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The Native American Graves Protection and Repatriation Act: Unresolved Issues Between Material Culture and Legal Definitions

ROBERT H. McLAUGHLIN[†]

Introduction

By enacting the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, Congress mandated that museums and federal agencies re-evaluate the concept of possession with respect to their collections of Native American objects of material culture.¹ Specifically, museums and federal agencies must identify human remains and funerary objects, sacred objects, and objects of cultural patrimony for possible repatriation to Native American communities throughout the United States, and they must expeditiously return such remains and objects upon the request of the appropriate Native American descendants or tribe.² Congress defined objects of cultural patrimony as those with "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual . . . regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization."³ Sacred objects, by Congressional definition, are objects which command ceremonial importance. Contemporary Native American religious leaders must use them in "the practice of

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1. Native American Graves Protection and Repatriation Act, Pub L No 101-601, 104 Stat 3048, codified as amended at 25 USC §§ 3001-3013 (Supp IV 1992).

2. 25 USC §§ 3004-3005; See also 25 USC § 3007 (imposing civil penalties for any museum which fails to comply with the Act).

3. 25 USC § 3001(3)(D).

traditional Native American religions by their present day adherents” for sacredness to attach to these objects under NAGPRA.⁴

In short, NAGPRA addresses a deeply important set of cultural and political issues: the control and the importance of material culture to the identities and histories of America’s native peoples. Some scholars have suggested that NAGPRA’s repatriation provisions bring to a close five hundred years of cultural tension between the West and Native American peoples.⁵ Such assertions are entirely incorrect; many difficult questions and issues remain unanswered or unresolved.

This Comment considers the particular difficulties and issues involved with distinguishing objects of art and other forms of material culture from sacred objects and objects of cultural patrimony, investigating the viability of the legal categories of sacredness and cultural patrimony. By drawing upon the histories of museums and the functions of their objects, it argues that the histories of collections and the ethics of their acquisition ought to play the central role in the evaluation processes of NAGPRA. These histories and ethics command a utility that the legal definitions lack. Thus, the purpose of this Comment is not to catalog examples of objects within NAGPRA’s legal definitions but rather to illustrate why historical inquiries, as a process, can inform the efforts of museums and Native American groups to arrive at workable and appropriate resolutions to their particular concerns about ethnographic and archaeological collections.

In broad terms, NAGPRA’s repatriation provisions raise two sets of issues. The first set concerns collective control or ownership and the identification of the Native American communities which may hold claims to particular collections.⁶ The second set of issues, the focus of this Comment, pertains to the

4. 25 USC § 3001(3)(C).

5. See, for example, Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 Ariz St L J 175, 176-77 (1992) (making this sweeping assertion in an article arguing that tribal courts are the “best prepared decision-makers” for evaluating factual issues arising under NAGPRA).

6. Although not the topic of this Comment, the issues regarding which communities Congress intended NAGPRA to address, how to accommodate competing claims among Native American groups, and how to balance the claims of multiple descendent populations when archaeological materials of significant time depth are concerned each pose difficult and complicated questions which turn on the concept of community. Equally complicated, Lawrence Rosen has suggested that there is a danger that Native American groups will mistakenly view the reacquisition of material culture as a means of achieving federal recognition and the privileges and economic benefits linked thereto. Meital Hershkovitz, *Tribes struggle to reclaim sacred artifacts*, 119 Colum Spectator 1, #6 (Nov 3, 1995).

For those aspects of this Comment that do relate to these and similar questions, I have borrowed the anthropological idea of an ethnographic space—a locus where fieldwork may be conducted—as a functional definition of community. This concept has moved beyond definition as a strict physical space in recent years, and is particularly appropriate for Native American groups because their contemporary populations have become both

identification and classification of the objects which comprise museum collections. This latter set of issues can be further parsed into concerns pertaining to human remains and those relevant to material culture. The choice to focus upon the largely unresolved issues of material culture in this Comment follows from recent developments at many institutions where human remains have been summarized in compliance with the November 16, 1995 federal deadline.⁷ The process of resolving the disposition of these collections has already begun, resulting in decisions regarding human remains that range from continued conservation in museums to reburials on Native American lands.⁸

This Comment consists of two parts, each containing three sections. The Comment's first part focuses on three related sets of concepts central to the repatriation provisions of NAGPRA. The first of these sections, "Material Culture: Concept and Categories," provides background information on the nature of objects in museum collections, takes a position on the issue of control, and problematizes the legal definitions of sacred objects and objects of cultural patrimony within federal law. The second section investigates the concepts of sacredness, customary law, and tradition which NAGPRA relies upon in defining its categories of material culture. This section concludes that these concepts are highly flexible and suggests that a process of historical inquiry will provide a better mode for resolving the disposition of collections subject to NAGPRA than a more narrow approach of considering notions of sacredness and cultural patrimony exclusively. The third section, "The Convergence of Material Culture Categories," investigates the concept of categories

increasingly dispersed nationally and also concentrated in diverse urban environments.

7. See 25 USC § 3003(b). Given the disparate size of museum collections subject to NAGPRA, however, the federal government also established a procedure to grant extensions to museums which met certain criteria. For this reason, the inventory process currently continues at various museums. In general, museums undertake the summary process as one of the initial stages of communication with Native American groups. The process establishes a foundation for both discussion and Native American requests for the repatriation of specific materials. See 25 USC §§ 3003-3005.

8. Because NAGPRA does not allocate funds to Native American communities for the care of human remains, sacred objects, and objects of cultural patrimony, the decision of what to do with materials subject to NAGPRA must take into account the economic, as well as cultural, concerns of Native American groups.

For a description of one resolution, see *Crow Chief Pretty Eagle laid to rest, again*, 8 News From Indian Country: The Nation's Native Paper 1 (late June 1994) (describing the reburial of Crow Chief Pretty Eagle, whose remains were returned to Montana from the collections of the American Museum of Natural History in New York City).

The historical approach towards material culture advocated in this Comment gains indirect support from another case involving human remains. In the first litigated case involving a museum's responsibilities under NAGPRA, the district court of Hawaii held that the Bishop Museum did not violate the terms of NAGPRA by conducting physical anthropology research upon four sets of human remains. The research involved determining the cultural affiliation of these remains in order to comply with the inventory requirement of NAGPRA. *Na Iwi O Na Kupuna O Makapu v Dalton*, 894 F Supp 1397, 1415-18 (D Hawaii 1995). In total, fifteen groups had asserted claims to the human remains in question. *Na Iwi O Na Kupuna O Makapu*, 894 F Supp at 1405.

through polarized examples of museum collections, reveals the nature of material culture categories as socially constructed, and posits their limitation within NAGPRA, a law of inherently cross-cultural concerns.

The second part of the Comment seeks to build upon the conceptual foundation of the first in advocating a process of historical inquiry into collections and the ethics of collection acquisition as a method for resolving the disposition of museum collections of Native American material culture. The first section of this part describes the rationale for evaluating collections through their specific histories by drawing upon three interrelated subjects: museum anthropology, "Primitivism," and exhibition. The final two sections take on more practical themes. The first discusses the politics of exhibition beyond NAGPRA, including a brief look at the use of ethnographic exhibition by indigenous populations. The second considers the range of histories among collections and the ethics of disparate modes of acquisition. This final section also discusses the range of possible solutions that Native American groups and museums may develop in resolving the disposition of collections and outlines the types and sequence of questions that the process of investigating the histories of collections and the ethics of their acquisition might entail.

