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NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences

Michael F. Brown

Margaret Bruchac
University of Pennsylvania, mbruchac@sas.upenn.edu

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Abstract
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Disciplines
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Art. 17. In the event of infraction of any of the conditions of the authorization, work may be suspended by the Director-General or by all agents of the Service authorized to do so, until the state of infraction has ceased. The authorization may even be withdrawn, in the case of a serious infraction, by order of the Minister of Public Works, taken on reasoned opinion of the Egyptology Committee, supported by the Director-General.

Art. 18. In addition to the clauses having the goal of giving effect to the provisions of the present regulation, excavation authorizations may contain all technical conditions which, proposed by the Director-General, shall be approved by the Egyptology Committee.

Art. 19. The present regulation shall come into effect as of January 1, 1913.

Cairo, December 8, 1912.
Minister of Public Works,
(Signed): Ismail Sirry

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Legal Puzzles and Unintended Consequences

Michael F. Brown and Margaret M. Bruchac[1]

The global decolonization movement that gathered strength after World War II began to shake the genteel world of museums and cultural repositories in the 1980s. Works of art acquired by warriors, explorers, and, in more recent times, professional looters became the focus of concerted diplomatic efforts by countries determined to see the restitution of their national patrimony. Many improperly acquired items have been returned to their original private owners or national museums; countless cases involving more ambiguous provenance await final resolution. It is safe to say that mere possession of art objects no longer guarantees that museums will be able to retain title to them indefinitely.

This same trend has sparked a revolution among institutions that manage material collected among the world's indigenous peoples. The scope of collections under dispute encompasses not just works of aesthetic value but human remains, religious objects, and in some cases even the raw archaeological or ethnographic information associated with them. If the complexities of Western fine-art repatriation cases seem formidable, these are eclipsed by the legal puzzles associated with the repatriation of museum holdings to indigenous communities. European governments may disagree about who should hold title to specific cultural treasures, but at least they share a general understanding of the objects' significance and the kinds of evidence that can disprove or substantiate claims to them. When museum curators sit across

[1] For help in understanding the complexities of repatriation, we wish to thank James Bradley, C. Wesley Cowan, T. J. Ferguson, Martha Graham, Robert L. Kelly, William L. Merrill, Donna Moody, John Moody, David Hurst Thomas, and Joe E. Watkins, among others. The opinions expressed here, however, are ours alone. For their memorable hospitality at the Imperialism, Art and Restitution conference at Washington University-St Louis, Michael Brown wishes to thank John O. Haley, John Henry Merryman, and Steven J. Gunn.

a negotiating table from a delegation of indigenous people, in contrast, they are likely to find themselves confronted by unfamiliar ways of thinking and talking about cultural property, a gulf that greatly complicates efforts to resolve contesting views.

In the United States, the principal force behind the return of cultural property to indigenous peoples is the Native American Graves Protection and Repatriation Act (Public Law 101-601), better known as NAGPRA, a measure enacted in 1990. The implementation of NAGPRA prompted anthropologists to examine their profession with a critical eye, to weigh the thoughtless and sometimes shameful behavior of anthropology's intellectual ancestors against more recent efforts to set matters right. For some, the discipline's role in the systematic collection of human skeletal materials and religious objects has summoned emotions that approach professional self-loathing. Anthropology, they charge, was a willing partner in acts of colonial oppression. Others evince little sympathy for such self-criticism, opting instead to defend science against what they scornfully dismiss as the emotionalism and science hatred of the repatriation movement. Our own informal queries suggest that a solid majority of anthropologists support NAGPRA but remain uneasy about its implications for future anthropological research and the management of ethnographic and archaeological collections.

Among Native peoples in the United States, NAGPRA is heralded as landmark legislation, a restoration of respect to ancestors whose remains have long been considered the property of non-Native others.[2] On the surface, NAGPRA is about intercultural reparations. The legislation was grounded in recognition that alienation of human remains and items of cultural patrimony violated Native religious traditions and common-law rights to protect the dead.[3] The impassioned nature of repatriation debate makes it difficult to find uncontested ground from which one can both assess the direction of relevant policies and make constructive suggestions about how to pursue them fairly. This situation is not helped by the insistence of some of the movement's most respected proponents that repatriation must be seen primarily

[2] Since the NAGPRA legislation defines *Indian* and *tribe* as terms exclusive to federally recognized tribes, in this chapter we have chosen to use the term *Native* as an inclusive generic for all of the indigenous peoples of the United States, whether or not they are acknowledged as sovereign peoples by the United States government.

[3] Jack E. Trope and Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History." In *Repatriation Reader: Who Owns American Indian Remains?*, ed. Devon A. Mihesuah. Lincoln and London: University of Nebraska Press, 2000, pp. 123–168 (essay originally published in 1992).

as a human-rights issue.[4] Although repatriation has a human-rights dimension primarily relating to the free exercise of religion, the discourse of human rights gravitates toward an absolutism that inhibits necessary discussion about how repatriation claims can best be framed and adjudicated in a multicultural and intertribal context. The discourse of property, also invoked in repatriation talk, has flaws of its own. Clearly, repatriation demands a synthetic approach that blends principles of human rights and property law with emerging ideas about how intercultural justice can best be achieved in postcolonial situations.

Rather than approaching the repatriation movement as a vast exercise in moral indemnification and cultural reclamation, which of course it is, we propose to examine it as an administrative puzzle whose contours are more visible now – the "middle distance" of our title – than they were in 1990. How does this important legislation deal with the cultural differences and distinctive histories that mark the nation's hundreds of Native societies? Given the varied survival strategies of Native people, does the law accommodate groups whose legal statuses may differ significantly? What kinds of evidence should be accepted in repatriation decisions? By imposing an Anglo-American legal framework on issues of cultural property, is NAGPRA yet another tool of colonialism? Because NAGPRA has now been in effect for a decade and half, its social consequences – both intended and unintended – have much to teach us about the possibilities and limitations of public efforts to make adequate reparations for historical wrongs.

BACKGROUND: NAGPRA'S LOGISTICS AND SCALE

In broad strokes, NAGPRA can be described as a federal law that gives federally recognized Native tribes, Native Hawaiian organizations, and Native individuals the right to petition for return of human remains and certain categories of artifacts for which these individuals and groups can establish lineal descent or prior ownership. Federal agencies, as well as all public or private institutions that receive any form of federal support, are required to inventory items in their collections that the law defines as potentially subject to repatriation. This information must be distributed to those federally recognized Indian tribes that, in the opinion of the repository, might

[4] "[T]he bill before us is not about the validity of museums or the validity of scientific inquiry. Rather, it is about human rights": Senator Daniel Inouye. In 136 Congressional Record S17174, October 26, 1990. Quoted in Jack E. Trope and Walter R. Echo-Hawk, op. cit., p. 127.

conceivably come forward with repatriation requests. Similar rules for disclosure, consultation, and possible repatriation also apply to new discoveries on federal and tribal lands.[5]

The challenges of complying with the law cannot be fully grasped without first considering the scale of the repatriation enterprise in the United States. Estimates of the total number of Native American individuals whose remains are held in U.S. museums vary widely, the most credible falling in the neighborhood of 200,000.[6] Whatever the actual number, we know that the remains are numerous, that many are not well curated, and that the records associated with them are highly variable in their completeness and accuracy. At Harvard's Peabody Museum alone, the staff has had to review the status of 8 million archaeological items, including skeletal materials from approximately 12,000 individuals, to meet NAGPRA's reporting requirements.[7] One can immediately see how complex an undertaking it is to identify these materials and determine whether they can be affiliated with existing Indian tribes.

