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## Introduction to Cultural Appropriation: A Framework for Analysis

The term *cultural appropriation* has been defined as “the taking—from a culture that is not one’s own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge.”<sup>1</sup> This simple description bristles with uncertainty: What do we mean by “taking”? What values and concerns are implicated in the processes of appropriation? And how, if at all, should we respond? These are among the questions that are addressed in *Borrowed Power: Essays on Cultural Appropriation*.

### **A Point of Departure**

This is a complex topic, owing partly to the fact that cultural appropriation is a multidimensional phenomenon. Consider the following illustrations (all of which are drawn from, or inspired by, the essays in this collection):

- *Example 1:* At the beginning of the nineteenth century, sculpted marble friezes were taken from the Parthenon on orders from Lord Elgin (at one time the British ambassador to the Ottoman Empire). These so-called Elgin Marbles were later sold to the British Museum in 1916, where they remain on display.

- *Example 2:* A folksinger from the United States recorded an ancient Senegalese folk song, the writer of which is unknown.
- *Example 3:* A muscle relaxant known as d-turbocurarine is patented by a pharmaceutical company. It was derived from an Amazonian arrow poison.<sup>2</sup>
- *Example 4:* A white writer published stories learned from members of a West Coast Native band. According to the customs and traditions of that band, the stories can be retold only by select elders.<sup>3</sup>
- *Example 5:* A nonaboriginal artist paints works based on images of Native cultures of North America. Patterns and symbols found on carpets, earthware, blankets, and clothing are used. Images of the peoples of the region, dressed in traditional attire, are also created.
- *Example 6:* The Nahua peoples of Mexico, under the hegemonic control of Spain, adopt the colonial discourses of this imperial presence, assimilating the cultural practices of this (European) Other.
- *Example 7:* W. P. Kinsella published a series of stories set on the Hobbema reserve in Alberta. The stories are all fictional, as are the characters, though some of those characters are given names of people living on the reserve.
- *Example 8:* Jazz, blues, soul, rap, and other musical forms emanating out of the Black musical experience in America are adopted by white musicians and audiences as part of a mainstream musical tradition.

If these are all instances of appropriation, then the range is broad; the net is cast widely. This is partly due to the fact that the idea of a "culture" is at the heart of the concept under study. That term is as indeterminate as any found within the social sciences.<sup>4</sup> It cannot, therefore, be relied upon to set clear limits as to where the concept of cultural appropriation begins and ends.

Consider the inherent ambiguity found in the convenient but intellectually austere definition quoted previously. It speaks of takings "from a culture that is not one's own." This merely begs the question of what counts as a culture for these purposes. Can a coherent conception of that term be developed? It might be taken to refer to the customs, values, and rule systems of a social group. When we hear people talk about social practices by asserting that "in our culture, we . . .," they might be referring to values that they believe to be commonly held. But this prompts questions about what those values are and what we mean when we talk about a sense of sharedness. These problems are aggravated by the fact that analysis of cultural appropriation sometimes also emphasizes that what is being appropriated are cultural goods. Used in that way, "culture" connotes some type of creative product (whether tangible or otherwise): these are the *objects* of appropriation.

The meaning of "appropriation" is also open-ended. The examples bear this out. However, from among that array three general points emerge: (1) appropriation concerns relationships among people, (2) there is wide range of modes through which it occurs, and (3) it is widely practiced.

First, because appropriation connotes some form of taking, it contemplates a relationship between persons or groups. At the most mundane level, the breach of an author's copyright or the theft of an artist's canvas is an appropriative act. Here we seem to be able to define the relevant actors with ease. However, in doing so, we are making a statement about the rights of *individuals* based on views about authorship or creation that give credit (in various forms) to a given person. In other words, our definition of the actors in this little scenario is value-laden and is therefore contentious.

The eight illustrations show that a much different notion of stakeholders is contemplated in this book. Ongoing attempts by Greece to repatriate the Parthenon Marbles depend on notions of nationalism and national heritage, not individual entitlements. Indeed, most of the essays in this book conceive of relationships among communities. And in thinking about appropriation in this way, we can base the organizing elements in our relation-based analysis on ethnicity, race, nationality, class, gender, and so forth. Appropriated cultural groups abound. Hence, "real" cowboy poets lament the emergence of "wannabes" who endeavor to invade the genre.<sup>5</sup> Digital samplers borrow snippets of songs and tunes to create musical collages in ways that flirt with copyright laws. Similarly, Henry Jenkins has described a form of textual poaching in which fans of popular culture borrow freely: "Undaunted by traditional conceptions of literary and intellectual property, fans raid mass culture, claiming its materials for their own use, reworking them as the basis for their own cultural creations and social interactions."<sup>6</sup>

The need to describe a community of insiders and outsiders is implicit in most of what has been said about the practice of appropriation. Once we speak of a relational activity, a boundary line must be drawn, and problems of definition emerge. Sometimes the "in-ness" or "out-ness" of a particular individual will be reasonably incontestable. It is of course inevitable that certain divisions among cultural groups will be amorphous. Nevertheless, some test of group belonging seems required in discussions about cultural appropriation.

Just as defining the parameters of a cultural group is difficult, so, too, is establishing a theoretical basis for connecting a particular cultural practice to that group. If cultural practices develop from an amalgam of influences, it becomes difficult to assign these to one group over another. To do so would at least mean determining what degree of nexus is required between a cultural good and a given community. The existence of shared cultures and histories suggests that sometimes these entitlements might also be shared or sharable.

The difficulty of finding a connection between communities (or individuals) and certain cultural products is associated with the nature of commonly held notions of authorship—that is, the idea that we can locate the source of a given work in one person. One critique of authorship is based on the concept of intertextuality, a phenomenon that affects the processes of reading and writing texts. Intertextuality implies that each reading of a work is unique; this is a natural outflow of the reader's individuality. This view also recognizes that an author does not work *tabula rasa* but rather draws relentlessly on past creations. The result is that any given text is a "tissue of quotations drawn from innumerable centers of culture."<sup>7</sup> It is this latter element that is most salient here. It seems fair to question the validity of the conception of the author as creator when any given work of art is inevitably layered with the contributions of others. At the same time, and for the very same reason, it can be just as difficult to repose authorship in some cultural group.

Second, we can see from the eight examples that there are various possible *modes* of appropriation. Some forms are rather straightforward. The pilfering of the Parthenon Marbles was an act of appropriation (though views may differ on whether it was a *misappropriation*). However, this description of appropriation will not do for the other listed examples; something more subtle is at play. The singer who performs a Senegalese folk song does not preclude others from doing the same. In other words, the taking of the song does not lead to a corresponding deprivation of the appropriated groups in the same way as it would if tangible objects were involved. Such is the nature of intellectual property interests: they give rise to what is sometimes referred to as nonrivalrous (i.e., nonexclusive) possession.

In addition, the remaining examples represent even more attenuated types of taking (at least if we view the Elgin Marbles example as the pure form). The borrowing of genres or the creation of stories *about* a culture is different again from the verbatim rendering of a song. But this is not to say that there is no appropriation in these instances. All of the examples reflect the central idea. The styles, forms, images, and topics were chosen by the various (appropriating) artists presumably because there is something evocative about them. Each such case is an instance of a current actor drawing on the creations of others.

