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Legal Consciousness and the Legal Culture of NAGPRA

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INTRODUCTION

NAGPRA, the Law

In 1990, after years of Native American grassroots activism, the Native American Graves Protection and Repatriation Act (NAGPRA) (Public Law 101-601; 25 USC. 3001-3013), was passed by the Senate and House of Representatives, and signed into law by President George H.W. Bush on November 16th of that same year (Stoffle & Evans, 1994). Widely referred to as human rights legislation, NAGPRA addresses the rights of lineal descendants and members of federally recognized Native American[1] tribes, Native Hawaiian organizations, and Alaska Native villages with respect to human remains and cultural items with which they are affiliated (Ibid.). NAGPRA was created to:

> Protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, objects of cultural patrimony on Federal, Indian and Native Hawaiian lands. The Act also sets up a process by which Federal agencies and museums receiving Federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects (H.R. Report No. 5237, 101 Congress, 2d Session 14, 19).

One major purpose of NAGPRA, that is largely what is discussed in this thesis, is that it facilitates the repatriation of Native American ancestral remains and "cultural items," which the law defines as *associated funerary objects* (AFOs) — objects part of a death rite or ceremony intentionally placed with human remains — *sacred objects* — specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional religions by their present-day

[1] Throughout this thesis, I will use the term "Native American" to refer to the Indigenous peoples of North America, unless quoting or referring to a quote where they are referred to as otherwise. Unlike in NAGPRA, I use "Native American" to refer to both federally recognized and non-recognized tribes unless otherwise specified. This is the term I was taught to use out of respect throughout my education, and thus the term I am used to using. However, I understand that many groups of people are included under the umbrella term of "Native American," such as Native Hawaiian organizations and Alaska Native villages, and I also understand that this term is widely debated and contested. So, throughout this thesis, I deploy this term mindfully and acknowledge that I do not know, nor do I have the authority to decide what is the right term to use.

adherents — and *objects of cultural patrimony* — objects that have ongoing historical, traditional, or cultural importance central to a Native American group or culture itself, rather than property owned by an individual (NAGPRA, 25 USC § 3001).

Under NAGPRA, federally funded museums and institutions[2] are required to make a "good-faith effort" to inventory their holdings of Native American human remains and funerary objects, as well as provide written summaries of other cultural items defined by NAGPRA (Ibid). These institutions are then required to consult with Native American tribes in order to attempt to reach agreements on the repatriation or other disposition of these remains and objects. To monitor and enforce compliance NAGPRA established a Review Committee[3] whose purpose is to monitor the inventory and identification process of cultural items, supervise and review repatriation efforts, and facilitate and make recommendations on the resolution disputes regarding repatriation or cultural affiliation (NAGPRA, 25 USC § 3001). NAGPRA also establishes penalties for both criminal and civil violations under the law. One who knowingly commits the following may be punished by imprisonment, a fine, or both: 1) "Sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American"; or 2) "Sells, purchases, uses for profit, or transports for sale or profit any Native American cultural item obtained in violation of NAGPRA" (Ibid).

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[2] As they are defined as the same thing under the law, I will use the terms "museum" and "institution" interchangeably throughout this thesis.

[3] The NAGPRA Review Committee is composed of seven members: three are appointed by the Secretary of the Interior from nominations submitted by Native American tribes and traditional Native American religious leaders, with at least two of such persons being traditional Native American religious leaders; three are appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and one appointed by the Secretary from a list of persons developed and consented to by all of the members already appointed (NAGPRA, 25 U.S.C. 3006(b)).

In order to request repatriation, tribes must prove *cultural affiliation* — "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day [federally recognized] Indian tribe or Native Hawaiian organization and an identifiable earlier group" (Ibid, Section 2). NAGPRA operates on a preponderance of evidence (more likely than not) standard when determining cultural affiliation. It allows for diverse lines of evidence to make a determination — geographical, folkloric, archaeological, biological, expert opinion, linguistic, kinship, traditional indigenous knowledge, and historical — giving Native history and ways of knowing supposedly the same weight as those that may fall within a more Western framework of knowledge (although as I will discuss later in this thesis, this is not always the case) (Atalay et. al., 2017).

If institutions are unable to make a determination of cultural affiliation, or decide the evidence provided by tribes is not enough, they categorize the object or ancestral remains as *culturally unidentifiable* (CUI) (Ibid.). When NAGPRA was first passed in 1990, institutions were only given five years to determine cultural affiliation. As such, a significant number of objects and remains were hastily lumped into the CUI category, even though there may have been enough evidence to make a determination, largely due to institutions' lack of money and staff to complete inventories in time (Atalay et. al., 2017). Also, many ancestors and belongings of non-federally recognized tribes were put into the CUI category, as NAGPRA did not mandate their return (Gould, 2017).

In 2010, Section 10.11 was passed in order to address these CUI objects and remains and allow non-recognized tribes a pathway to the repatriation of their ancestors. Although a step in the right direction, Section 10.11 was highly controversial because it *required* the return on CUI remains, but only *suggested* the return of their AFOs — so, "Native people can get Grandma back,

but not her moccasins, not her shawl" (Harjo, 2010: 155). This not only makes it difficult for a Native community to determine who this individual was, but not receiving a burial intact can be seen as a form of dismemberment, and reburial may no longer be an option (Ibid).

Nevertheless, NAGPRA is largely seen as a triumph of legislation in the archaeological and Native community. Over the past three decades, it has facilitated thousands of repatriations and meaningful consultations and collaborations between the archaeological community and Native Americans. In the spirit of the law (its intent), NAGPRA is about confronting and attempting to rectify historical wrongs. According to Chip Colwell in his book *Plundered Skulls and Stolen Spirits: Inside the Fight to Reclaim Native Americas Culture*:

> Since 1620, when the Pilgrims first dug into an Indian grave not far from Plymouth Rock out of curiosity, Native Americans had lost control over the graves of their ancestors. In the wake of colonialism, they had lost so many sacred things that gave their culture its meanings and its strength. For generations, Native Americans were outsiders to their own heritage as scientists and curators were entrusted to decide the fate of their material culture. Indian skulls and scalps were collected with impunity. All of this changed on November 16, 1990, when President Bush signed NAGPRA into law. With a swift stroke of the president's pen, the Unites States government reversed 370 years of history (108).

Although, 370 years of history cannot reversed — no law can erase the abuse endured by Native Americans at the hands of anthropologists, archaeologists, and the federal government — the implementation of NAGPRA has prompted anthropologists and archaeologists to take a step back and examine their profession with a critical eye, acknowledging the field's deep history of cultural exploitation and the harsh realities of colonialism and imperialism (Brown & Bruchac, 2006). Although some archaeologist and museum practitioners (still) seek to "defend" science against what they "scornfully dismiss as the emotionalism and science hatred of the repatriation movement," today, this view is uncommon (Ibid: 194).

In fact, one of the main feats of NAGPRA stems from the required consultations between museums and Native Americans. According to anthropologist Nina M. Versaggi, consultation allows for the unique "opportunity for archaeologists and Native peoples to share information, to have a meaningful dialogue, and repair a past of mutual mistrust" (Versaggi, 2006: 20). In the spirit of the law, where practitioners seem to locate the intent and morality of the law beyond the text of the actual legislation, museums and Native Americans can build mutually beneficial relationships that can create opportunities for collaborative exhibits and research, as well as networks of support and knowledge. Through these valuable and productive relationships and collaborations conceived in the spirit of the law, NAGPRA practitioners has built around it a rich legal culture around the law. this thesis will explore the question *What is the legal culture of NAGPRA?* I will examine NAGPRA's legal culture by utilizing Ewick and Silbey's *legal consciousnesses* of *before, with, and against the law*. I will then go on to show that a fourth consciousness, which I will call *beyond the law*, presents itself in the legal culture of NAGPRA and is necessary to more fully address the spirit of the law which a key force in building and sustaining the legal culture of NAGPRA.

THEORETICAL FRAMEWORK AND METHODS

My project consisted of two distinct goals: to chronicle NAGPRA's history (its precedents, development, passage, revisions, and implementation) and to gain insight on the legal culture of NAGPRA by investigating the legal consciousnesses of NAGPRA practitioners. To do so, I have combined aspects of textual analysis/interpretation, and in-depth, semi-structured interviews about NAGPRA and other Native American federal policy. This was all in an effort the counterbalance the objective, rational, and dogmatic nature of law in general with its more subjective and flexible social implications. My focus on both the objective and subjective importance of NAGPRA served in gaining insight on the legal consciousnesses of the NAGPRA practitioners with whom I spoke, as well as what is widely referred to as "the spirit of NAGPRA" — again, where practitioners seemed to locate the law's purpose and moral basis beyond the letter. As I will show, it is in this fourth legal consciousness — beyond NAGPRA — where most of the meaningful work (as considered by its practitioners) is accomplished between museums and tribes.

I began my research centered purely in the law itself. In the summer of 2019, I critically read NAGPRA (and related government documents) and deeply familiarized myself with the text and language of the law, as well as its meaning and implementation process. The National Park Service (NPS) website has an in-depth NAGPRA section that includes pages providing information on how to complete inventories and summaries, report a discovery on state or public land, or make a request to the Review Committee. It also provides important resources like NAGPRA training videos and webinars; the meeting minutes from every single Review Committee meeting; summary and inventory databases; a spreadsheet of NAGPRA tribal contacts; a glossary of NAGPRA terms; and templates for inventories, summaries, and notices. I found myself returning to the NPS website in my initial stages of research for these "nitty-gritty" details

of NAGPRA, and then later to gather the information of tribal contacts to interview. For the remainder of the summer, I deeply immersed myself in reading books and articles by various scholars with expertise in NAGPRA, museum studies, cultural property, and legal anthropology. I also studied Native American federal legislation in the United States pre-NAGPRA to help inform what I hoped to explore in my upcoming interviews with NAGPRA practitioners in the fall, as well as my later analysis of their responses — for example, if Native Americans have felt continually let down by past federal policies, this could help explain a more jaded view of NAGPRA today — or, if critiques of past Native American federal policies are/are not addressed, this could also affect both current Native and non-Native perspectives on NAGPRA.

Theoretical Framework

According to British legal scholar David Nelken, the idea of legal culture "points to differences in the way features of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society" (Nelken, 2001: 25). My project was largely inspired by American sociologists Patricia Ewick and Susan S. Silbey's 1998 publication *The Common Place of the Law: Stories from Everyday Life* that examined American legal culture. In their research, Ewick and Silbey focused on "collecting stories" and "having conversations" to learn how the law[4] presents itself and is perceived in an individual's everyday life. I did the same in my interview process to see how NAGPRA is presented and perceived within its own legal culture. Storytelling "extends temporally and socially what might otherwise be an individual, discrete, and ephemeral transaction," as well as offer information on

[4] Here, "the law" is used in the general sense, referring to any sort of formal rule or process connected to a legal institution — not specifically NAGPRA.

what an informant may initially think is irrelevant or unimportant (Ewick & Silbey, 2003: 1328). Often, in storytelling informants name and thus expose "what goes without saying" (Ibid: 1329).

French anthropologist and sociologist Pierre Bourdieu refers to the experience of parts of the social world appearing as self-evident and almost commonsensical — what an individual may consider "goes without saying" — as *doxa* (Bourdieu, 1977). According to Bourdieu, "every established order tends to produce (to very different degrees and with very different means) the naturalization of its own arbitrariness" (Ibid: 164). So, the way in which the social world operates (e.g. its norms, tendencies, beliefs, power, relationships, social or class structure, etc., *and* how they are re/produced and re/legitimized) could be completely otherwise and is often taken for granted, creating a doxic environment. I think that Bourdieu's view is important to consider when interviewing and "collecting stories" because in the "doxic mode," one may not realize that the parts of their answers they consider to be tangential, may turn out to be incredibly illuminating and insightful. The taken for granted is especially salient when determining *legal consciousness*.

Ewick and Silbey describe legal consciousness as "what people do as well as say about law" — how the law is understood, exercised, and sometimes resisted (Silbey, 2008). They introduce three consciousnesses that people may hold: *before the law*, *with the law*, and *against the law*. In this thesis, I will also propose a fourth legal consciousness: *beyond the law*. I will define and expand on what exactly these entail in the next section of this thesis. These concepts represent four distinct schemas that show how individuals see themselves in the world. They are ways of understanding how the law works in relation to the self — the extent to which an individual believes they are defined by the law and entitled to its protections (Merry, 2010). Any person may have more than one consciousness, deployed at different times depending on the situation and past experiences.

Each consciousness portrays legality as a particular configuration of *capacity* (what gives the law and its actors power) and *constraint* (what controls/inhibits the power of the law and its actors) (Ewick & Silbey, 1998). Capacity and constraint are organized to achieve a *normative ideal* — the "distinctive moral bases of legality" and what "determines the conditions under which people think law should or should not be mobilized" (Ibid: 191). Each consciousness also locates legality differently in time and space. Ewick and Silbey assign archetypes to represent how the law is viewed and carried out by actors in relation to the particular consciousness they may hold. Below is a table that Ewick and Silbey provide to organize legal consciousness with my addition of beyond the law:

	Before the Law	With the Law	Against the Law	**Beyond the Law**
Normativity	impartiality, objectivity	legitiamate partiality, self interest	power, "might makes right"	**accountability**
Constraint	organizational structure	contingency, closure	institutional visibility	**institutional/ community/ personal will, priority, ability**
Capacity	rules, formal organization	individual resources, experiences skill	social structures (roles, rules, hierarchy)	**relationships**
Time/Space	separate sphere from everyday	simultaneous with everyday	colonizing time/space of everday life	**the future**
Archetype	bureaucracy	game	making do	**the spirit of the law**

Table 1: Legal Consciousness. Adapted from *The Common Place of the Law: Stories from Everyday Life* (224), by P. Ewick and S. Silbey, 1998, Chicago University Press.

Legal consciousnesses comprise, influence, and are influenced by legal culture, which covers a wide range of actions related to and interactions with the law. These actions and interaction include "the nature of the legal profession, the importance of the judiciary, and the nature and extent of legal training, as well as ideas about what law is for, where it is to be found,

and how regulation and dispute resolution should take place" (Merry, 2010: 40). Ewick & Silbey (1998)'s description of legal culture shares the same broadness. It could be conceived that the law and our interactions with it are almost doxic in nature:

> American society is filled with signs of legal culture. Every package of food, piece of clothing, and electrical appliance contains a label warning us about its dangers, instructing us about its uses, and telling us to whom we can complain if something goes wrong. Every time we park a car, dry-clean clothing, or leave an umbrella in a cloakroom, we are informed about limited liabilities for loss. Newspapers, television, novels, plays, magazines, and movies are saturated with legal images, while these same cultural objects display their claims to copyright (xi).

Here Ewick and Silbey show that the law in a legal culture perspective (as understood by jurists) presents itself in all aspects of everyday life and often goes unnoticed. Every interaction with legal culture (doxic or not) informs an individual's conception of the law, which, in turn, informs their legal consciousness and the different schemas they employ. An individual's legal consciousness, then, informs how they will proceed (if at all) with an interaction with legal culture (e.g. whether they will call the company if an item is defective, or if they will sue the parking garage if their car is damaged). How readily people define their problems in legal terms and/or turn to the law for help is referred to as *legal mobilization* (Merry, 2010: 44). As in any sort of consciousness, legal consciousness is not solely of the individual, but is collective. Ewick and Silbey state that legal consciousness can be understood through the "reciprocal process" in which the meanings individuals assign to the world become "patterned, stabilized, and objectified" and, once institutionalized, part of the "material and discursive systems that limit and constrain future meaning making" (Silbey, 2008: 1).

Similarly, American anthropologist Clifford Geertz suggests a cultural approach to law, arguing that law is not simply a bounded set of norms, rules and principles, but a frame within which the world is made sense of (Merry, 2010). This frame is crystalized into concepts (Ibid.).

He theorizes that culture is "structures of meaning in terms of which individuals and groups of individuals live out their lives (Geertz, 1983: 182). These symbols and systems of symbols are shared and public. They constitute, communicate and alter structures of meaning in the domain of law (legal culture) as well as in other domains of social life (Merry, 2010). So, if Ewick and Silbey understand legal consciousness as systems of structures that reflect and form meaning making, then Geertz would likely understand it as component of culture, or more specifically, legal culture. Thus, this shows how legal consciousness provides insight into legal culture in that it is both a component of and can be used as an analytical tool to assess it.

According to Bourdieu, social structures produce *habitus* — the (unconscious) embodiment of a doxa (Bourdieu, 1977). Habitus is "a system of dispositions, that is of permanent manners of being, seeing, acting and thinking. Or a system of long-lasting (rather than permanent) schemes or schemata or structures of perception, conception and action" (Bourdieu, 1977: 27-28). So, for example, habitus can be anything in the realm of social norms, taste, etiquette, routine, prejudice, beliefs, values, or societal expectations.

So, legal consciousness, too, seems to be schemes of "perception, conception and action," specifically within legal culture. Perhaps legal consciousness could then be considered the habitus of legal culture. Habitus is the "built-in" way that we perceive and categorize things in the world (because of how we were raised, with whom we associate, what we read, what we watch on television, what we learn — or do not learn — in school), without even realizing it, and structures our tastes and actions (Jurafsky & Matsumoto, 2017). In my conversations with NAGPRA practitioners I saw how seemingly unrelated personal histories and experiences like taking long childhood walks with one's grandmother, being part of model UN in high school, or growing up as a middle child served in structuring and influencing practitioners' perceptions of and

proceedings with NAGPRA. Uprooting habitus and recognizing its mere existence helps us form a more robust picture of our own or another peoples' culture by answering the question *Why are we/people like this?* (Ibid.). Subsequently, uprooting, detecting, and categorizing legal consciousness helps to answer questions like *Why are laws created?, Why is the law followed/resisted?, What does following the law look like?, How is the law perceived?, When/why do people turn to the law for help? What are common/alternative dispute resolutions? How do laws change?*— different answers to these questions constitute different legal cultures

It is also important to address the structures of power at play when analyzing NAGPRA and the interactions of its practitioners. Ewick and Silbey more explicitly understand structure (created and embodied by what they consider "material and discursive systems") in the Foucaultian sense (Silbey, 2008: 1). In French historian and philosopher Paul-Michel Foucault's work, he understands structures as systems of knowledge and meaning that are shaped/legitimized by those who are in power and contextualized through history (Foucault, 1976). So, I think that Foucault's emphasis on power and historical context, too, is salient to the law regarding NAGPRA due to the age-old and ongoing marginalization of Native Americans in the United States. It is those in power that legitimized NAGPRA through legislative action (i.e. the federal government). It is also those in power that created the need for the law in the first place (i.e. collectors, universities, museums, and archaeologists) due to archaeology's complicated history of collecting, displaying, decontextualizing, and exoticizing stolen and pillaged Native American remains and cultural items.[5] I also acknowledge that my own power and positionality affect my research and the "truths" I am producing in my writing. As a white, American, middle-class, college-educated woman, I am

[5] See: *Plundered Skulls and Stolen Sprits: Inside the Fight to Reclaim Native America's Culture* by Chip Colwell.

not only part of the "dominant" culture that displaced Native Americans, stole their land, and looted their graves, but I am also writing from within an institution that unjustifiably holds their cultural property.

Methods

In October 2019, I reached out to potential participants via email asking if they would be interested in an interview. In the emails, I included a brief abstract of my thesis. I chose possible participants from the NPS tribal contacts spreadsheet or from the texts the I read throughout the summer — participants may have been cited, interviewed, or even authors. I tried to speak to a diverse range of NAGPRA practitioners — varying in region, tribal affiliation, tribal recognition, occupation, institutional affiliation, and years of experience. However, due to scheduling conflicts, possible incorrect contact information, and just by virtue of people being too busy, I did not get to interview everyone I had originally intended. Although they are included under NAGPRA, I did not have the opportunity to speak to any individuals from Alaska Native villages[6] or Native Hawaiian organizations,[7] which, to varying degrees, hold separate statuses under federal law than

[6] The usage of the term "Alaska Native" predominates because of its legal use in the Alaska Native Claims Settlement Act (ANCSA) of 1971. ANCSA is a comprehensive law regarding the land rights of Alaska's eighty thousand indigenous inhabitants. It significantly modified the nature of the federal government's relationship with Alaska Natives. Unlike most Native American reservations, which are held "in trust" on behalf of the tribes by the United States, Alaska Natives own and have sole power over their land. ANSCA transferred 43.7 million acres of land and $962.5 million in compensation for extinguishment of Alaska Native claims to land based on indigenous title. It created 13 regional corporations and over 200 village corporations — each corporation was granted land and money. These corporations administer federal and state health, housing, and other services to Alaska Natives in their respective regions. However, in 1998, the Supreme Court case *Alaska v. Native Village of Venetie Tribal Government* held that much of this Alaskan Native land did not qualify as "Indian Country," muddying the recognition of their status as tribal governments. Still, Alaska Natives try to exercise their sovereignty as much as they can (Wilkins, 2002). As such, Alaska Native governments are federally recognized and hold a separate, yet related, status to continental tribal governments and are distinguished in the letter of the law.

[7] Native Hawaiians have a unique legal status among peoples indigenous to the United States. Currently, they are not federally recognized but have a pre-existing sovereign status from before the illegal overthrow of Queen Lili'uokalani in 1893 and Hawaii's annexation in 1898. There have been multiple instances, such as the Akaka

continental tribal governments. As a result, my research focuses only on Native American groups and NAGPRA practitioners in the continental United States.

Also, I understand that participation in my research was relatively self-selective. Participants were used to talking about NAGPRA and believed that the law was a generally positive thing. Thus, this is reflected in their legal consciousnesses reported in this thesis, for example.

In all, I conducted a total of 11 interviews:

Participant Name	**Occupation/Relationship to NAGPRA**	**Date of Interview**
Jennifer (Jen) Shannon	Curator of Ethnology at the Museum of Natural History at the University of Colorado Boulder, Associate Professor of Cultural Anthropology at the University of Colorado Boulder, and a creator of *NAGPRA Comics*.	October 8, 2019
Anne Amati	NAGPRA Coordinator and Registrar at the University of Denver Museum of Anthropology.	October 15, 2019
John Swogger	Archaeologist, archaeological illustrator, and creator of *NAGPRA Comics*.	October 16, 2019
Bonnie Newsom	Former Chair of the Repatriation Review Committee for the Smithsonian Institution, Former Tribal Historic Preservation Officer for the Penobscot Indian Nation, and Assistant Professor of Archaeology at the University of Maine.	October 23, 2019

Bill (proposed in 2000), in which motions have been made in attempt to enact legislation to clarify and formalize the political status of Native Hawaiian organizations. The Akaka Bill would also create a framework for recognizing a government-to-government relationship of Native Hawaiian organizations with the federal government. This would allow for self-governance and self-determination — much like the sovereignty of federally recognized Native American tribes and Alaska Native villages. The sovereignty movement in Hawaii is complex, and some segments of the population desire more than just federal recognition. Others, however, believe that federal recognition is not a legitimate path to Hawaiian nationhood (and may even impede it), and that the United States government should not be involved in re-establishing Hawaiian sovereignty after the illegal overthrow and annexation of the kingdom. However, although they are not on the Department of the Interior's list of federally recognized tribes, Native Hawaiians *are* treated as federally recognized Native Americans for some legal purposes, like in NAGPRA, due in part to their pre-existing sovereignty (Wilkins, 2002). As the federal recognition and legal status of Native Hawaiian organizations is still up for debate, they are distinguished from Native Americans and Alaska Native villages in the letter of the law.