Part I. Central Concepts in NAGPRA

A. MATERIAL CULTURE: CONCEPT AND CATEGORIES

The central concept for understanding what museum collections consist of and what objects might be subject to repatriation is material culture. Material culture defines the domain in which Native American groups, museums, and legislators have developed subordinate categories such as art, sacred objects, and even technology. Contested points of view about objects occur where different interpretations of these subordinate categories collide. For that reason, this section begins with a definition of material culture, proceeds by taking a position on the issue of control, and concludes by problematizing NAGPRA's subordinate legal categories of material culture.

As James Deetz has thoughtfully articulated, material culture is "that sector of our physical environment that we modify through culturally determined behavior."⁹ Understood through this definition, the material culture of a people embodies much of that people's identity and history. It includes not only a people's arts, artifacts, and other products, but also the underlying materials,

9. James Deetz, *In Small Things Forgotten: The Archaeology of Early American Life* 24 (Anchor Books 1977). The utility of Deetz's definition of material culture is reflected not only directly through the work of museum scholars such as Susan Pearce, but also as an underlying concept in the work of archaeologists such as Christopher Tilley, who addresses the question of what roles museums should play in the field of archaeology. See Susan M. Pearce, *Museums, Objects, and Collections: A Cultural Study* 5 (Smithsonian 1993); Christopher Tilley, *Archaeology as socio-political action in the present*, in Valerie Pinsky and Alison Wylie, eds, *Critical Traditions in Contemporary Archaeology: Essays in the Philosophy, History, and Socio-Politics of Archaeology* 104, 114 (New Mexico 1995).

environments, and the processes by which these objects were formed, whether as tangible as craftsmanship or as abstract as inspiration.¹⁰ Consequently, possession of a people's material culture, either in the hands of an institution or in those of an indigenous population, implicates both power and control over the underlying culture. The basis of this power and control lies in the fusion of material wealth and interpretive authority associated with the possession of material culture.¹¹

Recognizing that the identities and histories of Native American peoples have been jeopardized and in many cases erased by the political history of the United States,¹² Congress sought, through NAGPRA, to restore Native American rights to material culture.¹³ Congress understood the Act as a tangible way of ensuring the role of Native American peoples as vibrant threads in the fabric of American society. As Congresswoman Patsy Mink of Hawaii stated, "[P]reserving [N]ative American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation."¹⁴

However, the terms of this "interest" are complicated and suggest that any Comment discussing either past or contemporary material culture must answer the questions: Whose material? Whose culture? Various possibilities exist. The material culture of the world's many and diverse populations may belong to all of humanity, held in trust by one generation for the next, never to be consumed, but always to be conserved for its intrinsic value. Alternatively, each of the world's cultures and their descendants may own their own material cultures exclusively. Yet another perspective espouses the idea that scholars, museums, or nations can own the material culture of various peoples as different, more

10. Pearce, *Museums, Objects, and Collections* at 4-6 (cited in note 9) (an elaboration on Deetz's definition of material culture).

11. Curtis M. Hinsley, *Collecting Cultures and Cultures of Collecting: The Lure of the American Southwest, 1880-1915*, 16 *Museum Anthropology* 12, 15-17, 19 (Feb 1992) (particularized discussion of the power dynamic of possessing material culture).

12. For a concise history of how Native American groups became enveloped by the United States, see Hans Koning, *The Conquest of America: How the Indian Nations Lost Their Continent* (Monthly Review 1993). Also see Gary B. Nash, *The Image of the Indian in the Southern Colonial Mind*, 29 *Wm & Mary Q* 197 (1972) (tracing different representations and perceptions of Native Americans from early encounters with Europeans through the nineteenth century and into the modern era). Nash finds parallels between these representations and the volatile political status of Native Americans, concluding that "[f]or the Indian the limited respect of European colonizers had come too late to halt the process of cultural change which would leave his image impaired and his power to resist further cultural and territorial aggrandizement fatally weakened. For the colonist, the image of the native, so useful in the past, would continue to reflect the needs and intentions of a restless, ambitious people." *Id.* at 230. For a more recent assessment of this process in the twentieth century, see David Rich Lewis, *Still Native: The Significance of Native Americans in the History of the Twentieth-Century American West*, 24 *W Historical Q* 203, 220-224, 226-27 (May 1993).

13. 136 Cong Rec 10988 (Oct 22, 1996) (statement of Rep. Campbell); 136 Cong Rec H10990 (Oct 22, 1990) (statement of Rep. Richardson); 136 Cong Rec H10991 (Oct 22, 1990) (statement of Rep. Mink).

14. 136 Cong Rec H10991 (cited in note 13).

corporate or more enduring entities. Or perhaps no one owns material culture according to the theory that people can own only tangible things—not the past, not history, not culture, and not meaning.¹⁵

This Comment accepts the first position, that the material culture of one group is a part of the overall and growing achievements of humanity. Although a problematic and normative position with which many would disagree, this perspective is the only one that does not systematically select in favor of one group's interests over another and can, therefore, accommodate the nature of material culture as an interactive entity marked by the types and contexts of contact which human populations share.

Certainly some groups may have a larger stake in the material culture of a particular region than others. When this is the case, these interests should inform the groups' levels of participation in the creation and conservation of material culture. Ultimately, however, much of what becomes recognized as the material culture of one population reflects that population's interaction with others. Even the idea that a nation-state could command authority over "its own" material culture fails.¹⁶ Just as the brightly colored beads that replaced quillwork techniques and came to characterize the beadwork of Native American moccasins and ceremonial clothing were introduced into the North American economy by European traders, "Europe learned to copy Indian textiles and Chinese porcelain, to drink [N]ative American chocolate, to smoke [N]ative American tobacco, to use Arabic numerals."¹⁷ As Eric Wolf has shown in his monumental text, *Europe and the People Without History*, "humankind constitutes a manifold, a totality of interconnected processes, and inquiries that disassemble this totality into bits and then fail to reassemble it falsify reality."¹⁸

From this perspective and the understanding that a museum is fundamentally a civic institution intended to provide a locus for the discovery, discussion, and dissemination of information, museums can begin to ask how to operationalize Congress' definitions of sacred objects and objects of cultural patrimony with respect to their specific collections. The difficulty of this task lies in the multipli-

15. For a discussion of the main ideological positions on the control of cultural properties with respect to the rights of ownership, access, and inheritance, see Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Properties Issues*, in Phyllis Mauch Messenger, ed, *The Ethics of Collecting Cultural Properties: Whose Culture? Whose Property?* 1 (New Mexico 1989).

16. Jamie Litvak King, *Cultural Property and National Sovereignty*, in Phyllis Mauch Messenger, ed, *The Ethics of Collecting Cultural Properties: Whose Culture? Whose Property?* 199 (New Mexico 1989).

This argument was underscored by the Smithsonian's National Museum of Natural History temporary exhibit, *Seeds of Change: Five Hundred Years Since Columbus*, which described the cultural history of exchange between the Old and the New Worlds through five tracers: sugar, potatoes, corn, horses, and disease. Herman J. Viola and Carolyn Margolis, eds, *Seeds of Change: A Quincentennial Commemoration* 14 (Smithsonian 1991).

