Boston College Law Review

Volume 60 | Issue 8 Article 4

12-2-2019

Owning Geronimo but not Elmer McCurdy: The Unique Property Status of Native American Remains

Alix Rogers
Stanford Law School, alixrogers@stanford.edu

OWNING GERONIMO BUT NOT ELMER McCURDY: THE UNIQUE PROPERTY STATUS OF NATIVE AMERICAN REMAINS

ALIX ROGERS

OWNING GERONIMO BUT NOT ELMER McCURDY: THE UNIQUE PROPERTY STATUS OF NATIVE AMERICAN REMAINS

ALIX ROGERS*

Abstract: This Article unifies two areas of legal scholarship that have not historically intersected. In the fields of biotechnology and the law, it is generally understood that human remains and many body parts are not objects of legal property. This general rule has a startling exception, which heretofore has gone unnoticed in the literature and relevant case law. The bodily remains of Native Americans were, and I argue, continue to be, objects of legal property. With the passage of the Native American Graves Protection and Repatriation Act of 1990 ("NAGPRA") Native American remains are classified as familial and tribal property. In Native American legal scholarship the distinction and significance of property status under NAGPRA has been overlooked. The perpetuation of property status is surprising given that NAGPRA was passed to address the systematic disrespect for Native American burial grounds and commercialization of Native American remains. Property status is all the more striking and important because some federal circuits have also interpreted NAGPRA to apply to contemporary individuals with Native American ancestry. With the rise of genetic testing technologies, application of this property rule takes on some surprising implications. At first glance, we might condemn the property status of Native American remains as continued evidence of dehumanization. Property is traditionally associated with rights of alienability, exclusion, commensurability, and commodification. The understanding of property in Native American human remains advocated for in this paper challenges classic property constructs of wealth-maximization and an individually centered right of exclusion. Instead, after re-considering the paradigm of property, I argue that the communal property approach embodied by the Act enables Native Americans to protect their dead more effectively than any other American group. NAGPRA, therefore, represents an intriguing pathway for human biological materials regulation reform beyond Native American remains.

* Fellow, Center for Law and the Biosciences, Stanford Law School. J.D., Yale Law School. Ph.D. Candidate, History and Philosophy of Science, Cambridge University. The author would like to thank Carol Rose, Greg Ablavsky, Hank Greely, Amy Motomura, Becky Wolitz and all the participants of the 2019 Biolawlapalooza conference.

INTRODUCTION

The treatment of Native peoples by Western powers is replete with instances of exploitation and dehumanization. This treatment extended beyond the lives of the living to the collection, display, and sale of the dead. The remains of Native peoples from Australia, Canada, North America, and Hawaii are exhibited behind glass screens or lay tucked away on shelves in museums across the United States and around the world. Recent estimates of the number of Native American remains removed and held in private and public collections range from one hundred thousand to two million.[1] Repatriation allows for these remains to be returned to the custody and care of contemporary descendants and tribes. Global repatriation of human remains by Native peoples is not significant simply because bodies and parts are being returned. The status and repatriation of Native remains reflects the past treatment of Native people and their relationship to contemporary society. From a political perspective, human remains are powerful symbols of identity.[2] In the United States, the remains of the Kennewick man, or Ancient one, have become a focal point for the broader recognition of Native American tribal rights and sovereignty.[3]

The Native American Graves Protection and Repatriation Act ("NAGPRA" or the "Act") was passed in 1990 to address the systematic disrespect for Native American burial grounds and the continued collection and display of Native American remains.[4] The existing literature on Native American remains and NAGPRA has generally focused on the historical treatment of Native American remains and repatriation efforts.[5] This paper argues that the

---

[1] Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 393 (1998).

[2] *See generally* CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY (Elazar Barkan & Ronald Bush eds., 2002).

[3] *See generally* DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY (2001).

[4] Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001–3013 (2012).

[5] *See, e.g.*, ACCOMPLISHING NAGPRA (Sangita Chari & Jaime M.N. Lavalle eds., 2013); NATIVE AMERICANS AND ARCHAEOLOGISTS: STEPPING STONES TO COMMON GROUND (Nina Swidler et al. eds., 1997); KATHLEEN SUE FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 47 (2002) (recounting the history of the repatriation movement); Pemina Yellow Bird, Essay, *NAGPRA at Twenty: A Report Card*, 44 ARIZ. ST. L.J. 921 (2012); Roger Buffalohead, *The History Behind the NMAI Act and NAGPRA, 1967–1990*, 44 ARIZ. ST. L.J. 639 (2012); Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L & SOC. CHANGE 437 (1986); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723 (1997); Francis P. McManamon & Larry V. Norby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 217 (1992); Angela R. Riley,

truly unique feature of Native American remains is that they were, and continue to be, legal property. Native American remains have evolved from individual, to government, to now tribal property under NAGPRA. In sharp contrast, non-Native remains were, and generally continue to be, accorded non-property or quasi-property status.[6] The legal status of Native American remains is therefore diametrically different from other human remains in American law.

This legal distinction has been largely overlooked in the literature but has reverberating legal, social, and ethical implications. The unique status of Native American remains under NAGPRA is relevant to ongoing controversies over the status and repatriation of archaeologically significant remains. In 2009, the lineal descendants of Geronimo brought a lawsuit to compel a Yale secret society, Skull and Bones, to return bodily remains of Geronimo that are rumored to be in the society's possession.[7] The University of California (UC) system also is embroiled in controversy over the repatriation of Native American remains. In 2014, the 9th Circuit decided a case that centered on the controversial repatriation of two 9500-year-old skeletons discovered on the UC San Diego campus.[8] Prompted in part by this case and the generally slow pace of repatriation by many of the UC schools, Governor Brown of California signed a bill in 2018 to accelerate the repatriation process across the UC system.[9]

The unique status of Native American remains is relevant not only to the treatment of older, historically significant remains, but also to the remains of the recently deceased. Federal circuits are divided on whether the Act's language of "human remains" as the "body of a person of Native American ancestry" should be interpreted to apply to *all* Native American remains,[10] or wheth-

---

Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act, 34 COLUM. HUM. RTS. L. REV. 49 (2002); Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175 (1992); Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 ST. THOMAS L. REV. 11 (2000) [hereinafter Strickland, *Things Not Spoken*].

[6] *See* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367 (2000). Quasi-property is a common law conception composed of limited interests that mimic some of the functions of property. It operates more as a liability rule, so it does not have any criminal or constitutional implications, like property. *See* Shyamkrishna Balganesh, *Quasi-Property: Like, but Not Quite Property*, 160 U. PENN. L. REV. 1889, 1891, 1916 (2012). Notably, theft is not applicable to quasi-property. *See id.* at 1917–18.

[7] In the case of the federal government, the plaintiffs argued possession because the gravesite was located on federal land. At minimum, the plaintiffs hoped to access the tomb to verify whether the body was intact or not. Geronimo v. Obama, 725 F. Supp. 2d 182, 184 (D.D.C. 2010).

[8] White v. Univ. of Cal., 765 F.3d 1010, 1015 (9th Cir. 2014).

[9] Assemb. B. 2836 (Cal. 2018); *see also* CAL. HEALTH & SAFETY CODE § 8026 (West 2019).

[10] 43 C.F.R. § 10.2(d)(1) (2015) ("*Human remains* means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that

er it should be restricted to only *some*, namely older, remains.[11] Some circuits have adopted a plain reading of the Act and concluded that more contemporary remains of Native Americans are included in the definition of "human remains."[12]

Consider the case of Jim Thorpe, a two-time gold medalist Native American, whose body was removed from a Sac and Fox ritual burial ceremony in 1953 and buried in the new town of Jim Thorpe, Pennsylvania.[13] His children and the Sac and Fox Nation sued the town in 2010 under NAGPRA, demanding the return of his remains.[14] Although the tribe and the descendants were ultimately unsuccessful in repatriating the remains, the Third Circuit Court of Appeals agreed that NAGPRA was applicable to Thorpe's, decidedly non-ancient, remains.[15]

When this contemporary application interpretation is paired with this Article's insight of property status, the implications are startling. They suggest that NAGPRA has far more sweeping effects than previously appreciated. The legal status of the remains of an individual who dies in 2019 could be dependent upon whether they have Native American ancestry. With the increasing popularity of ancestral genetic testing, the coverage of NAGPRA becomes especially complicated. NAGPRA coverage is not contingent upon formal membership in a tribe. Rather, the government has held, and courts have followed,[16] that NAGPRA applies to the "body of a person of Native American ancestry."[17] This broader interpretation of NAGPRA, therefore, has significant implications for contemporary biomedical research.

---

may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.").

[11] *Compare* Thorpe v. Borough of Thorpe, 770 F.3d 255, 257 (3d Cir. 2014) (holding that NAGPRA applies to Thorpe's remains), *and* Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047, 1060–61 (D.S.D. 2000) (holding that NAGPRA applies to a Native American cemetery), *with* Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644, 650 (W.D. Tex. 1999) (holding that NAGPRA does not apply to the remains of a recently deceased Native American).

[12] "Defendants' suggestion, in oral argument, that the Act applies only to prehistoric human remains, cannot be accepted." *Yankton Sioux Tribe*, 83 F. Supp. 2d at 1056.

[13] Erik Brady, *Fight for Jim Thorpe's Remains Continues 62 Years Later*, USA TODAY (Aug. 8, 2015), https://www.usatoday.com/story/sports/2015/08/08/jim-thorpe-pennsylvania-supreme-court-remains-nagpra/31341409/ [https://perma.cc/5FKV-NLCR].

[14] *Thorpe*, 770 F.3d at 257.

[15] *Id.*

[16] *Id.* at 262.

[17] 43 C.F.R. § 10.2(d) ("*What objects are covered by these regulations?* The Act covers four types of Native American objects. The term *Native American* means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii. (1) *Human remains* means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or natu-

At first glance, we might condemn the perpetuation of alternative legal statuses for the bodily remains of long dead, and potentially, recently departed Native Americans. NAGPRA was intended to heal wounds caused by hundreds of years of treating Native American remains differently from European remains. It was designed "to ensure *equal treatment* of Native American remains."[18] Contrasted with non-property status for other human remains, we might condemn the property status of Native American remains as continued evidence of dehumanization and commercialization.[19] This is because property is traditionally associated with rights of alienability, exclusion, commensurability, and commodification. The Anglo-American centric and traditional model of property is that "property rights identify a private owner who has title to a set of valued resources with a presumption of full power over those resources."[20]

I argue that analysis of the appropriateness of property status for Native American remains requires deeper theoretical analysis about the structure and meaning of property itself. The understanding of property in Native American human remains advocated for in this paper challenges classic property constructs of wealth-maximization and an individually centered right of exclusion.[21] Instead, like other objects of cultural property, property in human remains should transcend "classic legal concepts of markets, title, and alienability that we often associate with ownership, [thereby] making it all the more important for property scholars to evaluate its parameters."[22] I argue that the communal property approach embodied by NAGPRA enables Native Ameri-

---

rally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item."). Thus, the current controversy over Senator Elizabeth Warren's DNA test claiming Native American ancestry takes on a particularly complex twist. Rebecca Brag & Eric Badner, *Elizabeth Warren Releases DNA Test with 'Strong Evidence' of Native American Ancestry*, CNN (Oct. 15, 2018), https://www.cnn.com/2018/10/15/politics/elizabeth-warren-dna-test-native-american/index.html [https://perma.cc/RA2E-LGJK].

[18] *Thorpe*, 770 F.3d at 266 (quoting Amicus Br. of Nat'l Cong. of the Am. Indians, at 6–7, Thorpe v. Borough of Thorpe, 770 F.3d 255, 257 (3d Cir. 2014) (Nos. 13-2446 & 13-2451), 2013 WL 5869889).

[19] Yet, as will be discussed, there are reasons to justify the persistence of differential treatment of Native Americans in American law. *See generally* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002) (discussing Native American's preferential treatment in American law).

[20] Joseph William Singer, *Property and Social Relations*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 4 (Charles Geisler & Gail Daneker eds., 2000).

[21] *Compare* RICHARD PIPES, PROPERTY AND FREEDOM, at xi (1999) ("*Property* refers to the right of the owner or owners . . . to exploit assets to the exclusion of everyone else and dispose of them by sale or otherwise."), *with* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (calling the right of exclusion the "*sine qua non*" of property).

[22] Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1027 (2009).

cans to more effectively protect their dead compared to any other American group. Given the general lack of clarity and insufficient protections for all other human biological materials, NAGPRA represents an intriguing model for human biological materials regulation reform beyond Native American remains.

Part I explores America's long and terrible history of expropriating and exploiting Native American remains.[23] The existing literature on Native American remains shrouds their treatment in a language of exceptionalism.[24] For example, Senator Daniel Inouye noted in discussion of NAGPRA that:

> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers . . . . It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians.[25]

This historical treatment prompted the passage of NAGPRA, and the authorization of special protections for Native American remains. As shown in Part II,[26] however, Native American remains were not as uniquely maltreated as the existing literature on NAGPRA might suggest. America has a long and grisly history of expropriating and displaying all human remains, particularly those that were deemed exotic or were from the lower classes.[27]

This shared history of abuse does not diminish the pain nor justify the treatment of Native American communities. Native American remains and burial grounds were unquestionably systematically targeted on an unparalleled scale for a significantly longer period of time. This paper suggests, however, that the collection and display of human remains, while undeniably significant,

---

[23] *See supra* notes 31–61 and accompanying text.

[24] *See* Echo-Hawk, *supra* note 5, at 448 ("If human remains and burial offerings of Native people are so easily desecrated and removed, wherever located, while the sanctity of the final resting place of other races is strictly protected, it is obvious that Native burial practices and associated beliefs were never considered during the development of the American law of property . . . ."). Importantly, under NAGPRA, Native American "means of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9).

[25] 136 CONG. REC. S17173, S17290 (1990). It is conceded, however, that "Congress found that both archeologists and federal property managers had 'treated Native American human remains and funerary objects in a manner entirely different from the treatment of other human remains.'" Lannan, *supra* note 1, at 394 (quoting S. REP. NO. 101-473, at 5 (1990)). Unearthed non-native remains tended to be studied and reburied, whereas many Native American remains were sent to museums to be held in collections indefinitely. H.R. REP. NO. 101-877, at 13 (1990); *see also* Strickland, *Things Not Spoken*, supra note 5, at 11 (underscoring the importance of recognizing the relationship between indigenous populations and their homelands).

[26] *See supra* notes 62–94 and accompanying text.

[27] This, of course, does not excuse the horrific treatment, but it situates the practice in a broader context.

is not the most crucial or persistent legal distinction drawn between Native American and non-Native remains. The treatment and status of Native American remains in the past and today under NAGPRA are unique in other, previously overlooked, ways. The most important is the classification of Native American remains as objects of legal property. At common law and under most statutory regimes, non-Native human bodies and parts were, and are, not considered property. Moreover, American law follows an allocation system of rights of control and disposition of human remains that is centered on individual non-property rights. In contrast, there is a long history of classifying Native American remains as property. This status, I argue, is in part perpetuated under NAGPRA. Under the Act, many Native American remains are classified as objects of individual or tribal communal property. This Article argues that while property status before NAGPRA was dehumanizing and reflected negative underlying beliefs about Native Americans, such as otherness and commodification, under NAGPRA, property status can be empowering. This Article remedies the oversight within the existing literature regarding the evolution and import of property status for Native American remains.

Part III introduces NAGPRA and examines the sections of the Act that pertain to ownership.[28] The property status of Native American remains has heretofore not been subject to legal analysis but has significant implications for human remains regulation. The import of this status becomes apparent when the wider context of human remains regulation is explored in Part IV.

Part IV examines the four major legal mechanisms for protecting human remains generally: protections of graves and graveyards, criminalization, rights of disposition and control over dead bodies, and property rights.[29] Comparison between Native American and non-Native remains demonstrates the historical and heightened vulnerability of Native American remains within the wider context of the weak and deeply flawed human remains regulation in America. It also reveals the distinctive advantages for Native Americans now under NAGPRA.

The existence of divergent property statuses for Native and non-Native American remains should not necessarily, therefore, lead to condemnation of NAGPRA's ownership provisions. As shown in Part V, human remains are objects whose physical existence and symbolic nature present particular challenges for our legal system.[30] First, legal and social aversion to labeling human remains as property in America existed before the Declaration of Independence. Examination of the meaning and implications of treating human remains

---

[28] *See supra* notes 95–167 and accompanying text.

[29] *See supra* notes 168–281 and accompanying text.

[30] *See supra* notes 282–316 and accompanying text.

as non-property or property, however, suggests that we should not categorically oppose conceiving of human remains as property. Examination of foundational property theory demonstrates the viability and utility of this approach. Second, exploration of communal property suggests that human remains, which almost always exist within a web of family relations, are particularly good candidates for communal property. Given that the common law, statutes, and law enforcement provide mediocre protection of human remains generally, we should consider that property status now enables Native Americans to protect their dead more effectively than any other American group. Therefore, despite showing that Native American remains were subject to egregious acts as objects of property owned by individuals and the Government, and that a divergent property status still persists, the current framework under NAGPRA confers far more substantive authority to Native Americans over related remains compared to the protections available for non-Native remains. In fact, I argue that limited communal property is ripe for expanded application to all human remains, especially those that are not recently deceased.

I. THE TREATMENT OF NATIVE AMERICAN REMAINS FROM EARLY AMERICA TO 1989

Since their arrival in North America, early European Americans pursued ancient and contemporary Native American remains and artifacts in the name of science, history, and profit. One of the first exploration parties of the Plymouth Rock Pilgrims recounted how "we brought sundry of the prettiest things [from the burial pit] away with us, and covered up the corpse again."[31] Early American excavators and collectors encompassed all segments of society. Their ranks ranged from Thomas Jefferson, who excavated a Native American burial ground near his home,[32] to profit-seeking operators of traveling exhibitions and cabinets of curiosities.

The popularity of the study of phrenology in the late eighteenth and early nineteenth centuries, in particular, spurred the collection of Native American remains.[33] Samuel Morton, one of the founders of Physical Anthropology in America, sought to write an "American series (of craniology) . . . however, [he

---

[31] Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992) (citing DWIGHT B. HEATH, MOURT'S RELATION: A JOURNAL OF THE PILGRIMS AT PLYMOUTH 27–28 (1986)).