Chip Colwell	Curator of Anthropology at the Denver Museum of Nature and Science and author of *Plundered Skulls and Stolen Spirits: Inside the Fight to Reclaim Native America's Culture*.	October 29, 2019
Shannon Keller O'Loughlin	Executive Attorney for the Association on American Indian Affairs and citizen of the Choctaw Nation of Oklahoma.	October 31, 2019
Sandra Dong	NAGPRA Coordinator at the Peabody Museum of Archaeology and Ethnology at Harvard.	November 5, 2019
Ian Thompson	Director of the Historic Preservation Department, Tribal Archaeologist, NAGPRA Specialist, and former Tribal Historic Preservation Officer for the Choctaw Nation of Oklahoma, and the Chair of the Repatriation Review Committee at the Smithsonian National Museum of Natural History.	November 8, 2019
Deanna Byrd	NAGPRA Liaison-Coordinator of the Choctaw Nation of Oklahoma.	February 19, 2020
Donna Moody	Former Repatriation and Site Protection Coordinator for the Abenaki Nation[8] and Adjunct Professor of Anthropology at Franklin Pierce University.	February 26, 2020
Amy Margaris	The Chair of Anthropology and Archaeological Studies at Oberlin College and Oberlin's NAGPRA Compliance Officer.	February 26, 2020

Table 2: NAPRA Stakeholder Interviews

Once they agreed to an interview, they were sent a list of possible questions and a copy of a consent for audio recording and transcribing their interview.[9] Legal culture and legal

[8] The Abenaki Nation is only federally recognized in Canada, and therefore is not subject to NAGPRA. However, repatriation with NAGPRA is possible and had been done (not just by Moody and the Abenaki Nation), but it requires a few extra steps. I will discuss repatriation under NAGPRA with non-federally recognized tribes at a greater length later in this thesis.

[9] See Appendix III for a copy of "Informed Consent Form for Audio Recording and Transcribing Interviews."

consciousness can be measured by asking people questions about how they think about the law and by watching what they do — for example, you can ask a person what they think about speed limits and watch how fast they drive (Merry, 2010: 47). As, practically speaking, I could not go in and watch each of my participants at work, I made sure to craft questions addressing attitudes about NAGPRA *and* NAGPRA in practice. For the sake of time, I did not always get to every item on my list, but they were often addressed in some way or another throughout the conversation. Below is the list of questions I used in interviews and sent along to each participant:

1. Tell me about your own personal involvement with NAGPRA.
    a. How long have you personally/professionally been involved?
    b. How has NAGPRA affected your work or research?
2. Tell me about your profession's involvement in the NAGPRA process.
3. How has your overall experience with NAGPRA been?
    a. Do you find the NAGPRA process simple or difficult?
    b. Does the law provide proper and easy to follow guidelines?
    c. How often does the review committee get involved?
    d. Do all sides seem to evenly cooperate?
4. Could you share a personal experience of repatriation involving NAGPRA that you feel adequately exemplifies the NAGPRA process or your experience with it?
    a. Why do you think NAGPRA worked or did not work for this specific case?
5. What would you say are the strengths and weaknesses of NAGPRA?
    a. Can/How can NAGPRA be improved?
        i. Where can we start?
    b. Is it possible to have a "perfect," "one-size-fits-all" law for such complex and different cases and identities?
6. What will NAGPRA look like in the future?
    a. What are your hopes for the law?
    b. Are you personally taking any steps to make any additions or changes that you see to be necessary?

When creating these questions and conducting interviews, I found it important to acknowledge that although I am not part of NAGPRA's legal culture as a practitioner, I am a part of American legal culture, as is NAGPRA, and as are those I interviewed. I am an outsider to my study, but, at the same time, I very much am not. The challenge with studying one's own society is gaining enough distance. Palestinian-American anthropologist Lila Abu-Lughod suggests, "the

outsider self never simply stands outside," but instead they "[stand] in a definite relation with the Other of the study" (Abu-Lughold, 1991: 468). What anthropologists sometimes consider the "outside" is "a position within a larger political-historical complex" (Ibid.). I know that as a member of American legal culture, I am affected, at least in part, by the same doxa as my participants. What goes without saying, may also go without asking. As such, I had to consider that I did not necessarily have all the "right" questions, no matter how open-ended I tried to make them. Without even realizing it, I may have been searching for or expecting specific answers with my prompts. So, in an attempt to distance myself, I ended each conversation with a question that would give participants sole control over the conversation by asking *Was there anything else you were particularly excited to talk about?* or *Did you have any questions for me?* These questions hopefully in part picked up what I could have missed by just using my list of prepared ones (made, of course, in a doxic environment).

After each interview, I transcribed the conversation in full, making only minor edits for clarity and removing filler words. In accordance with the consent form and my Institutional Review Board Request for Review (Non-Exempt),[10] the audio from interviews was deleted after each transcription was completed. I then analyzed each transcription, paying close attention to not only how each individual talked about NAGPRA, but also law in general — seeing how professional, personal, and legal experience may have informed their legal consciousness and therefore their thoughts and feelings about NAGPRA (e.g. its strengths and weaknesses; their general understanding of its language and procedures; its impact on their life, work, or research; its impact on their relationships with practitioners and stakeholders; their perception of the "spirit

[10] See Appendix II for a copy of my Request for Review.

of the law"). I then used participants' legal consciousness to help answer my question: *What is the legal culture of NAGPRA?*

To answer this question, in the following chapters I will break down and analyze each of the four legal consciousnesses, before, against, with, and beyond the law, and exemplify how participants presented each throughout my interviews.

RESULTS: BEFORE, WITH, AND AGAINT THE LAW

Before NAGPRA

According to Ewick and Silbey, when a person is *before the law* they see it as a place, rather than a system of ideas or persons, independent of human action, desire, or interest (Ewick & Silbey, 1998). As such, before the law people see it is impartial, objective, and rational. Technical procedures and rules are understood to define the boundaries of legal agents' legitimate action as well as define to what one may or may not be entitled (Ibid.). These rules and regulations are given authority and empowered through *textualization* (what is "on paper") (Ibid.).

Before the law, people also view its time and space as timeless and transcendent, and separate from everyday life (Ibid). As the law itself is expansive and seems to "extend the linear, finite, and irreversible lifetime of any individual," relevant time exists long before and beyond the present (Ibid. 95). As Ewick and Silbey say, "The past can meet and control the present, but the present can reverse the past as well." In other words, its timelessness not only makes the law cumulative and expansive, but put also reversible — although precedence is powerful, laws can be overturned or amended (Ibid).

Within NAGPRA's legal culture, respondents suggested that they were before the law primarily in three distinct, yet interrelated ways: 1) they understood NAGPRA's time/space as extraordinary and expansive, extending the past into the present day — I refer to this particular phenomenon as standing before the *deep time* of NAGPRA; and 2) they recognized NAGPRA's capacity to ensure and protect the rights of Native Americans as centered in its textualization.

The Deep Time of NAGPRA

NAGPRA's roots run far down into North America's past. The deep time of NAGPRA brings along with it the people and things that claim it as their own. It begins before the law's

passage in 1990, and before the creation of the of the U.S. federal government and U.S. Constitution in 1789. Deep time stretches beyond European colonization and contact in 1492, and past the creation of Archaeology and Anthropology as disciplines. NAGPRA's deep time begins with what is at stake: arguably, it begins with the lives of Native American ancestors and the creation of Native American material culture. Archaeological evidence supports that Native Americans came to the continent at least 15,000 years ago, and Native American oral histories, too, support a time deep in the past (Mann, 2010). As such, the deep time of NAGPRA is profound and bring s with it every Native American life ever lived and act of Western colonization ever committed. The deep time of NAGPRA can hang like a cloud over a consultation. It can stand like a wall between an archaeologist and Native American, museums or federal agencies and tribal entities, colonizer and colonized, human and human. The deep time of NAGPRA is the elephant in the room. It disconnects and intimidates. It forces a reckoning.

Both Native and non-Native participants demonstrated that they were before the law by understanding NAGPRA's time/space as timeless, expansive, deep by situating the law's purpose in history. They considered the purpose of NAGPRA as something greater than simply the present return of ancestors and cultural items. NAGPRA is thought of as a mechanism to confront and acknowledge difficult histories of the colonization and exploitation of Native Americans. Participants saw NAGPRA as providing the framework to hold museums, archaeologists, and federal agencies accountable for the actions of their predecessors, of their colleagues, and of themselves.

Chip Colwell, Curator of Anthropology at the Denver Museum of Nature and Science, spoke specifically about museums taking accountability for their actions and through their actions by being proactive in NAGPRA:

> *Museums have an obligation to clean up the mess that was created. Tribes did not ask for their ancestors to be excavated. They did not ask for their ancestors to be held in museums for decades, or even longer. They did not ask for sacred objects to be taken from their community without consent. It was the museums in their often genuine effort to collect and record the world's cultures that they did this. The museum at the time was often not trying to perpetrate a harm. I think that we're in that situation where museums have often taken in collections without fully understanding the spiritual, social, and cultural repercussions on tribes, but now that we know, we should probably do something about it. So, it really is more in that sense that we, as museums, are in a position of recognizing that a mistake was made, problems were created, and we're in a position to help make things better.*

Here, Colwell made an intent versus impact argument. He suggested that despite the "genuine efforts" and good intentions of museums, they still caused the significant impact of "spiritual, social, and cultural repercussions on tribes," and this impact must be mitigated to the best of their abilities. Before the deep time of NAGPRA, intentionality is almost irrelevant. Actors and their intentions are often frozen and immortalized in time as authors of studies, names of museum wings, "Collector" on an object label (this additionally points to the authority of textualization when standing before the law). The intentions of museums, archaeologists, and collectors may have been good, and efforts "genuine," but the deep time of NAGPRA is comprised of actions and impact. It has been built upon and amplified as another body put in storage, another statistic, or another life disturbed, devalued, or ignored.

Shannon Keller O'Loughlin, Executive Attorney for the Association on American Indian Affairs and citizen of the Choctaw Nation of Oklahoma, extended NAGPRA back into the past, discussing how hundreds of years of problematic Native American policy has led up to its passing:

> *The task of, if you want to call it a task — the healing of repatriation and returning those items and ancestors back home is an extremely deep and profound healing experience. When you look at the history of Indian policy in the U.S. — knowing that Hitler used that policy to help his own genocidal efforts, and seeing how our languages were outlawed, our religious practices and cultures, dancing, singing, were outlawed — our children were stolen and taken to boarding schools where they were rid of any evidence of their cultures — not allowed to speak their language, their haircuts, and not allowed in the connection to their families — in*

> *order to assimilate. In order to assimilate indigenous peoples who were attached to place, and attached to their ancestors, and that long line of succession of their peoples, U.S. policy was developed to cut that — in order to take land, in order to progress the country and colonization, and how that has profoundly created the horrible statistics in Indian Country — suicide, I think it's between 12 and 24 year-olds, is the highest in Indian Country than anywhere else; the children in foster care and adoptive placement are higher than any other group, unemployment, heart disease —pull any statistic. This is all the result of that horrendous federal Indian policy that included digging up our ancestors — removing us from the soil, stealing our cultural practices and our religions so that we had no — can you imagine having your identity and everything that made you whole removed? (Shannon Keller O'Loughlin)*

Here, O'Loughlin is before the law because, as Ewick and Silbey would say, because she recognized that "the past can meet and control the present" (1998: 95). She understood that the deep time of NAGPRA, which included digging up her ancestors, is presented in the "horrible statistics" in Indian Country.

Deanna Byrd, NAGPRA Liaison-Coordinator of the Choctaw Nation of Oklahoma, expressed a similar view, extending the law into the past by discussing how NAGPRA was designed to eliminate the racist practices of archaeological community that was rampant pre-NAGPRA:

> *[NAGPRA] was designed to, for all intents and purposes, try to eliminate the racism that prevailed in this country and in the archeological community for years and years…It's no longer just the archeologist or the osteologist or the people that are writing publications and doing these studies on behalf of their own selfish interests, they're now having to have a conversation with individuals that claim these as their ancestors, this is their family, these are their descendant communities, and they're able to have a voice and be able to make decisions and to be an advocate for those ancestors.*

According to Byrd, NAGPRA flips the past practices of archaeologists and museum practitioners by obligating them to have a conversation with Native Americans, rather than simply acting upon them. Thus, just as the deep time of NAGPRA seems to control the present, the present (a world with NAGPRA) can extinguish what may have been accepted in the past.

Given the difficult history comprising the deep time of NAGPRA, Jen Shannon, Curator at the Museum of Natural History at the University of Colorado Boulder, discussed how coming into a consultation and seeing their ancestors and cultural items can uncover a lot of pain and trauma for Native Americans. She noted that this often comes with anger, frustration, and criticism directed towards her.

> *The first thing people often do is, kind of, lay out a critique, or say, "Why aren't all these things back home?" or express the frustration of having to come in and do this kind of work. That's really about acknowledging the past. Just placing people in a kind of unsettled feeling. I think a really important part to remember is not to take it personally. This is about a legacy of colonialism, and people wanting to speak in the place where we're acknowledging that legacy.*

Although Shannon was the subject of these critiques and negative emotions, she made it clear that she does not take it personally, indicating that she is aware that the law transcends both her and the present consultation. Being placed in this "unsettled feeling" is part of the law. It is what comes with standing before "a legacy of colonialism" and the deep time of NAGPRA.

There was a common thread of non-Native participants feeling unsettled, anxious, or intimidated when faced with the deep time of NAGPRA. This may be because to both Natives and Non-Natives, NAGPRA was seen as closely connected to ethics, morality, human rights, and it simply being the "right" thing to do:

> *The NAGPRA law is not about spiritual beliefs. It's not about emotion. It's simply about, you know, finally somebody did the right thing. (Donna Moody)*
>
> *To me, NAGPRA is human rights legislation. (Ian Thompson)*
>
> *I took [on the task of getting my institution into compliance] because it seemed like the right thing to do. (Amy Margaris)*

As respondents categorized NAGPRA as human rights law and centered deeply in morality, they sought to be before the law as a way of recognizing transcendent human values that are, or should

be, universal and timeless. John Swogger, archaeologist and illustrator of *NAGPRA Comics*,[11] recognized that NAGPRA deals with the ethics of holding one's family in boxes in a museum:

> *Unless you start to look at some of the stories behind why NAGPRA is necessary, you don't really understand the scale of the injustice and the scope of what's being talked about. As I say, from somebody whose experience of archaeology is all very old — you know, you talk about Ancient Egyptian stuff, or Near Eastern stuff, or Neolithic stuff — it never occurs to you that there's anything wrong about the way that you treat that material because there are no living descendants to say otherwise, or to have a sort of counter-example to putting skeletons in boxes and keeping them in museums, and so on. It's only when you move that up into the 18th century that you realize, "You know what, that's really not right." That's coming from that outside, beyond NAGPRA, beyond the North American archaeology perspective, and coming across this stuff for the first time. It then seems horrific. You suddenly say, "Why would people do this?" I think that the sort of awful thing about working with, or getting to know, NAGPRA is realizing that it's necessary full-stop.*

Swogger seemed to believe that once one looks at the deep time of NAGPRA and learns about the dark history of archaeology and museum's treatment of Native Americans and their ancestors, they will realize that NAGPRA is "necessary full-stop." Native ancestors are not simple "skeletons in boxes" and should be treated with respect and dignity.

As such, when a museum or institution stands before NAGPRA, they stand subject to moral judgement — from tribes, museum colleagues, or anyone who believes tribal ancestors and belongings should be returned. Anne Amati noted that, "Museums and institutions have responsibilities under the law, and tribes have rights under the law, and there's something about that difference that's very important." With this viewing of NAGPRA, the law dictates that it is the responsibility of museums and institutions to grant and ensure the rights of Native Americans.

[11] *NAGPRA Comics* is a community-based, collaboratively produced comic series created by Sonya Atalay, Jen Shannon, and John Swogger. The comics tell true stories about NAGPRA and repatriation from the tribal perspective. See: https://nagpracomics.weebly.com/the-comics.html

In failing to be in compliance, even unknowingly, museums and institutions are stripping tribes of their rights to reclaim their belongings and lay their ancestors to rest.

Amy Margaris, Associate Professor of Anthropology and NAGPRA Compliance Officer at Oberlin College, recounted that when she took on the role of Compliance Officer she "felt *extremely* nervous about not being in compliance," expressing the anxiety many NAGPRA practitioners experience before the law. As a relatively small institution, Oberlin is not necessarily on tribes' radar or list of priorities — thus, despite a good faith effort of completing an inventory of Oberlin's collection and reaching out to tribes, Margaris has only completed one repatriation. Her institution still holds Native American remains and NAGPRA-sensitive materials. Margaris is "very, very eager" to ensure tribes their rights in returning the materials her institution holds, yet seldom has the opportunity:

> *I am very, very eager to not retain these materials. It's stressful. I feel like I have other people's ancestors in a cabinet and I don't like it.*

Standing before the law, Margaris is stressed that she may not fulfill her responsibility of ensuring tribes their right to bury their ancestors.

Anne Amati, NAGPRA Coordinator at the University of Denver Museum of Anthropology, also explained that there is a lot of pressure on "museum folks" to "do the right thing," even when the "right thing" may not be totally clear:

> *I think the thing to remember is that when you're consulting and working with tribal reps, every time that someone from the culture is being faced with this, that's reliving trauma. So, it's emotionally exhausting for tribal reps, and it's very hard on museum folks too. Within the law, a lot of the burden is placed on the tribes to make claims, to provide evidence, but museums are the ones to make decisions — it's one of our main responsibilities. So, one of the things I see, sometimes, when a museum is faced with conflict — maybe two tribes aren't agreeing on something — they won't make a decision, and it just kind of pauses the process. It can be hard — and I've been in situations where I just want people to like me! I'm a middle child. I like everyone to get along. I want to do the right thing. I want to make people happy.*

If a museum feels they may risk making the "wrong" decision, they may become paralyzed and pause the NAGPRA process. This pause in the process is not about avoiding the law, nor is it about seeking to retain remains and materials, but instead it seems to be about delaying a "wrong decision" or facing moral judgement (from themselves or others). It may also come out of fear of angering tribes or appearing unfavorable. This view was suggested by Amati exclaiming, "I just want people to like me!" or jokingly acknowledged her stereotypical peaceable disposition as a middle child. Before the deep time of NAGPRA, the possibility making the wrong decisions a risk museums and institutions may not be willing to take. They may feel as if the weight of rectifying this relationship rests on a single consultation, and one wrong move may ruin things forever. Amati attributed one of the most "emotionally exhausting" parts of the law in this sense is "serving as a mediator between the past and the present," and figuring out how to move forward.

As a member of the Choctaw Nation of Oklahoma, Deanna Byrd recognized that archaeologists and museum practitioners may find her identity intimidating, feeling the need to assert that she, too, is a normal person:

> *I just recently did a guest lecture series down in Mississippi, in our homeland, and was able to meet with some future archeologists that are coming through their education. So, talking with them, letting them know "Hey, I'm a tribal member, I'm normal, just like you," and kind of making those consultations less scary.*

With the law's perceived purpose as acknowledging and confronting the effects of colonization, entering the NAGPRA process may not only feel like a confrontation between museum and tribe, but also between colonizer and colonized. Before the law, practitioners may also stand before their colonial roles.

Within the legal culture of NAGPRA, recognizing the deep time of NAGPRA is one way that people find themselves before the law. NAGPRA appears to them as something timeless,

eternal, causing the past to control every present interaction, but it also carries with it human values that may appear as timeless and transcendent.

NAGPRA's Textualization

Before the law, people locate its power in its letter, or *textualization* — participant reflected this view when discussing NAGPRA. Ewick and Silbey define textualization as "writing, inscription, and other modes of encoding communication that permits its extraction, preservation, and retrieval separated from ongoing interactions" (Ewick & Silbey, 1998: 99). One who is before the law sees textuality — what is "on paper, or in "the letter of the law" — as providing authority and affirmation of rights (Ibid). Most importantly, textuality is seen to grant people the ability to unequivocally take authority or assert their rights. People understand that laws can be changed, amended, or overturned, but the, at the very least, the temporary sense of permanence in its concreteness can be empowering (Ibid). Textualization is especially important and empowering to an individual when the passing of a law, its initial textualization, dictates a right or grants a capacity they did not have before. This is seen in the passage of NAGPRA, as it granted Native Americans rights to and protection of their ancestors and belongings that were never before recognized by the U.S. federal government. Before the law, NAGPRA's capacity to protect and further the rights of Native Americans is seen as coming from the textualization of its rules.

For many participants, both Native and non-Native, NAGPRA was seen as positive thing in itself:

The whole fact that NAGPRA exists is nothing but a bonus. (Donna Moody)

I think the fact that [NAGPRA] exists is a strength. (Sandra Dong).

NAGPRA is better than not-NAGPRA, (Shannon Keller O'Loughlin)

Before the law, participants saw NAGPRA's sheer existence in the letter of the law as serving in instilling, affirming, and protecting the rights of Native Americans

Participants also recognized NAGPRA's role in giving Native Americans the rights to protect and advocate for themselves, their ancestors, and their belongings, that were not recognized or respected pre-NAGPRA. According to Deanna Byrd, the NAGPRA Liaison-Coordinator of the Choctaw Nation of Oklahoma, pre-NAGPRA, there was no "real law," one that was textualized, that protected the basic human rights of Native Americans:

> *Until the enactment of [NAGPRA], there was no real law or any repercussion that said Native Americans are off limits. It was, they could be studied, they could be drilled into, their teeth could be removed, whatever it was…and the United Nations has human rights guidelines and lists that describe violations for just basic simple human rights, and we weren't allowed that. (Deanna Byrd)*

According to Byrd, NAGPRA textualized not only grants Native Americans newly recognized rights, but it also, for the first time, provides museums and institutions with repercussions — civil penalties and/or moral opprobrium — for disrespecting these rights.

Sandra Keller O'Loughlin, Executive Attorney for the Association on American Indian Affairs and citizen of the Choctaw Nation of Oklahoma, had a similar view to Byrd. She recognized the power of NAGPRA's textualization in granting Native Americans leverage that they never had before:

> *Before [NAGPRA], there were no incentives. In order to negotiate, it helps to have leverage. If you come and say, I want my ancestors back and you have no leverage, you have nothing in the law supporting you — you have nothing else to offer. Then, you may have a difficult time doing that, unless the person on the other side has some kind of willingness to undertake those discussions, and understand more, and become enlightened, and proceed in that way. (Shannon Keller O'Loughlin)*

According to O'Loughlin, pre-NAGPRA, there was nothing for Native Americans to offer in return for their ancestors, or even oblige the other side to have a conversation with them about the possibility. Now, with NAGPRA written into the law, it not only obliges a conversation, but, in

most cases, requires a repatriation. Before the law, O'Loughlin recognized the power of rules and regulations to grant capacity to people had previously not had it, and constrain the power of others, who had previously had all the power.

