Introduction

Of all the Western academic disciplines, anthropology has had the most enduring impact on the lives of Indigenous peoples, framing them in various 19th and 20th century texts as the cultural ‘Other’ according to their allegedly ‘primitive’ character. This cultural construction was based on an earlier philosophical lexicography that developed the trope of ‘civilization’ as a mode to justify rights to land, resources, and human labor within the colonial empires claimed by the European monarchs. The cultural constructions of the past continue to inform Western law and policy and are profoundly linked to both testimonial and hermeneutical forms of epistemic injustice. Although the more overt racism of the past has been carefully sanitized from contemporary usage, the theoretical framework of epistemic injustice provides a powerful new mechanism to understand the historic wrongs, as well as the contemporary harms that Indigenous peoples continue to experience. In addition, the theory of epistemic injustice can enhance the dynamic interaction between law and ethics that is currently reshaping the social context of work within anthropology and archaeology.

I was asked to write on epistemic injustice and anthropology, and I do so with respect. Much of anthropology merely replicates categories of knowledge that are deeply embedded within all Western intellectual disciplines, including law, philosophy, and the social sciences. There are many critiques of these academic disciplines, and many anthropologists have critiqued the origins of their own discipline and attempted to incorporate a more just set of guidelines into their practice. This chapter is not an attack on anthropology. Rather it is an effort to show how the cultural construction of the ‘Other’ extended into the law that continues to govern Indigenous rights, and how that law is now portrayed as ‘fair and neutral’, masking many forms of epistemic injustice.

This chapter first describes the historical context necessary to understand epistemic injustice as it concerns Indigenous peoples and anthropology and situates that discussion within several contemporary case studies. The chapter then engages the theoretical literature to see how theories of epistemic injustice can accurately describe the historical harms to Indigenous peoples, as well as the continuing harms that arise from inadequate legal and policy responses.
1. The historical context

From the date of contact to the formation of the modern nation-states, such as the United States, the European nations relied on the Doctrine of Discovery within the Law of Nations to claim their colonial empires in the New World. The Doctrine of Discovery originated during the Crusades but was later used by the European nations to claim ownership of lands in the Americas occupied by ‘uncivilized’ and non-Christian peoples. The first European nation to ‘discover’ and ‘settle’ lands occupied by ‘uncivilized’ peoples could claim good title to the lands. The Doctrine of Discovery was premised upon Christian theology and natural law, and as a legal construct, it relied upon the tropes of ‘civilization’ and ‘savagery’ to distinguish the respective mode of land acquisition. Lands occupied by Indigenous peoples were considered available for ‘discovery’ and ‘settlement’, whereas lands occupied by other civilized Nations could only be claimed by political ‘conquest’.

In 1830, Chief Justice John Marshall imported the Doctrine of Discovery into U.S. federal law when he settled a title dispute between two non-Indian claimants. In Johnson v. McIntosh, Marshall ruled that the United States had conveyed a valid title to defendant (McIntosh) because Great Britain had transferred its title by ‘discovery’ to the United States, enabling the U.S. to extinguish the Indians’ ‘right of occupancy’ and exercise its preemptive right to full ownership. The plaintiff (Johnson) claimed title from earlier pre-Revolutionary War purchases directly from the Chiefs of the Piankeshaw Indian Nation, who were the undisputed first possessors of the lands. However, Marshall said that the Indians merely held a ‘right of occupancy’ because they lacked the ‘civilized’ character necessary to claim a full legal title to land. This justification for limiting property rights to Europeans was based on the allegedly ‘primitive’ character of the Indians, who Marshall described as ‘fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness’. Taken in historical context, the opinion effectuated a triple injustice. Native peoples were considered too ‘savage’ to merit legal rights or to engage in a reasoned discourse about the nature of their rights. As nonparties to the action, they had no way to contest the development of the doctrine. Indeed, they were deemed incapable of understanding the nature of their juridical status. The federal government maintained full authority to direct legal actions on behalf of Indian tribes until 1967, when Congress finally granted Indian tribal governments the right to independent representation in American courts by their own legal counsel.

The Doctrine of Discovery is a legal fiction developed by the European nations to claim ownership of land, resources, and human labor in the New World, and it was premised upon the view that Europeans held superior rights because of their status as the most civilized peoples in the world. The Enlightenment philosophers legitimated that view within their accounts of political theory, to the clear disadvantage of Indigenous peoples. As John Stuart Mill reasoned in *On Liberty*, civilized peoples merited the greatest level of political rights. Thomas Hobbes wrote that the Indigenous peoples of the Americas were ‘savages’ living in the ‘state of nature’. Because of this, the Europeans had a ‘perfect right’ to capture the ‘insufficiently populated’ lands that they ‘discovered’.

