A Defense of Native Americans' Rights over Their Traditional Cultural Expressions

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Abstract

The Protocols for Native American Archival Materials (PNAAM) recommend best practices for dealing with Native American traditional cultural expressions (TCE) and traditional knowledge (TK) held in libraries and archives. The Society of American Archivists and the American Library Association have declined to endorse the recommendations of PNAAM, because some of them appear to be inconsistent with current ethical guidelines. This paper analyzes the key question in this controversy: "Do Native Americans have a moral right to control access to their TCE and TK?" It is argued that group privacy and the concept of restorative justice provide an ethical justification of this right.

In 2006, a group including librarians, archivists, museum curators, and representatives from fifteen Native American, First Nation, and Aboriginal communities came together to craft a document that would "identify best professional practices for culturally responsive care and use of American Indian archival material held by non-tribal organizations."[1] The result, Protocols for Native American Archival Materials (PNAAM), recommends best practices for dealing with Native American traditional cultural expressions and traditional knowledge held in libraries and archives. "Traditional cultural expressions" (TCE) have been defined by the World Intellectual Property Organization

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[1] First Archivists Circle, Protocols for Native American Archival Materials, 2007, http://www2.nau.edu/libnap-p/index.html, accessed 9 April 2010.

(WIPO) as cultural materials created by the community that reflect that "community's cultural and social identity" and are a "community's heritage" "handed down from one generation to another."[2] Traditional knowledge (TK) has been defined as "traditional technical know-how, or traditional ecological, scientific or medical knowledge."[3] The materials covered by the PNAAM include 1) "recordings and transcripts of songs, chants, oral histories, community histories, 'myths,' and folklore"; 2) "personal or family information"; 3) "cartographic materials of such things as sacred sites or areas, village sites, territories, use areas"; and 4) "archaeological data, ethnobotanical materials, or genealogical data."[4] Thus, Native American TCE and TK would potentially include any materials that represent the cultural heritage or knowledge that has been developed and passed down by Native American tribes and Native Hawaiians.[5] PNAAM strives to balance the rights and responsibilities of both tribes and nontribal information stewards in relation to TCE and TK, by providing best practices for both communities. It calls for the creation of collaborative and mutually respectful relationships between tribes and archives and libraries.

The normative foundation of PNAAM's recommendations is that Native American tribes have rights over the TCE and TK held in libraries and archives. It is important to note that the rights claimed in PNAAM are *moral* rights; a "moral right" creates an obligation for others to respect it, whether or not the right is encoded in law.[6] As Joel Feinberg puts it, a person "has a moral right when he [or she] has a claim the recognition of which is called for . . . by moral principles, or the principles of an enlightened conscience."[7] Concern for the moral rights of others is nothing new to the library and archival professions. Consider, for example, the rights listed in the *Library Bill of Rights*, which do not

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[2] World Intellectual Property Organization, *Intellectual Property and Traditional Knowledge* (Geneva: WIPO, 2005), 5, http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf, accessed 20 July 2012.

[3] WIPO, *Intellectual Property and Traditional Knowledge*, 4. These definitions are not uncontroversial; also see this document for a fuller discussion of various definitions of traditional knowledge.

[4] First Archivists Circle, Protocols for Native American Archival Materials. WIPO calls works of type 1 "traditional cultural expressions" and works of type 2, 3, and 4 "traditional knowledge." World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles* (Geneva: WIPO, 2006), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_4.pdf, accessed 3 May 2012.

[5] To avoid wordiness in what follows, I will use the terms "Native Americans" and "Native American tribes." This should be understood to include Native Hawaiians as well.

[6] Moral rights in this sense should not be confused with the "moral rights" (or *droits moral*) of authors under international copyright law (World Intellectual Property Organization, Article 6*bis*: "Moral Rights," *Berne Convention for the Protection of Artistic and Literary Works*, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html, accessed 20 August 2012).

[7] Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, N.J.: Princeton University Press, 1970).

necessarily have the force of law, but which are, nevertheless, held up as guides for the ethical conduct of library professionals.[8]

PNAAM recommends that librarians and archivists recognize the rights of Native Americans to limit or deny access to Native American stories, images, and information. While there is anecdotal evidence that some nontribal archives have formal or informal policies in line with some or all of the recommendations of PNAAM,[9] such policies and practices are not generally accepted within the archival profession. According to one archivist, "The Protocols call for sweeping power to control what is studied and written about Native American communities, which . . . is incompatible with our basic professional tenets of open and equitable access to information, and the practice of free and open inquiry...."[10] Others object that, "The Protocols challenge many 'bedrock' principles of American archival practice."[11] Concerns such as these have led both the Society of American Archivists (SAA) and the American Library Association (ALA) to refrain from endorsing PNAAM.[12]

At its heart, the controversy over PNAAM is based on a disagreement about the norms that ought to guide ethical practice in the archival and library professions. Like any profession, archivy has ethical codes that govern its practice.[13] *Ethics* has been defined as the "well-founded standards of right and wrong that prescribe what humans ought to do, usually in terms of rights,

[8] American Library Association, *Library Bill of Rights* (last approved 1996), in *Intellectual Freedom Manual* (Chicago: Office of Intellectual Freedom of the American Library Association, 2010), 49, http://www.ala.org/advocacy/intfreedom/librarybill/, accessed 25 June 2010.

[9] See, for example, Kim Walters, "Thinking about Archives and Cultural Sensitivity," *LA Autry Blog*, 7 July 2011, http://libraries.theautry.org/2011/07/25/thinking-about-archives-and-cultural-sensitivity/, accessed 12 December 2011.

[10] John Bolcer, "The Protocols for Native American Archival Materials: Considerations and Concerns from the Perspective of a Non-Tribal Archivist," *Easy Access: Newsletter of the Northwest Archivists, Inc.* 34 (2009): 3–6, 4.

[11] Frank Boles, David George-Shongo, Christine Weideman, *Report: Task Force to Review Protocols for Native American Archival Materials* (Chicago: Society of American Archivists, 2008), 10, http://www.archivists.org/governance/taskforces/0208-NativeAmProtocols-IIIA.pdf, accessed 18 June 2010.

[12] Boles et al., *Report: Task Force to Review Protocols for Native American Archival Materials*. The ALA has also discussed the issues raised in PNAAM. In response to the issues highlighted in PNAAM, the Office of Information Technology and Policy (OITP) of the ALA produced the document, "Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect" (Chicago: American Library Association, 2010), http://wo.ala.org/tce/wp-content/uploads/2010/02/tce.pdf, accessed 29 April 2011. This document resulted from a series of discussions led by the OITP and suggests concepts that should guide librarians in relation to Native American TCE (as of this writing, ALA has not approved this document). The ALA president formed a task force to review the document and related issues: American Library Association Presidential Traditional Cultural Expressions Task Force, *Presidential Traditional Cultural Expressions Task Force Report* (Chicago: American Library Association, 2011), http://www.districtdispatch.org/wp-content/uploads/2011/01/TCE-Task-Force-Report-Final-1-9-11.pdf, accessed 30 June 2012. The ALA has taken no action on these recommendations as of yet.

[13] Elena Danielson, *The Ethical Archivist* (Chicago: Society of American Archivists, 2010), 301–37.

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obligations, benefits to society, fairness, or specific virtues."[14] *Professional ethics* are "the principles and standards that underlie a profession's responsibilities and conduct."[15] Ethical responsibilities of archivists include the obligations to safeguard records from theft or destruction, to ensure equitable access to records, and to protect the privacy of the subjects of archival records. Work in archival ethics discusses the rationale for the codes of professional ethics and how they apply to specific cases.[16] The issue of how to deal with Native American archival materials, however, has gained little attention from those writing on archival ethics in the United States. Karen Benedict's 2003 *Ethics and the Archival Profession: Introduction and Case Studies*, for example, contains no case studies dealing with the issue. Elena Danielson's 2010 book, *The Ethical Archivist,* briefly mentions the issue in a single paragraph, but does not cover the controversial ethical issues surrounding it.

