

Interview with Michael F. Brown, Author of *Who Owns Native Culture?*

by Marren Sanders

Who Owns Native Culture? (Cambridge, 2003) ISBN 0-674-01171-6, pp. 315 \$29.95

Marren Sanders: Professor Brown, thank you so much taking time out of your busy schedule to speak with me. Could you tell us what led you to write about indigenous peoples and heritage as a protected resource?

Professor Michael Brown: Sure. There's a little bit of autobiography in the book. Most of my fieldwork and research prior to 1990 was in Amazonian Peru. Because of the political situation in the late 1980s and early 1990s it became difficult for me to continue working there. Aside from the personal risk to me, I worried about putting people I stayed with at risk. I had to find a project in the U.S. and loved doing ethnographic fieldwork. I liked bringing a sense of other people's voices to my work, so I spent three or four years doing ethnographic work among people involved in New Age spirituality, which resulted in a book called *The Channeling Zone*, published by Harvard in 1997. In the context of doing that work, which was a lot of fun and surprisingly difficult to write up in a neutral way, I got interested in the question of cultural appropriation. What, if anything, one could do about it? What would be the cost of trying to protect native spirituality and religion and other things associated with it? Is it really practical? I felt that the way it was being discussed, especially by anthropologists and advocates for native rights, had a great deal of rhetorical flair but at the level of practicality left a lot unstated and under-analyzed. So I decided to try and approach that problem asking tougher, questions like: how can any religion not appropriate from others? What kinds of strategies, legal or otherwise, would one employ to discourage that kind of activity? What would be the social costs and the political viability of those kinds of strategies? It got me interested in the broader question of cultural theft or cultural appropriation or cultural imitation, whatever you want to call it. My editor encouraged me to look at sacred sites cases as a way of broadening the scope of the book. I was resistant at first, but I came to think that her instincts were right. They appear on the surface to involve different issues. In the one case you're dealing with the intangible, primarily, and the other case you're dealing with something that's tangible. If you think about sacred sites and public land as being more or less equivalent to the notion of the public domain, then you have the same types of questions. How can a federal government which is legally prohibited from privileging religious activities with any one group, manage to make a site accessible to Native Americans, without privileging their religious activities over the legitimate activities of other types of patrons? You know better than I, as a law student, that the constitutional tightrope is very narrow and difficult, so I was really fascinated to go to these parks and talk to supervisors and rangers about how they balance these opposing interests. In many cases, they're remarkably sympathetic to Native American concerns and they understand and are persuaded by the moral argument. On the other hand, they're constrained by tremendously rich case law, which says that national parks simply can't close themselves to activities like hiking and other things that are permitted and are part of their mission, actually. It had the advantage of being a concrete example involving real people in a sort of practical sense that I think gave more texture to the analysis.

MS: I agree. One chapter was significant to me because I've stood within the Medicine Wheel in Wyoming. . .

MB: Isn't that an awesome place?

MS: You also write of the Devil's Tower dispute.

MB: Yes.

MS: Discussing the difficulty of reconciling religious claims with public ownership, you write of a question commonly posed by Indian activists: "How would your people feel if Lakotas used St. Patrick's Cathedral to perfect their climbing skills?" You answer: "[T]he best one can hope for is an imperfect, negotiated compromise based on common sense and some degree of mutual respect." Could you elaborate?

MB: Well, I'm sympathetic to the Native American claim and in some ways think that in an absolute moral sense, the sacred site chapters are perhaps the weakest because I take for granted that these sites are now federal lands. Many people would say "well, you're accepting an act of imperialism when you really should be looking at the question of why Devil's Tower is in the national system in the first place." So that's a choice one has to make. Coming from a position of liberal pragmatism, I just bracket the whole question of how it came to be that way and what, if anything can be done about it. Once you make that move, which I admit could be contested by many readers, and I would hope that they would think about those issues and come to their own conclusions; once you accept the status quo, the question is how you manage this in a way that balances these conflicting interests. I felt that you can look at the glass as half empty or half full, and I chose to look at it as half full, in the sense that if you look at these compromises as part of a long term process of public education and of making people sensitive to the moral implication of what they do in parks and what our nation does with public lands, then you see a distinct possibility that once these Indian claims have secured foothold, they can move and expand, which has been the pattern certainly in the last 20 or 30 years as far as indigenous rights are concerned. I think that a thirty day moratorium [on climbing], while not entirely satisfactory from the native point of view, is a strong place to start, and that perhaps as more people become aware of the importance of this site for the native peoples of the region they - the public that is - might be more willing to come to an expanded moratorium or some other kind of constraints and limits on the use of both parks in ways that make it easier for native peoples to worship.