Third, given the array of processes that can fall under the rubric of an appropriation, and the communities that it can affect, we can see that cultural appropriation is a pervasive phenomenon. If we conceive of the letters of the alphabet used in the English language as a cultural artifact belonging to the ancient Phoenicians (to whom its origins are attributed), we can appreciate how much latent traffic can occur in just this one cultural good. Acts of appropriation happen all around us in a vast number of creative domains as

cultural influences blend, merge, and synthesize. The illustrations set out previously are about various creative realms (music, narrative, art, science), but many more domains exist (dance, philosophy, theology).

Moreover, appropriation can be viewed as a multidirectional phenomenon. Although it is perceived primarily as a taking from a subordinate into a dominant culture, this is not the only type of cultural borrowing that occurs. As example 6 illustrates, cultural appropriation can be construed to have a complementary opposite: cultural assimilation.

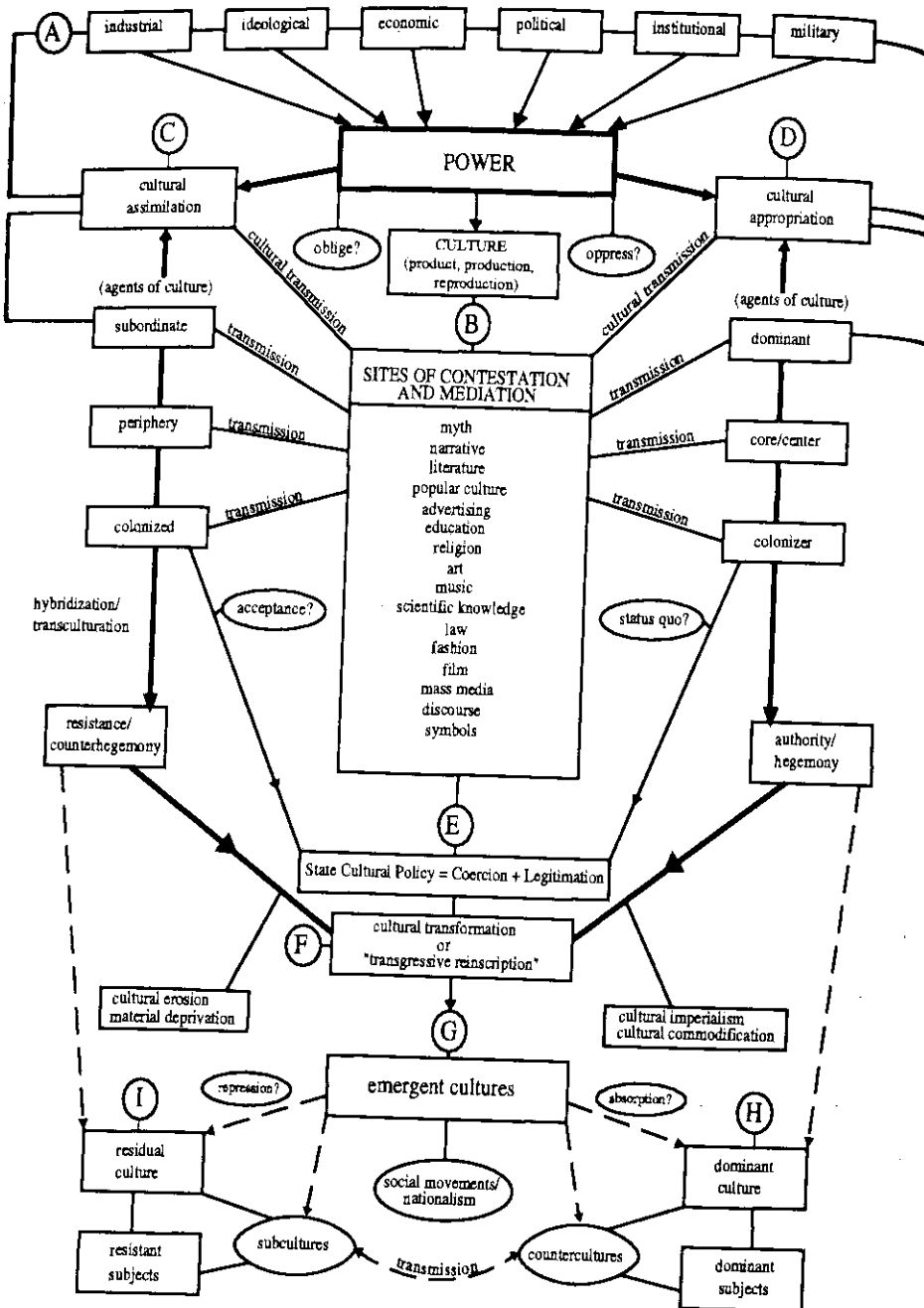
Given that appropriation is multidirectional, the issues could be conceived in purely acontextual terms. That is, we could raise questions about cultural takings of various kinds by members of culture A from culture B and vice versa, and through a type of "moral algebra," we could search for principles of universal fairness.<sup>8</sup> We could also tally up the benefits and detriments of all spheres of cross-cultural contact. Whether William Shakespeare appropriated Danish culture in *Hamlet* would be as worthwhile a question as any of those raised by the listed examples. Indeed, the discussion so far, which has been intentionally presented in a rather clinical way, invites that type of analysis.

However, to adopt this symmetrical approach would assume away, or at least downplay, an important part of the current debate. In particular, it would obscure the fact that the important questions about cultural appropriation are the political ones. When white writers appropriate the images of Blacks, a political event has occurred. The same is true when commercial interests exploit African folklore or indigenous knowledge from South America. These are events that teach us about power relationships and, in part, about how the law seeks to respond to appropriation.

It may be useful at this point to consider the ways in which power and the relationships of power can be construed as central to the concept of cultural appropriation. Figure 1 attempts to generate an understanding of cultural appropriation as just one form of cultural transmission (of which another is cultural assimilation).<sup>9</sup> This figure expresses the differential access to sources of power and the consequences for cultures and cultural forms that flow from this differential access to power. This model can be considered as a supplement (if not an alternative) to the general framework outlined in subsequent sections of this Introduction.

This figure is a structural representation of the social processes involved in cultural transmission. Although, admittedly, it is a highly simplified and abstract depiction, its purpose is to contrast the ways in which the transmission of culture can be construed and implicated differentially depending on whether the subjectivity of the receiver of culture is identified as being from a dominant or a subordinate group. Viewed in this light, cultural transmission can connote an *assimilative* practice—a process whereby cultural minorities often

Figure 1  
A Structural Representation of Cultural Transmission:  
Appropriation or Assimilation?



are encouraged, if not obliged, to adapt or assimilate the cultural forms and practices of the dominant group. Or cultural transmission can be seen as an *appropriative* practice—a process whereby dominant groups may be criticized and challenged when they borrow the cultural forms associated with subordinate groups. The analytical concept of power is situated as the focal point in this figure to indicate its centrality to questions of whether a particular cultural transmission should be read as appropriation or assimilation.

The specifics of the figure can be described in the following way. The boxes at A pointing toward “POWER” refer to the multiple sources of power. The box directly underneath “POWER” (at B) refers to the diverse and overlapping sociospatial networks and sites of power.<sup>10</sup> It is in these arenas that the production and reproduction of cultural products are contested and/or mediated.

