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## I See You - A Story from the Haudenosaunee

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### Cover Page Footnote

Simone Anter is a descendant of the Jicarilla Apache and Pascua Yaqui. She earned her B.A. from the University of Oregon in 2014 with a double major in philosophy and sociology and a minor in Spanish. She earned her J.D. from the University of California Los Angeles School of Law in 2017 with a specialization in critical race studies with a focus on indigenous human rights. She is currently an associate attorney at Columbia Riverkeeper in Hood River, Oregon. She would like to thank the editors of the American Indian Law Journal for their meticulous work on this paper, as well as Professor Angela Riley, whose seminar, "Cultural Property," inspired and facilitated this piece. In addition, she gives thanks to her peers for their helpful edits with a special thanks to Erica McMilin and Ben Myers. Lastly, the author would like to thank her parents, Bettina Anter and Travis Hardcastle, for their edits, insights, and for attending her lacrosse games in high school and college.

I SEE YOU—  
A STORY FROM THE HAUDENOSAUNEE

*Simone Anter, J.D.*

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# I SEE YOU— A STORY FROM THE HAUDENOSAUNEE

*Simone Anter, J.D.\**

## I. INTRODUCTION

*A young Apache woman sits on a bench outside of her university classroom; next to her is a stack of law books. She has just come from the first day of her first-year property class, where the professor lectured about the origins of property law devoid of any mention of Native people. As she sits she notices an individual walking along the sidewalk, towards her. This person wears a baseball hat with the Washington Redskins' logo embellished on the front, a grotesque caricature of an "Indian." The person's attire includes a T-shirt featuring a skull wearing a feathered headdress, probably merchandise from Kanye West's Yeezus tour. The human carries a lacrosse stick loosely over one shoulder, clutching a bag of popcorn in the other. As the person gets closer, the woman hears the individual loudly burst a bubblegum bubble. As the individual passes by the bench, they make no eye contact, not seeing the actual Indian in the proverbial room.*

Stories matter. They are a way of disrupting the status quo and adding a voice in a room of silence.<sup>1</sup> As Native scholars and

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<sup>1</sup> See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 302 (2002) [hereinafter *Reclaiming*].

critical race theorists have emphasized, who tells the stories, who listens to them, and what they say are crucial.<sup>2</sup> Tell any Indian<sup>3</sup> a story of how something was created and they will tell you a story back about how Indians invented that very same thing.<sup>4</sup> America tells a story about Indians; it tells the tale of an anachronistic figure, one that is no longer in the modern world: the vanishing Indian.<sup>5</sup> If something or someone is no longer there, then the unauthorized use of their very image, their very culture, is not problematic. If Indians are in fact gone, then there is no harmful consequence in taking Native cultural property and appropriating it.<sup>6</sup> There is a clear dissonance in society's mind between the image and culture of Indians and actual real Indian people. As people smoke their Spirit cigarettes, drive their Jeep Cherokees, cheer on the Washington Redskins, fly military missions with Apache helicopters, launch Tomahawk missiles from warships at sea, chew their bubblegum,<sup>7</sup> and play lacrosse, they ironically almost never think about actual Native people.

Native scholars have devoted a considerable amount of time to challenging the stereotypes embodied in these objects, asserting that there is a tangible harm in the stealing and stereotyping of culture. More specifically, they have focused on the role of law in

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*Stories*] quoting Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 203 (2001) ("Perhaps the most intangible aspect of Native Peoples' Existence is comprised within [tribal] stories.").

<sup>2</sup> See generally Martha Minow, *Storytelling and Political Resistance: Remembering Derrick Bell (with a Story about Dalton Trumbo)*, 28 HAR. J. ON RACIAL & ETHNIC JUST., 2, 8 (2012) (the piece seeks to "echo Derrick Bell's commitment to telling stories that challenge complacency.").

<sup>3</sup> This article will use Indian, Native, Native American, and Native People interchangeably.

<sup>4</sup> See *Reclaiming Native Stories*, *supra* note 1.

<sup>5</sup> Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TX. L. REV. 860, 881 (2016) [hereinafter *Owning Red*].

<sup>6</sup> This paper will use the definition of cultural property found in Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009) [hereinafter *In Defense of Property*] (defining cultural property as, "those things, both tangible and intangible, that are of such great and particular significance to the identity, experience, or survival of a people that they may deserve particular legal protection").

<sup>7</sup> See generally Vincent Schilling, *10 Native Inventions and Innovations that Changed the World*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jun. 29, 2014), <https://indiancountrymedianetwork.com/history/events/10-native-inventions-and-innovations-that-changed-the-world> [https://perma.cc/4XLK-EHYP] (listing ten inventions by Indians, including chewing gum and lacrosse).

dealing with the theft of culture because the law has failed and continues to fail miserably to protect Indians' cultural property.<sup>8</sup> There has been some legislation geared towards protection;<sup>9</sup> however, these laws are too few, too slow, and too narrow to actually provide the kind of robust safeguards that would protect Native culture before the harm occurs. To put it another way, Indians lack control over Native cultural property and lack legal recourse when that cultural property is appropriated.

This paper addresses why it is so difficult for legal institutions to adequately protect Indian cultural property and why cultural appropriation<sup>10</sup> is allowed to occur unfettered by legal repercussions. Specifically, this paper argues that cultural appropriation is part of the ongoing settler colonial project and that the first step in disrupting the settler colonial project is through visibility.<sup>11</sup> This paper also illustrates the reality that when settler normativity<sup>12</sup> acts as the baseline from which the laws function, legal reform is not the first place to begin when reclaiming one's cultural property. By looking at the particular experience of the Haudenosaunee<sup>13</sup> and their visibility within the lacrosse industry, this paper emphasizes that, in order to reclaim one's cultural property, one must first reclaim the story<sup>14</sup>—change the story as told

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<sup>8</sup> See Angela R. Riley, "Straight Stealing:" Towards an Indigenous System of Cultural Property Protection, 80 WASH. L. REV. 69 (2005) [hereinafter *Straight Stealing*] (discussing how current copyright regimes fail to protect indigenous peoples' cultural property). See generally PHILIP J. DELORIA, INDIANS IN UNEXPECTED PLACES (2004); *Reclaiming Stories*, *supra* note 1; *Owning Red*, *supra* note 5.

<sup>9</sup> *Reclaiming Native Stories*, *supra* note 1, at 635 (mentioning how NAGPRA was "designed to facilitate the return of cultural objects, as well as human remains" and how The Indian Arts and Crafts Act "attempt[ed] to prevent non-Indians from marketing copies of Native art forms."); see Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§3001-3013 (1994); Indian Arts and Crafts Act 25 U.S.C. §§305-305e (1994).

<sup>10</sup> Cultural appropriation is defined as "a taking, from a culture that is not one's own, intellectual property, cultural expressions and artifacts, history and ways of knowledge." *Reclaiming Native Stories*, *supra* note 1, at 300, quoting Lenore Keeshig-Tobias in Phillip Marchand, *Dancing to the Pork Barrel Polka*, TORONTO STAR B6 (Aug. 5, 1992).

<sup>11</sup> The term visibility will be defined later in the paper.

<sup>12</sup> The term "settler normativity" will be defined later in the paper.

<sup>13</sup> See section III(i) for a discussion and brief history of the Haudenosaunee.

<sup>14</sup> This paper uses the term "story" to evoke the particularly strong role that stories have in Native culture; as Professor Tsosie explains, "[s]tories are the bedrock of cultural survival for Native people because they contain the philosophical core of tribal cultures, including the norms and values that structure tribal world views." See *Reclaiming Native Stories*, *supra* note 1, at 303. Furthermore, the use of "story" is also meant to evoke the tradition in

from the settler's perspective to a story crafted and narrated by indigenous peoples—and in order to do this, one must be visible. The term “reclaim” is used to illustrate that when we seek visibility in a system that was created to deny our existence and reinforces this denial through the appropriation of our cultural property, it is necessary for Indians to assert our presence where we are unwanted and reclaim those aspects of our culture that have been stolen. Natives must exert cultural and political sovereignty in order to be visible and to challenge settler normativity and the settler cultural gaze.

Part I of this paper outlines the theory of settler colonialism and its defining characteristics pertaining to the United States' relationship with Indian Nations. Part II explores cultural appropriation as part of the settler colonial project and how legal institutions instantiate that project. This section will define the role and meaning of “visibility” in the context of disrupting the settler colonial project. Part III considers lacrosse and the Haudenosaunee as an example of how the settler colonial project can be disrupted through visibility. Lastly, Part IV examines critiques of this paper's argument and responses, as well as examples of how visibility may work in other cultural property contexts and may ultimately lead to legal changes.

