

## TAINO SACRED SITES: AN INTERNATIONAL COMPARATIVE ANALYSIS FOR A DOMESTIC SOLUTION

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The irony of the situation is, you can go on public lands to ski, to strip a mountain to mine, or leave a cyanide pool, but you can't go on public land to pray for its continued fertility.

-Vine Deloria, Jr.<sup>1</sup>

### I. BORIKEN<sup>2</sup> TAINO: INTRODUCTION TO THE GOOD PEOPLE

Taino.<sup>3</sup> We call ourselves The Good People.<sup>4</sup> That name bears a lot of responsibility. A principle obligation is to ensure that our stories, customs, dances, and songs remain, even after five hundred years of different colonizing voices trying to erase our cultural traditions. To accomplish that goal, Taino people need to remember. To remember, we need to maintain our relationships with our ancestors so they will continue to share the stories. To continue those relationships, we must respect the remains of our ancestors, preserve the sites

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1. IN THE LIGHT OF REVERENCE (Independent Television Service & Native American Public Telecommunications 1998).

2. The original descriptive name for the Island of Puerto Rico. Taino Inter-tribal Council, Inc., *The Dictionary of the Spoken Taino Language*, at <http://members.dandy.net/~orocobix/telist-b.htm> (last modified June 23, 1997) [hereinafter *Dictionary*]. The name "Borike" will be used interchangeably with "Puerto Rico" throughout the article.

3. Taino peoples are the Indigenous peoples of Puerto Rico and other Islands of the Caribbean. IRVING ROUSE, *THE TAINOS: RISE AND DECLINE OF THE PEOPLE WHO GREETED COLUMBUS* 5 (1992). Some authors assert that the Taino became extinct shortly after the Spanish arrived. *Id.* at 26. Others, however, find that "it would be incorrect . . . to conclude . . . that Indigenous peoples have ceased to exist in the tragic years of conquest . . ." Samuel M. Wilson, *The Legacy of the Indigenous Peoples of the Caribbean*, in *THE INDIGENOUS PEOPLES OF THE CARIBBEAN* 206 (Samuel M. Wilson ed., 1999). "[I]n the late 1800s and early 1900s, institutions like the Smithsonian National Museum of the American Indian and the U.S. War Department had separately documented the survival of Taino descendents in Cuba and Puerto Rico." Roberto Mucaro Borrero, *Rethinking Taino: A Taino Perspective*, in *TAINO REVIVAL* 152 (Gabriel Haslip-Viera ed., 2001).

4. *Dictionary*, *supra* note 2, at <http://members.dandy.net/~orocobix/telist-t.htm>.

where they are buried, protect their ceremonial items from tourists and museums, and maintain the sanctity of sacred sites throughout the Island.

Many Indigenous cultures have accomplished—and continue to accomplish—these tasks.<sup>5</sup> Native nations within the borders of the United States, for example, have worked to pass legislation like the Native American Grave Protection and Repatriation Act (NAGPRA)<sup>6</sup> and the National Historic Preservation Act.<sup>7</sup> This legislation includes, *inter alia*, provisions for Native peoples to take part in the discussions and decisions regarding their sacred sites. Indigenous peoples have also made their voices heard at international fora, successfully averting destruction of their ancestral sacred sites.<sup>8</sup> Taíno people are preparing to speak with the various governmental entities that purport to work on behalf of all Boricuas<sup>9</sup> on the Island. Armed with the experiences and lessons of Indigenous relatives on other continents, Taíno people will find appropriate ways to continue to uphold our responsibilities to our ancestors and to the coming generations.

#### **A. Da Boria Da Cacona:<sup>10</sup> The Places This Article Will Go**

The impetus for this Note arose from time I spent in Ciales, Borike where one of the elders from the Taíno community has a great expanse of land. I had

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5. See 16 U.S.C. § 228i(c) (1992) (granting religious and cultural access to Grand Canyon for Havasupai Nation); 16 U.S.C. § 410pp-6 (1999) (closing of Cibola temporarily for cultural and religious purposes); 16 U.S.C. § 460uu-47 (1999) (granting Indigenous peoples' access to and religious use of Malapais National Monument); 25 U.S.C. § 640d-20 (1995) (providing Navajo/Hopi mutual access to sacred sites); 42 U.S.C. § 1996 (1994) (creating government-wide public policy to protect and preserve sacred sites).

6. Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994).

7. National Historic Preservation Act, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988)).

8. See Sarah Pritchard & Charlotte Heindow-Dolman, *Indigenous Peoples and International Law: A Critical Overview*, 3 AUSTL. INDIGENOUS L. REP. 473 (1998) <http://www.austlii.edu.au/au/journals/AILR/1998/38.html> (discussing Hopu & Bessert v. France, Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1 (1997)).

9. Boricua is “the beautiful seven letter word that chronicles our past, our present, and our future . . .” Roberto Santiago, *Introduction*, in BORICUAS: INFLUENTIAL PUERTO RICAN WRITERS—AN ANTHOLOGY xxxiii (Roberto Santiago ed., 1995). “Boricua” describes one understanding that Puerto Ricans are a mix of Taíno, Spanish, and African descendants. The word is used as a familiar greeting between Island citizens and will be used interchangeably in this article with the phrase “Puerto Rican;” when necessary it will be used as distinct from “Taíno,” who acknowledge, celebrate, and practice the customs of their Indigenous ancestry.

10. “My Work My Reward.” *Dictionary*, *supra* note 2, at <http://members.dandy.net/~orocobix/tedict.html>.

been conducting legal research for her regarding the community's sacred sites and our meeting was intended to be somewhat of a "focus" session. We began to consider how the Taino could use a conglomerate of established rights to assert a possible domestic solution to the problems of access, repatriation, and control of sacred sites on the Island. As a result of this meeting, I decided to write this Note, which considers why and how the Taino might create a cooperative management agreement to gain control over our sacred sites. This would require combining Taino custom, local laws of the Puerto Rican government, U.S. federal law, and international instruments to create a management agreement like those used in Canada,<sup>11</sup> Australia,<sup>12</sup> and Washington State.<sup>13</sup> Since the Taino, like the Native nations' citizens, Native Hawaiians, and Alaskan Natives are Indigenous peoples under the colonial control of U.S. plenary authority, Taino have a right to the same protective provisions created for these peoples.

I have three main objectives for this Note: first, I will draw parallels between the Native nations' and Puerto Rico's respective legal-historical relationships with the United States federal government. The purpose of demonstrating this parallel relationship is a narrow one. My aim is to show why the United States has a duty to treat the Taino as an Indigenous people with similar rights as the Indigenous peoples living within the U.S. territorial borders. Second, I will outline U.S. domestic law and international law provisions that could ostensibly relate to Taino concerns. Finally, I will suggest a solution in the form of a multi-government cooperative agreement for access to, protection of, and repatriation of items to be returned to one main Taino sacred site.

In the remainder of Part I, I discuss Puerto Rico's history of colonization, from 1493 until the present. The latter part of the section includes specific difficulties Taino face as we try to maintain and protect our sacred sites. Part II evidences efforts the Taino have made to speak to the local Puerto Rican government about our concerns as well as the limitations on the Governor of Puerto Rico to effectuate any change. Part III turns the discussion toward the overriding sovereign, the United States. In this section I draw parallels between Puerto Rico's and the Native nations' respective colonial relationships with the United States. This leads to an analysis of U.S. federal law for Indigenous peoples and how it may pertain to Taino issues. Part IV summarizes some of the international provisions that could ostensibly apply pressure to the United States to protect Taino sacred sites. In Part V, I discuss domestic solutions that have

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11. See generally *Canada—The Nisga'a Final Agreement in Brief*, 3 AUST. INDIGENOUS L. REP. 562 (1998), <http://www.austlii.edu.au/au/journals/AILR/1998/37.html> [hereinafter *Nisga'a Final Agreement*].

12. Environment Australia, *National Reserve System Strategic Plan Land Management*, at <http://www.ea.gov.au/parks/nrs/stratplan/management.html> (last modified Dec. 20, 2002) (discussing Australian state and territory co-management regimes).

13. See generally Helen Ross, *New Ethos—New Solutions: Indigenous Negotiation of Cooperative Environmental Management Agreements in Washington State*, 4 AUST. INDIGENOUS L. REP. 1 (1999), <http://www.austlii.edu.au/au/journals/AILR/1999/16.html>.

worked to create cooperative agreements between Indigenous peoples on other continents and their respective local or federal governments. I then describe the steps Taíno could take to implement a similar agreement with a municipality in Puerto Rico. Finally, Part VI concludes the Note with potential concerns for Taíno activists to consider as we strategize our next moves.

### **B. A Brief History: Guami'ke'ni and His Colonizing Amigos**

Guami'ke'ni<sup>14</sup> first encountered the Taíno on the Bahamian Archipelago on October 12, 1492.<sup>15</sup> Later, when Guami'ke'ni came to the Island of Borike on November 19, 1493,<sup>16</sup> he and his colonizing successors enslaved the Taíno and implemented the *repartimiento* and *encomienda* (slavery) systems in which the Taíno were used as forced labor to dig for gold.<sup>17</sup> The purported objective of these systems was to Christianize the Taíno—allegedly to bring them into God's flock and protect them from their own infidel state.<sup>18</sup> According to the Crown, “[o]nly by forcibly denying the Indians their freedom and appropriating their labor could the civilizing task of assimilation be carried out.”<sup>19</sup> Therefore, under the Crown's rationale, the labor forced upon the Taíno merely functioned as a return for the Crown's unrequested Christian tutelage.<sup>20</sup>

Around the time the Crown issued this proclamation, the Queen was considering a question that weighed heavily in the minds of all of the colonizers concerned: were these Indians human at all? She concluded that the Indians were chattel, at least until such time that they were properly Christianized. Because the Indians were not chattel in the proper sense, as animate beings, the Taíno were subjects of the Crown, and as such, were required to pay monetary tributes to the colonizers.<sup>21</sup> Therefore, not only did the natural resource wealth dug up by the Taíno slaves go to the Crown, so too did the meager earnings the Indians accumulated—all in exchange for the so-called protections afforded by the Monarchy.

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14. “Christopher Columbus.” *Dictionary*, *supra* note 2, at <http://members.dandy.net/~orocobix/telet-g.htm>.

15. ROUSE, *supra* note 3, at 142.

16. JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* vii (1997).

17. *See* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 83-85 (1990). The slight distinction between the two systems of slavery is that in the former, the monetary tributes went directly to the Crown; under the latter, the tributes went to the individual Spanish colonizer who ran the daily work lives of the Taíno slaves.

18. *Id.*

19. *Id.* at 83.

20. Ricardo Alegría, *The Study of Aboriginal Peoples: Multiple Ways of Knowing*, in *THE INDIGENOUS PEOPLES OF THE CARIBBEAN*, *supra* note 3, at 11.

21. *Id.*

These rationales and related systems of slavery were part of a larger colonizing discourse founded in the interdependent relationship between the Spanish Crown and the Catholic Church.<sup>22</sup> According to these two ruling European powers, the Taíno were barbarians and heathens who needed to be Christianized and made into civilized beings.<sup>23</sup> To assert their authority over the Taíno, the Church and the Crown together issued a series of papal bulls,<sup>24</sup> the first of which was called *Inter Caetera Divinai*.<sup>25</sup> In a letter to the Taíno People, King Ferdinand put forth the point of the bulls:

In the name of King Ferdinand . . . conquerors of barbarian nations . . . [to whom] [t]he . . . Pope gave these Islands . . . we request that you understand this text, deliberate on its contents within a reasonable time, and recognize the Church and its highest priest, the Pope, as rulers of the universe, and in their name the King and Queen of Spain as rulers of this land, allowing the religious fathers to preach our holy Faith to you . . . . Should you fail to comply, . . . with the help of God we shall use force against you, declaring war upon you from all sides and with all possible means, and we shall bind you to the yoke of the Church and of Their Highnesses; we shall enslave your persons, wives and sons, sell you or dispose of you as the King sees fit; we shall seize your possessions and harm you as much as we can as disobedient and resisting vassals. And we declare you guilty of resulting deaths and injuries . . . .<sup>26</sup>

This letter exemplifies the predominant “discourse” of the colonizing era.<sup>27</sup> The Crown mandated that these writings be read aloud to the Taíno before hostilities were commenced against them legally,<sup>28</sup> despite a lack of evidence that the Taíno could even understand the language of the documents. Under this duress, many of the Taíno complied.

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22. See generally WILLIAMS, *supra* note 17.

23. *Id.* at 81.

24. Papal bulls are documents of a legal-religious character issued by the Pope in conjunction with the Crowns of its disciple-nations. These bulls were topic-specific, but many were issued in regard to international treatment of Indigenous peoples during the discovering era. *Id.* at 80.

25. *Id.* at 80-81.

26. *King Ferdinand's Letter to the Taíno/Arawak Indians*, at <http://www.hartford-hwp.com/archives/41/038.html> (last visited April 19, 2003).

27. See generally WILLIAMS, *supra* note 17.

28. *Id.* at 91.

