for a variety of reasons, including mass disruption in cultural continuity caused by colonial practices of removal, allotment, assimilation, prohibitions on Native religion, and the mass removal of Indian children into white Christian boarding schools, among others.

system of legal actors. They may look, for example, to other tribes, to international human rights or Indigenous rights law,<sup>43</sup> to federal law,<sup>44</sup> to states,<sup>45</sup> or elsewhere in developing their tribal laws.

In whatever form tribal law takes and from whatever influence, its very existence is an act of sovereignty, and it perhaps has no greater importance in Native governance than in the area of cultural property, which I will turn to more fully in Section I.C.

### B. Mismatch

In this Section, I set forth background principles to briefly explain the problem of protecting Indigenous Peoples' cultural property under Western law, with a brief discussion of what makes Indigenous Peoples' cultural property claims unique. I further lay out the contours of existing international and federal laws to explain both their importance, but also their shortcomings in addressing Indigenous cultural property concerns. I turn to the critical role tribal law plays in the subsequent Section I.C.

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In this Article, I draw on Indigenous Peoples' own expansive worldviews, also reflected in evolutions in the field over the last few decades, to employ a broad definition of "cultural property." Early definitions of cultural property focused almost entirely on tangible resources,<sup>46</sup> specifically those that were thought to have ethnographic, artistic, or historical value.<sup>47</sup> Today, the field has shifted from strict property conceptions toward the more expansive con-

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43. See, e.g., UNIV. OF COLO. L. SCH., NATIVE AM. RTS. FUND & UCLA SCH. OF L., TRIBAL IMPLEMENTATION TOOLKIT (2021), <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf> [perma.cc/22U2-VJJE].

44. See *infra* Part II.

45. For a criticism of importing state law into tribal legal systems, see Robert B. Porter, *Tribal Lawyers as Sovereignty Warriors*, KAN. J.L. & PUB. POL'Y, Winter 1997, at 7, 12 ("If the tribal lawyer does nothing other than, for example, borrow the state . . . law, the lawyer is doing nothing other than advising the tribe to replicate itself in the image of the dominant society. Because behavior does flow from the legal environment that encourages it, the tribal lawyer in that situation is unwittingly contributing to the demise of that tribe.").

46. See JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES (2d ed. 2009).

47. See LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY 110 (2003); see also Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 17, 1970, 96 Stat. 2350, 823 U.N.T.S. 232 (defining cultural property as "specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science and which belongs to" one of a list of fifteen categories). For the current implementation of the 1970 UNESCO Convention in the U.S. Code, see Convention on Cultural Property Implementation Act § 302, 19 U.S.C. § 2601(6) (relying on a similar definition).

ception of “cultural heritage” and, concomitantly, moved from the strictly tangible to the intangible.<sup>48</sup> Contemporary legal instruments capture this transformation, wherein the “old” tangible categories—such as land, water, and timber—work alongside intangible ones—folklore, traditional knowledge, and even Native religions—in the more expansive contemporary definition of “cultural property” that I employ here.<sup>49</sup>

My work is also attentive to another foundational shift in cultural property: the departure from the constrained focus on the nation-state as a stand-in for the cultural property claimant.<sup>50</sup> There is a growing emphasis globally on protecting the rights of Indigenous Peoples in particular. This body of theory, policy, and law recognizes that the nation-state is often an inadequate substitute for Indigenous groups existing within—or sometimes traversing—national borders.<sup>51</sup> Consider the recent high-profile case of the Hopi Tribe in the United States attempting to stop the sale of its sacred Katsina at auction in Paris, France.<sup>52</sup> The repatriation pursuit—though assisted by the United States

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48. For a sampling of literature expounding on the content of “cultural property,” see, for example, Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *Clarifying Cultural Property*, 17 INT’L J. CULTURAL PROP. 581 (2010); Susan Scafidi, *Introduction: New Dimensions of Cultural Property*, 31 FORDHAM INT’L L.J. 684 (2008) (discussing briefly changes in cultural property over time); Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT’L L.J. 690 (2008); and John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986) (describing national and international paradigms of cultural property).

49. See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 131–41 (2d ed. 2004) (reviewing international legal instruments, including the International Covenant on Civil and Political Rights (ICCPR), UNESCO Declaration of the Principles of International Cultural Cooperation and Universal Declaration on Cultural Diversity, and others that protect indigenous “cultural integrity”); UNDRIP, *supra* note 15 (enumerating indigenous cultural heritage protections under the U.N. Declaration on the Rights of Indigenous Peoples).

50. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1033–34 (2009).

51. My colleague Kristen Carpenter and I have written extensively regarding the bases upon which to consider Indigenous groups as “peoples.” See *id.* at 1046–65; Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENV’T L.J. 313, 346–57 (2008); Riley, *supra* note 35, at 1123–24. For seminal works on the rights and responsibilities of “peoples” more generally, compare JOHN RAWLS, *THE LAW OF PEOPLES* 23–25, 79–81 (1999), which proposes categories of “peoples” that should be recognized as playing a role in the international legal order and articulates limits on the behavior of non-liberal peoples such that they may still retain their autonomy, with MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE* 244, 263 (2006), which critiques Rawls’s concept of “peoples” as vague and argues for a more robust view of human rights.

52. See generally Krishnadev Calamur, *Mystery Bidder at French Auction Plans to Return Sacred Hopi Items*, NPR (Dec. 11, 2013, 1:29 PM), <https://www.npr.org/sections/thetwo-way/2013/12/11/250186793/mysterybidder-at-french-auction-plans-to-return-sacred-hopi-items> [perma.cc/44L7-4SHB]. Katsinas are sacred objects for the Hopi people, and the Hopi refer to them as “friends.” They are used in ceremonies, are not to be referred to as “masks” or “artifacts,” and should not be displayed. *Id.*

and the State Department—was, rightfully, Hopi-led and informed.<sup>53</sup> And the goal was to return the Katsina to the Hopi people, not to the United States itself.<sup>54</sup> Though perhaps intuitive as a matter of justice, such is not always the outcome for Indigenous Peoples, where nation-states often continue to claim Indigenous cultural property as their own.<sup>55</sup>

Circumstances calling out for laws to better protect the cultural and intellectual property of Indigenous Peoples have been widely reported, and there is a voluminous body of scholarship documenting the inadequacy of Western law to protect Indigenous Peoples' cultural property.<sup>56</sup> From violating the sanctity of private ceremonies,<sup>57</sup> to the destruction of sacred sites,<sup>58</sup> to allowing appropriation of songs, stories, and medicinal knowledge,<sup>59</sup> Western laws have repeatedly fallen short of offering a framework for Indigenous Peoples to thrive, especially through the preservation of Native culture.<sup>60</sup> Such appropriation and cultural destruction causes, as leading scholar Rebecca Tsosie has written, "cultural harm" to Indigenous Peoples.<sup>61</sup> As Tsosie explains, "[t]he failure to protect Native cultures . . . perpetuates significant harm to Native people as distinctive, living cultural groups."<sup>62</sup> It further replicates and allows racial hierarchies, discrimination, and systems of dominance that have been deployed for hundreds of years to harm, and even destroy, Indigenous Peoples.<sup>63</sup>

Why are Indigenous Peoples so vulnerable in this space? Quite simply, Indigenous Peoples' cultural property concerns are unique. First, for many

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53. See LAETITIA NICOLAZZI, ALESSANDRO CHECHI & MARC-ANDRÉ RENOLD, UNIV. OF GENEVA ART-LAW CTR., CASE HOPI MASKS – HOPI TRIBE V. NÉRET-MINET AND ESTIMATIONS & VENTES AUX ENCHÈRES (2015), <https://plone.unige.ch/art-adr/cases-affaires/hopi-masks-2013-hopi-tribe-v-neret-minet-and-estimations-ventes-aux-encheres/case-note-2013-hopi-masks-2013-hopi-tribe-v-neret-minet> [perma.cc/5CSN-LU3Q].

54. See Calamur, *supra* note 52.

55. See, e.g., Randy Kennedy, *Yale and Peruvian Officials Agree on Return of Artifacts*, N.Y. TIMES, Sept. 17, 2007, at E3 (discussing return of artifacts to nation of Peru, not to the Indigenous descendants of their creators).

56. See, e.g., *infra* note 57 and accompanying text.

57. E.g., Sam Lewin, *Sovereignty Symposium Contains Scary Messages*, NATIVE AM. TIMES, June 9, 2004, at 1 (discussing the unauthorized videotaping of a sacred Pueblo ceremony that was then duplicated and distributed on the Internet).

58. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (affirming the right of the federal government to build a road through a site sacred to the Yurok, Karuk, and Tolowa Indians, thus essentially destroying the tribes' ability to practice their religion).

59. See, e.g., *Bulun v R & T Textiles Proprietary Ltd.* (1998) 86 FCR 244 (Austl.).

60. See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000).

61. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 310 (2002); see also Trevor Reed, *Indigenous Dignity and the Right to Be Forgotten*, 46 BYU L. REV. 1119, 1127–28 (2021).

62. Tsosie, *supra* note 61, at 310.

63. See *id.* at 311.

Indigenous Peoples, tangible and intangible aspects of culture are not strictly siloed as they might be in Western law.<sup>64</sup> Land, religion, creation, design—these are all connected as an interrelated whole for Indigenous Peoples. Unlike the strict separation of land and culture in Western law, for example, for Indigenous Peoples, “traditional knowledge . . . represents a holistic system of cultural knowledge.”<sup>65</sup> Further, objects that may seem commonplace—and, in fact, may be used as part of everyday life—can also be imbued with spiritual meaning and power. One Santa Clara Pueblo tribal member explained: “A pot is not just a pot. In our community, the pots we create are seen as vital, breathing entities that must be respected as all other living beings.”<sup>66</sup>

In fact, Indigenous Peoples’ cultural property is attached to and springs from the earth itself, in a complex relationship between religion, land, culture, and law.<sup>67</sup> For Native peoples, some of whom live in concert with the earth and practice land-based religions, the dispossession of Indian lands has had the direct consequence of destroying Indigenous Peoples’ cultural property as well. Many tribes were removed from their traditional territories, unable to access sacred sites and practice ceremonies. Songs, stories, dances, and rituals tied to those places were disrupted. Traditional knowledge connected to *in situ* flora and fauna was lost, as were the medicines tribes had developed since time immemorial. Quite simply, for Indigenous Peoples, destruction of the physical environment often brings with it cultural devastation.<sup>68</sup>

Thus, for Indigenous Peoples, dispossession is inextricably intertwined with appropriation. In the United States, for example, the history of taking Indian lands and destroying Indian religions, as well as annihilation through genocide, removal, allotment, and assimilation, has created a particular brand of simultaneous Indian fetishism and Indian destruction. This phenomenon is well-documented in a body of literature that explains how colonization both destroyed and appropriated Indian culture.<sup>69</sup> Consider, for example, that generations of Americans grew up playing “cowboys and Indians,” in a bizarre

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64. See Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1138 (2012) (“[M]any Native societies operate within a holistic understanding of the rules and responsibilities that govern the relations between people and all components of the natural world, whether human or non-human.”).

65. Rebecca Tsosie, *Indigenous Peoples and “Cultural Sustainability”: The Role of Law and Traditional Knowledge*, in TRADITIONAL ECOLOGICAL KNOWLEDGE 229, 231 (Melissa K. Nelson & Dan Shilling eds., 2018).

66. Tessie Naranjo, *Thoughts on Two World Views*, in IMPLEMENTING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT 21, 22 (Roxana Adams ed., 2001).

67. For a full discussion of these concepts, see Carpenter et al., *supra* note 50.

68. See Naranjo, *supra* note 66, at 22 (“Respect of all life elements—rocks, trees, clay—is necessary because we understand our inseparable relationship with every part of our world.”).

69. See PHILIP J. DELORIA, PLAYING INDIAN 20 (1998) (documenting accounts of Whites “playing Indian” as early as the 1700s, in part as a way to facilitate a distinctly American identity); SHARI M. HUHDORF, GOING NATIVE 6, 14 (2001) (identifying simultaneous idealization and destruction of Native peoples).

simultaneous homage to Native culture and celebration of the destruction of the “merciless Indian Savages.”<sup>70</sup>

Moreover, the growth of anthropology and rapid westward expansion combined to fuel the mass unearthing of Indian graves and the removal of the human remains, funerary objects, and cultural patrimony contained therein.<sup>71</sup> The result in the United States was the widespread appropriation of all things Native.<sup>72</sup> Quite simply, the view was that Native people were doomed to “vanish,” and anything that belonged to the tribes—land, water, timber, resources, culture, tradition, and even ancestors—was free and available for the taking.<sup>73</sup> And all of this was supported and fueled by U.S. law.<sup>74</sup> As one Lakota activist put it, “[j]ust as our traditional homelands were stolen and expropriated without regard, so too has our very cultural identity.”<sup>75</sup>

In the wake of this disturbing history of dispossession, in the last several decades the United States has responded with Native-specific cultural property legislation. For example, in the early 1930s, a flood of counterfeit goods into the United States threatened to decimate struggling reservation economies that largely relied on Indian “handicrafts”—such as jewelry, silversmithing, rugs, pottery, and others—that provided a central source of income to Native communities.<sup>76</sup> To thwart this, Congress passed the Indian Arts and Crafts Act (IACA), which largely functions as a truth-in-advertising law. That is, the Act prohibits sellers from falsely suggesting their products are Indian produced, an Indian product, or made by an Indian tribe, if they are not.<sup>77</sup>

In many ways, the IACA parallels U.S. trademark law, though with some important nuances. A key feature of the IACA is that it does not prohibit anyone from making or selling goods that might be similar, or even identical, to Native goods and art. It merely works—through the imposition of civil and criminal penalties—as a legal barrier to artists claiming their work is Native when it is not. To give an example, only a Potawatomi Indian can sell “Potawatomi quill earrings,” and it is within the power of the tribes themselves to

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70. Riley & Katyal, *supra* note 3; see THE DECLARATION OF INDEPENDENCE (U.S. 1776).

71. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40–41 (1992).

72. Riley & Carpenter, *supra* note 22, at 869 (“In this way, we argue that U.S. law and policy has long facilitated the process of non-Indians ‘owning Red’—by which we mean the widespread practice by which non-Indians claim and use Indian resources for themselves, often without attribution, compensation, or permission, causing harm and loss to Indian people.”).

73. Riley & Carpenter, *supra* note 22, at 876.

74. For a full discussion of Indian appropriation, the history, and the contemporary ramifications, see *id.* at 869–91.

75. Tansy Hoskins, *Fake Native American Clothing Ranges Show the Darker Side of Fashion*, *Guardian* (Aug. 22, 2013, 12:26 PM), <https://www.theguardian.com/sustainable-business/fake-native-american-clothing-dark-side-fashion> [perma.cc/QTC2-3BAN].

76. Robert Fay Schrader, *The Indian Arts and Crafts Board: An Aspect of New Deal Indian Policy 100–07* (April 1981) (Ph.D. dissertation, Marquette University) (ProQuest).

77. See 25 U.S.C. § 305e.



determine who is, and is not, a tribal member.<sup>78</sup> There are additional provisions within the Act that allow for an artist to use a Native designation if they are “certified as an Indian artisan by an Indian tribe.”<sup>79</sup> Because of the complicated nature of tribal membership—with multi-layered statuses such as “descendant” and others—the IACA empowers tribes to make these important designations.

Additionally, in response to hundreds of years of human rights abuses during which the United States ignored or even encouraged the plundering of Native gravesites,<sup>80</sup> Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) into law in 1990.<sup>81</sup> NAGPRA established guidelines for the repatriation of Indigenous remains and certain artifacts from federally funded museums, criminalized trafficking of wrongfully acquired Indian cultural property,<sup>82</sup> and set forth consultation procedures to govern future excavations of Indian human remains and funerary objects on tribal or federal lands.<sup>83</sup> Despite its flaws, NAGPRA still stands today as a model for repatriation laws and is one of the most important pieces of human rights legislation ever enacted in the United States.<sup>84</sup>

These laws certainly are valuable, and both offer some protection for Indigenous Peoples’ cultural property; however, they are not specifically targeted toward many facets of Indigenous culture that are particularly vulnerable, including religious freedom and intangible cultural property. With regard to the latter, for example, the United States appears quite reluctant to take an active leadership role. When asked to speak to these concerns at a meeting of the United Nations World Intellectual Property Organization

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78. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 49–50 (1978) (upholding the Santa Clara Pueblo’s right to determine their own tribal membership). For a full discussion of tribal sovereignty and tribal membership, see Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 799–801, 810–13 (2007).

79. 18 U.S.C. § 1159(c)(1); 25 U.S.C. § 305e(a)(1)(B).

80. Trope & Echo-Hawk, *supra* note 71, at 57.

81. *Id.* at 59; Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013).

82. To give teeth to NAGPRA, Congress amended Title 18 of the U.S. Code to “criminalize trafficking in Native American cultural items and funerary objects.” 18 U.S.C. § 1170(a)–(b); Riley, *Straight Stealing*, *supra* note 14, at 85 n.91.

83. 25 U.S.C. §§ 3005–3006.

84. There are currently new regulations being considered to clarify some existing issues with NAGPRA. See NAT’L PARK SERV., 43 CFR PART 10 DRAFT NAGPRA REGULATIONS (2021), <https://www.nps.gov/subjects/nagpra/regulations.htm> [perma.cc/CSX8-D3AZ]. Because NAGPRA was an unfunded mandate, many institutions resisted its requirements, failing to repatriate thousands of ancestors to Indian tribes, which has led to ongoing disputes at federally funded institutions. See, e.g., UC’s *Native American Cultural Affiliation and Repatriation Policy*, UNIV. OF CAL. OFF. OF THE PRESIDENT (Dec. 22, 2021), <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation> [perma.cc/92BZ-9YVU].

(WIPO), which is working on a draft document for the protection of Indigenous Peoples' traditional knowledge,<sup>85</sup> a U.S. representative stated that the United States "does not have intellectual property laws that provide protection specifically for 'traditional knowledge,'" and that it "is not of the view that special intellectual property protection is needed for 'traditional knowledge.'" <sup>86</sup>

International laws, too, have developed in this area as Indigenous Peoples have advocated vociferously for their rights to cultural survival and self-determination under international law.<sup>87</sup> There is now a body of human rights law specifically focused on the flourishing of Indigenous groups. The International Labour Organization's (ILO) Convention Number 169 on the Rights of Indigenous and Tribal Peoples of 1989 addresses Indigenous Peoples' rights, including their right to maintain their separate customs and beliefs, and articulates a standard of "due regard" for the "customs [and] customary laws" of Indigenous and tribal peoples.<sup>88</sup>

WIPO also has played a central role, seeking to develop protections for folklore and traditional knowledge at the international level.<sup>89</sup> In September 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore,<sup>90</sup>

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85. *Intergovernmental Committee (IGC)*, WORLD INTELL. PROP. ORG. [hereinafter *IGC*], <https://www.wipo.int/tk/en/igc> [perma.cc/Q98N-DPQF].

86. Riley, *Straight Stealing*, *supra* note 14, at 73 n.22 (quoting WORLD INTELL. PROP. ORG., SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION FOR TRADITIONAL KNOWLEDGE 123–24 (2001), <https://www.wipo.int/export/sites/www/tk/en/igc/pdf/replies.pdf> [perma.cc/8F7X-4FCF]).

87. Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 664; S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 14–15 (2004). *See generally* Anaya, *supra* note 49.

88. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, Int'l Lab. Org., 28 I.L.M. 1382, [https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) [perma.cc/AL26-7SFA].

89. *IGC*, *supra* note 85.

90. Peter K. Yu, *An Introduction*, 11 CARDOZO J. INT'L & COMP. L. 239, 239–40 (2003). The author is currently serving as a member of the Indigenous Caucus under the credentials of the UCLA Native Nations Law and Policy Center, which is providing expertise and feedback on WIPO's draft text for the IGC.

which is undertaking to draft three separate treaties that would protect traditional knowledge,<sup>91</sup> traditional cultural expressions,<sup>92</sup> and genetic resources,<sup>93</sup> respectively. Additionally, the U.N.'s Convention on Biological Diversity acknowledges the significance of traditional knowledge in preserving biodiversity and achieving sustainable development.<sup>94</sup> And it has particular provisions mandating that parties to the convention “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.”<sup>95</sup>

Perhaps most significantly, in 2007—despite opposition from the four settler nations of the United States, Canada, New Zealand, and Australia—the U.N. General Assembly overwhelmingly adopted the U.N. Declaration on the Rights of Indigenous Peoples.<sup>96</sup> Within a few years, each of these reversed their positions, with the United States being the last in the world to do so in 2010.<sup>97</sup> The Declaration is a capacious document that contains forty-six operative Articles, with several—particularly Articles 11, 12, and 31—advancing Indigenous Peoples’ rights to culture and self-determination.<sup>98</sup> In particular,

91. *IGC*, *supra* note 85; *Traditional Knowledge*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/tk> [perma.cc/5H9C-4E2F] (“Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. . . . Traditional knowledge can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge.”).

92. *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/folklore> [perma.cc/RJU3-JAYV] (“Traditional cultural expressions (TCEs), also called ‘expressions of folklore’, may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. Traditional cultural expressions . . . may be considered as the forms in which traditional culture is expressed; form part of the identity and heritage of a traditional or indigenous community; [and] are passed down from generation to generation. . . . Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.”).

93. *Genetic Resources*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/genetic> [perma.cc/X7AL-7PGB] (“Genetic and other biological resources . . . include, for example, microorganisms, plant varieties, animal breeds, genetic sequences, nucleotide and amino acid sequence information, traits, molecular events, plasmids, and vectors.”)

94. See Marie-Claire Cordonier Segger, *Sustainable Development in the Negotiation of the FTAA*, 27 *FORDHAM INT’L L.J.* 1118, 1193 (2004).

