

**A GUIDE ALONG THE SPIRIT ROAD: NAGPRA,
CULTURALLY UNIDENTIFIABLE HUMAN REMAINS, AND
DEFERENCE TO ORAL TRADITION**

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He launched his body's burnished bone spears
beyond the race to a point beyond despair,
what broke in him, broken open, like a spore.
Prior to everything but pang and prayer,
he watches us inside a stillness freer
than all the speed that harries us through the air.
His mind unknowable, his face unknown,
the part that lasts was in between them: Bones
that die hard let us know him for our own.
His rise is a promise we will not go under
the jackhammer rain or river's power sander
but take more killing than a death can render
because we are the pearl and pit of matter,
infinite mind in a rind of dura mater
the hardest thing that matter ever mothered,
our historiography of wounds
graven deeper than the flighty winds
that make a rubbing of our eloquence.¹

INTRODUCTION

The Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in 1990² is best understood as a response to a shameful recurring trope in the United States’ relations with its Indigenous peoples—the disparate treatment of the human remains of Indigenous peoples by institutions such as museums.³ NAGPRA established a

1. Amit Majmudar, *Kennewick Elegy*, SMITHSONIAN MAG. (2014), <https://www.smithsonianmag.com/arts-culture/kennewick-elegy-180952463/> [<https://perma.cc/Q3DG-DKJX>].

2. Native American Graves Protection and Repatriation Act, 25 U.S.C.A. §§ 3001–3013 (Westlaw through Pub. L. 119-59).

3. See NAT'L PARK SERV., *Native American Graves Protection and Repatriation Act* (Apr. 29, 2024), <https://www.nps.gov/subjects/nagpra/index.htm> [<https://perma.cc/X2Y8-RZAT>] (“With this law, Congress sought to encourage a continuing dialogue between museums and Indian Tribes and Native Hawaiian organizations and to promote a greater understanding between the groups while at the same time recognizing the important function museums serve in society by preserving the past.”).

framework for U.S. federal agencies, museums, and institutions receiving federal funding to return human remains,⁴ as well as artifacts falling into the categories of funerary object,⁵ sacred object,⁶ and objects of cultural patrimony⁷ (“OCPs”); to lineal descendants,⁸ tribes, or Native Hawaiian groups. This process of return is referred to as repatriation,⁹ and its overriding intent is surrendering physical control of remains or artifacts to their associated communities.¹⁰ NAGPRA required all collecting institutions possessing ancestral remains to take inventories of relevant collections within five years of the act’s adoption in 1990.¹¹ The collecting institutions were then required to provide a notice of their findings to Indigenous groups whose artifacts or remains were in their collections, including information such as the cultural affiliation of funerary objects, sacred objects, or ancestral remains.¹² Some Indigenous human remains¹³

4. See NAT’L PARK SERV., *Native American Graves Protection and Repatriation Act Glossary* (Jan. 12, 2024), <https://www.nps.gov/subjects/nagpra/glossary.htm> [<https://perma.cc/C3ST-MC7S>] for the definition of human remains in this particular context.

5. *Id.* (“Funerary [objects are any objects] reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.”).

6. *Id.* (“Sacred [objects are] specific ceremonial object[s] needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. While many items might be imbued with sacredness in a culture, this term is specifically limited to an object needed for the observance or renewal of a Native American religious ceremony.”).

7. *Id.* (“[An] object of cultural patrimony [is an] object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group . . . according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization. . . . The object must be reasonably identified as being of such importance central to the group that it: (1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and (2) Must have been considered inalienable by the group at the time the object was separated from the group.”).

8. *Id.* (“[A] lineal descendant [is a] living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to this part; or . . . [a] living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to all the known individuals represented by comingled human remains.”).

9. *Id.* (“Repatriation [is when a] museum or Federal agency relinquishes possession or control of human remains or cultural items in a holding or collection to a lineal descendant, Indian Tribe, or Native Hawaiian organization.”).

10. Stephen E. Nash & Chip Colwell-Chantapongh, *NAGPRA at 30: The Effects of Repatriation*, 49 ANN. REV. ANTHROPOLOGY 225, 226 (2020), available at <https://doi.org/10.1146/annurev-anthro-010220-075435>.

11. 25 U.S.C.A. § 3003(b)(1) (Westlaw through Pub. L. 119-59).

12. 25 U.S.C.A. § 3003(d) (Westlaw through Pub. L. 119-59).

13. I will use the term “ancestral remains” to refer to Indigenous human remains, as this term is widely used and preferred by Indigenous communities and affiliated collecting institutions.

were covered by this provision, namely those to which a cultural association could be assigned based on a totality of circumstances test.¹⁴

Few can dispute that the statute has made headway—since NAGPRA’s implementation, “about 67,000 ancestral human remains, 1.9 million funerary objects, and 15,000 sacred and communally owned objects” have been returned to their communities of origin.¹⁵ However, the majority of Indigenous human remains (“ancestral remains”) held by collecting institutions¹⁶ have not been repatriated. The U.S. National Park Service estimates that roughly 127,000 ancestral remains continue to languish in collecting institutions’ custody.¹⁷ Many of these remains are considered “culturally unidentifiable” under the language of NAGPRA.

Culturally unidentifiable human remains pose perhaps the greatest conundrum for NAGPRA’s practical implementation. NAGPRA directly concerns only ancestral remains for which cultural affiliation is already evident, or potentially identifiable through collaborative historical discussions with Indigenous groups or lineal descendants. Ancestral remains for which cultural affiliation cannot be determined under a preponderance of the evidence standard¹⁸ are denoted as culturally unidentifiable. Needless to say, many culturally unidentifiable human remains cannot be assigned a culture of origin under this standard, as the scientific and epistemological complexities of establishing a cultural connection through often upwards of 10,000 years are significant. Consequently, many ancestral remains pulled from Indigenous gravesites on American soil are held in collecting institutions, even after a tribe seeks to repatriate them. They remain severed from their communities, wherever their lineal descendants may be. Such an outcome seems at odds with NAGPRA’s ethos of righting colonialist wrongs and fostering mutual understanding, as well as with the historical epistemologies¹⁹ of many North American Indigenous groups.²⁰ The product is a statute which, while well-

14. 25 U.S.C.A. § 3003(d)(2)(C) (Westlaw through Pub. L. 119-59).

15. Nash & Colwell-Chantapongh, *supra* note 10, at 226.

16. Term used in reference to museums, institutions receiving federal funding, and federal entities as a category.

17. See Nash & Colwell-Chantapongh, *supra* note 10, at 226.

18. See Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 60 n.128 (2013) (citing *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006)).

19. See Cathay Y. N. Smith, *Oral Tradition and the Kennewick Man*, 126 YALE L.J. FORUM 216, 219–20 (2016) for an examination of oral tradition as the primary form of history among Native North American groups.

20. See Nash & Colwell-Chantapongh, *supra* note 10, at 228 (discussing the inherent tension in NAGPRA between Indigenous kinship norms and Western-colonialist epistemological proof structures).

intentioned and profoundly beneficial in the aggregate, fails to make full amends.

Accordingly, this Note argues for the amendment of NAGPRA to require deference to Indigenous oral tradition and other forms of traditional historical knowledge²¹ where conventional means of establishing cultural affiliation, as provided in the statutory language,²² prove inadequate to illuminate connections through the deep past.²³ Such revisions are both consistent with the fundamental nature of NAGPRA as human rights legislation²⁴ and conducive to serving another chief aim of the statute—mending deep-seated wounds between the United States and Indigenous groups in both a historical-moral context²⁵ and for the discipline of archaeology specifically.²⁶

Part I of this Note provides an expansive overview of NAGPRA and its application to the question of effectively repatriating culturally unidentifiable human remains, focusing on the statute’s historical context and application to two high-profile repatriations. Part II of this Note argues for an understanding of NAGPRA as human rights legislation dedicated to the promotion of Indigenous self-determination, for which the strong consideration of oral tradition as evidence of cultural affiliation is morally required. Part III argues for the amendment of NAGPRA to require deference to oral tradition and traditional historical knowledge as a particularly compelling form of evidence. Under this proposal, oral and

21. See Smith, *supra* note 19, at 223 (“By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of evidence, Congress effectively acknowledged that oral tradition is valuable evidence.”).

22. 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59) (“[Culturally unidentifiable] Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence based upon *geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.*” (emphasis added)).

23. Cf. Smith, *supra* note 19, at 223 (arguing that oral-traditional evidence should be considered as evidence in a variety of Native American claims adjacent to NAGPRA, such as establishing historical land occupancy and the passing down of ancestral customs and traditions).

24. See Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 850 (2012) (“As separate peoples, Native Americans have a human right to reclaim their ancestors as a political right, equivalent to the right of the United States to repatriate the American servicemen who died on foreign soil. This also means that Native peoples have the cultural right to rebury their ancestors with the songs and ceremonies that ensure an unbroken journey on the spirit road. *The United States has a duty to repair the brutal history of its political encounters with the Native peoples of this land*, and it also has the obligation to recognize the moral and spiritual duty of contemporary Native peoples to reclaim their ancestral human remains, along with all associated funerary objects.”) (emphasis added).

25. *Id.*

26. See Chip Colwell-Chantapong, *Reconciling American Archaeology & Native America*, 138 DAEDALUS 94 (Spring 2009) for a brief discussion of the historical phenomena giving rise to an ingrained distrust of Western archaeology ongoing among North American Indigenous groups.

historical knowledge would determine cultural affiliation for culturally unidentifiable human remains where the Western epistemological methods provided in the statute have proven inadequate.

I. NAGPRA OVERVIEW

NAGPRA, though preceded by a number of other statutes at least tangentially linked to protecting Indigenous artifacts and antiquities,²⁷ was the first federal statute to specifically promote the repatriation and respectful treatment of ancestral remains and Indigenous artifacts of religious significance. Previous statutes concerning Indigenous cultural heritage, such as the Antiquities Act of 1906, the National Historic Preservation Act of 1966, the American Indian Religious Freedom Act of 1978, and the Archaeological Resources Protection Act of 1979,²⁸ focused primarily on cultural heritage as archaeological resources useful to the general American public²⁹ or as an element of Indigenous groups' private religious expression.³⁰ Any acknowledgment of the historically disparate treatment of ancestral remains, let alone any plan of action regarding culturally unidentifiable human remains, remained entirely unaddressed.³¹ Certainly, these statutes reflected an increasing political concern for protecting Indigenous antiquities and expressions of Indigenous culture. In this, they were necessary steps towards NAGPRA. However, their failure to center the legislative priorities of the Indigenous community³² sets NAGPRA apart as the first direct statutory acknowledgment of Indigenous people's "moral and spiritual duty . . . to reclaim their ancestral human remains, along with all associated funerary objects"³³ in light of the United States' past brutality and inhumane conduct.³⁴

27. See generally Phelan, *supra* note 18, at 49–55.

28. *Id.*

29. See *id.* at 46–47.

30. See *id.* at 52.

31. See, e.g., *id.* ("Native Americans were not successful in citing the AIRFA as authority for their right to retain their native cultural resources.").

