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INDIANA JONES AND THE ILLICIT EXCAVATION AND TRAFFICKING OF ANTIQUITIES: REFINING FEDERAL STATUTES TO STRENGTHEN CULTURAL HERITAGE PROTECTIONS

Abstract: Most nations consider the protection of cultural material, such as historical monuments, archaeological sites, and antiquities, to be of utmost consequence. Yet, despite the near-universal importance of safeguarding cultural heritage, domestic protections for cultural material in the United States tend to be difficult to interpret. These ambiguities and gaps allow for continued exploitation and illicit trafficking of cultural heritage. This Note focuses on the legal structures in the United States that safeguard indigenous cultural material. After briefly discussing the rationale behind safeguarding objects of heritage, this Note explores the dominant federal statutes that protect cultural material: the National Historic Preservation Act, Archaeological Resources Protection Act, and Native American Graves Protection and Repatriation Act. This Note then explores the various ways in which the efficacy of these protections is limited. Finally, this Note recommends amending federal statutes to eliminate gaps in protection, empower the Department of the Interior to prosecute violations, and increase training among those most likely to encounter illicitly trafficked cultural material—namely customs officials and law enforcement.

INTRODUCTION

In a 2015 interview, Dylan O’Brien, the star of the *Maze Runner* movie franchise admitted that while filming on a Native American burial site, “everyone just takes stuff, obviously.”¹ To O’Brien, this was simply a humorous anecdote explaining a series of mishaps and injuries befalling actors and crew on the *Maze Runner* set.² To listeners, he seemed to be inadvertently admitting to

¹ Abby Phillip, *Actor Brags About Looting Native American Artifacts on ‘Maze Runner’ Set*, WASH. POST (Oct. 6, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/06/actor-brags-about-looting-native-american-artifacts-on-maze-runner-set/> [https://perma.cc/A4LN-LJCH].

² See *id.* (describing O’Brien’s flippant attitude toward looting Native American cultural material). The movie was filmed near Albuquerque and despite being cautioned about respecting the site, actors and crew apparently stole artifacts belonging to the Pueblo people of that area. *Id.*; Maeve Cunningham, *Demand the Scorch Trials Cast and Crew Apologize to Native Americans*, CARE2 PETITIONS, <https://www.thepetitionsite.com/429/020/568/> [https://perma.cc/U9X9-B4PS]. According to O’Brien, after people began taking objects there were incidents of sickness and broken bones among cast and crew. Phillip, *supra* note 1.

the federal crime of removing artifacts from a Native American grave site without proper authorization.³ Despite federal laws prohibiting the practice, illegal looting and harboring of Native American cultural material continues.⁴ In 2019, for example, the FBI seized and repatriated upwards of forty thousand Native American objects collected by Don Miller, a deceased scientist who had illegally looted and hoarded the items.⁵ Miller's collection included the remains of at least five hundred people.⁶

³ See *infra* notes 51–110 and accompanying text (providing each cultural heritage statute and describing the looting of Native American cultural material as being against federal statutes). In the wake of O'Brien's comments, an online petition demanding an apology gathered upwards of fifty-four thousand signatures. Reuters Staff, *'Maze Runner' Cast Did Not Steal Native American Items*, *Studio Says*, REUTERS, <https://www.reuters.com/article/us-film-mazerunner-artifacts/maze-runner-cast-did-not-steal-native-american-items-studio-says-idUSKCN0S238320151008> [<https://perma.cc/PNP4-MM3A>] (Oct. 8, 2015). The studio and production team behind the *Maze Runner* movie disavowed O'Brien's comments, stating that they respect Native American culture and that a studio-led investigation showed no evidence that any cast or crew member had looted cultural items. *Id.*

⁴ See Phillip, *supra* note 1 (describing the cavalier attitude of a young actor claiming he stole cultural material from a Native American cemetery). The fascination with and looting of Native American cultural material began with the colonization of North America, when European settlers collected objects of indigenous peoples for private collection or display back in Europe. Becky Little, *Why Graverobbers Won't Leave Native American Burial Sites Alone*, HISTORY (Mar. 4, 2019), <https://www.history.com/news/native-american-burial-site-theft> [<https://perma.cc/6QEB-DYUN>]. Native American grave-robbing in the nineteenth century was motivated in turn by pseudo-scientific studies linking skeletal attributes to racial supremacy. *Id.* Although motives for removing cultural items may have changed, looting has continued. See *id.* (delving into the history of graverobbers looting Native American sites, from the European settling of North America to modern treasure-hunting). In 2014, for example, the Federal Bureau of Investigation (FBI) discovered two thousand skeletal remains representing five hundred Native Americans in the Indiana home of a ninety-year-old missionary. *Id.* Similarly, "Operation Cerberus," conducted by federal agents in 2009, involved forty-thousand seized artifacts and thirty-two suspects in Colorado, New Mexico, and Utah. Kathleen Sharp, *An Exclusive Look at the Greatest Haul of Native American Artifacts, Ever*, SMITHSONIAN MAG. (Nov. 2015), <https://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artifacts-looted-180956959/> [<https://perma.cc/ZFJ7-EHLJ>]; see *infra* notes 229–237 (providing a detailed discussion of Operation Cerberus). To be in alignment with the Native American Graves Repatriation and Protection Act, this Note's usage of "Native American" includes Native Alaskan and Native Hawaiian peoples in addition to those indigenous to the contiguous United States. 25 U.S.C. § 3001(7), (9), (10).

⁵ Theresa Braine, *FBI Seeks to Repatriate the Remains of Nearly 500 Native Americans Stolen from Their Ancient Graves by Amateur Collector*, N.Y. DAILY NEWS (Mar. 4, 2019), <https://www.nydailynews.com/news/national/ny-news-amateur-collector-don-miller-fbi-art-theft-native-american-grave-robbery-20190303-story.html> [<https://perma.cc/UC76-PEC9>].

⁶ *Id.* At the time, the artifacts found in Miller's home constituted the FBI's largest seizure of cultural heritage material. *Id.* Don Miller was a distinguished scientist who helped develop the atomic bomb and was open about his grave-robbing, even allowing school groups to visit his illegally obtained collections. *FBI Seeks to Identify Rightful Owners in Cultural Artifacts Case*, FBI: ART CRIME (Feb. 27, 2019), <https://www.fbi.gov/news/stories/fbi-seeks-owners-of-recovered-cultural-artifacts-022719> [<https://perma.cc/X8SG-JWXL>]. After seizing Miller's vast collection, the FBI faced the task of repatriating the inventory to its rightful owners, complicated by the fact that items came from across North and South America and Asia. *Id.*

Looting Native American cultural sites is a federal crime under the Native American Graves Protection and Repatriation Act (NAGPRA).⁷ Excavation of cultural sites may be conducted legally, however, provided researchers obtain a special permit under the Archaeological Resources Protection Act (ARPA).⁸ Additionally, under NAGPRA, all federally funded institutions are obligated to conduct inventories of Native American human remains and burial objects in their collections, notify tribes, and repatriate the items.⁹ Some federally funded museums, however, have failed to adhere to these requirements, and some have even attempted to sell Native American cultural material instead of repatriating it.¹⁰

How countries manage and safeguard their cultural heritage impacts not only diplomatic relations, but also human rights.¹¹ Threats to cultural heritage may come from indirect sources, such as natural disaster, tourism, and pollu-

⁷ Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, § 4, 104 Stat. 3048, 3052 (1990) (codified as amended at 25 U.S.C. § 3001). The first-time penalty for buying, selling, or trafficking Native American human remains or cultural items is up to one year in prison and/or a fine. 18 U.S.C. § 1170. As of 2018, the federal government had received \$29,179 in fines for violations of NAGPRA. John Raby, *University Fined for Violating Indian Remains Law*, AP NEWS (Apr. 26, 2018), <https://apnews.com/article/3f42019968f647848a2c399a2543f3ae> [<https://perma.cc/8LHM-KA99>].

⁸ Archaeological Resources Protection Act (ARPA) of 1979, 16 U.S.C. § 470cc. ARPA requires that any archaeological excavation on federal or tribal lands must apply for and receive a permit from the Secretary of the Interior. *Id.* § 470cc(a). The Secretary of the Interior will in turn notify any Native American tribes that consider the prospective site to be culturally important. *Id.* § 470cc(a), (c). The permit may be revoked if the applicant violates any ARPA provisions. *Id.* § 470cc(f).

⁹ 25 U.S.C. §§ 3003(a), (b), (d), 3005(a). The only exceptions to the prompt repatriation requirement are (1) if cultural material is necessary for a scientific study that will benefit the U.S. or (2) if there are competing claims of ownership by Native American groups. *Id.* § 3005(b), (e).

¹⁰ See Raby, *supra* note 7 (describing the \$4,999 fine levied against Marshall University for failing to complete the NAGPRA-required inventories of their Native American cultural objects and human remains). The monetary sanction against Marshall University was one of the highest ever imposed on an institution since Congress enacted NAGPRA in 1990. *Id.* Similarly, Andover Newton Theological School, facing financial issues, tried to sell sacred fishhooks belonging to the Tlingit people of Alaska. Russell Thornton, *Return Native American Objects to Their Rightful Home*, NEWSWEEK (May 23, 2017), <https://www.newsweek.com/save-native-american-objects-being-sold-cash-613708> [<https://perma.cc/22R8-WSTW>]. The Peabody Essex Museum, which maintains the school's collection, sent letters to many tribes warning them of the school's plan to sell the sacred fishhooks. Frank Hopper, *It Only Took Two Years: Andover Newton Begins Returning Native Artifacts to 396 Tribes*, INDIAN CNTY. TODAY, <https://indiancountrytoday.com/archive/two-years-andover-newton-begins-returning-native-artifacts-396-tribes> [<https://perma.cc/J79S-QRDF>] (Sept. 13, 2018). Learning of their intentions, the Department of the Interior cautioned the school against the sale. *Id.* Ultimately, the school decided against the sale and is now trying to comply with NAGPRA by repatriating Native American cultural objects to their rightful tribal owners. *Id.*

¹¹ See JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 271 (2015) (identifying how cultural heritage is a significant component of human rights, specifically in the creation and maintenance of identity for both individual people and cultural groups). The right to cultural self-determination is considered an essential human right and cultural heritage implicates individual and community identity, thus making cultural heritage and human rights inextricably intertwined. *Id.* at 275–77.

tion.¹² Humans may also directly threaten cultural material through activities such as destruction and theft.¹³ At present, many governments have enacted international and domestic legal frameworks to safeguard objects of cultural heritage.¹⁴ Nevertheless, the limited and ambiguous nature of these systems allow exploitation and illegal trafficking to continue.¹⁵ This Note focuses on the federal protections in the United States that Congress implemented to combat the illicit trade of items of indigenous cultural heritage.¹⁶ Part I discusses the federal laws in place in the United States intended to counteract the illegal trafficking of domestic cultural heritage.¹⁷ Part II inspects the efficacy of these statutes to combat trafficking.¹⁸ Finally, Part III argues that the existing system is inadequate to protect all types of cultural items due to flaws in the legislation and ineffective enforcement and suggests improvements to the current regulatory regime.¹⁹

I. THE EVOLUTION OF SAFEGUARDING CULTURAL HERITAGE BY STATUTE

Governments worldwide aim to protect cultural heritage.²⁰ Since World War II, many countries have supported preserving and safeguarding the tangible remnants of their global and national past.²¹ Section A provides a brief account of “cultural heritage” and its importance to native groups.²² Section B describes the dominant cultural heritage protection statutes in the United States—the Na-

¹² See KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 19 (1994) (describing the erosion of ancient structures due to air pollution as an example of an indirect threat to objects of cultural heritage).

¹³ See *id.* (explaining that pillaging or destruction during war or removal of cultural material through smuggling and theft constitute direct human threats to cultural material).

¹⁴ See James A.R. Nafziger, *United States*, in HANDBOOK ON THE LAW OF CULTURAL HERITAGE AND INTERNATIONAL TRADE 506, 506 (James A.R. Nafziger & Robert Kirkwood Paterson eds., 2014) [hereinafter Nafziger, *United States*] (describing that the United States system of cultural heritage protection relies on internal enforcement to prevent theft, rather than attempting to control the export of cultural items).

¹⁵ See *id.* (identifying a few of the flaws in the United States legal system, such as a lack of export restrictions, that undermine safeguards to domestic and international cultural heritage).

¹⁶ See *infra* notes 25–110 and accompanying text (discussing the rationale behind preserving cultural heritage in the U.S. and the relevant federal statutes).

¹⁷ See *infra* Part I.

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III.

²⁰ See James A.R. Nafziger & Ann M. Nicgorski, *Introduction* to CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE, at xvii, xvii–xviii (James A.R. Nafziger & Ann M. Nicgorski eds., 2009) (describing the emergence over the last few decades of a concerted global effort by countries to maintain and safeguard cultural heritage nationally and internationally through government crackdowns on smuggling and international organizations like the United Nations Educational, Scientific and Cultural Organization (UNESCO)).

²¹ See *infra* notes 31–40 and accompanying text (recounting the rise of global cultural heritage protection agreements and treaties preceding and following World War II).

²² See *infra* Section I.A.

tional Historical Preservation Act (NHPA), the Archaeological Resources Protection Act (ARPA), and the Native American Graves Protection and Repatriation Act (NAGPRA).²³ Finally, Section C explores other enforcement mechanisms that support cultural heritage protection in the United States.²⁴

A. The Importance of Cultural Heritage to Identity and Self-Determination

The term “cultural heritage” describes tangible and intangible products or property of a group of people that inform the group’s identity.²⁵ “Heritage” refers to something inherited and non-renewable or unique—something received by a present people from a prior one that future generations may expect to inherit.²⁶ Governments have long considered tangible and intangible objects of cultural heritage deserving of protection.²⁷ Indeed, governments often consider threats to or destruction of cultural heritage a human rights issue.²⁸ Those same governments generally accept that people have an inherent right to dignity and self-determination, including an understanding of their cultural history,

²³ See *infra* Section I.B.

²⁴ See *infra* Section I.C.

²⁵ See BLAKE, *supra* note 11, at 6–11 (explaining that the terminology used in international agreements to describe cultural heritage is not uniformly defined or accepted, including for terms such as “property” and “heritage,” which are used interchangeably but imply different scopes, with “property” indicating tangible items and “heritage” more broadly encompassing cultural material).

²⁶ *Id.* at 8–9. Angkor, a Khmer Empire archaeological site in Cambodia, dates to the ninth century and is an example of worldwide heritage. *Angkor*, U.N. EDUC., SCI. & CULTURAL ORG., <https://whc.unesco.org/en/list/668/> [<https://perma.cc/7258-QE34>]. The site is a uniquely well-preserved sample of Khmer architecture, art, and engineering and is protected by Cambodia with international support from UNESCO due to its value to our world’s understanding of the past and heritage. See *id.* (stating that Angkor is safeguarded by Cambodia and describing the maintenance efforts of UNESCO, international partners, and the Cambodian government, as well as efforts to encourage tourism and worldwide understanding).

²⁷ See JOTE, *supra* note 12, at 43 (describing the negative attitudes of prominent people in the Roman Empire toward the wartime pillaging of cultural material during a period when there were no laws or customs against the practice). For example, the Roman scholars Polybius and Cicero were vocal opponents of cultural heritage destruction during periods of war. *Id.* at 43–44. More recently, wartime destruction of culturally significant places and items during the Napoleonic wars and World Wars I and II generated worldwide negative public reactions. See *id.* at 45–46 (providing examples of public condemnation at this time, such as the French being criticized as thieves and the Germans as vandals).

²⁸ BLAKE, *supra* note 11, at 271, 275–77; *Cultural Rights and the Protection of Cultural Heritage*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, https://www.ohchr.org/en/issues/escr/pages/cultural_rights_protection_cultural_heritage.aspx#:~:text=On%20the%20relevant%20actions%20to%20achieve%20this [<https://perma.cc/U6QU-S9ZC>]. In 2016, the U.N. Human Rights Council adopted a resolution compelling member-states to respect the worldwide right to cultural heritage and to raise awareness, prevent cultural heritage destruction, and mitigate existing damage. *Cultural Rights and the Protection of Cultural Heritage*, *supra*. Following the resolution, the U.N. Office of the High Commissioner for Human Rights hosted a seminar in 2017 with experts and member-states discussing the impact of the destruction of cultural material on human rights and how the U.N. could address the issue. *Id.*

place in the world, and the accomplishments of their forbearers.²⁹ When cultural heritage is destroyed, individuals, communities, and governments often express outrage and horror at the loss to future generations.³⁰

Despite the universal sense of wrongness attached to destruction of cultural heritage, countries have long engaged in the looting and destruction of cultural material.³¹ The first codified prohibition against wartime destruction of cultural heritage was the 1864 Lieber Code.³² The Lieber Code was an American military handbook that instructed militaries to safeguard an enemy combatant's culturally important objects, such as art, libraries, and scientific collections, even when held in a strategically important place.³³ The Lieber Code later encouraged other countries to set up similar wartime codes of conduct.³⁴ Although there was no formal prohibition on such conduct until after

²⁹ See BLAKE, *supra* note 11, at 272, 276–77 (noting that threats to cultural heritage impact identity at an individual and community level, thus violating the individual human right to dignity and self-determination).

³⁰ See Rod Nordland, *2 Giant Buddhas Survived 1,500 Years. Fragments, Graffiti and a Hologram Remain.*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/world/asia/afghanistan-bamiyan-buddhas.html> [<https://perma.cc/7W24-SCMH>] (discussing the various efforts to recreate Afghanistan's Bamiyan Buddhas eighteen years after the Taliban destroyed them, including rebuilding the monuments and holograms). In 2000, the Taliban destroyed the Bamiyan Buddhas, which were over 1,500 years old, within a few weeks using explosives and gunfire. *Id.* The Buddhas were, at the time, the tallest standing Buddhas in the world and their destruction prompted worldwide outrage. *Id.* Academics and wealthy patrons have attempted to recreate the Buddhas through holograms and restoration, but in the meantime, the site lacks sufficient security and attracts trespassers who loot and graffiti the area. *Id.*

³¹ See John Henry Merryman, *Introduction to IMPERIALISM, ART AND RESTITUTION* 1, 2–8 (John Henry Merryman ed., 2006) (providing examples of cultural heritage destroyed or removed from its place of origin through aggression and opportunism, such as British explorers removing ancient items from Egypt to send to the British Museum). Ancient Roman authors wrote about the statues and art featured in the Roman Forum, originally taken from conquered peoples and set up so that the Roman public could admire their military success. *Id.* at 4. The pattern of victorious armies taking cultural heritage from the conquered nation was repeated in Constantinople during the Byzantine era, the Crusades, and the Napoleonic Campaigns. *Id.* at 4–5. At the time these acts did not violate any international law, but the practice enraged the conquered people. *Id.* at 6; Francesco Francioni, *The Evolving Framework for the Protection of Cultural Heritage in International Law*, in *CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY* 3, 7 (Silvia Borelli & Federico Lenzerini eds., 2012). For example, the Italians were furious when Napoleon forced conquered Italian cities to hand over cultural treasures. Merryman, *supra*, at 6. More recently, the Nazis designed a program of systemic looting of cultural material during World War II by mandating German soldiers seize art from conquered peoples to be destroyed, sold, or placed in Nazi museums. *Id.* at 7. This would later be deemed a war crime at the Nuremberg Trials. *Id.* at 8.

³² JOTE, *supra* note 12, at 47.

³³ *Id.*; *General Orders No. 100: The Lieber Code*, art. 35, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/19th_century/lieber.asp#art35 [<https://perma.cc/DU94-GFA7>]; Jenny Gesley, *The "Lieber Code"—the First Modern Codification of the Laws of War*, THE LIBR. OF CONG. (Apr. 24, 2018), <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/> [<https://perma.cc/W524-5CQ5>].

³⁴ Gesley, *supra* note 33. The Brussels Declaration, for example, was a non-binding document passed by fifteen European nations ten years after the Lieber Code that provided for various wartime

World War II, many governments attempted to discourage ransacking and looting of culturally important materials during war.³⁵

On November 16, 1945, thirty-seven countries created the United Nations Educational, Scientific and Cultural Organization (UNESCO) with a mandate to safeguard global heritage from theft, destruction, and illegal trade.³⁶ UNESCO aims to support world heritage and periodically issues guidance for states to better protect cultural material.³⁷ UNESCO defines “cultural heritage” very broadly to include movable, immovable, tangible, intangible, and underwater heritage.³⁸ UNESCO has produced two major global agreements on cultural heritage maintenance and protection: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.³⁹ The former calls on signatories to undertake measures to ensure protection of worldwide cultural heritage during war and the latter asks countries to confront and elimi-

standards for cultural preservation, including protections for religious and cultural institutions and prosecution for deliberate seizure and destruction of these locations. JOTE, *supra* note 12, at 48.