### 1. Continued Colonization and the Doctrine of Discovery

Over the next half-century, lawyers, philosophers, and theologians theorized about Spain's relationship with the Indigenous peoples of the Caribbean.<sup>29</sup> The predominant view was that Spain held title over Taíno lands based solely on the act of "discovery;" the arrival of Guami'ke'ni' to the lands of the Taíno—peoples perceived to be heathens and infidels in the eyes of the Church and the Crown—vested title in the discovering nation.<sup>30</sup> Theorist Franciscus de Vitoria, however, challenged this Doctrine of Discovery and became the most widely recognized primary source for colonizing legal theory.<sup>31</sup> His influence has lasted into the modern era and is still relied upon in United States 20th century federal Indian law jurisprudence.<sup>32</sup>

In his work, *On the Indians Lately Discovered*, Vitoria outlined three arguments. First, he asserted that the inhabitants of the Americas possessed natural legal rights as free and rational people.<sup>33</sup> Second, Vitoria argued the Pope's grant to Spain was "baseless" and could not affect the inherent rights of the Indian inhabitants.<sup>34</sup> His final argument was that transgressions of the universally binding norms of the Law of Nations by the Indians might serve to justify Christian nations' conquest and colonial empire in the Americas.<sup>35</sup>

This natural law approach to the relationship between the Taíno and the Spanish colonizers did not, unfortunately, free the Taíno of Spanish guardianship and their consequent forced labor. Instead, Vitoria's rhetoric was circuitous, eventually contending that:

[I]t concerns Christians to correct and direct [The Taíno]; nay it seems they are bound to do so. . . . [Thus,] not only could the Pope forbid others to preach, but also to trade there, if this would further the propagation of Christianity . . . . Therefore, in favor of those . . . who suffer wrong, the Spaniards can make war . . . . [T]his furnishes the Spaniards with another justification for seizing the lands and territory of the Natives and for setting up new lords . . . ."<sup>36</sup>

Ultimately, Vitoria's thought on the legal relationship between the Taíno and the Spanish affirmed the Doctrine of Discovery. He added to it, however, the right of

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29. *Id.* at 90.

30. *Id.*

31. *Id.* at 96.

32. *Montana v. United States*, 450 U.S. 544, 564 (1981) (re-stating the Doctrine of Discovery as an "implicit divestiture of sovereignty").

33. WILLIAMS, *supra* note 17, at 97.

34. *Id.*

35. *Id.*

36. *Id.* at 104-05.

conquest under religious law with the caveat that the Taíno have an inherent right to the lands they live on, but cannot exercise that right as infidels.

The Indigenous peoples of the Caribbean were enslaved and killed under this rubric of “natural law.” However, they have survived, but in some cases with great harm to their cultures. There has been resurgence, re-growth, and rebirth of traditional culture such that the Taíno elders and Taíno descendents have maintained a strong showing<sup>37</sup> in the general population of the Island. To continue this perpetual growth and re-birth, we have undertaken programs both on the Island and in the United States to educate all Boricuas of their centuries’ old language, culture, and traditions. Therefore, despite this historic and ever-present colonizing discourse, the Taíno remain a viable people.

## 2. The Land of the Good: A Part of [/Apart from] the Land of the Free

After over 400 years of colonial rule, the Island Boricuas began to make headway with their Spanish invaders and successfully argued their right to full representation in the Spanish Parliament.<sup>38</sup> Contemporaneously, however, as a bargaining chip at the close of the Spanish-American War, Spain ceded Puerto Rico to the United States subsequent to the U.S. led invasion of the Island on July 25, 1898.<sup>39</sup> Upon the cession, the only express language in the Treaty of Paris regarding citizenship was that which permitted residents of the Island to maintain their Spanish citizenship if they so chose.<sup>40</sup> This left the Island’s inhabitants with no clear definition as to their status *vis-à-vis* their new colonizers.<sup>41</sup> The only

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37. Any ordinary web search will bring up several Taíno organizations that are fighting to promote awareness about the issues being discussed in this article. *See supra* note 52. The members of these organizations are in contact with elders from the Island, as well as Taíno youth who are learning Taíno language and traditions from these elders. Additionally, Professor Juan Carlos Martínez Cruzado recently conducted a study that shows over 75% of the Island’s population is of “Indian” descent. Juan Carlos Martínez Cruzado, *Recent Research Contributions of Genetics to the Studies of Population History and Anthropology in Puerto Rico*, 1 DEL. REV. LATIN AM. STUD. (Aug. 15, 2000), at <http://www.udel.edu/LASP/profiles.html>. It is important to note, however, that Professor Cruzado’s study is of the kind many Taíno would like to see prohibited: it used Taíno ancestral remains from gravesites as part of the process. Yet it is equally as important to note that some Taíno may argue that this study will be helpful to the community as its members work with non-Indigenous lawmakers who privilege this type of “proof” of Indigenous historical continuity on the Island.

38. MONGE, *supra* note 16, at 14.

39. *Id.* at 20.

40. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, arts. IX, XI, 30 Stat. 1754 [hereinafter Treaty of Paris].

41. This Note does not focus on the controversial issues regarding the three status options that have evolved out of Puerto Rico’s history with the United States. Briefly, however, Puerto Rico’s status as a commonwealth of the United States (or “a free

language regarding the status of the citizens who did not maintain their allegiance to the Spanish Crown was in Art. IX of the Treaty: “The civil rights and political status of the Native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress,”<sup>42</sup> thereby initiating the first move toward United States congressional plenary power over the daily lives of the citizens of Borike.

### **C. Grave Robbers: Watch!—The Colonizers Take Many Forms**

[R]epresentation involves consumption: representations are put to use in the domestic economy of an imperial society. . . [and] the *act* of representing (and hence reducing) others almost always involves violence.

-Edward Said<sup>43</sup>

At the museum located on the Río Piedras campus of the University of Puerto Rico, human remains of a Taino ancestor are displayed in a waist-high glass showcase immediately in front of the cashier’s window. Visitors’ fingerprints and drink-cup marks have long since collected on the glass. The woman receiving entry fees loudly chews gum and occasionally utters a swear word in frustration with the task she has been hired to do. Is this educational? Is this representation? No. This is reduction. And this is violence.

Museum settings such as these owe their collections to archaeologists and anthropologists who traditionally considered:

[D]igging and removing the contents of Native American graves for reasons of profit or curiosity . . . common practice. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian’s cranium. This action, along with an attitude that accepted the desecration of countless . . . burial sites, resulted in

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associated state”) is challenged by those who would prefer complete independent sovereignty and those who would prefer fully incorporated statehood. *See generally* RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* (2d ed. 1996); MONGE, *supra* note 16.

42. Treaty of Paris, *supra* note 40, art. IX (emphasis added). The United States Congress exerts Plenary Power over Puerto Rico under both the Treaty of Paris and the Territorial Clause of the U.S. Constitution. U.S. CONST. art. IV, § 3, cl. 2; Treaty of Paris, *supra* note 40, art. IX. Essentially, what this plenary power means is that Puerto Rico is subject to a unilateral authority under which it has no United States voting rights nor any effective voice regarding its political status.

43. EDWARD W. SAID, *POWER, POLITICS, AND CULTURE: INTERVIEWS WITH EDWARD W. SAID* 40-41 (Gauri Viswanathan ed., 2001) (emphasis in original).



hundreds of thousands . . . of human remains and funerary objects being sold or housed in museums and educational institutions . . . .<sup>44</sup>

The Taíno sites on the Island of Puerto Rico are no exception.<sup>45</sup> Outsiders, archaeologists and anthropologists have been chronicling the cultural items left behind by the Taíno since the 16th century.<sup>46</sup> The Caguana<sup>47</sup> Ceremonial Site<sup>48</sup> is one of the Taíno sites that has garnered the most attention. The Caguana site is a National Historic Landmark under the management of the United States National Park Service (NPS).<sup>49</sup> At first glance, such a designation on the National Park Register might seem like something that would work in favor of the Taíno. However, it has had a devastating effect. In fact, as a National Historic Landmark, the site receives thousands of visitors each year, contributing to the destruction of the site.<sup>50</sup> Visitors not only disturb the items, but as they leave, they take parts with them. They also leave behind litter that can harm the area as a whole and the items within. The destruction of these sites frustrates the archaeologists who have worked so hard to research them.<sup>51</sup> Perhaps more important, however, are the frustrations of the Taíno elders and the descendents of the Taíno peoples that are grossly ignored.

Many Taíno elders would like full control over preservational work in the ceremonial parks to be in the hands of the Taíno People instead of the National Park Service. Others would be content if NPS would allow certain times of the day and month to be reserved for Taíno ceremonial use.<sup>52</sup> Some advocate for

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44. H.R. REP. NO. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369.

45. Roberto Mucaro Borrero, *Borike Taíno Leader Speaks Out in NYC*, LA VOZ DEL PUEBLO TAINO (United Confederation of Taíno People, New York, N.Y.) April-June 2001 at 1-2, [http://www.uctp.org/Volume4/April\\_June\\_2001/index.html](http://www.uctp.org/Volume4/April_June_2001/index.html).

46. Miguel A. Bonini, *A Cooperative Ball Court Study in Puerto Rico*, 20 CULTURAL RESOURCE MGMT. 59 (1997), <http://crm.cr.nps.gov/archive/20-11/20-11-29.pdf>.

47. Caguana is the Spirit of the Earth Mother about whom the Taíno sing in their traditional songs. See also *Dictionary*, supra note 2, at <http://members.dandy.net/~orocobix/telist-c.htm>.

48. Bonini, supra note 46, at 59.

49. *Id.*

50. *Id.* at 60.

51. *Id.*

52. Throughout this article, the author will refer to “some Taíno” and/or “other Taíno” merely in an attempt not to homogenize the wants of “all Taíno.” No one household necessarily holds the same belief about who should control Taíno sacred sites, but there does seem at least to be consensus on the need to protect our ancestors’ remains and their associated funerary objects. See *Declaration of 3 January 1998 of the United Confederation of Taíno People*, Jan. 3, 1998, art. 1, <http://www.uctp.org/declare.htm> (incorporating the mandate to protect Taíno sacred sites into the Declaration of the United Confederation of Taíno People); Biarakú: First People of a Sacred Place, *A Call to Support Efforts in Puerto Rico to End the Desecration of Ancestral Burial Sites and Their Remains*,

cooperative use agreements like those used in certain states, provinces, or territories of Australia, Canada, and Africa.<sup>53</sup> Still others would like to see the remains and items that are on display in museums and hidden in institutional vaults, most of them originally found at these sites, returned to the community so they can be given proper burial and care.

Despite the variation of Taíno voices that might be heard on the matter, one common sentiment is paramount: Taíno sacred places need to be protected and preserved. This is a job Taíno people and their descendants can uniquely perform. These places and the items found there are important to Taíno culture. Caguana is not merely a place-name in the Taíno language. “Caguana” is one of the words for the spirit of all that brings life. Likewise, *bateys* are more than just ball courts, but are the fields where the *areitos*—ceremonial dances—have taken place. For many Taíno, the mountain regions of the Island, where the two main *bateys* are located, are the sacred places of their birth and re-birth after they emerged from their hiding following the end of the *encomienda* system.

Because of the importance of these places to the Taíno, organizations like the United Confederation of Taíno People (UCTP)<sup>54</sup> and *Ihuche Rareito*<sup>55</sup> are working at a grassroots level mobilizing support for the protection and preservation of these sites. The two organizations work in consort by asking people to write letters to the Governor of Puerto Rico requesting an Executive Order for the preservation, accommodation, and protection of Taíno ceremonial spaces and items.<sup>56</sup> They also created a petition for people to sign in support of these efforts.<sup>57</sup> While these grassroots initiatives are strong ways to demonstrate public opinion on the issue, the Taíno people are also pursuing another strategy. We are in the process of gathering the knowledge we need to use a different set of tools—those provided by legal communities. Out of respect for local custom and

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at <http://members.aol.com/sTaino/desecration.htm> (last visited April 19, 2003) (describing some of the items that were recently stolen from Taíno burial sites); Peter Guankeyu Torres, *Our Taíno Objects are Being Sold*, at <http://Nativenet.uthscsa.edu/archive/nl/9606/0011.html> (May 31, 1996) (calling for cessation of sale of Taíno sacred objects).

53. See Environment Australia, *supra* note 12; *Nisga'a Final Agreement*, *supra* note 11 (advocating Canadian Indigenous co-management through treaty negotiation); see also Eric Baran & Pilippe Tous, *Artisanal Fishing, Sustainable Development and Co-management of Resources: Analysis of a Successful Project in West Africa*, <http://www.iucn.org/themes/pmns/topics/tous.html> (last visited April 19, 2003).

54. A political, cultural, and educational organization devoted to the promotion of Taíno culture. See United Confederation of Taíno People, *Honoring Caribbean Indigenous Peoples: Past, Present and Future*, at <http://www.uctp.org> (last modified Mar. 12, 2003).

55. A Taíno elders association works toward the preservation of Taíno cultural sites and the preservation of Taíno cultural ceremonies, medicines, and traditions, *information available at* HC-01 Box 5761 Ciales, Puerto Rico 00638-9624.

56. Borrero, *supra* note 45.

57. United Confederation of Taíno People, *Support Taíno Rights to their Ancestral Remains and Sacred Sites in Puerto Rico*, <http://www.PetitionOnline.com/taino/petition.html> (last visited April 19, 2003) [hereinafter *Petition*].

our closest relatives, the Taíno will turn first to the Puerto Rican government and the laws it provides for upholding its peoples' civil, political, and human rights.

## II. BORIKE: SPEAKING WITH CLOSE RELATIVES

Since Guami'ke'ni arrived in 1493, Boricuas have been under the rule of one foreign sovereign after another. The Taíno people, and other peoples from the Island and its surrounding islets, have a strong sense of Island pride. This pride is founded in a long history of cultural survival. Often, even people who advocate for fully integrated United States statehood<sup>58</sup> for the Island are not willing to relinquish the uniqueness of their Puerto Rican culture. Because of this need to hold onto a collective, cultural sense of self, the Taíno people will speak first to our closest relatives, the people who govern the Island that is still affectionately called Borike.

### A. Religious Freedom Laws for a Semi-Sovereign Democracy

Under both the Treaty of Paris and Puerto Rico's Constitution, freedom of religion is a fundamental right of all Peoples.<sup>59</sup> The original People of Puerto Rico are merely claiming their right not to be exempted from that rule. The petition to support the protection of Taíno sacred sites demands the recognition of our right to religious freedom. Included in these demands are the following: (1) the removal of ancestral remains from museum and institutional displays throughout Puerto Rico and Vieques, especially those used as a means to promote or generate tourism; (2) indigneous access to the sacred ceremonial centers and other sacred sites throughout the Island, which must be respected through the proper spiritual protocol; and (3) that all governmental projects promoting tourism protect and safeguard the integrity of local Taíno culture.<sup>60</sup>

Taino custom and religion incorporate prayer, a special relationship with the land, and an interdependent relationship with all beings of the Earth. That awareness and closeness make Taíno a distinct and separate culture from the Boricuas of the Island. It is also what informs the uniqueness of Puerto Rican culture as a whole. That uniqueness makes the people so proudly proclaim themselves as "Boricuas!" In addition, the teachings of the Taíno, past and present, benefit the Island overall. Knowledge of the old remedies, medicines, and plants can continue if the Taíno are permitted unrestricted access to these sites to read and understand the petroglyphs and *cemis* as their ancestors did before

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58. See *supra* note 41.

