American Indian Law Review

Volume 17 | Number 2

1-1-1992

One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis

June Camille Bush Raines

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>

Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

June C. Raines, *One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639 (1992),
<https://digitalcommons.law.ou.edu/ailr/vol17/iss2/6>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

ONE IS MISSING: NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AN OVERVIEW AND ANALYSIS

June Camille Bush Raines*

If human remains and burial offerings of Native people are so easily desecrated and removed, wherever located, while the sanctity of the final resting place of other races is strictly protected, it is obvious that Native burial practices and associated beliefs were never considered during the development of the American law of property

— Walter Echo-Hawk¹

I. Introduction

In 1960, during an archaeological study, the remains of thirty-two Native Americans who had been buried for over 1000 years were disinterred. Over the next thirty years, various museums and universities across the country studied the remains of these people.² On Wednesday, November 6, 1991, they went home.

Tribes descended from those thirty-two Native Americans were finally allowed to rebury the remains of these people. These reburials are the first since Congress enacted federal legislation requiring the repatriation of Native American remains and grave goods.³

This comment begins with a brief introduction to this repatriation legislation and examines the historical movement toward excavating Native American grave sites under the guise of science. Next, the legislation is examined. This development includes an examination of the perspectives of museums, scientists, and Native Americans. The legislation does not address all aspects of repatriating remains and grave goods; therefore, this comment includes suggestions for amendments to the act. This comment concludes with the proposition that the rights of Native Americans to their dead can be protected while still providing contributions to the scientific and museum communities.

* Third-year student, University of Oklahoma College of Law.

1. Walter R. Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources* 14 N.Y.U. REV. L & SOC. CHANGE 437, 448 (1986). Echo-Hawk is currently an attorney for the Native American Rights Fund (NARF) in Boulder, Colorado.

2. Alex Peltzer, *Native Americans Reclaim Remains of Ancestors*, Gannett News Service, Nov. 7, 1991, available in LEXIS, Nexis Library, Currnt File.

3. These remains are believed to have been of villagers of the Wakchumni tribe. *Id.*

This legislation does not have to mean an end to the archaeological study of our ancestors; alternatives do exist.

The Need for Legislation

Laws against grave-robbing exist in every state,⁴ as do laws against tampering with human corpses.⁵ Yet for centuries, scientists have been heralded for their work in disinterring the remains and grave goods of Native American people.

The federal government pays museums to house these remains and funds museum programs designed to locate, exhume, and display even more remains. The government has not drawn distinctions based on whether or not these long-dead people were on public, private, or Native American lands. The government's attitude toward the rights of Native Americans to their ancestors and their ancestors' possessions reflects the government's long-standing view of the Native American as someone generally less deserving of rights than the white man.

During the 1850s, many state governments enacted measures which forbade Native Americans from mingling with whites and which denied Native Americans access to legal protection.⁶ In 1871, Congress decreed that "no Indian tribe shall be acknowledged or recognized as an independent nation, tribe or power . . ."⁷ America needed a justification for its expansion into Native American domain, and what better justification than portraying the Native American as a nonperson, undeserving of rights or protection. The government believed Native Americans needed to feel they were in the "grasp of a superior."⁸ Congress apparently wanted to be that superior entity, and thus established laws and policies to ensure that it would be.

The images of Native Americans portrayed by the government for the purpose of keeping Native Americans inferior included the savage and the heathen; all portrayals were negative with regard to the Native American as a human being.⁹ The most obvious "evidence" that Native Americans were subhuman was their failure or refusal to understand white man's law — certain proof that the Native American had no reasoning ability and was therefore not human.¹⁰ The government viewed the Native American as "a relic of an earlier age who must be

4. For example, CAL. HEALTH & SAFETY CODE § 7052 (West 1988) makes disinterment of human remains, without legal authority, criminal.

5. For example, OHIO REV. CODE ANN. §§ 3763-3764 (1988) make tampering with corpses a crime.

6. RAY BILLINGTON & MARTIN RIDGE, *WESTWARD EXPANSION* 591 (5th ed., 1982).

7. *Id.* at 609.

8. LORING PRIEST, *UNCLE SAM'S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY 1865-1887*, at 242 (1961).

9. WILLIAM SAVAGE, *INDIAN LIFE* 6 (1977).

10. *Id.*

elevated or eliminated . . . a threat to an orderly Christian society.”¹¹

From the arrival of the earliest Indian-European, the government justified expansion into Indian Territory by defining the Native American as a degraded race. This stereotype, which lasted long after any political usefulness the government could have claimed, continues to work to the benefit of the United States.¹² The Native Americans' ambiguous dual legal status has allowed the government to classify the tribes as dependent or independent nations, depending upon which position better serves the government's needs at a particular point in time.¹³

Because of the efforts of humanitarian groups, Congress finally granted Native Americans citizenship in 1924.¹⁴ The rights that generally come with citizenship have been slow to develop for the Native Americans. “That Indians as a people survived at all is a testimony to their vitality and to their capacity to nurture their heritage in a hostile world.”¹⁵ It is this vitality which likely provided Native Americans with the strength to fight the United States government once again. This time the battle would be for their dead.

Recently the federal government succumbed to pressure from numerous Native American groups and passed legislation concerning their ancestral remains. Groups such as the National Congress of American Indians and the Association on American Indian Affairs worked together as the driving force behind the passage of legislation which provides Native Americans some control over the remains and grave goods of their forefathers.¹⁶ The Native American Graves Protection and Repatriation Act (NAGPRA or the Act),¹⁷ passed in November 1990, provides strict federal standards regarding the treatment of both museum-housed remains and objects and newly discovered remains and objects.

The main purpose of NAGPRA is to protect Native American burial sites by regulating the removal of human remains, funerary, sacred, and cultural patrimonial objects.¹⁸ This protection extends to remains and objects found on federal, Native American, and Hawaiian lands.¹⁹

11. BILLINGTON & RIDGE, *supra* note 6, at 19.

12. SAVAGE, *supra* note 9, at 7.

13. PRIEST, *supra* note 8, at 200.

14. Act of June 2, 1924, ch. 233, 43 Stat. 253.

15. BILLINGTON & RIDGE, *supra* note 6, at 601.

16. *Repatriation Act Protects Native Burial Remains and Artifacts*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Winter 1990, at 1, 3 (vol. 16, no. 1) [hereinafter *Repatriation Act Protects Remains*].

17. 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

18. H.R. REP. No. 877, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4367.

19. *Id.*

The Act requires all federally funded museums, entities, and agencies to comply by compiling an inventory of these items and then repatriating²⁰ them, upon request, to the tribe of origin.

According to its legislative history, NAGPRA has two objectives. One is to provide the tribes with first rights to anything found on the designated lands. Persons wishing to excavate such items must apply for a permit, pursuant to the Archaeological Resources Protection Act (ARPA).²¹ Any incidental discoveries made on federal land must be reported in writing to the federal land manager and to the appropriate tribe.²²

The second objective of NAGPRA is to provide affected tribes with a complete inventory of remains and funerary objects held by federally funded museums and agencies. NAGPRA allows museums and agencies five years to complete the written inventories and notify the affected tribes.²³ The museums or agencies must include with this inventory a statement describing how, when, where, and from whom the agency received the items.²⁴

II. Historical Movements

A. Excavation in the Name of Science

As early as the eighteenth century, the white man excavated Native American burial sites and mounds.²⁵ In 1784, Thomas Jefferson excavated the Native American burial mounds located on his Virginia property.²⁶ This excavation became known as the "first scientific excavation in the history of archaeology" and earned Jefferson the moniker of the "father of American archaeology."²⁷

It is not surprising that with the President of the United States not only approving of but also participating in the disinterment of Native

20. Repatriation means to send back to the country of birth or citizenship. WEBSTER'S II DICTIONARY 592 (1984).

21. 16 U.S.C. §§ 470(aa)-470(11) (1988). The Act requires notice of excavation be given to tribes if excavation is to take place on non-Indian land and could harm cultural or religious sites.

