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Underutilization and Unworkability of the Current NAGPRA Civil Penalties Provision

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UNDERUTILIZATION AND UNWORKABILITY OF THE CURRENT NAGPRA CIVIL PENALTIES PROVISION

*Carol Grace Engle**

Disclaimer: This Comment uses language that is within legal statutes and documentation, some of the terms that are used within them may not be the most updated and respectful terminology to refer to Native American or Indigenous communities. There is meant to be no disrespect towards any members of these communities when using certain language. Each community may prefer different words to identify themselves and their ancestry and this Comment is in no way meant to infringe or disrespect those preferences.¹

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When someone says archaeology, what do you think of? Dinosaurs, maybe? Indiana Jones? Well, if you thought of Indiana Jones, you were a little closer. The study of archaeology is a subcategory of anthropology, which is the “science of humanity.”² Archaeology specifically is the

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¹ *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT'L MUSEUM AM. INDIAN, <https://americanindian.si.edu/nk360/informational/impact-words-tips> (last visited Feb. 5, 2024).

² Farha Ghannam et al., *Anthropology*, ENCYCLOPEDIA BRITANNICA (Nov. 17, 2023), <https://www.britannica.com/science/anthropology>.

“scientific study of the material remains of past human life and activities.”³

Archaeology is not limited to looking at ancient Roman ruins or studying mummies in Egypt. It is the material study of human life and activities. That includes everything from Civil War battlefields to Pepsi cans from the 1980s; it is all data, and it is all important to gain an understanding of human culture during a particular period in time.⁴ Archaeology helps show that current culture is influenced by the foundation of previous cultures, making the information gathered by these scientists invaluable to our understanding of both past and present societies.

Looking from the present to the past, there are the tech eras, the big hair and synthesizers of the 1980s, the psychedelic 60s and 70s, the Red Scare, WWII, the Great Depression, the Gilded Age, the Civil War, the Industrial Revolution and Westward Expansion, the American Revolution, and colonization. That is just to name a few of the big ones. However, there is one time period and culture in American history that is often overlooked. The people and culture that were here before all those other things happened, the people who have called this land home for centuries, the Native Americans or Indigenous peoples.

There was a story that I heard a few years ago that has stuck with me. As many people know, Indigenous peoples were forced to leave their homelands and go west. This brutal and horrific forced migration is more commonly referred to as the “Trail of Tears.”⁵ People were forced from their homes with little aid and had to carry their own belongings over vast distances.⁶

I was told a story about people who would actually carry the soil from their homes and take it with them out west. These people had little resources, but they chose to carry some of this soil with them. The land itself has a different meaning to many Indigenous cultures than it does for most non-Indigenous people.⁷ That soil was a connection to their home; it was a part of who they were. The purpose wasn’t just to carry soil in general, it was the connection with that specific soil from that particular valley or that particular

³ Glyn Edmund Daniel, *Archaeology*, ENCYCLOPEDIA BRITANNICA (Nov. 3, 2023), <https://www.britannica.com/science/archaeology>.

⁴ Snippets of the past are everywhere and pop up in the most random places. Don’t believe me? Look at the jeans you may be wearing. Does it have a weird little pocket on one side that you may have thought was for a quarter? No, that is a remnant from when it was common for men to have pocket watches all the way back from the 1800s and it has just become a custom of what jeans look like. *Those Off-Forgotten Pant Parts*, LEVI STRAUSS & CO. (Apr. 17, 2014), <https://www.levistrauss.com/2014/04/17/those-off-forgotten-pant-parts/>.

⁵ *The Trail of Tears and the Forced Relocation of the Cherokee Nation (Teaching with Historic Places)*, NAT’L PARK SERV., <https://www.nps.gov/articles/the-trail-of-tears-and-the-forced-relocation-of-the-choerokee-nation-teaching-with-historic-places.htm> (Sept. 19, 2023).

⁶ *Id.*

⁷ Kelli Mosteller, *For Native Americans, Land Is More Than Just the Ground Beneath Their Feet*, NOT EVEN PAST (Oct. 26, 2016), <https://notevenpast.org/for-native-americans-land-is-more-than-just-the-ground-beneath-their-feet/>.

mountain which had been their home and the home of their ancestors for decades, if not centuries, that had meaning. That soil made their ceramics that were distinct for their Tribe; that soil was what created the food they lived off of; that soil was where their ancestors had been laid to rest and hopefully still remain at peace. That level of connection with the earth itself is something other cultures and modern American culture do not seem to value in the way Indigenous cultures do. This is just one example of how Indigenous culture may differ from one's own cultural values.⁸

Throughout history, people in the name of archaeology, scientific study, or personal interest, have dug up remains from sacred Indigenous lands and kept them in collections. Under modern Federal

law, through the Native American Graves Protection and Repatriations Act ("NAGPRA"), there is a process called repatriation to return Indigenous people's remains that have been removed and held by "museums."⁹ Repatriation is the "return of possession or control of Native American cultural items to lineal descendants, culturally affiliated Indian Tribes, and Native Hawaiian organizations."¹⁰ It is important to keep in mind that "museum" is defined within NAGPRA as "any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency."¹¹ Someone may not think that this would affect many remains, however, as of 2021, there are over 117,000 sets of human remains still being held in museums and universities across the country.¹²

It can be difficult for an Indigenous Tribe to utilize NAGPRA regulations, and there is little that they are able to do when a "museum" retains remains in violation of repatriation requirements. For decades, there have been minimal or no consequences for such behavior, which is not only

⁸ The Trail of Tears pole bean is another example of a what some may think is just a common seed carrying greater weight to another culture. The bean was "grown in the Smoky Mountains by the Cherokee people for generations. It is so named because the beans were carried in the pockets of the Cherokee people as they were marched from the Carolinas to Oklahoma by the Federal Government during the Trail of Tears in 1838-1839. . . . [These] Trail of Tears beans were thought to have been carried as a symbol of hope and in remembrance of home." Kelly Thomas, *Trail of Tears: The Story Behind the Seed*, TALLAHASSEE DEMOCRAT, <https://www.tallahassee.com/story/life/home-garden/2018/09/27/trail-tears-story-behind-seed/1430884002/> (Sept. 27, 2018, 6:33 PM).

⁹ *Frequently Asked Questions*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/frequently-asked-questions.htm> (Feb. 8, 2024).

¹⁰ *Frequently Asked Questions*, IND. UNIV. BLOOMINGTON, [https://nagpra.indiana.edu/Frequently%20Asked%20Questions.html#:~:text=In%20NAGPRA%20\(25%20USC%203005,Tribes%2C%20and%20Native%20Hawaiian%20organizations](https://nagpra.indiana.edu/Frequently%20Asked%20Questions.html#:~:text=In%20NAGPRA%20(25%20USC%203005,Tribes%2C%20and%20Native%20Hawaiian%20organizations) (last visited Feb. 5, 2024).

¹¹ 25 U.S.C. § 3001.

¹² U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM (2022).

ethically and morally problematic, but also in direct contradiction to the purpose of NAGPRA regulations. This Comment seeks to bring light to this issue, specifically looking at the underutilization and unworkability of the current civil penalties' framework within NAGPRA when museums are in noncompliance. This will be shown in comparison to other penalties and damages ascribed to other mishandling of remains. This provision, while recently updated, needs to reflect the current societal values and understandings of Indigenous traditions.

This Comment begins with a background understanding of archaeology and how the archaeological field has developed throughout history, illustrating how these Indigenous cultural items have been retained by institutions. Then, for a better understanding of the goals and principles of NAGPRA, there is a brief history describing how NAGPRA was created.

Part II of this Comment dives into the overall application of NAGPRA and how the repatriation process works. This includes the criteria that it takes for remains to be eligible for repatriation to a particular Tribe, in addition to the hurdles that Indigenous communities face to be able to claim their ancestors. Tribes face a variety of complex legal issues at the beginning stages of the NAGPRA process, including competing with scientific interests and deciphering administrative requirements. This section will also touch on universities and museums' retention of significant numbers of Indigenous remains.

Part III of this Comment discusses the civil penalties process for museums and universities that do not properly repatriate remains that was used until NAGPRA was recently amended in December of 2023. NAGPRA itself is discussed, as well as its frequency for being invoked. This section focuses on the overall difficulty in application of the statute because of its reliance on government officials and the use of a balancing test to determine the penalty amount.

Part IV compares the NAGPRA civil penalties provision to other civil and criminal penalties in similar areas. This section draws comparisons to the damages that are awarded for mishandling remains by funeral homes, and the rules that museums must abide by when they have these types of collections. There are also penalties for violations of the Anthropological Resources Protection Act as well as penalties for violations under the Indian Arts and Crafts Act of 1990 ("IACA"). This section compares these values with that of NAGRPA and explores why some penalties are higher than others.