³⁵ See *infra* notes 36–40 and accompanying text (describing the international treaties enacted after World War II to limit looting and destruction of culturally important items); JOTE, *supra* note 12, at 48–51 (relating other attempts at a global agreement for a wartime code to protect cultural material, including the non-binding Brussels Declaration of 1874 and the ineffectual Hague Conventions of 1899 and 1907, which were unsuccessful but set up a precedent for later efforts).

³⁶ JOTE, *supra* note 12, at 59, 194; *The Organization’s History*, U.N. EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/%20unesco/about-us/who-we-are/history/> [<https://perma.cc/8WYY-QZGK>].

³⁷ *UNESCO in Brief*, U.N. EDUC., SCI. & CULTURAL ORG., <https://en.unesco.org/about-us/introducing-unesco> [<https://perma.cc/W465-3FZM>]. UNESCO currently has 193 member-states and has designated one thousand seventy-three “World Heritage” sites for preservation in 167 countries. *Id.*; *Member States List*, U.N. EDUC., SCI. & CULTURAL ORG., <https://en.unesco.org/countries> [<https://perma.cc/92C7-3267>]. World Heritage status indicates that the site is so culturally important that it essentially “belong[s] to all the people[] of the world” regardless of where the site is located. *World Heritage*, U.N. EDUC., SCI. & CULTURAL ORG., <https://whc.unesco.org/en/about/> [<https://perma.cc/4AEU-4R88>]. Sites with this designation receive aid from UNESCO for preservation, education, and emergency assistance in the case of imminent danger. *Id.* For example, in 2010, UNESCO helped restore a minaret that had fallen in Meknes, Morocco, a designated World Heritage site. *UNESCO*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/unesco/> [<https://perma.cc/67HT-GKNV>].

³⁸ See *What Is Meant by “Cultural Heritage”* U.N. EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> [<https://perma.cc/M4HX-2JMP>] (defining “cultural heritage” for the purposes of UNESCO’s Conventions and agreements as tangible and intangible cultural heritage, objects that are movable and immovable, and even objects that are underwater, including a vast array of items like paintings, monuments, shipwrecks, and oral traditions).

³⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter 1970 Convention]; BLAKE, *supra* note 11, at 37.

nate the illicit trade of cultural heritage during peacetime.⁴⁰ The following case study illustrates one of the flaws in this international preservation regime: although treaties ask governments to protect all cultural material, they cannot enforce safeguarding on the international stage.⁴¹

In 2001, the Taliban destroyed the Bamiyan Buddhas, giant statues carved into the Bamiyan Cliffs in Afghanistan that date between the fifth and seventh centuries.⁴² Shortly before the bombing, the Taliban announced a campaign to destroy all symbols of idol-worship.⁴³ The international community begged the Taliban to safeguard the Buddhas and many Afghan museums sent collections to other countries for protection.⁴⁴ Afterwards, the international community condemned the bombing.⁴⁵ Although countries and peoples worldwide grieved the destruction of the Buddhas as a great loss to mankind and our understanding of the past, the Taliban did not violate any specific international treaty.⁴⁶ That is, there was no specific law requiring a governing force, especially one that had just seized power, to protect cultural heritage if it did not want to.⁴⁷ The international treaties take for granted that governments would want to protect cultural heritage within their borders.⁴⁸ The case of the Bamiyan Buddhas

⁴⁰ BLAKE, *supra* note 11, at 38–39; JOTE, *supra* note 12, at 65. The Hague Convention clarifies that protecting the cultural heritage of an enemy during war includes refraining from pillaging, destroying, or appropriating cultural objects. JOTE, *supra* note 12, at 65–66. The 1970 UNESCO Convention applies to eleven categories of materials, including historical property, archaeological material, manuscripts, postage, and furniture. *Id.* at 202.

⁴¹ See Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 YALE J. INT'L L. 347, 362–63 (2010) (explaining that no existing treaty prevents a ruling party from dismantling cultural material in its own land and explaining that state sovereignty allows ruling parties to oversee and maintain their property as they wish).

⁴² Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 620 (2003); Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <https://www.nytimes.com/2001/03/19/world/taliban-explains-buddha-demolition.html> [<https://perma.cc/X693-7VYK>].

⁴³ Fishman, *supra* note 41, at 361. The Taliban wanted to destroy these icons because they were symbols of icon-worship, which is against *shari'ah* law. *Id.* In addition to destroying the Bamiyan Buddhas, the Taliban destroyed many other cultural objects under this policy, including ancient Buddhist statues housed in the National Museum of Afghanistan. *Id.* at 362.

⁴⁴ *Id.* at 361.

⁴⁵ *Id.* at 363; Francioni & Lenzerini, *supra* note 42, at 621. The Bamiyan Buddhas were lauded as priceless objects that could yield much about the spread of Buddhism and ancient monument-building and thus their loss, in addition to removing a piece of Afghanistan's cultural identity, was a blow to the international scientific community. Fishman, *supra* note 41, at 361.

⁴⁶ Fishman, *supra* note 41, at 362.

⁴⁷ *Id.* at 362–63. Although there are international agreements that address safeguarding the cultural heritage of *other states* in times of war and peace, these agreements presuppose that the signatories would want to protect their own domestic heritage, not willfully destroy it. See 1970 Convention, *supra* note 39, at 232 (stating that it is the duty of each member-state to protect the heritage within its borders).

⁴⁸ See Francioni & Lenzerini, *supra* note 42, at 633–35 (suggesting that even though the Taliban may not be subject to relevant treaties as a signing party, a duty might be derived from custom where-

illustrates an incongruity in cultural heritage protection—nations want to safeguard cultural objects, but international treaties and domestic statutes are ambiguous about what should be protected and by whom.⁴⁹ The federal cultural heritage protection laws in the United States share some of these incongruities.⁵⁰

B. The Mechanics of Federal Cultural Heritage Statutes

Looters of Native American graves and cultural sites are driven by a myriad of motives, including profit, amateur archaeological analysis, and the desire to prove racial supremacy.⁵¹ In 1988, the Smithsonian admitted to holding 18,600 indigenous skeletal remains and thousands of associated artifacts, many gathered from the nineteenth-century drive to study the remains of “savages.”⁵² More recently, the Los Angeles Times published an article describing the large-scale destruction at Cuyamaca Rancho State Park, where looters robbed archaeological sites five times in two years.⁵³

in cultural heritage of general interest to the worldwide community should be protected and not deliberately destroyed).

⁴⁹ See Fishman, *supra* note 41, at 361, 363 (explaining that despite the international community’s pleas, there were no mechanisms in place to prevent the Taliban from destroying cultural material within their own borders).

⁵⁰ See *infra* notes 61–110 and accompanying text (describing the mechanics of the federal cultural heritage statutes).

⁵¹ See Andrew Gulliford, *Bones of Contention: The Repatriation of Native American Human Remains*, 18 PUB. HISTORIAN 119, 120 (1996) (discussing the racist motives to collect Native American human remains to study as “savages” and to display the remains alongside dinosaurs as another soon-to-be-extinct species); Robert J. Mallouf, *An Unraveling Rope: The Looting of America’s Past*, 20 AM. INDIAN Q. 197, 199, 201 (1996) (describing how looting can escalate from collecting artifacts as a hobby to excavating sites in the dead of night to make money or for “science”); Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2355 (2019) (presenting examples of early European Americans seeking Native American remains and cultural material for profit or for curiosity, including Thomas Jefferson who unearthed a burial near his house). For example, Dr. Samuel Morton, a pioneering anthropologist, collected Native American skulls in the mid-nineteenth century to take measurements to prove that the indigenous people were “savage[s]” and Europeans were superior. 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); see Little, *supra* note 4 (explaining the nineteenth-century pseudo-science practice of phrenology, the study of the skull, which claimed to measure a person’s intelligence by taking measurements of the subject’s head).

⁵² Gulliford, *supra* note 51, at 120. In 1868, the Surgeon General ordered the army to collect Native American skulls and body parts for the Army Medical Museum. Trope & Echo-Hawk, *supra* note 51, at 40. Soldiers looted burial grounds, battlefields, hospitals, and even decapitated Native Americans following this order. *Id.* at 40–41.

⁵³ J. Harry Jones, *‘Devastating’ Looting Hits Native American Archaeological Sites*, L.A. TIMES (Aug. 15, 2015), <https://www.latimes.com/local/california/la-me-0816-sd-archaeology-20150816-story.html> [<https://perma.cc/2QUY-G3LL>]. At one site, looters excavated twenty-one pits, each the size of a kitchen table. *Id.* Interestingly, because these sites did not contain lucrative items, such as arrowheads, the authorities suspected that the looting was done by collectors rather than treasure-hunters. *Id.*

The United States has three important statutes to curb removal of and illicit profiting from cultural heritage: the NHPA, ARPA, and NAGPRA.⁵⁴ These statutes preserve cultural property and explicitly prohibit buying, selling, excavating, and transporting historically important materials.⁵⁵ ARPA and NAGPRA, in particular, work together to require permits for excavations on federal and tribal lands and to prohibit the illegal removal and trafficking of excavated items.⁵⁶ From 1990 to 2005, NAGPRA was responsible for the repatriation of approximately six hundred thousand funerary objects, twelve hundred sacred objects, and thirty thousand sets of human remains to indigenous groups.⁵⁷ NAGPRA and ARPA address cultural heritage management and safeguarding within North America and Hawaii, but do not cover foreign cultural heritage imported into the United States.⁵⁸ Subsection 1 of this Section examines the federal statutes that aim to safeguard historical sites generally in the United States.⁵⁹ Subsection 2 examines NAGPRA as a statute specifically designed to protect and repatriate cultural material of indigenous peoples in the United States.⁶⁰

1. Statutes Safeguarding Historical Sites in the United States

Prior to 1906 and Congress's passage of several cultural heritage safeguarding statutes, the United States allowed unrestricted trade in domestic and

⁵⁴ 54 U.S.C. § 300101; 16 U.S.C. § 470aa; 25 U.S.C. § 3001; *see infra* notes 61–110 and accompanying text (describing the mechanisms of the three federal cultural heritage statutes that the United States adheres to in safeguarding cultural material).

⁵⁵ *See infra* notes 61–110 and accompanying text (detailing the targeted enforcement areas and compliance mechanics of each statute). The United States also has more specific safeguarding statutes, such as the Pre-Columbian Monumental and Architectural Sculpture and Murals Statute of 1972, that provide special protections for pre-Columbian cultural material. BEAT SCHÖNENBERGER, *THE RESTITUTION OF CULTURAL ASSETS: CAUSES OF ACTION—OBSTACLES TO RESTITUTION—DEVELOPMENTS* 74 (2009). The statute requires that all cultural material imported into the United States include an export certificate, or risk repatriation. *Id.*; 19 U.S.C. §§ 2092(b), 2093(a).

⁵⁶ *See* Kate Fitz Gibbon, *A Primer: NAGPRA, ARPA, and the Antiquities Act*, CULTURAL PROP. NEWS (Dec. 19, 2018), <https://culturalpropertynews.org/a-primer-nagpra-arpa-and-the-antiquities-act> [<https://perma.cc/TA4M-XNY3>] (providing the major requirements of ARPA and NAGPRA and describing the two statutes as the main laws impacting Native American cultural material today); James A.R. Nafziger, *Protection and Repatriation of Indigenous Cultural Heritage in the United States*, in CULTURAL HERITAGE ISSUES, *supra* note 20, at 37, 70 (describing the powerful interplay between ARPA, NAGPRA, and the NHPA to reinforce each other by, for example, each covering different types of cultural materials and thus providing for a fuller scope of protection).

⁵⁷ SCHÖNENBERGER, *supra* note 55, at 89.

⁵⁸ *See* Nafziger, *United States*, *supra* note 14, at 506–08 (explaining that the dominant cultural heritage protections in the United States are set apart from import laws governing foreign cultural material); 16 U.S.C. § 470bb (defining the scope of ARPA to archaeological material that is at least one hundred years old and found on public lands); 25 U.S.C. § 3002 (limiting the statute to Native American cultural items found on federal or tribal lands).

⁵⁹ *See infra* notes 61–86 and accompanying text.

⁶⁰ 25 U.S.C. § 3001; *see infra* notes 87–110 and accompanying text.

foreign cultural objects.⁶¹ Current federal statutes such as ARPA, however, regulate the possession, transport, and trade of Native American cultural material, and forbid theft or export of cultural items.⁶²

Congress passed the predecessor to these laws, the Antiquities Act of 1906, in response to the increasing plundering of Native American cultural material.⁶³ The Antiquities Act made it illegal to interfere with any prehistoric or historic ruin or “object of antiquity” found on federal land without permission from the federal government.⁶⁴ In addition to a generalized prohibition on looting, the Act made designation of national historic status more efficient.⁶⁵ The Antiquities Act allows the President to designate landmarks as “national monuments,” affording the sites particular care and status.⁶⁶ Prior to the Act,

⁶¹ See Francis P. McManamon, *Antiquities Act of 1906*, ARCHAEOLOGICAL METHOD & THEORY 33–35 (Linda Ellis ed., 2000), reproduced in Francis P. McManamon, *Antiquities Act of 1906*, NAT’L PARK SERV., <https://www.nps.gov/archeology/tools/laws/AntAct.htm> [<https://perma.cc/LZ5J-3UEY>] (Apr. 1, 2022) (remarking that the Act was the first cultural protection law in the United States and that prior to it there was extensive and unchecked looting of archaeological sites). Omitted from discussion in this Note is the Foreign Sovereign Immunities Act (FSIA), an act that waives foreign sovereign immunity and allows foreign countries to be sued in federal courts for violations of international law. Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 173 (2005).

⁶² See Nafziger, *United States*, *supra* note 14, at 508 (explaining the mechanics of ARPA and how export controls apply under the law, which prohibits the trade and transport of covered items and prohibits their export by implication).

⁶³ An Act for the Preservation of American Antiquities, Pub. L. No. 59-209, 34 Stat. 225 (1906), repealed by An Act to Enact Title 54, United States Code, “National Park Service and Related Programs,” as Positive Law, Pub. L. No. 113-287, 128 Stat. 3094 (2014) (codified as amended in scattered sections of at 54 U.S.C.); Tatiana Schlossberg, *What Is the Antiquities Act and Why Does President Trump Want to Change It?*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/climate/antiquities-act-federal-lands-donald-trump.html> [<https://perma.cc/2FKA-3FYP>]. Interestingly, an archeologist drafted the Act. *General Antiquities Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/enrd/general-antiquities-act> [<https://perma.cc/826P-VH3F>].

⁶⁴ *American Antiquities Act of 1906*, NAT’L PARK SERV., <https://www.nps.gov/articles/lee-story-appa.htm#:~:text=Be%20it%20enacted%20by%20the,by%20the%20Government%20of%20the> [<https://perma.cc/MR9C-JUVV>] (Aug. 1, 2019); JAMES A.R. NAFZIGER, ROBERT KIRKWOOD PATERSON & ALISON DUNDES RENTELN, *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 274 (2010). After the World’s Exposition in Chicago in the 1890s, many people became exposed to indigenous cultural heritage in the United States, leading to an increase in looting as opportunistic thieves tried to take advantage of public interest. McManamon, *supra* note 61, at 34. The growing commercial demand for cultural heritage objects and associated pillaging led to national efforts to protect archaeological sites through the Antiquities Act. *Id.*

⁶⁵ 54 U.S.C. § 320301; see NAFZIGER ET AL., *supra* note 64, at 274 (listing some of the monuments designated by Presidents since the enactment of the Antiquities Act, such as the Grand Canyon National Monument in 1908 and the Grand Staircase-Escalante in 1996). Under the Antiquities Act, the President may bestow monument status by presidential proclamation upon any historic or prehistoric landmark or structure and any objects of historic or scientific found on federal land. 54 U.S.C. § 320301(a); see CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 15 (2021) (clarifying that Presidents proclaim monuments under this Act and that 158 monuments have been proclaimed thus far).

⁶⁶ NAFZIGER ET AL., *supra* note 64, at 274.

only Congress could create national parks through legislation, a time-consuming process that could become mired in partisan discontent.⁶⁷ The Antiquities Act, by creating a new category of protected landmarks that could be created by presidential proclamation, gave cultural heritage within the United States enhanced protections.⁶⁸ The Act marked a departure from the prior *laissez-faire* attitude toward the excavation of culturally important materials, although opponents argued that it focused too narrowly on public lands and levied only minor penalties.⁶⁹ Critics also claimed that the Act's definitions were too vague, making it unclear what exactly was covered by its provisions and failing to deter criminals.⁷⁰ Although the Act's generalized prohibition against interfering with a ruin, monument, or historic monument on Federal lands would later be repealed, the ability to designate a national monument remains and is often utilized.⁷¹

ARPA, enacted in 1979, supersedes and improves upon the Antiquities Act.⁷² ARPA aimed to provide greater protection for cultural items by giving

⁶⁷ McManamon, *supra* note 61, at 34. Yellowstone National Park and Case Grande Ruins in Arizona, founded in 1872 and 1892 respectively, were each established through an act of Congress, accompanied by Presidential approval. *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.* at 33–34 (describing the Antiquities Act as the first cultural heritage protection statute in the United States); NAFZIGER ET AL., *supra* note 64, at 273–74 (stating that the United States has weak cultural heritage protections in comparison with other nations and outlining critiques of the Antiquities Act). In 1974, in *United States v. Diaz*, the U.S. Court of Appeals for the Ninth Circuit further reduced the efficacy of the Act, holding that the statutory terms defining prohibited material, such as “ruin” and “object of antiquity,” were unconstitutionally vague. 499 F.2d 113, 114–15 (9th Cir. 1974).

⁷⁰ McManamon, *supra* note 61, at 35; *see* Patty Gerstenblith, *Increasing Effectiveness of the Legal Regime for the Protection of the International Archaeological Heritage*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE, *supra* note 20, at 305, 306 n.5 (describing how ARPA fixed the vagueness in the Antiquities Act by defining protected material more clearly). For example, ARPA protects remnants of past human activity within a certain time period, rather than just vague “objects of antiquity,” as was the case in the Antiquities Act. 16 U.S.C. § 470bb(1); *see* An Act for the Preservation of American Antiquities, Pub. L. No. 59-209, 34 Stat. 225 (1906), *repealed by* An Act to Enact Title 54, United States Code, “National Park Service and Related Programs,” as Positive Law, Pub. L. No. 113-287, 128 Stat. 3094 (2014) (codified as amended in scattered sections of at 54 U.S.C.) (providing the original text of the Antiquities Act); *American Antiquities Act of 1906*, *supra* note 64 (same).

⁷¹ *See* An Act to Enact Title 54, United States Code, “National Park Service and Related Programs,” as Positive Law, § 7, 128 Stat. at 3272–73 (repealing §§ 1–4 of the Antiquities Act); VINCENT, *supra* note 65, at 15 (providing information on presidential usage of the Antiquities Act to designate monuments, including twenty-nine designations under President Obama and only one under President Trump). The right of the President to proclaim national monuments was retained from the Antiquities Act. 54 U.S.C. § 320301; An Act to Enact Title 54, United States Code, “National Park Service and Related Programs,” as Positive Law, § 3, 128 Stat. at 3259–60.

⁷² McManamon, *supra* note 61, at 35; NAFZIGER ET AL., *supra* note 64, at 274; Nafziger, *United States*, *supra* note 14, at 507; *see* Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (awarding greater protections to archaeological materials due to their “commercial attractiveness” and thus higher risk of theft).

the federal government more control over archaeological materials discovered on federal and tribal lands.⁷³ ARPA reasserts federal jurisdiction over cultural heritage objects on public land and forbids the excavation, trade, or transport of those objects, imposing stricter punishments for knowing violations of the Act.⁷⁴ Most impactfully, ARPA broadens and clarifies the purview of the Antiquities Act to include “any material remains of past human life or activities,” as long as the items are at least one hundred years old and are “of archaeological interest.”⁷⁵ The Act also prohibits excavation on federal and tribal lands without a permit.⁷⁶ ARPA violations may result in a monetary penalty according to the value of the archaeological material involved, including any cost of repair.⁷⁷ Moreover, the Act allows law enforcement officials to seize cultural material and the material is forfeited if it is obtained through a violation of the statute.⁷⁸

In 1966, Congress passed the NHPA.⁷⁹ The NHPA aims to safeguard historical landmarks, including buildings, sites, and structures, that are important to understanding American history, such as Mesa Verde National Park in Colorado.⁸⁰ The NHPA created the National Register to coordinate the management

⁷³ See 16 U.S.C. § 470aa (clarifying that because archaeological materials are irreplaceable and endangered, and that then-existing laws were inadequate, the statute was enacted to protect the resources on federal and tribal lands); Nafziger, *supra* note 56, at 37–38 (stating that ARPA largely replaces the Antiquities Act by claiming federal authority over archaeological material located on public land).

