

**Refracting Rights through Material Culture:
Implementing the Native American Graves
Protection and Repatriation Act
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March 2000

Prepared for the Cultural Policy Workshop, University of Chicago, January 28, 2000. Mr. McLaughlin is an attorney and a graduate student in the Department of Anthropology, University of Chicago. He wishes to thank the workshop participants and coordinators and the Irving B. Harris School of Public Policy Studies for the opportunity to present, discuss, and enhance this research.

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Abstract

Since the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) by the United States Congress in 1990, Native Americanists and legal scholars have claimed that the Act exemplifies progressive human rights legislation. This theoretical connection drawn between NAGPRA and human rights doctrine can be located in the provisions of the International Covenant on Economic, Social, and Cultural Rights promulgated by the United Nations in 1966. To date, however, as implementation of the Act continues, NAGPRA exposes and leaves unresolved several human rights issues beyond the purview of the statute and its regulations. These issues include the making and possession of cultural identities and histories relative to the universality and uniformity of human rights appeals and the capacity of a nation-state to engage alternative cultural and legal ideologies in the adjudication of claims implicating cultural difference. The ongoing challenge to define the legal concepts of culturally affiliated and unaffiliated or unidentifiable human remains, recent cases, and repatriations are discussed to delineate these issues and to reveal certain constraints of liberal democratic governance in addressing human rights claims associated with cultural difference.

I. NAGPRA, Native Ideologies, and Legal Pluralism

The Native American Graves Protection and Repatriation Act of 1990 mandates that museums and federal agencies evaluate their collections of Native American human remains and Native American material culture for possible repatriation to lineal descendants and to culturally affiliated, federally recognized Native American tribes. The law is intended to remedy wrongful and unethical practices associated with the acquisition of Native American cultural material and human remains. It further requires the expeditious repatriation of human remains and cultural items where appropriately claimed.

In an unusual if not unprecedented move, Congress engaged the ideologies of Native American cultures alongside traditional Western concepts of property law and individual rights in crafting the law, especially the legal concept of cultural affiliation and the typology of cultural items in NAGPRA. This typology includes human remains, associated and unassociated funerary objects, sacred objects, and cultural patrimony. The statute defines cultural affiliation to mean "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." The evidentiary standard to make a determination of cultural affiliation is "a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." With respect to the material culture classifications in NAGPRA, sacred objects, for example, are defined to mean "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by the present day adherents." Cultural patrimony consists of objects having "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of a Native American tribe or Native Hawaiian organization." Objects of cultural patrimony must also have been considered inalienable among their respective Native peoples at the moments of acquisition by non-tribal parties. By definition, then, the legal concept of cultural affiliation and the typology of cultural items codified in NAGPRA manifest a legislative move to engage Native American ideologies in this federal law.

United States federal law generally does not invoke or rely upon ideologies otherwise beyond its purview. Instead, federal law is usually adapted to circumstances by distinguishing the jurisdiction of the laws of the states and through specifying the limited authorities of Congress, administrative agencies, and the President. Moreover, American jurisprudence possesses its own cultural specificity. Courts in the United States do not, for example, recognize the cultural defenses or justifications of other societies to criminal acts committed in this country. In cases of culturally motivated infanticide, the Hmong practice of executing adulterous spouses, or the traditional Japanese practice of oyakoshinju—a form of parent-child suicide—evidence of the

cultural rationale for an act defined in the United States as criminal pertains only, if at all, to sentencing and not to a determination of innocence or guilt.

I argue that by endowing Native American ideologies with legal significance in the context of NAGPRA and invoking them in federal law, Congress has embraced a certain legal pluralism. This legal pluralism takes shape both through legal classifications of material culture mentioned above and through a procedural framework for making decisions about the disposition of collections of human remains and cultural items. Congress correctly anticipated that Tlingit, Navajo, and Iroquoian ideologies might, for example, entail disparate understandings of the purpose and role of material culture within their respective societies. Adopting a largely procedural approach to the governance of Native American material culture avoided the obvious difficulty of having to catalogue the cultural and legal ideologies of the federally recognized tribes to whom the Act applies and the implications of those ideologies for changing the disposition of various material objects. Instead, NAGPRA implementation began with requiring museums to prepare summaries of their Native American collections which were to be followed by more detailed inventories. Museums were charged with making initial determinations of cultural affiliation through procedures that involve substantial consultation with native peoples. Congress also enacted an advisory review procedure for disputes and contested claims. In addition, notice of the intent of a museum or federal agency to repatriate any cultural items or human remains is published in the *Federal Register* to inform other native groups and to allow for competing or alternate claims to be made and given due consideration. Recently, Keith Kintigh, President of the Society for American Archaeology, reported before a Senate oversight committee on NAGPRA that "repatriations of human remains and cultural items from both museum collections and new excavations occur regularly." Most of these repatriations, continued Kintigh, "result from mutual agreements between tribes and museums and agencies." By nature of these procedures and results, NAGPRA not only acknowledges the cultural and legal ideologies of federally recognized Native American tribes, but also strives towards reconciling these ideologies with Western legal concepts and with each other insofar as competing claims to cultural items arise among native groups.