On the Native side of the equation, many federally recognized tribes have found themselves inundated by NAGPRA summaries and inventories that they were ill equipped to evaluate because of a lack of trained staff. NAGPRA is a classic instance of an underfunded federal mandate that imposes substantial burdens on agencies, museums, and tribes alike. The government disbursed approximately $22 million in NAGPRA implementation grants to tribes and institutions in the ten-year period between 1994 and 2003. This represents only a small fraction of the actual cost of repatriation – a cost that some observers contend is disproportionately shouldered by Native tribes. The availability of funding often determines the level of participation of the 562 federally recognized tribes and approximately

[5] On NAGPRA's legislative history, see Trope and Echo-Hawk, op. cit. For an engaging overview of the history that made NAGPRA necessary, see David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity*, New York: Basic Books, 2000. Space considerations prevent us from discussing the National Museum of the American Indian Act (Public Law 101–185, passed in 1989), companion legislation that provides for the repatriation of remains and artifacts held by the museums of the Smithsonian Institution.

[6] For estimates of the number of individuals represented in American skeletal collections, see, among others, Jerome C. Rose, Thomas J. Green, and Victoria D. Green, "NAGPRA Is Forever: Osteology and the Repatriation of Skeletons," *Annual Review of Anthropology* (1996) 25: 84.

[7] Barbara Isaac, "Implementation of NAGPRA: The Peabody Museum of Archaeology and Ethnology, Harvard," In Cressida Fforde, Jane Hubert, and Paul Turnbull, eds., *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice*, New York: Routledge, 2002, pp. 160–170.

300 unrecognized tribes who have an interest in the NAGPRA process.[8] Particularly hard to measure is the impact of NAGPRA on museums that have had to curtail normal activities in order to ramp up the research and record keeping necessary to comply with the law. At some institutions, including the Smithsonian's National Museum of Natural History, almost all new hiring through the 1990s was focused on repatriation staff rather than on employees supporting normal curatorial and educational operations. This doubtless affected the institution's ability to pursue other programs closer to its core mission.

The National Park Service has been assigned the task of administering NAGPRA and monitoring compliance efforts.[9] Its May 2003 report notes that 861 institutions, including 165 federal agencies, had submitted summaries detailing their holdings of unassociated funerary objects, sacred objects, and items of cultural patrimony. Inventories of human remains and associated grave goods had been received from 815 institutions, including 261 federal agencies. Inventories published or scheduled to be published in the *Federal Register* include 27,863 sets of human remains and 564,726 associated funerary objects (including beads and other small objects), 1,185 sacred objects, and 267 items of cultural patrimony as defined by the law. Most of these will eventually be repatriated to federally recognized Indian tribes. Because the law does not require the maintenance of centralized records on completed repatriations, precise information on how much has actually been returned to Native communities is not readily available. The

[8] On federal grants to support repatriation research and activities, see National NAGPRA, National Park Service, *National NAGPRA FY03 Annual Report*, p. 8. On the law's economic impact on Indian tribes, see Roger Anyon and Russell Thornton, "Implementing Repatriation in the United States: Issues Raised and Lessons Learned," in Cressida Fforde, Jane Hubert, and Paul Turnbull, eds., *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice*, London: Routledge, pp. 190–198. For a list of the 562 federally recognized U.S. Indian tribes as of July 12, 2002, see the *Federal Register* 67 (No. 143), Notices pp. 46327–46333. Approximately 290 tribes are curently awaiting consideration of their intent to petition for federal recognition through the Bureau of Indian Affairs Branch of Acknowledgement and Recognition. Many of these tribes find that their repatriation claims are ignored by museums on the basis of the false presumption that NAGPRA procedures do not apply to tribes that have not yet secured fedral recognition.

[9] The National Park Service's (NPS's) role as NAGPRA's administrating agency is somewhat awkward because the NPS also controls substantial collections of human remains and other potentially repatriatable items of cultural property. This dual role has occasionally sparked complaints that the NPS's interests are inherently in conflict. For brief discussion, see National Park Service, Minutes of NAGPRA Review Committee, 21st Meeting, May 31–June 2, 2001, p. 24.

cost of completing the process of inventorying, consulting, repatriating, and reburying Native remains has been conservatively estimated by national NAGPRA staff to average $581 per individual burial.[10]

The process of inventorying and identifying Native collections is complicated by the complex manner in which they were accumulated. For decades, networks of professional and amateur archaeologists, historians, and private collectors participated in a nationwide trade in "Indian relics." Native skeletal remains and funerary objects were routinely separated from their original context for sale, trade, or exhibition. Native mortuary practices, spiritual beliefs, tools, and sacred objects were interpreted by using a bewildering array of theories and categorical sorting methods, with no reference to Native points of view. The documentary record of many Native collections is, as a result, woefully inadequate for the task of accurately identifying the source, use, sacredness, and tribal affiliation of Native remains and artifacts.[11]

To facilitate the research and reporting process, national NAGPRA maintains online, keyword-searchable databases of legislation, notices, inventories, and meeting minutes. National NAGPRA staff also provide consulting and training for institutions and tribes. But this process has not always led to more collaborative reporting procedures. Since the passage of the law, some museums have responded to the impending loss, potential illegality, and shifting cultural interpretations of their Native collections by restricting access to information. Exhibits have been pulled from view, valuable items have been placed under lock and key, and consultations have been initiated in an often secretive manner.

Because museums submit their NAGPRA inventories independently of one another, it is possible for different museums, each holding body parts or funerary objects from the same burial site, to assign them different tribal

[10] Data are from National Park Service, *National NAGPRA FY03 Annual Report*, p. 2, and National Park Service, National NAGPRA, "Frequently Asked Questions," updated December 30, 2003, p. 5, www.cr.nps.gov/nagpra/FAQ/ INDEX.HTM (accessed January 15, 2004). On the estimated processing cost per repatriated individual, see C. Timothy McKeown and Sherry Hutt, "In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After," *UCLA Journal of Environmental Law & Policy* 21 (2), Winter 2003, Vol. 21 Issue 2 pl 53 (60).