MS: You have a chapter called "Sign Wars" which deals with rights to native names, symbols and insignia. For many non-natives that means high school mascots.

MB: I really didn't talk too much about the mascot issue. In general, mascots are not a good idea and probably should be changed, unless you're talking about a native school or high school. That's one idea. I was more concerned with legitimate native symbols being diluted through their appropriation within the larger society. The Zia sun symbol case is, for me, emblematic of the heart of the problem for many native people. You have a case of the sun symbol, a slightly modified form of which becomes the New Mexico state flag in 1925, taken without permission of the community from a historic pottery design. It then gets reproduced on license plates, state

logos, and then eventually for commercial uses. It comes to stand for the entire state of New Mexico. But then what's the impact of seeing the religious symbol, even a variation on the authentic one, reproduced millions of times? How does that dilute, transform, or undermine the sacred significance of that symbol for members of Zia Pueblo and possibly other Pueblo Indian peoples? So, a lot of it turns on the question of how small groups, minority groups, can keep semiotic integrity or the integrity of their symbol within the context of this sort of media ocean, this over-stimulated digital/auditory world in which we live. I don't think there are any easy choices. It's very difficult to control the fusion of signs and symbols and words and ideas. In fact, we'd have to undertake a kind of national project of semiotic cleansing, you know, kind of a symbolic version of ethnic cleaning, to put all these symbols back in their proper boxes. I don't think it's going to happen, and I don't even think it would be a good idea if it did happen. There are specific legal issues that have to do with trademarks and misrepresentations. I completely agree with the USPTO that if a group, a corporation, is not associated with a native community, it shouldn't be allowed to use the name of an Indian tribe on its product because it misrepresents the product itself. The case law is mounting in such a way that that is simply coming to an end. You have a lot of trademarks that are grandfathered in because they've been in use for years, but I don't think new ones are going to be added to that list. That's a good thing. I think federally recognized tribes and other indigenous groups have legitimate economic interests in their names and key symbols, which they should be allowed to defend. I don't dispute that. In fact, I think there could be some broadening of those rights. On the other hand, you get into this totalizing notion that all native symbols can somehow be repatriated to their owner, that you can somehow undo hundreds of years of common usage. The arguments get kind of silly. It's important to strike a balance between what's legally defensible and practical on the one hand, and what simply is unlikely to happen.

MS: You also speak of cultural privacy.

MB: Yeah. Well, I thought it was an odd idea when I first saw the term used. As I say in the book it almost seemed like an oxymoron. Culture is public almost by definition, so the idea of talking about cultural privacy struck me as odd. But the more I looked at it, the more I began to think that privacy, while not a perfect concept to use to organize thinking about some of these issues, it was potentially more useful than I first thought. I try to make a case in the book that utilizing symbols or imitating ritual, taking names without permission, directly interferes with the legitimate functioning of a community and perhaps has a destructive effect on it. In a cautious, careful way one can begin to talk about, perhaps to a limited extent, legislative mechanisms that make that impossible or at least difficult. We need to give groups within our society the kind of social space they need to reproduce themselves and prosper and enjoy some reasonably high quality of community life together. Legal scholars such as Blaustein and others accept the notion that there is a level of privacy that is protected between spouses, between attorneys and their clients, between priests and their parishioners, and those rights trump other kinds of social rights and need-to-know standards. So, it might be useful, at the very least, to talk about whether we should begin to recognize formally the existence of those kinds of rights for native communities. One of the problems, of course, is that it's very hard to limit those special privacy rights simply to indigenous communities. We live in a society where we believe in the principle that the same laws apply to everyone. One of things I worry about is whether we can keep the notion of cultural privacy from expanding to include all sorts of groups whose

activities we would not consider legitimate or proper or morally defensible. That's a concern. Once you start articulating a notion of cultural privacy, where does it end? What about the state's legitimate rights to protect children within communities? This ties into a lot of complex thinking about cultural autonomy and balancing the needs of cultural groups against common standards of social welfare, education, that sort of thing. It's a tough issue, so I don't think there's any easy answer.

MS: Tell us about *Magpie Geese and Water Lilies at the Water Hole*. This was a landmark case in Australia.

