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Indigenous Dignity and the Right to Be Forgotten

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Indigenous Dignity and the Right to Be Forgotten

*Trevor Reed**

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INTRODUCTION

In 1871, the United States Congress formally concluded treaty-making with Native American Tribes within its borders.¹ While Tribal lands were by that time already considered by the federal government to be “interior” to the United States rather than autonomous, foreign nations,² the move effectively paved the way for subsequent federal policies of allotment and assimilation that would dispossess Tribes of not only land and resources, but also

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1. See 25 U.S.C. § 71 (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”). However, though treaty-making may have been ended by Congress, the power over treaty-making with Native American Tribes remains with Congress. See U.S. CONST. art. II, § 2, cl. 2.

2. The agency responsible for administering Indian affairs and Tribal lands was transferred from the Department of War to the newly created Department of the Interior in 1849. See *History of BIA*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/bia> (last visited Mar. 6, 2020); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (denominating Indigenous groups within the United States “domestic dependent nations” and rejecting their status as “foreign nations”).

their culture and identity.³ Paradoxically, however, by the late 1880s, Tribal lands became inundated with American anthropologists and their new recording technologies. Spurred by both the invention of the phonograph in 1877, and the creation of the U.S. Bureau of American Ethnology in 1879, anthropologists from American research institutions would spend roughly a century documenting nearly every aspect of Native American lives.⁴ Their task was deemed an urgent one: to gather what they could about “Indians” as a race and as distinct cultural groups – languages, customs, laws, oral histories, religions, and arts – before their “primitive lifeways” came to an end as proclaimed by then prevailing theories of social Darwinism.⁵

Indigenous cultural documentation amassed during this era constituted what might be considered America’s first instance of “big data” – a comprehensive set of information aggregated for the purpose of understanding a group’s social relationships and predicting their behaviors.⁶ Field notes, photographs, sound recordings, maps, kinship charts, and all manner of other cultural materials collected from Tribal members were shipped off to distant universities, museums, and archives (“Institutions”). They were then analyzed to formulate new academic theories about race, culture, and human evolution, which subsequently fueled the

3. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: Toward a Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877–78 (2015) (explaining how the federal government-imposed policies that broke up Tribal land masses and curtailed subsistence practices while simultaneously outlawing Tribal religious and cultural practices and forcing children to attend American boarding schools often far from Tribal lands).

4. For a comprehensive overview of early ethnographic sound recording, see generally ERIKA BRADY, *A SPIRAL WAY: HOW THE PHONOGRAPH CHANGED ETHNOGRAPHY* (1999).

5. See Richard B. Woodbury & Nathalie F.S. Woodbury, *The Rise and Fall of the Bureau of American Ethnology*, 41 J. SW. 283, 285–86 (1999); see also JONATHAN STERNE, *A Resonant Tomb*, in *THE AUDIBLE PAST: CULTURAL ORIGINS OF SOUND REPRODUCTION* 287–334 (2003).

6. As Oxford’s online dictionary defines it, “big data” consists of “[e]xtremely large data sets that may be analyzed computationally to reveal patterns, trends, and associations, especially relating to human behavior and interactions.” *Big Data*, LEXICO.COM, https://www.lexico.com/en/definition/big_data (last visited Nov. 9, 2020). A full comparison of the methods and objects of “big data” to early anthropological field work is beyond the scope of this symposium article; however, I hope to take up this comparative work in future writing.

development of experimental federal Indian policies aimed at making Americans out of Tribal members.⁷

This original “big data” set, still meticulously preserved in research institutions and federal repositories today, is in some cases an invaluable resource for Tribes – many of which are searching for evidence to support legal claims or are working to revitalize aspects of culture disrupted by the very government policies these collections were originally meant to support. While often touted by collectors and Institutions as rich historical and cultural resources,⁸ I argue that some of these collections have become toxic in their preserved forms, separated from their communities’ modes of care. These materials are among those that Indigenous groups should have the right to remove from settler Institutions and, if necessary, to erase, delete, or destroy.

The kind of Indigenous right to erase sensitive cultural material held by settler institutions I begin to sketch in this essay is not unlike data privacy rights already existing in European and European-descended legal systems. A right to prevent intrusive recording of one’s private affairs has existed in the United States for at least the last century,⁹ and a right to compel data controllers to erase private data (the “right to be forgotten”) under certain conditions has been codified by the European Union in its General Data Protection Regulation and to some extent by the State of

7. See Woodbury & Woodbury, *supra* note 5; Lomayumtewa C. Ishii, *Western Science Comes to the Hopis: Critically Deconstructing the Origins of an Imperialist Canon*, 25 WICAZO SA REV. 65, 82 (2010) (discussing how anthropological study of Indigenous culture by major anthropological collectors was a necessary input for the United States in its development of policies that exerted dominion and intellectual hegemony over Native Americans).

8. See, e.g., Aaron Fox, *Archive of the Archive: The Secret History of the Laura Boulton Collection*, in THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 194 (Jane Anderson & Haidy Geismar eds., 2017) (describing the way the Laura Boulton World Music Collection, while empty of any real scholarly value, was nonetheless leveraged for grants and donations to Columbia University).

9. See generally RESTATEMENT (SECOND) OF TORTS § 652B (Am. L. Inst. 1977) (defining the tort for intrusion upon seclusion as “intentionally intrud[ing], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person,” and citing examples of various forms of recordation, wiretapping, and eavesdropping); see also Robert C. Post, *The Social Foundations of Privacy: Community and the Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 965 (1989) (finding the origins of the privacy tort as presently constituted stem from Samuel Warren and Louis Brandeis’s 1890 article *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

California in its Consumer Privacy Act.¹⁰ While much of the debate surrounding a right to data erasure in the United States has focused on tensions between personal autonomy and the right of the public to be informed,¹¹ the collective rights of Indigenous peoples to maintain, control, and develop their intellectual properties and data provide important, yet often overlooked considerations.¹²

In the pages that follow, I draw from historical and ethnographic research conducted in partnership with the Hopi community (members of which reside in present-day Northeastern Arizona and beyond) to better understand why some forms of culture must necessarily be forgotten for a community to fully live. The right to collectively forget is vital in our data-saturated world, and all the more so for colonized communities whose ancestors' voices and likenesses continue to be held by settler Institutions. Recognizing Indigenous peoples' rights to care for their ancestors' voices and other cultural data would undoubtedly require a significant shift in the way Institutions conceptualize Indigenous cultural materials in their collections—from a curatable past-on-demand that substitutes for actual Indigenous presences and futures, to one respecting the sovereignty of contemporary Indigenous peoples and these materials' actual lives and existences. But these advances are necessary if we are sincerely committed to realizing Indigenous self-determination and cultural rights in the age of big data.

10. See Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 43; California Consumer Privacy Act, CAL. CIV. CODE § 1798.1 *et seq.*

11. See Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (Feb. 13, 2012), <https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/> (arguing that the right to be forgotten “represents the biggest threat to free speech on the Internet in the coming decade”); Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 994 (2018) (“There is no doubt serious tension between the right to be forgotten and freedom of expression, and different legal systems resolve this tension in different ways.”).

12. See G.A. Res. 61/295, U.N. DOCS. A/RES/61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 31 (Sept. 13, 2007).

I. HOPI FORGETTING: A CASE STUDY

As a ceremonial leader¹³ from my home village on the Hopi Reservation¹⁴ entered the final stages of cancer, he related to me his determination that he could not pass along key aspects of his ceremonial knowledge to others in our community. He was the last fully initiated man from our village—the last person with the knowledge and authority to carry out certain vital rituals. As such, he had received numerous visits to his hospital room from leaders across Hopi lands, asking him questions and seeking the knowledge he carried so that these important aspects of our community life could continue unabated. He related to me that he empathized with these leaders, but without fully functioning ceremonial and political institutions within our village, the decision over whether to pass along his knowledge and authority were effectively already made for him. The ceremonies he knew and the knowledge they contained would die with him.