17. Eric R. Wolf, *Europe and the People Without History* 3-4, 164, 184, 193 (California 1982).

18. Id at 3.

city of functions that objects serve and the newness of these legal definitions to the generally troubled existence of archaeological concepts and their corresponding terms of material culture in American jurisprudence.¹⁹ Although the Department of the Interior recently published rules and regulations to help museums and federal agencies implement NAGPRA, the regulations concentrate more on “determining the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony” than on suggesting how to distinguish these objects and remains from other forms of material culture.²⁰ On this latter point, the regulations state only that this burden rests initially with each museum and federal agency and that such determinations are subject to appeals to the museum or federal agency, then to the NAGPRA Review Committee, and possibly to federal courts.²¹

In looking for guidance on NAGPRA’s legal definitions outside of the NAGPRA discourse, one finds a similar congressional intention to classify material culture in the Arts and Artifact Indemnity Act which insures particular types of objects while on exhibition in the United States.²² Such objects include “tapestries, paintings, sculpture, folk art, graphics, and craft art” as well as “artifacts or objects” and several other forms of material culture.²³ The criteria for eligibility require that the objects be of “educational, historical, or scientific value” and be certified by the Director of the United States Information Agency as being exhibited in the national interest.²⁴ While this final requirement recalls Representative Mink’s statement that the underlying purpose of NAGPRA is to

19. Congress first introduced anthropological terminology into the United States Code with the Antiquities Act of 1906. Act of June 8, 1906, ch 3060, 34 Stat 225, codified as amended at 16 USC §§ 431-33 (1988). This act sought to protect “any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled” by the federal government from destruction. 16 USC § 433. But, in *United States v Diaz*, the Ninth Circuit held these categories unconstitutionally vague and consequently a violation of due process. 499 F2d 113, 114-15 (9th Cir 1974). Largely a response to the *Diaz* decision, Congress passed the Archaeological Resources Protection Act of 1979, which codified archaeological resources to include, “but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.” Pub L No 96-95, 93 Stat 721, codified as amended at 16 USC §§ 470aa-470mm (1994). While the itemized list of archaeological resources has undoubtedly improved the legal definitions available for the protection of federal sites (enforcement of the Archaeological Resource Protection Act being an entirely different matter), it does not provide an avenue for determining sacred objects or objects of cultural patrimony from other forms of material culture. Instead, the itemized list spans all of these categories, indicating that Congress has carefully avoided such characterizations of ethnological and archaeological materials.

20. Native American Graves Protection and Repatriation Act Regulations, 60 Fed Reg 62134 (1995) (amending 43 CFR § 10).

21. *Id.* at 62138-39, 62154.

22. Arts and Artifact Indemnity Act, 20 USC §§ 971-77 (1988).

23. 20 USC § 972.

24. *Id.*

preserve Native American cultures for the benefit of all Americans, the “national interest” in question remains undefined.²⁵ Furthermore, the Act avoids drawing any substantive distinctions among the objects it specifies, classifying art and the other specified forms of material culture as part of the same collective body of works. Thus, other federal laws emphasizing the plurality of cultural materials are unlikely to inform museum efforts to understand and apply the terms of NAGPRA.

Moreover, objects may be characterized by several of the categories mentioned in NAGPRA because the Act does not accommodate the practical consideration that groups must confer sacredness upon objects, an active cultural process. The regulations do, however, recognize the possibility of an object occupying more than one legal category. They note, for example, one commentator’s observation that Zuni war gods may accurately be described both as sacred objects and as objects of cultural patrimony. Yet, the regulations respond to the ambiguity created by double characterization by merely restating the duty of museums and federal agencies to make the initial determinations on the character of each object in their respective collections.²⁶

B. SACREDNESS AND THE CONCEPT OF CUSTOMARY LAW

Burdening museums and federal agencies with the task of identifying sacred objects and objects of cultural patrimony leaves unresolved the tension between NAGPRA’s static legal definitions and an anthropological understanding of the concept of sacredness. That understanding acknowledges that objects, including some of daily utility, may become sacred through particular practices or contexts such as ceremonies. Thus, anthropology regards sacredness as implicating special intersections of space, time, activity, and material culture.²⁷ This section explores this concept as well as the concepts of customary law and tradition, further problematizing NAGPRA’s reliance on sacredness and tradition in defining its categories of material culture. In addition, this exploration establishes the framework for the process of historical inquiry into collections and the ethics of acquisition advocated in this Comment as an alternative to relying solely on contemporary notions of sacredness and cultural patrimony in order to comply with NAGPRA.

The potlatch ceremonies of the Northwest Coast present one of the most well documented examples of how sacredness is conferred upon objects through active cultural processes. Outlawed by the Canadian government between 1876 and 1951 as destructive, heathen practices, potlatches and the shield-like sheets of copper at their center, “each with its own name, its own history and a value

25. See notes 12-14 and accompanying text.

26. 60 Fed Reg at 62139 (cited in note 20).

27. Raymond D. Fogelson, *Commentary*, 14 Chicago Anthropology Exchange, Special Issue: Native American Land 130, 131-132 (1981). Although Fogelson focuses upon sacred land issues and the implications of legal definitions in their formulation, his discussion of sacredness applies to material culture as well.

that increased each time it was bought, given away or ceremonially broken," served to mark special events including marriages and deaths.²⁸ Still practiced today, the potlatch tradition calls for the distribution of wealth from host to guests and invokes the spirituality and history of an entire people through its dances, speeches, and gift-giving traditions.²⁹ The potlatch thereby illustrates that sacredness, clearly not a static characteristic, emanates from material culture as a product of belief and tradition or "customary law"—systems which bring judgment and order to human lives, behaviors, and conflicts.³⁰

Recently, the work of historians and historically grounded anthropologists who study law in conjunction with power has further demonstrated that traditions and "customary law," like culture, are fluid over time.³¹ These studies and the fluidity of their underlying concepts are important to NAGPRA because they are invoked by its terms of collective ownership and help explain why certain objects "cannot be alienated, appropriated, or conveyed."³²

For example, Bernard Cohn has revealed changes in Indian courts and customary legal processes motivated by British influence during India's colonization.³³ Sally Falk Moore describes a similar pattern of change in the African context of today's Tanzania, specifically considering how British colonial officers employed local officials as a hegemonic device for controlling "customary law."³⁴ Through this process and the repugnancy clause under which British colonial officials could deny the authority of local law, Moore shows how customary law changed under colonial rule. The subsequent codification of this legal system marked an important further transformation of customary law for the post-colonial state of Tanzania.³⁵ Indeed, both Francis Snyder and Martin Chanock argue that this decolonizing moment in fact invented "customary law." In their respective case studies, each describes how the process of writing took customary law out of the domain of collective memory and fixed it in a text, invoking a precise historical moment as a point of departure and as a direct response to the immediate colonial past, its notions of justice and process, and its legal categories.³⁶

28. Brian Shein, *Playing, Pretending, Being Real. Alert Bay's U'mista Potlatch Collection: strength at the core of illusion*, Canadian Art 76, 78 (Spring 1987).

29. Id. See also Abraham Rosman and Paula G. Rubel, *The Tapestry of Culture: An Introduction to Cultural Anthropology* 27-28, 285 (McGraw-Hill 5th ed 1995).

30. Id at 175-77.

31. Mindie Lazarus-Black and Susan F. Hirsch, eds, *Contested States: Law, Hegemony and Resistance* 4 (Routledge 1994).

32. 25 USC § 3001(3)(D).

33. Bernard S. Cohn, *Some Notes on Law and Change in North India*, 8 *Econ Development & Cultural Change* 79, 86-93 (1959-60).

34. Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts*, 26 *L & Soc Rev* 11, 15-26, 35-39, and 44 (1992).