95. Convention on Biological Diversity art. 8(j), June 5, 1992, *reprinted in* SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, *HANDBOOK OF THE CONVENTION ON BIODIVERSITY* 8 (3d ed. 2005), <https://www.cbd.int/doc/handbook/cbd-hb-all-en.pdf> [perma.cc/9SPX-HC64].

96. UNDRIP, *supra* note 15; see also WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE* 3 (2013) (describing the UNDRIP as “a landmark event that promises to shape humanity in the post-colonial age”); Kirsty Gover, *Settler-State Political Theory, ‘CANZUS’ and the UN Declaration on the Rights of Indigenous Peoples*, 26 *EUR. J. INT’L L.* 345, 345 (2015).

97. Gover, *supra* note 96, at 346.

98. UNDRIP, *supra* note 15, arts. 11, 12, 31.

both Articles 11 and 12 of the Declaration maintain that Indigenous Peoples have the right to their own laws, customs, and traditions with regard to culture and cultural property and also maintain rights of cultural revitalization and repatriation.<sup>99</sup>

All these laws—including burgeoning legislation at the nation-state and regional levels—are working together to protect the cultural property of Indigenous Peoples.<sup>100</sup> But they alone are not enough. The continued existence of Indigenous Peoples as such is inextricably intertwined with cultural survival.<sup>101</sup> Fueled by a desire to live their sovereignty and to decolonize laws that have governed life for so long, Indigenous Peoples are working hard to devise tribal laws in a range of areas. Culture and cultural property are at the core of indigeneity, and this has become a central focus of lawmaking, so it is to tribal law that this Article now turns.

### C. Why Tribal Cultural Property Law?

In this Section, I return to tribal law. Specifically, I seek to answer the question—why is tribal law so important in the realm of Indigenous Peoples’ cultural property, particularly when there are real barriers to enforcement of tribal law beyond reservation borders?<sup>102</sup> I answer this question succinctly with three key points: (1) the development and enforcement of tribal cultural property law bolsters tribal sovereignty and Indigenous Peoples’ rights to self-determination as protected by international human rights law; (2) tribal cultural property law has the capacity to capture nuance and context regarding tribally specific lifeways and belief systems in ways that external law and policy

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99. *Id.* arts. 11–12. Article 11 of the Declaration recognizes that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as . . . artefacts . . .” *Id.* art. 11. Additionally, it sets forth that “[s]tates shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” *Id.* Article 12 is broader, recognizing the right of “Indigenous peoples . . . to manifest . . . their spiritual and religious traditions” and “the right to the use and control of their ceremonial objects.” *Id.* art. 12. Article 12 provides that “[s]tates shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.” *Id.*

100. See INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WORLD INTELL. PROP. ORG., TRADITIONAL KNOWLEDGE—OPERATIONAL TERMS AND DEFINITIONS 14 (2002), [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_3/wipo\\_grtkf\\_ic\\_3\\_9.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf) [perma.cc/7K6N-VTLY] (describing national and regional laws and draft laws regarding protection of traditional knowledge).

101. Tsosie, *supra* note 61, at 305–09.

102. For a detailed discussion of the vital role of tribal law in cultural property protection, see HILLARY HOFFMANN & MONTE MILLS, A THIRD WAY 94–112 (2020).

simply cannot; and (3) tribal cultural property law can and does influence external systems, shaping outcomes and further providing invaluable models for national and international legal systems to draw on, refuting the all-too-common argument that protecting Indigenous Peoples' cultural property is too difficult or even impossible. This third concept is fully discussed in Part III.

### 1. Living Sovereignty

Tribes are sovereign governments, and, as such, one duty of sovereignty is to make, enforce, and uphold the rule of law, despite the pressure of outside forces. Accordingly, the development of law and legal institutions generally is essential for tribes to fully exercise their rights of self-determination.<sup>103</sup> Though exogenous forces have had enormous, detrimental impacts on tribal self-governance, tribes have actively engaged in nation-building and in exercises of sovereignty, particularly in the last several decades.<sup>104</sup> These efforts are part and parcel of sovereignty itself—tribes function as governments qua governments, living their sovereignty and not seeking permission or validation from colonial governments to do so. As former Oneida Nation Chief Ray Halbritter has said:

We have empowered ourselves in a way that cannot be denied, and in a way that allows us to do things for our people that we have been unable to do for centuries. . . . I believe that such empowerment is more than just a statement of sovereignty, it is sovereignty, and we have established that sovereignty without waiting or depending on other people to define what that term means. Whatever . . . the pronouncements of the Supreme Court, sovereignty to us is the power to act . . . for ourselves.<sup>105</sup>

Quite simply, tribal law reflects what tribes value and what they seek to protect. Undertaking the process of lawmaking is a distinctly sovereign act and encourages tribes to consider and implement laws in areas they care about within their own communities. This process may challenge, but ultimately strengthen, Indigenous systems of governance and Nation building. Enacting a code that manages, defines, or restricts necessarily moves tribes to contemplate the role of government and its relationship to religious and other institutions on the reservation. Such processes may also promote tribal cohesion by creating community buy-in. Moreover, given the enormous importance of cultural issues to tribes, it further positions tribes to speak with their own voice and to direct their own destiny.

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103. See Anaya, *supra* note 49, at 48–52.

104. See generally Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021) (discussing the importance of understanding tribal law as part of American law).

105. Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 543 (2003) (quoting Ray Halbritter with Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 570–71 (1994)).

## 2. Magnifying Cultural Difference

The active pursuit of a distinct, tribal formulation of cultural property protection is important for the flourishing of Indigenous Peoples and tribal identity.<sup>106</sup> Simply put, as Tsosie has argued: “cultural restoration is essential to the task of building strong Nations in the future.”<sup>107</sup>

There are myriad ways in which tribal law regarding cultural property can and does depart from Western models, making tribal law particularly well suited to protect Indigenous cultural property. For one, Indigenous systems often reflect property conceptions that are distinct from those employed in the U.S. model.<sup>108</sup> Such differences may have particular resonance in the cultural property arena. For example, in contrast to a legal system that is adversarial and modeled on notice, disclosure, and transparency, tribal knowledge may be only partially disclosed or even entirely secret. In some cases, traditional knowledge may not even be widely shared within the tribal community and doing so would violate tribal law.<sup>109</sup> This concern may only be heightened if protection for proposed protective regimes, for example, requires submission of private material to a database that may or may not be made publicly available or necessitates that sacred places be identified in order to be protected under U.S. law.

Issues like these lead to a series of difficult questions. What is sacred, and what is secular? What can and should be shared outside of the tribal community? Will a tribe agree to designate sites as “sacred” to avoid their destruction by development or extractive industry? There are no easy answers here, and any answer must have legitimacy within the tribal community. Each tribe has its own story and history; not every tribe will have consistent views on these matters.<sup>110</sup> Navigating these questions is best situated within the clear domain of the tribes themselves.<sup>111</sup>

One other area where tribal cultural property law may be particularly critical to structuring tribal laws that are culturally relevant is the extent to which tribal law can and does accommodate Indigenous Peoples’ relationships to the land. Though certainly Indigenous Peoples are not homogenous, most Indigenous Peoples in the United States and around the globe share a culture and

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106. See generally, Porter, *supra* note 45.

107. Tsosie, *supra* note 61, at 308–09.

108. Tsosie, *supra* note 21, at 236.

109. See Reed, *supra* note 61, at 1127, n.27.

110. See Jack F. Trope & Dean B. Suagee, *Tribal Sacred Places and American Values*, 17 NAT. RES. & ENV'T 102, 103 (2002) (“It is often the case that tribes are reluctant to reveal certain information for cultural or religious reasons, or because of fears that, once identified, sites will be desecrated.”).

111. See Tsosie, *supra* note 21, at 236.

belief system that builds upon reverence for the natural world.<sup>112</sup> Native religions are often linked to land and to the earth, in sharp contrast to Western religions.<sup>113</sup> Such structures and beliefs are often captured in tribal law. Some tribes afford rights of personhood to nature, for example.<sup>114</sup> Many consider their place of creation to be sacred and holy ground.<sup>115</sup> Tribes still travel to remote locations—often lands from which they were once removed—to conduct ceremonies, pray, gather, or dance.<sup>116</sup> The relationship of Indigenous Peoples to the planet and to religion is one of the areas where Indigenous and Western world views collide. It is also a place where tribes themselves can animate cultural rights through law.

Finally, tribes are by nature more collective and communitarian than Western cultures. This is not to say that tribal cultures—like all cultures—have not evolved or that there are no aspects of individuality in tribal communities. But the worldview quite simply is not based on rabid individualism, which can push to the fore some hard questions about cultural property that are not intuitively handled by a Western legal system. For example, should individual tribal artisans be able to copyright tribal designs? Will the tribe collectively own or steward sacred objects? Are items of cultural or religious significance alienable? Are there goods that can be authorized as commercial, as opposed to those that should remain in the realm of nonfungible? These are questions that each tribe must decide for itself, and tribal law allows for this nuanced consideration.<sup>117</sup>

In all these ways, and in countless others, tribal law can speak to Indigenous cultural property issues in ways that Western law simply cannot.

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112. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 274 (1996).

113. Many Indigenous Peoples, most of whom have a land-based culture, commonly share a deep sense of respect for and spiritual connection with the earth. See *id.* (“A central feature of many indigenous world views is found in the spiritual relationship that Native American peoples appear to have with the environment.”). In Blackstone’s *Commentaries on the Laws of England*, William Blackstone asserted that “[t]he earth . . . and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.” 2 WILLIAM BLACKSTONE, COMMENTARIES \*2–3.

114. See generally, Hannah White, Comment, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129 (2018).

115. *Id.* at 129–37.

116. For instance, more than twenty tribes still travel to Devil’s Tower in Wyoming for various religious celebrations, despite its current location in a National Park. *Indian Religious Freedom at Devil’s Tower National Monument*, INDIAN L. RES. CTR., [https://indianlaw.org/projects/past\\_projects/cheyenne\\_river](https://indianlaw.org/projects/past_projects/cheyenne_river) [perma.cc/CQB3-NBJD].

117. Tsosie, *supra* note 61, at 313 (discussing whether even Hopis themselves should be allowed to sell the sacred kachina dolls); see also *Chilkat Indian Vill., IRA v. Johnson*, 20 Indian L. Rptr. 6127 (Chilkat Tr. Ct. 1993) (deciding, in an Alaskan tribal court, the merits of whether removed artifacts constituted tribal or individual property and whether their removal violated tribal law).

### 3. External Application

Finally, tribal law is essential because there is ample evidence that tribal law is already impacting external legal models and diplomatic relations regarding cultural property decisions. This issue is taken up more fully when I discuss tribal law innovations and the new jurisgenerative moment in Part III, but it bears mentioning a couple of examples here.<sup>118</sup>

In a well-known case, *Chilkat Indian Village, IRA v. Johnson*, the Chilkat Alaskan Native Village sought to recover ceremonial artifacts and whalebone carvings that had been conveyed to a non-Indian art dealer in violation of a tribal ordinance and against the wishes of the community at large.<sup>119</sup> Because these artifacts were items of inalienable cultural patrimony, the ordinance required that any party seeking to remove the property from tribal custody must first seek and obtain permission from the tribe's governing body, the Chilkat Indian Village Council.<sup>120</sup> On appeal in the Ninth Circuit, the court of appeals acknowledged that the Village's property interest in the artifact constituted a "creature of tribal law or tradition."<sup>121</sup> In dismissing the claims in favor of the tribal court, the court cited the customary tribal law of the Tlingit and referred to the artifacts ordinance.<sup>122</sup>

In a separate case involving a sacred site, *Natural Arch and Bridge Society v. Alston*, a group of non-Indians brought a First Amendment claim challenging the National Park Service's management plan for Rainbow Bridge National Monument, arguing that it violated the Establishment Clause.<sup>123</sup> The district court acknowledged the importance of Rainbow Bridge to Navajo culture, telling the story of why the Bridge was "important to [Navajo] spiritual

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118. See *infra* Part III.

119. *Chilkat*, 20 Indian L. Rptr. at 6127. The ordinance provided:

No person shall enter onto the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange a removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.

*Id.* at 6129.

120. Vanessa Magnanini, Note, *Constructing Tribal Sovereignty for the 21st Century: The Story of Lawmaking in Chilkat Indian Village, IRA v. Johnson*, 18 B.C. THIRD WORLD L.J. 45, 52 (1998).

121. *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1473 (9th. Cir. 1989) (holding therefore that the conversion claim did not arise under federal law).

122. *Id.* at 1475–76.

123. 209 F. Supp. 2d 1207, 1214–1215 (D. Utah 2002), *aff'd*, 98 F. App'x 711 (10th Cir. 2004). For a full discussion of Native peoples' access to sacred sites, see Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 HARV. L. REV. 2103 (2021) (book review).



beliefs and identity as a people.”<sup>124</sup> Though never identifying the Navajo tradition as “tribal customary law” per se, the court nevertheless relied on Navajo custom as a basis for shaping the management plan for the site.<sup>125</sup>

These are only two examples of how tribal law influences Western legal systems. In the agency process and many others, there are numerous additional examples. Such cases are growing in scope and import, and a full discussion of this jurisgenerative moment and innovations in tribal cultural property law is the subject of Part III.

## II. RESEARCH FINDINGS

In this Part, I set forth the findings of my research. Section II.A explains the methodology used in my study. Section II.B offers some big-picture insights and comparative analysis regarding changes over the last fifteen years in this area by comparing the 2005 research findings to the 2020 study with regard to tribal websites, cultural preservation programs, and cultural property laws, respectively, and contemplating the implications for Native governance. This Part concludes by analyzing the findings pursuant to new metrics introduced since the 2005 research, organizing tribal cultural property laws around five categories: (1) cultural preservation; (2) burial sites, funerary objects, and repatriation; (3) sacred sites and ceremonial places; (4) intangible property; and (5) data sovereignty. In addition, my study also examined where and how often tribal codes cited specifically to five relevant federal laws: the Native American Graves Protection and Repatriation Act (NAGPRA), the Indian Arts and Crafts Act (IACA), the Copyright Act, the Lanham Act, and federal patent law.

### A. Methodology

The tribal law research period for this project began in the summer of 2020 and concluded in the fall of the same year, with the objective of expanding upon similar research conducted for my 2005 article, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*. When published, *Straight Stealing* was the first comprehensive study of the cultural preservation laws and policies implemented by the federally recognized tribes in the contiguous United States.<sup>126</sup> The research for the 2005 article examined the 351 federally recognized (at the time) tribes located in the lower forty-eight states and focused on tribal websites, cultural resource programs, and tribal codes related to cultural preservation.<sup>127</sup>

This project builds on the 2005 study. While the research framework remained similar between the two projects—documenting the existence of tribal

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124. *Natural Arch*, 209 F. Supp. 2d at 1210.

125. *See id.* at 1223–24.

126. Riley, *Straight Stealing*, *supra* note 14, at 75.

127. *Id.* at 100–01.

cultural preservation programs and then documenting and analyzing every available tribal code—it quickly became clear that an expanded search of tribes was necessary to capture tribal innovations in this space. Accordingly, I sought to include the more than 250 Alaskan Native Villages in the study as well.

Thus, the sample group used for this project was comprised of the 574 tribes from the contiguous forty-eight U.S. states plus Alaska that were federally recognized and eligible to receive services from the Bureau of Indian Affairs as of January 30, 2020.<sup>128</sup> The research consisted of three steps: (1) identifying tribes' official websites; (2) locating information on tribal cultural preservation programs, including the establishment of Tribal Historic Preservation Officers; and (3) researching tribal codes related to cultural preservation generally, which were then broken down further into four more refined categories.

With regard to terminology, the research took a capacious view of codes related to the preservation and protection of culture and cultural property. Broadly speaking, this Article considered “cultural resources” to be those places and things—tangible and intangible—that constitute resources essential for or important to the preservation of culture.<sup>129</sup> However, because almost any tribal program or activity does, in a way, protect tribal culture, the search was limited by the search terms discussed herein. So, for example, a code related to the protection of ceremonial hunting would be captured by this research, whereas a tribal code that set forth general fish and game regulations would not.

For the 345 tribes within the contiguous United States, I first referenced the list of tribes and associated information compiled by the National Indian Law Library (NILL), located at the Native American Rights Fund (NARF). Research was conducted to find tribal cultural resource programs and tribal code sections regarding cultural preservation. When available, links to the tribes' websites, cultural resource programs, and relevant code sections were collected. Further research for the tribes within the contiguous United States, as well as research for the 229 federally recognized tribes within the State of Alaska, was conducted using the Indigenous Law Portal on Law Library Microform Consortium Digital<sup>130</sup> and the Tribal Law Gateway on National Indian Law Library.<sup>131</sup> Both websites offer alphabetical listings of tribes and links to websites and tribal law materials for each tribe. The provided links to tribal

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128. See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462 (Jan. 30, 2020).

129. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 211 (1996) (describing the term “cultural resources” to encompass anything that serves “the goal of cultural preservation”).

130. *Indigenous Law Portal—Tribe Listings*, LLMC DIGIT., <http://llmc.com/Indigenous/Tribe.aspx> [perma.cc/SFZ8-LKKX].

131. *Tribal Law Gateway*, NAT'L INDIAN L. LIBR. <https://www.narf.org/nill/triballaw/index.html> [perma.cc/5ADK-5SUT].

websites and tribal codes were followed to find information about cultural resource programs and to locate cultural preservation codes. Additionally, search engines were used to find updated web addresses and to conduct the most comprehensive research possible. Lexis Advance,<sup>132</sup> which has eight tribal codes, and Westlaw Edge,<sup>133</sup> which has twenty-four tribal codes, were consulted, as well as Tribal Court Clearinghouse,<sup>134</sup> National Tribal Justice Resource Center,<sup>135</sup> and National Congress of American Indians websites.<sup>136</sup>

Once the tribal cultural property laws were identified, they were then searched to find code sections related to cultural preservation generally, as well as citations to the enumerated federal statutes. A broad set of search terms was used, including: cultural resource, cultural property, culture, heritage, history, historic preservation, intellectual property, intangible, tradition, traditional, cultural knowledge, knowledge, language, art, ceremony, craft, religion, religious, burial, grave/s, human remains, conservation, repatriation, burial site, desecration, grave desecration, cemetery, sacred, site, ceremonial, ceremony, natural resources, museum, trademark, patent, copyright, crafts, research regulations, data, research, archive, and permit. The codes were also searched to see if there were references to relevant federal statutory law, including: the Native American Graves Protection and Repatriation Act (NAGPRA), the Indian Arts and Crafts Act (IACA), federal trademark law (Lanham Act), federal copyright law (Copyright Act), and federal patent law.

Findings were organized and analyzed, first, within a combined, general category, discussed herein as (1) cultural preservation. Then, the research was further organized into subcategories: (2) burial sites, funerary objects, and repatriation; (3) sacred sites and ceremonial locations; (4) intangible property; and (5) data sovereignty. References to the five federal laws previously mentioned were also tracked and noted.

As anticipated, many tribes had multiple code sections that fell within each category. For example, one tribe might have numerous code sections related to the protection of burial sites and repatriation. Additionally, some of the tribal codes could logically be listed in multiple categories, such as cases where a tribe's research protocol also addresses the ownership of the resulting intellectual property. And the depth of the treatment of the subject matter varied significantly. For example, one tribe might have a comprehensive code regarding protection of sacred sites, as contrasted with another tribe that briefly

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132. *Codes*, LEXIS ADVANCE, <https://advance.lexis.com/api/permalink/872c18ac-cf5a-4d99-9b8a275edf250aa/?context=1000516>.

133. *Tribal Codes*, WESTLAW EDGE, [https://www.westlaw.com/Browse/Home/StatutesCourtRules/TribalCodes?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Browse/Home/StatutesCourtRules/TribalCodes?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

134. *Tribal Laws/Codes*, TRIBAL CT. CLEARINGHOUSE, <https://www.tribal-institute.org/lists/codes.htm> [perma.cc/QQK6-LV2D].

135. Nat'l Am. Indian Ct. Judges Ass'n, *Nat'l Tribal Just. Res. Ctr.*, FORMSPAL, <https://formspal.com/tribalresourcecenter> [perma.cc/JT3D-5PAL].

136. *Tribal Code Library*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-vawa/resources/code-development/tribal-code-library> [perma.cc/44GL-HAGA].

mentions sacred sites only in the context of criminal prohibitions on desecration. Accordingly, because of these many nuances, rather than counting individual code sections or the number of references to a category within each code, the final counts identify the number of tribes that have codes that fall into each category. Tribes are counted one time within each category regardless of the number of codes in each category or the number of references to each category.

In order to capture and analyze the number of tribes with relevant cultural property laws in the five classifications (plus federal statutes), the tribal counts were organized according to code subject matter, with Category One—Cultural Preservation—comprised of the total number of tribes that had any cultural property laws broadly speaking, as all codes organized into the subcategories, to some extent, satisfy this category's defined parameters. When delineating the number of tribes whose codes fell into each of the remaining four subcategories, I defined the search terms as follows. Subcategory two, Burial Sites, Funerary Objects, and Repatriation, includes those tribes that had codes addressing burials, cemeteries, graves, funerary objects, human remains, desecration of graves, abuse of corpses, and repatriation of remains or culturally significant items. Subcategory three, Sacred Sites and Ceremonial Places, captures those tribes with codes related to places and spaces of cultural, historical, religious, spiritual, or scientific significance, including but not limited to natural landscapes of importance to tribes, churches, or historic structures. Subcategory four, Intangible Property, refers to tribes that have code provisions referring to culture, religion, language, ceremonial practices, traditional knowledge, and ownership of intellectual property. And subcategory five, Data Sovereignty, includes tribes with codes that refer to research regulations, scientific studies, archives, data, archival access, permits for research, and permits for archaeological investigations. The final grouping, references to federal law—which could appear in the research in any of the four subcategories, though most appear in subcategory four (Intangible Property)—includes tribes with codes that reference, respectively, the NAGPRA, the IACA, the Lanham Act, the Copyright Act, and federal patent law.