## II. SETTLER COLONIAL THEORY

Exploring the notion that the United States is a settler colony elucidates why and how the law-making institutions of the Nation are reluctant to protect Native cultural property before it is appropriated. In order to understand how to change the law to address Native cultural appropriation, it is crucial to understand on what assumptions law-making institutions rely. The next section will look at some of these assumptions.<sup>15</sup>

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Critical Race Theory of telling stories that disrupt and challenge complacency. See Minow, *supra* note 2.

<sup>15</sup> See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xxix (Kimberlé Crenshaw et al. eds., 1995) (explaining that Critical Race Theory challenges the assumptions and baselines upon which laws and institutions are built, and arguing that these baselines are not neutral but are instead formed on an unjust system of racial power).

### A. *Settler Colonialism is A Distinct Type of Colonialism*

Settler colonialism<sup>16</sup> is a distinct type of colonialism, though the two forms “routinely coexist and reciprocally define each other.”<sup>17</sup> Commonly, colonialism is defined as:

A relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers in pursuit of interests that are often defined in a distant metropolis. Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule.<sup>18</sup>

On the other hand, settler colonialism is “premised on the domination of a majority that has become indigenous.”<sup>19</sup> Thus, settler colonialism is a situation where colonizing occurs from within, as opposed to a distinct and removed metropolis that colonizes from afar.<sup>20</sup> For example, in the early formation of the United States, the colonizing of indigenous peoples occurred at the local level, with settlers viewing the United States as their home as opposed to Europe. Settler colonialism operates through the replacement of Native peoples with the invasive settler-society that creates a distinct identity and sovereignty—to that of its origin, e.g. English or European, and that of the indigenous populations present. The settlers, in order to reinforce their sovereign claims to this land, needed to simultaneously deny and distinguish Indian sovereign claims. Thus, settlers created law-making institutions to hold the

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<sup>16</sup> This paper uses “settler colony” to describe nations with this form of colonialism. Settler society, settler(s), and settler colonialist are used to describe the society within these colonies.

<sup>17</sup> LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW* 4 (2010) [hereinafter VERACINI, *SETTLER COLONIALISM*].

<sup>18</sup> *Id.* at 5 (citing JÜRGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* (1997)).

<sup>19</sup> VERACINI, *SETTLER COLONIALISM*, *supra* note 17, at 5 (explaining that settlers are made by both conquest and immigration and that settler colonialism is less defined by domination by a metropolitan core and skewed demographics).

<sup>20</sup> *Id.* at 6.



settlers' claims as the only ones worthy of sovereign entitlement. Three specific ontological moments mark settler colonialism as a distinct form of colonialism: first, settlers come to stay; second, colonial invasion is a structure, not an event; and lastly, it seeks its own end. Each of these will be discussed in turn.

### B. *They Come to Stay*

Settlers have no intention to return to the place of their origin and as such they seek to make the place of their arrival their own. As the settler colonial theorist Lorenzo Veracini suggests, "Settler colonialism obscures the conditions of its own production,"<sup>21</sup> meaning that "the peaceful settler hides behind the ethnic cleanser."<sup>22</sup> Today, always seeking to whitewash ethnic cleansing within a pioneer narrative, settlers tell the story that "colonization is an inherently non-violent activity; the settler enters a new, empty land to start a new life; indigenous people naturally and inevitably vanish, it is not settlers that displace them."<sup>23</sup> The need to keep and maintain the settler colonial society's self-justifying and peaceful story means that settler colonialism is "premised on the systematic disavowal of any indigenous presence."<sup>24</sup> For the settler to effectively claim authentic sovereignty over the new land they "discovered," it is necessary to dismiss indigenous sovereignty as moot and unfathomable.

In order for the invaders to stay and make a new home, the settlers had to base their assertion of power on the complete denial of Indians' existence. As Natsu Taylor alludes, "they [settlers] did not come to join someone else's society; they came to establish a state over which they could exercise complete control."<sup>25</sup> Seeking to gain control over an area already inhabited by sovereign Nations meant that the settler had to disavow that sovereign presence as being unworthy of recognition, as being savage. Thus, the settler colonists brought with them a presumption of "sovereign

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<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing Peter Pels, *The Anthropology of Colonialism: Culture, History, and the Emergence of Western Governmentality*, 26 ANN. REV. ANTHROPOLOGY 172–74 (1997)) (discussing the ongoing invisible nature of settler colonialism).

<sup>24</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17, at 14.

<sup>25</sup> Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A&M U. L. REV. 1 (2014).

entitlement”<sup>26</sup> on which the law-making institutions were built in order to support, strengthen, and entrench their colonial claims.

### C. *Settler Colonialism is a Structure not an Event*

As Patrick Wolfe articulates, “settler colonialism is a structure not an event.”<sup>27</sup> Settlers, in order to stay, constantly seek out territory; this serves as the primary motivation for the elimination of indigenous persons. This need to eliminate becomes an “organizing principle for the settler-colonial society” as opposed to a one-time occurrence.<sup>28</sup> Ironically, while settler colonial society needs to eliminate Natives in order to establish its “authentic” sovereign claim to territory, the settler colonial society also seeks to salvage indigeneity “in order to express its difference—and, accordingly, its independence—from the mother country.”<sup>29</sup>

As previous scholars have noted, during the Boston Tea Party, Samuel Adams and other protestors, in an egregious example of early cultural appropriation, dressed as Mohawk Indians as they asserted their independence from Great Britain.<sup>30</sup> This disturbing moment in history exemplifies how settlers adopt indigeneity when it allows them to assert their “difference” from other outside powers. Therefore, the process of elimination does not simply replace Natives; it must retain imprints of Native society in order to further substantiate the settler colonial society’s claim as opposed to others.<sup>31</sup> Settler colonial society thus operates within a contradictory framework that requires the elimination of Indians while, at the same time, harboring the need to retain vestiges of Indian culture to legitimize the settler’s, otherwise illegitimate, status: this framework becomes the organizing principle for the settler society.

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<sup>26</sup> Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. ON RACIAL & ETHNIC JUST. 31 (2015). VERACINI, *Settler Colonialism*, *supra* note 17, at 6.

<sup>27</sup> Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES., 387, 388 (2006).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 389.

<sup>30</sup> *Owning Red*, *supra* note 5, at 873. See PHILIP J. DELORIA JR., PLAYING INDIAN 31–32 (1998) (discussing the phenomenon of playing Indian within a society that subsequently disavowed actual Indians).

<sup>31</sup> Wolfe, *supra* note 27, at 389.

The Doctrine of Discovery provides another clear example of the settler colonial society's need for land and legitimacy.<sup>32</sup> Chief Justice Marshall opined in *Johnson v. M'Intosh* that Indians retained the rights of occupancy to land; however, their ability to sell land to whomever they wanted was necessarily diminished by the Doctrine of Discovery, which granted the United States the exclusive right to acquire Indian title and the right of first refusal (preemption).<sup>33</sup> The Doctrine of Discovery necessarily meant that the sovereign who "discovers" un-owned land had supreme title.<sup>34</sup> As Wolfe suggests, "the distinction between dominion and occupancy illuminates the settler colonial project's reliance on the elimination of Native societies."<sup>35</sup> In practice, the United States' exclusive right to buy always superseded the Native's right to *not* sell.<sup>36</sup> This example shows that the elimination principle in settler colonialism means more than just the absolute genocide of Indians. Since settler colonialism is a structure, not an event, it underscores the use of law-making institutions as a tool to structure and legitimize a settler colonial society while simultaneously delegitimizing indigenous claims of sovereignty.<sup>37</sup>

#### D. *Settler Colonialism Seeks its Own End*

The last premise of settler colonial theory can be encapsulated in the words of Veracini: "[A] triumphant settler colonial circumstance, having ceased to be a dependency of a colonizing metropole, having tamed the surrounding 'wilderness,' having extinguished indigenous autonomy, and having successfully integrated various migratory waves, has also ceased being settler colonial."<sup>38</sup> Thus, settler colonialism seeks its own end, always

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<sup>32</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 574 (1823) (the first opinion in the Marshall Trilogy setting the tone for property rights in the United States).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Wolfe, *supra* note 27, at 391.

<sup>36</sup> *Id.* (citing Harvey D. Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission*, in *IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS* 35–70 (IMRE SUTTON, ed., 1985)).