59. P.R. CONST. art. II, § 3; Treaty of Paris, *supra* note 40, art. X.

60. Petition, *supra* note 57.

them. With this knowledge, the Taíno can help preserve the unique aspects of the Island's culture.

To preserve such freedoms, the Boricuas of the Island have not only instituted a Bill of Rights,<sup>61</sup> but they have also outlined specific laws for sustaining human rights.<sup>62</sup> These rights, and the injunctions and actions the Taíno demand of the Puerto Rican government to ensure them, derive from the guarantees of the Puerto Rican Constitution. For example, annotations to the Preamble of the Puerto Rican Constitution assert, "to deny the use of public plazas to religious groups . . . clearly establishes a discrimination against them contrary to the constitutional provisions, and clearly does not fall within the separation doctrine as such has been construed."<sup>63</sup> This text demarcates a clear path for the Taíno to have access to public land for ceremonial purposes. The right of such access should especially be protected for those ceremonies at Caguana Park because it *is* a public plaza. On an Island where song and dance erupt spontaneously from a crowd of strangers, such ceremony would be difficult to repress. The above legal provision, therefore, identifies the strong need to uphold freedom of religion despite the location of its practice, and clarifies that such need lies outside the separation doctrine. These aspects of Puerto Rico's Constitution illustrate the Commonwealth's intent to treat its people—*all* of its people—with respect and fairness.

#### **B. *Mis Manos Están Atadas*:<sup>64</sup> Semi-Sovereignty and Semi-Self Determination**

Ms. Naniki Reyes Ocasio, a Taíno/Carib elder and activist, has written several letters to the Governor of Puerto Rico asking for discussions about maintenance of the parks and other concerns mentioned in the petition. As a result of Puerto Rico's commonwealth status, however, the Governor is limited in her ability to make change. Negotiating with the Puerto Rican government for access, protection, preservation, and repatriation will only get the Taíno so far—especially with regard to the Caguana Ceremonial Site—which is under the control of the NPS. Although it is still beneficial for the Taíno to garner the support of the Governor of Puerto Rico as an ally with political influence, U.S. approval is still required. Therefore, because of Puerto Rico's semi-sovereign status with its semi-self-determination abilities, the Taíno will go speak to those more distant relatives, those who claim to be their guardians and protectors, those who claim to have plenary power over us. We will turn, next, to the United States Congress.

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61. P.R. CONST. art. II.

62. P.R. CONST. art. II, § 20.

63. P.R. CONST. pmb. (1982 Main Volume Annotations note 2. Religious Beliefs 1956 Op. Sec. Jus. No. 24.). This Constitutional provision is telling of Puerto Rico's commitment to religious freedom.

64. Spanish for "My Hands are Tied."

### III. *LOS ESTADOS UNIDOS*:<sup>65</sup> SPEAKING WITH RELATIVES TO THE NORTH

Picking up where the Spanish Crown left off, the United States continues the tradition of keeping Puerto Rico in a state of tutelage through its colonial rule over the Island. The United States has made its colonial presence felt on the Island through its NPS control over Taíno ceremonial sites and through its persistent military bombing practices on the inhabited Island of Vieques.<sup>66</sup> Given the colonial legal structure imposed on Puerto Rico, however, Taíno could arguably use U.S. federal law to its own benefit. If construed in such a way as to acknowledge Taíno rights as the original, only non-transplanted people on the Island, U.S. law relating to Indigenous peoples may be able to serve Taíno needs.

#### **A. Borike—The Indian Reservation of the Caribbean**

The parallels between the U.S.-Native nation relationship and the U.S.-Puerto Rico relationship are many. A brief history of these respective relationships demonstrates such similarities. However, Puerto Rico has a unique relationship with the United States, including particulars that cannot be likened to that of the Native nations. Likewise, each Native nation has its own unique relationship with the United States based on particular treaty agreements and negotiations. In comparing and contrasting these colonial relationships, I intend no disrespect for the differences or for the hard battles that have been fought for freedom and self-determination. These historical distinctions should not be homogenized. The similarities, however, are striking enough to give strength to the current assertions I am making. Therefore, I draw these parallels for this limited purpose alone.

#### 1. Drawing Parallels [Albeit Precariously in the Sand]

*The Cherokee Cases*,<sup>67</sup> *The Insular Cases*,<sup>68</sup> and their progeny maintain the premise that Congress decides—in waning and waxing fashion—the status of the peoples discussed in the present article. From U.S. citizenship to decisions about whom the United States considers an Indian, Congress has exercised full

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65. Spanish for “The United States.”

66. FERNANDEZ, *supra* note 41, at 140. Vieques is a small island off the northeast shore of Puerto Rico.

67. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

68. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Downes v. Bidwell*, 182 U.S. 244 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901).

authority.<sup>69</sup> This control over Indian and Insular affairs has allowed Congress unilaterally to change its course without any warning to, or consent by, the peoples it is affecting.

Congress has used this plenary authority<sup>70</sup> to exert a purportedly benevolent guardianship role over both Puerto Rico and the Native nations. The United States has “assumed guardianship over [Puerto Rico] and the guidance of their destinies,” mainly based on the notion that the people of the Island were “children . . . , people . . . so unlike North Americans it [was] impossible to make any comparison.”<sup>71</sup> Likewise, the “guardianship” imposed upon the people of the Native nations came from *The Cherokee Cases* in which Chief Justice John Marshall enumerated certain powers that Congress would have over life in Indian communities.<sup>72</sup> Later, however, in *United States v. Kagama*,<sup>73</sup> the court stated, “[I]n this spirit the United States . . . [decided] . . . to govern [the Native nations] by acts of [C]ongress.”<sup>74</sup> The result of this decision was that almost all forms of redress for the indigenous peoples were left to the legislature and were taken out of the hands of the judiciary.

Creating the legal fiction that the Puerto Rican and the Indian were like children enabled the government to justify control over their lands, which was the fundamental reason for U.S. interest in playing parent. “Wards” are much easier to remove forcibly than people of equal footing. For each group discussed in this article, removal from their land for U.S. purposes of westward and colonial expansion is a hard and painful portion of their histories.

Removal of the Native nations from their ancestral homelands is a well-documented time in history.<sup>75</sup> The loss of life incurred in these removals and others under President Jackson was beyond description. The stated purpose was to open land for White settlers and free up space so Native/non-Native conflict

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69. The Indian Citizenship Act of 1924 unilaterally made all Native peoples living both on reservations and in the United States American citizens. The Jones Act of 1917 unilaterally made all Puerto Rican people living both on the Island and in the United States American citizens; for the purposes of hiring for the U.S. Bureau of Indian Affairs (BIA), the BIA extends preference in hiring to Indian individuals who are “one-fourth or more degree Indian blood and . . . member[s] of a Federally recognized tribe,” thereby defining “Indian” as someone who fits that criteria. *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (quoting *Morton v. Mancari*, 417 U.S. 519, 553 n.24 (1974)).

70. U.S. CONST. art. I, § 1.

71. FERNANDEZ, *supra* note 41, at 48, 91.

72. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 42 (8th prt. 1997).

73. 118 U.S. 375 (1886).

74. *Id.* at 382.

75. See GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 93-128 (4th ed. 1998). During President Andrew Jackson’s Removal Era, various tribes were forced to move from their ancestral lands to places the government decided the tribes should live, even if that meant sharing lands with historical tribal enemies.

could be at a minimum.<sup>76</sup> Yet, this action functioned as an attempt to extinguish Indian existence. When this effort failed, the next step was assimilation through forced land allotments, the surplus of which would go to non-Native settlers.<sup>77</sup> Either way, the United States still attained its goal: to acquire as much real estate as possible while offering as little consideration as possible (if any were offered at all).

In similar fashion, the U.S. military during WWII decided that a base in the Caribbean was “fundamental to . . . national defense,” and that the small Islands around mainland Puerto Rico would be ideal to fulfill this purpose.<sup>78</sup> During the construction efforts, the U.S. Navy took part in its own removal policy 100 years after Jackson’s reign by “forcibly transport[ing] more than 10,000 citizens of Vieques to St. Croix.”<sup>79</sup> The U.S. asserted that it needed the land to test bombs, and the ramifications for the people would be too great to allow them to stay. Later, as part of a plan for a second removal, the United States came up with an idea that violated even then-existing human rights standards. The United States decided that not only would the people of Vieques have to leave their ancestral homelands, but that they would have to take their cemeteries with them.<sup>80</sup> This request came about because the U.S. military personnel witnessed how important these grave sights were to the Vieques citizens. Military officers predicted the citizens’ dangerous return to the Island for the sake of their ancestors’ remains and suggested that the graves be removed as well.<sup>81</sup> Congress and the President, however, came to the conclusion that the cemetery removal plan, termed “The Dracula Plan,” would not withstand public opinion.<sup>82</sup> Therefore, the United States decided not to remove the cemeteries or the citizens of the Island. Instead, to this day, the United States conducts its bombing practice on the Island, despite the presence of nearly 8,000 citizens.<sup>83</sup>

These removal efforts are only part of the story behind the United States’ use of plenary power. Though there are many other stories to be told, the main focus in this writing is to draw the parallels. Ultimately, each group of peoples has been, and continues to be, subjected to the unilateral authority of a sovereign it does not wholly recognize. Each group of peoples is also consequently subject to a trust doctrine which functions as a corollary to U.S. plenary authority. Together,

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76. DELORIA & LYTLE, *supra* note 72, at 6.

77. GETCHES ET AL., *supra* note 75, at 141-90. The Allotment Era of Federal Indian Policy spanned from 1853 to 1936 at which time the Indian Reorganization Act mooted the General Allotment Act of 1853. Allotment was a policy intended to break up reservation land holdings, open the Indian land to White settlers, and in the process assimilate the Native people into the agricultural life of mainstream America.

78. FERNANDEZ, *supra* note 41, at 140.

79. *Id.* at 148.

80. *Id.* at 201.

81. *Id.*

82. *Id.* at 202.

83. *Id.*

the trust and plenary doctrines impose duties upon the U.S. to ensure that these respective peoples are provided the tools they need to survive under waxing and waning degrees of U.S. colonial rule. Therefore, a condensed chronology detailing certain aspects of these respective histories will further the Taino's warranted requests for similar ceremonial site protections by the U.S. government.

## 2. Plenary Power over the Native Nations: *The Cherokee Cases*

Chief Justice John Marshall penned the series of cases alternately known as *The Cherokee Cases* or *The Marshall Trilogy*. The salient issues that arise from this trilogy comprise the foundational concepts of Federal law as it pertains to Indigenous peoples. Beginning with *Johnson v. McIntosh*,<sup>84</sup> Marshall set out two limitations on the actions of the tribes based on their status as “conquered” peoples. First, they could only enter into treaties with the United States federal government, not with other nations. Second, Indians could not alienate their own lands because, according to Marshall, from the moment of discovery Indians had only a possessory interest in the land and fee title was held by the United States.<sup>85</sup> In *Johnson*, the controversy centered on lands Johnson purchased from the Illinois and the Piankeshaw Indian nations—land that the United States subsequently sold to McIntosh after the United States treated with those same nations.<sup>86</sup> The precise question of law that arose was whether the Courts of the United States could recognize the right of an Indian tribe to alienate land to a private citizen (and not the United States).<sup>87</sup> Marshall's two-fold answer, as described above, relied on the precepts of Vitoria's latter version of the Doctrine of Discovery, in essence, that Native nations are sovereigns with “necessarily . . . impaired” rights based on their “character and religion.”<sup>88</sup>

In *Cherokee Nation v. Georgia*,<sup>89</sup> Chief Justice Marshall carried forward the logic used in *Johnson* and wrote his most indelible words into the history of Indian law: “it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more accurately perhaps, be denominated domestic dependent nations.”<sup>90</sup> At issue in *Cherokee Nation* was a Georgia state law that would diminish a portion of Cherokee hunting ground, which would effectively inhibit the hunting aspect of Cherokee culture.<sup>91</sup> Prior to reaching the merits, however, Marshall entered into an analysis of whether Indians

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84. 21 U.S. (8 Wheat.) 543 (1823).

85. *Id.* at 573-74.

86. *Id.* at 572.

87. *Id.*

88. *Id.* at 572-74.

89. 30 U.S. (5 Pet.) 1 (1831).

90. *Id.* at 17.

91. *Id.* at 3-4.



within a U.S. territory were foreign nations within the meaning of the U.S. Constitution such that the Supreme Court could hear the cause of action.<sup>92</sup> Relying on the fact that the United States had entered into numerous treaties with the Native nations, Marshall came to a preliminary conclusion that the Native nations were indeed states by international law standards.<sup>93</sup> Yet, Marshall was careful not to accept the assertion that Native nations are foreign nations “in the sense of the Constitution”—that is, that Native nations owe no allegiance to the United States.<sup>94</sup>

There is a tension between those two assertions—that Indian nations are foreign states or that they are equal in status to states of the union. To resolve this tension, Marshall relied on his *Johnson* rationale that, due to their diminished property interest and their consequent impaired rights, the Indian/U.S. relationship “resembles that of a ward to his guardian.”<sup>95</sup> With their new titles now in place as “wards” and “domestic dependent nations,” this particular decision meant that the Supreme Court’s original jurisdiction could not extend to Native nations’ causes of action.<sup>96</sup> Effectively, without the injunction the Cherokee nation sought, Georgia could continue to create legislation implicating the Cherokees at the state level, which diminished tribal sovereignty in the process.<sup>97</sup>

By the end of 1831, U.S. Indian policy was clear: Indians were “ward-like” members of domestic dependent nations with only a possessory interest in their lands, the fee title of which they could not alienate. Chief Justice Marshall, however, adjudicated a slightly different result in *Worcester v. Georgia*.<sup>98</sup> Worcester, a non-Native Christian minister who had the Cherokee nation’s permission to be on their land, had no Georgia state permit to be there; Georgia state officials arrested him for violating its state law.<sup>99</sup> Based on *Cherokee Nation*, Georgia’s permit law would have been able to withstand judicial scrutiny. According to that decision, the Cherokee nation was a diminished sovereign. Therefore, the reach of Georgia state law onto the reservation would not have been a violation of the tribe’s right to make its own laws and be ruled by them.