There are some important limitations to this research that should be noted from the outset. This is not a quantitative empirical project, and there are constraints presented by both the data and methodology. Regarding cultural preservation programs, for example, this research almost certainly did not uncover all relevant information, either because some tribes with tribal cultural preservation programs do not maintain a tribal website or do not identify the relevant programs on the tribal website. Some tribal websites require login information for viewing materials, so in some cases access was limited. When it came to researching tribal codes, similar barriers exist. Some tribes, for example, only publish their table of contents online or only allow access to select sections of their tribal laws. Moreover, the materials that are available online may not reflect the most up-to-date information. Some tribal websites or tribal code hyperlinks are no longer functional, and some web pages on tribal websites indicate that they are in progress or coming soon.

One other limitation to the project is the extent to which I characterize tribal cultural property law as that which is represented by tribal codes. In my personal and professional experience, every tribe I have engaged with, including my own, has internal norms regarding the protection of tribal cultural property. This law exists, regardless of whether it is embodied in a formal tribal code. Because tribal law is often rooted in an oral tradition, some tribes have not made the shift to a written code. For other tribes, putting tribal custom and tradition regarding the protection of cultural and intellectual property into writing may, in and of itself, be anathema to tribal law. Accordingly, a tribe without a written code would not be captured in this data set, even though they may, in fact, have laws that govern access, control, and disposition of tribal cultural property. Additionally, even for tribes that have written codes, such codes are not necessarily available to the public and may be private and accessible only to tribal members, or the tribe may simply not have the necessary technical assistance to have made their codes available online. Finally, a tribe may provide for cultural property protections in its constitution rather than its codified law, which was the focus of this study. For all these reasons, the counts on tribal codes should be seen as evincing a general overview of the state of tribal law in the field rather than taken as a definitive set of precise numbers.

Despite these limitations, this project provides a foundation from which to examine Native Nations' growing and increasing—as reflected in the comparison of the 2005 and the 2020 studies—commitment to employ tribal governmental programs as well as codified tribal law to preserve tribal cultural property, all of which I contend is leading to the next jurisgenerative moment, as discussed in Part III.

#### B. *Overview: Comparative Findings and Identifying Trends*

One of the goals of this project was to compare the results of the 2005 research with what tribes are doing today, more than fifteen years later. To understand the comparison between the two projects, some additional context is helpful.

The dataset created in 2005 and the dataset created in 2020 vary in some significant ways. First, the Alaskan Native Villages were not included in 2005.<sup>137</sup> Thus, that search included only 351 Indian tribes, compared to a combined number of 574 federally recognized tribes and villages in 2020.<sup>138</sup> On the one hand, this constitutes a dramatic expansion of the project. On the other hand, the Alaskan Native Villages overall have less codified law to draw from with regard to cultural property protection, so their addition did not dramatically skew the results. Though there are likely many explanations for this, one possible reason is that there is currently no “Indian country” in

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137. Riley, *Straight Stealing*, *supra* note 14, at 133.

138. *Id.* at 93.

Alaska outside of the Metlakatla Reservation, so tribal jurisdictional authority has been greatly hampered.<sup>139</sup>

Additionally, given the paucity of identifiable tribal cultural property laws in 2005, at that time, I did not create categories of codes or even necessarily search for all the same terms as I did in 2020. As a result, while there was undoubtedly an expansion in tribes passing tribal laws related to cultural property, it is also possible that expanded search parameters contributed, at least somewhat, to the additional codes found in 2020.

Notably, this research does not—nor is it meant to—say anything conclusive about the tribes themselves. Outside of the facile observation that the Alaskan Native Villages have fewer codes related to cultural property than tribes in the lower forty-eight states, I made no attempt to draw any conclusions about the tribes or to correlate the findings to other tribal characteristics, such as land base, population size, language fluency, or other metrics. Accordingly, I am not asserting that causal relationships exist, nor am I suggesting that the findings are predictive in any way.

As this Part demonstrates, the results of this research, as compared to 2005, are quite striking. Along virtually every metric, tribes are actively and increasingly engaged in undertaking their own tribe-specific efforts to protect their cultural property. Such efforts are manifested in tribal cultural preservation programs and, particularly, in the rapid growth of tribal laws that relate specifically to cultural property protection. In short, in 2005, my research revealed that 193 tribes (out of 351 examined) had tribal websites. By 2020, using the same denominator as the number of federally recognized tribes in the lower forty-eight states, that number had grown to 317.<sup>140</sup> When the Alaskan Villages are included, the number increases to a total of 362. With regard to cultural preservation programs, I identified 62 tribes with such programs in 2005, which increased to 187 in 2020 using the same denominator, which jumped to 201 when Alaskan Native Villages are included. In the final category of cultural property laws, 27 tribes had relevant codes in 2005, whereas 134 tribes have relevant tribal laws on the books today.

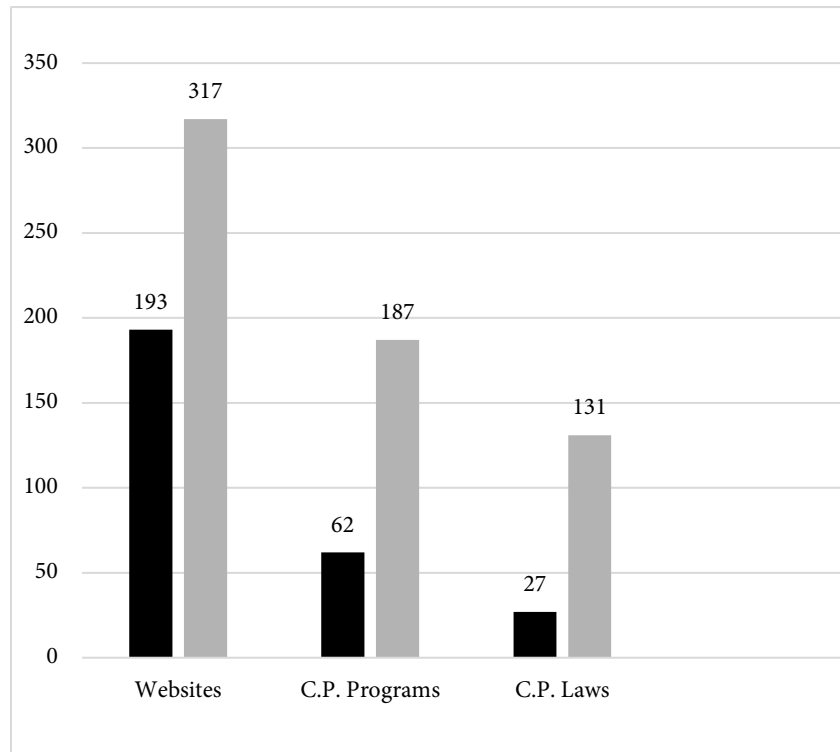
The following Figure 1 illustrates the comparison between 2005 and 2020 with regard to tribal websites, cultural preservation programs, and cultural property laws:

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139. See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998) (holding that ANCSA settled land claims, effectively ending “Indian country” in Alaska, outside the Metlakatla reservation). However, a new Department of the Interior Solicitor’s Opinion, M-37069, purports to put into place a streamlined process to take land into trust for Alaskan Native Villages, building on an Obama-era policy. Aliyah Chavez, *Interior Sets New Path Through Land Maze*, INDIAN COUNTRY TODAY (Apr. 28, 2021), <https://indiancountrytoday.com/news/interior-department-makes-land-into-trust-easier> [perma.cc/7GKY-QF9K].

140. Note that the denominator is not precisely identical, as a handful of tribes in the lower forty-eight states achieved federal recognition between 2005 and 2020.

Figure 1: Comparison Chart (2005/2020)



### 1. Tribal Websites

Even though there are some significant variances between the two datasets, there are still some salient findings when the two are compared. First, although some of the tribal codes in both searches were conducted through library resources, the vast majority of the codes examined were found on tribal websites (or are in library databases but are also on tribal websites). As a result of this method of research, it was essential to search for tribal websites as an initial matter. (The same search method was used in 2005.)<sup>141</sup>

The results of that process are fairly remarkable. The tribal website research in 2005 revealed that 193 out of 351 tribes maintained some version of an official website.<sup>142</sup> The contrast to the 2020 research is quite profound, both in terms of percentages and in terms of raw numbers. In the 2020 research, where 574 tribes were researched, 362 had official websites.<sup>143</sup> But, to make

141. Riley, *Straight Stealing*, *supra* note 14, at 93–95.

142. *Id.* at 100.

143. Official websites were rarer among the Native Alaskan tribes, with only 45 websites found out of 231 Alaskan Native Villages.

the comparison more apt, if Alaskan Native Villages are omitted, the comparison becomes clearer, with 193 in 2005 compared to 317 in 2020.

## 2. Tribal Cultural Preservation Programs and Tribal Historic Preservation Officers

As a recent spate of land acknowledgments (particularly in governmental and academic institutions)<sup>144</sup> reflects, there is no place in the United States that was not, at one time, Indian land. Indians occupied Turtle Island<sup>145</sup> from coast to coast and congregated at places rich in natural and cultural resources—like oceans and rivers and high country and mountaintops<sup>146</sup>—that are often now the sites of national parks,<sup>147</sup> universities,<sup>148</sup> and public beaches.<sup>149</sup> Whether a tribe has stayed in its aboriginal homeland or has been removed to a new reservation location, protection of cultural and natural resources is deeply ingrained in tribal ethics. Thus, I turned to tribal cultural preservation programs as a starting place for my research. I purposefully narrowed my search terms in this category in order to home in on cultural preservation programs. Even though arguably any program that protects the natural and cultural resources of a tribe, by definition, advances tribal culture, I cabined the definition to get a sense of how many tribes are actively pursuing cultural preservation in a more directed way.

What I found in this study was a remarkable trajectory of growth in tribal efforts to implement cultural preservation systems. In 2005, I identified only 62 tribes that had specific programs dedicated to the preservation of cultural

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144. See, e.g., *Land Acknowledgment*, NW. UNIV. (2022), <https://www.northwestern.edu/native-american-and-indigenous-peoples/about/Land%20Acknowledgement.html> [perma.cc/Y3JT-JM9Q]. To better understand the purpose of land acknowledgment statements and programs, see generally *A Guide to Indigenous Land Acknowledgment*, NATIVE GOVERNANCE CTR. (Oct. 22, 2019), <https://nativegov.org/news/a-guide-to-indigenous-land-acknowledgment> [perma.cc/4UTB-2835].

145. DUANE CHAMPAGNE, NOTES FROM THE CENTER OF TURTLE ISLAND, at viii (2010) (explaining that Chippewa creation stories indicate that “Turtle Island is the name given to the land”).

146. See Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV. 63, 76–79 (2021).

147. See, e.g., Nicolas Brulliard, *This Land Is Their Land*, NAT’L PARKS CONSERVATION ASS’N (Oct. 8, 2020), <https://www.npca.org/articles/2742-this-land-is-their-land> [perma.cc/879T-5X7Z].

148. See, e.g., Robert Lee & Tristan Ahtone, *How They Did It: Exposing How U.S. Universities Profited from Indigenous Land*, PULITZER CTR. (May 19, 2020), <https://pulitzercenter.org/stories/how-they-did-it-exposing-how-us-universities-profited-indigenous-land> [perma.cc/RA2M-6GP9].

149. See, e.g., *History—Sleeping Bear Dunes National Lakeshore*, NAT’L PARK SERV., <https://www.nps.gov/slbe/learn/kidsyouth/history.htm> [perma.cc/L8XE-63Z8].



resources.<sup>150</sup> Today, that number stands at 201 tribes, or 187 if Alaska is excluded (as it was in 2005).<sup>151</sup>

The tribal cultural preservation programs are expanding in scope along numerous axes. Today, there are significantly more tribes with such programs in place than fifteen years ago. The programs emphasize protections for the cultural and natural resources that are most relevant to the particular tribe. The Blackfeet Tribe, for example, requires extensive protection for the Badger-Two Medicine region along Montana's Rocky Mountain Front. This place of enormous power and beauty is located at the convergence of the Blackfeet Indian Reservation, Glacier National Park, and the headwaters of the Missouri River. The tribe notes that the site "is sacred to the Blackfeet people. It is the home of our creation story, and has continued to be a place of refuge and healing for 10,000 years."<sup>152</sup>

Other programs reflect a similar ethic, as tribal codes address protections for sites associated with sacred medicines<sup>153</sup> and traditional foods,<sup>154</sup> ancestral landscapes,<sup>155</sup> and places of origin and creation.<sup>156</sup> Cultural conservation programs similarly have expanded to include historic preservation efforts,<sup>157</sup> museum development,<sup>158</sup> and language revitalization,<sup>159</sup> among many others.

One additional area I sought to explore was the expansion of Tribal Historical Preservation Officers (THPOs), a tribal position that has been developed pursuant to the passage of the National Historic Preservation Act (NHPA). Originally enacted in 1966, the NHPA is a federal statute that seeks to protect historic properties within the United States.<sup>160</sup> In 1992, tribal provisions were added to the Act to ensure that tribes have rights of consultation

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150. Riley, *Straight Stealing*, *supra* note 14, at 101.

151. *Id.* at 93 n.134.

152. *Protection of the Badger-Two Medicine*, BLACKFEET NATION (2021), <https://blackfeetnation.com/badger-two-medicine> [perma.cc/8J4B-HJJC].

153. *See, e.g., Cultural Department*, GREENVILLE RANCHERIA, <https://www.grth.org/cultural-department> [perma.cc/3X2D-KBYR].

154. *See, e.g., Traditional Foods, Garden Build Community*, NW. TREATY TRIBES (Dec. 15, 2020), <https://nwtreatytribes.org/traditional-foods-garden-build-community> [perma.cc/U7AB-48RG].

155. *E.g., Culture and Heritage Department*, KLAMATH TRIBES (2022), <https://klamathtribes.org/culture> [perma.cc/LC9W-AWM3].

156. *See, e.g., Protection of the Badger-Two Medicine*, *supra* note 152.

157. *See, e.g., Cultural Affairs*, TOHONO O'ODHAM NATION (2016), <http://www.tonation.nsn.gov/natural-resources/cultural-affairs> [perma.cc/8CSU-QRW6].

158. *See, e.g., Miranda Caudell, Cultural Inspiration*, ME YAH WHAE, Fall/Winter 2021–2022, at 70, 70 ("Every aspect of the Agua Caliente Cultural Museum is designed to share the Tribe's story for generations to come.")

159. *See, e.g., Membership Services*, AK-CHIN INDIAN CMTY. (2021), <https://www.ak-chin.nsn.us/index.php/departments/membership-services> [perma.cc/SP9X-CXPQ].

160. National Historic Preservation Act of 1966, 54 U.S.C. §§ 300101–307107.

within what is known as the Section 106 consultation process.<sup>161</sup> Pursuant to these amendments, tribes can designate THPOs to play an important role in the preservation process for projects that impact tribal lands.<sup>162</sup> This allows tribes to take over duties that would normally be filled by the State Tribal Historic Preservation Officers, as long as the THPO is authorized by the National Park Service.

As a result of the NHPA and the Section 106 consultation rights of tribes, the number of THPOs has grown swiftly across Indian country, as tribes seek greater control over projects that impact tribal lands and Indian people. This also allows for tribes to displace state actors, who may not always work in the best interest of the tribes. Today, the National Park Service Tribal Preservation Program identifies more than 200 THPOs on its database.<sup>163</sup> And the tribal code research discussed herein is also tied to the presence of THPOs, as tribal cultural preservation codes refer to tribal administrative processes around projects that implicate the preservation officers.

In sum, as seen in Figure 1, *supra*, there has been a steady—if not marked—increase in tribal websites, tribal cultural preservation programs, and Tribal Historic Preservation Officers. In the next Section, I turn to a review and analysis of the cultural property laws themselves.

### 3. Tribal Cultural Property Laws

The expansion of tribal cultural property laws follows the same trend as cultural preservation programs. Both in percentage and raw numbers, the increase is significant. In 2005, I identified only 27 tribes with tribal laws that addressed the preservation of tribal cultural property.<sup>164</sup> Today, the research reveals a very different landscape. In comparison to fifteen years ago, my findings document 134 tribes with tribal code sections related to cultural preservation.<sup>165</sup> As discussed in the methodology section in Section II.A, *supra*, a broad range of search terms was employed to fully capture the extent and scope of tribal laws dealing with tribal efforts to protect and preserve tribal cultural property.

A few specific details regarding my choice of search terms for the subcategories defined in the 2020 research project—and the extent to which there are salient comparison points to the 2005 research—merit attention here. The four subcategories were largely selected and defined based on my experience and intuition as a researcher with more than two decades working in the field of Indigenous Peoples' cultural and intellectual property. Because of the small

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161. National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, tit. XL, 106 Stat. 4600, 4753–69 (codified as amended at 54 U.S.C. §§ 300101–307107).

162. See *Cultural Affairs*, *supra* note 157.

163. See *Tribal Preservation Program*, NAT'L PARK SERV., [https://grantsdev.cr.nps.gov/THPO\\_Review/EditTHPOResults\\_new.cfm](https://grantsdev.cr.nps.gov/THPO_Review/EditTHPOResults_new.cfm) [perma.cc/EP7X-XMW4]. I did not conduct a search regarding Tribal Historical Preservation Officers in 2005.

164. Riley, *Straight Stealing*, *supra* note 14, at 101.

165. Only one of the 134 is an Alaskan Native Village.

number of cultural property laws found in 2005, at that time I did not organize the codes by subcategory, so—apart from intangible property (discussed *infra*)—there are not relevant comparison points in the breakdown of what subjects the codes addressed in 2005 and 2020, respectively. Also of note is that the term “data sovereignty” was not in common usage fifteen years ago. However, in recent years, some of the most high-profile cases involving theft or appropriation, oftentimes by academic researchers, have centered around the extraction of tribal knowledge, including genetic resources and traditional knowledge. Tribes have responded in a variety of ways to these infractions. To account for this, my 2020 research study included a search for tribal codes addressing “data sovereignty,” which I define to include tribal research protocols, permitting systems for researchers, data governance, and others.

This project revealed that by 2020, 134 tribes have passed cultural property laws of one type or another. The research further breaks down by subcategory as follows. Eighty-one tribes have laws that protect Burial Sites, Funerary Objects, and Repatriation. Of these, thirty-one explicitly reference NAGPRA. Eighty-nine tribes have passed tribal laws that safeguard Sacred Sites and Ceremonial Places. Forty-eight tribes have enacted laws to protect Intangible Property, with seven explicitly referencing the Copyright Act or including a tribal variation of copyright law, four referencing trademark law, two including patent law, and three referencing or producing their own version of the Indian Arts and Crafts Act. And today, there are forty-nine tribes with laws focused on data sovereignty.

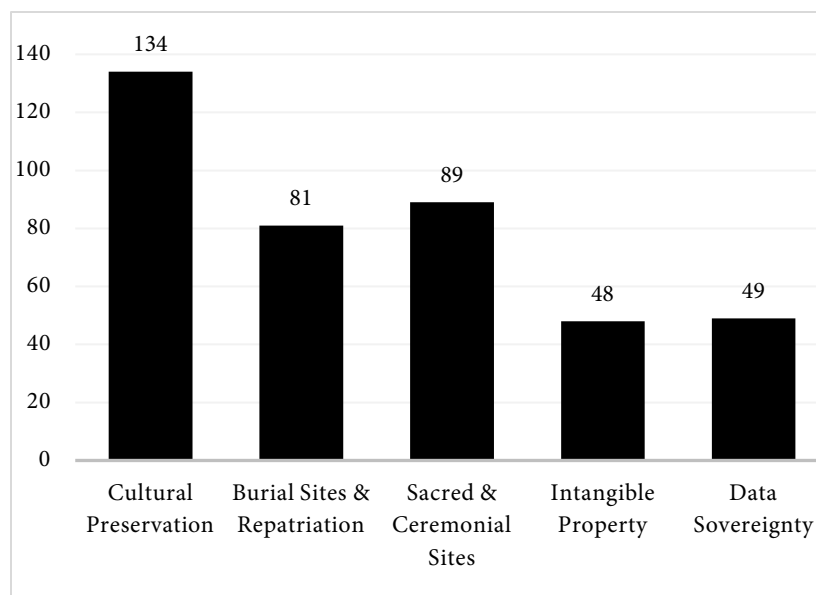
As mentioned previously, while the small number of tribal cultural property laws found in 2005 did not lend itself to more granular analysis, even at the time I sought to document whether any tribes had passed laws specifically to protect their “intellectual property.” The 2005 study identified no tribes with written laws regarding intellectual property *per se*, including protections for the intangible property aspects of songs, stories, dances, folklore, or brands, nor did my research uncover any laws that referenced commonly used intellectual property terms such as copyright, patent, or trademark.<sup>166</sup> Thus, it is significant that I found in the 2020 search, by contrast, forty-eight tribes that have tribal codes that govern tribal intangible knowledge, with ten of those expressly articulating protections for intellectual property that parallel federal statutory law and cite expressly to copyright law, patent law, trademark law, and the Indian Arts and Crafts Act.

These findings, revealing the number of tribes with cultural property laws generally, as well as further broken down by subcategory, is captured in the following Figure 2:

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166. See Riley, *Straight Stealing*, *supra* note 14, at 101.