Part V proposes some potential solutions to the current problem regarding the underutilization of civil penalties for NAGPRA violations. This involves a potential restructuring of the current penalties procedure, as well as trying to combat the true problem: returning Indigenous remains within this system and how to solve it.

PART I: BACKGROUND

The history of Indigenous peoples has been tumultuous to put it lightly. Thousands of Indigenous peoples have lived on this land with their own distinct cultures that spread from coast to coast for hundreds of years.¹³ Throughout the 16th and 17th centuries, more explorers sought to colonize the Americas, consuming native land.¹⁴ This was all driven by the “relentless expansion of European settlement and U.S. territory, and by U.S. government policies that relegated the independence and well-being of Native Americans to secondary status.”¹⁵ As more colonizers came, so did years of tremendous upheaval, resulting in Indigenous communities being forced to move, get renamed, combined with other Tribes, become dispersed, or even destroyed.¹⁶

This was not a quick process; these injustices spread across centuries with different actions ranging from deceit, genocide, disease, and bloodshed to declarations of friendship, perseverance, and hope despite all of it.¹⁷ The judicial system has also added to the prejudicial opinions and language towards these communities, referring to Indigenous peoples as “a simple, uninformed and inferior people,”¹⁸ and as recently as 1955, referring to communities as “savage” Tribes.¹⁹

Because Indigenous peoples had lived on the land for hundreds of years, physical remnants of their cultural world continue to be found and collected, like human remains. Many of these remains have been found through new and old ways of practicing archaeology. One of the main goals of an archaeologist is “to place the material remains in historical contexts, to supplement what may be known from written sources, and, thus, to increase understanding of the past.”²⁰ Archaeologists blend history and science, trying to piece together humanity’s past. There have always been people who were interested in the material remains of the past, but this specific discipline originated in 15th to 16th century Europe.²¹ However, the method that was used to do this has changed dramatically throughout time.

Archaeology developed from what people would commonly call art collecting and grave robbing today, to more of a scientific study in the 19th

¹³ *Immigration and Relocation in U.S. History: Native American*, LIBR. CONG., <https://www.loc.gov/classroom-materials/immigration/native-american/> (last visited Feb. 5, 2024).

¹⁴ *Native American History Timeline*, HIST., <https://www.history.com/topics/native-american-history/native-american-timeline> (June 2, 2023).

¹⁵ *Immigration and Relocation in U.S. History: Native American*, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *United States v. Sandoval*, 231 U.S. 28, 39 (1913).

¹⁹ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955).

²⁰ Glyn Edmund Daniel, *supra* note 3.

²¹ *Id.* This was “[w]hen the Renaissance Humanists looked back upon the glories of Greece and Rome.” *Id.*

century.²² Three things heavily impacted this scientific development: “a geological revolution, an antiquarian revolution, and the propagation of the doctrine of evolution.”²³ The 20th century saw further expansion of archaeology not only scientifically, but geographically, with people studying areas further east and across Asia.²⁴ These large strides in the field of archaeology have also influenced it to become a more common academic discipline.²⁵

Since the early 1800s, Federal agencies, which are also subject to NAGPRA regulations, have gathered millions of archaeological items.²⁶ Some of these agencies, like the National Parks Service (“NPS”), acquired their collections through archaeological excavations with the intention to advance scientific knowledge and preserve cultural resources.²⁷ Other agencies like the Army Corps of Engineers (“Corps”) and the Tennessee Valley Authority (“TVA”) made these discoveries during large construction projects that were a part of their own missions.²⁸

The Forest Service officials estimated that an overwhelming majority of the agency’s collections resulted from non-Forest Service initiated activities, like research by museums and universities, or as a result from construction on highways, reservoirs, and pipelines or mining claims.²⁹ In 2010, the Department of the Interior (“DOI”), with its land-management agencies, possessed the largest collection outside of the Smithsonian Institution, “with an estimated 146 million objects and documents that cover archaeology as well as disciplines like art and zoology.”³⁰

These Federal agencies house their collections in a variety of Federal and non-Federal repository facilities throughout the country.³¹ For example, according to a TVA official, the TVA’s amassed collections are stored at universities in Alabama, Kentucky, Michigan, Mississippi, North Carolina, and Tennessee; while their NAGPRA items are confined to the collections in Alabama, Kentucky, and Tennessee.³² These large Federal collections include tens of thousands of Indigenous human remains and hundreds of thousands of funerary objects, sacred objects, and objects of cultural

²² *Id.*

²³ *Id.*

²⁴ *Id.* However, serious archaeological work started later in America than it did in Europe, but, as early as 1784, Thomas Jefferson had excavated mounds in Virginia making careful stratigraphical observations. *Id.*

²⁵ *Id.*

²⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-768, NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT, 5 (2010).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

patrimony subject to NAGPRA.³³ These are the methodologies and circumstances in which these remains and funerary objects have been amassed in locations other than their original resting place or with modern Indigenous communities.

To alleviate some of these wrongdoings, NAGPRA was enacted. The purpose of NAGPRA was to “provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony.”³⁴ NAGPRA covers five types of Indigenous cultural items: human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.³⁵

This legislation that established a process for the repatriation of Indigenous human remains, funerary objects, cultural patrimony, and sacred objects originated because of a hearing held by the Select Committee on Indian Affairs in February of 1987.³⁶ In Smithsonian Secretary Robert McCormick Adams’s testimony on a bill to provide for the repatriation of Indigenous artifacts, he indicated that of the 34,000 human remains currently in the Smithsonian’s collection, approximately 42.5% or 14,523 of the remains were the remains of North American Indians, and another 11.9% or 4,061 of the remains represented Eskimo, Aleut, and Koniag populations.³⁷ Indigenous Tribes around the country called for the repatriation of those human remains that could be identified as associated with a specific Tribe or region for their permanent disposition in accordance with tribal customs and traditions; and for the proper burial elsewhere for the Indigenous peoples that could not be identified.³⁸

This Comment will primarily focus on human remains described under NAGPRA which are the “physical remains of the body of a person of Native American ancestry.”³⁹ Congress sought out to acknowledge that human remains, as well as other cultural items removed from Federal or tribal lands, belong firstly to lineal descendants, Indian Tribes, and Native Hawaiian organizations.⁴⁰ By creating these laws, Congress sought to encourage a continuing dialogue between museums, Indigenous Tribes, and Native Hawaiian organizations.⁴¹ Congress also sought to promote a larger

³³ *Id.* at 5–6.

³⁴ S. REP. NO. 101-473, at 1 (1990).

³⁵ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 26, at 4–5; 25 U.S.C. § 3001(3).

³⁶ S. REP. NO. 101-473, at 1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 43 C.F.R. § 10.2(d)(1) (2022).

⁴⁰ *Native American Graves Protection and Repatriation Act: Facilitating Respectful Return*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/index.htm> (Jan. 5, 2024).

⁴¹ *Id.*

understanding between these groups while balancing the important function museums serve in society: to preserve history.⁴² The Report of the Panel for a National Dialogue on Museum/Native American Relations (“Panel”) found that the process for determining appropriate disposition and treatment of these objects should be governed by a respect for Indigenous human rights.⁴³ The Panel also stated that human remains “must at all times be accorded dignity and respect.”⁴⁴

Section 8 of NAGPRA required the Secretary of the Interior to establish a Review Committee to monitor and review the implementation of inventory and the identification process, as well as repatriation activities under NAGPRA.⁴⁵ This Review Committee was composed of seven members appointed by the Secretary.⁴⁶ The Review Committee is responsible for:

- (1) upon request, reviewing and making findings related to the identity or cultural affiliation of cultural items or the return of such items;
- (2) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, and Federal agencies or museums relating to the return of such items; and
- (3) compiling an inventory of culturally unidentifiable human remains and recommending specific actions for developing a process for disposition of such remains.⁴⁷

NAGPRA is the overarching large act while the section regarding civil penalties was created into a final law through the Code of Federal Regulations on May 5, 2003, a decade after the creation of this Act.⁴⁸ Through these regulations, it was established that if a museum has failed to comply, it will be reviewed under a strict liability standard.⁴⁹ However, to determine the penalty amount, the Secretary also considered certain mitigating factors, including good faith attempts by the museum to comply.⁵⁰

Under Section 2 of the Act, a “museum” is any institution or State or local government agency, including any institution of higher learning, that receives Federal funds and has possession of, or control over, Indigenous

⁴² *Id.*

⁴³ S. REP. NO. 101-473, at 2 (1990).

⁴⁴ *Id.*

⁴⁵ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 26, at 10; 25 U.S.C. § 3006.

⁴⁶ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 26, at 10.

⁴⁷ *Id.* at 11.