II. Linking NAGPRA to Discourses of Rights

The intersection of Native American ideologies and Western law embodied in NAGPRA has inspired many Native Americanists and legal scholars to view the law as an achievement in human rights legislation. Though their assertions tend to be broad in character, the theoretical connection scholars draw between human rights and NAGPRA can be grounded specifically in the International Covenant on Economic, Social, and Cultural Rights promulgated by the United Nations in 1966. In Article XV, the States-Parties to the Covenant

recognize the right of *everyone*:

- a. To take part in cultural life;
- b. To enjoy the benefits of scientific progress and its applications;
- c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The enunciation of human rights to participate in culture and to benefit from the advancement of scientific knowledge within the same article of the Covenant suggests coherence in precisely the domains—science and culture—that NAGPRA, in practice, draws into conflict and opposition. This opposition persists in the ongoing NAGPRA implementation efforts of the past decade. Museum possession of Native American material culture is equated frequently and superficially with science, Native American possession with the persistence of indigenous cultures. For the purposes of this essay, however, the juxtaposition of science and culture in the Covenant offers an opportunity to consider the intersection of various types of rights discourses as refracted through material culture and politics. Although the categories of human, civil, and cultural rights remain arbitrary at their margins, as do the categories of any classificatory scheme, they nevertheless remain discernible in their basic premises. Their configuration in NAGPRA implementation and scholarship thereby informs not only questions about possessing history, but also the issue of legal pluralism in the liberal American nation-state.

The coherent specification of human rights as listed and described in the Universal Declaration of Human Rights, United Nations covenants, and analogous documents requires an overarching theoretical basis or theory of human rights. As a philosopher of human rights, Alan Gewirth of the University of Chicago advances a compelling argument that this theoretical basis may be found in a core commitment to productive human agency and the principle that respect for human dignity must be both uniform among and universal to all human beings. Gewirth argues that human rights are promulgated to attain for all persons the "freedom and well-being that are necessary conditions of human action and generally successful action." This freedom and well-being command certain further conditions. Among them lie material considerations including not only rights to the essential goods and tools of subsistence, but also those material conditions necessary for basic human endeavors such as what might be needed to obtain an education.

Anthropology may be read to augment and complicate the philosophical view Gewirth advances of the individual human being, especially with respect to what being human means. The discipline of anthropology and its generations of ethnographies observe that human existence is mediated by the manifold cultures and societies in which individuals are both formed and form

themselves. Attentive to this anthropological literature, some NAGPRA scholars consider cultural rights to be a subset of human rights, a vehicle linking individuals to intermediate collectivities and through those groups to the totality of humankind. In fact, however, culture and society conceptually implicate fundamental difference, terms of inclusion, terms of exclusion, and temporal boundaries that, while they may exceed the span of countless generations, ultimately fall far short of the total presence of the humankind and the human species in the world. Neither the concept of culture nor that of society resonates inherently with the claims to the universality and uniformity of human dignity on which human rights arguments and theories are grounded. Therefore, though they may share a certain nexus, human rights cannot generally be understood to entail cultural rights. Indeed, for a cultural right derivative of human rights to exist, it must enhance the freedom and well-being necessary to productive human agency and simultaneously inscribe the culture with the view that human dignity is uniform among and universal to all persons.

This specification of a common domain of human rights and cultural rights is not intended to either subordinate or dismiss the concept of cultural rights. Rather, this specification serves to clarify that NAGPRA, given its explicit mechanics of affiliating material culture with lineal descendants and those Native American tribes possessing federal recognition, exemplifies human rights law only insofar as it fits this model. In the context of such repatriations, the return of cultural items must support the freedom, well-being, and productive agency of the persons by whom they are claimed and to whom they are returned. The cultural practices, traditions, histories, and other social phenomena to which repatriated cultural items relate must also speak to human dignity in universal and uniform terms if the change in disposition is to be regarded as the implementation of a human right.

Repatriations satisfying these criteria occur. The reburial of Crow Chief Pretty Eagle during a two-day pow-wow in 1994 offers an example. Grounded in carrying forth a burial tradition respectful of human dignity, Crow Chief Pretty Eagle's remains were returned from the collections of the American Museum of Natural History in New York City to a traditional fasting site that overlooks Bighorn Canyon. Born in 1846, Pretty Eagle is credited with negotiating land sales and grazing leases, and he participated in a Crow delegation that met with President Hayes about the sale of Crow land for the construction of a railroad. Along with Chief Plenty Coups, Pretty Eagle demonstrated that a culture could prevail despite tides of change, as these two leaders became the first Crow Chiefs to earn money from manual labor, selling hay by the ton. Yet, not all repatriations appeal to the universality and uniformity of human dignity as the return and reburial of Chief Pretty Eagle's remains do. To be clear, the law does not require a repatriation claim to declare human rights justifications.