Similarly, in the *Second Treatise of Civil Government*, John Locke remarked that ‘in the beginning all the world was America’, a wilderness and commons ripe for settlement of land and cultivation of private property rights. While Locke did not endorse genocide of Indigenous peoples, he clearly believed that Indians lacked the capacity to own property because they ‘roamed’ over their vast wilderness instead of ‘cultivating’ the land as did the ‘civilized’ Europeans. Locke also used Indigenous peoples to support his epistemological theories concerning the origin of
knowledge. Locke considered Native people to possess a primitive form of knowledge, similar to that of ‘children, idiots, and the illiterate’. According to Locke, their heads were filled with ‘love and hunting’, and they had ‘vulgar conceptions of the divine’, which rendered their religions nothing more than superstition or atheism.

Hegel agreed, writing that Native Americans ‘are like unenlightened children, living from one day to the next, and untouched by higher thoughts or aspirations’. According to Hegel, the Indians suffered from their encounters with Europeans because of the ‘weakness of their physiology’, which made them susceptible to disease, and from their inability to engage the ‘arts of the Europeans’, including ‘brandy drinking’. These views ultimately supported the view that Indigenous peoples should be treated as the ‘wards’ of the civilized government. As the benevolent guardian, the civilized government had the power to constrain Indigenous peoples’ autonomy through the exercise of a fostering paternalism. John Stuart Mill sanctioned this treatment in his book, On Liberty, observing that because Indigenous peoples lacked the capacity to think for themselves, the government could rightfully subject them to ‘civilization’ programs.

The philosophical constructions were justified by reference to 19th century science, which held that Europeans were at the apex of civilization, while Africans were at the lowest rung. Indigenous peoples were somewhere in between, and it was hoped that they would eventually become more like the more favored ‘White race’. The field anthropologists of the day were working with evolutionary theory and social hierarchies. Thus, the science of craniology sought to measure the skulls of all races to determine which one was the most ‘civilized’. Not surprisingly, Europeans came out on top.

Interestingly, the political practice of the European governments toward Indian Nations was a bit different. Both Great Britain and the United States used treaties to negotiate their place on Indigenous lands, as they did with their counterparts in Europe and Asia. However, during the latter half of the 19th century, U.S. Indian policy turned from treaty negotiations to overt political domination. Congress acted in 1871 to bar the Executive from negotiating any further treaties with Indians, although it confirmed the legal status of the existing Indian treaties (which numbered over 500). After the Civil War ended, the United States sent its troops to the frontier to deal with the ‘Indian problem’. Although the Indians experienced some victories (most notably, the Battle of the Little Bighorn), they were few and short-lived. By the end of the 19th century, the Native population of the United States plummeted to its nadir, due to warfare, disease epidemics, and the appropriation of tribal lands and food resources for the benefit of a burgeoning settler population.

During the late 19th century and early 20th century, Federal policymakers employed the image of the ‘savage’ as they endorsed a paternalistic view of Native peoples as primitive wards and sought to forcibly assimilate American Indians and Alaska Natives to Anglo-American cultural norms. Federal officials removed Native children from their homes to federal boarding schools, where they were precluded from speaking their language or learning tribal customs. The federal agents also punished the active practice of Native ceremonies and cultural traditions on the reservation, often appropriating sacred objects from practitioners and selling them to various museums and collectors. Ironically, as federal officials actively worked to destroy Indigenous cultures, anthropologists invaded Native communities to document their languages, music, dances, and ceremonies before they ‘vanished’ altogether.

The hermeneutical consequences of these appropriations were massive and enduring. Indigenous peoples lost the authority to interpret their own history and culture, as well as their authority to protect themselves from further appropriation. Indigenous peoples lost physical possession of vast amounts of their cultural heritage, and they were also subjected to the imposition of alien hermeneutical schema. Indigenous peoples were foreclosed from participating in the creation
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of epistemic practices and excluded from the institutions where meaning is made. The interpretation of Indigenous culture shifted to the expertise of anthropologists within museums and academia, and Indigenous peoples became the objects of the epistemic practices of anthropology. Needless to say, this history is replete with instances of testimonial and hermeneutical injustice, and Indigenous peoples continue to suffer from participatory prejudice and informational prejudice as they seek to repatriate cultural objects within domestic and international forums.23

Despite the dire predictions of federal policymakers at the turn of the century, Indigenous peoples survived this brutal past. Within the United States, contemporary tribal governments possess jurisdiction to govern their reservation lands and their members under the prevailing federal policy of ‘self-determination’. Although federal law and policy now recognizes and confirms tribal authority, the Supreme Court has judicially restricted tribal jurisdiction over non-members and outside the reservation. This can frustrate the efforts of tribal governments to preserve and protect their cultural heritage.