Bonnie Newsom is an Assistant Professor of Archaeology at the University of Maine, as well as the former Chair of the Repatriation Review Committee for the Smithsonian Institution and the former Tribal Historic Preservation Officer for the Penobscot Indian Nation. She left the Penobscot Nation in 2012 and now considers to herself an ally to Maine tribes, especially when it comes to repatriation advocacy. She expressed that having a process for repatriation written into the letter of the law can be "stifling." Even as someone who seems to find less power in textualization, this exception in my research may, in fact, prove the rule. Because of the long-standing relationship between Natives and non-Natives in Maine, Newsom may have believed that tribes in Maine *already* had the right to advocate for the return of their ancestors. In her opinion, having specific requirements dictated and seemingly concretized into a law took away the possibility for negotiation with the state of Maine on the part of the tribes, and perhaps new opportunity for discretion on the part of museums. To Newsom, the objectivity of NAGPRA seems to remove the agency from tribes that is required "in making sure repatriation occurs":

> *The one thing I've seen here in Maine is that prior to NAGPRA, the tribes had some negotiating room with respect to bringing the ancestors home. But now, we are burdened, kind of, with this law that requires us to demonstrate proof that we are culturally affiliated. Prior to NAGPRA, we could make a claim and have some level of negotiation with the museum folks, you know. So, in that respect, I think NAGPRA can be stifling to those relationships because, again, you know, the burden of proof is on the tribes and the law is there, and if we don't meet the law's requirements, then repatriation won't occur. Before, there wasn't a law, and depending on who is in the position of museum directorship or whatever, you could maybe negotiate your way or use diplomacy in ways that would be influential in making sure that repatriation occurs.*

Newsom acknowledged that Native peoples in Maine have a significant relationship with non-Native people allowing them over time to develop important skills in diplomacy and negotiation, and that Maine has had representatives in the state legislature in the 1800s:

> *I think here in Maine, Native peoples have been engaged with non-Native people for a long, long time. I think over that time we've developed some really important skills in diplomacy and negotiating our way to making life better for ourselves. That requires a certain amount of "edge walking,"… where people walk in between essentially two worlds while maintaining a commitment and an advocacy for their indigenous world. I think Native people in Maine have been doing that for a very long time. We've had representatives in the state legislature since the 1800s.*

Although Maine tribes are not unique in having representatives in state legislature since the 1800s, Newsom was the only Native participant to mention a state-tribe relationship and extensive experience in "edge-walking," specifically in the political sphere. I find this important to note because I wonder if this notes some sort of extraordinary state-tribe relationship that the other Native participants did not perceive in their own states. If this is the case, this could further exemplify that the textualization of a law like NAGPRA feels especially empowering when it dictates a right or grants a capacity one did not feel they had before. Perhaps Newsom felt that she had the capacity to protect and reclaim her ancestors and cultural property before the rules of repatriation were textualized into NAGPRA. So, when NAGPRA was passed, it took away at least part of this capacity by investing it in a distant, federal process. Thus, the textualization of rules can also serve as a constraint. This still demonstrates its power before the law — textualization giveth, and textualization taketh away.

This duality of capacity was also seen when participants discussed various changes they would like to be seen in the letter of the law. Participants wanted to see amendments made in parts of the text of NAGPRA that they viewed as a constraint on the rights of Native Americans. An example of a common desired amendment was to clarify the definition of "Native American"

within the law. As of now, NAGPRA defines Native American as, "Of, or relating to, a tribe, people, or culture that is indigenous to the United States" (NAGPRA, 25 USC § 3001, 1990). However, as exemplified in *Bonnichsen v. United States* (2004), which addressed the repatriation of the "Ancient One" or "Kennewick Man,"[12] some remains may be considered too old to be classified as "Native American." There, the Ninth Circuit Court of Appeals decided:

> Because Kennewick Man's remains are so old and the information about his era is so limited, the record does not permit the Secretary [of the Interior] to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them (*Bonnichsen et al. v. United States et. al,* 217 F. Supp. 2d 1116 [Dist. OR] [2002]:1121).

Chip Colwell noted that calling remains too old to be considered Native American is a "distortion of the law," and that the vagueness of definition of "Native American" within NAGPRA should be clarified to include any human remains dating before 1492:

> *Most Native Americans and major archaeological organizations agree that the law should be amended to make clear that pretty much any human remains before 1492 should be defined ad Native American under the law. Whereas, actually, there's kind of a vagueness left open, and there's been a case or two where people say that remains are so old that they're not Native American anymore — whereas archaeologists, and archaeological organizations, and various Native leaders agree that that's really a distortion of the law, and we can all agree that the most basic definition of Native American is being indigenous to this continent, prior to European colonization.*

Sandra Keller O'Loughlin stated that a simple amendment to avoid this distortion of the law would be to add the phrase "or was" to NAGPRA's definition of "Native American":

> *So, if an ancestor may have had a connection or potential affiliation with a tribe that no longer exists, then that would not be a Native American. So, it was kind of counterintuitive to what the law originally intended. So, one simple amendment that could happen to NAGPRA is simply redefining the definition of "Native American" to include "is or was" instead of just "is."*

[12] See: *Skull Wars* by David Hurst Thomas.

The fact that participants view the addition of two words to the letter law as a way to avoid future situations like the Bonnichsen case is a testament to the perceived power of NAGPRA's textuality.

Within the legal culture of NAGPRA, recognizing the power of the law's textualization is one way in which people find themselves before the law. They see NAGPRA "on paper" as a way to grant Native Americans new rights and protections as well as control the power of museums and the archaeological community.

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These two ways that before the law manifests — deep time and textualization — are part of the legal culture of NAGPRA. This helps us understand how participants see the role of the past as both an explanation for the law and an influence on their present proceedings (e.g. why they chose to repatriate, how they treat each other in a consultation, how each side views the other, etc.). Looking at NAGPRA before the law also shows us that, even though the spirit of the law is incredibly important, textualization is important to NAGPRA stakeholders. In the next section, I will show that participants also found themselves *against the law*, a very different legal consciousness that exposes resistance and frustration with NAGPRA.

Against NAGPRA

According to Ewick and Silbey, when one stands *against the law,* they "recognize the dual strands of legality as a general ideal of objective and impartial deliberation and as a particular space of privilege and power" (Ewick & Silbey, 1998: 31). Although "justice is blind," it also seems to have a habit of seeing the privileged (of biography and/or circumstance) and ruling in their favor. As such, when one is against the law, they may feel that the system is structured against them — invoking it may be hopeless, useless, something to be avoided, or even punishing. Even so, the privileged may find themselves against the law as well, seeing it as too much of a hassle, or even a potential blow to status or reputation. Also, given the "pervasive authority of law to define, organize, and violate the lives of individuals," people may feel as if they are enveloped in it (Ibid: 183). The law may feel impossible to escape and unsympathetic to outside factors (e.g. work, health, location, etc.).

One may seek to avoid the law and its costs through acts of resistance. Resistance can be "expressed in silences, refusals, and absences as well as in acts of defiance and disruption" — really any action that disturbs the path that those in power have set (Ibid: 188-189). When one is acting against the law, they are forced or compelled to "make do," resolving disputes or solving their problems extra-legally. By doing so, engages in self-help, fashion[ing] solutions they would not be able to achieve within conventionally recognized schemas and resources" (Ibid: 48). One may also become overburdened and disillusioned, ending or refusing to participate in disputes and legal processes in order to delay or avoid the perceived costs of the law.

Within NAGPRA's legal culture, participants were against the law in one fundamental way: they noted how NAGPRA sometimes fell victim to its own bureaucracy, making it difficult for the law to reach its full capacity. As a result, they viewed invoking parts of NAGPRA as

frustrating or detrimental, and thus created their own internal procedures on the side in an act of avoidance or simply had to "make do."

A Victim of Bureaucracy

Within a bureaucracy, responsibilities are divided among a hierarchy of offices with specialized tasks dictated through rigid rules and regulations. This creates "a sequence of action linking investigation and fact finding to judgment and then to implementation and execution across widely dispersed places and persons" (Ewick & Silbey, 1998: 227). As such, causality and intention are often obscured, and the locus of power is difficult to identify within an institution (Ibid.). This lack of visibility and transparency makes it difficult for those against the law to effectively seek and receive help within these institutions and/or hold them accountable for their actions — or, as Ewick and Silbey say, "Mired in formal procedure, captured by bureaucratic structures and remote from the real concerns of citizens, the law is unable to effectively resolve disputes, recognize truth, or respond to injustice" (Ibid: 196).

NAGPRA is not an exception. The National NAGPRA Review Committee may unanimously agree to amend the law, but the amendment may not make it past Congress. A curator at a museum may agree to repatriate an object, but the museum's board of directors may refuse to give it up. Tribes may be the experts of their own culture, but the law dictates the museums as the determiner of cultural affiliation. What may serve as enough evidence of cultural affiliation at one museum may be indeterminate at another. The National NAGPRA Review Committee can hear disputes, but can only *really* make a recommendation. The rigidity and complexity of NAGPRA's bureaucratic structuring seems to complicate the NAGPRA process. At times, NAGPRA's rules and regulations can be inflexible, unaccommodating, and just flat out confusing for those

unfamiliar with its language and procedures. As a result, practitioners may be unable to make NAGPRA act smoothly and effectively to reach its full capacity as a law, falling victim to its own bureaucracy. One of the primary areas where NAGPRA seems to be "mired" in its bureaucracy is within the Review Committee.

Shannon Keller O'Loughlin served on the Review Committee from 2013 to 2015. She described her time on the committee as "a heck of a good time," and "really good work." She believed that the Review Committee is an essential part of NAGPRA and has the capacity to create meaningful change, but admitted that there were various barriers keeping it from reaching its full potential. She noted that, at times, it could be "a little bureaucratic":

> *What's important about the Review Committee is that most committee members don't really do the work necessary to make that Review Committee powerful. It could be a powerful federal advisory committee and be more active, but it just it isn't. I think part of that had to do with the leadership in the National NAGPRA program, which has changed. So, I think often the Review Committee was stymied to be able to really fully function. I think it's in a lot better position now, but it is a little bit bureaucratic.*

Even as a committee member, when O'Loughlin, in part, *was* the law, she was pushed up against it. In her view of NAGPRA, the Review Committee was created with the intent to be a powerful institution that could protect the rights of tribes and advocate on their behalf. However, although it is "a really good thing" and "serves well in disputes and dispossessions," she believed it did not reach the capacity of its intent. As its fate determined by its leadership, it is remotene from the public, and depends on institutional funding the Review Committee's effectiveness and functionality was "stymied."

O'Loughlin indicated that to overcome the barriers of bureaucracy, committee members need to be vigilant and proactive:

> *And what I didn't like about it is that it was hidden. It didn't sit on an equal level with the public or with tribes. It certainly didn't fully function in the consultative*

> *capacity that it should with tribes. It certainly didn't inform Congress in a way that I think was robust and to its full authority that it could be doing so. I think there is something lacking. A part of that is if you have a federal advisory committee, people are usually not paid. Maybe they get a stipend, they get their travel paid for, but they often are very busy people — experts from wherever they come from. They just don't put the time in to really create some lasting change. So, it's a really good thing. And I think it serves well in disputes and dispossessions. But everything else is just, you know, kind of bureaucratic.*

However, she understood that due to distance, low funding, and busy schedules, it could be difficult for committee members to go beyond what their positions require. Within national institutions like the Review Committee, the pitfalls of bureaucracy are amplified. National institutions "lift social activity from localized contexts and spread social relations across large distances of time and space so that the opportunities for action and intervention seem minimal" (Ewick & Silbey, 1998: 239). The members of the Review Committee are scattered throughout the U.S., and the meetings move all around the country. This not only makes meetings less frequent and accessible to the public (tribes, museums, etc.), but also more difficult for committee members to organize to create lasting change, further pushing NAGPRA practitioners—and even its national agents—against the law.

As a museum practitioner, Chip Colwell also suggested that he is dissatisfied with the current operation of the Review Committee. To Colwell, it has no "actual authority," thus offering no real protection to tribes:

> *The Review Committee only looks at disputes, and disputes are a long, drawn-out process the way it's currently set up. Also, the Review Committee has no actual authority, it just makes recommendations. So, there's one paper, for example, that looked at the number of disputes between 1990 and 2010, and out of 15 disputes the museums only complied with the Review Committee two times.*

NAGPRA seems to tie the hands of committee members, allowing them to only make recommendations that likely will not even be followed, further constraining the committee's functionality.

However, Colwell went on to offer the possible solution of a third party with "some kind of authority." To Colwell, this would constrain the power of museums and disrupt the current imbalance of power NAGPRA permits:

> *[Determining] cultural affiliation is left entirely in the hands of museums, and museums are being asked for these materials back. So, they're essentially the accused party in this case, yet, they are also asked to be the judge to determine whether the claim is legitimate under the law, or not… So, I think I would advocate for some more fair system where maybe tribes and museums have to work towards a consensus. Then if they can't determine consensus, maybe there's a review panel that could weigh the claims — or some process like that where you would at least provide tribes the opportunity to have just as much decision-making opportunity as museums. Or, you leave it in the hands of a third party, like an actual judge, that can make decisions in cases where there's a disagreement.*

Interestingly enough, Colwell, seemed to argue for a different bureaucratic structure by offering a procedural solution and suggesting the inclusion an "actual judge." However, this does not mean that Colwell does not find NAGPRA's bureaucracy to be a constraint on its effectiveness as a law. He found NAGPRA's current division of responsibility to be imbalanced and nonsensical — the museums are the "accused," but NAGPRA dictates them as the "judge"; the burden of proof for cultural affiliation falls on the tribes, yet the law gives them no decision-making power; the Review Committee is supposed to solve disputes, but the law only gives it the power to make recommendations. Colwell's "more fair system" calls for the removal of the roles and hierarchy that are the results of NAGPRA's current bureaucratic structure. This would level the playing field, in his view, allowing tribes and museums to work *together* to make a determination, or to appeal to a neutral third party to make an informed determination. If there is conflict, the determinacy of the third party reinforces this lack of hierarchy by ensuring that no party is the sole decision-maker.

However, Colwell was unsure if his authoritative third-party idea would be implemented any time soon. He claimed that, "There have already been some attempts to amend the law — at

times when everyone agrees on the amendment, and those don't even get through Congress." As a result, Colwell is compelled to take matters into his own hands:

> *One thing we've talked about here is that we could implement this internal process, where if there's a dispute, we can offer — obviously, tribes can take that to the Review Committee — but as an interim step, we're going to have a three-person panel. The tribe will nominate one person, the museum will nominate one person, and then those two people will agree on a third person. That three-individual panel would try to resolve the dispute with the idea that it would be quicker and easier. It would be fair because each party would have representation, and then that would be a way to kind of move things along more quickly, not having to elevate it to the National Review Committee, which is highly-politicized, and it takes like six months or a year, and on, and on.*

Here, Colwell indicated that he was against the law because in his efforts to create a new internal procedure within his museum, Colwell sought to avoid the pitfalls of the Review Committee and the long process of disputes. Also, by calling the Review Committee "highly politicized," he recognized the intersecting layers of institutional interests that subvert bureaucracies — especially considering that committee members often wear many hats (e.g. archaeologist, curator, tribal attorney, Tribal Historic Preservation Officer, friend of a disputant, etc.). These intersecting interests within the committee may conflict with or overshadow the interests of those seeking its help, further complicating an already complicated process. Colwell believed that NAGPRA should look a certain way — equitable and streamlined — and the best way to ensure this would be to act extra-legally, creating a system outside NAGPRAS's reach, and avoiding escalating matters to the Review Committee.

Museums may choose not to take the advice of the Review Committee, but, also, tribes may not even come forward in the first place. When asked how often she encountered disputes while serving on the Review Committee, O'Loughlin answered, "Not enough":

> *It was disappointing that there weren't more because I knew they were out there. One thing that I've learned in doing this work is a lot of tribes seem hesitant in bringing any kind of controversy to this work. Now, I can understand why. They*

> *want to create a good place. They want to give [institutions] the benefit of the doubt. The institutions are trying to help. And they want to make a comfortable place for their ancestors to come home. And they are thinking that creating controversy or creating a dispute may affect that.*

Here, O'Loughlin recognizes that there are instances when taking a dispute to the Review Committee is not only frustrating, but detrimental to a tribe's ability to form the relationships necessary to facilitate the return of their ancestors — extralegal considerations put them against the tool that had been created for their benefit, the Review Committee. Against the law, tribes worry they will be punished for taking advantage of one of the systems NAGPRA provides — one that is supposedly for their benefit. This reinforces the fact that, at times, that law seems to be a space of privilege and power, that is, a space primarily for museums. With one wrong move, one misunderstanding, or one angry museum, tribes may lose the rights NAGPRA is supposed to ensure. Thus, tribes not only hold the burden of proof, but also, quite possibly, the burden of "keeping the peace."

During her time as a tribal attorney, O'Loughlin helped tribes overcome this barrier to putting NAGPRA into practice by encouraging them to stick to their traditional values and hold people accountable to their roles. If a museum drags their feet or refuses to consult with tribes, then they are not sticking to their responsibilities dictated by NAGPRA. O'Loughlin sees disputes as a way to for tribes to utilize the law to resist this exploitation:

> *What I've always tried to give as advice is that it is traditional for us to hold people accountable to the roles that they've taken in the world. These institutions are accountable to this law and to and to protecting our interests of getting these items back. So, if they're not doing that, we should hold them accountable, as we would anyone else within our cultures or in our government. So, in trying to help support that, the dispute process and speaking out when institutions are needlessly delaying process or rejecting repatriation requests…it's important for us to give voice to that and hold people accountable. I think disputes can be very helpful. For one, it provides an incentive so other institutions aren't mirroring bad behavior. They know that their actions can be held for all to see — that includes their donors, and agencies that have enforcement and power, and all that other stuff. So, I was always*

> *happy to get involved in these issues as an attorney, because I could get the media involved. I can inform the public about what's going on. I can make life difficult for a museum or institution. I think I see that as a positive thing because we're holding them accountable and making sure people understand what's happening at that institution.*

Although she and her clients may have found themselves against the law, they found opportunities for intervention within disputes. O'Loughlin recognized that escalating an issue to the Review Committee increases the institutional visibility of museums that could before hide behind webs of bureaucracy and claims of "our hands are tied," thus furthering their own self interests. Filing a dispute with the Review Committee brings a local issue into the national, public sphere — especially if a player gets the media involved like O'Loughlin has. Public disputes hold the actions of institutions "for all to see," helping ensure compliance and they deter other institutions from taking advantage of tribes in the same way. Also, tribes may take advantage of this increased visibility to let others know filing a dispute is not only possible, but effective. Against the law, O'Loughlin recognizes that museums and federal institutions may attempt to use their power to avoid carrying out their consultation or repatriation duties. Thus, she helps tribes resist by using her own power to alert the media, involving extra-legal actors.

In her repatriation efforts assisting Maine tribes, Bonnie Newsom has never escalated to the Review Committee, but still has found herself against the law, tangled in the webs of NAGPRA's bureaucracy. To Newsom, the imbalance of power and uneven dispersion of responsibility written into the law place a disproportionate amount of burden onto the tribes — so much so that they become unable or discouraged to invoke it. Without help navigating NAGPRA's bureaucracies and deciphering its language, tribes are at a loss:

> *Honestly, I find [the NAGPRA process] too bureaucratic and difficult. I think it has to be that way because, you know, it's federal law. It's a good federal law. It was a much-needed federal law, but sometimes I think that we become mired in these colonial processes that make it — even though the law is, it's a positive thing — it*

> *just makes it so difficult to do that tribes become overburdened and it doesn't happen. And so, you know, there are no resources for tribes to do this work really either. And so, again, it requires an effort outside the normal scope of how we operate in our day to day lives. We have very committed people who put that effort in, and for good reason, and we have to do that work. But it is bureaucratic and in a language all its own. And if you don't have that background, it makes it very difficult to navigate your way through the process.*

To Newsom, the barriers of bureaucracy stretched beyond the present day into the deep time of colonialism. The great paradox of NAGPRA is that the law was conceived within a system that historically and systematically exploited and disenfranchised Native Americans. Actors in the NAGPRA process can become "mired" in "colonial processes" that can halt the process altogether. Although tribes are the experts of their own culture, museums make the final determinations and judgement. This reflects the paternalism born of colonialism still rampant in U.S. federal policy that has long pushed Native Americans against the law. Interestingly, Ewick and Silbey describe against the law as "colonizing" the time and space of everyday life; here, it seems to have a double meaning. NAGPRA not only colonizes time in the hours, energy, and focus NAGPRA takes up in the lives of its practitioners, but also these colonial processes are still very present in NAGPRA work even today.

Sandra Keller O'Loughlin also recognized the colonial processes within the NAGPRA process. She indicated her frustration in being expected to place her trust in those who have wronged her and her community:

> *We rely on those that have created the problem to make decisions opposite of what they've made in the past, instead of actually putting more authority into the tribal sovereign governments.*

The letter of the law places tribes in a reactive role. Tribes must wait for museums and federal institutions to "do the right thing" and reach out to them with inventories and summaries; tribes must travel to the holding institutions to consult; the holding institution asks the tribes to provide

evidence of cultural affiliation; and the holding institution makes the final decision. At the mercy of the museum, tribes are pushed against the law.

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I came across an exception to against the law in non-federally recognized tribes. As their rights are not ensured by the law, they cannot afford to be totally against the law if they seek to return their ancestors.

As a member of the Abenaki Nation, a non-federally recognized tribe, Donna Moody understandably seemed against the law more than most respondents, describing the NAGPRA process as, "really an arduous process for non-federally recognized peoples." NAGPRA's strict rules and regulations create additional hoops that non-recognized tribes must jump through if they wish to reclaim their ancestors. Non-recognized tribes are required to appear before the Review Committee if they desire to instigate a repatriation. They must also receive letters of support from recognized tribes in order for the committee to approve repatriation.

Moody discussed how the Abenaki must receive letters from Wabanaki tribes of Maine and the Wampanoag Confederacy in order to complete a repatriation. As a result, Moody said that is takes anywhere from eighteen months to two years to pull everything together — significantly slower than tribes that do not require this paper trail for a straightforward NAGPRA process (i.e. one where cultural affiliation is not disputed):

> *We're all closely related, both with the tribes in Maine and with the Wampanoag. We're very closely related to the Wampanoag. And we all know where are our traditional homelands, our traditional territory. So, if we have provenance that that indicates that, certainly, this is where this set of ancestral remains was disinterred. It's easy. It's just so easy to go. Yeah, that's yours. That's us. That's yours. So, this there's never been dispute about it with any of these tracks. It's just time element. It's having to wait for those letters. If we did not need that paper trail support from other tribes, it would simply be presented to the Repatriation Committee. They make a decision. Then we pick a date and go pick up the remains. So, it's that weight.*

Here, Moody indicated that an otherwise straightforward process is almost sabotaged by NAGPRA's requirements. To her, these seemingly unnecessary letters are the only thing standing between her and her ancestors.

To make matters worse, the time in which these letters are received are determined by forces completely outside of the Abenaki's control:

> *With Wampanoag, it's fairly easy because they're in a smaller geographical area than the tribes in Maine. The Wabanaki Confederacy, they are the Wabanaki tribes of Maine, have difficulty getting all of their members to a meeting because of weather, because of distance, because of whatever. So, it can take it generally has taken us longer to get that support. Not that there's been an issue with the support, just that they have to have all of their members together to sign the letter.*

This sheds light on one of the most frustrating aspects of bureaucracy that one often experiences when they are against the law. Within a bureaucracy, the fixed rules and regulations of an institution outweigh an individual's "mundane" emotions, values or needs. Against the law, "the arbitrary power of legal actors…[is] described in terms of their lack of empathy or sympathy," and people experience "the law's failure to acknowledge or take their situations into account as subverting, rather than ensuring, justice" (Ewick & Silbey, 1998: 190). Although outside conditions like weather and distance prove to be a serious obstacle to the Abenaki's repatriation efforts, NAGPRA does not seem to care.