22. H.R. REP. NO. 877, *supra* note 18, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 4368.

23. *Id.* The Act also makes provisions, discussed *infra* text accompanying note 54, for remains and objects which cannot be identified by tribe.

24. *Id.* The inventory is not required to be an item-by-item list. The Act allows museums and federally funded entities the option of submitting a summary of their inventory. If the inventory is in summary form, it must be completed within three years.

25. GORDON R. WILLEY & JEREMY A. SABLOFF, A HISTORY OF AMERICAN ARCHAEOLOGY 36 (1974).

26. *Id.* at 37. These mounds measured over twelve feet high and contained layers of skeletal remains.

27. *Id.* at 38.

American remains and funerary objects, the rest of the nation would soon become involved in "archaeology."²⁸ In 1846, the Smithsonian Institution opened its door and its "immeasurable impact on the dawning age of professional archaeology in the 19th century" began.²⁹ The Smithsonian, which became known as the "nation's attic," came to hold one of the largest collections of remains of Native Americans.³⁰

Other museums quickly followed. In 1868, the United States Surgeon General ordered a "collection" of Native American crania.³¹ The military used the crania in studies to determine whether the Native American was inferior to the white man, based solely on the size of the crania.³² Army personnel took over 4000 skulls from battlefields, fresh graves, and burial scaffolds and placed them in the Army Medical Museum.³³ The Smithsonian's Museum of Natural History currently stores all but eighteen of these 4000 skulls.³⁴

Presently the Smithsonian holds the single largest collection of Native American remains in this country; by the museum's own estimate, it holds over 18,500 skeletons of Native Americans.³⁵ This collection numbers far greater than its closest competitor, the Tennessee Valley Authority, which maintains approximately 13,500 Native American remains.³⁶ In this country, museum collections of Native American remains are estimated to total as high as 600,000.³⁷ Additionally, Native American remains have been found in museums as far away as London.³⁸ There may be as many as two million remains housed in

28. Willey and Sabloff do not state what Jefferson did with the objects and remains unearthed from these mounds.

29. WILLEY & SABLOFF, *supra* note 25, at 48. At its opening, the Smithsonian Institution was funded for the most part by Englishman James Smithson. He left a half million dollars to the United States to create an entity which would "increase and diffus[e] . . . knowledge among men." *Id.* at 41. It has since become federally funded.

30. *Repatriation Act Protects Remains*, *supra* note 16, at 1.

31. *Id.* at 2.

32. H.R. REP. NO. 877, *supra* note 18, at 8, *reprinted in* 1990 U.S.C.C.A.N. at 4367.

33. *Repatriation Act Protects Remains*, *supra* note 16, at 2.

34. *Id.* The Army does not have an accurate count of the number of skeletal remains or funerary objects in its possession. H.R. 5237, 101st Cong., 2d Sess. 27 (1990).

35. *Repatriation Act Protects Remains*, *supra* note 16, at 1. As a Northern Cheyenne woman described it: "[W]e saw huge ceilings in the room [of the Smithsonian's National Museum of Natural History], with rows upon rows of drawers." The curator explained the drawers housed Native American skeletal remains. *Id.*

36. *Id.* at 2 n.3.

37. Steve Moore, *Federal Indian Burial Policy: Historical Anachronism or Contemporary Reality?*, NARF LEGAL REV. (Native American Rights Fund, Boulder, Colo.), Spring 1987, at 1, 1 (vol. 12, no. 2).

38. Anne Hazard, *Lawmakers to Act on Bill Requiring Museums to Return Indian Remains*, 1991 States News Service, Oct. 5, 1990, available in LEXIS, Nexis Library, Current File. The Pitts Rivers Museum in London has a collection of many early North American tribes' skeletons.

museums internationally.³⁹

It is not only museums which keep large collections of Native American remains. Universities also maintain collections, often long after they have completed their studies of them. Western Washington University has in basement storage over eighty Lumi remains.⁴⁰ One tribe member who visited the university stated, "There were our people stacked in little boxes like cordwood."⁴¹

The methods museums and other entities employ are not different from those employed by Western Washington University. This lack of respect for ancestral remains fuels the fires that keep tribes like the Lumi pushing for the return of their ancestors' remains and possessions. While going through the boxes of remains, an elder discovered the skeleton of a young woman — the box shook and he said, "One is missing."⁴² It was then that another tribe member felt the spirit of death:

Anyone else would have thought it was the wind blowing across their shoulder. But I didn't ignore it. And I found the [young woman's] baby. . . . I wonder how many people that keep bones in boxes, drawers and museums walk by and think all they heard or felt was the wind.⁴³

B. *Science Must Take a Back Seat*

The Smithsonian Institution, along with most federally funded museums and agencies, demonstrated great unwillingness to return even one of the sets of remains to the descendants who requested their return from the museum. In fact, when the government organized a task force to examine and make recommendations regarding the display and treatment of scared objects and remains, the Smithsonian Institution refused to participate.⁴⁴

According to one museum curator, museums do not want to return Native American objects unless the museum can be assured the objects will receive proper care.⁴⁵ Based on the methods of storage many

39. Estimate given by Walter Echo-Hawk. Estimate includes universities, museums, tourist attractions, and government agencies. *Id.*

40. *Sidebar*, States News Service, Sept. 4, 1991, available in LEXIS, Nexis Library, Currnt File.

41. *Id.*

42. *Id.*

43. *Id.* (quoting Jewell James, a member of the Lumi Cultural Committee).

44. Echo-Hawk, *supra* note 1, at 440. The Smithsonian Institution claimed it was technically not a federally funded entity and, therefore, would not be affected by the recommendations. The government, however disagreed. *Id.*

45. M.S. Mason, *Ceremonial Mask Return Home*, CHRISTIAN SCI. MONITOR, June 12, 1991, at 14 (statement of Richard Conn, Curator of Denver Art Museum American Indian Collection).

facilities employ, such as the Smithsonian and Western Washington University,⁴⁶ it is ironic that museums worry that tribes will not take proper care of their ancestors.

Archaeologists at the Smithsonian fear that returning any of the bones would be to "forever alter, if not to end, the science of physical anthropology."⁴⁷ The chairman of the physical anthropology department at the Smithsonian's National Museum of Natural History stated that although there may be some social benefit in repatriating the remains of the affected tribes, the loss to science would be irreversible.⁴⁸ Proponents for Native Americans responded quickly by saying NAGPRA is evidence that, "[S]ociety has decided that when human remains and science collide, science has to take a back seat."⁴⁹

The loss of which the chairman spoke is, to some extent, real. Repatriating the remains from all federally funded entities will severely limit anthropological research in the future. But alternatives exist to foregoing the research altogether. In fact, NAGPRA includes a provision which actually encourages tribes and museums to work together in meeting each other's needs.⁵⁰ Museums and tribes can negotiate rights to remains and funerary objects. For example, one museum, which had held an Iroquois tribes' wampum belts as part of its collection, negotiated a shared usage agreement with the tribe.⁵¹ The parties agreed that the tribe has the right to use the wampum belts for religious and ceremonial purposes, and the museum may use the belts for study and education.