⁴⁸ 43 C.F.R. § 10.13(m)(1)–(3) (2022).

⁴⁹ Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 68 Fed. Reg. 64, 16354 (Apr. 3, 2003) (as codified at 43 C.F.R. pt. 10.13).

⁵⁰ *Id.*

human remains, funerary objects, or objects of cultural patrimony.⁵¹ This definition specifically excludes the Smithsonian Institution or any other Federal agency, even though they may be in possession of human remains.⁵² The Act does not allow the Secretary to assess civil penalties onto Federal agencies that fail to comply even though they house large collections of NAGPRA cultural objects.⁵³

The Executive Branch has also made attempts to try and establish better relationships with Indigenous communities. Ten years after the creation of NAGPRA, President Bill Clinton established Executive Order 13175 on November 6, 2000.⁵⁴ This executive order, titled “Consultation and Coordination With Indian Tribal Governments,” further established the commitment the Federal government had to try and mend the relationships with Indigenous communities.⁵⁵

The further strengthening of these relationships happened again when President Joe Biden wrote a memorandum on January 26, 2021, entitled “Tribal Consultation and Strengthening Nation-to-Nation Relationships.”⁵⁶ Part of its purpose was to reiterate the consultation requirements under Executive Order 13175.⁵⁷ President Biden said that it is a priority of his administration to make “respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations . . . cornerstones of Federal Indian policy.”⁵⁸ He went further to say that “we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.”⁵⁹

Despite all these good intentions, the enforcement of NAGPRA has had its difficulties and some lackluster results. For example, twenty years after NAGPRA had been enacted, the United States Government Accountability Office (“GAO”) conducted a report looking into the lack of

⁵¹ *Id.*

⁵² *Id.* “[M]useum’ means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.” 25 U.S.C. § 3001(8).

⁵³ Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 68 Fed. Reg. 64, at 16355.

⁵⁴ Exec. Order No. 13175, 65 Fed. Reg. 218, Consultations and Coordination with Indian Tribal Governments (Nov. 9, 2000).

⁵⁵ *Id.*

⁵⁶ Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 18 (Jan. 26, 2021).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Federal agency compliance with the Act.⁶⁰ The GAO focused on eight Federal agencies with significant historical collections: Interior’s Bureau of Indian Affairs (“BIA”), Bureau of Land Management (“BLM”), Bureau of Reclamation (“BOR”), U.S. Fish and Wildlife Service (“FWS”), NPS; Agriculture’s U.S. Forest Service; the Corps from the Department of Defense; and the TVA.⁶¹ The GAO found that these key Federal agencies still had not fully complied with the Act, and the agencies had generally not reported their data on repatriations to the National NAGPRA Program (“Program”) or Congress.⁶² This then hindered policy makers, Indigenous Tribes, and Native Hawaiian organizations from having access to information about culturally affiliated NAGPRA items.⁶³ The GAO recommended that the Departments of Agriculture, Defense, and Interior, as well as the TVA report to Congress the actions they need to take to fully comply with the Act and report their status of repatriation to the Program.⁶⁴ The GAO also made a comment that the Program should make improvements in their facilitation of the Act.⁶⁵ However, these are Federal agencies, so they are excluded within the definition of “museum” according to NAGPRA, and are therefore not subjected to civil penalties for their failure to comply.⁶⁶ This further demonstrates the administrative problems within NAGPRA for enforcement and repatriation when offending agencies are not subject to civil penalties and neglecting to lead by example.

Understanding these issues, the Department of the Interior recently acknowledged that the regulations needed to be updated in order to adequately carry out the intent of NAGPRA.⁶⁷ In October 2022, President Biden’s Department of the Interior published a new proposed rule designed “to clarify and improve upon the systematic processes for disposition or repatriation of Native American human remains and cultural items.”⁶⁸ After an extended period of public notice and comment on the proposed regulations, the final rule was unveiled and put into effect as of January 12, 2024.⁶⁹ While this new rule makes great strides to improve the administration of NAGPRA, there is still more work that can be done to ensure that Indigenous communities are

⁶⁰ See generally U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 26. While federal agencies may not be subject to civil penalties, they still must comply with NAGPRA. *Compliance*, NAT’L PARKS SERV., <https://www.nps.gov/subjects/nagpra/compliance.htm> (Jan. 12, 2024).

⁶¹ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 26 at Highlights.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 68 Fed. Reg. 64, 16354–55 (Apr. 3, 2003) (as codified at 43 C.F.R. pt. 10).

⁶⁷ Native American Graves Protection and Repatriation Act Systematic Process for Disposition and Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 238, 86452 (Dec. 13, 2023) (to be codified at 43 C.F.R. pt. 10).

⁶⁸ *Id.* at 86452.

⁶⁹ *Id.*

given a full and fair opportunity to repatriate the remains of their ancestors.

The enforcement of NAGPRA is important, but this is not merely about unnamed remains for many Indigenous peoples, but rather the right to a respectful burial according to their ancestral beliefs.⁷⁰ There is no one specific funeral rite in Indigenous cultures; many Tribes have their own customs and beliefs surrounding death, but “caretaking of the dead is something all Tribes consider sacred.”⁷¹

Indigenous culture is not the only spiritual or religious belief system that has a complex value for the treatment of the human remains themselves. In ancient Greece, people believed that the soul was not at rest until it was buried, and if anyone found an unburied body, they were expected to “immediately throw a handful of dust/dirt over it.”⁷² The lack of proper burial rites was an insult to human dignity.⁷³ The ancient Egyptians also had an intricate burial and mummification process in order for the soul of that person to have hope of eternal life.⁷⁴

Christian burial practices have also evolved over time.⁷⁵ Since the beginning, Christians practiced an earthen burial rather than cremation, imitating the burial of Christ and following the Jewish practice.⁷⁶ Through earthen burials, Christianity and resurrection became interwoven concepts; this connection meant that no human intervention would stop the divine work of the resurrection, creating an indifference to being buried or not.⁷⁷ This new Christian belief was part of the dramatic shift from other belief systems where resurrection and peace after death could only be achieved through an earthen burial.⁷⁸ Considering the many cultures who place great importance on the manner of burial, it is easy to understand the deep value and injustice it has been to not repatriate these remains in a timely and respectful manner. Just

⁷⁰ *Native American Graves Protection and Repatriation Act of 1990*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/nagpra.htm> (Jan. 12, 2023).

⁷¹ *Death Around the World: Native American Beliefs*, FUNERAL GUIDE (Oct. 14, 2016), <https://www.funeralguide.co.uk/blog/death-around-world-native-american-beliefs>; Eric Hemenway, Little Traverse Bay Bands of Odawa Indians, “*The Bones of Our Ancestors Were Thrown away and We Could Never Find them to Return them to the Ground*”, NAT'L PARK SERV., <https://www.nps.gov/articles/burial-practices.htm> (Aug. 14, 2017).

⁷² *Ancient Greek Burial Customs*, UNIV. OF THE PAC.: THEATRE ARTS DEP'T, <https://pacifictheatrearts.wordpress.com/ancient-burial-customs/> (last visited Feb. 6, 2023).

⁷³ Dep't of Greek and Roman Art, *Death, Burial, and the Afterlife in Ancient Greece*, THE METRO. MUSEUM OF ART (Oct. 2003), https://www.metmuseum.org/toah/hd/dbag/hd_dbag.htm. During a war, a general who did not provide a time for the burial of their dead soldiers would be guilty of a capital offense, regardless of who the person was. *Ancient Greek Burial Customs*, *supra* note 72.

⁷⁴ See Joshua J. Mark, *Ancient Egyptian Burial*, WORLD HIST. ENCYCLOPEDIA (Jan. 19, 2013), https://www.worldhistory.org/Egyptian_Burial/.

⁷⁵ *Burial, II (Early Christian)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/burial-ii-early-christian> (last visited Feb. 6, 2024).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

because it may not be one's personal belief does not mean it should not be deeply valued and respected out of a common courtesy to the importance of spirituality and religion in a culture.

PART II: APPLICATION OF NAGPRA

Before someone can try to bring attention to the fact that a museum may not be in compliance, there are many hurdles that Indigenous communities must face for NAGPRA to be applicable to their situation. These hurdles alone are problematic for Indigenous communities when the purpose of NAGPRA was to try to bridge this gap between cultures and nurture a respectful relationship. For example, only lineal descendants, Indian Tribes, and Native Hawaiian organizations may request Indigenous cultural items under NAGPRA.⁷⁹ Therefore, it is not required for museums or Federal agencies to work with non-Federally recognized Indigenous communities.⁸⁰ However, if a non-Federally recognized group seeks the return of human remains or cultural items, they may try to work with Federally recognized Tribes to participate in the NAGPRA process.⁸¹ This is yet another additional step and requirement that someone would need to overcome to bring their claim if they are not from a Federally recognized community.