[32] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 92–96 (Harper & Row, 1964) (1832); *see also* Karl Lehmann-Hartleben, *Thomas Jefferson, Archaeologist*, 47 AM. J. ARCHAEOLOGY 161, 162 (1943).

[33] Phrenology is the study of the shape and size of individual's head and facial shape with the intention of deducing character traits and mental abilities. *See* JOHN D. DAVIES, PHRENOLOGY, FAD, AND SCIENCE: A 19TH CENTURY AMERICAN CRUSADE 3–4 (1971).

was] yet considerably deficient [in skulls], but . . . promised assistance from so many different sources."[34] Morton enlisted army officers and physicians to this end from across the country including Tennessee, Michigan, and South Carolina.[35] Both Morton and his collectors were fully aware of the sanctity of the remains for the living members of Native American tribes. In letters to Morton, his collectors chronicled the "rather perilous business"[36] of procuring skulls. In CRANIA AMERICANA, published in 1839, Morton noted that "[t]he Indians have an extraordinary veneration for their dead, which sometimes induces them, on removing from one section of the country to another, to disinter the remains of their deceased relatives, and bear them to the new home of the tribe."[37] Despite this awareness, Morton and his contemporaries exhibited no signs of remorse or shame in their writings. The only concern expressed was to be careful to avoid detection by tribal members.

Collection of Native American remains was not restricted to individual scientists and doctors, but was also undertaken by the government and museums. In fact, it was "[m]otivated in large part by Morton's work, [that] the U.S. military began conducting craniometric studies on Native American skulls taken from battlefields and graves to prove similar hypotheses [about the inferiority of Native Americans]."[38] As part of this study, "[i]n 1868, the Surgeon General ordered all U.S. Army field officers to send him Indian skulls so that studies could be performed comparing the sizes of Indian and white crania."[39] Founded in 1862, the Army Medical Museum sought to "procure [a] sufficiently large series of adult crania of the principal Indian tribes to furnish accurate average measurements."[40] The result of this official government policy was

---

[34] ROBERT E. BIEDER, A BRIEF HISTORICAL SURVEY OF THE EXPROPRIATION OF AMERICAN INDIAN REMAINS 8 (1990) (quoting Letter from Samuel George Morton to John C. Warren (Feb. 27, 1837)).

[35] *Id.*

[36] *See id.* at 10 (quoting Letter from Galiotti to Samuel George Morton (Dec. 27, 1841)). Further, in 1892, army surgeon Z.T. Daniel wrote a letter explaining how he procured skulls from the Blackfeet, recounting:

> I collected them in a way somewhat unusual: the burial place is in plain sight of many Indian houses and very near frequented roads. I had to visit the country at night when not even the dogs were stirring . . . . [T]he greatest fear I had was that some Indian would miss the heads, see my tracks & ambush me, but they didn't.

Trope & Echo-Hawk, *supra* note 31, at 41.

[37] SAMUEL GEORGE MORTON, CRANIA AMERICANA 81 (1939).

[38] Zoe E. Niesel, *Better Late Than Never? The Effect of the Native American Graves Protection and Repatriation Act's 2010 Regulations*, 46 WAKE FOREST L. REV. 837, 841 (2011).

[39] Lannan, *supra* note 1, at 393 (citing H.R. REP. 101-877, at 10 (1990)).

[40] BIEDER, *supra* note 34, at 37 (citing DANIEL SMITH LAMB, A HISTORY OF THE UNITED STATES MEDICAL MUSEUM: 1862–1917, at 51 (quoting Memorandum for the Information of Medical Officers (September 1, 1868))).

that "over 4,000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country."[41] For example, the museum obtained the remains of those killed in the Sand Creek Massacre, wherein the Colorado militia killed 150 peaceful Cheyenne Indians in 1864.[42] Between 1900 and 1904, most of the museum's Native American remains were transferred to the Smithsonian Institution.[43] Consequently, in 1987, the Smithsonian Institution held one of the largest collections, possessing the remains of over 18,000 Native American individuals.[44]

The collection of Native American remains was a lucrative trade. Franz Boas, known as the father of "American Anthropology,"[45] reportedly paid his frontier grave robbers "$20 for a complete Indian skeleton and $5 for an Indian skull."[46] Museums were also willing to pay for collections of Indian bones. For example, in 1894 the Chicago Field Museum bought a collection of 238 remains from Franz Boas.[47] Moreover, human remains, particularly those of notable Native Americans, were sought after as valuable novelty objects. Native American bodies, both alive and dead, were popular attractions at traveling carnivals and world fairs. One such proprietor "shipped his fresh Indian artifact collection to Chicago during the 1893 World's Columbian Exposition . . . [and] opened a 500-piece Indian relic sideshow . . . . The principal attraction: a dried Indian baby. . . . Thousands of curious people [sought] . . . to catch a glimpse of what the billboard called the 'Mummified Indian Papoose, the Greatest Curiosity Ever on Exhibition.'"[48]

Remains of well-known Native Americans were frequently pursued. One of the most infamous instances relates to the remains of Geronimo. Geronimo was a leader of the Apache tribe and a celebrated warrior during his lifetime. He died in 1909 and was buried at Fort Sill Indian Agency Cemetery, Oklahoma.[49] While they were posted at Fort Sill during World War I, six members of

---

[41] Trope & Echo-Hawk, *supra* note 31, at 40.

[42] Russell Thornton, *Repatriation as Healing the Wounds of the Trauma of History: Cases of Native Americans in the United States of America*, *in* THE DEAD AND THEIR POSSESSIONS: REPATRIATION IN PRINCIPLE, POLICY AND PRACTICE 17, 23 (Cressida Forde et al. eds., 2004).

[43] *Repatriation at the National Museum of Health and Medicine*, NAT'L MUSEUM HEALTH & MED., http://www.medicalmuseum.mil/index.cfm?p=collections.anatomical.repatriation.index [https://perma.cc/9DBL-4WMW].

[44] Lannan, *supra* note 1, at 393–94 (citing S. REP. NO. 101-473, at 1–2 (1990)).

[45] *See* WILLIAM Y. ADAMS, THE BOASIANS: FOUNDING FATHERS AND MOTHERS OF AMERICAN ANTHROPOLOGY 5 (2016).

[46] BIEDER, *supra* note 34, at 31. To provide context, $20 in 1894 is equivalent to around $500 in 2012.

[47] *Id.*

[48] FINE-DARE, *supra* note 5, at 47 (citing RENÉE SANSOM FLOOD, LOST BIRD OF WOUNDED KNEE 53–54 (1998)).

[49] Complaint at 1, ¶ 47, Geronimo v. Obama, 725 F.Supp.2d 182 (D.D.C. 2010) (No. 1:09-cv-00303), 2009 WL 455211.

the Skull and Bones secret society, including Prescott Bush, grandfather of President George W. Bush, supposedly dug up Geronimo's grave and sent a skull back to New Haven. The rumor has never been proven true, although archival evidence indicates that at minimum the group procured bones they thought were from Geronimo's grave and sent them to New Haven.[50] In 2009, the lineal descendants of Geronimo brought a lawsuit to compel Skull and Bones and the Federal Government to return any remains in their possession.[51] As will be discussed later in this paper's section on NAGPRA, the suit was dismissed. The fate of Geronimo's body remains a mystery to this day.[52]

The treatment of Native American remains as curiosities and collectables persisted well into the 1980s and continues today. Estimates of Native American remains held in private and public collections range from one hundred thousand to two million.[53] Often the remains of one individual can be divided between several institutions. The Northern Cheyenne tribe, for instance, discovered upon repatriation a match between the lower part of a skull held by Harvard and the upper part of a skull held by the Smithsonian.[54] As will be seen, under NAGPRA, contemporary monetary transactions of Native American remains are largely forbidden, but they still occur on the black market or internationally. In 2016, a French auction house sold numerous Native American ceremonial items including a shirt made from human scalps and hair.[55] No discoverable convictions for the sale of human remains have occurred under NAGPRA,[56] although

---

[50] Ishaan Tharoor, *Top 10 Famous Stolen Body Parts*, TIME (May 10, 2011), http://content.time.com/time/specials/packages/article/0,28804,1988719_1988728_1988723,00.html [https://perma.cc/3CG7-7XVQ].

[51] In the case of the Federal Government the plaintiffs argued possession because the gravesite was located on federal land. At minimum, the plaintiffs hoped to access the tomb to verify whether the body was intact or not. Complaint ¶ 47, *Geronimo*, 2009 WL 455211.

[52] Tharoor, *supra* note 50. As an aside, it is worth noting that other rumors of actual human bones used by the society have proven true. In 2010, the auction company Christie's planned to auction off a 19th century Skull and Bones ballot box comprised of a human skull and crossbones. The item was ultimately withdrawn from auction after a title dispute. *Christie's Drops Human Skull from Auction*, CNN (Jan. 22, 2010), http://www.cnn.com/2010/US/01/22/new.york.skull.auction/index.html [https://perma.cc/SM37-ZHZM].

[53] Lannan, *supra* note 1, at 393.

[54] Thornton, *supra* note 42, at 17.

[55] Camila Domonoske, *Native American Protest a Planned Auction of Sacred Objects in France*, NAT'L PUB. RADIO (May 25, 2016), http://www.npr.org/sections/thetwo-way/2016/05/25/479455188/native-americans-protest-planned-auction-of-sacred-objects-in-france [https://perma.cc/52VH-G4TC]; *Vest De 'Guerrier' Ou Aux 'Scalps Probablement . . . [Warrior Vest, Probably of Scalps . . .]*, AUCTION EVE, http://www.auctio-eve.com/html/fiche.jsp?id=6016987&np=1&lng=fr&npp=10000&ordre=&aff=&r=&sold=&&setLng=en [https://perma.cc/4SBN-9B6J].

[56] This is not the case for other cultural items such as objects of cultural patrimony. There have been numerous instances of these convictions. *See generally* United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999) (masks and robes); United States v. Kramer, 168 F.3d 1196 (10th Cir. 1999) (prayer sticks and sun disk); United States v. Corrow, 119 F.3d 796 (10th Cir. 1997) (headdresses and feath-

in 2001, in *United States v. Ugo G. DeLuca*,[57] the government prosecuted an antiques seller for attempting to sell Native American skull fragments. The case seems to have eventually settled, however, as there is no record of a conviction. In addition, disrespect for Native American burial grounds continues into the modern era. In 1979, for example, 200 Miwok tribal graves were emptied and the land bulldozed in California to construct a residential tract over the protests of living Miwok descendants.[58] Similarly, in March 1989 National Geographic magazine published a report that detailed the recent desecration of over 650 Native American graves by contemporary relic hunters.[59]

In recognition of the injustices committed, the need to repatriate remains held by institutions, and to protect *in situ* remains,[60] Congress passed NAGPRA. The Act is discussed in more detail in Part III, but at this stage it is important to note that it was passed in response to the particular and egregious treatment of Native American remains and cultural objects. Florida Congressman Charles E. Bennett, who introduced NAGPRA, stated that he was prompted to introduce this legislation after reading the 1989 *National Geographic* article. He stated, "I [was] outraged by [t]his immoral and indecent treatment of the dead."[61] Without trivializing the experiences of Native Americans and the horrific treatment of Native American remains, Part II introduces the corresponding exploitation of non-Native remains. Native American remains were systematically collected and burial grounds were desecrated to an unparalleled degree and often with the full force of the United States government. Yet, the practice was part of a larger context that is relevant to later discussion of the disjunctive property status of non-Native and Native remains.

II. THE TREATMENT OF NON-NATIVE HUMAN REMAINS IN AMERICA

Across America, particularly in the eighteenth and nineteenth centuries, non-Native bodies and parts were also actively collected, traded, and displayed. The macabre fate of Elmer McCurdy is a noteworthy example.[62] Elmer

---

ers); State v. Taylor, 269 P.3d 740 (Haw. 2011) (wooden Native Hawaiian artifacts, state case pertaining to an earlier federal case that ended with a guilty plea deal).

[57] United States v. DeLuca, No. 00 CR 387, 2001 WL 1654770, at *1 (N.D. Ill. Dec. 20, 2001).

[58] Wana the Bear v. Cmty. Const., Inc., 180 Cal. Rptr. 423, 424 (Ct. App. 1982). The plaintiff sought criminal enforcement under California Health and Safety Code § 7052, which criminalized the disinterment of human remains without legal permission. *Id.* at 425.

[59] *See* Harvey Arden, *Who Owns Our Past?*, NAT'L GEOGRAPHIC, Mar. 1989, at 376.

[60] *In situ* means something that is in its natural position.

[61] *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 130 (1990) (statement of Representative Bennett).

[62] *See generally* MARK SVENVOLD, ELMER MCCURDY: THE LIFE AND AFTERLIFE OF AN AMERICAN OUTLAW (2002); Ella Morton, *How a Real Corpse Ended Up in a California Fun Park Spook-*

was a Caucasian small-time outlaw killed in Oklahoma by authorities after a failed train robbery in 1911.[63] His body was taken to a funeral home and embalmed. No one claimed the body for several years, however, and the owner of the funeral home displayed the body as both an advertisement of his services and a curiosity for visitors. Thereafter, Elmer's remains became a popular traveling carnival exhibit and movie prop. Overtime, the identity of the corpse was forgotten, and people assumed the body was a wax figure. It was not until 1976, while on movie set, that a film crew realized the remains were real. In 1977, the body was formally buried in Oklahoma, with approximately six feet of concrete over it to ensure it was not disturbed.[64] Elmer's story is clearly a remarkable one, but not as unusual as one might think. Dubious collection practices of all types of remains were fixtures of mainstream science and medicine in eighteenth- and nineteenth-century America.

A. Collecting in the Name of Science

Early American scientists and museums were not exclusively interested in collecting and cataloguing Native American remains. Samuel Morton also categorized European, Asian, and African skulls. Importantly, the Army Medical Museum, described above, which collected Native American crania, was founded during the Civil War to catalogue human body parts with injuries of particular medical interest. Field surgeons throughout the country were requested to submit preserved specimens that might be of instructional value. Surgeons were eager to learn and compliance was common.[65] Unlike the case with Native Americans, however, nationalism and duty played an important role. For example, the curator of the collection, Dr. John Brinton, was able to convince the objecting friends of a fallen soldier who had a "remarkable injury" of the "glory of a patriot having *part* of his body . . . under the special guard of his country."[66] While it seems that no requirements for consent of individuals or relatives were implemented, the above example does suggest that a greater degree of consideration was given to the acquisition of non-Native remains compared to Native remains. After the war, the displays at the Army

---

house, SLATE (Apr. 11, 2014), http://www.slate.com/blogs/atlas_obscura/2014/04/11/the_corpse_of_elmer_mccurdy_and_how_it_ended_up_in_a_long_beach_fun_park.html [https://perma.cc/SA9L-RP76].

[63] SVENVOLD, *supra* note 62, at 100, 113–17; *see also* Steve Harvey, *Inept Train Robber Had an Unimpressive Life but a Celebrated Afterlife*, L.A. TIMES (July 3, 2011), https://www.latimes.com/local/la-xpm-2011-jul-03-la-me-0703-then-20110703-story.html [https://perma.cc/CJW8-DGL2].

[64] SVENFOLD, *supra* note 62, at 256.

[65] GARY LADERMAN, THE SACRED REMAINS: AMERICAN ATTITUDES TOWARD DEATH 1799–1883, at 146 (1996).

[66] *Id.* at 146–47.

Medical Museum became a popular attraction to the public. Further, as if straight out of a Dickens' novel, it was noted by curators that "maimed soldiers also visited the museum, often in search of missing limbs."[67]

The Army Medical Museum was not an outlier; established doctors and institutions across the country collected non-Native human specimens. One of the oldest and most extensive collections remains open to visitors in the modern day. The College of Physicians of Philadelphia operates the Mutter Museum, which was founded in 1858. The museum houses a collection that includes roughly 5,000 remains.[68] The collection ranges from the Soap Lady, whose adipocere body was unearthed in the old city area of Philadelphia in 1875,[69] to the conjoined liver of the original Siamese twins Cheng and Eng, to a tumor removed from President Grover Cleveland. Not all of the collections are from remarkable or famous bodies. For instance, the museum has a collection of 139 largely European skulls known as the Hyrtl Collection.[70]

In general, most museums collected the bodies of the "monstrous" or the "marvelous." Consequently, in relation to Native American remains, it was not only that Native bodies were collected without consent, but also that the act of collection often implied a definition of Native bodies as different or other. The definition of Native bodies as different bodies is particularly salient in the context of more popular displays of human bodies and parts in eighteenth and nineteenth century America. As mentioned above, Native American bodies, both alive and dead, were offered as entertainment to the public at world fairs and traveling shows. Similarly, exotic bodies, such as those of African pygmies, and marvelous bodies, such as those of dwarfs, were displayed for paying audiences. Therefore, two additional components of the collection and display of human remains emerged: marginalization (for both the deceased individual and for family members) and commercialization. Those bodies deemed by mainstream society as within the sphere of "other" were more readily disenfranchised and commercialized. These bodies included Native Americans, but also encompassed African Americans, Europeans with physical abnormalities, and the poor.

---

[67] *Id.* at 147.

[68] E-mail correspondence with Anna N. Dhody, Curator of the Mutter Museum (Dec. 20, 2012) (on file with author).

[69] Edward Colimore, *Learning Secrets of the 'Soap Lady,'* PHILA. INQUIRER (May 17, 2008), https://www.inquirer.com/philly/news/local/20080517_Learning_secrets_of_the__soap_lady_.html [https://perma.cc/AZW5-JYW5]. Adipocere is a waxy, soap-like substance that forms when soft tissue decomposes. *See* FIGHT CLUB (20th Century Fox, 1999).

[70] *Hyrtl Skull Collection*, MÜTTER MUSEUM, http://muttermuseum.org/exhibitions/hyrtl-skull-collection/ [https://perma.cc/W4T4-Z5QY].