This type of agreement could easily be reached in regard to remains as well. Museums have considered making replicas of collections they will likely repatriate.⁵² Reservation-site museums, which have recently opened in the United States and Canada, provide another option as well.⁵³

46. See *supra* notes 40, 42. The Field Museum in Chicago kept remains of Blackfeet people in wooden crates. Steven Johnson, *Museum's Blackfeet Remains To Go Home*, CHI. TRIB., Oct. 20, 1991, at 1C.

47. Brigid Schulte, *Smithsonian Packs the First Large Shipment of Native American Remains to Return to Tribes*, 1991 States News Service, Sept. 5, 1991, available in LEXIS, Nexis Library, Currnt File.

48. *Id.*

49. *Id.*

50. H.R. REP. NO. 877, *supra* note 18, at 16, reprinted in 1990 U.S.C.C.A.N. at 4375.

51. *Id.* at 4372.

52. But consider Governor Edgar of Illinois who refused to recommend replacing Dickson Mounds Native American remains with replicas, despite the Native Americans' belief that the display of the remains was insensitive. Governor Edgar said plastic bones are "goofy" and expensive. *Across the Nation*, USA TODAY, Sept. 4, 1991, available in LEXIS, Nexis Library, Currnt File.

53. Mason, *supra* note 45, at 14. These museums allow the tribes to maintain the remains and allow the public the opportunity to benefit from the education experience.

There is no question that NAGPRA'S repatriation requirement will limit future studies based on actual remains and grave goods. However, NAGPRA provides that museums may retain rights to unidentifiable remains and objects and may keep remains and objects which tribes do not request be repatriated to them.⁵⁴ Furthermore, it is possible that some tribes will not seek the return of all items on a museum's inventory list — tribes may have limited resources which would impede their ability to preserve the objects museums currently care for. Museums should expect to have fewer remains and objects to study, but museums' complete loss of all available means of scientific research is not likely.

III. Legislative History of NAGPRA

A. Case Law Development

Although the specific movement behind the proposals which eventually became NAGPRA took over five years to legislate,⁵⁵ the movement for recognition of Native Americans' rights to ancestral remains has existed almost since the first excavation.⁵⁶ It is only recently, however, that Native Americans have felt they were in a position to bring a white government to court.⁵⁷

One problem Native Americans faced, and will likely continue to face even under NAGPRA, in suing the white man for tribal remains is standing. A party must have a direct, substantial interest which the court recognizes in the outcome of a suit in order to bring a claim against another.⁵⁸ Parties without standing cannot bring a court action.⁵⁹

Native Americans generally believe they are connected spiritually and familiarly with their ancestral Native Americans and that this connection is sufficient for standing. Courts, however, generally require a more direct and substantial interest. For example, in *Bailey v. Miller*,⁶⁰ a Native American sought to prevent the disinterment of the remains of an aboriginal. The court refused to allow the action, stating that because the Native American was not a direct descendant or an authorized representative for the tribe of the dead person, he had no standing to sue to prevent the disinterment.⁶¹ The court refused to

54. 25 U.S.C. § 3005 (Supp. II 1990).

55. *New Law Protects Human Remains and Cultural Items*, INDIAN AFFAIRS, Winter/Spring 1991, at 4 [hereinafter *New Law*].

56. See *supra* notes 25-27.

57. MARCUS F. PRICE, *DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS* 21 (1991).

58. *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972).

59. *Id.*

60. 143 N.Y.S.2d 122 (1955).

61. *Id.*

consider the Native American's belief that he had a spiritual relationship with the dead person, even though this relationship with the dead person is a recognized Native American religious belief.

This strict position continues to make it difficult for Native Americans to have tribal remains and grave goods returned to them, even under NAGPRA. Although the standing requirement is defined somewhat more loosely in NAGPRA,⁶² the burden of proof is still on the Native American to prove a relationship, or standing, to the items requested.⁶³

Perhaps NAGPRA should presume that grave goods and Native American remains are the property of the tribes or their representatives and, therefore, standing exists for repatriation requests. Museums, which have paperwork describing how they obtained each piece in a collection, are in a better position to meet a burden of proof of ownership than a tribe would be. Tribes would have no record of missing or stolen remains and grave goods.

Native Americans also faced the problem of semantics in American courts. In 1898, almost one hundred years after Jefferson's first "scientific excavation,"⁶⁴ an Ohio court addressed the issue of defining a "body" at law. Cemetery officials disinterred a body which had been buried for approximately forty years and reburied it in a common grave without the family's permission. The family sought damages based on the unlawful disinterment of a body. *Carter v. City of Zanesville*⁶⁵ ultimately held that the Native American skeleton was not a "body" in the eyes of the law because the governing statute prohibiting disinterment of bodies did not apply to decomposed persons.⁶⁶

Because of the general lack of statutory or common law provisions pertaining to remains and grave goods of Native Americans, courts continued to interpret laws in a manner which discriminated against these people. In 1965, *Newman v. State*⁶⁷ held that a college student's removal of the skull of a Native American from a burial site did not constitute desecration under the state's grave robbing statute because there was no evidence of malice.⁶⁸ The court considered the fact that

62. 25 U.S.C. § 3001 (Supp. II 1990).

63. Consider, for example, the Shiloh Mounds in Tennessee. Investigators have not yet been able to determine which historic Native American tribes may have been descendants of the mound builders. FRANKLIN FOLSOM & MARY FOLSOM, *AMERICA'S ANCIENT TREASURERS* 246 (1971). How then can a Native American today prove to the park administration that he or she should have standing to claim the remains and objects at Shiloh?

64. See *supra* notes 25-27 and accompanying text.

65. 52 N.E. 26 (Ohio 1898).

66. *Id.*

67. 174 So. 2d 479 (Fla. Dist. Ct. App. 1965).

68. *Id.*

this particular burial was an unfamiliar and a secret custom. Therefore, the court said, the student could not have been acting with malice.⁶⁹ The dissent, however, took a different view, based upon the idea that a grave need not be familiar or of ordinary custom to be protected. "The sanctity of the final resting place of the Indian peoples . . . should be recognized and should be accorded highest respect."⁷⁰

In 1971, an Ohio court determined that Native American remains did not qualify as a "body" under the state's grave-robbing statute. The court, in *State v. Glass*,⁷¹ reasoned that the skeleton was no longer a body because a corpse ceased to remain.⁷² The court reasoned that "body" was not the same as "remains of persons long buried and decomposed."⁷³ The court did not consider that the defendant in the case had paid someone to have the remains removed and reburied — a certain sign that a body of some kind remained.

In an equally chilling decision, a California court found that a Native American burial site, which had once contained remains of over 600 Native Americans, was not a cemetery under state law. In *Wana the Bear v. Community Construction*,⁷⁴ the court held that an ancient Miwok burial site did not constitute a cemetery and was, therefore, not protected by state law.⁷⁵ The court explained that in 1872, the state had outlined two means for creating a cemetery: dedication and prescriptive use.⁷⁶ The Miwok tribe had used the burial site in question as a cemetery since the early 1800s, but in 1850 the Miwok tribe was driven away. Therefore, the court reasoned, the site in question did not meet either of the prescribed methods for creating a cemetery.⁷⁷ The state allowed the land to be developed, unearthing numerous remains which ended in their destruction.