MB: It was dumb luck that got me into the courtroom. I contacted Colin Golvan, the barrister involved in the case, because he had also been involved in other cultural property cases involving Australian aboriginals. He said, "Well, gosh, at the time you're coming I'm going to be up in Darwin litigating a case. Why don't you just meet me up there?" I had dinner with Colin and his family who were there on holiday, and we walked into the courtroom the next day. As I mention in the book, there had been a day of testimony which I wasn't able to attend because I had no standing in the case and because the judge and attorneys chartered a plane and flew out to Arnhem Land to do interviewing of some of the Aboriginal people whose testimony was important to the case. They managed to cram the courtroom part of the proceedings into one day. The case turned on the question of whether the artist Johnny Bulun Bulun's clan community had certain kinds of fiduciary rights in his art. The infringement part of the trial had already been litigated. It was an open and shut case in which a textile manufacturer had reproduced the image without the knowledge and consent of the artist. They had been found guilty and, in fact, declared bankrupt. *Bulun Bulun* part two had to do with whether groups beyond the creator himself (the copyright holder, the artist) like his clan community had some kind of rights and responsibilities in the artwork. It was a fascinating case. The argument was, in a sense, that the religious authorities of the community implicitly licensed the artist to reproduce these religious images, and therefore if the artist failed to defend his rights in an infringement case, then the community could come forward to defend its rights in the work in his stead. The judgment was rather complicated and nuanced. The judge said that by the standards of common law and Australian law, the only copyright holder was the artist. There was no evidence that the community or the clan elders had any participatory role in the creation of the art object itself. So in terms of straight-ahead notions of copyright, Johnny Bulun Bulun held the copyright to the work of art. But the judge did accept the notion that the art, in a sense, had a community dimension, and the community could have some legal standing if the artist failed to defend his rights in an infringement situation because abuse of their religious imagery could have a prejudicial effect on the community itself. In a funny kind of way the community, on the face of it, appeared to lose the case, but it established the precedent for this fiduciary responsibility and set the stage, I think in a modest way, for the notion that communities as well as individual artists have some kind of group rights in art that's based on traditional imagery grounded in religion and, in the case of Australia, ownership or occupation of a given piece of land or "country" as they say there. It was a fascinating case, but it also had some disconcerting elements. As I mention in the book, there wasn't a single Aboriginal person in the room when the case was being argued in court, which obviously reflects logistical issues, because Arnhem Land is far away and remote. But it's a little odd to have all these high-powered lawyers in the room talking about Aboriginal title. It made me think what was really going on in tandem with

the main event was a kind of internal discussion of white Australia about how the Aboriginal world and aboriginal values fit into the identity of the nation.

MS: You also speak about community values in your chapter “Ethnobotany Blues.” Could you tell us a little more about bioprospecting and “biopiracy?”

MB: Well, in some ways the issues are more cut and dried than some of the other things discussed in the book. There was interest in the pharmaceutical industry beginning in the 1980s, in using traditional botanical knowledge as a way to shortcut the drug discovery process. The argument was that native peoples, whose culture was grounded or rooted in a particular environment, have hundreds or in some cases thousands of years of experience working with the botanical resources in that environment. There’s compelling evidence to show that if a plant is used in a well-established place in native pharmacopoeia, than the likelihood that it will be found to be biologically active in scientific terms is immensely greater than if you just randomly collected plants for analysis. So by studying and taking advantage of other native pharmacopoeia plant collectors can simplify and streamline the process of finding interesting chemicals, that then, of course, go through the whole battery of testing and clinical procedures associated with the industry. The problem is that current copyright law, and up until recently intellectual property law in general, saw traditional knowledge or folklore as being part of the public domain and therefore not being a protectable resource. The critics of bioprospecting, or as they prefer to call it biopiracy, see it as a case where largely Western pharmaceutical companies can take advantage of this traditional knowledge. They can then take something from the public domain and privatize it through the patent process, potentially reaping enormous profits with no obligation to return any of those profits back to the source community. The issue is immensely complicated because the number of drugs that successfully make it to the marketplace is very small. However many interesting plants one might collect in a field situation, of these perhaps one out of 1000 is likely to survive the process of testing before it’s approved by the FDA and taken into the marketplace. There are tremendous startup costs and risks associated with bioprospecting so the industry says, look, the rewards we receive have to compensate us for the risks associated with the drug discovery process. But there’s no question in my mind, and I hope it’s clear from the book, that I don’t approve of biopiracy. I think that drug companies have a moral obligation, if they develop a drug based on native knowledge, to engage native communities in profit-sharing strategies to make sure a reasonable percentage of the profits are returned to the people who made the discovery possible. That said, of course, there are lots of complexities. For example, a bioprospector may be working with only one village but the knowledge that he or she is drawing on might be distributed over tens of thousands of square miles. Returning profits to just one village doesn’t seem fair if the entire ethnic group shares that knowledge. So the question of what kinds of mechanisms have to be put in place to administer that profit-sharing can be very difficult. And then you ask what happens if traditional herbalists state that they use a drug for a specific purpose and scientists can’t find any evidence of bioactivity for that stated purpose. But in the process of studying that plant they discover *other* properties which seem to have no relationship to traditional usage, but which prove to be medically useful. Does that mean they have less of an obligation to reward the source community, or no obligation at all? The cases tend not to be as clear as they are presented in the literature. I had a moment when I was about to repeat [in the book] one of the alleged instances of biopiracy mentioned in dozens of sources. When I checked the facts, however, it