B. Collecting in the Name of Medicine

Nowhere is the story of marginalization and commercialization in early America more poignant than in the history of medical dissection. Before and after the Civil War, grave robbers targeted the remains of poor whites and African Americans, in particular, to provide corpses for medical dissection. Although illegal, individuals and authorities often turned a blind eye to grave robbing, particularly with regards to the graveyards of the lower classes. This was especially true for "potter's fields," where bodies were buried at public expense.[71] One sad example, recorded by David Humphrey, describes an incident in Philadelphia in 1845 wherein the inmates of the local almshouse petitioned the board to prevent the robbing of bodies from the almshouse graveyard. The board replied that "'the [medical] colleges must have subjects' and should grave robbers be barred from the almshouse they would plunder church cemeteries and other private burial grounds."[72] Thus, Americans of all classes adopted various measures, such as patented metal coffins, to protect their dead against the "ravages of t[h]e dissecting knife,"[73] but the poor had few political, social, and economic resources to protect their deceased. Thus, most corpses used for medical purposes came from the poor or the unknown dead.[74]

The economic stratification of body snatching was prevalent, but race was also a factor in selection. Prior to the Civil War, slave owners could sell slaves to researchers or medical schools for experiments or dissection.[75] Given the value of a living slave at the time, it was very unlikely anyone was sold and killed for dissection, but it was certainly the case that African Americans, particularly in the South, were mainstays of dissection halls. In 1835, for example, one traveler commented on how "[i]n Baltimore the bodies of coloured people are exclusively taken for dissection."[76] One medical school went even so far as to purchase a slave who was tasked with procuring African American and poor

---

[71] Frederick C. Waite, *Grave Robbing in New England*, 33 BULL. MED. LIBR. ASS'N 272, 279 (1945).

[72] David C. Humphrey, *Dissection and Discrimination: The Social Origins of Cadavers in America, 1760–1915*, 49 BULL. N.Y. ACAD. MED. 819, 819 (1973) (quoting CHARLES LAWRENCE, HISTORY OF THE PHILADELPHIA ALMSHOUSES AND HOSPITALS 160–61 (1905)). It should be noted, however, that the life of a grave robber was far from easy. As detailed in Dr. Frederick Waite's article, great care was taken to avoid detection, including replacing any decorative arrangement placed on top of the fresh grave. Waite, *supra* note 71, at 279–81.

[73] "Fisk's Patent Metallic Burial Cases" (advertisement, 1850) *in* LADERMAN, *supra* note 65.

[74] Humphrey, *supra* note 72, at 819.

[75] *See generally* HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2008).

[76] Humphrey, *supra* note 72, at 819 (quoting H. MARTINEAU, RETROSPECT OF WESTERN TRAVEL 140 (1838)).

white cadavers.[77] Further north, where there were fewer slaves, some medical schools made arrangements for bodies, hidden in barrels, to be shipped from the South.[78] The overrepresentation of African Americans continued into the post-Civil War era, when black cemeteries were far more frequently targeted for raiding than white cemeteries.[79]

In 1854, New York State passed a law to curtail grave robbing,[80] widely known as the Bone Bill.[81] Prior to the passage of the bill, between 600 and 700 graves were illicitly emptied annually in New York City.[82] The law is one of the earliest instances of dissection legislation in the United States,[83] and paralleled England's 1832 Anatomy Act.[84] Under the New York law, the bodies of those who died in poorhouses or prisons became available to medical schools.[85] Efforts to pass anatomy acts in most states faltered during the pre-Civil War period, "[o]f five anatomy laws enacted before 1860, three were repealed."[86] By the early 1880s, fourteen of the thirty-eight states had passed similar laws,[87] and by 1913, "of the 39 states with medical schools, Alabama and Louisiana still lacked anatomy laws, and North Carolina and Tennessee made only the bodies of deceased criminals legally available."[88]

While the passage of these acts helped protect the sanctity of the buried dead by providing a legally accessible supply of corpses for medical schools, in many cases this meant that instead of having to dig up a body from a potter's field, the deceased would be delivered directly to a medical school. Laws that permitted the allocation of unknown and unclaimed corpses in morgues to medical schools persist today. New York only modified its practice of making unclaimed and insolvent dead bodies available for medical research and educa-

---

[77] Tanya Telfair Sharpe, *Grandison Harris: The Medical College of Georgia's Resurrection Man*, *in* ROBERT L. BLAKELY & JUDITH M. HARRINGTON, BONES IN THE BASEMENT: POSTMORTEM RACISM IN NINETEENTH-CENTURY MEDICAL TRAINING 206, 212 (1997).

[78] Waite, *supra* note 71, at 283–84.

[79] MICHAEL SAPPOL, A TRAFFIC OF DEAD BODIES: ANATOMY AND EMBODIED SOCIAL IDENTITY IN NINTEENTH-CENTURY AMERICA 107 (2002).

[80] SENATE OF THE STATE OF NEW YORK, JOURNAL OF THE SENATE VOL. 77, at 529 (1854); *see also* Foley v. Phelps, 37 N.Y.S. 471, 472 (App. Div. 1896).

[81] *See* DAVID OSHINSKY, BELLEVUE: THREE CENTURIES OF MEDICINE AND MAYHEM AT AMERICA'S MOST STORIED HOSPITAL 67 (2016); SAPPOL, *supra* note 79, at 132.

[82] Humphrey, *supra* note 72, at 821.

[83] *Id.*

[84] *See* 2 & 3 Will. IV c. 75 (1832) (regulating schools of anatomy).

[85] SAPPOL, *supra* note 79, at 5.

[86] *Id.*

[87] Humphrey, *supra* note 72, at 823.

[88] John B. Blake, *The Development of American Anatomy Acts*, 30 J. MED. EDU. 431, 436 (1955). The populations of the southern states' prisons were, it should be noted, disproportionately African American. SAPPOL, *supra* note 79, at 329 n.6.

tion in 2016.[89] Although no exact data seems to exist, it is most likely that the bodies of minorities and the poor continue to be overrepresented on dissection tables. Studies have found, for instance, that high funeral costs disproportionately impact racial minorities.[90]

Bodies taken for dissection were not only removed, dissected, and frequently retained, but also, like Native American remains, they became commercialized objects bought and sold through the market. In A TALE OF TWO CITIES, Jerry Cruncher made extra money as a resurrection man selling corpses to medical schools. Although it may seem difficult to move from fictional examples to actual records of legal cases,[91] one Tennessee case from 1900, *Thompson v. State*,[92] records how E.D. Thompson, the county undertaker, and Frank Thompson were convicted after attempting to sell the body of a pauper, Jennie McGuire, for $50.[93] Shockingly, the defendants were only charged for the taking of the white female corpse even though they were also apprehended with the bodies of three African Americans.

The forgotten bodies of the three unnamed African Americans illustrate that it was not only Native people who were disenfranchised and commercialized in death. While it must be acknowledged that Native American remains, as illustrated by the 1989 National Geographic article, continued to be frequently expropriated and displayed without consent well into the twentieth century,[94] this section aims to illustrate that, contrary to much of the existing NAGPRA literature, the historical collection and display of Native American remains was part of a broader social context of collection and display of human remains, particularly of those deemed to be "other." Proceeding from the

---

[89] *See generally* N.Y. PUB. HEALTH LAW §§ 4211–4212 (McKinney 2016); Nina Bernstein, *Unearthing the Secrets of New York's Mass Graves*, N.Y. TIMES (May 15, 2016), https://www.nytimes.com/interactive/2016/05/15/nyregion/new-york-mass-graves-hart-island.html [https://perma.cc/5YCQ-CB9T].

[90] Dwayne A. Banks, *The Economics of Death? A Descriptive Study of the Impact of Funeral and Cremation Costs on U.S. Households*, 22 DEATH STUD. 269, 271 (2010).

[91] The most infamous case, however, occurred in Scotland with the actions of William Burke and William Hare, who, rather than dig up dead bodies, chose to kill and then sell for dissection the bodies of their victims. Both murderers were hanged and reaction to their crimes prompted the passage of England's Anatomy Act. Interestingly, it appears that Burke got his just deserts. The judge levied the additional punishment of dissection (which existed at the time) upon Burke's sentence. Hare was spared this fate because he testified against Burke. RUTH RICHARDSON, DEATH, DISSECTION AND THE DESTITUTE 132–43 (2000). Today, Burke's skeleton is on display at the University of Edinburgh Anatomical Museum. *See William Burke*, U. EDINBURGH ANATOMICAL MUSEUM, https://www.ed.ac.uk/biomedical-sciences/anatomy/anatomical-museum/collection/people/burke [https://perma.cc/DN7Z-YVTX].

[92] Thompson v. State, 58 S.W. 213, 213 (Tenn. 1900).

[93] *Id.* at 214. As an aside, it is worth noting that in 1894 the market value of a Native American skeleton appears to have been $20. *See* BIEDER, *supra* note 34, at 31.

[94] Arden, *supra* note 59, at 376.

historical treatment to the legal status in Parts III and IV, it becomes clear that what is significant about the treatment and status of Native American remains is not simply that they were taken or displayed. Rather, as will be shown, it was, and is, their status as objects of legal property. This status was perpetuated under NAGPRA, which was passed in 1990 to enable the protection of *in situ* Native remains on federal lands by Native peoples, to prevent the trade and display of Native remains, and to facilitate the return and burial of remains residing in federally sponsored collections across the country. The next section introduces NAGPRA and specifically discusses the property provisions of the Act.

III. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

In the 1960s, awareness increased about the existence of collections of Native American remains and objects, along with a broader reclaiming of cultural rights. Native American peoples and tribes began to fight to repatriate remains and objects held by institutions.[95] These efforts culminated with the passage of NAGPRA.[96] The result of detailed hearings and negotiations among tribal leaders, historians, archaeologists, and museums, NAGPRA dramatically changed the obligations of federally funded institutions to Native Americans and Native Hawaiians. Courts have interpreted NAGPRA as having two main objectives:

> [F]irst, to protect Native American burial sites and to require excavation of such sites only by permit, and second, to set up a process by which federal agencies and museums holding Native American remains and cultural artifacts will inventory those items and work with tribes to repatriate them.[97]

---

[95] *See generally* ACCOMPLISHING NAGPRA, *supra* note 5 (analyzing repatriation under NAGPRA); Buffalohead, *supra* note 5 (discussing the history of Native Americans and the need to repatriate a variety of cultural items).

[96] 25 U.S.C. §§ 3001–3013 (2012). Actually, just prior to NAGPRA, Congress passed the National Museum of the American Indian Act of 1989 (NMAIA). NMAIA applies exclusively to the Smithsonian Institution, and requires it to "inventory and identify the origin of human remains and associated funerary objects in the Smithsonian's possession or control and expeditiously return them upon the request of lineal descendants or culturally affiliated Indian tribes and Native Hawaiian organizations." C. Timothy McKeown, *Considering Repatriation Legislation as an Option*, *in* UTIMUT: PAST HERITAGE—FUTURE PARTNERSHIPS 134, 136 (Mille Gabriel & Jens Dahl eds., 2007); *see also* National Museum of the American Indian Act, Pub. L. 101-185 (1989). For the purposes of this Article, NAGPRA is used to encompass both the NMAIA and NAGPRA because NAGPRA has a broader reach.

[97] Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999).

NAGPRA recognized that Native Americans and Native Hawaiians have the right to receive information about, and ultimately repatriate, cultural items to which they are culturally affiliated. The Act represented a reversal of decades of federal government policies aimed at collecting and displaying the remains and cultural objects of Native American and Native Hawaiians. Notably for this paper, it created special categories, obligations, and rights to Native American and Native Hawaiian remains that have no legal analog for non-Native human remains.

As of September 2016, NAGPRA has provided a pathway for the repatriation of the remains of 57,847 individuals held in institutions and museums across the country.[98] Additionally, NAGPRA's impact has extended beyond the federally funded institutions it regulates. Some states, like California, have passed similar state-level legislation.[99] Implementation has varied across states and institutions. Within California, the University of California, Los Angeles has returned nearly all of the 2,300 remains it had in its collection.[100] In contrast, in 2018, at the University of California, Berkeley's Phoebe Hearst Museum, "which holds one of the largest collections of human remains in the country, fewer than 300 bodies have been returned out of more than 9,000."[101] Prompted in part by the generally slow pace of repatriation by many of the University of California schools, Governor Brown of California signed a bill in 2018 to speed the repatriation process across the University of California system.[102] The Act has had a cultural impact on institutions and collectors that are not legally subject to its requirements. These groups are now under significant social and moral pressure to repatriate remains and objects. Consequently, Native Americans and Native Hawaiians have successfully repatriated remains and objects from independent or international institutions and individuals not subject to NAGPRA.[103] The next sub-sections briefly outline some of the key property related features of NAGPRA.

---

[98] *National NAGPRA Frequently Asked Questions*, U.S DEP'T INTERIOR, https://www.nps.gov/nagpra/FAQ/INDEX.HTM#Grant [https://perma.cc/3BZ5-V7J9].

[99] *See* CAL. HEALTH & SAFETY CODE §§ 8010–8029 (West 2019) (requiring repatriation of Native American remains held by state institutions and agencies).

[100] Felecia Mello, *Native American Tribes Clash with UC Over Bones of Their Ancestors*, KQED (July 11, 2018), https://www.kqed.org/news/11680078/native-american-tribes-clash-with-uc-over-bones-of-their-ancestors [https://perma.cc/M5Z5-M2MV].

[101] *Id.*

[102] Assemb. B. 2836 (Cal. 2018); *see also* CAL. HEALTH & SAFETY CODE § 8026.

[103] The Annenberg Foundation, for example, purchased many of the sacred items sold at the auction in Paris in order to repatriate them. Alexandria Sage, *U.S. Foundation Buys Hopi Masks at Auction to Return to Tribe*, REUTERS (Dec. 11, 2013), https://www.reuters.com/article/us-france-auction-idUSBRE9B80QJ20131211 [https://perma.cc/MWN2-LR56].

A. Federal or Tribal Land & Federal Institutions

The Native American Graves Protection and Repatriation Act applies to all "cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990."[104] Native American burial sites, as was shown above, were frequent targets for relic hunters and grave robbers. Moreover, as will be seen in Part IV, Native American burial sites were infrequently accorded the same statutory and common law protections that pertain to cemeteries or other burial sites. Under NAGPRA, intentional excavation of Native American remains or objects from federal lands can only occur after consultation with the appropriate tribe and the issuance of a permit by the federal government.[105] Additionally, remains located on tribal lands can only be excavated with the consent of the relevant tribe.[106] Remains that are inadvertently discovered are also subject to reporting and consultation requirements.[107]

The Act also applies to all cultural items that are within the possession or control of a federal agency or museum that receives federal funding.[108] NAGPRA mandates that these organizations comply with consultation,[109] inventory,[110] and repatriation requirements.[111] The language of NAGPRA implies that these requirements apply to not only cultural items within the institution's possession or control before 1990, but also to any later acquisitions.

The breadth of the definition of "museum" has proven legally contentious. Under Department of the Interior guidelines, "museum" is very broadly defined as "any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds."[112] The case involving the remains of Native American athlete Jim Thorpe, discussed above, turned on the definition of "museum." In 1953, his body was removed from a Sac and Fox Nation Reservation in Oklahoma during a ritual burial ceremony. Instead of being buried in Oklahoma, in

---

[104] 25 U.S.C. § 3002(a).

[105] *Id.* § 3002(c). The federal government maintains a consultation database that provides contact information for tribes to aid the consultation process. *National NAGPRA Online Databases*, NAT'L PARK SERV., https://www.nps.gov/nagpra/ONLINEDB/INDEX.HTM [https://perma.cc/H75Z-4BX6].

[106] 25 U.S.C. § 3002(c).

[107] *Id.* § 3002(d).

[108] *Id.* § 3004. The Smithsonian is an exception to this rule. As noted above, the Smithsonian was covered by a similar act, passed the previous year, entitled, The National Museum of the American Indian Act. Pub. L. 101-185. It should also be noted that the NAGPRA does not apply to private individuals.

[109] 25 U.S.C. § 3002.

[110] *Id.* § 3003.

[111] *Id.* § 3005.

[112] 43 C.F.R. § 10.2(a)(2) (2015).

conformance with his wishes, Thorpe was buried in the newly re-named town of Jim Thorpe, Pennsylvania. The remains were interred, and a tourist memorial was erected over them. These arrangements were supposedly made by Thorpe's third wife, Patsy, in exchange for a lump sum of cash.[113] In 2010, Thorpe's children and the Sac and Fox Nation sued the town demanding the return of the remains using a NAGPRA claim.[114] Given that Thorpe's remains were removed from tribal lands before the enactment of NAGPRA, in order for a NAGPRA claim to succeed, the town borough containing the memorial needed to qualify as a "museum" under the Act. The lower court agreed that the borough was a museum under NAGPRA, and given the borough's prior receipt of federal funds, must comply with NAGPRA.[115]

The Third Circuit Court of Appeals reversed this holding.[116] After a lengthy analysis of legislative intent, the court concluded that "Congress did not intend the result required by a literal application [of the definition of 'museum']."[117] Crucially, the court held that, under NAGPRA, "a museum is [considered as] holding or collecting the remains for the purposes of display or study, as opposed to serving as an original burial site."[118] Thus, a passive holding intended as a "final resting place" by a federally funded institution does not qualify as a museum.[119] It remains unclear how a court would rule in deciding whether a research lab located within a federally funded institution of higher learning would qualify. The California legislature's 2018 law, for instance, adopted a broad campus-wide interpretation of NAGPRA.[120]

B. Human Remains

NAGPRA covers five types of Native American "cultural items": human remains,[121] associated funerary objects,[122] unassociated funerary objects,[123]

---

[113] Brady, *supra* note 13.

[114] Thorpe v. Borough of Thorpe, 770 F.3d 255, 257 (3d Cir. 2014).

[115] Thorpe v. Borough of Thorpe, No. 3:10-CV-01317, 2011 WL 5878377, at *5 (M.D. Pa. Nov. 23, 2011), *aff'd*, 770 F.3d 255 (3d Cir. 2014). "The District Court concluded that the Borough was a 'museum' within the meaning of NAGPRA and provisions of that law required the Borough to disinter Thorpe's remains and turn them over to the Sac and Fox tribe as requested by John Thorpe." *Thorpe*, 770 F.3d at 257.