This leader's choice not to disclose his ceremonial knowledge or pass along his ritual authority followed in the footsteps of other Hopi leaders who each faced the decision of whether or not to silence aspects of our Tribal culture. These decisions often had to be made during periods of coerced cultural forgetting—eras of harshly enforced prohibitions on ceremonial performances (which were sometimes perpetuated secretly),¹⁵ kidnapping and relocation

13. I do not disclose the name of this leader out of respect for our local protocols, which counsel that we should avoid repeated uses of the names of the deceased.

14. The "Hopi Indian Reservation" was designated as such in 1882 through an Executive Order of Chester A. Arthur, who was then President of the United States. It is located in the northeastern portion of what is now the U.S. state of Arizona. The sovereign Hopi Tribe, which now governs the Hopi People and their territory, is considered a "domestic dependent nation[]" by the United States. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). It should be noted, however, that Hopi aboriginal territory spans a much broader swath of the American Southwest than the somewhat arbitrary boundaries of President Arthur's Reservation, covering parts of what is now Utah, Colorado, New Mexico, and Mexico.

15. Leigh Kuwanwisiwma, as quoted in a 2015 collection of interviews and documents on the Spanish colonization of Hopi lands, had the following to say about the role of memory in the Spanish occupation of Hopi lands:

So inasmuch as the [Hopi] ceremonies were now publicly forbidden [by the Spanish] to be performed, some of the people talk about how the knowledge was still being rehearsed and then also passed on to coming generations so that at least the knowledge would survive and then the physical end of it, meaning perhaps

of Hopi children to boarding schools, and imposition of non-Hopi ways of living on Hopi lands.¹⁶ Given these and other changes brought on by settler colonization in the United States, many Hopi people have expressed to me their fears that our culture is “dying out” – that modernization, globalization, and acculturation have displaced people’s attachments to Hopi lands, our language, and our ceremonial performances. These changes, foretold in Hopi teachings, signal to Hopi people that the world is progressing rapidly toward its prophesied end.

Hopi people are not alone in this prediction. As far back as 1540, and right up to the present day, a number of anthropologists, folklorists, ethnomusicologists, tourists, and missionaries believed that Hopi and other Indigenous peoples’ cultures would die out.¹⁷ The field recordings, archeological specimens, and other forms of data they collected under this pretext fill numerous libraries and archives worldwide.¹⁸ But the underlying rationale for their labor –

the altars and the types of ritual objects, would also be re-created and subsequently used if they ever had an opportunity to come back with their ceremonies.

1 MOQUIS AND KASTILAM: HOPIS, SPANIARDS AND THE TRAUMA OF HISTORY 173 (Thomas E. Sheridan, Stewart B. Koyiyumptewa, Anton Daughters, Dale S. Brenneman, T.J. Ferguson, Leigh Kuwanwisiwma & Lee Wayne Lomayestewa eds., 2015).

16. See HARRY C. JAMES, PAGES FROM HOPHI HISTORY 125 (1974); JOHN D. LOFTIN, RELIGION AND HOPHI LIFE 108–21 (2d ed. 2003).

17. Spanish priests demonstrated their belief that Hopi culture would (or could be made to) die through violent acts of what they considered to be “discipline” aimed at saving Hopi people from their “slavery” to “idols” and thus making them worthy of heaven. See MOQUIS AND KASTILAM: HOPIS, SPANIARDS AND THE TRAUMA OF HISTORY, *supra* note 15, at 132, 238. Many early American anthropologists also corroborated the fatalistic intentions of colonization through their work, claiming that Hopi and other Indigenous cultural practices needed documentation and preservation because they would inevitably become extinct. See BRADY, *supra* note 4, at 75–80; see also STERNE, *supra* note 5, at 331–32. Moreover, ethnomusicologists from as recently as a generation ago also proclaimed the (impending) death of Hopi culture. See George List, *Song in Hopi Culture, Past and Present*, 14 J. INT’L FOLK MUSIC COUNCIL 30 (1962); LAURA BOULTON, THE MUSIC HUNTER: AN AUTOBIOGRAPHY OF A CAREER (1968). More recently, however, some anthropologists have begun to note that it is actually *anthropology* that may be dying out, due to lack of diversity, lack of action, and irrelevance to the real world. See Peter M. Whiteley, *The End of Anthropology (at Hopi)?*, 35 J. SW. 125, 148 (1993).

18. In 1977, David Laird produced a 3500-entry bibliography of scholarly writings on the Hopi people alone. See W. DAVID LAIRD, HOPHI BIBLIOGRAPHY: COMPREHENSIVE AND ANNOTATED (1977). The number of extant Hopi ritual artifacts, human remains, photographs, and other cultural items is impossible to calculate given that they exist in both public and private collections around the world. Hopi sound recording collections are numerous, including scholarly recordings made by Jesse Walter Fewkes, Natalie Curtis

the belief that Indigenous peoples would become extinct or their cultures would “evolve” to mirror colonizing societies—has itself become a casualty of intellectual evolution. Today, scholars, community activists, and Tribal leaders work together to reintegrate culturally-affiliated museum and archival materials back into Indigenous communities that are very much alive and intent on reclaiming and perpetuating their culture.¹⁹ While many of these materials have become reincorporated into Indigenous communities’ social fabrics, some contain aspects of rituals, ceremonies, or other culturally sensitive content that has or will soon become purposely extinguished by Tribes themselves, setting up an uncomfortable conflict between the institutional impetus to perpetually preserve and the decisions of Indigenous authorities, like our village leader, to let some of our culture die.

As the Hopi Tribe has discovered, current legal frameworks fail to provide the range of remedies necessary to deal with these challenging and sensitive issues. In the mid-1990s, relying on the federal Native American Graves Protection and Repatriation Act (NAGPRA)²⁰ and the Hopi Tribe’s own laws claiming ownership over Hopi human remains, artifacts, and recordings of “esoteric ritual, ceremonial and religious knowledge,”²¹ the Tribe sent hundreds of letters to Institutions demanding the return of its cultural property from their collections.²² As Tribal officials later explained it to me, they received a mixed response. Some Institutions made no reply, while others contested Hopi authority

Burlin, Samuel Barrett, Helen Roberts, Earnest and Pearl Beaglehole, Willard Rhodes, Robert Black, George List, and Robert Rhodes. For more information on these and other collectors, see *Archive of Traditional Music*, IND. UNIV. - BLOOMINGTON, <https://libraries.indiana.edu/archives-traditional-music> (last visited Oct. 19, 2020), and *The American Folklife Center*, LIBR. OF CONG., <https://www.loc.gov/folklife/index.html> (last visited Oct. 19, 2020). Recordings made by tourists, missionaries, and Hopi or other Indigenous peoples are also numerous.

19. Mique’l Dangeli, *Dancing Chiax, Dancing Sovereignty: Performing Protocol in Unceded Territories*, 48 DANCE RSCH. J. 74 (2016); Robin R.R. Gray (T’uu’tk), *Ts’msyen Revolution: The Poetics and Politics of Reclaiming* (Sept. 2015) (Ph.D. dissertation, University of Massachusetts Amherst) (on file with SCHOLARWORKS@UMassAmherst), https://scholarworks.umass.edu/dissertations_2/437/.

20. 25 U.S.C. §§ 3001-13.

21. Res. H-70-94, Hopi Tribal Council (1994) (on file with the author).

22. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 14-18 (2003).

to demand the return of their cultural materials.²³ Still others took the opportunity to relieve themselves of the burden of these materials: shortly after the demand letters were sent, package after package arrived at the Tribal offices, filling their cubicles to overflowing.²⁴

On one occasion, the Tribe received some particularly important ritual items that Hopi village leaders were looking forward to reusing in upcoming ceremonies. It seemed like the Tribe was finally receiving the restitution it deserved from centuries of taking; repatriation efforts were now providing opportunities to revitalize aspects of Hopi culture that had been absent for many years. But soon after the ceremonial performers began using the repatriated items, they became sick, with rashes and sores appearing where the items had come in contact with their bodies. Medical professionals soon discovered, much to everyone's horror, that the items had been preserved with arsenic.²⁵ Arsenic, while effectively preserving the life of the ritual items as museum objects, had poisoned the very people for whom the objects had been created.