⁷⁴ NAFZIGER ET AL., *supra* note 64, at 274.

⁷⁵ 16 U.S.C. § 470bb(1); NAFZIGER ET AL., *supra* note 64, at 274. “[A]rchaeological interest” means that the remains may aid scientific understanding of past human behavior. Rebecca Tsosie, *Who Controls Native Cultural Heritage?: “Art,” “Artifacts,” and the Right to Cultural Survival*, in CULTURAL HERITAGE ISSUES, *supra* note 20, at 3, 4 (quoting 16 U.S.C. § 470bb(1)).

⁷⁶ See 16 U.S.C. § 470ee(a), (d) (banning illegal excavation of or damage to archaeological resources and imposing penalties for violations, such as a fine of \$10,000, one year in prison, or both). In 1993, in *United States v. Gerber*, in which the defendant was convicted of stealing and transporting items stolen from a burial mound on privately-owned land, the U.S. Court of Appeals for the Seventh Circuit held that ARPA extends to cultural objects found on private land because the statute does not expressly state otherwise, making ARPA even more powerful. 999 F.2d 1112, 1112, 1116 (7th Cir. 1993).

⁷⁷ NAFZIGER ET AL., *supra* note 64, at 476. Criminal penalties for the first offense include fines of up to \$10,000 and up to a year in prison, which double if the archaeological materials involved are valued at more than \$500. § 470ee(d). Civil penalties are assessed by the Department of the Interior according to the value of the archaeological material involved and the cost of repairing any damage to the items or site. *Id.* § 470ff(a)(2).

⁷⁸ NAFZIGER ET AL., *supra* note 64, at 481.

⁷⁹ National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915; Nafziger, *supra* note 56, at 38. Prior to the NHPA, preservation legislation tended to be site-specific and prompted by specific events. *Id.*

⁸⁰ *Colorado: Mesa Verde National Park*, NAT’L PARK SERV., <https://www.nps.gov/articles/mesa-verde.htm> [<https://perma.cc/BJV6-MCGX>] (Apr. 9, 2021); see National Historic Preservation Act, 80 Stat. at 915 (describing that the purpose of the NHPA was to preserve the historical sites and objects of the United States which are the cultural and historical foundation of the country). The statute takes a wide view of what constitutes a significant site, including properties that are important to the nation-

of these landmarks and allows tax benefits for qualifying sites.⁸¹ Additionally, the NHPA provides federal grant-matching programs to assist states in preserving local sites.⁸² In 1992, Congress amended the NHPA to require federal agencies to consult with Native American tribes before enacting policies or making decisions about historic sites on tribal land.⁸³ The 1992 amendment also allowed federal agencies to withhold information about historical sites if that information might put the site at increased risk of looting or destruction.⁸⁴ Finally, the NHPA requires that federal agencies consider the effect of proposed projects on historic properties.⁸⁵ Together, ARPA and the NHPA—statutes that focus on preserving cultural and archaeological material for the

al understanding of engineering, architecture, archaeology, and culture. Tsosie, *supra* note 75, at 4. Under the Act, the President has great authority to designate national monuments in order to preserve them. *Id.* at 38 n.3. For example, President Theodore Roosevelt used the statute to mark the Grand Canyon a national monument in 1908 and President Bill Clinton declared the Grand Staircase-Escalante a national monument in 1996. *Id.*

⁸¹ Nafziger, *supra* note 56, at 38; NAFZIGER ET AL., *supra* note 64, at 274. Tax incentives for national monuments include a 20% tax credit for the restoration of historic buildings that produce income. *Tax Incentives for Preserving Historic Properties*, NAT'L PARK SERV., <https://www.nps.gov/tps/tax-incentives.htm#:~:text=A%2020%25%20income%20tax%20credit,National%20Park%20Service%20review%20the> [<https://perma.cc/G3M6-G2B9>]. To be listed on the National Register, a property must meet a range of broadly worded criteria, including that the property is significant to American history. See 36 C.F.R. § 60.4 (2021) (providing criteria for a property to be listed on the National Register, including that the site is associated with an event or person significant to the history of the United States or that the site is representative of a type of construction or artistic style). Examples of sites on the National Register include the Huron County Courthouse and Jail in Ohio and the Georgetown Historic District in Washington, D.C. § 60.3.

⁸² Nafziger, *supra* note 56, at 38; NAFZIGER ET AL., *supra* note 64, at 274.

⁸³ National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4006, 106 Stat. 4753, 4755–56; Nafziger, *supra* note 56, at 38; *ACHP Native American Policies*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/indian-tribes-and-native-hawaiians/initiatives/achp-native-american-policies> [<https://perma.cc/6D8J-YMN5>].

⁸⁴ Nafziger, *supra* note 56, at 55. The 1992 amendment marks a recognition by Congress that National Register sites are in danger of looting by opportunistic thieves and that it might be wise to keep the locations of certain sites secret to ensure their preservation and prevent destruction. See *id.* (describing similar policies in NAGPRA that allow denials of Freedom of Information Act requests for certain sacred sites or burial grounds).

⁸⁵ National Historic Preservation Act, § 106, 80 Stat. at 917. Many resources exist to aid federal agencies in adhering to Section 106 by providing guidance on when Section 106 applies and how to conduct a review. See *Section 106 Application Toolkit*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit> [<https://perma.cc/HD7H-3R5V>] (explaining the procedures involved in the § 106 consultation process, such as providing information on the project to the local state or local preservation office, which will then review the information and provide approval or ask for more data); *Frequently Asked Questions About Section 106 of the National Historic Preservation Act*, NAT'L ENDOWMENT FOR THE HUMANS., <https://www.neh.gov/grants/manage/frequently-asked-questions-about-section-106-the-national-historic-preservation-act> [<https://perma.cc/Q262-HCCN>] (offering information on how to comply with § 106, including explaining what agencies are involved in a § 106 review and what information the applicant must provide).

benefit of future generations—are generally seen by scholars as departures from the hands-off approach formerly taken by the federal government.⁸⁶

2. Statutes Protecting Indigenous Property Specifically

In 1990, Congress passed the most recent cultural heritage statute: NAGPRA.⁸⁷ NAGPRA criminalizes trafficking cultural items and affirms Native American ownership of cultural items found on federal and tribal land.⁸⁸ Partially prompting the creation of NAGPRA was Smithsonian Secretary Robert McCormick Adams’s testimony that of the thirty-four thousand human remains in inventory, about fifty-five percent belonged to populations indigenous to North America and Alaska.⁸⁹ Professional and amateur archaeologists marked the nineteenth and twentieth centuries by pillaging indigenous cultural and historical sites in the name of scientific discovery, and later selling their findings to private buyers or donating them to museums.⁹⁰ Museums and private owners of the era rejected Native groups’ attempts to reclaim the stolen property.⁹¹ The Smithsonian’s revelation spurred a national demand for the return of Native American remains, funerary materials, and sacred objects to their tribal groups and to establish a system of protection for such items.⁹²

⁸⁶ See NAFZIGER ET AL., *supra* note 64, at 274 (noting that Presidents continue to utilize the Antiquities Act to designate national monuments, but otherwise the NHPA and ARPA are the two most significant federal laws today for protecting historical and archaeological material in the U.S.).

⁸⁷ Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 4, 104 Stat. 3048, 3052 (1990) (codified as amended at 18 U.S.C. § 1170).

⁸⁸ Nafziger, *supra* note 56, at 47–48; *see* § 7, 104 Stat. at 3054 (codified as amended at 25 U.S.C. § 3005) (providing that Native American human remains and cultural objects harbored by federally funded institutions and museums must be repatriated to a descendant of the person or to an affiliated Native American tribe).

⁸⁹ S. REP. NO. 101-473, at 1 (1990). The revelation that the Smithsonian, the national museum of the United States, harbored so many indigenous skeletal remains followed a long history of European colonial looting of cultural artifacts of indigenous peoples in the United States and prompted tribes throughout the U.S. to demand repatriation. *See id.* (describing that Native American reaction to the testimony was fast and called for the immediate return of the items to associated tribes, as well as the burial of remains whose association could not be determined); *supra* notes 51–53 and accompanying text (providing an overview of the history and motives for looting indigenous graves, including amateur interest, profit, and to assert racial supremacy).

⁹⁰ *See* Tsosie, *supra* note 75, at 21 (explaining that archaeologists in the last few hundred years regularly looted Native American villages and burial grounds to sell or donate the found items); *supra* notes 51–53 and accompanying text (describing the nineteenth and twentieth century rationale behind looting Native American cultural sites and burial grounds, including racial supremacy and profit).

⁹¹ Tsosie, *supra* note 75, at 21. Before Congress enacted NAGPRA, Native Americans frequently had to rely on state law causes of action to reclaim cultural materials, such as the laws of replevin or malicious interference with a human burial. *Id.*

⁹² S. REP. NO. 101-473, at 1–2. One highly controversial spot was Dickson Mounds, a privately owned museum in Illinois which was built around a Native American burial ground and displayed Native American remains. June Camille Bush Raines, *One Is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 662 (1992). The site initially refused Native American requests to repatriate or rebury the Native American re-

Congress also set up rules for the governance of Native American cultural sites on federal and tribal land in NAGPRA.⁹³ These rules established processes for identifying cultural items discovered inadvertently on federal and tribal lands and mandated that all excavations comply with ARPA and provide notice to affiliated Native American tribes.⁹⁴ Perhaps most importantly, NAGPRA affirmed the right to repatriation of cultural items and created procedures to return indigenous human remains and cultural objects to Native American individuals and tribes.⁹⁵ NAGPRA allows a direct descendent—related by blood, adoption, or by means of the kinship system of the tribe—of an associated Native American tribe to make a claim for repatriation.⁹⁶ Objects covered by NAGPRA include funerary objects placed with or near human remains, sacred objects, human remains, and cultural patrimony—objects with historical or cultural significance to the tribe.⁹⁷ Descendants have no time limit in which to make a repatriation claim.⁹⁸

mains, which it could do because it was state funded, but the Governor of Illinois ultimately forced the site to return the items in 1991. *Id.* at 663; Hugh Dellios & Rick Pearson, *Neighbors Mourn Dickson Mounds' Demise*, CHI. TRIB. (Nov. 26, 1991), <https://www.chicagotribune.com/news/ct-xpm-1991-11-26-9104170045-story.html> [<https://perma.cc/S4L8-8CG7>].

⁹³ Nafziger, *supra* note 56, at 47–48.

⁹⁴ *NAGPRA Compliance*, ASS'N ON AM. INDIAN AFFS., <https://www.indian-affairs.org/nagpra-compliance.html> [<https://perma.cc/MD8T-2ZDP>]; see 25 U.S.C. § 3002(a) (establishing governance procedures for the ownership and control of Native American cultural objects); *Id.* § 3002(c)(1) (requiring that all excavation conform to NAGPRA and that excavation on tribal land is done with Native American consent); *Id.* § 3002(d) (providing rules in the case of inadvertent discovery of Native American remains, including that the finder must notify the Department of the Interior and shall cease whatever activity led to the discovery, such as construction or agriculture).

⁹⁵ See 25 U.S.C. § 3002 (establishing the right of title to Native American human remains and certain sacred and funerary objects and describing the process by which cultural affiliation may be recognized); *NAGPRA Compliance*, *supra* note 94 (providing information for those wishing to make claims by defining relevant terms and parties, instructing that “descendants” include people related through blood, adoption, or the kinship system of the tribe in question and that claims may be made against federal agencies and museums that receive federal funds).

⁹⁶ See 25 U.S.C. § 3001(2) (defining “cultural affiliation” as a shared identity traced from prehistory to the modern day); *id.* § 3005(a) (allowing repatriation of artifacts if probable affiliation is established between human remains or cultural objects and a direct lineal descendent, or when cultural affiliation may be shown). Cultural affiliation between the claimant and the remains may be established by a preponderance of evidence including geographic, linguistic, biological, folkloric, historical, or archaeological connections, or through expert opinion. *Id.* § 3005(a)(4); *NAGPRA Compliance*, *supra* note 94.

⁹⁷ See 25 U.S.C. § 3001(3) (defining burial sites, cultural items, and other relevant terms). The items covered by NAGPRA are limited to those associated with the funerary process, such as human remains and burial goods, as well as sacred objects and “cultural patrimony,” defined as culturally important items. *NAGPRA Compliance*, *supra* note 94.

⁹⁸ *NAGPRA Compliance*, *supra* note 94. Under the statute, ownership of Native American human remains and objects belong to the lineal descendant of the Native American individual, if it can be determined, or a Native American tribe affiliated by geographical proximity or culture to the deceased. 25 U.S.C. § 3002(a).

Importantly, NAGPRA requires beneficiaries of federal funding, such as museums and universities, to keep records and notify Native American tribes of any human remains and sacred objects in their possession.⁹⁹ NAGPRA further obligates these institutions to repatriate objects upon request from a descendent or affiliated tribe, regardless of whether the museum receives compensation or if it obtained the items before Congress enacted NAGPRA.¹⁰⁰ These provisions of NAGPRA are important because they negate legal title to cultural items in federally funded institutions and provide ownership rights solely based on the tribal cultural affiliation of an item.¹⁰¹ NAGPRA's repatriation rule has two exceptions under which the institution may retain the item: (1) if the objects are critically important for a scientific study which would be "of major benefit" to the United States and (2) if there are competing claims for an item from more than one tribe or descendant.¹⁰²

Scholars largely agree that NAGPRA solidified the basic rights of Native American people because it establishes their right to claim human remains and sacred objects and forces institutions to treat these items with respect.¹⁰³ As mentioned, NAGPRA affirms the right of descendants of Native American tribes to make claims for repatriation of certain human remains or objects.¹⁰⁴ To make a claim, however, the tribe must be recognized by the federal government.¹⁰⁵ If no direct descendant can be found, a culturally affiliated tribe

⁹⁹ 25 U.S.C. § 3003. Museums are required to compile such inventories in consultation with tribal government officials to accurately identify the geographical and cultural affiliations of the items. *Id.* § 3003(a)–(b)(1). After identifying an affiliated tribe, the museum must notify the Native American group of the human remains or cultural items in their possession. *Id.* § 3003(d).

¹⁰⁰ 25 U.S.C. § 3005(a); SCHÖNENBERGER, *supra* note 55, at 88. NAGPRA permits repatriation delay only if the item has yet to be studied and the study would be "of major benefit" to the United States. 25 U.S.C. § 3005(b).

¹⁰¹ *See* 25 U.S.C. § 3002(a) (declaring that all covered items found after Congress enacted NAGPRA are considered owned and controlled by a descendent or affiliated tribe); *id.* § 3003 (requiring inventories and tribal identifications based on available data of cultural affiliation, and geographic location, and information regarding the item's acquisition).

¹⁰² *Id.* § 3005(b), (e). If a study is "of major benefit" to the United States, the objects must be repatriated within ninety days of the study's completion. *Id.* § 3005(b). In contrast, Israel requires archaeologists to report any human skeleton findings to the Religious Services Ministry which immediately reburies the materials without studying the bones. Nir Hasson, *Israeli Archaeologists Dodge the Law to Study Human Remains*, HAARETZ <https://www.haaretz.com/israel-news/premium-israeli-archaeologists-dodge-the-law-to-study-human-remains-1.5434635> [<https://perma.cc/7GGM-YMEJ>] (Apr. 10, 2018). There is evidence, however, that archaeologists in Israel do not always follow that regulation. *See id.* (providing examples of excavations that do not follow requirements in order to study the discovered human remains).

¹⁰³ *See* Nafziger, *United States*, *supra* note 14, at 507 (identifying the statute as a "human rights law" and affirming that its main goal is to affirm Native American ownership of their heritage and to provide for repatriation (citing PANEL FOR A NAT'L DIALOGUE ON MUSEUM/NATIVE AM. RELS., REPORT § D(1)(a) (1990), *reprinted in* 24 ARIZ. ST. L.J. 487, 494 (1992))).

¹⁰⁴ 25 U.S.C. § 3005(a).

¹⁰⁵ *See id.* at § 3001(7) (defining eligible Native American tribes as those that have been recognized for receiving federal aid or services). A tribe may become federally recognized by an act of Con-

may claim the object following demonstration of an affiliation on the basis of kinship, geographic, biological, anthropological, linguistic, folkloric, historical, or other connection.¹⁰⁶

The Department of the Interior administers NAGPRA.¹⁰⁷ The Department has a Review Committee to resolve disputes and ensure that museums are conducting inventories and notifying descendants.¹⁰⁸ NAGPRA provides criminal penalties for anyone who knowingly buys, sells, profits from, or transports any cultural item covered by the Act.¹⁰⁹ An institution violates NAGPRA by selling or transferring a NAGPRA-covered item or by failing to comply with the statute's stipulated inventory, tribal notice, and repatriation requirements.¹¹⁰

gress, through a Department of the Interior inquiry, or by a court decision. *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/982N-PPDH>]. Federal recognition confers important benefits to tribes, including eligibility for funding, services, and rights of self-government. *Id.* Tribes may also be recognized by state governments. Martha Salazar, *State Recognition of American Indian Tribes*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2016), <https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx#:~:text=There%20are%2063%20state%2Drecognized,formal%20process%20for%20recognizing%20tribes> [<https://perma.cc/DH2U-GRM9>]. Although state recognition may provide eligibility for certain forms of funding from the Departments of Labor and Education, for example, it does not confer other benefits, like cultural protection under NAGPRA. *See id.* (outlining the benefits of state recognition and acknowledging that it lacks the full protection of federal status).

¹⁰⁶ 25 U.S.C. § 3005(a)(4). These factors must be proved by a preponderance of the evidence and tribes often rely on the use of an expert witness. Nafziger, *supra* note 56, at 49. An expert witness, however, may not be given much weight when used to support a claim of affiliation. *See Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1224 (D. Nev. 2006) (finding, in the case of the Fallon Paiute-Shoshone Tribe suing a federal agency for failing to repatriate affiliated remains, that the agency could dispute the Tribe's expert if there was sufficient evidence, but cautioning that the agency could not simply ignore evidence or refuse to give explanations for denial).

¹⁰⁷ *See* 25 U.S.C. § 3011 (giving the Secretary of the Interior the authority to promulgate regulations to carry out the statute); *Native American Graves Protection and Repatriation Act: Enforcement*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/enforcement.htm> [<https://perma.cc/R3XX-X7XT>] (Oct. 24, 2019) (describing the circumstances under which civil penalties may be exacted against non-complying institutions).

¹⁰⁸ 25 U.S.C. § 3006(a); Nafziger, *supra* note 56, at 50–51. NAGPRA established the Review Committee and requires that it consist of seven members, six of whom are appointed by the Secretary of the Interior from three nominations put forth by Native American tribes, museums, and science organizations, and the final member from a list agreed upon by all such groups. 25 U.S.C. § 3006(b)(1). In this way, the Department of the Interior ensures that the Review Committee is staffed evenly by interested parties. *See* Nafziger, *supra* note 56, at 51 (explaining that by requiring the Review Committee members to be split evenly between Native American groups and museums, NAGPRA is trying to balance the interests involved).

¹⁰⁹ 18 U.S.C. § 1170. The penalties for illegally trafficking Native American human remains and cultural objects include fines and the possibility of imprisonment for up to one year for the first offense and up to five years for the second offense. *Id.*

¹¹⁰ *Native American Graves Protection and Repatriation Act: Civil Penalties*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/civil-penalties.htm> [<https://perma.cc/5VTE-B2QY>] (Oct. 14, 2020). The National Park Service provides a detailed FAQ for museums to ensure that they remain in compliance with NAGPRA and avoid civil penalties. *Id.*

C. Enforcement Mechanisms

The NHPA, ARPA, and NAGPRA function together to criminalize improper excavations and looting of Native American cultural material on federal and tribal lands and to prohibit trafficking in cultural artifacts.¹¹¹ Although these statutes provide criminal and civil penalties for violations, they do not specify enforcement mechanisms.¹¹² In practice, federal and state law enforcement officers, customs officials, and museums enforce these statutes.¹¹³ Subsection 1 of this Section examines the role of the FBI and state agencies in enforcing these federal statutes.¹¹⁴ Subsection 2 addresses customs regulations as a means of enforcement.¹¹⁵ Finally, subsection 3 considers the self-regulating policies of museums as an alternative to enforcement.¹¹⁶

1. FBI and State Enforcement

First, although there are a few noteworthy instances of federal and state law enforcement assisting in the execution of these federal statutes, poor training makes enforcement uneven.¹¹⁷ The FBI Art Crime Team, comprised of twenty specially trained agents, is specifically tasked with preventing the looting and trafficking of art and cultural material.¹¹⁸ The Art Crime Team has re-

¹¹¹ See *supra* notes 51–110 and accompanying text (describing how the three federal statutes have overlapping jurisdictions and purposes in that they all seek to safeguard domestic cultural heritage).