[116] *Id.* at 266.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] Assemb. B. 2836 (Cal. 2018); *see also* CAL. HEALTH & SAFETY CODE § 8026.

[121] 43 C.F.R. § 10.2(d).

[122] *Id.*; *see also* 25 U.S.C. § 3001(3)(A) (defining associated funerary objects as, "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except

sacred objects,[124] and objects of cultural patrimony.[125] What exactly qualifies as human remains under the Act is currently unclear and has been the subject of several federal lawsuits.

Human remains are quite broadly defined as "the physical remains of the body of a person of Native American ancestry."[126] The broad definition of human remains entails that the Act covers a wide range of human remains from a few bone fragments to an entire corpse. Notably, NAGPRA's language of the "physical remains of the body" should apply to transplantable organs like corneas or hearts. This would uncontestably be the case if, for example, a federally funded museum had in its possession a preserved heart taken from a Native American. Whether "human remains" should apply to contemporary remains will be discussed further below, but it is worth noting here that neither the text of the National Organ Transplant Act of 1984 ("NOTA"),[127] nor a state law modeled on the Uniform Anatomical Gift Act,[128] conflict with such a reading of NAGPRA.[129]

Whether NAGPRA applies to body parts that have been excised from a living person, such as blood or tissue, has never been litigated. Between the legislative history, NAGPRA, and the published Department of the Interior interpretations of it, NAGPRA should be interpreted by courts as only applicable to bodily materials from deceased bodies. This means that cases such as

---

that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects").

[123] 43 C.F.R. § 10.2(d); *see also* 25 U.S.C. § 3001(3)(B) (defining unassociated funerary objects as, "objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe").

[124] 25 U.S.C. § 3001(3)(C) (defining sacred objects as "ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents").

[125] *Id.* at § 3001(3)(D) ("'[C]ultural patrimony' shall mean an object having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organizational member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from such group.").

[126] 43 C.F.R. § 10.2(d)(1).

[127] National Organ Transplant Act of 1984, Pub. L. 98-507 (codified at 42 U.S.C. §§ 274–274e (2001)).

[128] *See, e.g.*, MASS GEN. LAWS ch. 113A, § 16 (2019).

[129] There is, for example, no reason to read NAGPRA as excluding organ donation by Native American individuals. NAGPRA has a provision that permits bodily remains to be transferred if given with the "full knowledge and consent of the next of kin." 25 U.S.C. § 3001(13).

Moore v. Regents that involve tissue from a living donor, should not entail a NAGPRA claim.[130] A comparable case did arise, for example, involving blood taken from members of the Havasupai Tribe.[131] In that case, tribal members consented to participate in a diabetes research study conducted by researchers at the University of Arizona. Without their consent, other researchers utilized the blood samples to conduct research unconnected to the diabetes project. The research produced a host of publications, "[s]ome of the papers generated from the blood samples dealt with schizophrenia, inbreeding and theories about ancient human population migrations from Asia to North America. The latter body of work is contrary to the Havasupai belief that, as a people, they originated in the Grand Canyon."[132] The case was treated in a similar manner to *Moore* as one of fraud and informed consent.[133]

Human remains under NAGPRA "does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets."[134] The exclusion of "freely given or naturally shed" items from the definition of human remains tracks contemporary understanding of human remains. Regenerative body parts that are typically shed as waste, like finger nail clippings and hair, are typically unmentioned in most health codes, or other similar regulations of human bodies and parts.[135] To be protected by NAGPRA, a rope made from human hair would therefore need to be qualify as a funerary object, sacred object, or object of cultural patrimony. Otherwise, NAGPRA is broad. It applies to whole bodies, but also to fragments of skulls or individual teeth. Technically, under the Act, some ambiguity could exist over the classification of objects that incorporate non-freely given human remains. War shirts that include human hair and scalps are one such example. If the incorporated object also qualifies as a sacred object or an object of cultural patrimony, then theoretically there is tension as to whether the object should be classified as human remains or not. Surprisingly, this ambiguity is not legally significant under the Act in a general sense because it classifies human remains together with funerary objects, sacred objects, and objects of cultural patrimony as cultural items. There is notably limited distinction be-

---

[130] *See, e.g.*, Moore v. Regents, 973 P.2d 479 (Cal. 1990).

[131] Havasupai Tribe of Havasupai Reservation v. Ariz. Bd. of Regents, 204 P.3d 1063, 1066 (Ariz. Ct. App. 2008).

[132] *Id.* at 1067.

[133] *See id.*; *Moore*, 973 P.2d at 479.

[134] 43 C.F.R. § 10.2(d)(1).

[135] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 117700 (West 2015) (defining regulated medical waste).

tween these categories under the Act.[136] The distinction does, however, matter in terms of tribal designation. The Justice Department has made clear that in such cases, the object should be classified as the property of the tribe who made the object.[137] Regarding the applicability of NAGPRA to human remains incorporated into objects that do not meet the definition of cultural items, the Justice Department has noted that "[t]he legislative history is silent on this issue. Determination of the proper disposition of such human remains must necessarily be made on a case-by-case basis."[138]

Two additional important elements of the definition of human remains are unclear under the Act: genetic lineage and age. NAGPRA does not apply a condition of formal tribal membership or personal identity. Rather, its language is simply that of "a person of Native American ancestry."[139] In the context of ancient and older remains, the lack of a precondition of formal membership is appropriate and logical because the individual who lived before the rise of modern tribal membership criteria. The case of the prehistoric Kennewick man is an obvious example of the limitations of a tribal membership requirement.[140] On the other hand, the rise of genetic testing techniques has made the question of ancestry significantly more complicated than Congress likely contemplated in 1990 when the Act passed. With the rise of genetic testing techniques, researchers are increasingly able to positively identify the Native American ancestry of ancient remains, but also of living individuals. The prospects and perils of genetic testing for Native American ancestry was made all too clear by the recent episode involving Senator Elizabeth Warren.[141] Analysis of Senator Warren's DNA showed that she likely had a Native American ancestor. Techni-

---

[136] Often the biggest challenge for NAGPRA repatriation claims is distinguishing between more mundane individually owned and fully alienable objects, which are not covered under NAGPRA, and sacred objects or objects of cultural patrimony, which are covered under NAGPRA.

[137] *See* 43 C.F.R. § 10.2(d)(1) ("For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony . . . must be considered as part of that item.").

[138] Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62134-01, 62137 (Dec. 4, 1995) (codified at 43 C.F.R. § 10.2).

[139] 43 C.F.R. § 10.2(d)(1) ("*Human remains* means the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.").

[140] *See generally* THOMAS, *supra* note 3.

[141] *Elizabeth Warren Releases DNA Analysis Supporting Native American Ancestry Claims*, BOSTON 25 NEWS (Feb. 4, 2019), https://www.boston25news.com/news/elizabeth-warren-releases-dna-analysis-supporting-her-claim-of-native-american-ancestry/853329118 [https://perma.cc/P9KN-AJ4X].

cally, then, there is a set of circumstances wherein her remains could be covered by NAGPRA.[142]

Whether NAGPRA applies to the deceased bodies and parts of *all* Native Americans, regardless of what genetic test used, is also unclear. Does the Act only apply to older remains or to contemporary ones as well? Some state laws that mirror NAGPRA and extend protection to state lands set exact age requirements for what qualifies as "human remains." In Arizona, the remains must be from a human who "died more than fifty years before the remains are discovered."[143] No such limitation exists in the text of the federal law.

The existing case law about NAGPRA's applicability is contradictory. The Western District of Texas held that contemporary remains are not covered under NAGPRA. In *Kickapoo Traditional Tribe of Texas v. Chacon*,[144] a tribe that sought to prevent an investigative disinternment and autopsy argued that NAGPRA applied to a recently buried corpse. The court ruled that although the language of NAGPRA was unclear:

> [The p]lacement of the term "human remains" within the larger category of "cultural items" thus suggests that NAGPRA was not meant to apply to a recently buried corpse which is of no particular cultural or anthropological interest, but which is sought by state authorities for the purposes of conducting an inquest.[145]

It is unclear how old the remains need to be, but the court pointed to the Archaeological Resources Protection Act of 1979's discussion of objects of "archaeological interest" as a guide.[146] Under this more limited reading of NAGPRA, contemporary remains are not covered by NAGPRA.

In contrast, the U.S. District Court for the District of South Dakota and the Third Circuit Court have both taken a more expansive view, suggesting that NAGPRA applies more broadly. In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*,[147] the South Dakota court upheld the application of NAGPRA to remains that had been buried in 1900 and did not appear to be of any particular archaeological import. The court addressed the issue of age directly, stating:

> Defendants' suggestion, in oral argument, that the Act applies only to prehistoric human remains, cannot be accepted. A statute must be

---

[142] NAGPRA's further requirement for "cultural affiliation" could prevent a modern tribe from asserting a NAGPRA ownership claim to remains with such a tangential genetic link. Lineal descendants of the individual would, however, still have a valid NAGPRA claim. *See* 25 U.S.C. § 3002(a).

[143] ARIZ. REV. STAT. ANN. § 41-865(J)(5) (2018).

[144] *Kickapoo*, 46 F. Supp. 2d at 645–46.

[145] *Id.* at 650.

[146] *Id.* (citing 16 U.S.C. § 470bb(1) (2012)).

[147] Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000).

> interpreted "to give effect, if possible, to every clause and word" within it. . . . If the Act applied only to prehistoric human remains, its priority for lineal descendants in questions of ownership and control of human remains and associated funerary objects would be meaningless, since it is nearly, if not completely, impossible to determine the lineal descendants of persons who died before recorded time. The Act must therefore be interpreted to apply to all human remains within the meaning of 43 C.F.R. § 10.2(d)(1), and not merely human remains of prehistoric origin.[148]

Similarly, the Third Circuit in the *Thorpe* case, discussed above, accepted the lower court's ruling that NAGPRA applied to the remains even though Jim Thorpe had died in the 1950s.[149] The lower court rejected the defendant's assertion that NAGPRA was inapplicable "[b]ecause the complaint alleges that Jim Thorpe was of Native American ancestry, specifically of Sac and Fox lineage, his remains fall within the ambit of the regulatory definition."[150]

The lack of uniformity on the applicability of NAGPRA to contemporary remains is troubling, particularly when paired with the genetic ancestry discussion above. The scope of NAGPRA under these two interpretations becomes broader and more relevant to a wide range of biomedical research and medical education. Some states, for instance, maintain laws that allocate the bodies of unclaimed dead to medical schools or other medical education programs.[151] If an allocated body is later discovered to have Native American ancestry, should a NAGPRA claim be permitted?

There is unfortunately no bright line rule contained within NAGPRA or the case law regarding the age of the remains. My sense is that if presented with a case involving a very recent decedent, the court would, and should, follow *Kickapoo* and rule that NAGPRA is inapplicable.[152] *Kickapoo* is the only prior case to involve a recently deceased body with flesh, as opposed to decades old bones.[153] Second, even the Third Circuit in *Thorpe*,[154] which focused its analysis on the "museum" question and let stand the lower court's holding on applicability of the law to the remains on the basis of age, expressed some skepticism

---

[148] *Id.* (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

[149] *Thorpe*, 770 F.3d at 266.

[150] *Thorpe*, 2011 WL 13134010, at *9.

[151] Laws permitting the allocation of unknown and unclaimed corpses in morgues to medical schools persist today. New York only modified its practice of making unclaimed and insolvent dead bodies available for medical research and education in 2016. *See* N.Y. PUB. HEALTH LAW §§ 4211–4212 (McKinney 2016); *see also* Bernstein, *supra* note 89.

[152] *See generally Kickapoo*, 46 F. Supp. 2d 644.

[153] *Id.*

[154] *See generally Thorpe*, 770 F.3d 255.

about the applicability of NAGPRA to contemporary remains.[155] The court noted that, in large part, NAGPRA is intended to atone for the unjust treatment of Native Americans that was perpetuated *because* they were Native American.[156] Yet in both opinions, it is clear that the judges in *Kickapoo* and *Thorpe* believe that contemporary non-NAGPRA law can sufficiently and justly protect the remains.[157] While it is true that younger identifiable Native American remains are now more readily protected under broader common law and state statutes, this line of reasoning is fraught because, as will be discussed in Part IV, there are severe limitations and confusions about the existing legal status of human remains. A contemporary case involving Native American remains that fell within such a potential gap and risked a grossly unjust outcome could result in judicial recognition of a NAGPRA claim to contemporary remains.[158]

C. Ownership and Property

For the purposes of this paper, the most significant, and heretofore overlooked, provision of NAGPRA is section 3002: "Ownership."[159] The section

---

[155] *Id.* at 265. The court, for example, was clear that the purpose of NAGPRA was not to govern familial disputes over the disposition of human remains. "It was not intended to be wielded as a sword to settle familial disputes within Native American families. Yet, that is what we would allow if we were to enforce NAGPRA's repatriation provisions as written here." *Id.*

[156] *Id.*

[157] *See id.* (acknowledging the importance of NAGPRA but limiting its applicability); *Kickapoo*, 46 F. Supp. 2d at 651 (limiting NAGPRA so it does not nullify other statutory law).

[158] *Brotherton v. Cleveland*, which had a similar fact pattern and judicial decision on property status of human remains, is such an example. *See* 923 F.2d 477 (6th Cir. 1991).

[159] 25 U.S.C. § 3002(a). In its entirety the section reads:

> (a) Native American human remains and objects
>
> The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—
>
> (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
>
> (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—
>
> (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
>
> (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
>
> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

references the "ownership or control" of Native American "human remains and objects."[160] It details a descending list of recognized claimants for repatriation of cultural items, starting with lineal descendants and ending with any tribe that can demonstrate a cultural relationship to the remains.[161] No existing cases or literature have directly interpreted the ownership section of NAGPRA with regards to the uniqueness of property status of Native American remains.[162] The focus in much of the case law has been not *what* the remains are, but rather *who* has a valid claim regardless of legal status. This existing debate has been particularly important with regards to ancient unidentifiable remains. For example, in the case of the Kennewick man there was controversy over whether a modern tribe could assert a NAGPRA claim to 9000-year-old remains.[163] Until now, attention has not been paid to the property status implications of this section of the Act for Native American human remains. One likely reason for this is that, as will be argued in Part IV, Native American remains have, unlike non-Native human remains, been legally recognized as objects of property for over a hundred years. As will be shown, the American Antiquities Act of 1906 classified Native American remains as federal property.[164] The biggest change under NAGPRA then, is not simply the accordance of property status, but rather a shift in status as property owned not by the federal government, but by lineal descendants and tribal governments.

The individual and communal property reading of the Act advanced in this Article can be countered with the argument that the term "control" is intended to apply to human remains, and the term of "property" is intended to apply to objects. The problem with this construction is that, as detailed above, the definitions section of the Act makes it clear that human remains are to be

---

> (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
>
> (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

Id.

[160] *Id.*

[161] *Id.*

[162] *See* Sherry Hutt & C. Timothy McKeown, *In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 171–75 (2002). The article outlines the sixteen civil NAGPRA suits brought to protect burial grounds and the nine civil cases involving the NAGPRA collection provisions that arose between 1990 and 2002. *Id.*

[163] *Bonnichsen v. United States Department of the Army* is the most famous case and it centered on a 9000-year-old skeleton known as the "Kennewick Man." 969 F. Supp. 614, 617–19 (D. Or. 1997).

[164] 16 U.S.C. § 433, *repealed by* Pub. L. 113-287, § 7, Stat. 3272 (2014).

considered as cultural items along with various types of funerary and sacred physical objects.[165] The Act explicitly groups them together for shared treatment for much of its language.[166]

Objection can also be raised that since 18 U.S. C. § 1170(a) criminalized the trade of Native American remains, Native remains should not be considered as property. This argument runs into difficulty because the provision only criminalizes sale without rightful possession. Furthermore, § 1170(b) parallels § 1170(a) by outlawing the sale of cultural items obtained in violation of NAGPRA. Limitations on the right to sale are not on their face incongruous with property status, as will be discussed further in Part V.

Some courts have indicated an awareness of property status under NAGPRA. The United States District Court for the Northern District of California, for example, in the dispute involving the ancient remains discovered at UC Davis, noted that, "NAGPRA extends rights of 'ownership' and 'control' over human remains and funerary items to qualifying tribes. Accordingly, the present dispute is appropriately analogized to an ordinary property dispute, in which the parties assert conflicting ownership interests."[167] Consequently, it can be seen that NAGPRA recognizes both individual property and communal property in Native American remains.

The perpetuation of property status of Native American human remains under NAGPRA is significant because, at common law, human remains are not property. The prior lack of legal attention on the property status of Native American remains is significant not only for Native American law, but also for the regulation of human remains generally. Property status, as will be shown in Part IV, has important implications for the ability of Native American individuals and tribes to control and protect their dead. The next section details how common law and state statutes pertaining to cemeteries and corpses have his-

---

[165] *See* 25 U.S.C. § 3001.

[166] It seems the closest anyone has directly come was in the comments received during the comment period before the Act was passed. The final rule by the Department of Interior notes the following:

> One commenter recommended reiterating the applicability of "right of possession" to human remains and associated funerary objects recognized in the last sentence of section 2 (13) of the Act in this section of the regulations. American law generally recognizes that human remains cannot be "owned." This interpretation is consistent with the second sentence of section 2 (13) of the Act that specifically refers to unassociated funerary objects, sacred objects, and objects of cultural patrimony, and with section 7 (a)(1) and (a)(2) of the Act in which no right of possession to human remains or associated funerary objects is inferred.

Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62134-01 (Dec. 4, 1995).

[167] White v. Univ. of Cal., No. C 12-01978 RS, 2012 WL 12335354, at *9 (N.D. Cal. Oct. 9, 2012), *aff'd*, 765 F.3d 1010 (9th Cir. 2014).

torically been patch-worked instruments for protecting human remains. Moreover, Native American burial grounds and remains were systematically excluded from these inefficient mechanisms. In contrast, as will be argued in Section V, under NAGPRA, Native American remains, given their different status from non-Native remains, are now the most effectively protected human remains.