Nevertheless, Moody was able to share various instances where she "counted coup"[13] on the bureaucrats of the Review Committee as the Repatriation and Site Protection Coordinator for

[13] According to historian Anthony R. McGinnis, counting coup, or striking an enemy, was the highest honor earned by warriors participating in the intertribal wars of the Great Plains. This entailed charging the enemy on foot or horseback to get close enough to strike them with the hand, weapon, or a "coupstick." Although killing was seen as a part of war, one was seen as more courageous, proving their superiority over their opponents, if they defeated the opponent non-fatally. Risk of injury or death was required to count coup, but escaping unharmed was seen as a higher honor. After a battle the tribe would gather to recount their act of courage, also

the Abenaki Nation. It was telling that Moody used this term to describe her NAGPRA work as if each time she entered a Review Committee meeting, she were going into war. In telling her stories of victory and resistance, the only words that come to my mind to describe Moody's disposition are *sassy* and *spunky*. Ewick and Silbey state that:

> Relying on humor and bravado, [stories of resistance] recount and celebrate either a reversal or an exposure of power. The fact that these tales are offered with a smug pride or moral outrage, as opposed to shame or guilt, indicates that behind the telling of the trick or report of humiliation lies a moral claim, if not about justice and the possibilities of achieving it, then about power and the possibilities of evading it (Ibid: 220).

Moody's stories were playful and engaging. It was clear that she has told them many times before. There was not a shred of guilt or shame, but instead determination and satisfaction. The story sounded like it could be part of a pep-talk to other non-recognized tribes disillusioned with the NAGPRA process — it is Moody saying, "I persevered, and so can you."

She began with a story about a repatriation of ancient remains from the Harvard Peabody Museum, and a reluctant Review Committee member (whom she jokingly referred to as "my friend" throughout our conversation). "Hold on to your hat," she began, setting the stage:

> *There was someone in the mid and into the late 90s and early 2000s that was on the Review Committee that was not someone who agreed with NAGPRA. This is somebody who did not want particularly to have to have remains or anything else repatriated. And he was on the Committee for a long time, kept getting reappointed. It was Silver Springs, NAGPRA Review Committee meeting in the spring of 1997 or 98. I want to say 97, I'm not positive. Anyhow, this was a repatriation request that was being done in concert with Harvard Peabody in the state of New Hampshire and us, the Abenaki. In the repatriation from Harvard Peabody was a cremation burial. That was an ancient burial. In other words, before contact, European contact. He approached me the day before we were scheduled to present to the Committee. He kind of pulled me away from the group I was with and said, "Why don't you wait until all of your repatriations are ready to go?" Everything. So, he was talking not just about what was from Harvard Peabody, but from the whole world. "Wait until you've got it all and then make your petition." And I said, "No, you know, this is all set to go. We've done all the paperwork. We've done all*

known as "counting coup." Counting coup was carried over into later battles against Euroamerican troops (McGinnis, 2011).

> *the footwork. Everybody is in concert. We're all on the same page, and we're ready to go and we want these ancestors back." He became a little bit belligerent with me, not knowing me. Nuh-uh, you don't do that with an Abenaki woman, I'll tell you right now. And he kept trying to persuade me. And I said, "Look, we're moving ahead with this." And he said to me, almost yelling at me. I mean, his voice, the volume and the tenor of his voice just exacerbated it. He said to me, "You will never get that that cremation burial back." I looked at him and I said, "Oh, yeah, we will, and tomorrow it's going to be approved by the committee." The problem he was having with this was setting a precedent. We were the first non-federally recognized tribe to go through the NAGPRA process for ancient remains. And that's the issue he was having. That's the issue he was he was pursuing. He wanted to stop that particular repatriation. Of course, you know, it was approved the next day, and it was fine.*

To Moody, simply invoking the law in the first place was an act of resistance. This story took place at least a decade before Section 10.11 was passed in 2010. So, to this committee member, and likely many like him, by seeking repatriation on behalf of a non-recognized tribe. Moody was using NAGPRA in a way that should have been off-limits.

However, prior to 2010, although museums had no obligation to return culturally unidentifiable remains to non-recognized tribes, NAGPRA also did not explicitly forbid this type of repatriation. Here, we see Moody enact a form of resistance without even breaking the law. In fact, she seemed to have followed the law to a T. Ewick and Silbey refer to this form of resistance as *rule literalness,* which is based on the acknowledgement that all interactions within the law are governed by rules (Ibid.) Moody recognized that the Review Committee bureaucrats, like her "friend," were sticklers for the rules, so she made sure her process was airtight; she made sure to indicate that she did all the footwork and paperwork, had all her letters, and everyone was on the same page. Here, by completely following the law, Moody was resisting anyone saying she could not be a part of it.

Moody told another story about a repatriation that occurred a few years later regarding Abenaki remains found at a site in New Hampshire. In this case, the person who was refusing her

claim happened to be good friends with someone on the Review Committee. In this story, Moody recognized the arbitrariness of power defined by bureaucratic structures, as they were subverted by friendships, and used it as a way to assert her *own* power:

> *There was an archaeologist in New Hampshire who did not want these [remains] to be turned over. He and this particular person on the Review Committee were fairly good friends. So, we got to this this meeting that was held at Harvard. The first day we got there, we were scheduled for our petition to be heard on Sunday. We got there on Friday afternoon. I was informed by a legal person in the National Office that we had been removed from the agenda. And I said, "How is that possible?" She just kind shrugged her shoulders. I said, "So this was done between this person and this person?" And she said, you know, "I mean, this is between a rock and a hard place," and I said, "How can anyone have that unilateral power?" And she said, "Yeah. Doesn't sound right, does it?" And I said, "Put us back. Put us back where we were on the agenda." She said, "Okay." As I was leaving — this is one of my greatest counting coup moments in my entire life— as I was leaving that evening, the assistant director of the Department of the Interior said to me, "Gee, Donna, I'm really sorry you're not on the agenda." I did everything I could do to not laugh in his face. And I said, "Did you not hear? We're back on the agenda for Sunday!" He turned purple, spun on his heel and off he went. And we've never spoken since. But anyhow, I counted coup on the Department of the Interior, and I am just so pleased.*

With a simple request, Moody was able to add herself back onto the agenda, *almost* as easily as she was taken off. To her, the ease of this was almost laughable. As much as these committee members tried to assert their power, Moody could see right through their façade. She made the moral claim that the Abenaki had just as much a right to stand before the Review Committee as any recognized tribe, and just as much a right to bury their ancestors. "Bluntly," she said, "Creator doesn't place any more value on federally recognized peoples than non-federally recognized peoples or their ancestral remains."

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Within the legal culture of NAGPRA, against the law manifests in frustration with the bureaucratic structuring and tendencies of NAGPRA and its practitioners. This is especially seen within the Review Committee. Looking at against the law exposes practitioners' problems with

NAGPRA and what they may wish to see changed. We see how tribes and museums "make do" by creating internal procedures to dispute resolutions. We also see why tribes may feel hesitant to participate in the NAGPRA process, and how people like O'Loughlin and the Association on American Indian Affairs use their power to empower tribes to hold museums and federal institutions accountable for their actions. Finally, against the law, we see how Native American participation in the legal process in itself may be seen as an act of resistance, especially for non-recognized tribes. In the next section I will show that participants also found themselves *with the law*, exposing when tribes may feel empowered to act in their own self-interest, and why museums may view NAGPRA as a threat to their self-interests.

With the Law

According to Ewick and Silbey, when one is *with the law,* they see it as "an ensemble of legal actors, organizations, rules, and procedures with which [people] manage their daily lives" (Ewick & Silbey, 1998: 131). With the law, people understand legality as available and multipurpose, seeing the possibility of using the law to achieve their own interests (Ibid). They also understand that other players can ("fairly") do the same — Ewick and Silbey refer to this a "legitimate self-interest" (Ibid.). So, as interests are connected to persons and positions, people expect and accept varied, shifting, and conflicting objectives of both official and lay participants. In fact, with this perspective, the law is described and "played" as a game. It is "a bounded arena in which preexisting rules can be deployed and new rules invented to serve the widest range of interests and values" (Ibid: 48). People must act skillfully and strategically, using their individual resources (e.g. money, lawyers, and personal connections) to expedite the legal process and even bend or skirt the rules to achieve their own objective. However, people also understand that the law is not constantly and equally available to everyone. As seen in *against the law*, people may lack the experience and resources to effectively achieve their interests, and invoking the law may be more costly and risky for some than others.

It is important to note that my research design did not necessarily garner many instances of self-interested, with-the-law behavior reported by museum practitioners. This could be because participation in my research was fairly self-selective, excluding participants who may have otherwise acted on self-interest and been with the law. The people that agreed to speak with me wanted to talk about NAGPRA because they believe the law is a good thing. It is unlikely that a practitioner from a self-interested institution that retains ancestors and objects through being uncooperative, manipulative, or knowingly out of compliance would have spoken to me. Also, as

legally required consultation implies that NAGPRA is a collaborative process, practitioners may have known better than to portray themselves as self-interested, for this would seem contradictory. Finally, as the ultimate goal of the NAGPRA process is repatriation, the self-interest of museums retaining items may not fall into with the law's normative ideal of legitimate partiality (how the law should act). As, such museum practitioners may have felt it inappropriate to express self-interest — perhaps out of fear of judgment or the (mis)interpretation of their actions as malicious or against the spirit of the law.

With the law, people view its time and space as simultaneous with and enframed by everyday life. The law's boundaries are acknowledged, but also understood to be relatively porous. With the law "involves a bracketing of everyday life—different rules apply, different statuses and roles operate, different resources count—but it is a bracketing that can be abandoned if need be" (Ibid: 48). Thus, people can recognize, and perhaps relate to, the multiple roles, identities and contexts of their "opponents." They may also recognize the usefulness of deploying various facets of their own identity at different times to demand respect, gain sympathy, relate to other people, or "speak someone's language." This is illuminating when applied to NAGPRA because it can help explain why a museum curator feels they have to balance the interests of tribes and trustees, or why a tribal member feels that holding the identity of "archaeologist" gives them the capacity to better invoke the law.

According to respondents, with the law is manifested in NAGPRA's legal culture in two clear ways: 1) they recognized the time/space of NAGPRA as simultaneous with everyday life, and were thus able to deploy and identify multiple roles and identities at once, as well as recognize the influence of external factors; and 2) Native participants noted that NAGPRA as a law gives them the capacity to act in their legitimate interests to retrieve their ancestors and belongings —

alternatively, I will also offer cases where the interests of both tribes and museums were condemned as corrupt or selfish. At the end of this chapter, I will also report on how NAGPRA itself, as a collaborative and relatively non-conflictual law, may not be formulated in a way that participants see themselves as with the law.

NAGPRA as Simultaneous with Everyday Life

According to Ewick and Silbey, with the law, "legal players perceive and experience the law less in terms of its discontinuity and distance from everyday life than in terms of its simultaneity" (Ewick & Silbey, 1998: 158). Thus, players do not view each legal interaction as a separate, isolated experience (as they may if they stood *before* the law). Instead, they see each experience a culmination of past interactions with *and* the past (maybe unrelated) experiences of all who are involved. This simultaneity also creates multiple coexisting contexts in which people take on different roles, identities, and responsibilities. The different roles, identities, and responsibilities required in each context may affect another context. With the law, players recognize the existence of these multiple identities and contexts.

For example, within NAGPRA, museum curators have a legal responsibility to explore the possibility of repatriation with tribes, but as a member of the museum staff, they also have a fiduciary responsibility to museum trustees, who may desire that an object stays in the museum. As museum curators, Jen Shannon and Chip Colwell talked about their roles in managing the interests of trustees in the NAGPRA process. Jen Shannon discussed how the objects in her institution also have a meaningful place in the lives of her museum's donors:

> *As a curator, you're probably seeing me as, "Here's someone that's pro, pro, pro-NAGPRA!*[14] *Give everything back! Blah, blah, blah!" No. I am at this position where it is my responsibility to care and take care of this collection. And it's not just about the [Native] communities, but it's also about the donors, and their intentions for the long-term care of these items that had a meaningful place in their lives.*

Here, Shannon displays that she is with the law, balancing her dual responsibilities to the tribe and to her museum's donors. She also recognized that objection is her institution's collection have separate and significant contexts within the Native community *and* the museum's community.

Colwell, also discussed how it was his responsibility to balance the interests of tribes and his museum. Within some institutions, like Colwell's, the museum's board or a separate committee has the final say about the status of an item's repatriation. It is Colwell's job to make a suggestion based on his research and consultations with tribes:

> *Essentially at the museum, I actually make no decisions — in terms of day-to-day "Do I take this phone call or not?" I make those decisions — but, in terms of actually deciding on what to return or not, in terms of policy and procedures, I make none of those decisions. I just make recommendations to different committees, and then there are committees that make the decisions, and, even then, if there is something that we are returning that is more than $250,000 in value, then the museum board has to sign off on it. Essentially, there are different levels of checks and balances to the process.*

Here, Colwell is with the law in that he recognizes that the interests present in the context of consultations that lead up to his ultimate suggestion (himself and the tribes) may not be present in the contexts committee or museum board meetings where the final decision is made. In both Shannon and Colwell's examples, the boards may also be with the law if they require curators to retain items in accordance to their interests.

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[14] Here, when Shannon said she was not "pro, pro, pro-NAGPRA," it was clear that she meant she was not "pro-give-everything-back-no-mater-what." She was very supportive of NAGPRA as a law and viewed it as a necessary piece of legislation.

As a repatriation advocate for tribes in Maine, Bonnie Newsom recognizes that multiple (and perhaps conflicting) responsibilities of museum curators:

> *I understand because I'm an archaeologist. I understand that sometimes the rationale for why archaeologists may not feel they're able to repatriate. In many state institutions, they feel like they have a fiduciary responsibility or a trust responsibility to all of the people who are supporting their institution. But at the end of the day, it's about human rights.*

Here, Newsom is with the law because she attributed her ability to recognize these dual responsibilities as connected to her identity as an archaeologist. She is also with the law because she recognized the alternate context of managing interests within one's institution. Newsom acknowledges the presence of board interests that may conflict with those of tribes or even museum curators. However, she affirms that "at the end of the day it is about human rights." Here, she may be indicating that she does not believe that the board's self-interest is legitimate, meaning they cannot fairly act with the law.

Throughout our conversation, Newsom discussed being able to strategically deploy her identities of archaeologist and Native person to better act as an "ally" to Maine tribes:

> *I've always been an ally. I tried to be an ally for the tribe in terms of getting remains back, if that's the right word, but being successful in their claims. So here in Maine, the tribes have had a bit of a challenge getting state entities to comply. One of the challenges is that there's kind of a piece of the decision making that says here in Maine — and this is kind of on the archeology side of the house — Native peoples cannot be culturally affiliated back farther than a thousand years in the state. You have to remember that we've never been removed from our homelands like some tribes have. So, the Native peoples of Maine feel, and rightly so, that there's a cultural connection between us today and those folks as far back as people have been occupying Maine. So, one of the things that I've tried to do is work with those agencies on behalf of the tribe in order to get them to understand that. We do have a deep antiquity here, and I feel like sometimes this is where archaeologists and tribal viewpoints clash. That sets the stage for some tension and bad relationships. So, I've kind of tried to work on that relationship and be an advocate for the tribes whenever I can. Part of my role is that as an archaeologist and a tribal member, I can kind of speak both languages.*

Here, she notes that this dual identity is especially important because in Maine there is a clash between archaeological and tribal beliefs regarding cultural affiliation. As both an archaeologist and tribal member, Newsom is able to move between both contexts (tribe and institution) and "speak both languages" (Native and archaeological) acting with the law to advocate for repatriation. This puts Newsom with the law because she is able to strategically deploy her identities in order to effectively act in the interest of herself and her tribe.

Native participants also alluded to their perceived simultaneity of NAGPRA with their everyday life by noting how it aligned with their cultural values. Like Newsom, Deanna Byrd is also a professional archaeologist who is Native. When describing how she came into NAGPRA work, Deanna Byrd, the NAGPRA Liaison for the Choctaw Nation of Oklahoma, said "It was a nice fit between my personal values and my passion and [my culture's] desire to honor our ancestors." Byrd also discussed the repatriation process as multi-generational work:

> *I have a partner that I work with, Misty Madbull, and we both have families. So, we've often talked about how the more that we do, and the more individuals from our communities that we find, we can at least know where they are. Maybe they're not repatriated in our lifetime, but it's less our children have to do. It's less their children will have to do. So, it kind of sets that meaningful work in knowing that we're doing the best that we can.*

Here, Byrd recognizes not only the simultaneity of NAGPRA with her everyday life and values, but also its continuity. To her, each NAGPRA case is not separate and isolated, but, instead, some of the burden taken off generations to come — her children and her children's children.

Byrd was one of two participants who mentioned her children.[15] I was curious to know how much she shared her work with her family, considering that these were also their ancestors she was laying to rest, so I asked. She discussed how, although she does not share the "nitty-gritty

[15] Amy Margaris mentioned how her daughter was present when she participated in a repatriation — I discuss this in the next section, "Beyond the Law."

details" of each case, she finds it meaningful to discuss with them how honoring their ancestors is at the core of what she does:

> *I have three children, 19, 15, and 11, and my little guy sometimes misses me when I go on trips. I just took a trip to Mississippi in our homeland, and did some work on behalf of our ancestors. That first night was hard for him because I hadn't left in quite some time, so he was missing mom. We talked about how, "You've got to give up mom for three days for the ancestors, and then I'll be back." So, they're very understanding. It's neat to see them socialized into a culture that is very respectful of the dead, very respectful of our ancestors and their resting places. So, we talk about it often. I don't say the nitty-gritty details, but I do share the good experiences and why I do what I do.*

Discussing her NAGPRA work with her family does not necessarily mean that Byrd brings her work home with her, but instead she brings the values she practices at home into her work. Here, she is with the law in seeing the boundaries between the value systems of her home life and NAGRA work as porous or even non-existent.

Donna Moody also discussed "do[ing] the proper cultural thing" in her NAGPRA work. She talked about how when she was the Repatriation and Site Protection Coordinator for the Abenaki Nation, she would bring gifts for members of the Review Committee, "hauling [her] cultural and spiritual beliefs into the meeting," thus, deploying and asserting her identity as an Abenaki woman:

> *So, when I presented to the Review Committee, I have always brought them gifts before I begin my presentation, because that's the way we do things. You know, we don't ask. So, I'm hauling in my cultural and spiritual beliefs — and they are spiritual beliefs. A lot of it. I mean, this is for me. For me personally. I'm not saying for the NAGPRA law, I'm saying for me. So, when I had elders, that's what my elders would have expected of me. They would not expect me to go to the committee in my business suit and just give forth. They would expect me to do the proper cultural thing, which is when you're asking someone to do something for you, you bring them some kind of gift. So, I always did that. And I think that that created a bond between the tribal members [of the Review Committee] and me. I think that they're still following the law, but they're also looking at the intent of the law when they were dealing with me. And I think that that helped. Maybe I shouldn't say that. But I think it did. That was not why I did it. I did it because that's what I knew was proper for me to do.*

Moody felt that just because she was a professional actor in the NAGPRA context, it did not mean that she had to arrive in her "business suit and just give forth." With the law, Moody seemed to see no reason as to why she could not simultaneously be a NAGPRA professional *and* do what her elders would have expected of her.

Moody also stated her belief that asserting her tribal identity in this way in front of the Review Committee helped create a bond with her and the tribal members of the committee. Although she believed gift-giving worked in her favor regarding repatriation, she simply did it because it is the norm of Indian Country:

> *The next time I went to a Review Committee meeting, there was a member from Alaska on the review board, and she gifted me with a beautiful pair of earrings. You know, this is just Indian Country. This is how it's done. You know, there's a reciprocity in play. I don't know how else to describe it.*

By not dropping a part of her identity at the door (her spirituality and cultural norms that prioritized gift giving), Moody saw herself as with the law, letting NAGPRA coexist with her valued and with her everyday life.

Within the legal culture of NAGPRA, people view the law as simultaneous with their everyday life. They recognize that multiple contexts may consist of different identities, responsibilities, and values. However, they also recognize that these identities, responsibilities, and values can readily be brought into any other context. This explains why museum practitioners feel that they *also* have a responsibility to act in the interest of their board. It also illustrates how Native person may find their identity as an archaeologist helpful in the NARPRA process, or how Native people see NAGPRA as aligning with their cultural beliefs.

The (Il)Legitimate Self-Interest of Tribes and Museums

With the law, self-interest is tolerated and seen as legitimate when people play by the rules of the game. People understand that the rules of the game may not exactly match the letter of the law — when one is with the law, they may use resources and connections to help bend and expedite the legal process to ensure their self-interests. However, with the law, "people recognize limits to what ends might be sought or what means might be employed legitimately" (Ewick & Silbey, 1998: 144). When one goes beyond these limits, violating the rules of the game through dishonesty, malfeasance, or stark illegality, they are seen as corrupt. With the law, this type of partiality is seen as illegitimate. Generally, the higher one is on the legal hierarchy, the more their acts of self-interest are perceived as corruption (Ibid). With the law, it is understood that "these higher officials acting upon personal interests, by virtue of their power, substantially increase the likelihood of skewing the outcome and fixing the game" (Ibid: 145).

Ewick and Silbey discuss how marginalized communities do not often find themselves with the law due to the lack of power and resources that would grant them the capacity to act with the law. However, NAGPRA is meant to level the playing field to allow tribes to be with the law and achieve their interests of retrieving their ancestors and belongings. Of course, as shown in the previous section, NAGPRA is not a perfect law, museums have all the decision-making power, and tribes often do not have the means to successfully go through the process. Nevertheless, NAGPRA provided a framework for repatriation that empowers tribes to make a legitimate legal claim to their ancestors and belongings. As such, Native self-interest is widely seen as legitimate.

That being said, there certainly are cases where non-Native archaeologists and museum practitioners have accused Native interest in repatriation as selfish and ignorant. They argued that by seeking the return of their ancestors, Native peoples are "destroying" (laying to rest) a huge source of knowledge for the academic community: bones (Colwell, 2017). When NAGPRA was

first introduced, oral pathologist E.J. Neiburger wrote in *Nature* that NAGPRA "is a loss to the world, caused by greed, ignorance, and shortsighted zealotry" on the part of Native peoples (Ibid: 80). A professor of archaeology argued that, "If Native collections were gone, it would be comparable to losing a major section of the Library of Congress," and another added that reburial "is akin to taking an unread manuscript and throwing it on a fire" (Ibid: 80-81).

More recently in 2009, Elizabeth Weiss, Professor of Anthropology at San Jose State University published an article titled *The Bone Battle: The Attack on Scientific Freedom*. In this article, Weiss argues that the law is corrupt in itself, claiming that NAGPRA is a religious law that destroys the separation of church and state, violating the First Amendment of the U.S. Constitution. As, such believes that NAGPRA is fixed to privilege Native American oral tradition and "creation myths" over science. She also believes that through repatriation efforts, self-interested tribes do not only take away data, but also time and funding from research institutions, inhibiting scientific freedom:

> Claims and legal battles plague anthropology departments across the country. Not only have data been lost, but funding and research time too. It is impossible to calculate the impact of NAGPRA on museums and other institutions, which are forced to employ people on inventories and repatriations instead of research. Professional anthropologists have curtailed their own efforts to help people understand the past, in order to aid in repatriation. Amy Dansie of the Nevada State Museum wrote in a 1999 paper in the Society for American Archaeology Bulletin that efforts to abide by NAGPRA have "resulted in 10,000 hours spent over the past nine years of my life," and that NAGPRA work is "sucking day after day, year after year, out of our careers." These lost hours are spent on sincere but debilitating attempts to be in compliance - hours expended on inventories, consultations, and just trying to figure NAGPRA out. But to me, the scariest aspect of repatriation and reburial is the loss of scientific freedom. Scientists should be able to investigate all sorts of questions about the world around them, a world that includes the past; and the attempt to answer these questions should not be hampered by political or religious sentiments (42).