<sup>37</sup> *Id.* at 390. See also Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 184 (2014) (discussing the embodiment of settler colonialism as a structure in which "Indian rights were legally protected, but harshly limited, and ultimately subject to the power and politics of the conquering nation.").

<sup>38</sup> VERACINI, *SETTLER COLONIALISM*, *supra* note 17, at 21.

yearning to transcend its origin as a settler colonial society. The settler always articulates an end story; “settler colonialism forever proclaims its passing but it never goes away.”<sup>39</sup> The complete elimination of Indians, “despite recurring fantasies of ultimate suppression, is never complete and settler society is always... a society to come, characterized by the *promise* rather than the practice of a truly settled lifestyle.”<sup>40</sup> A settler society is always one to come because the settler has not yet eliminated the Native presence completely, yet it tells the story of Native elimination as part of its genesis tale.<sup>41</sup> Thus, the very presence of Indians and their “authentic” indigeneity delegitimizes the settler colonial society because Indians are not supposed to be there: we upset the story the settler wishes to tell.<sup>42</sup> The continuity of Indians and Native Nations represents an obstruction to the settler who must constantly target the modern Indian and delegitimize Indian claims. As such, settler colonial society, always confronted with the possibility of illegitimacy, uses various tools, which constantly target different aspects of indigenous life in order to physically or metaphorically eliminate the Indian.<sup>43</sup> Cultural appropriation is one such insidious tool.

### III. CULTURAL APPROPRIATION AS PART OF THE SETTLER COLONIAL PROJECT

#### A. *Settler Colonialism as Bacteria*

Settler colonialism has been likened to bacteria,<sup>44</sup> and its form operates in quite the same way. For example, bacteria are clonal in that they “inherit their parent’s genetic makeup,” however, at the same time they are also affected by certain external conditions that may lead to rapid evolution.<sup>45</sup> Similarly, settler colonists

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<sup>39</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17 at 9 (explaining what Patrick Wolfe means when he says that settler colonialism is a structure not an event because it is never complete).

<sup>40</sup> *Id.* at 23.

<sup>41</sup> As can be seen by the over 560 federally recognized tribes in the United States.

<sup>42</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17, at 34.

<sup>43</sup> *Id.* (examples of tools include legislatures enacting removal policies, missionaries converting Indians into society, assimilation policies, etc.)

<sup>44</sup> *Id.* at 21 (observing that, while colonialism is like a virus, settler colonialism is more like a bacteria).

<sup>45</sup> *Id.*

establish their societies by simultaneously cloning and “rapidly developing unique cultural patterns.”<sup>46</sup> Indeed, the democratic institutions of the United States were plagiarized from the Iroquois Confederacy’s unwritten democratic constitution without so much as a citation.<sup>47</sup> Furthermore, “settlers are seen as ‘bacterially’ replacing them [indigenous peoples] out of their superior efficiency.”<sup>48</sup> For Example, United States’ democratic ideals, even if based on the Iroquois Confederacy, are considered superior in this way.<sup>49</sup> Cultural appropriation is both a way of cloning the environment over which the settlers lay their claim and a way of replacing the indigenous population that must vanish in order for the settlers to live a legitimized actuality.

### B. *The Settler Cultural Gaze and Cultural Appropriation*

The settler gaze is the notion that on the one hand the settler can both perceive and dismiss the Indian presence, and on the other hand the settler always sees a settler society to come.<sup>50</sup> Building on this definition, the settler cultural gaze is the idea that the settler can, dismiss the Indian presence completely, while simultaneously only seeing the Indian when it reflects back what the settler wishes to see as an authentic image. An example of the settler cultural gaze can be seen in Donald Trump’s statements before Congress in 1993 about Indian casinos, in which he said, “they don’t look like Indians to me.”<sup>51</sup> In this statement, Trump exudes the settler cultural gaze: the Indians that he sees in the world do not look like the Indians the settler has created in his own mind. Therefore, in American society’s mind [Native] legal claims are illegitimate.

In unpacking the settler cultural gaze, Professor Rebecca Tsosie’s writing is illuminating, “culture is fundamentally tied to

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<sup>46</sup> *Id.*

<sup>47</sup> *Iroquois Constitution: A Forerunner to Colonists’ Democratic Principles*, N.Y. TIMES (June 28, 1987), <http://www.nytimes.com/1987/06/28/us/iroquois-constitution-a-forerunner-to-colonists-democratic-principles.html> [<https://perma.cc/B8LU-A9L7>].

<sup>48</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17 at 21.

<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.* at 83.

<sup>51</sup> Gillian Brockell, “*They Don’t Look Like Indians to Me: Donald Trump on Native American Casinos in 1993*,” WASHINGTON POST (July 1, 2016), [https://www.washingtonpost.com/video/politics/they-dont-look-like-indians-to-me-donald-trump-on-native-american-casinos-in-1993/2016/07/01/20736038-3fd4-11e6-9e16-4cf01a41dec\\_b\\_video.html](https://www.washingtonpost.com/video/politics/they-dont-look-like-indians-to-me-donald-trump-on-native-american-casinos-in-1993/2016/07/01/20736038-3fd4-11e6-9e16-4cf01a41dec_b_video.html) [<https://perma.cc/HT8B-FLX7>].

systems of power”<sup>52</sup> and often occurs in a societal context of power imbalance and racism. She further describes that, “the maintenance of relations of power may depend upon the dominant group’s ability to exercise control over specific cultural meanings.”<sup>53</sup> Settler colonialism works in such a way that it strips Indian people of who and what we are, essentially our entire identity. For settler colonies, the need to constantly disavow the presence of Natives leads to the actual claiming of Native cultural property as that of the settlers, thereby structuring the settler’s world to reinforce this appropriation and to reflect only the settler cultural gaze.

This societal structuring empowers the settler. Professor Angela Riley and Kristen Carpenter have eloquently penned that “U.S. law and policy has long facilitated the process of non-Indians ‘owning *Red*’—by which we mean the widespread practice by which non-Indians claim and use Indian resources for themselves, often without attribution, compensation, or permission, causing harm and loss to Indian people.”<sup>54</sup> While many settler colonial policies aim at eliminating the Indian physically,<sup>55</sup> many other policies and practices aim at eliminating the Indian metaphorically.<sup>56</sup> Cultural appropriation is one such practice.

By misusing the cultural property of Natives, the settler reinforces his or her perceived indigeneity to the region and forces the idea of indigenous peoples into the past.<sup>57</sup> As the settler continues to appropriate Native culture, the settler reinforces a stereotyped way in which Indian people and Native Nations are seen over time. This stereotyped appropriation of Native culture leads to the invisibility of actual Indian people and culture because “real” Indians do not mirror the “Indian” that the settler has crafted. This process “quickly establishes a situation in which a lack of recognition ensures that really existing indigenous people and our

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<sup>52</sup> See *Reclaiming Native Stories*, *supra* note 1, at 311.

<sup>53</sup> *Id.*

<sup>54</sup> See *Owning Red*, *supra* note 5, at 869.

<sup>55</sup> Boarding schools aimed at assimilation, religious conversion aimed at destroying native culture, their goal through assimilation was termination of Indian tribes, removal, genocide, etc. See generally PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* (2004).

<sup>56</sup> VERACINI, *SETTLER COLONIALISM*, *supra* note 17, at 37 (describing different modes of transfer within a settler colony, one being perception transfer “when indigenous peoples are disavowed in a variety of ways and their actual presence is not registered”).

<sup>57</sup> *Id.* at 39, 41 (explaining that “the indigenisation of the settler is mirrored by a parallel exogenisation of the Indigenous”).

grievances are seen as illegitimately occupying the indigenous section of the population system.”<sup>58</sup>

The settler cultural gaze thus leads to a series of sardonic situations, to which the settler is often oblivious. For example, it is seen as irreproachably reasonable for the newly appointed Secretary of the Interior (in part, responsible for federal land and administering programs related to Native Americans), Ryan Zinke, to arrive at work riding a horse named Tonto (a fictional Indian character of either Potawatomi or Comanche origin who accompanies the Lone Ranger in a popular western).<sup>59</sup> Because Tonto is a cultural appropriation of what an Indian is, the act of riding a horse of the same name to a job that administers Native American programs is not seen as contradictory or ironic by the settler; in fact he or she might not even notice since “real” Indians look nothing like the Tonto<sup>60</sup> of his or her imagination.