Interestingly, however, Marshall’s methodology differs in *Worcester*. Instead of relying on Vitoria’s version of the discovery doctrine to re-assert the tribes’ diminished status, Marshall relies on the Cherokee-U.S. Treaty of Hopewell—a document entered into by two sovereigns.<sup>100</sup> Based on his reading of

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92. *Id.* at 15-16.

93. *Id.* at 16.

94. *Id.*

95. *Id.* at 17.

96. *Id.* at 20.

97. Cherokee sovereignty is diminished because they are inhibited in their ability to practice their culture and conduct their society as they so choose due to the diminishment of their hunting territory.

98. 31 U.S. (6 Pet.) 515 (1832).

99. GETCHES ET AL., *supra* note 75, at 113.

100. *Worcester*, 31 U.S. (6 Pet.) at 539.

the treaty's criminal jurisdiction provisions, Marshall asserts, "[t]he only inference to be drawn . . . is, that the United States considered the Cherokee as a nation."<sup>101</sup> In addition, Marshall read the treaty's provision for Congress's exclusive right to regulate trade with the Indians and concluded that "[t]o construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of their necessary meaning."<sup>102</sup>

This reasoning was at odds with *Cherokee Nation*; the Court found that the perceived surrender of self-government in *Cherokee Nation* could be substantiated, but not the perceived surrender in *Worcester*. After creating one understanding of the Native-U.S. relationship in *Johnson and Cherokee Nation*, one year later in *Worcester*, Marshall rejected the notion that Indians surrendered the right to self-government.<sup>103</sup> This seeming inconsistency has frustrated Indian law scholars and practitioners for generations.

One consistent factor in all three cases, however, is Marshall's willingness to defer to the Federal government, specifically Congress.<sup>104</sup> The Cherokee acknowledged, according to Marshall, that under the Treaty of Hopewell they were "under the protection of the United States, and of no other power."<sup>105</sup> Ultimately, the nexus of meaning born from Marshall's Trilogy conferred Congress with plenary authority over all aspects of Indian life. Furthermore, it maintained that Native nations are domestic nations and would be a part of the United States when Congress deemed them so and likewise would be *apart* from the United States when Congress deemed them so.<sup>106</sup>

### 3. Plenary Power over Puerto Rico: *The Insular Cases*

Following General Nelson Appleton Miles' installation as governor of Puerto Rico on July 25, 1898, the U.S. Supreme Court granted *certiorari* to several cases to determine the practical effects of the U.S.-Puerto Rico relationship. *The Insular Cases*, when taken together, demonstrate the learning process of the United States with regard to its new trophy from the war with

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101. *Id.* at 553.

102. *Id.* at 553-54.

103. See GETCHES ET AL., *supra* note 75, at 124.

104. *Worcester*, 31 U.S. (6 Pet.) at 554. Marshall maintains that Congress' power over the Native nations is only limited by that which falls under the Commerce Clause of the U.S. Constitution, excluding the cession of their lands and security against intruders. Later cases in the 20th century would eventually change Marshall's explicitly reserved rights doctrine. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

105. *Worcester*, 31 U.S. (6 Pet.) at 551.

106. It is up to Congress whether federal legislation touches the internal laws of tribes. This Congressional free-reign leaves all aspects of the tribes' sovereign status—including abrogation of treaties through conflicts with legislation—at the complete whim of the U.S. Legislature. See *United States v. Dion*, 476 U.S. 734 (1986).

Spain. It had won the Spanish-American War, and consequently, the right to control Puerto Rico. However, the U.S. did not quite know what to do with the Island.

Three main themes emerged from the discussions following the United States acquisition of Puerto Rico. There were those who wanted plenary powers over the Island but did not want Puerto Rico to become a state. There were also those who did not want the Island annexed for both political reasons as well as ones based on race.<sup>107</sup> A third ideology eventually became the one adopted in the U.S. Supreme Court decision, *Downes v. Bidwell*.<sup>108</sup> The Court held that the Constitution allowed for two kinds of territories: incorporated (part of the United States) and unincorporated (possessions of the United States), and that Puerto Rico constituted the latter.<sup>109</sup>

In *Downes v. Bidwell*, Justice Brown faced the question of whether merchandise brought into the port of New York from Puerto Rico was exempt from duty, notwithstanding provisions of The Foraker Act,<sup>110</sup> which required the payment of duties upon articles of merchandise imported from foreign countries.<sup>111</sup> Using *DeLima v. Bidwell*<sup>112</sup> as a starting point, the Court stated,

In the case of *De Lima v. Bidwell* . . . we held that, upon the ratification of the treaty of peace with Spain, Porto Rico [*sic*] ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that “all duties, imposts, and excises shall be uniform throughout the United States.” Art. 1, § 8.<sup>113</sup>

Prior to coming to any conclusions, however, Justice Brown gives voice to the “concern” about Puerto Rican racial identity:

[I]f [the Island’s] inhabitants do not become . . . citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences

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107. MONGE, *supra* note 16, at 44.

108. 182 U.S. 244, 248 (1901).

109. *Id.*

110. Organic Act of 1900, ch. 191, 31 Stat. 77 codified at 48 U.S.C. § 731 (1987). The Act was more commonly known as the Foraker Act following the name of its author, Senator Joseph Benson Foraker.

111. *Downes*, 182 U.S. at 248-49.

112. 182 U.S. 1 (1901).

113. *Downes*, 182 U.S. at 248-49 (emphasis in original).

will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation . . . . There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.”<sup>114</sup>

Given his concerns on behalf of the American people that the Natives of Puerto Rico could be entitled the same rights as U.S. citizens,<sup>115</sup> ultimately, Justice Brown held “the Island of Porto Rico [*sic*] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . .”<sup>116</sup> The Court based its decision that the Island was an unincorporated territory on deference to Congress’ plenary power: “Large powers must necessarily be intrusted [*sic*] to Congress in dealing with these problems, and we are bound to assume that they will be judiciously exercised.”<sup>117</sup> Justice Brown relinquished control to the Legislative branch, leaving it with plenary authority over the Island and its inhabitants.

Justice White, in his concurrence, clarified Justice Brown’s holding and set forth what would become the foundation for Puerto Rico’s label as an “unincorporated territory:”

[W]hilst in an international sense Porto Rico [*sic*] was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the Island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.<sup>118</sup>

In these words, Puerto Rico’s political fate was sealed for at least the next century. It would continually be considered a foreign nation in some instances and domestic in others.

In his dissenting opinion, Justice Harlan showed concern for this outcome and for Congress’s plenary power, disagreeing with those who would say “the people inhabiting [new territories should] enjoy only such rights as Congress chooses to accord to them.”<sup>119</sup> Harlan insisted that such an idea was “wholly inconsistent with the spirit and genius . . . of the Constitution.”<sup>120</sup> His words garnered no other support, however. Instead, the Supreme Court maintained the

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114. *Id.* at 279.

115. *Id.* at 283.

116. *Id.* at 287.

117. *Id.* at 283.

118. *Id.* at 341-42 (White, J., concurring).

119. *Id.* at 380 (Harlan, J., dissenting).

120. *Id.*

position that Puerto Rico would be incorporated into or apart from the United States according to the whims of Congress.

As of this writing, uneasiness still persists both on the Island and in the United States regarding Puerto Rico's status as a foreign or a domestic nation. Similarly, the Native nations within the United States constantly have to remind the federal government about the nation-to-nation relationship once unambiguously shared between them. In both situations, Congress has the unfettered choice of whether to extend certain laws—and the rights and responsibilities associated with them—to these peoples. Congress' plenary power over Indian affairs arises from the special relationship between the U.S. government and Native nations, hence, the well-known phrase "from the duty comes the power." The government's fiduciary duty to act in good faith to the Indians, known as the Trust Doctrine, is born out of this special "guardian/ward" relationship.<sup>121</sup> Herein lies the symbiotic relationship between the plenary and trust doctrines: with every degree of liberty the United States takes with these people's lives through its plenary authority, the United States incurs a responsibility to them through the Trust Doctrine.

Based on these parallel histories—and the Plenary Power Doctrine that informs them—the Taíno people could assert that the Trust Doctrine likewise applies to U.S.–Puerto Rico relations. As a result, the U.S. government should accept the responsibility it created for itself when it deemed Boriké an unincorporated territory. The United States, therefore, is obligated under the Trust Doctrine to create or extend existing Indian legislation relating to access and protection of ceremonial sites to the Island's Indigenous community.

### **B. Federal Protection of Indigenous Ceremonial and Sacred Sites**

Generally speaking, Indigenous peoples across the globe face three primary concerns in regard to their ceremonial sites: access (and therefore protection), repatriation, and control. In some instances, the U.S. has accepted its responsibility to the Native nations and passed laws addressing these issues. The following is a sketch of U.S. domestic law<sup>122</sup> and policy on the topic and how each relates to Taíno concerns.

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121. Robert B. Porter, *The 4th Annual Tribal Law & Governance Conference: October 12-14, 2000, University of Kansas, Lawrence, Kansas: Decision from the American Indian Nations Supreme Court*, 10 KAN. J.L. & PUB. POL'Y 465, 482 (2001).

122. *E.g.*, Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994).

### 1. Gaining Access

In 1996, U.S. President Clinton issued an Executive Order<sup>123</sup> mandating all federal agencies to accommodate access to sacred sites for Indigenous religious practitioners. Such an order, if extended to recognize the Taíno right of access to the Caguana Ceremonial Site, would enable Taíno to revitalize our cultural and religious customs, songs, and dances where they have nearly been lost.<sup>124</sup> By holding ceremonies in their originally intended places, Taíno can look to the petroglyphs and *cemis*<sup>125</sup> that remain at these sites and rely on them, as our ancestors did, for their continuous stories and teachings. In these ways, we hold on to our distinct culture and to our collective and shared identity as The Good People.

Congress, in acknowledging the need for Indigenous peoples to preserve and maintain their cultural and spiritual traditions, passed the American Indian Religious Freedom Act,<sup>126</sup> which declares:

[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to

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123. Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). A new organization, the Sacred Lands Protection Coalition, is working to incorporate the principles of this Executive Order into Congressional legislation. Press Release, National Congress of American Indians, Protection of American Indian Sacred Lands Topic of Media Briefing (May 31, 2002) (on file with author).

124. The right to revitalize threatened cultural practices is part of both domestic and international customary law. NAGPRA's legislative history notes that "[i]n addition to ongoing ceremonies, the Committee recognizes that the practice of some ceremonies has been interrupted because of governmental coercion, adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at the time. It is the intent of the Committee to permit traditional Native American religious leaders to obtain such objects as are needed for the renewal of ceremonies that are part of their religions." H.R. REP. NO. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4373. The International Committee that oversees enforcement of the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States has ratified, has called on states to "[e]nsure that Indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs . . . ." General Recommendation XXIII, UN GAOR, Comm. on the Elimination of Racial Discrimination, 51st Sess., ¶ 4(e), UN Doc. A/52/18 (1997) [hereinafter General Recommendation XXIII]. Article 12 of the Draft UN Declaration on the Rights of Indigenous Peoples states "Indigenous peoples have the right to revitalize their cultural traditions and customs." *Draft UN Declaration on the Rights of Indigenous Peoples*, UN ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, art. 12 UN Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) [hereinafter *Draft UN Decl.*].

125. *Cemis* are carvings, in stone or bone usually, that represent spirits important to a given person or clan. See *Dictionary*, supra note 2, at <http://members.dandy.net/~orocobix/telist-c.htm>.

126. 42 U.S.C. § 1996 (1994).

believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.<sup>127</sup>

This “inherent” right to access came about during the broad-stroke self-determination era of U.S.-Indian policy and has been buttressed by community-specific legislation including, *inter alia*, access to the Grand Canyon for the Havasupai Nation, temporary closure of Cibola for cultural purposes, access to Malpais National Monument, and mutual access to Navajo/Hopi sacred sites.<sup>128</sup> Each of these pieces of legislation contains language that implies the need for Interior approval. However, there are explicit mandates to work alongside the respective Indigenous peoples concerned. Similar legislation for Taino could allow for enumerated rights, particularized for Taino-specific purposes. Given the acknowledgement of Taino as a people with a “distinctive spiritual and material relationship with the land,”<sup>129</sup> these protections easily extend to the issue of Taino access to Caguana Ceremonial Site *in collaboration with* the Taino community.

The U.S. court system has also grappled with arguments relating to religious freedom and Indigenous peoples’ access to their sacred sites, specifically in the case *Bear Lodge Multiple Use Association v. Babbitt*.<sup>130</sup> At issue in this case is the use of the popular tourist site Devil’s Tower.<sup>131</sup> Local Indigenous peoples regard this site as a sacred place while rock climbers use the area for sport. Because of these differences in cosmological perceptions of the site, climbers challenged the Interior Secretary’s approval of a Final Climbing Management Plan (FCMP)<sup>132</sup> created by the NPS to avoid confrontations between the two sets of visitors.<sup>133</sup> The Court declared, quoting the lower court in its discussion of the merits, “the NPS plan [to issue a request for a voluntary ban during the month of June] was ‘a lawful and legitimate exercise of authority . . . carefully crafted to

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127. § 1996.

128. *See supra* note 5.

129. 145 CONG. REC. E478 (daily ed. March 18, 1999) (statement of Rep. Gutierrez) [hereinafter Gutierrez].