32. See *id.* at 46–47 ("During the 20th century, Indian tribes persistently lobbied Congress for recognition of their rights, particularly for a congressional mandate that museums repatriate Native American human remains, funerary objects, and cultural artifacts in museum collections. . . . [NAGPRA], which became effective in 1991, provided some of the recognition and protection of Indian cultures Native Americans had long sought.").

33. Tsosie, *supra* note 24, at 850.

34. *Id.*

A. NAGPRA's Passage and Contents

Indigenous groups' lobbying for a Congressional repatriation initiative intensified in the late 1980s in the aftermath of *Lyng v. Northwest Indian Cemetery Protective Association*³⁵ and the Northern Cheyenne tribe's discovery that the Smithsonian Institution had custody of over 18,000 ancestral remains.³⁶ These two events spurred Indigenous groups' concerns about the inability of existing statutes to protect the most sensitive aspects of cultural heritage, all while drawing attention to the sheer scope of collecting institutions' disparate treatment of ancestral remains.³⁷

In *Lyng*, the United States Forest Service and a logging company attempted to build a road through forests historically used for spiritual purposes by the Karuk, Tolowa, and Yurok tribes of northern California.³⁸ The involved tribes sued under the American Indian Religious Freedom Act of 1978 (AIRFA), arguing that the resulting damage to the land in question would prevent their free religious expression in violation of the statute and the First Amendment.³⁹ Ultimately, the Supreme Court ruled against the tribes, finding that the Forest Service had attempted to avoid damaging spiritually significant land as much as possible in designing the course of the road, and therefore, construction would not impermissibly burden the tribes' religious expression.⁴⁰ The decision was a resounding expression of AIRFA's inability to secure tribal cultural heritage outside its narrow, specialized context⁴¹ and increased concern regarding cultural heritage among Indigenous advocates.

A simultaneous controversy of national scope arose after leaders of the Northern Cheyenne tribe discovered that the Smithsonian Institution was storing roughly 18,500 ancestral remains in its warehouses.⁴² The incident

35. 485 U.S. 439 (1988).

36. Kevin P. Ray, *NAGPRA and Its Limitations: Repatriation of Indigenous Cultural Heritage*, 15 J. MARSHALL REV. INTELL. PROP. L. 472, 476 (2016) [hereinafter Ray, *NAGPRA and Its Limitations*] (citing 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, 44 (1992)).

37. See Phelan, *supra* note 18, at 56 ("In 1988, the Senate Select Committee on Indian Affairs held a hearing on legislation which provided a process for the repatriation of Native American human remains The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate The Panel concluded that Federal legislation . . . was needed." (quoting Pub. L. No. 101-601 (Oct. 15, 1990), 1990 U.S.C.C.A.N. 4367, 4369-70)).

38. *Lyng*, 485 U.S. at 442-43, 451.

39. *Id.* at 455.

40. Phelan, *supra* note 18, at 56.

41. *Id.*

42. 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, 54-55 (1992).

served as the catalyst for a concerted national effort by Indigenous groups and associated organizations. They brought the issue of repatriation before Congress,⁴³ leading to the introduction of a number of unsuccessful precursor bills between 1986 and 1990.⁴⁴ Early legislation encountered vehement opposition from collecting institutions,⁴⁵ resulting in the tabling of such initiatives until a number of separate repatriation bills were consolidated into NAGPRA during the 101st Congress.⁴⁶

NAGPRA lays out a robust procedural framework for the identification, inventory, and repatriation of ancestral remains, funerary objects, and OCPs and applies the resulting restrictions to collecting institutions.⁴⁷ Fulfilling the long-desired objective of Indigenous cultural heritage advocates,⁴⁸ NAGPRA requires collecting institutions to consult with involved Indigenous and Native Hawaiian groups and conduct a full inventory of ancestral remains, funerary objects, and OCPs in their custody within five years of the statute's passage.⁴⁹ Simultaneously, collecting institutions are obligated to ascertain the cultural affiliation of their ancestral remains, funerary objects, and objects of cultural patrimony to the best of their ability and document their findings.⁵⁰ These inventories and the associated documents are then sent to a committee of Indigenous or Native Hawaiian overseers and other experts, selected by the Secretary of the Interior, for evaluation.⁵¹ If cultural affiliation is established between a tribe or lineal descendants of an extinct group and any materials in the inventory, the collecting institution is required to repatriate the remains or artifacts in question to said tribe or lineal descendants "expeditiously."⁵²

The determination of cultural affiliation is the axis upon which the successful implementation of NAGPRA turns. Correctly identifying ancestral remains', sacred objects', or OCPs' parent culture is self-evidently the most critical aspect of repatriation. NAGPRA accordingly sets out several methods for determining likely cultural affiliation. Notably, the burden of proof is placed on the Indigenous group claiming affiliation:⁵³

43. *Id.* at 55.

44. *Id.*

45. *Id.*

46. *See id.* at 55–56 (explaining how five Senators' and Congressmen's separate bills, all dealing with specific individual aspects of repatriation procedure, were consolidated into NAGPRA).

47. *See generally* 25 U.S.C.A. §§ 3003–3005 (Westlaw through Pub. L. 119-59).

48. Phelan, *supra* note 18, at 56–57.

49. *Id.*; *see also* 25 U.S.C.A. § 3003 (Westlaw through Pub. L. 119-59).

50. 25 U.S.C.A. § 3003(b) (Westlaw through Pub. L. 119-59).

51. 25 U.S.C.A. § 3006 (Westlaw through Pub. L. 119-59).

52. 25 U.S.C.A. § 3005(a) (Westlaw through Pub. L. 119-59).

53. 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59).

Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (c) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

In 2006, the District of Nevada elaborated on NAGPRA's preponderance standard in *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management*,⁵⁴ laying out a tripartite test for establishing cultural affiliation based on the above forms of evidence:

Cultural affiliation must only be proven by a preponderance of the evidence, not by scientific certainty, and such a finding should not be precluded merely because there are gaps in the historical record. In making the determination of affiliation, three things must be proven: **(1) the existence of an identifiable present-day tribe; (2) evidence of the existence of an identifiable earlier group; and (3) evidence of the existence of a shared group identity that can be reasonably traced between the present day tribe and the earlier group.** The types of evidence to be considered in this determination are geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. (emphasis added) (internal citations omitted).

Often, proving cultural affiliation by a mere preponderance with such robust routes of investigation is straightforward. However, NAGPRA's most significant controversies arise when these methods of investigation fail to illuminate a firm connection between ancestral remains and extant Indigenous groups. In such cases, even lineal descendants cannot be

54. 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006).

conclusively identified.⁵⁵ When this occurs, the ancestral remains are deemed culturally unidentifiable.

B. Culturally Unidentifiable Human Remains Under NAGPRA

The shortcomings of NAGPRA are most apparent in its framework for repatriating culturally unidentifiable human remains (“CUHRs”). NAGPRA does not explicitly define cultural unidentifiability, nor does it name CUHRs as a distinct category of ancestral remains,⁵⁶ but it does describe them by omission in § 3005(a)(4).⁵⁷ These are ancestral remains for which a cultural affiliation could not be established, in the eyes of collecting institutions,⁵⁸ by a preponderance established through any of the ten statutorily acceptable forms of investigation⁵⁹ and later refined through *Fallon*’s tripartite test of cultural affiliation.⁶⁰

NAGPRA provides little to no guidance about the proper treatment of CUHRs,⁶¹ despite significant controversy around the question during the act’s passage.⁶² The recommendations of a Congressional review committee established to provide an answer—the product of nine years of deliberation—promote greater cooperation between collecting institutions and Indigenous groups but have not been adopted by the Secretary of the Interior as of 2011.⁶³ Troublingly, the Congressional debate surrounding the fate of CUHRs centered entirely around their utility to scientific

55. See, e.g., Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CENTER FOR ART LAW (May 18, 2021), <https://itsartlaw.org/art-law/31-years-of-nagpra-evaluating-the-restitution-of-native-american-ancestral-remains-and-belongings/> [<https://perma.cc/KQT5-JXYA>] (characterizing putting NAGPRA’s repatriatory principles into practice as “not . . . without difficulty” regarding ancient remains).

56. See 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59).

57. See *supra* text accompanying note 53. CUHRs are those ancestral remains for which, implicitly, no affiliation to any present Indigenous group may be determined by a preponderance standard on the basis of extant evidence.

58. Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 524 (2010) (noting that the status of culturally unidentifiable is to some extent subjective and primarily predicated upon the judgment of collecting institutions).

59. See 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59) (“[E]vidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”).

60. *Fallon*, 455 F. Supp. 2d at 1217.

61. Gunn, *supra* note 58, at 524.

62. See, e.g., Clayton W. Dumont, Jr., *Contesting Scientists’ Narrations of NAGPRA’s Legislative History: Rule 10.11 and the Recovery of “Culturally Unidentifiable” Ancestors*, 26 WICAZO SA REV. 5, 20–25 (Spring 2011) (summarizing the significant controversy between Indigenous and Western scientific parties in developing the text of NAGPRA as it pertains to CUHRs).