There are continuing issues about which tribes constitute legitimate governments, as well as the credibility of tribal claims to ownership of their tangible and intangible culture heritage. Not surprisingly, in the legal narratives that resolve such claims, contemporary anthropologists and archaeologists hold the power as ‘experts’, while the perspectives of Indigenous peoples are often dismissed as biased, uninformed, or otherwise lacking in credibility. This dynamic is best analyzed under the principles of epistemic injustice.

2. Epistemic injustice

In an earlier article, I drew upon Miranda Fricker’s work to explain how ‘epistemic forms of injustice’, that is, injustices relating to the categories of knowledge and experience, affect Indigenous peoples.24 Western knowledge systems are typically built upon a rationalist, secular epistemology that elevates the importance of science, economics, and technology. These forms of knowledge are seen as principled, fair, and neutral. In comparison, Indigenous knowledge systems are often seen as deficient because they are perceived as faith-based ‘religious systems’ and or as the more primitive forms of cultural knowledge associated with ‘tribal’ groups. Western knowledge systems, on the other hand, are seen as universally superior to these forms of local knowledge as a mechanism of understanding our world and developing policy innovations. In addition, the attribution to “secularism” conveniently disregards the Protestant Christian roots of Western European knowledge and attributes religiosity to less civilized cultures, including indigenous peoples.

In a sense, this history can be equated with a form of ‘epistemic imperialism’ in which the epistemic values of efficiency, instrumental value, and domination of nature come to stand in for what is valid and true, privileging science and technology as objective and therefore ‘value-free’. Although contemporary scholars within postcolonial studies and global feminism have questioned this supposed objectivity,25 the discourses of science and technology continue to dominate the domestic policy arena, as demonstrated by public land management, agricultural production, public health administration, and the management of environmental and cultural resources.

This colonial and imperialist history continues to harm Indigenous peoples because the legal and policy structures that determine their contemporary rights, as well as their ability to gain redress for historic wrongs, are built upon a model that disregards indigenous values and excludes them from full participation in the social and epistemic practices of the dominant culture. This exclusion is largely invisible to other constituent members of society because the injustice to Indigenous peoples as ‘epistemic communities’ is masked by the pervasive view that American Indians and Alaska Natives are now ‘equal citizens’ under the United States Constitution.26 Although Indigenous peoples are themselves ‘epistemic agents’, uniquely embodied and
historically and socially situated within their identity as the First Nations of this land, their actual experience is one in which others define the narratives that construct their rights.

As Fricker points out, we share a collective space as members of a society, and our basic social interactions center upon knowledge and social experience. We convey knowledge to others by telling them, and we make sense of our own experience by interacting with others within the social spaces we share, including domains of governance, the job market, educational institutions, and the like. I will here be discussing the legal system, as a social institution that broadly invokes power relations between the U.S. government and its citizens, and between the U.S. government and Indigenous Nation. My argument is that forms of epistemic injustice permeate the legal system and reflect the long-standing cultural construction of Indigenous peoples as ‘Others’. I will first describe the essence of epistemic injustice and then develop several case studies to illustrate its impact upon Indigenous peoples.

Federal law controls the lives of Indigenous peoples within the United States because of the 19th century case law that articulated their legal status as ‘domestic dependent nations’ with a ‘trust relationship’ to the United States. This status is unique. In the 19th century, Indians were considered ‘wards’ of the United States and were not ‘citizens’ within the meaning of the U.S. Constitution, even after enactment of the 14th amendment. However, Congress ultimately naturalized American Indians to citizenship in 1924. As a result, contemporary Native Americans share an identity with other citizens as individuals, but they are also citizens of their tribal governments, whose political identity is both pre-Constitutional and extra-Constitutional. To the extent that the emphasis is placed on shared identity, Indigenous peoples are vulnerable to the forms of ‘identity harm’ that Fricker discusses. Indigenous rights derive from their aboriginal occupancy of the land and from the political bargains they made with the United States as separate sovereign nations. Consequently, the rights of Indigenous peoples to land and resources, including cultural heritage, depend upon the continuing ability of Indigenous Nations to assert their group identity as culturally and politically distinct from that of the United States.

Epistemic forms of injustice can suppress an Indigenous nation’s ability to articulate its own identity. This can occur in the form of ‘testimonial’ or ‘hermeneutical’ injustice. Under Fricker’s framework, testimonial injustice arises when someone is wronged in his or her capacity as a giver of knowledge, while hermeneutical injustice occurs when someone is wronged in his or her capacity as a subject and source of understanding.