IV. LEGAL STATUS, TREATMENT, AND PROTECTION OF HUMAN REMAINS

The regulation of Native American remains exists within a wide context that is both relational, namely the legal status, treatment, and protection of all human remains, and historical, namely the treatment of Native American remains before NAGPRA. There are several ways in which states and the federal government can regulate and protect human remains. The five major avenues are: (1) state protections of graves and graveyards, (2) federal protections of burial grounds, (3) criminalization, (4) rights of disposition and control over dead bodies, and (5) property rights. Historically Native American remains were treated differently in all five areas by the law, and important distinctions persist under NAGPRA. The next five subsections of this paper examine each of these five legal mechanisms in turn.

A. State Protection of Graves and Gravesites

Historically, in America, protection of the repose of the dead was largely accomplished through statutes that outlawed grave robbing or disturbing cemeteries. Regulation pertaining to gravesites is therefore intimately tied to the protection of human remains. This section focuses on the protection of land that contains Native and non-Native remains. Currently, in all fifty states and the District of Columbia, statutes regulate cemeteries and marked graves and protect them from vandalism and desecration.[168] A typical modern statute reads, "'[e]very person is guilty of a misdemeanor . . . who unlawfully or without right willfully . . . [d]estroys, cuts, mutilates, effaces, or otherwise injures, tears down, or removes . . . any tomb . . . [or who] [o]bliterates any grave, niche, or crypt.'"[169] Until recently, however, most statutes did not provide protections for Native American mortuary practices and unmarked graves.[170] In fact, "[p]rior to 1989, nearly half of state health and safety codes regulating the care of the [buried] dead applied only to marked graves in clear-

[168] Trope & Echo-Hawk, *supra* note 31, at 39.

[169] John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POL'Y J. 349, 401 (2004) (quoting CAL. PENAL CODE § 594.35 (West 2019)).

[170] Trope & Echo-Hawk, *supra* note 31, at 46.

ly established cemeteries."[171] Consequently, in 1982, when Wana the Bear, a direct Miwok tribe descendant, attempted to halt the bulldozing of over 200 Miwok tribal graves, the California Court of Appeals affirmed that the burial ground "is not a cemetery entitled to protection under the California cemetery law."[172] The court, therefore, allowed the burial ground to be bulldozed as part of the construction of a residential development.[173] The case demonstrates the significant implications of the failure to recognize Native American burial grounds alongside traditional non-Native cemeteries. Further, it illustrates that the issues at stake regarding the protection of burial grounds are not exclusively the ability to protect the repose of the dead. Issues can also arise regarding protection of sacred or ceremonial lands integral to Native people's cultural practices and, significantly for all of us, environmental concerns regarding the development of land. Dam projects in particular have raised numerous concerns for their impacts on Native burial grounds.[174]

1. Differential Treatment of Burial Grounds

The refusal to provide Native American burial grounds with the same protection as cemeteries created particular vulnerabilities for Native American remains. As was discussed in Part II, however, for much of American history, remains in cemeteries were also vulnerable to grave robbers. Moreover, even cemeteries can be subject to land development, transfer by private owners, and eminent domain. Thus, even if the Miwok burial ground had been recognized as a cemetery, equivalent to a non-Native cemetery, this would not have necessarily protected the land from development. One of the most cited cases on this matter is *In re Beekman St.*, in which the widening of a street in New York in 1856 created the necessity of moving "the bodies contained in eighty graves, amounting to about one hundred"[175] from the Brick Presbyterian Church graveyard. This practice continues today. In 2012, New Jersey exercised emi-

---

[171] Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 368 (1999).

[172] Wana the Bear v. Cmty. Const., Inc., 180 Cal. Rptr. 423, 424 (Ct. App. 1982).

[173] *Id. See generally* WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR (2011).

[174] *See* Cowlitz Tribe of Indians v. City of Tacoma, 253 F.2d 625, 625 (9th Cir. 1957); Sequoyah v. Tenn. Valley Auth., 480 F. Supp. 608, 610 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980). Golf courses have also caused concern. *See* Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001). This case centered upon the construction of a golf course in Texas. The project continued despite the discovery of Native remains. The remains were reinterred by the city at a ceremony witnessed by representatives of "various tribal organizations." The case is of additional interest because Castro Romero sued for personal damages as a member of the Apache tribe after his request for control of the remains was denied. *Id.* at 352.

[175] Wynkoop v. Wynkoop, 42 Pa. 293, 301 (1861) (citing *In re* Beekman St., 4 Bradf. 503, 532 (N.Y. 1857)).

nent domain over a cemetery operated by St. Mary's Church Gloucester.[176] The Church objected to the taking on technical grounds but did not seek to assert a claim about the inappropriateness of a state takings claim upon a cemetery. As noted by then Judge Cardozo, "[t]he dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."[177] Therefore, although the common law historically conferred more diligent protection to cemeteries compared to burial grounds, cemetery lands were and can be expropriated, particularly for public works.

Although neither the common law nor state statutes require the protection of the integrity of a cemetery's land, they do require the state or the landowner to provide notice to family members and to transfer identifiable remains. In the Beekman Street case mentioned above, for instance, Maria Smith prevailed with the court ordering that "the remains of her father be reinterred in a separate grave in such suitable locality as she might select, that the existing monument be erected over such grave, and that the necessary expense be defrayed out of the funds in court."[178] Similarly, an Oregon statute states that:

> Prior to any removal [from a cemetery] authorized under this section, written notice must be given to the family, or next of kin of the deceased, if known, and if unknown, notice of the removal shall be published for at least four successive weeks in a newspaper of general circulation in the county in which the cemetery is located and twice in a newspaper with statewide circulation.[179]

In contrast, as in *Wana the Bear v. Community Construction, Inc*., by excluding Native American burial grounds from common law and statutory protection of graveyards, notice and transfer were not required before construction commenced.[180] Instead, the graves were systematically bulldozed and emptied by the developer. Thus, the refusal to accord Native American burial grounds with equivalent status to cemeteries often resulted in unjust treatment.[181]

---

[176] State v. St. Mary's Church Gloucester, A-5448-10T1, 2012 WL 4795611, at *1 (N.J. Super. Ct. App. Div. Oct. 10, 2012).

[177] Yome v. Gorman, 152 N.E. 126, 129 (N.Y. 1926).

[178] *Wynkoop*, 42 Pa. at 301 (discussing the disposition of *In re Beekman St.*, 4 Bradf. at 503).

[179] OR. REV. STAT. ANN. § 97.450 (2018).

[180] *See Wana the Bear*, 180 Cal. Rptr. at 424.

[181] In some cases, the re-interment of Native American remains buried in cemeteries was given serious consideration by a court. For instance, in *United States v. Unknown Heirs*, the expansion of a military project required a cemetery to be moved. 152 F. Supp. 452, 453 (W.D. Okla. 1957). The remains of a Comanche chief and his mother were interred in the cemetery and the family could not reach a decision as to where to reinter the body at the government's expense. His children disagreed with one of his multiple wives as to which cemetery should be chosen. The court held that given that the woman did not have a marriage to the chieftain recognized by common law, his decedents' prefer-

2. Modern Recognition and Protections

Today, many states have amended their laws to protect Native American burial sites comparably to, if not more so than, cemeteries. California amended the Health and Safety Code to include in the definition of cemetery a "burial park" or "[a] place where six or more bodies are buried."[182] Furthermore, the State Public Resources Code now requires that "[a] person shall not knowingly and willfully excavate upon, or remove, destroy, injure, or deface, any historic or prehistoric ruins, [or] burial grounds . . . ."[183] Oregon has taken a similar historic approach of bundling cemeteries and burial grounds together, holding that "a cemetery or burial ground containing human remains that were interred before February 14, 1909 may not be discontinued or declared abandoned or have remains removed from the burial ground or cemetery without prior notice to and comment by the Oregon Commission on Historic Cemeteries."[184]

Shockingly, even if a court acknowledged that a Native American burial should be classified as a protected grave under relevant statutes, sometimes judges refuse to apply the law to protect Native remains. Such were arguably the circumstances in the pre-NAGPRA case of *Newman v. State*.[185] In 1964, Arnold Clifford Newman, a fourth-year undergraduate, came across the coffin of a Seminole Indian in a Florida swamp that had been undisturbed for about two years. Newman grabbed the skull, and he and his companion took pictures with it. Newman was convicted of a misdemeanor for the willful destruction, mutilation, defacement, injury, or removal of the contents of a grave.[186] On appeal, the court held that conviction required that the desecration under the law had to be perpetrated "wantonly and maliciously."[187] After examining Newman's character, report card, and passion for snake hunting, the judge concluded that Newman could not have committed the act of grabbing the

---

ence should be given priority. (Typically, at common law, the widow's preference is given priority). *See id.* at 455.

[182] CAL. HEALTH & SAFETY CODE § 7003 (West 2018) ("'Cemetery' means either of the following: (1) Any of the following that is used or intended to be used and dedicated for cemetery purposes: (A) A burial park, for earth interments. (B) A mausoleum, for crypt or vault interments. (C) A crematory and columbarium, for cinerary interments. (2) A place where six or more human bodies are buried.").

[183] CAL. PUB. RES. CODE § 5097.5 (West 2011); *see also id.* § 5097.9 (stating that "nor shall any such agency or party cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require").

[184] OR. REV. STAT. ANN. § 97.450.

[185] *See* Newman v. State, 174 So. 2d 479 (Fla. Dist. Ct. App. 1965). Although, given that NAGPRA only applies to older remains, the recent remains at issue in this case would likely not be covered by the Act if the case happened today.

[186] *Id.* at 480.

[187] *Id.*

skull with wanton and malicious intent and, therefore, "quashed" the conviction.[188] Consequently, it is not always sufficient for Native American burials to be accorded definitional status equal to that accorded to non-Native graves. They must also be accorded equivalent respect for their sanctity.

3. Vulnerabilities of Burial Grounds That Require Special Attention

In a practical sense, however, even if Native American burial grounds are accorded equivalent legal status and respect to non-Native cemeteries under statutes and common law, difficulties persist regarding their protection. The common law is not designed to protect unidentifiable remains located in cemeteries or burial grounds. The protection of named dead in American law is partially reflective of cultural values informed by Christianity. Christian burial practices tend to center upon the marking and naming of the deceased on tombstones. Many Native American remains are difficult to identify due to age or lack of burial markings. Native American burial practices reflected a different religious system, and most burials tended to be unmarked.[189] The common law is also not designed to protect long dead remains, those roughly over one hundred years old. The common law is individually based, and authority is derived from the rights of identifiable next of kin.[190] As a result, the vast majority of successful non-criminal grave protection cases involve individually named plaintiffs bringing suit in relation to individual and identifiable remains in a grave.[191] Plaintiffs, as direct descendants, can also illustrate legal title to the plot of land.[192] In *In re Beekman Street*, mentioned above, eighty graves, holding the remains of over 100 individuals, were emptied as part of the wid-

---

[188] *Id.* at 484.

[189] For instance, in *Newman*, William McKinley Osceola II, a Seminole Indian, testified. The court recounted:

> [T]he kin of the dead cannot go back except four moons, or two months, after a body is buried; in all his life he never saw an Indian go back to a grave. After the fourth moon they forget about the body altogether, unless there is some reason to go back. To mark the grave, four sticks are placed across a box and after that everything just rots down to the ground, that's all. The burial place, he said, is kept secret.

Id. at 481. Burial practices among Native American tribes vary greatly. They include earthly interment, the construction of earthen mounds, burial platforms, cremation, and interment in caves.

[190] *See, e.g.*, Massaro v. Charles J. O'Shea Funeral Home, 738 N.Y.S.2d 384 (App. Div. 2002). In *Massaro*, the court recognized that the son of a decedent could recover damages for emotional distress, but held that a grandchild who had witnessed the same disturbance of the corpse could not recover because he was not the next of kin. *Id.* at 386.

[191] *See, e.g.*, *In re* Beekman St., 4 Bradf. at 503–32; *see also* SAMUEL B. RUGGLES, AN EXAMINATION OF THE LAW OF BURIAL, IN A REPORT TO THE SUPREME COURT OF NEW YORK IN THE MATTER OF TAKING A PORTION OF THE BRICK PRESBYTERIAN CHURCH, IN WIDENING BEEKMAN STREET, IN THE CITY OF NEW YORK (1856).

[192] *See* Hairston v. Gen. Pipeline Const., Inc., 704 S.E.2d 663, 670 (W. Va. 2010).

ening of the street.[193] Only five were identifiable.[194] The plaintiff identified her father's remains by a ribbon tied in the decedent's hair.[195] The court ruled that she, as next of kin, was entitled to notice and compensation for re-internment, but did not discuss the fate of all of the other remains.[196] With the rise of genetic sequencing techniques, previously unidentifiable remains can be identified, and kin can be established generations later. Long dead and unidentifiable remains remain a problem for the common law.

These limitations of the common law are troubling for Native American burial grounds. The cases where Native American remains were disinterred without notice or consent tend to involve the ancient and unnamed dead. For instance, in the 1982 case of *Wana the Bear*, the plaintiff filed a claim on the basis of his tribal heritage, not on the basis of a named individual he was descended from.[197] These limitations are also problematic for non-Native populations, including early American settlers. In the 1990 case *Sanford v. Vinal*, the plaintiff was an eighth-generation descendant of Edward Wanton. Wanton had died in 1716 and was buried in what became known as the "Old Quaker Burial Ground" in Plymouth, Massachusetts.[198] By the 1900s, the cemetery had been fully abandoned and overgrown with "dense briars."[199] In 1987, when the city approved a construction project on a tract of land that included the burial grounds, the descendant sued to enjoin the construction project.[200] The judge held that the descendant did not have standing to sue:

> [Although] [t]he mere passage of time does not extinguish the rights of descendants . . . where the family has ceased to visit the cemetery and where they have so long neglected to care for it that the ground is no longer recognizable as a cemetery, the family burial ground has been abandoned, and with it the private standing of the descendants to require that those who own the land abstain from using the land for other purposes.[201]

---

[193] *In re* Beekman St., 4 Bradf. at 507; *see* RUGGLES, *supra* note 191, at 15.

[194] *In re* Beekman St., 4 Bradf. at 507.

[195] *Id.*

[196] *Id.*

[197] *Wana the Bear*, 180 Cal. Rptr. at 424.

[198] Sanford v. Vinal, 552 N.E.2d 579, 580 (Mass. App. Ct. 1990).

[199] *Id.* at 581.

[200] To give the city council its proper due, the exact location of the cemetery had been forgotten and the original efforts by a team of researchers failed to locate any remains. The city therefore allowed the construction project to proceed but required the project to halt if any remains were discovered. *Id.* at 581–82.

[201] *Id.* at 585–86. Unlike in *Sanford*, the Miwok people did not voluntarily abandon the burial ground at issue in *Wana the Bear*. The Miwok people were forced from their land by the government between 1850 and 1870. *Wana the Bear*, 180 Cal. Rptr. at 424.

Consequently, the protection of an early American, non-Native gravesite in this case was solely up to the discretion of the public. Thus, although a more pervasive problem for Native American communities, even non-Native populations can struggle to assert state level claims in cases involving long dead or unidentifiable remains under the common law.

With the passage of NAGPRA, many states amended their laws to include additional protections for Native American burial grounds and Native American remains accidentally disinterred from them. For example, the California Health and Safety Code was amended, changing the stage at which human remains are discovered such that:

> (a) Every person who knowingly mutilates or disinters, wantonly disturbs, or willfully removes any human remains in or from any location other than a dedicated cemetery without authority of law is guilty of a misdemeanor . . . . (c) If the coroner determines that the remains are not subject to his or her authority and if the coroner recognizes the human remains to be those of a Native American, or has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission.[202]

Similar provisions for notice do not exist if, for example, similarly aged remains of a non-Native, such as a Spanish missionary, were discovered. Most states have similar notification laws that pertain to either graveyards or physical remains, but other states have gone further. "Thirty-four . . . require some sort of governmental approval prior to [relocation]. Seventeen states require permission of the landowner. Five states, Idaho, Massachusetts, Minnesota, Missouri, and Oregon, give a Native American tribe veto power over the removal and reinterment of the human remains."[203] As illustrated by the *Sanford* case, an unmaintained Native American burial ground would receive greater protections than an unmaintained cemetery of early American Quakers, or Pilgrims, for that matter.

Native American burial grounds and the remains they contain are therefore frequently accorded higher levels of protection compared to non-Native cemeteries. This greater level of protection makes particular sense from a justice perspective. In many instances, Native Americans were forcibly removed from their lands. Unlike the Quaker family in *Sanford*, they did not voluntarily abandon or fail to maintain a burial ground. Additionally, as will be seen in our

---

[202] CAL. HEALTH & SAFETY CODE § 7050.5(a), (c).

[203] State v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 752 n.17 (Tenn. Ct. App. 2001).

later discussion with communal property and Native American remains, the allowance of communal consent in the case of Native American burial grounds makes a significant degree of sense. With ancient and unidentifiable non-Native graveyards, as the opinion in *Sanford* notes, the public and state government is granted the authority to protect and regulate.[204] A similar logic applies with tribes, who are more representative 'public guardians' for their tribal burial grounds.

B. Federal Protection of Burial Grounds

State governments are not the only ones who have singled out Native American burial grounds for additional protections. The federal government has a longstanding and ethically questionable history of doing so. While the application of common law protections and existence of state level regulations is a relatively recent occurrence, at the federal level, the government sought to regulate the wanton excavation of archaeological sites on federal lands long before the passage of NAGPRA. These efforts afforded some protection to Native American burial grounds unavailable at common law. The American Antiquities Act of 1906 provided that, "the examinations [of ruins], excavations [of archaeological sites], and gatherings [of objects of antiquities] are [to be] undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects . . . ."[205]

As illustrated by the 1989 National Geographic article, however, these protections were not always effectively enforced.[206] Moreover, these laws conferred the control of Native American burial grounds wholly into the hands of government officials. NAGPRA altered this federal policy to include Native American peoples in the protection and decision-making process regarding burial grounds located on federal lands. Currently, any excavations or projects must be granted a government permit and must have undergone consultation with Native peoples.[207] In the case of remains located on tribal lands, the "consent of the appropriate (if any) Indian tribe or Native Hawaiian organization" is required.[208] The consent requirement does not, however, pertain to federal lands, a feature that mirrors the nonexistence of consent requirements for non-Native remains in graveyards mentioned earlier.[209]

---

[204] *Sanford*, 552 N.E.2d at 586.