35. Id at 21-26.

36. Francis G. Snyder, *Colonialism and Legal Form: The Creation of "Customary Law" in Senegal*, 19 *J Legal Pluralism* 49, 51, 60, 68, and 74-77 (1981); Martin

These studies in the anthropology of law suggest that the ways in which Native American groups respond to NAGPRA and its terms of collective ownership, sacredness, and cultural patrimony under customary or traditional law should be case specific and historically construed because these categories are not autonomous, but rather determined by larger cultural systems and contexts. The relevance of the studies in drawing a connection to NAGPRA stems from the fact that as internally colonized peoples under the rubric of manifest destiny, Native Americans share many characteristics with populations colonized externally under a rubric of empire, including the indigenous populations of India and Africa. Central to these shared characteristics stand difficult histories of contact and conflict with Western authorities and powers.³⁷ In light of these histories, suggesting that the plurality of Native American notions of cultural property and sacredness could exist in complete isolation, that is, without any interaction with parallel notions in the non-indigenous communities of the United States or any internal changes, ignores the effects of five hundred years of cultural contact, exchange of ideas, and exchange of material culture. Moreover, the experience of now independent African states speaks to the authority of customary law (even if historically recent) in developing principled and systematic responses to the issues facing formerly colonized groups as they assert their own identities and legal authorities. Thus, given an understanding of sacredness and customary law as subject to change and transformation, museums and Native American groups should not rush to write or rewrite the meanings of objects. Instead, they should collaborate in the evaluation of museum collections, paying close and detailed attention to the relevant historical and political processes in order to arrive at understandings of what acquisitions should properly remain in museums and which ones or subcollections should be repatriated.

C. THE CONVERGENCE OF MATERIAL CULTURE CATEGORIES

On its surface, NAGPRA appears to employ terms of sacredness and cultural patrimony as finite categories of material culture. Rather than approaching these legal definitions from the perspective of a contemporary researcher walking through hallways of conserved artifacts, each tagged with a catalog number written in ink turned brown with age since the object arrived at its metropolitan

Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* 65-67 (Cambridge 1985).

For a further discussion of how new legal categories are created in non-legal institutions such as state exhibitions, see Joan Vincent, *On Law and Hegemonic Moments: Looking Behind the Law in Early Modern Uganda*, in Mindie Lazarus-Black and Susan F. Hirsch, eds, *Contested States: Law, Hegemony and Resistance* 118-37 (Routledge 1994).

37. For a comparison useful in understanding the common characteristics and similar histories of populations colonized internally and externally, consider Edwin Wilmsen's account of the San-Speaking cultures of the Kalahari desert over the past five hundred years and the experience of Native American peoples during the same period. Edwin N. Wilmsen, *Land Filled With Flies: A Political Economy of the Kalahari* 3, 130-158 (Chicago 1989). See also, generally, Koning, *The Conquest of America* (cited in note 12).

destination, and then trying to differentiate objects of cultural patrimony from works of art and other forms of material culture, consider sharply polarized examples of museum collections for the moment. Consider *duein fubara*, “foreheads of the dead,” from the Kalabari region of Africa’s Niger delta, and classical Greek ceramics as exemplifying an ethnographic and an artistic collection respectively. The juxtaposition of these two collections illuminates some general principles about categories of material culture, their convergence and socially constructed lines of distinction, as well as some principles about exhibition. These principles inform the repatriation endeavor and challenge the appearance of immediate utility in NAGPRA’s terms.

Conventionally known as ancestral screens, *duein fubara* would undoubtedly fit Congress’ definitions of cultural patrimony and sacredness if the Act were expanded to include indigenous cultures beyond the United States. The Kalabari create *duein fubara*, screens of wooden sculptures, in order to locate spirits of ancestral heads of households and other socially prominent members of their villages, essential in a society which regards an individual as a locus of interaction for a number of spiritual forces.³⁸ As the screens decay, they are replaced with new ones which do not seek to replicate the old precisely, but rather to incorporate the distinctive elements of the preceding screens to a degree of sufficient recognition.³⁹ A part of daily life, *duein fubara* command their presence from special, dimly lit side rooms of family trading houses. Entry into these rooms is carefully controlled.

A general rule is that women cannot enter, although the screens are normally visible to them from the main part of the hall. This is not to say that women do not make offerings to the ancestors. Often, they may do so to give thanks for easy labor pains or the safe birth of a child. They must, however, use an intermediary because they may not approach the screens Another general rule is that visitors must remove their shoes before approaching the screens. This practice is explained in terms of avoiding possible danger: one must show proper respect to avoid angering the spirit.⁴⁰

Despite the traditional practice of restricting access to those of “pure Kalabari birth,” the Smithsonian Institution’s National Museum of African Art mounted a temporary exhibit of *duein fubara* in 1988. Various museums, including the British Museum and the Pitt Rivers Museum, lent their ancestral screens to the Smithsonian exhibit. Yet, the pieces share a common, and typical, history. Between 1914 and 1916, a British colonial officer acquired the exhibit’s specific pieces in an effort to salvage the *duein fubara* from near certain destruction at the hands of a fundamentalist Christian cult.⁴¹ Nevertheless, these

38. Nigel Barely, *Foreheads of the Dead: An Anthropological View of Kalabari Ancestral Screens* 15, 21 (Smithsonian 1988).

39. *Id.* at 20.

40. *Id.* at 27.

41. *Id.* at 4, 7-8.

objects could be analyzed as an ethnographic collection of objects embodying both cultural patrimony and sacredness, which they no doubt are and do. If they were defined, therefore, as sacred objects, an authority speaking from (or for) the Kalabari could have objected to museum ownership and control of the objects and required repatriation, making them unavailable for exhibition.

By contrast, Greek ceramics constitute one of the most familiar forms of art and material culture to Western audiences. Socialized to view such objects as uncontroversial and within the trajectory of “mainstream” culture, Westerners often envision Greek ceramics when considering either art or archaeology in the abstract and have come to recognize museums as appropriate sites for exhibiting these materials. The widespread use of a Greco-Roman architectural vernacular in civic architecture during the late nineteenth century frames this perception of Greek ceramics.⁴² Among the many museums built during the final decades of the nineteenth century stands the Metropolitan Museum of Art, and among some of its first acquisitions were several Greek ceramic pieces which lend the museum an aura of credibility and timelessness.

For this reason as well as for their aesthetic and cultural significance, the ceramics merit description, not merely through the ever-present labels of exhibition, but also through inclusion in the official museum guide. In total, *The Metropolitan Museum of Art Guide* discusses eighteen Greek ceramic pieces.⁴³ These entries describe the legendary myths and figures often depicted upon ceramic mixing bowls, oil and wine containers, and funerary pots as well as the painting process used to render these images against white slip clay backgrounds.⁴⁴ For example, one entry describing a piece entitled “Black-Figured Krater: The Return of Hephaistos” and dating from circa 550 B.C. reads:

This mixing bowl of impressive proportions offered the artist a broad surface to depict Hephaistos being escorted to Mount Olympus by Dionysos and his retinue of satyrs and maenads. Lydos [painter] conveys the exuberance of the procession so vividly that one can almost hear it.

The black-figure technique of vase painting, invented in Corinth, was perfected in Attica, and by the mid-sixth century B.C. Attic vases began to eclipse those made in other centers. Distinct styles emerged, and the development of individual artists can be observed. Some names of vase painters are known from their signatures; others remain anonymous and have been given names of convenience. Among the painters of Attic black-figured vases of the sixth century, Kleitias, Lydos, the Amasis Painter, and Exekias

42. Formally known as the Beaux Arts movement, this architectural period is well documented in numerous texts. See, for example, Henry Hope Reed, *Beaux-Arts Architecture in New York* (Dover 1988); Marcus Wiffen and Frederick Koeper, *American Architecture 1607-1976* 268-291 (MIT 1981).