There is a small, but significant, movement in the United States striving to "pluralize archival research and teaching,"[17] so that it recognizes "the differing archival needs of the diverse communities [including indigenous communities] which constitute the globalised societies of the 21st century."[18] Scholars have put such pluralistic approaches into practice in archival projects involving materials held by Native American tribes and the Australian Aborigines.[19] However, while providing a more expansive view of the ways in which archival practice is being transformed by embracing the differing memory practices and protocols of various cultural groups, this scholarship does not provide an in-depth discussion

[14] Manuel Velasquez and Claire Andre, "What Is Ethics?," *Issues in Ethics* 1, no. 1 (1987), Santa Clara University, "Markula Center for Applied Ethics," http://www.scu.edu/ethics/practicing/decision/whatisethics.html, accessed 1 June 2011.

[15] Michael Davis, "Language of Professional Ethics" (Chicago: Center for the Study of Ethics in Professions, Illinois Institute of Technology, 2003), http://ethics.iit.edu/teaching/language-professional-ethicss, accessed 23 March 2011.

[16] See, for example, Richard J. Cox and David A. Wallace, *Archives and the Public Good: Accountability and Records in Modern Society* (Westport, Conn.: Quorum Books, 2002); Karen Benedict, *Ethics and the Archival Profession: Introduction and Case Studies* (Chicago: Society of American Archivists, 2003); and Danielson, *The Ethical Archivist.*

[17] The Archival Education and Research Institute and Pluralizing the Archival Curriculum Group, "Educating for the Archival Multiverse," *The American Archivist* 74 (2011): 69–101.

[18] Sue McKemmish, Anne Gilliland-Swetland, and Eric Ketelaar, "'Communities of Memory : Pluralising Archival Research and Education Agendas," *Archives and Manuscripts* 33 (2005): 146–75, 150. See also Anne Gilliland-Swetland and Kevin White, "Perpetuating and Extending the Archival Paradigm: The Historical and Contemporary Roles of Professional Education and Pedagogy," *InterActions: UCLA Journal of Education and Information Studies* 5 (2009): 1–23, eScholarship, http://escholarship.org/uc/item/7wp1q908#page-1, accessed 3 February 2011, and Sue McKemmish et al., "Australian Indigenous Knowledge and the Archives: Embracing Multiple Ways of Knowing and Keeping," *Archives and Manuscripts* 38 (2010): 27–50.

[19] See, for example, the work of Kim Christen, "Opening Archives: Respectful Repatriation," *The American Archivist* 74 (2011): 185–210, and Fiona Ross, Sue McKemmish, and Shannon Faulkhead, "Indigenous Knowledge and the Archives: Designing Trusted Archival Systems for Koorie Communities," *Archives and Manuscripts* 34 (2006): 112–51.

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of the ethical issues and controversies that arise in such culturally diverse contexts.[20]

Outside of the United States, the ethical questions surrounding control over Indigenous TCE and TK have received more attention. International organizations such as the United Nations (UN) and the WIPO have drafted statements asserting the rights of Indigenous peoples to control access to their TCEs and TK.[21] Article 31 of The Declaration of the Rights of Indigenous Peoples, for instance, states that Indigenous peoples, "have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions." Archivists in countries such as Australia have been grappling with these ethical issues for almost twenty years. The Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services (ATSI Protocols),[22] which served as an inspiration for PNAAM, were written in 1995 and were endorsed by the Australian Society of Archivists in 1996.[23] Since that time, a significant scholarly literature has developed on the ethical and legal issues surrounding the ATSI Protocols.[24]

Given the increasing international attention paid to the question of Indigenous peoples' rights over their TCE and TK, it is imperative that archivists and other LIS professionals in the United States engage in a serious discussion of the ethical issues involved. This paper seeks to advance this discussion by engaging in an ethical analysis of the key question, "Do Native Americans have

[20] Educational initiatives like the Tribal Libraries, Archives and Museums Project at the University of Wisconsin (http://tlam999.wordpress.com/, accessed 20 August 2012) and the Knowledge River program at the University of Arizona (http://sirls.arizona.edu/kr/, accessed 20 August 2012) are actively engaged in these issues as well.

[21] United Nations, Resolution 2006/2, Declaration on the Rights of Indigenous Peoples, 2006, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf, accessed 26 May 2011; World Intellectual Property Organization, "Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore: Policy Objectives and Core Principles" (Geneva: WIPO, 2006), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_4.pdf, accessed 26 March 2011. The WIPO draft, which asserts the collective right of Indigenous peoples to prohibit the dissemination of their TCE to the public, has already led to objections by prominent members of the LIS community. The Library Copyright Alliance argues that if adopted it "would impede libraries' ability to perform their mission of making information available to the public." Library Copyright Alliance, "Comments of the Library Copyright Alliance on the February 18, 2011, Draft Articles on the Protection of Traditional Cultural Expression," http://www.librarycopyrightalliance.org/bm~doc/lca_tcecomments21march11.pdf, accessed 23 March 2011.

[22] Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN), "Welcome to the ATSILIRN Protocols for Libraries, Archives and Information Services," 1995, http://aiatsis.gov.au/atsilirn/protocols.php, accessed 14 February 2012.

[23] Society of Australian Archivists, "Policy Statement on Archival Services and Aboriginal and Torres Strait Islander Peoples," 1996, http://www.archivists.org.au/icms_docs/123798_Policy_Statement_on_Archival_Services_and_Aboriginal_and_Torres_Strait_Islander_Peoples_1996.pdf, accessed 17 February 2012.

[24] See, for example, Martin N. Nakata and Marcia Langton, *Australian Indigenous Knowledge and Libraries* (Canberra, Aus.: Australian Academic and Research Libraries for the Australian Library and Information Association, 2005).

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a moral right to control access to their TCE and TK?"[25] As a work of applied ethics, this paper "seeks a reasoned defense of a moral viewpoint" using "considered judgments and moral frameworks to distinguish justified moral claims from unjustified ones."[26] The moral viewpoint defended here is that Native Americans do have a moral right to control access to their TCE and TK. Group privacy and the concept of restorative justice provide an ethical justification of this right.

The case for the rights of Native American tribes to control access to their intangible cultural heritage only makes sense when situated within its historical context. Thus, this essay begins with a short description of the history of suppression and appropriation of Native American cultures. The second section of the paper summarizes some of the controversial recommendations of PNAAM and notes a number of objections that have been made to them. The third section grapples with questions of methodology in ethics, adopting John Rawls's "overlapping consensus" approach as a method for resolving ethical conflicts between cultural groups. The fourth section surveys a number of proposed defenses of Native Americans' rights over their TCE and TK, and argues that they fail to provide the basis for an overlapping consensus. The fifth section argues that the right to privacy, as extended to groups, does provide such a basis. The final section of the paper addresses objections to the group privacy argument, most notably, that recognizing Native Americans' rights to their cultural information will put us on a slippery slope toward massive restrictions on access to information. I argue that the nature, context, and history of Native American cultures are unique. Consequently, the right of Native Americans over their TCE and TK as grounded in cultural privacy does not necessarily extend to other social, cultural, ethnic, or religious groups.

It must be emphasized that I do not claim in this paper to speak for Native American tribes or individuals. I approach this topic as a nonnative ethicist trained in Western philosophical ethics. I have sought to construct an ethical argument that provides a basis for a shared understanding of the rights of Native Americans over their TCE and TK. I am deeply indebted for my understanding of these issues to both my Native American students and Native American and Indigenous scholars who have written so passionately and convincingly on these issues. For a deeper understanding of the perspectives

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[25] In this paper I focus on the question of Native American rights to TCE and TK. There are differences in legal and political status between Native Americans and other Indigenous peoples. For instance, few other Indigenous groups have the legal sovereignty over territory that Native Americans do. However my arguments do not rely on anything unique about Native Americans and should apply equally well to many Indigenous peoples.