[205] 16 U.S.C. § 433, *repealed by* Pub. L. 113-287, § 7, Stat. 3272 (2014).

[206] Arden, *supra* note 59.

[207] 25 U.S.C. § 3002(c)(1), (2) (2012).

[208] *Id.* § 3002(c)(2).

[209] *Id.* The court in *Yankton Sioux Tribe v. United States Army Corps of Engineers* articulated this point, stating that "[a]lthough plaintiffs refer to 'consent' as being a requirement before removal, the

The expanded protection of Native remains and inclusion of Native peoples in decision-making created at the federal level, and prompted at the state level, by NAGPRA is a significant achievement. Although the consent of tribes is not required under NAGPRA, the act does place duties of care and protection of any discovered human remains upon the government and its agents. The Yankton Sioux Tribe, for instance, sued the United States Army Corps of Engineers for failing to comply with the consultation and protection requirements of NAGPRA when Native American remains were discovered on federal lands as part of a campsite expansion construction project.[210] The court granted a temporary restraining order preventing further construction until the project could comply with the provisions of NAGPRA.[211]

The protection of Native American burial grounds has been an issue with regards to significantly larger, and more environmentally damaging, construction projects.[212] Two dam cases that arose before the passage of NAGPRA are worth mentioning. First, in 1957, the Cowlitz Tribe sought to enjoin the construction of a dam project that would cause the "burial grounds of its ancients . . . [to] be desecrated."[213] The tribe's action was dismissed in a two-page opinion on the basis of their lack of title to the land.[214] Similarly, in *Sequoyah v. Tennessee Valley Authority*,[215] two Cherokee tribes sought to enjoin the construction of the same dam that was at issue in the earlier Supreme Court case of *Tennessee Valley Authority v. Hill*.[216] The tribes' claims regarding the protection of their burial grounds, however, were relatively weak due to the structure of the law at the time. Their two claims were based upon: (1) protection of religious freedoms;[217] and (2) the National Historic Preservation Act.[218] The court focused on and dismissed the religious claim, before ultimately concluding that because Congress had exempted the construction of the dam from "any other

---

cultural items at issue in this action were not located on tribal lands. Thus, the requirement of consent in 25 U.S.C. § 3002(c)(2) does not apply in this case [where remains are on federal lands]." 209 F. Supp. 2d 1008, 1018 (D.S.D. 2002).

[210] *Id.* at 1009–10.

[211] *Id.* at 1022.

[212] *See* JOHN J. COVE, WHAT THE BONES SAY: TASMANIAN ABORIGINES, SCIENCE AND DOMINATION 118 (1995). The Australia high court in a case pertaining to the construction of the Gordon-Franklin dam recognized bones as cultural property and the centrality of cultural property to Aboriginal identity. *Id.*

[213] *Cowlitz*, 253 F.2d at 625.

[214] *Id.* at 626.

[215] *Sequoyah*, 480 F. Supp. at 610.

[216] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978) (deciding whether the completion of the Tellico Dam violates the Endangered Species Act).

[217] Specifically, these protections are provided for under the First, Fifth, and Ninth Amendments, and the American Indian Religious Freedom Act. U.S. CONST. amends. I, V, IX; 42 U.S.C. § 1996 (2012).

[218] National Historic Preservation Act of 1966, 16 U.S.C. § 470 (transferred and omitted).

law,"[219] the court could not bar the construction of the project on the basis of any religious or statutory protections.[220]

NAGPRA created more substantive avenues for protecting burial grounds from dams. The Yankton Sioux Tribe mentioned above sued the Army Corps of Engineers two years earlier over the operations of a dam. The dam had been built in the 1950s, and the builders failed to remove and reinter many Native American remains. As a result of manual and regular lowering of the reservoir water level, human remains were frequently exposed. The judge honored the tribes petition to enjoin the lowering of the water levels and resulting exposure of the Native remains until sufficient protection and proper excavation of the remains occurred.[221]

Native burial grounds at common and statutory law have therefore arguably gone from some of the least protected to some of the most protected gravesites. State courts are increasingly applying common law and statutory protections of cemeteries to Native American burial grounds. NAGPRA and companion state laws have also resulted in substantive rights to protect Native American burial grounds for Native American individuals and tribes. Communal level tribal protections of burial grounds are particularly significant for enabling Native Americans to protect their dead. Most burial grounds that raise issues contain ancient remains that are unidentifiable beyond tribal membership. Unfortunately, the protections discussed in the prior two sections pertain to *in situ* remains.[222] Disinterred and displayed remains are not covered by cemetery and Native burial ground protections. Therefore, we must turn to examine criminal regulations, the right of disposition, and control over human remains and property rights.

C. Criminal Provisions

The government, largely at the state level, has been responsible for passing various statutes outlawing grave robbing, the mutilation of a body, or the

---

[219] *Sequoyah*, 480 F. Supp. at 611.

[220] *Id.* The district court in *Environmental Defense Fund v. Tennessee Valley Authority* reached a similar decision regarding the construction of the dam in violation of the National Environmental Policy Act of 1969. *See* 339 F. Supp. 806, 812 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

[221] Yankton v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047, 1060 (D.S.D. 2000). As an aside, it is worth nothing that in *San Carlos Apache Tribe v. United States*, the court held that although adjustment of dam water levels might affect Native American remains, action to enjoin adjustment under the NAGPRA was not possible until remains were actually affected. 272 F. Supp. 2d 860, 893 (D. Ariz. 2003).

[222] This includes very recently, and typically accidentally, excavated remains.

sale of human remains.[223] This is especially true with the passage of modern state laws regulating organ donation. Section 16 of the Massachusetts Uniform Anatomical Gift Act, for example, holds that the sale of body parts for transplantation or therapy is a felony.[224] Moreover, on the federal level, 42 U.S.C. § 274e makes it unlawful to "transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."[225] No section of the federal code, however, seems to outlaw the sale of human body parts for non-transplantation purposes. In this instance, Native American remains have additional federal protections. Section 4 of NAGPRA amended Title 18 of the criminal code and explicitly criminalizes traffic in Native American remains or cultural items. Consequently, under § 1170(a), "whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains" shall be fined or imprisoned, or both.[226] It is worth highlighting here that the provisions do not outlaw the trade in *all* Native American remains, only those wherein the owner does not have the right of possession. This will apply to the vast majority of remains because they were taken without permission or consideration. It is possible, however, that some holders could have valid rights of possession and therefore sell the remains. According to 25 U.S.C. § 3001:

> The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.[227]

As we shall see, 18 U.S.C. § 1170(a)'s limitation on sales will become relevant to the discussion of ownership and property in Part IV. A small number of cases have emerged under § 1170(a), and most of the defendants pled guilty without going to trial.[228] In 2001, however, the Northern District of Illinois heard one of

---

[223] For example, Connecticut has multiple statutes against disinterment. *See* CONN. GEN. STAT. § 19a-288 (2019) (statute against pecuniary profit); *id*. § 53-334 (2019) (statute against disinterment).

[224] "[A] person who for valuable consideration, knowingly purchases or sells a part for transplantation or therapy if removal of a part from an individual is intended to occur after the individual's death shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than $50,000 or by both such fine and imprisonment." MASS GEN. LAWS ch. 113A, § 16(a) (2019).

[225] *See* 42 U.S.C. § 274e (2001).

[226] 18 U.S.C. § 1170 (a) (2012).

[227] 25 U.S.C. § 3001(13).

[228] *See* Hutt & McKeown, *supra* note 162, at 207.

the only cases to go to trial, *United States v. DeLuca*, which involved the attempt to sell human skull fragments that were most likely Native American.[229] While the criminal conviction failed the beyond a reasonable doubt standard of evidence, the skull fragments were ultimately repatriated. Consequently, during Samuel Morton's time in the early nineteenth century, Native American skulls were granted significantly fewer criminal legal protections from collection and sale than for non-Natives. The current state under NAGPRA suggests that Native American remains are granted significantly greater protections.

D. Non-Property Personal Rights of Disposition and Control Over Human Remains

Under the inherited common law from England, human remains were not property.[230] The next of kin had a limited right and duty to ensure that the remains of their family members were buried. Once a corpse was buried, however, "[t]he duty of the executor or administrator [was] over, and also his rights, except in case of an improper interference with the grave, the body, or the grave-clothes of the deceased. The claims of society [had] been entirely satisfied."[231] American courts up through the eighteenth century regularly held that under the common law there was no actionable interest for the disturbance of a buried corpse. Rather, courts often limited family members who experienced grave robbing to a claim of trespass of the burial plot.[232] For instance, just after the Civil War, in 1868, in *Meagher v. Driscoll*,[233] the Supreme Judicial Court of Massachusetts held that in common law, "[t]he only action that can be brought for disinterring [a corpse] is trespass *quare clausum*."[234]

---

[229] United States v. DeLuca, No. 00 CR 387, 2001 WL 1654770, at *1 (N.D. Ill. Dec. 20, 2001).

[230] *See* ROHAN HARDCASTLE, LAW AND THE HUMAN BODY 25–26 (2007).

[231] *Wynkoop*, 42 Pa. at 301.

[232] Meagher v. Driscoll, 99 Mass. 281, 284 (1868).

[233] *Id.* The facts of *Meagher* are worth recounting because despite the trespass limitation, the judge upheld substantial damages above the value of the land. The case arose out of a misunderstanding about payment between the superintendent of a cemetery and the father of a deceased boy. The superintendent wrongly disinterred and removed the body of the child from the cemetery plot to another plot. Payment had actually been made for the original plot, so the plaintiff father had legal title. Consequently, he sued the superintendent for trespass upon the plot and was awarded damages by the jury for $837.50. Given that the plaintiff had paid thirty dollars for the plot, the jury award was substantially above the value of the land. The defendant's appeal argued that the damages should only reflect "the actual damage done to such real estate." *Id.* at 283. The Supreme Court of Massachusetts agreed with the lower court that in circumstances where there is willful trespass or gross carelessness, "the feelings of the plaintiff may be taken into consideration [of damages]." *Id.* at 285. Therefore, even though the "injury done to the property [the plot] is comparatively trifling," the damages calculation can reflect the mental suffering of the plaintiff. *Id.*

[234] *Id.* at 284.

1. Expanding Protections for Human Remains and the Introduction of Quasi-Property

After the Civil War, American courts and legislatures increasingly began to create more substantive protections for unburied and buried human remains. Courts began to recognize actions for the disinterment of, or damage to, human remains, and state legislatures began to pass statutes that recognized the next of kin's exclusive rights of possession, control, and disposition of the corpse.[235] These protections also included statutes criminalizing the grave robbing or other unpermitted disinterment mentioned in the previous subsection.[236] One of the more interesting legal mechanisms of regulating authority over human remains was through the legal fiction of quasi-property. Quasi-property is most frequently linked with the Supreme Court's 1918 decision in *International News Services v. Associated Press, Inc.*[237] It is a mechanism whereby judges can accord limited Hohfeldian incidents of ownership.[238] Quasi-property, a peculiarly American notion, was developed in the nineteenth century to meet adjudicative concerns in contexts where rights of use and control were needed but where judges did not want to accord a more substantial bundle of property rights or status as an object of property. Crucially for this paper, quasi-property is similar to, but is not formally, legal property.

Quasi-property status of human remains is most commonly cited as originating in 1872, in *Pierce v. Proprietors of Swan Point Cemetery*, with the Rhode Island Supreme Court.[239] *Pierce* grew out of a dispute about the burial of a decedent between his heir and his widow.[240] The opinion is paradigmatic of many of cases about human remains because it illustrates the extent to which traditional legal authority had not been adapted to adjudicate disputes over human remains. Before deciding the case, the judges first conducted a lengthy examination of their jurisdictional authority.[241] The judges reasoned

---

[235] For instance, in 1931, California passed a statute that recognized these rights and duties. Newman v. Sathyavaglswaran 287 F.3d 786, 793 (9th Cir. 2002) (citing CAL. HEALTH & SAFETY CODE § 7100).

[236] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7052 (criminalizing mutilation, disinterment, and sexual contact with human remains).

[237] Int'l News Serv. v. Associated Press, Inc., 248 U.S. 215, 236 (1918).

[238] *See* Balganesh, *supra* note 6, at 1890–91 (discussing quasi-property).

[239] Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 227 (1872). My research into quasi-property, however, suggests that quasi-property status for human remains originated with an earlier Ohio court. Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 71 HASTINGS L.J. (forthcoming Aug. 2020).

[240] It appears that the widow was the step-mother of the daughter. *See Pierce*, 10 R.I. at 227.

[241] *Id.* at 231–43. The ambiguity arises largely from the distinction between common law, equity, and ecclesiastical courts. Under the traditional English law, matters of burial fell under ecclesiastical jurisdiction. America never established ecclesiastical courts so there were some early debates about what, if any, jurisdiction was appropriate.

that given the English abdication of authority over burial law to ecclesiastical courts, "[i]n cases like the present no common law action could avail much. . . . [However given the lack of American ecclesiastical courts,] [e]quity . . . can give a full and complete remedy, and we think the jurisdiction is fully adequate to it."[242] The court then went on to assert that the body of the deceased is "a sort of *quasi* property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity."[243]

Mention of the quasi-property status of human remains is sprinkled throughout the case law;[244] unfortunately, there is little substantive discussion of what quasi-property actually means beyond the right of possession for burial. The late William Prosser, a leading tort law expert, stated that, "[i]t seems relatively obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer."[245] It is clear, however, that the right is not conveyable and that the court "may regulate it as such, and change the custody, if improperly managed."[246] Thus, while quasi-property has real functional legal significance in deciding between individual claimants, as in *Pierce*, and recovery for damages, it, along with the above common law and statutory protections, is more situated for the protection of recently dead remains awaiting burial.

2. The Challenge of Long Dead Remains for Quasi-Property

Quasi-property is not easily applied to long dead, or ancient, remains. None of the discoverable quasi-property case law involves long dead remains retained in museum collections. It is telling that when the heirs of Geronimo brought a lawsuit against the Skull and Bones Society, Yale University, and the federal government with the aim of recovering the skull and other bones of Geronimo, which were supposedly looted by members of the university in

---

[242] *Id.* at 242.

[243] *Id.* at 242–43.

[244] *See, e.g.*, *In re* Donn, 14 N.Y.S. 189, 191 (Sup. Ct. 1891).

[245] W.L. PROSSER & W.P. KEETON, PROSSER AND KEETON ON TORTS 63 (5th ed. 1984). Similarly, the court in *Carney v. Knollwood Cemetery Ass'n* refused to utilize quasi-property because it would create a legal fiction. The court notes:

> Under the "quasi-property" fiction, a cause of action was recognized which was somewhat analogous to tortious interference with contractual relations. . . ."Quasi property" seems to be, however, simply another convenient "hook" upon which liability is hung,—merely a phrase covering up and concealing the real basis for damages, which is mental anguish.

514 N.E.2d 430, 434 (Ohio Ct. of App. 1986).

[246] *In re Donn*, 14 N.Y.S. at 191.

1918 or 1919, they did so under the provisions of NAGPRA.[247] The plaintiff's complaint sought "an order compelling defendants to account for and turn over to plaintiffs all human remains and associated funerary objects of Geronimo subject to their authority and power, or in their control or possession."[248] Essentially, they sought an order requiring the federal government to unearth from federal land the remains of Geronimo to prove that the remains were intact and an order requiring the Skull and Bones Society to return any remains of Geronimo they might have in their possession. The court held that the provisions of NAGPRA did not apply to the requested order for disinterment because the inventory requirements of NAGPRA do not apply to gravesites. Interestingly, there is no discussion in the opinion regarding the second claim against the Skull and Bones Society and Yale. This is likely because the NAGPRA provisions do not apply to the privately-run Skull and Bones Society. It is also significant to note, however, that the plaintiffs did not attempt to make any assertions relying upon common law and statutory provisions. This is because the existing non-property and quasi-property provisions are not particularly powerful, nor are they easily applicable to long-dead remains.

3. Other Legal Difficulties for Long-Dead Remains

Often, long-dead remains can only be identified on a group, rather than individual, level. This means they are largely unprotected under both quasi-property and other common law actions and statutes.[249] Significantly, long-dead remains are also not well suited to mental distress actions. Mental distress actions are often a last resort claim by families that enables retribution for the expropriation or damage of human remains. Given the inefficiency and ambiguity of the protections of human remains described above, particularly regarding monetary compensation, a number of judges have relied upon mental distress claims to provide damages to family members. One of the most macabre examples of this is the case of *Lott v. State*.[250] On a fateful day in 1962, Mrs. Lott, an Orthodox Jew, and Mrs. Tumminelli, a Roman Catholic, died at about the same hour in Brooklyn State Hospital. Unfortunately, the bodies of the two women were transposed in the hospital morgue. The result was that the body of Mrs. Lott, in the possession of the Tumminelli funeral director, was embalmed, made up with cosmetics, and placed in a coffin with a crucifix and rosary

[247] Geronimo v. Obama, 725 F. Supp. 2d 182, 183 (D.D.C. 2010).

[248] Complaint at Prayer for Relief, *Geronimo*, 725 F. Supp. 2d 182, (No. 1:09 Civ. 00303), 2009 WL 455211.

[249] This is particularly true because many Health and Safety codes requiring the safe handling of human remains in the interest of public health do not apply to hundred-year-old bones.

[250] *See* Lott v. State, 225 N.Y.S.2d 434 (Ct. Cl. 1962).

beads in her hands in accordance with the rites of the Roman Catholic faith. Mrs. Tumminelli was prepared for an Orthodox Jewish burial with the requisite preparations and readings from the Torah. Shortly thereafter, the Lott family went to the funeral home to pay their final respects to Mrs. Lott, only to discover that the body that lay before them was not the body of their dearly departed. Needless to say, neither family was pleased. The court agreed that the "temporary deprivation of the right to the bodies . . . the unauthorized embalming of the body of Rose Lott and the resultant mental suffering of the claimants as next of kin are wrongs for which the defendant is liable [for $1,000]."[251] This case does not conform to many of the standard requirements of a mental distress action, and yet it is intuitively understandable why the judge allowed a distress claim. Furthermore, mental distress actions often enable judges to avoid the thornier issue of ascribing a monetary value to a damaged corpse. This will be discussed in the next sub-section.