Along the sidebars of the figure are C and D, under which are listed the various terms or labels used to describe the agents of culture occupying these spheres. (Note that the multiple identities of these agents of culture are informed by, among other things, gender, race, class, and status.) Depicted below are the antagonistic (and nonantagonistic) forms of responses that can flow from these agents of cultural transmission—namely, strategies of resistance to cultural assimilation/appropriation employed by subordinate groups that fear cultural erosion and may suffer material deprivation. Also found here are strategies of authority and legitimation exercised over the processes of cultural transmission by dominant groups that may practice cultural imperialism and engage in the commodification of cultural forms.

At E we see the cultural policies of the state. These policies might promote a “multicultural” (Canada) or a “melting pot” (United States) vision, but in either case these policies can give rise to institutionalized forms of both coercion and legitimation. It is through cultural policy (E) exercised by cultural agents (C and D) and made material in the sites of contestation and mediation (B) that may we witness cultural transformation (F).<sup>11</sup>

At G note the outflow of new emergent culture(s)—of which the principal offshoots are new legitimated forms of the dominant culture (H) espoused by the dominant subjects; the ancillary offshoots are the residual culture and practice (I) retained by subordinate and resistant subjects. In addition, note other extensions of the new emergent cultures—subcultures (linked to the residual culture) and countercultures (breaking from the dominant culture). What is reproduced or, conversely, what is repressed in the processes of cultural transmission (consisting of both appropriation and assimilation) results from the relative strengths and weaknesses of the cultural forces at play in a given time and place.

The figure emphasizes the place of politics within the cultural appropriation-

tion debate. Politics is generally about power: who gets to control the processes for allocating scarce resources. In the context of cultural appropriation the resources at issue are the many and varied forms of cultural production, expression, and creation.

These elements have influenced heavily the selected coverage of this book. It is those aspects of cultural appropriation that we perceive as being an important part of the contemporary political landscape. Today's issues are about minority groups and subjects (the disempowered, colonized, peripheral, or subordinate) who are seeking to claim and protect rights to a cultural heritage. The reasons for this struggle—the values that are implicated in acts of cultural appropriation—are therefore rather central to this inquiry.

### A Search for Values

There are those who view the recent attention paid to cultural appropriation with derision. Consider these stern rebukes:

“Appropriation” is a key buzz-word in the bash-a-honky rhetoric now popular among “minorities” and others who have decided history has given them a raw deal.<sup>12</sup>

The word “appropriation” . . . has lately become a rhetorical weapon in the hands of intellectuals claiming to speak for minority rights. Its power derives, oddly, from its very irrationality. In my experience, people hearing of it for the first time cannot believe that anyone would put forward so ludicrous an idea: even the most modest education in cultural history teaches us that art of all kinds has depended on the mixing of cultures.<sup>13</sup>

Importantly, both quotations reflect the idea that cultural appropriation is a political issue. These two critics see the controversy over appropriation as no more than an attempt by some to garner power. Equally, they both fail to consider the values that are implicated by acts of appropriation. What might these be?

When concerns about cultural appropriation arise within various domains, several claims tend to emerge. One is that cultural appropriation harms the appropriated community. This claim is therefore based on a concern for the integrity and identities of cultural groups. A second complaint focuses on the impact of appropriation on the cultural object itself. The concern is that appropriation can either damage or transform a given cultural good or practice. A third critique is that cultural appropriation wrongly allows some to benefit to the material (i.e., financial) detriment of others. A fourth argument is that current law fails to reflect alternative conceptions of what should be

treated as property or ownership in cultural goods. This is a claim based on sovereignty.

### The Prevention of Cultural Degradation

The first argument can be stated in capsule form: the cohesion of groups depends in part on the sharing of a common cultural heritage. In 1976, a UNESCO panel declared that “cultural property is a basic element of a people's identity.”<sup>14</sup> The statement was made in support of the restitution of tangible cultural property, but it can perhaps be germane to all forms of appropriation. Such a claim focuses on the way in which cultural practices can enhance or diminish the vibrancy of certain groups.<sup>15</sup> Appropriation, the argument goes, can have corrosive effects on the integrity of an exploited culture because appropriative conduct can erroneously depict the heritage from which it is drawn. To the extent that the depiction is misleading, tears can appear in the fabric of a group's cultural identity.

The cogency of this claim depends on an understanding of both social policy and empirical evidence. The policy element focuses on the pursuit of cultural distinctiveness and multiculturalism and therefore on the question, Why should we be concerned about culture diversity? The empirical element involves an inquiry into how cultural appropriation produces harmful results.

### *Social Policy: The Worth of Difference*

The policy questions relating to diversity have been examined by Jeremy Waldron. He has assessed the importance of cultural identity among marginalized groups by contrasting conceptions of cultural difference with a so-called cosmopolitan alternative.<sup>16</sup> Waldron considers and rejects the proposition that there exists a primary need that impels people to seek out cultural commonalities. For him, modern urban life in America involves a flourishing cosmopolitanism lived among a “kaleidoscope of cultures.”<sup>17</sup> His thesis is that cosmopolitanism more realistically describes the modern world, with its myriad cultural, economic, moral, and political connections and interdependencies. This concept recognizes that cultures borrow from each other and that these transmissions occur in language, literature, culture, science, religion, and so forth. This leads Waldron to assert that a debt is owed to the world community and civilization, in addition to any comparable obligation that might be felt toward a particular cultural group.<sup>18</sup> It would be a short step for him to regard the practice of cultural appropriation as having positive consequences.

This analysis is highly revealing. Waldron rejects the preeminent importance of enhancing and protecting cultural difference, which is premised on an innate imperative to seek cultural identity. Nevertheless, he recognizes that diversity is a sine qua non to the existence of his cosmopolitan alternative;

without host cultures, the cosmopole cannot survive. At least for this limited purpose, difference is to be valued and sustained. Waldron also acknowledges that minority cultures are in a precarious position and that their continued existence is often threatened.<sup>19</sup> Perhaps most important, Waldron's entire approach assumes that our beliefs about pluralism are not products of nature but of politics. In other words, our respecting and encouraging difference or our stressing sameness is a policy decision.

As a matter of policy, a society might wish to promote homogeneity among its citizenry for any number of reasons—to quell dissent, to promote a particular vision of community, to give effect to principles of equality. The society might discount the importance of ethnic diversity on the belief that the interconnection of cultures is a normal process. Alternatively, liberal democracies may stress social variance, including cultural diversity, on the view that freedom involves individual quests for the good life. Both types of polity are built around notions of equality. The former promotes beliefs such as equality of opportunity; the latter, equal respect for difference. And within both, subordinate groups struggle. They may seek to achieve equality of condition; they may challenge the institutions that, by purporting to represent social neutrality, actually sanction a particular cultural baseline to which all are “allowed” to conform.<sup>20</sup>

Questions of cultural diversity can be based on public policy concerns. In a society in which diversity is the prized value, cultural appropriation may be of concern if it can be shown that appropriation erodes or degrades cultural identity and thereby threatens diversity. Moreover, even in a society in which diversity is *not* treated as a state goal, cultural cohesion may still be crucially important because cultural identity forms the basis of what is sometimes called the politics of difference or identity politics. We use these terms to mean the strategic mobilization of political power around a felt sense of common cause. In liberal democracies, oppressed groups vie for attention. For them, cultural connections can provide a cohesive force that allows for the development of identity, solidarity, and strength. To the extent that cultural appropriation can lead to cultural degradation, the ability to practice identity politics may be compromised.