63. See Gunn, *supra* note 58, at 524.

endeavors.⁶⁴ The attitudes of Indigenous groups towards these ancestral remains—effectively individuals unmoored both in time and from their own people—were not discussed.⁶⁵

The most significant obstacle in the way of identifying and repatriating CUHRs is the immense financial commitments required of tribes seeking repatriation.⁶⁶ The process of seeking out CUHRs in the custody of collecting institutions is not only time-consuming and logistically complicated, but is also only the first step if a tribe wishes to pursue repatriation, which is generally subject to a daunting legal framework. Collecting institutions may deny repatriation requests in such cases, and tribes may then go to the Congressional review committee (“the Committee”) to request both reconsideration and a new attempt at establishing cultural affiliation.⁶⁷ If the Committee makes an adverse decision, the tribe may seek review in the federal courts,⁶⁸ but relief is unlikely, as the courts are required to afford “considerable deference” to the Committee’s rulings.⁶⁹ Combined with the federal government’s severely insufficient appropriations for tribal funding,⁷⁰ this situation has forced Indigenous groups to prioritize seeking repatriation of ancestral remains and funerary objects and forgo their sacred objects or OCPs.⁷¹ Moreover, pursuing the repatriation of ancestral remains is often not even a feasible endeavor when CUHRs are considered, as will be explained in greater depth.

Furthermore, the very designation of “culturally unidentifiable” and its implications for Indigenous identity and historical awareness have proven inimical to the repatriation of CUHRs, particularly when applied to ancestral remains of prehistoric origin,⁷² as have historic collecting practices

64. *See id.* (“Congress referred the matter to the Review Committee for its recommendations, noting that there was ‘general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest.’”).

65. *See id.*

66. *Id.* at 524–25.

67. *Id.* at 525.

68. *Id.*

69. *Id.* (citing 25 U.S.C.A. § 3013 (Westlaw through Pub. L. 119-59)).

70. *See Gunn, supra* note 58, at 525.

71. *See id.*

72. *See Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) for an example of how the great age of ancestral remains can obfuscate efforts at establishing cultural affiliation and cast the temporal and anthropological implications of the term “Native American” in the NAGPRA context into doubt. *See also Tsosie, supra* note 24, at 818 (“If the remains pre-date European contact[,] are they not Native American? There have been indigenous peoples on these lands since time immemorial, but the legal category of a federally recognized Indian tribe is a relatively recent concept created by the U.S. government” (internal quotation marks omitted)).

for Indigenous ancestral remains.⁷³ NAGPRA defines “Native American” ancestral remains as those connected by cultural affiliation to a human population that is indigenous to the territory of the United States.⁷⁴ At first, this definition almost appears tautological. However, the temporal implications of this clause have proven markedly consequential in the CUHR context. The Ninth Circuit in *Bonnichsen* understood “Native American” in the NAGPRA context to refer solely to Indigenous groups that are *extant* in the United States.⁷⁵ Opting to read the statute narrowly, the Ninth Circuit denied the repatriation of the Ancient One⁷⁶ to a group of local Plateau tribes asserting a cultural affiliation.⁷⁷ The court held that no connection could be drawn to any extant Indigenous group due to the great antiquity of the Ancient One⁷⁸ and the alleged unreliability of oral tradition as a means of proving cultural affiliation.⁷⁹ The result of applying such a stringent standard⁸⁰ is an effective severance of the most ancient ancestral remains—often CUHRs—from present Indigenous groups, despite the fact that some degree of kinship or descent almost certainly exists between them.⁸¹ This places a burden of proof, financial expenditure, and

73. See Tsosie, *supra* note 24, at 818 (discussing how unethical collecting and storage procedures for Indigenous human remains may severely complicate assigning a tribal affiliation).

74. 25 U.S.C.A. § 3001(9) (Westlaw through Pub. L. 119-59).

75. S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 104 (2006) [hereinafter Ray, *The Challenge of Kennewick Man*] (citing *Bonnichsen*, 367 F.3d at 875).

76. The remains of Kennewick Man, also known as the Ancient One by Indigenous groups, date from between 8340 and 9200 years before present and were found in 1996 on the banks of the Columbia River near Kennewick, Washington. Several tribes native to the surrounding region asserted that they were lineal descendants of the Ancient One and pursued repatriation, leading to the *Bonnichsen* suit. See *Bonnichsen*, 367 F.3d at 868–69. The author of this note will use the name “The Ancient One” for the ancestral remains involved in *Bonnichsen*.

77. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 105–06.

78. See *Bonnichsen*, 367 F.3d at 879.

79. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 135–36 (recounting the *Bonnichsen* court’s disregarding an expert witness’ testimony concerning the Plateau Tribes’ oral tradition’s ability to record extremely ancient events in their territory, possibly overlapping with the lifetime of the Ancient One, and attest to long-term occupation).

80. The restrictive nature of this standard was of concern to Congress in the aftermath of the *Bonnichsen* decision. In 2007, Senators John McCain and Byron Dorgan introduced an amendment to NAGPRA expanding the statutory definition of “Native American” to include populations native to the United States who are no longer extant. This amendment was defeated. See Ray, *NAGPRA and Its Limitations*, *supra* note 36, at 480.

81. See Tsosie, *supra* note 24, at 819 (“The existence of an identifiable earlier group is a bit more problematic because the current federally recognized tribes do not map onto the succession of tribes on these lands over time The regulations developed by the Interior Department to implement NAGPRA maintain that the existence of an identifiable earlier group may be established through evidence establishing the identity and cultural characteristics of the group, and which documents distinct patterns of material culture, and which establishes the earlier group as biologically distinct. . . . The categories often do not represent the cultural understandings of contemporary tribes about who they are and where they come from.” (internal quotation marks omitted)).

administrative dealings on the very groups whose human rights NAGPRA is designed to protect⁸² if they wish to pursue the repatriation of CUHRs. The ease of such a predicament occurring under NAGPRA appears inconsistent with the statute's purpose, historical context, and underlying principles.

C. Notable Cases Involving Cultural Unidentifiability

It is readily apparent that the criterion of cultural unidentifiability has dogged repatriation efforts, particularly of the most ancient ancestral remains. Having entered the North American continent at least 15,000 to 20,000 years ago,⁸³ early Indigenous groups have diverged into countless distinct ethnicities, of which a significant portion is no longer extant. Even so, the fact that such groups no longer exist does not preclude their relation, either by cultural commonality or direct lineal ancestry, to modern Indigenous groups.⁸⁴ As Western historical epistemologies—and at times, even the most advanced scientific investigation—may be insufficient to verify an alleged connection between such ancestral remains and present groups to the extent required under NAGPRA,⁸⁵ cases involving extremely ancient CUHRs are perhaps the clearest demonstrations of where NAGPRA fails.

1. *Bonnichsen and the Failings of NAGPRA*

The aforementioned *Bonnichsen v. United States*⁸⁶ is arguably the most obvious example of the difficulties for repatriation posed by the gulf between NAGPRA's standards for rendering CUHRs identifiable under the eye of the law and the epistemologies of Indigenous groups.

Bonnichsen concerned the ultimate fate of the Ancient One as to whether repatriation was an acceptable outcome for this individual, whose great antiquity rendered his remains potentially highly informative to scientists.⁸⁷ The Ancient One was rediscovered in 1996 by two teenagers at

82. See *id.* at 820 (“In many cases, the human right of Native American claimants to repatriate their ancestors will depend upon the group’s ability to hire outside experts to prove cultural affiliation according to the standards of American anthropologists.”).

83. See JENNIFER RAFF, ORIGINS: A GENETIC HISTORY OF THE AMERICAS 201–12 (Hachette Book Group, 1st ed. 2022) for a brief discussion of the hypothesized time of Indigenous Americans’ entry of the Americas from northeastern Asia based on recent archaeological and genetic evidence.

84. See Tsosie, *supra* note 24, at 819.

85. See *id.*

86. 367 F.3d 864 (9th Cir. 2004).

87. See *id.* at 870 (“The skeleton attracted attention because some of its physical features, such as the shape of the face and skull, differed from those of modern American Indians. Many scientists believed the discovery might shed light on the origins of humanity in the Americas.”).

the Columbia River near Kennewick, Washington on land managed by the United States Army Corps of Engineers (“Corps”)⁸⁸ and was thus covered under NAGPRA.⁸⁹ A public controversy soon arose, primarily due to the Ancient One’s physical features atypical of Indigenous Americans and great antiquity.⁹⁰

Soon after the Smithsonian Institution took physical custody of the Ancient One for scientific analysis,⁹¹ four tribes native to the Columbia Plateau region (“Plateau Tribes”) sought his repatriation.⁹² The Corps cooperated, and a number of scientists (“Plaintiffs”) sued to halt the repatriation;⁹³ their motion for summary judgment was denied in 1998, at which point further scientific investigations commenced to determine the cultural affiliation of the Ancient One.⁹⁴ In 2000, the Secretary of the Interior decided nonetheless that the Ancient One qualified as “Native American” *sensu* NAGPRA and ordered repatriation, prompting Plaintiffs to file an amended complaint that reached the Ninth Circuit.⁹⁵

The *Bonnichsen* court ultimately declined to repatriate the Ancient One to the Plateau Tribes,⁹⁶ its primary rationale being skepticism on whether the Ancient One qualified as “Native American” under NAGPRA’s language.⁹⁷ Of greatest significance to the Ninth Circuit were the temporal implications of NAGPRA’s definition of “Native American,” and the heightened standard of proof implied as a result:

88. *Id.* at 869.

89. *Id.*

90. *See id.* at 870.

91. *Id.*

92. *See id.*

93. *See id.* (“The scientists and others, including the Smithsonian Institution, objected to the Corps’ decision, arguing that the remains were a rare discovery of national and international significance.”).

94. *Id.* at 871.

95. *Id.* at 872.

96. *Id.* at 882.

97. *See id.* at 877 (“Though NAGPRA’s two inquiries have some commonality in that both focus on the relationship between human remains and present-day Indians, the two inquiries differ significantly. The first inquiry requires only a general finding that remains have a significant relationship to a presently existing ‘tribe, people, or culture,’ a relationship that goes beyond features common to all humanity. The second inquiry requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe. . . . Because the record shows no relationship of Kennewick Man to the Tribal Claimants, the district court was correct in holding that NAGPRA has no application.”).