Of the two forms of epistemic injustice, testimonial injustice is most aligned with legal theory and practice. Lawyers routinely invoke the testimony of witnesses to prove that something happened, or did not happen. Similarly, we ‘qualify’ the witnesses to ensure that they have the requisite knowledge and are capable of delivering their testimony. Ultimately, the judge and jury decide what testimony is most credible and persuasive. Within this structure, as Fricker and other theorists observe, there is a vast capacity for episodic forms of injustice to occur. For example, the listener may assess a credibility deficit to certain speakers, based on their race, class, gender, or appearance. They may also privilege speakers based on those characteristics. In fact, there is a growing body of literature indicating that 98% of human beings (including jurors and judges) harbor implicit racial biases that unconsciously affect their perception, memory, judgment, and action.

The forms of testimonial injustice that Fricker and others identify may become incorporated into the legal system, in which case they become structural forms of injustice. Gaile Pohlhaus, Jr. argues, correctly in my view, that the primary harm of testimonial injustice can be described in terms of the ‘subject/other’ relationship that ‘circumscribes the victim’s subjectivity within the confines of the perpetrator’s subjectivity’. For Indigenous peoples, the ‘subject/other’ relationship has always defined their nature in relation to Europeans, defining their identity as sovereigns,
as knowledge-holders, or as property holders. In this sense, Indigenous peoples have been deemed ‘deficient’ in comparison with Europeans. Their governmental status is frequently described as ‘quasi-sovereign’, while their aboriginal right to property is merely ‘a right to occupancy’, and not a full property interest for purposes of the Constitutional law regulating government takings. In addition, both tangible and intangible forms of Indigenous cultural heritage have been pillaged and appropriated on the theory that Indigenous cultural property does not merit the same protection accorded to owners or authors and artists within Western society.  

Testimonial forms of epistemic injustice privilege Western knowledge, even with respect to the most fundamental issue of whether a group is, in fact, an ‘Indian tribe’. For example, a tribe who is petitioning for ‘recognition’ through the federal acknowledgement process must generally ‘prove’ its identity by reference to written documentation produced by ‘objective’ experts, including historians and anthropologists. Similarly, tribes who seek to ‘prove’ the existence of a sacred site on aboriginal lands now under state or federal ownership must generally rely on the testimony of an anthropologist who can document the group’s belief system and its historical occupancy on particular lands. This type of testimonial injustice may not immediately discount the assertion of a tribal witness, but the truth of the assertion is contingent upon validation by a qualified ‘expert’ who is culturally ‘neutral’ and has the scientific training necessary to be ‘credible’.  

Hermeneutical injustice, on the other hand, is ‘the injustice of having some significant area of one’s social experience obscured from collective understanding’ because the group in question suffers from epistemic marginalization. This can occur because the group lacks the same hermeneutical resources to define viable categories of experience or because the group is not certified as having the same epistemic authority as the dominant group. In both cases, the dominant society draws upon its understanding of the historical circumstances and its assumptions to discount the experience of the indigenous group, and it also normalizes an epistemology that was created precisely to exclude other groups. Within the law, hermeneutical injustice commonly occurs when there is no recognized legal category for the category of harm experienced by an Indigenous group. For example, following the 1989 Exxon Valdez oil spill, several Native Alaskan communities sued Exxon for the destruction of their traditional subsistence way of life caused by the massive oil spill. The federal court described culture as an ‘internal’ state of mind, which could not be destroyed unless a person lost ‘the will’ to pursue a given way of life. The harm to the Indigenous group was multiple, disrupting longstanding practices, customs, and ceremonies that integrated the people with their environment. The people could not ‘live’ their culture or transmit it to their children because of the destruction of the environment and associated wildlife resources. However, the court found this type of harm to not be cognizable under any theory of tort law, which is not surprising given the fact that the British common law would not reflect harms to land-based Indigenous cultures. What is disappointing, however, is that this obvious hermeneutical gap did not even register an inquiry regarding the justice of limiting indigenous claims to the standard categories of Anglo-American common law.  

Similarly, the United States Supreme Court has routinely failed to find a ‘substantial burden’ on Indigenous religious practitioners for purposes of the First Amendment of the U.S. Constitution when some ‘neutral’ federal law or policy impedes their ability to practice their religion. Hence, in Lyng v. Northwest Indian Cemetery Protective Association, the Court held that the federal government could permissibly extend a logging road through a site held sacred by several Indigenous groups in Northern California because the government was merely developing ‘its’ land for the public benefit and had no intent to coerce the Indigenous peoples into giving up their ‘belief’ that the land was ‘sacred’. Again, the experience of the ‘sacred’ was evaluated at the individual level of what is in the ‘mind’. So long as individual Indians are free to ‘believe’ the site is sacred, it
is irrelevant that the conduct of the government will remove the ability of the group to practice ceremonies that it feels are vital to sustain its existence. The Court failed to find a ‘substantial burden’ even after assuming, for the sake of argument, that development would foreclose practice of the religion altogether.