Some of these ideas are reflected in Tony Kushner's play *Angels in America*, a poignant study of AIDS, homosexuality, and identity politics. The plot involves, among other things, a fictional account of the last days in the life of Roy Cohn, once a cohort of Senator Joseph McCarthy. When confronted by his doctor (Henry) with the news that he is dying of AIDS, Cohn's reply is sharp. He rejects the implication that he is gay because in the New York world of identity politics gay men are part of the disempowered and he, by contrast, is an influential political broker:

Your problem, Henry, is that you are hung up on words, on labels, that you believe they mean what they mean. AIDS. Homosexual. Gay. Lesbian. You think these are names that tell you who someone sleeps with, but they don't tell you that.

...  
Like all labels they tell you one thing and one thing only; where does an individual so identified fit in the food chain, in the pecking order? Not ideology, or sexual taste, but something much simpler: clout. Not who I fuck or who fucks me, but who will pick up the phone when I call, who owes me favors. Now to someone who does not understand this, homosexual is what I am because I sleep with men. But really this is wrong. Homosexuals are not men who sleep with other men. Homosexuals are men who in fifteen years of trying cannot get a pissant anti-discrimination bill through City Council. Homosexuals are men who know nobody and who nobody knows.

...  
Roy Cohn is not a homosexual man. Roy Cohn is a heterosexual man, Henry, who fucks around with guys.<sup>21</sup>

James Clifford has made a similar point. Reflecting on the discontinuity of cultures and traditions, and the fracturing of images of cultural purity in the modern world, he has suggested that “‘cultural’ difference is no longer a stable, exotic otherness; *self-other relations are matters of power and rhetoric rather than essence.*”<sup>22</sup>

If these assertions are right, then cultural appropriation is not only about the value of celebrating different cultural traditions; it is also about political praxis. This is true at least if the success of oppressed groups depends partly on the construction of a strong cultural identity. That identity becomes a glue that binds the movement. These images of culture allow for what bell hooks has called the “practice of self-love as a revolutionary intervention that undermines practices of domination” and that allows struggles of resistance to endure.<sup>23</sup>

#### *Empiricism: Processes of Degradation*

It is one thing to link culture to identity politics; it is another to connect this with cultural appropriation and degradation. Proving this connection is not an easy thing to do, but perhaps how the process might occur can be demonstrated. The first leg of the argument must focus on the role of representations of culture in the building of a collective image. Charles Taylor has maintained that our identity is shaped partially through recognition by others and partially through misrecognition and nonrecognition. The latter can produce palpable damage, particularly if demeaning images are mirrored back. On Taylor's view, “Nonrecognition or misrecognition can inflict harm, can be a form of

oppression, imprisoning someone in a false, distorted, and reduced mode of being.<sup>24</sup>

The use of the swastika provides a helpful—if extreme—paradigm of the ways in which cultural symbols can be transformed through appropriation. It is well known that Adolf Hitler adopted the swastika symbol first to represent the Nazi Party and later to be part of the flag of the Third Reich. The ancient origins of that symbol are not as fully appreciated. The symbol is thought to be at least five thousand years old and prior to the Nazi appropriation was found among indigenous cultures all over the world, including several in North America. In China it has been used to represent the sun; it has been found on statues of the Buddha; it was central to the religious belief of the Jains. Among many cultures on different continents, it serves as a sign of good fortune.<sup>25</sup> Today the symbolic force of the swastika is marred for all of these cultures because of its close association with Nazi Germany. This appropriative act has all but destroyed the swastika, except perhaps for neofascists, who, during the Nazi swastika's half-life, continue to adopt it as an evocative symbol of hatred and intolerance.

However, it is not merely the appropriation of cognate symbols that matters. The potential infliction of cultural damage through the flawed rendering of the Other was explored by Edward Said in his influential work *Orientalism*.<sup>26</sup> Said attempted to demonstrate how Orientalist scholars, mainly from the West, devised a somewhat exotic, somewhat primitive, somewhat mysterious image of the Islamic Middle East; those images were perpetuated by succeeding generations of Orientalists, who built on and thereby validated these early conceptions. That process continued in the academic discipline of Orientalism without regard for the very different evidence that abounded. Stereotypes of Arabic life and custom are among the legacies of these depictions.

Said recognized that scholars impose structures upon the data they collect, transforming this material into units of knowledge.<sup>27</sup> But his description of Orientalism is of a far more pernicious force than even this suggests. He saw the study of the Middle East as both a premise and a preparation for colonial control. It created a dichotomy of East and West, essentializing the former, and described a social order susceptible to imperialism, facilitating a dominance of Occident over Orient. Concerns about the creation and perpetuation of stereotypes can be applied outside of the Orient as well.

### The Preservation of Cultural Goods as Valuable Objects

The second complaint has two components. One is that cultural representations are best understood in their original setting; this is a claim based on aesthetics. Allied to this is a notion of stewardship. Here it is argued that we should protect cultural goods because they are a precious and finite resource.<sup>28</sup>

The aesthetic argument in relation to tangible artifacts stresses the importance of treating the work of art as intimately related to its setting. There can be no doubt that the experience of viewing the Parthenon Marbles in situ on the Acropolis would be different from seeing those works on display in the British Museum. Think of Marcel Duchamp's "Ready-mades": by taking ordinary objects (a shovel, a comb, a urinal) and placing them in a gallery, he forced a new reading of these items. Context counts.

When we turn to a consideration of intangibles, similar issues may arise. Dionne Brand's account of the curious treatment given Black blues singer Pinetop Perkins during an appearance at a workshop in Toronto in 1992 serves as illustration:

Pinetop Perkins . . . is an old blues man and in a Black community of blues players and blues audiences his virtuosity would be accorded veneration and context as a kind of historic speech in a continuum. A language sent and understood and in action.

At the blues workshop, Perkins is suspended in time, out of context, preserved as a museum piece, an icon no longer charged with readiness, place, dynamism, no longer seen as acting but inert, a remnant of a dead culture or rather a conquered culture.

. . . At the blues workshop there were no contemporary Black blues pianists to spoil the mediation of Black culture as petrified in time, full of "ancient" sorrow but no present, disturbing anger and certainly no hostile intent.<sup>29</sup>

We can question whether anything wrong has happened here. Brand's complaint seems to be about how Pinetop Perkins was treated *and* about how poorly the musical genre was presented: as being "petrified in time." However, the danger of regarding a given performance context as proper is that this runs the risk of producing some of the very consequences seen by Dionne Brand—namely, freezing the growth of cultural expressions in time and place. The extraordinary feature of the incident involving Pinetop Perkins is that if any appropriation occurred at all, it was in relation to the setting in which he appeared—outside of the milieu of Black culture and beyond the reach of Black audiences.

Comparable issues emerge when the stewardship argument is applied to intangibles. In connection with tangible items, stewardship involves finding the means through which the survival and maintenance of culture can be assured or enhanced. Ukrainian art treasures can be ruined or destroyed. If left unattended, cultural practices can also be lost. In one sense, the same can be true of oral traditions and others based on performance, which can be lost through disuse. Moreover, the stewardship argument responds to concerns

over the commodification and desecration of activities or objects such as sacred rituals or images.