The parties dispute whether the remains of Kennewick Man constitute Native American remains within NAGPRA's meaning. NAGPRA defines human remains as "Native American" if the remains are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." (citation omitted). The text of the relevant statutory clause is written in the present tense ("of, or relating to, a tribe, people, or culture *that is* indigenous"). Thus the statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American.⁹⁸

Accordingly, contemporary scientific analyses were unable to indicate—let alone prove by a preponderance standard—any lineal descent between the Ancient One and the Plateau Tribes,⁹⁹ a situation made murkier by the Ancient One's presumptively extinct phenotype.¹⁰⁰ The *Bonnichsen* court declined to consider the Ancient One a "Native American." In this, the designation of CUHR was made antithetical to the status of "Native American." To be culturally unidentifiable—and to remain culturally unidentifiable where Western epistemologies alone fail to establish a cultural affiliation—is to be denied the status of "Native American" entirely.¹⁰¹ Interestingly, the Ninth Circuit's understanding of indigeneity *sensu* NAGPRA conflicts with the very purpose of the statute. The court anticipates such an objection, citing the United States' desire to make amends for the disrespectful treatment of ancestral remains:

NAGPRA was enacted with two main goals: to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death. NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains.¹⁰²

98. *Id.* at 875.

99. *See id.* at 882.

100. *See generally id.* at 871, 880–81 (describing scientific confusion over the Ancient One's ethnicity due to his skeleton's resemblance to those of Polynesians or south Asians). It should be noted that genetic testing, more common in modern archaeological investigations, was unavailable at the time of the studies.

101. The *Bonnichsen* court in fact refused to consider oral history delivered by a tribal expert as evidence at all, even attacking oral tradition as epistemologically suspect in general. *Id.* at 881–82.

102. *Id.* at 876.

The Ninth Circuit evinces a concern that NAGPRA would be neutered and rendered absurd if extended to include CUHRs.¹⁰³ Even so, the court's implied denial that CUHRs might have any ancestral connection or cultural affiliation to modern Indigenous groups is troubling, considering NAGPRA's purpose. Not only does such a rigid construction of NAGPRA's language conflict with the canons of American Indian statutory interpretation,¹⁰⁴ but it also denies the "multivocality of the concept [of] Native American"¹⁰⁵ and favors strict biological or cultural descent, provable by Western standards alone, as the means of establishing cultural affiliation. This represents a flawed application of a statute whose ethos is one of human rights, historical atonement, and prioritizing the pressing cultural concerns of a group long maltreated.¹⁰⁶ To disregard Indigenous epistemologies such as oral tradition—an evidentiary form of particular concern, owing to its great antiquity of use on the North American continent and continued importance to Indigenous self-determination¹⁰⁷—further complicates the ability of NAGPRA to right historical wrongs under a human-rights philosophy.¹⁰⁸

The story of the Ancient One, however, was not without a happy ending for the Plateau Tribes and NAGPRA. New analyses of the Ancient One in

103. See generally *id.* at 878 (“[T]he Secretary’s interpretation would mean that the finding of any remains in the United States *in and of itself* would automatically render these remains ‘Native American.’ . . . But we cannot conclude that Congress intended an absurd result . . .”).

104. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 112–13 (“[T]he Bonnicksen court . . . held ‘that NAGPRA’s requirement that Native American remains bear some relationship to a presently existing tribe, people, or culture is unambiguous,’ the court concluded in a footnote that ‘we need not resort to the ‘Indian canon of construction,’ under which ‘doubtful expressions’ in legislation passed for the benefit of Indian tribes are resolved in favor of the Indians.” (citing *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986))).

105. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 94; see also *id.* (discussing NAGPRA’s neglect of the Indigenous conception of cultural kinship, which generally relies more on shared or passed-down cultural traits than strict biological descent).

106. See Tsosie, *supra* note 24, at 850; see also *id.* at 845–46 (“[I]nternational human rights law is premised on Kantian ethics that supports the primary value of respect for persons. . . . Under this approach, the basic moral duty of the United States would be to compensate for these past wrongs and to recognize the basic human dignity of Native peoples by validating their need to repatriate Native American ancestral remains. Only then would we accord the appropriate ‘respect’ for persons that international human rights law requires.”).

107. See Smith, *supra* note 19, at 219–20; see also Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 93 (“*Bonnicksen’s* reasoning, as much as its result, reveals that traditional Indian lifeways remain at best an enigma to most non-Native jurists who do not know how to incorporate stories of Indigenous self-understanding in their legal analyses, which continue to privilege scientific explanations.”); see also *id.* at 93 n.34 (“The [*Bonnicksen*] court’s conclusion seemed to have been based in large part on a fundamental skepticism about and rejection of all oral tradition evidence, which was contrary to Congress’s intentions as expressed in NAGPRA.” (quoting Allison M. Dussias, *Kennewick Man, Kinship, and the “Dying Race”: The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 107–17 (2005))).

108. See Tsosie, *supra* note 24, at 845–46.

the early 2010s, relying on genetic and other scientific evidence unavailable at the time of *Bonnichsen*, allowed scientists to determine that the Ancient One was closely related to at least one of the Plateau Tribes, belonging to an extinct group that was likely almost directly ancestral.¹⁰⁹ Accordingly, Washington State representatives introduced a bill in 2016 requiring the repatriation of the Ancient One to the Plateau Tribes, which then-President Barack Obama signed.¹¹⁰ In February 2017, more than 200 members of the Plateau Tribes gathered to lay the Ancient One to rest at an undisclosed location on their land—the land that the Ancient One himself once called home.¹¹¹

2. *Avoiding Litigation: The Anzick Boy*

However, the great antiquity of CUHRs need not be an absolute barrier to their repatriation under NAGPRA, despite the federal courts' skeptical view of Native American lineage in deep time. Recent examples of collaboration between scientific investigators and Indigenous communities who seek to ascertain the affiliation of CUHRs have hastened repatriation and avoided litigation.¹¹² The Anzick Boy discovery is perhaps an archetypal example and offers a blueprint for approaching NAGPRA's question of cultural affiliation in accordance with a human rights philosophy.¹¹³

In 1968, workers discovered the remains of an ancient Indigenous child (“Anzick Boy”) on the Anzick family's land in Wilsall, Montana while mining sandstone.¹¹⁴ Analysis revealed the Anzick Boy to be over 11,000 years old and likely a member of the Clovis culture of Paleo-Indians as evidenced by stone artifacts found in his grave.¹¹⁵ These artifacts were of great number and fine quality, indicating great personal attachment or

109. See Morten Rasmussen et al., *The Ancestry and Affiliations of Kennewick Man*, 523 NATURE 455–58 (2015) [hereinafter Rasmussen, *The Ancestry and Affiliations of Kennewick Man*].

110. Annette Cary, *Tribes Return Ancient Kennewick Man to the Ground*, TRI-CITY HERALD (Feb. 21, 2017), <https://www.tri-cityherald.com/news/local/article133780309.html> [<https://perma.cc/5BSU-JFDL>]

111. *Id.*

112. See Samuel S. White V, *The Anzick Site: Cultural Balance and the Treatment of Ancient Human Remains* (May 2015) (Graduate student thesis, University of Montana) (UMT.edu) at 41–44, 47–49 for two case studies where a collaborative approach was either initially used or eventually agreed upon.

113. Note, however, that the Anzick Boy was not subject to NAGPRA, but a nearly identical Montana statute. The Anzick case study is included here as a model of conduct for similar occurrences on federal land.

114. White, *supra* note 112, at 4.

115. See Ewen Callaway, *Ancient Genome Stirs Ethics Debate*, 506 NATURE 142 (2014); White, *supra* note 112, at 8–10.

religious consideration on the part of the Clovis people who had buried this small child many millennia before.¹¹⁶ Even so, the Anzick Boy's status as a member of the extremely ancient Clovis culture—one of the first in the Americas—approached CUHR status. The Clovis culture's direct genetic ancestry to the vast majority of Indigenous groups¹¹⁷ prevented identifying a single lineal or cultural descendant. After a period in museum custody, the Anzick Boy was transferred to the possession of the Anzick family in the late 1990s.¹¹⁸ Despite the inapplicability of NAGPRA to the Anzick Boy, a Montana statute imposed in 2001 permitted repatriation claims for ancestral remains found on private land and required that consultation with interested Indigenous groups occur, at which point the possibility of cultural affiliation would be ascertained.¹¹⁹

Though no repatriation claim under the Montana statute was ever made on the part of an Indigenous group,¹²⁰ the Anzick family eventually consulted the Crow and Northern Cheyenne tribes about conducting genomic analysis on the Anzick Boy for the purposes of determining cultural affiliation under Montana law.¹²¹ This revealed that the Anzick Boy's Clovis forebears were directly ancestral to almost all Indigenous groups south of the Canadian Arctic,¹²² thereby proving lineal descent. However, controversy arose regarding the stone artifacts with which the Anzick Boy had been buried. Montana law exempted these artifacts in particular from repatriation claims,¹²³ but some Indigenous groups strongly desired their reburial with the Anzick Boy.¹²⁴ Ultimately, the funerary artifacts would remain on display for educational purposes while the Anzick Boy would be reburied.¹²⁵ He rests in his original grave. The Anzick family and representatives of several Indigenous groups conducted traditional

116. White, *supra* note 112, at 13.

117. *Id.* at 73 (“The Clovis boy’s family are the direct ancestors to a roughly estimated 80% of all present day Native Americans.”) (citing Morten Rasmussen et al., *The Genome of a Late Pleistocene Human from a Clovis Burial Site in Western Montana*, 506 NATURE 225 (2014)) [hereinafter Rasmussen, *Anzick Boy Genome*].

118. See Callaway, *supra* note 115, at 142.

119. See White, *supra* note 112, at 69–71 for a discussion of the Montana statute postdating the Anzick discovery that would have required consultation with potentially linked Indigenous groups in relation to the Anzick Boy remains. A 2013 revision to this statute imposed new requirements to prove cultural affiliation which were virtually identical to those of NAGPRA. See also Mont. Code Ann. §§ 22-3-801–811 (West 2025) and 05 Mont. Admin. Reg. 319–21 (Apr. 4, 2013) (imposing NAGPRA’s proof structure onto Montana’s existing statutory test of cultural affiliation).

120. White, *supra* note 112, at 69.

121. *Id.* at 73–74.

122. See Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 225, 227.

123. See White, *supra* note 112, at 64–65.

124. White, *supra* note 112, at 74.

125. *Id.* at 74–75.

funerary rites for the child.¹²⁶ No further controversy ensued.