In addition, if a Tribe learns about a museum outside of the United States that has control of a culturally affiliated item, NAGPRA likely does not apply, and the Tribe would have to look into international repatriations.⁸² NAGPRA also only applies to human remains that were intentionally excavated or inadvertently discovered on Federal or tribal land; human remains held in private individuals' collections, or by states, museums, and agencies that do not receive Federal funding are not subject to NAGPRA regulations.⁸³

Until the 2024 updated regulations, NAGPRA had certain exceptions that function to try to protect scientific interest in some human remains and would therefore prevent their complete repatriation.⁸⁴ These exceptions included:

[I]f there are multiple disputing claimants pending dispute

⁷⁹ *Frequently Asked Questions*, *supra* note 9.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Matthew H. Birkhold, *Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provision*, 37 WM. MITCHELL L. RE. 2046, 2054 (2011); *Compliance*, *supra* note 60.

⁸⁴ Birkhold, *supra* note 83, at 2052; Marcel S. Pratt & Nina Kalandadze, *Department of Interior Revises Regulations for Native American Graves Protection and Repatriation Act*, BALLARD SPAHR (Jan. 12, 2024), <https://www.ballardspahr.com/insights/alerts-and-articles/2024/01/department-of-interior-revises-regulations-for-nagpra>.

resolution; if the Federal agency or museum has a right of possession; or if the item is part of a Federal agency or museum collection and is indispensable to the completion of a specific scientific study, the outcome of which is of “major benefit to the United States.”⁸⁵

While NAGPRA has been incredibly beneficial for many Indigenous communities, it is not without large hurdles, like the restrictions saying which groups have standing to make claims and the limitations on which remains are able to be repatriated.⁸⁶ These exceptions still seem to be evident in the updated regulations.⁸⁷ Even though anyone can bring a complaint about non-compliance, to even get to the possibility of civil penalties, the gauntlet of requirements would already have needed to be met.⁸⁸

Cultural items that are subject to NAGPRA are either held in museums, Federal agency collections, or were discovered on Federal or tribal land.⁸⁹ The implementation responsibilities of NAGPRA are assigned to the Secretary of the Interior, who then delegates certain tasks to the Program.⁹⁰ The NPS creates a yearly fiscal report for the Program.⁹¹ The 2021 fiscal year report spans from the period October 1, 2020 until September 30, 2021.⁹² The report stated that over 117,576 Native American individuals are still in collections and 94% of those have not been culturally affiliated with a present-day Indigenous Tribe or Native Hawaiian organization, leaving approximately 7,054 culturally affiliated remains that are still held in these museum collections.⁹³ The report further stated that “[c]ultural affiliation studies and in-depth consultations could resolve the rights to many of these [culturally unaffiliated] individuals.”⁹⁴

However, despite those numbers, there was only one letter alleging

⁸⁵ Birkhold, *supra* note 83, at 2052.

⁸⁶ *Id.* at 2052–53.

⁸⁷ 25 U.S.C. § 3005(b)–(c), (e).

⁸⁸ *Civil Penalties*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/civil-penalties.htm> (Jan. 10, 2024).

⁸⁹ FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

⁹⁰ *Id.*

⁹¹ *Program Reports*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/reports.htm> (Sept. 20, 2019).

⁹² FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

⁹³ *Id.* “[C]ultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” 25 U.S.C. § 3001(2). The “culturally unidentifiable human remains” has since been eliminated with the new regulations. *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves> (Dec. 6, 2023).

⁹⁴ FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

failure to comply that had been received during the 2021 fiscal year.⁹⁵ This could be for a variety of potential reasons: the facilities are complying but have taken a while to repatriate the remains, they may have been given extensions, or it may not be known if there have been failures to comply and people are not sending in notices. Despite all those reasons, the results are still the same; remains, culturally affiliated or not, are still in museums with very few complaints being filed.

While those are disappointing numbers in regards to remains that have not been returned to their communities, there have been some major accomplishments that have occurred from 1990-2021 stated within the report.⁹⁶ For example, 90.5% of culturally affiliated human remains have completed the NAGPRA process and over 1.8 million associated funerary objects have been transferred with human remains.⁹⁷ In addition, 21% of museums subject to NAGPRA have resolved all Indigenous human remains under their control.⁹⁸ More than 349,000 unassociated funerary objects have been repatriated, around 21,600 other cultural items have been repatriated, and seventy-two Review Committee meetings have been held.⁹⁹ Within this thirty-year time frame, 53.92 million dollars have been awarded in NAGPRA grants, and in 2021, NAGPRA increased available grant funds by 1.9 million dollars.¹⁰⁰

However, despite those accomplishments, since 1990, 202,253 human remains have been reported under NAGPRA, and as of September 2021, 117,576 human remains are still pending consultation and/or notice.¹⁰¹ Almost one-third of these remains are held in facilities of the five top offenders, containing 39,912 of these sets of Indigenous peoples alone: the University of California Berkeley (9,591), the University of Alabama Museums (9,120), Illinois State Museum (7,587), the Ohio History Connection (7,167), and Harvard University (6,447).¹⁰² So, while the rate of return for these remains has improved since 1990, there is still a massive amount of room for improvement and an ethical demand to make that happen.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

[A]ssociated funerary objects' which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

25 U.S.C. § 3001(3)(A).

⁹⁸ FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

⁹⁹ *Id.*

¹⁰⁰ *Id.* "Federal grants are available to museums, Indian Tribes, and Native Hawaiian organizations to assist in consultation, documentation, and repatriation under NAGPRA." *Grants*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/grants.htm> (Nov. 28, 2023).

¹⁰¹ FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

¹⁰² *Id.*

PART III: NAGPRA CIVIL PENALTIES

Within NAGPRA, 25 U.S.C. § 3007 sets out the civil penalty process and requirements for violations to NAGPRA.¹⁰³ This was the basis for 43 C.F.R. 10.12, which lists out the more in-depth regulations regarding this process.¹⁰⁴ The regulations became a final rule on May 5, 2003, and updated most recently on January 12, 2024, and is now under 43 C.F.R. 10.11.¹⁰⁵ The civil penalties provision is meant to be utilized when a “museum” is in non-compliance with NAGPRA.¹⁰⁶ Non-compliance within this context includes:

1. [transferring] human remains or cultural items to an individual or institution that is not required to comply with the Act and the regulations;
2. [n]ot compiling a summary by the required deadline;
3. [n]ot completing or updating an inventory by the required deadline;
4. [n]ot submitting a notice of inventory completion or notice of intended repatriation by the required deadline;
5. [n]ot sending a repatriation statement for human remains or cultural items by the required deadline;
6. [s]ending a repatriation statement for human remains or cultural items before publishing a Federal Register notice;
7. [n]ot consulting with lineal descendants, Indian Tribe officials, or traditional religious leaders who request to consult;
8. [n]ot informing the requestors of any presently known treatment of the cultural items with pesticides, preservatives, or other substances that represent a potential hazard to the objects or to persons handling the objects.¹⁰⁷

In addition, each instance of a failure to comply constitutes a separate violation.¹⁰⁸

While anyone can allege a failure to comply, the allegations must be

¹⁰³ 25 U.S.C. § 3007.

¹⁰⁴ 43 C.F.R. § 10.12 (2022).

¹⁰⁵ Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 68 Fed. Reg. 16354 (Apr. 3, 2003); 43 C.F.R. § 10.11.

¹⁰⁶ 43 C.F.R. § 10.11.

¹⁰⁷ *Enforcement*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/enforcement.htm> (Jan. 12, 2024); 43 C.F.R. § 10.12(b).

¹⁰⁸ 43 C.F.R. § 10.12(b)(2) (internal citations omitted).

in writing and are required to identify the failure to comply with supporting facts.¹⁰⁹ That documentation needs to include evidence that the museum has possession or control of Indigenous cultural items, receives Federal funding, and has failed to comply with particular provisions of NAGPRA.¹¹⁰ After an allegation is received, the Program will acknowledge receipt of the allegation to the person who complained and then an investigation will be coordinated.¹¹¹ After the completion of the investigation, the Assistant Secretary for Fish and Wildlife and Parks will notify the museum of the results and send a copy to the person who complained.¹¹²

If a museum is out of compliance and receives a written notice, it can request informal discussions, request an administrative hearing on the determination of their failure to comply, or take no further action and then wait for the notice of assessments for a civil penalty.¹¹³ If a museum is assessed a civil penalty, it can accept the proposed penalty and pay the penalty as assessed, request an informal discussion with the Assistant Secretary for Fish and Wildlife and Parks, file a petition for relief to the Assistant Secretary for Fish and Wildlife and Parks, or request an administrative hearing on the amount of the penalty.¹¹⁴

Until the newly implemented regulations, the penalty amount was assessed as either 0.25% of the museum's annual budget or \$8,054, whichever was lower, and there were factors that could increase the value of the penalty.¹¹⁵ An additional penalty of up to \$1,612 per day after the date of the final administrative decision could take effect if the museum continues to violate NAGPRA.¹¹⁶ Those factors looked at the importance of the scientific, archaeological, and historical value of the remains; the economic and non-economic damage to the aggrieved party; as well as the number of offenses.¹¹⁷ However, these factors are inherently difficult to weigh against each other after looking at the value each factor represents.