The 9th Circuit Court of Appeals, sitting *en banc*, used a similar logic in *Navajo Nation v. United States Forest Service*, which upheld the use of reclaimed sewage wastewater to manufacture artificial snow for a company leasing land for recreational skiing on the San Francisco Peaks. The San Francisco Peaks are a very sacred site for the Navajo Nation, the Hopi Tribe, and at least a dozen other tribal Nations in the Southwest. Although the Native practitioners argued that spraying sewage effluent over the area would desecrate the mountain and its associated spirit entities, as well as contaminate the herbs used by practitioners for healing ceremonies, the Court found that the federal agency was merely maximizing the value of the land for the ‘public benefit’ and had no duty to give weight to the subjective beliefs of the affected Native peoples.

Each of these cases illustrates hermeneutical injustice because the harms asserted include cultural and spiritual claims that do not map onto an available category of experience or thought within the Western legal system. The experience of cultural harm cannot be measured by Western empirical standards and witness testimony is often the only way to present the claim. In this respect, Indigenous peoples also suffer from testimonial injustice because they are often not perceived as credible when they attempt to convey their beliefs. For example, in the *Lyng* case, the Court noted that ‘not all Indians’ agreed that the site was sacred (and it is true that not every Indian person is a practitioner of his or her traditional culture) and also expressed the view that if the Forest Service had to cater to this belief, this would result in the Indigenous group claiming ‘de facto ownership’ of a vast area of public land.

Because the Indigenous claim must be addressed under Western standards, there is no ability to gain recognition for the unique harm suffered. In fact, the Constitutional right to freedom of religion is based upon what Ian James Kidd terms ‘cosmopolitan secularism,’ which dismisses Indigenous metaphysical beliefs as ‘false’, holding instead that:

‘[T]here are no supernatural entities,’ like gods and ancestor spirits and sacred places and creatures, nor transcendent realities, and so no sense to be made of ‘accounts of the good life that are grounded in the idea that a “significant existence” requires some contribution to the cosmos’

Under this view, the religious practitioners in the *Lyng* case could not ‘prove’ that their ‘World Renewal’ ceremony was in fact necessary to preserve the world. Nor could the Hopi practitioners in the San Francisco Peaks case prove that the ancestral spirits known as ‘Kat’šinas’ in fact ‘live’ on the San Francisco Peaks. This is not because of a lack of proof of sufficient quality or quantity, but because such claims are automatically considered ‘false’ because they are outside the realm of reasonable belief. No proof is possible and even sincere belief in what is ‘incredible’ constitutes a marker of epistemic dysfunction. The Indigenous reality cannot be articulated within the Western legal system because indigenous metaphysical views are dismissed as ‘false’ and because they are excluded from co-creating doctrines that could protect them from harm (for example, by using an intercultural definition of what constitutes a ‘substantial burden on religious practice’).

3. Case studies: anthropologists, archeologists, and epistemic injustice

The protection of Native cultural heritage is vitally important to tribal cultural survival. However, for most of U.S. history, the legal protections that exist for burial sites, tangible property,
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and intellectual property were generally held not to extend to Indigenous peoples because of their cultural differences. State laws protecting marked graves within consecrated Christian cemeteries were held not to extend to tribal burial sites. Similarly, tribal songs and designs were not protected by doctrines of U.S. copyright law that offer limited protection for 'original creative works' by an author. In the text that follows, I will offer additional case studies demonstrating the continuing existence of hermeneutical injustice and testimonial injustice. The debate over ownership and control affects the tangible cultural heritage of Native peoples, including ancestral human remains, funerary objects, sacred objects, and objects of cultural patrimony that are held by various institutions throughout the nation and the world.

Throughout much of the 19th and 20th centuries, anthropologists and archaeologists looted Native villages, battlefields, and cemeteries to acquire Native peoples’ personal effects, as well as their remains. The leading anthropologists in the country (such as Kroeber) maintained possession of Native American remains for study. In the late 19th century, the United States military issued an order authorizing servicemen to dismember Native American bodies recovered from battlefields, and send the remains to a medical repository in Washington, D.C. for ‘scientific’ analysis of Indian crania. In addition to these official policies, Indian bodies were routinely plundered and desecrated by frontier vigilantes.

As a legacy of this gruesome past, Native American human remains and cultural objects were openly traded on the market as historical artifacts or relics until 1990, when Congress passed the Native American Graves Protection and Repatriation Act. As of 1990, there were over 150,000 Native American human remains held by federal agencies and federally-funded museums, as well as hundreds of thousands of funerary objects, objects of cultural patrimony and sacred objects. NAGPRA authorized culturally affiliated tribes to request repatriation of the remains and cultural objects on the theory that the remains and objects were rightfully under the control of the communities of origin. The statute also prohibited commercial sale or trade of Native American human remains or cultural items.

