TWO THOUGHTS ABOUT TRADITIONAL KNOWLEDGE

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Professor Sunder's intriguing paper demonstrates the continuing power of the related ideas of environmentalism and the public domain, but it also identifies some of the hazards of those metaphors. I have only two unrelated thoughts to add to her analysis.

First, I was struck by the parallels between her argument and the historiography involving the displacement by British colonists of Native Americans. In the seventeenth and eighteenth centuries, the "Indians" of North America were commonly depicted as noble savages, living on but not altering their natural environment. This imagery underlay the most common moral justification for their displacement by Europeans: they weren't productive. In the words of Chief Justice Marshall, "[t]o leave them in possession of their country, was to leave the country a wilderness."[1]

Until recently, the main line of criticism of this vision and associated moral argument combined two related themes: first, it devalued the Indians' nonacquisitive, natural, respectful way of living lightly upon the land while conserving it; and second, it fostered imperialism and unjust conquest. In his pioneering book, *Changes in the Land*, William Cronon introduced an entirely different line of criticism.[2] The problem with the traditional account, he argued, is not merely that it prioritized aggressive, transformative uses of the land over conservation and harmony, but that it got the facts wrong. New England in particular, when the British arrived, was not a primeval wilderness, "a climax forest in permanent stasis," respected and preserved by its sparse human inhabitants. It was instead cultivated and occupied, an enormous garden or pasture. Of the many ways that it had been modified by the Indians to suit their own ends, one of the most important was the removal of the underbrush. Early

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1. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823). For other examples of the depiction of Indians as unproductive heathens—and the associated justification of their ouster by Europeans—see FRANCIS JENNINGS, THE INVASION OF AMERICA 15–31 (1975).

2. WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

British colonists remarked that one could ride a horse at a gallop through the forests. As anyone who has strayed recently from a hiking trail in New England can attest, the forest in its natural state is far denser. The openness of the seventeenth century had been deliberately produced by the Indians, specifically by periodically burning out the brush, to allow deer and other game to graze more effectively, and to enable the Indians more effectively to hunt them.[3]

Acceptance of Cronon's revisionist narrative requires reconsideration of our conception of the injustice of the conquest and ouster of the Native Americans. It was not the displacement of passive conservationists, by active, productive, rapacious people. It was the displacement of a civilization that rested upon one form of productivity and cultivation by a civilization that rested upon another form.

Professor Sunder's criticism of the traditional conception of traditional knowledge takes the same form and deserves to be similarly influential. The kinds of knowledge we describe, dangerously, as "traditional"—she demonstrates—are no more passive, raw, stable, or unproductive than the manner in which the Indians interacted with their physical environment. In crafting legal regimes that will handle knowledge like this with fairness, we need to recognize and accommodate its dynamic, active character.

Second, reading Professor Sunder's paper has reinforced my sense that we should be seeking, as a solution to this problem, not a harmonized global intellectual-property regime, in which creators of "traditional knowledge" obtain rights whose contours are determined by national laws, the content of which are largely dictated by multilateral treaties, but a more complex and variegated system of norms. Suppose that we added the following three parallel provisions to the TRIPS Agreement:

(a) It shall be a defense to a claim of patent infringement that the inventor(s), in developing the protected product or process, relied substantially upon materials or knowledge taken from a member country in violation of that country's laws.[4]

(b) It shall be a defense to a claim of trademark infringement that the trademark holder, or the original developer of the mark, relied substantially upon materials or knowledge taken from a member country in violation of that country's laws.

(c) It shall be a defense to a claim of copyright infringement that the work in which copyright is claimed constitutes a reproduction of a

3. *See id.* at 25, 49–50.

4. In *Legal Reform in Central America: Dispute Resolution and Property Systems*, I proposed a reform of this general sort to deal with the problems associated with bioprospecting. WILLIAM FISHER, LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS 256–57 (2001). Variants of the idea have since appeared in several settings. *See* Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547, 563–64 (2003). In a forthcoming book, DRUGS, LAW, AND THE GLOBAL HEALTH CRISIS, Talha Syed and I consider the option in depth. WILLIAM FISHER & TALHA SYED, DRUGS, LAW, AND THE GLOBAL HEALTH CRISIS (2007).

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The effect of this reform would be to increase the leverage of countries in determining the terms on which flora, fauna, medicinal knowledge, folklore, and traditional art forms are exploited by others. Many countries already have "natural resources" and folklore-protection laws that deal with such matters, but those laws rarely figure significantly in the debate about traditional knowledge (broadly construed) because it is so easy to violate them with impunity. Adding the three provisions set forth above to the TRIPS Agreement would give the local laws teeth, not by penalizing violations directly, but by exposing violators to the economically devastating sanction of the forfeiture of their own intellectual-property rights.

The countries in which traditional knowledge is currently concentrated could be expected to exercise their enhanced powers in various ways. Some would likely demand greater compensation from individuals and firms using their materials. Others would insist upon attribution. Still others would insist that the production of goods (drugs, clothing, et cetera) based upon traditional knowledge be done in the country where that knowledge originated. Finally, some would forbid the use of traditional knowledge altogether. Some of these responses likely would prove more effective than others, and we would then witness additional rounds of legal reform.

To be sure, implementation of this proposal would not be simple. Securing the necessary modifications of the TRIPS Agreement would be very difficult. Once that hurdle had been surmounted, and the laws of the member countries of the WTO had been modified accordingly, we would expect to see considerable litigation over what constituted "substantial reliance" within the meaning of any of the three provisions. A fair amount of time and money would be spent sorting things out.

Nor would the proposal solve all problems associated with traditional knowledge. In particular, it would do nothing to ensure that indigenous groups within developing countries got their fair share of the increased revenue that flowed to (or through) their national governments. But addressing that serious concern cannot be achieved through reforms engineered on the international level. Debate and struggle within each country are necessary if each group is to get its due.

In sum, the proposal is neither perfect nor comprehensive. But it seems more promising that any of the alternative approaches to traditional knowledge currently on the table.