In addition, there were factors within this regulation that could decrease a violating museum's penalty amount.¹¹⁸ Those factors included:

(1) a determination that the museum did not willfully fail to comply;

¹⁰⁹ *Civil Penalties*, *supra* note 88.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* An informal discussion is "generally between the museum officials and a representative for the Assistant Secretary for Fish and Wildlife and Parks." It needs to be in writing and has to be received within forty-five days of the museum getting the failure to comply notice. If the museum and the Enforcement Coordinator arrive at a formal resolution, they "are subject to approval from the Assistant Secretary for Fish and Wildlife and Parks as a final disposition of the matter." *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 10.12(g)(2) (2023).

¹¹⁶ *Id.* § 10.12(g)(3).

¹¹⁷ *Id.* § 10.12(g)(2).

¹¹⁸ *Id.* § 10.12(g)(4).

- (2) there was an agreement by the museum to mitigate the violation, including, but not limited to, payment of restitution to the aggrieved party or parties;
- (3) a determination that the museum is unable to pay, provided that this particular factor may not apply if the museum had been previously found to have failed to comply with these regulations;
- (4) a determination that the penalty constitutes excessive punishment under the circumstances.¹¹⁹

Under the new January 2024 update, this regulation has slightly changed. Now, the Assistant Secretary for Fish and Wildlife and Parks must calculate, when appropriate, a civil penalty with a base penalty amount of \$7,475 that can be increased or decreased depending on different considerations.¹²⁰ With the update, there are five factors for considering an increase in the penalty amount consisting of:

- (i) [t]he ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;
- (ii) [t]he archaeological, historical, or commercial value of the human remains or cultural items involved;
- (iii) [t]he economic and non-economic damages suffered by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization, including expenditures by the aggrieved party to compel the museum to comply with the Act or this subpart;
- (iv) [t]he number of prior violations by the museum that have occurred; or
- (v) [a]ny other appropriate factor justifying an increase.¹²¹

There are still factors to consider whether the penalty amount should be reduced.¹²² These include whether:

- (i) [t]he museum comes into compliance;
- (ii) [t]he museum agrees to mitigate the violation in the form of an actual or in-kind payment to an aggrieved lineal

¹¹⁹ *Id.*

¹²⁰ *Id.* § 10.11(c)(1)–(3).

¹²¹ *Id.* § 10.11(c)(2)(i)–(v).

¹²² *Id.* § 10.11(c)(3).

descendant, Indian Tribe, or Native Hawaiian organization;

(iii) [t]he penalty constitutes excessive punishment under the circumstances;

(iv) [t]he museum is unable to pay the full penalty and the museum has not previously been found to have failed to comply with the Act . . .; or

(v) [a]ny other appropriate factor that justifies a reduction.¹²³

It is important to give a space for museums to be able to explain what is going on and for that to be taken under consideration; however, there is a lot of room within those factors for violations to fall between the cracks, be explained away, or merely get a slap on the wrist, and that is not always appropriate.

While civil penalties have been available for decades as an enforcement mechanism within NAGPRA, an advocate at the Association of American Indian Affairs, Shannon O’Loughlin, has explained that the “lack of resources behind the enforcement program made the investigations into civil penalty complaints ‘extremely slow.’”¹²⁴ She further stated that “Tribes and others could not rely on the program to find violations and get them resolved to move repatriation work forward Even more importantly, because the investigations have taken so long, the process has not worked to be an incentive, forcing institutions to comply with urgency.”¹²⁵

As of the 2021 fiscal year, only \$59,111 have been collected in civil penalties for failures to comply.¹²⁶ As of 2011, there had been 116 accounts that were investigated for failure to comply by museums, and \$50,000 of penalties that were collected since the promulgation of the regulation in 1997.¹²⁷ This shows that in the last decade, 2011-2021, only about \$10,000 of civil penalties have been collected, while thousands of individuals are still within these museums. However, the Program manager, Melanie O’Brien, has said that the dollar amount does not “reflect enforcement.”¹²⁸ Regardless, this number is extremely low considering the number of individuals remaining in these museum facilities.

One of the reasons these penalty amounts are so low could be the

¹²³ 43 C.F.R. § 10.11(c)(3)(i)–(v) (2023).

¹²⁴ Jenna Kunze, *Department of the Interior Has Hired its First Full-Time Investigator to Ensure Museum Compliance with the Native American Graves Protection and Repatriation Act*, NATIVE NEWS ONLINE (Feb. 1, 2022), <https://nativenewsonline.net/currents/department-of-the-interior-has-hired-its-first-full-time-investigator-to-ensure-museum-compliance-with-the-native-american-graves-protection-and-repatriation-act>.

¹²⁵ *Id.*

¹²⁶ FISCAL YEAR 2021 REPORT: NATIONAL NAGPRA PROGRAM, *supra* note 12.

¹²⁷ *Finding Our Way Home: Achieving the Policy Goals of NAGPRA*, Hearing on H.R. 5237 Before the S. Comm. on Indian Affs., 112th Cong. 25–26 (2011).

¹²⁸ Kunze, *supra* note 124.

balancing factors that are used to increase penalty amounts. The Anglo-American legal system places a lot of emphasis on the “overriding and exclusive importance of logic . . . ,” where Indigenous claims are centered around “spiritual beliefs.”¹²⁹ According to Senator Daniel Inouye, the goal of repatriation legislation is “to strike a balance between the interest in scientific examination of skeletal remains and the recognition that Native Americans, like people from every culture around the world, have a religious and spiritual reverence for the remains of their ancestors[.]” but there is a logistical problem with trying to compare those two interests.¹³⁰

One author, Douglas Ackerman, stated that “[n]o compromise is possible where belief meets logic”; there is no real compromise between these two interests, science and religion, without inherently damaging the other.¹³¹ For example, Ackerman urged that Congress should value science over culture because the values of science are more consistent with the current Anglo-American values of “logic and reason” rather than in his interpreted “‘illogical’ notion of ‘spirituality’ that stems from Native American cultures.”¹³² As a whole, there has been a trend to defer to scientists within the legal system because they have a specialized knowledge about certain topics that have been perceived as superior to the ordinary citizen, but is that deference always appropriately placed in all situations?¹³³

The importance people place on science is not just within the legal system. Within American society, people place an elevated amount of importance on science. Students across the country are required to have a specific amount of science credits before they graduate high school.¹³⁴ Most states require between two to four science credits before high school graduation.¹³⁵ For example, the state of Ohio requires three units of science to meet high school graduation requirements.¹³⁶ While not every student may

¹²⁹ Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemp. Cultural Values*, 31 ARIZ. ST. L.J. 583, 613–14 (1999).

¹³⁰ Birkhold, *supra* note 83, at 2050. Daniel Inouye served as a Senator from Hawaii from 1963–2012, including a stint as President pro tempore between 2010–12.

¹³¹ Tsosie, *supra* note 129, at 613–14. Douglas Ackerman is a noted author about the Kennewick Man case. See generally Douglas W. Ackerman, *Kennewick Man: The Meaning of “Cultural Affiliation” and “Major Scientific Benefit” in the Native American. Graves Protection and Repatriation Act*, 33 TULSA L. J. 359, 381 (1997).

¹³² Tsosie, *supra* note 129, at 614.

¹³³ *Id.* at 617–18.

¹³⁴ *High School Graduation Requirements*, STUDY.COM, <https://study.com/resources/high-school-graduation-requirements> (last visited Feb. 6, 2024).

¹³⁵ *Id.*; *State Course Credit Requirements for High School Graduation, by State: 2018*, NAT’L CTR. FOR EDUC. STAT. (Dec. 31, 2018), https://nces.ed.gov/programs/statereform/tab2_13.asp; STUDY.COM, <https://study.com/resources/high-school-graduation-requirements> (last visited Apr. 9, 2023).

¹³⁶ *Ohio’s Graduation Requirements: Long-term Requirements 2023 and Beyond 7*, OHIO DEP’T OF EDUC. (Feb. 2020), https://education.ohio.gov/getattachment/Topics/Ohio-s-Graduation-Requirements/Ohio-s-Graduation-Requirements_Long-term-Requirements-2023-and-Beyond.pdf.aspx?lang=en-US.

enjoy these science classes, they are a part of the curriculum that students learn during these important formative years. Therefore, while science as a study is very important, it is likely that the consistent learning of science during this period further drives the importance of science within our society and culture as a whole.