43. Kathleen Howard, ed, *The Metropolitan Museum of Art Guide* (Metropolitan Museum of Art 1983).

44. Id at 283-89.

can be singled out as leaders, and all four are represented in the Museum.⁴⁵

Such descriptions indicate a broad common ground between the typical exhibition of Greek ceramics in art museums and the more “exotic” or “foreign” ethnographic exhibition of *duein fubara*. Both the ceramics and the *duein fubara* served practical daily functions. Both occupied specifically demarcated physical spaces in their respective cultures, and manifested high levels of skill and craftsmanship. Both not only served to record history or myth, but also to integrate these narratives into daily and ritual experiences. These functions motivated the production of each set of objects and continue to make them interesting to audiences today. If we imagine them in a single exhibit, their juxtaposition would reveal that contemporary categories such as art and sacredness are socially constructed, subject to change over time, and quite often either interpenetrate each other or become fused together.

These characteristics of the categories of art and ethnographic collections within the domain of material culture undermine the appearance of clarity and utility in NAGPRA’s legal definitions of sacred objects and objects of cultural patrimony. These socially constructed characteristics further suggest that the historical evaluation process will lead to more contextualized and case specific resolutions as to whether or not a museum should repatriate a particular collection or object. Such an approach avoids the potential bias of imposing NAGPRA’s legally codified categories upon objects and collections created in cultural contexts that may or may not have shared the same underlying distinctions.

Part II. Historical Inquiry: Rationale, Process, and Possibilities

A. MUSEUM ANTHROPOLOGY, “PRIMITIVISM”, AND EXHIBITION

In the historical evaluation process advocated in this Comment, museums and Native American groups should specifically consider museum functions (the discovery, discussion, and dissemination of information) and the ethics of collection acquisition and management in their discussions regarding repatriation. On the purpose of museum functions, Franz Boas, the father of American cultural anthropology, set forth decades ago that “the main object of ethnological collections should be the dissemination of the fact that civilization is not something absolute, but that it is relative, and that our ideas and conceptions are true only so far as our civilization goes.”⁴⁶ As ethnic and cultural divisions threaten to unravel aspects of American society and underlie many of the wars currently waged around the globe, this purpose appears as worthy of pursuit today as it did at the turn of the century when Boas spearheaded early ethnographic

45. Id at 285.

46. George W. Stocking, Jr., ed, *A Franz Boas Reader: The Shaping of American Anthropology, 1883-1911* 66 (Chicago 1982).

expeditions and exhibits for the American Museum of Natural History in New York City.⁴⁷ Boas, like many museums curators today, recognized the need to look forward with respect to the relations between cultures and museums. But in order to interpret that future from the vantage point of today, museums must look back at the landscape over which they have traveled thus far.

Across that landscape, three areas emerge as especially relevant to the issues raised by categories of material culture and the processes of classification: (1) the development of museums alongside the politics of colonization and the proliferation of new academic disciplines including museum anthropology and archaeology; (2) the cross-fertilization of ideas from non-Western⁴⁸ material culture into twentieth century Western art; and (3) the planning and exhibition techniques museums utilize. Some might argue that the museum is a failed artifact of colonialism. This perspective would suggest an entirely different and more sweeping interpretation of NAGPRA than the position advocated here. An implicit argument in accepting the purpose of ethnographic and archaeological exhibition stated above is that museums continue to hold the promise of heightened cross-cultural understanding in a pluralistic world. This rationale motivates the following survey and makes it relevant to the repatriation procedures mandated by NAGPRA.

Beginning with museums and their development, the most commonly recognized division of material culture appears to cut between art and ethnographic materials such as the *duein fubara* and Greek ceramics discussed above. Institutionalized through the separate collections of art museums and anthropology departments in natural history museums, the distinction between

47. Boas held joint appointments at the American Museum of Natural History and at Columbia University between 1896 and 1905, when he resigned from his position at the museum because of disagreements "stemming from basic theoretical differences over the arrangement of collections and exhibits." Valerie Pinsky, *Archaeology, Politics, and Boundary-Formation: The Boas Censure (1919) and the Development of American Archaeology during the Inter-war Years*, in Jonathan E. Reyman, ed, *Rediscovering Our Past: Essays on the History of American Archaeology* 161, 170 (Avebury 1992).

Boas' scientific side is perhaps best captured by Alexander Lesser, anthropologist and student of Boas, who wrote,

His careers as citizen and scientist are interwoven. He accepted a moral obligation to spread scientific knowledge as widely as possible, and he himself applied anthropological findings to human problems in education, race relations, nationalism and internationalism, war and peace, and the struggle for democracy and intellectual freedom.

Alexander Lesser, *Franz Boas*, in Sydel Silverman, ed, *Totems and Teachers: Perspectives on the History of Anthropology* 1, 11 (Columbia 1981).

48. I use the word "non-Western" reluctantly, frustrated by the bias of the English language in lacking an affirmative word for the peoples of the world who do not attribute their cultural background to European origins. This failure of language reflects the much larger processes that Edward Said captures in *Orientalism*. Defining his subject as Western authoritative positions over other peoples, Said describes processes developed "culturally and even ideologically as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles." Edward E. Said, *Orientalism* 2 (Vintage 1979).

art and ethnographic materials stems from historical, political, and intellectual roots. The physical separation of art and natural history museums has become integrated into urban plans through the creation of separate but complementary civic institutions in major metropolitan areas such as New York, Los Angeles, Chicago, and Washington, DC. The philosophical separation of art and ethnography is thus mapped into the minds of visitors as a way of constituting knowledge.⁴⁹ Visitors tend to carry a conception of museums as built around inherent and apolitical distinctions in the objects they collect rather than in the purposes or politics of exhibition.

Yet, the social construction of art and sacredness as discrete modern categories began with the rise of the modern museum in the aftermath of the French Revolution.⁵⁰ Because royal courts and religious institutions had historically commissioned and displayed the work of European artists, popular access to such collections manifested the dramatic changes in the status of classes as political bodies in the final decades of the eighteenth century. The transformation of the Louvre Palace into a national art museum offers the most vivid example. The French desire for social status and prestige among nations blended well with the internal political function of defining citizenship in terms of equality of access and viewing rights to public property.⁵¹

The public exhibition of ethnographic materials developed several decades later in the mid to late nineteenth century. Pieces arriving from distant locations brought material contact with peripheral colonized populations to the metropolitan centers of Europe and the United States. Thus, just as the rise of the art museum served the political function of conferring citizenship upon the peoples of newly organized governments, ethnographic exhibits (whether at enormous expositions such as Chicago's Columbian World's Exposition of 1893 or the natural history museums into which they fed, such as Chicago's Field Museum) served to define empire, metropole, and the hierarchies of human life and experience throughout an increasingly global political and economic sphere. As

49. For example, the American Museum of Natural History and the Metropolitan Museum of Art stand virtually across from one another along opposite sides of the vast rectangular space of Central Park in New York City. Washington, DC, presents another example of mapping knowledge through the three national museums delineating the north side of the National Mall along Constitution Avenue: the National Gallery of Art, the National Museum of Natural History, and the National Museum of American History (formerly the National Museum of History and Technology). This sequence presents collections which transcend time (the arts), collections located in geologic time (the convergence of rocks, dinosaurs, and ethnographic "others"), and collections reflecting a comparatively discrete unit of time (American history and modern technology). Traveling south from downtown Chicago reveals the same sequence as one passes the Art Institute of Chicago, the Field Museum of Natural History, and finally the Museum of Science and Industry.