This discrete view of the connection between human rights and NAGPRA implementation further comports with various arguments made before Congress as the Act underwent consideration and debate. Representative

Patsy Mink of Hawaii declared, for example, that "preserving [N]ative American and Hawaiian culture is in the interest of all Americans, for these unique cultures are a part of the history and heritage of our Nation." She underscores a collective interest in the connections between productive human agency, dignity, and material culture.

The scope of Congresswoman Mink's remarks is, however, that of the United States as one political and cultural community. Such consideration of a polity may reorient a rights discussion or analysis towards a civil rights focus, a focus that comports with the legal and political character of democratic citizenship and governance at the level of a nation-state. Indeed, in a recent law review article entitled, "Control of Cultural Property as Human Rights Law," authors Sherry Hutt and C. Timothy McKeown move their discussion of NAGPRA as human rights to a discussion of the law as civil rights by noting the national scale at which NAGPRA applies. In doing so, however, Hutt and McKeown do not address the conceptual and substantive differences between human rights and civil rights.

Civil rights pertain to the establishment of a uniform and universal political and legal status among the members of a citizenry. They serve to ensure the salient attributes of citizenship, securing specific forms of political and legal participation and membership, and the ability to accept rights and to fulfill correlative duties. They pertain to prejudice and bias insofar as these phenomena obstruct or impair the full enjoyment of citizenship. As Karl Marx explains in his provocative essay, "On the Jewish Question," liberties and freedoms are specific in their content, relative to the forms of restraint they stand in opposition to, and usually achieved through some medium connecting the individual with his or her sought-after rights. "When a man liberates himself politically," writes Marx, "he liberates himself by means of detour, through the medium of something else." For this reason, civil rights are partial in character. Marx provides an illustrative example, documenting how civil rights may free a citizen to the religion of his or her choosing, but cannot free the citizen from the presence of religion in society itself. Anthropologist Joallyn Archambault articulates this partiality in the contemporary context of her reflections, as a Native American, on Independence Day celebrations:

Oftentimes, I have been at pow-wows at the Fourth of July having an awful lot of fun, but it has absolutely nothing to do with being a citizen of the United States of America. ... I cannot personally remember a time when I was emotionally overtaken by total and indiscriminate pride in just being an American. My ethnic identity and tribal membership have always been for me and my family the overriding element of our lives.

Civil rights movements in the United States fit this interpretive model of specificity and partiality well. They relate to struggles to reveal the irrelevance of certain criteria—especially and notably racial, gender, and religious classifications of personhood—that impact inappropriately the enjoyment of full citizenship. Indeed, civil rights

movements aspire to make structural and systemic changes that secure equal citizenship among all citizens. Examples include the extension of voting rights to women and citizens of color, eligibility for legal representation in courts of law, standing to testify before legal tribunals, and authority to own property and to control one's own labor.

Against this historical backdrop, NAGPRA does not appear primarily to serve the objectives of civil rights legislation. Rather, its mandates relate with particularity to Native Americans and its remedial intent corresponds to endowing the unique status of Native American tribes as domestic dependent nations with a certain integrity. Although NAGPRA parallels the American Indian Religious Freedom Act (AIRFA) in this regard, Congress intended AIRFA redress the abridged religious freedoms guaranteed to Native Americans by the Constitution. NAGPRA serves a different role among Native Americans, museum and scientific communities, and the American public more broadly.

Unlike affirmative action programs which may perpetuate certain classifications such as those of assigning race and gender in order to compensate for generations of disparate access to opportunities and thereby to render citizenship equal both in theory and in fact, NAGPRA pertains to the maintenance of diverse cultures and their traditional practices. This objective is not opposed to that of affirmative action legislation and civil rights movements generally, but rather different in character. The distinction relates to the premise implicit in NAGPRA that the cultural, racial, and ethnic distinctions between Native Americans and other American citizens are relevant to contemporary United States society and the governance thereof. Indeed, they are. And these distinctions, unlike the racial distinction underlying the theory of separate but equal civil societies that the Supreme Court unanimously and summarily rejected in *Brown v. Board of Education*, continue to command an historical and theoretical logic.

By contrast to the peoples associated with most civil rights movements who read their personhood into the "We" of "the People of the United States," Native Americans first encountered the Constitution as a device excluding them from governance because and by means of their tribal affiliations. The Constitution provided Congress then, as it does today, with the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This further instantiated treaty based relations between the United States and Native American tribes. Whereas the champions of civil rights movements from Frederick Douglas to Dr. Martin Luther King, Jr. made advances by enunciating the internal contradictions of slavery and second class citizenship with respect to rights conferred by the Constitution on *all* persons and the Constitutional principles of due process and equal protection, Native American civil rights have largely turned instead on competing principles and politics of sovereignty, inclusion, and exclusion.