[11] This brief summary is part of a longer analysis of how the nature of the collecting process systematically destroyed clear recognition of the original indigenous context. See Margaret Bruchac, "Background History of Regional Collections of Native American Indian Skeletal Remains from the Middle Connecticut River Valley," working report for the Five College Repatriation Committee, December 2004.

affiliations and eventually repatriate them to different tribes. For example, at least five different museums are known to have excavated Native remains from a site in Greenfield, Massachusetts, known as "Cheapside," which is well documented as being located in Pocumtuck Indian territory. Nevertheless, the Robert S. Peabody Museum at Harvard University identifies remains and funerary objects from all sites in Greenfield and nearby Deerfield as "Nipmuc." The Springfield Science Museum identifies them as some unknown combination of "Stockbridge Mohican," "Aquinnah Wampanoag," and "Narragansett." By contrast, four other local institutions (Smith College, Amherst College, the Pocumtuck Valley Memorial Association, and the University of Massachusetts Amherst, the latter now tasked with curating a number of Native remains collected from Cheapside pending their repatriation) have all unequivocally identified these individuals as "Pocumtuck" on the basis of historical documentation, collectors' records, and tribal consultations. The situation would be absurd were it not so tragic.[12]

Unexpected problems of a different sort arise from the recent discovery that many museum objects subject to repatriation under NAGPRA are often dangerously toxic after decades of fumigation in storage facilities. The scant literature on the extent of this contamination conveys alarming results. A recent study of toxic chemicals in seventeen objects repatriated to the Hupa tribe of northern California, for instance, found high levels of mercury, napthalene, and DDT. Arsenic has been found in high concentrations in objects repatriated elsewhere.[13] This toxicity may be manageable if the objects are destined for display cabinets in tribal museums. But many tribes wish to return religious objects to active use. The goal for sacred masks, for instance, may be to use them in ceremonies until they are worn out and discarded in religiously appropriate ways. This clearly poses a substantial health risk to tribal members and may even pose a risk of groundwater contamination from reburial. Some tribes are contemplating the creation

[12] Records in local archives document the shared collecting activities of Amherst College, Harvard College, Smith College, and the Springfield Science Museum, at the most popular Native sites. See *Edward Hitchcock Jr. Papers*, Amherst College Archives, Amherst, MA; *George Sheldon Papers*, Memorial Libraries, Deerfield, MA; *Harris Hawthorne Wilder Papers*, Smith College Archives, Northampton, MA; among others. Also see Harris Hawthorne Wilder and Ralph Wheaton Whipple, "The Position of the Body in Aboriginal Interments in Western Massachusetts," *American Anthropologist* (1917) 19: 372–387.

[13] Peter T. Palmer et al., "Analysis of Pesticide Residues on Museum Objects Repatriated to the Hupa Tribe of California," *Environmental Science and Technology* 37, no. 6 (2003): 1083–1088.

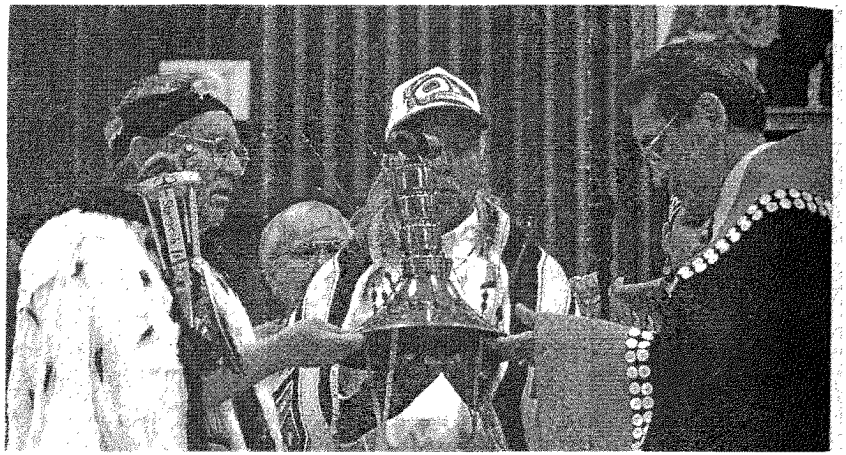

Figure 8.1. Numerous ceremonial objects have been returned in response to NAGPRA claims. The American Museum of Natural History repatriated the Peace Hat, a Russian-made brass hat commissioned for peace negotiations after battles between Russians and Tlingit Indians in 1802 and 1804. On July 19, 2003, it was ceremoniously presented to Fred Hope, *left*, leader of the Kiksadi Point House, in Sitka, Alaska. AP/Wide World Photos.

of facilities in which repatriated objects can be housed safely while scientists work to develop effective decontamination methods; others have declined to accept poisoned objects.[14]

In sum, NAGPRA requires museums and federal agencies to review the attributes and acquisition histories of thousands of items in their care,

[14] The contamination issue was discussed during the public-comment period at a NAGPRA Review Committee meeting in 2001. Leigh Kuwanwisiuwma of the Hopi Tribe notes that the Hopi had temporarily halted repatriation of items that would otherwise be used by them, pending the implementation of procedures for decontaminating artifacts. See National Park Service, Minutes of NAGPRA Review Committee, 21st Meeting, May 31–June 2, 2001, p. 34. In 2001, the Society for the Preservation of Natural History Collections also focused on the issue of contamination. See "Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues" by Rebecca Tsosie, Arizona State University College of Law; "Poisoned Heritage: Curatorial Assessment and Implications of Pesticide Residues in Anthropological Collections" by James D. Nason, Thomas Burke Memorial Washington State Museum and Department of Anthropology, University of Washington; and "Poisoning the Sacred" by G. Peter Jemison, Seneca Nation of Indians, among others, in Society for the Preservation of Natural History Collections Collection Forum for Fall 2001, Volume 17, Number 1 & 2, http://www.spnhc.org/documents/CF17-1_2.htm (accessed February 1, 2005).

reconcile records that may be inconsistent or of doubtful accuracy, examine items that may never have been studied in a systematic way, enter into consultation with scores or even hundreds of Indian tribes or Native Hawaiian communities, and ascertain whether repatriatable objects can be safely handled. For their part, Native communities must attempt to gain access to NAGPRA reports created by institutions that are believed to hold related collections, gather information to substantiate repatriation claims, and reach agreements, both internal and external, about the ultimate disposition of objects that qualify for repatriation. It should be clear from this brief sketch that in its ambition and scale repatriation is a formidably complex enterprise, joining what Max Weber identified as the technical expertise and codified rationalism of bureaucratic legal systems, on the one hand, and on the other the most primordial of community sentiments, including a people's feelings about its dead.

IDENTITY, AFFILIATION, AND LEGAL STANDING

At the heart of most repatriation cases is the question of cultural affiliation – that is, whether a community requesting the return of artifacts or human remains can show that it has, in the language of NAGPRA, "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group" from which the material was taken.[15] One can immediately see countless possibilities for uncertainty and disagreement. What exactly do we mean by group identity when confronting what James Clifford calls "a living tradition's combined and uneven processes of continuity, rupture, transformation, and revival"?[16]

In principle, affiliation might seem easy to establish. A Native group can assert a close historical connection to materials taken from areas that it now occupies, and that it has occupied for centuries. But even apparently simple cases become difficult as the time depth between object and petitioning group increases. This is an issue contested in the widely discussed "Kennewick Man" case (*Bonnichsen v. US*). In concurring with the federal district court decision denying a request to repatriate the remains to

[15] Native American Graves Protection and Repatriation Act, Section 2 (2) of 104 Stat. 3048 Public Law 101–601–Nov. 16, 1990, http://www.cr.nps.gov/nagpra/MANDATES/25USC3001etseq.htm (accessed February 12, 2005).