[26] Tom Beauchamp, "The Nature of Applied Ethics," in *A Companion to Applied Ethics*, ed. R. G. Frey and Christopher Heath Wellman (Malden, Mass.: Blackwell Publishing, 2003), 1–16.

of Native Americans, readers can do no better than to consult what Native Americans have written on this topic.[27]

Furthermore, it should be noted that I make no policy proposals or suggestions for implementation here. I argue that there are grounds already accepted within archival ethics to justify the rights of Native American to their TCE and TK. Exactly *how* these rights may be best respected through practices, policies, and laws is beyond the scope of this paper. Indeed, it would be inappropriate to make such suggestions here, as any such policies should be the result of dialogue and negotiation between Native American tribes and those who handle their cultural materials. Such dialogue is a central theme of PNAAM and a key component of a restorative justice approach.[28]

Two Stories of Cultural Appropriation

PNAAM is a response to the continuing impact of European colonization on Native American communities and cultures. There are two aspects to the cultural destruction wrought by settler peoples. First is the forced assimilation of Native Americans into the culture of the colonizers through such institutions as Indian Schools in the United States.[29] Second is the appropriation of that culture through such activities as unethical research practices;[30] collecting and selling stories, art and craft styles, and music;[31] and appropriating elements of native cultures as representations of the "'exotic,' 'authentic,' 'spiritual,' or 'savage.'"[32] A vivid example of this twofold cultural dispossession through suppression and appropriation can be seen in the case of H. R. Voth. Voth, a missionary who lived with the Hopis from 1893 to 1903, hoped to convert them to Christianity. While pursuing a path that he believed would lead to the

[27] These works are too numerous to list here, but one might start with (in addition to the text of PNAAM) the Tulalip Tribes of Washington, "Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge and the Public Domain," 9 July 2003, http://www.wipo.int/tk/en/igc/ngo/tulaliptribes.pdf, accessed 27 October 2011. See also the work of Native American scholars such as James D. Nason. "Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights and Legislation," *Stanford Law and Policy Review* 12 (2001): 225–66, and Loretta Todd, "Notes on Appropriation," *Parallelogramme* 16 (1990): 24–32.

[28] James W. Zion and Robert Yazzie, "Navajo Peacemaking: Original Dispute Resolution and a Way of Life," in *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tifft (New York: Routledge, 2006), 151–60.

[29] Clifford E. Trafzer, Jean A. Keller, and Lorene Sisquoc, *Boarding School Blues: Revisiting American Indian Educational Experiences* (Lincoln: University of Nebraska Press, 2006).

[30] Marlene Brant Castellano, "Ethics of Aboriginal Research," *Journal of Aboriginal Health* (January 2004): 98–114.

[31] Rosemary Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in Cultural Appropriation Controversy," *Canadian Journal of Law and Jurisprudence* 6 (1993): 249–85.

[32] Lisa Aldred, "Plastic Shamans and Astroturf Sun Dances: New Age Commercialization of Native American Spirituality," *American Indian Quarterly* 24 (Summer 2000): 329–52.

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destruction of their culture, Voth was also fascinated by the culture of the Hopis.[33] He learned their language and recorded descriptions of their cultural practices, beliefs, rituals, and stories in writing and photography.[34]

A number of Hopis deeply object to what they believe was Voth's theft of sacred cultural information. In the book *Sun Chief: An Autobiography of a Hopi Indian*, Don C. Talayesva says of Voth, "When he had worked here in my boyhood, the Hopi were afraid of him and dared not lay their hands on him or any other missionary, lest they be jailed by the Whites. During the ceremonies this wicked man would force his way into the kiva and write down everything that he saw. He wore shoes with solid heels, and when the Hopi tried to put him out of the kiva he would kick them."[35] While Voth and the individual Hopis he interacted with are gone, his legacy persists in the form of descriptions and images of sacred Hopi ceremonies in libraries and archives.

Even in cases where Native American peoples may seem to have willingly shared their culture with others, there was often some element of coercion. Consider the case of a member of the Tulalip Tribes of the Northwest United States. In 1912, William Shelton wanted to save the tradition of carving totem poles.[36] Policies of the Bureau of Indian Affairs (BIA) had suppressed this practice, along with other aspects of the Tulalip culture such as their language. In a "softening" of the BIA's position, it agreed to allow Shelton to begin carving.[37] However, he was allowed to save the tradition of the totem pole only on the condition that he "share" the stories of the Tulalip peoples with outsiders. According to a recent account of the incident, "Bureau leaders said he could [carve a pole], if in return he shared the stories symbolized in the pole for publication."[38] So Shelton was left with the choice of either preserving the tradition of totem pole carving, or the Tulalip people keeping control over their traditional stories. Such a devil's bargain puts the lie to any assumption that the "voluntary" publication of Native American stories was done with the free, informed consent of the peoples involved.

[33] Larry O'Dell, "Voth, Heinrich Richert (1855–1931)," in *Encyclopedia of Oklahoma History and Culture*, (Oklahoma City: Oklahoma Historical Society, 2007), http://digital.library.okstate.edu/encyclopedia/entries/V/VO001.html, accessed 11 October 2009.

[34] H. R. Voth, *The Traditions of the Hopi* (Chicago: Field Columbian Museum, Chicago, 1905).

[35] Don C. Talayesva, Leo W. Simmons, and Yale University, Institute of Human Relations, *Sun Chief: The Autobiography of a Hopi Indian* (New Haven: Yale University Press, 1972; 1942), 252.

[36] Or, more properly, "story poles." William Shelton, "Maker of Tulalip Totem Pole Tells Story of His Life," *The Everett Daily Herald,* 2 January 1914.

[37] Krista J. Kapralos, "Copyrighting Culture: Tulalips Assert Rights to Stories," *HeraldNet*, 15 April 2007, http://www.heraldnet.com/article/20070415/NEWS01/704150722/-1/news0103, accessed 17 November 2011. Margaret Riddle, "Shelton, William," in *Online Encyclopedia of Washington State History*, HistoryLink.org, http://www.historylink.org/index.cfm?displaypage=output.cfm&file_id=8928, accessed 28 May 2012.

[38] Kapralos, "Copyrighting Culture: Tulalips Assert Rights to Stories."

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These are just a couple of examples of the sorts of cases that have aroused the concern of Native Americans, anthropologists, and legal scholars about the ethics of engaging in research related to Indigenous peoples and to the disposition of Native American cultural materials and knowledge. An extensive literature in anthropology, Native American studies, and law addresses the issues raised by such cases. This literature includes discussions of the relationship between the legal concepts of *intellectual property* and *cultural property*, the ethical standards for research related to Indigenous peoples,[39] and the role of the international community and human rights in protecting Indigenous cultures.[40] PNAAM should be understood as part of this broader movement.

The Protocols for Native American Archival Material and Their Critics

PNAAM follows in the footsteps of the Native American Grave Protection and Repatriation Act (NAGPRA),[41] which was in some ways a model for it. NAGPRA, a federal law passed in 1990, holds that ownership of "certain Native American cultural items—human remains, funerary objects, sacred objects, or objects of cultural patrimony" belongs to the "lineal descendants, and culturally affiliated Indian tribes and Native Hawaiian organizations." The passing of NAGPRA led anthropologists and archaeologists to revise their practices regarding Native American cultural materials.[42] Like archivists, anthropologists and archaeologists followed an ethic of "stewardship,"[43] which includes "curational responsibilities" and "presupposes preservationist concerns."[44] Like some archivists, some anthropologists express concern that "relinquishing control threatens scientific or academic freedom or the integrity of

[39] Castellano, "Ethics of Aboriginal Research."

[40] Erica-Irene A. Daes and United Nations, Office of the High Commissioner for Human Rights, *Protection of the Heritage of Indigenous People* (New York: United Nations, 1997); Michel Streich and United Nations, *Declaration of the Rights of Indigenous People* (Crows Nest, N.S.W.: Allen and Unwin, 2009).

[41] Native American Graves Protection and Repatriation Act, 25 U.S.C., §§3001–3013, (2006).