The Anzick Boy case stands as an exemplar for navigating the turbulent cultural waters of NAGPRA's implementation. The Anzick family avoided inciting litigation and ripping open historical wounds by involving the perspectives of Indigenous groups of their own volition and initiative.¹²⁷ Not only did this course of action provide a path for individuals involved in repatriation negotiations to slip out from under the shadow of *Bonnichsen*,¹²⁸ but it also stood as a shining example of good faith, cultural sensitivity, and acknowledgment of NAGPRA's human rights purpose.¹²⁹

II. NAGPRA AS HUMAN RIGHTS LEGISLATION: THE CASE FOR CONSIDERING ORAL TRADITION

NAGPRA's good intentions—mending historical wounds from American institutions' depredatory treatment of Indigenous groups—often fail to manifest where CUHRs are concerned. What often ensues under the statute are financially costly and emotional negotiations.¹³⁰ Even where a tribe is able to muster the financial resources to proceed with repatriation, success is doubtful if cultural affiliation cannot be established by a preponderance under the statutorily-approved epistemologies.¹³¹ Oral traditional knowledge concerning land occupation is typically afforded little weight in determining cultural affiliation, which directly opposes the ethical thrust of NAGPRA.¹³²

Despite this critical flaw, the statute has undoubtedly made significant progress in overall repatriation—roughly 67,000 ancestral remains have been repatriated since the statute's 1990 inception.¹³³ However, a great number of ancestral remains, almost double the amount repatriated thus far,

126. *See id.* at 75–78.

127. *See id.* at 78–79 (discussing scientists' proactive efforts to contact and seek the approval of possibly affiliated tribes before conducting investigations on the Anzick Boy remains).

128. *See id.* at 78.

129. *See id.* (“[T]he effectiveness of interactions between differing cultures depends greatly on mutual respect, tolerance and an empathetic approach to the issues presented.”); *cf.* Tsosie, *supra* note 24, at 849 (“Native American human rights should not depend upon the vagaries of the domestic political process. Rather, the only way to deal with the issue of culturally unidentifiable Native American human remains fairly or equitably is to recognize that any legal right to Native American ancestral remains or associated funerary objects stems from the moral right of contemporary Native American peoples to protect their ancestors. . . .” (internal quotation marks omitted)).

130. *See* Gunn, *supra* note 58, at 524–25.

131. *See, e.g.,* Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 93 n.34.

132. *Cf.* Smith, *supra* note 19, at 223 (“By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of evidence, Congress effectively acknowledged that oral tradition is valuable evidence.”).

133. *See* Nash & Colwell-Chantapohn, *supra* note 10, at 226.

remain in museum custody as of 2020.¹³⁴ Many of these are CUHRs. The prospect of repatriating many of them is murky at best. While genetic evidence is often pivotal in establishing an affiliation sufficient to repatriate a CUHR,¹³⁵ it is fraught with serious ethical and logistical problems.¹³⁶ If CUHRs cannot be repatriated, it is almost as if the Indigenous groups claiming affiliation have had the truth of their histories taken from them. This is particularly relevant if the indigeneity of the CUHR is questioned¹³⁷—and accordingly, whether the Indigenous claimants are truly Indigenous to their land¹³⁸—as occurred in *Bonnichsen*.¹³⁹ Rex Buck, a leader of one of the Plateau Tribes, lamented the pain felt by his community due to the seemingly permanent stalling of the Ancient One’s repatriation:

Buck places Kennewick Man within a tradition of ancestors whose rest has been disturbed . . . [by] people who have arrived from time to time to “stir around our remains, like they don’t mean anything. Then they go back, and we pick up the pieces with a heavy heart and tears in our eyes. And we ask the Creator that he might forgive those ones that do that, for they must not know any better.”

134. *See id.*

135. *See* Rasmussen, *The Ancestry and Affiliations of Kennewick Man*, *supra* note 109 (genetic research on the Ancient One which directly precipitated his repatriation several years afterwards); Rasmussen, *Anzick Boy Genome*, *supra* note 117 (similar genetic research on the Anzick Boy, which led to his repatriation several years later).

136. *See* Gunn, *supra* note 58, at 527–28. Tribes, generally, are wary of scientific efforts to obtain genetic material from their living members or ancestors, owing to a history of ethical misconduct. *See, e.g.,* Havasupai Tribe of Havasupai Rsv. v. Ariz. Bd. of Regents, 220 Ariz. 214 (Ct. App. 2008) (highly publicized litigation concerning acts of deception on the part of scientists in taking blood samples from the Havasupai people of the Grand Canyon area for scientific analysis).

137. Laurence Straus, an archaeologist involved in the case of the Ancient One, denounced the controversy over the ancestral remains’ indigeneity and cultural affiliation as a naked attempt to “throw it in [Indigenous peoples’] faces that they are not the original Americans after all,” which he regarded as a particularly cruel allegation in light of the atrocious history of the United States vis-à-vis Indigenous peoples. *See* ROGER DOWNEY, RIDDLE OF THE BONES—POLITICS, SCIENCE, RACE, AND THE STORY OF KENNEWICK MAN 60 (2000).

138. The discovery of atypical CUHRs has spurred the growth of alternative scientific theories and public speculation about a lost “Paleoamerican” migration—possibly of ancient European origin—which reached the Americas first and in this constituted a “truer” Indigenous race than those encountered by European colonists. Such claims have been used as an oblique attempt to argue that North America is not Indigenous territory, but the rightful ancestral land of European colonists. *See* Ann M. Kakaliouras, *The Repatriation of the Palaeoamericans: Kennewick Man/the Ancient One and the End of a Non-Indian Ancient North America*, 4 BJHS THEMES 79, 91–92 (2019).

139. In *Bonnichsen*, a White supremacist neopagan sect sought to intervene in the case due to their belief that the Ancient One’s atypical features rendered him a native Caucasian, even Norseman, on American soil, and that NAGPRA’s inapplicability to Caucasian remains was discriminatory. *See* Scott L. Malcomson, *The Color of Bones*, N.Y. TIMES MAG. ¶ 6–9 (Apr. 2, 2000), <https://www.nytimes.com/2000/04/02/magazine/the-color-of-bones.html> [perma.cc/BNZ9-BQ8Y].

In his hesitant English, Buck tried to explain that his tribe's land had in it words from the Creator, and that the land was the means for God to speak to humans. One means for humans to speak to their Creator was by returning themselves to the earth. Being buried gave people a permanent place in this conversation with forces greater than they.

“Our ancestors have returned back to the earth,” he said. “Their body has become earth, as the word was put here. And their heart returned, and their life and spirit went on. But it's of no significance to the nonunderstanding race. But yet it holds the sacredness of the words that were passed through their generation, that are still living today. Those words were passed through those people that had no significance.” As for Kennewick Man, “he, too, was almost dirt. He, too, was giving himself back.”¹⁴⁰

The result is a continued destruction of Indigenous culture, along with practical concerns for future collaboration between Indigenous groups and American archaeologists.

Accordingly, NAGPRA's proof structure for cultural affiliation fails to honor the very purpose of the statute—human rights legislation, aimed at righting historical wrongs and promoting self-determination.¹⁴¹ If colonialist epistemologies are used to determine cultural affiliation for the ancestors of historically oppressed peoples before those of the oppressed peoples themselves, restitution under a Kantian human rights framework does not occur.¹⁴² Oral tradition and traditional knowledge—critical

140. See Malcomson, *supra* note 139, at ¶ 35–37. Cf. Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 97 (“According to the worldviews of [the Plateau Tribes], the remains of the Ancient One should have been reburied at once. As the tribes stated in a joint memorandum to the district court, ‘When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest.’”).

141. Tsosie, *supra* note 24, at 810–11 (“The notion that NAGPRA was enacted primarily to serve the human rights of Native American people was clearly articulated in 1990 by Senator Daniel Inouye. . . . [Inouye] first acknowledged the egregious history that led to the enactment of NAGPRA and the continuing violations of Native American civil rights and then stated that: ‘the bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.’”). Cf. Gunn, *supra* note 58, at 531.

142. See Tsosie, *supra* note 24, at 818 (“There have been indigenous peoples on these lands since time immemorial, but the legal category of a ‘federally recognized Indian tribe’ is a relatively recent concept created by the U.S. government. . . . [t]hus, the rights-holders under current law are a small subset of the indigenous peoples of this land as they have existed over time.”); see also *id.* at 820 (“It may seem rather strange that the very entity that has possession or control of indigenous remains by virtue of an original human rights violation now has the power to make the determination on cultural affiliation . . . but that is the statutory process.”).

aspects of self-determination and cultural identity¹⁴³—must be afforded substantial deference in NAGPRA’s proof structure for the statute to maintain ethical consistency. Where scientific evidence is insufficient to affiliate a CUHR with lineal or cultural descendants, oral tradition must be allowed to fill the gaps.

A. *Human Rights and NAGPRA*

From its 1990 passage, NAGPRA has been acknowledged as affirming the human right to control and possess one’s ancestors and cultural heritage, a direct response to the “egregious history” of atrocities against Indigenous peoples by the United States government and archaeological establishment.¹⁴⁴ In this, NAGPRA is human rights legislation *sensu* Kant¹⁴⁵ and accords with the State and Interior Departments’ 2010 rules in support of Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples.¹⁴⁶ These articulate a human right to repatriation of ancestral remains from sovereign states, conducted through “fair, transparent, and effective mechanisms developed in conjunction with . . . peoples concerned,” in accord with a right to maintain cultural traditions and autonomy as aspects of self-determination.¹⁴⁷

Rebecca Tsosie assails NAGPRA’s current procedures for determining cultural affiliation as diametrically opposed to ideals of human rights and self-determination. Their implementation by the courts has trended towards a “balancing” approach in which scientific interests are weighed against the human right of peoples to control the remains of their ancestors.¹⁴⁸ Such an approach permits collecting institutions—many of which are stained by human rights violations themselves¹⁴⁹—to have the final say on cultural

143. *Cf. id.* at 848 (“The principle of indigenous self-determination depends upon the recognition of intergenerational rights and a willingness to honor the spiritual connections that unite contemporary indigenous peoples with their lands and environments. In short, indigenous identity, as expressed by cultural insiders, is pivotal to the realization of self-determination.”).

144. *Id.* at 810–11.

145. *Id.* at 845–46 (“[Under [a Kantian human rights] approach, the basic moral duty of the United States would be to compensate for these past wrongs and to recognize the basic human dignity of Native peoples by validating their need to repatriate Native American ancestral remains.”).

146. *Id.* at 810–12.

147. *Id.* at 811.