Decisions such as these seem to be the result of clever attorneys finding a loophole in existing statutory definitions. To differentiate between a dead body and a "corpse long dead and buried" seems reaching at best. It seems logical that if something remains of the

69. *Id.* at 483.

70. *Id.* at 484; see also *Sequoyah v. TVA*, 620 F.2d 1159, 1163 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1981) ("Cherokees . . . have great reverence for their ancestors and believe places where they are buried have cultural and religious significance.").

71. *State v. Glass*, 273 N.E.2d 893 (Ohio Ct. App. 1971).

72. *Id.* at 896.

73. *Id.*

74. 180 Cal. Rptr. 423 (Ct. App. 1982).

75. *Id.* at 426.

76. A "dedicated" cemetery is a place dedicated to and used for permanent interment of humans. A "prescribed" cemetery is land used in or near a city as a cemetery for five uninterrupted years. CAL. HEALTH & SAFETY CODE § 8126 (West 1988).

77. *Wana the Bear*, 180 Cal. Rptr. at 426.

person buried, then does a body not exist? Further, if the body is buried in an area reserved for the burial of many people, a burial site or cemetery exists. NAGPRA does provide some guidance in that its definitional section broadens the interpretation of "burial site" and "remains."⁷⁸ Hopefully, these broader definitions will prevent future court findings such as those discussed in *Wana the Bear, Glass, and Carter*.

B. Governmental Policies

The government has been more willing to return land to the Native Americans than the rights to their dead. In 1946, Congress created the Indian Claims Commission, an entity designed to provide Native Americans restitution for lands taken from them by the white man.⁷⁹ Interestingly, Congress did not use this as an opportunity to provide Native Americans the additional right to have their ancestors returned. Instead, Congress allowed acts such as the Antiquities Act of 1906⁸⁰ and the Historic Sites Act of 1935⁸¹ to continue to exist unchanged, despite the fact that these acts presented little or no recourse for Native Americans seeking the return of the remains of their ancestors.

The Antiquities Act of 1906, which has yet to be repealed,⁸² gave exclusive jurisdiction and control of all prehistoric remains found on government-owned-or-controlled land to the federal government.⁸³ The Historic Sites Act of 1935, which was part of President Roosevelt's New Deal, is directed more at protecting historical sites than protecting or repatriating grave goods and aboriginal remains.⁸⁴

The American Indian Religious Freedom Act (AIRFA),⁸⁵ passed in 1978, provided Indians some rights to repatriation of tribal remains and grave goods.⁸⁶ The AIFRA stresses Native Americans' religious freedom as protected by the First Amendment of the Constitution and requires federal agencies to consider the effect their acts might have on "Indian religious beliefs, objects, and practices."⁸⁷ While the statute

78. See discussion *infra* note 126.

79. 25 U.S.C. § 70v-3 (1988).

80. 16 U.S.C. §§ 431-433 (1988). Generally, the Act provides that excavations must be "undertaken for the benefit of reputable museums. 16 U.S.C.A. § 432 (West 1974). Additionally, 43 C.F.R. § 3.17 (1985) states that collections obtained under the Antiquities Act of 1906 cannot be removed from public museums without written consent of the Smithsonian.

81. 16 U.S.C. §§ 461-467 (1988). Generally, the Act provides for the protection of properties of national significance.

82. However, some provisions in this Act have been declared unconstitutionally vague because certain crucial terms were not defined. See *United States v. Diaz*, 368 F. Supp. 856 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1974).

83. PRICE, *supra* note 57, at 25.

84. *Id.* at 26.

85. 42 U.S.C. § 1996 (1988).

86. *Id.*

87. PRICE, *supra* note 57, at 30.

appears to protect grave goods and possibly burial sites, it does not. The Act requires only that agencies consider the effect; not that they act upon the effect.

Although our government may have been unwilling to repatriate the remains to Native Americans currently residing in the United States, it was very receptive to the idea of repatriating these remains to other countries. In 1971, the United States entered into a treaty with Mexico providing for the recovery and return of stolen archaeological, historical, and cultural properties.⁸⁸ The treaty defines "cultural properties" as "art objects and artifacts of the pre-Columbian cultures of the United States of America and the United Mexican States . . . that are property of federal, state, or municipal governments."⁸⁹

Clearly, the United States government entered into this treaty based, at least in part, on its understanding of the importance that prehistoric remains have to their descendants, and likely in an attempt to strengthen or maintain good relations with a foreign government. It was nothing less than insulting for our government to refuse or neglect to provide this same courtesy and right to its own citizens. Native Americans certainly consider the remains and funerary objects housed by museums as having been stolen from them. The museums have no more right in keeping Native American stolen cultural objects than this country has in keeping objects stolen from the people of Mexico.

If the United States is willing to enter into such a treaty with a foreign government, should it not also be willing to enter into a similar treaty with the government of the Native Americans? Not only would such a treaty show Native Americans that the government recognized their sovereign rights, but it would also do much for government-tribal relations. The government's choice to deal with Mexico and not its own Native American citizens is a clear reflection of the second-class status that the United States grants Native Americans. Unfortunately, the United States took over fifteen years to offer similar protection to Native Americans.

C. *The Evolution of NAGPRA*

1. *Overcoming the Opposition*

Regulation in the area of repatriation has met with governmental resistance since first becoming a recognized issue. In 1986, Senator John Melcher (D-Mont.) introduced a bill which would have provided

88. Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494 [hereinafter Treaty of Cooperation], reprinted in FRANKLIN FELDMAN & STEPHEN WEIL, LEGAL & BUSINESS PROBLEMS OF ARTISTS, ART GALLERIES, AND MUSEUMS 23 (1973).

89. Treaty of Cooperation, *supra* note 88, 22 U.S.T. at 495, reprinted in FELDMAN & WEIL, *supra* note 88, at 24.

a means for dispute resolution between museums and Native Americans.⁹⁰ The bill was defeated, mostly because of pressure exerted on politicians by museum interest groups, who appear to have been more organized at the time than Native American groups.⁹¹

In 1988, the Senate Select Committee on Indian Affairs held hearings regarding repatriation legislation.⁹² The committee postponed the bill to allow museums and Native Americans the opportunity to discuss the needs of both sides. This is likely the first time representatives from these groups were encouraged to meet. The Panel of National Dialogue on Museum-Native American Relations met for approximately one year before presenting its recommendations.

The panel — made up of museum professionals, college professors, anthropologists, archaeologists, and tribal and religious leaders — recommended that federal legislation be enacted. The panel felt that the legislation should take into consideration both the rights of Native Americans and the value of scientific study and education.

The Native American Burial Site Preservation Act of 1989 was introduced March 14 but was quickly defeated.⁹³ If passed, this Act would have prohibited the excavation of Native American burial sites and the removal of grave goods. Less than two weeks later, the Native American Grave and Burial Protection Act was introduced.⁹⁴ Although this Act did not provide for repatriation, it received the support of Native American groups as a step in the right direction.

In 1989, the National Museum of the American Indian Act (the NMAIA)⁹⁵ passed. The NMAIA established the museum which will house the Smithsonian's large Native American collection. The NMAIA, a great improvement from the boxes of stored remains, applies only to the Smithsonian and serves as a "living memorial to Native Americans."⁹⁶

Most Native American communities again supported the NMAIA as a good beginning. The founding director of the museum, a Cheyenne, said the museum was designed to be a "collaborating partner" with Native Americans, a way to sustain their culture.⁹⁷ Perhaps, he said, it will even resolve the conflict between tribes and whites by providing a better understanding of Native American contributions.⁹⁸ Ironically,

90. *Repatriation Act Protects Remains*, *supra* note 16, at 3.