Figure 2: 2020 Findings



In analyzing my research results, I have selected samples that highlight salient points. In some cases, tribal laws are emphasized because they evince a common phenomenon; in others, an example may be employed because it is unusual or of particular interest. In all cases, I have attempted to contextualize the codes within the discussion. Finally, the laws themselves are rich and nuanced, drawing on a variety of sources. In some cases, a law may appear firmly rooted in tribal custom and tradition; in others, the influence of exogenous legal systems may be more evident. Where there were insights to be gleaned, such as where tribes cite to specific and select federal statutes, those are noted.

a. Cultural Preservation

For the 2020 study, I defined tribal cultural property laws broadly to include the total number of tribes that had any tribal law designed to protect tribal cultural property. In doing so, I found 134 tribes with cultural preservation codes and included them all within this category, regardless of which sub-categories the codes pertain to, which is discussed more fully herein.

As suspected, tribal laws give insight into tribal culture, values, customs, and traditions. In this sense, tribal codes do more than set forth specific laws and regulations. They also embody tribal worldviews and values. In many cases, the codes reflect principles of sustainability and gratitude, the interconnectedness of humans with other life on earth, and an ethic of conservation for future generations.

Consider this example: “Gii-kagwejimaad gimaamaanaan da-wiindigemigod a’aw Waabanag ogii-wiindamawaan ge-izhi-biminizha’aminid odinaakonigan. Gaawiin wiika oada-ganawaabandanziiin yo’ow gidakiiminaang.”<sup>167</sup>

The quote above, which appears in the Lac Courte Oreilles Band of Lake Superior Chippewa Indians’ Tribal Conservation Code, is written in Anishinaabemowin, the Ojibwe language. It tells the story of Mother Earth breaking from Morning Star, with the English translation appearing in the footnotes. According to the tribe, the story is included in the tribal code for a distinct purpose: “In order to ensure that this ordinance is interpreted in the spirit of gidizhitwaawininaan [tradition and custom], statements of tradition and custom are placed throughout this ordinance.”<sup>168</sup>

The Conservation Code Preamble recounts two separate stories that are intended to illustrate the tribe’s worldview, its relationship to the earth, and its belief system around sustainability and the conservation of resources.<sup>169</sup> In the Anishinaabemowin quote above, the tribe recalls the story of Mother Earth, who fell from her place in the sky with Morning Star. When she fell, she cried out, and the swans and geese flew to her in the sky and carried her down safely to earth. A deer then told her that the Great Spirit informed them that there would be Indian people on the earth someday, and the animals were to care for the people. But “[i]n return, you must have a feast to give thanks when you take our life to thank the Great Spirit for creating us and the deer spirit for giving his life up for you. You must never waste meat or take more than you need.”<sup>170</sup>

Like the Lac Courte Oreilles Band of Lake Superior Chippewa Indians Code, tribal cultural preservation laws as a general matter commonly reflect core tribal values and place significant emphasis on conservation for the continued existence of the tribe and for the benefit of the next seven generations. The Yurok Cultural Resources Protection Code, for example, states that the purpose of the code is “to preserve and promote our culture, language, and religious beliefs and practices, and pass them on to our children, our grandchildren, and to their children and grandchildren, on and on, forever.”<sup>171</sup> Similarly, the Hualapai Cultural Heritage Resources Ordinance states that its purpose is “[p]reserving and caring for cultural resources . . . for current and future generations of the Hualapai Tribe.”<sup>172</sup> And the Cheyenne River Sioux Tribe notes that “[p]reservation of our irreplaceable cultural heritage is in the

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167. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE OF L. tit. 6, ch. 1, Preamble (2015) [perma.cc/9ZW7-DRRZ].

168. *Id.* (emphasis omitted).

169. *Id.*

170. *Id.*

171. YUROK TRIBAL CODE tit. 14, ch. 10, § 10(a) (2022) [perma.cc/V3JF-SKQN].

172. Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98, pt. 1, § 102(d) (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

interest of the Lakota people . . . and . . . must be maintained for future generations of our people.”<sup>173</sup>

Relatedly, tribes also emphasize that cultural preservation—attached to environmental protection—is essential to maintain tribal culture and contributes to tribes’ spiritual and religious sustenance.<sup>174</sup> The Little Traverse Bay Band of Odawa Indians, for example, asserts that the tribe’s “way of life . . . relies upon environmental protection for cultural perpetuation.”<sup>175</sup> The Navajo Nation cites to Navajo Fundamental Law and states that “[t]he cultural heritage of the Navajo Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the Navajo people.”<sup>176</sup> Other tribes, similarly, highlight the importance of the tribe’s cultural heritage to community life, traditions, and development,<sup>177</sup> as well as to members’ “spiritual and physical well-being.”<sup>178</sup>

The codes also convey a sense of urgency and a conviction on the part of the tribe that tribal culture is under threat and that swift action must be taken to ensure cultural survival. The Cheyenne River Sioux explicitly states, for example, that “[t]he cultural heritage of the Lakota people should be preserved as a living part of our community life and development in order to give a sense of direction to tribal members” and that “[t]he cultural properties of the Lakota people are being lost or substantially altered, at times inadvertently, but with increasing frequency.”<sup>179</sup> Other tribes similarly acknowledge existential threats to tribal lifeways and assert that existing laws have been insufficient to protect and sustain tribal cultures for the future.<sup>180</sup> In this sense, tribal codes may not only advance cultural preservation through law but may also serve as a forum for the tribe to demonstrate its concerns and commitments.

173. Cheyenne River Sioux Tribe of S.D., Ordinance No. 57, § 2(4) (Jan. 9, 1992) [perma.cc/SU4E-2TJM]; see also Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14, § 103(b) (May 6, 2014) [perma.cc/9B2C-FSLC] (“It is the policy of the Fond du Lac Band . . . to . . . [a]dminister cultural resources owned or controlled by the Band as a steward for present and future generations . . .”).

174. See, e.g., LUMMI NATION CODE OF LS. § 40.01.030 (2008) [perma.cc/Q22K-76BZ]. “Sche’lang’en” means “way of life” in Lummi and “Tse Xhales onges-tle tse tengexw I meqstang tl’e tse Lhq’atemish, Xwlemi Elhtelnexw” translates: “The Creator gave the land, territory to the first peoples, Lummi people.” *Id.* § 40.01.040.

175. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. § 4.801 (2022) [perma.cc/5PBD-QNZ2].

176. NAVAJO NATION CODE ANN. tit. 19, § 1001(B)(2) (2014).

177. E.g., Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98, pt. 1, §§ 101, 102(b), (d) (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

178. Cheyenne River Sioux Tribe of S.D., Ordinance No. 57, § 2 (Jan. 9, 1992) [perma.cc/SU4E-2TJM] (general protection for “historical traditions” and “cultural resources”).

179. *Id.*; see also Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98 (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

180. Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98 (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

b. Burial Sites, Funerary Objects, and Repatriation

All cultures and religions have deeply rooted belief systems around the proper treatment of the dead.<sup>181</sup> Rituals and practices surrounding death—including handling of remains and funerary objects—reveal much about a community’s religious and spiritual commitments and values, including its relationship to the natural world and the larger universe. This may be particularly true for Indigenous Peoples, whose belief systems and lifeways tend to tether them to their aboriginal lands and their places of creation and are also typified by worldviews built around strong connections to ancestors, a common feature of Indigenous spirituality.<sup>182</sup>

Thus, the long and well-documented history of land dispossession and mistreatment of Indian dead has had devastating effects on Indigenous Peoples. Rather than being mere incidents of the past, as the recent tragic and disturbing discovery of hundreds of Indian children buried in mass graves on the grounds of Indian residential schools in Canada demonstrates,<sup>183</sup> such harms constitute ongoing human rights violations. In fact, even today, Native people are embroiled in legal and diplomatic processes to try to recover their ancestors.<sup>184</sup>

It is perhaps unsurprising that many of the tribes that have laws protecting their cultural property directly address issues around grave desecration, burial grounds, and repatriation. In fact, of the 134 tribes with cultural property codes, 81 have laws that protect burial sites, cemeteries, funerary objects,

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181. See, e.g., Trope & Echo-Hawk, *supra* note 71, at 38 (arguing that “respect for the dead is a mark of humanity and is as old as religion itself”).

182. Suagee, *supra* note 129, at 159, 203 (1996).

183. *Hundreds of Unmarked Graves Found at Another Former School for Indigenous Children*, NPR (June 24, 2021), <https://www.npr.org/2021/06/24/1009784025/hundreds-of-unmarked-graves-found-at-another-indigenous-school-in-canada> [perma.cc/4NHC-BA8Z].

184. See, e.g., Jeff Kisling, *Repatriation of Rosebud Sioux Tribe Children at Carlisle Indian Industrial School*, LANDBACK FRIENDS (July 15, 2021), <https://landbackfriends.com/2021/07/15/repatriation-of-rosebud-sioux-tribe-children-at-carlisle-indian-industrial-school> [perma.cc/9SG3-HKYN].

and rights of repatriation.<sup>185</sup> Of those, 31 explicitly cite to or incorporate NAGPRA.<sup>186</sup>

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185. ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLA. TRIBAL CODE, criminal offenses, §§ 516, 526 (2010); FORT PECK TRIBES COMPREHENSIVE CODE OF JUST. tit. 32 (2019); TRIBAL CT. CODE OF THE BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS ch. 1700 (2020); BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2 (2016); Cahto Tribe of the Laytonville Rancheria, Peace and Security Ordinance § 3.01(A) (Mar. 15, 2011); CHEROKEE NATION TRIBAL CODE tit. 8 (2019); *id.* tit. 21, ch. 47; CHEYENNE & ARAPAHO TRIBAL CODE, criminal offenses, § 516 (2008); Cheyenne River Sioux Tribe of S.D., Ordinance No. 57 (Jan. 9, 1992); CITIZEN POTAWATOMI NATION CODE tit. 12, ch. 5, § 116 (2017); SILETZ TRIBAL CODE §§ 9.001–9.031 (2005); CHEHALIS TRIBAL CODE tit. 4, ch. 15, § 70 (2022); COLVILLE TRIBAL L. & ORD. CODE tit. 3, ch. 3-1, § 172 (2020); *id.* tit. 4, ch. 4-4 (1983); CONFEDERATED TRIBES OF COOS, LOWER UMPQUA & SIUSLAW INDIANS' TRIBAL CODE tit. 10, ch. 9 (2020); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RSRV. CEMETERIES CODE (2010); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RSRV. HISTORIC PRES. CODE (2016); WARM SPRINGS TRIBAL CODE ch. 490, § 420 (2016); Tribal Council Res. No. 2018-02 (Delaware Tribe 2018); DRY CREEK RANCHERIA BAND OF POMO INDIANS CULTURAL PRES. CODE tit. 1 (2013); *id.* tit. 2; E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES chs. 70, 90 (2022); FORT McDOWELL YAVAPAI NATION L. & ORD. CODE ch. 19 (2017); Habematolel Pomo of Upper Lake, Tribal Cemetery Ordinance No. 2018-10-01 (Oct. 26, 2018); HO-CHUNK NATION CODE tit. 7, §§ 1, 2 (2016); HOPLAND BAND OF POMO INDIANS TRIBAL CODE tit. 15, § 1 (2006); Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98 (Feb. 18, 1998); Iowa Tribe of Okla., Cultural Heritage Ordinance (Aug. 12, 1994); JAMESTOWN S'KLALLAM TRIBE TRIBAL CODE tit. 27 (2009); KAIBAB BAND OF PAIUTE INDIANS TRIBAL CODE tit. 4, ch. 5, §§ 11–12 (1996); LAW & ORD. CODE OF THE KALISPEL TRIBE OF INDIANS §§ 9-7.21, 13-6.04 (2017); KAW NATION TRIBAL CODES tit. 7, §§ 516, 526 (2017); KICKAPOO TRADITIONAL TRIBE OF TEX. TRIBAL CODES ch. 18, §§ 516, 526 (2020); KICKAPOO TRIBE OF OKLA. CRIM. VIOLATIONS CODE ch. E, art. 528 (1995); KOOTENAI TRIBE OF IDAHO TRIBAL CODE § 4-5.08 (2019); LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE ch. 66 (2000); LAW & ORD. CODE OF THE LAS VEGAS TRIBE OF PAIUTE INDIANS tit. 5, § 70-030 (2012); LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL CODE ch. 400, tit. 3, § 10.03 (2014); LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 8, ch. 7 (2022); *id.* tit. 15, ch. 21; LUMMI NATION CODE OF LS. tit. 40 (2008); MAKAH L. & ORD. CODE tit. 5, ch. 5, § 4 (1999); MENOMINEE INDIAN TRIBE OF WIS. TRIBAL CODE pt. 2, ch. 293, § 1 (2022); MESCALERO APACHE TRIBAL CODE ch. 10, § 25 (2016); MIAMI TRIBE OF OKLA. CRIM. OFFENSES CODE §§ 516, 526 (2018); Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14 (May 6, 2014); Leech Lake Band of Chippewa Indians, Ordinance No. 96-03 (Dec. 22, 1995); MILLE LACS BAND STAT. ANN. tit. 10, ch. 2 (2016); Tribal Council Res. No. 001-97-019 (White Earth Band of Chippewa Indians 1997); NOOKSACK INDIAN LS. & ORDINANCES tit. 36 (2022); OMAHA TRIBAL CODE tit. 5, ch. 4, §§ 89, 90 (2013); ONEIDA INDIAN NATION OF WIS. CODE OF LS. tit. 1, ch. 113 (1998); FALLON PAIUTE-SHOSHONE TRIBE L. & ORD. CODE tit. 5, § 70-030 (2020); PASCUA YAQUI TRIBAL CODES tit. 2, ch. 2-22 (2022); PAWNEE TRIBE OF OKLA., L & ORD. CODE tit. 6, §§ 516, 526 (2005); PENOBSCOT NATIONS LS. & ORDINANCES ch. 20, § 4720 (1975); POARCH BAND OF CREEK INDIANS TRIBAL CODE tit. 39 (2022); Tribal Council Res. No. 2013-041 (Pueblo of Isleta 2013); PUEBLO OF LAGUNA, N.M. TRIBAL CODE tit. 15, ch 11, § 5 (2020); PUEBLO OF POJOAQUE L. & ORD. CODE § U-4(1)(2)(A) (2019); PUEBLO OF TESUQUE, N.M., TRIBAL CODE § 4-4-4; PUYALLUP TRIBAL CODES tit. 5, ch. 5.12, § 930 (2012); RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CODE OF LS. ch. 20, § 1 (2017); Tribal Council Res. No. 181-11 (Red Lake Band of Chippewa Indians 2011); RINCON TRIBAL CODE § 10.100 (2020); SAC & FOX NATION OF MO. TRIBAL CODES tit. 10, §§ 516, 526 (1992); SAC & FOX NATION OF OKLA. CODE OF LS. tit. 10, §§ 516, 526 (1992); SALT RIVER PIMAMARICOPA INDIAN CMTY. CODE OF ORDINANCES ch. 19 (2012); SAMISH TRIBAL CODE ch. 9 (1999); SAUK-SUIATTLE INDIAN TRIBE L. & ORD. CODE ch. 5, § 3.120 (2017); SAULT STE. MARIE



Given the long history of museums' interests in keeping, displaying, and controlling Native bodies and material culture, one notable feature of the laws regarding burial sites and repatriation is tribes' emphasis on their "living" cultures, cultures that are not static and situated in the past. Numerous tribal codes underscore tribes' contemporary vibrancy. The Oneida Nation code states, for example, "[t]he cultural foundation of the Nation should be preserved as a living part of our community life and development in order to maintain the identity of the Oneida people."<sup>187</sup> The Samish Tribe states as well: "Native American Tribes and groups are sovereign, legal, living cultures with vital ongoing lifeways, a rich traditional heritage and the primary responsibility for preserving, protecting, and extending their own cultures."<sup>188</sup> It goes on

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TRIBE OF CHIPPEWA INDIANS TRIBAL CODE ch. 100 (2015); SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73 (2005); SNOQUALMIE TRIBAL CODE tit. 11, ch. 1 (2012); SOKAOGON CHIPPEWA CMTY. CODES ch. 7 (2011); SQUAXIN ISLAND TRIBAL CODE tit. 9, ch. 12, § 240 (2014); STANDING ROCK SIOUX TRIBAL CODE OF JUST. tit. 38 (2015); SWINOMISH INDIAN TRIBAL CMTY. TRIBAL CODE tit. 21 (2003); CHICKASAW NATION CODE tit. 15, ch. 3 (2012); CHOCTAW NATION CRIM. CODE §§ 1151-1169 (2018); OSAGE NATION CODE tit. 8, ch. 1 (2021); TOHONO O'ODHAM TRIBAL CODE tit. 7, ch. 1, §§ 3.7, 3.8 (2020); *id.* tit. 8, ch. 1; UTE INDIAN CRIM. CODE tit. 13, § 4-101 (2013); WASHOE TRIBE OF NEV. & CAL. L. & ORD. CODE tit. 5, ch. 70, § 30 (2013); Wyandotte Nation, Cultural Ordinance §§ 3, 5, 6 (June 10, 2009); YERINGTON PAIUTE TRIBAL CODE tit. 5, ch. 70, § 30 (1984); YOMBA SHOSHONE TRIBE L. & ORD. CODE tit. 5, pt. G, § 4 (2001); YUROK TRIBAL CODE tit. 14 (2022).

186. FORT PECK TRIBES COMPREHENSIVE CODE OF JUST. tit. 32, ch. 13 (2019); TRIBAL CT. CODE OF THE BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS, ch. 1700, § 10(B)(1) (2020); BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2, § 182 (2016); Cheyenne River Sioux Tribe of S.D., Ordinance No. 57(a), amend. b (Mar. 4, 1999); CONFEDERATED TRIBES OF COOS, LOWER UMPQUA & SIUSLAW INDIANS' TRIBAL CODE tit. 10, ch. 9 (2020); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RSRV. HISTORIC PRES. CODE § 2.01 (2016); DRY CREEK RANCHERIA BAND OF POMO INDIANS CULTURAL PRES. CODE tit. 2 (2013); E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES ch. 70 (2022); Habematolel Pomo of Upper Lake, Tribal Cemetery Ordinance No. 2018-10-01 (Oct. 26, 2018); HO-CHUNK NATION CODE tit. 7, § 2 (2016); HOPLAND BAND OF POMO INDIANS TRIBAL CODE tit. 15, § 107.1 (2006); Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98, pt. 1, § 102(j) (Feb. 18, 1998); Iowa Tribe of Okla., Cultural Heritage Ordinance (Aug. 12, 1994); LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE ch. 66 (2000); LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 15, chs. 15, 21 (2022); LUMMI NATION CODE OF LS. tit. 40 (2008); Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14 (May 6, 2014); NOOKSACK INDIAN LS. & ORDINANCES tit. 36 (2022); ONEIDA INDIAN NATION OF WIS. CODE OF LS. tit. 1, ch. 113 (1998); PASCUA YAQUI TRIBAL CODES tit. 2, ch. 2-22 (2022); POARCH BAND OF CREEK INDIANS TRIBAL CODE tit. 39, ch. 2 (2022); RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS CODE OF LS. ch. 20, § 1 (2017); RINCON TRIBAL CODE § 10.100 (2020); SAMISH TRIBAL CODE ch. 9 (1999); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE ch. 100, § 103(8) (2015); SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73 (2005); SNOQUALMIE TRIBAL CODE tit. 11, ch. 1 (2012); SOKAOGON CHIPPEWA CMTY. CODES § 7.1.2(C) (2011); OSAGE NATION CODE tit. 8, ch. 1 (2021); Wyandotte Nation, Cultural Ordinance §§ 3, 5, 6 (June 10, 2009); YUROK TRIBAL CODE tit. 14 (2022).

187. ONEIDA INDIAN NATION OF WIS. CODE OF LS. tit. 1, ch. 113, § 1-2 (1998) [perma.cc/UU2C-FMFZ].

188. SAMISH TRIBAL CODE § 9.002 (1999) [perma.cc/5NB3-CQZC].

to say that Indian culture is “a vital part of the ongoing lifeways of the United States” and therefore “must be respected, protected, and treated as a living spiritual entity.”<sup>189</sup> The code reiterates that Native peoples and their cultures “are not museum objects of dead cultures or isolated remnants of lost tribes, but are members of ongoing governmental, social, economic, religious and political units.”<sup>190</sup> It also underscores the importance of representing tribal cultures in their “traditional settings” to understand and appreciate “their true value.”<sup>191</sup>

The provision most commonly found was for the prevention of grave desecration.<sup>192</sup> Several of the tribal codes examined seemed designed to address past harms caused by failures of federal law to protect or even acknowledge Native practices. For example, for most of American history, Native burial sites that did not comport with Western notions of “cemeteries” received no protection under the law, leading to grave robbing and mass plundering.<sup>193</sup> Several of the tribal codes seek to address this. For example, some tribes take a capacious view as to what constitutes a burial site, expanding it from “marked cemeteries” to “natural or prepared physical location[s]” that are consistent with the tribe’s “death rites” or “ceremonies of a culture.”<sup>194</sup> Sisseton-Wahpeton Oyate of the Lake Traverse Reservation notes that “burial sites” are “construed to be broader than those marked cemeteries and graveyards protected under existing State law.”<sup>195</sup>

Other tribal codes are tailored to deal with similar shortcomings in federal law, such as limited views of what artifacts or objects may be subject to repatriation or whether destructive analysis can be conducted on Indigenous remains. Consider the code of the Eastern Band of Cherokee Indians, which states, “[t]he graves of Cherokee people and their ancestors are sacred and shall not be disturbed or excavated” and further stipulates that “[t]he remains of Cherokee people shall not be subjected to destructive skeletal analysis.”<sup>196</sup> Other tribes have expansive burial or repatriation rights that include funerary items, cultural patrimony, and associated cultural property, such as “Indian

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189. *Id.*

190. *Id.*

191. *Id.*

192. *See, e.g.*, CITIZEN POTAWATOMI NATION CODE tit. 12, ch. 5, § 116 (2017) [perma.cc/S2KS-UHUM]; COLVILLE TRIBAL L. & ORD. CODE tit. 3, ch. 3-1, § 172 (2020) [perma.cc/EB6F-HQD8]; KAW NATION TRIBAL CODES tit. 7, § 516 (2017) [perma.cc/4N3V-8DW3]; KOOTENAI TRIBE OF IDAHO TRIBAL CODE § 4-5.08 (2019) [perma.cc/6XVJ-SAWK].