I relate this story about the harms produced by toxic artifacts because they are, I argue, analogous to the potential dangers of preserving Indigenous voices, images, and other forms of culture outside of Indigenous modes of care. At first glance, the risks of reusing preserved ritual artifacts may seem completely benign. One could argue that vocal sound is merely air vibrations, which can't poison anyone, or that using a digital photo for one purpose—say, scholarly historical analysis—doesn't diminish someone else's

23. See Trevor George Reed, *Returning Hopi Voices: Toward a Model for Community-Partnered Repatriation of Archived Traditional Music* 28 (2009) (unpublished M.A. thesis, Teachers College, Columbia University) (on file with author); Interview with Leigh Kuwanwisiwma, Dir. Hopi Tribal Cultural Pres. Off., in Kykotsmovi, Ariz. (Sept. 1, 2009).

24. See Reed, *supra* note 23, at 66; BROWN, *supra* note 22, at 18.

25. From the early 1840s until at least the 1990s, Lisa Goldberg reports that arsenic was commonly used to preserve collected specimens and as a seal for storage containers, particularly those processed into "natural history" collections. Some objects in the collections of the Smithsonian Museum, for example, are labeled "poisoned" and provided with the date when they were so preserved. See Lisa Goldberg, *A History of Pest Control Measures in the Anthropology Collections, National Museum of Natural History, Smithsonian Institution*, 35 J. AM. INST. CONSERVATION 23, 29–30, 32 (1996).

experience of it—say, to revitalize a ceremonial practice.²⁶ And yet, real injuries may happen when certain kinds of cultural data—particularly ceremonial or ritual recordings—are uncritically recirculated to new publics or even reincorporated into the originating community’s social fabric after a long absence.²⁷ As hybrids of settler modes of preservation and Indigenous generative power, preserved Indigenous voices, images, and cultural texts may take on a heightened degree of toxicity.²⁸ Much more than lifeless “data,” the cacophony of captured voices and cultural representations on settler Institutions’ shelves, expressing everything from rituals, histories, beliefs, and nearly every other facet of Indigenous peoples’ lives, are in fact “conditions with effects, bringing their own affects and animacies to bear on lives and nonlives.”²⁹

The toxification of recorded Hopi and other Indigenous groups’ ritual songs collected by early American ethnomusicologist Laura Boulton (1899–1980) provides an instructive example. As recent scholarship attests, many of the Indigenous recordings in the Boulton collection were made under ethically suspect

26. See Robert Lancefield, *On the Repatriation of Recorded Sound from Ethnomusicological Archives: A Survey of Some of the Issues Pertaining to People’s Access to Documentation of Their Musical Heritage* 47 (1993) (MA thesis, Wesleyan University).

27. Leonard Talaswaima, a ceremonial leader from the Hopi village of lower Sipaulovi, explained during the Hopi Food and Agricultural Symposium in 2014:

Some of the songs that people sometimes sing without knowledge of the sacredness of the songs may run into difficulties in their lives, so we have to be very [careful] . . . We refer to these songs as being *utilhi’i*—they should be handled with care; only people that should handle them need to handle them. They have a *wuwaapi*—a [metaphorical] whip. Anything that may happen to you is part of that.

Even though they [authorized people] sing them in public, you shouldn’t sing it.

Trevor Reed, *Itaataatawi: Hopi Song, Intellectual Property, and Sonic Sovereignty in an Era of Settler-Colonialism* 132 (2018) (Ph.D. dissertation, Columbia University) (third alteration in original), <https://academiccommons.columbia.edu/doi/10.7916/D87S95D0>.

28. In theorizing the impact of settler preservation on Indigenous voices and knowledge through the lens of toxicity, I draw from gender studies scholar Mel Chen’s conceptualization of that term as it emphasizes well the biopolitical aspects of preservation. Chen explains that toxicity exists as both a metaphor and as a physically or viscerally experienced condition: When viewed as “toxic,” objects carry racialized and gendered subjectivities as knowledge, beliefs, and fears about their “toxins” become widely circulated. But some toxins may literally “intoxicate” individuals or groups or function as “toxic assets.” Thus, the intersection of metaphorical toxicity and toxicity as experience produces real social impacts that cannot be overlooked in sociopolitical analyses of objects. See Mel Y. Chen, *Toxic Animacies, Inanimate Affections*, 17 *GLQ: J. LESBIAN & GAY STUD.* 265 (2011).

29. *Id.* at 282.

circumstances, possibly captured through fraud or duress, for the purpose of transforming them into “exotic” entertainment geared for settler audiences.³⁰ After making the recordings, Boulton unilaterally published several albums, disregarding Tribal laws, protocols, and ritual authorities designed to ensure their appropriate care and to limit the potential harms that might arise if used inappropriately.³¹ Not long thereafter, the recordings became further transformed into objects of settler desire and deception. As ethnomusicologist Aaron A. Fox reports in his history of the collection, during its acquisition by Columbia University, the recordings were used as bargaining chips between the university and a wealthy octogenarian alumnus intent on gaining Boulton’s affections.³² For decades after their acquisition, the recordings become research collateral used to secure grants and other funding for the Columbia music department.³³ Ironically, however, while touted by the university as a prized example of scholarship and a pillar of the Columbia music department’s holdings, they were entirely useless absent the Indigenous communities from whom the recordings originated. It was an open secret in Columbia circles that the collection’s existence there was merely a front to obtain millions of dollars of revenue, none of which has made its way back to the Indigenous or other minority communities who produced them.³⁴

II. THEORIZING ANONYMOUS CARE

In her 2014 book *Life Beside Itself*, Lisa Stevenson explores the disjuncture between Inuit modes of care and the serialized, “anonymous” way of caring espoused by the Canadian bureaucracy.³⁵ From governmental health programs that took great care to number and organize Inuit people sick with tuberculosis before disappearing them into distant sanatoria, to suicide prevention hotlines that instructed their volunteers to listen with curiosity to Inuit people’s grim suicide plans but not to develop personal relationships with them, Stevenson reveals the irony of

30. See Gray, *supra* note 19, at 68–74; Reed, *supra* note 27, at 71–74, 85–89.

31. See Trevor Reed, *Who Owns Our Ancestors’ Voices?: Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 288–90 (2016).

32. See Fox, *supra* note 8, at 200–02.

33. *Id.* at 200–07.

34. See *id.*

35. LISA STEVENSON, *LIFE BESIDE ITSELF: IMAGINING CARE IN THE CANADIAN ARCTIC* (2014).

Canada's efforts to impersonally "care" about Inuit as an exercise in population management.³⁶ As she points out, Canada cares only to the extent that it can maintain its power over Indigenous lives: "When life becomes an indifferent value, it no longer matters who you are, only that you cooperate in the project of staying alive."³⁷ In other words, Canada's care for "its" First Nations is a manifestation of a biopolitics that determines who is made to live and who the government lets die.³⁸ In stark contrast, Stephenson compares a number of Inuit modes of care, including traditional Inuit name transfer practices, which allow members of the community to care for and be comforted by one another, including those lost to illness or suicide.

Like many forms of settler bureaucracy, archives of fieldwork materials are notoriously sites of *anonymous care*, sites in which perpetual preservation of Indigenous voices and likenesses in easily accessible packages is privileged over the modes of caring established by the communities that generated them. In his volume on the cultural threads leading to the development of sound recording, Jonathan Sterne explains that the impetus to preserve the Indigenous voice that drove early fieldwork was not necessarily rooted in a desire to give Indigenous voices immortality, but was instead an outgrowth of settler desires to preserve the functionality of the Indigenous body despite its (anticipated) death. As he writes, "sound recording preserved the exteriority of the voice while completely transforming its interiority, its insides."³⁹ Sterne frames field recording as an illusion of live-ness, at best the preservation of what the recordist wanted to hear.⁴⁰ At worst, as Erika Brady

36. *Id.* at 3–6, 83–90.