[16] James Clifford, "Indigenous Articulations," *The Contemporary Pacific* 13, no. 2 (2001): 480.

a consortium of Indian tribes in the Northwest, the Ninth Circuit Court of Appeals held that there is no established affiliation between Kennewick Man and the tribes that claim him – or, beyond that, to any existing Native American group – because the age of the remains apparently makes such connections implausible. If the *Bonnichsen* ruling stands, it is likely to invite additional litigation testing the temporal limits of cultural affiliation. But is the courtroom the proper venue for situating ethnicity and settling questions of human history? Collaboration among archaeologists and Native knowledge bearers may be far more productive than litigation in resolving such issues. Scientific theories and academic practices – the legacy of what Roger Echo-Hawk calls "conquest archaeology" – and indigenous oral traditions all have inherent limitations in constructing our views of ancient human history.[17]

Equally complex is the question of legal standing in repatriation claims. NAGPRA specifically provides for the return of remains and funerary objects to lineal descendants of the deceased. If no direct lineal descendants come forward, the law allows other individuals or groups claiming the same cultural affiliation to pursue repatriation. As Tamara Bray and Lauryn Guttenplan Grant point out in their assessment of an important repatriation case involving the Smithsonian, such a broad definition of standing "potentially expands the scope of this legal principle far beyond its traditional bounds."[18]

In its attempts to define the players, NAGPRA has changed the terminology of indigenous nationhood. In NAGPRA-speak, the term *Native American* encompasses all of the continent's indigenous peoples, but only federally recognized "tribes" can claim to be "culturally affiliated" and "culturally identified" with museum collections. Lineal descendants may make a similar claim, but only if they can produce sufficient documentation to prove it. The remains and artifacts of federally unrecognized tribes and

[17] Roger Echo-Hawk, "Forging a New Ancient History for Native America." In Nina Swidler, Kurt E. Dongoske, Roger Anyon, and Alan S. Downer, eds., *Native Americans and Archaeologists: Stepping Stones to Common Ground*, Walnut Creek, CA: AltaMira Press 1997, pp. 88–102. Suzanne J. Crawford, "(Re)Constructing Bodies: Semiotic Sovereignty and the Debate over Kennewick Man." In *Repatriation Reader: Who Owns American Indian Remains*, Devon A. Mihesuah, ed., Lincoln and London: University of Nebraska Press, 2000, pp. 211–236.

[18] Tamara L. Bray and Lauryn Guttenplan Grant, "The Concept of Cultural Affiliation and Its Legal Significance in the Larsen Bay Repatriation." In Tamara L. Bray and Thomas W. Killion, eds., *Reckoning with the Dead: The Larsen Bay Repatriation and the Smithsonian Institution*, Washington, DC: Smithsonian Institution Press, 1994, p. 155.

tribes that are no longer extant as political entities are all categorized as "culturally-unaffiliated" and "culturally-unidentifiable."[19] The terminology of the NAGPRA legislation has had an insidious effect on intertribal discourse regarding sovereignty. Despite an emerging preference for the term *nation* to describe sovereign Native communities, both recognized and unrecognized, the term *tribe*, as used by NAGPRA, now carries more legal weight.

Just as NAGPRA grants a broad right of standing to federally recognized Native tribes, in other words, it explicitly marginalizes tribes that lack this important status.[20] Since unrecognized tribes receive no federal funding for NAGPRA work, their repatriation representatives tend to operate on a shoestring budget. By contrast, federally recognized tribes can apply for NAGPRA funding, including office and travel expenses, above and beyond whatever tribal resources they have at their disposal. Combined with an aggressive approach to initiating consultations, this has given recognized tribes a bigger foot in the door and led many otherwise well-meaning

[19] The NAGPRA "Final Rule," enacted in 1995, instituted the use of the terms *culturally affiliated* and *culturally identifiable* to apply exclusively to federally recognized tribes. NAGPRA requires institutions to alter their records to identify Native remains as "known" or "unknown," not on the basis of the state of actual knowledge about their identity and history, but instead on the basis of the current federal legal status of their descendants. Under Section 10.10 (g), all remains that are not associated with a federally recognized tribe "must be considered culturally unidentifiable" [43 CFR 10.10(g)]. See *Federal Register*, December 4, 1995 (Volume 60, Number 232), Rules and Regulations, Page 62133–62169, posted on the National NAGPRA Web site, http://www.cr.nps.gov/nagpra/MANDATES/43CFR10_12-4-95.htm (accessed February 6, 2005). Also see the new "Culturally Unidentifiable Native American Inventories Pilot Database," http://64.241.25.6/CUI_pilot/index.cfm (accessed February 6, 2005). The NAGPRA Review Committee acknowledges that "there are some cases in which nonfederally recognized tribes may be appropriate claimants." See "Frequently Asked Questions," http://www.cr.nps.gov/nagpra/ FAQ/INDEX.HTM#Non-Federal (accessed February 6, 2005).

[20] This misunderstanding seems to arise from ambiguous wording in the NAGPRA legislation enacted on November 16, 1990. Section 2 (3) (D) (7), specifies *Indian tribe* to mean only those federally – recognized Native communities who are "eligible for the special programs and services provided by the United States to Indians." Section 2 (3) (D) (9), however, defines *Native American* to include all of the indigenous peoples of the United States, whether recognized by the federal government or not. See Native American Graves Protection and Repatriation Act [104 STAT.3048 PUBLIC LAW 101–601 – NOV. 16, 1990] posted on the national NAGPRA Web site, http://www.cr.nps.gov/nagpra/MANDATES/ 25USC3001etseq.htm (accessed February 6, 2005).

museums to choose the course of least resistance by working with the first federally recognized tribe who comes calling.

Fortunately, this has not prevented some museums from voluntarily repatriating human remains to unrecognized tribes when compelling evidence of descent or cultural affiliation exists. In some regions, unrecognized tribes have also revived ancient intertribal relationships to initiate successful partnerships with their neighboring recognized tribes. In 1999, for instance, the NAGPRA Review Committee recommended that the Harvard Peabody Museum of Archaeology and Ethnology repatriate thirty sets of Native skeletal remains from New Hampshire and Vermont directly to the Abenaki Nation of Missisquoi, an unrecognized group. Letters of support were supplied by several of the surrounding federally recognized tribes, including the Mohegan Indian Tribe, the Narragansett Indian Tribe, the Wabanaki Confederacy (composed of the Aroostook Micmac, Passamaquoddy, Penobscot, and Maliseet of Maine), and the Wampanoag Tribe of Gayhead/Aquinnah, each of whom testified that the territory and the individuals in question were indisputably Abenaki.[21] In another example of indigenous cooperation, the Wampanoag Confederacy consolidated the efforts of three Wampanoag bands, Mashpee, Assonet, and Aquinnah, so that the one recognized tribe among them could be the lead claimant for notices in any of the traditional Wampanoag territories.[22] But many museums, and some federal agencies, fail to review evidence provided by unrecognized Native communities. Federal agencies have little latitude to repatriate items to unrecognized groups, however deserving, because doing so is perceived to be inconsistent with the government-to-government relationship between Indians and Washington. Tragically, this means that some of the Native peoples most devastated by the colonial experience are least likely to benefit from NAGPRA.