193. Elizabeth Evitts Dickinson, *The Endless Robbing of Native American Graves*, WASH. POST MAG. (July 8, 2021), <https://www.washingtonpost.com/magazine/2021/07/08/will-mass-robbery-native-american-graves-ever-end> [perma.cc/DLL7-ZDQQ].

194. SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73, tit. 2 (2005) [perma.cc/RJH7-CWAJ].

195. *Id.*

196. E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 70-1(a), (c) (2022) [perma.cc/3RLQ-C2Z7].

painting or marks.”<sup>197</sup> The Winnemucca tribal code refers to any “sacred, religious or traditional emblems which are interred with the deceased.”<sup>198</sup> And several tribes emphasize the role of spiritual leaders, elders, or others in directing the tribe in dealing with sensitive issues around repatriation or treatment of burial sites.<sup>199</sup> The Hualapai Cultural Ordinance extends authority to a panel of elders to determine which sites are places “of Heritage” to be protected under the Act.<sup>200</sup>

Others, such as the Little Traverse Bay Bands of Odawa Indians, for example, are taking particularly innovative approaches to burial site protection and repatriation. Little Traverse has developed a tribal burial code that connects tribal custom and tradition with a contemporary ethic of conservation and sustainability.<sup>201</sup> The tribal code states that it is “intended for natural burials” that “minimize the impact of burials on the planet.”<sup>202</sup> Thus, the tribe promotes practices that do not use chemicals and that employ only biodegradable materials and “unobtrusive grave markers,” which “don’t intrude on the landscape.”<sup>203</sup> It further encourages markers such as “shrubs and trees, or an engraved flat stone native to the area.”<sup>204</sup> They intend for these to be “a living memorial [that] helps form a wildlife area.”<sup>205</sup> The “Traditional Tribal Burial Grounds” definition is intended as a “statement of personal values for many people who recognize the Circle of Life and that life is cyclical in nature.”<sup>206</sup>

Similarly, the Pueblo of Pojoaque has devised its policies around repatriation to align with tribal culture and religion. The tribe requires that, when any items or ancestors are repatriated, they must be kept private.<sup>207</sup> All such things are to be maintained “in a non-visible cabinet” and “are never to be

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197. See, e.g., LAW & ORD. CODE OF THE KALISPEL TRIBE OF INDIANS § 9-7.21 (2017) [perma.cc/HL5A-UB3W].

198. Winnemucca Indian Colony, Ordinance No. 401, § 2(G) (Aug. 5, 2011) [perma.cc/SC3H-UEE7] (stating also that violation is grounds for exclusion).

199. See, e.g., LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE ch. 66, § 302(a) (2000) [perma.cc/ALU5-ZP4R] (noting the role of “Tribal Spiritual Leaders” in cases of grave disturbance); Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14, § 506(c) (May 6, 2014) [perma.cc/9B2C-FSLC] (“Tribal community, spiritual, and traditional leaders may assist any re-interment of unclaimed cultural remains.”).

200. Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98, § 301(c) (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

201. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 8, ch. 7 (2022) [perma.cc/8GWZ-XDA4].

202. *Id.* § 8.702(A).

203. *Id.* § 8.702(A)–(B).

204. *Id.* § 8.702(B).

205. *Id.*

206. *Id.* § 8.702(D).

207. PUEBLO OF POJOAQUE L. & ORD. CODE § U-4(1)(2)(A) (2019) [perma.cc/SYD8-VHVY].

viewed by the public nor are they ever to be exhibited.”<sup>208</sup> They will be cataloged “but never photographed nor physically numbered.”<sup>209</sup> This approach, which defies the Western instinct to objectify Native people and things by considering even humans to be museum relics, shows a sharp departure from the dominant society’s treatment of Indigenous remains and items of cultural patrimony in tribally specific ways.

Within this subcategory of tribal codes, thirty-one tribes cite expressly to NAGPRA.<sup>210</sup> The common thread among tribes that cite NAGPRA is the tribes’ effort to ensure that there are processes in place within the tribe to adequately engage in intergovernmental and interinstitutional cooperation to effectuate NAGPRA’s goals. Several of the tribes citing to NAGPRA reference the statute in setting up internal tribal procedures for working on NAGPRA-related concerns, often in conjunction with a tribal THPO. For example, the Confederated Tribes of the Umatilla Reservation’s Historic Preservation Code implements NAGPRA by establishing tribal procedures related to “[i]nadvertent discoveries of human remains” and to bring the THPO into conversation with tribal and federal agencies.<sup>211</sup> Little Traverse Bay Bands identifies the THPO as “the designated NAGPRA representative of the Tribe,” who is instructed to “provide advice to [the] Tribal Council on repatriation and protection of traditional cultural properties.”<sup>212</sup> And the Fond Du Lac Band of Lake Superior Chippewa sets out the THPO’s duties to include “[r]eceiving all notices to the Band of discovery of cultural remains under NAGPRA.”<sup>213</sup>

### c. Sacred Sites and Ceremonial Places

There exists an inextricable tie between Indigenous Peoples’ identities, lifeways, religions, and cultures and with the earth and all its creations.<sup>214</sup> In

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208. *Id.*

209. *Id.* § U-4(1)(2)(B).

210. *See supra* note 186.

211. *See* CONFEDERATED TRIBES OF THE UMATILLA INDIAN RSRV. HISTORIC PRES. CODE § 6.02 (2016) [perma.cc/3NK3-N2Q7].

212. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. § 15.2106(B)–(C) (2022) [perma.cc/8GWZ-XDA4].

213. Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14, § 501(c) (May 6, 2014) [perma.cc/9B2C-FSLC].

214. *See* Carpenter, *supra* note 123, at 2103–11. *See generally* ROBIN WALL KIMMERER, BRAIDING SWEETGRASS (2013) (connecting Indigenous lifeways to plants and animals and other features of the natural world).

fact, it is commonly understood that connection to the natural world is constitutive of Indigenous identity.<sup>215</sup> As a Gwich'in chief stated, “[w]e hurt because we see the land being destroyed. We believe in the wild earth because it’s the religion we’re born with.”<sup>216</sup>

This symbiotic and powerful relationship between Indigenous Peoples and the planet is a common thread seen amongst Indigenous Peoples all over the world. From Australia, where Aborigines conduct ceremonies and pray at Uluru (Ayers Rock), to the Lakota’s summer solstice ceremonies at Mato Tipila (Devil’s Tower)<sup>217</sup> and beyond, to places like the Araihoa Indigenous reserve in the Amazon, home to the Awa, Indigenous Peoples across the globe tie themselves to their aboriginal lands and the places of their creation.<sup>218</sup> But, in the United States and elsewhere, these lands are often the ones that were most desired by settlers, and, accordingly, many are now situated outside of tribally controlled territories.<sup>219</sup>

Today, in the United States, at Bear’s Ears,<sup>220</sup> Oak Flat,<sup>221</sup> and Standing Rock,<sup>222</sup> among others, Indian tribes are fighting to protect their off-reservation sacred places from mining, exploitation, and extractive industry. These same concerns apply to tribal lands as well, as tribes are asserting through tribal law their deeply held values to ensure survival of their ceremonial and sacred places. Maintaining these sites is essential for the cultural survival of Indigenous Peoples. David Comingdeer, Chief of the Echota Ceremonial

215. See ANAYA, *supra* note 49, at 3, 100–06 (“They are *indigenous* because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.”). For discussion of critiques that such claims “essentialize” Indigenous Peoples, see Carpenter et al., *supra* note 50, at 1061.

216. *Epigraph* to ARCTIC REFUGE (Hank Lentfer & Carolyn Servid eds., 2001) (quoting Trimble Gilbert, Chief of Arctic Village).

217. The Lakota people received the sacred pipe from the spirit world at Mato Tipila (Devil’s Tower):

To honor the Great Spirit, Lakota gathered at Mato Tipila for a sun dance. A mysterious woman approached, gave the Lakota a pipe, and taught them how to use it in prayer. As she headed back toward the horizon, the woman turned into a buffalo calf. Since then, she has been known as “White Buffalo Calf Woman.”

IN THE LIGHT OF REVERENCE, at 20:52 (Bullfrog Films 2001).

218. Dom Phillips, *In the Amazon, the ‘World’s Most Endangered Tribe’ Has Few Options*, WASH. POST (Dec. 1, 2015), [https://www.washingtonpost.com/world/the\\_americas/in-the-amazon-the-worlds-most-endangered-tribe-has-few-options/2015/11/30/dae41fd0-6621-11e5-bdb6-6861f4521205\\_story.html?noredirect=on](https://www.washingtonpost.com/world/the_americas/in-the-amazon-the-worlds-most-endangered-tribe-has-few-options/2015/11/30/dae41fd0-6621-11e5-bdb6-6861f4521205_story.html?noredirect=on) [perma.cc/CX49-YA4M].

219. For a thorough treatment of sacred sites under U.S. property law and cultural property theory, see Carpenter et al., *supra* note 50, at 1113–19.

220. Joshua Partlow, *Tourists and Looters Descend on Bears Ears as Biden Mulls Protections*, WASH. POST (Apr. 8, 2021, 6:30 PM), <https://www.washingtonpost.com/nation/2021/04/08/bears-ears-haaland> [perma.cc/2LM7-YM2T].

221. *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 597, 604 (D. Ariz. 2021).

222. Carpenter & Riley, *supra* note 10.

Ground in Oklahoma, has stated that “[i]f we don’t come together and continue to assemble at our respective fireplaces, square grounds, stomp grounds and continue to follow our rules and our regulations, then we will die as individuals.”<sup>223</sup>

Indigenous Peoples’ reverence for the earth is clearly—and specifically—reflected in their tribal codes, as tribes enact laws to protect ceremonial grounds, sacred sites, culturally significant landscapes, historic properties, and other places of deep religious and cultural significance.<sup>224</sup> As a general matter, tribes have broad authority to control what happens with sacred places on tribal lands, and a study of the tribal codes reflects a profound desire on the part of tribes to prioritize the preservation of these places for future generations.<sup>225</sup> Moreover, the laws also indicate that some tribes are reacting to a long history of federal law and policy that not only criminalized Indigenous spiritual practices but has continuously failed to protect Indians’ land-based religious practices.<sup>226</sup> Neither the First Amendment of the United States Constitution, nor the American Indian Religious Freedom Act, nor the Religious Freedom Restoration Act has proved sufficient to protect tribal religions and sacred places.<sup>227</sup> Thus, safeguards for the free exercise of tribal religious practices are commonly referenced in tribal codes in connection with sacred sites and ceremonial grounds, among others.

Given this history, tribal laws today unsurprisingly emphasize the deeply held significance of sacred places to Indian tribes. My research revealed eighty-nine tribes with codes geared toward the protection of sacred and ceremonial sites or culturally significant landscapes. Such codes embody more than narrowly tailored provisions designed to avoid disturbance and desecration of sites of cultural and religious significance (though such codes are also represented in the data). Many tribes go beyond the basic protections, conveying broader ethics of stewardship, sustainability, spiritual sustenance, and

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223. Carpenter, *supra* note 123, at 2112 (quoting Janux, *Native Peoples of Oklahoma—Cosmology & Religion—2.0.4 David Comingdeer Part 3*, YOUTUBE, at 04:22 (July 27, 2014), <https://youtu.be/0Efq-SAQRs>) (describing significance of Cherokee ceremonial grounds to group cultural survival). See generally Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 3 (2018) (“Within the Euchee, Muscogee, Cherokee and Shawnee, the stomp dances are part of a still-existing traditional religion.”).

224. See Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 464–65 (2012).

225. See Riley, *Straight Stealing*, *supra* note 14. Although for a variety of reasons—including federal limitations on the ability of tribes to exercise criminal jurisdiction over non-Indians in most circumstances—enforcement of some tribal laws in this area may be quite difficult. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

226. See Riley, *Straight Stealing*, *supra* note 14.

227. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); Carpenter, *supra* note 123, at 2106, 2117.

the importance of preserving sacred places for the well-being of future generations of the tribe and the planet.

These priorities are written into the respective codes in nuanced and tribe-specific ways. The Little Traverse Bay Bands of Odawa Indians, for example, emphasizes the importance of the Great Lakes to the physical, spiritual and cultural survival of the Bands. The code notes that the tribe “historically resided in the Great Lakes Region in harmony with the natural environment since well before the arrival of Europeans” and goes on to emphasize that “[p]reserving the environmental quality of the Great Lakes and their resources for the present and future generations is absolutely essential to the Tribe.”<sup>228</sup> The Oneida Nation of Wisconsin similarly posits that preservation of and continued access to sacred sites for ritual purposes is “fundamental in the recognition of traditional lifeways, values and histories of the Nation or its individual members.”<sup>229</sup>

The codes reflect a wide range of definitions of the natural features of sites that they seek to protect. The Assiniboine and Sioux Tribes of Fort Peck define their “spiritual sites” as:

[A]ny place or area, including, but not limited to, any geophysical or geographical area or feature . . . [w]here Tribal practitioners are required by their religion to gather, harvest or maintain natural substances or natural products for use in spiritual ceremonies or for spiritual purposes, including all places or areas where such natural substances or products are located; or . . . [t]hat is utilized by spiritual practitioners for ceremonies or spiritual practices.<sup>230</sup>

Other tribes use the precise language of “sacred sites” to tie the natural world to religious and ceremonial practices.<sup>231</sup> The Nooksack Indian Tribe, for example, posits that a “sacred site[.]” is a place with “religious, cultural or spiritual significance”<sup>232</sup> and also includes the “earth, air and water” as cultural properties.<sup>233</sup> Tribes also emphasize the importance of continued access to the sites for spiritual purposes.<sup>234</sup>

228. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. § 4.601(B) (2022) [perma.cc/5PBD-QNZ2]; see also *Goals and Priorities of the Member Tribes of the Midwest Alliance of Sovereign Tribes (MAST): Hearing Before the S. Comm. on Indian Affs.*, 107th Cong. 40–41 (2001) (statement of Gerald V. Chingwa, Chairman, Little Traverse Bay Bands of Odawa Indians).

229. ONEIDA INDIAN NATION OF WIS. CODE OF LS. tit. 1, ch. 113, § 1-1 (1998) [perma.cc/UU2C-FMFZ].

230. FORT PECK TRIBES COMPREHENSIVE CODE OF JUST. tit. 32, § 219 (2019) [perma.cc/9CXJ-AHQ4].

231. LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE ch. 66, § 110(16) (2000) [perma.cc/ALU5-ZP4R].

232. NOOKSACK INDIAN LS. & ORDINANCES § 36.04.030 (2022) [perma.cc/J8RN-52YN].

233. *Id.* § 36.04.070.

234. *E.g.*, BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2, § 174 (2016) [perma.cc/2TAU-94EP] (access to sacred sites).

In keeping with Indigenous Peoples' own conceptions of natural and cultural resources that are necessary for tribal survival and spiritual connection, my analysis also examined other landscapes and natural resources of great importance to tribal cultures. Like the Little Traverse Bay Band's emphasis on preservation of the Great Lakes, the Cherokee Nation of Oklahoma has enacted a "Scenic Rivers Act" to safeguard those rivers with "cultural significance" to the tribe.<sup>235</sup> Tribes codify protections for living monuments,<sup>236</sup> "culturally identified areas,"<sup>237</sup> "[h]istoric [p]roperties,"<sup>238</sup> and "ancestral lands."<sup>239</sup> My research revealed that it was also not uncommon to see laws ensuring religious freedom alongside laws protecting sacred places.<sup>240</sup> And many tribes with codes relevant to sacred or ceremonial sites focused those regulations on the prevention of desecration.<sup>241</sup>

In select cases, tribal codes embodied unique and tribe-specific values and practices with regard to sacred and ceremonial places. For example, the Muscogee (Creek) Nation's Code sets forth specific protections for tribal ceremonial grounds. It states the purpose of the tribe's Protection and Preservation of Ceremonial Sites Code is to ensure the continuance of "the cultural traditions and ceremonial sites of the Muscogee (Creek) people." And the law goes further, articulating a desire to ensure "the continuance of the Muscogee Ceremonial Traditional Religion" specifically.<sup>242</sup> It also provides for funding to support the tribe's traditional Green Corn Ceremonies and also to observe a

235. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. § 4.601(B) (2022) [perma.cc/5PBD-QNZ2]; CHEROKEE NATION TRIBAL CODE tit. 27, ch. 10, § 1002(A) (2019) [perma.cc/AUC7-9GP3].

236. N. ARAPAHO TRIBAL CODE tit. 13 (2010) [perma.cc/3QB7-ZK9S].

237. SHINGLE SPRINGS BAND OF MIWOK INDIANS, ENVIRONMENTAL MANAGEMENT PLAN § 3.8 (2016) [perma.cc/79QJ-PNYE].

238. SILETZ TRIBAL CODE § 9.006 (2005) [perma.cc/RG4G-W9KE].

239. YUROK TRIBAL CODE tit. 14, ch. 10, § 80 (2022) [perma.cc/MZT7-LKAM].

240. *E.g.*, BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2, §§ 171–172 (2016) [perma.cc/2TAU-94EP] (protection of Indian religious freedom and protection of sacred sites).

241. *See, e.g.*, CITIZEN POTAWATOMI NATION CODE tit. 12, ch. 5, § 116(A) (2017) [perma.cc/S2KS-UHUM]; KAIBAB BAND OF PAIUTE INDIANS TRIBAL CODE tit. 4, ch. 5, § 11 (1996) [perma.cc/QHJ4-38GB]; LAW & ORD. CODE OF THE KALISPEL TRIBE OF INDIANS § 13-6.04 (2017) [perma.cc/HL5A-UB3W]; KAW NATION TRIBAL CODES tit. 7, § 516 (2017) [perma.cc/4N3V-8DW3]; KICKAPOO TRADITIONAL TRIBE OF TEX. TRIBAL CODES ch. 18, § 516(a) (2020) [perma.cc/GY5K-QJVU]; MAKAH L. & ORD. CODE tit. 5, ch. 5, § 4 (1999) [perma.cc/U2AM-M2P5]; MIAMI TRIBE OF OKLA. CRIM. OFFENSES CODE § 516 (2018) [perma.cc/DD3S-K6TY]; LAW & ORD. CODE OF THE LAS VEGAS TRIBE OF PAIUTE INDIANS tit. 5, § 70-030 (2012) [perma.cc/DRX4-GXQL]; LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL CODE ch. 400, tit. 3, § 10.03 (2014) [perma.cc/DM4C-KK3C]; CHEHALIS TRIBAL CODE tit. 4, ch. 15, § 70 (2022) [perma.cc/A2RC-DAYB]; COLVILLE TRIBAL L. & ORD. CODE tit. 3, ch. 3-1, § 172 (2020) [perma.cc/EB6F-HQD8].

242. MUSCOGEE CODE ANN. tit. 5, ch. 1, §§ 101, 105 (2007) [perma.cc/FL5L-GBEU].



Day of Prayer.<sup>243</sup> Similarly, the White Mountain Apache Tribal code designates its “Holy Grounds,” or, in Apache, “The Place of the Sacred Cane.”<sup>244</sup> Similar to Muscogee Creek’s effort to preserve and advance the tribe’s traditional religion, White Mountain Apache further stipulates that the sacred and ceremonial sites are “set aside for the exclusive use of persons practicing traditional Apache religion.”<sup>245</sup>

There were numerous other unique features of the codes within this category. Of note were tribal efforts to establish processes for how a site might be defined as “sacred” under tribal law. Several of these tribes emphasize a role for traditional leaders and tribal elders. At the Confederated Tribes of Warm Springs, for example, the tribe stipulated that only “traditional Indian religious leaders” would identify sites as sacred.<sup>246</sup> Similarly, at Hualapai, an “Advisory Team of Elders” will consult on the identification of sacred places.<sup>247</sup> Several tribes mandate the limited release of cultural information and emphasize the importance of keeping the location and specifics about the sites confidential.<sup>248</sup> Others, like the Pueblo of Isleta, also state that the sites are to be “preserve[d] and maintain[ed] in perpetuity.”<sup>249</sup>

Although tribes have a great deal of control over their own lands, those lands are ultimately held in trust for tribes by the federal government.<sup>250</sup> Historically and today, the federal government continues to assert a great deal of control over what happens on Indian lands, though there has been some movement toward more robust policies of self-determination.<sup>251</sup> Perhaps not surprisingly, then, tribes commonly refer to the need for cooperation with states and the federal government to preserve tribes’ sacred places and lands of cultural significance. Some, like Burns Paiute, emphasize the importance of

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243. *Id.* ch. 2, § 201; *see also id.* ch. 3, § 301.

244. WHITE MOUNTAIN APACHE GOV’T CODE ch. 8, §§ 8.2, 8.4 (1991) [perma.cc/M7FZ-QKF9].

245. *Id.*

246. WARM SPRINGS TRIBAL CODE ch. 490, § 420 (2016) [perma.cc/N59B-99PP].

247. Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98, § 301(c) (Feb. 18, 1998) [perma.cc/4LBY-HE4S].