148. *Id.* at 812–13 (“[T]he interest-balancing approach is inappropriate to a resolution of the issue of [CUHRs]. . . . Native American peoples are not equally situated stakeholders in the claim to repatriate Native ancestral remains and funerary objects, and therefore, a human rights-based framework has far more capacity to advance the quest for justice than an interest-balancing approach.”) (internal quotation marks omitted).

149. *See id.* at 815 (discussing an 1868 Surgeon General order encouraging the shipment of the remains of Indigenous Americans killed in battle to the Army Museum for analysis under discredited racial science); *see also* Colwell-Chantapong, *supra* note 26.

affiliation for CUHRs, on some occasions.¹⁵⁰ In fraught scenarios such as these, NAGPRA fails to advance human rights and self-determination. What ensues is a continued subjugation of Indigenous epistemologies in repatriation proceedings to political caprices and archaeological science—the latter of which, unfortunately, remains somewhat tainted in the eyes of Native America—and an intrinsic contradiction in the implementation of NAGPRA.¹⁵¹

Further, the human rights focus of NAGPRA is shaped by the historical circumstances of the United States and scientific establishments' interactions with Indigenous groups. Regrettably, these were often brutal, violent, and founded on a conception of Indigenous peoples as ontologically subordinate and not entitled to respectful treatment of their bodily remains.¹⁵² Tsosie conceives of this history as one of war. Countless Indigenous people died for their nations or were murdered by invaders. The collection of Indigenous remains was, in many cases, a concern ancillary to the United States' policy of mass killing, leading to widespread grave-robbing and unspeakable human rights violations in which the archaeological and museum establishments were complicit:

Later, the search for Indian body parts became official federal policy with the Surgeon General's Order of 1868. . . . In ensuing decades, over 4000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country. Government headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.¹⁵³

150. See Tsosie, *supra* note 24, at 820 (lamenting the extent to which determining cultural affiliation for CUHRs depends in practice on the caprices and financial capabilities of non-Indigenous collecting institutions).

151. *Id.* at 820.

152. See *id.* at 845; see also Kalae Trask, *Toward Mutual Recognition: An Investigation of Oral Tradition Evidence in the United States and Canada*, 13 WASH. J. SOC. & ENV'T JUST. 54, 73 (2023).

153. Trope & Echo-Hawk, *supra* note 42, at 40–41.

During this period, collecting crews from America's newly founded museums engaged in competitive expeditions to obtain Indian skeletons. . . . Some museums employed outright deception in order to obtain skeletons. New York's American Museum of Natural History, for example, literally staged a fake funeral for a deceased [Inuit man] to prevent his son from discovering that the museum had stolen the remains.¹⁵⁴

As distinct peoples with the right to self-determination, the Indigenous nations of the United States have a Kantian human right to seek the return of their deceased ancestors, now interred on soil made foreign.¹⁵⁵ Only then is true Kantian respect for persons achieved, and only if NAGPRA's implementation prioritizes Indigenous self-determination can it remain consistent under principles of human rights law.¹⁵⁶ When applied to the problem of CUHRs, this demands the consideration of oral tradition and traditional knowledge as a prime determinant of cultural affiliation.

B. Oral Tradition and Culturally Unidentifiable Human Remains

Most often, human remains are deemed culturally unidentifiable (and thus CUHRs) due to their great antiquity. As Indigenous Americans have occupied the continent for at least 15,000 years,¹⁵⁷ the sheer depth of occupation obscures direct and specific lineal or cultural descent between ancient and modern groups in most cases. Consequently, oral tradition concerning land occupation is potentially an avenue to illuminate connections between CUHRs and modern populations where scientific evidence alone is either inconclusive or impossible to obtain.¹⁵⁸ Kalae Trask defines oral tradition as traditional stories and historical information passed down generationally by verbal recitation.¹⁵⁹ Oral tradition's ability to

154. *Id.* at 41.

155. Tsosie, *supra* note 24, at 850.

156. *Id.*

157. See RAFF, *supra* note 83, at 201–12.

158. See, e.g., Smith, *supra* note 19, at 222 (noting the scientific verification of certain oral traditions recounting environmental changes and other prehistoric and historic events).

159. See Trask, *supra* note 152, at 55–56.

recount extremely ancient events is well-attested,¹⁶⁰ as is its ability to serve as evidence of distant cultural relatedness and common origin.¹⁶¹ Its use is a particularly relevant consideration in light of the ethical questions associated with obtaining genetic samples from ancient Indigenous human remains.¹⁶²

NAGPRA uplifts oral tradition as an important form of evidence in proving cultural affiliation. Its listing of oral tradition alongside Western epistemological evidence belies no intention on the part of Congress to weigh forms of proof differently.¹⁶³ Nor is the statute to demand “absolute continuity.” Nor does it penalize gaps in Indigenous histories so long as the evidence meets a preponderance standard in the aggregate.¹⁶⁴ Congress’s apparent intention in including oral tradition as permissible in NAGPRA’s proof structure for cultural affiliation was to designate it as a legitimate form of evidence useful in exercising the human right to reclaim the ancestral dead.¹⁶⁵ However, cases such as *Bonnichsen* have directly attacked the reliability of oral tradition on epistemological grounds,¹⁶⁶ striking against NAGPRA’s intentions of human rights and self-determination. Such an outcome is troubling. Countless CUHRs who could be repatriated through

160. See, e.g., Roger C. Echo-Hawk, *Ancient History in the New World: Integrating Oral Traditions and the Archaeological Record in Deep Time*, 65 AM. ANTIQUITY 2 (Apr. 2000) 267, 276–278 (recounting an Arikara oral tradition of emergence from a cold, dark underground world and encountering giant bodies of water en route to the Arikara homeland and likening it to the Indigenous migration into North America via the High Arctic and along glacial lakes); *id.* at 277 (discussing several Indigenous groups’ oral traditions about lakes and catastrophic flooding in the context of Pleistocene glacial lakes). It must be noted that oral traditions also sometimes capture historic data through metaphor and mythic images. See, e.g., Smith, *supra* note 19, at 221 (recounting a First Mesa oral tradition about a clan-chief, which blended historically verifiable information about village sites and individual names with mythic tales about human flight).

161. See David W. Anthony & Dorcas R. Brown, *Late Bronze Age Midwinter Dog Sacrifices and Warrior Initiations at Krasnomarskoe, Russia*, in TRACING THE INDO-EUROPEANS: NEW EVIDENCE FROM ARCHAEOLOGY AND HISTORICAL LINGUISTICS 97, 104–06 (Birgit Annette Olsen et al. ed., 2019) for a fascinating example—the figure of an otherworldly dog (Cerberus being the archetypal example) survives in the myths of both numerous Indigenous American groups and the Indo-European peoples of present-day Europe, hinting at a remote common ancestry that also potentially shared this tradition. In fact, recent advances in archaeogenetics have shown that Indigenous Americans and Europeans share direct common descent from the same ancient Siberian population. See also *id.* at 105 (citing G.E. Lankford, *The “Path of Souls”: Some Death Imagery in the Southeastern Ceremonial Complex*, in ANCIENT OBJECTS AND SACRED REALMS: INTERPRETATION OF MISSISSIPPIAN ICONOGRAPHY 174 (F.K. Reilly III & J.F. Garber eds., 2007) (citing G.E. Lankford, *The Raptor on the Path*, in VISUALIZING THE SACRED: COSMIC VISIONS, REGIONALISM, AND THE ART OF THE MISSISSIPPIAN WORLD 240 (F.K. Reilly III and J.F. Garber eds., 2011)).

162. See *supra* note 136.

163. See Smith, *supra* note 19, at 223.

164. Trask, *supra* note 152, at 61.

165. See Tsosie, *supra* note 24, at 846–47, 850.

166. See Trask, *supra* note 152, at 64–66 (discussing the *Bonnichsen* court’s failure to acknowledge an amicus brief from the Haudenosaunee people concerning oral tradition’s reliability while relying on an amicus brief delegitimizing oral tradition from involved scientists).

an increased consideration of oral tradition instead appear doomed to remain forever separated from descended peoples.

Oral tradition can record historical truths; it is important to Indigenous self-determination¹⁶⁷ and can aid the repatriation of CUHRs. It deserves increased consideration under NAGPRA's cultural affiliation proof structure. Seeking an answer to Western courts' skepticism of oral tradition, Cathay Smith sets out a quadripartite inquiry, of which at least some prongs must be met, for assessing its reliability in court:

First . . . a court . . . should analyze the *individual consistency* of historical facts in oral tradition[.] [This] could mean comparing oral tradition obtained at a deposition with the testimony of the same narrator in a previous deposition, proceeding, or affidavit. . . .

Second, courts should analyze the *conformity* of historical facts in oral tradition. Conformity shows the degree to which the form or content of one individual's testimony conforms with others' testimonies—in other words, the conformity between the oral traditions of multiple people or tribes . . . accounts in oral tradition that are only endorsed by single individuals may be rejected as failing to conform to indigenous canons of the truly historical. . . .

Additionally, courts should consider the *context* of the oral tradition. Narratives that occur in ritual contexts may be more credible as historical facts because in Native American tradition, violations of truth in ritual contexts may subject the individual narrator to the possibility of supernatural sanctions. . . .

167. See *id.* at 73–75 (describing the consideration of Indigenous oral tradition evidence in court as critical to “mutual recognition” between sovereign governments as practiced during the era of treaty-making between Indigenous nations and Western colonies) (citing James Tully, *A Just Relationship Between Aboriginal and Non-aboriginal Peoples of Canada*, in *ABORIGINAL RIGHTS AND SELF-GOVERNMENT: THE CANADIAN AND MEXICAN EXPERIENCE IN NORTH AMERICAN PERSPECTIVE* 41 (Curtis Cook & Juan D. Lindau eds., McGill-Queen's Univ. Press 2000)); cf. Tsosie, *supra* note 24, at 846–47 (discussing cultural rights as a “key feature of indigenous self-determination” and compliant with portions of the U.N. Declaration on the Rights of Indigenous Peoples endorsed by the U.S. government in 2010).