91. *Id.*

92. H.R. REP. NO. 877, *supra* note 18, at 10, *reprinted in* 1990 U.S.C.C.A.N. at 4369.

93. *Id.*

94. H.R. 5237, 101st Cong., 2d Sess. 27 (1990).

95. Pub. L. No. 101-185, 103 Stat. 1337 (1989).

96. *Id.* at 1337. The museum is scheduled to open in the year 2000.

97. Zan Dubin, *O.C. Curator Helps Launch Museum in D.C.*, L.A. TIMES, Oct. 2, 1991, at 1F.

98. *Id.*

the NMAIA, which honors the first people in this country, will occupy the last space available in the National Mall in Washington, D.C.⁹⁹

The legislative history of the NMAIA indicated the purpose of the act was to collect and preserve Native American remains and funerary objects.¹⁰⁰ The NMAIA does provide for repatriation of these objects, but only for those which can be identified by a preponderance of the evidence as belonging to a particular individual or as affiliated with a particular tribe or as having been removed from a specific burial site.¹⁰¹ Obviously, Native Americans seeking repatriation of any items find themselves at the mercy of the National Museum of the American Indian. Native Americans can prove the affiliation or burial site generally only with the records and information kept by the museum.

Native Americans then have the burden of proof to show the museum has no rights to the requested items.¹⁰² Once the individual making the request meets this burden, the museum may offer proof that it does have the rights to the items. This burden of proof requirement certainly seems contrary to 25 U.S.C. § 194, which does not put the burden of proof on the Native American.¹⁰³

NAGPRA was introduced on July 10, 1990, by Representative Morris Udall (D.-Ariz.).¹⁰⁴ During hearings on the bill, Native American leaders testified that scientists quickly study and then rebury most non-Indian remains.¹⁰⁵ Indian remains, however, are sent to museums to be curated, and as one Native American so eloquently put it, "the cultural curation of mingled remains of various individuals [by museums] does not suggest reverence for the contents."¹⁰⁶ Some Native Americans believe the spirits of their dead cannot rest until they are returned to their homeland¹⁰⁷ and therefore, museums interfere with Native Americans' rights to religious freedom. "[The spirits of our

99. NMAIA, 103 Stat. at 1337.

100. H.R. REP. NO. 877, *supra* note 18, at 8, *reprinted in* 1990 U.S.C.C.A.N. at 4367.

101. NMAIA, 103 Stat. at 1343.

102. H.R. REP. NO. 877, *supra* note 18, at 19, *reprinted in* 1990 U.S.C.C.A.N. at 4378.

103. 25 U.S.C. § 194 (1988).

104. H.R. REP. NO. 877, *supra* note 18, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 4371.

105. As a member of the Blackfeet tribe said, "I don't think [white people] would appreciate it if their great-great-grandfathers were put on display in different reservations and had us handling them like a basketball or something." Johnson, *supra* note 47, at 1. Other analogies offered by Native Americans include the secret taping and public study of confessions given in a Catholic church. *Id.*

106. PRICE, *supra* note 57, at 16.

107. H.R. REP. NO. 877, *supra* note 18, at 13, *reprinted in* 1990 U.S.C.C.A.N. at 4372.

ancestors] have been held hostage in museums and universities in the name of science.”¹⁰⁸

Museum supporters countered that all Americans have the right to history and if museums are forced to rebury Native American remains, they will not be able to use the remains later as new testing methods develop. Archaeologists believe useful information still exists in the remains.¹⁰⁹ However, museum supporters do see a need for legislation to protect burial sites from looting and desecration, presumably because they too stand to lose directly in such an event.

Apparently, museums do not believe all Americans have the right to bury their dead. Nor do they seem to believe that history can be gleaned as effectively from the remains of non-Indians. Fortunately, however, legislation ultimately favored the Native Americans in this battle, and NAGPRA gave Native Americans the right to the return of their dead.

Support for NAGPRA from various federal agencies has not been overwhelming. Prior to the legislation's passage, the House requested comments from agencies likely to be affected by NAGPRA. The Department of Army voiced concerns in two areas. First, the Army believed the provision which requires notice to and consent of tribes prior to excavation placed an “impossible burden” on the federal land managers.¹¹⁰ Secondly, the Army believed NAGPRA presented an unnecessary overlap of the Archaeological Resources Protection Act.¹¹¹

The Army apparently did not have even a general understanding of either NAGPRA or the ARPA; there is virtually no overlap at all between these acts. The ARPA basically replaced the Antiquities Act of 1906; it seeks to secure present and future benefits which archaeological resources and sites can provide for Americans.¹¹² The ARPA makes no distinction between Indian and non-Indian lands.

Under the ARPA, Native American complaints regarding the disinterment of Native American remains and objects are advisory only. The emphasis is on protecting Native American objects. Further, the ARPA effectively prevents repatriation and reburial of grave goods and remains — it requires that such items found on federal land be preserved in “suitable institutions.”¹¹³ NAGPRA, on the other hand, gives Native Americans the final say in disinterment of Native American remains and grave goods. It also provides for the repatriation of

108. Johnson, *supra* note 46, at 1C.

109. John E. Peterson, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 119 (1990).

110. H.R. REP. NO. 877, *supra* note 18, at 23, reprinted in 1990 U.S.C.C.A.N. at 4382 (Letter from the Department of the Army).

111. 16 U.S.C. § 470(aa) (1988).

112. MARILYN E. PHELAN, MUSEUMS AND THE LAW 1113 (1982).

113. PRICE, *supra* note 57, at 30.

both remains and objects to the tribes, whether they were found on federal land or on Indian land. It will be interesting to see how these two provisions will be reconciled.

As to the Army's concern of undue burden, NAGPRA requires no more work from or by the federal land manager than the current method prescribed by the ARPA.¹¹⁴ In fact, under the ARPA, the federal land manager can control the entire permit process. Because Native Americans only advise the ARPA, the whole decision-making process must be handled solely by the federal land manager. Under NAGPRA, the federal land manager must handle the permit process only when unauthorized finds are discovered on non-Indian lands.

The Department of Justice took the opportunity to voice its concerns over the effect the Takings Clause of the United States Constitution might have in regard to NAGPRA.¹¹⁵ The Department felt uncomfortable with the idea that Congress would be exercising its spending power to accomplish an uncompensated taking of private property from museums and agencies.¹¹⁶ The basis for this argument is somewhat confusing because the Takings Clause applies to private property. Federally funded entities currently possess the remains sought to be recovered; therefore, they would not be considered private property.¹¹⁷

And what about the illegal taking of property from the Native Americans? Very few of the objects and remains housed in museums were actually purchased from the tribes. It is true that some objects may have been purchased from art dealers or individuals, but most of the objects and remains were taken from Native American burial grounds without any authorization from the affected tribes. The constitutionality of museums and federal agencies ability to keep objects they know with some degree of certainty belong to the descendants of those buried is questionable.

The Department of Justice might also have been more concerned with the issue of whether remains and grave goods located on private property might legally be the property of the current land owner — Indian or non-Indian. American property law generally vests ownership of all objects found on private land in the land owner.¹¹⁸ However,

114. 16 U.S.C. § 470 (1988).