To Weiss, when tribes are with the law pursuing the return of their ancestors, they are "sucking" time and money away from institutions' pursuit of knowledge, and thus blocking them from their "right" to this knowledge.

She legitimizes her self-interest in retaining ancestors (and delegitimizes the interests of tribes) by arguing the protection of scientific freedom. Weiss goes on to say:

> Scientific freedom is lost when tribal consultation or supervision is required. Tribes are not likely to allow the study of remains if they judge that the questions that the remains might answer are controversial or conflict with their creation myths (42).

Here she claims that with NAGPRA tribes may refuse the scientific study of their ancestors to pursue their own interests: the protection of their creation stories.[16] Weiss believes that NAGPRA gives tribes the capacity to hide behind the law to protect the validity of their beliefs. To Weiss, Native interests are illegitimate because they selfishly constrain scientific freedom. Within the current ethical climate of NAGPRA, however, Weiss's view, although certainly present in the archaeological community, does not seem to be widespread among NAGPRA practitioners (or, at least, widely expressed in such an extreme way). In fact, views like Weiss's are often condemned by Natives and museum practitioners alike. One Native participant recommended I read her work, calling it "the most negative view on NAGPRA" and "just evil."

As a Museum curator, Jen Shannon presented an alternative view to Weiss's suggestion that tribes are not interested in scientific knowledge regarding their ancestors. Shannon asserted

[16] Throughout her article Weiss privileges scientific evidence over everything else. Privileging scientific knowledge over other types of knowledge like oral histories is an incredibly Western point of view rooted in colonialism (Mann, 2003). One of the most lauded parts of NAGPRA is that it allows for diverse lines of evidence to determine cultural affiliation — geographical, folklore, archaeological, biological, expert opinion, linguistic, kinship, traditional indigenous knowledge, and historical — giving Native history and ways of knowing the same weight as those that may fall within a more Western framework (Atalay et. al., 2017: 7).

that tribal interests *can* and *do* align with institutions interested in the scientific research of their ancestors:

> *Really, it's just about being honest. I think where consultation breaks down is — and this often happened in the past, and I think it's less and less so — but people come into the room assuming they know what the other side is going to say. So, they kind of want to — and I'm really talking about the museum people here, more than anything — they try to shape what they say, and pick what they communicate in order to try to get a desired result — instead of just being like "Hey, this is what we have and this is what we want to do with it, and this is why." For instance, research on ancestors and human remains. There have actually been examples where tribes are like, "Yeah, we would like to know that too. you have two weeks, and then let's return that individual."*

Here, Shannon discussed a common occurrence in high-stakes negotiation. To achieve their interests with the law, actors may feel the need to keep their cards close to their chest, concealing their self-interests. With the law, actors may come into the legal process automatically expecting conflicting interests. However, Shannon suggested that if people are honest, they may realize that that share interests with those they perceived as their "opponents."

With the law, one may view it as a zero-sum game — to achieve their own interests, one must ensure that the other party cannot do the same. When one views NAGPRA as a more collaborative, rather than conflictual process, there may be no need for practitioners to be with the law to achieve their interests. Through consultation and collaboration museums and tribes may realize that they want the same thing, or come up with a solution that is in the interest of *both* parties.

NAGPRA may also legitimize tribal interests and empower them to be with the law because it lays out a framework for repatriation and legally requires museums to consult with tribes. Although Donna Moody mentioned that she faced difficulty seeking repatriation coming from a non-recognized tribe, she also recognized that NAGPRA gave her the capacity to make institutions "deal" with her, putting her with the law:

> *I did have one state archeologist say to me, "I don't need to deal with you. You're not federally recognized." And I said, "You will deal with me," and all I did was make a phone call when it became really contentious. Made a phone call to Tim McKeown, who was sitting in the NAGPRA Office and said, "Blah, blah, blah, blah, blah," and he called her and said, "What the hell is going on up there?"… Tim and I are good friends.*

Moody also showed that she was with the law because she used friends in high places to her advantage to have the museum consult with her. Here, Harvard Peabody was with the law, attempting to pick and choose the items they desired to keep or repatriate:

> *But, you know, we had a consultation meeting. I did have to argue [with the archaeologist] and we spent a full day of — and it was argument — at Harvard Peabody. They wanted to repatriate only the remains from contact period, and I said, "No, we want this one. We want this cremation burial. This. This." And they were like, "No, we're not going to do that." Finally, we got the museum director involved, and she was digging in their heels. Then we said, "Fine, go get the president of the college. Go get the president of Harvard. Have him come down here and we'll continue this discussion." They finally gave in. You know, so I don't think that has anything to do with us being non-federally recognized. I think that was just simply the landscape at the time."*

However, Moody remained with the law strategically "leapfrogging" over the curator and the museum director to make her case to the president of the University (Ewick & Silbey, 1998).

In seeking repatriation for Maine tribes, Bonnie Newsom said that she does not feel "empowered in [the NAGPRA] arena" because all the decision-making power lies with the holding institutions. Here, Newsom suggested a dissenting point of view, believing that NAGPRA does *not* allow her and tribes to be with the law, even when Maine tribes try to strategically repatriate together:

> *Here in Maine, I think we have a pretty good handle on it. One of the things that the Maine tribes have done is we've come together on this issue. So, we repatriate as a collective instead of one tribe going and making a claim and then another tribe coming along and making a claim. We see ourselves as all related. So, that has helped. We thought that because of that, we wouldn't have any issues around cultural affiliation because who else could it be? But because the power isn't within the tribe, it's within the people who are managing that, "collection." We are not empowered in that arena until we get into decision-making positions.*

As, Newsom does not feel directly empowered by the law, she seeks power elsewhere. She discussed how she was able to use her role as a commissioner at the Maine State Museum to bring old claims to the museum's attention.

> *The Maine State Museum still has human remains. In I want to say 2012, the Wabanaki made a brief repatriation claim under NAGPRA to the museum. They took that claim and they sent it to the state [Attorney General]'s office and it sat there — it sat there until 2016, when I came on the [museum] committee and said, "Oh, what about this claim." So, the claim was readdressed, you know, the museum folks readdressed that, but they recently sent it back to the [Attorney General]'s office, and so right now it's sitting there and we're waiting. But, you know, from 2012 to 2016, '17, I can't remember which it was, but that's a long time for a claim to sit there and not have anybody do any work on it. So, just being on the commission enabled me to raise the issue again from a position of influence because I was a commissioner. I feel like having that opportunity to alert people who are in decision making positions to these things is a good way to make sure that the tribal voices are heard.*

Here, Newsom is with the law because she has entered an arena in which she *can* have some decision-making power: the museum. In the museum, she can use her position to act in the interest of the tribe, pushing their claims forward. Newsom, in a sense, acts with the law in order to drag museums *before* the law.

NAGPRA is a law that deals with a complex network of interests — sometimes conflicting, sometimes seen as illegitimate on both sides. With the law sheds light on how NAGPRA stakeholders view and manage these interests, as well as seek to protect and ensure their own, and why some interests may be condemned while others are supported.

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Investigating how with the law presents itself in NAGPRA's legal culture helps us understand how practitioners recognize the law's boundaries as porous. It explains why the interests of trustees may seep into a consultation meeting between tribes and curators. It explains why a Native person may feel obliged to bring gifts to a Review Committee meeting. With the

law also show that within NAGPRA, self-interest is complicated. It provides insight on why an archaeologist that believes they are making important scientific progress is considered evil by a Native person, or why a Native person wanting to finally lay their ancestors to rest maybe considered selfish or ignorant by an archaeologist.

Looking at NAGPRA from the perspective of with the law also shows that more administrative laws like NAGPRA may not be designed for partiality. NAGPRA is a law that prioritizes collaboration to make a final determination — the Review Committee or litigation are seen as a last resort, or a need when the law does not seem to work. Also, as I will discuss in my next section, "Beyond the Law," practitioners often seek to build relationships with each other — if this is the case, partiality could be seen as detrimental.

A PROPOSED 4TH CONSCIOUSNESS: BEYOND THE LAW

Throughout my research and interviews, it was clear that NAGPRA practitioners recognized a need to balance the letter of the law and *the spirit of the law*. The spirit of the law focuses on NAGPRA's *intent* rather than the rules and regulations prescribed by its exact wording as an official legal document (i.e. the letter of the law). When Representative Morris Udall of Arizona introduced the bill to the House of Representatives in 1990, he characterized it as being about "respecting the rights of the dead," calling it "the biggest thing we may have ever done" in the "scope of conscience" (Midler, 2011: 1340). In the spirt of the law, NAGPRA is human rights legislation. It is about ensuring Native Americans the same rights to and respect of their bodies as anyone else in the United States. NAGPRA is also about coming to terms with the past and addressing historical injustices. It is about museums and the U.S. federal government taking accountability for the colonization, paternalistic treatment, exploitation, disrespect, and abuse of Native Americans and their ancestors. As such, when one considers the spirit of the law while carrying out the NAGPRA process they consider its history, their place in its history, and their responsibilities dictated by it.

Sometimes a law's greatest strength may not lie in the legal consciousnesses identified by Ewick and Silbey. In the case of NAGPRA, practitioners consistently reported going beyond what its letter requires, or may even be able to encompass as a legal document that was the result of a lengthy political process. Many participants supported this indicating that NAGPRA's real power and effectiveness lies in the *spirit of the law*. Rae Gould, a member of the Nipmuc Nation and the former Native American Program Specialist for the Advisory Council on Historic Preservation, illustrates this effectively with her concept of "institutional will." Gould believes to effectively carry out the NAGPRA process, a museum must have the "institutional

will" to "*want* to comply with not only the [letter of the] law, but also the spirit of the law in the most genuine way" (Gould, 2017: para. 3). Gould believes that with institutional will, the end goal is always focused on the return of ancestors and items to tribes. In fact, she even argues that without institutional will, repatriation often does not even occur. She cites the lumping of ancestors and objects as "culturally unidentifiable (CUI) and Section 10.11's implementation and (lack of) compliance as a bulk of her evidence.

According to Gould, museums that do not have the institutional will may apply the CUI label arbitrarily as an "exit strategy" to repatriation, even after Section 10.11 was passed in 2010 (Ibid). Requiring the return of CUI ancestors to tribes, 10.11 "leaves little doubt that the National NAGPRA Program legislation and the Secretary of the Interior view the purpose of NAGPRA legislation as the return of Native dead [including those classified as CUI] to Native peoples" (Ibid: para. 22). Thus, the intent/spirit of the law is focused on the return of ancestors.

However, as, discussed, 10.11 only *recommends* that museums also return to tribes the associated funerary objects (AFO) of the CUI remains. For many tribes, receiving the remains of their ancestors without the objects buried with them is not an option – even losing the soil they were buried with is a great loss (Gould, 2017). So, even with an established process for the repatriation of CUI ancestors, museums that are not acting in the spirit of the law have an excuse to avoid repatriation while still *technically* being in compliance (i.e. in accordance with the letter of the law). There are other reasons why museums may use the CUI label aside from avoiding repatriation like lack of institutional resources to carry out thorough inventories, tribes' discomfort in claiming cultural affiliation, its use as a placeholder before a determination can be made, or *fundamentally* not enough evidence. However, not being able to determine cultural affiliation with a federally recognized or non-recognized tribe does not mean that a repatriation or reinternment of

CUI remains cannot occur — museums may repatriate to any other tribe willing to claim the remains or reinter CUI remains "according to State or other law" (25 USC § 3001, Section 10.11). A 2016 survey found that over 116,000 sets of Native American human remains and nearly one million AFOs are still held in museums under the CUI label (Redman, 2016). As this is still the case nearly three decades after NAGPRA's implementation and a decade after 10.11, Gould argues that "institutional will – rather than law or amendments – remains the key factor in determining whether or not repatriation occurs" (Ibid: para. 23).

Gateways for non-compliance are created by Section 10.11 and NAGPRA's other purported weaknesses – such as the lack compliance enforcement, the Review Committee's inability to make binding decisions, and the burden of proof falling solely to tribes. These weakenesses combined with the sheer amount of judgement built into the law on the part of museums make it possible for museums to check off all the boxes without repatriating, or even consulting with tribes (e.g. a museum may send a tribe a letter and call that "consultation"). A museum can be in compliance according to the letter of the law, but never go through the NAGPRA process as intended by NAGPRA's creators and Native American activists who pushed for the law (McKeown, 2012). Thus, NAGPRA relies heavily on those, especially museums, acting in the spirit of the law, beyond what its letter requires/enforces, to ensure repatriation.

Also, the relationship-building and collaboration between tribes and museums – what many consider to be one of the most valuable parts of NAGPRA – heavily depends on one acting beyond the law in the spirit of the law. The letter of the law discusses museum-tribe collaboration in relation to consultation, but lays out no framework for what a consultation should look like. Thus, the effort put into, and the extent of, a consultation depends on how

much one considers the spirit of the law. This is especially important on the museum side as they are responsible for initiating consultations. The letter of the law also does not mention any sort of museum-tribe interaction outside of the legal process. Museums and tribes do not *have* to build and continue these relationships, but they *do*. In fact, every person I interviewed mentioned how relationships that originated from NAGPRA have impacted their professional and/or personal life in a positive way (e.g. lifelong friends, exiting exhibitions, important alternate perspectives).

These meaningful and fruitful relationships between tribes and museums are beyond what the rational letter of the law can touch. By sparking innovation, creating networks of support, and opening people up to new ways of seeing, knowing, and caring for collections, these relationships are what strengthen and expand NAGPRA's legal culture.

It is important that Ewick and Silbey's schemas include the letter of the law – for example, it is illuminating to see how one interprets legal text, if they find textualization to be powerful or arbitrary, where people see loopholes, etc. However, the spirit of the law can foster completely different actions and outcomes than the letter of the law can – ones that cannot be written into a legal procedure. In our conversation, museum practitioner Anne Amati discussed how "Build relationships!" or "Be nice! Be a decent human being!" cannot be written into laws. To act in the spirit of the law does not mean one needs to bend, resist, ignore, or feel limited by the letter of the law. It fundamentally means that one may feel the need to do *more* than what is legally required. Therefore, to gain a more robust analysis of NAGPRA's legal culture and help explain why NAGPRA stakeholders go further than what the letter requires, I believe it is necessary to isolate and hone in on the spirit of the law. Thus, I have found that within NAGPRA, there is a fourth legal consciousness at work that explains

things that cannot be accounted for by the other legal schemas as well removes the noise of the letter of the law that is inherently included in the consciousnesses of *before, against,* and *with*. I call this new legal consciousness *beyond the law*.

Beyond the Law

People beyond the law carry out the legal process with a focus on reconciling the law's letter and spirit. They may believe that it is their responsibility to fill in the gaps left in a legal process, especially if they feel accountable for their or others' actions in the past. To do so, they act in such a way beyond what is formally and legally required of them. Within NAGPRA, this could be museums also repatriating the AFOs of CUI remains, reaching out to tribes instead of waiting for claims to come in, or consulting with tribes on how to exhibit their cultural items.

The spirit of the law is also not bound within the beginning and the end of the legal process. People engage with the spirit of the law even if they themselves are not going through the legal process. Specifically regarding NAGPRA, this can take the form of comics about NAGPRA. Jen Shannon, a co-creator of *NAGPRA Comics* mentioned, "We wanted to write something about a regulation [Section 10.11] that doesn't seem to be in the spirit of the rest of the law, and asked how can we reach a broader audience?" Or, it could manifest in the idea of collaborative archaeology. Ian Thompson discussed a joint project with his tribe and the National Park Service at the Natchez Trace that stemmed from the NAGPRA process – "We worked with [Natchez Trace] to do interpretive signage, audio recordings, things for the Interpretive Center that they have there. Being a removed tribe, all of that allowed the Choctaw and Chickasaw Nations to

come back home in a way and put our own voice to these ancestral sites that have not been inhabited by us since removal."

Beyond the law is a positive feedback cycle. The more one engages beyond the law, the stronger their relationships become within this new legal culture, giving them the capacity to act beyond the law more in the future. These relationships may even grow to be something completely outside the legal culture itself like lifelong friendships, collaborative projects, or professional networks, unrelated to the law except in origin. For example, Donna Moody of the Abenaki Nation said that a once reluctant archaeologist is now "like family" to her.

Also, engaging with the law beyond the legal process means going the extra mile and then, perhaps, a mile more. So, it requires one to have the *will* to go beyond. Will is not only connected to *want,* but also *priority,* and *ability*. For example, within NAGPRA a tribe may want to collaborate with a museum to create an exhibit, but, for the time being, their immediate priority may be to devote their time to the return of all their ancestors. Or, a museum may want to hold a workshop on proper and respectful consultation, but their institution may not have the funding. If an institution or tribal entity does not have the will or ability to do more than what NAGPRA requires, or it is not currently their priority, this constrains their ability to act beyond the law. Finally, beyond the law, actors are oriented towards the future. By acknowledging the past and then working together to move forward, people are focused on building new relationships and creating a healthier, more productive legal culture that uplifts all.

Overall, beyond the law helps us answer the question: *What compels NAGPRA stakeholders to do beyond what is legally required, and then keep doing it?*

Sticking with Ewick and Silbey's model, I have laid out beyond the law's particular configuration of normative ideal, constraint, and capacity, as well as locating it in time/space:

Normativity: accountability

Constraint: institutional/community/personal will, priority, ability

Capacity: relationships, trust

Time/Space: the future

Archetype: the spirit of the law

In this penultimate section, to better introduce this new consciousness, I will provide examples from my interviews from each of these vantage points – beginning with its normativity.

Normativity: Accountability

Beyond the law, people view its normativity (how/why the law should be invoked) as a way to take accountability or hold one accountable. They believe that specific laws are created to address past injustices. Thus, some parties are in the position to take responsibility for their wrongs (or the wrongs of their communities) and attempt to make amends through sincere actions. Other parties are in the position to seek justice – and thus, a sense of healing and empowerment when this justice is brought to fruition. Beyond the law, taking accountability, and the recognition of such, may eventually lead to reconciliation. Beyond NAGPRA, stakeholders believe that the law was created to acknowledge the colonization, exploitation, and disrespect of Native Americans in the United States. Museums and federal institutions have the responsibility to acknowledge the deep harm of their actions towards Native Americans. Beyond NAGPRA, museums must take action, and attempt to rectify these injustices through consulting, repatriation, and then *further* collaborating and working closely with tribes. NAGPRA also gives Native Americans a voice and

a framework to advocate for themselves and their ancestors, as well as hold museums to their responsibilities. For Native Americans NAGPRA can be seen as a vital healing process, uprooting and dissolving the harmful practices that have plagued archaeology and U.S. federal policy for centuries.

Bonnie Newsom, a Native archaeologist and repatriation ally to Maine tribes, demonstrated that she was beyond the law when she described the purpose of the NAGPRA process as "truth and reconciliation":

> *I think [things can get better] until people have acknowledged that [NAGPRA] is almost like truth and reconciliation – I don't know if you're familiar with that process, but first you have to acknowledge that a wrong was done, and then you have to take the step to reconcile it. I think people are at the stage of acknowledging that a wrong was done. So, until you get that truth thing out of the way, as hard as it may be, you can't move on to the reconciliation piece of things. So, in my opinion, archeology as a whole could benefit from doing a little bit of that work – truthing how it has harmed Indigenous people.*

Here, Newsom suggested that when museums acknowledge a wrong ("truthing") it is a feat, but only the beginning.

For Newsom, within NAGPRA, museums must act beyond acknowledgement to move onto reconciliation. Newsom provided the decolonization efforts of the Abbe Museum in Bar Harbor Maine "as a model for how other institutions can do this work." On their website, the Abbe Museum describes this initiative:

> As the only museum in the world dedicated to Wabanaki art, history, and culture, the Abbe works closely with the Wabanaki Nations, sharing authority for the documentation and interpretation of Native culture. We are committed to an ongoing process of better understanding Wabanaki culture, history, and values, and with this in mind, we have a new vision for the Abbe, one that is groundbreaking, ambitious, and thrilling: The Abbe Museum will reflect and realize the values of decolonization in all of its practices, working with the Wabanaki Nations to share their stories, history, and culture with a broader audience (Anderson, 2016).

Decolonization is a process that is intended to "shed and recover from the ill effects of colonization" (Ibid). To do so, museums must work closely with tribes to "address these legacies of unresolved grief" (Anderson, 2016). Newsom put herself beyond the law in suggesting that museums see NAGPRA as an opportunity to take accountability, following the example of the Abbe Museum, and reorienting the purposes and practices of their institutions.

Museum curator Jen Shannon also believes that "NAGPRA makes us acknowledge the past and past practices." Like Newsom and the Abbe Museum, Shannon discussed that NAGPRA has reoriented the responsibility of the modern museum to support the health and well-being of the Native American community:

> *The thing that I have been pushing a lot lately… is that I fundamentally think we should use this coming together to learn the language and the meaning of connections to material culture as a way to reorient the purpose of the museum. So, I think that because of NAGPRA we've come into the same room and we've had these conversations, and we've changed our ways of seeing, and knowing, and caring for collections. Now, I think that we can consider one of the purposes of museums in the 21st century is to support Native American community health and well-being. Period. It's not just in the return of objects, but it's in visiting, it's co-curating, it's in many different ways. I am actually advocating for museums to consider that a purpose that they can fulfill at this intersection and relationship with tribes. I hope that if it's the right kind of museum, tribes see that as well and come to those museums.*

Here, Shannon placed herself beyond the law asserting that the NAGPRA process should entail more than returning objects to tribes. According to Shannon, it is the responsibility of museum to invite tribes to collaborate, discuss and co-curate collections.

Sandra Dong, the NAGPRA Coordinator at Harvard Peabody, discussed how NAGPRA has allowed her institution to take the steps necessary to ensure culturally appropriate care for their collections:

> *We work a lot with collections management. I'll give you an example. Part of the consultation process is if a tribal delegation comes to the museum to look at collections that they might be interested in under NAGPRA, we have a lot of*

> *conversations, you know, outside of NAGPRA, too – in terms of not just what you're interested in requesting, but how do we store these items in traditional ways, how do we care for them in a way that's culturally appropriate. We get a lot of requests for traditional care and handling. One of the most common requests that we get relates to what Cardinal Direction the item is facing – if someone says, "We would like this item to face East," or something. I don't know if you spent a lot of time in museum storage areas, but generally, they're windowless areas because light is bad for conservation concerns. So, there's not a lot of light inside these rooms. I don't what direction I'm facing when I'm outside, but certainly not when I'm inside. One of the things that we did – it seems like a small thing, but definitely a big, big help in repatriation consultation visits – is that someone stenciled the directions on the wall. It says north, south, east, west on all the walls. So, when we get a request that says, "We would like this to face east," we know, it should face the eastern wall. So things like that. Right. These are the kind of improvements that I see in the museum – that I've seen happen. And it kind of happened very naturally. That put us at the forefront of the museum's mission – of our strategic planning. And we definitely take it seriously, and everyone is involved in some way.*

Here, Dong and her institution are beyond NAGPRA, understanding that as long as these objects remain in their museum, it is their responsibility to ensure the proper care as requested by tribes.