[42] T. J. Ferguson, "Native Americans and the Practice of Archaeology," *Annual Review of Anthropology* 25 (1996): 63–79.

[43] Julie Hollowell and George Nicholas, "Using Ethnographic Methods to Articulate Community-Based Conceptions of Cultural Heritage Management," *Public Archaeology* 8 (2009): 141–60, 142.

[44] Frederick J. Stielow, "Archival Theory Redux and Redeemed: Definition and Context Toward a General Theory," *The American Archivist* 54 (1991): 14–26, 25.

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research . . . ."[45] Largely as a result of the changes sparked by NAGPRA, however, now archaeologists and Native Americans "are forging new partnerships to change archaeology so it is more acceptable and relevant to the descendants of the people who produced the archaeological record many archaeologists study."[46]

Unlike NAGPRA, PNAAM focuses on information[47] rather than objects.[48] PNAAM recommends that librarians and archivists work collaboratively with Native American tribes to develop policies for the handling of Native American TCE and TK.[49] While leaving ample room for collaboration, compromise, and creative problem solving, PNAAM does list a number of recommended actions and policies. It recommends, for instance, that some works may be removed or intentionally not preserved: "Some items, such as a photograph of a sacred ceremony, or object, or culturally sensitive documentation of a burial, should not be preserved forever or may need to be restricted or repatriated to the culturally affiliated group." It also recommends that in some cases, access to TCE ought to be restricted, requesting that librarians and archivists " . . . respect a community's request to restrict access to and use of materials that describe and represent esoteric, ceremonial, or religious knowledge that is significant to the community." Looking at the document as a whole, recommended practices that are likely to be controversial among librarians and archivists include 1) the removal of works for the purpose of repatriation or destruction, 2) intentional nonpreservation of works, 3) restricting access to works, 4) expurgation of works, 5) labeling of works, and 6) reclassification of works.

The 2008 report by the SAA on PNAAM summarizes the comments of archivists, historians, archaeologists, and other interested parties.[50] Although many write in support of PNAAM, many also object to one or more of its

[45] Hollowell and Nicholas, "Using Ethnographic Methods to Articulate Community-Based Conceptions of Cultural Heritage Management," 42. For an example of the debate among archaeologists on these issues, see Clement W. Meighan and Larry Zimmerman, "Native Americans and Archaeologists: Debating NAGPRA's Effects," *Archaeology*, 26 February 1999, http://www.archaeology.org/online/features/native/debate.html, accessed 15 June 2012.

[46] Ferguson, "Native Americans and the Practice of Archaeology," 74.

[47] By "information," I mean anything that has the function of "signifying something" beyond itself (this definition is adapted from Buckland in Chaim Zins, "Conceptual Approaches for Defining Data, Information, and Knowledge," *Journal of the American Society for Information Science* 58 (1997): 479–93, 480). An important feature of an "informational" object is that its value is in what it signifies, rather than in the thing itself.

[48] Indeed, materials that are of concern to the authors of PNAAM are not just original manuscripts or recordings held in archives, but also works that have been published and are now housed in public and academic libraries. Thus, many of the suggestions made in PNAAM, such as that libraries and archives partner with local tribes in evaluating and building collections, apply to any institution with information related to Native American culture.

[49] Hereafter, to avoid too many acronyms, "TCE" will be used to cover both TCE and TK (unless otherwise indicated).

[50] Boles et al., *Report: Task Force to Review Protocols for Native American Archival Materials.*

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provisions.[51] While some baldly assert that the recommendations are "unethical,"[52] other objections are more nuanced. Some argue that the recommendations of PNAAM conflict with the rights of nontribal members to access information and the rights of donors who intend the materials to be open to the public. Others are concerned about the potential negative impact on scholarly inquiry if PNAAM's recommendations are followed. A number of commentators object that recognizing the rights of Native Americans to restrict access would require recognizing the same rights for everyone, resulting in wide-ranging censorship.

The validity of the first objection depends on whether Native Americans have rights or merely "compelling interests"[53] in controlling access to their TCE. Interests are morally weaker than rights.[54] If Native Americans merely have interests in controlling access to their TCE, then these interests should take second place to respecting the rights of donors, scholars, and the public. If, however, Native Americans have rights to control their TCE, this objection is misplaced. While the rights of donors, scholars, and the public should be taken into account, their rights do not automatically disprove the existence of the rights of Native Americans to control access to their TCE. Rights conflicts are common; for example, the right of the public to know and the right of individuals to privacy. There are various ways to resolve such conflicts; for instance, by further specifying the rights or by determining which right is stronger in the circumstances.[55] A potential conflict does not show that one of the rights is invalid.

The second objection is also sound only if Native Americans do not have rights to control access to their TCE. Rights are limitations on the pursuit of other ends, such as scholarly inquiry. For instance, human rights place ethical limitations on the sorts of research that can be carried out on human subjects.[56]

[51] The ALA discusses the issues surrounding TCE and PNAAM in its *Presidential Traditional Cultural Expressions Task Force Report.* I focus on the SAA report here as it represents some of the more critical reactions to which this paper responds.

[52] Boles et al., *Report: Task Force to Review Protocols for Native American Archival Materials*, 110.

[53] Bolcer, "The Protocols for Native American Archival Materials: Considerations and Concerns from the Perspective of a Non-Tribal Archivist," 4.

[54] Some rights theorists take an instrumentalist approach to rights, arguing that rights are "instruments for achieving an optimal distribution of interests." Leif Wenar, "Rights," in *Stanford Encyclopedia of Philosophy*, Fall 2011, http://plato.stanford.edu/archives/fall2011/entries/rights, accessed 20 December 2011. However, Bolcer's point assumes that there is a moral distinction between rights and mere interests. This is consistent with the prevailing view of rights described by Wenar as providing "particularly powerful or weighty reasons, which override reasons of other sorts."

[55] Wenar, "Rights."

[56] United States National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* (Washington, D.C. The Commission, 1978).

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Thus, if Native Americans have moral rights over their TCE, these rights correctly set limits on the ways in which scholarly inquiry may be pursued.

The third objection is based on a misunderstanding of the universality of rights. While basic rights ought to be held equally by all persons, some rights are linked to specific features of an individual or group.[57] For instance, someone who asserts that all U.S. citizens have a moral right to participate in U.S. elections is not committed to the view that all human beings have the right to participate in U.S. elections. Similarly, if Native Americans have rights over their TCE in libraries and archives, it does not follow that all groups have such rights. In the final section of this paper, I discuss this point further, defending the claim that the right of Native Americans over their TCE does not generalize to all individuals and groups.

To sum up, whether or not the objections to PNAAM the SAA report raises are compelling depends on whether Native Americans have a moral right to control access to their TCE. The rest of this paper is devoted to establishing that they do.

Seeking an "Overlapping Consensus" between "Disparate Worldviews"

When it comes to legal rights, it is (relatively) easy to determine whether the right claimed exists. Establishing the existence of a moral right is a more difficult proposition, especially in a multicultural setting where a shared moral framework cannot be assumed. In some cases, those claiming a moral right may appeal to pre-existing moral understandings. For instance, if one says that the Occupy movement has a moral right to criticize the government, one can appeal to a shared understanding of the right to free speech. In other cases, however, to claim a right is to "seek to construct a *new set* of intersubjective understandings about . . . entitlements" [emphasis added].[58] Those who argue that Native Americans have rights over their TCE are seeking to construct just such a new intersubjective understanding between Native and nonnative peoples.

Admittedly, the language of rights is itself culturally bound. As rights theorist Christian Reus-Smit points out, "Moral argument can take different forms . . . rights cultures, in which rights constitute the principal form of entitlement claim, are but one kind of moral culture."[59] Thus, framing the issue in terms of rights might imply a Eurocentric perspective that PNAAM sets out

[57] Peter Jones, "Group Rights," *Stanford Encyclopedia of Philosophy*, Winter 2008, http://plato.stanford.edu/archives/win2008/entries/rights-group/, accessed 15 June 15 2011.