115. U.S. CONST. amend. V.

116. H.R. REP. NO. 877, *supra* note 18, at 25, *reprinted in* 1990 U.S.C.C.A.N. at 4384 (Letter from the Department of Justice).

117. *See* U.S. CONST. art. IV, § 3, cl. 2. In reference to the Department of Justice's concerns, the Committee included language to the effect that its intent was not to provide for takings in violation of article 5. H.R. REP. NO. 877, *supra* note 18, at 15, *reprinted in* 1990 U.S.C.C.A.N. at 4374.

118. Echo-Hawk, *supra* note 1, at 445.

in white versus Native American trials regarding the right to property, the white person has the burden to prove ownership.¹¹⁹

The Department of the Interior suggested that the government maintain a stewardship role over any unidentifiable remains.¹²⁰ "Unidentifiable," according to NAGPRA, means it is not possible to determine the tribe of origin for remains or grave goods.¹²¹ In conceding that the remains should be repatriated to the ancestral tribes, the government is admitting the government's right to the remains is subordinate to that of the tribes. However, the Department of the Interior did not explain why the government should maintain any control over these remains. This suggestion illustrates the government's desire to maintain at least some degree of control over Native American affairs — another example of the government's need to be the Great Father¹²² to its wards, the Native Americans.

2. Provisions and Prostrations

Supported by tribes, the American Association of Museums, and the Society for American Archaeology,¹²³ NAGPRA finally passed in November 1990.¹²⁴ The definitions in the Act, for terms such as burial site¹²⁵ and cultural items,¹²⁶ should prevent courts and attorneys from using interpretations of terms as loopholes to avoid the application of the statute.¹²⁷ The committee that drafted the bill intended courts to read the definitions literally and took care to clarify meanings.¹²⁸ The Act

119. 25 U.S.C.S. § 194 (Law. Co-op. 1983). However, it should be noted that individual tribe members have neither title nor right to communally owned property which is held for common use by the tribe. Echo-Hawk, *supra* note 1, at 442. This point, while proper in relation to the Takings Clause argument, is moot. Congress designed NAGPRA to regulate findings of remains and objects on federal, Hawaiian, and Indian lands only.

120. H.R. REP. No. 877, *supra* note 18, at 30, *reprinted in* 1990 U.S.C.C.A.N. at 4389 (Letter from the Department of the Interior).

121. 25 U.S.C. § 3001 (Supp. II 1990).

122. FRANCIS PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 2 (1984).

123. *New Law*, *supra* note 55, at 1.

124. 25 U.S.C. §§ 3001-3013 (Supp. II 1990).

125. *Id.* § 3001(1). The definition of "burial site" includes natural and prepared locations, either above or below the surface, where human remains are deposited. This definition should prevent decisions like *Glass* from recurring.

126. *Id.* § 3001(3). The definition of "cultural items" includes human remains and associated or unassociated funerary objects, sacred objects, and objects which have an ongoing traditional, historical, or cultural importance.

127. *See supra* notes 67, 71, 74.

128. For example, the Committee explained that "cultural affiliation" is a method of ensuring the claimant has a reasonable connection with the requested materials. H.R. REP. No. 877, *supra* note 18, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 4373.

also includes an in-depth explanation of "ownership,"¹²⁹ likely included to prevent standing problems as discussed above.

Sections 3003 and 3004 of the Act stipulate action that museums and other federally funded agencies which house aboriginal remains must take. Basically, these sections require these entities to take inventory of all aboriginal remains and funerary objects and to file the inventory list for publication in the Federal Register.¹³⁰ The Act describes which remains and objects must be repatriated and how to do so.¹³¹ In general, museums must repatriate upon request of the Native American tribe or organization associated with the remains.¹³² However, if a museum determines it needs a specific object for a specific scientific study or major benefit to the United States, it may keep the object for the duration of the study but must return it within ninety days of the study's completion.

The Act also establishes a review committee whose function is to "monitor and review the implementation of the inventory and identification process and repatriation activities"¹³³ Parties failing to comply with NAGPRA or with the review committee's findings will be penalized, after notice and opportunity for hearing under the Act.¹³⁴ Each violation is considered a separate offense and is subject to penalty.¹³⁵

The government included provisions whereby both Native American tribes and museums can apply for grants for the purpose of assisting in either enforcing or complying with NAGPRA.¹³⁶ It seems ironic that the government, which put off enacting this type of statute for so long, would include language, which states that the Act reflects the

129. 25 U.S.C.S. § 3002 (Law. Co-op. Supp. 1991). "Ownership" is defined in terms of order of priority, with lineal descendants being first, tribes being next, and the federal government following. The Committee explained that "right to possession" was not intended to usurp state law. H.R. REP. NO. 877, *supra* note 18, at 14, *reprinted in* 1990 U.S.C.C.A.N. at 4373.

130. 25 U.S.C. § 3003(d)(3) (Supp. II 1990). Museums have five years in which to complete and file this inventory.

131. *Id.* § 3005.

132. *Id.* § 3005(a)(5).

133. *Id.* § 3006(a). The committee is made up of seven members: three nominated by tribes, two of who are traditional religious leaders, three nominated by museum communities, and one appointed by consent of the others. H.R. REP. NO. 877, *supra* note 19, at 19, *reprinted in* 1990 U.S.C.C.A.N. at 4378.

134. 25 U.S.C. § 3007 (Supp. II 1990).

135. *Id.* § 3007(a). Civil penalties are assessed by the Secretary of the Interior. Criminal penalties are available for the illegal trafficking of Native American human remains and cultural items in violation of NAGPRA. These penalties range from up to one year in prison and/or fines for the first offense and up to five years and fines for the second offense. 18 U.S.C. § 1170 (Supp. II 1990).

136. 25 U.S.C. § 3008 (Supp. II 1990).

“unique relationship between the Federal Government and Indian tribes.”¹³⁷

NAGPRA includes authorization of funds “as may be necessary to carry out this Act.”¹³⁸ The Congressional Budget Office estimated the cost of enacting NAGPRA would be from \$200 million to \$500 million over a five-year period.¹³⁹ Congress allotted \$5 million to \$10 million for grants to tribes to aid in repatriation.¹⁴⁰ The main costs are anticipated to be the preparation of inventories. This figure is based on the estimate that federally funded museums hold between 100,000 to 200,000 Native American remains which will each cost fifty to one hundred fifty dollars to inventory.¹⁴¹ Based upon earlier estimates, NAGPRA failed to account for at least 400,000 to 500,000 remains — those likely held by privately funded museums and agencies, collectors, and art dealers. Although the newly enacted penalties¹⁴² should keep these numbers from growing, they provide little motivation for the numbers to decrease. There is nothing in NAGPRA to encourage or protect private entities or individuals from facing criminal charges for trafficking, should they want to come forward with their remains or grave goods.¹⁴³

Finally, NAGPRA vests the United States district courts with jurisdiction over actions brought under the Act.¹⁴⁴ There is no explanation given as to why the Act did not vest Native American tribal courts with this jurisdiction. Tribal courts generally have jurisdiction over actions, even by non-Indians, occurring on Indian land. NAGPRA should be no different. The Act, in distinguishing between remains found on tribal lands versus those found on federal lands, should provide tribal courts with jurisdiction even over those remains found on federal lands. There should at least be a distinction made as to the lands upon which the remains or grave goods were found.