Amy Margaris, the NAGPRA Compliance Officer at Oberlin College presented a similar point of view. Margaris is "eager" to repatriate the remains Oberlin College currently holds and has reached out to various tribes. However, as a smaller institution, Oberlin may not be at the top of tribes' lists. So, as Margaris awaits responses from tribes and opportunities to repatriate, she does what she can to sensitively care for the remains by smudging the room in which they are held:

> *I certainly have learned a lot through this process, and working with various other indigenous peoples about specific sort of sensitivities around having people's remains. You know, I smudge the room. Burn some sage. You know, open the cabinet and do that to help maybe make things better. Cleanse the air – purify. I've been told that's something that I can do to help.*

Here, even though Margaris does not currently have the opportunity to go through the entire NAGPRA process, she puts herself beyond the law by viewing it as her responsibility to do what she can to help ensure the health of tribes' ancestors until they may be returned.

As a museum curator, Chip Colwell discussed how he was first hired to bring his institution into compliance after "a number of failures." After he and his boss quickly brought the museum into compliance, they felt that the museum "had both an obligation and an opportunity to do more" than what NAGPRA required:

> *In 2007, I was hired as a curator here at the Denver Museum of Nature and Science. The museum, at that point, was recovering from being out of legal compliance with the law. In short, there had been a number of claims that were never addressed. The inventories were incomplete, and there were a number of other failures. So, I was hired to be a curator, but part of the job responsibilities what included what the museum called it's "NAGPRA Officer," which is essentially the museum's point-person for complying with NAPRA. So, my boss, Steve Nash, and I had some work to do to try to bring the museum back in to compliance. We did that relatively quickly with very sincere and real support from the museum's administration. At the same time, we decided that we needed to do a bit more than just bring the museum into compliance. We felt that the museum had both an obligation and an opportunity to do more. So, we set out to have a series of projects that would more proactively tackle complying with NAGPRA. So, at a lot of museums, you do have some responsibilities in terms of inventories and things like that, but, for the most part, you're sitting back and waiting for claims to come from tribes. But, we felt that, given, one, how much work tribes have in complying with NAGPRA, and number two that it was the museum that had created this ethical crisis, it was really the responsibility of the museum to be proactive in NAGPRA. So, what that meant was that we created a series of projects that really pushed forward the conversation about what to do with Native American human remains and sacred objects under the museum's control. For the last twelve years, that's really been our work.*

By "proactively tackl[ing] complying with NAGPRA," Colwell was acting beyond the law, taking accountability for the "ethical crisis" the museum created and helping to lighten the burden of proof NAGPRA puts on tribes.

Finally, Shannon Keller O'Loughlin shared a story from one of her first cases as a tribal attorney. She discussed a repatriation of wampum belts from Sotheby's. Although Sotheby's is a private institution, and thus not subject to NAGPRA, O'Loughlin stated that NAGPRA's textualization of cultural patrimony can be used to make a legal argument in the private sphere.[17]

[17]Shannon Keller O'Loughlin discussed how the idea of cultural patrimony can be taken from NAGPRA to ague repatriation in private settings: *The federal government basically has declared that certain items are cultural*

In her story, O'Loughlin discussed how an Iroquois man's reuniting with a wampum belt "touched everyone in the room at a level that went beyond just emotion":

> *I moved to New York State, where I began working with the Haudenosaunee Confederacy, otherwise known as the Six Nations or the Iroquois Confederacy… One of the directions that they gave me when I first was working with them as legal counsel was, "Go and get our ancestors, we'll never be whole until we get them back – that's your job." So, I had this awesome task of basically helping to make the people whole again by returning their ancestors. If you know anything about the Iroquois and the Iroquois Confederacy, they have been working on repatriation matters since the 1800s. So, there are documented instances of them going in and getting items that were stolen, and asking for items back – especially regarding wampum belts. Wampum belts are not just a treaty – you know, they're often described by Westerners or Europeans as indigenous documentations of a treaty of agreement, but they're actually much more than that. Wampum belts were imbued with other types of messages besides the obvious, or besides the symbolism. They were imbued with a life that had to be nurtured and cared for. I think that one of my most vivid examples of learning about the importance of wampum and wampum belts was that some wampum belts were on auction at Sotheby's. This was in 2008, and we finally got Sotheby's and the holder of the belts to pull them from auction for further investigation. We went to Sotheby's in New York City, and the belt was from a certain band of Mohawk that were just over what's now the Canadian-U.S. border. This [Iroquois] gentleman was able to look at the belt and touch it and pick it up, and he started crying. He started sharing how, basically, "You've locked up our child. You've locked up a living being that is supposed to be fed, and cared for, and nurture, and you've locked it in a box, you've locked it in a drawer." His care, the way he handled the wampum belts, the way he talked to it, and talked to us about it, that really just touched everyone in the room at a level that went beyond just emotion – it was of spirit, and something much bigger that's difficult to explain. The task of, if you want to call it a task – the healing of repatriation and returning those items and ancestors back home is an extremely deep and profound healing experience.*

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items. And they, for example, cultural patrimony. They've defined cultural patrimony as items that belong to the community that no one person could have any authority to remove from that community. Right. That's community art like religious pieces, or the Betsy Ross flag, or the Declaration of Independence. Cultural patrimony belongs to the nation. It belongs to the whole. That's extremely powerful because it recognizes a right that Indian tribes haven't been able to find in any other way. So, we can use that and say, "Okay, here's this shield that is being sold at an auction," NAGPRA doesn't apply, but it is a communally held piece of cultural patrimony and it's a religious object. So, no one had the authority to remove it from the community. That means the only way it could have been removed is through theft. It was misappropriated. It was taken improperly. So, if you have the chain of title of how that individual, even if it was a tribal member, removed it and sold it to someone, a thief cannot pass a title. So, you potentially have a legal argument. Whether it's civil or criminal, you know, depending on how much time has passed, you have a legal argument based on that idea of cultural patrimony or communal property that had never been defined before [for Native Americans].

To O'Loughlin, repatriation is not simply the transfer of ownership, but also "making people whole again." What O'Loughlin described here in this story made it clear that she saw this experience as more than a simple legal process. This was not only "an extremely deep and profound healing experience" for her and the tribe, but it also profoundly touched the people at Sotheby's. The way in which O'Loughlin described this experience, and the way that it has stuck with her, places her beyond the law. This is because to her, NAGPRA not only instigated a healing process, but it also helped push those at Sotheby's beyond the law, compelling them to take accountability to return the wampum belt, this living being they realized they were holding, even though they may not have been legally required to do so.

The way in which these practitioners describe the purpose of the NAGPRA process – truth and reconciliation, reorienting museums to uplift and collaborate with Native communities, providing an opportunity to more properly and respectfully care for collections, a profound healing experience – demonstrates that they view invoking NAGPRA as a way to take accountability or to hold one accountable.

Constraint: Institutional will, priority, and/or ability

Beyond the law, people locate constraints (where the power of the law may be limited) in a person/party's will, priority, or ability. People recognize that the law has the power to make one do things they *do not* want to do. Thus, if one acts in the spirit of the law and goes beyond what is legally required of them, it is likely because they want to or feel compelled to do so. In other words, they have the will. One may have the personal will to act beyond the law, but may be part of a larger party or institution that does not. This constrains their ability to act beyond the law. For example, in NAGPRA museum trustees may not have the desire to repatriate or engage with tribes

after the legal process, thus, constraining curators from doing so. Also, with laws like NAGPRA that require the collaboration of two or more parties, *another party's* lack of will could be constraining. A museum or tribe may have no interest in building or continuing a relationship in the NAGPRA process, even if the other has the will.

People may desire to act beyond the law in the future, but in the present, their priorities constrain them. For example, in NAGPRA, a tribe may have the will/desire to act beyond the, but for the time being, they are focused on the safe return of all of their ancestors. Also, many practitioners wear multiple hats, and thus they may be too busy to act beyond the law. Finally, people may not have the ability to act beyond the law. Doing more than what is legally required means spending extra resources (e.g. time, money, energy). Some people may only be able to do the bare minimum. For example, within NAGPRA, tribes and smaller museums may not have the funding or staff to collaborate and create exhibits.

Anne Amati, the NAGPRA Coordinator at University of Denver Museum of Anthropology, recognized a need to fill in this gap between institutional will and compliance/repatriation. A few years back, she created the NAGPRA Community of Practice[18] at the University of Denver which "bring[s] together individuals with all levels of NAGPRA expertise to connect, collaborate, and increase capacity" (NAGPRA Community of Practice). Within her Community of Practice, people can seek and share resources, knowledge, advice, experience, and support regarding NAGPRA implementation.

Believing museums and institutions have a responsibility under NAGPRA to ensure the rights of tribes and serve as facilitators, Amati focuses more on targeting the confusion and

[18] See more on NAGPRA Community of Practice here:
https://www.du.edu/ahss/anthropology/museum/mpin.html

misunderstandings on the institutional side of the law. This ensures that the "good faith effort" on the side of museums actually manifests as such on the side of tribes. By allowing NAGPRA practitioners to pool resources and help each other to Amati's Community of Practice removes constraints on institutional ability and places herself and those who participate beyond the law.

Amati said that she believes that there is more value in engaging with "smaller institutions that have the institutional will, but just don't have the capacity" rather than "tackl[ing] institutions that don't seem to be engaging with the spirit of the law." This shows that she also recognized institutional will as a constraint:

> *One thing that I'm trying with this new practice is that I'm not going to try to tackle the institutions that don't seem to be engaging with the spirit of the law. I think there's a lot more opportunity at those smaller institutions that have the institutional will, but just don't have the capacity, but I do think that as a museum field – like it's not going to take a change to the law to make museums change, as much as it will a change to what is accepted practice in the museum field. I feel like that's a big opportunity that sort of came out – an idea of public shaming that I don't want to engage in – now I'm getting off track [laughs]. But I think that there's more value within the museum field to hold each other accountable.*

Here, Amati is not only beyond the law because she recognizes the constraint of institutional will, but she also believes that through accessible training and the sharing of resources, removing constraints like lack of ability allows the law to reach its normativity of accountability. Instead of trying to change the perspectives of institutions that are not engaging with the spirit of the law, Amati asserted how there is more power in working with museums that have the institutional will to shift the values and practices of the museums community.

Amati also discussed how "one of the main obstacles" to implementing her Community of Practice "is that people are so busy, it's hard to add another thing," when they may have more immediate priorities – another constraint. But she is "hopeful" and does what she can to bring the Community of Practice *to* practitioners by going to conferences and interacting online. Beyond the

law, Amati is focused on adjusting her Community of Practice to fit into the busy lives of NAGPRA practitioners. She recognizes an opportunity to help remove barriers of priority and ability so that willing museums may better act in the spirit of the law by.

Tribal representatives may feel constrained by the long list of repatriations they need to complete and ancestors they need to bring home. Amy Margaris, Oberlin College's NAGPRA Compliance Officer, shared the story of a repatriation to the Onondaga Nation. She discussed how the Onondaga NAGPRA representative was a busy man who "wears a lot of hats" and travels all over the country to retrieve his nation's ancestors and belongings. As such, Margaris decided "there was not need to make him travel" if she could easily go to him – her institution was on break, and her mother lives in Upstate New York, so she knew it was not too far.

Margaris felt that as she did not have the same constraints in her schedule, she could afford the responsibility of travel, acting in the spirit of the law to take some of the burden off the Onondaga representative. This was Margaris' first repatriation and the only one she had in process at the time. As such Margaris said that she has "this kind of inflated idea in [her] mind" of what the process would look like:

> *In my mind, it was a huge importance because this was my first toe in the waters of NAGPRA for repatriation. I think for him, it was much more sadly, I don't want to say run of the mill, but all in a day's work.*

For the Onondaga representative, this repatriation, although special, was one of many he had done and had before him. As such, he had the constraint of time and a longer list of priorities, so could not engage beyond the NAGPRA process in a way that matched Margaris's expectations:

> *We were ready to meet up with the NAGPRA representative. So, we were texting and he said, "Okay, meet me in such and such a town at the parking lot of the B.K." I looked at the text for a minute and I was like, "Okay...does that mean..." I had to text him back and say, "Does that mean the Burger King?" So, I had this idea in my mind that there was going to be some like – it's not a celebration – but, I don't know, something special. I had this really, I think, inflated idea in my mind of what this*

> *was going to be like, and this was absolutely the most pedestrian location off the highway in the parking lot of the Burger King, where we just drove up next to each other, and there was just there was a transaction. [...] I'm not saying that it was a casual event. For him, it was very solemn. I was like, "Can I buy you a coffee at the Burger King?" and he was like, "No, thanks. I've got to keep going because I've got more work to do."… His van I saw had all kinds of like Coke bottles and stuff rolling around. It's clear the guy spends a lot of time in his van. He told me that he goes along with kids from the Onondaga Nation, and often brings them along repatriation trips so that they can learn and understand what's going on.*

Beyond the law, what Margaris may have seen as an opportunity to buy the representative a coffee, chat, and build a relationship, turned out to be constrained by his incredibly busy schedule. As he had more work to do, the Onondaga representative could only afford to meet in the parking lot of a Burger King for a short amount of time, before his next repatriation – his next priority. His constraints thus also constrained Margaris, hindering them both from being able to build some sort of relationship beyond the repatriation process.

Museum practitioners may feel constrained by the will of their institution or trustees. Anne Amati commented that she feels lucky to have "the easiest job of any NAGPRA practitioner" because at University of Denver Museum of Anthropology she is the decision-maker regarding NAGPRA, and thus has the authority to act on her own will:

> *I think that I have the easiest job of any NAGPRA practitioner. There's no one at my institution that is fighting to retain this material. It's a small institution. I am the decision-maker – there are some institutions where the person who's doing the implementation work, they have to make their case to a committee. At the University of California, there are multiple levels of committees. So, I'm the one who does the work, I'm the one who makes the decisions, which really helps in terms when I'm meeting with tribal reps, to know that there's that direct connection. One of the things that I've heard when I've talked with people is that it can be very frustrating when those decision-makers don't come to the table. The tribe is making their argument, and maybe the museum person is like, "I would do this, but this other person…" And, again, having that conversation directly with the tribal reps, I think, is really important.*

Amati discussed how at larger institutions there are multiple systems of checks and balances that may inhibit a repatriation even if the curator has the personal will. When decision-makers do not

come to the table, this not only constrains a museum practitioner's ability to repatriate, but could be incredibly frustrating to tribes who wish to have a productive conversation. As a museum's (lack of) institutional will is a reflection on the curator, this may make tribes feel reluctant to build a relationship, no matter how willful the curator is individually.

Though it may be tempting to assume that in the spirit of the law NAGPRA there exists no inequality and barriers to the process, locating where and when these constraints are present, and for whom, helps us see where inequality seeps into beyond the law. Beyond the law, tribes still bear the burden of proof and need to travel all over the U.S. to retrieve their ancestors and belongings. Although many museums and institutions have the institutional will to help lighten this burden, repatriate, and go beyond the law with tribes, as discussed in this chapter and the ones before, many also do not. As such, this will of museums seems to be a strong determiner of whether or not this consciousness may be present. If museums are not willing to shift accepted practices and reorient their purpose to go beyond the law benefit tribes, there will still be significant constraints to Native Americans being able to fully act beyond the law.

Capacity: Relationships

Beyond the law, people view its capacity (where the law gets its power) as stemming from relationships built during the legal process. As Ian Thompson of the Choctaw Nation said, "What feeds the spirit of the law is developing that trust to carry it out." Through sharing knowledge, gaining new perspectives, advocating on each other's behalf, and innovating through collaboration, relationships are what shape and build a legal culture.

As a museum curator and a professor of anthropology, Jen Shannon said that NAGPRA has become a foundation for her research and teaching:

> *It's often thought of as a closing off point, but what I found in the communities that I've begun a repatriation with is that we went on to do big projects together. With the Navajo… we did a big American Alliance of Museums Connect Grant together.*

Here, Shannon is beyond the law, recognizing how relationships built with tribes through consultation have directly enabled her to evolve her research and teaching. Beyond the law, these relationships are also highly collaborative and mutually beneficial. After completing a repatriation, Shannon's institution, the Museum of Natural History at the University of Colorado Boulder, and the Navajo Nation applied for Museum Connect grant. In her piece *Museum Mantras, Teachings from Indian Country: Posterity is Now; Failure is an Option, and Repatriation is a Foundation for Research* Shannon discusses this further*:*

> We contacted [the Navajo Nation] in 2009 to inform them of medicine bundles in our collection and invited them to consult. In January 2010, with their support, we applied for a National NAGPRA grant to facilitate their visit to our museum. By March of the same year, we also submitted an American Alliance of Museums (AAM) Museums Connect grant to work with Navajo Nation members on a research project called *iShare*. In 2011, the NAGPRA liaisons came for the consultation and insisted that we photograph all of the items and enter them into our collections management system before they were repatriated. They provided details on the names and meanings of each item for our records and recorded on video answers to students' questions about repatriation for teaching purposes. At the same time, our collaborative AAM *iShare* project with the Navajo Nation Museum was underway, in which Navajo and Paiwan, Indigenous peoples from Taiwan, travelled to each other's homelands, co-produced a collaborative website, developed culturally informative teaching kits about themselves to share in each other's schools, and gave public talks at our museum in Colorado (Shannon, 2019: 30).

This relationship built out of their initial NAGPRA consultation with Shannon and her institution helped the Navajo people create their material for *iShare* and take it all the way to Taiwan to collaborate and form new relationships with the Paiwan people. Through these relationships the Navajo had the capacity to act far beyond the NAGPRA process – all the way to Taiwan – to work on a completely separate and meaningful project. They were also given the capacity to come full-

circle and present their cultural information on their own terms back at the museum in Colorado, further strengthening their relationships in the United States. This relationship also helped Shannon and her museum gain more knowledge on the Navajo collection and enrich students with an understanding of the repatriation process (perhaps paving the way for future NAGPRA practitioners).

Shannon also discussed how her almost decade-long relationship with the Mandan, Hidatsa and Arikara (MHA) Nation began with a NAGPRA consultation in 2011. From there, she and the MHA Nation went on to create a documentary about the missionary that collected their items:

> *The MHA Nation we're still doing projects together – it's no coincidence that they're the next comic issue. We did a repatriation with them in 2013, '14. Our relationship began in 2011 when I invited them to consult, and, in the meantime while that was working its way through, I said, "Is there anything else you want us to do about this collection, or research on it?" And they said come up and do a video documentary about the missionary who collected it. I mean that came* straight *from the repatriation consultation. So, to me, NAGPRA has been central to where my research ended up going, which, you know, is always in unanticipated directions when you're working with a community-directed project. So, yeah, when I got this job, I don't think I would have imagined it would end up being so central to my, not just to my teaching, but to my research and practice, as well.*

This project addressing the collection's origin from the missionary gave Shannon and the MHA Nation the capacity to further act beyond the law. Acting in the spirit of the law and its normativity of accountability, they acknowledged and educated as to the collection's colonial origin of missionary work. Also, because of their relationship, Shannon stated that it is "no coincidence" that the MHA are collaborating on the next issue of *NAGPRA Comics* where she, and her colleagues John Swogger and Sonya Atalay, will work with MHA to help tell their own story about NAGPRA.

Deanna Byrd shared how in recent years, the Choctaw Nation of Oklahoma has taken a proactive approach to repatriation. Instead of waiting for institutions to contact them, they

systematically contact every institution in the country, both public and private, that potentially have Choctaw remains, sacred objects, funerary objects, or objects of cultural patrimony – as well as artisanal items that are *not* NAGPRA sensitive. With this approach, the Choctaw do not only seek repatriation through NAGPRA, but they also wish to add artisanal items to their *Chahta Imponna Database* to revitalize these techniques in their community. With this proactive approach the Choctaw Nation invites institutions to form long-term scholarly relationships with them:

> *We decided to take a more proactive approach and contact institutions and just go systematically state by state by state, and so we have completed about eleven states so far. But we're reaching out to historical societies, any institutions that carry federal funding and also ones that don't, so they might be local historical societies or antique places that have a collector's guild or an art studio that has Native American collections. The idea is two-fold. So, one of the things that makes it really great, it was like perfect timing to pair the two, was we have a database that we're creating called the Chahta Imponna Database, and what that means is the artwork or the works of Choctaw hands and people. So, we're trying to find these items that are skill sets for artisans to revitalize that in our community, perhaps there's a basket-maker in our community and by looking at baskets from all over the country and even all over the world, they can get to see different techniques, different dye strategies, different patterns and things like that and learn from it. So, when we approach an institution we're trying to establish these long-term scholarly relationships about the ethnographic or archeological collections that have nothing to do with NAGPRA, so these aren't funerary items or sacred items, these are just artisan items that we really want to be able to review and put into a database. So, the database is going to be put on a kiosk and then when people come to our cultural center, they can benefit from this knowledge. That really helped open the doors with the institutions that might otherwise be a little bit apprehensive to a conversation, whether that was because they don't have much compliance, much experience with NAGPRA.*

Through this proactive approach, Byrd and the Choctaw Nation extend the spirit of the law beyond NAGPRA, using these newly-formed scholarly relationships to grant their people the capacity to revitalize traditional artisanal techniques, directly benefitting the Choctaw community. Additionally, this invitation to build a scholarly relationship beyond NAGPRA, can open up conversations with institutions that may be apprehensive about the NAGPRA process. Having capacity in the realm of NAGPRA seems to give them capacity in related work.

The Choctaw also seem to use the repatriation and conversations facilitated by NAGPRA as a springboard into their personal project of revitalizing the art and craftsmanship that may have been lost in their culture throughout the years. Byrd also noted how proactively establishing these relationships allows her to keep tabs on museums and nudge them when necessary, guiding and ensuring compliance:

> *I notice is that [a proactive approach] changes the correspondence because we're now the ones that are initiating, and so we're able to keep track of and kind of hold [institutions] accountable in terms of the deadlines. After it's been thirty or sixty days and there's no correspondence, we're asking on behalf of our ancestors, we're the advocates saying, "Hey, what's the update on this inventory? Can you provide maybe your progress reports?" And a lot of institutions have responded by giving us regular monthly updates now.*

Byrd's ability to hold institutions accountable for their responsibilities in such a way creates the capacity for the law to act in accordance to the normativity of beyond the law.

Anne Amati believed that "museum practitioners sitting in a room together are really going to be able to change their perspectives." According to Amati, if museums truly wish to reorient and shift their practices into the spirit of the law, it is also important to hear the Native perspective:

> *I just see that when tribal representatives come in to talk to students about NAGPRA – it's so much more powerful than me standing up there and talking about why this is important. But then we also can't put the onus on the tribes to educate all the museums. So, I'm not really sure how that would move forward, although I do think that this community would benefit if tribal reps, and federal reps, and museum reps, and different people were involved, but I don't know necessarily what the tribal reps would need from this – or like, how can we serve them if we're asking them to be a part of this. A lot of this has come out of conversations that I've had with my own colleagues, and I've learned the most from my tribal colleagues with this work. So, I think that's part of why I think it's really important. Some of those folks have been involved in the discussions that's kind of led to this. One of the big things with NAGPRA is that you're dealing with 500 plus tribes, and everyone is different, and even within a tribe the people that are doing the work are different – so, there's not one thing that's going to work.*

In her Community of Practice, Amati hopes to find a way to include all people who are involved in the NAGPRA process. Beyond the law, Amati sees the power of relationship among NAGPRA

practitioners. As NAGPRA work and repatriations are incredibly diverse, as are the wants and needs of every tribe and museum, she believes it is important to create a diverse network of practitioners who may share their knowledge advice and perspectives. Although Amati was unsure of how to include the tribal perspective in her Community of Practice without putting the "onus" on tribes to educate museums, she still understood that this relationship also needs to be beneficial for the tribes.