Finally, courts should analyze the availability of *corroborating evidence* in the oral tradition, looking at whether the historical facts in the oral tradition conform to events recorded in other primary source material such as documents, photographs, diaries and letters **This factor does not necessarily seek external evidence corroborating the specific facts asserted in the oral-tradition evidence. Rather, it seeks evidence corroborating other aspects within the Native American claimants' oral tradition in order to support the credibility of the oral tradition as a whole.**¹⁶⁸

Applying the first two prongs of this test to *Zuni Tribe of New Mexico v. United States*,¹⁶⁹ Smith recounts the oral tradition evidence presented by Andrew Wiget, an expert witness for the Zuni Tribe.¹⁷⁰ Wiget satisfied the consistency prong by piecing together a cohesive narrative from thirty-three separate depositions by Zuni tribal members¹⁷¹ and satisfied the conformity prong by comparing these thirty-three depositions' critical allegations to one another.¹⁷² Smith also recounts the *Delgamuukw* litigation¹⁷³ of Canada, wherein oral traditional evidence concerning land occupation was again at issue,¹⁷⁴ in relation to the context prong. The oral tradition in this case derived from ritual historical recitations of the Gitksan and Wet'suwet'en peoples to which listeners could object if inaccuracies were spotted; error or deceit in such recitations was met with social and spiritual retribution.¹⁷⁵ Lastly, Smith returns to *Zuni Tribe* in assessing the corroboration prong, wherein Wiget reviewed historical and scientific literature concerning Zuni land occupation after gathering oral traditional evidence.¹⁷⁶ Ultimately,

168. Smith, *supra* note 19, at 224–26 (cleaned up) (emphasis added).

169. *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607 (1987). This case concerned the Zuni Tribe's efforts to receive just compensation for the United States government's taking of their land and to establish aboriginal title to this land.

170. Smith, *supra* note 19, at 224. Wiget was presented as an expert witness to render Zuni oral tradition indisputably admissible in court. *See id.* at 220 (“Oral tradition—which by its very nature is passed down orally through generations—could be excluded as hearsay if used as evidence of the events it describes. Recognizing this issue, Native American claimants typically introduce oral tradition through expert testimony and reports, which courts have found not to be subject to the hearsay rule.”).

171. *See id.* at 225.

172. *See id.*

173. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

174. *See* Trask, *supra* note 152, at 67 (recounting the origins of the *Delgamuukw* litigation in the efforts of Gitksan and Wet'suwet'en leaders' efforts to claim aboriginal title to some 58,000 square kilometers of land in British Columbia, which oral traditional, historical, and archaeological evidence suggested they had occupied prior to Canadian incursion).

175. *See* Smith, *supra* note 19, at 226; *cf.* Tsosie, *supra* note 24, at 846–47 (discussing cultural rights—that is, the right to maintain one's cultural traditions intact—as a “key feature of indigenous self-determination.”) (citing S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 131–41 (2d ed. 2004) (describing the right to cultural integrity as a central feature of indigenous self-determination)).

176. Smith, *supra* note 19, at 226.

tribal land occupation was established in *Zuni Tribe* in large part due to Wiget's verified evidence.¹⁷⁷ Were the Ninth Circuit in *Bonnichsen* to have applied the quadripartite test to the Plateau Tribes' claim of land occupation, the litigation may well have turned out quite differently:

[T]here was *conformity* of the historical facts in the oral-tradition evidence in *Bonnichsen*. To prepare his expert report . . . Boxberger relied on oral traditions from six separate Columbia Plateau tribes . . . The fact that there were common historical and factual themes in the oral traditions of six separate tribes that had resided in the same area for centuries showed the conformity of the oral tradition.

The factor of *corroborating evidence* also weighed in favor of the credibility of the oral-tradition evidence . . . [Boxberger] further showed that the oral traditions he examined described geological events that occurred in the distant past . . . Geologists and archaeologists confirmed many of the phenomena described in the Native American claimants' oral tradition. For example, all of the Native American claimants' oral traditions included a story outlining the reason for the absence of bison on the Columbia Plateau. A number of the oral traditions suggested that bison had been present on the Columbia Plateau in earlier times—a phenomenon that archaeological evidence dates to over 2000 years ago. Additionally, Boxberger examined oral traditions that described the change in the flow of the Columbia River from the Grand Coulee to the present channel. Current-day geologists have confirmed this phenomenon, and dated it to over 10,000 years ago.¹⁷⁸

Oral tradition evidence (meeting at least two of the rigorous tests of consistency, conformity, context, or corroboration) would have brought a swifter end to *Bonnichsen* and facilitated the repatriation of the Ancient One. Beyond that, it would have allowed an exercise of NAGPRA more consistent with a human rights framework. If the epistemologies of Indigenous peoples are afforded significant weight in the process of determining cultural affiliation, the Kantian human right to the repatriation

177. *Id.* at 227.

178. *Id.* at 230.

of the ancestral dead is better met.¹⁷⁹ In this, the statute achieves ethical consistency vis-à-vis its Congressional intentions.¹⁸⁰

C. Genetic Analysis and NAGPRA as Human Rights Legislation

Although genetic testing—unavailable at the time of the greatest CUHR controversies such as *Bonnichsen*¹⁸¹—can provide enough information to establish a cultural affiliation for even extremely ancient remains,¹⁸² it cannot supplant oral tradition. The ethical problems associated with obtaining genetic material from ancestral remains are severe. Procedures often involve the destruction of at least some bone matter,¹⁸³ which opposes a widespread Indigenous belief that the remains of ancestors must be undisturbed.¹⁸⁴ Moreover, genetic testing is already distrusted by a significant number of Indigenous groups, owing to the history of deception and unethical conduct involved in biometric research on Indigenous people.¹⁸⁵ The conduct underlying *Havasupai Tribe of Havasupai Reservation*¹⁸⁶ is a notorious example and further demonstrates the ethical quagmire of collecting genetic material from Indigenous peoples.

Indeed, the increasing reliance on genetic testing to detect the affinities of CUHRs pushes NAGPRA closer to fulfillment in a strictly material aspect, but it is a deeply flawed remedy. Such testing may attract the ire of Indigenous communities and perpetuate their distrust of genomic

179. See Tsosie, *supra* note 24, at 842 (“[I]n the context of NAGPRA, the United States is attempting to address the egregious history of injustice surrounding its appropriation of Native American bodies and sacred objects and its overt treatment of Native peoples as ‘less than human’ because they were treated as the objects of scientific discovery, rather than as human beings worthy of equal dignity and respect. . . .”); *cf. id.* at 818, 820 (describing the fundamental inconsistency between NAGPRA as Kantian human rights legislation and the fact that its implementation as to CUHRs often tends to discard Indigenous epistemologies in favor of those of colonial entities).

180. See *id.* at 810–11.

181. See, e.g., Rasmussen, *Anzick Boy Genome*, *supra* note 117.

182. See, e.g., *id.*

183. See Rasmussen, *The Ancestry and Affiliations of Kennewick Man*, *supra* note 109, at 455 (describing the acquisition of genomic information by extracting parts of the Ancient One’s metacarpal bone). See also Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 225 (describing the acquisition of genomic information from “bone fragments” of the Anzick Boy found at the site).

184. See Trope & Echo-Hawk, *supra* note 42, at 49.

185. See, e.g., *Havasupai Tribe of Havasupai Rsr. v. Ariz. Bd. of Regents*, 220 Ariz. 214 (Ct. App. 2008). The conduct giving rise to this litigation was an Arizona State University effort to take blood samples from Havasupai tribal members, ostensibly for diabetes research as type 2 diabetes was a widespread health issue among the Havasupai. However, the blood samples were used for archaeogenetic and psychiatric research without the knowledge or consent of the Havasupai, stoking distrust of the scientific establishment—particularly those involved in genetic and biomedical research—among Indigenous groups.

186. See generally *id.*

archaeology as a “vampire science,”¹⁸⁷ and has generally led to an excess of conflicts with Indigenous groups.¹⁸⁸ An excessive reliance on genetic testing risks executing NAGPRA’s human rights aims in an intrinsically flawed manner. Genetic testing of CUHRs is by no means a net wrong—in some cases, Indigenous groups have collaborated in such initiatives.¹⁸⁹ Even so, genetic research simply cannot become the linchpin. This would render the physical desecration of CUHRs the universal cost of repatriation and override a significant part of NAGPRA’s human rights focus. Oral tradition fills this space.

III. AN ORAL TRADITION AMENDMENT TO NAGPRA FOR CULTURALLY UNIDENTIFIABLE HUMAN REMAINS

NAGPRA remains human rights legislation at the core, designed to right the innumerable wrongs perpetrated against Indigenous nations on the part of the United States and the archaeological establishment. Its human rights focus and intent of mending these historic wounds were explicitly stated at its inception on the floor of Congress:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

187. Amelia Cortez et al., DNA Special Issue, *An Ethical Crisis in Ancient DNA Research: Insights from the Chaco Canyon Controversy as a Case Study*, 21 J. SOC. ARCHAEOLOGY 158, 160 (2021).

188. See Debra Harry, *Indigenous Peoples and Gene Disputes*, 84 CHI.-KENT L. REV. 147, 150–154 (2009) (recounting several controversies involving the collection of genetic material from indigenous peoples around the world; namely the *Havasupai* litigation, the nonconsensual use of blood samples from the Nuu-Chah-Nulth people for hundreds of papers’ worth of genetic research, and the use of Maori genetic material to argue that the Maori people in general had a genetic predisposition to substance abuse, violence, and risky behaviors such as gambling (all stereotypically associated with the Maori)).

189. See, e.g., Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 228.

In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. . . .

[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights. . . . This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums. For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate.

. . . [T]his bill represents a major step in correcting an injustice that started over 100 years ago. It is appropriate that Congress take an active role in helping to restore these rights to native Americans.¹⁹⁰ [emphasis added].

At times, the courts have lost sight of this focus, or even blinded themselves to it.¹⁹¹ Great pain has resulted for Indigenous peoples. Though imperfectly implemented and at times generative of controversies that further denied the human rights of Indigenous peoples, the statute has unquestionably been a net good for the cause of Indigenous human rights and self-determination. Even in a time where voluntary repatriation on the part of collecting institutions and Indigenous collaboration with the investigation of cultural affiliation have become increasingly popular,¹⁹² the CUHRs question remains unresolved.