248. *See, e.g., id.* (“[C]onfidentiality is advisable to protect the cultural resources at issue and the traditional uses of such resources by tribal members . . . .”); SILETZ TRIBAL CODE § 9.007 (2005) [perma.cc/RG4G-W9KE] (requiring procedures “for limited release of confidential information under appropriate circumstances”).

249. Tribal Council Res. No. 2013-041 (Pueblo of Isleta 2013) [perma.cc/6FNA-SUM5].

250. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

251. *See, e.g.,* Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150; *see also* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791 (2019).

entering into Memoranda of Understanding with other governments to facilitate cooperation with state and federal agencies.<sup>252</sup> Siletz, too, encourages intergovernmental cooperation.<sup>253</sup> And numerous tribes reference federal statutes that are relevant to the protection of culturally and historically significant sites on tribal lands, such as the Archaeological Resources Protection Act, the National Historic Preservation Act, and the Natural Environmental Policy Act.<sup>254</sup>

Because of the connection between religion and land, it was not uncommon to discover that many tribal codes also reference federal constitutional or statutory protections for religious freedom and practice, such as the First Amendment of the U.S. Constitution, the Religious Freedom Restoration Act, and the American Indian Religious Freedom Act. One tribe, the Northern Arapaho, took a different approach, however. Although the tribe cites to federal law, it does so to document how inadequate federal law has been in protecting Indian religion. The tribe specifically notes the “hypocrisy” and “callous indifference” shown by the United States to Native religions.<sup>255</sup> The code posits, further, that in some cases, federal law is expressly inapposite to tribal law with regard to certain religious practices.<sup>256</sup>

This analysis demonstrates that as tribes recover—deftly and swiftly—from the darkest parts of colonization, they are increasingly seeking to reclaim sacred lands, assert rights of self-determination and sovereignty over their territories, and live their sovereignty and culture. For Indigenous Peoples, this means fulfilling obligations to the natural world and securing rights to natural and cultural resources for the generations to come.

#### d. Intangible Property

Although cultural property historically was primarily defined by its tangible objects—such as monuments, artifacts, and religious shrines—the concept has broadened dramatically to include intangible cultural property as well. Under American law, intangible property, if protected at all, falls largely within the intellectual property laws of copyright, patent, and trademark, with some additional protections for publicity rights and trade secrets, among others. But these doctrines fail to protect much of Indigenous Peoples’ intellectual

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252. BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2, § 172(3) (2016) [perma.cc/2TAU-94EP].

253. SILETZ TRIBAL CODE §§ 9.001, 9.008 (2005) [perma.cc/RG4G-W9KE].

254. *E.g.*, COLVILLE TRIBAL L. & ORD. CODE tit. 4, ch. 4-4, § 2(b) (1983), [perma.cc/WG7K-X6TB] (citing ARPA); *id.* § 2(d) (citing NHPA); SHOSHONE & ARAPAHO L. & ORD. CODE tit. 11, ch. 6, § 1(2) (2004) [perma.cc/9GCL-XYXB] (citing NEPA and ARPA). There was not a comprehensive survey done in this study to account for these particular statutes.

255. N. ARAPAHO TRIBAL CODE tit. 13, § 101(h) (2010) [perma.cc/3QB7-ZK9S].

256. *Id.* § 101(c).

property.<sup>257</sup> Thus, just as cultural property has expanded to include the intangible, there has been a simultaneous growth in critiques addressing the shortcomings of Western intellectual property law with regard to Indigenous knowledge.<sup>258</sup> For Indigenous Peoples, their intangible properties—traditional medicines, folklore, and religious ceremonies—are often as valuable, if not more, as tangible property, but remain highly vulnerable under current law.<sup>259</sup>

As I have written before, tribal cultures rarely distinctly separate intellectual property rights from other aspects of tribal law and culture.<sup>260</sup> Thus, codes governing the creation, protection, or dissemination of intellectual property rights in tribal communities are oftentimes inextricably mixed with other tribal laws, such as what is or can be owned collectively versus individually, what knowledge is sacred and private versus public, or whether intellectual property can be alienated at all. The nuance and richness in Indigenous intangible property conceptions make tribal law resistant to a strict, siloed typology, like that seen in Western intellectual property regimes.

Tribal intangible cultural protection codes vary greatly in scope and substance. An examination of tribal law demonstrates a resistance to strict categorization and manifests a spectrum of engagement with Western intellectual property systems. It is evident that tribes are, in their own unique ways, selectively embracing Western intellectual property laws while still ensuring that they center tribal custom and tradition. The research revealed many cases of tribal intangible property protection based entirely on tribal custom and tradition, but with similar numbers of references to places where tribes draw from or even implement Western intellectual property law. To drill down on these nuances, I discuss some finer distinctions within the intangible property protection data later in this Section.

To ensure the project adequately captured Indigenous Peoples' own worldviews regarding intangible property, I employed a broad range of search terms, defining this category capaciously to align with tribes' own conceptions of intangible property and cultural preservation. This broad concept of intangible property would, in some sense, overreport intangible property laws if defined by U.S. legal doctrines. But the scope of this category—similar to the more fluid and crosscutting categories employed by the World Intellectual Property Organization—more closely aligns with tribal perspectives. Consider the following example. “Ceremony” was used as a search term in the intangible property category. When reporting on my findings, I included tribes

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257. See *supra* Section I.B.

258. For a discussion of the shortcomings of intellectual property law with regard to Indigenous creations, see Riley, *supra* note 60.

259. For a thorough discussion of the growth of “cultural property” to include intangible property, see Carpenter et al., *supra* note 50, at 1033–35.

260. See Riley, *Straight Stealing*, *supra* note 14.

that have laws to protect ceremonial practices, such as criminal codes that authorize punishment of individuals for desecration or disruption, even though such laws may not squarely fall within intangible property protection if considered in a conventional intellectual property frame.

With this category thus defined, my research revealed forty-eight tribes that have codes that protect intangible property.<sup>261</sup> The scope and subject matter of protection in the codes vary greatly. In recent years, there have been widely reported incidents of violative acts with regard to tribal ceremonies, such as unlawful filming and distribution or even the mimicking of sacred events by non-Indians. Thus, tribal laws, perhaps unsurprisingly, speak to these violations. The Northern Arapaho Tribe, for example, has ceremony protections in its code, which it asserts are “essential to the survival and well-

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261. N. ARAPAHO TRIBAL CODE tit. 13 (2010); BISHOP PAIUTE TRIBAL ORDINANCES tit. 7, ch. 7.6, § 4(H) (2019); BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2 (2016); CHEROKEE NATION TRIBAL CODE tit. 21, ch. 36 (2019); *id.* tit. 31; Cheyenne River Sioux Tribe of S.D., Ordinance No. 57 (Jan. 9, 1992); COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE (2020); SILETZ TRIBAL CODE §§ 9.100–9.111 (2005); WARM SPRINGS TRIBAL CODE ch. 490, § 420 (2016); COQUILLE INDIAN TRIBAL CODE ch. 250 (2018); Del. Tribe of Indians, Tribal Seal Protection Ordinance (Mar. 17, 2015); Tribal Council Res. No. 2017-03 (Del. Tribe 2017); Tribal Council Res. No. 2018-13 (Del. Tribe 2018); Tribal Council Res. No. 2019-55 (Del. Tribe 2019); E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES ch. 132 (2022); FORT MCDOWELL YAVAPAI NATION L. & ORD. CODE ch. 23, art. 3 (2017); HO-CHUNK NATION CODE tit. 7, § 4 (2016); HOPLAND BAND OF POMO INDIANS TRIBAL CODE tit. 15, §§ 3, 6, 7 (2006); Hualapai Tribe, Hualapai Cultural Heritage Resources Ordinance, No. 13-98 (Feb. 18, 1998); Iowa Tribe of Okla., Cultural Heritage Ordinance (Aug. 12, 1994); LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE OF L. tit. 6, ch. 1 (2015); LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 4, ch. 8 (2022); *id.* tit. 6, ch. 21; *id.* tit. 15, ch. 17; LUMMI NATION CODE OF LS. tit. 40 (2008); MENOMINEE INDIAN TRIBE OF WIS. TRIBAL CODE pt. 2, ch. 293, § 1 (2022); MESCALERO APACHE TRIBAL CODE ch. 10, § 26 (2016); *id.* ch. 15, § 4-3(C); Fond Du Lac Band of Lake Superior Chippewa, Ordinance No. 03/14 (May 6, 2014); Leech Lake Band of Chippewa Indians, Ordinance No. 96-03 (Dec. 22, 1995); MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES pt. 4, ch. 31, art. 2, § 31-26 (2021); NAVAJO NATION CODE ANN. tit. 19, ch. 11 (2014); NOOKSACK INDIAN LS. & ORDINANCES tit. 36 (2022); PASCUA YAQUI TRIBAL CODES tit. 2, ch. 2-22 (2022); *id.* tit. 8, ch. 7-1; POARCH BAND OF CREEK INDIANS TRIBAL CODE tit. 39 (2022); PUEBLO OF ACOMA LS. tit. 13 (2017); PUEBLO OF POJOAQUE L. & ORD. CODE § U-4 (2019); PUEBLO DE SAN ILDEFONSO CODE tit. 23, ch. 23.1, § 1.080 (2012); PUEBLO OF TESUQUE, N.M., TRIBAL CODE § 4-12-5; ROSEBUD STOUX L. & ORD. CODE tit. 18, ch. 15, §§ 101, 102(5) (1991); Saginaw Chippewa Indian Tribe, Ordinance No. 32, § 16 (July 6, 2011); SHINGLE SPRINGS BAND OF MIWOK INDIANS, ENVIRONMENTAL MANAGEMENT PLAN (2016); LAW & ORD. CODE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RSRV., IDAHO tit. 25, ch. 1 (2019); SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73 (2005); SNOQUALMIE TRIBAL CODE tit. 11, ch. 1 (2012); SOKAOGON CHIPPEWA CMTY. CODES ch. 7 (2011); SQUAXIN ISLAND TRIBAL CODE tit. 9, ch. 16, § 40 (2014); MUSCOGEE CODE ANN. tit. 5 (2007); OSAGE NATION CODE tit. 8, ch. 1 (2021); SEMINOLE NATION TRIBAL CODE tit. 1A, ch. 1 (2019); TULALIP TRIBAL CODES tit. 8 (2022); N. SLOPE BOROUGH CODE OF ORDINANCES tit. 2, ch. 2.16, § 110(L) (2019); Wyandotte Nation, Cultural Ordinance §§ 3, 5, 6 (June 10, 2009); YUROK TRIBAL CODE tit. 14 (2022).

being of the Tribe and its members.”<sup>262</sup> The code draws heavily on tribal custom and notes that the freedom of tribal members to participate in these “traditional ceremonies” is protected under Arapaho “ceremonial law.”<sup>263</sup>

There are also unique protections for tribally specific ceremonial practices found within other tribal laws as well. The Squaxin Island Tribe, for example, sets forth guidelines to protect traditional rituals, like ceremonial burning.<sup>264</sup> The Tulalip Tribes of Washington has provisions for “ceremonial fishing rights.”<sup>265</sup> And the Chippewa Lac Courte Oreilles Tribal Code articulates protection for hunting as a form of ceremony itself: “Geget giyose a’aw Anishinaabe da-zhaabwiid. Mii ezhichiged. Mii-wenji-gichi-apiitenimaad akina bemaadizinijin a’aw Anishinaabe,” which translates to: “But hunting is more than just a functional activity for the Ojibwe people; it is a way of life, which is marked by great respect and appreciation for all life.”<sup>266</sup> Others, like the Bishop Paiute Tribe, have criminal codes that allow for banishment or exclusion of anyone who causes “disturbances of celebrations or ceremonies within the Reservation.”<sup>267</sup>

As previously discussed, the long history of colonization and theft from Native peoples has made tribes highly sensitive to issues of confidentiality. When tribal intangible property is improperly disclosed, it can have devastating consequences for tribes. This “cultural harm”<sup>268</sup> can have far-reaching impacts on a tribe’s spiritual practices and ceremonies. Moreover, in cases where the disclosure causes increased attention to the tribe by outsiders, it may impose on or interrupt traditional ceremonial activities. Tribes have addressed these issues in their laws, which reflect attention to issues of privacy and confidentiality. For example, the Northern Arapaho has a “Protection of Ceremonies” provision in its code, which does not “allow any inquiry into or disclosure of any Northern Arapaho traditional ceremonies or practices by or to any person or entity not authorized by the traditional law of the Tribe.”<sup>269</sup> It further stipulates that all communications with “traditional ceremonial leadership” shall be and shall remain “privileged and confidential.”<sup>270</sup> The Pueblo of Tesuque similarly has detailed provisions prohibiting the disclosure of “any secret or sacred customs or traditions of the Tesuque Pueblo to any

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262. N. ARAPAHO TRIBAL CODE tit. 13, §§ 101, 105 (2010) [perma.cc/3QB7-ZK9S].

263. *Id.* § 101.

264. SQUAXIN ISLAND TRIBAL CODE tit. 9, ch. 16, § 40 (2014) [perma.cc/9BPW-NG52].

265. TULALIP TRIBAL CODES tit. 8, ch. 5, § 200 (2022) [perma.cc/ENG8-8Z9A].

266. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CODE OF L. tit. 6, ch. 1, Preamble (2015) [perma.cc/9ZW7-DRRZ].

267. BISHOP PAIUTE TRIBAL ORDINANCES tit. 7, ch. 7.6, § 4(H) (2019) [perma.cc/4RXM-MV9D].

268. Tsosie, *supra* note 61, at 310.

269. N. ARAPAHO TRIBAL CODE tit. 13 § 105 (2010) [perma.cc/3QB7-ZK9S].

270. *Id.*

person not a member of the Pueblo, or to the general public for any purpose whatsoever.”<sup>271</sup>

Some tribes have developed comprehensive intangible property laws that appear to draw largely from custom and tradition rather than exogenous sources. The Sisseton-Wahpeton Oyate’s Cultural Resource Protection Act, for example, provides a detailed set of guidelines and restrictions to promote and also protect the intangible knowledge of the tribe. The code defines “Indigenous intellectual property” as “the indigenous cultural information, knowledge, uses, and practices unique to the Tribe’s ways of life maintained and established over protected lands and aboriginal areas.”<sup>272</sup> The code goes on to acknowledge the rights as typically “communal” but does note that knowledge is held in some cases by individuals.<sup>273</sup> The tribe enumerates the capacious categories of knowledge it seeks to protect, which align in many respects with the sweeping, fluid definition of “traditional knowledge” employed by the World Intellectual Property Organization,<sup>274</sup> which attempts to more closely comport with Indigenous worldviews. The Sisseton-Wahpeton code includes in its definition images, sounds, performances, knowledge of systems, typologies of plants and animals, ceremonies, location of cultural sites, sacred information, and more.<sup>275</sup> As with other tribes concerned with confidentiality, the tribe’s code has strict prohibitions on disclosure of culturally sensitive information. It acknowledges several nuances regarding the maintenance and transmission of intangible knowledge that is of great import to tribal communities, such as what information is absolutely prohibited from being shared outside the tribe and whether the information is of a “highly specialized” nature and therefore should be held by only a few individuals within the tribe.<sup>276</sup> It also emphasizes that “[p]ublic disclosure of this type of information could cause severe harm and loss to Sisseton-Wahpeton Oyate culture and cultural resources.”<sup>277</sup>

Across these codes, there were some additional unique features. Some tribes, for example, address issues around collective versus individual ownership. The Menominee code, for example, states that tribal knowledge and cultural resources “are the cultural patrimony of the Menominee people, belonging to no specific individual,” and the code should be read to comport

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271. PUEBLO OF TESUQUE, N.M., TRIBAL CODE § 4-12-5 [perma.cc/D9Y8-H7RW].

272. SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73, tit. 2 (2005) [perma.cc/RJH7-CWAJ].

273. *Id.*

274. *Traditional Knowledge*, *supra* note 91.

275. SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73, tit. 2 (2005) [perma.cc/RJH7-CWAJ].

276. *Id.* tit. 5, § 1.

277. *Id.*

with “a traditional Menominee perspective.”<sup>278</sup> Other tribal codes deal with intellectual property rights in Indigenous languages,<sup>279</sup> contain rules regarding disclosure of trade secrets,<sup>280</sup> or establish regulations for use of the official tribal seal.<sup>281</sup> The Rosebud Sioux Tribe has established a “Natural and Cultural Resource Zone” as a secure place for tribal members to conduct a variety of traditional practices, including “religious or cultural activities.”<sup>282</sup> The Shoshone-Bannock Tribe has a similar provision.<sup>283</sup>

I was particularly interested to see whether and to what extent federal intellectual property law might be impacting tribal law. Thus, I also searched specifically for the terms “copyright,” “patent,” and “trademark,” as well as the federal statutes to which they correspond.<sup>284</sup> I also searched for references to the Indian Arts and Crafts Act. In doing so, I identified only a few tribes that protect their intangible property using the language of federal intellectual property law. In some cases, the tribal codes are comparable to federal protections, even though the language may not be identical.

Within this narrower focus, I found seven tribes that explicitly employ the language of “copyright” somewhere in their code, even though they do not all employ it identically or for the same purpose. These are the Cherokee Nation of Oklahoma,<sup>285</sup> Colorado River Indian Tribes (CRIT),<sup>286</sup> Ho-Chunk,<sup>287</sup> Mohegan Tribe,<sup>288</sup> Pascua Yaqui,<sup>289</sup> Pueblo of Acoma,<sup>290</sup> and Yurok Tribe.<sup>291</sup> Of these, four tribes—CRIT, Ho-Chunk, Mohegan, and Pascua Yaqui—also

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278. MENOMINEE INDIAN TRIBE OF WIS. TRIBAL CODE pt. 2, ch. 293, § 1 (2022) [perma.cc/Q5XM-3CAN].

279. *E.g.*, CHEROKEE NATION TRIBAL CODE tit. 31, ch. 1, § 103 (2019) [perma.cc/AUC7-9GP3].

280. *E.g.*, *id.* tit. 67, ch. 2, § 105.

281. *E.g.*, Del. Tribe of Indians, Tribal Seal Protection Ordinance §§ 1–4 (Mar. 17, 2015) [perma.cc/HQJ3-4DKW].

282. ROSEBUD SIOUX L. & ORD. CODE tit. 18, ch. 15, §§ 101, 102(5) (1991) [perma.cc/PQ4N-7Z5J].

283. LAW & ORD. CODE SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RSRV., IDAHO tit. 25, ch. 1, § 15 (2019) [perma.cc/7G8G-ET2A].

284. Though I did not explicitly search the data for codes related to trade secrets, I did come across them in my analysis.

285. CHEROKEE NATION TRIBAL CODE tit. 31, ch. 3, §§ 301–304 (2019) [perma.cc/AUC7-9GP3].

286. COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE ch. 7, § 1-701 (2020) [perma.cc/X88C-7F9Z].

287. HO-CHUNK NATION CODE tit. 7, § 4, ch. IX 9 (2016) [perma.cc/XR74-SYKE].

288. MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES pt. 4, ch. 31, art. 2, § 31-26(q)(1)–(2) (2021) [perma.cc/396C-UW2F].

289. PASCUA YAQUI TRIBE TRIBAL CODE tit. 8, pt. 7, ch. 7-1, §§ 40, 80 (2022) [perma.cc/6BN3-8TZP].

290. PUEBLO OF ACOMA LS. tit. 13, ch. 1, § 4(B)(3) (2017) [perma.cc/28TA-BSSQ].

291. YUROK TRIBE TRIBAL CODE tit. 14, ch. 14.20 (2021) [perma.cc/ZG8W-NNSF].

reference “trademark” law in their tribal codes. CRIT and Pascua Yaqui codes contain additional protections for “patents,” as does one other, the Little Traverse Bay Bands of Odawa Indians.<sup>292</sup> Finally, tribes such as the Poarch Band Creek<sup>293</sup> reference the Indian Arts and Crafts Act,<sup>294</sup> and in the cases of the Coquille<sup>295</sup> and the Cherokee Nation of Oklahoma,<sup>296</sup> implement their own tribal versions of the Act.<sup>297</sup>

The federal law references serve multiple roles in the tribal codes. The Colorado River Indian Tribes of the Colorado River Indian Reservation has an Intellectual Property Code<sup>298</sup> covering copyright,<sup>299</sup> trademark,<sup>300</sup> and patent.<sup>301</sup> The copyright and trademark provisions are designed to protect works that are copyrighted or trademarked by CRIT, while allowing select use of those works “on a case by case basis.”<sup>302</sup> The Pueblo of Acoma’s code assigns all copyrights in Acoma language publications and media produced by Pueblo schools to the Pueblo of Acoma.<sup>303</sup>

Other tribes employ tribal law to protect and manage intellectual properties that may be covered by the federal intellectual property doctrines but that receive distinct treatment under tribal law. Pascua Yaqui, for example, cites to federal laws but further defines “Traditional Indigenous Intellectual Property” according to custom and tradition:

“Traditional Indigenous Intellectual Property” means the indigenous cultural information, knowledge, uses, and practices unique to the Tribe’s ways of life maintained and established over tribal homelands and aboriginal areas

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292. LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS WAGANAKISING ODAWAK TRIBAL CODE OF L. tit. 1, ch. 10 (2022) [perma.cc/H3YL-AECB].

293. POARCH BAND OF CREEK INDIANS TRIBAL CODE tit. 39, ch. 2, § 2(k) (2022) [perma.cc/Q7C7-3AM2].

294. It is important to keep in mind that other tribes—perhaps many others—do protect intellectual property, even though it may not appear in the available tribal codes databases or may not appear within the search terms. For example, the Zuni tribe protects “intellectual property such as dances and songs” but does so through its Constitution, not its code. ZUNI TRIBE CONST. art. XVIII, § 2 [perma.cc/43NF-FSXZ]. This research focused primarily on tribal codes.