¹¹² See 16 U.S.C. §§ 470bb, 470ee (stating that ARPA will be administered by the “Federal land manager,” defined as the Secretary of the Interior and declaring certain acts prohibited but not elaborating on the mechanism for enforcement); 25 U.S.C. §§ 3007, 3011, 3013 (providing penalties for NAGPRA violations and stating that NAGPRA will be administered by the Department of the Interior and that federal courts will have jurisdiction). Although the statutes provide for jurisdictional control in terms of authorizing regulations and determining where court cases should be filed, none of the statutes cite the exact mechanism, for example a certain federal agency or local police force, that will serve to enforce the statutes. See 25 U.S.C. §§ 3007, 3011, 3013 (providing guidance for assessing penalties under NAGPRA, stating that the Secretary of the Interior will promulgate regulations, and giving jurisdiction to federal courts, but failing to clarify what or who will specifically enforce this statute); 16 U.S.C. §§ 470bb, 470ee (designating the Secretary of the Interior as responsible for maintaining ARPA and defining prohibited acts and penalties, but omitting whether a specific agency will actually enforce the statute).

¹¹³ See Nafziger, *United States*, *supra* note 14, at 507–09, 511–12, 524 (presenting an overview of cultural heritage law in the United States and arguing that enforcement mechanisms are lacking among state officials, export personnel, and museums); *infra* notes 117–148 and accompanying text (explaining how different agencies are forced to take up the task of enforcement because there are no other defined avenues in the statutes).

¹¹⁴ See *infra* Subsection I.C.1.

¹¹⁵ See *infra* Subsection I.C.2.

¹¹⁶ See *infra* Subsection I.C.3.

¹¹⁷ See *infra* notes 117–127 and accompanying text (explaining how federal and state police teams have been involved in enforcement actions involving these federal statutes).

¹¹⁸ *What We Investigate: Art Theft*, FBI, <https://www.fbi.gov/investigate/violent-crime/art-theft> [https://perma.cc/G2U8-63FP]. The FBI’s Art Crime Team notes that looting and trafficking art and cultural material is a burgeoning and extremely lucrative area of crime. *Id.* For example, the FBI han-

covered over fifteen thousand pieces of art and cultural materials with an estimated value of over eight hundred million dollars.¹¹⁹

At the state level, enforcement depends upon public reporting and state police action.¹²⁰ All states have statutes protecting archaeological resources and public monuments on state land.¹²¹ These statutes vary in scope and fall into two categories, protecting: (1) cemeteries broadly; and (2) any Native American remains and currently unidentified items.¹²² Similar to the federal statutes, however, state statutes tend to lack specific enforcement mechanisms, with the exception of a few well-funded and high-profile departments.¹²³ There

dled the case of Don Miller, a veteran who pillaged tens of thousands of cultural objects from Native American graves, in addition to other high-profile cases. Braine, *supra* note 5.

¹¹⁹ *What We Investigate: Art Theft*, *supra* note 118. The FBI utilizes the National Stolen Art Database to keep track of stolen objects. *Id.*

¹²⁰ See Nafziger, *United States*, *supra* note 14, at 508 (explaining that without a robust system of export enforcement, the United States relies on internal enforcement of cultural heritage statutes); *infra* notes 121–127 and accompanying text (exploring the role of local law enforcement in cultural heritage safeguarding and recovery). Although many states have passed NAGPRA-like statutes, not all state statutes order the repatriation of Native American remains, and those that do require repatriation do not necessarily substantiate the links between artifacts and claimed descendants. Robert Travis Willingham, *Holding States and Their Agencies Accountable Under the Museum Provisions of the Native American Graves Protection and Repatriation Act*, 71 UMKC L. REV. 955, 957–58 (2003).

¹²¹ Nafziger, *United States*, *supra* note 14, at 508–09. Additionally, courts interpret ARPA as applying broadly across federal, tribal, and even state lands. See *id.* (discussing the trend toward expanding federal authority to police ARPA and NAGPRA mandates on private land); *infra* notes 166–167 and accompanying text (explaining the interpretive expansion of ARPA following the *Gerber* case).

¹²² Willingham, *supra* note 120, at 963–64. For statutes that penalize cemetery desecration, see generally N.J. STAT. ANN. § 2C:33-9 (West 2021) (stating that it is “a disorderly persons offense” to desecrate a public monument or other venerated object); WYO. STAT. ANN. § 6-4-501 (2021) (assessing a fine of \$750 for anyone who opens a grave and removes remains without the consent of a relation of the deceased). For state laws protecting Native American and historical material specifically, see COLO. REV. STAT. §§ 24-80-1301 to -1305 (2021) (including “unmarked human burial” as protected cultural material); NEV. REV. STAT. §§ 383.150–.190 (2020) (protecting any funeral object, grave, or Native American burial site); VT. STAT. ANN. tit. 22, § 791 (2021) (stating that anyone who excavates an archaeological site without authorization will receive a \$1,000 fine or be sentenced to six months in prison and shall forfeit all specimens to the state).

¹²³ See, e.g., ARIZ. REV. STAT. ANN. §§ 41-844, 41-846 (2021) (setting a procedure for inadvertent discovery of human remains but failing to provide for an enforcement mechanism); Nafziger, *United States*, *supra* note 14, at 508–09 (describing that although all states have laws protecting cultural heritage and banning destruction and trafficking, these laws lack specific enforcement mechanisms); Willingham, *supra* note 120, at 965 (explaining that states may not know how local law enforcement should handle situations involving NAGPRA-covered objects on state land). For example, the Manhattan District Attorney’s Office has a unique program, the Antiquities Trafficking Unit, specially dedicated to recovering stolen artifacts from around the world. Jason Daley, *Manhattan DA Launches First Antiquities Trafficking Unit*, SMITHSONIAN MAG. (Dec. 2017), <https://www.smithsonianmag.com/smart-news/manhattan-da-launches-first-antiquities-trafficking-unit-180967607/> [<https://perma.cc/377L-SA4U>] (describing the first local law enforcement team dedicated to investigating and returning illegally trafficked antiquities). Through this Unit, the district attorney’s office alerted the Metropolitan Museum of Art (Met) to an illegally trafficked Ancient Egyptian coffin in its possession and worked with the Met to repatriate it to Egypt. Press Release, The Metro. Museum of Art, The Metropolitan Muse-

have been a few prominent cases involving enforcement of the cultural heritage statutes, but enforcement generally occurs accidentally or because of a focus on drug-smuggling or money laundering—crimes that tend to coincide with antiquities theft.¹²⁴ Police officers may not, for example, be aware that they are witnessing a NAGPRA violation if they do not actually see someone rummaging through a grave because they may not be trained to identify cultural patrimony, like ceramics or jewelry.¹²⁵ Instead, they may be focused on solving more conspicuous crimes, such as robbery or murder, and may not be aware a violation has occurred until a concerned citizen alerts them.¹²⁶ In practice, most states and local law enforcement do not have the capacity to take on

um of Art Returns Coffin to Egypt (Feb. 15, 2019), <https://www.metmuseum.org/press/news/2019/metropolitan-museum-of-art-returns-coffin-to-egypt> [<https://perma.cc/G7SP-GHP2>]. The Met's agreement to return the coffin to Egypt is just one of a series of repatriations in which the Museum has agreed to repatriate an item after pressure from foreign governments and local law enforcement. See Carl Franzen, *Ill-Gotten Gains: How Many Museums Have Stolen Objects in Their Collections?*, THE VERGE (May 13, 2013), <https://www.theverge.com/2013/5/13/4326306/museum-artifacts-looted-repatriation> [<https://perma.cc/6F29-EMVM>] (describing the murky ethics of museums harboring antiquities of uncertain provenance from foreign nations and listing some of the objects the Met has repatriated since 1994, such as two Cambodian statues).

¹²⁴ See Peter D. Hardy, *Art and Money Laundering*, NAT'L L. REV. (Mar. 20, 2019), <https://www.natlawreview.com/article/art-and-money-laundering> [<https://perma.cc/BFW2-79NY>] (explaining that art is popular in crime because art trades are generally private, prices are high and may be manipulated, and art can be hidden for years and retain value); Nafziger, *United States*, *supra* note 14, at 512 (explaining the tie between money laundering, drug and weapon smuggling, and the illicit cultural heritage market); Ed Caesar, *What Is the Value of Stolen Art?*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/17/magazine/what-is-the-value-of-stolen-art.html> [<https://perma.cc/63N8-MJD5>] (explaining that the stolen art trade may be a billion-dollar industry because billions of dollars of art is stolen or lost annually); Jonathan Jones, *Gangsters' Use of Paintings as Currency Shows a Profound Belief in Art*, THE GUARDIAN (Sept. 30, 2016), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/sep/30/gangsters-use-of-paintings-as-currency-shows-profound-belief-in-art> [<https://perma.cc/TB8C-CQYP>] (detailing the discovery of two stolen Van Gogh pieces in a drug trafficker's home which the criminal had used as collateral for drug deals).

¹²⁵ See Martin E. McAllister, *Archaeological Law Enforcement Training*, CULTURAL RES. MGMT., 2002, at 15, 15–16 (describing a federal training program to teach ARPA enforcement to officers and archaeologists and stating that although the class was effective, there is still a great unfulfilled need to educate police officers and prosecutors on how to deal with ARPA and other cultural heritage statutes); Kayla M. Bradshaw, *Assessing Wyoming's Public Perceptions and General Attitudes Towards Archaeology, and Statewide Trends in Looting* 23–24 (Apr. 2016) (M.S. thesis, St. Cloud State Univ.) (on file with the Repository at St. Cloud State) (suggesting that the lack of training about ARPA and other cultural heritage laws has resulted in low convictions because police officers do not know what they are looking for).

¹²⁶ See *Finding Our Way Home: Achieving the Policy Goals of NAGPRA: Hearing Before the S. Comm. on Indian Aff.*, 112th Cong. 112-157 (2011) (Statement of Hon. Mark Macarro, Chairman, Pechanga Band of Luiseno Indians) (outlining that Native American people have become highly trained through NAGPRA funding to assist archaeologist and others in the protection of cultural items). In one salient example, a state narcotics chief stated that he had not come across any violations of the cultural heritage laws but acknowledged that he would not be able to identify a cultural item if he saw one. Bradshaw, *supra* note 125, at 24.

matters of cultural heritage items, and would not necessarily have the training to respond effectively.¹²⁷

2. Customs Regulation as a Mechanism of Enforcement

Customs officials are more likely to be in a position to enforce ARPA and NAGPRA's prohibitions on the illicit trafficking of cultural heritage objects than other officials.¹²⁸ The federal government relies on export authorities such as Customs and Border Protection (CBP), the Transportation Security Administration (TSA), and the Bureau of Industry and Security to discover and prevent the export of cultural material from the United States.¹²⁹ Unfortunately, this reliance may be misplaced because the amount of goods coming into and out of the country every day, and the varying appearance of cultural material, makes it very difficult for border authorities to identify items.¹³⁰ One factor hindering effective enforcement by customs professionals is the lack of training and staffing among customs officials.¹³¹ Even without these safeguards,

¹²⁷ See McAllister, *supra* note 125, at 16 (arguing that trainings work to assist enforcement of the cultural heritage statutes and that much more training is needed to prevent rampant looting); Willingham, *supra* note 120, at 965 (explaining that although state statutes exist to criminalize looting, local law enforcement may not know how to handle situations that the statutes do not anticipate, such as the discovery of prehistoric remains without clear affiliation to a particular Native American tribe).

¹²⁸ See 16 U.S.C. § 470ee(b), (c) (prohibiting trafficking in cultural materials identified under federal, state, or local law); 18 U.S.C. § 1170 (banning trafficking of Native American cultural objects described by NAGPRA).

¹²⁹ See Nafziger, *United States*, *supra* note 14, at 509 (describing the role of federal agencies in discovering illegal trafficking and confiscating the items). The FBI's Art Crime Team works to counter illicit trafficking of cultural heritage objects, but with few agents the Team lacks the capacity to deal with the massive scale of trade at ports. See *id.* at 513–14 (describing the small number of agents on Art Crime Team and the Team's focus on fine arts pieces over \$2,000 in value).

¹³⁰ *Id.* at 512 (explaining that given the vast volume of goods passing through U.S. ports daily means there is insufficient time for customs officials to conduct the level of inspection necessary to find smuggled art and antiquities, and even if there were time, the officials may not be trained to recognize cultural material). Exports of goods in 2018, for example, totaled \$1.7 trillion. *Foreign Trade: Annual Trade Highlights*, U.S. CENSUS BUREAU, [https://www.census.gov/foreign-trade/statistics/highlights/annual.html#:~:text=Exports,-2018%20exports%20of%20goods%20\(%241.7%20trillion\)%20were%20the%20highest,were%20the%20highest%20on%20record](https://www.census.gov/foreign-trade/statistics/highlights/annual.html#:~:text=Exports,-2018%20exports%20of%20goods%20(%241.7%20trillion)%20were%20the%20highest,were%20the%20highest%20on%20record) [https://perma.cc/9BU6-7YJ5].

¹³¹ See Nafziger, *United States*, *supra* note 14, at 512 (describing the lack of resources available to customs officials to scrutinize each item that passes through inspection points). Additionally, survey results demonstrate that many customs officials do not know the rules and regulations that govern cultural material, nor would they necessarily be able to identify cultural objects. *Id.* Nonetheless, other countries and institutions, such as the International Criminal Police Organization (INTERPOL), aid the United States in combatting the export of illicitly trafficked goods. *Id.* at 515. INTERPOL is an inter-governmental police force comprised of representatives of 194 member-states. *What Is INTERPOL?*, INTERPOL, <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL> [https://perma.cc/8HRL-TMZ2]. INTERPOL lacks police powers, operating instead by encouraging cooperation and the sharing of information among member-states to combat international trafficking of drugs, cultural heritage, and people. JOTE, *supra* note 12, at 241–42. INTERPOL shares information, such as fingerprint records, maintains an active criminal database, and assists enforcement communication by processing and disseminating information globally. *What Is INTERPOL*, *supra*. INTERPOL also has a

illicitly trafficked cultural property may become apparent to a customs official if the agent finds that an item was falsely declared or undervalued on a customs declaration.¹³² The federal anti-smuggling statute allows federal agents to seize and force forfeiture of goods brought into the United States illegally.¹³³ The statute also criminalizes knowing participation in trafficking cultural items.¹³⁴ After cultural heritage objects are forfeited, the items should be returned to their rightful owners.¹³⁵

3. The Self-Enforcing Role of Museums

In 1983, Congress enacted enabling legislation for the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Convention).¹³⁶ The UNESCO Convention, originally enacted in 1970 by U.N. member-states, provides a framework prohibiting unauthorized trafficking of cultural property in member-states that adopt the framework nationally.¹³⁷ Specifically, the Convention requires member-states to enact protective measures for cultural material, adopt border-control protections to prevent illicit trade, and return stolen cultural material.¹³⁸ The Convention's implementing legislation in the United States, the Cultural Property Implementation Act (CPIA), prohibits any citizen, organization, or federal entity from harboring illicitly trafficked cultural mate-

publicly accessible database of stolen art, including descriptive characteristics. *Stolen Works of Art Database*, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database> [<https://perma.cc/22BE-4AG2>].

¹³² Nafziger, *United States*, *supra* note 14, at 516. Valuation of imported or exported material is within the general powers of customs officials. *Id.* Failure to report an import or inaccurate reporting is considered commercial fraud, a federal offense. *Id.*

¹³³ 18 U.S.C. § 545; SCHÖNENBERGER, *supra* note 55, at 68.

¹³⁴ SCHÖNENBERGER, *supra* note 55, at 68. The federal anti-smuggling statute provides fines and imprisonment for up to twenty years. 18 U.S.C. § 545. The United States takes customs violations and smuggling very seriously, and explicitly states that possession of trafficked goods alone is sufficient evidence to convict. *See id.* (outlining the harsh penalties for violating customs law, including a possible twenty-year prison sentence, much greater than that for digging up and trafficking Native American remains within the country multiple times).

¹³⁵ *See* 18 U.S.C. § 545 (stating that items brought into the United States in violation of the statute will be forfeited to the United States); SCHÖNENBERGER, *supra* note 55, at 68 (writing that items forfeited to the United States are then returned to victims).

¹³⁶ Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613).

¹³⁷ *About 1970 Convention*, UNESCO, <https://en.unesco.org/fightrafficking/1970> [<https://perma.cc/9SHY-9TQF>].

¹³⁸ *Id.* The Convention provides suggestions for how to realize each part of the Convention's requirements, such as by establishing databases for cultural heritage and art collections and enacting legislation to protect cultural heritage and create trade controls. *See id.* (providing detailed guidance, including how national protections might include inventories, ethical codes for dealers, and education).

rial.¹³⁹ Because the CPIA applies to all entities and persons in the United States, it requires all museums to return any cultural material that a foreign nation can prove was stolen.¹⁴⁰ Although museums in the United States are not obligated to investigate their collections, they tend to treat the CPIA obligations as a professional responsibility and thus do extensive research prior to acquiring material.¹⁴¹

The International Council of Museums (ICOM), of which many museums are members, produces professional ethics guidelines for member-museums.¹⁴² From its inception in 1946, ICOM has created regulations and standards for members to stem the trade of trafficked goods.¹⁴³ These regulations include a prohibition on member museums procuring cultural property without evidence

¹³⁹ See 19 U.S.C. § 2601(11) (identifying parties covered by the CPIA in the United States); *id.* § 2607 (stating that no stolen cultural object may be brought into the U.S.); *id.* § 2609 (iterating that any item subject to an import restriction or was removed in violation of the statute may be seized and forfeited to the United States to return to its state of origin). Section 2602 of the CPIA describes the procedures by which foreign states may make claims to the U.S. for the return of stolen material and lists the obligations for parties who wish to respond to complaints. *Id.* § 2602.

¹⁴⁰ See *id.* § 2601(11) (providing a broad definition for parties subject to the CPIA). The CPIA allows the President, counseled by the Cultural Property Advisory Committee, a special group composed of cultural material experts and museum officials, to designate items to be covered by the CPIA and to authorize the seizure and forfeiture of any item found to be imported into the United States in violation of the CPIA. *Id.* §§ 2602(a), (f), 2609. For example, in 2011 in *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, the U.S. District Court for the District of Maryland held that Customs and Borders Protection (CBP) correctly seized ancient Cypriot and Chinese coins because their authority had come by way of a presidential order designating ancient coins with unknown provenance as covered by the CPIA. 801 F. Supp. 2d 383, 392–94, 409, 412–13 (D. Md. 2011).

¹⁴¹ James Cuno, *View from the Universal Museum*, in *IMPERIALISM, ART AND RESTITUTION* 15, 22–23 (John Henry Merryman ed., 2006). This due diligence includes considering the nature of the acquisition, the parties involved, purported provenance and documentation of the item, and any known history of the material. *Id.*

¹⁴² See JOTE, *supra* note 12, at 243; *Missions and Objectives*, INT'L COUNCIL OF MUSEUMS, <https://icom.museum/en/about-us/missions-and-objectives/> [<https://perma.cc/9UP3-9YRL>]. The International Council of Museums (ICOM) currently has about 44,000 museum professionals as members in over 138 countries. *Id.* Prominent New York-based members of ICOM include the Metropolitan Museum of Art, the American Museum of Natural History, and the Guggenheim. *Thank You to Our 2020 Institutional Members!*, INT'L COUNCIL OF MUSEUMS, <https://www.icomus.org/institutional-members> [<https://perma.cc/3XSY-KLBU>].