The settler cultural gaze may happen with either tangible or intangible cultural property. For example, a War Bonnet (tangible) is a sacred item holding spiritual and political importance for Indians; however, for settlers a War Bonnet may invoke the idea of Coachella, Thanksgiving, Kanye West’s Yeezus tour, the Boy Scouts, Peter Pan, or the wild frontier. Settlers do not think of Indians. By associating a War Bonnet with the stereotypical appropriation that the settler has shrewdly created, indigenous opposition to the use of War Bonnets by non-Indians as costumes or decorations falls on deaf ears, as the settler cannot even cognize the problem.<sup>61</sup>

Another example is that of Native spirituality (intangible). For Natives, spirituality varies greatly across tribes and regions, yet

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<sup>58</sup> *Id.* at 41.

<sup>59</sup> Julie Bykowicz, *Zinke Rides a Horse to Work on First Day of the Job*, USA TODAY (Mar. 2, 2017), <https://www.usatoday.com/story/news/politics/2017/03/02/zinke-rides-horse-work-first-day-job/98633770/> [<https://perma.cc/PHC9-3PCT>]. See The Lone Ranger, IMDB, [http://www.imdb.com/title/tt0041038/?ref\\_=nv\\_sr\\_2](http://www.imdb.com/title/tt0041038/?ref_=nv_sr_2) [<https://perma.cc/7BPF-GYAA>].

<sup>60</sup> At least Tonto was actually played by a First Nations’ actor Jay Silverheels, see Jay Silverheels, IMDB, <http://www.imdb.com/name/nm0798855/bio> [<https://perma.cc/DQN2-8V6M>].

<sup>61</sup> See, e.g., *Navajo Nation v. Urban Outfitters*, No. 12-cv-00195 (2016) (Navajo Nation sued Urban Outfitters for trademark infringement by illegally selling items under the name “Navajo.”). The case ended up settling outside of court. Andrew Westney, *Navajo Nation, Urban Outfitters, Settle Trademark Dispute*, LAW 360 (Oct. 3, 2016), <https://www.law360.com/articles/847696/navajo-nation-urban-outfitters-settle-trademark-dispute> [<https://perma.cc/5EFT-7W5C>].

it always includes certain practices, ceremonies, and traditions that must be used appropriately and respectfully.<sup>62</sup> In contrast, when a settler envisions Native spirituality, he or she thinks of the stereotyped appropriation of Native spirituality that he or she has confronted, usually in some extremely distorted version. This may be a scene from a television show like *Shameless*, where a sweat lodge ceremony is depicted as being able to cure a failing liver, allowing Indians to “drink themselves stupid.”<sup>63</sup> Likewise, the settler may just simply envision Indians clad in loincloths dancing around a fire in the middle of the night, whooping at the moon. Settler policy makers further instantiate this image by failing to adequately protect Native religious claims that do not match the stereotyped version<sup>64</sup> or by promoting policies aimed at eradicating Native spirituality all together.<sup>65</sup>

These examples illustrate that the use of cultural appropriation by the settler is a tool brandished to render the indigenous population invisible and therefore non-existent, leaving Indians and Indian legal claims of cultural appropriation illegitimate. As Philip Deloria writes, “war chants and Indian-named automobiles make their way into our souls, and they lay the groundwork for day-to-day social interactions. They underpin the many ways non-Indian Americans blithely ignore the requests, opinions, and assertions of Native people.”<sup>66</sup>

### C. *Visibility as a Challenge to Settler Normativity*

Settlers fear revenge—“ongoing concerns with existential threats and a paranoid fear of ultimate decolonization can be seen as a constituent feature of the settler colonial situation.”<sup>67</sup> Settler colonies work relentlessly to erase Native people and our authentic

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<sup>62</sup> See generally VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* (1992) (discussing a contemporary take on Indian religion).

<sup>63</sup> *Shameless: There's the Rub*, Season 4, Episode 6 (aired Feb. 9, 2014).

<sup>64</sup> See *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (holding that the state could deny unemployment benefits to a person who was fired for violating a state law prohibiting peyote use, even though the use was for religious reasons).

<sup>65</sup> See *We Also Have a Religion: American Indian Religious Freedom Act and the Religious Freedom Project of the Native American Rights Fund*, NARF (Winter 1979), <http://www.narf.org/nill/documents/nlr/nlr5-1.pdf> (discussing how federal law aimed at eliminating Indian religion) [<https://perma.cc/H585-D98A>].

<sup>66</sup> PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 225 (2004).

<sup>67</sup> VERACINI, *SETTLER COLONIALISM*, *supra* note 17, at 81.



culture from society; therefore, the first move in decolonizing from the settler colony is to be actively and robustly visible from within. While settlers use cultural appropriation to erase Native peoples, settlers' institutions reinforce this process by making them extremely indifferent to cultural appropriation claims. As Professor Tsosie explains, "the existing legal structure is not set up to account for the interests that Native people are expressing."<sup>68</sup> Furthermore, she explains that Native cultural interests cannot be protected under a property rights theory of law because the law refuses to *see* the cultural aspect of Indigenous peoples' claims. This is problematic because "cultural resources, both tangible and intangible, are of critical importance to Native peoples, because Native culture is essential to the survival of Indian Nations as distinctive cultural and political groups."<sup>69</sup>

The idea that indigenous peoples' cultural property claims are not taken seriously because they do not fit into the current property rights framework can be described as settler normativity. Settler normativity suggests that we are all defined with the settler in mind and we are either the same as or different from the settler. Settler normativity is part of the fundamental need of the settler to erase and distort Natives and this need is the baseline from which the laws function.<sup>70</sup>

The indigenous Other ultimately does not exist: it is either a being that, literally, cannot be touched, or a life form whose identity and appearance invariably assumes the shape that the colonizer is willing to project. It is thus an encounter characterized by either a lack of perception, or an awareness that is systematically distorted by wishful thinking.<sup>71</sup>

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<sup>68</sup> See *Reclaiming Native Stories*, *supra* note 2, at 309.

<sup>69</sup> *Id.* at 300.

<sup>70</sup> See also Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1724 (1993) (article looks at the idea that whiteness functions as the baseline from which the laws function, and as such we are all looked at as either the same as or different from whiteness. In this same sense settler normativity looks to the particular situation of Indigenous peoples and how their legal claims are rendered invisible when the settler is the normative baseline).

<sup>71</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17, at 86; see also RAY BRADBURY, *THE MARTIAN CHRONICLES* (Harper Collins eds., 2001).

Thus, in a settler society one must necessarily forego the idea that “the law is morally benevolent or even neutral” in order to properly understand the role that the law plays in allowing cultural appropriation to function and what is at stake.<sup>72</sup> As such, legal reform—because of settler normativity—is not the first place, nor the most effective avenue for Indian people to reclaim cultural property. To challenge and disrupt settler normativity, we must stand in our own power—either as individual Indians or as Native Nations. Indians must be visible as the first act of cultural property reclamation. To attain true visibility, Indian people must exercise cultural sovereignty (meaning that Native people “exercise their own norms and values in structuring their collective features” by being seen as they wish to be seen)<sup>73</sup> and political sovereignty (meaning that Native people must exercise their rights of governance over their Native Nations).<sup>74</sup> Visibility, without political and cultural sovereignty is not standing in one’s own power and is thus not true visibility. Visibility stripped of sovereignty allows settler normativity to continue to function and for cultural appropriation to continue unhindered; it is merely the reflection of the settler cultural gaze. The example of the Native athlete in the following section illustrates this concept.

#### D. *The Native Athlete*

*“Hey Victor! Who do you think is the greatest basketball player ever?”*

*“That’s easy: Geronimo.”*

*“Geronimo? He couldn’t play basketball, man. He was Apache, man. Those suckers are about three feet tall.”*

*“It’s Geronimo, man. He was lean, mean and bloody.”*

*“He would’ve dunked on your flat Indian ass and cut it off.”*

*“Yeah, some days it’s a good day to die.”*

*“Some days, it’s a good day to play basketball.”*

*—Smoke Signals (1998)<sup>75</sup>*

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<sup>72</sup> Andrea Smith, *The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement*, 2 SETTLER COLONIAL STUD. 69, 71 (2012), <https://www.tandfonline.com/doi/abs/10.1080/2201473X.2012.10648842>.

<sup>73</sup> See *Reclaiming Native Stories*, *supra* note 1, at 306.

<sup>74</sup> *Id.* at 308 (“The conflict over cultural appropriation clearly emphasizes the nature of Native peoples’ sovereignty as both political and cultural.”).