turned out that the whole case unraveled. The argument was that the rosy periwinkle (*Catharanthus roseus*) was a medicinal plant of Madagascar that the Eli Lilly Company became interested in as a result of the study of indigenous medical practices in Madagascar. After studying the plant, scientists discovered that it had a considerable anti-tumor effect, which led it to be studied for its use in childhood leukemia cases. They isolated two active ingredients, vincristine and vinblastine, which were patented. These drugs led to cure rates in the 90 percent range for acute childhood lymphocytic leukemia. The story was that Eli Lilly realized hundreds of millions of dollars of profit from this drug, which were never shared with Madagascar. But when I looked at the case it turned out that, for one thing, the plant may not have originated in Madagascar. There is some debate among botanists about it. There's no question that it became a cosmopolitan species by the late 1700s, or certainly by the early 1800s. It was being grown as an ornamental virtually all over the world in any environment that was suitable to it. It's turned up in pharmacopoeias of England, Pakistan, Vietnam, and Dominica. The ethnobotanical clues that got Eli Lilly interested in the plant came from a physician working in Jamaica, so it had nothing to do Madagascar. In that case it was thought to be a drug for diabetes. At the time they analyzed it, they couldn't find an active ingredient that had any impact on diabetes, but they discovered more or less by chance these other properties that had to do with cancer, which apparently were not echoed in the ethnobotanical information that had been collected from traditional medicinal systems. So suddenly you're several steps away from Madagascar. You're talking about a plant whose uses were discovered in the New World rather than the Old World, whose uses had little to do with what it was patented for. The question is who is being exploited here? Is it Madagascar? Is it the people of Jamaica? It's hard to say. A lot other cases look like that. There are a few cases that are cited as instances of outright theft, and some of the cases have merit. But when you look at the track record, the cases of absolutely unquestionable exploitation can be counted on the fingers of one hand. Now that doesn't mean that there isn't a tremendous potential for injustice. The system as it is currently set up is manifestly unfair to traditional communities and to folkloric knowledge. I don't dispute the need to do something about it. It's just that the rhetoric that's marshaled to justify those things often bears little resemblance to what happened in the real world. And what people don't ask is, what's the social value of a cure for leukemia, for example? Do we want to allow Eli Lilly to realize a significant profit on this drug that has saved thousands of lives? I have a small child. I don't have a problem with the idea that this company and scientists should be rewarded for the discovery of medicine that could save my child from an untimely death. There's a whole series of nested questions that one has to ask about the system. What's really good about the campaign against biopiracy is that the drug companies now, if only for public relations reasons, are much more likely to enter into negotiations with groups that make reasonable claims of proprietorship that should be acknowledged in profit-sharing. The book mentions two cases, one from South Africa and one from Samoa, which I think are the wave of the future because there is an acknowledgment of the economic and moral rights of the source community. The problem is that advocacy groups have set the bar so high for justice that they interfere with the possibility of arriving at negotiated solutions. That's what I am concerned about.

MS: You note that your research indicates that many lawyers and activists believe that intellectual property law holds the key to heritage protection. Could you elaborate a little on that?