In comparison, for a variety of reasons, we do not have national religion class requirements.¹³⁷ Religious freedom is an important aspect of American society, but there are religions that are more widely practiced across the United States than others.¹³⁸ According to the Pew Research Center, approximately 70.6% of Americans are Christian, while Native American religions accounted for less than 0.3%.¹³⁹ If someone is not able to understand or know an Indigenous religion because it is not as commonly practiced, then people's personal understanding of it is likely more limited. This makes it much more difficult to be able to place a value on these "non-economic" damages or their ceremonial and cultural value to the aggrieved party compared to science, and that is exactly what the regulation is asking someone to do. This is not necessarily inherently wrong or right, but it is a flaw that needs to be acknowledged; while everyone knows about science, archaeology, and history, not everyone knows about Indigenous religion or places any sort of value on it.

During his opening statement in a committee meeting, Honorable Daniel K. Akaka, a U.S. Senator from Hawaii, stated that the topic of repatriation can be a "painful and deeply personal topic for many native peoples."¹⁴⁰ He went on to state that his own people believe that the "Mana, the spirit and power of a person, rests in the bones and connects families between the generations. Native Hawaiian tradition holds that what affects the bones can affect the future lives of the progeny and the after lives of the ancestors of those bones."¹⁴¹ This is a belief system that is precious to Indigenous communities and impossible to associate a monetary value to, especially when trying to balance against science.

It is a difficult task to try to place a monetary value on the ability to lay one's ancestors to rest. In part, this is because many who are not from the tribal culture do not fully appreciate the cultural significance that accompanies proper burials. As previously stated, the relationship between

¹³⁷ *Governmental Encouragement of Religion in Public Schools: Released Time*, FIND LAW, <https://constitution.findlaw.com/amendment1/annotation04.html> (July 20, 2022).

¹³⁸ *Why Religious Freedom Matters to America*, SHARE AM. (Feb. 4, 2019), <https://share.america.gov/why-religious-freedom-matters-to-americans/>; *Religious Landscape Study*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/> (last visited Jan. 26, 2024) [hereinafter *Religions*].

¹³⁹ *Id.*

¹⁴⁰ *Finding Our Way Home: Achieving the Policy Goals of NAGPRA*, *supra* note 127, at 1. Daniel Akaka served as a member of the United States House of Representatives between 1977-1990 and as a member of the United States Senate from 1990-2013.

¹⁴¹ *Id.*

Christian burials and the act of physically being buried has evolved.¹⁴² Therefore, it is not a stretch to believe that science receives more discretion than Indigenous beliefs in the balancing test because Indigenous relationships with ancestral remains' physical burial is different than a large portion of Americans.¹⁴³ There is a fundamental problem when trying to balance these two things because they are not really comparable in most circumstances, especially when someone is working with communities that have a strong spiritual belief that is not as common as other religions.

One of the most well-known cases involving some of these issues is the case of "Kennewick Man," involving an 8,000-year-old set of human remains that were found in the banks of a Washington river.¹⁴⁴ Archaeologists claimed that these remains were an instrumental piece in trying to figure out human history, and further scientific testing had the ability to reveal important information about early people in the Americas.¹⁴⁵ These remains predated any documented European presence in the Americas, but Kennewick Man possessed physical characteristics associated with someone from European descent.¹⁴⁶ Therefore, these remains had the ability to change the course of the scientific community's understandings of early Americans.¹⁴⁷

However, Indigenous peoples argued that these scientific tests were "incompatible with their spiritual traditions," and the law stated that proper ownership of the remains belongs to the closest affiliated Tribe.¹⁴⁸ The Tribes explained that when human remains are disturbed, the spirit of the deceased is disrupted from their rightful place, and is then destined to wander the earth until they are properly laid to rest according to their beliefs and traditions.¹⁴⁹ After the initial disturbance of the remains that resulted from them being found, the Indigenous people believed the continued scientific testing on the remains would cause further delay that is harmful to the deceased spirit as well as their living descendants.¹⁵⁰ This shows the inherent difficulty in trying to "compromise" or balance science and religion in regards to Indigenous remains because these scientific studies are destructive and are not compatible

¹⁴² *Diversity in Dying: Death across Cultures*, NURSING CARE AT THE END OF LIFE, <https://milnepublishing.geneseo.edu/nursingcare/chapter/diversity-in-dying-death-across-cultures/> (last visited on Feb. 6, 2024).

¹⁴³ Michael Casey, *Native People Demand Accountability for Ancestral Remains*, CHEROKEE PHX. (May 20, 2023), https://www.cherokeephox.org/news/native-people-demand-accountability-for-ancestral-remains/article_65476196-f684-11ed-8213-476f0f35431b.html; *Burial, II (Early Christian)*, *supra* note 75; *Religions*, *supra* note 138.

¹⁴⁴ Tsosie, *supra* note 129, at 585.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 615.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 585.

¹⁴⁹ *Id.* at 614–15.

¹⁵⁰ *Id.* at 615.

to many Indigenous beliefs.

After almost twenty years, the state of Washington returned Kennewick Man, or “the Ancient One,” to the Indigenous communities.¹⁵¹ During the ceremony, the state historic preservation officer, Allyson Brooks, said that returning these remains was one of her proudest moments in her eighteen-year tenure.¹⁵² She went on to apologize for the trauma this drawn-out ordeal caused to the Tribes, as well as for the Ancient One himself.¹⁵³ She said that she hoped for the Ancient One to go home to the Columbia River “so he can be at peace” and she wanted to congratulate these modern-day relatives “for never, ever, ever giving up on [their] family member.”¹⁵⁴

The Kennewick Man case is just one example illustrating the logistical problem with trying to balance scientific importance and respecting religious beliefs, while demonstrating that a “compromise” between these two important interests is extremely difficult. Someone cannot have one without pricelessly damaging the other. As described previously, the civil penalty amounts have been low and infrequent, but the use of a balancing test to increase that penalty amount is flawed because someone can not accurately balance these two interests against one another.¹⁵⁵ Therefore, the balancing test used, even with its recent improvements, is not an accurate method to analyze increasing penalty amounts, especially if its purpose is “to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony.”¹⁵⁶ The protective interest for Indigenous peoples does not get its appropriate weight when it is butting up against scientific interest. This may be one of the contributing circumstances causing the civil penalty amounts to be so low.

PART IV: COMPARISONS TO OTHER SITUATIONS

These low values are further illustrated against other damages and penalties that are awarded in somewhat similar contexts. It may be difficult to value the non-economic damage to Indigenous communities because of their spiritual values, but it is not a new concept. In the past, people have been awarded compensation due to the emotional distress and trauma when a family member’s remains have been mishandled.¹⁵⁷ As of 2022, thirty-six

¹⁵¹ Richard A. Walker, *Kennewick Man Returns Home*, ICT NEWS, <https://ictnews.org/archive/kennewick-man-returns-home> (Sept. 13, 2018).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., FISCAL YEAR 2023 REPORT: NATIONAL NAGPRA PROGRAM 2, 7–8 (2023), <http://npshistory.com/publications/diversity/nagpra/ann-rpt/2023.pdf>.

¹⁵⁶ S. REP. NO. 101-473, at 1 (1990).

¹⁵⁷ John Hochfelder, *Emotional Distress Damages for Morgue’s Mishandling of Body - \$400,000 Approved by Appellate Court*, N.Y. INJ. CASES BLOG (Jan. 27, 2011), <https://www.newyorkinjuriycasesblog.com/2011/01/articles/psychological-damages/emotional-distress-damages-for-morgues-mishandling-of-body-400000-approved-by-appellate-court/>.

states allow for someone to claim emotional distress damages for the mishandling of human remains without having to establish physical injury or manifestation.¹⁵⁸ While this may not be a perfect analogy, there are some interesting similarities between these different situations.