Overall, NAGPRA fills many of the gaps left by earlier acts such as the AIFRA, the ARPA, and the NMAIA. NAGPRA provides some explicit definitions of crucial terms, sets up a review committee to handle remains and objects which do not fit into any identifiable

137. *Id.* § 3010.

138. *Id.* § 3012.

139. H.R. REP. NO. 877, *supra* note 18, at 21, *reprinted in* 1990 U.S.C.C.A.N. at 4380. This figure is far lower than that estimated by private individuals. *See supra* note 40.

140. H.R. REP. NO. 877, *supra* note 18, at 22, *reprinted in* 1990 U.S.C.C.A.N. at 4381.

141. *Id.*

142. *See supra* note 124.

143. *See infra* note 167 and accompanying text (discussing the American Indian Ritual Objects Repatriation Foundation).

144. 25 U.S.C. § 3013 (Supp. II 1990).

categories, and protects both remains and grave goods. What the courts will do with this Act — how they will interpret it, how they will apply it — remains to be seen.

IV. *The Outlook*

The museum and archaeological communities knew it was only a matter of time until Native American groups could force the passage of this type of legislation. In 1973, the following quote appeared in *Museum News*:

[Indian reclamation attempts are] not a fad so much as a representative facet of the growing interest of American Indians in their own cultural heritage and in their identity as contemporary residents of this country. Museum specimens are not only the physical representations of this heritage and identity, but are also the symbols of the loss of American Indian autonomy and culture by military, legal and demographic processes.¹⁴⁵

Since the passage of NAGPRA, over thirty tribes from across the United States have sought the return of tribal remains from the Smithsonian Institution alone.¹⁴⁶ NAGPRA appears to have provided Native Americans not only with the standing to seek the return of tribal remains and grave goods, but also with the courage to challenge federal entities. As museums complete and file their collection inventories, this number will likely rise. However, unless all museums and people in associated fields do their best to comply with NAGPRA, actions litigating the ambiguities and loopholes of NAGPRA will soon reach the courtroom.

Consider, for example, actions in other states which had previously enacted legislation similar to NAGPRA. In 1989, in Nebraska, the state historical society claimed it was not a state agency because of its nonprofit corporate status. Therefore, the historical society stated it did not have to comply with the state statute and public records law requiring it to provide tribes with a list of its inventory and to return all identifiable remains upon request.¹⁴⁷ The Pawnee tribe learned that

145. Bowden Blair, *Indian Rights: Native Americans Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 148, (1979).

146. Schulte, *supra* note 47.

147. Unmarked Human Burial Sites and Skeletal Remains Protection Act, NEB. REV. STAT. § 12-1201-12 (1989).

the historical society intended to honor only partially the tribe's request for tribal remains and objects. The historical society intended to return just the prehistoric Pawnee remains, rather than all identifiable Pawnee remains.

The court received evidence that the state had appropriated over \$21 million to the historical society in the last ten years, accounting for seventy-five percent of the historical society's operating budget. Based on this information, the court ruled the historical society was a state agency and, accordingly, had to provide the requested documents to the Pawnee tribe.¹⁴⁸

This case illustrates the problem that could arise in determining exactly which museums and agencies qualify as "federally funded." It is unclear as to whether the federal government must completely fund a museum or agency in order for the museum to fall into this category or whether a museum or agency qualifies if it receives a one-time-only federal grant. If so, would that museum or agency be bound by NAGPRA for only the year the grant was received or forever? If not, how much funding means "federally funded"? This ambiguity presents federal agencies and museums with a loophole which could be used to stall compliance or even form the basis of a lawsuit. NAGPRA should be amended to define exactly what makes a museum or entity "federally funded" for purposes of the Act. Any museum or other entity which must rely on federal funds to remain in operation should be considered federally funded for purposes of NAGPRA — if the government provides the means for maintaining operations, the government should also have a say in what collections that entity retains.

Idaho has had a law similar to NAGPRA in effect since 1984.¹⁴⁹ It mandates reburial, prohibits willful disturbances of graves, and prohibits individual possession of grave goods or remains.¹⁵⁰ A separate provision states any violation of the statute is a felony and may result in imprisonment or fines up to \$10,000 per violation.¹⁵¹ The problem: Native Americans report that the statutes are not effective because of the light punishments courts choose to impose. In one case, a violator who robbed Native American graves and sold the artifacts received only a five-year probation and was ordered to pay restoration costs for the burial grounds he robbed.¹⁵² Native Americans in the state did not believe the punishment fit the crime nor that it would deter others from committing the same act.

148. Pawnee Tribe Prevails in Nebraska Historical Society Lawsuit 1, NARF News Release, July 12, 1991 (Native American Rights Fund, Boulder, Colo.).

149. IDAHO CODE §§ 27-501 to 27-504 (1990) ("Protection of Graves").

150. *Id.* § 27-502.

151. IDAHO CODE § 18-7028 (1987) ("Unlawful Removal of Human Remains").

152. PRICE, *supra* note 57, at 61.

NAGPRA provides for similar penalties¹⁵³ but, like those in the Idaho statute, the punishments are discretionary. The Secretary of the Interior determines the punishment and "may" assess civil penalties. Once a museum or agency has been assessed a penalty, even if it fails to pay, the next punishment is still discretionary.¹⁵⁴ Punishments should be mandatory under NAGPRA if they are to constitute an effective deterrent. If violators receive a "slap on the wrist," as did the party in the Idaho case, museums will not have a great deal of motivation to comply; in fact, museums may have less to lose by keeping remains if they face only small fines.

A case that illustrates just how far a party will go to avoid returning Native American remains or grave goods is *People v. Van Horn*.¹⁵⁵ During a 1987 archaeological survey for the city, Van Horn uncovered an ancient grave which contained two skeletons, each with a millstone¹⁵⁶ on its chest. Van Horn contacted the coroner about the skeletons and kept the millstones at his corporation's laboratory. Several Native American groups learned of the find and sought to have the millstones returned to be reburied with the skeletal remains. Van Horn refused, claiming that the Native Americans based their claim to the millstones on race rather than on kinship, that he did not have actual possession of the stones, that the stones were not grave goods or artifacts, and that the statute applied to Native Americans only — not to Indians.

Van Horn attempted to persuade the court that his corporation, not he, possessed the millstones and that these stones could not be considered artifacts because he personally believed that the stones had been placed on the bodies to weight them down and not as associated burial objects. Further, stated Van Horn, even if the stones were used as funerary objects, they were "Indian" objects, not "Native American" objects. The court was not convinced by this "purpose determines artifact" argument or by Van Horn's possession argument. The court saw Van Horn's distinction between "Indian" and "Native American" as helpful to the state's case.¹⁵⁷ By attempting to make the distinction between "Indians" and "Native Americans," a difference courts do not recognize, Van Horn admitted that an Indian would have rights to the millstones.

The California statute at issue made it illegal to possess Native American artifacts or human remains taken from a Native American grave.¹⁵⁸ Van Horn claimed that this statute was so vague that it

153. 25 U.S.C. § 3007(a)(5) (Supp. II 1990).

154. *Id.* § 3007(a), (c).

155. 267 Cal. Rptr. 804 (1990).

156. A millstone is one of a pair of thick, heavy disks used for grinding something such as flour. FUNK & WAGNALL'S NEW PRACTICAL STANDARD DICTIONARY 847 (1956).

157. *Van Horn*, 267 Cal. Rptr. at 808.