130. 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999).

131. Devil’s Tower is referred to in many Indigenous languages: “*Mato Tipila*” means “Bear Lodge” in Lakota, or “*He Hota Paha*,” which means “Grey Horn Butte” in Lakota. It is also called “Bear’s Tipi” in Arapahoe, “Bear’s House” in Crow, and “Tree Rock” in Kiowa. *Bear Lodge*, 175 F.3d at 816 n.2.

132. One of the essential elements to the FCMP is that the climbers voluntarily refrain from climbing during certain periods of the year, namely the month of June when the various Native peoples use the site for ceremonial purposes. The climbers involved in the suit, however, never did refrain from climbing; therefore, the climbers could not allege an injury for standing purposes since they never stopped the behavior the Plan requests they stop. *Id.* at 815-16.

133. *Id.* at 815.

balance the competing needs of individuals using Devil's Tower . . . while . . . obeying the edicts of the Constitution.' ”<sup>134</sup>

Taino descendents merely request the same right to access upheld by District Judge Downes and affirmed by 10th Circuit Judge Porfilio in *Bear Lodge*. In accordance with religious freedoms guaranteed by the Constitutions of both the United States and Puerto Rico,<sup>135</sup> Taino are justified in asserting their right to use of their ceremonial sites, one of which, like the sacred area in the *Bear Lodge* case, is under NPS control. As Indigenous peoples to the Island, Taino should not be discriminated against and disallowed their Constitutional right to participate in their cultural and religious responsibilities.

## 2. Returning the Old Ones Home

The Taino are ancestor worshipers.<sup>136</sup> According to some Taino stories, spirits of the dead remain in their bones after death and therefore skeletons of relatives have often been kept in baskets for ceremonial purposes in Taino homes. Even today, as evidenced in the United States' reasons for rescinding the Dracula Plan<sup>137</sup> to relocate Vieques citizens and their families' remains to St. Croix, the Indigenous peoples of Borike are still ancestor worshipers. Family members, including those who have passed, continue on as a living part of Taino daily life.

The Antiquities Act of 1906,<sup>138</sup> however, legally converted the remains of these ancestors into U.S. “federal property.”<sup>139</sup> This Act intended to protect “archaeological resources” on federal lands from looters, but in the process “defined dead Indians as ‘archaeological resources’ . . . contrary to long standing common-law principles.”<sup>140</sup> Under the Antiquities Act, these dead persons could be exhumed with a permit “for the permanent preservation of the remains in public museums.”<sup>141</sup> Two false assumptions were inherent in this Act. Principally, deceased Native peoples were not “people” in the same way the remains of Anglo ancestors were “people.” Secondly, the legislators assumed that archaeologists and museum curators rather than Native peoples had the best knowledge for the “permanent preservation” of these Native remains and sacred items. At a time when the assimilationist Allotment policies were plaguing the

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134. *Id.* at 820 (quoting *Bear Lodge*, 2 F. Supp. 2d at 1456).

135. U.S. CONST. amend. I; PR CONST. art. II, § 3.

136. Ivonne Figueroa, *Cultural History*, at <http://www.elboricua.com/history.html> (last visited April 19, 2003).

137. See FERNANDEZ, *supra* note 41, at 148.

138. Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (2000)).

139. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 42 (1992).

140. *Id.*

141. *Id.*



Native nations, the Antiquities Act furthered the notion of the “vanishing Indians” and, consequently, their remains could be treated as chattel owned and coveted by the federal government.<sup>142</sup> The Archaeological Resources Protection Act of 1979<sup>143</sup> attempted similar protections of archaeological sites for the purposes of scientific study.

Native rights advocates and attorneys criticized anthropologists for “collect[ing] large numbers of Indian crania . . . to scientifically prove, through skull measurements, that the American Indian was a racially inferior ‘savage’ who was naturally doomed to extinction.”<sup>144</sup> In fact, “[m]any contemporary examples of mistreatment of Native graves and dead bodies occurred in recent years under this rubric, which shocked the Nation’s conscience as social ethics have changed and society has become more sensitive to this Equal Protection problem.”<sup>145</sup>

It was not until 1989 that Congress began to re-think its assumptions about the treatment of Indigenous peoples’ human remains and sacred items. The National Museum of the American Indian Act<sup>146</sup> was the product of long discussions between museum owners and curators and Native nations’ elders known as the National Dialogue on Museum/Native American Relations.<sup>147</sup> Also subsequent to the National Dialogue, legislators developed an understanding that many Indigenous peoples place similar culturo-religious import on ancestral remains.

As a result, the U.S. Congress passed NAGPRA in 1990 mandating the return of Indigenous ancestral remains to their respective tribes. According to the activists and attorneys who lobbied for this Act, “NAGPRA is, first and foremost, human rights legislation.”<sup>148</sup> It allows Indigenous peoples’ ancestors the same rights as any other deceased individuals and attempts to relieve those who have passed from the gross disrespect afforded them by archaeologists and tourists.

NAGPRA’s stated purpose is as follows:

[T]o protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands. The Act also sets up a process by which Federal agencies and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian

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142. H.R. REP. NO. 101-877 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369.

143. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa-470mm (1988)).

144. Trope & Echo-Hawk, *supra* note 139, at 40.

145. *Id.* at 43.

146. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (codified as amended at 20 U.S.C. § 80q to 80q-15 (1989)).

147. H.R. REP. NO. 101-877 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4369.

148. Trope & Echo-Hawk, *supra* note 139, at 59.

tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.<sup>149</sup>

The Act's repatriation provisions, however, have been controversial from the outset. Within the legislative history of the public law, there are letters to Hon. Morris K. Udall, Chairman of the Committee on Interior and Insular Affairs, from various opponents of the Act.<sup>150</sup> Their concerns range from language in the statute's definitions section to issues of unconstitutionality under the Takings Clause. Not long after Congress passed NAGPRA, many others brought similar concerns to the courts. Since 1992, several suits have been filed seeking redress for alleged misapplication of NAGPRA's rules.<sup>151</sup>

#### a. The Kennewick Man Suit

*Bonnichsen v. Army Corps of Engineers*,<sup>152</sup> better known as "The Kennewick Man Case," has garnered a tremendous amount of publicity.<sup>153</sup> In July of 1996, the Army Corps of Engineers found a human skeleton and, in compliance with NAGPRA § 3005, the Corps issued a statement of intent to repatriate the remains.<sup>154</sup> Scientists, however, filed a complaint to enjoin the Corps from repatriating the 9,000-year-old remains so they could pursue scientific studies.<sup>155</sup>

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149. H.R. REP. NO. 101-877 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369.

150. H.R. REP. NO. 101-877. Robert W. Page, Assistant Secretary of the Army (Civil Works), C. Edward Dickey, Acting Principal Deputy Assistant Secretary (Civil Works), Bruce C. Navarro, Deputy Assistant Attorney General of the Interior, and Scott Sewell, Deputy Assistant Secretary of Interior.

151. See *Castro Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001); *W. Mohegan Tribe & Nation of N.Y. v. New York*, 246 F.3d 230 (2d Cir. 2001); *U.S. v. Kramer*, 168 F.3d 1196 (10th Cir. 1999); *U.S. v. Tidwell*, 191 F.3d 976 (9th Cir. 1999); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996); *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000); *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp. 2d 644 (W.D. Tex. 1999); *Idrogo v. U.S. Army*, 18 F. Supp. 2d 25 (D.D.C. 1998); *Bonnichsen v. United States*, 969 F. Supp. 608 (D. Or. 1997); *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992).

152. 969 F. Supp. 608 (D. Or. 1997).

153. See generally James C. Chatters, *Kennewick Man*, [http://www.mnh.si.edu/arctic/html/kennewick\\_man.html](http://www.mnh.si.edu/arctic/html/kennewick_man.html) (last visited April 29, 2003); Jim Chatters, *Meet Kennewick Man*, at <http://www.pbs.org/wgbh/nova/first/kennewick.html> (last visited April 19, 2003); *Kennewick Man Virtual Interpretive Center*, at <http://www.kennewick-man.com> (last visited April 19, 2003); The Burke Museum of Natural History and Culture, *Kennewick Man Virtual Experience*, at <http://www.washington.edu/burkemuseum/kman/default.htm> (last visited April 19, 2003).

154. *Bonnichsen*, 969 F. Supp. at 617-18.

155. *Id.* at 618.

In addition to the Bonnicksen scientists, a group called the Asatru Folk Assembly joined as plaintiffs to the suit. The group claims to be “a legally-recognized church ‘that represents Asatru, one of the major Indigenous, pre-Christian, European religions.’”<sup>156</sup> Asatru sought an injunction along with the scientists so that tests could prove the Kennewick Man’s descent and for “reinterment in accordance with Native European belief.”<sup>157</sup>

The decision of the court rested on the resolution of two intertwined issues: ripeness and exhaustion. Because the Corps had already made an administrative decision, namely that the remains were indeed Native American, and had contacted tribes of the surrounding area, the court held that these steps constituted an “agency action” lifting any jurisdictional bar based on ripeness or exhaustion problems.<sup>158</sup> However, the route to those answers required a discussion of exactly which groups NAGPRA covered.<sup>159</sup>

The legislative intent behind NAGPRA was to prevent Indigenous peoples’ remains from harm; it is not a general statute for disposing of human remains found on federal lands, but is concerned only with Native American remains and related objects.<sup>160</sup> The court affirms this reading of the statute in a footnote: “NAGPRA reflects the unique relationship between the Federal Government and Indian tribes.”<sup>161</sup> The court issues a limited holding—merely that ripeness and exhaustion issues have been satisfied for the court to exercise its jurisdiction. However, the court discusses the merits within the confines of answering the ripeness and exhaustion questions.<sup>162</sup> Within that limited discussion, it became clear that NAGPRA would not cover organizations like the Asatru Folk Assembly.<sup>163</sup> It is the Asatru Folk Assembly’s appearance in Kennewick Man Case that compels a very thorny discussion of who is or is not “Indigenous.”<sup>164</sup>

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156. *Id.*

157. *Id.*

158. *Id.* at 624.

159. *Id.* at 625.

160. See 25 U.S.C. § 3002(a) (1994).

161. *Bonnicksen*, 969 F. Supp. at 622 n.7.

162. *Id.* at 625.

163. *Id.* at 628 (holding that Asatru failed to state a colorable claim).

164. See generally *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: The Concept of “Indigenous Peoples,”* UN ESCOR, 14th Sess., Agenda Item 4, UN Doc. E/CN.4/Suv.2/AC.4/1996/2, (1996) (reflecting the UN’s ever-evolving understanding of what it is to be “Indigenous”).

b. Who's an Indian Anyway?: Hawaiian Natives Argue Their Right to Protection Under NAGPRA

In The Kennewick Man Case, the Asatru conceded to being European in descent, thus making their claim as Indigenous to North America rather tenuous. Conversely, NAGPRA specifically mentions the Native Hawaiian organization Hui Malama I Na Kupuna O Hawai'i Nei in its definitions section as an organization with authority and knowledge about Native Hawaiian customs.<sup>165</sup> In *Na Iwi O Na Kapuna O Mokapu v. Dalton*,<sup>166</sup> the plaintiff Native Hawaiian organization asserts two claims for standing: (1) that the remains themselves have standing,<sup>167</sup> and (2) that the NAGPRA text grants the Hawaiian organization the right to bring a cause of action.<sup>168</sup> As to the first claim, the Court decided, despite chronicling various other non-human entities that had standing in U.S. Courts, “[o]bjects or entities without any attributes of life in the observable provable sense are generally not afforded a legally-protected interest for standing purposes.”<sup>169</sup> Therefore, the remains have no standing both because there is no injury-in-fact and no causal connection between the injury and the defendant’s actions.<sup>170</sup> As to the second claim, however, the Court afforded the Native Hawaiian organization standing, finding that it not only met the requirements for standing as an organization but that its mention in the body of the Act was informative as well.<sup>171</sup> Not incidentally, in addition to maintaining that the Hui Malama properly had standing for the reasons articulated above, the court also explicitly stated its respect for the ancestral and personal beliefs of the Indigenous plaintiffs.<sup>172</sup>

c. Taíno Claims: Indigenous Enough?

The judiciary, in these two cases, began to refine their answer to the question of who may claim protections and redress under NAGPRA. In effect, it also decides who is Indian for the purposes of the legislation.<sup>173</sup> By amending

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165. 25 U.S.C. § 3001(11)(C) (1994).

166. 894 F. Supp. 1397 (1995).

167. *Id.* at 1406.

168. *Id.* at 1408.

169. *Id.* at 1407. In footnote 10 of the Court’s opinion, the majority acknowledges that such entities as birds, squirrels, and ecosystems generally were afforded standing by other courts. *Id.* at 1410 n.10.

170. *Id.*

171. *Id.* at 1409-10 (noting that mention of the Hawaiian organization in the statute was not despositive, however).

172. *Id.* at 1409.

173. Part of self-determination for all peoples is the right to self-identify. *Draft UN Decl., supra* note 124, art. 8. Yet, specifically in the Kennewick man Suit, it is evident the problems that arise out of that right to self-identification.

NAGPRA to include the UCTP and/or *Ihuche Rareito* in the legislation along with the Hawaiian organization, Hui Malama I Na Kupuna O Hawai'i Nei, Taino ancestral remains could be under the same protections as other Indigenous ancestral remains. The argument for such inclusion would be based on the parallel relationships between the United States and Borike, and the United States and the Native nations.

However, lack of mention does not preclude courts from finding that Taino have standing and should be protected. NAGPRA clarifies that the Act's protections are not reserved for federally recognized Indian tribes. Protection extends to tribes (or tribal organizations with knowledge and authority about their cultural traditions) that can show a "shared group identity which can be reasonably traced historically or prehistorically [to the remains]."<sup>174</sup> Whether organized under the UCTP or *Ihuche Rareito*, Taino understand themselves to be one people with shared foods, stories, customs, dances, and ways of knowing their place in the universe. Therefore, as an Indigenous people under the plenary authority and trust responsibilities of the United States, the Taino can arguably be included in NAGPRA's intended meaning of "tribe."