37. *Id.* at 82.

38. [Biopolitics] is, in a word, a matter of taking control of life and the biological processes of man-as-species and of ensuring that they are not disciplined, but regularized. . . . [The development of political s]overeignty took life and let live. And now we have the emergence of a power that I would call the power of regularization, and it, in contrast, consists in making live and letting die.

MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLEGE DE FRANCE, 1975–76, at 246–47 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 1976); STEVENSON, *supra* note 35, at 44 ("Thus in the psychic lives of both the colonizer and the colonized the biopolitical commandment to stay alive at all costs is haunted by the desire on the part of the colonist to murder the colonized, and also by the recurring sense the colonized have that what appear to be the most benign public health programs are, in fact, genocidal.").

39. STERNE, *supra* note 5, at 298.

40. *Id.* at 323–24.

reveals, recordings of Indigenous peoples were a mechanical means for “bronzing” or “freezing” Indigenous voices into discrete, aesthetic facts that could substitute for Indigenous peoples themselves.⁴¹ Once accessioned to an archive, the priority for recorded Indigenous voices continues to be their logical organization to support the anticipated ear of the researcher and his or her funders, and the perpetual prevention of decay, destruction, or non-transferability to newer media. Rather than looking to Indigenous communities for direction on the appropriate lives of archived Indigenous materials, decisions about care all too easily hinge on the needs of institutions to demonstrate their power and legitimacy by amassing more and more sonic, photographic, or cinematic facts.⁴² As with the sanatoria and suicide prevention centers of Canada, biopolitics is at work in the archival care of Indigenous voices and other likenesses: collecting them, organizing them, and deciding which are made to live (and made to speak/represent) and which it will let die (allow to decay, be edited out, or discarded), irrespective of Indigenous modes of care.⁴³

While the impetus to collect Indigenous materials by settler researchers like Boulton may have been to “save the lore,” as Director John P. Harrington of the U.S. Bureau of American Ethnology once phrased it, their care today need not be dictated by this now widely repudiated goal.⁴⁴ Instead, I argue, those who work with Indigenous records should look to Indigenous

41. BRADY, *supra* note 4, at 59–60.

42. Fox, *supra* note 8.

43. Intellectual property and critical museum studies scholar Jane Anderson has critiqued the ways in which archival practices and intellectual property laws continue to make Indigenous peoples the “subjects” of archival materials, while displacing them from positions of care and ownership over these materials: Archival “material comes encoded with relations of power and specific entitlements, and continues to position Indigenous peoples, cultures, lifestyles and practices within a Eurocentric locus of enunciation.” Jane Anderson, *Anxieties of Authorship in the Colonial Archive*, in *MEDIA AUTHORSHIP* 232 (C. Chris and D. Gerstener, eds., 2013). The mere fact that archives house so many Indigenous voices *in one place and without any kind of obligation or reciprocation to Indigenous communities* clearly bespeaks a Euro-American centered ontology of the voice rather than an Indigenous one. And this repurposing of the Indigenous voice likewise resonates with Ann Stoler’s view that colonial archives are not so much about care for the histories of the colonized, but about “factual production” or the narration of “factual stories” in which “the colonial state affirmed its fictions to itself[.]” Ann Laura Stoler, *Colonial Archives and the Arts of Governance*, 2 *ARCHIVAL SCI.* 87, 97 (2002).

44. STERNE, *supra* note 5, at 314 (quoting John P. Harrington).

temporalities and modes of care to determine the appropriate lives and after-lives of these materials. Forcing Hopi and other Indigenous peoples' voices to live in a preserved state may run counter to the kind of agentive existences that these voices have in our communities.

In the Hopi context, for example, death doesn't necessarily mark a change in one's existence from a present to a past temporality. As Mary Black has written, Hopi conceptions of life and death are often analogized to the growth and decay of corn plants, which Hopi people have cultivated as a primary source of sustenance for millennia.⁴⁵ After ears of corn are harvested in the fall time, the corn stalk eventually dies—it is *qatungwu* (lifeless) and without *soona* (substance, or “that which makes life viable”). While seeds contained in the mature ear will go on to generate new plants in different times and places, the corn stalks remain in the ground; they are laid down and allowed to decay. But even their decay has a purpose: they are not uprooted or plowed under, but they collectively become a guide for where to plant the next year, and they serve as the mulch that keeps the water and nutrients in the ground for years into the future.⁴⁶

This pattern holds true in theorizing appropriate care of individuals and their voices. The bodies of the dead are traditionally not preserved but are allowed to decay. As the substance of life is the breath, or *hikwsi*, in death our *hikwsi* is said to continue on; it is *aniwiti*, or “becoming perfected.” We generally free the deceased from their bindings to this world: we burn our dead's belongings, and we don't speak their names after a certain period of time; other members of the decedent's clan take on titles of responsibility (the roles of *so'o* [grandmother],

45. See Mary E. Black, *Maidens and Mothers: An Analysis of Hopi Corn Metaphors*, 23 *ETHNOLOGY* 279, 279–81 (1984) (explaining the ways Hopi lives are often compared to corn plants within Hopi culture).

46. The notion of past lives as slowly decaying guideposts is vital in the perpetuation of agentive Indigenous cultures. As Lauren Amsterdam has written about heritage expressions in Native hip-hop, “Examining performances of (ab)originality in terms of heritage does not presuppose the perfection of enactment, but rather accentuates the slippages that emerge as one realizes their agency within a web of larger commitments.” Amsterdam goes on to quote Tlingit hip-hop artist D-Script, who explains, “It is necessary first of all to know and to know how to *reaffirm* what comes before us, which we therefore receive even before choosing, and to behave in this respect as a free subject.” Lauren J. Amsterdam, *All the Eagles and the Ravens in the House Say Yeah: (Ab)original Hip-Hop, Heritage, and Love*, 37 *AM. INDIAN CULTURE & RSCH.* J. 53, 57 (2013).

kwa'a [grandfather]; *kya'a* [aunt], *taha* [uncle], etc.) and respective obligations of the deceased so that they can continue their work in other times and places. We are supposed to let them go.

Archival materials are unique because they occupy a space in between that which is *qatungwu* and that which has *soona*. Hopi *taatawi* or traditional songs, for example, when voiced with a good heart, are not simply entertainment, art, or cultural texts, but actively encourage and empower clouds, people, animals, crops, and other entities to come into meaningful relation for the good of the world. Because performances of *taatawi* are not merely aesthetic objects but actively do things in the community and the environment, decisions about when to use recordings containing *taatawi* and how to care for them must be made with community and environmental interests at the forefront. As Hopi Cultural Preservation Office Director Stewart B. Koyiymptewa explains, remembering and forgetting the relationships between people and songs is a natural part of the way in which generations grow, assume their leadership role, and then decay—some *taatawi* continue to link contemporary generations with the people and places who helped create them, while others begin to fall out of people's memory or are intentionally forgotten.⁴⁷

DJ DawaTiyo, a Hopi elder who ran a morning traditional music show on KUYI Hopi Radio for several years, took such care in his use of archival recordings. DawaTiyo regularly aired sometimes scratchy, historic sound recordings of Tribal members performing *taatawi*. After one broadcast in 2013, I asked DawaTiyo whether he thought the Hopi public could really relate to these “old songs,” many of which were recorded before most members of the Tribe were born. He responded: “You know, some people might say these are just old songs. But that's not really how they are for us. [For us] they are always present.”⁴⁸ When old recordings are played, he added, they may have someone's voice from the past on them—and that might make them interesting historically. But for Indigenous listeners, the songs themselves continue to do what they are meant to do. DawaTiyo's work in reanimating them

47. BRIAN SWANN, BORN IN THE BLOOD: ON NATIVE AMERICAN TRANSLATION 68–69 (2017) (quoting Chip Colwell & Stewart B. Koyiymptewa, *Translating Time: A Dialogue on Hopi Experiences of the Past*).