<sup>75</sup> SMOKE SIGNALS (Miramax 1998).

In American settler society, the law and Indian policy have facilitated brief moments of Indian inclusion and visibility; however, this settler-controlled visibility has always been premised on—and part of—the greater project of Indian assimilation, devoid of Indian cultural and political sovereignty. Take, for example, the emergence of the successful Native athlete.<sup>76</sup> At a time when segregation completely disallowed Blacks and Latinos from competing with white athletes, historical accounts suggest “Indian athletes may have first started competing formally with non-Indians during a mid-nineteenth-century upsurge of interest in foot racing.”<sup>77</sup> At a time when Ivy League schools were using sports as a means of re-entrenching the idea of white masculinity in an era of increasing modernity, Indian boarding schools were given the task of, “killing the Indian, in order to save the man.”<sup>78</sup> Thus, Indian boarding schools such as Carlisle and Haskell worked relentlessly to further the settler colonial project of assimilating, erasing, Native Americans.<sup>79</sup>

From these schools emerged various sports teams and athletes, which “made it clear to coaches and sports fans alike that Indian communities were producing great athletes who could enrich a football or baseball program.”<sup>80</sup> As Indians used athletics as an opportunity for travel, education, fun, and honor, so too did the settler colonial project use sports for its own advantage:

At the same time as they revoked primitive difference, however, such performances also affirmed assimilation, social evolution, successful

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<sup>76</sup> PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 114 (exploring the Native athlete’s emergence into mainstream white sports cultural while also acknowledging the robust tradition of sports in Native American culture); *see also* VERACINI, *SETTLER COLONIALISM*, *supra* note 17 (discussing how settler colonialism is built upon the relationship of three, which consists of the Settler, the Indigenous population, and the Exogenous Other).

<sup>77</sup> *Id.* at 115.

<sup>78</sup> *Id.* at 118 (“sports offered a sense of community to those anxious about the rise of an anonymous mass society”) Capitan Richard H. Pratt on the education of Native Americans.

<sup>79</sup> PHILIP J. DELORIA, *INDIANS IN UNEXPECTED PLACES* 127 (2004) (explaining that “Like Carlisle, Haskell continued to funnel Indians onto college, professional, and Olympic teams in track, basketball, football, baseball, wrestling, and boxing. Other Indian schools—especially Sherman in Riverside, California—ran similar successful programs.”).

<sup>80</sup> *Id.* at 119.

Christianization, and evolving forms of ongoing domination. The United States could easily assimilate Indian difference—where better than a baseball park or football stadium?—and fans could understand viscerally how such assimilation would strengthen a multicultural, transnational America.<sup>81</sup>

Indians' success in the athletic arena was premised on the notion that Indians could beat white men, not because they were Indian, but because they were becoming more like white men.<sup>82</sup> Indian athletes were seen as success stories from Indian boarding schools; the schools were successful in creating Native athletes who were beating white men because they were becoming properly assimilated into white settler society. Thus, while Indian athletes may have been visible in the early nineteenth century, their visibility was rooted in the settler colonial project, which insured that "Indian athletes were often expected to reflect white cultural understandings of Indianness back to their predominantly white audiences."<sup>83</sup> In other words, Indians were allowed to be visible only if they were visible in the way the settler believed them to be, i.e. reflecting the settler cultural gaze.<sup>84</sup> This situation shows how Indians' lack of cultural and political sovereignty insured that even with visibility, the Indian was only reflecting the settler cultural gaze. The early competitive sports industry's inclusion of Native athletes thus exemplified the contradictory showcasing of the Indians' athletic "primitive" prowess, as well as the settler's success in assimilation.

Ironically, in allowing Native athletes to be visible, but stripped of cultural and political sovereignty, the vehicle chosen, athletics (most commonly football, basketball, and foot racing) all have deep roots in Indian cultural heritage. As Philip Deloria writes, "the idea of sport was nothing new to Native people."<sup>85</sup> Moreover, Indians are responsible for the creation of at least ten Olympic sports

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<sup>81</sup> *Id.* at 122.

<sup>82</sup> *Id.* at 124.

<sup>83</sup> *Id.* at 129.

<sup>84</sup> *See, e.g., id.* at 129–30 (telling the story of Native athletes entering towns before games wearing headdresses and blankets as part of the show and further "playing Indian" even though the Indian athletes were often times more educated than the people in the town).

<sup>85</sup> *Id.* at 115.

and many more non-Olympic sports.<sup>86</sup> Consequently, while one can look at the Native athlete as simply a story of perpetrated assimilation that reflects back the cultural stereotype of a people, it is much more than that. Perpetrated assimilation reflects not only the settler's insatiable need to assimilate the Indian, but also the settler's ravenous need for the appropriation of Indigenous cultural property in order to legitimize the settler while simultaneously erasing the Indian.

#### IV. HAUDENOSAUNEE RECLAIMING OF LACROSSE

If settler colonialism is in fact bacteria, then Indigenous visibility within the settler colony is the first dose of antibiotics. The story of the Haudenosaunee and lacrosse exemplifies how a Native Nation stood in its own power to reclaim cultural property and robustly insert its visibility into a system that refuses to see its people. The Haudenosaunee exemplify what can happen when a Native Nation exercises visibility by being culturally and politically sovereign. If “the stories settlers tell themselves . . . about themselves are crucial to an exploration of settler colonial subjectivities,”<sup>87</sup> then equally as important is the story that Indian people tell about themselves and their culture, in order to dismantle the settler colonial subjectivities and stand in their own power.

##### A. *History of Lacrosse*

Different settlers call the Haudenosaunee people by different names: the French refer to them as the Iroquois Confederacy, while the English call them the League of Five (now Six) Nations.<sup>88</sup> Most importantly however, they call themselves the Haudenosaunee Confederacy, the People of the Longhouse.<sup>89</sup> The Confederacy was

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<sup>86</sup> Brad M. Gallagher, *The Disappearance of the Great American Indian Athlete*, 24 ENT. & SPORTS LAW. 1 (2006) (including, but not limited to, lacrosse, stick ball, shinny, field hockey, ice hockey, overhand swim stroke, and basketball.)

<sup>87</sup> VERACINI, SETTLER COLONIALISM, *supra* note 17, at 103.

<sup>88</sup> HAUDENOSAUNEE CONFEDERACY, <http://www.haudenosauneeconfederacy.com/aboutus.html> [https://perma.cc/Z2RH-MUHX]. See generally FRANCIS JENNINGS ET AL., THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE (1st ed. 1985) [hereinafter IROQUOIS DIPLOMACY].

<sup>89</sup> HAUDENOSAUNEE CONFEDERACY, *supra* note 88.

originally comprised of the Five Nations of New York: the Mohawk, Oneida, Onondaga, Cayuga, and Seneca People, and in the early eighteenth century they adopted into their Confederacy the Tuscarora of North Carolina as they were forced North as refugees.<sup>90</sup> The exact date of the joining of the Five Nations is unknown and is considered by the Haudenosaunee to be time immemorial to the people.<sup>91</sup>

The Haudenosaunee have been playing lacrosse in their homeland since the beginning of time, when the land was covered in water; it is a sport, a gift, and most importantly a story: “lacrosse was a gift to us from the Creator, to be played for his enjoyment and as a medicine game for healing the people.”<sup>92</sup> Lacrosse is also the physical telling of a story about a great ball game between the four-legged animals and the winged birds.<sup>93</sup> Originally, the game was

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<sup>90</sup> IROQUOIS DIPLOMACY, *supra* note 88, at 9.

<sup>91</sup> HAUDENOSAUNEE CONFEDERACY, *supra* note 88 (describing the Confederacy—“Upon confederation each nation took on a role within the metaphorical longhouse with the Onondaga being the Keepers of the Fire. The Mohawk, Seneca and Onondaga acted as the Elder Brothers of the confederacy while the Cayuga and Oneida were the Younger Brothers within Grand Council. The main meeting place was and still exists today on Onondaga territory.”)

<sup>92</sup> *The Story of Lacrosse*, IROQUOIS NATIONALS, <http://iroquoisnationals.org/the-iroquois/the-story-of-lacrosse/> (last visited Apr. 11, 2017).