158. CAL. PUB. RES. CODE § 5097.99 (West 1987).

violated the due process clause of the Fourteenth Amendment. His basis for this claim was that the statute did not define "Native American" or "grave." The court, relying on a "simple" reading of the statute, did not agree.¹⁵⁹ Despite Van Horn's attempt to argue every word of the statute, the court found against him and ordered him to return the millstones for reburial.¹⁶⁰ Van Horn's claims, although not victorious, had enough merit to keep the action in court for three years.

Similar ambiguities exist within NAGPRA. Many of the same issues facing courts prior to NAGPRA's passage will likely be raised again and again until the statute incorporates them. Decisions distinguishing between a cemetery and an abandoned burial site, which tested standing, and which refused to equate "remains" with "body" for grave-robbing purposes have not been handed down for the last time.

Along the same lines, an attorney could argue that while remains were placed in the burial site, what is in the site now can no longer be considered "remains" because of decomposition or passage of time. NAGPRA's definition of "remains" does not specifically include "decomposed bodies" or "as existing after long periods of time."

As to the standing issue, NAGPRA requires only a reasonable showing of affiliation, either to historical or prehistorical groups. The relationship which must be traced is that of a "shared group identity."¹⁶¹ This phrase is vague at best, and leaves room for an argument over what constitutes a "shared group identity" and a "reasonable" relationship. A better definition would include the kinds of evidence that are sufficient. It might require a showing of tribal papers, museum documents, oral testimony, and such evidence must show, for example, blood relation, religious connection, or tribal orientation. While the vagueness provides a greater opportunity for Native Americans to meet the standing requirement for making their repatriation request, it also provides many opportunities for museums and other entities to defeat that standing, depending on how a court might interpret it.

Perhaps the most obvious shortcoming of NAGPRA, and the weakness most difficult to correct, is that NAGPRA applies to federally funded entities. Private museums and collectors may still legally possess Native American remains, grave goods, and cultural items; NAGPRA does not provide any incentive for private museums or collectors to comply voluntarily with its mandates.

In 1990, Sotheby's, a world-renowned private auction house, announced plans to include in its May Indian art auction three Native American masks. Tribal representatives took immediate action, writing

159. *Van Horn*, 267 Cal. Rptr. at 816.

160. *Id.*

161. 25 U.S.C. § 3001(2) (Supp. II 1990).

the New York auction house to express their view that the sale of the ceremonial masks was sacrilegious.¹⁶² Sotheby's had identified two of the masks as Hopi and one as probably Navajo. Requests by these tribes to examine the masks, which represent life spirits, were denied.¹⁶³ Sotheby's left the masks on its auction list.

Fortunately, Elizabeth Sackler, of the Arthur M. Sackler Foundation, learned that Sotheby's intended to auction these masks against the wishes of the affected tribes.¹⁶⁴ Sackler purchased the masks at the auction and announced she intended to return the masks to "the Indian nations to whom they belong."¹⁶⁵ With this, Sackler launched the American Indian Ritual Objects Repatriation Foundation (AIROF).¹⁶⁶

Sackler hopes that the AIROF will be able to act as a middle man for art dealers, collectors, and others who want to return items to the tribes of origin. AIROF will help make this return possible by providing tax relief to the persons wishing to return the items¹⁶⁷ and guaranteeing the return of the items to the rightful owners.¹⁶⁸ Additionally, Sackler sees the AIROF as a liaison between museums and tribes seeking the repatriation of grave goods, cultural items, or remains. Sackler believes she can help repatriate goods by helping museums decide whom to contact within tribes, what to expect from the tribes that come to collect their goods, and by communicating with tribes seeking repatriation from museums.

Sackler says many Native Americans still have trouble communicating with white people about legal issues. Said one Hopi chief, "White man law and Indian law are different. White man law is changeable. Indian law is not."¹⁶⁹

What has been called the "last major battle in the bitter controversy over Native American remains and funerary objects"¹⁷⁰ is taking place at Dickson Mounds, Illinois. The museum, built around a Native American burial site, is the last remaining museum to display Native American remains publicly. Despite attempts by Oklahoma tribes to

162. Nancy Ross, *Mask of Uncertainty*, NEWSDAY, Aug. 15, 1991, at T5.

163. Amei Wallach, *No More Auction Block for 'Life Spirit'*, NEWSDAY, Nov. 7, 1991, at 113.

164. Elizabeth Sackler is president of the Arthur M. Sackler Foundation, which exhibits her father's collection of Asian and Middle Eastern antiquities and art. Her father founded the Arthur M. Sackler Gallery in Washington. *Id.*

165. Ross, *supra* note 162.

166. *Id.*

167. Persons wishing to donate the items back to the tribes would receive tax credit for the auction value of them. See Wallach, *supra* note 163.

168. *Id.*

169. *Id.*

170. Lauren Ina, *Indian Burial Site Focus of Controversy*, WASH. POST, Nov. 10, 1991, at A24.

have the site closed, the once privately owned museum refuses either to return the remains or to reburial them.¹⁷¹ Museum curators claim the remains are of Mississippians, a tribe whose lineage has yet to be traced to any specific tribe in existence today.¹⁷² The Oklahoma tribes protesting the display claim they are related to the Mississippians. Regardless of the standing issue, the museum is not legally required to return the remains or grave goods. The museum is state funded and Illinois currently has no law similar to NAGPRA which requires repatriation of such Native American items.

Organizations like AIROF provide little hope to Native Americans in cases such as the Dickson Mounds. Board members of Dickson Mounds take pride in their local museum, claiming the dispute is an economic issue. One board member went so far in his defense of the museum as to say there just are not that many places to spend money in the town — presumably the \$2000 annual revenue represents money spent by people seeking entertainment at the Dickson Mounds. Said another, "It's not like we're looking at dirty pictures here."¹⁷³

However, these displays offend Native Americans. Their protests, one of which included an attempt to reburial some of the remains, have been ignored by those in the position to close the display. Moreover, the state governor made a campaign promise to keep the site open. Those protesting the display have no hope of changing or closing the site unless Congress enacts federal law similar to NAGPRA which would apply to private museums like the Dickson Mounds.

V. Conclusion

NAGPRA provides Native Americans with more protection for their grave goods and ancestral remains than all the related legislation combined. NAGPRA gives Native Americans ownership rights in their own tribal and cultural property — to their history. NAGPRA furnishes Native Americans a foothold in the courtroom in actions to compel violators of the Act to comply. It serves as an indication that the government may finally be ready to put Native American rights above the research performed by a select group of the population, even over something so important as science.¹⁷⁴

NAGPRA is not without its flaws. It leaves enough ambiguities for the stubbornest of people to find a claim which is contrary to the

171. *Id.*

172. The Mississippians are believed to have lived from 900 A.D. to 1250 A.D. They were responsible for the raised platform earth mounds found in the Illinois area. *Id.*

173. *Id.*

174. As one commentator has noted with regard to change within our legal system: "The progress of science raised the authority of the test tube over the [cross]." WILL & AURIEL DURANT, *THE LESSONS OF HISTORY* 39 (1968).

Act's intent and also strong enough to get them into the courtroom. However, NAGPRA is a very good beginning of what can become one of the most meaningful pieces of legislation passed for Native Americans.

Museums and other federal entities that house the remnants and remains of the Native Americans' cultural and religious history have already begun the task of returning these objects to tribes. Whatever the tribes decide to do with the objects — house them in reservation museums, share them with federal museums, utilize them in ceremonies, rebury them — should serve as solace that the repatriated items and remains will return to Native Americans part of their history that has long been owed to them.