¹⁴³ JOTE, *supra* note 12, at 243; *Standards*, INT'L COUNCIL OF MUSEUMS, <https://icom.museum/en/resources/standards-guidelines/standards/> [<https://perma.cc/RD7J-6TRQ>]. These standards include the Code of Ethics for Museums, created in 1970, as well as guidance on curation, security, and professional ethics for museums. JOTE, *supra* note 12, at 243; IRINI A. STAMATOUDI, *CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW* 169 (Evangelos Kyriakidis ed., 2011). ICOM also collaborates with the International Observatory on Illicit Traffic in Cultural Goods, a website for institutions to share data about cultural material and cooperate to prevent trafficking. *International Observatory on Illicit Traffic in Cultural Goods*, INT'L COUNCIL OF MUSEUMS, <https://icom.museum/en/our-actions/heritage-protection/international-observatory-on-illicit-traffic-in-cultural-goods/> [<https://perma.cc/375G-Q52P>].

that the object was obtained legally.¹⁴⁴ This may be difficult for museums to satisfy and requires institutions to gather information from potential dealers diligently.¹⁴⁵ ICOM works closely with UNESCO to address cultural heritage item trafficking.¹⁴⁶ Additionally, ICOM requires member-museums to accommodate repatriation efforts by returning cultural objects obtained in violation of the UNESCO Convention of 1970.¹⁴⁷ Although there are several enforcement avenues available for the dominant cultural heritage statutes in the United States, neither the enforcement mechanisms nor the laws themselves are adequate to address the illegal looting and trade of cultural material.¹⁴⁸

II. INADEQUACIES, INCONSISTENCIES, AND LOOPHOLES

Congress enacted the NHPA, ARPA, and NAGPRA to confront the problems of historical site depreciation, looting, and antiquities trafficking, and to repatriate cultural materials that rightfully belong to Native American groups.¹⁴⁹ Although these statutes can work together to address these prob-

¹⁴⁴ JOTE, *supra* note 12, at 243. The code specifically obligates museums to make “[e]very effort” to ensure the item has valid title, a standard that requires establishing and investigating the full history and purported acquisition of the item since it was created or initially discovered. ICOM CODE OF ETHICS FOR MUSEUMS 9 (Int’l Code of Museums 2017). The code does provide, however, that if the object may make such an “outstanding” addition to world understanding and if experts agree, it may be in the public interest for museums to retain an item lacking provenance information. *Id.* at 19. ICOM, however, states that very important items without sufficient proof of title should be displayed sparingly to avoid encouraging illegal trade of cultural heritage items. *Id.* at 25.

¹⁴⁵ See ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144, at 9 (mandating that museums take “[e]very effort” to ensure proper provenance); JOTE, *supra* note 12, at 243 (stating that ICOM requires museums to show that any acquired object was legally obtained by proving lawful title of the object at each stage of its life, which may be quite difficult if the object is very old or if the means of acquisition are unknown).

¹⁴⁶ JOTE, *supra* note 12, at 243. Indeed, ICOM’s headquarters are within UNESCO’s office in Paris. *Id.* In May 2020, for example, ICOM and UNESCO jointly released two studies that demonstrated the negative effect the COVID-19 pandemic was having on cultural heritage institutions, including that at the height of the pandemic 90% were closed, and expressed their joint concern that up to 13% might never reopen. *COVID-19: UNESCO and ICOM Concerned About the Situation Faced by the World’s Museums*, UNESCO (May 18, 2020), <https://en.unesco.org/news/covid-19-unesco-and-icom-concerned-about-situation-faced-worlds-museums> [<https://perma.cc/XG68-EPP2>].

¹⁴⁷ JOTE, *supra* note 12, at 243; STAMATOUDI, *supra* note 143, at 172–73. It is noteworthy, however, that museums are required to repatriate only if mandated by the rules of their jurisdiction. STAMATOUDI, *supra* note 143, at 173.

¹⁴⁸ See Nafziger, *United States*, *supra* note 14, at 507–09, 511–12, 524 (positing that the federal statutes which protect cultural material in the U.S. are limited in scope and rely on internal enforcement, which may lack funds and training).

¹⁴⁹ See National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, 915 (describing the purpose of the NHPA as safeguarding historic properties of importance to American history); Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (explaining that ARPA safeguards archaeological resources that are threatened, finite, and from which people can learn); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 4, 104 Stat. 3048, 3052 (1990) (declaring that Native American remains and cultural materials belong to Native Americans and that these items shall be protected and repatriated under the law).

lems, their overall impact is uneven.¹⁵⁰ These statutes have inadequacies in scope and enforcement that impact their efficacy.¹⁵¹ Section A discusses how the scope of the statutes is limited and ambiguous, causing gaps in materials covered by the statutes and enforcement.¹⁵² Section B details the unclear terms and procedures in the statutory claims process.¹⁵³ Section C examines uneven and occasionally unreliable enforcement trends.¹⁵⁴ Finally, Section D presents Operation Cerberus, a case study of an FBI action that highlights the aforementioned issues.¹⁵⁵

A. Gaps in Statutory Coverage

Cultural material must meet certain criteria to receive the protections of the NHPA, ARPA, and NAGPRA.¹⁵⁶ First, ARPA and NAGPRA require that the cultural material is discovered on federal or tribal land.¹⁵⁷ Second, all three statutes require that the cultural material is tangible, older than a certain age, and is either important to historical understanding or belong to a certain class of item, such as funerary or sacred indigenous objects or human remains.¹⁵⁸ Finally, NAGPRA requires that the claimant is a member of a federally recog-

¹⁵⁰ See *infra* notes 229–237 and accompanying text (describing Operation Cerberus, in which suspects were charged with violations of both ARPA and NAGPRA). Indeed, scholars argue that the overlap of these statutes offers more robust protections because there are multiple options for repatriation and historical protection. See Nafziger, *supra* note 56, at 70 (describing the strengths of the federal cultural heritage safeguarding statutes, including that they dovetail nicely with each other, so a more recent funerary good or human remain that might not be covered by ARPA would be covered by NAGPRA); *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914–15, 917 (D.C. Cir. 2003) (finding meritless the tribe’s claim that the Army Corps of Engineers’ transfer of a parcel of land associated with the tribe to the state of North Dakota for wildlife restoration would harm cultural artifacts because the tribe could still pursue claims under NAGPRA, ARPA, and the NHPA).

¹⁵¹ See *infra* notes 156–228 and accompanying text (examining some of the inadequacies in the statutes in terms of scope, claims process, and enforcement).

¹⁵² See *infra* Section II.A.

¹⁵³ See *infra* Section II.B.

¹⁵⁴ See *infra* Section II.C.

¹⁵⁵ See *infra* Section II.D.

¹⁵⁶ See *supra* notes 61–110 and accompanying text (outlining the mechanics of each of the three statutes, including jurisdiction and enforcement).

¹⁵⁷ See 16 U.S.C. § 470bb(3)(A) (stating that the statute applies to lands owned or maintained by the federal government, or lands held by or in trust for Native American tribes or people that are subject to a federally imposed restriction on their sale); 25 U.S.C. § 3002(a) (limiting the statute to land owned or controlled by the federal government and “tribal lands,” land within a reservation or administered for the benefit of Native American people).

¹⁵⁸ See 16 U.S.C. § 470bb(1) (defining the cultural material covered by the statute as tangible remains of human activity, which might be studied by archaeologists, that are at least one hundred years old); 36 C.F.R. § 60.4 (2021) (stating that the item must be material, important to the history of the United States, and that the item should be older than fifty years, although younger items may qualify if exceptionally important); 25 U.S.C. § 3001(3) (explaining that the statute applies to funerary objects, such as human remains or burial goods, sacred items, and “cultural patrimony,” objects with a continuing historical or cultural importance).

nized tribe.¹⁵⁹ The stringent requirements for cultural material to qualify for protection under these statutes creates difficulties in their interpretation, as well as barriers for those who wish to file claims for repatriation or bring enforcement actions.¹⁶⁰

From a bird's eye view, ARPA and NAGPRA apply to objects of archaeological interest, Native American human remains, and cultural objects found on federal and tribal lands.¹⁶¹ The NHPA permits the creation of landmarks and grants protected status for sites listed on the National Register, which is designed to coordinate preservation efforts.¹⁶² Notably, these statutes have a limited range of coverage in terms of both geographic scope and cultural material because each has a very specific criteria for covered objects which creates gaps in what is protected.¹⁶³ Regarding location, the NHPA theoretically offers the broadest protection, in that location does not impact whether a property may be added to the National Register.¹⁶⁴ In contrast, ARPA and NAGPRA are limited

¹⁵⁹ 25 U.S.C. § 3001(7); see *supra* notes 104–108 and accompanying text (describing NAGPRA's claims process and the role of the Review Committee). A "descendant" is a person related by blood, adoption, or through the kinship system of the tribe to an object or set of remains. *NAGPRA Compliance*, *supra* note 94; see 25 U.S.C. § 3005(a)(1)–(4) (stating that Native American human remains or objects may be returned to a lineal descendant, affiliated tribe, or to an individual or tribe that can demonstrate cultural affiliation). A descendant may not necessarily be required to show direct lineage, but may instead show cultural affiliation by geographic, linguistic, biological, genetic, or archaeological ties to the claimed materials. 25 U.S.C. § 3005(a)(4); *NAGPRA Compliance*, *supra* note 94.

¹⁶⁰ See *infra* notes 190–202 and accompanying text (discussing the Kennewick Man case, in which unclear language about the age requirement for human remains covered by NAGPRA led the court to decide that the claimed item, a nine thousand year old skeleton, was too old to be considered "Native American" because there was a dearth of evidence about the Native Americans in the country that long ago). Additionally, even though the NHPA, ARPA, and NAGPRA have strong demonstrations of the intent to preserve cultural items, the statutes suffer from ambiguous terms and limits of coverage, like NAGPRA's failure to cover private land. See Nafziger, *supra* note 56, at 73–74 (pointing out other flaws, like lack of funding and that NAGPRA repatriation only applies to institutions and not individuals).

¹⁶¹ See 16 U.S.C. §§ 470aa–470bb (limiting the scope of ARPA to items relevant to archaeological study, including objects that indicate human activity, and stating that the statute applies to items discovered on federal and Native American lands); 25 U.S.C. § 3001(3), (5) (delineating cultural items covered under NAGPRA as human remains, funeral and sacred objects, and cultural items found on federal or Native land).

¹⁶² See 36 C.F.R. § 60.4 (describing the criteria for property covered by NHPA including association with a major historical event or person, demonstrated characteristics of a historical time period, and informative value about the past); National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, 915 (presenting the overall purpose of the NHPA to preserve the historical foundation of the country to benefit the people of the U.S.).

¹⁶³ See 16 U.S.C. §§ 470aa–470bb (covering cultural material indicative of past human activity, if it is over one hundred years old and not on private land); 25 U.S.C. § 3001(3), (5) (defining cultural items covered under NAGPRA as movable objects, not the grave structures themselves, and only objects found on federal or Native land); 36 C.F.R. § 60.4 (requiring that properties placed on the National Register have historical importance and be immovable).

¹⁶⁴ See 36 C.F.R. § 60.4 (outlining what historical landmarks are covered under the NHPA, such as buildings, sites, and districts and providing criteria, including historical significance and cultural characteristics to assist people in deciding whether to apply for National Register status).

by their statutory language to extending protection only to cultural sites located on public and federal lands.¹⁶⁵ In 1993, in *United States v. Gerber*, however, the U.S. Court of Appeals for the Seventh Circuit concluded that ARPA is not confined solely to federal and Indian lands, extending the Act to private lands.¹⁶⁶ In *Gerber*, Judge Richard A. Posner found that the legislative intent of ARPA was to protect archaeological lands broadly and thus there was no basis to limit the interpretation of the statute to federal and tribal lands alone.¹⁶⁷ Additionally, many states have enacted legislation similar to ARPA and NAGPRA to extend protections to state-owned land.¹⁶⁸

In line with these issues of geographic scope is ambiguity over what specific cultural artifacts are covered by each statute.¹⁶⁹ The NHPA, for example, covers property that has a demonstrated significance to the national understanding of the historical, anthropological, engineering, or cultural tradition of

¹⁶⁵ See 25 U.S.C. § 3001(5) (limiting protection to items found on federal and tribal lands); 16 U.S.C. § 470bb (restricting the statute as applying solely to items on federal and tribal lands). Dickson Mounds, a privately owned museum constructed around a Native American burial site in Illinois shuttered its exhibit of Native American remains in 1992 after legal and public pressure on the governor. Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 639 n.342 (1995). The human remains and cultural objects at Dickson Mounds were reburied. *Id.* The governor closed the exhibit out of respect for Native American tribes and for the 234 human remains on display. Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 103 (1992). In this case, the federal government had no power to intervene because the human remains and other cultural items were located on private land and were not being looted or trafficked, just displayed. See 25 U.S.C. § 3001(5) (limiting protection to items found on federal and tribal lands); 16 U.S.C. § 470ee (criminalizing excavation or trafficking of cultural items without authorization).

¹⁶⁶ See *United States v. Gerber*, 999 F.2d 1112, 1113, 1116 (7th Cir. 1993) (finding that private land was not exempt from ARPA and that the defendant, who had removed archaeological material from private land and trafficked it, had violated the statute).

¹⁶⁷ *Gerber*, 999 F.2d at 1115–16. Judge Posner declared it “almost inconceivable” that Congress would have restricted the statute to federal and tribal lands “to encourage” grave-robbers to instead focus on state property, or that Congress would have imposed a substantial fine only to discourage looting on federal or tribal property. *Id.* The statute’s purpose, the court explained, is to protect archaeological materials on “public lands,” meaning federal and state, and tribal lands. *Id.* at 1114 (quoting 16 U.S.C. §§ 470aa(a)(1), (b)).

¹⁶⁸ See, e.g., ARIZ. REV. STAT. ANN. § 41-844 (2021) (presenting the Arizona statute on inadvertent discovery of human remains by a person in charge of an excavation or construction site on public land or land owned by a corporation); Nafziger, *United States*, *supra* note 14, at 508 (elaborating that all states now have cultural heritage safeguarding statutes of some form that protect material on state land). Gerstenblith, *supra* note 165, at 630 (discussing the wide range of state statutes concerning cultural heritage protection and explaining that efficacy, or the ability of these statutes to deter and criminalize the looting of cultural material, varies greatly between states); Willingham, *supra* note 120, at 965 (explaining that although all states have passed statutes similar to the federal NAGPRA and ARPA, many do not explain what should happen to discovered cultural materials). Public pressure can also play a role in convincing states to enact further protections, as was the case with Dickson Mounds in Indiana. See Gerstenblith, *supra* note 165, at 639 n.342 (stating that public pressure on the governor and the threat of legal action ultimately led to the Dickson Mounds closing).

¹⁶⁹ See *infra* notes 170–176 and accompanying text (describing incongruities over what items are covered by what statute and whether there are gaps in coverage).

the United States.¹⁷⁰ This language is purposely broad, but the statute remains limited to landmarks including houses and historical districts.¹⁷¹ In contrast, ARPA covers archaeologically significant artifacts that are at least one hundred years old.¹⁷² Although ARPA is significantly more powerful than the former Antiquities Act, its coverage is still limited to artifacts at least one hundred years old.¹⁷³ As such, ARPA is well-suited to address illegal excavation or trafficking of indigenous heritage sites, which are older than one hundred years, but fails to cover artifacts and sites from modern history.¹⁷⁴

NAGPRA, although not bound by minimum age requirements, covers only four categories of objects—human remains, sacred objects, funerary objects, and cultural patrimony—and requires that these must be repatriated by federally funded institutions or federal agencies.¹⁷⁵ This means that private collectors or institutions that do not accept federal grants are not obligated to return cul-

¹⁷⁰ See 36 C.F.R. § 60.4 (2021) (describing the types of properties, such as buildings, sites, and local districts, that are eligible to be placed on the National Register and receive protection under the NHPA). The regulation provides the Huron County Courthouse and Jail in Ohio as an example of a historical site on the National Register. 36 C.F.R. § 60.3 (2021). The National Register indicates that the site was added in 1974, is significant for its unique architecture and engineering, and that the historical period of significance was from 1900 to 1924. *Ohio—Huron County*, NAT'L REG. OF HISTORIC PLACES, <http://www.nationalregisterofhistoricplaces.com/oh/huron/state.html> [https://perma.cc/XQC9-US6N].

¹⁷¹ See 36 C.F.R. § 60.4 (providing criteria for National Register designation and stating guidelines, such as property that has become important in only the last fifty years must be exceptionally important, and that a birthplace or grave of a person may be designated if there is no other property associated with the person's life). Indeed, the criteria for National Register designation is intentionally broad, in line with the intent of the NHPA to preserve the historical basis of the country and to give "a sense of orientation" to its people. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, 915.

¹⁷² 16 U.S.C. § 470bb(1). ARPA is strict about the one-hundred-year age minimum, stating that unless the archaeological material is over that age, it will not be covered by the statute. *Id.*

¹⁷³ See Gerstenblith, *supra* note 70, at 306 n.5 (explaining that Congress enacted ARPA to clarify the vague definitions in the Antiquities Act which resulted in uneven enforcement). The U.S. Court of Appeals for the Ninth Circuit, in 1974, in *United States v. Diaz* found that the Antiquities Act was unconstitutionally vague. 499 F.2d 113, 115 (9th Cir. 1974). The court concluded that because the statute failed to define "ruin," "monument," or "object of antiquity," people could not be expected to follow a law that was vague as to what items were within its scope. *Id.* at 114; Fitz Gibbon, *supra* note 56.

¹⁷⁴ Compare 16 U.S.C. § 470bb(1) (providing a one-hundred-year age minimum for items covered by ARPA), with 36 C.F.R. § 60.4 (stating that, barring exceptional circumstances, a site must be over fifty years old to qualify for National Register status). For example, the Martin Luther King, Jr. National Historic Site, the childhood home of Martin Luther King Jr., in Atlanta, is on the National Register marking it as a property with significance to the American historical and cultural record. See *Martin Luther King, Jr.*, NAT'L PARK SERV., <https://www.nps.gov/malu/index.htm> [https://perma.cc/PT8W-TCYP] (Mar. 27, 2022); see 36 C.F.R. § 60.4 (describing criteria for National Register eligibility). The site is less than one hundred years old, so it would not qualify under ARPA. *Martin Luther King, Jr.*, *supra*; see 16 U.S.C. § 470bb(1) (stating the strict age restrictions for ARPA protection).

¹⁷⁵ 25 U.S.C. §§ 3001(3), 3005(a); *NAGPRA Compliance*, *supra* note 94.

tural items under the statute.¹⁷⁶ Finally, NAGPRA allows claims for repatriation by descendants or a person affiliated with the Native American cultural material or human remains.¹⁷⁷ The statute only grants these rights to federally recognized Native American tribes.¹⁷⁸ The federal government recognizes five hundred and seventy-four tribes, leaving more than two hundred tribes without recognition and excluding these groups from bringing potentially valid claims.¹⁷⁹

B. Unclear Claims Process

Archaeologists found the Spirit Cave Man in a Nevada cave in 1940.¹⁸⁰ The Spirit Cave Man is the world's oldest naturally preserved mummy, with radiocarbon dating placing the remains at about 10,600 years old.¹⁸¹ Since its discovery, the Spirit Cave Man's body has prompted an intense legal fight for ownership between the Fallon Paiute-Shoshone Tribe and the Bureau of Land Management under NAGPRA.¹⁸² The tribe claimed that the Spirit Cave was

¹⁷⁶ Rebecca Tsosie, *International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property*, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 221, 240 (Christoph B. Graber, Karolina Kuprecht & Jessica C. Lai eds., 2012). Without proof that the cultural materials at issue were excavated in violation of ARPA or were unlawfully trafficked in interstate commerce under NAGPRA and ARPA, there is no statutory mandate that private owners return cultural material. See 25 U.S.C. § 3001(5) (restricting the geographic scope of NAGPRA to items found on federal and tribal lands); 16 U.S.C. § 470bb (limiting ARPA to items on federal and tribal lands). Rather, private property owners are considered owners of any Native American cultural property found on their land; Tsosie, *supra*, at 240.

¹⁷⁷ See 25 U.S.C. § 3005(a) (allowing repatriation if affiliation is established between human remains or cultural objects and a direct lineal descendant or through cultural affiliation). Affiliation is generally demonstrated by a preponderance of evidence including geographic, linguistic, biological, folkloric, historical, or archaeological connections, or through expert opinion. *Id.* § 3005(a)(4); *NAGPRA Compliance*, *supra* note 94.

¹⁷⁸ See 25 U.S.C. § 3001(7), (9) (defining an "Indian tribe" as a native group recognized for receiving federal aid or services, as opposed to a "Native American" which means a person of or related to a group indigenous to the country).

¹⁷⁹ See Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic*, NPR (Apr. 17, 2021), <https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aid-during-pandemic> [<https://perma.cc/8S7R-5NMC>] (providing statistics regarding unrecognized tribes and stating that although some tribes received federal recognition when they signed treaties with the government, others have a hard time becoming recognized). The federal government screens tribal applications for federal recognition thoroughly, looking at genealogy and tribal history to substantiate claims of Native American ancestry and prevent fraud. See Adam Elmahrek & Paul Pringle, *Two Tribes Aren't Recognized Federally. Yet Members Won \$500 Million in Minority Contracts*, L.A. TIMES (Dec. 31, 2019), <https://www.latimes.com/california/story/2019-12-31/native-american-tribes-alabama-minority-contracts> [<https://perma.cc/X6DE-Z6MR>] (discussing the process by which two tribes gained recognition from the state, not the federal government, and were awarded Small Business Loans).