Second, a wide range of evidence from oral histories to the archaeological record of the continent supports the view of Native American cultures as cohesive entities of independent legal and political means not only in the Pre-Contact Era and during the Colonial Encounter, but thereafter as well. It was on the basis of his ethnographic knowledge of Native Americans, of course, that anthropologist Franz Boas concluded in 1888 that "there is no people that lacks definite religious ideas and traditions, that has not made inventions, that does not live under the rule of customary laws regulating the relations between the members of the tribe." Consequently, historical and theoretical reasons associated with the concept and constructs of culture support the integrity of tribal organization and the persistence of Native American classifications in federal law. Yet, from a civil rights perspective, the distinction must remain exceptional. The achievements of more than two centuries of political struggle and constitutional interpretation are at risk of being misunderstood and misconstrued when scholars assume NAGPRA embodies *civil* rights. Though NAGPRA addresses largely underprivileged groups and issues of dispossession and disadvantage, the assumption is flawed. A civil rights analysis must pertain to the substantive content of the specified rights, that they bear inextricable ties to democratic governance, and that they support the universality and uniformity of citizenship among the citizenry of a polity. The repatriations initiated under NAGPRA may, but do not necessarily, embody the civil rights values that secure uniform and universal citizenship among all Americans, native and non-native alike.

One way to understand this point is to consider the argument that NAGPRA elevates a concern for Native American funerary and burial practices to a level associated with Anglo-American traditions. In fact, however, beyond the span of a few generations, Anglo-Americans generally lose interest in visiting and caring for the sites where their ancestors have been buried. Their emotional connections tend to wane as economic, scientific, or historical interests take shape. As anthropologist Randall McGuire explains on the basis of his research into mortuary customs, rituals of death, and memorialization in the upstate New York town of Binghamton:

When I talk to the people of Binghamton about cemeteries and burials they uniformly support the sanctity of the grave. Repeatedly they state that once in the ground a burial is to be undisturbed and a burial plot maintained in perpetuity. They are unaware of how frequently graves are moved or disturbed. Often when I mention some instance of a white grave being disturbed, a cemetery being abandoned or destroyed, they react in surprise that such activities are, in fact, legal. ... Cemetery abandonments are far more common in Broome County, New York than most of its citizens realize ... Many early historic cemeteries lacked or lost permanent markers and these have been disturbed by construction activities, especially road-building.

McGuire argues that this Anglo-American paradox of belief and actual practice reflects competing ideologies of death, family, history, and economy. To Native

American outsiders to whom this ideological paradox is abundantly clear, the cultural and legal conventions associated with Anglo-American death appear wholly inadequate. Many Native Americans experience their pasts differently, through arcs of spirituality and human ancestry that connect them to their tribes, families, and lands through media other than histories produced in the Western vein and economies committed to development. Consider how, for example, people of European descent generally regard Cro-Magnon populations at a considerable temporal and cultural distance from themselves and with some combination of scientific, archaeological curiosity and romance for mystery. By comparison, the Native American, Umatilla response to the discovery in 1996 of the 9,000 year old skeletal remains of a man known as Kennewick Man is to regard him as kin of their Columbia River lands and as possessing immediate spiritual importance to their tribe by means of a world-view that regiments time and space differently than Western cultures do. As Walter Echo Hawk, an attorney for the Native American Rights Fund and a NAGPRA scholar has explained, "We don't accept any artificial cut-off date set by scientists to separate us from our ancestors. ... What Europeans do with their dead is their business. We have different values." NAGPRA fosters these values to the extent that the legal concept of cultural affiliation allows. A civil rights approach to governing human remains and material culture would instead be likely to render Native American burials and the significance attached thereto subject to the temporal and practical limits of Anglo-American traditions, traditions that have shaped the paradox of Anglo-American burial practices and ideology, the ethics of economic development and science, and the laws of the states.

James Nason's discussion of what he terms, "esoteric knowledge," illustrates the same point, the inadequacy of certain Anglo-American legal forms from native perspectives even where applied equally and fairly pursuant to the civil rights of all Americans. Nason explains how recognized forms of intellectual property possess a cultural dimension. He describes how the view that knowledge ought to be generally and freely available both informs and limits intellectual property laws including patent, copyright, trademark, and trade secret laws. Nason then explores how Native American interests deviate from the commercial, scientific, artistic and other interests that recognized forms of intellectual property serve. He writes that while the full range of the knowledge with which he is concerned may never be fully known, "it certainly includes detailed traditional knowledge about the uses of plants and animals; songs, chants, and related music of various kinds; oral histories from the creation of the world to more recent historical events; ritual knowledge and other forms of religious knowledge; certain types of technological knowledge; and knowledge related to graphic and plastic arts, including knowledge that involves motifs and symbols." Nason notes that much of this knowledge circulates in the public domain already. Still, a substantial amount is retained exclusively by native groups, or, if contained in archival and museum collections, remains largely unknown to the American public. Consequently, because repatriations depend on researching collections and the existence of lineal descendants and or cultural affiliations, NAGPRA may have "preserved from absolute loss some aspects of cultural heritage," while also revealing, "for all and sundry much that Native Americans may now regret finding in the public domain." Because the