Perusal of transcripts of the public meetings of the NAGPRA Review Committee, held approximately twice a year since the law went into effect, suggests how strongly some of the Native Tribal Historic Preservation Officers from federally recognized tribes oppose inclusion of unrecognized groups in the repatriation process. A key reason for this opposition, as the minutes

[21] See testimony of Donna Roberts (Moody) in the minutes of the NAGPRA Review Committee, Seventeenth Meeting, May 3–5, 1999, in Silver Spring, Maryland, http://www.cr.nps.gov/nagpra/REVIEW/meetings/RCMIN017.HTM (accessed February 1, 2005).

[22] See testimony of Ramona Peters in the minutes of the NAGPRA Review Committee, Twenty-second Meeting, November 17–19, 2001, Harvard Law School, Cambridge, Massachusetts, http://www.cr.nps.gov/nagpra/REVIEW/meetings/RCMIN022.HTM (accessed February 1, 2005).

of the 1997 NAGPRA Review Committee meeting delicately put it, is "the potential that standing for groups in repatriation issues might extend into other areas not related to NAGPRA." Evidently this point refers to the important role that receiving repatriated items might have in validating a group's authenticity, thus bolstering its case for federal recognition.[23]

After years of debate in NAGPRA Review Committee meetings, procedures for consultation relating to "unaffiliated" remains were formalized in 1999, a move that represented modest progress in the incorporation of non–federally recognized groups into the NAGPRA process.[24] A general prejudice against unrecognized tribes has, however, resulted in troubling repatriations of the remains of Native individuals whose surviving descendants have the misfortune to lack federal recognition. Some of these remains have been assigned new tribal identities, repatriated to recognized tribes, and reburied in territories where they never lived. An emphasis on the speedy reburial of remains, justified by expressed Native concerns about the spirits of the deceased, has sometimes contributed to regrettably hasty determinations of cultural affiliation.[25]

Stepping back from the particulars, we should note that from a legal perspective the most significant feature of NAGPRA may be its high level of conceptual pluralism, far beyond that which is characteristic of American jurisprudence in general. The law declares that cultural affiliation must be substantiated "by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information" (NAGPRA, 7a [4]). This puts folklore on an equal footing with science, with the result,

[23] National Park Service, Minutes, NAGPRA Review Committee 13th Meeting, March 25–27, 1997, p. 9; see also p. 15.

[24] These principles were primarily drafted by James Bradley, museum appointee to the NAGPRA Review Committee and former Director of the Robert S. Peabody Museum at Phillips Academy. These principles encourage museums to consult with all Native communities, whether federally recognized or not, who might potentially be connected to the remains and artifacts in question. See *"Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains"* in the *Federal Register*: June 23, 1999 (Volume 64, Number 120); Notices page 33502–33504 from the *Federal Register Online* via GPO Access, wais.access.gpo.gov

[25] As Horace Axtell, Nez Perce, has explained it, "When remains are disturbed above the ground, their spirits are at unrest. To put those spirits at ease, the remains must be returned to the ground as soon as possible." See Suzanne J. Crawford, "(Re)Constructing Bodies: Semiotic Sovereignty and the Debate over Kennewick Man." In *Repatriation Reader: Who Owns American Indian Remains?*, Devon A. Mihesuah, ed., Lincoln.: University of Nebraska Press, 2000, p. 213.

as the anthropologist and legal scholar Robert H. McLaughlin observes, that "the repatriation process is thrown open to radically different ways of understanding culture, history, and ownership."[26]

Such dramatic liberalization of evidentiary standards acknowledges the profound differences that exist between cultures. In that sense it is a democratic move. Yet when all kinds of evidence are held to be equally valid, the law risks stumbling into a relativistic quagmire hostile to anything approaching consensual truth. In the face of this broadened spectrum of evidence and logics, how do contending parties establish a common yardstick for reasonableness? How does one weigh competing oral traditions? If intertribal diplomacy fails, and if a museum refuses to consider additional evidence or counterclaims, the only recourse NAGPRA offers is an appeal to the NAGPRA Review Committee.

The records of NAGPRA Review Committee meetings and interviews of museum professionals with considerable repatriation experience provide occasional glimpses of how challenging it can be to reconcile widely divergent perspectives. An attorney who has represented one of the nation's largest museums in repatriation discussions tells of a NAGPRA Review Committee meeting in which a tribal elder cited evidence given to him in a religious vision. "On what basis was I supposed to question the accuracy of his vision?" the attorney asked. At another Review Committee meeting, a spokesperson for an Iowa tribe declared that "no remains are unidentified or unaffiliated" because "Native American people know who they are."[27]

Yet there are limits in how far this conceptual pluralism extends. NAGPRA requires that museums consult Native people, but museums retain sole authority to make the final determination on the cultural affiliation of materials and human remains in their collections. National NAGPRA makes no attempt to reconcile the data in its notices. Instead, it offers the following disclaimer on every notice: "The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains [and associated funerary objects]. The National Park Service is not responsible for the determinations in this notice."[28]

[26] Robert H. McLaughlin, "The American Archaeological Record: Authority to Dig, Power to Interpret," *International Journal of Cultural Property* 7, no. 2 (1998): 359.

[27] Richard Koontz, personal communication to Michael F. Brown; National Park Service, Minutes, NAGPRA Review Committee Thirteenth Meeting, March 25–27, 1997, p. 13.

[28] See NAGPRA notice templates, http://www.cr.nps.gov/nagpra/NOTICES/INDEX.HTM (accessed February 1, 2005).

NAGPRA places the burden for documentation and reporting squarely on the shoulders of museums, apparently on the assumption that fair and honest consultation with the appropriate tribes will result in the publication of an accurate notice and a satisfactory repatriation. In principle, curators often imagine NAGPRA reporting as a checklist of routine tasks: inventory your collections; sort out Native human remains, funerary objects, sacred objects, and items of cultural patrimony; identify which tribes they belong to; send a list to each of the affiliated tribes; hold a consultation; publish a notice; repatriate. In practice, none of these steps is straightforward, and all must be negotiated in a confusing realm that forces colonial ideologies and Native perspectives into communication, often for the first time.

Museums and curators ill prepared for the task must choose which Native groups to consult with, weigh competing claims, and then assign cultural identities to the remains and artifacts in their collections. Although the legislation suggests that a wide range of evidence be considered, there is no mechanism for compelling museums to examine the documentary record of historical tribal relationships, consider the oral traditions of neighboring tribes, or weigh other crucial sources of information as they make their determinations.

An example of the confusion that may arise from haphazard consultation is provided by a recent repatriation case in Massachusetts. A museum chose to repatriate 84 sets of human remains, 195 associated funerary objects, and 8 pipes, all from sites in the Connecticut River Valley, to a federally recognized tribe, the Stockbridge-Munsee Band of Mohican in Wisconsin. The museum's determination that the material should be repatriated to the Stockbridge-Munsee ignored historically verifiable claims made by two geographically contiguous Native peoples – the Abenaki and Nipmuc, neither federally recognized – as well as the protests of other museums from the same region.[29] The NAGPRA notice filed by the museum also attempted to

[29] The historic tribes of the middle Connecticut River Valley – the Agawam, Nonotuck, Pocumtuck, Sokoki, Woronoco, and some Quaboag peoples – largely folded into the surrounding populations of Abenaki between 1676 and the 1750s. See Gordon Day, *The Identity of the Saint Francis Indians*, National Museum of Man, Mercury Series Paper No. 71, Ottawa, Canada: National Museums of Canada, 1981. The Mohican people of Stockbridge, Massachusetts, however, originated in the Hudson River Valley of New York and the Housatonic River Valley of Massachusetts. See Shirley W. Dunn, *Mohicans and Their Land: 1609–1730*, Fleishmanns, NY: Purple Mountain Press, 1994. Some of the Wampanoag and Narragansett people, who originated in southeastern New England, did ally with the tribes of the Connecticut River Valley during King

change the long-accepted scholarship on tribal territories by designating the region as being entirely "within the known homeland of the Mohican Indians." A subsequent amendment to that notice extended the claim to include two additional federally recognized tribes, on the basis of oral traditions that make no reference whatsoever to the known indigenous inhabitants of the valley.[30] No effort was made to reconcile this determination with the judgment of other regional museums that hold collections from the same archaeological sites.