295. COQUILLE INDIAN TRIBAL CODE ch. 250 (2018) [perma.cc/24BJ-FY2F].

296. CHEROKEE NATION TRIBAL CODE tit. 31, ch. 3, § 301 (2019) [perma.cc/3KTD-QA5N].

297. *Id.*; COQUILLE INDIAN TRIBAL CODE ch. 250, § 10 (2018) [perma.cc/24BJ-FY2F].

298. COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE ch. 7 (2020) [perma.cc/X88C-7F9Z].

299. *Id.* § 1-701.

300. *Id.* § 1-702.

301. *Id.* § 1-703.

302. *Id.* §§ 1-701 to -702.

303. PUEBLO ACOMA LS. tit. 13, ch. 1, § 4 (2017) [perma.cc/28TA-BSSQ].



since time immemorial. This knowledge is based upon millennia of observation, habitation, and experience, and is a communal right held by the Tribe and in some instances by individuals.<sup>304</sup>

Beyond the core federal intellectual property laws of copyright, trademark, and patent, I also sought to measure the occurrences of the Indian Arts and Crafts Act in the codes. As increasing litigation has demonstrated over the years, tribes have a deep interest in protecting their tribal names for both spiritual and, in some cases, commercial purposes. Asserting control of a tribal name is central to rights of self-determination. While some tribes and tribal artisans may seek to share their art and artistry with the outside world, they also want to be accurately depicted and fairly treated when it comes to use of their tribal names. As one leader from the Navajo Nation stated about the controversy with Urban Outfitters:

For some of our Navajo or native artisans, that's what sells their products. Attaching the name Navajo to their item generates income . . . . To the larger world, we are Navajo, and we take pride in being Navajo . . . . We don't want our name to be associated with a anything that isn't Navajo.<sup>305</sup>

Curiously, only four tribes reference the Indian Arts and Crafts Act in their tribal codes. Of these, two of the tribes—Cherokee Nation and the Coquille Tribe—have gone even further than the IACA to create tribe-specific versions of the Act. For example, the Cherokee Nation takes a specialized approach, where its tribal code includes comprehensive intellectual property laws, reflecting a unique marriage of Western and tribal conceptions of intellectual property. The tribe has both an “Arts and Crafts Copyright Act,”<sup>306</sup> as well as a “Truth in Advertising for Native Art Act.”<sup>307</sup> This latter statute maps on to the federal Indian Arts and Crafts Act, but this version is tailored to the Cherokee Nation, the purpose of which is to

establish guidelines for the purchase, promotion and sale of genuine Native American arts and crafts within Cherokee nation and by Cherokee Nation entities. This act is further intended to encourage and allow Cherokee artists to be diverse, creative as well as traditionally influenced and to continue the use of traditional materials as well as use new mediums.<sup>308</sup>

The Coquille Indian Tribe also has a Coquille Crafted Ordinance in its Tribal Code, which seeks to provide protections similar to those of the Indian

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304. PASCUA YAQUI TRIBAL CODES tit. 8, pt. 7, ch. 7-1, §40(A)(13) (2022) [perma.cc/6BN3-8TZP].

305. Stephanie Siek, *Navajo Nation Sues Urban Outfitters for Alleged Trademark Infringement*, CNN (Mar. 2, 2012, 4:57 PM) (second omission in original), <https://inamerica.blogs.cnn.com/2012/03/02/navajo-nation-sues-urban-outfitters-for-alleged-trademark-infringement> [perma.cc/C7ZT-XF9K] (internal quotation marks omitted).

306. CHEROKEE NATION TRIBAL CODE tit. 31, ch. 3 (2019) [perma.cc/AUC7-9GP3].

307. *Id.* ch. 4.

308. *Id.* § 402.

Arts and Crafts Act, by which artists may identify their works as “Coquille Crafted” if they meet certain requirements. This allows “[t]ribal members to market certain products, and to encourage the creation of traditional Coquille Products.”<sup>309</sup> It sets forth terms and definitions of what comprises “Coquille Made” (requiring enrollment in the Coquille Indian Tribe) and describes the requisite allocation of labor and materials in order to qualify as “Coquille Made.” (Labor must be entirely Coquille, but the individual component materials of the item need not be entirely Coquille made.)<sup>310</sup> Once the permit has been issued for Coquille tribal members to participate in the program, the authenticating documentation will be produced by the tribe and will affix to the handicraft.<sup>311</sup>

In sum, as the codes reflect, there’s been a remarkable increase in tribes’ efforts to protect their intangible knowledge in the last fifteen years. As issues of cultural appropriation and theft of Indigenous knowledge continue to arise, tribes are actively engaging a combination of tribal custom and tradition and external legal sources to devise intangible property protections that work for them. The trend is toward more explicit tribal laws that address intangible property, with many of the codes engaging with fluid conceptions of such knowledge—more akin to the WIPO project—as compared to the more narrowly defined categories created pursuant to U.S. law, which may be a poor match for Indigenous knowledge systems.

#### e. Data Sovereignty

In 2005, the Havasupai Indian Tribe—which has lived and flourished in villages located at the base of the Grand Canyon since time immemorial—filed a lawsuit against Arizona State University for misuse of blood samples for unauthorized studies into the tribe’s origin and genetic diseases.<sup>312</sup> Karitiana Indians in the Amazon basin gave blood to researchers who made promises of making their lives better with medication for diseases but instead sent nothing and sold their blood online to scientists.<sup>313</sup> And tribes like the Hopi, who are among the most studied people on the planet, have had their sacred dances and ceremonial songs recorded by anthropologists and made available on the internet to anyone in the world.<sup>314</sup> Many of these instances have come at great

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309. COQUILLE INDIAN TRIBAL CODE ch. 250, § 10 (2018) [perma.cc/24BJ-FY2F].

310. *Id.* § 100.

311. *Id.* § 400.

312. *Tilousi v. Ariz. State Univ.*, No. 04-CV-1290, 2005 WL 6199562, at \*2–6 (D. Ariz. Mar. 3, 2005).

313. Larry Rohter, *In the Amazon, Giving Blood but Getting Nothing*, N.Y. TIMES (June 20, 2007), <https://www.nytimes.com/2007/06/20/world/americas/20blood.html> [perma.cc/8D8R-SJVL] (discussing scientists’ taking of Amazonian Indians’ blood for scientific study without obtaining full, informed consent).

314. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 11–15 (First Harvard Univ. Press paperback ed. 2004).

cost to Indigenous Peoples, who have often been seen as a resource for outsiders' knowledge, curiosity, and career advancement.<sup>315</sup>

There is now a movement by tribes to exercise control over the plethora of information that comes from tribal communities—whether from the people, the land, the culture, or the religion. This effort, to control one's own information, is increasingly referred to in Indigenous communities as "Indigenous data sovereignty."<sup>316</sup> One of the leading legal scholars in the field, Rebecca Tsosie, defines "data sovereignty" as the belief "that Native nations and other Indigenous peoples ought to control the collection and use of data by and about them, and they link this normative claim to political and moral claims of 'self-determination' "<sup>317</sup> And Tsosie, too, has advocated for the development of laws at the tribal level to "inform analogous federal and state policies governing data."<sup>318</sup>

These concerns are manifested in tribal laws today, as tribes assert greater control over whether and how research can be conducted in tribal communities. This includes laws that deal with securing permits prior to conducting research, who can own the intellectual property that is produced, benefit-sharing requirements, and other research protocols that must be followed. Exercising "data sovereignty" aligns with tribal rights of self-determination and with a growing emphasis on protection for Indigenous knowledge as evidenced in international human rights law, including in the U.N. Declaration on the Rights of Indigenous Peoples.<sup>319</sup> Moreover, because tribes are empowered through these laws to ensure that researchers consent to tribal jurisdiction, tribes are well-positioned to enforce their own laws with regard to their Indigenous knowledge and offer greater protections to their communities for the advancement of tribal cultures.

My research revealed forty-nine tribes with data sovereignty codes in place. The bulk of the tribes' codes in this category pertains to permitting requirements, particularly with regard to land-based research. Codes regarding permits or processes for archaeological or geological research, for example, were quite common. These codes at times reflected the tribe's unique geographical positioning. Some tribes in the Northern Plains—such as the Cheyenne River Sioux<sup>320</sup> and the Standing Rock Sioux,<sup>321</sup> for example—have

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315. For a discussion of harm due to cultural appropriation, see generally Reed, *supra* note 61, at 1127–28.

316. For a comprehensive discussion of the meaning and scope of "data sovereignty," see Victoria Tauli-Corpuz, *Preface* to INDIGENOUS DATA SOVEREIGNTY, at xxi, xxi–xxii (Tahu Kukutai & John Taylor eds., 2016).

317. Tsosie, *supra* note 21, at 229.

318. *Id.* at 231.

319. UNDRIP, *supra* note 15.

320. Cheyenne River Sioux Tribe of S.D., Ordinance No. 57 § 6(a) (Jan. 9, 1992) [perma.cc/SU4E-2TJM].

321. STANDING ROCK SIOUX TRIBAL CODE OF JUST. tit. 38 (2015) [perma.cc/J2TA-FRMT].

specific provisions regarding paleontological resources. The Alaskan Native Village of Wainwright, located in Alaska's North Slope borough just south of the northernmost city in the United States, Utqiagvik, authorizes its cultural heritage commission to "[r]eview all research planned or under progress relating to or bearing upon the history, language and cultur[e] of the North Slope Region."<sup>322</sup> And, in a move similar to many "source" nations around the world that make all discovered cultural property subject to state ownership, the Iowa Tribe mandates that "any Native American cultural item above, on or below the surface of Tribal lands that is discovered, excavated or removed is deemed property of the Iowa Tribe" (subject to limited exceptions).<sup>323</sup>

Because many of the tribal codes are undated, it's not possible to know at what point the research guidelines came into effect. But one of the first I ever came across in my own work—more than a decade ago—was the Hopi Tribe's *Protocol for Research, Publication and Recordings: Motion, Visual, Sound, Multimedia and other Mechanical Devices*. As mentioned previously, the Hopi Tribe has been the subject of waves of unscrupulous researchers, with a great deal of their sacred intangible property disclosed without their knowledge or consent.<sup>324</sup> Their Protocol, in fact, reflects this history, reading: "Due to the continued abuse, misrepresentation and exploitation of the right[s] of the Hopi people, it is necessary that guidelines be established and strictly followed so as to protect the rights of the present and future generations of the Hopi people."<sup>325</sup>

In seeking to protect "their rights to privacy and to Hopi Intellectual Property," the tribe is also careful to clarify its position on commercialization of its intangible resources:

This protocol should in no way be construed as being a call for commoditization or commercialization of the intellectual property of Hopi people, nor is it a justification to bring the Hopi people unwillingly into a commercial relationship. The Hopi Tribe reserves the right *not to sell*, commoditize or have expropriated from the certain domains of knowledge or information.<sup>326</sup>

The Protocol further emphasizes issues of informed consent, rights to privacy and confidentiality, as well as the critical issue of benefit sharing, as so much

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322. N. SLOPE BOROUGH CODE OF ORDINANCES tit. 2, ch. 2.16, § 110(L) (2019) [perma.cc/ZDP2-32M6].

323. Iowa Tribe of Okla., Cultural Heritage Ordinance, ch. 3, § 301 (Aug. 12, 1994) [perma.cc/H5XF-3Q23].

324. See *supra* note 314 and accompanying text; see also Trevor Reed, Note, *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275 (2017).

325. HOPI CULTURAL PRESERVATION OFFICE, PROTOCOL FOR RESEARCH, PUBLICATION AND RECORDINGS (2021), <https://www.hopi-nsn.gov/wp-content/uploads/2021/09/HCPOR-Research-Protocol.REVISED.2021.pdf> [perma.cc/6T2E-Z2SZ].

326. *Id.* (emphasis omitted).

has been taken from Indigenous communities with so little offered in return.<sup>327</sup>

There are other key issues that seem to arise frequently across the various protocols. In addition to requiring permits, tribes oftentimes codify procedures for the establishment of the tribal body that will review and adjudicate. At the Swinomish Indian Community, applications must be first presented to the G<sup>w</sup>χd<sup>z</sup>adad—which translates to the “teachings of one’s ancestors”—for review.<sup>328</sup> At the Eastern Band of Cherokee Indians, the applications are submitted to the Principal Chief before going on to a tribal research committee.<sup>329</sup> And at CRIT, the tribe has an ethics review board to implement and enforce the code.<sup>330</sup>

Though tangible research requirements are most prevalent, especially as they pertain to archaeological sites, it appears that tribes are quickly expanding the permitting requirements to intangible knowledge as well. The tribal code of the Assiniboine and Sioux Tribes of Fort Peck, for example, requires researchers to get permits prior to, among other things, conducting “historical or ethnographic work or studies relating to the Community or its cultural resources.”<sup>331</sup> CRIT’s stated purpose is “[t]o create a uniform standard in how research on the Colorado River Indian Reservation . . . is to be conducted”<sup>332</sup> and to preserve and protect the unique and distinctive “language, cultures and traditions of the Tribes.”<sup>333</sup> The code is expansive topically, covering clinical research, studies of wildlife and animals, anthropological and archaeological research, culture-based research, and geological, botanic, and linguistic research, in addition to others.<sup>334</sup>

Several tribes address the issue of who will own the research collected and who will hold the intellectual property rights to the resulting products. Burns Paiute, for example, requires that “original copies of all work performed on tribally owned or controlled lands” must be sent to the tribe’s Cultural Resources Office.<sup>335</sup> Siletz, too, allows the tribe to retain ownership of all data, documents, correspondence, reports, specimens, or other information or

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327. *Id.*

328. SWINOMISH INDIAN TRIBAL CMTY. TRIBAL CODE tit. 21, ch. 1, §§ 40(D), 50(A)–(B) (2003) [perma.cc/2PVL-NCNP].

329. E. BAND OF CHEROKEE INDIANS CODE OF ORDINANCES § 70-3(b) (2022) [perma.cc/BC5W-2N43].

330. COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE ch. 1, § 1-102(b) (2020) [perma.cc/X88C-7F9Z].

331. FORT PECK TRIBES COMPREHENSIVE CODE OF JUST. tit. 32, § 701 (2019) [perma.cc/9CXJ-AHQ4].

332. COLO. RIVER INDIAN TRIBES HUM. & CULTURAL RSCH. CODE ch. 1, § 1-101(1) (2020) [perma.cc/X88C-7F9Z].

333. *Id.* § 1-101(4).

334. *Id.* §§ 1-102(e)(1)–(7).

335. BURNS PAIUTE TRIBAL CODE tit. 4, ch. 4.2, § 114 (2016) [perma.cc/2TAU-94EP].

items produced, generated, or gathered by the researcher unless there is an exception obtained.<sup>336</sup> Tribes remain concerned about privacy and confidentiality<sup>337</sup> and also want to ensure they will have jurisdiction over claims that may arise out of the research relationship.<sup>338</sup> And, as with Hopi, the question of benefit sharing and giving back to the tribal community appears repeatedly in the protocols, as do requirements of informed consent, a concept also reiterated in international human rights, most strongly by the Declaration.<sup>339</sup>

One of the most comprehensive research codes is that of the Mohegan Tribe of Indians of Connecticut. The tribe specifically addresses issues of “data governance,” authorizing its Council of Elders to “promulgate rules and regulations consistent with and necessary to implement this Code,” and requires that research conducted regarding the Mohegan be beneficial to the Mohegan Tribe “consistent with Mohegan Tribal priorities and concerns.”<sup>340</sup> The code further states that the research and data generated “represent inalienable intellectual property of the Mohegan people to be protected by the Tribe on behalf of the Tribal membership.”<sup>341</sup> The code asserts that the tribe “shall retain all ownership, property, trademark, copyright, and other rights to cultural, linguistic, and historic information that is not the intellectual property of the Researcher” and that the tribe must be credited as the appropriate source of information where relevant.<sup>342</sup> It also includes code provisions governing “Rights of Publicity and Rights of Privacy,” which “extend to a period of ten (10) years after [the research subject’s] death unless explicitly waived in writing.”<sup>343</sup> Pursuant to the tribe’s code, anyone who conducts “unauthorized research involving Mohegan Tribal members or the physical or cultural properties of the Mohegan Tribe, as well as persons conducting research under a permit issued pursuant to this Code shall be deemed to have consented to the personal jurisdiction of the Mohegan Tribe.”<sup>344</sup>

It is remarkable but perhaps not surprising that tribes would be working quickly to develop research protocols. Though the language of “data sovereignty” and “commodification” of Indigenous Peoples’ intellectual property may be fairly new, the harms giving rise to the need for these protections are

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336. SILETZ TRIBAL CODE § 9.110 (2005) [perma.cc/RG4G-W9KE].

337. *See, e.g., id.* § 9.023.

338. *See, e.g.,* COEUR D’ALENE TRIBAL CODE ch. 61, § 12.01 (2019) [perma.cc/9JEQ-QLPM].

339. *See, e.g.,* SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RSRV. TRIBAL CODE ch. 73, tit. 7, § 4 (2005) [perma.cc/RJH7-CWAJ]; *see also* UNDRIP, *supra* note 15.

340. MOHEGAN TRIBE OF INDIANS OF CONN. CODE OF ORDINANCES pt. 4, ch. 31, art. 2, § 31-26(b)(4), (c)(1) (2021) [perma.cc/396C-UW2F].

341. *Id.* § 31-26(b)(5).

342. *Id.* § 31-26(q)(1)(i)–(iii).

343. *Id.* § 31-26(q)(4).

344. *Id.* § 31-26(r)(9).

not. Tribes appear to be increasingly reacting to a history of theft and colonization that has taken so much out of tribal communities and, in turn, asserting their rights to self-determination to proactively protect tribal existence.

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In sum, as demonstrated in Figure 2, tribes are making enormous strides in enacting laws related to all aspects of cultural property preservation. The findings also reflect significant changes and growth in the development of cultural preservation codes in the last fifteen years. But perhaps even more so, they reflect what tribes care about, prioritize, and value with regard to cultural preservation. At heart, the codes illuminate tribes' commitments to cultural preservation and cultural survival for the next seven generations to come.

In the subsequent and final Part III, I turn to the present-day case study of the Maaso Kova to demonstrate that we are witnessing a new jurisgenerative moment in Indigenous Peoples' cultural rights, as we see legal developments at the tribal, national, and international levels shaped in real time, with tribal law demonstrating the potential to shape the future of Indigenous rights.

### III. TRIBAL LAW INNOVATIONS AND THE NEXT JURISGENERATIVE MOMENT

In this final Part, I explore areas where we are witnessing a new jurisgenerative moment around Indigenous Peoples' rights.<sup>345</sup> Here, I present the case study of the recent agreement to repatriate the Maaso Kova, a ceremonial deer head, from the government of Sweden to the cross-border Yaqui peoples. I also introduce several other examples in tribal, national, and international "sites" where the seeds have been planted for the growth of the next jurisgenerative moment in Indigenous cultural property rights today.

#### A. *Repatriation of the Yaqui Maaso Kova*

In the late nineteenth century, the Yaqui Indians—whose members now reside primarily in Arizona (Pascua Yaqui) and in Sonora, Mexico (los Ocho Pueblos)—were forced from their aboriginal homelands in Sonora as part of the Yaqui Wars.<sup>346</sup> They were held as prisoners of war, made to endure hard

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345. This theory was initially developed in a collaboration between the author and Professor Kristen Carpenter. For a full explication of this theory, see Carpenter & Riley, *supra* note 16, at 206–10.

346. EXPERT MECHANISM ON THE RTS. OF INDIGENOUS PEOPLES, U.N. HUM. RTS. COUNCIL, TECHNICAL ADVISORY NOTE—REPATRIATION REQUEST FOR THE YAQUI MAASO KOVA 7 (2020) [hereinafter TECHNICAL ADVISORY NOTE], <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session12/MaasoKova.pdf> [perma.cc/58CP-HP2M]. For further discussion of the repatriation of the Maaso Kova, see Kristen Carpenter & Alexey Tsykarev, *Indigenous Peoples and Diplomacy on the World Stage*, 115 AJIL UNBOUND 118, 121–22 (2021).

labor, and forced to serve in the Mexican military around various parts of Mexico, including the state of Tlaxcala.<sup>347</sup>

While the Yaqui were still at Tlaxcala in 1934, the Maaso Kova, a consecrated ceremonial deer head entrusted to the Kolensias ceremonial leaders of the Yaqui, ended up in the hands of two anthropologists: Danish sisters Bodil Christensen and Helga Larsen.<sup>348</sup> It was subsequently placed in the Museum of Ethnography in Sweden, and it remained there until it was rediscovered by the Yaqui people in the early 2000s.<sup>349</sup> From that point on, the Yaqui people attempted repatriation of the Maaso Kova from Sweden based on international law, most notably Article 11 of the U.N. Declaration on the Rights of Indigenous Peoples.<sup>350</sup> The Expert Mechanism of the Rights of Indigenous Peoples (EMRIP) became involved in the process in 2018 at the request of the International Indian Treaty Council.<sup>351</sup> Throughout much of this period of negotiation, despite the Yaqui's requests, Sweden maintained its rights to retain the Maaso Kova, largely based on the claim that the Maaso Kova was a gift to the sisters by the Yaqui ceremonial leadership at the time.<sup>352</sup>

As EMRIP worked to develop a deeper understanding of the matter, it looked to the laws of Sweden and Mexico, respectively, as well as to international law. But, in the course of this inquiry, EMRIP turned to Articles 11 and 12 of the Declaration, which reference the "laws, traditions and customs" and the "traditions, customs and ceremonies" of Indigenous Peoples, respectively.<sup>353</sup> Thus, another critical question arose: what was the state of *Yaqui* law regarding the Maaso Kova at the time it passed to the Danish sisters in 1934? To make this determination of tribal law, the parties turned to the "Maaso Kova Committee" (the Committee), a group comprised of members of several of the Yaqui ceremonial societies (including Kolensias, Chayekas, and Pajkolas, among others) from both Rio Yaqui and Pascua Yaqui.<sup>354</sup> The establishment of the Committee was particularly important due to the cross-border existence of the Yaqui peoples and the need for consensus on Yaqui law and custom within the community. The Committee made numerous points about the state of Yaqui law with regard to the Maaso Kova to guide the ongoing negotiations.