¹⁸⁰ Ewen Callaway, *Ancient Genome Delivers 'Spirit Cave Mummy' to US Tribe*, 540 NATURE 178, 178 (2016).

¹⁸¹ *Id.*

¹⁸² See *id.* at 178–79 (describing the long legal fight for ownership of the mummy); Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1210 (D. Nev. 2006) (noting

part of its ancestral territory, and thus the mummy and associated artifacts belonged to the tribe.¹⁸³ The NAGPRA Review Committee agreed, stating that the remains should be repatriated because there was evidence of cultural affiliation between the remains and the tribe.¹⁸⁴ The Bureau, however, refused to reconsider and retained the remains for scientific analysis.¹⁸⁵ It was not until 2015, when genome sequencing revealed that the mummy was related to the Fallon Paiute-Shoshone Tribe, that the Bureau finally agreed to repatriate the remains.¹⁸⁶

It can be difficult for tribal claimants to prove their connection to human remains or cultural objects under NAGPRA because they must be able to show a relationship between the item and the claimant or the claimant's ancestors.¹⁸⁷

that the tribe sought repatriation in 1997 and continuously objected to the Bureau's scientific analysis of the human remains).

¹⁸³ Callaway, *supra* note 180, at 178–79. The Fallon Paiute-Shoshone's claim was further supported by expert testimony about the shared cultural and historical affiliation of the skeletal remains and the tribe. See *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1211 (stating that the tribe decided to hire experts to present evidence in support of their position); Tsosie, *supra* note 75, at 9 (recounting that the experts hired by the tribe developed the most detailed and up-to-date evidence of connection, which the NAGPRA Review Committee used as the basis for agreeing with the tribe that the remains should be repatriated).

¹⁸⁴ Tsosie, *supra* note 75, at 9. The Bureau of Land Management referred the tribe to the Review Committee to consider their claims of affiliation. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1211. The Review Committee is a group of seven individuals chosen evenly by Native Americans and museums that consults with the two groups and makes recommendations about repatriation claims. Nafziger, *supra* note 56, at 50–51. The Bureau, conversely, asserted that the Review Committee was merely advisory and did not participate in hearings, and the Review Committee ultimately ruled six to one that the Bureau had failed to consider the expert information supporting affiliation between the Spirit Cave Man and the tribe. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1211–12. The Bureau rejected the Review Committee's findings, stating that it was simply an advisory committee and that the matter had been resolved internally, prompting the tribe to file a lawsuit against the Bureau of Land Management. *Id.*

¹⁸⁵ See *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1209 (describing that the Bureau's motive for retaining the mummy was to conduct further scientific analysis). The U.S. District Court for the District of Nevada, in 2006, considered the procedural history of the case, as well as the fact that the tribe had submitted scientific evidence from experts and found that the Bureau had arbitrarily and capriciously dismissed the tribe's claim without proper review despite scientific evidence of affiliation presented by the tribe and the Review Committee's ruling, and ordered the Bureau to reconsider their position. *Id.* at 1225. Importantly, the Court did not hold that the Bureau was incorrect to retain the mummy, citing the Kennewick Man case for the difficulty of dealing with very old specimens, but held that the Bureau's lack of review was unacceptable. *Id.* at 1225–26; see *infra* notes 190–202 (presenting the Kennewick Man case, in which a mummy was found to be too old to fall within NAGPRA's scope).

¹⁸⁶ Callaway, *supra* note 180, at 179. The Spirit Cave Man case may indicate that in disputes over ancient skeletal remains, where the remains are so old that affiliation determinations become difficult, genetic testing may provide an avenue for Native American recovery. See Callaway, *supra* note 180, at 178 (explaining that genetic testing provided evidence that the mummy was closely related to the tribe, which prompted repatriation); *infra* notes 190–202 (describing the difficulty of the Kennewick Man case and how to consider the affiliation of a mummy that is too old to fall under NAGPRA's scope).

¹⁸⁷ See SCHÖNENBERGER, *supra* note 55 at 87 (noting that if a direct relationship cannot be shown, then the items will go to a tribe with a geographic affiliation). Under NAGPRA, a claimant must be a

In theory, failing a clear showing of a direct relationship, a cultural item may be claimed by the most closely affiliated tribe or by the tribe that can show it occupied the land where the item was found.¹⁸⁸ As demonstrated in the Spirit Cave Man case, this process may become contentious, with institutions arguing the claimant's link is not substantiated and refusing to repatriate objects, even if the claimant has the backing of the NAGPRA Review Committee.¹⁸⁹

Until 2004, courts had not considered whether a set of prehistoric human remains found in the United States could be too old to be truly "Native American."¹⁹⁰ In 2004, in *Bonnichsen v. United States*, also called the Kennewick Man case, the U.S. Court of Appeals for the Ninth Circuit was forced to decide whether a set of nine-thousand-year-old human remains found in a river held by the Army Corps of Engineers fell within the protections of NAGPRA.¹⁹¹ Nearby tribes filed claims for ownership of the Kennewick Man, and the Army Corps of Engineers filed a notice of intent to repatriate the remains to the tribes, in line with NAGPRA.¹⁹² Even the Department of the Interior, which

direct descendant of the one who deposited the remains or establish affiliation based on connections such as kinship, geography, folklore, archaeology, and linguistics. 25 U.S.C. § 3005(a)(4). An expert witness may also be brought in to help assess the claim of affiliation by providing evidence of cultural affiliation. See Tsosie, *supra* note 75, at 9 (describing how the tribe brought in experts to substantiate the tribe's claims of affiliation).

¹⁸⁸ See 25 U.S.C. § 3005(a) (preferencing requests made by known lineal descendants but providing other means of establishing affiliation). Scholars argue that because the statute declines to create a hierarchy of factors to determine affiliation, courts are left to decide priority of affiliation for themselves and often prefer scientific evidence over creation myths, for example. SCHÖNENBERGER, *supra* note 55, at 88–89.

¹⁸⁹ See *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1225 (describing the Bureau of Land Management's failure to respect the Review Committee's findings); S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 89–90, 102, 106–07 (2006) (describing how, despite the fact that the Department of the Interior found that the Kennewick Man was culturally affiliated with the four claimant Native American tribes, the U.S. Court of Appeals for the Ninth Circuit refused to recognize the connection because of the age of the remains).

¹⁹⁰ *Bonnichsen v. United States*, 367 F.3d 864, 882 (9th Cir. 2004); see Ray, *supra* note 189, at 90–91 (noting that prior to the Kennewick Man case, courts generally focused on the illegal trafficking of cultural objects, inadvertent discovery, and jurisdiction rather than the age of the remains).

¹⁹¹ 367 F.3d at 869–70; Ray, *supra* note 189, at 90. The Kennewick Man remains were found in 1996 by two teenagers wading in a river near Kennewick, Washington. *Id.* at 95. One of the teens felt something under his foot and pulled a human skull from the mud. *Id.* The remains were eventually excavated by Dr. Chatters, a local anthropologist, under an ARPA permit. *Id.* at 95–96. At first, the local coroner and anthropologist were unsure of the skeleton's ancestry—it appeared to be European but had a stone projectile in its hip. Jenna Musselman, *Ninth Circuit Limits NAGPRA to Remains Linked with Presently Existing Tribes*, 32 ECOLOGY L.Q. 707, 707–08 (2005). Radiocarbon analysis of the projectile revealed that the human remains were between 8,340 and 9,200 years old. *Id.*

¹⁹² *Bonnichsen*, 367 F.3d at 870; Ray, *supra* note 189, at 97. The Army Corps of Engineers dramatically seized the remains from the studying anthropologist after conducting its analysis and agreeing with the tribes' claims of affiliation. Musselman, *supra* note 191, at 708. Additionally, the Army Corps of Engineers filled the entire site with rubble, a move interpreted by the District Court as intentionally trying to prevent discovery of artifacts, not to preserve the archaeological value of the cultural material. Ray, *supra* note 189, at 101–02.

administers NAGPRA, concluded that the remains were affiliated with the tribal claimants by a preponderance of the evidence.¹⁹³ A group of scientists disagreed and sued, arguing that repatriation without analysis would harm their research.¹⁹⁴ In this case, the Ninth Circuit rejected the tribes' claim of ownership and found that the human remains were too ancient to establish affiliation with the tribes and thus were not "Native American" under NAGPRA.¹⁹⁵ Even though the remains were indisputably discovered on the tribes' ancestral land, the court did not find specific information to conclude that the human remains bore a relationship to a modern tribe.¹⁹⁶ The court held that the lack of information about Native Americans from nine thousand years ago made it impossible to find a link between the claimants and the Kennewick Man.¹⁹⁷ Thus, the Ninth Circuit rejected the tribes' claim under NAGPRA and allowed the scientists to continue their research.¹⁹⁸

The ultimate issue in the Kennewick Man case was whether Congress intended NAGPRA's right to claim indigenous human remains to be sweeping or limited.¹⁹⁹ Theoretically, if Congress intended for the statute to apply only to more recent human remains for which a claimant's relationship could more easily be substantiated, the statute would reflect that.²⁰⁰ For example, the stat-

¹⁹³ Ray, *supra* note 189, at 102. Interestingly, the Ninth Circuit noted that the Department of the Interior was not entitled to *Chevron* deference, a means by which courts defer to a federal agency's reasonable decision, due to their failure to properly interpret the statute as referring to a relationship between the remains and a currently existing Native American tribes. *Bonnichsen*, 367 F.3d at 877.

¹⁹⁴ *Bonnichsen*, 367 F.3d at 870; see Musselman, *supra* note 191, at 708 (noting that the scientists objected to the tribes' repatriation claims, protesting that they had not had time yet to study the human remains).

¹⁹⁵ *Bonnichsen*, 367 F.3d at 882. The court elaborated that the remains, at over 9,000 years old, were too ancient to be related to the claimant. *Id.* The court relied on the language in NAGPRA defining "Native American" remains as remains relating to a tribe indigenous to the United States. Musselman, *supra* note 191, at 711. The present-tense use of terms, the court explained, indicated that the remains had to be related to an *existing* tribe. *Bonnichsen*, 367 F.3d at 875. Because of the advanced age of the remains, there was no link to the modern claimant tribes. Musselman, *supra* note 191, at 711–12.

¹⁹⁶ *Bonnichsen*, 367 F.3d at 882. The court acknowledged that the historical record may allow the Department of the Interior to find that the tribes had been in the area for a long time, but not that they shared cultural or genetic affiliation with the tribal claimants. *Id.*

¹⁹⁷ *Id.* The court found there was no evidence for the Department of the Interior to conclude the Kennewick Man shared any cultural or genetic traits with the modern tribes because of the skeleton's age and the lack of historical record from its time. *Id.*

¹⁹⁸ *Id.* The scientists argued that returning the remains to any tribe would prevent their study, causing irreparable harm to academia. See *id.* at 873 (dismissing the tribal claimants' argument that the scientists had no standing and could not show any injury).

¹⁹⁹ See Musselman, *supra* note 191, at 711–13 (describing the considerations made by the court in the *Bonnichsen* case, including an emphasis on congressional history of NAGPRA and Department of the Interior regulations, to decide whether Congress intended "Native American" to be confined to modern-day tribes or to apply more broadly in history (quoting *Bonnichsen*, 367 F.3d at 972)).

²⁰⁰ See *id.* (recounting the rationale of the Ninth Circuit, including the present-tense nature of the statutory language, to conclude that "Native American" specifically referred to modern tribes and

ute could include a specific age limit within which the material might be found to be affiliated with a tribe, or it could explicitly limit affiliation to current tribes that can substantiate their history back to the time of the claimed object.²⁰¹ Indeed, many commentators argue that the Ninth Circuit interpreted NAGPRA's definition of "Native American" too narrowly, thus limiting the rights of future claimants and acting against the spirit of the law.²⁰²

C. Limited Enforcement

In addition to issues of ambiguous scope and process, the NHPA, ARPA, and NAGPRA lack clearly defined enforcement mechanisms.²⁰³ NAGPRA, for example, is administered by the Department of the Interior, which maintains a Review Committee, empowered by NAGPRA, to monitor the inventory of museums, convey notification requirements, and help resolve disputes.²⁰⁴ Even with the Review Committee, museums frequently fall out of compliance with NAGPRA and simply accept whatever fine the Department of the Interior levies.²⁰⁵ Additionally, opinions issued by the Review Committee may be ignored by the other agencies or courts.²⁰⁶ Thus, the Department of the Interior may be stymied in its ability to advocate for the party it deems to possess affiliation

explaining that clearer language is necessary to clarify Congress's intent (quoting *Bonnichsen*, 357 F.3d at 972)).

²⁰¹ See 25 U.S.C. § 3001(2), (3) (defining "cultural affiliation" as a relationship that can be "reasonably traced" to a modern tribe and limiting cultural material covered under NAGPRA to human remains, funeral and sacred objects, and cultural items, not including a time limit).

²⁰² Ray, *supra* note 189, at 107. Some scholars have suggested an amendment to NAGPRA to clarify the definition of "Native American" to include tribes that "w[ere]" located within the United States, thus remove the limiting language interpreted by the Ninth Circuit. *Id.*; see Will R. Ripley, *You're Not Native American—You're Too Old!:* *Bonnichsen v. United States Exposes the Native American Graves Protection and Repatriation Act*, 9 J. GENDER, RACE & JUST. 137, 156–58 (2005) (arguing that NAGPRA must be amended and clarified to define "Native American" more precisely and to further detail the requirements for cultural affiliation).

²⁰³ See Nafziger, *United States*, *supra* note 14, at 507–09, 511–12, 524 (stating that cultural heritage statutes in the U.S. have a limited scope and rely on domestic enforcement that, in practice, has had limited success); *supra* notes 111–148 and accompanying text (describing how law enforcement, customs officials, and museums have had to fill the void of enforcement).

²⁰⁴ See 25 U.S.C. § 3006(c) (outlining the responsibilities of the Review Committee, including monitoring the inventory process and resolving disputes).

²⁰⁵ See, e.g., Raby, *supra* note 7 (describing a \$4,999 fine levied against Marshall University by the Department of the Interior for failing to complete the NAGPRA-mandated inventory of its collections in a timely manner); *Few Fines Under Native American Graves Protection and Repatriation Act*, INDIANZ (May 7, 2018), <https://www.indianz.com/News/2018/05/07/few-fines-under-native-american-graves-p.asp> [<https://perma.cc/HF6F-U8MR>] (discussing the \$13,500 fine that the Bishop Museum paid in a settlement with the Department of the Interior).

²⁰⁶ See *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1211–12 (D. Nev. 2006) (stating that despite receiving a report by the NAGPRA Review Committee supporting the claimant's argument, the Bureau of Land Management ignored this report as merely advisory).

with the human remains or objects at issue.²⁰⁷ Additionally, if museums are willing to accept a fine rather than comply with the provisions of NAGPRA, the Department of the Interior's enforcement tools, fines and sanctions, may not hold much weight.²⁰⁸ Customs officials, federal and state law enforcement, and museums may also investigate violations of the statutes and assist in enforcing the laws.²⁰⁹ A lack of training and focus, however, makes each of these less reliable.²¹⁰

Customs officials are charged with controlling items imported and exported to the U.S. at ports of entry.²¹¹ In theory, then, monitoring for illegal export and trafficking of cultural items identified by ARPA and NAGPRA should fall to these officials.²¹² In practice, however, customs officials tend to be more focused on identifying goods that contravene economic treaties than trafficked cultural objects.²¹³ Indeed, the Commerce Control List, a list of goods that absolutely may not be exported from the United States, features no cultural material and is directed instead at chemicals and other sensitive

²⁰⁷ See *id.* at 1225 (indicating that even though the Department of the Interior and the Review Committee are specifically empowered to administer NAGPRA and resolve disputes, other agencies do not always defer to their judgment).

²⁰⁸ See *Few Fines Under Native American Graves Protection and Repatriation Act*, *supra* note 205 (reporting that Hawaii's Bishop Museum settled with the federal government for over \$13,000 after violating NAGPRA).

²⁰⁹ See Nafziger, *United States*, *supra* note 14, at 507–09, 511–12, 524 (presenting an overview of the cultural heritage law in the United States and indicating that enforcement relies on internal mechanisms rather than export controls and finding enforcement lacking at the state level and among customs officials and museums); *supra* notes 111–148 and accompanying text (describing the enforcement landscape for the federal cultural heritage statutes).

²¹⁰ See *infra* notes 211–228 and accompanying text (outlining how inconsistencies and flaws in the enforcement structure of NAGPRA lead to lack of efficient enforcement); McAllister, *supra* note 125, at 15–16 (presenting a federal training program that educates enforcement personnel about ARPA and arguing that it is effective and must be broadly expanded in order to truly protect cultural material); Nafziger, *United States*, *supra* note 14, at 512 (describing the large volume of goods flowing through the U.S. daily and arguing that even if boarder officials had time to inspect each item, they may not be trained to recognize cultural material). Compare ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144 (requiring museums to conduct extensive investigations into all acquired cultural material to avoid illegally sourced goods), with Franzen, *supra* note 123 (presenting the questionable ethics of museums, like the Met, that retain antiquities without established provenance).

²¹¹ See Nafziger, *United States*, *supra* note 14, at 509–10 (describing the division of powers among customs officials, including that CBP monitors trade at ports and the Transportation Security Administration (TSA) processes passenger cargo).

²¹² See 16 U.S.C. § 470ee (criminalizing the trafficking of cultural items); 25 U.S.C. § 3002(c) (stating that removal of items covered by NAGPRA is not permitted if the excavator lacks a permit or rightful title to the item); Nafziger, *United States*, *supra* note 14, at 509–10 (explaining that because CBP controls trade at large ports and TSA monitors passenger luggage, they could be theoretically tasked with ensuring that no cultural materials exit the U.S. in violation of ARPA and NAGPRA).

²¹³ See Nafziger, *United States*, *supra* note 14, at 510 (describing how, in practice, the focus of customs officials is on national and international security and enforcing trade controls, particularly regarding trade of goods related to national security).

items.²¹⁴ Even if cultural objects were included on the Commerce Control List, however, there is no certainty that customs officials would be able to monitor sufficiently for these items.²¹⁵ Cultural materials vary so widely in appearance that finding them would require significant training and investigation into each exported item—demanding time and educated personnel that likely cannot be spared.²¹⁶ Following 9/11, customs officials focus overwhelmingly on national security, even though the tools they employ may also be useful in screening luggage for cultural material.²¹⁷ Interviews with customs officials indicate that some agents are completely unaware of the ban on trafficking cultural material.²¹⁸ Others were aware of the ban, but felt that it was impractical for them to identify cultural material, let alone prevent its export, given the mass scale of goods they inspect on a daily basis.²¹⁹

²¹⁴ *Id.* at 511. The Commerce Control List is put forth by the Bureau of Industry and Security and categorizes prohibited export items into groups such as nuclear, chemicals, electronics, information security, sensors and lasers, navigation and avionics, marine, and aerospace and propulsion. *Commerce Control List (CCL)*, BUREAU OF INDUS. & SEC., <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> [https://perma.cc/Y2GW-BMFQ].

²¹⁵ See Amber J. Slattery, *To Catch an Art Thief: Using International and Domestic Laws to Paint Fraudulent Art Dealers into a Corner*, 19 VILL. SPORTS & ENT. L.J. 827, 863, 848 n.160 (2012) (noting that there is an incentive to commit art theft due to the value and mobility of the items, including that they are small and rarely stopped by customs officials); Nafziger, *United States*, *supra* note 14, at 512 (stating that the intense volume of material exported out of the United States daily prohibits a piecemeal search for cultural heritage material). For example, in 2018 the U.S. recorded the most export of goods ever at \$1.7 trillion. *Foreign Trade: Annual Trade Highlights*, *supra* note 130.

²¹⁶ See Nafziger, *United States*, *supra* note 14, at 512 (discussing how it would be impractical for CBP agents to conduct adequate surveys of exported goods to ensure that no cultural material left the United States due to the volume of material moving through ports and the varying size and appearance of cultural material, making it difficult to identify).

²¹⁷ See *id.* at 512–13 (describing enhanced screening tools, such as screening each parcel in its individual parts, used by TSA for passenger flights after 9/11 that may accidentally find cultural material, but which are rarely used for commercial cargo carriers). The CBP's stated mission is to safeguard American borders by protecting American people from dangerous persons and materials and enabling legitimate trade, thereby supporting the economic mission of the United States. U.S. CUSTOMS & BORDER PROT., U.S. CUSTOMS AND BORDER PROTECTION STRATEGY 2020–2025, at 3 (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-May/cbp-strategy-2020-2025.pdf> [https://perma.cc/MPE4-LZRT]. Although the CBP has issued guidance to importers and exporters on the trade of cultural property, the guidance does not reveal actual statistics about enforcement and merely includes information on how to comply with U.S. customs laws and warns against trafficking stolen material. See U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: WORKS OF ART, COLLECTOR'S PIECES, ANTIQUES, AND OTHER CULTURAL PROPERTY 19 (2006), https://www.cbp.gov/sites/default/files/assets/documents/2020-Jun/Works%20of%20art%20etc%20ICP_0.pdf [https://perma.cc/JP39-T8SH] (providing an explanation of relevant customs rules regarding cultural material, such as that smuggled or illegally obtained items may not enter the United States, without going into detail on specific enforcement actions).