<sup>93</sup> *Id.* (The story is as follows:

The captains for the four-legged animals were: The Bear – whose weight overpowers all opposition, The Deer – whose speed and agility to stop and go made him invaluable to the team, and The Great Turtle – who could withstand the most powerful blows and still be able to advance towards the opposition. The captains for the winged birds were: The Owl – who excelled in the ability to keep his eye on the ball, no matter what position or direction the ball may be traveling. The Hawk and Eagle – both excel in quick, swift movements. These three represented all the winged animals. While the birds were preparing for the game, they noticed two small creatures, hardly larger than a feather, climbing up a tree where the winged leaders were perched. Upon reaching the top, they humbly asked the captains to be allowed to join the lacrosse game. The Eagle, easily noticing that they were a squirrel and a mouse, inquired as to why they didn’t ask to join the animal team. The little creatures explained that they had asked, but had been laughed at and rejected because of their small size. On hearing their story, the bird captains took pity on them, but wondered how they could join the birds’ teams if they had no wings. After some discussion, it was decided that they would try to make wings for the little fellows, but how would they do it? By happy inspiration, one bird thought of the water drum that is used in social and ceremonial gatherings. Perhaps a piece of the drum’s leather could be taken from the drumhead, cut and shaped and attached to the legs of one of the small creatures. It was done and thus originated the bat. The ball was now tossed into the air, the bat was told to catch it. With his skill in dodging

played with hundreds of players, on fields that were miles long, and for several days.<sup>94</sup>

As one variety of stickball game played by Indians in North America, lacrosse is distinguishable from field hockey and shinny “by the use of a netted racquet . . . to pick the ball off the ground, throw, catch and convey it into or past a goal to score a point.”<sup>95</sup> Written reports as early as 1636 contain depictions of the Iroquois playing the sport, while others suggest that the game was being played as early as 1200 A.D.<sup>96</sup> The Haudenosaunee, during a time when their very existence was terminally threatened by the settler colony, never ceased playing lacrosse. In 1867, a contingency of Iroquois toured England playing the sport; at the same historical moment when Canada declared lacrosse *its* national sport.<sup>97</sup> In 1875, the first English lacrosse club was formed in Stockport and is still active today.<sup>98</sup> In 1880, Indians were banned from international play. In the same year the American lacrosse team beat Canada for

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and circling he kept the ball constantly in motion never allowing it to hit the ground. Through his impressive performance he convinced the birds that they had gained a valuable ally. The birds thought they could do the same for the squirrel, but, to their dismay, all the leather had been used on the making of the bat’s wings. There was no time to send for more. At the last minute it was suggested that perhaps stretching the skin of the squirrel itself could make suitable wings. So, by tugging and pulling the fur between the front and hind feet, the task was completed and there originated the flying squirrel. When all was ready, they began the game. Eagle and Bear met, a face-off ensued and the flying squirrel caught the ball, cradled it up the tree and passed it off the Hawk. Hawk kept it in the air for some time. Then, just as the ball was to hit the ground, the Eagle seized it. Eagle, dodging and doubling, maintained possession and kept the ball from even the Deer, the opposition . . . the fastest of the four-legged team. Eagle then faked to Squirrel and passed to Bat, who moved in hard and left to score the goal. This goal won the victory for the birds.)

<sup>94</sup> *A History of Iroquois Nationals Lacrosse*, IROQUOIS NATIONALS, <http://iroquoisnationals.org/the-iroquois/a-history-of-iroquois-nationals-lacrosse/> [<http://perma.cc/WQA7-TPZH>] (explaining that the Eastern Cherokee word for the game may be roughly translated to “little war” because of the physical demand required of the game).

<sup>95</sup> Thomas Vennum Jr., *The History of Lacrosse*, US LACROSSE, <http://www.uslacrosse.org/about-the-sport/history> [<https://perma.cc/WY49-JYZ3>].

<sup>96</sup> *Timeline*, IROQUOIS NATIONALS, <http://iroquoisnationals.org/the-iroquois/timeline/> [<http://perma.cc/7BB9-RRVJ>] (explaining that French missionary father Jean Breboul described lacrosse as “le jeu de la crosse” indicating that the sticks look like a Bishop crozier); *A History of Iroquois Nationals Lacrosse*, *supra* note 94.

<sup>97</sup> See *A History of Iroquois Nationals Lacrosse*, *supra* note 94.

<sup>98</sup> *Id.*

the first time, in a proverbial settler-colonialist battle from which Indians were excluded.<sup>99</sup> Later, lacrosse evolved into a summer demonstration sport and was played in the 1928, 1932, and 1948 summer Olympics. Notably, the Iroquois played in the 1932 Los Angeles games.<sup>100</sup>

For the Haudenosaunee, lacrosse is an essential part of their cultural identity and every time players take the field they do so with a story, where “race, religion, culture, and family were inextricably tangled with his feats on the playing field . . . Indian players, [sic] carried with them specific tribal histories and general Indian histories that rendered their experiences unique.”<sup>101</sup> As the settler colonies of both Canada and the United States try relentlessly to subsume lacrosse into their own societies, while simultaneously buttressing the Iroquois access to the playing field, the Haudenosaunee people have remained potently visible and have reclaimed their cultural property.

### B. *Reclaiming Lacrosse*

While the Haudenosaunee never ceased to play lacrosse, their refusal to stop ultimately led to the founding of the Iroquois Nationals Lacrosse Program (Iroquois Nationals) in 1983 as an act of cultural and political sovereignty.<sup>102</sup> The Iroquois Nationals state that their lacrosse team is “the only Native American team authorized to play a sport internationally.”<sup>103</sup> The Federation of International Lacrosse (FIL) accepted the Iroquois Nationals as a full member nation in 1987, and they participated in their first game in 1990.<sup>104</sup> The team is made up of individuals from the Haudenosaunee Nation, as well as Native Americans from other tribes, and has been sponsored by Nike since 2006.<sup>105</sup> The Iroquois

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<sup>99</sup> *Id.*

<sup>100</sup> *Why Isn't Lacrosse an Olympic Sport?* INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 2, 2012), <https://indiancountrymedianetwork.com/news/why-isnt-lacrosse-an-olympic-sport/>.

<sup>101</sup> PHILIP J. DELORIA, INDIANS IN UNEXPECTED PLACES 112 (2004).

<sup>102</sup> *Timeline*, *supra* note 96.

<sup>103</sup> *A History of Iroquois Nationals Lacrosse*, *supra* note 94.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* “As part of the agreement with FIL, Native Americans from other tribes are also eligible to tryout and play for the Nationals.” Aimee Berg, *Fighting for More Than a Win: Iroquois Lacrosse Team Back in the Championships*, AL JAZEERA (July 9, 2014), <http://america.aljazeera.com/articles/2014/7/9/iroquois-lacrossechampionships.html> [<https://perma.cc/WQA7-TPZH>].



Nationals team is the way in which the Haudenosaunee visibly continue to play their medicine game in a modern and global world, and is thus a pronounced example of an Indian Nation reclaiming cultural property through cultural and political sovereignty. Their visibility in the lacrosse industry is not merely performative; it is for their own benefit. As such, every time a Haudenosaunee player picks up a stick and plays lacrosse it is an exercise of sovereignty in and of itself, for individual Indians as well as the Nation.

According to the team's general manager, Ansley Jemison, "[w]e play this game to give enjoyment to the Creator."<sup>106</sup> Moreover, the team has a spiritual advisor "who leads a traditional tobacco-burning rite, among other rituals that prepare the players to take the field."<sup>107</sup> Players on the team frequently insist that every time they pick up a stick, it is a medicine game first and foremost.<sup>108</sup> While the Iroquois Nationals play the modern version of lacrosse, they convey their own spirituality onto the game that their ancestors were given and "some say that the Iroquois' sacred motivation can be seen in their playing style."<sup>109</sup> Though the Iroquois Nationals play the game competitively, on the Iroquois reservation lacrosse is still used for ceremonial healing purposes and "can be summoned by clan mothers on behalf of any person or people who needs its healing powers."<sup>110</sup> On a competitive level, the Iroquois Nationals team is also the way in which the Confederacy continues to exercise its sovereign rights and maintain its visibility as a Nation, as it vigorously insists on traveling for international competition under treaty-guaranteed, Iroquois-issued passports. Furthermore, in any game the Iroquois Nationals play, they do so as an independent sovereign Nation.

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<sup>106</sup> *A History of Iroquois Nationals Lacrosse*, *supra* note 94.

<sup>107</sup> *Id.*

<sup>108</sup> Aimee Berg, *Fighting for More Than a Win: Iroquois Lacrosse Team Back in the Championships*, AL JAZEERA (July 9, 2014), <http://america.aljazeera.com/articles/2014/7/9/iroquois-lacrossechampionships.html>.