The Committee's crucial findings regarding Yaqui law are set forth in EMRIP's Technical Advisory Note. Because these matters of tribal law were

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347. TECHNICAL ADVISORY NOTE, *supra* note 346, at 7–8.

348. *Id.* at 8.

349. *Id.*

350. *Id.* Both Mexico and Sweden are parties to the Hague Convention of 1954 and the UNESCO Convention of 1970, but these instruments were not invoked in the repatriation process. *Id.* at 15.

351. *Id.* at 4.

352. *Id.* at 8–9.

353. *Id.* at 13–14 (quoting UNDRIP, *supra* note 15, arts. 11–12).

354. *Id.* at 11.



so central to the outcome of the case, I include them here in their entirety for reference:

- A consecrated Maaso Kova like the one held by the Swedish Museums of World Culture that has been used and blessed in the deer dance is a sacred living being with its own life and spirit. It is treated by Yaquis as a most respected and beloved relative.
- The Deer Dance takes place in certain ceremonies, at certain times of the year. This is the sacred responsibility and obligation of the society entrusted with conducting this ceremony, regardless of the circumstances in which they find themselves.
- The traditions, laws, and customs of the Yaqui do not permit a consecrated Maaso Kova to be in possession of anthropologists, museums, government or military officials, or anyone else outside the Yaqui ceremonial society of the deer dancer (Kolensia). It emerges at the time of ceremonies in which its participation is required. It is not meant to be on display for public viewing or to be kept outside the Yaqui culture.
- The Kolensia society is a men's society. Women, Yaqui or otherwise, do not touch or possess a consecrated Maaso Kova. It is not possible that a consecrated Maaso Kova would willingly be given or sold to a woman by a deer dancer or other member of the Kolensia. A consecrated Maaso Kova is only passed down to a younger deer dancer being trained by his elders to take his place in that society. It would never be freely and willingly given to anyone outside of that society.<sup>355</sup>

The Museum did not dispute that Yaqui law, as stated above, was the same law that was in existence at the time of the transfer of the Maaso Kova from the Yaqui to the sisters.<sup>356</sup> The elucidation of tribal law on the Maaso Kova was a transformative element of the two-year process during which EMRIP helped the parties work toward resolution. For Sweden, it was critical that participants acknowledge Swedish law on museum collections, which seemed to militate against repatriation in the Museum's view.<sup>357</sup> But when the Museum's representatives learned that the Yaquis also have applicable laws regarding the Maaso Kova, that realization seemed to elevate the legitimacy of the claim while providing substantive guidance about how the Maaso Kova should be treated.<sup>358</sup> At that point, all of the participants became more receptive to finding a solution that would be acceptable under Yaqui and Swedish law, while also meeting the requirements of the 1970 UNESCO convention and the Declaration.

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355. *Id.* at 9.

356. *Id.*

357. *Id.* at 13.

358. *See id.* at 9.

Finally, after decades of negotiation and almost a century since the Maaso Kova was taken from the Yaqui, the parties agreed to a dialogue in Canada on March 6, 2020, facilitated by EMRIP's chair, Kristen Carpenter, and its vice chair, Megan Davis.<sup>359</sup> Both the Yaqui and the Government of Sweden were represented.<sup>360</sup> Ultimately, under terms set forth in detail in EMRIP's note, the parties came to an agreement, requiring, among other things, the repatriation of the Maaso Kova to the Yaqui Kolensias, who are charged with its care and protection, as well as an ongoing collaboration between the Yaqui people and the Museum of Sweden.<sup>361</sup>

The story of the agreement to repatriate the Maaso Kova from Sweden to the Yaqui people is a truly jurisgenerative tale.<sup>362</sup> At every step along the way, the parties drew on tribal, national, and international laws to interpret, contemplate, and analyze the legal—and ethical—requirements for repatriation of the Maaso Kova, with laws at each “site” influencing one another in a dynamic and mutually constitutive process.<sup>363</sup> But the importance of tribal law here cannot be overstated.

Undoubtedly, the clear and powerfully persuasive articulation of tribal law weighed heavily in resolving the conflict between retention and repatriation. And this case is only one of many, as Indigenous Peoples around the world continue to seek the return of their sacred objects and ancestors.<sup>364</sup> And, as others have argued, it is not enough for repatriation to occur only amongst and between U.N. Member States.<sup>365</sup> The harsh realities of colonization dictate that national governments and Indigenous Peoples are often misaligned in their goals and positionality.<sup>366</sup> Accordingly, as EMRIP has observed: “States and the international community have come to understand these claims as emanating from indigenous peoples themselves, according to their laws, and

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359. *Id.* at 16–17.

360. *Id.* at 16.

361. *Id.* at 3.

362. *Cf.* Bigler, *supra* note 223.

363. *See* Resnik, *supra* note 17, at 1670 (discussing “multiple site[]” engagement of law).

364. *See, e.g.,* Javier Pes, *It's Not Just Art That Indigenous People Are Fighting to Reclaim from Museums. They Want Their Ancestors' Remains Back, Too*, ARTNET NEWS (Nov. 29, 2018), <https://news.artnet.com/market/its-not-just-art-that-indigenous-peoples-want-back-from-museums-they-want-their-ancestors-human-remains-too-1397737> [perma.cc/9EWZ-7MBM]; David Kindy, *Native Americans Urge Scottish Museum to Return Artifacts from Wounded Knee Massacre*, SMITHSONIAN MAG. (Feb. 24, 2022), <https://www.smithsonianmag.com/smart-news/native-americans-urge-scotland-museum-to-return-wounded-knee-massacre-artifacts-180979589> [perma.cc/4Y6X-8WTU]; Zachary Small, *Push to Return 116,000 Native American Remains Is Long-Awaited*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/06/arts/design/native-american-remains-museums-nagpra.html> [perma.cc/SC84-K2N5].

365. *E.g.,* Patty Gerstenblith, *International Art and Cultural Heritage*, 44 INT'L LAW. 487 (2010) (discussing repatriation of the artifacts held at Yale University to the nation-state of Peru, but not to the Incan descendants living there).

366. *See, e.g.,* Carpenter et al., *supra* note 50, at 1060–61.

from the perspective of living cultures.”<sup>367</sup> Though this is only one case, it stands apart as a model, personifying a truly jurisgenerative cultural property moment in Indigenous rights.

### B. *Jurisgenerative “Seeds” of Change*

The case of the Maaso Kova is a striking example of a truly jurisgenerative moment in Indigenous Peoples’ cultural property rights. In this Section, I explore other places where the jurisgenerative phenomenon is less certain and certainly more aspirational. Nevertheless, based on a detailed examination of law working at multiple “sites” in the following examples, it is evident that the seeds of change have been firmly planted. In my view, these examples illustrate an existing, observable phenomenon. The dynamic process of tribal law influencing legal “sites” all the way up, down, and around again is clearly documented and potentially transformative in the advancement of Indigenous Peoples’ cultural rights.

There are currently seismic changes underway with regard to the repatriation policies and procedures throughout the University of California (UC) system. And this is no trivial matter. As of 2021, universities within the University of California system still held somewhere close to 10,000 human remains of Indigenous ancestors.<sup>368</sup> This situation, largely created by the grim history of mistreatment of Indigenous Peoples’ human remains and funerary objects, had been exacerbated by the policies and practices of the universities themselves. Even after the passage of NAGPRA in 1990, universities relied in part on constrained statutory definitions, financial constraints, and unwieldy inventory requirements to take advantage of legal loopholes and unenforced timelines to hold on to thousands of sets of human remains.<sup>369</sup> In some cases, tribes were aware of the size and location of the collections and worked diligently to force compliance with NAGPRA to achieve repatriation, but too often were met with harsh resistance and meager or no results.<sup>370</sup> One longstanding and well-known offender of the law was the University of California,

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367. TECHNICAL ADVISORY NOTE, *supra* note 346, at 6.

368. See, e.g., *Berkeley Talks: Linda Rugg on Native American Repatriation at UC Berkeley*, UNIV. OF CAL., BERKELEY (July 2, 2021) [hereinafter *Berkeley Talks*], <https://news.berkeley.edu/2021/07/02/berkeley-talks-transcript-native-american-repatriation> [perma.cc/7NFH-4K8L].

369. See Wendy Teeter, Sedonna Goeman-Shulsky & Desireé Martinez, *Behind the Scenes with the Fowler Museum Archaeology Collections Facility: Actualizing Land Acknowledgments*, FOWLER MUSEUM AT UCLA, <https://fowler.ucla.edu/actualizing-land-acknowledgments> [perma.cc/C2G6-VWEH].

370. Gratefully, this has not been the case at the University of California, Los Angeles, which worked diligently with Indigenous Peoples to ensure repatriation of ancestors. By 2018, UCLA had repatriated approximately 98 percent of its collections and is currently steadily working to conclude that process. See *id.*

Berkeley, which, as of a decade ago, was in possession of at least 12,000 American Indian individuals, most stored beneath the Hearst Gymnasium swimming pool.<sup>371</sup> As of 2020, Berkeley was still in possession of at least 9,000 ancestors.<sup>372</sup>

Driven by tribal advocacy, California passed legislation in 2018 and again in 2020 to compel the University of California system to change its internal processes to make repatriation easier and more successful for the tribes.<sup>373</sup> The University of California system formed a Cultural Affiliation and Repatriation Policy Advisory Workgroup in early 2019,<sup>374</sup> which worked with the University of California Office of the President (UCOP) toward developing a policy, which has since been approved by the University's Academic Senate.<sup>375</sup>

Because the policy has only recently taken effect, the jurisgenerative possibilities emanating from the changes in the UC policy are currently only aspirational. However, there is great potential for them to be realized. Tribes have long had difficulty demonstrating that they are the proper caretakers for remains and funerary objects held by museums and universities.<sup>376</sup> The law has consistently preferred "scientific knowledge" over "traditional knowledge."<sup>377</sup> Over time, the oral records and Indigenous-led systems of knowing have been downplayed or dismissed altogether in repatriation conflicts.<sup>378</sup> For so long, deference has been given to the writings of anthropologists, historians, and geographers, with scant attention paid to the knowledge held and transmitted by Indigenous communities themselves.<sup>379</sup> Even when Indigenous traditional knowledge has been presented, it has almost always

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371. Richard C. Paddock, *Native Americans Say Berkeley Is No Place for Their Ancestors*, L.A. TIMES (Jan 13, 2008, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2008-jan-13-me-bones13-story.html> [perma.cc/V6ZY-48GE].

372. *Berkeley Talks*, *supra* note 368.

373. See Act of Sept. 27, 2018, ch. 823, 2018 Cal. Stat. 5300 (amended 2021); *Research Policy Analysis and Coordination: Revision Background*, UNIV. OF CAL. OFF. OF THE PRESIDENT (2022), <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation/background.html> [perma.cc/XLD8-5PGW]. I am one of the four members nominated by the Academic Senate, along with my colleagues Carole Goldberg, UCLA School of Law; Amy Lonetree, UC Santa Cruz History Department; and Beth Piattote, Native American Studies Professor at UC Berkeley.

374. *Research Policy Analysis and Coordination*, *supra* note 373.

375. As the policy was set to be implemented on September 29, 2020, Governor Newsom signed AB 275 into law, which made significant changes to California's state NAGPRA, necessitating more changes to the policy. See Act of Sept. 25, 2020, ch. 167, 2020 Cal. Stat. 2810; see also *Research Policy Analysis and Coordination: UC's Native American Cultural Affiliation and Repatriation Policy*, UNIV. OF CAL. OFF. OF THE PRESIDENT (Dec. 22, 2021), <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation> [perma.cc/F9E9-DPU9].

376. Teeter et al., *supra* note 369.

377. See *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

378. *Id.* at 868.

379. *Id.*

held less weight than writings and findings by non-Indian “experts,” whose work is ultimately prioritized and valued over that of Indigenous Peoples.<sup>380</sup> California’s recent legislation will change that in a few important ways.

First, the new policy will afford true respect to tribal evidence. The policy reiterates respect for tribal oral history and tribal knowledge regarding lands, cultures, and cultural affiliation.<sup>381</sup> It further clarifies that tribal knowledge alone—as a single line of evidence—may be sufficient to establish cultural affiliation.<sup>382</sup> Additionally, the policy will seek increased tribal input into the process and allow the tribes to review the documentation that underlies campus repatriation decisions.<sup>383</sup> But beyond that, it will allow tribes to present their own cases directly to the committees, either in person or in writing.<sup>384</sup> This change in policy will allow more opportunities for tribes to convey their own beliefs and values with regard to cultural property and human remains. And, finally, new procedures regarding confidentiality will allow tribes to review documents before publication to ensure that culturally sensitive information is not being improperly disclosed.<sup>385</sup>

These changes present a unique opportunity for the introduction of *tribal* law to work in conjunction with *university* policy, under a *state* law mandate, to facilitate Indigenous Peoples’ rights as mandated by *federal* law (NAGPRA), as well as *international* law (the Declaration). Consider the tribal cultural preservation codes discussed previously in Part II. Many of the codes go beyond the articulation of “laws” in the conventional sense and expound on tribal worldviews, lifeways, culture, language, and tradition. Some identify places or plants that are sacred to the tribe.<sup>386</sup> These articulations situate tribes in place and time, confirming tribal historical and continued existence. Further, their embodiment in tribal law demonstrates their endorsement and acceptance by the tribal community. Though there is no requirement that tribes employ written tribal codes in presenting repatriation cases to the UC campuses,<sup>387</sup> the existence of such documents may serve to bolster tribal claims regarding sites of origin, rights of privacy, and items of cultural patrimony, among many other issues.

Recalling the case of the Maaso Kova, one reason the repatriation was successful was that the Committee spoke with a unified voice as to the scope and

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380. *Id.* at 880.

381. See OFF. OF RSCH. & INNOVATION, UNIV. OF CAL. OFF. OF THE PRESIDENT, NATIVE AMERICAN CULTURAL AFFILIATION AND REPATRIATION 28 (2021) [hereinafter REPATRIATION POLICY], <https://policy.ucop.edu/doc/2500489/NAGPRA> [perma.cc/45K5-BBV2].

382. *Id.* at 28.

383. *Id.* at 20–24.

384. *Id.* at 18.

385. *Id.* at 24.

386. See *e.g.*, *supra* notes 214–249 and accompanying text (discussing tribal codes that identify sacred connections to places and plants).

387. REPATRIATION POLICY, *supra* note 381, at 28.

content of the tribal law. When there are disputes between tribes or even internally within tribes, it gives decisionmakers an opportunity to say that solutions are just too complex and messy to be implemented. If and when a tribe comes before one of the UC campuses in a repatriation case—which is probable—the use of codified tribal law to demonstrate the tribe’s cultural property views may have the ability to influence administrative decisionmakers applying university policy under a mandate of state law, thus shaping outcomes at all “sites” of engagement.

This same rationale may play out in the application of the Safeguard Tribal Objects of Patrimony (STOP) Act, a federal bill designed to prohibit the exportation of sacred Native American items and artifacts from the United States. The STOP Act would also increase penalties for the unlawful trafficking in tribal cultural patrimony.<sup>388</sup> The bill has broad bipartisan support, has passed the House, and is currently being considered in the Senate Committee on Indian Affairs.<sup>389</sup> Tribal leaders have rallied behind the bill, led in many respects by the Pueblo of Acoma, which sought for many years to repatriate one of its ceremonial shields back to the tribal community after the shield was illegally taken, trafficked, and put up for auction in Paris, France.<sup>390</sup> As former Pueblo of Acoma Governor Kurt Riley stated, “[i]t has been an uphill battle to secure [our cultural objects’] return. However, we continue to fight for their return as their loss threatens the ability of our children to continue our cultural practices and thus threatens our identity as a people.”<sup>391</sup>

Again, the STOP Act presents only a seed of a jurisgenerative moment, as it has not yet been enacted into law, and its final terms are, therefore, uncertain. However, one key feature of the Act will be its efforts to implement tribal perspectives into determinations as to what constitutes tribal cultural patrimony, for example, or what it means for an object to be “sacred” to a tribe, among many other questions.<sup>392</sup> In this sense, it has possibilities that parallel the implementation of repatriation policy at the University of California, and perhaps even the story of the Maaso Kova, as it potentially will allow *tribal law*

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388. H.R. 2930, 117th Cong. (2021).

389. See *H.R.2930—Safeguard Tribal Objects of Patrimony Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2930> [perma.cc/5M7Q-4HJJ]; *S.1471—Safeguard Tribal Objects of Patrimony Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/1471> [perma.cc/N37A-4UV4].

390. See Elena Saavedra Buckley, *Unraveling the Mystery of a Stolen Ceremonial Shield*, HIGH COUNTRY NEWS (Aug. 1, 2020), <https://www.hcn.org/issues/52.8/indigenous-affairs-unraveling-the-mystery-of-a-stolen-ceremonial-shield> [perma.cc/9URU-EYTD] (detailing how the shield disappeared from the Pueblo of Acoma and ended up in a Paris auction house, and describing how the tribe fought to have it returned).

391. Press Release, Martin Heinrich, U.S. Senator for New Mexico, Heinrich Introduces Bipartisan Legislation to Safeguard Tribal Items (June 21, 2017), <https://www.heinrich.senate.gov/press-releases/heinrich-introduces-bipartisan-legislation-to-safeguard-tribal-items> [perma.cc/KDK8-3V76].

392. See H.R. 2930, 117th Cong. (2021).

to impact the content of definitions under a *federal* statute that deals with the *international* movement of tribal cultural property, facilitating return of those items back to the tribes themselves.

Finally, as this Article has previously documented, there is movement at the international level as well regarding the protection of Indigenous Peoples' traditional knowledge. The United Nations, through WIPO, is currently seeking to develop protections for folklore and traditional knowledge.<sup>393</sup> The U.N.'s Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore is working on drafting three separate treaties that would protect traditional knowledge, traditional cultural expressions, and genetic resources, respectively.<sup>394</sup> As part of this process, the IGC is working with an Indigenous caucus, comprised of Indigenous leaders and tribal members from across the globe, who are commenting on the chair's drafts and offering critical feedback to the IGC on the text of the current documents. This is a vast undertaking, as the IGC is seeking to identify, honor, understand, and implement Indigenous laws alongside state laws in an international instrument. Undoubtedly, such processes challenge notions of efficiency, clarity, and ease of implementation. And yet, it proceeds. From aboriginal Australians to the Garo peoples of Bangladesh, stretching to the Laikipia Maasai in Kenya and beyond to the tribes of Papua New Guinea, among numerous others, Indigenous Peoples are actively engaged in the IGC process to shape and inform the resulting scope and content of traditional knowledge protections, infusing them with tribal law.<sup>395</sup>

Again, the IGC's work with the Indigenous caucus is merely the planting of a seed; it has not fully taken root. But there exists fertile ground for this virtually unprecedented Indigenous participation in the IGC, which has the potential to give life to the nuances and complexities of traditional knowledge in Indigenous communities. This engagement demonstrates, again, how *tribal* law is influencing the development of *international* law, which ultimately will be given life through implementation and enforcement at the *nation-state* level. In other words, it is a burgeoning but clear example of yet another jurisgenerative moment in Indigenous Peoples' cultural rights.

These examples are not isolated. From federal agency consultations to sacred sites litigation working through the courts, tribal law is infusing decisionmaking in a plethora of areas that bear on Indigenous peoples' cultural property and, ultimately, their cultural survival. With Indigenous leadership in key positions relevant to Indigenous rights—such as the appointment of Deb Haaland as the first Native Secretary of the Interior—Indigenous Peoples are poised to take a seat at the table to advance Indigenous laws, customs, and traditions, as set forth in the Declaration, to ensure their continued existence and cultural survival.

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393. IGC, *supra* note 85.

394. See *supra* text accompanying notes 87–93.

395. See *Presentations on Indigenous and Local Community Experiences*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/igc/panels.html> [perma.cc/FJ3K-XUXB].

## CONCLUSION

Indian tribes across the United States are actively engaged in the development of tribal cultural property law. Pushing back against centuries of colonization and an ethos that has treated all things Indigenous as resources to be used by outsiders, tribes are defining for themselves how they want to engage around issues of cultural preservation and, indeed, cultural survival, going forward. The development, implementation, and enforcement of tribal law are not merely academic. They are acts of living sovereignty, and tribal law's development furthers Indigenous Peoples' rights to self-determination as protected by centuries of U.S. law, as well as that which is set forth in international human rights law, most notably in the U.N. Declaration on the Rights of Indigenous Peoples. And, as demonstrated by conflicts like that regarding the Maaso Kova, tribal law can and does make a difference in cases involving Indigenous Peoples' rights to their most sacred and valuable goods and resources.

This Article has demonstrated the enormous changes that have taken place in tribal law in just the past fifteen years. These changes are a harbinger of what is to come. Elevated by an increased focus on the rights of Indigenous Peoples—at home and abroad—Indian tribes today are pushing forward in developing their own cultural property preservation systems, even in the face of powerful, exogenous forces that continue to threaten tribal cultural survival. Nevertheless, tribes are persisting and advocating—and legislating—for their continuation as tribal peoples and for the benefit of the next seven generations.