If the Taino community were to look to NAGPRA as a way to gain repatriation rights, amendments to include Taino would need to be carefully balanced to meet Taino-specific needs. Without these provisions catered specifically to Taino cultural needs, repatriation of Taino ancestors risks creating unintended consequences. Admittedly, providing another way in which the U.S. government would extend its legislative blanket over Taino affairs might not be a progressive step toward increasing self-determination or independence. Nonetheless, Taino sites need protection and some from the Taino community may view NAGPRA as a viable way to begin that process.

### 3. Indigenous Knowledge: Gaining Maintenance Rights and Control

Provisions of the National Historic Preservation Act (NHPA)<sup>175</sup> provide tribes with the opportunity to assume the functions of a Tribal or Commonwealth Historic Preservation Officer. In other words, the NHPA allows and encourages Indigenous peoples cooperative control over their sites, even outside of tribally owned land.<sup>176</sup> This legislation, still hegemonic in its implementation because it still requires Interior review, has the potential to create a fluid platform upon which to build co-management agreements between tribes and the United States. These agreements can describe various aspects of shared control and maintenance, including funding<sup>177</sup> to accomplish the tribes' goals in a given area.

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174. 25 U.S.C. § 3001(2) (1994).

175. National Historic Preservation Act, 16 U.S.C. §§ 470a to 470w-6 (1988).

176. § 470a(d)(2).

177. § 470a(e).

One example of tribal control over traditional ancestral resources that has been under close judicial examination for at least two decades is hunting and fishing rights, specifically in the Northwestern United States. The Washington State Decisions<sup>178</sup> yielded two conclusions: (1) tribes have a retained right to a certain percentage of fish migrating back to tribal territory, and (2) treaty rights contain an implicit requirement for protection of salmon habitat.<sup>179</sup> Despite these court victories, however, the tribes noticed that the salmon count was still declining and realized other measures were necessary in order to gain control of this culturally significant resource. The tribes involved in the Washington State litigation were inspired by movements internationally to work in collaboration with government agencies on co-management regimes. Consequently, they decided to enter into negotiations with the State and other stakeholders in the fish industry to share salmon-count management responsibilities.<sup>180</sup> These negotiations can serve as a model the Taino community might use to begin asserting control over ceremonial sites on the Island of Borike.

### **C. Who Decides What Happens**

Losses are certain  
in the pattern of this dance.

-Leslie Silko<sup>181</sup>

Imbedded in the above legislation and courts' analyses are cosmological differences in worldviews. This is a problem Indigenous peoples commonly encounter in bringing their claims to a non-Indigenous legal system. One glaring cosmological distinction is that illustrated in *Na Iwi O Na Kupuna O Mokapu* between the Court's concept of "entities without any attributes of life" and the Hui Malama's concept of what constitutes "life."<sup>182</sup> The Court relies on its own cultural context for understanding what is or is not bestowed with "attributes of life," basing that understanding on empirical notions of what is "observable and provable."<sup>183</sup> However, according to Native Hawaiian custom, human remains

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178. U.S. v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), *appeal dismissed per curiam*, 759 F.2d 1353 (9th Cir. 1985); U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

179. Ross, *supra* note 13, at "U.S. v. Washington."

180. *Id.*

181. Leslie Marmon Silko & James Wright, *Note on the Deer Dance*, in *THE DELICACY AND STRENGTH OF LACE* 11 (Anne Wright ed., 1986).

182. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1407 (D. Haw. 1995).

183. *Id.* at 1406-07.

“are spiritual beings that possess all of the traits of a living person.”<sup>184</sup> Similarly, U.S. recognition that the people of Vieques, Puerto Rico felt such a bond with their ancestral counterparts was the impetus for the Dracula Plan to remove Viequesan cemeteries during the attempted second forced removal to St. Croix.<sup>185</sup> Maintaining a connection to relatives who take forms other than human and who are not “observably or provably” alive is part of the core of Taino culture, custom, and religion. In dealing with federal provisions that implicate various cultural contexts—Indigenous and non-Indigenous—Taino people can anticipate similar difficulties articulating these cosmological “truths” to the dominant-society’s non-Indigenous legal system.<sup>186</sup> This is why Taino look to our relatives on other continents to see how they have succeeded in reifying their own traditional law, blending it with colonial laws, and handling the delicate balance between the two.

#### IV. *NATIAO Y NITIAU*:<sup>187</sup> SPEAKING WITH DISTANT RELATIVES

There are countless paths by which certain Indigenous peoples have in fact attained their respective legal goals. Examining international actors’ practices—including different Indigenous communities, inter-governmental organizations, and the states themselves—allows for a comparative analysis from which to learn. In some cases, Indigenous peoples have had to bring complaints against the states in which they reside to international tribunals after exhausting their domestic remedies. Increasingly, these international bodies have issued sanctions against states in response to the complaints of Indigenous peoples. Stories of communities’ strategies and the lessons that follow have stretched from one continent to another with reports of varying success. The Taino are ready to listen.

##### **A. International Instruments: Creating Normative Standards**

One of the profound effects international instruments have in the international law community is their ability to record and set normative standards.<sup>188</sup> Though there is always the risk of deviation from those standards,

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184. *Id.* at 1406.

185. FERNANDEZ, *supra* note 41, at 201.

186. My thesis—that Taino will be served best by a multi-government cooperative agreement regarding their right—rests on the idea that these types of problems inure in both adversarial methods of adjudication and in non-localized legislation.

187. “Brother(s) and Sister(s).” *Dictionary*, *supra* note 2, at <http://members.dandy.net/~orocobix/telist-n.htm>.

188. *See* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 49-58 (1996) (discussing developments of customary law relating to Indigenous peoples).

such actions do not necessarily negate the legitimate expectation-building that occurs in the process of establishing norms. Developments in human rights law are culminating in a tighter fabric of expectations for states' behaviors toward Indigenous peoples.<sup>189</sup> As this fabric becomes rich with the textures supplied by Indigenous communities themselves, using international instruments to their benefit becomes more of a viable option. In turn, the increased use of the international human rights system results in a greater recognition of Indigenous peoples' international character.

### 1. United Nations: Documenting the Transition Toward a Unique Treatment of Indigenous Peoples

The Commonwealth of Puerto Rico's international character is inextricably linked to that of the United States because of its status as a free-associated state, or self-governing territory. As a self-governing territory, it has garnered the attention of the UN Committee on Decolonization and two "International Decades" dedicated to supporting decolonization efforts.<sup>190</sup> On June 21, 2001, the Special Committee on Decolonization met and issued this statement:

[T]he Special Committee on Decolonization . . . called on the United States to expedite a process allowing the Puerto Rican people to fully exercise their inalienable right to self-determination and independence.

Further, the Committee requested the President of the United States to release all Puerto Rican political prisoners serving sentences in the United States prisons on cases related to the struggle for the independence of Puerto Rico.<sup>191</sup>

Several United Nations instruments relating to general human rights norms substantiate these assertions for Puerto Rican independence. Each one holds its

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189. *Id.*

190. See generally *Special Committee Decision of 22 June 2001 Concerning Puerto Rico*, UN GAOR Special Comm., UN Doc. A/AC/109/2002/L.4 (2002), <http://ods-dds-ny.un.org/doc/UNDOC/LTD/N02/367/57/PDF/N0236757.pdf?OpenElement>; United Nations, *The United Nations and Decolonization*, at <http://www.un.org/Depts/dpi/decolonization/main.htm>.

191. Press Release, United Nations Special Committee on Decolonization, Special Committee Resolution on Decolonization Adopts Resolution Urging United States to Halt Military Drill on Vieques Island, Puerto Rico, (June 21, 2001), <http://www.un.org/News/Press/docs/2001/gacol3053.doc.htm>.



own unique force for Boricua self-determination as a whole as well as for the Taino as a distinct people.

a. ICCPR and CERD: The Alphabet of International Anti-Discrimination

Born out of the decolonization period, Borike's "inalienable right to self-determination," on an international level is rooted in, *inter alia*, the International Covenant on Civil and Political Rights (ICCPR),<sup>192</sup> which states that "[a]ll peoples have the right of self-determination."<sup>193</sup> More precisely, as a distinct people within the pluri-cultural territory of Puerto Rico, Taino self-determination rights are articulated in Article 27 of the ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.<sup>194</sup>

The UN Human Rights Committee, charged with overseeing compliance with the ICCPR, issues reports and opinions in response to alleged violations of the ICCPR Covenant. Two examples of various Indigenous peoples who successfully issued complaints to the Human Rights Committee against the states in which they reside are the Saami people of Finland and peoples Indigenous to Polynesia.

Herding is a traditional practice in Saami culture. In *Länsmann v. Finland*,<sup>195</sup> the Human Rights Committee articulated what the Saami and other indigenous peoples had known for generations: that "the right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context."<sup>196</sup> Therefore, a sub-issue in this case became the question of who defines "traditional" as it is used in domestic laws allowing Indigenous peoples to maintain their "traditional" livelihoods on their "traditionally" occupied lands. According to the Committee, the fact that Saami reindeer herders now employ

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192. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 UNT.S. 171 (entered into force Mar. 23, 1976).

193. *Id.* art. 1(1).

194. *Id.* art. 27; see also Erica-Irene Daes, *Some Consideration on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993) (discussing the arguments that Indigenous peoples have a right to full self-determination as acknowledged for "all peoples" in Article 1, even including the right to secession when such a need arises and meets the criteria established under international law).

195. *Länsmann v. Finland*, Communication No. 511/1992, UN Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994).

196. Pritchard & Heindow-Dolman, *supra* note 8.

modern technology in their herding techniques does not mean they are barred from relying on Article 27. The article does not only protect a static, unchanging version of cultural and “traditional means of livelihood.”<sup>197</sup> Instead, the Committee acknowledged that, in the context of modern developments, the Saami have sustained their herding practices.<sup>198</sup> Therefore, the Saami case added to the growing recognition that Indigenous peoples, as ever-dynamic peoples, are subjects of the “collective rights” provision of the ICCPR.

Similarly, in the second example<sup>199</sup> Indigenous Polynesians were able to convey their own Indigenous conceptions of privacy and family to the Committee. In so doing, they successfully averted destruction of an ancestral burial ground based on their conceptual interpretations of the ICCPR. Upon review of the community’s allegations, the Committee stated, “[i]t transpires from the [Indigenous peoples’] claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.”<sup>200</sup> The Committee’s understanding and its application of that understanding to Articles 17(1) and 23(1) of the ICCPR, led it to conclude that destruction of the ancestral burial site would interfere arbitrarily with the Indigenous peoples’ right to privacy and family.<sup>201</sup> France (the colonizing entity) would therefore be in violation of the Covenant.

These holdings affirm that, as an Indigenous community, Taíno can define for itself what is “traditional,” who is a part of the community, and for what purposes. Under the Saami case, Taíno can assert that, despite changes in the ways and places in which they manifest their cultural practices, the practices remain. The Polynesian case helped to set an international precedent that allows Taíno to assert protections under their own conceptions of “family.” These international precedents assist in the Taíno push for access, protection, and return of their ancestors’ remains. This is significant because Taíno is a culture of ancestor worshippers for whom the remains of family members are ever-present entities. The United States, as a State party to the ICCPR, is bound to protect Taíno rights to self-determination. Therefore, it must cease to interfere with our traditional practices and ancestral and family relationships.

The Committee that oversees the states’ practices in relation to the Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>202</sup> has also provided another advantage for the Taíno. After its fifty-first session, it

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197. Länsmann, *supra* note 195, ¶ 9.3.

198. *Id.*

199. Hopu & Bessert v. France, Communication No. 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1 (1997).

200. *Id.* ¶ 10.3.

201. *Id.*

202. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 UNT.S. 195, (entered into force Jan. 4, 1969).

issued a statement specifically addressing the treatment of Indigenous peoples.<sup>203</sup> First, along with specific suggestions to states for improving relationships with Indigenous peoples, the Recommendation makes explicit the application of CERD's general human rights norms to Indigenous peoples' issues. Specifically, however, General Recommendation No. 23 discusses, *inter alia*, Indigenous peoples' right to practice and revitalize their cultural traditions<sup>204</sup> and to restitution for lands taken out of their control.<sup>205</sup> Therefore, based on the plain language of and the norms affirmed by this Committee's Recommendation, the Taíno have the right to revitalize the traditions that have been halted due to their exclusion as a people from ceremonial lands that are in the control of the U.S. National Park Service.

#### b. Indigenous Peoples in the UN System

Increasingly, human rights scholars point to an evolving norm that confers *sui generis* treatment on Indigenous peoples in international law.<sup>206</sup> Possible evidence of this emerging norm comes from at least three important documents that relate exclusively to Indigenous peoples: the International Labor Organization Convention (ILO) No. 169,<sup>207</sup> the Draft Declarations,<sup>208</sup> and the UN Resolution creating the Permanent Forum on Indigenous Issues.<sup>209</sup>

ILO No. 169 specifically addresses the concerns of Indigenous peoples. It applies to:

- (a) Tribal peoples . . . whose status is regulated wholly or partially by their own customs or traditions[;]
- (b) Peoples in independent countries who are regarded as Indigenous on account of their descent from the populations

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203. See generally General Recommendation XXIII, *supra* note 124.

204. *Id.* ¶ 4(e).

205. *Id.* ¶ 5.

206. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, in PEOPLES' RIGHTS 87 (Philip Alston ed., 2001).

207. International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169].

208. *Draft UN Decl.*, *supra* note 124; *Proposed American Declaration on the Rights of Indigenous Peoples*, Feb. 26, Inter-Am. C.H.R., OEA/Ser/L/11.95, doc. 6 1333d (1997), <http://www.cidh.oas.org/indigenous.htm> [hereinafter *Proposed American Decl.*].