Despite these advances, the statute did not resolve all of the battles. Under NAGPRA, the burden is on the Native American claimant to demonstrate its status as a ‘federally recognized’ Indian tribe that is ‘culturally affiliated’ to the remains or cultural objects at issue. Although the statute explicitly identifies cultural narratives and tribal histories as permissible methods of proof, the courts have developed more restrictive standards of ‘genetic similarity’. This has precluded some tribal communities from gaining repatriation of ‘ancient’ Indigenous remains. Archaeologists have asserted that ancient human remains should be considered the ‘property’ of science because they cannot be ‘culturally’ affiliated to modern day Indian tribes. In Bonnichsen v. United States, the federal court agreed, with reference to skeletal remains that washed up on the banks of the Columbia River in Washington and were estimated to be 9000 years old. The Court said that the tribal claimants were relying on their tribal narratives to demonstrate cultural affiliation, rather than scientific proof of shared ‘genetic or cultural identity’. According to the Court, the tribal testimony was insufficient to show ‘where historical fact ends and mythic tale begins,’ and thus the tribe failed to prove that the ‘Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures’. The Court’s ruling restricted the permissible standard for determining cultural affiliation to what was scientifically provable, thereby negating indigenous conceptions of cultural affiliation and indigenous constructions of kinship. Interestingly, after years of legal wrangling, scientists secured the right to do DNA testing of the remains and found that there was genetic similarity to the contemporary tribes holding ancestral occupancy rights in this area.

Native claims can also be obscured by the legal categories that pertain to commercial trade of ‘cultural heritage’ on the international market. There is still no international law regulating
museum collections of Indigenous human remains and cultural objects. Many of the world's leading museums in countries such as England, Germany, and Australia house collections of Indigenous remains and cultural objects from all of the former colonies. Do they 'own' these Native ancestral remains and sacred objects?

In an era where self-determination is understood to be a fundamental and inherent human right of all Indigenous peoples, Indigenous claimants have filed repatriation claims for return of their ancestral remains. However, there is no legal right to repatriation across international lines. Rather, such claims are usually treated as opportunities to craft voluntary ethical relationships between Indigenous peoples and museum professionals. For example, in April 2013, the Museum of Medical History in Berlin, which houses numerous exhibits of human body parts, returned ‘33 skulls and skeletons to Australia and to members of tribes from the Torres Strait Islands between northern Australia and Papua New Guinea’. Ned David, the leader of the Torres Strait Islander group, expressed their sense of relief at ‘bringing their ancestral remains home’, but said that the ‘moment is tinged with sadness for what was involved with the removal of the remains’. The German Museum Association’s ethical guidelines recommended that the museums ‘study provenance systematically and return human remains that had been collected as part of a violent conflict’.

In the United States, members of the Fort McDowell Yavapai Nation within the state of Arizona experienced a similar set of emotions when the community repatriated the remains of tribal members from the British Museum in 2014. The remains had been sold to the British Museum in the early 20th century after the infamous massacre of a group of unarmed and innocent Yavapai Indians in Arizona. It was not until 2014 that the tribe learned that the remains were in the British Museum’s collection, and the tribe subsequently made a repatriation request, which was honored on the moral principle that takings of Indigenous remains from episodes of historical violence ought to be returned to the communities of origin in accordance with basic moral principles honoring human dignity and equal respect.

The Hopi Tribe of Arizona did not merit the same standard of ethical treatment when it sought to enjoin the auction of 70 sacred objects known as Kat'sina, but popularly described as 'masks'. The sacred ceremonial objects dated to the 19th century and had been stolen from the tribe prior to passage of the federal repatriation statute in 1990, and they were ultimately placed for sale in a French auction house in April 2013. The Hopi Tribe’s Constitution precludes removal of sacred items from tribal lands, and the Hopi Tribe sought repatriation of the items, invoking diplomatic assistance from federal officials and the support of anthropologists, such as the Museum of Northern Arizona’s director, Robert Breunig, who wrote a letter to the Paris auction house urging return of the objects to the Hopi Tribe and the other affected Pueblo Nations at Acoma, Zuni, and Jemez. Breunig wrote:

I can tell you from personal knowledge that the proposed sale of these katsina friends and the international exposure of them, is causing outrage, sadness and stress among members of the affected tribes. For them, katsina friends are living beings . . . To be displayed disembodied in your catalog, and on the Internet, is sacrilegious and offensive.