50. Carol Duncan, *Art Museums and the Ritual of Citizenship*, in Ivan Karp and Steven D. Lavine, eds, *Exhibiting Cultures: The Poetics and Politics of Museum Display* 88, 92 (Smithsonian 1991).

51. Id at 88, 93-94.

visitors experienced their empires, each exhibition taught “both the achievements of imperial industries and the cultures of imperial others—a single lesson because the latter cultures would be comprehended primarily through a rhetoric of progress meant to convey the former achievements.”⁵²

A variety of new and interrelated disciplines including history, art history, geology, biology, and anthropology shaped this rhetoric.⁵³ The acceptance, appropriation, and misappropriation of Darwinian principles of evolution among these disciplines posited new classificatory systems like species and genus, as well as an increased sense of both geologic and human time in which to write the histories of nations.⁵⁴

In the United States, Darwin’s principles established a manipulable theoretical foundation for early anthropologists, most notably, Lewis Henry Morgan, whose perspective on evolution and culture became the intellectual position of the Smithsonian and the Bureau of American Ethnology under the administration of John Wesley Powell.⁵⁵ Morgan’s “three-stage scheme of social development—through savagery, barbarism, and civilization—was handy, current, and authoritative” as these institutions came to dominate museum anthropology in the post-Civil War period.⁵⁶ As Pinsky explains:

With Morgan, Powell regarded the North American Indian not as a separate racial type, but as the representative of a distinctive level of socio-cultural development; that is, of ‘savagery’ Any attempt to understand the North American Indian thus demanded a more fundamental knowledge of the nature of savagery as a particular developmental stage, and towards this end he urged basic descriptive and systematic survey of aboriginal cultures.⁵⁷

In an era when many believed that Native Americans were a vanishing race, Powell’s administration amassed enough empirical data to show that, contrary to popular belief, the major archaeological features of the North American landscape were not the products of a “lost civilization,” but rather historically and culturally linked to contemporary populations.⁵⁸ In so doing, however, Native Americans emerged as lacking any histories of their own while simultaneously providing the theoretical point of departure, “savagery,” for writing the history

52. James Kessenides, *Importing the Empire* 4 (1995) (on file with *The University of Chicago Law School Roundtable*).

53. Tony Bennett, *The Exhibitionary Complex*, in Nicholas B. Dirks, Geoff Eley, and Sherry B. Ortner, eds, *Culture/Power/History: A Reader in Contemporary Social Theory* 123, 139-44 (Princeton 1993).

54. *Id.* at 139-41, 143-44.

55. Curtis M. Hinsley, *The Smithsonian and the American Indian: Making a Moral Anthropology in Victorian America* 133 (Smithsonian 1994).

56. *Id.*; Valerie Ann Pinsky, *Anthropology and the New Archaeology: A Critical Study of Disciplinary Change in American Archaeology* 38 (Ph.D. dissertation, Cambridge 1992).

57. Pinsky, *Anthropology and the New Archeology* at 41.

58. *Id.* at 43.

of Western civilization. In its search for the cusp of nature and humanity, ape and human being, museum anthropology had transformed (dangerously close to irreversibly) Native Americans into "walking statues" of their distant ancestors.⁵⁹ Thus, in defeating one misconception of Native American peoples, museum anthropology had propagated another. This ahistorical misconception quite understandably underlies many people's concerns about non-indigenous control of material culture today.

Parallel developments in the history of Western art have reinforced this ahistorical perspective as "primitive arts" inspired new movements at the dawn of the twentieth century. Although harshly criticized when first displayed in Paris in 1907, Picasso's *Les Femmes d'Alger (O. J. R. M.)* has gained the praise of contemporary scholars as one of the most significant works of the twentieth century.⁶⁰ Inspired by the African masks in the Musée de l'Homme, the Parisian museum of ethnology, Picasso experimented with linking the dynamic sculptural characteristics of these masks to principles of abstraction.⁶¹ *Les Femmes d'Alger* thereby launched the cubist and primitivist movements. Closely resembling *duein fubara* in both aesthetics and function, the masks that inspired Picasso are clearly objects of cultural patrimony among the people who produced them. Yet, the masks have also come to hold a seminal place in the history and production of modern Western art, an entirely different cultural context complete with distinct modes of valuing and respecting material culture. Thus, the masks illustrate the multiplicity of function and meaning that material culture can embody.

As a category, ethnographic pieces continue to inspire contemporary artists in largely aesthetic, ahistorical and acultural ways. For example, the *New York Times* recently featured a profile of two prominent artists, Leon Golub and Nancy Spero, who recalled visiting the Field Museum of Natural History when they lived in Chicago during the 1940s and 50s.⁶² Golub remarked, "We were very moved by all that, more than with the Impressionism at the Art Institute." Both he and Spero had become "scavengers, ransacking everything from ancient art through contemporary photographs, even porn magazines, for imagery."⁶³

But beyond imagery, NAGPRA presents a legal response to both the institutional histories of museums and their widespread (and too often uninformed or ahistorical) exhibition of "foreign" material culture as art itself. Although this process offers another example of the kind of cultural exchange which motivates the understanding of cultural properties as belonging pluralistically to humanity rather than to specific peoples, much of the Native American material culture currently held in museums will be repatriated and removed from public circula-

59. See Hinsley, *The Smithsonian and the American Indian* at 20 (cited in note 55).

60. Marie-Laure Bernadac and Paule du Bouchet, *Picasso: Master of the New Idea* 47-49 (Henry N. Abrams 1993).

61. *Id.* at 46, 52.

62. Michael Kimmelman, *2 Artists Prowling for Ideas to Use Again*, *NY Times* B1 (Jan 5, 1996).

63. *Id.* (emphasis added).

tion. At this cost, one hopes that the repatriation of these sacred objects and objects of cultural patrimony will correct the perception of Native Americans as vestiges of past cultural groups and remedy the unethical or insensitive chapters of museums' histories.

B. EXHIBITION BEYOND NAGPRA: SILENCE AND ASSERTION AS POLITICS

Ultimately NAGPRA's processes of repatriation to Native American groups will reach some state of resolution. However, the politics of exhibition will continue to operate on the Native American cultures. Both silences and assertions about cultures make representations for other peoples to receive and to compare with any earlier representations which have provided the informational basis they bring to their understanding of those cultures. Therefore, the politics of exhibition are intrinsically linked to the identities and histories of Native American groups and must also be considered, as historical processes themselves, in resolving the disposition of the objects of material culture subject to NAGPRA.

During the winter of 1984-85, the Museum of Modern Art (MOMA) in New York City mounted a controversial exhibition entitled "Primitivism' in 20th Century Art: Affinity of the Tribal and the Modern" in which a special label described the absence of a Zuni war god. As James Clifford explains,

We learn that late in its preparations for the show, MOMA "was informed by knowledgeable authorities that Zuni people consider any public exhibition of their war gods to be sacrilegious." Thus, the label continues, although such figures are routinely displayed elsewhere, the museum decided not to bring the war god (an influence on Paul Klee) from Berlin.⁶⁴

Clifford further notes that the Zuni had already asserted a claim for a war god, a claim that the Denver Museum of Art voluntarily honored, and that shipping the figure associated with Klee's work from Berlin to New York would have run the risk of having it seized as contraband.⁶⁵ The absence of the Zuni war god, the only object directly objected to or missing at MOMA, clearly illustrated not only the relevance of material culture to the Zuni of today, but also the political awareness and activity of the Zuni as a contemporary culture with both an identity and a history of its own.