The historical evidence regarding tribal affiliation is hardest to reconcile with NAGPRA in those regions of the country that have the fewest numbers of federally recognized tribes. The draft guidelines for consulting on the remains of the unrecognized tribes encourage regional consulting, and there have been instances of fruitful cooperation among recognized and unrecognized tribes as a result. Ideally, honest discussion and collaboration among Native tribes would help to counterbalance implausible claims. But this rarely occurs in the politically charged world of repatriation. Disputes often end up on the docket of the NAGPRA Review Committee, a mix of scientists and Native leaders. The decisions rendered by the Review Committee have generally managed to satisfy cross-cultural standards of common sense – no small accomplishment given its diverse membership – but they also show an inclination to rule in favor of recognized tribes as exclusive claimants.[31]

IMPACT OF REPATRIATION ON NATIVE SOCIETIES

An aspect of NAGPRA that has received surprisingly little attention is its impact on the peoples who are its intended beneficiaries. The handful of articles that have been published on this theme tend, perhaps predictably, to focus on ways that Native communities are uplifted and strengthened

Philip's War from 1675 to 1676. This history and these relationships are extensively documented in primary sources, prevailing scholarship, and tribal traditions across New England.

30 See NAGPRA notices published by the Springfield Science Museum in the *Federal Register* as follows: March 7, 2003, Vol. 68, No. 45 p. 11140; August 20, 2003, Vol. 68, No. 161, pp. 50184–50186; and amended notice September 14, 2004, Vol. 69, No. 177, p. 55460, http://www.cast.uark.edu/other/nps/nagpra/DOCS/nic0781.html (accessed February 1, 2005).

31 See C. Timothy McKeown and Sherry Hutt, "In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act twelve Years After," *UCLA Journal of Environmental Law and Policy* 21 (2): 153–212.

by the return of ancestral remains. Yet conversations with curators and indigenous professionals close to repatriation cases suggest that the picture is far more complicated. Because the repatriation process has few precedents in the experience of Native communities, it confronts them with difficult questions and sometimes forces changes in the traditions it is ostensibly designed to preserve.[32]

Because few indigenous groups have traditional rituals suitable for reburying the remains of their ancestors, some tribes have concluded that repatriation and reburial should not be undertaken at all. The Zuni of New Mexico exemplify this position: after being informed that the Museum of New Mexico was holding human remains and grave goods collected on Zuni lands, the tribe decided that reburial would be deeply troubling to tribal members, who would be uncertain of the clan identities of the deceased and therefore unable to choose appropriate reinterment rituals. The Zuni stated that the materials should remain in the museum as long as they were treated respectfully – meaning, among other things, that they should not be put on public display. Some Oklahoma tribes whose members are predominantly Christian have apparently sought traditional ritual specialists from neighboring tribes to officiate at reburial ceremonies, on the grounds that it would be inappropriate to rebury non-Christian Indian ancestors with a Christian rite.[33]

A handful of ethnographers have begun to document the subtle cultural changes that repatriation can foster. Michael Harkin, for instance, reports that among Indians of the Northwest Coast repatriated objects are seen

32 See, for example, Edward Halealoha Ayau and Ty Kāwika Tengan. "*Ka Huaka'i O Na 'iwi*: The Journey Home." In *The Dead and Their Possessions: Repatriation in Principle, Policy and Practice*, edited by Cressida Fforde, Jane Hubert, and Paul Turnbull, 171–189. London: Routledge, 2002; and Connie Hart Yellowman, "'*Naevahoo'ohtseme*' – We Are Going Back Home: The Cheyenne Repatriation of Human Remains – a Woman's Perspective," *St. Thomas Law Review* 9 (Fall 1996): 103–116. In a nuanced and sympathetic assessment of NAGPRA's implementation, Kathleen S. Fine-Dare goes so far as to say that the law "has been nothing less than a nightmare for many of its participants." See her *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*, Lincoln: University of Nebraska Press, 2002, p. 7. Similar observations about repatriation's power to evoke inter- and intratribal conflict are presented in Orin Starn's moving account of the repatriation of the brain of the Yahi Indian Ishi; see *Ishi's Brain: In Search of America's Last "Wild" Indian*, New York, W. W. Norton, 2004.

33 Edmund J. Ladd, "A Zuni Perspective on Repatriation," in Tamara L. Bray, ed., *The Future of the Past: Archaeologists, Native Americans, and Repatriation* (New York: Garland, 2001), p. 113.

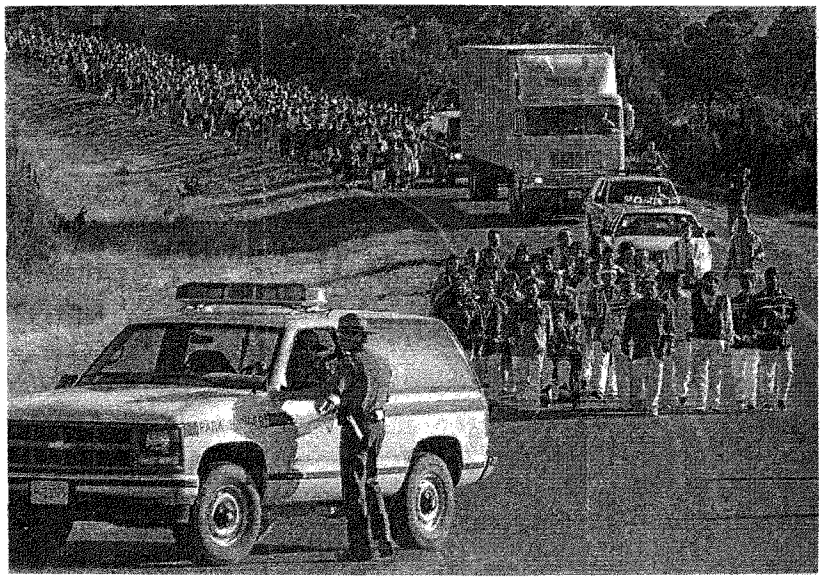

Figure 8.2. It can take considerable effort to return ancestral remains to their original territory. A procession of 600 Indians accompanies a truck carrying skeletal remains to Jemez Pueblo, New Mexico. The remains were excavated by archaeologists between 1915 and 1929 and repatriated by Harvard University in May 1999.