209. UN ESCOR, 56th Sess., at 50-52, UN Doc. E/RES/2000/22. (2000), <http://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf> [hereinafter Permanent Forum].

which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>210</sup>

ILO No. 169 also respects “[s]elf-identification as Indigenous . . . as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>211</sup> The Taíno clearly fit within the Convention’s definitions of Indigenous, as they are certainly the original peoples and the descendants of pre-colonized peoples from the Island.

Some Indigenous rights activists have critiqued ILO No. 169 for qualifying its use of the term “peoples.”<sup>212</sup> Their argument is that, by qualifying the use of the term, the Convention drafters avoided recognizing indigenous peoples’ right to full self-determination as that term is commonly understood in the international community.<sup>213</sup> Nonetheless, the Convention uses strong language in other areas such as Article 18 where the drafters assert the importance of putting land use rights back in the hands of the Indigenous people: “Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.”<sup>214</sup>

In fact, the Governing Body of the ILO recently issued a recommendation to Ecuador in which it described the purpose of the Convention: “[t]he Committee considers that the spirit of consultation and participation [in discussions about land and resource rights] constitutes the cornerstone of Convention No. 169 . . . .”<sup>215</sup> In their complaint to the ILO Governing Body, the Shuar Indigenous people of Ecuador established that the government had not consulted with them in regard to oil explorations that were already underway on

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210. ILO Convention No. 169, *supra* note 207, art. I, cl. 1.

211. *Id.* art. I, cl. 2.

212. *Id.* art. I, cl. 3.

213. See generally S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 131 (1993); Daes, *supra* note 194; Dalee Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 14, 21 (1993). These writers argue that Indigenous peoples are deserving of and indeed acquiring *sui generis* treatment regarding the general definition attributed to “peoples” and “self-determination.”

214. ILO Convention No. 169, *supra* note 207, art. 18.

215. Representation Alleging Non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), ¶ 31, GB.277/18/4 (submitted 2000), <http://www.ilo.org/ilolex> > Specific Country > Ecuador > Representations Under Article 24 of the ILO Constitution (last updated Sept. 13, 2002).

their traditional lands.<sup>216</sup> Based on Article 6 of the Convention, consultation is imperative and must occur prior to exploration on the lands.<sup>217</sup> Therefore, the ILO “Committee urge[d] the Government to begin a consultation process with the affected communities . . . .”<sup>218</sup> and to foster the communication needed to comply with the Convention.

Similarly, the Draft UN Declaration on the Rights of Indigenous Peoples<sup>219</sup> has increasingly contributed to the large body of international law relating to the treatment of these communities. Even though it still awaits adoption by the UN General Assembly, certain articles and concepts in the Draft have helped to develop implicit obligations on the part of states, thereby contributing to the body of customary international law.<sup>220</sup> Therefore, despite its tenuous status, the Draft sets out the “core elements of a new generation of internationally operative norms for finding increasing recognition” of Indigenous issues.<sup>221</sup>

Most recently, the United Nations successfully established the beginnings of a Permanent Forum on Indigenous Issues.<sup>222</sup> The Permanent Forum is “a new and unique organ within the United Nations system because it deals solely with Indigenous issues [and] . . . [w]ith the establishment of the Forum, Indigenous peoples have become members of a UN body and, as such, will help set the Forum’s agenda and determine its outcomes.”<sup>223</sup> Additionally, the Permanent Forum is at the same level in the UN system as the UN Commission on Human Rights.<sup>224</sup> The high placement of the Forum in the structural hierarchy of the human rights regime further evidences *sui generis* treatment of Indigenous peoples in international law. Therefore, through ILO No. 169, the Draft Declarations, and now the Permanent Forum, international actors continue to fortify this developing normative standard for a unique treatment of Indigenous peoples.

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216. *Id.* ¶ 12.

217. *Id.* ¶ 31.

218. *Id.* ¶ 40.

219. *Draft UN Decl.*, *supra* note 124.

220. As a norm becomes almost universally accepted by the international community, not just by states, it is said to be “customary international law,” which, once established as such, can be binding on all member states of the UN, even in the absence of clear assent to the acceptance of a particular norm. *See ANAYA, supra* note 188, at 49-50.

221. Pritchard & Heindow-Dolman, *supra* note 8.

222. *See supra* note 209 and accompanying text.

223. United Nations, *The Permanent Forum on Indigenous Issues Pamphlet*, <http://www.unhchr.ch/html/racism/indileaflet6.doc> (last visited April 19, 2003).

224. *Id.*

## 2. Organization of American States: A Regional Voice

As a regional body of the United Nations, the Organization of American States (OAS) concentrates on maintaining the strength and sustainability of the states within the Latin American region. Most pertinently, the Inter-American Commission on Human Rights (IACHR), part of the OAS, has its own set of instruments, which includes provisions important to Indigenous communities. For example, Article 12 of the American Convention on Human Rights declares: “No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.”<sup>225</sup> Because access to sacred and ceremonial places on the Island are vital to Taíno religious beliefs, this provision implicitly places an obligation on states not to impair that access.

In addition to general human rights provisions, the Inter-American Commission has approved a Draft Declaration on the Rights of Indigenous Peoples.<sup>226</sup> The emphasis in the Inter-American Draft Declaration seems to be on pluri-cultural communities where the Indigenous peoples are considered and often aspire to be an “integral segment” of the state’s population.<sup>227</sup> In spite of this integral segment undertone in the OAS Proposed American Declaration, the Inter-American Court on Human Rights recently heard a case wherein a Native community, scarcely recognized by Nicaragua, sought to remain a distinct community living on its ancestral lands. The Court held:

[Nicaragua] must adopt in its domestic law . . . measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of the members of [the Mayagna Community of Awás Tingni], in accordance with their customary law, values, uses and customs . . . .<sup>228</sup>

For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural heritage and transmit it on to future generations.<sup>229</sup>

Such impressive recognition of Indigenous peoples’ world-views and cosmologies in a judicial opinion is rare indeed. The ruling in *Awás Tingni* establishes a tremendous precedent that Indigenous peoples’ ways of construing

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225. American Convention on Human Rights, Nov. 22, 1969, 1144 UNT.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

226. *Proposed American Decl.*, *supra* note 208.

227. *Id.* art. I.

228. *The Mayagna (Sumo) Indigenous Community of Awás Tingni v. Nicaragua*, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), *reprinted in* 10 ARIZ. J. INT’L & COMP. L. 395, 428 (2002).

229. *Id.*, *reprinted in* 10 ARIZ. J. INT’L & COMP. L. 395, 430 (2002).

the world are not necessarily subordinate to that of the dominant society. Just as importantly, the case contributes to the rich fabric of international expectations for how states should relate to the Indigenous peoples living within their borders. Undoubtedly, it should be comforting to the Taíno that the Court issued such a sweeping opinion in this case. The facts and circumstances on which the Court based its decision align closely with those of the Taíno who are fighting for ceremonial access to their sacred sites.<sup>230</sup> The Awas Tingni's success could give hope to the Taíno that customary international law is developing to recognize Indigenous land rights arising from traditional use, including the peoples' spiritual relationship to the land.

### **B. Complications with Using the International System on Taíno's Behalf**

Puerto Rico is considered a self-governing territory of the United States, according to the United Nations.<sup>231</sup> It is not a state and therefore not permitted membership with the United Nations or the Organization of American States.<sup>232</sup> If the Boricuas and Taíno were to vote for independence in the next, as yet unscheduled, status-option plebiscite, they could eventually join the international community as a recognized state. As a result, the Taíno could work directly with the government of Puerto Rico to protect and maintain culturally and spiritually invaluable remains. Until then, however, if the Taíno and/or their Boricua brothers and sisters wish to assert violations of their rights in international fora, they are at the mercy of the complaint procedures proscribed for individuals and non-state actors in the various international instruments.<sup>233</sup>

For example, although the United States has ratified the ICCPR, it has not signed onto the ICCPR First Optional Protocol, which allows individual persons, groups of persons, or peoples to petition the Human Right Committee alleging ICCPR violations.<sup>234</sup> This refusal of the United States to sign the

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230. DeAnna Rivera, *Indigenous Land Claim Upheld in a Landmark Decision at the Inter-American Court of Human Rights—Taíno Implications?*, LA VOZ DEL PUEBLO TAÍNO (United Confederation of Taíno People, New York, N.Y.) Jan.-March, 2002 at 10, available at <http://www.uctp.org/Volume5/JanMarch2002/index.html> (discussing the ways in which the Awas Tingni decision is important to Taíno).

231. Press Release, Special Committee on the Situation with Regard to Implementation of the Declaration of the Granting of Independence to Colonial Peoples and Countries (Oct. 6, 2002), <http://www.un.org/News/fr-press/docs/2002/AGCOL199.doc.htm>.

232. UN CHARTER arts. 3-4.

233. See ANAYA, *supra* note 188, at 151-82 (explaining procedures for invoking human rights instruments).

234. International Covenant on Civil and Political Rights, *supra* note 192, art. 1 (providing that only states can bring complaints against other states under the ICCPR if the allegedly violative state is not signed onto the Optional Protocol).

Protocol silences these non-state entities. Alternatively, CERD, which the United States is signed onto, does allow for individual complaints. Taíno could allege U.S. violations of CERD to the CERD Committee and attach their related allegations of ICCPR violations to their CERD complaint. However, in the event that the CERD Committee does not find a solid basis for a discrimination complaint, procedural obstacles will still silence Taíno's ICCPR concerns. Additionally, the International Court of Justice, the UN judicial body,<sup>235</sup> does not hear cases unless both applicant and respondent are States, so Taíno and all non-state actors under U.S. jurisdiction will face challenges in their attempts to be heard in the UN human rights system.<sup>236</sup>

Similarly, the United States has not ratified the American Convention on Human Rights, which is a necessary step toward consenting to the binding jurisdiction of the Inter-American Court.<sup>237</sup> If the United States had consented to the Court's jurisdiction, the Court would hear complaints from non-state actors through the auspices of the Inter-American Commission.<sup>238</sup> Instead, as a self-governing territory that is *part of* the United States for some reasons and *apart from* the United States for others, Boriké and the Indigenous peoples living on the Island are restricted to bringing their claims before the non-binding authority of the Commission.<sup>239</sup>

Furthermore, once an international body issues an opinion in a particular case, redress will need to come in the form of a domestic solution. Yet, in order to file a petition with the Human Rights Committee or with the Inter-American Commission, the petitioners must have already exhausted their domestic remedies.<sup>240</sup> In certain situations, an opinion from one of these bodies merely perpetuates a circular procedure rather than a final solution.<sup>241</sup> For the Taíno, this

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235. International Court of Justice, *General Information—The Court at a Glance*, at <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (Feb. 10, 2003).

236. See *Rules of Procedure of the Inter-American Court of Human Rights*, Inter-Am. C.H.R., OAS/Ser.L/V/I.4, rev.8 (2001), <http://www.cidh.oas.org/basicos/basic18.htm>.

237. American Convention, *supra* note 225, ch. VIII.

238. *Id.* art. 44. Article 57 states that only the Commission is to bring a representation to the Court. Article 44 allows the Commission to bring representations from non-state parties. *Id.* arts. 44, 57.

239. There is also the argument that an opinion from the Commission has essentially the same effect on the State as an opinion from the Court: the embarrassment of having an international tribunal make a finding of a violation.

240. Many international committees and tribunals allow an exhaustion exception that states, where the bias of the domestic law or tribunal is too great for the complainants' allegations to be properly heard or where there is extreme and/or potentially detrimental delay in the domestic exhaustion, there may be a waiver of the exhaustion requirement. *E.g.*, American Convention, *supra* note 225, art. 46; General Recommendation XXIII, *supra* note 124, art. 14.7.

241. Where Indigenous peoples and the states in which they reside fail to communicate effectively and where states have refused to comply aptly with international



procedural rule brings them back to Congress because of its plenary power over the Island's affairs. As stated in the *Insular Cases*,<sup>242</sup> Congress is the Commonwealth's venue for redress.

Additionally, the Permanent Forum is not intended as a body that will provide redress for particular disputes or human rights violations. Its mandate is to raise awareness about Indigenous issues within and outside of the UN System.<sup>243</sup> It can receive communications and call on states to respond, but there is no established enforcement mechanism within the Forum to command compliance with international law norms.

In defense of these protocols and procedures, human rights scholars often argue that redress is not the key to international law. Instead, they assert that international law is about the development of normative standards for how states should be acting toward Indigenous peoples.<sup>244</sup> As discussed above, the international human rights program has developed norms that have proven to be favorable to these communities. Perhaps, then, the primary forum for the Taíno should be to rely on these norms as a basis for facilitating communication with both the United States and Puerto Rico, whenever and wherever possible. By focusing less on the adversarial or sanction-oriented systems offered by various committees, commissions, and courts, the Taíno can negotiate for a political solution. Taíno must attempt to implement agreeable means by which to gain the access and control needed over their sacred sites—an integral aspect of Taíno continuance as a people.

## V. LEARNING FROM INDIGENOUS PEOPLES' COOPERATIVE MANAGEMENT AGREEMENTS

[Terror is] the efficiency gained by eliminating, or threatening to eliminate, a player from the language game one shares with him. He is silenced or consents . . . . The decision-makers' arrogance . . . consists in the exercise of terror. It says: "Adapt your aspirations to our ends—or else."

-Jean François Lyotard<sup>245</sup>

Courts and legislatures have an inherent silencing effect on some of the communities they very well may be trying to serve. Whether at the state or federal level, it is nearly inevitable that some Indigenous communities will not be

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covenants, clearly these international tribunals provide a much-needed "nudge" toward effective communication.

242. See discussion *infra* Part III.A.3.

243. Permanent Forum, *supra* note 207, at 51.

244. See generally ANAYA, *supra* note 188.

245. JEAN-FRANÇOIS LYOTARD, THE POST MODERN CONDITION 63-64 (Geoff Bennington et al. trans., 9th prtg. 1993).

heard by these entities. Decisions about a community's social, cultural, and religious integrity are implemented without consent. The state or federal government's arrogance—assuming it knows what is best for each of the tribes—manifests in silence and violence. By contrast, co-management agreements between Indigenous peoples and their surrounding local communities allow for a narrative approach<sup>246</sup> to actually work *through* the problem at hand. In the case of the *Washington*<sup>247</sup> plaintiffs, for example, who decided to enter into co-management agreements with the state, a series of successful court cases did not help the decreasing number of salmon in their waters. It was through open discussion, negotiation, and co-management between Indigenous and non-Indigenous knowledge systems that allowed for control over the salmon population.