[58] Christian Reus-Smit, "On Rights and Institutions," in *Global Basic Rights*, ed. Charles Beitz and Robert Goodin (New York: Oxford University Press, 2009), 27.

[59] Reus-Smit, "On Rights and Institutions," 27.

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to challenge. However, PNAAM itself uses the discourse of rights. Indeed, in the justifications for its recommendations, the term "rights" is used over thirty-two times. For example, PNAAM states that: "Libraries and archives must recognize that Native American communities have *primary rights* for all culturally sensitive materials that are culturally affiliated with them" [emphasis added].

Nevertheless, Native American understandings of these rights and their moral grounding may be quite different from Eurocentric conceptions. As Native American scholar Willie Ermine puts it, nonnative and Native American peoples have "disparate worldviews each formed and guided by distinct histories, knowledge traditions, values, interests, and social, economic, and political realities."[60] Those working on "pluralizing archival research and education" similarly emphasize that different cultural groups may be working from within "incommensurable ontologies" and epistemologies.[61] If Native and nonnative peoples indeed have disparate worldviews, then the reasons that are compelling for Native Americans may have no grip on nonnative persons. And, unfortunately, agreeing to disagree will not work when the disagreement is about what ought to be done.

Harvard political philosopher John Rawls is concerned with how we can get agreement on principles of justice in a pluralistic, multicultural society. Rawls recognizes that, in pluralistic societies such as ours, it cannot be expected that people will share "comprehensive conceptions of the good."[62] A "comprehensive conception of the good" is a set of values grounded in metaphysical or spiritual beliefs about the nature of human beings and their place in the universe. Rawls argues that those with differing comprehensive conceptions can, nevertheless, agree on principles of justice based on an "overlapping consensus."[63] Unlike a unified consensus, an *overlapping* consensus does not require agreement about the reasons for a moral principle. A consensus "overlaps" when people accept the same principle, but based on different comprehensive conceptions.

Consider, for example, the nonestablishment clause of the United States Constitution. Both religious and nonreligious people can accept it as expressing the principle of freedom of conscience. The religious person may be committed to this principle on the grounds that persons should come to believe in God as a matter of individual conscience, not state coercion. The atheist may be committed to this principle on the grounds that all religions are equally false and, ideally, everyone will rationally reject religious beliefs. The religious person

[60] Willie Ermine, "Ethical Space: Transforming Relations" (paper presented at the National Gatherings on Indigenous Knowledge, Wanuskewin, Saskatchewan, 7–9 June 2005).

[61] McKemmish, Gilliland-Swetland, and Ketelaar, "'Communities of Memory': Pluralising Archival Research and Education Agendas," 152.

[62] John Rawls, "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7 (1987): 1–25, 4.

[63] Rawls, "The Idea of an Overlapping Consensus," 1.

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and the atheist do not have to share comprehensive conceptions to share a commitment to the principle of the separation of church and state.

The method of ethical inquiry adopted here seeks such an "overlapping consensus" on Native Americans' rights to control access to their TCE. Given that the recommendations in PNAAM reflect a set of principles that are already accepted by many Native American peoples, the rest of this essay focuses on whether we can find grounds for *nonnative* persons, archivists in particular, to accept the principle that Native Americans have rights over their TCE held in archives. I shall begin with archivists' own conception of the good as expressed in their professional ethics and values.

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Ethical Limitations on Access to Information

Access to information is a core value in the archival profession and the information professions more generally. This value gives rise to the duty to ensure that people have access to a wide range of resources. It is also true that the core values of archivists include respecting certain limits on access to information. Respecting the intellectual property rights of creators, respecting the requests for secrecy made by donors, and avoiding unnecessary harm are all professional duties of the archivist.[64] Each of these ethical limitations on access has been suggested in the literature as the basis for Native Americans' rights to control access to their TCE. The main goal of this section is to consider these justifications for Native Americans' rights to their TCE and to show the need for a better account. I argue that attempts to appeal to concepts of intellectual property, secrecy, and harm fail to provide the grounds for an overlapping consensus on Native Americans' rights to control access to their TCE.[65] I argue in the following section that the right to privacy provides a better basis for an overlapping consensus on Native Americans' rights over their TCE.

Arguments for rights to limit access to TCE frequently suggest that we should treat them as collective *intellectual property* (IP) owned by particular tribes.[66] So, for example, it has been suggested that the Hopis may wish to claim copyright in kachina dolls and images.[67] Do Native American tribes have

[64] Danielson, *The Ethical Archivist.*

[65] While many of these limitations on unfettered access to information are encoded in law, they are considered here as *ethically* appropriate limitations on access to information.

[66] Robert K. Paterson and Dennis S. Karjala, "Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples," *Cardozo Journal of International and Comparative Law* 11 (Summer 2003): 633–70; Nason, "Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights and Legislation."

[67] Richard A. Guest, "Intellectual Property Rights and Native American Tribes," *American Indian Law Review* 20 (1995): 111–39. It has also been argued that patent law may be applied to traditional seeds and folk crops. But, the issue here is materials in libraries and archives, so I will only discuss copyright.

intellectual property rights in all archival materials containing their TCE? Admittedly, U.S. law does not as yet recognize such rights, but that does not settle the moral question. According to the Universal Declaration of Human Rights, for instance, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[68] Human rights are based on equal respect for human dignity and apply to all persons independent of whether a particular legal system currently recognizes them. If Native Americans have a moral right to intellectual property in their collectively authored works, it would ethically obligate professionals to respect these rights in their policies and practices.

To determine whether TCE are a form of intellectual property rights, the basis for such rights needs to be examined more deeply. While some object that the term *property* implies absolute ownership of a thing (and, thus, is an inappropriate label for sacred cultural information), *property* as it is used here simply refers to "the rules that govern people's access to and control of things such as land, manufactured goods, or intellectual products."[69] In the Anglo-American tradition, two prominent theoretical approaches justify intellectual property rights: the utilitarian and the Lockean.[70] Unfortunately, neither of these approaches provides a justification for Native American IP rights over TCE.

In the utilitarian approach, rules of intellectual property start from the fact that human beings are sentient creatures whose lives can be improved by intellectual and artistic works, such as factual treatises, works of fiction, music, and the arts.[71] When creators are given property rights in their works, it allows them to profit from their work, thereby creating an incentive for further creation and distribution.[72] Everyone then benefits from the increased access to works in "science and the useful arts."[73] Intellectual property law in the United States follows this utilitarian model, giving authors and inventors rights in their works for a limited amount of time to provide them with an incentive for creation. The utilitarian account is a poor fit for justifying Native American IP rights in their TCE, however. The focus on incentives for creation and dissemination gives little or no support for property rights in works that are old or when the goal is to remove them permanently from the public sphere.

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[68] United Nations, Universal Declaration of Human Rights, art. 27(2).

[69] Jeremy Waldron, "Property and Ownership," in *Stanford Encyclopedia of Philosophy*, Spring 2011, http://plato.stanford.edu/archives/spr2012/entries/property/, accessed 4 August 2011.

[70] Edwin C. Hettinger, "Justifying Intellectual Property," *Philosophy and Public Affairs* 18 (1989): 31–52.

[71] Hettinger, "Justifying Intellectual Property," 47–51.

[72] Sara K. Stadler, "Forging a Truly Utilitarian Copyright," *Iowa Law Review* 91 (2006): 609–70.

[73] U.S. Const. art 1, sec. 8.

In the Lockean account, the rules of intellectual property are based on the fact that human beings are creators.[74] As creators, we work with the natural and social materials we find around us to make something new—we grow crops; we sew clothes; we manufacture tools; we make up stories. By so doing, we "mix our labor" with the available natural and social materials and thereby gain rights to control the things we have made. In the case of intellectual property, when a person (or group of persons) mixes his or her mental labor with the cultural materials available—for example, language, images, musical traditions—the creator then has property rights over that work.