issue of information and knowledge control remains unresolved, some tribes walk away from repatriation opportunities for fear of what more they may lose. The precise and emphatically undocumented location of sacred sites is a typical example. The fact that museums approach the issue seriously and with an eye for special accommodations where feasible, however, indicates that the implementation of NAGPRA relates primarily to rights and interests not well captured in the phrase civil rights.

With these examples in mind, NAGPRA is perhaps best described among the various rights discourses mentioned here as supporting cultural rights. This connection is manifest in the legislative record, in the statute and its interpretive regulations, and in ongoing efforts to implement the law. The idea of cultural rights embraces the plurality of cultures in the world, supports their perpetuation and diversity, and engages the variety of cultural and social forms that the concept of culture implicates. These include, among others, those Boas specified: languages, religious ideas and traditions, histories, inventions and manipulations of environment, customary legal systems, and variously structured economies. The analysis of material culture and human remains which NAGPRA mandates in order to determine potential cultural affiliations with contemporary Native American tribes arises from the knowledge these and other, similar categories specify. In practice, NAGPRA consultations often amplify that knowledge or, as anthropologists often regard it, knowledges. Indeed, since 1990, NAGPRA has served to enhance and renew Native American cultures and cultural identities. Native histories, too, have undergone renewal and change both in form and in content. Many tribes, for instance, had no cultural provisions for the reburial of ancestors when Congress enacted NAGPRA. Historically, the repatriations and reburials of the present exemplify an atypical practice. Not surprisingly, that fact matters in determining whether and how repatriation of human remains especially can be an appropriate part of a lineal descendant or tribe's present and future. While many groups find an opportunity in NAGPRA to approach the future through their pasts, some find no remedy in the possibilities and procedures for repatriations where the wrongs of their histories, as they understand them, cannot be set right. Nevertheless, the widespread enhancement and renewal of Native American cultures, cultural identities, and histories continues, and it resonates with the United Nations' International Covenant on Economic, Social, and Cultural Rights and its guarantees of rights to participate in cultural life and creative activity generally.

III. Possessing Histories, Accommodating Difference

Having advanced the argument that the implementation of NAGPRA comports with human rights objectives insofar as it supports the productive agency of human beings generally and promotes a universal and uniform view of human dignity, a question remains about the extent to which cultural histories and

identities implement human as well as cultural rights. While a debate rages over this question among human rights theorists, in practice, appeals to histories and cultural identities underlie not only the logic of movements regarded as progressive, including NAGPRA, but also horrors of genocide, civil war, and ethnic strife the world over. Conceptually, the relevance of cultural identities and histories remains to be resolved with the universality and uniformity human rights appeals require and demand. In what productive ways do they matter? How do they and how should they inform the legal and political institutions that structure the cultures and societies that compose humankind?

Because these questions remain largely unanswered and perhaps unanswerable, the argument that NAGPRA exemplifies the codification of human rights because it fosters cultural histories and identities seems premature if not complacent. NAGPRA certainly offers an opportunity to consider what sorts of history and in what ways cultural identities do foster human rights and or the rights specified in other discourses. Yet, by raising these unresolved questions and illuminating particular cases for study, NAGPRA implementation marks less of an achievement in human rights than an ongoing challenge. In addition, because the Universal Declaration of Human Rights relies instrumentally on nation-states to implement and secure human rights among democratic citizenries, thereby extending human rights to all human beings, NAGPRA implementation allows for an inquiry into the ability of nation-states to engage alternative cultural and legal ideologies productively in the adjudication of human rights claims that implicate cultural difference. How the legal pluralism manifest in NAGPRA continues to unfold in public debates, consultations, and the processing of repatriation claims will speak to this question, revealing possibilities for cross-cultural understandings as well as certain contours and constraints of liberal democratic governance in the contemporary United States.

A. The Challenge of Cultural Affiliation

The cultural affiliation of human remains and cultural items under NAGPRA and the uncertain status of culturally unidentifiable and unaffiliated categories loom large over the implementation of NAGPRA as ever-present and persistently unresolved matters of legal, cultural, and political contestation fraught with the limits of liberal democratic governance.

Congress recognized the extensive archaeological record and therefore developed two categories: culturally affiliated materials and culturally unidentifiable materials. The categories in fact represent the theoretical ends of a spectrum. The process of investigating the cultural affiliation of a collection

with a contemporary Native American tribe is an inquiry into the spectrum. The inquiry asks whether the evidence about a collection tends toward one end of the spectrum or the other.