²¹⁸ Nafziger, *United States*, *supra* note 14, at 512.

²¹⁹ *Id.* Given the focus on national security and trade and the fact that customs officials already have lists of items to monitor, this hesitance is not entirely surprising. See *Recent Progress and Actions on Port Congestion*, THE WHITE HOUSE: BLOG (Nov. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/11/10/recent-progress-and-actions-on-port-congestion/> [https://perma.cc/

Instead of relying on customs officials to block the export of cultural material at ports of entry, the United States tends to rely on domestic federal and state police actions.²²⁰ Federal enforcement may come from the FBI's Art Crime Team, a rapid deployment unit focused on investigating the theft of cultural material valued at least at two thousand dollars.²²¹ The team itself, however, is small and the minimum value requirement of the items the team investigates may limit the team's effectiveness against cultural item trafficking.²²² Additionally, the team typically hears about art theft from public tips or local law enforcement, usually from personal or institutional collections, which may prevent it from putting much emphasis on investigating ARPA and NAGPRA violations on public lands.²²³ The same enforcement problems occur disparately at the state level, at which some jurisdictions have more comprehensive laws and enforcement teams to confront antiquities trafficking and others have none.²²⁴

Q9J9-VLLW] (addressing issues of congestion at U.S. ports during the coronavirus pandemic and stating that ports are handling more material than ever, including 17% more containers at the Ports of Los Angeles and Long Beach).

²²⁰ See Nafziger, *United States*, *supra* note 14, at 509, 515 (stating that when customs officials uncover illegally trafficked cultural heritage items, it tends to be by accident); Slattery, *supra* note 215, at 863–65 (arguing that although it may be very difficult to uncover art theft due to how moveable the objects tend to be, the United States' prosecutorial system is obligated to fill the gap and bring actions with sanctions sufficient to deter theft).

²²¹ See *FBI Art Theft Program*, FBI, <https://www.fbi.gov/video-repository/newss-fbi-art-theft-program/view> [<https://perma.cc/97XJ-RFYV>] (describing how the FBI Art Crime Team learns of a matter to investigate and what cases are within the team's purview, for example the team reports that art theft in the U.S. generally occurs at private residences, which are more likely to be discovered by occupants than looting at an archaeological site or from an institution with vast collections).

²²² See *id.* (discussing the team's focus on stolen art valued at over \$2,000 and stating that unfortunately many art thefts are not reported because the theft, from an archaeological site or from a museum with a lot of items, is not noticed). The FBI specifically notes that it has jurisdiction over three types of cultural property cases, including cases involving interstate transportation, art law, and the theft of a major artwork. *Id.*

²²³ See *id.* (detailing ways that private collectors and museums can protect themselves from art theft, including providing an inventory for use by law enforcement in case of robbery). For example, the FBI Art Crime Team relies on local police to tell them about crimes, typically crimes involving theft from museums or private collections. *Id.* When antiquities are stolen from archaeological sites or Native American graves in violation of ARPA or NAGPRA, however, there may not be a tipster unless the instances happen to be observed by a whistle-blower or law enforcement. See *id.* (stating that much of the art theft at archaeological sites, churches, and even museums goes unreported).

²²⁴ Compare Daley, *supra* note 123 (announcing the country's first local law enforcement unit, located in New York City, dedicated to investigating and repatriating illegally trafficked antiquities), and NEV. REV. STAT. §§ 383.150–.190 (2020) (protecting cultural material or site within the state), with WYO. STAT. ANN. § 6-4-501 (2021) (assessing a relatively small fine of \$750 to anyone who opens a grave and removes remains without consent). See *supra* notes 117–127 and accompanying text (describing the wide-ranging state statutes related to cultural heritage protection and providing the Manhattan D.A.'s Office as an example of a highly-effective anti-art trafficking unit); Willingham, *supra* note 120, at 965 (describing that many states do not adequately prepare local police or other officials to address NAGPRA violations).

Museums are also able to fulfill NAGPRA provisions by investigating their collections and promptly repatriating cultural material.²²⁵ Just like at the federal and state level, however, this investigation requires a high level of cooperation, proactive monitoring, and self-enforcement.²²⁶ Although museums may be obligated to ensure standards of provenance by ICOM, many frequently violate the voluntary standards and NAGPRA.²²⁷ Thus, in addition to inadequacies of scope and confusion regarding legal claim process, the mechanisms of enforcement of these statutes are inconsistent.²²⁸

D. Operation Cerberus: A Case Study

Operation Cerberus, a massive FBI sting operation in 2009, involved about one hundred federal agents and resulted in the arrest of twenty-four individuals in Colorado, New Mexico, and Utah for violating ARPA and NAGPRA.²²⁹ Federal agents seized around forty thousand cultural objects looted from Native American cultural sites, including five thousand artifacts from one home and four thousand from another.²³⁰ Operation Cerberus is the

²²⁵ See 25 U.S.C. § 3003(a)–(b)(1), (d) (requiring that museums compile inventories of human remains in their collection and notifying Native American groups of their possession); ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144, at 9 (requiring member-museums to ensure that cultural material in their possession has valid title, a process which involves investigating the facts and circumstances of the item’s claimed history).

²²⁶ See ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144, at 9 (requiring that museums ensure valid title for any item they receive, which means investigating history and ownership of the item). ICOM allows member-museums to retain an item lacking clear title if it makes an “outstanding contribution” to worldwide understanding such that it is in the public interest to keep the item even if it may have been originally illegally obtained. *Id.* at 19; see *supra* notes 144–147 and accompanying text (outlining the ICOM standards for provenance review and museum self-regulation of materials). For self-enforcement to work, museums must be motivated to dedicate the resources to inventory and notification procedures mandated by NAGPRA and hand over these items when necessary. See ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144, at 9, 19 (presenting the ICOM guidance that many museums nominally adhere to but that require them to be proactive about identifying trafficked goods and refusing to accept them, unless there is a great public interest).

²²⁷ See 25 U.S.C. § 3003(a)–(b)(1), (d) (requiring museums to create lists of NAGPRA-governed items in their collections and notify Native American tribes); ICOM CODE OF ETHICS FOR MUSEUMS, *supra* note 144, at 9 (requiring member-museums to ensure that all items in their possession have valid title); *supra* note 10 and accompanying text (outlining the spotty track record of museums in repatriating Native American goods and in complying with NAGPRA).

²²⁸ See *supra* notes 149–228 and accompanying text (presenting the problems present in the execution of the NHPA, ARPA, and NAGPRA).

²²⁹ Sharp, *supra* note 4. The federal government had made occasional arrests of people involved in looting Native American cultural materials in Utah prior to Operation Cerberus, but there was local hostility to the federal effort and locals continued to pillage cultural sites. Joe Mozingo, *A Sting in the Desert*, L.A. TIMES (Sept. 21, 2014), <https://graphics.latimes.com/utah-sting/> [<https://perma.cc/F56U-7NH4>]. The case ramped up in 2006 when the Bureau of Land Management found a potential informant to help them infiltrate the rampant looting and trade community in the area. *Id.*

²³⁰ Sharp, *supra* note 4. When the artifacts were initially seized, they filled a 2,300 square foot warehouse in Salt Lake City. *Id.* These artifacts have been valued at \$335,000. Nicholas Riccardi &

largest federal investigation of cultural artifact theft and was very controversial for several reasons.²³¹ First, locals complained that Operation Cerberus constituted federal overreach into state affairs.²³² Arguably, however, if the suspects had gathered the artifacts from their own privately owned land instead of federal land, and had not engaged in antiquities trafficking, locals could have escaped federal involvement.²³³ Second, the trove of antiquities discovered was completely without documentation about the context and location in which the antiquities were found, limiting scientific analysis and repatriation efforts.²³⁴

Jim Tankersley, *Indian Artifact Theft Targeted*, L.A. TIMES (June 11, 2009), <https://www.latimes.com/archives/la-xpm-2009-jun-11-na-artifacts11-story.html> [<https://perma.cc/QV4K-P4LF>].

²³¹ See Sharp, *supra* note 4 (writing about the anger among local people for what they felt was disproportionate federal action); Brendan Borrell, *FBI Sting Catches Alleged Archaeological Thieves in Southwest*, SCI. AM. (June 16, 2009), <https://www.scientificamerican.com/article/fbi-sting-alleged-artifact-thieves/> [<https://perma.cc/FL4E-CTRF>] (describing the local attitude to the massive sting operation, including the reaction of one defendant who stated, “I’m guilty of arrowhead collecting. . . as is two-thirds of this town”). After the raid, the confidential informer and two suspects killed themselves, one of whom was a prominent area doctor who used to hunt for artifacts with his wife and daughter. Sharp, *supra* note 4. Following the suicides, the families filed wrongful death suits against the FBI. *Id.* The wrongful death case brought by the family of Dr. James Redd was dismissed in 2016 after the U.S. District Court in Utah found that there was little evidence to support the family’s claim of over one hundred officers in heavy armor and with weaponry raiding their house. Brian Maffly, *Judge Tosses Final Lawsuit in 2009 Southern Utah Artifact-Trafficking Saga*, SALT LAKE TRIB. (Mar. 19, 2016), <https://archive.sltrib.com/article.php?id=3682765&itype=CMSID> [<https://perma.cc/6GFK-NEA9>].

²³² Borrell, *supra* note 231. Community members opposed to the raid called for a federal investigation. *Id.* Previously, there had been a strong local culture of gathering Native American materials as a hobby. *Id.* In the 1920s, even the University of Utah once offered to buy antique pots for \$2. Riccardi & Tankersley, *supra* note 230. Locals proved hostile to changing this ingrained culture, and many of those who faced five years or more in federal prison for violations of ARPA and NAGPRA had no prior criminal record. *Id.* The fact that locals conducted the collection surreptitiously undeniably indicated that people knew they were committing a crime. See Sharp, *supra* note 4 (explaining how the informer wore a tiny camera disguised in a shirt button and recorded a hundred hours of secret transactions for artifacts, including discussions about value and origin); Riccardi & Tankersley, *supra* note 230 (describing the looting culture in this area as pervasive, including an estimate that 90% of the twenty thousand archaeological sites in the county had been pillaged, and that looting continued despite Native American protests and a Congressional ban). In one recording by the informant, a collector stated that she had been out to a site “[a]nd people had hit every mound.” Mozingo, *supra* note 229.

²³³ See 16 U.S.C. §§ 470aa–470bb (defining the scope of ARPA to apply to cultural material that is at least one hundred years old and not on private land); 25 U.S.C. § 3001(3), (5) (stating that items covered by NAGPRA include only objects found on federal or Native land); *supra* notes 165–168 and accompanying text (describing the jurisdictions of the federal cultural heritage statutes, including that the statutes expressly cover federal and tribal lands). Because the sting operation was conducted using a confidential informer who used a camera to record illicit excavations and transactions, any notion of improper overreach is unlikely to be taken seriously by a court. See Sharp, *supra* note 4 (outlining the lengths that law enforcement went to establish an airtight case, including placing motion-activated cameras at one archaeological site that was looted); Mozingo, *supra* note 229 (explaining that federal agents had been aware of the collectors’ activities for years and in 2006 had heard about a local collector who might be pressured to help gather evidence about the others).

²³⁴ Sharp, *supra* note 4.

Many of these items were uniquely well-preserved and of a type unlikely to be excavated again due to ARPA and NAGPRA restrictions, rendering the lack of information about the objects a crippling scientific loss.²³⁵ Although the Bureau of Land Management will attempt to repatriate the seized artifacts, NAGPRA's requirement that any claimant substantiate their connection through direct descent or cultural affiliation is also made more difficult by the lack of documentation.²³⁶ Finally, to the Native American tribes in the area, the operation was overdue and targeted the root of the problem—that ordinary people felt as though they were entitled to loot, harbor, and traffic indigenous artifacts.²³⁷

III. AVENUES OF IMPROVEMENT: AMENDMENTS AND EDUCATION

The NHPA, ARPA, and NAGPRA aim to protect cultural heritage in the United States.²³⁸ The statutes interact in such a way that when one does not apply, others may fill in the gap.²³⁹ These statutes have successfully increased the number of preserved cultural heritage sites in the United States, banned excavation without a permit, and granted ownership rights to indigenous groups regard-

²³⁵ *Id.*

²³⁶ *Id.* The Bureau of Land Management will likely have to be flexible with how descendants may show affiliation, accepting showings of cultural affiliation which may be demonstrated through geographic, linguistic, biological, folkloric, historical, or archaeological connections, rather than blood ties. See 25 U.S.C. § 3005(a)(4) (describing acceptable evidence of affiliation).

²³⁷ See Sharp, *supra* note 4 (detailing the expansive amount and scope of the seized artifacts and noting that there are twenty-eight Native American groups living in the area of the raid who feel like Operation Cerberus was a long-overdue step toward justice). The artifacts recovered in the raid included woven effigies, headdresses, ceramic bowls, and projectiles. *Id.*

²³⁸ See 16 U.S.C. § 470aa (declaring that the statute is intended to protect archaeological materials because then-existing laws were inadequate and the objects are irreplaceable and important); 36 C.F.R. § 60.4 (2021) (expressing that items that may be placed on the National Register include those that are important to the history of the United States); 25 U.S.C. §§ 3002, 3005 (vesting ownership of Native American cultural material with Native Americans and requiring repatriation of any material owned by a federally funded institution). Scholars argue that the overlapping coverage of the statutes offers more robust protections because there are multiple ways for claimants to recover and protect cultural material. Nafziger, *supra* note 56, at 70.

²³⁹ See 16 U.S.C. § 470bb(1), (3)–(4) (stating that the cultural material covered by ARPA includes tangible remains of human activity at least one hundred years old and found on federal or tribal lands); 36 C.F.R. § 60.4 (requiring that, to be considered for the National Register, a site must be material, important to the history of the United States, and should be older than fifty years, although younger items may qualify if exceptionally important); 25 U.S.C. § 3001(3), (5), (15) (defining the statute as applying to funerary objects, such as human remains or burial goods, sacred items, and “cultural patrimony,” objects with a continuing historical or cultural importance found on federal or tribal lands). For example, if a federally funded institution harbors a cultural object of questionable origin, only NAGPRA might apply to protect the item by requiring the repatriation of certain cultural objects and human remains from federal institutions. See 25 U.S.C. § 3005 (requiring repatriation of covered items under NAGPRA to descendants or affiliated tribes).

ing the remains and possessions of ancestors.²⁴⁰ Despite these successes, however, Congress can still improve the protections these statutes offer to cultural heritage in the United States.²⁴¹ Section A recommends amendments to the statutes to specify their stated goals more clearly, removing interpretive difficulties for courts and reducing interagency conflict.²⁴² Section B advocates for increased training for enforcement groups and expanding the power of the Department of the Interior to conduct enforcement activities.²⁴³ Finally, Section C presents concluding thoughts on the coherent, albeit flawed, repatriation efforts of the United States.²⁴⁴

A. Clarifying Statutory Goals, Scope, and Processes

The relevant cultural heritage statutes currently have overlapping jurisdictions, vague definitions and procedures, and purport uncertain goals—all of which cause confusion among those tasked with enforcing the statutes.²⁴⁵ Following the Kennewick Man case, in which human remains were deemed too old to be considered “Native American” despite the NAGPRA Review Com-

²⁴⁰ See *What Is the National Register of Historic Places?*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm> [https://perma.cc/7EGU-QFZ9] (Apr. 27, 2021) (explaining that since Congress enacted the NHPA in 1966, over ninety-five thousand historical sites have been listed on the National Register, with at least one property in nearly every county in the United States); 16 U.S.C. § 470cc (requiring that anyone who wishes to excavate on federal or tribal lands receive a permit from the Department of the Interior, which may be granted after the Department determines the applicant is qualified and notifies any tribes which deem the area important). 25 U.S.C. §§ 3002, 3003, 3005 (describing the mechanics of NAGPRA, including that federally funded institutions must provide lists of covered material to potentially affiliated Native Americans groups who may then claim repatriation, and how the statute vests the rights to indigenous cultural material with Native American peoples).

²⁴¹ See *infra* notes 245–266 and accompanying text (describing potential improvements to the statutory scheme).

²⁴² See *infra* Section III.A.

²⁴³ See *infra* Section III.B.

²⁴⁴ See *infra* Section III.C.

²⁴⁵ See 25 U.S.C. § 3001(3), (5), (15) (limiting the statute to funerary objects, such as human remains or burial goods, sacred items, and “cultural patrimony” found on federal or tribal lands); 16 U.S.C. § 470bb(1), (3)–(4) (elaborating that the cultural material covered by ARPA includes the remains of human life that is at least one hundred years old and found on federal or tribal lands); 36 C.F.R. § 60.4 (2021) (outlining that sites listed on the National Register must be material, important to the history of the country, and should be older than fifty years); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1211, 1225 (D. Nev. 2006) (holding that the Bureau of Land Management was arbitrary and capricious to reject the tribe’s support for repatriation, including a supporting opinion from the NAGPRA Review Committee); *Bonnichsen v. United States*, 367 F.3d 864, 877, 879 (9th Cir. 2004) (interpreting NAGPRA to require a relationship between the cultural material and a currently existing tribe and holding that a group of tribes that sought repatriation of a nine-thousand-year-old skeleton could not prove their connection firmly enough given the age of the materials); Ripley, *supra* note 202, at 156–58 (requesting that Congress eliminate the ambiguity of the term in NAGPRA that prevented tribes from receiving repatriated cultural material in the *Bonnichsen* case).

mittee's opinion, Congress attempted to clarify NAGPRA's stated purpose and goals but failed to come to a consensus.²⁴⁶

Another area of confusion and inconsistency is the scope of the statutes—what physical land they apply to, what material they cover, who may bring claims, and how claims should be brought.²⁴⁷ For example, an unintentionally uncovered Native American sacred object may be important for understanding United States history, but if it was not excavated without a permit or trafficked it will not be protected by ARPA.²⁴⁸ If the age or association of the item with a Native tribe is not clear, it will be difficult to determine who is entitled to title under NAGPRA.²⁴⁹ Alternatively, the NHPA may be a good option if the materials are located within a historical edifice, but otherwise none of the cultural heritage statutes will apply.²⁵⁰ Overall, the gaps in the scope of coverage in these statutes may allow cultural material to be exploited.²⁵¹

²⁴⁶ See Ray, *supra* note 189, at 107 (describing an attempt in Congress to amend NAGPRA in response to the Kennewick Man controversy); *Tribe Says NAGPRA Amendment Will Right a Wrong*, INDIANZ (Apr. 19, 2005), <https://www.indianz.com/News/2005/007676.asp?%20print=1%20> [<https://perma.cc/P5E7-PK28>] (describing a bill introduced by Senator John McCain to amend NAGPRA in response to the Kennewick Man case). The change would have included clarifying that with regards to repatriation, "Native American" meant a member of a group "that is or was indigenous to the United States" rather than the existing language, "that is indigenous to the United States." S. REP. NO. 109-67, at 4 (2005); 25 U.S.C. § 3001(9).

²⁴⁷ See 25 U.S.C. §§ 3001(3), (5), (15), 3002–3003, 3005 (stating that NAGPRA applies to funerary objects, such as human remains or burial goods, sacred items, and "cultural patrimony," found on federal or tribal lands, vesting ownership of the objects with descendants or associated tribes, and requiring federally funded museums to notify tribes and repatriate the objects if they possess covered material); 16 U.S.C. §§ 470bb(1), (3)–(4), 470ee (defining that the cultural material covered by ARPA includes the remains of human life that is at least one hundred years old and found on federal or tribal lands and forbidding the trafficking of such material); 36 C.F.R. § 60.4 (stating that cultural sites might be placed on the National Register if they are tangible, significant to United States history, and older than fifty years).

²⁴⁸ See 16 U.S.C. §§ 470cc, 470ee (requiring a person to obtain a permit to excavate covered cultural material on federal or tribal lands and forbidding trafficking such material); *Bonnichsen*, 367 F.3d at 869–70 (analyzing the applicability of NAGPRA, but not ARPA, to human remains uncovered unintentionally by teenagers walking in a river).

²⁴⁹ See 25 U.S.C. § 3002 (vesting title to covered cultural material with a descendant of the material or one who can establish cultural affiliation); *Bonnichsen*, 367 F.3d at 882 (holding that NAGPRA does not apply to materials that are so old that cultural affiliation cannot be firmly established by the historical record).