Lessons from Indigenous communities, both domestically and internationally, could inform the Taíno community's decision to embark on a co-management agreement. Three examples of the numerous cooperative agreements available to learn from are (1) the Washington State Inter-tribal agreements;<sup>248</sup> (2) the Nisga'a Treaty<sup>249</sup> with Canada; and (3) the Australian lease agreement with the Wiimpatja for partial use of Mutawintji National Park.<sup>250</sup> What is important to remember is that each type of agreement is as unique as the community it is intended to serve. Although these examples are important to examine, Taíno will need to come up with its own blend of cooperative control.

### **A. Examples of Co-Management Systems**

Each of the agreements mentioned above has its own objectives and, equally as important, its own processes for attaining those objectives. The agreements in Washington State were negotiated as management agreements, in part based on long-standing treaty rights with the U.S. federal government. Nisga'a, on the other hand, entered into a treaty with the province of British Columbia as part of an attempt to gain control over their traditional territory. Finally, the Wiimpatja agreement took the form of a lease wherein the Australian government issues payments to the Wiimpatja so the community can manage their ancestral land as they so choose, yet still allow tourists to visit the Mutawintji Park as part of the Commonwealth's "shared national heritage."

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246. Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites and Public Land*, 41 SANTA CLARA L. REV. 757, 759-60 (2001).

247. See cases cited *supra* note 178.

248. See discussion *infra* Part III.B.3.

249. *Nisga'a Final Agreement*, *supra* note 11.

250. Mutawintji National Park Lease, *reprinted in* 4 AUST. INDIGENOUS L. REP. 98, 98-107 (1999) [hereinafter Mutawintji Lease Agreement].

### 1. Washington/Inter-tribal Fishing Agreements

One of the more compelling aspects of these Washington/Inter-tribal fishing agreements is the *process* by which the tribes bargained for their agreements. Of course, the fact that the Indigenous people won several court cases prior to entering into negotiations undoubtedly had some impact on getting the State to the negotiation table. Some of the principles upheld during the negotiation should be highlighted here: (1) recognizing that process is as important as the goal; (2) inviting all possible stakeholders to participate in the negotiations; (3) consulting with Indigenous communities using their respective protocols; (4) using consensus to reach all conclusions; and (5) instituting a policy of mutual respect and professionalism and prohibiting slander and mud-slinging at the negotiation meetings. These simple principles allowed for a successful negotiation. Of course the process was not beyond criticism, but ultimately produced a general sense of community.

### 2. Nisga'a "Final" Agreement

In 1998, the Nisga'a community met with representatives of the Canadian government and the provincial government of British Columbia to transfer ownership of Indigenous traditional lands to the Nisga'a community. The agreement—entered into as a treaty—acknowledged, *inter alia*, the Nisga'a right to self-government and control over their cultural artifacts and heritage. This included repatriating cultural items that were in museums and provincial institutions. Despite its title, the Nisga'a "Final" Agreement was not "final" and has been re-negotiated on several occasions. There are several attributes of the agreement that deserve mention: (1) a dispute resolution provision that relies more on restorative justice principles rather than adversarial dispute resolution; (2) community eligibility provisions that rely on Nisga'a traditional law; and (3) provisions regulating visitor access to certain areas and permitting guaranteed access for fee simple owners within the Nisga'a territory. This precarious balance between Nisga'a needs and those of the dominant society is a reality nearly every Indigenous society would have to face in the creation of such agreements. That type of balance is successfully achieved only through open, equally bargained for, negotiations, which seek to give all parties a voice.

### 3. Mutawintji National Park Lease

In 1983, after fifteen years of struggle with the New South Wales government and the Commonwealth of Australia over control of their community's traditional homelands, the Wiimpatja Aboriginal community blockaded the entrance to Mutawintji National Park. That grassroots action

created the impetus for two substantial changes in the way the governments were to deal with aboriginal land base issues in the future. First, the Commonwealth passed amendments to the National Parks and Wildlife Act of 1974 and created the National Parks and Wildlife (Aboriginal Ownership) Amendments Act of 1996.<sup>251</sup> Second, the substantive changes in that Act created the groundwork for negotiations and formal agreements regarding aboriginal control and access to their traditional land. As a result, the Wiimpatija entered into an elaborate lease agreement with the New South Wales government, with funding coming from both State and Federal entities. Though many necessary re-negotiations are currently taking place, this initiative works in conjunction with a larger reconciliation process instituted in Australia over a decade ago.<sup>252</sup>

### **B. Caguana Ceremonial Site: Using the Tools Available**

One problem with using U.S. case law and legislation such as NAGPRA as tools for furthering Taíno rights is that Congress has failed to recognize the Taíno as “Indian.” Despite acknowledgement of Taíno as a culturally distinct people,<sup>253</sup> the fact remains that most of the Island, including the Taíno, consists of economically disadvantaged, mixed-race people. As a whole, Boricuas and Taínos are all pre-U.S.-contact peoples, but are not “Indian” as the United States government has defined that word.<sup>254</sup> Therefore, because of the predominant stereotypes upheld in the courts about what it means to be Indian,<sup>255</sup> until re-education can take place in the dominant society regarding conceptions of race and ethnicities, Taíno will need to find alternative routes for implementing the tools that are available.

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251. National Parks and Wildlife (Aboriginal Ownership) Amendments Act, 1996 (Austl.), *reprinted in* 3 AUST. INDIGENOUS L. REP. 67 (1998), <http://www.austlii.edu.au/au/journals/AILR/1998/2.html>. The Amendments to the original Act mainly insert the co-management provisions to be discussed here.

252. *See generally* Council for Aboriginal Reconciliation Act, 1991 (Austl.), *reprinted in* Council for Aboriginal Reconciliation, *Council Archive*, <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text02.htm> (last visited April 19, 2003).

253. Gutierrez, *supra* note 129.

254. For instance, the Allotment policy used in the United States to break up the reservation system issued trust patents to Indian allottees based on blood quantum. *See supra* note 77. Such genetically-based criteria for determining who is “Indigenous” were rejected in the *Awat Tingni* case. The *Mayagna (Sumo) Indigenous Community of Awat Tingni v. Nicaragua*, 79 Inter-Am. Ct. H.R. (ser. C) (Aug. 31, 2001), *reprinted in* 10 ARIZ. J. INT’L & COMP. L. 395 (2002). Also, under the I.L.O. No. 169, self-identification as “Indigenous” is paramount for such determinations. ILO Convention No. 169, *supra* note 207, art. I, cl. 1.

255. *See generally* Robert A. Williams, Jr., *Implications of the Supreme Court’s Embrace of Negative Racial Stereotypes* RED INK, Spring-Fall 2002, at 91.

Currently, co-management is the best solution available to Taíno, at least with regard to the Caguana Ceremonial Site. With the Caguana Site, there is an inroad for Taíno collaborative management since the site is listed as a National Historic Site under NPS control. Under provisions of the NHPA, local governments can become certified at managing such sites. The federal government will work in cooperation with other nations and in partnership with the States and local governments. Indian tribes will also work to promote leadership and management skills on the part of the Taíno communities involved.<sup>256</sup>

Procedurally, a State Preservation Officer,<sup>257</sup> or in the case of Puerto Rico a Commonwealth Preservation Officer, has the authority to enter into a “contract or cooperative agreement with any qualified nonprofit organization or educational institution.”<sup>258</sup> By lobbying the mayor of Utuado—the municipality now existing around the Caguana Site—to apply for Certified Local Government (CLG) status, non-profit Taíno organizations like UCTP and *Ihuche Rareito* can contract with the CLG to work on co-managing maintenance and access to the area. As stated above, funding is available for these organizations to co-manage NPS sites, which would be administered through the Commonwealth Preservation Officer.<sup>259</sup> In addition, to help train prospective Taíno land managers, there are paid internships for undergraduate and graduate students who want to work in the cultural preservation field.<sup>260</sup>

Substantively, this strategy has the potential to avoid the inherent problem with relying on the U.S. legislature to extend existing Indian law to Taíno, namely forcing our Taíno identity into an outsider’s definition of “Indigenous.” Although this solution works within the scheme of the United States federal system, the agreement need not be viewed as “reliance” on that system. On the contrary, the Taíno and the CLG would merely be holding the United States accountable for obligations it incurred by initially asserting its plenary authority over the Island and placing the site under NPS control. Taíno co-management of the Caguana Site would ultimately diminish the government’s role in maintaining the site, bolster Taíno pride in the ancestral park, and serve as an exercise of Taíno self-determination.

Clearly, the co-management agreement between Taíno and NPS must include details such as, *inter alia*, administration of non-Indigenous visitors, reserving dates and times of ceremonial use, and concerns over further commodification of Taíno culture. The Taíno communities will need to come to some agreement regarding the division of labor and responsibility. At the moment, however, placing control in the hands of Taíno—the people who know the area best—is one step toward these other aspirations.

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256. See 16 U.S.C. § 470a(d) (1988).

257. § 470a(b).

258. § 470a(b)(4).

259. § 470a(e)(4).

260. § 470a(j)(1)-(2).

## VI. ERACRA:<sup>261</sup> BRINGING IT ALL TOGETHER

*Korokote*, sacred Dancer, silver light of *Karaya*, the moon, in your hair, ages have come and gone but the dance and your flute song are without time. *Korokote*, beautiful one, I will follow you from the mountain to the sea and back again. I will dance to your song forever.

-Roberto Mucaro Borrero<sup>262</sup>

Taíno co-management of Caguana Park would be a tremendous step toward exercising our right to self-determine our own paths as a people. Politically, spiritually, and culturally, ceremonial access to this site will be of profound help to the Taíno community. They will be able to access the teachings of our ancestors and be able to carry them into our future teachings, thereby sustaining ourselves as a people.

As this Note aims to demonstrate, the most efficient way to garner the access and control rights of our sacred spaces is through cooperative and balanced agreements with the several government entities concerned. While international norms have been established under indigenous peoples' human rights law to permit the Taíno to expect government cooperation with our efforts at creating these peaceful agreements, procedural mechanisms may serve as a bar to Taíno claims at international fora. Domestically, religious and cultural rights provisions for indigenous peoples of the United States may arguably be applicable to Taíno issues, but these laws call for narrow understandings of who is or is not an indigenous people. These narrow definitions sometimes preclude the Taíno from the protections provided to other indigenous peoples.

Ultimately, then, like the Wiimpatja whose civil disobedience garnered the attention they needed to enter cooperative negotiations with the Australian government,<sup>263</sup> the Taíno need to continue to believe that their peaceful grassroots efforts will be effective. Through petitions, letters, community organizing, and outreach awareness-raising campaigns, the Taíno can effectuate the same types of legal change necessary to fulfill our goals.

In order to be effective, however, the Taíno will need to confront one remaining issue that is bigger than any international or domestic law obstacle: internal agreement. Most Taíno peoples and groups maintain preservation and protection of sacred sites as a priority. The question that remains unanswered, particularly with regard to repatriation, is who will be responsible for the protection and preservation, and how to further that goal. In *Na Iwi O Na Kupuna*

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261. "Roundhouse." *Dictionary*, *supra* note 2, at <http://members.dandy.net/~orocobix/telist-e.htm>.

262. Roberto Mucaro Borrero, *Korokote*, RED INK, Spring-Fall 2002, at 129.

263. Mutawintji Lease Agreement, *supra* note 250.

*O Mokuapu*, the court gave unique attention to such community divisiveness: “To allow Hui Malama to unilaterally litigate . . . would deny equal weight to the rights and potentially divergent interests of the other Native Hawaiian groups involved.”<sup>264</sup> The Taino community will need to reach some consensus before any effective activism can take place.

Additionally, the Taino have gone through a renaissance, much like the Native nations of the North have done since the 1970s.<sup>265</sup> With this resurgence comes a responsibility to look at the traditions wisely and decide how much modern import to employ. As these very precarious decisions are made regarding Taino resurgence, we also need to consider what traditions are necessary in order to regain control of our sacred sites and bring these lost sacred items in to our communities again. These human remains and ceremonial items have been away from their landscapes, their people, and their respective ceremonies for untold years. It is our responsibility as The Good People to help our ancestors complete their journeys. It is equally our responsibility to do so with the appropriate medicines, songs, and protocol. These are ceremonies we have not necessarily needed to perform for generations, if ever at all.<sup>266</sup> During our legal educational processes, we need also to be remembering our cultural educational processes so that when our ancestors are returned to us, we can treat them with the respect they deserve and that no one else can offer. We must remember that it is because of those ancestors that we fight, that we write, and that we continue.

In Taino history, the People gain and diminish in strength just as the moon wanes and waxes. Although there has been colonization, genocide, renewal, and re-colonization, all of the Indigenous inhabitants of the Island—all of the Boricuas—are a survivalist people. We learn, we grow, we age, and we come full circle again. This moment in Taino history is a growing time, and we must use what we have learned over all of these cycles to inform our next steps. The ideal tools are not always available, nor do we always have the freedom or resources to use the best ones that *are* available. What matters is how we implement our strategies and the tools we do have. Right now, we have an opportunity to use the system that is in front of us wisely—to use the NPS and the federal government’s inroads to build something we can call our own. That is what we should focus on. That is where our energies should go. That is how we will build something better for our daughters. That is how they will build something better for our great-greats. And that is how we will continue on as The Good People.

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264. *Na Iwi O Na Kupuna O Mokuapu v. Dalton*, 894 F. Supp. 1397, 1410 n.10 (D. Haw. 1995).

265. See VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* vii (6th prt. 1996).

266. Lorena Sekwan Fontaine has been kind enough to offer her thoughtful reminders in this area. *Bo Ma'tum* (Thank You) to all the Women for not letting me forget.