48. Interview with Bruce Talawyma, DJ, KUYI Hopi Radio, in Keams Canyon, Hopi Reservation (Ariz.) (Aug. 5, 2014).

through careful selection and recontextualization helps them to fulfill the community-building and encouraging functions for which these songs exist.

III. UNDERSTANDING INDIGENOUS ERASURE

While there are times when Hopi ceremonial songs and other cultural data should be remembered or even recorded, there are also times when they are supposed to be forgotten and, perhaps, even destroyed. Sometimes this is the result of selective filtering – sometimes they simply fail to resonate with the current generation, or with the local environment, or they are too complex to maintain and are soon forgotten. Cultural data can also be forgotten as an act of transferring ownership and demonstrating humility. For example, several older composers told me that when they give their songs to fellow village members for ceremonial performances, they forget the song in the process. And, as discussed above, some cultural expressions are toxic to those who hear or perform them without proper authorization. These are best forgotten if they are overheard. Whatever the case, forgetting, deletion, and erasure in Indigenous societies is not simply the inevitable outcome of relying on collective memory rather than written texts or recording technologies to preserve culture. Rather, forgetting can be just as intentional and valuable as remembering. Two moments from Hopi history provide instructive examples.

The intentional forgetting of Spanish Catholic ritual from Hopi lives following the 140-year Spanish colonization of what is now the Southwestern United States played a pivotal role in reestablishing Hopi sovereignty and beginning the process of healing within the Hopi community. Spanish conquistadores arrived on Hopi lands in 1540, but it was not until 1629 that Franciscan missionaries (nicknamed *tota'tsi*, or “dictators” – someone who wants to “have his own way all the time”) settled on Hopi lands.⁴⁹ By the mid-1660s, the Franciscans had built Spanish churches over the top of Hopi gathering and ceremonial spaces known as *kivas*.⁵⁰ Spanish documents show that after the Franciscans baptized roughly forty percent of the Hopi population,

49. MOQUIS AND KASTILAM: HOPIS, SPANIARDS AND THE TRAUMA OF HISTORY, *supra* note 15, at 122, 191.

50. *Id.* at 119.

they began to brutally extract labor from the entire population, disrupting Hopi lifeways and ceremonial practices.⁵¹ Hopi people were forced to carry heavy logs, water, and other resources 90 to 100 miles to build churches and provide materials for Catholic ceremonies; they were forced to use their own materials and labor to comply with Spanish *encomiendas* (a grant of power from the Crown to exact tribute); and they were forced to hide their own ceremonial performances because such were considered “idolatry” by the Franciscans.⁵² One Hopi man, Sitkyoma, was tortured and murdered by the Franciscans after sponsoring a Hopi *nimantiikive* (ceremony marking the annual departure of the *katsinam* or spirit-beings from Hopi lands), which enabled his daughter-in-law to complete the final stage of her Hopi wedding ceremony.⁵³

On August 10, 1680, the Indigenous peoples of the region collectively rose up against the Spanish and retook their territories. A network of runners with knowledge of the plan carried knotted ropes tracking the days until the coordinated rebellion would take place. In nearly all of the Indigenous villages, Spanish priests either were executed or fled after being tipped off to the uprising. Spanish churches and palaces were looted and burned. In the Hopi villages of Orayvi and Awa’ovi, Catholic churches were destroyed, and three Franciscan priests were executed.⁵⁴ Spanish Catholicism and its brutal and abusive practices had been forcibly erased from Hopi lands.

For a period of twenty years, Hopi people lived free of Spanish domination. Then, in the midst of a Hopi cultural revitalization, some Pueblo communities, including some clans in the Hopi village of Awa’ovi, began practicing Catholicism again.⁵⁵ As Hopi elder and Tribal Vice-Chairman Elgean Joshevama explained in a 2002

51. *Id.* at 60, 139 (Spanish accounts suggest 4,000 individuals were baptized, which Hopi oral historians suggest was approximately 40 to 50 percent of the population.).

52. *Id.* at 120–21, 169–77.

53. *Id.* at 170. *Katsinam* are spirit beings who visit the Hopi people during certain periods of the year. Sitkyoma sponsored the *nimantiikive* out of its ceremonial season while the Franciscans were away so that his daughter-in-law could present herself to the *katsinam* and thus complete the required steps for the wedding. I thank Stewart B. Koyiyumptewa of the Hopi Cultural Preservation for these insights.

54. Thomas E. Sheridan & Stewart Koyiyumptewa, *Moquis, Kastilam, and the Trauma of History: Hopi Oral Traditions of Seventeenth-Century Franciscan Missionary Abuses*, in *NEW MEXICO AND THE PIMERÍA ALTA: THE COLONIAL PERIOD IN THE AMERICAN SOUTHWEST* 250 (John G. Douglass & William M. Graves eds., 2017).

55. *Id.* at 251–52.

interview, Catholic priests—invited and assisted by Awa’ovi villagers—“started to reconstruct the remains of their church and tried to reconstruct their power there as well.”⁵⁶ Hopi people across Hopi lands recognized the resurgence of a power in the practice of Catholicism at Awa’ovi: the inculcation of foreign ritual knowledge coupled with a manipulating force that, borrowing the words of historian Michel Foucault, had “a hold over others’ bodies, not only so that they may do what one wishes, but so that they may operate as one wishes.”⁵⁷

Sometime between 1700 and 1701, leaders from many of the Hopi villages organized and carried out a complete destruction of the Hopi village of Awa’ovi, killing most of the men in the village and removing the women and children to other villages. As Joshevama explains,

[T]hat destruction, when you think about it, a Hopi village to be destroyed by Hopi people, that Hopi lives would be taken, when you think about it, how many of our people would be willing to make that kind of a decision today? . . . I think that demonstrates to us today . . . how strongly the Hopi people felt about saving this Hopi way of life. . . . That they just didn’t want any other way of life, especially the kind that had been imposed on us by, by the Spaniards.⁵⁸

The forced erasure of the dogma, rituals, and abusive practices of sixteenth century Spanish Catholicism from Hopi memory was permanent, intentional, and carried out by Indigenous authority.

While lives have been risked and even taken to retain Hopi rituals and to intentionally forget Catholic ones, some Hopi rituals

56. MOQUIS AND KASTILAM: HOPIS, SPANIARDS AND THE TRAUMA OF HISTORY, *supra* note 15, at 241.

57. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 138 (Alan Sheridan trans., Pantheon Books 1st American ed. 1977). Foucault’s description of the rise of disciplinary mechanisms of social control in the 17th and 18th centuries aptly captures the concern felt by Hopi people in 1700:

What was then being formed [through training of European soldiers, school children, prisoners, and workers] was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviour. The human body was entering a machinery of power that explores it, breaks it down and rearranges it. A ‘political anatomy’, which was also a ‘mechanics of power’, was being born; . . .

Id.

58. MOQUIS AND KASTILAM: HOPIS, SPANIARDS AND THE TRAUMA OF HISTORY, *supra* note 15, at 241–42.

have also been intentionally silenced and forgotten. In his book *Rethinking Hopi Ethnography*, ethnographer Peter Whiteley recounts one such episode that happened in the Hopi village of Orayvi (Oraibi) in the 1920s.⁵⁹ K.T. Johnson, a Hopi priest turned Mennonite convert, was one of the last members of Orayvi's Bow Clan. As one of the most powerful clans, the Bow Clan held ownership over some of the most important ceremonies in the village, and Johnson's position within the clan made him heir to the village leadership. But with dwindling numbers, and Johnson's conversion, the Clan had not performed its ceremonies for a number of years. At one point, two of Johnson's rivals from the neighboring village of Hotvela (Hotevilla), seemingly intent on revitalizing the ceremonies without him, stole the Bow Clan altar and other ceremonial objects, thereby demonstrating their legitimacy as village leaders.⁶⁰

In 1927, however, Johnson's aunt—the last matriarch of his clan—died, which meant the clan would in the next generation cease to exist at Orayvi. As quoted by the Mennonite missionary who converted him, Johnson declared that “the fire of our clanship [was] extinguished.”⁶¹ Not long thereafter, Johnson, with the Mennonite missionary in tow, approached the rival leaders who were in the process of conducting a ceremony, requested the return of the sacred objects, and indicated his intention to burn them.⁶² Suspicious of the missionary's influence over Johnson, the rivals initially resisted, but later relented, recognizing Johnson's legitimacy as the one rightfully authorized to control the ritual objects and the ceremonies pertaining to them. Once in possession of the objects, Johnson took them out of Orayvi to his new village (Kykotsmovi), piled them up, poured gas on the pile, and asked a local young man to light a match.⁶³ What archeologists and museum curators today would likely consider priceless historical artifacts of great value to humanity were transformed into ash and smoke.