By the same token, the concept of stewardship in the context of the cultural appropriation of intellectual property can imply the need for a level of purity of cultural expression that seems artificial. It is one thing to try to retain a faithful rendering of a practice, such as a traditional method of storytelling (if this is possible); it is another to try to preserve the practice forever *only* in its current form. This is where the analogy with tangible cultural property falters somewhat. The nonrivalrous nature of intellectual property allows some renderings to be protected—frozen in place like a museum diorama—while these very cultural traditions continue to evolve. Unless we claim that this evolution is an illegitimate part of the tradition, the stewardship rationale must allow this feature to endure. By doing so, the rationale recognizes the potential of appropriation to generate new artistic treasures. The only basis for preventing some forms of dissemination on stewardship grounds is if there is a danger that appropriative practices could undermine attempts at preservation. That might be true where, for instance, the prevalence of written texts eliminates the need for oral transmissions.

### The Deprivation of Material Advantage

In the context of cultural appropriation, the crux of the third claim is that cultural products of the past are being wrongfully exploited for financial gain. As is well known, the law of intellectual property (including that regulating copyright, trademarks, and patents) is geared toward the same concern. These laws regulate the use of the works and creations of others. In the United States, the law has also developed protections against the imitation of celebrity images.

But the argument that cultural appropriation allows some to benefit from the contributions of others has another facet. It may be that those engaged in misappropriation are occupying the commercial field, thereby limiting the access of others. If we can assume that there is some notional finite space accorded in the marketplace of the creative arts for works of this nature, then it is possible that the work of one artist can foreclose opportunities for others. Now this argument is based partly on assertions about the market and so might yield to another view about how the market might react. It might be claimed, for example, that the success of those who appropriate the voice of Native writers has opened avenues for other writers. (At the same time, these spillover benefits are themselves potentially constricted by the fact that access to the market is unevenly available for minority and mainstream artists.)

The law of trademarks provides an analogue that is relevant to the appropriation of cultural products. A trademark functions to represent a product or

business, to embody the goodwill that a commercial enterprise has established. Trademarks are regulated, in part, to preclude others from trading on that goodwill and deceiving customers. Trademark law recognizes the potency of symbols and therefore lends support to the argument based on cultural degradation. This body of law also tries to ensure that someone cannot free ride on the work of others. The rationale of the law is to ensure that financial benefits are not wrongly appropriated.

### The Failure to Recognize Sovereign Claims

The following statements all contain the same idea: by the rules of the speakers and their cultures, cultural appropriation is wrong; it is theft. Put another way, though the American or Canadian law of property may fail to prevent certain forms of appropriation, other rule-based systems are possible and in some cases extant. Therefore, a clash of sovereign claims can emerge as to which rules about ownership should govern.

I have seen entire cycles of stories stolen right from the tongues of our storytellers and published only to the profit and the credit of the publisher and the typist.<sup>30</sup>

We say that it is our past, our culture and heritage, and forms part of our present life. As such, it is ours to control and it is ours to share on our terms.<sup>31</sup>

We are saying, "These stories, these customs are things we own, things that belong to us."<sup>32</sup>

In our culture, people *own* stories. Individuals own stories. Tribes own stories. Nations own stories. And there is a protocol if you want to tell those stories: you go to the storyteller. And if you don't and you start telling those stories, then you are *stealing*.<sup>33</sup>

The potential for a conflict of rules systems is reflected in a recent Australian judicial decision. In *Milpurnuru et al. v. Indofurn Pty. Ltd. et al.*, seven Aboriginal painters brought a copyright action against the manufacturers of certain patterned carpets.<sup>34</sup> The patterns were taken from the works of the plaintiffs. The claims succeeded. In the course of the judgment, the court described the traditional rules that govern the use of symbols among the Aboriginal community of which the plaintiffs were members. This is the account:

Painting techniques, and the use of totemic and other images and symbols are in many instances, and almost invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom. Artworks are an



important means of recording these stories, and for teaching future generations. Accuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of an artwork can cause deep offence to those familiar with the dreaming.

The right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognized totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced. . . .

If unauthorized reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach. Notions of responsibility under Aboriginal law differ from those of the English common law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is later inappropriately used or reproduced by a third party the artist is held responsible for the breach which has occurred, even if the artist had no control over or knowledge of what occurred. The evidence . . . illustrates the severe consequences which may occur even in a case where plainly the misuse of the artwork was without permission, and contrary to Australian statute law. In times past the "offender" could be put to death. Now other forms of punishment are more likely such as preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community, or being required to make a payment of money; but the possibility of spearing was mentioned by Mr. Wanguarra as a continuing sanction in serious cases.<sup>35</sup>

These rules differ from those found under the Australian Copyright Act. In an important way this difference proved moot since the plaintiffs would have prevailed in either case. What is significant for the purposes of the present discussion is that the court acknowledged the Aboriginal rule system. At the same time, it is significant that the issue of whether that rule system should govern the action was not entertained.

## Responding to Appropriation

Let us imagine a world in which we cared sufficiently about the harms of cultural appropriation to commit resources and take action. What forms should our response take? In what way should museums change their ap-

proach to curation? In what way should the work of writers and scholars change? Can the law play a role in responding to appropriative practices?

Answering these questions is complicated by the factors previously mentioned. How we treat this matter will depend on the domains and modes of appropriation and the values that are threatened by particular appropriative practices. Added to this is the problem of crafting an effective instrumental response, of doing something that will have consequences.

Consider, for example, how these issues might play out in the context of what might be termed *literary* or *voice appropriation*. Within the last five years or so, the debate about cultural appropriation in Canada has centered largely on this domain; several of the essays herein are drawn from the debate that ensued. The main concern has been whether white novelists were wrong in appropriating Native voices by writing about Native culture or by speaking through the intermediaries of Native characters. Broader questions of voice appropriation of minority cultures by mainstream artists developed quickly from this initial issue. Should would-be appropriators somehow be silenced? To do so raises some difficult questions: Are the central identifying variables based on ethnicity, gender, sexual orientation, or class? If our inventive domains are too constricted by this reasoning, are we thereby doomed to creative projects that cannot extend beyond the realm of autobiography?<sup>36</sup>

In *Orientalism*, Said identified the impact of Orientalism on Western attitudes toward Arabic culture. He was deeply troubled by the oppressive potential of Orientalist discourse. To return to our form of analysis, he was concerned with what we have termed *cultural degradation*. Let us assume that he is right. And for the sake of simplicity, let us assume that this is the only value offended by Orientalist conduct. We naturally search for ways to counteract those practices. Said resisted the conclusion that there was a real Orient that differed from the constructions of the Orientalists or that this dissonance in descriptions arose because most Orientalist scholars were from the West.<sup>37</sup> With equal emphasis he rejected "the limited proposition that only a black can write about blacks, a Muslim about muslims, and so forth."<sup>38</sup> However, in a world permeated by social constructions of reality there is something to be said about controlling the process of creating that world, of imposing some control over who can or should hold the pen.