The domain of culturally affiliated human remains and material culture was understood to be narrow in content, not posing a Fifth Amendment takings issue for museums that, under mandate of federal law, endeavor to de-accession and repatriate collections without compensation. Still, the scale and scope of the cultural affiliated verses unaffiliated and unidentifiable categories has proven to be the single most controversial aspect of NAGPRA implementation. Among its many implications, the controversy suggests that the type of rational public sphere that theorists like Jürgen Habermas imagine as leading governance at present towards future, cosmopolitan directions lacks a practical sensitivity to the muddled terrain of cultural difference in politics.

Determinations of cultural affiliation are critical to repatriation claims because, as I have argued elsewhere, an elusive boundary of legal pluralism crosses the spectrum demarcated by affiliated human remains and cultural items on one end, and unaffiliated or unidentifiable human remains and material culture on the other. "In contrast to culturally affiliated human remains and cultural items, culturally unidentifiable materials are not currently subject to repatriation under NAGPRA. Federal law does not draw upon Native American ideologies to inform the disposition of these materials. Rather, their disposition awaits congressional amendment of the statute and regulations to be promulgated by the Secretary of the Interior." Culturally unaffiliated and unidentifiable human remains and material culture categories are typically associated with four primary sub-categories: 1) human remains and material culture for which insufficient information exists to make any determination of cultural affiliation, 2) human remains and material culture associated with Native American tribes that do not possess federal recognition and therefore lack standing under NAGPRA, 3) human remains and material culture associated with tribes historically known but without living descendants, and 4) human remains and material culture of considerable temporal and cultural distance from contemporary Native American tribes, precluding cultural affiliation under the Act.

To the extent that the categorical classifications of culturally unaffiliated and unidentifiable cultural items confine the scope of NAGPRA implementation and limit the degree to which Native American cultural and legal ideologies inform the disposition of human remains and material culture, they underscore the primacy of federal law, Anglo-American forms of science and knowledge, and the uniformity and universalism inherent to liberal legal codes over those native ideologies engaged to determine the appropriate disposition of collections and objects subject to the Act. For this reason, the various parties and interests that intersect in NAGPRA implementation experience great difficulty in conversing openly about the unaffiliated and unidentifiable categories and advancing consensus about the position and role of these categories ought to

command. Indeed, the topic has lingered on the agendas of the NAGPRA Review Committee meetings for several years with little productive action, and resulting, finally, in the summer of 1999 with nascent, draft principles of agreement and consensus that anticipate the writing of recommendations for future regulations. To the generality and inconsistencies of the draft principles, the scientific community has reacted with deep dissatisfaction and criticism, both constructive and otherwise.

Recall that cultural affiliation is defined as a "relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Native American tribe or Native Hawaiian organization and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group" and that the evidentiary standard to show cultural affiliation is defined as "a preponderance of evidence based upon geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." The statute and the regulations offer no hierarchy nor relative weight to be assigned to these types of evidence. They often conflict. For this reason, NAGPRA practitioners and archaeologists implore the Review Committee and Congress to draft better definitions. Doing so will, however, implicate determining the precise limits of native ideologies in the decision-making processes mandated by NAGPRA. These are limits of democratic governance in the United States, or rather limits of the liberal project that the American nation-state is purported to be. Constitutional principles of due process and equal protection require that the parties to NAGPRA claims be construed ultimately and uniformly as citizens whereas native groups perceive their native identities to be primary if not dispositive in all NAGPRA matters.

This conflict emanates powerfully from the controversy over the appropriate disposition of Kennewick Man, mentioned above. With the North American archaeological record extending approximately 15,000 years into the past, the Kennewick Man remains are among the oldest and rarest archaeological finds of North America. They pre-date known cultural groups, recognized either historically or archaeologically to have occupied North America. Consequently, scientists argue that while the Kennewick Man remains may be those of an indigenous North American individual, the remains are too remote from contemporary populations to sustain a relationship of cultural affiliation, and indeed constitute a paradigmatic example of culturally unaffiliated human remains. By contrast, the Umatilla Indians of the Columbia River Valley argue on the basis of their oral-historical tradition, a form of evidence positioned equally under the law, that they have always occupied the region and that any ancient human remains present must therefore be affiliated with their tribe. They reject the history of the continent offered by archaeologists and Western science. This position stands in opposition to the scientists' position, which similarly relies on forms of knowledge within the evidentiary standard of the law. Though the case appears to have been adjudicated largely in the scientists' favor, the larger conflict over resolving the affiliated and unaffiliated or

unidentifiable classifications begs for clarification. Such clarification is not reasonably anticipated at this time because the politically unapproachable and unspeakable limits of legal pluralism and of liberal democratic governance in an area of profound cultural difference hang in the balance.