In a New York case, when the funeral director went to pick up remains from the morgue, he found that they had been missing for over a week and the body's whereabouts were unknown.¹⁵⁹ Days later, it was discovered that the remains had been buried in a potter's field in Pennsylvania because the morgue had negligently released the remains to the wrong funeral home.¹⁶⁰ Due to the course of events, his remains were severely decomposed and they were ultimately cremated and a proper funeral was never held for him.¹⁶¹ The mother of the individual whose remains had been neglected, Mrs. Jones, brought a lawsuit claiming emotional distress damages due to the wrongful interference with her right to the immediate possession of her son's body, losing her chance to see her son one last time, and the ability to pay her proper respects.¹⁶² After a two-day trial on the issue of damages, the jury awarded Mrs. Jones \$800,000 for her emotional distress.¹⁶³ The defendant argued that this damages award was excessive and appealed; in response, the appellate court ruled for a reduction in damages to \$400,000.¹⁶⁴ Other cases had verdicts that were initially over a million dollars reduced to values of \$250,000 and \$350,000.¹⁶⁵ Those damages are a significant number, and a far cry from the less than collective \$60,000 in civil penalties that have been ordered in regard to NAGPRA violations over the last few decades.¹⁶⁶

Those cases involved the mishandling of remains, but the same is also happening within universities and museums housing Indigenous collections. One university that was caring for the TVA's collection had remains in plastic bags, in five-gallon buckets that were on the floor, as well as brown paper bags with the "burial fill spilling out," and used cardboard boxes "with gaping holes in the sides."¹⁶⁷ One of the purposes of this entire Act was to treat

¹⁵⁸ Christopher Ogolla, *Emotional Distress Recovery for Mishandling of Human Remains: A Fifty State Survey*, 14 DREXEL L. REV. 297, 317 (2022).

¹⁵⁹ Hochfelder, *supra* note 157.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Mrs. Jones testified that she was devastated about learning that her son's body was missing, the cremation of her son had a profound effect on her, she was not herself for more than a year, and she lost 40 pounds. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ FISCAL YEAR 2023 REPORT: NATIONAL NAGPRA PROGRAM, *Supra* note 155, at 2.

¹⁶⁷ Jenna Kunze, *University of Alabama Keeps Indigenous Remains in Paper Bags; Federal NAGPRA Committee Says Remains are Ancestors of Tribes & can be Returned*, NATIVE NEWS ONLINE (Dec. 2, 2021), <https://nativenewsonline.net/currents/university-of-alabama-keeps-indigenous-remains-in-paper-bags-boxes-federal-nagpra-committee-says-remains-are-ancestors-of-tribes-can-be-returned>.

Indigenous remains with respect and help foster a positive relationship with these communities that have continually faced adverse circumstances at the hands of the United States, but clearly something seems to be disjointed between the goals of the Act and the way it is being upheld.¹⁶⁸ That particular university had some of those remains for almost eighty years, which is certainly enough time to have handled those remains with more respect than what they were receiving.¹⁶⁹

While it may be argued there is a stronger tie between a mother and her son than to an Indigenous community and their ancestors, that gap may not be as wide when looking at Indigenous cultures and their beliefs a little further. It has been previously stated that many Indigenous peoples feel a significant responsibility for their ancestors, and not adhering or respecting their traditions can be detrimental to that person's spirit, as well as harmful to their current living descendants.¹⁷⁰ The inability to rectify that situation because Federal agencies, museums, and universities will not give back someone's ancestors could cause immense turmoil and emotional distress. Not only is it potentially harmful on a personal level because those are their family members, but it is also disrespectful on a macro scale because Indigenous beliefs, traditions, and requests are continually being pushed onto the back burner by this problem thirty years after NAGPRA was enacted. That continued lack of affirmative effort by those organizations whittles down the already-precarious rapport the United States has tried to build with Indigenous communities. That alone is priceless when trying to calculate a damages award or penalty amount. Therefore, the idea of Indigenous peoples experiencing potential emotional distress due to the mishandling of their ancestors remains may not be as far-fetched as originally perceived.

To further illustrate some of the wrongs being committed by museums and institutions, there are some additional ideas to keep in mind. Museums also are held to a certain ethical standard.¹⁷¹ The American Alliance of Museums ("AAM"), previously known as the American Association of Museums, adopted the AAM Code of Ethics for Museums in 1993, which states that "legal standards are a minimum."¹⁷² However, these

In archaeology a fill is the material that has accumulated or has been deposited into a cut feature such as ditch or pit of some kind of a later date than the feature itself. Fills are an important part of the archaeological record as their formation and composition can throw light on many aspects of archaeological study.

About: Fill (archaeology), DBPEDIA, [https://dbpedia.org/page/Fill_\(archaeology\)](https://dbpedia.org/page/Fill_(archaeology)) (last visited Feb. 6, 2024).

¹⁶⁸ S. REP. NO. 101-473, at 1 (1990).

¹⁶⁹ Kunze, *supra* note 167.

¹⁷⁰ Tsosie, *supra* note 129, at 615.

¹⁷¹ *AAM Code of Ethics for Museums*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/> (last visited Feb. 7, 2024).

¹⁷² *Id.* The "American Alliance of Museums (AAM) is the only organization representing the entire scope of the museum community." They were founded in 1906, and their mission is to "champion

standards say that museums must go further than just complying with the legal standards; they “must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically.”¹⁷³ Regarding museum collections, the museum is supposed to ensure that the “collections in its custody are lawfully held, protected, secure[d], unencumbered, cared for[,] and preserved.”¹⁷⁴ Even under these minimal ethical standards that the AAM sets up for their museums, it can be argued that many Federal agencies and museums would not even meet the AAM standards for ethics, especially when they seem to not be taking affirmative steps to maintain their integrity and are losing the public’s confidence in the way they handle this delicate situation.

There are other acts that deal with some similar interests to Indigenous culture or archaeological interests, and their civil and criminal penalties illustrate again the low civil penalties within NAGPRA. The IACA is a truth-in-advertising law which prohibits misrepresentation in the marketing of Native American art and craft products within the United States.¹⁷⁵ This establishes that it is illegal to offer or display for sale, or sell, any art or craft product in a way that falsely suggests it is a Native American produced, a Native American product, or the product of a particular Native American or Native American Tribe or Native American arts and crafts organization resident within the United States.¹⁷⁶

The IACA is important because non-Native artists will regularly copy traditional items.¹⁷⁷ That may not seem like it could have that much of an impact, but that is incorrect. When something is falsely marketed as genuine, that person or business is taking away profit from another legitimate artist while appropriating and misrepresenting Indigenous culture, which is an important interest to protect.¹⁷⁸ The IACA helps to safeguard legitimate artisans who are Federally or state-recognized, while allowing them to produce and sell their crafts without concern.¹⁷⁹

A first-time violation of IACA can result in an individual facing civil

museums and nurture excellence in partnership with our members and allies.” *Frequently Asked Questions (FAQs)*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/membership/frequently-asked-questions-faqs/> (last visited Feb. 7, 2024).

¹⁷³ *AAM Code of Ethics for Museums*, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ *The Indian Arts and Crafts Act of 1990*, U.S. DEP’T. OF THE INTERIOR, <https://www.doi.gov/iacb/act> (last visited Feb. 7, 2024).

¹⁷⁶ *Id.*

¹⁷⁷ *What To Know About the Indian Arts and Crafts Act of 1990*, TACHINI DRUMS (Nov. 10, 2020), <https://tachinidrums.com/what-to-know-about-the-indian-arts-and-crafts-act-of-1990/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

or criminal penalties up to \$250,000, a five-year prison term, or both.¹⁸⁰ In addition, if a business violates the IACA, it may face civil penalties or can be prosecuted and fined up to \$1,000,000.00.¹⁸¹ While the IACA may protect a different aspect of Indigenous culture, which is also important, these fines and penalties have significantly larger values associated with them. This further illustrates that the Federal government has placed a value on violations against Indigenous culture, which is a stark contrast to infrequent and low-valued civil penalties.

The Archaeological Resources Protection Act (“ARPA”) is a Federal law passed in 1979 and amended in 1988, which governs the excavation of archaeological sites on Federal and Indian lands in the United States, and the removal and disposition of archaeological collections from those sites.¹⁸² ARPA attempts to secure the protection of archaeological resources and sites on Federal and tribal lands for the present and the future benefit of the American people because these sites and artifacts are considered an “irreplaceable part of the nation’s heritage.”¹⁸³ ARPA tried to help provide more effective law enforcement to protect public archaeological sites.¹⁸⁴

ARPA substantially increased penalties that could be brought against violators compared to the Antiquities Act.¹⁸⁵ For a felony offense, first-time offenders could be fined up to \$20,000 and imprisoned for up to two years.¹⁸⁶ Second-time felony offenders could be fined up to \$100,000 and imprisoned for up to five years.¹⁸⁷ This is a significant improvement from the \$500 and 90-day imprisonment criminal penalties set in the Antiquities Act.¹⁸⁸ Again, these fines are penalties and are much more significant sums than the collective \$59,111 in civil penalties that have been assessed with NAGPRA violations.¹⁸⁹

PART V: POTENTIAL SOLUTIONS

The system currently in use is imperfect, and it is unlikely that a perfect one exists. However, if the goal is to “provide for the protection of

¹⁸⁰ *Archeological Resources Protection*, USDA, <https://www.fs.usda.gov/lei/archeological-resources-protection.php> (last visited Feb. 7, 2024).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Archaeological Resources Protection Act of 1979*, NAT’L PARK SERV., <https://www.nps.gov/subjects/archeology/archaeological-resources-protection-act.htm> (Jan. 12, 2023).