However, nothing prevents non-Western cultures from also using museums to achieve political goals in more affirmative ways alongside the missions of museums. As the case of the collection of Greek ceramics at the Metropolitan Museum of Art shows, a museum is not an entirely or inherently inappropriate site for sacred objects or objects of cultural patrimony. The Metropolitan's Sackler Wing, a separate exhibition space which breaks with the museum's clas-

64. James Clifford, *The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art* 189, 209 (Harvard 1988).

65. Id at 209 n11.

sical architecture through the use of visible steel beams and large panes of glass, dramatically reinforces this idea. Within it stands the Temple of Dendur, a Nubian monument dating from circa 15 B.C. which "would have been completely submerged by the lake formed by the construction of the Aswan High Dam (begun 1960)."⁶⁶ A gift from the Republic of Egypt in 1967, the Temple recognizes the American contribution to the international campaign to protect ancient Nubian archaeological sites.⁶⁷ The fundamental element of respect that visitors feel towards such museum spaces and the collections they present, the silence with which visitors often pass through these spaces, the intensity of their observation, and their desire to retain their experiences through catalogs, posters, and postcards underlies the common description of museums as modern "secular temples."⁶⁸ But perhaps more importantly, this respect suggests opportunities.

As part of a growing effort to assert sovereignty and cultural autonomy in New Zealand, a Native Pacific Island people, the Maori, developed the Te Maori Exhibition which traveled throughout the United States in 1984.⁶⁹ For the first time, tribal elders became involved with the exhibition plans designed to represent their culture.⁷⁰ Also notable was the participation of young Maori who served as guides and interpreters of material culture for visitors.⁷¹

The closing ceremonies at each venue were marked by moving and emotional scenes, as those involved took leave of their 'ancestors'. These evinced a notable sense of proprietorship among both old and young, many of whom had seldom, if ever, entered a museum prior to the Te Maori. . . . [T]he exhibition clearly inspired a flowering of emotional and cultural identity among Maori.⁷²

We should not lose sight of the fact that fostering this type of flowering of identity among indigenous peoples within a larger nation is precisely what Congress hoped to accomplish in passing NAGPRA.⁷³ The Te Maori case challenges museums and Native American groups to think about the management of ethnographic collections, in addition to considering the logistics of deaccessioning material culture as sacred objects and objects of cultural patrimony.

66. Howard, ed, *The Metropolitan Museum of Art Guide* at 141 (cited in note 43).

67. Id. A text panel along the south wall of the gallery also relates this information to museum visitors.

68. Carol Duncan, *Museums and Citizenship* at 90-91 (cited in note 50).

69. Steven D. Lavine and Ivan Karp, *Introduction: Museums and Multiculturalism*, in Ivan Karp and Steven D. Lavine, eds, *Exhibiting Cultures: The Politics and Poetics of Museum Display* 1, 2 (Smithsonian 1991).

70. Stephan O'Regan, *Maori control of the Maori heritage*, in Peter Gathercole and D. Lowenthal, eds, *The Politics of the Past* 99, 103-104 (Routledge 1994).

71. Id at 104.

72. Id.

73. See discussion at notes 12-14.

More recently, the Uluru-Kata Tjuta Cultural Center opened in Australia's Northern Territory on lands returned to the Anangu tribe by the Australian Government. The center integrates cultural events, historical exhibits incorporating photographs and oral histories, and contemporary arts and crafts.⁷⁴ The building's design takes its curved shape from the ancestral snakes from the Tjukurpa (the culture's story of creation) and incorporates the use of locally produced earth bricks.⁷⁵

In the United States, the opening of the Smithsonian's National Museum of the American Indian in the former United States Custom House in New York City manifests a similar retaking of land and power by the Native American community. The museum's location at the tip of Manhattan between the site of the island's purchase by Dutch traders and the World Trade Center plays upon both irony and history. However, while the museum seeks to be a "living museum" accessioning contemporary artworks, its permanent collections consist of the former George Gustav Heye Foundation's collections. The Heye Foundation's collections included Native American artworks, artifacts, and other examples of material culture which Heye acquired throughout the United States and brought to New York between 1903 and 1954.⁷⁶ Because of the collections' sparse documentation, the museum faces difficult repatriation issues despite its refined definition as an art museum and its commitment to involve Native American staff members, artists, and scholars in directing its activities.⁷⁷

In addition, the preparation for the new museum demonstrated that a mere legal response to resolving issues of material culture would prove inadequate. Prior to the opening of the museum, several museum pieces (including eleven ceremonial Seneca masks) and masked figures were sold at Sotheby's and Christie's auction houses. The sale underscored the fact that, apart from its trafficking provisions, NAGPRA does not apply to private citizens, including collectors and dealers of Native American material culture whose businesses require them to view objects as commodities or investments.⁷⁸

Yet, Sotheby's made an effort to be sensitive to the cultural values held about the masks. In accordance with an agreement between Sotheby's and the Seneca tribe, Sotheby's had written to a Seneca official about the proposed sale of the masks, but did not receive a response in time to stop the sale.⁷⁹ For this reason, the Seneca agreed not to stage a protest at the auction but rather

74. *Aboriginal Culture In an Australian Center*, NY Times E3 (Nov 12, 1995).

75. *Id.*

76. Joseph Bruchac, *The Heye Center opens in Manhattan with three exhibitions of Native arts*, 25 *Smithsonian* 40, 42-43 (Oct 1994).

77. As a Smithsonian museum, the National Museum of the American Indian is subject to the Museum Act, a specific repatriation act directed at the Smithsonian. National Museum of the American Indian Act § 11, Pub L No 101-185, 103 Stat 1342 (1989), codified at 20 USC § 80q-9 (1994). The Museum Act anticipated NAGPRA and entails very similar requirements and procedures.

78. Native American Graves Protection and Repatriation Act, Pub L No 101-601, 104 Stat 3052, codified as amended at 18 USC §§ 1170 (1994).

79. Rita Reif, *A Law, A Legacy And Indian Art*, NY Times H39 (Nov 6, 1994).

watched the masks sell for prices ranging from \$1,000 to \$3,000.⁸⁰ Following the sale and as part of its agreement, Sotheby's intended to contact the buyers to ask them to return the pieces to the Seneca.⁸¹ The case illustrates the difficulty of refraining from the treatment of all material culture as reducible to commodities of discrete economic value. And NAGPRA does not provide a mechanism to do so.

C. HISTORY, ETHICS, AND CONCLUSION

Like Sotheby's in the case of the Seneca masks, museums do not want unethical collections nor do they want to handle collections unethically. Although historically naive or unconcerned about the looting of archaeological sites and material culture, museums have become increasingly sensitive to these issues.⁸² For example, when Congress considered legislation that was intended to protect American museums from claims by foreign governments in the 1980s, the Association of Art Museum Directors rose in strong opposition.⁸³ The Cultural Property Repose Act, never enacted, would have provided that any object held by a museum for two years would be secure against such claims regardless of the method of acquisition.⁸⁴

When Paul Perrot, Director of the Virginia Museum of Fine Arts in Richmond spoke about the need of American museums to condemn rather than endorse the Cultural Property Repose Act (it was seen by him as an attempt to help museums collect illicitly obtained artifacts), he got a round of enthusiastic applause. The two other speakers, the endorsers of the act, were met with polite silence.⁸⁵

The Association of Art Museum Directors voted ninety-nine to seven to refuse to endorse the Cultural Property Repose Act.⁸⁶

Nevertheless, determining the contours of ethical acquisition can be difficult, especially since the categories of sacred object and cultural patrimony will probably not prove coextensive with illicit acquisition. An infinite variety of circumstances may relate to the acquisition of specific museum collections. While the flagrant theft objects and gifts from craftsmen who also possessed the authority to locate ownership or control of objects in a museum demarcate the ends of the ethics of acquisition spectrum, neat categories do not exist. To impose them would be to blunder. Furthermore, in many cases, an object's

80. Id.

81. Id.

82. Alan Shestack, *The Museum and Cultural Property: The Transformation of Institutional Ethics*, in Phyllis Mauch Messenger, ed, *The Ethics of Collecting Cultural Properties: Whose Culture? Whose Property?* 93, 95 (New Mexico 1989).