<sup>109</sup> *Id.* (quoting team player Ward as saying "'Watching our game,' Ward said, 'is way different than watching the U.S. or these other teams. You see a lot of Native American guys nowadays in college, having such great Division I careers—and they play with such a free spirit and free-flowing style that I think a lot of people are really starting to pick up on it and understand that that's our way.'").

<sup>110</sup> *Id.* (explaining that this medicine game is male only and in the most traditional homes, Haudenosaunee women are not allowed to touch a lacrosse stick).

The Haudenosaunee have always insisted that they are an independent Nation.<sup>111</sup> As such, in 1923 they began issuing Iroquois Confederacy passports to their members.<sup>112</sup> However, the United States, in an act of settler colonial erasure, passed the Indian Citizenship Act of 1924, which automatically conferred U.S. citizenship status to all Indian people.<sup>113</sup> Notably, the Haudenosaunee were vehemently opposed to the Act and many of the Confederacy's members, in a clear assertion of tribal sovereignty, declined U.S. citizenship and rejected dual citizenship, insisting that it is an independent Nation and it is so recognized by treaties between the Confederacy and the United States.<sup>114</sup>

Staunch new passport requirements in the wake of 9/11, however, have drastically represented an attempt to limit Haudenosaunee passport use, yet the attempted limitation has not deterred the Confederacy.<sup>115</sup> Incidentally, in 2010, the Iroquois Nationals made international headlines when they were banned from entering the United Kingdom to participate in the World Lacrosse Championship.<sup>116</sup> The United Kingdom refused to accept the Haudenosaunee passports because "the British did not receive official confirmation from the United States government that those using the Iroquois passport would be permitted back into the United States at the end of the event."<sup>117</sup> Furthermore, "British fears were

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<sup>111</sup> Brian Doyle, *Let Them Play: Reestablishing Iroquois Tribal Passports*, 35 SUFFOLK TRANSNAT'L L. REV. 421, 431 (2012) [hereinafter *Let Them Play*].

<sup>112</sup> *A History of Iroquois Nationals Lacrosse*, *supra* note 94.

<sup>113</sup> 8 U.S.C. §1401(b) (2006) (specifically, nothing in the Act indicated the ability for Indians to retain their tribal citizenship); *see also* Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 123–24 (1999) (discussing the Indian opposition to the Citizenship Act because Indians considered themselves to be citizens of their respective Nations.).

<sup>114</sup> *Let Them Play*, *supra* note 111, at 426 (noting that The Treaty of Canandaigua is the treaty in which the Iroquois rejected U.S. citizenship and maintain their separate nationhood status. Furthermore, this Treaty is still in force today and portions have been upheld in court.); *see also* IROQUOIS DIPLOMACY, *supra* note 88, discussing Iroquois treaty making throughout history.

<sup>115</sup> *Let Them Play*, *supra* note 111, at 435 (discussing new passport standards after 9/11 as well as tribal opposition because the new standards threatened to limit treaty guaranteed rights of tribes to cross the borders of Canada and Mexico).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 437 (explaining that merely two months before the incident three members of the Mohawk tribe entered the U.S. after a conference in Bolivia using Iroquois passports. Further stating that teams needed to travel on the

based on an erroneous belief that the tribal-issued passports did not comply with the enhanced security requirements necessary to re-enter the United States as promulgated under the Western Hemisphere Travel Initiative (WHTI).”<sup>118</sup> Incongruously, the British could not attain United States confirmation because, if the United States confirmed the return of the players it would have been a direct recognition of the legal usage of Iroquois passports internationally, something the settler nation cannot accept. Subsequently, the Iroquois Nationals were told to travel as United States citizens, a clear example of how the settler colony must always deny the authentic presence of indigenous people.<sup>119</sup> Then Secretary of State Hillary Clinton stepped in to grant the team one-time travel waivers; however, for the Iroquois to travel as United States citizens would have been an affront to their tribal sovereignty and they ultimately chose to forfeit the match instead.<sup>120</sup> Interestingly, the team’s commitment to their visibility in this moment led directly to Secretary Clinton’s travel waivers: an immediate example of visibility influencing the law.

This forfeiture stunned the other 29 competing lacrosse teams, as the Iroquois Nationals team is one of the top lacrosse teams in the world.<sup>121</sup> Ironically, the United States’ team won the World Championship; however, the Iroquois Nationals’ “2010 absence subsequently generated an emotional conflict within the sport over rankings that took its international governing body nearly a year to

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passports of the nations they were represented, so for the Iroquois Nationals U.S. passports would also not suffice.).

<sup>118</sup> Brian Kolva, *Lacrosse Players, Not Terrorists: The Effects of the Western Hemisphere Travel Initiative on Native American International Travel and Sovereignty*, 40 WASH. U. J.L. & POL’Y 307, 309 (2012). See also Western Hemisphere Travel Initiative (WHTI), 8 C.F. R. §212 (2009).

<sup>119</sup> *Let Them Play*, *supra* note 111, at 437.

<sup>120</sup> Aimee Berg, *Fighting for More Than a Win: Iroquois Lacrosse Team Back in the Championships*, AL JAZEERA (Jul. 9, 2014), <http://america.aljazeera.com/articles/2014/7/9/iroquois-lacrossechampionships.html>.

<sup>121</sup> *Id.*; See also *Lacrosse Players, Not Terrorists* *supra* note 118 (describing the 2010 team: “The Nationals were fielding a very competitive team for the Manchester games. With a combination of former collegiate All-Americans from lacrosse powerhouse Syracuse University, talented young players, and a group of wily veterans who had been playing the game since before they could walk, this team was being touted as—[the Iroquois’] most dynamic team yet. Coming off a string of high finishes in recent international competitions, the Nationals had a good chance at medaling on the sport’s—their sport’s—biggest stage.”).

settle and led to the resignation of a European official.”<sup>122</sup> This story illustrates the importance, for the Haudenosaunee, of playing *their* game of lacrosse, as visible Iroquois citizens; the point is not always to win, but to remain visible, to play *their* medicine game, and to refuse to submit to the infection of the settler colonial state. As a citizen of the Confederacy stated, “[w]e do not have the option of simply accepting American or Canadian passports. We are citizens of the Haudenosaunee Confederacy, as we have been for millennia before the Europeans’ arrival. That is not negotiable.”<sup>123</sup>

The Iroquois’ visibility in the field of lacrosse showcases how an Indian Nation has, and continues to, reclaim its cultural property from the settler despite constant pressure from the settler to remain invisible. In exercising their cultural and political sovereignty, the Haudenosaunee have gained pervasive visibility within the lacrosse industry, which disrupts the settler cultural gaze and challenges settler normativity. When settlers envision lacrosse, they can see the actual Iroquois Nationals, not some imaginary scene of a lacrosse game in the far distant past. Furthermore, the Haudenosaunee have used this visibility in the sport to branch into other places in order to further showcase their cultural property.

### C. *The Expansion of Visibility*

In May 2012, the movie *Crooked Arrows* hit theaters; an inspirational sports drama about a reservation rag-tag team of Native American lacrosse players led to championship glory by their Native coach—at the crossroads of his culture and the modern world.<sup>124</sup> The movie was made with the support of the Onondaga Nation, a member of the Haudenosaunee Confederacy.<sup>125</sup> *Crooked Arrows* is illustrative of what may happen when directors and screenwriters seek out the subject of their movies, not just for the purpose of

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<sup>122</sup> *Id.*

<sup>123</sup> Sid Hill, *My Six Nation Haudenosaunee Passport is Not a ‘Fantasy Document,’* THE GUARDIAN (Oct. 30, 2015), <https://www.theguardian.com/commentisfree/2015/oct/30/my-six-nation-haudenosaunee-passport-not-fantasy-document-indigenous-nations>.

<sup>124</sup> Sarah Moses, *Crooked Arrows: The Onondaga Nation Goes Hollywood*, SYRACUSE (May 7, 2012), [http://www.syracuse.com/news/index.ssf/2012/05/crooked\\_arrows\\_the\\_onondaga\\_na.html](http://www.syracuse.com/news/index.ssf/2012/05/crooked_arrows_the_onondaga_na.html) [<http://perma.cc/LSK9-CZ7W>].