¹⁸⁵ *Id.*

¹⁸⁶ Deana Davis, *The Archaeological Resources Protection Act*, THE LAW.’S COMM. FOR CULTURAL HERITAGE PRES. (Sept. 19, 2021), <https://www.culturalheritagelaw.org/The-Archaeological-Resources-Protection-Act>.

¹⁸⁷ *Id.*

¹⁸⁸ Grace Glueck, *New Laws for Old: Congress Designs an Antiquities Act to Suit Modern Times*, N.Y. TIMES (June 17, 1979), <https://www.nytimes.com/1979/06/17/archives/someone-is-stealing-the-greest-pots-of-america.html>.

¹⁸⁹ *Native American Graves Protection and Repatriation Act of 1990*, NAT’L PARK SERV., <https://www.nps.gov/subjects/archeology/napgra.htm> (Jan. 12, 2023).

Native American graves and the repatriation of Native American remains and cultural patrimony,” there is likely a better way to accomplish this goal with that purpose in mind.¹⁹⁰ While the updated rules and regulations will certainly help Indigenous communities, there is more that can, and should, be done. Here are some of my own thoughts on things that may be able to improve the current civil penalties process.

There should be an approach to place more pressure on these museums and universities to comply. This may be achieved with larger civil penalties or fines, or by pulling institutions’ Federal funding for noncompliance. While pulling Federal funding may seem like a radical step to get compliance, it is not unrealistic. Provisions in both Title VI and Title IX provide that if an institution fails to comply with the Act, their Federal funding or assistance may be terminated.¹⁹¹ This also shows the government’s seriousness about this issue, which may help to put “money where their mouth is” when the government says it wants to respect Indigenous cultures throughout the country.¹⁹² This may help to put a little more “teeth” on NAGPRA.

Another way to add enforcement pressure would be to add a citizen suit provision into NAGPRA. Citizen suits are a mechanism that help to supplement Federal enforcement.¹⁹³ The Clean Water Act is an example of this, where Congress empowered citizens to serve as “private attorneys general” and then bring their own lawsuits to stop illegal pollution discharges.¹⁹⁴ This could get more people involved and help with putting more of these infractions in front of a judge. It would also add even more pressure for museums to repatriate these items to avoid citizen suits. To further add to the appeal of attorneys to take these cases and for museums to comply, there could be a fee-shifting provision similar to what is in the Clean

¹⁹⁰ S. REP. NO. 101-473, at 1 (1990).

¹⁹¹ *The 14th Amendment and the Evolution of Title IX*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix> (last visited Feb. 7, 2024); *Title VI of the Civil Rights Act of 1964*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/TitleVI> (Jan. 24, 2024).

¹⁹² 20 U.S.C. § 1682 (1972) (“Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement”); 42 U.S.C. § 2000d-1 (1964) (“Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement”).

¹⁹³ See *Watershed Watchdog: Guide to Clean Water Act Citizen Suits*, OHIO ENV’T COUNCIL 6, https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/112a1.pdf (last visited Feb. 7, 2024).

¹⁹⁴ *Id.*

Water Act.¹⁹⁵ That provision states that a court may award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing or substantially prevailing party, when appropriate.¹⁹⁶ If NAGPRA included these two provisions, there could be significant movement in the repatriation process.

While there is a need for improvement, there does seem to be movement in this area. The DOI announced that it hired its first full-time investigator to ensure museum compliance with NAGPRA, where it had previously only had part-time investigators filling this role.¹⁹⁷ These positions are responsible for receiving allegations of museums out of compliance, conducting investigations, and presenting their findings to the Assistant Secretary for Fish and Wildlife and Parks, who is responsible for assessing civil penalties.¹⁹⁸ David Barland-Liles was the person hired in this position.¹⁹⁹ He is a longtime NPS law enforcement officer and has helped the DOI with investigations on a part-time basis for multiple years.²⁰⁰

The Program manager, Melanie O'Brien, said that this new position should be expected to "be able to do more and perhaps bigger investigations, and do them more efficiently and effectively."²⁰¹ The Assistant Secretary for Indian Affairs, Bryan Newland, stated that "[c]hanges to the NAGPRA regulations are on the way and long overdue" during a press release that announced this new position.²⁰² O'Brien also stated that she sees this new position providing "some force and consistency into a part of NAGPRA that has been ignored and is significant for NAGPRA compliance."²⁰³ This further shows the importance that these civil penalties can have on the appropriate compliance of NAGPRA.

More transparency and media coverage over these issues may also be a partial solution. Within the Annual Report to Congress for the Fiscal Year of 2022, the NAGPRA Review Committee stated that they are "very concerned that civil enforcement of NAGPRA has been carried out without any degree of public scrutiny, that the penalties assessed are typically mitigated or unknown, and that since 2016 it appears to have completely stopped."²⁰⁴ The Committee also said that information had finally been provided by the NPS after a five year hiatus, showing that to date twenty museums have failed to comply, three of them twice, and that \$59,111.34 in

¹⁹⁵ 33 U.S.C. § 1365(d).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Kunze, *supra* note 124.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

penalties had been collected.²⁰⁵ In ten of these allegations, the penalty had been waived.²⁰⁶ With this information, the NPS also indicated that there is a backlog of allegations against another sixty-three museums that have not been investigated. No failures to comply have been determined since 2016.²⁰⁷ The Committee asked Congress within this report to request the GAO to complete an evaluation of the implementation of the civil enforcement provisions within NAGPRA.²⁰⁸ Making this kind of information more readily known and accessible could also greatly help with compliance by adding public pressure for museums to comply.

CONCLUSION

It should be acknowledged that NAGPRA was very recently updated, which is a miraculous endeavor, and as Interior Secretary Deb Haaland stated an “important part of laying the groundwork for the healing of our people.”²⁰⁹ Some of these changes included strengthening the authority and role of Tribes and NHO’s in the repatriation process by requiring deference to Indigenous Knowledge of lineal descendants, Tribes, and NHO’s.²¹⁰ Museums and Federal agencies are now required to obtain prior and informed consent from these parties before allowing any exhibition of, access to, or research on human remains or cultural items.²¹¹ They must also consult and update inventories of human remains and associated funerary objects within five years of when the final rule took place.²¹² Other significant changes are the elimination of the category of “culturally unidentifiable human remains” and resetting the requirements for cultural affiliations to “better align the regulations with congressional intent[,]” as well as increasing transparency and reporting on collections currently unreported under existing regulations.²¹³ The balancing factors also slightly changed, as previously discussed, but balancing tests, no matter how many factors, are discretionary in many ways and can be difficult to predict.²¹⁴ These new regulations are

²⁰⁵ U.S. DEP’T OF THE INTERIOR, NATIVE AM. GRAVES PROT. & REPATRIATION REV. COMM’N, ANNUAL REPORT TO CONGRESS: FISCAL YEAR REPORT 2022, 14 (2023), <https://irma.nps.gov/DataStore/DownloadFile/684961>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Mary Hudetz, *New Federal Rules Aim to Speed Repatriations of Native Remains and Burial Items*, PROPUBLICA (Dec. 8, 2023, 1:15 PM), <https://www.propublica.org/article/interior-department-revamps-repatriation-rules-native-remains-nagpra>.

²¹¹ *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves> (Dec. 6, 2023).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

probably not perfect, but it does seem like a step in the right direction. However, for it to be helpful, it needs to be utilized.

There needs to be more enforcement of the civil penalties within NAGPRA. Having one person doing these investigations full-time is better than only part-time people, but this is still a big problem. Only having one person is likely not going to be enough to timely solve this issue. There needs to be more than just one person doing these investigations full time. In addition, there needs to be more transparency as a whole on how NAGPRA is being upheld. It is incredibly difficult to find information on the civil penalties process and the proceedings that take place. If more public attention is brought to violators, there would be even more pressure on these museums to get into compliance.

NAGPRA was enacted to give Indigenous communities a way to receive their ancestors and cultural objects back in a respectful manner. But to make that vision into a reality, there needs to be improvements made. There is a precarious balance within NAGPRA to be respectful to these communities while also preserving scientific interests, but at the end of the day, these remains are people, and this cannot be forgotten. They had families and have descendants who want to make sure they can be at peace. As a country and a legal community, we need to show that we care and value that objective. It is up to people today to make these changes because “[t]he dead [can] not defend themselves; it [is] the responsibility of the living to do so.”²¹⁵

²¹⁵ Hemenway, *supra* note 71.