190. 136 Cong. Rec. S17,174–75 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

191. See *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004); see also Trask, *supra* note 152, at 64–66.

192. See, e.g., Jack Tamisea, *Meet the Archaeologist Leading the Museum's Repatriation Efforts*, SMITHSONIAN MAG.: NATIONAL MUSEUM OF NATURAL HISTORY (Nov. 30, 2023), <https://www.smithsonianmag.com/blogs/national-museum-of-natural-history/2023/11/30/meet-the-archaeologist-leading-the-museums-repatriation-efforts/> (last visited Apr. 26, 2026); FIELD MUSEUM, *Repatriation at the Field Museum*, <https://repatriation.fieldmuseum.org/> [perma.cc/82CZ-V5WM].

In order to bring NAGPRA closer into line with its aims of furthering human rights, this Note proposes a statutory amendment to NAGPRA's procedural framework for determining the cultural affiliation of CUHRs—specifically, a provision to enshrine oral tradition as a mandatory consideration in assigning cultural affiliation where the provided Western epistemological forms of evidence¹⁹³ are unavailable or inconclusive. Such an amendment would require the gathering and evaluation of oral tradition evidence, or the increased reliance on extant oral tradition evidence, in establishing cultural affiliation in such circumstances. While oral tradition is already listed as a valid form of evidence in NAGPRA's test for determining cultural affiliation,¹⁹⁴ and is afforded equal weight among these forms,¹⁹⁵ its criticality to Indigenous epistemology and self-determination,¹⁹⁶ ability to record events and historical truths outside the reach of other forms of evidence, and ability to hasten repatriation for the countless ancient CUHRs for whom return appears impossible necessitate that it be afforded greater consideration and shielded from fundamental epistemological skepticism¹⁹⁷ on the part of the courts.

This Note further proposes that the amendment include provisions for assessing the reliability of oral traditional evidence as suggested by Smith and practiced by Wiget in *Zuni Tribe*.¹⁹⁸ Not only would mandating the quadripartite test for oral tradition evidence assuage the concerns of the archaeological community that extremely ancient CUHRs may simply be blocked from investigation to the detriment of science and humanity's understanding of its history,¹⁹⁹ but it would also lend credence to oral tradition as a serious form of evidence in the judicial system—and in this, further the “mutual recognition”²⁰⁰ of Indigenous peoples as sovereign nations.

Such a solution is neither radical, unprecedented, nor incompatible with the interests evinced in the statute. NAGPRA's human rights focus has been the subject of continual administrative and legislative discussion, particularly with respect to CUHRs. The NAGPRA Review Committee

193. See *supra* note 22 (providing statutory language).

194. See *supra* note 22 (listing oral tradition and folklore alongside the other forms of acceptable evidence of cultural affiliation, with no indication of to what forms of evidence priority should be given).

195. Smith, *supra* note 19, at 223.

196. See *id.* at 219; see also Trask, *supra* note 152, at 73–75 (describing the consideration of Indigenous oral tradition evidence in court as critical to “mutual recognition” between sovereign governments as practiced during the era of treaty-making between Indigenous nations and Western colonies); cf. Tsosie, *supra* note 24, at 848.

197. *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004).

198. Smith, *supra* note 19, at 224–26.

199. See Tsosie, *supra* note 24, at 842.

200. See Trask, *supra* note 152, at 73; see also *id.* at 75.

(“Committee”) on several occasions responded to outcry by the scientific community and Indigenous groups by seeking to expand on the meaning of CUHRs.²⁰¹ On all such occasions, the Committee recommended that Indigenous groups receive the final say on disposition and that “scientific values should not supersede the ‘spiritual and cultural concerns of Native American people’ who had the closest general affinity to the Native American remains.”²⁰² Moreover, the CUHRs question was of particular concern to Senator John McCain, an early proponent of NAGPRA. In 2007—perhaps in response to the *Bonnichsen* litigation—Senator McCain introduced an amendment striking out the temporality aspect of “Native American” as a group identity in determining cultural affiliation, simply defining it as any group that *is or was* indigenous to the United States.²⁰³ Virulent opposition from the scientific establishment forced the swift tabling of this amendment.²⁰⁴ While such an amendment would do much to advance NAGPRA’s human rights focus with regard to CUHRs, the same aim may be achieved through broader means—more respectful of Indigenous human rights and more in accordance with the statute’s moral posture—through an amendment explicitly requiring primary consideration of oral tradition where scientific evidence fails to establish cultural affiliation or where genetic analysis is unavailable.

Ultimately, repatriation, in accordance with NAGPRA’s overriding intention, is to be prioritized as the end goal. The increased consideration of oral tradition in the question of CUHRs’ cultural affiliation facilitates return and buttresses Indigenous culture and self-determination. In this, the human rights of Indigenous peoples are affirmed,²⁰⁵ and restitution is made for the “reality of the initial political encounter”²⁰⁶ between European colonists and Indigenous peoples and the ensuing depredation of their human remains.²⁰⁷ In this, the wound between Indigenous peoples and the discipline of archaeology²⁰⁸ may begin to be mended.

201. See Tsosie, *supra* note 24, at 835.

202. *Id.*

203. Gunn, *supra* note 58, at 526–27.

204. *Id.* at 527.

205. See Tsosie, *supra* note 24, at 850; *id.* at 810–11 (discussing the human right of Indigenous peoples to reclaim their ancestral dead as established in Articles 11 and 12 of the U.N. Declaration on the Rights of Indigenous Peoples, endorsed by the United States government in 2010); see also *id.* at 848 (discussed *supra* note 143).

206. *Id.* at 845–46.

207. See *id.* at 845.

208. See Colwell-Chantapong, *supra* note 26, at 95 (“Far from an innocuous pursuit, archaeological explorations have played a role in the drama of Native American efforts to protect their lands and dictate their own religious beliefs, identities, and histories. The archaeology of Native America is not only about the power to shed light on the past, but also the ability of native peoples to shape their own futures.”)

CONCLUSION

This Note is a call to remember NAGPRA's fundamental purpose as human rights legislation. NAGPRA was enacted for one primary purpose—to attempt to make amends for the colonial depredation of Indigenous peoples which was foundational to the expansion of the United States,²⁰⁹ and more specifically to repent for the abuse of Indigenous human remains which was ubiquitous in this process.²¹⁰ NAGPRA has been quite successful in the latter regard and has been celebrated for promoting the cultural rights, cultural heritage, and self-determination of Indigenous peoples.²¹¹ In opening the doorway to the mass repatriation of the ancestral dead, NAGPRA has also opened the doorway to affirming the human right of Indigenous peoples, as sovereign nations, to control the fates of their ancestors.²¹² The door is only cracked, however, and still has room to open fully.

By exercising their voice in the practice of archaeology in the United States and taking on their rightful role in determining the fate of their most ancient ancestors, Indigenous peoples counter the worst excesses of American archaeology.²¹³ If the archaeology of Indigenous Americans is a “means of defining and narrating the American soul,”²¹⁴ as Chip Colwell-Chantapongh puts it, NAGPRA has offered an opportunity to tell a new version of the American story—a story that reckons with the legacy of cruelty that underpins this nation's expansion²¹⁵ and leaves space for Indigenous peoples to broadcast that they inhabited this land first, and have done so since time immemorial. Amending NAGPRA to require greater deference to oral tradition and traditional knowledge where Western epistemology cannot prove to which community a CUHR belongs affirms this reality. It straightens its moral spine. As the repatriation movement in the United States continues, and as collecting institutions and Indigenous

209. See NAT'L PARK SERV., *supra* note 3; Tsosie, *supra* note 24, at 845–46.

210. See Trope & Echo-Hawk, *supra* note 42, at 41 (recounting some of the numerous human rights violations involved in the collection of Indigenous human remains by government authorities and collecting institutions alike).

211. See Ann M. Kakaliouras, *The Repatriation of the Palaeoamericans: Kennewick Man/the Ancient One and the End of a Non-Indian Ancient North America*, 4 BJHS THEMES 79, 88 (2019) (“For Native peoples, repatriation also marks the end of the separation between themselves, their ancestors, and many of their sacred objects. This reunification has both been inspired by, and led to, cultural revitalization among many Native groups.”).

212. See Tsosie, *supra* note 24, at 850; Kakaliouras, *supra* note 211, at 88.

213. Colwell-Chantapongh, *supra* note 26, at 95.

214. *Id.*

215. *See id.*

groups finally begin to see eye-to-eye, the future of NAGPRA, and that of the CUHRs whose return it has not yet secured, looks bright.²¹⁶

Intriguingly, recent archaeogenetic research on human remains found in Siberia has demonstrated that modern Europeans and Indigenous Americans share direct common descent from an ancient human population.²¹⁷ Evidently, these bygone people bifurcated somewhere in southern Siberia; some of them went over the Bering Strait into North America, some across the Urals into Europe.²¹⁸ Perhaps more intriguingly, recent investigations have demonstrated that common mythological themes persist among these countless peoples. Most prominent is the concept of a dog as the guardian of the afterlife—one may look at the Greeks and Romans’ fearsome Cerberus as an example.²¹⁹ Similar tales of a psychopomp canine have survived among Indigenous groups such as Siouans and Iroquoians.²²⁰ This dog guards the afterlife and guides the souls of the dead along the Milky Way. Perhaps the repatriation of the most ancient dead, those designated as CUHRs, could guide more souls along the spirit road, and aid the reconciliation of these long-separated peoples.

216. *See id.* at 103 (“Indigenous archaeology . . . provides an epochal path through the wilderness of the discipline’s future, a blending of the arts and sciences that will create more just and accurate understandings of the past and the nature of our material world.”).

217. *See* Anthony & Brown, *supra* note 161, at 104 (describing DNA from ancient human remains found near Mal’ta, Siberia, which proved the existence of an ancient population known as “Ancient North Eurasians” that contributed genes to both modern Europeans and Indigenous Americans).

218. *Id.*

219. *See id.* at 104–06.

220. *Id.* at 105 (citing G.E. Lankford, *The “Path of Souls”: Some Death Imagery in the Southeastern Ceremonial Complex*, in *ANCIENT OBJECTS AND SACRED REALMS: INTERPRETATION OF MISSISSIPPIAN ICONOGRAPHY* 174 (F.K. Reilly III & J.F. Garber eds., 2007) (citing G.E. Lankford, *The Raptor on the Path*, in *VISUALIZING THE SACRED: COSMIC VISIONS, REGIONALISM, AND THE ART OF THE MISSISSIPPIAN WORLD* 240 (F.K. Reilly III & J.F. Garber eds., 2011))).