B. The Traffic in Material Culture and Understandings

Whereas the difficulty in establishing cultural affiliations versus the unaffiliated or unidentifiable cultural character of material culture suggests limits to the legal pluralism embodied in NAGPRA, and to the promises of liberal democratic governance in areas of cultural difference generally, a recent and controversial trafficking case, *United States v. Richard Corrow*, indicates that some understandings across legal and cultural ideologies may nevertheless be achieved. Still, many scholars and museum professionals have been frustrated as well by the critical definitions of material culture in NAGPRA. They argue against vagueness and imprecision and worry about the legal implications of NAGPRA for specific collections. Native groups have also been frustrated by, for example, the emphasis the statute places on religion instead of on spiritualism, a more generally applicable concept. However, to approach the task of determining the appropriate dispositions of collections under the law through legal pluralism requires the flexibility ensured by a certain vagueness of the definitions of these statutory terms. The seminal question lies not in the precision of the NAGPRA definitions, but rather in whether they will serve the task for which they were designed adequately. In other words, will terms articulated in NAGPRA embody a usefulness that allows museums, federal agencies, and Native Americans to arrive at determinations that reflect an understanding and a balancing of both their disparate and their mutual interests in even the most difficult of cases? Responding in part to that question, *Corrow* reveals a terrain of possibility with respect to the concept and legal classification of cultural patrimony.

As mentioned at the outset of this essay, cultural patrimony is defined within NAGPRA as material culture with "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself." While largely descriptive, the definition further includes a clause that parallels the statutory definition of sacredness by referring to correlative cultural practices associated with material culture. This clause, the inalienability clause, requires that cultural patrimony belong to a Native American group in contrast to property owned by individual Native Americans. Such items "cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Native American tribe or Native Hawaiian organization" to qualify as cultural patrimony. The dominant legal interpretation of the alienation

clause has been to understand cultural patrimony as limited to, synonymous with, or best described as communal ownership. On close reading, however, the inalienability clause offers a broader concept than this. Any *collective* ownership or control that precludes alienation of the material culture by any one individual person satisfies the requirement of the statutory provision. The collectivity need not be an entire tribe as suggested by some NAGPRA scholars. Whereas communal ownership implicates an equality of interest among all persons in a particular community, collective ownership does not. Collective ownership can therefore accommodate circumstances ranging from the roles of tribal keepers and the members of classes who share control over items, such as medicine men collectively controlling medicine bundles, to instances where clan membership or gender plays an important role in the production, use, and control of material culture. Historical justifications of collective forms of ownership premised on such categories by Native groups further promote this analysis.

Moreover, the legal concept of cultural patrimony stands in stark contrast to earlier attempts by Congress to define and classify Native American material culture, most notably through the Antiquities Act of 1906 and the Archaeological Resources Protection Act of 1979. Congress did not attempt in either of these earlier acts to attach legal significance to indigenous perspectives in the statutory language itself. Comparing these Acts with the discussion of NAGPRA thus far reveals the legal pluralism of the latter. The express purpose of the Antiquities Act, for example, lay in the science of archaeology and its ability to write a national narrative history. In its report to the House of Representatives in 1906, the Committee on Public Lands argued for Congress to pass the Antiquities Act not by advocating the interests of Native Americans as a part of a diverse and plural society, as the advocates of NAGPRA would in 1990, but rather by noting that "[p]ractically every civilized government has enacted laws for the preservation of the remains of the historic past, and has provided that excavations and explorations shall be conducted in some systematic and practical way." Indeed, the Antiquities Act exemplifies a generation of laws enacted between the 1880s and World War I to advance the political and historical value Western governments conferred upon archaeological sites, a value that often enhanced the imperial ambitions of these governments.

In the case of the Archaeological Resources Protection Act (ARPA), motivated in part by indigenous interests and in part by the failure of the Antiquities Act to protect face masks placed in a sacred cave on the San Carlos Indian Reservation from theft, Congress adopted statutory language which simply catalogues the types of materials it protects. Unlike NAGPRA, ARPA does not contain an analytical framework for protection. Rather, ARPA protects by typological identification. Although expressly not exclusive, ARPA's typological list includes "pottery, basketry, bottles, weapons projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal remains, or any portion or piece of the foregoing items"

located on federal or tribal lands.

Such typological classifications clearly entail a certain convenience of identification that the focus in NAGPRA on ceremonial practice to define sacred objects and the combination of meaning and inalienability to define cultural patrimony lacks. For example, while the Act's interpretive regulations recognize one commentator's observation that Zuni war gods may be described accurately both as sacred objects and as objects of cultural patrimony, the regulations respond to the ambiguity of double characterization by simply restating the duty of museums and federal agencies to make the initial determinations about the character of the objects in their respective collections. Such ambiguities leave museums and federal agencies with little guidance as to whether to view items satisfying multiple definitions as sacred objects subject to repatriation to lineal descendants, as cultural patrimony belonging to a tribe in collective ownership of the items, or possibly as funerary objects.