83. Id at 93-94.

84. Id.

85. Id at 95.

86. Id at 94.

documentation is extremely sparse or limited to what might be gathered from the physical mutilation of the object in moving it from its point of origin to a museum.⁸⁷

Larger trends also inform the question of how ethically a collection arrived at a given museum. For instance, exchanges between early anthropologists and Native Americans cannot be considered in the absence of thoughtful discussion about their vastly different economic resources and the possibility of coercion. Curtis Hinsley alludes to this issue in his discussion of an exchange between Smithsonian anthropologist Frank Cushing and the Oraibi of the American Southwest in 1883.⁸⁸ Cushing said:

“I have asked one of your chiefs at Walpi what it was that was most needed by his children. According as he instructed I have brought abundance of all things. These things I will give you in return for your old vessels and implements, your worn out apparel, and the ancient things your fathers used.”

Challenged and insulted [by the Oraibi] in response, Cushing switched his approach:

“Have you children and wives? Do you love them, or do you speak as windstorms do, thinking of nothing? For your children are naked in winter, and your women are hungry with nourishing them. Food I have, and fabrics soft to the touch and bright to the eye.”⁸⁹

Over the subsequent decades of increased migration from the East Coast into the Southwest, these questions took on different nuances. During the 1920s and 30s, a number of philanthropic organizations came to view indigenous artistic traditions as Native American groups' most viable means of transcending poverty.⁹⁰ The efforts of these organizations to subsidize artists, commodify their work, and to place “traditional” objects into the stream of commerce and into the nation's civic institutions have been harshly challenged as not really “saving” Native American cultures at all, but rather as fundamentally altering

87. In this context, the word “documentation” takes on a sweeping definition. For purposes of evaluating collections, documentation includes, but is not limited to, accession records, relevant fieldnotes, journal entries, archaeological contexts, publications, diaries, receipts, general information about the agents involved with accessions and any information which Native American groups might be able to contribute such as the role of various objects in oral traditions or narrative stories. All of these forms of documentation can potentially inform the decisions museums and Native American groups agree upon with respect to the disposition of material culture.

88. See Hinsley, 16 *Museum Anthropology* at 18-19 (cited in note 11).

89. *Id.* at 19, quoting Elsie C. Parsons, *Contributions to Hopi History*, 24 *American Anthropologist* 253, 262 (1922).

90. Edwin L. Wade, *The Ethnic Art Market in the American Southwest 1880-1980*, in George W. Stocking, Jr., ed, *Objects and Others: Essays on Museums and Material Culture* 167, 176 (Wisconsin 1985).

the methods, materials, and purposes of artistic production.⁹¹ Thus, the site of these events along the ethical spectrum has undoubtedly shifted in the years since the objects were produced. But to where? On the one hand, the economic incentives must have been overwhelming. On the other, the producers of the material culture designed for the consumer art market must have been conscious of the potential exploitation of their culture and may have made distinctions in their production of sacred objects, objects of cultural patrimony, and objects for sale. And yet, this twentieth century experience may itself confer the character of cultural patrimony upon these objects depending on how deeply these pressures affected the particular styles, livelihoods, and cultural traditions of the groups who valued or produced the objects.

Despite the broad range of circumstances and contexts characterizing the acquisition of objects and collections, museums can begin the evaluation process with fairly systematic inquiries into their objects, collections, and corresponding documentation.⁹² Working chronologically, museums can begin evaluations by investigating who produced a given object, used the object, and controlled it. Museums can then ask which culture or group this individual or group of individuals belonged to and whether someone came from outside the boundaries of that culture or group to acquire the object. Did a member of the culture or group transfer the object to a recipient? If so, under what circumstances and did that individual have the culturally determined authority to make the transfer? If an object came from an archaeological context, can the museum accurately identify descendant populations? Do multiple populations present themselves and do their interests conflict? In cases of objects or collections that lack sufficient documentation to answer these questions specifically, museums might still investigate the social and economic contexts of the culture or group during the period in which the acquisition was made and analogize to more fully documented cases in order to assess the implications and consequences of the outflow of material culture. Minimally, museums will be able to provide information on the management of objects and collections in their care. Thus, with a broad sense of documentation and solid historical research, museums and Native American groups will face the task of resolving the disposition of relatively few objects or collections upon an absolute dearth of information about the histories and ethics of these acquisitions.⁹³

91. Id at 185-87.

92. For a functional definition of "documentation," see note 87.

93. As described in note 8, the District Court of Hawaii in *Na Iwi O Na Kupuna O Makapu v. Dalton* held that the Bishop Museum did not violate the terms of NAGPRA in conducting physical anthropology research upon four sets of human remains in order to determine the cultural affiliation of the remains in light of multiple claims. *Na Iwi O Na Kupuna O Makapu*, 894 F Supp at 1415-18. While the ethics and needs for this type of research are certainly subject to debate on a case by case basis, *Na Iwi O Na Kupuna O Makapu* suggests by analogy from human remains to material culture that few cases will face circumstances where no potential avenues for historical inquiry are available.

Researching the questions posed above can greatly inform museum discussions with Native American groups as they develop appropriate, forward-looking dispositions for sacred objects, objects of cultural patrimony, and other collections. However, these resolutions must also compensate for the fact that Congress has not provided funding to Native American groups for the conservation or other care of repatriated human remains, funerary objects, sacred objects, or objects of cultural patrimony. To name a few of the possibilities museums could consider, they could introduce culturally sensitive standards and methods of storage, confer with Native American groups about exhibition topics and designs, negotiate the terms and purposes for access to sensitive materials, and consider replications, computer imaging and on-line access, as well as legal arrangements involving loans and shared control.

In conclusion, this Comment has drawn upon a number of topics including legal terminology, the nature of material culture, customary law, and the histories of museums and modern Western art to argue that NAGPRA can be understood as implementing a set of processes with respect to material culture that carry important cultural and political functions. The politics of NAGPRA make the Act a natural outgrowth of the institutional histories which prompted it. In writing the next chapter of their histories, museums must respond to these politics. In the face of NAGPRA's difficult legal definitions of cultural patrimony and sacredness, this response will entail a new theme, one of balancing interests and interpretations, and museums will find that the histories of their collections and the ethics of both acquisition and collection management will provide the best background for this endeavor. Such an approach will allow museums and Native American groups to resolve each NAGPRA claim through its case specific context, accounting for the disparate and particular needs and cultural conceptions of ownership among Native American peoples. Furthermore, it will enable museums to operate into the future with confidence about both their policies and their purposes. To the extent that museums prove successful at balancing their interests and interpretations with those of Native American groups, they will participate in the cultural vitality of Native American peoples while continuing to serve as instructive and essential civic institutions. These are not mutually exclusive goals. In fact, combining them will ensure that ethnographic and archaeological museums achieve some of the most important aims of anthropology as the uniquely human and moral science it aspires to be.