by younger tribal members as property of the community, whereas older members are more likely to see them as legitimately belonging to specific individuals or family groups. Tribal members who are practicing Christians may also disagree about the propriety of celebrating and displaying powerful religious objects from the tribe's pre-Christian past.[34]

An example drawn from an international repatriation case is provided by Steven Rubenstein, an ethnographer of the Shuar people of the Peruvian and Ecuadorian rain forest. Rubenstein tracked the 1995 repatriation of a dozen *tsantsa* or shrunken heads from the collection of the National Museum of the American Indian (NMAI) to the Shuar Federation of Ecuador, an intercommunity organization that plays a pivotal role in contemporary Shuar politics. The initiative for repatriation was not taken by ordinary Shuar people, who have not taken heads on a regular basis for at least half a century and who traditionally saw the shrunken heads as having little spiritual significance

[34] Michael E. Harkin, "Privacy, Ownership, and the Repatriation of Cultural Properties: An Ethnographic Perspective from the Northwest Coast," paper presented at the conference Categories, Culture, and Property, Chicago-Kent School of Law, September 28, 2001. See also Sarah Harding, "Cultural Property and the Limitations of Preservation," *Law and Policy* (2003) 25: 17–36.

after the rituals associated with their preparation were completed. Instead, it seems to have been a bilateral process in which curators of the NMAI, committed to purging all human remains from their collections, came into contact with well-traveled Shuar Federation leaders responsive to American Indian insistence that human remains are invariably "sacred." The NMAI offered to return the heads to the Shuar even though it was not legally required to do so. The act of receiving the *tsantsa* under highly charged circumstances imbued them with symbolic capital that the Shuar leaders then used to strengthen their political influence at home. As Rubenstein puts it, "The repatriation of the heads does not merely reverse the Western appropriation of Shuar objects; it effects a Shuar appropriation of Western meanings."[35]

In this and other case studies, then, one sees intriguing evidence that the "recovery of tradition" associated with repatriation may actually destabilize and transform tradition. Some Native communities have had to construct new, often pan-Indian, traditions for the reburial of individuals who were never meant to be disturbed, in hopes of putting their spirits to rest. Federally recognized Native communities may feel spiritually enriched by the return of ancestors and ancestral objects, but the repatriation process may also evoke searching questions over how tradition can be reconciled with contemporary beliefs and practices. The response of unrecognized Native communities to NAGPRA is more ambivalent, since they regularly face the prospect of seeing their ancestors claimed by other Native peoples, their sacred objects put to uses for which they were never intended, and their traditional homelands identified with federally recognized tribes.

REPATRIATION OF THE INTANGIBLE?

One far-reaching effect of NAGPRA has been its power to provide a new vocabulary for disputes over the *intangible* elements of Native cultures – stories, religious beliefs, music, art styles, and biological knowledge. These,

[35] Steven L. Rubenstein, "Shuar Shrunken Heads and Problems with Power on the Colonial Frontier," unpublished ms., 2003. I am grateful to Rubenstein for allowing me to quote from his essay. The case raises difficult questions that cannot be explored here. For instance, although the *tsantsa* were probably prepared by the ancestors of the contemporary Shuar, the source of the heads was most likely the neighboring Achuara people. If the *tsantsa* are thought of as artifacts, they were rightly returned to the Shuar. If they are primarily thought of as human remains, though, do they not belong to the Achuara? For additional information on Shuar attitudes toward shrunken heads, see Rubenstein, "Shuar Migrants and Shrunken Heads Face to Face in a New York Museum," *Anthropology Today* (June 2004) 20: 15–18.

of course, are not directly affected by NAGPRA, but the law's success in reframing relations between Native Americans and museums has made it an obvious model for emulation. Inevitably, then, we have seen the publication of essays and position papers implying that ideas, as can items of cultural patrimony, can be owned and therefore repatriated. This notion is best expressed in a document issued by a consortium of Apache tribes in which Apache leaders lay claim to "all images, texts, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts" relating to the Apache, including any and all representations of Apache people.[36]

For better or for worse, musical and artistic styles or traditional knowledge does not obey the same rules as objects, which by definition can be in only one place at a time. The infinitely replicable quality of information raises two interrelated questions: How does one determine the ultimate origin of ideas, images, musical expressions, and environmental knowledge? And even if we can identify the communities that gave birth to these intangibles, what would be the social and political costs of controlling their movement?[37]

NAGPRA has itself contributed to Native anxiety over the movement of information because the law requires substantiating evidence to support repatriation claims. In a 1997 conference on NAGPRA held in Santa Fe, a Laguna Pueblo official named Paul Pino identified the problem this way. "One of the things that really concerns me," he said, "is again, how much does the government have to know, and how much do the officials have to know with regards to the use and purpose, what these objects are for? Again, we're stuck in that position where disclosure means, you know, losing what safeguards we have with regard to those items."[38] Museum professionals and

[36] *Inter-Apache Summit on Repatriation and the Protection of Apache Cultures*, 1995, ms. in possession of author. Examples of works that use repatriation as a springboard for discussion of intangible cultural property include S. Michelle Rasmus, "Repatriating Words: Local Knowledge in a Global Context," *American Indian Quarterly* (2002) 26: 286–307, and Claire R. Farrer, "Who Owns the Words?: An Anthropological Perspective on Public Law 101–601," *Journal of Arts Management, Law and Society* (1994) 2: 317–326.

[37] Michael F. Brown, *Who Owns Native Culture?* Cambridge, MA: Harvard University Press, 2003.

[38] Transcript, *Southwest Tribal Peoples NAGPRA Conference*, October 9–19, 1997, Santa Fe, NM, Museum of Indian Arts and Culture/Laboratory of Anthropology, p. 30. For further discussion of the dilemma of whether to reveal sensitive oral history information in order to preserve it, see Joe E. Watkins, "Beyond the Margins: American Indians, First Nations, and Archaeology in North America," *American Antiquity* 68 (2003): 282.

NAGPRA administrators are working hard to respond to these disclosure concerns, but they face a genuine dilemma: How can they comply with prevailing standards of legal transparency without forcing Native people to reveal information that is sensitive or confidential by indigenous standards? For Natives, one injury potentially becomes two: in order to recover things they believe should always have been theirs, they are asked to give away their religious secrets.

This emerging interest in information marks the next frontier for the global repatriation movement. Advocates for the implementation of legal regimes designed to protect folklore in its many forms celebrate UNESCO's International Convention for the Safeguarding of the Intangible Cultural Heritage, a protocol passed in 2003 and awaiting formal ratification by member states. A key provision of the convention is that each signatory nation must prepare "one or more inventories of the intangible cultural heritage present in its territory." By this the convention mandates formal documentation of every element of intangible culture – the multiple dimensions of language, religion, art, music, dress, technology, folk tales, and local knowledge of the environment – for each social group encompassed by the nation's borders. UNESCO's program is echoed elsewhere, particularly in India, by ambitious campaigns to "digitize heritage" in the expectation that this will help to defend national cultures from transnational corporations determined to profit from local knowledge by taking advantage of global intellectual property conventions.