The Lockean approach to Native American rights over TCE has clear drawbacks, however. First, it does not fit well with how Native Americans conceive of their relationship to their TCE. Like other Indigenous peoples, Native Americans do not typically conceive of their traditional stories, songs, ceremonies, and knowledge as something that they have labored to create. Rather, they view them as "gifts from the Creator."[75] Second, it does not fit well with the constitutional basis of IP law in the United States.[76] While IP laws have become stronger, to move to a Lockean model would remove all justification for the time limitation on copyright, which protects the public domain. IP rights are, thus, a poor basis for an overlapping consensus on Native American rights to their TCE, because they would not justify the sorts of perpetual rights desired by Native Americans.

It has also been suggested that *secrecy* is the correct model for justifying and protecting Native American rights. Secrecy is a morally ambiguous concept, but there are reasonable justifications for keeping some information secret. Trade secrecy, for instance, may be justified because it allows corporations to develop and use new ideas and techniques that can contribute to society as a whole. State secrecy may be defended on the grounds that governments cannot protect their citizens without the ability to keep sensitive information out of public circulation. While some argue that the TCE of Native Americans should be treated as a form of trade secret,[77] *state* secrecy might be a better fit.[78] As is pointed out by the authors of PNAAM, "Protecting certain kinds of secret information may be a matter of 'national security' for sovereign tribal governments."

[74] Adam D. Moore, *Intellectual Property and Information Control: Philosophical Foundations and Contemporary Issues* (New Brunswick, N.J.: Transaction Publishers, 2001).

[75] Tulalip Tribes, *Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge and the Public Domain.*

[76] Stadler, "Forging a Truly Utilitarian Copyright."

[77] Gelvina Rodriguez Stevenson, "Trade Secrets: The Secret to Protecting Indigenous Ethnobiological (Medicinal) Knowledge," *International Law and Politics* 32 (2000): 119–74.

[78] Trade secrets are a form of IP and, thus, are subject to the same objections as those to IP as grounds for rights over TCE (i.e., incentives and time limits).

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This defense of the rights of Native American tribes to their TCE is also problematic, however. First, as PNAAM points out, it only applies to "certain kinds" of information. It is unlikely that it will apply to all Native American TCE. Second, archivists and other LIS professions have endorsed statements expressing skepticism of the state secrets justification for limiting access to information.[79] Thus, while secrecy may provide some basis for an overlapping consensus on the rights of Native Americans to control access to their TCE, it is a limited and relatively weak basis.

According to the beliefs of some Native American tribes, inappropriate access to TCE can be harmful. Even John Stuart Mill, whose "On Liberty" is the *locus classicus* of the argument for freedom of expression, argues that we ought to prohibit people from engaging in activities that harm others. Thus, "harmful speech," such as yelling fire in a crowded theater, can be restricted. This "harm argument," then, could support limiting access to such materials. For instance, according to Navajo beliefs, if winter stories are told between April and September, it can result in grave consequences, such as crop failures and increased illness.[80] However, given that the beliefs about the harm in this case are based on a comprehensive conception about the nature of the universe, it is a poor basis for an overlapping consensus. The divergent worldviews of Navajos and non-Navajos would make it difficult to establish an overlapping consensus that reading winter stories in the summer causes harms such as crop failures.

The deep offense caused to Native Americans by the unauthorized taking and access to their TCE is a harm that everyone can recognize, whatever their comprehensive conception. To treat what is considered deeply meaningful and sacred as something merely for others edification, entertainment, or profit is profoundly offensive. Such profound offense can be extremely painful and disruptive to the lives of those subjected to it. Thus, it could be argued that access to TCE should be limited when it causes harm of this sort. However, while such harm is morally significant and should be considered when deciding how to deal with the cultural and personal materials of others, it is not clear that it justifies a *right* to control access to those materials. There are reasons to resist positing the existence of a right not to be offended, even profoundly offended.[81]

To sum up, while respecting intellectual property, protecting secrecy, avoiding harm, and avoiding the harm of giving profound offense are reasons

[79] Timothy L. Ericson, "Presidential Address" (presented at SAA's 68th Annual Meeting in Boston, 2–8 August, 2004), *The American Archivist* 68 (2005): 18–52. The Right to Know Community, *Toward a 21st Century Right-to-Know-Agenda* (Washington D.C.: 21st Century Right to Know Project, 2008), http://www.ombwatch.org/files/21strtkrecs.pdf, accessed 23 September 2011.

[80] Roberta Rosenberg, "Being There: The Importance of Field Experience in Teaching Native American Literature," *Studies in American Indian Literatures* 12 (Summer 2000): 38–60, 52–53.

[81] For a discussion of the concept of offense, profound offense, and whether it is morally acceptable to forbid offensive speech and behavior, see Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), 50–93.

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to respect the concerns of Native Americans in relation to their TCE, none of these justifications provides the grounds for an overlapping consensus on the *right* of Native Americans to control access to their TCE. The next section argues that we can find a basis for an overlapping consensus for the right of Native Americans to their TCE in their collective right to *privacy*.

The Right to Cultural Privacy

It has been suggested that the right of Native American peoples to control access to their TCE is based on a group right to informational privacy.[82] The right to "informational privacy" has been characterized as "the ability to determine for ourselves when, how, and to what extent information about us is communicated to others."[83] An extensive philosophical and legal literature exists on the nature of the right to privacy.[84] Within this literature are three prominent approaches to the defense of a right to informational privacy[85] (based on three prominent approaches in contemporary moral theory): 1) consequentialist, 2) Kantian liberal, and 3) communitarian. I shall argue that each of these perspectives on the value of privacy provides a basis for an overlapping consensus on the right of Native American peoples to control access to their TCE.[86]

Consequentialist Justification

For the consequentialist, privacy is valuable because it leads to good consequences—it promotes people's welfare and protects them from harm.[87] For example, keeping information such as Social Security numbers, personal conversations, or medical records private prevents this information from being

[82] See, for example, Michael F. Brown, *Who Owns Native Culture?* (Cambridge, Mass.: Harvard University Press, 2003) and the Protocols for Native American Archival Materials.

[83] Alan Westin, *Privacy and Freedom* (New York: Atheneum 1967), 7.

[84] Judith DeCew, "Privacy," *Stanford Encyclopedia of Philosophy*, Fall 2011, http://plato.stanford.edu/archives/fall2012/entries/privacy/, accessed 4 January 2012.

[85] As with IP, the focus here is on the moral right to privacy, not the legal right.

[86] While significant overlap exists in how the value of privacy is understood in the Western tradition and how it is understood in various Native American traditions (thus, it makes sense to use the term *privacy*), tribes have their own views about what privacy is and why it is important. For a discussion, see J. Wm. Moreland, "American Indians and the Right to Privacy: A Psychological Investigation of the Unauthorized Publication of Portraits of American Indians," *American Indian Law Review* 15 (1991): 237–77.

[87] For a discussion of the costs and benefits of privacy, see Tony Doyle, "Privacy and Perfect Voyeurism," *Ethics and Information Technology* 11 (2009): 181–89; and Richard A. Posner, "The Right to Privacy," *Georgia Law Review* 12 (Spring, 1978): 393–422.

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used to engage in identity theft, extortion, or discrimination. Privacy also protects people from the psychological harm caused by privacy invasions. In addition, privacy provides important benefits.[88] Privacy allows people to receive honest medical opinions, useful legal advice, and effective psychological counseling; none of which would be possible if people were not assured that their communications would remain confidential. In the context of libraries and archives, patrons can research sensitive or controversial topics secure in the knowledge that the resources they consult will be kept confidential.[89]

Similarly, a group's ability to control access to its cultural information leads to good consequences. First, it allows members of the group to avoid the harm created by unauthorized access and use. Just as private information about an individual can be used to exploit that individual financially, so can TCE be used to financially exploit Native Americans. Nonnative Americans using Native American TCE to enrich themselves at the expense of Native American peoples has a long history.[90] And, just as an individual would find it distressing if a stranger read and publicly shared his or her private diary, many Native American peoples find it distressing for outsiders to access and publicize their TCE.[91] Second, the right to group privacy can benefit all concerned. If members of Native American tribes know that they can control the extent to which TCE are disseminated, it will make them more willing to share information among themselves and with outsiders.