²⁵⁰ See 36 C.F.R. § 60.4 (providing criteria to determine whether a building, site, or structure might be placed on the National Register). Other statutes may be able to apply to protect these objects, possibly state statutes related to cultural heritage material and more general statutes about theft and destruction of property, for example. See Tsosie, *supra* note 75, at 21 (mentioning other legal arguments for repatriation, including malicious interference with a burial, that unfortunately have not been successful); *supra* note 122 and accompanying text (providing a list of several state statutes that protect cultural material either by penalizing interference with burials generally or by protecting Native American remains and cultural objects specifically).

²⁵¹ See *supra* notes 156–202 and accompanying text (discussing common issues with the interpretation of NHPA, ARPA, and NAGPRA, including that material may be too old or too young to meet the requirements for protection by the statutes or it might be found on private land). For example, a

To remedy these issues, Congress should examine each statute and its judicial interpretation carefully and amend the statutes to best fit Congress's legislative intent.²⁵² In particular, Congress should focus on explicitly defining what cultural material is covered by each statute to ensure that none is left out, thus avoiding further gaps.²⁵³ Additionally, Congress should provide clarifying amendments for each statute's purpose, scope of jurisdiction, and, in the case of NAGPRA, claims process, to ensure the statutes function as effectively as possible.²⁵⁴ At times Congress does consider modifying statutes to reflect development of knowledge or values since the time of the statute's passage.²⁵⁵ Finally, in amending these statutes, Congress should defer to the Department of the Interior

cultural artifact may be covered by one statute and not others. *See supra* note 174 and accompanying text (describing Martin Luther King Jr.'s house as being covered by the NHPA and not ARPA or NAGPRA). Alternatively, although the excavation of an item may be prohibited without permit from ARPA, if it is discovered inadvertently and is too old for NAGPRA to apply, it will not be protected by any cultural heritage statute. *See Bonnichsen*, 367 F.3d at 882 (holding that NAGPRA does not apply to remains or objects that are so ancient that cultural affiliation, and thus title, cannot be firmly established); *supra* notes 248–250 and accompanying text (presenting a hypothetical situation, similar to that of the Kennewick Man, in which the inadvertent discovery and the age of the materials meant that the items were not covered by any statute).

²⁵² *See* S. REP. NO. 109-67, at 4 (2005) (attempting to remedy instances in which cultural material is deemed too old for protection by changing the meaning of "Native American" for purposes of repatriation to include any member of a group "that is or was indigenous to the United States," rather than just a member of a group that "was" indigenous). Indeed, the Ninth Circuit struggled to divine Congress's intent in their consideration of *Bonnichsen*, and ultimately endorsed a more restrictive interpretation. *See* 367 F.3d at 875, 882 (opting for a conservative interpretation of NAGPRA because of the limited historical record and age of the human remains). The U.S. Court of Appeals for the Seventh Circuit similarly struggled to decipher Congress's intent in 1993, in *United States v. Gerber*, eventually reading the text more liberally to conclude that narrow interpretation was inconsistent with the broader purpose of ARPA. 999 F.2d 1112, 1116 (7th Cir 1993).

²⁵³ *See* 16 U.S.C. § 470cc (requiring a permit prior to excavating covered cultural material on federal or tribal lands, but not providing guidance in the case of inadvertent discovery); 25 U.S.C. §§ 3001(3)–(4), 3002 (limiting the statute to material discovered on federal and tribal lands, not material on private lands, and granting title to a descendant or one who can establish cultural affiliation, but not providing guidance in the case of an unclear record, as in *Bonnichsen*); 36 C.F.R. § 60.4 (providing criteria to determine whether a building, site, or structure might be acceptable for the National Register but limiting the inquiry to structures older than fifty years).

²⁵⁴ *See supra* notes 180–202 and accompanying text (outlining how difficult it is for Native American groups to know what the adjudicating authority will deem sufficient evidence to establish affiliation). This trouble is exemplified in the Spirit Cave Man case, in which the Bureau of Land Management refused to return the mummy despite the tribe's repatriation claim, expert testimony, and Review Committee support. *See Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1225 (D. Nev. 2006) (referring to the Bureau's refusal to return the mummy as arbitrary and capricious in the face of the amount of evidence offered by the tribe).

²⁵⁵ *See* NAFZIGER ET AL., *supra* note 64, at 274 (stating that ARPA was designed to supersede the Antiquities Act after *United States v. Diaz* in 1974, in which the Ninth Circuit declared the Antiquities Act's unconstitutional); S. REP. NO. 109-67, at 4 (2005) (recognizing that NAGPRA has ambiguities and suggesting solutions to fix errors, particularly regarding the definition of "Native American" for purposes of repatriation).

because, as the agency that administers the cultural heritage statutes, it has intimate knowledge of how they are used and how they may be improved upon.²⁵⁶

B. Improving Enforcement Through Increased Training and Authority

At a practical level for the NHPA, ARPA, and NAGPRA, there is a disconnect between Congressional intent and enforcement.²⁵⁷ For example, although ARPA and NAGPRA both forbid trafficking illegally obtained antiquities and enforce the prohibition by penalties and sanctions, neither statute explicitly states what entity will monitor cultural material or in what way.²⁵⁸ In reality, the enforcement of these statutes generally falls to federal and state law enforcement and customs officials.²⁵⁹ Lack of training at this level, however, creates enforcement inadequacies.²⁶⁰ By the time trafficked antiquities reach customs officials, it may already be too late to reclaim the item and customs

²⁵⁶ See 25 U.S.C. § 3011 (deferring to the Secretary of the Interior in matters of enforcing NAGPRA and promulgating relevant statutes); 16 U.S.C. §§ 470bb(2), 470cc, 470ff (defining the Secretary of the Interior as the “Federal land manager” that has the authority to issue permits and assess penalties); 54 U.S.C. § 320301(c) (stating that if an item on the National Register is located on private land, the land might be relinquished to the Secretary for maintenance); An Act to Enact Title 54, United States Code, “National Park Service and Related Programs,” as Positive Law, Pub. L. No. 113-287, § 100102(3), 128 Stat. 3094, 3097 (2014) (defining the “Secretary” for the purposes of caring for items on the National Register as the Secretary of the Interior).

²⁵⁷ See 16 U.S.C. §§ 470bb(2), 470ee (stating that ARPA will be administered by the “Federal land manager,” defined as the Secretary of the Interior, and declaring certain acts prohibited but not elaborating on the mechanism for enforcement); 25 U.S.C. §§ 3007, 3011, 3013 (providing penalties for NAGPRA violations and stating that NAGPRA will be administered by the Department of the Interior and that federal courts will have jurisdiction); 54 U.S.C. § 320301 (identifying the Secretary of the Interior as having authority to maintain items on the National Register but failing to elaborate more on enforcement measures).

²⁵⁸ See 16 U.S.C. § 470ee (creating penalties under ARPA for anyone who traffics antiquities or otherwise violates ARPA, such as by excavating without a permit); 25 U.S.C. § 3007 (assessing penalties for NAGPRA violations but failing to give more specific instructions for enforcement, such as by what means the Department of the Interior will find and prevent violations).

²⁵⁹ See Nafziger, *United States*, *supra* note 14, at 508 (stating that because the United States lacks a system of export enforcement, the United States tends to rely solely on internal enforcement of cultural heritage statutes); *supra* notes 149–228 and accompanying text (showcasing the lack of consistent statutory enforcement of NAGPRA and ARPA given the unclear authority granted to the Department of the Interior, lack of resources and focus of law enforcement and customs officials, and absence of a comprehensive investigative scheme). Although many states have passed internal cultural heritage statutes, the efficacy of the statutes vary widely. See Willingham, *supra* note 120, at 963–65 (explaining that some states rely on relatively generic laws to protect burials broadly while others have enacted specific laws catered to protecting archaeological material).

²⁶⁰ See McAllister, *supra* note 125, at 15–16 (presenting the success of a federal program to train law enforcement and archaeologists about ARPA enforcement and arguing that the class is effective and should be expanded); Bradshaw, *supra* note 125, at 23–24 (presenting an interview with a state law enforcement chief who admitted he would likely not be able to recognize a violation of a cultural heritage law).

officials are generally not well-equipped to recognize trafficked antiquities and do not have the staffing to conduct investigations on such a sweeping scale.²⁶¹

A feasible solution may be to direct resources to the Department of the Interior, empower the agency to conduct investigations, and enforce the Department's rules.²⁶² The Department of the Interior already administers the NHPA, ARPA, and NAGPRA through the Review Committee, so it has the most familiarity with threats to cultural heritage sites and the mandates of the statutes.²⁶³ In several cases, however, the Department of the Interior has not been granted deference by other agencies and the courts.²⁶⁴ Additionally, although the Department of the Interior ensures that the repatriation process is handled swiftly, federally funded institutions may shirk their obligations because of the lack of power behind the Department of the Interior's enforcement efforts.²⁶⁵ The Department of the Interior has been successful in high-profile cases and should have enhanced statutory authority to conduct investigations, issue opin-

²⁶¹ See Nafziger, *United States*, *supra* note 14, at 512 (finding that some customs officials were unaware of the ban on trafficking antiquities following interviews with officials and stating that this is especially concerning considering the large volume of trade at U.S. ports).

²⁶² See 25 U.S.C. § 3011 (designating the Secretary of the Interior to administer NAGPRA and promulgating relevant guidance); 16 U.S.C. §§ 470bb(2), 470cc, 470ff (assigning authority to issue archaeological permits and assess penalties to the Secretary of the Interior); 54 U.S.C. § 320301(c) (stating that the Secretary has the duty of maintaining items on the National Register located on federal land). Additionally, the Department of the Interior has been involved in high-profile enforcement actions, such as Operation Cerberus. See Sharp, *supra* note 4 (detailing the announcement of a joint operation by the Secretary of the Interior and the Deputy U.S. Attorney General to seize looted cultural material in Utah).

²⁶³ See 25 U.S.C. § 3006(g) (empowering the Department of the Interior to promulgate regulations for NAGPRA); 16 U.S.C. §§ 470bb(2), 470ff (bestowing the Secretary of the Interior with jurisdiction over assessing penalties under ARPA); National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 101, 80 Stat. 915, 915 (authorizing the Secretary of the Interior to maintain the National Register). Indeed, the Department of the Interior is authorized under the 1992 amendment to the NHPA to conceal information about historical sites to prevent threats to their preservation and maintenance from looting or destruction. Nafziger, *supra* note 56, at 55.

²⁶⁴ See *Bonnichsen v. United States*, 367 F.3d 864, 879 (9th Cir. 2004) (disagreeing with the Department of the Interior's ruling in favor of handing a nine-thousand-year-old skeleton to Native American tribes and instead finding that the remains were too old to be linked to contemporary tribes); *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1212, 1225 (D. Nev. 2006) (finding the Bureau of Land Management was arbitrary and capricious in refusing to consider the evidence in support of the Fallon Paiute-Shoshone Tribe's repatriation claim, including an opinion from the NAGPRA Review Committee which the Bureau of Land Management ignored as merely advisory).

²⁶⁵ See *Few Fines Under Native American Graves Protection and Repatriation Act*, *supra* note 205 (noting the large fine, over \$13,000, that the Bishop Museum in Hawaii paid in settlement to the Department of the Interior following NAGPRA violations); Raby, *supra* note 7 (explaining that Marshall University accepted a hefty financial penalty because it was extremely delayed in its NAGPRA compliance, rather than simply complying more quickly).

ions about tribal affiliation, and request enforcement actions from federal and local law enforcement.²⁶⁶

C. A Final Note on Repatriation Efforts

Although other countries have attempted to enact cultural repatriation policies, their effectiveness has been limited by bureaucratic inefficiencies and a lack of legal framework.²⁶⁷ For example, in 2018, a report commissioned by President Emmanuel Macron urged France to repatriate cultural material taken without consent.²⁶⁸ But nearly a year later, twenty-six cultural items from Benin were still in France pending legislation to allow for their repatriation.²⁶⁹ So far, France has initiated repatriation for only a single cultural item—a saber from Senegal.²⁷⁰ France’s 2018 commitment was lauded by scholars as reckon-

²⁶⁶ See Sharp, *supra* note 4 (detailing the largest recovery action by the Department of the Interior in Utah which resulted in over twenty arrests and the seizure of forty thousand cultural objects). The Department of the Interior has intimate knowledge of the statutes given that it promulgates relevant regulations and administers the laws and therefore should have more of a say in investigation strategies and enforcement techniques. See 25 U.S.C. § 3011 (designating the Secretary of the Interior as the administrator of NAGPRA); 16 U.S.C. §§ 470bb(2), 470cc, 470ff (granting the Secretary of the Interior the authority to issue archaeological permits and assess penalties for ARPA); 54 U.S.C. § 320301(c) (stating that the Secretary maintains sites on the National Register). Additionally, training sessions have been helpful in increasing the enforcement of cultural heritage laws and the Department of the Interior could continue to provide these sessions in greater numbers. See McAllister, *supra* note 125, at 15–16 (describing the positive outcome of a federal program to train enforcement personnel about ARPA enforcement and suggesting the class be expanded).

²⁶⁷ See Farah Nayeri, *France Vowed to Return Looted Treasures. But Few Are Heading Back.*, N.Y. TIMES, <https://www.nytimes.com/2019/11/22/arts/design/restitution-france-africa.html> [https://perma.cc/T5L3-P692] (Oct. 28, 2021) (discussing criticism of France’s supposed commitment to repatriation, including that it lacks legal force and was too bureaucratic); Christopher F. Schuetze, *Germany Sets Guidelines for Repatriating Colonial-Era Artifacts*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/arts/design/germany-museums-restitution.html> [https://perma.cc/88RL-2S4J] (detailing German guidance encouraging museums to repatriate items and discussing potential flaws, including the lack of legal force and substantive details to determine rightful claimants).

²⁶⁸ Geraldine Kendal Adams, *Macron Report Advocates Permanent Return of Colonial-Era African Objects*, MUSEUMS ASS’NS, <https://www.museumassociation.org/museums-journal/news/2018/11/28112018-macron-report-repatriation/> [https://perma.cc/S6ZD-SV3E] (Mar. 21, 2019). The French government announced its commitment to repatriation after the release of an influential report by scholars Felwine Sarr and Bénédicte Savoy advocating for returning the material. *Id.* Importantly, studies suggest that as much as 90% of sub-Saharan Africa’s cultural material is outside the African continent. *Id.*; Ruth Maclean, *France Urged to Change Heritage Law and Return Looted Art to Africa*, THE GUARDIAN (Nov. 21, 2018), <https://www.theguardian.com/world/2018/nov/21/france-urged-to-return-looted-african-art-treasures-macron> [https://perma.cc/Y7ZV-HZC7].

²⁶⁹ Nayeri, *supra* note 267.

²⁷⁰ *Id.* The repatriation of the saber was later delayed by French senators who wanted to develop a “scientific framework” to return cultural items. Alex Greenberger, *French National Assembly Rules That Landmark Repatriation of African Artifacts Must Go On*, ARTNEWS (Dec. 17, 2020), <https://www.artnews.com/art-news/news/french-senate-blocks-benin-senegal-repatriation-1234579723/> [https://perma.cc/NJ6T-KD5H]. Ultimately, the French National Assembly overruled the senators in favor of repatriating the items. *Id.* The senators apparently could not agree on how to return the items

ing with a wrong and encouraging other former colonial countries to follow suit.²⁷¹ Critics claimed, however, that France's efforts lacked an effective legal framework and was too bogged down in bureaucracy.²⁷² At the opposite end of the repatriation spectrum, the United Kingdom has refused outright to repatriate cultural objects displayed at the British Museum.²⁷³ The museum has declined to return culturally important items to Greece and Easter Island despite impassioned requests.²⁷⁴

Considering the varying success of repatriation efforts worldwide, the United States is doing well.²⁷⁵ In contrast to its counter-parts, the United States

and objected to some of the listed items, such as the crown of Madagascar's last queen, being repatriated without consultation with Parliament. *Id.*

²⁷¹ See Nayeri, *supra* note 267 (describing German repatriation efforts, including an investment of almost €2 million toward researching the origin of colonial artifacts). Germany, for example, disseminated guidelines to its museums in 2019 for repatriating antiquities that were not obtained legally. Schuetze, *supra* note 267. Still, the German guidelines were criticized for not being legally binding on museums and lacking guidelines on how, exactly, to determine rightful claimants for objects that may have been acquired over one hundred years ago. See *id.* (relating the comments of a German professor and lawyer who specializes in art law and who sees flaws in the framework). The National Museum of World Cultures in the Netherlands had recently enacted a similar set of rules. *Id.*

²⁷² See Nayeri, *supra* note 267 (discussing the lack of concrete action taken by politicians in France over a year after its commitment to repatriation).

²⁷³ *Id.* The British Museum, for example, has about 73,000 cultural items from sub-Saharan Africa, which it is willing to loan to other museums but is forbidden by law to return. *Id.* The British Museum is bound by the British Museum Act of 1963, which imposes on the Museum Trustees a fiduciary duty to preserve the collection. See Hannah R. Godwin, *Legal Complications of Repatriation at the British Museum*, 30 WASH. INT'L L.J. 144, 147 (2020) (stating that this obligation means that the Trustees cannot repatriate items without breaching their duty to the British Museum).

²⁷⁴ See Nayeri, *supra* note 267 (elaborating that the British Museum will lend items back to their country of origin, but retain legal possession). Among the many cultural items in its possession, the British Museum holds the Parthenon Sculptures from Greece. *The Parthenon Sculptures*, THE BRIT. MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures> [<https://perma.cc/P7DS-WDAZ>]. The Parthenon Sculptures are a collection of fifth century B.C.E. antiquities, including reliefs, friezes, and statues taken from the Parthenon by Lord Elgin with permission from the governing Ottoman Empire between 1801 and 1805. *Id.* The Greek government equates the Parthenon Sculptures to national identity and, in 1983, Minister of Culture Melina Mercouri, called the Marbles the country's "soul." See SCHÖNENBERGER, *supra* note 55, at 13 (quoting BERNHARD WALTER, RÜCKFÜHRUNG VON KULTURGUT IM INTERNATIONALEN RECHT, BREMEN 143 (1988)) (describing the fervor with which Greece requests the return of the Parthenon Sculptures, including impassioned pleas linking the Marbles with Greek identity and ancestry). The British Museum also holds the Hoa Hakananai'a, massive statues believed to contain the spirit of Easter Island ancestors. Agence France-Presse, *Easter Island Governor Begs British Museum to Return Moai: 'You Have Our Soul'*, THE GUARDIAN (Nov. 20, 2018), <https://www.theguardian.com/world/2018/nov/20/easter-island-british-museum-return-moai-statue> [<https://perma.cc/9JR5-UWLT>]. Although the British Museum has been willing to discuss loaning out the items, it has adamantly refused to repatriate them. *Id.* Because the British Museum claims to have outright ownership of the Parthenon Sculptures, for example, it will not consider a permanent return, but states it would consider a loan to Greece, should the Greeks recognize the British Museum's rightful ownership. *The Parthenon Sculptures, supra.*

²⁷⁵ See Nafziger, *supra* note 56, at 70 (describing the powerful interplay of ARPA, NAGPRA, and the NHPA to reinforce each other); *supra* notes 267–274 and accompanying text (discussing the

recognizes the right to ownership of other peoples and it has an established process for repatriation.²⁷⁶ Clarifying the cultural heritage statutes and empowering the Department of the Interior to enforce them may increase their efficacy, but even without these improvements the statutes provide a coherent framework to safeguard and repatriate cultural material of indigenous peoples in the United States.²⁷⁷

CONCLUSION

The National Historical Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act each play an important role in the preservation and safeguarding of indigenous cultural heritage in the United States. Indeed, these statutes often work together to accommodate gaps in the others' scope. Congress could significantly improve the functionality of these statutes, however, if it amended them to clarify Congress's intent, breadth, and claims process. Additionally, the execution of these statutes could be strengthened through training for customs and law enforcement officials and greater power and deference to the Department of the Interior.

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state of repatriation efforts in European countries which are less detailed and effective than those in the United States).

²⁷⁶ Compare 25 U.S.C. § 3002 (vesting ownership of NAGPRA-covered cultural material with Native American people who can show association by blood or cultural affiliation), with Godwin, *supra* note 273, at 145–47 (arguing that despite the controversy over the British Museum's refusal to return the Parthenon Sculptures to Greece, the Museum Trustees would be unable to repatriate even if they wished to do so due to their fiduciary duties to the collection).

²⁷⁷ See *supra* notes 245–266 and accompanying text (advocating amending the statutes to specify scope and jurisdiction issues, as well as providing greater enforcement power to the Department of the Interior).