This is an instance in which formal rationality and substantive rationality are launched on a collision course. In formal terms, the preparation of heritage inventories is a necessary precursor to legal protection. How can we protect something if we have not identified it first? Yet given the zero-sum nature of government budgets, the monumental bureaucratic labor required to prepare these lists is likely to siphon off scarce resources that might otherwise benefit traditional communities in practical ways – education, health care, and so forth. And given the increasing emphasis on secrecy among indigenous peoples worldwide, it is by no means clear that Native communities will be willing to cooperate with state-sponsored documentation efforts that may appear as threatening as the problem they are intended to solve.[39]

From a tactical standpoint, however, the UNESCO convention may have the beneficial effect of convincing the world community to acknowledge that

[39] For more extended discussion of these issues, see Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property," *International Journal of Cultural Property* 12 (2005): 46–61.

the cultural productions of folk communities are vulnerable to alienation. If UNESCO's approach to heritage protection is not entirely convincing, at least it puts the subject on the world's agenda, implicitly challenging the dominance of global media companies, the pharmaceutical industry, and other corporate interests that continue to use intellectual property law as a cover for what critics of economic globalization denounce as legalized theft.

CLOSING THOUGHTS

The return of human remains and sacred objects to indigenous peoples is but one facet of a worldwide movement committed to reconciliation with communities that have suffered historic wrongs, mostly at the hands of European colonial governments. The sociologist John Torpey, a perceptive observer of this movement, suggests that a new focus on undoing the injuries of history – what Torpey calls "reparations politics" – has arisen because our visions of a utopian future have largely exhausted themselves. If we cannot agree about the shape of the future, the movement's logic suggests, we can at least try to repair the past.[40]

As Torpey and others point out, advocates for restitution and reparations almost inevitably find themselves wedded to the racial and ethnic categories that they blame for the injustices of colonialism. In the U.S. context, we frequently hear the demand that unidentified or unaffiliated human remains be "turned over to American Indians, who should determine what happens to them." But which "Indians"? From which "tribes"? Such declarations accept the legitimacy of generic categories that in other contexts have been denounced as fabrications of the European colonial mind. In a similar fashion, ideas about cultural patrimony and tribal identity, as articulated by Native leaders in NAGPRA claims, sometimes seem less grounded in traditional rules of ownership than in romantic European notions of primitive collectivism.

Although NAGPRA surely benefited from the global turn to reparations politics, its effects are more practical and, to our minds at least, more compelling than those of many other proposals for effecting reconciliation with indigenous groups. The dignified treatment of ancestral remains, especially

[40] John Torpey, " 'Making Whole What Has Been Smashed': Reflections on Reparations," *Journal of Modern History* 73 (2001): 333–358. See also Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, New York: W. W. Norton, 2000.

those for whom a cultural affiliation is clearly known, is an expression of simple decency that can sometimes help to resolve painful memories. More sensitive policies addressing the disposition of newly discovered human remains have forced archaeologists, scientists, and administrators to acknowledge the moral claims and political authority of Native communities. The return of religious objects may help to revitalize elements of traditional religion. The practical utility of many of the religious objects returned in compliance with NAGPRA is probably the strongest argument against characterizing the law as a narrow expression of what John Henry Merryman has called "retentive cultural nationalism," although there is little doubt that cultural nationalism remains a powerful impetus for the worldwide repatriation movement. It is too early to judge whether NAGPRA has set the stage for broader efforts to return all material culture and folkloric knowledge to their perceived points of emergence.[41]

NAGPRA's effect on the market in Native American art is hard to assess. Experts we have consulted report a mixed impact. Collectors who once might have donated important works to museums may be disinclined to do so now, fearing that their collections will be repatriated against their wishes. Institutions that receive no federal funding – including art auction houses, private dealers, corporations, small museums, and online auction sites such as eBay – are relatively unconstrained by NAGPRA unless artifacts were obtained by looting archaeological sites, and prices for the most desirable artworks continue to rise steadily. Given increased public sensitivity to the importance of Native American ceremonial objects, however, collectors may find themselves the target of negative publicity. The American Indian Ritual Object Repatriation Foundation has had some success in convincing private owners to donate or share ceremonial objects with federally recognized tribes, using the prospect of tax deductions as an economic incentive.[42]

For anthropology, NAGPRA represents the kind of adversity that some have wisely turned into opportunity. The institutional relationships fostered by the law, including joint stewardship committees and consultation arrangements with regional Native communities, have paved the way for

[41] John Henry Merryman, "Two Ways of Thinking about Cultural Property," *American Journal of International Law* 80 (1986): 831–853.

[42] Kate Morris, "Strategies and Procedures for the Repatriation of Materials from the Private Sector." In *Mending the Circle, a Native American Repatriation Guide: Understanding and Implementing NAGPRA and the Official Smithsonian and Other Repatriation Policies*, New York: The American Indian Ritual Object Repatriation Foundation, 1996, pp. 64–71, http://www.repatriationfoundation.org (accessed February 6, 2005).

joint research projects of anthropologists and Native peoples. A newsletter published in Tucson, Arizona, for instance, describes a project in which archaeologists have collaborated with knowledgeable members of four Indian tribes to juxtapose oral histories and archaeological data about the San Pedro Valley of southeastern Arizona. In many ways the five versions of prehistory were difficult to reconcile. Yet there were also intriguing commonalities that have led the project archaeologists to rethink their view of the region's past. Among other things, they have begun to consider the possibility that the prevailing genealogical model for the emergence of today's Indian tribes should be replaced by a more "braided" pattern based on the continual exchange of people, technologies, and languages. Many anthropologists are convinced that over the long run collaborations such as the San Pedro Valley project will produce better anthropology than all the thousands of bones and grave goods held by the nation's museums.[43]

A curator at the Smithsonian with considerable experience in repatriation once remarked to one of us that she has been surprised to find that some Indian people were fascinated by the scientific data she and her colleagues gathered before returning bones for reburial. This information often encompasses the individuals' age, sex, and physical condition, and sometimes the cause of death. When taking possession of the bones, these Native people told her that this information "makes the dead seem more like real people." She commented ruefully that if anthropologists had done a better job of communicating this kind of information to Native people and the general public in the past, NAGPRA might not have been needed.

NAGPRA, in other words, is pushing anthropologists and museum professionals to do what we should have been doing all along. As most complex laws do, it falls short of perfection. It encourages museums to part with Native collections but also gives them great latitude to assign tribal affiliations to these materials. It sometimes fosters conflict among Native peoples by forcing recognized and unrecognized tribes to advance competing claims to ancestral remains. It puts in public view sensitive information about religious practices that many Native Americans feel should not circulate beyond the boundaries of their communities. It encourages the misplaced belief that all elements of culture, including intangible ones, can be returned to their original source. Despite its flaws, however, NAGPRA has opened a new chapter in the history of U.S. relations with Native peoples – a chapter based on

[43] T. J. Ferguson, Chip Colwell-Chanthaphonh, and Roger Anyon, "One Valley, Many Histories," *Archaeology Southwest* 18 (1)(2004): 13.

collaboration and the search for intercultural understanding whose promising results give us little reason to mourn the abandoned collection policies of the past. For more than 150 years, American museums based their collection practices and displays on the assumption that American Indians were destined to vanish from the face of the earth. The NAGPRA-inspired movement toward revising this antiquated view has already provided a deeper understanding of the complexity and vitality of Native societies, past and present, than ever could have been imagined by our anthropological predecessors.