Kantian Liberal Justification

Kantian liberals think that privacy ought to be protected, because, following Immanuel Kant, they place a high value on individual autonomy (literally "self-rule") and dignity.[92] Invasions of privacy are an affront to the dignity and individuality of the person as a "unique and self-determining being."[93] The Georgia Supreme Court vividly expressed this point of view in its decision that a person's photograph may not be used in a newspaper advertisement without

88 Posner, "The Right to Privacy."

89 Rhoda Garoogian, "Librarian/Patron Confidentiality: An Ethical Challenge," *Library Trends* 40 (1991): 216–33.

90 Brown, *Who Owns Native Culture?*

91 Precisely which sorts of information fall into this category may vary from tribe to tribe. Determining which information is sensitive requires that archivists "Consult with culturally affiliated community representatives to identify those materials that are culturally sensitive . . . " as suggested by PNAAM. For a discussion of methods for navigating these issues, see Katherine Becvar and Ramesh Srinivasan, "Indigenous Knowledge and Culturally Responsive Methods in Information Research," *Library Quarterly* 79 (2010): 421–41.

92 Edward J. Bloustein, "Privacy as an Aspect of Human Dignity," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 156–202.

93 Bloustein, "Privacy as an Aspect of Human Dignity," 163.

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his or her consent: "As long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being under the control of another, that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master."[94] Without the right to privacy, our lives and our identities are not our own; they can be used for the entertainment and profit of others.

Similar reasoning can be extended to groups. Groups have their own *collective* autonomy and dignity. Collective autonomy is the capacity for a group to engage in self-rule and is, thus, closely tied to the ideas of self-determination and sovereignty. Collective autonomy requires what Loretta Todd calls "cultural autonomy," which "signifies a right to one's origins and histories as told from within the culture and not as mediated from without."[95] This cultural autonomy is violated when those outside of the group forcibly appropriate cultural information and use it in ways not authorized by the cultural norms and practices of the group. A group loses control over its identity (as embedded in its cultural symbols and practices) when its TCE is treated merely as a means to others' education, entertainment, or enrichment. This denies members of the group, who identify with and create their lives within this culture, an important source of human dignity.

Communitarian Justification

While the Kantian focuses on privacy as important to our individual autonomy, the communitarian points out that privacy is essential to us as *social* beings.[96] As social creatures, we have certain needs and vulnerabilities that make privacy important to us.[97] Privacy allows us to manage our social lives by giving us the capacity to remove ourselves from social scrutiny. Without privacy, we are constantly open to the observation of others; thus, we begin to see ourselves solely through the eyes of these others. This interferes with our engagement in emotionally, interpersonally, or spiritually significant activities, because, we "cannot at the same time be lost in an experience and be observers of it."[98] Privacy is not merely a protection from social scrutiny, however; it also allows us to engage in a full range of social relationships. As James Rachels puts it, "our ability to control who has access to us, and who knows about us allows us to

[94] Quoted in Bloustein, "Privacy as an Aspect of Human Dignity," 174–75.

[95] Todd, "Notes on Cultural Appropriation," 24.

[96] Robert S. Gerstein, "Privacy and Self-Incrimination," in *Philosophical Dimensions of Privacy*, 245–64; James Rachels, "Why Privacy Is Important," in *Philosophical Dimensions of Privacy: An Anthology*; and Charles Fried, "Privacy (A Moral Analysis)," in *Philosophical Dimensions of Privacy*, 203–22.

[97] Gerstein, "Privacy and Self-Incrimination."

[98] Gerstein, "Privacy and Self-Incrimination," 266.

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maintain the variety of relationships with other people that we want to have."[99] Intimacy requires that we can reveal information about ourselves to some individuals or groups that we do not reveal to everyone; privacy, thus, enables us to modulate degrees of intimacy with others.[100]

The communitarian argument can also be marshaled to defend a group right to privacy. From within the experience of a sacred ceremony, for example, its significance depends on its meaning for the participants. When unauthorized outsiders observe the ceremony—even if it is motivated by laudable goals, such as to learn about another culture or way of life—the observers' presence can drain the experience of its significance for the participants and may block the ability of the participants truly to immerse themselves in it.[101] Native American groups experience a similar distancing from their own cultural experience when their TCE are accessed and used in ways inconsistent with their traditions. Furthermore, group privacy facilitates the creation and maintenance of internal relationships among the members of Native American groups. Through gradually learning sacred knowledge, each member of the society gains his or her place in the community. When the knowledge is openly accessible to all, it cannot perform this function of social integration. In addition, by allowing the group to modulate what and how much about its culture to reveal to outsiders, group privacy provides the creative space for a range of relationships with outside individuals and groups.

To sum up, groups need privacy just as individuals do. Groups face threats from invasions of privacy, and members can only enjoy certain benefits when their collective privacy is respected. Privacy protects and enhances the capacity of a group to enjoy collective autonomy, which enhances the lives of its members. And, the important social functions that groups play in creating meaning and a sense of belonging for their members require a measure of group privacy. If avoiding bad consequences, promoting good consequences, protecting autonomy and human dignity, creating and maintaining social relationships, and providing a context of meaning constitute the moral grounds for an individual right to privacy, then they also constitute the moral grounds for a group right to privacy. To the extent that one is committed to protecting individual privacy, one should also be committed to protecting a group right to cultural privacy. Thus, a commitment to the right to privacy provides archivists with a reason to support an overlapping consensus on the rights of Native American peoples to control access to their TCE.

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[99] Rachels, "Why Privacy is Important," 295.

[100] Fried, "Privacy (A Moral Analysis)," 210–11.

[101] Gerstein, "Privacy and Self-Incrimination."

Objections and Replies

This section responds to some objections to the above defense of Native Americans' right to their TCE. Of course, not all possible objections can be covered. In particular, I do not address reasonable objections from those who may agree with my conclusion, but who disagree with my reasoning for it. My focus is on the objections of those who are skeptical of the claim that Native Americans have the right to control access to their TCE.

Admittedly, the claim that groups have rights is not uncontroversial. Some argue that groups are just sets of individuals and that any advocate of group rights must be assuming, incorrectly, that groups have an independent existence and value.[102] This objection is mistaken, however. Accepting group rights does not require that one think that a group is an entity over and above the individual members or that it is more important than the members.[103] Will Kymlicka, for instance, argues that group rights ought to be understood as protecting the interests of individuals who are members of minority cultures.[104] In the case of the group right to privacy, while the rights holder is the group, the right protects the right of individual members to belong to an autonomous community. Rights to the collective goods connected to culture must be held collectively by the group as a whole. If the right was held by each individual taken separately, then each individual would be free to waive the right. In the case of a collective good, such as a culture or way of life, waiving a right does not just leave the individual's interests unprotected, it threatens the interests of all the members of the group.[105] To protect the right to culture of all individuals, the group as a whole must hold the right to privacy.

This is not to say that the members of a group will always agree about how a group right should be exercised. The advocate for group rights need not make the essentializing assumption that all members of a group speak with a single voice. Groups have rights because such rights enable a number of individuals to live together in their own way. Consider, for example, the group right to sovereignty. The United States is a sovereign nation with rights in the international realm and with a special status in regulating the behavior of U.S. citizens. This does not imply that we all share an "essential" Americaness, nor does it imply that we do not deeply disagree about how that sovereignty should be used. Groups, such as the United States and Native American tribes, have developed ways to resolve conflict and come to decisions that the members of

[102] Chandran Kukathas, "Are There Any Cultural Rights?," *Political Theory* 20 (1992): 105–39.

[103] For a discussion of the relationship between collective identity and individual identity, see Kay Mathiesen, "Collective Identity," *ProtoSociology* 18–19 (2003): 66–86.

[104] Will Kymlicka, *The Rights of Minority Cultures* (New York: Oxford University Press, 1995).

[105] Jones, "Group Rights."