59. PETER M. WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* 133 (1998).

60. *Id.* at 134–37, 141.

61. *Id.* at 134.

62. *Id.* at 139–40.

63. *Id.* at 152. While it isn't clear why Johnson didn't burn the objects himself, historical accounts relate that the young man who lit the altar on fire died several months thereafter. I thank Stewart B. Koyiymptewa of the Hopi Cultural Preservation Office for these insights.

Though a convert to the Mennonite faith, Johnson's burning of these artifacts was, in Whiteley's view, a means for fulfilling Hopi prophecies about the progression of Hopi culture.⁶⁴ This progression necessarily included the death of certain rituals so that others could develop, and so new leadership paradigms could emerge. The rival leaders themselves recognized this when Johnson requested the altar. As recorded in the Mennonite missionary's account of Johnson's words during the burning, "Alas! *It has come, but so must it be. By destroying these things, you will have DESTROYED the very foundation of our ceremonies. The conflagration must spread. Take these and do as you have said.*"⁶⁵ While the Mennonite missionary probably saw this as a victory in his efforts to convert Hopi people, the act of Johnson destroying the artifacts was in reality an act of intentional forgetting that further reinforced Indigenous authority over ritual knowledge.

Policy makers of today might attempt to understand the two foregoing historical moments as precedents useful in divining a standard of care for Hopi or other Indigenous peoples' cultural materials. They might extrapolate rules to determine when destructive forgetting should be permitted for Indigenous peoples' survival, and when preserving and remembering are so important that no cost—including the sacrifice of human lives—is too great. Indeed, I could attempt to weave a concise theoretical thread through these powerful examples of forgetting and attempt to connect them to our aforementioned village leader's decision to let more of our ceremonies die out. But that is not my place—nor is it my purpose in writing this essay.

What is relevant here for those who establish policy for the care of Indigenous voices, knowledges, and other forms of Indigenous culture is that the lives of these materials and the networks of which they are a part are often purposefully and profoundly finite, at least from our limited point of view, and that Indigenous refusals to extend these voices, knowledges, and cultural forms in time or space or theory are in themselves generative acts reserved for Indigenous authorities.⁶⁶ The refusal to permit the Franciscans' knowledge and power to exist in Hopi society meant that Hopi

64. *Id.* at 141–42.

65. *Id.* (emphasis in original).

66. For a discussion of the concept of Indigenous refusal, see AUDRA SIMPSON, *MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES* 133 (2014).

people were never again subjugated by the Spanish – and, I hope, through our memory of that forgetting, Hopi will never again be subjugated by any foreign power. And, while it is true that Johnson’s act of forgetting meant that some ceremonies are no longer performed at Hotevilla, I have witnessed how remnants of these ceremonies – words, melodic phrases, affects – have now become references in newer cultural expressions, which, through collective remembering, acquire profound meanings as they lose their particular temporalities and yet retain their effects. Indeed, though our present generation may lose direct access to the entirety of forgotten ceremonies and their associated songs, the voices that sing them continue on in other times and places. In this way, forgotten knowledge remains whole, resisting distortion or alteration outside of the necessary authorities.

IV. TOWARD AN INDIGENOUS RIGHT TO BE FORGOTTEN

When Indigenous voices, likenesses, and other forms of Indigenous cultural data are made to live under the preservation apparatus of the settler state, Indigenous sovereignty is diminished. Thus, the care of Indigenous voices should be, in the first instance, in the hands of Indigenous peoples and not those of settler governments or private research institutions, archives, and museums and their modes of anonymous care. Indigenous care of recorded voices and other documentary media presumes the right of Indigenous communities to determine how these voices should live or whether these voices should be erased, be allowed to disintegrate, or simply be forgotten. For Indigenous peoples to retain and fully exercise their sovereignty, they must have the power to create culture, but also, when necessary, allow that culture to die.

In many ways, this proposed right of Indigenous peoples to care for cultural materials parallels current debates regarding the right of individuals to have their data erased or “forgotten” by big data corporations like Google, Facebook, Apple, and Amazon. Governments in several parts of the world have now established policies to ensure forgetfulness and erasure of corporate memory

in defense of personal autonomy.⁶⁷ For example, in May 2016, the European Union (EU) adopted major revisions to its 1995 Data Protection Directive, including the addition of an individual “right to be forgotten.”⁶⁸ The European Parliament found that each European citizen “should have the right to have his or her personal data erased” under certain conditions,⁶⁹ including:

- Where “the personal data are no longer necessary in relation to the purposes for which they [are] collected or otherwise processed,”⁷⁰ or
- “[W]here [the citizen] has withdrawn his or her consent or objects to the processing of personal data concerning him or her,”⁷¹ or
- Where “personal data have been unlawfully processed.”⁷²

The EU was particularly concerned about situations in which individuals such as minors were “not fully aware of the risks involved” in allowing information about themselves to be digitized in the first place.⁷³ At the same time, the EU faced considerable pressure from social media corporations, journalists, and historians, among others, to weigh carefully the potential impact of the right to be forgotten on freedom of expression and information. In fact, the EU took particular care to preserve an exception to the right to be forgotten for “archiving purposes in the public interest, scientific or historical research purposes or statistical purposes,” among other seemingly self-evident publicly beneficial interests.⁷⁴

In the United States, legal scholars initially mocked European efforts to implement a right to be forgotten, particularly a 2014 Court of Justice of the European Union ruling which required

67. See Joseph Jerome, *California Privacy Law Shows Data Protection Is on the March*, ANTI-TRUST MAG., Fall 2018, at 96 (reporting that the European Union’s General Data Protection Regulation had “spurred other countries, including India and Brazil, to consider and adopt similar laws”); Hans Graux, Jef Ausloos & Peggy Valcke, *The Right to Be Forgotten in the Internet Era* (Interdisc. Ctr. for L. & ICT, ICRI Working Paper 11/2012, 2012).

68. Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 43.

69. *Id.* at Preamble ¶ 65.

70. *Id.* at art. 17(1)(a).

71. *Id.* at Preamble ¶ 65; *id.* at art. 17(1)(b), (c).

72. *Id.* at art. 17(1)(d).

73. *Id.* at Preamble ¶ 65.

74. *Id.* at art. 17(3)(a), (d). Just who the “public” is that benefits from these activities may necessitate further examination.

Google Spain to delete search results containing what the court deemed “irrelevant and excessive” information about a Spanish citizen’s debt auction, though the information had already been made public.⁷⁵ Of particular concern to commentators was the seeming incongruence of the right to be forgotten with U.S. First Amendment law, with one scholar describing it as “the biggest threat to free speech on the Internet in the coming decade.”⁷⁶ And yet, not long after the *Google Spain* decision and the E.U.’s implementation of the right to be forgotten, states like California moved forward with their own statutes akin to the E.U.’s right, albeit with substantial First Amendment carve-outs. The California Consumer Privacy Act (CCPA), for example, requires that a business which receives a verifiable request from consumers to erase personal data “shall delete the consumer’s personal information from its records.”⁷⁷ But the drafters of the CCPA made explicit that its variant on the right to be forgotten does not require businesses to erase information necessary to “[e]xercise free speech [or] ensure the right of another consumer to exercise that consumer’s right of free speech.”⁷⁸ Even so, the law has raised concerns over the prospect that some data, like a viral tweet or Facebook post, might be removed upon the request of the originator after being widely commented on by the public, thereby inhibiting public discourse.⁷⁹

Interestingly, nothing in the EU’s right to be forgotten or the CCPA currently requires that the respective country or state or its

75. Some commentators considered the European court to be out of their minds. Kieron O’Hara, *The Right to Be Forgotten: The Good, the Bad, and the Ugly*, DIGITAL CITIZEN, July–Aug. 2015, at 2–3, <http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=7131393>.