In addition to providing moral redress, from a law and economics perspective, enabling mental distress actions in instances such as the *Lott* case creates a desirable incentive for morgues to invest in procedures that correctly identify remains. Nonetheless, rulings are split, and many judges refuse to recognize mental distress claims, a decision that frequently leaves families with no other avenue to recover damages given the relatively limited scope of existing legal protections.[252] What is clear, however, is that mental distress claims are generally limited to next of kin. For instance, in *Massaro v. Charles J. O'Shea Funeral Home*, the court recognized that the son of a decedent could recover damages for emotional distress, but it held that a grandchild who had witnessed the same disturbance of the corpse could not recover because he was not the next of kin.[253] Thus, the limited legal avenues for the living to control and protect the physical bodies of their dead are largely reserved for recently deceased remains and very close family members. As we saw with cemetery protections, these provisions, therefore, are not particularly applicable to older and unidentifiable Native American remains that were collected and retained over the last two centuries. As a result, despite the general legislative and judicial trend toward protecting Native American burial grounds, applying criminal legal provisions to Native American burial grounds and remains, and recognizing non-property interests, which culminated in NAGPRA, these measures are not particularly well-suited for addressing the past injustices of the robbing of Native American graves or determining disposition of long-dead remains.

---

[251] *Id.* at 437.

[252] Annotation, *Damages for Mental Anguish on Account of Mutilation of Corpse*, 12 A.L.R. 342 (1921).

[253] *Massaro*, 738 N.Y.S.2d at 385.

E. Non-Property of Non-Native Remains and the Property Status of Native American Remains

Property represents a final avenue for exerting rights to protect, repossess, and control human remains that exists independently from the constraints discussed above. Under traditional common law, however, human bodies and parts cannot be objects of property. Lord Coke, for instance, noted that corpses under the common law were "*nullius in bonis*," or the property of no one.[254] English and American courts "took Coke at his word, often literally repeating his account such that the common law has come to accept, albeit largely though *obiter dicta*, that, buried or not, and rightly or wrongly, the dead human body is the subject to this so-called 'no-property rule.'"[255] The rule that remains cannot be property has implications for a wide range of legal actions ranging from theft to recovery for damages. As noted by Blackstone, the "stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the graveclothes be stolen with it."[256] Consequently, in the 1788 English case of *R v. Lynn*, the court relied upon Blackstone's determination and held that an individual could not be indicted for theft of a human corpse.[257] Similarly, in *Meagher v. Driscoll*, mentioned earlier, the Supreme Judicial Court of Massachusetts held that at common law, "[a] dead body is not the subject of property"[258] In modern American courts, the proposition that human bodies cannot be property has by-and-large remained intact.[259] Although the refusal to recognize corpses as property is grounded in notions of respect and sanctity of the dead, the legal implications of this refusal has often resulted in grave injustices that lacked legal remedy. This accounts for the proliferation and importance of statutes protecting cemeteries and outlawing grave robbing described in the previous sub-sections.

1. The Evolving Property Status of Native American Remains

a. Individual Property of Non-Natives

One major exception in American law to the no-property status of human corpses is the statutory treatment of Native American remains as property. Through sequential federal legislation, Native American remains have been legally transformed in America from private property, to government property,

---

[254] EDWARD COKE, THE THIRD PART OF INSTITUTES OF THE LAWS OF ENGLAND 203 (1644).
[255] Andrew Grubb, *'I, Me, Mine': Bodies, Parts and Property*, 3 MED. L. INT'L 299, 307 (1998).
[256] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *236.
[257] R. v. Lynn (1788) 168 Eng. Rep. 350.
[258] *Meagher*, 99 Mass. at 284.
[259] *See, e.g.*, Moore v. Regents, 973 P.2d 479 (Cal. 1990).

and then to private or communal property. Despite an inability to locate an early American case wherein Native American remains are recognized as private property, through a conversion action, for instance, the history described in Part I suggests that if part of Samuel Morton's skull collection had been stolen or damaged, he would have likely succeeded in a private property-based claim for restitution.

b. Property of the Federal Government

As briefly mentioned in Part III above, the United States government took an interest at the turn of the twentieth century in protecting the graves of Native Americans from grave robbers and looters. The Antiquities Act of 1906 was passed in part to address the destruction and looting of Native American sites.[260] The Antiquities Act serves to protect and preserve the United States' environment and heritage.[261] In addition to protecting Native American burial sites, the Antiquities Act has been utilized to protect particular graves and non-Native burial grounds. In 1925, the grave of the explorer Meriwether Lewis was declared a national monument,[262] and in 2006, a New York City burial ground utilized by African-American slaves was similarly protected under President Bush's order.[263] What is notable about the Antiquities Act in the context of this work is that the 1906 version stipulated that Native American remains discovered on federal lands were classified as "objects of antiquity."[264] This classification also encompassed more traditionally recognized property objects, including masks, baskets, and pottery. The Antiquities Act protected remains and artifacts in a single stroke by labeling them as antiquities that are the property of the government. The significance of this label as objects of an-

---

[260] The Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2012). *See generally* Mark Squallace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 478–85 (2003).

[261] Theodore Roosevelt was the first president to utilize the Antiquities Act, and through it he protected more than one million acres through the designation of National Monuments. Many of these presidentially decreed monuments, such as the Grand Canyon and Joshua Tree, went on to become National Parks. CTR. FOR AM. PROGRESS & THE WILDERNESS SOC'Y, THE ANTIQUITIES ACT, (2011) https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/monuments.pdf [https://perma.cc/GQ7N-8SJP].

[262] Meriwether Lewis's remains were actually subject to litigation in 1998. In *In re the Exhumation of Meriwether Lewis*, the state of Tennessee sought to exhume the body to conduct testing to determine Lewis's cause of death. 999 F. Supp. 1066, 1067 (M. D. Tenn. 1998). The court ruled that because the Archaeological Resources Protection Act conference of regulatory power to the Department of the Interior, the issuance of an order by the agency was required to exhume the body. *Id.* at 1072. No mention of Lewis's kin or property status is made in the opinion. Under the terms of the Antiquities Act, however, a case could be made that the remains became legal property.

[263] 16 U.S.C. §§ 431–433.

[264] *See* 16 U.S.C. §§ 431–433 (1906), https://www.nps.gov/history/local-law/anti1906.htm [https://perma.cc/UV55-XLG4].

tiquity, and therefore, objects of property, has gone unnoticed in the existing literature. On one hand, it was very logical for Congress to address antiquities and remains simultaneously, given that remains and antiquities are often discovered and traded together. On the other hand, this simultaneous regulation is fundamentally different from the separate regulation of other non-Native remains and non-Native artifacts. Under the Antiquities Act, Native American remains were the property of the federal government. Given the history of dehumanization and commercialization discussed in Part I, the Antiquities Act likely reflected an existing bias that Native remains were property objects kindred to other tradable commodities.

The Antiquities Act was in effect for seventy years before it encountered legal difficulty. It included punitive provisions for those caught violating it; any person who illegally took or destroyed an object of antiquity that was located on government lands could be fined up to 500 dollars and or imprisoned up to ninety days.[265] In 1974, in *United States v. Diaz*, the Ninth Circuit Court of Appeals held that the punitive provision of the Antiquities Act was, "fatally vague in violation of the due process clause of the Constitution."[266] In *Diaz*, the government sought to enforce the punitive provisions of the Antiquities Act against Diaz for the expropriation of Native American face masks that were only three or four years old. The court felt that the Antiquities Act failed to adequately define "antiquities," especially with regards to age, and it expressed concern that "[h]obbyists who explore the desert and its ghost towns for arrowheads and antique bottles could arguably find themselves within the Act's proscriptions."[267]

The vacating of the original punitive provisions of the Antiquities Act led other courts to consider whether the government could still convict expropriators of Native American antiquities of theft. The same year as *Diaz*, in *United States v. Jones*, the defendants were charged with "wilfully [sic] and knowingly [stealing] Indian artifacts consisting of clay pots, bone awls, stone metates and human skeletal remains, of a value in excess of $100."[268] The lower court held that, by the passage of the Antiquities Act, Congress intended to limit the

---

[265] 16 U.S.C. § 433 (1994) (repealed 2014) ("Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.").

[266] United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974).

[267] *Id.* at 114.

[268] United States v. Jones, 607 F.2d 269, 270 (9th Cir. 1979). A metate is a grinding stone, which is often used for grinding corn.

application of general theft statutes. The Ninth Circuit Court of Appeals, however, rejected this approach and held that, despite their ruling in *Diaz*, "[t]here can be little doubt that the ruins located in the Tonto National Forest and the relics found on the ruins are the property of the United States government."[269] The defendants could therefore be charged with theft.

At first glance, *Jones* does not appear to be a particularly important decision. In fact, it has received, little, if no, commentary in the literature of human remains. To overlook *Jones*, however, is a mistake. In *Jones*, the human skeletal remains are explicitly included in the list of property objects that the defendants were charged with stealing under the criminal statute against theft. As discussed above, at common law, human corpses were not considered property objects, and the taking of human remains was not actionable under theft.[270] Even today, most states do not allow theft of human remains as a viable action.[271] Most states currently proscribe stealing human bodies and parts through the public health sections of their codes. For example, New York's public health law includes a provision making it a class D felony to "steal" bodies.[272] Despite the rhetoric of "stealing," the provision falls under the regulation of cadavers in a manner that distinguishes the action from traditional theft of property.

While we can, and should, be condemnatory of the disparate historical treatment and conception of Native American remains, I suggest that we should not be as condemnatory of the decision in *Jones*. The fact pattern of *Jones* makes it quite clear that the defendants were wrongfully looting Native American graves, and the judges exhibited a clear desire to protect the remains and artifacts. As shall be discussed in Part V, labeling human remains as very limited property of the government or another enduring entity, such as a tribe, may be a desirably expedient way of enabling the reclamation of looted remains. In fact, there are examples where judges have labeled non-Native remains as property in order to enable a conviction for a morally wrongful act that would otherwise be technically legally. For instance, in 1891, in *Larson v. Chase*,[273] the court articulated a property status rule for human remains in order to enable recovery for the wrongful dissection of the plaintiff's deceased loved one. In the opinion, the judge recognized the no-property rule, but stated that:

---

[269] *Id.* at 272.

[270] *See* 4 BLACKSTONE, *supra* note 256, at *236.

[271] New Jersey is an outlier because it details that the theft of human remains shall constitute second-degree theft. *See* N.J. STAT. ANN. § 2C:20-2 (2013).

[272] N.Y. PUB. HEALTH LAW § 4216 (McKinney 2010).

[273] Larson v. Chase, 50 N.W. 238, 238–39 (Minn. 1891).

> [I]t would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.[274]

Therefore, he held that:

> Those who are entitled to possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. . . . [This] leads necessarily to the conclusion that it is his property in the broadest and most general sense of the term, viz., something over which the law accords him exclusive control.[275]

Larson, however, is by and large an outlier in American case law.[276] Unfortunately for the writers of the Antiquities Act of 1906 and the judges in *Jones*, it is unlikely that the same level of sentimental protection of the next of kin and the deceased in operation in *Larson* was the justification behind the assignment and confirmation of Native American remains as property in the early 1900s.

There is very little case law following *Diaz* and *Jones*, but the time window between the invalidation of the Antiquities Act's penal provisions by the Ninth Circuit and the promulgation of the Archaeological Resources Protection Act of 1979 ("ARPA") confirms the assertion that Native American remains

---

[274] *Id.* at 240.

[275] *Id.* at 239.

[276] *Regents v. Kelly* is an interesting example of an English case. *See* [1999] QB 621 (Eng.). Anthony-Noel Kelly was an artist who was granted "privileged access to the premises of the Royal College of Surgeons in order to draw anatomical specimens held on display and used for training surgeons." Kelly conspired to remove "35 to 40 such parts" from the collection, which he utilized as casts for one of his art projects. The government sought to convict him of theft under the Theft Act of 1968, but Kelly challenged that the body parts were not property for the purposes of the Act. The court stated:

> [I]t has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves and without more capable of being property protected by rights . . . . [I]n our judgment, parts of a corpse are capable of being property within section 4 of the Theft Act 1968 if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.

Reg. v. Kelly, [1999] WLR 384, 392–93 (Eng.). In the United States, some early jurisdictions have been prompted to hold that corpses are legal property. *See Larson*, 50 N.W. at 240; Bogert v. City of Indianapolis, 13 Ind. 120, 123 (1859).

were considered legal objects of property in a manner distinct from non-Native human remains under the common law. Under ARPA, Native American remains were reclassified from "objects of antiquity" to "archaeological resources."[277] Such resources "remain the property of the United States" even after they have been removed from federal lands.[278]

c. Individual and Communal Property Under NAGPRA

The historical distinction of remains as property was perpetuated with the passage of the Native American Graves Protection and Repatriation Act ("NAGPRA") in 1990. As discussed in Part III, human remains are classified as property under NAGPRA. The implications of Native American remains' continued distinction as property objects are dramatically different from earlier property statuses because ownership rights are vested with individual descendants and tribes. Section 3002 states, "Native American human remains and objects[:] The ownership or control of Native American cultural items . . . shall be . . . [granted in the following order]."[279] Rights over human remains, under NAGPRA, are first granted to lineal descendants. If no lineal descendants can be established, then, under NAGPRA, authority is vested with identifiable tribes.[280] Once a claim has been established, individuals and tribes under Section 3005 have the right to demand the return of those remains held by federal institutions.

The continued classification of Native American remains as individual and communal property, even as limited property, perpetuates the significantly different status and treatment of Native American remains under American law.[281] Native American remains have been uniquely carved out and specifical-

---

[277] *See* 16 U.S.C. §§ 431-33 (1906). Archaeological resources are defined as including "graves, human skeletal materials, or any portion or piece of any of the foregoing items [that are over 100 years old]." *Id.* § 470bb.

[278] *Id.* § 470cc(b)(3).

[279] 25 U.S.C. § 3002.

[280] *Id.* If no tribe can be identified, then authority is retained by the holding institution or the government.

[281] There are examples of the United States government recognizing other non-Native ancient remains as property, but they are international ones. For example, in 1983, the Egyptian government passed a law that established their ownership over any antiquities discovered in the land of Egypt. Antiquities are defined as "any movable or immovable property . . . as well as human and animal remains." The United States government has convicted individuals for conspiring to receive stolen property on the basis of Egyptian ownership claims. While to date it does not appear that a case has emerged, one would expect that the United States government would be willing to recognize Egyptian mummified remains as the property of the Egyptian government or even an American museum. Therefore, we should not assume that Native American remains are the *only* remains that are or could be recognized as property. Law No. 117 of 1983 (Law on the Protection of Antiquities), *al-Jarīdah al-Rasmīyah*, 6 Aug. 1983 (Egypt); *see also* United States v. Schultz, 333 F.3d 393, 399 (2d Cir. 2003)

ly labeled as property objects by federal legislation. The conception of ancient human remains as owned property will be more fully explored in Part V, but the purpose of this property sub-section has been to show that the general trend in American law is that human remains, particularly corpses and bones rather than bodily products, have been and continue to be classified as non-property objects, whereas Native American remains were historically carved out as property. This distinction persists under NAGPRA. Therefore, NAGPRA does more than recognize individual and communal rights of disposition and burial over Native American remains to tribes; it also, under § 3002, recognizes limited individual and communal property rights.

In this fourth Part on the status, treatment, and protection of human remains, five important areas of law that enable the protection of human remains have been discussed: (1) state protection of burial grounds, (2) federal protection for burial grounds, (3) criminal laws, (4) non-property interests, and (5) property interests. In each area, it has been shown that Native American remains have historically been treated dramatically differently from the majority of human remains. With the passage of NAGPRA and parallel state efforts, many of these distinctions, such as those between cemeteries and burial grounds, were removed. One area, however, where a substantial and questionable distinction persists is in the recognition of older Native American remains as individual and communal property under NAGPRA. Examination in Part V of property status and communal property, however, suggests that any concerns about property status are misguided. Despite the fact that NAGPRA has resulted in statutory protections for Native burial grounds and remains that are stronger than existing common law and statutory protections for non-Native remains, protections for burial grounds, criminal statutes, and non-property interests do not substantively apply to older unburied remains. As we shall see in Part V, property is therefore a particularly empowering legal signal and tool for Native Americans to assert rights of possession and disposition over their dead.

V. EXPLORING PROPERTY

As discussed in Part III, the two unique elements of the legal status of Native American remains are that they can be considered both individual and communal property. American law has tended to uphold a system whereby human remains are not considered property and rights of possession are granted to an individual. At first inspection, it might seem that the property-based approach to Native American remains should be vehemently argued against. This is understandable given the historical treatment of Native American re-

(determining whether an antiquity found in Egypt after 1983 is stolen within the meaning of the National Stolen Property Act).

mains as commodities, and the association between property and commerce. Exploration of the current formulation of the law as discussed in the above sections, however, suggests that the current framework under NAGPRA enables Native Americans to protect and control the remains of their dead more effectively than other groups. Two questions must be addressed first: (1) whether there is something inherently incompatible about labeling human remains as property; and (2) whether a communally based system is appropriate. It will be shown that in both instances there are benefits to the current ownership provisions of NAGPRA. Given these benefits, there would be similar advantages to applying communal property status more broadly to other human remains, particularly older remains.

A. Appropriateness of Property Status

The rationale underlying the common law no-property rule is readily apparent. Judges and laity both exhibit deep misgivings about attaching property status to the remains of deceased loved ones. This is in large part because the notion of property is, for most people, inextricably linked with commercialization and the right to sell. Whether human body parts can or should be sold is a separate discussion that need not be answered within the context of this Article's discussion of NAGPRA. It is worth noting that in the context of NAGPRA, the law only prohibits illegal trafficking, defined as "knowingly sell[ing], purchas[ing], use[ing] for profit, or transport[ing] for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in [NAGPRA]."[282] If human remains were obtained with "full knowledge and consent[,]" then the ban on commercial traffic does not apply.[283] Even if Congress were to ban all sales of Native American remains, this would not bar property status.[284] Despite a lay conception of property as "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,"[285] property as it exists within American law is far more multifaceted. Whether under a disagreeable Honorian bundle of rights view or a more essentialist conception of property, different formulations of rights and duties can apply to different objects and yet still be considered property. [286] Significantly, a property right can be severely limited and need not in-

[282] 18 U.S.C. 1170(a) (2012).