And yet, the recent decision of the Tenth Circuit Court of Appeals to affirm the conviction of Richard Corrow under NAGPRA's trafficking provisions underscores that the classifications of material culture in NAGPRA possess the necessary potential to serve their intended functions. In its opinion, a federal appellate court described the district court trial as "comprised predominantly of the testimony of expert witnesses clashing over whether the Yei B'Chei [masks] constitute 'cultural patrimony' protected by NAGPRA." The court further explained that "having concluded that they do, the jury convicted Mr. Corrow of illegal trafficking in cultural items" and the circuit court upheld this result.

Richard Corrow obtained twenty-two Yei B'Chei masks for \$10,000 from the eighty-five year old widow of a Navajo chanter. Navajo chanters use these ceremonial masks to heal sick people and to call rain. In light of these practices, displaying the masks in a museum offends Navajo religious beliefs and the sacredness of the masks. For this reason, Corrow promised that the masks would not leave the Navajo Nation and would be used to train a student of the traditional chants at the time he purchased them. However, he subsequently offered to sell the masks for \$50,000 through the East-West Trading Company in Santa Fe, New Mexico, to a buyer whom he believed intended to place the masks in a museum or a private collection. The buyer was an undercover government agent who promptly arrested Corrow, leading to Corrow's conviction under NAGPRA's trafficking provision, section 1170(b).

Corrow argued that the definition of cultural patrimony was void for vagueness, citing the 1974 decision of the Ninth Circuit holding the definition of objects of antiquity in the Antiquities Act of 1906 unconstitutionally vague. The Ninth Circuit explained in the case that enforcement of the Antiquities Act would violate due process. But the Tenth Circuit, the jurisdiction in which Mr. Corrow was tried, had reached the opposite conclusion in a subsequent Antiquities Act case, *United States v. Symer*. Both the district and appellate courts therefore

rejected Corrow's argument. Corrow further argued that even if the definition of cultural patrimony were constitutional, the items purchased were not within the scope of this definition. That question of fact required the determination of a jury.

At trial, the experts who testified for and against the characterization of the masks as cultural patrimony included Alfred Yazzie, an ordained hataali chanter and Navajo Nation Historic Preservation representative; Harry Walters, a Navajo anthropologist; Jackson Gillis, a medicine man from Monument Valley; Harrison Begay; and Billy Yellow, another hataali. Yazzie stated that the "Yei B'Chei must remain within the four sacred mountains of the Navajo for they represented the 'heartbeat' of the Navajo people." Walters described Navajo medicine bundles as "living entities" to which concepts of ownership were not appropriate, and testified as to their ritual use. By contrast, Corrow's witnesses, Gillis, Begay, and Yellow, testified that the Yei B'Chei could be sold under circumstances such as discomfort from inheriting them or an inability to care for or to use them. Based upon this testimony which represented a variety of perspectives, the jury determined the Yei B'Chei to be objects of cultural patrimony.

The determination of the jury reflects a successful engagement with the novel legal concept of cultural patrimony, various ideologies of material culture, and evidence of culturally specific content related to, ultimately, the productive agency and human dignity of the Navajo people. For this reason, I contrast the case and its result with the unsettled conflict over the distinctions and categories of affiliated, unaffiliated, and unidentifiable human remains and material culture. *Corrow* shows some promise for the role of legal pluralism in NAGPRA and, by extension, to other areas where competing claims implicating cultural difference must be resolved.

IV. Conclusion

The legal pluralism of NAGPRA embodied in its definitions of cultural items and its mandated procedures of evaluation and repatriation promotes analyses of the implementation of Act through various discourses of rights. Questions of material culture refract through discourses of rights variously as they shape interpretive claims about NAGPRA and the nature of the rights—human, civil, cultural, and otherwise—that this law may serve, enhance, and secure. Still, as NAGPRA implementation continues, it raises several rights questions beyond the purview of the law, especially in the area of human rights. These questions deserve rigorous scholarly attention. Examples described in this paper implicate the making and possession of cultural identities and histories relative to the principles of uniform and universal human dignity required of human rights appeals. Additional rights questions suggest limits to the

accommodations of liberal democratic governance in areas of true cultural difference. The discussion of the unresolved classifications of culturally affiliated, unaffiliated, and unidentifiable human remains and material culture, as well as that of the trafficking case of Richard Corrow have been used to specify these questions and to delineate some of the issues that surround them. Thus, where other scholars have declared NAGPRA to exemplify codified human rights for Native Americans, I perceive a serious challenge to explore unsettled connections between material culture, human remains, and the domains of human, civil, and cultural rights. Therein lies the potential to uncover insights into how human beings constitute their worlds and towards what moral and political ends they may choose to do so.

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