76. Rosen, *supra* note 11, at 88; see also Savanna Shuntich, *The Life, the Death, and the Long-Awaited Resurrection of Privacy: How Americans Can Reclaim Their Lives from the Internet with a Right to Be Forgotten*, 41 HUM. RTS. 2, 2–3 (2016) (explaining one view, common in the United States, that “a right to be forgotten would be impossible in the United States under the First Amendment and existing First Amendment jurisprudence even though it could be beneficial to the citizens”).

77. CAL. CIV. CODE § 1798.105(c).

78. *Id.* § 1798.105(d)(4). Importantly, the CCPA also allows entities to keep information collected from consumers to “[e]ngage in public or peer-reviewed scientific, historical, or statistical research in the public interest” as long as the data holder complies with ethics and privacy laws and the consumer “has provided informed consent.” *Id.* § 1798.105(d)(6). Such a provision alone would be unlikely to impede Tribal demands for erasure under the CCPA, as few researchers prior to the 1960s obtained informed consent from Tribal members before recording or collecting data from them.

79. See Jerome, *supra* note 67, at 99.

cultural institutions take into account the right of Indigenous individuals and communities—enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)—to receive redress for unauthorized taking of Indigenous knowledge or expression, or to secure Indigenous peoples’ rights to maintain, control, protect, and develop their cultures and intellectual property under their own laws and protocols.⁸⁰ Such an extension of the right to be forgotten, I argue, is necessary to allow Indigenous peoples to properly care for their voices, images, and other forms of recorded cultural data.

While some may see the right to be forgotten as an excessive burden on speech and public discourse, I argue that recognizing and upholding Indigenous peoples’ sovereign rights to care for their voices, images, and cultural data are consistent with broader theories of human dignity while also specific to their unique relationships with colonizing governments like the United States. The First Amendment’s prohibition on government regulation of speech has been understood as necessary to support “uninhibited, robust, and wide-open” debate on public issues.⁸¹ Thus, government limitations on citizens’ access to information are typically disfavored by American courts because these limitations potentially stifle or increase the costs of a robust public sphere and effective self-governance.⁸² And yet courts and commentators have

80. The United Nations Declaration on the Rights of Indigenous Peoples, while not necessarily binding on signatories, does provide global norms for data gathered from Indigenous groups. See G.A. Res. 61/295, U.N. Docs. A/RES/61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 11(2) (Sept. 13, 2007) (“States shall provide redress . . . developed in conjunction with [I]ndigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”); see also *id.* at art. 31(1) (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . . They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”).

81. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

82. See, e.g., Post, *supra* note 11, at 993–94 (criticizing the European Union’s Right to be Forgotten, codified in the General Data Protection Regulation, as incompatible with the kinds of “communicative action required by the democratic public sphere,” which most European nations already regulate to “protect the dignity of human beings”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–25 (1948) (“The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.”).

long recognized that circulation of private information in a way that causes harm may need to be curtailed to protect individual dignity.⁸³

The right of publicity tort provides one example of a way dignitary interests have been defended in American courts without offending free speech principles. As recently articulated by Professors Post and Rothman, the publicity tort's "right of dignity" prevents the misappropriation of an individual's voice, image, or other forms of identity in ways "that are inconsistent with forms of respect essential to the integrity of personality."⁸⁴ This dignity right recognizes that people's identities are intersubjective, and that we depend on others to maintain the integrity of our identities by abiding by certain social norms of respect or "civility rules."⁸⁵ Unconsented appropriations of one's identity that violate these civility rules in ways that are "highly offensive to a reasonable person," causing shame, embarrassment, or emotional distress, may result in liability,⁸⁶ notwithstanding First Amendment objections.⁸⁷ Speech acts that violate one's right to dignity by disclosing matters of purely private significance (as opposed to matters that are newsworthy or otherwise of public concern) are among those that may be so "highly offensive" that they fall outside of the First Amendment's ambit.⁸⁸

While state and federal courts have upheld rights to dignity for individual American plaintiffs, they have not yet determined what violations of Indigenous peoples' dignitary rights can be remedied

83. See generally Post, *supra* note 9 (arguing that the common law invasion of privacy tort protects civility norms and safeguards human dignity); Warren & Brandeis, *supra* note 9 (discussing whether the law at the time could be properly invoked to protect the desirable principle of individual privacy).

84. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *YALE L.J.* 86, 165 (2020).

85. *Id.* at 122 (describing "civility rules" as those which "convey the respect we deem necessary for the maintenance of our personality").

86. *Id.* at 122-24 (citing cases in which unconsented appropriation of one's voice or image resulted in shame, emotional distress, or embarrassment) (internal quotations omitted). Compare *RESTATEMENT (SECOND) OF TORTS* § 652D (1977) (restating the common-law invasion of privacy tort as requiring the publication of a matter of another's private life "that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public").

87. See Post & Rothman, *supra* note 84, at 165, 167-68.

88. *Id.* Note that "public concern" does not include speech that reveals private affairs for "mere curiosity" or for the "voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger." *Id.* at 167-68; *id.* at 168 n.357; *id.* at 170 n.364.

without impermissibly constraining speech. Given the colonized status of Indigenous peoples in the United States, it seems unlikely that the appropriate balance between Indigenous peoples' rights to dignity and American free speech will turn simply on whether the speech in question is "highly offensive to a reasonable [presumably settler] person" as an ordinary right to publicity claim might require. Indeed, Indigenous societies and their sovereign governments maintain rules and protocols governing the appropriate circulation of voices, images, and cultural data that are often distinct from those embraced by the United States constitution and the general American public.⁸⁹ Rather, the balance between Indigenous dignity and American free speech must account for duties the United States owes to Indigenous peoples as a result of American colonization, which sharply curtailed the ability of Tribes to maintain and defend their own "civility rules."

Just what duties the United States has to uphold Indigenous dignity can be observed through the history of federal policy toward Indigenous peoples. Since its founding, the United States has, through statutes, treaties, law, and administrative policy, repeatedly recognized and upheld the collective identities, autonomy, and self-determination of Native American Tribes.⁹⁰ Coupled with that recognition, the U.S. Supreme Court long ago established the federal government's duty to protect the political identities and associated rights of Indigenous peoples who, owing to American conquest, became dependent on the United States.⁹¹

89. This distinction between Constitutional principles governing American and Tribal public spheres has been articulated by the federal courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (finding that Tribal governments are "separate sovereigns pre-existing the Constitution" and therefore unconstrained by most Bill of Rights limitations); *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959) ("No provision of the Constitution makes the First Amendment applicable to Indian nations."); *see also Trevor Reed, Creative Sovereignty: Should Copyright Apply on Tribal Lands?* (forthcoming 2021) (discussing differences in the ways Indigenous peoples and American settlers govern their public spheres).

90. *See generally* Exec. Order No. 13175, 65 Fed. Reg. 67249, § 2 (Nov. 9, 2000) (recognizing the ongoing policy of the United States, established in the U.S. Constitution, its treaties, statutes, executive orders, and judicial decisions, to recognize Indigenous peoples as "domestic dependent nations," to work with Tribes on a "government-to-government basis," and to support "the right of Indian tribes to self-government . . . tribal sovereignty and self-determination").

91. *See United States v. Kagama*, 118 U.S. 375, 383-84 (1886) ("These Indian tribes . . . are communities *dependent* on the United States. Dependent largely for their daily food.