MB: Let me give you an example that post-dates the book. UNESCO has just ratified the Convention for the Protection of Intangible Cultural Heritage. The problem with the Convention is that it assumes that heritage somehow can be turned into an inventory list that then becomes subject to an intellectual property regime that doesn't yet exist. When you start thinking about the staggering implications of creating cultural inventories for say, China or Russia or even the United States, where you've got over 500 federally recognized indigenous groups, to say nothing of other ethnic communities, it just completely beggars the imagination. And this is, unfortunately, what happens when the bureaucratic mind comes to grips with using an intellectual property model for the protection of heritage. I'm very skeptical about the value of that as a holistic solution to problems of culture and sensitivity and appropriation. I hasten to emphasize that I'm not against modifying and reforming existing intellectual property laws so that they more adequately address moral and proprietary claims of traditional peoples. I just think it needs to be done with great caution. What interested me in this project was what I see as the complete disconnect between one group of progressive scholars and advocates who are talking about protecting indigenous cultures by turning their cultures into intellectual property, on one hand, and then the Larry Lessigs and James Boyles of the world who say that the problem with our society is that there is *too much* intellectual property; that corporations simply have too many rights in information and the effect is creating a kind of stranglehold on creativity and exchange and communication in general. And so I don't see how on the one hand you could accept the merit in the arguments of Lessig and Boyle and others, that the problem is too much intellectual property, and at the same time accept the claim that what natives need is a level of intellectual property protection the likes of which the world has never seen. I just didn't see those two positions coming together in any meaningful way, so what I tried to do was to at least juxtapose them so that people could see some of the contradictions inherent in these arguments. Now, it's true that I think if you look at the Bellagio Declaration, for example, it acknowledges that disconnect. It says we have too much intellectual property on the corporate side, we have not enough intellectual property on the indigenous side, so let's scale it up in the one case and scale it back in the other to sort of create a level playing field. Unfortunately, that balanced approach has been pushed to the background in much of the subsequent debate, where people are advocating levels of protection that, even if they were feasible, even if they could be practically implemented, would have almost no precedent within existing intellectual property. When we start playing out these things to see what they might look like as a legal code, I think there are grounds for legitimate skepticism. It would make a lot of work for attorneys in the future, but I don't think it necessarily serves the best interests of native peoples or of society as a whole.

MS: In closing, Professor Brown, tell us about your web site.

MB: Well, the web site was just an experiment. I wanted the book to have a presence on the Web beyond the entry that Harvard University Press gave it. I had to do in a way that balanced several things. I wanted it to be text driven rather than image driven because that's what I do. I wanted it to be interesting and timely, but without a lot of maintenance overhead. It consists of two parts. One is resources that link the book to the world. There are a number of treaties and legal decisions that I couldn't include the book because of the economics of academic publishing today. But what I could do was put them in the web site. I could say to readers of the book, "If you're interested in this or you want to check my interpretation of this treaty or this judicial decision, here to a link to full text copy of that decision or that treaty." At the same time I could

also put it links to the sites of advocacy organizations of one sort or another which would be of interest to readers. Whoever might want to pursue the issues in greater depth, could check my facts or maybe develop a completely different argument. Suddenly I began to see how the web site could take the book into the world and give it a kind of freshness and timeliness that books by definition can't have. It turned out to be easy to put together. I have a total investment in the web site of \$120, which is what it cost to hire a student to do the Java scripts, which I'm not too good at. The photographs are all mine, so they were my intellectual property, and obviously my institution pays for the server space and so on. Then the rest of the site consists of links organized according to topics such as sacred places, art and music, native religions, indigenous rights in general. I try to freshen those up on a regular basis, and I also have kind of breaking news stories that I update every week or two as judicial decisions are made public.

MS: What's the address?

MB: www.williams.edu/go/native

MS: Any final thoughts on the protection of native heritage?

MB: The book advocates the exploration of non-judicial solutions to the problem of cultural protection. In other words, instead of trying to see it as a problem that can be solved solely through legislation and litigation, which has a place, I argue that many of these problems can be resolved in a more cost-effective way through boycotts, public education, and professional best practice standards that sensitize people to the issues at stake. In many cases, people are simply unaware of it. They think they're doing the right thing, you know, by using a native symbol. For them it's an act of respect to indigenous people, and they have no notion of how hurtful it might be or how destructive it could potentially be of native culture. Americans, if you give them a choice to do the right thing, more often than not, if you ask, they're willing to do it. We live in a multicultural society, and we're not always as sensitive as we should be, but by and large we manage to get along because we're aware that our neighbors have different views about certain things. But when we say to them that it's against the law for you to climb Devil's Tower; it's against the law for you to see the Bighorn Medicine Wheel, people get annoyed; they resist. Politically, I think there's a real cost there. That isn't to say that there aren't situations where federal intervention or state-level intervention is required and the right thing to do. But I'm uncomfortable with the idea that the government should regulate and protect culture. The history of government intervention in indigenous culture doesn't make me sanguine for the potential about getting the government heavily involved in policing and defending, protecting and defining what constitutes native culture. I think we should encourage legalistic forms of heritage protection only with great caution.

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Michael F. Brown, Ph.D. is Professor of Anthropology at Williams College in Williamstown, Massachusetts. He can be contacted at mbrown@williams.edu.