Time/Space: The Future

Beyond the law occupies the time and space of the future. With its normativity as accountability, beyond the law is about confronting, acknowledging, and holding people accountable for the past, and then figuring out how to move forward into the future. Beyond the law people recognize that wrongs cannot fully be righted, but instead, it is a process. People cannot erase the past, but they can acknowledge their role in it and move forward, looking for opportunities to build relationships, learn more, educate others, and do better – to continually do *more*.

This is especially true for a human rights law like NAGPRA, so centered in colonialism and historical injustices. According to Rae Gould, anthropologist and member of the Nipmuc Nation:

> Through NAGPRA we can only try to amend some of this harm and hope to offer some piece of the healing process. What I came to realize through working to repatriate ancestors and belongings, though, was that the circle is never really closed, even though I worked hard to achieve that (Gould, 2017: para. 2).

Just as the future never seems to arrive, the circle may never fully close. Beyond the law, however, one does not look to this with a sense of hopelessness, but instead hope. A hope for a better future. A hope to close the circle just a little bit more.

Deanna Byrd, NAGPRA Liaison-Coordinator of the Choctaw Nation, discussed that her hope for NAGPRA does not lie so much the letter of the law and changing legislation, but instead in the next generation of practitioners:

> *As far as the law changing, I think that right now it's working. Sometimes it hobbles along, sometimes it sprints, but I think it's working. I think my future goal or hope for NAGPRA is not so much in the legislation but in helping shape the next generation that's going to be taking over these conversations, and so one of the things that we started doing in our community is helping support these young professionals that are coming up.*

To Byrd it is the responsibility of current NAGPRA practitioners to work to educate and push young and future NAGPRA practitioners beyond the law.

Anne Amati of the University of Denver Museum of Anthropology had a similar view. She discussed how current practitioners in the field may believe that the work is close to being done, but beyond the law, Amati believes that "the ethics are catching up." She has an eye towards the future and its practitioners, believing that there is always an opportunity to do better:

> *I think that people, students especially, get very interested in it, and engaged in it, and then the people that have maybe been in the field for a while are like, "Well, aren't you done with that yet?" I just think that we can do better. I think that's my main thing. I think we can do better and I think your generation is going to do better. You know, I came to this late! I came to this without an anthropology background. I think that, in a way, it's been a benefit to the work that I do because I'm able to go into a room and say, "I can't do this without the tribal reps," like, "I'm not the content expert." But that only can get you so far, and I think there is something very important about that anthropology focus and grounding that is really going to help moving forward with the work.*

Amati also asserted that it is never too late to start making things better. Not having an archaeology background, she noted the benefit of recognizing that she is not the "expert." Amati is beyond the law, viewing it as a process where she is always learning – from tribal colleagues, from fellow museum practitioners, from her own experience. Beyond the law, the future holds the potential for

her to have more knowledge, just as the future holds hope for anyone who is willing to be open minded and learn to participate in NAGPRA's legal culture.

Amati also explained that there may be no such thing as a "NAGPRA expert," but there are people with a lot of experience who can share that. NAGPRA is a complex law that deals with 573 federally recognized tribes and about 245 non-recognized tribes as well as hundreds of federally-funded institutions – each with different practices, policies, and resources. As such, Amati noted that "there's no one thing that's going to work:"

> *Being able to understand what the requirements of the law are, being able to understand what our ethical obligations as museum practitioners are, and just trying to do the best we can [is important]. Also, knowing that I'm constantly learning. I'm learning more all the time. I've talked to people – a lot of people are hesitant to say that they are NAGPRA experts, but there are people that have lots of experience. Even if we can't say "this is the right way to do it," which I don't know if we can – we can probably say, "This is the wrong way to do it," but there could be lots of right ways. There's a value in being able to say, "This is how I did it," and, "This is what worked for me." Hopefully that can help people as they're trying to address issues and move forward with the process.*

Perhaps, beyond the law, people are hesitant to claim expertise because they know, quite practically, that they cannot predict the future. Every tribe is different, every museum is different, and thus so is every consultation and repatriation. Beyond the law, even if one cannot predict the future, Amati recognized that there is great value in sharing experiences and advice to help each other move forward by easing and preparing for future consultations.

From the museums' perspective, Jen Shannon believed that "there is a different ethos" within the museum community. She discussed how she does not think there will be as many barriers to practicing NAGPRA for the next generation of museum practitioners as respect for Native communities is now the norm:

> *The younger generation of students, like yourself, coming into our classrooms, it is a given that they think that NAGPRA is a good thing. They want to enforce it. They believe in restorative justice. It is just not a question about whether it should be a*

> *part of museum practice – same thing about collaborating with communities in anthropological research. It's just like "Yeah, that's the right way to do it. We should do it that way." And so, I think that there's less of an entitlement to knowledge? I think whatever the zeitgeist is that has landed us there, I think is really great. We understand that there are multiple ways of knowing. The biggest thing that I have to keep reminding people is that not everybody has the right to know everything. So, I think that there is a respect for that that is just kind of the norm coming into these next generations.*

It seems to be Shannon's prediction that the future generations of museum NAGPRA practitioners will start out their work *already* beyond NAGPRA.

Throughout my interviews both Native and non-Native participants seemed suggest that in their NAGPRA careers, they started before, with, and/or against – stuck in the law's confusing language, seeing it as the realm of specialists, hearing about negative experiences from their predecessors – before they could move beyond the law. Of course, this head start for future practitioners is only possible because current and past practitioners have paved the way. As the legal culture of NAGPRA progresses, now in its thirtieth year, it seems as though more and more people find themselves beyond the law. Thus, perhaps the longer those within a legal culture act beyond the law, the more capacity they provide for future generations to be able to access this consciousness. The further a legal culture is in time from a laws implementation, the closer it seems to get to the spirit.

Shannon also made it clear that I should take her ideas about the future of NAGPRA "with a grain of salt." She was trained at the Museum of the American Indian, was a post-doc at the Museum of Anthropology at the University of British Columbia, and works in Colorado, which has "been praised in the coordination between institutions and tribes." Also, as the first Curator of Ethnology at her institution, the Museum of Natural History at the University of Colorado Boulder, Shannon got to make her job "whatever [she] wanted." To Shannon, like other museum

practitioners, she has carried out her career with virtually no constraints, but recognizes that tribes may not be able to say the same:

> *I have been operating in a very tight bubble here, in that I got these rosy glasses about the future [laughs] of museums and future relations. And, a lot of the museum anthropologists that I interact with are on the same page and know that tribes are not having this rosy of an experience.*

When considering the future beyond the law, tribes may have the same capacity (these "rosy glasses" Shannon and other museum practitioners may wear) to be so optimistic about the future. Although there certainly are many museums across the country going beyond the limited dictates of NAGPRA to be in the more capacious spirit of the law, it would be naïve assume that they all are. Native participants, made it clear that there are still institutions out there who drag their feet, skirt compliance, and feel entitled to ancestors, objects, and knowledge that are not theirs.

In discussing the future of NAGPRA, Native archaeologist Bonnie Newsom was hopeful but not overly optimistic:

> *Let's see. What will NAGPRA look like in 20…90? You know what? There won't be a need for NAGPRA in 2090. Maybe. That's my hope. So, my hope is that between now and 2090 maybe is that all of the ancestors that are being held in institutions have made their way home wherever that may be. Will that happen? I'm not overly optimistic that it will.*

Land is constantly being moved by man and erosion, uncovering Native American ancestors and material culture, and museums are constantly accepting private collections, bringing them into the public. As such the work of NAGPRA is never really "done" – the circle is always in the process of closing.

However, Newsom makes an important point. For people to truly be ready to move beyond the law, current responsibilities under the law must be fulfilled. If museums only actively try to complete a handful of repatriations, they are not fully taking the accountability the spirit of the law expects of them. Museums can speak of NAGPRA's bright future and the opportunity to build

more relationships all they want, but just as the letter of the law seems to lack real power without the spirit, the spirit of the law is meaningless when one does not follow the letter.

Newsom argued that to truly be able to move forward and act in the spirit of the law, museums must aggressively tackle what NAGPRA requires of them:

> *If [institutions] put energy and resources and effort into this [NAGPRA] department and this process – to get the staff they need, to go through the collections, to actually do the work of repatriation in kind of an aggressive way. Then, you can kind of take a breather and see how many unresolved issues there really are. There may not be many, but I think it goes with many institutions that this whole repatriation thing is an-add on and not part of the underlying mission of the museums that hold human remains. So, I think because it's an add on, it may not get the attention it deserves sometimes. If institutions would just say, "Okay, we're going to commit seventy five percent of our funding this year to resolving all of our NAGPRA or repatriation issues," they can put the issue behind them for the most part and move on to doing good educational outreach and other things that museums should be doing.*

Newsom also argued that for this to be possible, NAGPRA cannot be an "add-on," but museums must shift further into the normativity of beyond the law, reorienting their underlying mission to include this accountability. Only then, may the future of the law begin.

As a member of the Abenaki Nation, a non-federally recognized tribe, Donna Moody and her community are not ensured the same rights by the federal government as those who are recognized. This may, in part, account for her much more sobering view of the (possible lack of) future of NAGPRA. Instead of approaching the of NAGPRA with a sense of hope and opportunity, Moody was completely stumped. What she did know was that laws and the rights of Native Americans are fully subject to political whim, especially in our current political climate:

> *The future of NAGPRA? I don't know. I have no idea. Honestly, no idea. I mean, you sent me some questions to give me an idea of what you mean, and I thought about this one. The rest of them I didn't really have to think about because they're in the top of my head, you know. But this one I've really thought about and honestly, I don't know, I have some concerns. NAGPRA is as subject to political whims as is anything else in these last three years. I mean, my God, things that I never thought I would see decimated or abolished, you know, have been flying out on a daily basis.*

> *It's going to take us much more than three years to just get back to some semblance of sanity. So, I don't know [what the future of NAGPRA holds]. I honestly don't know. You know, the present administration, Donald Trump, absolutely abhors Indians. Why? They counted coup on him in Connecticut with the casinos. You know, so I mean, I thank God that NAGPRA isn't part of his worldview right now, because I'm sure he'd be trying to undermine it as much as possible. It doesn't take much. All it takes is to is to decrease the staffing or eliminate the staffing in the National Office – eliminate the office. So, you know, who knows? Who knows? I think that like anything else in this country, it is totally subjective to political whim. It's frightening to me. It's so scary. It's just scary because like, I don't think we can possibly as a people collectively go back to wholesale looting of burials. And, you know, graves at the sites are already being destroyed. You know, being open to mining enterprises much more so than they were twenty years ago.*

In discussing the future of NAGPRA, Moody was the utter exception out of all the participants. Although participants like Newsom expressed some qualms about the future of NAGPRA, none of them expressed fear of the possibility of NAGPRA being eradicated or rendered moot through complete lack of resources. The federal government has taken away so much from Native Americans, especially non-recognized tribes, Moody's view does not represent hopelessness, but instead the harsh reality of the inequality that currently plagues our legal system. Interestingly, Moody's fear did not transfer over to the legal culture of NAGPRA:

> *I think that there have been some good coalitions built between tribal entities and museums. I really do. I've seen some good work being done. I think that if we went back to where we were before NAGPRA, I think that museums would unilaterally, independently be doing the right thing. I really do. I really do.*

Even if Moody questions the future of NAGPRA in the broader sphere of the federal government, she sees hope in the legal culture of NAGPRA. Moody seems to believe that the legal culture of NAGPRA is self-sustaining. Beyond the law, even if NAGPRA were to vanish tomorrow, Moody believes that its spirit would still remain.

CONCLUSION

Before the law, practitioners are not only beholden to and empowered by NAGPRA's letter, but intimidated by its history. Beyond the law, they see its letter as a moral requirement to do more, and its history as something to confront. Against the law, practitioners may find barriers to doing NAGPRA work and completing repatriations. Beyond the law, they eliminate and help others overcome these barriers. With the law, practitioners locate and manage their interests in NAGPRA's legal culture. Beyond the law, they emphasize relationships and collaborations rather than simply actions and interests of the self.

Getting to know NAGPRA's legal culture I have found that there is power in and power beyond the letter of the law. NAGPRA recognizes the rights of Native Americans to their ancestors and belonging that they have never had before. Beyond the law, it also compels anthropologists, archaeologists, and museum practitioners to look at their profession with a critical eye. Although the law is nowhere near perfect, it is a start. Some practitioners see opportunities in the law's imperfection – not simply in changing its letter, but fundamentally rising above and going beyond it to do what they feel is right. Rich, diverse, and self-sustaining, NAGPRA's legal culture thrives in the spirit of the law.

When NAGPRA was first well over thirty years ago, the law may have been met with enthusiasm, but also hostility and confusion. The archaeological community was worried about "precious data" lost; Native Americans were hurt and outraged to find out just how many of their ancestors were locked away in boxes; museums were confused and intimidated by having to take a thorough look at their collections for maybe the first time ever (McKeown, 2012). People did not start off beyond the law. They were not creating projects and building coalitions right off the bat.

The world of musuems and archaeology was shook-up and changed forever, and people had to adjust. Deanna Byrd of the Choctaw Nation noted that:

> *I was a little concerned when I came onboard talking to some old-timers in the office that have been in the industry and worked with NAGPRA many years ago, who have had a lot of really negative experience to share. I'm pretty sure in the last two years through my experiences, I can say that the [museums] industry is definitely changing, that we have a lot of really warm-hearted individuals that are getting into these positions, they want to do the right thing and they're really bending over backwards and meeting us more than halfway.*

In discussing the future of NAGPRA, practitioners noted that "the ethics are catching up," and that there is now a "different ethos" than when the "old-timers" were doing NAGPRA work. The next generation of people doing NAGPRA may be *already* starting off beyond the law. Although there certainly is still pushback on the museum side, "bending over backwards and meeting [each other] more than halfway" seems to be becoming the norm. The legal culture of NAGPRA seems to bend those who believe in its spirit beyond the law — but, like any culture, this legal culture did not spontaneously manifest. The legal culture of NAGPRA as we see it today was thirty years in the making. It resulted from the hard work and collaboration of those who believed in and championed the spirit of the law — those who worked to get themselves beyond the law, and mentored and met future generations with patience so that they may do the same.

LIMITATIONS AND SUGGESTED FUTURE RESEARCH

As my project developed and I completed and compiled interviews, I found myself wishing that I had asked Native participants about how NAGPRA and the law's dispute resolution processes aligns (or does not) with the legal culture of their own communities. NAGPRA is one of many interfaces between American and Native legal cultures, so it would have been interesting

to compare and contrast them, and see how legal consciousness presents itself differently. I suggest this for future research.

Also, stemming from lack of time, another limitation of this project is diversity of perspective. Although I believe I was successful in balancing Native and non-Native voices, I did not get a chance to interview anyone who had serious qualms regarding NAGPRA's existence (or was willing to express them to me). I also did not get a chance to interview any museum trustees or Alaska Natives and Native Hawaiian organizations — again, this would have diversified the perspectives represented in this thesis.

Although NAGPRA illuminates the power of relationships and collaboration to feed the spirit of the law, and thus nurture and grow its legal culture, this is likely not unique. Future research might delve deeper into other laws that emphasize collaboration and go against the conflictual nature of American law, such as special education law, environmental law, or other human rights laws. It would be interesting to see how Ewick and Silbey's framework applies, and how/if beyond the law presents itself.

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Finally, I owe my education as well as the inspiration and support for this thesis to my classes, peers, and professors at Oberlin College in Oberlin, Ohio. What is now the town of Oberlin sits on the land that was originally inhabited by the Indigenous peoples living in the Vermillion watershed. For thousands of years, Native communities lived in relative prosperity in northern Ohio. However, historical evidence suggests that most Indigenous populations had left the region by about 400 years ago, returning a century later. Many western scholars say they do not know the names or detailed activities of these earliest inhabitants although it is clear there were Native Americans living in northern Ohio at the time of European contact in the mid-1700's (Redmond, 2008). Among these tribal groups were the Wyandotte and Ottawa, who lived in the area until the early 19th century — today, they now both preside in Oklahoma, as well as Kansas and Michigan respectively.

Their exact reasons for leaving is unclear, but it should not be ignored that, in 1835, Rev. John J. Shipherd and Philo P. Stewart settled on the recently vacated land and founded the Oberlin Collegiate Institute, today known as Oberlin College.

WORKS CITED

Abu-Lughod, L. (1991). "Writing against Culture." In R. G. Fox (Ed.), *Recapturing Anthropology: Working in the Present*.

American Indian History Timeline. (n.d.). Retrieved from https://iltf.org/resources/publications/

Anderson, H. (2016, January 15). What Does Decolonization Mean? Retrieved from https://www.abbemuseum.org/blog/2016/01/what-does-decolonization-mean.html

Atalay, S., Shannon, J. A., & Swogger, J. (2017). *Journeys to Complete the Work: Stories About Repatriations and Changing the Way We Bring Native American Ancestors Home*.

Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002)

Bourdieu, P. (1977). *Outline of a Theory of Practice*. New York: Cambridge University Press.

Bridging Disciplines for Deeper Understanding. (n.d.). Retrieved from https://liberalarts.du.edu/anthropology

Brown, M. F., & Bruchac, M. (2006). NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences. In Imperialism, Art and Restitution. University of Cambridge Press. Cambridge.

Colwell, C. (2019). *Plundered Skulls and Stolen Spirits: Inside the Fight to Reclaim Native Americas Culture*. Chicago: The University of Chicago Press.

Ewick, P., & Silbey, S. S. (2008). *The Common Place of Law: Stories from Everyday Life*. Chicago: The University of Chicago Press.

Foucault, M., & Hurley, R. J. (1990). *The History of Sexuality*. New York: Vintage.

Geertz, C. (2000). *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.

Gould, D. R. (2017). NAGPRA, CUI and institutional will. In J. Anderson & H. Geismar (Eds.), *The Routledge Companion to Cultural Property* (1st ed.). London.

Harjo, S. S. (2010). On the Twentieth Anniversary of the Native American Graves Protection and Repatriation Act. In Kauanui, J. K., & Warrior, R. A. (Eds.) (2018), *Speaking of indigenous politics: conversations with activists, scholars, and tribal leaders*. Minneapolis: University of Minnesota Press.

Jurafsky, D., & Matsumoto, Y. (2017, May). *Bourdieu's Distinction*. Stanford. Retrieved from https://web.stanford.edu/class/think53/bourdieu17.pdf

Mann, B. A., & Churchill, W. (2010). *Native Americans, archaeologists & the mounds*. New York: Peter Lang.

McGinnis, A. R. (2011). Encyclopedia of the Great Plains. Retrieved from http://plainshumanities.unl.edu/encyclopedia/doc/egp.war.013

McKeown, C. T. (2013). *In the Smaller Scope of Conscience: The Struggle for National Repatriation Legislation, 1986-1990*. Tucson: University of Arizona Press.

Merry, S. (2010). What is Legal Culture– An Anthropological Perspective. Journal of Comparative Law, 5(2), 40-58.

Midler, A. H. (2011). The Spirit of NAGPRA: The Native American Graves Protection and Repatriation Act and the Regulation of Culturally Unidentifiable Remains. *Chicago-Kent Law Review*, *86*(3), 1131–1361.

Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC § 3001.

Nelken, D. (2014). Thinking About Legal Culture. *Asian Journal of Law and Society*, 1–20.

Redman, B. (2008). The First Settlers: Native Peoples of the Vermillion Watershed. In Garvin, M. C., and Cooper, J. (Eds.) (2008), *Living in the Vermillion Watershed*. Chardon, Ohio: POV Communications.

Redman, S. J. (2016, March 6). How Many Human Skeletons Are in U.S. Museums? Retrieved from https://historynewsnetwork.org/article/161946

Shannon, J. (2019). Museum Mantras, Teachings from Indian Country. *Science Museums in Transition*, 28–36.

Silbey, S. S. (2005). After Legal Consciousness. *Annual Review of Law and Social Science*, *1*(1), 323–368.

Stoffle, R., & Evans, M. (1994). To Bury the Ancestors: A View of Nagpra. Practicing Anthropology,16 (3), 2932.

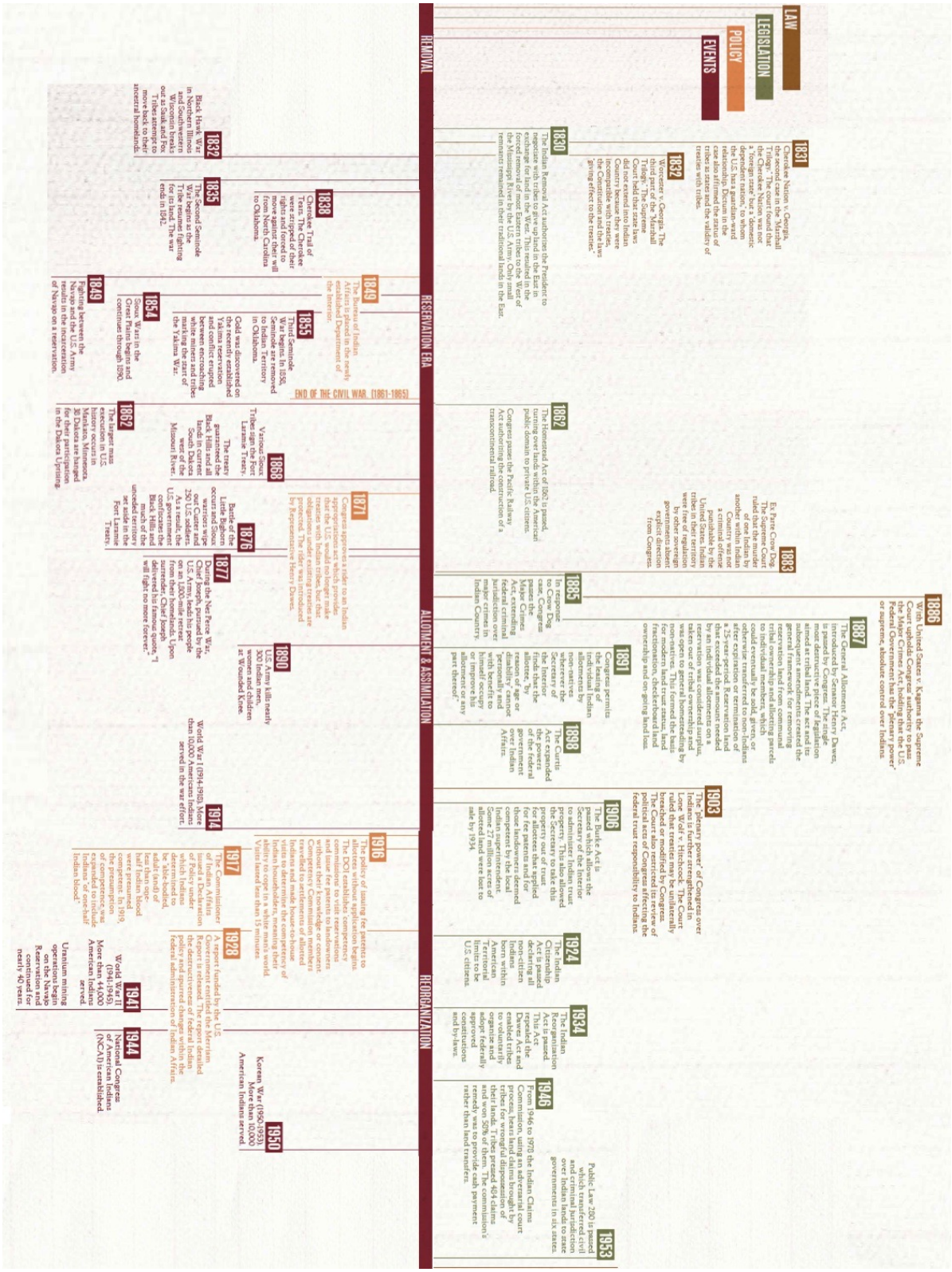
Versaggi, N. M. (2006). Tradition, Sovereignty, Recognition: NAGPRA Consultation with the Iroquois Confederacy of Sovereign Nations of New York. In Kerber, J. E. (Eds.) (2006), *Cross-cultural collaboration: Native peoples and archaeology in the northeastern United States*. Lincoln: University of Nebraska Press.