One possible response is to assist minority voices in being heard, say, through the creation of funding opportunities. Within the context of the debate in Canada, some demands have been even more modest. For example, there are Native writers who have asked only that those engaging in cultural appropriation do so with "sensitivity and respect."<sup>39</sup> The Writers' Union of Canada, caught in the eye of the storm over voice appropriation, adopted a similar position. Its membership divided on the matter: concerns over appropriation

were met with claims about free speech and artistic freedom. In response to the controversy, the governance of the union passed a resolution calling for "the responsibility and accountability that attend the freedom of imagination and the freedom of expression."<sup>40</sup>

The Writers' Union resolution reflects the difficulty of trying to construct an effective legislative response. Such an approach may well be futile. Nevertheless, a number of essays in this book consider whether the law—and the law of property in particular—can play an effective instrumental role.

There are a host of problems associated with establishing a property law regime to regulate some facet of appropriation. First, in the fashioning of a conception of ownership, in whom should a property right be placed? And would that right be communal or individual? Within either of these categories an unlimited range of rights configurations exists. Second, it is necessary to balance concerns about cultural appropriation against other interests. So even though concerns about free speech do not trump all other values, freedom of expression nevertheless remains a matter that a law on cultural appropriation might logically address. Likewise, the natural process of cultural interaction produces new social goods of great value. The difficulty here lies in the law allowing creative processes to continue while responding to unacceptable appropriative practices, whatever these may be.

Third, even if a variety of different protections, whether communal, individual, or otherwise, were recognized, and even if within such a regime both the benefits and burdens of cultural appropriation were taken into account, there still remains a practical concern about whether the complexity of the phenomenon limits the efficacy of the law. The problems here take us back to the multifaceted nature of appropriation described earlier. When an instrumental solution is sought, each definitional obstacle must be confronted.

Within some appropriative domains, the idea of developing a legal regulatory structure is not novel. Generally, these issues have arisen in two contexts. One involves the attempts by nation-states to reclaim art and artifacts that are said to form part of a national heritage—the Parthenon Marbles controversy serves as the archetypal example. The other context involves efforts by indigenous peoples to reclaim sacred antiquities and other properties.

There is now a large body of law, at both the domestic and international levels, dealing with these types of tangible cultural property claims. For example, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970) is one international instrument designed to promote the repatriation of national cultural treasures to their countries of origin. On the domestic front, the Native American Graves Protection and Repatriation Act (1990) is designed to protect aboriginal sacred sites and to facilitate the restitu-

tion of artifacts and other objects. Importantly, these measures draw on the rationales of cultural integrity, aesthetics, and stewardship that have been briefly outlined earlier in this Introduction.

The adoption of a workable regime for *intellectual* property is perhaps more problematic. By and large, the present laws (in the United States and Canada) governing such matters as copyright, trademark, and patent are hopelessly inadequate to deal with the issues raised here. For example, a traditional folk song is considered by the law to be part of the public domain. Its antiquity, far from assuring its protection, sets it free. If not fixed, that is, recorded in some way, it is not amenable to protection. There must be a sufficient match between the traditional song and the putative copy before an infringement can be found. For this reason, styles, genres—let alone entire traditions—cannot be protected. And no claim of protection under the current law can be claimed unless its creator can be ascertained. Similar hurdles exist in relation to the claiming of protection for indigenous knowledge that forms the bases of modern science.

Some attempts have been made to reconfigure property law to expand the scope of the protection of indigenous cultures, and these may provide guidance as to how various issues might be resolved.<sup>41</sup> For example, the World Intellectual Property Organisation has undertaken an initiative that has yielded both a model act intended for incorporation into national laws and a draft treaty.<sup>42</sup>

Under the Model Act folklore is defined as the "totality of the traditional artistic heritage of the traditional heritage developed and maintained" by a community within a given nation-state.<sup>43</sup> What the act protects are *expressions of folklore*. These are defined as "creations consisting of characteristic elements of folklore," including,

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms of rituals; whether or not reduced to a material form; and
- (iv) material expressions, such as
  - (a) productions of folk art, in particular drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
  - (b) musical instruments;
  - (c) architectural forms.<sup>44</sup>

The scheme of the Model Act is to regulate public performances or publications of expressions of folklore where they are made "with gainful intent" outside of their traditional or usual context.<sup>45</sup> In these instances the source of

the folklore must be acknowledged, and approval for its use must be sought. The authorization is granted by a regulatory agency, which may levy a fee and set conditions for use. Folklore that is used for educational purposes or as part of original work is not regulated so long as this latter use is "compatible with fair practice."<sup>46</sup>

These measures resemble copyright protections. However, notice that the protections are perpetual so that creations that are treated as being within the public domain under current domestic laws would be covered. And there is no requirement that the creations be fixed. Nevertheless, the proposals are still rather limited. They exclude works that have an original element, even where these are highly derivative of an expression of folklore. By focusing on traditional elements of folklore, the act adopts a static, ancient, romantic conception of culture. The uses of folklore that trigger the regulatory mechanisms are, generally speaking, those made with a commercial aim.<sup>47</sup> The premise underlying the Model Act is that the applicant-user can exploit the folklore resource on the payment of a royalty fee. And although the act is concerned with the folklore of a community within a state, its use is controlled by a *state* authority.

Some have cast doubt on the utility of an instrumental response through the law (see the Coombe, Philip, and Newton essays). Others seem more sanguine. Patricia Williams has maintained that the deficiencies in rights discourse do not lie in the basic strategy of rights-seeking but rather in the narrow way in which rights have been defined. For her, "Rights are to the law what conscious commitments are to the psyche."<sup>48</sup> Put another way, her argument is that property rights, if effectively framed, can serve both as a countervail to oppression and as a source of empowerment. The right of exclusion, at the heart of the concept of property, is ultimately about power. Similarly, the discussion about cultural appropriation is about empowerment (and its converse).<sup>49</sup> It is therefore at least sensible to view the questions raised by this book through the optic of the law.

### **About Borrowed Power: Essays on Cultural Appropriation**

This book is, in effect, a colloquium about the various facets of the appropriation of culture. Appropriative practices, as we have seen, can be found in a number of domains, and this, above all other considerations, has influenced the coverage and ordering of the collection. Because cultural appropriation may arise in so many realms, it has come under the scrutiny of scholars from a wide array of disciplines, including (but not limited to) anthropology, history (including art history), sociology, ethnomusicology, postmodern literary theory, political science, law, and (of course) cultural studies. In each of these

realms a body of literature has developed. Yet until now there has been little interconnection among the various nodes of activity. Therefore, in this collection we have endeavored to bring together the work being undertaken in these various fields.

One of our aims in assembling this collection is to locate common themes. Another is to explore diversity. We want to reflect the ways in which differently situated thinkers explore the central questions. The result is an extraordinary sampling of discourses, a stunning array of styles. It is not just that, say, lawyers and anthropologists see issues differently and write from within different traditions; that is no doubt part of the explanation of the variety among the essays. It is also that some of the contributors write from their experiences within the appropriation controversy, whereas others do not. So several of the essays are personal, up-close accounts; other pieces adopt a different vantage point.

We have focused on the vast array of appropriative practices in search of those instances that have political significance in contemporary society. Hence, many of the contributions deal with issues that relate to the position of indigenous peoples; others focus on Black culture and its interrelationship with dominant white discourse. All of the contributions involve an examination of the dynamics of domination and subordination. And because these questions have formed part of an intense national debate in Canada for almost a decade, the collection has a substantial Canadian dimension. We feel that this debate deserves a wider audience.

The ordering of these pieces is based on the domains analysis. Six domain clusters are considered: (1) music and musical forms, (2) art and narrative, (3) colonial and postcolonial discourse, (4) popular culture, (5) science, and (6) tangible cultural property.