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the groups see as legitimate. It is also true that when the world is divided into differing sovereign nations, conflicts will arise between these nations about how their interactions ought to be resolved. Nevertheless, these facts about our internal and external disagreements are not a reason to deny the existence of group rights so we can avoid "conflict within and between communities," as has been suggested (e.g., by the Library Copyright Alliance).[106]

One may accept group rights, and even group rights to privacy, but still ask, why do Native American peoples (in particular) have a right to cultural privacy? What about other groups such as the Church of Scientology, the Catholic Church, the American Library Association, or the Amish? Do they also have rights to cultural privacy that we have a duty to respect? If so, how much material about all of these groups might we have to remove from libraries and archives? It might seem that committing ourselves to a group right to cultural privacy is putting a foot on the slippery slope to censorship.[107] Such "slippery slope" objections, however, are often fallacious.[108] If a morally relevant distinction exists between the groups related to their need for privacy protections, then there is a natural break in the slope and we won't slip down it. I argue that such a morally relevant distinction exists between Native Americans and other groups.

One notable distinction between Native Americans and other groups is that many Native American tribes are sovereign entities with their own traditions and laws surrounding TCE. Indeed, PNAAM highlights Native American sovereignty as a reason why the cultural rights of Native American tribes ought to be respected. A group has "sovereignty" when it is the "supreme authority within a territory."[109] Thus, we ought to respect the authority of a sovereign nation when we are on its territory. This argument, however, is limited in scope. The recommendations in PNAAM are intended to cover the actions of those *outside* of Native American territories. The fact that a group has sovereignty over its territory says nothing about what those outside of this territory ought to do with regard to their own activities. So, it is unclear that sovereignty alone supplies

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[106] Library Copyright Alliance, *Comments of the Library Copyright Alliance on the February 18, 2011, Draft Articles on the Protection of Traditional Cultural Expression.* Furthermore, NAGPRA has already established legally protected cultural group rights. Thus, what is being suggested here is not something new or untried.

[107] This concern was voiced a number of times in the SAA task force report on the PNAAM, 17, 81, 101, and 123.

[108] Indeed, many logic textbooks classify slippery slope arguments as fallacious reasoning.

[109] Dan Philpott, "Sovereignty," in *Stanford Encyclopedia of Philosophy,* Summer 2010, http://plato.stanford.edu/archives/sum2010/entries/sovereignty/, accessed 11 October 2011. This definition is very close PNAAM's, i.e., "Supremacy of authority or rule; independence and self-government. A territory existing as a separate state."

a reason for archivists to treat Native American materials differently from the materials related to other groups.[110]

Rather than focus on the *legal fact* of sovereignty, we should consider why Native Americans, in particular, have and ought to have sovereignty. Given their history and culture, Native Americans have a unique need for collective cultural autonomy. One way to respect this need is to recognize the sovereignty of Native American tribes. Another way is to respect their rights to cultural privacy. Native American peoples' particularly strong need for cultural autonomy can be better understood by reflecting on two factors: 1) the historical context of genocide, forced assimilation, and cultural appropriation, and 2) the current context of economic, political, and social disempowerment that has resulted from this history.

The forced assimilation and destruction of Native American culture (as discussed in the first section of this article) led to a loss of control over how this culture is used and interpreted. Compare the case of a Native American tribe to the Church of Scientology, for instance. As long as the Church of Scientology can protect its secrets by ordinary means, such as committing members to silence, keeping outsiders away from its practices, and exercising its property rights, there is no need to provide extra protections in the form of a duty to protect its group privacy. This is not, and historically has not, been the case with Native Americans. Much of the information about their cultures was revealed and exposed because of colonization and genocide.

Furthermore, the majority culture does not just neglect the cultures of Native American peoples, but appropriates them as a way to achieve some supposedly "authentic" connection with nature or the primitive.[111] Others use the attractiveness of Native American cultures to nonnative peoples to make money. As discussed above in the section on privacy, such appropriations threaten the meaning of the culture for those who live within it. Most other groups do not face this sort of threat. As long as, for example, valid Catholic Masses are held every day and as long as the Catholic Church has the ability to enforce orthodoxy, it would be absurd and ineffective for non-Catholics to create or sell ersatz healing Masses. Thus, there is no need to provide extra protection to Catholic TCE. But, there is a need to provide such protections for Native American cultural materials and practices.

A further morally relevant distinction between Native Americans and other groups is the particular historical relationship between Native Americans and nonnative Americans. The United States recognized this relationship in the official apology passed in 2009. The text of the Native American Apology

[110] In addition, the scope of this argument is limited by the fact that not all Indigenous peoples have legal sovereignty and would thus limit the applicability of the case for cultural privacy presented here.

[111] Aldred, "Plastic Shamans and Astroturf Sun Dances."

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Resolution includes the following statements: "[T]he United States, acting through Congress . . . recognizes that there have been years of official depredations, ill-conceived policies, and the breaking of covenants by the Federal Government regarding Indian tribes." The United States "apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States." The United States is committed "to move toward a brighter future where all the people of this land live reconciled as brothers and sisters, and harmoniously steward and protect this land together."[112]

The history of injustice acknowledged in this apology creates special obligations for nonnative Americans to respect Native American peoples and their cultures.[113] Restitution and rehabilitation are key components of a restorative justice approach to the harms caused by past injustices.[114] Thus, one way to fulfill this obligation is to create policies in our institutions that respect and protect Native Americans' right to cultural privacy. The approach of restorative justice is particularly appropriate in the case of Native Americans, as it is in tune with Native American conceptions of justice.[115]

Conclusion

I have argued that there can be an overlapping consensus on the proposition that Native Americans have a right, grounded in cultural privacy, to control access to their TCE. With this overlapping consensus as a basis, it is possible to start responding to some of the worries expressed in the SAA report about the difficulties of implementing the suggestions in PNAAM. First, since Native Americans have rights to control access to their TCE, the fact that problems might arise as we try to implement policies to protect these rights does not provide a justification for refusing to do so. A right is a morally imperative

[112] Few Americans are aware of this apology, since (unlike Canada's and Australia's apologies) it was not read aloud by the head of government. Unlike the United States, Canada has followed up on its apology with a Truth and Reconciliation Commission, and Australia established a Council for Aboriginal Recognition. For a discussion of the Canadian case, see Mark D. Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada," in *The Politics of Reconciliation in Multicultural Societies*, ed. Bashir Bashir and Will Kymlicka (Oxford and New York: Oxford University Press, 2008), 165–91. For a discussion of the Australian situation, see Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Burlington, Vt.: Ashgate, 2008).

[113] For a defense of the idea of collective responsibility, see Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity; Blackwell Publishers, 2002); and Kay Mathiesen, "We're All in This Together: Responsibility of Collective Agents and Their Members," *Midwest Studies in Philosophy* 30 (2006): 240–55.

[114] Chris Cunneen, "Exploring the Relationship between Reparations, the Gross Violation of Human Rights, and Restorative Justice," *Handbook of Restorative Justice: A Global Perspective*, ed. Dennis Sullivan and Larry Tifft (New York: Routledge, 2006), 355–68, 364.

[115] Zion and Yazzie, "Navajo Peacemaking."

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demand, which cannot be put aside simply because it is inconvenient or difficult to respect. This is not to deny that archivists and other information professionals will need to ameliorate possible negative consequences and negotiate rights conflicts. As they move to adopt some of the provisions of PNAAM, no doubt the rights of various parties will conflict in certain cases. Thus, as specific policies that respect the rights of Native American peoples are developed, the rights of nonnative Americans, and the rights of Native American individuals who do not agree with the decisions of their tribes, will need to be considered. Luckily, navigating rights conflicts is nothing new to archivists.[116]

This is all to say that the objections to PNAAM expressed in the SAA report and elsewhere should not be seen as insurmountable obstacles, but instead as a starting point for collaborative negotiation and problem solving. As PNAAM puts it, "North American libraries, archives, and American Indian communities will benefit from embracing the power of conversation, cooperation, education, negotiation, and compromise."

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[116] Danielson, *The Ethical Archivist.*