The French court rejected the claim that the objects should be treated as ‘living beings’ and also the premise that the objects were ‘sacred’. The court ruled that French law did not prohibit the sale of the items because they were the ‘private property’ of a collector, and American law did not apply in France. The French auctioneer expressed ‘concern’ about ‘the Hopi’s sadness’ but said that when such objects become part of ‘private collections’ in Europe – or the United States – they ‘are desacralized’. Of course, it is hard to find that a category of objects has been
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‘desacralized’ without acknowledging that they were (and perhaps still are) ‘sacred’. This case illustrates the most egregious form of hermeneutical injustice – what Gaile Pohlhaus, Jr. terms ‘willful hermeneutical injustice’ – because the dominant group refuses to concede the possibility of certain interpretations of objects or experiences by the community of origin, even as it acknowledges that this experience may have once existed, but no longer does (again, according to the standards of the dominant group). 58

All of these cases are very recent, and they are all troubling because the contemporary conduct is considered lawful, despite the acknowledged harm to the Indigenous groups. The appeal to epistemic injustice is firmly grounded in the historical and contemporary claims of Indigenous peoples.

The injustice continues with respect to intangible cultural resources, such as tribal songs, symbols, ceremonies, and designs. During the late 19th and early 20th centuries, anthropologists documented and recorded tribal ceremonies and songs, often in graphic detail. Today, many tribal communities claim those sound recordings and archives as the ‘cultural and intellectual property’ of the community of origin. However, other citizens view these repositories as part of a rich cultural commons, free for appropriation. For example, in 2004, the hip-hop duo known as ‘OutKast’ was heavily criticized by Native Americans when the group performed ‘Hey Ya’ at the Grammy Awards. The song ‘borrows’ from a sacred Dine (Navajo) Beauty Way song, and the performance featured women in ‘buckskin bikinis’ who were imitating a Plains ‘War Cry’. The combination of stereotyping and cultural appropriation was deeply offensive to the Lakota and Dine people, as well as other Native Americans. There is a continuing and active debate over who ‘owns’ the historic sound recordings and archives and who ought to have the power to govern the use of them. These archives are important because they are the most complete documentary resource of Native epistemologies. They are important to Native peoples and they are important to anthropologists, which sets up a continuing tension over preservation and use.

Each of these case studies raises instances of identity harm, as well as testimonial and hermeneutical injustice. Year after year, these cases go into the American courts, and very rarely are they decided in favor of Indigenous peoples. The only route to ‘justice’ in the United States for Indigenous peoples is by appeal to Congress for a political solution. However, even that avenue is in jeopardy due to the current instability of the political process.

4. Conclusion: unpacking injustice: ‘the epistemology of resistance’

In the words of José Medina, ‘we need a theory of injustice more than a theory of justice’. 59 As Medina observes, this is true because our ‘idealizations about our epistemic interactions’ minimize the daily hermeneutical and testimonial injustices that surround us in our everyday practices. 60 For Indigenous peoples, the consequences are severe. Native Americans constitute less than 1.6% of the U.S. population, and yet they have aboriginal and treaty-guaranteed rights to land and resources that are distinct from any other group or population. Because they are the smallest of any domestic minority group, it is relatively easy for a rogue group of lawmakers to disregard Indigenous peoples’ rights in service of the economic or political goals of the majority. This recently occurred in Arizona when Congress attached a rider onto a huge defense Appropriations Bill transferring title to federal public lands to a private mining company in order to facilitate development that will have catastrophic cultural consequences for the San Carlos Apache Tribe and other Apache people. The Apache people had the prior possession of those lands, and they still access a sacred site at ‘Oak Flat’ for ceremonial purposes. So long as those lands were under federal control, the agency was bound by federal law to consult with culturally affiliated tribes and consider Native American cultural rights when
developing management plans. This process can be neatly by-passed once the lands are titled to a private mining company.

The public process of lawmaking is designed to allow citizens within democracy to debate, consider other perspectives, and act only after achieving a full understanding of the issues. The effort to privatize the public lands at Oak Flat through legislation was defeated on numerous occasions after testimony by the Apache people and their supporters, including environmental groups. In that sense, the larger society embraced the sort of ‘network solidarity’ that Medina endorses at the conclusion of his book. However, the closed-door ‘deal’ that resulted in a midnight ‘rider’ to the Defense Appropriations Bill negates any sense of shared responsibility for epistemic interaction. Going forward, the law gives a stamp of approval for what really constitutes a wholesale silencing of the Apache people.

The developing scholarship on epistemic injustice is important because it illuminates forms of injustice that are generally invisible to all except for the affected groups. In that sense, Indigenous peoples truly have developed the ‘meta-lucidity’ that Medina references, which allows them to ‘see the limitations of dominant ways of seeing’ and to ‘reconceptualize’ the ways in which we must relate to others.61 By naming what is occurring and refusing to allow members of the dominant society to slip into what Pohlhaus, Jr. terms ‘willful hermeneutical ignorance’, Indigenous peoples have an opportunity to participate in an intercultural understanding of what is ‘sacred’ and how we are connected to one another.62 Indigenous people understand time and place differently from Europeans. They possess a unique form of knowledge that is rooted in these lands. As the peoples that belong to these lands, we can make visible that which informs our mutual reality. It is the responsibility of the encompassing society to make this space available as a matter of law and public policy.