Part 1, which contains two pieces, deals with the appropriation of musical forms and works. In the first, "African-American Music: Dynamics of Appropriation and Innovation," Perry A. Hall discusses the appropriation of African-American music by the white-dominated wider culture. Hall's analysis is focused largely on the so-called modes of appropriation and their consequences. Hall notes that, ironically, although the dominant white culture may appropriate and absorb the aesthetic dimensions of Black culture, this is neither coupled with, nor does it lead to, an embrace of Black culture at the human level. Anthony Seeger's "Ethnomusicology and Music Law" takes up Hall's concerns over the need for a culturally sensitive treatment of musical works, though Seeger addresses the problem from a different context. He identifies the potential for conflict arising over such practices as collecting field recordings of indigenous music, reproducing ethnographic recordings on commercial record labels, and reproducing these recordings in supplements to

textbooks. Elucidating the contentious ownership issues that arose as he tried to reconcile the various customary forms of ownership with American copyright law, Seeger demonstrates that a deeper understanding is needed of the various culturally specific regimes that protect musical forms of property.

Part 2 deals with appropriation in art and narrative. The essays contained here draw on the Canadian controversy about voice appropriation. In the first essay, "Stop Stealing Native Stories," Lenore Keeshig-Tobias writes of the cultural appropriation of Native stories by non-Native writers. She describes the process as one in which individuals associated with the Canadian cultural industry steal, commercialize, and then profit from the retelling of Native stories without necessarily seeking the permission or creative input of Native persons. Rosemary J. Coombe, in "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination," endeavors to come to terms with the strains of discourse that have emerged in Canada. Arguing from the conflicting perspectives of both lawyer and anthropologist, she describes and analyzes the two dominant discourses in the debate, which she calls Romanticism and Orientalism. Coombe argues that from the postcolonial perspective, reliance on such categories of thought inherited from a colonial era and based in a philosophy of possessive individualism may not be the best way to confront the issues of cultural appropriation. In "The Disappearing Debate," M. Nourbese Philip examines the tensions that emerge when the critique over voice appropriation is met with claims of censorship. She argues that this shift is common in Western liberal democracies where censorship is the barometer used to compare the relative freedoms of societies and where the discourse of censorship has a tendency to become privileged over that of racism. Kwame Dawes's contribution, "Re-appropriating Cultural Appropriation," considers the provision of funding for minority artists as one response to problems of appropriation and examines the political dimension of this response. Dawes identifies that the arts and cultural world is inextricably linked to funding and that funding is a deeply political issue that requires highly politicized artists to challenge it. Noting the unprotected nature of Native and tribal copyright in the international marketplace, Joanne Cardinal-Schubert, in "In the Red," examines the appropriation, imitation, and commercialization of Native art and culture by the dominant white community. She discusses how this exploitative practice often incorporates a romanticized and distorted image of "the Indian."

Part 3 considers the appropriation of culture in colonial and postcolonial discourse. Jonathan Hart's "Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies" examines the exchange of cultures in a colonial and postcolonial context. Hart argues that by looking at the ways the colonial erupts in the postcolonial, we can begin to understand the complex-

ities of identity, resistance, hybridity, and mediation in the cultural exchange and representations of the Europeans as well as in the other cultures they encountered during the course of empire. J. Jorge Klor de Alva's intricate "Nahua Colonial Discourse and the Appropriation of the (European) Other" investigates questions of cultural appropriation from the vantage point of the colonized and their strategies of resistance. He discusses the use of colonial discourse by the Nahuas of New Spain as a weapon for resisting Spanish domination and as a tool for adapting to the shifting social, cultural, and political conditions brought on by the colonizers.

Part 4 looks at appropriation in popular culture. Nell Jessup Newton's "Memory and Misrepresentation: Representing Crazy Horse in Tribal Court" addresses appropriation in the commercial realm. The focus of her discussion is a lawsuit brought by Seth Big Crow, descendant of the Lakota chief Tansuke Witko (Crazy Horse), against the distributors of a product called Crazy Horse Malt Liquor. Deborah Root, in "'White Indians': Appropriation and the Politics of Display," comments on what we may think is a seemingly innocuous practice: a white "hippie" of the counterculture generation (in her words, a Native "wannabe") dressed in the clothing of assorted ethnic (aboriginal, Afghani, and indigenous Latin American) groups. Root believes that such patterns of appropriation have developed and become normalized through the imperialist practices of Western culture, such as the depiction of Natives in popular culture as passive but heroic victims standing in the way of "progress."

Part 5 moves beyond appropriation in the arts to an examination of how the issues play out in relation to the appropriation of scientific knowledge and other forms of intellectual property. James D. Nason's "Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge" maps out the central terrain. He looks at the new challenges posed by the appropriation of esoteric knowledge, such as sacred practices and scientific indigenous knowledge. Some of the challenges identified by James Nason are taken up by Naomi Roht-Arriaza in "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities." She examines in detail the intellectual property issues that surround the appropriation of scientific and technical knowledge of indigenous communities and peoples, and she describes the many ways in which corporations in the business of biotechnology and genetic engineering have made billions of dollars by appropriating the knowledge of indigenous communities without providing any compensation.

Part 6 takes us from the realm of artistic and social practices and indigenous knowledge to issues surrounding tangible cultural property. James D. Nason's second contribution, "Beyond Repatriation: Cultural Policy and Practice for

the Twenty-First Century," provides an analysis of issues concerning Native American cultural property, past, present, and future. Nason charts the developments that gave rise to the enactment of the Native American Graves Protection and Repatriation Act and the implications of the act. Against the background of Nason's discussion, the final essay can be seen as an important case study. In "A Coming Together: The Norton Allen Collection, Tohono O'odham Nation, and Arizona State Museum," Lynn S. Teague, Joseph T. Joaquin, and Hartman H. Lomawaima provide an account of the repatriation of cultural property once held in the private collection of Norton Allen. Their narrative describes how the donation of the Allen holdings led the way for an agreement between the O'odham Nation and the Museum. The agreement may well provide a model for other collaborative ventures.

What is cultural appropriation? Why should we care about it? How, if at all, should we respond? As the book progresses, the different modes of appropriation will become apparent; so, too, will the conceptions of community that the authors adopt. Our hope is that these values will shine through. Some of the contributors reflect concerns about *cultural degradation*. They claim that appropriators steal their cultural soul, misrepresent them, silence their voices, purport to speak for them. Because of this, important cultural goods may be weakened and destroyed. Some of the essays are based on *aesthetics and stewardship*. These claim that cultural treasures are sometimes diluted, altered, ruined, commodified; that sacred practices are trivialized; and that their sacredness is ignored or profaned. Other essays adopt a stance based on *material deprivation*. Appropriators abscond with the profits of someone else's intellectual property. They free ride on the property of others without proper compensation or recognition. Allied to this are claims of *sovereignty* in which these assertions are heard: We conceive of these cultural goods as ours and so have the right to control their use. Through appropriation, these sovereign claims are ignored.

In pursuing these themes, *Borrowed Power: Essays on Cultural Appropriation* purports to be neither comprehensive nor definitive. Instead, it endeavors to provide a forum for, and orchestrate a conversation about, the nature of a very complex subject. We hope this conversation is accomplished partially through this Introduction, partially through the Selected Bibliography, but principally through the essays that follow.