<sup>125</sup> *People of the Hills*, ONONDAGA NATION, <http://www.onondaganation.org/aboutus/> (last visited Apr. 16, 2017).

crafting an inspirational narrative and cultural appropriation for the audience's consumption, but for active involvement and cultural advice. As such, Neal Powless, a former professional lacrosse player, three-time All American, member of the Eel Clan of the Onondaga Nation, and son of the Onondaga Nation Chief, worked as cultural advisor to the film.<sup>126</sup>

Originally, the script for the movie was "riddled with cultural inaccuracies and stereotypes;" however, rather than continue with the offensive content, writers worked closely with the Onondaga Nation to make the film culturally appropriate.<sup>127</sup> While the main character of the film, Brandon Routh, is not Native, a significant portion of the cast is, with "eight lacrosse players from or near the Onondaga Nation selected to be on the team . . . most of them had never [even] been in front of a movie camera and over 500 Native extras."<sup>128</sup>

*Crooked Arrows* is the first mainstream movie about lacrosse, and it is supremely fitting that it was made with the support of the Onondaga Nation. Without the visibility that the Haudenosaunee have within the lacrosse industry, it is unclear if the film's writers would have sought support and advice from the Nation. What is clear, however, is that the visibility of lacrosse as cultural property of the Haudenosaunee people has led to other opportunities, such as culturally appropriate cooperation as seen in *Crooked Arrows*. The indigenous assertion of cultural and political sovereignty has led to powerful visibility, resulting in the ownership of cultural property rather than its appropriation. While this visibility has been shown to have influential effects on the law, as shown by the involvement of high ranking officials in granting international travel waivers, it is also having significant effects on movie portrayals of Native Americans, thus disrupting the settler colonial tool of cultural appropriation.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* ("Powless said the original script had numerous stereotypes about Native Americans because the writers wanted the script to relate to all Native Americans and not one specific nation or tribe. Some of the changes that needed to be made included the humor towards the Native American elders.").

<sup>128</sup> *Id.* (further, while the movie is based on the Haudenosaunee, a fictional tribe's name is used in order for the film to resonate with other Native people).

## V. WHERE TO GO FROM HERE

Cultural appropriation is a tool of settler colonial power aimed at eliminating Native visibility within society, and law-making institutions are premised on maintaining settler normativity, thus reflecting only the settler cultural gaze; that being said, where do Native people and Native Nations go from here? If one is critical of the argument set forth in this paper, one may insist that cultural and political sovereignty do not, in fact, create visibility. Robust political involvement and law-making reform may appear to be the best way in which to attain true visibility. However, this critique lacks the fundamental understanding that until legal institutions discontinue the instantiation of settler normativity and stop reflecting only the settler cultural gaze onto Native people, no true cultural property protection will result. Until law-making bodies can see the multifaceted legal claims that Native Nations and people are putting forth to protect their culture, any laws enacted will be too narrow. Like the slow and limited scope of the Native American Graves Protection Act and the Indian Arts and Crafts Act, laws that do not incorporate the need for the cultural sovereignty of Indian Nations will not adequately protect cultural property.<sup>129</sup>

Without an understanding of the stories that Indian people are telling, legislators will never quite protect Native culture and will, instead, continue to facilitate the settler's unquenchable predilection to appropriate it. Take for example the story of the Great Sioux Nation's fight for the sacred Black Hills.

The controversy over the Black Hills has been treated by the courts as a property dispute. The Supreme Court ultimately vindicated the Indians' position that the Black Hills had been wrongfully appropriated by the United States. The remedy however, was monetary damages rather than the repatriation of land... The Black Hills themselves, the law decrees, must be awarded to the United States government under 'property principles of eminent domain.'<sup>130</sup>

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<sup>129</sup> See Native American Graves Protection and Repatriation Act 25 U.S.C. §§3001-3013 (1994), Indian Arts and Crafts Act 25 U.S.C. §§305-305e (1994).

<sup>130</sup> *Reclaiming Native Stories*, *supra* note 1, at 307; *United States v. Sioux Nation*, 448 U.S. 371, 423-24 (1980).

The law looked at the Great Sioux Nation's claim for the Black Hills as nothing more than a mere property dispute between the Tribe and the United States government. What the law failed to see was the spiritual significance that the Black Hills holds for the surrounding tribes for which no amount of money could compensate. In describing the cultural significance of the Black Hills to the Lakota people specifically, Charlotte Black Elk, a prominent Oglala Lakota historian said the following:

All of the universe holds a song, [And] all of the songs of the universe [are] located in the Black Hills. [That said song] is only complete in the Black Hills ... Our ceremonial site, with the star knowledge, with our cosmology, tells us when to be in the Black Hills, where to be and what ceremony to perform.<sup>131</sup>

Legal institutions fail to see the cultural significance of certain places, ceremonies, names, items, and dances and the extent to which these threads make whole Indigenous life ways. It is this shortsightedness that allows the law to continue to reflect the settler cultural gaze. It is this blind volition that renders the settler unable to comprehend why the Great Sioux Nation will not collect its money settlement for the Black Hills<sup>132</sup> or why the Iroquois Nationals would rather forfeit the Lacrosse World Championships than travel as U.S. Citizens. In the face of an unseeing settler colonial state, the first step in combatting the settler cultural gaze is to continuously assert power through cultural and political sovereignty in order to claw back the visibility so long denied. Visibility becomes the tool able to eventually disrupt the baseline assumptions upon which the law is created and maintained.

Critics may further insist that Native culture is so subsumed by settler society as to be the cultural property of the settler, to which Indian people hold no title. However, this is merely a false narrative that the settler wishes to convey. If settler colonial society is never

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<sup>131</sup> Simon Moya-Smith, *Sacred Black Hills: An Ideological Battle Ground*, INDIAN COUNTRY TODAY MEDIA NETWORK, (June 25, 2013), <https://indiancountrymedianetwork.com/history/sacred-places/sacred-black-hills-an-ideological-battle-ground/>.

<sup>132</sup> Fraincine Uenuma & Mike Fritz, *Why the Sioux are Refusing \$1.3 Billion*, PBS NEWS HOUR (Aug. 24, 2011), [http://www.pbs.org/newshour/updates/north\\_america-july-dec11-blackhills\\_08-23/](http://www.pbs.org/newshour/updates/north_america-july-dec11-blackhills_08-23/) [<https://perma.cc/35S8-4V2P>].

complete until the complete elimination of Natives, yet the settler is unable to rid society of Natives, then the settler is forced instead to rely on cultural appropriation as a means of metaphorically killing Indians. Thus, the settler exclaims, “[t]his culture is mine because I proclaim it so.” This exclamation does not make the settler’s claim legitimate, just as the settler’s statement that Indians are savage heathens who may not hold title to land does not make the land any less ours. While the exclamation may not make the claim legitimate, the settler’s law-making institutions do. Therefore, visibility is the way in which Indian people and Native Nations can show that our culture belongs to us and us alone; it does not belong to the settler society no matter how forcibly the settler society tries to make it appear so. One must recognize that as long as laws grow out of settler normativity, they will always protect the settler and what the settler claims to be true. As such, the settler will always proclaim Indians gone and our culture as belonging to the settler; however, that does not make the settler’s story true.

## VI. CONCLUSION

The stories that we as Indian people tell belong to us. They do not belong to the settler no matter what false narratives the settler invents. Settler colonialism is premised on disavowing the Indian presence and the laws of the settler, steeped in this settler normativity, reinforce this position by failing to adequately protect Indian peoples’ claims of cultural appropriation. The settler cultural gaze ensures that Natives in society do not match the “Indian” the settler has created, causing us to disappear from the world. Yet today, we have not faded into the settler colonial abyss: we remain. As Indians continue to exercise cultural and political sovereignty, the story the settler seeks to tell is rendered less authentic and it loses its efficacy over time. The stories of Indians standing in their own power, like the Iroquois Nationals’ refusal to attend the World Lacrosse Championships and the Great Sioux Nation’s refusal to accept the monetary settlement for the illegal taking of the Black Hills, show how visibility can begin to erode the settler’s façade. Thus, it is always possible, though not easy, for Indian people and Native Nations to assert cultural and political sovereignty in order to reclaim our stories and our cultural property. It is imperative that the stories we tell about ourselves and about our cultural property



are visible within society. It is this visibility that allows Indian people to reclaim what the settler has fought so hard to strip from us. As Oren Lyons, the Faithkeeper for the Haudenosaunee said, “the Iroquois Nationals, we have lost many games, but we have never been defeated,” and this is what it means to stand in one’s own power and be visible.<sup>133</sup>

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<sup>133</sup> SPIRIT GAME: PRIDE OF A NATION (One Bowl Productions 2017).