Related chapters: 3, 28, 30, 35, 36, 37

Notes

1 I am very grateful for the helpful editorial comments of Ian James Kidd and Gaile Pohlhaus, Jr. on earlier drafts of this chapter. Their scholarly work has illuminated my understanding of the issues that I discuss, and their thoughtful responses to the text enhanced the quality of my arguments and analysis. I am also thankful for the exceptional support of Tara Mospan, the law librarian who assisted me when I was on the faculty of the Sandra Day O’Connor College of Law at Arizona State University, working on the initial draft of this chapter.


3 See Smith (2012: 68–69) on the ways that various academic disciplines developed in relation to colonialism.


5 See, e.g., Swidler, Dongoske, Anyon, and Downer (1997) – a compilation of essays, including essays by Native American archaeologists, such as Dorothy Lippert, who critique the colonial forms of thinking within the discipline but point out the beneficial work that archaeologists can do on behalf of Indian tribes.

6 See Williams, Jr. (1996).

7 See Williams, Jr. (2012).

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


11 See Mehta (1999) for a discussion of Mill’s On Liberty, as well as the impact of other philosophical works during this era.

12 See Hobbes (1651).

13 Of course, these views were uninformed by reality. In fact, many Indian nations, including the Pueblo Nations of the American Southwest were settled in villages that predated European arrival by several thousand years, and they maintained huge agricultural fields.
20 See Jefferson (1785).
22 I discuss the legacy of these policies in Section 3 of this chapter.
23 I am grateful to Ian James Kidd for this observation as well as the reference to Hookway’s account of participatory and informational prejudice.
24 See Tsoosie (2012a).
26 Here I am loosely relying on the argument that Pohlhaus, Jr. (2014b: 47) makes about the sociality of interdependence, namely that ‘epistemic communities’ precede epistemic individuals and therefore the individual necessarily must rely upon the help of others as he or she seeks to know about the world.
28 Tsoosie (2012a: 1154), citing Fricker.
29 The ‘state of the art’ in implicit bias research is surveyed in Staats, Capatosto, Wright, and Contractor (2015).
31 See Young and Brunk (2012).
32 Tsoosie (2012a: 1155 and ns. 141 and 142) describes the process of identifying ‘traditional cultural properties’ under the National Historic Preservation Act.
33 I am grateful to Ian James Kidd for differentiating these two different forms of testimonial injustice. The first assesses a credibility deficit to the speaker, based upon some imagined racial/cultural deficiency, while the second questions the entire epistemic framework of the indigenous speaker unless and until validated by an appropriate ‘objective’ framework of knowledge. In either case, the same outcome attaches, but they constitute conceptually distinct forms of prejudice.
34 Tsoosie (2012a: 1158), citing Fricker.
35 See Carel and Kidd (2014), discussing the ways in which hermeneutical injustice can arise.
36 In re Exxon Valdez, 1994 WL 182856 (D. Alaska), affirmed 104 F.2d 1196 (9th Cir. 1997).
37 1994 W.L. 182856 at *4.
39 Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008).
40 Tsoosie (2012a: 1161).
41 See Kidd (2014).
42 I thank Ian James Kidd for this insight and also his observation that ‘there is a conceit in cosmopolitan secularism, reflecting a tension between the titular terms: one claims to be cosmopolitan – open to learning from a diversity of traditions – but at the same time, one denies the self-understanding of every religious tradition, reducing them to “options” on a “menu” of religions.’
43 Peter Winch discusses the complexity of this in ‘Language, Belief and Relativism’, as he queries how a European anthropologist can make sense of a practice described by a member of the Zande people. The anthropologist describes the practice as ‘witchcraft’ in the sense of the Zande belief system. However, it may be the case that the Zande are using their language to describe a different reality, rather than merely holding a different belief about the same reality. See Winch (1987: 195–6).
44 See Tsoosie (2009).
46 It should be noted that NAGPRA does not apply to the sale or trade of Indigenous cultural heritage outside the United States. There is an active global market for all categories of Indigenous cultural heritage, including human remains.
47 Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).
48 Bonnichsen v. United States at 882.
49 See Preston (2014).
50 See Tsoosie (2012b).
See U.N. Declaration on the Rights of Indigenous Peoples, art. 3 (providing that Indigenous peoples have the right to self-determination); art 13 (providing that Indigenous peoples have the right ‘to the use and control of their ceremonial objects and the right to repatriation of their human remains’).

See Wagner (2013).
See Pohlhaus, Jr. (2012).
Medina (2012: 12).
Medina (2012: 13).
See Pohlhaus, Jr. (2012).
See Pohlhaus, Jr. (2012).

References


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**Legal cases**


Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008).

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