## Notes

1. Resolution of the Writers' Union of Canada, approved June 1992. The union's definition continues "and profiting at the expense of the people of that culture." We

deal with the question of material gain separately (in Part 3) because we feel that appropriation can occur even in the absence of profit-taking.

2. See Steven R. King, "The Source of Our Cures," *Cultural Survival Quarterly* 15 (Summer 1991): 19.

3. This is a hypothetical inspired by the publication of *Daughters of Copper Woman* (Vancouver: Press Gang, 1981), by Anne Cameron. The book contains a collection of stories told to her by the Nuu-Chah-Nulth women of Vancouver Island. The book was published with their permission and with an acknowledgment, and the proceeds of sale were donated to a cause seeking to preserve Native lands from logging. See Julia V. Emberly, *Thresholds of Difference: Feminist Critique, Native Women's Writings, and Postcolonial Theory* (Toronto: University of Toronto Press, 1993), 94.

4. Eugene Halton, "The Cultic Roots of Culture," in *Theory of Culture*, ed. Richard Munch and Neil J. Smelser (Berkeley and Los Angeles: University of California Press, 1992), 29-63, at 30.

5. See Miro Cernetig, "Ode on the Range: Cowboy Poets Are Trying to Protect the Purity of Their Traditional Territory from 'Faux Cowpunchers,'" *Globe and Mail*, August 10, 1993, A1.

6. Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (New York: Routledge, Chapman and Hall, 1992), 18.

7. Roland Barthes, *Image, Music, Text* (1967), 146; quoted in Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work," *Chicago-Kent Law Review* 68 (1993): 758.

8. Stanley Fish, *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (New York: Oxford University Press, 1994), 4.

9. We wish to thank Jonathan Hart and Raymond Morrow for their useful suggestions in the preparation of this figure.

10. Michael Mann has suggested that "societies are constituted of multiple overlapping and intersecting sociospatial networks of power." See Michael Mann, *The Sources of Social Power* (Cambridge: Cambridge University Press, 1986), 1.

11. Peter Burke calls this "transgressive reinscriptions of culture." This term has been coined to emphasize the way in which one group adopts and "adapts, or converts, inverts and subverts the vocabulary [or in this case, culture] of another." (See Peter Burke, *History and Social Theory* (Ithaca, N.Y.: Cornell University Press, 1992), 98.

12. John B. Mays [visual arts critic for the *Globe and Mail*], "Squabble over Carr: The Woman Muddies Critique of Her Paintings," *Globe and Mail*, April 9, 1994, C5.

13. Robert Fulford, "The Trouble with Emily" *Canadian Art* 10 (Winter 1993): 38.

14. Richard Handler, "Who Owns the Past?" in *The Politics of Culture*, ed. Brett Williams (Washington, D.C.: Smithsonian Institution Press, 1991), 67. The Preamble of the UNESCO convention also provides that "cultural property constitutes one of the basic elements of civilization and national culture."

15. See generally Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 32 (1982): 957. In this context one might speak not of "personhood" but of "grouphood," a term coined by John Moustakas, "Group Rights in Cultural Property: Justifying Strict Inalienability," *Cornell Law Review* 74 (1989): 1179.

16. Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," *University of Michigan Journal of Law Reform* 25 (1992): 751.

17. *Ibid.*, 762.

18. Ibid., 778.
19. Ibid., 761–762.
20. Charles Taylor, *Multiculturalism and "The Politics of Recognition"* (Princeton, N.J.: Princeton University Press, 1992), 25ff. See also bell hooks, *Black Looks: Race and Representation* (Toronto: Between the Lines Press, 1992), 12–13.
21. Tony Kushner, *Angels in America, Part One: Millennium Approaches* (New York: Theatre Communication Group, 1993), 45–46 (emphasis added). Later in the play, Louis, the gay lover of a man dying of AIDS, makes the same point in the context of race: "Power is the object, not being tolerated. Fuck assimilation. . . . Ultimately what defines us isn't race, but politics" (90).
22. James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge, Mass.: Harvard University Press 1988), 14 (emphasis added).
23. hooks, *Black Looks*, 20.
24. Taylor, *Multiculturalism*, 25.
25. See further Thomas Wilson, *The Swastika: The Earliest Known Symbol and Its Migrations* (Washington, 1896); Will Hayes, *The Swastika: A Study in Comparative Religion* (Chatham, England: Order of the Great Companions, 1934).
26. Edward W. Said, *Orientalism* (New York: Vintage Books, 1979).
27. Ibid., 67.
28. This argument is explored in depth in John H. Merryman, "The Public Interest in Cultural Property," *California Law Review* 77 (1989): 339–364.
29. Dionne Brand, "Who Can Speak for Whom?" *Brick* 46 (Summer 1993): 14.
30. Lorne Simon, "Freedom of Expression? Are Native Voices Being Silenced in the Name of Artistic Freedom?" *Canadian Forum* 72 (July–August 1993): 46.
31. Ros Langford, "Our Heritage—Your Playground," *Australian Archaeology* 16 (1983): 6; quoted in Amanda Pask, "Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture," *Intellectual Property Journal* 8 (1993): 59.
32. Lynne Van Luven, "Borrowing the Stories of Others," *Edmonton Journal*, January 27, 1990, sec. E.
33. Lenore Keeshig-Tobias, "The Public Face of the Cultural Appropriation Debate: Who Speaks for Whom?" *Morningside* (C.B.C. Radio), April 1, 1992; transcribed in *Textual Studies in Canada* 2 (1992): 42.
34. Not yet reported, December 15, 1994 (Aus. Fed. Ct.).
35. Ibid., 6–8 (per von Doussa, J.).
36. See also Joan Thomas, "Whose Freedom, Whose Voices?" *Winnipeg Free Press*, April 11, 1992, C36.
37. Said, *Orientalism*, 322.
38. Ibid.
39. *Morningside*, 47. See also Hartmut Lutz, *Contemporary Challenges: Conversations with Canadian Native Authors* (Saskatoon, Sask.: Fifth House Publishers, 1991), 6.
40. Resolution of Writers' Union of Canada, approved June 1992. Reacting to this measure, Tim Wynne-Jones, a member of the Writers' Union, commented: "This tokenism irks me but it is more sad than reprehensible", quoted in *Canadian Children's Literature* 68 (1992): 90.
41. See, e.g., Kamal Puri, "Cultural Ownership and Intellectual Property Rights Post *Mabo*: Putting Ideas into Action," *Intellectual Property Journal* 9(1) (1994): 91–103.

42. *Model Provisions for National Laws on the Protection of Expressions of Folklore*; reproduced as Annex 1 in "Working Group on the Intellectual Aspects of Folklore Protection," *Copyright* 17 (April 1981): 111; *Draft Treaty for the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions*; reproduced in "Report: Group of Experts on the International Protection of Folklore by Intellectual Property," *Copyright* 21 (February 1985): 40.
43. Model Act, s. 2(1).
44. S. 2(2).
45. S. 3.
46. S. 4. Nor is permission required where the use is incidental. Additionally, section 14 provides that "the protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore."
47. S. 3.
48. Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991), 159.
49. See also Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (London: B.E.I. Publishing, 1991), 6–8; Pask, "Cultural Appropriation and the Law," 80–81.