Though for much of the nineteenth and first part of the twentieth century the federal government and American settlers regularly participated in pillaging human remains, sacred objects, and other forms of Indigenous identity and culture in utter derogation of Indigenous peoples' laws and social norms, Congress began in the latter half of the twentieth century to fulfill its duty to uphold and protect collective Indigenous identities and rights to culture.⁹² In efforts to provide partial redress for previous violations of Indigenous human rights, Congress passed the landmark Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).⁹³ The law requires federal agencies, federally funded museums, and other institutions to return sacred or patrimonial cultural materials from their collections to Native American Tribes (or a lineal descendant) when those items had been acquired without proper Tribal authorization.⁹⁴ This government-sanctioned removal and return of ceremonial implements and sacred artifacts from museums' shelves and displays has undoubtedly curtailed American speech and public knowledge about Indigenous peoples. And yet, over the last three decades, thousands of these repatriations have been carried out under NAGPRA to remedy violations of Indigenous dignity,⁹⁵ apparently without raising First Amendment objections. The policy of the United States to recognize and protect collective Indigenous identities and culture may very

Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection").

92. See generally PHILIP DELORIA, *PLAYING INDIAN* (1999) (documenting the history of appropriation of Indigenous identities in the United States); Jack F. Trope & Walter Echo Hawk, *Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 *ARIZ. ST. L.J.* 35 (describing the ways human remains and cultural objects were taken from Indigenous lands in violation of norms of respect and dignity, and providing a legislative history of the Native American Graves Protection and Repatriation Act).

93. 25 U.S.C. §§ 3001-13; see S. REP. NO. 101-473, at 2, 4 (1990) ("[T]he process for determining the appropriate disposition and treatment of Native American . . . sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights.").

94. See 25 U.S.C. §§ 3001, 3005(a)(5) (requiring the expeditious return of sacred objects and objects of cultural patrimony upon request of a Tribe or lineal descendant when the holding institution lacks a proper right of possession).

95. NAT'L NATIVE AM. GRAVES PROT. & REPATRIATION ACT (NAGPRA) PROGRAM, FISCAL YEAR 2018 REPORT, at 3 (2018), <https://irma.nps.gov/DataStore/DownloadFile/620933> (estimating that approximately 15,000 cultural items (presumably sacred objects and objects of cultural patrimony) have been repatriated under NAGPRA).

well justify other federal remedies aimed at redressing dignitary harms to Indigenous peoples without disturbing the speech guarantees of the First Amendment.

Of course, not all unconsented uses of Indigenous voices, images, or cultural data will rise to the level of dignitary harm. But when Indigenous identities and cultural data are used in American public discourse in violation of rules of civility maintained by Tribal sovereigns, Tribes and their members often experience these as “abusive and alienating.”⁹⁶ As Rebecca Tsosie reports, many Indigenous groups have for centuries had their voices, images, and other cultural information collected and documented, often against their will, and then “used ‘against’ [them] . . . link[ing] them with criminality, susceptibility to disease, or vulnerability.”⁹⁷ These repeated affronts to Indigenous dignity were in many instances occasioned by invasions of privacy by settler governments and institutions intent on collecting cultural data; but they are perpetuated today through the continued, unconsented use and misrepresentation of that data. Illicit uses of Indigenous voices, images, and other forms of cultural data often led (and in some cases still lead) to deprivations of Indigenous groups’ collective autonomy and rights of self-government.⁹⁸

Upholding Indigenous dignity today therefore necessitates affirming a Tribal government’s right “to regulate data within its territory,” but also a right to “protect Indigenous peoples more broadly from harmful or exploitative policies of the encompassing nation-state,” whether that protection is accomplished through a Tribe’s affirmative care or, when necessary, through intentional erasure.⁹⁹ Those who would reify free speech so as to condone the continued invasion of Indigenous peoples’ sovereignty over their own voices, cultures, and representations for the purpose of enriching settler political discourse only inflame the dispossessive work of colonialism while sidestepping the immense imbalance in

96. See Post, *supra* note 11, at 1008–09. As Professor Post notes, the problem with using data in violation of civility rules is that doing so disrupts “essential activities and key relationships” that give people their personality and prevents people from experiencing public discourse “as a medium through which they might influence the construction of public opinion” or contribute to a shared democracy.

97. See Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing “Indigenous Data Sovereignty”*, 80 MONT. L. REV. 229, 245 (2019).

98. See Ishii, *supra* note 7.

99. *Id.* at 244.

access to knowledge that significantly favors settlers over Indigenous communities.¹⁰⁰

One of Indigenous sovereignty's core attributes must be the ability to care for the voices, likenesses, and cultural representations of our people: past, present, and future. This may include (but is certainly not limited to) the ability of Indigenous communities to determine appropriate preservation techniques and possibilities of circulation for these materials. It may also require archives to deaccession them and to transfer complete ownership of physical media and intellectual or cultural property rights to Indigenous communities. But it most certainly includes the rights of Indigenous peoples to exclude the settler state from using and accessing Indigenous voices, images, and other media documenting their culture, the right to care for those media, and the right to demand their destruction.

CONCLUSION

Determining when recorded Indigenous voices should be forgotten—or, in the case of archival materials, deaccessioned or destroyed—can be a deeply disturbing question in an era in which there is a prevailing sense that everything can, or even *should be* remembered and preserved. As Viktor Mayer-Schonberger, Professor of Internet Governance and Regulation at Oxford University, has written, “If we had to worry that any information

100. In her response to MICHAEL BROWN, WHO OWNS NATIVE CULTURE? (2003) (disapproving of Indigenous peoples' use of American intellectual property law to protect Indigenous culture from misappropriation, and advocating instead for an education-based approach), anthropologist and Indigenous studies scholar Audra Simpson refutes claims by free speech advocates that Indigenous culture should be freely available to the public in part by noting how limited Indigenous peoples' access to knowledge products is compared to non-Indigenous citizens of the United States and Canada. Audra Simpson, *On the Logic of Discernment*, 59 AM. Q. 479 (2007). As a recent United States Federal Communications Commission Study points out, even today Tribal homes—particularly on rural federal reservations—lag behind the rest of the nation in terms of broadband internet coverage, making it more difficult for them to access media otherwise accessible to non-Indigenous members of the public. FED. COMM'NS COMM'N, REPORT ON BROADBAND DEPLOYMENT IN INDIAN COUNTRY 1 (May 2019) (“[W]hile 92% of housing units on urban Tribal lands are covered by a fixed terrestrial provider of 25/3 Mbps broadband service—just six points behind their non-Tribal urban counterparts—just 46.6% of housing units on rural Tribal lands have access to that service, a nearly 27-point gap compared to non-Tribal rural areas. Mobile LTE coverage on Tribal lands is similarly behind deployment on non-Tribal lands; while 99.8% of the population living on non-Tribal areas are covered by mobile LTE service, only 96% of the population living on Tribal land are covered with such service.”).

about us would be remembered for longer than we live, would we still express our views on matters of trivial gossip, share personal experiences, make various political comments, or would we self-censor? The chilling effect of perfect memory alters our behavior.”¹⁰¹

Knowledge about the past is ever accumulating through public records and digital means. Some have found this hopelessly intoxicating. Misplaced words, misinformation, and endless commentary continue to inhabit the life-worlds of people’s virtual and actual lives as corporations generate massive archives filled with big data’s (toxic) assets. Injected into this global predicament through settler collecting and preservation enterprises, Indigenous voices may need to decay or be forgotten for the sake of allowing Indigenous communities to fully live. As with the example of Hopi cornstalks, some archived cultural materials might provide beneficial guidance and direction for future creative efforts, but may lack the substance, in their preserved form, to generate productive effects in today’s complex Indigenous worlds. Close, personal collaborations with, and deference to, Indigenous communities in the care of their voices, rather than anonymous safeguarding of their culture by settler institutions, are critical as we begin to recognize Indigenous dignity in the governance of these materials as they are planted in new contexts or allowed to pass on.

101. VIKTOR MAYER-SCHONBERGER, *THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 5, 15 (2009).