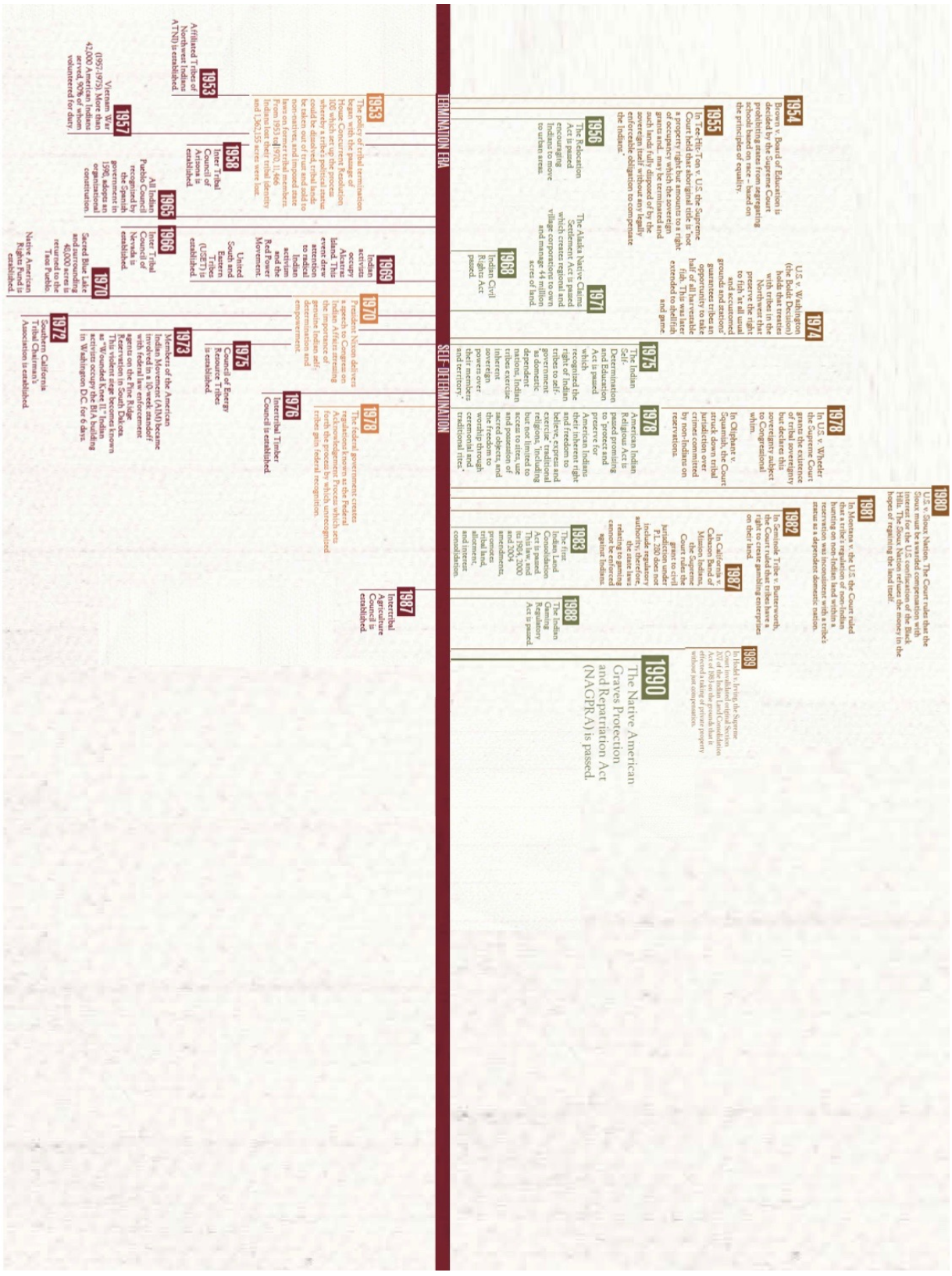
Weiss, E. (2009). *The bone battle: The Attack on Scientific Freedom*. San Jose State University.

Wilkins, D. E. (2002). *American Indian Politics and the American Political System*. Lanham, MD: Rowman & Littlefield Publishers, Inc.

APPENDIX

I. Timeline of Native American U.S. Federal Policy (1830–1990)





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II

II. Request for Review

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Request for Review (Non-Exempt)

Project Title:	Legal Consciousness and Perceptions of NAGPRA

Investigator Name:	Eleanor Haskin	Investigator Department:	Anthropology
Investigator Phone:	(917) 270-5292	Investigator's Email:	echaskin@oberlin.edu
Check one:	Faculty ☐ Staff	Oberlin College Student ☒	Graduate Student ☐
Investigator's Signature:*	Eleanor C. Haskin	Date: 8/5/19	

Proposed Starting Date: 9/3/19	Is project currently sponsored/funded: *Yes* ☐ *No* ☒	Is funding being applied for: *Yes* ☐ *No* ☒
If Project is Currently Funded:	Funding Agency: N/A	Proposal # (if known): N/A
If Funding is Being Sought:	Funding Agency: N/A	Application #(if known): N/A
Grant Title: N/A		

Oberlin College Student Projects

Is this project being conducted as: Course Project ☐	Honors or Research Project ☒	Other ☐
Faculty sponsor: Amy Margaris	Department: Anthropology	
Telephone: (440) 935-1646	E-mail: amy.margaris@oberlin.edu	
Faculty Signature* **Amy V. Margaris**		Date: August 13, 2019

Graduate Student Projects

University:		
Is this project being conducted as: Course Project ☐	Thesis Project ☐	Other ☐
Faculty sponsor:	Department:	
Telephone:	E-mail:	

Faculty Signature*	Date:

*Your signature indicates that you have reviewed and approved this application and accept responsibility for the research described, including work by students under your direction. It further attests that you are fully aware of all procedures to be followed, will monitor the research, and will notify the IRB of any significant problems or changes. Please type in your name as an electronic signature. For an electronic signature to be accepted, the protocol must be emailed from the Faculty sponsor's account.

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Approval date:			
Approval number:			
Signature, IRB Chair:			Date:

Request For Review
Page 2 of 4

Project Description: The IRB Committee is comprised of individuals from a number of disciplines. Please write your brief description in a manner that clearly conveys the necessary information to someone outside your field of expertise. Methods for recruitment need to be included and advertising/recruitment methods must provide an accurate portrayal of the study. All consent forms, surveys, questionnaires or interview questions to be used must be attached to the protocol.
Note: If deception is required for the research, explanation of its necessity needs to be included. If debriefing is for any reason inappropriate, this should also be documented.
Applications for student projects must be submitted from the faculty advisor's email account to provide an electronic signature. Only complete applications will be reviewed.
(For funded projects, please attach a copy of the grant proposal in addition to this protocol.

1) <u>Concise abstract stating the purpose and significance of the project</u>.

For my Honors project in Anthropology, I want to chronicle the story of the Native American Graves Protection and Repatriation Act's (NAGPRA). NAGPRA is the primary federal law that governs the access and ownership of Native American human remains and cultural items with which they are affiliated (Stoffle & Evans, 1994). It is concerned with the protection of the burial sites of federally recognized Native American tribes and the removal of remains/funerary objects on Federal and Native American land (Stoffle & Evans, 1994). NAGPRA has also created a process that facilitates the possible repatriation of these objects held by federal agencies and museums. It requires any federally supported institution to inventory objects in their collections that the law may define as subject to repatriation. They are then required to distribute this information to the tribal entities that could conceivably claim lineal descent or prior ownership of the items, or to work directly with the tribes if they come forward with repatriation requests (Stoffle & Evans, 1994). I will begin with what created the perceived need for such an act, the work and the groups of people that went into its ultimate advent in 1990, the language and editions of the policy itself, and trace some of its various successes and failures throughout the years. Conducting my research through the lens of legal anthropology, I will focus on the certain "requirements" (education, class, race, gender, ethnicity, tribal affiliation, etc.) that have allowed people(s) to actively participate in the formation/policy building of NAGPRA, become NAGPRA representatives, and benefit from the policy. I would also like to see how effective the law is in the eyes of those involved in the NAGPRA process (i.e. Native Americans, museums/collectors, NAGPRA policy builders, etc.) and what they think its strengths and weaknesses are.

Work cited:
Stoffle, R., & Evans, M. (1994). To Bury the Ancestors: A View of Nagpra. Practicing Anthropology,16 (3), 2932.

I will conduct interviews with those involved in all sides of the NAGPRA process (i.e. Native Americans, museums/collectors, NAGPRA policy stakeholders, etc.) in order to explore the various legal consciousnesses of the groups involved, seeing how their relationships and involvement with the law – or lack thereof – affect how the NAGPRA process is carried out. I will also look at specific court cases that exemplify a tribal entity that was

successful in repatriation and others in which they were not and explore why Through analysis of specific NAGPRA court cases and Native American legal discourse, as well as interviews of those who have been involved in the NAGPRA process, I hope to gain perspectives of NAGPRA from all sides of the process.

2) <u>Describe the methodology of the project</u>:

a) General description of the structure of the project

b) Describe the subject population including recruitment methods, age, type and number of subjects.

I will to interview NAGPRA representatives of museums, NAGPRA representatives of both federally and non-federally recognized Native American tribes, members of NAGPRA review committees, repatriation scholars/experts, Native American legal scholars, Native American activists, and members of law firms that litigate on behalf of NAGPRA. All will be publicly identified figures who offer their information on websites (such as the National Park Service's NAGPRA page or a law firm's website) or in their widely published work.

All participants must be over the age of 18. I am aiming to interview around 20 subjects in order to provide a diverse representation of NAGPRA stakeholders within my thesis.

I will find subjects through the public database of NAGPRA officials and representatives on the National Park Service Website, as well as connections given to me by Oberlin faculty members. I will reach out to subjects via email and phone calls.

c) Describe the procedures involving human subjects (including procedures which may be deceptive, embarrassing or discomforting to participants). Describe what the participant will encounter: when, where and how long. Note that subjects may decide to withdraw at any time, and how this will affect data collected. If the study involves an interview or survey, please also note that subjects may decide to skip questions at any time. Student researchers must indicate the date by which participants may request to withdraw their data. For example, for spring honors project this date should be no later than April 1 of the honors year. If deception is used, provide information stating why it is necessary for this project. If deception is used, provide information stating why it is necessary for this project.

Participants will be emailed questions ahead of time and interviews will be conducted over the phone, in person, or by email at the convenience of the participant. Phone/in person interviews are expected to last no more than two hours, or for as long as the participant is willing to participate. Interviews will be audio recorded only if the participant signs the informed consent form (attached to this application). Participants may choose to skip any question at any time or request that any or all of their responses be withdrawn from the study if they notify me by April 1, 2020. All transcripts and audio files will be stored on a password-protected computer. On or before May 17, 2020, all audio files and transcripts will be deleted. No deception will be used.

*d) Describe any surveys, questionnaires or interview schedules to be used and **append copies**.*

Sample interview schedule:

1. Tell me about your own personal involvement with NAGPRA.
    a. How long have you personally/professionally been involved?
    b. How has NAGPRA affected your work or research?
2. Tell me about your profession's involvement in the NAGPRA process.
3. How has your overall experience with NAGPRA been?

   a. Do you find the NAGPRA process simple or difficult?
   b. Does the law provide proper and easy to follow guidelines?
   c. How often does the review committee get involved?
   d. Do all sides seem to evenly cooperate?
4. Could you share a personal experience of repatriation involving NAGPRA that you feel adequately exemplifies the NAGPRA process or your experience with it?
   a. Why do you think NAGPRA worked or did not work for this specific case?
5. What would you say are the strengths and weaknesses of NAGPRA?
   a. Can/How can NAGPRA be improved?
      i. Where can we start?
   b. Is it possible to have a "perfect," "one-size-fits-all" law for such complex and different cases and identities?
6. What will NAGPRA look like in the future?
   a. What are your hopes for the law?
   b. Are you personally taking any steps to make any additions or changes that you see to be necessary?

3) Describe any risks and/or of benefits to participants *(e.g. participant may learn new study method; participant may become upset by some questions; include provisions made to minimize risks and to document and care for subjects in case of emotional upset, accident, injury. If appropriate, state that there are no benefits and/or risks will be minimal.)*

Risk will be minimal because participants are public figures who are professionals involved in the NAGPRA process (e.g. NAGPRA representatives at museums, NAGPRA representatives of Native American tribes, and members of the NAGPRA Review Committee). They have likely been asked questions of this nature before and are familiar with discussing/being interviewed about NAGPRA, their opinions on NAGPRA, their experience with NAGPRA, and their role within the NAGPRA process. Participants will derive no monetary or compensatory benefit from the research.

4) Describe any incentives being offered: *(explain any rewards the participants receive including course credits, food, gift certificates, etc. Note how these will be distributed in the event that the subject withdraws from the study. Note that participants my decide to withdraw at any time, or skip interview or survey questions, without penalty.)*

No incentives will be offered.

5) Describe means for ensuring privacy for subjects *(include a statement of how you will maintain either the desired degree of confidentiality or anonymity; if you intend to audio- or video-tape subjects, describe final disposition of the recordings [e.g., erased, destroyed, given to subjects; if retained explain how the desired degree of confidentiality will be maintained.] State whether or not identifying information will be stripped from data. Please note that student researchers may not retain data from vulnerable subjects indefinitely and must specify the date by which data will be destroyed. In cases of oral history, include a sample oral history release – see question 6. Investigators must also state how the research will be presented, such as: in a thesis, a publication, a presentation, etc.)*

As subjects will be public figures, identifying information will be included, unless requested otherwise. At the end of the project, all raw data, interview transcripts/notes, and audio recordings will be deleted and destroyed on May 17, 2020. Information will be presented in a thesis which will be deposited in Oberlin's Terrell Library and orally presented at a public forum at Oberlin College. The final written product will be sent to participants upon request.

6) **<u>Attach consent form, oral history release form, and/or description of debriefing</u>.**
Consent forms are required for regular and expedited reviews and for exempt reviews if you plan to audio- and/or videotape your participants. If you request a waiver of the requirement for informed consent, please include a detailed description of your debriefing plans. If conducting research in another language, please indicate the steps taken to insure the accuracy of the translation of the consent documents. The necessary elements of a consent form are listed in Appendix A. ***Please review that all relevant elements are present on the submitted consent form. Each participant should be given a copy of the consent form and/or contact information****.*

Please type your initials in the space that follows to certify that the English and non-English language version of the consent form are fully consistent. n/a

7) **<u>If the research will take place at a site away from Oberlin College, attach a letter of support from participating institution(s).</u>**

Elements of Informed Consent
Page 3 of 4

Consent forms should be written in lay language easily understood by the target population.

The consent form should contain, for each element/item that the participant is asked to give consent, an explicit opportunity for the participant to give consent or decline to give consent, such as check boxes and a place for initials.

The consent form must also contain a place for the participant to affirm consent by signature, including a line for the signature, a line for the printed name, and a line for the date.

A copy of the consent form and/or contact information should be given to each participant.

Consent forms should also contain all applicable elements of informed consent for the research project:

☒1. A statement that the study involves research

☒2. An explanation of the purposes of the research

☒3. The duration of the participant's participation

☒4. A description of procedures to be followed

☒5. Identification of any experimental procedures

☒6. A description of foreseeable risks or discomforts to the participant

☒7. A description of any benefits to the participants or any others that may be expected from the research

☒8. A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject

☒9. A statement describing the extent, if any, that confidentiality will be maintained

☒10. A statement describing how the research will be presented, such as in a thesis, a publication, a presentation, etc.

☒11. A statement that the subject may discontinue participation at any time without penalty or loss of benefits, and the date by which the subject must request that data be withdrawn if a publication or presentation is expected (for students, at least two weeks before the project or paper is due).

☒12. A state statement explaining whether or not identifying information will be stripped from data that is retained (Please note that student researchers may not retain data from vulnerable subjects indefinitely and must specify date by which data will be destroyed.)

☒13. A statement that participation is voluntary

☒14. A statement that refusal to participate involves no penalty or loss of benefits

☐15. If applicable, an explanation about any compensation or medical treatments that may be available if injury occurs, what they may be and where to get further information N/A

☐16. If applicable, an affirmation, confirmed by signature, that the subject is 18 years of age or older N/A

☒17. An explanation of whom to contact for answers to questions about the research study or whom to contact in the case of a research related injury or adverse effect. This should include the Principal Investigator's name, title and contact information, including campus address; if applicable, the faculty supervisor's name, title and contact information, including campus address; **AND** for questions regarding the rights of human participants, the name, campus address, and email address of the current IRB chair. The IRB Chair's campus address is Office of the Dean of Arts and Sciences, Cox 101, and the Chair's phone number is (440-775-8410).

Checklist For Investigators

(application will be returned if not complete)

Page 4 of 4

1. ☐ The application includes a lay abstract stating the purpose of the study.
2. ☐ The application describes the study population, inclusion/exclusion criteria, how subjects will be identified, etc.
3. ☐ The abstract includes a description of tasks the subjects will be asked to complete.
4. ☐ The application includes a full description of anticipated risks and expected benefits of study participation.
5. ☐ Provisions have been made to minimize risks and those procedures are outlined on the form.
6. ☐ Provisions have been made and documented to care for subjects in case of accident or injury.
7. ☐ Procedures to maintain confidentiality have been described fully.
8. ☐ Provisions have been made to obtain informed consent from all individuals related to the study (e.g., parents, subjects, cooperating institutions, etc.).
9. ☐ Plans for debriefing have been described.
10. ☐ All questions on the form have been completed.
11. ☐ All supporting documents have been attached, including consent forms, oral history releases, survey instruments, interview schedules, solicitation letters, letters of support from participating institutions advertisements, etc.
12. ☐ Appropriate appendices are attached, for example, grant proposals,
13. ☐ If this study requires approval of another committee or cooperating agency, documentation of approval or notice of application has been attached.
14. ☐ As appropriate, signatures, including signature of the faculty sponsor for student research, have been secured.

15. ☐ A copy of this application has been made for your records.

16. ☐ Please attach 1 copy of your application and consent form, and 1 copy of additional information. The application may be submitted by e-mail, if you prefer, but all the parts must be included.

Completed application forms should be emailed as an attachment to:
Daphne John, Chair
Institutional Review Board for Use of Human Subjects in Research
mail to: daphne.john@oberlin.edu and ocirb@oberlin.edu

III. **Informed Consent Form for Audio Recording and Transcribing Interviews**

Project title: "Legal Consciousness and Perceptions of NAGPRA"

Investigator: Eleanor Haskin, Oberlin College, Anthropology

Purpose: You are being asked to volunteer in a research study. The purpose of this study is to gain the perspectives of various groups involved in the NAGPRA process on NAGPRA, as well as gain insight on each group's "legal consciousness." *Legal consciousness* refers to their relationship to, experience with, and feelings towards the law in a general sense.

Procedure: This study involves a phone or in person interview and the audio recording of your interview with the researcher. Interview questions will be sent to the participants prior to the interview. The recordings of the interview will be transcribed. Transcripts may be reproduced in whole or in part to be used in the final written product (Senior Honors Thesis) resulting from the interview. A digital copy of the final product will be electronically uploaded and made available through the Ohio Library and Information Network (OhioLINK) system. The final product will also be orally presented at a public forum at Oberlin College in May 2020.

Duration of research: Interviews will be scheduled at the convenience of the participant (either in person or over the phone). Interviews are expected to last no more than two hours, or for as long as the participant is willing to participate. Participants may discontinue the interview at any time. After the interview, participants may be asked if they are open to answer additional questions on the record at a later date. Additional participation is completely voluntary.

Benefits: Participants will derive no monetary or compensatory benefit from the research.

Risks/Discomforts: There is no foreseeable risks or discomforts involved in this study beyond those involved in everyday activities.

Confidentiality: All participants will be quoted by name unless they request that they remain anonymous by April 1, 2020. Participants may request that any or all of their responses be deleted after the interview and/or not be included in the final product if they notify researcher by April 1, 2020. All recordings and transcripts will be kept on the password protected computer of the Principal Investigator.

Costs to you: There are no costs to you for participating in this study.

Participant rights:

- Your participation in this study is completely voluntary.
- You may request to be anonymous with no explanation and no penalty.
- You may change your mind about your participation in this study with no explanation and no penalty.
- You may skip any question or end the interview at any time with no explanation and with no penalty.
- You may request that any or all of your responses be deleted after the interview and/or not be included in the final product if you notify researcher by April 1, 2020 with no penalty.
- Any new information that may make you change your mind about participating in this study will be given to you.
- You will receive a copy of this consent form to keep for your records.

Questions about this study or rights as a research participant:

- If you have any questions about this study, you may contact the Principal Investigator, Eleanor Haskin, or her faculty supervisor, Amy Margaris (Associate Professor and Chair, Department of Anthropology at Oberlin College; Chair, Archaeological Studies at Oberlin College):

  Eleanor Haskin
  OCMR 1086
  135 West Lorain Street
  Oberlin, OH 44074
  Phone: (917) 270-5292
  Email ehaskin@oberlin.edu

  Amy Margaris
  King Building 302
  10 North Professor Street
  Oberlin, OH 44014
  Phone: (440) 935-1646
  Email: amy.margaris@oberlin.edu

- If you have any questions concerning your rights as a research participant, you may contact the chair of the Institutional Review Board, Daphne John (Associate Dean of Oberlin College):

  Daphne John
  Cox Administration Building, Room 101
  70 North Professor Street
  Oberlin, OH 44074
  Phone: (440) 775-8410
  Email: daphne.john@oberlin.edu

☐ **Please check this box to indicate that you are 18-years-old or older.**

This consent for taping and transcribing interviews is effective until May 17, 2020. On or before that date, the audio files and transcripts will be deleted. Participants may request a copy of the final product.

If you sign below, it means that you have read this consent form (or have had it read to you) and that you would like to be a volunteer in this study.

PLEASE PRINT YOUR NAME_____

SIGNATURE_____DATE_____

SIGNATURE OF PERSON OBTAINING
CONSENT_____DATE_____