[283] 25 U.S.C. 3001(13) (2012). This is, it is acknowledged, a very unlikely event.

[284] It is worth noting that the National Organ Transplant Act of 1984 only bans the sale of organs and tissues used for transplantation. Pub. L. 98-507 (codified at 42 U.S.C. §§ 274–274e).

[285] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2.

[286] *See generally* A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed., 1961) (outlining the standard incidents of property ownership as a bundle of rights). Also, as was

clude the right to sale. Judge Mosk, in his dissent in *Moore v. Regents*, noted this in reference to human biological materials, stating that, "some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold."[287] The existence of limitations on use or sale does not, therefore, categorically prohibit property status.[288] Even if limited in construct, property status is still entirely possible and congruent with prevailing theories of property.

I also believe that while property status under the 1906 Antiquities Act was dehumanizing and reflected negative underlying beliefs about Native Americans, otherness, and commodification, under NAGPRA, property status mirrors many of the key values-based features of traditional non-property human remains law. First, individual and tribal property rights to human remains are limited in a manner that mirrors the common law and statutory regulation of rights of use and control over human remains. For instance, while individuals and tribes can relinquish their rights, it does not appear that they can transfer them to another individual or tribe.[289] If an individual or tribe relinquishes their rights, it appears that any pre-existing ownership claims by an institution will be recognized. The parallel to this with non-Native human remains is that if the next of kin fails to claim their deceased, the state retains the authority to determine disposition. Second, NAGPRA has not been interpreted by courts to provide for monetary damages. This reflects the common law refusal to recognize any possible monetary damages, aside from emotional damages, resulting from the mutilation or destruction of a corpse.[290] In *Castro Romero v. Becken*, the court held that NAGPRA should not be construed as "provid[ing] grounds for recovery of monetary damages for individuals who allege Native American ancestry."[291] Third, an argument can be made that NAGPRA reflects general understandings about the status of ancient remains. American case law and other nations' statutory laws, such as Egypt's,[292] suggest that the older remains

noted in *Union Oil Co. v. State Board of Equalization*, "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." 386 P.2d 496, 500 (Cal. 1963). *See also generally* Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON J. WATCH 279 (2011) (arguing that viewing the property rights as a bundle of rights gives an incomplete picture of property). Even essentialist views that pronounce the necessity of the right to exclude for an instance of property remain open to the elimination of other instances of ownership, such as the right to sell.

[287] Moore v. Regents, 793 P.2d 479, 510 (Cal. 1990)(Mosk, J., dissenting).

[288] *Id.*

[289] 25 U.S.C. § 3002(e).

[290] *See* HARDCASTLE, *supra* note 230, at 173–201.

[291] Castro Romero v. Becken, 256 F.3d 349, 355 (5th Cir. 2001).

[292] Law No. 117 of 1983 (Law on the Protection of Antiquities), *al-Jarīdah al-Rasmīyah*, 6 Aug. 1983 (Egypt). Egypt's ownership of cultural property, including mummified remains, is recognized in the United States. *Memorandum of Understanding on Cultural Property Protection*, U.S. DEP'T

are and the farther they evolve from identified individual subjects into unidentified objects of display, the more willing we are, and should be, to recognize property status. Consequently, property status of Native American remains under NAGPRA may have, unlike in the past, much less to do with their identity as Native American remains, and much more to do with other attributes such as age and the need to enable repatriation. These features of property status under NAGPRA demonstrate that it is possible to align property status with the core tenets of the underlying non-property and quasi-property human remains case law.

There are many positive reasons to recognize Native American remains, particularly ancient displayed ones, as property:

> Because Native Americans had no property rights in the burial remains of their people, they were unable to direct what happened . . . . NAGPRA has changed the legal landscape in this regard. . . . Thus, NAGPRA employs the language of property to facilitate the return of items typically thought to transcend property concepts.[293]

The brutal history described in Part I makes clear that repatriation of remains and inclusion of Native Americans decision-making were required. While Congress could have chosen to only enact inventory and repatriation requirements for federally funded museums, they chose instead to include § 3002's ownership provisions. This recognition is symbolically and legally significant because property rights, rather than a requirement to only repatriate, ensures that Native Americans' voices have authority, and it broadens avenues for asserting claims in determining the treatment and disposition of Native American remains and artifacts. Consequently, whereas property status under the 1906 Antiquities Act may have been representative of disempowerment of Native Americans, property status under NAGPRA is empowering.

B. Communal Property

Given the legal and normative acceptability of property status, we must also turn to the second unique feature under NAGPRA: communal property. The majority of property rights in America are understood as individually, rather than communally, based.[294] Moreover, with human remains, the non-property right to possession is an individual right typically conferred to the

---

STATE NO. 16-1130, Nov. 30, 2016. American courts have indicated their willingness to recognize and uphold Law No. 117. *See* United States v. Schultz, 333 F.3d 393, 408 (2d Cir. 2003).

[293] Carpenter, *supra* note 22, at 1031.

[294] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–56 (1967).

next of kin of the deceased.[295] Courts have focused on ranked order of decision-making authority for non-Native remains, typically starting with the surviving spouse. Why then did Congress treat Native American remains differently by recognizing communal property rights? NAGPRA first recognizes the authority of lineal descendants, and, if there are none identifiable, tribal governments. Thus, while in earlier sections of this Article I, for the sake of clarity, reference individual ownership under NAGPRA to distinguish it from tribal property, the language of NAGPRA suggests all ownership under the Act is better termed communal property. The Act contemplates and encourages communal ownership, which deviates from the traditional regulation of non-Native remains. I think the communal property feature is the most powerful element of property status under NAGPRA.

There are two particularly salient reasons why a communal, rights-based approach is appropriate and beneficial. First, human remains are inherently communal. Spouses, children, and parents are all interconnected in their relationships to a decedent. With older remains, it can become even more challenging to assign a singular claim holder. The suit to ascertain the status of Geronimo's remains, for example, was filed by nineteen family members, including several great-grandchildren.[296] Second, there are realistic constraints raised by ancient remains such that an individual rights framework would be unworkable and prohibitively expensive. The individual identity of the remains may be difficult to ascertain, and even if known, proving a direct link to a modern descendant is cumbersome. Third, the communal and symbolic nature of human remains means that some groups of living people, not only Native American tribes, are often willing to take responsibility for the care of certain remains. Instances such as these will rarely rise to the level of a positive claim, but they can lead to an appropriate delegation of responsibility. The case of the non-Native outlaw Elmer McCurdy, discussed above, is demonstrative of this type of delegation of authority. The Los Angeles Coroner's office held McCurdy's remains after they were identified. A living relative could not be located. The remains were ultimately released to the custody of the Oklahoma chapter of Westerners International, a western cowboy organization, which petitioned to repatriate and inter the remains back to Oklahoma.[297]

NAGPRA's recognition of communal tribal property of human remains is consistent with other aspects of Native American law. In many areas, American

---

[295] *See, e.g.*, Carruthers v. Serenity Mem'l Funeral & Cremation Serv., LLC, 576 S.W.3d 301 (Mo. Ct. App. 2019) (holding that even through the decedent's mother paid for the cremation the decedent's son was still entitled to take remains as next of kin).

[296] Complaint ¶ 2, Geronimo v. Obama, 725 F. Supp. 2d 182 (D.D.C. 2010) (No. 1:09-cv-00303), 2009 WL 455211.

[297] *See* SVENFOLD, *supra* note 62.

law recognizes privileges, rights, and powers of tribes. One of the most relevant examples is that of adoption placement of Native American children. Under 25 U.S.C. § 1915(c), a tribe can petition to alter the adoption placement of a child who is a member of their tribe.[298] For non-Native adoptions, the right to determine placement is reserved for parents, or a next of kin, and the government. Consequently, while the recognition of a tribal right to possession is unique within the context of the law of human remains, it reflects a broader decision in American law to recognize the authority of tribes in a wide variety of matters.

Aside from legal congruency of recognition and respect for tribal decision-making in America, there are more fundamental reasons to adopt tribal communal property rights or control over Native American remains. In fact, it arguably makes more normative sense to follow a communal, rather than an individual, model with human remains. Human remains are unique objects because many people, family, and friends form interconnected webs of meaning and personal identity around them. While relevant connections are more likely with the remains of the recently deceased, they are also possible with the remains of the long dead, particularly if they can be identified as members of a tribe. Margaret Radin's personhood theory of property sheds light on which connections and interests we might want a legal system to respect, and it articulates a framework as to why we should recognize rights for tribes, not just individuals, over long dead and unidentifiable remains.[299] Arguably, the legal system has adopted an individual rights framework instead of a communal framework for human remains, as it also has with consent for medical treatment for incompetent patients,[300] to avoid conflict and indecision.[301] With long dead tribal remains, there is significantly less risk of conflict with communal members given an established tribal structure and singular religious practices.[302]

More broadly, human remains may be best understood as cultural property, which is inherently communal.[303] Cultural property can be defined as an object that describes the reality of a society in a distinctive way. In fact, "[i]t provides the underpinning of group identity in a spatial and temporal con-

---

[298] *See In re* Santos Y., 112 Cal. Rptr. 2d 692, 703 (Ct. App. 2001) (discussing the cancellation of reunification services between a tribe and child). The court rejected this provision of Native American adoption law, but the case involved a child who was only a quarter Native American and had very little connection to the tribe.

[299] *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

[300] *See* Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1235 (11th Cir. 2005) (denying an incapacitated patient's claims that doctors violated her individual rights).

[301] *See* Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 227 (1872) (holding that a dead body is property of the heir and that the relationship will be regulated by a court of equity).

[302] If not singular religious practices, they are at least very similar.

[303] *See* Carpenter, *supra* note 22, at 1031 (discussing human remains as cultural property).

text."[304] Cultural property objects also have intrinsic value to the group, "such that . . . loss, destruction, sale, or improper use by outsiders harms the group in a way that is not monetarily compensable."[305] Moreover, there is the fundamental notion that this symbolism justifies creating a category of property that "promotes grouphood."[306] The vast majority of human remains will never acquire this heightened degree of cultural symbolism, but there is good reason to think of collected and displayed Native American remains as tribal cultural property. As the legislative history of NAGPRA shows, modern American tribal groups are keenly aware and pained by the history of grave robbing and artifact looting.[307] Even a single tribal member's collected remains can be deeply symbolic for that entire tribal group.[308] Therefore, by enabling the recognition of the human remains that fall under its remit as communal property, NAGPRA is able to fulfill its purpose of protecting objects that have "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."[309]

Communal property rights are additionally desirable because they enable the government to effectively accomplish the goal of repatriation without undertaking significantly more expensive and impractical investigation to locate descendants. As Carol Rose notes, "[c]ommon property is a kind of property system that often emerges when it is impractical or expensive to have individualized property in a given resource."[310] While the use of modern DNA testing means it is technically possible that we could identify descendants of Native American remains, it would be highly expensive and impractical. Thus, it would often prove impossible. Tribal identification through archaeology is substantially cheaper than DNA identification, and allocation of rights to tribes has proven to be acceptable to Native peoples and society at large. Furthermore, recognition of communal rights enables the government to accomplish one of the goals of NAGPRA: providing redress for hundreds of years of governmental control over Native American remains and demonstrating respect for

---

[304] Hutt & McKeown, *supra* note 171, at 364.

[305] Cohan, *supra* note 169, at 390 (citing Radin, *supra* note 299, at 959).

[306] *Id.* at 388.

[307] *See* REPORT OF THE PANEL FOR A NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS (Feb. 28 1990). The report informed the legislative process. S. REP. NO. 473, 101 Cong., 2d Sess. 1, 3–4 (1990).

[308] Similarly, we might say that the remains in the Tombs of the Unknown Soldiers, or the preserved remains of Chairman Mao in China, are also cultural property. It can be noted that criticisms that might apply to the recognition of Ancient Egyptian artifacts or mummified remains as the cultural property of modern-day Egypt given the dramatic changes in religious and cultural practices there do not apply in the case of Native American tribes because of the perpetuation of group identity and funerary practices.

[309] 25 U.S.C. § 3001(3)(D).

[310] CAROL ROSE, PROPERTY AND PERSUASION 35 (1994).

Native American religious and burial practices. Under the existing law, when the next of kin of non-Native human remains are unidentifiable, the state is granted the authority to possess and determine disposition. The current practice in many states whereby unidentified remains can be donated by the state to medical schools is a prime example.[311] Similarly, under NAGPRA, the federal government, and its institutions, retain control over remains whose tribal identity cannot be established. Expanded recognition from next of kin to tribal rights ensures the return of greater numbers of remains. Beyond the practical concerns of identification, there is also a high risk that even if descendants could be identified, they might have little interest or resources to act upon a recognizable claim. Tribes represent an enduring entity that can be entrusted to look after the remains in a manner that mirrors the rationale for recognizing the role of the next of kin with all human remains cases. Significantly, tribes, compared to individuals, are hopefully better situated to have the financial and legal resources to pursue claims for repatriation and perform reburial ceremonies.[312]

Furthermore, communal tribal rights for older remains do not raise two of the typical concerns against communal ownership: squandered resources and conflicts over disposition.[313] Squandering resources, a frequent critique of communal property, has little application to most Native American remains covered by NAGPRA. They are older remains that have no medical application and are typically no longer considered valuable archaeologically. Society does have an interest in ensuring the production of knowledge through archaeology. But, as was noted in the congressional NAGPRA hearings, the vast majority of Native remains held in federal collections no longer play a particularly important role in research programs. The remains that are of interest are so ancient that they typically fall outside of the parameters of NAGPRA tribal affiliation requirements. Such was the case with the 9000-year-old remains of the Kennewick man.[314] For the majority of Native American remains that are held in collections and can be identified as being affiliated with an individual tribe, conflicts of interest are minimal. The tribal governments and their NAGPRA repatriation committees have mechanisms in place for determining disposition after repatriation. Tribes

---

[311] *See* N.Y. PUB. HEALTH LAW §§ 4211–4212 (McKinney 2016) (allowing remains to be donated to medical schools, universities, and colleges).

[312] I do recognize, however, that repatriation is often a significant financial and administrative burden for tribes.

[313] *See* ROSE, *supra* note 310, at 107 (naming these concerns as the two basic arguments in favor of private ownership rights).

[314] Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1138–39 (D. Or. 2002) (deciding that the 9000-year-old remains would not be covered under NAGPRA without evidence that the remains were Native American).

are therefore more appropriate actors than the government and will often be the only possible, or willing, custodian.

Although tribes should be open to the individual and communal property status created under the Act, two recommendations can be made. First, while it is technically workable to have human remains and cultural items, such as pottery and other man-made objects, regulated together, Congress should separate them under the legislation. Human remains raise particular issues and concerns that are best addressed separately. This is the model followed by states' regulation of non-Native remains, and it should be applied by the federal government under NAGPRA along with the state regulations, which model the provisions of NAGPRA. Second, courts have clarified some of the limitations and applicability of NAGPRA. Most significantly, *Kickapoo Traditional Tribe of Texas v. Chacon* asserted that NAGPRA does not apply to recently deceased remains.[315] Further clarification, however, is required to articulate the class of remains to which the Act applies and the extent and nature of the resulting property rights. In particular, while communal property is a desirable methodology, clarification is needed pertaining to the duties and constraints of tribes regarding communally owned human remains. Notably, it is currently unclear if it is permissible to sell Native American remains covered by the Act if there is valid possession and title. Of continued concern within the law is that ambiguity over sales is not unusual within human regulations more broadly. As discussed above, the sale of human remains outside the context of organ transplantation is not formally regulated.

Despite these recommendations, the property status and the communal rights-based approach embodied by NAGPRA are worth further analysis regarding the potential for broader application to human remains regulation, especially in the case of long dead remains. There are other communities of Americans who have struggled to protect older cemeteries and remains. Long dead remains that are unidentifiable at the individual level are discovered at regular intervals over the course of many construction projects. Often, archaeologists can identify remains on a group level. Most notably, numerous slave cemeteries have been identified from New York to Virginia. Lawsuits have arisen as African-American community members seek to protect remains in rare cases, but they fail because the claimants do not have standing without proof of direct descent.[316] Especially

---

[315] Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d 644, 646 (W.D. Tex. 1999).

[316] A lack of proof regarding descent appeared, for example, to be one of the main issues in a Richmond, Virginia case involving a slave burial ground. The complaint was dismissed. Mai-Linh K. Hong, *"Get Your Asphalt Off My Ancestors!": Reclaiming Richmond's African Burial Ground*, 13 LAW, CULTURE & HUMAN. 81, 83 (2017) (citing El-Amin v. Kilpatrick, No. CL1-67-00, slip op., (Va. Cir. Ct. Oct. 19, 2010)).

in instances such as these, a communal property type model would prove a powerful tool to effectuate living populations' interests in protecting human remains.

CONCLUSION

This Article's examination reveals that Native American remains are uniquely classified as objects of legal property. Historically, Native American remains were treated as individual and then federal government property. In sharp contrast, non-Native human remains have typically been classified as non-property objects. The Native American Graves Protection and Repatriation Act was a significant step forward in providing for the honor, protection, and repatriation of Native American remains. Yet, while NAGPRA removed the categorical status of government property, it still perpetuated this unique property status. Under the Act, Native American remains can become the legal property of lineal descendants or tribal governments. While at first glance NAGPRA's perpetuation of difference and property status is alarming, I argue that there are strong legal, normative, and efficiency benefits of property status. Crucially, the property perpetuated under NAGPRA is inherently communal. Communal property status of human remains confers desirable advantages and better represents the unique symbolic status of human remains compared to traditional human remains law in the United States. I believe the approach advanced by the Act is therefore ripe for further examination and application to human remains law more broadly.